

JortIn Antony and ors. Vs. Padmanabha Dasa Marthanda Varma and ors.

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Court : Kerala

Decided On : May-25-2000

Reported in : AIR2000Ker369

Judge : P.K. Balasubramanyan and; K.A. Abdul Gafoor, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 16, Rule 4 - Order 21, Rules 7, 14 and 21; Code of Civil Procedure (CPC) (Amendment) Act, 1976 - Sections 97(1)

Appeal No. : C.R.P. No. 333 of 2000(C)

Appellant : JortIn Antony and ors.

Respondent : Padmanabha Dasa Marthanda Varma and ors.

Advocate for Def. : S. Venikitasubramonia Ayyar,; K.L. Narasimhan,; V. Giri

Advocate for Pet/Ap. : P. Sukumaran Nayar (Sr.),; G. Unnikrishnan,; P.V. Ramesh

Disposition : Revision dismissed

Judgement :

Balasubramanyan, J.

1. The plaintiffs in a suit for specific performance of an agreement to sell immovable property are the petitioners. The plaintiffs filed the suit for specific performance on 4-10-1995. Defendants 1 to 8 appeared and filed written statements. Defendant No. 9 did not appear to contest. The contesting defendants in their written statements denied the claim of the plaintiffs. The trial Court settled the issues on 17-10-1996. The plaintiffs sought to serve interrogatories on defendants 1 to 8. Though that application was opposed, ultimately the same was allowed by the trial Court. Attempts made by defendants 1 to 5 in one set and defendants 6 to 8 in another to have that order set aside did not succeed. What according to them were answers to the interrogatories were furnished by the defendants. There was a complaint by the plaintiffs that the answers to the interrogatories were not complete and seeking the striking out of the defence in terms of Rule 21 of Order XI of the Code of Civil Procedure. Ultimately the trial Court posted the suit for steps and trial. The plaintiffs filed a list of witnesses, in that list the plaintiffs filed a list of witnesses. In that list the plaintiffs included defendants 1 to 8 also as witnesses to be examined on their behalf. One of the plaintiffs was examined on behalf of the plaintiffs. An Officer from the Income-tax Department was also examined. At that stage the plaintiffs filed I. A. 1480 of 1999 praying that summons be issued for appearance of witnesses shown as serial Nos. 11 to 18 in the schedule of witnesses, being defendants 1 to 8 in the suit for giving evidence. This application was opposed by the defendants. The trial Court considered the application and relying on the decisions which suggested that a party to the suit is not entitled to cite and examine the opposite party, dismissed the application. Challenging that order the above Revision was filed before this Court invoking Section 115 of the Code of Civil Procedure.

2. Before the learned single Judge learned counsel for the plaintiffs submitted that the decisions of the Kerala High Court referred to and relied on by the trial Court and relied on by the defendants were rendered without noticing the amended Rule 21 of Order XVI of the Code of Civil Procedure as obtaining in Kerala and hence the matter required reconsideration. The learned single Judge felt that in the light of the arguments addressed and In the light of Order XVI of the Code, the question deserved to be decided by a Division Bench. The learned single Judge therefore adjourned the case for being heard by a Division Bench In exercise of his

jurisdiction under Section 3 of the High Court Act.

3. Order XVI of the Code of Civil Procedure deals with the summoning of and attendance of witnesses. Rule I provides that the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court. A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned, No doubt it is open to the Court for reasons to be recorded, to permit a party to call any witness other than one whose name appears in the list originally submitted. Rule 1-A of Order XVI provides that any party to the suit may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents. Rule 7 of Order XVI gives the power to the Court to require any person present in Court to give evidence or to produce any document then and there in his possession and power. Rule 7 does not Indicate whether the expression 'any person' referred to in that Rule would include or exclude a party to the suit. But giving the expression its natural meaning, it is possible to say that Rule 7 of Order XVI of the Code gives power to the Court to require any person present in Court whether a party to the suit or a non-party to the suit to give evidence or to produce a document. But It has to be noted that the power under Rule 7 of Order XVI is available to give a direction in that behalf only to a person present in Court. Rule 14 of Order XVI provides that where the Court at any time thinks it necessary to examine any person including a party to the suit and not called as a witness by a party to the suit of its own motion cause such person to be summoned as a witness to give evidence or to produce any document in his possession on a day to be appointed and the Court may examine him as a witness or require him to produce such document. Thus Rule 14 confers power on the Court when it thinks it necessary, to examine any person including a party to the suit as a witness. Rule 20 of Order XVI provides the consequence for the refusal of a party summoned to give evidence by providing that where any party to a suit present in Court refuses without lawful excuse when required by the Court to give evidence or produce any document then and there in his possession or power, the Court may pronounce judgment against him and make such order in relation to the suit as it thinks fit. Rule 21 provides that where a

party to the suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

4. On a plain reading of the Rules as they are obtaining now in the Code of Civil Procedure, 1908 as amended by the Code of Civil Procedure, 1908 as amended by the Code of Civil Procedure (Amendment) Act, 1976, It can be said that the Court has the power to direct a party to the suit present in Court, or any other person present in Court, to give evidence in the suit and if he were a party to the suit and he refuses to give evidence without lawful excuse, the power to pronounce judgment against that party or to make such order as the Court may think fit. The Court also has the right to proceed against a party summoned to give evidence as If he were a witness in the suit. In addition, under Rule 14 of Order XVI of the Code, the Court has the power at any time it thinks necessary, to examine any person including a party to the suit of its own motion on a day to be appointed by the Court. The failure of a party to the suit summoned in terms of Rule 14 of Order XVI of the Code might also lead to the consequence provided for in Rule 20 of Order XVI, of, a judgment being pronounced against that party or the passing of any other appropriate order which the Court thinks suitable in the circumstances of the case.

5. Until the amendment of Rule 14 by the Code of Civil Procedure (Amendment) Act, 1976, the power of the Court under Rule 14 of Order XVI of the Code did not extend to Insisting on a party to the suit, being examined. The power was only to examine any person other than a party to the suit and to summon that party and proceed in terms of Rule 15 of the Code. Only by virtue of the amendment of the Code in the year 1976. the power of the Court was enlarged to include a power to summon also a party to the suit to give evidence. But we find that there was no amendment to Rule 7. 20 or 21 of Order XVI of the Code.

6. Thus going by Order XVI of the Code either before or after the amendment of the same by the Amendment Act of 1976, a party to the suit has not been conferred any specific right to summon the opposite party as a witness to be examined on his side. But the power was available to the Court under Rule 7 to direct a party who was present in Court to be examined. Until the amendment of

Rule 14 by the Amendment Act of 1976 the Court did not have the power to direct a party to the suit to be examined as a witness unless of course the conditions of Rule 7 were satisfied. But by virtue of the amendment of the year 1976 the Court was conferred the power to direct a party to the suit also to be summoned for giving evidence if it felt that it was necessary. Here again, the 1976 amendment did not introduce any provision conferring a right on a party to the suit to summon his opponent for being examined as a witness on his own behalf.

7. On a reference to the history of the legislation, it is seen that at one time in some parts of the country, a practice had grown by which a party to the suit was withheld from box by his counsel, which compelled the opposite party to cite him as a witness and to examine him, thus permitting the party to be cross-examined by his own counsel. This was considered as a pernicious practice by the Privy Council. In *Kishori Lal v. Chunni Lal* (1909) 36 Ind App 9 the Privy Council commented on this practice in rather strong terms. This is what their Lordships stated :--

'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.'

These words were echoed by their Lordships again in *Lal Kunwar v. Chiranji Lal* (1910) Ind App 1. It may be noted with respect that their Lordships were not commenting on the scope of Order XVI of the Code of Civil Procedure or the corresponding provisions of the Code of Civil Procedure then obtaining. 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. It may also be noted that in England even under the Evidence Act of

1851. parties were admissible witnesses and they were held to be competent and compellable to give evidence. But the observations of the Privy Council led to a serious debate on the question whether a party to the suit was entitled to call the opposite party as a witness on his own behalf. Whereas some of the Courts took the view that it was permissible, majority of the High Courts veered round to the view that it was not permissible.

In *Narayana Pillai v. Kalliyant Amma*, 1963 Ker LT 537 a learned single Judge of this Court held that the practice of a party causing his opponent to be summoned as a witness was disapproved in rather strong terms by their Lordships of the Privy Council. Therefore, as a matter of right the plaintiff cannot have defendants examined as witnesses. This view was followed in a subsequent decision by the same learned Judge in *Ebrahim Muhammed Kunju v. Shahubudeen*, 1969 Ker LT 170. That was a case where the proceeding was under Section 145 of the Code of Criminal Procedure. In *Syed Mohammad v. Aziz* (1990) 2 Ker LT 952 another learned Judge of this Court after referring to the decisions including the one in *Narayana Pillai v. Kalliyani Amma*, 1963 Ker LT 537 took the view that a defendant cannot compel another defendant to appear before Court as witness. In *Mary Francis v. Kesavan* (1993) 1 Ker LT 4 another learned single Judge after referring to the various decisions, noticed the impropriety of a situation in which counsel appearing for the opposite party has to cross-examine his own party. But his Lordship added a rider to the effect that it was true that the Court was not powerless in summoning an opposite party if there are suitable reasons. It is based on these decisions that the trial Court rejected the prayer of the plaintiffs in this case to issue summons to defendants 1 to 8 for having them examined as witnesses for the plaintiffs.

8. It is argued on behalf of the plaintiffs that none of the decisions have in terms referred to the relevant provisions of Order XVI of the Code of Civil Procedure or discussed their scope or considered their ambit and the decisions have also failed to take note of the amendment to Order XVI of the Code of Civil Procedure as introduced in Kerala. Counsel pointed out that Rule 21 of Order XVI as substituted in Kerala by notification dated 9-6-1959 was to the following effect:

'21. Rules in case of parties appearing as 'witnesses.-- (1) 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 witnesses shall apply to him so far as applicable.

(2) When a party to a suit gives evidence on his own behalf, the Court may, in its discretion, permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing.'

Counsel pointed out that this Rule 21 was available along with Rule 7 and Rule 14 of the Code of Civil Procedure which excluded a party to the suit from being examined at the instance of the Court and Rule 21 of Order 16 clearly indicated the intention that it was open to a party to a proceeding to cite his opposite party as a witness and to examine him. Counsel for the defendants pointed out that Rule 21 of Order 16 of the Code cannot have any such effect and even assuming that it had any such effect, the said rule ceased to be in operation on the coming into force of the Code of Civil Procedure, 1908 as amended by the Amending Act of 1976. According to counsel after the amendment of the Code of Civil Procedure by the Amendment Act of 1976, it was only that Code which prevailed and the Kerala Amendment or insertion dated 9-6-1959 cannot survive the 1976 Amendment of the Code.

9. It can be seen that what Rule 21 as it was obtaining in Kerala provides for. Is a contingency when a party to the suit is required by another party to the suit to give evidence. This according to counsel for the plaintiffs pre-supposes that a party to the suit has the right to call upon his opposite party to give evidence and the Court has the power to compel the giving of evidence by the opposite party. As we have noticed neither Rule 7 of Order 16 nor Rule 14 of Order 16 at the relevant time (before the 1976 Amendment) gave power to the Court to examine a party to the suit who was not present in Court. It is in the context of that power that Rule 21 as inserted in the year 1959 in Kerala has to be understood. Rule 21 only indicated that when a party to the suit is required by the other party to give evidence, the provisions as to witnesses shall apply so far as applicable. Since no substantive right as such is conferred on a party to call his opposite party to give evidence.

Rule 21 cannot be construed as conferring such a power on a party to the suit. We are, therefore, of the view that by reference to Rule 21 of Order 16 as it existed in Kerala subsequent to the insertion thereof on 9-6-1959, we cannot hold that a party to the suit has got the right to examine the opposite party as his witness. At the risk of repetition we may notice that even the power to examine on its own a party to the suit was conferred on the Court only by the amendment of Rule 14 of Order 16 of the Code in the year 1976 and until then there was a specific exclusion of a party to the suit from within the purview of Rule 14 of Order 16 of the Code.

10. By the 1976 Amendment of the Code, no alteration was made to the Code of 1908 without State amendments to Rule 7 or Rule 21 of Order 16. The only significant amendment was to Rule 14 of Order 16 by substituting in the place of any person excluding a party to the suit the expression 'any person including a party to the suit'. Though it is only by virtue of Rule 21 as it stood amended in Kerala by notification dated 9-6-1959 that it could be argued that a party to the suit can be required by the other party to the suit to give evidence and in that contingency the provisions as to witnesses shall apply. Rule 21 without reference to the Kerala amendment only provided that wherein a party to a suit is required to give evidence, the provisions as to witnesses shall apply to him. Therefore one aspect that has to be considered is whether after the amendment of the Code by the Amending Act of 1976 the substitution in Kerala by the notification dated 9-6-1959 would survive. The Supreme Court in *Ganpat v. Ind Additional District Judge, Balia*, AIR 1986 SC 589 dealing with the scope of Section 97(1) of the Code of Civil Procedure (Amendment) Act of 1976 observed ;

'It means that any local amendment of the Code which is inconsistent with the Code as amended by the Amending Act would cease to be operative on the commencement of the Amending Act, i.e., on Feb. 1, 1977. The repealing provision in Section 97(1) is not confined in its operation to provisions of the Code including the Orders and Rules in the First Schedule which are actually amended by the Amending Act. The object of Section 97 of the Amending Act appears to be that on and after Feb. 1, 1977 throughout India wherever the Code was in force there should be same procedural law in operation in all the Civil Courts subject of

course to any future local amendment that may be made either by the State Legislature or by the High Court, as the case may be, in accordance with law. Until such amendment is made the Code as amended by the Amending Act alone should govern the procedure in Civil Courts which are governed by the Code.'

Following this decision, a Division Bench of this Court held in *Arvindakshan v. Sukumaran* (2000) 1 Ker LT 107 that Order 37 of the Code as substituted by the Code of Civil Procedure Amendment Act, 1976 is in force in Kerala with effect from 1-2-1977 and continues to be in force.

11. In a recent decision in *Madhavan Nair v. Ramankutty* (2000) 2 SCC 356 the Supreme Court considered the question whether Section 100 of the Code of Civil Procedure as Inserted in Kerala would survive the amendment brought about to Section 100 by the Code of Civil Procedure (Amendment) Act of 1976. Their Lordships held that after the amendment of the Code by the Amending Act of 1976 only the Code as amended in 1976 would govern and the section introduced into the Code in Kerala prior to the Amending Act of 1976 cannot survive. Their Lordships stated :

'We are unable to agree with the submission of the learned senior counsel for the respondent. Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 provides that any amendment which is made or provision Inserted in the principal Act by a State Legislature or a High Court before the commencement of the Amending Act shall, except Insofar as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed. In Clause (m) of Sub-section (2) of Section 97 of the said Act, it is specifically provided that the provisions of the amended Section 100 shall not apply to or affect any appeal which stood admitted before the amendment in Section 100. In the present case, the appeal was admittedly filed after 1-2-1977 and this being so, it is the amendment in Section 100 having come to an end by virtue of the provisions of Section 97(1) of the amending Act. The High Court, therefore, ought to have applied the provisions of the amended S, 100 framed a substantial question of law if it arose and then decided the appeal.'

12. Section 97(1) of the Amending Act of 1976 only saves the provisions inserted by the State Legislature or a High Court or any amendment made before the commencement of the Amending Act only to the extent the provision is consistent with the provisions of the principal Act as amended by the Amending Act of 1976. In the light of the interpretation placed on that provision by the Supreme Court in the two decisions referred to above, and the Division Bench in Arvindakshan's case, we are of the view that It would be proper to proceed on the basis that the amendment of the year 1959 cannot survive the Code of Civil Procedure amended by the Amending Act of 1976. We are not unmindful of the fact that the Supreme Court has in a subsequent decision directed this Court to consider whether Section 100 of the Code as It existed in Kerala would survive the amendment of Section 100 by the Amending Act of 1976. In that decision there is no pronouncement on the question and the two pronouncements of the Supreme Court referred to above Indicate that the provision cannot survive the amendment of the Code in the year 1976. The only power available to the High Court or the State Legislature is to further amend the Code If a departure is warranted from the provisions as they obtained in the Code as amended by the Amending Act of 1976. We are therefore, of the view that the insertion dated 9-6-1959 cannot be relied on to hold that a party to the suit has the right to summon the opposite party to give evidence.

13. It is clear from Rule 14 of Order 16 of the Code as amended that the Court has the power when It thinks it necessary to examine a party to the suit or to compel a party to the suit to give evidence so as to enable the Court to take a decision satisfactory to its conscience. But this power available to the Court and made specifically available by the amendment brought to Rule 14 cannot be confused with the right of a party to call upon an opposite party to give evidence on his behalf. Clearly, when a party to the suit does not mount the box to speak in support of his case' in the pleading, that can be a circumstance which would enable the Court to accept the case of the opposite party. That can also be a circumstance where the Court can draw an adverse Inference against the party who has withheld himself from the witness-box. But those consequences arising out of non-apperance of a party as a witness cannot confer a right on a party to the suit to cite his opponent as his own witness. The power available to the Court under Rule 14 of Order 16 cannot be confused with a right to a party to the suit.

Whereas Rule 7 enables the Court to call on any person whether a party to the suit or a non-party to the suit who is present in Court to give evidence and provides the consequences for the failure of that person to give evidence, Rule 14 also enables the Court to summon a person to give evidence even if he is not present in Court whether he be a party or only a witness of its own accord and in furtherance of its quest to give a just decision in the cause. As regards a party to the suit even this power was not available until the year 1976 and this power becomes available only after the Insertion of the amendment of 1976. All that Rule 21 says is that in case where the Court thinks that it is necessary to direct a party to give evidence, the procedure regarding a witness could be applied by the Court regarding that party as well. As recognised by Shamsuddin, J. In *Mary Francis v. Kesavan* (1993) 1 Ker LT 4 the Court is not powerless in summoning an opposite party if there are suitable reasons and that summoning could be in exercise of its power under Rule 14 of Order 16 of the Code.

14. A few decisions on the question involved may be considered at this stage. In *Pirgondav. Vishwanath*, AIR 1956 Bom 251 the practice of citing the opposite side as a witness was disapproved but the Court observed that if a party who is in a position to give evidence does not go into the box, the Court is free to draw an Inference against him. This disapproval was also shared by the Mysore High Court in *Mallan Gowda v. Gavisiddan Gowda*, AIR 1959 Mysore 194. In *Appavoo Asary v. Sornammal Fernandez*, AIR 1933 Mad 821 and in *Bhupathiraju Suryanarayanaraju v. Bantupalli Appanna*, AIR 1959 Andh Pra 645 it was held that for summoning the opposite party as a witness, resort to Order 3, Rule 1 of the Code of Civil Procedure was not proper. But it was suggested that where one party desires the presence of the opposite party in Court for the purpose of examining him as a witness the proper procedure to adopt was the one under Order 16 of the Code. In *Syed Yasln v. Syed Shah Mohd. Hussain*. AIR 1967 Mys 37 a learned single Judge of the Mysore High Court held that it was permissible for the Court in exercise of its power under Order 16 of the Code to permit one party to cite his opponent as a witness. According to his Lordship, if the intention of the legislature was to Impose any limitations on the power of a party in summoning and examining the other party as a witness, it would have specifically stated so in Order 16, Rules 1. 19 and 20 as it had done in Rule 14 and if the Court comes to

the conclusion that the prayer of a party to summon and examine the other party to the suit as his witness does not amount to an abuse of process of Court, the prayer in that behalf can be allowed. In *Awadh Kishore Singh v. Brij Bihari Singh*, AIR 1993 Pat 122 it was held that a party cannot be debarred from examining his adversely and an order refusing permission to the plaintiff to examine the defendant as a witness was a jurisdictional error liable to be corrected in exercise of Jurisdiction under Section 115 of the Code of Civil Procedure. In the recent decision of the Andhra Pradesh High Court in *Kosuru Kalinga v. Kaikamma*, 2000 AIHC 786 it was held that the application seeking summoning of a party to the suit as a witness of the other party could not be dismissed on the sole ground of such a course being not known to law since that would mean the overlooking of Rule 14 of Order 16 of the Code. It was also indicated that if the applicant in that behalf fails to state reasons for such summoning, such a prayer cannot be allowed. All these decisions in our view only indicate that it is not as if the Court has no power to direct the examination of a party to the suit if it considers it necessary to order his examination. Though these decisions observe that there is nothing in the Code which prevents one party from citing the opposite party as his witness, it is also clear that there is no clear enabling provision which entitles one party to insist on his opponent being called as a witness. Considering the general principle recognised by the Privy Council we are inclined to the view that in the absence of any provision conferring such a right on a party to the suit, it must be held that there is no right as such in a party to the suit to summon his opponent to give evidence. These decisions in our view fortify generally the view expressed by Shamsuddin, J. In the decision in *Mary Francis v. Kesava* (1993) 1 Ker LT4.

15. We are thus of the view that a party to the suit does not have a right as such to summon the opposite party to give evidence. It is really left to the Court, possibly after the evidence of all the witnesses made available is completed, to consider whether the examination of one of the parties who has not come before Court, is necessary and in that context if found necessary, to compel that party to give evidence in exercise of its jurisdiction under Rule 14 of Order 16 of the Code. A plaintiff like the one in the present case, cannot as a matter of course include the defendant in his schedule of witnesses and as of right seek the issuance of summons to the defendant for being examined as a witness on his own behalf.

16. On the facts of this case, in any event, we are not satisfied that the Court below was not justified in refusing the prayer of the plaintiffs. The plaintiffs have sued for specific performance of an agreement to sell. Their right to relief is denied by the defendants in their written statements. It is for the plaintiffs to establish the elements required which would entitle them to a decree for specific performance in terms of the relevant provisions of the Specific Relief Act. That can be established by the plaintiffs by adducing their own evidence relying upon any adverse inference that may be available to them in case none of the defendants choose to mount the box. On the materials now available, we see no justification in interfering with the refusal by the Court below to summon defendants 1 to 8 as witnesses on behalf of the plaintiffs. On the facts of this case, we are not satisfied that any jurisdictional error or material irregularity in exercise of its jurisdiction has been committed by the trial Court in refusing to issue summons to defendants 1 to 8. even assuming that the Court has such a power and that power could be invoked by the plaintiffs.

Thus we are satisfied that no interference is called for with the order of the learned Subordinate Judge. We confirm that order and dismiss this revision. We make no order as to costs.