

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.3562 of 2018

ORDER:

The revision petitioners are defendant Nos.1 and 2 in O.S.No.223 of 2011 on the file of the VI Additional District and Sessions Judge, Nellore. The revision respondent No.1 is the sole plaintiff and the other respondents are defendant Nos.3 to 15 including the deceased defendants represented by legal representatives.

2. The revision is maintained impugning the order in I.A.No.17 of 2018, dated 02.04.2018, passed by the learned VI Additional District Judge, Nellore, on the application of the sole plaintiff in the suit O.S.No.223 of 2011, under Order XXVI Rule 4 read with 151 C.P.C., to appoint an Advocate Commissioner to examine the witness-Pokkireddy Jayachandra Reddy (covered by order in I.A.No.55 of 2018 impleaded as second plaintiff, now confirmed the same by dismissal of C.R.P.No.3561 of 2018). The trial Court allowed the application by the impugned order appointing one Ch.V.Rajesh as Advocate Commissioner to record the evidence at his residence Coramangala of Bangalore City at the expense of the plaintiff and to submit report. Same is now impugned.

3. The supporting affidavit averments before the trial to examine the witness at his residence is on the grounds of he has been suffering with old age ailments, like High B.P., Ratina problem and unable to

travel for a long distance to appear before the trial Court personally and thereby he has to be examined on commission at his residence at Bangalore City. Same was opposed by the revision petitioners as defendants/respondent Nos.1 and 2 saying the said averments are untrue. There is no basis to it and he is having kith and kin in and around Nellore city and he is an important witness to be examined before the Court and there are good number of clients for his travelling from Bangalore to Nellore and thereby the prayer cannot be considered. The lower court allowed the petition by impugned order saying the said witness shown aged 75 years, he is already impleaded as second plaintiff as per order in I.A.No.55 of 2018 and he is stated suffering from age old problems, like high B.P., defective eye site and cannot travel from Bangalore to Nellore, the mere fact that there are good number of trains when he is not able to travel without assistance of others is not a ground, thereby held necessary to appoint Advocate Commissioner to record the evidence.

4. Heard both sides and perused the grounds of revision impugning the same and other material on record.

5. The main impugment is for such a conclusion to arrive based on the affidavit of the plaintiff and not even of the witness, for the trial Court to appoint a Commissioner to record the evidence at residence of the witness is untenable. The contention of the plaintiff is that once from the very ails he is suffering from age old ailments, there is necessity found by the Court in its just order in appointing an

Advocate Commissioner and it no way requires interference for no illegality or impropriety within the limited scope to entertain the revision.

6. The purpose of the appointment of a Commissioner sought herein is the witness is unable to travel. The cause mentioned is not merely from his age, but for the factum of he is allegedly suffering from several ailments and unable to travel, even there are undisputedly number of trains and buses from Bangalore to Nellore. Once such is the case, basically there must be a foundation of he is suffering from several ill-health problems and not able to travel from Bangalore to Nellore. Without that foundation make out that too when the affidavit averments of the plaintiff disputing by defendants and that too the affidavit of the deponent-proposed witness not even filed to say that he is suffering from several problems and unable to travel, the order is with no basis.

7. However, that is not be all and end all herein, more particularly from the facts that as per the amended C.P.C., particularly from Order XVIII Rule 4, Order XXVI Rule 4 & 4-A, Order XVIII Rule 13 and Order XVIII Rule 19 C.P.C. in particular from Order XVIII Rule 19 C.P.C., for examination of a witness, the Court may either record the evidence or may appoint suo moto an Advocate Commissioner to record the evidence. The only rider from several expressions particularly with reference to the Constitution Bench of the Apex

Court in **Salem Bar Association v. Union of India**¹, where very complicated questions of law and intricacies involved in the lis and the witness is a prime witness in relation thereto, generally it is advisable to record the evidence by Court though Court otherwise got an absolute discretion to appoint a Commissioner on its own without even request of a party and so far as the payment of the Commission fees is concerned, both equally can share or the party who secures can share and that can be fixed. The same is reiterated by the expression of this Court in **V.Ramanaidu v. Smt. V.Ramadevi**². Once such is the case, though there is no foundation for his examination at his residence at Bangalore, the Commissioner can be continued to record the evidence of the witness at Nellore for what he wanted to say is he executed the un-registered gift deed and he wants to depose the factum of plaint 'A' schedule originally belonged to him that fallen to his share in the partition and though the gift deed was not registered, he delivered possession and 1st plaintiff is in possession of the property. Once such is the case, there are no any complicated legal issues or intricacies involved for his examination by the Court. Needless to say, he has to file chief-examination affidavit by serving in advance to the defendants for his cross-examination by defendants after the said chief-examination taken on oath by the Court or Commissioner as contemplated by Order XVIII Rule 4 C.P.C.

¹ 2005 (6) SCC 344

² 2018 (2) ALT 58

8. With these observations, rather than dismissal, and drive the trial Court to suo moto exercise its power to appoint another commissioner to record evidence at Nellore, the revision is to that extent modified.

9. Accordingly, the civil revision petition is disposed of .

Miscellaneous petitions pending, if any, shall stand closed. No costs.

6th July 2018.

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Dr. B. SIVA SANKARA RAO, J

