

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 3825 of 2017

ORDER:

- 1) Assailing the order dated 07.07.2017, passed in I.A.No.38 of 2017 in O.S.No.41 of 2011 on the file of the I Additional District Judge, Chittoor, where an application filed under Order XXVI Rule 2 of C.P.C. to appoint an advocate-commissioner to record the chief and cross examination at the house of the petitioner at Bangalore, was rejected, the present Civil Revision Petition is filed under Article 227 of the Constitution of India.
- 2) At the time when the matter is taken up for hearing, it is brought to the notice of the Court that the petitioner by name Manyam Chamundeswari, who has to depose on behalf of her two minor daughters, is now staying at Srikalahasti as she got herself shifted to her parents house due to ill health.
- 3) Heard both sides.
- 4) As seen from the record, two minor daughters of Chamundeswari filed the above suit represented by their mother as natural guardian, seeking declaration of their rights and title over the plaint schedule properties and also a direction to defendant Nos.1 to 4 to deliver vacant possession of the plaint schedule properties. The mother of the minor children filed the present application seeking appointment of an advocate-commissioner to record her evidence in chief and cross on the

ground that she has been suffering with gynecological problem apart from sciatica to her right leg. In support of her plea, she placed on record a certificate issued by Dr. Santosh Roy, Bangalore, wherein it was stated that Smt.M.Chamundeswari, is suffering from Sciatica pain on the right leg and is advised bed rest for six weeks. The said certificate is dated 04.03.2017. After hearing both sides, the trial Court rejected the request on the ground that the petitioner was asked to take bed rest for six weeks which period is over and there is any amount of doubt with regard to the issuance of certificate since no medical record has been placed to show that she was suffering from sciatica problem since two years apart from back pain etc. Challenging the same, the present Civil Revision Petition is filed.

5) Learned counsel for the petitioner mainly submits that due to ill health, the petitioner took treatment in Bangalore for some time and later got herself shifted to Srikalahasti and started staying with her mother. He placed on record the medical certificates issued by Dr.D.B.Sasidhar Reddy, a practicing doctor at Tirupati and Dr.P.Prameelamma, a practicing doctor at Srikalahasti in support of his plea. He also refers to some of the judgments of this Court and also that of Apex Court to show that even in the absence of any medical record, the Court can order appointment of an advocate-commissioner to record the evidence of a witness, if it is satisfied that the petitioner is sick.

6) On the other hand, learned counsels appearing for the respondents would submit that since the issue relates to genuineness of the WILL, the presence of the witness in the Court is very much essential, as the demeanor of the witness is to be seen by the Court in judging the veracity. He also relied upon the judgment of this Court in *D.Chendrakala and others v. Sri Matasharma Seva Sangam, Kakinada*¹ and also the judgment of the Apex Court in *Salem Advocate Bar Association, Tamilnadu v. Union of India*². Hence, pleaded that since the issue involved in the present case is a complex one, the presence of the witness in the Court is very much essential. He further submits that a witness can be actively cross-examined only when she is present in the Court and not in her house, where the atmosphere is conducive to her. He also submits that the very medical certificates which have been placed on record are fake. He also refers to the interpolations which are made on the certificate issued by the doctor at Bangalore with regard to date of its issuance. The certificates dated 21.07.2017 issued by the doctors at Tirupati and Srikalahasti, show that the petitioner, who was originally staying in Bangalore, is now residing in Srikalahasti and she is suffering from bil sciatica and neurogenic claudication. Insofar as the certificate issued by the Gynecologist, it shows that the petitioner is suffering with “DUB bleeding PV” since one month. The certificate further says that though the patient was

¹ (2007) 1 ALD 121

² AIR 2005 (SC) 3353

treated at Bangalore, bleeding could not be controlled and the ultra sound diagnosis showed fibroids.

7) Having regard to the above, both the doctors advised her to take bed rest for couple of months. It is also to be noted here that the persons, who filed the suit are the two minor daughters of the petitioner and she is deposing on behalf of her two minor daughters.

8) The averments in the plaint would show that the properties are self acquired properties of their great paternal grand father namely Munaswamy Reddy. The said Munaswamy Reddy had a son and two daughters Swadesamma and Bharathamma, who are defendant Nos.2 and 3 herein. Defendant No.4 is the daughter of Swadesamma. The said Munaswamy Reddy died on 23.01.2010. Therefore, the plaintiffs are none other than the great grand children of late K.Munaswamy Reddy, through defendant No.1 and Chamundeswari. It is stated that during his life time, Munaswamy Reddy, executed a registered WILL in favour of his wife Kamalamma and another bequeathing properties, but she predeceased him on 01.03.2006 and thus the WILL became non-est as Munaswamy Reddy continued to be the real owner. Having regard to the manner in which defendant No.1 is leading his life and as he is accustomed to all vices and had extra marital relationship, the plaintiffs states that Munaswamy Reddy was feeling guilty of spoiling the lives of the plaintiffs and their mother, as he was the root cause of the marriage. Having regard to the above, he is said

to have executed a WILL on 18.01.2010 bequeathing the properties in favour of the plaintiffs, by keeping Chamundeswari as guardian and by canceling the earlier WILL dated 17.09.1980.

9) From the above, it is clear that the main dispute is between the family members and the alleged WILL is said to have been executed by Munaswamy Reddy in favour of the plaintiffs.

10) In *Poola Lakshmi Narayanamma v. Gaddam Venkata Subbaiah and another*³ a learned Single Judge of this Court held as under:

“12. In view of the facts and circumstances especially taking the old age of the revision petitioner into consideration and also the medical certificate, the impugned order cannot be sustained since the discretion was not exercised judiciously and in proper perspective and accordingly, the impugned order is hereby set aside. It is needless to say that in view of the direction already issued for early disposal of the suit, the learned Judge is directed to appoint a Commissioner forthwith to complete the examination of the revision petitioner and to further proceed with the matter as expeditiously as possible. It is brought to the notice of this Court that recording of the evidence on commission at the house of the petitioner's son may not be just and proper in view of the fact that the sons of the petitioner occupy certain official positions. In view of the same, it would be just to direct the Commissioner to record her evidence at any other appropriate place which the learned Judge may deem fit and proper in the facts and circumstances of the case.”

³ (2005) 5 ALT 755

11) In *Vinayak Trading Company, Raichoor and others v. M/s. Sham Sunder and Co. Adilabad*⁴ a learned Single Judge of this Court held as under:

“A reading of rule 2 would amplify that the discretion of the Court is wide enough to order issue of commission on its own motion or on affidavit or otherwise. Therefore, an affidavit of a party or a witness is not mandatory nor a condition precedent. What is required is the appraisalment of the facts and circumstances under which the party is inviting the court to exercise its discretion.”

12) In *V.K.Chandra Sekhar v. V.K.Suseelamma (died) by L.R.s*⁵, a learned Single Judge of this Court held as under:

“At the outset, it is to be noticed that in the written statement filed by the 2nd defendant, it was specifically pleaded that the 1st defendant executed a will dated 15.09.1999 bequeathing her properties in favour of defendants 2 to 4. The suit agreement dated 30.12.1995 has been disputed by the 1st defendant in the written statement filed by her during her lifetime and it was contended that the suit agreement was fabricated and forged with a mala fide intention to grab the suit property. Admittedly the defendants 2 to 4 are claiming right and title over the suit schedule property by virtue of the alleged will executed by their mother dated 15.09.1999. To substantiate the title claimed by them, they wanted to examine the attestors of the will dated 15.09.1999. The present application is filed for appointment of a Commissioner to record the evidence of the said witnesses which is permissible under Order 26 Rule 1 of C.P.C. if the Court is satisfied that the witness who on account of illness or infirmity is unable to attend the Court. It is pleaded by the defendants 2 to 4 that the

⁴ AIR 1987 AP 236

⁵ (2010) 1 ALD 349

attestors of the will dated 15.09.1999 have become old and are unable to attend the Court to give evidence. The plaintiff in his counter did not specifically dispute the said plea but only contended that the inability of the witnesses has not been certified by a competent authority and that the examination of the said witnesses is not relevant for adjudication of the issue in question.

The Court below having been satisfied with the reasons given by the applicants for appointing a Commissioner thought it fit to allow the application making it clear that the Commissioner's fee and the other expenses including the expenses incurred by the plaintiff to go to Tirupati along with his advocate to cross-examine the witnesses shall be borne by the applicants/ defendants 2 to 4."

13) From the judgments referred to above, it is clear that if a witness is unable to attend the Court either due to sickness or otherwise, a discretion is given to the Court to appoint an advocate-commissioner to record her evidence. However in *Kodipaka Venkatesham v. Pasula Narsamma and another*⁶ this Court held as under:

"6. It is true that Parliament amended Order 18 C.P.C., to enable the Courts to record the evidence of witnesses, in cross-examination and re-examination also, by appointing a Commissioner. While filing of affidavits, in lieu of chief-examination, was provided for, as a matter of course, appointment of Commissioner for cross-examination of such witnesses, is made discretionary. The reason for making this distinction is that the cross-examination of a witness in the Court, has its own significance. It is during this step that several questions and objections arise, and the Court is required

⁶ (2006) 1 ALD 437

to apply its mind. It is particularly so, in case of witnesses who depose about the pleadings in the suit. The admissibility and proof of the documents needs to be considered. It is difficult to expect the same from a Commissioner, in the matter of recording of evidence in cross-examination. The fact that the objections raised before the Commissioner, can be addressed to by the Court at a later stage, is of hardly any solace, at least as regards the principal witnesses. At any rate, the Court is required to record reasons, as to why it has chosen to appoint a Commissioner for recording the evidence of the witness in cross-examination.”

14) It is to be noted that even in Salem Advocate Bar Association Case (2 supra), which has been relied upon by the learned counsel for the respondents, it has been held that proviso to sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down a hard and fast rule, controlling the discretion of the court to appoint Commissioner to record cross-examination and re-examination of witnesses. Giving examples, the Court held that in cases involving fraud, forgery, serious disputes as to the execution of the will etc. the court may prefer to itself, record the cross-examination of the material witnesses.

15) It is no doubt true that the case revolves around the WILL said to have been executed by the paternal great grand father of the plaintiffs. But the medical certificates dated 21.07.2007 demonstrates that the petitioner is not only suffering from pain in the right leg due to sciatica but also having gynec problem ie. over bleeding due to fibroids. Learned counsel for the petitioner states that the because of the same, she got herself moved from Bangalore to Srikalahasti with great difficulty and is staying with her parents. It is further stated that the distance between Srikalahasti and Chittoor, where the suit is pending is more than 125 kms and it will be difficult for her to travel, stand in the court and face the cross examination, having regard to her health. It is also to be noted here that though a comment has been made with regard to demeanor of the witness, it is to be seen that the petitioner is only deposing on behalf of her two minor daughters, who are the plaintiffs, in the above suit.

16) Having regard to the above circumstances and since the dispute is only amongst the close family members with regard to execution of WILL by the paternal great grand father of the plaintiffs, I am of the opinion that it is a fit case to exercise the discretion in appointing an advocate-commissioner to record the evidence of the witness at the house of the petitioner in Srikalahasti, by taking all the necessary precautions. The trial Court is directed to appoint an advocate-commissioner for the said purpose. It is needless to mention that the fee of the commissioner and other expenses shall be borne by the petitioner.

17) Accordingly, the Civil Revision Petition is allowed. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

05.09.2017
gkv

