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C.R.P.(PD)No.4058 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **24.10.2024**

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P.(PD)No.4058 of 2024
and C.M.P.No.22321 of 2024

Nageswaran

.. Petitioner

Vs

1.R.Ragunathan
Gokilambal (died)
Pushpammal (died)
2. Banumathi
3. Balachandran
4. Bharathi
5. Bhaskaran
6. A.Babu
7. Maheswarai
8. Kalisamy

.. Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the
Constitution of India, against the order dated 11.07.2024 made in



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I.A.No.1351 of 2023 in O.S.No.236 of 2016 on the file of the learned

Subordinate Judge at Avinashi.

For Petitioner : Mr.C.Prabakaran
for Mr.C.S.Saravanan

ORDER

This civil revision petition at the instance of the 2nd defendant arises against the order of the learned Subordinate Judge at Avinashi in I.A.No.1351 of 2023 in O.S.No.236 of 2016.

2. O.S.No.236 of 2016 is a suit for partition and separate possession. Summons was served on the defendants and the defendants also entered appearance. The 2nd defendant filed a detailed written statement.

3. In the said written statement, he did not contest the right of the plaintiff/1st respondent herein with respect to schedule-II of the suit property. However, he pleaded that in so far as schedule-I is concerned, the mother of the 2nd defendant, one Subbammal had executed a “Will” in his favour on 21.06.2001. As the testator passed on, the “Will” has come



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into force and the 2nd defendant is enjoying the property in his exclusive right.

4. The 2nd defendant also pointed out that previously a suit had been presented in O.S.No.341 of 2005 on the file of the District Munsif Court at Avinashi seeking for declaration and for consequential relief of permanent injunction. He added that in the suit, the present plaintiff was a party to the same and it resulted in an exparte decree on 11.11.2010.

5. On the basis of these pleadings, issues were framed and the parties were sent for trial.

6. During the course of trial, the plaintiff took out an application in I.A.No.1351 of 2023 under Order XII Rule 8 of the Code of Civil Procedure, 1908 calling upon the 2nd defendant to produce the original “Will” dated 21.06.2001. This application was resisted by the 2nd defendant pleading that as he has already become owner of the property by virtue of the “Will: dated 21.06.2001 and since he has succeeded in O.S.No.341 of 2005 on the file of the learned District Munsif at Avinashi, he need not produce the same. He further pleaded that the plaintiff herein



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took out an application in I.A.Nos.1158 & 1159 of 2016 to condone the delay and set aside the exparte decree in O.S.No.341 of 2005 and the said applications came to be dismissed on 23.08.2021. Therefore, it was argued that the decree in O.S.No.341 of 2005, having attained a finality is binding on the plaintiff and hence, he need not produce the same.

7. The learned Subordinate Judge at Avinashi, taking into consideration the respective arguments, came to a conclusion that as the original “Will” is in the custody of the 2nd defendant, he is duty bound to produce the primary evidence before the Court and consequently, allowed the application. Feeling aggrieved by the said order, the 2nd defendant is on revision before this Court.

8. Heard Mr.C.Prabakaran for Mr.C.S.Saravanan.

9. Mr.C.Prabakaran argues that the question of producing the original of the “Will” in this case does not arise as it had already been produced in O.S.No.341 of 2005 and had ended in exparte decree. He further submits that in O.S.No.341 of 2005, the attesting witness was examined as P.W.2 and a decree was obtained thereafter. He reiterates



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the contention that the attempts of the plaintiff herein to set aside the ex parte decree was rebuffed by the Court, when it dismissed the petitions under Section 5 of the Limitation Act and the applications under Order IX Rule 13 in I.A.Nos.1158 & 1159 of 2016. Hence, he argues it is not necessary to produce the original “Will” before the Court.

10. Mr.C.Prabakaran also argues that the plaintiff having filed the aforesaid applications ought to have pleaded about the suit in O.S.No.341 of 2005 and since he has failed to do so, the entire suit is an abuse of process of law.

11. I have carefully considered the submissions of Mr.C.Prabakaran and have gone through the records.

12. The plaintiff has come forth with the suit for partition. The said partition suit is sought to be dismissed in so far as item no.1 is concerned by projecting a “Will” dated 21.06.2001. The factum is the validity of the “Will” has been raised in this proceeding by the defendant. The plaintiff has not conceded to the execution of the “Will” by Subbammal and it is the 2nd defendant who has projected that plea in his



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favour. If a “Will” is projected during the course of trial, it is the duty of the propounder to prove the said “Will” during the course of the said proceedings. The exception to this rule found under Section 41 of the Indian Evidence Act. It states where the decree is one in rem as in the case of insolvency or a probate, then a Court subsequent to the grant cannot re-look into the said issue again. The learned District Munsif has not been empowered by the Indian Succession Act to grant a decree of probate. At this stage, I necessarily have to look at the judgment in O.S.No.341 of 2005. Mr.C.Prabakaran was kind enough to produce the said judgment and decree.

13. A perusal of the said judgment shows that the learned Judge has no where dealt with the validity of the “Will” which had been produced therein as under Ex.A7. It is for the learned Subordinate Judge at Avinashi while dealing with the suit to decide whether the judgment which has been rendered by the learned District Munsif at Avinashi on 11.11.2010 answers the requirements of Order XX of the Code of Civil Procedure. He might, at the time of rendering a judgment also, referred to the judgment of ***R.Stella v. V.Antony Francis, (AIR 2019 Madras 1806)*** delivered by the Hon'ble Mr.Justice N.Anand Venkatesh. As the matter is



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still pending before the learned Subordinate Judge, I am not entering into a conclusive finding on the same.

14. Needless to point out when a plea of resjudicata is raised by the defendants as held by the Supreme Court in ***Syed Mohd. Salie Labbai (dead) by legal heirs v. Mohd. Hanifs (dead) by legal heirs and others, 1976 AIR 1569***, it is the duty of the said defendant to produce the pleadings in the first suit in the second suit and along with it, the issues and the judgment. This is because the learned Judge dealing with the second suit must be aware that a specific issue had been framed and had been answered in the previous proceedings. In case an issue had been framed on the validity of the Will and if it had been answered by the learned District Munsif at Avinashi, then certainly the learned Subordinate Judge cannot probe into the said issue again. In case the learned District Munsif has not probed into the said issue, then it cannot be decided as if the learned District Munsif had heard and finally decided on the validity of the Will for it to be a bar on the Subordinate Judge to proceed further.

15. Suffice to say as the 2nd defendant has projected a “Will”, and



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as since he has admitted that he is having the possession of the same, he should produce the original before the Court. In case he does not produce the original before the Court, the learned Subordinate Judge at Avinashi can always draw an adverse inference in terms of Section 114 illustration (g) as against the said defendant.

16. In the light of the above discussions, I do not find any error with the reasoning that has been given by the learned Subordinate Judge at Avinashi in paragraph 3.1 of the impugned order and therefore, the order of the trial Court stands confirmed.

17. With the above observations, the civil revision petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

24.10.2024

Index:Yes/No
Speaking order/Non-speaking order
Neutral Citation:Yes/No

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To



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The Subordinate Judge at Avinashi.
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V. LAKSHMINARAYANAN,J.



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