

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

CMA No. 308 of 2006

ORDER:

This Appeal is filed against the order dated 16.01.2006 in SOP.No.1016 of 2002 passed by the Principal District Judge, Khammam.

For the sake of convenience, the parties are referred to as they are arrayed in the lower Court.

The application was filed under Section 372 of the Indian Succession Act, 1925 (for short 'the Act') by one N.Srinivasa Rao, claiming to be the son of Venkatarama Narsaiah @ Mylarapu Venakti. The petitioner claims that he was born to M.Venkati and Sakkubai. The marriage of Venkati and Sakkubai took place in the year 1970 and he was born in 1972. His mother died immediately after his birth. Therefore, he was brought up by his uncle. He pleads that later his father married the second respondent and begot three female children. The father was working with the first respondent-Singareni Collieries. After the death of Mylarapu Venkati, as the respondents failed to give him due share of the estate, the petitioner filed this application for a succession OP claiming a sum of Rs.1,33,333/-. The sum represents his 1/3rd share of the death benefits payable by the first respondent to his deceased father.

The first respondent filed a counter denying all the allegations and stating that as per their records, the wife and three daughters were shown as dependants. In the various nominations made by the employee, Bhadramma-the wife is shown as the nominee. The respondents also took a plea that two married daughters are not added as parties. Respondent No.2 filed a counter denying the entire case set up. They also pleaded that the two daughters, who were Class-I heirs, were not added even though they are necessary parties. The respondents also stated that the father executed a Will on 10.05.2002 by which among other things, the money payable by the first respondent is bequeathed to respondent No.2 only. Respondent No.3 adopted her counter. The parties went to trial and on behalf of the petitioner, PWs.1 to 3 were examined and Exs.A.1 to A.9 were marked. For the respondents, R.Ws.1 to 5 were examined and Exs.B.1 and B.2 were marked. The lower Court, after hearing the parties, came to a conclusion that the petitioner is entitled to 1/5th share in the entire property including the amounts lying with the first respondent. Respondent No.1 was also directed to pay the amount with reasonable interest. It is this order, which is now assailed in the appeal.

This Court has heard Sri Ch.Ravinder, learned counsel for the appellants and Sri V.Padmanabha Rao and J.Prabhakar, learned counsel for the respondents.

Learned counsel for the appellants argued that the order of the lower Court is totally contrary to law; that the SOP must be dismissed for non-joinder of necessary parties; that the petitioner did not prove that he was the son of Venkatarama Narsaiah @ Mylarapu Venkati and that lastly the decree passed is beyond the scope of the prayer itself. In reply thereto, learned counsel for the first respondent argued that the admission of DW.2 in her evidence makes it clear that the petitioner was the son of Mylarapu Venkatarama Narsaiah; that even though the daughters were not added, their interest was safeguarded and that the decree against the heirs impleaded is also binding on the other heirs. Learned counsel for the first respondent also argued that lower Court order does not suffer from any fatal errors. The second respondent's counsel stated that they would abide by the orders of the Court and had nothing more to add than what was pleaded in the lower Court.

This Court, after hearing both the parties, notices that the only documents that are marked for the petitioner are Ex.A.1-office copy of legal notice, Exs.A.2 and A.3-postal receipts, Ex.A.4-postal acknowledgment of A.1, Ex.A.5-xerox copy of voter identity card, Ex.A.6-copy of the application made by the petitioner to respondent No.1 and Exs.A.7 to A.9-the death ceremony invitation cards.

Learned counsel for the appellants argued that there is absolutely no documentary proof filed to show that the

petitioner was the son of Venkatarama Narsaiah and Sakkubai. He pointed out in the oral evidence also that Srinivasa Rao did not prove the factum of the marriage of his mother to Venkatarama Narsaiah or that he is the son born out of that marriage. He pointed out that P.W.2-the second witness was only aged about five (5) years when the alleged marriage took place between Venkatarama Narsaiah and Sakkubai. Similarly, he points out that the third witness-PW.3 was only aged about ten (10) years by the date of the said alleged marriage. Therefore, his contention is that PWs.1 to 3 have not introduced any evidence that would lead this Court to a conclusion that a valid marriage took place between Venkatarama Narsaiah and Sakkubai or that the present petitioner is the son born out of the said marriage. While it is true that the petitioner did not introduce any evidence, it is important to note that even after denying the marriage or the birth of the petitioner to Sakkubai and Venkatarama Narsaiah in her counter; Bhadramma, the wife of Venkatarama Narisaiah and first appellant herein filed her evidence affidavit in January, 2005, wherein she clearly admits that the petitioner took Ac.2.00 of land as his share, which was purchased by her husband and therefore, he cannot claim any further rights over the death benefits. This critical admission of RW.2 was rightly noticed by the lower Court also. If the petitioner was not the son; the question of his getting Ac.2.00 of land does not arise. The counsel for the

respondents also pointed out that if there is no proof that the petitioner was the son of Venkatarama Narsaiah and Sakkubai, this averment is conclusive of the fact that the petitioner is the son Venkatarama Narsaiah. Even if he is the illegitimate son, as per the learned counsel for the respondents, he is entitled to a share in the self acquired property of the father.

This Court holds that this admission of the second respondent as RW.1 is an important fact to prove that the petitioner had a share in the estate of late Venkatarama Narsaiah; and that the petitioner is the son of Venkatarama Narsaiah. It is also important to note that this admission of the petitioner's share is made in the chief-affidavit itself, which is typed and filed in lieu of the oral examination.

In addition to this oral evidence, RW.2 also produced a Will dated 10.05.2002, which is marked as Ex.B.2. To prove the contents of the Will, RWs.3 and 4 were examined as attesting witnesses. RW.5 is the scribe. Learned counsel for the appellants argued that the lower Court rightly rejected the Will. He points out that in the cross-examination of RW.4, it is clearly elicited that the deceased was not in a good health and even his mental condition was not good at the time of execution. RW.4 also admits that the deceased does not know how to sign and he only affixes his thumb impression, but he admits that Ex.B.2 shows that the deceased signed the Will. Even RW.3 also clearly admits that the deceased is a

thumb impressionist and all the papers filed, which are unmarked, bear the thumb impression of the deceased only, whereas the Will bears the signature and he says 'I do not know how he signed Ex.B.1 Will'.

This Court, on a perusal of the entire evidence, comes to a conclusion that there are suspicious circumstances surrounding the Will. The signature of the testator on the Will, when all the witnesses admit that the deceased only used to affix his thumb marks, is a fact that is of importance. The depositions of the witnesses, stating that the mental faculties of the deceased were not good at the time of execution of the Will also assumes importance. The lower Court also noticed that the Will surfaced only in the counter filed and not in the earlier interlocutory application. This Court, therefore, holds that the Will is not properly and effectively proved in this case and it cannot be relied upon to upset the general rule of succession.

Another important point that arises for consideration is the absence of the two other daughters as respondents. It is an admitted fact that in the petition itself, the petitioner has stated that apart from him, his father begot three other female children. But in the succession OP, he only added the second wife and one daughter-Vijaya Nirmala. Both in his application and in his affidavit in chief, he admits that there are two other daughters. After the records of the first respondent are produced, this fact is made crystal clear

namely that the deceased left behind a wife and three daughters.

It is the argument of the learned counsel for the appellants that despite the fact that the two daughters are not added, the lower Court granted an order as prayed for. He argued that in the absence of necessary parties, the case should have been dismissed under the provisions of Order I Rule 10 of C.P.C. He also points out that under Section 373 of the Act, a duty was cast upon the Court to issue a special notice to any person, in the opinion of the Court deserves the notice. He argues that the un-added daughters deserve to be put on notice and also heard. Therefore, it is the argument of the learned counsel for the appellants that the lower Court failed in its duty in noting the absence of the necessary parties and in failing to dismiss the application, on this ground.

In reply thereto, the learned counsel for the respondents argued that this is a case of non-joinder of a “proper” party only and there is sufficient representation of the estate. He also argues that the claim made is only a claim for payment of a share to the petitioner. The petitioner claimed a 1/3rd share along with respondent Nos.2 and 3. However, the evidence available and the admissions in the pleading make it clear that there are two more legal heirs. Therefore, the argument of the learned counsel for the respondents is that no harm is caused to the other siblings who are not

represented in this case. This Court also notices the judgment of the Hon'ble Supreme Court of India reported in ***Mohd. Hussain (dead) by LRs and others v. Occhavial and others***¹, wherein it was held that in the absence of fraud, collusion etc., which affect a decree, the decree passed against the impleaded heirs binds the other heirs also even though they are not parties to the suit. The extract from para 9 of this judgment is reproduced below:

“From a bare reading of the aforesaid observation of this Court in the abovementioned decision, it is clear that ordinarily the court does not regard a decree binding upon a person who was not impleaded in the action. While making this observation, this Court culled out some important exceptions:

(i) Where by the personal law governing the absent heir, the heir impleaded represents his interest in the estate of the deceased, the decree would be binding on all the persons interested in the estate.

(ii) If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate.

(iii) The court will also investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. Therefore, in the absence of fraud, collusion or other similar grounds, which taint the decree, a decree passed against the heirs impleaded binds the other heirs as well even though the other persons interested are not brought on record.”

¹ (2008) 3 SCC 233

In this case, on a review of the entire material, this Court holds that the petitioner, by not impleading the two other legal heirs, only prayed for a “larger” amount of $1/3^{\text{rd}}$ as his share. In view of the fact that the petitioner, a widow and three children are there, the petitioner is entitled to $1/5^{\text{th}}$ share in the amounts lying with the first respondent only and not $1/3^{\text{rd}}$ share as claimed. The petitioner, deceased’s widow-respondent No.2, respondent No.3 and the two daughters are entitled to a $1/5^{\text{th}}$ share each. The interests of the un-added daughters are thus protected by the heirs representing the estate and no harm is caused to them.

The counsel for the appellants, is however, right in his submission that the lower Court wrongly passed an order stating that the petitioner is entitled to a $1/5^{\text{th}}$ share in the entire property in the operative portion of the order. This Court concurs with the submission made and modifies the judgment of the lower Court to that extent holding that the petitioner is entitled to a ‘ $1/5^{\text{th}}$ share in all the amounts’ lying with the respondent No.1 only and not in the entire property.

To this extent, the judgment and decree of the lower Court is modified and it is made clear that the words ‘entire property’ are beyond the scope of the enquiry in a petition for a succession certificate.

With this modification, the judgment and decree of the lower Court is confirmed and the appeal is disposed of to the extent indicated. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 27.04.2018
KLP

