

THE HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

CIVIL REVISION PETITION No.1649 of 2018

ORDER:

1) Aggrieved by the order, dated 19.01.2018, passed in I.A.No.605 of 2014 in F.D.I.A.No.475 of 2013 in O.S.No.405 of 2012 on the file of the I Additional Senior Civil Judge, Kakinada, wherein an application filed by the second defendant to declare him as legal representative of the 1st defendant therein, was allowed, the present Civil Revision Petition came to be filed under Article 227 of the Constitution of India.

2) The facts in issue are as under:

The petitioner and the 1st respondent herein are brothers. O.S.No.405 of 2002 came to be filed by the petitioner seeking partition of the plaint schedule property. After the preliminary decree, the second defendant therein, filed a final decree petition requesting the Court to divide the plaint schedule property in terms of the preliminary decree. Pending final decree proceedings, the father of the petitioner herein and the second defendant died on 23.04.2014. Thereafter, the present petition came to be filed by the 1st respondent herein under Order 22 Rule 10 and Section 151 of C.P.C. to recognize him as legal representative of the first defendant basing on a Will. According to him, after the death of his father on 23.04.2014, the Registrar opened the sealed cover on 01.08.2014 and after conducting

preliminary enquiry about the death of his father, the Will was registered as document No.314/ 2014 on 01.08.2015. It is stated that as per the Will, whatever the share that is available to his father was bequeathed to him. It is stated that he filed a final decree petition requesting the Court to divide the property in terms of the preliminary decree. He filed the present petition seeking allotment of the share of his father to him, by declaring him as a legal representative of his father.

3) A counter came to be filed before the trial Court opposing the same and also disputing the averments in the petition. It is stated that since the second defendant along with his family members, were staying in Hyderabad, the plaintiff and his children used to attend his father and most of the time the children of the plaintiff used to stay with the father of the plaintiff. The plaintiff also performed the last rites of his father. It is stated that on the last day of ceremony, the plaintiff informed that his father executed a Will on 05.07.2012, wherein he bequeathed all his properties to the children of the plaintiff and the same is last Will and testament executed by his father. He also gave Photostat copy of the Will. The said Photostat Copy of the Will is filed along with the counter. In view of the above, it is urged that the contention of the second defendant that his father executed a Will on 22.01.2005, that the same was deposited before the Sub-Registrar and that the Sub-Registrar opened the Will are all false and concocted. It is said that the Will dated 05.07.2012 is the last Will and as per the said Will, the

children of the plaintiff and the children of the second defendant are entitled to the estates and liability of the father of the plaintiff. In view of the above, it is pleaded that the request of the second defendant for division of the property into seven equal shares and also to allot the share of their father ie., first defendant to the second defendant cannot be accepted.

4) During the course of enquiry in the said I.A., two witnesses came to be examined on behalf of the 1st respondent herein and Exs.P1 and P2 marked, while the petitioner herein examined himself as RW.1 and got marked Ex.R1.

5) After considering the evidence on record, the Court below allowed the application which was filed to recognize the first respondent herein as legal representation of his father-first defendant in the suit. Challenging the same, the present Civil Revision Petition is filed.

6) Reiterating the arguments advanced before the Court below and also referring to the evidence of PWs.1 and 2, the learned counsel for the plaintiff would contend that there is any amount of doubt with regard to the Will which is sought to be relied upon by the second defendant. In view of the discrepancy in the evidence of PWs.1 and 2, he would contend that the claim of his brother (second defendant) cannot be accepted.

7) On the other hand, the learned counsel for the respondent/ second defendant would contend that the original Will dated

22.01.2005, which was in sealed cover with the Registrar and which was registered after the death of the father of the plaintiff and second defendant, marked as Ex.P1, was proved by examining PW.2. Since it was with the Registrar in a sealed cover and being registered after the death of the first defendant, he pleads that the finding of the Court below in believing the same requires no interference.

8) The short question that falls for consideration is whether the Ex.P1-Will can be believed, so as to declare the second defendant as legal heir of his father or whether the same requires to be rejected in view of the discrepancy in the evidence of PWs.1 and 2 or whether the matter requires to be remanded for reconsideration in view of the evidence of PWs.1 and 2 coupled with CWs.1 and 2.

9) The second defendant, who examined himself as PW.1 and who initiated the final decree proceedings, in his evidence deposed that his father executed a Will on 22.01.2005, which was kept in a sealed cover before the District Registrar Office, Kakinada. After the death of his father, the Registrar opened the sealed cover on 01.08.2014 and registered the Will. PW.1 claims to have obtained a scanned copy of the Will from the Registrar Office, Kakinada and also got the original summoned from Registrar's Office, which is marked as Ex.P1. In view of the Will, he deposed that he is entitled to the estate of his father. He denies the execution of another Will dated 05.07.2012 by his

father. He further denies informing the plaintiff about the execution of Will, dated 05.07.2012, bequeathing the property to his children and children of the plaintiff. He also denies handing over of the copy of the Will dated 05.07.2012 to the plaintiff. He denies existence of Will dated 05.07.2012. He also denies the suggestion that his father never executed a Will dated 22.01.2005 and got the same deposited before the District Registrar, Kakinada.

10) PW.1 was cross-examined at length, wherein it is admitted that the appeal filed against the suit is pending before the III Additional District Judge, Kakinada, his elder brother performed the obsequies of his father and he also joined him for the said purpose. It has been elicited that there was no cordial relationship between the first defendant and the plaintiff. He admits that PW.2 is his brother-in-law. He further admits that he was not present at the time of execution of Ex.P1, but his father told him about the execution of the Will. To a suggestion that Ex.P1 is a fabricated document, brought into existence when there was a dispute between the first defendant and the plaintiff was denied. He further admits that he was not present when Ex.P1 was deposited before the District Registrar, but according to him, it was deposited on 22.01.2005. According to him four or five days after execution of Ex.P1, the deposit of it might have taken place. According to him, he has gone through the certified copy of Ex.P1. To a question put by Court that Ex.P1 reflects rivalry between the deceased and the plaintiff, he states that his

father got mentioned his feelings in Ex.P1, however he denies the suggestion that basing on rival contentions Ex.P1 was brought into existence.

11) From the evidence of this witness it appears that he was not present when Ex.P1 was prepared and also at the time when the same was deposited before the District Registrar in the year 2005.

12) PW.2 is none other than the brother-in-law of the plaintiff and second defendant. According to him, at the time of execution of Will he was present and all the family members of his father-in-law including the plaintiff know about the execution of the Will. According to him, himself and Sakshi Bhoolakshmi, who is one of the daughters of his father-in-law attested the Will. He further deposed that the deceased got the Will sealed before the District Registrar, Kakinada and the same was opened after the demise of his father-in-law. In the presence of Registrar, his mother-in-law signed in token of on opening the cover and registration of the Will. According to him, this Will is the last Will and testament of the first defendant.

13) PW.2 was also subjected to lengthy cross-examination. It would be appropriate to refer to that portion of the evidence, which is relied upon by the learned counsel for the petitioner herein.

“By the time of execution of Ex.P1, suit was pending. From the beginning PW.1 used to support D1. Fifteen or twenty days prior to execution of Ex.P1, D1

informed me that he was going to execute a Will. As seen from the endorsement made on sealed cover that D1 executed Will on 24.01.2005 and kept it in a sealed cover on the same day and it was deposited before the Registrar. Witness adds that on 24.01.2005 Will was kept in sealed cover, but on such date it was not executed. Ex.p1 was executed in three spells on 13.01.2005, 14.01.2005 and 15.01.2005. After completion of scribing the said Will on 15.01.2005, I attested Ex.P1. PW.1 was not present on those three days. He did not attend for festival. At the time of execution of Ex.P1, me, D1, 2nd attestor S Bhulakshmi, my wife, wife of D1 and other family members were present.”

14) His evidence also shows that the reason for executing Ex.P1 is that the first defendant was suffering from ill health by then. However, he admits that the contents of Ex.P1 were not read over to him. Witness adds that the first defendant states that he has not read over the contents of Ex.P1 but asked them to attest the same. The second attestor also did not go through the contents of Ex.P1. He also admits that his wife is one of the parties to the suit. To a suggestion that as per the Will dated 05.07.2012, the first defendant bequeathed his properties to the children of plaintiff and to the children of 1st respondent equally was denied by him. To a suggestion that at the instance of PW.1, Ex.P1 was fabricated was also denied. It was further elicited in the cross-examination of PW.2 that on 24.01.2005 at about 12.00 noon Ex.P1 was submitted to the Registrar.

15) In view of the discrepancy in the evidence of PWs.1 and 2 namely as to whether the said Will was executed on 22.01.2005 or on 13.01.2005, 14.01.2005 or 15.01.2005 as deposed by PW.2, the counsel for the petitioner submits that the said Will cannot be relied upon and that the same has been fabricated in collusion with the Registrar. According to him, the Will dated 05.07.2012 is the last Will executed by his father and there is no other Will except the said Will. But one fact which is to be noted here is that the Court below summoned the original of Ex.P1 from the office of the Sub-Registrar, Kakinada and then decided the issue. From the endorsements made on the cover, which has been forwarded by the office of the Sub-Registrar, it is evident that this Will was kept in a sealed cover before the Registrar in the month of January, 2005 and thereafter it was registered after the death of the first defendant.

16) Such being the position, the issue is whether the same can be disbelieved because of the alleged variation in the statements of PWs.1 and 2.

17) In order to appreciate the same, it is to be noted that though the petitioner herein has produced the Xerox copy of the Will dated 05.07.2012, alleged to have been executed by the first defendant, but he failed to produce the original. Even the attestor of the Will, dated 05.07.2012, who was examined as CW1, was not able to say as to what happened to the original of the Will dated 05.07.2012.

18) Coming to the alleged discrepancy, the fact that PW.1 was not present at the time of execution of Ex.P1 is admitted and only PW.2, who is said to be the brother-in-law of plaintiff and second defendant along with the sister of plaintiff and second defendant attested the Will. PW.2 in his evidence states that the Will came to be executed in three spells i.e., on 13.01.2005, 14.01.2005 and 15.01.2005. He categorically states that the same was kept with the Sub-Registrar in a sealed cover on 24.01.2005. The learned counsel for the petitioner would contend that there is any amount of doubt as to whether it was executed on three days as deposed by PW.2 or on 22.01.2005, the date which is reflected in the first page of the Will.

19) As seen from the said document, which is produced from the office of the Sub-Registrar in a sealed cover before the Court, the first page refers to the date as 22.01.2005 and the said Will which runs into six pages. It does not show that the said Will was drafted in three spells. By this, I feel that the execution of the Will itself cannot be disbelieved, having regard to the fact that the same came to be produced before the Court from the office of Sub-Registrar. Since PW.2 states in his evidence that he only signed without reading the contents, mentioning of the date 22.01.2005 on the top of the first page cannot be given so much of importance so as to disbelieve the Will which was registered after his demise, by opening the sealed cover before the Registrar.

20) In *K.V.Janardhanam Chetty and another v. K.V.Jaya Kumar and another*¹ this Court while dealing with a discrepancy regarding the name of attester on Ex.A9-Will, observed as under:

“86. Learned counsel for the plaintiff in O.S. No.208 of 1992 would contend that there is a discrepancy regarding name of the attester on Ex.A-9; according to PW.1, T.V. Narayana Reddy is one of the attestors of Ex.A-9 whereas according to PW.2, PW.2 himself and his driver Kondanda Ram attested Ex.A-9. As seen from the material available on record T.V. Narayana Reddy was the attester of Ex.A-11 endorsement made by Sub-Registrar on the reverse of Ex.A-9 but not the attester of Ex.A-9. This discrepancy is only due to confusion and the inability to distinguish the attestation of Exs.A-9 and 11. Therefore, the discrepancy pointed by the learned counsel for the plaintiff in O.S. No.208 of 1992 is insignificant and the same can be discarded as a minor discrepancy. The trial Court believing the evidence of PWs.1 and 2 in O.S. No.102 of 1985 accepted the will marked as Ex.A-9 but before this Court only basing on the discrepancy which I have mentioned in the earlier paragraphs disputed the execution of the will. In fact, it was not the case of the plaintiff in O.S. No.208 of 1992 that the will was forged or surrounded by any suspicious circumstances. A perusal of entire evidence on record, there is absolutely no evidence pointing out the suspicious circumstances in execution of Ex.A-9 will by K.C.R. Viswanatham Chetty.”

21) Even in the instant case, the document came to be opened before the Sub-Registrar, then got it registered after the death of the first defendant and the same came to be produced before the Court from the office of Sub-Registrar while deciding the I.A. Hence one cannot suspect the same.

¹ (2017) 2 ALD 387

22) For the aforesaid reasons, I see no illegality or irregularity in the order passed by the Court below. Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs.

23) As a sequel thereto, Miscellaneous Petitions pending if any, shall stand closed.

JUSTICE C.PRAVEEN KUMAR

12.10.2018
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