

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.06.2016

Coram

The Hon'ble Mr. Justice A.SELVAM
and
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.94 of 2016

1.Dr.M.Devaki
2.M.Parameswari .. Appellants
Vs
M.Parasulingam .. Respondent

Appeal preferred under Order XXXVI Rule II of O.S. Rules r/w Clause 15 of the Letters Patent against the order of this court dated 1.12.2015 made in T.O.S.No.5 of 2013. Praying that this court be pleased to grant an order of letters of administration with the will annexed to petitioner as the legatee under the said will dt.7.10.1994 of the said deceased having effect limited to the state of Tamil Nadu.

For Appellants .. Ms.C.S.Monica

For Respondent .. Mr.S.Balasubramanian for
Mr.G.Mohanarangan

JUDGMENT

(Judgment of the Court was delivered by A.SELVAM, J.)

This Original Side Appeal has been preferred against the judgment and decree passed in T.O.S.No.5 of 2003, dated 1.12.2015, by the learned Single Judge of this Court.

2. The respondent herein, as plaintiff, has filed O.P.No.478 of 2011, under Sections 232 and 276 of the Indian Succession Act, 1925 and subsequently converted into T.O.S.No.5 of 2013, wherein, the present appellants have been arrayed as defendants.

3. It is averred in the plaint that the plaintiff is a brother of the defendants and their father's name is G.Munuswamy. On 7.10.1994, the said G.Munuswamy voluntarily executed a Will in favour of the plaintiff in respect of an

immovable property mentioned therein and the same has been registered and subsequently he passed away. Under the said circumstances, the present suit has been instituted for the relief sought therein.

4. In the written statement filed on the side of the defendants it is averred that the relationship mentioned in the plaint is true. But it is false to aver that the deceased G.Munuswamy has voluntarily executed the Will dated 7.10.1994 in favour of the plaintiff. The plaintiff, by way of exercising undue influence and coercion, obtained the Will in question and therefore, the Will in question is not genuine. Under the said circumstances, the plaintiff is not entitled to get the relief sought in the suit.

5. On the basis of the divergent pleadings raised on either side, the learned single Judge has framed as many as five issues and after pondering both the oral and documentary evidence adduced on either side, has decreed the suit as prayed for. Against the judgment and decree passed by the learned Single Judge, the present Original Side Appeal has been preferred, at the instance of the defendants as appellants.

6. The sum and substance of the case of the plaintiff is that the property mentioned in the plaint is the absolute property of G.Munuswamy, who is none other than the father of the plaintiff and defendants and he voluntarily executed the Will dated 7.10.1994 in favour of the plaintiff and the same has been duly attested and subsequently registered and since he passed away subsequently, the same has come into effect. Under the said circumstances, the present suit has been instituted for the relief sought therein.

7. The main defence put forth on the side of the defendants is that the Will dated 7.10.1994 has not been executed in sound disposing state of mind by the executant and the same has been obtained by using undue influence and coercion and further, no proper attestation has been made and therefore, the plaintiff is not entitled to get the relief sought in the plaint.

8. The learned single Judge, after considering the rival contentions put forth on either side, has decreed the suit as prayed for.

9. The learned counsel appearing for the appellants/defendants has repleatedly contended that the Will dated 7.10.1994 has been marked as Ex.P1 and for the purpose of proving the due execution as well as attestation, on the side of the plaintiff, one Krishnan has been examined as P.W.2 and his specific evidence, during the course of cross-examination, is

that he has not filed any proof affidavit and further, in his evidence he has stated to the effect that he put his signature in the Will as first witness; whereas, in the Will dated 7.10.1994, his signature is found place in the second place and further, no identifying witness is found place for the purpose of proving registration and in fact, the case of the plaintiff is fully infested with vital infirmities and the learned single Judge, without considering the infirmities found in the case of the plaintiff, has erroneously decreed the suit and therefore, the judgment and decree passed by the learned single Judge are liable to be set aside.

10. The learned counsel appearing for the respondent/plaintiff has also equally contended that for proving the due execution as well as attestation of the Will dated 7.10.1994, P.W.2 one of the attesting witnesses has given clear evidence and even though, some flimsy contradictions are available in his evidence, by way of relying upon his evidence, the Court can easily discern that the plaintiff has proved the due execution as well as attestation of the Will dated 7.10.1994 and further, the remaining sisters of both the plaintiff and defendants have also given consent to execute the Will dated 7.10.1994, in favour of the plaintiff and the learned single Judge, after considering the overwhelming evidence available on the side of the plaintiff, has rightly decreed the suit and therefore, the judgment and decree passed by the learned Single Judge do not require interference.

11. It is an admitted fact that the property in question is originally belonged to the father of both the plaintiff and defendants. The consistent case put forth on the side of the plaintiff is that before his demise, in a sound and disposing state of mind, he voluntarily executed the Will dated 7.10.1994 and the same has been marked as Ex.P1.

12. It is an archaic principle of law that as per Section 68 of the Indian Evidence Act 1872, unless one of the attestors is examined for the purpose of proving the due execution as well as attestation, a particular Will cannot be treated as evidence.

13. In the instant case, for the purpose of proving the due execution as well as attestation, one of the attestors by name Krishnan has been examined as P.W.2. In fact, this Court has perused the proof affidavit filed by him, wherein it has been clearly stated to the effect that the deceased G.Munuswamy has executed the Will dated 7.10.1994 and he put his signature, and after his signature, the said Krishnan and other attesting witnesses have put their signatures.

14. It is true that during the course of cross-examination he would say that immediately after execution of the Will dated 7.10.1994, he put his signature.

15. The learned counsel appearing for the respondent/plaintiff would contend that P.W.2 is an octogenarian and due to his anility, he might have given such kind of evidence and the same has also been considered by the learned single Judge.

16. It is seen from the records that at the time of giving evidence P.W.2 has attained the age of 80. Since P.W.2 has attained age of 80, in his evidence some flimsy contradictions are available. But at the same time, by way of relying upon the entire evidence given by him, the Court can easily come to a conclusion that he has seen the signature of the executant of the Will dated 7.10.1994 and subsequently, he put his signature.

17. As adverted to earlier, as per Section 68 of the Indian Evidence Act, 1872, for the purpose of proving the due execution as well as attestation of a Will, one of the attesting witnesses has to be examined. In the instant case, as stated supra, P.W.2 has given necessary evidence so as to comply with the conditions mentioned in Section 68 of the Indian Evidence Act, 1872. Since P.W.2 has complied with the conditions mentioned in Section 68 of the Indian Evidence Act, 1872, there is no incertitude in coming to a conclusion that on the side of the plaintiff, Ex.P1, the Will dated 7.10.1994, has been clearly proved.

18. On the side of the appellants/defendants it has been contended to the effect that the Will dated 7.10.1994 has been obtained by way of exercising undue influence and coercion on the part of the plaintiff.

19. It is a settled principle of law that the plea of undue influence has to be proved by a party who pleads the same. But in the instant case, even though such a plea has been raised, no acceptable evidence is available on the side of the defendants. Under the said circumstances, the plea of undue influence and coercion raised on the side of the appellants/defendants cannot be accepted.

20. It has already been pointed out that the Will dated 7.10.1994 has been marked on the side of the plaintiff as Ex.P1. For the purpose of proving the same, as per law, P.W.2 has given trustworthy/acceptable evidence. On the basis of evidence given by P.W.2, it has already been pointed out that the Court can

easily come to a conclusion that on the side of the plaintiff, the due execution as well as attestation of Ex.P1 have been proved.

21. The learned single Judge, after analysing the evidence given by P.W.2 in a proper manner, has rightly found that Ex.P1 has been proved on the side of the plaintiff. In view of the foregoing enunciation of both factual and legal aspects, this Court has not found any force in the contentions put forth on the side of the appellants/defendants and altogether the present Original Side Appeal deserves to be dismissed.

In fine, this Original Side Appeal is dismissed with costs. The judgment and decree passed in T.O.S.No.5 of 2013, by this Court, are confirmed.

MEMORANDUM OF COSTS

Appellants() Costs	Rs. P.
Stamp for Vakalatnama	10.00
Batta and Postage	--
Translation and Printing/Typing charges	nil

	10.00

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

+1cc to Mr.C.S. Monika, Advocate, S.R.No.32962
+1cc to Mr.G. Mohanarangan, Advocate, S.R.No.32062

EV(CO)
EU(12/07/2016)

O.S.A.No.94 of 2016