

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED: 28.03.2019

CORAM

**THE HONOURABLE Ms. JUSTICE P.T. ASHA**

C.R.P(PD).No.906 of 2019  
&  
C.M.P.No.5918 of 2019

1.Mr.Ashwin Sabanayagam

2.Mr.Rajendran Sabanayagam

...Petitioners

Vs

The Catholic Syrian Bank Ltd.,  
Zonal Office,  
Rani Seethai Hall, 7<sup>th</sup> floor,  
603, Anna Salai, Chennai – 600006.

... Respondent

**Prayer:** Civil Revision Petition is filed under Article 227 of the Constitution of India against the order dated 31.01.2019 in I.A.No.222 of 2018 in O.S.No.4768 of 2014 on the file of the learned XV Additional City Civil Court.

For Petitioners : Mr.Roshan Balasubramanian  
For Respondent : Mr.V.Bhiman  
for M/s.Sampath Kumar &  
Associates

**ORDER**

The above Civil Revision Petition is filed by the defendants challenging the order passed in I.A.No.222 of 2018 in O.S.No.4768 of 2014. This application has been filed by the plaintiff to eschew the evidence of P.W.1, who had deposed in chief and partly in cross examination. The learned XV Additional City Civil Judge, Chennai has allowed the application and challenging the same the revision petitioners, namely, the defendants are before this Court. The facts without traversing into the minute details of the case are as follows:

2.The suit O.S.No.4768 of 2014 has been filed by the respondent/plaintiff for recovery of a sum of Rs.20,40,146/- together with interest at the rate of 17.25% per annum which is a refund of the advance amount retained by the defendants/landlord, though the plaintiff Bank had vacated the premises as early as on 12.10.2013. The plaintiff had examined the Chief Manager one P.C.Rajeev as P.W.1 and he had filed his proof affidavit in lieu of chief examination on 05.06.2018 and fourteen documents were marked on the side of the plaintiff. Thereafter the said P.C.Rajeev was examined in chief and partly in cross on 25.09.2018 and cross examination was adjourned to 24.10.2018. In fact, in answer to a question the witness has stated

“while pending suit a notice to produce documents, notice was given to us. I am able to produce Document Nos.3 and 4 but with regard to other documents they are all old documents, I am trying to search the same, if possible I will definitely produce it”. At this stage that the cross examination of P.W.1 had come to an end. Thereafter an affidavit was filed dated 28.11.2018 by the authorised signatory namely Chief Manager (Law) of the Bank stating that P.C.Rajeev had been relieved from service and it will not be possible for him to appear before this Court for further cross examination on account of his present avocation.

3.The affidavit further went on to state that the witness was also examined based on records. The suit is of the year 2014 for recovery of money since the entire transaction is borne out by records, further cross examination can be done by the present incumbent and therefore the petition was sought to eschew the evidence given by P.W.1, Mr.P.C.Rajeev.

4.The defendants had objected the said petition and had filed a counter affidavit wherein, they would contend that the evidence in

question could not be completed on 25.09.2018, only because the witness namely P.W.1 wanted to search certain documents to determine when the money was allegedly paid to the respondent by the Bank. They had also raised an objection that though the affidavit would state that the P.W.1 had been relieved from service there was no documents to prove the same and therefore the reason given appears to be suspect.

5.The learned XV Additional Judge by his order dated 31.01.2019, has proceeded to allow the application on the ground that the witness had filed his proof affidavit only on the basis of records and further his cross examination had not been completed, therefore, the Judgements relied upon by the defendants would not be applicable to the facts of the case. It is challenging this Order that the defendants are before this Court.

6.Mr.Roshan Balasubramanian, learned counsel, for the revision petitioners/defendants would submit that the P.W.1 has deposed not only in chief but also to a considerable extent in cross examination and there would be certain admissions which the respondent could use for

their advantage and by eschewing the entire evidence the revision petitioners/defendants would put to a great prejudice. He would submit the following Judgements in support of his case namely ***C.R.P.(PD).Nos.1665 & 1666 of 2013 (C.M.Dhananjaya Vs. Sri Kalidasa Educational Trust (Registered))*** dated **20.12.2016** headed by the Honourable ***Mr.Justice M.V.Muralidaran***, with particular reference to paragraph Nos.10 to 14 and the Judgement in ***D.F.Philips Vs. Damayanthi Kailasam and others*** reported in ***CDJ 2010 MHC 1572***, with particular reference to Paragraph Nos.23, 26 and 28 and the Judgement which was cited by the learned XV Additional Judge namely ***Mahalingappa and others Vs. Kariyanna*** reported in ***2009 (2) APLJ 121***, with reference to paragraph No.7.

7.Per Contra, Mr.Bhiman, learned counsel on behalf of the respondent would submit that the witness examined as P.W.1 has spoken from the records and therefore by eschewing the evidence already granted, there is no prejudice that is going to be caused to the revision petitioners/defendants. Therefore the order does not require reconsideration.

8. Heard the counsels on either side and perused the records. It is seen that from the records that the defendants have cross examined the witness P.W.1 to a considerable extent and the evidence was stopped at a stage, where the witness had stated that he would like to search for the documents. Therefore, the application to eschew evidence on the ground that the witness has been relieved from service is totally unknown to the procedure relating to the examination of witness. This Court in the Judgement in ***D.F.Philips Vs. Damayanthi Kailasam and others*** reported in ***CDJ 2010 MHC 1572*** has in detail extracted the procedure contemplated under Section 138 of the Evidence Act, relating to the cross examination of the witness and also discussed the probative value of an evidence that is recorded.

9. This Court has held that there is no provision for eschewing the evidence of the witness who has not completed his deposition, Ultimately, it is the Court which has to decide the probative value of the evidence and merely because the evidence is not available, the evidence so far deposed cannot be eschewed from the records.

10.The instant case is also of a similar nature, therefore this Court relying upon the Judgement in ***D.F.Philips Vs. Damayanthi Kailasam and others*** reported in ***CDJ 2010 MHC 1572*** allows the Civil Revision Petition. Consequently, the order passed by the learned XV Additional Judge in I.A.No.222 of 2018 in O.S.No.4768 of 2014 is set aside and evidence already recorded shall remain on file. Considering the fact that the suit is of the year 2014, the learned Judge is directed to dispose of the same within a period of three months from the date of receipt of a copy of the order.

The above Civil Revision Petition is allowed on the above directions. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is also closed.

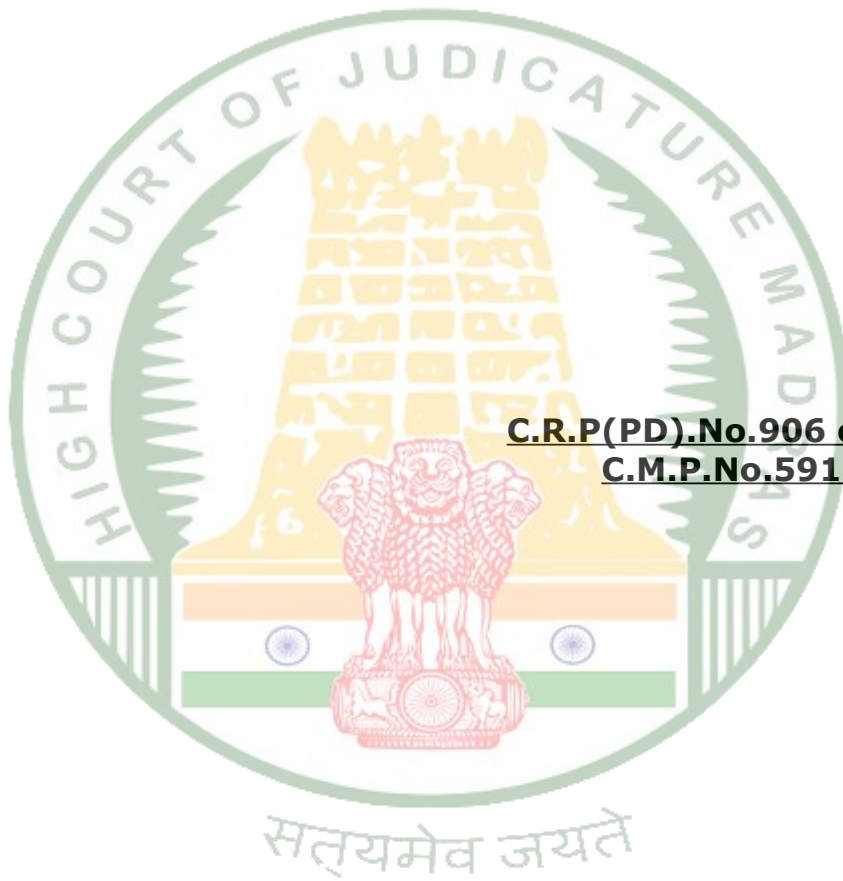
**28.03.2019**

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Index : Yes/No  
Speaking order/non-speaking order  
To  
The XV Additional City Civil Judge.

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**P.T.ASHA, J.,**

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