

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

O.S.A. No. 228 of 2011

K. Palani

...Appellant

Vs.

1. Balamani (Deceased)
2. K. Jayagopal
3. N. Sundaram
4. N. Sasi Kumar
5. N. Nalini Sankar
6. S. Bose

...Respondents

R3 to 6 brought on record as LRS of the deceased R1 vide order of Court Dated 03.01.2017, made in CMP.NO.12623 OF 2016 & 12624 OF 2016 IN OSA NO.228 OF 2011.

Prayer: Appeal under Order 36 Rule 2 of the O.S. Rule read with Clause 15 of the Letters Patent against the order dated 04.03.2011 made in Ordinary Original Civil Jurisdiction of Court T.O.S. No. 12 of 1996.

T.O.S. No. 12 of 1996:

Suit filed Under Section 222&276 of Indian Sessions Act XXXIX 861925 for grant of probate.

For Appellant : Mr.D.Ashok Kumar

For Respondents : No appearance

J U D G M E N T

(Delivered by M.M.SUNDRESH, J.)

This appeal is preferred against the judgment dated 4.3.2011 passed in T.O.S.No.12 of 1996, by which the testamentary original suit filed by the appellant was dismissed.

2. The appellant and the respondents are the children of the deceased E.Kanniappa Naicker, who was working in Railways. Admittedly, the suit property acquired under Ex.P1, an unregistered Will, is a self-acquired property.

It is the case of the appellant that the deceased father has bequeathed the property in his favour. In view of the contest, the probate petition was converted into testamentary original suit.

3. The respondents disputed the execution of the Will. They have contented that the appellant has taken a contradictory stand regarding the registration of the Will. The learned Single Judge framed the following issues for consideration:-

- (i) Whether the will dated 21.4.1989 said to have been executed by late E. Kanniyappan is true, valid and genuine?
- (ii) Whether the suit is bad for nonjoinder of necessary parties?
- (iii) Whether the impugned will is a forged one?
- (iv) To what relief the plaintiff is entitled to?

4. The younger brother of the appellant was added as a party to the proceeding. The learned Single Judge being satisfied about his mental capacity, recorded a finding that he was mentally sound. After considering the entire materials on record, the testamentary original suit was dismissed holding that the Will, Ex.P1, was not genuine.

5. Before the learned Single Judge, the appellant has examined himself as PW1. The Ex.P1 is the unregistered will. The scribe of the Ex.P1 and the counsel who notarized were not examined, as according to the appellant they were no more, though it was strongly disputed by the respondents.

6. Learned counsel appearing for the appellant would submit that mere participation in a proceeding cannot be a ground to create suspicion. The appellant was asked to assist the deceased. Mere exclusion of the other legal heirs cannot be a sole ground to doubt the execution of the Will (Ex.P1) and cannot constitute a ground of suspicion. As the scribe and the counsel who notarized Ex.P1 were not available, the learned Single Judge ought to have taken note of the facts into consideration.

7. Despite names being printed, none appeared for the respondents.

8. Though, it is contended that both the scribe and the counsel who notarized were no more, no materials have been produced to substantiate the same, especially when they were disputed by the other side. Secondly, the participation of the appellant was not disputed. The

appellant did not say it at the initial stage. He has also taken a contrary plea with respect to execution of the Will (Ex.P1). Earlier, he took a stand that it was a registered Will and thereafter stated that it was unregistered Will. Even Ex.P1 will not help the case of the appellant. He has not stated that Ex.P1 was executed by reading the contents to the testator. Therefore, there is no material to hold that the Will was put to the knowledge of the testator, who noticed it and thereafter put his signatures. This aspect was also taken note of by the learned Single Judge.

9. Inasmuch as the circumstances are clearly available creating suspicion over the execution of Ex.P1 and the appellant has not dispelled it to the satisfaction of the Court, we do not find any reason to interfere with the decision of the learned Single Judge. We also find that the issues have been correctly answered by the learned Single Judge. When once issue No.(i) is answered against the appellant, the testamentary original suit is certainly liable to be dismissed.

Accordingly, the appeal is dismissed. No costs. Consequently connected M.P.No.1 of 2011 is closed.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

ssm

To

The Sub Assistant Registrar
Original Side
High Court, Madras.

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O.S.A. No. 228 of 2011

A.SK(25/02/2019)

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