

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.7461 of 2018

ORDER:

This Revision is filed under Article 227 of the Constitution of India challenging the order dt.14.11.2018 in I.A.No.865 of 2017 in O.S.No.165 of 2010 of the XVI Additional District and Sessions Judge-cum-XVI Additional Metropolitan Sessions Judge-cum-III Additional Family Court, Ranga Reddy District at Malkajgiri.

2. Petitioner is the 1st defendant in the above suit.
3. The 1st respondent had filed the said suit against the petitioner and others for declaration of title and for recovery of possession on the basis of a registered Will dt.26.12.2007 executed by one Late Bhagyalakshmi and also for other reliefs.
4. Written statement was filed by the petitioner and respondent No.s 2 to 4 opposing the suit claim.
5. After framing of the issues, when the suit was coming up for adducing the evidence on behalf of the 1st respondent/plaintiff, ultimately, chief examination affidavit was filed on 25.01.2017.
6. Since there was no representation on behalf of the petitioner, who was to cross-examine PW1 on that date, his right to cross-examine PW1 was forfeited and the matter was posted to 16.02.2017 for defendants' evidence.

7. Later it was adjourned to 09.03.2017 and by imposing costs it was further adjourned to 28.03.2017 for adducing the evidence of defendants.

8. On 28.03.2017, petitioner filed chief examination affidavit along with I.A.No.s 380 of 2017 and 381 of 2017 for receiving documents and to re-call PW1 for the purpose of cross-examination.

9. Both these applications were allowed on condition of payment of costs of Rs.2,000/- and subject to cross-examination of PW1 on or before 22.08.2017.

10. On 22.08.2017, PW1 was not present and so the matter was posted to 14.09.2017 for the purpose of cross-examination of PW1.

11. On that day, counsel for the petitioner was unwell and did not appear personally before the Court. So, the Court below closed the evidence of PW1 again and posted the matter for final arguments.

12. Petitioner then filed I.A.No.865 of 2017 to re-call PW1 for the purpose of cross-examination by the petitioner by pointing out that though the Court had permitted such cross-examination on payment of costs and such costs were paid, but because of the ill-health of the counsel, the cross-examination of PW1 could not be done on 14.09.2017 and so another opportunity be given.

13. Counter affidavit was filed by the 1st respondent opposing the same and alleging that the petitioner did not comply with the conditions imposed when I.A.No.381 of 2017 was allowed. It is stated that the petitioner and his counsel did not show any interest in the matter to pursue the case.

14. By order dt.14.11.2018, the Court below dismissed the application. It merely recorded that the plaintiff's evidence had been closed on 25.01.2017 and the petitioner did not comply with the conditional order imposed in I.A.No.381 of 2017.

15. This is factually incorrect because the Docket of the Court below itself would show that costs of Rs.2,000/- were paid and though the petitioner's counsel was ready to cross-examine PW1 on 22.08.2017 (*which was one of the conditions in the order passed by the Court below in I.A.No.381 of 2017*), the witness(PW1) himself did not appear on that day and the matter got adjourned to 14.09.2017.

16. The Court below therefore cannot say that since the petitioner did not cross-examine PW1 on 22.08.2017, petitioner should suffer.

17. If the harsh standards which the Court applied to the petitioner are applied to the 1st respondent, then it should have forfeited the evidence of PW1 because of his non-submission to cross-examination on 22.08.2017. When it showed indulgence to PW1, in spite of his absence on 22.08.2017, to come again on

14.09.2017 and submit for cross-examination, it should have shown equal indulgence to the petitioner when his counsel did not appear on 14.09.2017 to cross-examine PW1.

18. It is settled law that, as far as possible matters should be decided on merits and only in compelling circumstances can *ex-parte* decrees be allowed to be passed.

19. When the party has shown due diligence in immediately filing the application seeking permission to cross-examine PW1, the Court below should have sympathetically considered the same and allowed it.

20. Therefore, this Civil Revision Petition is allowed; order dt.14.11.2018 in IA.No.865 of 2017 in O.S.No.165 of 2010 of the XVI Additional District and Sessions Judge-cum-XVI Additional Metropolitan Sessions Judge-cum-III Additional Family Court, Ranga Reddy District at Malkajgiri is set aside; and the said I.A., is allowed. No order as to costs.

21. Consequently, miscellaneous petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

09th July, 2019.

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