

HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.2066 of 2015

ORDER:

This revision under Article 227 of the Constitution of India is filed by the unsuccessful respondent/1st defendant assailing the order dated 16th day of April, 2015 of the learned Senior Civil Judge, Kothapeta of East Godavari District, passed in I.A.No.86 of 2015 in O.S.No.10 of 2013 filed by the petitioner/plaintiff under Order XVIII Rule 3-A read with Section 151 of the Code of Civil Procedure, 1908, requesting to permit her to examine G.S.R. Murthy, her son-in-law, who is also her GPA holder, as PW-1 in the suit in the first instance, reserving liberty to her to examine herself at a later stage, in case of necessity.

I have heard Sri V.V.S.S.Kameswara Rao, learned counsel for petitioner and Sri P.Rajesh Babu, learned counsel for the 1st respondent.

I have perused the material record.

In a suit for recovery of arrears of rent by the plaintiff against the defendants, the case of the plaintiff in support of her above said request, in brief, is as follows :-

She filed the suit for recovery of rents due from the defendants and for other reliefs; the defendants are resisting the suit; she filed her affidavit in lieu of examination in chief and also filed a petition to appoint an Advocate Commissioner to record her evidence; however, on the ground that she is not in a position to depose even before the Commissioner on account of her old age and health condition, which are not permitting her to withstand the

strain, she filed the subject application to permit her to examine her said son-in-law-cum-GPA holder in the first instance and reserve liberty to her to examine herself later, in case of necessity. It is *inter alia* stated in her affidavit that she is not in a position to undertake journeys from her place of residence to the Court where the suit is pending and that her GPA holder is her son-in-law being her daughter's husband and that she is living with him and her daughter since 2009 and that the GPA given to her son-in-law is in force.

Per contra, the case of the respondent/1st defendant, in brief, is this: The material allegations in the plaintiff's affidavit about her old age, health condition, inability to undertake journeys to the Court house and lack of ability to withstand the strain of deposing before an advocate-commissioner are all false. Though she is having filariasis in one of her lower limbs, in fact, she is of perfect health. She had already filed her affidavit in lieu of examination in chief and also filed an application to appoint an Advocate Commissioner to record her deposition; but, she later not pressed the said application and filed the present application for permission to examine her son-in-law as a first witness on her side alleging her old age, inability to undertake journey from her place of residence to the place of the Court and lack of ability to withstand the strain of deposing before an advocate-commissioner as grounds in support of her said request. Except making bare allegation that she was not in a position to depose before the Commissioner, no other grounds were alleged or made out. The plaintiff is not entitled to ask for liberty for her examination after her GPA holder is examined as PW1, more particularly, when she is a part-heard witness. She is trying to

avoid her cross-examination under the guise of the present petition. There are no *bona fides* in the petition.

On merits and by the orders impugned in this revision, the trial Court, while dismissing the petition as premature, granted liberty to the plaintiff to examine her son-in-law-cum-GPA holder as PW-1 and directed that she is at liberty to file similar application later in case she intends to examine herself at a later point of time. Aggrieved thereof, the 1st defendant preferred this revision.

The learned counsel for the revision petitioner/1st defendant, while reiterating the case of the 1st defendant, which is sated supra, would further submit that the 1st defendant has no grievance for the plaintiff examining her son-in-law-cum-GPA holder as PW-1, but in the facts and circumstances of the case, the trial Court ought not to have granted leave to the plaintiff to file a similar application at a later point of time in case she intended to examine herself after her son-in-law is examined as PW1. He would also submit that having filed her affidavit in lieu of her examination in chief and also an application to appoint Advocate Commissioner to record her evidence, she has become a part-heard witness, and, therefore, she is not entitled to seek the relief claimed in the subject application when she was in the box as a part-heard witness. He would also state that the contention that she is not in a position even to depose before the Advocate Commissioner is false.

Per contra, the learned counsel for plaintiff, while reiterating the plaintiff's submissions and while supporting the orders of the Court below, would contend that in view of plaintiff's advanced age, physical condition and poor health, the plaintiff was constrained to file the subject application

before the trial Court and that the trial Court having accepted the plaintiff's version gave leave to the plaintiff to file a similar application for permission for her examination at a later stage and further permitted to examine her son-in-law-cum-GPA holder as PW-1 having found that the application seeking liberty to examine the plaintiff as a 2nd witness after her son-in-law is examined, need not be filed at the threshold and that the said part of the request of the plaintiff is premature in view of the Division Bench judgment of this Court in **Aitipamula Shivalingam v. Aitipamula Chinna Narsamma** [1998 (2) ALT 7] and the judgment of a learned Single Judge of this Court in **Shaik Rafath Begum v. T.V.R.Anjaneyulu** [2006 (6) ALD 769]. The learned Counsel has further contended that the order of the trial Court is justified in the facts and circumstances of the case.

I have bestowed my attention to the facts and submissions.

In a suit for recovery of arrears of rent, which is being resisted by the contesting defendants, the trial Court framed appropriate issues as regards the arrears due and recoverable, if any, and also the quantum of rent. Plaintiff admittedly filed her affidavit in lieu of examination in chief and also an application to appoint Advocate Commissioner to record her evidence, but later she has not pressed that application and thereafter filed the present application to permit her to examine her son-in-law-cum-GPA holder at first instance and also grant her leave to examine herself later, in case of necessity. It is also her case that she is living with her son-in-law and only daughter since 2009 and that her son-in-law is looking after her affairs and that he is having knowledge of the facts of the case. The law is well settled that a GPA holder is a competent witness to state the facts

within his personal knowledge though he cannot speak about the aspects which are within the exclusive knowledge of his principal. Moreover, the aspect whether or not the GPA holder-cum-son-in-law, who is now sought to be examined as PW-1, is competent to give evidence cannot be decided at this stage. Order XVIII Rule 3-A clearly envisages that the party wishing to examine himself or herself as a witness, shall give evidence as a witness in the first instance before he or she examining other witnesses; at the same time the provision empowers the Court to record reasons and permit a party to the suit to give evidence as a witness at a subsequent stage i.e., after any other witness is examined in the first instance. Further, a party has got discretion as to how and through what evidence the fact in issue can be proved. The fact in issue can be proved by a party either through his or her evidence or through the evidence of a witness of that party. So, it is not within the purview of the Court to give a direction to the party to give evidence in the first instance before examining any other witness, as it is the discretion of the party. However, in the case on hand, the learned counsel for the 1st defendant assails the order of the trial Court mainly on the ground that the affidavit in lieu of examination in chief of the plaintiff was already filed, and, therefore, the plaintiff has already offered herself as a first witness and that she has also filed an application for appointment of an advocate commissioner to record her evidence and, therefore, she is a part-heard witness and that at that stage she is not entitled to file the subject application and seek the reliefs stated in the said application. His next contention is that if the son-in-law of the plaintiff is permitted to be examined as the first witness and the plaintiff is later given liberty to examine herself by filing an application as directed in the orders of the trial Court, she will be filling up

the lacunae and loopholes in the evidence of her son-in-law, and therefore, the said course causes prejudice to the revision petitioner/defendant No.1. In the first place, it is to be noted that though the affidavit of plaintiff in lieu of her examination in chief is filed into Court, it is not taken on file/record as evidence in chief by administering oath. Therefore, the contention that she is a part-heard witness cannot be countenanced. Be that as it may. As already noted, the plaintiff has got the discretion to prove her case in the manner she wishes to prove and the Court has no power to direct the plaintiff to prove her case or a fact in issue in a particular manner by giving a direction to her to give evidence as a first witness. This view of this Court finds support from the ratio in the decision in **Shaik Rafath Begum's** case (2nd supra).

Coming to the next contention that if the plaintiff is given liberty to file an application at a later stage to seek permission for her examination as a second witness after her son-in-law is examined as the first witness, the said course would cause prejudice to the 1st defendant, be it noted that the plaintiff in such a case would be running the risk of the Court refusing to give permission to give evidence as a witness at a later stage. Further, depending upon the facts and circumstances, she may be facing the peril of the Court drawing an adverse inference for not giving evidence as a witness on her behalf at the first instance in case there are improvements in her evidence and on a reading of her evidence and that of her son-in-law, who is permitted to be examined ahead of her, there is a possibility to draw an inference that the attempt on her part in examination of her son-in-law as a first witness is intended to cover up the loopholes in his evidence.

Viewed thus, this Court finds that the contentions of the 1st defendant do not merit consideration and that the order impugned brooks no interference.

On the above analysis this Court finds that the revision petition is devoid of merit and is liable to be dismissed.

Revision petition is accordingly dismissed. No order as to costs.

Pending miscellaneous application, if any, shall stand closed.

M.SEETHARAMA MURTI, J

28th November 2016
ajr

