

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **15..12.2016**

CORAM

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

T.O.S.No.15 of 2007

Jayesh B.Dolia

.. Plaintiff

vs

1. Umesh M.Tahilramani (died)
2. Haresh Tahilramani
3. Ms.Usha Sharma

.. Defendants

[2nd defendant is brought on record as the legal heir of the deceased first defendant as per order dated 27.02.2014 in A.No.4665 of 2010.

[3rd defendant is impleaded as per order in A.No.5988 of 2010 in TOS No.15 of 2007 dated 04.02.2015]

For Plaintiff : Mr.R.Shankaranarayanan

For Defendant : Mr.V.Achuthan for D3
D2-No appearance
D1- Died

JUDGMENT

The Executor, originally filed original petition in O.P.No.481 of 2006 to grant probate of the Will dated 03.11.2005 executed by the

testatrix G.Vimala. The husband of the testatrix was shown as the respondent. As caveat was filed by him, the original petition was converted into the above Testamentary Original Suit by order of this Court dated 06.07.2007.

2. The deceased Vimala, who is the testatrix, was a resident of Madras and that she possessed all properties, within the State of Tamil Nadu. She had executed the Will on 03.11.2005. She was married to the first defendant and that they had no children. The parents of the testatrix also pre-deceased her. The testatrix had a strained relationship with the first defendant/husband. Therefore, it is stated that she had made a bequest only towards charities, appointing the plaintiff as an Executor. Hence the plaintiff has sought for a probate.

3. After the original petition was converted into Testamentary Original Suit, the first defendant filed his written statement on 08.10.2007. After the evidence on the side of the plaintiff was over, the learned counsel for the first defendant had made an endorsement to the effect that there is no evidence on the side of the defendant. Thereafter, the matter was posted for arguments. Subsequently, the first defendant died on 12.06.2010. Therefore, the second defendant,

who is the son of the deceased first defendant, through his first wife, is brought on record as the legal heir of the deceased first defendant. The third defendant, who claims to be the wife of the first defendant was impleaded subsequently.

4. The first defendant had stated that the testatrix died out of complications arising out of colon cancer on 09.11.2005 at the Chennai Kaliappa Hospital. Though she was diagnosed of cancer in the year 2002, the onset of secondaries, resulted in her death. The first defendant further stated that even as early as in the year 2004, the testatrix suffered loss of memory as a consequence of the side effects of Chemotherapy and radiation. The first defendant also had stated that there were legal proceedings between the testatrix and himself before the Family Court, Chennai. The deceased had preferred O.P.No.501 of 2003 before the Family Court, Chennai and the same was dismissed, after her death, as abated. It is alleged by the first defendant that as the testatrix was admitted in an Intensive Care, she could not have executed the alleged Will.

5. The first defendant further denied the cause of action of the Will and also the affidavit of the attesting witnesses filed along with the

original petition. The first defendant also had stated that he was not informed of the death of the testatrix and he did not have knowledge till such time, he got to know of the same through newspaper. According to him, as the testatrix was under heavy medication and sedation, the Will has been obtained without her free will and volition. Though the deceased died on 09.11.2005, the original petition seeking probate was filed only on 10.04.2006 and the same was numbered much later and no notice was sent to him. After the death of the testatrix, the first defendant had sold the property bearing Door No.46/5, Kotturpuram, Chennai on 05.02.2007.

6. Based on the above pleadings, the following issues were framed:

1. Whether the impugned Will dated 3.11.2005 said to have been executed by late Mrs.G.Vimala is a true and genuine one?

2. Whether the plaintiff is entitled to grant of probate of the impugned Will dated 03.11.2005 said to have been executed by late Mrs.G.Vimala as prayed for?

3. To what relief, the plaintiff is entitled ?

7. On the side of the plaintiff, PWs.1 to 3 were examined and Exs.P1 to P5 were marked. On the side of the defendant, no oral evidence was let in and Exs.D1 to D3 were marked through the plaintiff's witness.

8. On a perusal of the Will of the testatrix dated 03.11.2005, it is seen that the Will has been attested by two witnesses, viz., K.Balasubramanian S/o.R.Krishnan and secondly, V.V.Subramanian, S/o. V.S.Venkatesan(late). In the Will, it is stated that the first defendant, viz., Umesh Tahilramani had been torturing her in many ways and he never cared for her well being and health. Therefore, the testatrix specifically mentioned that she did not wish to bequeath any property in favour of her husband. She had appointed the plaintiff as the Executor of the Will. The Will contains about six schedules of properties from A to F, which include the movables and immovables. As per the Will, the jewellery including the diamond jewellery and silver articles in the B schedule was bequeathed in favour of Shri Kanchi Kamakshi Amman Temple at Kanchipuram. A trust to be created in the name of G.Vimala Foundation Trust with Mr.S.Gopalan, Mr.R.Jambunathan and Mr. Jayesh B.Dolia as trustees. Only a sum of

Rs.2,00,000/- [Rupees two lakhs only] was given in bequest in favour of the second attesting witness, viz., V.V.Subramanian, as he was the person, who was taking care of her, during her illness in the last six months. The rest of the properties were directed to be utilised for charities, such as mass Upanayanam and marriages and for giving scholarships for deserving poor brahmin students, etc. The Will also mentions about her other charities to be carried on by the said Vimala Foundation Trust. The Will specifically cancelled the previous Wills dated 20.04.1987, 18.05.1991 and 01.02.2004. Therefore, it is stated that this is a last Will and testament of the testatrix. The Will is typewritten and signed by the testatrix at the end of each page of the Will. The witnesses have signed and their name and addresses are given. The probate was filed by the Executor on 10.04.2006 and said to be well within time. The Executor has been examined as PW1, PW2, is one of the attestors viz.,K.Balasubramanian and PW3 is said to be the person, who drafted the Will and the documents Exs.P1 to P5 and D1 to D3 were marked. PW1 Executor has stated in his proof affidavit that the testatrix had executed her last Will and testament on 03.11.2005 bequeathing her movables and immovable properties acquired by her in favour of a Trust, temple and several other beneficiaries through the trust with the intention that the aforesaid

properties could be enjoyed by such beneficiaries after her demise.

9. To implement her wishes, the plaintiff was appointed as an Executor. The original will is marked as Ex.P1 and the death certificate of the deceased testatrix is Ex.P2. The affidavit of assets is marked as Ex.P3. Ex.P4 is the passbook of G. Vimala Foundation Trust and Ex.P5 is the affidavit of one of the attesting witnesses. In the proof affidavit, PW1 has specifically stated that the Will was executed by the testatrix in the presence of two witnesses when she was admitted in Chennai Kaliappa Hospital. However, in the petition inadvertently it has been typed, as if it was written in her residence. It is further stated that the Will was executed by the testatrix with full consciousness and clarity of mind. She knew about the contents of the Will. She did not bequeath any property movable or immovable in favour of her husband as she has suffered a lot during her matrimonial life. She had also filed a petition for divorce on the file of the Principal Family Court, Chennai on the ground of cruelty. She died two days prior to the date of final hearing of the said petition. As the petitioner died, automatically the original petition seeking a personal remedy got abated. PW1 had further stated that the testatrix was normal on 03.11.2005 and was discussing the office problems and had given

directions to solve them. The Will was prepared on her instructions and on reading the same, she expressed satisfaction, since all the terms she wished to state in the Will had been incorporated. She signed the said Will in the presence of two witnesses viz., the Accountant Balasubramanian and her sister's son V.V.Subramanian. Both of them signed the Will in her presence. On 09.11.2005, she died of cardiac arrest. Though the first defendant was informed immediately he did not attend the funeral on 10.11.2005. PW1 has further stated that after 2004, the first defendant did not meet the plaintiff excepting in the Family Court. The testatrix directed to write the Will on 03.11.2005 when she was in the hospital as the final hearing of her divorce petition was listed on 10.11.2005 before the Family Court. During the cross examination, it was suggested to PW1 that Ex.P1 was created using the signed sheet of papers left by the testatrix in connection with litigations, in which the Executor himself had appeared. However the same was denied by PW1 and it is also not the case of the first defendant in his written statement. Though it was suggested to PW1 that after the cremation of the testatrix, the Executor visited her house and terminated the services of the watchman and removed the gold, diamond and other movables, the same was denied by PW1. Though the cross examination runs to more

than 20 pages, nothing has been elicited to cast doubt about the correctness on the statement of the witnesses regarding his knowledge of the testatrix signature and her ability. The entire cross examination was only about the removal of the jewellery and other movables and about the bank deposits.

10. The next evidence was given by one of the attestors as PW2, who is employed as an Accountant with the testatrix. In the proof affidavit of the attesting witness PW2, he has stated that the testatrix had called him to witness the execution on her last Will and sign as an attestor along with her nephew Mr.V.V.Subramanian. Therefore on 03.11.2005, after the office work he went to the hospital wherein the testatrix was admitted. The testatrix after reading the last Will and testament executed the Will in his presence and in the presence of other attestor viz., V.V.Subramanian. At the time of execution and attestation the Executor viz., PW1 and one Mr.Shanmugasundaram PW3 were also present along with Mr.S.Gopalan. It is specifically stated that the testatrix executed the Will after perusing the same in a sound state of mind and was happy that she was bequeathing her properties for charity and told all of them present there that she was not leaving behind any property for

the first defendant as he had been harassing and torturing her for the past few years. In the cross examination of PW2 also, nothing contra has been elicited by the first defendant about the execution of the Will. Even in the evidence of PW2 it has been categorically stated that he was present when the testatrix affix her signature on the Will and thereafter in her presence PW2 attested the Will at the end of the document in the presence of the other witness viz., V.V.Subramanian. PW2 had also stated that the Will was executed only in the hospital in Room No.213. Though the other witness, viz., V.V.Subramanian is available, as it is sufficient that any one of the witnesses can be examined in proof of a Will, the Executor had stated that he had not examined the other witness.

11. In the evidentiary context also Section 68 of the Indian Evidence Act, 1872 enjoins that if a document is required by law to be attested, it would not be used in evidence unless one attesting witness at least if alive, subject to the process of court and give evidence to prove its execution.

12. The third witness is one M.S.Shanmugasundaram, who was examined as PW3. The said PW3 had stated that he had drafted the

Will as per the instructions of the testatrix, based on the photocopy of the earlier Will furnished by her. PW3 has been examined only because he had drafted the Will. He has specifically stated that he had copied from the earlier Will. He only drafted the Will as per the instructions of the testatrix and that he had not put his name in the Will and the words "as drafted by".

13. As stated earlier, the first defendant, who is the husband of the testatrix though had filed caveat and his written statement, after the conversion of the original petition into a testamentary original suit, for the reasons best known, did not chose to examine himself. Having regard to the evidence of PWs 1 to 3, who are the Executor, one of the attesting witness and the person, who drafted the Will, appear to be cogent and all the three witnesses have stated the same with respect to the execution of the Will. Admittedly, the testatrix was in the hospital during the relevant period and even as on the date of execution of the Will, PW1 has already stated that due to inadvertence it has been stated in the plaint that the Will was executed in the house of the testatrix instead of stating that it was executed in the hospital. The criticism levelled against the execution of the Will was not proved by the first defendant.

14. As per section 63 of the Indian Succession Act, 1925 the Will has to contain the signature or mark of the testator and the same should be attested by two witnesses who have seen or received acknowledgement from the testator about his having signed the Will. Only when the attestors are no more, it may be impractical to expect any evidence regarding the testator. But in this case, admittedly both the attestors are there. However, the Executor chose to examine only one attestor, who is not connected with the family. The other attestor viz., V.V. Subramanian is the nephew of the testatrix and may be, that is the reason why he was not examined to prove the Will. The Executor himself being an Advocate practising in this Court, is thoroughly familiar with all the requirements of law and only his junior had drafted the Will on his behalf. The Executor being an advocate with considerable practice in this Court had taken care that the document is attested by two witnesses known to him. There is no contra evidence let in by the first defendant to disprove the same.

15. Insofar as the disposing state of mind of the testatrix, at the time of the execution of the Will, is concerned, though it is stated by the first defendant, only in the written statement that at the time of

execution, the testatrix was in the Intensive Care Unit in the hospital and was not capable of signing the Will, has not let in any evidence to prove the same. The testatrix, who is a woman entrepreneur was capable of knowing what she was doing. It was also stated in the evidence of PW2 that the testatrix had been giving instructions to him, with respect to her companies and how to handle certain matters. It is also stated that as the date of the final hearing for the divorce petition was fixed on 10.11.2005, the testatrix desired to write the Will on 03.11.2005. Therefore in the absence of any proof, contrary in that regard and also having regard to the manner in which the witness of the plaintiff's side were cross-examined and no evidence have been given by the first defendant himself, it could be easily concluded that the testatrix had sound disposing state of mind and was perfectly capable of making the Will on 03.11.2005.

16. The learned counsel for the plaintiff placed reliance on the decision reported in **2001(3) CTC 283 [Corra Vedachalam Chetty vs. G.Janakiraman]**. The relevant paragraphs are usefully extracted as follows:

"25. The testamentary Court is a Court of conscience. It is not a Court of suspicion. It is not the law that, whenever a Will is sought to be proved in the Court, the Court should start with

the presumption that the Will is not genuine, that it is fraudulent and that the person who chooses to probate the Will must remove all such suspicions even they are not unreal. The object of the probate proceedings is not to render the testamentary document ineffective but to make it effective and render the terms of that Will operative. In doing so, the Court has to take note of the fact that the testator is not available to the Court to state as to whether the document in fact was his or her last Will or as to whether he or she had signed the same and whether the attestors had signed receiving an acknowledgment from him about the execution of the Will. It is for that reason that the Courts should be cautious while dealing with the evidence placed before them in relation to the executions and attestation, of the Will as also the disposing state of mind of the testator.

26. This need for caution, cannot be exploited by unscrupulous caveators who choose to cull out imaginary suspicions with a view to prevent the legatees under the Will from claiming the benefit thereunder and to render the last Will of the deceased wholly ineffective. In this context, the conduct of the persons who raise the alleged ground for suspicion is also to be looked at, to know as to how credible are the grounds for suspicions sought to be raised by such persons. In this case, the suspicion is sought to be raised by a person who is keenly interested in making the Will ineffective and whose conduct is far from one which would inspire confidence in truthfulness of his statements."

17. Though the first defendant filed his written statement, had not come forward to prove the same. The denial in the written statement, is a mere denial of convenience and not of any substance.

18. The third defendant, claims right under the Will executed by the first defendant. She claims to be the wife of the first defendant and the details of which, are not relevant here. In the event of the Will dated 03.11.2005 executed by G.Vimala is not proved then the status of the first defendant as the husband of the testatrix remains. In the absence of the Will, if the properties devolve on him by natural inheritance, the first defendant had a chance of inheriting certain properties from his wife, the testatrix. Whereas in this case, as found earlier, the Will executed by the testatrix dated 03.11.2005 is proved to be true and valid, which totally deprived the first defendant of inheriting any property.

19. In such circumstances, any Will written by the first defendant comprising of those properties covered under the Will dated 03.11.2005 executed by G.Vimala, will not be valid. Though the third defendant, claims that a petition has been filed seeking probate of the said Will executed by the first defendant, there is nothing on record to show the same. However, in view of the fact that the Will of G.vimala dated 03.11.2005 is held to be valid, there is nothing for the first defendant to bequeath in favour of the third defendant. The third

defendant is apparently only desirous of asserting a right in the property contending that the Will dated 03.11.2005 was executed under suspicious circumstances, in order to avoid the effect of testamentary disposition made by the testatrix.

20. On a cumulative assessment of the evidence of PWs.1 to 3, I am of the opinion that there is no unexplained suspicious circumstances as alleged, which would warrant denial of probate of Will.

21. In the result, the Testamentary Original Suit is decreed as prayed for and Probate shall be issued to the Executor. No costs.

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vj2

Index : Yes/No

Internet: Yes

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