

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 30-09-2016

CORAM

THE HON'BLE MR.JUSTICE T. MATHIVANAN

CIVIL REVISION PETITION No.1399 of 2011

and

M.P.No.1 of 2011

Natesan,
S/o.Palanisamy,
Nadar Veethi
Chenapalayam
Suriyampalayam P.O.
Thiruchengode Taluk,
Namakkal District.
respondent/plaintiff

..... Petitioner /

vs

1. Thangammal,
W/o.Ramasamy,
Chanapalayam
Suriyampalayam PO
Thiruchengode Taluk,
Namakkal District.

2. Chandra,
W/o.Chengodan,
2/54,C K S V.Nagar,
Narajothipati,
Salem 4

3. Arthanari,
S/o.Ramasamy
Nadar Veethi,
Chanapalayam

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Suriyampalayam PO
Thiruchengode Taluk,
Namakkal District.

.. Petitioners/Defendants 2,4&5/Respondents

Civil revision petition filed under Article 227 of the Constitution of India, against the order of the Principal District Munsif at Thiruchengode, dated 9.2.2011 in I.A.No.1235 of 2010 in O.S.No.115 of 1992.

For Petitioner : Mr.P.Valliappan,

For Respondents : Mr.T.Arakia Doss

ORDER

This memorandum of Civil Revision Petition is directed against the fair and decretal order, dated 19.2.2011 and made in Application in I.A.No.1235 of 2010 in O.S.No.115 of 1992 on the file of the learned Principal District Munsif, Thiruchengode.

2. The revision petitioner herein is the plaintiff in the suit, whereas the respondents 1 to 3 herein are the defendants 2,4 and 5 in the said suit.

3. It is manifested from the records that the revision petitioner had filed the above said suit in O.S.No.115 of 1992, on the file of the Principal District Munsif, Thiruchengode as against five defendants which includes the respondents 1 to 3 herein and thereby sought the relief of partition.

4. During the pendency of the suit, the respondents/defendants 2,4 and 5 had come forward with an Application in I.A. No.1235 of 2010 under Order 8 Rule 1A (3) and Section 151 of Code of Civil Procedure to receive the document Nos.8 and 9 produced already by the respondents

<http://www.judis.nic.in> along with their proof affidavit and to mark them as exhibits B. 18 and 19

on their side.

5. The said petition was resisted by the revision petitioner/plaintiff by filing his counter statement. After hearing the counsels appearing for both parties the learned trial Judge had proceeded to allow the petition with a finding that the documents which were sought to be produced could be received as documentary evidence, subject to the objections raised on behalf of the revision petitioner/plaintiff.

6. Having been aggrieved by the impugned order, dated 9-2-2011, the revision petitioner being the plaintiff has approached this Court with the present Civil Revision Petition.

7. Heard Mr. P.Valliappan, learned counsel appearing for the revision petitioner and Mr. T.Arockiadoss learned counsel appearing for the respondents 1 to 3.

8. Order VIII Rule 1A of Code of Civil Procedure contemplates duty of defendant to produce the documents upon which relief is claimed or relied upon by him. Rule 1A has been inserted by Civil Procedure Code (Amendment) Act 46 of 1999 which came into effect from 1.7.2002. Sub rule 3 of Rule 1A of order VIII of Code of Civil Procedure says that a document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

9. As contemplated under sub rule-1 Rule 1A of Order VIII of the Code of Civil Procedure, where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter

such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

10. In case the documents on which the defendant bases his defence are omitted to be produced along with his written statement, as enacted under sub rule 1 to Rule 1A of Code of Civil Procedure, the defendant is not entitled to produce those documents which were omitted to be produced without the leave of the Court. Therefore sub- rule 3 to Rule 1A of Order VIII of Code of Civil Procedure acts as an enabling provision to the defendant to help him to fortify his defence, when the documents which were initially omitted to be produced and marked.

11. Section 65 of Indian Evidence Act, 1972 contemplates, cases in which secondary evidence relating to documents may be made. Clause (c) of Section Section 65 of the Act enacts that when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

12. Sub clause (e) of Section 65 of the Act says that when the original is public document within the meaning of section 74 ,secondary evidence may be given of the existence, condition, or contents of a document.

12. On coming to the provisions of Section 68 of Indian Evidence Act, 1972 it says about the proof of execution of document required by law to be attested. Section 68 of the Act is extracted as under:

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence"Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied..."

13. On coming to the facts and circumstances of the case on hand , the petition in I.A.No.1235 of 2010 has been filed by the defendants 2,4 and 5, seeking permission of the Court below to receive the documents 8 & 9 as documentary evidence under Exs.B 18 and B 19 respectively on their side.

14. As observed in the opening paragraph the learned trial Judge had concluded that there cannot be any direction in receiving those documents, subject to the objections of the respondent/plaintiff.

15. It is apparent from the records that the suit stood posted on 12-11-2010 for the examination of the witness on the side of the defendants.. At that time the second defendant had filed his proof affidavit along with 17 documents. He had filed a petition in I.A.No. 1162 of 2010 on 12-11-2010. The said Application was allowed by the trial Court and only thereafter the second defendant was examined as D.W.1 and Exs.B3 to B 17 were marked through him. It is also apparent that out of 17 documents, which were sought to be marked on the side of the defendants, except the document Nos.8 and 9 all other documents were marked on 12.11.2010 itself.

16. As revealed from the averments of the affidavit filed in support of the petition in I.A.No.1235 of 2010, document No.8 is the registration copy of the Will, dated 17.3.1983 said to have been executed by one

Muthayammal in favour of the second defendant. Document No.9 is the attested copy of the said Will. According to the respondents, since he had already proved the fact that the original Will was lost, he came along with the proof affidavit to mark the above said two documents, viz., document No.8 being the registration copy of the Will (document No.8) and document No.9 being the attested copy of the said Will.

17. It was vehemently resisted by the revision petitioner/plaintiff before the trial Court, expressing his strong objections to mark those documents.

18. In this connection Mr.P.Valliappan, learned counsel appearing for the revision petitioner has contended that the Application filed by the respondents/defendants under Order VIII Rule 1A of sub rule 3 of Code of Civil Procedure itself is untenable in law and that the learned trial Judge had deliberately failed to see that the registration copy of the Will could not be marked either through its propounder or through any attesting witness, as they were not the persons competent to identify either the execution or the attestation of the Will and in the absence of proper identification or execution of the Will, document Nos.8 and 9 could not be ordered to be received as documentary evidence.

19. In support of his contention, he has placed reliance upon the following two decisions:

- (i) Walter D' Souza vs Anita D Souza and others (2016 (1) MWN (Civil) 440 and
- (ii) Udhayakumar @ Kumar Vs. G.Kishore Kumar (2014 (5) CTC 118).

In Walter D'Souza's case (first cited supra), the following crucial question was arisen before the Bombay High Court for consideration:

<http://www.judis.nic.in> "whether evidence of attesting witness should be led before examination

of beneficiary of Will”.

For this question, it was answered by a learned single Judge of Bombay High Court that the general rule is that the plaintiff in a civil proceedings must adduce evidence first is directory and that the general procedure contemplated under Code of Civil Procedure must yield to substantive law.

Evidence of attesting witness must always be led first in contested probate proceedings. The executor of Will can adduce evidence after examination of attesting witness.

Where there is no attesting witness, rule contemplated under Sections 69 and 71 of the Act should be scrupulously followed in the absence of attesting witness to prove Will.

In Udhayakumar@ Kumar's case (second cited supra) a learned single Judge of this Court based on Order XIII Rule 3 of Code of Civil Procedure has held that the Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

20. On the other hand Mr. T.Arockiadoss, learned counsel appearing for the respondents 1 to 3 has contended that the respondents had mainly constructed their evidence based on the Will dated 17.3.1983 which was said to have been executed by one Muthayammal in favour of the first respondent/ second defendant. Since the first respondent/second defendant had lost the original copy of the Will, it was insisted by him to mark the registration copy as well as the attested copy of the Will dated 17.03.1983.

21. Mr. P.Valliappan, learned counsel for the revision petitioner

would contend that the registration copy of the Will, which was sought to be marked on behalf of the respondents was a rank forgery, as it was not produced during the cross-examination of P.W. 2. Mr. P.Valliappan has further canvassed that the case as set up by the respondents that the original Will, dated 17.3.1983 was lost is false. Further, the respondents 1 and 2 had not given any valid reason in their affidavit filed in support of the Application for the alleged loss of the Will. It is also to be seen that the process of recording of evidence was already closed on the side of the revision petitioner as early as on 25.10.2010 and only thereafter the present Application was filed on behalf of the respondents, after invoking the provisions of sub -rule 3 to Rule 1A of Order VIII of the Code of Civil Procedure to mark the above said documents belatedly.

22. On the other hand, fortifying his contentions, Mr. T.Arockiadoss, learned counsel appearing for the respondents 1 to 3 has made reference to the following decisions:

- (i) Bipin Shantilal V State of Gujarat, (AIR 2001 SC 1158),
- (ii) Karthik Meyyappan and others V Sri Sutha Devi and another, (2016-4-LW646); and
- (iii) P.K.Pandian v Komala, (2008 6 MLJ 782)

In Bipin Shantilal's case, (first cited above), a three Judges Bench of the Apex Court has held that

"..Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected documents tentatively as an exhibit in the case for record the objected part of the oral evidence subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. There is no illegality in adopting such a course. The court however made it clear that if the

objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.”

In Karthik Meyyappan and others, (cited second supra), a Division Bench of this Court has observed that in Section 68 of the Indian Evidence Act, 1872 there is no specific mention for the purpose that a Will has to be marked through an attesting witness and the said Section says only with regard to execution as well as attestation and the same does not speak about the marking of the same. It is also observed that the archaic procedure in civil Suit is that both parties are entitled to mark respective documents on which they based their claim. It is also acknowledged principle of law that mere marking is entirely different from proving of a particular document. Therefore it is needless to say that the Will in question can be marked through P.W.1. In other words, a Will can be marked through a propounder. Further, mere marking itself would not constitute its proof. Under the said circumstances, the contention put forth on the side of the appellants/defendants cannot be accepted.

23. On coming to the present case, this Court has considered the submissions made on behalf of both parties. As argued by Mr. P.Valliappan, learned counsel for the first respondent herein, who is the first defendant in the suit had sworn the affidavit. On a careful perusal of the averments of the said affidavit, this Court is able to find that nowhere, he has stated the real cause for the loss of the original Will, but simply he has stated that the original Will dated 17.3.1983 was lost and hence, he opted to produce the registration and attested copies of the above said

Will.

24. Since there was a strong objection contending that the alleged Will, dated 17.3.1983 itself is a rank forgery, it cannot be received at that stage without examining the appropriate witness. It is also to be noted that only during the course of cross-examination of P.W.2, the respondents have chosen to come forward with an Application before the Court below, so as to enable them to produce the above said Will. Keeping in view the above facts, this Court is of the considered view that the decisions relied on by the learned counsel appearing for the respondents cannot be made applicable to the present case on hand. Even the finding of the learned trial Judge that those documents could be received, subject to the objections of the revision petitioner/plaintiff cannot be countenanced by this Court.

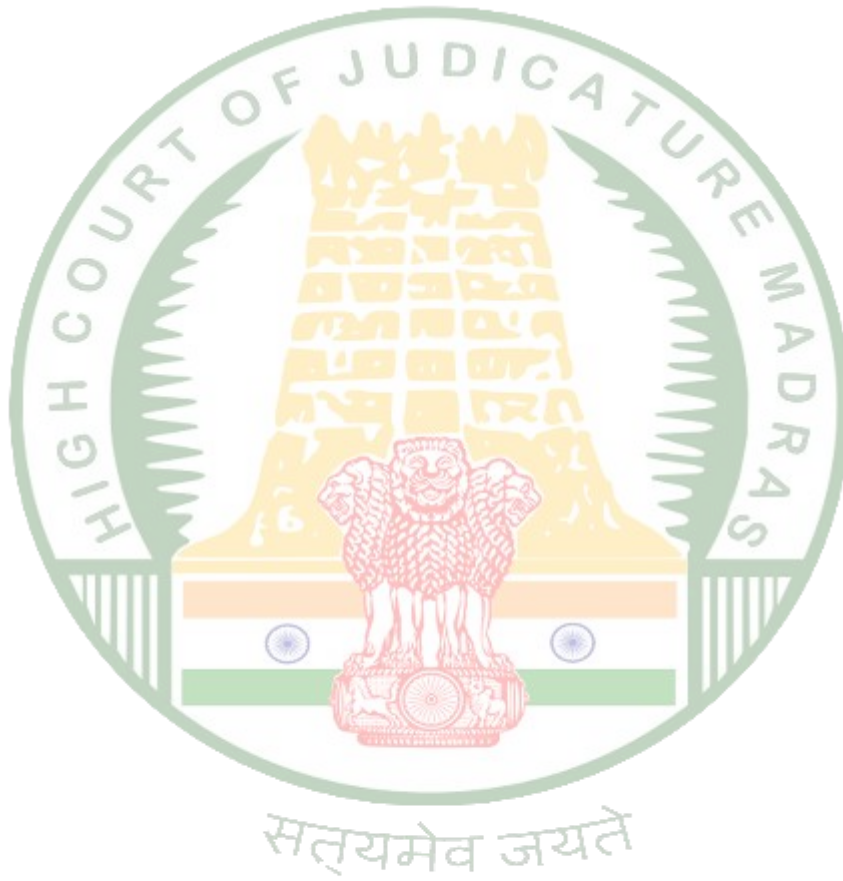
25. In the result, this Civil Revision Petition is allowed and the impugned order, dated 9.2.2011 made in I.A.No.1235 of 20010 is set aside and the petition

in I.A.No.1235 of 2010 is dismissed. M.P.No.1 of 2011 is closed. However, there will be no order as to costs.

.9.2016

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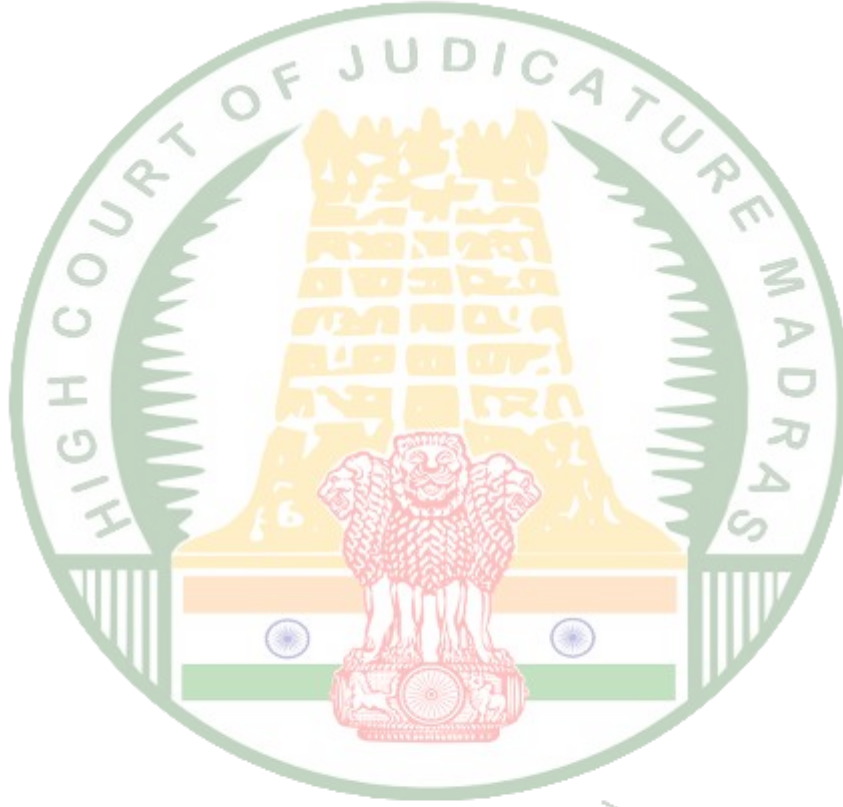
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T.MATHIVANAN, J

C.R.P.NO.1399 of 2011
&
M.P.No.1 of 2011



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