

APPLICATION NOS.3485, 3486 AND 3487 OF 2016
IN
C.S.NO.193 OF 2009

PUSHPA SATHYANARAYANA, J.

The above applications are taken out by the defendants in the civil suit for reopening, recalling the plaintiff's witness and to permit the applicants to file additional documents.

2. It is stated in the affidavits filed in support of these applications that when P.W.1 was being examined in cross, by the erstwhile counsel of the applicants, the present counsel had taken over by change of vakalat. As the cross examination could not be continued within the time stipulated, in view of the change of counsel, the matter was posted before this Court. On 21.06.2016, this Court had permitted the applicants to cross examine the plaintiff on 30.06.2016 and if for any reason, the applicants are unable to cross examine P.W.1, plaintiff's evidence would be closed. It is stated that on 30.06.2016, new counsel sought for time before the learned Master, as some more of the additional documents have to be filed, which was objected to by the plaintiff's counsel. Hence, the learned Master closed the evidence of P.W.1 and posted the matter for evidence of the defendants. As the defendants had to

bring in some more documents, which could not be done before 30.06.2016, time was sought for. As the evidence of P.W.1 is now closed, the present applications are filed to reopen, recall and to receive additional documents and mark the same.

3. The above applications were resisted by the learned counsel for the respondent / plaintiff stating that the suit is of the year 2009 and the defendants were originally set *ex parte* by order dated 07.09.2011. Thereafter, trial had commenced only in the year 2016 and till today, trial is not yet completed. It is also contended by the learned counsel that the order dated 21.06.2016 is passed under Order XVII Rule 2 (e) of the Code of Civil Procedure and hence, the present applications are not maintainable.

4. As the defendants, being the Bank and having changed the counsel on advise they are seeking to file certain documents. Therefore, it has only to be seen whether the evidence of P.W.1 may be reopened and recalled.

5. Order XVIII Rule 17 of the Code of Civil Procedure enables the Court at any stage of suit to recall any witness who has been examined and put such questions to him as it thinks fit. The said provision can be invoked by the

trial Court, either on its own motion or an application filed by any of the parties, though such power is discretionary and should be used sparingly. It is an enabling provision for the Courts to clarify any issue or doubt, by recalling a witness *suo motu* or at the request of the party. As there is no specific provision enabling the party to file such application to reopen the evidence, Order XIII Rule 17 has been invoked by the parties themselves.

6. Admittedly, P.W.1 was in the box when the direction was given to the defendants to complete the cross examination on or before 30.06.2016. The evidence was closed only for the reason that this Court had given a time frame. Therefore, there is no time gap between completion of evidence and hearing of the arguments, as the P.W.1's chief examination was over and only cross examination was in progress. Only in cases where the trial is concluded and the judgment is reserved, the said power under Order XVIII Rule 17 cannot be exercised.

7. The applicants also had explained that due to change of counsel and for want of relevant documents to be marked, the delay had occurred. No doubt, the power under Order XVIII Rule 17 of the Court cannot be used routinely for the mere asking. But when the case of the applicants is found to be

bonafide and the documents that are to be marked could clarify the evidence on all the issues, it will be of assistance to the Court in rendering justice. Excepting the change of counsel, this Court is unable to find anything mischievous and frivolous on the side of the applicants. Hence, this Court is inclined to allow the applications to reopen and recall the witness.

8. As the plaintiff had already completed the chief examination and the defendants are seeking to mark certain documents, subject to proof and relevancy, it may prejudice the plaintiff to an extent. However, the same may be compensated in terms of money. **Hence, the applications viz., A.Nos.3485 and 3486 of 2016 in C.S.No.193 of 2009 to reopen and recall are allowed on terms.**

9. The defendants are directed to pay a sum of Rs.10,000/- (Rupees Ten thousand only) to the plaintiff as a condition, within a period of two weeks from the date of receipt of a copy of this order, for allowing the applications for reopening and recalling P.W.1.

10. The other application viz., A.No.3487 of 2016 in C.S.No.193 of 2009 filed by the applicants is for receiving the documents and marking the

same in evidence. Though marking of these documents are also objected to by the learned counsel for the plaintiff, the same is allowed to be marked subject to proof and relevancy of the same. However, it is open to the respondent / plaintiff to raise all his objections and the same may be recorded at the time of marking the same.

11. In the result, all the applications are allowed.

09 / 08 / 2016

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