J U D G M E N T

Heard the learned counsel for appellant and learned counsel for respondents

2. This miscellaneous first appeal is filed under Section 289 of Indian Succession Act challenging the impugned order passed in Misc.case.No.16/1998 and prayed the Court to set aside the order dated 13.08.2007 passed by the Prl. District Judge, Dakshina Kannada, Mangalore and consequently allow the petition filed by the appellant under Section 263 of Indian Succession Act and grant such other relief as deem fit in the interest of justice and equity.

3. The grounds urged in the present appeal is that the very impugned order is erroneous, contrary to law and suffers from legal and factual infirmities. The Court below fails to appreciate the evidence and material on record in its proper perspective. The findings of the Court below are opposed to weight of evidence and probabilities of the case. The Court below seriously erred in coming to the conclusion that the appellant has been served notice personally in P and SC No.38/1983. The said finding is without any evidence. There is no documentary

evidence on record to show the personal service of notice, neither the copy of the said notice nor the acknowledgment has been produced before the Court. The drawing of inference of personal service of notice on the basis of the entry in the order sheet is improper and unsustainable in law. It is also contended that the RW1 in his cross examination has admitted that there are no records to show the service of notice in P and SC proceedings. Hence, the impugned order is illegal and liable to be set aside.

4. The counsel also vehemently contend that citation of the probate proceedings was taken out in a newspaper which is not at all having proper circulation. It is admitted by the witness RW1 that the newspaper in which the citation was taken out will be circulated only among the subscribers to the same. Therefore, it cannot be held that the requirement of law has been complied.

5. It is also contended that the Court below seriously erred in holding that the petition filed by the appellant suffers from latches even though the same is within the period of limitation. When the petition for revocation of probate was filed within the limitation period, the question of delay or latches will

not arise for consideration at all. The said findings of the Court below is opposed to law and liable to be set aside.

6. The counsel also would vehemently contend that the Court below failed to note that the witness RW1 is not at all competent to depose about the facts of the case. Since, the said witness is only a power of attorney holder. The counsel also vehemently contend that the RW1 in his cross examination it has been admitted by him that only after becoming the power of attorney holder for 4th respondent he came to know about the proceedings. The said power of attorney is of the year 1996. Hence, the evidence of RW1 could not have been relied upon.

7. The counsel also would vehemently contend that the respondents have obtained the probate by suppression of material facts and the executant of the Will was not in a position to execute any Will before his death and as on the date of alleged execution of Will he was 84 years old and he was not in physically fit condition. The Counsel also vehemently contend that the appellant was looking after the Testator being the youngest daughter of him and none other children of the Selvadore Menezes looked after him or lived with him and her

father was not having any capacity to execute the Will during the year 1973 or anytime subsequent to the period of 1971 to 1972 and probate was obtained fraudulently by concealing the material facts.

8. The counsel in his argument vehemently contend that when there was not a proper service and not followed the mandatory provision in making citation and obtained the probate fraudulently, hence, the impugned order requires to be set aside and matter has to be considered restoring the probate proceedings and to consider the same on merits. Hence, P and SC No.38/1983 has to be restored by setting aside the earlier order.

9. Per Contra, the counsel appearing for the respondent No.4(f) in his argument would vehemently contend that pleadings made in paragraph No.3 of the petition is not clear and in the probate proceedings notice was served personally on 24.01.1984. The Court also can invoke Section 114 of Indian Evidence Act and there is presumption with regard to the Court proceedings. The counsel also would vehemently contend that prior to filing of the suit, the notice was given in terms of Ex.D1

and reply was given in terms of Ex.D2 and he had the knowledge when the notice was served, notice with regard to the execution of the Will dated 24.01.1984 itself, now cannot dispute the Will.

10. The counsel also vehemently contend that the suit was also filed by the respondents in O.S.No.7/1997 for possession and prior to filing of the suit, notice was given and categorically stated probate was issued based on the Will. The said notice was served in the month of November 1995 itself and given reply in terms of Ex.D2 vide reply dated 24.11.1995 and the suit was filed on 02.12.1996 and appeared in the said suit, written statement also filed in the year 1998. The petition for recalling the of probate proceedings is also filed in the year 1998 and no explanation for delay. The documents are also produced i.e., Ex.R5 – letters for administration granted. The Will was executed in the year 1973 and bond was executed in year 1974 by the executant. He was having testamentary capacity and his testamentary capacity cannot be challenged since, he himself has executed bond in the year 1974 i.e, after the execution of the Will. The petitioner has not stated anything about the capacity in the evidence and not made out any grounds to set

aside the impugned order. The very pleadings is also cryptic and Ex.R13 is clear with regard to the accounts and inventory and the same is produced.

11. The counsel in support of his argument he relied upon the judgment of the Madras High Court ***Laws (MAD)-2009-10-265 in case of J.Srinivasan (Died) V/s S.Venkataraman Alias Balaji*** and brought to notice of this Court in paragraph No.5 wherein discussed with regard to when the notice was served, when the same was not objected by filing objections question of seeking an order to set aside the probate does not arise. Since, no objection was raised. The counsel also brought to notice of this Court in paragraph No.6 and contend that after obtaining the probate, the respondent herein issued a notice to the appellant to vacate and handover the possession of the property and gave reply and in the present case only filed for revocation of the probate after filing of the suit. Hence, the present judgment is aptly applicable to the case on hand.

12. The counsel also relied upon the judgment reported in ***AIR 1955 Supreme Court 566 in case of Anil Behari Ghosh V/s Smt.Latika Bala Dassi and others*** and brought to

notice of this Court at paragraph No.16 and 17 wherein discussed in detail regarding revocation of grant and held that the onus is upon the opponents to prove that the Will is genuine, only if the persons who ought to have been cited were not cited. In every case where there is a defect in citation, the Court must order a revocation or annulment of the grant and annulment is a matter of substance not of mere form. The Court may refuse to grant annulment in cases where there is no likelihood of proof being offered that the Will admitted to probate was either not genuine or had not been validly executed and it would serve no useful purpose to revoke the grant and make the parties to through the mere formality of proving the Will over again. Therefore, the omission of citation had no effect on the regularity of the proceeding resulting in the grant of 1921.

13. The counsel for the respondent No.1(a) and respondent No.4(e) in his argument would vehemently contend that the appellant has pleaded false plea regarding knowledge. The appellant grossly fails to prove that the procedure is defective in substance under Section 263 of Indian Succession

Act. The same is also barred by law under Article 137 of Limitation Act.

14. The counsel would vehemently contend that suit is filed in O.S.No.7/1997 by one of the beneficiary of the Will for possession. The Will is executed in favour of his sons with limited interest to wife and not in favour of any of his daughters. The document marked at Ex.R11 and Ex.R12 that it shows allegations are false and not produced any documents in the miscellaneous proceedings. The document marked at Ex.R3 is very clear that personally notice was served and the same was not disproved. Notice was served in the year 1984 itself and after 14 years, miscellaneous proceedings was filed.

15. The counsel in support of his argument also filed synopsis with citations, the counsel referring the judgment reported in ***(1997) 9 SCC 689 in case of Nalini Navin Bhagwati and others V/s Chandravadan.M.Mehta*** wherein held that the application under Section 263 of Indian Succession Act for revocation of probate can be treated as a miscellaneous application and mainly disposed of on the fact situation either in summarily after recording evidence and the application for

revocation shall not be treated as a suit as has been provided under Section 295 of Indian Succession Act, 1925.

16. The counsel also relied upon the judgment reported in ***AIR 1954 SC 280 in case of Ishwardeo Narain Singh V/s Kamta Devi*** wherein held that the Court of probate is only concerned with the question as to whether the document put forward as the last Will and Testament of deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing state of mind. The question whether a particular bequest is good or bad is not within the purview of the probate Court.

17. The counsel also relied upon the judgment reported in ***AIR 1996 SC 2677 in case of Ajay Krishan Shinhal etc V/s Union of India*** and counsel brought to notice of this Court that Section 114 of the Indian Evidence Act, 1872 and also brought to notice of this Court illustration (e) wherein held that it is not the law could not and would not be the law that publication of the substance of the Section 4(1) notification in the locality should be established beyond the shadow of doubt and benefit should be extended to the owner or interested

person of the land. Obvious thereto, presumption under Section 114(e) of Evidence Act has been raised that official acts have been properly done unless proved otherwise.

18. The counsel also relied upon the judgment reported in ***(2006) 5 SCC 353 in case of Prem Singh and others V/s Birbal and others*** and brought to notice of this Court in paragraph No.28 wherein also an observation is made with regard to illustration (e) invoking Section 114 of the Indian Evidence Act, 1872. Presumption of existence of certain facts and that judicial and official acts have been regularly conducted will be one of the presumptions.

19. The counsel also relied upon the judgment reported in ***AIR 1984 Karnataka 45 in case of Ramakrishna Ganapayya Hegde V/s Lakshminarayana Thimmayya*** and brought to notice of paragraph No.14 wherein also discussed with regard to illustration (e) where a discussion is made that there is presumption under Section 114 illustration (e) of the Indian Evidence Act that all official acts done by the official are in accordance with proper procedure. When plaintiff comes to Court challenging such official act, the burden is on him to prove

that the act was not done in accordance with law and for that purpose call for necessary records making the official a party to the suit and show that the procedure followed by him was vitiated.

20. The counsel also relied upon the judgment reported in ***AIR 1974 SC 555 in case of E.P.Royappa V/s State of Tamilnadu and another*** and the counsel brought to notice of this Court in paragraph No.92 wherein also discussed with regard to the burden of establishing malafides is very heavy on the person who alleges it. The allegations of malafides are often more easily made than proved, and the very seriousness of such allegations demands proof of high order of credibility.

21. The counsel also produced the document with regard to the rules governing probate and succession matters,1966 and brought to notice of this Court that when the Court directs that citation issued shall be published in any newspaper, the petitioner shall file into Court a copy of the newspaper in which citation is published and accordingly citation was taken and produced before the Court.

22. The counsel also relied upon the judgment reported in ***AIR 1955 SC 566 in case of Anil Behari Ghosh V/s Latika Bal Dassi and others*** and brought to notice of this Court paragraph No.16 wherein discussed with regard to Section 263 veils a judicial discretion in the Court to revoke or annul a grant for just cause. The explanation has indicate the circumstances in which the Court can come to the conclusion that "just cause" had been made out. The omission to issue citations to persons who should have been apprised of the probate proceeding may well be in normal case a ground by itself for revocation of the grant, but this is not as absolute right irrespective of other considerations arising from the proved facts of the case.

23. The counsel also relied upon the judgment reported in ***AIR 2017 SC 5453 in case of Lynette Fernandes V/s Gertie Mathais since deceased by LRs'*** and brought to notice of Section 3 and Article 137 of limitation Act, 1963 and relied upon paragraph No.6 of the judgment wherein discussed with regard to substantial defect for the grant of probate that the appellant has not adduced any evidence to prove that the Will

was not genuine and she has not initiated any proceedings to question the validity of the Will and also brought to notice of paragraph No.11 wherein also discussed with regard to article 137 of the Limitation Act as there is no provision under the limitation Act specifying the period of limitation for an application seeking revocation of grant of probate, Article 137 of Limitation Act will apply to the case in hand. The counsel referring this judgment would vehemently contend that belatedly questioned the probate proceedings.

24. The counsel also relied upon the judgment reported in ***(2008) 12 SCC 577 in case of Kamalesh Babu and others V/s Lajpat Rai Sharma and others*** by referring this judgment, the counsel brought to notice of this Court, paragraph No.19, 20 and 21 that plea of limitation is a mixed question of law and facts and the same cannot be raised at the appellate stage, the reasoning behind the said proposition is still that certain questions relating to the jurisdiction of Court, including limitation, goes to the very root of the Court's jurisdiction to entertain and decide a matter, as otherwise, the decision rendered without jurisdiction will be nullity.

25. In reply to the arguments of the counsel for respondents, the counsel for the appellant would vehemently contend that with regard to the knowledge is concerned, particularly in page No.3, it is specifically stated that after service of summons in original suit, only verified the records and the very observation of the Trial in paragraph No.11 and 12 is erroneous. But, observed that within time the petition was filed technically but erroneously comes to the conclusion that latches on the part of the appellant and the said observation is erroneous. In order to prove that the appellant had the knowledge, the respondents have not produced the document of service of notice.

26. The counsel also would vehemently contend that except office note, regarding service, no documents are produced and RW1 categorically admitted that it is only a weekly newspaper which circulates among the subscribers and categorically admitted that no documents are produced to show for having served the notice. Hence, there is a defective citation and no notice was served.

27. Having heard the respective appellant's counsel and the counsel appearing for the respondents and also the principles laid down in the judgments referred supra, the point that would arise for consideration of this Court are:

1) Whether the impugned order requires to be set aside and probate proceeding of P and SC No.38/1983 has to be restored for consideration on merits for non-compliance of Section 263 and Section 283 of Indian Succession Act?

2) What order?

28. The main contention of the appellant's counsel in the appeal that the Court below fails to appreciate the evidence and material on record in proper perspective. The main contention that the Court below erroneously comes to the conclusion that appellant has been served notice personally in P and SC 38/1983. No doubt on perusal of the Trial Court order sheet, there is a reference that notice was served personally on 24.01.1984 and the said reference is only an endorsement.

29. The very contention of counsel for the respondents also that notice was served and to that effect the counsel for respondent No.1 is also relied upon judgment of the Madras High Court which is referred supra and brought to notice of this Court

observation made at paragraph No.5 and 6, where the discussion is made with regard to not objecting the same.

30. The very contention of the appellant that no such notice was served. No doubt there is an endorsement on the order sheet, that it was served personally. But, no document is placed by the respondents before the Court that it was served personally. No documentary evidence to show that personal service of notice. Even the respondent neither produced the copy of the notice which was served on the appellant nor produced any acknowledgement for having served notice as contended by the respondents that it was personally served.

31. The very contention of the counsel for the respondent referring the judgments referred supra that the Court has to draw an inference for personal service of the notice on the basis of the entry in the order sheet, since the said act is done in the Court proceedings. No doubt the Court can draw an inference, but in the case on hand, it is the contention that no such notice was served and also not produced any document by the respondent that notice was served on the appellant herein and also no acknowledgment is produced, when such being the

case, drawing of inference is improper and the same is also not sustainable in the eye of law, since the same is not substantiated by producing any material.

32. It is also important to note that the RW1 in his cross examination has categorically admitted that there are no records to show that service of notice in P and SC proceedings against the appellant and when the appellant disputed the service and put the question to the RW1 that no proper service was taken and the respondents ought to have produced the acknowledgment for having served on the appellant, but no such acknowledgment is produced, no such notice was produced which bears the signature of the appellant.

33. The appellant categorically disputed that no such notice was served in P and SC proceedings. When the appellant took the specific ground in the petition, no such proper service of notice and when the respondent also fails to produce the document and the Trial Court ought to have accepted the contention of the appellant, only relies upon the ministerial entry in the order sheet that there is a service of notice and the same is not supported by any document in the evidence. Hence, the

Trial Court has committed an error in coming to the conclusion that there is a proper service. The decisions quoted by the respondents regarding inference will not comes to the aid of the respondents. The burden is on the respondents to substantiate the contention of proper service, since the person who asserts the same has to be proved.

34. The second ground urged by the appellant before the Court that no proper citation of probate proceedings was taken out in a newspaper which is not at all having proper circulation. It is also admitted by the witness RW1 in the cross examination that the citation which was taken out will be circulated only among the subscribers to the same. The same is also a weekly magzine. The very purpose and object is to taking out the citation is to give notice to the persons who are interested to appear and object the same. But, the categorical admission is given by RW1 that citation was taken out and the same will be circulated to the subscribers only, the same cannot be a proper service and the circulation is only among the subscribers. No doubt the respondent Nos.4(a) and 4(e) have relied upon several judgments with regard to the proper citation is

concerned, particularly the judgment of Supreme Court establishing malafides is very heavy on the person who alleges it and the same has been proved by the appellant that citation was not taken in a daily newspaper which is in circulation to the general public and the citation which was taken is a weekly magzine and same will be circulated among the subscribers only and the said admission is given by RW1 and the same has not been properly considered by the Trial Court with regard to the probate proceedings a citation was taken which is not a proper circulation and the same has been circulated among the subscribers, hence the same is not a proper circulation. No doubt the counsel relied upon the judgment of ***Anil Behari Ghosh*** case wherein discussed with regard to the proper citation is concerned in order to invoke Section 263 of the Indian Succession Act and a judicial discretion in the Court to revoke or annulment grant for just cause wherein the appellate Court has taken note with regard to the omission to issue citation to person who should have been appraised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant, but this is not a absolute right

irrespective of other consideration arising from the true facts of a case wherein also observed that we cannot ignore the facts that about 27 years had elapsed after the grant probate in 1921 and not the situation in the case on hand and circulation is only among the subscribers.

35. The counsel also would vehemently contend that there is a latches on the part of the appellant in approaching the Court. But, admittedly it is very clear that the probate was granted in the year 1984 based on the circulation of citation was made in the weekly magzine that it was circulated among the subscribers and the same cannot be a proper citation.

36. This Court would like to rely upon the judgment of the Apex Court reported in ***(2008) 1 Supreme Court Cases 267 in case of Basanti Devi V/s Ravi Prakash Ram Prasad Jaiswal*** wherein also the Apex Court discussed Section 263 of the Indian Succession Act particularly explanation (c) and held that application for revocation of probate, maintainability and locus standi, nature of Section 283(3) and effect of non-compliance therewith, provisions of Section 283(3), held, are mandatory. It is observed that where the deceased left the

properties in two different States but due to non-disclosure of one of them, probate was granted without issuance of citation in that State, held, application for revocation of the probate would be maintainable and non publication of citation can be a ground to revoke the probate, further held, any person aggrieved by the grant of probate and unaware of the proceedings due to non-issuance of proper citations can maintain the revocation application and hence the said judgment is aptly applicable to the case on hand. Since, non issuance of proper citation can maintain the revocation of application and in the case on hand also though citation was taken out and the same was taken in weekly magzine and that too only circulated among the subscribers and the same is not a proper citation. On the second ground also impugned order of the Trial Court is not sustainable in law.

37. The other contention of the appellant's counsel that the Court below has seriously erred in holding that petition filed by the appellant suffers from latches even though the same is within a period of limitation. It is also brought to notice of this Court that the Court below by considering the said issue also

comes to the conclusion that technically the petition is in time, but comes to the conclusion that there is a delay on latches on the part of the appellant and admittedly though probate proceedings was initiated in the year 1983 and the same was granted in the year 1984, for a period of one decade no steps was taken and suit was filed in the year 1996 and no doubt notice was issued in the year 1995 November in terms of Ex.R1 and also reply was given in terms of Ex.R2 and the appellant was also categorically stated that when the suit summons was received, she has verified the records in the year 1997. The petition was filed in the year 1998 and when such explanation is given, the Trial Court committed an error in coming to the conclusion that there is a delay and latches on the part of the appellant and the said finding is also erroneous and though observed that the petition is in time. But, erroneously comes to the conclusion that there is a delay and latches on the part of the appellant. The very approach of the Trial Court is erroneous and when the appellant specifically contend that no proper service and no proper citation was taken out and merely notice was given in the month of November, 1995 and the petition was

filed in the month of January 1998 itself within a period of three years from the date of knowledge also. Hence, the very finding of the Trial Court that there is latches on the part of the appellant is also erroneous and ought not to have made such an observation while dismissing the petition.

38. The other ground is also that RW1 is examined, he was only a power of attorney holder and he also categorically stated that only after becoming power of attorney holder for respondent No.4, he came to know about the proceedings. The power of attorney was issued in the year 1996. He was not having the knowledge of earlier probate proceedings of P and SC No.38/1983 and rightly pointed out that he was not having the knowledge of earlier proceedings also and his evidence would not have been relied upon by the Trial Court. Since, he was not having acquaintance with the facts of earlier case.

39. The other contention that the executant was not in a position to execute Will and he was incapable of execute the same. The counsel for the respondent brought to notice of this Court that though the Will was executed in the year 1973 and he himself has executed the bond in the year 1974 itself. The very

contention that he was not in a position to execute a Will and he was 84 years old and he was not in a physically fit condition and the same cannot be considered in a miscellaneous petition filed for the revocation of the probate as granted in P and SC No.38/1983 and if any observation is made and the same amounts to expressing an opinion on the P and SC 38/2023.

40. The other contention that the appellant was the youngest daughter and she was staying along with the father and the probate was obtained fraudulently by concealing the said facts and the father ought not to have disinherit the daughter who is staying along with him and also she is a widow, the said contention also cannot be considered in this petition and while considering the P and SC No.38/1983 on merits can be considered and if any opinion is formed on that aspect, it amounts to expressing an opinion on P and SC 38/1983.

41. Having considered the material on record, particularly considering no proper service of notice and no production of document for having served the notice and also citation was taken out not in the regular daily newspaper and the same was taken in weekly magzine, that too same will be

circulated to only among the subscribers and the same is not a proper citation as discussed earlier. Regarding other aspect also this Court considered the erroneous approach of the Trial Court with regard to the latches and delay as observed and also evidence of RW1 who was not having acquaintance with earlier proceedings P and SC No.38/1983 and Power of Attorney holder of the year 1996 and his evidence and his evidence is considered. Hence, it is appropriate to set aside the order dated 13.08.2007 passed by the Prl. District Judge, Dakshina Kannada, Mangalore passed in Misc.Case.No.16/1998 and consequently P and SC No.38/1983 is restored by allowing the miscellaneous petition invoking Section 263 of Indian Succession Act and probate granted is hereby revoked. Hence, I answered the point as Affirmative.

In view of the discussions made above, I pass the following:

ORDER

The appeal is ***allowed.***

The impugned order passed in Misc.Case.No.16/1998 is hereby set-aside and consequently the petition filed under

Section 263 of Indian Succession Act by the appellant is allowed and probate granted is hereby revoked. The P and SC No.38/1983 is restored to consider the matter afresh by giving an opportunity to the appellant herein to resist the same. The appellant is given one week time to file statement of objection from 05.10.2023.

The parties are directed to appear before the District Court in P and SC No.38/1983 without expecting any notice on 05.10.2023 and the Trial Court is also directed to dispose of the same within six months from 05.10.2023. The respective counsels and parties are also directed to assist the Trial Court in disposal of the same within a stipulated time.

The Registry is directed to send the records forthwith to enable the Trial Court to take up the matter on 05.10.2023.

Sd/-
JUDGE

RHS