



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 30.07.2018

Delivered on : 24.08.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

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C.R.P. (MD) (PD) No.72 of 2016

and

C.M.P. (MD) Nos.293 & 9107 of 2016

Nirmala Kamatchi

.. Petitioner/1st Respondent

vs.

1.K.P.M.S.Mariappan

2.K.P.M.S.Vasudeva Balakrishnan

3.S.Guruvammal

4.M.Sundaraj

5.M.Jayasundari

6.M.Tamilarasan

7.K.Alagesan

8.M.Ravi

9.R.Kalaiselvi

10.T.Rani

.. Respondents/Petitioners &

Respondents 2 to 10

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order dated 10.04.2015 rendered in I.A.No.193 of 2015 in O.S.No.4 of 2008 on the file of the IV Additional District Judge, Madurai allowing the petition seeking appointment of Commissioner for recording the evidence (cross-examination and re-examination) of the D.W-1, whose evidence (examination-in-chief) by affidavit has been furnished to the Court.

For Petitioner

: Mr.R.A.Mohanram

For Respondents

: Mr.D.Nallathambi (for R6)

Mr.G.Aravindan, for R1, R4, R5

R2,R3,R7 to R9 - Given up

No Appearance - (for R10)

ORDER

This Civil Revision Petition has been filed to set aside the order dated 10.04.2015, made in I.A.No.193 of 2015 in O.S.No.4 of 2008, on the file of the learned IV Additional District Court, Madurai.

2.The revision petitioner, who is the daughter of the first respondent filed the above suit in O.S.No.4 of 2008 on the file of the learned IV Additional District Court, Madurai for partition as against the first respondent, some family members and also against subsequent purchasers. When the suit is posted for the evidence on the side of the defendants, the second defendant filed his proof



affidavit and thereafter, he filed I.A.No.109 of 2012, for appointment of Advocate Commissioner to cross examine him at his residence.

3. According to the first respondent/second defendant, he is a senior citizen, aged about 64 years and he is suffering from blood pressure and diabetics and he is unable to stand for long time. He also stated that he finds it very difficult to climb stairs to the Court, which is at the first floor. Hence, filed application seeking to appoint Advocate Commissioner for the purpose of examining him, more particularly cross examination.

4. The petitioner filed counter affidavit denying the averments made in the application sought for appointment of Advocate Commissioner on the ground that no documentary proof has been filed showing the medical ailments suffered by him. In addition to these objections, the petitioner also stated that the first respondent would not be satisfactorily cross examined if she examine the first respondent at his residence. The learned Judge considering all the materials on record, allowed the application and appointed an Advocate Commissioner. Against the said order, the present Civil Revision petition is filed at the instance of the petitioner/plaintiff.

5. I heard Mr.R.A.Mohanram, learned counsel for the petitioner, Mr.D.Nallathambi, learned counsel for the 6th respondent and Mr.G.Aravindan, learned counsel for the respondents 1, 4 and 5 and perused the entire materials available on record. No representation on behalf of the 10th respondent. The learned counsel for the petitioner and the respondents reiterated the averments made in the affidavit and in the counter affidavit.

6. The learned counsel for the petitioner argued in a very crisp manner stated that the suit for partition is an appealable case and hence there cannot be any examination of witness through Advocate Commissioner. To his support, he drew my attention to Order XVIII Rule 5 of the Code of Civil Procedure, which reads thus:

"ORDER XVIII RULE 5. How evidence shall be taken in appealable cases. - In case in which an appeal is allowed, the evidence of each witness shall be,-

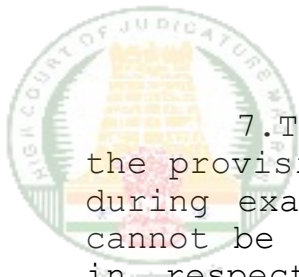
(a) taken down in the language of the Court,-

(i) in writing by, or in the presence and under the personal direction and superintendence of, the Judge, or

(ii) from the dictation of the Judge directly on a typewriter; or

(b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge."

Hence the learned counsel for the petitioner sought to set aside the order dated 10.04.2015 made in I.A.No.193 of 2015 in O.S.No.4 of 2008, on the file of the learned IV Additional District Court, Madurai and prayed for allowing the present civil revision petition.



7. The learned counsel for the first respondent submitted that the provision as stated in Order XVIII Rule 5 is applicable, only in during examination of witnesses in an appeal and the said proviso cannot be looked into in the present circumstances. He stated that, in respect of examination of witnesses in original suits, for recording of evidences, the procedure contemplated is Order XVIII Rule 4, which read thus:

"Order XVIII Rule 4. Recording of evidence.-

(1)

(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.

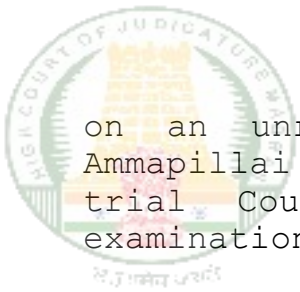
(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination: Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments."

Hence the learned counsel for the first respondent stated that examination of witnesses can be made in the presence of a Commissioner appointed by the Court. The said counsel also added that the evidence recorded by the Advocate Commissioner is not at all an unknown procedure.

8. Apart from his arguments, he submitted that the suit is one for partition, filed by daughter against her father, paternal uncle and subsequent purchasers. Such being the case, the plaintiff would not be anyway prejudiced, if the court directs her to go to the residence of her parents, to examine her 70 years old father, who is the first respondent / second defendant.

<https://hcservices.courts.gov.in/hcservices/> considerable force in the submissions made by the learned counsel for the first respondent/second defendant, but I cannot sweep away my eyes to his submissions alone. He also relied



on an unreported decision of this Court dated 11.08.2014 in Ammapillai Ammal v. T.Pathumuthu, in which this Court directed the trial Court to appoint an Advocate Commissioner for cross examination of a witness.

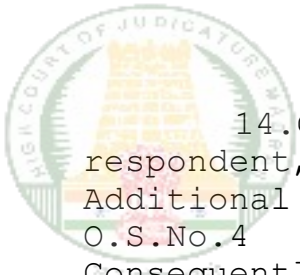
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10.The plea taken by the learned counsel for the petitioner that there cannot be any examination of witnesses except other than before Court, has to be dealt legally and decided legally. The stand taken by the learned counsel for the petitioner not holds correct as the said provision is only with regard to the proceedings took place in an appeal and not in a pending suit. In so far as it relates to examination of witnesses, in a suit, through or in the presence of an Advocate Commissioner, is concerned, there is a specific provision under Order XVIII Rule 4. Hence, it can be easily arrived at a conclusion that Court can appoint Advocate as Commissioner to record evidence during examination of witness, at his/her evidence.

11.Now, the only question stood before me is whether an Advocate Commissioner can be appointed in the present case. I have carefully considered the materials placed before me. It is seen that the first respondent is aged about 60 years at the time of filing of suit in the year 2007 and now, he is about 70 years old. He might be suffering due to old age also. The first respondent, though not filed any medical certificate to substantiate his claim that he is suffering of ailment and it can be visualized as to how difficult, it would be for him to come to the Court to give evidence.

12.I read over the provision namely, Order XVIII Rule 4, which is an enabling provision, so that sick/old witnesses, who are not in a position to appear before the Court, can be examined at their residence and they can also avoid to claim stairs in the Court buildings and wait in Courts for hours together. The decision relied upon by the learned counsel for the first respondent holds good and supports his contention. Considering all these aspects, the learned Judge has allowed the application and appointed an Advocate Commissioner to record the evidence of the first respondent at his residence.

13.Therefore, I hold that there is no infirmity or irregularity in the order passed by the learned Judge. The Civil Revision Petition is dismissed. The learned IV Additional District Judge, Madurai is directed to give instructions to the Advocate Commissioner to record evidence of the first respondent at his residence and complete the same within a period of two weeks from the date of such instructions being given and the parties are directed to co-operate with the Advocate Commissioner for recording of evidence in a fair manner as prescribed by the Court.



14. Considering the age of the first respondent and fourth respondent, who are aged around 70, I direct the learned IV Additional District Judge, Madurai, to dispose of the suit in O.S.No.4 of 2008 on merits before 31.12.2018. No costs. Consequently, connected miscellaneous petitions are closed.

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Sd/-
Assistant Registrar(AS)

/True Copy/

Sub Assistant Registrar(CS-I)

To

The IV Additional District Judge,
Madurai.

+1CC to Mr.R.A.Mohanram, Advocate, SR.No.80519
+1CC to Mr.N.Subramanian, Advocate, SR.No.80419
+1CC to Mr.D.Nallathambi, Advocate, SR.No.80162

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