

V. Jayakannan and ors. Vs. V.K. Sampath Alias V.K. Sampathkumar

V. Jayakannan and ors. Vs. V.K. Sampath Alias V.K. Sampathkumar

SooperKanoon Citation : sooperkanoon.com/790566

Court : Chennai

Decided On : Sep-18-1987

Reported in : (1991)2MLJ77

Appellant : V. Jayakannan and ors.

Respondent : V.K. Sampath Alias V.K. Sampathkumar

Judgement :

ORDER

M.N. Chandurkar, C.J.

1. This revision petition filed by the original defendants arises out of an order made by the IV Assistant City Civil Judge, Madras, in an application I.A. No. 7203 of 1986 in O.S. No. 1692 of 1984, holding that having regard to the provisions of Order 18, Rule 3-A of the Code of Civil Procedure, second defendant cannot be examined as a witness at the stage at which the trial of the suit was at the moment.

2. The respondent, petitioner in I.A. No. 7203 of 1986, is the plaintiff, has filed a suit for declaration that he is entitled to the suit property as a life-estate-holder pursuant to the settlement deed dated 1.12.1967 executed by his late father Kistappa Chettiar. He has also sought a decree for possession of the suit property. The basis of the claim for declaration and possession is that on 1.12.1967 the deceased Kistappa Chettiar had executed a settlement deed in favour of the

plaintiff in respect of the suit property and that after his death, the property passed on the plaintiffs heirs. This document, according to the plaintiff, was given effect to and has been acted upon. The plaintiff has also averred that on the sameday, that is, on 1.12.1967, the late Kistappa Chettiar had settled another property, namely, No. 66, Sattana Maicken Street, Choolai, Madras, in favour of the first defendant.

3. Out of the seven defendants to the suit the first defendant is the father of defendants 2 to 4, defendants 5 to 7 are, according to the plaintiff in occupation of the part of the premises as tenants.

4. Defendants 1 to 4, that is, father and three sons, have filed a common written statement. They have taken the plea that the alleged settlement deed dated 1.12.1967 executed in favour of the plaintiff was revoked later on by a deed of settlement dated 17.7.1977 and after this revocation the father of the plaintiff has executed another settlement deed on 31.10.1977 in favour of defendants 2 to 4 by which the suit property was given absolutely to defendants 2 to 4. Therefore, defendants 1 to 4 denied the claim of the plaintiff. They put forward the case that the plaintiff, who had no vestige of right or title to the property in question has been permitted to occupy a portion, but he was now trying to grab the entire property. It may be mentioned that the first defendant had earlier filed a suit for ejectment of the plaintiff, but that suit was dismissed and according to defendants 1 to 4, it was dismissed because the plaintiff contested the suit on the ground of title. The written statement has been verified by all the four defendants stating that the contents of the written statement are true to their knowledge and belief.

5. The suit was filed as far back as in January, 1984. It was taken up for trial. The plaintiff examined himself as P.W. 1 and he closed his case. Defendant No. 1 was examined as D.W. 1 and was cross-examined. After the examination of the first defendant was over, a third party by name Chokkayya was examined as D.W. 2. This witness is alleged to have attested the document of settlement said to have been executed by the late Kistappa Chettiar on 31.1.0.1977. It appears that, after the evidence of Chokkayya was over, there were several adjournments. On one day, when the matter was again taken up, it was stated on behalf of the defendants that they proposed to examine defendant No. 2 as a witness. When

this was mentioned, the plaintiff filed an objection to such a course being permitted in the form of an affidavit. In the affidavit the plaintiff stated that the defence of the defendants is common, they are represented by the same counsel and the defendants are now making an attempt to fill up the lacuna and the gaps which may have been left in the case after the attesting witness was examined by examining defendant No. 2. The contention of the plaintiff was that all the advantages which he had secured by getting certain answers in cross-examination of D.Ws. 1 and 2 would be lost if the second defendant is now permitted to be examined.

6. A counter-affidavit was filed on behalf of the defendants and it was denied that examination of defendant No. 2 was an attempt to fill up any lacuna. A case was put forth that when defendant No. 1 was examined as D.W. 1, he gave evidence with regard to what he knew in the matter and neither he nor the attesting witnesses has touched any matter which was to be adverted to by the rest of the defendants, 'who have to play their part with their witnesses'. It was stated that defendant No. 1 had been unwell for sometime and that he had as a matter of fact really undergone an operation on 8.3.1986. A right was asserted by the defendants 2 to 4 to prove what they wanted to say with their respective witness and that such a course was not prevented by any provision of law.

7. The learned IV Assistant City Civil Judge, took notice of the fact that defendants 1 to 4 had filed a common written statement, and therefore, the defence to the suit was common and that the counter in reply to the affidavit protesting against the permission to examine defendant No. 2 as a witness had also been filed by defendant No. 1 for himself and on behalf of the defendants 2 to 4. Reference, was also made to the fact that defendants 2 to 4 had engaged the same counsel to defend their case. The learned Judge, referred to a decision of this Court in *Marappa Gounder and Ors. v. Sellappa Gounder* : AIR1985 Mad183 , in which the learned Judge, Sathiadev, J., took the view that unless the Court for reasons to be recorded permits a party at a later stage, the party should not be allowed to examine as a witness at a later stage. Taking note of the fact that no application was filed seeking permission of the Court to examine the second defendant the learned Subordinate Judge held that, having regard to the provisions of Order 18,

Rule 3A of the Code of Civil Procedure, the second defendant cannot be examined as a witness at this stage. This order is challenged by defendants 1 to 4 in this revision petition.

8. The learned Counsel appearing on behalf of the defendants 1 to 4 revision petitioners has vehemently contended that it was for defendants 2 to 4 to show under what circumstances the settlement deed dated 31.10.1977 came to be executed. This according to the learned Counsel, could be done only by examining defendant No. 2 and then the defendants wanted to examine defendant No. 2 he was to be examined in his own right as a party and not as a witness for defendant No. 1. This argument was originally accepted and the contention raised was that defendants 3 and 4 who were parties were also entitled not only to examine themselves but to have their witnesses examined. Alternatively it was submitted that it was at least open to defendant No. 1 to examine his sons as witnesses on his behalf and therefore, the learned Judge was in error in holding that defendant No. 2 could not be permitted to be examined. It was pointed out that the provision in Order 18, Rule 3-A was a procedural provision and it must not be so stringently construed as to result in injustice. It was also pointed out that there was no finding by the learned Subordinate Judge that the object of examining defendant No. 2 was to fill up any lacunae left in the evidence given by other witnesses.

9. The learned Counsel appearing for the respondent-plaintiff contended that the decision in *Marappa Gounder and Ors. v. Sellappa Gounder* : AIR1985 Mad183 , took the correct view of the law that a party who wishes to reserve to itself for giving further evidence after other witnesses are examined, that party must apply before the other witnesses are examined and unless such application is made and specific permission is obtained from the teamed Judge, a party cannot insist upon itself to be examined as a witness. Any other view, according to the learned Counsel, would defeat the very purpose of order 18, Rule 3-A of the Code of Civil Procedure. The fact which was stated in the affidavit before the trial court was that if the second defendant was now permitted to be examined as a witness, then all the advantages which the plaintiff had gained by eliciting damaging answers in the cross-examination of defendant No. 1 and D.W. 2 would be undone and the plaintiff could not therefore, be allowed to be prejudiced by permitting the second

defendant to be examined as a witness.

10. Now there can be no doubt that the relevant provision so far as the facts of the present case are concerned, is in order 18, Rule 3-A of the Code of Civil Procedure, which has been expressly introduced by the amendment Act of 1976. It reads as follows:

Where a party himself wishes to appear as a witness, he shall so appear before any other witness, on his behalf has been examined, unless the court, for reasons to be recorded, permits him to appear as his own witness as at a later stage.

Plainly read, the provision clearly appears to be mandatory in character. Rule 3-A expressly provides that, if a party wishes to appear as a witness, then he shall so appear before any other witness on his behalf has been examined. If he wants to reserve himself as a witness and he proposes to examine himself after other witnesses are examined, that is undoubtedly permissible but he has to obtain previous permission of the court and the court has undoubtedly the discretion to grant such permission, but before that discretion is exercised in favour of the party, the court must record reasons for permitting a party to examine himself after the other witnesses are examined. The very fact that permission has to be obtained by a party desiring to be examined as a witness after other witnesses are examined clearly indicates that such permission must be obtained before the evidence of the other witnesses is adduced. Therefore, a party examining himself before other witnesses are examined is the rule. A party examining himself after the other witnesses are examined is an exception. An exception can be made only for valid reasons, that those valid reasons will depend on the facts and circumstances of each case. The requirement of Order 18, Rule 3-A that the court must record its reasons also indicates that Rule 3-A has specifically ruled out any permission being granted at a later stage after the witnesses are already examined. The obvious purpose of the rule is to do away with the practice which had grown in Indian Courts of examining all other witnesses first and then the party entering the witness box to fill up all the lacunae which might have been left or to undo the damage which might have been made by other witnesses. It adversely affects the opposite party. It is a normal rule of appreciation of evidence that the substantive

evidence in each case is of the party itself and the other witnesses are most of the time treated as witness corroborating the substantive evidence which has now been incorporated in the mandatory provision by the enactment of Order 18, Rule 3-A of the Code of Civil Procedure. Any other construction, and especially, the construction which is canvassed on behalf of the defendants, will defeat the very purpose and intent of Order 18, Rule 3-A. Rule 3-A is a provision which is intended to regulate the trial, then it is expected not only of the parties, but also of the courts to give effect to the provisions of Order 18, Rule 3-A, though it is quite possible that such a strict construction in a given case may cause prejudice. But even that prejudice can be undone, if the party takes care to apply to the court in time before other evidence is recorded. If in a given case the party does not apply, to the court for permission to examine himself after other witnesses are examined it will only mean that the party has defaulted with regard to what he is required to do at the trial. This may even be due either to negligence or a casual approach towards the litigation. But, for this the party must blame himself. Even assuming that prejudice will be caused to the party if he is deprived of a chance of examining himself as a witness, he alone must be held responsible for the prejudice. Also the possibility of prejudice arising from the party's own negligence cannot undermine the purpose and intent of Order 18, Rule 3-A of the Code which was enacted in the larger interests of justice to secure a fair trial of the issues which a court is called upon to decide. Therefore, plainly read, the only construction, which may appear to be inconvenient to some of the parties, is that, before the evidence of other witnesses is recorded the party must go into the witness box. A departure from this rule is not normally possible, except in exceptional circumstances, only if the previous permission is taken allowing the party to be examined after the other witnesses are examined. That seems to be the view which is taken in *Marappa Gounder and Ors. v. Sellappa Gounder* : AIR1985 Mad183 . The learned Judge, while construing Order 18, Rule 3-A of the Code of Civil Procedure, has observed as follows:

A duty is cast on the court to record reasons, which means that valid and compulsive grounds must be made out, for postponing the examination of parties to the suit. If a party to the suit desires to be examined later on, he should seek prior permission before the other witnesses are examined. In its absence, it can be

sought later on at the time when the party is put in the witness box, if by mischance any of his witnesses have been already examined, without securing earlier permission. Whenever permission is sought for, it is obligatory on the part of the Court to record reasons by passing a written order either granting or refusing it. If permission is sought in the initial stage before any witness is examined, then reasons to be given should relate to the justifiable inability on the part of the party to first examine himself. Before granting permission, it should hear the objections, if any of the other side and then alone permit any witness of the party to be examined.

11. It is true that in that decision, the learned Judge also expressed the view that since there was no total ban against parties being examined after their witnesses are put in the witness box, the rule has been considered as directory in nature. But the learned Judge has at the same time observed that this would not mean that the rule could be transgressed indiscriminately in an unbridled manner. The learned Judge later on pointed out that, unless compelling strong circumstances which are relevant and germane had existed, permission to a party to a proceeding to examine himself after his witnesses had been examined ought not to be granted. There is no reason to differ from the view taken by Sathiadev, J. In Marappa Gounder 's case A.I.R. 1985 Mad. 183. The decision of Sathiadev, J., has been followed in a later decision in U.K. Rao v. A. Henry 1986 T.L.N.J. 78, in C.R.P. 628 of 1986 dated 3.4.1986.

12. My attention has been invited to another decision of this Court in A. Karuppuswamy v. Gnana Soundari (1986) 2 M.L.J. 456, Singaravelu, J., in that decision has undoubtedly observed that the provisions of Order 18, Rule 3-A Code of Civil Procedure, are directory and not mandatory, and while observing that the court has adequate discretion under Order 18, Rule 3-A to permit a party to give evidence even after witnesses have been examined, but that the court will have to state the reasons for permitting him to appear at a later stage, the learned Judge has ultimately taken the view on the facts of that case that the lower court had not considered the merits of the application in that case and it had not decided whether the case is a fit one for granting such permission or not. The order was set aside on the ground that the court proceeded on the footing that it had no

discretion to grant any permission on a misreading of Order 18, Rule 3-A of the Code of Civil Procedure. It does not appear to me that the decision in Karuppuswami's case (1986) 2 M.L.J. 456, is in any way contrary to the decision in Marappa Gounder's case : AIR1985 Mad183 .

13. Now so far as the facts of the present case are concerned, it is difficult to accept the contention of the learned Counsel for the defendants 1 to 4 that defendant No. 2 has a right to examine himself as a witness because, he is a party. According to the learned Counsel it is for defendants Nos. 2 to 4 to show the circumstances in which the settlement deed dated 31.10.1977 came to be executed. It requires to be noticed that defendants 1 to 4 have filed a written statement jointly. No separate written statements have been filed. There is no conflict between the defendant No. 1 and defendants 2 to 4 who are his sons. They are represented by one and the same counsel. I asked the learned Counsel to point out to me the plea with regard to the circumstances in which the document dated 31.10.1977 came to be executed, if the reasons for examining defendant No. 2 was that it was for the children of defendant No. 1 to prove how the document dated 31.10.1977 came to be executed. My attention was invited to the averments in paragraph 2 of the written statement which even on a plain reading makes no reference to any particular circumstance, nor to the document, dated 31.10.1977. This is a case in which there is no conflict of interest between defendant Nos. 1 to 4 later so. At least defendants 1 to 4 never proceeded on the footing that there was any conflict of interest. On the other hand, there is a common written statement, the plea taken are common and the counsel appearing for all the defendants is also one. I have already referred to the fact that all the four defendants have verified the contents of the written statement to be true to their personal knowledge and belief. In such circumstances such defendant cannot take shelter under the fact that he wants to examine himself separately as a witness. If any other witnesses were to be examined, they would be witnesses on behalf of all the defendants. What would be the position in the case of witnesses other than the party where plaintiff or defendant is only one in a suit would be the position where all the defendants have filed a common written statement and are contesting the suit on common grounds and there was no conflict of interests between them. Therefore, if all the four defendants wanted to examine themselves as parties,

they should have been examined one after the other and then only other witnesses should have been examined. Similarly it would not be permissible for a party to the suit to be examined as a witness of another party if the defence is common. In such a case the witnesses must be treated as being examined on behalf of all defendants. Defendant No. 1, therefore, cannot have a right to examine defendant No. 2 as his witness. Merely because defendant No. 1 wants to have defendant No. 2 examined as his witness, defendant No. 2 does not cease to have the capacity of being a party to the suit. This is, therefore, a case where the defendants should have sought the permission of the court under Order 18, Rule 3-A before D.W. 2 was examined. In the absence of such permission, it is clearly not permissible for defendant No. 2 to be now examined as a witness.

14. In so far as the argument of stringently construing Order 18, is concerned, it has to be realised that if this provision is not construed stringently, the situation in the case of trial of suits will be the same as it was before the provision was enacted. The obvious result will be that if the provision in Order 18, Rule 3-A is not implemented, it will defeat the very intent and purpose for which it was enacted. The provision in Order 18, Rule 3-A must therefore, receive a strict construction. In the view which I have taken it is not possible to find any infirmity in the order of the learned subordinate Judge. The lower court is now directed to proceed with the trial of the suit expeditiously.

15. The revision petition is dismissed with costs Rs. 250.