

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.03.2021

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.R.P.Nos.99 and 100 of 2021

&

C.M.P.No.915 of 2021 & C.R.P.No.99 of 2021

V.Sivasakthi
Velappan

... Petitioner in C.R.P.No.99 of 2021
... Petitioner in C.R.P.No.100 of 2021

Vs.

1. K.Ramasamy
2. K.Arumugam
3. K.Vellappan

4. The Special Officer,

K-918, Kettisamudram Nilakudiyetra
Co-operative Society Ltd.,
Anthiyur Taluk,
Erode District

... Respondents in both the petitions

Civil Revision Petitions are filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 05.12.2020; 30.01.2020 made in I.A.No.4 of 2020 and I.A.No.2 of 2019 in O.S.No.19 of 2019 respectively on the file of District Munsif Court, Anthiyur and to allow the present Civil Revision Petitions.

For Petitioners

: Mr.Harish for
Mr.N.Manoharan

For Respondents

: Mr.C.Kulanthaivel for R1 to R3
Mr.L.P.Shanmughasundaram
Special Government Pleader (Co-op) for R4

C O M M O N O R D E R

Since the issues involved in these petitions pertain to the same O.S.Number, viz., O.S.No.19 of 2019, they are taken up together and a common order is passed.

2. The Civil Revision Petitions are filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 05.12.2020; 30.01.2020 made in I.A.Nos.4 of 2020 and 2 of 2019 in O.S.No.19 of 2019 respectively on the file of District Munsif Court, Anthiyur and to allow the present Civil Revision Petitions by various grounds.

3. The petitioner in C.R.P.No.100 of 2021 is the 1st defendant in suit in O.S.No.19 of 2019 and the petitioner in C.R.P.No.99 of 2021 is the son of the 1st defendant. The respondents 1 and 2 are the plaintiffs in O.S.No.19 of 2019 and they filed a suit seeking permanent injunction restraining the respondents 3 and 4 / defendants therein, their agents and men from trespassing into the suit 'B' schedule property or in any other manner interfering with the plaintiffs peaceful possession and enjoyment of suit 'B' schedule property.

4. The 1st defendant filed a written statement in the said suit stating that the allegations mentioned by the plaintiffs are totally false and there was no oral partition held 40 years back and they claim that plaint 'B' Schedule property was allotted to the plaintiffs and the remaining western portion of 'A' schedule property was allotted to the share of the 1st defendant and thereby the parties were in possession and enjoyment of the respective shares amicably for the last 40 years. The 1st defendant has also stated in the written statement that the defendants never played fraud upon the officials and cheated them in getting himself as a member of the 2nd defendant-society on 09.08.1978 and they have not tress-passed into the property as alleged by the plaintiffs.

5. When the trial was conducted, the 1st defendant's son, viz., Sivasakthi had filed an application in I.A.No.2 of 2019 stating that he is the son of Velappan and the said suit was posted for letting in evidence of D.W.1, as the said documents which was alleged to be filed at the time when the suit was filed, could not be filed, in view of the fact that the same were already filed in a different proceedings and were pending. Since all these documents are important and necessary one to be adduced in evidence, prayed for accepting the same by condoning the delay in filing the same. [list of documents from 1 to 12 was sought to be marked in evidence].

6. Resisting the same, a counter statement was filed by the 1st respondent / 1st plaintiff stating that the averments that the said documents were marked in some other proceedings, which are material documents to prove his case, and now, he obtained the documents, are all false and the delay was due the negligent action, therefore sought to dismiss the said application.

7. The Counter proceeds to state that the suit is filed against the 1st defendant and his son is not a party to the suit and he cannot swear an affidavit and file a petition to accept the said documents to be marked in the said trial. The 1st defendant has no valid reason for filing these documents through his son and further, to protract the proceedings and defraud the legitimate claim of the plaintiffs, the said I.A.No.2 of 2019 has been filed, he pleaded.

8. Moreover, the 1st respondent would further state in the counter that the document no.12 is the office copy of the plaint in O.S.No.438 of 2015 filed by the 1st defendant against the respondents, which was also withdrawn by him and it was dismissed as not pressed and there is no pleading about the document no.12 in the present suit. Hence the said document cannot be accepted as evidence and it is inadmissible. He further submitted that the defence of the petitioner in I.A.No.2 of 2019 suffers from constructive res-judicata and prays for dismissal of the same.

9. The court below after considering the pleadings on either side had come to the conclusion that the application with regard to the documents have been filed only at the belated stage, wherein the matter has been listed for defendants' evidence and the 1st defendant's son, is not party to the proceedings and he had not sought prior permission from the court regarding the said marking of the documents or filing this application. If at all there was any power of attorney executed on behalf of him, the same was not produced and without any permission from the court below, the petitioner cannot file this application and the same was dismissed, as per Order 18 Rule 13A of Civil Procedure Code.

10. Subsequently, according to the petitioners since the 1st defendant is unfit to appear and give evidence before the trial court, his son was examined as D.W.1., and there is no legal impediment for the 1st defendant to examine his son or any other person on his behalf. Subsequently, 1st defendant's son, [petitioner in C.R.P.No.99 of 2021] has filed I.A.No.4 of 2020 to receive the documents and the said petition was also dismissed on 05.12.2020 on the ground that a witness cannot file a petition under Order 16 Rule 7 and Section 151 CPC to receive the documents.

11. The learned counsel for the petitioners contends that the suit is a matter to be decided on evidence and the parties to the suit or the witness cannot be prevented from letting in evidence in support of their case and denial of an opportunity, amounts to denial of a fair trial. The trial judge has adopted a technical approach to non-suit the 1st defendant from producing

documents in support of his defence and that no prejudice can be caused in the event of receiving the documents during the course of the trial, the learned counsel for the petitioners pleaded. Challenging the same, the petitioners are before this Court.

12. The learned counsel for the petitioners contends that there is no legal impediment for the 1st defendant's son to examine himself as a witness or to file documents in support his father and there is no provision of law stated by the court below either under the Code of Civil Procedure or under the evidence Act.

13. It is represented on behalf of the learned counsel for the petitioners that the admissibility and genuineness of the documents can be gone into only after receiving the documents in evidence. However, the learned trial judge has adopted a strict approach by declining permission to the petitioners to mark the documents. Further, Order 16 Rule 1A of CPC, enables the parties to the suit to summon and bring any witness to give evidence or to produce document.

14. Per contra, the respondents 1 and 2 / plaintiffs' case is that the 1st defendant had forged a document, as consent letter for admitting the 1st defendant, as a member of the 2nd defendant. The 1st defendant obtained the membership towards the entire suit properties from 2nd defendant is illegal one and the same is in anyway not binding on the plaintiffs and their possession over the B schedule of suit properties. Hence they filed a suit for permanent injunction, thereby sought to dismiss the present revision petitions.

15. On going through the plaint averments, it is seen that the plaintiffs 1 and 2 and the 1st defendant are brothers and they are the sons of one Karuppan. The said Karuppan, became a member of the 2nd defendant-society and the suit 'A' schedule property was given to Karuppan for cultivation according to the Rules and Regulations of the society and there arose a dispute between the parties, due to which, one party filed a suit against the other. The petitioner, in C.R.P. No.99 of 2021 who is the son of 1st defendant has filed an Interlocutory Application No.4 of 2020 for accepting him to give evidence as D.W.1 and mark the documents and this petition was also dismissed by the court below.

16. The defendants' case is that the son of the 1st defendant was already examined as witness as D.W.1 on 05.12.2019 on behalf of 1st defendant and marked the documents and the same was also recorded. Thereafter, a petition under Order 8 Rule 3A and 151 of CPC was filed for condoning the delay in filing the said documents in I.A.No.2 of 2019 on 05.12.2019. The said

documents were considered on 30.01.2020 the said application was dismissed by the court below and the said order copy was not immediately available, hence he could not proceed further in this petition. Regarding the disputed suit schedule property, the 1st defendant's document would prove the case of the 1st defendant. Further, the 1st defendant is aged about 80 years, who is not in a position to come and report before the court below and hence the 1st defendant's son is the only person to mark the same by deposing before the court below. As he has already been examined as D.W.1 witness, he is entitled to mark the present documents and that he can be examined further. If the petition is not allowed, he will be put to great loss.

17. It is the further case of the petitioners / defendants that when the 1st defendant's son was already examined, the court cannot now say that he is not entitled to mark those documents. The said plea was also considered by the court below, wherein the plaintiffs have also filed a counter before the court and as per the counter, the plaintiffs have submitted that without the 1st defendant's son being party to the proceedings, he cannot file an application as a third party. The third party on his own as well as on behalf of other, cannot now come and seek for any prayer.

18. It is represented on behalf of the respondents that when there is no proof filed to show that the 1st defendant's son was not in possession of the said documents and those documents were also not a necessary document to the present dispute and the earlier Original Suit has been withdrawn and these petitioners have not filed any appeal against the order in I.A.No.2 of 2019, now, they cannot again take out this application seeking to mark the said documents. It is also the case of the respondents that when the petitioners have not produced any documents to show that the 1st defendant is having illhealth due to his age related ailments and has not produced any medical certificate in support of his contention, the said plea should not be accepted.

19. It is further represented on behalf of the respondents that earlier O.S. No.438 of 2015 was already filed by the 1st defendant and the said suit was withdrawn by them at the earlier point of time. The same documents cannot be filed here, as constructive resjudicata will be acting on them and the same cannot be taken on time. That apart, there is no whisper about the said documents and if at all the 1st defendant's son had pleaded earlier, the same would have been taken into account, but here, he has not pleaded so, and now in a shortcut method he cannot file this application to accept the document to be filed in the suit.

20. That apart, the court below after considering the pleadings, counter pleadings and after hearing the arguments, has come to the conclusion that as per Order 8 Rule 3A CPC, he filed a petition for marking the said documents, which was dismissed on 30.01.2020 and 1st defendant's son has not filed any appeal or Civil Revision Petition before any court and now the petitioners filed these petitions stating that all the documents are in the name of 1st defendant and he is not well and that his son has filed a application on his behalf, is not an acceptable one. Since the 1st defendant's son being a third party and the documents are not relevant to the proceedings, the same was dismissed. As against the same, the present Civil Revision Petitions are filed by the petitioners stating that the petitioner in C.R.P. No.99 of 2021 being son of the 1st defendant was already examined as D.W.1, hence there may not be any legal impediment for the respondents / plaintiffs to examine 1st defendant's son or any person as a witness.

21. It is pertinent to point out that Order XVI Rule 1-A Civil Procedure Code under the caption 'Production of Witnesses without Summons' states that Subject to the provisions of Sub-rule (3) Rule 1, any party to the suit may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents. As per the said provisions, it is seen that 1A empowers a party to the suit to bring any witness to give evidence or to produce any documents without obtaining any summons and the counsel for the petitioners submit that according to the said provision, without any suit summons, they can bring any witness or produce documents, but herein the petitioner in C.R.P. No.99 of 2021 is not a party to the proceeding, and he is only a third party, and only the petitioner in C.R.P. No.100 of 2021 is the party to the suit and he is the 1st defendant, if at all he is aggrieved, he can bring in any evidence or witness and produce any documents, but herein his son being the 3rd party, has applied on behalf of the defendants, which cannot be acceptable and the same is hereby rejected.

23. In respect of Order XVIII Rule 3-A of CPC, Party to appear before other witness - Where a party himself wishes to appear as a witness, he shall so appear before any other witnesses on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage]. If a person needs to appear as a witness, he has to seek a permission from the court and the court has to give permission only if it is necessary and only after recording reasons. If a party wishes to be examined as a witness, he would first offer himself for examination, before other witness could be examined, but herein, the 1st defendant has not been examined himself, but the 3rd party, being his son

is trying to let in evidence without even seeking any permission from the court below.

24. Moreover, Order 16 Rule 7 CPC, empowers Power to require persons present in Court to give evidence or to produce document - Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power. From the said proviso, it is clear that if the court directs the party to give evidence, which may be required by the court, then the party is at liberty to do so, but, in the present case, the court has not directed the party to give evidence or produce any documents, which was in his possession, as these documents are only to be marked herein by the 1st defendant and not by his son and the same is hereby rejected.

25. If at all the petitioners wanted to let in evidence or produce any documents, they should have already applied for permission before the court under what capacity the 1st defendant's son, [petitioner in C.R.P.No.99 of 2021] is eligible to give evidence and produce the documents. Further, when no materials have been produced by the 1st defendant [petitioner in C.R.P. No.100 of 2021] to show that he is suffering from age related ailments and not in a position to give evidence, that being the case, the evidence given by the petitioner, [son of the 1st defendant] in C.R.P. No.99 of 2021, cannot be accepted, as he is not party to the proceedings. Therefore, the evidence given by the 1st defendant's son, as D.W.1, cannot be taken as valid one. If the court below on erroneous view had allowed the third party to be examined as D.W.1, that cannot be continued by allowing him to mark the documents.

In view of the above said observations, this Court is not inclined to interfere with the order passed by the court below, since it is a well considered order. In the result, the present Civil Revision Petitions are hereby dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

ssd

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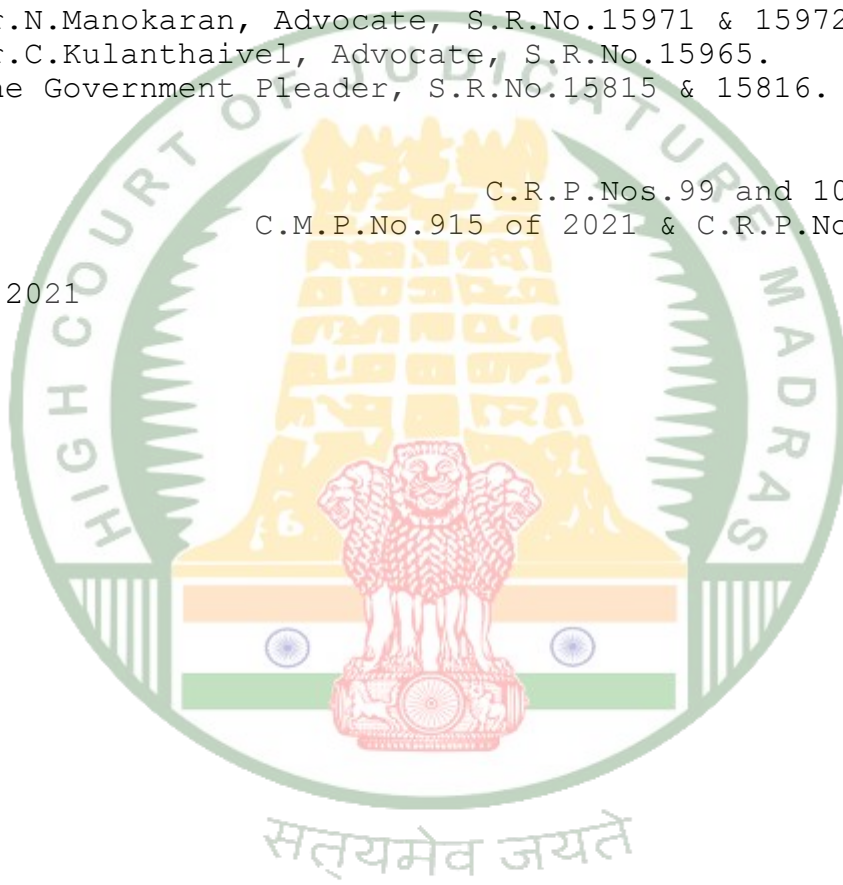
The District Munsif Court,
Anthiyur.

Copy to: The Section Officer,
V.R.Section,
High Court, Madras.(2)

+2cc to Mr.N.Manokaran, Advocate, S.R.No.15971 & 15972.
+1cc to Mr.C.Kulanthaivel, Advocate, S.R.No.15965.
+1cc to the Government Pleader, S.R.No.15815 & 15816.

SR-II(CO)
CSR 28.04.2021

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C.M.P.No.915 of 2021 & C.R.P.No.99 of 2021



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