

HONOURABLE SRI JUSTICE P.NAVEEN RAO

**CIVIL REVISION PETITION NOs.4317, 4361, 4362, 4363 &
4364 OF 2016**

Date: 22.09.2016

CRP No.4317 of 2006:

Between:

Trilokchand Jain s/o. Late Hanuman Bakshi,
Aged about 73 years, R/o H.No.3-3-9,
Main Road, Dornakal, Warangal.

.....Petitioner/2nd respondent/
2nd defendant

and

Gurrapu Rajamouli, S/o Ramaiah,
Aged about 64 years, Occu: Business,
R/o H.No.4-1-24, Post Office Road,
Dornakal, Warangal District.

.....Respondent/petitioner/
Plaintiff

Madanlal Kala s/o Jawaharlal,
Aged about 65 years, Occu: Business,
R/o 12-12-187, Kuflanaka, Begumbazar,
Hyderabad.

.... Respondent/ 1st respondent/
Defendant no.1

The Court made the following:

HONOURABLE SRI JUSTICE P.NAVEEN RAO

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COMMON ORDER:

Aggrieved by the common order dated 19.08.2016 on the file of Senior Civil Judge, Mahabubabad allowing five IAs filed by plaintiff, defendant No.2 filed CRP No.4317 of 2017 (against IA No.285/2016); CRP No.4362 of 2016 (against IA No.283/2016); CRP No.4363 of 2016 (against IA No.284/2016); CRP No.4364 of 2016 (against IA No.286/2016) and CRP No.4365 of 2016 (against IA No.282/2016). These five civil revision petitions are disposed of by this common order. For convenience the parties are referred to as arrayed in the suit.

2. Heard Sri P.Raja Sekhar, learned counsel for petitioner and Sri. K.V.Bhanu Prasad, learned counsel for respondent No.1 in all the CRPs.

3. The facts which are necessary for consideration of the issues agitated are as under:

Defendant No.2 filed O.S.No.37 of 1982 on the file of Principal Judge, Warangal, for specific performance of agreement of sale of the suit schedule property by the 1st defendant. The said suit was decreed on 14.10.1993. Plaintiff purchased the suit schedule property and sale deed was registered in his favour by the 1st defendant on 18.12.1992 i.e., during the pendency of O.S.No.37 of 1982. Application filed by Plaintiff to implead as defendant in O.S.No.37 of 1982 was dismissed. Present suit is filed praying to set aside the decree in O.S.No.37 of 1982 alleging that it was

obtained by collusion and fraud. Plaintiff filed five interlocutory applications. I.A.No.282 of 2016 is filed under Order VII Rule 14(3) of CPC seeking leave of the Court for production of eight documents mentioned in the said application; I.A.No.283 of 2016 is filed under Order XVI Rule 1 of CPC to issue summons to the sole proposed witness to examine on behalf of the plaintiff to authenticate the signature on the demand draft; I.A.No.284 of 2016 is filed under Section 151 of CPC to reopen the evidence on behalf of the plaintiff; I.A.No.285 of 2016 is filed under Order XVIII Rule 17 of CPC to recall P.W.1 to mark the documents filed in I.A.No.282; and I.A.No.286 of 2016 is filed to permit the plaintiff to lead secondary evidence in respect of the photocopy of demand draft. Simultaneously, the 2nd defendant filed I.A.No.294 under Order VII Rule 14 (3) of CPC to receive documents on behalf of the 2nd defendant. All these IAs were clubbed and disposed of by the common order. The trial Court allowed all the IAs filed by the plaintiff as well as I.A. filed by the defendant No.2. It is to be noted that the suit is of the year 1996 and is one of the longest pending suits in the trial Court.

4.1. The first and foremost submission of Mr. Raja Sekhar is that suit was instituted in the year 1996, for one reason or the other the suit is dragged on for 20 years. While so and after the closure of the evidence, the order under challenge is passed by the trial Court. He would submit that the suit filed by the 2nd defendant and the suit filed by 1st defendant against 2nd defendant were within the knowledge of the plaintiff. Plaintiff filed implead petition in the suit filed by 2nd defendant and the same was dismissed. He did not pursue the matter further. During the pendency of the

suit, with full knowledge, plaintiff purchased the suit schedule property and, therefore, is bound by the decree passed in the said suit.

4.2. He would further submit that out of eight documents he seeks to introduce, six documents relate to O.S.No.36 of 1982 and O.S.No.39 of 1983. He would submit that these documents ought to have been marked when the evidence of plaintiff was recorded. No justification is shown as to why plaintiff is seeking to mark those documents at this stage. He would further submit that merely because there is a change in the counsel and that the counsel now engaged by him gave advice to file these interlocutory applications is not a good ground to accept the plea.

4.3. It is his case that defendant no.2 has been categorically asserting that no such sale transaction took place between the plaintiff and the 1st defendant and that the sale consideration was not paid. Plaintiff ought to have pleaded and marked documents when plaintiff evidence was recorded. It is not permissible to introduce, at this belated stage, photocopy of demand draft as proof of payment of full sale consideration. Plaintiff can not rely on secondary evidence in the form of Xerox copy of DD. He would submit that it is not stated clearly as to when the photocopy of demand draft was secured by him. He would further submit that in the absence of record with the bank no useful purpose would be served by examining the then Manager of the Karur Vysya Bank Limited, Warangal Branch; such prayer is not *bona fide* and is a vexatious claim to divert the issue and to protract the litigation.

4.4. He would further submit that the trial Court erred in entertaining the applications and granting the reliefs sought. Any application filed at a belated stage, more particularly after the evidence is closed, cannot be entertained. In the instant case, the suit has been pending for more than 20 years and the present action of the plaintiff is only to protract the litigation. He would submit that it is not a case where no new facts are discovered subsequently by the plaintiff and that these facts were not within his knowledge when the suit was instituted. It is well settled that power to recall the witness and power to mark the documents, which are subsequently sought to be brought on record, cannot be ordered in a routine manner and unless plaintiff explains the reasons for bringing the documents on record after such long lapse of time and unless the Court is convinced of justification shown for the delay, those petitions cannot be order as a matter of course.

4.5. In support of his contention, Mr. Raja Sekhar placed reliance on the decision of Supreme Court in **Bagai Construction v. Gupta Building Material Store**¹; decision of this Court in **Sundaramudi China Lakshmayya v. K.Suryanarayana**² and decision of Patna High Court in **Kumar Basant Narain Singh and others v. the State**³.

5.1. Sri K.V.Bhanu Prasad would submit that to prove that sale consideration was paid by the plaintiff the only evidence available with him is photocopy of the demand draft dated 18.12.1992 taken from Karur Vyays Bank Limited. In spite of best efforts, plaintiff

¹ (2013) 14 SCC 1

² AIR 1958 AP 254

³ AIR 1958 Patna 458

could not secure the original of demand draft. The Bank officials expressed their inability to supply the information regarding the said transaction on the ground that records are not available. Therefore, he intends to introduce the said document in support of his claim. Since original records are not available with the Bank, in order to establish that said demand draft was validly taken plaintiff has no other option except to examine the then Manager of Karur Vysya Bank Limited, who is presently working in Axis Bank, to authenticate the signature on the demand draft.

5.2. He would further submit that plaintiff was under the impression that 2nd defendant would bring on record all the relevant documents concerning OS No.37 of 1982 instituted by him and OS No.39 of 1983 on the file of District Munsif Court, Mahabubabad instituted by the 1st defendant against the 2nd defendant, which was filed claiming for delivery of possession of the suit schedule property. Since 2nd defendant did not mark them, the plaintiff had taken steps soon after DW.2 deposed. The documents 1 to 6 are part of the Court record. Only certified copies of the documents are now filed.

5.3. He would therefore submit that there is no illegality or irregularity and in order to have a fair adjudication of the matter, these documents are necessary and merely because they were not filed earlier, cannot be a ground to throw away the applications filed by the plaintiff. He would submit that in the interest of justice and fair disposal of the suit, these IAs are validly allowed and there is no error, much less patent error, in exercise of discretion by the trial Court warranting interference by this Court.

5.4. In support of his contentions, he placed reliance on the decision of the Supreme Court in **K.K.Velusamy v. N.Palanisamy**⁴. He would further submit that the decision in **Bagai Construction**, turns on its own facts and, therefore, is not applicable to the facts on hand.

6. The question for consideration is whether in exercise of discretion vested in the trial Court under Order XVII Rule 17 read with Section 151 of CPC, can the trial Court permit the plaintiff to introduce new evidence at this stage and permit plaintiff to lead secondary evidence.

7. At this stage, it is appropriate to consider the observations of Hon'ble Supreme Court on the scope of discretion available to trial court in allowing new evidence.

8. In **Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate**⁵, Supreme Court held that Order XVIII, Rule 17 C.P.C., is not intended to be used to fill up omissions in the evidence of witness, who is already examined. Facts in the said case some what similar to the facts of this case. In the said case also no new facts have been discovered subsequently, which were not within the knowledge of the party when the affidavit evidence was filed. The Hon'ble Supreme Court held as under:

“28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-

⁴ (2011) 11 SCC 275

⁵ (2009) 4 SCC 410

examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

29. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.

(30) xxxxx

31. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it ultimately within the court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out. ”

9.1. The scope of power of trial Court in resorting to provision under Order XVIII Rule 17 read with Section 151 of CPC was considered by the Supreme Court in **K.K.Velusamy**. Supreme Court observed that though Order XVIII Rule 17 enables the Court, at any stage of the suit, to recall any witness, who was already examined and to put such question as it thinks fit, but should be exercised sparingly, in appropriate cases, to meet the ends of justice, should not be allowed to be used to abuse process of law and to protract the litigation.

9.2. Supreme Court has delineated various issues that require consideration in exercise of power under section 151 CPC. Supreme Court cautioned that provision under section 151 CPC cannot be routinely invoked for reopening the evidence or recalling the witnesses and should be used only to secure the ends of justice and to prevent abuse of its process; that the availability of power under Section 151 CPC is coextensive and may be used where the

remedy or procedure is not provided in CPC. It is complementary; that since no guidelines are prescribed in CPC, such power should be exercised in exercise of sound discretion and the wisdom of the Court and in given facts and circumstances of the case, which would have to be used with circumspection and care. It is not intended to be used to fill up omissions in the evidence of a witness who was already been examined.

9.3. Supreme Court further observed as under:

“14 But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands on earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.”

10. In **Bagai Construction**, the plaintiff sought to introduce the documents which were in his possession all along. The earlier decision in **K.K.Velusamy** was considered. Supreme Court observed as under:

“15. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly.”

11. The principle deducible from these decisions is, discretionary power vested in Order XVIII Rule 17 read with Section 151 CPC should be exercised sparingly and such applications filed belatedly

should be accepted for compelling reasons and if sufficient justification is shown. The *bona fides* of the party which seek to introduce the documents should be considered and cannot be allowed in a routine manner.

12.1. It is not in dispute that out of the eight documents, which the plaintiff seeks to mark on his behalf, six are the documents relate to earlier round of litigation and the same was within the knowledge of the plaintiff even by the time the instant suit was instituted. No satisfactory explanation is furnished for not marking those documents when evidence of plaintiff was recorded. It is for the plaintiff to prove his case and he can not expect the defendant to mark documents which plaintiff relies. Furthermore, change of counsel and advise by new counsel cannot be a ground to explain the delay in marking the documents.

12.2 The last two documents relate to correspondence between plaintiff and the Bank generated recently, enquiring about the record concerning the alleged demand draft issued by the plaintiff in favour of 1st defendant towards payment of part sale consideration to purchase the suit schedule property. No satisfactory explanation is furnished as to why plaintiff kept quite for 20 long years to obtain information, according to him, is crucial. It has been the burden of song of the 2nd defendant that no such sale consideration took place. Petitioner/plaintiff sought to introduce these documents much later, after defendant deposition was recorded. Ordinarily, the photocopy of a document is not admissible in evidence. The mandate of Section 65 of Evidence Act is not complied.

12.3. According to plaintiff's own statement, he was in possession of photo copy of Demand Draft since the time the original was handed over to first defendant. He deposed in his affidavit filed in support of I.A.No.286 of 2016 as under: "*I obtained the Xerox copy of the demand draft, at the time of handing over the original demand draft to the respondent/defendant No.1*".

12.4. It appears no endeavour was made to ascertain the information from the Bank about the authenticity of document. It also appears there was no endeavour made by plaintiff to elicit information from 1st defendant. The affidavit filed in support of I.A.No.286 of 2016 is shorn of any details. Thus, the lapse on his part cannot be said as inadvertence. The Bank categorically states that records of transactions made 20 years back are not available. In the absence of record, it is not possible to authenticate the transaction and mere recording of statement of then manager regarding the authenticity of the signature is not sufficient. In the absence of relevant record, it is not possible to expect a person to authenticate a transaction made 24 years ago based on a photocopy. The decision of Delhi High Court in **Suresh Kumar v. Baldev Raj**⁶ turns on its facts and do not come to the aid of plaintiff.

13. *Prima facie*, the plaintiff lacks *bona fides* in filing the IAs and the efforts appears to be to drag on the litigation. The trial Court fell into patent error in not appreciating the scope of the IAs and the lack of *bona fides* of the plaintiff and allowed the IAs in a routine manner.

⁶ AIR 1984 Delhi 439

14. It is not a case where some new facts are discovered by the plaintiff in the recent past, which has bearing on the proceedings of the suit. The instant suit is pending for more than 20 years and is one of the longest pending suits in a trial Court. Pendency of this suit is contrary to the very concept of speedy justice. No satisfactory explanation is given for moving the IAs after 20 years. It is apt to note the observations of Supreme Court in recent judgement in **Gayathri v. M.Girish**⁷, which read as under:

“16. ... We are constrained to say the virus of seeking adjournment has to be controlled. The saying of Gita “Awake ! Arise ! Oh Partha! is apt here to be stated for guidance of trial courts.”

15. Plaintiff is guilty of wilful laches and negligence. The applications filed by the plaintiff are in abuse of the process of the Court. The common order of trial Court in IA Nos.282, 283, 284, 285 and 286 of 2016 in O.S.No.151 of 1996 is not sustainable. It is accordingly set aside.

16. The Civil Revision Petitions are allowed. However, it is made clear that observations made herein are only for the purpose of disposal of instant CRPs and can have no bearing on the merits of the claim in the suit.

Miscellaneous petitions if any pending shall stand closed.
There shall be no order as to costs.

JUSTICE P.NAVEEN RAO

Date: 22.09.2016
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⁷ 2016 SCC Online SC 744

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