

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.5824 of 2015

ORDER:

The revision petitioners 1 to 3 are no other than defendants 3 to 5 in O.S.No.307 of 2007 on the file of Principal Junior Civil Judge, Peddapuram, for specific performance of contract for sale maintained against four defendants originally, of whom, the 2<sup>nd</sup> defendant since died besides defendants 3 and 4 being his sons and wife as 5<sup>th</sup> defendant also brought on record and it is the suit maintained by plaintiff against them with the claim that defendants 2 to 4 alienated the property to the 1<sup>st</sup> defendant under contract for sale and the same was assigned to the plaintiff.

2. The 1<sup>st</sup> defendant for whom his counsel reported no instructions way back on 31.08.2012, filed the application in I.A.No.691 of 2015 on 14.09.2015, which is long after closure of evidence of both sides in the year 2013 and while the matter has been coming since then for arguments of both sides and at the stage of reply arguments of him by taken time for that, now seeking permission to examine himself as a co-defendant to the suit saying he got a good defence in the suit and his examination is necessary. Same was vehemently opposed by the defendants 3 to 5 by their counter saying the

so called allegation of he was at Orissa besides not true but for subject to proof if any, he was not diligent and having filed written statement in sailing with the plaintiff and for there is no independent contest of him and thereby having not chosen to come to witness box before the contesting defendants evidence commenced and even participated till then including till end of August, 2012, leave about the trial Court docket also reflects as participated by cross examination of DW.1-3<sup>rd</sup> defendant on 14.02.2012 also and it is only after the written arguments of plaintiff submitted on 26.08.2015, having reported no arguments even at that time, subsequently from the matter posted to 03.09.2015 for arguments of the defendants 3 to 5 and from the written arguments of the defendants 3 to 5 submitted on 03.09.2015, it is on 14.09.2015, after going through to fill up the lacunas the petition to recall and receive his evidence is filed and thereby the impugned order of the lower Court allowing his application is unsustainable.

3. Whereas, it is the submission of the learned counsel for the 1<sup>st</sup> defendant/revision 1<sup>st</sup> respondent that the order of the lower Court holds good when it exercises its jurisdiction from believing his version of he was held up in Orissa what he stated on oath from the factum true according to him and thereby sought for dismissal of the revision petition.

4. Heard and perused the material on record.

5. The 1<sup>st</sup> defendant through whom the plaintiff is claiming, in fact, sailing with the plaintiff by filing a written statement supporting the suit claim. Once such is the case, if at all he wants to lead any evidence independently, he was supposed to come to the witness box before commencement of the contesting defendants' evidence i.e., defendants 3 to 5. The averment that he went to Orissa and held up there, is not a ground even to consider, for his alleged absence after 2012 till filing of the petition on 14.09.2015 for more than three years, by his not participating in the proceedings even knowingly. Though there was from the docket order of the trial Court, it reflects that on 31.08.2012, his counsel reported no instructions for him, it is subsequently on 14.12.2012, the 1<sup>st</sup> defendant either present or through counsel cross examined the DW.1 i.e., 3<sup>rd</sup> defendant. Once same is reflecting from the docket proceedings of the trial Court it can be presumed from all purposes that he was there and having full knowledge of the trial proceedings, that too if at all the counsel earlier reported no instructions, either filed fresh vakalat or Court permitting again same counsel if at all no instructions was not recorded, but for his personal presence otherwise, question of such recording on the docket on 14.12.2012 does not arise. Leave it as it is, there is no and worth explanation, but for

simply saying he was at Orissa for his earlier not coming to witness box before commencement of the contesting defendants evidence, that too when he was sailing with the plaintiff. The scope of Order 18 Rule 17 as law laid down is not any right of party but for any necessity of examination after closure of evidence of both sides, if at all the Court felt necessity and relevant to put any relevant questions or even to permit any relevant questions to be put by any of the party in support of their version too. It is almost in recognition of the right of the Court under Section 165 of the Evidence Act, though the ultimate consideration is only to the relevancy and admissibility. Once such is the case, there is no justification in the impugned order of the lower Court in permitting the sleeping over 1<sup>st</sup> defendant, who is sailing with plaintiff nearly 3 years after closure of evidence of both sides and even after filing of written arguments of defendants 3 to 5 and after having gone through their contest now even chosen to fill up the lacunas therein. Thus, the trial Court should not have been ignored this factum which goes to the root of the matter. The trial Court should have been rejected such request instead of allowing by imposing costs of Rs.1,000/- . Thereby, the order of the lower Court is unsustainable for not an exercise of the discretion contemplated by the settled expressions of the Court within the scope of Order 18 Rule 17 C.P.C.

6. Having regard to the above, the order dated 11.12.2016 in I.A.No.691 of 2015 in O.S.No.307 of 2007 passed by the Principal Junior Civil Judge, Peddapuram is set aside and the revision is allowed. While allowing the revision it is however made clear that, if at all the trial Court felt from what the 1<sup>st</sup> defendant claims of his evidence is necessary to bring on record for the efficacious and effective disposal of the lis, it can call the 1<sup>st</sup> defendant as a Court Witness under Order XVI Rule 7 C.P.C. with right of cross examination both to the plaintiff and contesting defendants 3 to 5. Needless to say, such cross examination by contesting defendants 3 to 5 is only after cross examination by plaintiff for the reason of the 1<sup>st</sup> defendant's written statement contest is supporting the case of the plaintiff. No order as to costs.

7. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

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Dr. B. SIVA SANKARA RAO, J

Date:02-09-2016

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