

THE HONOURABLE SRI JUSTICE SAMBASIVA RAO NAIDU

CIVIL REVISION PETITION NOS.412 AND 415 OF 2022

COMMON ORDER :

These revision petitions have been filed under Article 227 of the Constitution of India, being aggrieved by the common Order dated 25.01.2022 passed in I.A.Nos.810 and 811 of 2021 in O.S.No.45 of 2021 by the learned XII Additional Chief Judge, City Civil Court, Secunderabad, whereunder, the petitioner/defendant No.1 filed two application seeking to summon the witnesses, are dismissed.

2. Since two revision petitions filed against the common order and as the grounds under which the revision petitions are filed are one and the same and as the learned counsel appearing for both the parties advanced their respective arguments in both revisions as such, it is proposed to dispose of both the revisions under the common Order.

3. As can be seen from the impugned Order in the revision petitions, the petitioner/defendant No.1 filed interlocutory applications under Order XVIII, Rule 6 read with Section 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') seeking permission to examine Mrs.Maya Kishandas Sachdev, W/o late Kishandas Sewaram Sachdev, as a witness on his behalf out of turn i.e., even before the actual trial is commenced in O.S.No.45/2021.

4. In support of the petitions, the petitioner/defendant No.1 filed his affidavit and submitted before the Court below that the respondent/plaintiff filed a speculative suit vide O.S.No.45/2021 and sought for partition of the suit schedule property even there was no such property available for partition. The petitioner has claimed that during the life time of late Sri K.Venkat Rao, who is the father of the petitioner/defendant No.1 and the respondent/plaintiff executed a Will deed on

22.08.2019 and bequeathed all his properties to his wife Smt.K.Laxmi Venkat Rao i.e., the mother of the petitioner/defendant No.1 and the respondent/plaintiff.

5. After the death of the said K.Venkat Rao, his wife inherited all the properties in pursuance of the Will deed executed by her husband. The petitioner has further submitted that his mother being absolute owner of all the properties gifted/bequeathed the properties in favour of the petitioner and executed a registered Will deed dated 28.11.2020. The said Mrs.Maya Kishandas Sachdev, W/o late Kishandas Sewaram Sachdev, who is aged about 79 years is an attesting witness to the above referred Will deed, and it was registered on 02.01.2021 vide Document No.1/111/2021 (CS No.1/2021) of Sub-Registrar, Marredpally, Secunderabad. The petitioner further stated that his mother took extra precautions of getting the Will registered personally and requested

Mrs.Maya Krishnadas Sachdev to appear as a witness and she accepted the request of the mother of the petitioner.

6. The petitioner further submitted that one month after the demise of his mother, the said Mrs.Maya Kishandas Sachdev along with Sri Venkatsubbaiah had visited Swarna Palace and they tried to hand over the registered Will deed to the petitioner and respondent No.1 but respondent No.1 did not allow them to hand over the Will deed. After two hours, they handed over the copy of the Will deed to the relatives of the petitioner and the original Will deed is in the custody of the said Mrs.Maya Kishandas Sachdev.

7. The petitioner has further submitted that the said attesting witness Mrs.Maya Kishandas Sachdev is suffering from various ailments and due to her advanced age, she got typhoid recently and she was advised bed rest. Given her fragile health and advanced age, it is imperative that Mrs.Maya

Kishandas Sachdev be examined immediately out of turn to prove the case of the petitioner about the execution of the Will deed in his favour by his mother out of free will. The testimony of Mrs.Maya Kishandas Sachdev is vital to prove the Will deed executed by his mother with her free will and volition and it reflected her true intention. The petitioner would suffer grave and irreparable loss if the evidence of Mrs.Maya Kishandas Sachdev is not recorded immediately.

8. Respondent No.1/plaintiff has opposed the said petitions and denied the material averments made by the petitioner. Respondent No.1 has submitted the details of other interlocutory applications filed by him under Order XXXIX, Rules 1 and 2 read with Section 151 of C.P.C. and for appointment of Advocate Commissioner to take inventory of the movables found in Locker No.249 lying with respondent No.3 and also about the Orders passed on the said interlocutory applications. Respondent No.1 has claimed that the

claim of the petitioner about the execution of Will deed dated 28.11.2022 is a pre-planned creation of the petitioner and he will demonstrate the same at the time of the examination of the witnesses. Respondent No.1 has further pleaded that Order XVI, Rule 14 of CPC does not envisage the examination of a witness at this stage of proceedings. Without following the due process of law and procedure it would be prejudicial to the interest of this respondent since there would not be effective cross-examination of the witness without full information. Respondent No.1 has further submitted that the petitioner with a view to prevent respondent No.1 from conducting effective cross-examination and to cause prejudice to respondent No.1 for exercise of his lawful rights filed the application. Thereby, such request cannot be permitted. He has also pleaded that the proposed witness is a hale and healthy, therefore, sought for dismissal of the petition.

9. Learned trial Court having heard both parties, dismissed the interlocutory application with an observation that as there is no apprehension that the witness is leaving jurisdiction of the Court and in the absence of any medical proof that to show that the witness is suffering from diseases, such a request cannot be considered.

10. The present revision applications have been filed on the following grounds:

The Court below committed an error in dismissing the petitions on the ground that there was no document to show the age of the proposed witness without considering the fact that the petitioner has already filed her Aadhar card. The Court below failed to consider the reference to the Gift Deed was also mentioned in the application filed to examine the witness out of turn. The Court below failed to consider that the petitioner cannot obtain the medical record of a third party, who is aged about 79 years and he has

also pleaded that the Court below failed to consider the Judgment of the Hon'ble Supreme Court reported in **2013 (3) SCC 801** referred by the petitioner wherein the Hon'ble Apex Court was pleased to found fault with the party therein for not resorting to provisions under Order XVIII, Rule 16 of CPC.

11. The petitioner further submitted that the Court below failed to consider that Mrs. Maya Kishandas Sachdev is a crucial witness as she is not only an attesting witness to the Will but a close friend of the mother of the petitioner. The Court below failed to consider that the original Will is in the custody of the proposed witness and the same shall be produced before the Court below. The petitioner claims that if there is any unfortunate event happen to the proposed witness, the right of the petitioner would be severely prejudiced as the plaintiff has been wrongly disputing the execution of the Will on flimsy grounds. He also claimed that the examination of the proposed witness

out of turn may not cause any prejudice to the rights of the respondent. He also claimed that if the circumstances so warrant and permits, the witness could be recalled for further cross-examination.

12. According to the petitioner, the Court below failed to consider that that the defence set up by respondent No.1 that issues are not framed is not a tenable defence to oppose an application under Order XVIII, Rule 16 of CPC. While placing reliance on the Judgment between **RAM DHIR PRASAD AND ANTOHER v. RAM SEWAK LAL AND OTHERS**¹, the petitioner has claimed that even if the issues are not framed the witness can be examined out of turn. The petitioner has relied on some other Judgments which will be discussed in subsequent paragraphs and submitted that the impugned Order in the above referred interlocutory applications is liable to be set

¹ AIR 1978 PAT 218

aside and he is entitled to examine the proposed witness out of turn.

13. Heard learned counsel appearing for both the parties.

14. Now, the point that would emerge for determination:

Whether the Court below failed to consider the request of the petitioner in a proper way, whether the Order in Interlocutory applications is liable to be set aside and whether the petitioner can be permitted to examine Mrs.Maya Kishandas Sachdev as a witness on behalf of the petitioner out of turn as prayed for ?

15. The petitioner herein is defendant No.1 in the suit filed by the respondent/plaintiff. The petitioner claims exclusive and absolute rights on the property left by his parents by virtue of the Will deed said to have been executed by his mother and registered in the presence of the proposed witnesses. The petitioner has claimed that his mother has got the schedule property by way of a Will executed by her husband i.e., father of the petitioner herein and later she has bequeathed the

property in his favour through a Will. Therefore, the petitioner has to prove the Will and its registration.

The petitioner has claimed that the attesting witness Mrs.Maya Kishandas Sach Dev is more than 70 years old and suffering from age related ailments. He apprehends if any unfortunate event happened to the witness, he may not be able to prove his claim and with a view to preserve the evidence, he sought for examination of the witness out of turn.

16. The Court below dismissed the request of the petitioner mainly on two grounds namely there is no proof about the age of the proposed witness and the petitioner is not able to show that the witness was suffering from any ailments. As rightly submitted by the petitioner, the age of the witness can be assessed based on the copy of Aadhar card available in the record. In view of the age being more than 70 years, it can be accepted that the witness is prone to illness. It is true that the petitioner did not file any medical

record of the witness but that may not be a ground to reject the request in view of the advanced age of the petitioner.

17. The above referred application was filed under Order XVIII Rule 6 read with Section 151 of C.P.C. and it reads as follows:

Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in the manner herein before provided.

18. The petitioner relied on a Judgment between Joseph **JOHN PETER SANDY v. VEROMIKA THOMAS RAJ KUMAR AND ANR**², for the proposition that the party can avail Rule 6 of Order XVIII C.P.C. for early examination of a witness. In this Judgment, the Hon'ble Apex Court was pleased to observe that the

² 2013 (3) SCC 801

appellant therein could have taken resort to the provisions of Order XVIII, Rule 6 of C.P.C. to examine the witness immediately.

19. He has also relied on another Judgment between ***RAM DHIR PRASAD AND ANOTHER v. RAM SEWAK LAL AND OTHERS*** (referred *supra*) and argued that the evidence of crucial witness, who is aged and suffering from ailments can be recorded out of turn. In this Judgment, it was held that in an appropriate facts and circumstances, an application may be moved by the plaintiff even where the defendant has not filed written statement and issues have not been framed, but an order cannot be passed in violation of principles of natural justice.

20. The provisions of law under Order XVIII, Rule 6 of CPC, the Court deals with the powers of the Court to examine the witnesses without waiting for the suit to reach the stage of recording the evidence of the parties. If this petitioner is able to show that the proposed

witness is about to leave the jurisdiction of the Court or in case of any sufficient cause shown to the satisfaction of the Court while the evidence of such a witness is necessary and should be taken immediately. The Court at any time after the institution of the suit can examine the witness out of turn. Therefore, the request of the petitioner based on the age and ill-health of the proposed witness can be considered. It is not the case of respondent/plaintiff that the witness is not of such age and it is not the case of respondent that the witness is not suffering from any such ill-health. Even if there is any such proof, in view of the advanced age of the witness more particularly in the light of the apprehension of the petitioner that if anything happens to the witness, he may lose a valuable evidence, his request can be considered by ordering the examination of the proposed witness out of turn.

21. In view of the Judgments relied on by the petitioner herein and in the light of the circumstances explained in the affidavit filed in support of the petition, the Court below ought to have considered the request of the petitioner and examine the witness out of turn. Therefore, the revision can be allowed by directing the Court below to record the evidence of the proposed witness out of turn.

22. Under the circumstance narrated hereinbefore, the Civil Revision Petitions are allowed, setting aside the impugned common Order dated 25.01.2022 passed in I.A.Nos.810 and 811 of 2021 in O.S.No.45 of 2021 by learned XII Additional Chief Judge, City Civil Court, Secunderabad. As a consequence thereof, I.A.Nos.810 and 811 of 2021 in O.S.No.45 of 2021 are hereby allowed.

Pending miscellaneous applications, if any, shall stand closed. No costs.

JUSTICE SAMBASIVA RAO NAIDU

DATED 20.12.2022
YNK/PLV

THE HONOURABLE SRI JUSTICE SAMBASIVA RAO NAIDU

CIVIL REVISION PETITION NOS.412 AND 415 OF 2022

DATED 20.12.2022

YNK/PLV