

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 6089 of 2018

ORDER:

1) Assailing the order dated 24.09.2018, passed in I.A.No.398 of 2018 in O.S.No.16 of 2013 on the file of the X Additional District Judge, Gurazala, wherein an application filed under Order XXVI Rule 1 and Order 18 Rule 4 (2) Section 151 of C.P.C. to appoint an advocate-commissioner to record the evidence of the petitioner/defendant in his house, was rejected, the present Civil Revision Petition is filed under Article 227 of the Constitution of India.

2) The facts in issue are as under:

The respondent/plaintiff filed the above suit for recovery of money basing on four promissory notes against the petitioner/defendant. When the suit is posted for defendant's evidence, the petitioner herein filed the said application seeking appointment of an advocate-commissioner to record his evidence at his house since he underwent operation and unable to move from the bed. In support of his plea he placed on record the certificate issued by Dr.N.Venkata Reddy of N.Perireddy Memorial Nursing Home, Macherla. Respondent/plaintiff filed counter denying the averments made in the affidavit filed in support of the petition contending that only to drag on the suit proceedings, the petition came to be filed and the same is liable to be dismissed. After hearing both sides, the trial Court rejected the request of the

petitioner. Challenging the same, the present Civil Revision Petition is filed.

3) Learned counsel for the petitioner mainly submits that due to ill health, the petitioner, who is aged about 74 years, has undergone surgery on spine in the month of October, 2015, suffering with severe back ache and is unable to move from bed. He also refers to 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.

4) On the other hand, learned counsel appearing for the respondent would submit that since the suit is based on promissory notes, 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 relies upon the judgment of the Apex Court in *Salem Advocate Bar Association, Tamilnadu v. Union of India*¹. Hence, pleads 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 he is present in the Court and not in his house. He also submits that the very medical certificate which has been placed on record is fake.

¹ AIR 2005 (SC) 3353

5) The averments in the plaint would show that the defendant borrowed an amount of Rs.7,25,000/- and Rs.7,32,000/- on 22.07.2008, Rs.8,47,000/- on 02.03.2009, Rs. 7,28,000/- on 21.10.2009, Rs.15,45,000/- on 28.04.2010, agreeing to repay the same with interest at 18%p.a. In spite of repeated reminders, the defendants failed to pay the said amount, as such, the plaintiff filed the above suit.

6) In *Poola Lakshmi Narayanamma v. Gaddam Venkata Subbaiah and another*² 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.”

² (2005) 5 ALT 755

7) In *Vinayak Trading Company, Raichoor and others v. M/s. Sham Sunder and Co. Adilabad*³ 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.”

8) In *V.K.Chandra Sekhar v. V.K.Suseelamma (died) by L.R.s*⁴, 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

³ AIR 1987 AP 236

⁴ (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."

9) 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, discretion is given to the Court to appoint an advocate-commissioner to record his evidence. However in *Kodipaka Venkatesham v. Pasula Narsamma and another*⁵ 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

⁵ (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.”

10) It is to be noted that even in Salem Advocate Bar Association Case (1 supra), which has been relied upon by the learned counsel for the respondent, 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 made, nature of evidence to be adduced 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. 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 record itself the cross-examination of the material witnesses.

11) It is to be noted that the discharge summary 14.10.2015 demonstrates that the petitioner has undergone two difficult surgeries over his spine. The Certificate dated 13.07.2018 would

also show that the petitioner has undergone surgery of spine about three years back and now the petitioner, who is aged about 76 years, is suffering with severe back ache and unable to move from bed.

12) Having regard to the above, I am of the opinion that it is a fit case to exercise discretion in appointing an advocate-commissioner to record the evidence of the witness at the house of the petitioner, by taking all necessary precautions. The trial Court is directed to appoint an advocate-commissioner for the said purpose, who shall take steps for recording the evidence of the petitioner within a period of four weeks from the date of his appointment. Further the petitioner shall make himself available, on the date fixed by the advocate-commissioner, and the cross-examination of the witness, if any, shall also be done on the same day. If the petitioner tries to evade the same, his evidence shall stand eschewed. It is needless to mention that the fee of the commissioner and other expenses shall be borne by the petitioner.

13) 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

23.11.2018
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