

**HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

**CIVIL REVISION PETITION No.4808 of 2018**

**ORDER :**

This Civil Revision Petition is arising out of the order dated 10.07.2018 in I.A.No.51 of 2018 in O.S.No.56 of 2010 passed by the learned Junior Civil Judge at Nandalur, Kadapa District (trial Court), dismissing the application filed by the petitioner/plaintiff under Section 151 of C.P.C., seeking to reject the evidence of DW.1 as not maintainable and not admissible under law.

The revision petitioner is the plaintiff and the respondent is the defendant in the suit O.S.No.56 of 2010.

The brief facts of the case are that the plaintiff filed suit in O.S.No.56 of 2010 before the trial Court seeking for permanent injunction against the defendant. On behalf of defendant, chief affidavit of the defendant (DW.1) was filed on 04.03.2016, but on that day he was not present for cross-examination before the trial Court. Therefore, the trial Court eschewed his evidence. Aggrieved by that, the defendant has filed I.A.No.153 of 2016 seeking to permit him to examine his son on his behalf, and the trial Court has allowed the application on 22.12.2016.

Aggrieved by the same, the plaintiff has preferred C.R.P.No.4037 of 2017 before this Court and the same was

allowed vide order dated 30.11.2017. The order dated 22.12.2016 in I.A.No.153 of 2016 passed by the trial Court was set aside by the above order.

By way of docket order dated 11.07.2017, the trial Court has allowed the parties to mark the documents in the suit. The plaintiff has preferred a revision against those orders in C.R.P.No.4079 of 2017 before this Court and the same was allowed on 30.11.2017.

Thereafter, the defendant filed his chief affidavit and the trial Court also received the same and posted the matter for cross-examination of the defendant.

At that stage, the plaintiff has filed the present I.A.No.51 of 2018 under Section 151 of C.P.C., seeking to reject the evidence of DW.1 as not maintainable under law.

After hearing both sides, the trial Court has dismissed the said application through the impugned order dated 10.07.2018.

Heard learned counsel for the petitioner/plaintiff and the learned counsel for the respondent/defendant. Perused the material on record.

Learned counsel for the petitioner submits that in the order dated 30.11.2017 in C.R.P.No.4037 of 2017, this Court clearly observed that if the defendant wants to examine any

witness on his behalf, he can examine him, but the trial Court without examining any other witness has permitted the defendant to be examined as a witness. Further, the trial Court without setting aside the eschewing of evidence order, has allowed the defendant to file his affidavit.

Learned counsel for the petitioner further submits that the order passed by the trial Court in dismissing his application is not in accordance with law. It is further submitted that having eschewed the evidence of the defendant, the trial Court cannot straight away accept the affidavit of DW.1 without the order being set aside.

At this juncture, it is appropriate to refer to para-3 of the order dated 30.11.2017 in C.R.P.No.4037 of 2017, wherein it was observed as under:

“A perusal of the record reveals that the petitioner filed O.S.No.56 of 2010 on the file of the Court of the Junior Civil Judge, Nandalur against the respondent seeking perpetual injunction. After closure of the evidence on petitioner's side, the respondent filed his chief examination affidavit. For one reason or the other, the respondent did not choose to appear before the trial Court for the purpose of cross examination. Therefore, his chief examination affidavit was eschewed. Thereafter, the respondent filed I.A.No.153 of 2016 under section 151 CPC seeking permission of the Court to examine his son on his behalf. The trial court allowed that petition. Hence the present Civil Revision Petition by the petitioner/plaintiff.”

In fact the plaintiff filed a suit for perpetual injunction against the defendant. If the defendant is not contesting the matter and any order is passed by the trial Court, it amounts to an ex parte order. Admittedly, as the defendant could not give evidence before the trial Court due to ill-health, his evidence was eschewed and he was given an opportunity to examine any other witnesses on his behalf to prove his case. Now, the defendant, without getting set aside the said order of eschewing of evidence of defendant, has filed his chief affidavit and the same was accepted by the trial Court.

The impugned order dated 10.07.2018 in I.A.No.51 of 2018 passed by the trial Court is suffering from some infirmity. Having eschewed the evidence of the defendant, again the trial Court cannot straight away accept the evidence of DW.1 without getting it set aside. No doubt, this is a technical aspect of the evidence.

The defendant has a right to contest the matter and that right cannot be forfeited, as he was suffering with ill-health. His rights are to be protected and the same cannot be defeated by virtue of the technicalities, that the eschewing of evidence was not set aside by the trial Court, and received the affidavit of DW.1.

However, in view of the fact that the defendant himself wants to come to the witness box and give evidence, instead

of remanding the matter to the trial Court merely for setting aside the order passed by it eschewing the evidence of DW.1 and to permit the defendant to give evidence, the interest of justice would be met if some costs are imposed for the inconvenience caused to the petitioner/plaintiff.

However since some inconvenience was caused to the plaintiff because of the defendant not coming to the witness box for giving evidence, and subsequently tried to bring his son to give evidence on his behalf, and the parties approaching this Court, and thereafter the trial Court accepting the evidence of DW.1 and dismissing I.A.No.51 of 2018, is nothing but multiplicity of proceedings as they did not advance the cause of justice in the matter.

In view of the submissions made by the learned counsel for the petitioner and the respondent, who have fairly conceded for allowing the revision on payment of costs payable to the petitioner, the following order is passed:

In this regard,

- (a) On condition of the respondent paying costs of Rs.7,500/- (Rupees seven thousand five hundred only) to the petitioner and get ready for cross-examination within fifteen (15) days from the date of receipt of a copy of this order, and

(b) On such payment of costs, the trial Court shall take up the matter for disposal in accordance with law.

With the above observations, this Civil Revision Petition is disposed of. No order as to costs.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

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GUDISEVA SHYAM PRASAD, J

16.11.2018.

NOTE: Issue C.C. by 19.11.2018.  
(B/O)  
Msr



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Msr