

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.09.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.1762 of 2016
and C.M.P.No.9333 of 2016

J.Ravi

... Petitioner

Vs.

1.Prince Thamburaj

2.Noble Thamburaj

3.Victor Thamburaj

4.Sophie Holloway

5.Geetha Prince

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 02.04.2016 made in I.A.No.6 of 2016 in O.S.No.45 of 2012 on the file of I Additional District and Sessions Court, Vellore.

For Petitioner : Mr.K.Sukumaran
For R1 to R3 and R5 : Ms.Mehek
for Mr.Thomas T.Jacob
For R4 : No appearance

ORDER

(The matter is heard through “Video Conferencing/Hybrid Mode”).)

Civil Revision Petition is filed against the fair and decretal order dated 02.04.2016 made in I.A.No.6 of 2016 in O.S.No.45 of 2012 on the file of I Additional District and Sessions Court, Vellore.

2.The petitioner is plaintiff and respondents are the defendants in O.S.No.45 of 2012 on the file of I Additional District and Sessions Court, Vellore. The petitioner filed the said suit for partition of 1/4th share in Item No.1 of the suit schedule property and for a direction to the respondents to pay a sum of Rs.3,76,469.75 together with interest @ 9% per annum from the date of plaint till the date of realisation. The respondents filed written statement on 09.06.2012 and are contesting the suit. The trial commenced. The petitioner examined himself as P.W.1 and

examined two other witnesses as P.W.2 and P.W.3. When the suit was posted for evidence on behalf of the respondents, the respondents filed I.A.No.6 of 2016 under Order VIII Rule 9 and Section 151 of C.P.C. for granting leave to file additional written statement along with the documents.

3. According to the respondents, at the time of filing written statement, due to inadvertence, several facts were not mentioned in the written statement filed on 09.06.2012. Only during trial, they came to know about the several Wills executed by the deceased Dr.Lalitha Selwyn and came to know about the registered Will dated 25.02.1998 executed by Dr.Lalitha Selwyn only, in the year 2015. The 5th respondent obtained certified copy of the said Will from the concerned Sub-Registrar Office, only on 23.01.2015. The details of the Will dated 25.02.1998 were not mentioned in the written statement filed on 09.06.2012, which is very much essential for adjudication of their case. As per the Will dated 07.07.2007 and as per the wish of Dr.Lalitha Selwyn, a partition

has already been done in between the petitioner, respondents and other beneficiaries with respect to movable properties. As per the direction mentioned in the Will of Dr.Lalitha Selwyn, her gold jewels, silver articles and other things had been distributed to the petitioner, his wife, respondents and other beneficiaries. But due to inadvertence, such fact was not mentioned in the earlier written statement filed on 09.06.2012 and the Wills executed by Dr.Lalitha Selwyn were not filed along with previous written statement. The respondents further stated that after the demise of Dr.Lalitha Selwyn, the salaries of servant maids of Dr.Lalitha Selwyn had been given by the respondents. House taxes, property taxes, telephone bills and electricity bills were also paid by the respondents for few years, amounting to Rs.3,34,575/-. The petitioner has to give his respective share for the above expenses spent by the respondents and prayed to treat their claim as counter claim and for a direction to pay the Court fee. Due to mistake and over sight, they did not mention about these facts and did not file those documents in their previous written statement. At the time of evidence let in by the petitioner, the respondents

came to know about several new facts, which must be put forth before the Court. All the above new facts are not mentioned in the earlier written statement, which are very much essential for the proper adjudication and to meet out the ends of justice in this case.

4.The petitioner filed counter affidavit and denied various averments made in the affidavit. It is the specific case of the petitioner that Dr.Lalitha Selwyn died intestate and claimed partition of 1/4th share in the suit property. The respondents filed written statement stating that there is a Will dated 07.07.2007 and claimed that they are beneficiaries under the said Will. In the written statement, they further pleaded that even assuming without admitting that Dr.Lalitha Selwyn died intestate by virtue of Section 48 of the Indian Succession Act, the petitioner is entitled to only 1/6th share and not 1/4th share as claimed in the suit. The petitioner further stated that during his cross-examination as P.W.1, the counsel for the defendants/respondents herein put a suggestion that Will dated 25.02.1998 was cancelled by subsequent Will dated 07.07.2007.

By this additional written statement, the respondents are introducing a new case by giving up earlier case in the written statement. The respondents cannot rely on the Will dated 25.02.1998, which was not probated and prayed for dismissal of the said I.A.

5.The learned Judge considering the averments made in the affidavit and counter affidavit, allowed I.A. holding that the respondents obtained certified copy of the Will dated 25.02.1998 only on 23.01.2015 and it was not available at the time of filing written statement by the respondents. Further, the Will dated 25.02.1998 is a registered Will and question of fabrication does not arise. By additional written statement, the respondents are not introducing any new case and no prejudice will be caused to the petitioner.

6.Against the said fair and decretal order dated 02.04.2016 made in I.A.No.6 of 2016 in O.S.No.45 of 2012, the petitioner has come out with the present Civil Revision Petition.

7.The learned counsel appearing for the petitioner reiterated the averments made in the counter affidavit and submitted that the learned Judge failed to see that the respondents filed present I.A., when the suit was posted for defendants' side evidence with ulterior motive to drag on the proceedings and to deprive the petitioner to realise the fruits of the decree that may be passed in his favour. The learned Judge failed to see that the respondents relied on the Will dated 07.07.2007 in the earlier written statement and now they are introducing the new set of defence by relying upon the Will dated 25.02.1998 by giving up their original defence in the written statement filed on 09.06.2012. The learned Judge failed to see that the respondents by filing application under Order VIII Rule 9 of C.P.C. are only seeking amendment of earlier pleadings in the guise of filing additional written statement and are attempting to withdraw the categorical admission made in the original written statement. The respondents are introducing new set of defence and it will amount to raising a fresh cause of action. While considering the application under Order VIII Rule 9 of C.P.C., the learned Judge has to

consider the conduct of the applicant, stage of the case, delay that will cause prejudice to the other side. According to the respondents, they obtained certified copy of the Will dated 25.02.1998 on 23.01.2015. Based on the said Will, the petitioner was cross-examined by the counsel for the defendants/respondents herein and according to the respondents, the Will dated 25.02.1998 was cancelled by subsequent Will dated 07.07.2007. The said suggestion was answered by the petitioner that he does not know. The learned counsel appearing for the petitioner further contended that even after obtaining certified copy of the Will dated 25.02.1998 on 23.01.2015, the respondents filed present I.A. only in October 2015. The learned Judge failed to see even in the Will dated 07.07.2007, there is mention about the cancellation of the Will dated 25.02.1998. In view of the same, the respondents had knowledge about the existence of the Will dated 25.02.1998 at the time of filing of the written statement itself. Mere obtaining certified copy of the said Will on 23.01.2015, it does not vest any right on the respondents to approach the trial Court by filing I.A. under Order VIII Rule 9 of C.P.C., to file

additional written statement relying on the Will dated 25.02.1998. The respondents cannot be permitted to raise inconsistent plea without following the procedure under Order VI Rule 17 of C.P.C. The respondents have not proved that in spite of due diligence, they have not raised present plea and produced document in the earlier written statement filed on 09.06.2012 before commencement of trial and prayed for allowing the Civil Revision Petition.

8.The learned counsel appearing for the respondents 1 to 3 and 5 reiterated the averments made in the affidavit and contended that only on 23.01.2015, the respondents obtained certified copy of the Will dated 25.02.1998 and filed present I.A. for leave to file additional written statement along with documents. The Will dated 25.02.1998 is a registered Will and therefore, no prejudice would be caused to the petitioner by filing additional written statement as well as by marking the said registered Will. As per the registered Will, only 5th respondent is the beneficiary of the properties of Dr.Lalitha Selwyn and the petitioner has

no share in the properties of Dr.Lalitha Selwyn. The learned Judge considering the entire materials, allowed I.A. and there is no error in the order of the learned Judge. The learned counsel for the respondents 1 to 3 and 5 further contended that the learned Judge has also given liberty to the petitioner to file reply to the additional written statement. In view of the same, no prejudice will be caused to the petitioner by filing additional written statement along with the documents and prayed for dismissal of the Civil Revision Petition.

9.Though notice has been served on the 4th respondent and her name is printed in the cause list, there is no representation for the 4th respondent either in person or through counsel.

10.Heard the learned counsel appearing for the petitioner as well as the learned counsel appearing for the respondents 1 to 3 and 5 and perused the entire materials on record.

11.From the materials on record, it is seen that the petitioner filed suit for partition of suit property and allot 1/4th share to him. According to the petitioner, the suit property belonged to one Dr.Lalitha Selwyn and she died intestate. As a legal heir of Dr.Lalitha Selwyn, the petitioner and respondents are entitled to share in the property of Dr.Lalitha Selwyn. The respondents filed written statement and stated that Dr.Lalitha Selwyn executed a Will dated 07.07.2007 and as per the said Will, the respondents are beneficiaries and petitioner has no share in the suit schedule property of Dr.Lalitha Selwyn. They have also taken a stand in the written statement that even if the stand of the petitioner is accepted that Dr.Lalitha Selwyn died intestate, the petitioner will be entitled to only 1/6th share and not 1/4th share as claimed by him. On these pleadings, trial commenced. During cross-examination of petitioner as P.W.1, the counsel for the defendants/respondents herein has put a suggestion that the Will dated 25.02.1998 was cancelled by the Will dated 07.07.2007 of Dr.Lalitha Selwyn and the property will go only to the beneficiaries of the Will dated 07.07.2007. The petitioner answered

that he does not know. From the above pleadings of the respondents in the written statement, it is clear that the Will dated 07.07.2007 was with them, when they filed written statement. Further from the suggestion in the cross-examination and cross-examination of P.W.1 by counsel for the defendants/respondents herein, it is clear that the Will dated 25.02.1998 was cancelled by the Will dated 07.07.2007. Therefore, it is clear that the respondents claimed their right over the suit property based on the Will dated 07.07.2007, wherein the Will dated 25.02.1998 was cancelled. The respondents in the affidavit filed in support of the above application have stated that by inadvertence, they failed to mention various Wills of Dr.Lalitha Selwyn. The respondents having claimed their right over the suit property in the written statement based on the Will dated 07.07.2007, now they cannot introduce a new case claiming right based on the Will dated 25.02.1998, which according to them was cancelled by subsequent Will dated 07.07.2007. By these pleadings, they are introducing a new case and nature of the claim is changed.

12.Further, it is the case of the respondents that due to inadvertence, the Wills of Dr.Lalitha Selwyn were not mentioned in the written statement filed by them on 09.06.2012. The respondents have not stated that in spite of due diligence, they could not get the Will dated 25.02.1998 earlier, especially before commencement of trial. At the time of cross-examination of P.W.1, the respondents knew about the Will dated 25.02.1998 and a suggestion was made that in the Will dated 07.07.2007, earlier Will dated 25.02.1998 was cancelled. The respondents even thereafter, have not taken any steps before the cross-examination of P.W.1 to file additional written statement and documents. Further it is the admitted case that the respondents obtained certified copy of the Will dated 25.02.1998 on 23.01.2015, but have filed application only on 02.10.2015 and have not explained the delay during the said period.

13.The learned Judge failed to consider that the respondents have not given any acceptable and valid reason for not filing application for

leave to file additional written statement with documents before commencement of trial. The reason given by the learned Judge that the Will dated 25.02.1998 is a registered Will and there is no possibility of fabrication, is not a valid reason for allowing I.A. Without considering the fact that the respondents are not diligent enough to file additional written statement and Will dated 25.02.1998 before commencement of trial, by that additional written statement, the respondents are introducing a new case and changing the character of the suit, the learned Judge has committed an error and irregularity in allowing I.A. without properly appreciating the materials and provisions of C.P.C. For the above reasons, the order of the learned Judge is liable to be set aside and is hereby set aside. I.A.No.6 of 2016 in O.S.No.45 of 2012 is dismissed. The learned Judge is directed to return the additional written statement with documents.

14. With the above directions, the Civil Revision Petition stands allowed. The suit is of the year 2012 and is in the stage of examination of

the witnesses on behalf of the defendants/respondents herein. In view of the same, the learned Judge is directed to dispose of the suit as expeditiously as possible, in any event, within four months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

27.09.2021

Index : Yes/No
Internet: Yes/No
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To

I Additional Judge
District and Sessions Court, Vellore.

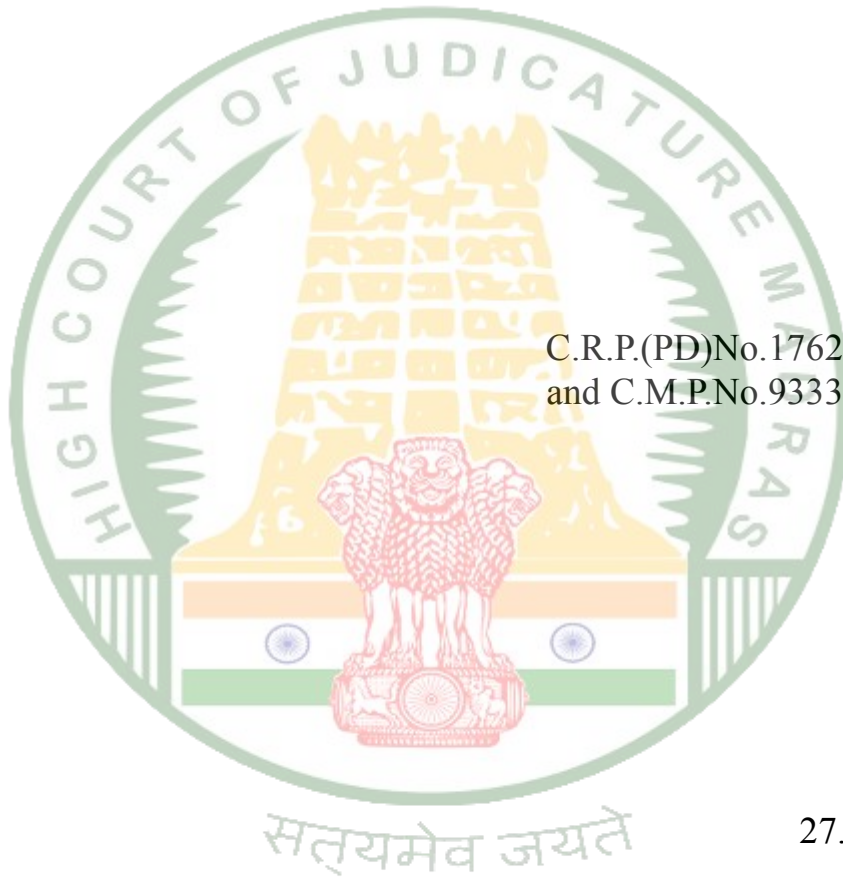


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V.M.VELUMANI,J.

Kj



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