

THE HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

CIVIL REVISION PETITION No.6495 of 2016

ORDER:

1) Assailing the order, dated 13.10.2016 passed in I.A.No.766 of 2016 in O.S.No.222 of 2008 on the file of the Principal Junior Civil Judge, Punganur, wherein an application filed under section 151 of C.P.C. to modify the order dated 08.08.2016 directing PW.1 to face further cross-examination or pass an order that her refusal enter into witness box entitles the Court to take an adverse inference, was dismissed, the petitioner, who is defendant No.2 in O.S.No.222 of 2008, filed the present Civil Revision Petition.

2) Originally one Sanduri Venkataramana, who is respondent No.1 herein, filed O.S.No.222 of 2008 seeking perpetual injunction restraining the defendants, their men and their agents from in any way interfering with his peaceful possession and enjoyment over the schedule property. After his death, respondent Nos.2 to 5 herein, were brought on record as legal heirs of Sanduri Venkataramana. In the said suit, respondent No.2 was cross examined as PW.1 and her cross-examination remained incomplete. The trial Court deferred the cross examination of PW.1. Without completing the cross examination of PW.1, respondent Nos.2 to 5 herein filed chief affidavit of PW.2, who was not a party to the suit. Having regard to the above, the Court below passed an order stating that since PW.1 did not turn up to

face further cross examination, her examination in cross on 25.07.2016 be ignored. Thereafter, the defendants filed I.A.No.766 of 2016 seeking modification of the order dated 08.08.2016 either directing PW.1 to face further cross examination or pass an order that her refusal to enter the witness box entitles the Court to take adverse inference. The said application came to be dismissed. Aggrieved by which the present Civil Revision Petition came to be filed.

3) Relying on the judgment of this Court in *Mahalingappa and others v. Kariyanna*¹ learned counsel for the petitioner would submit that the Court below erred in ignoring the cross examination of PW.1 on 25.07.2016.

4) The fact that PW.1 was cross examined to certain extent is not in dispute. Thereafter, PW.1 failed to attend the Court and got herself subjected to further cross examination. The Court below eschewed the cross-examination of PW.1 done by the defendants on 25.07.2016 vide its docket order dated 08.08.2016, which reads as under:

“Cost paid. The counsel for the plaintiff represented that PW.1 is not turn up to face continuation cross of PW.1. So, cross examination of PW.1 on 25.07.2016 can be ignored and the matter is posted for further evidence of plaintiffs side. Call on 11.08.2016.

5) In *Mahalingappa case (supra)* a learned single Judge of this Court while dealing with an identical issue held as under:

¹ (2009) 5 ALD 395

“Chapter X of the Indian Evidence Act, 1872, deals with the examination of the witnesses. As per Section 138 of the Evidence Act, a witness shall be first examined in chief and then he can be cross-examined if the opposite party so desires. In case a witness, after examination-in-chief, failed to make himself available for the cross-examination by the opposite party, may be his evidence in chief can be eschewed since there was no opportunity to the opposite party to test the veracity of the evidence in chief. However, when a witness was already cross-examined by the adverse party to some extent, merely because he failed to make himself available for further cross-examination, the entire evidence cannot be eschewed. It is relevant to note that cross-examination under Section 138 of the Evidence Act need not be confined to the facts to which the witness testified in his examination-in-chief but he can be examined as to the whole of the case. In the present case, Ex.A3 document was marked on behalf of the plaintiff through DW1 and according to the plaintiff certain material admissions were also made by DW1 during his cross-examination. In the circumstances, the eschewal of the entire evidence of DW.1 causes prejudice to the plaintiff. It is also relevant to note that setting aside such an order does not result in compelling DW.1 to subject himself to further cross-examination, but it would only enable the Court to take into consideration the evidence already recorded. Hence, the order dated 17.08.2007 eschewing the evidence of DW.1 was erroneous and the said procedure adopted by the Court below resulted in failure of justice.”

6) From the judgment referred to above, it is clear that Section 151 of C.P.C. saves the inherent powers of the Court to pass such orders as may be necessary to meet the ends of justice so long as such order is not contrary to the express provisions of any statute.

7) Having regard to the judgment referred to above wherein this Court held that even if the witness is cross examined by the adverse party to some extent, merely because she failed to make herself available for further cross-examination, the entire evidence cannot be eschewed. Hence, the order dated 08.08.2016 eschewing the evidence of PW.1 is set aside. It is always open to the petitioner to take steps for production of PW.1, in accordance with law.

8) Accordingly, the Civil Revision Petition is disposed of. There shall be no order as to costs.

9) As a sequel thereto, Miscellaneous Petitions pending if any, shall stand closed.

JUSTICE C. PRAVEEN KUMAR

23.02.2017
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