HON'BLE SRI JUSTICE S.V. BHATT

C.R.P.Nos.5502 & 5503 OF 2016

COMMON ORDER:

Defendants 1 and 2 in the suit are the revision petitioners.

C.R.P.No.5502 of 2016 is directed against the order dated 28.10.2016 in I.A.No.271 of 2016 in O.S.No.51 of 2012, on the file of the Andhra Pradesh Wakf Tribunal, Hyderabad and C.R.P.No.5503 of 2016 is directed against the order of even date in I.A.No.270 of 2016.

The 1st respondent filed I.A.Nos.270 & 271 of 2016 for the reliefs of reopening the suit for adducing further evidence, summoning 3rd respondent/3rd defendant as a witness of 1st respondent and producing the record relating to plaint schedule property.

The 1st respondent filed O.S.No.51 of 2012 on the file of the A.P.State Wakf Tribunal, Hyderabad for declaration that the plaint schedule property is a wakf property and to direct the revision petitioners herein to deliver possession of suit schedule property. The plaintiff prays for perpetual injunction restraining the revision petitioners or their heirs etc., from claiming any right through them. The plaint schedule property consists of 61.2 sq. yards out of 1070 sq. yards within the premises of Jamia Masjid, Jillela Village, Gosapadu Mandal, Kurnool District, with the following boundaries:

North	:	Public road
South	:	Open land of Jamia Masjid
East	:	Open land of Jamia Masjid
West	:	Open land of Jamia Masjid

The suit is ripe for arguments.

The allegations in the affidavit filed by the 1st respondent are that the 2nd respondent herein on 21.03.2016 filed written statement along with I.A.No.128 of 2016 to set aside the *ex parte* order against 2nd respondent. I.A.No.128 of 2016 was allowed. The revision petitioners aggrieved by the order in I.A filed C.R.P.No.2515 of 2016. On 08.09.2016, the revision was allowed. On 03.10.2016, the present application is filed by contending that the 2nd respondent is not precluded to participate in the proceedings in spite of the order dated 08.09.2016 in C.R.P.No.2515 of 2016. The 2nd respondent is a statutory board and has the power of general superintendence of all wakf institutions, including the suit schedule property. The 1st respondent refers to a suit filed by revision petitioners and its dismissal on 12.02.2008. For summoning the 2nd respondent as witness, the reason stated is the relief of declaration for the beneficial interest of 2nd respondent and, therefore, the evidence of 2nd respondent is very much essential to come to right conclusion on the issues between the parties. The 1st respondent prays for an opportunity to summon the 2nd respondent as witness and if opportunity is not afforded, the 1st respondent will be put to hardship and loss and on the other hand, if opportunity is provided, the revision petitioners will not suffer injury or hardship. It is stated that this Court has power under Order XVI Rule 14 CPC. Therefore, I.As are filed with the prayers referred above.

Respondents 1 and 2 opposed the application on all fours. According to revision petitioners, the suit schedule property is

Government poramboke and not wakf property. The plaint schedule does not give details of survey number and the documents relied upon by the plaintiff do not show that suit schedule is wakf property. It is stated that the application under Order XVI Rules 1, 2 & 14 CPC is not maintainable. The 1st respondent having not filed the list of witnesses cannot summon a person who is one of the parties to the suit. Any amount of evidence without pleading is impermissible. The 2nd respondent herein cannot give evidence on behalf of the plaintiff. The objection which has bearing on the disposal of the revision reads thus:

> "In reply to paras 3 to 6 of the affidavit filed in support of the petition, it is submitted that the written statement filed by the 3rd respondent /defendant No.3 was rejected and his evidence was also achieved on the ground that there cannot be any evidence without there being pleadings on behalf of the 3rd respondent/defendant No.3 in the suit. The petitioner/plaintiff is a stranger to the suit property, in his evidence he clearly admitted that no evidence/documents was produced to show that his grandfather was a defacto Mutavalli of the Jamia Mosque, Jillela Village. The petitioner/plaintiff has no locus to institute the present suit.
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> In reply to paras 7 to 9 of the affidavit filed in support of the petition, it is submitted that the property in O.S.No.266 of 2007 and present suit property are totally different and it is a Government property and the Wakf Board has no right on the suit schedule property. Admittedly the petitioner has not taken steps to implead the Government of Andhra Pradesh as party defendant in the suit. When the petitioner/plaintiff is seeking declaration of title and recovery of possession, it is the primary duty of the petitioner/plaintiff to satisfy his prima facie case, such as his right, title and interest in the property. When he has not made out his prima facie case the suit has to fail. The petitioner/plaintiff cannot summon the

> 3rd respondent/defendant No.3 to give evidence when his evidence has already been achieved by this Hon'ble Tribunal, on the ground his written statement rejected as per orders of the Hon'ble High Court in C.R.P.No.2515 of 2016. The present petition is devoid of merits to drag the issue years together. Though the Hon'ble High Court categorically directed this Hon'ble Tribunal to dispose of the suit O.S.No.51 of 2012, within a period of six months by order dated 22.09.2015 in C.R.P.No.5633 of 2012"

The Wakf Tribunal framed the following points for consideration:

> **I.A.No.270 of 2016 :**
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> Whether there are grounds to reopen the suit for the purpose of adducing further evidence for petitioner/plaintiff as prayed for?
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> **I.A.No.271 of 2016 :**
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> Whether the 3rd respondent/3rd defendant can be summoned as a witness to be examined for the petitioner/ plaintiff under Order 16 Rule 14 CPC as prayed for?

In answering the point in I.A.No.270 of 2016, the Tribunal was persuaded with the reasoning given for ordering I.A.No.271 of 2016. While answering the point in I.A.No.271 of 2016, the Tribunal has referred to the decisions reported in *NATIONAL INSURANCE CO., LTD. AND OTHERS v. SUSRU SEA FOODS, VISAKHAPATNAM*[1], *VEESAM MOHAN REDDY V. REBBA PEDDA AGAIAH*[2] and *T.NARAYANA REDDY v. PATAN RAZAK KHAN AND ANOTHER*[3]. The reasoning of the Tribunal is that a party to suit can summon the opposite party as a witness on his behalf to establish his plea and for proper adjudication of the matter in dispute. The 2nd respondent is wakf

[1] 2005(1) ALT 464
[2] 2008(2) ALD 304
[3] 2009(1) ALD 839

board. The 1st respondent is agitating the cause for and on behalf of the 2nd respondent as well. On the contrary, the revision petitioners claim the subject matter as Government poramboke land. Therefore, it is observed that the plaintiff has to establish the nature of plaint schedule property as wakf property basing on the documents in the custody of 2nd respondent wakf board. The 2nd respondent is negligent and, therefore, the Court finds that it is satisfied that the prayer for summoning the wakf board as witness on behalf of 1st respondent can be accepted. The Tribunal allowed both the interlocutory applications.

Mr.Challa Shiva Shankar for revision petitioners contends that the Tribunal committed serious illegality in allowing the IAs, for evidence on behalf of the both the parties is closed and if at this stage evidence is reopened, the petitioners suffer irreparable hardship. The request for adducing further evidence cannot and could not be considered, as the burden is on the 1st respondent to discharge. The evidence of 1st respondent was closed. Thereafter, the revision petitioners have adduced evidence on their behalf and at that stage of the matter, there is no further step as further evidence and reopening the suit for that purpose is completely illegal, amounts to arbitrarily exercising the jurisdiction conferred on the Tribunal by Order XVI Rule 14 CPC.

He contends that in the facts and circumstances of the case, more particularly having regard to the order dated 08.09.2016 in C.R.P.No.2515 of 2016, the Tribunal does not have unbridled and absolute discretion to summon a witness at the instance of one of

the parties. The applicability of Order XVI Rule 14 CPC cannot be the real point for consideration. The question is whether the discretion and jurisdiction conferred on the Tribunal can and could be exercised in view of the findings recorded by this Court in C.R.P.No.2515 of 2016. According to him, the finding that wakf board is negligent again reinforces the findings recorded by this Court while allowing C.R.P.No.2515 of 2016 and still extending the discretion to summon 2nd respondent as witness is unavailable, illegal and liable to be set aside. The Tribunal cannot, on the ground that 2nd respondent is an institution, afford unreasonable opportunity which prejudicially affects the revision petitioners. He prays for setting aside the orders in revisions. He relies upon BAGAI CONSTRUCTION V. GUPTA BUILDING MATERIAL SOURCES[4] for the proposition that reopening of suit as matter of course when the suit is posted for arguments is impermissible and relies upon the following paragraphs:

> "If we apply the principles enunciated in the above case and the limitation as explained with regard to the application under Order XVIII Rule 17, the applications filed by the plaintiff have to be rejected. However, learned counsel for the respondent by placing heavy reliance on a subsequent decision, namely, K.K. Velusamy vs. N. Palanisamy, (2011) 11 SCC 275, submitted that with the aid of Section 151 CPC, the plaintiff may be given an opportunity to put additional evidence and to recall PW-1 to prove those documents and if need arises other side may be compensated. According to him, since the High Court has adopted the said course, there is no need to interfere with the same.

[4] (2013) 14 SCC 1

In Velusamy even after considering the principles laid down in Vadiraj Naggappa Vernekar and taking note of Section 151 CPC, this Court concluded:

> "22….. in the interests of justice and to prevent abuse of the process of the Court, the trial Court is free to consider whether it was necessary to reopen the evidence and if so, in what manner and to what extent".

Further, it is observed that the evidence should be permitted in exercise of its power under Section 151 of the Code. The following principles laid down in that case are relevant:

> "We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

With these principles, let us consider the merits of the case in hand.

The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further

seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial Court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the trial Court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial. Unfortunately, the High Court taking note of the words "at any stage" occurring in Order XVIII Rule 17 casually set aside the order of the trial Court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW-1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of the court and Court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the information as shown in the order of the trial Court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 of CPC, the plaintiff cannot be permitted.

After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to

> overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. 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".

Mr.B.Vijaysen Reddy for 1st respondent contends that the power to summon a party as a witness of opposite party is covered by Order XVI Rule 14 CPC and the ratio laid down by this Court in *NATIONAL INSURANCE CO., LTD's* case, *VEESAM MOHAN REDDY's* case and *T.NARAYANA REDDY's* case (supra 1, 2, 3) lays down the law on the point and no exception to the order impugned in the revision can be taken. To the pointed query of the Court on the effect of the order of this Court in C.R.P.No.2515 of 2016 dated 08.09.2016, he submits that the order of this Court has virtually erased the pleading of 2nd respondent herein and the evidence sought to be introduced by 2nd respondent. He submits that the 2nd respondent being wakf board is known for its casual and callous approach in conduct of litigation. Therefore, to do justice and give reasonable opportunity, the Tribunal has allowed the applications and according to him, no case is made out for interfering with the orders under revision by this Court in exercise of its jurisdiction under

Article 227 of the Constitution of India. He prays for dismissing the revisions.

I have perused the material available on record and taken note of the rival submissions.

Now the point for consideration is - whether the orders of the Tribunal reopening the suit and summoning 2nd respondent as witness of 1st respondent are tenable or not?

Let me first examine the reasons given by the Tribunal for accepting the prayer to summon 2nd respondent as witness of 1st respondent. The Tribunal was persuaded to exercise the discretion in favour of 1st respondent on the ground that it has power under Order XVI Rule 14 CPC and the decisions relied upon by the 1st respondent further show the circumstances under which one of the parties to a suit can be summoned as a witness of a party. This Court *prima faice* is unable to agree with the approach of the Tribunal. It is one thing to hold that the Tribunal has jurisdiction to summon a party as witness and it is another thing to hold that the party has made out a case for exercising the jurisdiction conferred on the Tribunal by Order XVI Rule 14 CPC. The circumstance viz., filing of I.A.No.128 of 2016 by 2nd respondent herein has significance and the order of this Court in C.R.P.No.2515 of 2016. The operative portion of the order dated 08.09.2016 in C.R.P.No.2515 of 2016 reads thus:

> "According to the principle laid down in the above judgment, the Court is not powerless to extend the time, but the time can be extended only in exceptionally hard cases.

In the present case, the petitioner/third defendant/Wakf Board, though engaged an advocate, did not file written statement even at a belated stage where the entire Trial was over, except pronouncing judgment. Moreover the reason assigned by the petitioner to set-aside such an order is bifurcation of State, which is highly improper and it is not sufficient cause. It is difficult to hold that the cause shown by the petitioner is sufficient cause, which is beyond the control of the petitioner to set-aside such an order. The word 'sufficient cause' is not defined anywhere, but it can be construed that, in case, which is beyond the control of the petitioner, it can be said to be sufficient cause depending upon the circumstances of the case. Time and again, the Courts held that the word 'sufficient cause' has to be construed liberally, to do substantial justice to the parties and shall not adopt pedantic approach while considering any cause as 'sufficient cause'. No doubt, the law declared by the Apex Court and the other Courts reiterated the same principle. But, in the present case, the cause shown by the petitioner is that due to bifurcation of erstwhile State of Andhra Pradesh into State of Telangana and residuary State of Andhra Pradesh, the petitioner/third defendant/Wakf Board could not file written statement. The order was passed long prior to bifurcation of the State of Andhra Pradesh. Therefore, such cause can never be construed as 'sufficient cause', since it was not beyond control and nothing prevented the petitioner to file written statement before bifurcation of the State of Andhra Pradesh into two states, i.e State of Telangana and residuary State of Andhra Pradesh.

The Supreme Court in Lanka Venkateswarlu (D) by L.Rs. v State of A.P. and Ors., held as follows:

> "We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", justice oriented approach", "substantial

> justice" cannot be employed to jettison the substantial law of limitation, especially in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers."

In view of the law declared by the Apex Court, the Courts cannot jettison substantive law of limitation on the concept of substantial justice or complete justice and set-aside the order accepting any cause shown by the petitioner as 'sufficient cause'. By applying the principle laid down in the above judgment to the present case, allowing an application on the ground that due to State bifurcation, the petitioner could not file written statement, directly amounts to jettisoning the procedural law i.e. Order 8 Rule 1 and Rule 10 of C.P.C and it amounts to relaxing the time frame fixed under Order 8 Rule 1 and it would directly frustrate the very intention of legislature rather than substantial justice. Justice oriented approach is to be adopted not only to the defendant, but also to the plaintiff. If such cause is accepted, it amounts to encouraging who is dormant and

doing injustice to the plaintiff who diligently prosecuting the proceedings.

In the present facts, it is brought to the notice of this Court during argument by the learned counsel for the revision petitioners herein/respondents 2 & 3 before the Trial Court, that the learned counsel for the respondent reported no written statement which is not borne out from the record. If he reported no written statement, the question of forfeiting to file written statement does not arise. However, it is evident that the matter was contested throughout by the counsel and the counsel for the petitioner/third defendant before the Tribunal and reported no cross-examination of the witnesses, consciously, in such case, the cause shown by the petitioner cannot be construed or accepted as 'sufficient cause', which prevented the petitioner/third defendant to file written statement.

On an overall consideration of the material available on record, the word 'sufficient cause' assumed importance to pass any order setting aside the *ex parte* decree or order and forfeiting the right to file a written statement by the defendant. But the cause shown by the petitioner is not sufficient cause, as discussed above and by applying the principle laid down by the Apex Court in **Lanka Venkateswarlu's** case (referred supra). The Tribunal did not consider any of these requirements to set-aside the order dated 28.08.2012, but on the same ground that it would not cause any prejudice to the parties, passed the impugned order by the Tribunal, which is totally contrary to the law declared by the Courts in the judgments referred supra.

Hence, I find that the order of the Tribunal is *ex facie* erroneous and the same is liable to be set-aside. Accordingly, the point is answered in favour of the revision petitioners herein/defendants 2 & 3 before the Tribunal and against the respondents herein".

This Court, while examining the prayer of 2nd respondent to set aside the *ex parte* order, receiving written statement and documents, recorded categorical findings for not accepting the request of 2nd respondent made in the order in I.A.No.271 of 2016. There is no doubt that the trial Court has jurisdiction to summon a party as witness of a party to the *lis*. Had it been a situation where the jurisdiction and discretion are exercised for the first time on the pleas putfoward by parties, the scope of review under Article 227 of the Constitution of India is limited. The Tribunal exercises discretion and the term 'discretion' has more than one meaning and definitely means different things in different contexts. Discretion means the power to choose between two or more causes of action, each of which is thought of as permissible. Now the order in C.R.P.No.2515 of 2016 cannot be ignored and the discretion entertained in absolute terms. Further, the discretion of trial Court is conditioned by the observations of this Court. There is hardly any reference to the effect of order of this Court in C.R.P.No.2515 of 2016 and/or whether the discretion now to be exercised by the Tribunal is in any manner regulated by the findings recorded while disposing of the revision. Let me refer to a converse situation. Supposing, the 2nd respondent had not attempted in any manner to file pleadings or place evidence before the Tribunal, then the Tribunal has full sweep of discretion in considering the prayer made under Order XVI Rule 16 CPC. The finding in CRP.No.2515 of 2016 is that the Courts cannot jettison on the substantive law of limitation on the concept of substantial justice or complete justice and set aside the order accepting any cause shown by the petitioner as

sufficient. The observation made in C.R.P.No.2515 of 2016 regulates the discretion exercised by the Tribunal for considering the prayer made in I.A.No.271 of 2016. The ratio laid down in the decisions relied upon by the 1st respondent are not disputed and this Court is in agreement with the ratio laid down in the decisions referred above. But this Court is not in agreement with the findings of the Tribunal viz., that Order XVI Rule 14 CPC provides for summoning a witness and that the 2nd respondent is a statutory body and negligent in conducting the litigation and, therefore, the prayer to summon can be accepted. In other words, what the 2nd respondent could not directly do by filing I.A again the evidence is introduced in the name of further evidence by summoning the 2nd respondent as a witness.

By following the decision of the Apex Court in *BAGAI CONSTRUCTION's* case (4 supra), this Court is of the view that reopening the suit for further evidence is unsustainable. In other words, to reopen the suit for further evidence for all purposes causes hardship and prejudice to contesting parties as well. From the material placed on record, it appears that 1st respondent has already placed on record the documents on which the 1st respondent is relying upon and this Court is satisfied that burden is discharged.

For the above reasons, the orders impugned in the revisions are set aside. The revisions are allowed. The Tribunal is directed to dispose of the suit without further delay. There shall be no order as costs.

Consequently, pending miscellaneous petitions, if any, also stand disposed of.

S.V.BHATT, J

21st March, 2017

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