

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

Civil Revision Petition No.5255 of 2018

ORDER:

Aggrieved by the order dated 20.08.2018 in I.A.No.228 of 2018 in O.S.No.6 of 2006 passed by the learned V Additional District and Sessions Judge, Bhongir, allowing the petition filed by the plaintiff under Order XVIII Rule 3 r/w Section 151 CPC seeking to set aside the eschewment order dated 17.04.2015 and discard the chief examination affidavit already filed by giving an opportunity to file fresh chief examination affidavit, the defendants 1 to 3 preferred the instant CRP.

2) The parties are referred as they were arrayed in the suit before the Trial Court.

3) The factual matrix of the case is thus:

a) The plaintiff filed the suit—O.S.No.6/2006 for specific performance of agreement of sale dated 12.01.2005 against defendants 1 to 3. The 1st defendant filed his written statement contending that he was not the owner of the suit land and the same belongs to defendants 2 to 15 and hence the plaintiff impleaded defendants 2 to 15 in the suit. Subsequently, defendants 2 to 15 created documents in favour of defendants 16 to 29 and so the plaintiff got impleaded defendants 16 to 29 in the suit and filed amendment petition with an intention to seek alternative relief. The said petition was allowed and amendment was

carried out. Thereafter, the plaintiff filed chief examination affidavit and also got marked documents. During cross-examination, the defendants filed a petition to set aside the order of amendment petition and the same was dismissed. Aggrieved, the defendants preferred revision before the High Court, wherein the High Court allowed the revision directing the Trial Court to give an opportunity to defendant to hear the amendment petition but subsequently the petitioner/plaintiff not pressed the amendment petition. The defendants filed a memo stating that chief affidavit filed by plaintiff is containing alternative relief and the same was not pressed. Hence the plaintiff filed fresh chief affidavit. The Trial Court in its order dated 17.04.2015 eschewed the chief affidavit instead of discarding the same but the plaintiff was under the impression that his chief affidavit was discarded and filed another affidavit and the same was coming up for cross-examination of PW.1. The defendants instead of cross-examining PW.1, took an objection that once the evidence of a party is eschewed, he cannot be examined and hence, the plaintiff filed the petition to set aside the eschewment order dated 17.04.2015.

b) The defendants 1 to 3 filed counter denying all the allegations made in the petition and contended that the petition was liable to be dismissed as the same was filed after lapse of 3 years i.e, 1066 days and no condonation delay petition was filed. It is further contended that the Trial Court cannot set aside its own order.

c) The Trial Court allowed the I.A.No.228/2018 on the observation that an opportunity should be given to petitioner to adduce evidence and

to mark documents by filing fresh chief affidavit of PW.1 and also an opportunity to other side for cross-examination.

Hence the CRP by defendants 1 to 3.

4) Heard arguments of Sri G. Krishna Murthy, learned counsel for petitioners and Sri Kiran Palakurthy, learned counsel for 1st respondent/ plaintiff. Respondents 2 to 27 are not necessary parties in this CRP vide cause title.

5) As can be seen, the difference between the earlier chief affidavit and subsequent chief affidavit is that in the earlier one the plaintiff sought for alternative relief of return of advance amount and also payment of damages. This prayer for alternative relief can be found in paras-15 and 17 of the earlier chief affidavit. However, in the subsequent chief affidavit, the plaintiff has not made the alternative relief as contained in the earlier chief affidavit. Sans this difference, both the chief affidavits in substance are one and the same. The reason for withdrawal of the alternative relief in the subsequent chief affidavit by PW1, it appears, to be that after filing of the earlier chief affidavit the defendants have filed a memo taking an objection for PW1 seeking alternative relief on the ground that alternative relief was not pressed and therefore in the evidence he cannot claim alternative relief. Therefore, plaintiff filed a memo stating that he was filing a fresh chief affidavit and former chief affidavit may be eschewed.

6) In the considered view of this Court, instead of seeking eschewment of the entire chief affidavit and filing of fresh affidavit, the plaintiff ought to have submitted to the Court that he was not pressing the alternative relief in his earlier chief affidavit and thereupon the Court ought to have proceeded with the cross-examination basing on the remaining part of his earlier chief examination. On the other hand, the plaintiff requested for eschewing his entire chief affidavit which was allowed and he filed a fresh chief affidavit. It is true, as rightly argued by the counsel for defendants, once evidence of a witness is eschewed, the same witness cannot file a fresh affidavit with the same evidence which would amount to nullifying the earlier order of eschewing his evidence. Therefore, in the instant case, as observed, the plaintiff ought to have not pressed his claim for alternative relief made in the earlier chief affidavit and the trial Court ought to have proceeded with the remaining part of his evidence by directing the defendants to cross-examine the PW1. Thus, the entire episode manifests a technical error committed by the plaintiff as well as the Court to some extent. However, this technicality will not cause any prejudice to the defendants if the impugned order is modified suitably.

7) In the result, the impugned order in I.A.No.228 of 2018 is set aside and the trial Court is directed to restore the earlier chief affidavit of PW1 by deleting the portion of alternative relief prayed by the plaintiff in paras-15 and 17 of his affidavit and the defendants be directed to cross-examine PW1 accordingly. The subsequent chief

affidavit filed by the plaintiff being redundant shall be discarded by the trial Court.

8) This CRP is ordered accordingly. No costs.

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

U. DURGA PRASAD RAO, J

Date: 11.12.2018

Scs/Murthy

