

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 13.06.2018	DELIVERED ON 18.06.2018
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CORAM:

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

C.M.P NO.2948 OF 2017

IN

O.S.A SR.NO.107938 OF 2014

1.M.Ramanathan
2.Sbrahmaniyen
3.Muthucaruppan @ Solayiyappan ... Appellants
sought to be preferred OSA.SR.

..Vs..

1.N.M.Narayanan @ Mtuhucaruppan
2.Smt.A.N.Nachammai Achi ... Respondents

Prayer:

Appeal is filed under Order XXXVI Rule 1 of the O.S. Rules read with Clause 15 of the Amended Letters Patent of 1865 sought to be preferred to set aside the order dated 08.08.2012 made in A.No.5285 of 2011 in O.P.No.452 of 2010.

C.M.P No.2948 of 2017 is filed under Order XIV Rule 8 of the Original Side Rules r/w Section 5 of the Limitation Act, 1963, to condone the delay of 734 days in filing O.A.S.sr.107938 of 2014.

For Appellants : Mr.V.Lakshminaraynan

For Respondents : Mr. K.Ramu

JUDGMENT

N.ANAND VENKATESH., J.

This petition has been filed to condone the delay of 734 days in filing the O.S.A. In the affidavit filed in support of the petition to condone the delay, health grounds have been stated to be the reason for the delay. This petition has been

vehemently opposed by the respondents on the ground that there are absolutely no materials to show that the 2nd and 3rd petitioners were seriously ill and the 1st petitioner was attending to the health of his mother-in-law who was also stated to be seriously ill.

2.We have gone through the averments made in the affidavit and also heard the respective counsels. We thought that we will take up the main O.S.A itself for final hearing on merits along with the condone delay petition and we requested the learned counsel on either side to address their arguments on the merits of the case apart from the condone delay petition, so that we can effectively dispose of the main case itself which was filed for issuing Letters of Administration to the respondents under the Registered Will dated 31.10.2003.

3.The respondents filed O.P.No.452 of 2010 for grant of Letters of Administration on the ground that their father late Muthukaruppan Chettiar has left behind a Will dated 31.10.2003 in and by which he has bequeathed the suit property in favour of the respondents. The said late Muthukaruppan Chettiar died on 04.02.2008. Subsequent to his death, the respondents filed the said petition for grant of Letters of Administration.

4.In the petition, the appellants who are also the sons of late Muthukaruppan Chettiar were added as respondents. Notice was ordered to the respondents and on service of notice, the respondents entered appearance through their counsel. The respondents had filed a caveat, supporting affidavit and vakalat on 15.07.2010 and the same was returned on 19.07.2010. It is seen from the records that it was represented on 17.07.2012 and it was again returned on 20.11.2012. The learned counsel for the appellants took back the returned papers on 01.08.2013.

5.It is also seen from the records that the name of the learned counsel was printed when the matter was posted before the learned Master for taking evidence in the O.P. specifically mentioning that the vakalat has been returned. Since there was no appearance on the side of the appellants and since no caveat or supporting affidavit was found on record, the learned Master after taking evidence had sent the papers back to the Court and the learned Single Judge after satisfying himself that the Will has been sufficiently proved and is a true and genuine document, by an order dated 29.07.2013 was pleased to grant Letters of Administration in favour of the respondents.

6.After orders were passed in the O.P, the appellants filed A.No.5285 of 2011 praying this Court to revoke the order of Letters of Administration granted in the O.P in favour of the respondents.

7.The learned Single Judge took up for hearing, the application filed by the appellants in A.No.5285 of 2011 and after hearing the learned counsel for either parties and after taking into consideration the materials available on record, was pleased to dismiss the application by an order dated 08.08.2012. Aggrieved by this order, the present O.S.A has been filed.

8.The learned counsel for the appellants would submit that in spite of filing the caveat and the supporting affidavit, the O.P instead of being converted into a T.O.S, was allowed as if no caveat was filed. The learned counsel for the appellants would further submit that there are two Wills, one executed by the father late Muthukaruppan Chettiar and another Will executed by the mother and both these Wills were executed and registered on the same day and the attesting witness in both the Wills were the same persons. His further contention is that insofar as the Will executed by the mother, the appellants have already filed a caveat and the O.P has been converted into a T.O.S and the same is pending. The learned counsel for the appellants would contend that C.S.No.792 of 2007 that was filed by the appellants for the relief of partition against the respondents is pending before this Court and in that suit the properties left behind by the mother is the subject matter. The learned counsel for the appellants would therefore contend that since the appellants are contesting the Will executed by the mother tooth and nail and are also claiming a share in the property left behind by the mother by filing a suit before this Court, it was not right on the part of the learned Single Judge to have dismissed the application and an opportunity should have been given to the appellants to contest the Will by converting the O.P into T.O.S. So that the pending T.O.S. Which touches upon the Will executed by the mother and the present O.P which touches upon the Will executed by the father could have been disposed on merits. The learned counsel for the appellants also contended that the order granting probate is an order passed without any discussion and therefore even on this ground, the same is liable to be set aside.

9.The learned counsel for the appellants relied upon the following judgments:

(i)Meenakshisundaram Textiles, 1st Floor, Sona Towers, 72, Millers Road, Bangalore-52, rep. by its Managing Director .V. Valliammal Textiles Ltd., No.50/1, Aandipalayam, Mangalam Road, Tiruppur 2011 (3) CTC 168,

(ii) Shantilal Gulabchand Mutha .V. Tata Engineering and Locomotive Company Limited and Another (2013) 4 SCC 396, and

(iii) The Commissioner, Rameshwaram
Municipality, Ramanathapuram District .V.
Tmt. Subbuthayammal & Others [2015-4-L.W.142]

in order to substantiate his arguments that de-hors the written statement, being filed or not, the Court has to independently satisfy itself that the petitioners in the O.P have sufficiently made out a case for grant of Letters of Administration and should give reasons. This law which applies to a judgment passed by a Civil Court by virtue of Section 2(9) r/w Order 20 Rule 4 of C.P.c, is equally applicable to an order passed by this Court while exercising its original side jurisdiction.

10. Per contra, the learned counsel for the respondents would contend that the appellants never served any supporting affidavit when the caveat was served on 15.07.2010. The learned counsel would further contend that even though the name of the learned counsel was printed in the cause list every time when the case was posted before the learned Master and also before the learned Single Judge, there was no appearance on the side of the appellants. The learned counsel would further contend that in the absence of a caveat and a supporting affidavit available on record, the Court is left with no other alternative except to proceed further with the case and decide the O.P on merits before granting the Letter of Administration. The learned counsel further contended that a mere perusal of the order passed by the learned Single Judge while granting Letters of Administration would clearly show that the learned Single Judge was satisfied that all the requirements that are necessary to grant Letters of Administration were fulfilled by the respondents and the learned Single Judge has given sufficient reasons while allowing the O.P. The learned counsel has put forth a further contention that where a person has been served with the notice and he fails to file an affidavit as contemplated under Order 25 Rule 52 of O.S.Rules, that person cannot subsequently maintain an application for revocation under Order 25 Rule 62 of the original side rules and on that ground alone the application filed by the appellants was liable to be rejected.

11. The learned counsel for the respondents relied upon the following judgments:

- (i) S.V.Ramakrishnan .V. P.R.Sethuraman,
2.P.R.Ramanathan,, 3.P.R.Venkataraman,
4.P.Narayani, [2011 (3) MWN (Civil) 772]
(ii) N.Sthirasundari 2.N.Jayalakshmi .Vs.
V.Kalyani 2.S.Vasudevan 3.Priya Kaushik
[2013 (1) CTC 646]

to substantiate his arguments that under Order 25 Rule 52 of the O.S.Rules, on failure to file an affidavit in support of the caveat, the caveat will stand discharged and probate will be granted and also to substantiate his arguments that once notice is served on the appellants who failed to comply with the requirements of Order 25 Rule 52, a petition for revocation under Rule 25 & 62 of the original side rules is not maintainable.

12.We have heard the learned counsel appearing on either side and also went through all the materials available before us.

13.The important issues that arises for consideration in this O.S.A are ;

1)When the caveat and supporting affidavit was initially filed by the appellants which came to be returned and was never represented, whether the probate Court should offer an opportunity to the appellants by converting the O.P into T.O.S ?

2)When the appellants were served with notice and were given an opportunity to contest the O.P by complying with the requirements of Order 25 Rule 52 of the O.S rules and they failed to do so, whether the appellants can maintain a subsequent application for revocation of the probate?

Issue No.1:

14.It is an admitted case that the property which is the subject matter in the O.P belong to the father late Muthukaruppan Chettiar. He died on 04.02.2008 leaving behind a Registered Will dated 31.10.2013 bequeathing the property in favour of the respondents. The respondents filed the O.P for grant of Letters of Administration. It is also an admitted case that the appellants were served with notice in the O.P and they entered appearance through the counsel.

15.It is admitted by the learned counsel for the respondents that they were served only with a caveat and no supporting affidavit was served on them by the learned counsel for the appellants. From the records we were able to find that the caveat, supporting affidavit and vakalat were filed on 15.07.2010 and there is an entry in the records in C.D.No.28957 of 2010. All these papers were returned by the Registry on 19.07.2010 which came to be again represented on 17.07.2012. The papers were again returned on 20.11.2012 and the return was

taken by the learned counsel for the appellants only on 01.08.2013.

16.All these facts are borne out by records. It is therefore clear that after the papers were returned on 19.07.2010, till the order was passed in the O.P on 29.07.2011, no caveat or supporting affidavit was available on the file of this Court in O.P.No.452 of 2010.

17.It can also be seen from the records that every time when the matter was posted before the learned Master at the time of recording evidence and before the learned Single Judge, the name of the learned counsel for the appellants was printed but however there was no representation on their side. The learned Single Judge in his order at Paragraph No.5 has given a list of dates when the case was posted and the orders that were passed during those dates and has categorically given a finding that the appellants were fully aware of the proceedings, but allowed the case to become final and had deliberately stayed away from participating in the proceedings.

18.From the above facts it is clear that the appellants who were given sufficient opportunity to contest the O.P for reasons best known to them failed and neglected from participating in the proceedings. Even though initially a caveat and a supporting affidavit was filed as contended by the learned counsel for the appellants, the moment it is returned back and the appellant chooses not to represent it on time, insofar as the probate Court is concerned it has to proceed further with the case as if no caveat and supporting affidavit was filed and decide the O.P in accordance with law.

19.The Hon'ble Division Bench of this Court in the case of N.Sthirasundari and Another referred supra, dealt with in detail Order 25 Rule 52, 53 and 54 of the Madras High Court Original Side Rules and held as follows:

"11.Under order 25, Rule 52 of Original Side Rules, Affidavit must state "right and interest of the Caveator and the grounds of objection to the Application and that Caveator opposes to the grant". Up to the filing of the Affidavit, nothing need be done by the Court. In case, no Affidavit is filed within the stipulated period of eight days or no application is filed seeking extension of time for filing an Affidavit, the matter never becomes contentious. To put in other words, unless the Affidavit is filed, such Caveat shall not prevent granting of Probate or Letters of Administration.

12.As per the mandatory requirement of Order 25, Rule 52 of Madras High Court Original Side Rules, Appellants have not filed Affidavit in support of their Caveat. Even if there was settlement talks, nothing prevented the Appellants from filing an Affidavit in support of the Caveat. O.P.No.188 of 2006 was listed on 10.07.2007, 16.07.2007, 23.07.2007 & 31.07.2007. Name of Mr.R.Sivakumar Counsel for Respondent No.2 & 3, who filed the Caveat was printed in the cause list on 23.07.2007 & 31.07.2007. Even though the counsel Mr.R.Sivakumar's name was printed in the Cause List, there was no representation for the Appellants. As pointed out earlier, in compliance with Order 25, Rule 52 of Original Side Rules, no Affidavit was filed in support of the Caveat. Since continuously there was no representation for the Appellants and in the absence of Affidavit setting out of any of the grounds assailing the Will, on 31.07.2007, the Court discharged the Caveat and directed issuance of Probate".

It was further held that the entry of caveat by itself does not render the proceedings contentious. When the appellants have not filed the affidavit in support of caveat within the time stipulated or thereafter, it cannot be said that Court was not right in discharging the caveat.

20.This judgment will squarely apply to the facts of the present case. In the instant case after 19.07.2010, till the O.P was taken up for final hearing and orders were passed on 29.07.2011, there was neither a caveat nor supporting affidavit available on record and therefore the learned Single Judge was perfectly right in proceeding further with the O.P by passing final orders. We therefore do not find any error on the part of the learned Single Judge in deciding the O.P on its own merits. There was no necessity for the learned Single Judge to convert the O.P into T.O.S in the absence of the caveat and the supporting affidavit available on record. In this case the appellants had sufficient opportunity to contest the O.P since they were represented by a learned counsel right from the beginning and they did not avail of that opportunity for which the appellants will have to blame themselves. Accordingly, the first point for consideration is answered.

Issue No.2 :-

21.The second point for consideration, is squarely covered by the judgment of this Court in the case of S.V.Ramakrishnan

referred supra. It was held in that judgment as follows:

"12.Order 25, Rule 62 stipulates that if subsequent to the grant of Probate or Letters of Administration, any person interested in the property of the deceased desires that the Will may be proved in solemn form or that the said grant may be revoked, he shall file an Affidavit setting out the grounds there for.

13.Where a person, who after being served with notice or otherwise takes notice in the Probate proceedings should file an Affidavit within eight days. If he fails to do so, he cannot take advantage of his default and subsequently come forward with an Affidavit and ask for Petition to be registered as a Suit. A person, who failed to file the Affidavit under Order 25 Rule 52 cannot resort to Order 25 Rule 62. In the instant case, if the Appellant having entered appearance in the Probate proceedings, has not chosen to file any Caveat and thereafter cannot seek to revoke the Probate".

22.In the instant case the appellants filed an application in A.No.5285 of 2011 on 01.08.2011 to revoke the grant of Letters of Administration. The only ground that was taken in the said application for revoking the grant was that they entered caveat with the supporting affidavit and O.P ought to have been converted into a T.O.S and the petition should not have been decided ex-parte. This petition is clearly not maintainable, since the appellants after being served notice in the O.P failed to comply with the requirements of Order 25 Rule 52 and 53 of the Madras High Court Original Side Rules and even subsequently never chose to contest the O.P in spite of sufficient opportunities. The law is also fairly settled by the Hon'ble Division Bench of this Court which was referred supra.

23.The judgments relied upon by the learned counsel for the appellants are not applicable to the facts of the present case since we find that the learned single Judge while ordering the grant of Letters of Administration had taken into consideration all the materials and has given sufficient reasons for allowing the O.P.

24.The contention of the learned counsel for the appellants that the appellants are contesting the Will executed by the mother and also a partition suit has been filed before this Court claiming a share in her property and therefore they must be permitted to contest the Will executed by the father by

converting the present O.P into T.O.S is wholly unsustainable. The appellants who have been involved in Court battles right from the year 1990 even when the father was alive are fully aware about their legal rights and the procedure involved in probate proceedings. Curiously in the present case alone the appellants decided to wait and watch the proceedings for reasons best known to them. Therefore, just because the appellants are contesting the other cases, that will not entitle them to reopen this case also. The appellants are facing the consequences of their own conduct in waiting and watching the present proceedings.

25.The learned Single Judge has elaborately dealt with the entire facts and circumstances and has given sufficient reasons for dismissing the application filed by the appellants. We do not find any ground to interfere with the order of the learned Single Judge.

26.The appellants have also not given any sufficient reasons for the enormous delay of 734 days in filing the present O.S.A and we are not satisfied with the reasons assigned in the affidavit filed in support of the condone delay petition. Accordingly, the Civil Miscellaneous Petition stands dismissed. Even otherwise, we do not find any merits in the present appeal and the same is dismissed at the S.R.stage itself. There shall be no order as to costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

KP

To

The Sub. Asst. Registrar,
Original Side, High Court
Madras.

+1cc to Mr. K.Ramu, Advocate, S.R.No.38167

C.M.P No.2948 of 2017
in
O.S.A SR.No.107938 of 2014

VD(Co)
CS/09/07/18