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C.R.P.No.2123 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.03.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

**C.R.P. No.2123 of 2020**

**and**

**C.M.P. No.13449 of 2020**

1. M. Kumarappan S/o. Marappa Gounder
2. Shanmugam S/o. N. Kumarappan

... Petitioners

vs.

1. Ponnusamy S/o. Marappa Gounder
  2. Palaniammal W/o. Muthusamy (died)
  3. Saraswathy D/o. Muthusamy
  4. Revathy W/o. Muthusamy
  5. Pongiammal W/o. Ramasamy Gounder
  6. Ganesan S/o. Muthusamy Gounder
  7. Kuppusamy (died) S/o. Palaniappa Gounder
  8. Duraisamy S/o. Kuppusamy
- [\* 2<sup>nd</sup> respondent died and the respondents 3 and 4 (already on record) are recorded as legal representatives of 2<sup>nd</sup> respondent vide order dated 12.03.2024 in C.M.P. No.13449 of 2020 and  
\* the 7<sup>th</sup> respondent died and the 8<sup>th</sup> respondent (who is already on record) is recorded as legal representative of 7<sup>th</sup> respondent vide order dated 12.03.2024 made in C.M.P. No.13449 of 2020]

... Respondents



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Prayer: Civil Revision Petition filed under Article 227 of Constitution of

India, praying to set aside the fair and decretal order passed by the learned

Additional District and Sessions Judge, Namakkal dated 08.02.2018 made in

I.A. No.1 of 2014 in A.S. No.36 of 2013.

For Petitioners : Mr. P. Valliappan, Senior Advocate.

For Respondent : Mr. S. Mukunth, Senior Advocate  
for Ms. J. Samyuktha [for R3 and R6]

R1, R4, R5 and R8 – served –  
No appearance

R2 and R7 – died.

### **ORDER**

The Civil Revision Petition is filed challenging the order passed by the First Appellate Court dismissing the application filed by the petitioners for reception of additional evidence under Order XLI Rule 27 of Code of Civil Procedure.

2. The petitioners herein filed a Suit for partition and separate possession. The petitioners referred about a Will dated 14.07.1992 executed



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by one Pavayi Ammal in favour of Chinnammal and Shanmugam. The said

Chinnammal and Shanmugam are vendors of petitioners' vendor Radhamani

and Senthilkumar. The respondents herein filed their Written statement and

resisted the Suit, inter-alia denying the Will relied on by the petitioners. The

Trial Court held that the Will relied on by the petitioners was not proved by

examining attesting witnesses and hence dismissed the Suit. Aggrieved by the

same, the petitioners filed an appeal in A.S. No.36 of 2013 before the

Additional District and Sessions Court, Namakkal.

3. Pending appeal, the petitioners filed an application under Order XLI Rule 27 of Code of Civil Procedure seeking leave of the Court to examine attestor to the Will in the First Appellate Court. Aggrieved by the dismissal of said application, the petitioners are before this Court.

4. Mr. P. Valliappan, the learned Senior Counsel appearing for the petitioners submitted that the petitioners are not the direct beneficiaries under the Will. According to him, the Will was executed in favour of the petitioners' vendor's vendor and hence, the failure of the petitioners to examine the



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attestors cannot be put against them. The learned counsel further submits that

**WEB C** Order XLI Rule 27 of Code of Civil Procedure is only a procedural law and

the same is a handmaid of justice. Therefore, in order to give an opportunity to the petitioners to prove their case, leave shall be granted to examine the attesor of the disputed Will.

5. Mr. S. Mukunth, the learned Senior Counsel appearing for the respondents submitted that the Will relied on by the petitioners was specifically disputed in the written statement filed by the respondents and notwithstanding the said fact the petitioners failed to prove the Will by examining any one of the attestors to the document. Therefore, the petitioners cannot be allowed to fill up the lacunae in their evidence. In support of the contention, the learned Senior Counsel for the respondents has relied on the judgment of the Hon'ble Apex Court in *N. Kamalam (Dead) and another vs. Ayyasamy and another reported in (2001) 7 Supreme Court Cases 503*.

6. A perusal of the averments found in the plaint would indicate that the petitioners referred to the Will executed by Pavayi Ammal in favour of



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their vendors' vendors Chinnammal and Shanmugam. In response to the averments in the plaint, the respondents in their written statement specifically denied the Will. However, the petitioners, for the reasons best known to them, failed to examine the attestor to the Will and prove the same in the manner known to law. It was also stated by the petitioners that the disputed Will was produced by the petitioners in a claim petition itself. The said claim petition was allowed and the said order was marked as Ex.A.18.

7. The petitioners were very well aware of the dispute raised by the respondents with regard to the genuineness of the Will. In such circumstances, the burden is on the petitioners, as propounder of the Will, to prove the same by examining anyone of the attestors to the document. In the affidavit filed in support of the present application for leading additional evidence, the petitioners have not mentioned any reason for their failure to examine the attestor before the Trial Court.

8. Order XLI Rule 27 of Code of Civil Procedure reads as follows:-

*“27. Production of additional evidence in Appellate Court – (1) The parties to an appeal shall not be entitled to*



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*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 Appellate Court, the Court shall record the reason for its admission”.*

As per the provisions of Order XLI Rule 27 (1)(aa) of Code of Civil Procedure, the party seeking to produce additional evidence must establish 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 before the Trial Court. In the case on hand, in the affidavit filed in support of the present application, the petitioners have not stated any valid reason for their failure to call any attester to prove the disputed Will.

9. In *N.Kamalam (Dead) and another vs. Ayyasamy and another*



*reported in (2001) 7 Supreme Court Cases 503*, while considering the

similar question, the Hon'ble Apex Court observed as follows:-

*19. Incidentally, the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal – it does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. This Court in Municipal Corpn. Of Greater Bombay v. Lala Pancham has been candid enough to record that the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. In Para 9 of the judgment, this Court observed (AIR p.1012)*

*“This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in*



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*a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports 'in a large measure' the plaintiffs' contention about fraud and mala fides. We shall deal with these documents presently but before that we must point out that the power under Clause (b) of sub-rule (1) of Rule 27 cannot be exercised for adding to the evidence on record except upon one of the grounds specified in the provision".*

*Further in Pramod Kumari v. Om Prakash Bhatia this Court also in more or less an identical situation laid down that since an application to the High Court has been made very many years after the filing of the suit and also quite some years after the appeal had been filed before the High Court, question of interfering with the discretion exercised by the High Court in refusing to receive an additional evidence at that stage would not arise. The*





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*time-lag in the matter under consideration is also enormous and the additional evidence sought to be produced was as a matter of fact after a period of 10 years after the filing of the appeal. Presently, the suit was instituted in the year 1981 and the decree therein was passed in 1983. The first appeal was filed before the High Court in April 1983 but the application for permission to adduce additional evidence came to be made only in August 1993. Needless to record that the courts shall have to be cautious and letting in additional evidence particularly, in the form of oral evidence at the appellate stage and that too, after a long lapse of time. In our view, a plain production of additional evidence after a period of 10 years from the date of filing of the appeal, as noticed above, cannot be termed to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not stand attracted. The learned trial judge while dealing with the matter has, as a matter of fact, very strongly commented upon the lapse and failure on the part of the plaintiffs even to summon the attestors to the Will and in our view contextually, the justice of the situation does not*



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*warrant any interference. The attempt, the High Court ascribed it to be a stage-managed affair in order to somehow defeat the claim of the respondents – and having had the privilege of perusal of record we lend our concurrence thereto and the finding of the High Court cannot be found fault with for rejecting the prayer of the appellants for additional evidence made in the belated application. In that view of the matter, the first issue is answered in the negative and thus against the plaintiffs, being the appellants herein”.*

9. Therefore the parties are not entitled to patch up the weak points in the evidence by invoking provisions of Order XLI Rule 27 of Code of Civil Procedure before the First Appellate Court. In the case on hand, the petitioners failed to call the attesor to the Will in order to prove the testamentary documents. The failure of petitioners would amount to failure to exercise due diligence in prosecuting the case. Now, by invoking Order XLI Rule 27 of Code of Civil Procedure, the petitioners are trying to fill up the weak points in the case which is the result of their omission and the same is not permissible in law. The petitioners are not entitled to lead evidence in



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instalments.

**WEB COPY**10. Therefore, I do not find any error in the order passed by the First

Appellate Court and accordingly, the Civil Revision Petition stands dismissed.

No costs. Consequently, connected miscellaneous petition is closed.

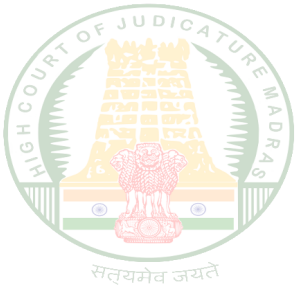
**22.03.2024**

Index : Yes / No

Speaking order : Yes / No

Neutral Citation : Yes / No

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**S.SOUNTHAR, J.**

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To  
The Additional District and Sessions Judge, Namakkal .

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