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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.10.2017

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.M.A.(MD)No.604 of 2017

and

C.M.P.(MD) Nos.6296 and 7286 of 2017

M.Gnanasekaran

... Appellant

Vs.

1.Mothi Periyakaruppan @ M.Maharajan

2.M.Malaichamy

... Respondents

Prayer: Appeal filed under Order 43 Rule 1 of C.P.C., to set aside the fair order and executable order dated 05.04.2017 allowing the petition in I.A.No.87 of 2017 to review the order dated 16.12.2016 in I.A.No.729 of 2016 in O.S.No.11 of 2014 on the file of V Additional District Judge, Madurai.

For Appellant

: Mr.R.Suriya Narayanan

For Respondent No.1

: Mr.V.Meenakshi Sundaram

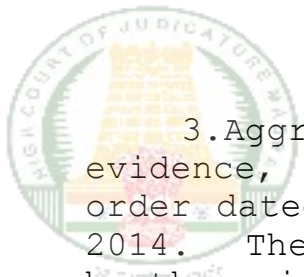
For Respondent No.2

: No Appearance

JUDGMENT

Heard the learned counsel for both parties.

2.The first respondent herein filed O.S.No.11 of 2014 on the file of V Additional District Judge, Madurai seeking the relief of partition in respect of A,B and C schedule properties and for declaration that he is the Trustee of the suit Trust by enjoying the D schedule properties. The plaintiff as well as the defendants are sons of late Mothi Ayyan Ambalam, who passed away on 02.11.2013. The second defendant who is the appellant herein filed his written statement contending that a suit for partition will not lie in view of execution of a registered Will dated 02.03.2007 in his favour by Mothi Ayyan Ambalam. After the plaintiff examined himself and another witness on his side and closed his evidence, the appellant as the propounder of the Will dated 02.03.2007 examined himself and two of the attestors. When the matter was posted for arguments, the plaintiff filed I.A.Nos.729 to 731 of 2016 for re-opening the case for further evidence, for recall of P.W.1 and for reception of additional documents. The learned trial Judge allowed I.A.No.729 of 2016 in O.S.No.11 of 2014 on 16.12.2016. However, in paragraph No.14 of the said order, it was held that there is no provision contemplated in law to enable the plaintiff to adduce evidence rebutting the evidence of P.Ws.2 and 3. Therefore, the prayer for re-opening the evidence of D.Ws.2 and 3 with regard to the execution and attestation of Ex.B2 Will was rejected.



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3. Aggrieved by the denial of the right to lead rebuttal evidence, the plaintiff filed I.A.No.87 of 2017 for reviewing the order dated 16.12.2016 made in I.A.No.729 of 2016 in O.S.No.11 of 2014. The review petition was allowed on 05.04.2017. Aggrieved by the said order, this civil miscellaneous appeal has been filed.

4. The learned counsel for the appellant contended that the second defendant, who is the appellant herein is the propounder of Ex.B2 Will. Therefore, the onus to prove the same lies on him. In view of Section 68 of the Evidence Act, a special mode of proof is contemplated in the case of Wills. He has to examine at least one of the attestors. Will being a special kind of document, it has to be proved to the satisfaction of the Court. Therefore the question of leading rebuttal evidence in the case of Wills cannot arise. He also pointed out that the plaintiff had closed his side and did not reserve his right to lead rebuttal evidence. More than anything else, there was no error apparent on the face of the record and a petition for review would not lie. In support of his contention, he relied on the decisions rendered by the High Court of Punjab and Haryana, particularly the one reported on AIR 2007 Punjab 1 - (Surjith Singh Vs. Jagtar Singh). The Division Bench of the Punjab and Haryana High Court held that the plaintiff has to exercise his option to reserve the right to lead evidence of rebuttal at the time of the close of his evidence. The last stage for exercising option to reserve the right of rebuttal can well be before the other party begins its evidence. The learned counsel for the appellant contended that in this case, the plaintiff having failed to reserve his right at the appropriate stage cannot be allowed to file an application for leading rebuttal evidence after the defence has closed their side.

5. Rebutting the arguments advanced by the learned counsel for the appellant, Thiru.V.Meenakshisndaram, learned counsel appearing for the contesting respondents relied on the decision reported in AIR 1992 AP 97 (DB) (Nalajala Narasayya V. Nalajala Sitayya). He contended that the option to reserve the right of rebuttal need not always be express, but, it can also be implied from the facts of the case. In this case, the plaintiffs cannot be faulted for having adduced evidence first in view of the decision of this Court reported in 2017(1) CTC 305 - (P.Lingasamy V. B.Premavathy). Order 18 Rule 3 of C.P.C. specifically enables the party beginning to produce evidence by way of rebuttal. The trial Court erroneously held that there was no provision providing for rebuttal evidence when it passed the order dated 16.12.2016 in I.A.No.729 of 2016. This was an error apparent on the face of record. Therefore, the said order was rightly reviewed. The learned counsel also pointed out that as per the decision reported in AIR 2004 Delhi 136, even after the evidence of defendant is closed and the case is posted for final argument, an application under Order 18 Rule 3 for producing evidence in rebuttal can be filed.

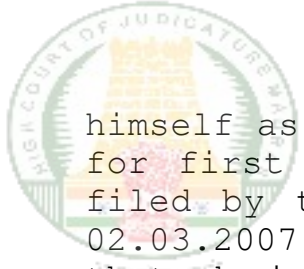


6.I carefully perused the entire materials on record. I also went through the various case laws arising out of Order 18 Rule 3 C.P.C.

7.The learned counsel for the contesting respondents is right in his submission that the application for review is maintainable. The trial Judge was not right in originally holding that the other party to the suit cannot rebut the evidence adduced by the propounder of the Will on the ground that the onus lies only on the propounder in terms of Section 68 of Indian Evidence Act. Order 18 Rule 3 of C.P.C. is applicable in such cases also and its existence was originally lost sight of. When the said error which is apparent on the face of the record was pointed out, the trial Judge rightly referred to the said provision and corrected the error. All of us are fallible. When the error committed by the concerned Court is pointed out, a duty is cast on the Court to correct the same. Of course, the parameters laid down in Order 47C.P.C. will have to be borne in mind. Omission to take into account the relevant statutory provision is certainly an error apparent on the face of record. I sustain the submission of Thiru.V.Meenakshi Sundaram in this regard. The learned counsel is equally right in his submission that the option to reserve the right of rebuttal need not always be express. It can very well be implied in a case, where the counsel for the party makes a statement that he is closing the evidence of his party in the affirmative only.

8.But the real question in this case is not whether the plaintiff reserved the right to adduce rebuttal evidence. It is whether he is entitled to do so? As already pointed out, the suit was one for partition of A, B and C items and declaration in respect of D schedule item. In order to defeat the suit claim, the appellant herein relied on the alleged execution of Ex.B2 Will dated 02.03.2007. Since the appellant has chosen to propound a Will in support of his claim, the onus lies entirely on him to prove the genuineness and due execution of the said Will. Since the appellant took such a plea in his written statement, the plaintiff filed his reply statement denying such execution. He also further pleaded that the father Mothi Ayyan Ambalam was not in a sound disposing state of mind.

9.Even though the plaintiff led the evidence first, the option to reserve his right to let in rebuttal evidence would have been available to him only if he had abstained from leading evidence on this issue where the burden of proof lay only on the defendant. For this proposition, I place reliance on the decision of this Court reported in AIR 1996 Mad 152 - (T.R.S.Mani V. T.R.Suryanarayanan). The said interpretation of Order 18 Rule 3 of C.P.C. is also placed in MULLA's Code of Civil Procedure (18th Edition at Page 2225). In this case, the plaintiff examined



himself as P.W.1. His deposition has been enclosed by the counsel for first respondent. As per paragraph 9 of the proof affidavit filed by the plaintiff, he has deposed that no such Will dated 02.03.2007 as propounded by the second defendant was executed and that during the said period, their father was not in a proper mental condition. The plaintiff also examined one 77 year old Deenadhayan as P.W.2 to depose to the effect that Mothi Ayyan Ambalam was physically ill from January 2007 onwards and that as a result, his mental condition was impaired. The said witness was examined since he claimed that he was acquainted with the plaintiff's family for generations. Thus, the plaintiff chose to let in positive evidence on the issue relating to the genuineness of the suit Will. If the plaintiff had not let in such evidence in the first instance on the issue regarding the genuineness of the suit Will since the burden lay only on the second defendant, then, he would certainly have had the right to adduce rebuttal evidence. In this case, on account of his own conduct, the plaintiff had forfeited his right to lead such a rebuttal evidence.

10.I therefore set aside the order dated 05.04.2017 allowing the review petition in I.A.No.87 of 2017 in I.A.No.729 of 2016 in O.S.No.11 of 2014 on the file of V Additional District Judge, Madurai. This civil miscellaneous appeal stand allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar

To

The V Additional District Judge, Madurai.

COPY TO:

The Record Keeper, Vernacular Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to M/S.D.Nallathambi, Advocate SR.No. 82496

+1cc to M/S.R.Suriya Narayanan, Advocate SR.No. 82698

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