

THE HONOURABLE SRI JUSTICE N. BALAYOGI

CIVIL REVISION PETITION Nos.5460 of 2017 AND 5505 of 2017

ORDER:

Both the Civil Revision Petitions arose out of the Common order dated:16.8.2017 in I.A.No.612 of 2017 to reopen the Suit and I.A. No.613 of 2017 to set aside the eschew order dated:16.3.2017 in O.S.No.198 of 2007.

2. The petitioner in both the C.R.Ps is one and the same. The grounds in both the C.R.Ps are also same and common.

3. The contention of the petitioner is that the petitioner filed evidence affidavit of PW.4 - Palaparthi Venkata Ramana who is a witness to the agreement of sale but could not produce for cross examination. As such, his evidence was eschewed. Thereafter, PW.4 agreed to give evidence after imploring that not to worry about the threats of respondents. But the respondent did not file any counter denying petitioner averments against him. The reasoning of the trial Court is that PW.4 cannot be examined after examination of PW.5 is erroneous, and the trial Court failed to see that if eschew order is set aside, the evidence of PW.4 will be restored. The observation of the Court through Common order dated:16.8.2017 by holding that since the Suit pertains to pre 2012, it has to be decided on merits and failed to consider that in a Suit for Specific Performance examination of attesor is crucial and if Palaparthi Venkata Ramana (PW.4) is not cross examined, great injustice will be caused to the petitioner.

Contd..P.2.

4. Per contra, the respondent contended that the petitioner purposefully did not produce PW.4 till examination of PW.5. There is a delay of five months in filing Application. Had there been any bona fides, petitioner ought to have filed the petition immediately to set aside the eschew order to confront the evidence of PW.4 or before commencement of PW.5 evidence.

5. Now, the points that arose for determination is:

(1). *Whether the eschew order dated:16.3.2017 can be set aside? and*

(2). *Whether PW.4 can be recalled in the interests of justice?*

6. A perusal of the record would go to suggest that the petitioner filed the main Suit in O.S.No.198 of 2007 for Specific Performance of agreement of sale dated:20-3-2006. After examining PWs.1 to 3, the petitioner / plaintiff filed evidence affidavit of P. Venkata Ramana as PW.4, but the petitioner could not produce the said PW.4 for confrontation of evidence and subjecting him for cross examination by the respondent herein who is the defendant. The record further go to suggest that the evidence of PW.4 is eschewed on 16.3.2017 and PW.5 was examined on 27.7.2017. After conclusion of evidence of PW5, the petitioner filed these applications with notice to the respondent.

7. In the affidavit in IA.No.612/2017 and IA.No.613/2017, the petitioner specifically averred that the respondent /defendant prevented PW.4 from appearing before the Court and as such, PW.4 did not appear and tender himself for cross examination. Whatever may be the reason the fact remains that the evidence affidavit of PW.4 is filed, but could not appear before the Court when posted for confrontation of PW.4.

8. These petitions are filed to reopen the Suit and to set aside the eschew order dated:16.3.2017 and to recall PW.4 for the purpose of cross examination. If the eschew order is set aside and if the Suit is restored to its original position for examination of PW.4, there should not be any prejudice or loss to the respondent because he is having opportunity to cross examine the PW.4 and to adduce rebuttal evidence.

9. The reason given by the trial Court while dismissing the IA.No.612/2017 and IA.613/2017 is that, "It is the duty of the parties to examine PW.4 before examining PW.5. Therefore, the petition is not maintainable and the objection taken by the respondent / defendant is tenable under law." This order of the trial Court is not supported by any tenable reasons. As discussed above, if the eschew order is set aside, the Suit will be restored to its original position for cross examination of PW.4 and no prejudice will be caused to the respondent. Thus, balance of convenience lies in favour of the petitioner.

In the result, both the Civil Revision Petitions are allowed by setting side the Common order dated:16.8.2017 in I.A.No.612 of 2017-to reopen the Suit and I.A. No.613 of 2017 to set aside the eschew order dated:16.3.2017 in O.S.No.198 of 2007.

10. However, considering the fact that the Suit is of the year 2007, the trial Court is directed to give opportunity to both the parties and proceed with the trial, expeditiously. No order as to costs.

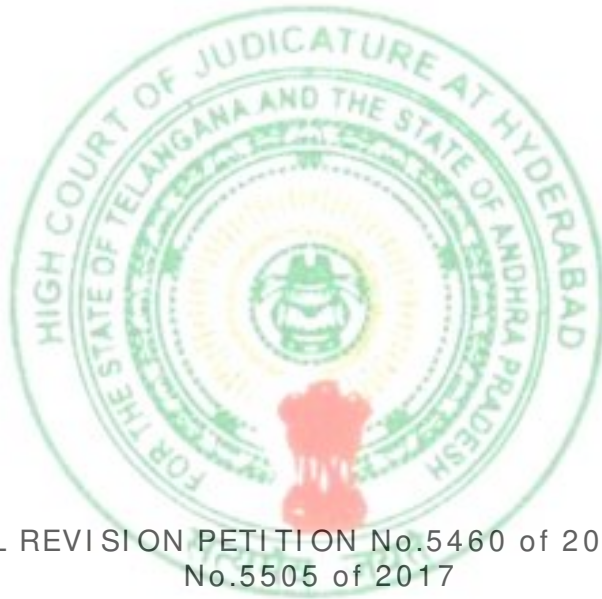
11. Miscellaneous Petitions, if any, pending, shall stand closed.

JUSTICE N. BALAYOGI

Dated:02-2-2017

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