

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.3172 of 2015
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ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India by the unsuccessful petitioner/plaintiff is directed against the order dated 03.03.2015 of the learned VIII Additional District Judge, Vijayawada passed in IA.no.210 of 2015 in OS.no.233 of 2011 filed under Order XVIII Rule 17 and Section 151 of the Code of Civil Procedure, 1908 to recall DW1 for the purpose of cross-examination on behalf of the plaintiff in the interests of justice and equity.

2. I have heard the submissions of the learned counsel for the revision petitioner/plaintiff. The learned counsel for the plaintiff submits that notice as directed is served on the counsel for the respondent on record in the proceedings before the trial Court. None appears. I have perused the material record.

3. The facts, which are necessary for consideration, in brief, are as follows:

The plaintiff brought the suit against the defendant for recovery of money. The matter was adjourned several times for the evidence of the defendant. It is not in dispute and it is also borne out by the record of the trial Court that on certain occasions, the matter was adjourned after imposing costs payable by the defendant. Having thus taken further time from 24.07.2014 till 22.09.2014, the defendant had appeared before the trial Court and had filed his affidavit in lieu of examination-in-chief having paid costs of Rs.50/- imposed against him. From 22.09.2014, the matter was adjourned to 06.10.2014 for cross examination of DW1. As that day was declared as a holiday, the matter was adjourned to the next day. On 07.10.2014 the defendant was absent and the matter was adjourned to 14.10.2014. As the

Presiding Officer was on leave on 14.10.2014, the matter was adjourned to 15.10.2014. Again on 15.10.2014 as the defendant/DW1 was absent, the matter was adjourned to 18.10.2014 on costs of Rs.20/-. As on that day the defendant was absent the matter was again adjourned to 13.11.2014 on costs of Rs.20/-. As he was again absent on that day, the matter was again adjourned to 20.11.2014. On 20.11.2014 as he was absent the matter was adjourned to 25.11.2014 after imposing costs of Rs.20/-. On 25.11.2014, the DW1 was present and costs were paid. Therefore, the matter was adjourned to 01.12.2014 for cross-examination of DW1. However, on 01.12.2014, as the plaintiff was absent and did not cross-examine DW1, the cross-examination of DW1 on behalf of the plaintiff was recorded as 'NIL'. In the said circumstances, the subject application to recall DW1 was filed. While allowing the said petition and permitting the plaintiff to cross-examine DW1, the trial Court had appointed an advocate commissioner for recording the cross-examination of DW1 by fixing the Commissioner fee at Rs.3,000/- payable by the plaintiff. Therefore, the plaintiff is aggrieved.

4. In view of the sequence of events, which are narrated supra, it is evident that all through the defendant was not ready and was taking time, and the Court below was granting time very liberally; even after the affidavit in lieu of examination in chief of the defendant was filed also, he (DW1) was not appearing before the trial Court and was taking time from time to time; and the matter was being adjourned for the cross examination of DW1 and on certain occasions he was taking time by paying costs imposed by the Court. Thus, he had taken long time for commencing evidence on his side and also for filing his affidavit in lieu of examination in chief and also for his appearance before the trial Court for cross examination by the other side. Until, 01.12.2014, except on two dates on which the Presiding Officer is on leave and the Court was not working as that day was declared as a holiday, the matter was being adjourned for the sole reason that the defendant was not getting ready and is taking time. Despite all the sequence of events and the background, for the absence of the plaintiff's counsel just only on one day, viz., 01.12.2014, the Court below closed the cross examination of DW1 by the

plaintiff by recording in the deposition that cross-examination is 'NIL'. When an application is filed by the plaintiff to recall DW1 for the purpose of cross-examination, the Court below while allowing the said application has appointed an advocate-commissioner for recording the cross-examination of DW1 by fixing the Commissioner fee at Rs.3,000/- payable by the plaintiff

5. The learned counsel for the revision petitioner, while highlighting the day to day recordings in the docket/proceedings sheet, which are adverted to supra, would submit that the order, which is passed by the Court below insofar as appointing a Commissioner for recording cross-examination of DW1 and directing the plaintiff to bear the costs is unjust, unfair and lopsided in the facts and circumstances of the case. She would also submit that it is not the case of DW1 that he is unwell and that he is not in a position to attend the Court and give evidence and that, therefore, the trial Court ought to have recorded the cross-examination in open Court.

6. Having regard to the detailed sequence of events aforementioned and the submissions of the learned counsel for the revision petitioner, this Court is satisfied that the order impugned insofar as it related to appointment of advocate commissioner for recording cross-examination of DW1 is unsustainable being *ex facie* unfair, unjust and unbalanced in the facts and circumstances of the case. The Court below, which has shown so much of leniency while adjourning the matter a number of times at the request of the defendant, has somehow adopted a harsh and unfair approach towards the plaintiff; and the said approach of the Court below cannot be approved keeping in view the principles of fair play and equity. Further, the defendant is a resident of Hyderabad whereas the suit is pending in a Court at Vijayawada. If the Commissioner appointed has to proceed to record the cross-examination of DW1, the plaintiff has not only to bear the expenses towards Commissioner's fee but also the travelling and boarding expenses of the Commissioner and that of his counsel and also his expenses; and that would result mulcting the plaintiff with un-necessary costs for no fault of his.

7. Viewed thus, this Court finds that the order impugned insofar as it

related to appointment of advocate commissioner to record cross-examination of DW1 is unsustainable and brooks interference.

8. In the result, the Civil Revision Petition is allowed and the order impugned is set aside to the extent as indicated supra. Considering that the suit is of the year 2011, DW1 is directed to appear before the Court below, as and when directed by the Court below, for his cross-examination by the learned counsel for the plaintiff. On receipt of a copy of this order, the trial Court shall fix a date for appearance of DW1 for his cross-examination which may be convenient to all concerned and expeditiously dispose of the suit preferably within two (02) months from the date of the receipt of a copy of this order.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

12th April, 2016
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