

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07.11.2017

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THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

C.R.P.(PD) No.3269 and 3270 of 2017
and C.M.P.No.15268 of 2017

M.Nirmala

... Petitioner/Plaintiff in both CRPs.

Vs

1 K.Rajagopal
2 Kanniyammal
3 Lakshmi

... Respondents/Defendants in both CRPs

PRAYER IN C.R.P.(PD) No.3269 of 2017:

This Civil Revision Petition is filed under Article 227 of Constitution of India against the order dated 05.06.2017 made in I.A.No.5208 of 2017 in O.S.No.4428 of 2016 on the file of the XV Assistant Judge, City Civil Court, Chennai.

PRAYER IN C.R.P.(PD) No.3270 of 2017:

This Civil Revision Petition is filed under Article 227 of Constitution of India against the order dated 05.06.2017 made in I.A.No.5209 of 2017 in O.S.No.4428 of 2016 on the file of the XV Assistant Judge, City Civil Court, Chennai.

For Petitioner	: Mr.G.Ranganathan
For Respondents	: Mr.N.Damodaran

COMMON ORDER

Since these two Civil revision petitions arise out of a common order passed by the learned XV Assistant Judge, City Civil Court, Chennai in the applications filed by the revision petitioner, common order is being passed.

2 According to the petitioner, the petitioner has filed a suit in O.S.No.4428 of 2016 for declaration that the settlement deed executed by the first defendant in favour of the defendants 2 and 3 is illegal, null and void and for permanent injunction. In the aforesaid suit, the petitioner has filed an application in I.A.No.5208 of 2017 under Section 151 C.P.C. to reopen the case. The application in I.A.No.5209 of 2017 has been filed by the petitioner under Section XVI Rule 1 Subrule 2 and Sec.151 C.P.C. to summon the defendants 2 and 3 and examine them as witnesses on the side of plaintiff or as court witness.

3 According to the petitioner, as the defendants 1 to 3 endorsed no oral evidence, the plaintiff wants to examine the defendants 2 and 3 as witnesses enabling the petitioner to cross examine them. Counter affidavit has been filed by the respondents/defendants. According to the petitioner,

without appreciating the contention of the petitioner, the trial Court erroneously dismissed the said applications by stating that a party cannot compel the opposite party to give evidence as witness or direct him to give evidence and the plaintiff should prove her own case. Challenging the said order, the petitioner has invoked Article 227 of the Constitution of India.

4 Per contra, the learned counsel for the respondents would submit that the court below has rightly dismissed the applications. The defendants cannot be compelled to give evidence as witnesses in the suit. Therefore, the order passed by the court below does not warrant interference by this court.

5 Heard the learned counsel for the petitioner and the learned counsel for the respondents and perused the materials on record.

6 The issue involved in the present Civil revision petitions is that whether the party can compel opposite party to depose evidence before the court as witness in the suit ?.

7 The learned counsel for the petitioner drawn the attention of

this court to a judgment of this Court in **P.MOHAN VS. G.CHANDRASEKARAN** reported in **(2003)1 M.L.J. 762** wherein it was held as under:

"11. The learned counsel for the revision petitioner contended that the Court below committed illegality in conducting the sale on 21.6.1999 by selling the property for Rs.2,00,200/- when it was worth Rupees thirty nine lakhs for the purpose of realising the decree amount of Rs.72,394/-. The auction purchaser/respondent herein due to fraud played by him on the Court was able to purchase an extent of 31,220 sq.ft. for a sum of Rs.2,00,200/-, whereas the respondent's sister Tmt.Dhanalakshmi, her husband-Naga Pillai and their son Srinivasan had dealt with the property measuring 26,235 sq.ft. and the market value comes to Rs.34,52,200/-. The Court below went wrong in dismissing the E.A.by holding that it cannot reopen the earlier proceedings in violation of the orders passed by this Court. The presumption is wrong because no order was passed by this Court on merit, but only on the reason that all the parties were not brought on record.

19. It is therefore clear from the aforesaid decision and discussion that the Court below ought to have allowed the application filed by the revision petitioner to examine the three persons referred to in the execution application in the interests of justice because it would throw light as to what price they have conveyed the property even prior to the Court auction. But, at the

same time in the Court auction had been sold for a lesser price namely Rs. 2,00,200/-. Simply because the registered copies of the sale deeds are filed into the Court it could be proper proof and for proving the document it is just and necessary that these three persons have to be summoned and evidence has to be recorded so that an opportunity can be given to the revision petitioner to establish the plea of fraud and the Court can come to the conclusion whether the property was sold for a song or for a reasonable price and other facts. Hence, the points are answered accordingly."

8. In the above case, the contention of the revision petitioner is that auction purchaser/respondent due to fraud played by him on the Court was able to purchase an extent 31,220 sq.ft. for a sum of Rs.2,00,200/- as against the market value of Rs.39 lakhs. Hence, the petitioner therein has filed an application to examine three persons referred to in the Execution application, who according to the petitioner, had dealt with the property measuring 26,235 sq.ft. and the market value comes to Rs.34,52,200/-. Whereas in the case in hand, the plaintiff has filed two applications to reopen the case and to summon the defendants 2 and 3 to examine them as witnesses in the suit. Therefore, the aforesaid judgment will not apply to the facts of the case in hand.

9 The learned counsel for the respondent relied upon the decision of this Court in **V.L.RAMANATHAN VS. SALEM NAGARATHAR SANGAM** (2014-4 L.W. 174) wherein this Court held as under:

"7. The decision of this Court relied on by the learned counsel for the respondent reported in (2003) 1 MLJ 556 (V.P.Subramaniam v. P.Saraswathi), in which, it reads as follows:-

"13. Coming to the contention of the learned counsel for the petitioner that the petitioner has got every right to file the petitions of present nature seeking a direction to examine the respondent as a witness, this Court is of the view that no party to the proceedings can be compelled to give evidence in a Court of law at the instance of the other. It is always open to the Court to draw an adverse inference by the conduct of the party, who keeps away from the witness box. When that be the principle, it is not known as to how a defendant in the suit can be permitted to be examined as a plaintiff witness. Virtually, it may amount to compel the defendant to appear as a witness of the plaintiff and depose against her. If not, she will be subjected to unnecessary questions, which may not be warranted in the nature of the proceedings."

9. The learned counsel appearing for the revision petitioner at the end of his submissions reported that if

the above said alleged witness i.e., 4th respondent / 4th defendant is willing to give evidence voluntarily, this Court may be permitted to examine the above said witness. This Court is of the view that it is not proper to permit the revision petitioner to examine the above said witness. If the above said witness voluntarily willing to depose in favour of the revision petitioner, the concerned trial court may decide and this Court is not given any opinion on the above said prayer of the revision petitioner.”

10 Further, the learned counsel for the respondent relied upon the recent judgment of this Court in **THE MANAGING DIRECTOR, M/S.V.V.D. & SONS P. LTD. VS. MISS KAJAL AGGARWAL [2017-2 L.W. 46]** wherein this Court relying upon the earlier decision of this Court in **KALIAPERUMAL VS. PANKAJAVALLI AND TWO OTHERS (1999-1 L.W. 660)** and 3 other judgments, considered the Scope of Order XVI Rule 7(A) (1) of C.P.C. and held as under:

“13. Admittedly, the instant suit is filed on the basis of the alleged breach of contract, which is said to have been entered into between the parties herein. The absence of the plaintiff to prove the alleged breach, may be a ground to the other side to insist upon the Court to draw an adverse inference against the respondent/original plaintiff. When the position of law is such, the applicant/original defendant cannot compel

the original plaintiff to get herself examined, since the evidence on her side is already over. It is prerogative right of the original plaintiff to examine any witnesses on her side. It is the choice of the original plaintiff as to whom to be examined as witness. Hence, the contention of the applicant/original defendant that the original

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plaintiff to be summoned to give evidence cannot be sustained at this stage.”

11 Therefore, it is clear from the aforesaid judgments that a party in a suit cannot compel the opposite party or direct them to depose before the court as witness in the suit. In the absence of evidence of defendants, the plaintiff can raise ground in the trial court to draw adverse inference against the defendants. In the facts and circumstances of the case and the decisions cited supra, there is no error or illegality in the order passed by the court below.

12 In the result, both the Civil revision petitions fail and stand dismissed accordingly. However, there is no order as to cost. Consequently, connected miscellaneous petition is closed.

7.11.2017

Index: Yes/No
Internet:Yes/No
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To

The XV Assistant Judge, City Civil Court, Chennai.

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