
(2013) 10 AP CK 0002

In the Andhra Pradesh High Court

Case No : Civil Revision Petition Nos. 4024 and 4052 of 2013

Yousuf Saleh

APPELLANT

Vs

Aisha Siddique

RESPONDENT

Date of Decision : 25-10-2013

Acts Referred:

Citation : (2013) 6 ALT 412

Final Decision : Dismissed

Judgement

P. Naveen Rao, J.—Petitioner and respondents in both Civil Revision Petitions are same. Both Civil Revision Petitions arise out of common order. Plaintiff is the petitioner and the defendants are the respondents herein. Plaintiff filed the suit for partition against the respondents, who are her mother, brother and sister.

2. Plaintiff filed I.A. Nos. 553 and 554 of 2013. I.A. No. 553 of 2013 is filed praying to recall P.W.1 for the purpose of marking the documents i.e., compromise agreement and compromise petition as exhibits. I.A. No. 554 of 2013 is filed to reopen the suit for marking the documents. These two petitions are filed on the ground that there was an agreement between the parties for resolution of dispute and enclosing the agreement petition is filed under Order XXIII, Rule 3 C.P.C. to record the compromise, but, due to inadvertence, the same could not be marked as documents. Plaintiff submitted that these are the crucial documents for adjudication. Therefore prayed for indulgence of the Court to reopen the case and recall P.W.1 for marking the documents.

3. The claim of the plaintiff is opposed by the defendants contending that the compromise agreement was drafted by the plaintiff by playing fraud and defendants never agreed for such compromise. It is contended that though the suit is of the year 2008 and the compromise memo was drafted on 16.04.2008 and was referred to Lok-Adalat, it was not settled before the Lok-Adalat and therefore, the matter was remitted back to the trial Court. The plaintiff was aware of all the developments and kept quiet all along, allowed recording of the evidence and when the matter is listed for submission of arguments, these

petitions are filed only to protract the litigation.

4. Considering the rival submissions, the trial Court dismissed both I.As. Aggrieved by the same, these two C.R.Ps are preferred.

5. Heard learned counsel for the petitioner and learned counsel for the respondents.

6. Learned counsel for the petitioner submits that on 16.04.2008, plaintiff and defendants have entered into an agreement to resolve pending disputes and on the same day, petition is filed before the trial Court enclosing the copy of the agreement. Since parties have already compromised the issue and filed a petition, to record compromise and to dispose of the suit, matter was referred to Lok-adalat. Learned counsel submits that these documents are vital for proper adjudication of the claim in the suit. Relying on the provision in Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (for short, C.P.C.), learned counsel submits that witness can be recalled at any time and that merely because suit is coming up for arguments, is no ground for not recalling the witness. Thus, the trial court erred in not exercising the discretion vested in Order XVIII Rule 17 C.P.C. Learned counsel further contends that according to Order XXIII Rule 3 C.P.C., where a petition to compromise is filed along with agreement, but one of the parties to the agreement denied the correctness of the compromise, it is mandatory for the Court to decide the question. Having regard to the provision contained in Order XXIII Rule 3 C.P.C., the trial Court ought to have decided the question and instead of deciding the question, the I.As filed by the petitioner were erroneously dismissed.

7. Learned counsel for the respondents submits that the compromise was obtained by playing fraud. Learned counsel submits that believing the husband of the 7th respondent, who is an elderly person, respondents have signed on the blank papers and taking advantage of the respect and regard given to him, after obtaining the signatures on blank papers, husband of 7th respondent created fraudulent compromise deed to suit the convenience of the 7th respondent and the plaintiff. Learned counsel submits that respondents resiled from the said compromise and suit has to be adjudicated on merits without regard to the so called compromise. Learned counsel contends that there is collusion between the plaintiff and the 7th defendant and for the reasons best known, the 7th defendant did not choose to appear before the Court or file the written statement.

8. Learned counsel further submits that even though the so called compromise memo was filed in April, 2008, the plaintiff kept quiet all along, allowed the evidence to be recorded. There was no whisper in her evidence nor in the evidence given by plaintiff No. 2. They never pressed for marking of these documents. After recording of evidence and when the matter was posted for arguments, petitioner sought five adjournments and only on the last adjournment, these petitions are filed. The learned counsel further submits that Order XVIII Rule 17 C.P.C., can be invoked if a new fact has come to the light of

the petitioner. In the instant case, petitioner was aware of the documents, which she wanted to mark, since at her instance only the so called agreement was drafted and presented to the court. Therefore, when the said documents were within the possession and knowledge of the plaintiff, plaintiff having not chosen to mark the same while deposing and having kept quiet for almost five years, it is not open to the plaintiff to reopen the case and to recall plaintiff No. 1 to mark the documents.

9. Learned counsel further contends that the petitions are not supported by detailed pleadings and no reasons are assigned as to why the plaintiff could not mark those documents when her evidence was recorded and that why at this stage the plaintiff has realized to mark those documents. The learned counsel submits that any settlement between the parties to a suit, can assume finality, if only compromise is recorded by the Court on an application filed under Order XXIII, Rule 3 C.P.C. and until such compromise is recorded by the court, any amount of agreement between the parties, or acknowledgement of the steps, cannot affect the rights of the parties and at the most, the parties, who resile from such steps in the direction of a settlement, can be subjected to cross-examination. In support of his contentions, reliance is placed on the decision of the Hon"ble Supreme Court in the case of Vadiraj Naggapa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate, and the decision of this Court in the case of T. Srinivasa Rao Vs. T. Venkata Rangaiah and Another, .

10. In reply, learned counsel for the petitioner further submits that petition is filed under Order XXIII, Rule 3 seeking compromise. He further submits that defendant No. 1 is an Advocate. He adduced his evidence in December, 2012 and he was cross-examined on 06.02.2013. All the defendants are literates and they were aware of the consequences of signing compromise. It is an after-thought to contend that they signed on blank papers, whereas the fact of matter is that they read the settlement deed and accordingly signed on the documents.

11. As facts on record would disclose, a compromise agreement was drafted and petition to record compromise is filed in the suit. The alleged compromise was entered into in April, 2008, soon after institution of the suit. When the suit was called before the Lok-adalat for recording of compromise, the parties remained absent. The suit underwent adjournments before the Lok-Adalat and since parties were not showing interest for settlement, on 10.06.2008 the suit was remitted to the trial Court. Thus, it is not the case of the petitioner that she was not aware of the agreement to compromise when she deposed as P.W.1. Even after the conclusion of depositions and till the matter is listed for arguments, no steps were taken by the plaintiff to mark those documents. Order XVIII Rule 17 C.P.C., can be invoked where a new material has come to the knowledge of the parties to a litigation, which has bearing on the ultimate adjudication of the suit and, therefore, can apply to the court for recalling of the witness. The discretion vested in the court under Order XVIII Rule 17 C.P.C., cannot be invoked in matters of this nature, more particularly, when no reasons are assigned by the

petitioner in the affidavit filed in support of the petition to reopen the case as to why petitioner kept quiet for almost five years and no steps were taken to mark so called compromise agreement. The provision contained in Order XVIII, Rule 17 C.P.C. is an enabling provision that vests discretion in the court to come to the rescue of the party to the litigation that for valid reasons, certain facts/documents could not be brought on record. If deposition of the witnesses is completed, but for some genuine reason, it is necessary to recall the witness to elicit the correct information, the trial Court can exercise discretion to recall a witness to record additional evidence and to mark additional documents.

12. The facts in *Vadiraj Naggapa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate*, are identical to the facts of this case. Hon'ble Supreme Court held that Order XVIII, Rule 17 C.P.C., is not intended to be used to fill up omissions in the evidence of witnesses, who are already examined. In the said case also no new facts have been discovered subsequently, which were not within the knowledge of the party when the affidavit evidence was filed. The Hon'ble Supreme Court held as under:

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 reexamination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

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.

.. 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 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.

13. In the case on hand, the trial Court was not (sic.) convinced that the claim for reopening of suit and recalling of P.W.1 was not genuine and not in the interest of justice. In the facts of this case, it cannot be said that trial court erred in not exercising its discretion under Order XVIII Rule 17 C.P.C.

14. Learned counsel for petitioner made earnest endeavours to persuade this court to set aside the order of the trial court and to remit back the matter to the trial court. He placed strong reliance on provision contained in Order XXIII Rule 3 C.P.C. Order XXIII, Rule 3 of C.P.C., reads as under:

3. Compromise of suit. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties], or where the defendant satisfies the

plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

Explanation. An agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of this rule.]

15. This provision enables the Court, if it is satisfied, that the suit has been adjusted wholly or in part of lawful agreement or compromise. The Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith. According to the proviso appended to Rule 3, if one party alleges and denies an adjustment or satisfaction, the Court should decide the question. In the instant case, after filing of the compromise agreement along with compromise memo, the matter was referred to Lok-adalat for settlement.

Parties have not appeared before the Lok-adalat. Since parties failed to appear before the Lok-Adalat and satisfy the Lok-Adalat that the suit has been adjusted to the satisfaction of all, the Lok-adalat recorded the same and remitted the matter back to the trial court for adjudication on merits.

16. The I.As., are not with reference to exercising power under Order XXIII Rule 3 C.P.C. As evident from the order of the trial Court, the stage of compromise as mandated by Order XXIII Rule 3 C.P.C., is over and suit has to be adjudicated on merits without regard to the terms of compromise. These two I.As. are to recall P.W.1 and to reopen the suit and to mark the documents. Thus, these two petitions are not on the issue of trial court not exercising power under proviso to Order XXIII Rule 3 C.P.C. Therefore, the contention of the learned counsel for the petitioner is misconceived. Furthermore, parties have not chosen to appear before the Lok-adalat, which shows that parties did not evince interest in enforcing the terms of compromise. Even after the suit is remitted back to the trial court, no claim for compromise was made. On 07.11.2008 the respondents entered their appearance and filed their written statement on 19.01.2009. In the written statement, defence taken by the respondents was that the compromise was drafted after obtaining their signatures on blank papers. The respondents signed on blank papers trusting the elderly person and that person has deceived the respondents. Therefore, the respondents resiled from the earlier stand of compromise. In T. Srinivasa Rao Vs. T. Venkata Rangaiah and Another, , this

Court held as under:

.. Any settlement between the parties to a suit; arrived at during the pendency of the suit, can assume finality, if only an application is filed under Order 23 C.P.C. Till the Court records such a compromise, any amount of agreement between the parties, or acknowledgement of the steps, cannot affect the rights of the parties. At the most, the parties, who resile from such steps, in the direction of a settlement, can be subjected to cross-examination.

17. As held by this court in T. Srinivasa Rao Vs. T. Venkata Rangaiah and Another, , until court records compromise, the so called agreement has no validity.

18. P.W.1 has not deposed regarding the so called compromise and has not marked compromise agreement and compromise memo as documents and has not subjected the defendants to cross-examination regarding the compromise agreement and compromise memo.

19. Thus, I see no merit in the revision petitions and accordingly these Civil Revision Petitions are dismissed. No costs. It is made clear that findings recorded/ observations made in this order are only for the purpose of disposal of these civil revision petitions and this Court has not expressed any opinion on merits. Miscellaneous petitions pending, if any, in these petitions shall stand dismissed.