

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.10.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.3173 of 2017
and C.M.P.No.14847 of 2017

1.K.Subramaniam

2.S.Gobinath

... Petitioners

Vs.

1.S.K.Natarajan

2.S.Senthilkumar

3.K.P.Selvaraj

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 27.04.2017 made in I.A.No.243 of 2017 in O.S.No.46 of 2014 on the file of the Sub Court, Sathyamangalam.

For Petitioners : Mr.A.Mohamed Ismail
For R1 : Mr.R.T.Doraisamy
For R2 and R3 : No appearance

ORDER

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

Civil Revision Petition is filed against the fair and decretal order dated 27.04.2017 made in I.A.No.243 of 2017 in O.S.No.46 of 2014 on the file of the Sub Court, Sathyamangalam.

2.Though notice has been served on the respondents 2 and 3 and their names are printed in the cause list, there is no representation for them either in person or through counsel.

3.Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the 1st respondent and perused the entire materials on record.

4.The petitioners are defendants 1 and 3, 1st respondent is the plaintiff, the respondents 2 and 3 are the defendants 4 and 5 in O.S.No.46 of 2014 on the file of the Sub Court, Sathyamangalam. The 1st respondent filed the said suit for partition claiming 1/2 share against the petitioners, respondents 2 and 3. The petitioners filed written statement on 22.10.2016 and are contesting the suit. The trial commenced. Both the 1st respondent and the petitioners let in evidence and marked the documents. The petitioners along with the respondents 2 and 3 filed I.A.No.243 of 2007 under Section 45 of Indian Evidence Act and Order XXVI Rule 10(A) of C.P.C. to prove the genuineness of thumb impression in Ex.B2 with admitted thumb impression in Exs.B6 and B11 filed and marked by the petitioners, respondents 2 and 3, by appointing Advocate Commissioner to obtain report from the handwriting expert.

5.According to the petitioners and respondents 2 and 3, the 1st respondent is disputing the genuineness of thumb impression in Ex.B2. In view of the same, they must prove the genuineness of thumb

impression in Ex.B2. The petitioners further stated that they filed I.A. for issue of summons to two attesting witnesses. In spite of best efforts, they could not find out the present address of the attesting witnesses and also they could not get the details of the legal heirs of the attesting witnesses. In such circumstances, it is necessary to send for Exs.B6 and B11 containing admitted thumb impression of father of the 1st petitioner and 1st respondent to compare the disputed thumb impression in Ex.B2.

6.The 1st respondent filed counter affidavit denying all the averments in the affidavit and stated that the 1st respondent is disputing the execution and thumb impression of father in the Will dated 23.08.1984 and another Will dated 26.06.1989. The Will dated 23.08.1984 has been executed by coercion. It is for the petitioners to prove the Will as per the provisions of Section 63(c) of Indian Succession Act and Section 68 of Indian Evidence Act. The petitioners are seeking comparison of genuineness of thumb impression in the Will dated 23.08.1984, but abandoned the Will dated 26.06.1989. The

petitioners have not examined the attestors and scribe of both the Wills. Hence, the application filed under Section 45 of the Indian Evidence Act is not maintainable and prayed for dismissal of the said I.A.

7.The learned Judge considering the averments in the affidavit and counter affidavit, dismissed the I.A. holding that it is for the 1st respondent to prove that the Will is not genuine and forged, further held that the petitioners have to prove the genuineness of the Will only by examining the witnesses as per law and application under Section 45 of the Indian Evidence Act is not acceptable.

8.Against the said fair and decretal order dated 27.04.2017 made in I.A.No.243 of 2017 in O.S.No.46 of 2014, the petitioners have come out with the present Civil Revision Petition.

9.From the materials available on record, it is seen that the petitioners, respondents 2 and 3 are denying the relief of partition to the 1st respondent on the ground that father of the 1st petitioner and 1st

respondent, who was the owner of the suit property executed a Will dated 23.08.1984 bequeathing the property to the 1st petitioner. The 1st respondent is disputing the execution and thumb impression in the said Will. The 1st respondent has also taken a stand that the Wills were executed by threat and coercion by the petitioners. The 1st respondent has taken two stands with regard to genuineness of the Will and also validity of the Will. When the 1st respondent disputes the genuineness of thumb impression in the Will, it is for the petitioners to prove the genuineness of thumb impression. They could prove the same by examining attesting witness or by obtaining opinion from the handwriting expert by comparison of thumb impression in the disputed document with thumb impression in the admitted document.

10. In the present case, according to the petitioners, they have taken steps to examine the attesting witnesses, but their whereabouts are not known. These averments are not disputed by the 1st respondent. In view of the fact that the 1st respondent is disputing the genuineness of thumb

impression in the Will, it is for the petitioners to prove the genuineness of thumb impression in the Will. The petitioners have marked Exs.B6 and B11, which contains thumb impression of father of the 1st petitioner and 1st respondent. The 1st respondent has not disputed the thumb impression in Ex.B6 and Ex.B11. The 1st respondent has not specifically denied thumb impression in Exs.B6 and B11 in the counter affidavit filed in the present I.A. The 1st respondent has also taken another stand that the Will was executed by coercion. It is for the 1st respondent to prove the same by letting in acceptable evidence that the Will was executed by coercion. The learned Judge failed to consider that the 1st respondent has disputed the genuineness of thumb impression in the Will Ex.B2 and alleged that the same is forged. The learned Judge has committed an error in not considering such a stand taken by the 1st respondent and that it is for the petitioners to prove the genuineness of thumb impression in the Will, when the same is disputed by the 1st respondent. In view of the error committed by the learned Judge, the impugned order of the learned Judge made in I.A.No.243 of 2017 in O.S.No.46 of 2014 is liable to be set aside

and is hereby set aside. I.A.No.243 of 2017 in O.S.No.46 of 2014 is allowed and is remitted to the learned Judge for appointment of Advocate Commissioner and permit him to take Ex.B2 along with Exs.B6 and B11 to get opinion from the handwriting expert. All the expenses are to be met by the petitioners.

11.With the above directions, the Civil Revision Petition stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

20.10.2021

Index : Yes/No
Internet: Yes/No
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To

The Subordinate Judge, Sathyamangalam.

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V.M.VELUMANI,J.

Kj



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