

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.R.P.No.713 of 2016

ORDER

This petition is filed under Article 227 of the Constitution of India challenging the order dated 23.12.2015 passed in I.A.No.804 of 2015 in O.S.No.421 of 2005 by the I Additional Senior Civil Judge, Warangal dismissing the application filed under Order XXVI Rule 4 C.P.C. to appoint an advocate commissioner to record evidence i.e. cross examination of the petitioner as DW.5 as she was suffering from severe health problem and unable to appear before the Court for recording her cross examination.

Aggrieved by the impugned order, the present revision is filed on the ground that the petitioner is not in a position to move from the house due to severe ill-health and unless the commissioner is appointed, it is difficult for her to adduce evidence. The petitioner also explained the reasons for dismissal of earlier I.A.No.711 of 2015 i.e. due to shifting of advocate commissioner from Warangal to Hyderabad and thereby he could not execute the warrant and returned the warrant unexecuted. Therefore, requested to set aside the impugned order.

During hearing, learned counsel for the petitioner reiterated the contentions raised in the petition. Whereas learned counsel for the respondents objected for appointment of advocate commissioner on the ground that earlier I.A.No.711 of 2015 was ended in dismissal as the advocate commissioner returned warrant unexecuted.

As seen from the material on record, the petitioner undisputedly filed I.A.No.711 of 2015 earlier for the same relief on the same

grounds and the reason for return of warrant by the advocate commissioner was that he shifted his practice from Warangal to Hyderabad, but not due to default of the petitioner. Undoubtedly, earlier order will come in the way of passing an order. In view of the circumstances stated by learned counsel for the petitioner that the advocate commissioner returned the warrant as he shifted his practice from Warangal to Hyderabad shall not be taken in to consideration. However, as per Order XVIII Rule 4 C.P.C., the advocate commissioner can record cross examination of witness. In **Salem Advocate Bar Association, Tamilnadu v Union of India**¹, the Apex Court laid down the guidelines for appointment of advocate Commissioner in certain cases. However, even in the absence of Order XVIII Rule 4(2) C.P.C, Order XXVI Rule 4 C.P.C. permits appointment of advocate commissioner for recording evidence even prior to amendment of C.P.C. by Act 20 of 2002 subject to certain exceptions contained under Order XVI C.P.C. In any view of the matter, affording another opportunity to the petitioner, I deem it appropriate to set aside the order passed by the Court below as her evidence will have its impact on the decision and her claim will be defeated.

In the result, the civil revision petition is disposed of without costs directing the I Additional Senior Civil Judge, Warangal to appoint advocate commissioner within a week from the date of receipt of a copy of this order, for specific purpose i.e. recording cross examination of DW.5 alone. The advocate commissioner shall execute warrant within 15 days from the date of his appointment

¹ (2003)(1) SCC 49

subject to payment of his fee by the petitioner directly to the advocate commissioner within a week and that the advocate commissioner shall return the warrant after execution of warrant within a week. In any event, the petitioner failed to co-operate with the advocate commissioner, he shall return the warrant within the time specified with the above direction, the trial Court is directed to issue warrant fixing commissioner fee. If the petitioner did not cooperate with the Court below, the Court below is directed to dispose of the suit in accordance with law since the suit pertains to the year 2005.

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

22.10.2018

Note: issue c.c in one week
b/o
kvrn

M. SATYANARAYANA MURTHY, J

