



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED DATE : 01.02.2019
PRONOUNCED DATE: 16.04.2019

CORAM

WEB COPY

THE HONOURABLE MRS. JUSTICE R. THARANI

C.M.S.A.(MD)No.35 of 2015

Minor A.Abhiyantha Sureka,
D/o.Arunkumar Sureka
rep by her mother Pinky Sureka
Sole appellant declared as Major vide
Court order dated 24.04.2017 made in
C.M.P.(MD)No.3979 of 2017 in
CMSA(MD)No.35 of 2015. ... Appellant/Petitioner/Respondent

Vs.

N.Ashish Karwa, ... Respondent/Respondent/Petitioner

Prayer : This Civil Miscellaneous Second Appeal is filed under Section 100 of Civil Procedure Code r/w 299 of Indian Succession Act, against the Judgment and Decree passed in C.M.A.No.8 of 2014 on the file of Principal District Judge, Tuticorin dated 27.04.2015 confirming the order passed in R.P.O.P.No.179 of 2012 on the file of Subordinate Judge, Tuticorin dated 24.01.2014.

For Appellant	: Mr.S.Meenakshi Sundaram Senior counsel for Mr.M.P.Senthil
For Respondent	: Mr.G.Jermiah for Mr.G.Ghouse Kathiri

J U D G M E N T

This Civil Miscellaneous Second Appeal has been filed against the Judgment and Decree passed in C.M.A.No.8 of 2014 on the file of Principal District Judge, Tuticorin dated 27.04.2015 confirming the order passed in R.P.O.P.No.179 of 2012 on the file of Subordinate Judge, Tuticorin dated 24.01.2014.

2.The appellant is the respondent in R.P.O.P.No.179 of 2012. The respondent is the petitioner in R.P.O.P.No.179 of 2012. The appellant herein filed Probate O.P.No.16 of 2007 before the Sub Judge, Thoothukudi and she obtained an order on 28.07.2007.



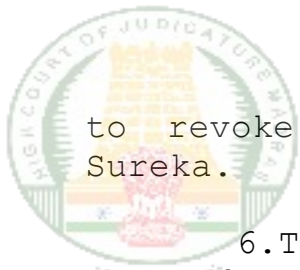
3.The case of the petitioner in R.P.O.P.No.179 of 2012 is as follows:

Minor.Abhiyantha Sureka, has filed a Probate O.P.No.16 of 2007 on the file of the Sub Judge, Thoothukudi in respect of a Will, dated 06.06.2006 and the petition was allowed on 27.08.2007. The respondent herein has filed a petition in R.P.O.P.No.179 of 2012 to reopen the O.P. proceedings in Probate O.P.No.16 of 2007 and to revoke the Probate granted to the petitioner/ appellant herein. The Subordinate Judge, Thoothukudi allowed the petition in R.P.O.P.No.179 of 2012 and revoked the order passed in Probate O.P.No.16 of 2007. Aggrieved by that order, the appellant preferred an appeal before the learned Principal District Judge, Thoothukudi, where the appeal was dismissed, against which the appellant has preferred this Civil Miscellaneous Second Appeal.

4.The brief substance of the averments in the petition is as follows:

The petitioner is the auction purchaser of the property situated in S.No.1409/3A of Meelavitan Village measuring an extend of 74 cents which is the subject matter of the probate granted in O.P.No.16 of 2007, dated 28.06.2007 in respect of the Will dated 06.06.2006 alleged to have been executed by Late.Shri.Hari Prasad Sureks. The mother of the minor respondent had filed a suit in O.S.No.5 of 2010 against M/s.Tamil Nadu Industrial Investment Corporation Limited, Ramnad and M/s.Krishna Trading Corporation. The property which is the subject matter of probate was mortgaged to TIIC in the year 1999 as collateral security for the financial assistance obtained by Sri Krishna Trading Corporation. The property was brought to sale by way of a public auction conducted on 30.11.2007 and the petitioner was the successful bidder and a sale deed dated 03.07.2009 was executed in his faour and the suit in O.S.No.5 of 2010 had been filed by the mother of the minor respondent questioning the constructive possession taken by TIIC, auction held on 30.11.2007 and the execution of sale deed dated 03.07.2009.

5.The averments made in the plaint in O.S.No.5 of 2010 reveals that a Will dated 06.06.2006 was executed by late. Hari Prasad Sureka bequeathing the property in favour of the minor respondent and the Will had been probated as per the order in O.P.No.16 of 2007 dated 28.06.2007, by the Sub Judge, Thoothukudi. The probate order was marked as Ex.A7 and the Will was marked Ex.B2. The said Will did not fulfill the statutory requirements stipulated under Section 63 of the Indian Succession Act. The respondent did not add either TIIC or the kith and kin of the deceased Hari Prasad Sureka as a party to the probate O.P. The said Will is suspicious, since the testator had excluded his natural heirs viz., his wife and three sons and bequeathed the property in favour of his grand daughter. Only when the petitioner was served with the copy of the plaint in O.S.No.5 of 2010, he came to know about probate O.P. and filed this petition



to revoke the probate granted in favour of Minor Abhiyantha Sureka.

6.The brief substance of the counter filed by the respondent in R.P.O.P.No.179 of 2012 is as follows:

Until the grant of probate of the Will of Late.Hari Prasad Sureka, the TIIC did not bring the schedule property for auction and only on 30.11.2007 after 5 months from the date of grant of probate the alleged auction by the TIIC is said to have been taken place only. The petitioner is not a legal heir of the testator and he did not have any locus standi for filing a petition for revocation of the probate. In fact, one R.Senthilkumar, S/o.Ramasamy residing at Pandurangan Street, Thoothukudi is the attester of the Will and when he was examined as P.W.2, he clearly deposed regarding the execution of the Will executed by Hari Prasad Sureka and hence, the requirements under Section 263 of the Indian Succession Act is fulfilled. This petition is belated one, which is barred by limitation.

7.Before the trial Court, on the side of the petitioner, three witnesses were examined as P.Ws.1 to P.W.3 and fourteen documents were marked as Exs.P1 to P.14. On the side of the respondent, three witnesses were examined as R.Ws.1 to R.W.3 and six documents were marked as Exs.R1 to R.6.

8.After considering the evidence and documents, the learned Subordinate Judge, Thoothukudi allowed the petition in R.P.O.P.No.179 of 2012. Against the order, the appellant herein filed an appeal, before the learned Principal District Judge, Thoothukudi, in C.M.A.No.8 of 2014.

9.The grounds of appeal before the first Appellate Court as set out in the memorandum of C.M.A.No.8 of 2014 are as follows:-

During the time of Probating the Will and until the grant of Probate of the Will of late Hari Prasad Sureka, the TIIC did not bring any auction of the schedule property and after five months from the date of grant of probate the alleged auction by the TIIC is said to have taken place only on 30.11.2007 and after 23 years, the alleged sale deed has been conveyed by the TIIC in favour of the petitioner and hence the petitioner does not have any locus-standi for revocation of the above Probate. In fact, one R.Senthilkumar, S/o.Ramasamy residing at Pandurangan Street, Thoothukudi was an attester of the above Will and the said attester also appeared before the court and was examined as P.W.2 and he clearly deposed regarding the execution and circumstances of the Will executed by Hari Prasad Sureka and therefore, the Will had fulfilled the requirements under Section 263 of the Indian Succession Act. The petitioner has filed this petition only



belated though and therefore the petition is barred by limitation and there is no need for revocation of the probate as alleged by the petitioner.

10. After considering the grounds of Appeal and the arguments put forth on both the sides, the First Appellate Court dismissed the appeal by confirming the order passed by the learned Subordinate Judge, Thoothukudi. Against that order, this Civil Miscellaneous Second Appeal has been filed by the appellant.

11. The grounds of appeal as set out in the memorandum of appeal are as follows:-

The respondent is a total stranger to the family and he has no locus to question the validity and genuineness of the Will, dated 06.06.2006 and the petition is barred by limitation. The Courts below failed to advert the very revocation O.P. filed by the respondent in R.P.O.P.No.179 of 2012 to revoke the probate O.P. granted in O.P.No.16 of 2007 almost after the period of five years and the order passed in Probate O.P.No.16 of 2007 is not valid, even, without adverting that none of the legal heirs of the Hariprasath Sureka has come forward to object the probate certificate granted in Probate O.P.No.16 of 2007.

12. The Courts below failed to consider that the legal heirs of Hariprasath Sureka have not come forward to object the probate certificate granted in Probate O.P.No.16 of 2007, though the order was passed only after due paper publication no third person is entitled to question a Will except the legal heirs.

13. The Will was executed by Hariprasath Sureka on his own volition and in a sound disposing state of mind. The cogent evidence was inconsonance with the mandatory requirements contemplated under Section 63 r/w Section 68 of the Indian Evidence Act is fulfilled. Without adverting to the scope and ambit of Sections 263 and 272 of the Indian Succession Act, Probate O.P.No.16 of 2007 was revoked. The Lower Court is wrong in comparing signature found in Ex.A7, sale deed and the signature in Will, dated 06.06.2006.

14. When the other legal heirs are not questioning the probate, impleading the other legal heirs cannot be a ground for revoking the probate. The Lower Court failed to consider that Arunkumar Sureka, to safeguard his properties which are offered as prime security at the time of availing loan has induced the filing of this petition.

15. At the time of admission of the appeal the following substantial questions of law were framed:

<https://hcservices.ecourts.gov.in/hcservices/> Whether the orders of the Courts below revoking the probate certificate granted in O.P.No.16 of 2007 could be sustained in law even without adverting the very



revocation O.P.No.179 of 2012 filed at the instance of a stranger to the family who is not a legal heir of the testator to the Will dated 06.06.2006 is not maintainable?

II. Whether the Courts below are right in law in entertaining the very revocation O.P.No.179 of 2012 after a period of five years from the date of probate certificate granted in O.P.No.16 of 2007 which is clearly barred by limitation?

III. Whether the orders passed in the revocation O.P.No.16 of 2007 as confirmed in C.M.A.No.8 of 2014 could be sustained in law as the same has been passed without adverting to the very scope and ambit of Sections 263 and 272 of the Indian Succession Act?

IV. Have not the Courts below, especially the learned Subordinate Judge committed a serious error in entertaining the very revocation application without any jurisdiction, even without adverting to Section 264 of the Indian Succession Act which was also mechanically confirmed by the lower appellate Court absolutely without any independent consideration of the oral and documentary evidence?"

Issue No.I

16. On the side of the appellant, it is stated that the lower Court without adverting the fact that the probate O.P.No.179 of 2012 was filed by a stranger viz., auction purchaser, who is not a legal heir of the testator of the Will dated 06.06.2006 and the order of the lower Court is not maintainable.

17. The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of **Ramani U. Krishnan v. Dr. Ammini Praveen Joshua @ Veena**, reported in **2005 (4) C.T.C. 165**, which reads as follows:

"The applicant is neither a legal heir nor would she get an interest in the property, but for the Will. It is a well established principle that only when the person has got some interest in the property but for the Will, for any of the reasons mentioned in Section 263 of the Indian Succession Act, he can file an application for revocation of probate.

.....As rightly concluded by the learned Judge, the applicant does not have a claim to cite or oppose the grant of Probate. Further, a person who is not claiming any right under testator nor a beneficiary of a Will nor who is likely to inherit the estate of the deceased whose claim is adverse to the interest of the testator, cannot file an application under Section 263 of the Indian Succession Act, 1925 for revocation of the Probate."



18. The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of **Valliammal v. S.Arumugha Gounder and another**, reported in **2001 (1) C.T.C. 708**, which reads as follows:

WEB COPY

" On other cases when a third party stranger like the first defendant makes a passing reference in his defence with regard to the truth and validity and the mental status of the testator at the time of the making of the will, the Court must satisfy itself by examining the attestators because as per the Hindu Succession Act and the Indian Evidence Act, will is a document by law required to be proved by, atleast by examining one of the two attestors.

.....The other legal heirs namely the first wife and children also have not so far questioned the validity and execution of the Will by late Muthusamy Gounder. The lower Appellate Court ought to have considered the evidence adduced on the side of the plaintiff to prove the execution of the Will. Under Such circumstance the defendant who is stranger to the family will not be competent to urge other contentions to hold that there are suspicious circumstances regarding the execution of the Will."

19. The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of **S.Ganesan v. S.Kuppuswamy & Other**, reported in **2009-2-L.W. 636**, which reads as follows:

" In view of the decision of the Hon'ble Apex Court reported in (2008) 4 SCC 300 (Cited supra) when a person having no cavetable interest or in any way related to the testator cannot insist upon the Will being proved strictly in accordance with Section 68 of the Indian Evidence Act. In this case, the defendants admittedly are not in any way related to the deceased and obviously they are not the legal heirs of the deceased testator and in such a case, the defendants cannot call upon the plaintiff to prove Ex.A17, the Will in accordance with Section 68 of the Indian Evidence Act."

20. The learned counsel appearing for the respondents relied upon the judgment passed by the Hon'ble Supreme Court in the case of **Elizabeth Antony v. Michel Charles John Chown Lengera** reported in **CDJ 1990 SC 387**, which reads as follows:

".....considering the locus standi of a person to oppose grant, it is held that any interest, however, slight and even a bare possibility of an interest is sufficient to entitle a person to enter caveat in a probate proceedings."



21. On the side of the respondent, it is stated that the respondent as an auction purchaser, who purchased the property for valuable consideration whose right will be affected by the grant of probate is having every right to revoke the probate certificate granted by the trial Court.

22. On the side of the respondent, a judgment reported in **2008 (1) CTC 698 (Basanti Devi vs. Raviprakash Ramprasad Jaiswal)** is cited wherein it is held that it is now well settled that an application for grant of probate is a proceeding in rem. A probate when granted not only binds all the parties before the Court but also binds all other persons in all the proceedings arising out of the Will or claims under or connected therewith.

23. Being a judgment in rem, a person, who is aggrieved thereby and having had no knowledge about the proceedings and proper citations having not been made, is entitled to file an application for revocation of probate on such grounds as may be available to him. A Judgment passed by this Court in the case of **S. Panchanathan Vs. Ellappan (died) and others** reported in **1995 (2) L.W. 852** is cited, wherein it has been held that a person who has acquired an interest in the testator's estate, though after his death, by reason of the mortgage transfer by the testator's son and who is undoubtedly also a creditor of the testator's said son, whom the alleged will purports to disinherit has plainly locus standi to apply for revocation of the grant, particularly when his allegation is that the grant was obtained in fraud of the creditors.

24. Since the respondent is a bonafide purchaser, who purchase the property in an auction by the TIIC, the probate order will affect the rights of the respondent. When an order is affecting the right of a particular person that person is having every right to question the same. Hence, it is decided that the respondent is having locus standi to question the probate certificated granted in Probate O.P.No.16 of 2007.

Issue No.II:

25. On the side of the appellant, it is stated that the revocation O.P.No.179 of 2012 after a period of five years from the date of probate certificate granted in O.P.No.16 of 2007 is clearly barred by limitation.

26. The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of **J. Malarvizhi v. D. Shankar**, reported in **2010 (2) C.T.C. 680**, which reads as follows:



Issue No.III:

30.On the side of the appellant, it is stated that in the order passed in the revocation O.P.No.172 of 2012 , confirmed by the Principal District Judge, Thoothukudi in C.M.A.No.8 of 2014 is unsustainable in law as the order was passed without adverting to the scope and ambit of Sections 263 and 272 of the Indian Succession Act.

31.On the side of the respondent, it is stated that the revocation of the probate order has been made after completing the scope and ambit of Sections 263 and 272 of the Indian Succession Act, which reads as follows:

"263. Revocation or annulment for just cause.-
The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation.--Just cause shall be deemed to exist where--

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

272.Probate and letters of administration may be granted by Delegate.-Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition, verified as hereinafter provided, that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate."



32. It is seen that in Probate O.P.No.16 of 2007, the appellant failed to implead the other legal heirs of the testator's of the Will. In the Will it is clearly stated that there is a mortgage made by the testator regarding the suit property. Even then the appellant has not chosen to implead TIIC as a party to the Probate proceedings. The contention of the appellant is that even after the paper publication made in the probate O.P.No.16 of 2007, the close relatives of Hariprasath Sureka has not turned up to contest the probate O.P. It is seen that the appellant has not impleaded the other legal heirs of Hariprasath Sureka, the trial Court after considering the evidence and documents filed by both the parties has come to the conclusion that there is a suspicious circumstances regarding the execution of the Will. The Will is executed in a language, which unknown to the testator and his family members, why the other legal heirs are excluded from the Will is not clearly explained by the appellant.

33. In the above circumstances, the trial Court has correctly passed the order after adverting the scope and ambit of Section 263 (a) and 263 (b) as the appellant has wilfully omitted to implead TIIC as a party, though the mortgage was specified in the Will. This amount to an just cause as narrated under Section 263 of the Indian Succession Act. Hence, the contention of the appellant is not accepted.

Issue No.IV:

34. On the side of the appellant, it is stated that the Courts below without adverting to Section 264 of Indian Succession Act has mechanically confirmed the trial Court order without any independent consideration of the oral and document any evidence.

35. A perusal of the Lower Court order clearly reveals that the First Appellate Court after considering all the documents and evidence and other materials available before the Court, has passed a detailed order regarding the admissibility of Probate O.P.No.16 of 2017 and decided that there are suspicious circumstances in the execution of the Will and has confirmed the order of the Subordinate Judge, Thoothukudi in revoking the probate O.P. The trial Court is having the right and jurisdiction under Section 264(1) of the Indian Succession Act to revoke the probate. Hence, the contention of the appellant is not acceptable and the revocation granted in Probate O.P.No.16 of 2017 is correct.

36. As all the substantial questions of law raised by the appellant are unsustainable and there is no sufficient grounds to interfere in the orders of the First Appellate Court.

<https://hcservices.ecourts.gov.in/hcservices/> 37. Hence, this Civil Miscellaneous Second Appeal is dismissed by confirming the order made in C.M.A.No.8 of 2014 on the file of Principal District Judge, Tuticorin dated 27.04.2015



WEB COPY

11

confirming the order made in R.P.O.P.No.179 of 2012 on the file of Subordinate Judge, Tuticorin dated 24.01.2014. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar (CS)

To

1.The Sub-Judge, Thoothukudi

2.The Principal District Judge, Thoothukudi

Copy to :

The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

Is
made in
C.M.S.A. (MD) No.35 of 2015
16.04.2019

NA (31.07.2019) 11P :5C