



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.01.2022

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THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P(MD)No.18 of 2022 &
CMP(MD)No.125 of 2022

Rajeswari ... Petitioner/Petitioner/3rd Defendant
Vs.
1.Alagarsamy
2.Subbammal ... Respondents/Respondents/Plaintiff

PRAYER:- Civil Revision Petition filed under Article 227 of Constitution of India to set aside the fair and decreetal order in IA.No.300/2021 in OS.No.41/2017 dated 16.11.2021 on the file of the Sub Court, Kovilpatti by allowing this Civil Revision Petition.

For Petitioner : Mr.N.Vignesh
for Mr.H.Arumugam

ORDER

The third defendant is before this Court questioning the dismissal of her application to examine the second plaintiff as a witness on her side.

2. The facts in brief necessary to dispose of the above Civil Revision Petition are as follows.

The plaintiffs who are the respondents in the impugned IA had filed the suit for partition. The second plaintiff is the mother of the first plaintiff and the defendants 1 and 2, and the mother-in-law of the third defendant. The plaintiffs had come forward with the suit for partition contending that the suit properties are the ancestral properties of the Veerasamy Naicker, the father of the first plaintiff and the defendants 1 and 2 and the husband of the second plaintiff. Veerasamy Naicker passed away on 16.12.1982 and thereupon, the properties devolved on the plaintiffs and the defendants 1 and 2. The third defendant who is the revision petitioner herein is the wife of the second defendant. Since she was claiming a non-existent right over the properties, she had been impleaded as a formal party. The third defendant had pleaded that the second plaintiff had orally settled the plaint schedule property on her husband / the second defendant.



3. It is the case of the petitioner / third defendant that during the lifetime of her father-in-law / Veerasamy Naicker, the properties had been purchased in the name of the first plaintiff, who was then a minor, wherein the second plaintiff was shown as a guardian. The suit properties were orally settled on the second defendant / the husband of the third defendant. It is the case of the third defendant that her husband had suddenly disappeared from the village since he was unable to face the creditors from whom he was forced to borrow money to meet the lavish expenses of the first defendant. After her husband had left the village, she has been in possession and enjoyment of the suit properties. Therefore, she would submit that these properties are not available for partition. Pending trial, the third defendant has come forward with the impugned application, wherein, she would seek to examine the second plaintiff as a witness on her side and the only reason given was that the plaintiffs had closed the evidence without examining the second plaintiff.

4. The respondents / plaintiffs had filed a counter *inter alia* denying the oral statement, stating that it is the first plaintiff who is conducting the suit on behalf of the second plaintiff as a whole and that a petition to direct a party to this proceedings to give evidence cannot be maintained.

5. The learned Subordinate Judge, Kovilpatti by order dated 16.11.2021 has dismissed the said application. Challenging the same, the revision petitioner is before this Court.

6. The learned counsel appearing on behalf of the petitioner / third defendant would submit that the provisions of Order 16 Rule 21 gives right to summon a witness. He would rely on the paragraph 12 of the Judgment of the Principal Seat of this Court in V.K. Periasamy alias Perianna Gounder vs. D. Rajan reported in 2001 (3) CTC 20 in support of this argument.

7. Heard the learned counsel appearing for the petitioner and perused the records and the evidence relied upon by the counsel.

8. In the Judgment *cited supra*, the learned Judge has allowed the application only on the ground that the person who sought to be examined is not the opposite party and is consenting to the case of the plaintiff. The learned Judge has observed as follows.

"12.....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 recognizing 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 recognized 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....."

Therefore the order allowing the application under Order 16 Rule 21 was on account of the fact that the person who sought to be examined as a witness is a person who is concurring with the plaintiff. However, in the case on hand, the situation is otherwise. That apart, the reason given by the revision petitioner / third defendant for seeking to examine the second plaintiff is on the ground that the second plaintiff has orally settled the suit properties on the second defendant / the husband of the third defendant. The revision petitioner / third defendant seeks to elicit this fact from the second plaintiff. The second plaintiff had filed the suit for partition along with the first plaintiff, has impliedly not confirmed the oral settlement. Therefore, the second plaintiff is denying the claim of the third defendant and is therefore, a contesting party differing with the third defendant. The learned Subordinate Judge, Kovilpatti has rightly dismissed the application and I find no reason to interfere with the same.

9. Accordingly, the Civil Revision Petition is dismissed. No costs. The order passed in IA.No.300/2021 in OS.No.41/2017 dated 16.11.2021 by the Subordinate Judge, Kovilpatti is hereby confirmed. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (P&A)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To:-

The Sub Court,
Kovilpatti

+1 CC to M/s.H.ARUMUGAM, Advocate (SR-1089[F] dated 10/01/2022)

C.R.P (MD) No.18 of 2022
07.01.2022

BK (CO)
KB (28.01.2022) 4P 3C