

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION Nos.6135 AND 6401 OF 2016

COMMON ORDER:

Both these Civil Revision Petitions are filed under Article 227 of the Constitution of India questioning the orders dated 05.12.2016 in I.A. No.628 of 2016 and I.A. No.629 of 2016 in O.S. No.289 of 2013, on the file of Principal Junior Civil Judge, Mancherial, Adilabad District.

2. I.A. No.628 of 2016 was filed by the revision petitioners under Section 151 of Code of Civil Procedure, 1908 (for short 'CPC') to reopen the case for further cross-examination of PW.2, whereas I.A. No.629 of 2016 was filed under Order XVIII Rule 17 read with section 151 CPC, requesting to recall PW.2 for further cross-examination in respect of admission made by her with regard to Ex.A-7 that it is a forged and created document.

3. The learned Principal Junior Civil Judge, Mancherial did not accede to the request to reopen the case for further cross-examination of PW.2. He has set out certain reasons in paragraph No.11 of the order under challenge stating that when PW.2 deposed in Court as a witness, she did not whisper that under the influence of respondent - plaintiff, she made a false statement; even the written statement filed by the revision petitioners - defendants does not disclose that they did take any plea that PW.2 executed a document before the Notary

stating that Ex.A-1 is forged and fabricated document and, on the other hand, in her cross-examination when a question was put, she admitted that a criminal case was registered against her, respondent - plaintiff and attestors on the complaint lodged by the revision petitioners - defendants stating that they created the signatures of executants - Ameer Khan subsequent to his death on 30.12.1994, and thereby drawn an inference that the revision petitioners filed the said application under Section 151 C.P.C. only to protract the litigation knowing full well that PW.2 was examined on 17.11.2014 and she was cross-examined at length. Yet another reason assigned by the Court below has been, that the revision petitioners failed to satisfy that the document now sought to be confronted to the witness was not within her knowledge or that the revision petitioners could not produce the same when they were leading evidence.

i) The Court below also referred to the exercise of inherent power under Section 151 CPC and under Order XVIII Rule 17 CPC stating that Section 151 CPC does not limit the power of the Court and the inherent powers can be exercised in order to render justice or to prevent the abuse of process of Court and the said inherent power is not effected by the express power conferred upon the Court. Opining that the revision petitioners failed to explain the reasons to reopen the matter for further cross-examination of PW.2 and the reason assigned, that PW.2 gave evidence under the influence and instructions of the

respondent - plaintiff is not sufficient to order the petition, refused to grant the requests.

4. The learned Principal Junior Civil Judge has passed an identical order in I.A. No.629 of 2016 filed under Order XVIII Rule 17 CPC to recall PW.2. The only addition made is extracting the provisions of Order XVIII Rule 17 CPC in paragraph No.7, and the observation being that the evidence affidavit of PW.2 goes to show that she gave evidence voluntarily before the Court below and nowhere she deposed that she gave evidence under the pressure of respondent - plaintiff.

5. In the grounds of appeal in both the revisions, the petitioners would contend that though, they approached the Court with a genuine reason for reopening and recalling PW.2, and though, such applications can be filed at any stage of the suit, and the only rider is that an application should be filed on sufficient and convincing grounds and despite the fact that they made out good cause for reopening the case and evidence, the Court below without proper appreciation of the reasons assigned by them, observing that the applications have been filed at the fag-end in a routine manner to drag on the proceedings, dismissed them and, therefore, to set aside the orders.

6. Heard Sri K.V. Bhanu Prasad, learned counsel for the revision petitioners - defendants and Sri V. Ravi Kiran Rao, learned counsel for respondent - plaintiff.

7. Referring to the ruling of the Hon'ble Supreme Court in **K.K. Velusamy v. N. Palanisamy**¹, the learned counsel for the revision petitioners would submit that power to recall a witness under Order XVIII Rule 17 CPC can be exercised by Courts either on its motion or on an application filed by any of the parties to the suit requesting it to exercise the said power and, therefore, the Court below was not right in rejecting such a request when PW.2 is sought to be recalled to confront her with the notarized declaration made by her to prove certain facts touching execution of Ex.A-1 and its genuineness. The learned counsel would submit that though, the suit is reserved for judgment, when kept in view, the need for the Court to act in a manner to achieve the ends of justice does not end when arguments were heard and judgment is reserved as held by the Hon'ble Supreme Court in the ruling referred to in the above and, therefore, sought to set aside the orders passed by the Court below and to afford an opportunity to the revision petitioners to further cross-examine PW.2 by confronting the document which they termed as 'notarized declaration'.

8. The main submission of the learned counsel for the respondent - plaintiff is, that no convincing grounds have been shown

¹. 2011 (4) SCJ 48

to reopen the case and to recall PW.2 and the notarized declaration now sought to be introduced cannot be allowed as PW.2 has given positive admissions as to the execution of Ex.A-1 in favour of the respondent, and there is absolutely no ambiguity occurring in the evidence of PW.2 necessitating any clarification in which event the applications under Section 151 CPC and Order XVIII Rule 17 CPC are not maintainable and, therefore, sought to dismiss the present revisions.

i) The learned counsel places reliance in **T. Ramachandra Murthy v. K. Rama Murthy and others²**; **Binder Singh v. Babu Ram³**; **Vadiraj Naggappa Vernekar (dead) through L.Rs. v. Sharadchandra Prabhakar Gogate⁴**; **Balkrishna Shivappa Shetty v. Mahesh Nenshi Bhakta and others⁵**; **Shaik Gousiya Begum v. Shaik Hussan and others⁶**; **A.R.K. Raju v. A.V.S.Raju⁷**; **Cheerla @ Cuddapah Naganna v. Koya Naganna⁸** and also the authority relied on by the learned counsel for the revision petitioners in **K.K. Velusamy** (Supra).

9. The decision in **K.K. Velusamy** (Supra) was rendered subsequent to deletion of provision in Order XVIII Rule 17-A with effect from 01.07.2002. The object of enacting Rule 17 of Order XVIII CPC is obvious. The power to recall a witness under the said

². AIR 1980 AP 265 (1)

³. 2007 LawSuit(P&H) 1125

⁴. (2009) 4 SCC 410

⁵. AIR 2003 Bombay 293

⁶. 2014 (1) ALT 268

⁷. 2015 (1) ALT 509

⁸. 2008 (1) ALD 806

provision for his further cross-examination is intended only to clarify the Court's to clear any ambiguity, but not intended to fill up, any omissions in his evidence, as the expression occurring in the said provision "put such questions to him as the Court thinks fit" explains. By the Act 46 of 1999, Rule 17-A was omitted. The said provision was intended for production of evidence not previously known or the evidence which could not be produced despite due diligence and it enables the Court to permit a party to produce any evidence even at a later stage, after the conclusion of his evidence if he satisfies the Court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence.

i) In **K.K. Velusamy** (Supra), the applications were made before conclusion of the arguments, it was held that power is discretionary and should be used sparingly in appropriate cases to enable the Court to clarify any doubts which may have in regard to the evidence led by the parties and not intended to be used to fill up omissions in the evidence of a witness, who has already been examined. It was further held that if there is abuse of process of the Court, or if interest of justice require the Court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard either fully or partly. While cautioning that the power under Section 151 of CPC or Order XVIII Rule 17 CPC is not intended to be used routinely, merely

for the asking, as it will defeat the very purpose of various amendments to the Code to expedite trials, and if 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 satisfy 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, held in paragraph No.16 thus:

“16. 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. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution

if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.”

Whether the above principle would attract the present fact-situation requires examination, which would be taken up a little later after referring to catena of decisions relied on by the learned counsel for respondent herein.

10. In **T. Ramachandra Murthy** (Supra), a learned Single Judge of this Court held that application under Order XVIII Rule 17 CPC cannot be allowed when made after arguments were over and judgment was reserved and power under Section 151 CPC could not be exercised in that regard.

i) In **Binder Singh** (Supra), a learned Single Judge of High Court of Punjab & Haryana held the reason that some material question could not be put to PW - Babu Ram witness when he was cross-examined cannot be a ground for recalling him as it cannot be made the basis for recalling the said witness.

ii) In **Vadiraj Naggappa Vernekar** (Supra), the Hon'ble Supreme Court held that the power under the provisions of Order

XVIII 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, as that is not the scheme or intention of Order XVIII Rule 17 CPC, and the power to recall any witness under Order XVIII Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, and such power is to be invoked not to fill up the *lacunae* in the evidence of the witness which has already been recorded, but to clear any ambiguity that may have arisen during the course of his cross-examination.

iii) In **Balkrishna Shivappa Shetty** (Supra), a learned Single Judge of Bombay High Court held that provisions of Order XVIII Rule 17 and Section 151 CPC do not empower the Court to recall the witness for purpose of cross-examination at sweet will of either of parties, but it only permits recall of witness for examination by Court.

iv) In **Cheerla @ Cuddapah Naganna** (Supra), a learned Single Judge of this Court held that power to recall and examine witness is discretionary, but such power has to be exercised judiciously having regard to facts and circumstances of particular case.

v) In **Shaik Gousiya Begum** (Supra), a learned Single Judge of this Court referred to the ruling of Hon'ble Supreme Court in **Vadiraj Naggappa Vernekar** (Supra) stating that power of Court to recall any

witness under Order XVIII Rule 17 CPC can be invoked only to clear any ambiguity arisen in the evidence but not to fill up the *lacunae* in the evidence of the witnesses already recorded.

vi) In **A.R.K. Raju** (Supra), another Single Judge of this Court, while expressing that the provisions of Order XVIII Rule 17 CPC empowers the Court to recall any witness for further examination even at the instance of a party, held that the said provision, however, is not intended to be used to fill up omissions in the evidence of a witness who was already examined.

11. Turning to the case in hand, arguments in the suit in O.S. No.289 of 2013 were concluded and the learned Principal Junior Civil Judge, Mancheri has reserved the suit for judgment on 16.12.2016, which is not in dispute between the parties. The suit was filed by the respondent herein for grant of perpetual injunction. PW.2 - Mukhtar Begum is the vendor of respondent, who sold the suit house to the respondent in 1998 under a registered sale deed and delivered possession thereof and she purchased it from Ameer Khan under a registered sale deed, dated 19.11.1996. The purpose for which the evidence of plaintiff sought to be reopened by the revision petitioners - defendants is to further cross-examine PW.2 by confronting a 'notarized declaration' said to have made by her.

12. In course of hearing in the present revisions, the learned counsel for the revision petitioners has placed a copy of the said

declaration and the learned counsel for the respondent has filed material papers containing the evidence of PWs.1 to 3 and DWs.1 and 2. As could be seen from the dates of examination of witnesses, PWs.1 to 3 were examined in 2014 and, thereafter, affidavit-in-chief of DW.1 was filed and he was cross-examined on 11.08.2015 and examined in chief further and was cross-examined on 22.09.2016, and after filing the affidavit in chief of DW.2, he was cross-examined on 09.11.2016. The alleged 'notarized declaration' shows the date as 01.10.2016. Thus, it is clear that the said document purported to have been made by PW.2 was dated 01.10.2016, whereas PW.2 filed her examination-in-chief on 15.11.2014 and she was cross-examined on 17.11.2014. DW.2 was examined on 09.11.2016, which was subsequent to the alleged 'notarized declaration' of PW.2. He speaks everything though, he claims to be one of the attestors of a Will said to have executed by Ameer Khan, vendor under Ex.A-7, though, by then itself the 'notarized declaration' now sought to be introduced was available, DW.2 did not speak anything about the said document. The appropriate stage at which the petitions under challenge could have been filed was prior to examination of DW.2 himself as by then according to DW.1, PW.2 said to have made that declaration.

13. Be that as it may, when perused the affidavit filed by revision petitioner No.2, he states that he recently came to know that PW.2 admitted that under the influence of plaintiff, she was constrained to give evidence as per his instructions and Ex.A-7 is a

created and forged document having no legal sanctity and to that effect, she has also executed declaration before notary-advocate, the same is now required to be confronted to PW.2 and for that purpose, the applications in I.A. Nos.628 and 629 of 2016 were filed. No other reasons are shown to reopen and recall PW.2. The revision petitioners are unsuccessful in showing that the applications are intended to prevent abuse of process of the Court, nor set out any convincing grounds that these two applications are intended to achieve ends of justice. There is yet another reason why the requests in these applications cannot be acceded to, that being, the revision petitioners have to lay factual foundation touching the alleged notarized declaration, as it is *post litem motam* document as could be seen from the facts narrated in the above. Even, the revision petitions are not intended in the direction of clarifying any ambiguity in the evidence of PW.2. Thus, seen, certainly, even the ruling in **K.K. Velusamy** (Supra) would not assist the revision petitioners to accede to their requests. There is no merit in the present revisions.

14. Therefore, both the revision petitions are dismissed. However, there shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the revisions, stand disposed of.

A. SHANKAR NARAYANA, J

January 20, 2017.
Mgr