



WEB COPY



A.No.725 of 2026

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16-06-2026

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THE HON'BLE DR.JUSTICE A.D.MARIA CLETE

A No. 725 of 2026

in

T.O.S. No. 41 of 2013

R.Nithya

No.203, Srvanthi Pride -2, 12th Cross, 2nd Main, J.P.
Nagar, 3rd Phase, Bangalore - 560 078

..Applicant(s)

Vs

R.Priya

Plot No.58, Senthil Andavar Street,
Dhanalakshmi Colony,
Vadapalani, Chennai 600 026.

..Respondent(s)

To permit the 1st Attesting Witness viz Latha Ramesh to be examined
de be nesse on the side of Plaintiff, as PW-1 in the above mentioned T.O.S.

For Applicant(s): Ms.Gayathri for M/s. P.B. Ramanujam

For Respondent(s): Mr.P.Veeraraghavan

ORDER

This Application has been filed by the Applicant / Plaintiff seeking
permission to examine the first attesting witness, viz., Latha Ramesh, *de bene esse*
on the side of the Plaintiff as P.W.1 in the above Testamentary Original Suit.



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2. The learned counsel for the Applicant / Plaintiff would submit that the above suit is one for the grant of Letters of Administration with the Will annexed in respect of the Last Will and Testament of the late N. Lalitha. It is submitted that the evidence of an attesting witness is necessary for proving the Will in accordance with law. It is further submitted that the first attesting witness is not keeping good health and is also suffering from age-related ailments, and that the second attesting witness is presently in Muscat and is not readily available for adducing evidence in the suit. On these grounds, it is prayed that the said witness be permitted to be examined *de bene esse*.

3. The Respondent / Defendant has filed a counter affidavit opposing the Application. In the counter, it is contended that the present age and full postal address of the proposed witness, Latha Ramesh, have not been furnished in the Application. It is further contended that the Applicant / Plaintiff has not obtained leave of this Court under Order XVIII Rule 3A of the Code of Civil Procedure to examine another witness before examining herself. It is also contended that the Applicant / Plaintiff, being the propounder of the Will, has to enter the witness box and cannot avoid examining herself as a witness in the suit. On the above grounds, the Respondent / Defendant seeks dismissal of the Application.

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This court considered the rival submissions and perused the material on

5. At the outset, it is necessary to notice that the provision under which a witness is sought to be examined *de bene esse* (Order XXVI Rule 1&2 of the Original Side Rules), Order XVIII Rule 16 of the Code of Civil Procedure, and Order XVIII Rule 3A of the Code of Civil Procedure operate in three wholly distinct fields, and one has nothing to do with the other. The *de bene esse* provision enables the conditional and anticipatory examination of a witness whose evidence is in danger of being lost, so that such evidence may be preserved and read at the hearing should the witness thereafter become unavailable. Order XVIII Rule 16 empowers the Court, where a witness is about to leave its jurisdiction or where other sufficient cause is shown—that is, upon proof of urgency or emergency—to take the evidence of such witness immediately, at any time after the institution of the suit. Order XVIII Rule 3A, on the other hand, has an altogether different object: it merely regulates the sequence in which a party desiring to testify must examine herself relative to her own witnesses, the purpose being to prevent a party from tailoring her evidence to fill up the lacunae after hearing her own witnesses. The examination of an endangered attesting witness *de bene esse*, or upon

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sufficient cause under Order XXVI, therefore neither attracts nor is controlled by

Rule 3A; the objection founded upon the absence of prior leave under Rule 3A proceeds upon a conflation of three distinct provisions and is misconceived.

6. In the present case, the Applicant has made out sufficient cause and emergency for the immediate examination of the witness: the first attesting witness is aged and is suffering from age-related ailments and ill-health, and the second attesting witness is admittedly in Muscat and not readily available. The evidence of at least one attesting witness being indispensable for proving the Will in terms of Section 68 of the Indian Evidence Act, 1872, and such evidence being in real danger of being lost, this is a fit case for permitting the examination of the witness *de bene esse*.

7. The objection founded upon Order XVIII Rule 3A is, in any event, unsustainable for the further reason that the said provision is only directory and not mandatory. The conflict among the learned single Judges of this Court on the point—between the view that prior permission is mandatory (*Ayyasami Gounder v. T.S. Palanisami Gounder*, AIR 1990 Madras 237; *V. Jayakannan v. V.K. Sampathkumar*,



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1991 (II) MLJ 77) and the view that the rule is merely directory (*Marappa*

Gounder v. Sellappa Gounder, AIR 1985 Madras 183; *A. Karuppuswamy v. Gnana Soundari*, 1986 (II) MLJ 456)—which led to a reference being made by Sathasivam, J. in *S. Srinivasan v. Balambal*, 2000 (1) CTC 646, has since been authoritatively resolved by a Division Bench of this Court in *Ravi and Gurunathapillai v. Ramar* reported in 2008 (1) CTC 36. The Division Bench, after a comprehensive survey of the law, held that Order XVIII Rule 3A is directory in nature; that the Court may grant permission to a party to examine himself at a later stage even where no such permission was sought at the threshold; and that the overriding consideration is not whether the application is made at the threshold or subsequently, but whether, for a genuine and germane reason, the party is required to be examined at a later stage, the only embargo being that permission must be refused where the party has deliberately withheld himself in order to fill up the lacunae in the evidence.

8. Tested on these principles, the Applicant cannot be denied the relief sought. The Applicant is not seeking to examine herself out of turn; she seeks only to preserve, by way of *de bene esse* examination, the endangered evidence of an attesting witness. There is no question of any lacunae being filled, and the



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Applicant, being the propounded, remains free and indeed obliged to enter the witness box and depose at the appropriate stage. The omission to furnish the precise age and address of the proposed witness is not, in the circumstances, fatal, and the same may be supplied; it cannot defeat an otherwise meritorious application.

9. Accordingly, the Applicant / Plaintiff is permitted to examine the first attesting witness, viz., Latha Ramesh, *de bene esse* as P.W.1 in the above suit. It is made clear that the Respondent / Defendant shall be entitled to cross-examine the said witness in accordance with law, and therefore no prejudice would be caused to the Respondent / Defendant. Thus the Application is allowed. No costs.

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Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No

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DR.A.D.MARIA CLETE, J.

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