
(2007) 04 MAD CK 0098

Madras High Court

Case No: CRP (PD) No. 1087 of 2006 and M.P. No. 1 of 2006

Bansilal and Co.

APPELLANT

Vs

Singamesetty
Ateendrooloo Chetty's
Charities

RESPONDENT

Date of Decision: April 18, 2007

Acts Referred:

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

Citation: (2007) 04 MAD CK 0098

Hon'ble Judges: S. Ashok Kumar, J

Bench: Single Bench

Advocate: V.V. Giridhar, for the Appellant; A. Venkatesan, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Ashok Kumar, J.

The revision petitioner/defendant has come forward with this revision as against the order of rejection by the trial court to examine himself as D.W.2 and to mark certain documents.

2. The brief facts of the case are as follows:

(a) The suit property belongs to the plaintiff, respondent herein. The suit property which was a land was leased out to the petitioner firm in the year 1977 and the petitioner had put up construction in the said premises. The respondent/plaintiff filed the suit for recovery of possession from the petitioner/defendant. The petitioner/defendant filed written statement as well as made counter claim for the relief of mandatory direction to the plaintiff to execute a lease deed in respect of the suit premises for a period of 20 years.

(b) The plaintiff was examined and his evidence was closed. The suit was posted for the evidence of the petitioner/defendant. In the initial stage, the partner of the defendant firm was not doing well and the firm had authorised a third party, who is none other than the brother of the partners of the firm to give evidence on their behalf. He was examined as D.W.1 in chief and also cross examined by the plaintiff side. The suit was posted for further evidence of the defendant. At that time, the partner of the defendant's firm filed the I.A., under Order XVIII Rule 3A CPC seeking leave of the court to examine him as D.W.2 for further examination and for marking certain documents. The plaintiff resisted the said application and after enquiry, the trial court dismissed the application, holding that there is no need for examining the partner of the firm and directed the defendant to file an application to recall DW.1 for marking the said documents. Hence this revision.

3. Learned Counsel for the revision petitioner contended that Order XVIII Rule 3A is not mandatory in nature and it is directory in nature and if sufficient ground is made out, the party may secure such permission as has been held in the decision reported in AIR 2000 Bom 384, AIR 1978 Oris 228, [Kwality Restaurant, Amritsar Vs. Satinder Khanna](#), and [Swami Hari Harananda Giri Vs. Yogoda Satsangha Society of India and Others](#), . Placing reliance upon the above decisions, the learned Counsel submitted that in the present case, since the defendant fell ill he could not attend the trial, they authorised D.W.1, their brother to give evidence and now one of them (partner of the firm who fell ill) has become all right and now he wants to give evidence and to mark certain documents in support of their case. Therefore, the trial court ought to have permitted him to give evidence and the rejection of the application on the ground that the petitioners' intention in filing the application is only to fill up the lacuna in the evidence of D.W.1 is not correct.

4. The relevant provision of Order 18, Rule 3A reads as follows:

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 reason is to be recorded, permits him to appear as his own witness at a later stage.

5. A plain reading of Order 18, rule 3A CPC shows that the party who wishes to appear as a witness, can depose before any other witness on his behalf has been examined. However, if the plaintiff wants to appear and depose at a later stage, after examination of his witnesses, he must obtain permission from the court concerned. If the court is satisfied, after recording the reasons, it can permit the plaintiff to appear as his own witness at a later stage. This provision has been interpreted by various decisions of this Court. Some of the learned Judges have taken a view that it is a mandatory one and without prior permission, the plaintiff cannot appear as a witness at a later stage. However, in some of the decisions, the Hon"ble Judges of this Court have taken a view that it is only a directory and if petition is filed at the time of his evidence showing sufficient cause, the court can condone the said act and permit him to appear as a witness at a later stage. Such a benevolent view has been taken in the decisions of this Court reported in [G.K. Rao Vs. A. Henry](#), . The above decisions would also make it clear

that there is no stipulation of time as to when the permission has to be sought for. If a party wants to appear as a witness, he should do so prior to the examination of any witness on his behalf. Otherwise, if he wants to appear at a later point of time if the court permits, he can do so.

6. In [Marappa Gounder and Others Vs. Sellappa Gounder and Others](#), Sathiadev, J., has held that if a party to the suit desires to be examined later on, he should seek prior permission before other witnesses were examined. Whenever permission is sought for, according to him, it is obligatory on the part of the court to record reasons, by passing a written order, either granting or refusing it. The learned Judge has expressed that if permission is sought in the initial stage before any witness is examined, then reasons to be given should relate to the justifiability on the part of the party to first examine himself. Before granting permission, it should hear the objections, if any, of the other side, and then alone permit any witness of the party to be examined. The learned Judge has also observed that in such of those cases wherein without prior permission witnesses of the party had been examined, and later on the party wishes to appear as a witnesses, the court is duty bound to find out, whether on the party being examined at that stage, it would result in filling up any blank or any lacunae left out in the evidence already given, and whether he avoided the witness box with ulterior motives and whether he has place in such a situation or circumstances which had disabled him from being examined earlier etc., It is further observed that if compelling strong circumstances which are relevant and germane had existed permission to a party to a proceeding to examine himself after his witnesses had been examined, ought to be granted.

7. Considering the present case in the background of the above case laws, it is clear that the trial court has failed to examine whether the revision petitioner was placed in such a situation or circumstances which had disabled him from being examined earlier, though no prior permission was obtained. It is the case of the petitioner that he was unwell during the material point of time. Further, as a partner of the firm, the revision petitioner has got every right to examine himself as a witness in support of his case. Therefore, it cannot be said that the petitioner's intention is only to fill up the lacuna left out in the evidence already given by D.W.1. It should also be borne in mind that in the present case that no prejudice would be caused to the plaintiff/respondent as the petitioner is one of the partner of the petitioner-firm and not a stranger to the suit proceedings. Further the evidence on the side of the petitioner/defendant was not closed and the suit was posted for further evidence on the part of the petitioner/defendant and therefore no ill motive can be attributed to the revision petitioner in filing this petition under Order 18, Rule 3A CPC. Therefore, in the facts and circumstances of the case, the trial should have allowed the application filed by the revision petitioner.

8. In the circumstances, I am of the view that the trial court has erred in exercising the jurisdiction vested in it in the proper perspective and had misdirected itself in dismissing the application. In the result, the CRP is allowed, setting aside the order made in I.A. No. 9593 of 2006 in O.S. No. 7028 of 1998 by the learned II Assistant City Civil Court,

Chennai. Consequently, connected CMP is closed. No costs.