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IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

T.O.S.No.8 of 2011

in

(O.P.No.601 Of 2010)

1.K.Baskaran

2.K.Babu (deceased)

(1st plaintiff and the defendant are
recorded as legal heir of the
2nd plaintiff)

... Plaintiffs

Vs.

R.Bhavani

.. Defendant

Original Petition No 601 of 2010 was filed under Sections 232 and 276 of Indian Succession Act, XXXIX of 1925 for the grant of letters of Administration. Against this petition a Caveat was filed on 24.09.2010 by the Caveator. As per order of this Court dated 04.03.2013 in O.P.No.601 of 2010, the Original Petition No. 601 of 2010 was converted into Testamentary Original Suit No.8 of 2011.

For Plaintiffs : Mr. C.B.Murali Krishnan
For defendant : Mr. T.M.Hariharan for
S.Conscious Ilango

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 case of the plaintiffs are as follows:-

The plaintiffs are the sons of one Krishnamurthy, who is the brother of V.M.Balasubramanian, the testator herein. The said V.M.Balasubramanian left a Will dated 10.02.2009 bequeathing the movable properties, namely, gold jewels, silver articles and brass articles are to be acquired by the plaintiffs absolutely. The savings amount of Rs.8,000/- in the Indian Overseas Bank in Account No.21200 is to be divided equally

among the plaintiffs. The second plaintiff was given with life interest in the immovable property bearing No.19, Balambika Nagar, Villivakkam, Chennai-49 and the absolute title vested with the first plaintiff. The first plaintiff was directed to take care of the second plaintiff from and out of the income derived in the property, since he is a divorcee. The wife of the testator, namely, Rajalakshmi, pre-deceased the testator on 17.01.2009. The settlement deed for the property executed in favour of the defendant was cancelled by the testator on 10.02.2009 and the same was duly intimated to the defendant by the deceased Balasubramanian. To avoid further litigation, the deceased had executed and registered his last Will and Testament dated 10.02.2009. Hence, the suit is filed for grant of Letters of Administration for administering the property covered under the Will of the deceased V.M. Balasubramanian.

3. The brief facts of the case of the defendant are as follows:-

(i) Denying the allegations contained in the plaint, the defendant stated that the the above petition for grant of Letters

of Administration of the alleged Will dated 10.02.2009 said to have been executed by the deceased V.M.Balasubramanian, is *per se* not maintainable in so far as it relates to the Item II of the schedule mentioned immovable property as the testator has no semblance of right over the immovable property. According to the defendant, the testator, out of love and affection and as per his wish and desire, settled the house property absolutely in favour of the defendant. The settlement deed is irrevocable. Later the testator also registered a Deed of Cancellation of Will registered as Document No.73/2007 dated 16.11.2008. According to the defendant, the alleged Deed of Cancellation of Settlement is void, invalid and legally unenforceable.

(ii) It is stated by the defendant that by virtue of the above said Settlement Deed, the testator transferred his right, title and interest over the said house property in favour of her absolutely and she had also accepted and acted upon the settlement. Thereafter, the defendant got the mutation of Revenue entries and also paid property tax and other taxes. According to the defendant, due to the old age, the testator fell

seriously ill, physically and mentally unstable and bedridden and looked after by his wife and assisted by the defendant as the plaintiffs have totally neglected them. While so, suddenly, on 17.01.2009, the testator's wife died leaving the testator alone in the house property. Thereafter, the plaintiffs threatened her with serious consequences and not even permitted her to enter the house. The defendant further states that the plaintiffs, who had custody of the testator in his last day and dominating the Will of the testator have fraudulently brought out the alleged Will by exercising undue influence on the testator as he is not in a position to repudiate. Hence, the defendant prayed for dismissal of the suit.

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

- (1) Whether the alleged Will dated 10.02.2009 is true and valid as pleaded by the plaintiffs?
- (2) Whether the plaintiffs are entitled to letters of administration as alleged in the plaint?
- (3) To what relief the plaintiffs are entitled

to?

5. On the side of the plaintiffs, P.W.1 to P.W.3 were examined and Exs.P1 to P6 were marked. No witness was examined, on the side of the defendant however, Ex.D1 was marked. The details of the documents are here under:

Exhibits produced on the side of the plaintiffs:

<i>S. No</i>	<i>Exs.</i>	<i>Date</i>	<i>Description of documents</i>
1.	P-1	10.02.2009	Original Will executed by V.M.Balasubramanian
2.	P-2	-	Computer generated death certificate of V.M.Balasubramanian, who died on 01.03.2009
3.	P-3	-	Computer generated death certificate of B.Rajalakshmi, wife of V.M.Balasubramanian, who died on 17.01.2009
4.	P-4	-	Computer generated death certificate of K.Babu, who died on 15.11.2010
5.	P-5	-	Acknowledgement card signed by Ramani
6.	P-6	13.02.2009	Original letter written by R.Bhavani to V.M.Balasubramanian.

Exhibits produced on the side of the defendant:

<i>S. No.</i>	<i>Exhibits</i>	<i>Date</i>	<i>Description of documents</i>
1	D-1	-	Certified copy of the Will executed by V.M.Balasubramanian

Witnesses examined on the side of the plaintiffs:

P.W.1. - K.Baskaran
P.W.2- J.Khader Mohideen
P.W.3 - Pasupathi

6. The learned counsel for the plaintiffs submitted that the deceased V.M.Balasubramanian, who is the uncle of the plaintiffs, has left the Will dated 10.02.2009 bequeathing the property to the plaintiffs. The learned counsel for the plaintiffs further submitted that since the second plaintiff was given life interest and was died in the year 2010, the first plaintiff is the beneficiary of the entire estate of the said Balasubramanian. It is submitted by the learned counsel for the plaintiffs that the defendant, who is the sister of the plaintiffs, was given sufficient provisions. Therefore, mere exclusion of the defendant is not a ground to infer any suspicion over the Will. The Will is a registered one and execution and attestation has also been proved. Therefore, the first plaintiff is certainly entitled for Letters of Administration.

7. The learned counsel for the plaintiffs further submitted that though it was stated by the defendant that the suit property was originally settled in favour of her in the year 2007, such Settlement was obtained by fraud and undue influence and the same has not been acted upon. Therefore, the settlor V.M.Balasubramaniam has cancelled the Settlement on 10.02.2009 and executed the Will on the same day in favour of the plaintiffs. It is the submission of the learned counsel for the plaintiffs that the factum of Revocation was also intimated to the defendant and the same was accepted by the defendant by letter dated 13.02.2009.

8. It is the contention of the learned counsel for the plaintiffs that having accepted the Cancellation of the Settlement, now the defendant is estopped from questioning the Revocation. It is submitted by the learned counsel for the plaintiffs that the defendant has also not entered into box to subject herself to the

cross examination. Therefore, an adverse inference has to be drawn against her. The conduct of the defendant assumes significant as after receipt of notice from the Court in OP proceedings, she has sold the property to the third party. Such conduct cannot be ignored altogether. Though the subsequent purchaser has filed a suit in C.S.No.465 of 2004, that itself is not a ground to reject the valid Will, which is proved in the manner known to law. Hence, the learned counsel for the plaintiffs submitted that the Probate Court cannot decide any question of title, since the Will has been duly proved in the manner known to law. Therefore, the first plaintiff is entitled for Letters of Administration as prayed for.

9. In support of his arguments, he also relied on the judgments of the Hon`ble Supreme Court reported in AIR 1999 SC 1441 (1) (**VIDHYADHAR V. MANKIKRAO AND ANOTHER**); AIR 2002 SCC 2004 (**RAKESH WADHAWAN V. M/s. JAGADAMBA INDUSTRIAL CORPORATION AND OTHERS**) and 2013 (5) CTC 884 (**VATHSALA MANICKAVASAGAM & OTHERS**).

10. Countering the argument, the learned counsel for the defendant submitted that the said V.M.Balasubramanian, who is the uncle of the plaintiffs and the defendant, had no issues. In fact, he had executed the Will in the year 2001 itself, wherein he has disinherited the first plaintiff and reason was also given for such disinheritance. The deceased V.M.Balasubramanian had not shown much affection to the first plaintiff at any point of time. In fact, the defendant was treated as his own daughter. Therefore, the entire property was settled in her favour in the year 2009 itself. The learned counsel for the defendant further submitted that ever since from the date of Settlement, mutation has been taken place in her name and all of a sudden, after the death of the wife of the said V.M.Balasubramanian, the plaintiffs, taking advantage of the said situation, played a dominant role and took the deceased V.M.Balasubramanian to the Registrar's Office with the help of strangers and revoked the Settlement already

executed by him and also registered Will in his favour. The second plaintiff was already sick. Therefore, to make it appear, as if he was also given property, his name was also included in the Will. The second plaintiff, died immediately, in the same year. Therefore, it is clear that the ultimate object of the first plaintiff is to acquire the entire land.

11. It is the contention of the learned counsel for the defendant that the deceased V.M. Balasubramanian has lost his wife and was in the hospital for quite a long period and he had no mental capacity to execute the Will on his own volition. Further, P.W.2 and P.W.3, who are said to be the attesting witnesses, are strangers and they have signed the document as witnesses, would also create suspicious circumstances surrounding the will. That apart, the deceased V.M.Balasubramanian was in bereavement during the relevant period of time, since his wife had died and hence, the document said to have executed by V.M.Balasubramanian lacks bona fide. At any event, the evidence of P.W.2 and P.W.3, so called attesting witnesses, also creates serious doubt about the

execution of the document by the said V.M. Balasubramanian. So called Will is shrouded with serious doubt and suspicion. Exs.P5 and P6 have been created for the purpose of the case. The above documents, in fact, expose the conduct of the plaintiffs in preparing the Will. Hence, it is submitted by the learned counsel for the defendant that merely because the Will was registered, its genuineness cannot be inferred.

12. It is also the contention of the learned counsel for the defendant that on the date of the alleged Will, Ex.P1, V.M.Balasubramanian had no title to the property. The settlement deed executed in the year 2007 is valid and binding. The alleged unilateral revocation by the said Balasubramanian is not valid in the eye of law. Hence on the date of the alleged Will, the said Balasubramanian has no title or property in his name to leave the Will. Hence, it is submitted by the learned counsel for the defendant that suit is liable to be dismissed.

13. In the light of the above submissions, now the issues have to be answered one by one.

14. The relationship between the parties are not disputed. The first plaintiff and the defendant are brother and sister. The subject matter of the Will in the suit was originally belonged to one V.M.Balsubramanian, who is the uncle of the first plaintiff and the defendant. It is also not disputed that the deceased Balasubramanian had originally executed a Will in the year 2001, which was exhibited as D1. In the above Will, the first plaintiff herein was not allotted any property. It is also admitted fact that the said V.M.Balasubramanian had no issues. Similarly, it is also admitted by both sides that the said Balasubramanian had executed the registered Settlement Deed in respect of the suit property in favour of the defendant on 10.9.2007. Further it is also not in dispute that the second plaintiff, who is the brother of the first plaintiff and the defendant died in the year 2010 and he was a divorcee.

15. In the background of the above, now this Court has to analyse the evidence and documents to find out whether the Will propounded by the first plaintiff was executed by the said V.M.

Balasubramanian in favour of the plaintiffs and as the second plaintiff died, who was given a life interest, the entire property would devolve upon the first plaintiff. The alleged Will has been marked as Ex.P1. P.W.2, J.Khader Mohideen and P.W.3, pasupathy, who are attesting witnesses, were examined by the plaintiffs. It is true that initial burden always lies on the propounder to prove the execution and attestation of the Will by examining at least one of the attesting witnesses as well as to prove the testamentary capacity of the testator.

16. When the evidence of P.W.2 and P.W.3, the attesting witnesses were carefully perused, one J.Khader Mohideen in his evidence, has stated that he knew the deceased Balasubramanian and he used to pick him and drop him whenever he requested. Accordingly, on 10.02.2009, he was called by the said Balasubramanian at about 12.00 p.m. Therefore, he and P.W.3 one Pasupathy took the deceased V.M. Balasubramanian to the Registrar Office, where the deceased V.M.Balasubramanian executed Ex.P1 Will, in their presence. They also signed as attesting witnesses. P.W.2 and

P.W.3, in their evidence in chief examination, have stated that they are friends. Their evidence would disclose that they are no way connected with the deceased family, except saying that they knew the deceased Balasubramanian. They have categorically stated that they used to pick the deceased V.M.Balasubramanian and drop him whenever needed by him. Their evidence does not show that how they came to be trusted by said Balasubramanian.

17. It is to be noted that for trusting somebody, who have not connected with the family, to attest the documents, atleast there must be an nexus between the parties. P.W.2 is an auto driver. P.W.2 in his evidence, has stated that the deceased Balasubramanian used to travel in his auto. Accordingly, at his request, he picked him to the registrar Office on the alleged date. Whereas P.W.3 in his evidence has stated that he picked up the deceased Balasubramanian in his Indica Car on the alleged date. Though P.W.2 and P.W.3 in their evidence have stated that the deceased Balasubramanian requested them to accompany with him to the Registrar Office at 12 p.m, on a perusal of Ex.P1

document, it is seen that the same was registered only between 3 to 4 p.m.

18. It is an admitted fact that the deceased Balasubramanian was more than 82 years old at the relevant time. Absolutely, there is no evidence whatsoever, how Ex.P1 came to be typed and who are all assisted to prepare the said document. Though Ex.P1 appears to have been drafted by one Advocate, P.W.2 and P.W.3 have not even whispered about the preparations of the Will by the said Advocate and whose instructions the Will was prepared.

19. It is further to be noted that the wife of the said Balasubramanian, namely, Rajalakshmi, died on 17.01.2009, which is evident as per Ex.P3, Death Certificate. In the cross examination, P.W.2, has stated that he only took the testator Balasubramanian to the hospital after the death of his wife, where he was treated as In-Patient for 10 days. He does not know when he was discharged. P.W.1, the beneficiary, also in his

evidence admitted that the testator was admitted in the hospital after the death of his wife. It is to be noted that the testator's wife died on 17.01.2009. Therefore, it is clear that the said Balasubramanian was in bereavement at the time besides he was also admitted in the hospital. According to one of the attesting witnesses, P.W.2, testator was in the hospital for more than 10 days. Admittedly, he was aged more than 82 years. He was living in solitude. As per the evidence of P.W.3, on the date of registration of the Will, he only taken the said Balasubramanian to the Registrar Office in Indica Car and P.W.1 has paid taxi fare. These facts clearly indicate that the aged man, who lost his wife few days back and also admitted in the hospital for some time, executing the Will in a free mind is highly improbable. Therefore, this Court is of the view that merely because some witnesses were examined to satisfy the requirement of law, that itself is not sufficient to infer the genuineness of the Will, when the circumstances clearly pointed out that testator would not have been in the free mind at the relevant time.

20. It is further to be noted that, admittedly, on the date of the execution of the Will, the testator was not the owner of the property, and that the property was already settled in favour of the first defendant. Though it is the contention of the plaintiffs' counsel that title cannot be gone into in the Probate proceedings, it is to be noted that only on the date of the execution of Ex.P1, Will, the Settlement, which was executed by the testator two years back, was also unilaterally cancelled. Such unilateral cancellation of the document itself is not sustainable in law. Once the settlement is executed and the right to interest has been transferred to setlee, unilateral cancellation of such document, is not permissible in law. The Settlement cannot be revoked by unilateral Act, when no power of reservation given in the Deed itself. Therefore, this Court is of the view that the unilateral Act on the part of the testator to revoke the earlier Settlement itself is impermissible. That being so, executing the Will by the testator who had no title to the property at the relevant time, is not valid.

21. In this regard, it is useful to refer Section 59 of the

Indian Succession Act, which reads as follows:

“59. Person Capable of making Wills-
Every person of sound mind not being a minor
may dispose of his property by Will

Explanation: 1 – A married woman may
dispose by Will of any property which she could
alienate by her own act during her life.

Explanation : 2 – Persons who are deaf or
dumb or blind are not thereby incapacitated for
making a Will, if they are able to know what they
do by it.

Explanation :3 – A person who is ordinarily
insane may make a Will during interval in which
he is of sound mind.

Explanation : 4 – No person can make a
Will while he is in such a state of mind, whether
arising from intoxication or from illness or from
any other cause, that he does not know what he
is doing.”

22. On a reading of the above section, it is clear that there must be a property belonging to the testator to dispose of the same by way of Will. On the date of execution of the Will, the testator had no title to the property and that the property was already transferred in the name of the setlee, in the year 2007. The evidence of P.W.1 also shows that mutation has already taken place in her name. That being the case, mere Revocation of the settlement by the settlor at the instance of the beneficiaries at a later time will not divest the right and title of the setlee under the previous Settlement Deed.

23. It is further to be noted that it is the main contention of the plaintiffs that the factum of Cancellation of Settlement was known to the defendant and the defendant also accepted the same in writing. Admittedly, the alleged Cancellation of the Settlement was done on 10.02.2009 i.e., on the same day, when Ex.P1 was executed. The plaintiff, by relying upon Ex.P5, acknowledgement card, said to have been signed by the husband of the defendant, contended that the letter informing the Cancellation of the Settlement has been addressed to one

Ramani, the husband of the defendant for which, the defendant herself sent a letter, EX.P6, admitting and accepting the Cancellation.

24. On a careful perusal of Ex.P6, letter, it is seen that the same has been typed in computer. If really the first defendant has written such a letter, there was no need for somebody putting "x" mark to obtain her signature. Further, there is no evidence to show that how the said Ex.P6, letter, reached the hands of the plaintiffs. If really the defendant has sent this letter, the same should have either handed over to them through hand delivery or by post. But no evidence whatsoever, available to that effect. It is further to be noted that the original of the so called Ex.P6, letter addressed to the husband of the defendant, has not seen the light of the day. Copy of this so called letter addressed through Ex.P5, acknowledgement card has been filed.

25. It is curious to note that it is the contention of the plaintiffs that the cancellation of the Settlement Deed was informed to the defendant through registered post addressed to the husband of the defendant. To prove the same Ex.P5

acknowledgement said to have been signed by one Ramani, husband of the defendant was marked. When Ex.P5 Acknowledgement Card is carefully perused, it is seen that the same was signed by one Ramani and below the signature of the said Ramani, the date has been written subsequently in a different manner, as if it was delivered on 12.02.2009. Further, on a careful perusal of the said Ex.P5, it is seen that this letter was originally addressed by one K.Babu to Ramani, who is said to be the husband of the defendant and the said letter was despatched on 06.2.2009, which could be seen from the seal of the Postal Department, and delivered at Pudukkottai on the same date.

26. It is to be noted that the alleged Cancellation of the Settlement Deed was done only on 10.02.2009, whereas this Acknowledgement Card showing the said letter was despatched to the defendant, is dated 06.2.2009. Therefore, the contention of the plaintiff that the factum of Cancellation of the Settlement Deed was informed to the defendant by Registered letter to her husband is highly concocted one and the said story cannot be

believed and this document has been created and utilised as an evidence to gain undue advantage. This piece of evidence, i.e., Ex.P5 clinchingly show that the same was prepared by the plaintiffs to show as if the Settlement Deed was cancelled and the same was accepted by the defendant. The above conduct of the first plaintiff clearly shows that he is capable of going to any extent to get the documents in his favour. Therefore, this Court is of the view that Ex.P1, though registered, its genuineness cannot be inferred, merely the attesting witness signed and examined before this Court.

27. Insofar as the judgments cited by the learned counsel for the plaintiffs are concerned, there is no dispute with regard to the proposition laid down there. In all the judgments principles are one and the same. But in the instant case, testamentary capacity of the testator has not been established. Therefore, the judgments cited by the learned counsel for the plaintiffs will not help them in any way in appreciating evidence in the given case.

28. Admittedly, the testator was in the hospital while he was bereaving the death of his wife. The Will was executed on 10.02.2009. The testator also died on 01.3.2009 within the short span of period from the date of execution of the Will. Further, the hurried manner in which the testator was taken to the hospital in a car to register the two documents, one for Cancellation of settlement and another for registration of the Will, with the help of the third parties, create serious doubt about the execution of the document. When the person, who was in the advanced age, and who lost his wife and was also suffering from diabetic and was admitted in the hospital for some time, anyone, who claims benefits from such ailing person, should establish before the Court that entire transaction is free from any doubt and the same was done in good faith and *bona fide*.

29. Further, merely because the defendant has not given oral evidence, adverse inference cannot be inferred. The plaintiffs cannot take advantage of the same. It is for them to establish the genuineness of the documents before the Court below. In this case, this Court is not satisfied the genuineness of

the Will in view of the various suspicious circumstances surrounded with the same. Hence, the plaintiffs are not entitled to any relief. Accordingly the issues are answered.

30. In the result, the suit is dismissed. Considering the relationship between the parties, there is no order as to costs.

09.01.2017

Index:Yes/no

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N.SATHISH KUMAR.J.

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Pre-delivery Judgment in
T.O.S.No.8 of 2011

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