

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 2842 of 2017

ORDER:

1) Aggrieved by the order, dated 17.02.2017, passed in I.A.No.90 of 2014 in A.S.No.69 of 2013 on the file of the IX Additional District Judge, Chittoor, wherein an application filed under Order I Rule 10 of C.P.C. to implead the petitioner, who is the proposed legal representative of the sole respondent as second respondent in appeal, was dismissed, the present Civil Revision Petition came to be filed under Section 115 of C.P.C.

2) The facts in issue are as under:

The second respondent herein filed O.S.No.51 of 2014 seeking partition and separate possession of the plaint schedule property into four equal shares and to allot three such shares to him. After a full pledged trial, the said suit was dismissed on 12.08.2013. Challenging the same, the second respondent herein filed A.S.No.69 of 2013 before the IX Additional District Judge, Chittoor. Pending appeal, the sole respondent/ defendant died. Hence, the petitioner herein filed I.A.No.90 of 2013 to come on record as a legatee. The averments in the affidavit filed in support of the said I.A. would show that the sole respondent/ defendant is said to be foster mother of the petitioner and that the deceased bequeathed the suit schedule property in her favour under a registered Will dated 15.07.2002,

while she was in sound and disposing state of mind. It is further stated that the sole respondent/ defendant while living with the petitioner at Tirupati died on 08.12.2013 and the husband of the petitioner was said to have performed the funeral and obsequies. In view of the registered Will said to have been executed, the petitioner claiming herself to be the legal representative intends to come on record.

3) A counter came to be filed by the appellant stating that the Will dated 15.07.2002 was not executed by the respondent in the appeal and the same was forged and fabricated. The petitioner has no right to come on record as a legal heir of the deceased defendant and the appellant alone is the legal heir and legal representatives of the deceased.

4) After considering the rival submissions made, the Court below dismissed the said petition. Challenging the same the present Civil Revision Petition came to be filed.

5) Learned counsel for the petitioner would submit that there is nothing wrong in petitioner coming on record basing on the registered Will. According to him, the truth or otherwise of the Will can be decided by the said Court during the course of hearing of appeal as well. He further submits that if the petitioner is not brought on record, the appeal itself would get abated and even the appellant cannot execute the decree against the dead person or even against the estate of deceased respondent.

6) The same is opposed by the learned counsel for the second respondent contending that the order of the learned Judge in directing the petitioner to file a separate suit basing on the registered Will warrants no interference. He further submits that there is any amount of doubt as to who the legal heir is and since both of them are claiming right over the property as legal heirs, it is urged that there is nothing wrong in directing the petitioner to file a suit basing on the Will.

7) As seen from the record, suit filed by the second respondent herein for partition of plaint schedule property was dismissed, against which an appeal came to be filed. Pending appeal, the sole respondent died. Basing on a registered Will dated 15.07.2002 alleged to have been executed by M.D.Vedanayaki (defendant in the suit) in favour of the petitioner herein, an I.A. came to be filed seeking permission of the Court to come on record. The petitioner as well as the second respondent/ appellant are claiming to be the legal heirs of deceased M.D.Vedanayaki.

8) Insofar as the registered Will is concerned, the appellant pleads that the same is a forged one and that the deceased never fostered the present petitioner. Though counsel for both sides took time to produce authorities but failed to place on record any judgment covering the said aspect directly. Situation would have been different had there been any issues or surviving husband to the deceased. Admittedly there are no issues to the

deceased. Therefore, the primary issue is as to what should happen to the appeal in case of death of sole respondent.

9) Had it been a suit, other than partition, and if no legal representatives are brought on record and when the sole respondent dies, normally the appeal would get abated, but the situation appears to be different in case of suits relating to partition.

10) Before proceeding further, it would be useful to refer to the provisions of Order 41 Rule 27 of the CPC which are as follows:

"27. Production of additional evidence in Appellate Court:

[1] The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in Appellate Court. But if-

[a] the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[aa] the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

[b] the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

[2] Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

11) A reading of the said provision would clearly show that the court may permit additional evidence to be produced only when it is satisfied with the three grounds namely, (i) if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; (ii) a party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed; and (iii) when the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment; or for any other substantial cause.

12) In the instant case, the issue is whether the petitioner can be permitted to come on record as legal representative, when there is a dispute with regard to the execution of Will.

13) It may not be permissible for this Court to decide whether the registered Will is forged or genuine one. Therefore, the only course would be to direct the appellate Court or to the trial Court to decide the very genuinity of the Will and then proceed further by taking into consideration the result of such enquiry.

While dismissing the said I.A. the appellate Court did not anywhere state as to whether the appeal gets abated or not.

14) Since the appeal is still pending consideration before the appellate Court, this Court is of the opinion that, it would be just and proper to direct the appellate Court to conduct an independent enquiry/ trial with regard to validity or otherwise of the registered Will dated 15.07.2002 produced by the petitioner in the I.A. and then proceed in accordance with law.

15) Accordingly, the Civil Revision Petition is disposed of setting aside the impugned order. The IX Additional District Judge, Chittoor is directed to conduct an enquiry/trial in the said appeal with regard to validity or otherwise of the registered Will dated 15.07.2002 and thereafter proceed in accordance with law.

16) As a sequel thereto, Miscellaneous Petitions pending if any in this Civil Revision Petition, shall stand closed. There shall be no order as to costs.

C. PRAVEEN KUMAR, J

19.09.2017
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