

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.01.2020
Dated : 24.01.2020

Coram

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice KRISHNAN RAMASAMY

Original Side Appeal No.472 of 2018

G.Paras Singh Munoth ... Appellant/Plaintiff

Vs.

1.Gyanlatha

2.M/s Sindhu Buildings Equipments Limited,
31 (Old No.16), First Floor,
North Usman Road, T.Nagar,
Chennai-600 017.

3.S.Ganesh ... Respondents/Defendants

Original Side Appeal is filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent against the judgment and decree dated 06.06.2018 made in T.O.S.No.12 of 2009.

For Appellant : Mr.V.Raghavachari

For Respondents : No appearance for R1
Mr.T.V.Ramanujam, Sr.C.,
for Mr.N.C.Ashok Kumar
for R2 & R3

JUDGMENT

M.M.SUNDRESH, J.

This Original Side Appeal has been preferred by the unsuccessful plaintiff in T.O.S.No.12 of 2009 challenging the dismissal order passed by the learned single Judge holding that the Will dated 14.07.1986 has not been proved.

2.Brief Facts:

2.1.The appellant is none other than the brother-in-law of the testator by name S.Parasmal Jain, who died on 11.08.1986.

The first respondent is the sister of the appellant and the wife of the deceased testator. The respondents 2 and 3 are the purchasers of the suit property from the first defendant/first respondent vide sale deed dated 20.02.2009. Incidentally, the appellant is also an executor and the maternal uncle of the beneficiaries.

2.2. According to the appellant, the alleged registered Will has been executed by his brother-in-law, the deceased Parasmal Jain. When he went to Hyderabad and in a hospital while taking treatment for his ailment, the officials of the Registration Department in the State of Andhra Pradesh came to the hospital and did registration. The Will states that there are two copies, one to be kept by the appellant being the executor and the other being registered. The following is the relevant passage in the Will dated 14.07.1986.

"8. In witnesseth thereof I the said Parasmal Jain have signed this Will at Hyderabad on the date and year above mentioned. I have made out two original copies of this Will one of them being kept with the Executor and the other being got registered both the letters of will shall be treated as original in the event of any dispute."

2.3. Parasmal Jain died on 11.08.1986. After about 21 years, the appellant has filed the original petition in O.P.No.438 of 2008 seeking to probate it. It was done with the certified copy and thus, not with the original. To be noted, it has been filed invoking Sections 222 and 276 of the Indian Succession Act (hereinafter referred to as "the Act") and not under Section 237 of the Act which is pertaining to non-availability of original Will. The averment in the petition was to the effect that "the appellant was not aware of the Will till recently and therefore, the same could not be filed in time".

2.4. In this connection, it is to be noted that the appellant himself has stated in his evidence that the reason for not allowing the first respondent to deal with the suit property was that she was innocent. However, the appellant has not made any attempt till such point of time to get the Will from his sister.

2.5. It appears that prior to the filing of the said original petition for probate, the beneficiaries issued a legal notice dated 06.06.2007 to the first respondent stating that the property actually belonged to one Sajjan Bai, who was the mother of the deceased Parasmal Jain. It was accordingly replied by the first respondent stating that it actually belonged to her

husband and being the Class-I heir, being devolved on her. Apparently, the above said circumstance would have led the appellant to file the original petition. On 01.10.2007, the appellant filed an Application in A.No.6053 of 2007 asking the first respondent to produce the Will seeking a prayer for citation. There was no mention about the existence of two originals as noted in Ex.A1 Will. Similarly, there was no reason assigned as to how the first respondent got the said original.

2.6.The first respondent filed a counter affidavit contesting the application filed. It has also been stated that the original Will was destroyed and thus, she was not in possession. The first respondent has also stated that the beneficiaries issued a legal notice claiming the property as that of Sajjan Bai. A plea has been taken that there was another Will replacing the earlier one. Accordingly, the application in A.No.6053 of 2007 filed was closed and the original petition was directed to be numbered.

2.7.As the first respondent was contesting the petition filed for probate, thus, it was duly converted as TOS.No.12 of 2009. Pursuant to the sale deed executed in favour of the respondents 2 and 3 and upon coming to know of the same, the appellant filed an Application in A.No.4971 of 2010 in TOS.No.12 of 209 to implead them as respondents, inter alia alleging that they are proper and necessary parties and the said application was ordered.

2.8.When the testamentary original suit came up for hearing, the appellant for the reasons known, gave up defendants 2 and 3, while the first respondent filed a change of vakalath.

2.9.The Testamentary Original Suit has been allowed without the participation of respondents 2 and 3. Obviously, the first respondent did not choose to challenge the same in view of her change of heart and stand. To be noted, the original Will has never been produced.

2.10.Thereafter, respondents 2 and 3 have filed applications in A.Nos.8354 and 8534 of 2014 to revoke the probate. This was opposed both by the appellant and the first respondent on the premise that they do not have any caveatable interest. By an order dated 11.01.2016, these applications were accordingly allowed with the following finding.

"16. Admittedly, in this case, the present applicants/D2 and D3 have caveatable interest in the properties and they were earlier impleaded as parties to the proceedings in pursuance of the above said impleading

application in A.No.4971 of 2010 filed by the plaintiff, but subsequently, they have been given up without assigning valid reason. In this case, it is clearly proved that D2 and D3 have caveatable interest in the properties. They have been given up in the suit in T.O.S.No.12 of 2009 without assigning any proper reason and the probate decree was passed behind their back. Therefore, this Court is of the considered view that the probate already granted by this Court is liable to be revoked and the applicants herein, i.e., D2 and D3 are entitled to contest the probate proceedings.

17. Hence, the judgment and decree dated 30.04.2014 passed in T.O.S.No.12 of 2009 granting probate, are set aside and the probate granted is hereby revoked. Accordingly, A.No.8355 of 2014 filed for revoking the grant of probate, is allowed. In view of allowing A.No.8355 of 2014, the application in A.No.8354 of 2014 filed for stay, is closed. The first respondent herein, i.e., the plaintiff, is directed to return to the Registry of this Court - the original probate already granted by this Court, by order dated 30.04.2014 in TOS No.12 of 2009. The applicants herein, i.e. Defendants 2 and 3 are entitled to contest T.O.S.No.12 of 2009. Accordingly, T.O.S.No.12 of 2009 is hereby reopened for trial. The defendants 2 and 3 shall file their written statement, if any, within a period of four weeks from today. Registry is directed to list T.O.S.No.12 of 2009 after four weeks."

Thereafter, respondents 2 and 3 filed their written statement inter alia alleging that there is a clear collusion between the appellant and the first respondent.

2.11. An appeal was filed challenging the order of the learned single Judge in Application No.8354 and 8534 of 2014 dated 11.01.2016 and the appeal filed by the appellant was also dismissed with the following findings.

"18.8. As indicated above, the fact as to whether or not title passed on to respondent No.2 and 3, pursuant to the sale deeds dated 06.02.2009, cannot be the subject matter of enquiry in the present proceedings. Suffice it to say that the totality of facts do show that respondent No.2 and 3, as indicated above, had some interest, (at least, as is demonstratable, at this juncture),

in the estate of the testator, notwithstanding the purported failure on their part to pay and / or arrange the entire sale consideration, as alleged by respondent No.1. Therefore, the argument advanced by Mr.Raja Kalifulla that respondent No.2 and 3 had changed their position from projecting that they had a caveatable interest, to a lesser position, if you like, which is, that they have some interest in the estate of the testator, to our minds, is a submission which does not help the cause of the appellant, given the state of the law. Either way, respondent No.2 and 3 would be entitled to sustain an application under Section 263 of the 1925 Act.

In our opinion, respondent No.2 and 3, would have a locus standi to move an application to seek revocation of grant of probate of the purported July, 1986 Will.

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19.1. Respondent No.2 and 3, in our view, has demonstrated that the proceedings to obtain probate were defective in substance and/or involved concealment of material facts from the Court. As noticed above, substantial defects arose, mainly, on account of the appellant seeking probate of a certified photocopy of the purported July, 1986 Will (Ex.P.1), without advertng to the fact that as per the very same document, one counterpart of the original was in his custody. Though, this fact is admitted by the appellant before us, it is sought to be explained by stating that it was handed over to respondent No.1. This explanation, to our minds, is an afterthought, which does not emerge from the evidence placed before the probate Court. As a matter of fact, respondent No.1, in her counter affidavit to the application (A.No.6053 of 2007), clearly, took the stand that the original of July, 1986 Will (Ex.P.1), was not in her custody. The appellant took recourse, it appears, to this strategy to explain the delay of nearly 21 years in approaching the Court for grant of probate. The appellant in order to counter the arguments advanced on behalf of respondent No.2 and 3 that the probate should have been sought, by taking recourse to Sections 237 and 239 of the 1925 Act, it appears, has advanced this plea, which is, that the original was handed over to

respondent No.1, and therefore, the said provisions were not applicable in the instant case.

19.2. In our view, if, this was the position, such an averment ought to have been made in the petition, while, seeking grant of probate based on a certified photocopy of the purported July, 1986 Will (Ex.P.1). This is especially so, as a perusal of the testimony of respondent No.1, would, clearly, demonstrate that while, she does not appear to be aggrieved by the grant of probate, she continues to maintain that the purported July, 1986 Will (Ex.P.1), was destroyed, at the say so of the deceased testator/Parasmal Jain, and thereafter, the unregistered August, 1986 Will was drawn up. The fact that neither the original of July, 1986 Will nor that of August, 1986 Will has seen the light of the day, does not help the cause of the appellant."

2.12. In this connection, it is to be borne in mind that the first respondent has also mortgaged the suit property in the year 2002 itself which was cancelled in the year 2004. It was further utilised for obtaining loan by deposit of title, but it was once again cancelled in the year 2007. Thus, the property was dealt with by the first respondent as her individual property, much prior to the filing of the probate petition.

2.13. The learned single Judge has framed the following issues:

1. Whether the Will dated 14.07.1986 is the Last Will and Testament of deceased Mr.S.Parasmal Jain?
2. Whether the Will dated 14.07.1986 has been revoked by the Will dated 07.08.1986 of deceased Mr.S.Parasmal Jain?
3. Whether the plaintiff is entitled to the probate of the Will and Testament dated 14.07.1986 in view of the subsequent Will dated 07.08.1986 of the deceased Mr.S.Parasmal Jain? and
4. Relief and costs."

2.14. The appellant, who examined himself as P.W.1 has deposed that it is he, who asked the deceased to give the Will to the first respondent. It is correct to state that Ex.P1 says that one original would be kept with the appellant. He was also aware of the execution of Ex.P1. He did not remember seeing Ex.P1 thereafter. He did not remember as to whether Ex.P1 was

written in hand or typed. He did not remember as to who prepared it and where. As stated, he has further deposed that the first respondent is a very innocent person and that is the reason for making the Will. So that, no third party can cheat her. If that is the case, there is no reason why he left the Will with her and thereafter did not take any care either to take it back, probate and manage and maintain the suit property. In his cross examination, he has further stated that Ex.P1 was hand written, which is also obviously incorrect. Thus, there is absolutely no whisper about not filing a petition for more than two decades especially when the first respondent was his own sister, who is innocent and not having any strained relationship. Thus, the evidence of P.W.1 has been rightly found favoured with the learned single Judge.

2.15.P.W.2 is stated to be one of the attestors. There appears to be some discrepancy in the name mentioned in Ex.P1 and his actual name. P.W.2 has stated that the Will was typed in the hospital. However, he did not know, who drafted it. It is also his evidence that he saw the original of the Will only once. He has further deposed that Ex.P1 was prepared at Madras and thereafter, says that he did not know. P.W.3 is the witness, who was stated to be present at the time of execution of Ex.P1. He has also deposed that he has not seen the signature of the other witness by name Ratanlal Gupta. He has also admitted that he did not see the original of Ex.P1. The learned single Judge rightly disbelieved the evidence of all the witnesses. The learned single Judge has considered the evidence of P.Ws.1 to 3 and D.W.1 while coming to the conclusion. Accordingly, the suit was dismissed inter alia holding that the suspicion surrounding has not been proved.

3. The learned counsel appearing for the appellant would submit that the Will is a registered one. Even the first respondent has not stated anything nor denied the execution. It is her case that the Will has been destroyed. Though she has stated that there was a subsequent Will, the same has not been produced. The delay per se cannot be a ground to disbelieve the Will. The learned single Judge has not considered the evidence available as a whole. The original Will could not be produced since it was under the custody of the first respondent. P.W.2 is the one who attested the Will. The mere discrepancy in the name would not make his evidence unbelievable. Therefore, the appeal has to be allowed.

4.Per contra, the learned Senior Counsel appearing for respondents 2 and 3 would submit that there are material discrepancies in the evidence adduced by the appellant and the statement made by the first respondent. It is a clear case of collusion. The appellant, for the reason known, has given up

respondents 2 and 3. Apparently, the first respondent went to the extent of saying that the sale deeds are not true and genuine. Respondents 2 and 3 are bonafide purchasers for valuable consideration. The entitlement to question a Will by respondents 2 and 3 has already been approved by the Division Bench. There are material discrepancies in the evidence of P.Ws.1, 2 and 3. Therefore, the appeal will have to be dismissed.

5.DISCUSSION:-

5.1.As rightly submitted by the learned Senior Counsel appearing for respondents 2 and 3, there are very many discrepancies in the evidence adduced by P.W.1. Similarly, the first respondent, who contested the probate proceedings earlier, after change of vakalath has changed her stand. Admittedly, the original Will has not been produced. P.W.1 has stated that his sister is innocent. If that is the case, we do not know as to why he made no attempt either to take the original from her or to file a petition immediately thereafter. In fact, in the petition filed, the appellant has stated that he was not aware of the Will. This averment is totally contrary to his own evidence. Even in the proof affidavit, P.W.1 has stated about the execution of the Will and the manner in which it was done. In his cross examination, he has stated that in August, 1986, the testator was not in a sound state of health. The Will is stated to have been executed in the hospital and that too, when the testator was in Hyderabad.

5.2. From the materials available including the pleadings, it appears that the probate proceedings have been initiated only after an attempt was made by the beneficiaries to get the property and the mortgage was redeemed. The first respondent was treating the property as that of her own till the sale effected in favour of respondents 2 and 3. The averments made by her with respect to the exchange of legal notices issued by the beneficiaries and the two mortgages executed by her as the Class-I legal heir of the deceased husband are not denied or disputed. There is no adequate reason assigned for not filing the probate petition at the earliest point of time. Similarly, there is no material with respect to the stand taken by the appellant on the non production of the original Will. As noted earlier, the appellant being an executor and after making an averment that respondents 2 and 3 are the proper and necessary parties, has chosen to give them up. At that point of time, wisdom has dawned upon the first respondent, who changed her counsel and took a contrary stand in support of the beneficiaries. A mere registration per se cannot be a ground to uphold the validity of the Will. It is strange to note that the appellant did not even know that the first respondent was not in possession of the Will. Ex.A1 says that there were two

original copies. The contention that one original was given in favour of the first respondent has not been proved by the appellant.

5.3. We also do not find any material to hold that respondents 2 and 3 were aware of the proceedings in O.P.No.438 of 2008 at the relevant point of time when they purchased the suit property. The Sub Registrar, who was stated to be present in the Hospital for registration has also not been examined. The circumstances under which the Will was handed over to the Testator was also not proved. The case projected by the appellant through his proof affidavit that the original was handed over to the first respondent in his presence was not even pleaded either in the probate petition or in the affidavit filed in support of his citation applications. In the proof affidavit, a statement has been made that the original Will was handed over to the first respondent after registration, whereas in the cross examination the appellant has stated that it was handed over after execution. We also noted that none of the witnesses knew about the fate of the Will after its execution.

6. Thus, we find that there are very many circumstance creating serious suspicion on the manner in which the Will Ex.A1 has been executed. There are a number of material contradictions in the evidence of P.W.1 and so also the different stand taken by the first respondent. Thus, we do not find any reason to interfere with the judgment and decree rendered by the trial Court. Accordingly, the appeal stands dismissed. No costs.

s/d-

Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

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To

The Sub Assistant Registrar
Original Side
High Court, Madras 104.

+1 CC to Mr.V.Raghavachari, Advocate sr 4978
+1 CC to Mr.N.C.Ashok Kumar, Advocate sr 5501.

O.S.A.No.472 of 2018

SSI(CO)
SP(09/06/2020)