

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **02.12.2016**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

Application No.5215 of 2016
in
T.O.S.No.104 of 2013

S.Kotteeswaran

.. Applicant

Vs

1. J.Mallika

2. J.Ganesh

.. Respondents

Prayer: Application filed seeking to set aside the order dated 07.09.2016 in A.No.3837 of 2016 in T.O.S.No.104 of 2013 passed by the Hon'ble Master.

For Applicant : Mr.Sugumar R.Rajulu

For Respondents : Mr.N.Vanaraj

ORDER

This application is filed by the applicant / plaintiff to set aside the order dated 07.09.2016 made in A.No.3837 of 2016 in T.O.S.No.104 of 2013.

2. The application in A.No.3837 of 2016 was filed to issue Subpoena to one K.M.Janakiraman, S/o.K.Markandeya Chetty, who was the sixth respondent in the original O.P, to produce the original Will dated 12.12.1986

executed by the testatrix before the Hon'ble Master. Initially Original Petition was filed seeking probate of the Will and subsequently the same was converted into Testamentary Original Suit and it was posted for recording evidence. The applicant / plaintiff had examined himself as P.W.1 and marked exhibits as P1 to P12 and the certified copy of the Will is marked as Ex.P.12. When it is posted for further evidence on the plaintiff's side evidence, the application for issuance of subpoena was filed. Along with T.O.S, the plaintiff had also filed a citation application directing the said Janakiraman to produce the original Will to be produced before this Court.

3. It is his case that, there was a mortgage with the said Janakiraman, by deposit of title deeds along with the original title deed itself. Even the original Will was deposited with him. Hence, he was in possession of the Original Will.

4. As the Testamentary Original Suit is his for the proof of the said Will, the plaintiff cannot file this application. It is relevant to note that after service of notice and the citation is issued, the said Janakiraman entered his appearance through counsel, he did not file any affidavit. In that regard, when the Original Petition was posted before the Master for completion of service, the bailiff, who served the notice to the said Janakiraman, was sought to be examined. However, the Bailiff did not appear. The applicant / plaintiff thought it fit to give up the said Janakiraman as he is not a

necessary party. Having given up the sixth respondent, now the present application is filed by the applicant for issuance of Subpoena to direct the said Janakiraman to produce the Will.

5. The learned counsel appearing for the respondents contending that as per Order 25 Rule 65 of Original Side Rules, if a person cited alleges that he is unable to comply with the citation, he should file an affidavit stating his inability and give notice thereof to the person issuing the citation. In the event, that the Court is not satisfied with the affidavit, as insufficient, the person cited shall be considered in contempt of Court and any party to the proceedings will apply that the person cited may be ordered to attend for the purpose of being cross examined on the affidavit or that he may be committed for contempt.

6. In the present case, the person cited though entered appearance through counsel, had not filed any affidavit. It is also open to any party to the proceedings to apply with the person cited may be ordered to attend for the purpose of cross examination on the affidavit or he may be committed for contempt of Court.

7. Be that as it may, now the question is whether the said Janakiraman has to be summoned to this Court to produce the Will.

8. In the light of the above referred Order 25 Rule 65 of Original Side Rules, the plaintiff has already taken out the citation for the said person. The person cited had not cared to appear before this Court. Subsequently, he was given up by the applicant. Now he is again summoning the same person on Subpoena for production of the Will.

9. The learned counsel appearing for the respondent though initially objected, however, agreed for allowing the said application on condition that the said Janakiraman should be cross examined by him. The learned counsel for the applicant has no objection for the same.

10. Hence, this Court is inclined to set aside the order passed by the Hon'ble Master on 07.09.2016 and Subpoena shall be issued to K.M.Janakiraman, S/o. K.Markandeya Chetty to produce the Original Will dated 12.12.1986 executed by the testatrix before this Court on that day, which may be fixed. Once, the Will is produced by the Subpoena witness, the same shall be deposited into Court. The respondent is also given liberty to cross examine the said Janakiraman.

11. With the above direction, the application is allowed. Post the matter before the learned Master on 09.01.2017.

02.12.2016

srn

PUSHPA SATHYANARAYANA,J.,

srn

Application No.5215 of 2016
in
T.O.S.No.104 of 2013

02.12.2016

<http://www.judis.nic.in>