

Petitioner Vs. Respondent

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Court : Chennai

Decided On : Jul-19-2016

Judge : The Honourable Mrs. Justice Pushpa Sathyanarayana

Appeal No. : Application No.1270 of 2016 in C.S.No. 624 of 2000

Appellant : Petitioner

Respondent : Respondent

Judgement :

Pushpa Sathyanarayana, J.

1. The above application is filed by the first defendant, who is the only contesting defendant in the suit, for appointing an Advocate Commissioner for the purpose of taking the original will dated 30.11.1998, which is marked as Ex.D13, along with the original registered will dated 11.06.1981 and the original registered settlement deed dated 23.03.1992, for comparison of the signature and thumb impression of Late Pattammal and to obtain a report of the expert from the Forensic Science Department, Chennai.

2. A will was executed in favour of the applicant on 30.11.1998 by Pattammal, who died on 19.02.2000. Based on the said will, the applicant had also filed a suit in O.S.No.94 of 2000, on the file of the Sub Court, Ponneri, which was transferred to this Court and numbered as Tr.C.S.No.595 of 2003. No evidence had been let in

by the parties and the evidence on the side of the applicant was closed on 29.09.2015.

3. While so, the plaintiff challenged the validity of the will dated 30.11.1998 on the ground that the same had not been probated and that the applicant had taken active part in the preparation of the will. As the will dated 30.11.1998 was executed, outside the jurisdiction of this Court, it did not require probate, at that point of time. However, a will has to be proved in a manner known to law. One of the attestors, by name, Sekar was examined as D.W.2, though had admitted his signature during his examination, he had stated that he did not see Pattammal signing. As the above statement of the attesting witness may not help in the proof of the will, the applicant has taken out the above application for the purpose of an expert opinion to compare the signature and thumb impression of Pattammal, with the admitted signatures in the original registered settlement deed dated 23.03.1992 and also the registered will dated 11.06.1981, which were executed by Pattammal. The above documents contain her signature. As the opinion of an expert in this case is indispensable, the above application has been filed by the applicant. The original registered settlement deed dated 23.03.1992 and the registered will dated 11.06.1982 were already marked.

4. The above application was resisted by the plaintiffs 1 to 4 contending that the will has not been proved in the manner known to law, as required under Section 68 of the Indian Evidence Act. It is further contended that comparison of signature of a will is not applicable, in testamentary jurisdiction and the application itself, is not maintainable. Hence, prayed for dismissal of the application.

5. It is relevant to note that after evidence was closed, the first defendant had filed applications viz., Application Nos.1268 and 1269 of 2016. In Application No.1271 of 2016, this Court had granted leave to the applicant herein, to file additional documents mentioned thereunder, which are now stated to be the documents, containing the admitted signatures. In view of the permission granted to receive those documents, this Court had also allowed the applications viz., Application Nos.1268 and 1269 of 2016, for reopening and recalling the witness for marking the said documents. Accordingly, those documents are also marked. Thereafter,

the present application has been filed for sending the documents to the Forensic Science Department for obtaining a report by comparing with the admitted signatures.

6. Since the will itself is denied and the attesting witness had deposed that he had not seen the testator signed before him, the applicant has taken steps to examine the signature and the thumb impression of the testatrix Pattammal to be compared with the admitted signatures found in the registered settlement deed and the original registered will mentioned earlier.

7. As per Section 68 of the Indian Evidence Act, the will has to be proved in the manner stated therein. When in certain circumstances, it is not possible to prove the will, under Section 68 of the Indian Evidence Act, it can be proved as contemplated under Sections 69 and 71 of the Indian Evidence Act. Section 69 of the Indian Evidence Act gives an exception to the rule that when there is no attesting witness available, the will can be proved by other evidence. So far as Section 71 of the Indian Evidence Act is concerned, when it is not possible to prove the execution of the will, by examining an attesting witness, though alive or when the attesting witness who appeared, but either denied or failed to recollect the execution of the document, the said Section is only to give assistance and come to the rescue of the party, who was taken steps to get attesting witness to give evidence, but failed to recollect the execution of the will. In such circumstances, with a view to prove due execution of the will by other evidence, the applicant has taken the move to send the signature for comparison to the Forensic expert.

8. It is the specific case of the plaintiff that there is no such will executed by Pattammal and that the first defendant had taken active part in probate of the will. Therefore, in order to dispel the suspicious circumstances, the onus is on the propounder of the will, to explain the circumstances. If the propounder himself takes a prominent role, in execution of the will, he is required to remove the doubts, by clear and satisfactory evidence. If a propounder of the will, namely, the applicant herein, failed to remove the suspicious circumstances, by placing satisfactory materials before this Court, it would lead to a conclusion that the will is

not proved.

9. Admittedly, one of the attestors, who was examined as D.W.2, has deposed that he had not seen the testator signed the will. The said witness cannot be treated as a hostile witness, by the applicant and cross examine him. In the process of proof of the will, the next course open to the applicant is by obtaining an expert's opinion, by sending the same for comparison with the admitted signatures, on contemporaneous documents, that were available on record. The objections raised by the respondents that an opinion of the Forensic expert cannot be taken for proof of will, as testamentary jurisdiction does not allow the will, to be taken out of Court. In such circumstances, it was not possible to send the documents for expert opinion.

10. In this regard, it is useful to advert to the judgment of this Court in UTHAM PRABHAT INDUSTRIES, ETC., VS. P.SUBRAMANIAM, ETC. [1996 (1) L.W. 255] wherein, dealing with similar application, this Court has dealt with the mode, in which, the documents can be handed over to the Commissioner for production before the Expert for the investigation following certain conditions:-

12..... The documents can be handed over to the Commissioner for production before the expert for the investigation, subject to the following conditions:

1. The disputed original documents, sought to be examined, shall be photocopied before the Second Assistant Registrar (Original Side) before handing over the same to the Commissioner. These photocopies will be signed by the Second Assistant Registrar and will be retained in the Court along with the case papers.

2. The Commissioner shall address the Director of the Tamil Nadu Forensic Science Department, Mylapore, Madras, to fix a date and time for the examination of the documents in his presence, as per the orders of this Court, and after fixing the time, he shall receive the Court records either on the same day or one day in advance, from the Court.

3. A list will be prepared for the original disputed documents and the documents given for comparison to be delivered to the Commissioner and the same shall be

signed by the Advocate Commissioner.

4. The disputed original documents and the documents given for comparison with the sample signatures or hand-writings, will be enclosed in two separate envelopes and sealed in the presence of the Commissioner, who has to acknowledge the contents of the envelopes and also the receipt of the same. These two sealed covers and the letter of requisition of the Second Assistant Registrar (Original Side) with a sample seal, shall be enclosed in another cover, which will also be sealed in the presence of the Commissioner, to whom this cover will be delivered by the Second Assistant Registrar (Original Side).

5. The Commissioner shall deliver this envelope to the Director, Tamil Nadu Forensic Science Department, Mylapore, Madras, and be present in the place of investigation of this documents throughout to ensure that the examination of the documents, including the photocopying, was done in his presence. After the examination of the documents is over, the office of the Director, Tamil Nadu Forensic Science Department, shall enclose the documents in a sealed cover with their covering letter and hand over to the Commissioner, who has to return all the documents received by him to the Second Assistant Registrar (Original Side).

6. The Director, Tamil Nadu Forensic Science Department, Mylapore, shall send his report after the investigation, recording his opinion, in a sealed cover, direct to the Second Assistant Registrar (Original Side) of this Court. As fixed originally, the Director, Tamil Nadu Science Department, is entitled to Rs.1,000/- towards his remuneration.

11. The above mentioned conditions should be followed in this case also, to safeguard the original documents. For this purpose, Mrs.C.Kanakavalli, B.A., B.L., Advocate, No.30, Anna Street, Minjur 601 203, Phone: 99520 63826 / 8056141692 is appointed as Advocate Commissioner and a sum of Rs.15,000/- (Rupees Fifteen Thousand Only) is fixed towards remuneration to the Advocate Commissioner, payable to him by the applicant / first defendant. The entire exercise has to be completed on or before 30.09.2016.

12. In the result, this application is allowed. No costs.

