



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.11.2021

CORAM

THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P (MD)No.1735 of 2021

and

C.M.P(MD) No.9252 of 2021

Gunasekaran

... Petitioner

Vs.

Vinodhini

... Respondent

PRAYER:- Civil Revision Petition filed under Article 227 of Constitution of India, to call for the records relating to the impugned fair and decreetal order dated 02.08.2021 made in I.A.No.02 of 2021 in O.S.No.62 of 2018 on the file of the learned Principal District Judge, Virudhunagar, set aside the same and allow this civil revision petition.

For Petitioner : Mr.S.Srinivasa Raghavan

ORDER

The petitioner/first defendant has challenged the dismissal of his application filed for recalling D.W.2 to examine him on the side of the petitioner/first defendant.

2.The suit in O.S.No.62 of 2018 was filed by the respondent herein for partition of her $\frac{1}{4}$ share in the suit schedule property. The petitioner and the respondent are siblings. It is the case of the respondent/plaintiff that the suit schedule property belonged to her grandfather Govindan Chettiar. On 06.12.1941, there was a partition between the said Govindan Chettiar and his sons Srinivasan (the father of the petitioner and respondent herein) and Gurusamy. The first item of the property in the said partition, which is the suit property was allotted to the share of the Srinivasan, besides other properties. It is her further case that except the suit property, their father had alienated all the other properties which was allotted to his share, under the partition dated 06.12.1941. Their father Srinivasan passed away intestate on 12.01.2012. Despite several requests, the petitioner herein had not come forward to partition the suit property, hence the respondent has filed the suit for partition.



3.The petitioner herein had filed a written statement admitting the contention of the respondent that the suit property was allotted to their father under the partition deed dated 06.12.1941. The petitioner would contend that the house was constructed out of the funds of both the petitioner as well as his father Srinivasan and the house was constructed after retirement of their father Srinivasan. The petitioner would submit that he had contributed for the construction, since his father did not have sufficient fund. The petitioner would further submit that the suit properties are self acquired property of their father, who was in peaceful possession and enjoyment of the same till his life time.

4.It is also the case of the petitioner that on 09.01.2003, his father out of his own will and volition and in a sound disposing state of mind, has executed a Will in and by which he had bequeathed the property in favour of his wife Visalatchi (mother of the petitioner and respondent) to be enjoyed by her absolutely and after her demise, the property was to devolve on the petitioner absolutely. On the death of his father, the Will came into force. His mother Visalatchi passed away on 26.07.2016 and therefore, the first defendant was left to succeed to the estate of late Srinivasan absolutely. The petitioner would submit that therefore neither the respondent herein nor the other defendants have any right over the suit property. The petitioner would further contend that the respondent was never in joint possession of the suit property. He would seek to have the suit dismissed.

5.The evidence of both parties was concluded and thereafter the petitioner had come forward with the impugned application in I.A.No. 2 of 2021 to recall D.W.2 and examine him. In the affidavit filed in support of the said petition, the petitioner would contend that he had to re-examine D.W.2 for putting certain questions to him, which were omitted to ask when he was examined as D.W.2.

6.The respondent had filed a counter statement *inter alia* contending that this petition is only an attempt to fill up the lacuna, since D.W.2 had clearly deposed in his chief examination that he was asked to put the signature, while he was working in the fields of late Srinivasan and that he did not know as what deed, he was affixing his signature to. Therefore, in order to overcome the statement made both in chief and cross examination, the petitioner has taken out this application to fill up the lacuna.

7.The learned Principal District Munsif, Srivilliputtur, by his order dated 02.08.2021 was pleased to dismiss the said application. The learned Principal District Munsif relied on the provision of Order 18, Rule 17 of Code of Civil Procedure and Section 138 and 154 of Indian Evidence Act to hold that the power of recalling the witness, cannot be utilized for filling up the gap or for contradicting the evidence of witness, which has been elicited



during the cross examination. The learned Principal District Munsif has observed that the examination in chief and cross of D.W.2 has to be read in full and any admission made cannot be retracted by once again recalling the witness and questioning him. Challenging the same, the petitioner is before this court.

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8.The learned counsel for the petitioner would submit that during the chief examination of D.W.2, it has been omitted to ask as to whether D.W.2 had seen that the deceased Srinivasan affix his signature in the Will Ex.P1 and this is a vital question. Therefore, the petitioner should be permitted to recall D.W.2. He would further submit that the Court could impose conditions for recalling the witness D.W.2.

9.Heard the learned counsel for the petitioner and perused the records.

10.A perusal of the evidence of D.W.2, who is now sought to be recalled, would indicate that even in his chief examination, he has stated that while he was working in the field of Srinivasan, Srinivasan had come over to him and asked him to sign a document and he had done so. He had clearly stated that he did not know what document he was affixing his signature to and he does not know who had affixed the signature as witness along with him. He would also contend in his chief examination that the signature has been affixed by him at the Sub Registrar Office at Srivilliputtur. He would further state that Srinivasan had said that he was bequeathing his property to the first defendant Gunasekaran for which he required D.W.2's signature. Even in the chief examination there appears to be contradiction in the statement. In the earlier portion, the witness would state that he had put a signature in the field, when the same was brought to him by Srinivasan and he did not know in what document he was putting his signature. Thereafter, in answer to a leading question he has stated that he has put the signature in the Sub Registrar Office at Srivilliputtur and he was informed by Srinivasan that he was bequeathing his property upon his son Gunasekaran. In his cross examination, D.W.2 clearly admitted that he does not know what deed he had affixed the signature to and he does not know the contents of the deed. He has also adduced evidence that when he had affixed the signature, only the son of Srinivasan was available and none else.

11.Therefore, from this answer, it is clear that the intention of the first defendant in filing the impugned petition, is to retract the admission made by D.W.2 in his earlier evidence. This cannot be permitted. The power of recalling the witness and reopening the evidence should be sparingly exercised. The Court below has rightly dismissed the said petition and this court concurs with the finding of the learned Principal District and Sessions Judge, Virudhunagar District at Srivilliputtur.



12. In the result, this Civil Revision Petition is dismissed.
No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

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// True Copy //

/ /2021

Sub Assistant Registrar(CS)

cp

Note In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:-

The Principal District Court
Viruthunagar District at Srivilliputhur,

+1 CC to M/s.S. SRINIVASA RAGHAVAN, Advocate (SR-34190[F] dated 11/11/2021)

C.R.P(MD)No.1735 of 2021
11.11.2021

PK(CO)
KB(08.12.2021) 4P 3C