

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.4140 of 2016

ORDER:

The revision petitioners are the plaintiffs 1 and 2 and revision respondents are defendants 1 to 5. The suit in O.S.No.128 of 2007 (original No.606 of 204) on the file of XIII Junior Civil Judge, City Small Causes Court, Hyderabad, for the relief of perpetual prohibitory injunction not to dispossess the plaintiffs/tenant from the suit schedule premises door No.7-1-510. In the course of trial, after completion of evidence of plaintiffs, 1st defendant-DW.1 filed his chief examination affidavit and after taken on oath the chief examination, while coming for cross examination from April/June 2015 including for his absence on the grounds of ill health and including on petitions for adjournment therefrom since closed, I.A.No.5 of 2015 filed and reopened the evidence by setting aside the closed order on 15.06.2015, 11.08.2015 and again from called absent posted to 20.08.2015 by closing the evidence and posted for further evidence and while so, again filed reopen petition in I.A.No.8 of 2015 and closed evidence order dated 20.08.2015 was set aside and posted to 18.11.2015 and 20.11.2015 and for absence to 24.11.2015. On that day he was cross examined in part and posted to 07.12.2015 for continuation at request of defendants and on that day called absent and again posted from time to time and it is while so, the application in I.A.No.1 of 2016 filed in the end of December 2015 saying he is aged about 75 years and suffering from old age diseases and even earlier attended for few occasions with difficulty to cross examination and fell sick and Doctors advised complete bed rest and being unable to attend the Court for facing further cross examination seeking Advocate

Commissioner's appointment to record his cross examination at his residence and it was on contest from the counter of the plaintiffs of the deponent-DW.1 is hale and healthy and even attending the Collectorate in relation to the land acquisition of metro rail project for compensation and it is only of rouse of so called ill health, by the impugned order dated 04.04.2016 the learned Junior Civil Judge allowed the application describing all the facts saying due to the non appearance of DW.1 many a time and from the request of both the counsels for cross examination the matter is dragging and the suit is of year 2007 with no progress and from thereby inclined to allow the petition for appointment of Advocate Commissioner for no prejudice caused to the respondents by such appointment at costs of DW.1.

In the revision even the respondents were served with notice failed to attend, hence taken as heard. Heard learned counsel for the revision petitioners and perused the material on record.

No doubt Order 26 amended Rule 4-A apart from Order 26 Rules 1 to 8 read with Order 18 amended Rule 19 CPC enables the Court even on its own to direct the statements of witnesses to be recorded on commission. However in this case on hand, whether there are any existing facts for such discretion is the issue. The very order of the lower Court when shows DW.1 filed his chief affidavit and taken on oath way back in April 2015 and coming for cross examination and only once or twice attended in December 2015 for cross examination leave about on 02.06.2015 earlier he was not cross examined from the absence of counsel for the plaintiffs, in all other times it is the DW.1's absence in not attending for cross examination and in taking time one way or the other and even closed twice by cause reopened. If any such facts and circumstances of his

abstaining from Court without even attending and that too having attended ultimately on 07.12.2015 and nothing on record before the Court of ill health by medical proof and that too when the counter of the other side shows including by a photo of attended Kalayanalaxmi Function Hall at Nagole on 19.02.2016, apart from Collectorate hearing on metro rail acquisition on 09.03.2016. Thereby the trial Court should not have been appointed Advocate Commissioner for mere asking of the alleged ill health with no proof of inability to move but for recording the evidence in Court and if failed to attend to close the evidence by treating with no value of what he already deposed of the chief affidavit taken on oath and cross examination in part.

Accordingly and in the result, the revision is allowed by setting aside the order of the lower Court with a direction to the lower Court to record the evidence of DW.1 before the Court by fixing any particular dates or proceed day to day for recording the cross examination of DW.1 in its endeavour in saying the suit is of the year 2007 and it requires early disposal and if he is not cooperating to treat the evidence on record of him with no value by closing the same to proceed further.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 04.11.2016
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