

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

CIVIL REVISION PETITION NO.3465 OF 2017

Sarikonda Srinivasa Raju

.. Petitioner

Vs.

K. Ravi Prasad

.. Respondent

DATE OF JUDGMENT PRONOUNCED: 13.10.2017

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR

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

SANJAY KUMAR, J

*** THE HON'BLE SRI JUSTICE SANJAY KUMAR**
+ CIVIL REVISION PETITION NO.3465 OF 2017

% DATED 13th OCTOBER, 2017

Sarikonda Srinivasa Raju

.. Petitioner

Vs.

\$ K. Ravi Prasad

.. Respondent

<Gist:

>Head Note:

! Counsel for petitioner : Sri P.Surya Narayana Murthy

^Counsel for respondent : Smt. G.Jyothi Kiran

? CASES REFERRED:

1. AIR 1955 SC 425
2. AIR 1963 SC 1526
3. (1988) 4 SCC 619
4. (2011) 6 SCC 321
5. (1991) Suppl. 1 SCC 191
6. (2002) 4 SCC 736



THE HON'BLE SRI JUSTICE SANJAY KUMAR**CIVIL REVISION PETITION No.3465 of 2017****O R D E R**

By order dated 04.07.2017, the learned XIII Additional District and Sessions Judge at L.B.Nagar, Ranga Reddy District, allowed I.A.No.393 of 2017 in O.S.No.954 of 2015 holding that the defendant in the suit, the petitioner in the said I.A., was entitled to cross-examine the plaintiff on the affidavit filed by him for passing judgment and to argue the matter. Aggrieved thereby, the plaintiff is before this Court by way of this revision under Article 227 of the Constitution.

O.S.No.954 of 2015 was filed by the petitioner/plaintiff under Order 37 CPC for recovery of money on the strength of promissory notes. Earlier, when the defendant in the said suit filed an application under Order 37 Rule 3 (5) CPC seeking the leave of the Court to defend the suit, the trial Court granted him leave conditionally. Aggrieved by the condition imposed that he should deposit a sum of Rs.40,00,000/- within a time frame, he filed C.R.P.No.1662 of 2017 before this Court. The said revision petition was dismissed by this Court on 11.04.2017 holding that the condition imposed was not onerous.

Having suffered the said order, it is an admitted fact that the defendant in the suit failed to deposit the amount as directed by the trial Court as a condition precedent for grant of leave to defend the suit. He however filed the subject I.A.No.393 of 2017 therein detailing the alleged erroneous claims made by the plaintiff in his affidavit to pass judgment and asserted that unless he cross-examined the plaintiff, the true facts would not come to light.

As the trial Court had already posted the suit for judgment, he prayed for re-opening of the suit so as to enable him to establish his case. He further stated that no prejudice would be caused to the plaintiff if he was permitted to cross-examine him on the affidavit filed for passing judgment. **SANGRAM SINGH V/s. ELECTION TRIBUNAL KOTA¹** was cited, wherein the Supreme Court held that even if a defendant is set *ex parte*, he would still be entitled to take part in the proceedings from that stage, including the cross-examination of witnesses who are examined thereafter, subject to such terms and conditions as the Court may impose.

Accepting this *ratio*, the trial Court opined that though the defendant had failed to comply with the earlier order requiring him to make a pre-deposit as a condition precedent for grant of leave to defend the suit, his right to cross-examine the plaintiff and argue would not be barred and accordingly allowed the I.A. Hence, this revision.

Heard Sri P.Surya Narayana Murthy, learned counsel for the petitioner/plaintiff, and Smt.G.Jyothi Kiran, learned counsel for the respondent/defendant.

At the outset, it may be noted that Order 37 CPC prescribes the 'summary procedure' to be followed in the classes of suits to which it applies. The essence of a summary suit is that the defendant therein is not entitled as of right to defend the suit, as in an ordinary suit. He has to apply for leave to defend within a time frame and such leave would be granted only if he succeeds in disclosing facts that would make it necessary for the plaintiff to prove consideration or such facts as the Court may deem sufficient

¹ AIR 1955 SC 425

for granting leave. If no leave to defend is granted, the plaintiff would be straightaway entitled to a decree.

The thrust of the summary procedure prescribed under Order 37 CPC is to prevent unreasonable obstruction by a defendant who has no real defence. Order 37 Rule 1 CPC details the Courts and the suits to which such summary procedure would apply. Suits based on bills of exchange, hundies and promissory notes find mention in Order 37 Rule 1(2)(a) CPC. Order 37 Rule 2 details the procedure to be followed for institution of summary suits and sub-rule (3) thereof provides that the defendant shall not defend the suit unless he enters appearance and in default of his entering appearance, allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. Order 37 Rule 3 CPC deals with the procedure to be followed for appearance of the defendant. Sub-rule (5) thereof states that the defendant may, at any time within ten days from the service of the summons for judgment, disclose such facts as may be deemed to be sufficient to entitle him to defend the suit and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court to be just. Order 37 Rule 4 CPC reserves the power to the Court to set aside a decree under special circumstances and grant leave to the defendant to appear to the summons and defend the suit. Order 37 Rule 7 CPC makes it clear that the procedure in suits instituted in the ordinary manner would be applicable to suits covered by summary procedure only to the extent not already provided for in Order 37 CPC. It is therefore clear that the procedure contemplated under Order 37 CPC, being a summary procedure, cannot be put on par with the procedure followed in ordinary suits in all respects.

Smt.G.Jyothi Kiran, learned counsel, would cite the decisions of the Supreme Court in ***K.VENKATARAMIAH V/s. A.SEETHARAMA REDDY***², ***MODULA INDIA V/s. KAMAKSHYA SINGH DEO***³ and ***MAHADEV GOVIND GHARGE V/s. SPECIAL LAND ACQUISITION OFFICER, UPPER KRISHNA PROJECT, JAMKHANDI, KARNATAKA***⁴ in support of her contention that it would be within the discretion of the trial Court, in the interest of justice, to permit a defendant to cross-examine the plaintiff's witnesses notwithstanding the fact that such defendant has been set *ex parte*. She would contend that failure on the part of her client to deposit the amount in terms of the earlier order of the trial Court, which was confirmed by this Court, would only result in his being set *ex parte* and therefore, he should not be denied the right to cross-examine the plaintiff on the affidavit filed by him for passing judgment.

Opposing this plea, Sri P.Surya Narayana Murthy, learned counsel, would contend that once the defendant suffered an order requiring him to make a pre-deposit as a condition precedent for leave to defend the suit and he failed to do so, it is not open to him to get over the same by indirect means. Learned counsel would argue that allowing him to cross-examine the plaintiff would be nothing short of permitting him to defend the suit.

At this stage, it may be noted that none of the judgments cited by Smt.G.Jyothi Kiran, learned counsel, relate to Order 37 CPC. As already noted *supra*, all principles applicable in ordinary suits cannot be extended *mutatis mutandis* to suits covered by Order 37 CPC. Only to the extent Order 37 CPC does not provide

² AIR 1963 SC 1526

³ (1988) 4 SCC 619

⁴ (2011) 6 SCC 321

the procedure to be followed in summary suits, the regular procedure applicable to ordinary suits may be adopted. Be it noted that a defendant cannot claim leave to defend a summary suit as a matter of right, as he would in an ordinary suit. He cannot therefore draw a parallel with a defendant in an ordinary suit in all respects. Further, failure on the part of a defendant in a summary suit to enter appearance automatically entails the suit being decreed in favour of the plaintiff, as provided in Order 37 Rule 2(3) CPC. The question of setting such a defendant *ex parte* at that stage does not arise at all. The judgments cited, relating to ordinary suits and a situation therein involving an *ex parte* defendant, would therefore not be of guidance while dealing with a suit under Order 37 CPC.

In the light of the rival contentions, the core issue that falls for consideration before this Court is whether a defendant in a summary suit under Order 37 CPC can claim the right to cross-examine the plaintiff, having failed to comply with the condition precedent for grant of leave to defend the suit.

The argument of Smt.G.Jyothi Kiran, learned counsel, proceeds on the assumption that leave to defend a summary suit would not encompass the right of the defendant to cross-examine the plaintiff. If not, failure on the part of the defendant in complying with the earlier order passed by the trial Court, to the effect that he should deposit Rs.40,00,000/- as a condition precedent for grant of leave would automatically bar him from claiming the right of such cross-examination.

The next question, therefore, is whether the right to cross-examine the plaintiff in a summary suit would fall within the

ambit of the defendant's leave to defend the suit in terms of Order 37 Rule 3(5) CPC.

Both issues already stand settled. In **RAJ DUGGAL V/s. RAMESH KUMAR BANSAL**⁵, the Supreme Court was dealing with the question whether leave to defend should be granted to the defendant in a suit filed under Order 37 CPC and observed thus:

'3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied.' (*emphasis is mine*)

This observation was reiterated and affirmed by the Supreme Court in **VINODAN T. V/s. UNIVERSITY OF CALICUT**⁶.

It is manifest from the aforesaid observation of the Supreme Court that where the facts in a summary suit are of such a nature as to entitle the defendant to 'interrogate the plaintiff' or to 'cross-examine his witnesses', leave should not be denied. In effect, the right of the defendant to interrogate/cross-examine the plaintiff or his witnesses flows from the leave to defend granted to him under Order 37 Rule 3(5) CPC and not independently.

In consequence, it is not open to the defendant to now claim that his right to cross-examine the plaintiff would not be part and

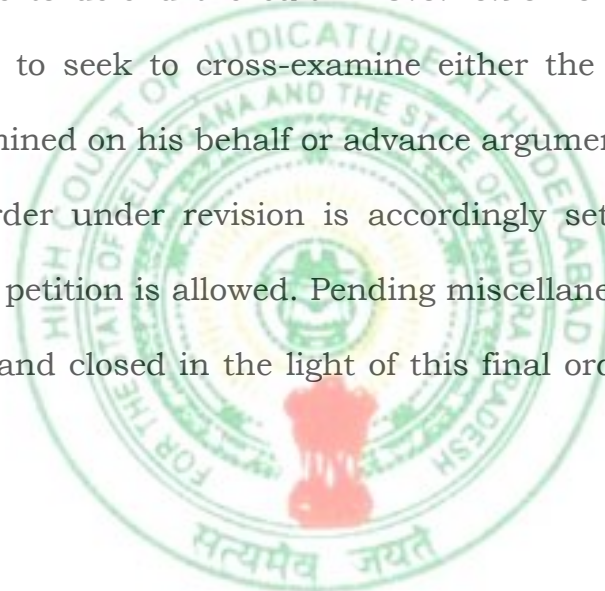
⁵ (1991) Suppl. 1 SCC 191

⁶ (2002) 4 SCC 736

parcel of his leave to defend the suit. As such a right cannot be claimed automatically by the defendant and leave to defend was, in fact, granted to him subject to the condition of a pre-deposit, it is not open to the defendant to get over the same and indirectly try to defend the suit by asking for permission to cross-examine the plaintiff.

The trial Court therefore erred in drawing a parallel from a principle that would apply in an ordinary suit and deciding the I.A. in favour of the defendant. Unless and until the petitioner/defendant complies with the conditional order, whereby he was granted leave to defend the suit in O.S.No.954 of 2015, it is not open to him to seek to cross-examine either the plaintiff or any witness examined on his behalf or advance arguments.

The order under revision is accordingly set aside and the civil revision petition is allowed. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.



SANJAY KUMAR,J

13th OCTOBER, 2017.

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