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C.R.P.No.1471 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.01.2023

CORAM

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

C.R.P.No.1471 of 2016

and

C.M.P.No.8078 of 2016

S. Raju

....

Petitioner

Vs

1. S.Balasundaram

2. S.Sambamoorthy (Died)

3. S.Palanisamy

4. Konammal

5. S.Vijayalakshmi

6. S.Ramesh Kumar

7. S.Saravana Kumar

8. Geetha Rani

(Respondents 5 to 8 brought on record
as LR's of the deceased R2 vide Court
order dated 05.12.2022 made in
CMP No.1350 & 1351 of 2017 in
CRP No.1471 of 2016)

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Respondents

Prayer :- Civil Revision Petition is filed under Article 227 of Constitution of India to set aside the fair and decretal order dated 09.12.2015 in I.A.No.24 of 2015 in A.S.No.5 of 2012 on the file of the I Additional Subordinate Judge, Coimbatore.



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For Petitioners : Mr.R.Subramanian
For R1 : Dr.C.Ravichandran
For R2 : Died (Steps taken)
For R3 to R8 : No appearance

ORDER

This Civil Revision Petition has been filed to set aside the fair and decretal order dated 09.12.2015 made in I.A.No.24 of 2015 in A.S.No.5 of 2012 on the file of the I Additional Subordinate Judge, Coimbatore, thereby allowing the petition filed under Order 41 Rule 27 read with Section 151 of CPC to examine the attesting witness S.K.Shanmugasundaram as additional evidence in the appeal suit.

2. The revision petitioner is the plaintiff and the respondents are the defendants in the suit for partition in respect of the suit schedule property. The case of the petitioner is that the petitioner and other respondents are the legal heirs of their father S.V.Shanmugam. The 1st item of the suit schedule property belonged to their mother viz., Chinnamuthu by virtue of the sale deed dated 15.03.1950. The said Chinnamuthu predeceased her husband by name S.V.Shanmugam. After demise of the said Chinnamuthu, the 1st item of the suit schedule property was devolved upon the legal heirs of deceased Chinnamuthu viz., S.V.Shanmugam, the petitioner and the respondents herein. They were in



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joint possession and enjoyment of the 1st item of the suit schedule property. Insofar as the item Nos.2 and 3 of the suit schedule properties are concerned, those properties belonged to their father by virtue of the sale deeds dated 18.03.1970 and 27.06.1977. Therefore, they are entitled to have equal share.

3. The first respondent herein, being the third defendant, resisted the suit by filing separate written statement stating that by a Will dated 28.06.1987, item Nos.2 and 3 of the suit schedule properties were already bequeathed in his favour and the 1st item of the property, has to be divided into six shares and he is entitled for one share. However, he failed to prove the said Will dated 28.06.1987 before the Trial Court and as such, the Trial Court had not believed the stand taken by the first respondent herein and decreed the suit as prayed for. Aggrieved by the same, the first respondent herein filed an appeal suit. Pending appeal suit, the first respondent filed an application under Order 41 Rule 27 read with 151 of CPC to examine one of the attesting witness S.K.Shanmugasundaram as additional evidence on his side. It was allowed. Aggrieved by the same, the present Civil Revision Petition.

4. The learned counsel appearing for the revision petitioner



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would submit that though the Will allegedly executed in favour of the first respondent on 28.06.1987, even on receipt of the suit notice, the first respondent failed to disclose the same. Only after filing the written statement, he produced the Will and failed to prove the same. He did not take any steps to examine any attesting witness to the said Will before the Trial Court. Only on that ground, the suit filed by the petitioner was decreed and only to fill up the *lacuna*, the first respondent had now filed a petition to adduce additional evidence. She further submitted that the first respondent failed to exercise due diligence before the Trial Court to examine any attesting witness.

5. In support of his contention, he relied upon the Judgement reported in **(2001) 7 SCC 503** in the case of ***N.Kamalam (Dead) and another Vs. Ayyasamy and another***, in which, the Hon'ble Supreme Court of India held that the provision under Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of appeal. It does not authorise any *lacuna* or gaps in evidence to be filled up. The authority and jurisdiction as conferred on the appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular



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way. She also submitted that the first respondent failed to prove the Will before the Trial Court in the manner known to law. Therefore, the present petition has been filed only to fill up the *lacuna*.

6. The learned counsel appearing for the first respondent submitted that in order to arrive at a proper decision, it would be necessary to examine additional evidence in order to prove the Will, which was marked as Ex.B47. Further, the first respondent had taken appropriate steps to examine the attestors of the Will. However, on issuance of notice to the attestors, one of the attestors received the same and failed to appear before the Court. Notice to the other attestors was returned for the reason that their correct address would not be found. Pending appeal suit, the first respondent found one of the attestors in the case viz., S.K.Shanmugasundaram and filed the present application. Therefore, the Court below rightly allowed the petition.

7. In support of his contention, he also relied upon the Judgment reported in **CDJ 2018 SC 1008** in the case of **Uttaradi Mutt Vs. Raghavendra Swamy Mutt**, in which, the Hon'ble Supreme Court of India held that the additional evidence sought to be adduced removes the



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cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.

8. Heard, Mr.R.Subramanian, learned counsel appearing for the petitioner and Dr.C.Ravichandran, learned counsel appearing for the first respondent and perused the materials available on record.

9. The first respondent mainly resisted the suit on the strength of the Will, which was marked as Ex.47, dated 28.06.1987. Further, he failed to examine any attestor of the Will before the Trial Court. The findings of the Trial Court is that the first respondent failed to prove the Will dated 28.06.1987. Further, he failed to prove that the said Will was acted upon in the year 2000. As per the provision under Sections 68 and 69 of the Indian Evidence Act, the first respondent did not take any steps to examine any witness in order to prove the Will. A perusal of Exs.B48 and B49 shows that the letter to the attestors were returned. Further, he did not take any steps to summon those attestors before the Court of law. Therefore, the Trial Court decreed the suit.



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Aggrieved by the Judgment and Decree passed by the Trial Court, the first respondent preferred an appeal suit.

10. Pending appeal suit, the first respondent filed a petition under Order 41 Rule 27 read with 151 of CPC on the ground that the Will dated 28.06.1987 executed by his father creating limited estate in his favour and his wife and vested remainder in his favour and his daughter with regard to the suit schedule property. The attesting witness of the above Will could not be examined during trial as their whereabouts were not known. Further, now he found the address of the attesting witness viz, S.K.Shanmugasundaram. Therefore, the witness is vital to substantiate his case and in order to substantiate the Will dated 28.06.1987, he has to be examined before the Trial Court. In order to clear the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record to render judgment. The Court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the Court judicially taking into



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consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the Court below and as such whether the applicant had prosecuted his case before the Court below diligently and as to whether such evidence is required to pronounce the judgment by the Appellate Court.

11. In the case on hand, the first respondent had returned letter of the attestors, which was marked as Ex.B48. The letters were returned and the returned covers were marked as Ex.B49. Therefore, the first respondent had taken steps before the Trial Court in order to examine the attestors of the petitioner. Even then he could not find out the correct address of the attestors. Pending appeal suit, one of the attestors was found and he had taken steps to examine him on his side. Therefore, the First Appellate Court rightly allowed the application.

12. In view of the above, this Court finds no infirmity or illegality in the order dated 09.12.2015 in I.A.No.24 of 2015 in A.S.No.5 of 2012 on the file of the I Additional Subordinate Judge, Coimbatore. Accordingly, this Civil Revision Petitions stands dismissed.



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Consequently, connected miscellaneous petition is closed. No costs.

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Index: Yes/No

Internet: Yes/No

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To

The I Additional Subordinate Judge,
Coimbatore.

G.K.ILANTHIRAIYAN, J.



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