



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 27.06.2018

Pronounced on : 30.07.2018

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CORAM:

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (PD) (MD) No.1243 of 2018
and C.M.P. (MD) No.5255 of 2018

S.Balasubramanian ... Revision Petitioner/2nd Respondent/
2nd Defendant

-vs-

1.M.Chandira ... 1st Respondent/Petitioner/Plaintiff

2. Baskar ... 2nd Respondent/1st Respondent/1st Defendant

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and decreetal order passed in I.A.No.270 of 2018 in O.S.No.16 of 2016 dated 08.06.2018 on the file of the 1st Additional District Munsif Court, Tirunelveli, by allowing this civil revision petition.

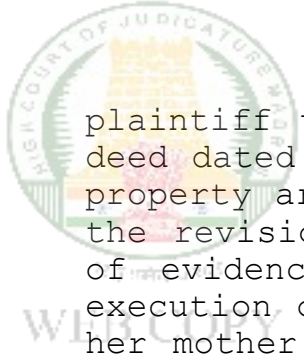
For Petitioner : Mr.H.Arumugam

For R1 : Mr.V.Meenakshi Sundaram

O R D E R

The Revision Petitioner is the defendant in O.S.No.16 of 2016 dated 08.06.2018 on the file of the 1st Additional District Munsif Court, Tirunelveli and in the suit, the plaintiff / 1st respondent herein sought for declaration, etc. During pendency of the suit, the plaintiff/respondent herein had filed an application in I.A.No.270 of 2018 for appointment of an Advocate Commissioner to examine his mother in petition mentioned house on the side of the plaintiff and the said application was allowed by the Trial Court, holding that no prejudice would be caused to other side. Challenging the same, this revision petition has been filed.

2. It was the case of the revision petitioner that the suit schedule property originally belonged to one Rajam and the said property in turn was sold to the revision petitioner / 2nd defendant on 19.04.1996 by her Power Agent / 1st defendant in the suit, who is none other than the son of Rajam. The averments made by the



plaintiff that the property was sold by her mother by way of sale deed dated 07.01.1997 and she is in possession and enjoyment of the property are absolutely false and denied. It is the further case of the revision petitioner that the plaintiff had not shown any piece of evidence to prove that a fraud has been committed regarding execution of Power of Attorney and its registration. The plaintiff, her mother and the son of Rajam/1st defendant colluded together and attempted to usurp the property from the 2nd respondent on account of inflation of the value of the property and also filed the suit against the 2nd defendant.

3. It was the case of the revision petitioner that he was a bonafide purchaser of the property from the Power of Attorney and had the Power of Attorney deed, purported to have been executed by the said Rajam appointing the 1st defendant as her Power Agent been a fraudulent one, she could have initiated all sort of legal proceedings against the 1st defendant and without doing so, the plaintiff had filed the suit against the 2nd defendant, seeking the relief of declaration by impleading the 1st defendant for name sake.

4. The revision petitioner further states that the sale deed has been duly executed by the Power Agent before the Office of the Sub Registrar, Burkitmanahar vide Doc.No.119 of 1996 dated 15.04.1996, pursuant to which, he had taken steps to mutate the Revenue Records, which was subsequently cancelled by the Revenue Divisional Officer, Tirunelveli on the basis of the complaint lodged by the plaintiff, which was challenged by the 1st defendant before the District Revenue Officer, Tirunelveli, in which, both the plaintiff and her mother duly contested.

5. That being the case, the plaintiff subsequently took out an application in I.A.No.270 of 2018 for appointment of an Advocate Commissioner to examine her mother at her residence, which was allowed by the Trial Court without adhering to the procedures adumbrated under the relevant provisions of law, viz., an Advocate Commissioner can be appointed under 26 Rule 4(A) to examine a witness, who must be a resident of the Court's jurisdiction, whereas the mother of the plaintiff is a non resident of the local jurisdiction of the Court. If the witness is examined in Court, then only the real truth will come out and the plaintiff purposely wanted to avoid to bring her mother to the Court so as to enter into the witness box.

6. Learned counsel for the petitioner, in support of his submission that in absence of any documentary evidence to show that the witness is sick, there is no need to appoint Advocate Commissioner for examination of the witness at the resident, has relied upon the following judgments of this Court as well as the High Court of Andhra Pradesh, which read as under:

<https://hcservices.ecourts.gov.in/hcservices/> An. Mohan vs. Natesan [C.R.P.(PD) No.2871 of 2003] decided on 16.07.2004;

"3. The learned counsel for the revision petitioners



would submit that the witnesses, who were sought to be examined, were sick and in view of the same, the plaintiffs were compelled to file an application for the appointment of the Advocate Commissioner. The lower court has clearly pointed out in its order that in order to substantiate the fact that they are physically ill and sick, no documentary evidence from any medical officer was filed, and apart from that out of three witnesses, two were aged about 57 and 60 years. In the absence of any documentary evidence to substantiate the same, the order of the lower court has got to be affirmed. Now, the suit is also pending trial. Under the stated circumstances, while dismissing the civil revision petition, the lower court is directed to examine the witness, namely Durai, who is aged about 80 years, and record his chief and cross examination on the consecutive days without causing any delay and dispose of the matter as expeditiously as possible. This civil revision petition is dismissed accordingly. No costs. Consequently, connected CMP is closed."

ii) Orugunati Ranganayakamma vs. Maduri Lakshminarasamma and another, reported in AIR 1979 Andhra Pradesh 8;

"3. It is not in dispute that the place where the witness practices as a private doctor is only a distance of 40 miles from Chirala but it is outside the territorial limits of Chirala District Munsif Court. O. 26 R. 4 C. P. C. would empower any court to issue a Commission for the examination of any person residing beyond the local limits of its jurisdiction. The learned counsel for the revision petitioner does not question the jurisdiction of the Court below to issue the commission. But, what is sought to be contended is the propriety of the regularity in the exercise of its discretion in appoint in the commission to record the evidence of a witness. A single Judge of this Court in P. R Bizani v, Hans Zucker Boeker, held that even where a witness resides outside the jurisdiction, there is no right to have a commission issued to examine a witness on that ground and that the issue of a commission is a matter of discretion of the Court and that that discretion has to be exercised judiciously upon all the facts and circumstances of the case. It can be noted that the evidence of an attester of a will in the instant case is a very material piece of evidence which will tilt the balance and decide the rights of the parties. It is common ground that the said will has come to be registered after 44 days of the alleged execution. Having regard to this circumstance, it is equally necessary for the Court to note the demeanour and watch this witness, who is one of the attestors while being examined. It could be rather futile to contend that the evidence of such witness is of a formal character. Having regard to this circumstance it



does not appear that the examination of this witness on commission to say the least, was desirable. The learned District Munsif appears to have made the order mechanically in the light of the provisions of O. 26 R. 4 (1) (a).

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4. As noted above, merely because the witness resides outside the jurisdiction that does not entitle a party to have a commission issued for the examination of witness as of right. It is opposite to refer in this context to a ruling of a Division Bench of this Court in *Java Shanker Mills (Barsi) Ltd. v. Hazi Zakaria Hazi Ebrahim*, AIR 1962 Andh Pra 435. That is also a case under O. 26, R.4 C. P. C. It is held therein:

"The broad principles which must necessarily be kept in mind when exercising discretion in the matter of issuing a commission for the examination of a witness are that the person invoking it must be bona fide in making the application, that the application of the defendant should not be subject to the same amount of scrutiny as that of the plaintiff, that the reasons why the witness cannot be examined in Court must be carefully considered that regard must be had to the conduct of the party and that further. I must be considered whether the examination on commission would result in manifest injustice to any party or is not calculated to permit the evidence being tested fairly or is likely to prove an abuse of process of Court. Justice above all is of Paramount consideration and the discretion should be exercised for furtherance of the same in the particular circumstances of the case. Even in cases where there is a statutory right it is open to the Court to refuse the same if the witness is under the control of the party and the application is not bona fide.

Observing the demeanour of a witness by the Judge is a strong or sufficient ground for refusing issue of commission for examination of a defendant residing beyond the local limits of the jurisdiction of the Court. Inconvenience of a party. cannot be a significant factor when the interests of justice warrant that he should come before the Court."

All that is alleged in the affidavit in support of the petition is that the said witness is a busy medical practitioner and cannot spare time. But as noted above, the requirement of this particular case is that the witness should be examined by the Court so that the Court may have the opportunity to note the demeanour of the



witness as against the allegations of concoction of the will in collusion the witness by the husband of the plaintiff. It is not the case of the plaintiff that the witness sought to be examined on commission is an aged, or infirm person. Mere inconvenience of the said witness cannot be a ground for his examination on commission. I am satisfied that, having regard to the circumstances of the case, the witness ought to be mined by the Court and the exercised by the lower Court was not proper."

Contending that the provision for appointment of an Advocate Commissioner to examine a witness at the resident can be used in a rarest of the rare case and the said provision cannot be used in a routine manner, it is prayed that the order of the Trial Court is set aside.

7. Per contra, learned counsel for the 1st respondent/plaintiff has contended that the plaintiff had examined herself as P.W.1 in the suit and the mother of the plaintiff is a diabetes patient, having Blood Pressure and it is highly impossible to cast her appearance before the Trial Court. It was further contended that the plaintiff, having come to know of the fact that the 2nd defendant / revision petitioner herein had altered the revenue records, had thereafter taken steps to file a suit besides preferring complaint before the concerned Revenue Officials. The mother of the plaintiff is aged 86, due to which, she could not be able to come to the Court and therefore, the Trial Court has rightly permitted the plaintiff to examine her mother through a Commissioner, which does not call for interference by this Court.

8. Heard the learned counsel for the petitioner and the learned counsel appearing for R1. Notice to R2 is dispensed with, in view of nature of disposal of this petition.

9. The plaintiff laid a suit for declaration and the case of the plaintiff/1st defendant is that the property of her mother, namely, K.Rajam, which had already been settled in favour of the plaintiff, had allegedly been sold to the revision petitioner/2nd respondent through a Power of Attorney, which was a forged one. It was her further case that her mother used to sign in English and her signature has been forged for creation of alleged Power of Attorney, which is not at all genuine one. Since her mother is actively behind the entire litigation, her deposition cannot be thrown out and it is her mother, who has to clarify by way of deposition as to whether she had really executed any such power in favour of her son, namely, 1st respondent herein. However, being an aged woman, she could not be in a position to come to Court to attend the Court proceedings.

10. On the contrary, it was the main stand urged by the revision petitioner / 2nd defendant that there is no enabling provision to examine a witness residing outside the territorial jurisdiction of the Court and therefore, the plaintiff is not



entitled to the relief sought for.

11. The application was filed by the plaintiff under Order 26 Rule 2, 4(A) and 151 CPC for recording the evidence of the mother of the plaintiff at her residence. After the CPC Amendment, Order 26 Rule 4A CPC reads that "notwithstanding anything contained in the Rules under Order 26, any Court may issue commission in any suit for examination, interrogation or otherwise of a person resident of the Courts jurisdiction and the evidence so recorded shall be read in evidence. Order 26 Rules 1 to 4 & 8 speaks of cases in which Court may issue by order commission to examine witness and to read the deposition in evidence and Rules 3 & 5 cover the examination by commission of a witness within Courts jurisdiction and of a witness not within India.

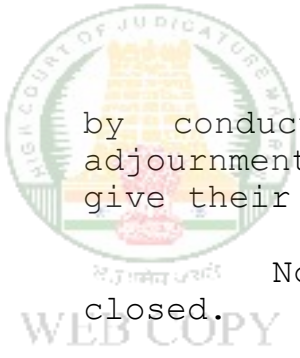
12. On a bare reading of the application filed by the plaintiff, it was stated that her mother is a diabetes. It is needless to state that it is quite natural that since her mother is aged 86, such old aged people will get affected by attendant diseases and it is not the case of the plaintiff that her mother is immobile and could not walk. It is a settled law that the aid of commissions could be used in cases where the witnesses are unable to attend Court, but in the present case on hand, no documentary evidence or medical certificate has been produced to show that her health condition will not let her come to the Court to adduce evidence. It is the strong case of the plaintiff that her mother's property was tried to be alienated without her knowledge and therefore, it is for the plaintiff, who has to prove her case beyond reasonable doubt by producing appropriate witnesses.

13. Moreover, the provision enables examination of a witness through an Advocate Commissioner, who is well placed within the limits of the said Court, but in the case on hand, the plaintiff and her mother have been living outside the purview of the Court and in the event of allowing such examination at the residence, there is a possibility for each and every one of litigants knocking at the doors of Courts asking for such relief, citing the very same reasons, bypassing the object of the provisions. Under such circumstances, keeping in mind the judgments (referred to supra), this Court is of the view that the order dated 08.06.2018 passed in I.A.No.270 of 2018 in O.S.No.16 of 2016 by the learned 1st Additional District Munsif, Tirunelveli is contrary to law and is liable to be set aside.

14. In the result,

a) this civil revision petition is allowed and the order dated 08.06.2018 passed in I.A.No.270 of 2018 in O.S.No.16 of 2016 by the learned 1st Additional District Munsif, Tirunelveli, is set aside;

b) the learned 1st Additional District Munsif, Tirunelveli, is directed to dispose of the suit in O.S.No.16 of 2016 within a period of six months from the date of receipt of copy of this order,



by conducting trial on day-to-day basis without giving any adjournments to either parties and the parties are also directed to give their fullest cooperation for early disposal of the suit;

No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar (CS-III)

To:

The 1st Additional District Munsif,
Tirunelveli.

DS SKN RSK SAR-3;03.09.2018; 7P/2C

ORDER IN
C.R.P. (PD) (MD) No.1243 of 2018

30.07.2018