

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.1108 of 2008
& M.P.No.1 of 2008

P.Kumar

.. Petitioner

Vs.

1.R.Srikanth
2.R.Sakubai (Died)
3.Kiruparani

.. Respondents

(Petitioner, R1 and R3 are Legal
Representatives of the deceased
2nd respondent, already on record
are recorded vide Court order dated
20.10.2017 in C.R.P.No.1108/2008)

PRAYER: Civil Revision Petition filed under Article 227 of the
Constitution of India against the fair and decretal order dated
11.02.2008 made in I.A.No.1042 of 2007 in O.S.No.289 of 2004 on
the file of the Fast Track Court No.I, Salem.

For Petitioner : M/s.G.Sumitha

For R1 & R2 : No appearance

For R3 : Not ready in notice

ORDER

This Civil Revision Petition is filed against the fair and decretal order dated 11.02.2008 made in I.A.No.1042 of 2007 in O.S.No.289 of 2004 on the file of the Fast Track Court No.I, Salem.

2. The revision petitioner is the first plaintiff, respondents 1 to 3 are the defendants in O.S.No.289 of 2004 on the file of the Fast Track Court No.I, Salem. Originally the suit was filed by the petitioner, his mother/second respondent, his sister/third respondent and grand mother/deceased second plaintiff against the first respondent herein, who is the brother of the petitioner for partition. Subsequently, the respondents 2 and 3 were transposed as defendants 2 and 3. Pending suit, the grand mother/second respondent of the petitioner died.

3. The petitioner filed I.A.No.1042 of 2007 under Order 6 Rule 17 C.P.C for amendment of the plaint. According to the petitioner, the fourth item of the property belonged absolutely to the petitioner and first respondent and they sold the said property. Item Nos.6 and 7 of the suit property belongs absolutely to the petitioner and

first respondent as per the settlement deed dated 06.03.1962. The respondents 2 and 3 have no share in the said property. Therefore, he prayed for deletion of these properties in the amendment petition. The petitioner further stated that the second plaintiff by the Will dated 30.06.1986, registered as Document No.27/BK3 on the file of the Sub Registrar of Salem East, bequeathed all her right and share in the property to the petitioner. In view of the death of the second plaintiff, the petitioner is entitled to share of the second plaintiff also, as per the Will dated 30.06.1986 and sought for amendment of the plaint with regard to his share.

4. The first respondent filed counter affidavit and submitted that item no.4 was sold on 09.05.2001 itself. The petitioner has not explained as to why he has not sought for present amendment in the earlier application filed by him for amendment. As far as the properties in item nos.6 and 7 are concerned, the petitioner and first respondent have share in the property and the same has to be partitioned. The alleged Will dated 30.06.1986 is forged one. The second plaintiff, at the time of filing of the suit did not mention about the Will in the plaint. By filing this amendment, the petitioner is introducing a new case and new cause of action.

5. The respondents 2 and 3 filed separate counter affidavits and opposed the application and submitted that each of them have $\frac{1}{4}$ share in all the properties.

6. The learned Judge, considering the averments in the affidavit, counter affidavits and materials on record, dismissed the application.

7. Against the said order dated 11.02.2008 made in I.A.No.1042 of 2007 in O.S.No.289 of 2004, the present Civil Revision Petition is filed by the petitioner.

8. Heard the learned counsel appearing for the petitioner and perused the materials available on record. Though notice has been served on the respondents 1 and 2 and their names are printed in the cause list, there is no representation either in person or through counsel.

9. From the materials available on record, it is seen that it is

admitted by the petitioner and first respondent that item no.4 was sold and it is not available for partition. The respondents 2 and 3 has also not disputed the fact that the petitioner and first respondent did not have right to sell that property. As far as the item nos.6 and 7 are concerned, the petitioner and first respondent have share in the said property and properties are to be partitioned in the suit. As far as the Will is concerned, it is a registered Will. The objection of the first respondent is that second plaintiff, when she filed the suit did not mention about the Will in the plaint and the said Will is forged one. The contention with regard to the Will is without merits. The second plaintiff has claimed share in the suit property for herself, while she was alive. Therefore, the question of mentioning the Will by which she has alleged to have bequeathed all her properties to the petitioner does not arise. The Will dated 30.06.1986 comes into force only after the death of executrix. It is for the petitioner to prove the genuineness of the Will as per law. The respondents have right to disprove the genuineness of the Will by letting in evidence.

10. In the circumstances, this Civil Revision Petition is partly allowed, setting aside the impugned order of the learned Judge with

regard to the deletion of the 4th item of the property and as far as the other amendments are concerned, the order of the learned Judge is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

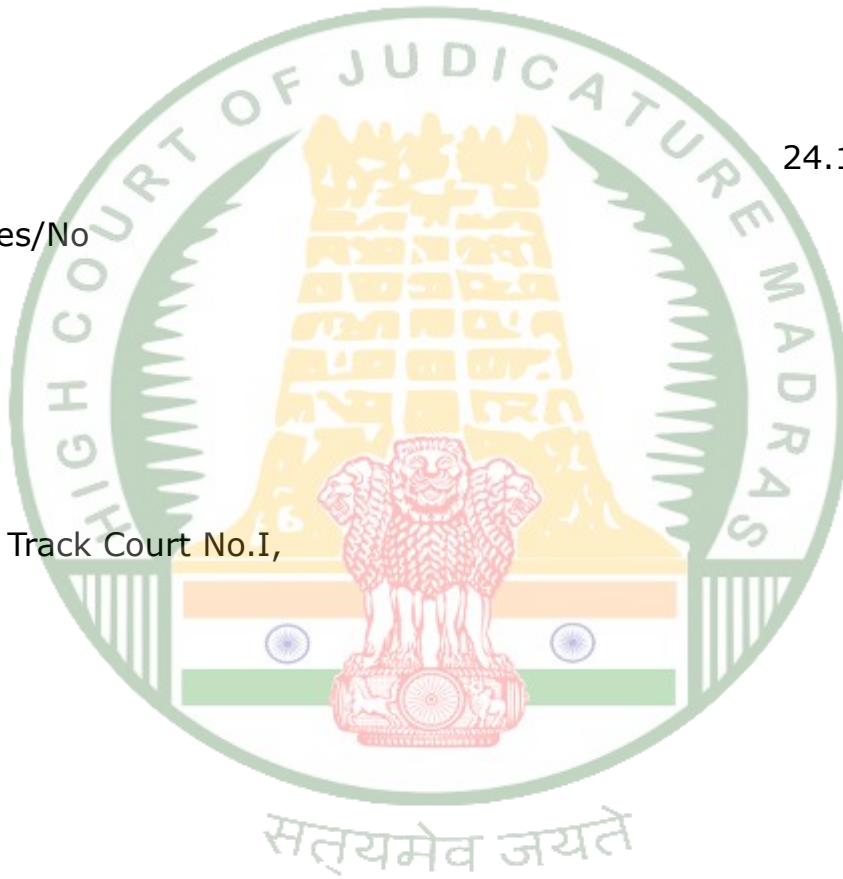
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Index: Yes/No

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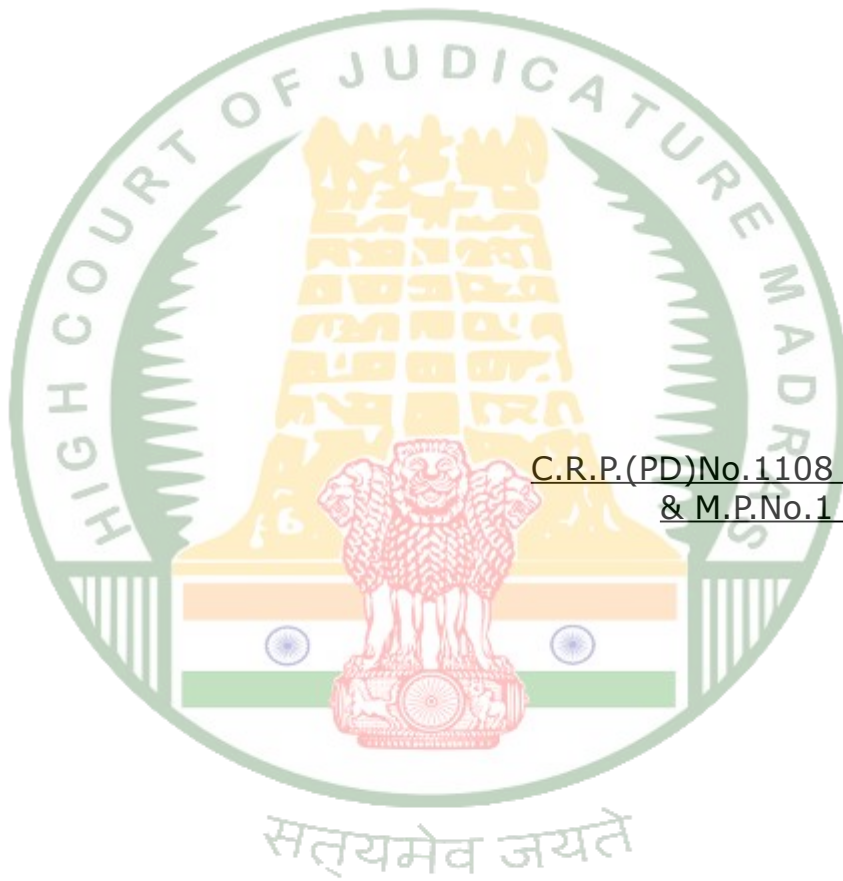
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V.M.VELUMANI,J.

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