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O.S.A.No.248 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.04.2023

Delivered on: 28.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

O.S.A.No.248 of 2012

&

M.P.No.1 of 2012

P.Chitra

.. Appellant

Vs.

1.S.Gangadharan

2.S.Prabhakar Rao

3.S.Ratnakar

4.S.Jagadish

5.D.S.Kumari

6.D.Ganeshram

.. respondents

Prayer:- Original Side Appeal filed under Order 36 Rule 9 of the Original side Rules read with Clause 15 of the Letters Patent, against the judgement



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and decree dated 14.06.2011 made in O.P.No.577 of 2008.

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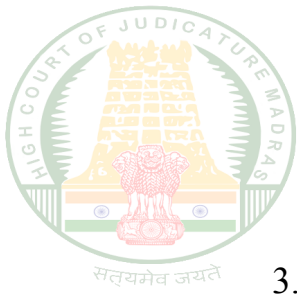
For Appellants : Mr.S.Senthil Nathan
For Respondent : Mr.B.Chandrasekaran
for
Mr.R.Subramaniam Associates for R1
R2- 5 no appearance

JUDGMENT

(Judgment of the Court was made by P.B.BALAJI,J.)

The above Original Side Appeal has been preferred against the order and decree in O.P.No.577 of 2008 dated 14.06.2011. The 4th respondent in the Original Petition is the appellant herein.

2. The 1st respondent filed the said Original Petition for grant of probate of the last Will and testament dated 20.11.1992 executed by his father, Srinivasa Rao, who had died on 15.02.2006, leaving behind his sons Prabhakar Rao, Ratnakar, respondents 2 and 3 and legal heirs of a pre-deceased son, S.Diwakar, being respondents 4 to 6, being the Class I legal heirs of Late S.Srinivasa Rao.



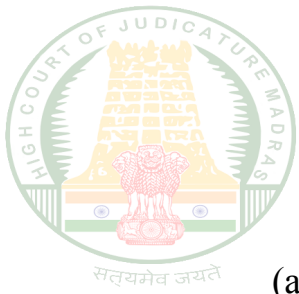
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3. On receipt of notice from the Court in the original proceedings, the appellant appears to have filed a caveat intending to oppose the grant of probate sought for by the 1st respondent. The said caveat was lodged on 03.02.2009. An affidavit of objections supporting the caveat also appears to have been filed and returned on 04.02.2009. However, the Registry has returned the affidavit of objections also on 02.03.2009 and admittedly both the caveat and affidavit of objections never came to be represented. In this backdrop, the parties proceeded with the matter before the Court.

4. The learned Single Judge directed evidence to be recorded before the learned Master and upon such evidence being taken, the matter was referred back to the learned Single Judge, who heard the arguments of the counsel for the appellant as well as the counsel for the 1st respondent and granted probate holding that the Will had been proved in the manner required under law.

5. Aggrieved by the said order of the learned Single Judge the 4th respondent has preferred the above Original Side Appeal on the following grounds:



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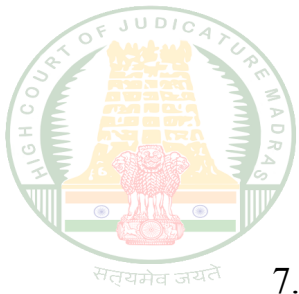
(a) The learned Single Judge ought to have converted the Probate proceedings into a Testamentary Original Suit since caveat and the required affidavit objections had been filed.

(b) Being a daughter, the appellant had caveatable interest and the Court ought to have given an opportunity to the appellant for disproving in contending the genuineness of the Will.

(c) The Registry ought not have returned the caveat and that the same was in variance to Rule 55 of Or.XXV of the Original Side Rules.

(d) The counsel for the appellant was misled by the counsel for the 1st respondent when the evidence of the attesting witness was recorded before the learned Master saying that he was going to take time but however on the contrary on the same day, the 1st respondent and the attesting witness were examined.

6. Heard Mr. S.Senthil Nathan, learned counsel for the appellant and Mr.B.Chandrasekaran for the 1st respondent who is the contesting party in the Original Side Appeal.

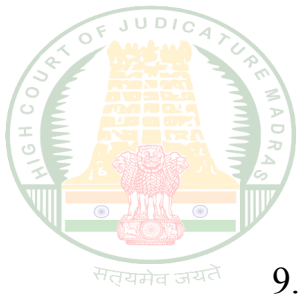


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7. This Court has also called for the original records from the original side and perused the same.

8. Order XXV of the Original Side Rules deals with testamentary and intestate matters. The procedure contemplated for hearing and disposal of Original Petitions for grant of probate, letters of administration or succession certificate, are summary in nature. However, a special procedure is carved out by including a separate heading viz., “Contentious Proceedings”. Under the said head “Contentious Proceedings”, R.51 to 68 are framed. Whenever any person intends to oppose the grant of probate or letters of administration, then such person will have to invoke Rs.51 of Or.XXV and file a caveat, either in person or through his advocate in Form No.69, which is available in the Original Side Rules. R.52 of Or.XXV provides for a caveat being entered even after an application for grant of probate or letters of administration has been made to the Court. In such cases an affidavit in support of the caveat ought to be filed within eight days of the caveat being filed and such affidavit shall state the right and interest of the caveator besides also the grounds of objections to the application for probate of letters of administration, as the case may be.



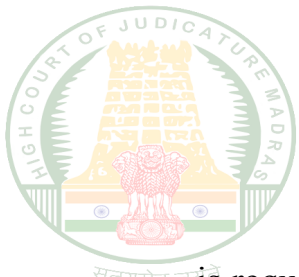
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9. R.55 of Or.XXV which is strenuously harped upon by the learned counsel for the appellant, states that upon the affidavit in support of the caveat being filed and a copy of which has been given by the caveator to the petitioner, the proceedings shall be numbered and registered as a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant.

10. Placing reliance on this rule, the learned counsel for the appellant vehemently argued that once a caveat was filed and followed up with an affidavit of objections also, the Registry has to necessarily convert the Original Petition into a Testamentary Original Suit. When this procedure is adopted, the summary procedure contemplated for hearing and disposal of Original Petitions stand converted to regular Trial as in any other Civil suit and the parties will have to lead evidence as they normally do in any Civil suit.

11. At the outset, this Court would necessarily have to reject the argument of the learned counsel for the appellant in this regard. It is not that the moment a caveat and affidavit of objections are filed, nothing more



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is required to be done by the caveator and the Registry has to automatically convert the Original Petition into a Testamentary Original Suit.

12. The counsel for the appellant also brought to the notice of this Court that the caveat was numbered as Caveat 19 of 2009 and subsequently the same could not have been returned. Moreover, according to the counsel for the appellant the reason for returning the caveat was only on the ground that affidavit of objections required to be filed along with the caveat has not been filed. Therefore, the counsel for the appellant contended that when admittedly the affidavit of objections had also were filed within two days after the caveat had been lodged, the Registry was clearly in error, returning the caveat. This Court is aware of the practice of lodging caveats in the Original Side, especially in matters pertaining to testamentary and intestate jurisdiction. Unlike regular caveat under C.P.C, in the case of Original Petitions, a separate caveat register is available in the original side filing section where the counsel for the caveator himself enters all the details of the caveat and even the caveat number is assigned in seriatum depending on the earlier caveats numbered. Only after this entry is made in the caveat register by the counsel for the caveator, the



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Registry takes up the caveat and sees whether it is in order. There may be cases where the caveat is not duly stamped or the notice required to the petitioner has not been sent or proof in support of the same is not filed etc., No doubt, one of the reasons for returning the caveat could be that the affidavit of objections is not filed. It is not necessary for the affidavit of objections to be filed along with the caveat.

13. R.52 of Or.XXV of Original Side Rules provides an eight day period to file the affidavit of objections from the date of filing or lodging the caveat. Be that as it may, in the instant case admittedly both the caveat and the affidavit of objections have been returned by the Registry. Infact from the original records, this Court is able to see the following:-

On 16.07.2010 when the matter was posted before the learned Single Judge both the counsel for the appellant as well as the counsel for the 1st respondent was heard. The order passed by the learned Single Judge is as follows:

“*Heard both.*

Both the parties are willing to co-operate with

the Master in recording evidence in this O.P.



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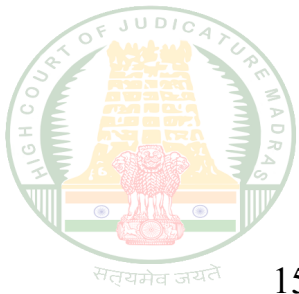


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Accordingly, Registry is directed to post the case before the learned Master on 23.07.2010 for recording evidence and the Master is directed to record the evidence on that day and to send the papers for passing further orders by this Court on 27.07.2010.

Registry is also directed to post the case before the Court on 27.07.2010 after recording the evidence.”

14. From a reading of this order passed by the learned Single Judge it is clear that the counsel for the appellant was heard before the learned Single Judge even before the matter was directed to be posted for recording evidence. Even at that stage, the counsel for appellant has not taken any objection or chosen to either re-present the caveat and affidavit of objections or actually file a fresh caveat and affidavit of objections. This Court is also aware that a caveat filed under Order XXV of Original Side Rules is valid for 6 months unlike a caveat filed under C.P.C, which is valid only for 90 days.



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15. This Court would like to point out that there is no time limit for filing a caveat in Testamentary and intestate matters. The appellant had two options viz.,

(i) either she could have re-presented the returned caveat and affidavit of objections assigning proper reasons and could have got herself an option to contest the proceedings or alternatively

(ii) file a fresh caveat along with affidavit of objections.

16. There is no bar in filing a fresh caveat and objections. Any time before final orders are passed in the Original Petition, a person intending to oppose the grant is entitled to file a caveat along with an affidavit of objections. Unfortunately in the present case the appellant has not chosen to follow either of two options available to her.

17. Evidence was recorded before the learned Master and the 1st respondent and attesting witness was examined on 23.07.2010 and thereafter the learned Master referred the matter back to the learned Single Judge. When the matter was posted before the learned Single Judge on 30.07.2010, the counsel for the appellant has raised the very same issue of



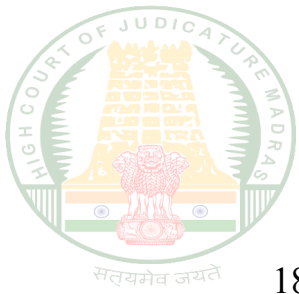
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his caveat No.19 of 2009 having been filed. Therefore, the learned Single Judge directed the Registry to verify the same and posted the matter to 04.08.2010 for passing orders after verifying the necessary particulars. Thereafter, the Registry has made the following endorsement on 03.08.2010:

“ M/s. S.Senthilkumar, Advocate filed caveat for R4 in D.No.3505/09 on 03.02.2009 which was returned on 04.02.2009. Affidavit in support of caveat filed on 03.02.2009 also returned on 02.03.2009”

There seems to be some confusion in the dates stated by the Counsel for the appellant and the Registry. However, the fact remains that both the caveat and affidavit of objections has been returned and not re-presented. Thereafter, when the matter was posted before the learned Single Judge on 06.08.2010, the arguments of both counsel for the appellant as well as the counsel for the respondent were heard and the learned Single Judge directed the Original Petition to be posted for orders. Thereafter, only on 14.06.2011 the learned Single Judge passed final orders in the Original Petition.



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18. The learned counsel for the respondent stated that except the appellant, all the other legal heirs have given consent affidavits for grant of probate in favour of the 1st respondent and it was only the appellant, none else than the 1st respondent's sister who wanted to put spokes in the grant of probate to the 1st respondent. He also brought to the notice of the Court that the Will was registered Will and all his brothers and only sister were provided by either the father or the mother and it was only the 1st respondent who was not given anything substantial and therefore under the impugned Will the father bequeathed one of his immovable properties to the 1st respondent. The counsel for the 1st respondent also contended that the learned Single Judge has considered all necessary factors and circumstances and allowed the Original Petition only after granting sufficient opportunity to the appellant and therefore no interference is warranted in the appeal.

19. This Court has already noticed that the appellant had ample opportunity to either re-present her caveat or alternatively even file a fresh caveat as the same is not a bar under law. Without doing so, the appellant as seen from the proceedings before the learned Single Judge, has actually



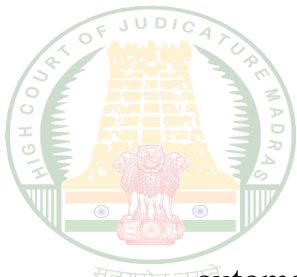
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participated and also argued the matter before the learned Single Judge.

Having opted to take such a risk, it is not open to the appellant to now contend that the Original Petition ought to have been converted as a Testamentary Original Suit and that, being a person who had a caveatable interest, the appellant should have been afforded an opportunity to object to the grant of probate.

20. As we already pointed out, in the testamentary matters where there is an intended contest, a separate and special procedure is available under Original Side Rules and without availing the opportunities available to her, the appellant, cannot find fault with the order of learned Single Judge granting probate. Infact, the 1st respondent as well as one of the attesting witnesses have also been examined before the learned Master. The learned Single Judge has found the evidence on record to be satisfactory and also meeting the requirement of law. This Court has also gone through the evidence of P.W.1 and 2 and finds that sufficient proof has been adduced in support of due execution and attestation of the Will in question. Merely because the appellant had filed a caveat and objections as required under Or.XXV of the Original Side Rules, it does not



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automatically clothe here right to seek reopening of the proceedings or challenge the grant of probate by way of appeal.

21. This Court finds that the conduct of appellant clearly amounts to abandoning her right to contest the proceedings for probate and having consciously followed such a path she took it would be wholly unjust and unfair to set aside the order of probate only on the ground that a person who had caveatable interest was not heard. This Court has already found that the appellant had several opportunities to put forth her defence or even create an opportunity to convert the Original Petition into a Testamentary Original Suit. Without doing so, it is not open to the appellant to now challenge the grant of probate. One of the arguments of the learned counsel for the appellant was that evidence was recorded behind his back. However, the matter has been subsequently heard by the learned Single Judge on more than a couple of dates and nothing prevented the counsel for appellant to lodge a complaint in this regard to the learned Single Judge.



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22. The learned counsel for the 1st respondent relied on the following judgments:

(i) **Ct.Ramasamy Vs. Sp.Kaveri Achi**, reported in LQ/MadHc/2002/1476

(ii) **S.V.Ramakrishnan vs. P.R.Sethuram and Ors**, reported in 2012 2 MLJ 12

(iii) **N.Sthirasundari and another Vs. V.Kalyani and Ors**, reported in 2013(1) CTC 646

23. In **S.V.Ramakrishnan's** case as well as in **N.Sthirasundari's** case the Division Bench was dealing with an issue of revocation of grant of probate U/s. 263 of the Indian Succession Act. This is not a case where revocation of grant of probate is sought for. It is only a challenge to the grant of probate by a party to the proceedings. Therefore, the ratio laid down by the two Division Bench judgments will not be of any use to further the case of the 1st respondent. In **C.T.Ramasamy's** case the Division Bench of this Court, finding that the Original Petition was still pending, directed the respondent to file a fresh caveat and also an affidavit in support of the said caveat as per the procedure contemplated in the



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Original side Rules. This case will also not help the case of the 1st
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respondent. Infact, the ratio laid down in this case would have actually come to the rescue of the appellant since this Court has clearly held that once the caveat period expires, there is no bar for the caveator to even file a fresh caveat.

24. The learned Single Judge has considered all these material aspects in coming to the conclusion that the Will had been proved and that the appellant had lost her right to contest the Original Petition. This Court does not find any justifiable reason whatsoever for disagreeing with the findings of the learned Single Judge.

25. In fine, the Original Side Appeal stands dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

(S.S.S.R.J) & (P.B.B.J)
28.04.2023

Internet : Yes
Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No



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To

1.The Sub Assistant Registrar (Original side)
High Court, Madras

2.The Section Officer
VR Section,
High Court, Madras



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S.S.SUNDAR, J.,
and
P.B.BALAJI, J
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Pre-delivery judgment in
O.S.A.No.248 of 2012

28.04.2023