

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.R.P. No.6668 of 2017

ORDER:

The revision petitioners are the plaintiffs and the revision respondent No.1 is the defendant in O.S.No.709 of 2016. The revision respondent No.2 is the proposed party as defendant No.2 sought for impleadment in I.A.Nos.278 & 279 of 2017 under Order 1 Rule 10 (2) C.P.C. in the suit vis-à-vis the injunction petition in I.A.No.126 of 2016. The suit filed by the two plaintiffs, no other than plaintiff No.2 is the wife of plaintiff No.1 and plaintiff No.1 is the brother of defendant No.1 and they are the sons of the proposed defendant No.2, against the sole defendant in O.S.No.709 of 2016 supra pending on the file of the learned XX Junior Civil Judge, City Civil Court, Hyderabad, is for the relief of perpetual injunction in respect of the plaint schedule property. Pending the suit, the plaintiffs also sought temporary injunction against the sole defendant in I.A.No.126 of 2016 supra to restrain him and his men from interfering in any manner with the plaintiffs' possession and enjoyment of the plaint schedule property. The sole defendant contested the matter impugning the maintainability of suit and also by saying the plaintiffs are neither owners nor lessees over the suit premises and they have no right to seek injunction and they obtained the *ex parte* interim injunction behind back by suppression of

the material facts and having approached with unclean hands, that is liable to be vacated, and there is no cause of action apart from the suit for perpetual injunction is not maintainable, and with defence that the suit property is situated at Osmangunj, Hyderabad, which is a shop, owned by Jamia Nizamia Trust of Hussaini Alam, Hyderabad, that was taken on lease by the defendant's father C.Veerender in the year 1998, in which he was doing business with the name and style of "Veerabhadra Confectionery" on rent of Rs.250/- per month and having enhanced the rents from time-to-time and now by paying Rs.5,000/- per month, and the defendant is assisting his father since then besides even earlier his father was doing the wholesale business of Agarbathi and confectioneries with the name and style of "Veerender General Stores" from 1970, which is opposite to the present plaintiff schedule premises, and he was assisting his father almost from 1975 onwards. The said Agarbathi business was later closed and after shifted to the suit property by starting confectionery business. Plaintiff No.1 is 10 years younger to the defendant being the third issue of father Veerender and the said Veerender, for the defendant not educated, wanted to educate plaintiff No.1, but he was not school going and addicted to vices. As the defendant and his father wanted to train plaintiff No.1 at least in some business allowing by

training him in the shop, where he is not even doing any work, but stealing away the goods and money from the shop. Plaintiff No.1 married the plaintiff No.2 in 1994 and later they separated from the joint family and later plaintiff No.2 filed a criminal case against the in-laws other than the husband-plaintiff No.1 for the reasons better known to her. The father of plaintiff No.1 and defendant established an independent shop at Mangalghat in 1997 exclusively for plaintiff No.1, but within one year plaintiff No.1 ran it into losses by wasting money of about Rs.2,00,000/- and even in the year 2002 a kirana shop was established at Ramanthapur, that business also suffered losses at the hands of plaintiff No.1 and even in the year 2003 plaintiff No.1 himself established the confectionery shop in Osmangunj, that was also closed abruptly by plaintiff No.1 and his wife, who left to somewhere for about one year. The defendant is suffering from heart ailment and the plaintiffs have no *prima facie* case and the balance of convenience is also not lies in their favour nor suffered irreparable loss and damages and thereby, not entitled to injunction. The written statement contest is also by denying all the plaint averments almost in same lines in seeking to dismiss the suit. During pendency of the suit, the proposed defendant No.2 Veerender (father of plaintiff No.1 and the sole defendant) sought for his impleadment.

2. The affidavit petition averments of the proposed defendant No.2, who aged about 79 years, are that the suit is filed for perpetual injunction by the plaintiffs against the defendant No.1 with a *mala fide* intention and the self-same averments of the injunction petition. The counter filed by the sole defendant almost by replica and by further saying he is the lessee of premises and executed the Deed of Authorization transferring the lease hold rights over the suit schedule shop vide registered document No.70/ 2015, dated 29.04.2015, in favour of the defendant and later he cancelled the said document No.70/ 2015 vide registered Cancellation Deed No.195/ 2016, dated 23.11.2016, and registered another Authorization Deed bearing No.196/ 2016 exclusively in favour of the defendant to enable him to get the lease hold rights transferred in his name for the shop and thereby, he may be permitted to come on record in the suit and in the injunction petition for effective adjudication of the *lis*.

3. Plaintiff No.1, on behalf of the plaintiffs, filed I.A.No.738 of 2017 for permitting the cross-examination of deponent of the implead petitions in I.A.Nos.278 & 279 of 2017 by saying the proposed defendant No.2 Veerender was attacked with Paralysis and could not recover and became speechless and his sight became very poor to the extent that he could not identify the persons before him and he cannot

understand the words of any person to converse and was completely bedridden having unable to move nor in a position to sit in one place atleast for an hour and he is under drug influence. He further contended that defendant No.1 from the inception, with dishonest intention, having evil eye over the joint family property and in the business carrying on by the plaintiff therein and by taking advantage of his father's health condition got filed two implead petitions to bring his father on record as defendant No.2 and the proposed defendant No.2 cannot attend his natural calls and the affidavits filed for the implead petitions are not prepared at the instructions of the said Veerender, but at the instance of defendant No.1 and thereby, he has to be called to the witness box for cross-examination on the correctness of the affidavit. Defendant No.1 filed the counter opposing the same by denying all the petition averments and sought for dismissal of calling the proposed defendant No.2 to witness box for cross-examination.

4. It is therefrom the trial Court while dismissing the petition in I.A.No.738 of 2017, by order dated 25.10.2017, observed that the suit is for injunction simplicitor and plaintiff No.1 and defendant No.1 are sons of the proposed defendant No.2, and as per the averments the leasehold mulgi stands in the name of proposed defendant No.2 as a lessee on rent of

Rs.5,000/- per month under the original owners and in deciding the suit as to whether the plaintiffs are in possession and entitled to the injunction, in the impleadment there is no necessity to call for their father, the deponent of implead petitions, for cross-examination, but for if at all after impleadment during trial if comes to witness box, and thereby the petition is devoid of merits.

5. Heard both sides and perused the material on record.

6. 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

¹ 1995 (1) ALT 305

² 2015 (3) ALD 468

Act, unless the Court permits proof of any fact or facts by means of affidavit evidence under Order XIX 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 sub-serve 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.

7. From the above principle, coming to the facts even from the very plaint averments, the proposed defendant No.2 is the lessee of premises in question and there is nothing to show any attornment or sub-lease of the leasehold rights in favour of the plaintiff and even in the suit for injunction whether the plaintiff is in possession as on the date of suit, to grant injunction or not is the criteria. Once the proposed party, who is the lessee of premises in question, when sought to be impleaded, there is no necessity of permitting his cross-examination by the plaintiff in opposing the implead petition by saying he is aged about 75 years and he was attacked with Paralysis and could not recover and became speechless and his sight became very poor to the extent that he could not identify the persons before him and he cannot understand the

words of any person to converse and was completely bedridden and was unable to speak or unable to move. Once he is impleaded being the necessary party as referred supra for originally the lessee of premises in question, if at all he cannot substantiate any of his claim by coming to the witness box during trial by adducing evidence, the Court can decide the matter on merits. However, so far as the impleadment is concerned irrespective of the deponent's entitlement to maintain the petition for impleadment or not, once the trial Court got the power to implead even under Order 1 Rule 10 (2) C.P.C. of any necessary or proper party, there is no necessity of permitting the cross-examination of the deponent to the implead petition even to exercise such power by the trial Court with reference to the facts. Further, if at all the deponent of the affidavit choosing to come on record is in a fit condition of mind or not and any next friend to appoint or not, the Court can on its own even enquire at any stage of the proceedings under Order XXXII C.P.C. In this regard, Order XXXII Rule 15 C.P.C. reads thus:

"15. Rules 1 to 14 (except Rule 2-A) to apply to persons of unsound mind - Rules 1 to 14 (except Rule 2-A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued."

8. On a bare perusal of the said provision, it is evident that the Court is empowered to appoint a guardian in the event a person is adjudged to be of unsound mind. It further provides that even if a person is not so adjudged but is found by the court on inquiry to be incapable of protecting his or her interest when suing or being sued by reason of any mental infirmity, an appropriate order thereunder can be passed. The plaintiffs even did not contend that the proposed defendant No.2 herein is of unsound mind. Thereby, the lower Court is right in dismissal of the application in I.A.No.738 of 2017 on 25.10.2017 where the plaintiffs sought cross-examination of the proposed defendant No.2 as deponent of I.A.Nos.278 & 279 of 2017.

Accordingly, and in the result, the Civil Revision Petition is dismissed, which is without prejudice to the context in deciding the implead petitions in I.A.Nos.278 & 279 of 2017 on own merits.

Dr. B. SIVA SANKARA RAO, J

03.01.2018
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