

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.2775 of 2012

ORDER:

The unsuccessful respondent/defendant had filed this Civil Revision Petition under Article 227 of the Constitution of India assailing the orders dated 08.12.2011 of the learned Principal Senior Civil Judge, Tenali passed in I.A.no.203 of 2011 in O.S.no.202 of 2006 filed by the plaintiffs under Order XVIII Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 requesting to recall PW1 to file her further affidavit in lieu of her further examination-in-chief in support of the contentions stated by her in her rejoinder.

2. I have heard the submissions of the learned counsel for the revision petitioner/defendant ('the defendant', for brevity) and the learned counsel for the respondents/plaintiffs ('the plaintiffs', for brevity). I have perused the material record.

3. To begin with, it is necessary to refer to the pleadings of the parties.

3.1 The case of the 1st plaintiff/PW1 in support of her request aforementioned is as follows:

She is looking after the proceedings in the above suit on behalf of the 2nd plaintiff also, who is her mother. She had already filed her affidavit in lieu of her examination-in-chief. Her counsel, while going through the record, had noticed that her chief-examination affidavit is only confined to the contents averred in the plaint. In fact, the plaintiffs had filed a rejoinder. So her affidavit filed in lieu of her examination-in-chief does not reveal the contents averred to in the rejoinder. The said mistake is not intentional but had occasioned due to over sight. Hence, she is advised to file the present petition to recall her for the purpose of filing her further affidavit in lieu of her further examination-in-chief to enable her to state in that affidavit the averments in the rejoinder. There are no laches either on her part or on the

part of her counsel in not filing the original chief examination affidavit with the contents supporting the averments in the rejoinder also.

4. The case of the respondent/defendant, in brief, is this:

The allegations in the rejoinder of the plaintiffs are all false. The 1st plaintiff filed a petition on 13.12.2007 requesting the Court to direct the defendant to produce into the Court the original Will dated 16.04.2003 executed by Kanneganti Manikyamma for inspection and for filing chief examination affidavit. As directed by the Court, the defendant had filed into Court, the original Will. Thereafter, the plaintiff had inspected the Will in open Court and had filed her affidavit in lieu of her examination-in-chief. She was cross-examined. During her cross-examination, she had admitted that she had filed the petition on 13.12.2007 to direct the defendant to produce the original Will dated 16.04.2003 executed by Kanneganti Manikyamma to inspect the same before filing her chief affidavit. She had further admitted that the defendant had filed the Will and that she has gone through the said Will in open Court. After the plaintiff had inspected the Will, the said Will was kept in a sealed cover. The defendant had filed the photostat copy of the Will with the written statement. The plaintiffs had filed a rejoinder. The 1st plaintiff never denied the execution of the Will dated 16.04.2003. Hence, after cross-examination is completed, the plaintiffs are not entitled to request to recall her to file further chief affidavit.

5. The trial Court, on merits and by the orders impugned, had allowed the petition filed by the plaintiffs and recalled PW1 and permitted her to file additional chief affidavit as prayed for.

6. Aggrieved of the said orders, the defendant had filed this revision.

7. The learned counsel for the defendant while reiterating the case of the defendant, which is stated supra, would contend as follows:

The trial Court had erroneously allowed the application of the plaintiffs and recalled PW1 and permitted her to file further chief examination affidavit though she is not entitled to do so. The defendant had relied upon the Will by

pleading about the Will in the written statement. Along with the written statement, the Photostat copy of the Will is filed. The plaintiffs filed a rejoinder. On an application filed by the 1st plaintiff, the Court below had directed the defendant to produce the original Will. The original Will was produced into Court. The 1st plaintiff had inspected the Will in open Court. Subsequently, she had filed her affidavit in lieu of her examination-in-chief. In her cross-examination, she had admitted all the above facts. In the light of the above facts and events, the contention that by mistake or over sight, the contents in the rejoinder of the plaintiffs were not referred to in the original chief affidavit of PW1 cannot be countenanced. Therefore, she cannot be permitted to file an additional affidavit in lieu of her further examination-in-chief, as she had never denied the execution of the Will. The order of the Court below is erroneous. The Court below committed a serious mistake in ordering the application of the plaintiffs after having concluded that PW1 had not denied execution of the Will. The order impugned is unsustainable under facts and in law and the same is liable to be dismissed.

8. On the other hand, the learned counsel for the plaintiffs while reiterating the case of the plaintiffs and while supporting the orders of the Court below would contend as follows:

The original chief affidavit filed by PW1 is confined to the averments in the plaint. Her counsel, while going through the record, had noticed that in that affidavit that there is no reference to the averments in the rejoinder filed by the plaintiffs. The non-mentioning of the averments in the affidavit of PW1 is only on account of unintentional mistake and over sight. There are no laches on the part of the plaintiffs or their counsel. In the original affidavit filed, it is categorically stated that Kanneganti Manikyamma died intestate on 30.07.2003 regarding her remaining properties. Therefore, there is a denial of the Will. Hence, it cannot be said that the alleged Will is not denied. However, to state the contents of the rejoinder, it is necessary to recall PW1 and permit her to file her further affidavit in lieu of her further examination-in-chief. Therefore, the trial Court is right in allowing the petition. There is no merit in the revision and the revision is liable to be dismissed.

9. I have bestowed my attention to the facts and submissions.

The suit is filed for recovery of possession of the plaint schedule property. The defendant is resisting the suit by stating in her defence that Kanneganti Manikyamma executed a Will dated 16.04.2003. The plaintiffs had filed a rejoinder denying the Will. However, when PW1 filed her affidavit in lieu of her examination in chief, the same was confined to the averments in the plaint. Therefore, the averments in the rejoinder are not mentioned in her affidavit filed in lieu of her examination-in-chief. The said fact is not in dispute.

Therefore, the present petition is filed requesting to recall her and to permit her to file further affidavit in lieu of her further examination-in-chief in support of the contentions in the rejoinder of the plaintiffs. It is *inter alia* stated that though the averments in the rejoinder are not mentioned in the original chief examination affidavit, it is clearly sated that the said Kanneganti Manikyamma had died intestate insofar as the suit schedule properties are concerned. The defendant is opposing the said request stating mainly that the photostat copy of the Will is filed along with the written statement and that the original Will is produced into Court on a direction given by the Court to produce the same on the application filed by the 1st plaintiff and that on production of the original Will before the Court, PW1 had inspected the same in the Court and that later, she had filed her affidavit in lieu of her examination-in-chief and that in that affidavit, she had not denied the Will and therefore, she cannot be permitted to file additional affidavit in lieu of her further examination-in-chief by recalling her as it would amount to permitting her to filling up the lacunae. Be it noted that she had categorically stated in her original affidavit filed in lieu of her examination-in-chief that Kanneganti Manikyamma died on 30.07.2003 intestate regarding her remaining properties. Therefore, she had asserted her pleaded case in her affidavit insofar as the averments in the plaint are concerned but she did not specifically deny the Will, which is being relied upon by the defendant. It is for the plaintiffs to prove their pleaded case. However, the defendant has to prove the said Will being relied upon by her in the first instance by adducing necessary evidence as required under facts and law as the initial onus of

proof to prove the Will is on the defendant. After the defendant adduces the necessary evidence on the issue concerning the genuineness or otherwise of the Will and discharges the initial onus of proof, which is on her, then the onus to introduce evidence shifts to the plaintiffs. Therefore, in the facts and circumstances of the case, the plaintiffs have always a right to adduce rebuttal evidence on the said issue in answer to the evidence that would be adduced by the defendant, as the initial onus of proof in regard to the issue concerning the Will set up by the defendant in the written statement is on the defendant and that only on the defendant first adducing evidence in regard to the said Will the onus to introduce rebuttal evidence shifts to the plaintiffs. Therefore, the plaintiffs are entitled to adduce rebuttal evidence in regard to the Will, which they are disputing. However, the plaintiffs in their discretion, instead of reserving their right to adduce rebuttal evidence, are seeking to recall PW1 to file further chief examination affidavit in support of the contentions, in the rejoinder of the plaintiffs.

9.1 It is necessary to refer to infra the provision of Rule 3 of Order XVIII of the Code, which deals with the relevant aspect.

3.Evidence where several issues:- Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.”

In the facts and circumstances of the case, this Court, for the reasons aforesaid is of the considered view that the plaintiffs are entitled to recall PW1 for the purpose of filing further chief affidavit in lieu of further examination-in-chief in support of the contentions in the rejoinder. Further, when the matter is in the trial Court and when PW1 had already stated that Kanneganti Manikyamma died on 30.07.2003 intestate regarding her remaining properties, if she is recalled and permitted to file her additional affidavit in lieu of her further examination-in-chief in support of the contentions in the

rejoinder of the plaintiffs, it cannot be said that it would amount to permitting her to fill up the lacunae in her evidence.

10. Viewed thus, this Court finds that the Court below is justified in allowing the petition of the plaintiffs and there is no merit in the revision and that the order impugned brooks no interference.

11. Accordingly, the Civil Revision Petition is dismissed. No costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

13th July, 2016
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