

(2007) 03 MAD CK 0301

In the Madras High Court

Case No : CRP (PD) No. 1135 and 1764 of 2005 and CMP No's. 13866 and 13867 of 2005

K.R. Andu Gowder

APPELLANT

Vs

Ammu Ammal and Others

RESPONDENT

Date of Decision : 22-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2)
Constitution of India, 1950 — Article 227
Succession Act, 1925 — Section 211

Citation : (2007) 03 MAD CK 0301

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : Srinath Sridevan, in CRP.1135 and P.R. Balasubramaniam, in CRP.1764, for the Appellant; AR. L. Sundaresan, S.C. and AL. Gandhimathi, for the Respondent

Final Decision : Dismissed

Judgement

S. Ashok Kumar, J.—CRP. No: 1135 of 2005 has been filed to strike off the suit taken on the file of the Subordinate Court, Ooty as the same is not maintainable in the eye of law.

2. The brief facts of the case are as follows:

The respondents herein are the legal heirs of the K.R. Raju, defendant in the earlier suit filed for partition in O.S.No:161 of 1984 filed by K.R.Andu Gowder, the revision petitioner, the first defendant in the present suit O.S.No. 99 of 2005 filed by the respondents herein. A preliminary decree was passed in the earlier suit favour of the plaintiff holding that he would be entitled for 1/4th share of the property. K.R.Raju Gowder, brother of K.R.Andu Gowder filed A.S.No. 888 of 1985 before this Court against the said decree. He also filed O.S.No; 80 of 1987 before the DMC, Ooty, which was later transferred to DMC, Kothagiri and renumbered as OS.No. 78 of 1996. A.S.No:888 of 1985 was dismissed on

9.11.2001. Thereafter, the O.S.No. 161 of 1984 was transferred and renumbered as OS.No. 46 of 1997 and the same is pending for final decree proceedings on the file of the DMC, Kothagiri. O.S.No:155 of 1986 was filed by K.R.Andu Gowder against his brother K.R.Raju Gowder for partition and separate possession of his half share in the property and the said suit was dismissed after contest. An appeal was filed by him in A.S.No. 29 of 2000. During the pendency of the appeal, and while the matters stood thus, K.R.Raju died on 24.3.2002 leaving behind an unregistered Will dated 12.2.2002 bequeathing all his properties, movables and immovable in faovur of the respondents who are none other than the step mother and step brothers of the testator, since he was at logger heads with his brother K.R.Andu Gowder. Hence the respondents herein filed I.A.No: 53 of 2003 under Order 1 Rule 10(2) CPC for impleading themselves as parties to the appeal in the place of deceased Mr.K.R. Raju Gowder who was the sole respondent. Aggrieved of the same, they filed CP.NO.546 of 2003 before this Court and the same was dismissed on the ground that the Will was not probated. Against the same, SLP.No. 21038 of 2005 was preferred to Supreme Court of India and interim stay was granted on 25.10.2005.

3. In the meantime the main A.S.No:29 of 2000 itself was dismissed as devoid of merits confirming the dismissal of the suit O.S.No. 155 of 1996. When the same was brought to the notice of the Supreme Court, recording the said fact, the SLP was dismissed on 28.9.2005 and when the respondents prayed that their rights to be protected in case the revision petitioner files a Second Appeal, the SLP was again listed on 28.8.2006 and when it was represented that he did not intend to file a Second Appeal as against the dismissal of A.S.No. 29 of 2000, recording the same, the SLP was dismissed by the Supreme Court. In the meanwhile, the present Suit in O.S.No. 99 of 2005 was filed by the respondents herein claiming that Andu Gowder tried to take possession of the property based on the preliminary decree granted in his favour. Aggrieved of the same, the first respondent Andu Gowder filed this revision to strike off the same on various grounds.

4. According to the learned Counsel for the revision petitioner The SLP filed against the dismissal of the CRP.No. 546 of 2003 was dismissed and therefore, the respondents cannot claim as Legal Heirs of Raju Gowder. All the points now being raised in O.S.No. 99 of 2005 have already been heard and decided in the earlier suit O.S.No. 161 of 1984 (now numbered as OS.No. 46 of 1997) which has also been confirmed in A.S.No. 888/85 by this Court. The very same respondents sought exactly the same relief in OS.No. 80 of 1987 before the District Court now renumbered as O.S.No. 78 of 1996 before DMC, Kothagiri an the said suit was dismissed. Suppressing these dismissals, the present suit has been filed. The very relief sought for in the suit cannot be given in the final decree proceedings as no permanent injunction can be sought to grant a protective relief pending some other suit in some other court.

5. It is the further contention of the learned Counsel for the revision petitioner

that being not the legal heirs of the deceased K.R.Raju Gowder, since the alleged Will is not probated so long they prove the same, they are not entitled to file the present suit. In the CRP.No:546 of 2003, this Court held that the Will had not been produced before the Revenue Authorities and that the alleged will is fabricated and forged and that the respondents cannot derive any interest through that will. It is also held by this Court that protection u/s 211 of the Indian Succession Act also cannot come to the rescue of the respondents. Further unprobated Will can be relied upon only for collateral purposes as has been held by this Court in C. Rajendran v. M.Senthilkumar 2003 (1) LW 43 and Ganshamdoss Narayandoss Vs. Gulab Bi Bai, . If the Will is not probated then the general rule of succession will have to be followed as has been decided by the Apex Court in Hardev Singh V. Gurmeet Singh 2007 2 CTC 78.

6. However, learned senior counsel appearing for the respondents contended that the present CRP itself filed under Article 227 of the Constitution of India is not maintainable in law and also on facts and the plaint cannot be struck off by a revision since there is an efficacious alternative remedy of contesting the suit on merits by filing written statement before the court below. According to the learned senior counsel, K.R.Raju father of the respondents, died on 24.3.2003 leaving behind an unregistered Will dated 12.2.2002 bequeathing all the properties movable and immovable in favour of the respondents herein who are none other than the step mother and step brothers of the testator. He was at logger heads with his brother K.R.Andu Gowder and hence he chose to execute the Will in favour of his step mother and step brothers. Learned Counsel also referred to the decisions of the Apex Court as well as this Court in support of his contention that under Article 227, the High Court's power is only superintendence and it does not imply the High Court to influence the Subordinate Judiciary to pass an order or judgment in a particular manner or fashion.

7. A perusal of the proceedings would show that O.S.No:155 of 1986 filed by Andu Gowder for partition and separate possession of his half share in the property in Kothagiri Village was dismissed after contest. The appeal in A.S.No. 29 of 2000 as against the said dismissal was also met with the same result. It is only as against the dismissal of the I.A.No. 53 of 2003 filed by the respondents herein to implead themselves as L.Rs of the deceased K.R.Raju Gowder, they preferred the CRP.546 of 2003 which was also dismissed. As against the same they preferred SLP before the Supreme Court of India and the said court after knowing the dismissal of the Appeal Suit No. 29 of 2000 itself by the District Court, Ooty, dismissed the SLP. As such the respondents herein were not in any manner prejudiced by not getting themselves impleaded in the said appeal since the appeal itself was dismissed and the trial court judgment was confirmed, which rejected the claim of the revision petitioner for partition and separate possession. Even when the SLP was dismissed, the Supreme Court recorded a finding in effect, protecting the rights of the respondents. Further it is also seen from the findings of the CRP.No. 546 of 2003 against the the SLP was preferred

to the Supreme Court, that this Court dismissed the said CRP only on the ground that the alleged Will was not probated. Further, the said order does not finally determine the rights of the respondents herein as the legatees under the Will dated 12.2.2002. Ultimately the appeal A.S.No. 29 of 2000 was also dismissed. Therefore, it cannot be said that merely on the ground that the Will has not been probated, the suit which has been filed by the respondents in O.S.No:99 of 2005 cannot be dismissed. Whether the Will can be marked in evidence or whether there is any other proof that the respondents are the legal representatives of Mr.K.R.Raju are all issues which have to be decided only at the time of trial. At the most, the revision petitioner could raise such issues as preliminary issues in the pending suit. That apart, the respondents have enough time to get the Will probated in their favour before such issues are taken up for trial. Therefore, the suit cannot be struck off and the plaint cannot be rejected at this stage at the threshold without giving opportunity to the respondents as plaintiffs to substantiate their case in the suit. It is also to be mentioned that the disposal of A.S.No. 888 of 1985 does not have anything to do with the present suit. The rights of Mr.K.R.Raju Gowder was recognized in the said appeal and in the present suit the issue is with regard to the rights of the respondents as L.Rs of the deceased K.R.Raju Gowder.

8. In *Jasbir Singh Vs. State of Punjab*, the Hon'ble Supreme Court held that under Article 227 of the Constitution of India, the High Court's power of superintendence and control over all subordinate courts and tribunals is in the nature of both administrative and judicial, which could be exercised suo motu also. But such exercise of power of superintendence does not imply that High Courts can influence the Subordinate judiciary to pass any order or judgment in a particular manner. It is also held that while invoking the provisions of Article 227 the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. It cannot intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions is. It is the members of the subordinate judiciary who directly interact with the parties in the course of proceedings of the case and, therefore, it is no less important that their independence should be protected effectively to the satisfaction of the litigants. It is also held by the Apex Court that even in respect of Article 235 also, the powers of control to be exercised thereunder do not extend to interfering with the judicial functions of the subordinate courts. By virtue of the power under Article 235 the High Court cannot direct the Presiding Officer of the subordinate court to pass a judicial order in a particular manner as that would certainly amount to interfering with the independence of the subordinate judiciary.

9. In *Ganesa Naicker and Anr. v. Kokilambal and Ors.* 2006 (I) LW 677, this Court observed as follows:

The scope of supervisory jurisdiction has been dealt with in various decisions. The power under Article 227 must be exercised with restraint and only for the purpose of keeping the Subordinate courts and tribunals within the bounds of their authority, especially when-

- (i) the court or tribunal has assumed a jurisdiction which it does not have,
- (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and
- (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction, and not for correcting mere errors. To interfere with the impugned order under Article 227, it is not enough for the petitioners to establish that the court might, on the same materials, have passed a different order. "It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong", to use the words in 1948 1 All ER 343 (Bellenden v. Satterthwaite) or when the order involves miscarriage of justice, that we can interfere.

10. Following the above judgements it is clear that under exercising the superintendence power under Article 227 of the Constitution of India, this Court in a revision petition, has to act with restraint and it cannot influence the subordinate court to pass any order or judgment in a particular manner or it could frequently invoke the provision of Article 227 to interfere with the independence of judicial functions of the lower judiciary, except in appropriate cases in order to keep the subordinate courts within the bounds of their authority. For these reasons, I do not find this as a fit case to reject the plaint as the petitioner has an efficacious remedy of challenging the same before the trial court itself by raising such issues as preliminary objections. Further, it is always open for the respondents to probate the Will, and such opportunity cannot be denied to them. In the circumstances, this CRP is liable to be dismissed.

11. As regards CRP.No: 1764 of 2005, the revision has been filed against the order dated 15.11.2005, in I.A.NO.497 of 2005 in the pending suit O.S.No:99 of 2005 by which the sub court granted interim injunction. As against the same, the petitioner has got an efficacious alternative remedy by way of a Civil Miscellaneous appeal under Order 43 Rule 1 CPC. This revision filed directly without resorting such a recourse is not maintainable in law. Further, the orders passed on various dates between 31.7.2005 and 15.11.2005 would establish that the trial court has taken into consideration the pendency of the CRP before this Court as well as the SLP before the Hon'ble Apex Court and ultimately granted the order of ad interim injunction. Therefore, when there is an appeal provision, I am not inclined to interfere with the order of the trial court in this revision petition.

12. For these reasons, both the CRPs are dismissed. Consequently, connected Miscellaneous Petitions are also dismissed. No costs.