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C.R.P. (PD) No.166 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.06.2022

Delivered on : 07.07.2022

CORAM

THE HONOURABLE MRS. JUSTICE S. KANNAMMAL

C.R.P. (PD) No.166 of 2020
and CMP No.929 of 2020

S.M.Suresh

... Petitioner

Vs.

Mohana Flat Owner's Assn.
Rep. by its President & Secretary,
96, Arcot Road,
Virugambakkam, Ch-92.

... Respondent

Prayer : The Civil Revision petition filed under Section 115 of the Code of Civil Procedure, against the order dated 01.10.2019 made in I.A No.1 of 2019 in O.S. No. 5235 of 2014 on the file of the learned XVI Assistant Judge, City Civil Court, Chennai.

For Petitioner : Ms. Jayashree Narasimhan

For Respondent : Mr.M.Swaminathan

ORDER

The plaintiff in O.S.No.5235 of 2014 on the file of the XVI Assistant Judge, City Civil Court, Chennai has come forward with this Civil Revision petition challenging the order dated 01.10.2019 made in IA No.1 of 2019 in

O.S.No.5235 of 2014.

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2. The plaintiff has filed the suit in OS No. 5235 of 2014 praying for

the following reliefs:

- i. *For a mandatory injunction directing the defendant, his servants, agents, persons, authorized by them or claiming through them provide necessary and sufficient space for a car park in the common area so as to enable the plaintiff and his tenant at door no.G-5 to use and enjoy the common car park facility.*
- ii. *For a permanent injunction restraining the Defendant, his servants, agents, person, authorized by them or claiming through them from interfering or enjoying the car park in the common area available in the suit property.*
- iii. *For a Declaration that the plaintiff is entitled to car parking space within the premises of Mohana Flat Owner's Assn, situate at 96, Arcot Road, Virugambakkam, Chennai.*

3. The sum and substance of the plaint averments is to the effect that the plaintiff has purchased one of the flats in Mohana apartments, No.96, Arcot Road, Virugambakkam, Chennai – 92 in the year 1995. According to the plaintiff, he is not residing in the flat due to his pre-occupation with his employee at Ahmedabad and therefore, he has authorized his brother through a general power of attorney, dated 17.08.1994, to deal with his property. On the strength of such power of attorney, his brother had let out the property for rent to a tenant. The main grievance of the plaintiff appears to be that his tenant was not permitted to park his car in the apartment complex. On the other hand, there are some owners who are permitted to park their car and there are



some other owners who park more than one cars belonged to them within the apartment complex. Even though, the plaintiff is also one of the owners of flats, out of 112 flats, the defendant Association, without any reason, did not permit his tenant to park the car in the apartment complex. The defendant, which is a registered association, is seldom following the bylaws of the association. Few days prior to the institution of the suit, the tenant who was in occupation of the flat owned by the plaintiff, vacated it mainly due to the reason that he was not permitted to park his car in the apartment, with the result, the flat he has purchased is lying vacant. Further, the tenants who approached the plaintiff to let out his flat premises ultimately refused to take it for rent mainly due to the reason that the defendant association did not provide space for parking car for his tenant. It is in those circumstances, the plaintiff has come forward with the present suit.

4. On notice, the defendant association filed a written statement repudiating the plaint averments. It was specifically stated that there was no intention on the part of the defendant association to deny permission to the tenant to provide space for parking of the car. It is stated that due to space crunch, most of the tenants in the flats were not permitted to park their cars and only the owners, who are self-occupants of the flats, are permitted to park



the cars. The tenants who are in occupation of various flats were only directed to park their cars outside the flats. In fact, the defendant association convened the General Body Meeting on 05.06.2011 in which the issue as regards the permission to grant parking space came up for consideration. In that meeting, it was unanimously decided to discontinue the system of allowing of parking of cars of guests and visitors during nights. It was also unanimously decided not to permit the tenants to park their cars purportedly to meet the growing needs of owner of the flats, who are members of the defendant association. Even in the subsequent Annual General Body Meeting convened on 05.05.2013, the plaintiff himself was present and he was fully aware of the decision taken to permit the cars of those who occupied the flats, as owners. Therefore, it was contended by the defendant association that there is no willful or wanton denial on the part of the defendant in not permitting space for parking the car of the tenant inducted by the plaintiff. Therefore, the defendant prayed for dismissal of the suit.

5. During trial in the suit, one Mr.R.Selvavinayagam, was examined as DW1 on the behalf of the defendant association. It appears that in the year 2018, the said Selvavinayagam, who was the President of the defendant association, left the Association and therefore, in his place one Mr.Ganesan,



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Treasurer, and who was authorized by the defendant association, was sought to be deposed in the suit by eschewing the deposition, hitherto tendered by DW1, Mr.Selvavinayagam. For this purpose, the defendant has filed the instant application in IA No.1 of 2019 praying to eschew the evidence of DW1 examined on behalf of the defendant association and in his place permit Mr.Ganesan, Treasurer, to be examined as DW1.

6. Opposing the plea raised in I.A. No. 1 of 2019 by the defendant Association, the plaintiff filed a counter affidavit stating that Selvavinayagam, at the time of his examination, was the President of the defendant/association and he was fully aware of the events that had unfolded in the flat premises and the nature of the suit filed by the plaintiff. While so, there is no reason as to why the deposition of the Selvavinayagam has to be eschewed. The deposition of the Selvavinayagam so far recorded before the Court is proper and therefore, the plaintiff prayed for dismissal of I.A.No.1 of 2019.

7. The trial Court, on consideration of the arguments advanced by the counsel for both sides, allowed the Interlocutory Application in I.A. No. 1 of 2019 filed by the defendant association to eschew the deposition of DW1 - Selvavinayagam and permitting Mr.Ganesan, Treasurer of the defendant



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association, which has given raise to the plaintiff filing the present Civil Revision Petition.

8. The learned counsel for the revision petitioner would contend that the evidence of Selvavinayagam, as DW1, recorded in the suit, was proper. However, it appears that the defendant association, in order to cover up the latches in the evidence tendered by Selvavinayagam, have come up with the present application. Even assuming that the said Selvavinayagam had left the defendant association, still he can be examined as DW1 and he will be called upon to depose as to the events that had unfolded at the time of institution of the suit. The trial Court lost the sight of the fact that only in order to fill up the lacuna, the instant application has been filed by the defendant association and the learned counsel for the revision petitioner-plaintiff prayed for allowing the Revision Petition.

9. On the above contention of the counsel for the revision petitioner, this Court heard the learned counsel for the respondent and perused the materials available on record, including the order passed by the trial court, which is impugned in this revision.



10. The suit was filed by the plaintiff for the relief of mandatory injunction directing the defendant association to permit the plaintiff's tenant to park his or her car in the flat premises in question and for other reliefs. Pending suit, DW1 Selvavinayagam, erstwhile President of the defendant association was examined in the suit. However, by claiming that Mr. Selvavinayagam said to have left the association, the defendant association has filed the instant application to eschew his evidence so far recorded and in his place permit one Mr.Ganesan who was appointed as Treasurer, to be examined. According to the counsel for the respondent-plaintiff, only in order to fill up the lacuna, the evidence so far tendered by Selvavinayagam, as DW1, is sought to be eschewed and such a plea ought not to have been accepted by the trial court.

11. This Court finds considerable force in the argument putforth by the counsel for the plaintiff/respondent herein. When the erstwhile President of the defendant association left the association, it is not necessary to eschew his evidence. There is no reason assigned on behalf of the defendant association as to why or how the evidence so far tendered by DW1 is inadmissible in evidence and the necessity to eschew his evidence. Merely because DW1 Selvavinayagam left the defendant association, it will not be ground for



defendant association to attempt to discredit his evidence and to file the instant petition. As the defendant is a registered Association, there will be frequent change in the office bearers at the helm of affairs from time to time. If one office bearer leaves the defendant association and who was examined as a witness in the suit, his or her evidence need not be eschewed. When once a person had tendered evidence before the Court of law and it was also recorded, it cannot be eschewed on any ground except in the event of unceremonious death of the witness or upon proof to show that the witness is incapable of tendering any further evidence. If for any reason a witness could not be examined further, after recording his or her chief examination, the probative value of such witness can be taken into consideration by the Court. If an analogy is taken where cross-examination of a witness was not completed or partially completed and the witness was not in a position to subject himself for further cross-examination on account of terminal illness or otherwise, which had reasonably precluded him to subject himself to judicial process, the probative value of such evidence can always be considered by the Court. Thus, even if a witness who had tendered his evidence in chief examination or partially cross-examined could not be examined further on account of his death or cannot be found or was incapable of giving evidence, his or her evidence need not be eschewed by the Court.



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12. In the present case on hand, it is the claim of the defendant association that their erstwhile President Selvavinayagam had left the association. Mr.Selvavinayagam is also one of the owners of the flat in the defendant. Merely because Mr. Selvavinayagam had left the association, it will not be a ground to eschew the evidence recorded so far. In any event, there is no reason assigned by the defendant association to eschew the evidence of DW1 which was admittedly recorded before the Court below. The trial Court without considering the above, has erroneously allowed the application filed by the defendant association.

13. Accordingly, the order dated 01.10.2019 passed by the trial Court in I.A.No.1 of 2019 stands set aside. The Civil Revision Petition is allowed. Taking into account the fact that the suit was filed in the year 2014, the trial Court is directed to complete the trial and proceed further with the suit in accordance with law within a period of one year from the date of receipt of a copy of this Order. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No

Speaking order / Nonspeaking order

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S. KANNAMMAL, J

To

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The XVI Assistant Judge,
City Civil Court, Chennai.

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