

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.09.2016

CORAM

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

Civil Revision Petition (PD) No.957 of 2012 &
M.P.No.1 of 2012

1. Ramasamy Kounder
2. Murugan
3. Sampath
4. Gunasekar

... Petitioners

Versus

Asokan

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 13.12.2011 passed in I.A.No.529 of 2011 in O.S.No.99 of 2010 on the file of the Subordinate Judge, Kallakurichi.

For Petitioners : Mr.N.Suresh

For Respondents : Mr.P.Valliappan

ORDER

This memorandum of revision has been directed against the fair and decreetal Order dated 13.12.2011 and made in I.A.No.529 of 2011 in O.S.No.99 of 2010 on the file of the learned Subordinate Judge, Kallakurichi.

2. The revision petitioners are the defendants in the suit whereas the respondent is the plaintiff. It is manifested from the records, that the respondent seems to have filed the above suit as against the petitioners 1 to 4 seeking the relief of specific performance of contract of sale dated 09.12.2003. In so far as this suit is concerned, the defendants, who are the revision petitioners herein have filed their written statement and after framing of necessary issues, the trial Court has proceeded to record the evidence of the parties concerned and it appears from the records the witnesses P.Ws.1 to P.W.5 were examined on behalf of the plaintiff. Only at the time of examination of P.W.5, a promissory note was sought to be marked through P.W.5. But it was strenuously opposed by the revision petitioners and based on their objection, the marking of the said document was deferred.

3. Thereafter, it appears that the respondent has taken out an application in I.A.No.529 of 2011 under Order XVIII Rule 17 of CPC to recall P.W.1 only for the purpose of re-examining him in respect of the said promissory note. The petition was resisted by the revision petitioner. However, the learned trial Judge has proceeded to allow this petition with a view that no prejudice would be caused to the defendants if the petition was allowed and accordingly, the petition was allowed and the said document was ordered to be marked. Challenging the said Order dated 13.12.2011, this revision is filed.

4. Heard Mr.N.Suresh, learned counsel for the revision petitioners and Mr.Valliappan, learned counsel for the respondent.

5. In so far as this revision petition is concerned, it is the contention of the respondent/plaintiff that he had entered into an agreement of sale with the first defendant on 09.10.2003 in respect of the suit property and thereby, the first defendant had agreed to sell the property in favour of the respondent/plaintiff for a total sale consideration of Rs.5,30,000/-. On the date of agreement of sale, a sum of Rs.30,000/- was paid to the first defendant and the balance of sale consideration of Rs.5 lakhs was agreed to be paid within three months from the date of sale agreement and to have the sale executed and registered in favour of the respondent/plaintiff. It is also the case of the respondent that the first revision petitioner had approached him and requested to part with a sum of Rs.one lakh to meet out his family expenses and in respect of the balance of sale consideration, he would execute a promissory note and complete the sale transaction and accordingly, he had paid a sum of Rs.one lakh to the first defendant in the presence of witnesses and subsequently he had also executed a promissory note towards the balance of sale consideration.

6. The alleged promissory note plays a crucial role in so far as this case is

concerned. But it is revealed from the counter statement filed by the respondent that the proof affidavit of P.W.5 was filed on 16.04.2010 and in his proof affidavit, P.W.5 has stated that the said promissory note was handed over to him by the first defendant in the presence of panchayatdars and accordingly, P.W.5 came to be in possession of the said promissory note. P.W.5 has also stated in his proof affidavit that the first defendant, who is the first revision petitioner herein had got it returned immediately and handed it over to him saying that the amount to be paid at the time of execution of the document, viz., sale deed.

7. In this connection, Mr.Suresh, learned counsel for the petitioner has argued that if really, the said promissory note had come in to existence even at the time of filing of the suit, it could have been produced by the respondent/plaintiff at the time of his examination. But he had miserably failed to do so. Mr.N.Suresh has also maintained that according to the case of the respondent/plaintiff, the said promissory note was in existence even at the time of filing of the suit and despite this fact, he had miserably failed to produce the same and he had also not explained as to what prevented him from marking the document at the time of his examination. Even the proof affidavit filed by P.W.5 itself is not sufficient to show the existence of the promissory note and that P.W.5 is not a competent person to speak about the existence of promissory note.

8. While Mr.P.Valliappan has submitted that unfortunately, the said promissory note was not able to be marked at the time of examination of the respondent/plaintiff, while he was as examined as P.W.1 and nothing was suppressed in this case as the same had been stated in the plaint filed by the respondent/plaintiff.

9. Mr.Suresh, in support of his arguments has relied upon the decision of the apex Court reported in

2011 (3) CTC 422 – (K.K.Velusamy Vs N.Palanisamy)

wherein a Division Bench of the Apex Court has held as under :

“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 thinks 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, 2009 (4) SCC 410]. Order 18, Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18, Rule 17 is primarily a provision enabling the Court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the Court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.”

10. On the other hand, Mr.P.Valliappan, learned counsel for the respondent, while advancing his arguments has placed reliance upon the following decisions in support of his contentions.

- 1. Bipin Shanthilal Panchal Vs. State of Gujarat and another – 2001 (3) SCC 1**
- 2. Mary Kamalam Vs. Duraiswamy – 2010 (1) MWN (Civil) 832**
- 3. P.S.Pandian Vs. Annai Velanganni Films represented by its Partner**

Mrs.Savithri Devaraj – 2002 (3) CTC 92

4. K.Subramanian Vs. S.Balashanmugam – 2004 (4) CTC 17

11. In the decision first cited supra, the Apex Court with regard to the provisions of Sections 5 and 3 of the Indian Evidence Act 1972, with regard to the admissibility of evidence has observed that the procedure to be followed by the trial Court at evidence taking stage, when any objection is raised regarding admissibility of any material or any item of oral evidence, a detailed order allowing or rejecting the objection and then giving time by suspending trial to enable the parties concerned to move the higher court against such interlocutory order. In this connection, the Apex Court has held that the above practice was not proper, instead, the Court should make notice of the said objection and decide it at the last stage of final judgment.

12. In the decision second cited supra, the learned Judge of this Court has held that an opportunity to a party to recall any witness for the purpose of examination, cross-examination or re-examination not only governed by Order 18 Rule 17 Code of the Civil Procedure, but also under Section 151 of Code of Civil Procedure.

13. In the decision third cited supra, the learned Judge of this Court has

observed that no prejudice would be caused to the other party and on the other hand his mere denial of such permission would deprive the plaintiff from substantiating his case. The power conferred to Court under Order 18 Rule 17 of Code of the Civil Procedure should be exercised by the court liberally to meet the ends of justice.

14. In the decision fourth cited supra, this Court has observed that a plain reading of the provision of Order 18 Rule 17 to recall witness for further examination, would go to show that the witness may be recalled at any stage and the Court alone can put questions to witnesses and law does not prohibit party to recall himself or recall any other witness to elucidate the matter in issue.

15. Applying the principles laid down by the Apex Court in the decision reported in **K.K.Velusamy Vs. N.Palanisamy, - 2011 (3) CTC 422**, this Court finds that the power of the Court, of course, is discretionary, it should be used sparingly in appropriate cases to enable the Court to clarify any doubts it may have in regard to the evidence let in by the parties and the said power is not entitled to be used to fill-up the omissions in the evidence of a witness, who has already been examined.

16. This principle can very well be applied to the present case on hand

because, already P.W.1 was examined both in chief as well in cross. But he has not offered any explanation as to why the said document was not marked at the time of his examination. Secondly, there is no explanation as to how P.W.5 came to be in possession of the promissory note. The promissory note was said to have been executed by the respondent/plaintiff in favour of the first revision petitioner/first defendant and it is alleged by P.W.5 in his proof affidavit that the first defendant had handed over the said promissory note to him. This fact cannot be accepted and it is presumed that the plaintiff is trying to fill-up the lacunae, which was omitted to be filled up at the earliest point of time and this Court, therefore, finds that this revision petition deserves to be allowed.

17. Accordingly, this Civil Revision Petition is allowed and the impugned Order dated 13.12.2011 is set aside and the petition in I.A.No.529 of 2011 is dismissed. However, there shall be no order as to cost. Consequently, the connected miscellaneous petition is closed.

23.09.2016

Index:yes/no
Internet:yes

vrc

To

The Subordinate Judge,
(Senior Division),
Kallakurichi.

T.MATHIVANAN, J.,

vrc

C.R.P.(PD) No.957 of 2012

23.09.2016