

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.07.2017

CORAM

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

CRP(PD)No.95 of 2017

and

C.M.P.No.456 of 2017

K.Padma

.. Petitioner

..Vs..

1.V.Selvamani

2.M.Ettiyammal

..Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the docket order dated 29.11.2016 made in I.A.No.1106 of 2016 in O.S.No.3 of 2013 on the file of the Principal District Court, Chengalpattu.

For Petitioner : Mr.G.Magesh Kumar

For R2 : Mr.K.Chandrasekaran

ORDER

Civil Revision Petition is filed to set aside the docket order dated 29.11.2016 made in I.A.No.1106 of 2016 in O.S.No.3 of 2013 on the file of the Principal District Court, Chengalpattu.

2. The petitioner is the plaintiff and the respondents are the defendants 2 and 3 in O.S.No.3 of 2013. The petitioner filed suit for three declarations, mandatory injunction and permanent injunction. The second respondent filed written statement on 01.09.2014 and first respondent filed written statement on 27.10.2014 and are contesting the suit. The petitioner let in evidence and closed her side. The first respondent was examined as D.W.1 by filing proof affidavit on 21.09.2016. The suit was posted for cross-examination of D.W.1 to 23.09.2016. The petitioner cross-examined D.W.1 on 23.09.2016 in part and the suit was adjourned to 30.09.2016 for further cross-examination of D.W.1. The second respondent, who is the second defendant in the suit, on verification, found that her cross-examination was closed on 23.09.2016 itself without giving any opportunity to her for cross-examining D.W.1. She filed the present I.A.No.1106 of 2016 to reopen the evidence of D.W.1 for the purpose of cross-examination on her behalf.

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3. According to the second respondent, her advocate was held up in High Court on 23.09.2016 and he instructed one of the local advocates to represent the case, when it reaches. The said advocate could not appear, when the case was called and cross-examination on behalf of the second respondent was closed.

According to her, being a party defendant, she is entitled to cross-examine D.W.1.

4. The petitioner filed counter affidavit and opposed the said application. According to the petitioner, the second respondent being the second defendant will put leading questions and fill up the lacuna and will try to undo the omissions and admissions of D.W.1. The second respondent is sailing with the first respondent and she is not adverse party and therefore, she is not entitled to cross-examine D.W.1. This Court directed the trial Court to dispose the suit on time frame and application for reopen is filed only to drag on the proceedings.

5. The learned Judge considering the materials on record, allowed the application by the order dated 29.11.2016 on the ground that evidentiary value of answers obtained by cross-examination of D.W.1 by second respondent has to be decided by the Court in the final disposal of the suit and to avoid further delay of trial, allowed the application and directed the second respondent to pay a sum of Rs.2,000/- as costs to the District Legal Services Authority on or before 08.12.2016.

6. Against the order dated 29.11.2016 made in I.A.No.1106 of 2016, the present Civil Revision Petition is filed by the petitioner.

7. Learned counsel for the petitioner submitted that the respondents are not adverse parties to each other and they are sailing together. As per Section 138 of Indian Evidence Act, only adverse party can cross-examine the other parties. The learned Judge having accepted the contention of the petitioner that the application is filed only to fill up lacuna erred in allowing the application, as though no prejudice will be caused to the petitioner.

8. The learned counsel for the petitioner relied on the following judgments in support of his contention:

(i) **(2008) 3 MLJ 1068 (Vijaya v. Saraswathi and others)**, in para-8, it is held as follows:

“8. As pointed out earlier, if there is any conflicting interest between the petitioner herein, who is the fourth defendant in O.S.No.4 of 2005 and P.W.1, the plaintiff in O.S.No.7 of 2006, an opportunity should have been given to the petitioner herein to cross-examine P.W.1. But, since it is demonstrated that their interest is common and that there is no conflicting interest, the question of permitting the petitioner herein to cross-examine P.W.1 does not arise in any manner.”

(ii) **AIR 2002 Calcutta 235 (State of W.B., Rama Devi**

and others), in para-13, it is held as follows:

"13. Admittedly, Mr. Das's client is not an adversary to the plaintiff, so he cannot examine witness of the plaintiff. In the scheme of the Evidence Act there is no provision for friendly cross-examination by the pro forma defendant. The proforma defendant, in my view has to play a role akin to a witness and it cannot have any stake in the result of the hearing of the suit. Its right by any stretch of imagination will not be affected in any manner. Mr. Sharma has appropriately placed judgment of Gujarat High Court. This judgment of Justice Ahmadi (as His Lordship then was) in paragraph 3 has explained amongst other that, in order to cross-examination a witness it must be shown that the party seeking cross-examination is an 'adverse party'. Merely because a party is shown as a defendant in the cause title of the plaintiff, that party cannot be styled as an adverse party, unless it is further shown that the party is an contesting party in the sense that he disputes the case put up by the plaintiff in the plaint. If a party accepts the plaintiffs case, there is no contest between the plaintiff and that party and such a defendant cannot be styled as an 'adverse party' and would, therefore, not be entitled to cross examine the plaintiff. I respectfully adopt and accept observation of Justice Ahmadi, I hold in this case Mr. Das's client has no right to

examine either adversely or friendly the witness of the plaintiff, nor his client has any right to bring his own witness and cross-examine adversely the witness which might be produced by the defendant, as his client has put forward any case by filing written statement. "

He contended that the second respondent is not entitled to cross-examine D.W.1 as per Section 138 of Indian Evidence Act.

(iii) **AIR 1981 Gujarat 190 (Hussens Hasanali Pulavwala v. Sobbirbhai Hasanalli Pulavwala and others)**, para-2 and 7 are extracted hereunder:

"2. Section 137 of the Evidence Act defines 'Examination-in-Chief' as examination of a witness by the party who calls him for giving evidence. The examination of that witness by the adverse party is called 'cross-examination'. The examination of that witness subsequent to the cross-examination, by the Party who called him is called 're-examination'. Section 138 then lays down the order of examination and provides that a witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, and then (if the Party calling him so desires) re-examined. The examination in-chief and cross-examination must relate to relevant facts. The cross-examination need not be confined to facts to which the witness testified on his examination-in-chief. The re-examination shall be directed to the

explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse Party may further cross-examine upon that matter. Section 142 next provides that leading question must not, if objected to by the adverse party, be asked in an examination-in-chief or in re-examination except with the permission of the Court. According to Section 143, leading questions may however be asked in cross-examination. According to Section 154, it is open to the Court to permit the person who calls a witness to put any questions to him which might be not in cross-examination by the adverse party. Section 155 next provides that the credit of a witness may be impeached by the adverse party, or, with the consent of the Court by the party who calls him in the manner set out in clauses (1) to (4) thereof.

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7. In view of the above pronouncements of the Supreme Court, it is obvious that this Court will not be entitled to interfere with the order Passed by the trial Court in exercise of its jurisdiction under Section 115 of the Code unless it is shown that the trial Court has committed a jurisdictional error in passing the impugned order. Now, the impugned order passed by the learned trial Judge is, in the circumstances of the case, just and proper because defendants Nos. 4 and 5 not being adverse parties

had no right to cross-examine the plaintiff. To redress a wrong, in the absence of any provision to the contrary in the Code, the Court had inherent jurisdiction under Section 151 of the Code to pass the, impugned order. I therefore, refuse to entertain this revision application. ”

Learned counsel submitted that even if the second respondent was already permitted to cross-examine D.W.1 pending C.R.P. by exercising inherent powers, the said cross-examination can be deleted.

9. Per contra, learned counsel for the respondents submitted that all the defendants have right to cross-examine the witness produced by the plaintiff as well as witness produced by the co-defendant. In case of witness produced by the co-defendant order of cross-examination is that co-defendant must cross-examine such witness before plaintiff cross-examine the witness. In the present case, the suit was posted for cross-examination of second respondent on 23.09.2016. On that day, the second respondent could not cross-examine D.W.1. The learned Judge ought to have given an opportunity to the second respondent to cross-examine D.W.1 instead of allowing the petitioner to cross-examine on that day itself. By this procedure, the right of the second respondent is taken away.

Section 138 of Indian Evidence Act and judgments relied on by the learned counsel for the petitioner are not applicable to the facts of the present case. The second respondent has already cross-examined D.W.1 and therefore, prayed for dismissal of the civil revision petition.

10. Heard the learned counsel for the petitioner and respondents, perused the materials on record and judgments relied on by the learned counsel for the petitioner.

11. The main contention of the counsel for the petitioner is that second respondent is not an adverse party to the first respondent. They have common interest and are sailing together. In the circumstances, as per Section 138 of Indian Evidence Act, second respondent has no right to cross-examine D.W.1. This contention is untenable. It is well settled that all the parties to the suit can cross-examine the witness produced by other party. The order of cross-examination by the party in the suit is the criteria. When one of the defendants is supporting the case of the plaintiff and other defendant opposing the claim, the defendant who is supporting the plaintiff must cross-examine the plaintiff witness before other defendants cross-examine the said witness. Similarly, when defendants have same interest, the witness produced by one of the defendants must be cross-examined by the defendant before such witness is cross-

12. In the present case, after chief-examination of D.W.1, the suit was posted for cross-examination on behalf of the second respondent. On that day, there was no representation on behalf of the second respondent/second defendant and the learned Judge closed the cross-examination on behalf of the second respondent and allowed the petitioner to cross-examine D.W.1.

13. From the averments made in the affidavit filed in support of the application to reopen, it is seen that the chief-examination of D.W.1 was done on 21.09.2016 and suit was posted to 23.09.2016 for cross-examination by the second respondent. Taking into consideration that the second respondent was absent on 23.09.2016 on the first occasion, the learned Judge ought to have given an opportunity to the second respondent to cross-examine D.W.1 by adjourning the suit by any short date instead of allowing the petitioner to cross-examine D.W.1 on 23.09.2016 itself. The second respondent has filed the application within short time for reopening and it cannot be said that intention of the second respondent is to drag on the proceedings. In view of the above, the judgments relied on by the learned counsel for the petitioner are not applicable to the facts of the present case. The learned Judge has rightly held that evidentiary value of cross-examination by the second respondent has to be decided by the Court in the final disposal of the

suit. The learned Judge in order to avoid delay in conclusion of trial, has allowed the application and imposed costs of Rs.2,000/-. In the circumstances, I find there is no irregularity or illegality in the order passed by the learned Judge warranting interference by this Court. It is admitted by both the parties that second respondent cross-examined D.W.1.

14. This Court on the earlier occasion directed the learned Judge to dispose the suit within a time frame fixed by this Court. Considering the said fact, the learned Judge is directed to dispose the suit in O.S.No.3 of 2013 within a period of three months from the date of receipt of a copy of this order.

15. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

14.07.2017

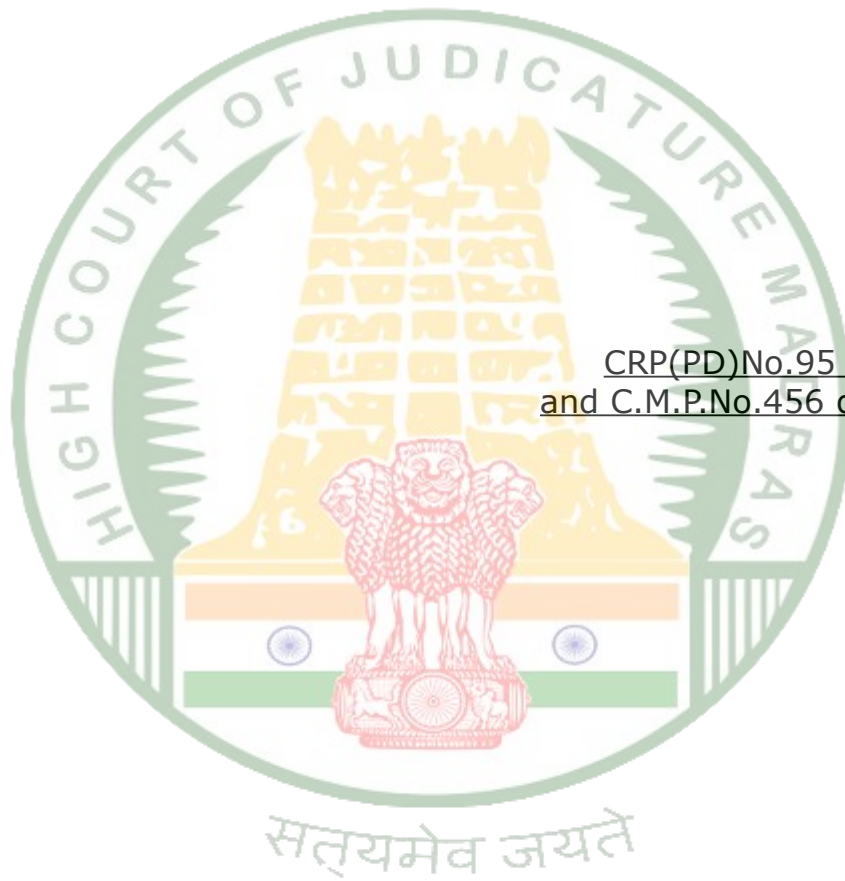
Index :Yes / No
Speaking Order/Non Speaking Order

To

The Principal District Court
Chengalpattu.

V.M.VELUMANI,J.

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