

THE HON'BLE SRI JUSTICE A. VENKATESHWARA REDDY

CRP Nos.865 and 866 of 2020

COMMON ORDER:

1. These civil revision petitions are filed under Article 227 of the Constitution of India, aggrieved by the common order dated 28.01.2020 in IA No.1941 of 2019 and in IA No.1942 of 2019 in O.S. No.3033 of 2006 on the file of the learned IX Additional Senior Civil Judge, L.B.Nagar, Ranga Reddy District.
2. IA No.1941 of 2019 is filed under Order-18, Rule-17 read with Section 151 of the Civil Procedure Code (for short 'CPC') to recall DW.1 and IA No.1942 of 2019 is filed under Order-8, Rule-1A(3) of C.P.C. to receive the documents i.e., death certificate of Ch. Papaiah and his depositions in OS Nos.1590 and 1591 of 2004 on the file of the II Additional Junior Civil Judge, Ranga Reddy District, in evidence, as the said witness-Ch. Papaiah could not be examined in this case and he died after filing the evidence affidavit in lieu of chief examination. Since both the IA Nos.1941 and 1942 of 2019 filed by the petitioners/defendants 1 & 2 were dismissed, through the impugned common order dated 28.01.2020, these civil revision petitions are filed.
3. The original suit No.3033 of 2006 is filed by the plaintiffs against the defendants for declaration of title and recovery of possession. Pleadings are completed, issues are settled and evidence

on behalf of plaintiffs was also concluded. Thereafter, on behalf of defendants, DWs.1 & 2 are examined. It appears that they have filed the evidence affidavit of Ch. Papaiah as DW.3 and Advocate Commissioner was appointed to record his evidence in cross-examination. In the meanwhile, the said Ch. Papaiah passed away on 28.10.2019 before recording his cross-examination. Therefore, these two applications are filed by the defendants to recall DW.1 for the purpose of further evidence and for marking the death certificate of DW.3 and his evidence affidavit in OS Nos.1590 and 1591 of 2004 under Section 33 of the Indian Evidence Act, 1872.

4. Admittedly, the suits in OS Nos.1590 and 1591 of 2004 were filed for different reliefs and the present suit in OS No.3033 of 2006 is filed for declaration of title and for recovery of possession. On a careful examination of the pleadings in OS No.3033 of 2006, a specific plea was taken in the plaint that the defendants having obtained injunction orders in OS Nos.1590 and 1591 of 2004 have illegally occupied the suit schedule property and the cause of action in paragraph No.10 of the plaint in OS No.3033 of 2006 is also shown as the defendants having filed those two suits have illegally occupied the suit schedule property.

5. It is pertinent to note that the original suit No.3033 of 2006 was filed in the year 2006, pleadings were completed, evidence of plaintiff was closed and on behalf of the defendants, DWs.1 & 2 were also

examined. Thereafter, the evidence affidavit of DW.3 was filed. DW.3-Ch. Papaiah passed away on 28.10.2019 before recording his cross-examination. Now, the defendants intended to file the evidence of Ch. Papaiah, which was given in OS Nos.1590 and 1591 of 2004 in support of their claim in the present suit.

6. Section 33 of Indian Evidence Act, 1872 deals with the relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. This section provides that the evidence given by a witness in an earlier judicial proceeding, or before any person authorized by law to take evidence, is relevant in a subsequent judicial proceeding or at a later stage of the same judicial proceeding, for the purpose of proving the truth of the facts contained therein, if certain conditions mentioned in the section are satisfied. The death of witness whose evidence is admitted should first to be proved unless it is admitted on other side.

7. Here, in the instant case, there is no dispute as to the death of DW.3-Ch. Papaiah whose evidence affidavit was filed in lieu of chief examination. It is not in dispute that the said Ch. Papaiah was examined as PW.2 in OS No.1590 of 2004 and that he was also cross-examined at length. It is a fact that O.S.Nos.1590 and 1591 of 2004 are suits for injunction simplicitors, whereas the present suit is filed for declaration of title and recovery of possession and both the suits are in respect of the same property. Thus, the evidence of a witness in

a previous judicial proceedings and who is not available for cross-examination, evidence filed the chief evidence affidavit as DW.3 is quite relevant in the subsequent judicial proceedings when such a witness is dead (as per the principles laid in the case of *Papa Rao v. Satyanarayana*¹).

8. Even for that matter, a statement made by a party in an earlier litigation would be relevant against the party making such statement, but if other persons were not parties then it cannot be binding on them. Where a witness gave evidence in a suit with reference to possession of the parties and his evidence affidavit is filed in subsequent proceedings, but he died before cross-examination, in my considered opinion, the evidence of such witness in previous proceedings is relevant, may be taken on record under Section 33 of the Indian Evidence Act. Particularly, in view of the fact that Ch. Papaiah is examined as DW.3, his evidence affidavit is filed, admittedly advocate commissioner was appointed for recording the cross-examination of that witness, but before recording his cross-examination, he passed away on 28.10.2019. Thus, his evidence on record is not tested with cross-examination, the petitioner has taken all the reasonable steps to secure the presence of DW.3, filed his evidence affidavit, got the advocate commissioner appointed for recording the cross-examination, but unfortunately before recording the cross-examination, the witness died.

¹ AIR 1983 AP 257

9. In such circumstances, as the evidence of defendants is in progress, if DW.1 was recalled, the certified copy of deposition of Ch. Papaiah as PW.2 in OS No.1590 of 2004 is received in evidence, no prejudice would cause to the respondents/plaintiffs, as they are at liberty to cross-examine DW.1 on such document filed during further cross-examination. In that view of the matter, I find that the Court below is not justified in dismissing the applications in IA Nos.1940 and 1941 of 2019. Accordingly, the common order impugned is set aside. Both the applications are allowed. DW.1 is ordered to be recalled for further chief examination and for further cross-examination, the documents sought to be filed by the defendants i.e., the death certificate of Ch. Papaiah, evidence affidavit of Ch. Papaiah as PW.2 in OS No.1590 of 2004 be received in evidence on behalf of the defendants.

10. With the above observations, both the Civil Revision Petitions are allowed by setting aside the impugned common order dated 28.01.2020 in IA No.1941 of 2019 and in IA No.1942 of 2019 in O.S. No.3033 of 2006 on the file of the learned IX Additional Senior Civil Judge, L.B.Nagar, Ranga Reddy District. However, in view of the fact that the original suit is filed in the year 2006 and the evidence of plaintiffs is concluded, defence evidence is also in progress, the trial Court shall make every endeavour for disposal of the original suit, within four months from the date of receipt of a copy of this order. Both the parties to the suit shall cooperate with the trial Court for

expeditious disposal of the Original Suit, as directed. In the circumstances of these cases, there shall be no order as to costs.

11. Miscellaneous applications, if any pending in these civil revision petitions shall stand closed.

A. VENKATESHWARA REDDY, J.

Date: 20.01.2022
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