

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.03.2015

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THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P(PD) No.442 of 2015

and M.P.No.1 of 2015

&

C.R.P.(PD).No.443 of 2015

T.Murugesan

.. Petitioner in both CRPs

Vs

1.S.Murugan

2.R.Nagaraj

.. Respondents in both CRPs

Prayer : Civil Revision Petitions are filed under Article 227 of the Constitution of India, against the petition and docket order of the learned Principal District Judge of Krishnagiri, dated 27.01.2015 returning the petition filed under Order 18 Rule 17 C.P.C. to recall P.W.1 to mark the document and filed under Section 151 CPC to reopen the suit for marking the document already filed in Court in O.S.No.32 of 2009 without numbering.

For Petitioner : Mr.V.Nicholas

For Respondents : Mr.N.Thiyagarajan
Senior Counsel
for Mr.R.Lakshminarayanan

COMMON ORDER

These civil revision petitions have been filed against the order of the Learned Principal District Judge, Krishnagiri in unnumbered I.A.Nos. of 2015 and in O.S.No.32 of 2009.

2. The civil revision petitioner is the plaintiff in O.S.No.32 of 2009 filed against the respondents for specific performance and for permanent injunction. The petitioner has filed two applications, (i) to re-open the suit for marking documents and (ii) to re-call P.W.1 for further examination.

3. The case of the petitioner is that he entered into a sale agreement dated 07.03.2007 with the first defendant, who agreed to sell the suit property for Rs.35,00,000/- and received an advance amount of Rs.1,50,000/- and also agreed to receive the balance amount within a period of 11 months.

4. As per the agreement, the petitioner has paid a sum of Rs.5,51,000/- on 30.03.2007 for the loan amount of the first defendant to the Co-operative Bank and also obtained a receipt. The payment of Rs.5,51,000/-, was made towards part performance and on 30.03.2007, the first defendant has handed over the possession of

4.37 Acres and the same was reduced as an agreement muchalika in a Rs.2/- affixed Revenue Stamp receipt.

5. Further, case of the petitioner is that as the said agreement of possession dated 30.03.2007 was insufficiently stamped, he paid the stamp duty and penalty in Court, but, omitted to mark the document during the Chief Examination. It is further alleged by the petitioner that the first defendant has denied his signature in the agreement of possession and also, filed I.A.No.227 of 2010 for sending the receipt for opinion of an handwriting expert. The trial Court dismissed the same and the civil revision petition filed by the first defendant in CRP No.1944 of 2011 was also dismissed observing that the plaintiff has to prove his case and the attempt made by the first defendant to get expert opinion was not at all necessary however, unfortunately, the document was not marked during the examination of P.W.1. The applications were filed at the arguments stage, the trial Court returned them as not maintainable. Challenging the orders, the present civil revision petitions are filed.

6. Mr.V.Nicholas, learned counsel for the petitioner submitted that the application under Order 18 Rule 17 C.P.C. can be filed at any stage of the suit to recall any witness for the purpose of re-

examination and for marking documents and the merits of the application can be decided only after affording opportunity to the petitioner and the applications cannot be rejected as not maintainable.

7. On the other hand, Mr.Thiyagarajan, learned Senior Counsel for the respondents would contend that the petitioner is abusing the process of law; that when the first defendant wanted to send the document for expert opinion, the petitioner filed a counter stating that he is not relying on the document; that, after the entire evidence was over, when the suit was posted for arguments on 20.12.2014, the petitioner chose to file this application, which amounts to patent abuse of process of law.

8. The learned Senior counsel further contended that the application filed under Rule 17 of Order 18 could be filed only in exceptional cases to clarify the ambiguity in the evidence, which cannot be filed by a party to fill up lacuna in the case. The learned Senior Counsel relied upon the decisions reported in **(2011) 11 SCC 275 (K.K.Velusamy Vs.N.Palanisamy), and 2014 (6) CTC 670 (S.V.Matha Prasad Vs.Renuka Devi).**

9. In 2011 (11) Sec 275, the Hon'ble Supreme Court has held as follows:

"9. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it things fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (*Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate*)

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19. We may add a word of caution. The power under Sectin 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will

defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. "

10. This Division Bench of this Court in **2014 (6) CTC 670 (S.V.Matha Prasad Vs.Renuka Devi)** following the judgements of the Hon'ble Supreme Court reported in **2011 (3) CTC 422 (SC) (K.K.Velusamy Vs. N.Palanisamy)** and **2013 (1) MWN (Civil) 573 (Bagai Construction thr. Its proprietor Vs. Gupta Building, Material Store)** has held as follows;

"12.The First Respondent/ Plaintiff, did seek further cross-examination and one more document was produced in that process. Whether such permission ought to have been granted permission ought to have been granted or not is a issue no more open, as the exercise of discretion by the learned Single Judge was upheld even by the Division Bench. We, however, fail to appreciate the plea of parity on this account, i.e., because the First Respondent/Plaintiff was permitted to further cross-examination of the Appellant/Second defendant, in which process, one more document was exhibited, the Appellant/ Second Defendant should be given an opportunity to cross-examine the First Respondent/Plaintiff as PW1 qua all the documents produced by the First Respondent/Plaintiff during the cross-examination of the Appellant/Second Defendant. Each party has to prove his own case or leads his own defence. As observed by the Hon'ble Supreme Court in the aforesaid two Judgments of K.K.Velusamy v. N.Palanisamy, 2011 (3) CTC 422(SC); and Bagai Construction thr.

its Proprietor v. Gupta Building, Material Store, 2013 (1) MWN (Civil) 573 (SC), supra, the objective cannot be to fill in the lacunae and gaps in the evidence, by this exercise. It is not a case where the court has felt handicapped and needs any elucidation. These documents pertain to the Appellant/Second Defendant. They are matters of legal proceedings. The Appellant/Second Defendant has not been caught by surprise. Thus, the Appellant/Second Defendant, at this stage, cannot be permitted to cross-examine the First Respondent/Plaintiff as PW1. It is on completion of trial that belatedly the prayer was made by the Appellant/ Second Defendant. It is at a stage where even the evidence of the defendants is over and in fact, the Applications were filed post adjournment of the suit for final hearing on a date agreed to by the counsel for the parties.

13.The Appeals are, thus, completely meritless and the impugned order of the learned Single Judge is unexceptional.

11. In the case at hand, indisputably, after the entire evidence was over and when the suit stands posted for arguments, the

petitioner chose to file the application to mark the document. I am of the considered view that the application was filed with intent to fillup the lacuna in this case.

12. In the light of the decisions of the Hon'ble Supreme Court and this Court, the petitioner cannot maintain the applications. Though the trial Court could have numbered and rejected the same after affording opportunity to the petitioner, however, considering the fact and pronouncement of the Supreme Court, I am of the view that the case need not be remanded back for fresh disposal by the trial Court to observe the empty formality. Accordingly, this civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

31.03.2015

Index : Yes/No

Internet : Yes/No

sms

To

1. The learned Principal District Judge, Krishnagiri.

K.KALYANASUNDARAM,J

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