

HON'BLE SRI JUSTICE S.V.BHATT

CIVIL REVISION PETITION No.5484 OF 2017

ORDER:

Heard Mr.Ghanshyamdas Mandani for petitioners and Mr.M.Rajamalla Reddy for respondents.

The defendants in O.S. No.62 of 2005 are the revision petitioners. The revision is directed against the order dated 11.08.2017 passed in Memo filed by the learned Advocate appearing for the revision petitioners. The Memo reads as follows:

“ May it please your honour,

In the above case, on behalf of the defendants, Komakula Veeraiah accepted to give evidence and agreed to produce the simple agreement dated 08.05.1994 with in hands of him (sic) available with him, hence Hon'ble Court may kindly receive the same more in the interest of justice.

Hence this Memo.

Sd/-

J.Satyanarayana Rao
Advocate for defendant”

The Respondents opposed the prayer to receive a document through DW.2. The trial Court rejected the Memo and the order reads thus:

“Counsel for petitioner submits that K.Veeraiah accepted to give evidence on behalf of defendants and agreed to produce the simple agreement which is in his hands. Hence, prays the court to receive the document.

On the other hand the counsel for respondent submits that a witness cannot produce a document which creates interest in the subject matter of suit, moreover the alleged agreement is not admissible in evidence. As per recitals of said document, it is creating ownership in respect of several lands in favour of many persons. The alleged document is compulsory registerable document. Hence prays the court to dismiss this memo.

Now the point for consideration is “whether the petitioner is entitled to the relief as prayed for”?

In the instant case the matter is entirely different, the party is not producing the document, the witness is producing the document in fact the party has not relied upon it and he has not stated any thing about this document. The party has not mentioned about the document in his pleadings, introducing this document at this stage without any pleadings i.e., more particularly through the witness, will cause prejudice to the other side, it is not proper to receive this document. Hence, this memo is hereby dismissed. Hence, the order.”

Hence, the C.R.P.

The respondents filed O.S. No.62 of 2005 for the relief of perpetual injunction restraining the petitioners herein their men, agents etc. from interfering with respondents' possession and enjoyment of plaint schedule property. The plaint schedule consists of Ac.2-00 of agricultural land in Survey No.109/A, described with boundaries at Bommakal Village of Karimnagar Mandal and District. On 25.07.2005, the revision petitioners filed written statement. The suit is at the stage of recording evidence of revision petitioners.

Mr.Ghanshyamdas Mandani contends that the impugned order is completely illegal and unsustainable in as much as the trial Court failed to exercise the jurisdiction and discretion vested in it, in permitting a party to introduce or exhibit a document. According to him, a witness is entitled to exhibit documents and the document now produced is in the custody of DW.2, therefore, DW.2 alone is competent to produce the document, refusal to permit production of document amounts to denying opportunity to revision petitioners

to lead evidence on a crucial aspect which is an issue in O.S. No.62 of 2005. In other words, according to him, the permission for producing the document through DW.2 ought to have been granted and secondly Civil Procedure Code (CPC) does not prohibit from producing a document by a witness. He relies on *Ashok Sharma v. Ram Adhar Sharma*¹ for the proposition that a witness produced under Order 16 Rule 1-A can also produce the document in his custody. He relies on the following paragraphs.

11. Order XVI of the Code deals with summoning and attendance of witnesses. The Court under Order XVI Rule 1, on or before the date, may appoint but not later than 15 days after the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in Court. Order XVI Rule 1-A, however, gives a right to a party to a suit to produce witness without summons.

12. Order XVI Rule 1-A of the Code runs as under :-

"Rule 1-A: Production of witnesses without summons - Subject to the provisions of sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents."

A plain reading of this provision would clearly show that Rule 1-A of Order XVI of the Code has been substituted by the Legislature to empower a party to bring any witness without obtaining summons subject to the permission of the court, even if the name of the witness is not in the list to be presented within 15 days of settlement of issues.

13. After issues were framed, the respondent in order to prove the date of completion of construction of the

¹ (2009) 11 SCC 47

Society in which the suit premises is located, summoned Shri. Pawan Kumar Vasudeva, the President of the Society, (PW-3) to bring the record of completion of construction of the suit premises which is located in the said area of the Society. The trial court had allowed the summoning of the President of the Society for the purpose of showing the time of the completion of construction of the suit premises. PW-3 identified his signature on Ext.PW1/3 which was the certificate issued by the said Society to the respondent. Thereafter, the said witness produced the documents of completion of construction of the Society which were summoned by the respondent, but the trial court by the order dated 2nd of May, 2006 rejected the application and did not allow the witness to place the documents brought by him on record on the ground mentioned hereinafter.

14. As noted herein earlier, the High Court has reversed the order of the trial court and allowed production of the document produced by PW-3. In our view, there is no ground for which we can hold that the order of the High Court was not properly passed.

15. As noted herein earlier, Order XVI Rule 1 and 1-A of the Code, if read together, would clearly indicate that it is open to a party to summon a witness to the Court or even may, without applying for summons, bring a witness to give evidence or to produce documents. Since Rule 1-A is subject to the provisions of sub-Rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness, who might have been brought by a party for the purpose, the leave of the court may be necessary. This by itself would not mean that Rule 1-A was in derogation to sub-Rule (3) of Rule 1. Such document brought by the said witness can be taken on record and it is not necessary that the plaintiff must have filed on record the copies of the said document earlier.

The counsel for revision petitioners relies on *Bipin Shantilal Panchal v. State of Gujarat* ² for the proposition that the relevancy, legality or admissibility could not be the factors for consideration at the stage of granting leave, and these requirements could certainly be considered at a later stage of trial. He relies on paragraphs 12 to 14 which read as thus:

12. As pointed out earlier, on different occasions the trial judge has chosen to decide questions of admissibility of documents or other items of evidence, as and when objections thereto were raised and then detailed orders were passed either upholding or overruling such objections. The worse part is that after passing the orders the trial court waited for days and weeks for the concerned parties to go before the higher courts for the purpose of challenging such interlocutory orders.

13. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fall out of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede

² (2001) 3 SCC 1

steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

He prays for allowing the C.R.P.

Mr. Rajamalla Reddy contends that the procedure followed by revision petitioners does not conform to the requirements of pleadings and documents filed under various provisions from Order 6 to Order 16 of CPC. According to him, the prayer of revision petitioners to introduce agreement dated 08.05.1994 through DW.2 has been rightly rejected by the trial Court. He supplements the reasons by contending that the revision petitioners have not referred to agreement dated 08.05.1994 in the written statement, therefore, any amount of evidence without basis in pleading ought not to be entertained by a Court of law. According to him, if the procedure to file a document in this fashion is allowed, such introduction of a document causes surprise and irreparable

hardship and injury to a contesting party. Mr. Rajamalla Reddy refers to Order 7 Rule 14; Order 8 Rule I-A, Order 12 Rule 8, Order 13 Rule 1 and Rule 4 and Order 16 Rule I-A of CPC and contends that the procedure under Order 16 Rule 1 and I-A is followed keeping in view the requirement of filing documents along with the pleadings under Order 7 Rule 14 etc. He contends that the ratio *decidendi* of Apex Court in Ashok Sharma Case (1 supra) is distinguishable to the facts of this case and not applicable. According to him, the Apex Court was dealing with a case where the documents in the custody of a witness which are already referred to, in the pleadings are summoned and marked through the witness under Order 16 Rules 1 and I-A. But in the case on hand, the custody and the possession of document are considered with the other requirements of filing documents along with the pleadings etc. In the absence of pleading and the custody of those documents is stated with the person through whom it is sought to be brought on record, the document cannot be considered and entertained by the Court. According to him, the procedure followed by revision petitioners by filing a memo for substantive orders is not maintainable, even assuming without admitting that the prayer made through memo is maintainable. According to him, the reasons given by the trial Court are substantial and no case is made out for granting permission to revision petitioners to introduce agreement dated 08.05.1994 through DW.2. He prays for dismissing the C.R.P.

I have heard the learned counsel and perused the record. Now the point for consideration is whether the revision petitioners

are entitled to produce simple agreement dated 08.05.1994 through DW.2 or not?

The case of revision petitioner is that agreement dated 08.05.1994 was with one Komakula Veeraiah who has agreed now to give evidence on the enjoyment on ground by various owners in Survey No.109 of Bommakal Village. The witness is entitled to produce document and the prayer of revision petitioners ought to have been allowed by the trial Court. The preliminary objection of respondents is two fold that agreement dated 08.05.1994 is not adverted in the written statement dated 25.07.2005 and secondly a witness ought not to be allowed to produce the document which has bearing on the title claimed by a party. For the purpose that no amount of evidence is permissible in the absence of pleadings, the respondents rely on decisions in Siddik Mahomed Shah v. Saran³, and S. H. Samwala v. Burma Cycle Trading Co.⁴.

In Siddik Mahomed Shah, the Privy Council held as follows:

“where a claim has been never made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward.”

In S.H. Samwala, the Supreme Court held as follows:

“The High Court, as previously stated, considered that the application for eviction which had been filed by the appellants was in the nature of a proceeding to enforce a right arising from a contract. It is difficult to understand the decision on the point. It is common ground that when the property was purchased by the appellants the tenant attorned to them. It had neither been pleaded nor proved that there was any contract of tenancy between the firm Saleh Bros., and the tenant, the present respondent. In the absence of any pleading on the point by the

³ AIR 1930 PC 57 (1)

⁴ 1971 (3) SCC 881

respondent no issue had been raised by the Rent Controller, quite rights, on the property belonging to the partnership firm or the latter being the real landlord. It is indeed axiomatic that no proof of evidence can be allowed to be adduced on matters which are neither pleaded nor put into issue. It is quite clear that Section 69(3) of the Indian Partnership Act had no applicability in such circumstances and the High Court was in error in going into this matter at all.”

The proposition that any amount of evidence without pleading cannot be looked into is well established and this Court proposes to consider in the case on hand whether the revision petitioners have laid basis in the written statement on the agreement dated 08.05.1994 which the defendant is seeking to get on record.

Paragraph Nos. 3 and 4 of written statement read thus:

3. That the contents of paras No.5 and 6 of the plaint are wrong and denied. The plaintiff is not possessor over the suit land. Therefore, is not entitled to seek any relief of perpetual injunction. The plaintiff will not suffer any loss if perpetual injunction is not granted. The cause of action did not arise on any date to file this suit.

4. That the Sy.No.109, 110 and 111 constitute compact plot. The plaintiff is in possession over the suit land in Sy.No.110 and 111 and the Defendants are in possession over Sy.No.109. As per the boundaries of sale deed of Defendant No.1, the Defendant No.1 is possession of Sy.No.109 and as per boundaries of sale deed of plaintiff is in possession over Sy.No.110 and 111. The plaintiff has dug a well in Sy.No.110 and he has no land in Sy.No.109. The time will come out if land purchased by plaintiff and Defendant No.1 are located as per their sale deeds.”

From the above pleading, it is clear that there is no pleading in the written statement and adducing evidence without pleading

is impermissible and ought to be avoided by the courts in conducting the trial. Therefore, the first objection raised is answered in favour of respondents and against the revision petitioners.

Mr. Ghansyamdas Mandani relied on Ashok Sharma case (1 supra) wherein as already noted, the Apex Court has held that Order 16 Rule 1 and 1-A of the CPC permits the court to pass the order directing the witnesses to take the documents on record in dealing with the application for production of documents under Order 16 Rule 1 read with Rule 1-A of the Code, what is required was that leave of the court would be necessary. Therefore, according to him, DW.2 ought to have been permitted by the trial Court to place on record agreement dated 08.05.1994. This Court has considered the circumstances and also the undisputed facts under which the Apex Court confirmed the order of Delhi High Court in permitting a witness to file documents in the Court. One of the circumstances is that the documents which are already referred to in the pleadings in Ashok Sharma case (1 supra) were not in the custody of the party who sought to rely on these documents, but with the Society as custodian of documents. Therefore, the documents not only relevant to party to the suit in Ashok Sharma case (1 supra) but also all the members of the society are with the Society. Under those circumstances, permission to introduce a document was considered and granted by the Delhi High Court and was confirmed by the Apex Court. This Court proposes to examine various Orders on which Mr. Rajamalla Reddy relied on and contends that de-hors all the procedures from Order 7 Rule 14 etc.

by straightaway referring to Order 16 Rules 1 and I-A permission to a party can not be granted by the Court. Order 7 Rule 14 Reads thus:

“Production of document on which plaintiff sues or relies.

- (1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross- examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.”

To the same effect is Order 8 Rule I-A. Order 7 Rule 14 or Order 8 Rule 1-A directs the plaintiff or defendant as the case may be to file documents which he intends to rely on. Where a document entered in the list of documents is not produced along with plaint; it shall not be received in evidence without leave of the Court. Therefore, not only a plea but also the document in support of that plea is filed by party at the earliest point of time. Order 13 Rules 1 and 4 provide for producing original document at or before the settlement of issues and making endorsement on the documents filed in evidence. Order 16 deals with summoning and

attendance of witness. Either the summoning of witness or production of document through a witness subject to the leave of the Court is permissible, only if that document satisfies the requirement of foundation in pleadings and the document is referred to in the list of documents in the plaint or written statement, but the copy or the original of such document is not filed along with the plaint or written statement for which leave is sought for from the Court and in such circumstances the leave can be granted. The exception to this procedure can be appreciated from making documents through cross-examination. On the other hand, if leave to file document through a witness by disregarding the above procedural requirement, if is accepted, the production of documents in this fashion causes prejudice to the contesting party. This Court is in agreement with the reasons recorded by the trial Court for refusing the permission sought through memo filed by revision petitioners herein. In the above analysis, the revision fails and is accordingly dismissed. No order as to costs.

S.V.BHATT, J

Date:26.02.2018

Note:

LR copy to be marked.

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