



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 08.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CRP (PD) (MD) No.1398 of 2018

and

CMP (MD) No.6001 of 2018

S.P.V.Navaladi

... Petitioner

Vs.

S.V.Kanthasamy

... Respondent

Prayer : Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 07.03.2018 made in I.A No.732 of 2016 in O.S No.286 of 2004 on the file of the District Munsif Court, Musiri.

For Petitioner

: Mr.G.Sridharan

For Respondent

: Mr.K.Govindharajan

ORDER

O.S No.286 of 2004 on the file of the learned District Munsif Court, Musiri was filed by the revision petitioner herein seeking the relief of declaration and recovery of possession and future profit. The suit was laid on the strength of a registered Will dated 25.02.1994. The respondent herein set up a subsequent rival Will of the year 1997. The same is not a registered one. To prove the execution of the said unregistered Will, the defendant examined the attestors. But, the attestors did not support the stand of the respondent herein. Therefore, the respondent has filed I.A No.732 of 2016 for examining the witness who is said to be acquainted with the signature of the attestor. The court below by order dated 07.03.2018 allowed the same. Questioning the same, the plaintiff has filed this civil revision petition.

2.Heard the learned counsel on either side.

3.As rightly pointed out by the learned counsel appearing for the revision petitioner, Section 71 of the Evidence Act will come into play only if the attesting witness denies or does not recollect the execution of the document. In such a case, execution of the Will can be proved by other evidence. In this case, both the attestors have deposed. What they denied was the execution of the Will by the testator in their presence. This will not fall within the circumstance set out in Section 71 of the Evidence Act. The Hon'ble Supreme Court's decision reported in (2003) 2 SCC 91 (Janki Narayan Bhoir vs. Narayan Namdeo Kadam) is squarely on the point. The Hon'ble Supreme Court has held as follows :

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

11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68



of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But, Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time, Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will.

12.....Section 71 of the Evidence Act can only be requisitioned when the attesting witnesses who have been called failed to prove the execution of the will by reason of either denying their own signatures or denying the signature of the testator or having no recollection as to the execution of the document."

4. In this view of the matter, the order impugned in this civil revision is set aside and this civil revision petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar (CS-III)

To
The District Munsif, Musiri.

+1cc to Mr.G.Sridharan, Advocate Sr.No.89350
+1cc to Mr.K.Govindharajan, Advocate Sr.No.89501

SKM

VB/PM/SAR3/13.11.2018/2P/4C

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