

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.143 of 2017

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed challenging the Docket Order dt. 27.10.2016 in O.S.No.513 of 2005 passed by XVIII Additional Senior Civil Judge, City Civil Court, Hyderabad, declining to receive and mark certified copy of the deposition of P.V.S.Anand Kumar, as witness in O.S.No.255 of 2005 on the file of Chief Judge, City Civil Court, Hyderabad.

The main ground raised before the Court is that the certified copy of the Written Statement of the defendant in O.S.No.255 of 2005 and the Certified copy of the Deposition of P.V.S. Anand Kumar recorded in O.S.No.255 of 2005, by the Chief Judge, City Civil Court, Hyderabad, are tendered for marking, but the counsel for the respondent/defendant objected for marking of Written Statement and deposition of P.V.S. Anand Kumar recorded in O.S.No.255 of 2005 on the file of Chief Judge, City Civil Court, Hyderabad, on the ground that unless the said P.V.S. Anand Kumar is examined as a witness and confronted the document, these documents cannot be marked, in view of the bar under Section 33 of the Indian Evidence Act, 1872.

Therefore, the trial Court, after hearing the petitioner as a party-in-person and the counsel for respondent, declined to grant leave to the petitioner herein to mark those two

documents on the ground that the documents cannot be marked as exhibit unless the person who made such admission is examined as a witness.

The present Revision is filed on various grounds, mainly on the ground that even if the party who made an admission in earlier proceedings is not examined as a witness in the present suit, he can mark the certified copies of Written Statement and the deposition recorded in O.S.No.255 of 2005 and they can be marked as exhibits and placed reliance on the judgments reported in *Damu Ganu Bendale v. Arvinda Dhondu Talekar and others*¹, *Ambika Prasad Thakur and others v. Ram Ekbal Rai (dead) by his legal representatives and others*², *Union of India v. Moksh Builders and Financiers Limited and others*³, *Ajodhya Prasad Bhargava v. Bhawani Shanker Bhargava and another*⁴ and more particularly in *Bharat Singh v. Bhagirathi*⁵ in support of his contentions and drawn the attention of this Court to Section 21 of the Indian Evidence Act.

Whereas, the counsel for the respondent while reiterating the contentions urged before the trial Court, placed reliance on a judgment of Apex Court reported in *Sashi Jena and others v Khadal Swain and another*⁶ in support of his contentions and

¹ AIR 1994 SC 1303

² AIR 1996 SC 605

³ AIR 1977 SC 409

⁴ AIR 1957 Allahabad 1

⁵ 1966 1 SCR 606

⁶ (2004)4 SCC 236

on the strength of the principle laid down in the judgment, he requested to dismiss the petition.

The petitioner as a party-in-person is prosecuting the proceedings before the trial Court and filed a suit O.S.No.513 of 2005 for recovery of money and also filed the earlier suit O.S.No.255 of 2005 against the respondent herein, P.V.S.Anand Kumar was examined as DW.1 and his evidence was recorded by Chief Judge, City Civil Court, Hyderabad, obtained Certified Copy of the Deposition of P.V.S.Anand Kumar, who was examined as DW.1 in the earlier suit O.S.No.255 of 2005 on the file of the Chief Judge, City Civil Court, Hyderabad. The defendant in O.S.No.255 of 2005 also filed Written Statement in the earlier suit, which is allegedly relevant for deciding the real controversy between the parties in the present Suit. Therefore, requested the XVIII Additional Senior Civil Judge, City Civil Court, Hyderabad, to mark the same as exhibit before the Court without examining P.V.S.Anand Kumar. Before the trial Court, he relied on all the judgments which he relied on before this Court, but, now drawn the attention of this Court to Section 21 of the Indian Evidence Act.

Section 21 of the Indian Evidence Act deals with “Proof of admissions against persons making them, and by or on their behalf”, it reads as follows:

“Admissions are relevant and may be proved as against the person who makes them, or his representative-in-interest; but they cannot be proved by or on behalf of the person who makes them or by his representative-in-interest, except in the following cases:

(i) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 31.

(ii) An admission may be proved by or on behalf of person making it when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(iii) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission”.

A close analysis of Section 21 of the Indian Evidence Act, it permit the parties to prove a particular admission made by a person by himself or his representative, but subject to Clause (1).

The petitioner as a party-in-person contended that admission is a conclusive proof and the same has to be marked in this suit i.e., the deposition recorded in O.S.No.255 of 2005 on the file of the Chief Judge, City Civil Court, Hyderabad. Section 17 of the Indian Evidence Act defined the admission as a statement, oral or documentary or contained in electronic form), which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereafter mentioned in the Act.

Section 31 of the Indian Evidence Act further says that admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions contained under the Act. Therefore, a conjoint reading of Sections 18 and 31 of the Indian Evidence Act, it is clear that an admission is not a conclusive proof of the matters admitted, but it would estops the person who made such admission.

The normal procedure for marking the previous statement is to confront the previous statement to the witness to contradict the same under Section 155 of the Indian Evidence Act. But here, the said P.V.S.Anand Kumar was not examined as a party so as to confront his previous statement, recorded in O.S.No.255 of 2005 to him in the present suit. But the contention of the petitioner is that whether he is examined or not, his previous statement can be marked as exhibit and placed reliance on a judgment reported in *Bharat Singh's* case (5 supra), wherein the Apex Court held that an admission is substantive evidence of the fact admitted and that admissions duly proved are “admissible in evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as a witness was confronted with those statements in case it made a statement contrary to the admissions”.

In view of the law declared by the Apex Court in *Bharat Singh's* case (5 supra), an admission i.e., the previous statement can be marked as exhibit even without examining the person who made such statement or confronting to him. The only objection before the trial Court is that in view of the bar under Section 33 of the Indian Evidence Act, such previous statement of a person alive cannot be marked as exhibit. Section 33 of the Indian Evidence Act deals with relevancy of certain evidence for proving in subsequent proceeding, the truth of facts therein stated and the provisio thereto contemplate three situations, which are as follows:

- i) “such statement can be proved that the proceedings was between the same parties or their representatives in interest;
- ii) that the adverse party in the first proceeding had the right and opportunity to cross examine; and
- iii) the question in issue were substantially the same in the first as in the second proceeding”.

Therefore, the petitioner herein has to satisfy all the three requirements under the proviso annexed to Section 33 of the Indian Evidence Act to mark the previous statement of P.V.S.Anand Kumar in the present suit i.e., the statement recorded in the previous suit in the present suit. But here, the said P.V.S.Anand Kumar is the authorized representative of the defendant according to the petitioner/party-in-person, however, the learned counsel for respondent informed that he was removed as an authorized representative and substituted by some other person.

In the present case, as he was not the alleged authorized representative, the said P.V.S.Anand Kumar, did not enter into the witness box. Therefore, the petitioner had no opportunity to confront the document to the said P.V.S.Anand Kumar and in such a case, it is difficult for him to confront the document i.e., previous statement recorded in O.S.No.255 of 2005. If Sections 21 and 33 of Indian Evidence Act are read co-joinly, the petitioner is required to establish three requirements under the proviso to Section 33 of Evidence Act. But, the petitioner contended that the provisions from Section 32 of Evidence Act onwards have no application to Section 21 of the Act. Therefore, Section 33 of the Indian Evidence Act cannot be applied.

The counsel for the respondent based on the principle laid down in *Sashi Jena's* case contended that previous statement of said P.V.S.Anand Kumar cannot be marked as exhibit before the Court unless he is examined, based on the three requirements contained in Section 33 of the Indian Evidence Act and in para No.8 of the Judgment, the Apex Court held as follows:

"From a bare perusal of the aforesaid provision, it would appear that evidence given by a witness in a judicial proceeding or before any person authorized to take it is admissible for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states in its evidence given in earlier judicial proceeding or earlier stage of the same judicial proceeding, but under proviso there are three pre-requisites for making the said evidence admissible in subsequent proceeding or later stage of the same proceeding and they are (i) that the earlier proceeding was between the same parties; (ii) that the adverse party in the first proceeding had the right and opportunity to cross examine; and (iii) that the questions in issue in both the proceedings were substantially the same, and in the absence of any of the three pre-requisites afore-stated, Section 33 of the Act would not be attracted. This Court had occasion to consider this question in the case of *V.M. Mathew vs. V.S. Sharma & Ors.*, AIR 1996 Supreme Court 109, in which it was laid down that in view of the second proviso, evidence of a witness in a previous proceeding would be admissible under Section 33 of the Act only if the adverse party in the first proceeding had the right and opportunity to cross examine the witness. The Court observed thus at pages 110 and 111 :-

"The adverse party referred in the proviso is the party in the previous proceeding against whom the evidence adduced therein was given against his interest. He had the right and opportunity to cross examine the witness in the previous proceeding | | the proviso lays down the acid test that statement of a particular witness should have been tested by both parties by examination and cross-examination in order to make it admissible in the later proceeding."

Here, the main objection for marking the document is that said P.V.S.Anand Kumar remained *ex parte* in the suit and thereby he will not appear as a witness before the Court. But, the petitioner can summon the said P.V.S.Anand Kumar as a Court witness and the Court by exercising power under Order 16 Rule 14 CPC may summon the said P.V.S.Anand Kumar as a

witness in view of 1976 amendment to CPC. Earlier, only persons, who are not parties to the suit, alone are permitted to be examined. But, after amendment, the words “including a party to the suit and not called as a witness by a party to the suit” are included and therefore, the petitioner can summon the said P.V.S. Anand Kumar, who is a representative of first defendant, and examine him as a witness confronting the previous statement recorded in O.S.No.255 of 2005 by the Chief Judge, City Civil Court, Hyderabad. This position is clarified in more than one prospective pronouncements of this Court.

In *Kosuru Kalinga Maharaju v Kosuru Kaikamma*⁷ case, this Court held as follows:

"A reading of Rule 14 of Order 16 would leave no doubt in the mind to say that "either party to the suit proceedings can summon a person including a party to the suit who is not called as a witness by a party to the suit, as a witness".

Legislature has felt the need for a direct provision enabling the Court to summon a party for giving evidence as a witness to help curbing the malpractice of a party not appearing as a witness and forcing the other party to call him as a witness, and adjudicate the issues properly. What is laid down in the above provision is that if the Court is satisfied about such a necessity to cause any person to be examined as a witness, Court can summon such person as a witness. The emphasis is laid on the subjective satisfaction of the Court. However, this power is to be exercised by the Courts guardedly and not as a matter of routine."

In *National Insurance Co. Ltd v. Susru Sea Foods, Visakhapatnam*⁸ this Court held as follows:

“ a Civil Court is conferred with jurisdiction and power to examine any person including a party to the suit who is not called as

⁷ 1999(6) ALD 789

⁸ 2005 (1) ALD 464

a witness by a party to the suit. This can be done on its own motion, which means and includes that its jurisdiction can even be set in motion by any of the parties to the suit. The words "to examine any person, including a party to the suit" has been substituted for "to examine any person other than a party to the suit" by Act 104 of 1976, with effect from 1-2-1977. What was otherwise implicit is now made explicit that even a party to the suit who is not called as a witness by a party to the suit can be called by the Court as a witness to give evidence, or to produce any document in his possession".

Relying on the judgment of National Insurance Co. Ltd (8 supra), this Court took a similar view in T. Narayana Reddy v. Patan Razak Khan and another⁹ case".

In view of the law declared by this Court, though, the said P.V.S.Anand Kumar is a party, who remained *ex parte*, he can be summoned and if he is summoned as a Court witness on any application filed under Order 16 Rule 14, the deposition i.e., previous statement recorded in O.S.No.255 of 2005 can be confronted to put an end to controversy without touching other controversy. Therefore, a liberty is given to the petitioner to file an appropriate application under Order 16 Rule 14 CPC before the trial Court and on filing such application, the Court may consider his request and pass appropriate order and in the event of appearing the said P.V.S.Anand Kumar as a Court Witness, the petitioner can confront his previous statement. If for any reason, the trial Court declined permission, the petitioner is at liberty to approach this Court for appropriate remedy.

With the above direction, this Civil Revision Petition is disposed of.

⁹ 2009(1)ALD 839

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand dismissed.

M. SATYANARAYANA MURTHY, J

Date: 05-07-2017.
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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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