

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.04.2017

CORAM

THE HONOURABLE Ms. JUSTICE V.M.VELUMANI

CRP (PD) Nos.434, 435 & 436 of 2017  
and CMP.No.2110 of 2017 in CRP (PD) No.436 of 2017

B.Shantha Devi

.. Petitioner in all CRPs

Vs

1. V.Vasanth Kumar  
2. Selvanayagi  
CRPs

.. Respondents in all

Prayer in CRP(PD) 434 of 2017:- Civil Revision Petition filed under Section 227 of the Constitution of India, to set aside the impugned order dated 12.01.2017 in I.A.No.770 of 2016 in O.S.No.130 of 2006 on the file of the I Additional District Judge, Coimbatore.

Prayer in CRP(PD) 435 of 2017:- Civil Revision Petition filed under Section 227 of the Constitution of India, to set aside the impugned order dated 12.01.2017 in I.A.No.802 of 2016 in O.S.No.130 of 2006 on the file of the I Additional District Judge, Coimbatore.

Prayer in CRP(PD) 436 of 2017:- Civil Revision Petition filed under Section 227 of the Constitution of India, to set aside the impugned order dated 12.01.2017 in I.A.No.803 of 2016 in O.S.No.130 of 2006 on the file of the I Additional District Judge, Coimbatore.

For Petitioner  
For respondents

: Mr.S.Thiruvengadam  
: Mr.K.S.Karthik Raja – R1  
Mr.M.Senthil Kumar – R2

COMMON ORDER

The petitioner has filed these Civil Revision Petitions to set aside the common order dated 12.01.2017 made in I.A.Nos.770, 802, and 803 of 2016 in O.S.No.130 of 2006 on the file of the I Additional District Judge, Coimbatore.

2. The petitioner/plaintiff filed the suit for partition claiming one third share in the suit properties described in Schedule 'A', 'B', 'C' and 'D' in O.S.No.130 of 2006. The respondents/defendants filed written statement and are contesting the suit. The respondents in the written statement have denied the claim of the petitioner and stated that the petitioner is not entitled to one third share in the suit scheduled properties. It is submitted by the first respondent in the written statement that his mother was the absolute owner of the suit properties scheduled in 'A', 'B' and 'C' and whereas the 'D' schedule property was his ancestral property. According to the first respondent, by a Will dated 08.02.2005, the suit property in schedule 'A' 'B' and 'C' was bequeathed to him by his mother and he was in possession and enjoyment of the said suit properties.

3. Considering the fact that the 1st respondent/1st defendant is claiming title over the property based on the Will

dated 08.02.2005, the respondents were directed to let in evidence first. The respondents examined D.W.1 to D.W.5 and marked the documents. The Will dated 08.02.2005 was marked through the second defendant as Ext.B7.

4. Thereafter the petitioner/plaintiff filed an application I.A.No.770 of 2016, to recall D.W.1 for further cross-examination. According to the petitioner, she could not cross-examine D.W.1 with regard to the Will dated 08.02.2005, as the same was marked only through D.W.2 as Ext.B7.

5. Subsequently, the defendants/respondents also filed two applications viz., I.A.No.802/2016 and I.A.No.803 of 2016. The application in I.A.No.802 of 206 was filed to reopen the defendants' side evidence; and the another I.A.No.803 of 2016 was filed to recall D.W.1 for further chief examination and for marking the documents by the defendants.

6. According to the respondents/defendants, certain documents which are very much essential to prove their case, were omitted to be marked on their side, when the first defendant was examined as D.W.1. Hence, they have stated that unless those documents are allowed to be marked, the respondents/defendants

will be put to irreparable loss and hardship.

7. The petitioner/plaintiff filed counter in I.A.Nos.802 and 803 of 2016 and opposed both the applications. The petitioner/plaintiff objected to the marking of the Will dated 04.03.2002 on the ground that there was no pleading about the alleged Will in the original written statement, additional written statement and proof affidavit filed by D.W.1 and also in the suit notice. Without pleadings, no oral documentary evidence can be let in. The Will can only be marked through attestors as per Section 71 of the Indian Evidence Act, and it can be proved by the attesor only as per Section 65(c) of the Indian Evidence Act.

8. Considering the averments made in the affidavit, counter affidavit, and on perusing all the materials available on record and the judgment relied on by the learned counsel for the petitioner/plaintiff and the arguments of the parties before the trial Court, the learned Judge by a common order dated 12.01.2017, allowed the applications filed in I.A.No.802 of 2016 and I.A.No.803 of 2016 and closed the application in I.A.No.770 of 2016, holding that the respondents are not claiming any right over the suit property based on the Will dated 04.03.2002. The respondents are relying on the Will dated 04.03.2002, only for collateral

purpose. Against the said common order dated 12.01.2017, the petitioner has filed the present three Civil Revision Petitions.

9. The learned counsel appearing for the petitioner submitted that the respondents have not mentioned about the Will dated 04.03.2002 earlier in the pleadings. Without pleadings, no documentary evidence can be let in and the said evidence cannot be looked into. Therefore, the respondents are not entitled to mark the Will dated 04.03.2002. The said Will can be marked only through attestor and can be proved only as per Indian Succession Act and Indian Evidence Act. The respondents have filed these two applications only to fill in the lacunae. According to the petitioner, the learned Judge is not correct in allowing the applications in I.A.Nos.802 and 803 of 2016 filed by the respondents and closing the application in I.A.No.770 of 2016 filed by the petitioner, on the ground that the respondents are seeking permission to mark the documents for collateral purpose.

10. Per contra, the learned counsel appearing for the respondents submitted that the petitioner herself filed I.A.No.770 of 2016 to recall D.W.1 for cross-examination with regard to Will dated 08.02.2005. The respondents are claiming their right only through the Will dated 08.02.2005 and it is already marked as

Ext.B7. The Will dated 04.03.2002 is sought to be marked only for collateral purpose to prove that the mother of the parties on an earlier occasion, executed the said Will and subsequently cancelled it. The other documents are only I.D. proof of the mother. The learned Judge has given valid reasons for allowing the applications in I.A.No.802 of 2016 and I.A.No.803 of 2016 filed by the respondents.

11. Heard the learned counsel appearing for the petitioner and the learned counsel for the respondents and perused the materials available on record.

12. From the impugned order of the learned Judge, it is seen that the respondents are seeking permission to mark the Will dated 04.03.2002 for collateral purpose and they have categorically stated that they are not claiming any right based on the Will dated 04.03.2002. According to the respondents, the earlier Will dated 04.03.2002 was cancelled and Will dated 08.02.2005 was executed bequeathing properties to them. They are claiming right only through the Will dated 08.02.2005. It is for the respondents to substantiate the claim by proving the Will as per law. Similarly, the petitioner has right to disprove the said Will by letting in evidence. The learned Judge has allowed the applications viz.,

I.A.Nos.802 and 803 of 2016 filed by the respondents to reopen the evidence and to recall D.W.1 for further chief examination. The petitioner has prayed to cross-examine D.W.1 with regard to Will dated 08.02.2005 and filed I.A.No.770 of 2016 and the same was closed by the learned Judge holding that the petitioner/plaintiff would get an opportunity to cross-examine D.W.1, when the applications filed by the respondents/defendants are allowed. The learned Judge has rightly passed the common order in the said applications by giving cogent and valid reasons. There is no irregularity or illegality in the order dated 12.01.2017 passed by the learned I Additional District Judge, Coimbatore, in I.A.No.770 of 2016, I.A.No.802 of 2016 and I.A.No.803 of 2016 in O.S.No.130 of 2006.

13. In the result, these Civil Revision Petitions are dismissed. However, the learned I Additional District Judge, Coimbatore, is directed to dispose of the suit in O.S.No.130 of 2006 on merits and in accordance with law, as expeditiously as possible, in any event, not later than 31<sup>st</sup> August 2017. No cost. Consequently, connected miscellaneous petition is closed.

24.04.2017

ds

Speaking Order/Non speaking order

Index : Yes / No

V.M.VELUMANI,J

ds

To:

The I Additional District Judge,  
Coimbatore.

CRP (PD) Nos.434, 435 & 436 of 2017

24.04.2017

<http://www.judis.nic.in>