

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.2070 OF 2017

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No.134 of 2017 in O.S.No.272 of 2004 dated 06.04.2017 passed by the XIX Additional Senior Civil Judge, City Civil Court, Secunderabad, whereby, the Trial Court dismissed the interlocutory application for recall of P.W.1 for cross-examination.

For the sake of convenience, the parties to the petition will hereinafter be referred as petitioners and respondents, as arrayed before the Trial Court.

The petitioner filed I.A.No.134 of 2017 alleging that the petitioners in O.S.No.272 of 2004 were brought under coercion to pay a sum of Rs.4,00,000/- for settlement of all civil and criminal cases filed by the petitioners in the suit. It is submitted that, a joint compromise memo and decree in O.S.No.188 of 2004 dated 07.10.2009 is sufficient to pass a decree in the suit in terms of compromise petition filed under Order XXIII C.P.C, pending further adjudications. It is also submitted that the respondents 1 & 2 are bound by the compromise decree in O.S.No.188 of 2004 pending on the file of XII Senior Civil Judge, City Civil Court, Secunderabad, to terminate the suit proceedings. It is submitted that inspite of receipt of demand draft bearing No. TSA 526257 dated 01.10.2009 drawn on Punjab national Bank, M.G. Road Branch, Secunderabad, the same was encashed on 03.02.2010 by

the respondents through their banker State Bank of India, Bible House Branch where they are maintaining joint account, with malafide intentions, the respondent are not cooperating with Court for decreeing the suit in terms of compromise. It is submitted that P.W.1 was not cross examined for one or the other reasons, other defending party as well as all the defendants are contesting the suit and the suit is at trial stage, summoning of P.W.1 to appear for cross-examination on petition filed by third defendant. It is submitted that the petitioners be provided reasonable opportunity for cross-examination of all the witnesses for disposal of the suit on merits. It is also submitted that fast approaching of time for disposal cannot be a ground to deny relief and the petitioners and defendant nos. 1 & 2 are constrained to file I.A.No.134 of 2017 to recall P.W.1 for cross examination and unless the witness is recalled granting leave to cross-examine by the petitioners, the suit cannot be decided on merits.

The respondents filed counter in I.A.No.134 of 2017 denying material allegations, *inter alia*, contending that the payment pleaded in the petition is in respect of criminal appeal, pending before the XI Metropolitan Magistrate at Secunderabad. When the petitioners proposed a compromise for sum of Rs.4,00,000/- to be paid by the petitioners, anticipating that the lower court judgment would be confirmed, and as such they proposed a compromise and settlement, and the said compromise has nothing to do with this present suit. It is also stated in the counter that P.W.1 filed an affidavit in lieu of Examination in Chief of on 22.07.2006 vide S.R.No.590 of 2006. Since then, the matter

has been prolonged by the petitioners on one pretext or the other. Subsequently, on 24.03.2016 P.W.1 had marked the documents i.e. Exs.A-1 to A-40 and the matter was posted for cross-examination from time to time, but, P.W.1 was not examined on one pretext or the other and ultimately, the matter was referred to Lok Adalat on 19.04.2016 and no purpose was served and returned due to absence of both the parties before the District Legal Services Authority and later P.W.1 was present on more than six dates of adjournments. But, the witness was not cross-examined by the defendants. Ultimately, on 18.07.2016, the cross-examination was adjourned on payment of costs of Rs.100/- by the petitioners to the plaintiffs, as P.W.1 was present and again posted the matter to 28.07.2016 and again on payment of further costs of Rs.100/-, the matter was posted to 01.08.2016. On 01.08.2016 the learned counsel refused to cross-examine P.W.1 and the matter was finally adjourned to 31.08.2016. Thereby, the cross-examination was closed and several adjournments were obtained by the petitioners for cross-examining P.W.s.1 & 2. Therefore, it is submitted that the petitioners are not evincing any interest in prosecuting the suit and prayed to dismiss the petition.

Curiously, the petitioners filed rejoined to the counter without obtaining leave of the Court narrating several aspects running into five pages. Filing such rejoinder application is not permissible, except with the leave of the Court under Order VIII Rule 9 C.P.C and no such permission or leave was obtained by the petitioners or brought to the notice of the Court.

The Trial Court upon hearing argument of both the counsel, dismissed I.A.No.134 of 2017 observing that the petitioners instead of assisting the Court for speedy disposal of the suit, they are intentionally protracting the matter for one or the other reason, preventing the Trial Court from disposing the suit, though it is 2004 suit. It is also observed by the Trial Court that the petitioners have filed a petition to recall P.Ws 1 & 2 vide I.A.No.574 of 2016 on the same allegations and averments mentioned in the affidavit of the petitioner, which was allowed by imposing costs of Rs.500/- on condition to cross-examine the witnesses i.e. P.W.1 & P.W.2 by next date of hearing. But, even then the petitioners did not choose to cross examine P.Ws. 1 & 2 even after imposing conditions and costs. Finally, the cross-examination of P.W.1 was recorded as 'nil' and again, the petitioners came up with petition in I.A.No.134 of 2017 to recall P.W.1. The petitioners counsel did not choose to cross-examine P.Ws.1 & 2, though they were present again on the date of adjournments on payment of costs. But, finally, cross-examination of P.Ws. 1 & 2 was recorded as nil and again the petitioners filed identical application. Therefore, the application is maintainable. The Trial Court placed reliance on **K.K. Velusamy v. N. Palanisamy**¹ and **Gayathri v. M. Girish**² on the strength of the principles, the Trial Court dismissed I.A.No.134 of 2017.

During hearing, learned counsel for the petitioners Sri N. Subba Rao contended that P.Ws. 1 & 2 were already recalled for cross-examination by order dated 01.05.2017 in I.A.No.207 of

¹ 2011 (2) Supreme Court Cases 667

² 2016(3) CLJ(SC) 89

2017 in O.S.No.272 of 2004 by the Senior Civil Judge, City Civil Court at Secunderabad on an application filed by Mrs. Shaista Praveen. Therefore, no prejudice would be caused to the respondents even if they are recalled for cross-examination and requested this Court to permit them to cross-examine the witness.

Learned counsel for the respondents Sri M.V.Suresh Kuamr opposed the application, highlighting the conduct of the petitioners in filing petitions one after the other to protract the proceedings for sufficiently long time and the petitioners having filed earlier application in I.A.No.574 of 2016 for recall of P.Ws. 1 & 2 for cross-examination, they did not avail the opportunity to cross-examine P.Ws. 1 & 2 and refused to cross-examine them for one reason or the other. In such circumstances, the petitioners cannot be permitted to cross-examine P.W.1 by recalling witness and requested to dismiss the petition.

Considering rival contentions and perusing the material available on record, the point that arises for consideration is ***“whether P.W.1 be recalled for cross-examination by petitioners”***

P O I N T:

The only reason assigned by the petitioners in the affidavit is that they entered into compromise on payment of Rs.4,00,000/- by demand draft on 01.10.2009 drawn on Punjab National Bank, M.G. Road Branch, Secunderabad and the same was encashed by the petitioners through their collecting bank i.e. State Bank of India Bible House Branch. Therefore the petitioners did not cross-examine P.W.1, as the matter was already settled. In the entire

affidavit, except mentioning the said reason, no other ground is raised to recall P.W.1 for cross-examination. It is an undisputed fact that P.W.1 was not cross-examined, sufficiently for long time and the details furnished by the respondents in the counter affidavit would clinchingly establish the conduct of the petitioners in protracting the proceedings for one reason or the other. P.W.1 filed an affidavit in lieu of Examination in Chief on 22.07.2006 vide S.R.No.590 of 2006 after serving notice on the petitioners counsel and later, Exs.A-1 to A-40 were marked on 24.03.2016, granting time till 30.03.2016 for cross-examination of P.W.1. But, conveniently the petitioners filed transfer petition vide Tr.O.P.616 of 2016 and on account of transfer petition, the suit was adjourned to 07.04.2016 and 19.04.2016. At that stage, both the parties filed a joint memo on 23.04.2016 to refer the matter to Lok Adalat for settlement on 19.04.2016 and accordingly, the suit was referred, but , it was returned, as both the parties were absent before the District Legal Services Authority. On 01.06.2016, both the parties were absent and thereafter, the matter underwent adjournments on 11.06.2016, 17.06.2016, 27.06.2016, 08.07.2016 and 18.07.2016. On 18.07.2016,P.W.1 was present, but he was not cross-examined by the learned counsel for the petitioners. Thereupon, the Trial Court adjourned the matter for cross-examination on payment of costs. On 28.07.2016 also P.W.1 was present, but obtained adjournment on further payment of costs and the matter was adjourned to 01.08.2016. Further, on 01.08.2016 the counsel refused to cross-examine P.W.1 and again adjourned to 03.08.2016 and the cross-examination of P.W.1 was

closed. Thereafter, P.W.2 was examined, but he was not cross-examined despite adjourning the matter on payment of costs twice of Rs.100/- & Rs.200/-. On 02.09.2016, cross-examination of P.W.2 was recorded as 'nil' and posted the suit for defendants evidence on 06.09.2016. Since then the petitioners did not adduce evidence and the evidence was closed on 19.09.2016 while adjourning the matter for arguments on 23.09.2016 and again filed Transfer O.P and the suit was adjourned from time to time. Thus, the conduct of the petitioners for reasons obviously known to them, they are not interested to prosecute the proceedings and creating hurdles or obstructions to complete the trial of the suit in the Trial Court in one way or the other at every stage and they did not obey the order of the Court for payment of costs also and conveniently filed I.A.No.547 of 2016 for recall of P.Ws.1 & 2. Though the said petition as allowed, they did not choose to cross-examine the witnesses P.Ws.1 & 2 without any justifiable or reasonable cause. But, the contention of the petitioners is that, on account of compromise, learned counsel for the petitioners did not cross-examine P.Ws. 1 & 2. In fact, the alleged compromise on criminal appeal was on 16.04.2016 and even prior to that, the suit went several adjournments for cross-examination of P.W.1 and conveniently filed transfer petitions one after the other. But, ultimately refused to cross-examine P.W.1 on 01.08.2016, though alleged compromise had taken place prior to four months i.e on 16.04.2016. It is contended that the conduct of the petitioners would directly amount to abuse of process of the Court and if such conduct of the parties is taken into consideration, they are

disentitled to claim discretionary relief of recalling P.W.1 under Order XVIII Rule 17 C.P.C

As seen from Order XVIII Rule 17 C.P.C, a witness can be recalled at any stage of the suit or proceedings.

In **Vadiraj Naggappa Vernekar (dead) through LRs v. Sharadchandra Prabhakar Gogate**³, the Supreme Court though considered the scope of Order XVIII Rule 17 i.e. to recall of witness after examination is completed, the scheme and object and held that it is obvious that only after cross- examination of the witness that certain lapses 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. The Supreme Court further held that it is now well settled that the power to recall any witness under Order 18 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, but as indicated hereinabove, 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 examination. Of course, if the

³ (2009) 4 Supreme Court Cases 410

evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the Trial Court to permit recall of such a witness for re-examination with permission to the defendants to cross-examine the witness thereafter. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests 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. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extra-ordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power under section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the arguments. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the Court to put such question to elicit any clarifications. The power to recall any witness under Order 18 Rule 17 can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to

enable the court to clarify any issue or doubt it may have in regard to the evidence led by the parties by recalling any witness so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions. However, this power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. Order 18 Rule 17 is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded.

In the later judgment of the Apex Court in **Gayatri v. M. Girish**⁴ case, the Apex Court relied on **Vadiraj Naggappa Vernekar**² case referred supra and highlighted the responsibility of the counsel appearing in the suits before the Court while placing reliance on **Noor Mohammed v. Jethanand**⁵ commenting on the delay caused due to dilatory tactics adopted by the parties and the Court was compelled to say that:

“In a democratic set-up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice-dispensation system cannot be allowed

⁴ [2016(3) CLJ(SC) 89]

⁵ (2013) 5 SCC 202

to remotely conceive of a casual approach.

And, again:

Thus, from the aforesaid, it is clear as day that everyone involved in the system of dispensation of justice has to inspire the confidence of the common man in the effectiveness of the judicial system. Sustenance of faith has to be treated as spinal sans sympathy or indulgence. If someone considers the task to be Herculean, the same has to be performed with solemnity, for faith is the 'elan vital' of our system."

In all the three judgments referred supra, question came up before Apex Court as to when a witness can be recalled by exercising discretion under Order XVIII Rule 17.

In view of the law declared by the Apex Court in various judgments referred supra, it is the duty of the Advocate on record to prosecute the proceedings properly and in the present case, the petitioners counsel has gone to the extent of refusing to cross-examine the witnesses.

The Apex Court in **Gayatri**⁴ case, held that, delay caused due to dilatory tactics adopted by the parties and made it clear that everyone involved in the system of dispensation of justice has to inspire the confidence of the common man in the effectiveness of the judicial system. Sustenance of faith has to be treated as spinal sans sympathy or indulgence. If someone considers the task to be Herculean, the same has to be performed with solemnity, for faith is the 'elan vital' of our system.

In all the judgments referred supra, the question came up before the Apex Court was as to when the witness can recalled by using discretion under Order XVIII Rule 17 C.P.C.

But in **Bagai Construction through its Proprietor Lalit Bagai v. Gupta Building Material Store**⁶ where the Apex Court again highlighted the power of Court under Order XVIII Rule 17 and power under Section 151 C.P.C to reopen the case by recalling the witness by filing an application at the belated stage of the suit. More particularly, when the matter is posted for judgment and held as follows:

“After change of various provisions by way of amendment in the Code of Civil Procedure, 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 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 Code of Civil Procedure.”

Thus, it is clear from the catena of perspective pronouncements of the Apex Court, the power of Order XVIII Rule 17 C.P.C is purely discretionary in nature and when such discretion is conferred on the Courts, the Courts have to exercise its discretion judiciously, but not on equitable grounds, since Courts in India are law Courts. Therefore, there is a purpose in

⁶ (2013) 14 Supreme Court Cases 1

enacting the procedural laws. But, merely on the ground that the procedural laws are hand made of justice, they cannot be ignored altogether on the concept of substantial justice or complete justice to the parties. If, such relaxation is given to the parties who are guilty of protracting the litigation for years together, there will not be any end to the proceedings and fixing time limit for granting adjournments by Amendment Act No.22 of 2002 is only to control the proceedings and to render speedy justice to the litigant public. If the conduct of the petitioners in the present case is taken into account, the petitioners having dragged the matter sufficiently for long time, and they having obtained adjournments on payment of costs, did not obey the directions issued by the Trial Court and they have even gone to the extent of refusing to cross-examine the witness. In such case, such conduct of the petitioners and the counsel is tantamount disowning the responsibility as officer of the Court. An advocate is expected to prosecute the proceedings as long as his authorization is continuing. But, refusal to cross-examine the witness is a serious matter of concern. However, it is between the client and the advocate and the Courts are unconcerned.

In the present case, the advocate prosecuted the proceedings in utter disregard of Institutional responsibility as an advocate who is an officer of the Court. Though the parties may not be aware of the procedural laws, advocate has to guide them properly and conduct the proceedings to uphold the dignity of the Court. But here, the counsel before the Trial Court totally ignored the institutional responsibility, who is the officer of the Court and

acted at his whim and fancy, as if there is a guarantee that he would obtain an order from the other Courts to recall P.W.1, such impression is mockery of justice. Therefore, the person who is guilty of such lapses is not entitled to claim a discretionary relief under Order XVIII Rule 17 C.P.C and the Courts are not expected to show any indulgence to such parties who are careless in prosecuting the proceedings and they does not deserve any sympathy. Therefore, taking into consideration of the totality of the circumstances, including the conduct of the petitioners in prosecuting the proceedings, at various stages, I am unable to exercise my judicial discretion in favour of the petitioners to recall P.W.1 for cross-examination. Even otherwise, according to **Vadiraj Nagappa Vernekar** case, recall would arise only when there are lapses in the cross-examination after completion of their examination. Here, cross-examination was not done and the counsel for the petitioners also refused to cross-examine the witness, disowning his institutional responsibility and made a sincere and honest attempt to protract the proceedings for sufficiently long time.

In **Shiv Cotex v. Tirgun Auto Plast Private Limited and others**⁷ the Supreme Court heavily laid on the practice of granting adjournments, laid down guidelines in granting adjournments describing the procedure of granting adjournments as cancer corroding the entire body of justice delivery system and directed the judges to be pro-active while observing that when the Advocate is facing some inconvenience, the Advocate has to make necessary

⁷ (2011) 9 SCC 678

alternative arrangements and directed the Courts not to grant adjournments on mere asking and paragraph 16 of the said judgment reads as follows:

“16. No. litigant has a right to abuse the procedure provided in the Code of Civil Procedure. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII. Rule 1 Code of Civil Procedure is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 Code of Civil Procedure should be maintained. When we say 'justifiable cause' what we mean to say is, a cause which is not only 'sufficient cause' as contemplated in Sub-rule (1) of Order XVII Code of Civil Procedure but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has No. right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit - whether Plaintiff or Defendant - must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the Plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, No. evidence was let in by the Plaintiff, in our view, it deserved No. sympathy in second appeal in exercise of power under Section 100 Code of Civil Procedure. We find No. justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the Plaintiff an opportunity to produce evidence when No. justification for that course existed.”

(emphasis supplied)

In view of the above circumstances, it is apparent from the record that, it is only an attempt made by the petitioners to drag the proceedings for some more time by recalling P.W.1 by filing the present petition. As observed by me in the earlier paragraphs, the petitioners are not entitled to claim purely discretionary and equitable relief when their conduct is blameworthy at every stage of the proceedings in the suit. Though, it is contended by the learned counsel for the petitioners that P.Ws. 1 & 2 were already recalled for cross-examination by order dated 01.05.2017 in I.A.No.207 of 2017 in O.S.No.272 of 2004 by the Senior Civil Judge, City Civil Court at Secunderabad on an application filed by Mrs. Shaista Praveen, the petitioners also requested to afford an opportunity to cross-examine them. But, such opportunity cannot be given to the petitioners when they are guilty of serious lapses and prevented the Court from deciding the *lis* pending before it by adopting dilatory tactics by filing petitions one after the other and even after obtaining orders, the petitioners counsel did not choose to cross-examine the witness. Therefore, recalling P.Ws.1 on the application filed by Mrs. Shaista Praveen in I.A.No.207 of 2017 in O.S.No.272 of 2004 is not a ground to recall P.W.1, if such applications are allowed, the Courts also become privies for the delays in dispensation of Justice.

Hence, I find no legal infirmity in the order passed by the Trial Court, warranting interference of this Court, while exercising power under Article 227 of the Constitution of India. The petition deserves to be dismissed, as it is devoid of merits.

In the result, the civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:28.07.2017

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