

IN THE COURT OF THE II ADDITIONAL DISTRICT JUDGE AT SALEM  
PRESENT: Thiru. A. M. Ravi, B.A., B.L.,  
II Additional District Judge, Salem.

Tuesday, the 31<sup>st</sup> day of October 2023

I.A.No.6/2023

in

O.S. 119/2016

1. Kondammal

2. K. Selvaraj

3. K. Duraimurugan

... Petitioners/ Defendants

/Vs/

1. P. Panneer Selvam

2. P. Manoharan

3. Vijayalakshmi

... Respondents/ Defendants

This petition is taken on file on 07.10.2023 and came up before me on 18.10.2023 for final hearing in the presence of Thiru. A. Nithianandam, Advocate for Petitioner, and of Thiru.G.Muthamilselvan, Advocate for the Respondents. On hearing both side arguments, and upon perusing the entire records and matter having stood over for considering till this day, this Court delivered the following :

**ORDER**

The Petitioners / Plaintiffs filed a Petition under Order XXVI Rule 4 of C.P.C. to appointing a Commissioner for the purpose of examination of the witness.

**2. The Summary of the averments in the petition filed by the 2<sup>nd</sup> Petitioner on behalf of other Petitioners are as follows:-**

The Petitioners / Plaintiffs filed a suit for Declaration and permanent injunction. The trial of the above suit has been commenced. The Petitioners have marked a Panchayath Muchalika dated 12.10.1990 and marked as Ex.A12. The Petitioners have to prove the said document. One of the attestors namely Natesan S/o.Venkatachalam Gounder. Thippampatti has to be examined. The said Natesan is aged about 75 years. He is suffering from Blood pressure and diabetic. The said person could not come out of his house. The said person could not attend Court to give evidence due to his old age and health condition. There are no other attestors available. In order to prove the Ex.A12 the evidence of the person is necessary. In order to examine the said Natesan, an Advocate Commissioner has to be appointed to examine the witness at his resident to record his evidence. There is no other way to record his evidence. Hence this petition.

**3. The Summary of the averments in the counter statements filed by the Respondents are as follows:-**

The alleged witness is alleged to have been suffering from Diabetics and blood pressure, his capacity to depose the evidence and his mental ability are main core issue, which has to be exclusively decided by this

Court and the same cannot be delegated to the Advocate Commissioner. Similarly, the demeanour of the alleged witness can be decided only by this Court. So, it is just and necessary to examine the said alleged witness before this Court, instead of examining him through the Advocate Commissioner. If the witness would be examined through the Advocate Commissioner, there might be a chance to tutor the alleged witness by the Petitioners / Plaintiff and the Respondents will be prejudiced.

3.ii) The amendment in the code of the Civil Procedure 1908 mandates the parties to the suit that the examination in chief of the witness shall be through the proof affidavit and it cannot be skipped by the Petitioners. The reasons stated in the affidavit for the examination of the alleged witnesses are not sufficient ground to examine him through the Advocate Commissioner. Hence, the Respondents prayed for dismissal of the petition.

4. Both sides no oral and documentary evidence are produced and marked.

5. Both sides arguments heard.

**6. The Point for consideration in this petition is that Whether this petition is deserved to be allowed or not?**

7. The Petitioners / Plaintiffs filed a suit for Declaration of right and title over the suit property and consequential relief of permanent injunction. It is a part heard matter. Now the case is stands posted for examination of the further Plaintiff side evidence. At this juncture the Petitioners / Plaintiffs filed this petition and submitted that the Petitioner side they wants to examine the one of the attestor of the document namely Natesan S/o.Venkatachalagounder, and submitted that he is aged about 70 years and suffering from blood pressure and diabetic and he could not come out from his house, due to his old age and health condition he could not appear before this Court and give evidence. Therefore a Court commissioner may be appointed for examination of the said witness by the Court commissioner and he ready to pay the remuneration of the Court commissioner.

8. The other side objection is that the alleged witness is alleged to have been suffering form Diabetics and blood pressure, his capacity to depose the evidence and his mental ability are main core issue, which has to be exclusively decided by this Court and the same cannot be delegated to the Advocate Commissioner. Similarly, the demeanour of the alleged witness can be decided only by this Court. So, it is just and necessary to examine the said alleged witness before this Court, instead of examining

him through the Advocate Commissioner. If the witness would be examined through the Advocate Commissioner , there might be a chance to tutor the alleged witness by the Petitioners / Plaintiff and the Respondents will be prejudiced.

9. Considering the contentions submitted by the both sides if the Commissioner is appointed for examination of the witness that will not cause any prejudice to the other side. On the other hand the Respondent also having opportunity to cross examine the witness in the presence of the Court commissioner, the Court Commissioner only act as on behalf of the Court nothing else. Hence in the interest of the Justice, this petition is allowed with following conditions.

**IN THE RESULT:-**

This petition will be allowed on following conditions:

1. Mr.R.Theertheswaran, Enrolment No.6288/2022, Advocate appointed as Court Commissioner.
2. The Court commissioner directed to examine the witness attestor Mr. Natesan S/o.Venkatachalagounder, Thippampatti record his deposition including chief and cross examination of the said witness in the residence of the witness before the Plaintiff and the defendant and their learned Counsels.

3. Necessary notice to be given to the Plaintiff and the Defendant's Counsel and fix the date and time for recording the deposition of the said witness.
4. Any document produce before at the time of recording deposition neither the Plaintiff nor the defendant side the Court Commissioner has to receive the documents and that document will be marked before this Court in Open Court only. The commissioner not to mark any document.
5. After recording the chief and cross examination the signature of the witness to be obtained in the deposition itself, and the Commissioner has to submit his report along with the deposition of the witnesses including chief and cross examination to be filed before this Court in earlier date.
6. The Commissioner remuneration is fixed Rs.6,000/- to be paid him directly.

The Commissioner report and the deposition of the witness including chief and cross examination to be filed before this Court on or before 08.11.2023. This petition is allowed accordingly.

The order dictated to Steno-typist, directly typed by her, corrected and pronounced by me in the open Court, the 31<sup>st</sup> day of October 2023.

**sd/-A.M.Ravi**  
**II Additional District Judge,**  
**Salem.**

**APPENDIX :**

**List of Petitioner side witnesses :** NIL

**List of Petitioner side Documents :** NIL

**List of Respondent side witnesses :** NIL

**List of Respondent side Documents :** NIL

**sd/-A.M.Ravi**  
**II Additional District Judge,**  
**Salem.**