

(1994) 03 MAD CK 0026
In the Madras High Court

Kaliaperumal Naidu

APPELLANT

Vs

Kuppuswami Naidu and Others

RESPONDENT

Date of Decision : 24-03-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17, 151

Citation : (1994) 1 LW 475 : (1994) 2 MLJ 147

Hon'ble Judges : Thangamani, J

Bench : Division Bench

Judgement

Thangamani, J.—The revision petitioner herein is the first defendant in O.S. No. 717 of 1986 in the Court of District Munsif at Thirukoilur.

Present respondents 1 to 3 filed the suit for declaration and injunction in respect of suit lands on the allegation that the properties originally

belonged to their father Pakkirisamy Naidu. Pakkirisamy Naidu died on 17.7.1984. His wife had pre-deceased him. First plaintiff and first

defendant who are his sons and plaintiffs 2 and 3 who are the daughters are his only heirs. Even during the life time of their father they have divided

their properties under two deeds dated 4.4.1959 and 1.12.1982. The suit lands and some other items were admitted to be mentioned in these two

partition deeds. Plaintiffs and the first defendant alone are in enjoyment of these properties after the death of their other. At the instance of the first

defendant, defendants 2 to 6 are trying to disturb the possession of the plaintiffs. The first defendant resisted the suit pleading that he was not

aware of the partition deed dated 1.12.1982, and it would not bind him. The suit items belonged to the joint family of Pakkirisamy Naidu and his

sons. This defendant has been impleaded in order to harass him. We find from the disposition of first plaintiff as P.W. 1, that when he was in the

witness box on 10.3.1993, the first defendant did not choose to cross-examine him. The cross-examination of the second defendant alone finds a place therein. However, on 18.3.1993 the first defendant has come forward with I.A. No. 853 of 1993. u/s 151, C.P.C. seeking permission to recall P.W. 1 and cross-examine him. In the affidavit in support of the application he states that P.W. 1 has given false evidence against the first defendant when he was cross-examined by defendants 2 to 6. So, he has to recall P.W. 1 and cross-examine him on that aspect. This was resisted by the fourth respondent claiming that it is only an attempt to fill up the lacuna in evidence. The first defendant who is the brother of the plaintiffs has submitted to decree. Only in order to help his brother he has come forward with this application. And in any event the application to recall should have been filed under Order 18, Rule 17, C.P.C. and not u/s 151, C.P.C. The court below holding that the application should have been filed under Order 18, Rule 17, C.P.C. and not u/s 151, C.P.C. and that the first defendant had not chosen to cross-examine P.W. 1, in any manner and so he has no right to recall him for cross-examination, rejected the application. And this civil revision petition by the first defendant is directed against the said order.

2. It is a well-settled legal proposition that quoting wrong provision of law in the application cannot be a bar by itself in granting the remedy. In

Alamelu v. Rama Iyer AIR 1922 Mad. 446, a Division Bench of this Court has held that the fact that the petition in a case is headed as u/s 151

does not debar the Court from proceeding with it under any other provision, which it may find actually applicable. In (Polavarapu) Ankayya Vs.

(Gaddamanugu) Subhadrayya and Others, , this Court has pointed out that courts should not consider an application only with reference to the

section under which it is purported to be filed. If courts have got inherent power to entertain an application and grant the relief prayed for therein,

the circumstance that a wrong section is quoted should not be taken as such into account when the high court is asked to exercise its power of

revision in such matters. Evidently the view of the court below is erroneous and the failure to file the application under Order 18, Rule 17, C.P.C.

cannot stand in the way of recalling P.W. 1 for cross-examination, if it is in the interest of justice.

3. Learned Counsel for the respondents submitted that the trial court has rejected the application to recall P.W. 1 also for the reason that the first defendant had not chosen to cross-examine him initially. But it is necessary to bear in mind that as per the contention of the revision petitioner because certain questions concerning the first defendant were asked in the cross-examination of P.W. 1 by defendants 2 to 6 he was constrained to recall P.W. 1. So, the reason given by learned District Munsif to refuse permission cannot stand. Besides, Order 18, Rule 17, C.P.C. enables the court at any stage of a suit to recall any witness who has been examined and put such questions to him as it thinks fit. Under this provision it is court which can suo motu or at the instance of party recall witness and put questions to him. In *Sultan Saleh Bin Omer v. Vijayachand Sirjmal* AIR 1966 A.P. 296 : (1966) 1 An.W.R. 58, it was contended that the order of the court below reopening the suit and giving an opportunity to the plaintiff to cross-examine D.W. 1 and lead rebuttal evidence is an erraneous and illegal exercise of jurisdiction, and that the circumstances of the case also did not warrant it. It was further contended that in view of Order 18, Rule 17, C.P.C. Section 151, C.P.C. could not be invoked. A single Judge of Andhra Pradesh High Court repelled this argument and held that a close reading of Order 18, Rule 17, C.P.C. makes it obvious that the right under that Rule to put questions at any stage of a suit, or recall any witness for that purpose, is given to the court. The court can put questions to the witness re-called, and to cross-examination is ordinarily allowed upon the answers to the questions put by the Judge without leave. The right to set under this Rule is not restricted to the court on its own notion, but may be exercised at the instance of a party. It cannot, therefore, he said that an opportunity to a party to recall any witness for the purpose of examining, cross-examining or re-examining is governed by Order 18, Rule 17, C.P.C. He therefore, held that if circumstances warrant an opportunity to a party to recall a witness for examining, cross examining or re-examining can be granted by a Court in the exercise of its inherent jurisdiction u/s 151, C.P.C. So, there could be no doubt that in the interest of justice the first defendant has to be given an opportunity to recall P.W. 1 and cross-examine him u/s 151, C.P.C.

4. In the result, the civil revision petition is allowed and the order of the court below in I.A. No. 853 of 1993 is set aside and the petition to recall

P.W. 1 is permitted. Parties to bear their respective costs throughout.