

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.2609 of 2016

ORDER:

The revision petitioner is the 3rd defendant in O.S.No.190 of 2014 on the file of XIX Junior Civil Judge, City Civil Court, Hyderabad. In the suit originally there were 2 defendants and the 3rd defendant on his application came on record as per orders in I.A.No.94 of 2013 dated 10.06.2013. Before impleadment of the 3rd defendant, on behalf of plaintiff, PWs.1 & 2 already examined, PW.2 it appears father of PW.1, is a senior citizen. The 3rd defendant sought for recall of PWs.1 & 2 for further cross examination so also of DW.1 by filing I.A.No.833 of 2013. The lower Court allowed the application to the extent of recall of PW.1 and DW.1 and dismissed for recall of PW.2. It is said order of the lower Court dated 24.10.2013 subject matter of impugment in the present revision. The impugned order of the lower Court reads that this application is filed under Order XVIII Rule 17 CPC seeking recall of PWs.1 & 2 and DW.1. R.1/plaintiff filed counter and argued and R.2 & 3/defendant Nos.1 & 2 remained exparte.

Heard both sides and perused the entire record in hand. In this case, the petitioner was added as 3rd defendant and filed written statement. By mistake case was posted for his side evidence without giving opportunity to the petitioner to cross examine PW.1 and DW.1.

In the above circumstances, this Court is inclined to allow the application. The petitioner is permitted to cross examine DW.1 and PW.1, but not PW.2 as PW.2 not examined. Accordingly, the petition was allowed. It clearly shows the trial

Court is under the mistaken impression as if there is no PW.2. In fact, undisputedly PW.2 was examined on commission and this Court called for report from the Chief Judge, City Civil Court and the evidence of PW.2 is recorded by Commissioner appointed by the Court. Once such is the case, it is a mistake on the part of the learned trial Judge in saying as if PW.2 was not at all examined. It is based on the principle of ***actus curiae neminem gravabit*** to rectify the order of the Court, which is a mistaken outcome as referred supra including from the report of the learned Chief Judge, dated 05.01.2017, the order is liable to be set aside to revert the clock back and because the report clearly shows PW.2 already examined also to be permitted for cross examination.

However, at this stage learned counsel for the plaintiff says the PW.2 is no other than father of PW.1 is not in a position to depose and he is mentally ill and there is no medical record for that and if time granted he wants to file when Court ask regarding proof. It is thereby the order of the lower Court is set aside and the matter is sent back to the lower Court to secure the presence of PW.2 before the Court and ascertain whether he is mentally ill and not in a position to understand and give answers or he is capable of understanding questions and give rational answers and to examine and close the evidence and to appreciate the consequence of his evidence so far as against PW.2 concerned with reference to the settled expressions in this regard.

Accordingly and in the result, the Civil Revision Petition is allowed and the petition is remanded back to the lower Court to decide as above.

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

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 29.12.2017
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