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A. No.5911 of 2014 in C.S. No.912 of 2015
& A.No.989 of 2013 in OP.No.95 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2024

THE HON'BLE MR.JUSTICE A.A.NAKKIRAN

**A.No.5911 of 2016
in C.S.No.912 of 2015
and
A.No.989 of 2013
in OP.No.95 of 2009**

COMMON ORDERS

A. No.989 of 2013:

This application has been filed by the applicant being the 4th respondent in O.P. Proceedings, to revoke the probate granted on 11.01.2011 in O.P No.95 of 2010 in favour of the respondent/petitioner therein.

A. No.5911 of 2016:

This application has been filed by the applicant being the petitioner in O.P. Proceedings, to reject the plaint as the same is barred under Section 213 of Indian Succession Act, 1925.



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2.For the sake of convenience, the parties ranked in A.No.989 of 2013 are referred herein.

A. No.989 of 2013 in O.P.No.95 of 2009:

3.The learned counsel for the applicant/4th respondent has submitted that the applicant's father S. Parthasarthy died intestate on 19.08.1989, His properties remained un-partitioned for several years. The applicant knew that his brother P. Ravichandran had suddenly invented an unregistered Will dated 14.08.1989 purported to be executed by his deceased father just 5 days before this death. The respondent filed a OP.No. 95 of 2010 before this court seeking probate of the Will. The applicant did not file any affidavit consenting for grant of probate. The applicant's signatures are forged by his brother playing fraud upon this court.

4.It has been further submitted that the Will itself is a forged one. His father could not have even signed the Will dated 14.08.1989 and he was not in a sound disposing mind to even write a Will. The long delay of 20 years in filing a petition for probate itself shows that the Will is an after thought of his brother. It is just and necessary to revoke the probate granted on 11.01.2011 by this court.



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5.The learned counsel for the 1" respondent has submitted that

the application is not legally maintainable and the applicant is estopped by her conduct as she has given consent for sustaining the original petition. The private notice dated 20.07.2010 issued to this applicant was duly served on her as per the proof of service enclosing the acknowledgement card signed by the applicant evidencing the fact that she is aware of the proceedings and she also given the consent letter. The said Will was executed in the present of two witnesses who were also examined before grant of letter of administration. Even after receiving the private notice, she failed to oppose the above O.P proceedings. There is ample evidence available and proved before the court that the Will was executed by the deceased testator and the same cannot be unsettled by the application at this length of time. Hence, this application deserves to be dismissed.

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6. The learned counsel for the Applicants submits that the respondents are applicant's younger sister who have filed the suit for partition of the property described in the schedule of the plaint on the ground that the Will executed by the deceased father is not genuine and



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grant of probate of the same has been obtained on fraudulent means. The first respondent has already filed an application to revoke the order of probate granted by this court which has been opposed by the applicant. Moreover, the plaintiff have no locus to challenge the probate in the parallel proceedings by filing the present suit which are barred under Section 9 of CPC in the light of the implication of Section 213 of Indian Succession Act, 1925.

7. It has been further submitted that since the grant of Probate has been challenged in application No.989 of 2013 in OP.No.95 of 2010 it is for the plaintiff to prosecute the said application and get relief but keeping the same pending and filing the above suit exactly on the same pleading is barred under Section 11 of CPC the suit is not legally maintainable and hence it deserves to be dismissed.

8. The learned counsel for the respondent submits that the present suit has been filed against the respondent for the Family partition in order to determine their share in the property and hence it does not have any limitation as to when partition suit can be filed and thus it is not barred



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by any law. When the authenticity and maintainability of the alleged Will is pending before this Hon'ble Court, by way of Application A.No.989 of 2012 in O.P. No.95 of 2009, Section 213 of the Indian Succession Act cannot be applied in the present suit. The authenticity of the Will can only be proved at the stage of trial. Hence, she prays to allow the application in A.No.989 of 2012 in O.P. No.95 of 2009 filed by the applicant herein and consequently to dismiss the application filed by the respondents in A.No.5911 of 2016 in C.S.No.912 of 2015.

9. Heard both sides and perused the materials available on records.

10. On perusal of the records, it is seen that the applicant being the 4th respondent in O.P. has filed the consent affidavit dated 25.05.2009. and the Court notice has been sent to the Applicant/4th Respondent and returned the same with the endorsement of left the address on 04.03.2010. Further, the respondent/petitioner has effected service through Paper publication. In the month of June, 2010, the respondent/petitioner filed a Memo stating the new address of the 4th



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respondent. Based on his memo, private notice was ordered to the New Address of the applicant/4th respondent, and served on 20.07.2010, the same was acknowledged by the 4th respondent/applicant on 23.07.2010. In the affidavit in A. No.989 of 2013, it was also accepted by the applicant.

11.Despite notice was acknowledged by the applicant, she has not chosen to contest the O.P. After considering the nature of the case and consent affidavits filed by the respondents in the O.P, and no objection was raised by any other respondents, this Court granted probate on 11.01.2011 in favour of the petitioner.

12. At present, other than the applicant being the 4th respondent in O.P, no other respondents in O.P has agitated the grant of Probate in favour of the petitioner, even though she acknowledged the notice in the O.P. Proceedings. If at all any objection on her side, she would have come in the O.P. Proceedings by filing Caveat against the grant of probate to the petitioner or after receiving the private notice from the petitioner.



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13. Even though the applicant has got sufficient opportunity to contest the O.P., she failed to do the same. Per contra, she filed the suit for partition after four years from the date of grant of probate. The proper reasons was not adduced by the applicant for the delay of filing the suit. The applicant has no locus standi to challenge the probate in the parallel proceedings by filing the present suit and such suit is specifically barred under Section 9 CPC in the light of the implication of Section 213 of Indian Succession Act, 1925:

Section 213: Right as executor or legatee when established:-

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

14. Under such circumstances, this Court is inclined to dismiss the A. No.989 of 2013. Since O.A. is dismissed, A. No.5911 of 2016 in C.S. No.912 of 2015 is liable to be allowed. Consequently, C.S. No.912 of 2015 filed for suit for partition is liable to be dismissed.



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15. In the result, A. No. 989 of 2013 in O.P. No.95 of 2009 is dismissed. Consequently A. No.5911 of 2014 in C.S. No.912 of 2015 is allowed. Based on the above application is allowed, C.S. No.912 of 2015 is dismissed.

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Index:Yes/No
Web:Yes/No
Speaking/Non Speaking
Gv/lbm



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A.A.NAKKIRAN, J.
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