

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO
CIVIL REVISION PETITION NO.4923 OF 2018

ORDER
(Per Hon'ble Sri Justice Sanjay Kumar)

M/s.Nagarjuna Agro Chemicals Private Limited, Hyderabad, the plaintiff in COS No.234 of 2017 on the file of the learned Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, filed I.A.No.391 of 2018 therein under Section 151 CPC to reopen the suit for further cross-examination of D.W.1. By order dated 23.07.2018, the trial Court dismissed the I.A. Aggrieved thereby, the plaintiff-company is before this Court by way of this revision filed under Article 227 of the Constitution.

Heard Mr.S.Satyanarayana Prasad, learned senior counsel representing Ms.C.Sindhu Kumari, learned counsel for the petitioner-plaintiff company, and Ms.Manasi Ganu, learned counsel for the first respondent-first defendant company. Respondents 2 to 4-defendants 2 to 4 did not choose to enter appearance despite service of notice upon their counsel in the trial Court. Respondent 5-defendant 5 is yet to be served.

Parties shall hereinafter be referred to as arrayed in the suit.

D.W.1 was examined-in-chief on 11.02.2016. On 23.02.2016, Mr.DLN Goud was appointed as an Advocate-Commissioner under Order 26 Rule 2 CPC to record the cross-examination of D.W.1. He however filed report dated 08.01.2018 before the trial Court stating that the plaintiff-company was not cooperating with him. Pursuant thereto, cross-examination of D.W.1 was closed on 19.01.2018 and as the defendants reported no further evidence, the suit was posted for arguments. At that stage, the plaintiff-company filed I.A.No.83 of 2018 in the suit to reopen the matter and to recall D.W.1 for cross-examination. This I.A. was allowed on

payment of costs of Rs.3,000/- and Mr.Asgar Ali was appointed as the Advocate-Commissioner to record the cross-examination of D.W.1. In spite of the date being fixed for such cross-examination, the plaintiff-company failed to do so and suffered further costs of Rs.4,000/-. Despite the plaintiff-company failing to pay the costs of Rs.4,000/-, time was granted liberally by fixing further dates for cross-examination of D.W.1 but as the plaintiff-company failed to take advantage of the same, the right of cross-examining D.W.1 stood forfeited on 27.06.2018. It is on the strength of these facts that the trial Court dismissed the subject I.A., holding that the plaintiff-company had failed to cooperate with the Advocate-Commissioner as well as the Court.

Mr.S.Satyanarayana Prasad, learned senior counsel, would contend that the Advocate-Commissioners were not capable of recording the cross-examination of D.W.1 and therefore, the matter could not go on. He would further state that D.W.1 was non-cooperative but the Advocate-Commissioners could not prevail upon the witness to answer the questions put to him.

However, it may be noted this aspect of the matter, if true, was never brought to the notice of the trial Court.

On the other hand, Ms.Manasi Ganu, learned counsel, would point out that interference in a revision filed under Article 227 of the Constitution would not be as a matter of course and unless this Court finds a manifest error apparent on the face of the proceedings, such as when the order passed by the trial Court is based on clear ignorance or utter disregard of the law or a grave and gross failure of justice is occasioned thereby, this Court would be chary of exercising its Constitutional power of judicial superintendence. She would place reliance in this regard upon the recent

judgment of a Division Bench of the Gujarat High Court in STATE OF GUJARAT V/ s. UNION OF INDIA¹. On facts, the learned counsel would point out that the cross-examination of D.W.1 was conducted in part over a period of two years and it was not true that there were constant obstructions and interference in such cross-examination, thereby rendering the Advocate-Commissioners helpless in proceeding with the matter.

She would rely upon the counter-affidavit filed by the first defendant company through Jagadish Prasad Sarda, its Director, setting out the factual details and the chronology of events and point out that Mr.DLN Goud, the earlier Advocate-Commissioner, who was appointed on 23.02.2016, took up the matter for recording the cross-examination of D.W.1 on 09.03.2017, 21.03.2017, 13.07.2017 and 08.12.2017. It was only thereafter that he filed a report before the trial Court stating that the plaintiff-company was not cooperating. On 19.01.2018, the trial Court took note of this report and enforced forfeiture of the right of cross-examination of D.W.1. The matter thereafter underwent adjournments for arguments on 29.01.2018, 01.02.2018, 07.02.2018 and 15.02.2018. It was at this stage that the plaintiff-company filed I.A.No.83 of 2018 in the suit to reopen the matter and to recall D.W.1 for cross-examination. This I.A. was allowed on payment of costs of Rs.3,000/- and Mr.Asgar Ali was appointed as an Advocate-Commissioner under Order 26 Rule 2 CPC for recording further cross-examination of D.W.1. This order was passed on 15.02.2018 fixing the date for execution of the commission as 09.03.2018 and the suit was posted for filing of the Commissioner's report on 12.03.2018. However, the counsel for the plaintiff-company filed a Memo on 09.03.2018 seeking an adjournment. Again, on 12.03.2018, the plaintiff-company filed an

¹ Special Civil Application No.737 of 2018 dated 07.05.2018.

enlargement petition seeking extension of time to cross-examine D.W.1. The same was allowed by the trial Court upon payment of costs of Rs.4,000/- and the date for execution of the commission was fixed as 15.03.2018. The suit was posted to 22.03.2018 for filing of the Commissioner's report. On 15.03.2018, the cross-examination of D.W.1 was conducted in part but the plaintiff-company failed to pay the costs as directed by the trial Court. Again, on 21.03.2018, the cross-examination of D.W.1 continued, but the counsel for the plaintiff-company did not choose to proceed with the cross-examination on the later dates fixed by the Court, viz., 28.03.2018, 09.04.2018, 21.04.2018, 26.04.2018, 19.06.2018 and 25.06.2018. Learned counsel would concede that D.W.1 was not present on two of the aforestated dates, i.e., 21.04.2018 and 26.04.2018, on account of his son's wedding but on all the other dates, he was present but to no avail. Learned counsel would assert that ample opportunity was afforded to the plaintiff-company to complete the cross-examination but despite the same, the plaintiff-company failed to make use of it. She would therefore contend that no grounds are made out for interference by this Court.

In reply, Mr.S.Satyanarayana Prasad, learned senior counsel, would state that though the trial Court did fix the dates for execution of the commission as 26.04.2018, 19.06.2018 and 25.06.2018, the Advocate-Commissioner's proceedings dated 21.04.2018 reflect that the cross-examination had been reported as NIL and therefore, it was for the trial Court to take up further cross-examination itself but failing to take note of the said proceedings dated 21.04.2018, the trial Court blindly continued to give further dates for execution of the commission.

On an analysis of the above facts and chronology of events, it may be noted that the matter was kept pending from February, 2016 till June, 2018

for cross-examination of D.W.1. Though Mr.S.Satyanarayana Prasad, learned senior counsel, would state that the Advocate-Commissioners appointed by the trial Court were inept in executing the commission, the plaintiff-company admittedly never went before the trial Court and made a complaint in that regard. The statement now made to this effect is therefore merely self-serving and cannot be accepted. As regards the contention that the second Advocate-Commissioner also submitted a NIL report on 21.04.2018, it may be noticed that the Advocate-Commissioner's proceedings dated 21.04.2018 only referred to the events on that day and the Advocate-Commissioner recorded that the cross-examination was NIL. It is an admitted fact that the Advocate-Commissioner was not discharged from the commission after filing of these proceedings and the trial Court went on to fix further dates for execution of the commission, viz., 26.04.2018, 19.06.2018 and 25.06.2018. No explanation whatsoever is forthcoming from the plaintiff-company as to why it failed to take steps on 19.06.2018 and 25.06.2018 to complete the cross-examination of D.W.1, who is stated to have been present on those days.

Though the learned senior counsel would assert that as it is the plaintiff-company's own case, more lenience should have been shown towards it, this Court is of the opinion that a suit dating back to the year 2007, which was re-numbered as COS.No.234 of 2017 upon transfer to the Commercial Court, cannot be kept pending indefinitely merely because the plaintiff-company wants to drag its feet.

Be it viewed from any angle, this Court finds no irregularity in the order under revision warranting interference in exercise of the Constitutional power of judicial superintendence vesting in this Court under Article 227 of the Constitution.

The civil revision petition is therefore devoid of merit and is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

M.GANGA RAO, J

28th SEPTEMBER, 2018

PGS

