

THE HIGH COURT FOR THE STATE OF TELANGANA
*** THE HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**
AND
THE HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI
+ CIVIL REVISION PETITION No.6 OF 2019

% Date:20.03.2019

Between:

% M/s. Nagarjuna Agro Chemicals Pvt. Ltd.,
Begumpet, Hyderabad, Rep. by its Director
Mukund Daga.

... Petitioner

v.

\$ M/s. Sarda Agro Oils Limited,
Panjugatta, Hyderabad, rep. by its
Managing Director and others.

... Respondents

! For Petitioner

: Mr. Sathyanarayana Prasad,
Senior Counsel for
Ms. C. Sindhu Kumari

^ For Respondents

: Mr. Sunil B.Ganu

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> Head Note

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? Cases Referred

: 2011 (11) SCC 275.

**HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HONOURABLE SRI JUSTICE ABHINAND KUMAR SHAVILI
CIVIL REVISION PETITION No.6 OF 2019**

ORDER: *(Per V. Ramasubramanian, J)*

Aggrieved by the dismissal of an application filed by them, to reopen the evidence on the side of the plaintiff, the plaintiff has come up with the above Civil Revision Petition under Article 227 of the Constitution of India.

2. Heard Mr.Satyanarayana Prasad, learned Senior counsel appearing for the petitioner and Mr. Sunil B. Ganu, learned counsel appearing for the respondents 1, 3 and 4.

3. The 5th respondent is not a necessary party and notice to them was already dispensed with. The 2nd respondent despite being served with notice has not chosen to appear.

4. The petitioner herein filed a civil suit in O.S No.147 of 2007 on the file of the II Additional Chief Judge, City Civil Court, Hyderabad for recovery of a sum of Rs.2,12,27,446/-. The case of the petitioner/plaintiff in the suit was that the 5th respondent herein floated a tender in May 2006 for the supply of 4600 MTs of Vanaspathi; that respondents 2 to 4 solicited the services of the petitioner for participation in the tender; that the petitioner accordingly purchased the tender application and also paid EMD of Rs.23,75,000/-; that the Director of the petitioner/plaintiff was authorized to represent the 1st defendant in the tender negotiations; that the 1st defendant then became a successful bidder and entered into a Memorandum of

Understanding (MoU) on 07.07.2006 with the plaintiff; that the 5th respondent entered into an agreement dated 05.08.2006 with the 1st defendant for the supply of 4600 MTs of Vanaspathi; that pursuant to the said MoU, the plaintiff paid a total amount of Rs.1,08,76,126/- to the 1st defendant; that subsequently disputes arose resulting in the 1st defendant cancelling the authority granted to the plaintiff; and that due to the cancellation, a sum of Rs.2,12,27,446/- became due and payable by the defendants.

5. It appears that the suit was later transferred to the file of the Commercial Court and renumbered as COS No.234 of 2017.

6. The trial commenced and the Managing Director of the petitioner/plaintiff was examined as PW.1. Certain documents were marked and the evidence on the side of the plaintiff was closed. Thereafter, the 3rd defendant was examined as DW.1.

7. At that stage, the petitioner/plaintiff filed an application in I.A. No.681 of 2018 for reopening the evidence on their side, for the purpose of marking the certified copy of the deposition of the 2nd defendant in a proceeding under Section 138 of the Negotiable Instruments Act in CC No.636 of 2008. The said application was dismissed by the Commercial Court, forcing the petitioner/plaintiff to come up with the above revision.

8. The background in which the petitioner sought reopening of their evidence was that at the time when the Memorandum of Understanding was entered into between the plaintiff and the 1st defendant, the 2nd defendant was the Managing Director and

defendants 3 and 4 were the Directors of the 1st defendant company. But, it appears that when the matter was taken up for trial, the 3rd defendant became the Managing Director of the 1st defendant and he was examined as DW.1. The 2nd defendant chose not to go to the witness box. Therefore, the petitioner/plaintiff wanted to adduce rebuttal evidence. But, the Court below rejected the application on the short ground that the evidence available on record was sufficient to show who was the Managing Director at the relevant point of time when the contract was executed and the cheque issued.

9. But, the reasoning given by the Commercial Court is completely out of sync with the issue raised. According to the petitioner, the 2nd defendant was the Managing Director, who signed the Memorandum of Understanding and also issued some cheques. The dishonour of the cheques led to a criminal complaint in CC No.636 of 2008 being filed. In the said complaint, the 2nd defendant was examined as a witness. According to the petitioner, the evidence given by the 2nd defendant before the Criminal Court, is inconsistent with the evidence given by the 3rd defendant as DW.1 in the present proceedings. Therefore, the petitioner sought to mark the certified copy of the deposition of the second defendant before the criminal court, to rebut the evidence of DW-1.

10. It is true that the petitioner could have marked the certified copy of the deposition of the 2nd defendant in CC No.636 of 2008, through PW.1 even in the first instance. But, there was a valid reason as to why he did not do so. At the time when PW.1 was examined, it

was not known whether the 2nd defendant would go to the witness box. If he had gone to the witness box, the petitioner would have marked the certified copy of the deposition during cross examination. It is only after the 3rd defendant examined himself as DW.1 that it became clear that the 2nd defendant was not willing to go to the witness box.

11. Therefore, the petitioner lost an opportunity to confront the 2nd defendant in the witness box, with the deposition that he had given in the Criminal Court. Hence, the petitioner had no alternative except to seek reopening of the evidence on their side to mark the deposition of the 2nd defendant before the Criminal Court. This aspect has been completely lost sight of by the Commercial Court.

12. It is contended by the learned counsel for the respondents that Section 33 of the Indian Evidence Act 1872 would not apply to the case on hand and that the provisions of Order – 18 Rule 17 CPC cannot be misused as a matter of routine. Reliance is placed in this regard upon the decision of the Supreme Court in **K.K. Velusamy v. N. Palanisamy**¹.

13. Section 33 of the Indian Evidence Act, 1872 reads as follows:

“33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated:—Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it

¹ 2011 (11) SCC 275

states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided— that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.”

14. Evidence given by a witness in a judicial proceeding is relevant under Section 33 of the Indian Evidence Act, for the purpose of proving the truth of the facts which it states, provided any one of the following conditions is satisfied; (1) the witness is dead or cannot be found, (2) the witness is incapable of giving evidence, (3) the witness is kept out of the way by the adverse party or (4) the presence of the witness cannot be obtained without an amount of delay or expense.

15. According to the petitioner, the 2nd defendant is kept out of the way by the adverse party. The three conditions laid down in proviso to section 33 are also satisfied, namely, (1) that the proceeding was between the same parties, (2) that the adverse party in the first proceeding had the right to cross-examine and (3) that the questions in issue were substantially the same.

16. It is true that the power under order 18 Rule 17 CPC, as held by the Supreme Court in **K.K. Velusamy** (supra 1), is not intended to be used routinely. The Court should apply its mind to see

whether the invocation of the power will defeat the very purpose of the various amendments to the Code.

17. In this case, the contention of the learned counsel for the respondents is that the petitioner came up with an application for reopening the evidence after ten months of the examination of DW.1. Therefore, it is contended that allowing the application of the petitioner would defeat the purpose of various amendments.

18. But, we do not think so. Even in cases where an application for reopening is allowed and it is found out later on that the evidence was not genuine or relevant, the Court can award exemplary costs. This is what the Supreme Court pointed out in paragraph-20 of its judgment in **K.K. Velusamy** (supra1).

19. At the time when the petitioner examined PW.1, they could not have anticipated that the 2nd defendant would not go to the witness box. If the petitioner had believed that the 2nd defendant being the person, who was the Managing Director of the 1st defendant at the time of entering into the contract, would certainly go to the witness box, they were justified in their belief. Normally, a party to a civil suit would choose to examine a person, who participated in the negotiations at the time of entering into the contract. But, if such a genuine belief on the part of the petitioner/plaintiff had been belied by the 3rd defendant going to the witness box as DW.1 and the 2nd defendant shying away from going to the witness box, the petitioner could have had no alternative except to seek reopening of the evidence to mark the certified copy of the deposition of the 2nd

defendant before the criminal Court. Rebuttal evidence, by its very nature, can come only after the evidence on the side of the defendant is over. This aspect has been completely lost sight of by the Commercial Court. Hence, the revision is liable to be allowed.

20. Accordingly, the revision petition is allowed and the impugned order is set aside. The application for reopening of the evidence filed by the petitioner shall stand allowed to enable the petitioner to mark the deposition of D.2 and the judgment in the criminal case as exhibits.

21. The miscellaneous petitions, if any, pending shall stand closed. No order as to costs.

V. RAMASUBRAMANIAN, J

ABHINAND KUMAR SHAVILI

March 20, 2019
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