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Court : Chennai

Decided On : Jul-18-2007

Reported in : (2007)6MLJ866

Judge : S. Nagamuthu, J.

Acts : Evidence Act - Sections 69; Code of Civil Procedure (CPC) - Order 16, Rule 10 and 10(2)

Appeal No. : C.R.P. NPD (MD) No. 625 of 2005 and C.M.P. No. 4790 of 2005

Appellant : Dharmaraj

Respondent : Rajalingam

Advocate for Def. : K. Govindarajan, Adv. for Sarvabhauman Associates

Advocate for Pet/Ap. : Maria Roseline, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

S. Nagamuthu, J.

1. The petitioner who is the 10th defendant in O.S. No. 680 of 2005, on the file of the learned Subordinate Judge, Kulithalai, has come forward with this revision

challenging the order dated 07.03.2005 made in I.A. No. 189 of 2004. The respondent is the plaintiff.

2. The suit is for partition filed by the respondent. In the written statement, the 10th defendant has taken a stand that the suit properties are not available for partition, in view of a registered Will said to have been executed by one P. Kailasam Pillai in favour of him on 05.06.1995.

3. During the trial, in order to prove the said Will, the petitioner has filed I.A. No. 189 of 2004, to examine the attesting witnesses. But, unfortunately, the summon sent to those witnesses had been returned with the endorsement that they have gone to Mumbai. Therefore, making a statement that the attesting witnesses are not found, the petitioner wanted to examine the other persons who have got acquaintance with the handwriting of those attesting witnesses as required under Section 69 of the Evidence Act. The same was opposed by the respondent. The lower Court by means of the impugned order has dismissed the said I.A. Challenging the said order of dismissal, this revision has been filed.

4. Heard the Learned Counsel for the petitioner as well as the learned Counsel for the respondent.

5. The Learned Counsel for the petitioner would submit that in order to prove the registered Will as required under Section 69 of the Evidence Act, at least one attester has to be examined. But the petitioner is not in a position to examine at least one such attester, in view of the fact that both the attesters are not found in their place of residence and it is reported that they have gone to Mumbai and their Mumbai address could not be traced.

6. Per contra, the learned Counsel for the respondent would submit that unless it is proved to the satisfaction of the Court that the attesting witnesses are not found anywhere, it is not permissible to examine others to prove the signatures of the attesters since, under Section 69 of the Evidence Act, if no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

7. The learned Counsel for the respondent would further rely on Order XVI Rule 10 C.P.C., which speaks about the procedure where the witness fails to comply with the summons. Under Order XVI Rule 10(2) C.P.C., it has been provided that if a witness intentionally either avoided service or if he fails to appear, without any lawful excuse, then, the Court has to issue proclamation and follow the other procedure as laid down. According to the learned Counsel, since no proclamation has been so far made, it cannot be held that the witnesses are not found so as to permit the petitioner to invoke Section 69 of the Evidence Act. He would further rely on Judgment of a Division Bench of Patna High Court reported in Mt. Shahzadi Begul v. Muhammad Qasim wherein, it has been held that unless a proclamation followed by an order of attachment of the property of the witness have been made it is not possible to invoke Section 69 of the Evidence Act. The Court has further held that before a party is entitled to rely upon Section 69 of the Evidence Act, he must ask the Court to exhaust all process of the Court.

8. I have considered the rival contentions urged by the learned Counsel for both parties.

9. It is admitted by the Learned Counsel for the petitioner that during examination in chief, the petitioner has not chosen to let in any evidence to the effect that the attesting witnesses were not found in the village. To explain the same, the learned Counsel would submit that when the petitioner was examined, it was not known to the respondent that the attesting witnesses were not available. He would further submit that it came to light that the witnesses have gone to Mumbai and whereabouts are not known only when the summons taken out for them through the Court were returned. Thus, it is clear that so far no evidence was let in to satisfy the lower Court that the attesting witnesses were not found any where, so as to invoke Section 69 of the Evidence Act.

10. It is to be stated that invariably in all cases, the party is not required to let in evidence to prove that the attesting witnesses are not found. Instead the party can very well follow the procedure under Order XVI Rule 10 C.P.C. Under the said procedure he has to make an application for proclamation and for attachment of the property. If only a judicial finding is given by the Court under Order XVI Rule

10 C.P.C., that the witnesses are not really found resulting in an order of attachment of properties, then only the requirement under Section 69 of the Evidence Act, that the witnesses are not found any where, will get satisfied so as to permit the party to let in evidence to prove the signatures of the attesters through the persons who are well acquainted with their signatures. In this case, the petitioner has not chosen to approach the trial Court under Order XVI Rule 10 C.P.C also. Thus the party has the option either to let in evidence or to follow the procedure under Order XVI Rule 10 C.P.C., to satisfy the requirements of Section 69 of the Evidence Act.

11. As rightly pointed out by the learned Counsel for the respondent, and also held by the Patna High Court, in the absence of any order of attachment made by the Court under Order XVI Rule 10 C.P.C., or in the absence of any evidence about the absence of the attesters and in the absence of any finding to that effect by the lower Court, the petitioner cannot be allowed to examine any person to prove the signatures of the attesters of the Will.

12. For the foregoing reasons, I am of the considered view that though the petitioner is entitled to examine any person/persons who is/are well acquainted with the signatures of the attesters, the said right will accrue for on the petitioner if only he satisfies the requirements of Section 69 of the Evidence Act, either by means of evidence or by following the procedure under Order XVI Rule 10 C.P.C., and then only he can exercise the said right to summon any person as stated above. Thus the lower Court, in my considered view was right in dismissing the said I.A. However, merely confirming the order of the lower Court would not meet the ends of justice, in my considered opinion. The petitioner should be given sufficient opportunity to satisfy Section 69 of the Evidence Act, to invoke the said provision to examine other persons. If such liberty is not given, it may result in failure of justice and may cause serious prejudice to the petitioner. In view of the above factual and legal positions, I am inclined to set aside the impugned order of the lower Court with appropriate liberty to the petitioner.

13. In the result, the impugned order passed by the learned Subordinate Judge, Kulithalai, dated 07.03.2005 made in I.A. No. 189 of 2004 in O.S. No. 680 of 1995,

is set aside. I.A. No. 189 of 2004, is remanded back to the file of the learned Subordinate Judge, Kulithalai, with a liberty to the petitioner to take steps to satisfy the Court as required under Section 69 of the Evidence Act, either by adducing evidence or by following procedure under Order XVI Rule 10 C.P.C. The lower Court is directed to dispose of the said I.A., in accordance with law after affording such opportunity to the petitioner.

14. With the above direction, the civil revision petition is dismissed. NO costs. Consequently, connected C.M.P is closed.

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