



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 10.09.2018

DELIVERED ON : 01.10.2018

WEB COPY

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THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (NPD) (MD) No.1224 of 2015

1.M.Bakkirisamy
2.M.Subbulakshmi
3.M.Nagalakshmi

.. Petitioners/Respondents/Plaintiffs

Vs.

1.Sundareswari
2.Karthikeyan
3.Rajkumar @Muni
4.Senthil
5.Uma Maheswari
6.Shanmugalakshmi

.. Respondents/Petitioners/Defendants

Prayer : This Civil revision petition is filed under Article 227 of the Constitution of India, to set aside the order and decreetal order dated 09.03.2015 passed in I.A.No.563 of 2014 in I.A.No.508 of 2014 in O.S.No.179 of 2011 by the District Munsif Court, Virudhunagar.

For Petitioners
For Respondents

: Mr.D.Shanmugaraja Sethupathi
: Mr.S.V.Nagarajan

ORDER

Heard Mr.D.Shanmugaraja Sethupathi, learned counsel appearing for the petitioners and Mr.S.V.Nagarajan, learned counsel appearing for the respondents.

2.This petition has been filed to set aside the order and decreetal order dated 09.03.2015 passed in I.A.No.563 of 2014 in I.A.No.508 of 2014 in O.S.No.179 of 2011 by the District Munsif Court, Virudhunagar.

3.The petitioners are the plaintiffs and the respondents are the defendants in the suit. The suit is filed for a prayer of partition. The respondents herein filed a petition in I.A.No.508 of 2014 for amendment in the written statement and since the petitioners herein failed to file counter in time, the petition is allowed. Against the exparte order, the petitioners



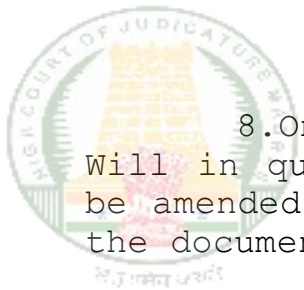
herein have filed the petition in I.A.No.563 of 2014, to set aside the exparte order in I.A.No.508 of 2014. The trial Court dismissed the petition. Against the dismissal order, the petitioners have come forward with this revision petition.

4. On the side of the petitioners, it is stated that the respondents filed an amendment petition on 15.09.2014 after the commencement of the trial and at the stage of cross examination of D.W.1, the I.A.No.508 of 2014 was passed on 11.10.2014. The counsel for the petitioners prepared counter affidavit and at that stage, Bar Association, Virudhunagar declared boycott and the petitioners were also held up at some other place. Hence, the counter affidavit cannot be filed on that date and the Court passed an exparte order. The exparte order should be on merits and not merely for not filing of the counter and the petition is to be allowed.

5. On the side of the respondents, it is stated that on 11.10.2014, the I.A.No.508 of 2014 was posted for filing counter. Advocate boycott is not an excuse for not filing the counter. The order was passed on merits. The petitioners were set exparte on that day only revision is prevailed over the petition and hence, the present petition cannot be allowed. Already the petitioners have filed C.R.P.(MD)No.1341 of 2014 before this Court, this Court has directed to dispose of the main suit within a period of two months from the date of receipt of copy of that order. Only to drag on the proceedings, this petition is filed.

6. Records perused. After the examination of D.W.1, I.A.No.508 of 2014 is filed by the respondents to carry out the amendment in the written statement, regarding the date of Will from 21.06.1972 to amend the same as 21.06.1971. I.A. Was posted for hearing on 25.09.2014. Again an opportunity was given to the petitioners to file a counter. The petitioners did not file counter and thereby, I.A.No.508 of 2014 was allowed. A perusal of the records reveals that the case of the respondents is that date of the Will is 21.06.1971 but in the written statement, the date of the Will is wrongly printed as 21.06.1972. It is further stated that based on the written statement, the affidavit was prepared wherein the date of Will is wrongly printed as 21.06.1972. This is a typographical error and the respondents seek for amendment of this error in I.A.No.508 of 2014.

7. On the side of the petitioners, it is stated that the date of Will and the tamil date did not co-relate each other and the petitioners got the particulars from the Bar Association and the person who signed as Advocate S. Senthil Vinayama is not a Bar council member and the petitioners obtained a Certificate from the Bar Association wherein it is stated that no such person by name S. Senthil Vinayama is enrolled in the Bar Council. It is further stated that as per proviso Order 6 Rule 17 of CPC, amendment cannot be entertained after the commencement of the trial.



8. On the side of the respondents, it is stated that the Will in question was already marked only the clerical mistake is be amended. The Will is dated 21.06.1971. The Advocate who signed the document may not be alive.

9. On the side of the petitioners, it is stated that even if the person is not alive, there will be entry in the Bar Council regarding the enrolment.

10. A perusal of the records reveals that the Will is dated 21.06.1971. The contention of the respondents is that clerical mistake has occurred in the suit and the same was repeated in the proof affidavit. This reason seems to be agreeable. The document is of the year 1971, there may not be a chance for the Bar Counsel to identify the person at the time and a reasonable opportunity is to be given to the respondents to put forth their case. The petitioners are not set as exparte by the trial Court. I.A.No.508 of 2014 order is passed on merits since the petitioners were not set as exparte. There is no chance for the petitioners to set aside the exparte order. The burden of proving the case is upon the respondents. Hence, the trial Court is directed to frame the issue regarding the correctness of the date of the Will, by giving an opportunity to both side by adhering the evidence as to the date of will.

11. With the above directions, this Civil Revision Petition is dismissed. No Costs.

Sd/-
Assistant Registrar(AD-I)

/TRUE COPY/

Sub Assistant Registrar(CS-I)

To

The District Munsif Court, Virudhunagar.

+1. C.C. to M/S.P.JESSI JEEVA PRIYA, Advocate SR.No. 87980
+1. C.C. to M/S.D.SHANMUGARAJA SETHUPATHI, Advocate SR.No. 87886

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