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.CRP.No.1027 of 2020.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 14.03.2023

Delivered On : 08.03.2024

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

CRP.No.1027 of 2020

and

C.M.P.No.5611 of 2020

1. Kolandasamy
2. Achiyammal
3. Pappathi
4. Eswaran
5. Dhanalakshmi

... Petitioners/Petitioners/Third Parties

Vs.

1. Palanisamy
2. Dharmaraj

... Respondents/Respondents

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the Fair and Decretal Order dated 03.10.2019 in I.A.No.2/2019 in I.A.No.1/2019 in O.S.No.65/2017 on the file of the learned Principal Subordinate Judge, Erode.

For Petitioners : Mr.M.V.Venkataseshan
Senior Counsel for
Mr.Kiran Kishan B.M

For Respondents : Mr.G.C.Nelson Britto
for Mr.C.E.Pratap for R-1
: No Appearance for R-2



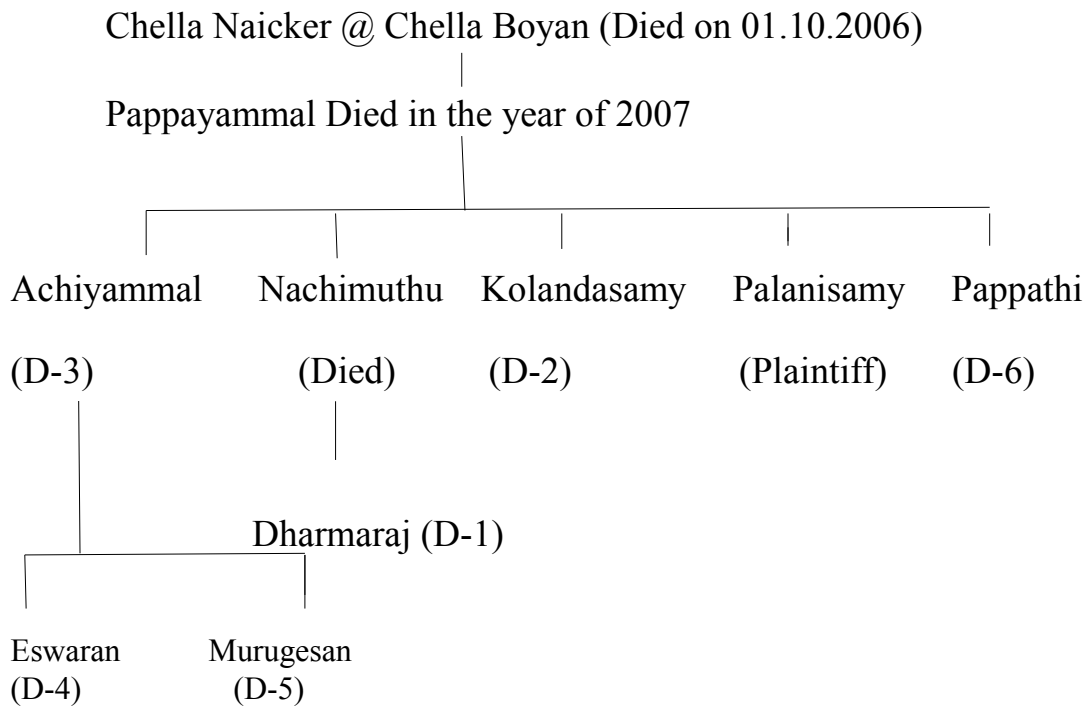
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ORDER

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This Civil Revision Petition has been filed to set aside the Fair and Decretal Order dated 03.10.2019 in I.A.No.2/2019 in I.A.No.1/2019 in O.S.No.65/2017 on the file of the learned Principal Subordinate Judge, Erode.

2. Mr.M.V.Venkateseshan, learned Senior Counsel for Mr.Kiran Kishan B.M appearing for the Petitioners invited the attention of this Court to the genealogical tree, which is extracted hereunder:





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2.1. The Plaintiff is Palanisamy. The father of Palanisamy viz., Chella Naicker had executed a Will in favour of the Plaintiff/Palanisamy and Dharmaraj the son of pre-deceased son Nachimuthu. Therefore, in the light of the above alleged Will, the Plaintiff had instituted the Suit in O.S.No.1/2014 on the file of the learned District Munsif, Erode in which the Revision Petitioners herein were also Defendants. After receipt of summons from the Court, the Defendants entered appearance and disputed the claim of the Plaintiff in the Plaint averments. The claim of the Plaintiff in O.S.No.1/2014 that it was a self-acquired property of the Plaintiff's father/Chella Naicker which was disputed by the Defendants stating that it is an ancestral property of Chella Naicker and Chella Naicker could not have executed Will in favour of the Plaintiff and the son of the pre-deceased brother. The alleged Will is not a bona fide Will. It is to be verified by sending it to the Expert regarding hand writing and signature of the deceased/Chella Naicker. After filing of the written statement, the Plaintiff/Palanisamy let the Suit in O.S.No.1/2014 for dismissal. Subsequently, he had filed the Suit in O.S.No.65/2017 with the same prayer claiming that the father of the Plaintiff/Chella Naicker had executed a registered Will in favour of the Plaintiff/Palanisamy and



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son of the pre-deceased son Dharmaraj and no other legal heirs of Chella Naicker were parties to the Suit. The said son of the pre-deceased son Dharmaraj remained *ex parte*. Based on the Will, the Suit was decreed *ex parte* (preliminary decree) and partition was granted in favour of the Plaintiff/Palanisamy.

2.2. Based on the *ex parte* preliminary decree, the Plaintiff/Palanisamy filed I.A.No.1/2014 in which the Defendants in the earlier Suit in O.S.No.1/2014 filed Petition to implead them as Defendants in O.S.No.65/2017 and seeking to set aside the preliminary decree for partition in I.A.No.1/2014.

2.3. It is the contention of the learned Counsel for the Revision Petitioners that in O.S.No.65/2017, Palanisamy had examined himself as P.W-1, the scribe of the Will was examined as P.W-2. Therefore, the Petition filed by the Defendants in the earlier Suit in O.S.No.01/2014 as Petitioners herein seeking to set aside the *ex parte* decree in favour of Palanisamy was dismissed by the learned District Munsif, Erode. Aggrieved by the same, the Petitioners in I.A.No.02/2019 in



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I.A.No.1/2019 in O.S.No.65/2017 had approached this Court seeking to set aside the Order of preliminary decree and to implead themselves as party Respondents/Defendants in the Suit. The Respondents had filed counter. Based on the counter, after due enquiry, the learned District Munsif dismissed the I.A.No.2/2019. Aggrieved by the same, the Petitioners are before this Court with this Petition.

2.4. It is the contention of the learned Counsel for the Petitioners that after a Suit was dismissed for default, the party has to restore the Suit. Here, the Plaintiff in O.S.No.1/2014 is the Plaintiff in O.S.No.65/2017 had not attempted to restore the earlier Suit under Order IX, Rule 9 of Civil Procedure Code. He had filed the Suit in O.S.No.65/2017 straight away.

2.5. It is the further contention of the learned Counsel for the Petitioners that the partition Suit is always maintainable, it may be filed at any time. At the same time, the Defendants who had squat on the properties were left out. Particularly, in the light of the facts and circumstances, after filing of written statement, the Plaintiff let it for



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dismissal. Under those circumstances for complete adjudication of the dispute, whether the Will is alleged to have been executed in favour of the Plaintiff/Palanisamy and son of the pre-deceased son; Whether it is true and whether the father of the Plaintiff had ignored the other legal heirs are to be considered in pre-trial that cannot be curtailed at the initial stage by nullifying the Suit for Plaintiff/Palanisamy and his pre-deceased brother's son.

2.6. The learned Counsel for the Revision Petitioners invited the attention of this Court to the Provisions of Indian Succession Act particularly Section 283, which is extracted hereunder:

“283. Powers of District Judge.—

(1) In all cases the District judge or District Delegate may, if he thinks proper,—

(a) examine the petitioner in person, upon oath;

(b) require further evidence of the due execution of the Will or the right of the petitioner to the letters of administration, as the case may be;

(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the court-house, and also the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) Where any portion of the assets has been stated by the petitioner



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to be situate within the jurisdiction of a District Judge in another State, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.”

2.7. The dismissal of the earlier Suit bars filing of the present Suit.

But there is an exemption for Suit for partition. Here, it is a different case from the earlier Suit. The Petitioners were parties in the subsequent Suit, the Petitioners were left out.

2.8. The learned Counsel for the Petitioners invited the attention of this Court to the ruling reported in **2012 (7) MLJ 198** in the case of ***Kaliammal and Others Vs. K.Mayilsamy & others***. The relevant portion is extracted hereunder:

“2. the case of the first respondent was that the suit properties were the ancestral properties of one Krishnan Chettiyar and Pappammal was his wife who was the first Defendant in the suit and they had a daughter by name Saraswati and defendants 2 to 7 are the legal heirs of Sarasawati. The first Defendant and the plaintiff/first Respondent's mother Muthammal were sisters and the first respondent herein was taken in adoption by Krishnan Chettiyar and Pappammal when the first respondent/plaintiff was three months old and he was treated as adopted son of Krishnan Chettiyar and Pappammal and therefore, he is entitled to half share in the suit properties and after the death of Krishnan Chettiyar , he is entitled to 1/6 share along with the defendants and the first defendant was entitled to 1/6 share and defendants 2 to 7 together are entitled to 1/6 share and after the death of the first



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defendant, he became entitled to 1/12 share and therefore, the first respondent/plaintiff is entitled to $1/2 + 1/6 + 1/12 = 9/12$ share and the suit was filed for that.

3. The first defendant Pappammal filed statement disputing the claim of the first respondent/plaintiff herein as the adopted son of Krishna Chettiyar and Pappammal and denied that the plaintiff/first respondent was the adopted son and therefore, he is not entitled to any share in the properties of Krishna Chettiyar and Krishna Chettiyar; during his life time, settled his properties in favour of his daughter Saraswati and therefore, the plaintiff/first respondent cannot claim any right over the properties and therefore, he is not entitled to the relief of partition.

33. Admittedly, the first respondent filed O.S.No.1048 of 1989 for partition on the very same pleading and the basis of his claim for partition in that suit was that he was the adopted son of Krishnan Chettiyar. That suit was allowed to be dismissed and on the same pleading, the present suit is filed. Therefore, it is contended by the learned counsel for the appellants that the suit is barred under Order 9 Rule 9 of the Code of Civil Procedure.

38. As per Order 9 Rule 9, when a suit is disposed as per Order 9 Rule 8, the plaintiff is precluded from filing a fresh suit on the very same cause of action. Therefore, the cause of action in O.S.No. 1048 of 1989 and the present suit is one and the same viz., the plaintiff is the adopted son of Krishnan Chettiyar and therefore, the bar under Order 9 Rule 9 will come into play as O.S. No. 1048 of 1989 was dismissed as per Order 9 Rule 8. The cause of action expressed in the judgment relied upon by the learned senior counsel was that suit for partition was among the members who are entitled to a share in the properties by reason of their birth in the same family and there was no dispute regarding the right claim partition and the dispute was with regard to the shares to which the parties are entitled to. In that context only it was held in those judgments that in a partition suit, the cause of action is a continuing one. The present suit cannot be considered as a partition and the present suit and the earlier suit were filed only on the basis that the plaintiff is the adoptive son of Krishnan



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Chettiyar and the cause of action is the factum of adoption and therefore, the prohibition under Order 9 Rule 9 will come into operation though the present suit is for partition I hold that the present suit is barred under Order 9 Rule 9 of the Code of Civil Procedure. The second substantial question of law is answered in favour of the appellant. I, therefore, hold that the Courts below, without appearing the judgments of the Honorable Supreme Court and without referring to the Exhibit B-1, erroneously held that the plaintiff has proved that he was the adoptive son Krishnan Chettiyar and the lower appellate Court erred in dismissing the application for additional evidence and ought to have received the additional evidence as Exhibits.”

(ii) **2007 (3) CTC 332** in the case of ***Dhanalakshmi and others***

vs. P.Mohan and others. The relevant portion is extracted hereunder:

“3. the High Court dismissed the Revision Petition filed by the appellants herein against the order dismissing the Application filed by them to implead themselves in the Suit filed by the first respondent (P.Mohan) for partition of his share of the property in O.S.No. 82 of 2004. Accordingly to the appellants, they have purchased the properties from the second, third, fourth and sixth respondents by two registered sale deeds dated 18.06.1999 and 21.06.1999 and they are the bona fide purchasers for the value and entitled for alienor's share in equity and, therefore, they are the necessary parties for effective adjudication of the dispute in O.S.No.82 of 2004. the Principal District Judge, Tanjavur came to the conclusion that since the sales in favour of the appellants were covered by the doctrine of Lis Pendens and since they can only have whatever rights transferors had, it is necessary to deal with their separately and dismissed the Application. Against that order, the appellants preferred the Revision before the High Court. The High Court also dismissed the Revision on the ground that the appellants are not entitled to be impleaded since the right that they have cannot be larger than the right of their vendors, assuming that they are bona fide purchasers. The High Court holding so, dismissed the Revision on the ground that there is no justification to interfere with the orders passed by the Court below.



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Aggrieved by the same, the appellants have come before this Court.

5. Section 52 deals with a transfer of property pending Suit. In the instant case, the appellants have admittedly purchased the undivided shares of the respondents nos. 2,3,4, & 6. It is not in dispute that the first respondent P.Mohan has got an undivided share in the Suit property. Because of the purchase by the appellants of the undivided share in the Suit property, the rights of the first respondent herein in the Suit or proceeding will not affect his right in the Suit property by enforcing a partition. Admittedly, the appellants, having purchased the property from the other co-shares, in our opinion, are entitled to come on record in order to work out the equity in their favour in the final decree proceedings. In our opinion, the appellants are necessary and proper parties to the Suit, which is now pending before the Trial Court. We also make it clear that we are not concerned with the other Suit filed by the mortgage in these proceedings.

7. In view of the order now passed by this Court , the preliminary decree passed by the Trial Court in the absence of the appellants cannot stand. We, therefore, set aside the preliminary decree and restore the Suit to its original number and direct the Trial Court to dispose of the same on merits and affording opportunity to the appellants to file a written statement and after framing the necessary issues. The Trial Court is directed to dispose of this Suit within six months from today.”

The Suit to be heard afresh after hearing all the parties.

3. The learned Counsel for the Respondents submitted his arguments by way of reply, he had invited the attention of this Court to the certified copy of Will, the relevant portion is extracted hereunder:

“இந்த உயில் சாசனத்தில் இறுதியில் விவரிக்கப்பட்டுள்ள சொத்தானது நான் சுயமாக 10.4.1947ம் தேதியிட்ட கிரையப்பத்திரத்தின் மூலம் அரசச்சலுர் கிராமம், பெரியாக்கவுண்டர் மகன் வேலப்ப கவுண்டரிடம்



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கிரையம் பெற்ற வகையினில், 10.4.1947ம் தேதியிட்ட கிரையப்பத்திரத்தின் மூலம் அரச்சலுர் கிராமம், சேனாதிபதிபாளையம் பெரியாககவுண்டர் மகன் குப்பக்கவுண்டரிடம் கிரையம் பெற்ற வகையிலும், மேலும் 2.5.63ம் தேதியிட்ட கிரையப்பத்திரத்தின் மூலம் அரச்சலுர் கிராமம், வெள்ளியங்கிரிப்புதுர் சீரங்கநாயக்கன் மகன் ரங்கநாயக்கன் மற்றும் ரங்கநாயக்கன் மகன் குப்புசாமி ஆகியோரிடம் கிரையம்பெற்ற வகையிலும் எனக்குப் பாத்தியப்பட்டு தற்போது என்னுடைய சொந்த அனுபோகத்தில் எவ்வித வில்லங்க விவகாரங்களும் இல்லாமலும் இருந்து வருகிறது.

..... மேலும், முனைவியின் வாழ்நாளுக்குப்பின்னிட்டு இந்த சொத்தானது என்னுடைய முன்றாவது மகன் பழனிச்சாமிக்கும் மற்றும் என்னுடைய முதல் மகன் நாச்சிமுத்து வாயிலாகப் பிறந்த என் பேரன் தர்மராஜிக்கும் சமமாகச் சென்றடையவேண்டியது.”

3.1. The Will was registered in the year 1989 which was bona fide.

The Plaintiff had examined the scribe of the Will. In the light of the above, well-considered order of the learned District Munsif dismissing the Petition filed by the Petitioner is found justified. Hence, this Civil Revision Petition has no merits and is to be dismissed.

4. By way of rejoinder the learned Counsel for the Petitioners submitted that the genuineness of the Will ought to have considered by the Court. Also, he invited the attention of Section 118 of Indian Succession Act, which is extracted hereunder:

“118. Bequest to religious or charitable uses.—No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by



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a Will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the Wills of living persons: 1[Provided that nothing in this section shall apply to a Parsi.] Illustrations A having a nephew makes a bequest by a Will not executed and deposited as required—for the relief of poor people; for the maintenance of sick soldiers; for the erection or support of a hospital; for the education and preferment of orphans; for the support of scholars; for the erection or support of a school; for the building and repairs of a bridge; for the making of roads; for the erection or support of a church; for the repairs of a church; for the benefit of ministers of religion; for the formation or support of a public garden; All these bequests are void. comment Section 118 comes within the purview of articles 14 and 15 of the Constitution of India and it is, therefore, necessary that all testators who are similarly situated should be subjected to the same rule of procedure. There cannot be any unusual burden of Christian testators alone when all other testators, making similar bequests for similar charities and similar religious purposes are not subjected to such procedure. Therefore section 118 is anomalous, discriminatory and violative of articles 14, 15, 25 and 26 of Constitution. The Court in exercise of its jurisdiction and to remedy the violation of fundamental rights, declared this section as invalid and unconstitutional; John Vallamattom v. Union of India, (2003) 6 SCC 611.”

Point For Consideration:

Whether the Order passed by the learned Principal Subordinate Judge, Erode in I.A.No.2/2019 in I.A.No.1/2019 in O.S.No.65/2017, dated 03.10.2019 is to be set aside?



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5. On consideration of the rival submissions and on perusal of the Order passed by the learned Principal Sub Judge, Erode dismissing the Petition is found unacceptable considering the facts and circumstances of this case. In the earlier Suit for partition in O.S.No.1 of 2014, all the legal heirs of Chella Naicker were impleaded as party Defendants to the suit. Subsequently, after filing of the written statement by the Defendants, the suit was dismissed for non-prosecution by the Plaintiff himself. As per the reported ruling of this Court in **2012 (7) MLJ 498 [Kaliammal and others vs. K.Malyilsamy and others]** when the earlier suit is dismissed for non-prosecution, the subsequent suit for the same cause of action cannot be filed. Here in this case, the Plaintiff/Palanisamy had filed subsequent suit in O.S.No.65 of 2017 in which he had wantonly avoided all the Defendants in the earlier suit in O.S.No.1 of 2014 and cleverly impleaded only the deceased son of Chella Naicker son of pre-deceased son Nachimuthu. The said Dharmaraj had left it *ex parte*. Therefore, the Plaintiff-Palanisamy himself had examined as P.W-1 and marked the Will executed by Chella Naicker and the scribe of the Will was examined as P.W-2. The Plaintiff had obtained an *ex parte* preliminary decree for partition. Subsequently,



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he filed Interlocutory Application for final decree only then the Defendants in the earlier suit in O.S.No.1 of 2014 came to know about the subsequent suit. Therefore, they had sought to implead them in the suit in O.S.No.65 of 2017 as Defendants and also seeking to set aside the *ex parte* preliminary decree. Instead based on the vehement objection of the learned Counsel for the Plaintiff in O.S.No.65 of 2017 as Respondent in I.A.No.2 of 2019, the I.A.No.2 of 2019 was dismissed by the learned District Munsif, by order dated 03.10.2019 which is found to be unacceptable in the light of the facts that there is a bar to file a subsequent suit for the same cause of action when the earlier suit was dismissed for non-prosecution.

6. The second ruling cited by the learned Counsel for the Petitioners in **2007 (3) CTC 332 [Dhanalakshmi and others -vs- P.Mohan and others]** is the case where an undivided sharer of a joint family property sold his undivided properties to the third parties. The third parties sought to implead them as necessary parties in the partition Suit which was refused by the trial Court on the ground that under Section 52 of Transfer of Property Act, the properties purchased by the



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third party was hit by *lis pendens* and therefore, whatever is allotted to seller (undivided share) will be allotted to the purchasers also. Therefore, there is no necessity for impleading them. When the Revision came up before the High Court, the High Court had set aside the Order of the learned trial Judge stating that in equity the purchasers are entitled to implead themselves as necessary party. Therefore, the Civil Revision Petition was allowed. The learned Counsel for the Revision Petitioners had relied on this ruling, in support of his contention that the Revision Petitioners herein who are necessary parties in the earlier Suit in O.S.No.1/2014 which was also filed by the Plaintiff in O.S.No.65/2017 for partition was allowed to be dismissed for non-prosecution by the Plaintiff after filing of the written statement by the Petitioners herein as Defendants in the Suit. Subsequently, the very same Plaintiff instead of restoring the Suit in O.S.No.1/2014 had filed the Suit in O.S.No.65/2017 also for partition, leaving out the Petitioners herein who are necessary parties in the earlier Suit and only impleading the Defendant who is the son of the pre-deceased brother of the Plaintiff. The said sole Defendant remained *ex parte* and therefore, preliminary decree for partition was passed as though the Plaintiff is the only party entitled to preliminary



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decree and Plaintiff and the Defendant alone are entitled to preliminary decree. Only, when the Petitioners came to know about the suppression and filing of a collusive Suit by the Plaintiff in O.S.No.65/2017, the Petitioners herein as Petitioners in I.A.No.2/2019 had filed Petition to set aside the *ex parte* preliminary decree passed in O.S.No.65/2017 which was refused by the trial Court. Therefore, the ruling cited by the learned Counsel for the Revision Petitioners in **2007 (3) CTC 332 [Dhanalakshmi and others -vs- P.Mohan and others]** is found applicable to the facts of this case.

7. The contention of the learned Counsel for the Respondents who are the Plaintiffs in the Suit submitted that the Suit for partition can be filed any time as the cause of action continues even though found reasonable cannot be accepted in the peculiar facts of this case. Originally, when the Plaintiff filed Suit in O.S.No.1/2019, he had impleaded all necessary parties after filing of written statement by the Defendants, the Petitioners herein he was aware of the out-come of the Suit. Therefore, he left it for dismissal/non-prosecution. Subsequently, instead of restoring the Suit, he had filed a fresh Suit. This time, leaving



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out all other parties except Plaintiff's pre-deceased brother's son as the sole Defendant on the ground that the Will was executed by the father of the Plaintiff in favour of the Plaintiff in O.S.No.65/2017 and pre-deceased brother's son was sole Defendant. Earlier also it was a same contention which were disputed by the Defendant in the written statement. This time, the party who disputed the alleged Will was wantonly left out and the Suit had been filed behind the back of the Defendant in the earlier Suit which had caused prejudice to the Petitioners herein who were the Defendants in the earlier Suit regarding the claim of right in the joint family property. The claim of right of the Revision Petitioners herein can be considered only after full trial. Therefore, the Order of the learned trial Judge on the basis of vehement objection by the Plaintiff to allow the Petition and dismissing the Petition by Order dated 03.10.2019 is found unacceptable and unreasonable. The submission of the learned Counsel for the Respondents/Plaintiffs cannot at all be accepted in the light of the above discussion. Therefore, the same has to be set aside.



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8.Also, the subsequent Suit filed without impleading all the legal heirs of Chella Naicker creates doubt in the mind of the Court. When the valuable right of the legal heirs are lost, it cannot be compensated. Therefore, the parties had to be impleaded in the Suit, so that they can raise their objection and only then whether the Will was a registered Will or genuine Will could be considered. Just because the Will was registered, cannot be taken for granted that the Will was genuine and therefore, the Petitioner herein are not parties to the Suit. The contention that Plaintiff and the Defendant in the Suit in O.S.No.1/2014, who is the son of the pre-deceased son alone are entitled, cannot be considered at this stage. The Will has to be considered only after the appearance of all the legal heirs by comparing signature and the same is to be proved in the Civil Court as per Section 65 of the Indian Evidence Act, atleast one of the attested Witness has to be examined. In the light of the above, the submission of the learned Counsel for the Respondents that this Civil Revision Petition is not maintainable is found unacceptable and is rejected. The submission of the learned Counsel for the Petitioners is accepted. If this Petition is dismissed, it will end up in miscarriage of justice for not hearing the parties, who are the parties in the earlier Suit.



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Those circumstances arise, only due to the conduct of the Plaintiff in instituting the fresh Suit without all the legal heirs of deceased Chella Naicker and only filing the Suit with D-1 as only contesting Defendant who is none other than the son of the pre-deceased son.

Under those circumstances, **this Civil Revision Petition is allowed.** The Order passed by the learned Principal Sub Judge, Erode in I.A.No.2/2019 in I.A.No.1/2019 in O.S.No.65/2017, dated 03.10.2019 is set aside. The learned Principal Sub Judge is directed to hold the enquiry and proceed with the trial after giving opportunity to the other Defendants to contest the claim of the Plaintiff. Consequently, connected Miscellaneous Petition is closed. No costs.

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Index: Yes/No

Internet: Yes/No

Speaking Order/Non-speaking Order



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To

1. The Principal Sub Ordinate Judge,
Erode.
2. The District Munsif,
Erode.
3. Section Officer,
V.R.Section,
High Court, Madras.

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