

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.03.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.NPD.Nos.2455 and 2456 of 2014

and
MP.No.1 of 2014

CRP.NPD.Nos.2455 of 2014

1. Palanisamy
2. Dhakshinamoorthy ... Petitioners

Vs.

1. Karthikeyan
2. Rangasamy
3. Kailasam
4. Srirangan ... Respondents

PRAYER: The Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 22.11.2013 made in I.A.No.650 of 2013 in O.S.No.76 of 2011 on the file of the learned First Additional Sub Court, Erode.

For Petitioners : Mr.N.Manokaran

For Respondents : M/s.Zeenath Begum (for R1)
: Notice Served (for R2 to R4)

CRP.NPD.Nos.2456 of 2014

1. Palanisamy
2. Dhakshinamoorthy

... Petitioners

Vs.

1. Karthikeyan
2. Rangasamy
3. Kailasam
4. Srirangan

... Respondents

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For Petitioners : Mr.N.Manokaran

For Respondents : M/s.Zeenath Begum (for R1)
: Notice Served (for R2 to R4)

COMMON ORDER

These Civil Revision Petitions are directed as against the fair and decretal orders passed in I.A.Nos.650 and 651 of 2013 in O.S.No.76 of 2011 dated 22.11.2013 on the file of the First Additional Sub Court, Erode, thereby, allowing the petitions to re-open the suit in O.S.No.76 of 2011 and to receive in evidence the deposition of D.W.2 in O.S.No.76 of 2011.

2. The first respondent is the fourth defendant in the suit filed by the petitioners for specific performance, on the strength of the agreement for sale dated 30.12.1998 in respect of the suit properties. To escape from the clutches of the suit for specific performance, the 2nd respondent already set up one of his daughter and filed a suit for partition in respect of the very same properties in O.S.No.408 of 2010. While pending the suit, the first respondent filed petitions to re-open and also sought permission to receive the deposition of D.W.2 recorded in O.S.No.408 of 2010 as evidence in O.S.No.76 of 2011 for the reason that mistakenly, one Bhuvaneshwaran, was examined as D.W.2 in O.S.No.408 of 2010, which is filed for partition. It was allowed for the reason that the said evidence is vital to dispose of the present suit and it does not amount to any proof of document or its admissibility. The question relating to admissibility of a document and whether it can be marked through the particular witness, cannot be determined now and it has to be adjudicated only at the time of trial. The learned counsel for the petitioners pointed out that under Section 33 of the Indian Evidence Act, 1872, it is not permitted and it can be marked only after satisfying one of the ingredients as contemplated under Section 33 of

the Indian Evidence Act, 1872. In this regard, it is relevant to extract

Section 33 of the Indian Evidence Act, 1872 as follows:-

“33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. -

Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.”

3. Accordingly, Section 33 of the Indian Evidence Act, 1872 would not apply, unless the five conditions are satisfied viz., (i) when the witness

is dead, (ii) when he cannot be found, (iii) when he is incapable of giving evidence, (iv) when he is kept out of the way by the adverse party, and (v) when his presence cannot be obtained without an amount of delay or expense which the Court considers unreasonable.

4. Admittedly, one Bhuvaneswaran who was examined as D.W.2 in O.S.No.408 of 2010, is very much alive. Therefore, he can very well let in evidence in the present suit. As such, the first respondent failed to satisfy even any one of the above conditions to mark the evidence of D.W.2 in O.S.No.408 of 2010. Therefore, the impugned orders passed by the Court below are perverse and illegal.

5. In view of the above discussion, these Civil Revision Petitions are allowed and the orders passed in I.A.Nos.650 and 651 of 2013 in O.S.No.76 of 2011 dated 22.11.2013 are set aside. However, the first respondent is at liberty to examine the said Bhuvaneswaran in O.S.No.76 of 2011 as his evidence, if so advised. Consequently, the connected Miscellaneous Petition is closed. No costs.

19.03.2021

Speaking/Non-speaking order

Index : Yes/No
kv

G.K.ILANTHIRAIYAN,J.

kv

To

1. The First Additional Sub Judge, Erode.
2. The Section Officer,
V.R.Section, High Court of Madras.



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and 2456 of 2014**

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