

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO. 6364 OF 2016

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India by the petitioner/plaintiff challenging the order dated 20.10.2016 in I.A.No.741 of 2016 in O.S.No.13 of 2003 passed by the Judge Family Court-cum-VII Additional District and Sessions Judge, Medak at Sangareddy, to recall and reopen and to permit to adduce further evidence by filing documents as detailed in the affidavit.

The petitioner/plaintiff is the private limited company filed suit for recovery of Rs.17,00,165/- against the respondent M/s Vijaya Laxmi Engineering Works. During trial, after cross-examination of witnesses examined on behalf of plaintiff, the respondent filed counter claim for recovery of Rs.18,56,749/- at a belated stage. The petitioner raised a contention that it is barred by limitation. When the matter reached this Court, ultimately this Court dismissed the revision permitting the petitioner to raise the question of limitation before the trial Court. During Trial, the respondent alleged that the petitioner has not shown an amount of Rs.3,03,385/- & Rs.3,05,122/-, the value of the scrap supplied by the respondent in statement of account, but an amount of Rs.3,42,679/- was wrongly shown as Rs.3,03,385/- for the value of scrap material supplied on behalf of N.V. Engineering Enterprises. Thus, the respondent mislead the Court by issuing cheque and demand draft by N.V. Engineering Enterprises and adjusted the same to its account and thus confused the petitioner during trial.

It is further contended that the cheque bearing No.588528 dated 27.02.2000 for Rs.7,00,000/- and banker cheque for Rs.2,00,000/- bearing no.590287 dated 26.06.2000 were also received by the petitioner, but the same are issued on behalf of M/s N.V. Engineering Enterprises and the said amount is adjusted to the account of M/s N.V. Engineering Enterprises. The respondent issued statement confirming balance for M/s Vijayalaxmi Engineering Works and M/s N.V. Engineering Enterprises. Therefore, the petitioner intended to file the said documents and in the absence of documents, it is difficult for him to contest the counter claim filed by the respondent and he also required to file certain documents regarding examination of sales tax and other particulars and sought to reopen the evidence of petitioner/plaintiff in the above suit and counter claim and permit him to adduce further evidence by filing certain documents.

The respondent/defendant filed counter before the Trial Court referring the admitted facts of the suit and also counter claim and examination of the witnesses on behalf of the plaintiff P.Ws 1 to 3 and also examination of the witnesses on behalf of the defendant company and on the other hand the respondent vehemently opposed the petition that when the respondent filed a counter claim, the Court allowed the counter claim and questioned the same, the petitioner filed a civil revision petition before this Court and the same was dismissed. The respondent in the counter submits that, as per the amendment to Order XVIII Rule 17-A, the Court should not allow the parties to reopen the case and adduce further evidence at a belated stage, as the petitioner filed this petition at a belated stage, as such, it is not maintainable.

The Trial Court after hearing both the counsel, dismissed the petition on various grounds. Aggrieved by the order passed by the Trial Court, the present civil revision petition is filed under Article 227 of Constitution of India, raising several contentions. The main contention of the learned counsel for the petitioner is that the counter claim was filed subsequent to examination of P.Ws.1 & 2 and though, it was challenged before the Court, on the ground that the counter claim is barred by limitation, the same was not considered. However, in C.R.P.No.4143 of 2008, this Court observed that Court should have taken into consideration that the reopening of the case and marking of documents is necessary to avoid multiplicity of claims and dismissed the petition. The petitioner filed I.A.No.741 of 2016 in O.S.No.13 of 2003 to reopen the evidence and receive the documents and reexamine some of the witnesses on its behalf. But the Trial Court did not consider the fact of filing counter claim and without giving any liberty to the petitioner to adduce evidence on the counter claim, the Trial Court dismissed the petition erroneously and prayed to set-aside the same.

Learned counsel for the petitioner during argument, while reiterating the contentions in the petition, placed reliance on the judgments of the Apex Court in **K.K. Velusamy v. N. Palanisamy**¹ **Vadiraj Naggappa Vernekar (dead) through LRs v. Sharadchandra Prabhakar Gogate**² and **Gayatri v. M. Girish**³. Based on the principles in the above judgments, the learned counsel for the petitioner contended that at any stage, the evidence of the parties can be reopened and witnesses can be recalled.

¹ (2011) 11 Supreme Court Cases 275

² (2009) 4 Supreme Court Cases 410

³ [2016(3) CLJ(SC) 89]

Whereas, learned counsel for the respondent while contending that when once the arguments were heard and the matter is posted for judgment, the Court cannot reopen the matter on any ground. Therefore, the present petition is not maintainable. To support his contention, learned counsel for the respondent placed reliance on **Arjun Singh v. Mohindra Kumar and others**⁴ and **Bagai Construction through its Proprietor Lalit Bagai v. Gupta Building Material Store**⁵ and prayed for dismissal of the civil revision petition based on the principles laid down in the above two judgments.

Considering rival contentions and perusing the material available on record, the point that arises for consideration is

“Whether the evidence of the petitioner (plaintiff in O.S.No.13 of 2003) be reopened at this stage when the suit is reserved for judgment by the Trial Court?”

P O I N T:

As seen from the allegations in affidavit and the relief claimed in the petition, the petitioner sought for reopening the suit to adduce evidence of respondent in the suit and to afford an opportunity to adduce further evidence by filing documents. The relief claimed in the petition is two fold. The first relief is to reopen the evidence of the defendant and the second relief is to permit the petitioner to file additional documents. But, curiously, filing petition for reopening Section 151 C.P.C is sufficient, as there is no other provision in the C.P.C to reopen the evidence of the petitioner/plaintiff. But claiming relief for filing documents mentioned in the affidavit is impermissible under Section 151 C.P.C, as there is specific provision in C.P.C. If the

⁴ AIR 1964 SC 993

⁵ (2013) 14 Supreme Court Cases 1

petitioner/plaintiff wanted to file additional documents, he can file documents under Order VII Rule 14(3) C.P.C, where a document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. Moreover, there is a clear bar under Civil Rules of Practice prohibiting to claim two reliefs in one petition. If, two reliefs are claimed, the Court may for sufficient reason, after affording opportunity to the petitioner limit the relief to any one of the reliefs claimed in the petitions. But, here, the Trial Court did not follow the procedure prescribed under Rule 55 of the Civil Rules of Practice, prohibiting claim for two reliefs in a petition. If, two reliefs are claimed, the Court may for sufficient reason after affording opportunity to the petitioner limit the relief to any one of the reliefs claimed in the petition. But here, the Trial Court did not follow the procedure prescribed under Rule 55 of Civil Rules of Practice. On this ground alone, the order is liable to be set-aside.

The main concentration of the learned counsel for the petitioner is that a witness can be recalled at any stage including the stage when the suit is reserved for judgment by exercising power under Order XVIII Rule 17-A C.P.C. Learned counsel for the petitioner relied on three judgments in support of his claim referred supra.

In Vadiraj Nagappa Vernekar case, 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 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.

In **Vadiraj Naggappa Vernekar²** case, the Supreme Court held as follows:

“In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required under Section 151, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. If there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to

such terms as the court may deem fit to impose. (paras 12 and 14)

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.” (para 15)

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 17 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. (paras 11, 9 and 10).”

In the later judgment of the Apex Court in **Gayatri**³ 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**⁶ 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

⁶ (2013) 5 SCC 202

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 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. Learned counsel for the respondent placed reliance on **Bagai Construction**⁵ case 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:

"The perusal of the materials placed by the Plaintiff which are intended to be marked as bills have already been mentioned by the Plaintiff in its statement of account but the original bills have not been placed on record by the Plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the Plaintiff but for the reasons known to it, still the Plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial Court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of judgment, we are of the view that the Plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the trial Court, there is no acceptable reason or cause which has been shown by the Plaintiff as to why these documents were not placed on record by the Plaintiff during the entire trial. Unfortunately, the High Court taking note of the words "at any stage" occurring in Order XVIII Rule [17](#)

casually set aside the order of the trial Court, allowed those applications and permitted the Plaintiff to place on record certain bills and also granted permission to recall PW-1 to prove those bills. Though power Under Section [151](#) can be exercised if ends of justice so warrant and to prevent abuse of process of the court and Court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the information as shown in the order of the trial Court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 of Code of Civil Procedure, the Plaintiff cannot be permitted.

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 plaint, 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.”

In **Arjun Singh⁴** case, the Apex Court in the said judgment, held as follows:

“1So far as the case before us is concerned the order under appeal cannot be sustained even on the basis that the finding recorded in disposing of an application under O. IX, r. 7 would operate as res judicata when the same question of fact is raised in a subsequent application to set aside an ex parte decree under O. IX, r. 13. This is because it is not disputed that in order to operate as res judicata, the court dealing with the first matter must have had jurisdiction and competency to entertain and decide the issue. Adverting to the facts of the present appeal, this would primarily turn upon the proper construction of the terms of O. IX, r. 7. The opening words of that rule are, as already seen, 'Where the Court has adjourned the hearing of the suit ex parte'. Now, what do these words mean ? Obviously they assume that there is to be "a hearing" on the date to which the suit stands adjourned. If the entirety of the "hearing" of a suit has been completed and the Court being competent to pronounce judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. XX, r. 1, there is clearly no adjournment of

"the hearing" of the suit, for there is nothing more to be heard in the suit. It was precisely this idea that was expressed by the learned Civil Judge when he stated that having regard to the stage which the suit had reached the only proceeding in which the appellant could participate was to bear the judgment pronounced and that on the terms of rules 6 & 7 he would permit him to do that. If, therefore, the hearing was completed and the suit was not "adjourned for hearing", O. IX, r. 7 could have no application and the matter would stand at the stage of O. IX, r. 6 to be followed up by the passing of an ex parte decree making r. 13 the only provision in order IX applicable. If this were the correct position, it would automatically follow that the learned Civil Judge would have no jurisdiction to entertain the application dated May 31, 1958 purporting to be under O. IX, r. 7, or pass any order thereon on the merits. This in its turn would lead to the result that the application under O. IX, r. 13 was not only competent but had to be heard on the merits without reference to the findings contained in the previous order"

Thus, when once the suit is reserved for judgment, question of reopen does not arise and it is for the Judge to decide the matter, in view of the law declared in both the judgments in **Arjun Singh⁴ & Bagai Construction⁵** cases. Once the Court completed hearing of the matter and reserved the matter for judgment, any party is not entitled to file a petition to reopen. But, the Trial Court went on discussing about recalling of witnesses based on several judgments of this Court and other courts.

In fact, that was not the issue before this Court. Since no petition was filed under Order XVII Rule 17 to recall any witness, but filed petition under Section 151 to reopen the evidence of the plaintiff and to permit him file additional documents on his behalf. But, the Trial Court mostly concentrated on power to recall of the witnesses and also failed to consider Rule 55 of Civil Rules of Practice. Therefore, the order passed by the Trial Court is erroneous on the face of record.

The judgments relied on by the learned counsel for the petitioner have no direct application to the present facts of the case, since the petition was filed only for reopening and receiving

documents but not for recalling the witnesses. But the decision relied on by the learned counsel for the petitioner does not have any bearing on this issue, but on account of failure of the Trial Court to follow the procedure prescribed under Rule 55 of Civil Rules of Practice, this Court has no option except to direct the Trial Court to follow Rule 55 of Civil Rules of Practice and decide the application in accordance with law, in view of the law declared by the Apex Court in the decisions referred supra, afresh, ignoring the scope of Order XVIII Rule 17, since no such relief was claimed in this petition.

In view of my foregoing discussion, the order dated 20.10.2016 in I.A.No.741 of 2016 in O.S.No.13 of 2003 passed by the Judge Family Court-cum-VII Additional District and Sessions Judge, Medak at Sangareddy is hereby set-aside, remanding the matter to the Trial Court with a direction to decide the matter by following Rule 55 of Civil Rules of Practice and the relief claimed in the petition, as expeditiously as possible, in any event not later than one month.

In the result, the civil revision petition is disposed of.

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

JUSTICE M. SATYANARAYANA MURTHY

Dated: 27.03.2017

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