

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11.2016

CORAM

THE HONOURABLE MR.JUSTICE R. SURESH KUMAR

W.P.No.17993 of 2009 and

M.P.No.1 of 2009

Mrs.R.Saradha

..Petitioner

Versus

1.The Managing Director,
Tamil Nadu Slum Clearance Board,
No.5, Kamarajar Salai, Chennai - 600 005.

2. M.Ramalingam

..Respondents

Prayer: Petition filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus, to call for the records of the first respondent dt.NIL.8.2009 and made in Na.Ka.No.E5/9534/2008 and quash the order of the first respondent as illegal and without jurisdiction and consequently directing the first respondent to effect name transfer in the name of the petitioner in respect of Plot No.137, Door No.3A, Jothi Ammal Nagar First Street, East Club Road, Shenoy Nagar, Chennai-30.

For Petitioner : Mr.G.Ravisankar
For R1 : Mr.R.V.Babu
For R2 : Mr.T.S.N.Prabakaran

सतयमेव जयते
O R D E R

The prayer in the Writ Petition is for a writ of Certiorarified Mandamus, calling for the records of the first respondent dt.NIL.8.2009 made in Na.Ka.No.E5/9534/2008 and quash the order of the first respondent as illegal and without jurisdiction and consequently directing the first respondent to effect name transfer in the name of the petitioner in respect of Plot No.137, Door No.3A, Jothi Ammal Nagar First Street, East Club Road, Shenoy Nagar, Chennai-30.

2. The case of the petitioner is that the first respondent Board allotted a plot in plot no.137, Door No.3A, Jothi Ammal Nagar, phase-II scheme, measuring 43 square meters

in the name of one Mrs.Poosam, by order dated 23.08.1984, wherein the said Mrs.Poosam constructed house and had lived there. While so, in the year 2003, the said Mrs.Poosam had given a complaint to the Inspector of Police, T.P.Chatram Police Station, Chennai, making allegation against her own son i.e., the second respondent herein, as if that the second respondent had taken all the documents pertaining to the said house as there was no good relationship between the said Mrs.Poosam and the second respondent.

3. Subsequently, on 20.08.2003, the said Mrs.Poosam executed a Will in favour of the petitioner pertaining to the said property allotted by the first respondent Board and the said Will was duly registered at the office of the Sub Registrar, Periamet, Chennai as Document No.56/2003. Thereafter, the said Mrs.Poosam, by request dated 03.09.2003 had given a detailed representation to the first respondent to give the certified copy of the order of the allotment and the No Objection Certificate pertaining to the house, which were originally in possession of the said Mrs.Poosam. A legal notice was issued on 25.10.2003 to the second respondent to make good of the wrong done by the said second respondent against said Mrs.Poosam. The reply notice was issued by the counsel of the second respondent on 29.10.2003 and rejoinder on behalf of the said Mrs.Poosam was issued on 05.11.2003.

4. While so, on 03.02.2008, the said Mrs.Poosam died and the said factor is confirmed by the Death Certificate, issued by the Corporation of Chennai dated 17.03.2008. Thereafter, on 08.02.2008, the petitioner, who is a niece of the said Mrs.Poosam, had sent a detailed request to the first respondent to issue orders for transferring the allotment order in the name of the petitioner in compliance of the Will executed by the said Mrs.Poosam. Thereafter, legal notice was also issued on behalf of the petitioner to the first respondent on 15.04.2008. However, ultimately, by impugned order dated 27.08.2009, the first respondent has rejected the request of the petitioner stating that though a Will was executed by said Mrs.Poosam and was registered at Sub Registrar, Periyamet, Chennai, the same was not probated in the competent Court of law. Moreover, as per the agreement between the allottee and the Board, the Plot shall not be sold or let out for rent to anyone. While so, when the said Mrs.Poosam being an allottee has executed a Will without getting the Sale deed in her name, based on the same the request of the petitioner cannot be considered and further stated that only the legal heirs of the allottee are entitled to get transfer of allotment and not the third persons, who purchased or mortgaged or the person, who got the property under Will. By stating these reasons, the first respondent had rejected the request of the petitioner through the impugned order, challenging the same, the petitioner has come out with the present petition with the aforesaid prayer.

5. Heard both sides. The learned counsel for the petitioner would contend that the only reason cited in the impugned order by the first respondent is that though Will was executed by the original allottee in favour of the petitioner, who is niece of the allottee, the Will was not probated before the competent Court of Law. In this regard, the learned counsel for the petitioner would further contend that subsequently, proceedings was initiated in O.P.No.608 of 2009 to probate the said Will and the same on contest, was converted as T.O.S.No.16 of 2010. Ultimately, by order dated 22.06.2012, this Court has passed an order probating the said Will. As against the said order of this Court, the second respondent filed an appeal in O.S.A.No.5 of 2014. Even in the said O.S.A.No.5 of 2014, by a final order dated 12.02.2014, the Division Bench of this Court having taken into account, the execution of the Will and the other relevant aspects, ultimately disposed the said O.S.A filed by the second respondent by confirming the order of the learned Judge in T.O.S.No.16 of 2010.

6. Therefore, the learned counsel for the petitioner would contend that the only impediment expressed by the first respondent in the order impugned has now disappeared in view of the categorical pronouncement of this Court as stated above by which the said Will in favour of the petitioner has been probated and the same has been confirmed by the order of the Division Bench of this Court. Therefore, the learned counsel would submit that the petitioner shall be entitled to get transfer of the allotment and therefore, the impugned order can be interfered with.

7. Per contra, the learned counsel for the second respondent would contend that even though Will was executed and the same was got probated by order of this Court, that has not decided the title upon the parties as the Probate Court is not competent to determine the question of title. In this context, the learned counsel appearing for the second respondent heavily relied upon the decision of the Hon'ble Apex Court reported in Kanwarjit Singh Dhillon Vs. Hardayal Singh Dhillon & others, 2008 (1) CTC 80. According to the learned counsel for the second respondent that the law is well settled as has been reiterated in the said Judgment of the Apex Court that Probate Court is not competent to decide the title. Also, the Probate Court function is only to see that the Will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or undue inference and the same was duly attested. Therefore, by quoting the relevant portion of the said judgment viz., para 10, which is reproduced herein:-

"It is well settled law that the functions of a Probate Court are to see that the Will executed by the testator was actually executed by him in a sound

disposing State of mind without coercion or undue inference and the same was duly attested. It was, therefore, not competent for the Probate Court to determine whether late S.Kirpal Singh had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his Will. The Probate Court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by his Will.”,

the learned counsel for the second respondent would contend that whether the testator of the Will viz., the said (Late) Mrs.Poosam was entitled to execute the Will even though the same has been probated; and whether the title will automatically flow in favour of the petitioner is questionable and according to the learned counsel for the second respondent, the only option for the petitioner to get the allotment in her favour is by filing a suit before the competent Court and decide the title therein and only then she may be entitled to claim the suit property.

8. The learned counsel appearing for the first respondent would contend that at the time of passing the impugned order, the Will was not probated. Therefore, the first respondent rightly passed the impugned order by rejecting the claim of the petitioner to transfer the allotment in her favour based on the Will. Therefore, the impugned order is fully sustainable and not to be interfered with.

9. This Court have considered the rival submissions made by the respective learned counsel appearing for the parties and also perused the materials placed before this Court.

10. It is not in dispute now that the Will executed in favour of the petitioner has got probated and the said probate has also been confirmed by the Division Bench of this Court. Therefore, in the eye of law, the Will is an acceptable, legal document for the execution of the willingness of the testator, which is reflected in the Will. In the said Will, the testator after having expressed her mind towards the second respondent as well as the petitioner, ultimately had expressed her desire to bequeath the property to and in favour of the petitioner

11. As has been argued by the learned counsel for the petitioner the judgment of the Probate Court granting probate of a Will in favour of the petitioner must be presumed to have been obtained in accordance with the procedures prescribed by Law and it is a judgment in rem. In support of his contention, the learned counsel for the petitioner has relied one of the earliest judgment of the Hon'ble Apex Court in this regard,

reported in AIR 1957 SC 875 in Surinder Kumar and others Vs. Gian Chand and others.

12. In so far as the judgment referred by the learned counsel for the second respondent, i.e. 2008 (1) CTC (cited supra), no doubt the legal principle has been reiterated by which the Hon'ble Apex Court by its unequivocal term has reiterated that the Probate Court has to see that the Will is executed by the testator, was in actually sound and disposing state of mind and executed without coercion or undue influence and the Will was duly attested. The Apex Court has further stated that the Probate Court, therefore, was not competent to determine as to whether the executor had or had not the authority to dispose the properties, which he or she purported to bequeath by his or her Will. It was also held that the Probate Court is also not competent to determine the question of title to the properties nor will it go into the question whether the suit property bequeathed by his Will.

13. Insofar as the said principle of the Apex Court, if it is applied in the circumstances of the present case, the natural outcome would be that only because a Will was executed and the same got probated that will not automatically confer the title in favour of the petitioner and the same is to be resolved by a competent Civil Court by way of suit or other litigation, if the same is instituted by the parties concerned. However, in the absence of any claim or counter claim by way of civil proceedings instituted or pending by either of the parties claiming right over the property bequeathed under the Will, then certainly the probate granted by the Probate Court can be taken up as acceptable evidence for further follow up.

14. In this regard, when we take up the case in hand, the property was actually allotted in the name of the said late Mrs. Poosam, who, till her lifetime enjoyed the property and during her life time in sound and disposing mind, she, without any coercion or threat, bequeathed the Will in favour of the petitioner, which was subsequently on the death of the testator, probated in a manner known to law and the said probate also has been confirmed by the Division Bench of this Court. Thereafter, no legal proceedings is pending whatsoever between the petitioner and the second respondent. When that being so, the first respondent being the Governmental authority established for the welfare of downtrodden people to fulfil their requirements for dwelling purposes, has to necessarily take into account, the legal pronouncements pertaining to the will and based upon the same, decisions can be freely taken by the first respondent as to who will be the right person to bequeath the property, which was originally allotted to the said Mrs. Poosam.

15. Therefore, in the given circumstances of the case and based on the factual matrix, this Court is of the view that the impugned order stating the reason of non-probating of the Will executed in favour of the petitioner since is no more available, is not a valid reason in view of the Will get probated already and therefore shall not stand in the legal scrutiny anymore and hence the same is liable to be quashed. Accordingly, the impugned order of the 1st respondent dated NIL.8.2009 made in Na.Ka.No.E5/9534/2008 is quashed. Consequently, the matter is remitted back to the first respondent to take a conscious decision by taking into account, the probate issued by this Court as confirmed by the Division Bench of this Court in T.O.S.No.16 of 2010 and O.S.A.No.5 of 2014 by orders dated 22.06.2012 and 12.02.2014 respectively and pass suitable orders transferring the allotment given to the said late Mrs.Poosam, to and in favour of the petitioner. The needful shall be done by the first respondent within a period of four weeks from the date of receipt of a copy of this order.

16. This writ petition is allowed with the above directions. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

kmi

To

The Managing Director,
Tamil Nadu Slum Clearance Board,
No.5, Kamarajar Salai, Chennai - 600 005

+1cc to Mr.T.S.N. Prabhakaran, Advocate Sr. 67349

+1cc to Mr. G. Ravi Sankar, Advocate Sr. 67317

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W.P.No.17993 of 2009
& M.P.No.1 of 2009

RV(CO)
VR(22/03/2017)