

## Balaselvi Vs Adhimoolam Rep. by Power agent Mrs. Dhanavalli

**Court:** Madras High Court

**Date of Decision:** March 1, 2013

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 26 Rule 9, Order 3 Rule 1, Order 3 Rule 2, Order 9 Rule 12

**Citation:** (2013) 2 LW 510 : (2013) 3 MLJ 604

**Hon'ble Judges:** M. Venugopal, J

**Bench:** Single Bench

**Advocate:** A.L. Ganthimathi, for the Appellant; S. Arun for Mr. R. Thirumoorthy, for the Respondent

**Final Decision:** Dismissed

### Judgement

@JUDGMENTTAG-ORDER

M. Venugopal, J.

The Revision Petitioner/Respondent/Plaintiff has preferred the instant Civil Revision Petition as against the order dated 05.01.2011 in I.A. No. 96 of 2010 in O.S. No. 152 of 2006 passed by the Learned 1st Additional District Munsif, Vridhachalam. The Learned

1st Additional District Munsif, Vridhachalam, while passing the impugned order in I.A. No. 96 of 2010 in O.S. No. 152 of 2006 on 05.01.2011,

on the file of the Trial Court has in crystal clear terms observed that

in the above suit, plaintiff side evidence was completed (sic) and the 1st Defendant was examined as DW1 and partly cross-examined by

Respondent/Plaintiff side and the case was adjourned to further cross-examination of DW1. Due to non appearance of 1st Defendant, his evidence

was closed and subsequently, Defendant's side evidence is also closed. Any how considering the above facts of the petitioner this Court is of the

opinion that there will be no prejudice to Respondent allowing this application. Admittedly, this application is filed at the time when the suit is

posted for trial, this Court is of the considered view that the suit involves the property rights of the parties and filed for the relief of declaration and

permanent injunction while has to be decided on (sic) merits. This Court is of opinion that a few opportunity has to be given to both parties in

proving their case....

and allowed the application without costs.

2. According to the Learned Counsel appearing for the Revision Petitioner/Plaintiff, the Trial Court should have seen that Dhanavalli, being the

Power Agent of the Respondent/First Defendant cannot, without bona fide, file an application under Order III Rule 2 of the CPC.

3. The main plank of attack projected by the Learned Counsel appearing for the Revision Petitioner/Plaintiff is that the Respondent/First Defendant

was already examined as DW1 and also cross-examined in part and only at that point of time, I.A. No. 96 of 2010 has been projected on the side

of the Respondent/First Defendant, which, ought not to have been allowed by the Trial Court in the interest of justice.

4. The Learned Counsel appearing for the Revision Petitioner/Plaintiff urges before this Court that the Trial Court has not assigned reasons for

allowing the I.A. No. 96 of 2010 in O.S. No. 152 of 2006, which is mandatorily required as per O. III R. 2 CPC.

5. Lastly, the Learned Counsel appearing for the Revision Petitioner/Plaintiff contends that the Respondent/First Defendant alone can depose the

fact having the personal knowledge of the suit facts and in law, the Power Agent cannot depose on behalf of the Principal and that too, when DW1

(First Defendant) has been particularly cross-examined and he is very much in the Witness Box.

6. Per contra, Mr. Arun, Learned Counsel appearing for the Respondent/First Defendant submits that the Trial Court has assigned proper reasons

for allowing the I.A. No. 96 of 2010 in O.S. No. 152 of 2006 filed by the Respondent/First Defendant and further the Trial Court, in order to

provide few opportunities to the Respondent/First Defendant, has allowed the application in question. Furthermore, the case of the

Respondent/First Defendant is that he is bed-ridden and at times, his memory is slipping and, therefore, the Respondent/First Defendant has

thought it fit to appoint his daughter-in-law Dhanavalli as his Power Agent as per Document dated 16.02.2010.

7. It is to be pointed out that "a General Power of Attorney Holder" can appear as a witness, only in his personal capacity. But he cannot appear

as a witness on behalf of the Plaintiff in the capacity of Plaintiff as per the decision in S. Padmavathamma Vs. S. Sudha Rani and Others,

8. Also from Or. 3 R. 1 of CPC and Or. 9 R. 12 of CPC, it is clear that in appropriate cases, a Civil Court may direct a party to the suit either

Plaintiff or Defendant to appear in person as per decision in Jagraj Singh Vs. Birpal Kaur,

9. As a matter of fact, an objection of the validity of Power of Attorney must be taken at the early stage before the trial Court, in the considered

opinion of this Court.

10. The word "acts" in R. 2 of Or. 3 of CPC does not include the act of General Power of Attorney to appear as a witness on behalf of his party

as per the decision in 2005 AIHC 280 (DB) (Kerala).

11. It is to be noted that a Power of Attorney is to be strictly construed as giving such authority as it expressly or by implication, enables a person

to do specified acts. Ordinarily, a Court of Law cannot decline to recognise an implied authority that every agent has to do whatever that is

necessary or incidental to the effective/efficacious execution of the express authority conferred on him by the said Power of Attorney. When a

power-of-attorney holder enters into the witness box, he/she can only depose in regard to the documents and such evidence can be relied upon.

12. It is to be borne in mind that the Power Agent cannot depose relating to some factual aspect of the matter touching upon the controversies in

issue which are within a special knowledge or within the purview or domain of the Principal. Now in the present case, DW1 has already been

examined in chief (by means of filing of proof affidavit) and also he has been cross-examined in part. A power-of-attorney holder can only depose

in regard to his/her personal knowledge and he cannot depose on behalf of the Respondent/First Defendant at the stage of DW1 being particularly

cross-examined. The reason for permitting the power-of-attorney holder to adduce evidence must be spelt out in the order passed by the trial

Court in allowing the Interlocutory Application filed on behalf of a party under O. III R. 2 CPC. In the present case, when DW1 is in the stage of

cross-examination and also that he has been examined in cross in part, at that point of time only, I.A. 96 of 2010 in O.S. No. 152 of 2006 has

been filed before the Trial Court stating that the Respondent/First Defendant is bed-ridden and sometimes, during the last one week, his memory is

slipping and under these circumstances, she is appointed as his agent as per Special Power of Attorney dated 16.02.2010. At this stage, this Court

pertinently points out that the trial Court while allowing IA. 96 of 2010 in O.S. No. 152 of 2006, has not passed any orders eschewing the

evidence already tendered by DW1/First Defendant in his chief-examination and also in his cross-examination in part. Without eschewing the

evidence of DW1/First Defendant already examined before the trial Court in part and when the DW1/First Defendant has been examined in part in

cross-examination, the trial Court has committed an error in allowing the I.A. 96 of 2010 in O.S. No. 152 of 2006 filed by the Respondent/First

Defendant on its file under O. III R. 2 CPC.

13. It cannot be lost sight of that when the Respondent/First Defendant is said to be bed-ridden and for the last one week when his memory is

slipping many times, going by the averments made by him in the petition in I.A. 96 of 2010 in O.S. No. 152 of 2006, nothing prevented the

Respondent/First Defendant to file necessary Interlocutory Application praying for appointment of an Advocate Commissioner as per O. 26 R. 9

CPC or under any other provision under CPC and to seek appropriate remedy in the manner known to law and in accordance with law.

However, in the instant case, the Respondent/First Defendant has not chosen to file an application praying for appointment of Advocate

Commissioner for the purpose of recording his evidence at his residence or otherwise. Viewed in that perspective, this Court holds that the order

of the Trial Court in I.A. 96 of 2010 in O.S. No. 152 of 2006 dated 05.01.2011 filed on behalf of the Respondent/First Defendant is liable to be

set aside and accordingly, set aside in the interest of justice. Consequently, the Civil Revision Petition succeeds.

In the result, the Civil Revision Petition is allowed leaving the parties to bear their own costs. Resultantly, the order dated 05.01.2011 passed by

the 1st Additional District Munsif, Vridhachalam, in I.A. 96 of 2010 in O.S. No. 152 of 2006 is hereby set aside for the reasons assigned in this

Revision. The Trial Court is directed to take up the I.A. 96 of 2010 in O.S. No. 152 of 2006 on its file, afresh and to pass a reasoned and

speaking order by mentioning the outline of process of reasoning in conformity with the well established principles of law and also after adhering to

necessary ingredients of O. III R. 2 CPC relating to recognised agents and pleaders in the manner known to law and in accordance with law.

Consequently, connected Miscellaneous Petition is closed.