



C.M.P.(MD)No.7505 of 2022

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.04.2025

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

and

THE HONOURABLE MR.JUSTICE M.JOTHIRAMAN

C.M.P.(MD)No.7505 of 2022

in

A.S.(MD)No.101 of 2016

M.Viswanathan

.... Petitioner / Appellant

Vs.

1.Kannammal

2.A.Shanmughasundaram

3.Sarojini

4.Mangayarkarasi

... Respondents / Respondents

Prayer : Petition filed under Order XLI Rule 27 of C.P.C praying to pass an order permitting the petitioner to produce the additional documentary evidence namely original Will dated 17.09.2003 executed by the petitioner's grandmother Palaniammal.

For Appellants : Mr.S.Anand Chandrasekar
for M/s.Sarvabhauman Associates

For Respondents : Mr.D.S.Haroon Rasheed
for R1
: No appearance for R2 to R4

ORDER

(Order of the Court was made by G.R.SWAMINATHAN, J.)

A.S.(MD)No.101 of 2016 arises out of a suit for partition. The suit schedule

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properties are two in number. The first item is a residential property, while the second item is a non-residential property. It is not in dispute that both the items were purchased by one Palaniammal under Ex.A1 & Ex.A2. Palaniammal got married to Ammapatti Chettiar. Through the wedlock, three children were born namely Marimuthu, Shanmugasundaram & Kannammal. According to Kannammal, Palaniammal died intestate and therefore, she is entitled to 1/3rd share in the suit schedule properties. O.S.No.18 of 2011 was instituted on the file of the Additional District Judge, Dindigul for dividing the property in three equal share and allotting one such share in her favour. Even before the suit was filed, the elder son Marimuthu passed away leaving behind the legal heirs namely Sarojini, Viswanathan & Mangayarkarasi (D2 to D4). The preliminary decree was passed as prayed for on 23.02.2016. Challenging the same, the appeal came to be filed by Viswanathan / 3rd defendant.

2. Viswanathan had also filed C.M.P.(MD)No.7505 of 2022 for adducing additional evidence. The said petition was taken up along with the main appeal. The learned counsel appearing for the appellant submitted that the prime defence of the appellant Viswanathan was that Palaniammal had executed the registered Will dated 17.09.2003 bequeathing the suit second schedule item in his favour. Since the Will has to be proved by examining atleast one attestor, the appellant had also



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produced the attesor before the Court below for examination. For reasons that the
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appellant is unable to explain, the attesor was not examined. As a result,
Viswanathan who sought to propound the Will not prove the same in terms of
Section 68 of the Evidence Act, 1872.

3. The learned counsel appearing for the appellant states that during the relevant time, only a certified copy of the Will was marked as Ex.B1. Since the appellant had raised funds on the strength of the Will, the original Will was deposited with the Bank. The original Will was subsequently taken back. The appellant is also ready to prove the said Will by examining the testator as well the scribe. This attempt on the part of the appellant is strenuously opposed by the learned counsel for the plaintiff.

4. The learned counsel for the plaintiff states that in terms of the Order 41 Rule 27 of C.P.C., the appellant cannot be granted such indulgence. If the petition filed by the appellant is allowed, it would amount to helping the appellant to fill up the lacuna. The appellant obviously knew that Will can be proved only by examining atleast one of the attestors if alive. The court below had held against the appellant only because he failed to prove the said Will. Having failed to avail the opportunity, the appellant cannot be now allowed any more indulgence. If the appellant had not been given opportunities, then he may have cause for complaint.



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In this case, opportunity was given and it was not utilized by the appellant. He therefore called upon this Court to dismiss the petition under Order 41 Rule 27 of C.P.C.

5. Order 41 Rule 27 of C.P.C reads as follows:-

“27.Production of Additional Evidence in Appellate Court:-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time, when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce Judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Additional Court, the Court shall record the reason for its admission.”



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6. We carefully considered the rival contentions and went through the evidence on record. The decision of the Hon'ble Supreme Court reported in (2015) 1 SCC 677 (Wadi Vs. Amilal and others) is on the point. The Hon'ble Supreme Court in the said decision held as follows:-

“7. Now it is clear that Rule 27 deals with production of additional evidence in the appellate court. The general principle incorporated in Sub-rule (1) is that the parties to an appeal are not entitled to produce additional evidence (oral or documentary) in the appellate court to cure a lacuna or fill up a gap in a case. The exceptions to that principle are enumerated thereunder in Clauses (a), (a) and (b). We are concerned here with Clause (b) which is an enabling provision. It says that if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, it may allow such document to be produced or witness to be examined. The requirement or need is that of the appellate court bearing in mind that the interest of justice is paramount. If it feels that pronouncing a judgment in the absence of such evidence would result in a defective decision and to pronounce an effective judgment admission of such evidence is necessary, Clause (b) enables it to adopt that course. Invocation of Clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them. It is for the appellant to resort to it when on a consideration of material on record it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the



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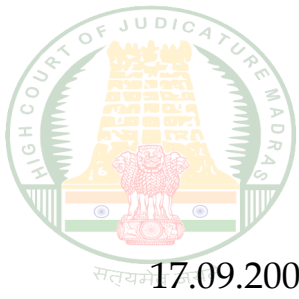
case.”
7. Respectfully applying the aforesaid ratio, we hold that this petition has to be allowed. It is true that the appellant had been guilty of a serious negligence. But then, his entire case is based on the registered Will. The Court below had also made an observation that the appellant had produced the attesting witness as well as the scribe. Because of this specific finding given by the Court below, we are inclined to show some indulgence in this case. But then, it is the appellant who is responsible for delaying the proceedings. He should therefore be mulcted with necessary cost.

8. The Civil Miscellaneous Petition is allowed in the following terms:-

A. The court below is directed to mark the original Will dated 17.09.2003 as Ex.B12.

B. The parties will appear before the Court below on 14.07.2025. The Court below will issue notices to all the parties. On the said date, the appellant herein must be ready with his witnesses. The examination of the witnesses shall be concluded on the same day or any other day subject to the convenience of the Court below.

C. After marking the document and recording the evidence of the witnesses, the record shall be despatched to this Court. The evidence to be adduced by the witnesses will be confined to proof of Ex.B1-Will dated



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17.09.2003.

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D. The learned counsel for the plaintiff as well as the other contesting defendants are at liberty to cross examine the said witnesses.

The appellant is directed to pay cost of Rs.10,000/- to the plaintiff.

sd/-
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/05/2025
Sub-Assistant Registrar (C.S.-I/ II /III/ IV)
Madurai Bench of Madras High Court,
Madurai - 625 023.

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TO

THE ADDITIONAL DISTRICT JUDGE, DINDIGUL.

Copy to

THE SECTION OFFICER, JUDICIAL SECTION, MADURAI BENCH OF MADRAS
HIGH COURT, MADURAI.

ORDER
IN
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in
A.S.(MD)No.101 of 2016
Date :21/04/2025

NBF/SAR/09.05.2025 7P/3C

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