

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.02.2017

Pronounced on : 14.02.2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

A No.7245 of 2014 in T.O.S.No.6 of 2012

C.Jaichander

.. Applicant

vs.

1. E.Rajalakshmi
2. J.Girija
3. M.Jayalakshmi
4. K.Varalakshmi
5. J.Venkataramana
6. V.Baghyalakshmi
7. A.Sekar
8. K.Azhaguraman

.. Respondents

Prayer : Application filed under Order XIV Rule 8 of Original Side Rules 1956 read with Order VII Rule 11 and Section 151 of CPC seeking to dismiss the Testamentary Original Petition as barred under the law of limitation and on the ground of waiver and abandonment of the alleged claim.

For Applicants : Mrs.Chitra Sampath, Sr. Counsel
for T.S.Baskaran

For respondents : Mr.K.V.Babu - R1
Mr.A.R.Karuna Kannan - R7

O R D E R

This application is filed to reject the testamentary suit transferring O.P.No.6 of 2013.;

2. The brief facts leading to filing of this application is as follows :

The respondent/plaintiff filed Original Petition for grant of Letters of administration on the basis of the Will dated 09.07.1995 left by one Bhagyalakshmi said to be the mother of the applicant herein. Initially, the applicant did not know the execution of the Will. Thereafter on 02.03.1996, he became aware of the Will through the letter of one Ashok Menon. Immediately, the applicant raised the dispute as to its genuineness and validity of the Will besides, he also approached the City Civil Court by filing a suit in O.S.No.7861 of 1996 for the relief of permanent injunction. In the above suit, the respondent/plaintiff has filed a written statement stating that she was not claiming any right under the alleged Will and the suit has been dismissed as against her. The applicant has also filed caveat against the respondent and her family and also the executors named in the alleged Will before this Court as early as on 22.05.1996. But no steps were taken to obtain probate of the alleged Will by the executors or legatees under the alleged Will. When the applicant was helping the mother of the respondent in dispensing their

half share in the property, the respondent has become avaricious and filed suits one after the other against her mother J.Girija claiming a share in the property belonging to her mother. In another suit in O.S.No.2521 of 2008 on the file of the City Civil Court, Chennai, she has admitted that the applicant has succeeded the properties of his mother. However in another suit, C.S.No.962 of 2008, the respondent has referred to the alleged Will. In another suit in C.S.No.182 of 2008 on the file of this Court, she sought to assert her claim under the Will of Bagyalakshmi.

3. The respondent though have knowledge of the alleged Will as early as in the year 1996, she has not chosen to approach this Court to obtain Letters of Administration. No notices were also executed to executors or Ashok Menon to act in terms or to produce the original Will before this Court. The respondent has knowingly abandoned or waived her right against the Will and kept quite for more than 13 years. She has colluded with the alleged executrix and with Ashok Menon to create a proceedings as though the original Will is not traceable. Consequently she has already filed an application in A.No.3834 of 2013 to lead secondary evidence and the same is pending consideration. The respondent has taken several applications one after another as though she is trying to take steps to produce the original Will in this Court. Hence, it is the contention of the applicant that the alleged original Will is not in existence at all and it is absolutely a

fraudulent document. Therefore, the contention of the applicant is that the present proceedings for Letters of Administration is liable to be rejected without any further enquiry. Hence, application filed to dismiss the Testamentary suit as barred by limitation and on the ground of waiver and abandonment on the part of the respondent.

4. Brief Contentions of the counter filed by the respondent :

Denying the entire allegations, it is the contention of the respondent that he has filed a original petition in O.P.No.913 of 2010 for grant of Letters of Administration in her favour as a legatee under the Will dated 09.07.1995 executed by her maternal aunt Dr.C.Baghyalakshmi in respect of certain immovable properties covered under the said Will bequeathing to the respondent. The applicant herein filed caveat and therefore, the Original Petition has been converted as that of a Testamentary suit. Issues are framed in the suit and the suit itself is ripe for trial. It is the contention of the respondent that she has filed an application in A.No.693 of 2003 for issue of citation to the executors who have been appointed under the said Will dated 09.07.1995 and necessary notices were also issued on various dates calling upon them to produce the original Will. The executors have not taken any steps to collect the original Will from the said Ashok Menon, who was holding the custody of the Will dated 09.07.1995.

Thereafter, pending the above proceedings, the respondent has received a copy of a petition alleged to have been filed by an Executor Sekar in Diary No.18777 of 2011 on the file of this Court for grant of probate of the Will dated 09.07.1995 executed by the Testatrix Dr.C.Bagyalakshmi. On verification of the records, such papers were returned by the Registry on 15.06.2011 for compliance and thereafter, the same was not represented. The respondent also sent a letter to the said Sekar. No reply whatsoever has been received nor any information has been received about the numbering of the said O.P. Left with no other option, she has filed an application seeking appropriate directions for production of the Will by the the executors and also by the advocate Ashok Menon. In the present O.P. She has filed various application for appropriate direction to the executors as well as to the Advocate Ashok Menon. Pending adjudication in those application, the present application has been filed by the applicant to dismiss the O.P. as barred by law of limitation. It is the contention of the respondent that the original will also made known to the applicant by the Advocate Ashok Menon. Immediately after seeing the Will, he has filed a suit in 7861 of 1996. Since the executors have not filed any application for probate, the respondent was forced to present the proceedings for grant of Letters of Administration. Since the executors did not perform their part of their obligation, the above O.P. was filed by the respondent. She never abandoned or waived her right in the said Will.

She has initiated various proceedings against the executors for production of the original Will. Except the respondent, the executors of the Will and the other legatees know rights of the applicant under the Will. Hence, prayed for dismissal of the application.

5. The learned counsel appearing for the applicant has submitted that the Will dated 09.07.1995 is an unregistered Will and the Original Petition for grant of Letters of Administration has been filed only in the year 2009. No reasons whatsoever has been stated for the delay in filing the Original Petition. In the year 1996, the respondent/plaintiff has waived and abandoned her right over the properties which was the subject matter of the alleged Will dated 09.07.1995. In the written statement filed by her in a previous proceedings, she has admitted that she is not claiming any right over the property under the Will. She is also aware of the fact that the applicant denied the existence of the Will. Therefore, it is the contention of the learned counsel that right to apply for Letters of Administration actually arose in the year 1996. The plaintiff ought to have filed the application within 3 years from the year 1996. Whereas, this proceedings has been initiated only in the year 2009. The original Will was also not produced. Now the respondent has also filed an application to receive the copy of the Will as secondary evidence. Earlier proceedings clearly indicate that the respondent has in fact dishonoured or abandoned her right

in the alleged Will. Hence, submitted that the probate proceedings initiated after a lapse of 14 years without any sufficient reason is not maintainable and barred by limitation. In support of his arguments, he has relied upon the judgement of the Honourable Supreme Court reported in **2008(8) Supreme Court Cases 463 (Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others)**.

6. Countering the submissions of the learned senior counsel, it is the contention of the learned counsel for the respondent that the applicant is also aware of the existence of the Will. In fact, the factum of existence of the Will left by his mother was informed to him by the advocate and two executors who were appointed in the Will. The respondent was under the impression that the executors will file an application for probate. Though one of the executors filed an application for probate in D.No.18777 of 2011, subsequently there was no representation of the said application. Despite the several steps taken by the plaintiff/respondent, the executors did not take any action to get the Will probated. Similarly, neither the executors nor the Advocate Ashok Menon produced the original Will. Therefore, the respondent/plaintiff had no other option except to approach this Court for seeking probate of the Will left by the said Bagyalakshmi. She has also sought permission to adduce secondary evidence as the original Will has not been produced by the executors as well as by

the advocate, who was having the custody of the Will. The delay in filing the application by the respondent/plaintiff is not due to deliberate act on her part. Only when the executors did not file an application and failed to produce the original Will, she has filed an application for probate in the year 2009. Therefore, it is the contention of the learned counsel that the delay was properly explained in the application itself. Hence, in order to avoid the trial, the applicant has filed this application to dismiss the suit which is not maintainable in law. In support of his arguments, he also relied upon the judgments reported in **AIR 1991 Madras 214(1) (S.Krishnaswami Vs. E.Devarajan and others; 2008(8) Supreme Court Cases 463 (Kunvarjeet Singh Khandpur vs. Kirandeep Kaur and others); 2009(11) Supreme Court Cases 537 (Krishan Kumar Sharma Vs. Rajesh Kumar Sharma) and 2016(1) CTC 257 (S.R.Ragunathan Vs. M.S.Krishnan SC for M.Balasubramanian).**

7. In the light of the above submissions, now the point that arises for consideration in this application is

Whether the testamentary Original Suit in T.O.S.No.6 of 2013 has to be rejected as claimed by the applicant?

8. The Testamentary Original Suit has been originally filed as Original Petition for grant of Letters of Administration and as the caveat was entered by the defendants, the same was converted into Testamentary

Original Suit. This application has been filed for grant of Letters of Administration on the basis of the Will dated 09.07.1995 said to have been executed by Dr.Mrs.Bhagyalakshmi, who is the mother of the applicant herein. It is also not in dispute that the said Bhagyalakshmi is the respondent's mother's sister.

9. The main contention of the learned senior counsel for the applicant is that in the year 1996 itself, the applicant herein denied the existence of the Will and filed a suit for permanent injunction as against the defendant therein and the defendant specifically pleaded that she is not claiming any right under the Will. She has completely abandoned her right on the basis of the alleged Will. Therefore, it is the contention of the learned counsel that the right to apply the Letters of Administration arose in the year 1996 itself and the factum of existence of the Will is denied by the applicant herein. Therefore, any application for Letters of Administration ought to have been filed within a period of three years.

10. In the light of the above submissions, in the typed set filed by the respondent/plaintiff, a copy of the unregistered Will dated 09.07.1995 said to have been executed by the said Bagyalakshmi when perused. In the above Will, Dr.C.Bhagyalakshmi, who has bequeathed half share in the premises to her sister's daughter, namely the plaintiff in the suit, is one of the beneficiary. Though

the above Will said to have been executed at the relevant point of time, the fact remains that on 01.02.1996 one Advocate Ashok Menon, who has prepared the Will had informed one Cavala Parthasarathy Chettiar that the said Will to be opened in the presence of the said Cavala Parthasarathy Chettiar, Dr.Khadri, C.Jayachander, J.Giriya, J.Venkatamunuswamy Chettiar. In a suit filed by the applicant, respondent also filed a written statement and the same clearly indicate that the defendant in the above suit has denied the allegation of the plaintiff in manner in which the defendants are trying to interfere with the property of Bhagyalakshmi. Such denial could be construed as only a denial to the facts alleged by the plaintiff. It cannot be construed to mean that she has totally waived her right under the Will.

11. In a suit in O.S.No.182 of 2009 filed by the respondent/plaintiff, she has asserted the existence of the Will. The typed set also clearly indicate that she has also taken steps in Application in A.No.869 of 2009 against the executors for probating the Will. Similarly, citations also issued by the Court against the executors to produce the original Will. And the Application in A.No.693 of 2009 has been closed as original Will has not been produced inspite of the directions issued. In the Applications in A.Nos.720, 721 of 2010, by an order dated

22.10.2017, Orders were passed against the executors named in the Will for production of the original Will.

Similarly, she has also issued a letter dated 22.09.2010 to the named executors to produce the Will. Similarly, she has also issued notice to the executors for taking steps to obtain probate in respect of the Will. Thereafter, she has come before this Court, as a legatee for grant of Letters of Administration. From the available records, it is clear that the executors have not taken any steps to obtain probate and also failed to produce the original Will before this Court. Therefore, the respondent has filed the present Original Petition and also connected applications for adducing secondary evidence.

12. From the records, it can be seen that a Original Petition was filed in Diary No.80777 of 2011 on 08.06.2011 by one Sekar seeking probate of the Will. The said Original Petition was returned by the Registry on 16.06.2001 and it is not represented thereafter. As the said Sekar denied filing any such application before this Court, this Court by an order dated 22.08.2014 also issued a notice to the counsels who filed the applications. Similarly a direction was also given by this Court in the Application in A.No.3885 of 2013 for production of the Original Will by the executors. In pursuant to the said direction, one of the executors Azhaguram, who is a practising advocate has filed a memo before this Court that he is not in possession of the original Will. However, another executor Sekar has not produced the same. The advocate who is said to have prepared the Will also failed

to produce the document in spite of the direction given by this Court and he has not responded to the Court. Therefore, this Court by an order dated 19.12.2013 passed Orders as follows :

"Since there is no response from Mr.K.Ashok Menon before this Court, takes a view that presumption could be drawn, this Court fails to put him on notice. The registry is directed to print the name of Ashok Menon in Application in A.No.3885 of 2013 against the applicant, print the name of Ashok Menon (to produce the document) as per Order dated 22.11.2013 for hearing on 10.2.2016."

In spite of the above directions, the original Will has not seen the light of the day.

13. From the above records in the typed set filed, it can be easily seen that the executors named in the Will of one Bhagyalakshmi have not shown any interest from the very beginning to file probate proceedings. Similarly they have also not produced the Will and the Advocate who drafted the Will also failed to produce the original Will. Therefore, now one of the beneficiary in the Will filed this testamentary Original Petition on the basis of the copy of the Will. It was marked in the suit filed by the applicant herein for grant of Letters of Administration.

The sequence of the events from the year 1996, clearly indicate that though the plaintiff was aware of the Will in

the earlier proceedings, she has filed an application only in the year 2009. It is normal for any beneficiary to wait for the executors to initiate the probate proceedings. Sequence of events as stated above clearly indicate that the executors and person who had drafted the Will have somehow or other were dodging to place the original document before this Court for the reasons best known to them. That being the scenario, the plaintiff who is a beneficiary has come before this Court in Original Petition in the year 2009. It is to be noted that for limitation aspect the various facts and sequence of events all have to be come on record. Therefore, this Court is of the view that mere delay in coming to the Court cannot be a ground to dismiss the testamentary suit at threshold without going to the merits of the case.

14. Of Course, in the judgment reported in 2008(8) Supreme Court Cases 463, the Honourable Supreme Court has held as follows :

"16. Similarly reference was made to a decision of the Bombay High Court's case in **Vasudev Daulatram Sadarangani v Sajni Prem Lalwani (AIR 1983 Bom.268)** Para 16 reads as follows:

"16. Rejecting Mr. Dalapatrai's contention, I summarise my conclusions thus:--

(a) under the [Limitation Act](#) no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under [Article 137](#) the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

1. such an application is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of he deceased's death.

(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates".

17. The conclusion 'b' is not correct while the conclusion 'c' is the correct position of law.

18. In view of the factual scenario, the right to apply actually arose on 9.8.1999 when the proceedings were withdrawn by Smt. Nirmal Jeet Kaur. Since the petition was filed within three years, the same was within time and therefore the appeal is without merit, deserves dismissal, which we direct but in the circumstances without any order as to costs.

As per the above judgment Article 137 of the Limitation act is covered for grant of probate of Letters of Administration under laws. A Similar view has been taken in the Judgment of the Supreme Court reported in **2009 (11)**

Supreme Court Cases 537 (Krishan Kumar Sharma Vs. Rajesh Kumar Sharma.

(S.Vatsala Vs. K.S.Mohan and others) it has been held as follows :

"At this Juncture, it would be relevant to refer to the decision of the Larger Bench, comprising of five Judges of the Honourable Apex Court in P.W.Santhappan (Dead) by Lrs. V. Andhra Bank Limited and others (MANU/SC/0873/2004:(2005) 1 MLJ 105 (SC), wherein, in paragraph 32 of the judgment, it has been observed in the following words :

"A Letters Patent is a special law for the concerned High Court. Civil Procedure Code is a general law applicable to all Courts. It is well settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 of Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 C.P.C. Only a specific provision to the contrary can exclude the special law. The

specific provision would be a provision like
Section 100A."

16. Considering the above judgments and also the various sequence of events found in various documents, it is for the plaintiff to explain the delay in the suit itself. All other aspects pleaded by both sides are matter of evidence. Therefore, this Court is of the view that the application to reject the Testamentary Suit itself is not maintainable as discussed above.

17. In the result, this application is dismissed. No cost.

Sd/.N.S.K.J
14.02.2017

//Certified to be a true copy//

Dated this the day of 2017.

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COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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