

IN THE IV ADDITIONAL CITY CIVIL COURT, CHENNAI

Present: J. Chandran,

IV Additional Judge.

This Friday, the 1st day of December 2023

I.A.No. 3 of 2023 & I.A.No.4 of 2023

in

O.S.No.5077 of 2019

C.N.R.No.TNCH01-022017-2019

I.A.No. 3 of 2023

1. Mrs. S.P.Meharnisha

W/o. Ponniah

No.3/555, Kaveri Street

Rajeshwari Avenue

Madanagar, Madanandapuram

Chennai.

2. Reenu Ponniah

W/o. Apparajth Dinakaran

No.B-3, Saraswathi Nagar

1st Street, Rajakilpakkam

Chennai.

...Petitioners/Plaintiffs

also in I.A.No. 4 of 2023

/versus/

1. M/s.Fortis Malar Hospital

represented by its Dean

No.52, 1st Main Road, Gandhi Nagar

Adyar, Chennai.

2. Dr. Nithyaa Ramamurthy, M.B.B.S., D.G.O.

Obstetrician and Gynecologist,

Fortis Malar Hospital, No.52, 1st Main Road,

Gandhi Nagar, Adyar, Chennai.

3. Dr. Janani, MD., RD.,

Radiologist, Fortis Malar Hospital

No.52, 1st Main Road, Gandhi Nagar

Adyar, Chennai.

..Respondents/Defendants

also in I.A.No. 4 of 2023

Both petitions came up before me for final hearing on 17.10.2023 in the presence of M/s.N.Kavitha Rameshwar and R.Ramachandran Counsels appearing for the petitioners/plaintiffs and of M/s.Rahul Balaji, Madhan Babu, Vishnu Mohan and V.Uma Rekha Counsels appearing for the respondents No.1 and 2/defendants No.1 and 2 and of M/s. K.Harishankar and T.K.Bhaskar Counsel appearing for the 3rd respondent in both petitions, upon hearing the arguments from the counsels for both side, upon perusing the records of this case and having stood over for consideration till this day, this Court passed the following

COMMON ORDER

I.A.No.3/2023

This petition has been filed by the petitioners/plaintiffs to reopen the plaintiffs side evidence which was closed on 03.02.2023 under Order XVIII Rule 17 of CPC.

This petition has been filed by the petitioners/plaintiffs to receive the additional documents mentioned in the petition under Order VII Rule 14 of CPC.

1. The averments found in the affidavit filed along with the petitions are as follows:-

The mother of the petitioner who is the first plaintiff had examined herself as PW1 and marked Exhibits A1 to A24. At the time of filing this suit they had filed 25 documents along with the X-ray and mammography bill dated 25.06.2015 but the same were not taken on record by the registry stating that they cannot maintain it due to its size and the same cannot be folded and hence the same has been returned stating that it can be produced in evidence at the time of marking of documents. Therefore, the petitioners were unable to mark the said documents on their side. PW1 had attended several chemotherapy sessions and the said documents are also relevant to the suit and need to be adduced in evidence. PW1 was cross examined and the case was posted for further PWs on 16.12.2022, 19.01.2023 and 03.02.2023 but due to some medical illness the petitioners were unable to be present to produce further evidence and deposed as witness and to meet certain documents. Hence there has been a delay in filing proof affidavit of PW2.

2. The evidence of the 2nd plaintiff and the documents which intended to be adduced as evidence are relevant to the suit and her case and on 03.02.2023 the 2nd plaintiff had appeared before this Court and requested short time for filing documents and proof affidavit but the same was rejected by this Court and the plaintiffs side evidence was closed. The petitioners have good case on merits and if the order of this Court dated 03.02.2023 closing the evidence of plaintiffs' side is not set aside and the evidence is not reopened, these petitioners would be put into irreparable injury and hardship which cannot be compensated by any means and on the other hand no prejudice would have been caused to the respondents/defendants if the evidence is reopened, and the documents were received.

3. The averments found in the counter affidavit filed by the 1st respondent for himself and on behalf of the 2nd respondent are as follows:

This suit has been filed alleging medical negligence for treatment provided during the year 2015. The entire suit claims are misconceived and proceed on an entirely erroneous premise. The case of the petitioners is that breast cancer of the 1st plaintiff was not diagnosed in time. In fact appropriate protocols were followed and it was because of the follow up and referred by the 2nd defendant and on her advise the appropriate treatment was provided. The first plaintiff presented herself with a pain in her right breast had been there for 3 days prior to consult on 25.06.2015. A mammogram was done on the same day and it

revealed that no mammography evidence of abnormality and she was treated as an out-patient and all the medical records were handed over to the first plaintiff. The plaintiffs failed to file the said X-Ray and ultrasound imaging films but filed only the report. The treatment records of the first plaintiff were marked Exhibits A1 to A24 and one document was rejected. X-ray and mammography film taken on 25.06.2015 were not provided by the petitioners from the inception of filing the suit.

4. The first plaintiff was cross examined by these respondents on 10.06.2022 and 04.07.2022 and she was cross examined by the 3rd defendant on 18.11.2022 and the case was posted for further PWs but the 2nd plaintiff failed to present and prolonged the case and took adjournments for the past 5 months. Now, they have chosen to file the first plaintiff's further treatment records taken in Apollo Speciality Hospital for her Carcinoma Right Breast Cycle of Chemotherapy Cycle of Chemotherapy dated 14.03.2016, 21.03.2016, 4.4.2016, 11.04.2026, 18.04.2016 and mammography-radiology report taken on 24.10.2016 and Ultrasound whole abdomen report.

5. The above documents were very much available with the petitioners and they have willfully omitted to file the same when the suit was filed. This is more evident that ex-facie and malicious attempts to raise wrongful claims against these respondents. The petitioners have deliberately not impleaded the Apollo

Speciality Hospital where the part of cause of action arose as the first plaintiff's illness diagnosis or treatment and her malignancy and carcinoma chemotherapy cycles were conducted in Apollo Speciality Hospital. The petitioners rely upon the treatment records of the said hospital for her subsequent diagnosis whereas baseless and arbitrary claims have been made against the respondents with an ulterior motive. The present petitions have been filed only for the purpose of protract the proceedings and nothing else and the same are not material or relevant to this case pleaded by the petitioners and hence prays for dismissal of these petitions.

6. The averments found in the counter affidavit filed by the 3rd respondent are as follows:

As far as two X-ray films which the petitioners wishes to receive as additional documents were taken on 25.06.2015 and 20.10.2015 and the same were very well within the custody of the plaintiffs at the time of filing the plaint. The petitioners chose not to file the same into the Court at the time of filing the plaint. The petitioners have not filed any endorsement of the registry in support of their claims that those two x-rays were returned by the registry as the same cannot be maintained and preserved. If the statement of the petitioners are taken to be truth, the same will hold good even for receiving the documents through this applications as the said documents cannot be preserved safely after marking them as exhibits. X-rays cannot be inferred without an aid of

necessary instruments and could not be readily utilized for the case of the petitioners. The petitioners have already exhibited the reports issued with the concerned X-ray films. Thus, no cause would be served by allowing the X-ray films to be received as additional documents.

7. Document Nos.3 to 9 pertain to chemotherapy discharge summary which were conducted post the date of filing of the plaint. If these documents are allowed to be taken on record, the same would amount to changing the nature of the claims and also it would tantamount to evidence being led without any pleadings. These documents are neither vital nor necessary to determine the prime issues as to whether there was negligence as alleged on the part of the defendants while administering medical care thereby causing any so called damage to the petitioners. These documents are also not relevant to ascertain the damages as the petitioners have already quantified the damages in the plaint and hence those documents are no way relevant for determining the present suit. Sufficient opportunity was afforded to the plaintiffs to lead additional evidence. After closing the evidence of PW1 the suit was posted on 16.12.2022, 09.01.2023 and 03.02.2023 for let in further evidence on the side of the petitioners. Only after giving sufficient opportunity this Court has rightly closed the evidence on the side of the plaintiffs. Affidavit filed by the petitioners does not disclose sufficient reasons as to why the petitioners were unable to let in further evidence on their side. The documents sought to be received do not

have any bearing the case at hand and no valid or satisfactory reasons are being offered by the petitioners as to why the evidence on their side needs to be reopened. Hence there is no merit in these applications and the same are liable to be dismissed.

8. Point for consideration in both petitions:

1. Whether this petition in I.A.No.3/2023 to reopen the evidence on the plaintiffs side is to be allowed or not? and
 2. Whether this petition in I.A.No.4/2023 to receive additional documents is to be allowed or not? are the questions to be decided in these petitions?
9. No document was marked and no oral evidence was adduced by either side for these petitions.

10. To the Point:-

It is an admitted fact that the plaintiffs being the mother and daughter had filed the original suit for damages against the defendants on the ground that medical negligence was said to have been committed by the respondents/defendants. It is also an admitted fact that the suit was originally filed before the Original Civil jurisdiction of the Hon'ble High Court in the year 2016 and the same was transferred to this Court on the point of jurisdiction in

the year 2019, that when the case was posted for defendants side evidence these petitions were filed. It is also not in dispute that the first plaintiff was examined as PW1 and Exhibits A1 to A24 were marked through her. The cross examination of PW1 by the learned Counsel appearing for the 3rd defendant was conducted on 18.11.2022 after the payment of cost of Rs.500/- as ordered by this Court and subsequently, the case was posted on 16.12.2022, 19.01.2023 and 03.02.2023 for further plaintiffs side evidence and on 03.02.2023 the plaintiffs side evidence was closed by this Court and the case was posted to 09.02.2023 for defendants side evidence. It is to be pointed out that though the 2nd plaintiff has stated in her affidavit that she requested short time before this Court on 03.02.2023 for adducing her evidence but her request was rejected by this Court, no such notes paper order was made by my predecessor for the said hearing on 03.02.2023. The docket order made on 03.02.2023 in the suit notes-paper reads as follows:

“No further PWs. Plaintiffs’ evidence closed. Defendants evidence by 9.2.23”

It has not been stated as if the 2nd plaintiff was present and requested time on 03.02.2023.

11. The petition in I.A.No.3/2023 has been filed to reopen the plaintiffs side evidence and the petition in I.A.No.4/2023 has been filed to receive the

additional documents. The petition in I.A.No.3/2023 has been filed under Order XVIII Rule 17 of CPC which is a specific provision to recall the witness who was already examined by the Court. The correct provision to re-open the evidence of a party which was closed by the Court is Section 151 of CPC, as there is no specific provision to reopen the evidence in CPC. It is the settled position of law that mere quoting of a wrong provision of law in the petition will not dis-entitle a party to claim the relief and the Court can grant relief even for a wrong quoted provision for the petition to meet the ends of justice. The learned counsel appearing for the respondents have not raised that point in their counter affidavit and the same might be the magnanimous mindset of the counsel on record for the respondents. Hence wrong quoting of a provision of law is not a ground to reject the petitions.

12. The petitioners approached the Court by filing these applications with intention to examine the 2nd petitioner as PW2 and through her they want to mark 9 documents as additional exhibits. The petitioners sought for to receive the documents namely X-ray mammography film, X-ray film(4), Chemotherapy discharge summary dated 14.03.2016, 21.03.2016, 04.04.2016, 11.04.2016 and 18.04.2016, mammography single side (left) report and ultrasound whole abdomen report. The petitioners have claimed that those documents are vital and relevant to prove the case of the petitioners. On the other hand the learned

counsels appearing for the respondents have submitted that those documents were available with the plaintiffs even at the time of filing the suit and the same were not been filed along with the plaint and the petitioners have not explained properly for the non production of the same at the time of examination of PW1 in chief.

13. The petitioners themselves have admitted in the affidavit filed by the 2nd petitioner that those documents were available with them even at the time of filing the suit and it is their explanation that when they have filed along with the plaint the registry had informed them that the same cannot be maintained and preserved and permitted them to file the same at the time of adducing evidence. The learned counsel appearing for the respondents have vehemently submitted that there is no endorsement of the registry in the plaint with regard to those documents. It is true that only 24 documents were filed at the time of filing the plaint and the documents now sought for by the petitioners were not filed at the time of filing the plaint in the year 2016. The petitioners have further explained that due to their medical illness they were not able to produce those documents at the time of examination of PW1.

14. It is the settled position of law that receiving documents is entirely different from marking of the documents and marking documents is entirely different

from proving the contents of the documents. The petition in I.A.No.4/2023 has been filed only to receive the additional documents. The respondents have claimed that those documents are not vital or relevant to this case. On the other hand the learned counsel appearing for the petitioners have claimed that the documents now sought for are the discharge summary issued for the treatment taken by the first plaintiff and reports issued for mammography ultrasound taken for the alleged ailment suffered by the first plaintiff apart from the X-ray films. They have claimed that those documents are most relevant to prove the case of the petitioners. The respondents are at liberty to question or challenged those documents and the contents found in it by way of cross examination of the witness during their turn and they can take all lawful steps to disprove the contents found in those documents during their cross examination.

15. The learned counsel appearing for the 3rd respondent has vehemently opposed these applications during the course of her arguments. She had relied upon a case law in ***Bagai Construction through its Proprietor Lalit Bagai vs. Gupta Building Material Store*** reported in (2013) 14 SCC 1, in which she has highlighted the findings which reads as follows:-

“It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial court at this belated

stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of the judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the trial court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial. Unfortunately, the High Court taking note of the words “at any stage” occurring in Order 18 Rule 17 casually set aside the order of the trial court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW 1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of court and court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties. In the light of the information as shown in the order of the trial court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 CPC, the plaintiff cannot be permitted.”

She has also relied upon the findings made in another case law in ***K.Ganesan vs Alamelu and Another*** reported in ***2019 SCC OnLine Mad 2438*** which reads as follows:-

“As regards the other documents, the trial Court concluded that document no.9, namely, the death certificate of Mariyayee is not relevant because the death or the date of death is not disputed. Likewise, as regards document nos. 10 to 14, the trial Court concluded that the said documents relate to the period subsequent to the filing of the suit and, therefore, cannot be relied upon to establish the suit claim. I find no infirmity or material irregularity in the findings or conclusions of the trial Court. Accordingly, there is no reason to interfere with the impugned order.”

16. The learned counsel appearing for the respondents 1 and 2 had relied upon several case laws in support of her contention. In **Gold Rock World Trade Ltd., vs. Veejay Lakshmi Engineering Works** reported in (2008) 149 PLR 40 in which the Hon'ble Delhi High Court has held as follows:

“Thus, the Supreme Court held that the insertion of Rule 17-A was only clarificatory of the in-built power of the Court to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence”

She has also highlighted the portion of the Judgment in the above case laws which reads as follows:-

“ In fact, the affidavit by way of evidence was filed by the plaintiff in the year 2003 and even in that affidavit, there is no reference to the documents which are now sought to be introduced. In my view , These circumstances clearly show that the conditions necessary before leave of the Court can be granted have not been satisfied.”

In another case law in **J.K.Kashyap vs Rajiv Gupta And Ors.** decided by the Hon'ble High Court of Delhi in I.A.Nos.4595/2012 & 2742/2012 in CS(OS) No.2156/2007 on 20.07.2012 it was held as follows:-

“It can cannot be said that the plaintiff was not aware of the documents earlier, or that the same could not be produced in spite of due diligence on the part of the plaintiff. As the plaintiff was not diligent enough at that point of time, this Court is left with no alternative but to reject its request.”

In another case law in ***M/S. Pan Resorts Limited vs. H.H.Karthika Pooyam Thirunal*** decided on 10.12.2010 in ***A.Nos.5471 & 5472 of 2010*** in C.S.No.632/1997 in which our Hon'ble High Court has held as follows:

“From the perusal of Order 18 Rule 17 CPC it is clear that while exercising the power under Order 18 Rule 17, the Court is competent to recall any witness, who had already been examined and he may be put questions as the Court thinks fit. The examination of the witnesses includes cross-examination as well. When a witness has been examined, the Court at any stage of the suit may recall the said witness for the purpose of examination which includes cross-examination. However, in so far as the production of document is concerned, since the documents have not been produced on the record, could not be allowed to be produced in the later stage especially when the provisions of Order 18 Rule 17(A) CPC were omitted by virtue of the Code of Civil procedure (Amendment Act 2002), which has come into force with effect from 01.07.2002. As rightly observed by Lal Chandran Keshav vs. Rajesh Thakoor reported in AIR 2006 HP 61, “the production of documents is not covered by the provision under Order 18 Rule 17 of CPC.”

In another case law in ***Aparna Construction vs Akshay K*** in CRP.No.3883 of 2018 decided by the Hon'ble Telangana High Court on 6.4.2022, it was held as follows:-

“The defendants are not entitled for reception of documents at this belated stage after closure of evidence on both sides when the suit is being adjourned for arguments without assigning proper reasons for not filing the said documents along with written statement. That too, when the defendants have filed the present Civil Revision petition only assailing the

orders in IA No.451 of 2018 without questioning the legality or validity of the common AVRJ CRP No.3883 of 2018 order in IA No.449 and 450 of 2018 for recall of witness and reopening of the suit for defendants further evidence, they are not entitled for any relief as prayed for.”

17. From the findings made in the above case laws it can be ascertained that the plea of the party to receive documents, and either reopen the case or to recall witness were rejected mainly on the ground that the evidence of both parties were over according to one case and when the case was posted for Judgment after hearing the arguments from both sides and at that peculiar circumstances the plea of the parties were rejected in these cases. On the other hand, in this case, the defendants side evidence has not been commenced so far. Three hearings alone were given for the plaintiffs to adduce further evidence on the side of the plaintiffs. As this case itself has been filed by the plaintiffs for damages due to alleged medical negligence and as the documents sought for by the petitioners or medical records to prove the case in which the first plaintiff was treated, the said documents cannot be treated as irrelevant to the case on hands.

18. The Hon’ble Supreme Court in various case laws has held that the Trial Courts are to be in magnanimous mind to allow the parties to file documents and to adduce evidence during the course of trial to meet the ends of justice.

The petitioners cannot file another suit for damages for the cause of action said to have been taken place for filing the present suit. Hence sufficient opportunity has to be given to the petitioners to establish their case in accordance with law before the Trial Court.

19. In a case law in ***Sugandhi (Dead) by L.Rs. and Ors. vs. P.Rajkumar*** reported in 2020(4) SCC 217 (MANU/SC/0792/2020) the Hon'ble Supreme Court has held as follows:-

Sub-rule (3), (Order VIII) as quoted above, provides a second opportunity to the defendant to produce the documents which ought to have been produced in the Court along with the written statement, with the leave of the Court. The discretion conferred upon the Court to grant such leave is to be exercised judiciously. While there is no straight jacket formula, this leave can be granted by the Court on a good cause being shown by the defendant".

Further, it was also held as follows:-

"It is often said that procedure is the handmaid of justice. Procedural and technical hurdles shall not be allowed to come in the way of the Court while doing substantial justice. If the procedural violation does not seriously caused prejudice to the adversary party, Courts must lean towards doing substantial justice rather than relying upon the procedural and technical violation. We should not forget the fact that litigation is nothing but a journey towards truth which is the foundation of justice and the Court is required to take appropriate steps to thrash

out the underlying truth in every disputes. Therefore, the Courts shall take a lenient view when an application is made for production of the documents in Sub-rule(3).”

In the above case law, the Hon’ble Supreme Court itself has permitted the defendants to file documents subsequently by invoking the provision under Order VIII Rule 1(3) of CPC. The said findings equally applicable to the petition filed under Order VII Rule 14 of CPC which is the enabling provision for the plaintiffs.

20. As the respondents namely R1 to R3 are experts in the medical field they can easily go through the documents and make all possible defence for their case unlike the petitioners who are not expert in the medical field. It is the settled position of law that every opportunity should have been given to the parties to prove their case during the course of trial and the case of the parties should not be shut down without giving them sufficient opportunity to prove their case. The petitioners prays to allow these petitions only to adduce one more evidence and no hardship would have been caused to the respondents even if these petitions are allowed. On the other hand the petitioners would be put into irreparable loss if these petitions are not allowed as rightly pointed out by the learned counsel appearing for the petitioners. Mere order to receive documents and allowed the petitioners to examine the 2nd plaintiff as only

witness in support of the case of the first plaintiff will not cause any prejudice to the case of the respondents in any manner. Nothing will be happened if one more opportunity has been given to the petitioners to produce evidence to establish their case.

21. The petitioners have stated that the documents filed along with this petition are very much essential for effective adjudication of the case on hand. The Hon'ble Supreme Court has held in the above case law that the Court should give importance only towards substantial justice when the procedural violation does not seriously caused prejudice to the respondents. The respondents have not shown any cause to prove that they would be put into prejudice in any way if the petitions are allowed. The respondents have every right to raise their objection while marking the documents and they are also having right to cross examine the witness based on the documents and hence no prejudice would have been caused on the respondents even if these petitions are allowed. The Court is here only for rendering the substantial justice. Considering the above stated circumstances, in the interest of justice and in the lights of the findings of the Hon'ble Supreme Court, this Court finds that these petitions are to be allowed and the point has been decided accordingly.

In the result, this petition in I.A.No.3/2023 is allowed and the plaintiffs' side evidence is ordered to be reopened and the petition in I.A.No.4/2023 is allowed and the documents mentioned in this petition are ordered to be received. The parties are directed to bear their own cost.

This Order has been dictated by me to the steno typist, transcribed and computerized by her, corrected and pronounced by me in the open Court on this Friday, the 1st day of December 2023.

IV Additional Judge,
IV Additional City Civil Court, Chennai.

List of witness examined and exhibit marked
on the side of the Petitioner:

Nil

List of witness examined and exhibit marked
on the side of the Respondents:

Nil

IV Additional Judge,
IV Additional City Civil Court, Chennai.