



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 23.04.2018
DELIVERED ON : 28.08.2018
CORAM

WEB COPY

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) No.872 of 2017
and
CMP(MD)No.3850 of 2017

K.Panneer Selvam

... Petitioner/Plaintiff

-Vs.-

1.Anandhakumar

2.A.Nagarani

3.R.Indhirani

4.G.Banumathi

5.G.Arun Prasad

6.G.Balaguru

7.G.Saravanan

8.M.M.Uthirapathi

9.V.Subramanian

... Respondents/Defendants

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, against the order dated 10.02.2017 in I.A.No.331 of 2016 in O.S.No.114 of 2015 on the file of the I Additional District Judge (PCR), Trichy.

For Petitioner

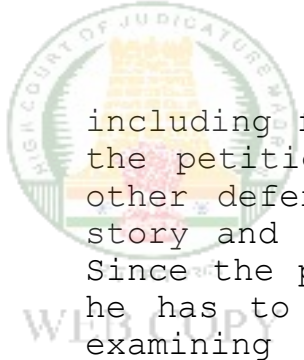
: Mr.D.Boopal

ORDER

This revision has been filed by the petitioner against the order dated 10.02.2017 passed in I.A.No.331 of 2016 in O.S.No.114 of 2015 on the file of the learned I Additional District Judge (PCR), Trichy, dismissing the petition filed by the petitioner under Order 18, Rule 1 C.P.C.

2. The petitioner is the plaintiff in the suit and he filed the suit for partition and separate possession of his 1/3rd share in the suit properties. In the suit, the petitioner has also sought declaration to declare that the sale made by the first defendant in favour of the 9th defendant as null and void and also to direct the defendants 1, 4 to 7 to account for their management of the joint family properties.

3. Pending suit, the petitioner has filed I.A.No.331 of 2016 seeking to direct the first defendant to begin the trial first alleging that the first defendant has taken various defences,



including family arrangement and execution of Will and according to the petitioner, the family arrangement, execution of Will and all other defences taken by the first defendant were only an invented story and the burden of proof solely lies on the first defendant. Since the petitioner was not doing well and was affected by stroke, he has to file an application under Order 26, Rule 1 C.P.C. for examining him through advocate commissioner. Therefore, the petitioner prayed to direct the first respondent to let in evidence first.

4. Resisting the petition, the first defendant filed counter stating that the petitioner himself was well aware of the family arrangement and execution of the Will and conveniently, he had suppressed the real facts. The first defendant has not introduced any new theory as alleged by the petitioner. The story that the petitioner was not feeling well was not at all correct and he cannot shift the burden to the defendants to begin the case first and prayed for dismissal of the petition.

5. Upon consideration of the rival submissions, the trial Court dismissed the petition. Aggrieved by the same, the petitioner has preferred this revision.

6. I heard Mr.D.Boopal, learned counsel for the petitioner and perused the materials available on record.

7. The learned counsel for the petitioner submitted that the first defendant had taken various defences based on the family arrangement and the Will said to have been executed in his favour and the petitioner denied the same. Therefore, the burden is on the first defendant to prove his defence first, but the trial Court has not considered the said aspect and dismissed the petition. He would submit that the trial Court erred in dismissing the petition without considering the averments made by him and therefore, the order of the trial Court is arbitrary, illegal and against the law. In support of his submission, the learned counsel relied upon the following decisions:

- (i) Bama v. Rukiyal Bivi, reported in 2004 (1) CTC 109.
- (ii) Unreported order of this Court in C.R.P.(MD) No.1120 of 2011, dated 30.11.2011 (V.Palanisamy v. V.Shanmugam and others)
- (iii) Unreported order of this Court in C.R.P.(PD) No.28 of 2013, dated 07.1.2013 (Krishnakumar v.V.Seethalakshmi)

8. In Bama v. Rukiyal Bivi, supra, the learned Single Judge of this Court held:

"6.As a general rule, the plaintiff has to prove his claim by positive proof, but the Court has to see whether there is a proof of claim before it need enquire to the truth or otherwise of the defence. It is open to the plaintiff to say that although he has right to



begin, he may rest content with relying upon the averments made in the written statement and may say that he does not propose to adduce further evidence. If the defendant admits material allegations in the plaint, the defendant may begin. However, the plaintiff must prima facie satisfy that there are reasons to believe that particular thing is within the knowledge of the defendant. If the denial by the defendant is without substance in view of the other admitted facts, the onus lies on the defendant and he must be directed to lead the evidence first."

9. In *V.Palanisamy v. V.Shanmugam*, supra, the Single Judge of this Court observed as under:

"10. It must be noted that the present case is a case of partition. In normal circumstances there will be very little difference of opinion between the partners. But, when a defendant seeks to purport a property in question on the basis of a family arrangement which was specifically acted upon, then it is for him to prove such a family arrangement before the Court so as to exclude those properties from the common pool. The plaintiff cannot be expected to prove the negative, as it was a matter not covered by any documentary evidence and based upon an oral arrangement followed by conduct of the parties."

10. In *Krishnakumar v. V.Seethalakshi*, supra, the learned Single Judge of this Court held as under:

"8. In this case too, the burden of proof lies on the party, who asserts a particular fact. The particular fact, which is asserted is, whether the property belonged to Narayana Asari absolutely. That fact has been asserted by the plaintiffs and also admitted by the defendants. Therefore, there is no burden of proof on the plaintiffs to prove that fact. Insofar as the onus of proof is concerned, it is held in that judgment, referred to above, that onus of proof by a party would cease, the moment, the opposite party admits the transaction. In this case, the onus of proof is on the defendants to prove the execution of the Will, that has been denied by the plaintiffs. Once defendants are able to prove the Will to the satisfaction of the Court, the suit filed by the plaintiffs will be dismissed and there is no necessity to go into the further aspects of the matter, by letting evidence by the plaintiffs. Considering all these aspects, the Court below initially directed the defendants to lead evidence first and that was properly appreciated, while considering the Review Application. Further, I do not find any infirmity in the order passed by the Court below in the Review Application and there is no error apparent on the face of record to interfere with the same."



11. On a perusal of the pleadings, particularly, the written statement of the first defendant, it is seen that the first defendant resisted the partition on several grounds, including one based on the Will dated 08.08.2007 executed by Vairathammal in favour of the first defendant. Therefore, as rightly held by the trial Court, the first defendant cannot be compelled to let in evidence first.

12. In a recent decision, relied upon by the trial Court, in Premavathy and another, reported in 2017 (1) CTC 305, the defendant resisted the suit for partition on several grounds, including reliance in the Will, which excluded the plaintiff any interest in the property. In the given factual case, this Court held that the burden of proof in each issue is different and the defendant cannot be compelled to adduce evidence first.

13. Therefore, the decisions relied upon by the learned counsel for the petitioner are not applicable to the facts of the present case for the reason that in the said decisions, in the facts and circumstances of the case, the Court directed the defendant therein to adduce evidence first. Whereas, as rightly held by the trial Court, in the instant case since the first defendant was resisting the suit based on the Will said to have been executed in his favour, he cannot be compelled to let in evidence at the first instance.

14. As a general rule, the plaintiff has to prove his claim by positive proof and therefore, the defendants, particularly, the first defendant cannot be compelled to go witness box first. Therefore, the trial Court was right in dismissing the petition. There is no illegality and/or perversity in the order of the trial Court and the revision is liable to be dismissed.

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

Sd/-

Assistant Registrar(CS-III)

/True Copy/

Sub Assistant Registrar(CS-I)

To
The I Additional District Judge (PCR)
Trichy.

C.R.P. (MD) (PD) No.872 of 2017 and
CMP (MD) No.3850 of 2017
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VSV

<https://heservices.courts.gov.in/heservices/>
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