



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 16.02.2018

DELIVERED ON : 28.04.2018

WEB COPY

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU
C.R.P(NPD) (MD)No.2275 of 2016

and

C.M.P(MD)Nos.10491 of 2016 & 1129 of 2018

S.Sankara Subramanian : Petitioner / Petitioner

vs.

1.S.Balammal (Deceased)
2.S.Krishnaswamy
3.S.Ramaiah
4.S.Pitchaiah
5.S.Thirukooda Rajappan
6.S.Guhan

: Respondents / Respondents

PRAYER : Petition filed under Article 227 of the Constitution of India to set aside the order dated 06.09.2016 passed by the Principal Sub Court, Tenkasi in I.A.No.296 of 2016 in I.A.No.149 of 2007 in O.S.No.31 of 1985 on the file of the Principal Sub Court, Tenkasi.

For Petitioner : Mr.K.Shanmugakani
For Respondents : Mr.A.Arumugam for R.2
No appearance for R.3
Mr.N.Rajachandrasekaran for R.4
Mr.M.Karthikeyan for R.5
Mr.M.Ashok kumar for R.6

ORDER

This Civil Revision Petition has been filed to set aside the order passed by the learned Principal Subordinate Judge, Tenkasi in I.A.No.296 of 2016 in I.A.No.149 of 2007 in O.S.No.31 of 1985 dated 06.09.2016.

2.The facts of the case are that the second respondent herein, as plaintiff, has instituted a suit in O.S.No.31 of 1985 against the petitioner herein as well as other respondents, seeking the relief of partition. In the said suit, all the parties have filed a compromise memo, based on which, a preliminary decree was passed on 29.06.1985. Thereafter, on 04.12.2006, Balammal, one of the co-sharers died and therefore, the petitioner herein has filed an interlocutory application in I.A.No.149 of 2007 for supplemental



decree to redistribute the share of the said Balammal to other sharers.

3. In the said proceedings, the respondents came out with the surprise of an alleged will executed by Smt.S.Balammal deposited at the District Registrar, Virudhunagar. The said deposited will was marked by the respondents as Exs.R25 and R26, in which, there is a reference of an earlier will of Smt.S.Balammal on 16.02.1998 deposited at District Registrar, Virudhunagar. Hence, the petitioner filed I.A.No.296/2016 in I.A.No.149/2007 in O.S.No.31 of 1985 for summoning of the said will dated 16.02.1998 deposited at the office of the District Registrar, Virudhunagar. The said I.A.No.296/2016 has been filed by the petitioner through his power of attorney S.Sabariperumal. In the said I.A.No.296/2016, the respondents filed counter. After hearing the submissions made by the petitioner as well as respondents, the lower Court passed an order dated 06.09.2016 dismissing the petitioner's application in I.A.No.296/16 for summoning of will dated 16.02.1998, against which, the present revision petition has been filed.

4. The 2nd respondent through his counter has stated that the petitioner herein is the 3rd defendant in the main suit and petitioner in I.A.No.149 of 2007. His son namely, S.Sabariperumal who is an advocate by profession has filed I.A.No.296/16 as power of attorney holder of the revision petitioner. He is not necessary party in the proceedings and he has been examined only as a witness in I.A.No.149 of 2007 for his father S.Sankarasubramanian/3rd defendant and therefore, he does not have any right to file the present application for sending the document even as a power of attorney of the 3rd defendant and to file the present application as a power of attorney, S.Sabariperumal has not followed the procedure contemplated under Order 3 Rules 1 and 2 CPC. When DW6 was cross examined, the 2nd respondent/Dr.S.Krishnaswamy has stated that since the will executed by Balammal in the year 1998 got back by her from the office of Virudhunagar District Registrar and retained it with her, necessity arose to Balammal to execute a subsequent will. The will which was earlier deposited before the District Registrar's office has been cancelled by the will which was executed by Balammal in 2001 and the said information is found in the will executed in 2001. However, the petitioner has filed the present application to send for the will which had been already cancelled, which clearly shows that to protract the proceedings, the petitioner has filed the present application. From 2007 onwards, in one way or other, the petitioner had been prolonging the matter not allowing to complete the proceedings in I.A.No.149 of 2007 and therefore, the 2nd respondent prayed for dismissal of the above application.

5. The 4th respondent would contend that S.Sabariperumal who is the son of the 3rd defendant/revision petitioner herein has been



examined only as a witness in I.A.No.149 of 2007 and though the present petition has been filed by S.Sabariperumal as the power agent of the 3rd defendant, he has not filed any application to permit him to represent the 3rd defendant as power agent under Order 3, Rules 1 and 2 CPC. He would further contend that there is no purpose to send for the already cancelled will.

6.The 6th respondent filed counter stating that in the affidavit filed by the petitioner, it has been stated that on 16.02.2008, will of the said Balammal has been deposited in the District Registrar Office, Virudhunagar and the petitioner has not stated for what purpose, production of the said deposited will is necessary. The 6th respondent has further stated that when Balammal has executed a subsequent will dated 14.02.2001 and that has been deposited in the office of the District Registrar, Virudhunagar, the earlier will stood cancelled. He would also state that there is no possibility of the alleged will being deposited in the Registrar's office. It was also contended that after submitting death certificate of the person who executed the will alleged to have been deposited along with the deposit certificate, the alleged will should be opened and registered in the presence of the beneficiaries of the will and when such course has not been done, the prayer of the petitioner for summoning of the will cannot be allowed. Therefore, he prayed for dismissal of the present application.

7.Heard the learned counsel for the petitioner as well as the respondents and perused the materials available on record.

8.Perusal of the record shows that the 3rd defendant filed I.A.No.149 of 2007 for passing of the supplemental preliminary decree. In the said proceedings, the respondents contended that Balammal executed a will and deposited the same at the District Registrar, Virudhunagar and the respondents also marked the said will as Exs.R25 and R26, in which there was a reference of earlier will of Balammal dated 16.02.1999 deposited at District Registrar, Virudhunagar. Therefore, the revision petitioner/3rd defendant filed the present petition in I.A.No.296 of 2017 through his power of attorney/S.Sabariperumal, to issue summon to the District Registrar, Virudhunagar, to produce the deposited will of Balammal dated 16.02.1998. Perusal of the present I.A.No.296 of 2017 shows that the same has been filed under Rule 75 of the Civil Rules of Practice and the petitioner cannot file such application.

9.Before the Court below, the respondent would rely on the judgment reported in 2007 (4) CTC 135, wherein, it has been stated as follows:-

'I have considered this contention made by the learned counsel for the petitioner. When a witness comes to court, there is no legal bar for him to come with any document to refresh his memory to give evidence as

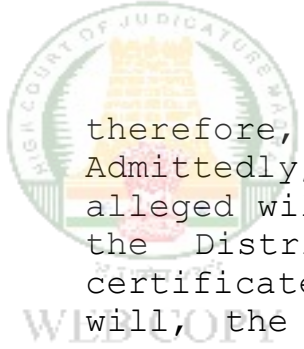


provided under Section 159 of the Evidence Act. Therefore, the witnesses summoned in their case are at liberty to bring any register from the respective office and to give oral evidence by going through the said register by way of refreshing their memory. But the lower Court cannot summon those documents in view of the bar contained in Rule 75 of the Civil Rules of Practice. In that view of the matter, that part of this order of the lower court directing the witnesses to produce the documents alone requires modification. Instead of directing for production of documents in court, this court can very much while summoning the witnesses indicate that they should come with relevant registers to give oral evidence by perusing the same.'

10. Referring to the above judgment, the learned Judge has found that as per Rule 75(2) of the Civil Rules of Practice, there is a bar for submitting the document before the Court, but at the same time, the Registers may be called for and the concerned person may be summoned and therefore, as per the above provision, the Registrar cannot be called to submit the document before the Court. The petitioner has filed the present application under Rule 75(2) of the Civil Rules of Practice, but under the said Rule 75(2), present petition can be filed only as a verified petition. When such course has not been adopted by the petitioner, the present application cannot be entertained. Moreover, the petitioner has not stated in his affidavit that in what way, the above will dated 16.02.1998 is related to the proceedings in I.A.No.149/2007 and the petitioner has not fulfilled the procedure contemplated under Rule 75(2) of the Civil Rules of Practice.

11. Perusal of the record further shows that in I.A.No.149 of 2007, filed by the petitioner, he has not stated about the alleged will dated 16.02.1998. In fact, in I.A.No.149 of 2007, the petitioner has denied stating that Balammal has not executed any will and deposited the same in the District Registrar's Office, Virudhunagar. But, quite contrary to the same, the petitioner has filed the present petition in I.A.No.296/2016 stating that Balammal has executed a will and that has been deposited in District Registrar's Office, Virudhunagar, and therefore, the said will should be called for to decide I.A.No.149 of 2007. The above contradictory averments of the petitioner in I.A.No.149 of 2007 and I.A.No.296 of 2016, would clearly show that the petitioner is attempting to protract the proceedings.

12. Though the present petition has been filed by the revision petitioner through his power of attorney/S.Sabariperumal, no power deed has been produced to show that S.Sabariperumal has been authorised by the petitioner to file the present petition and



therefore, the present petition cannot be entertained. Admittedly, the said Balammal died. Even assuming that the alleged will dated 16.02.1998 executed by Balammal is deposited at the District Registrar, Virudhunagar, after submitting death certificate of Balammal along with the deposit certificate of the will, the alleged will should be opened and registered in the presence of the beneficiaries of the will and thereafter, copies of the will should be given to the beneficiaries. If only such procedure is followed, then the will can be summoned. In the instant case, such procedure has not been followed.

13. Perusal of the records shows that the suit is of the year 1985 and the application for passing of supplemental preliminary decree has been prolonged from 2007 onwards in one way or other and the learned Judge has elaborately considered the present petition and has rightly dismissed the same by the impugned order which does not warrant any interference from this Court.

Accordingly, this Civil Revision Petition is dismissed. No costs. The interim order already granted is vacated. Consequently, CMP(MD)No.10491 of 2016 is dismissed and CMP(MD) No.1129 of 2018 is allowed.

Sd/
Assistant Registrar (CS-I)

/True copy/

Sub Assistant Registrar

To

The Principal Subordinate Judge,
Tenkasi.

+1cc to Mr.K.SHANMUGAKANI, Advocate, SR.No.64538

Copy to:
The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.(2 COPIES)

C.R.P. (NPD) (MD) No.2275 of 2016
28.04.2018

BALA/GK
KK/RSK/SAR-3/22.05.2018/5P-5C