

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.01.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

C.R.P (PD) No.1373 of 2012

&

M.P.No.1 of 2012

Palaniammal

...2nd Respondent / Petitioner

Vs.

1. Karuppusamy sounder
2. Saraswathi
3. D.Gowri
4. V.Shanmugam ...Petitioners/Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 25.01.2012 made in I.A.No.61 of 2012 in O.S.No. 488 of 2004 on the file of District Munsif, Gobichettipalayam in so far as the same directs the petitioner to lead the evidence first.

For Petitioner : Mr.A.V.Arun

For Respondents : Mr.R.T.Doraisamy

ORDER

In a fight between the sister and brothers in respect of succession to the property of the father, two suits came to be filed, the first one being O.S.No. 146 of 2005 on the file of the learned District Munsif, Gobichettipalayam filed by the sister on 27.04.2001 and the other suit being O.S.No. 488 of 2004 on the file of the learned District Munsif, Gobichettipalayam filed on 30.04.2001 by the brothers for declaration of title claimed by the rival parties to one and the same properties.

2. The claim of the sister is based on a Will dated 07.12.1976; whereas the claim of the brothers is based on a Will dated 22.03.2000, both claimed to be executed by Avinashi Gounder, the father of the parties. The suit filed by the petitioner is resisted by the respondents contending that the Will dated 07.12.1976 propounded by the petitioner is a forged one. A similar contention has been raised by the petitioner in the suit filed by the respondents (brothers). Since both the suits have been filed in respect of the estate of the deceased Avinashi Gounder based on the above said Wills, each claiming the respective Will propounded by them to be the last Will and testament of Avinashi sounder, the respondents filed a petition before the trial

Court in I.A.No. 61 of 2012 in O.S.No. 488 of 2004 for joint trial of both the suits and for recording common evidence for both the suits in O.S.No. 146 of 2005 which was admittedly filed earlier in point of time. Besides seeking joint trial and recording of common evidence for both the cases in O.S.No. 146 of 2005, the respondents had also prayed therein that the revision petitioner should be called upon to lead evidence in proof of the Will dated 07.12.1976 propounded by her.

3. It was contended by the revision petitioner that since the respondents were relying on the Will which was executed later in point of time as the last Will and Testament of the testator Avinashi Gounder, the necessity to prove the Will propounded by her would arise only in case of the respondents' failure to prove the Will dated 22.03.2010 and that hence, the respondents should be directed to lead evidence before ever the petitioner shall be called upon to lead evidence. The learned trial Judge, after hearing both sides, sustained the contentions of the respondents herein and rejected the contention of the revision petitioner. Accordingly, by an order dated 25.01.2012, joint trial of O.S.No. 146 of 2005 and O.S.No. 488 of 2004 was ordered with a direction to record common evidence for both the suits in O.S.No. 146 of 2005, with a further direction that the revision

petitioner, namely, the plaintiff in O.S.No. 146 of 2005 should lead evidence at the first instance in proof of the Will propounded by her.

4. Aggrieved by and challenging the said order, not in respect of its entirety but in respect of that portion which directs the revision petitioner to lead evidence at the first instance in proof of the Will propounded by her, the present Revision has been filed.

5. The arguments advanced by Mr.A.V.Arun, learned counsel appearing for the petitioner and by Mr.R.T.Doraisamy, learned counsel appearing for the respondents are heard. The materials available on record are also perused.

6. The short point that arises for consideration in the revision is, whether the trial Court is wrong in directing the revision petitioner (the plaintiff in O.S.No. 146 of 2005) to lead evidence in proof of the Will dated 07.12.1976 propounded by her before ever the respondents (plaintiff in O.S.No. 488 of 2004) would be called upon to prove their case based on the Will dated 22.3.2000 propounded by them as the last Will and Testament of Avinashi Gounder. Admittedly, Avinashi Gounder died on 23.06.2000. In the event of both the Wills being

genuine, the second Will, namely, the Will dated 22.03.2000 propounded by the respondents will supersede the Will dated 07.12.1976, as according to the respondents, the earlier Wills executed by the testator came to be revoked by the Will dated 22.03.2000.

7. Though the respondents might have chosen to file the subsequent suit, namely O.S.No. 488 of 2004, they need not have filed the said suit in order to establish their claim and they could have been content with resisting the claim of the revision petitioner made in the earlier suit, namely O.S.No. 146 of 2005 and tried to defeat the claim by proving the Will propounded by them, namely the Will dated 22.03.2000. Further, the normal procedure in case of joint trial of two or more cases shall be to ask the plaintiff in the comprehensive suit or the suit filed earlier in point of time to lead evidence in proof of their case before ever the other parties are called upon to lead evidence in proof of their case. There maybe cases in which the claim made in the earlier suit might have been conceded, but the relief alone is contested on the basis of the plea made in the written statement and in the subsequent suit filed by the other party. In such cases, the plaintiff in the earlier suit may waive his right to begin the case. Civil Procedure

Code contains the provision in Order XVIII Rule (1) of CPC, stating who among the parties shall have the right to begin. It reads as follows:-

" 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."

8. It states that the plaintiff has a right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or in some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks and in which event, the defendant shall have the right to begin. The rule simply deals with the right of the parties to begin on the premise that the party who begins the case shall have an advantage over the other party. When the parties to the suits are placed on equal footing and both the parties are not prepared to waive their right to begin the case, then it shall be decided by the Court as to who is to

lead evidence at the first instance in proof of his case.

9. Even in accordance with Order XVIII Rule 1 C.P.C., the contention of the petitioner cannot be countenanced. The respondents have not admitted the contention of the petitioner that Avinashi Gounder executed the Will dated 07.12.1976 relied on by the revision petitioner. Suppose the respondents have admitted the said Will, but have taken a plea that the Will has been revoked and superseded by the subsequent Will, then the petitioner shall have the justification to contend that as per Order XVIII Rule (1) of CPC, the right to begin shall be with the respondents herein. That is not the case here. The respondents have totally disputed the alleged execution of the Will of Avinashi Gounder dated 07.12.1976. In addition, they have also contended that it is rank forgery.

10. Under such circumstances, directing the petitioner who filed the suit earlier in point of time to lead evidence in proof of his case is quite in consonance with Order XVIII Rule (1) of CPC and the impugned order of the trial Court cannot be found fault with. There is no merits in the revision and the same deserves dismissal.

P.R.SHIVAKUMAR. J.,

vsg

11. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

13.01.2015

Index: Yes/No

Internet: Yes/No

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To

District Munsif, Gobichettipalayam.

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