

**IN THE COURT OF THE PRINCIPAL DISTRICT JUDGE,
KRISHNAGIRI**

**Present: TMT.M.SUMATHI SAI PRIYA M.A., M.L.,
Principal District Judge, Krishnagiri**

Thursday, the 18th day of April 2024.

IA.No.03/2023 in O.S.No.158/2021

1. Lakshmi
2. R.Jayakumar

...Petitioners/Defendants no.1 and 2

Versus

1. P.S.Chitra
2. Sudha
3. K.S.Sekar

... 1st Respondent/ Plaintiff

...Respondents/Defendants no. 3 and 4

This petition coming up for final hearing before this court on 10.04.2024 in the presence of Tr.K.Baskar, Advocate for petitioners, and Tmt. Mani, Advocate for the 1st respondent/Plaintiff and Tmt.Ponmani, Advocate for the 2nd respondent and Tr.P.Chinnasamy, Advocate for the 3rd respondent, R.2 and R.3 endorsed as no counter and upon hearing both side arguments and upon perusing the documents and the case having stood over for my consideration till this day, I delivered the following:

I.A..No.3/2023 in OS NO:158/2021

ORDER

This petition has been filed by the petitioners Under Order 18 Rule 17 of CPC and section 151 of CPC, seeking to recall the evidence of D.W.1 – 2nd respondent/ 2nd defendant for further examination in OS No:158/2021.

2. The Gist of the petition are as follows:-

The 2nd petitioner has filed this affidavit on behalf of his mother who is the 1st petitioner. The 2nd petitioner is the 2nd defendant in the Original Suit. The 1st petitioner is the mother of the 2nd petitioner and she is 1st defendant in the suit. In the original suit, while at the time of deposing evidence by the 2nd petitioner, the 2nd petitioner instructed that the Will may be marked through the witness but he was failed to mark the said Will at that time and the Will has not marked through by the 2nd petitioner. But, at the time of examination of one of the attesting witness namely Madhaiyan on his side the Junior Advocate has failed to mark the Will on his side. At the time of cross examination of Madhaiyan, then only the 2nd petitioner find out that the Will has not marked. Therefore the 2nd petitioner/ 2nd defendant humbly prays that this Honourable Court may be pleased to allow this petition and recall the DW1- 2nd petitioner / 2 defendant/ DW2 for further examination on defendant's side and thus render justice.

3. The Gist of the counter of 1st respondent are as follows:-

The respondent denied the petition averments. The Petition is false, frivolous and is liable to be dismissed. Ample opportunity was given to the petitioner to let in

evidence on his side. There is another attesor for the said Will is available. Nothing prevented him to examine the another attesor. Now, the petitioner wants to fill up the lacuna through D.W.1. They are not entitled to do so. The petitioners are not entitled to mark the Will through D.W.1. It cannot be done so because of D.W.1 is not an attesor. Hence, the petition is liable to be dismissed.

4] On the side of respondents no.(2) and (3), on 08.03.2024, the learned counsel has endorsed as 'No counter'

5] Now, the point that arises for consideration is whether this petition has to be allowed or not?

Discussion and decision to the point:

6] Heard both sides. The petitioners have filed this petition under Order 18 Rule 17 of CPC and section 151 of CPC, wherein they have stated that at the time of deposing evidence by the 2nd petitioner/ 2nd defendant in O.S.No.158/2021, the 2nd petitioner/2nd defendant has failed to mark the Will on his side and further, at the time of examination of one of the attesting witness namely Madhaiyan on his side, one of the Junior Advocate also had failed to mark the Will on his side. It is further stated that at the time of cross examination of Madhaiyan only, the 2nd petitioner find out that the Will has not marked on his side. Hence, the learned counsel praying to allow this petition by recall the evidence of D.W.1 – 2nd respondent/ 2nd defendant for further examination in OS No:158/2021.

7] On the other hand, the 1st respondent/Plaintiff filed counter, wherein the 1st respondent has stated that already ample opportunity was given to the petitioner to let in evidence on his side and there is another attesor for the said Will also available to examine on their side and nothing prevented him to examine the another attesor as witness. The learned counsel for the 1st respondent further submits that the petitioner wants to fill up the lacuna through D.W.1 and they are not entitled to do so. The petitioners are not entitled to mark the Will through D.W.1. It cannot be done so because the D.W.1 is not an attesor. Hence, the petition is liable to be dismissed.

8] This Court has considered both sides' submissions. On perusal of Will dated 26.03.2015, it appears that on 26.03.2015, the 2nd petitioner's father namely A.G.Raman has executed Will in favour of the 2nd petitioner namely R.Jayakumar. The said R.Jayakumar was examined as D.W.1 on the side of defendants in O.S.No.158/2021. At the time of deposing his evidence, the petitioner has failed to mark the above said Will on his side. Further, they have failed to mark the said Will at the time of examining one of the attesting witness namely Madhaiyan and now they have filed this petition seeking to recall the evidence of D.W.1. The learned counsel for the 1st respondent has stated that still one of the attesting witness is also available to examine on the side of defendants and at that time, they can mark the said Will through the another attesting witness and there is no need to recall the D.W.1. Considering

the nature of this petition, and considering the fact that the 2nd petitioner / D.W.1 is the propounder of the said will, and to adhere the principles of natural justice fully, and in the interest of justice, this Court does incline to allow the petition.

In the result, this petition stands allowed and D.W.1 is ordered to be recalled for reexamination. There will be no order as to costs.

Dictated to steno-typist, transcribed by him and typed in computer, corrected and pronounced by me in the Open Court on this, the 18th day of April, 2024.

Prl.District Judge,
Krishnagiri