

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION No.1867 OF 2018

ORDER:

Aggrieved over the order dated 2.4.2018 in I.A. No.1763 of 2017 in O.S. No.467 of 2010 on the file of II-Additional Chief Judge, City Civil Court, Hyderabad, allowing the application filed under Order XVIII Rule 17 of Civil Procedure Code, 1908 (for short, 'C.P.C.') to recall D.W.1 for further examination, the present Civil Revision Petition is filed under Article 227 of the Constitution of India by the respondent-defendant.

2. Heard Sri Shyam S. Agarwal, learned counsel for the revision petitioner and, Sri S. Malla Rao, learned Counsel for the respondent.

3. Learned trial Judge observing that the respondent-petitioner is the plaintiff in the suit; the suit is filed for recovery of Rs.57,01,179/- based on promissory notes; on perusal of the record it is clear that after cross-examination of D.W.1 no other trial work was conducted in the suit; it may be true that the petitioner did not mention the grounds on which he intends to cross-examine the witness; however, he specifically stated that certain important questions were not put to witness by oversight, no serious prejudice will be caused to the respondent by allowing the application and since the suit is of the year 2010, it is just and proper to allow the petition in the interest of

justice for just decision in the main suit by imposing certain conditions allowed the petition on payment of costs of Rs.1,000/- to the revision petitioner/respondent/defendant and also imposed condition that the respondent herein shall cross-examine the witness within a week from that day failing which he would loose right of further cross-examination.

4. Sri Shyam S. Agarwal, learned counsel for the revision petitioner would submit that the affidavit itself was very vague and the cross-examination of D.W.1 was comprehensively done in a suit for recovery of money and though, the affidavit is extracted without referring to on which of the aspects D.W.1 could not be cross-examined and the same was due to oversight, still, the Court below went wrong in acceding to the request on the mere ground that no prejudice would be caused to the revision petitioner and that no further witnesses were examined after P.W.1 was examined.

5. Learned counsel relies on a decision in **Md. Karamathula Khan and another v. Akkireddy Chandraiah**¹ to fortify his submission that the application to recall D.W.1 is intended to prevent abuse of process of the Court nor did set out any convincing ground that the request in the application is intended to achieve the ends of justice, and, therefore, according to the learned counsel, the reason assigned by the Court below that it is just and

¹ 2017 (2) ALT 378

proper to allow the application in the interest of justice for just decision in the main suit is not tenable.

6. Per contra, learned counsel for the respondent would submit that subsequent to examination of D.W.1 no further trial took place, and, therefore, no prejudice would be caused to further cross-examine D.W.1 and the trial Court has got powers to recall witness for further cross-examination under Order XVIII Rule 17 of C.P.C. on an application filed by the party since such power is independent of Section 151 of C.P.C. and the powers of the Court to act under Order XVIII Rule 17 of C.P.C. are very wide and purely discretionary, and, therefore, no fetter on the rights of either party or powers of the Court in coming to the conclusion that a party can ask the Court to exercise power.

7. This Court (myself being the party) in **Mohd. Karamathula Khan** (1 supra) had the occasion to refer to a catena of decisions in *K. K. Velusamy v. N. Palanisamy* [2011 (4) SCJ 48 = 2011 (5) ALT 12.1 (DN SC)]; *T. Ramachandra Murthy v. K. Rama Murthy and others* [AIR 1980 AP 265 (1)] ; *Binder Singh v. Babu Ram* [2007 LawSuit (P&H) 1125]; *Vadiraj Nagappa Vernekar (dead) through L.Rs. v. Sharadchandra Prabhakar Gogate* [2009 (3) ALT 25 (SC) = (2009) 4 SCC 410]; *Balakrishna Shivappa Shetty v. Mahesh Nenshi Bhakta and others* [AIR 2003 Bombay 293]; *Shaik Gousiya Begum v. Shaik Hussan and others* [2014 (1) ALT 268]; and *A.R.K.Raju v. A.V.S. Raju* [2015 (1) ALT 509].

8. In *K. K. Velusamy* (supra) it was held that the power to recall witness under the provisions of Order XVIII Rule 17 of C.P.C. for further cross-examination of witness can only be exercised for the purpose of clarifying the Courts or to clear any ambiguity, but not intended to fill up, any omission since the expression occurring in the said provision “put such questions to him as the Court thinks fit” explains.

9. In *Binder Singh* (supra), the Hon’ble High Court of Punjab and Haryana held the reason that some material question could not be put to witness when he was cross-examined cannot be a ground for recalling him as it cannot be made the basis for recalling the said witness.

10. In *Vadiraj Nagappa Vernekar* (supra) the Hon’ble Supreme Court held that while dealing with the power under the provisions of Order XVIII Rule 17 of C.P.C. 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 be caused no prejudice to the parties as that is not the scheme or intention of Order XVIII Rule 17 of C.P.C., and the power to recall any witness under Order XVIII Rule 17 of C.P.C. can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, and 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 cross-examination.

11. When the affidavit filed along with petition for recalling D.W.1 by the respondent herein is seen, what is stated in paragraph-4 by the respondent/petitioner is relevant. It reads thus:

“4. I submit that after going through the cross-examination of D.W.1, I noticed that few important questions/suggestions relying to the matters at issue which are necessary for a just decision in the matter by oversight or inadvertently were not put to D.W.1. Hence, this petition. There is no delay in filing this petition. The suit is coming up for further evidence of D.W.1. If D.W.1 is recalled for further cross-examination the same will not hamper the progress of the trial in the suit as the suit is coming up for further evidence of defendant. The Hon’ble Court has got ample power to pass order recalling D.W.1 for further cross-examination. No prejudice will be caused to D.W.1 if his evidence is recalled as he has not adduced further evidence so far. If D.W.1 is not recalled for further cross-examination I will be put to irreparable loss and damage.”

12. Thus, when examined to find out the reason assigned in making a request to recall D.W.1, there is nothing to show in the affidavit that D.W.1 is required for further cross-examination to clarify any ambiguity or clear any ambiguity. Further, what all averred in his affidavit is that if D.W.1 is not recalled for further

cross-examination, he will be put to irreparable loss and damage. This particular averment mentioned in paragraph-4 of his affidavit is not supported by any reasoning as to in what way irreparable loss and damage would occasion in case of D.W.1 is not recalled and not allowed to be cross-examined further.

13. It is no doubt true, he has stated that the Court has got ample power to recall D.W.1 and no prejudice will be caused to D.W.1 if he has not adduced further evidence so far. But, the dicta laid down by the Hon'ble Apex Court in *K.K. Velusamy* (supra) cannot be overlooked for the reason, though, the power is discretionary, but it can be used sparingly in appropriate cases to enable the Court to clarify any doubts which may have in regard to the evidence led by the parties and not intended to be used to fill up omissions in the evidence of a witness, who has already been examined.

14. Turning to the reason assigned by the Court below in ordering the petition that the suit is of the year 2010 and that it is just and proper to allow the petition in the interest of justice for just decision, certainly, it cannot be said that it is valid reason as nothing is shown by the respondent herein to justify the request to recall D.W.1.

15. The only ground shown by the respondent herein in the request to recall D.W.1 mentioned in his affidavit is that certain important questions were not to put to D.W.1 due to advertence and

the same was noticed after the respondent has gone through the deposition of D.W.1 cannot be viewed as convincing to allow the said request by the Court below for the reason in *Binder Singh* (supra) it was held the reason that some material question could not be put to a witness when he was cross-examined cannot be a ground for recalling him as it cannot be made the basis for recalling the said witness.

16. Turning to the submission of the learned counsel for the respondent that the order passed by the Court below is just and proper and such request can be acceded to by the Court under Order XVIII Rule 17 of C.P.C., relies on a ruling in **S.S.S. Durai Pandian v. S.A. Samuthira Pandian**² wherein a learned Single Judge of Madras High Court held that the trial Court has the power to recall witness under Order XVIII Rule 17 of C.P.C. on an application filed by the party and such power is independent of Section 151 of C.P.C. and the powers of the Court to act under Order XVIII Rule 17 of C.P.C. are very wide and is purely discretionary and, however, the same ought to be exercised with the greatest care and only in the most peculiar circumstances and the right of the Court to act under this Rule is not restricted to action of its own motion and there are no fetter on the rights of the either party or the powers of the Court in coming to the conclusion that a party can ask the Court to exercise the power. Though, the learned counsel relied on this decision, but, however, learned Single Judge indeed referred to the caution given by the

² 1998 (2) CCC 9 (Mad.)

Hon'ble Apex Court in holding that exercise of power ought to be with the greatest care and only in the most peculiar circumstances. When the reasons shown by the respondent in the affidavit extracted in the above are seen, he has not made out any case to arrive at that, peculiar circumstances occur in the case at hand on account of deposition given by D.W.1 earlier which compelled him to make such request by filing the application to recall D.W.1 for further cross-examination. Therefore, the ruling in *S.S.S. Durai Pandian* (2 supra) would not render any assistance to the respondent herein to justify the order under challenge herein.

17. Even looking at the order, the reason assigned by the learned trial Judge in allowing the application, despite nothing is stated in the affidavit to substantiate the request has been that he opines that it is just and proper to allow the petition in the interest of justice for just decision in the main suit by imposing certain conditions. He imposes a condition of payment of costs of Rs.1,000/- by granting week's time to fulfill the condition imposed by him that in case the petitioner fails to cross-examine the witness within a week he will loose right of further cross-examination would in fact reflects that he acceded to the request in a routine manner.

18. Hence, the order under challenge suffers from material irregularity warranting interference, and, therefore, it is liable to be set aside, and, accordingly, set aside allowing the present Civil Revision Petition.

19. The present Civil Revision Petition is, therefore, allowed directing the parties to bear their respective costs.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the Civil Revision Petition shall stand closed.

A. SHANKAR NARAYANA, J

Dt. 02.04.2018
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