

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Civil Revision Petition Nos. 5079 of 2015 and 184 of 2016

COMMON ORDER:

The C.R.P.No.5079 of 2015 is preferred against the order in I.A.No.213 of 2015 and the C.R.P.No.184 of 2016 against the orders in I.A.No.212 of 2015 dated 09.10.2015 by the petitioners therein.

2. The petition in I.A.No.213 of 2015 is to recall the C.W.1 for cross-examination. The factual matrix in nutshell necessary for the lis is that the R.C.No.292 of 2002 was filed by late Mohd. Dastagir against late Madanlal for eviction. Pending the case, said Dastagiri died by his legal representatives two sons and daughter viz; Mohd. Riyaz Anwar, Sajjad Anwar and Faziunnisa Begum. So called tenant Madanlal also died by his legal representatives wife and son viz; Saraswathi Bai and Satyanarayana as respondents 2 and 3 and one Mohd. Fasiuddin as respondent No.4 and the respondent No.4 is impleaded subsequently. While the matter was pending after the evidence on both sides, there was an application by the petitioners to examine the Inspector Auditor of Wakf Board as a witness. The application was filed under Order XVI Rule 1 CPC. No doubt mere wrong quoting of sub provision no way fatal, once the main provision that applies even to seek examination as a Court witness and the same was allowed undisputedly and made final and C.W.1 was examined in Chief and when the matter was coming for cross-examination from the time taken by the petitioners in R.C.No.292 of 2002 including after adjournment on costs of Rs.500/- from the final witness came time and again before the Court, from the representation of learned counsel engaged in High Court, whereas, affidavit petition speaks as if out of station, from opposing by other side, ended in dismissal vide orders dated 09.10.2015 supra.

3. Heard both the sides at length and perused the material.

4. One of the contentions by the learned counsel for the respondents is that Mohd.Fasiuddin, wrongly impleaded as if a co-petitioner instead of co-respondent. It is no doubt a mistaken outcome from which nothing can be made a mountain of the moundhill equally for the mere quoting of wrong provision in that application allowing the examination of the official witness as a Court witness referred supra. In fact after the evidence and before filing the application to examine the witness, there is a gap of more than three years and the same was allowed and C.W.1 was examined in chief and for non-cooperation, as can be seen from the record in taking time, the right of cross-examination was forfeited. It shows from the order, the matter is at the stage of reserved for judgment. It is his submission that it is not reserved for judgment practically but for a closure of evidence of C.W.1 as forfeited his right of cross-examining the C.W.1 and coming for arguments. Leave it as it is. The application to re-open since filed that serves purpose and what the decision placed reliance on by the petitioners is T.Ramachandra Murthy Vs. K.Rama Murthy¹, in which it is held as once the arguments were over and reserved for judgment, without filing application to re-open the case for recall, the recall cannot be allowed. Even the same is taken into consideration, here there is an application to re-open and separate application for recall, thereby there is compliance.

5. Now coming to the revision petition impugning the dismissal order of the lower Court, the lower Court mainly made the observation from the misrepresentation in one breath saying the learned counsel engaged in High Court for the attempt to take adjournment and the other breath in the affidavit petition saying the learned counsel is out of

¹ AIR 1980 AP 265(1)

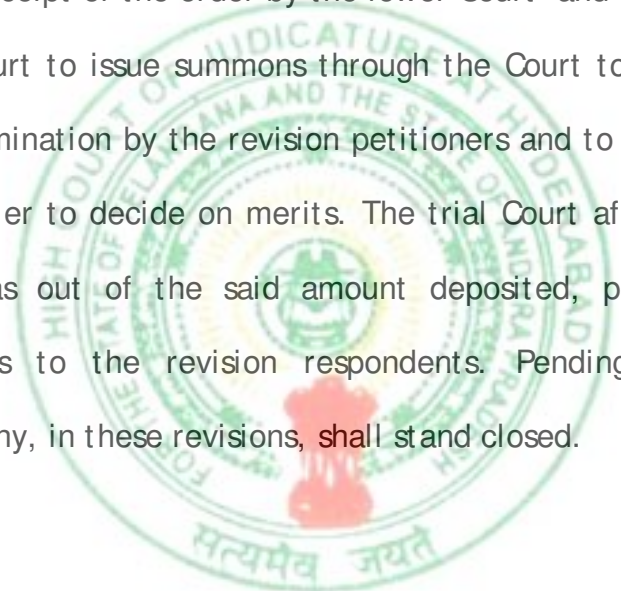
station which lacks bona fide and further held the opportunity not availed to cross-examine despite gaining time and without even payment of costs made an attempt to take adjournment thereby right forfeited for the official witness cannot be made to go round the Court. No doubt, the power of revision generally is limited to interfere where the order is suffered from impropriety or illegality. Here there are justifiable reasons for this Court to come to the conclusion. However, it is mainly the ends of justice which prevail over ends of law to subserve and the plenary jurisdiction under Article 227 of the Constitution of India that can be extended thereby that of its elasticity to the necessity, the very right of cross-examination once forfeited no doubt not properly availed and the application is filed. Had it been allowed though latches if any, on such terms as to heavy costs instead of dismissing in October, 2015 itself, the matter could have been disposed of on merits wayback but the dismissal order now culminated in giving life further to the litigation and multiplying the proceedings by maintaining the revisions before the Court and as cross-examination is one of the available rights, that too, when it is the case that the witness to be examined is on impugning the title and the tribunal cannot decide title but for within the limited scope to decide the Rent Control lis for any other efficacious remedy is elsewhere, and on that aspect even from the witness contended as could not have been permitted to be examined and without going further into merits for lack of sufficient material in that regard for this Court to make any observation, it is only by providing the opportunity by imposing costs to subserve the ends of justice.

6. The expression of the Apex Court in *Varadaraju Nagappa Vernekar Vs. Sharatchandra Prabhakar Gogate*² on the scope of Order

² 2009(6) SCC 410 = AIR 2009 SC 1604

XVIII Rule 17 CPC speaks that the discretionary power to be exercised is from the facts and circumstances however neither to introduce new evidence nor to fill up the lacunae in evidence later but for certain lapses in the evidence that were noticed. In this case, it is not introducing any new evidence but for the closed cross-examination for timely not cross-examined, in seeking permission to it.

7. In view of the above, these two revisions are allowed by re-opening the evidence by permitting recall of C.W.1 subject to costs of Rs.5,000/- to be deposited by the revision petitioner within 15 days from the date of receipt of the order by the lower Court and on such deposit, the lower Court to issue summons through the Court to secure witness for cross-examination by the revision petitioners and to proceed further with the matter to decide on merits. The trial Court after meeting the witness battas out of the said amount deposited, pay the balance towards costs to the revision respondents. Pending miscellaneous petitions, if any, in these revisions, shall stand closed.



Dr. B. SIVA SANKARA RAO, J

Date:02.09.2016
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