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Court : Karnataka

Decided On : Mar-26-2014

Judge : Mohan M. Shantanagoudar

Appeal No. : WP. No. 11605 of 2014 (GM-CPC)

Appellant : M/S. Krithi Constructions

Respondent : K. Thippa Reddy and Others

Judgement :

(Prayer: This W.P. Is Filed Praying To Set Aside The Order Dated 03.03.2014 Passed By The Xxviii Addl. City Civil and Sessions Judge, Mayo Hall Unit, C.H.N0.29, Bengaluru City Dismissing The Application Filed U/O 16, Rule 21 R/W Sec.151 Of The Cpc In O.S.N0.15959/Z005, Vide Annx-A By Allowing The Application Filed Before The Trial Court By Allowing This Writ Petition.)

1. By the impugned order, the Court below has rejected the application filed by the petitioner/ second defendant under Order 16 Rule 21 of CPC to summon defendant no. 1/respondent-3 herein for giving evidence on behalf of Petitioner herein.

2. The records reveal that respondents 1 and 2 herein (who are the plaintiffs) filed suit for declaration that the sale deed dated 20.12.2004 executed by first defendant (third respondent herein) based on the forged/fabricated/created General Power of Attorney, in favour of second defendant (petitioner herein) in

respect of the suit schedule property as null and void and for consequential reliefs.

3. In the said suit, though, defendant No.1 tiled written statement earlier agreeing to the case of the defendant No.2, sought permission of the Court to amend the written statement subsequently. Thereafter, para.22(a) of the written statement was inserted by amending the written statement with the permission of the Court. In para.22(a) of the written statement, defendant No.1 has emphatically conceded that general power of attorney executed in his favour by the plaintiff is bogus and the same cannot be relied upon, which means that defendant No. 1 has admitted in his written statement, the case of the plaintiff. He has also prayed in para 22 of the written statement that the suit be decreed. Subsequently, very defendant No.1 filed one more application to withdraw such admissions made by him. Such application has been rejected by the Court below. The said order was questioned by defendant No.1 in WP No.9561/14 which came to be dismissed on 10.3.2014. Thus, it is clear that the written statement filed by defendant No. 1 as it stands now, after 3.11.2010 supports the case of the plaintiffs fully. Defendant No.1 as aforementioned has prayed for decreeing the suit.

4. After the failure on the part of defendant No. 1 to get the admissions made in his written statement withdrawn, the petitioner herein who is defendant No.2 in the suit filed an application to examine the defendant No.1 herein as his witness. The said application is rejected by the Court below. This Court does not find any error in the impugned order.

5. No doubt Order XVI Rule 1 r/w Rule-21 of Code of Civil Procedure as amended by Karnataka High Court indicates that when a party to a suit, is required by any other party thereto to give evidence, or to produce a document, the provisions as to witness shall apply to him so far as applicable. However as held by this Court in the case of SYED YASIN .vs. SYED SHAHA MOHD. HUSSAIN (AIR 1967 Mys.788), it is open to the Court, if in its opinion, summoning of the other party or opponent is likely to result in the abuse of the process of the Court, it may refuse as well. Ordinarily the practice of calling the opposite party as a witness has been held and considered to be unhealthy practice (see the Judgment in the case of MAHANT SHATRUGAN DAS .vs. BAWA SHAM DAS - AIR 1938 PC 59). The

Division Bench of this Court in the case of MALLANGOWDA vs. GAVI SI DD AN GOWDA (AIR 1959 Mys 194) has observed that practice of calling the opposite party as a witness on his side should not be countenanced as it is not in the interests of justice.

6. In the case of KISHORI LAL .vs. CHUNNI LAL {(1909) 36 Ind App 9} the Privy Council commented on the practice in rather strong terms as under:

"As to this last matter, it would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance."

7. It may be noted with respect that their Lordships were not commenting on the scope of Order XVI of the CPC or the corresponding provisions of the CPC then existed. Their Lordships were only discouraging an unhealthy practice that was being resorted to in some parts of the country in the matter of examining the parties to the suit, as witnesses. However it may have to be observed here itself that the Court is not powerless in summoning the opposite party if there are suitable reasons. If the Court comes to the conclusion that the application of the particular party calling for the opposite party as the witness, is an abuse of process of Court, such application needs to be disallowed even under inherent powers.

8. Though it is true that the party to the suit can examine another party to the suit as witness, such procedure has to be permitted in rarest of rare cases. This practice of calling the opposite party as witness on his own side, cannot be allowed, if, the same is not in the interest of justice. The discretionary power to summon the opposite party as a witness has to be exercised judiciously. If calling the opposite party to give evidence is not in the interest of justice, it is not open for the Court to permit to summon his opponent as a witness in his own case. In the

matter on hand, respondent No.3 herein, in unmistakable terms, has admitted about the plaintiffs case. He has prayed for decreeing the suit. Subsequently, he made an attempt to withdraw the admission by filing one more application which came to be rejected. Thereafter, one more attempt is being made by defendant No.2 for summoning Defendant No.1 to depose on his behalf.

9. Sri H.R.Ananthakrisima Murthy, learned Advocate for defendant No. 1 submits, if the Court issues summons, defendant No.1 will appear and depose on behalf of the petitioner herein. This itself goes to show that there is a collusion between the Defendant No.2 and Defendant No. 1 as of now. Looking to the entire material on record. I find that examination of first Defendant before Court below as a witness of Defendant No.2 is not in the interest of justice. If such a prayer is allowed, the same amounts to abuse of process of Law.

Moreover, application came to be filed by the petitioner when the final arguments are being heard. The plaintiffs have already argued the matter and the matter is set down for final arguments of defendants. At that stage the application is filed. No valid reasons are assigned by the Defendant No.1 in his application praying for permission to examine Defendant No.2 as his witness, at such a belated stage of the suit. Hence, no interference is called for, on that ground also,

10. The Writ Petition is accordingly dismissed.

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