



WEB COPY



C.R.P.(PD)No.1739 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2023

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P(PD)No.1739 of 2019
and CMP.No.11129 of 2019

R.Devarajalu (died) by L.R.

D.Vijayakumar

.. Petitioner

VS

1.S.Padmavathi

2.S.Ranganathan

3.S.Venkatesh

4.R.Krishnamoorthy

.. Respondents

Petition filed under Article 227 of the Constitution of India against
petition and Docket order passed in I.A.No.509 of 2018 in O.S.No.765 of
2010 dated 26.06.2018 on the file of First Additional Subordinate Judge
of Coimbatore.

For Petitioner : Mr.S.S.Mathivanan

For Respondents : Mr.P.Valliappan, Senior Counsel
for Mr.Deeraj



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ORDER

This revision arises against an order in I.A.No.509 of 2018 in O.S.No.765 of 2010. The petitioner is the plaintiff in the suit. The suit has been filed for partition of 1/3rd share and separate possession. The defence of the respondents is that the property originally belonged to one Raju Naidu, who had executed a Will in favour of their father Samulu. The document in favour of Samulu was registered with the jurisdiction of Sub-Registrar on 27.11.1985.

2.Between Samulu and Devarajalu, (the father of this civil revision petitioner), a suit was presented in O.S.No.64 of 1993 whereunder this Will was projected as a defence by Samulu. The said suit was dismissed for default.

3.Thereafter, the present suit has come to be filed. Though several objections were raised by Mr.S.S.Mathivanan stating that the Will cannot be received in evidence, etc., according to him, the original has not been produced and therefore, the Will cannot be proved.

4.Putting forth his argument, Mr.Valliappan, learned Senior Counsel for Mr.Deeraj, learned counsel appearing for the respondent would submit that pending the revision, the attesting witness one Kondasamy Naidu, who is the son-in-law of the testator Raju Naidu and



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the brother-in-law of Devarajulu namely, the father of the civil revision petitioner was examined. He would also point out that an application was taken out by the civil revision petitioner calling upon the respondent to produce the original Will in I.A.No.506 of 2018 and the same is pending.

5.I have considered the arguments on either side and I have carefully perused the records.

6.The arguments that have been submitted by the learned counsel appearing for the petitioner Mr.S.S.Mathivanan has to be appropriately raised in I.A.No.506 of 2018, which is an application taken out to produce the original.

7.Insofar as this revision is concerned, the only issue is whether the Court below was correct in permitting a 94 year old gentleman to enter the witness box and to mark the document. I feel the Court below is correct. It has considered the application taking into account the age of the deponent and his health. Further on 26.06.2018 the attesting witness, Mr.Kondasamy Naidu, had entered the witness box and had filed a proof affidavit in support of the Will. A proof affidavit, after the amendment of Code of Civil Procedure, will have to be treated as chief examination. He was not examined in cross. In case, he is not cross examined the respondents can take the benefit of Sections 32, 137 and 138 of the



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Indian Evidence Act. These are aspects which has to be gone into at the time of trial.

8.Suffice it to state in this revision, the said DW1 having been examined and since he has passed away on 16.01.2023, the burden is heavily on the respondent to prove the existence of the Will and also prove the attestation and execution of the same in terms of Section 69 or Section 71 of the Indian Evidence Act.

9.Apart from that, whatever rights the civil revision petitioner wants to claim in this revision, he is permitted to raise in I.A.No.506 of 2018, which is still pending.

10.With the above directions, this civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

01.08.2023

Index:Yes/No

Speaking order/Non-speaking order

Neutral Citation:Yes/No

vs

To

The First Additional Subordinate Judge,
Coimbatore.



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V. LAKSHMINARAYANAN,J.

VS

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