



CMP No.13423 of 2023 in S.A.No.1064 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.10.2024

DELIVERED ON:25.10.2024

CORAM:

THE HONOURABLE Mr. JUSTICE P.B.BALAJI

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1.Rajamani @ Rajammal

2.N.Palanisamy (Died on 15.04.2021)

3.M.Mallika

4.P.Karthick

... Petitioners

VS

1. Shanmugadevi

2.Palaniammal

3.Kamalam

... Respondents

This petition is filed to permit the petitioners to adduce additional oral evidence viz., 1. Shanmugam, S/o Late Murugaiyan and 2. Ramasamy, S/o Late Murugaiyan.

For petitioners :Mr.Ma.Pa.Thangavel

For Respondents : No appearance



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ORDER

Though the above petition along with Civil Revision Petition in CRP No.1223 of 2018 and Second Appeal No.1064 of 2013 were listed before me on 04.10.2024 and again on 19.10.2024, learned counsel for the respondents was absent. Considering that the above miscellaneous petition is filed in S.A.No.1064 of 2013, seeking permission to adduce additional oral evidence, I proceeded to hear Mr.Ma.P.Thangavel, learned counsel for the petitioners.

2. Learned counsel for the petitioners would submit that the appellant in the Second Appeal is the first revision petitioner in CRP No.1223 of 2018. The suit in O.S.No.213 of 2005 came to be filed by the respondents herein, seeking declaration and recovery of possession in the suit property. The suit property, admittedly, belonged to one Subbanna Gounder . It is the case of the petitioners/appellants that the said Subbanna Gounder has executed a registered Will dated 25.02.1980 under Ex.B.19. Learned counsel would further submit that the said Will was revoked by Subbanna Gounder by subsequent Will dated 09.06.1985 under Ex.B.20, under which, the suit



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property has been bequeathed to the deceased testator's predeceased brother's wife/the first petitioner herein.

3. It is the case of the petitioners that in pursuance of the subsequent Will dated 09.06.1985 the petitioners are residing in the property for almost twenty years and despite the Will being acted upon and set up as defence in the suit for declaration, the Courts have disbelieved the Will on the ground that the Will has not been proved in the manner known to law. Now the petitioners seek to examine the witnesses to prove the Will in accordance with Indian Evidence Act, 1872 read with Section 63 of the Indian Succession Act.

4. The Will in Ex.B.20 dated 09.06.1985 is a registered Will. The suit was resisted only on the ground that the Will has been executed and in furtherance of the bequest alone and the revision petitioners in CRP No.1223 of 2018, who are the defendants, were in possession of the suit property. However, they were not able to prove the Will in accordance with law. The revision petitioners have been non-suited and the suit has been decreed against them and for the same reasons, they have lost before the first



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appellate Court and an execution petition has also been filed.

5. This Court has also admitted CRP No.1223 of 2018 and granted interim stay, protecting the possession of the revision petitioners.

6. Considering the fact that Subbanna Gounder has executed a Registered Will dated 09.06.1985, which is the second Will, Ex.B.20, the petitioners can be given an opportunity to prove the Will as required under the Indian Succession Act and also Indian Evidence Act.

7. The fact that the petitioners have been in possession for more than two decades claiming under registered Will and in pursuance of which, they have been enjoying the property by paying electricity and water consumption charges, would show prima facie there is a bonafide claim over the suit property. In fact the petitioners have filed patta under Ex.B.22 to show that the Will was acted upon subsequent to the demise of Subbanna Gounder dated 18.12.2003. In the affidavit, filed along with the petition, the petitioners have also set out the reasons as to why they were not in a position



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to examine atleast one of the attestors in the said Will Ex.B.20 and the reasons assigned appear to be prima facie satisfactory. In any event, the respondents have not chosen to file a counter to rebut any of the allegations made in the petition. Therefore, in the interest of justice and in order to give an opportunity to the petitioners to prove the Will in accordance with law which would alone subserve the wishes of the testator, I deem it fit to entertain CMP No.13423 of 2023.

8. In the result, CMP No.13423 of 2023 is allowed on the following terms:

- (i) Registry shall remit the papers back to the first appellate Court viz., Sub Court, Tirupur and the Sub Court, Tirupur shall fix a date for appearance of the parties and the petitioners shall be entitled to lead evidence and examine Shanmugam, S/o late Murugaiyan and /or Ramasamy, S/o late Murugaiyan or any other witness to prove the Will Ex.B.20.



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(ii) It is needless to state that the respondents shall have an opportunity to cross examine the witnesses being examined on the side of the petitioners.

(iii) The Sub Court, Tirupur shall record a finding with regard to the proof of the above mentioned Will and send a Report to this Court.

(iv) The entire exercise shall be done within a period of three months from the date of receipt of a copy of this Order.

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P.B.BALAJI,J.,

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Pre-Delivery Order in **CMP**
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