

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 05.01.2017

CORAM:

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

C.M.A.No.3349 of 2004

K.Periyasamy

... Appellant/Petitioner

-Vs-

P.Ramasamy

... Respondent/Respondent

Prayer:- Civil Miscellaneous Appeal filed under Section 299 of Indian Succession Act, against the order and decretal order dated 12.02.2004 passed in Probate O.P.No.80 of 2002 passed by the Principal District Judge, Namakkal.

For Appellant : Mr.P.Mathivanan

For Respondent : Mr.Bijaisundar

JUDGMENT

The petitioner, who has lost his Original Petition in O.P.No.80 of 2002 for probating a Will dated 10.10.2000 alleged to have been executed by one Kaliammal has come forward with this appeal.

2. The material facts on the basis of which the appellant has moved the trial Court are as follows:

One Kaliammal was married to one Perianna Gounder, through whom she has a son Ramasamy. He is the respondent herein. Kaliammal was separated from her husband some forty years back and had come to reside in Chinnamanali, Tiruchengodu Taluk, where she had constructed her house, which is scheduled as I item of property in the suit. This property was purchased on 02.12.1972. Ever since her separation from her husband, Kaliammal was essentially under the care and protection of her brother Kandasamy. The appellant/petitioner is the son of said Kandasamy. Besides the one item of immovable property detailed above, Kaliammal had two items of movable properties, both of which are actionable claims.

● On 10.10.2000, Kaliammal had executed a Will bequeathing all her movable and immovable properties to her nephew, the appellant herein. Be that as it may, the testator died on 30.11.2000. Hence the petition is filed to probate the Will

3. In the counter, the essential contention raised by the respondent is that the Will was fabricated and shrouded in suspicion as it ignored Kaliammal's only natural heir, the respondent herein. It was also denied in the counter that Kaliammal was ever separated from her husband and that she was under the care and protection of her brother Kandasamy.

4. Before the trial Court, the appellant has examined himself as PW-1 and also examined the two attesting witnesses to the Will as PW-2 and PW-3. The Will itself was marked as Ext.P-5. On behalf of the respondent, he has examined himself as RW-1. On going through the evidence before it, the trial Court has disbelieved the genuineness of the Will. It has reasoned:

- There is no material evidence to indicate that Kaliammal was separated from her husband and consequently, there is no reason for her to ignore her natural born son.
- Where as both P.W.2 and P.W.3 (the attestors to the Will) have deposed that the Will was handwritten by one Senthil Kumar, the Will, in fact, was typed and it constituted a suspicious circumstance.
- When it is admitted that the testator was an illiterate senior citizen, there is no endorsement anywhere in the Will that it was read over to the testator before its execution.
- Nowhere in the first two pages of the Will, is there an endorsement or indication that the thumb impression found there represented the left hand thumb impression of Kaliammal.

According to the trial Court the above facts constituted suspicious circumstances or such variety that it considered them adequate enough to vitiate the genuineness of the Will. Hence the petitioner before the trial Court has come forward with this appeal.

5. The learned counsel for the appellant contended that the trial Court's order was premised on the fact that both Kaliammal and her son were living cordially and that she was living under the care of her natural born son. This, even that very son, the respondent herein, does not support. Indeed in his cross-examination he as R.W.1 has conceded that his mother was separated from his father and that after their separation, he continued to live with his father. Necessarily, a young illiterate woman cannot become a destitute of her own destiny and would naturally seek to be in the care of someone. Rightfully she went to her brother Kandasamy, and in a scenario such as this it was only natural for her to express her love and perhaps gratitude to the family that cared her and to execute the Will in favour of her nephew. Ext.P-5 must therefore be contextually understood and appreciated. Turning to the proof

of the Will, both P.W.2 and P.W.3 have categorically deposed that the Will in question was executed by the testator in their presence. Merely because the testator was an illiterate, it does not imply that she was incapable of executing a Will, contended the Counsel.

6. Per contra, the learned counsel for the respondent highlighted two aspects:-

(i) Neither of the two attesting witnesses viz., P.W.2 and P.W.3 have deposed that the testator had executed the Will in their presence, and that they too had attested in the presence of the executant as is statutorily required both under Sec. 63 of Indian Succession Act and Sec.68 of the Indian Evidence Act.

(ii) Both P.W.2 and P.W.3 have testified that the Will was hand-written and it was taken down by its scribe Senthil Kumar on the dictation of the testator. If the Will was prepared instantaneously on the basis of dictation given by the testator, it would surely be a handwritten one, whereas the Will before the Court is typed one. The Will being a solemn document, it is essential that the propounder of the Will explained every circumstance and material fact that might tilt the needle of suspicion towards the Will.

7. As to the background facts in which the execution of the Will was sought to be appreciated, I find merit in the submissions of the learned counsel for the appellant. R.W.1 has conceded, as was argued by the learned counsel for the appellant, that Kaliammal was separated from her husband and was living close to 40 years prior to her death in Chinnamanali where her brother Kandasami lived, and that he himself had opted to stay with his father even after her mother's separation from her father. In a circumstance such as the one in which Kaliammal found herself, it would be safe to presume that she had moved to Chinnamanali only for the care, protection and emotional support that her brother Kandasami could provide. It is nobody's case that she had strained her relationship with her brother or nephew. Therefore, the circumstances in which the Will was said to have been executed, it would be only natural for her to prefer her nephew to her natural born son, if only she had chosen to execute a Will.

8. That however, does not complete the story. The focus now shifts to understand if there are any suspicious elements in the matter of executing the Will, which is also of utmost importance in establishing the genuineness of the Will. Here, in my assessment, the appellant has failed miserably. Both the attesting witnesses P.W.2 and P.W.3 have deposed that the Will was prepared by its scribe by taking down the dictation of the

testator. Here, for two reasons, I hold that the proof of execution of the Will has not passed the litmus test: (a) First, the testator was an 70 year old illiterate woman and it is extremely doubtful that she was capable of collecting her thoughts cogently enough for her to dictate the contents of the Will to facilitate its simultaneous or contemporaneous recording; (b) Secondly, and factually the Will is a type-written one and is not a hand-written one.

9. I therefore conclude that notwithstanding the circumstances which might be considered as favourable for Kaliasammal to execute a Will in favour of her nephew, the appellant herein, the fact remains that the Will that was presented before this Court could not be stated to be the Will executed by Kaliasammal. I therefore find that the reasonings of the trial Court, to the extent it pertain to the execution of the Will are acceptable and hence it does not call for any interference.

10. In the result, the appeal is dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kmi

To:

1. The Principal District Court,
Namakkal.
2. The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.K. Bijaisundar, Advocate, S.R.No.1018

gj (CO)
md(07/02/2017)

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