

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.01.2020

PRONOUNCED ON : 19.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CRP.(PD).Nos.4783 & 4784 of 2014

and

M.P.No.1 of 2014

A.K.Palanisamy

...Petitioner/
1st Defendant
in both CRPs

Vs.

1.Palaniammal
2.Karuppusamy
3.M.Poomalai

...Respondents1 - 3/
Plaintiffs
in both CRPs

4.The Executive Officer
Anamalai Town Panchayat,
Town Panchayat Office Premises,
Anamalai, Pollachi Taluk.

... 4th Respondent/
2nd Defendant
in both CRPs

COMMON PRAYER: These Civil Revision Petitions have been filed under Article 227 of the Constitution of India to set aside the fair and the decretal order dated 03.04.2014 in I.A.Nos.352 & 353 of 2014 in O.S.No.235 of 2010, on the file of the learned Subordinate Judge, Pollachi.

For Petitioner
in both CRPs : Mr.C.R.Prasanan

For R1 to R4
in both CRPs : Mr.T.M.Naveen

For R4
in both CRPs : Mr.S.Jaganathan

COMMON ORDER

These Civil Revision Petitions have been filed against the order passed by the learned Subordinate Judge, Pollachi, in I.A.Nos.352 & 353 of 2014 in O.S.No.235 of 2010, dated 03.04.2014.

2 The first defendant in the suit O.S.No.235 of 2010 is the revision herein.

3 Brief facts of the case are as follows:

(i) The respondents 1, 2 & 3 herein/plaintiffs have filed a suit in O.S.No.235 of 2010, before the learned Subordinate Judge, Pollachi, for declaration of title; for permanent injunction; for mandatory injunction against the Executive Officer, Anamalai Town Panchayat, not to approve the plots as house sites. During the pendency of the suit, the defendants have filed written statement and the evidence was let in.

(ii) On behalf of the plaintiffs, first respondent herein was examined as PW1 and third respondent herein was examined as PW2 and exhibits were marked. On behalf of the defendants DW1 and DW2 were examined and documents were marked. Subsequently, the first defendant/revision petitioner was examined as Official Witness CW1 and the matter was posted for arguments

and it was adjourned at two incidents. After the matter was posted for arguments, the plaintiffs have filed the applications in I.A.Nos.352 & 353 of 2014 to reopen the petition and to recall PW2 for further chief-examination and cross-examination, on the ground that after the evidence they got some documents to show a fraud has been played by the defendants by impersonation of the person by name S.R.Ramasamy, which was categorically denied by the DW1 and they said to have been obtained death certificate of S.R.Ramasamy and also the paper publication published in that regard. Therefore, they wanted to re-open and recall the matter for further evidence of PW2.

(iii) The defendants in the counter statement have categorically stated that evidence on both sides was over and the documents have also been marked and official witness has also been marked as CW1 and the matter was posted for trial.

(iv) It is further stated that at this stage, the plaintiff wanted to set up a new plea by way of after-thought, after the trial is over and they wanted to fill up the lacuna in the petition and that in the petitioner's evidence, the plea of impersonation is taken only in the course of cross examination and not before. Though the alleged

documents sought to be introduced referring to S.R.Ramasamy, whereas, the power is in favour of the said S.R.Ramasamy. Even the address given in the proposed documents viz., Death Register and the address found in the power of attorney was totally different and the new document viz., the paper publication is in the name of S.R.Ramasamy which is sought to give in evidence but the same is without date of birth and door number, which are the title in respect of plea of impersonation.

(iv) After the hearing the arguments, the learned District Munsif, Pollachi, has allowed both the applications and hence, the Civil Revision Petition has been preferred by the first defendant/revision petitioner under Article 227 of the Constitution of the India, before this Court.

4 Heard both sides and perused the materials placed on record.

5 On a perusal of the records, it is seen that PW1 & PW2 were examined and documents were marked, RW1 & RW2 were examined and documents were marked and the Court official witness was examined as CW1.

6 When the matter was at the stage of arguments, a new plea of impersonation has been introduced in the petitions viz., I.A.Nos.352 & 353 of 2014, for reopening and recalling the evidence PW2, wherein, they wanted to mark the Death Certificate of one S.R.Ramasamy. While, the person concerned in the case is S.R.Ramasamy, the official address given in the Death Certificate and the full name is totally different from the Power of Attorney. The documents have already been marked in this Court with that of the proposed documents viz., death certificate and the paper publication. It remains to be stated that the Trial Court has allowed the application as the matter was posted for trial.

7 The learned counsel for the petitioner has relied upon the following judgments reported in

(i) 2011 (2) MWN (Civil) 320 - [P.K.Madeswaran Vs. T.S.Sivakumar], wherein, this Court has held as follows:

"Order 18, Rule 17 cannot be invoked to fill up lacuna in evidence of witness which has already been recorded - Power under Order 18, Rule 17 is to be exercised sparingly and in appropriate cases and not as general Rule."

(ii) 2015 (SCC) Online Mad 8591 – [Santhirakani and others

Vs. Vijaya @ Viji, wherein, this Court has held as follows:

"(i) Order 18 Rule 17 CPC is an equitable relief,

(ii) It is clear that the said applications have been filed only with a view to fill up the lacunae found at the time of recoding evidence and the same cannot be entertained,

(iii) In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those tow applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence."

(iii) 2009 (4) SCC 410 – [Vadiraj Naggappa Vernekar (dead) through legal representatives Vs. Sharadchandra Prabhakar Gogate], wherein, the Hon'ble Supreme Court has held as follows:

"Held, Order 18 Rule 17 is not intended to be used to fill up omissions in the evidence of a witness, who has already been examined – Main purpose of Order 18, Rule 17 is to enable Court to clarify any doubts that may have arisen during the course of his examination."

(iv) 2013 (14) SCC 1 – [Bagai Construction through its

proprietor Lalit Bagai Vs. Gupta Building Material Store], wherein, the Hon'ble Supreme Court has held as follows:

"Filing of application for re-examination of witness, when matter posted for judgment – Exercise of inherent powers – Impermissibility of – Respondent-plaintiff filing suit for recovery of an amount – When matter posted for judgment, respondent-plaintiff filed application to submit some more documents and recall of PW1 for proving those documents."

(v) 2016 (5) CTC 555 – *[Ram Rati Vs. Mange Ram (D) through Legal Representatives and others]*, wherein, the Hon'ble Supreme Court has held as follows:

"Discretionary power envisaged under Code should be exercised sparingly in appropriate cases – Court should see that trial is not unnecessarily protracted under guise of recall of Witness – Impugned Order recalling Witness for further elaboration on left out points is legally impermissible."

"10. Order 18 of C.P.C deals with hearing of the Suit and examination of Witnesses. By an amendment introduced thereunder with effect from 01.02.1977, Rule 17-A was introduced permitting production of evidence not previously known or which could not be produced despite due diligence. It appears, the amendment only caused unnecessary protraction of

the litigation, and hence, the said provision was omitted by the Code of Civil Procedure (Amendment) Act, 1999 with effect from 01.07.2002. However, Rule 17, was retained which reads as follows:

*"17.Court may recall and examine
Witness – The Court may at any stage of a
Suit recall any Witness who has been
examined and may (subject to the law of
evidence for the time being in force) put
such questions to him as the Court thinks
fit."*

11. The Respondent filed the Application under Rule 17 read with Section 151 of the CPC invoking the inherent powers of the Court to make Orders for the ends of justice or to prevent abuse of the process of the Court. The basis Purpose of Rule 17, is to enable the Court to clarify any position or doubt, and the Court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the Suit. No doubt, once the Court recalls the Witness for the purpose of any such clarification, the Court may permit the parties to assist the Court by examining the Witness for the purpose of clarification required or permitted by the Court. The power under Rule 17, cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for

the purpose of filling up a lacuna in the evidence. 'No prejudice is caused to either party' is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the Court but to be used only sparingly, and in case, the Court decided to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground."

8 After going through pleading and also documents now by way of reopening and recalling PW2 and the plaintiff is now introduced new case of impersonation in respect of power of attorney agent, who said to have been executed Sale Deed in favour of the defendant. There is no pleadings nor even whisper by PW1 and PW2 while they are in the witness box. The another documents namely the death certificate is proposed to be marked after recall if permitted by the Court, the address also found to be difference besides. The another document paper publication also lacks particulars. The case is posted for arguments at this juncture it appears only with a view to protect the litigation, the applications have been filed to re-open the plaintiff side and to re-call PW2.

9 I do not find any reason for the same. Especially, when there is no plea of fraud raised by the plaintiff side and the Doctor in evidence, there is no whisper. Hence, the same cannot be

permitted. Therefore, to let evidence, without any plea, whatsoever be, amount of evidence, the same is not permissible in law, when there is no plea. It is to be stated that on such reopening, the plaintiff wanted to rewrite the entire pleadings, consequently, levying another lie on the evidence without going to the same.

10 The Trial Court has committed an error by allowing it subject to the admissibility and relevancy of the documents. But, admissibility and relevancy of the documents, will be considered only at the time of judgment. Therefore, such approach by the Trial Court is deprecated. As the new plea has been attempted to be introduced, it will lead to change of the basic structure of the plaint. Consequently, further evidence on the change of plea, admissibility and relevancy of the documents will be of no consequences. Furthermore, on the change of a new plea taken at the time of the arguments other issues have to be raised and hence, the entire structure of the suit as well as the trial conducted so far, will become futile. While so being the case, in exercise of powers under Article 227 of the Constitution of India, this Court is of the view that now, at this stage, the plea taken by the respondent, is not permissible.

11 Taking into consideration the entire facts as stated supra, this Court is of the considered view that the orders passed by the Trial Court in IA.Nos.352 & 353 of 2014 are erroneous and accordingly, the same is set aside and the order passed in the above I.As. shall stand dismissed. The Trial Court is directed to hear the arguments and pronounce the judgment within a period of four weeks from the date of receipt of a copy of this order.

12 In the result, the Civil Revision Petition stands allowed with the above direction and the order passed in I.A.Nos.352 & 353 of 2014 in O.S.No.235 of 2010, by the learned Subordinate Judge, Pollachi, dated 03.04.2014, is hereby set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

19.02.2020

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Index : Yes / No
Internet : Yes

Note: The Trial Court is directed to hear the arguments and pronounce the judgment within a period of four weeks from the date of receipt of a copy of this order.

To
The Subordinate Judge, Pollachi.

RMT.TEEKAA RAMAN., J

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Pre-Delivery Order
in
CRP.(PD).Nos.4783 & 4784 of 2014

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