

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.04.2021

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRP(PD) No.307 of 2017

in
CMP.No.1403 of 2017

1. Duraisamy
S/o.Late Palaniappan gounder

2. Dinesh
S/o.Duraisamy

Nisha (Died)

... Petitioners/Petitioners/Defendants 1 and 2

Vs.

Pavayee
W/o.Late Thangamuthu

... Respondent/Respondent/Plaintiff

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India to set aside the Fair & Final order passed in I.A.No.699 of 2016 in O.S.No.608 of 2008 dated 11.11.2016 on the file of the Sub Judge Court, Tiruchengode.

For Petitioner : Mr.V.S.Kesavan

For Respondent : Mr.R.Marudhachalamoorthy

ORDER

(This case has been heard through video conference)

This Civil Revision Petition has been filed to set aside the Fair and Final order passed in I.A.No.699 of 2016 in O.S.No.608 of 2008 dated 11.11.2016 on the file of the Sub Court, Tiruchengode dismissing the petition filed seeking to permit the petitioners/defendants to mark the registered Will dated 27.01.2000 which was executed by one Thangamuthu in favour of the Second Petitioner.

2. The learned counsel for the petitioners would submit that the petitioners are the defendants in O.S.No.608 of 2008 filed by the respondent/plaintiff for partition and separate possession of the suit property. He would further submit that the first petitioner/first defendant was examined as DW-1 and that he had filed a proof affidavit on 15.10.2014 and even prior to that, the first petitioner had filed the registered Will dated 27.01.2000 executed by his elder brother namely Thangamuthu in favour of the second petitioner/second defendant. He would further submit that the elder brother Thangamuthu passed away on 03.02.2003 and that the petitioners had also filed the death certificate and other connected documents. He would further submit that since, objection was made by the

respondent / plaintiff to mark the registered Will dated 27.01.2000, the documents have not been not marked till date. He would further submit that since, the second petitioner/second defendant namely Dinesh was a minor at the time of execution of the Will, the executor/his elder brother had appointed the first petitioner /first defendant as a guardian of the 2nd defendant and the Will was also in the custody of the 1st petitioner and thereafter, the Will was filed before the Trial Court. He would further submit that since, the second petitioner/second defendant was not in station, in order to prove the finger print of the Executor of the Will, the first petitioner/ first defendant had produced the certificate issued by the Forensic Experts and thereby, the petition was filed to mark the Will through the 1st petitioner. He would further submit that the respondent had filed a counter objecting that the second petitioner/second defendant had attained majority and that the Will could be either marked though the second petitioner/second defendant or through the witnesses who had attested the Will and the Trial Court without looking into the legal positions that a document can be marked subject to the objections raised by the other side and that such objections can be decided at the final stage while delivering judgment, had dismissed the petition. He would further submit that the Hon'ble Apex Court in ***Bipin Shantilal Panchal V. State of Gujarat and Another*** reported in (2001)

(3) *SCC 1* has held that when any objection is raised regarding admissibility of any material or any item of oral evidence, the Court instead of passing any detailed order allowing or rejecting the objections, should make a note of such objection and decide it at the last stage of the final Judgment and that procedure has to be followed except to the objections relating to the stamp duty of the documents. The Apex court has deprecated such practice for the reason that it would pave way for delay in trial, since the Court has to suspend the trial to enable parties to approach the higher forum. He would further submit that in this case, there is no quarrel with regard to stamp duty and that the respondent/ plaintiff had only objected the mode of marking. He would further submit that the trial Court without taking into consideration the law in that aspect, had dismissed the petition and thereby, he would seek to set aside the order and permit the petitioners to mark documents.

3. Per contra, the learned Counsel for the respondent/plaintiff would oppose stating that in this case, an attempt was made by the first petitioner/1st defendant to mark a document when he is neither the scribe of the document nor the attesting witness to the document and further, the beneficiary of the Will, who is the second petitioner /second defendant in this case, has attained majority and there is no quarrel in the document being

marked through the second petitioner/second defendant who is the beneficiary of the Will. He would further submit that the Trial Court has also found that the petition has been filed belatedly only to drag the trial and thereby, the trial Court has rightly dismissed the petition. He would further submit that the Trial Court by following the dictum laid down in ***Karthik Meyyappan and Others Vs. Sudha Devi and Others reported in 2016 (6) MLJ 371*** has rightly dismissed the petition.

4. At this juncture, the learned Counsel for the petitioners would submit that the judgment of this Court in ***Karthik Meyyappan and Others Vs. Sudha Devi and Others*** referred supra is in conformity with the judgment of the Hon'ble Apex Court in the case of ***Bipin Shantilal Panchal V. State of Gujarat and Another*** referred below. He would reiterate that the Hon'ble Supreme Court has held that the document can be allowed to be marked subject to objections and all objections raised shall be decided by the Court at the final stage. When the Court has directed this practice to be adopted in order to avoid stalling of trial and delay in the trial. He would further submit that the petitioner has attempted to mark it, subject to his own risk and the legality of such marking can be decided at the final stage.

5. Heard the learned Counsels and perused the materials placed on record.

6. In this case, the first petitioner/first defendant had attempted to mark a registered Will executed by his elder brother in favour of his son/ the second petitioner/second defendant. An objection has been raised by the respondent / plaintiff that the first petitioner/first defendant is neither a Scribe nor the attesting witness nor the beneficiary of the Will. Further, objection was made stating that the petition was filed belatedly to drag on the proceedings. Further, an objection has been raised stating that the second petitioner/second defendant who is the beneficiary has attained majority and that it could have been marked through him. The trial Court finding that an attempt was made to mark a document through a wrong person, had dismissed the petition.

7. In *Karthik Meyyappan and Others Vs. Sudha Devi and Others* reported in 2016 (6) MLJ 371 referred supra, this Court has held that;

“9. it is a well settled principle of law that as per Section 63(c) of the Indian Succession Act, 1925, a Will has to be attested

at least by two attesting witnesses and they must see the signature or thumb impression of the executant and in turn, the executant must see their signatures.

10. At this juncture, it would be apposite to look into Section 68 of the Indian Evidence Act, 1872. It Section 68 of the Indian Evidence Act, 1872, it is clearly stated that if a document required by law to be attested, at least one of the attesting witnesses must be examined for the purpose of proving its execution as well as attestation, otherwise, the same cannot be treated as evidence.

In the above judgment, this Court has acknowledged the principles of law that mere marking is entirely different from proving of a particular document. In I.A.No.699 of 2016, the prayer is only to accept the Will and to mark the Will.

8. It is relevant to refer to the Judgment of the Hon'ble Apex Court in ***Bipin Shantilal Panchal V. State of Gujarat and Another*** reported in ***2001 (3) SCC 1*** wherein, it has been held as under:-

"13. It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fallout of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral

evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)"

The above view of the Hon'ble Supreme Court in ***Bipin Shantilal Panchal V. State of Gujarat and Another*** referred supra has been endorsed by the Hon'ble Supreme Court in a later decision in ***Dhanpat Vs. Sheo Ram (Deceased) Through legal representatives and Others***, reported in **(2020) 16 SCC 209** and the relevant paragraph is extracted hereunder;

20. This Court in *Bipin Shantilal Panchal v. State of Gujarat* [Bipin Shantilal Panchal v. State of Gujarat, (2001) 3 SCC 1 : 2001 SCC (Cri) 417], deprecated the practice in respect of the admissibility of any material evidence, where the Court does not proceed further without passing order on such objection. It was held that all objections raised shall be decided by the Court at the final stage. The Court held as under: (SCC pp. 5-6, paras 14-15)

“14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence-taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the

correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.”

9. In view of the above, the Civil Revision Petition stands allowed and the order dated 11.11.2016 passed in I.A.No.699 of 2016 in O.S.No.608 of 2008 on the file of the Sub Court, Tiruchengode, is set aside on the following terms;

The petitioners are permitted to mark the registered Will dated 27.01.2000 subject to recording of objections raised by the respondent/plaintiff regarding the admissibility of the document and the Trial Court shall make a note of such objection and mark the document tentatively as exhibit in this case and such objections can be decided at the last stage of the final Judgment.

10. Since, the Suit is of the year 2008, the learned Sub Judge, Trinchengode, is directed to give priority and see to that the Suit is disposed as expeditiously as possible preferably within a period of six months from the date of receipt of copy of this order.

11. It is made clear that the document is merely allowed to be marked and the admissibility of the document is subject to proof and admissibility in accordance with rules of evidence. It is further made clear that mere marking itself would not constitute its proof.

12. With the above observations, this Civil Revision stands allowed. Consequently, connected Miscellaneous Petition is closed. No costs.

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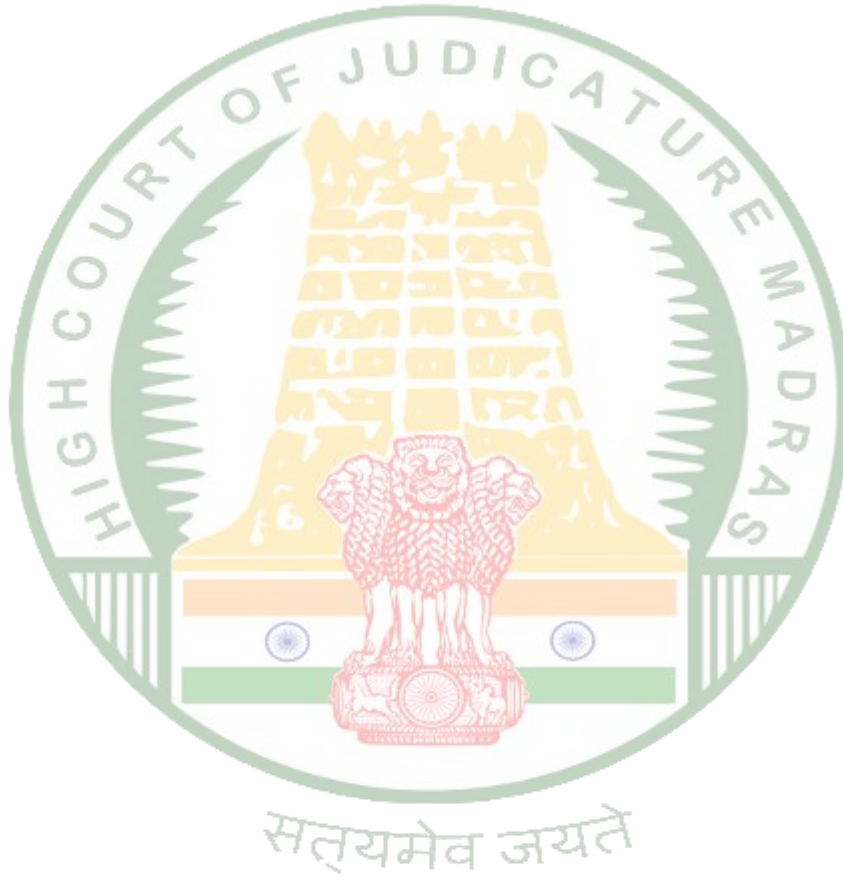
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To

The Sub Court, Tiruchengode.



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A.D.JAGADISH CHANDIRA,J.

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