

A.NOS.4983 AND 3097 OF 2016
IN T.O.S.NO.12 OF 2009

PUSHPA SATHYANARAYANA, J.

The above applications have been taken out by the applicant / first defendant to condone the delay of 2232 days in filing the written statement and permit him to file the written statement in the above said T.O.S.

2. O.P.No.44 of 2008, for probate of Will dated 14.07.1986, was filed in which the applicant had filed caveat, as a result of which, O.P. was converted into T.O.S. Infact, the applicant was residing in the property covered under the Will. In the affidavit filed in support of the application, it is stated that one Rajendran was taking care of the entire matter and a counsel was engaged on behalf of the applicant. However, it is stated that the applicant does not remember whether he signed any papers or could recollect filing of the written statement in the above suit. The applicant was also examined in the probate proceedings and the probate was granted on 30.04.2014. The order granting probate was also referred to in the written statement filed by the applicant. However, it is later found that the said Rajendran, who was assisting the applicant had taken her for a ride and played a fraud on her. Therefore, the applicant had engaged a different counsel and filed the written statement.

3. The learned counsel appearing for respondents 2 and 3 /

defendants 2 and 3 has submitted that there is a clear collusion between the first defendant and the plaintiff and they obtained probate by suppressing the material facts behind their back. Though the plaintiff had originally impleaded the defendants 2 and 3, subsequently they were given up from the array of parties. Therefore, application in A.No.8355 of 2014 was filed to revoke the probate obtained and the same was allowed on 11.01.2016. Therefore, defendants 2 and 3 were permitted to file written statement and contest the above T.O.S.

4. The learned counsel for the respondents 2 and 3 / defendants 2 and 3 also denied that the applicant does not have knowledge about the matter nor knowledge about filing of the written statement. According to the defendants 2 and 3, the applicant had earlier filed written statement, which has also been referred to by this Court while granting probate at the first instance. Therefore, accepting the second written statement, is not permissible. Hence, the respondents 2 and 3 objected to the reception of the written statement filed, now with enormous delay.

5. However, a perusal of the records and also the note put up by the Registry states that there is no such written statement filed by the applicant/first defendant earlier. Neither the plaintiff nor the defendants 2 and 3 could produce the served copy of the alleged written statement filed earlier. The learned counsel for the plaintiff also seriously opposed the

condonation of delay.

6. At this juncture, it is relevant to note that the Honourable Supreme Court has reiterated that a liberal pragmatic and justice oriented approach should be given in dealing with the application for condonation of delay. It is the substantial justice which is paramount and pivotal that the technical considerations should not be given unnecessary emphasis. Of course, lack of *bona fides* imputable to a party seeking condonation of delay is relevant and significant fact.

7. The earlier order granting probate was set aside on the ground that the defendants 2 and 3 were deliberately kept away by giving them up in the Court of proceedings. When they were impleaded as persons having caveatable interest, they were given up by the plaintiff for the reasons best known to him. Therefore, the probate granted earlier was revoked. In such circumstances, the written statement alleged to have filed by the first defendant earlier is not available and the counsel is unable to furnish the diary number for filing the same. The defendants 2 and 3 also have got the probate order revoked. In the above conspectus of facts, this Court is of the view that the delay has to be condoned in filing written statement.

8. This Court, having satisfied with the reasons stated in the

affidavit filed in support of these applications, is inclined to condone the delay. Accordingly, the delay is condoned and the written statement is taken on file.

9. Now, the question to be decided is with respect to the procedure to be followed after the revocation of probate.

10. It is settled law that the probate Court, is a Court of essence and the duty of the probate Court is only to adjudicate whether the Will in question was the last Will and testament of the deceased; whether the same was duly executed and attested; whether the same was executed without being vitiated by force, fraud, undue influence etc and whether the testator had the required mental capacity to execute the Will. Therefore, apart from the above mentioned questions, a probate Court cannot go into the question of title of the testator nor can the Court grant a probate, which is at variance with that of the Will.

11. The learned counsel for the respondents placed his reliance on the decision of Hon'ble Supreme Court reported in **(1997) 9 SCC Page 689 in NALINI NAVIN BHAGWATI (Mrs) and OTHERS -vs- CHANDRAVADAN M.MEHTA**, in para 7, it has been held as follows:

“7.Similarly when the suit was dismissed for default, under Order IX Rule 9 an

application would be filed and on proof of the circumstances for absence, the order would be set aside and the suit would get restored. Similarly, when probate or letter of administration is granted and it is sought to be revoked, Section 263 provides for the grounds on the basis of which it would be revoked. When the grounds are sought to be proved, the question is: whether such an application would be treated to be a suit? We are of the considered view that an application to revoke probate or letter of administration would be treated as miscellaneous application and may be disposed of on the fact situation in an appropriate case either summarily or after recording evidence. The application to revoke the probate or letter of administration thus may be disposed of by the District Judge either summarily or in a given situation where it requires proof of the facts by adduction of evidence by the parties by recording such evidence as is adduced by the parties. The burden will be on the applicant to prove the facts to revoke the probate or letter of administration and the respondent who obtained probate or letter of administration has to disprove the contentions of the applicant. In that situation, based upon the given facts situation, it will be for the Court to dispose it

of either summarily or after giving opportunity to both the parties to adduce evidence and consideration thereof. Under these circumstances, it is not necessary that the application for revocation of the probate or letter of administration would be treated as a suit as contemplated under Section 295 of the Act.

Therefore, the revocation of the grant of probate would be disposed of only as an application not as a suit. Nevertheless, as stated earlier, only those questions mentioned supra, have to be considered by the Court issuing probate.

12. A party, who seeks to prove fraud and collusion vitiating the decree of probate Court under which the probate was granted to the plaintiff only can agitate those questions.

13. It should be seen whether the revocation was granted on the grounds of fraud, collusion and undue influence or due to the deliberate omission of defendants 2 and 3. As the revocation order granted by this Court, is based on the averments and allegations raised by defendants 2 and 3, the same need not be raised again in the probate proceedings.

14. The learned counsel for the respondents 2 and 3 contended that the evidence recorded, prior to the order of revocation, have to be

ignored and de-novo trial has to be conducted.

15. No doubt failure to give respondents 2 and 3 an opportunity to produce evidence, to put forth their case, was a good cause for revocation of the probate granted. However that does not mean that the parties can be permitted to traverse beyond what is required of probate Court. It would not be justified to enable a party to have an opportunity for producing evidence to discharge the burden of proof other than what is required. Though the order of probate was revoked and an opportunity to prove the Will was given in the presence of parties who sought for revocation, the contention of the respondents 2 and 3 that the Will was brought into existence to defraud them or it was obtained by fraud, were all, already decided. In the application to revoke the probate, as stated earlier, only the proof of Will alone is required to be tried by the probate Court and it does not have any jurisdiction to go into the question of title. The para 17 of order of revocation dated 11.01.2016 is as follows:-

“7. Hence, the judgment and decree dated 30.04.2014 passed in T.O.S.No.12 of 2009 granting probate, are set aside and the probate granted is hereby revoked. Accordingly, A.No.8355 of 2014 filed for revoking the grant of probate, is allowed. In view of allowing A.No.8355 of 2014, the application in A.No.8355 of 2014, the application in A.No.8354 of 2014

filed for stay, is closed. The first respondent herein, ie. The plaintiff, is directed to return to the Registry of this Court - the original probate already granted by this Court, by order dated 30.04.2014 in T.O.S.No.12 of 2009. The applicants herein, i.e. defendants 2 and 3 are entitled to contest T.O.S.No.12 of 2009. Accordingly, T.O.S.No.12 of 2009 is hereby reopened for trial. The defendants 2 and 3 shall file their written statement, if any, within a period of four weeks from today. Registry is directed to list T.O.S.No.12 of 2009 after four weeks.”

16. A reading of the above para would make it clear that the applicants therein, namely, defendants 2 and 3 were entitled to contest the T.O.S. by reopening the same and liberty was granted to them for filing the written statement. The order did not specifically state that the evidence recorded would be wiped of and de-novo enquiry should be conducted.

17. In such circumstances, the parties are directed only to adduce evidence in addition to whatever has been recorded earlier and cannot ask for eschewing the evidence recorded and go in for a fresh trial.

18. With the above observations, the applications are allowed and the matter is directed to be posted before the learned Additional Master-II

on 07.11.2016 for trial.

18.10.2016

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