
(1978) 07 MAD CK 0033
In the Madras High Court

Amnia Bivi represented by power agent' K.M. Raja Mohammad APPELLANT
Vs
Abdul Jabbar RESPONDENT

Date of Decision : 17-07-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 5

Citation : (1979) ILR (Mad) 263 : (1978) 91 LW 629 : (1979) 1 MLJ 21

Hon'ble Judges : S. Nainar Sundaram, J

Bench : Division Bench

Judgement

S. Nainar Sundaram, J.—The plaintiff in O.S. No. 93 of 1974 on the of the Subordinate Judge, Mayuram, is the petitioner in this revision. The respondent herein is the defendant in the said suit. The plaintiff filed I.A. No. 744 of 1976 under Order 26, Rule 5 of the Civil Procedure Code, to appoint a Commissioner for examining one Abdul Wahab or issue a letter of request addressed to the Presiding Officer of the Court within whose jurisdiction the said Abdul Wahab resides requesting him to appoint a Commissioner and to have the said Abdul Wahab examined by such Commissioner and forward the evidence to the lower Court. There were other suits O.S. Nos. 92, 94 and 121 of 1974 on the file of the Sub-Court, Mayuram. In those suits the said Abdul Wahab is a party plaintiff.

2. Applications were also taken out by the plaintiffs in the said suits for the issue of commission to examine the said Abdul Wahab. There is no dispute that the said Abdul Wahab is in Malaysia and difficulties are being experienced with reference to going over to India so as to attend the Court below to give the required evidence. These applications were contested by the defendant in the said suits and the contentions of the defendant have been upheld by the Court below and the said applications have been dismissed. The present revision is filed against the orders of the Court below in I.A. No. 744/of 1976.

3. It is not in dispute that Abdul Wahab is a relevant witness. The necessary averments are found in paragraphs 12 and 14 of the affidavit which run as follows:

As stated above, Abdul Wahab is in Malaysia. After the suits were listed he was intimated of the said fact and he was required to proceed to India and to give evidence in the case. By his letter dated 21st August, 1976, addressed to my lawyer's clerk expressing inability to proceed to India and be present to give evidence on 20th September, 1976 (sic). He has further stated in letter that due to certain difficulties in the matter of arranging for the management of his business in Malaysia he is unable to proceed to India, (sic).

Interrogatories may be submitted by both parties and answers may be elicited from. Wahab by the Commissioner.

He is not only outside the jurisdiction of the Court below but he is at a place not within India, and hence the provisions of Order 26, Rule 5 of the CPC are attracted. It is true that the order, subject-matter of this revision is essentially a discretionary order. But the Court has to exercise its discretion judicially as to granting or not granting a Commission and this Court would be very unwilling to interfere with the exercise of that discretion. If this Court saw that the discretion has been wrongly exercised, if it saw that the case in all its bearings was not laid before the Court below, if it saw that the Court below misapprehended an important part of the case, this Court would interfere. The question is whether the facts of the present case come within the above dictum.

4. Thiru K. Chandra Mouli, learned Counsel for the petitioner, submits that so far as O.S. No. 93 of 1974 is concerned, Abdul Wahab is not a party to the suit and hence the rule with reference to the examination of witnesses on commission alone should have been applied by the Court below and the rule with reference to the examination on commission of a person who is a party to the suit ought not to have been invoked and applied, and in the instant case, the Court below has not kept this in mind and has committed an error with reference to the application of the correct principle with regard to the issue of a commission. Let us see as to whether there is substance in this submission.

5. Certain principles have been laid down by Courts with regard to issue of commission to examine witnesses. There is a difference between a party witnesses and a third party witnesses. Although in the Code of Civil Procedure, there is no distinction drawn as regards this point, between the plaintiff, the defendant or the witness, yet as a rule of prudence this rule has been supplied. Normally a party would not be allowed to be examined on commission. In *A.R. Lakshmanan Chettiar v. Vadivelu Ambalam* (1967) 1 M.L.J. 252 : 80 L.W. 148, Ananthanarayanan, C.J., observed that it would be an unusual privilege to exempt the party from attendance in Court merely because he was living beyond the limits of its jurisdiction and permitting him to be examined on commission.

6. Even as between the parties a vital distinction between the plaintiff and the defendant has to be kept up. When a plaintiff asks for a commission to examine himself, the Court would not normally accede to such a request unless a very strong case is made out. However, the ease would be different where the

application is made by a defendant and especially a defendant, who is normally outside the jurisdiction of the Court. The Court need not view the case of the defendant with the same strictness as the case of the plaintiff.

7. It would be relevant in the context to examine the observation of Jagadisan, J., in *Ramakrishna Kulvant Rai Vs. F.E. Hardcastle and Co. (P.) Ltd. and Others*, which runs as follows:

The witness who is a third party to the action, cannot be compelled to attend Court to give evidence if he is resident at a place beyond 290 miles from the Court house; a party to a suit or proceeding has no such unqualified right. The plaintiff having filed the suit in a forum of his choice or in a forum where the suit had necessarily to be instituted, cannot, except in the circumstances of bodily infirmity or other disabling factors, avoid giving evidence in Court. A defendant, however, is in a slightly better position. If he is a resident in a far-off place quite a long way from the jurisdiction of the Court, he can pray for the issue of a commission to examine him as a witness.... 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 a party or not should be given in public Court and tested by cross-examination. Inability to attend Court on grounds of sickness or infirmity or detriment to the public service, would justify the issue of a commission. The Court has got a discretion to relax the rule of attendance in Court where the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the Court. This discretion may be exercised even if the person happens to be no other than the defendant see *In Re: U.R.M.M.S.S. Subramanian Chettiar and Others*, . There can, of course, be no rule of law demarcating the boundaries and the area of the discretion to be exercised in these matters. What can however be stated is that the Court of Nisi Prius must judicially having regard to all the circumstances of the case, the desirability of the physical presence of the witness in Court to enable it to observe his or her demeanour and the not unusual fact that convenience and economy of expenses for the applicant may involve his opponent in great inconvenience and considerable expenses.

8. In the case of a third party witness, he stands on a different footing; because he is not interested in the subject-matter of litigation and he is a third party to the action. Moreover the very provisions of Order 16, Rule 19, Civil Procedure Code, come to his rescue. As observed by the Supreme Court in *Filmistan Private Ltd., Bombay Vs. Bhagwandas Santprakash and Another*, the fact that the witnesses examined on commission cannot be affectively cross-examined or their examination will entail heavy costs are not sufficient circumstances to interfere with the discretion of the learned trial Judge.

9. I find that the Court below so far as O.S. No 93 of 1974 is concerned has not dealt with the matter separately from the other suits. The Court below observes as follows:

I may say at the outset that having regard to the nature of the suits and the pleas taken by the defendants and in view of the position occupied by the person, Abdul Wahab as he is the plaintiff in three suits is more or less the plaintiff in the other suit, namely, O.S. No. 93 of 1974; he should necessarily be examined in Court and not on commission.

The above observations make it clear that the Court below has entertained a misconception that Abdul Wahab must be equated to a plaintiff in O.S. No. 93 of 1974 when in fact he is not so. If this is so, he being sought to be examined only as a witness different considerations will have to weigh, and in particular with reference to the averments made in the affidavit and he cannot be compelled to attend Court to give evidence in O.S. No. 93 of 1974 : In the said circumstances the equation of the said Abdul Wahab to a party to the suit O.S. No. 93 of 1974, by the Court below and its refusal to issue the commission cannot be upheld on the facts of the case.

10. In this view, I am inclined to interfere in revision and so far as O.S. No. 93 of 1974 is concerned the orders of the Court below are set aside and the application I.A. No. 744 of 1976 will stand allowed and I make it clear that the purport and scope of the commission will be confined to the matters in dispute in O.S. No. 93 of 1974. The Court below is directed to issue a commission or a letter of request as prayed for in accordance and the compliance with the provisions of the Code of Civil Procedure. Thiru Balachandar, learned Counsel for the respondent expresses an anxiety with reference to the heavy costs for conducting the commission enquiry in a far off place. It goes without saying that in case the plaintiff fails in the suit and he is called upon by the Court below to pay the costs of the suit, the costs incurred by the defendant will naturally be borne by the plaintiff.

11. In the result the civil revision petition will stand allowed. No costs.