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CRP.No. 1796 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2023

CORAM:

THE HONOURABLE MRS. JUSTICE V. BHAVANI SUBBAROYAN

Civil Revision Petition No. 1796 of 2021

and

CMP No. 13955 of 2021

K. Shanmugam (died)

1. K.Murugan

2. S.Mohan

3. S.Narayanamurthy

.. Petitioners

Versus

T.Ambiga

.. Respondent

Civil Revision Petition is filed under Article 227 of the Constitution of India, praying to set aside the fair and decretal order dated 10.03.2021 passed in I.A.No. 03 of 2020 in O.S.No. 3934 of 2018 on the file of the III Additional City Civil Court, Chennai.

For Petitioners : Mr. R. Marudhachalamurthy

For Respondent : Mrs. R. Jeevitha

ORDER

This Civil Revision Petition has been filed to set aside the fair and decretal order dated 10.03.2021 passed in I.A.No. 03 of 2020 in O.S.No. 3934 of 2018 on the file of the III Additional City Civil Court, Chennai.



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2. The revision petitioners are the defendants and the respondent is the plaintiff in the original suit.

3. The contention of the learned counsel for the petitioners/defendants is that the respondent/plaintiff, instead of adducing evidence on her own, permitted her daughter to give evidence on her behalf, on the basis of Authorization Letter dated 08.01.2020. It is further stated that the plaintiff's daughter has to get Power of Attorney recognized under Order III Rule 2(a) of CPC., to give evidence on behalf of the plaintiff. The Court below has not passed any order, under Rule XVI (2) of Civil Rules of Practice to authorize the plaintiff's daughter viz., K. Shanthi to give evidence on behalf of the plaintiff and further K.Shanthi had already adduced evidence in her individual capacity. Hence, the plaintiff's daughter cannot be permitted to be examined on behalf of the plaintiff as PW1, without eschewing the evidence of the plaintiff's evidence already recorded before the court below. Therefore, the learned counsel for the revision petitioners/ defendants prayed for allowing of this Civil Revision Petition.



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4. Per contra, it is contended by the learned counsel for the respondent/plaintiff that the respondent/plaintiff has filed the suit for partition of the land and building and for delivery of separate possession of her 1/3 share and for permanent injunction restraining the defendants from alienating the suit property. Due to her old age and health condition, she had authorized her daughter to give evidence on her behalf. She was not in a position to walk continuously and unable to stand, hence, she authorized her daughter to conduct the case. She was also not in a position to execute Power of Attorney due to her health conditions and also due to COVID-19 pandemic situation. Unless she is permitted to conduct the case through her daughter, the plaintiff will be put to great loss and hardship and she prays to dismiss the above revision.

5. Heard the learned counsel for the revision petitioners and the learned counsel for the respondent and perused materials available on records.

6. It is seen from the records that the respondent/plaintiff filed the suit in O.S. No. 3934 of 2018 before the III Additional City Civil Court, Chennai, for partition of the land and building situated at Plot No.23, Door No.11, L.B.Road, Kamarajar Nagar and Salai, Thiruvanmiyur, Chennai-600



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041, measuring an extent of 79 sq.mt. (i.e. 850 sqft) comprised in S.No.135/1 pt., by metes and bounds, allot 1/3 share in the suit property to her and deliver possession thereof, for passing a final decree and put the plaintiff in possession of her 1/3 share in the said schedule property. The plaintiff also sought for a consequential relief of permanent injunction restraining the defendants from alienating, encumbering, disposing, leasing, mortgaging etc., of the suit schedule property in any manner at any time without the consent of the plaintiff.

7. The defendants denied all the allegations made in the plaint and strongly objected the suit by way of filing written statement.

8. During the pendency of the suit proceedings, the petitioners/ defendants filed I.A. No. 3 of 2020 under Section 151 of CPC., seeking to eschew the evidence of PW1-K.Shanthi, Wife of K.Kumar, who had adduced evidence on the strength of Ex.A1-Authorization Letter dated 08.01.2020 given by the plaintiff viz., T.Ambiga, Wife of M.Thangasamy, in view of failure in following the procedures contemplated under the Code of Civil Procedure, 1908 CPC, and Civil Rules of Practice. After perusing the records, the trial Court dismissed the said application by the impugned order dated



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10.03.2021. It was reasoned by the Court below that Shanthi is none other than the daughter of the plaintiff - Ambiga. It is not a case where a proprietorship concern or a firm authorises its employees warranting a power of attorney to be executed and recognised under Order III Rule 2 (a) of CPC. The plaintiff due to her ill health has authorised her daughter and it cannot be said to be illegal. Aggrieved by the said order, the petitioners/defendants have filed this revision.

9. The petitioners/defendants have filed I.A.No.3 of 2020 in which they have clearly admitted that subsequent to filing of suit and written statement, the plaintiff was examined in Chief as PW1. The plaintiff also filed the proof affidavit but cross examination was not done.

10. It is well settled that when once a person had tendered evidence before the Court of law and it was also recorded, it cannot be eschewed on any ground except in the event of unceremonious death of the witness or upon proof to show that the witness is incapable of tendering any further evidence. If for any reason a witness could not be examined further, after recording his or her chief examination, the probative value of such evidence can be taken into consideration by the Court. If an analogy is taken where



cross-examination of a witness was not completed or partially completed and the witness was not in a position to subject himself for further cross-examination on account of terminal illness or otherwise, which had reasonably precluded him to subject himself to judicial process, the probative value of such evidence can always be considered by the Court. Thus, even if a witness who had tendered his evidence in chief examination or partially cross-examined could not be examined further on account of his death or cannot be found or was incapable of giving evidence, his or her evidence need not be eschewed by the Court. However, the probative value of the evidence tendered by such witness can always be considered and taken into account while finally disposing of the case. This was the ratio laid down by this Court in the case of **S.M. Suresh vs. Mohana Flat Owners Association, rep. by its President & Secretary, Virugambakkam, Chennai** reported in **AIR 2022 Madras 255**. Applying the ratio laid down in that decision, this Court is of the view that the plaintiff's daughter can always be examined on behalf of the plaintiff and as a pre-condition to examine the daughter of the plaintiff, the evidence already tendered by the plaintiff need not be eschewed as it is stated that the plaintiff is immobile due to her illness and age. Thus, even though the chief examination of the plaintiff was already over, it need not be eschewed and the probative value of the evidence of the plaintiff can always be taken



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note of by the trial court at the time of disposal of the suit. It is needless to say that upon examination of the daughter of the plaintiff, it is always open to the defendants/revision petitioners to cross-examine her.

11. With the above observation, this Civil Revision Petition is disposed of. The trial Court is directed to dispose of the suit, as expeditiously as possible, within a period of six months from the date of receipt of a copy of this order. There shall be no order as to costs in this revision. Consequently, connected Miscellaneous Petition is closed.

03.01.2023

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

To

1. The III Additional City Civil Judge, Chennai.
2. The Section Officer, V.R.Section, High Court, Madras.



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V. BHAVANI SUBBAROYAN, J

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