

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.09.2020

CORAM:

THE HON'BLE MS.JUSTICE V.M.VELUMANI

C.R.P. (PD). Nos.3052 & 3053 of 2013
and M.P. No. 1 of 2013

Varadappan

... Petitioner in both C.R.Ps.

Vs

1.State by its District Collector,
Namakkal District,
Collectorate,
Tiruchengode Road,
Namakkal District.

2.The Tahsildar,
O/o. The Tahsildar,
Mohanur Road,
Namakkal District.

3.The Village Administrative Officer,
Thalambadi Village,
Namakkal Taluk.

... Respondents in both C.R.Ps.

Common Prayer: Civil Revision Petitions are filed under Article 227 of the Constitution of India, to set aside the fair and decretal orders dated 08.04.2013 made in I.A. Nos.334 & 335 of 2013 respectively in O.S. No.561 of 2007 on the file of the Principal District Munsif Court, Namakkal.

For Petitioner : Mr. Vishnu
for Mr. N.Manokaran

For Respondents : Mr. S. Jaganathan,
Government Advocate (CS)

COMMON ORDER

The matter is heard through "Video Conferencing".

The present Civil Revision Petitions are filed to set aside the fair and decretal orders dated 08.04.2013 made in I.A.Nos.334 & 335 of 2013 respectively in O.S. No.561 of 2007 on the file of the Principal District Munsif Court, Namakkal.

2. The issue involved in both the Civil Revision Petitions are interlinked and hence, they are disposed of by this common order.

3. The petitioner is the plaintiff and the respondents are the defendants in O.S. No.561 of 2007 on the file of the Principal District Munsif Court, Namakkal. The petitioners filed the said suit for declaration and injunction. By the judgment and decree dated 10.12.2011, the said suit was dismissed

and in the appeal filed by the petitioner in A.S. No.29 of 2012, the judgment and decree in O.S.No.561 of 2007 was set aside and suit was remanded to Trial Court to give an opportunity to the petitioner to examine the witness to Ex.A4 – Will, executed by the petitioner's father. After remand, when the suit was posted for evidence on behalf of the petitioner, the petitioner filed two petitions in I.A.Nos.334 and 335 of 2013 to recall P.W.1 and for a permission to mark the Suit Register extract in O.S.No.353 of 1968 as evidence in O.S.No.561 of 2007. The respondents filed counter affidavit and opposed the said petitions. The learned Judge considering the order of remand in A.S.No.29 of 2012 made by the First Appellate Judge, dismissed both the petitions.

4. Against the said orders of dismissal dated 08.04.2013 made in I.A. Nos.334 & 335 of 2013 respectively in O.S. No.561 of 2007, the petitioner has come out with the present two Civil Revision Petitions.

5. The learned counsel appearing for the petitioner contended that the Appellate Court set aside the judgment and decree of the Trial Court and

remanded the suit to give an opportunity to produce witness to prove his case. The First Appellate Court has remanded the suit not only for proving Ex.A4 – Will, but ordered *de nova* trial. The Suit Register extract of O.S.No.353 of 1968 on the file of the Sub Court, Salem relates to the Will – Ex.A4 and no prejudice would be caused to the respondents by recalling P.W.1 and marking the said document. The petition under Order XVIII Rule 17 of C.P.C. must be considered liberally. The Hon'ble Apex Court has held that amendment of C.P.C. has not restricted the power of the Trial Court, but recall and reopen the evidence to mark the document. The denial of opportunity to mark a document is denial of fair trial. As per the judgment of the First Appellate Court in A.S.No.29 of 2012, the Trial Court ought to have granted an opportunity to the petitioner to prove his case and prayed for setting aside the orders of the learned Judge in the two petitions and allow the Civil Revision Petitions.

6. Mr.S.Jaganathan, learned Government Advocate (CS) appearing for the respondents contended that the order of remand is very specific, granting opportunity to the petitioner to examine the attesting witness to prove Ex.A4–

Will. The Appellate Court did not order *de nova* trial. The learned Judge considering the order of remand properly, dismissed both the petitions by giving valid reason and prayed for dismissal of the Civil Revision Petitions.

7. Heard the learned counsel appearing for the petitioner as well as the learned Government Advocate (CS) appearing for the respondents and perused the materials available on record.

8. From the materials on record, it is seen that the suit filed by the petitioner was dismissed on 10.12.2011. The petitioner filed A.S.No.29 of 2012. The learned First Appellate Judge considering the claim of the petitioner in the suit and the judgment of the Trial Court, held that no witness was examined to prove Ex.A4, based on which the petitioner is claiming the relief. In order to give an opportunity to the petitioner to prove the Will by examining attesting witness, the learned First Appellate Judge set aside the judgment and decree and remanded the suit to the Trial Court. The contention of the learned counsel appearing for the petitioner that the Appellate Court ordered *de nova* trial is contrary to the judgment rendered by the First

Appellate Court. The judgment has to be considered in its entirety and considering few sentences, it cannot be held that the Appellate Court ordered *de nova* trial. A reading of the judgment of the First Appellate Court makes it clear that the suit was remanded only to give an opportunity to the petitioner to examine the attesting witness and the First Appellate Court did not order *de nova* trial. It is seen from the impugned order of the learned Judge that the petitioner has taken steps to examine the witness to the Will. The two witnesses were dead and witness summons could not be served on the third person. The petitioner has stated that no further proceedings with regard to summoning of the witness is necessary. Hence, the petitioner has given up his right to examine the attesting witness to the Will - Ex.A4, as per the order of remand.

9. As far as the contention of the learned counsel appearing for the petitioner that Order XVIII Rule 17 of C.P.C. must be considered liberally is concerned, the Courts have power to recall any witness at any stage of the suit for proper adjudication of the issue in the suit and the said power is discretionary and the same has to be exercised judicially in the interest of

justice, for clarification and not for filling up lacuna. In the present case, the petitioner is seeking to recall and mark extract of Suit Register in O.S.No.353 of 1968. The Trial Court considering the order of remand, averments in the affidavit and counter affidavit, dismissed both the petitions by giving cogent and valid reason. There is no reason to interfere in the said orders of the learned Judge.

10. In the result, both the Civil Revision Petitions are dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

24.09.2020

gsa
Index: Yes/No

To

The Principal District Munsif,
Namakkal.

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V.M.VELUMANI,J.

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