



WEB COPY



C.R.P (PD) No.3255 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.12.2022

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

C.R.P (PD) No.3255 of 2016
and C.M.P. No.16495 of 2016

Denzil C.Jolly

... Petitioner

Vs.

1.Heather Oakley (Deceased)

2.Patricia Joe Curian

3.Melville Jolly (Deceased)

4.Trevor Jolly

5.Jennifer Desouza

6.Allan Oakley

7.Kevi Oakley

8.Angelo Oakley

(Respondents 6 to 8 impleaded as LR's of deceased
1st respondent vide order of the court dated 08.12.2022
in C.M.P. No.15034 of 2022)

9.Juliana Jolly

10.Germain Jolly

11.Joanne Jolly

... Respondents

(Respondents 6 to 8 impleaded as LR's of deceased
1st respondent vide order of the court dated 08.12.2022
in C.M.P. No.15028/ of 2022)



C.R.P (PD) No.3255 of 2016

PRAYER: The Civil Revision Petition filed under Article 227 of the Constitution of India, to call for the records of the lower court and set side the order and decretal order dated 29.08.2016 made in I.A. No.189 of 2015 in O.S. No.36 of 2013 by the District Judge, The Nilgiris at Udagamandalam.

For Petitioner : Mr.P.Prakesh Kumar
for L.Rajasekar

For Respondents : Mr.V.Rajesh for
Mr.M.Guruprasad for R4 & R5

ORDER

The fourth defendant/petitioner has filed this petition challenging the fair and final order dated 29.08.2016 made in I.A. No.189 of 2015 in O.S. No.36 of 2013, filed by the respondents 1 and 2/plaintiffs allowing an application filed under Order XVIII Rule 3A of CPC.

2. The plaintiffs filed the suit in O.S. No.36 of 2013 seeking for the relief of partition and for allotment of 2/6th share in the suit property. The suit reached the stage of trial and at that point of time, the plaintiffs filed an application under Order XVIII Rule 3A of CPC first to examine the attesting witnesses in the Will and thereafter to permit the plaintiffs to adduce evidence. This application came to be allowed by the court below by order dated



29.08.2016. Aggrieved by the same, the present civil revision petition has been filed before this court by the fourth defendant.

2. Heard Mr.P.Prakesh Kumar, learned counsel appearing for Mr.L.Rajasekar, counsel on record for the petitioner.

3. The learned counsel appearing for the respondents 3 to 5 submitted that he has no instructions in this case and requested this court to record the same. Accordingly, the same is recorded.

4. The short point that arises for consideration in the present case is as to *whether the order passed by the court below by permitting the plaintiffs to first examine the attesting witnesses and thereafter the plaintiffs, suffers from any illegality?*

5. The scope of Order XVIII Rule 3A of CPC is that, a party should appear before examining the other witnesses and if the party makes an application at the threshold to justify the examination of the other witnesses and thereafter to examine himself/herself at a later stage, the party has to give genuine and germane reasons.



WEB COPY

6. Insofar as the proof of Will is concerned, the same is to be proved through the attesting witnesses. Section 63(c) of the Indian Succession Act, 1925 provides that the Will has to be attested at least by two attesting witnesses and they must see the signature or the thumb impression of the executor. It will also be apposite to take note of Section 68 of the Indian Evidence Act, 1872, which clearly states that a document that is required by Law to be attested, can be proved only by examining at least one of the attesting witnesses, failing which, the document itself cannot be acted upon. There is no indication under Section 68 of the Indian Evidence Act that the Will has to be marked only through the attesting witnesses. In other words, there is no indication as to how the Will should be marked. Taking note of the same, a Division Bench of this court in **Karthik Meyyappan vs. Sri Sutha Devi** reported in **2016 (6) MLJ 371** has held that the Will can be marked through the propounder, but, however it can be proved only through the attesting witnesses. It is, therefore, clear that the scope of examining the attesting witnesses is only to prove the execution of the Will.

7. In view of the above, the order passed by the court below, cannot be held to be illegal, since the scope of the order only permits the attesting



C.R.P (PD) No.3255 of 2016

witnesses to be examined before the plaintiff gets into the box. Hence the Will can be marked through the attesting witness and later, it can be spoken to by the plaintiffs. Such a process will not, in any way, prejudice the interest of the defendants. If the defendants are seriously raising objections on the very admissibility of the document on the ground that the Will has not been probated, such an objection can be raised even when the Will is marked through the attesting witnesses. It will not make any difference if the Will is marked either through the propounder or through the attesting witnesses and the right of the defendants to object to the document remains intact.

8. In view of the above discussions, this court does not find any illegality or infirmity in the order passed by the court below, which warrants its interference under Article 227 of the Constitution of India and the civil revision petition, accordingly, stands dismissed. No costs. Consequently, the connected civil miscellaneous petition is closed. The court below is directed to dispose of the suit in O.S. No.36 of 2013 within a period of three months from the date of receipt of a copy of this order.

08.12.2022

Asr



WEB COPY



C.R.P (PD) No.3255 of 2016

N.ANAND VENKATESH, J.,

Asr

To
The District Judge, The Nilgiris at Udhagamandalam

C.R.P (PD) No.3255 of 2016
and C.M.P. No.16495 of 2016

08.12.2022