

* HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

+ C.R.P. No.5323 of 2016

% 25.11.2016

#Kishore Singh & another

...Revision Petitioners

VERSUS

\$ Manesh Singh & others

...Respondents

< GIST:

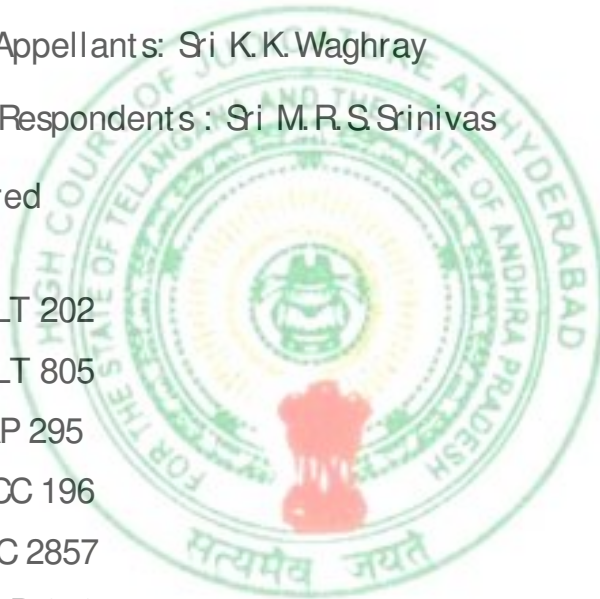
> HEAD NOTE:

!Counsel for Appellants: Sri K.K.Waghray

^Counsel for Respondents : Sri M.R.S Srinivas

? Cases referred

1. (2011) 6 ALT 202
2. 2005 (1) ALT 805
3. AIR 1966 AP 295
4. 2012 (2) SCC 196
5. AIR 2000 SC 2857
6. 2016 (5) ALD 656
7. 2011 (11) SCC 275



HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

C.R.P. No.5323 OF 2016

ORDER:

The revision involves two questions to answer viz.,
1) whether before reserving a matter for orders/decreed/award/judgement by Court, even any evidence of either side or both sides closed any application for reopen is mandatory? and 2) whether Order XVIII Rule 17 CPC or Section 151 CPC that is applicable to examine a new witness by either side after formal closure of evidence?

2) The revision petitioners—plaintiffs maintained the revision impugning the order dated 25.10.2016 passed in I.A. No.1319 of 2016 in O.S. No.344 of 2005 by the learned IX Additional Chief Judge (FTC), City Civil Court, Hyderabad, on the application of the petitioners/ defendant Nos.1, 2, 3, 5, 6, 14 to 16 showing the two plaintiffs and other defendants among defendants 1 to 16 as respondent Nos.1 to 10, filed under Section 151 C.P.C to cause examine the self same one of the attestors to Exs.B7 and 15, registered gift deeds as DW.5, that was since allowed.

3) The grounds of revision impugning said order of the lower Court are that, the lower Court committed grave illegality in improperly exercising the discretion for reopening the evidence for the purpose of examination of the proposed witness as attestor to the documents even such an opportunity is not availed by the defendants earlier having relied upon the document and they filed the petition to re-open the evidence for cross examination of the attestor of the purported Will and at that stage not even choose to examine this witness as attestor to the so-called two documents of

gifts and having not availed and for the latches and lacuna they cannot be allowed to fill up the gaps and the provision is not meant for that and the averments of the affidavit petition are laconic without even sufficient reasons, much less existence of bonafides and the order is thereby liable to be set-aside by dismissing the petition before the trial Court in allowing the revision.

4) Learned counsel for the revision petitioners/ plaintiffs in the course of hearing reiterated the contentions in the grounds of revision and elaborate arguments submitted by referring to several expressions of the constitutional Courts. Whereas it is the submission of the learned counsel for the successful petitioners before the lower Court as co-respondents 1 to 8 to the revision that the order of the lower Court no way requires interference for same is supported by reasons and the revision is liable to be dismissed by placing reliance on the several expressions of the constitutional courts to support their contention.

5) Heard learned counsel for the revision petitioners and learned counsel for respondents 1 to 8 as referred supra. Perused the material on record.

6) The factual matrix of the case is that earlier with evidence of PW.1 from closure of plaintiffs' evidence and of DWs.1 and 4 from closure of the defendants' evidence, the matter was posted for arguments. It was in the course of arguments, from what the plaintiffs contended of the so-called gift deeds not proved though compulsorily attestable documents and despite denial. It is needful to say, even earlier when the suit ripened for arguments, at the stage of arguments being advanced by the defendants they

sought to examine DW.4, one of the attestors to the so-called will—Ex.B29 and the Court permitted examination of the witness by reopening the defendants evidence at that stage and after that the matter again posted for arguments and after completing the arguments of plaintiffs, the application covered by the impugned order of the lower Court was filed which reads that in the suit for partition and separate possession of the suit schedule property sought by the plaintiffs, leave about, defendant Nos.5 & 6, who filed another suit O.S. No.708 of 2007 and both suits were clubbed together for joint trial, after closure of joint trial and closure of the evidence, the matter is when coming up for arguments of both the matters, it is noticed the non-cross examination of atleast one of the attestors of the two gift deeds i.e., Exs.B7 and B15 and the plaintiffs in O.S. No.344 of 2015 and defendant Nos.5 & 6 of O.S. of 2007 want to examine one of the common attestor of the two documents by name Gurjit Singh, S/o.Inderjit Singh, R/o.14-1-541/1, Mangalhat, Hyderabad, hence to reopen and permit to examine said witness in the interest of justice else the plaintiffs and the respective defendants in both the suits supra will be put to irreparable loss.

7) The counter filed in opposing the petition, mainly by the plaintiffs, is with contentions that the defendants who are the applicants in I.A. No.1319 of 2016 from the beginning have been dodging the case and delaying the matter on one pretext or the other by putting spokes to the early disposal of the suits and even earlier in both the suits evidence was closed and the matter was posted for arguments to 20.01.2014 and on 20.01.2014, the matter was heard in part and while so, filed similar applications in

I.A. Nos.745 and 746 of 2014 for receiving of documents and recall of DW.2 originally that were allowed by affording opportunity to them. In the meantime, the defendant No.1 was expired and thereafter the legal representatives were brought on record and the defendants brought up a will said to have been executed by 1st defendant to cause examine the attestor of the will and examined DW.4 besides DW.3 and the evidence of defendant No.5 reported nil on 08.12.2015 and therefrom the matter was when coming for arguments and after submission of arguments of plaintiffs on 10.03.2016 and when it was coming up hearing reply arguments, the non-examination of any of the attestors of the two gift deeds contemplated by Section 68 of the Indian Evidence Act was submitted in arguments with reference to legal position. At that stage instead of submitting further arguments, this application to fill up the lacuna is filed and it cannot be admitted at the fag end of arguments and, that too, for non availing the opportunity earlier and there are no sufficient reasons to reopen or to permit examination of the proposed witness and thereby sought for dismissal. The other argument is that without filing an application for reopening the matter when it is at the stage of arguments, the application for examination of further witness or the application for recall of any witness is impermissible in law.

8) So far as any application is required or not to reopen the evidence concerned, from the very wording of Rule 2 (g) of Civil Rules of Practice and Circular Orders, what is meant by 'First hearing'; Order XVII Rule 1 explanation, Order IX Rule 7 wording and Order XV Rule 1 to 4 of C.P.C, it is clear that hearing of the suit is not confined for framing of issues as from the stage of

hearing for framing of issues till reserving for judgment. Thus either framing of issues or adducing and closure of evidence of plaintiffs supporting defendants' or closure of evidence of contesting defendants, but after closure of entire evidence and hearing arguments and posted or reserved for judgment. It is only after closure of arguments once the matter is reserved for judgment, the Court may pronounce the judgement and even the wording of Order XXII Rule 6 also clear in this regard of no abatement by death of any party, after hearing of arguments before pronouncement of judgment by virtue of that legal fiction to say till completion of hearing arguments and reserved the matter for judgment, the hearing of the suit deemed pending to continue.

9) It is needless to say, as contemplated by Order XVIII Rule 1 to 3 C.P.C and Sections 101 to 103 of the Indian Evidence Act, there is a right to begin practically to say the legal duty or obligation to adduce evidence on or any of the issues, unless defence admits anything and sets up any positive defence as the case may be to put burden on defendants, if no evidence adduced plaintiff be non-suited of suit claim. Leave about, passing of any decree on admissions as contemplated by Order XII Rule 6 read with Order X, XI, XV C.P.C and Order VIII Rule 3 to 5 C.P.C and Sections 17 and 58 of the Indian Evidence Act, in the context require to be decided from several issues to rely the controversy when the defendants disputed the entitlement of plaintiff as the legal obligation to adduce evidence on plaintiff and after that the Court has to invariably, practically and statistically, however, close the evidence of plaintiffs and thereafter permit any supporting defendants to the case of plaintiffs to adduce their evidence before

commencing evidence of the contesting defendants and it is after such closure statistically again permitting the contesting defendants evidence and it is after such closure statistically again to hear the arguments of both sides.

10) However all these steps form part of the course of hearing of the suit including at the stage of arguments to say in between and till reserving for judgment, no application to reopen the evidence practically is required as what is closed of the evidence of plaintiffs or supporting defendants or the contesting defendants, as the case may be, is only statistically as observed supra. It was no doubt on closure of the arguments once posted for judgment or reserved the matter for judgment, an application to reopen the matter is required. Thus, to reopen the matter only an application is required and to reopen evidence of any side no separate application is required for the reason, irrespective of Rule 55 of Civil Rules of Practice speaks a separate application for each distinct prayer is a must and even an application filed with more than one prayer the Court has to confine only to one prayer said application, unless shown the other prayer/s are consequential to the main prayer and the legal position in interpreting the provision is also clear that Court may direct to file any additional application rather than technically to dismiss the application with two prayers but for to confine to one prayer so to direct for the other and that is not even required in more than one prayers, the reliefs or either ancillary are interconnected to say within the meaning of consequential vide **Massarath Yasmeen vs Mohammed**

Azeemuddin¹. Even thereby application to bring LRs by setting aside abatement and condone the delay further under Limitation Act can be survived in one application if the affidavit is with factual foundation. As also in case of setting aside the *ex parte* decree with delay condonation as held by this Court in **Kavali Narayana vs Kavali Chennamma².**

11) Leave about, power of the Court to reopen, if at all, under Order XVIII Rule 17 from the wording at any stage of the suit to mean till pronouncement of judgment as it is only on pronouncement of judgment, the Court is *functuous officio* and till then the inherent power of the Court can be exercised.

12) No doubt, from the wording of Order XVIII Rule 17 C.P.C, it is confined to recall of any witness either by plaintiff/s or defendant/s, as the case may be, or even for that matter of any Court witness even to exercise the power, leave about the power under Section 151 C.P.C in addition to that and also under Section 165 of Evidence Act to exercise during the course of hearing right from stage of issues and commencement of trial till pronouncement of judgment from the wording of at any stage of the suit equally can be extended from the wording of Section 165 of Evidence Act and Section 151 C.P.C with all its elasticity to the necessity to sub-serve the ends of justice. Thus the exercise of power by the Court *suo moto* either to reopen or to recall any witness or to examine any additional witness or to cause production of any document to exhibit is always there.

¹ (2011) 6 ALT 202

² 2005 (1) ALT 805

13) Thus, therefrom it can be said, leave about powers of the Court, once the matter is reserved for judgment, parties cannot have any right even to move an application without seeking reopen of the matter for recall of any witness. Though on their bringing to the notice of the Court any necessity, the Court can exercise that power. That what the law practically laid down, from the combined reading of the two expressions viz., **Sultan Saleh Bin Omer vs Vijayachand Sirimal**³ by this Court particularly from para Nos.6 to 9 of the judgment though there is a comment by the learned Single Judge of there is an unwarranted practice adopting in some of the subordinate Courts, which is evidently adopted in this case, of treating the completion of the evidence as closing of the trial, and hearing arguments as a separate stage of the trial....., to some extent that observation requires clarification for the reason a statistical closing of plaintiffs evidence before commencement of defendants evidence and closure of defendants evidence also before commencement of arguments are required, else any supporting defendant of plaintiffs' claim may choose to come after evidence of both sides to fill up any lacunas.

14) The other expression in this regard of the Apex Court is **Rasiklal Manikchand Dhariwal vs M.S.S.Food Products**⁴ wherein it was held in dealing application under Order IX Rule 7 C.P.C in interpreting what is meant by hearing and what is meant by adjournment, that application of any of the co-defendant to file application to set-aside set-exparte order for which no limitation during hearing of the suit, does not mean still available after the

³ AIR 1966 AP 295

⁴ 2012 (2) SCC 196

matter reserved for orders and after hearing of the arguments. The Apex Court, therefrom, further cleared the cloud in saying, only on closure of the arguments and reserved for judgment or on fixing a date to pronounce judgment there is closure of hearing of the suit and till then hearing of suit is deemed pending.

15) Thereby, practically no application for reopening of the matter is required. Further, there is no specific wording by any provision in C.P.C or in the Indian Evidence Act of closure of evidence of plaintiffs side and closure of evidence of defendants side but for from reading of Sections 133 and 137 of the Indian Evidence Act of examination of witness on chief examination, cross examination and re-examination further chief or further cross examination as the case may be. It is from that there is closure of the evidence of each witness. It is statistically like closure of evidence of plaintiff side and defendants' side and thus it does not mean any application for reopening of the evidence from such statistical closing is required. From the respective arguments advanced on the above aspects saying as if there is a cloud in this regard to clear, the same be clarified of no cloud at all.

16) Now coming to the exercise of the discretion by the lower Court in the application filed under Section 151 C.P.C for examination of additional witness, for not a recall of the witness under Order XVIII Rule 17 C.P.C is just or illegal exercise or improper exercise prone to revision concerned, the factual matrix as referred supra shows arguments advanced and one of the expressions in ***Rosammal Issetheenammal Fernandez (dead) by***

Lrs vs Joosa Mariyan Fernandez⁵ relied on by plaintiffs is saying there is non-compliance with the statutory requirement of examination of atleast one of the witness fatal.

17) There are definitely laches on the part of the applicants in this regard and they did not avail this but for in the final arguments with the plaintiffs evidence in saying that the so-called gift deeds not proved and plaintiffs are not entitled to the suit reliefs for partition. In this regard, coming to the scope of law, the very wording of Section 151 C.P.C speaks on three aspects. The inherent power, which does not confer specifically by a statute and which inheres in the very constitution of each Court/ tribunal to exercise is not taken away by the provisions C.P.C, apart from the other powers specifically conferred by Section 165 of the Indian Evidence Act to call and examine any witness at any stage including with reference to any document and even to produce and exhibit i.e., civil or criminal proceedings as the case may be.

18) Thus, either to prevent abuse of process or to subserve the ends of justice or to give effect to the orders passed by the Courts, on these three requirements the inherent power is saved by CPC which inherent power is in every court with all elasticity to the necessity, it can be equally leave about the power under Section 165 of the Indian Evidence Act empower the Court of its own or on an application even to permit for examination of any additional witness either as court witness or from any request of the party as witness of the respective party plaintiff or party defendants as the case may be.

⁵ AIR 2000 SC 2857

19) Here the witness available is shown as proposed DW.5 with name and address. The witness ought to have been examined earlier, was not examined. The non-examination goes to the root of the very proof of the two gift deeds to which he is the attesor, as, it is the legal requirement of proof from specific denial under Section 68 of the Indian Evidence Act. From that, even the defendants want to rely on the documents and brought to the notice of the Court, from non-examination of attesor earlier in proof of the documents concerned though could approach the Court early and not so done the Court has to adopt liberal approach as the procedural law is hand maid and not mistress of justice. Now the expressions placed reliance by both sides on **Sanagala Srinivasulu vs Ponnampoola Seetharamaiah**⁶, the single judge of this Court dismissed the revision against the dismissal of the application for recall of the witness for further cross examination for the latches therein, for there is no lacuna which requires interference by sitting in revision by the revision. From this decision, the principle reiterated is that revision Court cannot causally interfere with the reasoned and discretionary orders of lower Court.

20) In **K.K.Velusamy vs N.Palanisamy**⁷ the Apex Court particularly at para No.5, observed that even at the stage of arguments from the wording of Order XVIII Rule 17 C.P.C 'at any stage of the hearing of the suit' it is for the Court to exercise under the provision to recall and examine or even otherwise under Section 151 C.P.C to examine any witness to do justice. Here two

⁶ 2016 (5) ALD 656

⁷ 2011 (11) SCC 275

aspects are required to be considered. Doing of justice is an elaborate concept. In doing justice, it is covering up the latches of any party or filling up the lacuna, is not a criteria for that does not comes in the way for rendering of justice, though latches and lacunas cannot be encouraged to fill. However, these technicalities will not come in the way for doing complete justice between the parties. Undoubtedly, in the case of conflict between equality and law in doing justice, Court has no right to ignore the law still and lean towards equality, but when law enables and to render complete justice, Court has to do equity as the common law courts are also known as courts of equity.

21) Once such is the case, examination of the witness is once necessary to prove the document and it is the bone of contention, though there are latches that can be compensated as also held in **K.K.Veluswamy** (supra). The lower Court, however, in allowing the application ignored this aspect even the said expression brought to its notice and simply allowed the petition without imposing heavy costs.

22) Having regard to the above and in the result, the revision is partly allowed while confirming the order of lower Court permitting examination of the witness as DW.5 to prove attestation of Exs.B7 and B15, however, subject to costs of Rs.10,000/-. It is made clear that the non-payment of costs not entitle the concession of the order of lower Court. It is also made clear that the scope of examination of the witness is confined to prove due attestation of Exs.B7 and B15 and nothing beyond and that too

within the time being fixed by the trial Court as the suit is at fag end and arguments in part already heard.

23) Consequently, pending miscellaneous petitions, if any, shall stand dismissed.

Dr.JUSTICE B. SIVA SANKARA RAO

Dt.25.11.2016

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