



C.R.P.(MD)Nos.1399 and 1400 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 10.07.2023

Delivered on : 11.08.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

C.R.P.(MD)Nos.1399 and 1400 of 2019

and

C.M.P.(MD)No.7451 of 2019

C.R.P.(MD)No.1399 of 2019

1.Pakkiam @ Pakkialakshmi

2.N.Ammakkannu

3.S.Mallika ... Petitioners/ Petitioners/ Defendants 16 to 18

Vs.

1.Meenal ... 1st Respondent / 1st Respondent/ Plaintiff

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order, dated 09.08.2018, passed in I.A.No.79 of 2018, in O.S.No.154 of 2011, on the file of the Principal District Munsif, Karaikudi.

C.R.P.(MD)No.1400 of 2019

1.Pakkiam @ Pakkialakshmi

2.S.Mallika



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3.N.Ammakkannu

... Petitioners/ Petitioners/ Defendants 16 to 18

Vs.

1.Meenal ... 1st Respondent /1st Respondent/ 1st Respondent /
Plaintiff

2.Ponnammal

3.L.Ulaganathan

4.Partheeban

5.Karuppiah

6.K.Ulaganathan

7.K.Raja

8.K.Renuga

9.Seenivasan

10.Senthil

11.Abinaya

12.Vikraman

13.Kavidasan

14.Padmasheela

15.Renuga Devi

16.Muthulakshmi

17.Meyyathal

18.Mallika

19.Soundaravalli

20.Gandhimathi

21.Jeyalakshmi

22.Vellaichamy



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23.Muthammal

24.Sivaraj

25.Muthu

26.Kasthuri

27.Natchammai

28.Vasantha

29.Vallikkannu

30.Ganesan

31.SP.Natchiappan ... Respondents 2 to 31 / Respondents 2 to 31/
Respondents / Defendants 1 to 15 & 19 to 33

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order, dated 09.08.2018, passed in I.A.No.80 of 2018, in O.S.No.154 of 2011, on the file of the Principal District Munsif, Karaikudi.

(In both C.R.Ps.)

For Petitioners : Mrs.P.Jeesi Jeeva Priya

For Respondents : Mr.S.Parthasarathy for R1

: No appearance for R2 to R30

: Mr.Ajmal Khan, Senior Counsel
for M/s.Ajmal Associates for R31



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COMMON ORDER

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These Civil Revision Petitions have been filed against the order, dated 09.08.2018, passed in I.A.Nos.79 and 80 of 2018, in O.S.No.154 of 2011, on the file of the Principal District Munsif, Karaikudi.

2. In C.R.P.(MD)No.1399 of 2019, the revision petitioners are the defendants 16 to 18 and the respondent is the plaintiff before the trial Court.

3. In C.R.P.(MD)No.1400 of 2019, the revision petitioners are the defendants 16 to 18, the first respondent herein is the plaintiff and the respondents 2 to 33 are the defendants 1 to 15 & 19 to 33, before the trial Court.

4. For the sake of convenience, the parties are referred according to their litigative status before the trial Court.

5. Short facts which give rise to the instant Civil Revision Petition, are as under:



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5.1. The plaintiff / first respondent has filed a suit for specific performance, based upon the sale agreement, dated 13.06.1997. It appears that, originally the petitioners herein have adopted the written statement, which was filed by the 33rd defendant and it also appears that they have initially engaged a counsel, who appeared for the 33rd defendant. It seems that these petitioners have filed a memo before the Court on 11.03.2015, withdrawing the vakalat given in the name of one V.S.Shanmugam Ayya, who is the counsel of the 33rd defendant and it also reveals that subsequent to the withdrawal of the vakalat, they have filed a separate written statement on 17.12.2015.

5.2. While this being so, the petitioners herein have filed an application for reopen the petitioners' side evidence and for recall so as to cross examine the plaintiff, third defendant and the 33rd defendant. The said application was stoutly objected by the plaintiff as well as the 33rd defendant, on the ground that having engaged the counsel of the 33rd respondent and filed a memo adopting the written statement of the 33rd defendant, the very conduct of the petitioner in filing the application, latter on again to cross examine the witness, seems to be fallacious.



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6. In similar line, the third defendant-Mr.Partheeban has also filed the counter statement. He contended that having cancelled the vakalat, on 04.06.2015, filing the instant application during 2018, would only exemplify the fraudulent conduct of the petitioner. This counter statement was also adopted by the respondents 1 to 10, 15, 19, 20, 23, 24, 25, 26 and 33.

7. After considering either side submissions, the learned trial Judge has rejected both the application on the ground that, when actually the third defendant was not examined, as a witness the very prayer to recall the third defendant would become meaningless, and also found that, when the petitioner come forward to mark certain additional documents through cross examination, an application has not been filed for receipt of the additional documents, and it was also the finding of the learned trial Judge that having cancelled the vakalat during 2015 filing of an application at a belated stage would also go counter to the petitioners' prayer. Hence, the trial Court has dismissed this application.



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8. Aggrieved with the order of the learned trial Judge, rejecting his application to recall the witnesses as well as reopen plaintiff's evidence, the petitioners have come forward with the instant revision petitions.

9. The learned counsel for the petitioners would submit that, they have cancelled the vakalat of their previous counsel, and that when they have filed a separate written statement, in the interest of justice, they are entitled to cross examine the witnesses, in line with their defence. It is also the submission of the learned counsel for the petitioners that since because, the third defendant was not examined as a witness, the prayer for recall will not vanish, as still the prayer for recalling other two witnesses survives. It is the further submission of the learned counsel for the petitioner that, when they have filed a separate written statement, they have got inherent right to cross examine the witnesses, based upon the written statement and that there is a collusion between the other defendants among themselves. More particularly, the defendants 1 to 3 and 33 have colluded and have cheated this petitioner and hence, prayed to allow the applications.



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10. The learned counsel for the plaintiff though filed a counter statement objecting the applications, while submitting the argument expressed his no objection in allowing the revision petitions, so as to have early disposal of the suit.

11. Per contra, the learned senior counsel appearing on behalf of the 33rd defendant would strenuously contend that the causal attitude of the petitioner in filing the applications, for recall and reopen would be viewed seriously, and he would also further emphasise before this Court that the casual attitude of the petitioners in filing the applications would explicit from the prayer to recall the third defendant, when the third defendant was not at all examined.

12. The learned Senior Counsel would rely upon the judgment of the Hon'ble Supreme Court reported in **2009-4-SCC-410 (Vadiraj Naggappa Vernekar (Dead) V. Sharadchandra Prabhakar Gogate)**. The relevant portion of the judgment is extracted as follows:

“24. Having heard learned counsel for the respective parties, we are unable to agree with Mr. Narasimha that both the Single Judge and the Division



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Bench of the High Court had erred in rejecting the appellants' application under Order 18 Rule 17 CPC since, according to Mr. Narasimha, no prejudice would be caused to the respondent as he would be given a chance of cross-examination after re-examination-in-chief by the plaintiff.

*25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, **the main purpose of the said rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.***

26. As indicated by the learned Single Judge, the evidence now being sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared.”

(Emphasis supplied by this Court)



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Therefore, would submit that since no new fact exist for the petitioner to cross examine, the application will fail.

13. The learned Senior Counsel would also rely upon the judgment of the Hon'ble Supreme Court reported in **2016-11-SCC-296 (Ram Rati V. Mange Ram (Dead))**. The relevant portion of the judgment is extracted as follows:

“10. Order 18 C.P.C deals with hearing of the suit and examination of witnesses. By an amendment introduced thereunder with effect from 11.02.1977, 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.



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“11. The respondent filed the application under Rule 17 read with Section 151 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 basic 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.”

(Emphasis supplied by this Court)

14. I have given my anxious consideration to the either side submission and perused the records.

15. It is an admitted fact that originally these petitioners have engaged the counsel of the 33rd defendant and filed the statement along with 33rd defendant. Only during 2015, they have cancelled the vakalat



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executed in favour of their previous counsel, who was also the Advocate for the 33rd defendant. It is pertinent to mention here that, these petitioners on their behalf filed a separate written statement and the same is available on record. Therefore, *prima facie*, this Court finds that when the petitioners themselves have filed the written statement and when they have pleaded collusion, fraud between the other defendants, against these petitioners in all eventuality, an opportunity should have been given to the petitioners herein to confront the witnesses, according to their pleadings, which they have filed subsequently.

16. It is the submission of the learned senior counsel for the 33rd defendant that having filed the counter statement along with 33rd defendant, only to defeat this defendants' claim and to fill up the *lacuna* on the behalf of the plaintiff, they have come up with these applications. The ratio of the judgments cited by the 33rd defendant is that the reopen and recall petitions can not be allowed to fill up the *lacunas*. However, power of recall and reopen can be exercised at any stage of the suit for clarification. Further, from the above, the inherent power of the Court for recall and reopen can not be treated as *carteblanche* to grant any relief.



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17. Keeping in mind with the above proposition, let us consider the facts in the instant case. As rightly submitted by the learned Senior counsel of the 33rd respondent, the recall and reopen applications have been filed after a period of 2 years, from the date of cancellation of vakalat. At this juncture, this Court would like to mention here that the recalling of vakalat by the petitioners was not at all been disputed by either party and it is also not disputed by either party about the filing of the written statement subsequent to recalling of vakalat given to the previous counsel. To crown it all it is not in dispute that the petitioners did not file any written statement previously.

18. However, before filing the separate written statement by this petitioner, the cross examination of the plaintiff as well as the 33rd defendant was over. Therefore when the petitioners were permitted to file a written statement, his case could only be effectively putforth before this Court, through cross examination of witness in line with his written statement. Therefore, in the above back ground, if at all, this Court finds anything adverse to the petitioner, it would only be the delay. The so-called delay in filing the application will in no way defeat the right of the



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petitioner, to cross examine the witnesses based upon their written statement. As a matter of fact no one has objected the filing of written statement at a belated stage,

19. Therefore, it is a natural phenomenon that whenever a person filing a written statement, he is entitled to cross examine the witnesses, based upon their written statement. In this case, according to the respondent, the petitioners have cross examined through the counsel of the 33rd defendant, who was appointed by the petitioner herein. As referred elsewhere in the order such appointment of counsel was subsequently cancelled and a separate written statement has also been filed on the ground that there was a collusion among the other defendants. In that context, this Court is of the view that unless the petitioners are permitted to cross examine the witnesses, it would cause great prejudice to them.

20. However, as rightly found by the learned trial Judge the affidavit was sworn in a casual manner and has prayed to recall the plaintiff as well as the 3rd defendant and 33rd defendant for cross examination. Though the petitioner has wrongly prayed to recall the third defendant



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when he was not examined as witness, this Court is of the view that such a defect will in no way affect his valuable rights in cross examining other available witnesses. The next ground considered by the learned trial Judge for dismissal of application is that the petitioner did not file document which they want to elicit before the witness during their cross examination. The said finding is also contrary to the spirit of cross examination. Because if the documents are revealed to the witnesses, before the witness come to the witness box, then we cannot have the spontaneity or truthful answer as there is a chance for tutoring the witness. Therefore, both the reasons assigned by the learned trial Judge for rejecting the application appears to be perverse.

21. Therefore, this Court would like to interfere with the order of the learned trial Judge by allowing the petition. However, as rightly submitted by the learned Senior Counsel, the delay is starrng against them and such delay might have definitely caused certain hardship to the respondents. Therefore, this Court would like to compensate the hardship of the respondent by imposing cost to the petitioner. However, since, the 3rd defendant was not examined, the prayer in respect of recalling the 3rd



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defendant is redundant and the prayer to that extent is deserves to be dismissed.

22. In the result, both the Civil Revision Petitions are **allowed** on payment of cost of **Rs.5,000/- (Rupees Five Thousand only)** to the **respondents herein**, within four weeks from the date of receipt of the copy of the order, failing which, this revision petition shall stand dismissed without any further reference to the order of this Court. On complying the condition, the order made in I.A.Nos.79 & 80 of 2018, in O.S.No.154 of 2011, on the file of the Principal District Munsif, Karaikudi, is hereby set aside, thereby, the witness P.W.1 and D.W.1, are ordered to be recalled.

23. The instant Civil Revision Petitions are allowed, with the above observation. Consequently, connected Miscellaneous Petition is closed.

11.08.2023

NCC : Yes/No
Index : Yes/No
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To

- 1.The Principal District Munsif,
Karaikudi.
- 2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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C.KUMARAPPAN.,J.

Ls

Pre-delivery order made in
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