

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.2160 of 2013

ORDER:

The revision petitioners are the plaintiffs in O.S.No.709 of 2007 on the file of I Additional Junior Civil Judge, Ongole. The revision respondents 2 to 4 among respondents 1 to 4, are the defendants to the suit, 1st defendant- Yanamadala Seshiah since died his son-2nd defendant represents the estate also as party on record, the 3rd defendant is the A.P.State Finance Corporation so called mortgagee of the plaint schedule properties and the 4th defendant is the auction purchaser in the course of realization of the mortgage debt by the 3rd defendant invoking the State Finance Corporation Act, 1954, particularly Sections 29 and 32 with sub-sections therein, if any, vis-à-vis the Revenue Recovery Act provisions applicable to that extent if any. The claim of the plaintiffs 1 and 2 in the suit is that they purchased the property from the defendants 1 and 2 and they are not aware of the so called mortgage said to have been obtained by the 3rd defendant from a person by name Y.Peda Venkaiah. The suit is contesting mainly by the defendants 3 and 4 saying the suit claim is not true, they are not the bonafide purchasers

from 2nd defendant by private sale, which is even subsequent to the mortgage of the properties with the 3rd defendant and the suit claim is liable to be dismissed. The 2nd defendant remained ex parte and did not choose to contest the suit filed by his vendees, who are the plaintiffs.

2. During course of trial the evidence of plaintiffs is support of the suit claim is that the name of the mortgagor shown as Y.Peda Venkaiah and the 1st defendant's father and 2nd defendant's grand father was by name, Y.Peda Venkaiah and if at all he was the alleged mortgagor, he died way back and he was not in existence even by the time of the alleged mortgage to validate. The 2nd defendant who remained ex parte was cause examined by the plaintiffs as PW.5. In his chief examination, the 2nd defendant as PW.5 categorically stated that, since the age of his discretion, his father alone in possession and enjoyment of the suit schedule property, which his father got in partition as one of the items, which is an extent of Ac.9.00 cents and that his father's father, by name, Y.Peda Venkaiah, died more than 60 years back and he was no more even by the time of his discretion. In his chief affidavit his age was shown as 40 years. From his chief examination affidavit averments taken on oath, in the course of his cross examination particularly by the 3rd defendant, he deposed that plaintiffs told him

about their filing of the present suit few months before its filing and he told the plaintiffs that he does not know about the so called mortgage with the 3rd defendant of the suit property before grant father died and his father told that he took death certificate of his grand father and given to the plaintiffs and plaintiffs informed about filing of the death certificate in Court and he has no copy of the death certificate shown by his father indicating so if his grand father died in the year, 1948 and he does not know when it came to notice of the Revenue Authorities about said fact but the death certificate was issued in the year, 2007 by the Mandal Revenue Officer and he does not know who reported the death and he added to the above version that when he enquired with, there is no record found and he confirmed the fact only from the enquiry of the old persons in the village of his grand father died in the year, 1948.

3. No doubt, the so called death certificate said to have been recorded by the Revenue Authorities of the death of his grand father in the year, 1948; recorded in the year, 2007 if true, same not seen light to say obtained by his father and original certified copy given to the plaintiffs by his father and her verified copy.

4. However, the fact remains that it is after said evidence of PW.5-2nd defendant, the plaintiffs filed the

present application covered by the impugned order dated 12.03.2013 in I.A.No.60 of 2013 under Order XVIII Rule 17 read with Section 151 of the Code of Civil Procedure (for short 'C.P.C.') for recall of PW.5 and to receive some documents. The cross examination of PW.5 was on 24.12.2012 and the application filed was on 03.01.2013 after nine days. It is the version of the plaintiffs in the petition affidavit that, PW.5-2nd defendant after said deposition of him, went to his village and searched and found the documents proposed to be filed in seeking to receive and to recall him to exhibit. The defendants 3 and 4 to the suit as respondents 3 and 4 opposed the petition. The 2nd respondent/ 2nd defendant is sailing with the plaintiffs because he and his father are the vendors to the plaintiffs to support that alienation. Ultimately the lower Court by the impugned order supra dismissed the application.

5. The impugned order shows, as seen from the record, PW.5 is no other than 2nd defendant, who remained ex parte, some documents are sought to be filed is nothing but to fill up the gaps in the cross examination and the same is an abuse of process and thereby, the petition is devoid on merits and liable to be dismissed.

6. It is impugning the same, present revision is filed with the contentions in the grounds of appeal vis-à-vis oral

submissions of the learned counsel for the revision petitioners/plaintiffs that the impugned order is unsustainable and liable to be set aside as without proper appreciation of the facts and law and ought to have been allowed for recall of PW.5 by receiving the documents for its marking and thereby sought for allowing the revision setting aside the dismissal order of the lower Court.

7. Prayer in the petition shows, it is only to recall PW.5 for giving further evidence and mark documents and to pass such other just orders. The purpose of recall is for further evidence and to mark documents. Here, the documents without receiving undisputedly not filed originally, question of recall of PW.5 does not arise. Though reopen is not required from plaintiffs' evidence is not closed and even closed and the matter is in the stage of evidence since pending. It is the representation that there is another petition pending before the lower Court and that was not disposed of.

8. In fact, if there are more than one prayers in an interlocutory application, but for one prayer, it will not sustain as per Rule 55 of the A.P.Civil Rules of Practice and Circular Orders, 1990. The law is settled in this regard that the Court can confine the application to one prayer. Thus, it can be confined only to receive the documents.

9. So far as receiving of the documents concerned, with the list there are 9 documents filed and 9th document mentioned as Photostat copy of marriage invitation and not even a original and there are only 3 registered documents viz., registered settlement deed dated 19.06.1962, Exchange deeds 2 in number dated 14.05.1968, the other documents are cist receipts and so called ryotwari passbook and so called Tobacco Growers Membership Card. When there is no explanation for its existence and non-filing, but for the 3 registered documents of 1962 and 1968 existence cannot be doubted, this Court could not find any reason to receive other documents. Thus, the 3 documents can be received pursuant to the observations supra.

10. No doubt, the purpose of receiving as referred supra is to exhibit through PW.5 by recall.

a) Order XVIII Rule 17 of C.P.C. reads as follows:

“ Court may recall and examine witness. The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such question to him as the Court thinks fit.”

b) The decisions relied on by both the parties are as follows:

(i) In Vadiraj Naggappa Vernekar (dead) through L.Rs v. Sharadchandra Prabhakar Gogate¹, it was observed that though the provisions have been interpreted to include

¹ (2009) 4 SCC 410

applications to be filed by the parties for recall of witnesses, the main purpose of such Rule is to enable the Court, while trying a suit, to clarify any doubts, which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

(ii) For that it referred a Single Judge expression of *Sunder Theatres v. Allahabad Bank*² and another expression of the Apex Court in *M.M.Amonkar v. Dr.S.A.Johari*³.

(iii) It was held in *M.M.Amonkar* (supra) that the trial Court may assign reasons for dismissal or allowing the application by application of the judicial mind within the scope of the provision for exercise of the judicial discretion of the necessity or not of such recall.

(iv) The other decision placed reliance is *K.K.Velusamy v. N.Palanisamy*⁴, where it is quoted with approval the expression in *Vadiraj Naggappa Vernekar* (supra) and also referred several expressions and particularly in paras 10, 11, 12 and 16 besides at 19, the scope is vividly dealt with. It is observed in gist from the paras that the provision is not

² AIR 1999 Allahabad 14

³ (1984) 2 SCC 354

⁴ (2011) 11 SCC 275

intended to enable a party to recall witness for further examination in chief or cross or to place additional material or evidence which could not be produced when the evidence was being recorded. It is a provision primarily enables the Court to clarify any issue or doubt by recalling witness either *suo moto* or at request of any party, so that the Court itself can put questions and elicit answers. Once a witness is recalled for purpose of such clarification, it may, of course, permit the parties to assist it by putting some questions. The inherent power under Section 151 C.P.C. for reopening the matters, though it inheres in every Court to exercise, it is either to prevent the abuse of process or to sub-serve the ends of justice and this inherent power not to be exercised to over side any express provision. The provisions conferred under Order XVIII Rule 17 C.P.C. to recall any witness is thus to enable the Court to put such questions to elicit such clarifications if any. It negated the contention of Section 151 C.P.C. cannot be used for recall or reopen the evidence.

(v) In fact, Salem Advocate Bar Association, T.N. v. Union of India⁵, is categorical in this expression in its specifically dealing with the scope that Court got the inherent power to reopen a matter or to recall a witness for re-examination. Even Order XVIII Rule 17-A specifically

⁵ (2005) 6 SC Cases 344

deleted by the amended provisions of C.P.C in the year 1999 and 2002 respectively.

(vi) Coming back to the expression in K.K.Velusamy (supra), at para-16, no doubt it was observed that the power is, for evidence sought to be produced would, either assist in clarifying the evidence led on the issues or leads to a just and effective adjudication and not otherwise. Ultimately it is a word of caution made in para-19 that the power either under Section 151 or Order XVIII Rule 17 CP.C. is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials.

(vii) Where the application is found to be bonafide and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the Court may exercise its discretion and if does so, it should ensure that the process does not become a protracting tactics. The Court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the Court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be

mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

(viii) Coming to the other expression of another two Judge Bench in *Bagai Construction v. Gupta Building Material Store*⁶, the expressions in *K.K.Velusamy and Vadiraj Naggappa Vernekar* (supra) came for consideration therein and ultimately it was held at paras 14 and 15 referring to the facts that the plaintiff intended to mark the bills already mentioned in the statement of account but not placed on record earlier till date of filing of such application and during entire trial even those are in his exclusive possession for reasons not known and in such circumstances as observed by the trial Court, at the belated stage, that too after conclusion of evidence and at the stage of final arguments and after reserving the matter for pronouncement of the judgment, the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. The trial Court's order when no way requires interference, the reversal of the order in the revision by the High Court held is not unsustainable.

11. The law referred from the two expressions supra is that if the ends of justice warrant or to prevent abuse of process, the power either under Order XVIII Rule 17 C.P.C.

⁶ 2013(14) SCC 1

or under Section 151 can be exercised by the Court to permit reopen of evidence or recall of witness or for further cross examination or re-examination after evidence led by the parties. It is further observed that it is desirable that recording of evidence should be continuous and followed by argument and decision thereon within a reasonable time as per the spirit of the amended C.P.C. provisions. The Apex Court in so holding observed to make endeavour to follow the time schedule to the extent and if not followed, the purpose of amendment of the provisions would be defeated and applications for adjournments, reopen, recall or interim measures so far may be possibly avoided but for compelling and acceptable reasons to consider.

12. Coming to the other decision placed reliance in *A.R.K. Raju v. A.V.S. Raju*⁷, a Single Judge expression of this court referring to *Vadiraj Naggappa Vernekar* (supra) only held that the ground on which respondent sought recall of PW.1 for further examination on facts when totally unsustainable and non-existent and the lower Court failed to examine this aspect and erroneously allowed the applications even without assigning any reasons, though reasons are required to be given as per *Vadiraj Naggappa Vernekar* (supra).

⁷ 2014(6) ALD 20

13. Coming to the other latest expression of the Apex Court in *Ram Rati v. Mange Ram (died) through L.R.s and others*⁸, it was held that the power under XVIII Rule 17 C.P.C. can be exercised including under Section 151 C.P.C. besides the specific rule *supra* to make orders to sub-serve the ends of justice or to prevent the abuse of process and coming to the provisions, the basic purpose postulated is to enable the Court to clarify any position or doubt and the Court may either *suo moto* or on the request of the party, recall any witness at any stage in this regard and this power can be exercised at any stage of the suit and once the Court recalls the witness for the purpose of clarification, may permit the parties even to assist the Court by examining the witness for said purpose of clarification required or permitted by the Court and it cannot be stretched any further. The power cannot be invoked to fill up the gaps and any prejudice caused or not thereby to a party by exercise of such power is also a ground for consideration in exercise of the discretion. Conclusion *supra* is arrived by referring to *K.K.Velusamy, Vadiraj Naggappa Vernekar and Bagai Construction (supra)*.

14. Referring to the above expressions, this Court in C.R.P.Nos.5349 and 5350 of 2015 by order dated 26.08.2016

⁸ 2016(3) ALD 162 (SC)

exhaustively dealt with the issue and laid guidelines, where purpose of any proposed examination by recall, only relevant questions to be given of the area in a sealed cover of the same be kept in confidently by the Court and thereby to consider such a purpose in existence for recall and re-examination or not and it is the discretionary power to be exercised and not so casually and if prejudice caused to the other side also to be kept in mind however not to fill up the lacunas.

15. Having regard to the above propositions and coming back to the facts referred supra, the purpose of receiving the three documents is for marking through PW.5 by recall. It is only to substantiate the factum of the death borne by the three registered documents as claimed, leave about such proof of death whether got any bearing on the registered mortgage and if so how far is another question, for the trial Court to decide as that is also one of the core issues of the lis.

16. In the result, this Civil Revision Petition is allowed by permitting to receive the three documents i.e., registered settlement deed dated 19.06.1962, Exchange deeds two in number dated 14.05.1968 and by exercising the *suo moto* and plenary power equally by sitting in revision ordering recall of PW.5 subject to costs of Rs.5,000/- (Rupees Five

thousand only) payable by the plaintiffs to the 3rd defendant since paid in the open Court and on production of PW.5, plaintiffs shall exhibit the three documents and shall not put any further evidence to the mouth of the evidence but for any cross examination limited to that area by the defendants 3 and 4.

17. Miscellaneous petitions, pending if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:23.09.2016

Note:

L.R. copy to be marked-yes

B/o.

pab



* HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

+ CIVIL REVISION PETITION No.2160 of 2013

%23-09-2016

#Adaka Peda Anjaiah and another

...petitioners

Vs.

Yanamadala Seshaiah (died) and three others

... Respondents

!Counsel for the petitioners : Sri V.S.R Anjaneyulu

Counsel for the Respondents: Smt.Y.N.Lohita

<Gist :

>Head Note:

? Cases referred:

¹ (2009) 4 SCC 410

² AIR 1999 Allahabad 14

³ (1984) 2 SCC 354

⁴)2011) 11 SCC 275

⁵ (2005) 6 SC Cases 344

⁶ 2013(14) SCC 1



IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

CIVIL REVISION PETITION No.2160 of 2013

Between:

Adaka Peda Anjaiah and another ...petitioners

Vs.

Yanamadala Sessaiah (died) and three others ... Respondents

DATE OF JUDGMENT PRONOUNCED: 23.09.2016

SUBMITTED FOR APPROVAL:

HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

- 1 Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/ No
- 2 Whether the copies of judgment may be marked to Law Reports/ Journals Yes/ No
- 3 Whether Their Ladyship/ Lordship wish to see the fair copy of the Judgment? Yes/ No