

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.4710 of 2016

ORDER:

The plaintiff in O.S.No.45 of 2013 impugning the order of the trial Court in I.A.No.1219 of 2015 filed by the defendants under Order XVIII Rule 17 CPC to recall PWs.1 and 2 for cross examination since allowed by imposing costs of Rs.1,000/- fixing the date for cross examination and to complete on same day on 28.01.2016 vide order dated 12.01.2016, impugning the same maintained the revision.

2. The order of the lower Court reads as follows:

“Heard both sides. It is the contention that due to ill-health PWs.1 and 2 were not examined. Thereafter he changed his counsel and pleaded to permit them to cross examine the PWs.1 and 2 by recalling them.

The respondent deferred the case of the petitioner and relied on the reputed citation. They have correctly pointed out that this petition at the time of judgment.

But the Court has gone through the material available in their case and came to a conclusion that, it is settled principle of law that instead of dismissing the petition on technicality it is better to give chance to contest the case to dispose the same on merits. In view of that the Court has taken lenient view. Hence the petition allowed. PWs.1 and 2 recalled. For cross examination with a direction to complete the cross examination on the same day on costs of Rs.1,000/- payable to other side for compliance call on 28.01.2016.”

3. No doubt from perusal, the order could have been with more reasons, in exercise of the judicial discretion. Here the only point for consideration is whether the discretion exercised by the Court is perverse and requires interference within the discretionary power by sitting in revision within the limited scope. Section 165 of Evidence Act permits the Court to call for any witness even *suo*

motu or any document or put any questions, however the object behind it is to sub serve the ends of justice. The procedural law is hand maid in this regard.

4. The learned counsel for the revision petitioner impugning the order supra allowing the application by pointing out the defendants having availed the opportunity did not choose to cross examine the PWs.1 and 2 and their idea is only to procrastinate and trial Court should not have been permitted them by perpetrating their illegal act further. The counsel placed reliance on the expression of Apex Court in **Rasiklal Manickchand Dhariwal & Another Vs. M/S M.S.S. Food Products**¹, it is no doubt in considering the scope of Order XVIII Rules 1, 13 & 15 and Order 20 Rule 1 CPC as to what is meant by commencement of proceedings and hearing of a case and what is meant by conclusion of the proceedings. It is particularly at Paras 41 & 42 observed the Courts time out of number, have said that, that adjournment for purpose of pronouncing judgment is no adjournment of the hearing of the suit..... Further at Para 42 observed secondly, once the suit is closed for pronouncing judgment, there is no question of further proceedings in the suit. Merely because the defendants continued to make application after application and the trial Court heard those applications, it cannot be said that such appearance by the defendants is covered by the expression “appeared on the day fixed for his appearance” occurring in Order 9 Rule 7 of the Code and thereby entitling them to address the Court on the merits of the case.

¹ 2012 (2) SCC 196

5. It is to say once the matter is after hearing reserved for judgment, parties have no right at all much less to submit any arguments. Here same is different from the power of the Court under Order XVIII Rule 17 CPC. The provision speaks Court may at any stage recall and examine witnesses who has been examined and may (subject to law of evidence for the time being in force) put such questions to him as Court thinks fit. This provision clearly speaks, at any stage of suit power of the Court to recall any witnesses. It is not the right of a party and any application even invoking the provision made by a party is only to consider whether the power of the Court can be exercised or not and not to claim such consideration from any right of a party. The law in this regard is very clear from the expressions of the Apex Court right from **Salem Advocate Bar Association, T.N. Vs. Union of India**², **Vadiraj Naggappa Vernekar (dead) through L.Rs Vs. Sharadchandra Prabhakar Gogate**³, **K.K.Velusamy Vs. N.Palanisamy**⁴ not to mention the earlier expression prior to 2002 amendment of the Apex Court in **M.M.Amonkar Vs. Dr.S.A.Johari**⁵; besides later expressions in **Bagai Construction Vs. Gupta Building Material Store**⁶ and in the latest expression of **Ram Rati Vs. Mange Ram (died) through L.R.s and others**⁷.

6. In **Ram Rati supra** it is observed that power under Order 18 Rule 17 can be exercised including under Section 151 CPC besides the specific rule supra, to make orders only to sub serve ends of justice or to prevent abuse of process and the basic

² (2005) 6 SCC 344

³ (2009) 4 SCC 410

⁴ (2011) 11 SCC 275

⁵ (1984) 2 SCC 354

⁶ 2013 (14) SCC 1

⁷ 2016 (3) ALD 162 (SC)

purpose postulated is to enable the Court to clarify any position or doubt and the Court may even exercise *suo motu*, if not on the request of the party, to recall any witness at any stage and the power can be exercised at any stage of the suit. Once the Court recalls the witness for purpose of the same, it may permit the parties even to assist the Court by examining the witness for said purpose including of any clarification required or permitted by the Court and cannot be stretched any further.

7. No doubt the power cannot be invoked to fill up the gaps much less to grave prejudice to the other party by such exercise which is not to sub serve the ends of justice.

8. These principles were reiterated by this Court in recent expression in C.R.P.No.2160 of 2013 dated 23.09.2016. Once this power is conferred by law on the Court to exercise to sub serve the ends of justice, it is to consider now whether there is any factual foundation exists.

9. Coming to the facts in exercise of discretion by the lower Court is to sub serve the ends of justice or not to decide, PWs.1 and 2 were so far undisputedly not cross examined. Cross examination is a valuable right envisaged by Section 139 of the Evidence Act, and it is only therefrom the evidence is full of any witness, for proper appreciation by the Court in the voyage of trial to arrive the truth.

10. Once for such a valuable right of the cross examination, even from the latches of the parties not earlier availed, once trial Court exercised the discretion to sub serve the ends of justice as fit

case of fixing the date on costs to do any cross examination and complete on same day else with no further opportunity, for this Court while sitting in revision there is nothing to interfere.

11. However, it is made clear from the date fixed by the Court expired already; time is fixed in disposing of the revision to pay costs of Rs.1,000/- if not already paid by the defendants for purpose of recall of witnesses i.e., PWs.1 and 2 and complete cross examination within one week from the date of receipt of this order to be fixed by the trial Court and the same if not complied with on the date so fixed, the Court shall not permit to avail any such right thereafter, but for to proceed with the pronouncement of judgment from the arguments already heard and the matter once already reserved for judgment.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 15.11.2016
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