

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2017

PRONOUNCED ON: 20..3..2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

Application Nos.2842 and 2843 of 2010

in TOS.No.13 of 1993

1. M.Manivannan (deceased)

2. M.Janakiraman

3. M.Valliammal

4. M.Senguttuvam

5. M.Poombavai

6. T.Vasugi

7. S.Samundeeswari

.. Applicants

vs.

1. Ko. Munnetram alias Venkatachalam

S/o. Late Gopal Mudaliar

44, 3rd Palla Street, Vysarpadi

Chennai -600 039

.. 1st respondent/plaintiff

2. Padmanabha Mudaliar (Deceased) ..2nd respondent

/defendant

Application 2842 of 2010 filed under Order XIV Rule 8 of Madras High Court Original Side Rules of Original Side Rules read with 263 of Indian Succession Act 1925 to revoke the order of Letters of Administration in TOS.No.13 of 1993 dated 07.03.2008.

For applicant : Mr. R.Natarajan

For respondent : Mr. S.V.Jayaraman

Senior Counsel

for Mr.J.R.K.Bhavananthan

ORDER

The captioned application has been filed by the applicants to revoke the grant of Letters of Administration dated 07.03.2008 in T.O.S.No.13 of 1993.

2. Originally, the Testamentary Suit was filed by the original plaintiff for issuance of Letters of Administration in respect of the Will dated 18.08.1990. This Court, vide judgment dated 07.3.2008, granted Letters of Administration to the original

plaintiff. Aggrieved against the said judgment, the applicants have come forward with the instant application for revocation of Letters of Administration on the ground that the same has been obtained by the original plaintiff by playing fraud upon the Court, based upon a fabricated Will dated 18.8.1990 alleged to have been executed by the deceased Kokilambal. It is further stated that the original plaintiff has failed to disclose all the material facts concerning the deceased Kokilambal and the properties owned by her. It is also stated that though the factum of demise of the sole defendant in the TOS was very much known to the original plaintiff, the legal representatives of the sole defendant were not at all brought on record for the reasons best known to him. According to the applicants, any order obtained from the Court of Law by playing fraud upon the Court is a nullity and non-est in law. Hence, the applicants prayed for revocation of the Letters of Administration granted to the original plaintiff. The learned counsel for the applicants has placed reliance on the judgments reported in (2009) 14 SCC 294 **(T.GNANAVEL V.**

T.S.KANAGARAJ AND ANOTEHR) and 2008 10 SCC 489
(G.GOPAL V. C.BASKAR AND OTHERS) to substantiate the
above contention.

3. A counter affidavit has been filed by the original plaintiff stating that the 1st applicant herein has no caveatable interest and that, no ground is made for revocation of Letters of Administration. According to the original plaintiff, the applicants are not entitled to suspend the operation of Letters of Administration. The 1st applicant, i.e., the deceased M.Manivannan was neither entitled to ¼ share in the ground and building in premises bearing door No.32-44, Cooks Road, Otteri, Chennai -12 not had any caveatable interest in the subject matter of the Will. It is stated that the deceased himself admitted in his letter dated 04.10.1991 written by panchayatdars and signed by him in the presence of Panchayatdars that the aforesaid premises have been under the control of the original plaintiff and, therefore, the 1st applicant was estopped from

denying the title of the landlord. Hence, the original plaintiff prayed for dismissal of the application.

4. Denying the statement made in the counter affidavit, a reply affidavit has been filed by 1st applicant *inter alia* contending that the original plaintiff has filed concocted and fabricated documents to set forth a new claim of tenancy under the original plaintiff as against the 1st applicant. It is stated that the applicants herein are having caveatable interest, the concept of which although having not been defined under Indian Succession Act but the judicial pronouncement would amply imply and indicate that the applicants are having caveatable interest without whom the original plaintiff cannot seek Letters of Administration. It is not denied by the original plaintiff with regard to the existing dictum holding that the Letters of Administration obtained against dead person without impleading the legal representatives is a nullity and *non est* in the eye of law. It is contended that on the said sole ground itself the Letters of Administration granted is

liable to be recalled or revoked. To substantiate the above contention, the learned counsel for the original plaintiff has placed reliance on the judgments reported in AIR 1955 SC 566 (**ANIL BEHARI GHOSH V. SMT. LATIKA BALA DASSI AND OTHERS**); 1994-2-LW 326 (**R.THANGARAJAN V. R.BALASUBRAMANIAN AND 3 OTHERS**) 2010 (2) CTC 680 (**J.MALARVIZHI V. D.SHANKAR**); 1992 -1- LW. 185 (**R.KRISHNAMOORTHY V. J.CHANDRASEKARAN**); (2010) 5 SCC 157 (**JAGJIT SIGNH AND OTHERS v. PAMELA MANMOHAN SINGH**); and AIR 2007 BOMBAY 103 (**THIRTY SAM SHROFF V. SHIRAZ BYRAMJI ANKLESARIA AND ANOTHER**).

5. The learned counsel for the applicants submitted that the original plaintiffs by suppressing the material facts, had obtained Letters of Administration on 07.3.2008 in respect of the alleged Will of one Kokilambal wife of Duraikannan Mudaliar. Originally, the property was owned by one Narayanansamy Mudaliar. The

said Narayanasamy Mudaliar had four sons namely, Meganatha Mudaliar, Gopal Mudaliar, Duraikannu Mudaliar and Padmanabha Mudaliar. The alleged testatrix, Kokilambal is the wife of the Duraikannu Mudaliar. They had no issues during their life time. Therefore, even if any property owned by Kokilambal as alleged, after her death, will go back to the legal heirs of other three sons of the said Narayanansamy Mudaliar. When that being so, the original plaintiff has filed Petition being OP.No.475 of 1992, which was objected to by one of the son of the said Narayanasamy Mudaliar, by name, Padmanabha Mudaliar, i.e., the original defendant. In view of the said objection, the OP was converted as TOS.No.13 of 1992 and the original defendant, Padamanabha Mudaliar, was contesting the above TOS.

6. The learned counsel for the applicants further submitted that during the pendency of the aforesaid testamentary suit, the sole defendant i.e., Padamanabha Mudaliar died on 29.9.1994 leaving behind his wife, Poongavanam and two sons, by name,

Sivaraman and Sethuraman, who are blind and dumb. The original plaintiff, despite knowing the demise of the sole defendant Padmanabha Mudaliar, way back on 29.9.1994, has failed to bring the LRs of the said Padmanabha Mudaliar on record and deliberately pursued the proceedings and obtained the Letters of Administration from this Court. It is submitted by the learned counsel for the applicants that only after securing orders from this Court, the original plaintiff started disturbing the applicants' possession in the suit property and hence, the applicants have filed the present application.

7. It is the main contention of the learned counsel for the applicants that without bringing the LR's of the deceased Padmanabha Mudaliar and also without impleading the other near relatives of Kokilambal, the Letters of Administration has been obtained by the original plaintiff by suppressing the material facts. According to the learned counsel, the other beneficiaries allegedly shown in the Will were also not made as parties in the

suit and the original plaintiff was not examined in the above suit. It is submitted that the applicants are entitled to succeed the properties of Duraikannu Mudaliar, as per Section 15 (2) of the Hindu Succession Act. Hence, submitted that the Letters of Administration granted in favour of the original plaintiff is liable to be revoked on the ground of suppression of material facts.

8. Per contra, it is the contention of the learned counsel for the original plaintiff that notes of paper shows that in spite of the letter sent to Padmanabha Mudaliar, he did not appear. Therefore, there was no suppression of fact in obtaining the Letters of Administration. It is the further contention of the learned counsel that previous application filed by the applicants for revoking the Letters of Administration has not seen the light of the day. It is submitted by the learned counsel that 1st applicant has no caveatable interest, as he is only a remote relatives. In the previous application, no serious stand has been made by the applicants with regard to the death of the said Padmanabha Mudaliar. Hence submitted that the Letters of

Administration granted by this Court based on the Will, which is proved in the manner known to law, does not warrant any interference.

9. While granting injunction, as prayed for in O.A.Nos.596 of 2010, pending disposal of the above applications, this Court, vide order dated, had observed that the following arguable and contentious questions are involved in the application for revocation, they are:

1. *Whether the suit did not abate on the death of the sole defendant and consequent to the failure on the part of the plaintiff to implead the legal representatives of the deceased sole defendant?*
2. *Whether the legal heirs of the deceased sole defendant can be said to have not inherited the caveatable interest of the defendant to question the genuineness and validity of the Will and the plea for*

the grant of Letters of Administration?

3. *Whether there had been suppression of facts and the grant of Letters of Administration was obtained based on such suppression? “*

Points 1 to 3:

10. Originally, this application is filed by 1st and 2nd applicants. In view of the death of 1st applicant, the applicants 3 to 7 were impleaded, as legal heirs, vide application Nos. 3383 to 3385 of 2001. Genealogy of the family is not disputed by both sides. Originally, the property involved in the suit belonging to Narayanasamy Mudaliar. He had four sons, by name, Meganatha Mudaliar, Gopal Mudaliar, Duraikannu Mudaliar and Padmanabha Mudaliar. The applicants 1 and 2 are the sons of Meganatha Mudaliar. It is also not disputed by both sides that one Padmanabha Mudaliar is also one of the son of Narayanasamy Mudaliar, who was contesting the testamentary suit in TOS.No.13

of 1993. The subject matter of the Will, which relates to the property inherited by the said Kokilambal, is said to have been bequeathed by one Kokilambal, the wife of the Duraikannu Mudaliar, who is also one of the son of the Narayanasamy Mudaliar. The said Kokilambal inherited the property of her husband Duraikannu Mudaliar. Similarly, it is not disputed by both sides that Duraikannu Mudaliar and Kokilambal had no issues.

11. Admittedly, the original plaintiff is the son of the deceased Gopal Mudaliar, who is the brother of Duraikannu Mudaliar. The original plaintiff propounded the Will as if Kokilambal treated him as foster son and bequeathed the entire property, which was inherited by her from her husband, to him. In the Will, apart from the original plaintiff, two of the sisters were given provision. While filing the application for grant of Letters of Administration, the other beneficiaries found in the Will dated 18.08.1990 were not made as parties and only Padmanabha Mudaliar, who is the another son of Duraikannu

Mudaliar, has filed a caveat and, therefore, Original Petition was converted as testamentary suit. This fact is also not in dispute.

12. It is also not disputed by both sides that the said Padmanabha Mudaliar, being elder member of the family, has already obtained Letters of Administration in OP.No.191 of 1992 dated 24.4.1992 and the same was cancelled by this Court at the instance of the original plaintiff vide order dated 27.8.1993 in Application No.3583 of 1992. After revocation of the Letters of Administration granted in favour of Padmanabha Mudaliar, the original plaintiff filed Original Petition, being OP.No.475 of 1992, which was subsequently converted as TOS No.13 of 1993. While filing the aforesaid Original Petition, the original plaintiff has not impleaded the other legal heirs. Thereafter, one Padmanabha Mudaliar, filed caveat and in view of the same, the aforesaid Original Petition was converted into testamentary Suit.

13. It is pertinent to refer the notes of paper of this Court, dated 19.01.2006, which reads as follows:

"As assumed by the learned counsel appearing for the defendant, no report has been filed by him today and he is also absent. No representation for the defendant. Learned counsel for the petitioner represents that really the defendant Padmanabha Mudaliar died in 1994 and the matter has to be referred to Master for recording evidence.

Based upon the representation post the matter before Master for recording evidence. "

The notes of paper reveals the fact that on 19.01.2010 itself, it was represented by the learned counsel for the original plaintiff with regard to the death of the original defendant and hence, the matter has been posted for recording evidence.

14. On the side of the original plaintiff, one of the attesting witness was examined as P.W.1 and marked Ex.P1, the alleged

Will. Thereafter the evidence was closed. Based on the evidence, this Court, had granted Letters of Administration in favour of the original plaintiff.

15. It is to be noted that Padmanabha Mudaliar is none other than the uncle of the original plaintiff. Therefore, he must be aware of the death of Padmanabha Mudaliar, who died as early as in the year 1994. The original plaintiff has not taken any steps to implead the two children and wife of Padmanabha Mudaliar, the original defendant. According to the learned counsel for the applicants that two children of the original defendant, Padmanabha Mudaliar are blind and dumb respectively. This fact is also not in dispute. Since the demise of the said Padmanabha Mudaliar was informed to the Court as early as on 19.01.2006, the original plaintiff ought to have taken steps to bring on record the Legal Representatives of the said Padmanabha Mudaliar, who was the only contesting defendant at the relevant time. Therefore, obtaining Letters of Administration

itself is a clear case of fraud played on the Court, knowing very well about the death of the Padmanabha Mudaliar and after recording evidence of P.W.1.

16. But, it is the contention of the learned counsel for the Original plaintiff that since the Court had posted the matter for recording evidence, it could be presumed that the Original plaintiff was exempted from taking steps under Order 22 Rule 4 of CPC. In this context, it is useful to refer Order 22 Rule 4 CPC, which reads as follows:

4. Procedure in case of death of one of several defendants or of sole defendant.--(1)
Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

[(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where-

(a) the plaintiff was ignorant of the death

of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.]

HIGH COURT AMENDMENT (MADRAS) :

At the end sub-rule (3), add the words "except as hereinafter provided".

(ii) Insert the following as sub-rule (4):

“(4) The Court whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared ex parte or who has failed to file his written statement or who having filed it, has failed to appear and contest at the hearing; and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it has been pronounced before death took place.”

In the new sub-rule (4) inserted by the Amendment Act, 1976 the amendment made by the Madras High Court has been incorporated.

[4A. Procedure where there is no legal representative.-(1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or

may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court-

(a) may require notice of the application for the order to be given to such (if any of the persons having an interest in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person.”

A conjoint reading of the above Section makes it clear that there

must be an order by the Court exempting the plaintiff from the necessity of substituting the legal representatives of the defendant, who has failed to file a written statement or who having filed it failed to appear and contest the suit at the time of hearing and in such a case, judgment may be pronounced against the said defendant notwithstanding his death. Therefore, it is clear that the order of exemption should have been granted by the Court or original plaintiff should have sought exemption before requesting the Court to post the matter for recording evidence.

17. In this case, notes of paper, which is extracted above, in fact, reveals the fact that the counsel for the original plaintiff had requested the Court to post the Matter for recording evidence. But fact remains that this Court did not give any exemption to the original plaintiff from the necessity of substituting the legal representatives of the sole defendant. Therefore, from Order 22 Rule 4, it can be easily inferred that any decree passed without any exemption granted by the Court

against the dead person, cannot be in valid in law.

18. In this regard, it is useful to refer the judgment reported in (2009) 14 SCC 294 **(T.GNANAVEL V. T.S.KANAGARAJ AND ANOTEHR)**, wherein the Hon`ble Supreme Court by following the Judgment of this Court, has held as follows:

“.. .. 28. This view has also been expressed by the Madras High Court in Elisa v. A. Doss [AIR 1992 Mad 159] in which the Madras High Court in para 3 had observed as follows: (AIR pp. 160-61, para 3)

“3. It is seen from the rules that an application to bring the legal representatives on record shall be made within the time limited by law and if no application is made within the said period, the suit shall abate as against the deceased defendant. That is the effect of sub-rule (3). Sub-rule (4) provides an exception to sub-rule (3). Under sub-rule (4), it is open to the court to pass an order exempting the

plaintiff from the necessity of bringing on record the legal representatives of any defendant, who had failed to file a written statement or if having filed the written statement, failed to appear and contest the suit at the hearing. But, the language of sub-rule (4) is clear enough to show that the court must pass an order exempting the plaintiff from the necessity of substituting the legal representatives. Of course, it is not necessary for the plaintiff to file a written application seeking such exemption, as the rule does not require one. Under the said rule, the court must apply its mind and think it fit, in the facts and circumstances of the case, to grant the exemption. For granting such exemption, the defendant who died should have remained ex parte, either without filing the written statement or after filing the written statement. It is clear from the language of the said rule that the order of

exemption shall be passed before a judgment in the case is pronounced. The relevant portion of the said rule reads that the court 'may exempt the plaintiff and judgment may, in such case pronounced'. That part of the sub-rule says that the order of exemption should precede the judgment to be pronounced in the suit."

(emphasis supplied)

29. For the reasons aforesaid, we are of the opinion that the High Court had rightly interpreted the provision of Order 22 Rule 4(4) CPC and accordingly held that the decree passed by the trial court on 20-12-2002, in OS No. 3946 of 1999 was a nullity in the eye of the law as the defendant had died during the pendency of the suit for specific performance of the contract for sale and no exemption was sought at the instance of the appellant-plaintiff to bring on record the heirs and legal representatives of the defendant before the

judgment was pronounced.

30. There is another submission that needs to be considered at this stage. The learned counsel appearing on behalf of the appellant had contended that the respondents were duty-bound under the provisions of Order 22 Rule 10-A CPC to intimate the knowledge of the death of the defendant to the court as well as to the appellant, which they had failed to do and therefore, the trial court was correct in law to grant exemption to the appellant from bringing on record the heirs and legal representatives of the defendant after the decree was passed.

31. As had already been mentioned above, the conditions laid down in the above mentioned Rule are clear to the effect that the exemption to be granted by the Court has to be obtained before the judgment is delivered and not after it. Therefore, we are not in a position to accept the contention of the appellant to

this effect. “

The above judgment is squarely applicable to the facts of the present case. Admittedly, in this case, the original plaintiff is not a stranger to the original defendant. He is the niece of the original defendant Padmanabha Mudaliar. Therefore, he must be aware of the death of the said Padmanabha Mudaliar. Knowing very well about the death of the original defendant, he failed to implead the Legal representatives of the original defendant. This fact itself clearly show that the order passed by this Court granting Letters of Administration cannot be sustained in law. In fact, the suit itself should have been abated, when the Legal Representatives have not been brought on record.

19. Admittedly, the testatrix Kokilambal inherited the property of her husband and she had no issues. Therefore, any property inherited through her husband will revert back to the

legal heirs of husband. The 1st and 2nd applicants are the sons of the testatrix's husband's brother. Similarly the original defendant Padmanabha Mudaliar children are also very much available. If the Will is found to be false, they will get shares as per the entitlement under the provisions of Section 15 of the Hindu Succession Act. As already stated, the testatrix Kokilambal had no issues. As such, it is the case of the learned counsel for the applicants that the applicants and the original defendant, Padmanabha Mudaliar's sons, being brothers' sons, will come under Class II legal heirs, if class I legal heirs are not available. That being the case, they will also get interest over the suit property. Therefore, this Court is of the view that it cannot be stated that they would have no caveatable interest.

20. Similarly, in the judgment reported in 2008 10 SCC 489 (***G.Gopal v. C.Baskar and others***) the Hon`ble Supreme Court has held that the person who is having slight interest in the estate of the testatrix is entitled to file caveat and contest grant

of probate. Though it is stated that the said judgment is referred to larger bench by the Hon`ble Supreme Court, in view of the earlier conflicting view on the above aspect, counsels appearing for both sides have not produced any materials to show that larger bench has decided the issue. Since the matter is not decided, this Court is of the view that the view expressed by the Hon`ble Supreme Court, as referred above, would apply. Accordingly, this Court is of the view that the applicants have caveatable interest.

21. As discussed above, while filing the petition for probate, none of the near relatives were impleaded as per Section 278 of the Indian Succession Act. Section 278 of the Indian Succession Act 1925 mandates all the family members and other relatives of the deceased, and their respective residence to be written in the petition. Though the petition contains the particulars of the family members or other relatives of the deceased, none of the near relations were added as parties. Further, despite the

knowledge about the death of the sole contesting defendant, who is none other than the uncle of the original plaintiff and without impleading the legal representatives of the said deceased on record, Letters of Administration was obtained fraudulently by making false submissions. More so, the application for probate is also defective in substance, as all the legal heirs were not impleaded.

22. Insofar as the judgments in the case of **R.Thangarajan v.R.Balasubramanian and three others and R.Krishnamoorthy v. J.Chandrasekaran** (cited supra) are concerned, there is no dispute with regard to the above judgments. But the facts of the present case clearly indicate that the Legal Representatives of the contesting defendant were not impleaded despite knowing the death of the said defendant. That apart, other legal heirs who have interest over the property, have also not been made as parties. These two grounds itself is sufficient to revoke the grant of Letters of Administration.

23. Though the learned counsel for the original plaintiff relied on the judgment reported in AIR 2007 Bombay 103 **(Thirty sam shroff v. Shiraz Byramji Anklesaria and Another)**, the said judgment deals with abatement of proceedings when all the executors died. Whereas in the case on hand, legatees of the alleged Will, i.e. near relationship of the testatrix have not been impleaded. Besides Legal Representatives of the contesting defendant were also not impleaded. Hence, the said judgment is not applicable to the facts of the present case.

24. Having regard to the above discussion, this Court is of the view that the applicants have established their stand for revoking the letters of Administration granted in favour of the original plaintiff. Hence, the Letters of Administration granted in favour of the original plaintiff in testamentary Suit, TOS.No.13 of 1993, is hereby revoked.

25. In the result, the application No.2842 of 2010 is allowed. Since the Letters of Administration granted on 07.3.2008 in TOS.No.13 of 1993 is revoked, the application No. 2843 of 2010 seeking suspension of the operation of the order dated 07.3.2008 is dismissed as unnecessary.

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Index: Yes/No

Internet : Yes/No

N.SATHISH KUMAR, J

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Pre-Delivery order in
A.NO.2842 of 2010 in
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