

Application No.6270 of 2014
in C.S.No.396 of 2010

S.VIMALA, J.,

This Application has been filed by D-1 to D-5 to reopen the evidence of them, which was closed on 29.11.2013, for the purpose of enabling them to adduce oral and documentary evidence.

2. The plaintiff and the first defendant are the registered Partnership Firms. Defendants 2 to 4 are the partners of the first defendant / Firm. Defendants 1 to 4 have executed a power of attorney in favour of the fifth defendant. The fifth defendant is stated to have entered into an agreement of sale with the plaintiff.

2.1. Later on, the defendants cancelled the Power of Attorney executed in favour of the fifth defendant and executed a fresh power of attorney in favour of the sixth defendant. Towards the discharge of liability, the sixth defendant has issued cheques in favour of the plaintiff.

2.2. The plaintiff has also initiated proceedings under Section 138 of the Negotiable Instruments Act against the defendants. The Plaintiff has made a claim for a sum of Rs.1 crore as against the defendants with interest.

3. In the affidavit filed in support of this Application (to reopen the evidence of defendants 1 to 5), it is stated by the fifth defendant / Applicant that the sale agreement, dated 23.09.2006 was not executed under the instructions of defendants 1 to 5; the cheques issued by the sixth defendant are stated to be not binding upon other defendants.

4. On finding that the affidavit was bereft of essential details, this Court directed the Applicant to file a better affidavit and thereafter, additional affidavit sworn in by the fifth defendant, Gunasekara Pandian, has been filed.

4.1. In paragraph 7 of the additional affidavit, it is stated that he is contesting the suit on behalf of the other petitioners / defendants 1 to 4 because of the reason that the suit property has been allotted to him under the family partition and that thus, it belonged to him; defendants 1 to 4 are stated to be just formal parties having no direct interest in the properties; the fifth defendant is stated to be the only person to let in evidence; as he was suffering from Arthritis (knee pain), he was not able to appear before the Court to give evidence, is the reason alleged.

5. This Application is opposed by the plaintiff / R-1 herein on the following grounds:-

(i) The fifth defendant filed O.A.No.5034 of 2014 to condone the delay in representing the Application to reopen the evidence on the side of the defendants. The said Application was allowed only to the extent of permitting the fifth defendant and not the other defendants.

(ii) The Power executed in favour of the fifth defendant has been cancelled and the fifth defendant, along with the other defendants, has executed the Power of Attorney in favour of the sixth defendant (Ex.P-7) and therefore, the fifth defendant cannot represent other defendants.

(iii) The Application is belated.

6. The suit itself has been filed for recovery of Rs.1 crore arising out of the Memorandum of Agreement, dated 23.03.2007, executed by the sixth defendant, the Power of Attorney, on behalf of defendants 2 to 5. Thus, the defendants are answerable to the claim of the plaintiff. For the sake of convenience, they may take the assistance of the holder of the Power of Attorney. That does not deprive their own right to give evidence in their capacity as Principals. Therefore, just because D-2 to D-4 executed a Power of Attorney in favour of the fifth

defendant their right to lead evidence cannot be curtailed. But, it is stated by the Applicant that there may not be any evidence de hors the evidence of the fifth defendant / Applicant. The learned Master shall make note of the averments made in the affidavit.

7. As submitted by the learned counsel for the respondents, there is an inordinate delay in filing this Application, after remaining silent without leading evidence for months together. Therefore, the inconvenience caused to the other side has to be compensated by imposing costs.

8. In the result, this Application is allowed, subject to the condition that: (a) the fifth defendant shall pay either by himself or on behalf of all other defendants, a sum of Rs.5,000/- (Rupees five thousand only) as costs to the plaintiff within a period of one week from today; and (b) the learned Master shall permit the examination of fifth defendant, first, and if need be, to permit examination of one more witness additionally (having regard to the statement made that other defendants have no interest in the suit property). Recording of the evidence of D-5 and D-6 shall be completed within a period of two months.

09.06.2015

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