

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.07.2021

CORAM

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

C.R.P.(PD) No.4138 of 2018 and
CMP.No.22785 of 2018

Audhikesavan

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Petitioner

Vs

1.Ramani
2.Vasanth
3.Selvam
4.Gowri
5.Saravanan
Padma(deceased)
6.Varadhan
7.Palani
8.Gokila
9.Devadoss
10.Arumugam
11.Vijaya
12.Mari
13.Chandra
14.Parasuraman
15.Jayaraman
16.M/s.V.G.N.Pearl Square Properties Pvt Ltd.,
Rep. by its Director – Mr.D.Pratheesh,
No.333, Poonamallee High Road,
Aminjikarai,
Chennai 600 029

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Respondents

Prayer :- Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and final order dated 01.10.2018 passed in IA.No.1099 of 2017 in AS.No.22 of 2016 on the file of the II Additional District Judge, Thiruvallur at Poonamallee thereby permit the petitioner to adduce additional evidence by examining the attestors of Ex.B1 in the appeal.

For Petitioner : Mr.V.Ayapparaja
for Mr.Bharath Kuma R

For Respondents
For R1 & 2 : Mr.M.Chidambaram
R3 to 16 : No Appearance

ORDER

This Civil Revision Petition is filed against the fair and final order dated 01.10.2018 passed in IA.No.1099 of 2017 in AS.No.22 of 2016 on the file of the II Additional District Judge, Thiruvallur at Poonamallee, thereby dismissing the petition seeking permission to adduce additional evidence.

2. The petitioner is the eighth defendant and the respondents 1 and 2 are the plaintiffs. The respondents 1 and 2 filed suit for partition in respect of 'A' and 'B' schedule properties. According to the petitioner, 'A' schedule property belongs to their father and 'B' schedule property belongs to their

mother. While their mother was alive, 'B' schedule property was bequeathed in favour of the petitioner by the registered Will dated 26.07.1995, which was marked as Ex.B1 before the court below. However, the petitioner could not able to trace the attestors of the Will and as such he examined only scribe of the Will as DW3. However, the court below without considering the Will executed by their mother in favour of the petitioner and decreed the suit as prayed by the respondents 1 and 2 herein. Aggrieved by the same, the petitioner alone preferred appeal suit. While pending appeal suit, the petitioner filed petition under Order 41 Rule 27 of CPC seeking permission to adduce additional evidence by examining the attesting witness of the Will executed by his mother.

3. On perusal of the affidavit filed in support of the petitioner revealed that Ex.B1 was attested by two witnesses. But unfortunately, the petitioner could not able to trace out the witnesses who attested in the Will and produce before the court below to examine them. However, the petitioner examined the scribe of the Will as DW3. But the court below did not accept his evidence and decreed the suit. Now, the petitioner is able to

find out the witness and seeks permission to examine one of the attesting witness to prove the Will. It was dismissed and aggrieved by the same, the present civil revision petition has been filed.

4. In this regard the learned counsel for the petitioner has relied upon the judgment in the case of ***G.Venkatachalam Vs. A.P.Kuppraj & Ors.*** reported in ***2017 (4) CTC 32***, wherein this Court held as follows:

27 In this connection, in Union of India vs. Ibrahim Uddin and another (2012)8 SCC 148), the Hon'ble Supreme Court has held as under:

"52. Thus, from the above, it is crystal clear that application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored."

28 Keeping the above principles in our mind, let us approach the case at our hand.

29 The crux of the plaint averments is the existence of a cartrack in the property of the first defendant through which the plaintiff is alleged to have access to his property comprised in S.No.407/2, situate in a Kolathupalayam in Kodumudy in Erode District. In the impugned order, the learned first Additional Sub Judge, Erode has completely went into the merit of the appeal itself. The Appellate Court went beyond the scope of Order 41 Rule 27 C.P.C.

*30 An aspect to be noted is that the Appellate Court has heard and disposed of the petition filed under Order 41, Rule 27 C.P.C. independently, separately. It should hear only along with main appeal. Then only the Court could read the evidence, record of the case and decide whether the new documents are necessary to take a decision in the appeal. The procedure adopted by the Appellate court is as against the principles governing Order 41, Rule 27 C.P.C., the ratio laid down by the Hon'ble Supreme Court in *Union of India vs. Ibrahim Uddin and another* (supra).*

5. When the petitioner filed petition under Order 41 Rule 27 of CPC, the appellate court should hear the application along with the main appeal, and then only could read the evidence, record of the case and decide

whether the new documents are necessary to take a decision in the appeal.

6. In the case on hand, the application was separately considered by the first appellate court and dismissed for the reason that the Will executed in favour of the petitioner was not proved as contemplated under Section 65 of the Indian Evidence Act. Therefore, the above judgment is squarely applicable to the case on hand. The first appellate court should have read the evidence, record of the case and decide whether the new documents are necessary to take a decision in the appeal.

7. In view of the above, this civil revision petition is allowed and the fair and final order dated 01.10.2018 passed in IA.No.1099 of 2017 in AS.No.22 of 2016 on the file of the II Additional District Judge, Thiruvallur at Poonamallee is set aside. The application in IA.No.1099 of 2017 is remanded back to the first appellate court, and the first appellate court is directed to dispose of the same along with main appeal. Further, the first appellate court is directed to dispose of the appeal suit within a period of three months from the date of receipt of copy of this order. Consequently,

connected miscellaneous petition is closed. No order as to costs.

15.07.2021

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Index: Yes/No

Internet: Yes/No

Speaking Order: Yes/No

C.R.P.(P.D).No.4138 of 2018

G.K.ILANTHIRAIYAN,J.

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To

The II Additional District Judge,
Thiruvallur at Poonamallee

C.R.P.(PD) No.4138 of 2018

15.07.2021