

Subbaraj Vs. S. Rajendran

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Court : Chennai

Decided On : Oct-31-2012

Judge : K. Chandru

Appeal No. : Application No.1663 of 2012 in O.P. No. 341 of 2010

Appellant : Subbaraj

Respondent : S. Rajendran

Advocate for Pet/Ap. : For the Petitioner: ----- For the Respondent: -----

Judgement :

1. This application is filed by the applicant seeking to revoke the grant of the Probate of the Will left by late S.Sulochana made in O.P.No.341 of 2010, dated 09.07.2010. On notice, on behalf of the respondent, a counter affidavit, dated 19.7.2012 has been filed by her father and guardian S.Rajendran.

2. The applicant is a third party to the original proceedings. The O.P was filed by the respondent seeking for the grant of probate in respect of the last will, dated 7.2.2007 left by late S.Sulochana. The O.P was admitted on 15.4.2010. The notice was affixed in the court notice board. The succession duty of Rs.6000/- was paid. The notice was also sent to the District Collector. When the matter came up on 25.6.2010, it was directed to be posted before the learned Master for recording evidence. Before the learned Master, the original petitioner examined himself as P.W.1. He also examined one G.Jayaraman as P.W.2 being an attesting witness.

It was thereafter, this court by an order dated 09.07.2010 had granted probate in favour of the original petitioner.

3. It is the case of the applicant that the testatrix late S.Sulochana was his mother's sister (maternal Aunt). She owned properties at Chathirareddiapatti village, Virudhunagar Taluk. Her husband's name was Srinivasaga Reddiar. They had one daughter by name Vijayalakshmi. The said Vijayalakshmi married the original petitioner. Even though the said Vijayalakshmi was the only daughter, she never took care of her mother and she used to reside with the in the village. Her daughter Vijayalakshmi also died. Thereafter, the connection with her daughter's family was totally cut off. The applicant showered affection and took care of the testatrix by providing medical help. She had executed a Will in his favour on 06.11.2006 and it was registered with the Joint Registrar, No.II, Virudhunagar as document No.82/2006. By virtue of the Will dated 06.11.2006, the properties were devolved on him and patta was also transferred in his name. He was paying all taxes regularly in her name. He is in possession and enjoyment of the properties. But, during September, 2011, one C.Narayanan residing in Chennai claimed to be the owner of the said lands and had attempted to enter into the properties. He had issued a legal notice and a reply was also sent. The said Narayanan claimed title by virtue of the sale deed dated 26.7.2011 executed by the original petitioner / respondent. In the reply, he claimed that the Will executed by Sulochana on 7.2.2007 was probated and hence the properties devolved upon them. It is only when he applied for a copy of the sale deed, she also got the copy of the Will. He had also instituted a suit in O.S.No.180 of 2011 before the District Munsif Court, Virudhunagar for declaration of title in her favour. But the probate has been obtained fraudulently. The probate was granted to the respondent on the basis of the forged Will. Further, she was not shown as a party to the proceedings.

4. In the counter affidavit filed by the respondent, it was stated that he is the father of minor Gayathri. The testatrix Sulochana owned lands in Chathirareddiapatti village, which she got under partition between her and her sister Mrs.Subbulakshmi under partition deed dated 19.03.1974. It is in respect of the land owned by her, she was managing herself and was in possession. The testatrix had only one daughter by name Vijayalakshmi, whom the respondent

married on 23.7.1976. Subsequent to that, they were living together. They had no issues. Though Sulochana lived in Chathirareddiapatti village, she used to visit their Chennai home. They also used to visit her in the village. The allegation that her daughter never took care of her mother was denied. It was made only with a view to grab the land which she had bequeathed to her grand daughter. The respondent's wife regularly visited her mother. The said Sulochana stayed continuously for more than six months at Chennai. After the demise of her daughter, Sulochana came from the village and stayed with the respondent and her grand daughter Gayathri. The respondent was working as a Driver in the Metro Transport Corporation. In fact, Sulochana's name was also included in the family ration card for the year 2005-2009 issued by the Civil Supplies Department. She was living with them as a family member.

5. The respondent when he was driving the bus on 6.4.1994, after completing his work while getting down from the bus, he saw a new born female child. He took the child to his residence and they were taking care of the child. He and his wife had great love and affection for the child. They named the child as Gayathri. The child was admitted to the school, She is now studying in Engineering college. The respondent and his wife and the grand mother Sulochana had great love and affection for the child. The respondent's wife died on 14.05.2004. The respondent and his daughter Gayathri are the only legal heir of Vijayalakshmi. The said Gayathri had attained puberty in February, 2007, for which a celebration was made. At that time, the testatrix came to his residence and took part in the celebration. It was her desire to make permanent arrangement for the welfare of the minor Gayathri. In the celebration, photos were also taken, in which the picture of Sulochana was very much found. Sulochana had executed a Will on 7.2.2007 bequeathing the land of 3 acres 86 cents located at Chathirareddiapatti village to her grand daughter Gayathri and had appointed the respondent as the executor. It was after the death of the testatrix, he made arrangement to get the Will probated. All formalities were completed before this court. It was only because he found it difficult to maintain and manage the land on behalf of his daughter, he decided to sell the land. Then as the father and guardian of the minor, he filed O.P.No.273 of 2011 before this court for the grant of permission to sell the land owned by the minor Gayathri. This court by an order dated 29.4.2011 permitted him to sell the

property. One Narayanan had purchased the property by a sale deed dated 26.7.2011. Out of the sale of the property, he received Rs.2 lakhs as a consideration, which has been deposited in the Indian Bank, High Court Branch. It is only after coming to know that he had sold the land to Narayanan, the applicant had sent a legal notice. The allegation that late Sulochana lived with the applicant was denied. Even assuming that the Will upon which reliance placed by the applicant was true, subsequent to the Will, dated 7.2.2007, the earlier Will, dated 06.11.2006 got automatically cancelled. The application at the instance of a third party is not maintainable. There is no other legal heir for the late Sulochana. Hence no citation need be issued to the applicant.

6. In the light of the above, it has to be seen whether the application deserved to be considered by this court?

7. The counsel for the applicant placed reliance upon a judgment of the Supreme Court in *Basanti Devi Vs. Ravi Prakash Ram Prasad Jaiswal* reported in (2008) 1 SCC 267 for contending that agnates is also an heir in terms of the Hindu Succession Act. Under Section 263 of the Succession Act, a person is entitled for notice. The provisions of Section 283(3) are mandatory. The grant of probate being a judgment in rem, the person who is aggrieved thereby and has no knowledge about the proceedings and proper citation was not issued, he is entitled to file an application for revocation of probate on such grounds as are available to him.

8. He also referred to a judgment of a division bench of this Court in *E. Sankaran Vs. Krishnaveni* and another reported in 2011 (5) CTC 117, wherein the division bench held that under Section 263 of the Indian Succession Act, the parties who can participate in the probate proceedings and the parties who are affected by an order of grant of probate and having caveatable interest, cannot be deprived the right of any portion. There is no quarrel over the proposition laid down in those judgments.

9. However, this court is not inclined to accept the stand of the applicant. This court do not find any fraud has been committed so as to get probate. As rightly contended, the subsequent Will cancelled the previous Will if any and a person for

whom the properties were bequeathed cannot be said to be a stranger. On the other hand, after obtaining probate, the respondent had approached this court for the grant of permission to sell the property for the welfare of the minor and that the property was sold only for the benefit of the minor. It was also admitted by both sides that the property was sold to one C.Narayanan. The applicant had already filed a suit for declaration of title. Only questioning the right of the testatrix to bequeath the property, the applicant cannot plead that he is the necessary party.

10. Under Section 332 of the Indian Succession Act, the property vest with the executor under the Will from the date of the demise of the testatrix and that the executor can dispose of the property and that the assent of the executor or administrator is necessary to complete a legatee's title. Even assuming any revocation of the probate, it can only be under Section 332 and it can only operate prospectively and not retrospectively. Even if this court can grant revocation, the revocation can only be prospectively and not retrospectively.

11. The Supreme Court vide its judgment in *Crystal Developers v. Asha Lata Ghosh* reported in 2005-1-L.W.387 = (2005) 9 SCC 375 dealt with the distinction between the probate and the letters of administration and in paragraph 28, it was observed as follows :

"28. Under Section 213, no right as an executor or a legatee can be established in any court, unless probate of the will is granted, by the probate court, under which the right is claimed. Similarly, no right as executor or legatee can be established in any court unless the competent court grants letters of administration with the will annexed thereto. Sections 211, 212 and 213 bring out a dichotomy between an executor and an administrator. They indicate that the property shall vest in the executor by virtue of the will whereas the property will vest in the administrator by virtue of the grant of the letters of administration by the court. These sections indicate that an executor is the creature of the will whereas an administrator derives all his rights from the grant of letters of administration by the court. Section 214 states inter alia that no debt owing to a deceased testator can be recovered through the court except by the holder of probate or letters of administration or succession certificate. Section 216 inter alia lays down that after

any grant of probate or letters of administration, no person other than such grantee shall have power to sue or otherwise act as a representative of the deceased, until such probate or letters of administration is recalled or revoked. Part IX of the Act deals with probate, letters of administration and administration of assets of the deceased. Under Section 218(1), if the deceased is a Hindu, having died intestate, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable to such deceased, would be entitled to..... As stated above, in the case of letters of administration, intermediate acts of the grantee are not protected whereas in the case of probate, all such acts are treated as valid. Further, Section 227 states that a probate proves the will right from the date of the death of the testator and consequently all intermediate acts are rendered valid. It indicates that probate operates prospectively. It protects all intermediate acts of the executor as long as they are compatible with the administration of the estate. Therefore, Section 221 read with Section 227 brings out the distinction between the executor and holder of letters of administration; that the executor is a creature of the will; that he derives his authority from the will whereas the administrator derives his authority only from the date of the grant in his favour by the court. Section 235 inter alia states that letters of administration with the will annexed shall not be granted to any legatee, other than universal or residuary legatee, until a citation has been issued and published calling on the next of kin to accept or refuse letters of administration. Such provision is not there in respect of grant of probate."

12. In the light of the above, this court do not find any merit in the application. Accordingly, the application will stand dismissed. No costs.

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