

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(ORDINARY ORIGINAL CIVIL JURISDICTION)

Reserved on : 07.03.2017

Pronounced on:15.03.2017

THE HON'BLE MR. JUSTICE T.RAVINDRAN

A.No.1021 of 2017
in
C.S. No.388 of 2013

K.V.Sadhanandham
S/o.K.K.Velayudham
now temporarily residing at
Sri Aravindh Apartments
Old No.37, Kesavaperumal Koil
East Mada Street, Mylapore,
Chennai-4
Permanently residing at No.2/94
Mandaveli Street
Chennai-28

..Plaintiff

vs

1.K.V.Sasidharan,
S/o.K.K.Velayudham
No.2/94, Mandaveli Street
Chennai-28

2.K.V.Sivakumar
Kadukkat House,
Padiyam(via)
Anthikad Post
Trichur District
Pin-680641.

..Defendants

A.No.1021 of 2017:

1.K.V.Sasidharan,
S/o.K.K.Velayudham
No.2/94, Mandaveli Street
Chennai-600 028.

..Applicant/1st Defendant

vs

K.V.Sadhanandham
S/o.K.K.Velayudham
now temporarily residing at
Sri Aravind Apartments
Old No.37, Kesavaperumal Koil
East Mada Street, Mylapore,
Chennai 600 004
Permanent resident No.2/94
Mandaveli Street
Chennai-600 028

..Respondent/Plaintiff

Application praying that this Hon'ble court be pleased to reject the plaint filed by the respondent/plaintiff in C.S.No.388 of 2013.

This Application coming on this day before this court for hearing the court made the following order:

This application has been laid by the first defendant under Order 7 Rule 11 (a) and (d) of the Code of Civil Procedure.

2. The suit has been laid by the plaintiff seeking partition and to render true and proper accounts.

3. It is found that the defendants are the brothers of the plaintiff. Further, it is found that only the first defendant is contesting the claim of the partition sought for by the plaintiff. It is also noted that on the first defendant filing the written statement, the Court has also framed the issues and forwarded the matter to the learned Additional Master for recording evidence. At that stage of the matter, the present application has come to be laid by the first defendant.

4. The application has been preferred by the first defendant for the rejection of the plaint on the footing that the plaintiff has sought the relief of partition and to render true and proper accounts, on the basis of the Will dated 26.07.1999 said to have been executed by the father of the parties and according to the first defendant, inasmuch as the above mentioned Will has not been probated as per law, the plaintiff is not entitled to claim any right over the unprobated Will and as such, the plaintiff's suit is barred under Section 57 read with Section 213 of the Indian Succession Act, 1925 and thus, it is contended that the plaint is without any cause of action and also as the claim of the plaintiff is barred by law above mentioned, hence the suit is liable to be rejected.

5. A perusal of the affidavit filed in support of the application would go to show that the first defendant has based his claim for the rejection of the plaint on the basis that the plaintiff has sought the relief of partition on an unprobated Will dated 26.07.1999. However, a reading of the plaint in toto would go to show that the plaintiff has not made his claim for partition on the basis of the above referred Will. On the other hand, the plaintiff has claimed the relief of partition on the footing that the suit property and the business

carried therein belonged to his father and as such, he, as his son, is entitled to a share of the suit property and accordingly, laid the suit for partition and other reliefs. Therefore, it could be seen that the plaintiff has not based his claim for partition on the above mentioned Will.

6. In the counter filed to the present application also, the plaintiff has clearly averred that the suit for partition is not based upon the Will and it is also his case that the said Will does not pertain to the suit property as such and according to the plaintiff, the Will pertains to the property situated at Kerala.

7. It is found that even the first defendant is aware of the case of the plaintiff that he is not seeking the relief sought for in the plaint on the basis of the Will dated 26.07.1999. However, he would press this application on the footing that the plaintiff has laid the claim only on the said Will. But, when it is found and also admitted by the plaintiff that he has not laid the suit for partition on the basis of the above mentioned Will, it could be seen that as rightly put forth by the plaintiff's counsel, the above application preferred by the first defendant is misconceived.

8. If really, the plaintiff has laid the suit on the basis of the above mentioned Will, it could be seen that

the same would have been referred to in the cause of action para of the plaint. The applicant himself has admitted that the Will has not been referred to in the cause of action para of the plaint. This has also been admitted by the plaintiff in his counter contending that inasmuch as he has not laid the suit on the basis of the Will above mentioned, there is no need for him to refer the Will in the cause of the action para of the plaint. Therefore, it could be seen that when the plaintiff has not based his claim for partition on the above mentioned Will, the present application taken out by the first defendant that the plaintiff's suit has to be rejected on the footing that the Will relied upon by the plaintiff is not probated as per law has to be thrown out.

9. It is found that a reference has been made in the plaint that the suit property and the family business had been referred to in the Will above mentioned. That apart, the plaintiff has not stated anything about the Will. In such view of the matter, to contend that the plaintiff has based his claim only upon the above mentioned Will is nothing but a misconception of the plaint averments by the first defendant.

10. Inasmuch as it has been found that the plaintiff has not laid the suit based upon the above said Will, the authorities projected by the applicant as

regards the proposition of law that an unprobated Will cannot be the basis for a claim in the suit reported in **1997 - 1-L.W.49 (M.Vaidurayamma V. P.Suryanarayanan and three others), 2011 (2) CTC 435 (G.Ganesan and 5 others V. P.Sundari and two others)**, as rightly put forth by the plaintiff counsel would not be applicable to the facts and circumstances of the case at hand. The applicant's counsel has also relied upon the decision reported in **(2003) 1 Supreme Court Cases 557 (Saleem Bhai and others V. State of Maharashtra and others)**, for the proposition that the application under Order 7 Rule 11 CPC could be preferred at any time before the conclusion of the trial.

11. However, the plaintiff's counsel would contend that the present application has been preferred by the applicant only to delay the proceedings after the issues had been framed knowing very well about the nature of the claim made by the plaintiff in the suit. In this connection, the plaintiff's counsel relied upon the decision reported in **2011 (3) MWN (Civil) 566 (P.Harisudha and another V. K.Palanisamy)** for the proposition that it would not be proper to file a petition to reject the plaint after the filing of the written statement. Further, for the proposition that an unprobated Will could be received in evidence for a collateral purpose in other proceedings except probate

proceedings, the decision reported in **(2004) 7 Supreme Court Cases 505 (Commissioner, Jalandhar Division and others V. Mohan Krishan Abrol and another)** is also relied upon by the plaintiff's counsel. In addition to that, the plaintiff's counsel has also relied upon the decisions reported in **(2005) 7 Supreme Court Cases 510 (Popat and Kotecha Property V. State Bank of India Staff Association), AIR 2001 CALCUTTA 122 (Mohanal Dungarmal Futnani V. Vishanji Dungarmal Futnani and others), AIR 1962 Supreme Court 941 (Vijai Pratap Singh and another V. Sukh Haran Nath Singh and another) and (2011) 3 KLJ 767 (Dr.N.K.Mohammed Basheet & Ors. V.C.K.Ahmed Kutty)**. The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

12. It is however contended by the applicant's counsel that if the plaintiff has not relied upon the above mentioned Will for seeking the reliefs claimed in the plaint, the plaintiff then would not be entitled to claim $\frac{1}{2}$ share in the suit property. As regards to what share the plaintiff would be entitled to or really entitled to the reliefs sought for, are matters not germane for deciding this application. The same could be determined on the basis of the evidence adduced by the respective parties in the matter coupled with the legal

entitlement of the plaintiff.

13. In the light of the above discussion, when it has been found that the plaintiff has not laid the suit for partition and the other reliefs based upon the Will dated 26.07.1999 , it is found that the application laid by the first defendant for rejection of the plaint on the said ground is found to be misconceived and devoid of merits.

In conclusion, the application deserves to be dismissed and accordingly, the same is dismissed with costs.

sd/.T.R.D.J

15.03.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/24.03.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.