

+IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 06.07.2018

Pronounced On : 11.07.2018

CORAM

THE HONOURABLE MS. JUSTICE P.T.ASHA

C.R.P(NPD).No.2068 of 2010
and
M.P.No.1 of 2010

1.Chinna gounder

2.Karuppayammal

3.Kaliammal

4.Vijalakshmi

...Petitioners

1. Periyanna Gounder

2. Nallammal

...Respondents

PRAYER: Civil Revision Petition filed under Section 227 of Constitution of India to set aside the fair and decretal order dated 23.04.2010 made in I.A.No.148 of 2010 in O.S.No.682 of 1992 on the file of the First Additional District Munsif Court, Bhavani by allowing the Civil Revision Petition.

For Petitioners : Mr.N.Manoharan
For Respondents : Mr.V.Rajesh for R1
Not ready in notice for R2

ORDER

The Civil Revision Petition is directed against the order of the learned I Additional District Munsif, Bhavani in I.A.No.148 of 2010 in O.S.No.682 of 1992 in and by which the learned Judge has dismissed the application filed by the petitioners herein who are the defendants 2,4,5 and 6 in the suit for recalling P.W.1.

2. From a perusal of the papers, it is seen that the first respondent herein had filed a suit for partition against his brother Kaliyannagounder. Pending the suit Kaliyannagounder died and the petitioners herein and the second respondent were brought on record as his legal representatives. An *ex parte* preliminary decree was passed on 03.06.1999, declaring the $\frac{1}{2}$ share of the first respondent in the suit properties. The first respondent had thereafter filed I.A.No.13 of 2007 for passing final decree in terms of the preliminary decree dated 03.06.1999. It appears that the petitioners herein after receiving notice in the final decree proceedings had taken out a petition in I.A.No.263 of 2009 seeking the following relief:

"To pass an order to declare 3rd petitioner/4th defendant's 1/3rd share in the suit property and declare equal share of petitioners/defendants 2,4,5 and 6 and respondent/plaintiff in the remaining extent of 2/3rd share in the suit property."

3. The petitioners would contend that due to the sudden demise of Kaliyannagounder, the petitioners were unable to move and instruct her counsel. Though, initially they had engaged him to represent them, she would further submit that the final decree was not passed till date of the shares had to be modified, since under a Will dated 25.04.1988 of her late husband she was entitled to 1/3rd share in the entire suit properties and the remaining 2/3rd share has to be distributed between other petitioners and the respondents herein.

4. It further appears that during the oral evidence of P.W.1, in I.A.No.263 of 2009, a certified copy of the sale dated 25.04.1998 was marked and the original was not marked. Thereafter, an interlocutory application in I.A.No.148 of 2010 was taken out by the petitioners to recall P.W.1 for marking the original Will. In the affidavit filed in support of this petition, the petitioners would contend that they were unable to file the original, at the time of the oral examination of P.W.1, since the same was damaged. They would contend that only now the original Will could be rectified (சரி செய்து). Therefore the petition. The first respondent has filed his counter *inter alia* contending that there is no explanation as to why the Will, even if damaged could not have been produced during the examination of P.W.1. This omission,

according to the first respondent assumes significance more particularly when I.A.No.263 of 2009 has been filed on the specific statement that Kaliyannagounder had executed Will bequeathing his 1/3rd share in the suit property to the petitioners. The learned District Munsif after a detailed enquiry dismissed the application on the ground that when P.W.1 was examined and the Certified copy marked, the petitioner had not come forward with the statement that the original Will had been damaged and could therefore not be filed. Further, it was also observed that the petitioners had not come forward to produce even this damaged Will for the scrutiny of the Court.

5. It is this Order that is the subject matter of challenge in the present Civil Revision Petition.

6. Mr.N.Manoharan, learned counsel who appears for the petitioner would contend that the petitioners are not attempting to put in any new document and it is only the original of the Certified copy that they are seeking to mark. He submitted that the original Will was in a highly damaged condition and therefore, the same was not marked through P.W.1. He would contend that no prejudice is going to be caused to the petitioners, if P.W.1 is recalled.

In support of his arguments, the learned counsel for the petitioners has relied upon the Judgment reported in **(2011) 11 SCC 275 K.K.Velusamy Vs. N.Palanisamy** wherein the Hon'ble Supreme Court as held that the power to recall a witness was discretionary power which is available with the Court, even, if a case is reserved for judgment. He would in particular draw the attention of this Court to Paragraph Nos.19 to 23 to advance his arguments.

7. Mr.V.Rajesh, learned counsel appearing for the respondent would submit that the petitioners have not only taken out this application at a belated stage, but the very petition to recall P.W.1 is bereft of any details and the document that they seek to mark through P.W.1 has also not been produced for the Court's scrutiny. The counsel therefore submitted that the Court should not interfere with the order of the learned District Munsif, whereby the first respondent had obtained a preliminary decree declaring his $\frac{1}{2}$ share in the suit property.

8. After hearing the counsels on either side this Court is passing the following order:

The suit was filed in the year 1992 and the decree was obtained in the year 1999. The first defendant who was alive till 1997 had not taken any steps to defend the suit or deny the right of the first respondent. The petitioners

who were brought on record as the legal heirs of the deceased defendant, by order dated 17.09.1998 had also not chosen to contest the suit. After notice in final decree had been received by the petitioners, the petitioners have come forward with an application in I.A.No.263 of 2009 which in effect tries to alter the preliminary decree already granted. Further, the petitioners who have come forward with the impugned petition to recall P.W.1 for the sole purpose of marking the original Will in the place of the certified copy which was originally marked through P.W.1 have not care to produce the document for the Courts scrutiny.

9. This omission assumes significance especially when it is the contention of the petitioner that the Will could not be marked because, it was in a highly damaged stage. The affidavit filed in support of the petition is totally bereft of any details as to how the Will was damaged and what was the rectification that has been effected on this Will. The learned District Munsif has rightly taken objection to the non-production of the Will which gives rise to suspicious circumstances particularly when the petitioners would contend that they have rectified the damage. The judgments cited by the petitioners would not advance the case of the petitioners. In view of the judgment of the Hon'ble Supreme Court that the power under Order 18 Rule 17 of the Code of Civil Procedure has to be sparingly used and only in case, where a ground or

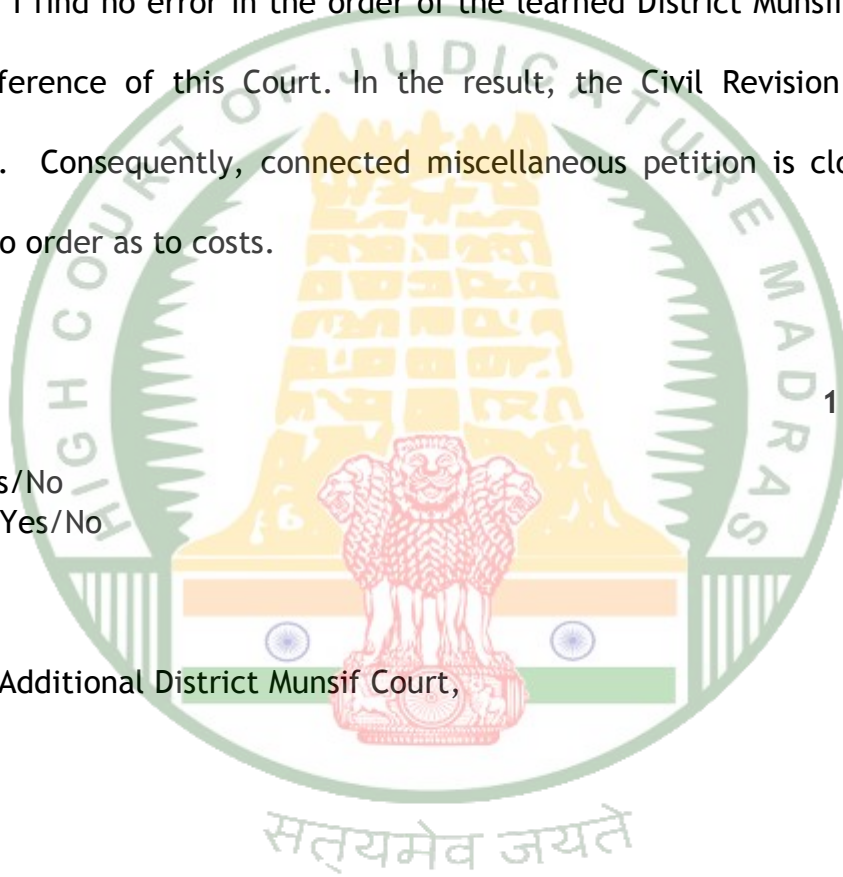
sufficient cause has been shown for recalling a witness, this Court finds no reason to interfere with the order of the learned District Munsif especially when the petitioner has not made out any ground or sufficient cause.

10. I find no error in the order of the learned District Munsif warranting the interference of this Court. In the result, the Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

11.07.2018

Index: Yes/No
Internet: Yes/No
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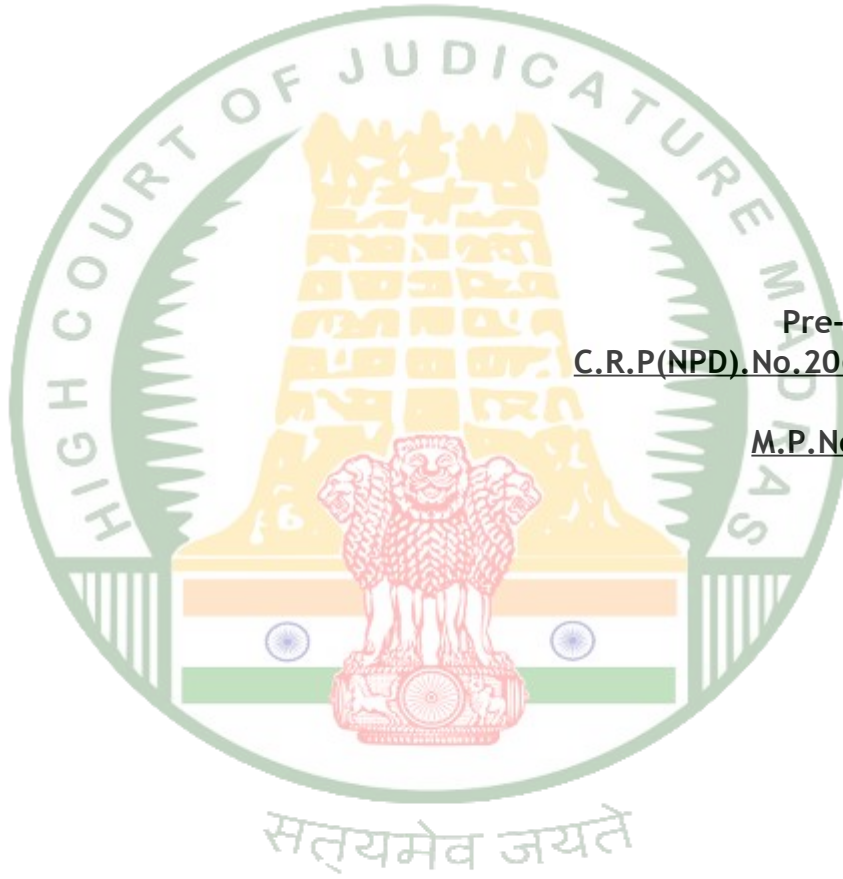
To
The First Additional District Munsif Court,
Bhavani.



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P.T.ASHA.J

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