



S.A.No.603 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.01.2024

CORAM

THE HONOURABLE Mr. JUSTICE G.ARUL MURUGAN

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and M.P.Nos.2 & 3 of 2007 & C.M.P.No.13071 of 2017

1.D.Swaminathan (died)

2.S.Usharani

3.S.Jayakumar

4.S.Karthik ... Appellants

(Appellants 2 to 4 brought on record as LR's of
the deceased first appellant vide order dated 24.08.2017
in C.M.P.No.14253 of 2017.)

-Vs-

1.Latha (minor)

2.Sujatha (minor)

rep. by their mother and natural guardian

D.Yasodha

3.D.Sarangapani

4.S.Yasodha

5.R.Ramani

6.S.Padmini

7.D.Kalyani ...Respondents



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Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 16.06.2005 in A.S.No.162 of 1997 passed by the learned Additional District and Sessions Judge, Fast Track Court-IV, Chennai, confirming the judgment and decree dated 26.06.1996 in O.S.No.3247 of 1993 passed by the learned First Assistant Judge, City Civil Court, Madras.

For appellants : Ms.Vasudha Thiagarajan
For respondents 1, 2 & 4 : Mr.P.Sunil
For respondents 3, 5 to 7 : No appearance

J U D G M E N T

1. The third defendant in the suit has filed the above Second Appeal and pending this Second Appeal, the sole appellant died and the appellants 2 to 4 were brought on record as his legal heirs.

2. The present Second Appeal has been filed as against the judgment and decree dated 16.06.2005 in A.S.No.162 of 1997 passed by the Additional District and Sessions Judge, Fast Track Court-IV,



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Chennai, confirming the judgment and decree dated 26.06.1996 in O.S.No.3247 of 1993 passed by the First Assistant Judge, City Civil Court, Madras.

3. For the sake of convenience, the parties will be referred to according to their litigative status as before the Trial Court.

The brief facts, which give rise to the instant second appeal, are as follows:

4. According to the plaintiffs, they are the absolute owners of the entire premises, bearing New No.16/2, Aziz Mulk 1st Street, Madras-6, measuring 1200 sq.ft. The plaintiffs and their mother were residing in the back portion of the said premises, measuring 530 sq.ft., which is terraced having first floor and the rest of the said property measuring 670 sq.ft is tiled, which is occupied by the defendants.

5. Further, according to the plaintiffs, the said premises was originally a part of the property bearing old D.No.16, in all measuring



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1430 sq.ft, which belonged to the plaintiffs' grandfather Dakshinamurthy. The said Dakshinamurthy had executed a Will dated 28.07.1980 by bequeathing the rear portion measuring an extent of 1200 sq.ft to the plaintiffs. After the death of the plaintiffs' grandfather Dakshinamurthy on 29.01.1982, they have filed an Original Petition in O.P.No.185 of 1984 before this Court for Letters of Administration with the Will annexed.

6. According to the plaintiffs, D.Yashodha/mother of the plaintiffs, was appointed as natural guardian of the plaintiffs and the Letters of administration was issued in her favour. Since the plaintiffs were intending to develop the property bequeathed in their favour, they came up with the suit for recovery of possession.

7. The said suit was resisted by the defendants by filing written statement by disputing the Will. According to the defendants, the Will is a forged one and not sustainable in law. Further, the property is measuring 1430 sq.ft, but in the Will, it is mentioned as only 1200 sq.ft.



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8. According to the defendants, Late Dakshinamurthy had got four female issues and two male issues in addition to his wife. Neither of them was consulted and they had no knowledge about the Will executed by Late Dakshninamurthy. The defendants further contended that in the probate proceedings, no notice was issued and they were not made as parties. Since no notice was issued, they have taken steps to revoke the probate. Hence, they prayed to dismiss the suit.

Evidence and documents:

9. During trial, on the side of the plaintiffs, the plaintiffs' mother/D.Yasodha was examined as P.W.1 and Exs.A1 to A6 were marked. On the side of the defendants, the third and first defendants were examined as D.W.1 and D.W.2 and no documents were marked.

Findings of the Courts below:

10. After appreciating the evidences and documents, the Trial



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Court decreed the suit. Aggrieved by the same, the first and third defendants filed an appeal in A.S.No.162 of 1992. The Lower Appellate Court, after re-appreciating the evidences, dismissed the appeal. Challenging the same, since the first appellant in the appeal died pending



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the appeal, the third defendant has come up with the present Second Appeal.

Substantial question of law:

11. At the time of admission, this Court, by an order dated 18.08.2007, admitted the Second Appeal and framed the following substantial question of law:

“1.Whether the Courts below are right in granting a decree for possession and damages when the right derived under the Testamentary disposition dated 28.07.1980, forming the subject matter of O.P.No.185 of 1985 and present T.O.S.No.30 of 1988 is yet to be granted to them?”

Submissions on both sides:

12. The learned counsel for the defendants/appellants submitted that the very suit for recovery of possession has been filed only based on the alleged Will dated 28.07.1980 in Ex.A1 executed by Late.Dakshinamurthy in favour of the plaintiffs. The learned counsel for



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the defendants/appellants submitted that the plaintiffs, who are represented by their mother, have filed O.P.No.185 of 1984 for grant of Letters of administration. Without impleading the defendants as parties and without issuing any notice to them, the Original Petition was pleaded and the Letters of administration annexed to the Will was granted in the year 1986.

13. The learned counsel further submitted that only after the filing of the present suit, the defendants had come to know about the Will and the Original Petition filed by the plaintiffs for grant of Letters of administration and immediately, they have taken steps to revoke the Letters of administration granted in favour of the plaintiffs. This Court, after hearing the parties, by an order dated 08.10.1988, revoked the Letters of administration granted in favour of the plaintiffs.

14. The learned counsel also contended that the plaintiffs have filed an Original Petition and later, the said Original Petition was converted as T.O.S.No.30 of 1998 and that the defendants have filed



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written statement. While so, T.O.S.No.30 of 1998 was also dismissed for default on 24.07.2008. On the application filed by the plaintiffs, the delay had been condoned and the said T.O.S No.30 of 1998 was restored and the defendants have filed an appeal in O.S.A.No.128 of 2023 as against restoration and the same is pending.

15. The learned counsel further contended that the Will dated 28.07.1980 in Ex.A1, based on which, the present suit is filed and the Letters of administration granted by this Court, has also been revoked and as on date, the Will dated 28.07.1980 has not been proved and the decree passed by the Courts below based on the Letters of administration granted for the Will dated 28.07.1980, cannot be allowed to continue, as the very Letters of administration has been revoked.

16. The learned counsel further contended that before the Lower Appellate Court, they have filed a petition under Order XLI Rule 27 of C.P.C. to file additional documents for filing the revocation of the Letters of administration granted and also the order of dismissal of default of the



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T.O.S.No.30 of 1998. Further, the Lower Appellate Court, without allowing these documents, erroneously dismissed the petition.

17. The learned counsel further contended that as per Section 216 of the Indian Evidence Act, 1872, no suit can be filed by any other person in estate after the Letters of administration is granted unless and until the probate or Letters of administration is recalled or revoked. Further, the learned counsel, by relying on Order XXV Rule 59 and Rule 65 of Original Side Rules, submitted that once the grant of Letters of administration is revoked, the parties in estate, have to surrender the original certificate and the same has not been complied with. Further, the decree passed by the Courts below for recovery of possession, on the strength on the Letters of administration granted by this Court for the Will executed by Late Dakshinamurthy dated 28.07.1980 in Ex.A1, cannot be sustained. The learned counsel further contended that unless T.O.S No.30 of 1998 is finally decided and the genuineness of the Will is decided by this Court, the Will dated 28.07.1980 cannot be accepted for evidence and therefore, sought for allowing this Second Appeal.



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18. The learned counsel for the plaintiffs/respondents though admitted all the subsequent proceedings contended that on the date of filing of the suit, the Letters of administration granted in favour of the plaintiffs for the Will executed by their grandfather dated 28.07.1980 in Ex.A1, was in force and the trial was conducted and ultimately, the Trial Court decreed the suit. The Lower Appellate Court also, by re-appreciating the evidence, has dismissed the appeal by confirming the decree passed by the Trial Court. The learned counsel further contended that if the decree passed by the Courts below are interfered with in view of the subsequent developments and then ultimately T.O.S. is allowed in their favour and the Will is accepted as genuine, they will have to initiate the proceedings afresh, which will be detrimental to their interest and submitted that the Second Appeal may be statistically closed.

19. Heard the learned counsel on either side and perused the materials on record.



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Analysis on the submissions:

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20. Admittedly, one Dakshinamurthy was the owner of the suit properties and the first appellant before this Court is the son of Dakshinamurthy, who is the natural legal heir. The appellants, along with the other legal heirs are residing in a portion of the suit property. The plaintiffs are claiming that their grandfather Dakshinamurthy executed the Will dated 28.07.1980 in Ex.A1 bequeathing the suit properties in their favour and represented by their mother, they have filed O.P.No.185 of 1984 before this Court for grant of Letters of administration with the Will annexed. In the Original Petition proceedings, even the defendants were not a party and they were not issued any notice and the Letters of Administration was granted by this Court in the year 1986. On the strength of the Letters of administration granted by this Court, the plaintiffs, represented by their mother, have filed the suit for recovery and possession as against the defendants. After filing of the suit, the defendants came to know about the probate proceedings and they have immediately taken steps for revocation of the grant of Letters of Administration. Pending the application filed by them for revocation of



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grant of Letters of Administration, the Trial Court, by the judgment and decree dated 26.06.1996, has decreed the suit and has ordered for recovery of possession. In the meantime, the other legal heirs have also filed the suit in C.S.No.1451 of 1994 claiming for partition before this Court. In view of the pecuniary jurisdiction, the same has been



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transferred to the City Civil Court, Chennai and now, the same is pending in O.S.No.11825 of 1996.

21. In the meantime, the application filed by the defendants for revocation of the grant of Letters of administration was taken up and by an order dated 08.10.1998, the Letters of administration granted in favour of the plaintiffs was revoked. The defendants have preferred the appeal in A.S.No.162 of 1997 and in the appeal, they have also filed a petition under Order XLI Rule 27 of C.P.C. for marking of additional documents by filing the order dated 08.10.1998 in respect of the revocation of the Letters of administration. However the Lower Appellate Court by judgment and decree dated 16.06.2005 dismissed the appeal. Pursuant to the revocation of Letters of administration, O.P.No.185 of 1984 was converted as T.O.S.No.30 of 1998 and the defendants also filed the written statement in the suit. It is brought to the notice of this Court that T.O.S was also dismissed for default on 24.07.2008 and later the plaintiffs filed the petition in A.No.18 of 2021 to condone the delay and for restoring T.O.S, which was ultimately



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allowed. As against the same, the defendants filed O.S.A.No.128 of 2023 and the same is pending.

22. As rightly contended by the learned counsel for the defendants/appellants, only on the strength of the Letters of administration granted by this Court for the Will in Ex.A1 dated 28.07.1980, the said suit for recovery of possession was filed and decreed once the Letters of administration has been revoked, the decree passed based on the Letters of administration cannot be sustained.

23. At this juncture, it would be useful to refer to Section 216 of Indian Succession Act, 1925 and hence, it is extracted hereunder:

“216. Grantee of probate or administration alone to sue, etc., until same revoked.—After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the State in



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which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.”

24. From the above, it is clear that no suit can be filed by any other person other than in estate after the Letters of administration is granted, unless revoked. Further, unless the Will is accepted as genuine and the Letters of administration is granted, the same cannot be received as an evidence before the Court. Here, when Ex.A1/Will was allowed to be marked, the Letters of administration granted in favour of the plaintiffs annexing the Will/Ex.A1 was in force. However, when once the Letters of administration granted has been revoked and the O.P has been converted as T.O.S, all the proceedings undertaken on the strength of the Letters of administration can no longer survive.

25. Further, as per Section 296 of the Indian Succession Act, 1925, when a grant of probate or Letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall



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forthwith deliver up the probate or letters to the Court which made the grant.

26. Therefore, under the circumstances, the proceedings initiated and the decree passed by the Courts below, on the strength of the Will dated 28.07.1980 in Ex.A1 based on the Letters of administration granted by this Court, which has thereafter been revoked, can no longer survive. Therefore the submissions of the learned counsel for the respondents that the Second Appeal can be statistically closed cannot be accepted as the decree for recovery of possession is there against the appellant. Unless the validity of the Will is finally decided, no right accrues for the plaintiff to maintain the suit against the defendants for recovery of possession.

27. In view of the admitted position, the decree passed by both the Courts below are liable to be interfered with and the substantial question of law is answered in favour of the appellants.

28. In the result, this Second Appeal is allowed and the judgment and decree passed by both the Courts below are set aside.



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Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

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Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order
apd

To

1. The Additional District and Sessions Judge, Fast Track Court-IV, Chennai.
2. The First Assistant Judge, City Civil Court, Madras.
3. The Section Officer, V.R. Section, High Court, Madras.



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G.ARUL MURUGAN, J.

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