

IN THE COURT OF THE SUBORDINATE JUDGE,
KOTTARAKKARA

Present:- Sri. Shanavas.A, Civil Judge (Senior Division)
On Monday, the 12th day of August, 2024/ 21st day of Sravana, 1946.

IA. No: 11/2024

in

OS No.14/2022

Between

Petitioner /Plaintiff : -

Shameer.S, S/o. Shahul Hameed, aged 36 years,
Business, residing at Shanavas Manzil, Chenkoor Muri,
Velinalloor Village, Kottarakkara Taluk,
Kollam District.

By Adv: Sri. Maranadu. G. Krishna Kumar.
&
Athulya Manohar and Adv: Rajalekshmi. R

And

Counter Petitioner /Defendant:-

Veena G.V, D/o. Vasanthakumari Amma,
residing at Krishna Vilasam House,
Thevannoor Muri, Valakom Village,
Kottarakkara Taluk, Kollam District.

By Adv: Sri. Viswanatha Pillai.M
Adv: Rakhi.S, Adv: Arya Kesavan.

This Petition was filed under Section 151 of the Code of Civil Procedure. The petition was called on for hearing on 12/08/2024 and the court on the same day passed the following:

ORDER

This is an order in a petition filed under section 151 of the Code of Civil Procedure, 1908 to reopen the evidence of plaintiff.

2. **Petitioner's case in brief is as follows:-** Petitioner is the plaintiff in the Suit. The Suit is filed for specific performance of an agreement and in the alternative recovery of advance money. The petitioner was ready and willing to obtain the property on sale in tune with the stipulations in the agreement. Initially to file the Suit, the petitioner engaged Adv. Sreekumar from Chunda for issuing legal notice to defendant/respondent and for further proceedings expressing the readiness and willingness to get the sale deed executed on payment of balance sale consideration. Meanwhile the petitioner was in Saudi Arabia, after he returned to India, he contacted the counsel for ascertaining the progress of the entrusted matter. But the counsel returned the documents entrusted to him without filing suit. Consequently, the present counsel filed the suit. The counsel Adv. Sreekumar informed the petitioner that he already issued legal notice. Thus, in order to establish the fact that the counsel issued legal notice to the defendant, that matter has to bring in evidence before this

court by summoning the Post Master and to direct to produce the documents with regard to the conflict. It will definitely prove that the counsel already issued legal notice to the defendant. Further more, after closure of the evidence of the plaintiff, the defendant examined Adv. Sreekumar and Adv. Vijayan as their witnesses. So in order to prove that Adv. Sreekumar sent legal notice to the defendant, it is essential to lead evidence in this regard. Nonetheless, one of the witnesses of the defendant was not cross examined by the plaintiff. So the plaintiff sought for cross examination of the witness and summoning the Post Master and other witnesses before this court by reopening evidence. Thus this petition.

3. **The respondent/defendant filed objection contenting interalia as follows:** The petition is not maintainable either in law or on facts. No sufficient reasons stated by the plaintiff to reopen the evidence. The petitioner filed IA 7/2023 to reopen the evidence for examination of Post Master. But that was declined by this court as per order dated 22/12/2023 and for the same reasons the petitioner filed get another petition. So it is barred by the principles of resjudicata. The petitioner has got sufficient time to adduce evidence. But in order to prolong the matter he deliberately evaded the same from the court. On all these reasons the respondents sought to dismiss the petition with costs.

4. Heard both sides.

5. The following points arise for consideration.

1) Whether the petitioner entitled to get an order to reopen the evidence as sought for?

2) What shall be the order and costs?

6. **Point No.1:-** The petitioner herein seeks for an order to reopen the evidence of the plaintiff in order to examine the Post Master to prove that the earlier counsel issued legal notice to demonstrate that the plaintiff was ready and willing to purchase the plaint schedule property in compliance of the conditions in the agreement. The evidence of either side over and the case kept for final hearing. The petitioner earlier filed IA 7/2023 interalia for summoning post master. However, that was dismissed by this court holding interalia that unnecessary summoning of the public servants at the detriment of public service is to be avoided. Here in this case DW3 and DW4 are the practicing Advocates. DW4 allegedly issued legal notice to the defendant. When DW4 was in the testimony box he precisely deposed that he did not issue any legal notice or the plaintiff/ petitioner or received brief from the petitioner/ plaintiff. The Suit was filed in the year 2022. Anyhow the examination of Post Master in this regard will not get any benefit to the petitioner on the premise that after 2 years the details of registered postal articles will be destroyed by the authority as per rules. Hence, they cannot produce any documents. So there will be no purpose served if this court is inclined to allow this petition and to summon the Post Master. Furthermore, ongoing through the records it can be seen that the counsel for the plaintiff / petitioner was absent some days when the evidence was lead. When DW2 was examined counsel for the plaintiff was absent twice and nobody for the plaintiff to cross examination of DW2. Thus this court is constrained to adjourn the cross examination . It can be seen that the evidence of the plaintiff/ Petitioner cannot be reopened to

examine the other witnesses proposed to be examined as the evidence of the petitioner was closed long ago. Nonetheless the petition to re-open the evidence was dismissed by my learned predecessor in office. Petitioner/ Plaintiff examined. Two witnesses as PW1 and PW2 and documents were marked in order to prove the claim. Since the petitioner failed to take steps to summon the witness the evidence was closed. DW2 was examined on 22/12/2023, the cross examination was deferred on the request of counsel for plaintiff. DW2 was bound over to 16.01.2024. The counsel for the plaintiff was absent there was only a proxy representation. Thus this court constrained to record no cross of DW2. It can be gathered that plaintiff was not interested in cross examination of DW2. Though he got an opportunity twice. It is true that the DW2 was not cross examined even though the plaintiff was got opportunity for the same. So, an opportunity has to be given in the interest of fair trial and justice to cross examine the DW2. The suit was listed for trial on 09/10/2023. The order sheet of the case speaks in volumes that the petitioner prolonged the matter by not appearing for cross examination of witness. The cross examination of DW2 is essential for the interest of justice. But the difficulty faced by DW2 has to be compensated. Ergo, I am inclined to allow this petition in part. Hence point No.1 is found in favour of the petitioner in part.

7. Point No.2: In view of my discussions and findings on point No.1 the petition is liable to be allowed in part.

In the result, the petition is allowed in part. DW2 is recalled on payment of costs of Rs.5000/- to District Legal Service Authority, Kollam and Rs. 1000/- to DW2. It is made clear that the evidence of

plaintiff is reopened only for the cross examination of DW2. Examination of other witness sought by the petitioner is declined. The petitioner shall deposit the costs of DW2 before the court and pay the costs to DLSA directly and produce the receipt accordingly.

Dictated to the confidential assistant, typewritten by her, corrected and pronounced in open court on this 12th day of August 2024.

Sd/-
Shanavas. A,
Civil Judge (Senior Division)

APPENDIX:- Nil.

Sd/-
Civil Judge (Senior Division)

Typed by : Binu.S.
Compared by: Sheela.M.S