HC-KAR

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF JULY, 2025

BEFORE

THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL

WRIT PETITION NO.50575/2019 (GM-CPC)

BETWEEN:

1. M. SHARADAMMA
W/O LATE SRI. NAGARAJ M.K.
AGED ABOUT 34 YEARS
OCC: HOUSEWIFE
R/O YAMUNA NILAYA
DOOR NO.117/10-45
IST FLOOR, T.C. LAYOUT
R.M.C. ROAD, DAVANAGERE-577001.

2. MASTER KISHAN NAGARAJ MELLEKATTE
S/O LATE SRI. NAGARAJ M.K.
AGED ABOUT 11 YEARS
OCC : HOUSEWIFE
R/O YAMUNA NILAYA
DOOR NO.117/10-45
IST FLOOR, T.C. LAYOUT
R.M.C. ROAD, DAVANAGERE-577001
REP. BY NATURAL GUARDIAN
HIS MOTHER M. SHARADAMMA
W/O LATE SRI. NAGARAJ M.K.

3. MASTER ROHAN NAGARAJ MELLEKATTE
S/O LATE SRI. NAGARAJ M.K.
AGED ABOUT 10 YEARS
OCC : HOUSEWIFE
R/O YAMUNA NILAYA
DOOR NO.117/10-45
1st FLOOR, T C LAYOUT
RMC ROAD, DAVANGERE 577 001
REPRESENTED BY NATURAL GUARDIAN
HIS MOTHER M. SHARADAMMA
W/O LATE SRI. NAGARAJ M.K.

...PETITIONERS

(BY SRI. DEEPAK S. SHETTY, ADV.,)

AND:

1. KIRAN KUMAR
   S/O LATE SRI. PREMCHAND
   AGED ABOUT 49 YEARS
   BUSINESS MAN
   NO.23, KLIKADEVI ROAD
   DAVANGERE 577 001.

2. N. MALLIKARJUNA
   S/O LATE SRI. N.S. SANNAVEERAPPA
   AGED ABOUT 57 YEARS
   OCC : BUSINESS
   R/O DOOR NO.2035/87
   13th CROSS, ANAJAEYA BADAVANE
   DAVANGERE 577 004.

3. N. RAJESH
   S/O LATE SRI. N. VEERABADARAPPA
   AGED ABOUT 48 YEARS
   OCC : BUSINESS
   R/O DOOR NO.2035/87
   13th CROSS, ANAJAEYA BADAVANE
   DAVANAGERE 577 004.

…RESPONDENTS

(BY SRI. S.D.N. PRASAD, ADV., FOR R1
R2 SERVED AND UNREPRESENTED V/O/DTD:18.02.2021
NOTICE TO R3 IS D/W)

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THIS W.P. IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA, PRAYING TO ISSUE A WRIT OF CERTIORARI OR ORDER OR DIRECTION OR WRIT TO QUASH THE ORDER DATED 12.09.2019 PASSED ON I.A.NO.15 IN O.S.NO.80/2017, PASSED BY THE II ADDITIONAL SENIOR CIVIL JUDGE AND JMFC AT DAVANGERE & ETC.

THIS PETITION HAVING BEEN HEARD AND RESERVED ON 03.07.2025, COMING ON FOR PRONOUNCEMENT OF ORDER, THIS DAY, THE COURT MADE THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL

CAV ORDER

This writ petition is filed challenging the order dated 12.09.2019 passed on I.A.No.15 in O.S.No.80/2017 by the II Additional Senior Civil Judge and JMFC, Davanagere.

2. Heard.

3. Sri.Deepak S. Shetty, learned counsel appearing for the petitioners submits that the Trial Court committed a grave error in allowing an application filed by the respondent No.1 to summon the witness. The Trial Court allowed the application to summon the petitioner No.1-defendant No.1 as a witness on behalf of the plaintiff-respondent No.1, which is contrary to the settled principles of law. It is submitted that the plaintiff-respondent No.1 has to prove the case based on his pleadings and evidence and he cannot compel the petitioner No.1-defendant No.1 to speak in the witness box in his favour. It is further submitted that the respondent No.1 examined 3 witnesses. During the cross-examination, there were admissions with regard to the execution of the alleged sale agreement and PWs-2 and 3 also gave inconsistent evidence and to overcome the same, such application is filed which was

allowed by the Trial Court. There cannot be summoning of the opponent as a witness in the Court. In support of his contentions, he placed reliance on the following decisions:

(1) MALLANGOWDA AND ORS. Vs. GAVISIDDANGOWDA AND ANOTHER[1]

(2) JORTIN ANTONY AND ORS. Vs. PADMANABHA DASA MARTHANDA VARMA AND ORS.[2]

(3) SURESH S/O SAHEBRAO TAWALE Vs. UTTAM S/O SHANKAR GHADGE AND ORS.[3]

(4) MINOR ARUMUGAM ALIAS LOGESH Vs. STATE BANK OF INDIA[4]

Hence, he seeks to allow the petition.

4. *Per contra*, Sri.S.D.N.Prasad, learned counsel appearing for the respondent No.1 supports the impugned order and submits that the petitioner No.1 did not come forward to depose before the Court which compelled the respondent No.1 to file an application to summon her. It is submitted that the law does not prohibit summoning of opposite party as a witness, which has been rightly considered

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[1] AIR 1959 MYSORE 194
[2] AIR 2000 KER 369
[3] (2012) 5 ALL MR 880
[4] LAWS (MAD) 2005 7 208

by the Trial Court taking into consideration the decision of this Court. Hence, he seeks to dismiss the petition.

5. I have heard the arguments of the learned counsel for the petitioners, learned counsel for the respondent No.1 and perused the material available on record. I have given my anxious consideration to the submissions advanced on both the sides.

6. The material on record indicates that the plaintiff-respondent No.1 filed O.S.No.80/2017 against the petitioners and the respondent Nos.2 and 3 for the relief of specific performance of the contract. The petitioners denied the execution of the agreement of sale as contended in the plaint and sought for dismissal of the suit. The records indicate that the respondent No.1 examined 3 witnesses as PWs-1 to 3 to prove the agreement of sale in question. Thereafter, filed an application under Order XVI Rules 1 and 2 of the Code of Civil Procedure, 1908, seeking to condone the delay in filing the additional list of witnesses and also permission to examine them. The affidavit filed in support of the application indicates that the petitioner No.1 and her husband were in need of

money. Hence, they offered to sell the suit schedule property in favour of the respondent No.1 and after negotiations, entered the agreement of sale on 11.07.2015. It is further averred that the petitioners denied the plaint averments. However, the petitioner No.1-defendant No.1 did not enter the witness box. The defendant No.4 was examined as DW-2 and got marked certain documents. It is also averred that the petitioners falsely denied the execution of the agreement of sale in favour of the respondent No.1. Hence, it is just and necessary to examine the petitioner No.1-defendant No.1 as a witness, which would throw sufficient light on the contentions raised and to prove the case.

7. The Trial Court, considering the scope of Order XVI Rules 1 and 2 of the CPC, allowed the application by permitting the plaintiff to examine the witnesses cited in the additional witness list. The Trial Court came to the conclusion that any party to the suit can be summoned as a witness and allowed the application as per Rule 21 of Order XVI of the CPC.

8. To appreciate the issue involved in the petition, it would be useful to refer the decisions of the Hon'ble Supreme Court and different High Courts.

(a) In the case of ***MALLANGOWDA AND ORS.*** referred *supra,* The Hon'ble Division Bench of the then Mysore High Court at paragraph 7 has held as under:

> ***"7.*** *In this case whether the transaction is an absolute sale or not has to be gathered from reading the plaint as a whole and putting it in juxta position with the evidence in this case. Plaintiff himself has been examined as a witness, no doubt, on behalf of the defendant. We have in unmistakable terms, stated in this Court previously that this practice of calling the opposite party as a witness on his side should not be countenanced as it is not in the interests of justice. A scrutiny of the plaintiff's evidence throws light as to the nature of the transaction that was entered into between him and the defendants."*

In the aforesaid decision the Hon'ble Court observed that the practice of calling opposite party as a witness on his side should not be countenanced as it is not in the interest of justice.

(b) In the case of ***JORTIN ANTONY AND ORS.*** referred *supra,* the Division Bench of Kerala High Court at paragraphs 14 to 16 held as under:

> ***"14.*** *A few decisions on the question involved may be considered at this stage. In Pirgonda v. Vishwanath, AIR 1956 Bom 251 the practice of citing the opposite side as a witness was disapproved but the Court observed that if a party who is in a position to give evidence does not go into the box, the Court is free to draw an inference against him. This disapproval was also shared by the Mysore High Court in Mallan Gowda v. Gavisiddan Gowda, AIR 1959 Mysore 194. In Appavoo Asary v. Sornammal Fernandez, AIR 1933 Mad 821 and in Bhupathiraju Suryanarayanaraju v. Bantupalli Appanna, AIR 1959 Andh Pra 645 it was held that for summoning the opposite party as a witness, resort to O. 3, Rule 1 of the Code of Civil Procedure was not proper. But it was suggested that where one party desires the presence of the opposite party in Court for the purpose of examining him as a witness the proper procedure to adopt was the one under O. 16 of the Code. In Syed Yasin v. Syed Shah Mohd. Hussain, AIR 1967 Mys 37 a learned single Judge of the Mysore High Court held that it was permissible for the Court in exercise of its power under O. 16 of the Code to permit one party to cite his opponent as a witness. According to his Lordship, if the intention of the legislature was to impose any limitations on the power of a party in*

summoning and examining the other party as a witness, it would have specifically stated so in O. 16, Rules 1, 19 and 20 as it had done in Rule 14 and if the Court comes to the conclusion that the prayer of a party to summon and examine the other party to the suit as his witness does not amount to an abuse of process of Court, the prayer in that behalf can be allowed. In Awadh Kishore Singh v. Brij Bihari Singh, AIR 1993 Pat 122 it was held that a party cannot be debarred from examining his adversely and an order refusing permission to the plaintiff to examine the defendant as a witness was a jurisdictional error liable to be corrected in exercise of jurisdiction under S. 115 of the Code of Civil Procedure. In the recent decision of the Andhra Pradesh High Court in Kosuru Kalinga v. Kaikamma, 2000 AIHC 786 it was held that the application seeking summoning of a party to the suit as a witness of the other party could not be dismissed on the sole ground of such a course being not known to law since that would mean the overlooking of Rule 14 of O. 16 of the Code. It was also indicated that if the applicant in that behalf fails to state reasons for such summoning, such a prayer cannot be allowed. All these decisions in our view only indicate that it is not as if the Court has no power to direct the examination of a party to the suit if it considers it necessary to order his examination. Though these decisions observe that there is nothing in the Code which prevents one party from citing the opposite party as his witness, it is also clear that there

is no clear enabling provision which entitles one party to insist on his opponent being called as a witness. Considering the general principle recognised by the Privy Council we are inclined to the view that in the absence of any provision conferring such a right on a party to the suit, it must be held that there is no right as such in a party to the suit to summon his opponent to give evidence. These decisions in our view fortify generally the view expressed by Shamsuddin, J. in the decision in Mary Francis v. Kesava (1993) 1 Ker LT 4.

15. *We are thus of the view that a party to the suit does not have a right as such to summon the opposite party to give evidence. It is really left to the Court, possibly after the evidence of all the witnesses made available is completed, to consider whether the examination of one of the parties who has not come before Court, is necessary and in that context if found necessary, to compel that party to give evidence in exercise of its jurisdiction under R. 14 of O. 16 of the Code. A plaintiff like the one in the present case, cannot as a matter of course include the defendant in his schedule of witnesses and as of right seek the issuance of summons to the defendant for being examined as a witness on his own behalf.*

16. *On the facts of this case, in any event, we are not satisfied that the Court below was not justified in refusing the prayer of the plaintiffs. The plaintiffs have sued for specific performance of an agreement to sell. Their right to relief is denied by the defendants in their*

written statements. It is for the plaintiffs to establish the elements required which would entitle them to a decree for specific performance in terms of the relevant provisions of the Specific Relief Act. That can be established by the plaintiffs by adducing their own evidence relying upon any adverse inference that may be available to them in case none of the defendants choose to mount the box. On the materials now available, we see no jutification in interfering with the refusal by the Court below to summon defenadnts 1 to 8 as witnesses on behalf of the plaintiffs. On the facts of this case, we are not satisfied that any jurisdictional error or material irregularity in exercise of its jurisdiction has been committed by the trial Court in refusing to issue summons to defendants 1 to 8. even assuming that the Court has such a power and that power could be invoked by the plaintiffs."

The Court observed that there is no express provision that confers right on one party to call the opponent as a witness. The plaintiff cannot, as a matter of course include the defendant in his list of witness.

(c) In the case of ***SURESH S/O SAHEBRAO TAWALE*** referred *supra*, the learned Single Judge of the Bombay High Court at paragraph 5 held as under:

"5. As rightly contended by the Counsel for the petitioner the Privy Council, in the case of Mahunt

Shatrugan Das (supra), has held that the practice of calling the defendant, as a witness to give evidence on behalf of the plaintiff, is condemnable. In such a case the plaintiff must be treated as a person who puts the defendant forward as a witness of truth.

This Court also had occasion, in the case of Pirgonda Hongonda (supra), to consider the point whether the plaintiff can call the defendant as his witness and upon considering rival submissions on merits, this Court in said exposition has reproduced the observations of Privy Council in Kishori Lal v. Chunni Lal (31 ALL 116 at p 122 (PC)(A), thus:

"Such a practice, said their Lordships "ought never to be permitted in the result to embarrass judicial investigation as it is sometimes allowed to be done. Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness box it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witnesses box, it should normally not be open to his opponent to compel his presence by the issue of a witnesses summons."

The view taken by the Privy Council is also reiterated by the High Court of Jammu and Kashmir.

The contention of the Counsel for the respondents that the judgment of this Court in the case of Ramdas Dhondibhu Pokharkar (supra), and in particular, the ratio laid down in paragraph no.5 has application in the present case, is devoid of any merits. Upon

careful reading of the said judgment, it appears that the Bank employee was summoned to identify the signature and he was not called as a defendant as such.

Therefore, in the facts of this case, reliance placed by the Counsel for the respondents, in the case of Ramdas Dhondibhu Pokharkar is misplaced."

In the said case, the Court, placing reliance on the decision of the Privy Council in the case of ***KISHORILAL Vs. CHUNNILAL***[5] held that it is not necessary for the Trial Court to entertain an application to call the opponent as a witness and that it is always open for the Trial Court to draw adverse inference against a party refusing to enter the witness box.

d) In the case of ***MINOR ARUMUGAM ALIAS LOGESH*** referred *supra,* the High Court of Madras at paragraph 12 has held as under:

"12. In civil proceedings, there may be a case, where a party supports the case of the plaintiff, but fails to come as co-plaintiff. In order to avoid certain technicalities, it is not uncommon that the supporting party is shown as defendant(s). In that case, the party so impleaded as defendant, cannot be termed as opposite party or opponent as the case may be. In this view, when the

[5] 31 ALL 116 AT P.122 (PC)(A)

party is desirous of obtaining summon to a party to the suit, he can very well invoke Order 16, Rule 21 r/w Rule 1(2), stating the purpose, for which witness is proposed to be summoned or examined. In that case, as observed by Prabha Sridevan, J., when very good reasons are shown, the Court should exercise its discretion in favour of the party seeking permission and there should not be total denial, since no such bar is contemplated, under any of the above said provisions.

The submission of the learned Counsel for the respondents that calling opposite party as witness placing reliance upon the decisions in Mallangowda v. Gavisiddangowda, AIR 1959 Mys. 194 and Leelavathi K. v. Maheswari Sakthi Ganesan, 2002 (3) CTC 551, cannot be accepted in all the cases, though it is well applicable to certain cases, as discussed by me supra. In the first decision, a Division bench of Mysore High Court has held:

> *"Practice of calling the opposite party as a witness should not be countenanced as it is not in the interests of justice."*
>
> *and in the second decision, it is said:*
>
> *"It is true that if a party refuses to voluntarily give evidence, he cannot be compelled to do so at the instance of the opposite party, as the Court is always at liberty to draw an inference against the party, who refuses to give evidence voluntarily."*

In both the cases, it appears, the parties sought to be summoned as witnesses by other side were the real opponents and therefore, compelling such parties to give evidence on behalf of other party, is not desirable

judicially, which view I should also endorse. But if the parties sought to be summoned are not the real opponents, then there may be relaxation for very good reasons. Thus analysing the provisions contained in Order 16, Rule 21, C.P.C. and also the decisions brought to my notice, I conclude that in certain cases, a party to a suit can invoke Order 16, Rule 21, C.P.C, but not always, as of right and it all depends upon the purpose for which he is summoned and the stand taken by the party in the suit. At the risk of repetition, it could be said, if the party, who is desirous of examining another party as witness, has no conflicting interest, whereas the party to be summoned is supporting the other party, who is seeking the aid of Order 16, Rule 21, C.P.C, the Court could very well issue summons and not in the case where there is conflicting interest or no defence at all, as in this case."

The view of the Court is that one party can seek to summon the opposite party as a witness but not always, as of right and it all depends upon the purpose for which he is summoned and the stand taken by the party in the suit.

e) This Court in the case of ***SYED YASIN Vs. SYED SHAHA MOHD. HUSSAIN***[6] at paragraphs 12 to 15 held as under:

[6] AIR 1967 MYS 37

12. *That it is possible for one party to examine the other party as a witness, is made clear by Rule 21 of Order XVI which reads as follows:*

> *"Where any party to a suit is required to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as they are applicable."*

13. *It is obvious that this rule does not refer to evidence given by a party to the suit on his own behalf as a witness. The words used in the rule are "Where any party to a suit is required to give evidence……" The words "required to give evidence" denote, not voluntary act of giving evidence by a party in his own favour, but required to do so by the other side or the Court. This rule makes the provisions of the Code as to the witness applicable as far as possible, to parties who are required to give evidence or produce documents.*

14. *In any opinion, this rule clearly indicates that one party to the suit can examine the other party as his witness or require him to produce documents. Instead of there being any prohibition in the Code as regards the examination of one party to the suit by the other, this rule clearly enables one party to the suit to require the other party to give evidence. It is also interesting to note that the Madras, Andhra Pradesh and Kerala High Courts have introduced the following amendment to the said Rule, which is Rule 21(1):*

> *"Where a party in a suit is required by any other party there to give evidence or to produce documents, the provisions as to*

> *witnesses shall apply to him as far as applicable."*

15. *Sub-rule (2) of Rule 21 is not material for our purpose. The amendment introduced by these High Courts support the conclusion that I have come to that under the Code, one party to a suit can summon the other party thereto to give evidence on his behalf or to produce any document. No reasons have been given by the trial Court for rejecting the application of the petitioner for summoning the plaintiff as his witness. The learned Munsiff has only stated as follows:*

> *".....At that stage the defendant has sought for summoning Sajjada (Plaintiff) as defence witness and I find that the defendant is not entitled for such a relief.*
> *In the result the application is dismissed. No costs.****"*

The opinion of the Court is that one party to the suit can examine the other party as his witness or require him to produce the document, as there is no prohibition in the Code with regard to one party being examined by the other. On the contrary, Rule 21 enables one party to the suit to require the other party to give evidence.

f) The Hon'ble Supreme Court in the case of ***MOHAMMAD ABDUL WAHID Vs. NILOUFER AND ORS.***[7] held at paragraphs 13 to 22 as under:

> **"13.** A party to the suit is one on whose behalf or against whom a proceeding in a court has been filed. A witness is a person, either on behalf of the plaintiff or the defendant, who appears before a court to substantiate a statement or claim made by either side. Neither the phrase "party to the suit" nor "witness" is defined under CPC or any other statute on the books. However on this issue, a Constitution Bench of this Court in State of Bombay v. Kathi Kalu Oghad [State of Bombay v. Kathi Kalu Oghad, 1961 SCC OnLine SC 74 : AIR 1961 SC 1808] held as under : (AIR p. 1814, para 11)
>
> > "11. … "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said "to be a witness" to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy."
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> A "witness" as defined by P. Ramanatha Aiyar's Advanced Law Lexicon is as under:

[7] (2024) 2 SCC 144

> "One who sees, knows, or vouches for something (a witness to the accident). (1) in person, (2) by oral or written deposition, or (3) by affidavit (the prosecution called its next witness)."

Black's Law Dictionary, 7th Edn., 1999:

> "The term "witness" [Corpus Juris Secundum : A Contemporary Statement of American Law as Derived from Reported Cases and Legislation. West, 1994.] , in its strict legal sense, means one who gives evidence in a cause before a Court; and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceeding, and so includes deponents and affiants as well as persons delivering oral testimony before a Court or jury."

14. The High Court in its considered view stated that a party cannot be equated to a witness. It is recorded in the impugned judgment [Mohd. Abdul Wahid v. Nilofer, 2021 SCC OnLine Bom 170] that various provisions of CPC lend credence to the difference between a party to the suit and a witness in a suit.

15. In advancing its arguments before this Court, the respondents submitted that the phraseology of the Code, employing "the plaintiff's witnesses" and "the defendant's witnesses" suggests a clear difference between the parties to the suit and the witness produced at their instance — and would submit that the literal rule of interpretation, in the absence of any ambiguity, would be what is required to be followed.

16. This understanding, in our view, implies that the law places a party to a suit and a witness to a suit in watertight compartments and that a plaintiff/defendant, even when testifying to their own cause are not witnesses despite being in the witness box and being subject to the same practices and procedures as any other witness before the court on their behest.

17. This differentiation appears to be questionable. Reference may be made to Section 120 of the Evidence Act, 1872 which states that parties to a civil suit shall be competent witnesses. It reads:

> "**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."

The word used is witnesses—which implies that a witness otherwise produced as also the defendant or the plaintiff themselves, will stand on the same footing when entering evidence for the consideration of the court. The Code itself speaks to the effect that when a party to a suit is to testify in court. Regard may be had to Order 14 Rule 21 which reads as under:

> "**21. Rules as to witnesses to apply to parties summoned**.—Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable."

18. Further, Order 16 Rule 14, as extracted hereunder is taken note of.

> "**14. Court may of its own accord summon as witnesses strangers to suit**.— Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary [to examine any person, including a party to the suit] and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document."
>
> (emphasis supplied)

In respect of the above provision, it is essential to notice that prior to the amendment to the Code in the year 1976, this section was applicable to "any person other than a party to suit" [Code of Civil Procedure (Amendment) Act, 1976] the express exclusion has been amended, to turn it into an explicit inclusion within the term "witness".

19. We may also refer to Order 18 Rule 3-A which states that when a party to a suit wishes to appear as a witness, he is to do so prior to other witnesses. The section reads:

> "**3-A. Party to appear before other witnesses**.—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."

(emphasis supplied)

20. The relevant principles as culled out by B.P. Sinha, C.J. (majority opinion) in the above referenced decision of the Constitution Bench in Kathi Kalu Oghad case [State of Bombay v. Kathi Kalu Oghad, 1961 SCC OnLine SC 74 : AIR 1961 SC 1808] may also be instructive in gaining an understanding of the ambit of a witness. In para 16, it was observed : (AIR pp. 1816-817)

> "16. … (3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.
>
> (4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showings parts of the body by way of identification are not included in the expression "to be a witness".
>
> (5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.
>
> (6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing."

21. It is clear from the above discussion, that witnesses and parties to a suit, for the purposes of adducing evidence, either documentary or oral are on the same footing. The discussion as aforesaid, emphasises

the lack of differentiation between a party to suit acting as a witness and a witness simpliciter in the suit proceedings. The presence of these provisions also begs the question that if the legislature had the intent to differentiate between a party to a suit as a witness, and a witness simpliciter, it would have done so, explicitly. On this we may only highlight what the High Court [Mohd. Abdul Wahid v. Nilofer, 2021 SCC OnLine Bom 170] had to observe : (Mohd. Abdul Wahid case [Mohd. Abdul Wahid v. Nilofer, 2021 SCC OnLine Bom 170] , SCC OnLine Bom para 27).

> "27. Merely because Order 16 Rule 21 provides that the Rules as to witnesses are to apply to parties summoned, that would not mean that the party is being equated with a witness. The Rule only applies for regulating the conduct of a party when he enters the witness box in his own cause, otherwise in absence of such a provision, there would be a void and the conduct of a party entering the witness box in his own cause, would go unregulated. This is further substantiated from the use of the expression "insofar as they are applicable" occurring in Rule 21 of Order 16."

22. A simple brushing off by saying that "merely because" one provision mentions them to be performing similar functions, they are not to be equated, cannot be allowed. No proper reason is forthcoming from a perusal of the extracted portion or otherwise for the differentiation which is between a witness in the witness box and the conduct of a party appearing as a witness in the witness box. In our considered view, this distinction does not rest on firm ground. This is so because the function performed by either a witness or a party to a suit

> when in the witness box is the same. The phrase "so far as it is applicable" in Order 16 Rule 21 does not suggest a difference in the function performed."

The Hon'ble Supreme Court, in the aforesaid decision after considering the scope of Order XVI with reference to different Rules under the said Order, held that the functions performed by either a witness or a party to the suit when in the witness box, is the same. The phrase "sofar as it is applicable" in Order XVI Rule 21 does not suggest a difference in the function performed. In other words, the Hon'ble Supreme Court held that there is no difference between a party to a suit as a witness and a witness simplicitor.

9. The contention of the learned counsel for the petitioner No.1-defendant No.1 that the plaintiff-respondent No.1 cannot call her as a witness in the additional list of witnesses furnished by the plaintiff-respondent No.1, has no merit in view of the enunciation of law laid down by the Hon'ble Supreme Court. In the case on hand, the contention of the plaintiff-respondent No.1 is that the petitioner No.1-defendant No.1 and her husband have executed registered agreement of sale and the petitioner No.1-defendant No.1 is conveniently

trying to evade entering the witness box, which has compelled the plaintiff-respondent No.1 to file an application to summon petitioner No.1-defendant No.1 as a witness. No doubt, the Trial Court on the basis of evidence on record, can draw adverse inference with regard to the conduct of the petitioner No.1-defendant No.1, if she fails to enter the witness box. Order XVI Rule 1 of the CPC recognizes the right of a party to the suit to file a list of witnesses whom they propose to call either to give evidence or to produce document. Rule 21 says that where any party to the suit is required by any other thereto to give evidence, or to produce document, the provisions as to the witness shall apply to him so far as applicable. The Court, while considering the application for summoning of the witness is required to consider the purpose for which the witness is proposed to be summoned. Rule 1(2) of the aforesaid Order confers discretion on the Trial Court to summon or not to summon the witness after considering the purpose for which the witness is proposed to be summoned. The Trial Court is required to exercise the discretion judiciously, more particularly when a party to the suit seeks to summon his/her opponent as a witness. I am of the considered view

that the plaintiff can seek to summon the defendant as his witness but the same cannot be allowed as a matter of right and the Trial Court is required to consider the purpose for which, the witness is proposed to be summoned and thereafter, consider the application by assigning proper reasons.

10. The Court shall keep in mind that if the parties sought to be summoned as a witness by the other side were the real opponents and therefore, compelling such parties to give evidence on behalf of the other party, is not desirable judiciously. Even in such cases, the option is available to the Court to either draw adverse inference against such a party or if the Court comes to the conclusion that the opponent's evidence is necessary to decide the issue involved in the case, then to summon them exercising its power under Order XVI Rule 1(2) of the CPC. Under such circumstances, the Court can exercise its discretion in favour of the party seeking to summon the opponent as a witness. In the case on hand, the Trial Court, on judicious application of mind has come to the conclusion that the opponent's witness is necessary and allowed the application. The decision arrived by the Trial Court

is by exercising its discretion under Order XVI Rule 1. This Court, while exercising its power under Article 227 of the Constitution of India, cannot add its views to the views of the Trial Court.

11. For the aforementioned reasons, I proceed to pass the following:

ORDER

The writ petition is devoid of merits and the same is accordingly rejected.

Sd/-
(VIJAYKUMAR A. PATIL)
JUDGE

RV
List No.: 1 Sl No.: 1