

IN THE COURT OF SUBORDINATE JUDGE, OMALUR,
SALEM DISTRICT.

Present : Thiru. Gnana Balakrishnan, B.Sc., B.L.,
Subordinate Judge, Omalur.

Saturday, the 10th day of August 2024
I.A.No.4/2024 in O.S.No.685/2018

Rajammal

..... Petitioner/plaintiff

/versus/

1. Sellammal
2. Muthumanickam
3. Sampooram
4. Manoharan
5. Subramaniam
6. Vanitha

... Respondents/Defendants

This Petition is coming up before this court for final hearing on 09.08.2024 in the presence of Learned counsel Thiru R. Dheenadayalan, M.A., B.L., for the Petitioner/plaintiff. R1 and R2 ex parte in the suit. The learned counsel Thiru P.S. Sundararajan, M.A., B.L., for the respondents 3 & 4/Defendants 3 & 4 and the learned counsel Thiru K.T. Selladurai, B.Sc., B.L., for the respondents 5 & 6 /Defendants 5 & 6 and upon hearing the arguments of both side and perusing the records, having stood over till this day for consideration and this court delivered the following:

ORDER

1. This Petition has been filed by the Petitioner/plaintiff that order to issue court summon to examine the 1st defendant as plaintiff side witness under Order 16 Rule 14 & section 151 of Civil Procedure Code.

2. **The brief averments of the Petitioner's Affidavit is as follows:**

The petitioner is plaintiff in the above suit. The plaintiff has been filed the above suit for seeking the relief of declaration and partition against the defendants. 1st defendant is the mother of the petitioner. 2 and 3 defendants are her brother and sister. 4th defendant is the husband of her sister. 5th defendant is the husband of her deceased sister Vasanthi and the 6th defendant is the daughter of deceased Vasanthi. The suit properties are originally belonged to the petitioner and 2 & 3 defendants' grandmother namely Palaniammal and Perumayee in Doc. 321/1938 and they were in possession and enjoyment of the suit property and the said Palaniammal was given the entire property to Perumayee as her sister. From the year 1945 Perumayee was in possession and enjoyment of the suit property as an absolute owner. The petitioner and defendants were enjoyed the suit property in joint possession of as their legal heirs. The defendants are refused to give the share of the plaintiff and they are alienate and encumbrance the suit property, hence the petitioner has filed the above suit. In the above suit, even though the 1st defendant has received the court summon, he did not appeared before this court. The 1st defendant only knowing the full details in respect of the suit property. She wantonly avoid to appear before this court. If the 1st defendant will examine on the plaintiff's side, she will give the full details and regarding the alienation and encumbrance of the suit property. Hence this petition.

3. **The brief averments of the counter filed by the 4th Respondent and adopted by the 3rd Respondent is as follows:**

This petition is false, frivolous, unsustainable in law and on facts. The petitioner is put to strict proof of the allegations made in the affidavit filed in support of the petition, save those that are specifically admitted herein by this respondent. The relationship stated in the affidavit is admitted by these

respondents. It is false to state that the petitioner/plaintiff is enjoying the suit property jointly along with the respondents and the suit properties were alienated by the respondents. It is false to state that the 1st defendant knows all the facts of the case. It is false to state that if at all the 1st defendant is not examined as plaintiff side witness, the facts of the case would not come to the knowledge of the court. The petitioner/plaintiff did not come to the court with clean hands. The petitioner is not trying to examine any third party as her witness to prove her case. The 1st and 2nd defendants are colluded parties to the plaintiff and hence they did not come forward to contest the case and remained ex parte. Now the fact that 1st and 2nd defendants are colluded with plaintiff came to light. The petitioner has filed this petition to drag on the proceedings. There is no single point of truth or merits in the averments of the petition and the petition is liable to be dismissed in limine.

4. **The brief averments of the counter filed by the 5th Respondent and adopted by the 6th Respondent is as follows:**

This petition is false, frivolous, unsustainable in law and on facts. The petitioner is put to strict proof of the allegations made in the affidavit filed in support of the petition, save those that are specifically admitted herein by this respondent. The relationship stated in the affidavit is admitted by these respondents. It is true that the 1st defendant has received the court summon and he did not appear before this court set ex parte. The 2nd defendant also ex parte in the above suit. It is false to state that the 1st defendant knows all the facts of the case. It is falsely stated that if at all the 1st defendant is not examined as plaintiff side witness, the facts of the case would not come to the knowledge of the court. The petitioner has filed this petition to drag on the proceedings. There is no single point of truth or merits in the averments of the petition and the petition is liable to be dismissed in limine.

4. The Points for consideration is, whether the Petition is to be allowed or not?
5. Both side heard. Records perused. Both sides have not adduced any oral and documentary evidence.
6. The learned petitioner counsel argued that the petitioner/plaintiff wants the 1st defendant to be examined as the plaintiff side witness due to she knows all the facts of the case. The 1st defendant has received court summon and not entered herself or through her counsel. The 1st defendant only knowing the full details in respect of the suit property. He wantonly avoid and not appeared before this court. If the 1st defendant is examined on the plaintiff's side witness, that she will give the full details and regarding the alienation and encumbrance of the suit property.
7. The learned 3rd and 4th respondent counsel argued that petitioner is not trying to examine any third party as her witness to prove the case. She filed this petition to seek permission of this court to examine 1st defendant as plaintiff side witness. Further, the petitioner/plaintiff and the 1st and 2nd defendants are colluded parties to the plaintiff. In the circumstance, the petition is not maintainable and to be dismissed.
8. The learned 5th and 6th respondent counsel argued that it is false to state that the 1st defendant knows all the facts of the case. It is falsely stated that the 1st defendant is examined in this case, she knows all the details of the case and if she is examined by the plaintiff, the court will come to know the facts of the case. Hence the petition to be dismissed.

9. Considering the fact of the petition, the petitioner is sought to examine the 1st defendant as a plaintiff side witness. The reason stated in the affidavit that the 1st defendant knows all the facts and details of the case, alienation and encumbrance of the suit property. The learned 3 to 6th defendants strongly opposed to allow this petition. They have raised the objection that the 1st and 2nd defendant colluded with the plaintiff. The only reasons that the 1st and 2nd defendant are not conduct in this case.

10) This court relied on the Judgment of **Kaliaperumal vs Pankajavalli and Ors. on 27 October 1998:**

it is held as follows:-

6. In **Mallangowda V. Gavisiddangowda,**

Practice of calling the opposite party as a witness should not be countenanced as it is not in the interests of justice.

7. In **Narayana Pillai V. Kalyani Ammal 1963 K.L.T. 537**, it is held that the practice of party causing his opponent to be summoned as witness was disapproved in rather strong terms by the Lordships of Privy Council and that as a matter of right, the party cannot have the opposite party as witness.

8. The above decision was follows by Kerala High Court in a case between **Muhammed Kunji V. Shahabudeed 1969 K.L.T. 170** , wherein it is 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.

11) This court considered that the petitioner/plaintiff has filed the suit for declaration and partition against the respondents/defendants. The suit property originally belongs to the petitioner, 2nd and 3rd respondents' grandmother namely Palaniammal and Perumayee by virtue of the Doc. No. 321/1938. The 1st defendant is the mother of the petitioner. The 2 and 3 defendants are her brother and sister. 4th defendant is the husband of her sister. 5th defendant is the husband of her deceased sister Vasanthi and the 6th defendant is the daughter of deceased Vasanthi. In this case that there are six defendants in this suit. The defendants 3 to 6 are contest in the case. The other defendants 1 and 2 have received the summons and did not appeared before the court and remained exparte. In this stage, the petitioner/plaintiff has filed an application and seeking permission to examine the 1st defendant on the side of plaintiff witness. The respondents 3 to 6 have filed the counter stated that strongly opposed this petition and the 1st and 2nd respondents are colluded with the petitioner/plaintiff.

12) The petitioner stated in her application that the 1st defendant only knowing the full details in respect of the suit property. She wantonly avoid to appear before this court. The 1st defendant in this case knows all the details of the facts and come out the truth if she is examined by the plaintiff. This court considered that the petitioner has filed the suit for declaration and partition against the respondents/defendants. The petitioner/plaintiff has to prove her case.

13) This court relied on the ratio of the above judgment is squarely applicable to the fact of this petition and this court follows the above dictum. The 1st respondent/1st defendant is a party in the above suit proceedings, but she was set exparte, the petitioner/plaintiff cannot calling the opposite party as a

plaintiff side witness. In the circumstances that there is no merit and this court not inclined to allow this petition.

In the result, the Petition is dismissed. No cost.

Order directly dictated to steno typist and she had typed in computer and after rectification of mistake, Pronounced by me in open court this the 10th day of August 2024.

Subordinate Judge,
Omalur

Enclosure:

Both side witnesses/documents: --Nil--

Subordinate Judge,
Omalur

Draft/ Fair Order in
IA 4/2024
in
O.S. No.685/2018
Date: 10.08.2024

