

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 9TH DAY OF JANUARY 2017

THE HON'BLE MR. JUSTICE P.VELMURUGAN

A.No.6368 of 2016

in

C.S.No.551 of 2003

Mrs.T.M.Ambujam
Flat No.C.40,
Syndicate Residency,
Door No.36,
Dr.Thomas First Street,
T.Nagar, Chennai- 600 017

: Plaintiff

Vs.

1.Mrs.Malathy Rangarajan,
Old Door No.3, New Door No.5,
Ramanathan Street,
Mahalingapuram,
Chennai- 600 034

2.M.Srinath
Old Door No.3, New Door No.5,
Ramanathan Street,
Mahalingapuram,
Chennai- 600 034

3.M.Sricharan
Old Door No.3, New Door No.5,
Ramanathan Street,
Mahalingapuram,
Chennai- 600 034

: Defendants

A.No.6368 of 2016:

Mrs.Ambujam T.M.
 Door No.36, Dr.Thomas First Street,
 T.Nagar, Chennai- 600 017 ..Applicant/Plaintiff

vs

1.Mrs.Malathy Rangarajan
 2.M.Srinath
 3.M.Sricharan

All at Old No.3, New Door No.5,
 Ramanathan Street,
 Mahalingapuram,
 Chennai- 600 034

..Respondents/Defendants

Application praying that this Hon'ble Court be pleased to appoint an Advocate Commissioner to examine the Applicant/Plaintiff in her residence in the above suit.

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 to appoint an Advocate Commissioner to examine her in her residence.

2. The averments made in the affidavit are as follows :-

The suit is filed for partition and separate possession of the applicant/plaintiffs 1/4th share in the properties set out in Schedule "A" to "D" annexed to the plaint, directing the defendants to handover possession of

the same and to render account of the amounts invested in the fixed deposits in the name of late T.M.Rangarajan and in the name of the respondents 1 to 3/defendants 1 to 3 and also the income derived by the respondents from the schedule mentioned properties. The respondents have filed their written statement in the main suit and reply statement was also filed by the applicant. The applicant states that she is 96years old and unable to travel and feel very weak, the Doctor advised her not to go out in the advanced age and she is not in a position to appear before this Court for giving evidence, hence, filed this application to appoint an Advocate Commissioner to record her evidence and further submits that no prejudice would be caused to the respondents if a Commissioner is appointed by this Court and it will only expedite the trial process.

3. Per contra, the learned counsel for the respondents filed counter alleging that the applicant filed this application with the sole intention to drag on the proceedings and to harass the defendants. The reasons stated by the applicant for appointment of advocate commissioner is that the applicant is advised by the Doctor not to go out due to her advanced age and not because of any ailment and the applicant has not produced any medical records or certificate issued by the Doctor before this

Court, to that effect. During 2015, the applicant appeared before this Court for mediation proceedings, hence, prays for dismissal of the application.

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

5. The learned counsel for the applicant would submit that the applicant has filed the suit for partition and separate possession of 1/4th share in the properties. Now, the pleadings have been completed, the suit is ripe for trial, the plaintiff has to be necessarily examined and let in evidence. The plaintiff is aged about 96 years old lady, she is unable to travel and the Doctor advised her not to go out at this advanced stage, leaving without any other option she filed this application for appointment of Advocate Commissioner for examining her through the Advocate Commissioner. If an Advocate Commissioner is appointed no prejudice would be caused to the defendants/respondents.

6. The learned counsel for the respondents would submit that she has filed this application only with an intention to drag on the proceedings, in paragraph 3 of the affidavit filed by the applicant, the applicant blamed the 3rd defendant and what are the conversation transpired before the mediators, the parties shall maintain confidentiality

in respect of events that have transpired during mediation and shall not rely on or introduce the said information in any other proceedings.

7. Mere old age and illness is not a ground to examine through the Commissioner and the learned counsel for the respondent has placed his reliance on the following decisions :-

1. **MANU/TN/0035/1963 - Ramakrishna Kulvant Rai V. F.E.Hardcastle and Co.(P) Ltd., and others.**
2. **MANU/TN/0299/1979 - Amina Bivi V. Abdul Jabar.**
3. **MANU/TN/2628/2005 - P.Kaliappa Gounder V. M.Loganathan and others.**

The authorities 1 and 2 are not applicable to the present case, that the authorities are prior to the Amendment Act 22 of 2002 CPC. The third authority cited by the respondent reported in **MANU/TN/2628/2005 - P.Kaliappa Gounder V. M.Loganathan and others**, though it is pronounced on 08.08.2005, subsequent to the pronouncement of Salem Bar Association case (i.e, 02.08.2005), which was not probably brought to the knowledge of this Court, the same is not helpful to the respondent.

8. On bare perusal of records, this application is filed by the plaintiff to examine her through the Advocate Commissioner, the reasons stated in the affidavit is that she is aged about 96years and she is unable to travel and

the Doctor advised her not to go out at this advanced stage. The learned counsel for the respondents vehemently objected to allow this application and contended that the old age and sickness are not ground and examination through Advocate Commissioner, the demeanour of the applicant is to be noted while recording her witnesses, the same cannot be noted by this Court.

9. On perusal of records, after amendment Act 22 of 2002, Order XVIII Rule 4 has been introduced, it is necessary to extract Order XVIII Rule 4(2) as follows :-

Order XVIII Rule 4(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:

As per above Rule, no need to mention any reason to examine the witness through Commissioner, after introducing this Section as per Amended Act 22 of 2002 CPC, even for examining the witnesses through Commissioner.

10. It is pertinent to refer the three judges Bench judgment of the Hon'ble Supreme Court in the case of **Salem**

Advocate Bar Association. T.N. V. Union of India reported in **(2005) 6 SCC 344**, wherein paragraph 5 of the judgment it is held as follows :-

"Amendment of Order XVIII Rule 4

5. The amendment provides that in every case, the examination-in- chief of a witness shall be on affidavit. The Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open court has not been disturbed by Order XVIII Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 has been examined and its validity upheld in Salem Advocates Bar Association's case. There is

also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in Salem Advocates Bar Association's case, it has been held that the trial court in appropriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint Commissioner to record cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad

and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of the will etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witness. That may be so but, In our view, the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. It may also be noted that Order XVIII

Rule 4, specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner. "

11. The purpose and object of Order XVIII Rule 4 of CPC is speedy trial of the case and saves precious time of the Court and file an affidavit, produce copies of documents which ought to be supplied to the opposite party. This provision of law cannot be construed to mean that those documents which are not produced along with the affidavit as examination-in-chief cannot be relied on by a party. The proviso makes it clear that the Court may, while appointing a commission under this sub-rule consider taking into account such relevant factors as it thinks fit.

12. It is discretionary power of the Court to appoint Commissioner to record cross-examination and re-examination of witnesses. In the case reported in **Salem Bar Association** (cited supra) a general guidelines for the exercise of discretion has been given, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious

allegations of fraud, forgery, serious disputes as to the execution of the will etc.

13. But in this case, the properties are belong to the deceased son of the applicant/plaintiff, who is first class legal heir, the applicant is the mother of the deceased son filed the present suit for partition and separate possession of 1/4th share, there is no complex question involved in this case.

14. Considering the view taken in the **Salem Bar Association** (cited supra) three judges Bench of the Hon'ble Supreme Court, is subsequent to the introduction of Amendment Act 22 of 2002 CPC, Order XVIII Rule 4 has been introduced, therefore, even after examining the witness through Advocate Commissioner no reason to be given, the object is only for speedy trial. After introduction of Order XVIII Rule 4 CPC, the old age, sickness or any disability are not a ground for allowing or disallowing the application.

15. Considering the circumstances of the case, if this application is allowed and the applicant is examined through the Commissioner, no prejudice would be caused to the respondents and it is a fit case to exercise the discretionary power of the Court for appointment of Advocate Commissioner to record evidence of the

applicant/plaintiff.

16. In fine, this application is allowed. The applicant is directed to appear before Master for filing proof affidavit along with documents to be relied on by her, on or before 18.01.2017. Mr.K.Palanisamy, District Judge (Retd), Mobile No.9444155663 Residing at No.29/4, S.S.Pillai Street, Ganapathypuram, Tambaram, Chennai - 600 055, is appointed as Advocate Commissioner for recording evidence of the applicant/plaintiff by name Mrs.T.M.Ambujam. The Advocate Commissioner fees is fixed at Rs.10,000/- (Ten thousand only) payable by the applicant to the Advocate Commissioner, at the time of filing proof affidavit before this Court. After receipt of warrant, the Advocate Commissioner is directed to receive proof affidavit along with documents from the Registry. The examination of witness is fixed at 10.00am on 21.01.2017 (Saturday) in the residence of the applicant.

17. After recording of evidence, the Advocate Commissioner is directed to file his report and return the warrant, before the Registry on or before 27.01.2017.

18. Registry is directed to list the suit before this Court on 30.01.2017.

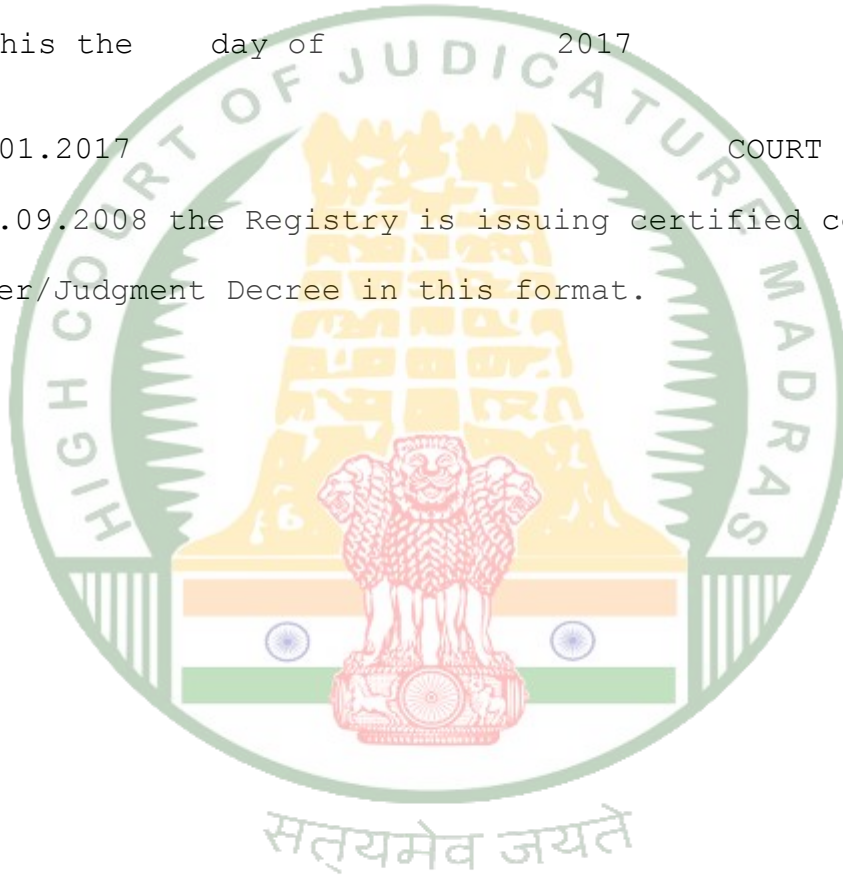
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09.01.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/10.01.2017 COURT OFFICER

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



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