



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.06.2017
(Reserved on 19.06.2017)

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CORAM1 :

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

CRP(PD) (MD) No.212 of 2017
and
CMP(MD) Nos.940 and 4726 of 2017

T.G.Bavani Shankar Iyer ... Petitioner / Petitioner

vs.

1) P.Duraisamy
2) N.Ramadass @ N.Ramalingam
3) R.Sivakumar @ R.Sivasankar
4) A.Kavitha
5) S.Krithika
6) V.Gowri
7) M.Subramaniam
8) T.A.Punithan
9) N.Satheeshkumar

... Respondents / Respondents

Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 02.01.2017 made in I.A.No.454/2016 in O.S.No.50 of 2009 on the file of learned I Additional District Judge (PCR), Trichy.

For Petitioner : Mr.Veerakathiravan, Senior Counsel for
M/S Veera Associates
For R1 : Ms.J.Anandhavalli

ORDER

The point involved in this revision petition is whether one of the defendants in the suit can seek the leave of the Court to summon a co-defendant who remained ex parte to be examined as court witness?

2.The facts leading to this revision petition are as under:-

The revision petitioner is the 7th defendant in the suit filed for specific performance based on a sale agreement dated 07.03.2007 purported to have been executed in favour of the plaintiff by the 6th defendant as power of attorney of defendants 1 to 5. The suit is contested by the defendants 1 to 5 and 7. Whereas, the 6th defendant and 8th defendant have remained ex parte.



3. According to the written statement of the defendants 1 to 5, the power of attorney was given to the 6th defendant by way of security for their borrowings from the 6th defendant. On 19.06.2007, the power of attorney was cancelled. The suit sale agreement is an antedated document based on which the suit is filed in collusion with 6th defendant.

4. The 7th defendant who is the revision petitioner herein in his written statement has sought for dismissal of the suit on the ground of suppression of material facts and for approaching the Court with unclean hands. The property originally owned by defendants 1 to 5. The alleged agreement with 6th defendant is false, baseless and denied. The alleged agreement deed is a false, fabricated document created by the plaintiff in collusion with the 6th defendant. The plaintiff is only a name lender to the 6th defendant.

5. According to the 7th defendant, the power of the attorney dated 24.05.2004 executed by defendants 1 to 5 in favour of 6th defendant was later cancelled on 19.06.2007, therefore, the alleged sale agreement between plaintiff and 6th defendant on 07.03.2007 is a concocted document. Whereas, he entered into an agreement for sale on 24.11.2008 with one T.A. Punithan who was the power of attorney of 1st defendant arrayed as 8th defendant in this suit. The defendants 1 to 5 had executed a Written Consent Deed dated 05.11.2011 in favour of the 7th defendant acknowledging and confirming the sale agreement. Subsequently, the said Punithan started acting against the interest of his principals namely, defendants 1 to 5. So, the defendants 1 to 4 directly executed a sale deed on 30.11.2011 in favour of the 7th defendant. Since the 5th defendant was not in the town at that point of time, the sale deed in respect of her share is yet to be conveyed to this defendant.

6. The additional written statement also filed by the 7th defendant claiming absolute ownership of the property based on the sale deed executed by the title holders/defendants 1 to 4 directly on 30.11.2011 and the entire sale consideration paid.

7. The Trial Court has framed issues based on the pleadings and taken up the suit for trial. On behalf of the plaintiff, he was examined as PW1 and two other witnesses were examined. At that juncture, the 7th defendant has filed a petition under Order 16 Rule 14 of CPC to summon the 6th defendant to examine him as court witness. The Trial Court has dismissed the petition. The reason for the dismissal is extracted below:-

'This Court is of the view that the petitioner/7th defendant cannot invoke the provision under Order 16 Rule 14 of CPC seeking this court to exercise its power to



witness. Such a summon should be on its own motion and not on application by the parties to the suit. Even otherwise, the Trial Court after considering the petition moved by the 7th defendant has concluded that it is not necessary to summon 6th defendant who has remained *exparte*. When there is no error, illegality or perversity in the order of the Trial Court, revision petition under Article 227 of the Constitution is not maintainable.

11.The counsels to buttress their respective arguments, referred to the following citations rendered by the Courts touching upon the issue.

11.1.In **Appavoo Asary vs. Sornammal Fernandez and another** reported in **1933 The Law Weekly page 868**, in an application filed by the plaintiff under Order 3 Rule 1 of CPC to examine one of the defendants as plaintiff, the Court held as under:-

'No Court of law would be justified in ordering a party to appear in Court on an application put in under Order 3 Rule 1 of the Civil Procedure Code except for very good reasons. Where one party desires the presence of the opposite party in Court for the purpose of examining him as a witness, the proper procedure to adopt is the one under Order 16 and not the one under the proviso to Order 3 Rule 1 of the Code.'

11.2.In **Pitchai vs. Natarajan and another** reported in **(2000) 2 MLJ 482**, the Madras High Court considering the judgment of Andhra Pradesh High Court rendered in **P.S.Chetty vs. K.E.Reddy** reported in (1988) A.L.T 279 held as follows:-

'From the above decision it is clear that if circumstance exist after scanning entire evidence, if court feels summons have to be issued to a witness it has got power though application is filed by one of the parties to the suit. The application is considered as reminder to the court.'

11.3.In **Jortin Antony vs. Padmanabha Dasa Marthanda Varma** reported in **AIR 2000 Kerala 369**, the Division Bench of the Kerala High Court while considering the application filed by the plaintiff to summon the opposite party as a witness to be examined on his side has held as follows:-

'5.Until the amendment of Rule 14 by the Code of Civil Procedure (Amendment) Act, 1976, the power of the Court under Rule 14 of Order XVI of the Code did not extend to insisting on a party to the suit, being examined. The power was only to examine any person other than a party to the suit and to summon that party and proceed in terms of Rule 15 of the Code. Only by virtue of the amendment of the Code in the year 1976, the power of the Court was enlarged to include a power to summon also a party to the suit to give evidence. But we find



that there was no amendment to Rule 7, 20 or 21 of Order XVI of the Code.

6. Thus going by Order XVI of the Code either before or after the amendment of the same by the Amendment Act of 1976, a party to the suit has not been conferred any specific right to summon the opposite party as a witness to be examined on his side. But the power was available to the Court under Rule 7 to direct a party who was present in Court to be examined. Until the amendment of Rule 14 by the Amendment Act of 1976 the Court did not have the power to direct a party to the suit to be examined as a witness unless of course the conditions of Rule 7 were satisfied. But by virtue of the amendment of the year 1976 the Court was conferred the power to direct a party to the suit also to be summoned for giving evidence if it felt that it was necessary. Here again, the 1976 amendment did not introduce any provision conferring a right on a party to the suit to summon his opponent for being examined as a witness on his own behalf."

11.3.1. The above judgment of the Kerala High Court also traces the history of the legislation and the reason to incorporate Rule 14 to Order 16 in the Code by way of Amendment Act 104/1976. This judgment clearly gives a bird's-eye view of the right of the parties to summon any other party to the proceedings to give evidence. The Kerala High Court in the said judgment while concluding has held as under:-

"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."

The above view expressed by the Division Bench in my opinion almost gives quietus to the point involved in this revision petition.

12.4. In **K.C. Palanisamy vs. M. Chinnasamy and 16 others** reported in **2002 (4) CTC 222**, when the application filed by the election petitioner to summon the Returning Officer initially arrayed as 17th respondent but deleted later, to examine him as court witness, the Madras High Court held as follows:-

"It would appear therefore that in the absence of any prohibition contained in the law, the Court has the power to summon a court witness if it thinks that the ends of justice require or that the case before it needs



that kind of evidence. It must be remembered that an election petition is not an action at law or a suit in equity. It is a special proceeding. The law even requires that an election petitioner should not be allowed to withdraw an election petition which he has once made and that the election petition may be continued by another person, so long as another person is available.''

12.5. In **Minor Arumugam @ Logesh and another vs. State Bank of India** reported in **2005 (5) CTC 773**, it has been held as follows:-

'8. Order 16, Rule 21, C.P.C. reads:

"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."

which is in accordance with the rule substituted by this Court under amendment, which reads:

"When a party to a suit is required by any other party thereto to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as applicable."

9. Mere reading of the above Sub-rule gives an impression, that even a party to a suit can be summoned, if he is required to give evidence or to produce document. In that case, what is the procedure to be followed is also given, which says the provisions as to witnesses shall apply.

10. Order 16, Rule 1, C.P.C. gives guideline to the Court, how the witnesses should be summoned for their attendance to give evidence. Sub-Rule 2 to Rule 1 of Order 16, C.P.C. reads:

"A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned."

The rule does not say, it is an automatic or for mere asking, without reason and it is evident, that there must be a reason, not only from the reading of Sub-rule (2), but also by the reading of Sub-rule 3. In Sub-rule 2, when the party applies to the Court, he must state 'the purpose' for which the witnesses are proposed to be summoned or examined. If reasons are assigned, then it is the duty of the Court, for the reasons to be recorded, to permit the application to call the witnesses either by summoning through Court or otherwise, thereby making it clear that a party desirous of obtaining any summons, for the attendance of any person which should include a party to the suit, also should assign reasons viz., the purpose. If the purpose is not stated, then the Court is competent to deny the demand, refuse to issue summons,



which cannot be questioned. In this context, we have to see, what is purpose of summoning defendants 2 & 3 by defendants 4 & 5.'

12.6. In **V.K.Periasamy @ Perianna Gounder vs. D.Rajan** reported in **2001 (3) CTC 20**, considering the facts of the case, the Court has held as follows:-

'8. Therefore, it is apparent that the contest is only between the petitioner and the Respondent. It is also relevant to note the provisions of Order 18, Rule 2, C.P.C. The parties before the court therefore have a right to adduce evidence on their behalf. In fact, where there are several defendants and some of them support the case of the plaintiff, it has been held that the court cannot shut out their evidence and they are entitled to adduce evidence in their turn as a matter of right. Of course, the procedural formality requires that the order in which the evidence is to be taken is that first, the plaintiff and those defendants who support his case must address the court and call their evidence and then, the other party, i.e. the other defendants should address the court. In this case, the first defendant cannot be strictly called the other party, because he has consented to the right of the plaintiff and it is also the case of the respondent that he alone is challenging the right of the petitioner.'

13. The position of law declared by courts in respect of summoning witnesses, can be capsulated in the following lines.

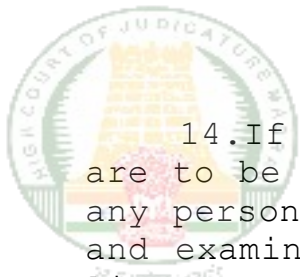
(i) The parties to the suit at the first instance entitled to examine witnesses on their behalf except those who are arrayed as parties to the proceedings.

(ii) If any party to the suit is required by any other party thereto to give evidence, he can do so under Order 16 Rule 21 CPC (as amended by the Madras High Court). While exercising the said power, the provisions as to witnesses shall apply.

(iii) Court under Order 16 Rule 14 can suo motu summon any person including party to the proceedings. There is no legal bar for any party to the proceedings to seek the indulgence of the Court to invoke its power under Order 16 Rule 14 of CPC. Such application has to be considered as reminder to the Court.

(iv) However, if the Court does not invoke its power under Order 16 Rule 14 on his own (suo motu), then the stage of requesting the Court by the parties to remind the Court to exercise the power under Order 16 Rule 14 shall arise only after parties complete the examination of their witnesses and neither of the party summon the said witness to give evidence.

It is the prerogative of the Court to refuse or entertain the request as the Court deems fit.



14.If Order 16 Rule 1, Order 16 Rule 14 and Order 16 Rule 21 are to be read harmoniously. If so read, it will make clear that any person either party to the proceedings or not can be summoned and examined, provided he is a necessary witness relevant to the lis.

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15.In the present case, the revision petitioner has filed petition under Order 16 Rule 14 of CPC before he mounting the witness box. The procedure of examining witnesses is clearly narrated by Hon'ble Mrs.Justice Prabha Srideven in V.K.Periasamy @ Perianna Gounder's case(cited supra).

16.In this case, there are several defendants. As of now, only D1 and D2 are examined. Only after closing the defendants side evidence and if 6th defendant is not examined as witness, the question whether he is necessary witness will arise. At that point of time, either the Court itself may exercise the power conferred under Order 16 Rule 14 or it is open to the parties to exercise the right under Order 16 Rule 21 of CPC(As amended by Madras High Court). If good reasons are shown the Court should exercise its discretion in favour of the party seeking permission.

17.In the light of the above legal position, this Court finds no error or illegality in the order of the Court below dismissing the petition filed by the revision petitioner.

Hence, this Civil Revision Petition is dismissed. No costs. The interim order already granted is vacated. Connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (P&A)

/True copy/

Sub Assistant Registrar

To

The I Additional District Judge (PCR),
Trichy.

+1 CC to M/s.VEERA ASSOCIATES, Advocate, SR No. 62128.

+1 CC to M/s.J.ANANDHAVALLI, Advocate, SR No. 62098

NBI

PSM/JC/SAR1/07.07.2017/8P/4C

Pre delivery order made in
CRP(PD) (MD) No.212 of 2017
27.06.2017