



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 09.08.2018

CORAM

THE HONOURABLE MR. JUSTICE G.R.SWAMINATHAN

C.R.P.PD[MD]No.1345 of 2018
and
C.M.P.[MD]No.5834 of 2018

Umashankar

: Petitioner

Vs.

1.K.Krishnamoorthy
2.Anitha
3.Padmavathy
4.K.Ganesamurthy
5.K.Sivaramamurugan
Ammani Ammal (Died)
6.Meenakumari
Palaniyandi (Died)

7.Arokkiamatha Educational Health and Charitable Trust,
Rep. by its Chariman Dr.A.Arunachalam,
S/o.Ayyamperumal,
Karikara Street, Vallam, Tanjore

: Respondents

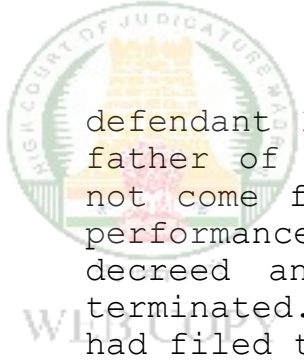
PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, praying to set aside the fair and decreetal order dated 03.04.2018 made in I.A.No.54 of 2018 in O.S.No.2921 of 2004 on the file of the Principal District Munsif, Tiruchirappalli.

For Petitioner : Mr.Ragavaran Gopalan
for Mr.K.Prabhakar
For Respondent No.1 : Mr.K.K.Senthil
For Respondents 3,5,6 & 7 : No appearance

O R D E R

The revision petitioner herein is figuring as the 8th defendant in O.S.No.2921 of 2004 filed before the District Munsif Court, Tiruchirappalli. It is a suit for partition. The plaintiff in the suit namely, Anitha, is the grand-daughter of the 6th defendant Ammani Ammal. The contesting respondent herein namely, Krishnamoorthy is figuring as the fourth defendant in the suit.

2.Mrs.Ammani Ammal had executed a settlement in favour of the fifth defendant Meenakumari, way back in the year 1981. It is not a registered document. In the said document, according to the revision petitioner, the third and fourth defendants have signed as attesting witnesses. The second defendant had identified the sixth defendant as his mother. Based on the said settlement deed, the fifth



defendant Meenakumari had entered into a sale agreement with the father of the revision petitioner. Since, the fifth defendant did not come forward to execute the sale deed, the suit for specific performance was filed against the said Meenakumari. The suit was decreed and execution petition was also filed and successfully terminated. Thereafter, the grand-daughter of the sixth defendant had filed the present suit for partition.

3.The first respondent herein Krishnamoorthy had filed his written statement in the said suit virtually submitting to decree. He had categorically stated that he has no dispute over the plaintiff's claim. Be that as it may, the revision petitioner herein took out an application for summoning the fourth defendant Krishnamoorthy as a witness. Summon was issued. To revoke the same, the fourth defendant filed I.A.No.54 of 2018. The same was allowed by order dated 03.04.2018. Assailing the correctness of the said order, the eighth defendant has filed this Civil Revision Petition.

4.Heard the learned Counsel on either side.

5.The learned Counsel for the fourth defendant / first respondent herein contended that he had taken a stand that is diametrically opposite to the interest of the revision petitioner. Reaching this conclusion is not difficult at all because, the fourth defendant / first respondent has admitted the decree by accepting the case projected by the plaintiff in *toto*. Therefore, the defendant whose stand is opposite to that of the plaintiff or that of the co-defendant cannot be summoned by the respective opposing parties. He placed reliance on a decision rendered by the learned Judge of this Court reported in *2017 SCC Online Madras 12749*. In paragraph No.17 of the said decision, the learned Judge had held that in certain cases, a party to a suit can invoke Order XVI Rule 21 CPC 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. A party can examine another party as a witness, provided he has no conflicting interest. It was specifically held that Order XVI Rule 21 cannot be invoked and summons cannot be issued by the trial Court in the case where there is a conflicting interest or there is no defence at all as in this case.

6.The Court below had adopted the very same contentions now raised by the Counsel for the first respondent / fourth defendant for allowing I.A.No.54 of 2018.

7.This Court is unable to subscribe to the approach adopted by the Court below. This is for more reasons than one. As rightly pointed out by the learned Counsel for the revision petitioner, this is not the first round of litigation. It was preceded by the earlier round. In the earlier round the revision petitioner herein took steps to have not only the fourth defendant but also the third defendant examined. But then, he had fast tracked the process. He



went for proclamation straightaway. To set aside the same, I.A.No.643 of 2016 was filed by the first respondent herein and the same was allowed. The said order was challenged in C.R.P.No.729 of 2017.

8.This Court by order dated 07.04.2017, disposed of the said revision petition with certain observations. The observations are set out in paragraph No.4 of the said order. This Court had specifically observed that the persons sought to be summoned to give evidence are parties to the proceedings. They are supposed to speak about the attestation of documents which is now in dispute. Therefore, to meet the ends of justice, it was held essentially that these two persons i.e., third and fourth defendants are necessary witnesses. To secure the ends of justice, opportunity to the revision petition namely, Umashankar was granted to take fresh steps to summon the witnesses and proceed in accordance with law. This order was passed as early as on 07.04.2017.

9.It appears that this Civil Revision Petition was disposed of at the admission stage itself. But then, obviously, the first respondent got knowledge of the passing of this order later. In fact, in the order impugned in the Civil Revision Petition, a specific reference is made. It has also been marked as Ex.R.1. Atleast when the order dated 07.04.2017 in C.R.P.(MD)No.729 of 2017 was marked, the first respondent should have taken steps to file a review petition before this Court. Such steps were not taken. Therefore, I am clearly of the view that the first respondent is now bound by this order. In any event, the trial Court could not have placed a different construction. In my view, the observations set out in paragraph No.4 of the order dated 07.04.2017 in C.R.P.(MD) No.729 of 2017 are unambiguous and do not admit of any doubt.

10.That apart, the specific case projected by the revision petitioner is that the settlement deed executed by Ammani Ammal in favour of Meenakumari was attested by the third and fourth defendants. The first respondent herein who is now contesting so vehemently, has not made any averment in his written statement denying this claim of the eighth defendant. If the first respondent has averred that he did not attest the settlement deed in question, then definitely there will be a clear variance in the stand taken by the first respondent. The first respondent has not done so. Therefore, I respectfully follow the decision of this Court reported in (2001) 2 L.W. 396 [V.K.Periasamy @ Perianna Gounder Vs. D.Rajan]. In paragraph No.12 of the said decision, it has been held as follows:

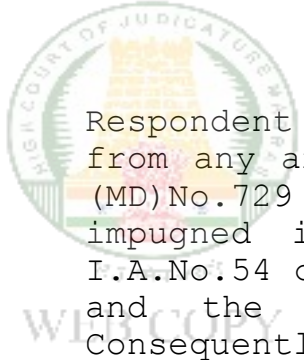
"If there was a total bar on the right of a party to summon another party to give evidence as a witness, Order 16 Rule 21 will not find a place in the Code. The inclusion of this provision itself shows that there may be situations where a



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party may be called upon by another to give evidence as the latter's witness. In fact, in A.I.R. 1993 Madras 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. In this case, the first defendant is not the contesting defendant and from the averments in the affidavit, it is seen that he has been made a party only so that the suit would not be dismissed for non-joinder. The petitioner relies on a document in which the first defendant is a signatory recognised the right which is claimed by the petitioner in the suit. This is also not a case where a party who avoids the witness box calls upon the other side to give evidence. Evidence has been adduced on the side of the petitioner and documents have also been marked. The petitioner wants to elicit evidence with regard to two of the Exhibits to which the first defendant is a party. The reasons that prevailed in the minds of the Judges for condemning the practice of summoning the other side witness do not exist in this case. The first defendant is not strictly an opposite party and this is also recognised by the respondent herein whose pleading is that the interest of the petitioner and the other defendants are common. In these circumstances, I see no reason why this application under Order 16, Rule 21 should not be allowed, of course, if the first defendant is examined on the side of the petitioner, the petitioner will be bound by the evidence elicited from the said witness. The Order of the Court below is therefore set aside. CRP is allowed. No costs."

11. In this case also, the fourth defendant herein was not strictly an opposite party as far as the revision petitioner is concerned. A mere reading of the written statement gives an impression that he is entirely indifferent to the outcome of the proceedings. The principle of *res judicata* is applicable even in subsequent stages of the same proceedings. Inasmuch as the first respondent has not chosen to question the order dated 07.04.2017 made in C.R.P.(MD)No.729 of 2017, this Court is of the view that



Respondent No.1 is clearly bound by the same. Therefore, looked at from any angle, particularly in view of the order passed in C.R.P. (MD)No.729 of 2017, this Court is of the view that the order impugned in this revision petition deserves to be set aside. I.A.No.54 of 2018 has to be dismissed. Accordingly, it is set aside and the Civil Revision Petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/

Assistant Registrar (Writs)

/True copy/

Sub Assistant Registrar (CS-II)

To
The Principal District Munsif,
Tiruchirappalli.

+1cc to Mr.K.K.SENTHIL, Advocate, SR.No.77983
+1cc to Mr.K.PRABHAKAR, Advocate, SR.No. 78238

C.R.P.PD[MD]No.1345 of 2018
AND
CMP.PD (MD)No.5834 of 2018
09.08.2018

mr
KK/SKN/SAR-2/28.09.2018/5P-4C