

Reserved On: 24-08-2016
Delivered On: 02-09-2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02-09-2016

CORAM

THE HONOURABLE THIRU JUSTICE M. DURAISWAMY

C.R.P. (NPD) Nos. 1477 and 1478 of 2004, 2162 and 2165 of 2010
and 2289 of 2016

and CMP Nos. 285 & 286/2013 in CRP Nos. 1477 & 1478/2004
CMP No. 178/2015 in CRP No. 1477/2004

CMP Nos. 13992 & 13993 in CRP Nos. 1477 & 1478/2004

M.P. No. 1/2010 in CRP No. 2162/2010

and

CMP No. 11875/2016 in CRP No. 2289/2016

1. Smt. Krishnaveni

2. Kavitha ... Petitioners in CRP Nos. 1477, 1478/2004
and CRP No. 2289/2016

1. K. Ramalingam

2. Vanaja ... Petitioners in CRP Nos. 2162 & 2165/2004

vs

R. Vanaja

... 1st respondent in CRP No. 1477/2004

Umapathy

... 1st respondent in CRP No. 1478/2004

Samsudeen

.... 2nd Respondents in CRP Nos. 1477 &
1478/2004

1. Krishnaveni

2. Kowsalya Respondents in CRP Nos. 2162 &
2165/2010

Kandasamy (died)

1. Easwariammal

2. M. Samsudeen

3. P.V.S. Marketing rep by

its Partner Sukumaran and

Venkatachalam, carrying on

business at No. 227, Dr. Rajendra Prasad Road,

100 Feet Road, Tatabad,

Coimbatore-641 012

WEB COPY

4. Vashini Business Machines
rep by its Partner Sreedharan
Carrying on business at
No.227, Dr. Rajendra Prasad Road,
100 Feet Road, Tatabad,
Coimbatore - 641 012

5. P.R.G. Electronics
rep by its Proprietor
Mr.Rajkumar Carrying on business
at No.o.227, Dr. Rajendra Prasad Road,
100 Feet Road, Tatabad,
Coimbatore - 641 012

6. Tmt.Vanaja Ramalingam ... Respondents in CRP No.2289/2016

Civil Revision Petition in CRP (NPD) No.1477/2004 filed under Article 227 of the Constitution of India against the fair and decreetal order dated 2.12.2003 made in E.A No.641/2002 in E.P.No.143/2001 in RCOP No.85/98 on the file of District Munsif Court, Coimbatore.

Civil Revision Petition in CRP (NPD) No.1478/2004 filed under Article 227 of the Constitution of India against the fair and decreetal order dated 2.12.2003 made in EP No.143/2001 in RCOP No.85/98 on the file of District Munsif Court, Coimbatore.

Civil Revision Petition in CRP(NPD) No.2162/2010 filed under Section 115 of the Civil Procedure Code against the order and decree dated 17.09.2007 made in I.A.No.622/2006 in O.S.No.286/1997 on the file of Principal District Munsif, Coimbatore.

Civil Revision Petition in CRP(NPD) No.2165/2010 filed under Section 115 of the Civil Procedure Code against the order and decree dated 22.10.2007 made in I.A.No.622/2006 in O.S.No.286/1997 on the file of Principal District Munsif, Coimbatore.

Civil Revision Petition in CRP (NPD) No.2289/2016 filed under Article 227 of the Constitution of India against the fair and final order dated 22.12.2015 made in I.A.No.478/2015 in O.S.No.966/2004 on the file of III Additional District Munsif Court, Coimbatore.

For petitioners in CRP Nos. : Mr.P.M. Duraiswamy
1477,1478/2004 & CRP No.
2289/2016

For petitioners in CRP Nos. : Mr.S.V. Jayaraman
2162 & 2165/2010 Senior Counsel for
Mr.T. Dhanasekaran

For R.1 in CRP Nos.1477 & : Mr.S.V. Jayaraman
1478/2004 Senior Counsel for
Mr.G. Vasudevan

For R.2 in CRP Nos.1477 & :
1478/2004 Mr.A. Radhakrishnan

For respondents in CRP Nos. :
2162 & 2165/2010 Mr.P.M. Duraiswamy

For R.1 in CRP No.2289/2016 : Mr.C. Kanagaraj

For R.6 in CRP No.2289/2016 : Mr.G. Vasudevan

For R.2 to R.5 in CRP No.2289/2016: Givenup

For imp. petitioner : Mr.R.Ramesh Kumar Chopra

COMMON ORDER

C.R.P.(NPD)No.1477/2004 arises against the order passed in E.A.No.641/2002 in E.P.No.143/2001 in R.C.O.P No.85/1998 on the file of District Munsif Court, Coimbatore.

C.R.P.(NPD)No.1478/2004 arises against the order passed in E.P.No.143/2001 in RCOP No.85/1998 on the file of District Munsif Court, Coimbatore.

2. In both these matters, the landlords are the petitioners and the respondents viz., Umapathy and Samsuddin are tenants. The first respondent in CRP (NPD) No.1477/2004 is the legal heir of the deceased M. Kandasamy.

3. C.R.P (NPD) No.2162/2010 arises against the order dated 17.09.2007 passed in I.A.No.622/2006 in O.S.No.286/1997 on the file of District Munsif Court, Coimbatore.

4. C.R.P (NPD) No.2165/2010 arises against the order dated 22.10.2007 passed in I.A.No.622/2006 in O.S.No.286/1997 on the file of District Munsif Court, Coimbatore.

5. In both these Civil Revision Petitions, the petitioners are defendants in the suit and the respondents are the legal representatives of the deceased M. Kandasamy, who was the plaintiff in the suit.

6. C.R.P (NPD)No.2289/2016 arises against the order passed in I.A.No.478/2015 in O.S.No.966/2004 on the file of III Additional District Munsif Court, Coimbatore. The defendants 7 and 8 are the petitioners, the first respondent is the plaintiff and the respondents 2 to 6 are the defendants 2 to 6.

7. Since the dispute is common, at the request of the learned counsel on either side, all the Civil Revision Petitions are taken up together and disposed of by this common order.

8. Heard Mr.P.M. Duraiswamy, learned counsel appearing for the petitioners in CRP Nos.1477, 1478/2004 and 2289/2016 and for the respondents in CRP Nos.2162 and 2165/2010; Mr.S.V. Jayaraman, learned Senior Counsel for the petitioners in CRP Nos.2162 and 2165/2010 and for the first respondent in CRP Nos.1477 and 1478/2004; Mr.A. Radhakrishnan, learned counsel appearing for the second respondent in CRP Nos.1477 and 1478/2004; Mr.C. Kanagaraj, learned counsel appearing for the first respondent and Mr.G. Vasudevan, learned counsel appearing for the sixth respondent in CRP No.2289/2016 and Mr.R. Ramesh Kumar Chopra for the impleading peitttioner.

9. The learned counsel appearing for the petitioners submitted that the Civil Revision Petitions, filed by the petitioners, are not maintainable and only an appeal is maintainable. Further, the learned counsel submitted that the finding of the Executing Court, with regard to the Will, is erroneous and that the petitioners should be given an opportunity to prove the Will in accordance with Law. In support of his contention, the learned counsel relied upon an unreported judgment of this Court dated 03.08.2010 made in CRP No.523/2005, wherein, this Court held that as against the order passed in an application, filed under Section 47 of the Civil Procedure Code, only an appeal is maintainable and not a revision.

10. Countering the submissions made by the learned counsel for the petitioners, Mr.S.V. Jayaraman, learned Senior Counsel, appearing for the respondents, submitted that the Executing Court, taking into consideration the evidence of Attestor, had rightly held that the alleged Will is not a true and genuine and therefore, the Civil Revision Petitions are liable to be dismissed. Further, the learned Senior Counsel submitted that the Revisions, filed by the Revision Petitioners, are maintainable and there is no necessity for giving liberty to the petitioners to file an appeal as against the impugned orders.

11. Since the contention raised by the learned counsel for the petitioners with regard to the maintainability of the Civil Revision Petitions cannot be accepted, after a lapse of twelve years, for the reason that the petitioners themselves have filed the Civil Revision Petitions before this court and after a lapse of twelve years, they cannot now contend that they should be given an opportunity to challenge the impugned orders, passed in E.A.No.641/2002, by way of an appeal. That apart, as against the order passed in an application, filed under Sec.47 of the Civil Procedure Code, only a revision is maintainable before this Court. Therefore, I do not find any reason to give liberty to the petitioners to challenge the order passed in the application in E.A.No.641/2002, by way of an appeal. The contention, raised by the learned counsel for the petitioners, is rejected.

12. The case of the petitioners in CRP (NPD) Nos.1477 and 1478 of 2004 is that one M. Kandasamy had two wives viz., Easwariammal and Krishnaveni. According to the petitioners, Easwariammal is the first wife and the Krishnaveni is the second wife of the said M. Kandasamy. The first petitioner is Krishnaveni and the second petitioner is her daughter, born to M. Kandasamy. The first respondent is the daughter of Easwariammal and M. Kandasamy. The first petitioner is the younger sister of Easwariammal.

13. The said M. Kandasamy filed a petition in R.C.O.P No.85/98 on the file of District Munsif Court, Coimbatore for eviction and the petition was allowed on 20.03.2001. Pursuant to the order of eviction, he filed an Execution Petition in E.P.No.14/2001. During the pendency of the Execution Petition, the said M. Kandasamy had died on 23.12.2001. The revision petitioners got themselves impleaded as legal representatives of the deceased M. Kandasamy, based on a Will dated 29.01.2001, alleged to have been executed by late M. Kandasamy, in respect of the property, which is the subject matter of the Rent Control Original Petition.

14. The Registered Joint Will was alleged to have been executed by the testator late M. Kandasamy and his second wife viz., the first petitioner herein, bequeathing the entire properties in Door Nos. 227 and 228, Dr.Rajendra Prasad Road, Tatabad, Coimbatore-641 012, giving life estate to the first petitioner and absolute right to the second petitioner and K. Kousalya, K. Rajini and K. Rani, by allotting separate portion to them.

15. In the said Execution Petition, the first respondent, who is the daughter of M. Kandasamy and his first wife Easwariammal, filed an application in E.A.No.641/2002 under Sec.47 of the Civil Procedure Code, questioning the

executability, legality and validity of the Execution Petition at the behest of the petitioners.

16. After contest, the Executing Court allowed the application in E.A.No.641/2002 and dismissed the Execution Petition in E.P.No.143/2001. Against the orders passed in E.A.No.641/2002 and in E.P.No.143/2001, the petitioners have filed Civil Revision Petitions in C.R.P (NPD) Nos.1477 and 1478/2004.

17. Before the Executing Court, on the side of the first respondent, she was examined as P.W.1 and two documents Exs.P.1 and P.2 were marked. On the side of the petitioners, three witnesses were examined and five documents Exs.R.1 to R.5 were marked. The respondents in CRP No.1478/2004 are tenants.

18. When the Civil Revision Petitions were taken up for hearing, the learned counsel for the petitioners submitted that the tenants had already vacated the premises and therefore, nothing survives for adjudication in these Civil Revision Petitions, however, the petitioners are aggrieved over the findings given by the Executing Court in E.A.No.641/2002 in E.P.No.143/2001 with regard to the Will, executed by M. Kandasamy in their favour. The petitioners have filed the application to get themselves impleaded based on Ex.R.5, Will dated 29.01.2001. Ex.R.5 Will is a registered Will.

19. The learned counsel, appearing for the petitioners in CRP (NPD) Nos.1477 and 1478/2002, in support of his contention, relied upon the following judgments:

(i) 2011 (11) SCC 1 (Revansiddappa and another vs Mallikarjun and others) wherein, the Hon'ble Supreme Court held as follows:

39. We are constrained to differ from the interpretation of Section 16 (3) rendered by this Court in Jinia Keotin (supra) and, thereafter, in Neelamma (supra) and Bharatha Matha (supra) in view of the constitutional values enshrined in the preamble of our Constitution which focuses on the concept of equality of status and opportunity and also on individual dignity. The Court has to remember that relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage.

This is the crux of the amendment in Section 16(3). However, some limitation on the property rights of such children is still there in the sense their right is confined to the property of their parents. Such rights cannot be further restricted in view of the pre-existing common law view discussed above.

(ii) 2013 (7) SCC 490 (M.B. Ramesh (D) by LRs vs K.M. Veeraje Urs (D) by LRs and Others), wherein, the Hon'ble Supreme Court held as follows:

16. That takes us to the crucial issue involved in the present case, viz. with respect to the validity and proving of the concerned will. A Will, has to be executed in the manner required by S 63 of the Succession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in paragraph 11 of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam reported in 2003 (2) SCC 91 and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time, as held in that very judgment the section cannot be read to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available. The relevant provisions of these three sections read as follows:

"Section 63 of the Succession Act "63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall

execute his will according to the following rules:-

(a)

(b)

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Section 68 of the Evidence Act "68. Proof of execution of document required by law to be attested.- 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 it's execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence..."

Section 71 of the Evidence Act "71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

17. In the present matter, there is no dispute that the requirement of Section 68 of the Evidence Act is satisfied, since one attesting witness i.e. PW-2 was called for the purpose of proving the execution of the will, and he has deposed to that effect. The question, however, arises as to whether the will itself could be said

to have been executed in the manner required by law, namely, as per Section 63 (c) of the Succession Act. PW-2 has stated that he has signed the will in the presence of Smt. Nagammanni, and she has also signed the will in his presence. It is however contended that his evidence is silent on the issue as to whether Smt. Nagammann executed the will in the presence of M. Mallaraje Urs, and whether M. Mallaraje Urs also signed as attesting witness in the presence of Smt. Nagammanni. Section 63 (c) of the Succession Act very much lays down the requirement of a valid and enforceable will that it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, and each of the witnesses has signed the will in the presence of the testator. As held by a bench of three judges of this Court (per Gajendragadkar J, as he then was) way back in R. Venkatachala Iyengar Vs. B N. Thimmajamma reported in AIR 1959 SC 443, that a will has to be proved like any other document except that evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, apart from the one under Section 68 of the Evidence Act.

20. In E.A.No.641/2002, the first respondent, who is the daughter of Easwariammal and M. Kandasamy, has stated that the petitioners are not the legal heirs of late M. Kandasamy. The first respondent relied upon the order passed by the Kerala High Court in CRP No.870/87 dated 9.12.1998, wherein, the first petitioner was not recognised as the wife of late Kandasamy. Further, the first respondent has contended that the alleged Will cannot be a true and genuine document.

21. The petitioners filed their counter, stating that the Will was executed voluntarily by M. Kandasamy in their favour on 29.01.2001. Therefore, by virtue of the said document, they are the legal representatives in respect of the subject matter of the Rent Control Original Petition. Since the Will was disputed by the first respondent, in order to prove the Will, the petitioners examined the Attestor of the Will as R.W.2 and the Scribe of the Will as R.W.3. Though the Will was attested by two Attestors, only one Attestor was examined and the other was not examined.

22. On a perusal of the evidence of R.W.2, it could be seen that he was not in a position to specifically state about the Testator's mental capacity and also about the signature found in the Will. The relevant portion of the cross examination of R.W.2 reads as follows:

“உயில் எழுதியவர் என்ன மனநிலையில் இ
ருந்தார் எப்படி இருந்தவர் என்பது எனக்குத்
தெரியாது, கந்தசாமி தான் கையெழுத்து இ
ட்டார் என்று உறுதியாக சொல்ல முடியாது.”

23. Though R.W.2 was not in a position to say about the mental capacity of the testator and his signature, he was not re-examined by the petitioners on this aspect. In spite of evidence of R.W.2, the other attester was not examined to prove the Will. The Scribe of the document cannot improve the evidence of the attester viz., R.W.2. The Scribe was examined as R.W.3. The attester/R.W.2 has stated that he was asked to attest the Will by R.W.3 and therefore he had attested the document. R.W.3 had stated that the Will was attested by one more attester viz., Vasanthi, however, the said Vasanthi was not examined by the petitioners to prove the Will.

24. As per Sec.68 of the Indian Evidence Act and Sec.63 of Indian Succession Act, it would be suffice to examine atleast one attester to prove the Will, but when the evidence of R.W.2 creates a doubt, with regard to the execution of the Will, in order to prove the Will, the petitioners should have examined the other attester viz., Vasanthi. R.W.2 went to the extent of saying that he was not in a position to confirm the signature of the testator in the alleged Will. As already stated, the petitioners have not re-examined R.W.2 with regard to this aspect. In these circumstances, the Executing Court had no option except to reject the Will dated 29.01.2001. In view of the evidence of R.W.2 and R.W.3, I am of the view that the Executing Court has rightly rejected the Will and allowed the application, filed by the first respondent in E.A.No.641/2002 in E.P.No.143/2001.

25. So far as the Civil Revision Petition in C.R.P (NPD) Nos.2162 and 2165/2010 are concerned, the above said M. Kandasamy filed the suit in O.S.No.286/1997 for declaration, recovery of possession and for damages. The suit was filed against his daughter Vanaja and Son-in-law Ramalingam. During the pendency of the suit, the plaintiff/M. Kandasamy had died and the respondents in C.R.P Nos.2162 and 2165/2010 filed an application in I.A.No.622/2006 under Order 1 Rule 10 of the Civil Procedure Code to implead themselves as legal representatives of the deceased M. Kandasamy. Though the

application was opposed by the petitioners herein, the trial Court allowed the application on payment of cost of Rs.500/-.

26. The learned Senior Counsel, appearing for the petitioners submitted that the respondents have not paid the cost amount of Rs.500/-, therefore, the application in I.A.No.622/2006 is liable to be dismissed.

27. The learned counsel appearing for the respondents submitted that the respondents have paid the cost amount, which was also recorded by the trial Court on 22.10.2007. The Docket Order, passed by the trial Court, has been also enclosed in the typed set of papers at Page No.36.

28. On a perusal of the same, it could be seen that the trial Court had passed an order with regard to the payment of cost on 22.10.2007. The respondents have also enclosed the Cost Memo, filed before the trial Court.

29. Since the respondents have paid the cost amount, as directed by the trial Court, the contention, raised by the learned Senior Counsel, appearing for the petitioners, cannot be accepted. However, the trial Court should decide the rights of the parties, impleaded in the suit independently. Merely because the respondents were impleaded in the suit, it shall not absolve them of their burden of proving their rights before the trial Court. In these circumstances, the order, passed by the trial Court, does not warrant interference.

30. The Civil Revision Petition in CRP No.2289/2006 arises against the order passed in I.A.No.275/2016 in O.S.No.966/2004 on the file of III Additional District Munsif Court, Coimbatore. The defendants 7 and 8 viz., Tmt. Krishnaveni and Tmt. Kavitha are the revision petitioners.

31. The first respondent, who is the plaintiff, viz., Easwariammal, filed a suit in O.S.No.966/2004 for declaration, permanent injunction, mandatory injunction and for other reliefs. The defendants filed their written statement and were contesting the suit. When the suit was taken up for trial, the plaintiff Easwariammal was examined as P.W.1. The plaintiff is aged more than 80 years. Initially, she filed an application to examine her through an Advocate-Commissioner, due to her ill health. Subsequently, on recovery from the illness, she came to the Court and deposed evidence.

32. On a perusal of the materials available on record, it could be seen that P.W.1 was cross examined elaborately by the revision petitioners. In the affidavit, filed in support of the petition, the revision petitioners have stated that since the Original Will was not available at the time of examination of

P.W.1, she was not cross examined with regard to the Will dated 29.01.2001. Therefore, the revision petitioners filed an application to recall P.W.1 for further cross examination.

33. On a perusal of the cross examination of P.W.1, it could be seen that the plaintiff has specifically denied the execution of the alleged Will dated 29.01.2001 by M. Kandasamy. When a specific question was put to P.W.1 with regard to the Will, there is no necessity for again putting the question to her with regard to the very same Will. The revision petitioners cannot cross examine P.W.1 in peace meal manner to fill up the lacuna. She has specifically stated in her cross examination that her husband did not execute any Will. Taking into consideration the age of the witness, the trial Court had rightly dismissed the application. While rejecting the application, the trial Court gave liberty to the petitioners to mark the Will through the Attestor of the said Will. When P.W.1 says that her husband did not execute any Will, no further question can be put to her with regard to the execution of the alleged Will. In these circumstances, the trial Court had rightly dismissed the petition.

34. For the reasons stated above, I do not find any error or irregularity in the orders passed by the Courts below and all the Civil Revision Petitions are liable to be dismissed. Accordingly, the same are dismissed. No costs. Consequently, connected CMPs and MP are closed.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

To

1.The Principal District Munsif Court, Coimbatore.

2.The III Additional District Munsif Court, Coimbatore.

Copy to:

The Section Officer,
V.R.Section, High Court, madras.

+1 cc to Mr.Rameshkumar chopda,advocate,sr.50336

+1 cc to M/s.C.Kanagaraj,advocate,sr.49940

+2 cc to Mr.P.H.Duraiswamy,advocate,sr.50045

+3 cc's to Mr.G.Vasudevan,advocate,sr.49964.

scd(co)

krd 14/9

C.R.P. (NPD) Nos.1477 & 1478 of 2004,
2162 and 2165 of 2010 and 2289 of 2016