
(2013) 03 KL CK 0046
In the High Court Of Kerala
Case No : O.P. (C) No. 387 of 2013 (O)

K.V. Narayani and Others

APPELLANT

Vs

K.V. Kamalam and K.V. Bhaskaran

RESPONDENT

Date of Decision : 04-03-2013

Acts Referred:

Citation : (2013) 03 KL CK 0046

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Judgement

Thomas P. Joseph, J.—Judgment debtors in E.P. No. 188 of 2011 in O.S. No. 552 of 2003 of Munsiff's Court, Hosdurg challenge Ext. P8, order passed by the executing court on 19.01.2013 directing delivery of property as prayed for by the second respondent herein. Deceased first respondent filed O.S. No. 552 of 2003 and obtained a decree for recovery of possession of the property. Petitioners filed A.S. No. 24 of 2007 in the Sub Court, Hosdurg. During pendency of that appeal, first respondent died on 29.04.2012. Death was reported on 29.06.2012 and the appeal was posted for steps on 07.11.2012. On that day, the appeal was dismissed for failure to take steps. Exts. P3 to P7, applications are pending in the Sub Court, Hosdurg to readmit the appeal, condone the delay etc.

2. Second respondent who is the son of deceased first respondent filed E.A. No. 711 of 2012 in E.P. No. 188 of 2011 for his impleadment as additional decree holder as per a Will (allegedly) executed by the deceased first respondent. That application was allowed on 03.01.2012. The said order as well as order dated 19.01.2013 directing delivery are under challenge.

3. Learned counsel for petitioners submits that though petitioners had disputed the Will relied on by the second respondent, it is without conducting enquiry as required under Rule 5 of Order XXII of the CPC (for short, "the Code") that the executing court has allowed E.A. No. 711 of 2012 on 03.01.2012. It is also argued that the third respondent who is another legal heir of deceased first respondent is not made a party in E.P. No. 188 of 2011. Exts. P3 to P7,

applications are coming up for decision before learned Sub Judge, Hosdurg on 13.03.2007. In the circumstances order for delivery cannot be sustained.

4. Learned counsel for respondents 2 and 3 submits that even if it is assumed that the Will is not taken into account, second respondent, in his capacity as a legal heir of deceased first respondent is entitled to execute the decree. It is also submitted that third respondent who is the other legal heir has filed affidavit in the Sub Court, Hosdurg (A.S. No. 24 of 2007) admitting genuineness of the Will.

5. In E.P. No. 188 of 2011, the only supplementary decree holder is the second respondent. When he is claiming impleadment and right to execute the decree under the Will, it ought to be enquired into under Rule 5 of Order XXII of the Code, notwithstanding that petitioners are third parties so far as the Will is concerned.

6. But, if the third respondent also joins E.P. No. 188 of 2011, notwithstanding the Will and without conducting any enquiry into the genuineness of the Will, it is open to the respondents 2 and 3 to execute the decree in their capacity as legal heirs. Learned counsel for respondents 2 and 3 submits that third respondent will seek her impleadment in E.P. No. 188 of 2011. If that is done, the defect that petitioners urge will stand cured.

7. Learned counsel for respondents 2 and 3 also submits that Exts. P3 to P7, applications in A.S. No. 24 of 2007 could be allowed on terms and that a direction may be given to the learned Sub Judge, Hosdurg to dispose of A.S. No. 24 of 2007 as early as possible.

8. I cannot deal with Exts. P3 to P7, applications in this proceeding. Learned Sub Judge, Hosdurg has to dispose of those applications as early as possible however, considering the submission made by the learned counsel for respondents 2 and 3 regarding allowability of Exts. P3 to P7. In case those applications are allowed, learned Sub Judge has to expedite disposal of A.S. No. 24 of 2007. Until disposal of Exts. P3 to P7, applications and in case those applications are allowed, until disposal of A.S. No. 24 of 2007, delivery of property ordered in E.P. No. 188 of 2011 has to stand in abeyance.

Resultantly this original petition is disposed of as under:

(i) Submission made by the learned counsel for respondents 2 and 3 that third respondent will seek her impleadment in E.P. No. 188 of 2011 as a legal heir of deceased first respondent is recorded.

(ii) If any such application for impleadment is preferred, learned Munsiff, Hosdurg shall dispose of that application as provided under law as early as possible after hearing petitioners as well.

(iii) Since the second respondent is one of the legal heirs of deceased first respondent and third respondent has no objection in the second respondent executing the decree in that capacity, it is unnecessary to go to the question of

genuineness of the Will in that proceeding.

(iv) Learned Sub Judge, Hosdurg is directed to dispose of Exts. P3 to P7, applications in A.S. No. 24 of 2007 as early as possible.

(v) In case those applications are allowed, learned Sub Judge shall dispose of A.S. No. 24 of 2007 as early as possible.

(vi) It is directed that the order for delivery of property in E.P. No. 188 of 2011 (in O.S. No. 552 of 2003 of Munsiff's Court, Hosdurg) will stand in abeyance until Exts. P3 to P7, applications are disposed of, and in case those applications are allowed, until A.S. No. 24 of 2007 is disposed of.