

The Executive Officer. Vs. Prabhakaran

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Court : Chennai

Decided On : Jul-10-2012

Judge : V.Dhanapalan, J.

Acts : [Code of Civil Procedure,\(CPC\) 1908](#) - Section 151, Order 18 Rule 3A;
[Constitution of India](#) - Articles 227

Appeal No. : C.R.P.(PD) No.361 of 2012

Appellant : The Executive Officer

Respondent : Prabhakaran

Advocate for Def. : Mr.A.K.Kumaraswamy, Adv.

Advocate for Pet/Ap. : Mr.D.Ashok Kumar, Adv.

Judgement :

Civil Revision Petition filed under Article 227 of the [Constitution of India](#) against the decretal and fair order made in I.A.No.1042 of 2011 in O.S. No.138 of 2008 duly passed by the District Munsif, Palladam dated 21.09.2011 in dismissing the application duly taken out under Order 18 Rule 3A and Section 151 CPC to condone the delay in examination of the petitioner and for recording of evidence.

ORDER

1. This Civil Revision Petition is filed against the decretal and fair order dated 21.09.2011 made in I.A.No.1042 of 2011 in O.S. No.138 of 2008 passed by the District Munsif, Palladam in dismissing the application duly taken out under Order XVIII Rule 3A and Section 151 CPC to condone the delay in examination of the petitioner and for recording of evidence.

2. The petitioner is the 3rd defendant and respondents 1 and 2 are defendants 1 and 2 before the Trial Court. The 3rd respondent herein is the plaintiff. He filed a suit in O.S.No.138 of 2008 for permanent injunction. During the course of proceedings, the petitioner herein, who is the 3rd defendant in the suit filed an application in I.A.No.1042 of 2011 under Order XVIII Rule 3A and Section 151 of C.P.C. to condone the delay in examination of the petitioner/3rd defendant and record his evidence. The said Application was resisted by the 3rd respondent/plaintiff by filing a counter.

3. Upon perusal of documents and hearing the arguments of the learned counsel on either side, the Trial Court observed that the petitioner/3rd defendant wishes to examine himself after examining a witness on his side and that the respondents resisted it on the ground that the petitioner ought to have obtained permission from the Trial Court already. It has further observed that the petitioner ought to have obtained permission even before he had examined a third party witness and without getting permission from the Court already, he had examined a third party witness and thereby the petitioner has automatically closed the chance of examining himself as a witness. Taking note of the said observations and in view of the relevant provisions, the Trial Court dismissed the said Application.

4. Mr.D.Ashok Kumar, learned counsel for the petitioner would contend that the Court below failed to see that the application had been taken by the petitioner in his capacity as a 3rd defendant and as the trial had not been concluded, there is no impediment whatsoever in allowing the application and extending an opportunity of hearing to the petitioner to substantiate his case. It is his further contention that it is always open to a litigant either as a plaintiff or as a defendant to file any number of recall petitions and reopen petitions for the purpose of his examination and in such circumstances, the dismissal of the application is

erroneous.

5. In support of his case, learned counsel for the petitioner has relied on the following decisions :

(i)a decision of this Court reported in (2009) 4 MLJ 622 in the case of Nathu Banu Asha vs. The Lakshmi Vilas Bank Ltd., Namakkal District

"8.... The gist and kernel of the aforesaid maxims as well as the Bonapartem concept, would exemplify and display that when law prohibits or mandates a particular course, it should be followed in stricto sensu and a party cannot be allowed to circumvent the same in any manner. Here the *raison d'être* dearth of Order 18 Rule 3(a) C.P.C. is that a party should not examine oneself at a later stage, so as to fill up the lacuna in the evidence of his own witnesses. Here the power of attorney as correctly put forth by the learned counsel for the revision petitioner is the person actually representing the Bank having corporate personality. In such a case, when a person is interested in seeing that he succeeds in the litigation, then such a person should be taken as equal to that of the party himself and without the permission of Order 18 Rule 3(a) of C.P.C., the said power of attorney should not be allowed to be examined at a later stage. Hence, in these circumstances, the ratiocination adhered to by the lower court deserves to be rejected and accordingly, the order of the lower Court is set aside by allowing this revision petition. However, making it clear that it is open for the respondent/plaintiff to file an application for getting the power of attorney examined as P.W.2, whereupon after hearing both sides, it is for the Court to decide it purely on merits."

(ii)yet another decision of this Court reported in (2011) 2 MLJ 329 in the case of S.Ramachandra Reddy and another vs. Natarajan and others

"5.A reading of Order 18 Rule 3-A of C.P.C. would make it clear that where a party wishes to examine any witness before examining himself, he has to obtain the permission of the Court. Such permission can be sought for even after examining the witnesses as held by the Division Bench of this Court in the judgment in the matter of Ravi and another vs. Ramar (2007) 6 MLJ 1119 : (2008) 1 L.W. 1055

and in the judgment in the matter of Chennimalai v. Alagulakshmi also the same position has been reiterated. But, without filing an application, it is not open to the party to examine himself after the examination of witnesses. Though in this case, no such application was filed, the Court below dismissed the application for appointment of Commissioner on the ground that a permission ought to have been obtained before the commencement of the examination of other witnesses on behalf of the party for seeking permission. As stated supra, as per the Division Bench of this Court in the judgment in Ravi and another v. Ramar (supra), this Court has held as follows:

"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."

Therefore, what is necessary is to file an application for permission and it is not necessary that such application should be filed before the commencement of examination of the witnesses."

6. Heard the learned counsel for the parties.

7. It is seen that the Suit is for permanent injunction, filed by the 3rd respondent/plaintiff. The VAO has filed patta in the petitioner's name. Since the evidence of VAO was essential and there was a necessity to examine the VAO by then, he was examined already. Since the petitioner did not have patta in his name already, he was not examined. As the VAO presented patta in the petitioner's name before the Trial Court, the petitioner filed an Application to condone the delay in examining him and record his evidence. The Trial Court, after perusing the documents on record and on consideration of the relevant provisions, made clear that the petitioner should have obtained permission even before he had examined a third party witness and dismissed the said Application.

8. It is a settled principle that a party should not examine oneself at a later stage, so as to fill up the lacuna in the evidence of his own witnesses. When a person is interested in seeing that he succeeds in the litigation, then such a person should be taken as equal to that of the party himself. An amendment to the Code of Civil Procedure inserted by an Act of 104 of 1976 under Order XVIII Rule 3-A of C.P.C contemplates that 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. From the above provision, it is clear that where a party wishes to examine any witness before examining himself, he has to obtain permission of the Court.

9. In similar circumstances, a Division Bench of this Court in the case of Ravi and another vs. Ramar reported in (2007) 6 MLJ 1119 has held that where a party wishes to examine any witness before examining himself, he has to obtain the permission of the Court and such permission can be sought for even after examining the witnesses. In yet another decision of this Court in the case of Chennimalai vs. Alagulakshmi reported in (2008) 1 LW 1055, this Court has held that without filing an application, it is not open to party to examine himself after the examination of witnesses.

10. In the instant case, the Executive Officer, who is the 3rd defendant filed a petition to condone the delay to examine him and record his evidence on the ground that he did not have the patta in his name already, and hence, he was not able to examine himself. Thereafter, the VAO presented the patta in the name of the petitioner/Executive Officer before the Trial Court and the petitioner was ready to give evidence on his behalf. Resisting the said claim of the Executive Officer, the respondents in the Application contended that the Application is not maintainable in law and on facts.

11. After the amendment of the Civil Procedure Code, 1908, without the permission of the Court, the petitioner cannot lead evidence. The intention of the amendment is to check the practice then prevalent of leading the evidence of the witness of the party and then examine the party himself to fill up the loopholes and

the gaps in the evidence of the other witnesses. The rule laid down is that the party who wants to examine himself should examine first before any witness is examined. This rule can be deviated only with the permission of the Court.

12. Considering the above factor, the Trial Court came to the conclusion that the petitioner/Executive Officer ought to have obtained permission even before he had examined a third party witness. Without getting permission from the Trial Court already, he had examined a third party witness and thereby the petitioner/Executive Officer has automatically closed the chance of examining himself as a witness. The Trial Court also observed that since the provision uses the term 'shall', the petitioner/Executive Officer's appearance before examining other witness is mandatory, and rejected the petitioner/Executive Officer's claim.

13. On a reading of the relevant provision and the facts of the case, it is seen that the witness examined is a Government Official, viz., VAO and he has been allowed to let in evidence since the petitioner/Executive Officer did not have a patta in his name. When the VAO presented the patta in the petitioner's name before the Trial Court, the petitioner/Executive Officer was ready to give evidence on his behalf and hence filed the application to condone the delay to examine himself.

14. The petitioner/Executive Officer is a Government Official and he has allowed another Government Official to depose evidence. As per the amended provision of the CPC under Order 18 Rule 3-A, 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.

15. It is relevant to note that the VAO was examined already as the patta did not stand in the name of the petitioner/Executive Officer during the relevant period of time and, thereafter, the VAO himself has produced patta in the petitioner's name before the Court below. Therefore, prior to filing an application for examining the petitioner and recording his evidence, since there was delay in filing such an application in time, the petitioner has filed the application before the trial court for condonation of delay. In fact, the application in question is not the one praying for

permitting the petitioner to examine himself at a later stage after examination of a third party. It is only an application for condonation of delay. Only on such an application being allowed, the petitioner can be able to file a separate application under Order 18 Rule 3-A CPC for permission to examine himself as a witness at a later stage, after examination of a third party, who is the VAO in this case. At this stage, it is incumbent for the Trial Court to condone such a delay and only thereafter, the question of permitting the petitioner for his examination arises, which shall be decided on merits and in accordance with law. Therefore, it is premature for the Trial Court to dismiss the application in question, especially when it is only for condonation of delay.

16. Under the peculiar facts and circumstances of the case, the Civil Revision Petition is allowed and the order impugned is set aside. Instead of remanding the matter to the Trial Court for fresh consideration, in order to shorten the litigation and to avoid multiplicity of proceedings so also to render substantial justice, the application of the petitioner for condonation of delay before the trial Court is allowed, subject to payment of costs of Rs.2000/-, which shall be paid by the petitioner directly to the third respondent/plaintiff. Thereafter, the Trial Court is directed to consider the request of the petitioner for permission to examine him only on a separate application being filed under Order 18 Rule 3-A and decide the issue on merits and in accordance with law. No costs. Consequently, connected M.P.No.1 of 2012 is closed.

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