

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
ORDER RESERVED ON: 06.03.2018

ORDER PRONOUNCED ON: 19.03.2018

CORAM:

**THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN**

Application No.1458 of 2018  
in CS No.803 of 2011

P.M.Elavarasan ... Applicant

Versus

1. Mrs.A.Sujatha
2. C.U.Shah Charities,. Rep by its Trustee,  
having office at No.158, 'Dev Darghas'  
5<sup>th</sup> Floor, Door No.1,  
Barnaby Road, Kilpauk, Chennai 600 010.
3. Mr.Ahmed Sheriff (Died)
4. N.Ananthakrishnan
5. Mrs. Poongodi
6. A.Samikannu ... Respondents

**PRAYER:** This Application has been filed under Order XIV Rule 8(xii) of Original Side Rules, seeking to strike out the deposition of D.W.1 the applicant herein recorded on 23.01.2017 and on 19.06.2017 and striking out the Exhibits marked as Ex.P30, Ex.P31, and Ex.P32 are against the rules of original side and procedures followed thereunder and strikeout the averments made in para 6 of the proof affidavit filed by the P.W.2, Abdul Gaffar which is derogatory, per se defamatory.

For Applicant : Mr.M.Jaya Balan

For Respondents : Mr.Balasubramanian

**ORDER**

This application has been filed seeking the applicant/6<sup>th</sup> defendant to strike out the deposition of D.W.1, recorded on 23.01.2017 and 19.06.2017 and to strike out the Exhibits marked as Exs.P30, P31 and P32, as according to the applicant, the procedure adopted in recording the said evidence and in marking those documents is against the Rules of the Original Side of this Court and the questions put in cross-examination to the witness are *per se* defamatory.

2. The suit in CS No.803 of 2011 is for a declaration that the plaintiff is the absolute owner of the property, for a declaration that the sale deed executed by the 2<sup>nd</sup> defendant in favour of defendants 3 to 5 dated 14.06.2010, the sham and nominal and not binding on the plaintiff in as much as the 2<sup>nd</sup> defendant has no salable interest over the said property, for a declaration declaring the purported sale deed executed by defendants 3 to 5 on 08.08.2011 in favour of the 6<sup>th</sup> defendant as sham and nominal and not binding on the plaintiff and for a consequential injunction restraining the defendants from interfering with the plaintiff exclusive possession and enjoyment of the property or in the alternative for recovery of possession of the property. The 6<sup>th</sup> defendant in the suit, viz. CS No.803 of 2011, has filed another suit in CS No.159 of 2012 seeking a declaration of his title and for permanent injunction. These

suits went for trial, the 6<sup>th</sup> defendant in CS No.803 of 2011 was examined as D.W.1.

3. During the course of the evidence, in cross-examination, the documents, viz. Exs.P30, P31 and P32 were marked. Exhibit P30 is an interim order passed in IA No.13533 of 2011 in OS No.6469 of 2011, wherein the application for injunction filed by the said witness, who was also the plaintiff in the said suit, directing maintenance of status quo by the parties. The witness as well as the plaintiff in the present suit are the parties to the said proceedings. Ex.P31 is the certified copy of the order passed in OSA Nos.328 and 329 of 2012. The said appeals have been filed by the said witness, viz. D.W.1 against the orders passed in Transfer Application No.1823 of 2012 and Original Application No.187 of 2012. While the appeal against the order in Transfer Application No.1823 of 2012 has been dismissed as infructuous. This Court had only directed the maintenance of status quo, as directed by the City Civil Court in IA No.13533 of 2011 in OS No.6469 of 2011, while disposing of the appeal against OA No.187 of 2012. The third document, viz. Ex.P32, which is the sale deed executed by D.W.1 in favour of one Siva Chidambaram, with reference to a major portion of the suit property subject matter of CS No.803 of 2011.

4. It is seen that these documents were marked in cross-examination of the said witness, the witness has not denied the truth or genuineness of those documents, in fact

he has admitted the documents. The main ground on which the learned counsel for the applicant would claim that the marking of those documents in Cross-examination of D.W.1, is against the procedure prescribed in the Original Side Rules is that it is in violation of Order IX Rule 8 of the Original Side Rules, Rule 8 reads as follows:

**"Rule 8:** If an affidavit of documents has been filed, no document which is not mentioned in such affidavit and which is or has been in the possession or power of the party making such affidavit shall be admitted in evidence except by the special order of the Court."

5. Of course a plain reading of Rule 8 extracted above would show that any document, it is not mentioned in the affidavit of documents, cannot be allowed to be produced in evidence, except by a Special Order of the Court. Relying upon the above said Rule, the learned counsel for the applicant would vehemently contend that the learned Additional Master was not justified in allowing the respondent, to mark the documents in cross-examination of D.W.1. The Original Side Rules govern the procedure to be adopted at the time of trial of suit by this Court exercising its ordinary original jurisdiction. Rule 3 of Order I of the Original Side Rules, provides for an exception to the applicability of the Code of Civil Procedure to proceeding on the original side of this Court. Rule 3 of Order I, reads as follows:

**“Rule 3:** Except to the extent specifically provided for by these rules, the provisions of the Code shall apply to all proceedings. The rules and forms mentioned in Appendix III hereto and all previous rules and forms, and the provisions of the Code, so far as such provisions are inconsistent with these rules and forms, are hereby repealed and superseded and the following rules, orders and forms shall stand in lieu thereof.”

6. Relying upon Rule 3 of Order I, Mr.M.Balasubramanian, learned counsel appearing for the respondents would contend that wherever the Original Side Rules are silent, the provisions of the Code of Civil Procedure would apply. He would also draw my attention to the provisions of Order VII Rule 14 of the Code of Civil Procedure, which relates to the production of documents on which the plaintiff sues or relies. Rule 14 of Order VII of the Code of Civil Procedure, reads as follows:

**Rule 14: Production of document on which plaintiff sues or relies.-**

(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be

<https://hcservices.ecourts.gov.in/hcservices/> with the plaint.

(2) Where any such document is not in the

possession or power of the plaintiff, he shall, where possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

**(4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.**

(emphasis supplied)

7. Pointing out Sub Rule 4 of Rule 14 of Order VII, Mr.M.Balasubramanian would submit that the prohibition contained in Rules 1 to 3 will not apply to a document that is sought to be produced in cross-examination of the witness by the adversary. He would further submit that in view of Rule 3 of Order I, in as much as the Original Side Rules are silent about production of document in cross-examination of the witness by the adversary, this Court could always fall back on Sub Rule 4 of Rule 14 of Order VII of the Code of Civil Procedure, to permit such marking of documents in cross-examination.

8. Mr.M.Balasubramanian, learned counsel would also

invite my attention to Order XLIX Rule 3 of the Code of  
<https://hcservices.ecourts.gov.in/hcservices/>

Civil Procedure, which excludes applicability of some of the

Rules of the Code of Civil Procedure from their application to the proceeding, before this Court in exercise of its ordinary or extra-ordinary original civil jurisdiction. Rule 3 of Order XLIX of the Code of Civil Procedure, reads as follows:

**Rule 3: Application of rules.-**

The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:

1. rule 10 and rule 11, clause (b) and (c) of Order VII;
2. rule 3 of Order X;
3. rule 2 of Order XVI;
4. rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence of Order XVIII);
5. rules 1 to 8 of Order XX; and
6. rule 7 of Order XXXIII (so far as relates to the making of a memorandum;

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

9. The question that arises for consideration in this application is as to whether Rule 8 of Order IX of the Original Side Rules, completely bars production of documents in cross-examination of witnesses by the adversary. The Division Bench of this Court in **Saradambal Ammal v. Sambanda Mudaliar**, reported in **1962 (2) MLJ 166**, had held that the provisions of the Civil Procedure Code, which are inconsistent with the Original Side Rules of this Court will

not apply to the proceedings in the Original Side of this Court. Section 137 of the Evidence Act, vests a right of cross-examination on the adverse party and such right cannot be reduced to be empty formality. In ***K.V.Kuppuswamy Ayyangar and another v. The State of Tamil Nadu, rep by its Chief Secretary, Madras and others*** reported in **1991 (2) MLJ 480**, a Division Bench of this Court had held that the power under order VI Rule 17, is available to this Court for allowing amendment of the plaint. The Division Bench after considering the scope of Rule 3 of Order I of the Original Side Rules, held that the High Court will have the power to amend the plaint, under Order VI Rule 17 of the Code of Civil Procedure, *de hors* the absence of a provision in the Original Side Rules.

10. Section 144 of the Evidence Act, relates to evidence as to matters in writing and it enables question being put the witness under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and for that purpose, it enables the document being produced, Section 145 of the Evidence Act, enables cross-examination of witness as to previous statements made by him in writing or reduced into writing, and if the witness is to be contradicted by the said writing. Section 145 requires the attention of the witnesses, must be drawn to the writing, before he/she could be questioned on the writings. Therefore, production of documents in cross-

examination cannot be said to be totally barred, either by the Original Side Rules or the Rules contained in the Code of Civil Procedure. These Rules being procedural in nature must give way to the substantive law, viz. The Evidence Act.

11. The mere fact that the Original Side Rules, does not enable production of documents in cross-examination of the witness, cannot be used as a tool to shut out Cross-examination of the witness on the contents of the documents as well as production of documents in cross-examination. The absence of any provision in the Original Side Rules, which enables production of documents in cross-examination, cannot amount to a prohibition against the production of documents in cross-examination. In fact, Order XLIX Rule 3 of the Code of Civil Procedure, itself enumerates the Rules in the Civil Procedure Code, which will not apply to the High Court exercising its ordinary original jurisdiction. Order VII Rule 14 of the Code of Civil Procedure, does not form part of those Rules and its application is not excluded by Order XLIX Rule 3 of the Code of Civil Procedure. Therefore, in my considered opinion the provisions of Order VII Rule 14 Sub Rule 4 can always be made applicable to the proceedings in the original side of this Court. Any other interpretation would only be doing violence to the provisions of the substantive law, viz. The Indian Evidence Act 1872. Therefore, I am of the opinion that the procedure adopted by the learned Additional Master, in allowing marking of Exs.

for any interference and the documents cannot be struck off from evidence.

12. The other prayer is sought for in this application is that the question, which are put to the witness in cross-examination on 19.06.2017 are *per se* defamatory. The only question that is objected to is as follows:

*"I deny the suggestion that I am a prominent land grabber and I suffered lot of judgments against me by the Hon'ble High Court."*

13. Here again, it should be pointed out that Section 138 of the Evidence Act, provides that cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. Section 146 of the Evidence Act, provides that it shall be lawful for the cross-examining counsel, to put questions to discover who the witness is and what is its position in life or to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty of forfeiture. Therefore, it was definitely open to the counsel to ask the question regarding the character of the witnesses, while cross examining the witness and from the portion of the evidence extracted above, it could be seen the witness promptly denied the suggestion. Therefore, I do not see any need to strike out the evidence recorded on 19.06.2017 as contended by the

learned counsel claiming it to be *per se* defamatory.

14. In fine, the application is dismissed. However, there will be no order as to costs.

sd/R.S.M.J

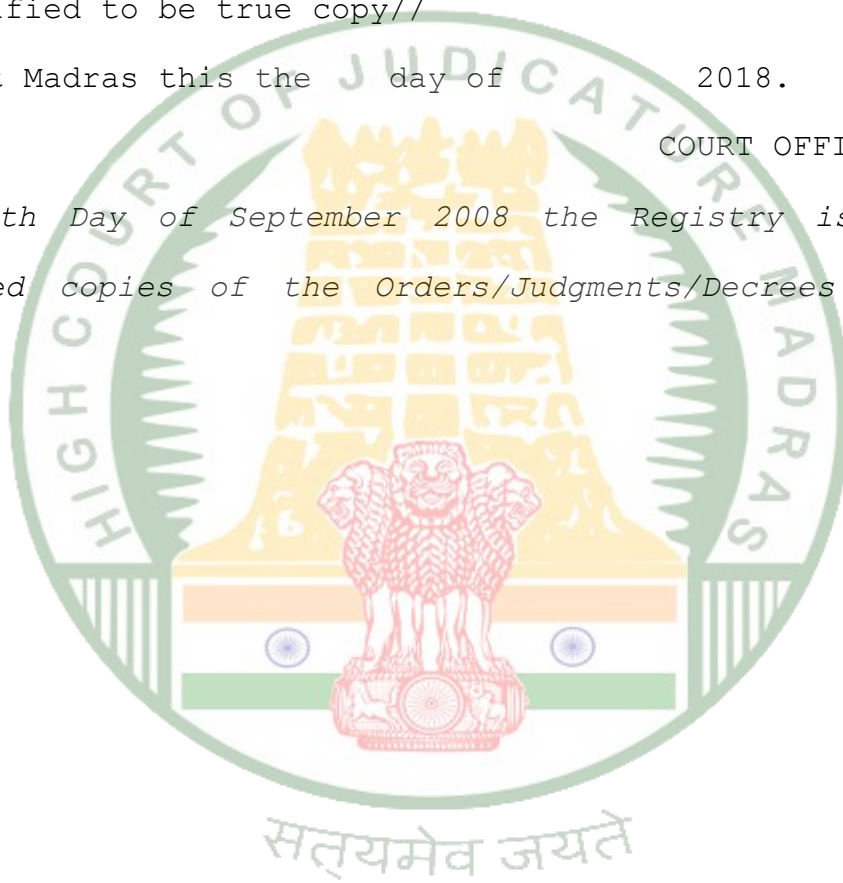
19.03.2018

//Certified to be true copy//

Dated at Madras this the day of 2018.

COURT OFFICER (O.S.)

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