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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.06.2020

CORAM

**THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR**

**O.S.A.No.225 of 2019
and C.M.P.No.20229 of 2019**

S.Swaminathan

... Appellant

Vs.

1. S.Dhanushkodi

2. S.Kamala Devi

3. S.Kalyani Devi

4. S.Vasuki Devi

... Respondents

Appeal filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent, seeking to set aside the order, dated 10.06.2019 in A.No.3078 of 2019 in A.No.8112 of 2017 in T.O.S.No.36 of 2018.

For Appellant : Mr.K.V.Babu
for Mr.S.Rajesh

For Respondents : Mr.K.Chandrasekaran for R1
Mr.A.R.Nixon for R2
No Appearance for R3

J U D G M E N T

(Judgment of the Court was delivered by ***R.SURESH KUMAR, J***)

This Intra Court Appeal is directed against the order passed by the learned single Judge in A.No.3078 of 2019 by order, dated 10.06.2019.

2. The appellant and the first respondent are brothers, the remaining respondents are sisters whose father one P.S.Singaraja Nadar died on 03.09.1973 and their mother and one of the sister, namely Vennila Devi also died on 01.02.1994 and 20.02.1989 respectively.

3. Therefore, it seems that, a partition has been effected among the brothers and sisters sometime in 1998 and a partition deed to that effect also was registered as Document No.1441 of 1998 at Sub Registrar Office, Royapuram, Chennai, pursuant to which, it is the claim of the appellant that, the parties have acted upon as per the said partition. However it is the case of the appellant that, the said partition had been effected and acted upon on the impression that, their father Singaraja Nadar died intestate, but the fact remains that, according to the appellant, the father bequeathed a Will and Testament dated 28.02.1973 and the

same was registered as Document No.23 of 1973 on the file of the Joint Sub-Registrar, District Registration Office, First Line Beach, Chennai and without disclosing the same, since, according to the appellant, the first respondent was in possession of the said Will as he did not disclose that, the appellant claim that, he along with sisters entered into a partition in 1998 with the first respondent. Therefore the appellant, in order to get a Letters of Administration, on the alleged Will of his father, from this Court, filed the Original Petition in O.P.Diary No.17329 of 2016.

4. It is the further case of the appellant that, since the original Will of his father was not available with him, he obtained a certified copy from the concerned Registrar Office and with the strength of the said certified copy, he wanted to proceed with the O.P., seeking for Letters of Administration.

5. In this regard, it is the further case of the appellant that, the appellant filed an Application before the learned Master in A.No.5258 of 2016 for issuance of citation against the first respondent, however, the said application of the appellant for citation was dismissed on 02.08.2017. Therefore the appellant, having no option, filed an Application in A.No.8112 of 2017 in the unnumbered

O.P, invoking Section 237 of the Indian Succession Act, 1925 (herein after referred to as "the Act"), seeking for a prayer permitting to number the Original Petition seeking Letters of Administration with the certified copy of the registered last Will and Testament of the deceased P.S.Singaraja Nadar, dated 28.02.1973 registered as Document No.23 of 1973 on the file of the Joint Sub-Registrar, District Registration Office, First Line Beach, Chennai.

6. The said application was ordered by the learned Master, vide his order, dated 07.12.2017 and thereby permission was granted to the appellant as sought for to number the O.P with the certified copy of the last Will of his father.

7. In this context, felt aggrieved over the said order passed by the learned Master made in A.No.8112 of 2017 allowing the appellant herein to number the O.P for Letters of Administration with the certified copy of the Will, the first respondent filed A.No.3078 of 2019 by way of Appeal before the learned single Judge of this Court, where, the first respondent seems to have taken a stand that, before ordering the A.No.8112 of 2017, the learned Master not issued any notice and no notice was served on the first respondent and therefore without hearing the first respondent, as well as the other respondents, the said A.No.8112 of 2017

ought not to have been allowed by the learned Master. Therefore the said order passed by the learned Master in A.No.8112 of 2017, dated 07.12.2017 has to be interfered with.

8. The learned Judge who heard the application, after hearing both sides, allowed the said application through the impugned order, dated 10.06.2019, whereby the learned Judge, while setting aside the order passed by the learned Master vide his order, dated 07.12.2017 made in A.No.8112 of 2017, remanded the application back to the learned Master to hear the said application, after put all parties, i.e., respondents in the said application in notice. Aggrieved over the said order of the learned Judge, dated 10.06.2019 made in A.No.3078 of 2019, the present Intra Court Appeal has been filed by the appellant, who was the first respondent before the learned single Judge.

9. We have heard Mr.K.V.Babu, learned counsel appearing for the appellant and Mr.K.Chandrasekaran, learned counsel appearing for the first respondent who is the main contesting respondent and Mr.A.R.Nixon, learned counsel appearing for the second respondent. Though one of the respondent, i.e., R4 still has not been served, in view of the decision which we are going to take ultimately in this Appeal, the serving of notice to the fourth respondent is dispensed with.

10. It is the contention of the learned counsel for the appellant that, the last Will written by his father was a registered Will and at the time of the death of his father, since the appellant was minor, although the first respondent also was minor, since the first respondent was elder to the appellant and subsequently for several years upto the year 2013, since both the appellant as well as the first respondent, i.e., brothers, claimed to have been lived together and were doing joint business and in the mean while lot of developments taken place as admittedly there had been a partition sometime in 1998 on the impression that, his father died intestate, only subsequent to 2013, the appellant came to know that, a Will was written by his father which is a registered Will also and after getting the certified copy of the same, the appellant claimed that, he came to know that, the partition taken place sometime in 1998 was not a proper partition and therefore as per the Will of his father, the legal heirs have to act upon. Therefore in order to get Letters of Administration out of the said Will of his father, the appellant filed the O.P. However at that time, since the appellant was able to get only the certified copy of the Will, an application for issuance of citation was also taken out by the appellant, as the same was dismissed, the appellant has no option except to seek indulgence of this Court, i.e., the learned Master to permit him to number the O.P, based on the certified copy of the Will which action is purely inconsonance with

the procedure established under Section 237 of the Act. Therefore having considered the same and satisfied with the said legal as well as the factual aspects, the learned Master allowed the said application and permitted the appellant to number the O.P.

11. The learned counsel would further submit that, pursuant to such permission, the O.P got numbered and subsequently, since objection affidavits was filed by the first respondent, it has been converted into Testamentary Original Suit and accordingly, it was numbered as T.O.S.No.36 of 2018, where notice was ordered and certainly the defendants in the T.O.S., including the contesting first respondent, i.e., elder brother of the appellant would have a complete chance of resisting the suit, i.e., T.O.S., of the appellant.

12. The learned counsel would further submit that, when that being the position, without taking into account these aspects, the learned Judge by erroneously interpreting or by taking an erroneous view in the context of Section 237 of the Act, has come to a conclusion that, the learned Master ought not to have allowed the said application of the appellant permitting him to number the O.P., Therefore the conclusion reached by the learned Judge through the impugned

order is not inconsonance with the factual aspects of the case as well as the legal position established in the context of Section 237 of the Act. Therefore the said order of the learned Judge which is impugned herein is liable to be interfered with.

13. However Mr.K.Chandrasekaran, learned counsel appearing for the first respondent would contend that, all the contentions raised on factual aspects by the learned counsel for the appellant are the matter to be proved before the Court in so far as the merits of the case in the O.P. He would further submit that, however, in so far as the order passed by the learned Master allowing the A.No.8112 of 2017 permitting the appellant to number the O.P, without even hearing the respondents including the contesting first respondent, is erroneous. He would also submit that, though it is possible to get the Original Petition numbered seeking Letters of Administration with the strength of certified copy or draft copy of the Will, the necessary ingredients, which should be fulfilled by the person by whom such Letters of Administration sought for by filing Original Petition before this Court, ought to have been fulfilled, otherwise, he would not be entitled to seek the benefit under Section 237 of the Act.

14. The learned counsel would also submit that, so far as the application filed by the appellant earlier in A.No.5258 of 2016 for citation against the first respondent, it was rejected on 02.08.2017 holding that, the appellant has not proved that the alleged Will was in the possession of the first respondent herein.

15. Therefore the learned counsel would submit that, the attempt made by the appellant, by way of seeking citation against the first respondent with regard to the possession of the Will, since was ended in failure, the appellant cannot take shelter under Section 237 thereafter, that too without fulfilling the ingredients contained in Section 237.

16. Therefore the learned counsel would contend that, these defects in the order passed by the learned Master made in A.No.8112 of 2017 was rightly taken into account and accordingly, the learned Judge interfered with the said order by setting aside the order of the learned Master and only remitted the matter back to the Master for re-hearing and decision.

17. Because of the order passed by the learned Judge, which is impugned herein, in remitting the matter to the learned Master, no one would get prejudiced

especially the appellant herein as both parties would be heard and on merits this application would be decided by the learned Master. Therefore the learned counsel would submit that, absolutely there is no ground to interfere with the impugned order of the learned Judge, therefore the present Appeal is liable to be rejected, he contended. Mr.A.R.Nixon, learned counsel appearing for R2 also supported the case of the first respondent.

18. We have given our anxious consideration to the said submissions made by the learned counsel for the parties and have considered the materials placed before this Court for our perusal.

19. That in so far as the narration of facts which lead to filing the present Intra Court Appeal, as has been quoted in the above paragraphs of this order, there could be no much controversy among the parties. The only issue to be considered is whether the reasoning cited by the learned Judge in the order impugned in setting aside the order passed by the learned Master in A.No.8112 of 2017, dated 07.12.2017 and remitted the matter back to the learned Master for re-hearing, is justifiable or not.

20. Both the learned counsel relied upon Section 237 of the Act and the learned Judge also has dealt with the said issue. To appreciate the same, relevant portion of the order impugned of the learned Judge is extracted hereunder :

"2. This application has been ordered by the learned Master without notice to the respondents. Of course, Section 237 of the Indian Succession Act enables the party to obtain Probate or Letters of Administration for a copy or the draft of the lost Will. In order to enable the party to obtain Probate or Letters of Administration for a copy or draft of the lost Will, it should atleast be averred that the original Will has either been mislaid or destroyed by wrong or accident and not by the act of the Testator.

3. A perusal of the application in A.No.8112 of 2017 shows no such averment has been made while filing the application to number the Original Petition without production of the original Will."

21. It is an admitted case that, the O.P was filed by the appellant without the original Will, however with the certified copy of the Will. When application for issuance of citation was made by the appellant, the same was rejected by the court and that has become final. Only thereafter the appellant has chosen to file the

present application seeking permission of the Court, by order of the learned Master to number the O.P.

22. The learned Master vide his order, dated 07.12.2017 has passed the following order :

"Heard, the reason original by the applicant are acceptable. Permission granted application is allowed in the interest of justice."

23. Nothing has been discussed in the said order of the learned Master as to on what basis the reason given by the appellant was acceptable.

24. Though Section 237 of the Act has paved way for seeking probate or Letters of Administration of a Will, based on a copy or draft of the lost Will, certain requirements as contemplated in Section 237 has to be fulfilled before seeking such benefit from the Court. For easy understanding, Section 237 of the Indian Succession Act, 1925 is extracted hereunder :

"237. Probate of copy or draft of lost Will -

When a Will has been lost or mislaid since the testator's death, or has been destroyed by wrong or

accident and not by any act of the testator, and a copy or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original, or a properly authenticated copy of it is produced."

25. The first ingredient is that, the Will either should have been lost or mislaid since the testator's death or should have been destroyed by wrong or accident and not by any act of the testator. The second ingredient is that, a copy or the draft of the Will has to be preserved and based on which probate may be granted of such copy or draft only for limited period, i.e., until the original or a properly authenticated copy of it is produced.

26. Here in the case in hand, it is the claim of the appellant that, there has been a last Will of his father, which was a registered one and he was able to get the certified copy of the Will and according to him, the first respondent was in possession of the said Will, therefore an application for issuance of citation was taken out unsuccessfully, with the result the appellant having no option filed the present application invoking Section 237 of the Act.

27. It is to be noted that, the learned Judge, in the order impugned has taken note of the import of Section 237 of the Act and also the ingredients spelt out therein. The learned Judge also stated in the impugned order that, a perusal of the application in A.No.8112 of 2017 shows that, no such averment as required to be averred under Section 237 of the Act has been made or averred in such application / affidavit. Therefore the learned Judge has come to the conclusion that, the invocation of Section 237 of the Act must have been made of course by following the required formalities, procedures and the necessary ingredients set out therein by filing an appropriate application or affidavit stating the said reason, without which such an invocation of Section 237, according to the learned Judge, might not have been possible.

28. That apart, particularly the learned Judge has concluded to set aside the order of the learned Master and to remit the matter back to the learned Master on the ground that, before the said order was passed by the learned Master in A.No.8112 of 2017, no notice was given to the respondents therein, i.e., the respondents herein, hence for the said reason, the order of the learned Master has to be set aside. This is evidenced at para 4 of the order of the learned Judge, which is impugned herein and the same is extracted hereunder for ready reference:

"4. The learned Master had chosen to allow the application without notice. For this reason, the order of the learned Master dated 07.12.2017 made in A.No.8112 of 2017 is set aside. The application in A.No.8112 of 2017 is remitted to the learned Master. The learned Master is directed to issue notice to the respondents in A.No.8112 of 2017, hear them and pass orders in accordance with law."

29. The learned Judge also taken note of the fact that, subsequently that is during the pendency of the application before the learned Judge, pursuant to the order of the learned Master, the O.P got numbered and subsequently it was converted into Testamentary Original Suit as T.O.S.No.36 of 2018 and therefore the learned Judge directed to de-number the T.O.S., for the time being and wait the decision to be taken by the learned Master in A.No.8112 of 2017, pursuant to the remand made through the impugned order.

30. From the said facts discussed above, it become clear that, the learned Master has passed a three line order by merely saying "accepting the reason", without disclosing on what basis, that too without issuing any notice to the

respondents. Even though it was argued by the learned counsel for the appellant that, notice have been served on the respondents, there is no proof to show that, notice have been served on the respondents and this point, while canvassed before the learned Judge, the learned Judge having accepted the same, has recorded in the impugned order that, the learned Master had chosen to allow the application without notice. Therefore it has further become clear that, the learned Master without reason and without giving notice to the respondents has allowed the application in A.No.8112 of 2017 by order, dated 07.12.2017, therefore it was rightly interfered with by the learned Judge by setting aside the said order. At the same time, the learned Judge has remitted the matter back to the learned Master for re-hearing after giving notice to all parties. Therefore, as has been rightly contended by the learned counsel for the first respondent, no prejudice would be caused to any one including the appellant herein as the issue once again to be heard and decided by the learned Master, where both parties can putforth their case and ultimately whatever decision to be made by the learned Master, the parties can work out their remedy in accordance with law.

31. Since the legal principle of *Audi alteram partem* is the foundation of justice dispensation system, violation of the said principle even for minuscule

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issue which comes before the Court of law is undoubtedly impermissible, therefore, the learned Judge has rightly interfered in the order of the learned Master. Hence this Court feels that, the said order of the learned Judge which is impugned herein is fully fortified by the celebrity principle of *Audi alteram partem*, accordingly, it deserves to be sustained.

32. In the result, this Original Side Appeal fails and hence it is dismissed. Consequently, connected C.M.P.No.20229 of 2019 is also dismissed. However there shall be no order as to costs.

(V.K. J.) (R.S.K. J.)

03-06-2020

Index : Yes

Speaking Order : Yes

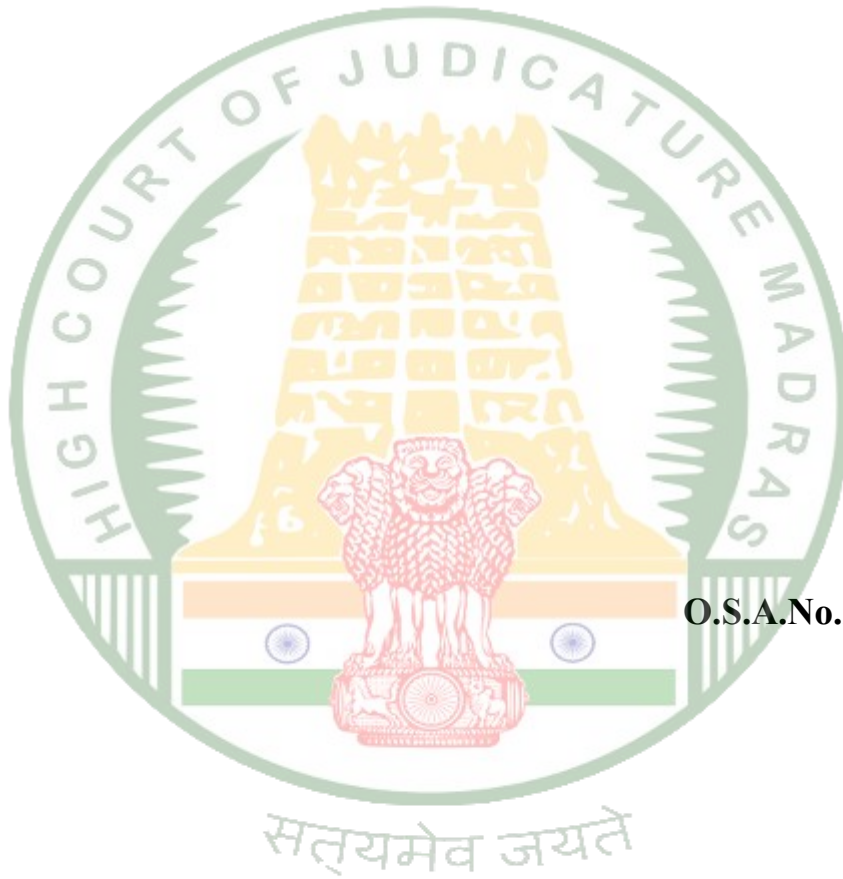
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AND
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