

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 28.03.2016

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

C.R.P (PD) No.4563 of 2015 & M.P.No.1 of 2015

1.S.Singaravelu
2.T.Gokilambal
3.S.Duraisingam
4.M.Seethalakshmi
5.M.Senthilkumar
6.Sowrirajan
Banumathi (Died)
7.Baskaran
8.B.Hari
9.M.Usha
10.M.Shanthi
11.M.Mahalakshmi

... Petitioners

vs.

1.S.Natarajan
2.M.Manonmani
3.R.Visagalakshmi
4.M.Arumugam

...Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 06.11.2015 passed in I.A.No.117 of 2015 in O.S.No.68 of 2011 on the file of the District Judge, Karaikal.

For Petitioners : Mr.G.K.Ilanthiraiyan
for M/s.Sai Bharath Ilan

For Respondent : Mr.M.E.V.Tulasi for R1
Mr.P.Selvan Amunas for R2 & R3

R4-No appearance

ORDER

Defendants 3 to 6 and 8 to 14 in O.S.No.68 of 2011 on the file of the Court of District Judge, Karaikal are the petitioners in the present Civil Revision Petition filed under Article 227 of the Constitution of India. The second defendant in the said suit is the first respondent in the revision. The seventh defendant in the said suit is the fourth respondent in the revision. Plaintiffs 1 and 2 in the Original Suit are the respondents 2 and 3 in the Civil Revision Petition.

2. The second defendant, who is the first respondent in the present revision, filed an application I.A.No.117 of 2015 in the above said suit O.S.No.68 of 2011 under Order VIII Rule 9 r/w. Section 94 (e) and 151 CPC seeking permission to file a separate written statement with a counter claim. The said petition was resisted by the revision petitioners herein. After hearing both sides, the learned trial Judge, by order dated 06.11.2015 allowed the said application and permitted the first respondent/second defendant to file a separate written statement containing a counter claim. It is as against the said order of the trial Court, the present Civil Revision Petition has been filed.

3. The respondents 2 and 3 herein/plaintiffs 1 and 2 filed the above said suit O.S.No.68 of 2011 against one S.Mathanasundaram (deceased first defendant), S.Natarajan, S.Singaravelu, T.Gokilambal and S.Duraisingam, defendants 2 to 5, for the relief of partition and separate possession claiming that they were entitled to 2/7th share in the suit properties. The suit was resisted by the then defendants, namely defendants 1 to 5 based on the written statement filed by Duraisingam, the fifth defendant and adopted by other four defendants, namely defendants 1 to 4.

4. The suit claim was made based on the plaint averments that the plaintiffs (respondents 2 and 3 in the revision) and the original defendants 1 to 5 were brothers and sisters by birth, being the sons and daughters of Supramania Pillai, S/o.Singaram Pillai of Thirunallar, who married one Danam, through whom the first plaintiff and the defendants 1 to 4 were born; that through the second wife of the said Supramania Pillai by name Govindammal, second plaintiff and the fifth defendant were born; that Govindammal, the second wife of the Supramania Pillai died in 2008; that Supramania Pillai died on 16.01.1983 at Thirunallar leaving the plaintiffs and the original defendants alone as the successors to inherit his estate and that thus the plaintiffs and the original defendants 1 to 5 were equally entitled to inherit the estate of deceased Supramania Pillai as per law of

succession applicable to them in the Union Territory of Pondicherry. Accordingly, they claimed that each one of the plaintiffs and each one of the defendants 1 to 5 was entitled to 1/7th share.

5. In the written statement filed by the fifth defendant, which was adopted by defendants 1 to 4, they did admit that the suit property originally belonged to Supramania Pillai of Thirunallar and that plaintiffs 1 and 2 and defendants 1 to 5 being the sons and daughters of Supramania Pillai were brothers and sisters. They had also admitted that the first wife of Supramania Pillai gave birth to first plaintiff and defendants 1 to 4 and through his second wife Govindammal, the second plaintiff and the fifth defendant were born to Supramania Pillai. They admitted the fact that Supramania Pillai died on 16.01.1983 and on the other hand, they denied the year of death of his second wife Govindammal to be 2008 as stated in the plaint. On the other hand, they contended that the said Govindammal died on 28.11.2007 at Thirunallar. It was the further contention of the defendants 1 to 5 that Supramania Pillai did not die intestate and on the other hand, during his life time, he executed a Will dated 31.03.1981 as his last Will and the same was registered on the file of the Sub-Registrar, Thirunallar as Document No.05/1981 on 08.04.1981 and that by virtue of the said Will, he created life interest in the suit property in favour of his sons, namely defendants 1 to 3

and 5 and an absolute interest thereafter in favour of his grandsons. It was also contended therein that in the said Will, a life interest was created in favour of his second wife Govindammal in the first item of the suit properties and that the Will was acted upon by the legal heirs and legal representatives of the deceased Supramania Pillai after his death on 16.01.1983. It was the further contention made there in that some of the items were sold to third parties based on the above said Will of Supramania Pillai; that the said Will was not at all disputed or challenged and that hence, the claim of the plaintiffs for partition was not legally sustainable.

6. In short, the plaintiffs claimed partition of the suit properties on the basis of their contention that Supramania Pillai died intestate, whereas the suit was resisted by the defendants 1 to 5 on the basis of their contention that Supramania Pillai did not die intestate and on the other hand, he left a registered Will dated 31.03.1981 registered as Document No.5 /1981 on the file of Sub-Registrar, Thirunallar on 08.04.1981 creating life interest in favour of his sons and in favour of his second wife and bequeathing the properties absolutely to his grandsons subject to the above said life interest and that the said Will came into effect on the death of Supramania Pillai on 16.01.1983. During the pendency of the suit, the first defendant Mathanasundaram died and on his death, his legal

representatives, including the legal representatives of one of the daughters of Mathanasundaram by name Banumathi, were impleaded as defendants 6 to 14. All of them contested the suit based on the written statement of the fifth defendant, which was adopted by defendants 1 to 4, based on which issues were framed and a trial was conducted.

7. At the conclusion of trial, the learned trial Judge, by a judgment and decree dated 26.08.2014, dismissed the suit holding that the Will dated 31.03.1981 propounded by the defendants, which was marked as Ex.B10 was valid and binding on the plaintiffs. As against the said decree of the trial Court dated 26.08.2014, the plaintiffs, who are the respondents 2 and 3 herein, filed an appeal in A.S.No.864 of 2014 on the file of this Court. A learned single Judge of this Court, by a Judgment dated 23.06.2015, allowed the appeal, set aside the decree of the trial Court dated 26.08.2014 and remitted the suit back to the trial Court for deciding the question whether the Will propounded by the defendants was true and genuine, after examining the attestors of the Will and after giving an opportunity to both sides to depose. Thus, the suit came to be restored on the file of the trial Court.

8. At that point of time, the first respondent/second defendant filed I.A.No.117 of 2015 seeking permission to file a separate written statement of the second defendant containing a counter claim. The reason assigned in the supporting affidavit is to the effect that the fifth defendant who got his signature in the Vakalat for engaging Mr.A.Thirumal Valavan, Advocate, Karaikal as counsel for the defendants, informed him that he would take him to the Advocate for giving his instructions to prepare a separate written statement; that subsequently, the fifth defendant did not do so; that whenever the second defendant/first respondent herein would meet the fifth defendant and ask him about the preparation of his written statement, he used to state that there was time to file his written statement; that thereafter due to his old age he could not personally meet the advocate to give instructions for the preparation of the written statement and that he did not instruct either the said Advocate or the fifth defendant to adopt the written statement of the fifth defendant. It is also contended in the supporting affidavit that his father Supramania Pillai was aged about 80 years at the time of executing the alleged Will; that the testator was not maintaining good health and he was suffering from frequent giddiness and that the said Will was created by the fifth defendant Duraisingam. It was also averred in the supporting affidavit that the fifth defendant, who was the mastermind behind creating the Will in question, stopped the first

respondent/second defendant from filing a separate written statement; hence, he was not aware of the entire proceedings in the original suit and that now having understood the nature of pleadings made by the parties, the first respondent/second defendant has come forward to file a separate written statement and that hence, he should be permitted to file such separate written statement.

9. The respondents 2 and 3/plaintiffs did not oppose the said application. The revision petitioners and the fourth respondent, namely defendants 3 to 14 resisted the application contending that the first respondent/second defendant, having taken an earlier stand by adopting the written statement of the fifth defendant regarding genuineness and validity of the Will marked as Ex.B10, should not be allowed to blow hot and cold by taking a plea, which is totally opposite to the earlier plea, at a belated stage, namely after the suit was remanded by the appellate Court for re-hearing regarding the genuineness and validity of the Will. Rejecting the said objection and accepting the contention raised by the first respondent herein/second defendant and holding that the objection raised by the revision petitioners and the fourth respondent/defendants 2 to 14 were pertaining to factual aspects regarding the merits of the suit, which cannot be gone into in an application seeking permission to file a separate written statement of the second defendant, the learned trial

Judge chose to allow the said application by order dated 06.11.2015 permitting the second defendant to file the written statement on or before 17.11.2015. The said order is the subject matter of challenge in the present revision.

10. It is the contention of the petitioners in the revision that the first respondent/second defendant, having chosen to file a common written statement along with defendants 1 and 3 to 5 in the form of the written statement signed by the fifth defendant and adopted by the defendants 1 to 4, he should not be allowed to totally disown the same and take a diametrically opposite plea by way of a new written statement. It is the further contention of the learned counsel for the petitioners that the first respondent/second defendant, having participated in the trial on the basis of the common plea made by defendants 1 to 5 in the written statement filed by the fifth defendant and adopted by the defendants 1 to 4, which resulted in a judgment and decree of the trial Court dated 26.08.2014, and having participated in the appeal before the High Court in A.S.No.864 of 2014 which resulted in a judgment and an order of remand dated 23.06.2015, should not be allowed to disown the written statement after such remand of the case and set up a new plea, which is totally destructive of the earlier plea. It is the further contention of the learned counsel for the petitioners in the revision that the prayer for

filing a separate written statement should have been rejected on the ground of belatedness also. Learned counsel for the petitioners in the revision also points out the fact that though the first respondent/second defendant contended that he never instructed his counsel in the lower Court to adopt the written statement of the fifth defendant and he simply affixed his signature in the vakalat only for engaging the Advocate, it cannot be said that he was unaware of the pleadings as he happened to be the first respondent in the appeal A.S.No.864 of 2014 and that he entered appearance in the said appeal by engaging a counsel in whose favour he executed the vakalat. Learned counsel for the petitioners pointed out the fact that there is nothing in his affidavit that he did not sign the vakalat for engaging a counsel in the said appeal along with the other respondents therein. The very fact that the first respondent herein/second defendant happened to be the first respondent in the above said appeal, which resulted in a judgment setting aside the decree of the trial Court and in the remand of the original suit for further hearing regarding the genuineness and validity of the Will propounded by the defendants, will show that the contention that he was not aware of the fact that the written statement of the fifth defendant was adopted by him also is nothing but an afterthought and hence, is untenable.

11. Per contra, it is the contention of the learned counsel for the first respondent/second defendant that till the case was remanded, the first respondent/second defendant was of the view that the Will was genuine and that only after the remand of the suit to the trial Court, he came to know that the Will could not be genuine and it could have been created. According to the submissions of the learned counsel for the first respondent/second defendant, as he had come to know about the fraud committed only subsequent to the remand of the case to the trial Court, he should be permitted to make his plea by filing a separate written statement.

12. This Court paid its anxious considerations to the above said submissions made on both sides.

13. The first respondent/second defendant has sought permission to file a separate written statement, despite the fact that he had earlier adopted the written statement filed by the fifth defendant, solely on the ground that he did not instruct his erstwhile counsel to adopt the written statement of the fifth defendant and he had only instructed his erstwhile counsel to prepare his separate written statement. If at all the same could be true, he would not have kept quiet till the trial was over and a judgment was pronounced by the trial Court in the original suit. Even if it is accepted for argument's

sake that he was not aware of the fact that the written statement of the fifth defendant was stated to be adopted by him without his knowledge, he could have very well raised such a plea in the appeal filed against the decree dated 26.08.2014 made in O.S.No.68 of 2011. The first respondent/second defendant figured as the first respondent in the above said appeal A.S.No.864 of 2014. He has contested the appeal jointly with the other defendants. Atleast at that point of time, he could have come across the fact that the fifth defendant's written statement had been adopted by him. If at all he was of the view that the fifth defendant's written statement had not been adopted by him, he could have very well taken a stand different from the stand taken by the other defendants by engaging a separate counsel for him in the above said appeal. Having not done so, the first respondent/second defendant seems to have chosen to shift his stand and support the plaintiffs by preferring to seek permission to file a separate written statement containing averments contrary to the earlier written statement. If such separate written statement is allowed to be filed, that too at the belated stage, then the same will cause much prejudice to the other defendants, who are the petitioners in the present revision. The reason assigned by the first respondent/second defendant for disowning the earlier written statement and seeking to press into service a written statement containing a totally different and opposite plea, was not properly dealt with by the Court below.

Therefore, the impugned order of the trial Court allowing I.A.No.117 of 2015 in O.S.No.68 of 2011 on the file of the trial Court and permitting the first respondent / second defendant in the said original suit to file a separate written statement disowning the earlier written statement cannot be sustained in law. The same has got to be interfered with and set aside.

Accordingly, the Civil Revision Petition is allowed. The order of the trial Court dated 06.11.2015 made in I.A.No.117 of 2015 in O.S.No.68 of 2011 is set aside and I.A.No.117 of 2015 shall stand dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

28.03.2016

Index : Yes/No
Internet : Yes/No
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To

The District Judge
Karaikal

P.R.SHIVAKUMAR, J.

gpa

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M.P.No.1 of 2015

Dated : 28-03-2016