

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.2275 of 2018

ORDER:

The revision petitioners are defendant Nos.1, 2, 3, 5, 6 & 10 and revision respondent is the sole plaintiff in OS.No.353 of 2008 pending on the file of learned Principal Senior Civil Judge, Nellore, which is a suit for partition.

The suit pending since more than a decade while coming for defendants' evidence, chief affidavit of 1st defendant filed was taken on oath as DW.1 chief examination. Subsequently to face cross examination he failed to attend, the trial Court rightly treated the evidence with no value for that though used the word eschew unknown to law on 05.02.2018. The trial Court should have been permitted the further evidence of the defendants if any rather than closing not only evidence of D.1 but also other defendants for even DW.1 failed to attend and his evidence in chief treated with no value as not chosen to face the cross examination by due appearance before the Court.

It is impugning the dismissal order of the reopen by setting aside the order of eschew on 05.02.2018, vide order in I.A.No.162 of 2018 dated 14.03.2018, the present revision is maintained. Respondent even served by registered post and acknowledgment received failed to attend in person or through advocate.

Heard learned counsel for the petitioners and taken as heard the respondent/plaintiff and perused the impugned order and other material on record.

In **Cheedella Padmavathi (died) per LRs Vs. Cheedella Lakshminarasimha Rao (died) per LRs**¹, this Court held at Paras 14(f)(iii) and 14(f)(iv) as follows:

14(f)(iii). It is also held that in assessing the value to be attached to oral evidence, particularly as Judge of fact, it is open to the appellate Judges to test the evidence placed before them on the basis of probabilities, irrespective of lack of effective or no cross examination by opposite party, Court is not bound to rely, if probabilities show otherwise, but for to consider in the facts if so to construe as admission from facts deposed supported by plea not disputed in cross examination as a rule of essential justice. vide - **A.E.G.Carapiet Vs A.Y.Derderian**².

14(f)(iv). **Rules of justice require that the party cross examining must put the crucial and important part of his case to the witness of the other side in his cross-examination** and if no question is put to the witness in the cross examination with regard to a certain fact challenging the same, then such fact has to be presumed to be true. No doubt for that conclusion it is to be seen, whether there is any pleading in this regard and in the absence of which, merely because the attention of the said stray sentence of the witness, inadvertently not drawn attention while cross-examination to put a question on it by itself does not amount to admission but for to read the entire evidence as a whole to cull out such is the admission or not from non-testing by cross-

¹ 2015 (5) ALT 634

² AIR 1961 Calcutta 359

examination of said sentence-vide- **Shri Ravinder Kumar Sharma Vs RFA 757/2002 16 State of Assam**³.

No doubt as held by the Calcutta High Court in **AEG Carapiet supra** with reference to Sections 134 and 137 of the Indian Evidence Act that cross examination is vital for any party from his chief examination to treat as evidence tested by cross examination and till then the evidence is not complete even of the witness for consideration. It is one thing the witness having filed the chief examination failed to attend and not even filed any application for adjournment if at all could not attend in advance and another thing that too in the old and identified suit that too pending more than a decade. Thus so far as by treating with no value concerned, there is nothing but for any special reasons assigned for non-attendance in IA.No.162 of 2018 filed to set aside that closed order/eschew order dated 05.02.2018 it is stated that he could not attend as he was to attend funeral ceremony of close relative and informed the advocate for taking adjournment and it could not be properly mentioned. Once it is justifiable, the party could have filed a petition in advance that was not done.

Having regard to the above, had it been properly brought to the notice of the Court by a petition the Court could not have been closed by eschew, but for not bringing

³ 1999 SAR(Civil) 837

the said factum and subsequently said factum mentioned in a petition, the Court should have been considered rather than dismissal.

Having regard to the above, this Civil Revision Petition is allowed by setting aside the dismissal order and by restoring the DW.1's chief examination by directing the defendants to see DW.1 shall appear before the Court on the next day being fixed by the Court to face cross examination to be recorded either by the Court or through advocate commissioner. It is subject to costs of Rs.4,000/- of which Rs.2,000/- payable to the plaintiff and Rs.2,000/- payable to the Army Welfare Fund, within one week from the date of receipt of this order before the trial Court and it is on deposit of the costs only the revive of the defendant's evidence including of the DW.1 to face cross examination before the trial Court arises for its further proceeding with the matter expeditiously and said non-compliance without further reference to this Court be treated as dismissal in toto of the revision.

Miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 06.07.2018
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