

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 02.03.2018

PRONOUNCED ON: 19.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

TOS.No.17 of 2017

Ajith Kumar

Plaintiff

Vs

Arun Kumar

Defendant

Prayer:- This Testamentary Original Suit is filed under Sections 222 and 276 of the Indian Succession Act for grant of Probate.

For Plaintiff : Mr.L.Rajasekar

For Defendants : Mr.M.Vivekanandan

JUDGEMENT

Originally, OP.No.798 of 2016 had been filed by the Plaintiff, Ajit Kumar, against six Respondents, namely, Arun Kumar, Anil Kumar, Anand Kumar, Dr.Ajoy Kumar, Ashok Kumar and Ashwin Kumar, seeking grant of Probate in respect of the Will, dated 09.11.2004 in common form.

2. Since the 2nd Respondent had filed a caveat, dated 17.03.2017, the OP.No.798 of 2016 was converted into TOS.No.17 of 2017. Pursuant to the caveat filed by the 2nd Respondent, the other Respondents had filed their consent affidavits. Thus, 2nd Respondent in the OP alone is the contesting Defendant in the TOS.

3. The case of the Petitioner as stated in the OP is as follows:-

(a) The Petitioner and the Respondents are brothers. Their mother, Lakshmi Devi Nair died on 5.2.2012 at No.52, Anand Building, Casa Major Road, Egmore, Chennai-8 and she derived title to the Schedule property vide settlement deed, dated 17.01.1973, registered as Document No. 116 of 1973, in the Office of the Sub Registrar, Palghat. She executed a Will dated 9.11.2004 at the above address in the presence of the witnesses whose names appear at the foot thereof. The Petitioner is the Executor of the Will. The amount of the assets which are likely to come into the Petitioner's hands does not exceed in the aggregate the sum of Rs.46,80,000/- and the net amount of the assets after deducting all items which the Petitioner is by law allowed to deduct is of the value of Rs.46,80,000/-. He has impleaded all the next of kin and other persons interested as Respondents and there is no other next of kin or other person to be impleaded. The parents of the Testatrix predeceased her.

(b) There is no caveat pending against this petition. The Petitioner undertakes to duly administer the property and credits of the deceased Testatrix, in any way concerning her Will by paying first his debts and then the legacies therein bequeathed so far as the assets will extend and to make a full and true inventory thereof and exhibit the same before this Court within six months from the date of grant of Probate with the Will annexed herewith and also render a true account of the said property and credits within one year from the said date.

c. Except the 2nd and 3rd Respondents, the other Respondents have consented for the grant of probate in favour of the Petitioner and they have

individually sworn consent affidavits. No application has been made to any Court seeking probate of any Will of the deceased Testatrix or for Letters of Administration with or without the Will annexed to her property and credit. In such circumstances, the Petitioner as Executor of the Will has filed this OP for grant of probate of the Will.

4. As stated above, the OP.No.798 of 2016 had been converted into TOS.No.17 of 2017 in view of the caveat filed by the 2nd Respondent. The 2nd Respondent, who is alone contesting the TOS, as the Defendant, had filed a written statement.

5. In the written statement, it has been stated as follows:-

a. The averments in the petition are vexatious. Execution of the Will as stated by the Petitioner had been denied. There is no will dated 09.11.2004 in existence. It was forged and created with a view to grab the entire family property that stood in the name of their mother and to nullify the rights of the other brothers. There was no necessity for the Testatrix to execute the Will in favour of the Plaintiff without the knowledge of the other sons. The Testatrix died in 2010 i.e. after 6 years from the date of execution of the alleged Will and he was not informed about the existence of the Will for the past 12 years either by the Plaintiff or their mother. There is no evidence to prove that on the date of executing the alleged Will, the Testatrix was in a good health and fits state of mind. The petition is not valued properly and the Plaintiff is not entitled to any rights or reliefs as claimed in the Schedule property. Hence, the TOS must be dismissed with costs.

6. Based on the pleadings, this court had framed the following

issues for trial on 11.09.2017:-

1. Whether the Will dated 09.11.2004, was executed by Mrs.Lakshmi Devi Nair, out of free will and consent and whether she had at that point of time mental ability to execute the Will?
2. Whether the delay pointed out by the Defendants in applying for probate of the Will is properly explained and whether it is fatal to the case of the Plaintiff?
3. Whether the Will is true and genuine?
4. Whether the Will has been proved in a manner known to law?
5. To what other reliefs, the parties are entitled to?

7. Thereafter, the parties were invited to lead evidence. During the trial, the Plaintiff was examined as PW.1. The first attesting witness Dr.Sanjan John was examined as PW.2 and the second attesting witness, Moti Philips was examined as PW.3. On the side of the Plaintiff, Ex.P1 to Ex.P9 were marked.

8. Ex.P1 is copy of the death certificate of K.K.Nair, father of the Petitioner. Ex.P2 is the original Will, dated 09.11.2004. Ex.P3 is the computer downloaded copy of death certificate of Testatrix dated 9.2.2010. Ex.P4 is the original legal heir certificate of the Testatrix, dated 29.2.2016. Ex.P5 is the affidavit of assets dated 16.08.2016. Ex.P6 is the copy of the settlement deed dated 13.01.1973, written in Malayalam. Ex.P7 is the English translated version of settlement deed dated 13.01.1973. Ex.P8 and Ex.P9 are the affidavits filed by the attesting witnesses, Dr.Sanjan John and Moti Philips.

9. PW.2, the first attesting witness to the Will had deposed in his

evidence as follows:-

"I knew the deceased, Lakshmi Devi Nair and she executed her last Will and testament on 9.11.2004. I saw the Testatrix signing in Ex.P2 Will. Myself and another attesting witness Moti Philips were present at the time of execution of Ex.P2 by the Testatrix. At her request, I put my signature as first attesting witness in Ex.P2. Thereafter, Moti Philips signed in the said Will as second attesting witness. The Testatrix saw myself and Moti Philips signing in the said Will as attesting witnesses one after the other. The Testatrix was in a sound and disposing state of mind, memory and in good health at the time of execution of Ex.P2 Will. I am filing my affidavit as attesting witness to Ex.P2 and same is now marked as Ex.P8.

10. PW.3, the second the attesting witnesses to the Will, had

deposed in his evidence as follows:-

"I knew the deceased, Lakshmi Devi Nair and she executed her last Will and Testament on 9.11.2004. I saw the Testatrix signing in Ex.P2 Will. Myself and another attesting witness Dr.Sanjan John were present at the time of execution of Ex.P2 by the Testatrix. At her request, Dr.Sanjan John signed in the said Will as first attesting witness. Thereafter, I put my signature as second attesting witness in Ex.P2. The Testatrix saw Dr.Sanjan John and myself signing in the said Will as attesting witnesses one after the other. The Testatrix was in a sound and disposing state of mind, memory and in good health at the time of execution of Ex.P2 Will. I am filing my affidavit as attesting witness to Ex.P2 and the same is now marked as Ex.P9."

11. Though the Defendant had filed a written statement, he did not

come forward to let in evidence. On the other hand, as stated above, the

Plaintiff has let in oral and documentary evidence to substantiate the suit claim.

However, a Memo of Compromise dated 22.11.2017, signed by the Plaintiff

and the Defendant and their respective counsel has been filed. In the said

Memo of Compromise, it has been stated as under:-

"1. The Plaintiff herein was the original Petitioner in OP.No.798 of 2016, filed a petition for grant of probate. There are 6 Respondents. The Respondents 1,4, 5, 6 filed consent affidavits expressing their no objection and the second Respondent filed

the caveat and the OP was converted as the TOS and numbered as TOS.No.17 of 2017 and it is being contested by the second Respondent.

2. The Plaintiff and the second Respondent/ Defendant have amicably settled their differences by mutual discussions among themselves and their brothers and have come for the following compromise.

3. The second Respondent / Defendant withdraws all the allegations made in the written statement in respect of the Last Will of the Late Lakshmi Devi Nair.

4. Pursuant to the said discussions, the second Respondent/ Defendant submits that he has no objection for the grant of probate or grant of decree in favour of the Plaintiff herein for the relief sought for by the Petitioner/ Plaintiff.

Therefore, this Hon'ble Court may record the compromise and pass a judgement and decree granting probate in favour of the Petitioner in TOS.No.17 of 2017 and pass such further or other order/orders as deem fit and proper in the circumstances of the case and thus render justice."

12. It is seen from the said Memo of Compromise, dated 22.11.2017 that the Defendant has no objection for the grant of probate in favour of the Petitioner as prayed for. Accordingly, this TOS is decreed as prayed for. Issue probate in favour of the Plaintiff. No costs. The Memo of Compromise dated 22.11.2017 shall form part of the decree.

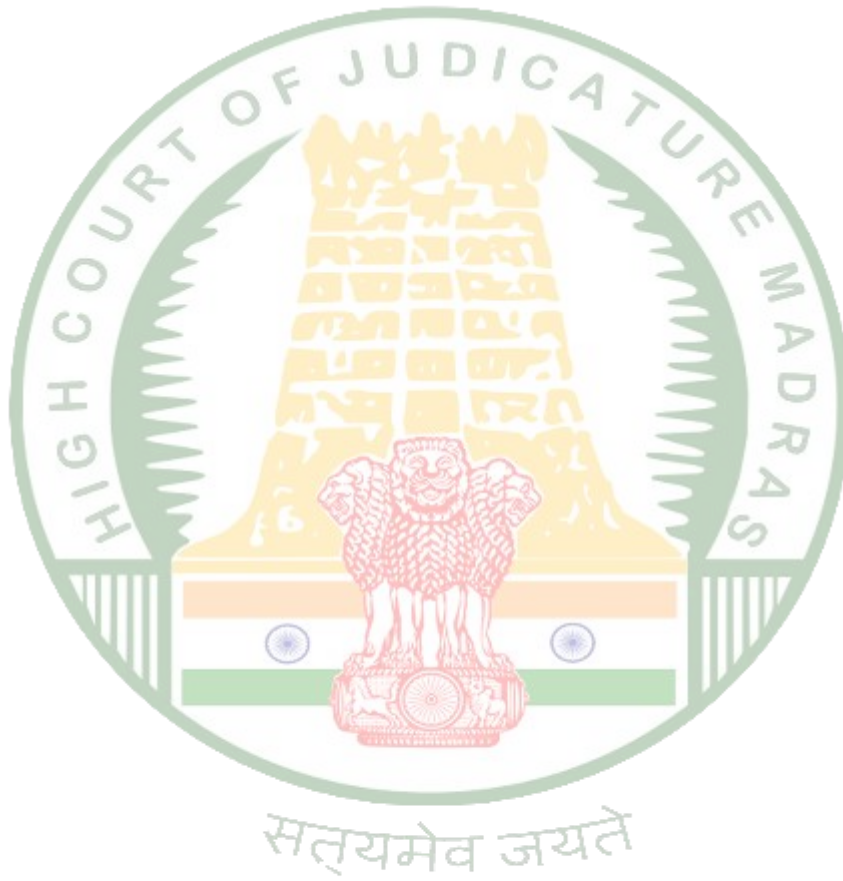
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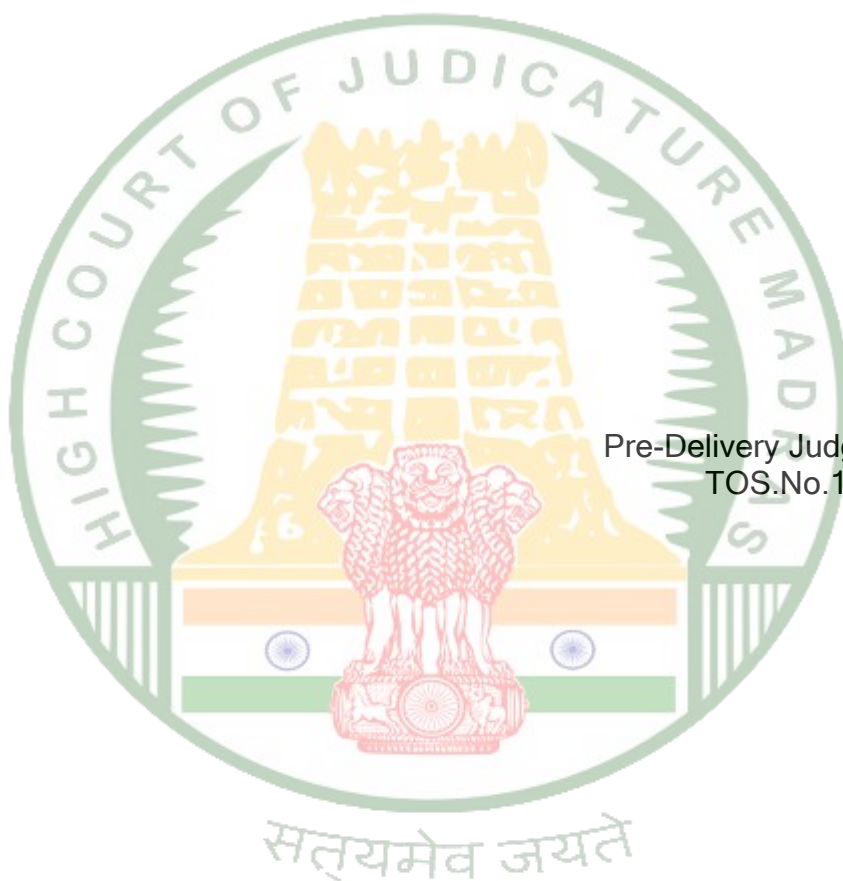
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To:

1. The Record Keeper, VR Section, High Court, Madras



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Pre-Delivery Judgement in
TOS.No.17 of 2017

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