

IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE, DINDIGUL.
PRESENT : **THIRU. A.K. MEHBUB ALI KHAN, B.L.M., LL.M., PG.D.PM/IR.,**
ADDITIONAL DISTRICT JUDGE, DINDIGUL.

Tuesday, the 08th Day of September 2023

I.A. No.6/2023 in O. S. 106/2017

N. Vasantha ... Petitioner/Plaintiff

-Vs-

M. Basheer ... Respondent/Defendant

and

I.A. No.7/2023 in O.S. No.106/2017

M. Basheer ... Petitioner/Defendant

-Vs-

N. Vasantha ... Respondent/Plaintiff

These two petitions coming on 4.09.2023 before me for final hearing commonly in the presence of Thiru. J.Prabakaran Advocate for the petitioner in I.A 6/2023 and respondent in I.A. 7/2023 and of Thiru. A. Selvam, Advocate for the Respondent in I.A. 6/2023 and Petitioner in I.A. 7/2023 and after having heard the arguments of both sides and on perusal of records this Court delivers the following :

COMMON ORDER

Petition in I.A. 6 of 2023 is filed by the petitioner/plaintiff U/O 18 R 3A and sec 151 CPC

Petition in I.A. 7 of 2023 is filed by the petitioner/defendant U/O 18 R 3A and sec 151 CPC.

1. Ironically though both the petitions are filed under order 18 rule 3A CPC, the plaintiff has filed this petition to permit her to be examined as a witness. Whereas the petition in I.A 7/2023 is filed by the defendant to scrap the evidence in chief of the plaintiff examined as PW2.

2. Since the facts relevant to decide both the petitions are common, they are disposed of by this common order.

3. Facts relevant for these petitions:

4. The petitioner in I.A 6/2023 is the plaintiff who has filed the suit for specific performance against the defendant. The suit was earlier posted for trial and she was examined as witness and when the suit was posted for cross examination the defendant did not cross examine her and hence the suit was decreed exparte. Later the defendant filed petition to set aside the exparte decree and the same was allowed. The suit was again posted for trial on 10.2.2023 but since the plaintiff had taken her husband to Singapore for treatment on 7.1.2023 and had to stay there, she could not give evidence and so her power agent was examined as PW1 and Ex.A1 to Ex.A5 were marked and he was also cross examined by the defendant. But, the original FD receipt for Rs.20 lakhs could not be marked through him as it was with her. Unfortunately, the plaintiff's husband died on 13.2.2023 at Singapore and she came back to Madurai only after that. PW1 could

not give evidence regarding the means to pay the balance sale consideration payable, which is within the personal knowledge of the plaintiff and so she offered herself to be examined as PW2 and proof affidavit was recorded on 20.3.2023 and Ex.A6 to Ex.A8 were marked and the case was passed over for cross examination. But the defendant did cross examine and the case was posted for cross examination to 27.3.2023 and again to 10.4.2023 as the defendant was not ready to cross examine. On 10.4.2023, he filed an application to scrap the evidence of PW2 as permission under order 18 rule 3A was not obtained. Hence the plaintiff has filed this petition seeking permission to examine herself as a witness under order 18 rule 3A CPC. She could not be examined earlier due to the reasons beyond her control and her non examination was neither willful nor wanton. She has not filed this petition to fill up the lacunae but only to depose in respect of the matter within her personal knowledge and offer herself for cross examination. Thus she has prayed to allow the petition and permit her to be examined as PW2 in the interest of justice and equity. She has also prayed to dismiss the petition in I.A 7/2023 filed by the defendant to scrap her evidence as it has become infructuous since she has filed the petition seeking permission under order 18 rule 3A CPC.

5. The defendant who has filed a separate petition in I.A. 7/2023 under order 18 rule 3A CPC to scrap the evidence of PW2 has stated that the plaintiff has deposed as PW2 after examination of her power agent as PW1. He had made an endorsement in the proof affidavit that he has objections to mark the additional documents as they were not produced earlier. He had also objected that the power agent was already examined on behalf of the plaintiff and that she could not be examined without getting permission under order 18 rule 3A CPC. But despite his objections, her proof affidavit was recorded on 20.3.2023 and Ex.A6 to Ex.A8

were marked. Hence he has filed the petition in I.A.7/2023 to scarp the evidence of PW2 which was recorded against the provisions of order 18 rule 3A CPC since it is against law and procedure and as it would cause him irreparable loss and hardships. He has reiterated these averments in the counter filed in I.A. 6/2023. And has prayed to dismiss the said petition.

6. Heard elaborate arguments of both sides.

7. The points to be determined in these petitions are:

1. Whether the petition in I.A. 6/2023 be allowed and plaintiff be permitted to be examined as PW2?

2. Whether the petition is I.A. 7/2023 be allowed and the proof affidavit of PW2 be scraped?

8. Points 1 and 2:

9. The parties are referred to as their status in the suit for convenient and easy understanding.

10. The learned counsel for the plaintiff argued that the plaintiff had given power of attorney to file the suit as she had to frequently travel to Singapore for the treatment of her husband. As she had gone to Singapore on 7.1.2023 for his treatment she could not be examined and she could not file necessary petition under order 18 rule 3A CPC earlier. So her power agent was examined as PW1. Her husband died on 13.2.2023 and only after she came back to India she was examined as PW2 and has filed this petition seeking permission to be examined as a witness after PW1. He further argued that since the facts within her personal knowledge have to be stated, only she could depose those facts and so prayed to

allow her petition. He relied upon the decisions of the Hon'ble Supreme court in "**2005 (3) CTC 128**" and Hon'ble Madras High court in "**2008 (4) CTC 490**" in his support.

11. Per contra the learned counsel for the defendant argued that she should have sought permission before being examined as PW2 and since such permission was not obtained her evidence has to be scrapped and she could not now file petition seeking permission. He relied upon the decision of the Hon'ble Madras High court in "**Daisy Gnanammal Vs Ponnuthai dated 5.6.2018**".

12. It is settled proposition that the power agent cannot depose the facts not within his knowledge and the person who has personal knowledge alone can depose about those facts as held and reiterated by the Hon'ble Supreme court in catena of decisions including the one referred by the plaintiff's counsel cited above. In this case, the fact about the availability of sufficient means to pay the balance amount is within the personal knowledge of the plaintiff and so she alone can depose about it. Further, it is also now well settled as per the decision of the division bench of the Hon'ble Madras High court in "**Ravi and another Vs Ramar (2008(1) CTC 36**", that the provision under order 18 rule 3A CPC are directory in nature and that the court can give permission to the party to examine himself at a later stage even if no such permission had been sought for at the very threshold. It is also well settled that the court is required to consider the matter in its proper perspective and is required to find out as to why the party could not examine himself at the beginning and also as to why the application for seeking permission was not filed at the threshold.

13. Therefore, it is imperative upon this court to find out if the reasons given by the plaintiff are germane and relevant so as to grant the permission. In this case, the plaintiff has filed copies of the flight tickets for her travel to Singapore on 7.1.2023 and also the death certificate of her husband who had died on 13.2.2023 in Singapore. Hence she was not examined earlier and was also not available to file petition under order 18 rule 3A CPC at the threshold when PW1 was examined. It is pertinent to note that earlier when the suit was decreed *ex parte*, she herself was examined as PW1 though she had filed the suit through her power agent. But the said decree was set aside later. Thus the reason for the plaintiff not being examined as PW1 on 10.2.2023 is beyond her control and is quite acceptable. So also the reason for not filing the petition when PW1 was examined is also germane and acceptable.

14. However, she had come to India later and was examined as PW2 on 20.3.2023. Though no petition was filed on the day of her examination, now she has filed this petition after the defendant filed the petition to scrap her evidence. A perusal of the endorsement made on the proof affidavit of PW2 reveals that the defendant has only objected to the marking of the documents and has not raised objections that permission was not obtained under order 18 rule 3A CPC but has filed petition in I.A.7/2023 only on 10.4.2023. Even otherwise, it has been held by the division bench that the provision of order 18 rule 3A CPC is only directory and not mandatory. Therefore, this court finds no reason to reject the claim of the plaintiff on the technical ground that the petition was filed belatedly after she was examined.

15. The suit is for specific performance and the burden is upon the plaintiff to prove her readiness and willingness to pay the balance amount. Hence an opportunity must be given to her to let in evidence to prove the same. No serious prejudice would be caused to the defendant. It has to be taken into consideration that the defendant has already delayed the trial for a long time and the court cannot dismiss the petition filed by the plaintiff on hyper technicalities. The decision relied upon by the defendant cited above is not helpful for him as even in that case the hon'ble High court had dismissed the petition to scrap the evidence.

16. Therefore, in the considered opinion of this court, the plaintiff must be given permission under order 18 rule 3A CPC to be examined as PW2 and her evidence already recorded cannot be scraped. Accordingly, it is held that the petition filed by the plaintiff in I.A. No. 6/2023 has to be allowed and the petition filed by the defendant in I.A. No. 7/2023 has to be dismissed. These points are decided accordingly.

In the result the petition in I.A. No. 6/2023 is allowed without costs.

In the result the petition in I.A. No. 7/2023 is dismissed without costs.

This order typed by me directly in my laptop, corrected and pronounced in open court on this the 8th day of September 2023.

Additional District Judge,
Dindigul.