



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.01.2017

CORAM:

WEB COPY

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P. (MD) No.81 of 2017(PD)

and

C.M.P (MD) No.305 of 2017

T.K.S.Kathar Beer (Died)

1. T.K.S. Chinnameera
2. T.K.S. Abdul Samathu
3. T.K.S. Abdulkalam
4. Mohamed Pathu
5. Sakar Banu
6. Aamanulla
7. Mohamed Abdulla
8. Syedmeera
9. Jamal Mohamed

.. Petitioners/Respondents/Defendants

vs.

T.A.Kathar Meera Ravuthar @ Kareem

.. Respondent/Petitioner/Plaintiff

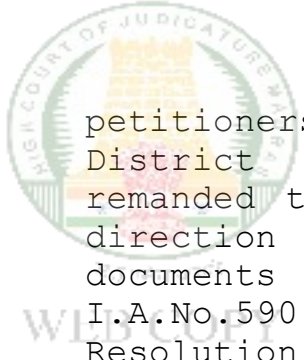
PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India to call for the entire records and set aside the Fair and Decretal order, dated 26.10.2016 passed in I.A.No.590 of 2016 in O.S.No.72 of 2004 on the file of the Subordinate Court, Sivagangai.

For Petitioner : Mr. V.R. Venkatesan

ORDER

The petitioner has filed this Civil Revision Petition to call for the entire records and to set aside the Fair and Decretal order, dated 26.10.2016 passed in I.A.No.590 of 2016 in O.S.No.72 of 2004 on the file of the Subordinate Court, Sivagangai.

2.The petitioners are the defendants. The respondent is the plaintiff. The respondent filed suit in O.S.No.72 of 2004 for declaration and injunction. The petitioners filed written statement and contested the suit. After contest, the suit was decreed on 19.02.2013. Against the said judgment and decree, the



petitioners filed an appeal in A.S.No.5 of 2014 before the District Court, Sivagangai. The District Judge, Sivagangai remanded the suit to the trial Court to decide the suit with a direction to give a chance to both parties to receive additional documents in respect of effect of partition. The respondent filed I.A.No.590 of 2016 for permission to mark the Xerox copy of Jamath Resolution to be marked as Ex.A30.

3. According to the respondent, the certificate issued by Jamath as per the Panchayat has been marked as Ex.A.29. Original Jamath Resolution is with the petitioners only. Therefore, Xerox copy is with the respondent. Therefore, the original document is in the hands of the petitioners herein and they denied the original document before the Court below. The first appellate Court remanded the suit with a direction to give a chance to both parties to receive additional documents in respect of effect of partition between the parties. The petitioners opposed the same and denied the possession of original on the ground that there is no Jamath resolution. The respondent has created alleged resolution by Jamath. In the written statement itself, the petitioners denied the existence of the alleged resolution. Without proving the existence of the original, the respondent is not entitled to mark the Xerox copy of the document. The learned Judge considering the averments made in the affidavit and counter affidavit and all the materials on record and judgment relied on by the parties allowed the application holding that the admissibility of the said documents could be argued at the time of arguments while deciding the suit.

4. Against the said order of allowing I.A.No.590 of 2016, the present Civil Revision Petition is filed.

5. The learned counsel appearing for the petitioners submitted that the petitioners denied the existence of the resolution of Panchayat in the written statement itself. No summons were issued on the petitioners to produce the original document. This Court and Hon'ble Supreme Court have held that the Xerox copy of the documents can be marked only after exhausting of the means to procure the original documents. The learned Judge is not correct in applying the ratio in the judgment reported in **2008(4) TLNJ 208**. The said Judgment is not applicable to the facts of the present case.

6. In support of his case, the learned counsel for the petitioner relied on the judgment reported in **2007(3) CTC 781 (J. Yashoda vs. K. Shobha Rani)** wherein it has been held as follows:-

"7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the



party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence " means and includes" and then follow the five kinds of secondary evidence."

7.I have heard the learned counsel appearing for the petitioners and also perused the entire materials on record.

8.The original suit filed by the respondent was decreed. On appeal filed by the petitioners, the first appellate Court remanded the suit for fresh trial with a direction to give a chance to both parties to receive additional documents in respect of effect of partition between the parties. The respondent filed I.A.No.590 of 2016 for marking of Xerox copy of the Panchayat Jamath Resolution, based on which partition has been effected between the parties. The petitioners denied the said resolution. The learned Judge considering the materials on record and judgment reported in **2008(4) TLNJ 208** allowed the application permitting the respondent to mark the documents with condition that admissibility of the document can be argued at the time of arguments based on the evidence and cross-examination of witnesses. In view of the order passed by the learned Judge, it is open to the parties to object the marking of the said document and the learned Judge shall consider the admission of the document on the objection raised by the petitioner at the time of deciding the issues in the suit.

9.In the above circumstances, the Civil Revision Petition is dismissed. No cost. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(Writ)

/True copy/

Sub Assistant Registrar

To

The Subordinate Judge, Sivagangai.

+1 cc to M/s.V.R.Venkatesan, Advocate in SR.No.2945

am

CSL/MR-VS/SAR-III/30.01.2017 :3P/3C