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CRP.No. 421 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.01.2023

CORAM:

THE HONOURABLE **MRS. JUSTICE V.BHAVANI SUBBAROYAN**

CRP.No. 421 of 2021

and

CMP.No. 3638 of 2021

Palaniammal

... Petitioner

Versus

Selvi

.. Respondent

Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 07.11.2020 in I.A.No. 1 of 2019 in O.S.No. 202 of 2013 on the file of III Additional District Judge, Salem.

For Petitioner	: Mr.V. Lakshminarayanan
For Respondent	: No Appearance

ORDER

This Revision has been filed by the petitioner seeking to set aside the fair and decretal order dated 07.11.2020 made in I.A.No. 1 of 2019 in O.S.No. 202 of 2013 passed by the learned III Additional District Judge, Salem.



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2. The revision petitioner herein is the defendant and the respondent herein is the plaintiff in the original suit proceedings.

3. On a perusal of the records, it is seen that the respondent/plaintiff has filed the suit in O.S.No.202 of 2013 before the learned III Additional District Judge, Salem, for declaration declaring that the cancellation deed dated 23.04.2013 executed by the defendant in Document No.2284 of 2013 on the file of Sub Registrar, Attur, as null and void and not binding on the plaintiff and the same may be ordered to be cancelled and restraining the defendant from in any way alienating the suit "C" schedule property till the proceedings of this partition suit are finally over, by way of an order of injunction and directing the defendant to divide the suit properties into two equal shares and allot one such divided share to the plaintiff and put her in possession of the same and also directing the defendant to render true and proper accounts and a decree for *mense* profits. The defendant has contested the suit by filing written statement and denied all the averments made in the plaint. During the pendency of the suit proceedings, the petitioner filed I.A.No. 1 of 2019 under Section 45 of the Indian Evidence Act read with Section 151 CPC seeking expert opinion. After perusing the records, the



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Court below dismissed the application by order dated 07.11.2020.

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Challenging the said order, the petitioner has filed this Revision.

4. According to the petitioner/defendant, the respondent has filed the suit for partition based on the legal heirship certificate of her deceased husband Babu. The 1st and 2nd items of the suit properties were self acquired properties of the deceased son of the petitioner. The 3rd item of the suit properties was a self-acquired property of petitioner. The son of the petitioner executed a Will dated 31.12.2011 in favour of the petitioner with regard to 1st and 2nd items of the suit properties and a settlement was executed by the petitioner on 21.12.2011 in favour of her son. The settlement has also not come into force. The son of the petitioner, namely, Babu did not cancel the above said Will executed in favour of the petitioner and the settlement deed dated 21.12.2011 was also cancelled by the petitioner on 23.04.2013, according to the petitioner. The petitioner submitted that in order to probate the above said Will, she filed a POP No.109 of 2013 before the II Additional District Court, Salem and on application by the petitioner, the entire records connected with POP.No.109 of 2013 was send for the Court.



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5. The learned counsel for the revision petitioner contended that the order of the Court below in dismissing the application filed for comparison of signature, is contrary to law and erroneous. The suit is filed for partition. The 1st and 2nd items of the properties are self-acquired properties of the petitioner's son. He had executed a Will on 31.12.2011 with regard to the said items. A settlement deed was also executed by the petitioner on 21.12.2011 in favour of her son and the same has not come into force. While that being the case, the said Will was last testament of the deceased son of the petitioner. An application for grant of Probate was made in P.OP. 109 of 2013 and the same was dismissed on 10.04.2014 on technical grounds for not impleading one of the legal heirs of the deceased.

6. On a perusal of the records, it reveals that the suit was filed on 30.07.2013 and thereafter, the respondent/plaintiff filed her proof affidavit for Chief Examination on 01.06.2017 and documents were marked on 20.06.2017 and thereafter, the suit was posted for cross examination of PW1 by the petitioner/defendant on 01.07.2017 and it was posted to 05.07.2017 for cross examination of PW1. But on 05.07.2017, the defendant was set ex-parte and thereafter, on application it was set aside and then the



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respondent/plaintiff filed another proof affidavit on 01.02.2018 and it was adjourned to 07.02.2018 for cross examination of PW1. On 07.02.2018, there was no cross examination on the side of the respondent/plaintiff. But on that day, a petition Order 8 Rule 9 CPC., was filed and it was allowed on 22.02.2018 and again, the suit was taken on file in I.A.No. 157 of 2018 and finally, the said I.A.No. 157 of 2018 was also allowed by this Court on 18.04.2018. I.A.No. 157 of 2018 was filed by the defendant to send for the records of POP.No. 109 of 2013. After the POP records were received by the Court, again the present petitioner/defendant set ex-parte on 13.11.2018. Thereafter, the ex-parte order was set aside as per order in I.A.No. 26 of 2019. Again, when the case was posted for cross examination of PW1, a petition under Rule 74 of the Civil Rules of Practice was filed and it was returned by the Court on 18.06.2019 thereafter, and the above said petition was not represented and the matter was posted for cross examination of PW1 by the defendant's side. Therefore, the petition for expert opinion was filed by the petitioner/defendant on 11.07.2019, even though the plaintiff filed proof affidavit as stated earlier for more than one time, the present petitioner/defendant submitted that the respondent/plaintiff denies the guidelines of the above said Will in the proof affidavit and therefore, it is



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necessary for sending the Will for expert opinion. Even though the defendant filed his written statement on 06.12.2013 by mentioning the Will, the defendant' filed this petition for getting expert opinion only on 11.07.2019 after the lapse of six years. Since the probate petition filed by the defendant was dismissed as stated earlier, the present defendant is bound to prove the disputed Will in accordance with law.

7. Obtaining handwriting experts opinion in the facts and circumstances of this case would certainly help the Court to arrive at a consistent and firm conclusion. A plain reading of the trial Court order would reveal that the application was rejected only on the sole ground that there was delay in filing the application for getting the assistance of the handwriting expert. In such a case, the mere delay should not be taken as a material since the defendant is bound to prove the disputed Will.

8. On a further perusal of the records, it reveals that the said Will was received by the Court along with case records in POP.NO.109 of 2013. All the above facts shows that whenever the suit was posted for cross examination of PW1, the defendant is having a habit of filing petition one



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after another. It shows that the petitioner failed to approach the forum with clean hands. It is also seen that the above said POP.No.109 of 2013 was also dismissed and one of the grounds is that the wife of Babu was not impleaded as one of the respondents.

9. Taking into consideration the above facts and circumstances of the case and the suit is of the year 2013, this Court directs the Court below by appointing an Advocate Commissioner for sending expert opinion from the Competent Authority in respect of disputed Will dated 31.12.2011 and after getting expert opinion, the trial Court is directed to dispose of the suit in O.S.No. 202 of 2013 within a period of six months from the date of receipt of a copy of this order. The petitioner/defendant is directed to co-operate for cross-examination of PW1 in the suit.

10. With the above directions, the Civil Revision Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

10.01.2023

msm



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Speaking order : Yes/No
Neutral citation : Yes/No
MSM

To

1. The III Additional District Judge, Salem.
2. The Section Officer, High Court, Madras.



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V.BHAVANI SUBBAROYAN, J.

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