



OSA.No.31/2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on 14.08.2024

Delivered on 20.08.2024

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE K.RAJASEKAR

OSA.No.31/2024

1.S.Sangeetha

2.S.Sujatha

3.S.Indira Priyadharshini

... Appellants

Vs.

Tmt.P.Ponni

... Respondent

Prayer : Original Side Appeal filed under Order 36 Rule 1 of Original Side Rules read with Clause 15 of Letters Patent as against the judgment and decree passed in A.No.4262/2022 in TOS.No.12/2021 dated 04.11.2022.

For Appellants

: Mr.R.Thiyagarajan

For Respondent

: Mr.K.V.Ananthakrushnan



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JUDGMENT

S.S.SUNDAR, J.,

- (1) This vexatious Original Side Appeal is filed by the defendants in TOS.No.12/2021 as against the order of the learned Single Judge dated 04.11.2022 in Application No.4262/2022 in TOS.No.12/2021.
- (2)The respondent herein filed OP.No.164/2020 for grant of Letters of Administration in respect of a Will and Testament of late Smt.C.Shyamalavalli. Since the defendants had entered caveat in OP.No.164/2020, the petition was converted into Testamentary Original Suit and numbered as TOS.No.12/2021.
- (3)The appellants filed a detailed written statement and it is to be noted that the defendants/appellants, in response to a five page petition filed by the respondent herein, filed the written statement running to sixteen pages making several allegations probably to highlight suspicious circumstances. The contentions raised in the written statement prompted the respondent herein to file a reply statement meeting those allegations in the written statement. After commencement of trial, the respondent



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herein filed a proof affidavit meeting the allegations that are raised in the written statement and reiterated the contentions in the reply statement. In the proof affidavit, a list of 17 documents to be marked as Exs.A1 to A17 is also given.

(4)After receipt of proof affidavit, the appellants filed A.No.4262/2022 in TOS.No.12/2021 with a prayer to eschew the proof affidavit and to eschew the averments in the proof affidavit in paragraphs No.9, 13 to 27 and also to eschew the documents which are shown in the list as Exs.1, 5, 6 and 11 to 17.

(5)This application was dismissed by the learned Single Judge of this Court vide order dated 04.11.2022. Aggrieved by the same, the above Original Side Appeal is filed by the defendants.

(6)The reasons for eschewing the specific averments in the proof affidavit, certain paragraphs in the proof affidavit and the documents referred to in the proof affidavit, are broadly stated in the affidavit filed in support of the appeal, in the following line:-

(a)The proof affidavit contained irrelevant particulars and details



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which are alien to the testamentary proceedings.

(b) The averments and allegations made in the proof affidavit are not germane for a smooth and orderly conduct of testamentary proceedings.

(c) 17 documents referred to in the proof affidavit cannot be received in evidence and an attempt is made to convert the testamentary proceedings as a civil suit raising contentious issues.

(d) The documents like original Will ought to have been marked through the attesting witness and a few documents which are Xerox copies of the original, cannot be received in evidence.

(7) The learned Single Judge, while hearing the arguments, considered all the submissions and contentions of the appellants. On a perusal of the written statement filed by the appellants, which is very elaborate running to 16 pages with several allegations, the learned Judge recorded a finding that the apprehension of the respondent that the allegations in the written statement would be taken as admitted in case the averments in the written statement are not met with due diligence by way of a lengthy proof affidavit cannot be faulted. With regard to marking of documents, the



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learned Judge made a distinction between marking and proof of any document. However, on a careful consideration of certain documents, the learned Judge also found that certain Xerox copies of the documents cannot be marked unless there is an explanation for the non-availability of the originals. The application was dismissed after holding that it is not necessary to eschew the proof affidavit dated 10.08.2022. However, the learned Judge indicated that the documents can be received in evidence subject to objections as indicated in the order.

(8)The learned counsel appearing for the appellants submitted that the learned Judge has committed a manifest error of law in not exercising the judicial discretion vested in him as if the learned Judge has committed a jurisdictional error by dismissing the application insofar as the prayer for eschewing the proof affidavit dated 10.08.2022. He repeatedly submitted that the Probate Court is concerned only with the validity of the Will and it is not for the Court while considering the validity of Will, to go into the questions of title of property which is alien to the testamentary proceedings. Referring to Section 68 and Section 69 of the Indian Evidence Act and Section 63 of the Indian Succession Act, the learned



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counsel for the appellants submitted that the respondent / plaintiff instead of proving the Will as required in law, is trying to enlarge the scope of testamentary proceedings as if the petition is for deciding the rights of parties in a regular suit. The learned counsel also relied upon Form 56 which is the format in which the affidavit of attesting witness along with the application for probate in terms of Order XXV Rule 4[b] of Rules of High Court [Original Side], 1994. This has nothing to do with the proof affidavit.

(9) This Court is unable to find merit in any of the submissions of the learned counsel for the appellant.

(10) As seen from the typed set, it is the appellants who have raised issues which are outside the scope of testamentary proceedings. It is to be noted that such averments if go un-controverted, the appellants will try to project a case doubting the probability of the Will. A reading of the written statement would reveal that the appellants have raised several suspicious circumstances by referring to the pendency of other proceedings and the nature of pleadings by the parties concerned in each proceedings. It is the appellants who have made sweeping statements



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about the character of proceedings, nature of litigations before and after the alleged Will which is the subject matter of TOS proceedings.

(11) Therefore, it is necessary for the respondent to file a reply statement and the proof affidavit is now filed to elaborate with the background facts which are required to be met in the interest of the respondent as propounder of the Will.

(12) The essential ingredients of an affidavit are that statements that are made by the deponent relevant to the subject matter in order to support the case which a party is required in law to affirm. Mere filing of an affidavit is not a proof of statements that are found in the affidavit. Mere filing of proof affidavit does not dispense with the proof by relevant evidence. Eschewing the contents of proof affidavit in the peculiar facts and circumstances will cause serious prejudice to the respondents. In such circumstances, this Court is unable to appreciate the contention of the appellants and the learned counsel appearing for the appellants.

(13) In a testamentary proceedings, the burden lies on the propounder of the



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Will to prove due execution beyond reasonable doubt. It is the propounder who has to dispel all the suspicious circumstances surrounding the Will. Therefore, apart from mere examination of the attesting witnesses, which is mandatory, the plaintiff has to prove the Will to the satisfaction of the Court. Since there is no limitation to project any circumstance as suspicious by any party who is opposing the genuineness of the Will, it is the duty of the plaintiff to explain some times, the fantasies of doubting mind. Hence, this Court finds that there is no *bona fides* in this litigation as revealed from the facts admitted. The intention and object behind this filing of appeal is obvious from the conduct of the appellants. Even though the proof affidavit is filed in August 2022, the appellants have successfully dragged the proceedings to a few more years by filing the application to eschew the proof affidavit itself by projecting a case with ill-motive.

(14) Regarding admissibility of certain documents, the learned counsel has not made any submissions as the position of law indicated in ***Bipin Shantilal Panchal Vs. State of Gujarat [2001 [3] SCC 1]***, has been accepted by this Court and Hon'ble Supreme Court in a few judgments. It



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is a well settled proposition that evidence, both oral and documentary, should not be shut down at the initial stage. In case the appellants have any objection as to the marking of any document, the same can be considered at the relevant point of time. A document can also be permitted to be marked subject to admissibility which can be considered at the appropriate stage as may be directed by the Hon'ble Supreme Court in the aforesaid judgment.

(15) It is not for the appellants to dictate as to what document should be marked and what should be stated in the proof affidavit. It is also stated by the respondent that the appellants are squatting over the properties detriment to the interest of other sharers. Having regard to the conduct of the appellants in this proceedings and the points canvassed by the learned counsel for the appellants to eschew the proof affidavit, this Court is unable to discard the contentions of the respondent as to the object behind this appeal to protract the proceedings.

(16) For all the above reasons, this Court finds no merit in the appeal and the Original Side Appeal is liable to be dismissed with the cost of **Rs.10,000/-** **[Rupees Ten Thousand only] payable to the Registrar General, High**



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Court, Madras, within a period of two weeks from the date of receipt of a copy of this order, so that the amount shall be transferred to the Government of Kerala along with the contribution of Hon'ble Judges of this Court, as part of Relief Fund in the wake of Wayanad Landslide tragedy.

[S.S.S.R., J.] [K.R.S., J.]
20.08.2024

AP
Internet : Yes
Neutral Citation: Yes

COPY TO :-The Registrar General, High Court, Chennai.



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S.S. SUNDAR, J.,
and
K.RAJASEKAR, J.,

AP

Judgment in
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