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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.01.2018

PRONOUNCED ON : 28.04.2018

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP (PD) (MD) Nos.1495 and 1496 of 2017

and

CMP (MD) Nos.8010 & 10011 of 2017 in C.R.P. (MD) No.1495 of 2017

1) R.Karpaganathan

2) A.Saroja

3) J.Kasthuri

... Petitioners in both CRPs /
Petitioners / Plaintiffs 2, 5 & 6

Vs.

1) Prabha Appasamy

2) Sitha Panickar

3) Vijayan Jones

4) Navaneetham

5) Chandra

6) Menaga

7) Adhilakshmi

8) Janagiraman

9) Kalavathi

10) Nandagopal

11) B.Ganesan (court guardian) ... Respondents in both CRPs /
Respondents / Defendants 4, 7, 13, 16 to 23

COMMON PRAYER: Petitions filed under Article 227 of the Constitution of India, against the fair and executable order, dated 05.07.2017, passed in I.A.Nos.210 and 211 of 2017 in O.S.No.17 of 1992 by the learned District Munsif cum Judicial Magistrate, Kodaikanal.

For Petitioners : Mr.J.Barathan
in both

For respondents 1 to 3 : Mr.I.Sam Jegan
in both

COMMON ORDER

These Civil Revision Petitions have been filed against the order of the District Munsif cum Judicial Magistrate, Kodaikanal, dated 05.07.2017, in O.S.No.17 of 1992, seeking the petitions filed for reopening the evidence of DW2 and recalling DW2 for cross examination on the side of the

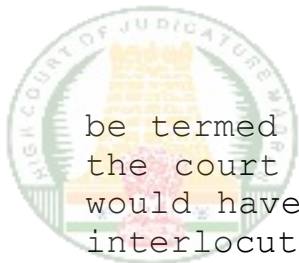
petitioners / plaintiffs.

2.0. Learned counsel for the petitioners would submit that the suit was filed for redemption and recovery of possession. Originally, the suit was filed by Munusamy Naidu as power agent of three plaintiffs namely, Karpaganathan, Krishnamoorthy and Kannammal. Later, Munusamy Naidu started acting against the plaintiffs. Hence, a transpose application in I.A.No.243 of 1993 was filed to transpose Munusamy Naidu as 11th defendant in the suit which was allowed on 27.07.1993. After the demise of Kannammal, the plaintiffs 5 and 6 namely, Saroja and Kasthuri were impleaded as legal representatives of Kannammal, by order dated 23.12.1994 passed in I.A.No.256 of 1994. Later, the plaintiff Krishnamoorthy acted against the other plaintiffs. Hence, he was transposed as 12th defendant as per the order, dated 23.12.1994, passed in I.A.No.257 of 1994. Pending suit, Munusamy Naidu died. However, mistakenly, his legal representatives were added as plaintiffs 7 to 15 instead of adding them as defendants. To rectify the said mistake, the petitioners filed I.A.No.210 of 2013 to transpose the legal representatives of Munusamy Naidu as defendants which was allowed on 21.02.2014. Without challenging the order, dated 21.02.2014, passed in I.A.No.210 of 2013, the legal representatives of Munusamy Naidu filed another transposition application in I.A.No.273 of 2015 to transpose them back as plaintiffs which was allowed on 05.12.2015.

2.1 Learned counsel for the petitioners would further submit that aggrieved by the said order, the petitioners filed CRP.No.760 of 2016 challenging the order, dated 05.12.2015 and this Court admitted the said revision and granted interim stay. Later on, the said revision petition was allowed on 12.01.2017. In the meanwhile respondents 1 to 3/ Prabha Appasamy, Sitha Panickar and Vijayan Jones filed CRP.No.1152 of 2014 for early disposal of the suit and the same was allowed on 17.06.2014. Subsequently, trial had began and the petitioners / plaintiffs examined witnesses and their side evidence was closed. The legal representatives of Munusamy Naidu (D16 to D22) took time to let in evidence between 25.04.2017 and 01.06.2017 and the same was granted by the Court. On 01.06.2017, proof affidavit of DW2 was filed and on 08.06.2017, Exs.B19 to B28 were marked by the defendants. Thereafter, the case was adjourned from 08.06.2017 to 13.06.2017 and 15.06.2017, on which date DW2 was absent and therefore, the case was posted to 19.06.2017, on that date also, DW2 was absent. Hence, the Court adjourned the case to 20.06.2017 for appearance of DW2 for cross examination stating that if DW2 fails to appear on the said date, his evidence will be closed and eschewed. However, even on 20.06.2017, DW2 was absent and hence, the Court closed the evidence of DW2.

<https://hcservices.ecourts.gov.in/hcservices/>

2.2. It is the contention of the petitioners that the deposition of DW2, who has not been cross examined by them cannot



be termed as an evidence and it cannot be used against them and if the court had eschewed the evidence of DW2, then, the petitioners would have no grievance. Hence, the petitioners filed the present interlocutory applications in I.A.Nos.210 and 211 of 2017 to reopen and recall DW2 for cross examination.

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2.3. Learned counsel for the petitioners further contended that it is a settled proposition of law that when a witness has not been cross examined, his deposition has no evidentiary value at all and it has to be eschewed. Therefore, the evidence of DW2 who has not been cross examined by the petitioners / plaintiffs, has no evidentiary value at all and it cannot be used in the suit. However, the Court below dismissed the interlocutory applications holding as if there is no conflict of interest between the petitioners herein and legal representatives of Munusamy Naidu, which is erroneous as Munusamy Naidu had been transposed from the array of plaintiff to the array of defendant even in 1993 by the order dated 27.07.1993 made in I.A.No.243 of 1993, only because there was conflict of interest between them and acted against the interest of the petitioners/plaintiffs and that the said order dated 27.07.1993 have not been challenged and it attained finality. Therefore, the learned counsel for the petitioners prayed that the impugned order is liable to be set aside.

3.0. Learned counsel for the respondents 1 to 3 contended that the trial of the suit commenced on 22.02.2017 and the plaintiffs' side evidence was closed on 16.03.2017. Subsequently, DW1 was examined on behalf of the respondents 1 to 3 and their side evidence was closed on 12.04.2017. Thereafter, the revision petitioners filed petitions to reopen and recall PW1 with an intention to drag on the suit. The evidence of PW1 was re-opened and PW1 filed proof affidavit on 24.04.2017 and he was cross-examined by the respondents 1 to 3 on the same day, thereby, the evidence of the plaintiffs was closed on 24.04.2017. Thereafter, on the side of the defendants 16 to 22, the 17th defendant in the suit and 5th respondent herein was examined as DW2 and Exs.B19 to B27 were marked on 08.06.2017 and on the same day, DW2 was cross examined by the petitioners and during cross examination, Ex.B28 was marked. According to the respondents 1 to 3, DW2 and the revision petitioners have colluded each other and both are having common interest of getting positive decree and judgment in the suit. The pleadings in the proof affidavits of the plaintiffs' and DW2's are more or less same with regard to the redemption of mortgage deed dated 07.04.1921.

3.1. Learned counsel for the respondents 1 to 3 further contended that it is the settled law that cross examination arises only in the event of adverse interest. In this case, the interest of the respondents 2 to 6 and DW2 is common that the mortgage deed, dated 07.04.1921, is to be redeemed and therefore, the revision petitioners cannot be permitted to cross examine DW2 as their



interest is common and there is no conflicting interest as per Section 137 of the Indian Evidence Act.

3.2. In support of the above contention, learned counsel relied on a judgment in **Vijaya vs. Saraswathi and others** reported in **2008 (2) CTC 573**, wherein, it has been held that "when it is found that the interest is common and not adverse, question of permitting cross examination does not arise".

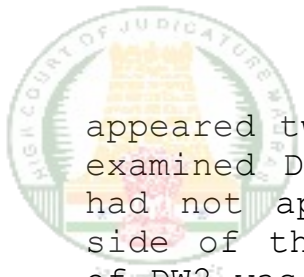
3.3. It is further submitted by the respondents 1 to 3 that the counsel for revision petitioners/plaintiffs in the suit and the defendants 15 to 22 including DW2 was one and the same and vakalath filed by the said counsel has been marked as Ex.B28. Therefore, the learned counsel contended that there is a collusion between the petitioners herein and 5th respondent / DW2 to drag on the suit. It is further contended that respondents 1 to 3 brought out the truth into light during the cross examination of DW2 and therefore, only to fill up the lacuna, the present petition to recall DW2 has been filed.

3.4. Learned counsel for the respondents 1 to 3 further submitted that the Court has given ample opportunities to the petitioners to cross examine DW2, but the petitioners did not avail the same. The revision petitioners also filed I.A.No.251 of 2017 to scrap the evidence of DW2 and suppressing the same, they have filed the present revision petitions which are not maintainable. It is also submitted that the petitioners also filed a vexatious Transfer Original Petition in Tr.O.P.No.79 of 2017 before the learned Principal District Judge, Dindigul, with false allegation casting a doubt on the integrity of the Presiding Officer of Kodaikanal, which was dismissed by the learned Judge, holding that the petitioners in an attempt to prolong the trial and to by-pass the directions of the High Court for early disposal of the suit, have come forward with the above transfer petition.

3.5. The learned counsel for the respondents 1 to 3 further contended that the intention of the petitioners is only to prolong the proceedings and the learned Judge has rightly dismissed the interlocutory applications seeking reopen and recall DW2 and the same need not be interfered with. In support of his contentions, learned counsel for the respondents 1 to 3 also relied on the judgment in **Gayathri vs. M.Girish** reported in **2017 (4) CTC 321**.

4. Heard the learned counsel for the petitioners and respondents 1 to 3 and perused the materials available on record.

5. The suit is of the year 1992. DW2 initially was arrayed as one of the plaintiffs and subsequently, transposed as one of the defendants. DW2 was cross examined by the defendants 4, 7 and 13 on 08.06.2017. Thereafter, though DW2



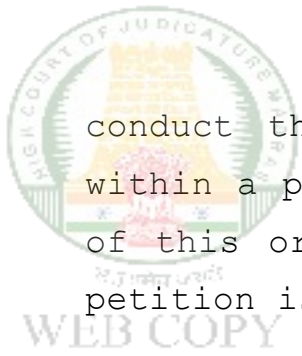
appeared twice for cross-examination, the plaintiffs had not cross examined DW2 and they sought for time. Subsequently, thrice DW2 had not appeared before the Court for cross examination on the side of the petitioners / plaintiffs and therefore, the evidence of DW2 was closed.

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6. The grounds on which the Court below has dismissed the applications for reopen and recall is that there is no conflict of interest between the petitioners / plaintiffs and DW2, and in order to drag on the proceedings, they have filed the above petitions for reopen and recall. It is seen that in the year 1993 itself, DW2 was transposed as one of the defendants ie., 17th defendant, as a conflict interest arose between the said parties. A perusal of the typed set filed by the respondents 1 to 3 also shows that through DW2, Exs.B19 to 27 were marked against the interest of the petitioners / plaintiffs. More over, in the written statement, the 17th defendant, who examined as DW2, had stated that the plaintiffs 2 to 6 are not the legal heirs of Manjammal and they do not have any right over the suit property and therefore, the petitioners / plaintiffs wanted to cross examine DW2.

7. If a witness fails to appear for cross examination, it would not proper to use the evidence of such witness against the party, who could not cross-examine such witness. Here, in this case, DW2 has not been cross-examined by the petitioners / plaintiffs, due to non appearance of DW2. Instead closing the evidence, the Court below ought to have summoned DW2 for cross examination on the side of the petitioners / plaintiffs. It is seen that after filing these petitions for reopen and recall DW2 for cross examination, the revision petitioners / plaintiffs have also filed I.A.No.251 of 2017 for scrapping the evidence of DW1 and the same is still pending before the Court below. It is stated that the petitioners / plaintiffs have been filing petition after petition for dragging on the proceedings, for which they cannot be deprived of their rights. Further, no prejudice would be caused to the respondents in allowing both the petitions. The Court below has erroneously dismissed both the petitions.

8. In view of the above, both the civil revision petitions are allowed and the trial Court is directed to reopen the case and recall DW2 for cross examination on the side of the petitioners / plaintiffs and to permit the petitioners / plaintiffs to cross-examine DW2 within a day or two. The petitioners / plaintiffs are directed to co-operate with the trial Court and complete the cross-examination of DW2 within a day or two. Considering the fact that the suit is of the year 1992, the trial Court is directed to



conduct the case on day to day basis and dispose of the same within a period of four months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

sd/
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

To

1. The District Munsif cum Judicial Magistrate,
Kodaikanal.

Copy to:

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1cc to Mr.T.R.Jeyapalam, Advocate in SR.No. 64830

gcg
AE/RSK/SAR1/17.05.2018/6P/5C

Common order in
CRP(PD) (MD) Nos.1495 and 1496 of 2017
28.04.2018