



C.R.P. No.4304 of 2018

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 29.11.2022

CORAM

**THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI**

C.R.P.No.4304 of 2018  
and  
C.M.P. No. 23546 of 2018

1. Poovathal,  
W/o. Mylsamy

2. Lalithamani,  
D/o. Mylsamy

... Petitioners

Versus

1. Vasanthamani,  
W/o. Late Suresh

2. Minor Dhanabal,  
S/o. late Suresh

... Respondents

**PRAYER :** Civil Revision Petition filed under Art. 227 of Constitution of India, praying to set aside the fair and final order passed in I.A.No.689 of 2017 in O.S.No. 148 of 2013 on the file of the District Munsif, Palladam, dated 04.06.2018.



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For Petitioners : Mr.S.Kasirajan

For Respondents : Mr.S.Nagarajan for R1 and R2

### **ORDER**

Challenging the impugned order passed in I.A.No.689 of 2017 in O.S.No. 148 of 2013, on the file of learned District Munsif, Palladam, the defendants preferred this Civil Revision Petition.

2. Originally, a Suit in O.S.No. 148 of 2013 was filed by the plaintiffs claiming 2/9 shares in the suit properties said to be belonged to 1<sup>st</sup> plaintiff's father-in-law Mysamy. The said Mysamy had a son viz., Suresh, who died leaving behind these plaintiffs. The said Mysamy died on 06.03.2011 leaving behind plaintiffs, his wife and daughter/defendants as his legal heirs. Since the properties were the self-acquired properties of Mysamy, as a legal heirs of Suresh, the plaintiffs claiming 2/9 shares in the suit properties. The 1<sup>st</sup> defendant, who is mother-in-law of 1<sup>st</sup> plaintiff contented that during the life time of her husband, Mysamy executed a Will in her favour on 12.06.2002. Thereafter, he died on 06.03.2011 and from that year



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onwards, she is the absolute owner of suit properties as per the Will. Hence, she totally denied the plaintiffs right over the properties. She also contented that all the properties were purchased by the said Mysamy through the sale deed dated 10.06.1998 and claiming it as his self-acquired properties. Thereafter, the plaintiffs filed an application in I.A.No. 689 of 2017 under Order 18 Rule 3 of C.P.C. seeking an order to direct the defendants to commence the trial. The reasons assigned by the plaintiffs is that in a suit for partition, they are claiming right over the properties contending that they are legal heirs of son of Mysamy. But, in the written statement, the defendants totally denied the plaintiffs right over the suit properties and the 1<sup>st</sup> defendant claimed herself as absolute owner of suit properties as per the Will executed by her husband dated 12.06.2002. Having denied the plaintiffs right over the property, she filed this application to commence the trial, since because, the defendants claimed right over the properties and totally denied the plaintiffs right, they should commence the trial by adducing evidence in order to prove the Will. The said application was strongly objected by the defendants by filing counter statement stating that having approached the court for the relief of partition, the plaintiffs are



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bound to prove their case, since she is setting the law in motion. On considering submissions of both sides, the trial judge allowed the application holding that since the defendants contested the suit as the said Mysamy acquired the properties and the 1<sup>st</sup> defendant claimed entire right over the suit properties itself shows that she totally denied the plaintiffs right. Hence, the defendants alone have to commence the trial in order to prove the Will by relying the provisions under Order 18 Rule 3 of C.P.C. Challenging the said findings, the revision petitioners/defendants preferred this Civil Revision Petition.

3. The learned counsel for Revision Petitioners argued that the trial court failed to take note of the fact that as the plaintiffs approached the court for the relief of partition to establish their right in the suit properties and the same was not properly appreciated by the trial judge.

4. On seeing the facts, it would reveals that the plaintiffs claiming right over the properties of one Mysamy, who is father-in-law of 1<sup>st</sup> plaintiff and also contended that the suit properties are self-acquired



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properties of Mysamy, as a legal heir of Mysamy's son, the plaintiffs approached this Court. The 1<sup>st</sup> defendant, who is mother-in-law of 1<sup>st</sup> plaintiff contended that her husband executed the Will dated 12.06.2002 and thereafter, he died on 06.03.2011 and from that year onwards, she is the absolute owner of entire suit properties. So, the fact reveals that the 1<sup>st</sup> defendant claiming absolute right and also totally denied the plaintiffs right. Therefore, the provision under Order 8 Rule 3 of C.P.C. would clearly indicate that when the defendants not admitted the right of plaintiffs totally and the defendants are claiming right over the suit properties under the Will in a suit for partition. Thus, the defendants have to begin the trial, But, defendant relying the preposition laid down in the case of **Chinnaiyyan vs. Jayaraman** reported in **CDJ 1996 MHC 428**, wherein this Court held in para 7 as follows :-

*“7. It is well settled law that a person who sets the law in motion and seeks a relief before the Court, must necessarily be in a position to prove his case and get the relief moulded by the law and in no case, he can be allowed to stand on the legs of the defendant, whatever may be the position or stand the defendant takes, for the very reasoning that the defendant is expected to answer the claim and allegation made by the*



*plaintiff in the suit. In consonance with the said legal mandate, it is for the plaintiff to taken up the case and discharge his onus first. It is what is embodied by the statue under O. 8, R. 1 of the Code. To say so more precisely, the defendant has not admitted the claim of the plaintiff, viz., the defendant is not entitled to form a road. On the other hand, the defendant wants his right to form a road to be declared. In the context that such right has not at all been given to the defendant in the partition deed or otherwise, simply because the defendant was allowed to use the land of the plaintiff, it does not amount to the presumption that the defendant has admitted the claim of the plaintiff. To substantiate the claim of the plaintiff, and to get the relief asked for in the plaint, the plaintiff has to prove that the defendant is attempting to form a road through his land and that is what actually in the cause of action for the suit. Having thus considered the two reliefs, viz., the relief claimed in the suit as well as the counter-claim made in the written statement, with reference to the pleadings of the both the parties, it is all well to say that both the reliefs are different and distinct and the plaintiff and the defendant are put on separate onus to prove the said reliefs by adducing legal evidence. But, however, pursuant to the O. 18, R. 1 of the Code of Civil Procedure, since the plaintiff has come forward with the suit with a specific relief, it is for him to*



*discharge his onus first and then, the defendant is entitled to adduce rebuttal evidence, which may sometimes or if allowed by the trial Court, include the first issue framed for the purpose of trial regarding the counter-claim made in the written statement"*

The learned counsel for Revision Petitioners/defendants referring the above ratio argued that since the plaintiffs approached the court for the relief of partition, they have to prove their case and they shall not depend upon the evidence of defendants.

5. On seeing the above ratio laid down by this court, it did not attract the facts of the present case for the reason that the defendants totally denied the plaintiffs right and also contented that the properties are self-acquired properties of Mysamy. So, the defendants are the right persons to begin the trial, since they claimed absolute right over the suit properties. Hence, the reasons assigned by the learned trial judge as such is maintainable in law and the findings of the learned trial judge is confirmed.



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6. In the result, this Civil Revision Petition is dismissed and the order passed by the trial judge in I.A.No. 689 of 2017 is confirmed and the defendants are directed to begin the trial. However, the trial court is directed to proceed with the trial and dispose the case within a period of four months from the date of receipt of copy of this order. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

**29.11.2022**

Index: Yes/No  
Internet: Yes/No  
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To

Disriect Munsif,  
Palladam.



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**T.V.THAMILSELVI, J.**

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