



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.01.2020

CORAM:

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (MD)Nos.2298 & 1770 of 2019

and

C.M.P. (MD)No.9070 of 2019

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N.Sivasubramanian

...Revision Petitioner/
Petitioner/ 4th Defendant
in both C.R.P's

Vs.

N.Kumaresan

.. Respondent/Respondent/
Plaintiff in both C.R.P's

COMMON PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the fair and decretal order passed in I.A.Nos.229 & 230 of 2018 in O.S.No.232 of 2011 dated 27.08.2019, on the file of the Additional Sub-Court, Karur.

In both cases:

For Petitioner : Mr.K.Suresh
For Respondent : Mr.R.Mathiyalagan

C O M M O N O R D E R

Since the issue involved in both the cases are one and the same, they are disposed of by this common order.

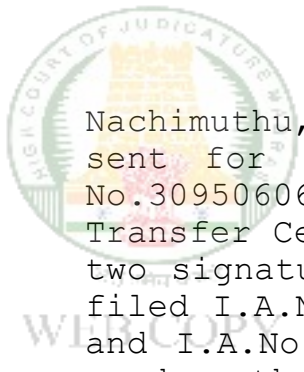
2. These civil revision petitions have been filed against the order passed in I.A.Nos.229 & 230 of 2018 in O.S.No.232 of 2011 dated 27.08.2019, on the file of the Additional Sub-Court, Karur.

3. The petitioner herein is the fourth defendant. The respondent is the plaintiff in the suit. The respondent filed a suit in O.S.No.232 of 2011 for a prayer of partition and for allotment of 1/10th share in the suit properties. The revision petitioner as the fourth defendant, has filed two Interlocutory Applications viz. I.A.No.229 of 2018, to send for the admission form from the Bank and I.A.No.230 of 2018 for appointment of Court Commissioner to take the documents for comparison by an expert.

4. The trial Court dismissed both I.A.Nos.229 & 230 of 2018 against which the revision petitioner has preferred the present civil revision petitions. The brief substance of I.A.Nos.229 & 230 of 2018 are as follows:-

The father of the petitioner executed a will on 19.11.2010. The petitioner was examined as D.W.1, attesters of the Will were examined as D.W.2 and D.W.3. At the time of cross examination of D.W.1, the signature of Nachimuthu was questioned by the plaintiff.

In the above circumstances, it is necessary that the signature of



Nachimuthu, which is in the bank account admission form, has to be sent for from the Central Bank of India pertaining to Account No.3095060604. The said Natchimuthu has also signed in the School Transfer Certificate of the third defendant. The comparison of these two signatures with the disputed will is necessary. The petitioner filed I.A.No.229 of 2018 to send for the account form from the Bank and I.A.No.230 of 2018 for appointment of a Court Commissioner to produce the documents for expert opinion.

5. The brief substance of the counter is as follows:-

The original suit was filed in the year 2011 and earlier the petitioner was set as *ex-parte* on 25.08.2012. Subsequently, after the examination of P.W.1, since the third defendant was not ready to cross examine P.W.1, the third defendant was again set as *ex-parte* on 25.07.2015. The petitioner filed a petition in I.A.No.63 of 2017 to set aside the *ex-parte* order. Even after the *ex-parte* order was set aside, the petitioner did not come forward to cross examine D.W.1. Once again, the petitioner was set as *ex-parte*. As per the orders passed in I.A.No.527, 528 and 529 of 2017, the *ex-parte* orders were subsequently set aside. The scribe of the Will and attestors of the Will were examined and cross examined. Only with a motive to drag on the proceedings, the petitioner has come forward with these two civil revision petitions and hence, the petitions are to be dismissed.

6. The trial Court dismissed both the petitions against which the revision petitioner preferred this revision on the following grounds.

The respondent has not denied the Will dated 19.11.2010 in his pleadings. Only during the cross examination of D.W.1, the respondent counsel made a suggestion regarding the signatures and finger prints found in the Will. The cross examination was done on 30.01.2018. The expert opinion will facilitate the Court in arriving at a conclusion regarding the genuineness of the Will. It is also seen that no reply statement was filed by the respondent denying the Will. The examination of the attesting witnesses will not be a hurdle for examination of the signatures by an expert. The signatures to be compared are contemporary in nature and therefore, an opportunity for the petitioner to establish his case has to be given.

7. In the counter affidavit filed by the respondent, it is stated that one Natchimuthu has purchased the property and he has two wives. The plaintiff and the second defendant are the children of the first wife and the fifth defendant is the second wife. The defendants 3 and 4 are the children of the second wife. Natchimuthu died on 23.01.2011. The petitioner is the fourth defendant in the suit. He entered appearance on 13.03.2012. Even after getting so many adjournments, he has not filed the written statement and was set *ex-parte* on 25.08.2012. The respondent was examined as P.W.1 on



29.03.2016. The third defendant did not cross examine the plaintiff till 25.07.2016. Only on 29.11.2016, when the case was posted for arguments, the petitioner filed a petition to set aside the ex-parte order in I.A.No.63 of 2017. That the petition was allowed on 23.02.2017.

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8. It is further submitted that the petitioner failed to cross-examine the respondent and again he was set as ex-parte. The petitioner filed I.A.Nos.527, 528 & 529 of 2018 petitions to set aside the ex-parte decree, to recall witnesses and re-open the trial and all those petitions were allowed. The petitioner was cross examined only on 28.08.2017. The petitioner examined himself and two other witnesses as D.W.1 to D.W.3. When the suit was posted for arguments, the petitioner came forward with this petition to drag on the case. At the time of cross examination of D.W.1, he admitted that the Will is now in the hands of the second defendant, but the unregistered Will was not filed along with the written statement of D.W.2 and therefore, the petitions are to be dismissed.

9. On the side of the petitioner, it is stated that though the petitioner has mentioned about the Will in the written statement, the plaintiff did not file any reply statement questioning the thumb impression and the signature in the Will. Only during the cross examination of D.W.1 on 30.01.2018, the plaintiff questioned the signature in the Will. The petitioner has to call for contemporary documents and hence, the petitioner filed this petition on 02.03.2018 and there is no delay on the part of the petitioner.

10. On the side of the petitioner, it is stated that, the petitioner filed a petition to send for the account opening form from the Bank and that form was filled up in the year 2010. Except delay, no other reason is given in the order of the trial Court. A petition for comparing the signatures can be filled at any stage of the suit. There is no law preventing the petitioner from filing a petition subsequent to the examination of attesting witnesses. If the respondents filed a reply statement denying the signatures in the Will, the petitioner might have filed the petition much earlier.

11. On the side of the petitioner, a judgment in **Kuppanna Gounder and another vs. R.Sivakami** case reported in 1998 3 CTC 650 is cited, wherein it has been referred as follows:-

"12. Merely because the applications were filed at the time of trial to which every one of the parties and their counsel have contributed, the Court below ought not to have rejected interlocutory applications without entertaining the same. The object of the Court should be to render substantial justice and sufficient opportunity should be afforded to prove the disputed Will. As already pointed out not only the party but also the counsel



appearing for the parties on either side have contributed for the delay and present situation, not to speak of the delay in Courts and not to speak of the innumerable boycotts resorted to by the members of Bar which at times results in unexpected results or consequences."

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12. On the side of the petitioner another judgment of the High Court of Madras published in **2012 1 ChLT 653** in the case of **D.Janaki vs S.Jayalakshmi**, is cited wherein it decided that there is no bar to send the documents for expert opinion.

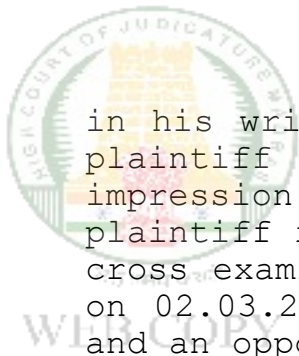
13. On the side of the petitioner, another judgment of the High Court of Madras reported in **2010 0 Supreme (Mad) 4795** in the case of **Balavelumani and others vs. A.Thulasiammal and others**, wherein the High Court has observed that an occasion to file an application to send the disputed signature for comparison arose only after the examination of the concerned person and if the said application is filed immediately thereafter. It cannot be held that such an application is filed to drag on the proceedings.

14. On the side of the petitioner, another judgment in the case of **Palaniammal and others vs. Palaniswami** reported in **2003 3 LW 649**, is cited wherein it has been referred in paragraph no.6 as follows:-

"Merely because of the reason that the trial Court has compared the admitted signature and the disputed signature invoking Section 73 of the Evidence Act, there is no bar or ban for the first appellate Court to send the documents for canvassing the expert's opinion. Under such circumstances, an opportunity has got to be given for comparison of the documents by a handwriting expert. The Court is unable to notice any lack of bonafide, but, there was delay. The Court is of the view that the delay that was caused in making such a request before the trial Court cannot be equated to the lack of bonafide. Therefore, it is a fit case where the delay has got to be compensated by way of awarding reasonable costs along with a direction to the first appellate Court to dispose of the appeal within a stipulated time."

15. On the side of the respondent, it is stated that with an intention to delay the proceedings, the petitioner was absent and he was set *ex parte*, several times. Even after the examination of attesting witnesses, the petitioner has filed these petitions at the stage of arguments and only to fill up the lacuna and to drag on the proceedings, the petitioner has come forward with these petitions.

16. It is seen that the petitioner was set as *ex parte* twice in the suit. It is seen that the petitioner narrated about the Will



in his written statements. But no reply statement was filed by the plaintiff questioning the genuineness of the signatures and thumb impression. Only during the cross examination of D.W.1, the plaintiff raised the above point. It is seen that the petitioner was cross examined on 30.01.2018 and he came forward with this petition on 02.03.2018. The claim of the petitioner is based upon the Will and an opportunity for the petitioner to put forth his case has to be given. Except the delay, no other reason is stated in the order of the trial Court.

17. In the above circumstances, the order of the trial Court has to be set aside and the petitioner should be given an opportunity to send for the admitted documents and to send the disputed documents for comparison by an expert. Hence, the order passed by the trial court in I.A.Nos.229 & 230 of 2018 in O.S.No.232 of 2011 dated 27.08.2019, on the file of the Additional Sub-Court, Karur are set aside and the trial Court is directed to appoint a Court Commissioner as per law to send the documents for expert opinion.

18. With the above directions, the Civil Revision Petitions are allowed. Consequently, connected C.M.P.(MD)No.9070 of 2019 is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

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Sub Assistant Registrar(CS)

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To:

1) The Additional Subordinate Judge,
Karur.

Copy to:

The Section Officer, (2 copies)
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

Common Order made in
C.R.P. (MD)Nos.2298 & 1770 of 2019
Dated:08.01.2020

SMA/28/02/2020/5P/4C