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Court : Rajasthan

Decided On : May-02-1969

Reported in : 1969WLN248

Judge : Jagat Narayan, J.

Appeal No. : S.B. Civil Misc. Appeal No. 55 of 1968

Appellant : Gangadas

Respondent : Moolchand

Disposition : Appeal allowed

Judgement :

Jagat Narayan, J.

1. This is an appeal by one Gangadas against an order of the District Judge, Jodhpur dismissing his objection to the grant of probate of a will alleged to have been executed by one Haridas deceased in favour of Mool-Chand respondent.

2. Gangadas is the real brother of Haridas. If the will is not proved to have been duly executed, then Gangadas will inherit the property of Haridas.

3. Moolchand filed an application for grant of a probate in respect of the will Gangadas filed an objection on 1-9-67 against the grant of probate on the ground

that the will was a forged on and on the ground that he was the nearest heir of Haridas who was entitled to succeed to his property. No affidavit was filed -within 14 days of the filing of this objection. On 11-11-1967 Mool Chand filed an application that as no affidavit had been filed within 14 days of the filing of the caveat as required by Rule 777 of the Rajasthan High Court Rules, the caveat should de discharged. Gangadas filed an application in reply to this application on 8-12-67 giving reasons as to why he was unable to file an affidavit within 14 days of the filing of the caveat. He also filed an affidavit in accordance with the requirement of Rule 778 on 8-12-1967.

4. In the affidavit it was stated by Gangadas that he was employed as a Patwari in Bilara Tehsil and his official duties required him to be busy during the months of September. October and November so that he was unable to come to jodhpur to file an affidavit. Further it was alleged that he came to Jodhpur on 24-11-1967 but on that date his lawyer Shri Vishva Nath Vyas was lying ill.

5. No counter-affidavit was filed on behalf of Moolchand, nor was any prayer made to cross-examine Gangadas on his affidavit. Despite this, the learned District Judge did not believe the allegations made in the affidavit because he had not produced any proof that he had applied for leave in the month of September or Oct, and his application for leave was rejected by a competent authority. It is not the practice for a party filing an affidavit for the condonation of delay in taking any steps to file documentary evidence along with his affidavit. It is only when any allegation is challenged either by a counter affidavit that the stage for producing the evidence in support of the allegations made in the affidavit is reached. There was thus no occasion for Ganga Das to have produced a copy of any leave application which he might have filed and which, might have been rejected, or to produce his officer to whom he might have applied orally for leave and which might have declined to grant him. I am accordingly satisfied that there was sufficient reason for Gangadas not to have filed an affidavit with 14 days of filing his obejction.

6. The next question which arises for decision in this case is whether the provision in Rule 778 that the affidavit should be filed within 14 days is mandatory or merely

directory. If it is mandatory then even if Gangadas had sufficient reason not to have filed an affidavit within 14 days it would not help him. This question came up for consideration before a Division Bench of this Court in Kalyan Singh v. Gaind Kanwar ILR 1960 Raj. 1959. It was held that whenever an objection in filed against the grant of probate it will be treated to be a caveat within the meaning of Rules 777 to 780 of the High Court Rules. But the question wither the provision in Rule 778 that the affidavit should be filed within 14 days of the filing of the caveat is mandatory was not decided. In that case even after the objection had been taken on behalf of the applicant, that no affidavit had been filed, the objector did not file any affidavit in the trial court. Their Lordships assumed for the purpose of that appeal that the court below could in a proper case have allowed the filing of the affidavit even after the time prescribed by Rule 778. An affidavit was filed before their Lordships. They considered even that affidavit to find out whether it fulfilled the requirements of Rule 778. It was found to be defective in as much as no reason whatever was given as to why no affidavit was filed within 14 days. Further the grounds for objecting to the grant of probate were also not given in the affidavit. It was in these circumstances that the appeal of the caveator was dismissed.

7. In the present case, the facts are quite different. When an objection was taken on behalf of petitioner in the trial court about non-filing of an affidavit, an affidavit was filed and reasons were also given for not filing it within 14 days of the filing of the caveat. The grounds on which the grant of probate is objected to and the interest of the objector in the estate of the deceased have also been given.

Rules 777 to 780 run as follows:

Caveats : 777. Any person intending to oppose the issuing of a grant of probate or letters of administration must either personally or by his advocate file a caveat in the court in the prescribed form. Notice of the filing of the caveat shall be given by the court to the petitioner or his Advocate (form prescribed).

778. Where a caveat is entered after an application has been made for grant of probate or letters of administration with or without the affidavits in support of annexed affidavit shall be filed within fourteen days of the caveat being lodged.

Such affidavit shall state the right and interest of the caveator, and the ground of the objections to the application.

779. Where an application for grant of probate or letters of administration with or without the will annexed is presented after a caveat has been filed, the Registrar shall forthwith issue notice to the caveator, calling upon him to file his affidavit or affidavits in support of the caveat within fourteen days from the service of such notice.

780. Where the caveator fails to file and affidavit in support of his caveat, in compliance with Rule 778 or in compliance with, the notice issued under Rule 779, the caveat may be discharged by an order to be obtained on application to the court.

8. A reading of Rule 780 goes to show that the filing of an affidavit is mandatory but the period of 14 days prescribed under Rule 778 i.e. not mandatory. The consequence of not filing an affidavit is given in Rule 780. There is no mention of the period in that Rule. The affidavit is to be filed in compliance with Rule 778 no doubt. Stress has been laid on filing an affidavit and penalty has been provided for not filing the affidavit at all. If the filing of the affidavit within 14 days had been intended to be mandatory, then Rule 780 would have run as follows:.Whether the caveator fails to file any affidavit in support of his caveat in compliance with Rule 778 within 14 days of the caveat being lodged being....

9. I accordingly allow the appeal, set aside the order of the learned District Judge and direct that the objection taken by Gangadas to the grant of the probate should be tried in accordance with law. In the circumstances of the case. I leave the parties to bear their own costs.

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