

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.01.2017

Coram

The Honourable MRS.JUSTICE PUSHPA SATHYANARAYANA

C.R.P.PD.No.57 of 2015
and
M.P.No.1 of 2015

1. K.K.Paramasivam
2. P.Pankajam

... Petitioners

vs.

Om Prakash Parival
rep.by his Power of Attorney
R.Thangavel

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 06.11.2014 passed by the learned II Additional District Judge, Erode in I.A.No.132 of 2014 in O.S.No.294 of 2010.

For Petitioners : Mr.T.Murugamanickam
For Respondent : Mr.N.Manokaran

ORDER

The revision is preferred by the defendants in the suit, aggrieved by the order passed by the Court below in disallowing the application filed by them under Order 16 Rule 14 of the Code of Civil Procedure to examine the power of attorney of the

respondent/plaintiff.

2. For convenience sake, the parties are referred to here under according to their litigative status and ranking in the suit.

3. The brief facts of the case is as follows:

(i) The suit in O.S.No.294 of 2010 has been filed by the plaintiff for specific performance and the plaintiff is represented through his power of attorney R.Thangavelu vide registered power deed dated 06.02.2008. Though the plaintiff was represented by his power of attorney the principal himself has appeared as PW1. It is the case of the defendants that prior to the filing of the suit, the power of attorney has given two complaints and the same was registered for certain cognizable offences. The defendants apprehend that the case put forth by the power of attorney is inter se contrary to the evidence given by PW1, the principal/plaintiff. Therefore, to get over the anomaly, the principal has kept away the power of attorney from the witness box and examined himself. When PW1 was confronted in the cross examination about Exs.B1 to B5, he had pleaded ignorance. Therefore, the defendants have taken out this application under Order XIV Rule 14 of CPC to summon the power

agent to give evidence.

(ii) The said application was resisted by the plaintiff stating that there is no anomaly in the pleadings, evidence and the records filed before the Court. When the principal himself had appeared before the Court and had given evidence to prove his case, there is no necessity for the power agent to be examined. Normally, where the power agent who may not have personal knowledge about the case and if examined on behalf of the principal, such objection would be raised. On the contrary in the case on hand, when the principal himself has appeared before the Court and has given evidence to prove his case, the examination of the power agent is unnecessary. In the suit for specific performance only the agreement based on which the suit is laid is important. The other documents viz., Exs. B1 to B5, which are the complaints and lawyer notices given have nothing to do with the issue involved in the main case. Therefore, prayed for the dismissal of the application.

(iii) The learned trial Judge who tried the application dismissed the same, as summoning of the power agent when the principal himself has been examined, is impermissible. Aggrieved by the said order, the present revision has been filed by the defendants.

4. Heard both sides.

5. The contention of the learned counsel for the revision petitioners/defendants is that only if the power agent is cross examined, the material contradictions of the plaintiff's case with that of his power agent will be elicited. When certain transactions prior to the litigation are said to have been performed by the power agent, the principal is trying to protect the power agent, without letting him into the witness box and therefore, contended that the power agent may be summoned to depose as witness.

6. Per contra, the learned counsel for the respondent/plaintiff contended that it is a suit for specific performance. The First Information Report referred to by the defendants are nothing to do with the suit transactions and they are independent transactions. The suit being one for specific performance, it is open to the defendants to raise any legitimate plea available to them under law to defend the suit of the plaintiff, including the plea as to whether the sale agreement is true, valid and genuine. Therefore, the entire question only depends upon the pleadings of the parties, the nature of the suit and the nature of the evidence let in by them.

7. The learned counsel for the respondent/plaintiff by relying on paragraph No.16, in the decision of the Hon'ble Supreme Court reported in ***AIR 1999 SC 1441 [Vidhyadhar vs. Manik Rao and another]*** would submit that only if the party does not appear into the witness box, a presumption would arise that he has not projected a true case. However, in the case on hand, the principal himself has entered into the witness box to examine himself as PW1 and therefore, there is no need for the Court to summon the power agent. The relevant portion is as follows:

"16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts.

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 .. The Allahabad High Court in [Arjun Singh v. Virender Nath and Anr.](#) held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in [Bhagwan Dass v. Bhishan Chand and Ors.](#), drew a presumption under [Section 114](#) of the Evidence Act against a party who did not enter into the witness box."

He would further submit that notwithstanding the fact that the power agent is representing the case of the principal, the principal can

examine himself.

8. However, the learned counsel for the revision petitioners/defendants would contend that the defendants cannot summon the power agent of the principal as defendants' witness. Therefore, it is necessary for them to seek permission of this Court to summon the power agent as Court witness, so that the principal and the defendant get equal opportunity to cross examine the power agent.

9. This contention is seriously opposed by the learned counsel for the respondent/plaintiff on the ground that the plaintiff need not cross examine his own witness unless during the proceeding, his witness had turned hostile. In the absence of any such incident, the defendants cannot be given any indulgence to examine the power agent of the principal.

10. It is also contended by the learned counsel for the respondent/plaintiff that the application is filed under Order XVI Rule 14 of CPC, which is the power exclusively given only to the Court to summon the witness, who are strangers to the suit on its own accord. The power agent of the plaintiff is not a stranger but he is only an

agent on behalf of the plaintiff. Hence, he may not be called as a stranger to the suit.

11. In this regard, the learned counsel for the respondent/plaintiff placed reliance on the decision of the Kerala High Court reported in ***AIR 2000 Kerala 369 [Jortin Antony and others vs. Padmanabha Dasa Marthanda Varma and others]***. The relevant paragraphs are extracted as under:

"13. It is clear from Rule 14 of Order 16 [of the Code](#) as amended that the Court has the power when it thinks it necessary to examine a party to the suit or to compel a party to the suit to give evidence so as to enable the Court to take a decision satisfactory to its conscience. But this power available to the Court and made specifically available by the amendment brought to Rule 14 cannot be confused with the right of a party to call upon an opposite party to give evidence on his behalf. Clearly, when a party to the suit does not mount the box to speak in support of his case' in the pleading, that can be a circumstance which would enable the Court to accept the case of the opposite party. That can also be a circumstance where the Court can draw an adverse inference against the party who has withheld himself from the witness-box. But those consequences arising out of non-appearance of a party as a witness cannot confer a right on a party to the suit to cite his opponent as his own witness. The power available to the Court under Rule 14 of Order 16 cannot be confused with a right to a party to the suit.

Whereas Rule 7 enables the Court to call on any person whether a party to the suit or a non-party to the suit who is present in Court to give evidence and provides the consequences for the failure of that person to give evidence, Rule 14 also enables the Court to summon a person to give evidence even if he is not present in Court whether he be a party or only a witness of its own accord and in furtherance of its quest to give a just decision in the cause. As regards a party to the suit even this power was not available until the year 1976 and this power becomes available only after the Insertion of the amendment of 1976. All that Rule 21 says is that in case where the Court thinks that it is necessary to direct a party to give evidence, the procedure regarding a witness could be applied by the Court regarding that party as well. As recognised by [Shamsuddin, J. In Mary Francis v. Kesavan](#) (1993) 1 Ker LT 4 the Court is not powerless in summoning an opposite party if there are suitable reasons and that summoning could be in exercise of its power under Rule 14 of Order 16 [of the Code](#).

14.....

15. We are thus of the view that a party to the suit does not have a right as such to summon the opposite party to give evidence. It is really left to the Court, possibly after the evidence of all the witnesses made available is completed, to consider whether the examination of one of the parties who has not come before Court, is necessary and in that context if found necessary, to compel that party to give evidence in exercise of its jurisdiction under Rule 14 of Order 16 [of the Code](#). A plaintiff like the one in the present case, cannot as a matter of course include the defendant in his schedule of witnesses and as of right seek the issuance of summons to the defendant for being

examined as a witness on his own behalf. "

12. In view of the above principles enunciated in the said decision, the application filed by the defendants under order XVI Rule 14 of the Code of Civil Procedure was rightly dismissed by the Court below, warranting no interference in this revision.

13. Accordingly, the civil revision petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

06.01.2017

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Index: Yes/No
Internet: yes
To

1. The II Additional District Judge, Erode

PUSHPA SATHYANARAYANA.J

vj2

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