

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.07.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
AND
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

ORIGINAL SIDE APPEAL NO.165 OF 2017

1. N.Jayamurugan
2. J.Geetha

... Appellants

Vs.

1. S.Dhandapani
2. S.Govindasami
3. S.Madhan
Lakshmi Subbiah @ Lakshmi (deceased)
4. K.P.Subbiah @ Subbiah Gounder

... Respondents

Prayer: Appeal filed under Order XXXVI Rule 11 of the O.S.Rules read with Clause 15 of the Letters Patent to set aside the order dated 21.02.2017 made in Application No.872 of 2017 in C.S.No.431 of 2004.

For Appellants : Mr.AR.L.Sundaresan, Senior Counsel
for Ms.AL.Ganthimathi

For Respondents: Ms.Valsala

JUDGMENT

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. Counsels for parties, agree that the appeal can be taken up for hearing and final disposal.

2. This appeal, seeks to assail order dated 21.02.2017, passed by the learned Single Judge, in A.No.872 of 2017, preferred in C.S.No.431 of 2014.

3. Briefly, the prayer made in the application was that the appellants i.e. defendant Nos.2 and 3, be given permission to step into the witness box.

3.1. This application, was opposed by the respondents / plaintiffs.

3.2. The principal ground on which the application was opposed was that D.W.1 was employed as a Manager by the appellants / defendant Nos.2 and 3 and that he was still in their employment.

3.3. The suggestion was that the appellants / defendant Nos.2 and 3 were attempting to fill the lacuna in the testimony, which, had been brought on record.

4. Mr.AR.L.Sundaresan, learned senior counsel, appearing for the appellants / defendant Nos.2 and 3, submits that the learned Single Judge, while dismissing the aforementioned application, relied on the provisions of Order XVIII Rule 3-A of C.P.C.

4.1. It is the submission of learned senior counsel that the learned Single Judge has come to an erroneous conclusion in holding that such an application could only be maintained, if the party to the proceedings, moves the application, in the first instance, that is, before testimony of other witnesses is recorded.

4.2. In other words, the submission was, that even if other witnesses produced by the party are examined, there is no bar, in law, in the party moving the Court for seeking permission to step into the witness box, as long as, the party is able to put forth good reasons for not moving such an application in the first instance.

4.3. In support of his submission, the learned senior counsel relies upon the judgment of a Division Bench of this Court rendered in Ravi and another Vs. Ramar, [2008 (1) CTC 36].

5. We heard the learned counsel for the parties and perused the records.

6. According to us, the issue raised in the present appeal turns essentially on the language of Order XVIII Rule 3-A of C.P.C. The said provision reads as follows:

"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."

6.1. A plain reading of Rule 3-A of Order XVIII of C.P.C. would show that where a party wishes to appear as a witness, he shall do so, before any other witness, on his behalf, is examined. The exception to this Rule is, where a Court, for reasons to be recorded, permits, the party to appear as a witness at a later stage. There is nothing in Rule 3-A of Order XVIII of C.P.C., which is, suggestive of the fact that the permission, which the Court may or may not grant should be sought prior to the examination of other witnesses. Ordinarily, such permission is sought by a party before examination of other witnesses cited by him.

6.2. Having said so, as indicated above, the party may, in the given circumstances, wish to step into the witness box after other witnesses have been examined. If the party wishes to do so, the party would have to move an application and the Court may, for reasons to be recorded in writing, grant such permission. Mere fact that this application is moved after the witnesses cited by the party were examined, cannot, according to us, disentitle the party to move an application of such nature as provided in Rule 3-A of Order XVIII of C.P.C.

7. Therefore, according to us, the reason given by the learned Single Judge for dismissing the application cannot be sustained.

7.1. We could have remanded the matter to the learned Single Judge to rehear the parties in application No.872 of 2017, such a course would undoubtedly delay the trial. We have, accordingly, put to the learned counsel for the respondents / plaintiffs as to whether she would want the matter to be remanded, as obviously, this route, would delay the trial of the suit. The learned counsel for the respondents / plaintiffs does agree that the trial of the suit, which is of the year 2004, will get delayed if remand is ordered.

7.2. Given this position, we have chosen to examine the matter further instead of resorting to remand.

7.3. To be noted, the learned counsel for the respondents / plaintiffs has based her opposition on submissions made in the reply to the application filed before the learned Single Judge.

8. We have examined the averments made in the reply. We find that the reason given by the respondents / plaintiffs to oppose the application are in the realm of speculation, in as much as, nothing has been put on record to demonstrate that D.W.1 is still in the employment of appellants / defendants 2 and 3.

8.1. We do not wish to comment further on the matter as it may impact the trial. Suffice it to say, according to us, the appellants / defendant Nos.2 and 3 should be given the permission to be examined as witnesses. It is ordered accordingly, subject to payment of cost of Rs.10,000/-. (Rupees ten thousand only). Costs will be paid to respondents / plaintiffs in equal proportion.

9. Furthermore, the appellants / defendant Nos.2 and 3 are directed to file their affidavits of evidence, within a period of two (2) weeks; a copy of the same, will be handed over to the learned counsel for the respondents / plaintiffs. The matter, will be listed before the learned Master, within two weeks, for cross examination, of the appellants / defendant Nos.2 and 3.

9.1. The learned Master will place the matter before the Court immediately after completion of the cross examination of the appellants / defendant Nos.2 and 3.

9.2. The entire exercise will be completed by the learned Master within a period of six weeks from the date of receipt of certified copy of the order.

10. The appeal is disposed of accordingly.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

kk
To

The Sub Assistant Registrar(Original Side)
High Court,
Madras-104.

(for Watching the payment
of costs and posting the matter
before the master as directed)

+1cc to Mr.K.S.Kumar, Advocate, S.R.No.51922
+1cc to Ms.AL.Ganthimathi, Advocate, S.R.No.52410

O.S.A.No.164 of 2017 and
C.M.P.No.11052 of 2017

MSM(CO)
CS/16/08/17