

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03 / 08 / 2016

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

T.O.S. NOS.18 OF 1988  
AND 1 OF 1998

T.O.S.NO.18 OF 1988

Padmavathy Ammal (Deceased)  
J.Santhammal  
(impleaded as plaintiff as per order  
dated 04.12.1995 in A.No.5165 / 1995)  
Plaintiff

..

VS.

1.Rajendrakumar  
2.Vijayakumar  
3.Kalarani  
4.J.Ramu  
5.Ramanamma  
6.Kamala  
(Defendants 4, 5 and 6 impleaded as per  
order dated 12.06.1997 in A.No.982/1997)  
(D5 name is amended as Ramanamma as  
per order dated 15.07.2010  
in A.No.3723/2010)

.. Defendants

**PRAYER:** Petition filed under Section 222 read with Section 276 of Indian Succession Act and Order XXV Rule 4 of Original Side Rules, by the plaintiff, for the following relief:

a) She may be permitted and also allowed to prove the will in common form and that the probate thereof to have effect throughout the whole of Tamil Nadu may be granted to her;

b) To pass such further or other orders as this Court may deem fit.

**T.O.S.NO.1 OF 1998**

Santha Ammal

.. Plaintiff

**VS.**

1.Rajendrakumar

2.Vijayakumar

3.Kala Rani

4.Ramu

5.Kamala

6.Ramanamma

(D6 name is amended as Ramanamma as  
per order dated 15.07.2010 in A.No.3724/2010)

.. Defendants

**PRAYER:** Petition filed under Section 232 read with Section 276 of Indian Succession Act and Order XXV Rule 5 of Original Side Rules, by the plaintiff, for the following relief:

a) She may be permitted and also allowed to prove the will in common form and that the letter of administration thereof to have effect throughout the whole of Tamil Nadu may be granted to her;

b) To pass such further or other orders as this Court may deem fit.

For Plaintiff : Mr.S.Mahimairaj

For Defendants 1-3 : Mr.P.B.Balaji

For Defendants 5 : Mr.K.V.Sundararajan

**COMMON JUDGMENT**

**T.O.S.NO.18 OF 1988**

The original plaintiff had filed a petition under Sections 222 and

276 of the Indian Succession Act, 1995 for issuance of probate with respect to the last will and testament of J.Kannabiran, dated 09.03.1982. The said will is an unregistered one. The testator died on 05.05.1982 at Chennai. The will is said to have been executed by J.Kannabiran in the presence of witnesses, namely S.M.Murugesan and P.Periaswamy. The original plaintiff is the mother of the testator. The defendants 1 to 3 are the children of the testator J.Kannabiran, born through Kamala, who is the sixth defendant. The fifth defendant is the first wife of the testator J.Kannabiran. The fourth defendant is the brother of the testator.

2. According to the original plaintiff, the testator, who was her son, was married to one Ramanamma. There was no issues out of the said marriage. She lived with him for three years and later, the said Ramanamma deserted him. The deceased left behind him his mother - the original plaintiff and the defendants 1, 2, 3 and 6. The sixth defendant was said to have been living with him and through her, he begot three children, namely, defendants 1 to 3. According to the original plaintiff, the testator had executed the unregistered will dated 09.03.1982, bequeathing all the rights in property under the will and appointed the original plaintiff as executor of the same. Hence, the suit is filed for issuance of probate of the will.

3. Caveat petition was filed by the defendants 1 to 3 originally,

based on which, the suit was converted into the present Testamentary Original Suit.

4. The defendants 1 to 3 have filed their written statement denying and disputing the genuineness of the will dated 09.03.1982. The deceased plaintiff namely Padmavathy Ammal, being a propounder of the will is put to strict proof of the execution of the will.

5. According to the defendants, the deceased J.Kannabiran had legally married the sixth defendant Kamala, in accordance with Hindu Rites and Customs, in the presence of his parents and relatives. They were living as husband and wife and the defendants 1 to 3 were born to them out of the wedlock. In fact, the sixth defendant had also filed O.P.No.94 of 1978 on the file of the VI Assistant Judge, City Civil Court, Chennai, for divorce against the deceased J.Kannabiran and obtained a decree for divorce. As the status of the sixth defendant as wife was recognized, the defendants 1 to 3 cannot be termed as illegitimate children. The defendants further contended that the testator was an alcoholic and due to the same, he did not have his mental balance, memory and thinking power. The first defendant also filed a suit in O.S.No.6466 of 1982 for partition. Though the will is said to have been executed on 09.03.1982 and the testator died on 05.05.1982, the Original Petition for probate was filed in

the year 1988. The reason for the delay is not explained, which leads to suspicion. Hence, prayed for dismissal of the testamentary original suit.

6. The fifth defendant, who is said to be the first wife of the testator also had filed a written statement contending that she is the lawfully wedded wife of said J.Kannabiran, who died leaving behind him the fifth defendant as his widow and the mother Padmavathy Ammal, as legal heirs. Hence, the will dated 09.03.1982 alleged to have been executed by the testator is false. Even according to the fifth defendant, the will is not true as the same is forged and fabricated.

7. Based on the above pleadings, the following issues were framed by this Court on 07.02.1997.

*1) Whether the will dated 09.03.1982 is true, valid  
and was executed in a sound and disposing state of mind ?  
and*

*2) to what relief ?*

8. The following additional issue was framed by this Court on 02.09.2010.

*1) Whether the will dated 09.03.1982 was executed by the testator J.Kannabiran in the presence of two or more attesting witnesses in a sound and disposing state of mind ?*

9. The unregistered will of the testator J.Kannabiran was alleged to have been executed on 09.03.1982, bequeathing the only property, to his mother Padmavathy Ammal, who was the original plaintiff, in the Original Petition. The will is said to have been attested by two persons, namely, S.M.Murugesan and P.Periaswamy. Pending the proceedings, the original plaintiff Padmavathy Ammal died on 31.07.1993 and one J.Santhammal, who is the daughter of Padmavathy Ammal, was brought on record. As the said Padmavathy Ammal had executed a will on 07.06.1993, in favour of the said Santhammal, the said P.Santhammal was examined as P.W.1. In her evidence, it is stated that when the testator died, he was 42 years and he did not have any disease and he was keeping good health. Further, it is stated that she did not know that the testator had three children born through Kamala. It was only on the information from her mother, the original plaintiff Padmavathy Ammal, she gained knowledge about the said will. With respect to the execution of the said will, P.W.1, had stated as follows:

*“I deny the suggestion that to deprive the children of Kannabiran and Kamala two wills have been created by*

*me. I did not write any letter but I enquired about the whereabouts of Murugesan the 1<sup>st</sup> attesting witness in Ex.P1. Murugesan children were running a shop Teynampet. I went and enquired whereabouts of their father Murugesan. They said that their father Murugesan left Chennai. I do not know whether Murugesan is alive or not. When I enquired the children of Murugesan. Murugesan was alive. I deny the suggestion that I am not producing Murugesan to prove the Will since his evidence Will establish that Ex.P1 Will is not genuine. The children of Murugesan vacated the shop about ten years back. The 2<sup>nd</sup> attesting witness in Ex.P3 Periyasamy is not alive..... “*

10. From the evidence of P.W.1, nothing could be elucidated about the execution of the will by the testator J.Kannabiran. Even according to her, the second attester is no more and the first attester Mr.Murugesan has already vacated the shop ten years back. It is also stated that the said Murugesan had filed affidavit, but the same was not marked as document. Hence, the same is not taken on file and the same cannot be looked into.

11. Ms.M.Saraswathi, P.W.2, one of the daughters of Shanthammal was examined. The evidence of P.W.2 is also not helpful in the process of

proving the will. P.W.3 had specifically admitted that she was not present at the time of execution of the will Ex.P1, dated 09.03.1982 or Ex.P3 dated 07.06.1993 executed by Padmavathy Ammal. She specifically admits that if Exs.P1 and P3 are not in existence, then, her mother cannot claim any right over the properties. Therefore, the evidence of P.W.3 also is not supportive for the plaintiff to prove the will.

12. According to the learned counsel appearing for the defendants 1 to 3, the will itself is not executed by J.Kannabiran, as he was only 42 years at the time of his death. It is also stated that he was hale and healthy and he died out of the freak accident suddenly. Therefore, the testator would not have a foreseen that he has to even write a will. There is some force in the argument of the defendants, as P.W.1 had admitted that the death of J.Kannabiran was sudden and he was hale and healthy till the date of his death. So, there is no reason or anything that had prompted him to write a will at the said age. The defendants 1 to 3 are the children born to the testator J.Kannabiran and Kamala, who is the sixth defendant.

13. It is contended by the learned counsel appearing for the defendants 1 to 3 that the factum of marriage of the testator with Kamala is

proved, as there was matrimonial proceedings between them, in which, the sixth defendant had obtained an order of divorce in O.P.No.94 of 1978 dated 29.01.1980.

14. In Ex.P1, para 2 reads as follows:

“2.vdf;F kpft[k; njf mbrsfhpaKk;,  
gytPdkhft[k;, cly;epiy nkhrkhf ,Ug;gjhYk; ve;j  
rkak; vdf;F vd;d neUnkh vd;w epiyapy;  
,Ug;gjhYk; vd; \$Ptjpirf;Fg; gpwF vd;  
brhj;Jf;fSf;F xU Vw;ghL bra;a ,e;j capy; !h!dk;  
vGjp itf;fpnwd;.”

This aspect has been disproved even by the evidence of P.W.2 and P.W.3, who admitted that the testator was hale and healthy, even till the date of his death, as the death was sudden. Though P.W.1 had stated that she knows the signature of the testator in Ex.P1 - will, the signature has not been proved in the manner known to law. Even the evidence of P.W.1 and P.W.2, it is stated that they have never seen the execution of the will, but she was present, which is unbelievable. The will is not proved as required under Section 68 of the Indian Evidence Act.

Considering the overall circumstances of the case, the execution of the will itself is un-natural, as the deceased seem to have married Ramanamma and had also married Kamala and lived with her and begot three children. There is no reason given as to why the testator has to disinherit the wife and children.

15. It is quite surprising to believe that a person of 42 years of age, who is hale and healthy and mentally sound, should execute a will in favour of the mother, who is older in age and was not keeping very good health, admittedly, at the relevant point of time. In this regard, the evidence of P.W.1 in the cross examination stated that her mother had a health problem, that is why, the probate was filed belatedly. At another place, she had stated that her mother was in a healthy condition and that she denied the suggestion that even during the cross examination she was repeatedly changing the stand because there was no truth in the deposition given by her. There is absolutely no reason given in the will executed by the testator J.Kannabiran, to disinherit his wife and children. Even if the testator was not on cordial terms with his wife, there is no reason why he should disinherit his children, namely defendants 1 to 3. The unnatural bequest without proof of execution of the will leads to suspicious circumstances. Even after filing of the Original Petition, the attester was available and it is stated that his affidavit was filed in the Court. However, after

it was converted into Testamentary Original Suit, he could not be produced before the Court and examined. There is no justifiable reason given for the same.

16. Since Section 63 of the Indian Succession Act requires a will to be attested, it cannot be used as evidence until as required by Section 68 of the Indian Evidence Act, one attesting witness atleast has been called for the purpose of proving his execution. If any one of the attesting witnesses is alive and he is capable of giving evidence, it is the duty of the propounder to procure him to Court, to speak about the execution of the will. When the suspicious circumstances surround the execution of the will, like the propounder herself taking a lead in the execution of the same or getting a substantial benefit, the duty is cast upon the propounder to clear the suspicion. A mere assertion of the propounder that the signature found on the disputed will is that of the testator will not remove the suspicion. In fact, the presence of suspicious circumstances, makes the onus heavier and therefore, in cases where circumstances attended upon, the execution of the will raises a doubt in the mind of the Court and hence, the propounder of the will must remove all legitimate suspicion, before the document can be accepted, as the last will of the testator. If the defendants / caveators alleges fraud, undue influence, coercion etc., such pleas have to be

proved by him. But, even in the absence of such pleas, the very circumstances, surrounding the execution of the will, may raise a doubt as to whether the testator was acting on his own.

17. In this case, it is not in doubt that the testator was young, hale and healthy. Hence, at the first and foremost, the plaintiff ought to have proved beyond doubt, the reason for the testator to execute a will at that point of time, especially in favour of the mother.

18. In the light of the above discussion, the execution of the will dated 09.03.1982, marked as Ex.P1, has not been proved by the plaintiff, in the manner known to law. Hence, the probate cannot be issued. Accordingly, T.O.S.No.18 of 1988 is liable to be dismissed.

#### **T.O.S.NO. 1 OF 1998**

19. The above Testamentary Original Suit is filed for issuance of probate with respect to the unregistered will dated 07.06.1993, executed by Padmavathy Ammal, who was the original plaintiff in T.O.S.No.18 of 1988. The said Padmavathy Ammal does not get any independent right *de hors* Ex.P1 - will dated 09.03.1982. As the will dated 09.03.1982, marked as Ex.P1, has not been proved in accordance with law, T.O.S.No.18 of 1988 is liable to be dismissed. As

a result of which, T.O.S.No.1 of 1998 is also liable to be dismissed.

20. In fine, both the Testamentary Original Suits are dismissed. No costs.

03 / 08 / 2016

Index : Yes/No  
Internet : Yes/No  
TK

**LIST OF WITNESSES EXAMINED ON THE SIDE OF THE PLAINTIFF**

| <i><b>Sl.No.</b></i> | <i><b>Exhibits</b></i> | <i><b>Description of documents</b></i>                                                        | <i><b>Date</b></i> |
|----------------------|------------------------|-----------------------------------------------------------------------------------------------|--------------------|
| 1                    | P-1                    | Original unregistered will executed by J.Kannabiran                                           | 09.03.1982         |
| 2                    | P-2                    | Original death certificate of J.Kannabiran, who died on 05.05.1982                            |                    |
| 3                    | P-3                    | Original unregistered will executed by Mrs.Padmavathi Ammal                                   | 07.06.1993         |
| 4                    | P-4                    | Original death certificate of Mrs.J.Padmavathi Ammal who died on 31.07.1993                   |                    |
| 5                    | P-5                    | Computer generated copy of the death certificate of P.Periyasamy Nadar who died on 29.01.1998 |                    |
| 6                    | P-6                    | Original death certificate of Y.Narayanasamy, who died on 02.08.2010                          |                    |
| 7                    | P-7                    | Registration copy of the partition deed                                                       | 15.04.1980         |

**LIST OF WITNESSES EXAMINED ON THE SIDE OF THE DEFENDANTS**

| <i><b>Sl.No.</b></i> | <i><b>Exhibits</b></i> | <i><b>Description of documents</b></i>         | <i><b>Date</b></i> |
|----------------------|------------------------|------------------------------------------------|--------------------|
| 1                    | D-1                    | Certified copy of the suit register extract of |                    |

| <i><b>Sl.No.</b></i> | <i><b>Exhibits</b></i> | <i><b>Description of documents</b></i>               | <i><b>Date</b></i> |
|----------------------|------------------------|------------------------------------------------------|--------------------|
|                      |                        | O.P.No.94 of 1978 on the file of City Civil Court    |                    |
| 2                    | D-2                    | Preliminary judgment in O.S.No.7905 of 1983          | 12.03.1990         |
| 3                    | D-3                    | Preliminary decree in O.S.No.7905 of 1983            | 12.03.1990         |
| 4                    | D-4                    | Order in I.A.No.16387 of 1991 in O.S.No.7905 of 1983 | 14.02.1992         |
| 5                    | D-5                    | Order in I.A.No.16387 of 1991 in O.S.No.7905 of 1983 | 17.03.2004         |

**PUSHPA SATHYANARAYANA, J.**

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**T.O.S. NOS.18 OF 1988**  
**AND 1 OF 1998**

**03 / 08 / 2016**