



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.01.2018
(Reserved on 11.10.2017)

WEB COPY

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP(PD)(MD)No.1617 of 2017
and
CMP(MD)No.9132 of 2017

K.Periyammal

...Petitioner/Petitioner/Plaintiff

vs.

Karuppanna Gounder(died)

1)Murugesan

2)Sarasu @ Saraswathi

3)Krishna Moorthi

4)Karuppannan

5)Devaraj

... Respondents/Respondents 2 to 6/
Defendants 2 to 6

Nallammal (Died)

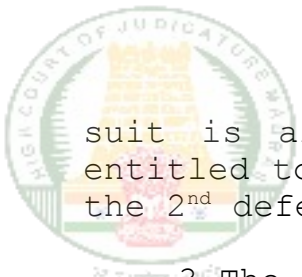
Petition filed under Article 227 of the Constitution of India, against the order and decreetal order dated 08.08.2017 made in I.A.No.552 of 2017 in O.S.No.1 of 2010 on the file of Principal Sub Court, Karur.

For Petitioner : Mr.V.Sitharanjandas
For R1/Caveator : Mr.M.P.Senthil

ORDER

This revision petition has been filed against the order and decreetal order dated 08.08.2017 made in I.A.No.552 of 2017 in O.S.No.1 of 2010 on the file of Principal Sub Court, Karur.

2.The revision petitioner is the plaintiff and the respondents 1 to 5 are defendants 2 to 6. The plaintiff filed the suit for partition, separate possession and to set aside the sale deed dated 28.02.2007. The defendants 2 and 7 filed their respective written statements. The witnesses were examined on either side. While so, the plaintiff filed I.A.No.552 of 2017 to reject the chief proof affidavit filed by the 3rd respondent/3rd defendant on the side of the 2nd defendant, stating that although the 3rd defendant remained ex parte, she was summoned on the side of the 2nd defendant and instead of examining her as a summoned witness, she was examined in chief on the side of the 2nd defendant by submitting the written chief affidavit. Therefore, it was contended that since the present



suit is already against the 3rd respondent, she is not legally entitled to get into the witness box and give evidence in favour of the 2nd defendant.

3. The Trial Court dismissed the application seeking to reject the chief proof affidavit filed by the 3rd respondent/3rd defendant holding that the application has been filed only to drag on the proceedings. Aggrieved by the said order, this revision petition has been filed.

4. The learned counsel for the revision petitioner contended that without considering the fact that examination of the 3rd defendant as a witness on behalf of the 2nd defendant is not permissible in law, the Trial Court erroneously dismissed the interlocutory application of the petitioner holding that the application has been filed to protract the proceedings. It is further contended that the finding of the Trial Court that the petitioner did not object for issuing witness summons to the 3rd defendant for giving evidence on behalf of the 2nd defendant, is erroneous in view of the settled proposition of law that the 3rd defendant who was set ex parte is entitled to give direct evidence only after setting aside the order of ex parte but not as a witness of the 2nd defendant.

5. The learned counsel for the petitioner further contended that the finding of the Trial Court that since the revision petitioner was given chance to cross examine the 3rd defendant, she cannot file the application to reject the chief proof affidavit filed by the 3rd respondent/3rd defendant, is erroneous. Further, the finding that the 3rd defendant is only her sister who also remained ex parte in the connected suit O.S.No.157 of 2011 and therefore, there is no bar for examining her as a witness of the 2nd defendant since her stand in the proceedings is neutral, is also wrong. It is also contended that the finding of the Trial Court that since the 3rd defendant is having share in the properties and although she was set ex parte in the preliminary decree proceedings, she is entitled to participate in the final decree proceedings and therefore, there is no bar for her to give evidence as a witness, is erroneous.

6. Lastly, it is contended that the finding of the Trial Court that the 3rd defendant is not a third party to the proceedings and therefore, she can appear as a witness is erroneous for the reason that she can always file an application to set aside the ex parte order and give direct evidence instead of appearing as a witness. What the revision petitioner's objection is the 3rd defendant cannot participate in the proceedings as a witness.

7. In support of his submissions, the learned counsel for the petitioner relied upon the following judgments:-

(i) Srinivasan vs. Vidya Durai reported in 2011 (3) CTC 444.

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

(ii) S. Balachandar vs. Vayyapuri reported in 2013 (1) CTC 304.



8. The learned counsel for the 1st respondent/2nd defendant submitted that the allegation of the revision petitioner that the 3rd defendant remained ex parte and therefore she is stopped from contesting the present case either by let in evidence or otherwise is erroneous. It is further submitted that in a partition suit, the plaintiffs are defendants and defendants are plaintiffs. Even if any one of the parties to the suit remains ex parte, as per law, the Court has to pass a decree allotting a share to each of the parties to the case. Further, the Court is empowered to summon a party to the suit who remained ex parte to give evidence on behalf of the contesting defendants. The learned counsel for the 1st respondent further contended that the 3rd defendant was summoned and examined only as a witness on the side of the 2nd defendant and not in chief by submitting the written chief affidavit.

9. In support of his submissions, the learned counsel for the 1st respondent relied upon the following judgments:-

(i) V.K. Periasamy @ Perianna Gounder vs. D. Rajan reported in 2001 (3) CTC 20.

(ii) T. Narayana Reddy vs. Patan Razak Khan (CRP.No.2677 of 2008 dated 18.07.2008).

10. Heard the learned counsel for the petitioner as well as the 1st respondent/Caveator and perused the materials available on record.

11. Perusal of the records shows that the revision petitioner/plaintiff filed O.S.No.1 of 2010 on the file of Principal Sub Court, Karur, against the defendants for partition claiming 1/4th share in plaint schedule properties and also to set aside the sale deed dated 28.02.2007. In the said suit, the 2nd respondent/3rd defendant did not file any written statement and thereafter she was set exparte. The above suit was directed to have joint trial along with two other suits O.S.Nos.155 and 157 of 2011. The 2nd respondent herein remained exparte in O.S.No.157 of 2011 also and no steps were taken to set aside the ex parte order. After examination of witnesses, the 1st respondent/2nd defendant obtained witness summons against the 2nd respondent/3rd defendant to appear and give evidence as witness on his behalf. The chief examination was taken by filing proof affidavit. Thereafter, the revision petitioner filed I.A.No.552 of 2017 to reject the chief proof affidavit of the 2nd respondent/3rd defendant stating that she cannot give evidence as a witness since she can very well depose as direct evidence after setting aside the exparte order.

12. In V.K. Periasamy @ Perianna Gounder vs. D. Rajan reported in 2001 (3) CTC 20 relied on by the counsel for 1st respondent, it has been held as follows:-

''If there was a total bar on the right of a party to summon another party to give evidence as a witness, Order 16, Rule 21 will not find a place in the code. The inclusion of this



provision itself shows that there may be situations where a party may be called upon by another to give evidence as the latter's witness. In fact, in Appavoo Asary v. Sornammal Fernandes, A.I.R. 1933 Mad. 821, the learned Judge held as seen from the passage extracted above that when one party desires the presence of other party, the proper procedure is under Order 16. Therefore, if there are very good reasons, the court may exercise its discretion in favour of the party seeking permission. The Case laws with regard to Order 18, Rule 2 are to the effect that even the defendants who support the case of the plaintiff are entitled to give evidence and it is in fact their right and they cannot be shut out.'

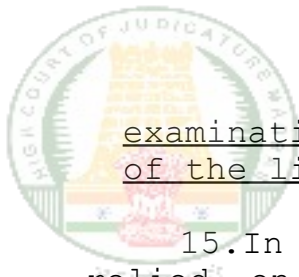
13. In T. Narayana Reddy vs. Patan Razak Khan (CRP.No.2677 of 2008 dated 18.07.2008) relied on by the counsel for 1st respondent, the Andhra Pradesh High Court held as follows:-

'That a plain reading of the said provision makes it abundantly clear that a Civil Court is conferred with jurisdiction and power to examine any person including a party to the suit and not called as a witness by a party to the suit. This can be done on its own motion, which means and includes that its jurisdiction can even be set in motion by any of the parties to the suit. The words to examine any person, including a party to the suit has been substituted for to examine any person other than a party to the suit by act 104 of 1976, with effect from 1-2-1977. What was otherwise implicit is now made explicit that even a party to the suit and not called as a witness by a party to the suit can be called by the Court as a witness to give evidence, or to produce any document in his possession.'

I am of the opinion that this court already held in National Insurance Company Limited (1 supra) that as per order 16 rule 14 CPC, the Civil Court is conferred with jurisdiction and empowered to examine any person including a party to the suit, and not called as a witness by a party to the suit earlier, and this can be done on its own motion.'

14. In S. Balachandar vs. Vayyapuri reported in 2013 (1) CTC 304, relied on by the counsel for petitioner, this Court held as follows:-

'Order 16, Rule 14 of the Code of Civil Procedure deals with the situation where the Court at anytime thinks it necessary to examine any person including a party to the suit and not called as a witness by a party to the suit, the Court may on its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document. Therefore, a reading of Order 16 Rule 14 makes it clear that whenever the Court thinks it necessary to examine any person and such person was not called as a witness by a party to the suit, the Court may summon such person. Therefore, the satisfaction of the Court is necessary for the issuance of summons to examine any person as a Court witness and the Court must also feel that



examination of such person is necessary for proper adjudication of the lis between the parties.'

15. In Srinivasan vs. Vidya Durai reported in 2011 (3) CTC 444, relied on by the counsel for petitioner, this Court held as follows:-

"8. Having regard to the issues to be decided in the suit, in my opinion, there is no need to examine Bama Ravi. In the judgment in Sri Aurobindo Ashram Trust vs. Kamal Dora, (2003) 3 MLJ 7, it has been held as follows:-

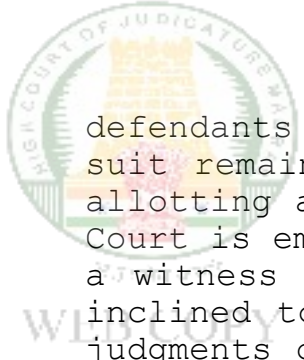
"So, the legal position is that a party who seeks for a prayer to the court to issue summons to a witness, must reveal to the court the purpose for which the witness is proposed to be summoned. Once such an application is filed it is for the court to use its discretion and to decide whether summons are to be issued to those witnesses. It has to be pointed out that the issue of summons is not automatic and in appropriate cases or in cases where the objections are raised, the bona fides of the request has to be looked into an appropriate orders passed."

9. Therefore, issuance of summon is not automatic. The court has got power to consider the request and pass appropriate orders. As the evidence of Mrs. Bama Ravi is not necessary to decide the issue involved in the suit, the court below has rightly dismissed the application. I do not find any ground to interfere with the order of the court below."

16. Though the learned counsel for the petitioner relying on the above judgments contended that once an application for issuance of summon to a witness is filed, it is for the court to use its discretion and to decide whether summons are to be issued to those witnesses and further contended that the wordings of Order 16, Rule 14 cannot be interpreted in a pedantic manner, this Court is not inclined to accept the said contention. Merely because it is stated under Order 16, Rule 14 that the Court, may, of its own motion, summon any person to give evidence as Court witness, it cannot be said that the Court has to act only on its motion and cannot act on the application filed by the parties.

17. As rightly held by the Trial Court, in the present case, the revision petitioner neither objected to for issuance of summon to the 3rd defendant nor when she was examined as witness. Having not resisted to examine the 3rd defendant who admittedly remained exparte, as a witness on the side of the 2nd defendant, the revision petitioner cannot now sought to reject the chief proof affidavit filed by the 3rd respondent/3rd defendant stating that being a party to the suit, the 3rd defendant can give direct evidence after setting aside the exparte order against her, but she cannot depose as a witness of the 2nd respondent. In short, as held by the Trial Court, the filing of the petition to reject the chief proof affidavit of the 3rd defendant itself is only an attempt to protract the proceedings.

18. As rightly contended by the learned counsel for the 1st respondent, in a partition suit, the plaintiffs are defendants and



defendants are plaintiffs and even if any one of the parties to the suit remains ex parte, as per law, the Court has to pass a decree allotting a share to each of the parties to the case. Further, the Court is empowered to summon a party to the suit to give evidence as a witness as per Order 16 Rule 14. Therefore, this Court is not inclined to accept the contention of the revision petitioner. The judgments cited by the counsel for petitioner are not applicable to the present case and judgments cited by the counsel for 1st respondent lend support the facts of this case. There is no infirmity in the impugned order and therefore, the interference of this Court is not necessary.

Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar

To

The Principal Sub Judge, Karur.

+1CC to Mr.V.Sitharanjandas, Advocate, SR.No. 42807

+1CC to Mr.M.P.Senthil, Advocate, SR.No. 43037

order made in
CRP(PD) (MD) No.1617 of 2017
19.01.2018

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AM/MR/SAR 4/31.01.2018/6P/4C