

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.08.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P(PD).No.3684 of 2011
and M.P.No.1 of 2011

1. Namachivayam
2. Munusami

.. Petitioners

Vs.

1. Anandharaman
2. Anbukkarasi
3. Sowrirajaraja Udayar
4. The District Collector,
Collector's Buildings,
Villupuram.
5. The Tasildhar
Taluk Office,
Tindivanam.

6. M.N.Gunasekaran

7. Pazhani
Village Administrative Officer,
Chinnanerkunam
Thindivanam Taluk.

.. Respondents

PRAYER: Civil Revision Petition filed Under Article 227 of the Constitution of India, against the fair and decretal order dated 11.07.2011, made in I.A.No.1377 of 2010 in O.S.No.597 of 2004, on the file of the District Munsif, Tindivanam.

For Petitioners	: Mr. D.Ravichandran
For R1	: Mr. P.Mani
For R2 & R3	: Mr.a.Devanarendran
For R4 to R7	: Given up

ORDER

This Civil Revision Petition is filed against the fair and decreetal order dated 11.07.2011, made in I.A.No.1377 of 2010 in O.S.No.597 of 2004, on the file of the District Munsif, Tindivanam.

2. The petitioners are the plaintiffs, respondents are the defendants in O.S.No.597 of 2004, on the file of the District Munsif, Tindivanam. Petitioners filed the said suit against the respondents for declaration of their title to the suit property and consequently for a permanent injunction, restraining the respondents from interfering with the peaceful possession and enjoyment of the suit properties. According to the petitioners, the suit property originally belonged to one Santhanakrishna Udayar and his wife, Ganthamani ammal. Due to love and affection, they executed a will dated 11.08.1989 and codicil dated 11.07.1999, bequeathing property to second respondent and her husband, third respondent. After death of original owner, the second petitioner purchased the property from

the respondents 2 and 3, by the deed of sale dated 25.08.2004. The second petitioner sold the said property by the deed of sale dated 28.06.2007 to the first petitioner. The first respondent, without any right claimed title, as adopted son of Santhanakrishna Udayar and Ganthamani ammal and disputed the will dated 11.08.1989 and codicil dated 11.07.1999. He also claims that Santhanakrishna Udayar executed a will on 27.09.2001 in his favour. In the circumstances, the petitioners filed suit and subsequently, the petitioner also filed an Interlocutory Application in I.A.No.1377 of 2010 for permission to the petitioners to examine the third respondent, Sowriraja Udayar as first witness on the petitioner side to speak about the genuineness of the will.

3. The first respondent filed counter affidavit and submitted that an Advocate of the petitioners, appearing at the instigation of the advocate of the third respondent has filed petition, without consent of the petitioners. The second petitioner/first plaintiff has not appeared before the Court. The Advocate for the petitioners have appointed his junior to appear for the respondents 2 and 3. An ex parte order passed against the respondents 2 and 3 was set aside, without notice to the first respondent. The petitioners can

examine the third respondent, only after examining themselves as witness. There is no provision in law to examine third respondent as plaintiffs' witness. Only to drag on the proceedings, the petitioners have filed the present petition and prayed for dismissal of the application.

4. The learned Judge, considering the averments in the affidavit, counter affidavit, materials on record and relying on the judgment reported in **(1999) 1 LW 660 (Kaliaperumal V. Pankajavalli & 2 others)**, dismissed the application, holding that it is for the petitioner to first examine themselves as witness and then only, they can seek permission to examine other witnesses. Only when third respondent failed to give evidence, the petitioner can file a petition for examining third respondent.

5. Against the said order of dismissal, dated 11.07.2011, made in I.A.No.1377 of 2010 in O.S.No.597 of 2004, the present civil revision petition has been filed by the petitioners.

6. The learned counsel appearing for the petitioners submitted that the respondents 2 and 3 do not have adverse claim against that

of the petitioners. The petitioners have purchased the property only based on the will and codicil, whereby the respondents 2 and 3 acquired title. The third respondent is the competent person to depose, with regard to the genuineness of the will. There is no bar for the party to call upon the opposite party to give evidence on his behalf, when the opposite party is not a contesting party or opposing the claim of the party who is calling to examine the said party. The learned counsel appearing for the petitioners, in support of his contention, relied on the judgment reported in **2001 (2) MLJ**

235 (V.K.Periasamy alias Perianna Gounder V. D.Rajan):

"12. If there was a total bar on the right of a party to summon another party to give evidence as a witness, Order 16, Rule 21 will not find a place in the Code. The inclusion of this provision itself shows that there may be situations where a party may be called upon by another to give evidence as the latter's witness. In fact, in Appavoo Asary V. Sornamal Fernandes, 65 M.L.J. 734: A.I.R. 1933 Mad. 821, the learned Judge held as seen from the passage extracted above that when one party desires the presence of other party, the proper procedure is under Order 16. Therefore, if there are very good reasons, the Court may exercise its discretion in favour of the party seeking permission. The case laws with regard to Order 18, Rule 2 are to the effect that

even the defendants who support the case of the plaintiff are entitled to give evidence and it is in fact their right and they cannot be shut out. In this case, the first defendant is not the contesting defendant and from the averments in the affidavit, it is seen that he has been made a party only, so that the suit would not be dismissed for non-joinder."

7. Per contra, the learned counsel appearing for the respondents submitted that a party is not entitled to call upon his opponent to give evidence on his behalf. The petitioner/ plaintiff must give evidence at first and there is no provision to call upon the third respondent, who is the third defendant in the suit to give evidence first and also submitted that there is a specific bar under Order 18 C.P.C and also submitted that the third respondent cannot give evidence as PW1. The petitioner has not given reason for examining the third respondent as PW1 and only in order to fill up the lacuna, he has filed the present petition. In support of his contention, the learned counsel appearing for the respondents relied on the Judgment of the Division Bench, reported in **(2008) 1 LW 1055 (Ravi & Gurunathapillai Vs. Ramar):**

"22. Where the Court comes to a conclusion that the party had deliberately with-held himself to be

examined as a witness at a later stage with a view to fill up the lacunae in the evidence, obviously permission cannot be granted to such a party to examine himself at a later stage."

The learned counsel appearing for the respondents 2 and 3 also submitted that the third respondent is willing to give evidence on behalf of the petitioner and also filed an affidavit to that effect.

8. Heard the learned counsels appearing for petitioners and respondents 1 to 3 and perused the materials available on record and judgments relied on by both the parties.

9. From the materials on record, it is seen that the petitioners are claiming title to the suit property, based on the will dated 11.08.1989 and codicil dated 11.07.1999. As per the said will and codicil, the respondents 2 and 3 claimed to have acquired title to the suit property and on the assurance given by the respondents 2 and 3, the second petitioner purchased the property from them and subsequently sold the suit property to the first petitioner. The respondents 2 and 3 are not disputing the claim of the petitioners. Only the first respondent is a contesting defendant and he claims

that he is the adopted son of Santhanakrishna Udayar and Ganthamani ammal and claimed title and stated that Santhanakrishna Udayar and Ganthamani ammal executed a will dated 27.09.2001, bequeathing all the properties to the first respondent. In the circumstances, the third respondent is the competent person to prove the genuineness of the will and codicil. The contention of the first respondent that there is no provision in law to examine the opposite party as his witness, is not correct. This Court, considered the said issue in the decision reported in **(2001) 2 MLJ 235 (V.K.Periasamy alias Perianna Gounder V. D.Rajan)** and held that as per the Order 16, Rule 21, a party can examine opposite party, when their interest is common. In the present case, the interest of the petitioners and respondents 2 and 3 are common and respondents 2 and 3 are not opposing the claim of the petitioners. On the other hand, the learned counsel appearing for the respondents 2 and 3 submitted that the third respondent is willing to give evidence on behalf of the petitioners and also filed an affidavit to that effect.

10. Considering all the facts, I hold that the Order of this Court, reported in **(2001) 2 MLJ 235 (V.K.Periasamy alias**

Perianna Gounder V. D.Rajan) is squarely applicable to the facts of the present case and the judgment reported in **(1999) 1 LW 660 (Kaliaperumal V. Pankajavalli & 2 others)**, relied on by the learned counsel appearing for the respondents, before the learned Judge is not applicable to the facts of the case. The Division Bench judgment, reported in **(2008) 1 LW 1055 (Ravi & Gurunathapillai Vs. Ramar)**, relied on by the learned counsel for the first respondent is also not applicable to the present case, on the ground that the petitioner has not given any reason for examining the third respondent. The petitioners have stated that the third respondent is competent person to speak about the will and codicil and he can prove the genuineness of the will and codicil. Further, by examining the third respondent before the petitioners, with regard the will and codicil, the first respondent will not be prejudiced. The learned Judge, has erred in dismissing the application and committed irregularity and has not properly appreciated the facts and law, relating to examining opposite party as a witness on behalf of the other party. For the above reason, the civil revision petition is allowed and the order dated 11.07.2011, made in I.A.No.1377 of 2010 in O.S.No.597 of 2004, is set aside.

V.M.VELUMANI, J.

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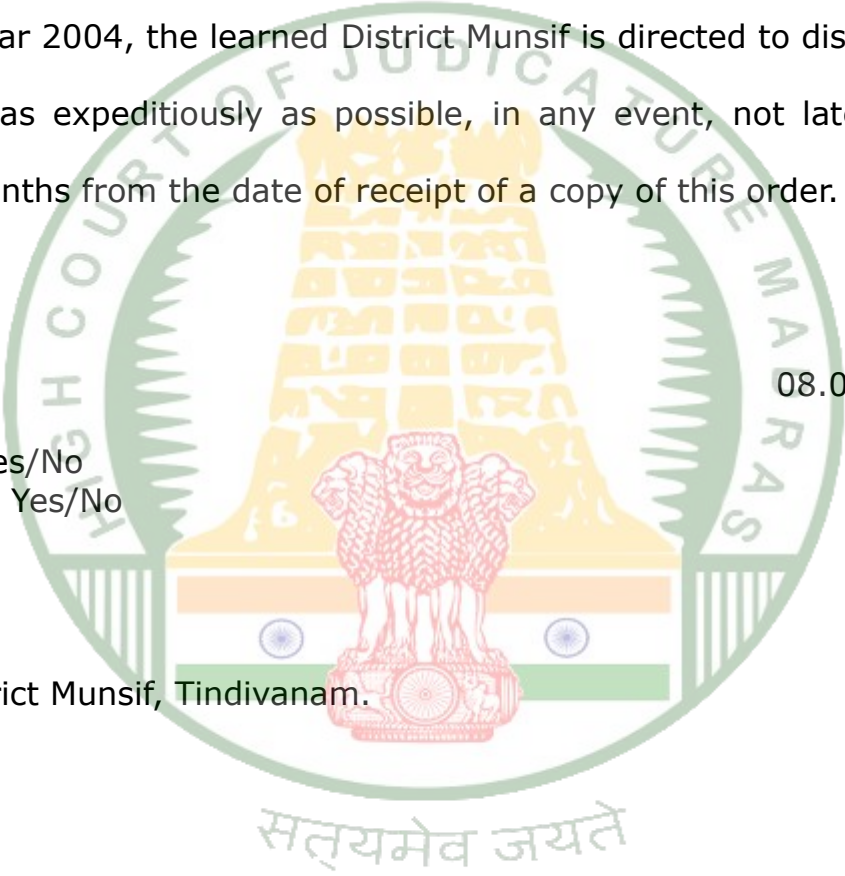
11. The petitioners are permitted to examine the third respondent as the witness on their behalf. No costs. Since the suit is of the year 2004, the learned District Munsif is directed to dispose of the suit as expeditiously as possible, in any event, not later than three months from the date of receipt of a copy of this order.

08.08.2017

Index: Yes/No
Internet: Yes/No

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To
The District Munsif, Tindivanam.



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