

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 17.08.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(PD)No.1950 of 2012
and
M.P.No.1 of 2012**

Dhanalakshmi

.. Petitioner

Vs.

Karuppayee

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order and decretal order dated 11.04.2012 made in I.A.No.296 of 2012 in I.A.No.892 of 2011 in O.S.No.453 of 2011, on the file of the learned Principal District Munsif Court, Namakkal.

For Petitioner : Mr.T.Dhanyakumar

For Respondent :Mr.N.Manokaran

ORDER

The petitioner has filed this Civil Revision Petition to allow the C.R.P and to set aside the order and decretal order dated 11.04.2012 made in I.A.No.892 of 2011 in O.S.No.453 of 2011 on the file of Principal District Munsif Court, Namakkal.

2.The Plaintiff is the revision petitioner. The plaintiff/petitioner filed the suit for permanent injunction. According to the revision petitioner, she has purchased the suit property from her husband Palanichamy under a registered sale deed dated 13.12.1994. The suit properties are situated with the registration department of Sub-Registrar, Paramathi, however, the plaintiff and her husband registered the sale deed at Parassala Sub-Register Office at Kerala State. Thereafter she is in absolute possession and enjoyment over the suit property. Since the respondent herein who has no right whatsoever with respect of the suit property attempted to interfere with the possession of the revision petitioner, she filed the above suit for permanent injunction.

3.It is the case of the respondent that he entered into an agreement of sale with the husband of the plaintiff with respect of the

suit schedule property on 18.05.1994. Since the plaintiff's husband failed to execute the sale deed in favour of the defendant, she filed a suit for specific performance against the said Palanisamy in O.S.No.523 of 1994 and the same was decreed on 21.01.1997. Against which the plaintiff's husband filed appeal in A.S.No.62 of 1997 and the same was dismissed on 28.11.1997. As against the same, a second appeal was filed in S.A.No.706 of 1998 and the same was also dismissed on 27.08.2008 by this Court. Thereafter the respondent herein filed E.P.No.57 of 2011 to execute the sale deed.

4.While so, the revision petitioner filed the present suit for permanent injunction against the respondent at the instigation of her husband Palanichamy as if she purchased the suit property, but no consideration was passed and thus the said sale deed is not valid in law.

5.Further, the plaintiff along with her suit has filed I.A.No.892 of 2011 for interim injunction and obtained an order of interim injunction. The contention of the respondent herein is that in the said interim injunction application, the plaintiff / revision petitioner has suppressed so many things, especially where the sale deed was executed and what

is the relationship of her vendor. The intention of the plaintiff and her husband is that the respondent herein shall not be allowed to execute the decree in the E.P filed by her. Therefore, in order to elucidate the real fact to the Court, the respondent / defendant took out an application under Order.19, Rule 1 and 2 CPC in I.A.No.292 of 2012 to permit the defendant to cross examine the plaintiff on her affidavit filed under order 39, rule 1 and 2 C.P.C.

6.The plaintiff filed counter affidavit to the said I.A and resisted the case of the respondent herein. Upon considering the arguments of both parties, the learned trial judge allowed the said I.A. by order dated 11.04.2012 and thereby permitted the defendant to cross examine the plaintiff. The said order is under challenge in this civil revision.

7.I heard Mr.T.Dhanyakumar, learned counsel appearing for the petitioner and Mr.N.Manokaran, learned counsel appearing for the respondent and perused the entire records.

8.The learned counsel for the petitioner would submit that the learned trial judge failed to consider the scope of Order.19, Rule 1 and

2 CPC. The Order 19, Rule 1 and 2 of CPC states as follows:

"Order - XIX

1.Power to order any point to be proved by affidavit. - Any Court may at the time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such condition as the Court thinks reasonable:

Provided that where it appears to the Court that entire party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2.Power to order attendance of deponent for cross-examination. - (1) upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs. Para 5 of the said

judgment.”

The Order 19, Rule 1 and 2 of CPC which would apply only to the suit and not interlocutory application. It is further contended that the power to call the deponent for cross examination can be exercised carefully and the same can't be exercised arbitrarily. He relied on the judgment of this Hon'ble Court reported in **2013 (1) MWN (Civil) 425**, wherein this Hon'ble Court has held that affidavit filed in support of an application for condonation of delay cannot be treated as evidence and as such order 19, Rule 2 of CPC cannot invoked.

9.Per contra, the learned counsel for the respondent would submit that the plaintiff has filed the interim injunction application supported by an affidavit wherein she has not disclosed the real facts, which necessitated the defendant to file the present I.A.No.296 of 2012 under Order 19, Rule 1 and 2 CPC and the same was rightly allowed by the trial judge. The power of the Court to cross examine the deponent is untrammelled and the defendant is entitled to cross examine the deponent. In support of his contention, he relies on a decision of our High Court reported in **2008 (4) TLNJ 2187 (Civil)** wherein it is held that the deponent of an affidavit can be called for cross examination, when an affidavit has been filed in support of an

application under Order 39, Rule 1 CPC. Therefore the learned counsel for the respondent contended that the trial Court has exercised its judicious discretion having satisfied summoning of the deponent for cross examination is necessary in the interest of justice.

10. At this juncture, it is useful to refer Order 19, Rule 1 and 2 CPC which is extracted hereunder:

Order - XIX

1. Power to order any point to be proved by affidavit. - Any Court may at the time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such condition as the Court thinks reasonable:

Provided that where it appears to the Court that entire party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

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may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs. Para 5 of the said judgment.

11. In this context it is useful to refer the judgment of this Court reported in **2015 (1) CTC 27** in the case of **V. Baby v. Sekar & another**, wherein it is held that the affidavit filed in support of the application is only a statement of fact which itself is not an evidence. The applicant if he chooses, has to prove such statement of fact by letting in evidence and such evidence may be by proof affidavit, as contemplated under Order 19, Rule 1 CPC, only when such proof affidavit is filed, the other side can seek for cross examination of the deponent of such proof affidavit. In another judgment on the same point reported in **2011 (1) MWN (Civil) 981** also useful to decide the issue.

12. Now this Court will have to consider the scope of Order 19, Rule 2 of CPC in the light of the definition of evidence as contemplated

under Section 3 of Indian Evidence Act, 1872, Which reads as follows:-

“Evidence means and includes

(1)All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry,

Such statements are called oral evidence”.

13.The reading of Order 19, Rule 1 CPC is very clear that if the Court is directed that any particular fact may be proved by affidavit then the affidavit filed on the direction of Court shall be treated as evidence instead of directing the attendance of deponent. However, if the other party wants to cross examine the deponent of such affidavit in terms of Order 19, Rule 2 he can make application and the Court can order attendance of deponent for cross examination. The Proviso further makes it clear that if it appears to the Court that such witness himself can be produced before the Court an order shall not be made authorizing the evidence of such witness to be given by affidavit. Therefore the scope of Order 19, Rule 2 is very clear from the language the direction by the Court to prove the fact by affidavit cannot be given when the witness himself can be produced and in that case the appearance of the witness is must.

14. Further the cross examination of witness, who filed affidavit as per the direction of Court under Order 19, Rule 1 CPC is not automatic right vested with the other party but he must make an application seeking permission for cross examination as contemplated in Rule 2 of Order 19 CPC. Therefore the affidavit filed in support of an interlocutory application cannot be treated as an affidavit mentioned in the above order and it cannot be treated as evidence. To say in other words, the rights of opposite party to cross examine the deponent of affidavit filed as evidence is automatic and the same does not require any specific application seeking permission from him as it flows from the provisions of Evidence Act. But the cross examination provided in the above order is the discretionary power of Court which will arise only if the Court directed to prove the fact by affidavit invoking its power under Order 19, Rule 1 of CPC. As such the same cannot be applied to the affidavit filed in support of an application. Thus this Court concurs with the views expressed in the judgments reported in **2013 (1) MWN (Civil) 425, 2015 (1) CTC 27 and 2011 (1) MWN (Civil) 981.**

15. Therefore, I am unable to accept the contention of the

learned counsel for the respondent that the deponent can be cross examined for the affidavit filed by her under Order 39, Rule 1 CPC by invoking the provision of Order 19, Rule 2 CPC.

16.In view of the same, I have no hesitation to allow this Civil Revision Petition. The learned trial Judge without considering the settled legal proportion of law has erroneously ordered to cross examine the plaintiff on her affidavit filed under Order 39, Rule 1 and 2 C.P.C. and the same is liable to be set aside and accordingly it is set aside.

17.In the result, this Civil Revision Petition stands allowed by setting aside the order passed in I.A.No.296 of 2012 in I.A.No.892 of 2011 in O.S.No.453 of 2011, dated 11.04.2012, on the file of the learned Principal District Munsif Court, Namakkal. Connected miscellaneous petition is closed. No costs.

Note:Issue order copy on 26.10.2017
Index:Yes
Speaking Order

vs
To
The Principal District Munsif Court,
Namakkal.

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17.08.2017

M.V.MURALIDARAN, J.

VS



Pre-Delivery order made in
CRP(PD)No.1950 of 2012
and
M.P.No.1 of 2012

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