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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.09.2020

CORAM

THE HON'BLE MR.JUSTICE **S.S.SUNDAR**

C.R.P. (PD) (MD)Nos.2015 and 2016 of 2019

and

C.M.P. (MD)No.10386 of 2019

P.Vellur : Petitioner/Petitioner/Plaintiff
(in both cases)

.. Vs ..

P.Pandian (Died)

- 1.Petchiammal,W/o Pandian,
- 2.Kaliyammal
- 3.Vellathai
- 4.Petchiammal,W/o Kalimuthu
- 5.Poomari
- 6.Selvakumar

: Respondents/Respondents/
Defendants 1 to 7(in both cases)

COMMON PRAYER: Civil Revision Petitions filed under Article 227 of Constitution of India, to call for the records relating to the fair and decreel order passed in I.A.Nos.2 and 3 of 2019 in O.S.No.74 of 2012, dated 01.10.2019 on the file of the III Additional District Court, Tirunelveli and set aside the same.

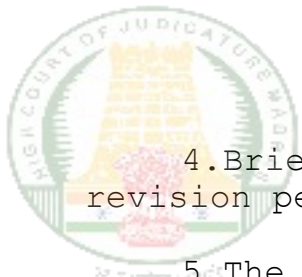
For Petitioner	:	Mr.V.Meenakshi Sundaram
For R1 to R3	:	No Appearance
For R4 and R5	:	Notice dispensed with
For R6	:	Mr.S.Ramesh @ Ramiah (in both cases)

COMMON ORDER

C.R.P.(MD)No.2015 of 2019 is directed against the order passed by the learned III Additional District Judge, Tirunelveli, in I.A.No.2 of 2019 in O.S.No.74 of 2012, dated 01.10.2019.

2.Similarly, C.R.P.(MD)No.2016 of 2019 is directed against the order passed by the learned III Additional District Judge, Tirunelveli, in I.A.No.3 of 2019 in O.S.No.74 of 2012, dated 01.10.2019.

3.Heard the learned Counsel appearing for the petitioner and the learned Counsel appearing for the 6th respondent. The learned Counsel for the petitioner filed a memo to the effect that the petitioner has given up the relief as against the respondents 4 and 5 in these revision petitions. Therefore, notice was dispensed with for respondents 4 and 5.



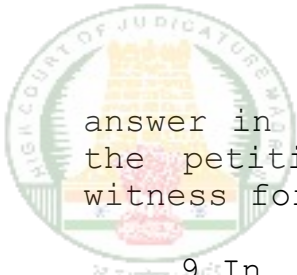
4. Brief facts that are necessary for the disposal of these revision petitions are as follows:

5. The revision petitioner filed the suit in O.S.No.74 of 2012 on the file of the III Additional District Court, Tirunelveli for partition and separate possession of his half share in all the suit property by metes and bounds. The suit was contested by the defendants mainly on the ground that there had been a partition earlier and that therefore, the suit for partition is not maintainable. The defendants in the written statement contended that the partition is supported by a document, which was reduced in writing. In the written statement, a counter claim was also made by the defendants seeking a prayer for issuing a mandatory injunction directing the plaintiff to come to the Registrar Office to register the document relied upon by the defendants to prove the earlier partition.

6. The trial Court in the middle of trial found that no issue was framed with regard to the counter claim raised by the defendants. This was found of-course after the closure of evidence on either side. However, after the issue was framed in this regard by the trial Court, the revision petitioner/plaintiff filed two applications in I.A.No.2 of 2019 to reopen the case and I.A.No.3 of 2019 to recall DW-1 for cross examination. Both the applications filed by the revision petitioner were dismissed by the learned III Additional District Judge, Tirunelveli, by order, dated 01.10.2019. Aggrieved by the same, the above revision petitions have been filed.

7. The learned Counsel for the revision petitioner submitted that the issue was framed only on 26.07.2019 in relation to the counter claim and that therefore, the plaintiff, who is opposing the counter claim, should be given a fair opportunity to recall one of the witnesses for cross-examination in relation to the additional issues framed pertaining to the counter claim. The learned Counsel further submitted that the additional issue was framed only on 26.07.2019 and that the additional issue is relating to the partition, that was set up by the defendants and the documents, that was pleaded by the defendants in the written statement.

8. The additional issue framed by the trial Court is whether the defendants are entitled to mandatory injunction as prayed for in the counter claim. This issue was framed only after the evidence was closed on either side. In such circumstances, the learned Counsel for the revision petitioner is right in seeking a fair opportunity for the plaintiff to lead evidence or to cross examine the witness, who was already examined on behalf of the defendants. In the present case, though the plaintiff is entitled to seek further evidence to be let-in to invalidate or to disprove the partition pleaded by the respondents or to recall every witness to get an



answer in favour of the plaintiff in relation to the counter claim, the petitioner is seeking only to recall the defendants' side witness for cross examination.

9. In the affidavit filed in support of the petitions filed before the lower Court, the revision petitioner has stated that the purpose of cross examination is only about the additional issues framed by the trial Court. In paragraph 2 of the affidavit filed in support of the interlocutory application in I.A.No.2 of 2019, the petitioner has stated as follows:

“2.சமூகம் நீதிமன்றம் கடந்த 22.7.2019 அன்று கூடுதல் எழுவினா வரைய 26.7.2019 க்கு வாய்தா போடப்பட்டுள்ளது. அந்த எழுவினாக்கள் சம்மந்தமாக உள்ள சாட்சியங்கள் விபரத்திற்கு *DWI* ஆகிய 7ம் பிரதிவாதியை குறுக்கு விசாரணை செய்ய *DWI*ஐ மீண்டும் அழைத்து உத்தரவிட வேண்டியுள்ளது. இல்லாவிடில் எனக்கு மிகுந்த கஷ்ட நஷ்டம் ஏற்பட்டு விடும்.”

10. Since recalling of DW-1 is only for the purpose of cross examination in relation to the additional issues framed on 22.07.2019, this Court is of the view that the petitioner is entitled to an opportunity as a matter of right after additional issue was framed. The learned Counsel for the 6th respondent, however, opposed the revision petitions by relying upon the judgment of this Honourable Supreme Court in the case of **Nagubai Ammal and others vs B.Sharma Rao and others**, reported in **AR 1956 SC 593**.

11. This Court has no difficulty in understanding the dictum of judgment of Honourable Supreme Court. However, the said judgment has no application to the present case, where, the parties to the *lis* are expected to have a fair opportunity to let in evidence, if a new issue framed or issues are recast in case a party wants to lead evidence with reference to the new or additional issue framed by the Court. Order 18 Rule 17 CPC confers power on the Court to recall any witness at any stage of the suit. Such power can be exercised at the instance of the party to the *lis*, if that party requires a fair opportunity to seek indulgence of the Court upon framing additional issue, which was not focussed or considered before the evidence was closed on either side.

12. As pointed out earlier, the petitioner has got reason for getting opportunity to cross examine DW-1 after the additional issue relating to counter claim was framed. This should be given as a matter of right. The trial Court dismissed the petition filed by the revision petitioner to recall the witness on the ground that such power cannot be exercised by the Court at the instance of the plaintiff. After dismissing the application to recall DW-1, the lower Court has dismissed the petition to reopen the case on the ground that the petition to recall DW-1 was dismissed by the Court. The power of the Court under Order 18 Rule 17 CPC to recall any witness is absolute and that it can be exercised either on its own motion or on the application of any of the parties to the *lis*. The



language employed under Order 18 Rule 17 does not prevent the Court from exercising the power to recall the witness at the instance of plaintiff or defendant. In the present case, the peculiar circumstances warrant such power being exercised by the Court to render justice.

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13.For the reasons stated above, these Civil Revision Petitions are allowed and the orders passed by the learned III Additional District Judge, Tirunelveli, I.A.Nos.2 and 3 of 2019 in O.S.No.74 of 2012, dated 01.10.2019, are set aside. The applications I.A.Nos.2 and 3 of 2019 in O.S.No.74 of 2012 stands allowed.

14.The learned Counsel for the revision petitioner submitted that he has not availed the opportunity of letting in further evidence on his side and therefore, he has no proposal to recall any witness examined on his side earlier or to call anyone for further cross examination regarding the counter claim. This Court has recorded the said statement and treat this as an undertaking given by the learned Counsel for the revision petitioner that he will not seek further examination of anyone. The learned Counsel for the revision petitioner also submitted that the cross examination of DW-1 will be confined only to the additional issues framed by the Court. Hence, this Court hold that the revision petitioner is entitled to recall DW-1 for cross examination in relation to the additional issue arising out of the counter claim. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

cmr

To

1.The III Additional District Judge, Tirunelveli.

+1 CC to M/s.D. NALLATHAMBI, Advocate (SR-18028[F] dated 24/09/2020)

C.R.P.(PD)(MD)Nos.2015 and 2016 of 2019
22.09.2020

SRK(CO)

AP(05/10/2020) 4P 3C