

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 14.11.2017

PRONOUNCED ON: 04.01.2018

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

TOS.No.44 of 2010 and
A.No.4 of 2006 in OP.No.418 of 2001

K.Govindasamy

Plaintiff

Vs

1. T.Rajasekaran
2. R.Vasantha

Defendants

Prayer:- This Testamentary Original Suit is filed under Sections 222 and 276 of the Indian Succession Act for the relief as stated therein.

For Plaintiff : Mr.T.V.Krishnamachari

For Defendants : Mr.M.Kalyanasundaram, SC

JUDGEMENT

A.No.4 of 2006 had been filed, seeking to revoke the probate granted with respect to the last Will and Testament of T.Kanakasekaran, dated 18.02.1991 in OP.No.418 of 2001, by judgement dated 4.12.2001.

2. OP.No.418 of 2001 had been filed by T.Rajasekaran, seeking Letters of Administration with the Will annexed with respect to the last Will and Testament of his brother, T.Kanakasekaran, who died on 11.6.1997, leaving behind a registered Will, dated 18.2.1991, which was registered as Document No.12 of 1991, in the Office of the Sub Registrar, Sembium.

3. In the said Original Petition, the consent affidavit of the wife

T.Kanakasekaran, namely, K.Mahalakshmi was filed. The consent affidavit of V.Nirmala, sister of late T.Kanakasekaran and the consent affidavit of T.Selvasekaran, another brother of the late T.Kanakasekaran, were also filed. In the said proceedings, this court, after examining the evidence on record, had granted probate, by order dated 4.12.2001.

4. Subsequently, A.No.4 of 2006 had been filed by the said K.Mahalakshmi, seeking revocation of the probate on the ground that she did not actually give the consent affidavit, which was relied on, while granting the order of probate, by this court on 4.12.2001. Pending the said application, K.Mahalakshmi died and her two legal representatives, G.Shantha and K.Govindasamy, were brought on record. Subsequently, G.Shantha also died and her legal representative, R.Vasantha was brought on record. In the said application, the 1st Respondent was T.Rajasekaran, in whose favour, Letters of Administration was granted and the 2nd 3rd Respondents were T.Selvasekaran and V.Nirmala, who were the brother and sister of the deceased T.Kanakasekaran and who had also given consent affidavits. There were also Respondents 2 to 9, who were all tenants and the Respondents 10 and 11 are the purchasers of the property.

5. In the mean while, OP.No.149 of 2010 had been filed, with respect to the last Will and Testament of K.Mahalakshmi, who died on 1.11.2009. She was said to have left behind a Will, which was registered on 10.2.2003, as Document No.13 of 2003 in the Office of the Sub Registrar, Annanagar. Her sister's husband, K.Govindasamy, who was shown as the 3rd Petitioner in A.No.4 of 2006, is the Petitioner and the 1st Respondent is

G.Shantha, who subsequently died and the 2nd 3rd and 4th Respondents are T.Rajasekaran, T.Selvasekaran and V.Nirmala, who are the brothers and sister of the deceased T.Kanakasekaran, husband of the Testatrix, K.Mahalakshmi.

6. OP.No.418 of 2001 was filed with respect to the last Will and Testament of T.Kanakasekaran. T.Kanakasekaran had left behind a registered Will dated 18.2.1991. The Will was registered as Document No.12 of 1991 in the Office of the Sub Registrar, Sembium. He died on 11.6.1997. He left behind his widow, K.Mahalakshmi as his only legal heir. They did not have any issues. In the Will, he had appointed his brother, T.Rajasekaran as the Executor. According to the said Will, he had bequeathed the immovable properties at Door No.1, Rangappa Maistry Street, Ayanavaram, Chennai, measuring 1545 sq.ft. of land and building and also land and building at Plot No.43, 6th Street, Kamarajar Nagar, Avadi, Pabripettai Village, Tiruvallur District, measuring 5280 sq.ft. to his brothers, T.Rajasekaran and T.Selvasekaran. He has further stated in the Will that his two brothers should pay a sum of Rs.400 every month to his widow K.Mahalakshmi for her expenses. In the said proceedings, K.Mahalakshmi, T.Selvasekaran and V.Nirmala, sister of the deceased T.Kanakasekaran have filed consent affidavits.

7. The Petitioner, T.Rajasekaran examined himself as PW.1. The original registered Will was marked as Ex.P1 and the original death certificate of T.Kanakasekaran was marked as Ex.P2. The consent affidavits were marked as Ex.P3 (series). The first attesting witness, G.Palaniappan had filed his proof affidavit, stating that along with the other attesting witness,

M.Sundarapandian was present at the time of execution of the Will. He further stated that he attested the Will as an attesting witness and he and the other attester saw the Testator signing the Will and the Testator also saw them signing the Will as witnesses. He further stated that the Testator was in a sound and disposing state of mind. His affidavit was marked as Ex.P4. On consideration of the evidence, this court had granted probate in favour of T.Rajasekaran on 4.12.2001.

8. Thereafter, the present application in A.No.4 of 2006 had been filed by K.Mahalakshmi for revocation of the probate granted in OP.No.418 of 2001. In the affidavit filed by her, she has stated that T.Kanakasekaran was working in CVD Central Heavy Vehicle Factory, Avadi and he was also doing finance business and he had purchased two properties. He died on 11.6.1997. She has further stated that she was staying in the first floor of the property at Door No.1/1, Rangappa Maistry Street, Iyyanavaram, Chennai. She further stated that there were four residential portions occupied by the four tenants in the ground floor. She further stated that there were five shops in the front of the ground floor occupied by four tenants. In the other property at Door No.42, 6th Street, Kamarajar Nagar, Avadi, Chennai, there was also a tenant. In the application, she had impleaded the tenants as the Respondents 4 to 9. She had impleaded the Respondents 1 and 2, T.Rajasekaran and T.Selvasekaran, who were brothers of her husband, T.Kanakasekaran. She had impleaded as the 3rd Respondent, V.Nirmala, who is the sister of her husband, T.Kanakasekaran. The 1st Respondent had purchased the property mentioned in A-Schedule. He refused to pay the rents to her. She claimed that she was

not informed about the registered Will. She claimed that it was forged. She claimed that she had sent a legal notice on 3.10.2002 to the 1st and 2nd Respondents and also to the tenants, calling upon them to pay the monthly rents. The 1st and 2nd Respondents had issued a reply on 14.10.2002. They stated that she had given consent for probate of the Will said to have been executed by her husband, T.Kanakasekaran. She issued a rejoinder notice that she did not know about the Will and did not give her consent for probate of the alleged will. It has been stated that the 10th Respondent had purchased the property at Avadi. In the said circumstances, she has stated that the probate granted in favour of the Respondents 1 and 2 with respect to the Will of her husband, T.Kanakasekaran, in OP.No.418 of 2001 must be revoked.

9. A counter had been filed by the 1st Respondent. In the counter of the 1st Respondent, it has been stated that T.Kanakasekaran had executed a registered Will dated 18.2.1991, bequeathing the properties in favour of himself and his brother T.Selvasekaran. T.Kanakasekaran died on 11.6.1997. He had only one legal heir, namely, K.Mahalakshmi, his widow. They had no children. He had further stated that there were frequent quarrels between T.Kanakasekaran and K.Mahalakshmi. He also suffered fracture during the quarrel. He has further stated that since they had no children, he decided to bequeath the properties to himself and to his brother, T.Selvasekaran. There was a condition that Rs.400 per month must be given to the widow. In the affidavit, it has been mentioned that Rs.800 was being paid to the widow till September 2002 and when the properties were sold, after sale, they had been paying a sum of Rs.2,500/- payable to the 11th Respondent for the occupation

of the entire upstairs portion at the property at Door No.1, Rangappa Maistry Street, Ayanavaram, Chennai, where K.Mahalakshmi was residing. He was also earning family pension of Rs.300 through Canara Bank, Ayanavaram Branch. It was stated that they also gave gold jewels at the time of bequeathing. It has been stated that these facts had been properly mentioned in the advocate notice sent in reply to the notice issued by her. It has been further stated that she had given consent affidavit. He specifically stated that the consent affidavit was granted in the presence of an Advocate, who also attested the same. It has been stated that a comparison of the signatures would show that the same person had signed both the consent affidavit and the application in A.No.4 of 2006. It was therefore prayed that the application should be dismissed.

10. In the said application, on 19.11.2008, this Court had directed that evidence should be taken in A.No.4 of 2006 and had further stated that the evidence shall be confined to the question whether the Applicant had given the consent affidavit. It must be mentioned that the Applicant had also filed A.No.4454 of 2007 to send the document for verification of the signature of K.Mahalakshmi and the same was dismissed as withdrawn. Subsequently, K.Mahalakshmi died and her sister and sister's husband were brought on record in A.No.6619 of 2009 by order dated 17.6.2011. Evidence was also recorded even prior to the death of K.Mahalakshmi and she was examined and also cross examined. She was examined as PW.1. T.Rajasekaran, the 1st Respondent was examined as RW.1 and K.Thangasamy, the learned counsel who had filed OP.No.418 of 2001, was examined as RW.2. K.Govindasamy,

was examined as PW.2, who was the husband of G.Shantha, sister of K.Mahalakshmi.

11. OP.No.149 of 2010 was converted into TOS.No.44 of 2010. This OP had been filed, seeking to grant of probate of the Will of K.Mahalakshmi. In the said Will, she had bequeathed two properties, which were already bequeathed in favour of T.Rajasekaran and T.Selvasekaran, by her husband T.Kanakasekaran and which had already been sold to her younger sister, G.Shantha. She had appointed the husband of the said sister, K.Govindasamy as her Executor. He filed OP.No.149 of 2010 and had impleaded G.Shantha as the 1st Respondent and T.Rajasekaran, T.Selvasekaran and V.Nirmala as the Respondents 2 to 4. In view of the caveat filed by T.Rajasekaran, OP.No.149 of 2010 was converted into TOS.No.44 of 2010.

12. Since the properties had already been bequeathed, it has been fairly argued by both the learned counsel that any order in A.No.4 of 2006 would be binding with respect to the bequeath made by either T.Kanakasekaran or K.Mahalakshmi under their respective Wills. Consequently, the evidence recorded in A.No.4 of 2006 is taken up for consideration.

13. The issues involved are (i) whether K.Mahalakshmi had given consent affidavit out of her free will in OP.No.418 of 2001, (ii) whether the order granting probate dated 4.12.2001 is to be rejected and (iii) to what relief are the parties entitled?

14. As stated above, this Court had limited the evidence to

determine whether K.Mahalakshmi had given the consent affidavit or not. K.Mahalakshmi was examined as PW.1. K.Govindasamy was examined as PW.2. T.Rajasekaran was examined as RW.1 and K.Thangasamy was examined as RW.2.

15. In her proof affidavit, K.Mahalakshmi reiterated the facts as stated in her application. She has stated that she had not signed the consent affidavit before the Commissioner of Oaths and the affidavit was not read over to her. She claimed that she was an illiterate lady. She was then cross examined. During her cross examination, she admitted that she signs as “மகலக்ஷ்மி”. In the same manner, she had also signed the consent affidavit.

16. It is seen from the records that the consent affidavit was attested by Mr.S.Adaikalam, Advocate Notary on 18.12.2009. During the cross examination of RW.1, T.Rajasekaran had stated that T.Kanakasekaran and his wife K.Mahalakshmi were not living together and they were separated for two years. He further stated during the cross examination that the Will was actually registered and since they had no issues, the properties were bequeathed to the brothers of T.Kanakasekaran. He further stated that he had taken possession of the properties. During the cross examination, he specifically stated that he informed K.Mahalakshmi that she has to give consent for grant of Letters of Administration. He further stated that he had helped her to get pension from the pension office.

17. The learned counsel for the Applicant has stated that the Advocate, S.Thangasamy was at the second floor of the Madras High Court Advocates Association Office. It has also been stated during the cross

examination that the properties were also sold. The Advocate Notary, Mr.S.Thangasamy was examined as RW.2. His chief examination was taken orally. He has stated that he drafted the Will according to the instructions of the Testator. He initially stated that he wrote the Will. At any rate, he was directly involved in the preparation of the Will. He specifically stated that K.Mahalakshmi and the sisters of the Petitioner signed the consent affidavits in his presence and the affidavit were not noticed by the Commissioner on Oath, Mr.Adaikalam. He specifically stated that the consent affidavits were executed and signed in his presence and attested by the Commissioner of Oaths. During his cross examination, he has stated that he was working in the Revenue Department. It was pointed out that he knew T.Rajasekaran even prior to joining the profession.

18. At any rate, the evidence of RW.2 is very clear that K.Mahalakshmi signed the affidavit in his presence and it was also attested by the Commissioner of Oaths. The Petitioner thereafter examined as PW.2 K.Govindasamy. In his cross examination, he has stated that he does not know whether Mahalakshmi gave consent affidavit. It is, therefore, clear that the witness has not deposed anything to his direct knowledge before Court. On analysis of the evidence available, particularly from the evidence of RW.2, S.Thangasamy, it is clear that K.Mahalakshmi signed the consent affidavit and it was also counter signed and attested by Mr.Adaikalam, Notary Public and Commissioner of Oaths.

19. It is seen that K.Mahalakshmi has come to Court nearly 5 years after the grant of probate by this Court and she had filed the application for

comparison of her signature. This effectively means that the signature found in the papers available in the Court records are her signature alone. In so far as the signature in the consent affidavit is concerned, it is also attested by an Advocate Notary. This gives an authenticity and unless fraud is proved, this court cannot negate a plea, which is taken against presumption of document being true and genuine.

20. She had also signed the consent affidavit dated 18.12.1999 in Tamil and Mr.Adaikalam, Advocate and Oath Commissioner had attested the affidavit. He had also attested the affidavit of V.Nirmala, sister of the deceased T.Kanakasekaran. A comparison of the signature of K.Mahalakshmi in her consent affidavit and in the affidavit filed in support of A.No.4 of 2006 and in the Will dated 10.2.2003 clearly shows that the same person had signed all the said three documents.

21. She had subsequently withdrawn the application to examine the signature by an expert. Consequently, this court has to examine the signatures under Section 73 of the Indian Evidence Act and it is clear that the same person had signed the three documents. Section 67 of the Indian Evidence Act provides that if a document is also to be looked into by any person, signature of that person must be proved and that the signature is in her own handwriting. Section 45 of the Indian Evidence Act provides for sending a document to an expert. It was for this purpose, A.No.4454 of 2007 was filed by K.Mahalakshmi, and had been dismissed, as withdrawn.

22. Under Section 47 of the Indian Evidence Act, it is provided that opinion of persons, who are acquainted with the disputed handwritings, are

relevant. In this connection, the evidence of RW.2, T.Rajasekaran in A.No.4 of 2006 and the evidence of RW.2, S.Thangasamy, Advocate, which spoke directly about K.Mahalakshmi executing the consent affidavit, becomes very relevant. Moreover, the consent affidavit has also been attested by Mr.Adaikalam, Advocate Notary and Oath Commissioner.

23. In 1996 4 SCC 596 (S.Gopal Reddy Vs. State of AP) in paragraph 29, it had been stated as follows:-

“29. Section 67 of the Evidence Act, 1872 enjoins that before a document can be looked into, it has to be proved. Section 67, of course, does not prescribe any particular mode of proof. Section 47 of the Evidence Act which occurs in the chapter relating to “relevancy of facts” provides that the opinion of a person who is acquainted with the handwriting of a particular person is a relevant fact. Similarly, opinion of a handwriting expert is also a relevant fact for identifying any handwriting. The ordinary method of proving a document is by calling as a witness the person who had executed the document or saw it being executed or signed or is otherwise qualified and competent to express his opinion as to the handwriting. There are some other modes of proof of documents also as by comparison of the handwriting as envisaged under Section 73 of the Evidence Act or through the evidence of a handwriting expert under Section 45 of the Act, besides by the admission of the person against whom the document is intended to be used. ...”.

24. IN 2003 3 SCC 583 (Lalit Popli Vs. Canara Bank and others) in paragraph 13, it had been stated as under:-

“13. It is to be noted that under Sections 45 and 47 of the Evidence Act, the court has to take a view on the opinion of others, whereas under Section 73 of the said Act, the court by its own comparison of writings can form its opinion. Evidence of the identity of handwriting is dealt with in three sections of the Evidence Act. They are Sections 45, 47 and 73. Both under Sections 45 and 47 the evidence is an opinion. In the former case it is by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experiences. In both the cases, the court is required to satisfy

itself by such means as are open to conclude that the opinion may be acted upon. Irrespective of an opinion of the handwriting expert, the court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible under Section 73 of the Evidence Act. Ordinarily, Sections 45 and 73 are complementary to each other. Evidence of the handwriting expert need not be invariably corroborated. It is for the court to decide whether to accept such an uncorroborated evidence or not. It is clear that even when an expert's evidence is not there, the court has power to compare the writings and decide the matter."

25. In the present case, since A.No.4454 of 2007 had been withdrawn by K.Mahalakshmi, the Applicant in A.No.4 of 2006, this Court has no other option except to compare the signature under Section 73 of the Indian evidence Act. I hold that the signatures do not vary and it appears to the naked eye that the same person had affixed the signature. More particularly, the fact that the consent affidavit of K.Mahalakshmi had been attested by an Advocate Notary also shows that the said document cannot be brushed aside without any concrete evidence.

26. Section 152 of the Indian Succession Act is as follows:-

"152. Ademption explained.-If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect, by reason of the subject matter having been withdrawn from the operation of the will."

27. Section 273 of the Indian Succession Act is as follows:-

"273. Conclusiveness of probate or letters of administration.-

Probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased,

throughout the State in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted:

Provided that probates and letters of administration granted--

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the State does not exceed ten thousand rupees, shall, unless otherwise directed by the grant, have like effect throughout 1*[the other States.

The proviso to this section shall apply in India after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date.

The proviso shall also apply in India after the separation of Pakistan from India to probates and letters of administration granted before the date of the separation, or after that date in proceedings pending at that date, in any of the territories which on that date constituted Pakistan."

28. On the date of the execution of the Will, the properties had been sold and consequently, K.Mahalakshmi did not have any capacity to execute or bequeath the properties further. Revocation of the Will would not give any better title.

29. In 2005 9 SCC 375 (Crystal Developers Vs. Asha Lata Ghosh)

it had been held as follows:-

"32. .. Revocation will not operate retrospectively so as to obliterate all intermediate acts of the executor performed during

the existence of the probate, however, if the intermediate acts are incompatible with the administration of the estate, they will not be protected. That the conclusiveness under Section 273 is of validity and contents of the will.”

30. It is, therefore, seen that the application had been filed more out of desperation. It has also come out in evidence and the learned counsel have also stated during the arguments that actually K.Mahalakshmi was looked after by RW.1, T.Rajasekaran. As a matter of fact, even though the property was sold, the rents were paid by the purchaser for the portion under occupation till her death. Therefore, I hold that nothing survives in this application and is to be dismissed.

31. In the result, this application in A.No.4 of 2006 is dismissed. No costs. The probate granted with respect to the last Will and Testament of T.Kanakasekaran, dated 18.2.1991 in OP.No.418 of 2001 by judgement dated 4.12.2001 is confirmed. Consequently, TOS.No.44 of 2010 is also dismissed.

04.01.2018

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Pre-Delivery Order in
A.No.4 of 2006 in
OP.No.418 of 2001 and
TOS.No.44 of 2010