

Balachander Vs. Vayyapuri

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Court : Chennai

Decided On : Oct-12-2012

Judge : R.S. Ramanathan

Appeal No. : C.R.P.(PD) Nos. 3169, 2193 & 2395 of 2012 & M.P. Nos. 1 of 2012
(two Petitions)

Appellant : Balachander

Respondent : Vayyapuri

Advocate for Pet/Ap. : For the Petitioner: S. Venkatesan, Advocate. For the
Respondent: P. Valliappan , Advocate.

Judgement :

(Prayers: Civil Revision Petition No.3196 of 2012 against the order dated 15.3.2012 in I.A. No.104 of 2012 in O.S. No.594 of 2003 on the file of the Sub-Judge, Namakkal.

Civil Revision Petition No.2193 of 2012 against the order dated 8.12.2011 in I.A. No.821 of 2011 in O.S. No.594 of 2003 on the file of the Sub-Judge, Namakkal.

Civil Revision Petition No.2395 of 2012 against the order dated 15.6.2012 in I.A. No.235 of 2012 in O.S. No.594 of 2003 on the file of the Sub-Judge, Namakkal.)

1. Defendant is the Revision Petitioner in C.R.P. (PD) Nos. 2193 & 3169 of 2012. The Plaintiff is the Revision Petitioner in C.R.P. (PD) No.2395 of 2012.

2. The Plaintiff filed the Suit in O.S. No.594 of 2003 for recovery of money on the basis of the pro-notes executed by the Defendant. In the Suit, the Plaintiff examined himself as PW1 and also examined another witness as PW2 and the Defendant also examined himself as DW1. At that stage, the Defendant filed Application under Section 154 of the Evidence Act for the issuance of summons to one Palanichamy as Court Witness and that Application was dismissed and against the same, C.R.P. (PD) No.3169 of 2012 was filed.

3. The Defendant also filed an Application to recall PW1 for further cross-examination and that Application was dismissed and against that C.R.P. (PD) No.3169 of 2012 was filed.

4. It is submitted by the learned Counsel for the Revision Petitioner/ Defendant that the Respondent/Plaintiff filed the Suit on the basis of six pro-notes dated 7.7.1997 alleged to have been executed by the Revision Petitioner/ Defendant and the Revision Petitioner has taken the defence that the pro-notes are fabricated and he borrowed money from one Palanichamy and executed various blank pro-notes as demanded by the said Palanichamy and the said Palanichamy filed a Suit against the Revision Petitioner/ Defendant and also gave other blank pro-notes to the Respondent/Plaintiff for filing the present Suit and the Suit filed by Palanichamy in O.S. No.232 of 2004 was also decreed and therefore, to prove that the pro-notes relied upon by the Respondent/Plaintiff were given by Palanichamy, the said Palanichamy has to be examined as Court Witness and as the said Palanichamy has already filed the Suit against the Revision Petitioner, he cannot be examined on his side and therefore, he must be examined as Court Witness and without appreciating the same, the Court below erred in dismissing the Application holding that the Application ought to have been filed under Order 16, Rule 14 of the Code of Civil Procedure and the Application was filed under Section 154 of the Evidence Act and therefore, the Application was not maintainable and the Court below ought not to have rejected the Application on the ground that wrong provision was quoted and under Order 16, Rule 14, the Court has got

discretion to summon any person as witness and as per the judgment in Palanisamy, K.C. V. M. Chinnasamy, 2002 (4) CTC 222, when the Court feels that a person cannot give evidence in favour of a party, such person can be examined as Court Witness and considering the fact that Palanichamy filed the Suit against the Revision Petitioner, he cannot be examined by the Revision Petitioner and his evidence is most important to decide the issue and that was not properly appreciated by the Court below.

5. He further submitted that PW1 was examined in the year 2009 and certain important facts are omitted to be asked to PW1 and for that purpose, he has to be recalled and that was not properly appreciated by the Court below.

6. On the other hand, Mr.P. Valliappan, learned Counsel for the Respondent/ Plaintiff submitted that under Order 16, Rule 14, the Court has to summon a person as Court Witness on its own initiative and it cannot be ordered on the Application filed by a party to Suit and therefore, the Application filed by the Revision Petitioner even assuming to be under Order 16, Rule 14 of the Code of Civil Procedure is not maintainable. He further submitted that the evidence of Palanichamy is not at all relevant to decide the issue and the Respondent/ Plaintiff filed the Suit on the basis of the pro-notes and it is for the Defendant/ Revision Petitioner to prove that the pro-notes were not executed by him in favour of the Respondent/Plaintiff and for that purpose, there is no need to examine Palanichamy and the Court below has also rightly observed that the Petitioner could have summoned the said Palanichamy as his witness and if he gives answers against the interest of the Revision Petitioner, he can seek permission of the Court to treat him as hostile witness and put questions to him and therefore, there is no need to interfere with the order of the Court below. He also relied upon the judgments in Shaik Abdul Rasool, Kadapa v. G. Lakshmi Reddy, Kadappa and another, 2011 (3) ALT 627; Varadharajan v. Saravanan, 2003 (2) LW 731; Tirumuruga Real Estate v. Dhanraj Kochar, 2011 (3) MWN (Civil) 80 in support of his contention.

7. He further submitted that the Application to recall PW1 was rightly rejected by the Court below and PW1 filed proof Affidavit on 17.3.2009 and he was partly

cross-examined on that date and the cross-examination continued on 8.4.2009, 21.10.2011 and the Revision Petitioner cross-examined with regard to the pro-notes executed by him in favour of Palanichamy and also put questions that the Respondent is acting as benami for Palanichamy and thereafter, PW2 was examined on 3.11.2011 and cross-examined on 11.11.2011 and the Revision Petitioner also filed proof Affidavit on 18.9.2010 and he was cross-examined on 6.2.2012 and when the case was posted for further examination of Defendant's side witness, the Application was filed and considering the cross-examination conducted by the Revision Petitioner on the witnesses viz., PWs 1 & 2, the Court below has rightly dismissed the Application and there is no need to interfere with the order of the Court below. The learned Counsel for the Revision Petitioner relied upon the judgment reported in Palanisamy, K.C. v. M. Chinnasamy, 2002 (4) CTC 222, in support of his contention that though under Order 16, Rule 14, the Court has got power to examine any person as Court Witness, a duty is cast upon the party to make out a case for examining any person as Court Witness and therefore, it cannot be stated that the Court cannot examine any person as Court Witness on the basis of Petition filed by the party and the Court must act on its own.

8. To Appreciate the contention of both the parties, the provision under Order 16, Rule 14, has to be taken into consideration. Order 16, Rule 14, reads as follows:

“Court may of its own accord summon as witnesses strangers to Suit - Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person, including a party to the Suit and not called as witness by a party to the Suit, the Court may, 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 may examine him as a witness or require him to produce such document.”

9. The Rule begins with the following words:

“Subject to the provisions of this Code as to the attendance and appearance and to any law time for the time being in force.”

Therefore, the power to examine any person as Court Witness when the Court at any time thinks it necessary is subject to the provisions of this Court as to the attendance and appearance of the parties.

10. Order 16 of the Code of Procedure deals with summoning and attendance of witnesses. As per Order 16, Rule 1 on or before such date as the Court may appoint and not later than 15 days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce document and obtain summonses to such person for their attendance in Court. Rule 1-A enables the party to bring any witness without applying for summons as per Rule 1. Rules 2, 3 and 4 deal with the expenses to be paid into Court when parties apply for summons. Rule 5 says that time and place and purpose of attendance to be specified in summons and Rule 7 says that if any person is asked to produce documents that must be stated clearly and Rule 7-A permits summons to be given to the parties for service. Rule 8 deals with service of summons. Rule 10 deals with the situation when the witness fails to comply with the summons. As per Rule 10, even after receipt of summons, if the witness fails to attend or to produce a document, the Court may issue proclamation requiring the witness to attend the Court and give witness or produce document and Rule 11 provides for withdrawal of order of attachment if the witness appears and Rule 12 deals with the procedure when the witness fails to appear and Rule 13 deals with the mode of attachment of property of the witness. Therefore, as per the provision of Order 16, Rules 1 to 13, the parties are directed to file list of witnesses and also apply for summons for the appearance of the witnesses either to give evidence or to produce document. These Rules also deal with the situation when witnesses did not appear after receipt of summons.

11. Order 16, Rule 14 of the Code of Civil Procedure deals with the situation where the Court at anytime 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, the Court may, on its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document. Therefore, a reading of Order 6, Rule 14 makes it clear that whenever the Court thinks it necessary to examine any person and such person was not called as a witness by a party to the Suit, the Court may

summon such person. Therefore, the satisfaction of the Court is necessary for the issuance of summons to examine any person as a Court Witness and the Court must also feel that examination of such person is necessary for proper adjudication of the lis between the parties.

12. The next question that arises for consideration is whether the Court can act on the Application filed by the parties for the issuance of summons to examine any person as Court Witness or the Court must act on its own without any Application by the parties.

13. According to me thought the Rule is worded in such a fashion, the Court may of its own motion cause such person to be summoned as a witness to give evidence when it thinks it necessary to examine such person, the Court being a neutral party, cannot be expected to act on its own in all cases and the Court has to be provided with all the particulars or the reasons for summoning a person as a Court Witness and this has been made clear in the Judgment in Palanisamy, K.C. v. M. Chinnasamy, 2002 (4) CTC 222, wherein this Court has held that the Court has got power to examine any person as a Court Witness, but, it is the duty of the Petitioner to make out a case for examining a person as Court Witness.

14. In the judgment in Varadharajan v. Saravanan, 2003 (2) LW 731, the scope of Order 16, Rule 14 has been explained as follows:

“Even in this Rule, the power of the Court to examine the witnesses on his own motion, is discretionary. Ordinarily it is for the party to summon the witnesses necessary for his case and when the party has done everything in that regard, it is the duty of the Court to enforce their attendance. Only when it appears to the Court that the evidence of a particular witness is necessary for the proper adjudication of the Suit, then only the Court may secure suo motu the attendance of such witness. This discretionary power under this Rule should not be used to help a party to tide over a real difficulty in examining that witnesses. When neither side has summoned the material witness to give evidence, the Court is justified in refusing to call him as a Court Witness after closure of evidence.”

15. In the Judgment in Tirumuruga Real Estate v. Dhanraj Kochar, 2011 (3) MWN (Civil) 80, this Court has approved the findings of the Court below wherein the Court below held that the Court has to act on its own and party cannot invoke such provision to summon the witness. In the judgment in Shaik Abdul Rasool, Kadapa v. G. Lakshmi Reddy, Kadappa and another, 2011 (3) ALT 627, it is held that Order 16, Rule 14 confers exclusive power upon the Court and the power can be exercised only when the Court feels to do so, irrespective of the stance which the parties may take on the matter. In that judgment, it is further held that though the Court is not obliged to invoke the power at the instance of the parties and the parties have no right to move an Application under this Rule, either of the parties can bring to the notice of the Court the necessity for examining any person as Court Witness and on such Application, the Court may scan the totality of the facts and circumstances and arrive at an independent conclusion as to the necessity of a Court Witness.

16. Therefore, having regard to the above judgments, it is not illegal to issue summons for examining the person as Court Witness on the basis of the Application filed by the parties as the parties are entitled to bring to the knowledge of the Court about the circumstances and the reasons for examining such person as Court Witness and thereafter, the Court has to take an independent decision whether to examine a person as Court Witness or not and if the Court thinks that such person has to be examined as Court Witness, the Court can issue necessary summons to that person.

17. Further, the wordings of Order 16, Rule 14 cannot be interpreted in a pedantic manner and merely because it is stated under Order 16, Rule 14 that the Court may, of its own motion, summon any person to give evidence as Court Witness, it cannot be held that the Court has to act only on its motion and cannot act on the Application Filed by the parties. For example, Order 40 deals with the appointment of receivers and Order 40, Rule 1 says that where it appears to the Court to be just and convenient, the Court may order appoint a Receiver and so on. Therefore, as per the wordings under Order 40, Rule 1, a Receiver can be appointed when it appears to the Court to be just and convenient and it cannot be stated that a receiver cannot be appointed on the Application filed by the parties. Therefore,

even though Order 16, Rule 14 says that when the Court thinks it necessary, it may on its own motion cause issuance of summons and that does not mean that that power cannot be exercised on the Application filed by the parties and it can be exercised only by the Court on its own motion.

18. Further, the Court below was also not right in dismissing the Application on the ground that the Application was filed under Section 154 of the Evidence Act and it was not filed under Order 16, Rule 14 of the Code of Civil Procedure and therefore, the Application is not maintainable. It is settled law that an Application cannot be dismissed for wrong quoting of the provision. Therefore, the Court below should not have dismissed the Application on that ground.

19. Nevertheless, having regard to the facts of this case, I am of the opinion that the Revision Petitioner has not made out a case for examining the said Palanichamy as Court Witness. As stated supra, the Revision petitioner could have summoned Palanichamy as his witness. Even though Palanichamy has filed the Suit against him and in all probabilities, he may not give evidence in support of the Revision Petitioner, nothing prevented the Revision Petitioner to summon Palanichamy on his side and even if he does not support the case of the Revision Petitioner, it is always open to the Revision Petitioner to apply to the Court under Section 154 of the Evidence Act to treat the witness as hostile and he can cross-examine the witness. Even if a person is summoned as a Court Witness, the party can cross-examine the witness and that opportunity could have been availed by the Revision Petitioner by summoning the said Palanichamy as a witness on his side. No reason was stated by the Revision Petitioner for not summoning the said Palanichamy and the only reason stated is that he may not give evidence in support of his case and that cannot be the reason for not summoning a person. Further, the Suit was filed by the Respondent on the basis of the pronote alleged to have been executed by the Revision Petitioner and the Revision Petitioner has to independently prove the circumstances in which the pro-notes were signed by him and given to Palanichamy and without substantiating the same, he cannot file the Application to summon Palanichamy as Court Witness. Therefore, I am of the opinion that no case is made out by the Revision Petitioner to summon Palanichamy as Court Witness and therefore, rejection of the Application by the

Court below is correct and I do not find any infirmity in rejection of the Application and C.R.P. No.3169 of 2012 is dismissed.

20. The Revision Petitioner filed I.A.No. 821 of 2011 to recall PW1 and as submitted by the learned Counsel for the Respondent, PW1 was cross-examined in detail on three days and the cross-examination of PW1 also makes it clear that the Revision Petitioner cross-examined PW1 with respect to the pro-notes executed in favour of Palanichamy and that was denied by the Respondent and having elaborately cross-examined PW1, it is not open to the Revision Petitioner to file Application for recalling PW1 and no acceptable reason has been stated for recalling PW1 and it is only stated that certain vital aspects of questions were omitted to be asked and having regard to the manner in which cross-examination was conducted on PW1 by the Revision Petitioner, I do not find any reason to interfere with the order of the Court below and the Court has rightly dismissed the Application, Hence, C.R.P. No. 2193 of 2012 is dismissed.

21. C.R.P. No. 2395 of 2012 is filed against the order passed in I.A. No. 235 of 2012. The Defendant in the Suit filed the said Application to stay the trial of the Suit till he obtains certified copy of the judgment made in I.A. No. 104 of 2012 filed by him to summon Palanichamy as Court Witness and that petition was accepted and the case was adjourned by two months. Aggrieved by the same, this Revision is filed.

22. According to me, the Revision Petition has become infructuous as the period is also over and the Revision filed against the order passed in I.A. No. 104 of 2012 is also dismissed today by this Court. However, the learned Counsel for the Plaintiff submitted that having regard to the fact that the Suit was filed in the year 2003, suitable direction may be given to the Court below to dispose of the Suit within a time frame.

23. Considering the fact that the Suit was filed in the year 2003 and the examination of witnesses was commenced in the year 2009, the Court below is directed to dispose of the Suit within four months from the date of receipt of copy of this order. C.R.P. No.2395 of 2012 is dismissed as infructuous. No costs. The connected Miscellaneous Petitions are dismissed.

