

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION Nos.574 & 642 of 2017

COMMON ORDER:

The revision petitioner is the plaintiff in O.S.No.34 of 2011, which is a suit for specific performance of the contract for sale dated 27.12.2005, maintained against the 3 revision respondents/defendants. The suit is under contest. In the course of trial, the plaintiff himself came to the witness as PW.1. After closure of the evidence of plaintiff for no witness choose to examine and on behalf of the defendant, 3 witnesses already examined. Among them for one witness did not choose to come to witness box his evidence in chief or part of the cross examination was treated with no value loosely referred as evidence is eschieved, for eschieved evidence is not known to law, but for to treat with no value if any once brought on record. It is after 6 adjournments under the stage of arguments, the plaintiff filed 2 applications, one is to reopen the evidence in seeking permission to adduce further evidence and other is to summon the 3 witnesses chosen to viz., the so called attestors or the scribe of the said sale agreement dated 27.12.2005. The respondents/defendants opposed the same for no grounds.

The very affidavit averments in support of the 2 petitions before the trial Court are that during preparation for the arguments in the case it is noticed that vital and important witnesses not examined viz., D.Prabhakar Reddy, Syed Sirajuddin and Syed Shaharulla, who are no other than the scribe and witnesses to the sale agreement transaction of the suit property and their evidence is crucial in proving the case of the plaintiff

and as their examination is essential and due to his business in Saudi Arabia, he was unable to examine those witnesses on his behalf earlier, which is neither willful nor intentional, it is necessary to reopen and permit to issue summons to examine those witnesses. It is not even his case that he earlier made any efforts to secure those witnesses and they were out of availability and recently secured their addresses or traced. What he claims having not chosen to examine originally now after closure of the evidence admittedly having taken 6 adjournments for arguments and in the course of preparing for arguments noticed about those witnesses examination is necessary in seeking to summon them by reopening the evidence. Order 18 Rule 17 CPC is not meant for such a recourse nor it is any right of the party, but for at best the power of the Court to sub serve the ends of justice or to prevent the abuse of process including to exercise the inherent power in addition to that as per the provision under Section 151 CPC which inheres in very Constitution of every Civil Court apart from the scope of law under Section 165 of the Evidence Act where Court from closure of evidence of both sides requires from the evidence in clarifying to recall any of the already examined witness to put some questions to elicit any answers to have that clarity and in that course even to permit any party to put such questions to the extent what the Court felt necessary and not as to right of party. Once that provision is not meant even the Section 151 CPC inherent power is to exercise only to implement the orders of the Court or to sub serve the ends of justice or to prevent abuse process of law. It is not because to any of the 3 limbs to the inherent power of the facts alleged in the affidavit

petition of the petitioner. The law is very clear in this regard from the expression of the Apex Court in **Vadiraj Naggappa Vernekar (Deceased by LRs) Vs. Sharad Chand Prabhakar Gogate¹**, wherein it was held at Paragraph 16 as follows:

“16. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said 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. As indicated by the learned single Judge, the evidence now being sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared. In the instant case, Sadanand Shet was shown to have been actively involved in the acquisition of the flat in question and, therefore, had knowledge of all the transactions involving such acquisition. It is obvious that only after cross-examination of the witness that certain apses in his evidence came to be noticed which impelled the appellant to file the application under Order 18 Rule 17 CPC. Such a course of action which arises out of the fact situation in this case, does not make out a case for recall of a witness after his examination has been completed. 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-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.”

¹ AIR 2009 SC 1604

In **Badana Mutyalamma and Another Vs. Palli Appala**

Raju² this Court held that:

“On the scope of Order XVIII Rule 17 CPC, the latest expression of the Apex Court in **Ram Rati Vs. Mange Ram (D) thr. LRs and Others**³ at Para 11 referring to the earlier expressions of the Apex Court including in **K.K. Veluswamy Vs. N.Palaniswamy**⁴ (which is in suit for specific performance of the contract for sale) that, the power even to exercise besides the specific rule is to make orders for ends of justice or prevent abuse of process. Further coming to the provisions in Order XVIII Rule 17 CPC the basic purpose postulated is to enable the Court to clarify any position or doubt and the Court may either suo motu or on the request of the party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt once the Court recalls the witness for the purpose of any such clarification, the Court may permit the parties to assist the Court by examining the witness for said purpose of clarification required or permitted by the Court. The power cannot be stretched any further. The power cannot be invoked to fill up the gaps and any prejudice cause or not thereby to a party by exercise of such a power is also a ground for consideration in exercise of the discretion.

From this, the law is very clear on the scope of Order XVIII Rule 17 CPC, as to the power of the Court equally provided in Section 165 of the Indian Evidence Act to permit any party to call for any witness to put any questions where the Court felt necessity.”

The same is reiterated in the recent expression of this Court in CRP.Nos.7275 & 7276 of 2017 dated 22.12.2017. Once such is the case, there are no grounds at all to permit to fill up the lacunas to examine the 3 new witness which the plaintiff never thought to examine, but for at best during arguments allegedly

² 2017 (5) ALT 69

³ 2016 (3) ALD 162 (SC)

⁴ (2011) 11 SCC 275

thought of to examine. Coming to the summoning of the witnesses as contemplated by Order XVI CPC concerned, no doubt the lower Court went wrong in its observation that because of list of witnesses not filed, not entitled to summon. The law is very clear that non-filing of the list of witness is not a bar to summon any witness for the Court to consider provided where a party is entitled to examine the witnesses. Here the evidence closed and the plaintiff did not choose to examine the scribe and attester in the course of his evidence and after closure of his evidence and after the evidence of defendant even plaintiff/PW.1 sought by recall with reference to some documents and was recalled and some documents were exhibited even at that stage not chosen to examine any of the witness and it is only after taking 6 adjournments for arguments chosen to examine those and sought for summoning those persons, this provision is not contemplated when there is no right to adduce evidence by reopen invoking Order XVIII Rule 17 CPC and Section 151 CPC.

Having regard to the above, both the revisions are dismissed by confirming the order of the lower Court for no grounds to interfere.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 22.12.2017
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