

**Zabiya Bibi Vs. A. Sivaperumal**

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**Court** : Chennai

**Decided On** : Feb-12-1968

**Reported in** : (1970)89MLJ1

**Appellant** : Zabiya Bibi

**Respondent** : A. Sivaperumal

**Judgement** :

ORDER

M.M. Ismail, J.

1. This is an application, to revise an order of the learned District Munsif of Salem, dated 7th December, 1966, dismissing an application filed by the petitioner for examining herself on commission. I must straightaway point out that the petitioner is the plaintiff in O.S.No. 674 of 1965 on the file of the learned District Munsif, Salem. The present I.A. No. 2003 of 1966 for the purpose of examining her. on commission was filed on the ground that she was residing 200 miles away from Salem in Nilambur in Kerala State and her husband has been recently discharged from the Mental Hospital and she had been attending on her husband. The learned District Munsif dismissed the application holding that previously the respondent had filed an application directing the petitioner to be present in the Court and in that application no objection was taken by the petitioner that she could not because of the distance, be present, in Court. The learned District Munsif has further pointed out that Nilambur is not far away from the Court and that there is no difficulty for the petitioner to appear before the Court if she really intended to do so. It is to revise this order the present civil revision petition has been filed.

2. Mr. N. Appu Rao, learned Counsel for the petitioner, contends that the Code of Civil Procedure, does not make any difference between a witness and a party to a suit and once a person comes within the scope of Order 16, Rule 19 Code of Civil Procedure, such a person is entitled to be examined on commission, whether such a person happens to be a witness or a party to the suit. Admittedly, whether a commission should be issued for the examination of a witness or not is always a matter of discretion of the Court. But, in exercising the discretion, the Court will have to take into consideration the fact whether the person sought to be examined on such commission is a party to the suit or merely a witness. There is a vital difference between a witness and a party to the suit, because, a witness is not interested in the subject-matter of the litigation and he is a third party to the action, but with reference to the parties, the same cannot be said. Even as between the parties, there is again a basic difference between the plaintiff and the defendant. The plaintiff is the person who has initiated the action and has chosen the forum and dragged the

defendant into the Court. Consequently, with reference to the plaintiff, when he or she wants to give evidence in support of his or her case, the position is different from that of a third party being called to the Court to give evidence in support of the plaintiff or the defendant. Therefore I am unable to agree with the contention for the petitioner that there is no difference between a party witness and a third party witness.

3. In support of his contentions, Mr. Appu Rao relied upon on *Gulab Rai Ghntghutia v. Mahendra Nath Sreemani* A.I.R. 1935 Pat. 220, Even in that decision, the learned Judge had pointed out that the case of the plaintiff stands on a different footing from that of a defendant or a witness when the question arises as to whether a commission should issue, for examination or not, and although in the Code of Civil Procedure there is no distinction drawn anywhere so far as this point is Concerned between the plaintiff, a defendant or a witness, yet as a rule of prudence this rule can be supplied. The learned Judge further pointed out that when the plaintiff has chosen the forum and! has filed the suit in the forum of his own choice, he is not entitled to have a commission issued unless under very exceptional circumstances. Consequences, the decision of the Patna High Court, far from supporting the contention of Mr. Appu Rao is against him.

4. On the other hand, Jagadisan, J., in *Ramakrishna Kulwant Rai v. F.E. Hardcastle & Co.* : (1962)2MLJ490 had observed:

The witness, who is a third party to the auction, cannot be compelled to attend Court to give evidence if he is resident at a place beyond 200 miles away from the Court-house ; a party to a suit or proceeding has no such unqualified right. The plaintiff having filed the suit in a forum of his choice or in a forum where the suit had necessarily to be instituted, cannot, except in circumstances of bodily infirmity or other disabling factors, avoid giving evidence in Court. A defendant however, is in a slightly better position. If he is a resident in a far off place, quite a long way from the jurisdiction of the Court, he can pray for the issue of a commission to examine him as a witness....

The general rule is, and this should not be lost sight of or blurred, that the evidence of a witness in an action, be he or she a party or not, should be given in public Court and tested by cross-examination. Inability to attend Court on grounds of sickness or infirmity, or detriment to the public service, would justify the issue of a commission. The Court has got a discretion to relax the rule of attendance in Court where the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the Court. This discretion may be exercised even if the person happens to be no other than the defendant (See *Subramania Chettair, in re.* There can of course, be no rule of law demarcating the boundaries and the area of the discretion to be exercised to these matters. What can however be stated is that the Court of nisi prius must act judicially, having regard to all the circumstance of the case, the desirability of the physical presence of the witness in Court to enable it to observe his or her demeanor, and the not unusual fact that convenience, and economy of expenses for the applicant may involve his opponent in great inconvenience and considerable expenses.

To the same effect; is the observation of Anantanarayanan, Chief Justice, in *A.R. Laksamanan Chettiar v. Vadivelu Ambalam*, where the learned Chief Justice, after referring to the judgment of Jagadisan, J., referred to above, proceeded to state:..it

would be an unusual privilege to exempt the party from attendance in Court merely because he was living beyond the limits of jurisdiction, and permitting him to be examined on commission. Very vital factors in the appreciation of evidence, such as the demeanor of the party under cross-examination, etc. may have to be assessed and a party ought not to be lightly permitted to escape such scrutiny, by the plea that the party is residing beyond the jurisdiction specified in Order 16, Rule 19, Civil Procedure Code, and is hence entitled to be examined on commission.

5. In view of these decisions, I am of the opinion that the petitioner herein cannot claim as a matter of right that a commission should issue to examine her, simply because she is residing in Nilambur in Kerala State.

6. In the end, Mr. Appurao strongly relied on Order 16, Rule 21(1) of the Code of Civil Procedure, as supporting his contention. That rule introduced by the Madras High Court is as follows:

When a party, to a suit is required by any other party thereto to give evidence or to produce a document the provisions as to witness shall apply to him so far as applicable.

This rule also, far from supporting the contention, negatives it. By implication, this rule states that a party not being required by any other party to the cause to give evidence or to produce document, voluntarily gives evidence on his own behalf is not in the same position as any other witness. Rule 21 (2) also confirms this conclusion.

7. As for the other ground, that her husband was discharged from the mental hospital and the petitioner was attending on her husband, that statement was made more than a year ago and it cannot be said that that ground is still available. In any event, it cannot be said that the unusual circumstances under which alone the plaintiff can be exempted from appearance in Court for giving evidence are present in this case. The learned District Munsif has exercised his discretion in accordance with the law.

8. Under these circumstances, I do, not see any justification for interfering with the order of the learned District Munsif and the civil revision petition is dismissed.