

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.02.2017

PRONOUNCED ON 27..2..2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

Application No.456 of 2017

in C.S.No.635 of 2011

The Managing Director

M/s. V.V.D. & Sons P.Ltd

No.6/18, Casa Major Road

Egmore, Chennai -600 008

.. Applicant /defendant

vs.

Miss.Kajal Aggarwal

No.16/4, Nagin Mahal

82, Veer Nariman Road

Church Gate, Mumbai – 400 020

.. Respondent/Plaintiff

Application filed under Order XVI Rule 7 (A) (1) of CPC read with Order XIV Rule 8 of Original Side Rules to summon the plaintiff Ms.Kajal Aggarwal to tender evidence before this Court.

For applicant : Mr.P.V.S.Giridhar

For respondent : Mr.V.Manohar

ORDER

The captioned application has been filed by the original defendant to summon the plaintiff to adduce evidence before the Court.

2. It is the case of the applicant /original defendant that an agreement was entered into between the respondent/original plaintiff, who is a movie actor, and the original defendant to use the original plaintiff's profile for a period of 12 months emanated from 29.12.2008 to 28.12.2009 in the advertisement materials. When the contract was in existence, the respondent/original plaintiff filed the instant suit seeking compensation of Rs.2.5 crores and also for an injunction restraining the applicant/original defendant from using or publicising or projecting or promoting or

advertising the materials with the presence of the original plaintiff's profile or her presence in any forms on the ground that the defendant had breached the aforesaid agreement. According to the applicant/ original defendant, they have not committed any breach of contract and hence, the respondent/original plaintiff has no right to restrain the defendant from exhibiting or using the ad film in any manner, as the term of copyright is 60 years, as per Section 26 of the Copyright Act. It is stated by the applicant/original defendant that the original plaintiff is not interested in the present litigation and she has been pressurized by others to do so. Therefore, it is necessary to summon her to give evidence to verify the crucial facts.

3. Denying the allegations, a counter affidavit has been filed by the respondent/original plaintiff stating that the present application is not maintainable. It is stated by the original plaintiff that she authorised her father, who acted as the Manager, for the purpose of scrutinising the veracity of the averments and

allegations set forth in the plaint. It is also stated that in order to harass her, the original defendant has taken the present application, that too, at the stage of argument. According to the original plaintiff, no party can be compelled to adduce evidence. The allegation that she is not interested in litigation and she was pressurized by others on ulterior motive are all nothing but wild imagination without any substances. The provisions of copyright have no relevance to the purpose set forth in the application. Hence, the original plaintiff prayed for dismissal of the application.

4. The learned counsel for the applicant/original defendant submitted that the original plaintiff having filed the suit for damages of a sum of Rs.2.5 crores alleging that the original defendant had committed breach of agreement, which was entered into between them for using her profile uptill 29.12.2009 in the advertisement materials, which include her image on the product, advertising brochure and other promotional materials

and also an add film in which she acted, has not come forward to adduce evidence before the Court. It is submitted by the learned counsel for the original defendant that original plaintiff's father alone was examined as P.W.1. Hence, it is the submission of the learned counsel for the applicant/original defendant that cross examination of the plaintiff is necessary for completion of the adjudication of the issue that has arisen in the present suit. In support of his arguments, the learned counsel for the applicant/original defendant has placed reliance on AIR 1967 KANT 37 **(SYED YASIN V. SYED SHAHA MOHD.HUSSAIN)** and AIR 1973 AP 309 **(GOPALA KRISHNA MURTHY V. B.RAMACHANDER RAO AND ORS.)**

5. Whereas it is the contention of the learned counsel for the respondent/ original plaintiff that the father of the plaintiff was examined as P.W.1 and he was also cross examined by the defendant and that the cross examination was completed in the year 2016. It is also the contention of the learned counsel for

the respondent/original plaintiff that on the side of the defendant, D.W.1 was examined and he was also cross examined by the plaintiff. At this stage, the present application has been filed by the original defendant for summoning the original plaintiff to adduce evidence before the Court only to harass her. Since the original defendant has already examined D.W.1 and he was also cross examined as early as on 30.11.2016, now he cannot compel the original plaintiff to adduce evidence. It is submitted that merely because the respondent / original plaintiff is a Cine actor, this application is filed to issue summon to adduce evidence before the Court. Since the original plaintiff's side evidence is already over, the learned counsel for the respondent/original plaintiff prayed for dismissal of the application. In support of his argument, the learned counsel for the original plaintiff relied upon the judgments reported in 1999 – 1- L.W. 660 (**KALIAPERUMAL V. PANKAJAVALLI AND TWO OTHERS**) and 2005 (5) CTC 773 (**MINOR ARUMUGAM @ LOGESH AND ANOTHER V. STATE BANK OF INDIA**)

6. In the light of the above submission, now the only point for consideration is as to whether the original defendant can summon the original plaintiff to adduce evidence, when the entire evidence on the side of the original plaintiff is already over.

7. The suit has been filed to award damages for a sum of Rs.2,50,00,000/- (Rupees Two Crores and Fifty Lakhs only) for the alleged breach of contract by the original plaintiff. On the side of the original plaintiff, her father was examined as P.W.1 and Exs.P1 to P8 were marked besides M.O.1. Original Plaintiff's side evidence was over as early as on 10.3.2016. On the side of the defendants, D.W.1 was examined. D.W.1 was also cross examined on 30.11.2016.

8. In these circumstances, the present application has been filed under Order XVI Rule 7 (A)(1) of CPC read with Order XIV Rule 8 of Original Side Rules. Order XVI CPC deals with

summoning and attendance of witnesses. Order XVI Rule 8 CPC deals with the service of summons. Order XVI nowhere compels the other side to examine witnesses. In this regard, the learned counsel for the applicant/original defendant has placed reliance on the judgment in the case of **SYED YASIN V. SYED SHAHA MOHD. HUSSAIN** cited *supra* wherein the Hon`ble High Court of Mysore by relying upon Rules 14 and 20 of Order XVI, C.P.C., has held as follows:

".. .. 10. Rules 14 and 20 of Order XVI, CPC deal with the powers of the court to summon Court witness. Rule 14 states:

"Subject to the provisions of this Code as to the attendance and appearance and to any Law for the time being in force, where the court at any time thinks it necessary to examine any person other than a party to the suit, and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be

*summoned as a witness to give evidence or to produce any document in his possession * * * **" Rule 20 of the said Order states

" Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court, may pronounce judgment against him or make such order in relation to the suit as it thinks fit."

Rule 20 gives power to the Court, when it so requires, to direct any party to a suit who is present in Court, to give evidence or to produce any document; If the party without lawful excuse, refuses to obey the direction of the court, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit. From this it is

apparent that the court can require the examination of a party if he is present in court. But the same power has not been given to the Court to compel the examination of a party if he is not present in Court. The Legislature has thought fit to impose certain limitations on the powers of the Court in summoning and examining as Court witness a party to the suit. If the intention of the Legislature was to impose any limitations on the power of one party in summoning and examining the other party as a witness, as stated earlier the legislature would have stated so, as it has done in Rule 14 of Order XVI of the Code of Civil Procedure.

11. That it is possible for one party to examine the other party as a witness, is made clear by Rule 21 of Order XVI which reads as follows:

" Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply

to him so far as they are applicable."

It is obvious that this rule does not refer to evidence given by a party to the suit on IMS own behalf as a witness. The words used in the rule are "Where any party to a suit is required to give evidence." The words required to give evidence" denote, not voluntary act of giving evidence by a party in his own favour, but required to do so by the other side or the Court, This rule makes the provisions of the Code as to the witness applicable as far as possible, to parties who are required to give evidence or produce documents.

In any opinion, this rule clearly indicates that one party to the suit can examine the other party as his witness or require him to produce documents. Instead of there being any prohibition in the Code as regards the examination of one party to the suit by the other, this rule clearly enables one party to the

suit to require the other party to give evidence. It is also interesting note to that the Madras, Andhra Pradesh and Kerala High Courts have introduced the following amendment to the said Rule, which is Rule 21(1):

"Where a party in a suit is required by any other party there to give evidence or to produce documents, the provisions as to witnesses shall apply to him as far as applicable."

Sub-rule (2) of Rule 21 is not material for our purpose. The amendment introduced by these High Courts support the conclusion that I have come to that under the Code, one party to a suit can summon the other party thereto to give evidence on his behalf or to produce any document."

In the above judgment, the High Court of Mysore held that one party to a suit can summon the other party to given evidence.

9. Similarly, in the case of **GOPALA KRISHNA MURTHY V. B.RAMACHANDER RAO AND OTHERS** cited supra, the High Court of Andhra Pradesh has held as follows:

“.. ..9. A reading of the above authorities leads me to lay down the following propositions.

- (1) Under Order 16, Rule 1, Civil P. C. It is the right of the party at any stage of the suit to make an application to the Court seeking that summons be issued to a witness either to give evidence or to produce documents.*
- (2) The Court is not entitled to refuse such an application on the ground that it might cause delay in the trial of the suit on the adjourned date of the suit.*
- (3) If the summons is not served by the adjourned date of the suit the party who filed the application to issue the summons would take the risk.*
- (4) If an application for an adjournment is made at the instance of the party who applied under Order 16, Rule 1, Civil P.C,*

it is for the Court to consider whether or not an adjournment should be granted.

(5) The Court may not refuse to order an application under Order 16, Rule 1, Civil P.C. on the ground that the evidence, if produced, may not be of any help to the applicant.

(6) Though Order 16, Rule 1, Civil P.C. does not in terms impose any restrictions on the Court, the Court in the exercise of its inherent jurisdiction may refuse to issue summons in an application made under O 16, R. 1, Civil P.C. in those cases where it is satisfied that the application filed was not bona fide or was vexatious or granting the application would result in an abuse of process of the Court. Except in these three above contingencies the application must almost always be ordered. .. “

10. In the case of **KALIAPERUMAL V. PANKAJAVALLI AND 2 OTHERS** cited *supra*, this Court relying upon the judgments of Bombay High Court, Mysore High Court, Kerala High Court and Allahabad High Court has held that as follows:

"4. Plaintiff wants the opposite party to be examined as their witness. According to me such a practice has been deprecated by all Courts and I asked the learned counsel for the petitioner how can he compel the second defendant to be examined as a witness for the plaintiff. Counsel only submitted that under Order 16, Rule 21, of Code of Civil Procedure, all procedures regarding witness is applicable to a party also and therefore a party also could be examined as a witness.

5. I do not think that the submission made by the learned counsel for the petitioner could be accepted. In A.I.R. 1956 Bombay 251 (pirgonda v. Vishwanath), His Lordship followed the decision of Privy Council reported in 31 Allahabad 116 at page 122, wherein it was held thus,

"Mr.Datar has also relied upon Circular No. 161 of the Circulars issued by this Court in

*the Civil Manual. This circular has invited the attention of the subordinate Judges to the observations of the Privy Council in -'Kishori Lal v.Chunni Lal'*³¹ *All 116 at p.122 (PC) (A). Their Lordships of the Privy Council have referred to the practice which sometimes seemed to obtain in some of the Courts in India of calling the party's opponent as witness and they have observed that this practice is highly objectionable. 'Such a practice', said their Lordships, ought never to be permitted in the result to embarrass judicial investigation as it is sometimes allowed to be done".*

6. In *A.I.R. 1959 Mysore 194 (Mallangowda v.Gavisiddangowda)*, it is held thus,

"Practice of calling the opposite party as a witness should not be countenanced as it is not in the interests of justice".

7. In 1963 KLT 537 (*Narayana Pillai v. Kalyani Ammal*), it is held that the practice of party causing his opponent to be summoned as witness was disapproved in rather strong terms by the Lordships of Privy Council and that as a matter of right, the party cannot have the opposite party as witness.

8. The above decision was followed by Kerala High Court in a case between *Muhammed Kunju v. Shahabudeen* reported in 1969 K.L.T. 170, wherein it is held thus,

"The practice of a party causing his opponent to be summoned as a witness has to be disapproved.

As a matter of right, a party cannot have the opposite party examined as a witness".

9. In view of the settled legal position, I do not think that the petitioner can compel the second defendant to be examined as a witness

for him.”

11. This Court in the case of **MINOR ARUMUGAM @ LOGESH AND ANOTHER V. STATE BANK OF INDIA**, cited supra, has held as follows:

“17. In civil proceedings, there may be a case, where a party supports the case of the plaintiff, but fails to come as co-plaintiff. In order to avoid certain technicalities, it is not uncommon that the supporting party is shown as defendant(s). In that case, the party so impleaded as defendant, cannot be termed as opposite party or opponent as the case may be. In this view, when the party is desirous of obtaining summon to a party to the suit, he can very well invoke Order 16, Rule 21 r/w Rule 1(2), stating the purpose, for which witness is proposed to be summoned or examined. In that case, as observed by Prabha Sridevan,J., when very good reasons

are shown, the court should exercise its discretion in favour of the party seeking permission and there should not be total denial, since no such bar is contemplated, under any of the above said provisions.

18. The submission of the learned counsel for the respondents that calling opposite party as witness placing reliance upon the decisions in Mallangowda v. Gavisiddangowda, AIR 1959 Mys. 194 and Leelavathi k. v. Maheswari Sakthi Ganesan, 2002 (3) CTC 551, cannot be accepted in all the cases, though it is well applicable to certain cases, as discussed by me supra. In the first decision, a Division bench of Mysore High Court has held:

"Practice of calling the opposite party as a witness should not be countenanced as it is not in the interests of justice."

and in the second decision, it is said:

"It is true that if a party refuses to voluntarily give evidence, he cannot be compelled to do so at the instance of the opposite party, as the Court is always at liberty to draw an inference against the party, who refuses to give evidence voluntarily."

In both the cases, it appears, the parties sought to be summoned as witnesses by other side were the real opponents and therefore, compelling such parties to give evidence on behalf of other party, is not desirable judicially, which view I should also endorse. But if the parties sought to be summoned are not the real opponents, then there may be relaxation for very good reasons. Thus analysing the provisions contained in Order 16, Rule 21, C.P.C. and also the decisions brought to my notice, I conclude that in certain cases, a party to a suit can invoke Order 16, Rule 21, C.P.C, but not always, as of

right and it all depends upon the purpose for which he is summoned and the stand taken by the party in the suit. At the risk of repetition, it could be said, if the party, who is desirous of examining another party as witness, has no conflicting interest, whereas the party to be summoned is supporting the other party, who is seeking the aid of Order 16, Rule 21, C.P.C, the court could very well issue summons and not in the case where there is conflicting interest or no defence at all, as in this case.

19. Viewing the case from all possible

angles, either on facts or on law, the revision petitioners are not entitled to seek the permission of the court to issue summons for the examination of defendants 2 & 3 only because of the reason, defendants 2 & 3 have cross examined D.W.I, therefore the revision

petitioners also should cross examine them, which is not the purport of Order 16, Rule 21, C.P.C. Hence the revision is devoid of merits and liable to be rejected. “

12. In ***Minor Arumugam's case (cited supra)***, this Court, after considering the various judgments, has clearly held that it is not open to compel the other party to adduce evidence. Having regard to the said judgment of this Court *and the facts and circumstances of the instant case, this Court is of the view that the judgments of other High Courts, as relied on by the learned counsel for the original defendant in this aspect, are not applicable to the case on hand. Therefore, the applicant/original defendant cannot compel the original plaintiff to adduce evidence, particularly, when the evidence on her side is already over and the defendant also examined D.W.1.*

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

14. That apart, the rival contentions raised in the suit shall be decided only after a full fledged trial in the suit. The burden of proof always lies on the party who raised such rival contentions, to prove their case based on the evidence and documents available on record. Once the evidence is over, it is not open to

the original defendant to compel the original plaintiff to adduce evidence.

15. Having regard to the judgment of this Court in *Minor Arumugam's case* (cited supra) and also considering the facts and circumstances of this case, I am of the view that summoning the original plaintiff to adduce evidence is unwarranted at this stage.

The captioned application is, accordingly, dismissed.

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Index: Yes/No

Internet : Yes/No

N.SATHISH KUMAR, J

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Pre-Delivery order in
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