

C.R.P.NPD.No.278 of 2017
C.M.P.No.1241 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.08.2019

CORAM

THE HON'BLE Mr. JUSTICE M.GOVINDARAJ

C.R.P.NPD.No.278 of 2017
C.M.P.No.1241 of 2017

Imam Noor Mohammed ...Petitioner

vs

Meharunnisa
Respondent

...

Prayer: Civil Revision Petition filed under Section 115 of C.P.C against the fair and decreetal orders dated 17/02/2015 passed in I.A.No.173 of 2012 in A.S.No.8 of 2012 on the file of the Sub Court, Kallakurichi.

For Petitioner : Mr.R.Meenal

For Respondent : Mr.P.Parthikanaan

ORDER

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The petitioner filed a suit for declaration of title and consequential injunction. After elaborate trial, the Trial Court dismissed the suit. Against which, preferred an appeal. During the pendency of the appeal, the petitioner filed an application under Or.XXIII, R.1(3) of CPC seeking permission of the Court to withdraw the suit and to file a fresh suit on the very same

cause of action. The Appellate Court dismissed the above application. Against which, the petitioner is before this Court.

2. Learned counsel for the petitioner would contend that he rested his case on the basis of Will. Since he had failed to mention the circumstances in which the Will was executed, the source of right to property and other details elaborately. Therefore, the Trial Court for want of details has decided against both the parties. In order to set right the defects, he seeks an opportunity to file a fresh suit on the very same cause of action. Therefore, the Lower Appellate Court should have permitted the petitioner to file a fresh suit.

3. On the other hand, respondent would vehemently contend that both the parties have restricted their claim on the basis of two different Wills. After elaborate evidence, the Trial court after considering the facts and circumstances dismissed the suit. Even a document produced by the defendant was also not accepted. While all these documents were considered and a decision was taken on merits, the petitioner cannot be permitted to file a fresh suit on the very same cause of action.

4. Heard the learned counsel for the petitioner and the learned counsel for the respondent.

5. Admittedly, both the plaintiff and defendant have claimed title through two different Wills. It is well settled that will has to be proved as per Sec.68 of the Indian Evidence Act. Once a person having failed to prove a will cannot take one more opportunity to prove it again. If opportunity is granted it will remove the bar of *resjudicata* in filing a fresh suit. Clause (3) Or.XXIII R.1 contemplates the circumstances in which opportunity can be granted to file a fresh suit. (i) a suit must fail by reason of formal defect and (ii) there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. In the instant case, the petitioner having failed to prove the will, cannot take a ground that he failed to explain the right of the testator and propounder by filing a fresh suit. As rightly contended that having failed to prove the will, the party to the suit cannot redo it by removing the cap of *resjudicata* under this provision. Therefore, I'm of the considered opinion that the petitioner has not satisfied the criteria for permitting him to withdraw the suit with a liberty to file a fresh suit.

6. This Court in the case of ***Duraikannu and others vs. Malayammal, 200 4 L.W. 453***, held as under:

"9. The other sufficient ground is that the defect must not be due to plaintiff's own fault, hence the expression 'other sufficient ground' should be construed 'ejusdem generis' with formal defect. The failure of the plaintiff to prove his own case is no ground for allowing him to withdraw his suit with liberty of suing again for the same subject matter".

7. In view of the above judgment also, the petitioner having failed to prove his case cannot take liberty to sue again on the very same subject matter viz., will in the present case. Further, the case relied on by the petitioner in ***V. Rajendran and Ors vs. Annasamy Pandian (D) thr. L.Rs. Karthayayani Natchiar, 2017 (1) CTC 762*** is not applicable to this case, as the permission was granted in that case during the course of trial and not after a decision is taken by the Trial Court.

8. In fine, the Civil Revision Petition deserves no consideration and accordingly dismissed. No costs. Consequently, connected miscellaneous petition is closed.

19.08.2019

Index:Yes / No
Internet: Yes / No
Speaking / Non-Speaking order
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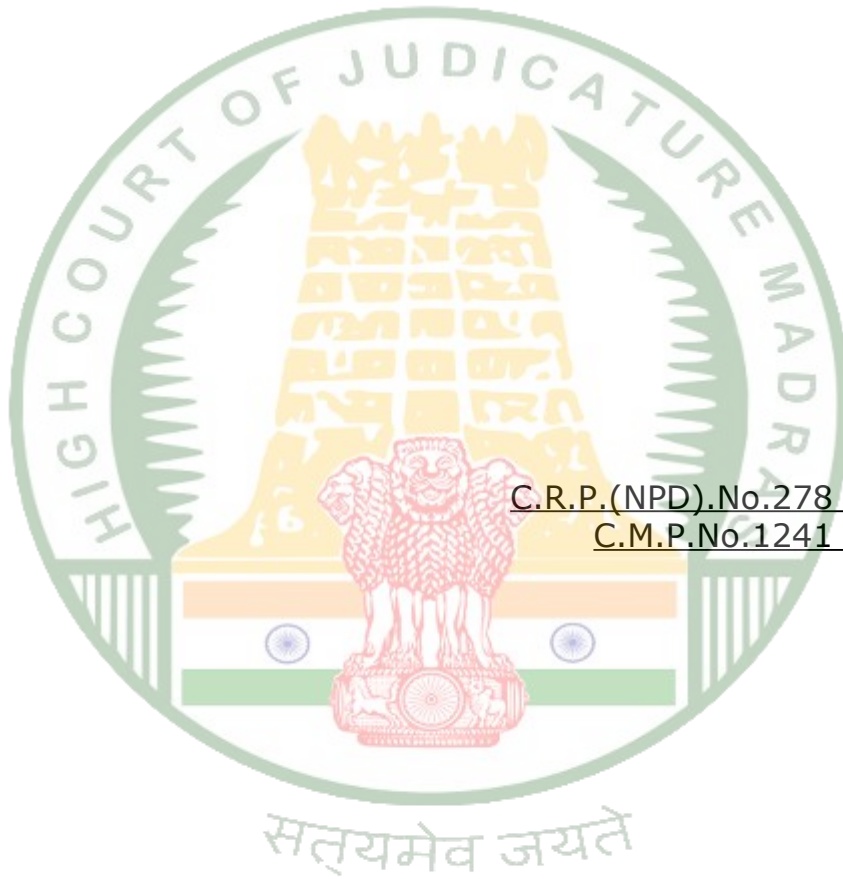


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M.GOVINDARAJ,J.

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