



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 31.01.2017

CORAM:

WEB COPY

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P (MD) No.752 of 2016 (PD)

and

C.M.P (MD) No.3725 of 2016

N. Balamurugan

...Petitioner/Plaintiff

Vs

1. C. Boominathan

2. C. Nagarajan

3. S. Balamurugan

4. S. Sakthivel

5. Nagameenal

6. Nagavalli

7. Santhanalakshmi

8. Umaiyal

...Respondents/Defendants

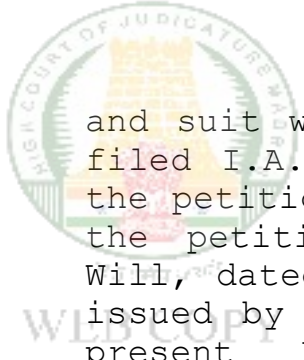
PRAYER: Civil Revision Petition is filed, under Article 227 of Constitution of India, to set aside the impugned order of the VI Additional District Judge, Madurai in I.A.No.969 of 2014 in O.S.No.124 of 2007, dated 12.02.2016 considering the merits of the case by allowing this Civil Revision Petition.

For Petitioner : Mr. S. Chandrasekaran
For Respondents 7 & 8 : Mr. S. Parthasarathy

ORDER

The petitioner has filed this Civil Revision Petition to set aside the impugned order passed by the VI Additional District Judge, Madurai in I.A.No.969 of 2014 in O.S.No.124 of 2007, dated 12.02.2016.

2.The petitioner is the plaintiff and the respondents are the defendants in the suit. The petitioner filed suit in O.S.No.124 of 2007 for partition and allotment of $\frac{1}{2}$ share in the suit property and for permanent injunction and mesne profit also. According to the petitioner, he is entitled to $\frac{1}{2}$ share based on the Will, dated 21.06.1989. The respondents 1,2,5, 7 & 8 filed written statement on 09.10.2008, 31.01.2008 and 17.10.2008 respectively and contesting the suit. The evidence was let in by both parties



and suit was posted for arguments. At that stage, the petitioner filed I.A.No.969 of 2014 to send for the documents mentioned in the petition from the concerned Sub Registrar Office. According to the petitioner, his paternal-grand-mother Rakkammal executed a Will, dated 21.06.1989 in his favour and he is having only a copy issued by the Sub Registrar Office. Therefore, he has filed the present I.A.No.969 of 2014.

3.In the I.A., the respondents 7 & 8 filed counter and submitted that the petitioner has filed the present petition belatedly after completion of evidence and when it was posted for arguments. The petitioner must prove not only Thump impression of his paternal-grand-mother Rakkammal but also must prove the execution of the said Will by examining atleast one attesting witness as per the Provisions of Sections 67 and 68 of the Indian Evidence Act.

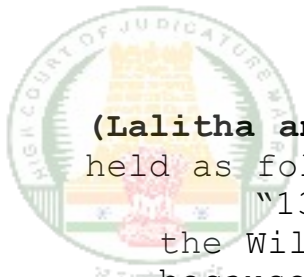
4.The learned Judge considering the averments made in the affidavit and counter affidavit and materials on record dismissed the application holding that the petitioner has not given any reason for not filing the original Will and he is producing only copy of the sale deed and not the original sale deed for comparison and petitioner has to prove the Will as per the provisions of Sections 67 & 68 of the Indian Evidence Act.

5.Against the said order of dismissal, the petitioner has filed the present Civil Revision Petition.

6.The learned counsel appearing for the petitioner submitted that the learned Judge erroneously dismissed the application and failed to consider the fact that in the proof affidavit filed by the 7th respondent, he has admitted that he is having custody of all the documents of Rakkammal and her husband Chelliah Servai. The learned Judge failed to see that all the efforts taken by the petitioner to issue summons to attesting witnesses by paying batta and summons ended in vain as petitioner could not trace the attesting witnesses. The summons sent to the scribe of the Will was returned with an endorsement as "died". The learned Judge erred in dismissing the application on the ground that sale deeds, dated 31.07.1980 and 30.04.1982 are not Contemporaneous documents as petitioner is seeking Thump impression of Rakkammal. The necessity to get expert opinion arose only when D.W.1 denied the existence of Will even though he is also one of the beneficiaries. The learned Judge failed to see D.W.1 and D.W.2 have stated that they have no objection for comparing the Thump impression of Rakkammal with Contemporaneous documents. The learned Judge erred in holding that the application is filed belatedly at the stage of arguments.

<https://hcservices.ecourts.gov.in/hcservices/>

7.In support of his case the learned counsel appearing for the petitioner relied on the judgment reported in **(2013) 2 MLJ 677**



(Lalitha and others vs. Ponnuswamy and others) in paragraph 13 has held as follows:-

"13.Hence, I am of the considered view that proving the Will and establishing one's right is a valid right and because of the delay aspect alone, such persons should not be deprived of their right. The opposite party should always be compensated in terms of money. Here, the revision petitions are facing with an obstacle to the effect that both the testators died and in such a case, in order to prove the signature of the testator, they wanted to take the assistance of a hand writing expert. In such a case, if the lower appellate Court also deprived the right of the revision petitioners, then it would amount to perpetually debarring the revision petitioners from their right."

8.The learned counsel appearing for the respondents 7 & 8 submitted that the petitioner has not given any valid reason for not filing the original Will at the earliest and he has not taken any steps for summoning the document. It is not sufficient for the petitioner to prove the Thump Impression of Rakkammal in the Will but also he has to prove the execution of Will by Rakkammal as per the Provisions of Section 67 and 68 of the Indian Evidence Act. The attester is being called only to find out the mental status of the executor. For satisfaction of the Court specific proof is contemplated.

9.I have heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent 7 & 8 and also perused the entire materials on record.

10.The petitioner has filed the suit for partition and allotment of $\frac{1}{2}$ share based on the Will, dated 21.06.1989 executed by the paternal-grand-mother. The petitioner has not filed original Will and has not taken any steps to summon the original document from the Registrar Office for comparing the Thump impression till completion of the evidence and till the suit was posted for arguments. He further submitted that original Will must be either with first respondent or with the 7th respondent. The petitioner has not given any notice to that to produce the original Will. The contention of the learned counsel for the petitioner that the application is not belated one as necessity for sending the document for comparison arise only when D.W.1 denied the existence of the Will, is untenable. The defendants 1,2,5,7 & 8 denied the execution of Will in the written statement filed by them 19.10.2007, 09.10.2008, 31.01.2008 and 17.10.2008 respectively. Further the learned Judge has rightly held that it is not sufficient to prove the Will by proving the Thump impression of Rakkammal in the Will. The Will has to be proved as per the provisions of Sections 67 & 68 of the Indian Evidence Act. In the present case, the petitioner has not examined any of the



attesting witness, scribe of the document and stated that the attesting witness are not traceable and scribe of the Will is dead. In the circumstances, the judgment relied on by the learned counsel for the petitioner is not applicable to the facts of the present case. The learned judge has correctly dismissed the application by giving cogent and valid reason and there is no illegality or irregularity warranting interference by this case.

11. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/
Assistant Registrar

/TRUE COPY/

Sub Assistant Registrar

To
The VI Additional District Judge,
Madurai.

+1cc to Mr.S.Chandrasekaran, Advocate, in SR No.5397.
+1cc to Mr.S.Parthasarathy, Advocate, in SR No.5115.

am
MS-RSK-SAR 2/9.2.2017/4P-4C

C.R.P (MD) No.752 of 2016 (PD)
31.01.2017