

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.10.2021

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.NO.16315 OF 2021

&

W.M.P.NO.17284 OF 2021

A.Kirubanithi

... Petitioner

.Vs.

The Sub Registrar,  
Thirukovilur Sub Registrar Office,  
Thirukovilur Taluk,  
Kallakurichi District

... Respondent

PRAYER:-

Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records of the respondent pertaining to his order vide proceedings in Check Slip No.RFL/Thirukovilur/88/2021 dated 23.07.2021 and quash the same and consequently direct the respondent herein to receive the Mortgage deed dated 23.07.2021 executed by the petitioner, register and return the document to the petitioner.

For Petitioner : Mr.G.Arul Murugan

For Respondent : Mr.Yogesh Kannadasan  
Government Advocate

O R D E R

This Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records of the respondent pertaining to his order vide proceedings in Check Slip No.RFL/Thirukovilur/88/2021 dated 23.07.2021 and quash the same and consequently, direct the respondent herein to receive the Mortgage deed dated 23.07.2021 executed by the petitioner, register and return the document to the petitioner.

2. The brief facts of the case is that the petitioner is the absolute owner of the plot measuring an extent of 2400 sq.ft., with house bearing No.35 of Sri Karthikeyan Nagar Extension, comprised in Survey No.732/8C of Thirukovilur (South) village and in possession and enjoyment of the property and Patta No.3357 was issued in favour of the petitioner by subdividing S.No.732/8C1B and 732/8CID. The petitioner purchased the same in the year 2005 and executed a settlement deed dated 08.01.2007 registered as document No.78 of 2007 in favour of his mother, namely, Sudamani Ammal. Thereafter, his mother, executed a unregistered Will dated 21.01.2021 bequeathing the above property in favour of the petitioner after his life time and the petitioner's mother died on 19.05.2021, due to health problems. As per the Will executed by petitioner's mother, petitioner received the property, pursuant to the application made to the Tahsildar, Thirukovilur, Patta No.3357 was transferred in favour of the petitioner in New Survey Nos.731/8C1B and 731/8C1D.

3. According to the petitioner, due to urgent financial assistance, on account of his mother's treatment, the petitioner approached one Mr.Arulraj and borrowed a sum of Rs.50,000/- for monthly interest by mortgaging the above property in his favour. Thereafter, a mortgage deed dated 23.07.2021 was executed in favour of Arulraj, however the respondent without registering the mortgage deed has passed the impugned check slip rejecting the mortgage document for registration stating that the property was received through an unregistered Will, and that the probate should be obtained from the court at the first instance.

4. It is the case of the petitioner that the impugned order passed by the respondent is on the face of it, is unsustainable and without any basis and the property is not situated within the City of Chennai for which a probate of the Will has to be obtained from this Court to deal with the property and the said property is situated in Thirukovilur District. In fact, pursuant to the petitioner's application, the Tahsildar, has acted upon the Will and Patta for the above property has been mutated in favour of the petitioner and as on date, the petitioner is the owner of the property. The interpretation given by the respondent is beyond his jurisdiction, unjustified and with malafide intentions. The beneficiaries can deal with the property as per the Will executed for the properties situated outside the local limits of the ordinary original civil jurisdiction of High Court of Judicature at Madras and only where the properties are situated within Chennai, the probate has to be obtained for the Will from the Court.

5. That apart, it is also the contention of the petitioner that Section 213(1) of the Indian Succession Act, 1925 makes it mandatory for every legatee or executor to obtain a probate of

the Will or Letter of Administration with the Will before they try to execute a Will. However, Section 213(2) r/w Section 57 of the Indian Succession Act, 1925 clearly carves out certain exceptions to the mandate under Section 213(1) of the Act. For useful reference Sections 57 and 213 of the Indian Succession Act, are extracted hereunder:-

#### Section 57.

Application of certain provisions of Part to a class of Wills made by Hindus, etc.—The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b), provided that marriage shall not revoke any such Will or codicil.

#### Section 213. Right as executor or legatee when established:

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This section shall not apply in the case of Wills made by Muhammadans or Indian Christians or and shall only apply

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the 4 [ordinary original civil jurisdiction] of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immoveable property situated within those limits.

6. It is also the case of the petitioner that a bare reading of Sections 213(2) and 57 of the Act, makes it clear that probate in respect of Wills made by any Hindu, Buddhist, Sikh or Jain, outside the local limits of the ordinary original civil jurisdiction of the High Courts of Madras and Bombay is not required. In support of the same, he has relied on the decision of the Hon'ble Supreme Court in Clarence Pais & Others Vs. Union of India reported in 2001 (4) SCC 325, wherein the validity of Section 213 of the Indian Succession Act, 1925 was challenged as unconstitutional and discriminatory against the Christians. Though the mortgage deed has been prepared and presented for registration, the respondent has refused to register the document and therefore, the petitioner is not able to complete the registration and borrow the loan, thereby seeks to allow the prayer in the Writ Petition.

7. The learned Government Advocate appearing for the respondent has filed a detailed counter affidavit by stating that the Inspector General of Registration has instructed under Circular No.18339/C1/2012 dated 25.04.2012 that the registering officer should insist presentation of previous original deed/deeds by which the executants acquired right over the property before registering the document and then verify the previous documents to satisfy himself that the executants have right over the property. The alleged Will dated 21.01.2021 was not registered and it is true that registration of Will is optional and not compulsory, as per Section 18(e) of the Registration Act. As the Will has not been registered or probated, the respondent could not satisfy the genuineness of the Will. Accordingly, the respondent has issued the impugned Check Slip Dated 23.07.2021 and thereby pleaded to dismiss the petition.

8. Heard the learned counsel on either side and perused the documents placed on record.

9. Considering the facts and circumstances of the case and in the light of the decision of the Hon'ble Supreme Court reported in (2020) 14 SCC 102 [Kanta Yadav Vs. Om Prakash Yadav and Others], wherein it is held that it is not necessary to seek probate or letters of administration in respect of properties or the persons, when they are not located in the States of Bengal, Madras or Bombay and the decision of Hon'ble Supreme Court in Clarence Pais and Others Vs. Union of India reported in (2001) 4 Supreme Court Cases 325 , this Court is of the view that the Impugned Refusal Check Slip dated 23.07.2021 seeking for a probate is liable to be set aside and accordingly the same is set aside. The respondent is directed to register the said mortgage deed presented by the petitioner by following due procedure as per Law as well as the guidelines issued in the aforesaid decision of the Hon'ble Apex Court after verifying the necessary documents within a period of eight weeks from the date of receipt of a copy of this order.

In view of the above, the present Writ Petition is allowed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-  
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

ssd

To

The Sub Registrar,  
Thirukovilur Sub Registrar Office,  
Thirukovilur Taluk,  
Kallakurichi District.

+1cc to Mr.G.Arul Murugan, Advocate, S.R.No.52478  
+1cc to the Government Pleader, S.R.No.53209

W.P.No.16315 of 2021 &  
W.M.P.No.17284 of 2021

RSI(CO)  
PBS/28/10/2021