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C.R.P.(MD) Nos.1142 to 1144 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	01.08.2023
Delivered on	08.09.2023

CORAM

THE HON'BLE **MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI**

C.R.P.(MD) Nos.1142 to 1144 of 2023

and

C.M.P.(MD) No.5460 of 2023

1.S.Balachandran

2.S.Chandhra Sekaran

... Petitioners in
all C.R.Ps.

Vs.

1.M.Nalini

2.K.Madhana

3.The Joint Sub-Registrar,
Office of the Joint Sub-Registrar,
No.2, Madurai Road,
Virudhunagar.

... Respondents in
all C.R.Ps.

Common Prayer:- These Civil Revision Petitions filed under Article 227 of the Constitution of India, to set aside the orders dated 14.03.2023 passed in I.A.Nos.3, 4 & 5 of 2023 in O.S.No.136 of 2013, on the files of the District Munsif Court, Virudhunagar.



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For Petitioners
in all C.R.Ps. : M/s.P.Jessi Jeeva Priya

For R1 & R2
in all C.R.Ps. : Mr.M.Kannan

For R3
in all C.R.Ps. : Mr.G.Suriyananth
Additional Government Pleader

COMMON ORDER

By this common order, all these three Civil Revision Petitions are being disposed of.

2. These Civil Revision Petitions are preferred by the petitioners against the orders dated 14.03.2023 passed by the District Munsif Court, Virudhunagar in I.A.Nos.3, 4 & 5 of 2023 in O.S.No.136 of 2013.

3. According to the revision petitioners, the suit in O.S.No.136 of 2013 was filed by the revision petitioners for declaration of title in the suit property, recovery of possession and for permanent injunction restraining the first and second respondents from making any encumbrance and alienation in the office of the third respondent Joint Sub Registrar.



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4. During the pendency of the suit, the revision petitioners filed I.A.Nos. 3, 4 & 5 of 2023 to re-open the case, to re-call the summoned witness and to issue warrant, respectively. The said applications were dismissed by the Trial Court *vide* impugned orders dated 14.03.2023.

5. The learned counsel appearing for the revision petitioners would submit that earlier, they filed I.A.No.2 of 2023 to summon the attestors in the Will dated 21.04.2012 which is relied upon by the revision petitioners. The said application was allowed on 15.11.2022. Summon to witness was ordered on 21.11.2022. It is submitted that the summon issued to the first attestor was returned with an endorsement 'died' and the summon to the second attestor was served. Since the summoned second attestor failed to appear before the Court, the plaintiffs side evidence was closed. Since steps have not been taken without following the procedure laid down under Order 16 Rule 10 of the Code of Civil Procedure, 1908, the applications were filed to re-open, re-call and issue warrant to the witness.

6. The applications filed by the revision petitioners were resisted on the side of the first and second defendants stating that the intentions of the revision petitioners, i.e. Plaintiffs, is only to drag on the proceedings. It is submitted



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that the Trial Court after analysing the averments made in the petition and the counter affidavit has rightly dismissed the above applications which calls for no interference.

7. The learned counsel appearing for the revision petitioner would submit that the Trial Court failed to see that the evidence of the attester to a Will is mandatory to prove the execution of the Will which is the basis of the case of the plaintiffs/revision petitioners.

8. She would further submit that as per Order 16 Rule 10(2) of the Code of Civil Procedure, 1908, when a person failed to attend the Court in spite of receipt of the summon, the Court should order for issuance of proclamation requiring him to attend the Court to adduce evidence and copy of the such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides and thereafter, as per Order 16 Rule 10(3) of the Code of Civil Procedure, 1908, the Court may, in its discretion, issue warrant, either with or without bail, for the arrest of such person.

9. The Trial Court failed to comply with the provision of Order 16 Rule 12 of the Code of Civil Procedure, 1908, as per which, if the witness failed to



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appear before the Court, the Court may impose upon him fine not exceeding Rs.500/- and order his property or any part thereof to be attached and sold. It is submitted that since the Trial Court failed to follow the provisions of Order 16 Rules 10, 11, 12 & 13 of the Code of Civil Procedure, 1908, the petitioner moved the above applications in I.A.Nos.3, 4 & 5 of 2023 which were erroneously dismissed by the Trial Court. Therefore, the impugned orders passed by the Trial Court are liable to be set aside.

10. On the other hand, the learned counsel appearing for the first and second respondents would submit that though I.A.No.2 of 2022 filed by the petitioners for examination of the attestors in the Will which was also allowed on 08.11.2022 with cost of Rs.3,000/-, the attestors did not appear before the Court and therefore, the plaintiffs side evidence was closed. It is further submitted that the petitioners filed I.A.Nos.3, 4 & 5 of 2023 to re-open the case, to re-call the summoned witness and to issue warrant, respectively which were dismissed *vide* impugned orders. It is submitted that now the case is posted for Judgment and therefore, the Trial Court was right in dismissing the above applications.

11. Heard on both sides. Perused the records.



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12. Admittedly, the above applications were filed in order to prove the genuinity of the Will relied upon by the petitioners. The Will has to be established in accordance with Section 65 of the Indian Evidence Act by examining the Attestor of the Will to prove its execution. The petitioners in order to prove the execution of the Will took out summons to the Attestors. The summons issued to the first Attestor was returned with an endorsement that the first Attestor had died. The second Attestor after receipt of the summon failed to appear before the Court.

13. While so, the Trial Court ought to have followed the procedure contemplated in Order 16 Rule 10(2) of the Code of Civil Procedure, 1908 in order to procure the appearance of the attesting witness. Hence, the petitioners filed the above applications for re-opening and re-calling the summoned witness and for issuance of warrant to the summoned witness which is in accordance with Order 16 Rule 10(2) of the Code of Civil Procedure, 1908.

Order 16 Rule 10 of the Code of Civil Procedure, 1908 reads as under:-

10. Procedure where witness fails to comply with summons. (1) Where a person has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court-



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(a) shall, if the certificate of the serving officer has not been verified by the affidavit, or if service of the summons has effected by a party or his agent, or

(b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.

14.The Trial Court without following the above provisions simply dismissed the above applications stating that they were filed belatedly. It has become necessary for the petitioners to establish the genuinity of the Will by examining one of the Attestors of the Will. Therefore, the impugned orders



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passed by the Trial Court are unsustainable and are liable to be set aside.

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15.The trial Court is directed to issue fresh summon to the attesting witness of the disputed Will and if he failed to appear before the Court, the trial Court is directed to invoke the provision under Order 16 Rule 10(2) of the Code of Civil Procedure, 1908, to secure the attendance of the attesting witness in order to establish the genuinity of the Will.

16.Considering the fact that the suit was filed in the year 2013, the trial Court is also directed to dispose the suit in O.S.No.136 of 2013, on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this order.

17. Accordingly, these Civil Revision Petitions are allowed. No cost. Consequently, connected Miscellaneous Petitions are closed.

08.09.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To
The Judge,
District Munsif Court,
Virudhunagar.



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K.GOVINDARAJAN THILAKAVADI, J.

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Pre-Delivery Common Order made in

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and C.M.P.(MD) No.5460 of 2023

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