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C.R.P.(MD)No.2038 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.10.2024

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.R.P.(MD).No.2038 of 2024 and
C.M.P.(MD)No.11603 of 2024

C.Paul Raj

... Petitioner /Petitioner /
Plaintiff

Vs.

C.Thankappan

... Respondent /Respondent/
Defendant

PRAYER : Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order and decree dated 18.06.2024 made in I.A.No.1 of 2023 in O.S.No.77 of 2013 on the file of the Additional District and Sessions Court, Padmanabapuram, Kanyakumari District and allow this civil revision petition.

For Petitioners : Mr.G.Gomathisankar

For Respondent : No appearance.



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ORDER

Heard the learned counsel appearing for the revision petitioner.

2. The revision petitioner is the plaintiff in O.S.No.77 of 2013 on the file of the Additional District and Sessions Court, Padmanabapuram. The petitioner filed I.A.No.1 of 2023 for appointing an Advocate Commissioner for examining him as a witness and for marking the documents submitted by him as exhibits. The Court below vide order dated 18.06.2024 dismissed the IA. Challenging the same, this civil revision petition came to be filed.

3. The case of the revision petitioner is that he has suffered stroke and that he is not in a position to move about freely. He produced medical certificate dated 08.08.2022 in support of his assertion. The court below took the view that the said medical certificate did not reveal the present health status of the petitioner. That was why, the court below dismissed the IA. To meet this reasoning, the revision petitioner has enclosed copy of the certificate dated 14.07.2024 issued by the



neurologist which reads that the petitioner is not in a position to walk on account of the cerebral stroke suffered by him.

4. Order 26 Rule 1 C.P.C reads as follows:-

“Any Court may, in any suit, issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

Provided that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do. Explanation.—The Court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness. ”

It is true that the power to grant a commission is discretionary. The general rule is and this should not be lost sight of or blurred that the evidence of a witness in an action be he or she be a party or not, should be given in public court and tested by cross-examination (vide ***Ramakrishna Kulvant Rai Vs. F.E.Hardcastle and Co.(P).Ltd. (1962 2 MLJ 490)***). In the case of a party who wants to examine himself as a



commission, the court must be chary in issuing a commission. It was however recognised that inability to attend court on grounds of sickness or infirmity would justify the issue of a commission. The court has got a discretion to relax the rule of attendance in court. There can, of-course be no rule of law demarcating the boundaries and the area of the discretion to be exercised in these matters. The court must act judicially having regard to all the circumstances of the case while exercising its discretionary power. In *Lakshman Vs. Ellammel (1978) 2 MLJ 280*, it was held that when a registered medical practitioner opined about the sickness or infirmity of a patient, it may not be proper for the Court to brush aside the opinion and come to its own conclusions in the absence of expert medical professional knowledge. When there is a specific provision to call the medical practitioner and examine him with reference to the medical certificate issue, it will not be fair and proper for the court to take a different opinion than that expressed by the registered medical practitioner through the certificate. Earlier, there was doubt if such a medical certificate can be taken into account and acted upon without examining the doctor who issued the certificate. But on account of the amendment made in the year 1976 and incorporation of Explanation to



Order 26 Rule 1, the court can very well accept the medical certificate without calling the medical practitioner as a witness. These are beneficial and enabling provisions. Unless the court comes to the conclusion that the party does not want to appear in person without justification, such discretionary powers are meant to be appropriately exercised. The two legal maxims ***Discretio est scire per legem quid sit justum*** (*Discretion consists in knowing what is just in law*) and ***Discretio est discernere per legem quid sit justum*** (*Discretion is to discern through law what is just*) are to be borne in mind in such cases.

5. The court below failed to exercise the discretion cast on it. If according to the court below the medical certificate was outdated and not reflective of the current condition, it could have called upon the applicant to produce a certificate of recent vintage. When sickness or infirmity is pleaded, duty is cast on the court to approach the issue with greater sensitivity. In such cases, the endeavor must be to find out if there is truth in the claim. Once the court's conscience is satisfied, the matter no longer remains confined in the realm of discretion; it becomes the duty of the court to exercise the power conferred by the statutory provision in favour of the applicant.



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6. In this case, I am more than satisfied that the petitioner is having physical disability which prevents him from attending the court in person to depose as witness. To cater to such situations, Order 26 Rule 1 had been incorporated in C.P.C. This is a fit case for invoking the power conferred by the said provision. In this view of the matter, the impugned order is set aside. The Civil Revision Petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

18.10.2024

Index : Yes/No

Internet: Yes/No

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To

The Additional District and Sessions Judge,
Padmanabapuram, Kanyakumari District.



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G.R.SWAMINATHAN,J.

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