

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.08.2016

Coram

The Hon'ble Mr.Justice M.DURAIWAMY

CRP(NPD)No.2341 of 2016
and C.M.P.No.12062 of 2016

- 1.A.Jayanthi
2. A.Sujatha
3. A.Ramesh Babu
4. T.Divakaran
5. A.Bhuvaneswari

...Petitioners

Vs

1. T.S.Arumugam
2. Jeeva
3. Karthikeyan
4. Ananda Sivashankar
5. Ananda Srinivasan
6. M/s Indian Financial Association
of Seventh day Adventist
Rep. By its Director
M.Manassesh
S/o Masilamani
Eswaran Koil Street,
Venkateswara Nagar,
Ambathur,
Chennai 53
7. A. Anbarasan

... Respondents

Civil Revision Petition filed under Section 115 of the Civil Procedure Code against the fair and decretal order dated 03.06.2016 dismissing the application in I.A.No.31 of 2016 in A.S.No.30 of 2014 on the file of the I Additional District Judge, Thiruvallur.

For Petitioners : Mr.P.Jagadeesan

For Respondents : Mrs.R.Sripriya for
Mr.V.Raghavachari

ORDER

Heard Mr.P.Jagadeesan, learned counsel for the petitioners and Mrs.R.Sripriya, learned counsel for Mr.V.Raghavachari, learned counsel appearing for the respondents.

2. Challenging the fair and decreetal order dated 03.06.2016 passed in I.A.No.31 of 2016 in A.S.No.30 of 2014 on the file of the I Additional District Court, Thiruvallur, the appellants, who are the plaintiffs have filed the above Civil Revision Petition.

3. The plaintiffs have filed a suit in O.S.No.360 of 1995 on the file of the Sub Judge, Thiruvallur for partition. The defendants produced Ex.B93-Will before the trial Court and relied upon the said document. The trial Court, taking into consideration the case of both parties, dismissed the suit. Aggrieved over the same, the plaintiffs filed an appeal in A.S.No.30 of 2014 before the I Additional District Court, Tiruvallur. In the appeal, the plaintiffs took out an application in I.A.No.31 of 2016 under Order 26 Rule 10(A) of the Code of Civil Procedure, seeking for appointment of an Advocate Commissioner to take Exs.B93 and B.94 along with Vakalath given in favour of an Advocate to the forensic expert to find out whether the thumb impressions are one and the same.

Admittedly, no such application was filed before the trial Court. The lower Appellate Court, by order dated 03.06.2016 dismissed the said application. Aggrieved over the same, the present Civil Revision Petition is filed.

4. The learned counsel appearing for the petitioners submitted that in order to prove the Will in accordance with law, the respondents have not examined the Attestors and that in order to establish that thumb impressions found in Exs.B93 and B94 is not that of the Testator, the present application has been filed by the petitioners for comparison of the thumb impression. The Will has to be proved in accordance with the provisions of Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act.

5. When the plaintiffs had every opportunity to file similar application before the trial Court, they choose not to file such an application before the trial Court. The present application filed by the petitioners cannot be allowed at the appellate stage. That apart, there is no pleading disputing the thumb impression found in the Will. As already stated, the Will must be proved under Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act.

6. The learned counsel appearing for the petitioners/plaintiffs submitted that though the defendants have failed to examine the Attestors of Exs.B93 Will, the lower Appellate Court, while dismissing the application in I.A.No.31 of 2016, erroneously gave a finding that D.W.2 had clearly spoken about the due execution and his witnessing the Testator and Attestors, setting their hand in the document. Admittedly, D.W.2 is a scribe of Ex.B93 Will. The learned counsel submitted that the finding given by the lower Appellate Court is against the provisions of the Indian Evidence Act. Further, the learned counsel submitted that the findings of the trial Court with regard to Exs.B93 and B94 documents are under challenge in the First Appeal. Since the present application has been filed at the belated stage before the lower Appellate Court, the same was rightly dismissed by the lower Appellate Court. I do not find any reason to interfere with the order passed by the lower Appellate Court. The Civil Revision Petition is devoid of merits and the same is dismissed.

7. The I Additional District Judge, Tiruvallur is directed to decide the appeal in A.S.No.30 of 2014 independently on its own merits and in accordance with law, without being influenced by any of the observations made in the order dated 03.06.2016 in I.A.No.31 of 2016 in A.S.No.30 of

2014 as expeditiously as possible.

No costs. Connected miscellaneous petition is also dismissed.

17.08.2016

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To

- 1) The Sub Judge, Tiruvallur
- 2) I Additional District Judge, Thiruvallur.

M.DURAI SWAMY,J

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