

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

CIVIL REVISION PETITION No. 4631 OF 2016

Between:

Chinna Bayyannagari Munirami Reddy PETITIONER

VERSUS

Chinna Bayyannagari Shankar Reddy and others RESPONDENTS

JUDGMENT PRONOUNCED ON : 20.12.2016

HON'BLE SRI JUSTICE : C. PRAVEEN KUMAR

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

JUSTICE C. PRAVEEN KUMAR

THE HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

CIVIL REVISION PETITION No. 4631 of 2016

ORDER :

%Dated 20.12.2016

Chinna Bayyannagari Munirami Reddy PETITIONER

VERSUS

\$ Chinna Bayyannagari Shankar Reddy and others RESPONDENTS

! Counsel for Petitioner : Sri P.Jagadishchandra Prasad

^ Counsel for Respondents : None appeared

< GIST :

> HEAD NOTE :

? Cases referred :

1. AIR (31) 1994 All. 188
2. C.R.P.No.3392 of 2009 and Batch
3. AIR (Cal) 2002, 281



THE HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No.4631 of 2016

ORDER:

- 1) Aggrieved by the order, dated 09.08.2016, passed in I.A.No.565 of 2016 in O.S.No.24 of 2010 on the file of the Additional Senior Civil Judge, Tirupati, wherein an application filed under section 151 of C.P.C. to set aside the order of eschewing the evidence of DW.1, dated 08.07.2016, was dismissed, the petitioner, who is plaintiff in O.S.No.24 of 2010, filed the present Civil Revision Petition.
- 2) For the sake of convenience the parties hereinafter referred to as arrayed in the suit.
- 3) The facts in issue are as under:
- 4) The plaintiffs filed O.S.No.24 of 2010 seeking injunction restraining the defendants and their men from interfering with their peaceful possession and enjoyment over the plaint schedule property. A written statement came to be filed on behalf of defendant No.1 on 10.06.2010. Defendant No.6 also filed a separate written statement in the month of July, 2016, by engaging a different lawyer. After completion of the plaintiffs' evidence, defendant No.1 filed his chief affidavit as DW.1 on 17.06.2015 and the matter was posted for his cross-examination to 25.01.2016. On that day, DW.1 was cross examined by the

plaintiffs' counsel. It is said that the answers given by DW.1 show that he colluded with the plaintiffs. Thereafter, the matter was posted to 09.02.2016 for cross examination of DW.1 by defendant No.6. Since then, DW.1 did not turn up before the Court for subjecting himself to the cross-examination by defendant No.6. On 26.02.2016 learned counsel for defendant Nos.1 to 3 represented before the Court to eschew the evidence of DW.1 as he did not turn up. The Court accepted the request and closed the evidence of defendant Nos.1 to 3 and posted the case to 03.03.2016 for the evidence of defendant No.6. The record reveals that defendant No.6 took time for filing his chief affidavit on 14.03.2016 and the case was posted to 24.03.2016. On the said date, defendant No.6 filed an application vide I.A.No.270 of 2016 to recall DW.1 for the purpose of his cross examination, which was allowed on 14.06.2016. The matter was adjourned to 21.06.2016 for appearance of DW.1 and for his cross examination which again got adjourned to 28.06.2016. As DW.1 did not turn up, on 08.07.2016, a request was made for eschewing the evidence of DW.1. Since DW.1 failed to appear before the Court, the trial Court eschewed the evidence of DW.1 and posted the case to 19.07.2016. On 13.07.2016, an application came to be filed seeking to set aside the order eschewing the evidence of DW.1 on the ground that the plaintiffs may be put to irreparable loss and injury if the order is not set aside. The said application came to be rejected, against which the present Civil Revision Petition came to be filed.

5) The main ground urged by the learned counsel for the petitioner is that grave prejudice would be caused to the plaintiffs if the evidence of DW.1 is eschewed from consideration since the evidence of DW.1 would tilt the case in their favour. It is further urged that the Court below has no jurisdiction to eschew the recorded evidence merely because DW.1 failed to appear before the Court for cross-examination by his co-defendants.

6) It is the case of defendant No.6 that plaintiff No.2, who was examined as PW1, has stated in favour of defendant Nos.1 to 3 in his cross examination, whereas, defendant No.1, who examined himself as DW1, answered in favour of the plaintiffs. It is his case that the application filed to set aside the order eschewing the evidence of DW.1, is only to gain wrongfully. It is also his case that defendant Nos.1 to 3 colluded with the plaintiffs, got filed this petition with a view to grab the suit land. Having regard to the fact that the trial Court has no jurisdiction to review an order eschewing the evidence of DW.1, learned counsel for defendant No.6 submits that there are no merits in the revision and the same is liable to be dismissed.

7) The short questions that arise for consideration is; (1) whether the trial Court was justified in refusing the request of the plaintiffs to set aside the order of eschewing the evidence of DW.1? and (2) whether the trial Court has jurisdiction to review the order eschewing the evidence of DW.1?

8) Before proceeding further, it would be useful to refer to Section 33 of the Evidence Act, which reads as under:

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.—Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable: Provided—that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding. Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

9) A reading of the Section makes it clear that the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding, or in later stage of the same proceedings. When the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way, by the adverse party or if his presence cannot be obtained, without amount of delay or expense which under the circumstances of the case, the Court can consider it.

10) Similarly, Section 138 of the Indian Evidence Act states that the witness shall be examined in chief first and then (if the

adverse party so desires) cross-examine him and then re-examine if the party calling him so desires.

11) It is well established principle that evidence of a witness given in chief-examination is not legally admissible unless other side is given an opportunity to cross examine him or if the other side waives the right to cross examine him.

12) Keeping in view the principles of law, I shall now proceed to deal as to whether the trial Court is justified in eschewing the evidence of DW1.

13) Admittedly, the evidence in chief of DW.1 and the cross examination of plaintiffs' counsel is over. For reasons best known, DW1 did not attend the Court in spite of giving him number of opportunities. Seeing the nature of answers elicited, defendant No.6 intend to cross-examine DW.1 and as such he made an application to recall DW.1 which was allowed, and the case was posted for appearance of DW.1. In spite of giving couple of opportunities, DW.1 did not turn up and hence at the request of other defendants, the Court eschewed the evidence of DW.1.

14) It is to be noted that the evidence of a witness given in chief will not be legally admissible in evidence unless the other side is given an opportunity to cross examine him or unless the other side waives his right to prosecute. (*Ahmad Ali v. Joti Prasad*¹).

¹ AIR (31) 1944 AIL.188

15) In *G. Pramila and others v. G. Venugopal and another*² this Court, while dealing with the provisions of Section 33 of the Indian Evidence Act, held as under:

“If the witness was alive after the examination in chief, but did not offer himself for cross examination, the entire evidence needs to be eschewed from consideration without any hesitation. If, on the other hand, the witness was cross-examined to certain extent, but was not alive thereafter the evidence need not be ignored altogether. Hence, this Court accepted the view expressed by the Calcutta High Court in *Dever Park Builders Private Limited v. Smt. Madhuri Jalan*³ that there is nothing in law, which provides for discarding the evidence on the sole ground that the witness was not cross-examined, needs to be accepted. If the party, who was entitled to cross-examine the witness, did not turn up, the chief examination itself becomes the entire evidence of that witness, for all practical purposes.”

16) As stated above, Defendant No.1 got examined himself as DW1 on 17.06.2015. Thereafter, he was cross examined by the plaintiffs on 25.01.2016. Realizing the answers elicited, defendant No.6 made an application to recall DW.1. for further cross-examination, which was allowed, but DW.1 did not turn up for cross examination. On the basis of the representation made by the counsel for defendant Nos.1 to 3, the evidence of DW.1 was eschewed by the trial Court.

17) The question as to whether there was any collusion between the plaintiffs and DW.1 cannot be decided or gone into at this

² C.R.P.No.3392 of 2009 and Batch

³ AIR (Cal) 2002, 281

stage. It is for the trial Court to decide the same during the course of further proceedings. Once, the plaintiffs were given an opportunity to cross examine DW1, which option has been exercised, the evidence of DW.1 to the extent of cross-examination done by the plaintiffs cannot be eschewed from consideration.

18) Having regard to the judgment referred (2 supra) to above wherein this Court held that even if the witness is cross examined to a certain extent but was not alive thereafter the evidence need not be ignored altogether, get support to the view that when the plaintiffs having completely cross-examined DW.1, the question of eschewing that part of evidence of DW.1 from consideration though DW1 has not appeared for cross-examination of defendant No.6 may not be proper.

19) Accordingly, the Civil Revision Petition is allowed. It is always open to defendant No.6 to take steps for production of DW.1, in accordance with law. There shall be no order as to costs.

20) As a sequel thereto, Miscellaneous Petitions pending if any, shall stand closed.

JUSTICE C.PRAVEEN KUMAR

20.12.2016

Note: L.R. Copy to be marked.

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