

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.08.2017

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THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. PD Nos.3309 to 3312 of 2011
and M.P.No.1 of 2011**

Dharani Sugars and Chemicals Ltd.,
Rep.by its Executive Director,
Having their Registered office at
No.1, Venus Colony
Second Street, Chennai – 600 018. ... Petitioners in all CRPs

Vs

M/s.T.M.N.Engineering Industries
Rep.by Mrs.T.R.Natarajan
having their Head office at
No.2, Ashby Shopping Complex,
Junction Road, Tiruchirapalli ... Respondents in all CRPs

Civil Revision Petitions are filed under Article 227 of the Constitution of India against the common order dated 20.08.2011 made in I.A.Nos.179 217, 218, 223 of 2011 in O.S.No.1533 of 2011 on the file of the Additional District Judge, Chennai, Fast Track Court No.1, Chennai.

For Petitioners : Mr.T.K.Bhaskar
in all CRPs

For Respondents : Mr.S.A.Hafiz
in all CRPs

ORDER

These Civil Revision Petitions are filed against the common order dated 20.08.2011 made in I.A.Nos.179, 217, 218 & 223 of 2011 in O.S.No.1533 of 2011 on the file of the Additional District Judge, Chennai, Fast Track Court No.1, Chennai.

2. The petitioner is the defendant and the respondent is the plaintiff in O.S.No.67 of 2004 on the file of Fast Track Court No.1, Chennai. The respondent filed C.S.No.433 of 1996 before this Court which was transferred to Additional District Judge, Fast Track Court No.1, Chennai and re-numbered as O.S.No.1533 of 2011, for a declaration that the order dated 27.05.1996 passed by the petitioner on 27.05.1996 unilaterally terminating the agreement dated 31.05.1995 as illegal and void, for recovery of Rs.14,92,500/- being the balance amount due towards the value of the work completed in pursuant to the agreement dated 31.05.1995 for payment towards extract work done outside the scope of agreement and return of material equipments, tools & shackles and for permanent injunction restraining the petitioner.

3. The respondent filed suit represented by Mr.T.R.Natarajan. The petitioner filed written statement and is contesting the suit. Originally the suit was filed before this Court as C.S.No.403 of 1996. Proof affidavit of PW1 was filed in March 2008 and he was cross examined. The petitioner filed Application No.5091 of 2008 in C.S.No.403 of 1996 to frame additional issues. This Court, by order dated 12.11.2008 held that the issue raised by the petitioner is a question of law and the same can be raised during the arguments and there is no necessity to frame additional issues. The respondent filed Application No.227 of 2009 for leave to file additional documents. They also filed Application Nos.5585 and 5586 of 2008 to re-open the evidence on their side and to re-call PW1. All the applications were allowed by this Court. Due to enhancement of pecuniary jurisdiction of City Civil Court, the suit was transferred to Fast Track Court No.1, Chennai and re-numbered as O.S.No.1533 of 2011. The evidence on behalf of the respondent was re-opened and certified copy of the registration of respondent was marked as Ex.A97 and notice sent by the respondent counsel to the petitioner counsel calling upon to produce certain documents above marked as Ex.A98. Arguments were advanced and judgment was reserved. On that day, when the Court reserved suit for judgment, the respondent filed I.A.No.179 of 2011

under Section 151 CPC to re-open the case for clarification and advancing further arguments on the respondent's side. Subsequently, the respondent filed three applications in I.A.Nos.217 of 2011 under Order XVIII Rule 17 CPC to recall PW1 for further evidence, I.A.No.218 of 2011 filed under Section 151 CPC to re-open the evidence of PW1 and I.A.No.223 of 2011 filed under Order VII Rule 14 (3) CPC to receive the documents namely Registration certificate of the respondent.

4. According to the respondent, the petitioner, during arguments had raised the maintainability of suit on the ground that the respondent has not established that it is a Registered Partnership Firm and person who has filed the suit is a partner of the said firm. In view of the same, clarification is necessary and filed I.A.No.179 of 2011. As far as other three applications are concerned, the respondent submitted that the evidence on behalf of the respondent has to be re-opened to place essential factors and materials in view of the technical plea raised by the petitioner during the arguments and they have obtained certified copy of the registration certificate of respondent firm in Form "A" in Registration of Firms maintained by Registrar of Firms, Tiruchirapalli.

5. The petitioner filed counter affidavit and opposed all the four applications and submitted that the respondent failed to produce the said document at the time of filing of the suit or when the evidence on behalf of the respondent was re-opened, PW1 was recalled and the respondent was permitted to mark the documents. The respondent is trying to defend their case after conclusion of the arguments which is untenable. Great prejudice would be caused to the petitioner if application is allowed and prayed for dismissal of all the four applications. The learned Judge allowed all the applications on the ground, marking of Firm Registration certificate and details of partners are necessary to decide the issue and petitioner would be having opportunity to cross examine the witness with regard to said document and let in rebuttable evidence.

6. The learned Judge, allowed the applications by imposing a cost of Rs.5,000/- in total, to be paid by the respondent to the petitioner.

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7. Against the common order dated 20.08.2011 made in I.A.Nos.179, 217, 218 and 223 of 2011 in O.S.No.1533 of 2011, the present Civil Revision Petitions are filed.

8. The learned counsel appearing for the petitioner submitted that the respondent has not given any reason for not filing the documents now sought to be filed earlier or when the evidence on behalf of the respondent was re-opened and given opportunity to mark the documents. The learned Judge has not stated that Court is satisfied with the documents would not have been filed at the earlier stage. In view of not giving any finding on this point, the learned Judge ought to have dismissed the application. The learned Judge has not properly appreciated the judgment of the Hon'ble Apex Court reported in **2011 (3) CTC 422 [K.K.Velusamy v. N.Palanisamy]**. The learned counsel for the petitioner, in support of his contention relied on the judgment of Hon'ble Karnataka High Court reported in **ILR 2004 KAR 2215 [Rabiya Bi Kassim M. v. The Country Wide Consumer Financial Service Ltd.]** wherein the Court held that for re-opening the case and to record further evidence after the suit was reserved for pronouncing of judgment is not permissible. The learned Judge did not even refer to this judgment. The learned Judge is not correct in holding that marking of the document now sought to be marked is necessary to decide the case. The learned Judge failed to see that respondent is trying to fill up the lacuna after arguments are over and when the suit is reserved for judgment. The reasons given

by the learned Judge that the petitioner will have an opportunity to cross examine PW1 and let in rebuttable evidence are not valid reason for allowing the repeated applications filed by the respondent. Awarding cost would not remedy the injustice and harassment caused to the petitioner. The learned counsel for the petitioner relied on the following judgments -

(i) MANU/SC/0195/2013 [Bagai Construction Thr. Its Proprietor Mr.Lalit Bagal v. Gupta Building Materila Store]

(12)In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.

(ii) Judgment of this Court dated 27.04.2010 in CRP (PD) No.479 of 2010 [A.S.K.Sivakumar v. D.Rajesh Jain]

12. The learned counsel appearing for the respondent had relied on the decision in VADIRAJ NAGAPPA VERNEKARA (D) THROUGH LRS. Vs. SHARAD CHAND PRABHAKAR GOGATE, 2009 (5) L.W. 52, wherein, it has been held that the power to recall any witness, under Order 18 Rule 17 of the Civil

Procedure Code, 1908, can be exercised by the Court, either on its own motion or on an application filed by any of the party to the suit. Such a power is to be invoked not to fill up the lacuna in the evidence of the witness, but to clear an ambiguity that may have arisen during the course of his examination. If the evidence of re-examination of the witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the trial Court to permit recall of such a witness for re-examination-in-chief, with the permission to the defendants to cross examine the witness thereafter. The Supreme Court had relied on its earlier decision in SMT.M.N.AMOKAR AND OTHERS Vs. DR.S.A.JOHARI (1984 2 SCC 354) wherein, the Supreme Court, while considering the scope of Article 227 in dealing with an application, under Order 18 Rule 17 of the Civil Procedure Code, 1908, came to a finding that unless the reasons given by the trial Court in rejecting an application, under Order 18 Rule 17 can be said to be moonshine, flimsy or irrational, the rejection of the application cannot be dubbed as suggestive of non-judicial approach or bias or partiality on the part of the trial Court, merely because in the exercise of its discretion, another Court might have taken different view and allowed the application.

The decision of the Allahabad High Court, in SUNDER THEATERS v. ALLAHABAD BANK, JHANSI (AIR 1999 ALL.14), it had been stated that the power of the Court, under Order 18 Rule 17 CPC, discretionary and has to be exercised with the greatest care only on exceptional circumstances. Under the garb of this rule, the Court ought not to recall a witness at the instance of a party in order to fill up the lacuna in the evidence already led.

(iii) MANU/KA/0107/2004 [Rabiya Bi Kassim M. v. The Country Wide Consumer Financial Service Ltd.]

9. On consideration, we are of the opinion that once the matter has been finally heard and posted for judgment, as held by the Supreme Court in ARJUN SINGH's case (*supra*) nothing is required to be done by the Court except to pronounce the judgment, and therefore the decision in LAXMINARAYAN ENTERPRISES case is not helpful. Admittedly, Clause (4) of Order 18 Rule 2, of CPC has been deleted and therefore the respondent-plaintiff cannot take advantage of LAXMINARAYAN's case in the facts of the given case. Even if we assume it for the sake of argument without accepting, in view of the amendment in CPC, as we find, the law relating to procedure in suits and civil proceedings are governed by CPC, The CPC has been amended from time to time. Recently also, in order to cut short the delays at various levels in disposal of civil cases, CPC was amended by the Amendment Act of 1999 with effect from 1.7.2002. In the facts of the given case, sufficient opportunity was given to the plaintiff to complete his evidence, but he has not availed the opportunity at appropriate time and thereafter his evidence was closed. The case was fixed for defendant's evidence and ultimately the case was heard and reserved for judgment on 20.6.2001. In our view, if the matter is reserved for pronouncement of judgment, such an application is not maintainable as otherwise it will defeat the very object of amendment in speedy disposal of the cases.

(iv) AIR 2009 (SC) 1604 [Vadiraj Naggapa Vernekar (D) Through Lrs v. Sharad Chand Prabhakar Gogate]

17. 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. Of course, if the evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the Trial Court to permit recall of such a witness for re-examination-in-chief with permission to the defendants to cross-examine the witness thereafter. There is nothing to indicate that such is the situation in the present case. 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 is 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.

(v) MANU/IP/0390/1998 [Sunder Theatres (Nandani Talkies), Civil Lines, Jhansi v. Allahabad Bank, Branch Civil Lines, Jhansi]

7.The power of the Court under Rule 17 of Order XV11I is discretionary and has to be exercised with greatest care and only in exceptional circumstances. Under the garb of this rule, it has been held that Courts ought not to recall a witness at the instance of a party in order to fill up the lacuna in the evidence already led, in my view, the Court below has rightly exercised its discretion in rejecting the application to recall Mukund Lal Mehrotra for further examination at the instance of Judgment-debtors. Not only this, the impugned order dated 7.11.1997 is purely of interlocutory nature as it does not decide or affect the rights of any one of the parties, and, therefore, not subject to revision. The same view was taken in Civil Misc. Writ No. 4 of 1998 in which it was observed that the impugned order was interlocutory, the legality of which could be examined by superior court in

appeal, revision or writ petition 'after the final decision of the execution case'.

(vi) MANU/TN/3157/2011 [Pan Resorts Limited rep. by its Director Sri.K.Subbiah v. H.H.Karthika Thirunal Lakshmi Bai and Ors.]

19. When we carefully read the affidavit filed in support of the petition, we could see a clear admission that the documents, which are sought to be marked, were in the custody of the plaintiff, however, the plaintiff has not chosen to make any pleading regarding the availability of those documents, in the plaint. The reason assigned by the plaintiff was he was under the bonafide impression that there was no dispute with regard to the ownership of the property and it was also not denied by the defendants. At the same time, the plaintiff has also not exercised due diligence to produce the documents even after the cross-examination was over, where, the defendants have made a specific denial of the title of the plaintiff to the property. Taking into consideration the gap between the period of cross-examination and the arguments advanced before two learned single Judges of this Court and the time taken for advancing arguments before the third judge, we hold that the applications filed by the plaintiff are frivolous and cannot be entertained. As rightly pointed out by the learned single Judge, the suit was pending for the past 13 years and the present application was filed after the arguments are closed for the third time. It is evident that the applications were filed only to drag on the proceedings.

25. As far as O.S.A. No 221 of 2011 filed by the defendants 7 and 8, which arose out of the application filed for suspension of the interim order, we find that the interim order was in force atleast from the year 2004 and the suit is also now posted for argument. At this stage, we are not inclined to vacate the interim order. As rightly pointed out by

the learned single Judge, in a suit for specific performance, if the subject matter of the property is alienated, it will invite creation of third party rights resulting in multiplicity of proceedings. Even though if the property is alienated during the pendency of the suit, it will attract the principles of lis pendence, at this length of time, we are not inclined to vacate the interim order which was in force for a long time. We only direct both the parties to cooperate for expeditious disposal of the suit.

9. Per contra, the learned counsel appearing for the respondent submitted that at any stage of the suit, even after reserving the judgment before pronouncing of judgment, Court has power to reopen the case and permit the respondent to mark the document, if the said document is necessary to decide the issue in the suit. The petitioner did not raise the issue in the written statement that respondent is not a Registered Partnership Firm and the person who has filed the suit representing the firm is not a partner. The said issue was raised only during the cross examination of PW1. This court, by order dated 12.11.2008 made in Application No.1591 of 2008 held that no additional issues are necessary as the petitioner can raise the issue at the time of argument as the same is question of law. The respondent filed applications for clarification and marking additional documents to prove that the respondent is a partner of the firm. The respondent has already marked registration certificate of firm as Ex.A97. Now, the respondent is seeking to mark the registration certificate in Form "A"

from the Registrar of Firms which contain the names of the partners. This will not amount to filling up lacuna and no prejudice would be caused to the petitioner in marking the documents. The respondent must be given an opportunity to prove that respondent is a registered partnership firm and the person who is representing is a partner. The petitioner is not entitled to raise issue with regard to registration of respondent firm without raising the same in the written statement. In support of his contention, the learned counsel for the respondent relied on the following judgments -

(i) AIR (29) 1942 MADRAS 634 [Goverdhandoss Takersey v. M.Abdul Rahiman and another]

There is a distinct provision in the Limitation Act that a Court is bound to dismiss a suit on the ground of limitation if it finds the suit to be barred whether a plea of this kind had been raised on behalf of the defendants or not. No such provision however exists in the Partnership Act. It is not therefore quite easy to accept the view that the court is bound to dismiss a suit on the ground of non-registration of the firm suo motu even if no plea had been raised by any of the defendants to the suit.

(ii) AIR 1972 MADRAS 86 (V.59 C 26) [Jalal

**Mohammed Ibrahim (died) and ors. v. Jajja
Mohammed Ghouse Sahib and another]**

11.The maintainability of the suit is one of the grounds that will have to be specifically pleaded under will have to be specifically pleaded under Order 8, Rule 2, Civil P.C. The defendants in that suit and not raised that plea. The learned author Mulla in his book on Civil P.C. 13th Edn. p. 769 states that a question of fact, which had not been put forward in the written statement, cannot be allowed to be raised later, for example a plea that a partnership was not registered. In *Chaimanram v. Ganga Saha*, it was held that the plea could not be allowed to be raised in second appeal when it was not pleaded in the written statement. In *Mohamed Ali v. Kondho Rayaguru*, AIR 1945 Pat 286 a Division Bench of the Patna High Court took the same view and further observed that, since it was the defendant who intended to contest the performance of the condition precedent, viz the registration of the firm within the meaning of Order 6, Rule 6, Civil P.C. and if that point was not raised in the pleadings, the question was not at all before the court. A similar view was taken by the Rajasthan High Court in *Kalyan Sahai v. Firm Lachminarian*, . These authorities clearly establish that the defence of non-registration of the firm is as plea that will have to be raised in the suit itself, and if it had not been raised, it could not be permitted to be raised for the first time in the second appeal. Such a plea could not be permitted to be raised in a separate suit is in our opinion, a fortiori case.

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(iii) AIR 1945 PATNA 236 [Mohamad Ali v. Karji Kondho Rayaguru]

Whether the firm was or was not actually registered under the Partnership Act, is a mixed question of fact and the point cannot be raised for the first time in second appeal. Since it is the defendant who intends to contest the performance of the condition precedent viz., the registration of the firm and if the point is not raised in the pleadings, the question is not at all before the Court.

10. Heard the learned counsel for the petitioner as well as respondent and perused the materials available on record.

11. The points for consideration in all the CRPs is whether the impugned orders of the learned Judge allowing the applications after suit was reserved was judgment is correct or not.

12. The contention of the learned counsel for the petitioner is that the respondent is that the respondent is now seeking to file the certified copy of the registration certificate in Form "A" of the respondent firm issued by the Registrar of Registration of Firms, Tiruchirapalli. This document was available to the respondent at the

time of filing of the suit and when the evidence on behalf of the respondent was re-opened, PW1 was recalled and respondent was permitted to file additional document. The respondent did not avail the said opportunity and failed to produce the document now sought to be marked. The respondent has not given any reason for not producing the said document at the time of filing of the suit or earlier. It only amounts to filling up lacuna. These contentions are without any merits. The Court has discretionary power to re-open the evidence and to re-open any witness suo moto or on submission by a party. The discretionary power has to be exercised judicially, sparingly and in exceptional cases. The Court has to consider whether re-opening of the evidence on behalf of the parties and permission to mark a document is necessary to decide the issue. The Court has power to reopen, recall and permit marking of documents, if the same is to clarify certain ambiguity in the evidence let in by the parties. Only when the intention of the party is to fill up lacuna, drag on the proceedings and is malafide or it will cause great prejudice and prejudice to other party, the Court cannot allow the request of the party for re-opening and let in further evidence.

13. In the judgment reported in **AIR 2009 (SC) 1604**, cited supra, the Hon'ble Apex Court has held that the Court can exercise discretionary power to recall any witness to clear any ambiguity that may have arisen during the course of his examination and re-examination of a witness has a bearing on the ultimate decision of the suit.

14. From the judgment referred to by the learned counsel for the petitioner, it is seen that the Court has discretion to recall the witness but the said discretionary powers must be exercised sparingly and cautiously and should not be exercised to allow the party to fill up lacuna. The courts have power to reopen, recall and permit further oral and documentary evidence if the same has a bearing to decide the issues in the suit. In the present case, the petitioner has raised the issue of registration of respondent firm as well as authority of person who has filed the suit on behalf of the respondent during cross examination and at the time of arguments. The respondent has already filed certificate of registration of respondent's firm, now the respondent seeks to file certified copy of the registration certificate to show the names of the partners. The respondent has stated that

certified copy of registration certificate in Form 'A' maintained by Registrar of Firm, Tiruchirapalli showing the names of partners of the respondent is obtained and seek permission to mark the said document. This will not amount to filling up lacuna, as contended by the learned counsel for the petitioner. On the other hand, the names of the partners of respondent's firm, as contained in the document sought to be marked has a bearing to decide the issue in the suit.

15. The learned counsel for the respondent contended that the Court cannot consider the plea of the petitioner that respondent's firm is not a registered firm, without raising the issue in the written statement and relied on the judgment reported in **AIR (29) 1942 MADRAS 634**, cited supra. This judgment is not relevant to decide these Civil Revision Petitions. It is open to the respondent to raise this issue before the Trial Court.

16. The learned Judge has considered all these materials and law in proper perspective and allowed the applications. I do not find any illegality or irregularity in the impugned order warranting interference by this Court.

17. In the result, all these Civil Revision Petitions are dismissed.

No costs. Consequently, connected Miscellaneous Petition is closed.

30.08.2017

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Index : Yes/No

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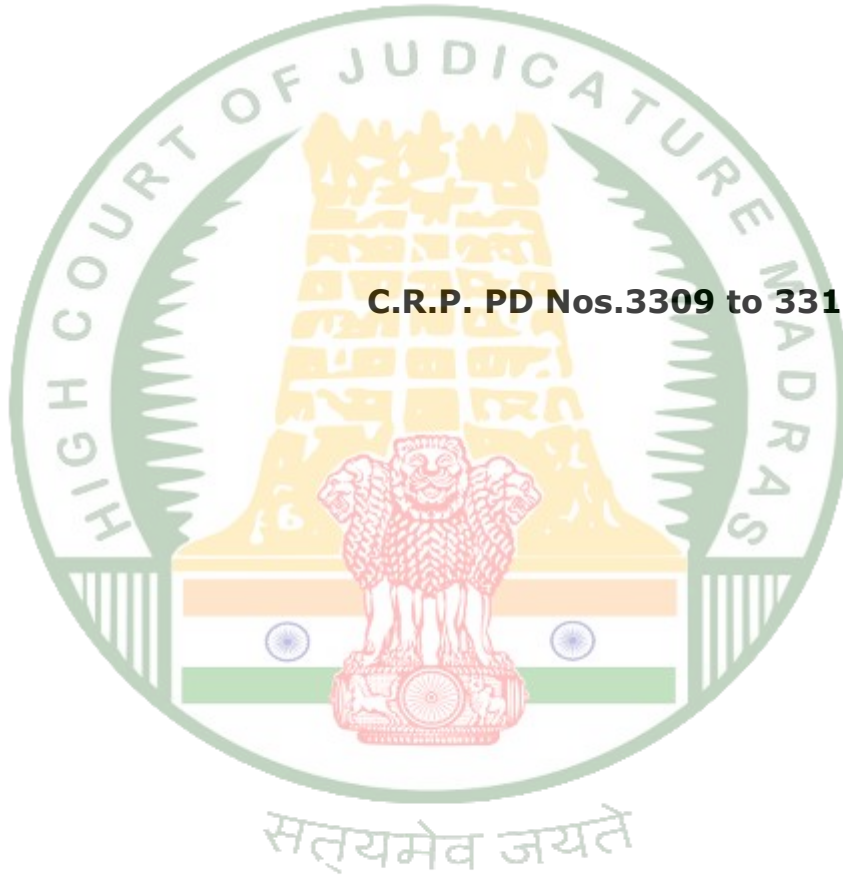
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V.M.VELUMANI, J.

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