

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH**Civil Revision No.2089-2021 (O&M)****Date of Decision: 22.03.2023****Shri Uma Shankar Bhartia****..... Petitioner****Versus****M/s Suvidha Estate Agency & Another****..... Respondents****CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA**

Argued by:- Ms. Munisha Gandhi, Sr. Advocate with
Mr. Viraj Gandhi, Advocate
Ms. Priya Singh, Advocate for the petitioner.

Mr. Rajesh Sethi, Advocate
Mr. Arun Biriwal, Advocate
Mr. Tushar Gera, Advocate for respondent No.1.

Nidhi Gupta, J.

Prayer in the present Revision Petition, is for setting aside order dated 23.07.2021 (Annexure P1) whereby learned trial Court has allowed interim miscellaneous application dated 15.01.2020 (Annexure P-12) filed by respondent No.1/plaintiff, seeking to examine the petitioner/defendant No.2, as its own witness during evidence of plaintiff.

2. Brief facts of the case are that on 16.11.2018, the plaintiff instituted a Suit (Annexure P-2) for recovery of Rs.90,62,400/- against the defendants No.1 and 2/proforma respondent No.2 and the petitioner herein, respectively. Upon notice, the petitioner and respondent No.2 appeared and filed joint written statement dated 17.05.2019 (Annexure P-3), in the said Suit. It is the pleaded case of the plaintiff that he is a property dealer who deals in real estate and sale & purchase of

immovable properties. Respondent No.2 and the petitioner who were in possession of the suit property as described in the head note of the plaint, were desirous of selling the same and therefore, approached plaintiff for sale of said property.

3. It is the case of the plaintiff that upon sale of the suit property he was entitled to claim commission @ 2% of the sale proceeds along with GST at the applicable rate. As per Agreement to Sell dated 07.05.2018 executed between sellers and purchasers, either sellers or purchasers would pay commission to respondent No.1 along with GST. In pursuance to the said Agreement to Sell dated 07.05.2018, Sale Deed dated 16.07.2018 was executed in respect of the suit property between 'sellers'/being the petitioner and respondent No.2 herein, and the 'purchasers'/being one Mr. Vijay Kumar Bhandari and 3 others. It was the grievance of the plaintiff that he was not paid the commission as agreed upon at the time of Agreement to Sell. Accordingly, the plaintiff/respondent No.1 herein, filed Suit for recovery of the aforesaid amount, wherein a joint written statement is filed by the petitioner and respondent No.2.

4. Vide order dated 17.07.2019, following issues were framed in the matter:-

"i. Whether Plaintiff is entitled to a decree for recovery of Rs.93,34,272/- along with interest as prayed for? (OPP)

*ii. Whether suit is not maintainable in the present form?
(OPD)*

iii. Relief."

5. That during pendency of the said Suit, on 15.01.2020, the plaintiff moved an interim miscellaneous application (Annexure P12) for examination of the petitioner as its own witness. The petitioner and respondent No.2 herein filed common reply dated 18.02.2020 (Annexure P13) to the aforesaid application. It is this application which has been allowed by the learned trial Court vide impugned order dated 23.07.2021 (Annexure P1). Hence, present Revision Petition.

6. It is vehemently submitted by learned Senior Counsel for the petitioner that it is a well-established principle in law that in adversarial litigation, practice of summoning defendant/opposite party as own witness is deprecable. It is submitted that in the plaint, there is no mention whatsoever of the petitioner. It is submitted that admittedly, Sale Deed dated 16.07.2018 did not bear petitioner's signature, and that the same had been signed by one R.K. Gupta on behalf of defendant No.1/respondent No.2-Company. It is submitted that therefore, there was no occasion or need to summon petitioner as a witness, and it is clear that application filed by plaintiff was mala fide and vexatious as the petitioner is only a Director of the respondent No.2-company and has only signed the attorney for defending Civil Suit.

7. It is further submitted that application in question is a vexatious attempt on part of the plaintiff to further delay the Civil Suit. It is stated that it is evident from the record of the case, in particular from perusal of zimni orders Annexure P-4 to Annexure P-11, that the plaintiff has indulged in every endeavor to delay the suit on one pretext or the other, and the present application is another such manoeuvre. It is stated

that issues in the Suit had been framed on 17.07.2019 whereafter, from 05.08.2019 to 26.11.2019 the plaintiff had availed eight opportunities to lead evidence, and the present application was moved only on 15.01.2020.

8. It is further submitted that in view of the fact that plaintiff's right to recovery of money has been categorically denied by the defendants in their written statement, burden of proof is on the plaintiff to establish its case by adducing its own evidence. Plaintiff cannot be permitted to rely upon the petitioner/defendant to prove his case. It is also submitted that the petitioner is not named in the list of witnesses and therefore, he cannot be summoned for this reason as well.

9. In support of her contentions, Learned Senior Counsel relies upon judgments of various High Courts in ***Dina Nath & Another Vs. Shanti Devi (Punjab & Haryana High Court) (2006) 1 RCR Rent 290; Pirgonda Horgonda Vs. Vishwanath Ganesh & Others (Bombay High Court) AIR 1956 Bom 251; K. Jayaraj Vs. Moses Pandian & Another (2010) 95 AIC 888; Amitabha Sen Vs. Sports World International Ltd. & Others (Delhi High Court) (2008) 101 DRJ 528; V.P. Subramaniam Vs. P. Saraswati (Madras High Court) (2003) 1 Mad LJ 556; Minor Arumugam @ Logesh & Another Vs. State Bank of India & Others (Madras High Court) (2005) 5 CTC 773; D. Babu Vs. K.A. Dinachandran (Madras High Court) (2013) 1 CTC 881; D. Rangaraj Vs. M. Palanisamy & Others (Madras High Court) 2016 SCC OnLine Mad 8655; and Awadh Kishore Singh & Another Vs. Brij Bihari Singh & Others (Patna High Court) AIR 1993 Pat 122.***

10. In response, it is submitted by learned counsel for respondent No.1/plaintiff that under Civil Law, there is no absolute bar on summoning a party to the lis as witness. It is stated that admittedly, it has been termed as a deprecable practice, however, Courts in their wisdom have not placed an absolute bar upon such a practice. It is submitted that respondent No.1 would not have troubled learned trial Court if it was unnecessary to prove the documents in question. However, the said Agreement to Sell dated 07.05.2018 goes to the root of the issue at hand and it is imperative for the plaintiff to prove it, in order to establish its case.

11. It is further submitted that at first, the plaintiff has to establish its case, to stand on its own legs and therefore, leading of positive evidence is required and therefore, there was no error in the application filed by the plaintiff, or even in the impugned order.

12. It is further submitted that both R.K. Gupta and petitioner were present at the time of signing of Agreement to Sell dated 07.05.2018, wherein commission payable to the plaintiff is recorded. It is submitted that it has been categorically stated in application (Annexure P12) filed by the plaintiff for grant of permission to examine petitioner as a witness, that the petitioner was very much present and attended meetings leading up to the signing of said Agreement.

13. It is further submitted that in their reply to the said application, defendants had undertaken to produce R.K. Gupta as witness. It is submitted that in view of the said undertaking, the petitioner is now

precluded and thereby estopped from opposing the plaintiff's request for producing the petitioner as witness.

14. It is further submitted that adversary of the plaintiff is the company, and the petitioner only represents the company. It is submitted that respondent No.2-Company has not approached this Court and once defendant-company is satisfied with the impugned order, how can the petitioner challenge the same.

15. It is further submitted that "Truth" is the ultimate journey of every procedural law and purpose of examination and cross-examination is only to elucidate "Truth". It is also submitted that by concealing and suppressing relevant material from Courts, task of the Courts is made arduous.

16. It is further submitted that there are two questions of law to be considered by this Court: a) that as per law there is no absolute bar on summoning party to the lis as witness; and b) that the petitioner has been sued only as representative of the company and therefore, once the company has not challenged the impugned order, it is not open to the petitioner to challenge the same in his individual capacity.

17. It is further submitted that plaintiff has to establish its case on its own legs and plaintiff is seeking recovery against defendant No.1/company/respondent No.2 herein, and plaintiff is running a great risk in calling defendant No.2 as witness who will obviously support case of defendant No.1, but plaintiff has no option but to lead positive evidence in order to establish its case.

18. It is further submitted that it is incorrect of the petitioner to state that pleadings of plaintiff did not reflect or mention the petitioner. In the Civil Suit it has been clearly pleaded that Agreement was entered into with the 'defendants', which necessarily includes the petitioner being defendant No.2. It is stated that said R.K. Gupta had personal knowledge as he was present at time of signing of the Agreement in question. It is stated that now in view of death of Mr. RK Gupta, the defendants have suggested that one Mr. HK Seth be examined instead, however, when Mr. HK Seth became Director, no one knows. Moreover, Mr. HK Seth has no knowledge of the facts of the present case or course of events. It is submitted that if Mr. HK Seth can appear as witness then why can the petitioner not.

19. In support, Learned counsel for the respondent No.1 relies upon judgments in ***National Insurance Company Ltd. Calcutta & Others Vs. M/s Susru Sea Foods (Andhra Pradesh High Court) 2005 (2) RCR Civil 194; Sri Awadh Kishore Singh & Another Vs. Sri Brij Bihari Singh & Others (Patna High Court) 1993 AIR (Patna) 122; V.P. Subramaniam Vs. P. Saraswathi (Madras High Court) 2003 (3) RCR Civil 604; Minor Arumugam @ Logesh Vs. State Bank of India & Others (Madras High Court) 2005 (4) RCR Civil 736; and V.K. Periasamy @ Perianna Gounder Vs. D. Rajan (Madras High Court) 2001 AIR (Madras) 410.***

20. In rebuttal, it is submitted by learned Senior Counsel for the petitioner that company had undertaken to produce Mr. R.K. Gupta because he had signed the Sale Deed on behalf of the company. However, application Annexure P-12 was filed in January, 2020;

petitioner/defendants had filed their reply Annexure P-13 to the said application in February, 2020, and Mr. R.K. Gupta had expired thereafter, on 27.10.2020. As such, he could not be produced. It is further submitted that because Mr. R.K. Gupta was a signatory to the actual Sale Deed therefore, in the above said reply (Annexure P13), defendants had undertaken to produce him as witness; or in the alternative Mr. H.K. Seth was subsequently offered as a substitute witness. It is further stated emphatically that petitioner is not willing to appear as witness and cannot be compelled to appear as witness either for himself or for the plaintiff, and it is up to the plaintiff to prove its own case.

21. No other argument is made on behalf of the parties.

22. I have heard learned counsel for the parties.

23. I have given my thoughtful consideration to the rival submissions advanced on behalf of the parties. For the reasons recorded hereinbelow, I find merit in the arguments advanced on behalf of the petitioner.

24. The *ratio decidendi* of the above said rulings relied upon by both the parties is, that though there is no legal impediment in summoning of opposite party as own witness, yet, it is a deplorable practice that is to be condemned and is to be undertaken only if there are very good reasons. Thus, the Court may exercise its discretion in favour of the parties seeking permission, and permit summoning of an opposite party as own witness, only in exceptional circumstances.

25. Reference be made to judgment of this Court in case of ***Dina Nath (supra)***, wherein it has been acknowledged in para 5 thereof as under:-

“...The said case is confined to its own facts and even otherwise depending on the facts and circumstances of each case such a prayer can be allowed and it is not always that a party cannot call the opposite party as a witness. However, in the case in hand, the special attorney for the landlady has already appeared and in case the landlady does not wish to appear, there is no reason to compel her to appear. Besides, whatever adverse inference which can be drawn for her non-appearance shall be considered by the Rent Controller at the appropriate stage of the case. In V.K. Periasamy alias Perianna Gounder v. D. Rajan, AIR 2001 Madras 410 it was held that if there are very good reasons for summoning the opposite party as a witness, the Court may exercise its discretion in favour of the party seeking permission. There is no dispute to the said proposition. In the case in hand no sufficient and good reasons have been given for summoning the opposite party as a witness except that to bring out the truth she is required to be summoned...”

26. Even in judgment of the Delhi High Court in case of ***Amitabha Sen Vs. Sports World International Ltd. & Others (supra)***, it has been held that *“summoning of a witness of an opposite party should be allowed in exceptional circumstances”*.

27. Accordingly, what has to be determined in the present case is, whether the plaintiff had sufficient and good reasons to summon the opposite party/petitioner as own witness.

28. In the present case, the reference regarding the role of the petitioner, is found in paras 2 and 3 of the plaint, wherein it is averred as follows:

“2. That M/s. Hindustan Wires Limited i.e. the defendant no.1 company was owner in possession of an industrial property bearing plot No.267, measuring 41663.75 Sq. Yards along with construction made thereon, situated at Sector-24, Industrial Estate, Faridabad, Tehsil Ballabgarh and the company was desirous to sell the aforesaid property and for that purpose the defendants contacted the plaintiff and requested him to get struck some deal regarding sale of the aforesaid property stuck.

3. That the plaintiff deals in real estate and he also sell and purchase the immoveable properties. Therefore, plaintiff made it clear to the defendants that he will get struck the deal of aforesaid properties and will claim commission @ 2% of the sale proceed along with GST at the applicable rate, as the plaintiff is a service provider and registered under the GST.”

29. In my view, the abovesaid averments, are vague and general. Even no date or month or any details as to when the petitioner/defendants allegedly contacted the plaintiff are given. In fact, throughout the entire plaint no specific role is found to be attributed to the petitioner and only similar general assertions have been made.

30. Further, the only two assignments made against the petitioner, are contained in para 3 of the application dated 15.01.2020 (Annexure P-12) seeking summoning of the petitioner. Paras 3 and 4 of the said application are reproduced hereinbelow:-

“3. That thereafter, a meeting was arranged in the office of plaintiff in the first week of April, 2018 which was also attended by the defendant no.2 besides the others. Written statement is filed by the defendants jointly which has been signed by defendant no.1 on behalf of the defendant no.2 in the capacity of attorney.

4. That now in order to prove that the defendants agreed to pay commission @ 2% of the sale proceed for striking the deal of the

property of the defendants, plaintiff wants to examine the defendant no.2 as witness on his behalf.”

31. It is to be noted that in the entire case, the above pleadings constitute the sum total of the role attributed to the petitioner i.e. a) petitioner is alleged to have attended a meeting in the office of the plaintiff in the first week of April, 2018; and b) the defendants have filed a joint written statement which was signed by the defendant No.1 on behalf of the petitioner. Admittedly, no other reference is made in respect of the involvement of the petitioner at any stage.

32. In this regard, reply dated 18.02.2020 (Annexure P-13) of the petitioner/defendant to the abovesaid application is important. In Para 3 of the Preliminary Objections of the said reply it has been stated that:-

“3. That in the statements of none of the witnesses examined by the plaintiff-applicant it has come that there was an involvement of Sh. Uma Shankar Bhartia defendant No.2 while settling the alleged deal of payment of commission to the plaintiff. So for this reason examination of Sh. Uma Shankar Bhartia defendant No.2 in the witness-box is entirely unnecessary. The plaintiff himself and his witnesses have shown the presence of Sh.R.K. Gupta, the Executive Director of defendant No.1, as a party to the said deal and Sh. R.K. Gupta has put his signatures on the agreement of sale containing the alleged term of payment of commission charges to the plaintiff. It is undertaken that after the closure of the evidence of the plaintiff, Sh. R.K. Gupta will be examined in the witness-box on behalf of the defendants.”

33. In paras 2 and 3 of the Reply on Merits of the said reply dated 18.02.2020, it has been stated as follows:

“2. That with regards to the averments contained in para 2 of the application it is submitted that it is nowhere alleged in the plaint specifically that the condition of payment of commission at the rate of 2% of commission was settled in the presence of defendant No.2. It is also submitted that the said agreement containing the alleged stipulation is Ex.P-1 which shows only the presence of Sh. R.K. Gupta, executive director of defendant No.1, on behalf of the defendants and not of defendant no.2 who is sought to be summoned via the present application. Moreover, the plaintiff Vishwender Singh, the proprietor of the plaintiff concern, has himself appeared in the witness-box as PW-2 and in his cross-examination he stated that at the time of the said settlement only Vijay Kumar Bhandari from the side of the vendees and his father (father of PW-2) were present and the vendors had not come at that time. He claims that these talks in his office were held in April 2018. PW-3 Kamal Chaudhary, father of PW-2 stated in his cross-examination that for the first time talks were held between his son and Sh. R.K. Gupta of M/s Hindustan Wires Limited. He does not say in his deposition that defendant No.2 Sh. Uma Shankar Bhartia was also present at any time during these negotiations. Two more witnesses were also examined by the plaintiff namely, Jibachh Mishra from the side of the vendees as PW-4 and one Azad Singh as PW-5. These PWs also did not state anywhere in the deposition that at the time of the alleged negotiations regarding the condition of payment of commission on the deal of sale, Sh. Uma Shankar Bhartia defendant No.2 was present. In the circumstances examination of Sh. Uma Shankar Bhartia is absolutely not essential.”

3. That with regard to the averments contained in para 3 of the application it is submitted that signing of the written statement by both the defendants with defendant No.1 signing the same as Attorney of defendant No.2 does not advance the case of the applicant for calling defendant No.2 in the witness-box.” (Emphasis supplied)

34. Perusal of the above pleadings therefore, shows that presence of the petitioner even in the alleged meeting of April, 2018, has

been categorically denied. Even the plaintiff's witnesses have not admitted the presence of the petitioner at the said meeting of April, 2018. Admittedly, no replication thereto was filed by respondent No.1. However, while passing the impugned order, learned trial Court has totally ignored the above said facts and evidence as set out by the defendants in their reply to the application. Thus, in my view, the reasons for which learned trial Court has allowed the plaintiff's application are not borne out from the record and cannot be made a ground to compel the petitioner to appear as witness.

35. Moreover, besides the fact that the abovesaid assertions of the plaintiff have been denied by the petitioner, in my view, the same are vague and unspecific, and deserve to be rejected.

36. Further, it is the pleaded case of the plaintiff, as contained in para 5 of the plaint that *"it was made clear in the agreement to sell executed between the defendants and the purchasers itself that the purchaser/seller will pay commission plus GST to the plaintiff firm..."* Accordingly, the entire case of the plaintiff is based on the Agreement to Sell dated 07.05.2018. Needless to say, onus is upon the plaintiff to prove the said Agreement. Burden of proof is on the plaintiff to establish its case by adducing its own evidence. Plaintiff cannot be permitted to rely upon the petitioner to prove its case. Moreover, in my view, in the face of documentary evidence in the form of the Agreement to Sell in question, oral evidence would not have such a bearing on the issue at hand. Therefore, presence of the petitioner does not seem to be relevant, especially in view of the admitted fact that the petitioner is not a signatory

to the said Agreement to Sell dated 07.05.2018 and sale deed dated 16.07.2018, and that Mr. RK Gupta, was signatory to the said Agreement/Sale Deed.

37. This fact has been noticed by the learned trial Court itself in para 8 of the impugned order that *“Although nowhere name of defendant no. 2 is mentioned in sale deed Ex. P-1 and name of Sh. RK Gupta is stated in said sale deed for defendant no. 1 and that is why in their reply defendants had claimed that they would examine Sh. RK Gupta in course of their evidence.”* However, reasoning of the learned trial Court that as Mr. RK Gupta has expired and therefore, only other person fully conversant with the facts of the case is the petitioner is fallacious as: a) as already demonstrated above, the petitioner has been shown to have negligible role, if any, in the entire proceedings. Petitioner is not signatory to either the Agreement to Sell, or even the Sale Deed; and b) In this regard, learned trial Court has overlooked the fact that the plaintiff had sought the examination of the petitioner as own witness during the lifetime of Mr. RK Gupta. Plaintiff had filed the instant application Annexure P-12 on 15.01.2020; petitioner/defendant had filed his reply Annexure P-13 to the said application on 18.2.2020, and Mr. R.K. Gupta had expired thereafter, on 27.10.2020. Thus, even at the time of filing the application for summoning of witness (Annexure P12), Mr. R.K. Gupta was alive. In my view, this factum would lend credence to the contention of the petitioner that the plaintiff is resorting to dilatory conduct with the mal-intent to harass the petitioner/delay the proceedings. Otherwise, it is trite that in order to prove his case the plaintiff, in the first instance, would seek to

examine the signatory Mr. RK Gupta as a witness, and not the petitioner who is admittedly, not a signatory, and whose presence at the meeting has been denied. Moreover, petitioner is not even named in the list of witnesses. Accordingly, this Court is of the considered view that, it is for the plaintiff to prove his case by leading positive evidence by examining his own witnesses. In my view, the present facts and circumstances do not constitute sufficient cause to permit examination of the petitioner as plaintiff witness, and petitioner cannot be compelled to appear.

38. As regards argument of the plaintiff that the defendants have filed a joint written statement which was signed by the defendant No.1 on behalf of the petitioner, the same is entirely misplaced. It has been rightly pleaded by the petitioner that the said argument does not advance the case of the plaintiff in any manner.

39. Further, observation of the learned trial Court in para 7 of the impugned order that it has been stated in para 6 of the plaint that after the above mentioned meeting in April 2018, site was inspected by defendants and with the efforts of the plaintiff, said deal was struck, is factually incorrect. Perusal of para 6 of the plaint does not evidence any such averment.

40. As regards argument of the learned counsel for the plaintiff that once the company has not challenged the impugned order, it is not open to the petitioner to challenge the same in his individual capacity, the same is entirely misplaced as, the petitioner is a defendant also and has a right to come by himself in his own right.

41. Accordingly, for the reasons stated hereinabove, the impugned order dated 23.07.2021 is set aside, and present Revision Petition is hereby, **allowed**. However, nothing stated hereinabove shall be construed as an observation on the merits of the matter.

42. Pending application(s) if any also stand(s) disposed of.

22.03.2023

Sunena

(Nidhi Gupta)
Judge

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No