



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 16.07.2018

CORAM:
THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P.(PD) (MD) No.515 of 2016
and C.M.P. (MD) No.2228 of 2016

WEB COPY

G.N.Vijaya

... Petitioner/Petitioner/Defendant

-vs-

1. Sivasubramanian

2. Balaganesan

... Respondents/Respondents/Plaintiffs

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India to call for the records pertaining to the order dated 12.06.2015 made in I.A.No.211 of 2015 in O.S.No.68 of 2012 on the file of the learned III Additional District Judge, Tiruchirappalli and set aside and allow the same.

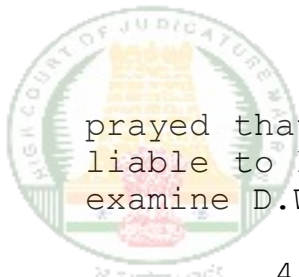
For Petitioner : Mr.N.Anandakumar
For Respondents : No Appearance

ORDER

The Revision Petitioner is the defendant in O.S.No.68 of 2012 on the file of the learned III Additional District Judge, Tiruchirappalli and in the suit, the plaintiffs / respondents herein sought for declaration, etc. During pendency of the suit, the defendant/petitioner herein had filed an application in I.A.No.211 of 2015 for appointment of an Advocate Commissioner to conduct the chief and cross examination of D.W.2 at her residence in the presence of lawyers on both sides and the said application was dismissed by the Trial Court, holding that the petitioner did not prove the sickness of D.W.2 with medical documents. Challenging the same, this revision petition has been filed.

2. It is the case of the revision petitioner that she was examined as D.W.1 and she cited one Savithiri as D.W.2 to the suit and since the said Savithiri evaded from appearing before the Court, the petitioner herein took effective steps for casting her appearance. Subsequently, D.W.2 had filed a memo stating that she is 70 years old and a diabetic and therefore, she could not be able to attend the Court proceedings. It is the further case of the revision petitioner that the Will executed by the husband of Savithiri can be proved only through her, it is absolutely necessary to examine her.

3. The revision petitioner further states that since D.W.2 herself filed a memo showing her inability to attend the Court, an Advocate Commissioner can be appointed for the purpose of examining her and in that event, no prejudice would be caused to other side and the interest of justice would also be met. Therefore, it is



prayed that the order of the Trial Court, declining her request, is liable to be set aside and an Advocate Commissioner be appointed to examine D.W.2 at her residence.

4. Heard the learned counsel for the petitioner and also perused the material documents available on record. Though notice has been served on the respondents and their names printed in the cause list, there is no representation on behalf of the respondents.

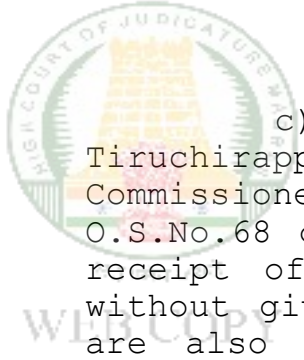
5. The plaintiffs laid a suit for declaration, during pendency of which, the defendant had filed an application under Order 26 Rule 2, 4(A) and 151 CPC for conducting chief and cross examinations of one Savithiri as D.W.2 through an Advocate Commissioner. After the CPC Amendment, Order XXVI Rule 4A CPC 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 XXVI 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.

6. It is a settled law that the aid of commission could be used in cases where the witnesses are unable to attend Courts and in the present case on hand, it was stated by D.W.2 herself that she, being aged 70, is a diabetes and is not a position to attend Court proceedings. The provision also enables examination of a witness through an Advocate Commissioner, who is well placed within the limits of the said Court. It is the strong case of the petitioner that the subject Will is a vital document that has got to be proved by examination of D.W.2 in order to defend her case. Under such circumstances, this Court is of the view that the order of the Trial Court is liable to be set aside, as no prejudice would be caused to the plaintiffs in such examinations at the residence of D.W.2.

7. In the result,

a) this civil revision petition is allowed and the order dated 12.06.2015 made in I.A.No.211 of 2015 in O.S.No.68 of 2012 by the learned III Additional District Judge, Tiruchirappalli, is set aside;

b) the Trial Court is directed to appoint an Advocate Commissioner within a period of two weeks from the date of receipt of a copy of this order, with a direction to the Advocate Commissioner to conduct the chief and cross examination of D.W.2 at her residence in the presence of Advocates on both sides and complete the entire exercise within four weeks thereafter;



c) the learned III Additional District Judge, Tiruchirappalli, on receipt of report from the Advocate Commissioner, is further directed to dispose of the suit in O.S.No.68 of 2012 within a period of two months from the date of receipt of such report, 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(CS-II)

/True Copy/

Sub Assistant Registrar(CS-I)

To:

- 1.The III Additional District Judge,
Tiruchirappalli.
- 2.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. **(2 copies)**

+1CC to Mr.N.Anandakumar, Advocate, SR.No.73206

C.R.P.(PD) (MD) No.515 of 2016

16.07.2018

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