

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.5769 of 2015

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed challenging the Order dt. 18.11.2015 in I.A.No.758 of 2015 in O.S.No.02 of 2012 on the file of VI Additional District and Sessions Judge, Markapur, dismissing the petition filed under Section 151 CPC to reopen the evidence of plaintiffs alleging that the plaintiffs filed the suit for specific performance against the defendant and the defendant contested the suit by filing Writing Statement and the plaintiffs could not adduce any evidence in support of their claim and consequently, the trial Court closed the evidence of plaintiffs and recorded the evidence of defendant and marked Exs. B.1 to B.10 and the suit is coming up for arguments.

The reason assigned in the affidavit is that "Unfortunately, the plaintiffs could not produce the evidence of plaintiffs' side to prove the case. There are no intentional latches on the part of the plaintiffs". Except this ground, no other ground is made out in the entire affidavit.

The respondent/defendant filed Counter denying the material allegations *inter alia* contending that the suit was posted for the evidence of plaintiffs and Bhuvanagiri Rangaiah filed his affidavit on 31.01.2013, but did not turn up and his evidence remained as it is on record. But, the trial Court closed the evidence of plaintiffs and posted the suit for defendant's evidence and after some time, the defendant was examined as Dw.1 and later the matter was protracted sufficiently for a long period of time and ultimately the defendant was cross examined on 09.06.2015 and posted the suit for further evidence of defendant. But, the defendant closed his evidence on 10.07.2015 and posted the suit for argument on

17.07.2015. Thereafter, the plaintiffs filed interlocutory application under Section 151 CPC to reopen the evidence of plaintiffs permitting the defendant to cross examine Pw.1 without assigning any reason and that there are no grounds to allow the petition and prayed to dismiss the petition.

Upon hearing both the counsel, the trial Court passed the Order impugned in this revision dt. 18.11.2015 dismissing the application filed under Section 151 CPC since no reason muchless sufficient reason to allow the petitioners/plaintiffs to adduce evidence by reopening the evidence of petitioners/plaintiffs.

Aggrieved by the Order impugned in this revision dt. 18.11.2015, the present Revision is filed mainly contending that the application filed under Section 151 CPC cannot be dismissed on the ground of delay and the suit is filed specific performance where substantive rights of the parties are involved and the trial Court failed to exercise its jurisdiction that vested on the petitioners and committed an error in dismissing the petition and prayed to set aside the Order passed by the trial Court allowing I.A.No.758 of 2015 in O.S.No.2 of 2012 on the file of VI Additional District Judge, Markapur.

During hearing, Sri M. Venkateswaralu Chakkilam, learned counsel for the petitioners herein/plaintiffs contended that where substantial rights of the parties are involved in the suit, the Court has to exercise discretion to allow the parties to adduce evidence to decide the case on merits. The suit is filed for specific performance involving Ac.14.00 cents of agricultural land, it is also contended that when the plaintiffs did not adduce evidence, the course is open to the Court to following the procedure under Order 17 Rules 2 and 3 CPC, but the Court cannot

proceed on merits and thus committed an error in dismissing the petition and prayed to set aside the same.

Learned counsel for the respondent/defendant contended that no cause muchless less good or sufficient cause is shown in the entire affidavit, which presented the petitioners from adducing evidence in the matter and the petitioners protracted the suit sufficiently for a long time and when the suit is posted for argument in the year 2015, the petitioners, conveniently, obtained interim order and dragged the matter till today and prayed to dismiss the petition confirming the Order passed by the trial Court.

The petition is filed to reopen the evidence of the plaintiffs on the ground that the petitioners/plaintiffs could not adduce evidence, but filed an affidavit of Pw.1 under Order 18 Rule 4 CPC, but he was not tendered for cross examination by the adversary for one reason or the other. One of the grounds urged by the learned counsel for the petitioners during hearing is that there was no proper communication between the petitioners and their counsel to adduce evidence. When PW.1 filed his affidavit under Order 18 Rule 4 CPC, he is supposed to know the date of adjournment for his cross examination, but for one reason or the other, the witness was not tendered for cross examination by the defendant's counsel. Thereupon, having no other alternative, the Court below closed the evidence. Moreover, the petitioners cross examined Dw.1 on 09.06.2016, but did not raise their little finger to file an application for reopening the evidence, but leisurely after posting the suit for argument, they filed the present petition under Section 151 CPC to reopen the evidence at the convenience of the petitioners.

The affidavit of the petitioners is silent as to the reason which prevented them to adduce evidence. Though the suit pertains to

Ac.14.00 of land and substantial rights of the parties are involved, the petition cannot be allowed on mere asking and it is for the petitioners to disclose the reason for failure to adduce evidence. When no reason is assigned, the Court is not under obligation to exercise its direction merely because of substantial rights of the parties are involved. When the petitioners say about substantial rights of the parties are involved in the suit, they must be more diligent than an ordinary suit. But, they exhibited sheer negligence in prosecuting the proceedings having filed an affidavit of Pw.1 under Order 18 Rule 4 CPC, in lieu of examination in chief, failed to tender himself for the cross examination by adversary. This itself sufficient to conclude that the petitioners were negligent in prosecuting the proceedings and at his convenience after cross examination of Dw.1, approached this Court by filing the petition under Section 151 CPC i.e., almost after 3 years from the date of closure of the evidence. In such a case where the petitioners were negligent and they are not entitled to claim discretionary relief.

One of the contentions raised before this Court is that when the plaintiffs did not adduce evidence, the course open to the Court is to dismiss the suit for non-prosecution. Instead of doing so, the trial Court proceeded to record the evidence of Dw.1 and posted the suit for argument. According to Rule 17 (2) CPC, where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed under Order IX CPC or make such other order as it thinks fits. But, according to Andhra Pradesh State Amendment, an explanation was inserted and according to it, the mere presence in Court of a party or his counsel not duly instructed shall not be considered to be an appearance of the party within the meaning of this Rule. Rule 3 CPC further says that where any party to a suit to whom time has been granted, fails to

produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed. The Court may notwithstanding such default, if the parties are present, proceed to decide the suit forthwith or if the parties are , or any of them is absent, proceed under Order 2 of Rule 17 CPC.

The Andhra Pradesh Amendment thereto further added to proviso to Rule 3, which reads as follows: 'provided that in a case where there is default under this rule as well as default of appearance under Rule 2, the Court may proceed under Rule 2. In view of Andhra Pradesh Amendment to Rule 3 CPC, the suit shall be disposed of under Rule 2 only, not under Rule 3 though party failed to appear on the date of adjournment.

In the facts of the present case, the petitioners filed suit for specific performance and after framing issues, the suit was posted for trial. During trial, Pw.1 filed his affidavit under Order 18 Rule 4 CPC in lieu of examination in chief and later posted the matter for cross examination by the defendant's counsel. Conveniently, the witness (Pw.1) did not appear before the Court and tendered himself for cross examination by the counsel for the adversary. The normal procedure being followed by the Courts to eschew the examination in chief when the witness was not tendered for cross examination. Instead of following such normal procedure, the trial Court recorded the evidence of defendant and accordingly examination in chief and cross examination was recorded since the defendant reported no further evidence and posted the suit for argument. At that stage, the petitioners came up with this petition under Section 151 CPC to reopen the evidence without filing any application for recall of Pw.1, who filed his affidavit under Order 18 Rule 4 CPC in lieu of examination in chief tending for cross examination by the adversary. The

conduct of the parties clearly discloses that the petitioners are not diligent in prosecuting the proceedings and on the other hand protracted the suit for a considerable period from 2013 onwards for one reason or the other though they are conscious about their right to adduce evidence and having filed affidavit under Order 18 Rule 4 CPC, thereafter did not adduce evidence even after cross examining Dw.1 and no steps have been taken to get the evidence reopened. The conduct of the parties itself suffices to deny the discretionary relief irrespective of substantive rights of the parties involved in the matter. Therefore, the trial Court rightly dismissed the petition declining to reopen the evidence on behalf of plaintiffs and apart from that there is a possibility to fill up lacuna in the evidence taking advantage of cross examination of Dw.1 in the event this Court permit the petitioners to adduce evidence. Therefore, I am not inclined to interfere with the findings impugned in this revision and the petition is liable to be dismissed as it lacks merit.

Accordingly, this Civil Revision Petition is dismissed. No costs.

As a sequel to it, miscellaneous petitions, if any pending in this appeal, shall stand closed.

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M. SATYANARAYANA MURTHY, J

Date: 19.02.2018

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THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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Dt. 19.02.2018

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