

IN THE COURT OF THE DISTRICT MUNSIF, SULUR

Present : **Tmt.N.Renuga., B.A., B.L.,**

District Munsif, Sulur

Friday the 2nd day of June 2023

I.A.No.4/2023

in

O.S.No.937/2017

1. Deivasigamani

2. Subramaniam

... Petitioners/Plaintiffs

/VS/

1. M/s.K.P.R.Cotton Mills Pvt. Ltd

2. K.P.Ramasamy

3. K.P.Deivasigamani

4. P.Nataraj

All defendants are represented by their

Power agent Krishnan

...Respondents/Defendants

This petition is coming on 24.04.2023 for final hearing before me in the presence of Thiru.V.Raveendran, Advocate for the Petitioners and Thiru.K.C.Loghanathan, Advocate for the Respondents and upon perusing the records, and this court made the following:

ORDERS:

This petition filed under section 33 of Indian Evidence Act and under section 151 of CPC to consider the chief examination of PW.2 is admissible under law.

1. The brief averments of the affidavit filed by the petitioner as follows:

1.1. The 1st petitioner is brother of 2nd petitioner's father. The petitioners filed the main suit for permanent injunction and declaration against the respondents/defendants. The plaintiff examined one Ramasamy son of Muthusamygounder who is aged about 77 years as PW.2 on 20.11.2017. But, the respondents/defendants have absolutely failed to cross examine the above witness PW.2. Therefore the Hon'ble court was decree the suit on exparte. Thereafter the respondents/defendants have filed an application to set aside the exparte decree and the same was allowed by this court.

1.2. The witness namely Ramasamy PW.2 is suffering with Paralysis disease and Amnesia (loss of memory power). Hence, he is not able to walk and speak and

also not able to appear before this court for cross examination. The petitioners/plaintiffs have filed an application for appointment of commissioner in IA.No.3/2022 in order to cross examine the witness PW.2. This court was to appoint advocate Mr.K.Jaffer Shatik as a commissioner to record the cross examination of PW.2. As per the order of the court the commissioner visited the residence of PW.2 and tested the capacity of the witness for cross examination. After testing the witness, the commissioner comes to the conclusion that the witness is not having capacity to depose evidence. The commissioner filed the detailed report by stating the above fact.

1.3. The evidence of PW.2, the chief examination of PW.2 is admissible under evidence act. Further his evidence is cannot be thrown out totally. Therefore the hon'ble court considers the evidence of PW.2 to decide the case. The PW.2 namely Ramasamy deposed in chief examination in respect of the attestation and execution of the WILL dated 22.03.2004 executed by the father of the 2nd plaintiff who died latter. Therefore the WILL was acted upon. In the above fact the respondent is no way connected. Hence, the respondents not entitled to object the admissibility of evidence of PW.2. Hence, this petition.

2. The brief averments of Counter filed by the Respondents as follows:

2.1. The petition is not maintainable both in law and on facts. The petitioners filed on application section 33 of Indian Evidence Act, to admission of the PW.2 third party witness of chief examination. The PW.2 taken on examined in the stage of respondents/defendants exparty after that to taken the evidence. The commissioner filed report clearly mentioned the condition of the PW.2 witness is non capable person to take evidence. Hence, this is category non sustainable law.

2.2. The petition is an abuse in process of law to drag on the proceeding. The reasons quoted in the petitioners affidavit are not true. Hence, the petition has to be dismissed in limine.

3. Point for consideration:-

Whether the petition under section 33 of Indian Evidence Act and under section

151 of CPC is to be allowed?

4. Points:-

4.1. Heard the counsels for both the parties. Originally the suit is filed in the year 2010 and the case is posted for trial in list on 07.04.2017 and the 1st plaintiff examined as PW.1. Further on failure of cross examine by the defense side, he was set exparte on 13.11.2017. On next hearing 20.11.2017, the plaintiff has examined the witness person who is the in Ex.A.18 as PW.2. And the suit is decreed as exparte on 24.11.2017.

4.2. Again the defendant has filed exparte decree set side petition in the year 2020 in IA.No.1/2020, the same was allowed on 25.08.2022. The PW.1 was cross examine by the defense side, on 28.10.2022. Further this case posted for cross of PW.2 on that date, the plaintiff side filed memo stating that, the PW.2 has got his memory loss, hence, he unable to produced before this court for cross examination. Further this court on application by the plaintiff side ordered to examine the PW.2 through court Advocate Commissioner. The Advocate Commissioner who went for recording of evidence of cross examination of PW.2 has returned his warrant by stating that the witnesses is not in good condition to depose evidence and he fully forgot all the things which happened earlier. The plaintiff now filed this petition to take the chief examination of PW.2 under section 33 of Indian Evidence Act as valid one. As per Indian Evidence Act section 33 the evidence of a person in a suit or proceedings can be considered in later part of the case or proceedings.

4.3. Hence, as per section 33 of Indian Evidence Act the admissibility and reliability of PW.2 chief examination is cannot be decided now it can be decided only at the time of pronouncement of judgment. Hence, this petition is dismissed.

In the result, this petition is dismissed. No cost.

Dictated to the Steno-typist and directly typed by her in computer, corrected and pronounced by me in open court this the 2nd day of June 2023.

District Munsif,
Sulur.

List of witnesses and documents on petitioners side:-

Nil

List of witnesses and documents on Respondents side:-

Nil

District Munsif,
Sulur.

Draft/ Fair Order
I.A.No.4/2023 in
O.S.No.937/2017
Dated : 02.06.2023
DMC, Sulur