

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.4957 of 2015

ORDER:

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This civil revision petition under Article 227 of the Constitution of India by the 1st plaintiff is directed against the orders dated 28.09.2015 of the learned Principal Junior Civil Judge, Kakinada passed in IA.no.646 of 2015 in OS.no.659 of 2011 filed by the 1st defendant under Section 65 (c) of the Indian Evidence Act read with Section 151 of the Code of Civil Procedure, 1908 requesting to grant permission to file Photostat copy of the Will dated 12.06.1998 said to have been executed by his father R. Surayanarayana, who died on 31.12.1998.

2. I have heard the submissions of the learned counsel for the revision petitioner/1st plaintiff ('the 1st plaintiff', for brevity) and the learned counsel for the 1st respondent/1st defendant ('the 1st defendant', for brevity). I have perused the material record.

3. The 1st defendant is resisting the suit for partition filed by the plaintiffs. While the trial is in progress, the 1st defendant had filed the aforementioned application for permission to file the Photostat copy of the Will dated 12.06.1998 said to have been executed by his father as secondary evidence on the grounds that his father having executed the said Will in a sound and disposing state of mind had handed over the said Will and also the original title deed dated 01.12.1980 to the 1st defendant and that after the death of his father, the said original Will is lost while he was undertaking a travel from Rajahmundry to Kakinada in connection with the suit-OS.no.482 of 2010, which was filed by E.Satyanrayanamma against him, and that the Will that was lost could not be traced inspite of his best efforts and that, therefore, he is advised to file the Photostat copy of the Will as secondary evidence.

4. The plaintiffs filed a counter *inter alia* contending that the averments

that R. Suryanarayana executed the alleged Will dated 12.06.1998 in a sound and disposing state of mind and handed over the same along with the title deed to the 1st defendant are all false and that the averments in the affidavit filed in support of the petition of the 1st defendant are invented and that there is no iota of truth in the allegations.

5. On merits and by the order impugned, the trial Court had allowed the petition of the 1st defendant and permitted to file the Photostat copy of the aforementioned Will as secondary evidence. Therefore, the aggrieved 1st plaintiff filed this revision.

6. The learned counsel for the 1st plaintiff while reiterating the case of the plaintiffs, which is stated supra, would further contend as follows: 'The trial Court ought to have rejected the request of the 1st defendant as he had not taken a specific plea in his written statement about the existence of the Will and as the application is filed at a belated stage. The 1st defendant, in OS.no.851 of 1993 filed by him, had earlier admitted in his deposition that his father had executed a Will on 07.09.1998 and no other Will and that it is a registered Will. Therefore, his said deposition would disclose that there is no Will executed by his father on 12.06.1998 and that any such Will is not in existence. The Photostat copy of the said Will now being sought to be filed is created. The same, therefore, cannot be received as secondary evidence.'

7. On the other hand, the learned counsel for the 1st defendant while reiterating the case of the 1st defendant and while supporting the orders of the Court below would contend that the 1st defendant had specifically pleaded about the existence of the Will in his written statement and that as rightly held by the Court below mere receiving of the Photostat copy of the Will as secondary evidence does not dispense with the proof of the same and that even if it is received on file still the 1st defendant has to establish the truth or otherwise of it and that, therefore, the plaintiffs will have an opportunity to rebut the case of the 1st defendant when evidence is lead to prove the Will.

8. I have bestowed my attention to the facts and given earnest consideration to the submissions. The 1st defendant, in a suit for partition, placing reliance on an unregistered Will dated 12.06.1998 of his father would *inter alia* contend that the original Will which is given to him was lost while he was undertaking travel from Rajahmundry to Kakinada and that the same could not be traced despite of his best efforts and that in view of the fact that the original Will is lost he may be permitted to adduce secondary evidence by producing the Photostat copy of the Will. The only contention of the plaintiffs based on the earlier deposition of the 1st defendant in an earlier suit is that the said deposition of the 1st defendant would disclose that the said Will is not in existence and it is created even according to the own deposition of the 1st defendant. Be it noted that while considering the request of the 1st defendant for permission to adduce secondary evidence by producing a Photostat copy of the Will, this Court is not obligated to record any findings about the existence or otherwise or the truth/validity or otherwise of the Will as the said aspects have to be considered at the time of appreciation of evidence, that is, at a later stage when the issues involved in the suit come up for adjudication at a final stage. When it is the case of a party that the original has been lost and it could not be traced despite of his best efforts, the law as laid down under Section 65 of the Evidence Act permits him to file a copy and adduce secondary evidence. Therefore, this Court, for the reasons assigned, finds that the trial Court is justified in passing the order impugned and that there is no merit in the revision.

9. Viewed thus, this Court finds that the order impugned does not warrant interference.

10. In the result, the Civil Revision Petition is dismissed, however, subject to the observation that the existence and/or the truth or otherwise of the Will, will have to be decided on merits by the trial Court at an appropriate later stage when all the issues involved in the suit are finally adjudicated.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

10th June, 2016
Vjl