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Rev.Appl.No.200 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.01.2023

CORAM:

THE HON'BLE MS.JUSTICE P.T.ASHA

Rev.Appl.No.200 of 2019

and

S.A.No.33 of 2015

1.Prabhu
2.Shanthi

...Review Petitioners

Vs.

1.Murugana Gounder
2.Ammasaiammal
3.Vadivelu
4.Valliammal

... Respondents

PRAYER : Review petition filed under Order XLVII Rules 1 and 2 & Sec.114 of CPC., to review the judgment passed on 14.03.2018 in S.A.No.33 of 2015 and allow the review petition.

For Petitioners : Mr.A.K.Kumarswamy
Senior Counsel
for Mr.S.Kaithamalai Kumaran

For Respondents : Mr.N.Manokaran for R1 to R3



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ORDER

The above review petition is filed seeking to review the judgment and decree dated 14.03.2018 passed in S.A.No.33 of 2015. The only ground on which the review has been filed is that, in the judgment in question in Paragraph No.17, this Court has dismissed the review petitioner's claim over the second item of the suit property only on the ground that there is an absence of proof of the Will dated 02.09.1936. The review petitioners seek to review this portion of the order on the ground that this issue had never been raised before the trial Court and therefore, there was no finding regarding the same and further, the review petitioners have been denied an opportunity to meet this finding.

2. Mr.A.K.Kumaraswamy, learned Counsel appearing on behalf of the review petitioners, would submit that the review petitioners have not sought for a declaration in respect of the second item of the property and therefore, the question of proving the Will does not apply. On the other hand, the learned Senior Counsel would further submit that



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the respondents have themselves accepted and acknowledged the execution of the Will Ex.A1 dated 09.02.1936 and despite the above, this Court has proceeded to non-suit the review petitioners on the ground that the Will has not been proved.

3. Per contra, Mr.N.Manokaran, learned Senior Counsel appearing for the respondents, would submit that, even in cases where the Will has not been disputed, the Hon'ble Supreme Court has held that the Will has to be proved in the manner known to law, namely Section 68 of the Evidence Act and further these judgments have been reiterated in the judgment of the learned Single Judge of this Court reported in **2022 (3) CTC Page.88 Malliga Vs. P.Kumaran**. He would further submit that the ground that has now been raised in the review petition is not a ground of review but is an attempt to re-argue the Second Appeal. If the judgment of the learned Judge is erroneous, the remedy available to the review petitioners is only to challenge the said judgment by filing an appeal to the Hon'ble Supreme Court and not file a review petition. He would also submit that, while exercising the review jurisdiction, the scope of interference is very limited. He would rely upon the judgment of



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the Hon'ble Supreme Court reported in **2022 LiveLaw (SC) 685**,

S.Madhusudhan Reddy Vs. V.Narayana Reddy and others in support of this.

4. Heard the counsels on either side.

5. The suit in O.S.No.183 of 2010 on the file of the Sub-Court, Perundurai, which is the basis for the above review petition was filed by the review petitioners seeking the relief of declaration that the second plaintiff is the legally wedded wife of Velliyangiri and the first plaintiff was born out of the lawful wedlock of the second plaintiff, division of the first item of the suit property in 18 equal shares and allotting 5 shares to the plaintiffs and to restrain the defendants by means of an injunction from alienating or creating any encumbrance over the second item of the suit property. The case pleaded by the review petitioners in respect of the second item of the property was that the second item of the property belonged to one Vadivelappa Gounder, who is the father of the second defendant. He had executed Ex.A1 Will on 02.09.1936 bequeathing his properties infavour of his 8 daughters including the second defendant



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and under this Will, the daughters were granted only a life estate and after their life time the properties devolved upon their respective male heirs.

6. Therefore, it is the contention of the review petitioners that the second item of the suit property should devolve upon the third defendant and the father of the first review petitioner and the husband of the second review petitioner. Though the relief is one for injunction, the right to claim such a relief stems from the Will Ex.A1. It is no doubt that this issue has not been raised at any point of time and is raised for the first time during the arguments before the learned Judge in the Second Appeal.

7. This Court has also not framed any substantial question of law in this regard. However, the review petitioners have been denied the relief of injunction in respect of the second item of property only on the ground that the Will Ex.A1 has not been proved in the manner known to law as stipulated under Section 68 of the Evidence Act. The Hon'ble Supreme Court in the judgment of *Ramesh Verma (Dead) through legal*



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representatives and another reported in **2017 1 SCC 257** has held that the mandate of Section 68 of the Evidence Act remains the same even in the case where the opposite party does not question the execution of the document or deny the execution of the document in the written statement.

8. A similar view has been taken by the Hon'ble Division Bench of the **Kerala High Court in (Sarada Vs. Radhamani)** reported in **2017 2 KLT 327** and by this Court in the judgment reported in 2022 (3) CTC pg.88 where the learned Judge had extracted the earlier judgments in paragraph No.27 and had stated as follows:

“27. It is clear from the above judgment that the view express by the Hon'ble Supreme Court to the extent that Section 68 of the Evidence Act is Mandatory for proof of Will, has been reiterated and the same view has to be once again reiterated in this case also.”

9. The ground of review therefore is primarily a challenge to the judgment and decree in S.A.No.33 of 2015.

10. The Hon'ble Supreme Court in the judgment produced by the respondents has set out the contingency in which, an order could be



reviewed and where a review will not be maintainable by placing reliance on the the judgment of the Hon'ble Supreme Court reported in **2013 8 SCC 320, Kamlesh Verma Vs. Mayawati and others**. In the aforesaid judgment in para 20.02, the learned Judge has set out the grounds under which a review would not be maintainable as follows:

“20.2. When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the fact of the record should not be an error which has to be fished out and searched.



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(viii) The appreciation of evidence on record is fully within the domain of the appellate Court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.”

11. The arguments put forward would clearly show that what is being put forward is a challenge to the judgment and not a review of the same. It has been clearly stated that a review cannot be an appeal in disguise whereby an erroneous decision is re-heard and corrected. A review would lie only in cases of a patent error on the face of the judgment. Therefore, I see no reason for reviewing the judgment and decree in S.A.No.33 of 2015 dated 14.03.2018. Hence, this Review Application is dismissed. However, it is open to the revision petitioners to take such proceedings if required to have his title declared.

20.01.2023

Index : Yes/No
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The Sub-Court, Perundurai.



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