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Reserved on : 25.06.2018

Pronounced on : 29.06.2018

A.No.2934 of 2017 in

O.P.No.698 of 2011

N.SATHISH KUMAR, J.

This application has been filed by the applicant to recall P.W.1, Y.S.Krishnamurthy for cross examination by the applicant.

2. This Original Petition has been filed for grant of Letters of Administration in respect of the Will of one Mr.Narayana Moorthy. The respondents are the kith and kin of the the said Narayana Moorthy. The respondents 3 to 5 are the legal heirs of the first respondent, who died during the pendency of this petition.

3. The Original Petition has been filed in the year 2011. As there was no caveat and objections were filed immediately after service of notice, the matter was referred to Master and the evidence was recorded. On the side of the petitioner P.W.1 and P.W.2 were examined and Ex.P.1 to Ex.P.6 were marked. The respondent side has not adduced any evidence.

However, they have filed an application to recall P.W.1 for cross



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examination. At this stage, this Original Petition has been posted before this Court for orders.

4. The main contention of the counsel appearing for the applicant is that this Original Petition should be treated as a suit since they have filed caveat. On the other hand, it is the contention of the learned Senior Counsel appearing for the first respondent that the Original Petition is of the year 2011 and the second respondent, who is aware of the proceedings from the year 2011, has not filed any caveat in time nor filed any objection within 8 days of the caveat being filed. Further her objection also did not show any caveatable interest. The objection has been filed only in the year 2017 to the effect that she is objecting the Will. Except stating that, there is no reason whatsoever given in the affidavit.

5. It is the main contention of learned Senior Counsel that the caveat has not been filed in time and they are not even prepared to cross examine P.W.2, the attesting witness, whereas, they have filed an application to recall P.W.1 only for the personal reasons and to fight out personal allegations against each other. Hence, submitted that it has to be construed that no objection has been filed and caveat has not been filed and the Original Petition cannot be converted as a suit. Since the evidence is already on record, the Original Petition may be disposed of on merits.



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6. This Original Petition has been filed in the year 2011. The adjudication in the petition also shows that the respondents have entered appearance on 26.08.2013 and it has also been represented to the Court that Caveat has been filed in SR No.1846 of 2013. Having filed such caveat, they have not filed any objection within 8 days as mandated under Order XXV Rule 52. Of the Original Side Rules. Order XXV Rule 52 of the Original Side Rules reads as follows :

“Where a caveat is entered after an application has been made for a grant of probate or letters of administration, the affidavit in support of the caveat shall be filed within eight days of the caveat being filed. Such affidavit shall state the right and interest of the caveator and the grounds of the objection to the application.”

From a reading of the above statutory rule, it is mandatory that once a caveat is entered, the affidavit in support of the caveat should be filed within 8 days of the caveat being filed. Such an affidavit should also state the right and interest of the caveator in the grounds of the objection of the caveator. Only after such compliance has been made, the proceedings shall be numbered and registered as a suit.



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7. A perusal of the records reveals that the respondents, having entered caveat in the year 2013, have not filed the affidavit within 8 days. Whereas the affidavit has been filed only on 05.07.2017 before this Court. Even in the affidavit, the right and the interest of the caveator has not been stated. Except stating that as per the Will of the testator Narayanamoorthy, the second respondent is also entitled to 1/3 share in the Will and she is recording her objections, she has not made any objection claiming any right or interest. Therefore, this Court is of the view that having failed to file an affidavit and objection as required under law, merely by filing some affidavit, that too after a long delay to comply the mandatory provisions of law, the respondent cannot seek the conversion of the Original Petition into suit. When a person is aware of the proceedings and entered through caveat in the year 2013 and failed to file an affidavit within 8 days, he or she cannot take advantage of their own default and subsequently come forward with a mere affidavit, even without any serious objections and seek for conversion of the Original Petition into a testamentary suit. Further, filing the affidavit after four years after the caveat being filed, will not give any right to the respondents to convert the Original Petition in to a testamentary suit.

8. However, having regard to the fact that this matter is concerning to a Will in respect of the family property and the relationship of the parties,



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this Court is of the view that one more opportunity may be given to the applicant to cross examine the witness.

9. Hence, post this Original Petition before the Master on 09.07.2018 and the Master is directed to issue summons to P.W.1 for cross examination by the applicant and the entire cross examination shall be completed within one month. The applicant shall complete the evidence on the day fixed by the Master. Failing to avail the opportunity, she will lose her right of cross examination.

10. With the above observation, this application is allowed. Post the Original Petition before the Master on 09.07.2018.

29.06.2018

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N.SATHISH KUMAR, J.

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Order in

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