

D. Babu Vs. K.A. Dinachandran and Others

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Court : Chennai

Decided On : Nov-01-2012

Reported in : 2013(1)MLJ24; 2012(5)LW931; 2013(1)CTC881

Judge : R.S. Ramanathan

Appeal No. : C.R.P.(PD)No. 3929 of 2012 & M.P.No.1 of 2012

Appellant : D. Babu

Respondent : K.A. Dinachandran and Others

Advocate for Pet/Ap. : For the Petitioner: K.N. Nataraj, Advocate. For the Respondents: -----

Judgement :

(Prayer: Civil Revision Petition against the order dated 28.9.2012 in I.A.No.11120 of 2012 in O.S.No.1098 of 2011 on the file of the XVII Assistant Judge, City Civil Court, Chennai and direct the trial court to issue summons to defendants 1 and 2 to appear and produce the sale deed dated 21.10.2004 registered as Doct.No.5253 of 2004 on the file of the SRO, Konnur.)

Plaintiff is the revision petitioner.

2. The plaintiff filed the suit for declaration that he was not competent to enter into any contract between 1998 and 2008 and consequently, the sale deed executed

by him in favour of defendants 1 and 2 cannot be acted upon and for injunction. In that suit, defendants 1 and 2 remained ex parte and the third defendant viz., the third respondent herein filed a statement and when the case is ripe for trial, the revision petitioner/plaintiff filed application under Order XVI Rule 14 of the Code of Civil Procedure to issue summons through court to defendants 1 and 2 for their appearance for examination and to produce the sale deed dated 21.10.2004 registered as document No.5253 of 2004 on the file of the Sub Registrar, Konnur. That application was dismissed and aggrieved by the same, this revision is filed.

3. Learned counsel for the revision petitioner submitted that the petitioner is entitled to summon defendants 1 and 2 who remained absent to give evidence and only by examining them, the revision petitioner can prove his case that the document executed in favour of defendants 1 and 2 was not valid and defendants 1 and 2 will not get any title to the suit property. He also relied upon the judgment in V.K.PERIASAMY ALIAS PERIANNA GOUNDER v. D.RAJAN AIR 2001 MADRAS 410 in support of his contention. He also relied upon the judgment in SRI AWADH KISHORE SINGH AND ANOTHER v. SRI BRIJ BIHARI SINGH AND OTHERS (AIR 1993 PATNA 122).

4. According to me, the court below has rightly dismissed the application. It is seen from the averments in the plaint that the revision petitioner was an alcoholic between 1998 and 2008 and taking advantage of his position, defendants 1 and 2 induced him to convey the suit property in their names and no consideration was passed and the sale deed dated 21.10.2004 is not a valid sale deed. It is further stated that defendants 1 and 2 also availed loan from the third defendant bank based on the sale deed executed by the plaintiff. Therefore, as rightly contended by the third defendant before the court below, the issue to be decided in the suit is whether the plaintiff was competent to enter into any contract during the period between 1998 and 2008 and whether consideration was passed or not. Therefore, the duty is cast upon the plaintiff to prove that he was not in a position to enter into any contract as he was an alcoholic at that time and he would not know what he was doing and that was taken advantage of by defendants 1 and 2 and got the document.

5. Further, in the written statement, the third defendant had stated that the property was given as a security for the loan availed by defendants 1 and 2 and the property was brought to sale and the same was challenged by the revision petitioner/plaintiff by filing application under section 17 of the SARFAESI Act in S.A.No.95 of 2008 and that petition was dismissed on merits on 21.12.2009. Further, one Renuka Devi a partner of M/s.Prime Tech Enterprises filed S.A.No.74 of 2010 and that application was also not pursued further and was closed on 16.8.2011. Thereafter, the revision petitioner/plaintiff filed S.A.No.95 of 2010 before the Debts Recovery Tribunal II and that was dismissed and defendants 1 and 2 also filed application in S.A.No.9 of 2011 before the Debts Recovery Tribunal III, Chennai and the same is pending.

6. Therefore, having regard to the nature of allegations made in the plaint, the court below has rightly dismissed the application. Further, in the judgment reported in AIR 2001 MADRAS 410, the learned Judge referred to the judgments of this court in KALIAPERUMAL v. PANKAJAVALLI ((1999) 1 MLJ 97, UNION BANK OF INDIA v. MUTHIAH ((1999) 1 MLJ 679) and also referred to the judgments in MALLANGOWDA v. GAVISIDDANGOWDA (AIR 1959 MYSORE 194) and PIRGONDA v. VISHWANATH (AIR 1956 BOMBAY 251). After referring to the above judgments, the learned Judge allowed the application filed by the petitioner holding that the petitioner relied on a document in which the first defendant in the suit is a signatory and the petitioner wants to elicit evidence with regard to the exhibits to which the first defendant is a party and the first defendant in that suit is not strictly an opposite party and he was impleaded as a party only to avoid the dismissal of the suit on the ground of non-joinder of parties and therefore, the application filed by the petitioner therein for examining the first defendant on his side can be allowed.

7. According to me, the reason for allowing the petition in the above judgment is entirely different and therefore, that judgment cannot be applied to the facts of this case. Further, in this case, it is specifically alleged by the revision petitioner that during the period between 1998 and 2008, he was under the influence of alcohol and was not knowing what he was doing and taking advantage of his position, defendants 1 and 2 got the sale deed in their names.

8. Therefore, having regard to the allegations made in the plaint, it cannot be stated that defendants 1 and 2 are formal parties and though they remained ex parte, they are necessary parties to the suit and they also supported the case of the plaintiff before the Debts Recovery Tribunal as stated above.

9. Further, in the judgment reported in (1999) 1 MLJ 679, after referring to the judgments in SHATRUGAN DAS v. SHAM DAS (AIR 1938 PC 59), PIRGONDA v. VISHWANATH (AIR 1956 BOMBAY 251) and other judgments, this court has held as follows:-

"8. Mulla on his Commentaries to Code of Civil Procedure, 15th Edition, has stated thus,

"Duty of suitors to give evidence on their own behalf In Lal Kunwar v. Chirajji Lal (m), their Lordships of the Privy Council severely condemned the practice followed in some parts of India of advocate omitting to call their own client as a witness in the hope of forcing their opponents to call him as their witness in order that they themselves may have the opportunity of cross-examining their own client when called by the other side. Referring to this practice, their Lordships said: 'it is a vicious practice, unworthy of a high-toned or reputable system of advocacy. It must embarrass and perplex judicial investigation, and, it is to be feared, too often enables fraud,' falsehood, or chicane to baffle justice."

Likewise, the practice of calling the opposite side as one's own witness has been disapproved. 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.

9. As early as in Shatrugan Das v. Sham Das A.I.R. 1938 P.C, 59 : 172 I.C. 633, it is held thus:

"The practice of calling the defendant as a witness to give evidence on behalf of the plaintiff is condemnable. In such a case the plaintiff must be treated as a person who puts the defendant forward as a witness of truth."

10. In Pirgonda v. Vishwanath, AIR 1956 Bom. 251, Justice Gajendragadkar (as he then was) held thus,

"Mr. Datar has also relied upon circular No. 161 of the circulars issued by this Court in the civil Manual. This circular has invited the attention of the subordinate Judges to the observations of the Privy Council in *Kishori Lal v. Chuwni Lal* 31 All 116 at 122(PC)(A). Their Lordships of the Privy Council have referred to the practice which sometimes seemed to obtain in some of the Courts in India of calling the party's opponent as a witness and they have observed that this practice is highly objectionable. 'Such practice', said their Lordships 'ought never to be permitted in the result to embarrass judicial investigation as it is sometimes allowed to be done.'"

Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness box it would be open to the trial court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons."

11. In *Mallangowda v. Gavisiddangowda* A.I.R. 1959 Mys. 194, the Division Bench of Mysore High Court held thus,

"the practice of calling the opposite party as witness should not be countenanced as it is not in the interest of Justice."

12. Kerala High Court also had an occasion to consider the same position, which is reported in *Muhammad Kunju v. Shahabudeen*, 1969 K.L.T. 170, Justice Raghavan (as he then was) held thus,

"The practice of a party causing his opponent to be summoned as a witness has to be disapproved. As a matter of right a party cannot have the opposite party examined as a witness."

13. In *Gandamal v. Bhulloo Ram*, AIR 1951 J&K; 5 at para 12 of the judgment, their Lordships held thus,

"It is a bad practice that when parties are in a position to give personal evidence they should refrain from entering the witness box. If such, evidence is withheld without sufficient cause, the court is not only entitled to but is bound to draw an

adverse inference against the party who has thus withheld evidence. It is a still more objectionable practice to cite opposite side as one's own witness. This places the examination and cross-examination of such a witness in wrong hands, necessitates the criticism of the evidence by the side which has called it and this embarrasses fair trial and causes obstruction of justice."

10. The same principle was reiterated in the judgment reported in (1999) 1 MLJ 97. Therefore, considering the judgments reported in (1999) 1 MLJ 679 and (1999) 1 MLJ 97 and other judgments referred therein and considering the facts of the case in the judgment reported in AIR 2001 MADRAS 410, I would prefer the judgment rendered by this court and reported in (1999) 1 MLJ 97 and (1999) 1 MLJ 679. Therefore, as per the above judgment, the plaintiff cannot apply for issuance of subpoena for examination of defendants who are the contesting parties having regard to the allegations made in the plaint. Hence, I do not find any merit in the revision.

In the result, the revision is dismissed. No costs. The connected miscellaneous petition is also dismissed.

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