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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.11.2015

Delivered on : 01.12.2015

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN

T.O.S.No.35 of 2011
(O.P.No.712 of 2010)

R.Anandan .. Petitioner/Plaintiff

Vs.

V.Kusala Kumari .. Caveator/Defendant

Prayers: Petitions filed under Sections 222 and 276 of the Indian Succession Act, XXXIX of 1925, for the grant of Probate.

For Petitioner/Plaintiff : Mr.C.Sundaramoorthy

For Defendant : M/s.Kumar and Baskar

J U D G M E N T

O.P.No.712 of 2010 was filed by the Executor of the Will, namely Mr.R.Anandan, praying for the grant of Probate and on receipt of the notice, the third respondent has lodged a caveat and therefore, converted as T.O.S.No.35 of 2011.

2. In the affidavit, it is averred by the petitioner among other things that Thiru.K.M.Sambanda Mudaliar, who was aged about 78 years, left the residence bearing Door No.18,



and did not return home thereafter. Vigorous search was made to trace him and it was unsuccessful and hence, his eldest son, namely Thiru.S.Ramalingam (first respondent in the O.P.) has lodged a police complaint on 04.05.1996 and an F.I.R. in Crime No.831/1996 was registered by J-1 Saidapet Police Station and since the police could not trace him, issued a Non-traceable certificate on 17.05.2003. Wife of Thiru.K.M.Sambanda Mudaliar/mother of Thiru.S.Ramalingam/fifth respondent in O.P.No.712 of 2010, filed O.S.No.7373 of 2005 on the file of the City Civil Court, Chennai, praying for a declaration, declaring that her husband Thiru.K.M.Sambanda Mudaliar, died a civil death and the Suit was decreed on 07.12.2006. It is further stated that Thiru.K.M.Sambanda Mudaliar, while was alive, has executed a Will and Testament dated 23.09.1987, out of his free will and volition, appointing the petitioner as the sole legatee and bequeathed the assets in favour of his two sons, namely Thiru.S.Ramalingam and Thiru.Inbasekaran/respondents 1 and 2 in O.P.No.712 of 2010 and would further state that amount of the Assets which are likely to come into the petitioner's hands, does not exceed in an aggregate sum of Rs.8,24,680/- and prayed for issuance of Letters of Administration with or without the Will.

3. The third respondent in the Original Petition, namely, Tmt.V.Kusala Kumari, on receipt of the notice, lodged a caveat and therefore, it was converted as



T.O.S.No.35 of 2011 and she has filed her written statement stating among other things that there is a clear contradiction made in the petition for probate as well as in the original Will about the execution of the Will. The defendant further pleaded that the Will has not been executed by her father and the complaint as to his alleged disappearance was lodged by his brother, namely Thiru.S.Ramalingam, only on 04.05.1996 and no reasons has been stated as to why he took more than ten days to lodge the complaint from the date of disappearance of his father and further that the disappearance/missing of his father was also not informed to her. The defendant would further contend that in the Suit in O.S.No.7373 of 2006, filed by her mother, none of the other legal heirs as well as the jurisdictional police were arrayed as defendants and along with her, Thiru.S.Ramalingam was arrayed as the defendants and therefore, the Suit is unsustainable. The defendant would further state that no reason has been given for the delay in filing the application for probate and admittedly, the alleged Will came to be executed on 21.10.1991 and the Original Petition was filed in the year 2010 and the delay in filing the Original Petition creates a grave doubt as to the truth and genuineness of the said Will. It is also contended by the defendant that her two brothers and two sisters were made over by some sort of inducement and since she was close to her father, no reason has been assigned in



the Will as to why she has been excluded from conferment of any benefit. It is also contended that she was not even aware of the demise of her mother and in order to deprive her the benefits of the property, other beneficiaries of the Will colluded with each other and the Will is not at all genuine one and the attesting witnesses to the Will also seems to be fictitious and hence, prays for dismissal of the Suit.

4. The following issues are framed for trial and adjudication:

1. *Whether the defendant is entitled for dismissal of the above suit on the basis of the defence raised by her that the other legal heirs were not made as party to the proceedings in the civil suit filed by the defendant's mother in O.S.No.7373/2006 before the Hon'ble XVII Asst. City Civil Court, Chennai for declaration of civil death of their father Late K.M.Sambanda Mudaliar?*

2. *Whether the plaintiff can justify for not filing the above probate immediately after they got the declaration from the Civil Court?*

3. *Whether the plaintiff establishes his case inspite of non-filing of consent affidavit of other legal heirs who want the will to be probated?*



Will dated 21.10.1991 is in existence as pleaded by the plaintiff that another Will dated 23.09.1987 was executed by the deceased?

The following additional issues are also framed for trial:

(a) Whether the Will dated 21.10.1991 executed by late K.Sambanda Mudaliar in favour of plaintiffs 1 and 2, appointing R.Anandan as the Executor, is genuine and valid?

(b) Whether the Will dated 21.10.1991, is surrounded by suspicious circumstances?

5. The Executor of the Will, namely Thiru.R.Anandan, was examined as PW1 and one of the attesting witness, namely Thiru.K.Murugesan was examined as PW2. Exs.P1 and P2 were marked on behalf of the plaintiff. The sole defendant, namely Tmt.V.Kusalakumari examined herself as DW1 and no exhibit was marked on her behalf.

Issue No.1

6. The learned counsel appearing for the plaintiff would submit that the Testator of the Will Thiru.K.M.Sambanda Mudaliar, left his residence on 27.04.1996 and inspite of repeated best efforts, he could not be traced and therefore, his eldest son, namely Thiru.S.Ramalingam has lodged a complaint on the file of J1, Saidapet Police Station, based on which, an F.I.R. in Crime

No.831/1996 was registered and the police has made valiant



efforts to trace him, but he was not traceable and accordingly, issued Non-traceable Certificate under Ex.P3. Wife of Thiru.K.M.Sambanda Mudaliar/mother of the defendant, has also filed O.S.No.7373 of 2006 on the file of the 17th Assistant Judge, City Civil Court, Chennai, praying for a declaration, declaring that her husband suffered civil death and the first respondent in O.P.No.712 of 2010 was arrayed as the defendant and he has also filed his written statement and the said Suit came to be decreed as prayed for on 07.12.2006, marked as Exs.P4 and P5. Insofar as the contention put forward on behalf of the defendant that other legal heirs of Thiru.K.M.Sambanda Mudaliar have not been arrayed as defendants as well as the concerned jurisdictional police, it is the submission of the learned counsel appearing for the plaintiff that it is not at all necessary and if at all the defendant is aggrieved by the Suit decree, nothing prevented her to prefer an appeal by obtaining leave and admittedly, she did not do so and the defendant also did not seriously dispute her father leaving the residence and thereafter did not return and therefore, at this belated point of time, it is not open to her to challenge in that regard. The learned counsel appearing for the defendant would submit that non-impleadment of other legal heirs in the said Suit as well as the jurisdictional police creates grave doubt as to the Will itself and the burden lies heavily on the plaintiff to clear the same and



he has failed to do so.

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7. PW1, in the course of cross examination, would state that after lodging of Ex.P2/F.I.R., the jurisdictional police gave the Non-traceable Certificate/Ex.P3 during the year 2003 and the Suit filed by the wife of Thiru.K.M.Sambanda Mudaliar came to be decreed on 17.12.2006 under Exs.P4 and P5 and he do not know the reason as to why the other legal heirs of Thiru.K.S.Sambanda Mudaliar have not been impleaded as parties to the Suit and he do not know the details of the witnesses mentioned in Ex.P1 Will. The fact remains that disappearance of Thiru.K.M.Sambanda Mudaliar is not in serious dispute and the Suit in O.S.No.7373 of 2006 was filed by none other than the wife of Thiru.K.M.Sambanda Mudaliar/mother of the defendant and in the said Suit, the first respondent in O.P.No.712 of 2010 namely, Thiru.S.Ramalingam, elder brother of the defendant, was arrayed as the respondent and he has filed a written statement not seriously opposing the grant of decree and documents were also marked as exhibits and the Trial Court, on consideration of pleadings, oral and documentary evidence, has decreed the Suit on 07.12.2006. As rightly contended by the learned counsel appearing for the plaintiff that if the defendant is being aggrieved by the said decree, nothing prevented her from filing of appeal after obtaining leave and even otherwise, she should have filed another Suit challenging the legality of the judgment and decree in



O.S.No.7373 of 2006, but she did not do so and therefore, the judgment and decree passed in O.S.No.7373 of 2006 under Exs.P4 and P5 have become final and at this distant point of time, it is not open to the defendant to make a challenge to the said judgment and decree in a collateral proceeding.

8. Therefore, Issue No.1 is answered in negative against the defendant.

Issue No.2

9. It is the submission of the learned counsel appearing for the defendant that though Ex.P1 Will came to be executed on 23.09.1987, the Original Petition was filed only during April 2009 and no explanation whatsoever has been offered as to the belated filing of the Original Petition and therefore, there exist a suspicious circumstance as to the genuineness and validity of the Will. In response to the said submission, learned counsel appearing for the plaintiff would contend that Non-traceable Certificate was filed and marked as Ex.P2 in O.S.No.7373 of 2006 filed by the mother of the defendant and for return of the documents, necessary application was filed before the Court and it was returned and the plaintiff/Executor of the Will has filed the Original Petition for probating the Will and simultaneously the wife of the Testator, namely Thiru.K.M.Sambanda Mudaliar, also filed a caveat before the learned Master to pass an order that her husband suffered civil death and the case filed by her was returned by the



learned Master, vide endorsement dated 15.03.2005, directing her to file a Suit and accordingly the Suit in O.S.No.7373 of 2006 was filed before the City Civil Court, Chennai, which came to be decreed [Exs.P4 and P5] on 07.12.2006 and that is why the delay has occurred.

10. PW1, in the cross examination, would submit that on receipt of Non-traceable certificate under Ex.P3, the petition for probating the Will was filed. A perusal of Ex.P3-Non-traceable certificate would disclose that the seal of City Civil Court was found and taking into consideration the submission made by the learned counsel appearing for the plaintiff that the said document was returned by the said Court pursuant to the order dated 19.02.2006 and the Original Petition came to be filed in the year 2009, this Court is of the view that the delay in filing the petition for probating the Will has been properly and sufficiently explained.

11. ***Therefore, Issue No.2 is answered in affirmative in favour of the plaintiff.***

Issue No.3

12. No doubt, the consent affidavit of other legal heirs have not been filed and it is the case of the defendant that her brother Thiru.S.Inbasekaran and two sisters have been won over by her elder brother. It is to be pointed out at this juncture that notices in the Original Petition have been served on them and they did not choose to



file caveat opposing the grant of Letters of Administration and therefore, they are not interested in opposing the claim of the Executor of the Will, which confers benefits to Thiru.S.Inbasekaran and Thiru.S.Ramalingam. Therefore, this Court holds that non-filing of consent affidavits by other legal heirs would sustain the case of the plaintiff.

13. Hence, Issue No.3 is answered in affirmative in favour of the plaintiff.

Issue No.4

14. The learned counsel appearing for the plaintiff would submit that apart from the Will dated 21.10.1991, marked as Ex.P1, no other Will was executed by Thiru.K.M.Sambanda Mudaliar and it is not even the case of the defendant in the written statement that subsequent to Ex.P1 Will, some other Will came into being. The learned counsel appearing for the defendant is unable to substantiate as to the execution of some other Will other than Ex.P1 Will and there is no question or suggestion is put as to the execution of some other Will by Thiru.K.M.Sambanda Mudaliar.

15. Therefore, Issue No.4 is answered in favour of the plaintiff.

Additional Issue (a)

16. Executor of the Will/plaintiff, in order to prove the Will, has examined one of the attesting witness, namely



Thiru.K.Murugesan as PW2. PW2 would depose that the first respondent in O.P., namely Thiru.S.Ramalingam has worked with him and Thiru.K.M.Sambanda Mudaliar and Thiru.S.Ramalingam came to his house and asked him to come to the Registrar Office for attesting the will and he went to Saidapet Sub-Registrar Office where he saw another attesting witness, namely Veeramani. PW2 further deposed that Thiru.K.M.Sambanda Mudaliar told him about the execution of Will in favour of his two sons and he knows the Testator for the reason that he is the father of the co-employee, namely Thiru.S.Ramalingam. PW1 would further depose that Thiru.K.M.Sambanda Mudaliar signed as first person and thereafter, he signed as first witness and Veeramani was also called to attest the Will. PW2 identified his signature in Ex.P1. PW2 would further depose that subsequently Thiru.S.Ramalingam came with a typed paper and asked him to sign and he signed that paper and though he signed, did not read the contents of the paper and since Thiru.S.Ramalingam requested him to come and give evidence, he has given evidence and a question was put to PW2 that at the time of execution whether the testator was in sound state of mind and he answered that the testator was in sound state of mind.

17. This Court has also perused Ex.P1 Will, which came into being on 21.10.1991 and it is also a registered Will and in the reverse side of the first page of the Will, the



Executor of the Will, namely Thiru.K.M.Sambanda Mudaliar, was not keeping good health or in sound state of mind. It is also pertinent to point out at this juncture that Ex.P1 Will was executed on 21.10.1991 and Thiru.K.M.Sambanda Mudaliar left his residence on 27.04.1996 and as per the judgment and decree obtained by his wife, marked as Ex.P5, his disappearance was declared as civil death. The execution of the Will was also proved by examining one of the attesting witness, namely PW2 and he is very categorical that he was called to the office of the Sub-Registrar by Thiru.K.M.Sambanda Mudaliar as well as his son Thiru.S.Ramalingam to attest the Will and he saw Thiru.K.M.Sambanda Mudaliar signing the Will and thereafter he has attested the Will and Page 2 of Ex.P1 Will would disclose that Thiru.K.M.Sambanda Mudaliar has signed the Will, followed by PW2 and Veeramani. The testimony of PW2 would also disclose that his intention was also to attest the execution of the Will by Thiru.K.M.Sambanda Mudaliar and the said legal requirement has also been proved beyond all probabilities. Therefore, this Court holds that Ex.P1 Will executed by Thiru.K.S.Sambanda Mudaliar is genuine and valid.

20. Therefore, Additional Issue No.(a) is answered in negative against the defendant.



21. As already pointed out, onus of proving is on the propounder to prove that the Will is not surrounded by any suspicious circumstance and the pleadings and evidence of PW1 would amply demonstrate that the execution of the Will by Thiru.K.M.Sambanda Mudaliar was voluntary, to benefit his two sons and the recitals in the Will would also disclose that the testator was fully conscious as to what he was doing clearly stipulating reasons as to why he wants to exclude his three daughters and benefit his two sons. In fact, suspicious circumstances are totally absent. The evidence of DW1 would read that she did not visit her parents after the wedding of her 4th sister and she was not even aware that her father was missing and further claimed that the fact of demise of her mother was not informed to her. DW1 made a crucial admission in the cross examination that she knows the signature of her father and the signature found in the reverse side of page No.1 of Ex.P1 Will is that of her father and she did not know that the first attesting witness and she would further depose that Ex.P1 Will is a false document and it could have been obtained by threat or coercion. The written statement of the defendant coupled with her oral testimony, did not sustain her defence and she has miserably failed to substantiate/probablise her case that Ex.P1 Will is surrounded by suspicious circumstances.

22. Therefore, Additional Issue No.(b) is answered in

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negative against the defendant.



23. In the result:

(i) T.O.S.No.35 of 2011 (O.P.No.712 of 2010) is decreed as prayed for and the Registry is directed to issue probate.

(iii) This Court, taking into consideration the nature of relationship between the parties, is not inclined to award costs.

List of Witnesses:

PW1 : R.Anandan
PW2 : K.Murugesan

DW1 : V.Kusalakumari

List of Exhibits:

Ex.P1 : Copy of the Original Will dated 21.10.1991
Ex.P2 : Certified copy of F.I.R. In Crime No.831/1996 on the file of J1, Saidapet Police Station.
Ex.P3 : Certified copy of Non-traceable Certificate dated 17.05.2003 issued by J1, Saidapet Police Station.
Ex.P4 : Certified copy of Judgment in O.S.No.7373 of 2006
Ex.P5 : Certified copy of Decree in O.S.No.7373 of 2006

sd/.M.S.N.J
01.12.2015

//Certified to be a true copy//

Dated this the day of 2016

R.s/02.2.2016

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