

## APPELLATE CIVIL.

*Before Mr. Justice Cornish.*1934,  
August 30.MUTHIA CHETTIAR (FIRST DEFENDANT-PETITIONER),  
PETITIONER,

v.

S. R. M. A. R. RAMANATHAN CHETTIAR AND ANOTHER  
(PLAINTIFFS-RESPONDENTS), RESPONDENTS.\**Madras Civil Rules of Practice, rr. 57 and 59—Commission—  
Issue of—Proper time for making application for—Applica-  
tion made later—Effect of—Prayer for adjournment of trial  
consequent on such application—Principles governing the  
grant or refusal of.*

Under rule 57 of the Civil Rules of Practice the proper time for making an application for the issue of a commission is the date of the first hearing of the suit. Inasmuch as there is no rule preventing an application from being made subsequently, an application for the said purpose, made long after the said date but a few days before the date fixed for final hearing, should not be refused, though the party runs the risk of the commission not being completed and returned in time. But the Court should refuse the prayer for adjournment of the trial under rule 59 unless it is satisfied that the application could not or ought not to have been made at the first hearing.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Devakottai, dated the 16th day of August 1933 and made in Interlocutory Application No. 1162 of 1933 in Original Suit No. 144 of 1933.

*M. Patanjali Sastri* for petitioner.*V. Ramaswami Ayyar* and *N. G. Krishna Ayyangar* for respondents.

\* Civil Revision Petition No. 1199 of 1933.

## JUDGMENT.

MUTHIA  
CHETTIAR  
v.  
RAMANATHAN  
CHETTIAR.

The petitioner was defendant in a suit in the Devakkottai Sub-Court. His petition is for the revision of an order of the Additional Subordinate Judge dismissing his application for the issue of a commission for the examination of a witness in Burma. The suit was instituted on 19th August 1932. The date of first hearing was 24th February 1933, and on that occasion issues were framed. The case was posted for trial on 29th August 1933. On 11th August 1933, that is to say, eighteen days before the day fixed for trial, the petitioner applied to the Court to issue a commission. The learned Subordinate Judge said that the issue of a commission at that stage would mean a further adjournment of the suit indefinitely for some months. He was also of opinion that the excuse offered by the petitioner for not having made his application earlier could not be accepted.

Now it is clear under rule 57 of the Civil Rules of Practice that the proper time for making an application for a commission is the date of the first hearing of the suit. There is nothing in the rules to prevent the application from being made subsequently. But the applicant who delays his application until after the date of first hearing is liable to the risk of being refused an adjournment of the trial to enable him to have the commission returned in time for the trial.

Rule 59 says that, if an application for the issue of a commission to examine a witness is made subsequently to the first hearing and an adjournment of the final hearing is prayed, the adjournment shall not be allowed, unless it is made to appear to the Court that the application

MUTHIA  
CHETTIAR  
v.  
RAMANATHAN  
CHETTIAR.

could not or ought not to have been made at the first hearing.

The rule means this—that, if a prayer for adjournment of the trial is coupled with an application for a commission, the Court shall refuse the adjournment unless it is satisfied that the application could not or ought not to have been made at the first hearing. The rule does not say that the application for a commission must be refused in such circumstances. If an applicant thinks that the commission will be completed before the trial, there is no reason why he should ask for an adjournment.

The learned Subordinate Judge seems to have thought that, because the issue of the commission might entail an adjournment of the trial (which had not been asked for), he must refuse the commission. In so thinking he misdirected himself.

The defendant was entitled to have his commission subject to the risk of its not being completed and returned in time for the trial. The civil revision petition is allowed, and a commission will issue from the lower Court and a fresh date will be fixed for the final hearing. A reasonable time for the issue and return of the commission must be allowed. Petitioner will get costs of the civil revision petition in this Court.

G.R.

---