

(1978) 06 AP CK 0005

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 2344 of 1977

Orugunati Ranganayakamma

APPELLANT

Vs

Maduri Lakshminarasamma and Another

RESPONDENT

Date of Decision : 29-06-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 1, Order 26 Rule 4, 115

Citation : AIR 1979 AP 8

Hon'ble Judges : Narasinga Rag, J

Bench : Single Bench

Advocate : P. Anjaneya Sarma, for the Appellant; S. Hanumaiah, for the Respondent

Judgement

1. The Civil Revision Petition is filed by the 2nd defendant against the order of the District Munsif, Chirala where under he allowed the Petition of the plaintiff for the appointment of a Commissioner to examine a witness for the plaintiff.

2. The plaintiff laid a suit for declaration and possession of certain properties on the strength of a will said to have been executed by one Krishnavenamma on 7-11-1969. The case of the plaintiff, who is the sister of the said Krishnavenamma, is that prior to the death of Krishnavenamma, she was undergoing treatment at a Hospital at Ongole and that on 7-11-1969, she executed a will in the Hospital. The said Krishnavenamma died later, on 14-12-1969. The 2nd defendant is said to be the daughter of the Said Krishnavenamma. The will purports to bequeath the entire properties of Krishnavenamma in favour of the plaintiff for the exclusion of the 2nd defendant. The suit is resisted by the 2nd defendant inter alia on the ground that the said will is a forged one and that the husband of the plaintiff in connivance of the attestors and others brought a false will into existence. The doctor, that is, the private practitioner at Ongole, where Krishnavenamma was under treatment prior to her death, is said to be one of the attestors. The plaintiff has filed an application which was opposed by the 2nd defendant, the learned District Munsif

allowed the same and passed the following cryptic order:-

"Heard petition is allowed. Sri M. James is appointed Commissioner to examine the witness....."

The 2nd defendant has now challenged the appointment of the Commissioner in this revision on the ground that in the written statement, they have taken a stand that the alleged will was concocted by the husband of the plaintiff with the conclusion of the said medical practitioner and others. This plea of his is borne out by the fact that the affidavit in support of the petition for appointment of the Commissioner has now come to be made by the husband of the plaintiff and that he is actively behind this whole litigation. It is also contended that the rights of the Plaintiff mainly depend upon the proof of the will in question and if an important witness like the medical practitioner, one of the attestors, is examined on Commission, the Court will not have the opportunity of noting the demeanour of the witness and if that witness is examined only by the Commissioner, all that the Court will have is only the record of his statement. It is thus contended that though the witness resides outside the jurisdiction of the Court of Chirala, but only within a distance of 40 miles from that place, the trial Court has not exercised its discretion properly in allowing the petition it was on the other hand contended by the learned counsel for the respondent No. 1, Plaintiff, that admittedly, the witness resides outside the jurisdiction of the District Munsif's Court, Chirala, and the examination of that witness by the issue of a Commission is within the jurisdiction of the District Munsif and in accordance with the provisions of O. 28 it. 4 (a) C. P. C. It is further contended that as the said witness is a busy medical practitioner, running a private clinic of his own, he would not be in a position to spare much time to attend the court or to attend the court at the expense of his suffering patients.

3. It is not in dispute that the place where the witness practices as a private doctor is only a distance of 40 miles from Chirala but it is outside the territorial limits of Chirala District Munsif Court. O. 26 R. 4 C. P. C. would empower any court to issue a Commission for the examination of any person residing beyond the local limits of its jurisdiction The learned counsel for the revision petitioner does not question the jurisdiction of the Court below to issue the commission. But, what is sought to be contended is the propriety of the regularity in the exercise of its discretion in appoint in the commission to record the evidence of a witness. A single Judge of this Court in P.R. Bizani Vs. Hans Zucker Baeker, held that even where a witness resides outside the jurisdiction, there is no right to have a commission issued to examine a witness on that ground and that the issue of a commission is a matter of discretion of the Court and that that discretion has to be exercised judiciously upon all the facts and circumstances of the case. It can be noted that the evidence of an attestor of a will in the instant case is a very material piece of evidence which will tilt the balance and decide the rights of the parties It is common ground that the said will has come to be registered after 44 days of the alleged execution. Having regard to this

circumstance, it is equally necessary for the Court to note the demeanour and watch this witness, who is one of the attestors while being examined. It could be rather futile to contend that the evidence of such witness is of a formal character. Having regard to this circumstance it does not appear that the examination of this witness on commission to say the least, was desirable. The learned District Munsif appears to have made the order mechanically in the light of the provisions of O. 26 R. 4 (1) (a).

4. As noted above, merely because the witness resides outside the jurisdiction that does not entitle a party to have a commission issued for the examination of witness as of right. It is opposite to refer in this context to a ruling of a Division Bench of this Court in *Java Shanker Mills (Barsi) Ltd. v. Hazi Zakaria Hazi Ebrahim*, AIR 1962 AP 435. That is also a case under O. 26, R.4 C. P. C. It is held therein

"The broad principles which must necessarily be kept in mind when exercising discretion in the matter of issuing a commission for the examination of a witness are that the person invoking it must be bona fide in making the application, that the application of the defendant should not be subject to the same amount of scrutiny as that of the plaintiff, that the reasons why the witness cannot be examined in Court must be carefully considered that regard must be had to the conduct of the party and that further. I must be considered whether the examination on commission would result in manifest injustice to any party or is not calculated to permit the evidence being tested fairly or is likely to prove an abuse of process of Court. Justice above all is of Paramount consideration and the discretion should be exercised for furtherance of the same in the particular circumstances of the case. Even in cases where there is a statutory right it is open to the Court to refuse the same if the witness is under the control of the party and the application is not bona fide.

Observing the demeanour of a witness by the Judge is a strong or sufficient ground for refusing issue of commission for examination of a defendant residing beyond the local limits of the jurisdiction of the Court. Inconvenience of a party. cannot be a significant factor when the interests of justice warrant that he should come before the Court."

All that is alleged in the affidavit in support of the petition is that the said witness is a busy medical practitioner and cannot spare time. But as noted above, the requirement of this particular case is that the witness should be examined by the Court so that the Court may have the opportunity to note the demeanour of the witness as against the allegations of concoction of the will in collusion the witness by the husband of the plaintiff. It is not the case of the plaintiff that the witness sought to be examined on commission is an aged, or infirm person. Mere inconvenience of the said witness cannot be a ground for his examination on commission. I am satisfied that, having regard to the circumstances of the case, the witness ought to be examined by the Court and the exercise by the lower Court was not proper.

5. It Is however contended by the learned Counsel for the respondents, that there are no grounds to interfere by way of revision as the District Munsif has fairly exercised his jurisdiction and that there is no material irregularity.

6. It is true that under the amended Code, If a point can be raised by way of appeal the same cannot be raised way of revision. But, if one is to take such a view in this case, there will positive miscarriage of justice for the witness would be examined on commission before the matter would be taken by way of appeal after the whole trial is over. Thus, no purpose would be served if this matter is deferred and permitted to be raised only at the stage of appeal and is not interfered with presently by way of revision. The erroneous exercise of discretion can be equated to a material irregularity resulting in miscarriage of justice.

7. For these reasons, the order of the District Munsif, Chirala, is set aside. The witness will be now examined in Court. The revision is allowed accordingly, but without costs.

8. Revision allowed.