



WEB COPY



C.R.P.No.3890 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.07.2023

CORAM:

THE HONOURABLE Mr. JUSTICE V. LAKSHMINARAYANAN

Civil Revision Petition.No.3890 of 2018

and

C.M.P.No.21628 of 2018

1.Radhamani

2.Chitra

... Petitioners

Vs.

1.S.Kumaraswami

2.S.Kuppuraj

3.S.Mageshkumar

4.Syamala

...Respondents

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and final order passed in I.A.No.335 of 2018 in O.S.No.337 of 2010 on the file of the IV Additional District Munsif Court, Coimbatore, dated 01.08.2018.

For Petitioners : Mr.Muthu Kumar
For Respondents : M/s.Kalpana Devi
: for 1st respondent



C.R.P.No.3890 of 2018

WEB COPY

ORDER

Heard Mr.Muthu Kumar, the learned counsel for the petitioners and M/s.Kalpana Devi for Mr.V.Sivakumar, learned counsel for the respondents.

2.The learned IVth Additional District Munsif, Coimbatore, has allowed an application under Section 65 (a) of the Indian Evidence Act, 1872. The case of the plaintiff is that the property belonged to one Chellamal who died on 08.10.1988, leaving behind her only son Mr.Sundaram Chettiar. The plaintiffs and defendants are the daughters and sons of Mr.Sundaram Chettiar. The said Sundaram Chettiar died on 13.12.2009. After his death, property had been administered by Rajammal, the first defendant. As per the Will, written by Chellamal on 30.09.1987, according to the first respondent, the property belongs to the fourth defendant S.Mageshkumar and Kumaraswami.

3.During the course of trial, one S.Kuppuraj was examined as P.W.1. He had stated that original Will is available with the first defendant/Rajammal. The 1st respondent had given notice to produce the Will on 08.06.2018. However, the respondents issued a reply to the same



stating that they are not in possession of the document. The 3rd defendant, not being in possession of the document, has filed an application to let in evidence by way of secondary evidence.

4. Mr.G.K.Muthu, learned counsel for the petitioner would submit that the order of the trial court is contrary to the principles laid down in ***Smt. J. Yashoda vs Smt. K. Shobha Rani 2007 (5) SCC 730***. He would state that :-

(I).The 1st Respondent has not proved the existence of the original.

(II). It has not shown that the original is available with the Civil Revision Petitioners as mandated under Section 65 (a) of the aforesaid Act.

(III). Since the 1st Defendant was residing with Defendants 3 and 4, the application ought not to have been allowed.

5.The general principle of law is that a party must always produce the best evidence in the case. In other words, it is always preferable to produce the original. There are instances where the original Will not be available with a party. Therefore, the Indian Evidence Act, 1872 has created an exception and states secondary evidence can be proved when the original or the higher evidence is not available. This principle was laid down in ***Smt. J. Yashoda vs Smt. K. Shobha Rani 2007 (5) SCC 730*** and the Court held that



secondary evidence can be given in the absence of primary evidence.

WEB COPY

6.As to what are secondary evidences is clear from Section 63 of the said Act. As per Section 63, copies made from the original by mechanical process, which in themselves ensure the accuracy of the copy and copies compared with such copies are treated as secondary evidence. The argument of the learned Counsel for the Petitioner is that unless and until the original is shown to be in possession of the person against whom the document is sought to be proved, secondary evidence is inadmissible. This interpretation is only partly true. Under Section 65 (a) of the Act, where it appears to be in possession or power of the person against whom the document is sought to be proved "or of any person out of reach, or not subject to, the process of the Court or of any person legally bound to produce it" are also essential ingredients. In the case on hand, DW1, Kumarasamy had stated that the document is in possession of the mother, the first defendant.

7.In order to satisfy the requirements, under Section 65 (a) of the aforesaid Act, the petitioner had filed a notice to produce the original Will on 08.06.2008. To this, the response was that the same is not available. The entire claim of the plaintiff is based on the Will. If the Will is available with the defendants and I were to prevent the first respondent from producing a copy of



the document, then I will be shutting out vital evidence from the case.

WEB COPY

8.Rules of evidence and procedure incorporate principles of fairness. Sections 63 and 65 of the aforesaid Act, permits production of secondary evidence because in all cases the party will not be having primary evidence. If the Legislature wanted only primary evidence to be brought in, they would not have incorporated Section 65 (a) of the aforesaid Act. Prior to a person producing secondary evidence, the Act contemplates certain conditionalities. One such conditionality is that he must give an opportunity to the other side to produce it on issuing a notice to produce. This but is fair because the court requires and when the original is not available with the person, he calls upon his opponent or the person in whose custody it is available to produce it. It is not unusual for the person in possession of the document to refuse the same. This is because he would not want to assist the opposing party by producing the document. The parties do not realize that by not producing the original, while they are trying to torpedo their opponents's case, they are not helping the court to reach a just conclusion. It is in that light, Section 65 (a) of the said Act has been incorporated.

9.A perusal of the written statement shows that the 1st respondent herein



had taken a specific plea that the document is not in his possession but in the custody of the mother, the first defendant. To call upon a party to produce a document which he is not in possession of, is to expect an impossibility. Law does not require a party to do the impossible. Therefore, in compliance with law, the first respondent had issued a notice to defendants 2 and 4 on 08.06.2012, calling upon the parties to produce the documents. Defendants 2 and 4 had taken a stand that they are not in possession of the same. Being left with no other opportunity, this petition has been filed.

10.A reading of *Smt. J. Yashoda vs Smt. K. Shobha Rani 2007 (5) SCC 730* shows that where a party has laid a foundation for leading secondary evidence, then the Court should permit that person to adduce the same. It is not as if by the mere production of a Will, the suit is going to go in favour of the party, producing it. A bigger burden lies on the party who is propounding the Will to prove the same in terms of the Evidence Act and the Indian Succession Act, 1956.

11.I am satisfied in reading the judgment of *Smt. J. Yashoda vs Smt. K. Shobha Rani 2007 (5) SCC 730* that if a party complies with the conditions under Section 65 (a) of the said Act, then he must be permitted to let in



C.R.P.No.3890 of 2018

secondary evidence. I concur with the finding of the Trial Court that the condition precedent for invoking Section 65 (a) has been complied with.

12. On the argument that the document must be shown to exist, it overlooks the fact that even when it is shown or appears to be in possession of the third party, secondary evidence is admissible. I cannot demand the 1st respondent to let in better evidence when he is not in possession of the same. He has fulfilled the requirements of Section 65 (a) of the said Act. Therefore, there can be no reason to interfere with the orders passed by the learned IVth Additional District Munsif, Coimbatore. Hence, the Civil Revision petition is dismissed. No costs. Consequently, connected C.M.P.No.21628 of 2018 is closed.

07.07.2023

jai/nst

Index : Yes/No
Speaking Order : Yes/No
Neutral Citation Case : Yes/No



WEB COPY



C.R.P.No.3890 of 2018

V. LAKSHMINARAYANAN
jai/nst

To
The IV Additional District Munsiff Court,
Coimbatore.



WEB COPY



C.R.P.No.3890 of 2018

Civil Revision Petition.No.3890 of 2018
and
C.M.P.No.21628 of 2018

07.07.2023