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CRP No.3828 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.03.2023

CORAM :

THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

CRP No.3828 of 2022

Mahalakshmi

.. Petitioner/plaintiff

-Vs-

Boopathi

.. Respondent/defendant

Prayer : Civil Revision Petition under Article 227 of the Constitution of India, to set aside the fair and decretal order in I.A No.4 of 2022 in O.S No. 40 of 2008 on the file of Subordinate Judge, Dharapuram dated 19.10.2022.

For Petitioner : Mr.A.K.Kumarasamy Senior Advocate
for Kaithamalai Kumaran

For Respondent : Mr.N.Manokaran

ORDER

This Civil Revision petition has been filed to set aside the fair and decretal order in I.A No.4 of 2022 in O.S No. 40 of 2008 on the file of Subordinate Judge, Dharapuram judge dated 19.10.2022.



2. Heard the learned counsel for the petitioner and the learned counsel for the respondent.

3. The suit was filed by the petitioner herein/plaintiff for the relief of declaration and injunction against respondent herein/defendant, based on the Will dated 20.04.1992 which was said to have executed by his father. The respondent herein contested the suit stating that through settlement deed dated 26.02.2003/defendant, the suit property was settled in his favour. After framing issues P.W.1 to P.W.5 were examined as witnesses on the side of the petitioner. Now, P.W.2 turned hostile. In order to prove the Will, P.W.3 and P.W.4 were examined before the Trial Court. But, at that time lower Court counsel failed to show the signatures of the plaintiff's father and attesor Subramani to P.W.3 and P.W.4 for identification. Hence the petitioner filed an I.A No. 4 of 2022 in said suit to recall P.W.3(nephew of 2nd attesor of Will dated 20.04.1992) and P.W.4(identified in settlement dated 23.12.1996) the said application was objected by the defendant stating that reason for recalling is not permissible in law after elaborate cross examination made by him and also not entitle to recall the witness in order to fill up lacuna by invoking Order 18 Rule 17 of C.P.C. After considering the submissions on either side, the said application was



dismissed by the Trial Court. Aggrieved over the same, the plaintiff preferred this Civil Revision petition.

4. The learned counsel for the petitioner submitted that while examining P.W.3 and P.W.4, the lower Court Counsel failed to show the signature of the attester's and Subramani to the witness to identify the signature. If the signature is not identified, the object of calling the witness will be defeated due to the error committed by the lower Court counsel. Hence he filed this petition and also relied the Judgment of the Supreme Court in the case of Bagai Construction Vs Gupta Building Material Store, reported in (2013) 14 SCC 1:

12. Further, it is observed that the evidence should be permitted in exercise of its power under Section 151 of the Code. The following principles laid down in that case are relevant:

“19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is



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avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

5. The learned counsel for the respondent submitted that plaintiff is not entitled to recall witness in order to fill up lacunae. In this case, after cross examination of P.W.3 and P.W. 4, two other witnesses were examined on the side of the plaintiff. Now, in order to fill up lacunae, they want to recall P.W.3 and P.W. 4 and the same was rightly rejected by the Trial court which needs no interference. Further he relied the Judgment of the Supreme Court in the case of *Bagai Construction Vs Gupta Building Material Store*, reported in (2013) 14 SCC 1:

8) *In Vadiraj Naggappa Vernekar (dead) through LRs. vs. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410, this Court had an occasion to consider similar claim, particularly, application filed under Order XVIII Rule 17 and held as under:*

“25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

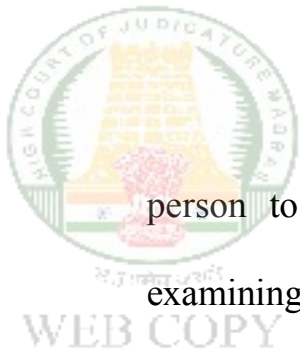
28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.



29. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.

31. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out.

6. Considering the fact that the plaintiff filed a suit based on a Will. On the other side, the defendant claiming the suit property was settled in the favour of the defendant based on a settlement deed. In fact, the petitioner allegation in plaint reveals that father of the plaintiff executed the subject Will and a settlement deed in favour of the plaintiff. However, subsequently, the said settlement deed was cancelled by her father. Later, another settlement deed was executed in favour of the defendant. Both the parties claiming right over the property based on their respective documents. So the plaintiff is having valid points to prove her case by relying documents, in order to prove her claim the petitioner relied the Will. Admittedly one attestor turned hostile, as per the Section 68 of Evidence Act, person who relying the Will bound to prove the genuineness by examining available witness. Admittedly, the plaintiff is entitled to take steps to examine the



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person to identify the signature of the attesor. In the present case, while examining the P.W.3 and P.W.4, the lower court counsel failed to show the signature of the attestors/Subramani and petitioner's father to P.W.3 and P.W.4 which clearly shows the mistake of the lower court counsel who appeared on behalf of the plaintiff/petitioner herein. It is settled proposition of law that the parties should not be suffered due to the lethargic attitude of the advocate. Hence, the findings of the Trial Court in I.A No.4 of 2022 in O.S No.40 of 2008 is hereby set aside. The Trial Court is directed to recall P.W.3 and P.W.4 for the limited purpose of identifying signature of the Subramani and petitioner's father after giving ample opportunity to the respondent for cross examination. Since the suit is pending for more than 14 years, the Trial Court is directed to complete the Trial as expeditiously as possible preferably within a period of 6 months.

7. Accordingly this Civil Revision Petition is disposed of. No costs.

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