



CRP No.3648 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.07.2024

CORAM

THE HON'BLE MR.JUSTICE V. LAKSHMINARAYANAN

Civil Revision Petition No.3648 of 2023

1.B.Gomathi

2.Minor P.Arthi

3.Minor P.Preeti

(Minors represented by Natural guardian
mother B.Gomathi)

: Petitioners

versus

1.Nagaraj

2.Kavitha

3.Manikandan @ Deepu

: Respondents

Prayer: Revision petition filed against the order passed in IA No.2 of 2023 in OS No.137 of 2022 on the file of the Subordinate Court, Udagamandalam, dated 28.08.2023.

For Petitioners : Mr.V.Sivakumar

For Respondents 1 and 3 : Mr.S.Rajesh

For Respondent No.2 : No appearance



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ORDER

This revision petition arises against the order of learned Subordinate Judge, Uthagamandalam, in IA No.2 of 2023 in OS No.137 of 2022, dated 28.08.2023.

2. The revision petitioners are the plaintiffs in the suit. It is the case of the plaintiffs that they are the wife and children of one A.S.Babu. The first defendant Nagaraj is brother of the said A.S.Babu. Defendants 2 and 3 are the daughter-in-law and son of one Viswanathan, who is also a brother of A.S.Babu.

3. According to the plaintiffs, A.S.Babu, Nagaraj and Viswanathan were doing business jointly in Uthagamandalam. From the income of the joint business conducted by the brothers, the shares were divided equally, i.e. 1/3rd each. According to the plaintiffs, when A.S.Babu had gone out of the city for business purposes, the suit schedule mentioned property was purchased by Nagaraj and Viswanathan, from and out of the income generated from the business. In order to demonstrate that, the plaintiffs relied upon a memorandum



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of family settlement that had been entered into between the three brothers – A.S.Babu, Nagaraj and Viswanathan. They would state that the predecessor-in-interest of the plaintiffs, A.S.Babu died on 29.07.2012. Even post his death, the first defendant and Viswanathan were paying a sum of Rs.6,000/- per month to the plaintiffs. It was agreed that a separate partnership deed would be entered into between the parties. But it did not fructify as Viswanathan also passed away. Taking advantage of the death of Babu and Viswanathan, Nagaraj stopped paying any amount to the plaintiffs from the income of the business. Being left with no other alternative, the plaintiffs came forward with the aforesaid suit.

4. Even at the time of presentation of the plaint, in paragraph 2, the plaintiffs have specifically pleaded about the existence of the memorandum of family settlement. In terms of Order VII Rule 14(3) of the Code of Civil Procedure had also pleaded that the memorandum of family settlement had been taken away by the paternal uncle of the second and third defendants. He had taken the document away under the strength of the fact that he was in the police department.

5. A written statement was received from the first defendant,



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who has clearly admitted to the execution of the memorandum of family settlement in paragraph 5 of the written statement.

6. During the course of trial, the memorandum of family settlement was sought to be marked. The plaintiffs, as they had specifically explained in the plaint that the document was not in their possession, had to rely upon a photostat copy of the said document. They served a notice to produce on the third defendant, in whose custody the document is alleged to have been. The third defendant denied custody of the memorandum of family settlement and therefore, that application in IA No.1 of 2023 came to be dismissed on 03.07.2023. With their effort to extract the document from the defendants having failed, the plaintiff took out the present petition in IA No.2 of 2023 to mark the photostat copy of the document, in exercise of the power under Section 65 of the Indian Evidence Act. On receipt of a counter, the learned Judge came to a conclusion that the application is not maintainable since the deed, whose photostat copy is to be marked, requires registration and therefore, dismissed the petition. Aggrieved by the same, the present revision has been filed.

7. Heard Mr.V.Sivakumar, learned counsel for the petitioners and



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Mr.S.Rajesh, learned counsel for respondents 1 and 3.

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8. A narration of the aforesaid facts would go to show that it is the specific case of the plaintiffs that the original of the document, on the basis of which the suit has been presented, is not available with them but it is only available with defendants 2 and 3. The loss of the document has been explained by stating that the paternal uncle of defendants 2 and 3, being an official in the police department, had managed to remove the document from the custody of the plaintiffs. This explanation having been given, they proceeded further by taking out an application under Order XI Rule 16 of the Code, calling upon the defendants to produce the same.

9. The third respondent, as expected, took a stand that he does not have possession of the document. Therefore, the petition came to be dismissed.

10. The only option available to the plaintiffs is to produce a photostat copy of the document which is in their possession. The question of registration of the document or otherwise, would depend upon whether the document divides the property *in praesenti* or merely records the past transaction. If the memorandum of family



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settlement is one which records the past transaction, then it certainly does not require registration in terms of Section 17 of the Registration Act. The issue of registration cannot be decided even before the document is received in evidence.

11. The purpose of filing the petition was to enable the Court to receive the document. A perusal of the written statement shows that the first defendant, who is the only surviving brother, has conceded to the fact that the brothers, A.S.Babu, Nagaraj and Viswanathan, had entered into an agreement on 27.04.2006. Whether the document that is sought to be filed is a document that is referred to in paragraph 5 of the written statement is a matter which can be gone into only at the time of marshaling of evidence of the respective parties, just before the pronouncement of judgment. But the plaintiffs, having complied with the provisions of Section 65 of the Evidence Act, cannot be shut out on the grounds pointed out by the learned Subordinate Judge, Uthagamandalam. They had taken all the steps necessary for the purpose of marking the document. The position of law has been settled by a decision of the Supreme Court in **J.Yasodha vs. K.Shobha Rani, reported in 2007(3) CTC 781**. The Court had held that if the plaintiff complies with the requirements of Section 65 of the Indian



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Evidence Act by calling upon the opposite party to produce the evidence and still is unsuccessful, it is always open to them to mark the photostat copy of the document that they rely upon.

12. Following the aforesaid judgment, I am of the view that the order of the trial Judge cannot be sustained. Accordingly, IA No.2 of 2023 in OS No.137 of 2022, stands allowed. The order dated 28.08.2023 is set aside. Leave is granted to the plaintiffs to mark the photostat copy of the memorandum of family settlement dated 27.04.2006. It shall of course be received subject to relevancy and proof.

13. There shall be no order as to costs. Consequently, CMP No.22904 of 2023 is closed.

12.07.2024

Index : Yes/No
Neutral Citation : Yes/No
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To

The Subordinate Court, Udagamandalam



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V. LAKSHMINARAYANAN, J.

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