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C.M.A.No.1337 of 2018



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.08.2023

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

C.M.A. No.1337 of 2018

1. Vincent Paul Raj
2. Vincent Premkumar
3. Dominic

... Appellants

Vs.

A.Mary Banu alias Banumathi

... Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 229 of the Indian Succession Act, to set aside the judgment and decree dated 08.02.2017 made in Probate Original Petition No.1 of 2003 on the file of the District Court, Tiruvannamalai.

For Appellants : Mr.NA.Malaisaravanan

For Respondent : Mr. R.Krishnaprasad for
M/s.Sarvabhauman Associates



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JUDGMENT

This Civil Miscellaneous Appeal is filed to set aside the judgment and decree dated 08.02.2017 made in Probate Original Petition No.1 of 2003 on the file of the District Court, Tiruvannamalai.

2. The respondent herein filed a Probate Original Petition in No.1 of 2003 for Probate of the Will dated 11.12.1991 executed in her favour, by one B.Arulnathan, stating that she is the 3rd wife of the said Arulnathan. The 2nd wife of the said Arulnathan died on 09.03.1990 and after her demise, he married to the respondent herein on 11.10.1991 and it was a registered marriage. After the marriage, they both lived together as husband and wife. While the Arulnathan was in a sound disposing state of mind, had registered the Will bequeathing the schedule mentioned property in favour of the respondent herein on 11.12.1991. Subsequently, he died on 06.07.1998 and the respondent herein became entitled to the schedule mentioned property as absolute owner. After the demise of the Arulnathan, the respondent herein filed a Succession Original Petition No.2 of 1998 on the file of the District Munsif Court, Arni, to declare herself to be entitled to the pension amount of her deceased husband namely Arulnathan as his legal heir



and the same was also ordered and the respondent herein was declared as the wife of said Arulnathan. Thereafter, the respondent herein was receiving the monthly pension. Subsequently, since the appellants herein disputed the title of the respondent herein with regard to the petition mentioned properties, she filed the Probate Original Petition for Probate of the Will dated 11.12.1991 executed in her favour, by her deceased husband. The Probate Court granted Probate to the respondent herein by order dated 08.02.2017. Aggrieved by the same, the respondents therein who are the children of the deceased Arulnathan have filed the present appeal before this Court.

3. The learned counsel for the appellants submitted that one Arulnathan married to his 1st wife and begotten children. After the death of his 1st wife, he married to one Gunabooshanam as a 2nd wife and the property belongs to the said Gunabooshanam and she executed a Will in favour of the children born to Arulnathan and Thrisamary (1st wife) thorough a Will dated 20.02.1990. He would submit that since the property belongs to Gunabooshanam, the Arulnathan has no right to execute any Will infavour of the respondent herein/petitioner in Probate Original Petition as he has no right in the property. Further, the said Arulnathan has got seven children. But



the respondent herein has not impleaded all the legal representatives of the said Arulnathan and she only impleaded 3 of his children and left the remaining children. They challenged the very title of the said Arulnathan and he has no right to bequeath the property. Further, the said Arulnathan could not have married the respondent herein as his wife, since at the time of alleged marriage, he was aged 65 years. Even otherwise, once the said Arulnathan has no right and title in the property and he has no right to execute any Will. Therefore, the respondent cannot get a better title and the respondent has not proved the Will in the manner known to law. Even she has not examined any of the attestors and therefore, the Will was not proved in the manner known to law. The trial Court failed to appreciate the facts that the petition is hit by non joinder of necessary parties and the Will was not proved in the manner known to law. Therefore, the Probate granted to the respondent herein, by the Court below is perverse and it is liable to be set aside.

4. The learned counsel for the respondent would submit that the marriage between the Arulnathan and the respondent herein is a registered marriage and the same was not disputed by the appellants herein or any other



legal representatives of the Arulnathan on earlier occasion. He further submitted that even R.W.1 has clearly admitted the execution of Will. Therefore, admitted documents need not be proved. Further, the alleged Will said to have been executed by the said Gunabooshanam in favour of the appellants and others, is not proved in the manner known to law and it is an unregistered Will and the appellants herein simply challenged the said Will and the appellants have no caveatable interest in the O.P. Therefore, the Court below has rightly appreciated the evidence of P.W.1 and also R.W.1 wherein, he has admitted the execution of the Will. He would submit that admission is the best piece of evidence and therefore, the trial Court rightly appreciated the evidence and granted the Probate. He further submitted that the respondent took much effort to examine the attesting witnesses. But, one of the attestors was not able to find out and the other attestor died one year before. Even the Scribe was not in a movable condition and he had lost his eye sight. Therefore, the respondent could not prove the Will under Section 68 of the Evidence Act. The learned counsel placed reliance on the following Judgements of the Hon'ble Supreme Court and also the Division Bench of this Court.

*1.Pentakota Satyanarayanan and Others Vs.
Pentakota Seetharatnam and Others reported in*



(2005) 8 SCC 67.

2. *Janaki Devi Vs. R.Vasanthi and Others reported in 2005 (1) CTC 11.*

3. *Irudayam Ammal Vs. Salayath Mary reported in Vol.86 LW 122 (App. Nos.321 of 1965 and 562 of 1970, 1st August 1972)*

5. The learned counsel for the respondent further submitted that if the beneficiary of the Will is not able to prove the Will under Section 68 of the Evidence Act and if it is a registered Will and the attestors and the testators had signed before the Registrar, then the genuinity of the execution cannot be challenged and the registration of the Will itself would give the presumption of genuineness. Therefore, the Probate Court rightly appreciated both the oral and documentary evidence and granted Probate. Therefore, there is no merit in the appeal and that the appellants have not proved their caveatable interest in the O.P. Therefore, the appeal is liable to be dismissed.

6. Heard the learned counsel for the appellants and the learned counsel for the respondent and perused the entire materials available on record.



7. Admittedly the appellants are the children of one Arulnathan and the respondent herein is one of the wives of the Arulnathan. The Arulnathan said to have executed a Will in favour of the respondent herein. After the death of the said Arulnathan, the respondent herein filled a petition for Probate and the Probate Court has also granted Probate which is now under challenge.

8. On a perusal of the materials, though the existence of the Will is not in dispute, it is settled proposition of law that Will is a peculiar document which is required to be attested. The Will has got to be executed under Section 63 of Indian Succession Act and the same has to be proved under Section 68 of Indian Evidence Act. In case, if the beneficiary or the person who claims the right and interest in the Will is not able to prove the Will under Section 68 of Indian Evidence Act, the yet another enabling provision is Section 69 of Indian evidence Act. In the absence of proving the Will under Section 68 of Indian Evidence Act, the beneficiary has to comply with the provisions of Section 69 of Indian Evidence Act, whereas, in this case, though the respondent herein has let the evidence stating that she tried to summon the attestors and she came to know that one of the attestors was not able to find out and the another attestor is no more and the Scribe was not in a



position to give evidence, as stated above, if the respondent was not able to comply with the provisions under Section 68 of Indian Evidence Act for proving the Will, then the respondent should have taken efforts and proved the Will under Section 69 of the Indian Evidence Act. But, there is no material to show that the respondent had taken efforts to prove the Will under Section 69 of the Act. Even there is no material to show that she made attempts to find out the ways to prove the Will under Section 69 of the Act. The Probate Court failed to consider the same. Even though the Probate Court need not go in-depth about the title and other things, the Probate Court has to satisfy the proof of execution of the Will. Unless the Will is proved, the Probate cannot be granted, especially when the respondent herein had filed the petition showing only some of the parties as respondents.

9. Though the learned counsel for the respondent submitted that the Will was admitted and sought the aid of the decisions of the Hon'ble Supreme Court and the Division Bench of this Court, this Court is of the view that unless the respondent satisfies with the compliance of Section 68 or 69 of Indian Evidence Act, she is not entitled to get the order of Probate. Section 69 of Indian Evidence Act is very clear that in case, if a Will is not able to prove



under Section 68 of the Act, then it has to be proved under Section 69 of the Act. Therefore, the citations referred to by the learned counsel for the respondent is not applicable to the present case on hand. The facts and circumstance of the case on hand and the case referred to by the learned counsel for the respondent are distinguishable.

10. The learned counsel for the respondent reiterated the decision of the Hon'ble Supreme Court in the case of ***Janaki Devi Vs. R.Vasanthi and Others reported in 2005 (1) CTC 11***. In that case, P.W.1 has seen the execution of Will and signing of the testator before the attestors. But in this case, P.W.1 has not stated anything that the Will was registered in their presence before the registration office and she accompanied along with the testator or at the time of registration, she was present in the registration office. In the absence of the same, the said citation will not applicable to the present case.

11. Therefore, this Court finds that the subject matter of Will, is not proved in the manner known to law. Hence, the Probate granted by the Probate Court is liable to be set aside.



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12. Accordingly, this Civil Miscellaneous Appeal is allowed. The judgment and decree dated 08.02.2017 made in Probate Original Petition No.1 of 2003 on the file of the District Court, Tiruvannamalai, is set aside.

No cost.

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Index : Yes / No

Speaking Order : Yes / No

Neutral Citation Case : Yes/No



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To

1. The District Court,
Tiruvannamalai.
2. The Section Officer,
VR Section,
High Court,
Madras.



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P.VELMURUGAN. J.

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