

HONOURABLE SRI JUSTICE P.NAVEEN RAO

CIVIL REVISION PETITION No.6043 of 2016

Date: 17.02.2017

Between:

Boga (Bogi alias Bogu) Siddamma,
W/o. Sri Venkataiah, Aged about 65 years,
Occu:Household, R/o.4-3-20, Gundlagadda,
Locality of Jangaon Town of Jangaon Revenue
Mandal, Warangal District.

.....Petitioner

and

Gurram Susheela died per LRs,

Gurram Srinivas s/o. late Sri Mallaiah,
Aged about 75 years, Occu: Civil Servant,
R/o. Ippaguda Village, Station Ghanpur
Mandal, Warangal district and another.

.....Respondents



The Court made the following:

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ORDER:

Plaintiff is the petitioner. Petitioner filed IA No.373 of 2016 in IA No.233 of 2014 in OS No.866 of 1990 on the file of Principal Junior Civil Judge, Jangaon, Warangal District to reject the Advocate Commissioner Report filed on 16.09.2016. The said application was dismissed by the trial Court on 07.11.2016, impugned in this revision petition.

2. Heard Sri Ashok Reddy Kanathala, learned counsel for petitioner and Sri Bankatlal Mandhani, learned counsel for respondents 2 and 3.

3. The only contention urged by learned counsel for petitioner is that Order XVIII Rule 4 of the Code of Civil Procedure, 1908 (for short, 'CPC') mandates furnishing of chief affidavit. As the chief affidavit of the defendant witness was not furnished to the petitioner, the question of recording of evidence by the Advocate Commissioner would not arise and, therefore, the Advocate Commissioner erred in recording evidence of a witness on behalf of the defendant without following provisions of Order XVIII Rule 4 of the CPC. He would submit that provision in Order XVIII Rule 4 is in mandatory terms and non-compliance of the same, would vitiate consequential steps. Though provision in Order XXVI Rule 4 enables Court to appoint Advocate Commissioner to record evidence of a person, who is outside the jurisdiction of the trial Court, the same has to be read inconsonance with provision in

Order XVIII Rule 4 of the CPC and, therefore, on that ground, report of the Commissioner was vitiated.

4. In response, learned counsel appearing for the respondents submitted that the Advocate Commissioner was appointed in accordance with the directions issued by this Court in CRP No.5409 of 2014 dated 12.03.2015; that recording of evidence by the Advocate Commissioner is deemed to be evidence recorded by the Court. The party, who sought to be examined, is stranger to the defendant also. Order XVI Rule 1 of CPC is applicable where the witness is within the jurisdiction of the Court. Order XXVI of CPC comes into play when witness is not within the jurisdiction of the Court. Once Advocate Commissioner is appointed, it is deemed that witness was examined by the Court. He submitted that this witness was sought to be examined on the ground that defendant raised specific objection that plaintiff is impersonator and that the real Siddamma lives in Sholapur town in Maharashtra State and, therefore, in order to establish this contention, defendant wanted to examine the witness and since said witness is unable to come over to Warangal to give evidence, prayer to appoint Advocate Commissioner was made.

5. In support of the contention that there is no need for chief-examination of a witness taken in advance, he placed reliance on the decision of Full Bench of this Court in **Rita Pandit v. Atul Pandit**¹.

6. The short issue for consideration in this revision is whether before examining the witness by the Advocate Commissioner, is it

¹ AIR 2005 Andhra Pradesh 253

mandatory that there must be a chief affidavit duly served on the other party and whether non-compliance thereof would vitiate the report of Advocate Commissioner in the facts of this case.

7. Order XVIII Rule 4 of CPC is applicable in normal circumstances, where under examination-in-chief of a witness should be by an affidavit and copies thereof should be supplied to the opposite party. Order XXVI of the CPC vests power in the Court to appoint an Advocate Commissioner to record evidence of a witness, who is outside the jurisdiction of the Court. In the instant case, it is not in dispute that witness examined by the Advocate Commissioner was residing in Sholapur and is outside the jurisdiction of the trial Court. The specific assertion of the respondent-defendant that the witness sought to be examined by the Advocate Commissioner is stranger to defendant is not denied by the petitioner.

8. In the Full Bench decision relied upon by the counsel for respondents, the issue was on the scope of application of Order XVIII Rules 4 and 5 of CPC. On exhaustive consideration of the precedent decisions, the Full Bench of this Court held as under:

“we hold,

- (1) that in all cases the examination-in-chief has to be conducted by way of affidavits.
- (2) That in cases where the witness is not under the control of the party who wants to examine him as a witness, recourse can be taken to Order 16 Rule 1 of the Code of Civil Procedure and after taking recourse to Order 16, Rule 1 of CPC and after he is summoned by the Court, ***the witness can be asked either to file an affidavit or can be examined in the Court itself.*** (emphasis supplied)

9. It is thus seen that the Full Bench held that if the witness is not under the control of the party, the recourse can be resorted to Order XVI Rule 1 of CPC and witness can be asked either to file an

affidavit or can be examined in the Court itself. As noted above, Order XXVI of CPC deals with examination of witnesses by the Advocate Commissioner. When a witness is examined by the Advocate Commissioner, it amounts to examination of the witness by the Court. The Advocate Commissioner discharges the functions of the Court acting on behalf of the Court to record evidence of a witness, more particularly if such witness is outside the jurisdiction of the Court.

10. It is also relevant to note the conduct of the party. As recorded by the trial Court, plaintiff did not respond to the notices issued by the Advocate-Commissioner and avoided participating in recording the evidence by the Advocate-Commissioner on one reason or the other and neither plaintiff nor his counsel accompanied the Advocate-Commissioner for cross-examination of the witness in spite of service of notices by the Advocate-Commissioner. It is also appropriate to note that the Advocate-Commissioner was appointed by the orders of the trial Court in I.A.No.233 of 2014 in pursuant to the directions issued by this Court in C.R.P.No.5409 of 2014. That order has become final.

11. Petitioner has not made out any case for interference by this Court against the well considered order passed by the trial Court.

12. Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this revision petition shall stand closed.

JUSTICE P.NAVEEN RAO

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