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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.07.2019
(Reserved on 29.04.2019)

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP (NPD) (MD) No.333 of 2011
and
M.P (MD) No.1 of 2011

Ponmani

... Petitioner/Petitioner

vs.

Mariammal (Died)

- 1) Venisula
- 2) Antonyammal
- 3) Arasu Rathinam
- 4) Antony Samy
- 5) Sumathi
- 6) Victoria
- 7) Rani
- 8) Alphonse
- 9) Xavier
- 10) Hensing Bharatha Ratna

... Respondents/Respondents

(The 1st respondent died during the pendency of the above I.A.No.312/2007 and her L.Rs R2, R10 and R11 are already party to the said I.A. And the Respondents 3 to 10 are exparte before the Lower Court and hence R2 to R10 are given up in this C.R.P.)

Petition filed under Article 227 of the Constitution of India, to call for the records in I.A.No.312 of 2007 in A.S.No.71 of 2007 on the file of the Sub Court, Valliyoor and set aside the order dated 09.07.2010 and allow the said I.A.No.312/2007.

For Petitioner : Mr.C.Dhana Seelan
For R1, R9 & R10 : Mr.H.Arumugam
R2 to R8 : Given up

ORDER

The 3rd defendant in the suit has filed this revision petition. The respondents 1 and 2 are the plaintiffs in the suit.

2.The 1st respondent died, during the pendency of I.A.No.312/2007 filed before the lower appellate court. The respondents 2, 10 and 11 were already on record as legal representatives of the deceased 1st respondent in the said interlocutory application. The respondents 3 to 10 remained



exparte before the lower appellate court. Hence, notice to them has been dispensed with.

3.The plaintiffs filed the suit for declaration and injunction in respect of the suit property. The claim of the plaintiffs was based upon the registered will executed by Susai Antony [the father of the 1st plaintiff and brother of the defendants 1 and 2] dated 09.04.1986 which was marked as Ex.A8. The execution of Ex.A8 was not disputed by the defendants.

4.The 3rd defendant who is the revision petitioner, is the wife of the 2nd defendant. The defendants relied upon the registered will dated 19.03.1996 allegedly executed by Susai Antony who died on 31.03.1996 within two weeks of the will.

5.The execution of the will was denied, the circumstances under which the will was executed was doubted and the sound disposing state of mind was disputed by the plaintiffs.

6.In order to prove the will, the defendants had examined three witnesses namely, DW2, the person who accompanied the testator at the time of registration of the will, DW3 one of the attesting witnesses and DW4 the scribe of the will. The trial Court found that execution of the will was not proved and with the following reasoning, rejected the claim of the defendants and accepted the case of the plaintiffs.

a)The first page of Ex.B1 will remained without any signature or thumb impression of the testator;

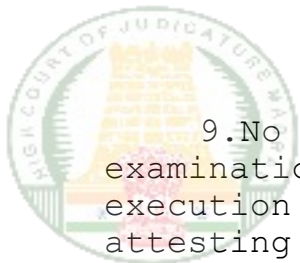
b)there was smudging in the thumb impression;

c)Ex.B1-will did not mention any thing about the earlier will of Susai Antony namely, Ex.A8;

d)there was signature in Ex.A8-will, but Ex.B1-will carried only thumb impression;

7.One of the findings of the Trial Court that there was smudging in the thumb impression caused an impression in the mind of D3 that if further proof is adduced, it would strengthen the proof regarding execution of will. With that idea in mind, before the first appellate court, the appellant/D3 took out an application for sending the disputed will for the opinion of the handwriting expert, but that application came to be dismissed. Challenging the same, the present revision petition has been filed by D3.

8.Learned counsel for the revision petitioner pointed out that the reasons stated by the first appellate court for dismissing I.A.No.312/2007 is patently wrong and this Court has to exercise the jurisdiction to correct the manifest illegality in the order passed. The first appellate court while dismissing the prayer, has given the reason that the will has to be proved only by the examination of the attesting witness and it cannot be proved by the comparison of the disputed signature with the admitted signature of the executant. This reasoning is under challenge.



9.No doubt, under Section 68 of the Indian Evidence Act, examination of the attesting witness is mandatory to prove the execution of the will. In this case also, it is not as if that no attesting witness has been examined and without examining witnesses, the defendants are seeking comparison of the disputed thumb impression with the admitted thumb impression. This is a case where, the defendants have examined as many as 3 witnesses before the trial Court to prove the execution of the will, but the trial Court did not believe those witnesses and has pointed out some smudging in the thumb impression and because of that, the defendants are seeking comparison of the disputed thumb impression with the admitted thumb impression. It is for the defendants to convince and satisfy the Court, regarding other aspects of the case, but the mode of proof as contemplated under the law has been complied with by the defendants. Additionally, the defendants wanted to prove that the thumb impression as found in Ex.B1-will was that of Susai Antony. If the additional evidence is going to help the court to arrive at the truth, the dismissal of the claim of the 3rd defendant, is unwarranted.

10.The reasoning given by the 1st appellate court for dismissing the application seeking expert opinion is not legally sound. Under the circumstances, the application seeking expert opinion based on comparison of the admitted thumb impression with that of the disputed thumb impression, has to be allowed and it is allowed. The matter is remitted back to the lower appellate Court with the direction to the revision petitioner herein to take appropriate steps for comparison of the thumb impression as found in Ex.B1 with that of the admitted thumb impression, preferably within a period of three months from the date of communication of the order to the lower appellate court. The lower appellate court after receipt of the report shall provide sufficient opportunity to both parties and to decide the appeal within a period of three months thereafter.

11.With the above direction, this revision petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

// True Copy //

Sub Assistant Registrar(CS)

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To

The Subordinate Judge,
Valliyoor.

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+1CC TO MR.H.ARUMUGAM, Advocate Sr. No.78733

+1CC TO MR.C.DHANASEELAN, Advocate Sr. No. 79250

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30.07.2019

(CO)

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