

**(2017) 04 MAD CK 0232**

**In the Madras High Court**

**Case No : 129 of 2016 and CMP(MD)No 581 of 2016**

J.Balamurugan

APPELLANT

Vs

Suruli Bommiah & Ors.

RESPONDENT

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**Date of Decision : 07-04-2017**

**Acts Referred:**

<a href=3859>Code of Civil Procedure, 1908</a>, <a href=3859-47>Section 47</a> - Questions to be determined by the Court executing decree

**Citation : (2017) 04 MAD CK 0232**

**Hon'ble Judges : G.Jayachandran**

**Bench : SINGLE BENCH**

**Advocate : G.Jayachandran**

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## **Judgement**

1. This revision petition is directed against the dismissal of the interlocutory application filed under Section 47 CPC in the execution proceedings pending for executing the decree of specific performance.

2. The brief facts leading to this revision petition is that one Gurusamy Gounder purchased the demised premises on 04.12.1961 and was in enjoyment of it. Whereas, he died on 12.07.2001, leaving behind three sons and three daughters. Suruli Bommiah is one of his sons filed the suit for specific performance against other two sons and two daughters, alleging that after the demise of Gurusamy Gounder, the suit schedule property was enjoyed by the plaintiff and the defendants commonly as a consideration for relinquishing the rights of the defendants in favour of the plaintiff.

3. The defendants 1 to 3 agreed to sell the suit property to the plaintiff for a sum of Rs.75,000/- and pursuant to that, they received Rs. 5,000/- as advance and promised to execute the sale deed in favour of the plaintiff by 30th of Tamil Month "Aani". Based on the unregistered sale agreement dated 08.05.2005, the suit for specific performance was filed and the same was allowed by the Trial Court on 27.03.2010.

4. Thereafter, the execution petition was filed and pending execution petition, the present revision petitioner, who is the son of G.Jeyaraj, the second defendant in the suit, has filed an application under Section 47 CPC, to set aside the decree as null and void, on the ground that the parties to the proceedings have no right over the property, since the owner of the property namely, Gurusamy Gounder has executed a Will dated 20.01.1999 bequeathing the suit property in favour of the revision petitioner.

5. The Trial Court, after considering the application filed under Section 47 CPC and the counter of the respective parties, held that the revision petitioner has not proved the execution of the Will in the manner known to law and therefore, he is not entitled to the relief.

6. Aggrieved by the dismissal of Section 47 application, the present revision petition is filed on the ground that the Trial Court has erred in dismissing the application without proper application and understanding of Sections 68 and 69 of the Indian Evidence Act and despite proving the execution of the Will in the manner known to law, on a frivolous reason, the Trial Court has wrongly concluded that Will has not been proved.

7. The revision petitioner is none other than the son of second defendant. The suit is for specific performance in respect of the property originally owned by Gurusamy Gounder and claimed by his sons and daughters on the death of Gurusamy Gounder. The case of the plaintiff is that the other sharers have agreed to sell their respective shares in favour of the plaintiff for total consideration of Rs.75,000/- and received Rs.5,000/- as advance and executed a sale agreement. They have failed to honour their promise in spite of request. After contest, the suit has been decreed in favour of the plaintiff and pending execution, the revision petitioner has filed an application under Section 47 as a third party.

8. It is relevant to extract below Section 47 CPC:- "47. Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) omitted by Act 104 of 1976. effective from 1-2-1977 (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court  
Explanation I: For the purposes of this section, a plaintiff whose Suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. Explanation II: (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the degree is passed; and

(b) All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the

execution, discharge or satisfaction of the decree within the meaning of this section."

9. Admittedly, the revision petitioner though son of the second defendant does not stake claim through the second defendant, but set up a title for himself through a Will alleged to have been executed by Gurusamy Gounder on 20.01.1999. While his father was effectively contesting the suit, he has not whispered any thing about the existence of the Will alleged to have been executed by Gurusamy Gounder in favour of his grandson Balamurugan.

10. When the application was filed by the revision petitioner under Section 47, his father who is one of the parties to the suit, has conceded to the relief sought by this petitioner, which clearly indicates collusion between them and in so far as the genuineness of the Will, the Trial Court after examining five witnesses on behalf of the revision petitioner and two on behalf of the respondents, has held that the alleged Will is shrouded with suspicion, as it has come to light after 10 years that too after the decree passed in the suit for specific performance as against the father of the revision petitioner.

11. The Trial Court has disbelieved the case of the revision petitioner, since he was not able to prove the execution of the Will through the attesting witness, since both of them have died and the only person who is alive and privy to the Will is the scribe of the document, who was examined as PW2 and he has not supported the case of the petitioner. The other witnesses are not admittedly privy to the document, except the petitioner himself. If really there was a Will executed by Gurusamy Gounder on 20.01.1999, that could have been spoken by the father of the revision petitioner in the suit itself. The conspicuous silence of the second defendant about the Will creates suspicion and renders to disbelieve the Will. The attempt made by the revision petitioner to prove the execution of Will has been miserably failed. Thus, the Trial Court has rightly pointed out that the execution of will has not been proved and the very execution of the Will is doubtful.

12. Considering the records relevant to this case, this Court is of the opinion that the Trial Court has rightly dismissed the application of the revision petitioner and there is no error in it.