

Vinoraj Vs. 1. Udhayakumar

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Court : Chennai

Decided On : Mar-23-2015

Judge : The Honourable Mrs.Justice Pushpa Sathyanarayana

Appellant : Vinoraj

Respondent : 1. Udhayakumar

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

23. 3.2015 CORAM THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA C.R.P.NPD (MD) Nos.553 of 2004 and 716 of 2004 Vinoraj ... Petitioner in both the petitions Vs 1. Udhayakumar 2. Reghu 3. Krishnakumar 4. Bhagavathiappan 5. Mony 6. Maheswari 7. Gopalan 8. Muthulakshmi 9. Rajeswari 10. Rajeswari 11. Dhinesh 12. Sindhu (minor) 13. Santhia (minor) ... Respondents in both the petitions (minor respondents 12 and 13 are represented by mother and natural guardian eighth respondent) Prayer in C.R.P.NPD (MD) No.553 of 2004:- Petition filed under Section 115 of the Code of Civil Procedure to set aside the order passed in I.A.No.478 of 2003 in O.S.No.451 of 1995 dated 10/12/2003 on the file of the Principal District Munsif, Kuzhithurai. Prayer in C.R.P.NPD (MD) No.716 of 2004:- Petition filed under Article 227 of the Constitution of India to set aside the order passed in I.A.No.480 of 2003 in O.S.No.451 of 1995 dated 10/12/2003 on the file of the Principal District Munsif, Kuzhithurai. !For petitioner ... Mr.C.Godwin ^For respondents ... Mr.K.Sreekumaran Nair for R.R.2 to 4, 6 to 13.

No appearance for R.R.1 and 5. :COMMON

ORDER

The revision petitioner in both the revisions is the proposed second plaintiff in the suit in O.S.No.451 of 1995 which was filed for partition.

2. The revision petitioner had filed I.A.No.478 of 2003 under Section 5 of the Limitation Act and I.A.No.480 of 2003 for impleading himself as the second plaintiff in the suit.

3. The original plaintiff viz., Lilly Bai died on 28/3/2003 and she had no issues. She had executed a Will in favour of the revision petitioner bequeathing all her properties in his favour. He was not aware of the Will and the pendency of the suit at that time. Immediately, after he got the knowledge of the suit, he had filed an application to implead him as the second plaintiff with a delay of 65 days in setting aside the abatement caused due to the death of the original plaintiff.

4. The said applications were contested by the respondent first of all as not maintainable. Secondly, it was contended that the petitioner is not the legal heir of the original plaintiff. The Will which was relied upon by the petitioner was opposed by the respondents as not valid and genuine. There is no necessity for the original plaintiff to execute a Will when she has got no legal heirs of her own. The respondents also denied the signature in the recitals of the Will.

5. The respondents also alleged that the Will was created by the petitioner for the purpose of the case. Hence prayed for the dismissal of both the applications.

6. The trial Court which tried the applications dismissed the same. Aggrieved by the order of dismissal, the above Civil Revision Petitions have been filed.

7. The question that has to be decided is whether the delay can be condoned and whether the revision petitioner is a legal representative of the deceased original plaintiff.

8. On the side of the petitioner, P.Ws.1 to 3 were examined and on the side of the respondents, R.W.1 was examined.

9. The revision petitioner claims his right through the Will executed by the original plaintiff in his favour bequeathing an extent of 25 cents of land in S.No.251 in Painkulam Village, Vilavancode Taluk and the same is marked as Ex.P.1. The original plaintiff/testatrix died on 28/3/2003 and the Will was executed on 12/6/2002.

10. The petitioner examined himself as P.W.1 and stated that he was not present when the Will was executed by the testator. The petitioner also admitted that he had no knowledge about the registration of the Will. The petitioner was also not aware of the pendency of the suit.

11. P.W.2 is one Rajamani who claim to know the original plaintiff for the last 35 years. He also had deposed that he had seen the signature of the plaintiff made in the Will. It was deposed by P.W.2 that it was prepared by an Advocate, who was presented at the time of execution of the Will and he had also signed the Will as a witness. At the time of execution of the Will, P.W.2 was studying in Chennai staying with his sister.

12. P.W.3 is one John Isaac, who is an Advocate by profession. He is the one who had prepared the Will and he vouched for the execution of the Will by stating that he was present when the testatrix affixed her signature in the Will and P.W.2 also put his signature on the Will. He had also admitted that the Will was executed in the residence of the original plaintiff.

13. Though the above facts were denied by the respondents, they had not produced any other evidence to disprove the Will. The suit is filed for partition and the genuineness of the Will can also be gone into only at the time of trial of the suit. The respondents contended that the revision petitioner is a total stranger to the deceased original plaintiff and he cannot continue the suit as the legal heir of the deceased original plaintiff.

14. Admittedly, the original plaintiff did not have issues and there are no other immediate legal heir surviving her to continue with the suit. The revision petitioner is only seeking permission to implead him in the suit to continue the cause of action and he claims the said right under the Will.

15. In Ex.P.1 Will, the testatrix has referred the revision petitioner as ?vdJ je;ij Fl;o ehllh; mth;fsJ rBfhjuDk; vdJ rpd;idaht[k; Mfpa fhyk; brd;w jpU.kf;fd;ehllh; mth;fs; kfd; Jiuuh\$pd; kfd; tpBdhuh\$;??. Therefore, the said testatrix is the aunt of the petitioner. When the testatrix herself is described the relationship, the petitioner cannot be stated as a stranger.

16. At this juncture, it is useful to refer to Order 22 Rule 4 (A) of the Code of Civil Procedure is as follows:- ?4 A. Procedure where there is no legal representative - (1). If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator ?. General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit. (2). Before making an order under this Rule, the Court (a). may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and (b). shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person.?.

17. The learned counsel for the petitioner cites the decision reported in AIR 1981 HIMACHAL PRADESH ?. 29 (Smt.DWARKOO AND ANOTHER Vs. UNION OF INDIA AND OTHERS), wherein in paragraph Nos.10 and 11, it has been held as follows:- ?.10. There is no dispute that Bardoo died after coming into force of the latest amendments in the Code of Civil Procedure. Even the order making Sukh Dev as the legal representative of the deceased was passed after these amendments. It is the case of Shri Sukh Dev that he has no interest in the estate of the deceased. It is however, not pointed out by him as to who are the real legal representatives of the deceased. The Will, a copy whereof, as referred to above, has been produced, apparently appears to have been executed during the month

of December, 1965, and registered on 4th of January, 1966. The claimants on the basis of the said Will have not taken any step, as contended in the application, to obtain any probate or letters of administration of the Will. Even a mutation on that basis has not been entered. As such, it cannot be reasonably presumed that they may interested in the estate of the deceased. Accordingly, it can be inferred that there is no other real legal representative of the deceased. Consequently, we are of the view that the provisions of the aforesaid Rule 4 ? A of Order XXII can be applied to the facts of the case.

11. Under the circumstances, it is evident that the deceased Bardoo, has no real legal representative and the appeal can proceed, in the absence of the person representing the estate. It is further held that the appeal has not abated. We are also of the view that no notice is required to be given to any person under sub-rule (2) (a) of Rule 4 ? A of Order XXII of the Code of Civil Procedure, as no reasonable basis exists for the same.?

18. In the above said case, even though there was a Will, the claimants therein had not taken any step for obtaining probate or letters of administration of the same. Therefore, an inference was drawn on that there is no other real legal representative of the deceased. But in this case, the revision petitioner has established himself to be the nephew of the deceased Lilly Bai and to substantiate the same, he has produced the Will. No doubt, the Will has to be proved in the manner known to law. However, such exercise can be taken during the trial of the suit. The revision petitioner can be determined by the Court as legal representative as per Order 22 Rule 5 of the Code of Civil Procedure. In the said circumstances, as held in the decision above, there is no abatement of the appeal. Hence the delay application is not necessary. In such circumstances, I.As filed by the revision petitioners are allowed and the order passed in I.A.Nos.478 and 480 of 2003 are set aside.

19. In the result, these Civil Revision Petitions are allowed and the order passed in I.A.Nos.478 and 480 of 2003 by the Principal District Munsif, Kuzhithurai are set aside. As the suit is of the year 1995, the same is directed to be disposed of on or before 31/12/2015. No costs. 23/3/2015 Index: yes/No website: Yes/No To 1. The

Principal District Munsif, Kuzhithurai PUSHPA SATHYANARAYANA,J mvs.
C.R.P.NPD (MD) Nos.553 and 716 of 2004 23/3/2015

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