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CRP.No. 2269 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2023

CORAM:

THE HONOURABLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

Civil Revision Petition No. 2269 of 2020

and

CMP.No. 14204 of 2020

1.Ramasamy
2.Vijayakumar

.. Petitioners

Versus

1.Baskaran @ Kuppusamy
2. Kavitha
3. Paramasivan

..
Respondents

Civil Revision Petition is filed under Article 227 of the Constitution of India, praying to set aside the fair and decretal order dated 27.02.2020 in I.A.No. 03 of 2020 in O.S.No. 109 of 2013 on the file of the Principal District Munsif Court, Tiruchengode.

For Petitioners : Mr. R. Tholgappian

For Respondents : Mr. L. Muthusamy



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ORDER

This Civil Revision Petition has been filed to set aside the fair and decretal order dated 27.02.2020 passed in I.A. No. 03 of 2020 in O.S.No. 109 of 2013 on the file of the Principal District Munsif Court, Tiruchengode.

2. Heard the learned counsel for the revision petitioners and the learned counsel for the respondents and perused materials available on records.

3. The revision petitioners herein are the plaintiffs and the respondents herein are the defendants in the original suit.

4. The revision petitioners have filed the suit in O.S.No.109 of 2013 before the District Munsif Court, Tiruchengode, for declaration, declaring that they are the title holders of the suit property and for a consequential permanent injunction, restraining the defendants from in any manner interfering with the plaintiffs peaceful possession and



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enjoyment of the suit property.

5. The first defendant has contested the suit by way of filing written statement and denying all the averments made in the plaint.

6. The trial in the suit began. After completion of the plaintiffs side evidence, on behalf of the defendants, DW1 was examined. According to the plaintiffs, DW1, Mrs. Mani, Wife of Baskaran, is an independent witness. In other words, DW1 is not arrayed as defendants in the suit and she deposed on behalf of the defendants. It is contended that DW1 specifically deposed that she is deposing on behalf of the defendants 1 to 3. She also deposed that before examination of the defendants 1 to 3 as witnesses, she was examined on behalf of the defendants, however, no permission was obtained from the Court by filing an application under Order 18 Rule 3A of the Code of Civil Procedure. While so, the third defendant sought to examine himself as DW2 after examination of DW1, an independent witnesses. Opposing the same, it was contended on behalf of the plaintiffs that DW2 in his chief examination has attempted to fill up the lacuna in the deposition of DW1, an independent witnesses. Therefore,



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the plaintiffs have filed I.A. No. 3 of 2020 before the Court below under Order 18 Rule 3A of CPC to reject the evidence of DW2/third defendant by way of chief affidavit as DW2 on 19.12.2019.

7. A counter affidavit has been filed on behalf of the defendants stating that DW1 Mrs. Mani is none other than the wife of first defendant Kuppusamy @ Baskaran and it cannot be said that she has no nexus to the suit filed by the plaintiff. It is further stated that before the examination of the first defendant, as DW2, a copy of the proof affidavit was served on the plaintiffs and in their presence, the chief examination of DW2 was recorded. At the time of examination of DW2, the plaintiffs have not raised any objection and therefore, at this stage, the prayer sought for in the application to reject the evidence of DW2 need not be granted. The plaintiffs are only attempting to prevent the first defendant from deposing in this case with respect to specific facts pleaded in the written statement, while so, it cannot be said that the first defendant, as DW2, is attempting to fill up the lacuna in the deposition of DW1.

8. The trial court, after perusing the records, dismissed the said



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application by order dated 27.02.2020. Aggrieved by the said order, the present revision is filed by the petitioner.

9. On a perusal of the impugned order, it reveals that one Tmt.Mani, the wife of the first defendant was examined as DW1. During her cross examination, she has categorically stated that, "பிரதிவாதிகள் 3 பேருக்காகவும் நான் சாட்சியம் அளிக்கிறேன் என்றால் சரிதான். இந்த வழக்கில் ஒன்று முதல் மூன்று பிரதிவாதிகள் சாட்சிகளாக விசாரிப்பதற்கு முன்பாக என்னை சாட்சியாக விசாரிக்க மனு செய்து அனுமதி எதுவும் பெறவில்லை என்று சொன்னால் சரிதான்".

10. After the evidence of the independent witness-DW1, Mr.Paramasivan, the 3rd respondent herein, has filed his proof affidavit for chief examination as DW2. The contention of the revision petitioners is that he has not been examined before the examination of the independent witness-DW1 as per the procedure laid down under Order 18 Rule 3A of CPC. The above said provision is very clear that where the party himself wishes to appear as witness, he "shall" so appear before any



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other witness on his behalf has been examined, unless the Court for the reasons to be recorded, permits him to appear as his own witness at a "later stage".

11. According to the learned counsel for the plaintiffs, after examination of DW1, an independent witnesses, before examining the first defendant as DW2, permission ought to have been obtained from the Court. It is further stated that no such permission has been obtained from the Court and therefore, the chief examination of DW2 recorded by the Court below is liable to be rejected. In support his contention the learned counsel for the petitioners/plaintiffs relied on the decision in the case of **Ravi and another v. Ramar**, reported in **2008 (1) CTC 36 (DB)**, wherein, it has been held in Paragraph Nos. 20, 21 and 22 are extracted hereunder:-

"20. Keeping in view the principle that procedural rules are normally considered as directory unless the consequence of not following the procedure is specifically indicated, it would be appropriate to hold that the Court can give permission to the party to examine himself at a later stage even if no such permission had been sought for at the very threshold. As a matter of fact, save and except in one or two decisions of the Single Judges of the Madras High



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Court, most of the High Courts, including many of the Judges of Madras High Court, have preferred to follow a more liberal path of laying down the proposition that even where such permission has not been sought for at the threshold, such permission can be granted for relevant reasons at a later stage. This is not to suggest that as and when such Petition is filed the Court is bound to grant such permission merely for the asking. Obviously, the Court is required to consider the matter in its proper perspective and is required to find out as to why the party could not examine himself at the beginning and also as to why the Application for seeking such permission was not filed at the threshold. If the Court finds that the party deliberately held himself back with a view to fill-up the lacunae in the evidence at a later stage, obviously such permission is to be refused irrespective of the fact whether permission is sought for at the threshold or at a later stage. If convinced on such aspects, the Court may permit the party to examine himself as a witness at a later stage. What is important is recording of reasons and obviously it means reasons which are germane to the matter, that is to say, relevant for the purpose.

21. It appears that in many cases Petitions are filed after examination of other witnesses stating that the party or even his Advocate was not aware of the legal position and, therefore, the party could not be examined at the beginning. Ordinarily such a plea cannot be countenanced as ignorance of law cannot be considered as an excuse, particularly when a party is represented by an Advocate. Moreover, the opposite party can always be vigilant and raise objection at the time of examination of a non-party witness before the examination of party witness and if such objection is raised, obviously the Court should record such objection.



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22. The amendment was introduced with a view to ensure that the party examining himself as a witness at a later stage should not be permitted to fill-up the lacunae in the evidence adduced from his side. Where the Court comes to a conclusion that the party had deliberately with-held himself to be examined as a witness at a later stage with a view to fill-up the lacunae in the evidence, obviously permission cannot be granted to such a party to examine himself at a later stage. This is a relevant consideration where the Application is filed, seeking permission to examine him at a later stage, either at the threshold of examination of other witnesses or subsequently after examination of all or some of the witnesses. The real test is to find out whether there was a genuine cause for which the party was not examined as a first witness. If for some genuine reasons, which could not be foreseen initially, a party wants to examine himself at a later stage, permission can be granted. Therefore, the overriding consideration is not whether the party makes the Application at the threshold or at the subsequent stage, but whether for a genuine and germane reason the party is required to be examined at a later stage notwithstanding the fact that he was not examined as a witness at the beginning. This seems to be the essence of the different decisions of different High Courts. What would be the relevant facts and circumstances, obviously cannot be laid down in a strait-jacket formula and obviously it is for the Court concerned to deal with the matter in judicious manner. The reference is accordingly answered. The Civil Revisions shall now be placed before the learned Single Judge for disposal, in accordance with law.

(ii) Reliance was also placed in the case of **M. Kumar v. S.**



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Subbiah Kone and another, reported in **2009 (2) LW 398**, it has been held in Paragraph No.17 is extracted hereunder:-

"17. The learned counsel for the respondent would garner support from a decision of Division Bench of this Court reported in 2008 (1) CTC 36, *Ravi and another v. Ramar*, in which the learned Judges have elaborately dealt with the subject in the light of the decisions of this Court and of the Supreme Court and concluded as follows:

“The amendment was introduced with a view to ensure that the party examining himself as a witness at a later stage should not be permitted to full-up the lacunae in the evidence adduced from his side. Where the Court comes to a conclusion that the party had deliberately withheld himself to be examined as a witness at a later stage with a view to fill-up the lacunae in the evidence, obviously permission cannot be granted to such a party to examine himself at a later stage. This is a relevant consideration where the Application is filed, seeking permission to examine him at a later stage, either at the threshold of examination of other witnesses or subsequently after examination of all or some of the witnesses. The real test is to find whether there was a genuine cause for which the party was not examined as a first witness. If for some genuine reasons, which could not be foreseen initially, a party wants to examine himself at a later stage, permission can be granted. Therefore, the overriding consideration is not whether the party makes the Application at the threshold or at the subsequent stage, but whether for a genuine and



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germane reason the party is required to be examined at a later stage notwithstanding the fact that he was not examined as a witness at the beginning.”

(iii) The learned counsel for the revision petitioners also placed reliance on the decision in **S. Ramachandra Reddy and another v. Natarajan and another**, reported in **2010 (6) CTC 716**, wherein it has been held in Paragraph No.5 as under:-

"5. A reading of Order 18, Rule 3-A of C.P.C. would make it clear that where a party wishes to examine any witness before examining himself he has to obtain the permission of the Court. Such permission can be sought for even after examining the witnesses as held by the Division Bench of this Court in the judgment reported in the matter of *Ravi & another v. Ramar*, 2008 (1) LW 1055; and in the judgment reported in the matter of *Chennimala v. Alagulakshmi*, 2008 (4) CTC 490, also the same position has been reiterated. But without filing an Application, it is not open to the party to examine himself after the examination of witnesses. Though in this case no such Application was filed, the Court below dismissed the Application for appointment of Commissioner on the ground that a permission ought to have been obtained before the commencement of the examination of other witnesses on behalf of the party for seeking permission. As stated supra, as per the Division Bench of this Court in the judgment reported in *2008 (1) LW 1055*, this



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Court has held as follows:

“As observed in the various decisions and more particularly in the decisions of the Division Benches of Punjab & Haryana, Jammu & Kashmir, Patna and Orissa High Courts, what is necessary is that before giving such permission, the Court is required to give reasons and obviously the reasons must be relevant. However, to lay down as an inexorable rule that in no case such an Application can be filed after the examination of any other witness may result in injustice.

Therefore, what is necessary is to file an Application for permission and it is not necessary that such Application should be filed before the commencement of examination of the witnesses.”

12. On going through the provisions of Order 18 Rule 3A of the Civil Procedure Code and the above averments of the parties, it is evident that the 1st defendant's wife has been examined as DW1. While so, there cannot be any proof affidavit filed by the third defendant to examine himself as DW2, without obtaining prior permission from the Court below. However, it is stated that such a permission could be availed later from the Court below, which is legally impermissible. When a third party to the suit has been examined even before the examination of any one of the defendants, the third defendant ought to have obtained permission



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from the trial court before examining him as a witness as required under Order 18 Rule 3A of CPC. Even though it is a discretion vested with the trial court to grant such permission or to reject it, the procedure required is that a permission has to be obtained from the trial court before examining the third defendant as DW2, after examination of DW1, an independent witnesses.

13. As per the decision of this Court in the case of **Samidurai and 4 Others v. Kannayal**, dated 11.09.1996, in Paragraph No.11 of the order, it is stated that except the judgment reported in *Ayyasami v. T.S. Palaniswami*, in all other cases, it has been held that it is open to the party to appear at a later point of time as a witness, provided the Court grants permission for the same. It is not necessary that the party should reserve his/her right to appear as a witness at a later point of time by obtaining permission after commencement of the evidence on their side. Even in the case reported in *Ayyasami Goundar v. T.S.Palanisami* it was indicated that the provision under Order 18 Rule 3A CPC., does not in terms indicate the stage at which such an application should be made. But, however, the learned Judge took a different view. Perhaps, it may be that none of the



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judgments referred to above had been brought to the notice of the learned Judge. Therefore, this Court is unable to agree with the principle laid down in the judgment reported in Ayyasami Gounder v. T.S. Palanisami especially when there are number of judgments wherein it has been held that Order 18 Rule 3A is only mandatory and it is open to the party to appear as a witness at a later point of time by obtaining the permission of the Court. Those judgments had in fact referred to the precedents and found support for such view. However, the trial Court held that Order 18 Rule 3A CPC is only directory and it is not necessary for the party to get permission of the Court before the commencement of the proceedings to examine him/her as a witness at a later point of time.

14. In the light of the above, this Court is of the view that the order of the trial Court is contrary to law and improper exercise of jurisdiction vested in it under Order 18 Rule 3A CPC. The trial Court erred in dismissing the petition filed by the plaintiffs under Order 18 Rule 3A read with Section 151 CPC and Section 135 of the Indian Evidence Act. The Lower Court erred in dismissing the petition seeking to reject the evidence of third defendant by way of proof affidavit. The observation



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of the Court below that since no objection was raised at the time of filing proof affidavit of DW2, the petition for rejecting the evidence proof affidavit of DW2 is not maintainable, is erroneous. The Court below has failed to bear in mind the settled principles governing the provision of Order 18 Rule 3A CPC as enunciated in 2008 (1) CTC 36 (DB) and squarely covered by the decision reported in 2009 (2) LW 398. The Court below has failed to appreciate that the defendants failed to file an application at the stage of commencement of evidence and seek permission to examine the party 3rd defendant at a later stage. Having not sought for such permission, the Court below ought not to have allowed the evidence of proof affidavit of DW2 without an application for seeking permission as provided under Order 18 Rule 3A CPC. The Court below has failed to appreciate that merely because no objection was raised at the time of filing proof affidavit, it cannot preclude the petitioners/plaintiffs from seeking for rejecting the same. The Court below has erroneously relied upon the decision referred to in the impugned order without appreciating the later binding Division Bench decision and other decisions of this Court and has failed to exercise jurisdiction to consider the application under Order 18 Rule 3A.



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15. The Court below has failed to see that the examination of party- defendant as DW2, was an attempt to fill up the lacuna in the evidence of DW1 and the Court below, by dismissing the petition, had permitted the respondents/defendants to fill up the lacuna through DW2. The Court below overlooked the statement of DW1 to the effect that she was tendering the oral evidence on behalf of all the defendants. While that being so, it is improper on the part of the Court below to have entertained the proof affidavit of the 3rd defendant to examine him as DW2. On the whole, the order passed by the Court below is absolutely without jurisdiction and legally unsustainable in having not insisted upon the respondents/defendants to seek formal permission to tender evidence upon satisfaction of the Court.

16. Strictly, as per Order 18 Rule 3A CPC, before examination of a witnesses, permission should be obtained from the Court. However, the Court below did not provide any opportunity to the petitioners/plaintiffs as enunciated under Order 18 Rule 3A of CPC. The trial Court, without even considering the same, dismissed the application without providing such



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opportunity. It is not available when the person who is in the box on behalf of the defendants to be cross-examined or the Cross examination is over and the third defendant ought to have sought permission from the Court. If any such application is filed it would have been opposed by the plaintiffs but the defendants have simply filed proof affidavit and thereby depriving the opportunity to the plaintiffs to oppose such examination without obtaining prior permission from the Court. Hence, the findings of the trial Court are liable to be set aside. The trial Court has not recorded any valid reason when the objection was raised and a cryptic order has been passed by the trial Court. The findings of the trial Court are liable to be set aside and the Revision has to be allowed.

17. Accordingly, the Civil Revision Petition is allowed. It is left open to the parties to raise all the points before the Court below at the time of trial in the manner known to law. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No



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Speaking order / Non speaking order
Neutral Citation: Yes/no
MSM

To

1. The Principal District Munsif, Tiruchengode.
2. The Section Officer, V.R.Section,
High Court, Madras.

V.BHAVANI SUBBAROYAN, J.

msm



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