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**(2014) 11 MAD CK 0486**

**Madras High Court**

**Case No:** C.R.P (NPD) No. 3196 of 2009 and M.P. No. 1 of 2009

B.T. Nagarajan

APPELLANT

Vs

Maranaicker

RESPONDENT

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**Date of Decision:** Nov. 6, 2014

**Hon'ble Judges:** R. Karuppiyah, J

**Bench:** Single Bench

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### **Judgement**

@JUDGMENTTAG-ORDER

R. Karuppiyah, J.

1. The revision petitioner, who is the plaintiff in the original suit in O.S.No. 229 of 2003 filed this revision petition against the order passed in I.A.No. 67 of 2009 in O.S.No. 229 of 2003 on the file of I Additional Subordinate Court, Gobichettipalayam.
2. For the sake of convenience, the plaintiff in the original suit / petitioner in I.A.No. 67 of 2009 referred as revision petitioner and the defendants in the original suit / respondents in I.A.No. 67 of 2009 are referred as respondent hereafter.
3. On perusal of records and from both side submissions it is revealed that the revision petitioner filed a suit in O.S.No. 229 of 2003 for specific performance of a contract. On the side of the respondents filed written statement and the trial was commenced. On the side of the revision petitioner / plaintiff examined two witnesses as PW1 and PW2 and on the side of the respondents examined two witnesses as DW1 and DW2.
4. In the above said circumstances, on the side of the revision petitioner filed an application in I.A.No. 67 of 2009 in which he prayed for to delete Exs.B1 to B5 marked through DW2. In the affidavit in support of the above said application, it is stated as the proof affidavit of DW2 has not been furnished to the revision petitioner or his counsel and further, the respondents herein have not filed any application to condone the delay to receive the above said documents, but, the trial court has

marked the above said documents as Exs.B1 to B5 and therefore, prayed for to remove the above said documents from the evidence and also reject the above said documents.

5. On the side of the respondents filed detailed counter, in which, it is stated that before filing the proof affidavit of DW2, copy of the proof affidavit along with details of documents furnished to the revision petitioner's counsel and obtained endorsement and then filed the above said affidavit before the trial court. At the time of Chief examination of DW2, the revision petitioner or his counsel are not present and failed to peruse the above said documents and therefore, it is only negligent on the part of the revision petitioner. It is also averred in the counter that the respondents taken summons to DW2 through Court to produce the above said documents and given evidence since the above said witness is not a party in the suit. As per the Court summons, the above said witness produced the documents and filed proof affidavit before trial Court for evidence. Hence, question of filing an application to condone the delay will not arise. Further, the trial Judge had realised the mistake in marking the above said documents as Exs.B1 to B5 instead of Exs.X1 to X5 and the trial court has corrected the above said mistake and marked the documents as Exs.X1 to X5 and therefore, no merits in the above said application and prayed for to dismiss the application.

6. On hearing both side submissions and on perusal of the record, the trial court has dismissed the above said application and the relevant portion of the order passed by the trial court is extracted hereunder:

""4. Orders pronounced D.W.2 was examined on the side of the defendants. The person who was examined as D.W.2 is not one of the defendant but a relative of the defendant as independent witness. The documents produced by him was from his custody and power and not from the custody of any of the defendant. Therefore, an application to condone the delay in receiving document does not arise in his case. The documents which were sought to be marked was mentioned in the proof affidavit itself. However the documents while marked as exhibits ought to have been marked as X1 to X5 but it was mistakenly marked as B1 to B5. Thus the error is to be rectified and ordered to be corrected. Therefore, the non filing of an application to condone the delay will in no way effect the marking of exhibits in evidence. Thus there are no merits in the petition and the same is hereby dismissed.""

7. Aggrieved over the above said dismissal order passed by the trial court, the revision petitioner preferred this revision petition.

8. Heard Mr. B. Kumarasamy, learned counsel appearing for the revision petitioner and Mr. P. Raja, learned counsel appearing for the 1st respondent.

9. The learned counsel appearing for the revision petitioner would submit that the trial court has not considered the fact that unless furnishing the documents either to the revision petitioner or his counsel and without filed any application to condone

the delay, the respondents are not entitled to mark the above said documents. Further, the learned counsel pointed out that the trial court erred in converting the above said documents Exs.B1 to B5 as Exs.X1 to X5 is against law, arbitrary and illegal.

10. Per contra, the learned counsel appearing for the 1st respondent would submit that after examining DW1, necessary steps have been taken to summon the witness DW2, who is not a party in the suit to give evidence and also produced documents. Accordingly, DW2 has filed a proof affidavit for chief examination with details of documents and further, the above said copy of affidavit with details already furnished to the revision petitioner's counsel and obtained endorsement and then produced before the trial court at the time of evidence. The learned counsel further pointed out that the trial court has wrongly marked the above said document as Exs.B1 to B5 but later realised the mistake and marked the documents as Exs.X1 to X5 and therefore, no illegality in the above said order passed by the trial court.

11. Point for consideration in this revision petition is that whether the order passed by the trial court is illegal as contended by the learned counsel appearing for the revision petitioner. It is not in dispute that the person who is examined as DW2 is not a party to the original suit. It is also revealed that only on summons, the above said witness was present and produced the proof affidavit along with documents after giving the above said copy of proof affidavit with details of documents to the revision petitioner's counsel. It is also not in dispute that at the time of examining the witness (i.e.) DW2, the revision petitioner or his counsel not appeared. The revision petitioner has not at all stated any reasons in the affidavit why the revision petitioner or his counsel not appeared before the trial court so as to object to mark the above said documents. The learned counsel appearing for the revision petitioner has also not pointed out any reason for his absence or the absence of the revision petitioner, at the time of examination of witness and at the time of marking the documents. The revision petitioner has also not stated in the affidavit or before the trial court or before this Court how the above said marking of documents is prejudice to the revision petitioner.

12. The learned counsel appearing for the revision petitioner also contended that as per Order XVIII Rule 3A, without obtaining permission of the trial court by filing an application, the examination of DW2 and marking of documents are illegal. Per contra, the learned counsel appearing for the respondents would submit that Order XVIII Rule 3A is not at all applicable to the facts of the present case since in the instant case, the defendant in the suit (i.e.) DW1 was already examined and DW2, who is third party to the proceedings was summoned to give evidence and for production of documents and therefore, the contentions of the revision petitioner cannot be accepted. It is relevant to extract the above said provision Order XVIII Rule 3A hereunder:-

"" 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.'"

13. On perusal of the above said provision of law and the facts of the present case, it is clear that the above said provision is not applicable to the facts of the present case as rightly pointed out by the learned counsel appearing for the respondents. In the instant case, only after examination of DW1, on Court summon"s DW2 was examined and marked the documents and therefore, the above said provisions not applicable to the present case. From the above said discussion, it is clear that the findings of the trial court is not perverse or illegal as contended by the learned counsel appearing for the respondents and therefore, no merits in the revision petition.

14. In the result, this Civil Revision Petition is dismissed. No order as to costs. Consequently, connected miscellaneous petition is closed.