



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.03.2018
(Reserved on 12.02.2018)

WEB COPY

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP (NPD) (MD) No.785 of 2016
and
CMP (MD) No.3914 of 2016 and
CMP (MD) No.9763 of 2017

1) Palanichamy
2) Murugesan
3) Saravanan
4) Indra Gandhi

... Petitioners/Petitioners/
Appellants

vs.

Periyathambi

... Respondent/Respondent/
Respondent

Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 24.04.2015 in I.A.No.96 of 2014 in A.S.No.46 of 2012 on the file of Additional Sub Court, Dindigul.

For Petitioner : Mr.H.Lakshmi Shankar
For Respondent : Mr.T.Antony Arul Raj

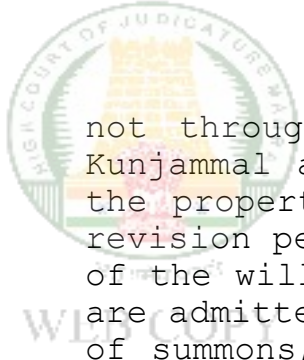
ORDER

This revision petition has been filed against the fair and decreetal order dated 24.04.2015 in I.A.No.96 of 2014 in A.S.No.46 of 2012 on the file of Additional Sub Court, Dindigul.

2.Learned counsel for the petitioners would submit that the revision petitioners are appellants in A.S.No.46 of 2012 on the file of Additional Sub Court, Dindigul. They filed I.A.No.96 of 2014 to permit them to examine the attesting witnesses in the will in the appeal by sending summons to them. The suit in O.S.No.136 of 2008 was filed by the revision petitioners for declaration and permanent injunction and for mandatory injunction. The revision petitioners filed the suit claiming right over the suit property through the will dated 06.03.2000 alleged to have been executed by one Kunjammal in their favour. The said Kunjammal did not have any issues and she died on 14.10.2000.

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

3.Learned counsel for the petitioners would further submit that the respondent/defendant is claiming right over the suit property



not through the said Kunjammal and he is not the legal heir of Kunjammal and therefore, he is not the rival claimant who will get the property automatically if the disputed will is disproved. The revision petitioners had sent summons through court to the attestors of the will executed by Kunjammal namely, Gopal and Shanmugan, who are admittedly cousins of the respondent/defendant. Despite receipt of summons, they did not appear before the court to give evidence. It is the specific case of the petitioners that DW1-defendant, during his cross examination has admitted that attesting witnesses are his cousins and petitioners took steps to summon them.

4.It is the further contention of the counsel for the petitioners that the Trial Court erroneously dismissed the suit holding that the petitioners failed to prove the will by examining one of the attesting witnesses as per Section 68 of the Indian Evidence Act, without taking note of the fact that the petitioners also filed application to compel the attesting witnesses to give evidence which was returned as not maintainable. Therefore, the petitioners filed first appeal and filed the present interlocutory application to examine the attesting witnesses by sending summons to them. The said application was dismissed by the appellate Court by impugned order and therefore, the petitioners have come forward with the present revision petition to quash the same.

5.In support of his contentions, learned counsel for the petitioners relied on the following decisions:-

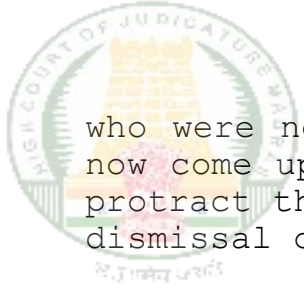
(I)Vishnu Ramkrishna Wani vs. Nathu Vithual Wani reported in AIR 1949 Bom 266 = 1949 51 BLR 245)

(ii)S.Shanmugham vs. S.Sundaram and 4 others reported in 2005-3-L.W.366

(iii)Union of India vs. Ibrahim Uddin and another reported in 2012 (3) T.N.C.J. 191 (SC).

6.Learned counsel for the respondent/defendant would submit that the present interlocutory application filed by the petitioners under Order 16 Rule 1 CPC is not maintainable since the said provision is relating to examination of witnesses before the Trial Court. It is further contended that though the appellate Court is having power to permit the parties to adduce additional evidence in the appeal stage under Order 41 Rule 27 CPC, the said provision is not applicable to the present case for the reason that to file a petition under the said provision, the party shall establish that such evidence was not within his knowledge or could not let in despite due diligence. In the present case, the petitioners have not satisfied the requirements of Order 41 Rule 27 CPC.

7.Learned counsel for the respondent further contended that despite receipt of summons when the attesting witnesses did not appear, the petitioners filed a petition under Section 151 CPC for civil arrest on 03.08.2011 and it was returned on the same day and no steps were taken to represent the same and thereafter, the suit was dismissed on 18.11.2011 which clearly shows that the petitioners



who were not interested in pursuing the petition in the suit, have now come up with the present petition only to fill up lacuna and to protract the proceedings. Therefore, the learned counsel prayed for dismissal of this revision petition.

8. Heard the learned counsel for the petitioners as well as the respondent and perused the materials available on record.

9. Perusal of the record shows that in the suit, the petitioners have filed an application to compel the attesting witnesses to give evidence which was returned as not maintainable. Perusal of the record also shows that the petitioners have taken out an application in the appeal before the appellate court to examine the attesting witnesses by sending summons them. In my considered opinion, to meet the ends of justice, the learned Judge ought to have allowed the application filed by the petitioner and therefore, the order passed by the learned Judge does warrant interference. Accordingly, the impugned order dated 24.04.2015 made in I.A.No.96 of 2014 in A.S.No.46 of 2012 on the file of Additional Sub Court, Dindigul, is set aside and this Civil Revision Petition is allowed. No costs. The learned Additional Sub Judge, Dindigul, is directed to dispose of A.S.No.46 of 2012 within a period of four months from the date of receipt of a copy of this order. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

The Additional Subordinate Judge,
Dindigul.

+ 1 CC TO Mr.H.LAKSHMI SHANKAR, ADVOCATE IN SR No. 59124

+ 1 CC TO Mr.T.ANTONY ARUL RAJ, ADVOCATE IN SR No. 59160

BALA

TE/KKR/SAR-3 : 25/04/2018 : 3P/4C

order made in
CRP (NPD) (MD) No.785 of 2016
28.03.2018