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CRP.No.3397 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2023

CORAM :

THE HONOURABLE MRS. JUSTICE T.V. THAMILSELVI

Civil Revision Petition No.3397 of 2023
and
CMP.No.21074 of 2023

1.Issac Prabhu
2. Issac Babu
3. Issac Raja
4.Arul Rani
5.Ashokra
6.Amirthraj
7.Aruljothi
8.Arulselvi
9.Anandaraj
10.Anburaj
11.Aruldevi

.. Petitioners

Versus

Sundaram (died)

T.Rajkumar

.. Respondent

Civil Revision Petition filed Under Article 227 of Constitution of India, praying to set aside the order passed in E.A. No. 3 of 2019 in E.A. No. 319 of 2005 in E.P. No. 705 of 2004 in RCOP. No. 152 of 1999 on the file of the I Additional District Munsif Court, Coimbatore, dated 03.02.2020.



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For Petitioners : Mr. C.Deivasigamani
For Respondent : Mr. T.Rajkumar, Party in person.

ORDER

The petitioners have filed this revision petition to set aside the order passed in E.A. No. 3 of 2019 in E.A. No. 319 of 2005 in E.P. No. 705 of 2004 in RCOP. No. 152 of 1999 on the file of the I Additional District Munsif Court, Coimbatore.

2. Heard Mr. C. Deivasigamani, the learned counsel for the petitioners and Mr. T. Rajkumar, respondent/Party in person and perused the materials available on record.

3. The revision petitioners are 3rd parties, who have filed an application before the Executing Court under order XVI Rule 16 of CPC r/w Section 151 of CPC, praying to take evidence of the attester of the registered Will in favour of Mr. J. Ebnesar Samuvel, S/o.Joseph, executed by Ponnachiammal registered as Document No.595/1991, dated 01.11.1991.



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4. The respondent contended that the petitioners in order to prolong the litigation have filed the application and prayed for dismissal of the same. It was also stated that the petitioners have nothing to do with the petition mentioned property and their claim based on the alleged Will said to have been executed by Ponnachiammal on 01.11.1991 is untenable. The petitioners have already initiated probate proceedings in OP. No. 38 of 2007 under Section 234 of Indian Succession Act before the Principal Subordinate Court, Coimbatore seeking probate of the alleged Will dated 01.11.1991. The said probate petition was dismissed way back on 07.09.2016. Therefore, the contention of the petitioners that they are having some semblance of right in the petition mentioned property based on the alleged Will relied on by them falls to the ground. The petitioners alleged that the original Will was with the legal heirs of one Thirugnanam. Based on that contention they have requested this Court to direct issuance of summon to one of the legal heirs of Thirugnanam to produce the alleged Will. This Court rightly dismissed the vexatious application after enquiry on 16.04.2019. Therefore it is clear that the alleged original Will is not available with the petitioners as on today. After the dismissal of the application on 16.04.2019 instead of getting on with the enquiry in the vexatious application filed in EA. No. 319 of 2005 the petitioners have filed the application for examination of one of the alleged attester of the Will dated



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01.11.1991 without even producing the original Will. Therefore, the question of examining the alleged attester of the Will which is not available is unnecessary and not warranted. More over, the probate Court dismissed the probate application stating that it is binding on the petitioners who are parties and it is clearly barred under the principles of res judicata. On considering both side submissions, the learned trial Judge dismissed the E.A. No. 3 of 2019. Aggrieved by the same the revision petitioners have preferred this revision.

5. The learned counsel for the revision petitioners submitted that to prove the execution of the Will, examination of one of the witnesses is necessary. One of the attesting witness already died and the other attester is alive as on date. Hence it is necessary to examine the attester. Further, after obtaining decree, fraudulently the respondent is attempting to execute the same. If the surviving attesting witness is permitted to be examined, no harm will be caused to the respondent. In both the Wills, the attesting witnesses are one and the same. Fairly the respondent ought to have conceded examining the attesting witness, but the respondent has opposed it with malafide intention. He further submitted that the probate proceedings in O.P. No. 38 of 2007 has been dismissed for default and not merits and the petitioners are taking efforts



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to restore the OP No. 38 of 2007. In any event, the dismissal of OP No. 38 of 2007 has got nothing to do with the examination of the attesting witness in the execution petition. The prayer in the probate is only to prove the genuineness of the Will. It can also be proved in the execution petition. The executing Court has come to the conclusion that appeal should have been filed against the order of delivery of possession under Order XXI Rule 97 to 105, but the said provision speaks about obstruction. Hence there is no necessity to file an appeal against the delivery of possession. Further the secondary evidence can be produced under certain circumstances. Therefore under such circumstance when secondary evidence is admissible in evidence it is not necessary that only Will can be proved by Primary evidence. Hence, they pray to set aside the order passed in E.A.3 of 2019.

6. The learned counsel for the respondent submitted that the respondent is the absolute owner of the petition mentioned property and his title and interest in the petitioner mentioned property was affirmed by the decree dated 08.11.1996 in O.S. No. 1291 of 1994 on the file of the I-Additional Subordinate Court, Coimbatore. The decree in the said suit has not been assailed and it is binding on the petitioners. He further submitted the Will mentioned by the petitioners is not genuine and it is only a fraudulent



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creation by the petitioners and Anugulam and they are not entitled to claim any relief under the said will. In the execution petition the 2nd respondent remained exparte. The exparte order is also a valid one and the petitioners cannot make wild allegations against the respondent and seek this Court to consider the materials on record in respect of the case at this stage. As a matter of fact, the petitioners have no right whatsoever to seek the relief of examination of one of the attesting witnesses and they are fully aware that the delivery has been effected. There is no scope for recording any objections at this stage. The possession has already been delivered and the Amin has also filed his report. After delivery of possession now the petitioners are filing frivolous petition to protract the litigation, hence, he prays to dismiss this Civil Revision petition.

7. On a perusal of the records, it reveals that as on date RCOP. No. 152 of 1992 is not pending. The decree passed in the Original Petition has been executed and the property in question has been delivered to the respondent. Therefore, at this stage, the application filed by the respondent to issue summons to one of the attesting witnesses of the Will is nothing but an attempt to prolong the litigation. Therefore, the order passed by the trial court, dismissing the application filed by the petitioners needs no interference.



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8. Accordingly, this Civil Revision Petition is dismissed as devoid of merits. Consequently connected Miscellaneous petition is closed. No costs.

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Index : Yes/No
Speaking/Non Speaking order
Neutral Citation: Yes/No

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To

1. The I Additional District Munsif Court, Coimbatore.
2. The Section Officer,
VR-Section, High Court of Madras.

T.V.THAMILSELVI, J.



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