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O.S.A.No.231 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2024

CORAM

**HE HONOURABLE MR.JUSTICE R.MAHADEVAN
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

**O.S.A.No.231 of 2023
and
C.M.P.No.27593 of 2023**

Mathew Samuel

.. Appellant

Vs.

1.Edapadi K.Palanisamy
2.Jibin Pulian Godan
3.Shija Anil
4.Shivani
5.Radha Krishnan
6.Sayan
7.Valayar Manoj

..Respondents

PRAYER: Original Side Appeal filed under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 and 9 of the Original Side Rules, praying to set aside the fair and decretal order passed by the learned Judge in A.No.5731 of 2023 in C.S.No.82 of 2019 dated 07.11.2023.

For Appellant : Mr.N.R.Elango, Senior Counsel

For Respondents : Mr.S.R.Rajagopal, Senior Counsel
Mr.S.R.Raghunathan
for Mr.V.Anil Kumar for R1



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JUDGMENT

(Judgment of the Court was made by R.Mahadevan,J.)

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Heard the learned senior counsel appearing for the appellant as well as the first respondent herein and also perused the materials available on record.

2.The first respondent / plaintiff is the former Chief Minister of the State of Tamil Nadu and presently, the leader of Opposition party. In connection with a defamatory video pertaining to the criminal trespass, murder and robbery that occurred in the Kodanadu Estate belonging to the erstwhile Chief Minister of Tamil Nadu and former leader of the first respondent's political party, late Selvi J.Jayalalithaa in 2017, and the suspicious death of people, particularly, Mr.Kanakaraj, an accused, supposedly involved in the said crime, uploaded in the Youtube and in the social media, he had preferred a suit in O.S. No. 82 of 2019, against the appellant and respondents 2 to 7 herein / defendants 1 to 7 for the following reliefs:

“(i)Directing the defendants jointly and severally to make payment of a sum of Rs.1,10,00,000/- towards damages caused to the plaintiff by uploading of the Video in the YouTube and in the Social Media which is filed as Document Nos.1 to 3 along with plaint;

(ii)Permanent injunction restraining the defendants, their men, agents, servants, person or persons acting through or under them or on their behalf from in any manner whatsoever releasing, circulating, publishing any video clippings or articles and/or give press interviews and/or post any items, messages on social media containing any allegation as found or resembling to the one in the document Nos.1 to 3 filed along with the plaint;



(iii) *Cost of the suit.*”

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3.A perusal of the records would reveal that by order dated 30.03.2021, issues were framed and the suit was directed to be posted before the learned Master for recording evidence. Accordingly, the case was posted before the learned Additional Master -I on 30.04.2021 for recording the evidence of the first respondent herein. But, the first respondent did not appear for recording evidence. After two years, without recording the evidence of the first respondent, the learned Master by order dated 21.07.2023, directed the suit to be posted before the learned Judge.

4.While so, the first respondent has taken out an application in A.No.5731 of 2023 in CS No. 82 of 2019 seeking to appoint an Advocate as Commissioner for recording his evidence. The learned Judge allowed the said application, by order dated 07.11.2023, the relevant passage of which is profitably extracted below:

“6.I have perused the entire materials. Without going into the merits of the case, it is relevant to note that Order XVIII Rule 4 and Order XXVI Rule 4A of Code of Civil Procedure were amended by Act 22 of 2002 and Act 46 of 1999 respectively, w.e.f. 01-07-2002, wherein, the evidence of the witness can be examined by the Commissioner also. The Commissioner also, while recording the evidence, may record such remarks including the demeanour of the witness.

7.Therefore, the apprehension of the learned Senior Counsel for the first respondent that the Commissioner cannot make a remark and note down



the demeanour of the witnesses has no legs to stand. Once, the Commissioner is appointed by the Court to record the evidences, he is entitled to record such remarks as to the demeanour of the witness or the parties during such proceedings.

8.Such view of the matter, the apprehension of the learned Senior Counsel for the first respondent that sensitive questions cannot be asked while examining the parties during the Commission cannot be countenanced.

9.Even during the cross examination, the parties are at liberty to discredit the witness in the manner known to law. Therefore, the apprehension or the contention made by the first respondent/ defendant in this regard also has to be rejected.

10.Considering the fact that the petitioner is a former Chief Minister of the State of Tamil Nadu and presently the leader of opposition party, directing him to appear before the Court, in fact, it may lead to unwarranted crowd in the court premises also. To avoid those things, this Court is of the view that he can be examined through the Advocate Commissioner.

11.Accordingly, this Court appoints, Mr.S.KARTHIKEI BALAN, No.224, KB Law Chambers, 4th Floor, LIC Building, Near Hot Chips Hotel, NSC Bose Road, Parrys Corner, Chennai – 600 001, Mobile No.98945 02341 is appointed as an advocate commissioner for recording evidence of the plaintiff in both chief and cross examination. The remuneration to the Advocate Commissioner is fixed at Rs.50,000/- and the same shall be paid by the plaintiff directly to the Advocate Commissioner. The Advocate Commissioner shall inform the dates of examination to both sides and after getting convenient time from both sides, he shall record and complete the evidence at the plaintiff's official residence namely NB-9, Seveenthi TSKR Road, Chennai – 600 028.

11.Both the chief and cross examination of the witnesses shall be completed before 15.12.2023 and file the evidence of the witnesses along with the Advocate Commissioner's report before this Court, on 15.12.2023.”

Aggrieved by the aforesaid order passed by the learned Judge, the appellant / first defendant has come up with this original side appeal.

5.On 01.12.2023, when the matter was taken up for admission, the learned senior counsel for the appellant submitted that the application seeking appointment of an Advocate Commissioner for recording evidence of the



plaintiff himself, has been filed, after an enormous delay of 2 years, but the same was allowed by the learned Judge, without taking note of such huge delay.

Referring to paragraph 6 of the order impugned herein, the learned senior counsel submitted that the order appointing the Commissioner was passed under Order XXVI Rule 4A of the Civil Procedure Code (in short, “the CPC”), whereas the actual rule under which the Commissioner was appointed, is Order XXVI Rule 1 of the CPC and hence, the Learned Judge erred in mis-appreciation of the correct provision relating to appointment of Commissioner for recording the evidence. The learned senior counsel further submitted that the Commission can be ordered for examination of witness and not for the party himself. In this regard, he relied on the following decisions:

(i)*Zabiya Bibi v. A.Sivaperumal* [1968- 81 -LW 430(Mad)], wherein it was pointed out by this court that there is vital difference between a witness and a party to the suit, and hence, no interference is required in rejecting the application filed seeking examination of party herself on commission.

(ii)*Rajeevi Ammal & Jayaraman v. M.M.Swami Naidu* [1986 -99 -LW -913], in which, this court was of the view that in according the privilege of the plaintiff being examined on commission, there is grave risk of doing injustice to the defendants.



Relying on the decision in *Muhammad Zackria v. Abdul Karim Rowther* [1956

WEB (2) MLJ 371], the learned senior counsel submitted that the demeanor of witness has to be recorded by the Court and not by the Commissioner. However, the learned Judge erred in allowing the application seeking appointment of commissioner to record the evidence of the plaintiff himself.

6.On the other hand, the learned senior counsel appearing for the first respondent submitted that the respondent is a former Chief Minister of the State of Tamil Nadu and if he appears in person, it would cause serious inconvenience, not just to him, but to the public in general. Moreover, there are security issues for him to appear before the court and give evidence. Thus, according to the learned senior counsel, considering the totality of circumstances, the Learned Judge has rightly passed the order impugned herein and the same need not be interfered with by this court.

7.As a riposte, the learned senior counsel for the appellant submitted that the entire High Court premises is guarded by CISF and no untoward incident can possibly happen. The learned senior counsel further submitted that it could be seen from the records that the first respondent has taken more than 21 adjournments to lead evidence. No reason has been adduced by the first respondent for non-appearance in person before the Court. However, without



considering the conduct of the first respondent/plaintiff, the learned Judge erred in allowing his claim. It is also submitted that Order XXVI Rule 4A of the CPC came into effect, in the year 2002, when Video conferencing was not an option of appearance in Courts of law. Hence, the decisions rendered by the courts in relation to this provision, in earlier point of time, would not be directly applicable to the present era. Stating so, the learned senior counsel prayed to allow this appeal by setting aside the order of the learned Judge.

8.This court has considered the submissions made by the learned senior counsel appearing on either side and also perused the materials carefully and meticulously. It is settled law that the power to issue commission for recording the evidence is discretionary. The evidence of witness is normally / usually recorded by examining the person in Court and it is only in exceptional cases, a commission would be appointed for examination. The court is duty bound to exercise its discretionary power more cautiously and sparingly, in a case where the party to the litigation himself/ herself claims to be examined by a commission. The court can adopt a liberal approach in such cases, if both the parties express consent to the appointment of commission. In the present case, the appellant raised serious objections for appointment of Advocate Commissioner for recording the evidence of the plaintiff / first respondent,



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stating *inter alia* that the plaintiff failed to appear before the learned Master for

more than 21 hearings for the past two years and hence, the matter was directed to be posted before the learned Judge, without recording his evidence. The contentions made by the learned senior counsel for the appellant, more particularly, that the demeanor of a party to the litigation would be better appreciated only by the court and not by the Commissioner, finds merit and acceptance by this court. The plaintiff having filed the suit on his own choice, cannot be permitted to give evidence on commission, as he is very much available within the jurisdiction of the court, where the suit is pending. Citing security issues for non-appearance before the learned Master for recording evidence, cannot be countenanced by this court. All are equal before law. Hence, the order passed by the learned Judge allowing the claim of the first respondent / plaintiff to appoint an Advocate Commissioner to record his evidence, cannot be allowed to be sustained.

9. When this court expressed its view as regards the order impugned herein, the learned senior counsel appearing for the first respondent / plaintiff sought a short accommodation for getting instructions from his client as to his appearance before the learned Master for the purpose of giving evidence.

10. Accordingly, today, when the matter was taken up for consideration, the learned Senior Counsel appearing for the first respondent, on instructions,



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submitted that the first respondent is a law abiding citizen and he is ready to appear before the learned Additional Master -I and give evidence. Citing pongal holidays as well as ensuing assembly sessions, the learned Senior counsel prayed this court to fix a date, so as to enable the first respondent to appear and give evidence before the Additional Master -I, for which, the learned senior counsel appearing for the appellant has no serious objection.

11.In view of the above, the order passed by the learned Judge is set aside and the matter is directed to be posted before the learned Additional Master -I. The first respondent / plaintiff is directed to appear before the learned Additional Master -I and give evidence on 30.01.2024 and 31.01.2024. On completion of the same, the matter be posted before the learned Judge for further proceedings.

12.With the aforesaid directions, this appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

[R.M.D.,J] [M.S.Q.,J]
05.01.2024

Speaking (or) Non Speaking Order
Index:Yes/No
Neutral Citation: Yes/No
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AND
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