

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 4400 of 2017

ORDER:

1) Assailing the order dated 05.07.2017 passed in I.A.No.254 of 2017 in O.S.No.110 of 2011 wherein an application filed by the defendants under Order XVIII Rule 3A and Section 151 of CPC seeking to permit the second defendant to give evidence as D.W.5, was dismissed, the present C.R.P. is filed.

2) The averments in the affidavit filed in support of the said I.A., shows that the above suit was filed by the younger brother of the husband of the petitioner, for partition of the property, purchased by the petitioner and her husband (D-1) situated in Ponnimman Koil street, Chittoor. In the said suit, the first defendant filed his written statement and the petitioner and third defendant adopted the written statement filed by the first defendant. During the course of trial, the husband of the petitioner, who is D-1 was examined as D.W.1, and subsequent thereto, three more witnesses were examined. Thereafter, the present application came to be filed seeking examination of defendant No.2, who is the petitioner herein, as D.W.5 on the ground that her husband failed to depose about the petitioner, pledging the gold jewelry given to her by her parents at the time of marriage for augmenting funds to purchase the said

property as well as subsequent pledging of some jewelry for discharge of the debts. It is also stated that the petitioner is alleged to have secured amounts from her brother as loan for purchase of suit property. In order to depose these facts, the petitioner intends to enter into the box as D.W.5.

3) A counter came to be filed opposing the same. It is stated that in order to fillup the lapse, the present application came to be filed. It is further stated that the respondent even raised an objection with regard to the filing of chief affidavit. After considering the rival submissions made and taking into consideration the facts submitted, the trial court rejected the petition. Challenging the same, the present C.R.P. is filed.

4) Reiterating the averments made in the affidavit filed in support of the petition and placing reliance on the judgment of this Court in **Kondaveeti Franchis v. Mallarapu Lurdamma**¹ the learned counsel for the petitioners would submit that no prejudice would be caused to the respondent if the petitioner is allowed to depose as D.W.5.

5) The learned counsel for the respondent opposed the same contending that if the petitioner is allowed to depose as D.W.5, the same would not only amount to the filling up the gaps but it would be contrary to Order XVIII Rule 3-A CPC.

¹ 1994(3) ALT 425

6) A Division Bench judgment of this Court in **Devarapalli Pattabhi Ramaiah v. Davuluri Lakshmi Prasanna and others**², while dealing with Order XVIII Rule 3-A CPC, observed as under:-

"Rule 3-A of the code of Civil Procedure was introduced by Act 104 of 1976 into the Code of Civil Procedure. Pursuant to the recommendations of the Law Commission in the 54th report with an intention to prevent the notorious practice indulged in by litigants in examining other witnesses first and later covering up the gaps by the examination of the parties themselves later, to substantiate their case. If that is the mischief sought to be remedied by the amended Rule 3-A of Order 18 of the Code of Civil Procedure, the order of the examination of such of the defendants who wish to examine themselves as witnesses in support of their defence cannot be left to the choice of the plaintiff. The defendants are entitled to put forward the best defence available to them. In putting forward such defence it is for them to decide as to which one of the defendants should be examined first as a witness to effectively defend the case. That right cannot be made subject to the arbitrary or even a designed choice of the plaintiff. No doubt as against other witnesses whom the defendants wish to examine in support of their case the defendants must get themselves examined first unless the Court permits otherwise."

6. Number of decisions were cited at the Bar. Before we proceed to examine these authorities, it would be more appropriate to analyse the language of Order 18 Rule 3-A of the Code of Civil Procedure which reads as follows:

Order 18 Rule 3-A : Party to appear before other witnesses: Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the court, for reasons to be recorded, permits him to appear as his own witness at a later stage."

7. A reading of the above rule shows that it is in two parts, the first part of the rule creates a mandatory obligation on the litigant to examine himself as a witness before any other witness on his behalf is examined. If the rule were to end there, there would have been no

² 1997(6) ALT 475 (D.B)

scope perhaps to interpret the rule except follow the letter of the rule. But the latter half of the rule provides power to the Court to permit deviation from the general principle enshrined in the first part and accord permission to the litigant for reasons to be recorded by the Court. As far as the second part is concerned, the rule is not very definite as to the point of time at which such permission can be accorded.

7) Keeping in view the principles laid down in the judgment referred to above, I shall now deal with the case on hand.

8) The reason for the second petitioner to depose as D.W.5 appears to be that her husband who was examined as D.W.1, failed to not mention about the gold jewelry given by her parents at the time of marriage, pledging of gold jewelry for discharging the debts, and taking of loan, from her brothers. But the said pleading does not find place in the written statement filed by D-1. As stated earlier, the petitioner as well as D-3 did not file any written statement putting forth their case, but on the other hand, adopted the written statement of D-1, who examined himself as D.W.1. When there is no plea and when the pleadings are silent, the question of permitting the petitioner to depose to the said facts will not arise. Though the latter half of Rule 3-A provides power to the Court to permit deviation from the general principle enshrined in the first part and accord permission to the litigant for reasons to be recorded by the Court, but if the said permission is granted, it would definitely amount to setting up a new case and trying to fillup the gaps. As

observed by the trial court, the effort which is made now is only to fillup the gaps or coverup that portion of the case which D.Ws.1 to 4, fail to mention in their evidence. Hence, I see no merits in the revision and order under challenge warrants no interference.

9) Accordingly, the Civil Revision Petition is dismissed. No order as to costs. Consequently, the Miscellaneous Petitions pending if any shall stand closed.

JUSTICE C. PRAVEEN KUMAR

Dt:07.09.2017
GM

