

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	<i>Delivered on</i>
09.12.2016	20.12.2016

CORAM:

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

T.O.S.No.97 of 2013 in
(O.P.No.485 of 2013)

1. G.Lakshmi

2. G.Gayathri

.. Plaintiffs

Vs.

1. U.Saraswathi

.. Defendant

Original Petition No.485 of 2003 was filed under Sections 232 and 276 of Indian Succession Act, XXXIX of 1925 for the grant of letters of Administration with Will annexed. As per order of this Court dated 1.10.2013 in O.P.No.485 of 2013, the Original Petition No.485 of 2013 was converted into Testamentary Original Suit No.97 of 2013.

For Plaintiffs .. Mr.K.P.Gopalakrishnan

For defendant .. Mr.Manoj Sreevatsan

J U D G M E N T

The petition originally filed for the grant of Letters of Administration has been converted as suit in view of the caveat filed by the defendant herein.

2. The brief facts of the plaintiffs' case may be stated as follows:

The plaintiffs are the daughters of Ganesan, who is the brother of one Pattammal, who is the testatrix. The said Pattammal left a Will dated 6.3.2005 bequeathing the suit property in favour of her brother Ganesan. The suit property was purchased in the name of said Pattammal, who is the binami of her brother Ganesan. The beneficiary Ganesan was in fact paying taxes to the suit property from the date of its purchase, in the name of Pattammal. During the life time of the said Ganesan, he has executed a Settlement Deed in favour of the plaintiffs on 20.11.2009. After that, he died on 9.4.2010, leaving behind the plaintiffs as legal heirs. As the original Will was not immediately available, the Letters of Administration could not be obtained earlier. Hence the suit is filed for grant of Letters of Administration for administering the property covered under the Will of Pattammal.

3. The sole defendant, denying the allegations contained in the plaint, submitted that the suit property was purchased by her mother Pattammal out of her own funds received from the sale proceeds of the ancestral property. The defendant is not aware of the execution of the alleged Will dated 6.3.2005. The allegation that Ganesan purchased the suit property out of his own income is also denied. The said Ganesan being the maternal Uncle of the defendant used to quarrel

with the defendant's mother and used to bring all sorts of threat and used to obtain blank signature not only from the mother of the defendant, but also the defendant. Since the defendant and her mother have no support of any male member in their family to protect the harassment made by the said Ganesan, they do not prefer any police complaint against him, keeping in mind the dignity of their family in mind. The said Ganesan was the Sub Registrar. By using his official influence in the Department, he has got out the Will. It is also submitted that the plaintiffs have no right to file an application for Letters of Administration. As the original beneficiary has not filed any application for grant of probate or letters of administration during his life time, she prayed for dismissal of the suit.

4. On the basis of the above pleadings, the following issues are framed:

(i) Whether the Will dated 6.3.2005 stated to have been executed by Tmt.Dharmambal alias Pattammal is genuine and valid?

(ii) Whether the plaintiff is entitled to a decree for Letters of Administration with the Will annexed?

(iii) Relief and cost.

5. Learned counsel appearing for the plaintiffs has submitted that Ex.A.1, the Will dated 6.3.2005 is the registered one and the signature of the testatrix is also clearly established and the second plaintiff and the defendant are the attesting witnesses in the above Will. The second plaintiff was examined as P.W.1. She has categorically stated about the signature of the testatrix and also the attestation. D.W.1 in the cross-examination also has not denied the signature of the testatrix in the Will. In fact, she has admitted the Will executed by Pattammal. Therefore, it is the contention of the learned counsel that the allegation of fraud, undue influence and coercion, as set out in the written statement, has not been established. The burden to establish the said allegation by the defendant is not discharged and no suspicious circumstances, whatsoever pleaded as to the Will, are available in the present case. In the absence of any suspicious circumstances, the genuinity of the Will is proved and therefore the registered Will has to be given credence and it has to be admitted. The testatrix died after four years of the execution of the Will. These facts clearly establish that the Will has been left by the said Testatrix, namely Pattammal. It is the further contention of the learned counsel that the plaintiffs are setlees from their father, who was the original beneficiary under the Will. They are entitled to grant of Letters of Administration of the Will left by Pattammal and hence the plaintiffs prayed for a decree of grant of Letters of Administration.

6. Countering the argument made by the learned counsel for the plaintiffs, it is the contention of the learned counsel for the defendant that the so called alleged Will Ex.P.1 dated 6.3.2005 has been registered only on 19.4.2005. Having obtained the signature of the testatrix on 6.3.2005, there was no reason whatsoever for producing the same for registration with inordinate delay, whereas P.W.1 in her evidence clearly has spoken about the fact that very next day, the Will has been registered before the Registrar Office . These facts clearly show serious doubt about the execution. It is the further contention of the learned counsel that the conduct of the original beneficiary Ganesan in not obtaining either probate or letters of administration during his life time, creates serious doubt about the Will itself. The plaintiffs being the propounder of the Will have to remove all the suspicious circumstances and also the circumstances, which are inherent, doubtful about the testamentary capacity of the testatrix. The recitals in the Will are virtually self-explanatory that she is the benami of Ganesan, as the recitals itself will clearly indicate that the Will has been brought out by force. Without the original Will being probated, the settlement executed in favour of the plaintiffs is not valid in law. The beneficiary Ganesan was in fact on dominant position to dominant the Will of her sister. These facts clearly indicate that the Will has been fabricated at a later point of time and there was no free Will on the part of the testatrix. It is the further contention of the learned counsel that execution and attestation of the said Will has not

at all been established. P.W.1 in her entire evidence has not spoken about the execution as well as attestation of the said Will. In the absence of proof of attestation, as contemplated under section 63(c) of the Indian Evidence Succession Act as well as Section 3 of the Transfer of Property Act, mere signature of the testatrix in the Will will not prove the valid execution and attestation. It is further submitted that the Will has not been proved and the same is surrounded with serious circumventing circumstances and hence the suit is not maintainable. In support of his argument, he has relied upon a judgment reported in **AIR 1959 SC 443 (H.Venkatachala Iyengar vs. B.N.Thimmajamma and others) and (1995) 6 SCC 213 (Kashibai vs. Parwatibai).**

7. In the light of the above submissions, this Court has to answer the issue Nos.1 and 2.

Issue Nos.1 and 2: The plaintiff originally filed an application for grant of Letters of Administration and the same has been converted into Testamentary Original Suit, in view of the caveat lodged by the defendant. The plaintiffs are the daughters of one Ganesan, who was the original beneficiary under Ex.P.1 Will dated 6.3.2005, which is said to have been executed by Dharmambal @ Pattammal. It is also not disputed that the plaintiff is claiming right on the basis of Settlement Deed executed by the said Ganesan, who is the father of the plaintiffs on 20.11.2009. It is to be noted that before establishing right under

Ex.P.1 Will, the said beneficiary Ganesan has transferred the property in the name of the plaintiffs by virtue of the Settlement Deed executed in their favour on 20.11.2009.

8. Be that as it may. Now the plaintiffs seek grant of Letters of Administration on the basis of Ex.P.1, which is said to be the last Will and testament of the late Dharmambal @ Pattammal in favour of their father Ganesan.

9. It is well settled that the propounder of the Will has to prove the execution as well as attestation of the Will before the Court of law. Attestation and execution are two different acts, one following the other. Only when the two acts as contemplated under section 63(c) of the Indian Succession Act and Section 3 of the Transfer of Property Act are complied with, the Will is said to be proved in a manner known to law. There can be no valid execution of the document, which under the law is required to be attested, without the proof of its due attestation and if due attestation is not proved, mere signature of the testatrix in the alleged Will is of no avail.

10. It is useful to refer Section 63 (c) of the Indian Succession Act and the same reads as follows:

"(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

11. It is also useful to refer Section 3 of the Transfer of Property Act, which reads as follows:

"3. 'attested', in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

12. From the above provisions of law, it is very clear that both execution as well as attestation has to be proved, for the proof of the Will in a Court of law. In the above background, if the evidence adduced on the side of the plaintiffs is carefully analyzed, this Court is unable to find any evidence to prove either execution as well as attestation. In chief-examination of P.W.1, who is said to be one of the attesting witnesses in the Will, she never stated about the signing of the Will by the testatrix in her presence and the attesting witnesses have seen the testatrix signing the Will and the Testatrix also seen the attesting witnesses signing in her presence. Absolutely there is no evidence whatsoever to prove not only execution but also attestation. Except the mere statement to the effect that the testatrix left the Will dated 6.3.2005, she never stated in chief examination as to the signature of the testatrix in their presence and they also signed in the presence of the testatrix. The above evidence would not prove the attestation, as contemplated under section 63(c) of the Indian Succession Act and Section 3 of the Transfer of Property Act. Of Course Ex.P.1 is a registered Will. It is to be noted that according to the plaintiffs, the Will is said to be executed on 6.3.2005, whereas the same has been registered on 19.4.2005, after a long delay. It is to be noted that in the Registrar Office, the testatrix has signed the document during lunch hours, as could be seen in the endorsement found in the original Will. The identifying witnesses, who signed in the Registrar Office, are one Kothandaraman and Jayam. Both are

husband and wife. Mr.Kothandaraman is none other than P.W.1's maternal uncle. The same has been admitted by her in cross-examination. Having attested the Will as early as on 6.3.2005, either P.W.1 or another attesting witness, who is the defendant herein, have not accompanied the testatrix to the Registrar office on 19.4.2005. It is an admitted fact that Ganesan, the original beneficiary under the Will was working as Sub Registrar in the Registration Department for some time.

13. The conduct of getting the Will registered, that too, during lunch hours in fact, creates some doubt. This doubt is further fortified by the admission of P.W.1 in the cross-examination to the effect that Ganesan only took the testatrix to the Registrar Office and in fact, the Will itself was brought to the house by the said Ganesan to the house at Nadhamuni Street in T.Nagar. The above evidence of P.W.1 clearly proves the fact that the so-called beneficiary Ganesan took prominent role not only in typing the contents of the Will and getting it signed in the house of the testatrix, but also in taking her to the Registrar office for registration.

14. Further, the doubt with regard to getting the Will registered during lunch hours, is further fortified from the recitals of the Will. The entire recitals of the Will show as if the property stood in the name of of Pattammal, who was the benami of Ganesan and

further the entire amount has been paid by Ganesan for the purchase of the property. It is to be noted that no one is entitled to claim such peculiar right, after the advent of the The Benami Transactions (Prohibition) Act, 1988. But the fact remains that the recitals clearly show that in fact he was in the position of dominating the Will of his sister. Even assuming the recitals found in the alleged Will are true, the same clearly indicate the fact that because of such understanding between the parties, he was in dominant position over her sister. These facts coupled with registration of the document in the Registrar Office during the lunch hours, that too in the presence of the close relatives as identifying witnesses, the entire evidence is doubtful. The testatrix's execution of the Will has not been proved. Even as per the Will, the testatrix was aged about 77 years. When a document is executed by an aged and infirm person, the sound and disposing state of mind of the said person to execute such transaction has to be proved so as to establish that the transaction is a bona fide one.

15. Admittedly, the said Ganesan was in a dominant position. In fact, he has contributed amount for the purchase of the property and he was in an active confidence at the relevant time. Therefore, the burden lies on the persons taking the benefits from such transaction to show that transaction was bona fide and done in good faith. In the given case, Ganesan has not taken any steps during his life time to prove the Will, whereas his legal heirs now seek to prove

the Will based on the Settlement Deed executed by the said Ganesan. Therefore, the burden equally lies on them to show that the testatrix had testamentary capacity at the relevant time while executing the Will. The entire evidence of P.W.1, who is said to be one of the attesting witness of the Will, does not show the testamentary capacity of the testatrix at the relevant time. P.W.1 has not even spoken in her evidence that the testatrix was in a sound and disposing state of mind at the relevant time while executing the Will. Besides, she has also not spoken, as discussed above, either as to the attestation as well as execution of the Will by the testatrix. Therefore, this Court is of the view that the Will has not been proved as per law.

16. Though it is pleaded by the plaintiffs to the effect that one of the attesting witness of the Will is none other than the defendant herein, it is to be noted that the sole defendant, who is the only daughter of Dharmambal @ Pattammal, totally denied the signature in her cross-examination. The sole defendant has been examined as D.W.1 and she has totally denied the execution of the Will. In fact, in cross-examination, she has not only denied the Will, but also the signature said to be belonged to D.W.1 and no further steps whatsoever have been taken by the plaintiffs to confront the evidence of the so-called another attesting witness, viz., the defendant in the manner known to law. Even assuming D.W.1 has purposely denied the signature in the Will, the same could have been proved by other mode

by comparison of her signature with admitted signature of D.W.1 by taking aid of experts.

17. It is well settled law that once the signature itself is denied by the party, the other side has to prove its execution. In the given case, absolutely there is no evidence whatsoever available on record to show that D.W.1 was another attesting witness in the will.

18. Having regard to the above facts and available evidence adduced by both sides, this Court is of the view that Ex.P.1, Will has not been proved in a manner known to law. Though the contention of the learned counsel for the plaintiffs is that ever since the purchase of the suit property in the year 1973, in the name of Pattammal, only Ganesan was looking after the property and paying the tax, but, no document whatsoever was filed on that regard. Whereas, Ex.D.2 and D.3, Property Tax receipt and Water Tax receipt, clearly show that the defendant has paid the property tax and Water Tax to the Corporation. Except the Death Certificates and Ex.P.1, no other documents whatsoever filed by the plaintiffs to substantiate their allegation that their father was all along maintaining the property from the year 1973. At any event, Ex.P.1, Will has not been proved as per law.

19. In this regard, it is useful to refer to the judgment reported in **AIR 1959 SC 443** (H.Venkatachala Iyengar vs.

B.N.Thimmajamma and others), wherein the Hon'ble Supreme Court in paragraph No.19 has held as follows:

"19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills, the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated."

20. In **(1995) 6 SCC 213** (Kashibai vs. Parwatibai), in paragraph No.10, the Hon'ble Supreme Court has held as follows:

"10. This brings us to the question of the Will alleged to have been executed by deceased Lachiram in favour of his grandson Purshottam, defendant 3. Section 68 of Evidence Act relates to the proof of execution of document required by law to be attested. Admittedly, a Deed of Will is one of such documents which necessarily require by law to be attested. Section 68 of the Evidence Act contemplates that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. A reading of Section 68 will show that 'attestation' and 'execution' are two different acts one following the other. There can be no valid execution of a document which under the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the fact of execution is of no avail. Section 63 of the Indian Succession Act, 1925 also lays down certain rules with regard to the execution of unprivileged Wills. Clause (c) of Section 63 provides that the Will shall be attested by two or more witnesses, each one of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark or the signature of such other person; and each of the witnesses should sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary."

21. In the light of the aforesaid judgments, evidence and as discussed above, this Court is of the view that Ex.P.1 has not been established and proved in the manner known to law. Therefore, the plaintiffs' prayer for grant of Letters of Administration has to fail. Accordingly, the issue Nos.1 and 2 are answered against the plaintiffs.

22. Issue No.3: In view of the discussions held in respect of issue Nos.1 and 2 and failure to establish the Will Ex.P.1 as per law, the plaintiffs are not entitled to any relief as prayed for.

23. In the result, the **Testamentary Original Suit is dismissed**. However, considering the relationship of the parties, there shall be no order as to costs.

20.12.2016

Index:Yes/no

ajr

N.SATHISH KUMAR.J.

Ajr

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