

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 31ST DAY OF JANUARY 2017

THE HON'BLE MR. JUSTICE P.VELMURUGAN

A.No.5900 of 2016

in

C.S.No.962 of 2008

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1.E.Rajalakshmi,
No.3, Waddells Road,
Kilpauk, Chennai-600 010.Applicants/Plaintiff

Vs

1.J.Girija,
No.15, Subbiah Naidu Street,
Chennai-600 007.

2.M.Jayalakshmi,
No.19, M.M.D.A.Colony,
Arumbakkam,
Chennai-600 106.

3.K.Varalakshmi,
Employed at TFB, India,
Vepery,
Chennai-600 007.

4.J.Venkataramana,
No.15, Subbiah Naidu Street,
Vepery,
Chennai-600 007.

5.V.Bagyalakshmi @ Chitra,
No.2, Sami Pillai Street, II Floor,
choolai, Chennai-600 112.

6.C.Jaichander,
N.No.46, O.No.58,
Jermiah Road,
Vepery,
Chennai-600 007.

7.Anssar Ali,
No.15/7, Balaji Nagar, 1st Street,

Royapettah,
Chennai-600 014.

8.Maruti Builders,
Rep. By its Managing Director,
4th Floor,
'Sendur Plaza'
No.42, Montieth Road,
chennai-600 008.

9.M/s.Connecting Point,
Rep. By Adul Rahman,
Flat No.2, 'Sendur Plaza',
First Floor, No.42,
Montieth Road,
Chennai-600 008.

..Defendants

*10.Vimala M.Jain,
W/o.Manohar,

*11.Latha B Jain,
W/o.Bipu Kumar,
Both at No.38,
Jormiah Road,

*12.Deepak Kumar D.Jain,
S/o.Dhanraj Sanghir,
at No.14, Ekambareswarar Agraharam,
Chennai-600 003.

*13.Nasmukh & Son (HUF)
Represented by Karta Nasmukh,
S/o.Nainmull,
No.1, Church Road,
Chennai-600 007.

..Proposed parties/Respondents

*(defendants 10 to 13 impleaded ad per
order dt 21.11.2012 in A.No.5124 of 2009)

Application praying that this Hon'ble Court be pleased to issue just and necessary that the 1st respondent should be examined as a witness. "de bene esse" to enable the recording of her evidence forthwith in this suit through the Advocate Commissioner appointed to record evidence even before the evidence of the plaintiff and thereby also

permit the plaintiff to lead her evidence at a later stage after the evidence of the 1st respondent as witness "de bene esse".

This Application coming on this day before this court for hearing the court made the following order:

This application is filed by the applicant/plaintiff that the 1st respondent should be examined as a witness "de bene esse" to enable the recording of her evidence forthwith in this suit through the Advocate Commissioner appointed to record evidence even before the evidence of the plaintiff and thereby also permit the plaintiff to lead her evidence at a later stage after the evidence of the 1st respondent as witness de bene esse.

2. The averments made in the application is that the suit is filed by the applicant/plaintiff for declaration. The applicant filed A.No.1918 of 2013 for appointment of a court guardian for the 1st respondent in the suit. Both the parties agreed for early disposal of the suit, and prays for an advocate commissioner may be appointed to record the evidence of the parties in the suit. A.No.1918 of 2013 was closed based on the agreement between the parties and upon considering the health condition of the

1st respondent she should be examined first before the evidence of the plaintiff and that the plaintiff may be allowed to adduce evidence at a later stage. The same is informed before this Court that an application would be filed for obtaining orders in this regard. The respondents herein filed a suit for partition in CS.No.1005 of 2010 before this Court, the present applicant is also one of the party to the suit and the first respondent herein as plaintiff in the suit, started to give evidence but due to serious health conditions, unable to continue her evidence on a regular basis. The first respondent is an amputee and her right leg amputated due to chronic diabetics, sufferings with other related health condition. The same was informed before this Court that cellulites of the amputated leg and in such condition A.No.4638 of 2016 in CS.No.1005 of 2010 has been filed by the first respondent that she is 70years old, with great difficulty she had to travel 26km and walk down the road to reach the Court and obtain entry pass from the security counter and thereafter to reach the Court Hall, by that time she reach the Court hall she was exhausted due to fluctuating sugar levels. The 1st respondent/plaintiff has filed an application seeking for appointment of an Advocate Commissioner to examine the PW1 only on medical grounds and due to her serious ill-health.

3. The first respondent filed her counter denying the facts and she cannot be examined before examining the plaintiff as she is defendant in the suit. The other respondents filed counter and denied the facts and stated that the present application for de bene esse to enable recording of evidence forthwith in the suit through the Advocate Commissioner appointed to record the evidence, prior to the evidence of the plaintiff and to permit the plaintiff to let her evidence at a later stage is not maintainable, either in law or on facts. The applicant cannot take advantage for forcibly examining before the commencement of trial or before the plaintiff comes to the box.

4. According to the applicant, the respondents 1 to 3 herein filed suit for partition in CS.No.1005 of 2010, the applicant herein is the first defendant, wherein, the first respondent herein filed application in A.No.4638 of 2016 to examine her as PW1 by the Advocate Commissioner.

5. According to the respondents, the plaintiff cannot insist the defendant to get into the witness box, the plaintiff has to prove his case, the plaintiff cannot take advantage of the loop holes of the defendants, before

getting into the witness it is not proper on the part of the plaintiff insisting the defendants to let in evidence and further stated the diabetics is not a disease. Hence, the application is not maintainable.

6. The present suit is filed for declaration by the applicant/plaintiff and first respondent/first defendant filed another suit in CS.No.1005 of 2010, which is pending. The plaintiff therein started to give evidence, due to her serious health conditions, she is unable to continue her evidence on regular basis.

7. Heard the rival submissions made on both sides and perused the records.

8. The short point raised herein for consideration is that the application is to examine the first respondent as de bene esse through the Commissioner before commencement of the trial. During the pendency of this suit, the respondents 1 to 3 herein had filed suit for partition in CS.No.1005 of 2010 on the file of this Court, in the said suit the present applicant is also one of the defendants. The first respondent herein as plaintiff in CS.No.1005 of 2010 had started giving evidence as PW1 and she has filed application for appointment of an Advocate Commissioner to

examine as PW1 on the medical grounds and due to her serious ill health and amputation. This Court appointed an Commissioner to examine the first plaintiff therein as PW1. Interregnum, the present application in CS.No.962 of 2008 is filed by the applicant/plaintiff against the first respondent to examine her as witness under Order XVIII Rule 16 CPC r/w. Order 26 Rule 1 of OS rules. It is useful to extract the above rules as follows :-

Order XVIII Rule 16 CPC

Rule 16. Power to examine witness immediately : (1)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 manner herein before provided.

(2)Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3)The evidence so taken, shall be read over

to the witness and, if he admits it to be correct, shall be signed by him, and the judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

Order XXVI Rule 1 of Original Side Rules

R.1. For the purpose of examining a witness *De Bene Esse*, the party may apply to the Court either for his examination in Court or for the issue of a Commission under Sec.76 or under Order XXVI Rule 4 if the Code.

9. The learned counsel for the applicant would submit that the first respondent filed affidavit before this Court in CS.No.1005 of 2010 for appointing advocate commissioner to examine her through Commissioner, in her affidavit she has stated that she is 70years old, with great difficulty she has to travel 26km and walk down the road to reach the Court and obtain entry pass from the security counter and thereafter to reach the Court Hall, by that time she reaches the Court hall, she was exhausted due to fluctuating sugar levels and she is unable to withstand the examination due to the delay caused in taking up the matter. She has filed application for appointment of an

Advocate Commissioner to examine her as PW1 on the medical grounds, due to her serious ill health and amputation.

10. Considering the reasons stated in the affidavit, the High Court allowed the petition and appointed Commissioner to examine, now she has been cross examined through Advocate Commissioner. In this application also an advocate commissioner has to be appointed to examine before any other witnesses and the applicant counsel in support of his contention relied on the authority reported in **AIR 1965 MAD 266 (Vol.52, C.87) - N.Mohamed Hussain Sahib v. The Chartered Bank, Madras and another.**

11. In this case, the learned counsel for the applicant submitted the authority which is prior to the amendment of CPC i.e., 01.07.2002, after the said amendment cross examination of witnesses can be done either in the Court or through the Commissioner, no special reason assigned for the same, it is absolutely discretionary power of the Court. Therefore, the authority cited by the counsel for the applicant is not helpful to the applicant in the case in hand.

12. It is pertinent to refer Order XVIII Rule 4(1) &

(2) CPC :

<https://hcservices.ecourts.gov.in/hcservices/>

Recording of evidence (1) In every case, the examination in chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence :

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross examination and re-examination) of the witness in attendance, whose evidence (examination in chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it.

Provided that the Court may, while appointing a commission under this sub-rule consider taking into account such relevant factors as it thinks fit.

13. In the Full Bench judgment of the Bombay High Court reported in **Harish Vithal Kulkarni V. Pradeep Mahadev**

Sabnis - 2011 (1) CTC 133 (Bom) (FB) held that the Court

has discretion to direct cross examination to be done before Commissioner appointed by it with such direction as it may think fit and it was not mandatory for Court to record evidence only before Court. It is discretion of the Court to direct the party to examine the witness before the Court or before the Commissioner appointed by it.

14. The learned counsel for the respondents would submit that the first respondent herein is one of the plaintiffs in CS.No.1005 of 2010, therefore, in order to prove her case she opted to examine as witnesses and she filed proof affidavit and thereafter she was not able to come before the Court due to the reasons mentioned in the affidavit due to the Amputation of leg, and prayed for cross examination through Advocate Commissioner. Whereas, in this application, the subject matter is that the suit is filed by the applicant and trial has not yet been commenced, before commencement of trial, before examining plaintiff, the applicant/plaintiff has filed this application under Order XVIII Rule 16 CPC r/w. Order 26 Rule 1 of OS Rules. As the plaintiff, she has to prove his case and the plaintiff cannot compel the first defendant to enter into the witness box to let in evidence. Therefore, the question of appointing the Commissioner for examining first respondent will not arise herein. For

which, the learned counsel for the first respondent submitted the following authorities :-

(i) **(2013) 4 SCC 97 - Laxmibai and another**

v. Bhagwantbuva and others wherein it is held that *"mere apprehension of death of a witness cannot be a sufficient cause for immediate examination of a witness"*.

(ii) In the Division Bench judgment of this Court reported **2013 SCC Online Mad 2293 : (2013) 6 Mad LJ 617 - Union of India v. Central Administrative Tribunal** - wherein it is observed that *"medical experts state that blood glucose levels fluctuate throughout the day, which is also the case of people without diabetics, and one test result cannot be an assessment of the overall health of a person with diabetics"*.

15. The first respondent herein is the plaintiff in the other suit in CS.No.1005 of 2010, the suit was posted for cross examination before the Master and the plaintiff therein appeared twice as PW1 and after her amputation of leg, this Court appointed Advocate Commissioner for cross examination of the witness. In this case, the plaintiff is

the applicant, filed this application invoking the provisions under Order XVIII Rule 16 CPC r/w. Order 26 Rule 1 of OS Rules to examine the first respondent/first defendant as de bene esse to enable recording her evidence forthwith in this suit.

16. Even otherwise, the plaintiff cannot examine one of the defendant as her witness, where the defendant opposes and the plaintiff cannot insist upon the defendant to go into the witness box. If at all either the plaintiff or plaintiff side witness or any of the party can file the application or any witnesses on their own an application for examining as witness. What the parties are not entitled to do directly cannot do indirectly. The plaintiff cannot file any such application to examine any of the defendants as witness, further, the rules clearly shows that where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is show to the satisfaction of the court why his evidence should be taken immediately. But the reason stated in the affidavit is that the first respondent is a chronic diabetes, suffering with other related health conditions and amputation of her right leg is the main reason raised by the applicant and the first respondent should be examined as a de bene esse to enable for recording of

evidence. The reason stated in the affidavit is not legally acceptable.

17. This Court is not inclined to exercise the discretionary power to order the application and there is no compelling circumstances arises herein to allow this application, the applicant has not clearly established the compelling circumstances as to why the first respondent should be examined as a witness de bene esse, that too before commencement of the trial in the suit and issues were also not framed, even before the plaintiff or plaintiff witnesses or any other witnesses on the side of the plaintiff has been examined. Hence, the present application filed by the plaintiff is liable to be dismissed and the same is hereby dismissed.

18. In the result, the application stands dismissed.

sd/.P.V.M.J

31.01.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/19.04.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.