



C.R.P.(MD).Nos.144 & 145 of 2018

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 16.07.2024

DELIVERED ON: 26.07.2024

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

**C.R.P.(MD).Nos.144 & 145 of 2018
and CMP(MD).No.597 of 2018**

P.Duraisamy

....Petitioner/1st Respondent
/Plaintiff in both revisions

Vs

1.T.G.Bavani Shankar Iyer

....1st Respondent/Petitioner
/7th Defendant in both revisions

2.N.Ramadass @ N.Ramalingam

3.R.Sivakumar @ R.Sivasankar

4.A.Kavitha

5.S.Krithika

6.V.Gowri

7.M.Subramaniam

8.T.A.Punithan

1/19



C.R.P.(MD).Nos.144 & 145 of 2018

9.N.Satheeshkumar

...Respondents 2 to 9/Respondents 2 to 9
/Defendants 4 to 6, 8 & 9 in both revisions

COMMON PRAYER : The Civil Revision Petitions have been filed under Article 227 of Constitution of India, to set aside the fair and decreetal order dated 08.12.2017 passed in I.A.Nos.472 &473 of 2017 in O.S.No.50 of 2009 on the file of the I Additional District Court (PCR) Trichy District and allow the civil revision petitions.

(In both revision petitions)

For Petitioner	: M/s.J.Anandhavalli
For Respondents	: Mr.Veera. Kathiravan Senior Counsel for M/s.Veera Associates for R1
	: Mr.M.P.Senthil for R7
	: Mr.R.Sundar for R9
	No appearance for R2 to R6 & R8

COMMON ORDER

The plaintiff in O.S.No.50 of 2009 on the file of the First Additional District Court (PCR), Trichy is the petitioner in both the revision petitions.

2.The 7th defendant in the said suit had filed an application to re-open the defendants' side evidence and to examine the 6th defendant as a



C.R.P.(MD).Nos.144 & 145 of 2018

Court witness. These two applications were allowed by the trial Court.

Challenging the same, the present revision petitions have been filed by the plaintiff.

(A)Facts leading to the filing of these revision petitions are as follows:

3.The revision petitioner herein as plaintiff has filed the above said suit for the relief of specific performance of a sale agreement dated 07.03.2007 said to have been executed by the defendants 1 to 5 through their power agent namely the 6th defendant.

4.The plaintiff had contended that the defendants 1 to 5 are the owners of the property and they had executed a registered power of attorney in favour of the 6th defendant on 24.05.2004. Based upon the said power deed, the 6th defendant had executed a sale agreement in favour of the plaintiff on 07.03.2007 for a total sale consideration of Rs.13,00,000/-. On the date of the agreement itself, the entire sale consideration of Rs.13,00,000/- was paid and the time was fixed as six months for completion of the sale deed.

5.The plaintiff had further contended that since the 6th defendant has not come forward to execute a sale deed, he had issued a legal notice



C.R.P.(MD).Nos.144 & 145 of 2018

on 09.05.2007 for which the 6th defendant had issued a reply notice on 28.05.2007 agreeing to execute a sale deed as early as possible. Since the said undertaking of the 6th defendant was not complied with, a second legal notice was issued by the plaintiff to the 6th defendant on 16.08.2008. Since there was no response from the 6th defendant, the present suit for specific performance has been filed.

6. Pending suit, one T.G.Bavani Sankar Iyer had filed I.A.No.135 of 2014 to implead himself as the 7th defendant and the said application was allowed on 30.04.2014. It is contended by the 7th defendant that the power of attorney in favour of the 6th defendant said to have been executed by the defendants 1 to 5 was cancelled by a registered document dated 19.06.2007. Thereafter out of the five owners, defendants 1 to 4 have executed a registered sale deed in favour of the 7th defendant on 30.11.2011. Hence, he had contended that he is a necessary party to the proceedings.

7. On 19.10.2008, the first defendant had executed a power of attorney in favour of the 8th defendant. The said power of attorney is said to have been cancelled on a later date. However, based upon the said power deed, the 8th defendant is said to have executed a sale deed in favour



C.R.P.(MD).Nos.144 & 145 of 2018

of the 9th defendant on 27.08.2012.

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8.In the written statement filed by the first defendant (which was adopted by the other defendants), it is contended that the general power of attorney, executed in favour of the 6th defendant on 24.05.2004 only as a security for the amount borrowed from him and there was no intention to permit the 6th defendant to enter into any sale agreement or sale deed.

9.The 7th defendant in the suit had filed I.A.No.454 of 2016 under Order 16 Rule 14 C.P.C to examine the 6th defendant in the suit as a Court witness on the ground that he is involved in all the transactions and he is aware of all the facts of the case. It was further contended that the 6th defendant had executed two registered sale deeds in favour of his wife on 08.10.2007 on the basis of the general power of attorney dated 24.05.2004 especially after the cancellation of the power deed. The said application was dismissed by the trial Court by an order dated 02.01.2017. The said order was challenged by the 7th defendant in C.R.P(MD).No.212 of 2017.

10.A learned Single Judge of this Court by an order dated 27.06.2017 had dismissed the revision petition on the ground that the defendants' side evidence is yet to be closed and only after the defendants'



C.R.P.(MD).Nos.144 & 145 of 2018

side evidence closed, it would be clear whether the 6th defendant is being examined or not. After the defendants' side evidence is closed and if the 6th defendant is not examined, the Court can suo-motu exercise its power conferred under Order 16 Rule 14 C.P.C or the 7th defendant can file an application to call the 6th defendant as a Court witness provided he is a necessary witness relevant to the lis.

11. Without examining the 6th defendant, the defendants' side evidence was closed. Thereafter, the 7th defendant had filed I.A.No.472 of 2017 to re-open the evidence on the side of the defendant. Another application in I.A.No.473 of 2017 was filed under Order 16 Rule 14 C.P.C to examine the 6th defendant as a Court witness. These two applications were heard on merits by the trial Court. The trial Court had allowed both the applications with the finding that the 6th defendant is the man behind all the episodes leading to the filing of the suit as well as the other connected proceedings. The 6th defendant having remained exparte, examining him as a Court witness will enlighten and throw light with regard to the matters in dispute between the parties in the suit. These two orders are under challenge in the present revision petition.



C.R.P.(MD).Nos.144 & 145 of 2018

(B).Contentions of the learned counsels appearing on either side are as follows:

12.The learned counsel appearing for the revision petitioner had contended that the plaintiff had filed the suit for specific performance tracing his rights through the power deed executed by the defendants 1 to 5 in favour of the 6th defendant. The defendants 1 to 5 have not evinced any interest to examine the 6th defendant as a Court witness. That apart, when the 6th defendant had remained exparte, it only means that he is supporting the case of the plaintiff. In such an event, it may not be proper to compel him to appear before the Court as a Court witness.

13.The learned counsel appearing for the revision petitioner had further contended that the plaintiff is a beneficiary of the power deed dated 24.05.2004 and the sale agreement dated 07.03.2007. However, the 7th defendant traces his rights through a sale deed executed by the defendants 1 to 4 on 30.11.2011. Therefore, the 7th defendant who is not tracing his rights through the 6th defendant has no legal right whatsoever to compel the appearance of the 6th defendant as a Court witness.



C.R.P.(MD).Nos.144 & 145 of 2018

affected, if the 6th defendant is called upon to appear as a Court witness. In fact, if the 6th defendant appears as a Court witness, the plaintiff will also have an opportunity to cross examine him. He had further contended that the plaintiff is attempting to screen the 6th defendant from the Court proceedings. When the plaintiff is tracing his rights through the 6th defendant and there are allegations as against the 6th defendant that he had alienated some portions of the property in favour of his wife, it is all the more necessary that he is examined as a Court witness since it will protect the rights of the plaintiff also.

17.The 9th respondent had submitted that he has no objection for examination of the 6th defendant as a Court witness.

18.I have considered the submissions made on either side and perused the material records.

(C) Discussion

19.This is a second round of litigation for examining the 6th defendant as a Court witness. Earlier, the same 7th defendant had filed I.A.No.454 of 2016 to examine the 6th defendant as a Court witness. The said application was filed at a stage when the defendants 1 and 2 alone have been examined. The said application was dismissed by the trial Court



C.R.P.(MD).Nos.144 & 145 of 2018

on 02.01.2017. Challenging the said order, the 7th defendant had approached this Court by filing C.RP(MD).No.212 of 2017. This Court by an order dated 27.06.2017 had dismissed the revision petition. The operative portion of the order in paragraph Nos. 13 to 17 is extracted as follows:

20.The position of law declared by Courts in respect of summoning witnesses, can be capsulated in the following lines.

(i)The parties to the suit at the first instance entitled to examine witnesses on their behalf except those who are arrayed as parties to the proceedings.

(ii)If any party to the suit is required by any other party thereto to give evidence, he can do so under order 16 Rule 21 C.P.C (as amended by the Madras High Court). While exercising the said power, the provisions as to witnesses shall apply.

(iii)Court under Order 16 Rule 14 can suo motu summon any person including party to the proceedings. There is no legal bar for any party to the proceedings to seek the indulgence of the Court to invoke its power under Order 16 Rule 14 of C.P.C. Such application has to be considered as reminder to the Court.

(iv)However, if the Court does not invoke its power under order 16 Rule 14 on his own (suo motu), then the stage of



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requesting the Court by the parties to remind the Court to exercise the power under Order 16 Rule 14 shall arise only after parties complete the examination of their witnesses and neither of the party summon the said witness to give evidence.

It is the prerogative of the Court to refuse or entertain the request as the Court deems fit.

14.If order 16 Rule 1, order 16 Rule 14 and order 16 Rule 21 are to be read harmoniously. If so read, it will make clear that any person either party to the proceedings or not can be summoned and examined, provided he is a necessary witness relevant to the lis.

15.In the present case, the revision petitioner has filed petitioner under order 16 Rule 14 of C.P.C before he mounting the witness box. The procedure of examining witnesses is clearly narrated by Hon'ble Mrs.Justice Prabha Sridevant in V.R.Perisamy@ Perianna Gounder's case (cited supra).

16.In this case, there are several defendants. As of now, only D1 and D2 are examined. Only after closing the defendants side evidence and if 6th defendant is not examined as witness, the question whether he is necessary witness will arise. At that point of time, either the Court itself may exercise the power conferred under Order 16 Rule 14 or it is open to the parties to exercise the right under Order 16 Rule 21 of C.P.C(As amended by Madras High Court). If good reasons are shown the Court should exercise its discretion in favour of



C.R.P.(MD).Nos.144 & 145 of 2018

the party seeking permission.

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17. In the light of the above legal position, this Court finds no error or illegality in the order of the Court below dismissing the petition filed by the revision petitioner.”

21. A perusal of the order of this Court clearly indicates that the revision petition was dismissed on the following grounds:

(a) It has been filed at a premature stage before closing of the evidence on the side of the defendant.

(b) If the 6th defendant is not examined as a witness, then the question whether he is a necessary witness would arise. Thereafter, the Court can either exercise its suo-motu power or any one of the parties can file an application to call the 6th defendant as a Court witness.

(c) In such an event, if good reasons are shown, the Court should exercise its discretionary power in favour of the parties seeking permission.

22. The present application in I.A.Nos.472 & 473 of 2017 have been filed to re-open and to call the 6th defendant as a Court witness only after closure of the defendants' side evidence. Since the Court has not exercised its suo-motu power, the 7th defendant has chosen to file an application under appropriate provisions of C.P.C. Therefore, out of the



C.R.P.(MD).Nos.144 & 145 of 2018

three ingredients which are required to be satisfied to call a co-defendant as a Court witness, two of the ingredients have been satisfied. The third ingredient that was pointed out by the Court is that only if good reasons are shown, the Court can exercise its discretion and compel the 6th defendant to appear as a Court witness. Therefore, the issue that arises for consideration in the present revision is that whether any good cause or reason has been shown by the 7th defendant to file these applications to compel the 6th defendant to appear as a Court witness.

23.The role of the 6th defendant in the transaction could be catalogued as follows:

(a)The absolute owner of the property namely the defendants 1 to 5 have executed a registered power of attorney in favour of the 6th defendant on 24.05.2004 and based upon the power deed, an unregistered agreement has been executed by the 6th defendant in favour of the plaintiff on 07.03.2007. Only based upon this unregistered sale agreement, the present suit for specific performance has been filed. The defendants 1 to 5 have filed a written statement specifically contending that the power deed was executed only as a security for the loan obtained from the 6th



C.R.P.(MD).Nos.144 & 145 of 2018

defendant and they have cancelled the said power deed through another registered document dated 19.06.2007. Therefore, it has to be ascertained whether the unregistered suit sale agreement dated 07.03.2007 was antedated or not as alleged by the 7th defendant.

(b) In the written statement filed by the first defendant and adopted by the defendants 2 to 5, it is contended that after cancellation of power deed on 19.06.2007 through a registered document, the 6th defendant had executed a sale deed in favour of his wife on 08.10.2007 and has created an encumbrance. It is contended by the 7th defendant that the plaintiff and the 6th defendant have colluded together and the present suit for specific performance has been filed after cancellation of the power deed in favour of the 6th defendant.

(c) It is further alleged that the plaintiff while he was examined as PW1 had admitted that his lawyer is one Mr.Jeyaraman. It is further alleged that the same advocate has been engaged by the 6th defendant to file a suit in O.S.No.1642 of 2008 before the District Munsif Court, Trichy. Therefore, there is a collusion between the plaintiff and the 6th defendant in filing the present suit for specific



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performance.

(d) The 6th defendant had chosen to remain exparte despite several allegations been made against him.

(e) In the written statement filed by the first defendant, he had specifically alleged that the general power of attorney in favour of the 6th defendant was executed on 24.05.2004 only as a security for the loan obtained from him.

24. The above said allegations and the counter allegations made between the parties would clearly indicate that the 6th defendant has played a pivotal role in dealing with the suit schedule properties. Examination of the 6th defendant as a Court witness would not in any way be prejudicial to the plaintiff. In fact, the plaintiff himself traces his rights only through the sale agreement said to have been executed by the 6th defendant.

25. The 6th defendant has been arrayed as the 7th respondent in I.A.Nos.472 & 473 of 2017. From the order passed by the trial Court, it could be seen that the 6th defendant has not filed any counter objecting to these two applications, though he was represented through a counsel. Though the order was passed on 08.12.2017 compelling the 6th defendant to appear as a Court witness, so far he has not chosen to challenge the said



C.R.P.(MD).Nos.144 & 145 of 2018

order. Therefore, it is clear that the 6th defendant has no objection whatsoever for being called as a Court witness at the instance of the 7th defendant.

26. It is for the defendants to decide whom to examine as a witness on their side. In case, if any one of the defendants had remained exparte or had chosen to keep him away from being examined, the defendants are at liberty to file an application seeking to compel the said co-defendant to appear as a Court witness, if a good cause is shown and the Court is satisfied with the reasons assigned by the other defendants. Therefore, the plaintiff cannot dictate terms to the defendant that they should not examine one among them as a Court witness.

27. It is not an application filed by the defendant to compel one of the plaintiffs to appear as a witness. It is an application filed by one of the co-defendants to compel the 6th defendant to appear as a Court witness. Therefore, the plaintiff has no locustandi whatsoever to question the prayer sought for by one of the defendants to examine a co-defendant as a Court witness especially in the light of the reasons catalogued by this Court in the above referred paragraphs.



C.R.P.(MD).Nos.144 & 145 of 2018

28.The plaintiff is not able to establish any prejudice whatsoever by examination of the 6th defendant as a Court witness. In fact, he is at liberty to cross examine him. The 7th defendant is a person who is affected by an unregistered sale agreement executed by the 6th defendant in favour of the plaintiff on 07.03.2007 and the sale deed executed by the 6th defendant in favour of his wife on 08.10.2007. These two documents would affect the title of the 7th defendant. Therefore, the 7th defendant has got good reason /cause to call upon the 6th defendant to appear as a Court witness.

29.In view of the above said deliberations, this Court does not find any merits in the revision petitions. Both the Civil Revision Petitions are dismissed. No costs. Consequently, connected miscellaneous petition is closed.

26.07.2024

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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C.R.P.(MD).Nos.144 & 145 of 2018

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To

1. I Additional District Judge (PCR)
Trichy District
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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C.R.P.(MD).Nos.144 & 145 of 2018

R.VIJAYAKUMAR, J

msa

Pre-delivery common order made in

C.R.P.(MD).Nos.144 & 145 of 2018
and CMP(MD).No.597 of 2018

26.07.2024