

**IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA**

CMPMO No.182 of 2008.

Judgment Reserved on: 22.09.2008.

Date of decision: 30.09.2008.

Ram Dass & Others **...Petitioners**

Versus

Suresh Chander Prashar **...Respondent**

Coram

The Hon'ble Mr. Justice Dev Darshan Sud, J.

Whether approved for reporting ?¹

For the Petitioners: Ms. Salochana Kaundal, Advocate

For the Respondent: Mr. Pawan Gautam, Advocate.

Dev Darshan Sud, J.

This is the defendants' petition accepting the request of the plaintiff for recalling the summons issued to him to appear as a witness on behalf of the petitioners-defendants.

The suit filed by the plaintiff was for a decree for possession of land detailed in the suit. From the order it appears that General Power of Attorney Sagli Ram was prosecuting the case on behalf of the plaintiff. The defendants sought assistance of the Court calling upon the plaintiff to appear as a witness in the suit. This was resisted by the plaintiff, who

¹ *Whether the reporters of Local Papers may be allowed to see the judgement?*

moved an application for recalling of the summons. It was pleaded that the suit was filed through the General Power of Attorney who is fully conversant with the factual position and that there was no need for the plaintiff to be examined as a witness in this case. The plaintiff pleaded that the Power of Attorney bound him to all acts and deeds performed by his general attorney. He also pleaded his inability to attend the Court. The application was resisted by the defendants-petitioners herein. One of the grounds urged is that the General Power of Attorney is not conversant with certain facts which only the plaintiff is aware of and it is for this reason he is the person who can depose on oath regarding that factual situation. The learned trial Court holds that the examination is not necessary for the reasons that the plaintiff has expressed his inability to attend the Court and that the onus of proof regarding the issue on which he (defendant) seeks to prove the particular fact namely issue No.7 is on the defendants. The application was rejected.

Learned counsel for the parties have placed reliance on a number of decisions to urge that the party to the suit cannot be called or can be called as a witness to depose to testify on behalf of the party so calling.

In ***Kishori Lal vs. Chunni Lal (1909) 36 Indian Appeals 9***, the Privy Council deprecated the practice of calling the other side as a witness. The Court observed:-

"As to this last matter, it would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance."

This was followed by another decision by the Privy Council. In **Musammatt Lal Kunwar vs. Chiranji Lal (1909-1910)XXXVII Indian Appeals 1**, where the **Privy Council** was dealing with a case of the practice prevalent of withholding a party to a suit as a witness and then gambling upon the fact that the opposite party will call him as a witness so that he could be cross-examined at a length by his counsel. The Privy Council held:

"... ..The plaintiff, however, was never produced as a witness to sustain his own case and so help to discharge the burden of proof that rested upon

him. It is suggested that the presumption which would be drawn in this country to the detriment of a plaintiff who, under similar circumstances, failed to enter the witness-box and face the ordeal of cross-examination ought not to be drawn in cases between natives tried in India, because of a species of advocacy tolerated by the Courts of law in that country, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he himself may have the opportunity of cross-examining that client. The result is that, should the opponent refuse to be led into this trap, the parties (the principal witnesses, who possibly could throw light on all those tangled transactions which so perplex those who have to decide these cases) are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end. This case is a good example of this practice, for not only was the plaintiff not examined on his own behalf, but the defendant, Musammat Dhan Kunwar, was not examined on her own behalf either. 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... .."

In ***M.C. Ananda and another vs. M.C. Chikkanna and another, AIR 2001 Karnataka 139***, the High Court of Karnataka has held that there is no bar in calling the opposite side as a witness. To similar effect is the decision of the High Court of Madras in ***V.K. periasamy alias perianna Gounder vs. V.D. Rajan, AIR 2001 Madras 410***. In both these cases the Courts have dealt at length with the provisions of Order 16 Rule 21 of the Code of Civil Procedure. In ***V.K. Periasamy's*** case, the Court held that if there was a bar to the opposite party being summoned as a witness, such prohibition would have been enacted in Order 16 Rule 21 itself.

To similar effect is the decision of the Orissa High Court in ***Braja Mohan Patra vs. Ananta Charan Patra and Others, AIR 2003 Orissa 209***. Two other decisions may be noticed in ***Muhammad Ahtramullah Khan vs. Delhi Motor & Furniture Works, Ltd., AIR 1933 Lahore 243***. The High Court of Lahore held:-

"... .. Their Lordships of the Privy Council have, in recent years, been pleased to lay down that it is the duty of a party who has certain facts relating to his case within his personal knowledge, to appear before the Court at a very early stage of the case as a witness and to give evidence relating to those facts and submit himself to cross-examination by the other side. Unfortunately these words,

which are based upon mature wisdom and long forensic experience, are neglected in this Province, and pleaders in the District Courts still consider it good advocacy not to put the parties into the witness-box."

This principle was reiterated by a Division Bench of the Saurashtra High Court in ***Shah Hiralal Jadavji and another vs. Shah Fulchand Jadavji and others, AIR 1956 Saurashtra 89***, holding that a party in know of the facts should be produced first before the other evidence is recorded.

The High Court of Patna in ***Sri Awadh Kishore Singh and another vs. Sri Brij Bihari Singh and others, AIR 1993 Patna 122*** and the Mysore High Court in ***Sayed Yasin vs. Syed Shaha Mohd.Hussain, AIR 1967 Mysore 37*** also subscribe to the same principle that a party to a suit can be summoned. In the judgments of the Orissa, Madras and Karnataka High Courts, the decision of the Privy Council in ***Sardar Gurbakhsh Singh vs. Gurdial Singh, AIR 1927 Privy Council 230*** has been discussed. The Courts hold that caution in ***Kishori Lal*** and ***Sardar Gurbakhsh Singh's*** case is not an absolute bar for summoning the opposite party as a witness. All that can be said is that speculative litigation was condemned by the Privy Council. Surely, a person cannot be allowed shy away from the witness box in case he is in the know of facts and his presence is required for the just determination of the case. This principle of law is not

being applied in a vacuum but in a situation where it is just and proper for the parties to be examined. From the discussion and the reasons for rejection of the request of the petitioners i.e. by recalling the summons issued, I do not find that the trial Court has exercised its discretion in a judicial manner.

Learned counsel appearing for the respondents places reliance on the judgment of the Madras High Court in **V.P. Subramaniam vs. P.Saraswathi, 2003(3) R.C.R.(Civil) 604**, holding that Order 16 Rule 7 and 7A does not permit the other side to be examined as a witness. With respect, I cannot persuade myself to accept this proposition as the preponderance of the precedent is otherwise. Summoning the other party as witness may not be a rule or a general practice which is to be followed, but at the same time, why should a party shy away from the witness box?

Learned counsel for the respondents also places reliance on the provisions of Order 3 Rule 2 of the Code of Civil Procedure to urge that it is open to a party to present his evidence in Court through his attorney. There is no dispute regarding this proposition as in certain cases it may be permissible for an attorney to testify on the facts exclusively within his knowledge and those facts central to the dispute regarding which the plaintiff states that it is the attorney who has exclusive knowledge. Learned counsel then places reliance on the provisions of

Section 102 of the Indian Evidence Act to say that it is for the party to discharge the onus. Again there is no dispute regarding this fact.

If the presence of the opposite party is required for the discharge of its burden and onus, I find that Order 16 Rule 21 is not a bar for examination of the opposite side as a witness. The submission of the learned counsel for the respondent cannot be accepted.

In view of the facts and circumstances of the case, this petition is accepted. The order passed by the learned trial Court is quashed and set aside and a direction is issued that the request of the defendants, petitioners herein, for calling the plaintiff as a witness, shall stand allowed. The interim order is vacated.

Parties to appear before the learned trial Court on **3rd November, 2008.**

September 30, 2008.
(aks)

(Dev Darshan Sud)
Judge.