

(1994) 12 MAD CK 0009

Madras High Court

Case No: O.S. Appeal No. 105 of 1992

G. Nagappan

APPELLANT

Vs

Kalaiselvam

RESPONDENT

Date of Decision: Dec. 1, 1994

Acts Referred:

- Succession Act, 1925 - Section 263

Hon'ble Judges: Srinivasan, J; S.S. Subramani, J

Bench: Division Bench

Advocate: M.N. Padmanabhan, for M/s. M.N. Muthukumar and S. Palaniswamy, for the Appellant; Krishanan, for the Respondent

Judgement

Srinivasan, J.

This appeal is directed against the order of the learned single Judge on the Original Side dismissing Application No. 5800 of

1991, which was one for revoking the probate granted in O.P. No. 621 of 1990 with reference to the Will dated 1.12.1989 said to have been

executed by one Saraswathi Ammal. The order under appeal suffers from two errors apparent on the face of the record. In paragraph 5 of the

order, the learned Judge has said,

Again, I see from the affidavit of the petitioner stating that he is a close relative of the deceased Saraswathi a word as vague and as vagueness

could possibly be.

This statement is clearly erroneous, in view of the fact that in the affidavit filed by the appellant herein, who was the petitioner before the learned

Judge, in support of the application for revocation of the probate, he has stated in paragraph 4 the relationship of parties with the deceased. No

doubt, in paragraph 3 therein the petitioner has stated that he is a close relative of the deceased Saraswathi as well as the alleged legatee Mr.

Kalaiselvam, the respondent herein. But in paragraph 4, the appellant has stated that his father Govindaswamy had three wives and Sareswathi and

her sister Jaya were the daughters of the first wife. Govindaswamy married a second wife by name Panchavaranam Ammal after the death of the

first wife. Through her he had four children by name Balakrishnan, Poongavanam, Kumari and Vijaya. The respondent Kalaichelvan is the son of

Balakrishnan. The affidavit has also stated that the said Govindaswamy married a third wife by name Pavunammal through whom he had three

children Saroja, Nagappan and Chinnaponnu. Nagappan is the appellant herein. In view of the fact that the relationship has been clearly set out in

paragraph 4, the learned Judge is wrong in stating that the averment in the affidavit of the appellant was vague. There is no justification for such a

statement.

2. No doubt, the respondent had filed a counter-affidavit disputing the status of the appellant herein. But that is a dispute which has to be decided

elsewhere. For the present, the question is whether the appellant has disclosed his relationship with the deceased Saraswathi. That, he has done

and the learned Judge is wrong in thinking that he has not done so.

2.1 The second error committed by the learned Judge arises as follows: The learned Judge says that it is well known that grant of probate does not

determine any title and any person challenging the title of the person to whom the probate is granted has ample scope to agitate it in a properly

constituted suit therefore in a competent Court. No doubt, the proposition of law is correct. But that has no relevance to the facts of the case. In

this proceeding, the appellant has challenged only the genuineness of the Will of Saraswathi. That, he is entitled to do as he claims to be a close

relative of Saraswathi. If his case is true, he will be a nearer relation than the respondent Kalaiselvan. No doubt, these are disputed questions of

fact.

3. Consequently, it follows that the order of the learned Judge under appeal is unsustainable. In the normal course, we would have set aside the same and remanded the matter for fresh disposal. But having regard to the fact that the application for revocation is of the year 1991 and the original proceeding for grant of probate in of the year 1990, we do not purpose to remit the matter for fresh disposal but we will proceed to consider the merits of Application No. 5800 of 1991 on the basis of the records available.

4. That application has been filed under Sec. 263 of the Indian Succession Act. That Section provides for revocation or annulment of grant of probate for just cause. Explanations (a) to (e) of the Section provides for a legal fiction as to when just cause shall be deemed to exist. It is not necessary for us to consider that aspect of the matter in detail in this appeal. Suffice it to point out that under Explanation (a) if the proceedings to obtain the grant was defective in substance and under Explanation (b) if the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case, it would be deemed to be just cause which enables the Court to revoke or annul the probate.

5. In the original petition filed by the respondent for grant of probate, he has stated in paragraph 4 thereof that Palani Chettiar, husband of Saraswathi pre-deceased her and she had not issued and ""as such, but for the will no other person is entitled to her share in the schedule mentioned properties "" (underlying by us). This Statement contained in paragraph 4 of the Original Petition is obviously false. Even according to the respondent, his father Balakrishnan lived at the time of the original Petition and he died only three months back. Balakrishnan is undoubtedly an heir to Saraswathi and that too, a nearer heir. His sisters Poongavanam, Kumari and Vijaya will also be nearer heirs than the respondent. The respondent ought to have disclosed their names in the petition and informed the Court that they are the nearer relatives and obtained the orders of the court for issue of notice to them in ascertaining whether they contest the will or not. He did not do so. It may be that the respondent is disputing

the status of Pavunambal and her children Saroja, Nagappa (appellant herein) and Chinnaponnu, but he is not disputing the status of Balakrishnan

and his sisters. Hence he ought to have impleaded them as parties to the present proceeding particularly in view of the provision in the Original

Side Rules. Under O.25, Rule 4 of the Original Side Rules, an application for probate shall be made by a petition with the will annexed,

accompanied, if the will is not in English by an Official translation thereof in English and such application shall be in Form No. 55 or as near thereto

as the circumstances of the case may permit. The language is mandatory and the application ought to be in Form 55. Form 55 found in Appendix

II in Cl. 7 thereof, which was introduced by R.O.C. No. 3618-A/89 F1, reads as follows:

The petitioner has impleaded all the next of kin or other persons interested as party/respondents. There is no next of kin or other person interested

to be impleaded.

No doubt the form was amended only in 1991 but the Court was always insisting upon such impleading of nearer heirs. The petitioner was guilty of

not even disclosing the particulars of such persons. The petitioner ought to have impleaded his father Balakrishnan and his sisters as parties. The

appellant and his two sisters were undoubtedly interested parties to the Original Petition and notice should have been issued to them. Even if it can

be said that they cannot claim to be legal heirs unless they prove their status they were interested parties and they ought to have been made

respondents in the original petition.

6. Inasmuch as the respondent herein had made a false suggestion in the Original Petition by stating in paragraph 4 that but for the will no other

person was entitled to the property of Saraswathi and concealed from the Court, facts material to the case, viz., the existence of his father

Balakrishnan and his three sisters as well as the claims of the appellant and his two sisters, the proceedings to obtain grant were defective in

substance as the necessary parties were not impleaded thereto.

7. It follows automatically that the grant of probate made in O.P. No. 621 of 1990 has to be revoked as there is a just cause therefore. The matter

really falls under Explanation (a) and (b). Hence we revoke the probate granted on 9-1-1991 in O.P. No. 621 of 1990. The Original Petition is

now restored to file. The respondent is directed to return the original probate to the Court on the original side on or before 12.12.1994. The same shall be entrusted to the Registrar of this Court for safe custody. The respondent is permitted to implead Poongavanam, Kumari, Vijaya, Saroja, Nagappan (Appellant herein) and Chinnaponnu and the three brothers of the respondent, viz., Elangovan, Ravi and Ramesh. Notice shall be issued by the Registry to these parties and further proceedings shall go on in accordance with the rules. The appeal is partly allowed. No costs.