IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **28.11.2016**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

Application No.4921 of 2016
in
TOS No.32 of 2003

N.Mahalakshmi Natarajan .. Applicant

vs

R.V.Natarajan(Deceased)
1. N.Rakesh Balaji
2. N.Suresh Balaji
3. N.Sakunthala (Caveator) .. Respondents

Prayer: Application filed under Order XIV Rule 8 of O.S.Rules r/w Section 151 of the Code of Civil Procedure.

For Applicant : Mr.M.K.Kabir
Senior counsel for
Ms.C.Rekha Kumari

For Respondents : Mr.Chairman Selvaraj
Mr.V.Vasantha Kumar
Advocate Commissioner

ORDER

The second plaintiff in the above Testamentary Original Suit is the applicant, who has filed the above application to eschew the evidence of one S.Baskarapandian, who has been examined as PW2.

2. The Testamentary Original Suit has been filed for probating the last Will and testament of one R.Velusamy Nadar dated 31.01.1996. As the third respondent herein had filed the caveat, the Original Petition filed was converted into Testamentary Original Suit.

3. The above said Will was attested by S.Baskarapandian and V.Dakshinamurthy. As the whereabouts of one of the attestors Dakshinamurthy was not known, it became necessary only to examine the other attestor available viz., S.Baskarapndian. As the said Baskarapandian was very old and was unable to come to Court to depose, an application in A.No.2003 of 2016 was filed for appointing an Advocate Commissioner to record the evidence at his residence. The same was allowed and the Advocate Commissioner visited the residence of the said Baskarapandian to record the evidence. Admittedly, the witness was bed ridden and it was beyond his comprehension to understand what was being spoken to. As the witness was incoherently answering and was not able to recall the past events, further continuation of his evidence had to be abandoned. However, the present application is filed to eschew the evidence of the said Baskarapandian to the extent he was examined.

4. As stated earlier, the other witness whereabouts were not known, the applicant had to depend upon the evidence of PW2-Baskarapandian and as his answers were also incoherent the applicant desired to prove the Will in the manner known to law by examining the scribe or other independent witnesses.

5. The question now, to be determined, is whether eschewing the evidence of PW2-Baskarapandian is possible?

6. The learned Advocate Commissioner appointed by this Court had filed his report wherein in para No.2 he has stated that he was satisfied that the witness is capable of giving answers and then proceeded with recording of his evidence. It is also stated that further after a few questions, he had answered incoherently and he was not even able to recollect his own address.

7. The learned Advocate Commissioner also has filed the proceedings that happened on 20.08.2016. Insofar as the questions that have been asked, the witness seems to have answered relevantly. However the learned Commissioner has stated that later his answers were not coherent and he could not even recollect his address.

8. Learned Senior Counsel appearing for the applicant contended that he has no other go but to eschew the evidence of P.W2. He had also elaborated on the physical and clinical condition of the witness and stated that the said witness, Baskarapandian has been suffering from Alzheimer's and Dementia.

9. The question of eschewing the evidence was dealt with by this Court in the judgment reported in ***(2009) 6 MLJ 677 [D.F.Philips vs. Damayanthi Kailasam and Others],*** wherein it is held as follows:

> "28. There is no provision for eschewing the incomplete evidence of a witness. The evidentiary value or probative value of such evidence is a matter to be considered by the trial Court. Situations would arise where on account of the less favourable answers given in the initial stage of cross examination, the witness may avoid the box on subsequent occasions. In such circumstances, the trial Court is justified in forming an opinion about the probative value of such evidence in the peculiar factual background. In all cases where there was no deliberate attempt on the part of the witness to avoid cross examination, evidence would be admissible but its probative value is a matter to be decided by the trial Court. Merely by avoiding further cross examination, it cannot be said that the entire evidence has to be eschewed from consideration. It is always possible for the Court to examine all the surrounding circumstances

leading to the avoidance of further cross examination and to come to a definite conclusion as to whether it was a deliberate act on the part of the witness. "

10. In view of the above legal position, the evidence of PW2-Baskarapandian is deemed to be closed and cannot be eschewed. However, it is open to the applicant to examine any other witness to prove her case.

11. With the above observation, this application is dismissed.

28.11.2016

vj2

PUSHPA SATHYANARAYANA,J.,

vj2

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