

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on: 21.02.2017

Judgment pronounced on: 27.02.2017

Coram:

The Hon'ble Mr.Justice N.SATHISHKUMAR

Testamentary Original Suit No.22 of 2010

1. N.Durga Bai		
2. N.Uvarajan		
3. N.Thirunavukkarasu	...	Plaintiffs
	Versus	

1. Mrs.C.S.Pandari Bai		
2. Mrs.Sasikala	...	Respondents

Original Petition filed under Section 232 and 276 of the Indian Succession Act, 1925, read with Order XXV Rule 5 of the Original Side Rules of Madras High Court, 1956, for the grant of Letters of Administration with the will dated 19.12.1983 annexed to the petitioners viz., the wife and sons/legatees under the will of the said deceased having effect limited to the State of Tamilnadu. As the Defendants have filed caveat, the Original Petition was converted into Testamentary Original Suit No.22 of 2010 as per the order of this Court dated 18.02.2010 in O.P.No.160 of 2008.

For Plaintiffs	..	Mr.M.Balasubramanian
For Respondents	..	M/s.V.Baskaran and R.Chakravarthy

JUDGMENT

Original Petition No.160 of 2008 has been filed for the grant of Letters of Administration with the will dated 19.12.1983 annexed to the petitioners viz., the wife and sons/legatees under the will of the said deceased K.Neelakandan, having effect limited to the State of Tamilnadu. As the Defendants have filed caveat, the Original Petition was converted into Testamentary Original Suit No.22 of 2010 as per the order of this Court dated 18.02.2010 in O.P.No.160 of 2008.

2. The case of the plaintiffs is, that the first Plaintiff is the wife and Plaintiffs 2 and 3 are sons and Defendants 1 and 2 are daughters of Late. Neelakandan. The father of the plaintiffs Late.K.Neelakandan, executed a registered will dated 19.12.1983, bequeathing the first item of properties mentioned in the schedule to the alleged will to his sons/Plaintiffs 2 and 3 for their lives with a gift over absolutely to their male issues, item 2 of the properties mentioned in the schedule to the alleged will to his wife the first plaintiff providing her life interest and the vested remainder to his sons-plaintiffs 2 and 3 absolutely. The testator has not bequeathed

any right or interest in the suit properties to his daughters/defendants 1 and 2. The plaintiffs are enjoying the properties as per the will and only when the defendants sent legal notice on 06.10.2010 claiming partition of the suit properties, the mother of the plaintiffs 2 and 3 handed over the wills to her sons to take steps. Therefore, the Plaintiffs filed O.P.No.160 of 2008 seeking to issue Letters of Administration in respect of the registered will dated 19.12.1983 executed by deceased K.Neelakandan. As the Defendants filed caveat, the Original Petition was converted into Testamentary Original Suit No.22 of 2010.

3. The Defendants resisted the said Testamentary Original Suit by filing written statement. The defendants specifically deny the execution of the alleged will by the deceased K.Neelakandan and put the plaintiffs to strict proof of the same. The defendants further contended that they are having equal rights over the properties mentioned in the schedule to the alleged will and are entitled to 1/5th share each in the properties. The defendants submit that the Testator was not having stable mind during the period of execution of the alleged will and the plaintiffs by fraudulent means and by coercion and misrepresentation might have obtained the alleged will. If the alleged will is true the plaintiffs would have approached this Court

immediately after the death of the Testator. Whereas the plaintiffs have filed the present petition after a lapse of 14 years which clearly shows that the plaintiffs have not come before this court with clean hands. The defendants submit that even as per the will dated 19.12.1983, alleged to have been executed by Late K.Neelakandan, all the three items of schedule properties has been bequeathed to their mother, the first plaintiff for her life time and only after her life time, the three items of schedule property will devolve on the plaintiffs 2 and 3 and the second defendant. The Plaintiffs failed to establish the existence of will at the earliest opportunity. There is no proper explanation for the delay in filing the present suit seeking letters of administration. Hence, the defendants pray for dismissal of the suit.

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

1. Whether the will dated 19.12.1983 executed by Late.K.Neelakandan- husband of the first plaintiff, father of the plaintiffs 2 and 3 and defendants 1 and 2 is genuine and valid and not surrounded by suspicious circumstances?
2. Whether the Testator was in sound state of mind at the time of execution of the will dated 19.12.1983?

3. Whether the plaintiffs have played fraud, coercion and mis-representation before execution of the will dated 19.12.1983?

4. To what relief, the parties are entitled to?

5. On the side of Plaintiffs Mr.N.Uvarajan-second plaintiff examined himself as P.W1 and Mr.P.M.Ganesh was examined as P.W.2 and Exhibits P1 to P7 have been marked. Ex.P1 is the original Registered Will dated 19.12.1983, Ex.P2 is the original Death Certificate of Mr.Neelakandan, Ex.P3 is the affidavit of Mr.R.Natesan, Ex.P4 is the original Registered Mortgage Deed dated 05.05.1979, Ex.P5 is the Xerox copy of the Registered Will, Ex.P6 is the Original Corporation Property Tax Receipt dated 26.9.1983 and Ex.P7 is the original Corporation Property Tax Receipt dated 01.03.1991.

6. On the side of the Defendants Mrs. Sasikala-second defendant examined herself as D.W.1 has been examined and no document has been marked.

7. It is the contention of the learned counsel for the Plaintiffs that first Plaintiff is the wife and Plaintiffs 2 and 3 are sons and Defendants 1 and 2 are daughters of the deceased K.Neelakandan, who has executed a registered will dated 19.12.1983 bequeathing the

properties to the Plaintiffs. The first defendant was disinherited in the will since she has got married against her parents' will. However, Late.K.Neelakandan has executed another will bequeathing a property situate in some other place to the first defendant. The plaintiffs are enjoying the properties as per the will and only when the defendants sent legal notice on 06.10.2010 claiming partition of the suit properties, the mother of the plaintiffs 2 and 3 handed over the wills to the plaintiffs 2 and 3 to take steps. Therefore, the delay was reasonable and bona fide.

8. It is the contention of the learned counsel for the plaintiffs that the will is registered one. Originally ex parte evidence was recorded on 13.09.2013 and at that time one Natesan was also examined. Thereafter, the ex parte order was set aside. In the meanwhile, Natesan could not be traced out to examine him to prove the will. It is the contention of the learned counsel that the attesting witnesses signed in the will could not be traced out and their whereabouts were not known. Therefore, P.W.2 was examined to prove the signature found in the will with that of the testator. The testator died after 9 years from the date of execution of the will. There was no suspicious circumstances surrounding with the will. Hence, submitted that when the attesting witnesses could not be

traced out, P.W.2 was examined to identify the signature found in the will with that of one of the attestors. Hence it is the contention of the learned counsel that the will has been proved in the manner known to law and hence the plaintiffs are entitled for grant of Letters of Administration. In support of his arguments the learned counsel for the Defendants has also relied upon a Judgment of the Supreme Court in ***Naresh Charan Das Gupta vs Paresh Charan Das Gupta (AIR 1955 SC 363)***.

9. Countering the arguments of the learned counsel for the Plaintiffs, it is the contention of the learned counsel for the Defendants that the will has not been proved in the manner known to law. Though the will is of the year 1983 the Plaintiffs have come forward to file Original Petition for grant of Letters of Administration in the year 2006. The delay has not been properly explained. In the Original Petition for Letters of Administration, it is pleaded by the Plaintiffs that both the attesting witnesses are died. Whereas in the proof affidavit, P.W.1 has taken a different stand to the effect that whereabouts of the attesting witnesses are not known. The evidence of P.W.1 that the attesting witnesses were working along with the testator and thereafter, they left the company also falsified in view of the specific address of the attesting witnesses were given in the will

itself. The same clearly proved the fact that the attesting witnesses could not have worked with the testator. In fact, one of the attesting witnesses was working in a different company. Hence, it is submitted that without examining the attesting witnesses the will cannot be admitted in evidence. P.W.2's evidence also will not prove the execution of the will as mandated by the law. Hence, it is submitted that Exhibit P1 will cannot be admitted in evidence. In support of his arguments the learned counsel for the Defendants has also relied upon a Judgment of the Supreme Court in ***Babu Singh and others vs. Ram Sahai Alias Ram Singh (2008) 14 SCC 754.***

10. In the light of the above submissions, now this Court has to answer the issues 1 to 3. The relationship between the parties are not in dispute. In fact, the first plaintiff is the wife of the deceased Neelakandan, second and third plaintiffs are sons and defendants 1 and 2 are the daughters. These are not in dispute. The plaintiff propounded a registered will dated 19.12.1983 said to have been executed by the testator Neelakandan, bequeathing the properties to the plaintiffs together providing life interest to the first plaintiff and vested remainder whatsoever to the plaintiffs 2 and 3.

11. It is the contention of the plaintiffs' counsel that the will has been registered one and there was no suspicious circumstances

attached with the will, undue influence and coercion pleaded by the defendants has not been established. Since the attesting witnesses whereabouts are not known, P.W.2 was examined to prove the signature found in the will with that of the testator. Hence, it is the contention of the Plaintiffs' counsel that the will has been proved in the manner known to law.

12. Having regard to the above submissions, it has to be analyzed as to whether the propounder of the will proved the will Ex.P1 in the manner known to law. Ex.P1 is a registered will dated 19.12.1983 left by deceased Neelakandan bequeathing the properties to the plaintiffs herein with life interest to the first plaintiff vested remainder to the second and third plaintiffs and first defendant was totally disinherited from the property and condition also imposed on the plaintiffs 2 and 3 to conduct the marriage of the second defendant. Once the marriage of the second defendant is performed, she is not entitled to share in the properties bequeathed in the will. Before the will being proved in the manner known to law contents of the document cannot be taken as an evidence. It is well settled that mere registration of the document will not dispense with the proof of the will. Will has to be proved in the manner known to law as contemplated under Section 68 of the Indian Evidence Act, by

examining at least one of the attesting witnesses to prove the will. Once the execution and attestation of the will has been proved as required under Section 63(c) of the Indian Succession Act coupled with Section 68 of the Indian Evidence Act, besides testamentary capacity of the testator, the initial burden of the plaintiffs is discharged. Thereafter onus automatically lies on the other side who is attacking the genuineness of the will on the ground of forgery, undue influence, coercion etc., to establish the above fact. That being the legal position, it is for the Plaintiffs to establish the execution of the will in the manner known to law, before the Court as per law.

13. In the petition filed by the Plaintiffs for Letters of Administration it is the categorical pleadings of the plaintiffs to the effect that both the attesting witnesses were dead. Whereas in the chief examination it is the contention of P.W.1 that the attesting witnesses whereabouts are not known. These tow contradictions in the statements of the Plaintiffs clearly invites a serious doubt in the mind of the Court and if the attesting witnesses are really dead the plaintiffs can very well prove the will by resorting to Section 69 of the Indian Evidence Act by examining one of the persons who has acquaintance with the signature of any one of the attesting witnesses and also the executant of the document. Before resorting to the

provision under Section 69 of the Indian Evidence Act to prove the will, it must be established by the plaintiffs the factum of death of attesting witnesses. Mere pleading in the plaint as to their death itself is not sufficient for establishing the factum of the death of the attesting witnesses. The plaintiff ought to have filed death certificates of the concerned attesting witnesses to prove their alleged death. But no attempt whatsoever has been made by the plaintiffs in that regard. Therefore, the contention of the plaintiffs that both the attesting witnesses were dead, cannot be countenanced without establishing the factum of death of the above witnesses.

14. Now, coming to the other contention of the plaintiffs in the proof affidavit to the effect that the attesting witnesses could not be traced and their whereabouts are not known is taken into consideration. Mere assertion in the evidence itself is not sufficient to dispense with the proof of diligent search which was supposed to be made to establish the fact that their whereabouts are not known to the plaintiff. In the proof affidavit P.W.1 in the chief examination except stating that two of the attesting witnesses Munusamy and R.Subramani whereabouts are not known to them and the scribe who drafted the will also passed away, the plaintiff has not stated anything about the diligent search made by them to find out the

address of the attesting witnesses. It is the stand of the Plaintiffs' counsel that since the attesting witnesses were also working with the testator in the Binny Mills and after the Mill was closed in the year 1984 the attesting witnesses whereabouts are not known to them. In this regard when a careful reading of the will Ex.P1 it is seen that the addresses of the attesting witnesses were clearly given in the place while signing as identifying witness. One of the attesting witnesses Munusamy's address was shown as No.10, Bharathi Nagar, Kolathur, Chennai-99 and his avocation is shown as business. Similarly, another attesting witness namely Subramani son of Ramasamy, and his address was given as No.7, Elumalai Street, George Colony, Chennai-11 and his occupation also shown as IP Limited. i.e. India Pistons Limited Company. When the specific address of the attesting witnesses has been given, the entire evidence of P.W.1 when carefully seen they have not made any attempt to summon these witnesses before this Court by resorting to Order 16 Rule 10 of CPC. No coercive step was also taken as against them to procure their presence before the Court. Further, to countenance the pleading in the plaint that both the attesting witnesses were died no one was examined to prove the same and no death certificates whatsoever were filed. In the absence of any evidence as to the diligent search made by the plaintiff to secure the attesting witnesses, mere

statement of the plaintiff about the non availability of the attesting witnesses itself is not sufficient to hold that the attesting witnesses either dead or their whereabouts are not known. Therefore, the plaintiff has failed to prove the will by examining the attesting witnesses. Of course the plaintiffs examined one P.M.Ganesh, P.W.2 said to be the son of Munivel to prove the signature found in the will that of the Munivel.

15. The entire evidence of P.W.2 shows that he has identified the signature of the testator alone. He has not identified the signature of the attesting witnesses. Though he would contend that he also present at the time of execution of the will, his cross-examination clearly indicate that he was pursuing his Diploma in Engineering at the relevant point of time when the will was executed in a working day. Therefore, P.W.2 accompanying the testator and identified his signature at the time of the execution of the will also highly improbable and doubtful. In any event, the evidence of P.W.2 also does not satisfy the requirements of law as contemplated in Section 69 of Indian Evidence Act to prove the will. In the absence of the attesting witnesses alive. Section 69 of the Indian Evidence Act reads as follows:-

"69. Proof where no attesting witness found. If no

such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

16. A careful reading of the above Section itself is very clear that if the attesting witnesses are not available, it must be proved that attestation of one attesting witness at least in his handwriting, and that the signature of the person executing the document is in the handwriting of that person. Two conditions are required to be proved for valid proof of the Will i.e. the person who has acquaintance with the signature of the one of the attesting witnesses and also the person executing the document should identify both the signatures before the Court. But the evidence of P.W.2 would show that he has identified the signature of the testator. His evidence clearly shows that he is not acquaintance with the signature of the both attesting witnesses. Therefore, there is no compliance of Section 69 also in this case. As already discussed, before resorting the proving under Section 69 the plaintiff should have established the factum of death

of the attesting witnesses or should have made diligent search to prove the fact as to non availability of the attesting witnesses. The plaintiff has not done anything in that aspect. At any event, the will has not been proved in the manner known to law. In this regard the judgment reported in ***Babu Singh and others vs. Ram Sahai Alias Ram Singh*** [(2008) 14 SCC 754] the Hon'ble Supreme Court has held as follows:-

"Evidence Act, 1872 Section 69- Applicable in absence of attesting witness-only when the party moves court for purposes under Order 16 Rule 10 CPC but despite issuance of summons, the witness fails to obey the summons, can the will be proved in the manner indicated in Section 69- Mere statement of counsel of the plaintiff that the attesting witness was won over by the opposite party not sufficient to prove his absence- Handwriting of the attesting witness and signature of the person executing the will must be proved- Burden of proof then shifts on others- Civil Procedure Code, 1908, Order 16 Rule 10."

"Section 69 of the Evidence Act would apply, inter alia, in a case where the attesting witness is either

dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69 i.e. by examining witness who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

Whereas, a will ordinarily must be proved keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Evidence Act, in the event the ingredients thereof, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.

The Calcutta High Court in *Amal Sankar Sen case*, AIR 1945 Cal 350, rightly observed: (AIR p.352)

"... In order that Section 69, Evidence Act, may be applied, mere taking out of the summons or the service of summons upon an attesting witness or the mere taking out of warrant against him is not sufficient. It is only when the witness does not appear even after all the processes under Order 16

Rule 10, which the Court considered to be fit and proper had been exhausted that the foundation will be laid for the application of Section 69, Evidence Act."

17. Though the plaintiff has filed Ex.P2 to P7 to prove the admitted signature of the testator, this Court is not in a position to compare the signature when the law mandates that a particular document should be proved in a particular manner, this Court cannot give validity of the will merely on the basis of comparing the admitted signature of the testator. Ex.P3 is the affidavit of one R.Natesan to prove the signature found in the will is that of the testator. It is to be noted that the said Natesan is also a third party to the proceedings and he has not been examined before this Court. Therefore, her affidavit also will not be in any use since the same is not substantive piece of evidence to prove the will and further the document filed by the plaintiff is also of no use in establishing the will. When the document required by law to be attested, it shall not be used as an evidence until it is proved in the manner known to law, resorting Section 68 or 69 and 70 and 71 of the Indian Evidence Act. When the attesting witnesses are available, there is no difficulty in proving the document by examining one of the attesting witness as

per Section 68 of the Evidence Act.

18. When there is no attesting witness found, then Section 69 of the Indian Evidence Act comes into play, before resorting Section 69 of Evidence Act plaintiff should establish either factum of death of attesting witnesses or their non availability by convincing evidence. Then in the event of the attesting witnesses do not support the will, propounder can resort to Section 71 of the Indian Evidence Act for proving the document by other mode. Only by these procedures, the Will can be admitted in evidence. Without establishing the execution and attestation of will Ex.P1 same cannot be admitted in evidence. Therefore, this Court is of the view that since the document in question Ex.P1 will has not been proved in the manner known to law, and the same cannot be used as an evidence, hence the question of deciding its truth and genuineness does not arise at all. Accordingly, this Court is of the view that no discussion is required with regard to the validity and genuineness of the will. Accordingly, the issues are answered against the plaintiffs.

19. In the result, the suit is dismissed. However, considering the relationship of the parties, no costs.

27.02.2017

Index:Yes/No
Internet:Yes/No
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N.SATHISHKUMAR, J

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