

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P.No.2936 of 2013

ORDER

This petition under Article 227 of Constitution of India is filed challenging the order dated 18.06.2013 in I.A.No.441 of 2013 in O.S.No.133 of 2007 passed by the Principal Senior Civil Judge, Narasaraopet, allowing the application filed under Section 151 of CPC to permit the first defendant to adduce evidence after examination of second defendant.

2. The parties hereinafter will be referred as petitioner and respondents for convenience.

3. The first respondent filed I.A.No.441 of 2013 under Section 151 of CPC before the trial Court to reopen the matter for adducing evidence on her behalf on the ground that after completion of evidence of plaintiff, the suit was posted for her evidence, but due to transfer of her son from Narasaraopet to Kadapa, she could not intimate the same to her Advocate and thus, there is no communication about the progress of the suit, when she came to Narasaraopet to contact her Advocate, a day before filing the petition, she came to know that because of her non-appearance, the trial Court was pleased to post the matter for arguments to 04.04.2013 , but her evidence is necessary to decide the real controversy and prayed to allow the petition permitting her to adduce evidence on her behalf.

4. The 3rd respondent, 2nd petitioner herein, alone filed counter alleging that the cause shown by petitioner that due to transfer of her son from Narasaraopet to Kadapa, she could not contact her counsel, is not a ground to permit her to adduce evidence. It is also further stated that as defendants 2 to 6 have already adduced their evidence and the matter was posted for arguments, at that stage, the first defendant cannot be permitted to adduce evidence since she is the supporting defendant (supporting the case of the plaintiff) and much prejudice would be caused to the third respondent if permission is granted to adduce evidence and prayed for dismissal of the petition.

5. The trial Court, upon hearing the argument of both the counsel, concluded that the reason assigned by petitioner for adducing evidence on her behalf is not satisfactory. However, the trial Court held that the suit is for specific performance of agreement of sale and that it is not a case of respondents that there was no collusion between the plaintiff and defendants, to determine the disputed issue, opined that allowing this petition would not cause any prejudice to the case of the respondents and accordingly, allowed the petition as the witness is material witness.

6. Aggrieved by the order, respondents 2 to 6 in the I.A. preferred the present revision raising several contentions. It is mainly contended in the grounds that the order of the trial Court is contrary to the principle laid down in **Kurukula Sanyasi (died) and others V.**

Bhavisetty Sankara Rao¹ and that it is contrary to the settled principles of law that the defendant sailing with the plaintiff cannot be permitted after examination of the witnesses on behalf of the contesting defendants. It is also contended that when the Court recorded its finding that the cause shown by petitioner is not satisfactory, the Court ought not to have allowed the application, but contrary to the finding, the trial Court ordered the petition as such, order of the trial Court is erroneous and finally, prayed to set aside the petition.

7. During hearing, learned counsel for petitioners Sri G.L.V.Ramana Murthy, while reiterating the contentions raised in the grounds of revision and the grounds urged in the counter before the trial Court, has drawn the attention of this Court as to the contents of the written statement to establish that the first defendant is a sailing defendant with the plaintiff and that apart, a petition filed seeking permission to examine the son of the first defendant, the first respondent herein, is still pending before the Court. He placed reliance on the two judgments of this Court reported in **Kurukula Sanyasi's** case referred to supra and **Y. Prabhakara Rao v. P.S.Anil Kumar and others**² and the reportable judgment of the Apex Court in Civil Appeal No.1684 of 2016 dated 23.02.2016 between **Ram Rati v. Mange Ram (D) through LRs and others**.

8. On the other hand, learned counsel for respondents

¹ 1999(5) ALT 475 (S.B)

² 2013(6) ALT 19

Sri Nallapati Lakshmi Narayana, would contend that granting permission to adduce evidence to the first respondent herein would not cause any prejudice to the revision petitioners and on the other hand, her evidence would be helpful to decide the real controversy between the parties. Therefore, the trial Court has rightly come to a conclusion that the first respondent herein is entitled to adduce evidence, moreover, the judgments relied on by the counsel for petitioners are distinguishable on facts and the Court, by placing reliance on those judgments, cannot reject permission to adduce evidence setting aside the order under challenge and prayed to dismiss the revision, confirming the order passed by the trial Court.

9. Considering the rival contentions and perusing the material on record, the points that arise for consideration is:

“whether the first respondent (petitioner in I.A.) is a sailing defendant with the plaintiff, if so, whether the first respondent be permitted to adduce evidence after adducing evidence by defendants 2 to 6, petitioners herein, in the suit when the matter is posted for arguments?”

10. **POINT:**

The suit was filed for grant of decree for specific performance of agreement of sale marked as Ex.A1 before the trial Court, allegedly executed by the first respondent herein (the first defendant) in favour of the plaintiff and the petitioners/defendants 2 to 6. Defendants 2 to 6 are alleged subsequent purchasers. The petitioners herein denied the very execution of the agreement of sale by the first respondent/first defendant in favour of the plaintiff while contending that they are bona fide purchasers for valid consideration

by filing an independent written statement before the trial Court. Whereas the first defendant filed written statement supporting the plaintiff's case and the specific allegations made in second paragraph of the written statement are extracted hereunder for better appreciation:

"It is true that the property described in the schedule and adjacent property originally belonged to this defendant and that this defendant offered to sell the same to the plaintiff and the 2nd defendant, and that the bargain was settled for Rs.2,45,000/- and that after the settlement this defendant received a sum of Rs.2,44,000/- and that this defendant executed an agreement of sale on 24.08.1994 and that this defendant delivered possession of the property and that the remaining balance of sale consideration was also paid to this defendant".

Similarly, in paragraph No.7 of the written statement, the first defendant/first respondent made specific admissions regarding receipt of consideration by executing an agreement of sale. She asserted as under:

"It is submitted that at the time of the execution of the registered sale deed in respect of the suit schedule property, the plaintiff and the son of the 1st defendant were present. In the said registered sale deed, the agreement mentioned above are also referred. As this defendant is not aware of legal process or other things, he executed the registered sale deed in respect of the schedule property in favour of the 2nd defendant. This defendant can act as per the direction of this Honourable Court, if the sale deed executed in favour of the 2nd defendant is found not correct. This defendant acted in a bonafide manner in registering the document. In fact, there was no hike in the prices of the schedule property at the time of the registration".

11. From the admissions made in the written statement extracted above, it is evident that the first respondent herein is supporting the

case of the plaintiff in all respects. Thus, she is a sailing defendant with the plaintiff or supporting defendant. When D2 to D6, who resisted the claim of the plaintiff, have examined themselves and closed their evidence, the matter was posted for arguments, the supporting defendant or sailing defendant with the plaintiff cannot be permitted to be examined as witness. Though the counsel for the first respondent contended that the first respondent is not a supporting defendant, the same cannot be accepted in view of the allegations in paragraph Nos.2 and 7 of the written statement, which are extracted above. If those allegations are taken into consideration, it is clear that the first defendant is sailing with the plaintiff or supporting the plaintiff's case. In such case, her evidence is almost on par with the plaintiff and she shall be treated on par with the plaintiff for the purpose of deciding the suit though arrayed as defendant. If she is interested to examine herself as a witness, she has to be examined before examination of the other witnesses, who are contesting the claim, by filing separate written statements denying the claim of the plaintiff. The normal procedure in examination of witness is that when a plaintiff was examined in chief, such witness is to be cross-examined first by a supporting or sailing defendant with the plaintiff. Thereafter, basing on the same, contesting defendants have to cross-examine the witness. Similarly, the supporting defendant has to examine himself or herself after closure of the plaintiff's evidence depending upon the onus of proof. But such supporting or sailing defendant with the plaintiff cannot be permitted to adduce evidence after completion of the evidence of

contesting defendants. This view is fortified by the judgment of this Court in **Y. Prabhakara Rao's** referred to supra, wherein this Court, based on the facts of the case, held that when no issue was settled against the first defendant and when there is no controversy between the first defendant and plaintiff, the sailing defendant with the plaintiff cannot be permitted to be examined, subsequent to closure of the evidence by contesting defendants. This view is supported by another judgment of this Court in **M. Hymavathi and another v. M. Koteswara Rao**³ and **Namala Govindu v. B. Lakshmana and another**⁴. But this principle laid down in the above judgments is based on Order 18 Rule 3(a) CPC.

12. In **Kurukula Sanyasi's** case referred to supra, this Court held as under:

“When the matter was adjourned for arguments after closer of the evidence of the contesting respondents, a petition for re-opening the evidence was filed, except stating that the witnesses were not available at the time of trial. As the suit was being adjourned for advancing arguments, at that stage allowing such a prayer and re-opening the matter permitting the plaintiff to examine some more witnesses would certainly cause prejudice to the other side. In fact, it is not the prejudice that is likely to be caused to the other side alone that has to be looked into. The real rest should be that whether the party making such an application is trying to get any undue advantage by such re-opening of the matter and such an applicant shall explain what prejudice he is going to suffer, if that petition is not allowed”.

Therefore, prejudice alone is not the ground, but the Court has to keep in mind the undue advantage to supporting defendant.

³ 2006(5) ALD 328

⁴ 2008(1) ALT 630

However, the facts of the present case though cannot be equated with the facts of the above two decisions, still the legal principle declared in those judgments can be accepted and it is a binding precedent on this Court.

13. Order 18 Rules 1 to 3-A of CPC deals with order of examination of witness. But the question as to who should be permitted to lead evidence and at what stage is not exhaustively dealt with by the provisions of the Civil Procedure Code, the writ of which does not lie in its brevity. This statute which is the great source of all our major level disputations over the questions of proper procedure to be applied by the Court in trying the civil suits, has only one provision dealing with this question. Order 18 Rule 1 CPC recognizes generally the plaintiffs right to begin the case, because it is on him the law places burden of proving his case. Rule 2 of Order 18 succumbing to the pressure of request for adjournment says that either on the day fixed for the trial of the suit or any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence and thereafter the rival party should state its case and lead evidence. The party beginning will have a right to reply generally. The evidence is then closed. These provisions work well enough when all the parties are nearly arraigned either on the side of the plaintiffs or defendants. But when there are non-co-operating defendants having common interests with the plaintiffs, the situation gets complicated. Order 18 provides no express guidance in dealing with that situation. Nor does it tell up when a Court witness should be examined. One

cannot find anything in support of or in opposition to the claims of a supporting defendant to lead evidence after the evidence of the contesting defendants is over. These questions have therefore to be decided upon by the Courts on the basis of general principles of fair procedure and sense of justice, vide judgment of this Court in *G. Venkatakrishnam Raju v. B. Jayalakshmi* (1988 (1) APLJ 6). The Court emphasized the difficulty being faced during trial in certain situations recording examination of sailing witness with the plaintiff after closure of the contesting defendants' evidence. But, in the later judgment in **M. Hymavathi and another v. M. Koteswararao and others**⁵, this Court categorically held that a contesting defendant, who was fully supporting the case of the plaintiff, could be permitted to lead evidence after the evidence of the contesting defendants, but when the defendant wanted to fill up the gaps in the evidence of the plaintiff after closure of the evidence of the contesting defendants, it could not be said that the defendant was supporting the plaintiff could also lead evidence after closure of the evidence of the contesting defendant, but this is nothing but abuse of process of law since the Explanation added after Rule 2 of Order 18, the Court has power to permit the party to examine any witnesses at any stage, but only after recording reasons, though sub-rule (4) of Order 18, has been omitted. However, there is no reason to allow the petitioners to lead evidence after the evidence of contesting defendants is closed and the Court below has not committed any error in upholding the objection raised by petitioner. Thus, the supporting defendant cannot be permitted to adduce evidence after examination of

⁵ AIR 2006 AP 395

contesting defendant. The facts of the judgments are identical to the facts of the present case.

14. The suit was filed for specific performance against defendants 1 to 6. Defendants 2,3 and 5 were the contesting defendants and defendants 4 and 6 are the supporting defendants of the plaintiff's case. But after closure of contesting defendants' evidence, sailing defendant wanted to adduce evidence, but the Court that it amounts to filling up the gaps in the evidence of plaintiff by examining the supporting or sailing defendant with the plaintiff. In such case, those defendants cannot be allowed to be examined. In the earlier judgment of this Court, the facts may be different. But the facts in the present case are identical to the judgment in **M. Hymavathi's** case referred to supra and it is difficult to draw any distinction between the facts in the judgment and the present case to uphold that the defendant is entitled to adduce evidence after closure of evidence of the contesting defendants being a sailing defendant with the plaintiff. Hence, the law declared by this Court in **M. Hymavathi's** case is binding precedent and squarely applies to the present facts of the case.

15. Similarly, in a petition filed under Order 18 Rule 17 CPC to recall the witness, the Apex Court in **Ram Rati's** case referred to supra, based on the judgment in **K.K.Velusamy v. N. Palanisamy**⁶ referred to supra, has laid down certain guidelines (a) to (f), but the relevant guideline is (f) and the same is extracted hereunder for

⁶ (2011) 11 SCC 275

better appreciation:

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of Court”.

In view of the above principle, the Court can exercise power under Section 151 CPC to re-open the evidence and permit the first respondent herein to adduce evidence on behalf of petitioner. Considering the facts with great circumspection after recording the finding by the Court that the reason is absolutely not satisfactory, the trial Court found that there are bona fides in the application.

16. In the present case, the ground raised before the trial Court and this Court is that on account of transfer her son from Narasaraopet to Kadapa, the first respondent proceeded to Kadapa without informing her address to her counsel to communicate and thereby she could not contact her Advocate to adduce evidence in the suit. The contesting respondents filed counter denying the cause while contending that it is not sufficient cause. The finding recorded by trial Court is extracted hereunder for brevity.

“As seen from the record, it reveals the petitioner/D1 side evidence was closed on 19.12.2011 after giving several adjournments by imposing costs and posted for evidence of D2 and D3. Subsequently, the D2 was reported died and his LRs D4 to D6 came on record and the matter posted for D3 side evidence after completing evidence of D3 side. D4 to D6 reported no evidence. Hence, posted for arguments in the month of March, 2013. At the stage of arguments the petitioner came forward with

this petition to reopen the matter for adducing evidence on behalf of the petitioner/D1 for the reason assigned above. So the petitioner kept quiet for a period of one year. The reason for not adducing evidence for petitioner is not satisfactory. However, this is a suit for specific performance of agreement of sale. It is not the case of the respondents that there was collusion between the plaintiff and witness to determine the disputed issue. Therefore, I am of the opinion, allowing the petition does not cause any prejudice to the case of the respondents. Keeping these circumstances into mind, I am of the opinion with a great honour to the decision submitted by the learned counsel for D3, the facts of the aforesaid decisions are totally different from the facts of the instant case. Hence, it cannot be applied to the instant case”.

It was not the case of the first respondent that she is a material witness, but for the reason that the respondents did not allege any collusion between plaintiff and first defendant and that her evidence is not intended to fill up the lacunas in the evidence of the plaintiff alleged in the application, allowing such application on that ground, which is not pleaded by first respondent before the trial Court in the petition, is nothing but traveling beyond the pleadings and granting relief. In fact, it was the case of the petitioners herein from the beginning that the first respondent is a sailing defendant with the plaintiff and no specific relation need be attributed when she herself filed written statement supporting the case of the plaintiff. If for any reason, the first respondent, who is supporting the plaintiff, is allowed to be examined or adduce evidence on the material aspects and agreed to act as directed by the Court in paragraph No.7 of the written statement, certainly her evidence is helpful to the plaintiff/respondent. The petitioners will have no opportunity to rebut the evidence of the first defendant if permitted to adduce evidence in the

suit and that would cause serious prejudice in the suit.

17. Filing of an application while maintaining silence and waking up after a long period without assigning any sufficient cause and allowing such application while not accepting the cause shown by petitioner to reopen the evidence by the trial Court, is apparent errors on the face of record. The Court is not expected to travel beyond the relief and invent a cause to grant relief. Therefore, allowing petition recording a finding that she is a material witness in a suit for specific performance is an error apparent on the face of the record. The trial Court also did not consider the defence set up by each of the defendants and prejudice that is likely to be caused to the contesting defendants in the suit, but simply allowed the petition recording a finding that she is a material witness. If really she is a material witness, nothing prevented her to examine herself or adduce evidence on her behalf before examining the contesting defendant before the Court. Hence, the order passed by the trial Court is erroneous and liable to be set aside.

18. In view of my foregoing discussion, I find that the contentions raised by the respondents are without any substance and on the other hand, I find that the order under challenge suffers from serious legal infirmity warranting interference by this Court, besides prejudice to the petitioners before this Court. Hence, the order is liable to be set aside.

19. In the result, the Civil Revision Petition is allowed, setting

aside the order dated 18.06.2013 in I.A.No.441 of 2013 in O.S.No.133 of 2007 passed by the Principal Senior Civil Judge, Narasaraopet. No order as to costs. Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SATYANARAYANA MURTHY, J

19th June, 2017

sj

