

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.11.2017

CORAM:

**THE HONOURABLE MS.JUSTICE V.M.VELUMANI**

**C.R.P.(PD)No.2104 of 2014**  
**& M.P.No.1 of 2014**

1.K.Arunachalam (Deceased)  
2.Punithavathy  
3.A.Lokesh Mithun (Minor) .. Petitioners

(2<sup>nd</sup> petitioner appointed as next  
friend and guardian of the 3<sup>rd</sup>  
petitioner)

(Petitioners 2 and 3 are brought  
on record as LR's of the deceased  
sole petitioner viz., K.Arunachalam  
vide order of Court dated 10.11.2017  
made in C.M.P.Nos.6427 & 6428/2017)

Vs.

1.R.Karuppusamy  
2.K.Subramaniam .. Respondents

**PRAYER:** Civil Revision Petition filed under Article 227 of the  
Constitution of India against the fair and decretal order dated  
18.02.2014 made in I.A.No.13 of 2014 in O.S.No.687 of 2011 on  
the file of the V Additional District & Sessions Court, Coimbatore.

For Petitioners : Mr.S.Mukunth  
for M/s.Sarvabhauman Asso.

For Respondents : Mr.B.Bharath Kumar

**ORDER**

This Civil Revision Petition has been filed against the fair and decretal order dated 18.02.2014 made in I.A.No.13 of 2014 in O.S.No.687 of 2011 on the file of the V Additional District & Sessions Court, Coimbatore.

2.The 1<sup>st</sup> petitioner, who is the husband of the 2<sup>nd</sup> petitioner and father of the 3<sup>rd</sup> petitioner is the plaintiff and the respondents are the defendants 1 and 2 in O.S.No.687 of 2011. The deceased 1<sup>st</sup> petitioner filed the said suit against the respondents and his sister/3<sup>rd</sup> defendant for partition and permanent injunction. The respondents filed written statement in the month of August 2013 and are contesting the suit. Trial commenced. The parties let in evidence and closed their side. The counsel for the 1<sup>st</sup> petitioner contended that non-examination of the 1<sup>st</sup> respondent/1<sup>st</sup> defendant, who is the father of the 1<sup>st</sup> petitioner, 2<sup>nd</sup> respondent and 3<sup>rd</sup> defendant is fatal to the case of the respondents. After completion of arguments by counsel for 1<sup>st</sup> petitioner and after taking number of adjournments, the 2<sup>nd</sup> respondent filed I.A.No.13 of 2014, under Section 151 C.P.C, for himself and on behalf of the 1<sup>st</sup> respondent through commission to reopen the case on the side of the

respondents for further evidence. According to the respondents, the 1<sup>st</sup> respondent is aged 86 years and he could not climb stairs and due to his old age and ailments, he did not appear before Court and give evidence. In view of the contention of the learned counsel for the 1<sup>st</sup> petitioner, the 1<sup>st</sup> respondent is willing to give evidence.

3.The 1<sup>st</sup> petitioner filed counter affidavit and opposed the said application and submitted that the present application is filed only to fill in the lacunae. The 2<sup>nd</sup> respondent, who is the 2<sup>nd</sup> defendant in the suit gave evidence for himself and on behalf of the 1<sup>st</sup> respondent. After the 2<sup>nd</sup> respondent was examined as DW1, one common person was examined as DW2 on behalf of the respondents and closed their side. The 3<sup>rd</sup> defendant examined herself as DW3 and closed her side. As per the Order XVIII Rule 3(a), the parties to the suit must be examined first before any other party is examined as witnesses. In the present case, the DW2, a third party had been examined and the present application in the circumstances is not maintainable. The respondents failed to file application earlier.

4.The learned Judge allowed the application on the ground that the examination of the 1<sup>st</sup> respondent would help the Court to arrive at a just decision.

5. Against the said order dated 18.02.2014 made in I.A.No.13 of 2014 in O.S.No.687 of 2011, the 1<sup>st</sup> petitioner filed the Civil Revision Petition. Pending Civil Revision Petition, the 1<sup>st</sup> petitioner died and his legal heirs were brought on record as the petitioners 2 and 3 vide Order of the Court dated 10.11.2017 made in C.M.P.Nos.6427 & 6428/2017.

6. Heard the learned counsel for the petitioners as well as respondents perused the materials available on record.

7. The learned counsel for the respondents have come out with the application for reopening the case to examine the 1<sup>st</sup> respondent through commission. According to the respondents, the 1<sup>st</sup> respondent was not examined earlier, as he could not climb stairs due to his old age and ailments. This reason is not a valid reason for reopening the case for examining the 1<sup>st</sup> respondent on commission. As rightly pointed out by the learned counsel for the petitioners 2 and 3 that a party to the suit cannot be examined as a witness, subsequent to examining a third party as per the **Order XVIII Rule**

### **3-A:**

*“3A. **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.”*

The learned counsel for the respondents submitted that the Order XVIII Rule 3A is not applicable to the facts of the present case as there are more than one defendant and no third party witness was examined on behalf of the first respondent. The learned counsel for the respondents, in support of his contentions, relied on the judgment reported in **2010 (5) CTC 14 (R.Nagarajan and another Vs. Naveenchander Singh and others):**

*“6. I am not able to accept the contention of the learned counsel for the Revision Petitioners. No doubt in the aforesaid Division Bench Judgement the Hon'ble Division bench has held that where the Court comes to a conclusion that the party had deliberately withheld 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, under Order XVIII, Rule 3-A. In this case it is admitted that there are eight plaintiffs and before examining any witnesses the deceased 1<sup>st</sup> plaintiff and 2<sup>nd</sup> plaintiff were examined as PW1 and PW2. Thereafter, two witnesses were examined and at that stage the application was filed by the 7<sup>th</sup> plaintiff to examine himself. In my opinion, in a case where the plaintiffs are more than one and some of them were examined as witnesses on the plaintiffs' side and before the examination of other plaintiffs some other witnesses were examined, there is no need to apply for*

permission under Order XVIII, Rule 3-A. The reason is as per Order XVIII, Rule 3-A, where a party 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. Therefore, the prohibition under Order XVIII, Rule 3-A, will come into operation when a party examines any witness on his behalf before examining himself and later on he cannot examine himself. It is made clear that in the above Rule that “he shall so appear before any other witness on his behalf has been examined”. Therefore, unless the witnesses were examined on behalf earlier, then the prohibition under Order 1, Rule 3-A, will come into operation. In this case it is not contended by the learned counsel for the Revision Petitioners that the witnesses – PW3 and PW4 were examined on behalf of the 7<sup>th</sup> Plaintiff. Further, when more than one plaintiffs are there in the suit the question of getting permission under Order XVIII, Rule 3-A, will arise only when any witness was examined on behalf of a particular plaintiff and thereafter that plaintiff wants to examine himself at a later stage. In this case, as stated supra, there are eight plaintiffs and after examining 1<sup>st</sup> plaintiff and 2<sup>nd</sup> plaintiff two witnesses were examined and thereafter 7<sup>th</sup> plaintiff wants to examine himself and in such circumstances, there is no need to apply for permission from the lower Court as the witnesses PW3 and PW4 were not examined on behalf of the 7<sup>th</sup> plaintiff.

7. Further, the controversy whether 7<sup>th</sup> plaintiff will be permitted to examine himself after examination of the witnesses on his side was settled by the Hon'ble Division Bench of this Court and after considering various judgments, in the

*judgment reported in Ravi and another V. Ramar, 2008 (1) CTC 36 (DB): 2007 (6) MLJ 1119 the Division Bench has held that unless the party had deliberately withheld himself to be examined as a witness at a later stage with a view to fill-up the lacunae in the evidence, the permission cannot be denied to such a party. Therefore, having regard to the facts of the case, the Revision Petitioners are not able to prove that the 7<sup>th</sup> plaintiff deliberately did not examine himself after the examination of PW1 and PW3 and he wants to let in evidence to fill-up the lacunae and hence the order of the lower Court cannot be interfered with. Further, as stated supra, in case of more than one plaintiffs unless it is proved that the witnesses were examined in the first instance on behalf of a particular plaintiff Order XVIII, Rule 3-A, will not come into operation. Therefore, I do not interfere with the order of the lower Court and it is confirmed.”*

8. The learned counsel for the petitioners 2 and 3 submitted that the 2<sup>nd</sup> respondent examined himself and also on behalf of the 1<sup>st</sup> respondent. However, the contentions of the learned counsel for the petitioners 2 and 3 that the respondents ought to have filed this application before 2<sup>nd</sup> respondent was examined as DW1 and the reason given by the respondents for examination of the 1<sup>st</sup> respondent on commission at the stage of the arguments by the respondents is not a valid ground has considerable force. The learned Judge has failed to consider the

contention of the counsel for first petitioner; to appreciate the provisions of CPC (Order XVIII Rule 3-A) and the fact that the respondents failed to examine the 1<sup>st</sup> respondent earlier, erred in allowing the application on the ground that it would help the Court in arriving at the just conclusion.

9. The contention of the learned counsel for the respondents that Order XVIII Rule 3A is not applicable to the facts of the present case is without merits and judgment relied on by the learned counsel for the respondents does not advance the case of the respondents. In the present case, the second respondent gave evidence for himself and on behalf of the first respondent. DW2, who is a third party to the suit was examined on behalf of the respondents 1 and 2. In view of this fact, the first respondent is not entitled to give evidence after third party was examined as DW2 on his behalf also. The first respondent has not obtained any permission from the Court to examine himself later on after examination of third party on his behalf. Further, the reason given by the respondents to reopen the case and examine the first respondent through commission is not a valid ground for reopening the case to permit the first respondent to be examined on commission.

10.In the result, this Civil Revision Petition is allowed.

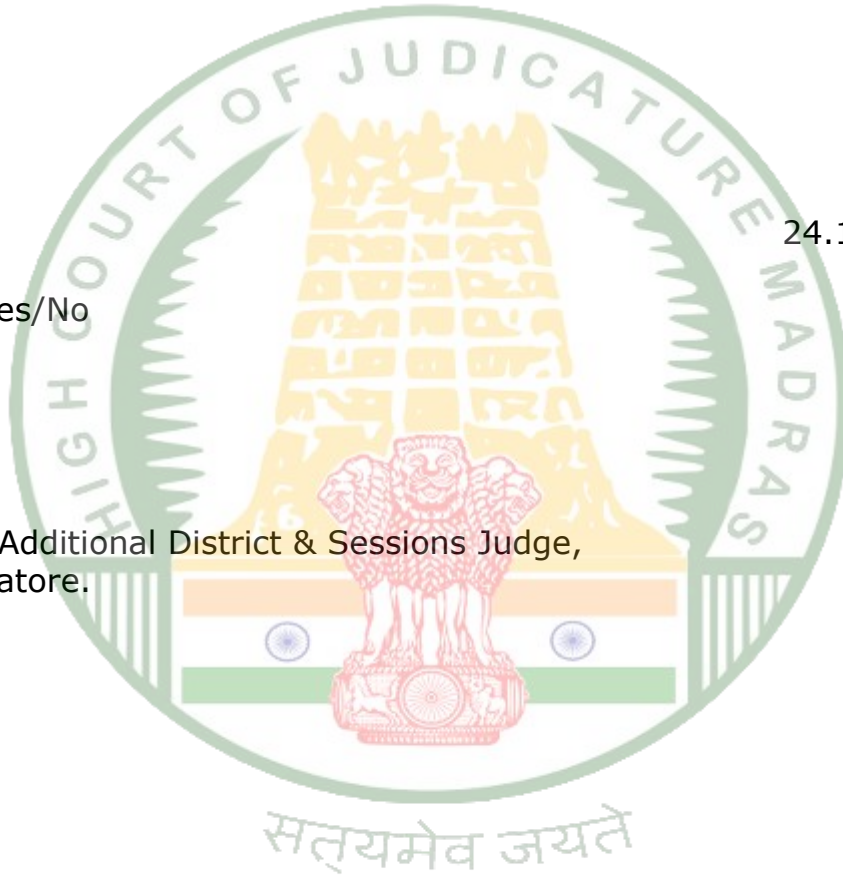
No costs. Consequently, connected miscellaneous petition is closed.

24.11.2017

Index: Yes/No  
gsa

To

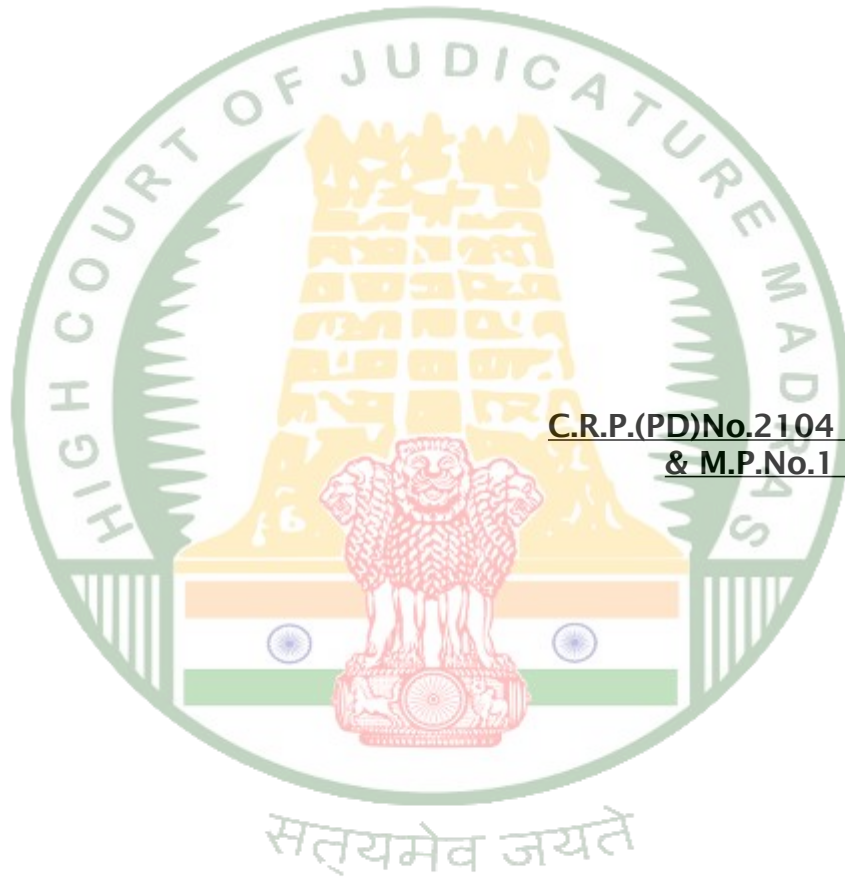
The V Additional District & Sessions Judge,  
Coimbatore.



WEB COPY

**V.M.VELUMANI,J.**

gsa



**C.R.P.(PD)No.2104 of 2014**  
**& M.P.No.1 of 2014**

WEB COPY

**24.11.2017**