THE HON'BLE SRI JUSTICE A.V.SESHA SAI

C.R.P.No.4690 of 2017

O R D E R:

Defendants 1 to 12 in O.S.No.497 of 2008, on the file of the Court of the Principal Senior Civil Judge, Kurnool, are the petitioners in the present revision filed under Article 227 of the Constitution of India.

2. O.S.No.497 of 2008 is for the relief of partition, instituted by the first respondent herein claiming 1/15th share in the plaint schedule properties. In the said suit, defendants 1, 2 and 15 to 17 filed I.A.No.354 of 2017 under the provisions of Order 18 Rule 17 read with Section 151 of the Code of Civil Procedure to recall DW.2, Sri Mandla Chinna Nagamma, for the purpose of proving Ex.B.1 Will. Plaintiff filed a counter resisting the said application. By way of an order dated 21.08.2017, the learned Judge dismissed the said application. Legal sustainability of the said order is under challenge in the present revision.

3. Heard Sri Virupaksha Dattatreya Gouda, learned counsel for the petitioners and Sri Ratangapani Reddy, learned counsel for the first respondent/plaintiff apart from perusing the material available before the Court.

4. Submissions/contentions of the learned counsel for the petitioners:

4.1. The questioned order is erroneous, contrary to law and opposed to the very spirit and object of the provisions of Order 18 Rule 17 of the Code of Civil Procedure.

4.2. The contents of the affidavit filed in support of the application were not properly appreciated. The learned Senior Civil Judge, failed

to note that a witness can be called if new facts which were not within the knowledge of the applicant are discovered.

4.3. The learned Judge grossly erred in holding that the petitioners are attempting to fill up the omissions in the evidence of DW.2.

4.4. The judgment on which the Court below placed reliance is of no relevance to the facts and circumstances of the case.

4.5. The present application is in furtherance of the due compliance of the provisions of Section 68 of the Indian Evidence Act and not to fill up the lapses or lacunae in the evidence already adduced.

To bolster his submissions and contentions, learned counsel for the petitioners placed reliance on the judgments of the Hon'ble Apex Court in *K.K. VELUSAMY v. N. PALAANISAMY*[1] and *RAJENDRA PRASAD v. NARCOTIC CELL THROUGH ITS OFFICER*[2].

5. Submissions and the contentions of the learned counsel for the first respondent:

5.1. There is no error nor there exists any infirmity in the impugned order and the learned Senior Civil Judge is perfectly justified in dismissing the application having regard to the facts and circumstances of the case.

5.2. The reasons assigned in the affidavit filed in support of the application are not sufficient to maintain an application under the provisions of Order 18 Rule 17 of the Code of Civil Procedure.

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[1] (2011) 11 SCC 275
[2] (1999) 6 SCC 110

5.3. For the purpose of filling up the lacuna or omissions, petition to recall is not maintainable.

Learned counsel for the first respondent/plaintiff in support of his submissions, takes the support of the judgment of the Hon'ble Apex Court in the case of *VADIRAJ NAGGAPPA VERNEKAR (D) THROUGH LRS. v. SHARAD CHAND PRABHAKAR GOGATE*[3].

6. In the above background, now the issues which this Court is called upon to answer in the present revision are:

1. Whether the petitioners herein have made out a case which enables them to invoke the provisions of Order 18 Rule 17 of the Code of Civil Procedure?

2. Whether the impugned order warrants any interference of this Court under Article 227 of the Constitution of India?

7. The provision of law which is germane and relevant for the purpose of adjudication of the issues in the present revision is Rule 17 of Order 18 of the Code of Civil Procedure, which reads as under:

> "17. Court may recall and examine witness.- The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit."

8.. It is very much clear from a reading of the above provision of law that at any stage of the suit the Court is empowered to recall any witness, who has been examined already and the power conferred by virtue of the said provision of law cannot be used in a routine manner and can be used with great caution and circumspection and subject to certain limitations.

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[3] (2009) 4 SCC 410

Therefore, in the present revision the Court is required to examine as to whether in the light of the reasons assigned in the affidavit filed in support of the application, such jurisdiction can be exercised. In order to decide the same it may be appropriate to refer to the averments in the supporting affidavit. In the supporting affidavit, the deponent/second defendant stated that he examined DW.2 for the purpose of proving partition, but by mistake the evidence relating to Ex.B.1 Will was not adduced and the same happened because of inadvertence. The information available before the Court reveal that in fact the chief-affidavit of DW.2 was filed on 07.11.2016 and she was cross-examined on 25.01.2017 and subsequently the DW.3 was also examined. In this context, it would appropriate to refer to the judgments cited by the learned counsel for the petitioners and the first respondent/plaintiff.

9. In *K.K. VELUSAMY (supra 1),* the Hon'ble Apex Court at paragraphs 8 and 9, held as follows:

> "8. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate - 2009 (4) SCC 410]. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.
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> 9. There is no specific provision in the Code enabling the parties to re- open the evidence for the purpose of further examination-in-

> chief or cross- examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re- open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications."

10. In *RAJENDRA PRASAD (supra 2),* the Hon'ble Apex Court at paragraph 9 held as follows:

> "9. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trail of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No parry in a trial can before-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

11. In *VADIRAJ NAGGAPPA VERNEKAR (D) THROUGH LRS (supra 3),* cited by the learned counsel for the first respondent, the Hon'ble Apex Court at paragraph 16 and 17, held as follows:

> "16. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined. As indicated by the learned Single Judge, the evidence now being

sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared. In the instant case, Sadanand Shet was shown to have been actively involved in the acquisition of the flat in question and, therefore, had knowledge of all the transactions involving such acquisition. It is obvious that only after cross- examination of the witness that certain lapses in his evidence came to be noticed which impelled the appellant to file the application under Order 18 Rule 17 CPC. Such a course of action which arises out of the fact situation in this case, does not make out a case for recall of a witness after his examination has been completed. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

17. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination. Of course, if the evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the Trial Court to permit recall of such a witness for re-examination-in-chief with permission to the defendants to cross-examine the witness thereafter. There is nothing to indicate that such is the situation in the present case. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the Court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out."

12. It is very much evident from the principles laid down from the above referred judgments of the Hon'ble Apex Court in the case of

K.K. VELUSAMY (supra 1) and *VADIRAJ NAGGAPPA VERNEKAR (D) THROUGH LRS (supra 3)* that the jurisdiction under Order 18 Rule 17 is required to be exercised very sparingly and not as a general rule. The Hon'ble Apex Court also clarified that the usage of such power in a mechanical manner is not the intention of Order 18 Rule 17 of the Code of Civil Procedure. The judgment of the Hon'ble Apex Court in *RAJENDRA PRASAD (supra 2),* in the facts and circumstances of the case, would not render any assistance to the petitioners as the said case pertains to a criminal case where the issues would pertain to the life and liberty of the individual.

13. Obviously, in the instant case also the intention of the petitioners is to fill up the lacuna and omissions in the evidence of PW.2, but not to clarify the issues already thereon record. In the considered opinion of this Court, the reasons assigned in the supporting affidavit are not sufficient to maintain the application under the provisions of Order 18 Rule 17 of the Code of Civil Procedure.

14. For the aforesaid reasons, the revision is dismissed. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

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A.V.SESHA SAI, J

Date:30.11.2017
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THE HON'BLE SRI JUSTICE A.V.SESHA SAI

HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH
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C.R.P.No.4690 of 2017

Dated:30.11.2017

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