

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 08.03.2018

PRONOUNCED ON: 19.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

TOS.No.3 of 2011

C.D.Anna Sholly

Plaintiff

Vs

1. C.D.Antony Raisen

2. C.D.Elsi Joshy

Defendants

Prayer:- This Testamentary Original Suit is filed under Sections 232 and 276 of the Indian Succession Act for grant of Letters of Administration with the certified copy of the Will annexed.

For Plaintiff

Mr.M.Sivavarthan

For Defendants

Mr.M.A.Nissar Ahamed-D1
Mr.G.Rm.Palaniappan-D2
(Set Exparte)

JUDGEMENT

Originally, OP.No.28 of 2010 had been filed by the Plaintiff, C.D.Anna Sholly, against three Respondents, namely, Therasa Baby, C.D.Antony Raisen and C.D.Elsi Joshy, seeking Letters of Administration with the certified copy of the Will annexed, dated 02.12.1983.

2. Since the Respondents 2 and 3 had filed a caveat dated 4.2.2010 and 22.10.2010, the OP.No.28 of 2010 was converted into TOS.No.3 of 2011.

Thus, the Respondents 2 and 3 were impleaded as the Defendants in the TOS.

3. The case of the Plaintiff as set out in the petition is as follows:-

a. The 1st Respondent, Elsi Anthony, is the mother of the Petitioner and the Respondents 2 and 3. The Respondents 2 and 3 are the brother and sister of the Petitioner. The mother of the 1st Respondent, Elsi Anthony was the absolute owner of the land, building and premises, bearing Old Door No.12, New Door No.4, Main Road, Dhandeeswaran Nagar, Velacherry, Chennai-42, in S.No.197/1, measuring 1200 sq.ft. with built up area of 900 sq.ft. consisting of 6 shops, having purchased the same by a sale deed dated 2.4.1975, registered as Document No. 882 of 1975, in the Office of Saidapet, Joint-II, from out of her own resources. She executed a last Will and Testament on 2.12.1983 at her residence at No.52, Velachery Main Road, Chennai-42 and registered as Document No. 39/1983 in Book III, Volume 9, pages 67 and 68 in the office of the Joint Sub Registrar I, Madras South in the presence of the witnesses, who names appear at the foot thereof.

b. The attesting witnesses could not be traced by the Petitioner due to efflux of time since those witnesses were more than 60 years old even at the time of execution of the Will. Hence, a third party affidavit had been filed along with the Petition. The Testatrix died on 25.12.1983 at her ordinary resident at No.5, Cross Street, LIC Colony, Velachery, Chennai-42, leaving behind her surviving her husband, Anthony, the Petitioner and the Respondents as her legal heirs. The husband of the Testatrix died on 9.3.1999 and the parents of the Testatrix also predeceased her. The 1st Respondent, mother of the Petitioner is the only legal heir to the Testatrix, who also gone out of the family,

leaving her children, the Petitioner and the Respondents 2 and 3. Hence, the Testatrix did not propose to bequeath any part of the immovable property in favour of the 1st Respondent. She possessed movable and immovable properties within the State of Tamil Nadu.

c. The Petitioner did not know about the whereabouts of the last Will dated 2.12.1983 in spite of due and diligent search. Hence, a certified copy of the last Will dated 2.12.1983 had been produced. Thus, the delay had occurred in filing the petition. The Petitioner is one of the beneficiaries under the Will. Though, the husband of the Testatrix had been appointed as the Executor under the Will, he did not file a petition for probate due to his ill health and old age and he died on 9.3.1999. Since the Respondents have not chosen to do anything, the Petitioner was constrained to file this petition for grant of Letters of Administration.

d. The amount of assets, which is likely to come to the hands of the Plaintiff does not exceed in the aggregate the sum of Rs.10,00,000/-/- and the net amount of the said assets after deducting all items which the Petitioner is by law allowed to deduct is only of the value of Rs.9,98,000/-. The Petitioner undertakes to duly administer the property and credits of the deceased Testatrix in any way concerning his Will by paying first her 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 Letters of Administration with the certified copy Will annexed and also render a true account of the said property and credits within one years from the said date. No application has been made

to any Court, seeking similar relief.

e. The deceased Testatrix left no other legal heirs other than the Petitioner and the Respondents and executed the last Will and Testament in favour of the Petitioner and the Respondents 2 and 3 out of free will and voluntary consent, in a sound and disposing state of mind. In such circumstances, this Original Petition had been filed, seeking Letters of Administration.

4. Though the Defendants entered appearance through counsel, after they were served on 22.2.2011 and 17.2.2011 respectively, no written statement had been filed by them. Hence, the matter was ordered to posted under the caption 'Undefended Board'. For filing of the written statement, the Defendants were set exparte and exparte evidence was ordered to be recorded by the order of this Court dated 22.03.2017.

5. As per the said order dated, 22.03.2017, before the Additional Master II, the Plaintiff was examined as PW.1 and Ex.P1 to Ex.P3 were marked through PW.1. One D.Justian, who was said to be one of the attesting witnesses to the Will, was examined as PW.2 and Ex.P4, was marked through him.

6. Ex.P1 is the certified copy of the Will dated 2.12.1983. Ex.P2 is the computer generated copy of the death certificate. Ex.P3 is the computer generated copy of death certificate. Ex.P4 is the affidavit sworn by PW.2.

7. Ex.P1, which is the certified copy of the Will, dated 02.12.1983, is of the year 1983. It has been stated in the petition that the attesting witnesses to Ex.P1 could not be traced due to efflux of time since both the attesting

witnesses were aged 60 years even at the time of execution of the Will. Hence, it was stated by the Plaintiff that he had filed a third party affidavit along with the petition. But, this court finds no such third party affidavit filed. Further, the name of the third party, who had sworn the affidavit, was also not given in the petition averments.

8. On 23.6.2016, the Master had observed as follows:-

“Plaintiff is present. To prove Will attesting witnesses are no more. Examining to prove signature of one of the attesting witness steps have been taken. Adjourned to 5.7.2017.”

But, it was observed by the Master on 18.7.2017 as follows:-

“One of the attesting witnesses appears. Attesting witness, D.Justin, PW.2 examined. His affidavit is marked as Ex.P4. Post the matter before the Hon'ble Court.”

9. It is seen from Ex.P1 that D.Justian and P.S.Gopalan were shown as the two attesting witnesses and their signatures were also found in Ex.P1. Though it had been stated by both the Plaintiff and the Master that the attesting witnesses were no more, strangely, D.Justin, who was shown as the first attesting witness in Ex.P1, certified copy of the Will, had filed his affidavit dated 17.07.2017 signed by him both at the foot of the first page and at end of the affidavit for his chief examination. He had also given evidence.

10. On comparison of the signatures found in Ex.P1 with the signatures found in Ex.P4, which is the affidavit filed by the D.Justin, on the face of it, it is apparent that they do not tally and match with each other. Even a look into the signatures found in the first page and at the end of Ex.P4, reveals that there is variance. Even the initial of the said witness, who had sworn the affidavit, found in the affidavit Ex.P4 and in Ex.P1 are also different. However,

it was recorded by the Master as if D.Justin had given evidence.

11. Another glaring and suspicious aspect is the age of the said attesting witness, D.Justian. In this regard, it is to be noted that Ex.P1, certified copy of the Will, is of the year 1983. It has been stated that the attesting witnesses were both aged 60 years at the time of execution of the Ex.P1, which is dated 2.12.1983. PW.2, S.Justin, who was said to be one of attesting witnesses, had sworn in the affidavit, Ex.P4 as if he was aged about 77 years old as on 17.07.2017 and he was there as an attesting witness at the time of execution of the Will and he saw both the Testatrix and the other attesting witness, signing the Will and the Testatrix saw him affixing his signature as witness to the Will. Actually, as on date, he would be aged about 93 years old. Therefore, an adverse inference can be drawn with respect to the genuineness of the signatures of the attesting witnesses found in the Will, Ex.P1 and the affidavit Ex.P4 against the Plaintiff, by holding either that the signatures of the said attesting witness were forged.

12. Further, as averred by the Plaintiff, in order to prove the Will, Ex.P4, no third party affidavit had been filed. Instead, by fabricating the signature of the one of the attesting witness, as stated above, Ex.P4 had been filed and PW.2, who filed Ex.P4 had deposed evidence as if he was one of the attesting witnesses to Ex.P1.

13. On 23.6.2017, actually, the Master, holding that the attesting witnesses were no more, had ordered to prove the signature of one of the attesting witnesses only. But, when the matter was posted before him on 18.7.2017, he miserably failed to look into his own previous order and he

examined the said attesting witness as PW.2 and marked Ex.P4.

14. Though it is seen that the Defendants are not interested in prosecuting the case, by filing the written statement and consequently, the Defendants had been set exparte, since forgery and fabrication was found in the signatures of the one of attesting witnesses, as stated above and since there were discrepancies in the details as to the age of the said attesting witness and since no third party was examined to prove the signature of one of the said attesting witness, it can be safely held that the Ex.P1 has not been proved by the Plaintiff in a manner known to law. Consequently, I hold that the Plaintiff is not entitled for grant of Letters of Administration.

16. In the result, this TOS is dismissed. No costs.

19.03.2018

Index:Yes/No
Web:Yes/No
Speaking/Non Speaking
Srcm

To:

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

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Pre-Delivery Judgement in
TOS.No.3 of 2011