



Rev.Appl.No.55 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.07.2024

DATE OF DECISION : 03.09.2024

CORAM :

THE HON'BLE MR. JUSTICE S.S.SUNDAR
AND
THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

Review Application No.55 of 2022

1. Lalitha Mohan
W/o late M.Krishna Mohan

2. K.Anuradha Mothuri .. Review Applicants

v.

Pratap K.Moturi .. Respondent

Memorandum of Grounds of Review Application filed under Order XLVII, Rule 1 read with Section 114 of the Civil Procedure Code to review the judgment and decree dated 17.02.2020 made in O.S.A.No.19 of 2019.

For Review Applicants :: Mr.S.Parthasarathy
Senior Counsel for
Mr.P.Dinesh Kumar

For Respondent :: Mr.Jayanth Muthu Raj
Senior Counsel for
Mr.J.Pothiraj



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ORDER

S.S.SUNDAR.J.

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The above review application is filed seeking to expunge the disparaging remarks made against the review applicants herein in paragraph-8 of the judgment in O.S.A.No.19 of 2019, which was disposed of by this Court by order dated 17.02.2020, on the ground that it is an error or mistake apparent on the face of the records.

2. Brief facts that are necessary for the disposal of this review application are as follows:-

(a) The applicants herein are defendants 2 & 3 in the testamentary original suit in T.O.S.No.73 of 2013, which was originally taken on file in O.P.No.761 of 2004 and later converted in view of the caveat filed by the first defendant. The original petition was for grant of Letters of Administration to the Will dated 20.05.1983 executed by late Sri.S.Moturi Sathyanarayana and deposited with the Registrar. The testator had three sons and four daughters. The first defendant is the first son of Sri.S.Moturi Sathyanarayana, who died on 06.03.1995 at Madras where he was



ordinarily residing. The third son of deceased i.e., the respondent herein and the petitioner in original petition, was appointed as the executor of the Will.

After the original petition was converted as testamentary original suit, the suit was between the executor of the Will, namely, the plaintiff and the first defendant. Later the first defendant, who is the eldest son of testator, died on 16.09.2014 during the pendency of proceedings and hence the applicants herein were brought on record as the legal representatives of the deceased first defendant.

(b) Originally, the first defendant filed a written statement denying the execution of the Will dated 20.05.1983. The first defendant also contended that there are several discrepancies in the execution of the Will, apart from pointing out a few suspicious circumstances surrounding the Will. It was contended by the first defendant that the testator had lot of love and affection to his elder son and his four daughters and that the testator had no reason to exclude his sons and daughters. The specific case of the first defendant is that the Will is forged. One of the points raised by the first defendant was that one of the properties, which was bequeathed in the Will, had been sold by the plaintiff himself claiming exclusive title to the property



during the pendency of original petition and that therefore the fabrication of the Will is evident.

(c) It is admitted that the testator Sri.S.Moturi Sathyanarayana was a Member of Parliament in Rajya Sabha for the period 1950-1966. He was also the Founder of “Hindu Prachar Sabha” in T.Nagar, Chennai. The testator had six grounds of land in Adyar with a huge building and a valuable property in Poonamallee measuring an extent of 4 acres. In the written statement filed by the first defendant, there was a reply. As per the Will, it appears that the plaintiff was given the ground floor in the residential bungalow in Adyar, whereas the second respondent in the original petition, namely, the second son of testator was given the second and third floors. The other property being the land at Poonamallee had been given in favour of his grand children including the second applicant herein.

(d) In the testamentary suit, the plaintiff, the Propounder of the Will was examined as P.W.1. The attestors of the Will were examined and they are P.W.2 and P.W.3. On behalf of plaintiff, Exhibits P1 to P13 were marked. The first applicant examined herself as D.W.1. On behalf of applicants, Exhibits D1 to D11 were marked. During the proceedings,



Ex.D7, a Will alleged to have been executed by the testator dated 04.03.1995 was marked. It is admitted that nobody was examined to prove the alleged Will dated 04.03.1995 marked as Ex.D7.

(e) In the course of trial, the following issues were framed for consideration:-

“(i) Whether the Will dated 20.05.1983 executed by late S.Moturi Sathyanarayana is genuine, valid and not surrounded by suspicious circumstances?

(ii) Whether the testator, namely, S.Moturi Sathyanarayana had executed another Will dated 04.03.1995 and if so, whether it is valid, genuine and not surrounded by suspicious circumstances?

(iii) To what other reliefs the plaintiff is entitled to?”

(f) On the first issue, the trial Court held that the Will propounded by the plaintiff under Ex.P1 has been proved in accordance with law. On the second issue, the trial Court found that the applicants were unable to produce anyone of the attesting witnesses. Even though it is reported that one of the attesting witnesses was dead and the other witness could not be traced, an attempt was made by the applicants by appointing an Advocate



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Commissioner to locate the other attesting witness. Since there was none to prove the due execution of the Will, the trial Court held that the subsequent Will dated 04.03.1995 marked as Ex.D7 is not proved in the manner known to law. In view of the findings recorded above, the testamentary suit was decreed and Letters of Administration was granted.

(g) Aggrieved by the same, the applicants preferred an appeal in O.S.A.No.19 of 2019. The Division Bench, while dismissing the original side appeal, confirmed the finding of the trial Court that the registered Will executed on 20.05.1983 and marked as Ex.P1 is proved in accordance with law. It is to be noted that the daughters of testator had not objected to the Will even though they were also excluded in the Will. Taking note of the overall circumstances, the Division Bench, finding that the first Will was duly proved and that the second Will propounded by the first defendant in the testamentary suit is not proved, has observed as follows:-

“We have perused the judgment of the learned single Judge. All the contentions have been taken note of. The deceased first defendant and the appellants have set up a false and fabricated Will by way of defence. The cancellation deed executed by the plaintiff also makes the reference to Ex.P1. Thus, this



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document cannot help the case of the appellants. In such view of the matter, while answering the issues in favour of the plaintiff, the above original side appeal stands dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.” (emphasis supplied)

The above review application is filed only to expunge the following remarks in paragraph-8, namely, “*The deceased first defendant and the appellants have set up a false and fabricated Will by way of defence.*”

3. The learned Senior Counsel appearing for the review applicants submitted that the first defendant was the author of Will, as the applicants had never pleaded the alleged second Will in their written statement. It is their specific case that they genuinely believed and trusted the first defendant who had revealed the Will dated 04.03.1995. Since the first defendant was one from whom the second Will was made known, it is stated that the applicants are convinced that the second Will was the last Will of the testator. The learned Senior Counsel further submitted that the first applicant is 78 years old and was 72 years at the time of recording her deposition and that she is a Gynecologist by profession with high reputation



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in her field. Senior Counsel suggested that she would not have forged the Will. It is further stated that merely because the applicants are unable to prove the second Will, the disparaging remarks in paragraph-8 of the order is unwarranted and the same needs to be expunged, as it is not based on any independent and rational analysis of facts or supported by any findings of the trial Court.

4. On the other hand, the learned Senior Counsel appearing for the respondent submitted that the finding of the Division Bench is based on records. Since the applicants have categorically and assertively raised a ground that there was a Will dated 04.03.1995 revoking the earlier Will dated 20.05.1983 and marked the same as Ex.D7, the conclusion reached by the Division Bench cannot be assailed. Referring to the proof affidavit and the evidence of the first applicant during cross examination and the grounds of appeal, the learned Senior Counsel appearing for the respondent pointed out that the applicants have been canvassing the fabricated Will and that the finding of the Division Bench cannot be set aside, as no appeal has been filed as against the order. The learned Senior Counsel then pointed out that



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the first applicant in the review application was convicted by a judgment dated 26.12.2022 by the Metropolitan Magistrate Court in C.C.No.46 of 2013 for the offence under Section 420 read with 34 IPC, as the alleged fabricated Will was used to settle the property by the first defendant in favour of the first applicant in the review application. It is also stated that the applicants on the basis of the Will and settlement deed had sold the property covered under the Will to third parties. The point that was focussed by the learned Senior Counsel is that the second Will was not even pleaded in the written statement and that therefore the applicants have created the Will only to grab the property. The learned Senior Counsel also relied upon a few judgments of the Hon'ble Supreme Court on the scope of entertaining a review application under Order XLVII, Rule 1 of the Code of Civil Procedure.

5. It is admitted that the applicants have not raised any defence in their written statement setting up the second Will. However, in the course of evidence, the second Will was marked and relied upon by the applicants. The trial Court, after elaborate consideration of pleadings and evidence,



decreed the suit filed by the plaintiff and held in paragraphs 42, 43 & 44 of the judgment as follows:-

“42. Consequently, I hold that the Will, Ex.P1 had been properly executed and properly attested and properly proved. Accordingly, issue (1) is answered in favour of the Plaintiff.

43. Issue (2):- The Defendants have produced a Will, marked as Ex.D7, dated 4.3.1995. It is unregistered. It is dated two days before the death of the Testator. There are two attesting witnesses. Assistance of this Court was sought to examine the said attesting witnesses. The propounder of the Will has to produce the witnesses. DW.1 is the 2nd Defendant and she had filed the applications. The Court granted permission. Subsequently, it was found that one of the attesting witnesses was dead and the other attesting witnesses could not be traced. This Court, thereafter, came to the further assistance of the 2nd Defendant by appointing an Advocate Commissioner. Unfortunately, the Advocate Commissioner, who went in search of the address of the said witness, could not locate the address and in fact, found the address itself was wrong. The Advocate Commissioner had also made enquiries with the neighbours. He was informed that the attesting witness was not traceable. Consequently, I hold that Ex.D7 Will dated 4.3.1995 has not been proved by the



propounder, DW.1, the 2nd Defendant in a manner known to law. Accordingly, issue (2) is answered against the Defendants.

44. For all these reasons, I hold that the Will, Ex.P1 has been proved in accordance with law. Consequently, with respect to issue (1), I hold that the Will, Ex.P1, dated 20.05.1983 executed by the Testator, S.Moturi Satyanarayana, is true and genuine and I hold the Issue (1) in favour of the Plaintiff. With respect to issue (2), I hold that Ex.D7 has not been proved by the 2nd Defendant, in a manner known to law and accordingly, I hold the issue (2) against the Defendants. With respect to issue (3), I hold that the Plaintiff is entitled to the relief by granting Letters of Administration with the Will annexed.” (emphasis supplied)

6. From the findings of the trial Court, this Court is unable to get a clue as to how the respondent can make serious allegations against the applicants. Even now it is open to anyone to agitate his/her right on merits. Failure to prove the second Will cannot lead to an inference that the second Will was fabricated. In the case of Will, mere proof of execution of the Will is not sufficient and the propounder is required to prove attestation. The



learned Senior Counsel appearing for the respondent submitted that the first applicant, though did not plead the alleged second Will, during chief examination produced and marked the unregistered Will dated 04.03.1995 as Ex.D7 and that she deposed to the effect that there is a Will dated 04.03.1995 executed by her father in law after cancelling the previous Will. Since the second applicant played an active role in propounding the Will dated 04.03.1995, the counsel submitted that the finding of this Court cannot be assailed.

7. This Court is unable to appreciate the contentions of the learned Senior Counsel appearing for the respondent for several reasons. The proof of execution and genuineness of the Will is a matter of evidence. However, the allegation of fraud, fabrication or forgery cannot be presumed as a consequence merely because the applicants failed to prove due execution or genuineness of the Will. The standard of proof for holding that a document is forged or fabricated is by letting in concrete evidence, as it will lead to a legitimate inference about the bad character of an individual in a lis. This Court has already extracted the finding of the trial Court, which would in no



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circumstances be understood or construed that the trial Court has given a finding that the second Will had been forged by the second defendant.

Assuming that the second defendant/first applicant herein is the Propounder of the latter Will under Ex.D7 dated 04.03.1995, failure to prove the Will cannot be taken that the second Will is a forged one. In the absence of any specific plea and proof regarding forgery or fabrication of Will, the finding by the Division Bench in paragraph-8 holding that the first defendant and the applicants herein have set up a false and fabricated Will by way of defence is totally unwarranted. The plaintiff had sold one of the properties covered under the Will showing him as the absolute owner of the property. The sale deed was executed in 2008 after the initiation of testamentary proceedings. Having regard to the pleadings and the evidence let in, this Court finds that there is no material to warrant a finding or observation that the Will propounded by the applicants is forged and fabricated. Therefore, the disparaging remarks in paragraph-8 as pointed out above is an error apparent and hence cannot be sustained.

8. Coming to the judgment of the Hon'ble Supreme Court relied upon



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by the learned Senior Counsel for respondent in *State of Telangana and*

others v. Mohd.Abdul Qasim (dead) per LRs reported in 2024 SCC OnLine

SC 548, the Hon'ble Supreme Court has made a specific distinction between the power of review and the power of appellate Court and the following principles reiterated by the Hon'ble Supreme Court earlier, have been quoted with approval:-

“(a) It is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except “where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.

(b) An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC.

(c) There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction.

(d) The term “mistake or error apparent” by its very



connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position.”

Almost the same principles have been reiterated by the Hon'ble Supreme Court in the other two judgments relied upon by the learned Senior Counsel for respondent in *Government of NCT of Delhi through its Secretary, Land and Building Department and another v. K.L.Rathi Steels Limited and others*, 2024 SCC OnLine SC 1090 and in *Karnal Singh v. State of Haryana and others*, 2024 SCC OnLine SC 961.

9. It is to be noted that the applicants in this review application are asking for expunging the disparaging remarks which is not warranted in the context. It is true that a review is maintainable only if there is an error apparent on the face of the record. It is also true that if an error has to be detected by the process of reasoning, review is not maintainable. The power of appellate Court is different from the power of review, which is limited to the grounds under Order 47 Rule 1 CPC. However, the disparaging remarks against the applicants in paragraph-8 of the judgment is not supported by



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any finding. The Division Bench has relied upon the judgment of trial Court to justify the remarks. The trial Court, while deciding the testamentary suit, has not given any finding about any fraud or forgery or fabrication. The conclusions reached by the trial Court in the testamentary suit would show that the alleged second Will propounded by the applicants has not been proved by examining at least one of the attesting witnesses. It is to be noted that one of the attesting witnesses to the second Will is no more. Though an attempt was made by the applicants to trace the second attestor in the Will, it is placed on record by the trial Court that the applicants failed in their attempt. Except this fact, there is no finding by the trial Court in the suit to warrant the observation the Division Bench has made in paragraph-8.

10. It is settled law that adverse or disparaging remarks are not normally made against the parties whose conduct is tested before a Court of law, unless it is really necessary for the decision of the case and supported by sufficient pleadings. The respondent has not examined anyone to prove the fabrication or forgery by the applicants. Since the existence of both Wills are disputed by the first defendant and the applicants, there is no pleading



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by the respondent/plaintiff about the fraud or fabrication in propounding the second Will. The alleged document was not sent for any expert opinion to show that the document is forged. Even though the observation is not even required for dismissing the appeal, the Division Bench has made the disparaging remarks which appear to be made inadvertently. Since such disparaging remarks has serious consequences as admitted by the respondent in the written arguments, this Court finds that it is appropriate to expunge the remarks in paragraph-8 of the order. One more aspect which has to be taken note of is that an appeal is not maintainable against mere finding when no part of decree is questioned. The applicants are not against the finding which would nullify or set at naught the judgment or decree. Therefore, the review application is most appropriate.

11. For all the above reasons, the review application is allowed and the disparaging remarks in paragraph-8 of the judgment, namely, “*The deceased first defendant and the appellants have set up a false and fabricated Will by way of defence*” is expunged and the judgment in O.S.A.No.19 of 2019 dated 17.02.2020 shall be read without the remarks



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referred to above. The judgment and decree of this Court in O.S.A.No.19 of 2019 in other respects shall be in tact. No order as to costs.

Index : yes/no
Neutral citation : yes/no

(S.S.S.R.,J.) (K.R.,J.)
03.09.2024

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AND

KRISHNAN RAMASAMY,J.

SS

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