



2024/KER/43463

O.P.(C).No.154/2024

-:1:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 18TH DAY OF JUNE 2024 / 28TH JYAISHTA, 1946

OP(C) NO. 154 OF 2024

IA 3/2023 IN OS NO.106 OF 2010 OF SUB COURT, MANJERI

PETITIONER/PETITIONER/PLAINTIFF:

SMITH

BY ADVS.VINOD MADHAVAN
M.V.BOSE, NISHA BOSE
SANIYA C.V.

RESPONDENTS/RESPONDENTS/DEFENDANTS:

- 1 ANIL KUMA
- 2 SHAJIB
- 3 MUHAMMED MUNEE

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
18.06.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

**J U D G M E N T**

The rejection of the request for examining the husband of the plaintiff in the trial of a suit, for and on behalf of the plaintiff, is under challenge in this original petition.

2. The petitioner is the plaintiff, and the respondents are the defendants in O.S.No.106/2010 on the files of the Sub Court, Manjeri (for short 'the trial court'). The suit is to declare two registered cancellation deeds executed by the 1st defendant as null and void and for a permanent prohibitory injunction.

3. When the case was posted for evidence, the petitioner filed I.A.No.3/2023 (Ext.P1) to permit her husband to adduce evidence for and on her behalf. The trial court dismissed the application as per the impugned order.

4. I have heard Sri. Vinod Madhavan, the learned counsel for the petitioner. There is no appearance for the respondents.

5. The trial court dismissed Ext.P1, holding that it is not possible to permit any person to give evidence on another person's behalf. It was further observed that the husband could be cited as a witness and examined as the plaintiff's witness.



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6. Section 135 of the Evidence Act deals with the order of production and examination of witnesses. It lays down that the production and examination of witnesses shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court. How and in what order the witnesses are to be produced and examined and the method of recording the evidence is regulated by the provision of Order 18 of the Civil Procedure Code (for short CPC). Rule 1 of Order 18 lays down general rule of procedure that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. Order 18 Rule 3-A provides that where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage. Order 16 also deals with the summoning and attendance of witnesses. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to



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appear and act in any court in respect of an act required or authorised by law to be made or done by a party in such court. Thus, a power of attorney can give evidence on behalf of a party in civil proceedings. However, he cannot depose in place and instead of principal. It is trite that the power of attorney holder cannot depose about the facts which are within the personal knowledge of the principal or which are not within his personal knowledge (***Janki Vashdeo Bhojwani and Another v. Indusind Bank Ltd. And others*** (2005) 2 SCC 217] and ***Man Kaur (Dead) by Lrs. v. Hartar Singh Sangha***, (2010) 10 SCC 512).

7. Sec.118 of the Evidence Act declares that all persons are competent witnesses, while Sec.120 deals with the spousal competency of one spouse to testify for a litigant spouse in civil and criminal proceedings. Section 120 reads thus:

"120. Parties to civil suit, and their wives or husbands – husband or wife of person under criminal trial

In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."



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8. On a careful reading of the above provision, it is clear that a non-litigating spouse is a competent witness for the other spouse who litigates. The expression competency of witness refers to the capacity, ability or qualification to give evidence in the Court of Law. Section 120 permits the husband to give evidence in place and instead of his wife and vice versa even in the absence of a written authority or power of attorney. Such a witness is entitled to depose not only the facts within his/her knowledge but also within the knowledge of his/her spouse.

For the aforesaid reasons, the finding of the trial court in the impugned order that the husband cannot give evidence on behalf of the plaintiff/wife and that he can only be cited and examined as the plaintiff's witness cannot be justified. The trial court passed the impugned order without adverting to Section 120 of the Indian Evidence Act. Accordingly, it is set aside. Ext.P1 stands allowed. The original petition is disposed of.

Sd/-
DR. KAUSER EDAPPAGATH
JUDGE

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APPENDIX OF OP(C) 154/2024

PETITIONER EXHIBITS

- Exhibit P 1 A TRUE COPY OF THE CERTIFIED COPY OF THE I.A.NO.3/2023 IN O.S.NO.106 2010 ON THE FILES OF THE SUBORDINATE JUDGE, MANJERI, ALONG WITH THE AFFIDAVIT SUPPORTING THE PETITION
- Exhibit P2 THE CERTIFIED COPY OF THE ORDER PASSED BY THE LEARNED SUBORDINATE JUDGE OF MANJERI IN I.A.NO.3/2023 IN O.S.NO.106 2010
- Exhibit P3 A TRUE COPY OF THE AMENDED PLAINT DATED 05/09/2023 FILED BY THE PLAINTIFF IN O.S. NO. 106/2010 ON THE FILES OF THE SUBORDINATE JUDGE, MANJERI
- Exhibit P4 A TRUE COPY OF THE WRITTEN STATEMENT DATED 07/07/2010 FILED BY THE 2ND DEFENDANT IN O.S. NO. 106/2010 ON THE FILES OF THE SUBORDINATE JUDGE, MANJERI
- Exhibit P5 A TRUE COPY OF THE WRITTEN STATEMENT DATED 19/12/2023 FILED BY THE 3 RD DEFENDANT IN O.S. NO. 106/2010 ON THE FILES OF THE SUBORDINATE JUDGE, MANJERI
- Exhibit P6 A TRUE COPY OF THE COUNTER AFFIDAVIT DATED 08/11/2023 FILED BY THE 2 ND DEFENDANT IN I.A. NO. 3/2023 IN O.S. NO. 106/2010 ON THE FILES OF THE SUBORDINATE JUDGE, MANJERI