

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 23.12.2016

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU
and
THE HONOURABLE MR.JUSTICE N. AUTHINATHAN

O.S.A.No.109 of 2013

Subbaraj

...Appellant/Applicant
3rd Party

Vs

S. Rajendran

...Respondent/Respondent/
Petitioner

Appeal filed Under Clause 15 of Letters Patent r/w O.36 R.9 of Original Side Rules against the judgment of the learned Single Judge made in Application No.1663 of 2012 in O.P.No.341 of 2010 on the file of this Court.

For Appellant : Mr.R. Thiagarajan

For respondent : Mr.C. Hanumantha Rao

JUDGMENT

[Judgment of the court was delivered by S.NAGAMUTHU, J.]

The appellant herein filed an application in A.No.1663 of 2012 in O.P.No.341 of 2010 before the learned Single Judge of this Court

praying to revoke the grant of probate of Will dated 7.02.2007 made in O.P.No.341 of 2010. The learned Single Judge, by Order dated 31.10.2012 dismissed the Original Application. Challenging the same, the appellant has come up with this appeal.

2. We have heard the learned Counsel for the appellant and the learned counsel for the respondent and we have also perused the records carefully.

3. The Original Petition in O.P.No.341 of 2010 was filed by the respondent herein, seeking grant of probate in respect of the Will dated 07.02.2007 executed by one Ms.S.Sulochana.

Accordingly, Probate was granted. The appellant alleges that he was not aware of the proceedings in O.P No.341 of 2010, which was filed by the respondent, seeking probate. However, he came to know of the grant of Probate subsequently and thereafter, he filed an application in A.No.1663 of 2012, seeking to revoke the same. According to him, Ms.S. Sulochana had executed a Registered Will dated 06.11.2006 in favour of the appellant. It is his further contention that the Will, for which, Probate was granted in favour of the respondent, is a forged Will and the Will in favour of the appellant is the last will of the deceased Sulochana. The appellant also raised few more grounds for revocation of the Will, as referred under Sec.263 of the Indian Succession Act.

4. But the respondent contested the said Original Application contending that the Will in favour of the respondent alone is the last and genuine Will of the deceased and thus, the Court was right in granting Probate. It was also contended that the appellant did not have any valid ground for revocation of the Probate.

5. It needs to be mentioned that neither party let in any oral or documentary evidence in the revocation application. The learned Single Judge, upon considering appellant's affidavit, filed in support of the petition and the counter affidavit filed by the respondent, dismissed the petition, relying upon the judgment of the Hon'ble Supreme Court in the case of Crystal Developers vs Asha Lata Ghosh reported in 2005-1-L.W 387, wherein, it has been held that the letters of administration shall not be granted to any legatee, other than universal or residuary legatee, until a citation has been issued and published calling on the next of kin to accept or refuse letters of administration. Such provision is not there in respect of grant of probate.

6. Referring to the said finding of the Hon'ble Supreme Court, the learned Single Judge held that because what was sought for by the respondent was only a grant of Probate and not letters of administration, there was no need for the Court to issue notice to the appellant herein.

7. The learned counsel for the appellant submitted that the dismissal of the Original Application by the learned Single Judge is not sustainable for more than one reason. According to him, the learned Single Judge ought to have allowed the appellant to let in oral and documentary evidence to prove the grounds as enumerated under Sec.263 of Indian Succession Act.

8. He would further submit that it is true that in respect of the probate proceedings, no citation is required to be issued to the relatives of the legal heirs of the deceased testator. However in the instant case, since the appellant had no notice of the probate proceedings, he was not able to prove that the Will, upon which the respondent places reliance is a forged one. Therefore, according to the learned counsel, the learned Single Judge ought to have allowed the applicant to let in both oral and documentary evidence to prove that the said Will, upon which the respondent makes reliance is a forged one and the Will, which is in favour of the appellant is the genuine one.

9. Countering the submissions of the learned counsel for the appellant, the learned counsel for the respondent would submit that the Probate granted by the Court cannot be revoked unless one or more of the grounds enumerated in Sec.263 of the Indian Succession Act is made out. He would further submit that unless the Probate is revoked, the matter cannot be converted as a civil suit.

10. We have considered the above submissions.

11. Admittedly the Will, upon which the respondent places reliance, is an unregistered Will. The appellant contends that it is a forged Will. After the grant of Probate of this said Will, if the appellant wants to challenge the validity of the said Will, the only way for him is to seek for revocation of this Probate. Without seeking revocation of the Probate, he cannot claim title or challenge the title of the respondent in any other proceedings. That is the reason why he has filed the Original Application for revocation of the Probate.

12. At the same time, it cannot be ignored that simply because an application for revocation is made, raising certain grounds, the Probate granted cannot be revoked. For revocation of Probate, one who seeks such revocation, should prove any one or more of the grounds enumerated in Sec.263 of the Indian Succession Act as laid down in the Judgment of the Hon'ble Supreme Court in the case of Parshotam Singh (dead) through Lrs vs Harbans Kaur and another reported in 1997 (9) SCC 692.

13. Therefore, in the instant case, the appellant ought to have let in evidence either oral or documentary to prove the grounds raised by him as enumerated in Sec..263 of the Indian Succession Act, which he has failed.

14. The learned counsel for the appellant would submit that he was not allowed to let in any evidence. But the order

of the learned Single Judge would go to show that there was not even any attempt made by the appellant to let in any evidence, either oral or

documentary. But on that score alone we cannot shut the doors for the appellant for any reason. If it is true that the Will in favour of the respondent is a forged one, we cannot allow the Probate Certificate to survive on such fraudulent document. Therefore, we cannot non suit the appellant for failure of the counsel to have advised the appellant to let oral and documentary evidence.

15. Therefore, we are of the view that it is a fit case where we have to set aside the impugned order of the learned Single Judge and remand the matter back to the learned Single Judge for fresh disposal in accordance with law. While doing so, the appellant as well as the respondent shall be permitted to let in both oral and documentary evidence to prove and also to disprove the grounds raised as required under Sec.263 of the Indian Succession Act.

16. In the result, the appeal is allowed. The impugned order of the learned Single Judge made in Application No.1663 of 2012 in O.P.No.341 of 2010 is set aside and the application in A.No.1663 of 2012 in O.P.No.341 of 2010 is remanded back to the learned Single Judge for fresh disposal in accordance with law. The appellant as well as the respondent are at liberty to let in both oral and documentary evidence in support of their respective claims as indicated above. Considering the nature of the dispute, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

सत्यमेव जयते

Sub Assistant Registrar

sr
To

The Sub Assistant Registrar,
(Original Side),
High Court, Chennai.

+1cc to Mr.Thiagarajan, Advocate, S.R.No.76182

UG(CO)
RS(24/01/2017)

O.S.A No.109 of 2013