



C.R.P.(PD)(MD) No.155 of 2020

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDERS RESERVED ON : 23.02.2024

ORDERS PRONOUNCED ON : 26.03.2024

CORAM

THE HON'BLE MR.JUSTICE MUMMINENI SUDHEER KUMAR

C.R.P.(PD)(MD) No.155 of 2020

and

C.M.P.(MD) No.847 of 2020

1.Sulochana

2.Bhuvaneswari

... Petitioners/
Respondents/Plaintiffs

Vs.

1.Pitchaimurugan

2.Saravanan

... Respondents/
Petitioners/Defendants

Prayer: Petition filed under Article 227 of the Constitution of India to set aside the order dated 23.09.2019 in I.A.No.2 of 2019 in O.S.No.40 of 2016 on the file of the Court of the Subordinate Judge, Aruppukkottai.

For Petitioners : Mr.S.Parthasarathy

For Respondents : Mr.Ananth C. Rajesh



C.R.P.(PD)(MD) No.155 of 2020

WEB COPY

ORDER

This civil revision petition is directed against an order dated 23rd September, 2019 passed in I.A.No.2 of 2019 in O.S.No.40 of 2016 passed by the Court of the Subordinate Judge, Aruppukottai.

2. The said application was filed by the respondents/defendants under Order XVI Rule 1(3) and Rule 21 read with Section 151 of the Civil Procedure Code to summon the 1st petitioner/plaintiff as D.W.2. The said application was allowed by the learned trial Court on the ground that this Court in the case of *V.K.Periasamy alias Perianna Gounder vs. D.Rajan⁽ⁱ⁾*, held that there is no bar to examine the opposite side as a witness under the Civil Procedure Code. Except the said reason, there is no other reason assigned by the learned trial Court, while passing the order under revision. The basic facts that made the respondents herein to file the application in question were also not considered by the learned trial Court. Merely

(i) AIR 2001 Mad 410 = (2001) 2 M.L.J. 235



C.R.P.(PD)(MD) No.155 of 2020

because there is no bar for filing such an application can never be a reason for allowing the said application calling upon the opposite party to give evidence on behalf of the other party. On this ground alone, the order under revision is liable to be set aside.

3. Learned counsel for the petitioners strenuously contended that Petitioner No.1 herein, who is Plaintiff No.1 has not chosen to enter the witness box and on behalf of her, Plaintiff No.2 was already examined as P.W.1. In case, if Petitioner No.1 herein is to be examined as D.W.2 on behalf of the respondents herein, learned counsel for the plaintiffs will be constrained to cross examine his own party, which is not the procedure that is contemplated under the provisions of the Civil Procedure Code. He also further contended that the provisions under Order XVI Rule 1 and Rule 21 of the Civil Procedure Code are only to enable the Court to examine any party, if the Court feels the same is necessary and it is not open for either parties to file application to summon the opposite party as their witness.



C.R.P.(PD)(MD) No.155 of 2020

WEB COPY

4. In support of his contentions, he also relied upon decisions in the cases of *Varadharajan vs. Saravanan*⁽ⁱⁱ⁾; *Minor Arumugam alias Logesh represented by next friend and natural guardian mother, Sampornam vs. State Bank of India*⁽ⁱⁱⁱ⁾; and *B.Rajeswari and another vs. B.Vinayagam and 2 others*^(iv).

5. On the other hand, learned counsel appearing for the respondents contended that the suit was filed for partition and Petitioner No. 1 herein did not choose to enter witness box. As the respondents herein intended to rely upon a registered settlement deed executed by their mother for which the petitioners herein are the attesting witnesses and in order to confront them with their signatures, the examination of P.W.1 is very much necessary. He also further contended that the order under revision is perfectly valid and the same is permissible in the light of the order passed by this Court in the case of *V.K.Periasamy alias Perianna Gounder vs. D.Rajan*⁽ⁱ⁾

(ii) 2003-2-L.W.731

(iii) (2005) 4 M.L.J. 239

(iv) 2010 (1) MWN (Civil) 403

(i) AIR 2001 Mad 410 = (2001) 2 M.L.J. 235



C.R.P.(PD)(MD) No.155 of 2020

6. This Court has carefully considered the submissions made on either side and also perused the entire material on record.

7. The petitioners herein filed O.S.No.40 of 2016 seeking partition of the suit schedule properties. The petitioners herein are the daughters and respondents are the sons of Sundaramoorthy and Mookkammal. The suit schedule property is the property, which was purchased by their mother under a registered sale deed dated 29.11.1985. According to the petitioners, the dispute is with regard to the said property. The petitioners are claiming partition of the same. Whereas the respondents herein claim that the said property was settled in favour of the respondents under two registered settlement deeds dated 05.02.2001. It is also claimed by the respondents that both the petitioners herein and their father are the attesting witnesses of both the settlement deeds.

8. From the perusal of the material on record, it is also noticed that the said documents were already confronted to Petitioner No.2/P.W.1 during her cross examination. Now, the respondents filed the present



C.R.P.(PD)(MD) No.155 of 2020

application with a view to confront the said documents to Petitioner No.1 herein also and for that purpose, they intended to call Petitioner No.1 herein as D.W.2. Petitioner No.1 is the one who filed the suit along with Petitioner No.2 seeking partition of the suit schedule property. The defendants are seriously contesting the claim made by the petitioners in the suit. Thus, there is a serious conflict of interest between the parties.

9. This Court in *V.K.Periasamy alias Perianna Gounder vs. D.Rajan⁽ⁱ⁾*, after having elaborately considering the various decisions of this Court, came to the conclusion that there is no absolute bar to summon the opposite party as a witness. However, it was also considered that every opposite party may not be a contesting party and on some times, the parties may be added as defendants/respondents under certain circumstance, though they do not have much interest to contest the matter, nor any relief is sought against such defendants/respondents. But such of the parties, who are not seriously contesting the matter may be called for as witness by the opposite party in certain facts and circumstances, but not as a matter of course. The

(i) AIR 2001 Mad 410 = (2001) 2 M.L.J. 235



WEB COPY

learned Judge further held as under in Paragraph No.12:

“12. ... Therefore, if there are very good reasons, the Court may exercise its discretion in favour of the party seeking permission. The case laws with regard to O.18, Rule 2 are to the effect that even the defendants who support the case of the plaintiff are entitled to give evidence and it is in fact their right and they cannot be shut out. 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 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



C.R.P.(PD)(MD) No.155 of 2020

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 O.16, Rule 21 should not be allowed. Of course, if the first defendant is examined on the side of the petitioner, the petitioner will be bound by the evidence elicited from the said witness. The order of the Court below is therefore set aside. C.R.P. is allowed. No costs.”

10. In the case of ***Varadharajan vs. Saravanan⁽ⁱⁱ⁾***, a learned Single Judge of this Court after examining the entire case law elaborately, came to the conclusion that power to examine any person including the party to the suit was given to the Court under Order XVI Rule 14 of the Civil Procedure Code and such power is not given to any party to the suit under Order XVI Rule 21 of the Civil Procedure Code. The relevant Paragraph No.12 reads as under:

“12. From the above, it could be seen that the power to examine any person including the party to the

(ii) 2003-2-L.W.731



C.R.P.(PD)(MD) No.155 of 2020

suit was given to the Court under Order 16 Rule 14 C.P.C. And such power is not given to a party to the suit under Order 16 Rule 21 C.P.C. Therefore the Courts have been deprecating and disallowing the practice of a party calling his adversary as a witness on his side. In the said view of the matter, the petitioner/defendant is not entitled to summon the original promisees as witnesses on his side and therefore, the order passed by the trial Court, does not suffer from any infirmity which calls for any interference by this Court. The Civil Revision Petition is dismissed.”

11. Similarly, in the case of ***Minor Arumugam alias Logesh represented by next friend and natural guardian mother, Samppornam vs. State Bank of India⁽ⁱⁱⁱ⁾***, another learned Judge of this Court held as under:

“18. The submission of the learned counsel for the respondents that calling opposite witness placing reliance upon the decisions in Mallangowda Gavisiddangowda, AIR 1959 Mys. 194 and Leelavathi K. v. Sakthi Ganesan, (2002) 3 CTC. 551, be accepted in all

(iii) (2005) 4 M.L.J. 239



C.R.P.(PD)(MD) No.155 of 2020

the cases, though it is well applicable to certain cases, as discussed by me supra. In the first decision, a Division Bench of Mysore High Court has held:

"Practice of calling the opposite party as a witness should not be countenanced as it is not in the interests of justice"

and in the second decision, it is said:

"It is true that if a party refuses to voluntarily give evidence, he cannot be compelled to do so at the instance of the opposite party. as the Court is always at liberty to draw an inference against the party, who refuses to give evidence voluntarily."

In both the cases, it appears, the parties sought to be summoned as witnesses by other side were the real opponents and therefore, compelling such parties to give evidence on behalf of other party, is not desirable judicially, which view I should also endorse. But if the parties sought to be summoned are not the real opponents, then there may be relaxation for very good reasons. Thus analysing the provisions contained in O. 16, Rule 21, C.P.C., and also the decisions brought to my notice, I conclude that in certain cases, a party to a suit can invoke O.16, Rule 21, C.P.C., but not always, as of



right and it all depends upon the purpose for which he is summoned and the stand taken by the party in the suit. At the risk of repetition, it could be said, if the party, who is desirous of examining another party as witness, has no conflicting interest, whereas the party to be summoned is supporting the other party, who is seeking the aid of O. 16, Rule 21, C.P.C., the Court could very well issue summons and not in the case where there is conflicting interest or no defence at all, as in this case.

19. Viewing the case from all possible angles, either on facts or on law, the revision petitioners are not entitled to seek the permission of the Court to issue summons for the examination of defendants 2 and 3 only because of the reason, defendants 2 and 3 have cross-examined D.W.1, therefore the revision petitioners also should cross-examine them, which is not the purport of O.16, Rule 21, C.P.C. Hence the revision is devoid of merits and liable to be rejected. In the result, the revision petition is dismissed.”

12. Yet in another decision, ***B.Rajeswari and another vs. B.Vinayagam and 2 others***^(iv), a learned Judge of this Court came to the

(iv) 2010 (1) MWN (Civil) 403



C.R.P.(PD)(MD) No.155 of 2020

conclusion that the contesting respondents can never be called as the witnesses of the opposite party to speak for them and allowed the defendants to be summoned as plaintiff witnesses, after taking note of the fact that the said defendant is not contesting the claim of the plaintiffs therein.

13. From the above decisions rendered by this Court, it is clear that it is only when an application is filed to summon a non-contesting defendant/respondent as a witness of the opposite party, such an application can be considered basing on the facts and circumstances of each case. It is also settled law that if a party does not choose to enter witness box to speak on the facts of the case, an adverse inference can be drawn by the Courts while deciding the matter against such party.

14. In the case on hand, the petitioners refused to acknowledge the registered settlement deeds relied upon by the respondents herein. Petitioner No.2 already appears to have denied the said documents in her cross examination. In spite of bringing such documents on record, if



C.R.P.(PD)(MD) No.155 of 2020

Petitioner No.1 does not choose to enter witness box to deny her alleged signature on the said documents, it is open for the Court to draw adverse inference by duly taking into consideration the over all facts and circumstances and the evidence that is brought on record. In the light of the settled legal position as discussed above, as Petitioner No.1 herein is a seriously contesting party having conflict of interest to that of the respondents herein, the question of summoning Petitioner No.1 herein for examining her as D.W.1 on behalf of the respondents/defendants cannot be permitted. No party can be compelled to speak for the opposite party or to speak against oneself.

15. From the above, it is evident that the learned trial Court failed to take note of the fact situation prevailing in the case on hand and instead blindly allowed the application filed by the respondents without even noting the ratio laid down in *V.K.Periasamy alias Perianna Gounder vs. D.Rajan⁽ⁱ⁾*.

(i) AIR 2001 Mad 410 = (2001) 2 M.L.J. 235



C.R.P.(PD)(MD) No.155 of 2020

WEB COPY

16. In the above circumstances, the order under revision is not sustainable and the same is accordingly set aside. Consequently, this Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

26.03.2024

NCC : Yes/No
Index : Yes/No
Internet : Yes

ABR



WEB COPY



C.R.P.(PD)(MD) No.155 of 2020

To

The Subordinate Judge,
Aruppukkottai.



WEB COPY



C.R.P.(PD)(MD) No.155 of 2020

MUMMINENI SUDHEER KUMAR, J.

abr

Pre-delivery Order made in
C.R.P.(PD)(MD) No.155 of 2020

26.03.2024