

**HIGH COURT OF ANDHRA PRADESH**  
TUESDAY ,THE TWENTY THIRD DAY OF APRIL  
TWO THOUSAND AND NINETEEN

**PRSENT**

**THE HONOURABLE SRI JUSTICE D.V.S.S.SOMAYAJULU**  
**CIVIL REVISION PETITION NO: 7339 OF 2018**

**Between:**

1. Jakka Srinivasa Rao S/o Peda Subbarao, Hindu, Age 43,  
Business, R/o Door No.20-1593, Vinukonda Town, Guntur District.
2. Jakka Rajya Lakshmi W/o Late China Subbarao, Hindu, Age 61,  
House Hold, R/o Door No.25-117, Vinukonda Town, Guntur District.
3. Jakka Nageswara Rao S/o Late China Subbarao, Hindu, Age 41,  
Business, R/o Door No.25-117, Vinukonda Town, Guntur District.

**...PETITIONER(S)**

**AND:**

1. Javvaji Venkata Chalapathi Rao S/o Venkatappaiah, Hindu, age 55,  
Business, R/o Library Street, Door no. 1-118, Upstairs, Vinukonda Town.
4. Javvaji Lakshmi Chalapathi Rao S/o Venkatappaiah, Hindu, age 51,  
Business, R/o Library Street, Door no. 1-18, Upstairs, Vinukonda Town.
5. Javvaji Raghava Rao S/o Venkatappaiah, Hindu, age 55,  
Business, R/o Library Street, Door no. 1-188,  
Upstairs, Vinukonda Town.

**...RESPONDENTS**

**Counsel for the Petitioner(s): VENKATESWARLU POSANI**

**Counsel for the Respondents: P DURGA PRASAD**

**The Court made the following: ORDER**

## HIGH COURT OF ANDHRA PRADESH

TUESDAY, THE TWENTY THIRD DAY OF APRIL  
TWO THOUSAND AND NINETEEN

PRESENT

THE HONOURABLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CRP No. 7339 OF 2018

Petition under Article 227 of the Constitution of India aggrieved by an order and decree dated 01.10.2018 Passed in I.A. No. 562/2018 in O.S. No. 23/2011 on the file of the XIII Additional District Judge, Narasaraopet

**Between:**

1. Jakka Srinivasa Rao, S/o Peda Subbarao,.
2. Jakka Rajya Lakshmi, W/o Late China Subbarao,.
3. Jakka Nageswara Rao, S/o Late China Subbarao.

Petitioners/Respondents/Plaintiff

AND

1. Javvaji Venkata Chalapathi Rao, S/o Venkatappaiah, Hindu, age 55, Business, R/o Library Street, Door no. 1-118, Upstairs, Vinukonda Town.
2. Javvaji Lakshmi Chalapathi Rao, S/o Venkatappaiah, Hindu, age 51, Business, R/o Library Street, Door No. 1-18, Upstairs, Vinukonda Town.
3. Javvaji Raghava Rao, S/o Venkatappaiah, Hindu, age 55, Business, R/o Library Street, Door no. 1-188, Upstairs, Vinukonda Town.

Respondents/Petitioners/Defendant Nos. 1 to 3

IA NO: 1 OF 2018

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to stay of all further proceedings in O.S No.23 of 2011 on the file of the XIII Additional District Judge, Narsaraopet pending disposal of the Civil Revision Petition.

IA NO: 1 OF 2019

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to permit the petitioners/appellants to file additional material papers in CRP No.7339 of 2018.

For the Petitioners: Sri Posani Venkateswarlu

For the Respondents: Sri P. Durga Prasad

the Court made the following: ORDER

**HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**  
**CIVIL REVISION PETITION No.7339 OF 2018**

**ORDER:**

This Civil Revision Petition is filed questioning the Order, dated 01.10.2018, in I.A.No.562 of 2018 in O.S.No.23 of 2011, passed by the learned XIII Additional District Judge, Narsaraopet.

In O.S.No. 23 of 2011 an application in I.A.No.562 of 2018 was filed under Section 151 of C.P.C. to mark the deposition of one Jakka Subba Rao, which was recorded in another suit in O.S.No. 98 of 1993 on the file of Additional Senior Civil Judge, Narasaraopet. The said application was opposed by the respondents, who are the plaintiffs in the suit. Ultimately by the impugned order the October, 2018 the Court permitted the receipt of the deposition recorded earlier in another suit in O.S.No.98 of 1993. Challenging the same the present Civil Revision Petition is filed.

This Court has heard Sri Posani Venkateswarlu, learned counsel for the revision petitioners and Sri P. Durga Prasad, learned counsel for the respondents.

Learned counsel for the revision petitioners very strongly objected to the application being allowed. He stressed that Section 33 of Indian Evidence Act is an

exception to the general rule of hearsay and argues that unless the conditions specified under Section 33 of the Evidence Act (in short "the Act") are very strictly complied with, the deposition in another suit cannot be received as evidence in the present suit. He pointed out that the grounds raised by him, which are ground Nos. 3, 4, 5, 9, 11, 12 and 13 are the essential points that are being urged by him in the revision. It is his contention that without any proof and without the compliance of the essential conditions of Section 33 of the Act, the lower Court allowed the application. His further contention is that the matters in issue are not the same. The incapacity of the witness to give evidence is not proved and there was no cross-examination of the witness in the earlier suit and that, therefore, none of the essential ingredients under Section 33 of the Act are fulfilled. Learned counsel for the petitioner also relied on the judgments reported in **Dr.S.J. Vince v Bethany Chapel Trust and Ors.**,<sup>1</sup> **Amarjit Kaur and Ors., v Kishan Chand**<sup>2</sup> and **Sistla Venkata Sastri v Zernini Venkatagopaludu**<sup>3</sup> to contend that the lower Court committed an error.

<sup>1</sup> 2010 (4) (AP) 106

<sup>2</sup> 17 (1980) DLT 225

<sup>3</sup> 85Ind.Cas.209 = Manu/TN/0849/1924

In reply to this, learned counsel for the respondent submits that the lower Court considered all the matters in coming to a conclusion that the evidence recorded in the earlier suit is admissible in evidence. Learned counsel relies upon para-11 of the impugned order and argues that the Court below noticed that the suit schedule property was common, the Advocate Commissioner, who was appointed to record the evidence, categorically stated that the witness was not responding to his questions and that the Court therefore had adequate material to come to a conclusion that the said J.Subbarao, was incapable of giving evidence.

**LEGAL BACKDROP:**

As per the well settled law on the subject the following conditions are necessary to be satisfied before the evidence recorded in a previous judicial proceedings can be received in another judicial proceedings:-

- (1) The evidence must have been given in a judicial proceeding or before any person authorized by law to take evidence;
- (2) That the first proceeding was between the same parties as in the second proceeding or between representatives in interest of the parties;
- (3) That the party against whom the deposition is tendered had the full opportunity of cross-examining the deponent when the deposition was recorded;

- (4) That the issues involved in both the proceedings are the *same* or are *substantially the same*;
- (5) That the witness is *incapable* of being called at the subsequent proceeding on account of death, or incapability of giving evidence, or being kept out of the way by the other side, or an unreasonable amount of delay or expense etc.,

The Hon'ble Apex Court in **Shashi Jena & Ors. v. Khadal Swain & Anr.**<sup>4</sup> held as follows:

"8. From a bare perusal of the aforesaid provision, it would appear that evidence given by a witness in a judicial proceeding or before any person authorized to take it is admissible 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 states in its evidence given in earlier judicial proceeding or earlier stage of the same judicial proceeding, but under proviso there are three pre-requisites for making the said evidence admissible in subsequent proceeding or later stage of the same proceeding and they are (i) that the earlier proceeding was between the same parties; (ii) that the adverse party in the first proceeding had the right and opportunity to cross examine; and (iii) that the questions in issue in both the proceedings were substantially the same, and in the absence of any of the three pre-requisites afore-stated. Section 33 of the Act would not be attracted. This Court had occasion to consider this question in the case of **V.M.**

<sup>4</sup> (2004) 4 SCC 236

**Mathew v. V.S. Sharma and Ors.**<sup>5</sup>, in which it was laid down that in view of the second proviso, evidence of a witness in a previous proceeding would be admissible under Section 33 of the Act only if the adverse party in the first proceeding had the right and opportunity to cross examine the witness. The Court observed thus at AIR pp. 110 and 111: (SCC p.125, para 8).

"8. The adverse party referred in the proviso is the party in the previous proceeding against whom the evidence adduced therein was given against his interest. He had the right and opportunity to cross-examine the witness in the previous proceeding.....*the proviso lays down the acid test that statement of a particular witness should have been tested by both parties by examination and cross-examination in order to make it admissible in the later proceeding.*" [emphasis added]"

**EVIDENCE:**

If the present case is examined against the backdrop of this legal position, the first and foremost fact that comes to the notice of this Court is that there is no documentary evidence before the Court for coming to the conclusion that the previous deposition is admissible as evidence. The present suit O.S.No.23 of 2011 is filed by J. Srinivasa Rao and J. Chinna Subba Rao. As J. Chinna Subba Rao died, his LRs were brought on record as plaintiffs 3 and 4. There are eight defendants:- five individual

<sup>5</sup> (1995) 6 SCC 122:AOR 1996 SC 109

defendants, two proprietary firms (Defendant Nos. 6 and 7) and a partnership firm (defendant No.8). The suit is filed for partition of the suit schedule property. The additional material papers filed by the learned counsel for the revision petitioners shows that the other suit O.S.No.98 of 1993 was filed by Nagasarapu Siva Venkata Rangarao, Sanisetty Venkateswarlu, Garre Satyanarayana, Nerella Venkata Papparao and Penugonda Gandhi against the following defendants: 1) Jakka Subbarao, 2) Jakka China Subbarao, 3) Javvaji Venkataappaiah, 4) Javvaji Venkata Chalapathirao, 5) Javvaji Raghava Rao, 6) Javvaji Lakshmi Chalapathi Rao, 7) Official Receiver, Guntur and four partnership firms as defendants 8 to 11. The said suit was filed for specific performance of a contract dated 21.12.1990. This plaint was not considered by the Trial Court.

Just like in a case of the *resjudicata* etc., where the pleadings in the earlier and later suit are to be filed to enable the Court to come to a conclusion that the issue in both the matters are the same, in a case of this nature also that if the Court has to come to a conclusion that the issues involved in both the suits are



same/substantially the same and that the parties are same etc. Hence, there is a necessity for the Court to consider the pleadings or other material etc., in both the suits to come to this conclusion. The Court should also be convinced that the party, against whom the deposition is tendered, has had a full opportunity of cross-examining the defendants. For this the entire deposition of the witness must be filed and considered. Lastly, the Court should be convinced that the witness was "incapable" of giving evidence in the subsequent proceedings. The incapacity should not be temporary or momentary as it is when caused by the temporary weakness, illness etc. The Court should be clearly convinced on all these grounds and the party who wishes to file the deposition in the earlier suit should plead and prove these essential elements.

**CONCLUSION:**

In the case on hand the Trial Court did not have any material whatsoever to conclude (a) that the issues involved in both the proceedings are same or substantially the same; (b) that all the parties in the earlier suit had an opportunity of full and complete cross-examination of the witness whose deposition is sought to be marked; (c) that the witness was incapable

of giving evidence because of his sickness or for some other similar reasons. As mentioned by this Court earlier, these are all the matters which have to be carefully assessed by the Court and proved by the petitioners. In fact, the affidavit filed in this case in support of the application to receive the deposition states that the witness is intentionally avoiding to give evidence (emphasis supplied), which clearly suggests that witness is conscious of what he is doing and is deliberately avoiding to give replies. In addition to this the counter filed also asserts that due to old age weakness and paralysis the witness was not giving evidence and the counter reiterates that he is not disabled.

In the light of the provisions of law, which clearly are not fulfilled, this Court is of the opinion that the Court below committed an error in passing the impugned order. The lower Court on the basis of some observations came to a conclusion that the proceedings between the parties are same and that the issues between the parties are substantially the same. This procedure is clearly wrong. The Advocate Commissioner returned the warrant unexecuted as the witness was not answering the questions, but the affidavit filed by the 1<sup>st</sup> defendant in I.A.No.562 of 2018 clearly states that the witness is

intentionally avoiding to give evidence. This aspect was not considered by the Trial Court. Therefore, this Court is unable to accept the findings of the Court that the witness was actually "incapable" and not in a position to give evidence.

In that view of the matter, after hearing both the parties and considering the law on the subject, this Court is of the opinion that the Court below committed an error in passing the impugned order. Therefore, the Civil Revision Petition is allowed setting aside the Order, dated 01.10.2018, in I.A.No.562 of 2018 in O.S.No.23 of 2011, passed by the learned XIII Additional District Judge, Narsaraopet. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in this appeal, shall stand closed.

// TRUE COPY //

Sd/- M.RAMESH BABU  
ASSISTANT REGISTRAR

SECTION OFFICER

One Fair Copy to Hon'ble Sri Justice D.V.S.S. Somayajulu  
(for his Lordship's kind Perusal).

To,

1. The XIII Additional District Judge, Narsaraopet, Guntur District. ✓
2. 9LR Copies.
3. The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi. ✓
4. The Secretary, Andhra Pradesh Advocates Association, Library, High Court Buildings, Hyderabad. ✓
5. One CC to Sri Venkateswarlu Posani Advocate [OPUC] ✓
6. One CC to Sri P. Durga Prasad Advocate [OPUC]. ✓
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*Phai*



HIGH COURT

2019:APHC:15850

DATED: 23-04-2019

OC  
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21/5/19

ORDER

CRP NO.7339 OF 2018

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J.R.

ALLOWING THE CRP  
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