

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.R.P. No.3260 of 2016

ORDER:

The revision petitioner is the defendant and the revision respondents are the plaintiffs in O.S.No.364 of 2010 on the file of IV Additional District Judge, Visakhapatnam, filed for the relief of specific performance of the contract for sale dated 09.02.1984 covered by the amended agreement dated 09.06.1998 and another agreement dated 08.04.1999 with alternative relief of refund of the advance amount of Rs.4,85,000/- with interest and for such other reliefs. The suit was decreed *ex parte* on 09.06.2011 from the chief examination of PW1 with reference to the Sale Agreement *supra* and Xerox copies of the orders in W.P.No.5417 of 1985, W.P.No.15212 of 2010, W.P.No.21487 of 2010 and W.P.No.21493 of 2000 besides the letter addressed by the plaintiffs to the defendant and the Power of Attorney executed by the plaintiffs 1 and 2 in favour of plaintiff No.3. The plaint schedule property for Ac.2.635 cents is the defendant's 1/4th share out of total extent of Ac.10.54 cents in T.S.No.1028, Block No.44 (which surrounds T.S.No.1029 pertaining to Circuit), Waltair Ward within the limits of Greater Visakhapatnam Municipal Corporation with boundaries described therein. The *ex parte* decree directed the defendant to execute the registered Sale Deed in favour of

the plaintiffs within one month therefrom, and in case of the defendant's failure, the plaintiffs are entitled to have the same through Court, and with a direction to the plaintiffs to deposit balance sale consideration into the Court within one month therefrom besides directing the defendant to pay to the plaintiffs a sum of Rs.1,58,938/- towards costs of the suit. The defendant filed an application to set aside the *ex parte* decree supra with an application to condone the delay of 612 days in filing the application under Section 5 of the Limitation Act.

2. An application is also filed by the defendant through the deponent-cum-Special Power of Attorney holder K.Sanyasi Raju under Rule 32 of the Civil Rules of Practice read with Section 151 C.P.C. to grant permission to the defendant to prosecute the suit through the Special Power of Attorney holder supra saying the defendant, who is aged about 66 years and resident of Bangalore and suffering from old age ailments with arthritis and unable to pursue personally by attending the Court, executed the Special Power of Attorney in favour of said K.Sanyasi Raju on 31.01.2013 and thereby, seeking to permit her to represent through the Special Power of Attorney holder.

3. It is in the pending application of delay condonation to set aside the *ex parte* decree in I.A.No.445 of 2013 of the

defendant filed against the plaintiffs supra, plaintiff No.3 Nadimpalli Venkata Rama Raju, who is representing as G.P.A. for other plaintiffs as referred supra, filed I.A.No.224 of 2015, as respondent No.3 to I.A.No.445 of 2013, under Order XIX Rule 2 C.P.C. with a prayer to direct the deponent-defendant Smt. Vijaya Lakshmi Bisht in the application under Section 5 of the Limitation Act for cross-examination on her affidavit as deponent with the affidavit averments that the contentions of applicant in application under Section 5 of the Limitation Act are two fold viz., she came to know about passing of the *ex parte* decree in January 2013 through Kalidindi Sanyasi Raju, Special Power of Attorney holder, and that there is no seller-purchaser relationship between herself and the plaintiffs by her denying the execution of Agreement of Sale itself contending as the said document is fabricated and plaintiff No.3 or other plaintiffs obtained signatures on blank papers, which is not at all a believable version even from perusal of the Sale Agreement with endorsement on the backside of it and the applicant in the application under Section 5 of the Limitation Act is expected to come forward with clarity and definiteness in whatever she asserts, and there is a remittance by way of cheques from the bank account of plaintiff No.3 in favour of said Vijaya Lakshmi Bisht, who was the drawee of cheques, from which it is incompatible of what

she alleged in her affidavit. Thereby, impugning the Sale Agreement he shall be afforded the opportunity to cross-examine her on the affidavit supra, else he will suffer irreparable loss and injury.

4. The learned IV Additional District Judge, Visakhapatnam, by the revision impugned order dated 11.03.2016 allowed I.A.No.224 of 2015 with observation that as per Order XIX Rule 2 C.P.C. upon any application evidence may be given by affidavit, but the Court may at the instance of either party order the attendance for cross-examination of the deponent, and the present application is to direct the deponent to appear for cross-examination in seeking to permit to elicit the truth in her petition to condone the delay in filing the *ex parte* decree set aside application and in support of that contention the learned counsel for petitioner therein relied upon the judgments in C.R.P.No.245 of 1981 of Rajasthan High Court and in C.R.P.No.66 of 1973 of Allahabad High Court saying the affidavit is not an evidence, but may be deemed to be evidence where it is just to permit any cross-examination and it is not a case of the deponent is to be exempted from personal appearance in Court and thereby, it is just and reasonable to cross-examine the deponent for better adjudication of the application in directing her to appear before the Court to face the cross-examination in I.A.No.445

of 2013. The said order is impugned in the present Civil Revision Petition.

5. Learned counsel for the revision respondents supported the order of lower Court.

6. Heard both sides at length and perused the material on record and the propositions relied on in support of the rival contentions of the revision for and against the impugned order of the lower Court.

7. In an application to condone the delay under Section 5 of the Limitation Act, the approach is pragmatic, more particularly for the reason that no personnel willfully allow a decree to be passed on stand against knowing generally, but for some reason or other and to consider therefrom whether within the pragmatic approach the reason assigned is just to condone the delay or not, leave apart not the length of mere delay, but for the reason assigned for the delay in considering as to any just cause or not and if the explanation is one and the same for the entire period, that is enough for no separate mention of day-to-day delay with self-same explanation for the entire period. Keeping these principles on the scope of the application in mind and even coming to the merits prior to filing of the suit, undisputedly no suit notice is issued and it is the contention of notices ordered not served and substitute

service ordered through the Eenadu daily Telugu edition of Bangalore circulation and once she claims that she cannot read and write telugu, that is a crucial aspect to be ascertained by the Court in this regard as to she can read and write telugu or not and she got any knowledge about the substitute service or not.

8. Once such is the case, coming to the scope of Order XIX Rules 1 to 3 C.P.C., as held by this Court way back in 1995 in the decision of Gaddipati Samrajyam v. Panguluri Mahalakshamma¹ it is the discretion in an interlocutory application to call for the deponent or not and not mandatory like in the suit where there is a right of cross-examination with reference to the provisions of the Evidence Act and referring to several expressions this Court in the decision of Nadella Estates (P) Ltd. v. Prema Ravindranath² where sought for cross-examination of the proposed implead petitioners, some of them represented through G.P.As for cross-examination, it is observed that a reading of Order XIX Rules 1 to 3 C.P.C. clearly indicates that an affidavit by itself is of no evidence since it is not included in Sections 1 & 3 of the Evidence Act, apart from specifically excluded by Section 1 of the Evidence Act, unless the Court permits proof of any fact or facts by means of affidavit evidence under Order XIX

¹ 1995 (1) ALT 305

² 2015 (3) ALD 468

Rules 1 and 2 C.P.C., and the proof used in Order XIX Rule 1 is in the sense to mean final proof and not *prima facie* proof. Whenever any fact or facts permitted by Court to be proved by means of an affidavit of a witness or a party, if the opposite party desires presence of deponent to cross-examine, the Court should not accept the affidavit as evidence under Order XIX Rule 1 C.P.C. as per its proviso in case of evidence affidavit during trial. Whereas under Order XIX Rule 2 C.P.C. for proof *prima facie* (and not final proof on merits) upon application of party to give evidence by affidavit filed in Court, when the Court not using the affidavit as evidence, the party may produce the deponent for cross-examination by opposite party or the Court can, call the deponent's presence for cross-examination by opposite party at the instance of either party, and as per Order XIX Rule 3 C.P.C, if we read keeping the above distinction between the Rules 1 and 2 supra, makes it further clear since the scope of facts that can be confined in the affidavit of deponent are for final proof, such facts to state which the deponent is able to prove from his personal knowledge and whereas for the *prima facie* proof in interlocutory applications the statement of deponent's belief is also admissible, provided the grounds thereof are stated. Rules 34 to 52 of Chapter IV of the Civil Rules of Practice, which deal with affidavits for use in judicial

proceedings so also counter-affidavits or reply affidavits and the Court got power to direct the deponents for cross-examination wherever necessary not otherwise. Once Rule 60 of the A.P. Civil Rules of Practice contemplates proof of affidavits in interlocutory proceedings and the same is not evidence to treat in trial by permitting cross-examination, it is not necessary to permit cross-examination on every affidavit filed in interlocutory application as proof or proof in the sense in which the word is used in Rule 1, which is distant to Rule 2, means final proof and not *prima facie* proof. This Court referring to the expression of Nadella Estates (supra 2), particularly from paragraphs 15 to 17 while dismissing the applications for permitting the cross-examinations of the deponents in the implead petition, observed that the party seeking permission of the Court to cross-examine the declarant must disclose the reasons as to why it is necessary to cross-examine the deponents and it should not merely be a pretext for delaying the proceedings or to procrastinate the proceedings under the guise of seeking permission for cross-examination. The Court is no doubt under the obligation to pass an appropriate order giving cogent reasons for allowing or rejecting such application to call the deponent for cross-examination and such course is not to be adopted in a routine manner to call for cross-examination, though there is no

straightjacket formula to adopt, but for the Court has to examine the facts and circumstances of each case including exercise of the inherent powers of the Court to pass such orders as may be necessary either to allow or reject to subserve the ends of justice or to prevent abuse of process and there must be some *bona fide* reasons that should be made out always even to seek for cross-examination by saying otherwise rights being seriously prejudice.

9. No doubt, regarding the truth and genuineness of the Sale Agreement and it is a forged one or genuine one is premature to decide in the application to condone the delay in filing the application in seeking to set aside the *ex parte* decree, but for to confine the scope referred supra on the said application as to sufficient cause to condone the delay or not and the *ex parte* decree passed can be set aside or not. The impugned order of the lower Court is as vague as anything in its saying as the defendant (deponent to I.A.No.445 of 2013) is not an exempted women from personal appearance, but for better adjudication the application can be allowed to permit the cross-examination of her to elicit the truth in her petition, without considering the scope of application and the need of permitting cross-examination therefrom. However, as referred supra once she claims that there is no service of notice and there is no knowledge of her about the substitute

service by Eenadu Telugu daily edition of Bangalore circulation; from the Order IX Rule 13 C.P.C. in seeking to set aside the *ex parte* decree is on satisfaction of the Court from the application averments with any supporting material of summons were not duly served or that the defendant was prevented by any sufficient cause from appearing when suit was called on for hearing, to consider on such terms as to costs and payment into Court or otherwise as it thinks fit and to appoint a date for proceeding with the suit. Among the two provisos, proviso 2 speaks that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. The limitation provided to set aside an *ex parte* decree as per the Article 123 of the Limitation Act is 30 days from the date of decree or where summons were not duly served; when the applicant had knowledge of the decree. The explanation of it speaks for the purpose of this Article, a substitute service under Rule 20 of Order 5 C.P.C. shall not be deemed to be due service. In view of the scope of law, from the above suggestion it is only to consider whether she got knowledge of the suit and was duly served either by Court notice or registered post or by substitute service notice, the permission

to cross-examine her must be limited to that more particularly on her contention of she does not know telugu to read or understand the said substitute service through Eenadu daily edition of Bangalore circulation.

10. Having regard to the above, the order of lower Court in directing the deponent to appear for cross-examination for the reasons assigned therein though not sustainable is necessary for otherwise causes prejudice to the plaintiffs for the above, thereby to confirm, however to permit the cross-examination only on the limited aspects supra and nothing beyond, which is subject to condition of the deponent-petitioner either in person or through G.P.A. not chosen to adduce any evidence on the application to condone the delay and to set aside the *ex parte* decree with a direction to the lower Court to dispose of both the applications for one application is otherwise maintainable for both the reliefs as per the settled law of this Court.

With the above observations, this Civil Revision Petition is disposed of. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

Dr. B. SIVA SANKARA RAO, J

08.02.2018
MVA