

(2016) 01 MAD CK 0089

In the Madras High Court

Case No : C.R.P.(PD) No. 2078 of 2013 and M.P. No. 1 of 2013

Athayee and Others

APPELLANT

Vs

A. Ramasamy and Others

RESPONDENT

Date of Decision : 05-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 3-A, Order 8 Rule 1

Citation : (2016) 01 MAD CK 0089

Hon'ble Judges : G. Chockalingam, J.

Bench : Single Bench

Advocate : V.S. Kesavan, for the Appellant; P. Mani, for the Respondent

Final Decision : Allowed

Judgement

G. Chockalingam, J.—1. This Civil Revision Petition is filed against the order dated 28.03.2013 in I.A. No. 206 of 2013 in O.S. No. 198 of 2006 passed by the learned Additional District Munsif, Tiruchengode, in and by which, the application filed by the revision petitioners/plaintiffs under Order 18 Rule 3-A CPC seeking permission to examine the first plaintiff as P.W.3, was dismissed.

2. Learned counsel for the revision petitioners/plaintiffs contended that the suit was filed in 2006 while the first plaintiff was aged about 72 years and now, she is aged about 81 years. He further stated that the first plaintiff is the wife of one Ramasamy. He further submitted that the suit was filed by the first plaintiff, for partition, along with her daughter, the second plaintiff, against her husband's brother's children. He further contended that the defendants 1 and 2 have filed the written statement stating that the first plaintiff is not the wife of the said Ramasamy; the said Ramasamy never married the first plaintiff and the second plaintiff is not the daughter of the said Ramasamy. Learned counsel further submitted that the defendants' grandfather Rangasamy had two sons, namely the defendants' father Athiyappan and the said Ramasamy. He further contended that since the first plaintiff is suffering from Cancer and under medical treatment and also due to her old age, she could not be examined as a witness on the side

of the plaintiff during the earlier occasion and now she has recovered partly from the ailment and ready to depose before the Court. Therefore, learned counsel submitted that considering the age of the first plaintiff, she may be permitted to be examined as one of the witnesses on the side of the plaintiff and he prayed that the Civil Revision Petition may be allowed.

3. Learned counsel for the respondents 1 to 4/defendants 1 to 4 contended that the averments of the revision petitioners/plaintiffs, are not true and the lower Court, after considering the facts and circumstances of the case, rightly dismissed the application and he prayed that the Civil Revision Petition may be dismissed.

4. Heard the learned counsel appearing for the revision petitioners/plaintiffs and the learned counsel appearing for the respondents 1 to 4/D1 to 4 and perused the materials available on record.

5. Admittedly, the suit was filed by the plaintiffs for partition and the defendants denied the marriage of the first plaintiff with the said Ramasamy. Hence, the evidence of the first plaintiff is necessary to prove the factum of her marriage with the said Ramasamy, who is stated to be the father of the second plaintiff. Learned counsel for the revision petitioners/plaintiffs submitted that since the first plaintiff had been suffering from Cancer and under medical treatment because of the said ailment, she could not be examined before the second plaintiff was examined as P.W.1 and one other witness was examined as P.W.2, and the omission to examine the first plaintiff as a witness, is neither wilful nor wanton. In order to prove the factum of marriage, the first plaintiff has to be permitted to be examined as P.W.3. The above said facts are not seriously disputed by the learned counsel for the respondents 1 to 4/D1 to D4.

6. It is worthwhile to quote Order 18 Rule 3-A CPC, which reads as follows:

"Order 18: Hearing of the suit and examination of witnesses:

Rule 3-A: Party to appear before other witnesses: Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded permits him to appear as his own witness at a later stage."

7. In the above context, is useful to refer a Division Bench decision of this Court (Madurai Bench) reported in , 2008 (1) CTC 36 (Ravi v. Kumar), wherein, the Division Bench observed as follows:

"16. It is well settled proposition of law that rules or procedure are handmaids of justice and not its mistress. In R.N. Jadi and Brother v. Subhashchandra, , 2007 (4) CTC 331, the Supreme Court, while dealing with the provisions contained in Order 8, Rule 1, C.P.C., observed:

"9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the

fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unlike compelled by express and specific language of the Statute, the provisions of the C.P.C. or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice

....

11. The processual law so dominates in certain systems as to over power substantive rights and substantial justice, the humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable.... Justice is the goal of jurisprudence processual, as much as substantive. (See *Sushil Kumar Sen v. State of Bihar*, 1975 (1) SCC 774).

14. It is also to be noted that though the power of the Court under the Proviso appended to Rule 1 of Order 8 is circumscribed by the words.... "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The Courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."

....

19. 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.

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 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 it 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.

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."

8. In view of the above said facts and circumstances, considering the age of the first plaintiff and her medical ailment and also following the above said Division

Bench decision, this Court is of the considered view that the Civil Revision Petition has to be allowed on condition of payment of costs to the respondents 1 to 4/D1 to D4 and the first plaintiff has to be permitted to be examined as P.W.3.

9. Accordingly, the impugned order of the trial Court is set aside and the Civil Revision Petition is allowed on condition that the revision petitioners/plaintiffs are directed to pay the costs of Rs. 1,000/- (Rupees one thousand only) to the respondents 1 to 4/D1 to D4, on or before 18.01.2016, failing which, the Civil Revision Petition shall stand dismissed automatically without further reference to the Court. Since the suit is of the year 2006, considering the long pendency of the suit, the trial Court is directed to dispose of the suit within a period of three months from 18.01.2016. The Miscellaneous Petition is closed.