

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05-01-2016

(Orders reserved on 14.12.2015)

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

C.R.P.(PD).No.1352 of 2013
& M.P.No.1 of 2013

1. Baby @ Valli
2. N.Sundar
Petitioners

..

Vs.

Kamalam

.. Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 14.02.2013 in I.A.No.307 of 2012 in O.S.No.285 of 2008 on the file of the Sub-Court, Rasipuram.

For petitioners : Mr.T.Murugamanickam

For respondent : Mr.P.Valliappan

ORDER

This Civil Revision Petition is filed against the order dated 14.02.2013 in I.A.No.307 of 2012 in O.S.No.285 of 2008 passed by the learned Subordinate Judge, Rasipuram, in and by which, the application filed by the revision petitioners/defendants 2 and 3 seeking leave of the Court to examine them as D.W.4 and D.W.5 in the suit, was dismissed.

2. Learned counsel for the revision petitioners/D2 and D3 contended that

the first defendant was examined as D.W.1 and the Will was marked through the attestor D.W.2; immediately thereafter, D.W.3, an official witness, i.e. the then Deputy Tahsildar, being in old age, was examined. Learned counsel further submitted that the sixth defendant was set ex-parte on 24.08.2009 and she filed application in I.A.No.295 of 2009 in O.S.No.285 of 2008 to set aside the ex-parte order and she also filed I.A.No.296 of 2009 in O.S.No.285 of 2008 seeking leave to file additional written statement. Both the applications were taken up for enquiry and they were allowed only on 12.06.2012. Only thereafter, D.W.1 was cross-examined and subsequently, D.Ws.2 and 3 were examined and their examination is also completed. Thereafter, without any delay, the revision petitioners/D2 and D3 have filed the application seeking leave of the Court to examine them as D.W.4 and D.W.5. Learned counsel further submitted that the trial Court, without properly appreciating the factual aspects, dismissed the application. He further contended that the provisions of Order 18 Rule 3-A CPC, will not apply to the facts of the present case and he prayed that the Civil Revision Petition may be allowed. In support of his submissions, learned counsel for the revision petitioners/D2 and D3, relied on a decision of a Division Bench of this Court (Madurai Bench) reported in 2008 (1) CTC 36 (Ravi Vs. Kumar), wherein, the Division Bench observed as follows:

"16. It is well settled proposition of law that rules or procedure are handmaids of justice and not its mistress. In *R.N.Jadi and Brother Vs. Subhashchandra*, 2007 (4) CTC 331, the Supreme Court, while dealing with the provisions contained in Order 8, Rule 1, C.P.C., observed:

"9. All the rules of procedure are the handmaid of justice.

The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unlike compelled by express and specific language of the Statute, the provisions of the C.P.C. or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice.

... ..

11. The processual law so dominates in certain systems as to over power substantive rights and substantial justice, the humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act *ex debito juticiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence processual, as much as substantive. (See *Sushil Kumar Sen Vs. State of Bihar, 1975 (1) SCC 774*).

14. It is also to be noted that though the power of the Court under the Proviso appended to Rule 1 of Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The Courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."

... ..

19. As observed in the various decisions and more particularly in the decisions of the Division Benches of Punjab & Haryana, Jammu & Kashmir, Patna and Orissa High Courts, what is necessary is that before giving such permission, the Court is required to give reasons and obviously the reasons must be relevant. However to lay down as an inexorable rule that in no case such an Application can be filed after the examination of any other witness may result in injustice.

20. Keeping in view the principle that procedural rules are normally considered as directory unless the consequence of not following the procedure is specifically indicated, it would be appropriate to hold that the Court can give permission to the party to examine himself at a later stage even if no such permission had been sought for at the very threshold. As a matter of fact, save and except in one or two

decisions of the Single Judges of the Madras High Court, most of the High Courts, including many of the Judges of Madras High Court, have preferred to follow a more liberal path of laying down the proposition that even where such permission has not been sought for at the threshold, such permission can be granted for relevant reasons at a later stage. This is not to suggest that as and when such Petition is filed the Court is bound to grant such permission merely for the asking. Obviously, the Court is required to consider the matter in its proper perspective and is required to find out as to why the party could not examine himself at the beginning and also as to why the Application for seeking such permission was not filed at the threshold. If the Court finds that the party deliberately held himself back with a view to fill-up the lacunae in the evidence at a later stage, obviously such permission is to be refused irrespective of the fact whether permission is sought for at the threshold or at a later stage. If convinced on such aspects, the Court may permit the party to examine himself as a witness at a later stage. What is important is recording of reasons and obviously it means reasons which are germane to the matter, that is to say, relevant for the purpose.

21. It appears that in many cases Petitions are filed after examination of other witnesses stating that the party or even his Advocate was not aware of the legal position and, therefore, the party could not be examined at the beginning.

Ordinarily, such a plea cannot be countenanced as ignorance of law cannot be considered as an excuse, particularly when a party is represented by an Advocate. Moreover, the opposite party can always be vigilant and raise objection at the time of examination of a non-party witness before the examination of party witness and if such objection is raised, obviously the Court should record such objection.

22. The amendment was introduced with a view to ensure that the party examining himself as a witness at a later stage should not be permitted to fill-up the lacunae in the evidence adduced from his side. Where the Court comes to a conclusion that the party had deliberately with-held himself to be examined as a witness at a later stage with a view to fill-up the lacunae in the evidence, obviously permission cannot be granted to such a party to examine himself at a later stage. This is a relevant consideration where the Application is filed, seeking permission to examine him at a later stage, either at the threshold of examination of other witnesses or subsequently after examination of all or some of the witnesses. The real test is to find out whether there was a genuine cause for which the party was not examined as a first witness. If for some genuine reasons, which could not be foreseen initially, a party wants to examine himself at a later stage, permission can be granted. Therefore, the overriding consideration is not whether the party makes the Application at the threshold or at the subsequent stage, but whether for a genuine and germane reason the party is required to be examined at a later stage notwithstanding the fact that he was not examined as a witness at the beginning. This seems to be the essence of the different

decisions of different High Courts. What would be the relevant facts and circumstances, obviously cannot be laid down in a strait-jacket formula and obviously it is for the Court concerned to deal with the matter in judicious manner. The reference is accordingly answered. The Civil Revisions shall now be placed before the learned Single Judge for disposal, in accordance with law."

3. Learned counsel for the respondent/plaintiff contended that the trial Court has rightly dismissed the application by properly appreciating the facts of the case and applying the provisions of Order 18 Rule 3-A CPC and hence, he prayed that the Civil Revision Petition may be dismissed.

4. Heard the learned counsel appearing for the parties and perused the materials available on record.

5. It is seen that after examination of D.Ws.1 to 3, the revision petitioners/D2 and D3 have filed the application seeking leave of the Court to examine them as D.W.4 and D.W.5. The reason stated in the affidavit filed in support of the application before the trial Court is that the first defendant was examined as D.W.1 and the attesor to the Will was examined as D.W.2 and the official witness, i.e. the then Deputy Tahsildar being old, was examined as D.W.3. Under those circumstances, the revision petitioners/D2 and D3 prayed that they may be examined as D.W.4 and D.W.5. Even before examination of the official witness, i.e. D.W.3, the revision petitioners could have obtained permission of the Court to examine them. But no such permission was obtained by them. It is seen that the defendants rely on the Will to substantiate their claim. The attesor to the Will was already examined as D.W.2. After

examination of D.Ws.1 to 3 for proving the Will, it is not proper for the revision petitioners/D2 and D3 to seek leave of the Court to examine them as D.W.4 and D.W.5 at the later stage, as the same would defeat the purpose of Order 18 Rule 3-A CPC, which reads as follows:

"Order 18: Hearing of the suit and examination of witnesses:

Rule 3-A: Party to appear before other witnesses: Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded permits him to appear as his own witness at a later stage."

6. Since the defendants rely on the Will, the burden is on the defendants to prove the Will. In order to prove the Will, the attestor to the Will was examined as D.W.2. Subsequently, the official witness was examined as D.W.3. Only to fill up the lacuna in the case, the revision petitioners/D2 and D3 are seeking leave of the Court to examine them as D.W.4 and D.W.5, that too at the later stage, which is not permissible. There is no valid reason stated by the revision petitioners/D2 and D3 to examine them at the later stage and the reasons attributed by them are baseless and the same are not acceptable. Even in the above said Division Bench decision of this Court, reported in 2008 (1) CTC 36 (cited supra), which is relied on by the learned counsel for the revision petitioners, it was observed by the Division Bench that where the Court comes to a conclusion that the party had deliberately with-held himself to be examined as a witness at a later stage with a view to fill up the lacunae in the evidence,

permission cannot be granted to such a party to examine himself at a later stage. Therefore, applying the said principle to the facts of the present case, the application filed by the revision petitioners/D2 and D3 at the later stage seeking permission to examine them as D.W.4 and D.W.5, is not maintainable. Therefore, the impugned order of the trial Court does not warrant interference by this Court and the Civil Revision Petition is liable to be dismissed.

7. Accordingly, the Civil Revision Petition is dismissed. No costs. The Miscellaneous Petition is closed.

05-01-2016

Index: Yes/no

Internet: Yes/no
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Copy to

1. The Subordinate Judge, Rasipuram.
2. The Record Keeper, V.R. Section, High Court, Madras.

G.CHOCKALINGAM,J

CS

Order

in

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