

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.826 of 2013
& M.P.No.1 of 2013

Janakiraman (Family Manager),
rep. by Power Agent Kothandaraman

.. Petitioner

Vs.

1. Ranga Reddy

2. Rajamani

3. Chinnamurthy Ammal

4. Minor Felix Gabriel Mark,
Rep. by Guardian Dharmaraj

.. Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India,
against the fair and decretal order dated 24.11.2012 in I.A.No.465 of 2012 in
O.S.No.126 of 2007 on the file of the Principal Sub-Court, Tindivanam.

For petitioner : Mr.A.K.Kumaraswamy

For respondents: Mr.P.B.Ramanujam for RR-1 & 2

RR-3 and 4 - notice served. No appearance

ORDER

This Civil Revision Petition is filed against the order dated 24.11.2012 in
I.A.No.465 of 2012 in O.S.No.126 of 2007 passed by the learned Principal

Subordinate Judge, Tindivanam, in and by which, the application filed by the revision petitioner/plaintiff seeking permission to examine him as a witness on the side of the plaintiff and state the facts before he appointed Power Agent and also to state the facts directly known to him, was dismissed.

2. Learned counsel for the revision petitioner/plaintiff contended that the trial Court failed to consider the reasons assigned by the petitioner for not examining himself at the first instance before examining his Power Agent as a witness. He further submitted that the petitioner/plaintiff was not in country during the time and hence, he appointed the Power Agent on his behalf and the Power Agent was examined. Hence, learned counsel prayed that the Civil Revision Petition may be allowed and the revision petitioner/plaintiff may be permitted to be examined as a witness in the suit on the side of the plaintiff.

3. Learned counsel for the respondents 1 and 2 / defendants 1 and 2 contended that the reasons assigned by the petitioner/plaintiff are not all sustainable and the lower Court, after considering the facts and circumstances of the case, correctly rejected the request of the plaintiff and he prayed that the Civil Revision Petition may be dismissed. In support of his submissions, learned counsel for the respondents 1 and 2 relied on a decision of this Court reported in 2009 (6) MLJ 885 (Arya Vysya Samajam Vs. R.Murali), wherein, this Court observed as follows:

"5. Indubitably and incontrovertibly, unassailably and apparently it is clear that the matter was posted for arguments. The said suit itself was filed by the respondent/plaintiff through his

Power of Attorney who examined himself as a witness. No permission was sought for from the Court for getting the respondent/plaintiff examined at a later stage, as per Order 18 Rule 3-A of C.P.C. However, the lower Court simply remarking that Order 18 Rule 3-A is not mandatory and it is only recommendatory, allowed the application. The said approach of the lower Court is far from satisfactory for the reason that the affidavit is vague as vagueness could be and it is bereft of details. It is just and necessary to extract here under the relevant portion of the affidavit for ready reference:

"2. I further submit that the above case is posted for arguments. The petitioner was in Muscat and that he could be examined as a witness on the side of the plaintiff. He wants to depose as a witness, with regard to some important aspects, and that the evidence on the side of the plaintiff is to be re-opened. Otherwise the petitioner will be seriously prejudiced."

6. A bare perusal of it would reveal that the aforesaid averments are bald as baldness could be and that can by no stretch of imagination could be taken as proper ground, much less sufficient ground for the purpose of the respondent/plaintiff getting himself examined at such a belated stage of the case. It is a common or garden principle of law that after the closing of evidence on the defendants' side, if the plaintiff's side is opened and that too for examining certain important witness like the party to the case, certainly, the Court should look for sound reasons. But, in this case, absolutely there is no morsel or iota, shard or shred of reason found set out, justifying the prayer of the respondent/plaintiff."

4. Heard the learned counsel for the petitioner and the learned counsel for the respondents 1 and 2 and perused the materials available on record.

5. It is pertinent to extract 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. Admittedly, in this case, the Power Agent of the plaintiff was examined as P.W.1 and no other witness was examined on the side of the plaintiff. The plaintiff was out of country and was in America during that time. In the affidavit filed in support of the application, the plaintiff has clearly stated that since during the course of trial, he urgently went to America, he appointed the Power Agent. Subsequently, after his return from America, he has filed the present application to examine him as a witness. The respondents 1 to 3, in their counter affidavits filed before the lower Court, stated that the plaintiff has returned from America long back and they have opposed for examination of the revision petitioner/plaintiff as P.W.2 at this stage.

7. In the decision relied on by the learned counsel for the respondents 1 and 2, it was observed by this Court that the lower Court therein simply remarking that Order 18 Rule 3-A CPC is not mandatory and it is only recommendatory, allowed the application therein. In the case on hand, since the plaintiff has to be examined at a later stage, the request of the plaintiff cannot be rejected, as he was out of country during the time of examination of P.W.1, who is the Power Agent of the plaintiff. It is just and necessary and to meet the ends of justice, the request of the plaintiff has to be considered and rejecting the

request is unreasonable.

8. In this regard, it is useful to refer 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."

9. In view of the above facts and circumstances of the case and also following the above decision of the Division Bench of this Court, this Court is of the considered view that since the revision petitioner/plaintiff has to be examined at a later stage, the Civil Revision Petition has to be allowed on condition and the revision petitioner/plaintiff has to be examined as P.W.2.

10. Therefore, the impugned order of the trial Court is set aside. The Civil Revision Petition is allowed on condition that the revision petitioner/plaintiff is directed to pay Rs.1,000/- (Rupees one thousand only) as costs to the learned counsel for the respondents 1 and 2/defendants 1 and 2, on or before 18.01.2016, failing which, the Civil Revision Petition shall stand dismissed automatically without further reference to this Court. The revision

petitioner/plaintiff is permitted to be examined as P.W.2. It is made clear that if the learned counsel for the respondents 1 and 2/defendants 1 and 2, refuses to receive the said amount of costs, the revision petitioner/plaintiff shall deposit the said amount of Rs.1,000/- before the trial Court to the credit of the suit and by also indicating this C.R.P. number (i.e. C.R.P.(PD).No.826 of 2013). The trial Court shall complete the trial in the suit and dispose of the same within a period of three months from 18.01.2016. The Miscellaneous Petition is closed.

05-01-2016

Index: Yes/no

Internet: Yes/no

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Copy to

The Principal Subordinate Judge, Tindivanam.

G.CHOCKALINGAM,J

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Order

in

C.R.P.(PD).No.826 of 2013

