

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 08.03.2019

JUDGMENT PRONOUNCED ON : 02.04.2019

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.557 of 2010
and
TOS.No.5 of 2011

C.S.No.557 of 2010:

M.Sugantha Priya ... Plaintiff

Vs.

1.J.Gowri Shankar

2.J.Ravi Shankar

3.S.Amba Shankari Defendants

PRAYER : Complaint filed under Order IV Rule 1 of Original Side Rules, read with OrderVII, Rule 1 of Code of Civil Procedure, praying for the following judgment and decree:-

- (a)for partition and separate possession of the plaintiff's one fourth share in the suit properties and
(b)for costs of the suit.

T.O.S.No.5 of 2011:

S.Amba Shankari ... Plaintiff

Vs.

1.J.Gowri Shankar

2.J.Ravi Shankar

3.M.Sugantha Priya

... Defendant

PRAYER : Petition filed under Section 232, 255 and 276 of the Indian Succession Act read with Order XXV Rule 5 of Original Side Rules praying for grant of Letters of Administration with the Will annexed in favour of the petitioner as she is one of the daughters/ legatees under the Will of the deceased having effect limited to the State of Tamil Nadu only limited to the properties mentioned in the Schedules - A and B of the Will.

For Plaintiff : Mr.M.S.Mani in TOS.No.5 of 2011
and for D3 in CS.No.557 of 2010

For Defendants : Mr.T.S.Baskaran in TOS.No.5 of 2011
and for plaintiff in CS.No.557 of 2010

J U D G M E N T

1. The plaintiff filed the Original Petition in OP.No.650 of 2010 seeking grant of letters of administration with the Will annexed for the Will and Testament of her father late Mr.V.T.Jayaraman dated 22.01.1996.

2. As per the said Will, the property situated in Chennai was bequeathed to the petitioner and the 2nd respondent and the property at Vellore has been bequeathed to the petitioner absolutely. The Testator Mr.V.T.Jayaraman died at Chennai on

03.01.2010. Claiming that no executor has been appointed under the said Will, the petitioner had sought for grant of letters of administration with the Will annexed.

3. The 3rd respondent who is another daughter of the testator had filed a caveat. In view of the caveat, the Original Petition was converted into Testamentary Original proceeding and numbered as Testamentary Original Suit in TOS.No.5 of 2011.

4. The 3rd respondent would contend that the Will is a forged one and the testator Mr.V.T.Jayaraman had never executed such a Will. It is claimed that the said Mr.V.T.Jayaraman died intestate on 03.01.2010. It is also claimed that the defendant issued a legal notice on 19.01.2010 and a reply notice was issued by the plaintiff on 28.01.2010 setting up the Will. A re-joinder was issued by the defendant on 23.02.2010 denying the execution of the Will.

5. On the basis of the above pleadings the following issues were framed by this court on 25.08.2011:

1. Whether the Will dated 22.01.1986 propounded by the plaintiff is true, genuine and valid?

2. Whether the plaintiff is entitled to the relief of Letters of Administration with the Will annexed?

6. The 3rd defendant in the Testamentary Original Suit had also filed a suit in CS.No.557 of 2010 seeking partition and separate possession of her 1/4th share in the suit properties.

The averments in the said suit are as follows:-

7. The suit properties are the absolute properties of late Mr.V.T.Jayaraman father of the plaintiff and the defendants. The said Mr.V.T.Jayaraman died intestate on 03.01.2010 leaving behind the plaintiff and the defendants to succeed to his estate. His wife pre-deceased him as early as in 1967. It is further alleged that the plaintiff had issued a legal notice demanding partition on 19.01.2010 to which the 3rd defendant had issued a reply notice on 28.01.2010 alleging that the plaintiff was given in adoption to one M.Viswanathan at the age of 3 years and hence she cannot be claimed to be a legal heir of the deceased Mr.V.T.Jayaraman.

8. It is further alleged in the said reply notice that the said late Mr.V.T.Jayaraman had executed a Will on 22.01.1996, in and by which, he had bequeathed his properties in favour of the 2nd and 3rd defendants in the suit. On receipt of the said reply notice the plaintiff had issued a rejoinder dated 23.02.2010 denying the said adoption and truth and genuineness of the Will dated 22.01.1996. Claiming that the

daughter the plaintiff is entitled to 1/4th share, the plaintiff had sought for partition and separate possession.

9. The suit was resisted by the 1st defendant contending that the said Mr.V.T.Jayaraman had executed a Will on 10.09.2008. It is further claimed that the Will dated 22.01.1996 projected by the 3rd defendant in the suit is a forged document. While the claim of the plaintiff that Mr.V.T.Jayaraman died intestate is denied, the written statement of the 1st defendant is silent about the alleged adoption set up by the 3rd defendant.

10. The 3rd defendant filed a separate written statement reiterating the averments contained in the plaint in TOS.No.5 of 2011. The 3rd defendant would specifically deny the claim of the 1st defendant that the deceased Mr.V.T.Jayaraman had executed a Will on 10.09.2008. It is also claimed that the Will dated 22.01.1996 is a true and genuine document.

11. On the above pleadings the following issues were framed in the suit:-

1. *Whether the plaintiff who was given in adoption at the age of 3 years is entitled to a decree for partition of the property left by her father?*

2. *Whether the suit is properly valued?*

The following additional issues were framed in the suit:-

1. Whether the plaintiff is entitled to a decree of partition of the suit property and separate allotment of her 1/4th share?

2. Whether the Will and testament dated 22.01.1996 is genuine?

3. Whether the plaintiff is entitled for a decree for mesne profits?

12. By an order dated 05.06.2014, this Court had directed both the suits in CS.No.557 of 2010 and TOS.No.5 of 2011 to be heard together. The learned Additional Master was also directed to record evidence in TOS.No.5 of 2011 at the first instance.

13. At trial, one M.Bhuvaneswaran, attesting witness to the Will dated 22.01.1996 was examined as PW1 De Bene Esse as per the procedure prescribed under Order XXIV Rule 1 and 2 of the Original Side Rules, since it was reported that he was very sick.

14. The plaintiff in TOS.No.5 of 2011 was examined as PW2. The defendant in TOS.No.5 of 2011/ the plaintiff in CS.No.557 of 2010 was examined as DW1. Ex.P1 to Ex.P9 were marked on the side of the plaintiff, while Ex.D1 to Ex.D15 were marked on the side of the defendants. It is seen from the records that the sons of Mr.V.T.Jayaraman viz., defendants 1 and 2 in the suit did not participate in the trial.

15. I have heard Mr.M.S.Mani, learned counsel appearing for the plaintiff in TOS.No.5 of 2011 and for 3rd defendant in CS.No.557 of 2010 and Mr.T.S.Baskaran, learned counsel appearing for the sole defendant in TOS.No.5 of 2011 and the plaintiff in CS.No.557 of 2010.

Issue No.1 in TOS.No.5 of 2011 and Additional Issues No.2 in C.S.No.557 of 2010:-

16. These issues relate to the truth and validity of the Will dated 22.01.1996. The original Will has been produced as Ex.P1. The death certificate of Mr.V.T.Jayaraman and his wife have been produced as Ex.P2 and Ex.P3. The attesting witness to the Will has been examined as PW1. The said attesting witness has also filed an affidavit before Court in OP.No.650 of 2010. In the said affidavit filed along with OP.No.650 of 2010, the attesting witness has stated that he was present along with the other attesting witness A.R.Srinivasan at the house of the deceased and the deceased subscribed his signature to the Will in the presence of the attesting witnesses and the attesting witnesses attested the said document in the presence of the testator. However, while deposing before Court, PW1 viz., attesting witness had not stated anything about the execution of the Will. The chief examination of PW1 on 26.04.2011 reads as follows:-

deceased Mr.V.T.Jayaraman as he was my distant relative. I am aware that Mr.V.T.Jayaraman has executed his last Will and Testament on 22.01.1996. He was very sound and disposing state of mind at the time of execution of the said last Will and Testament."

17. Though, the notes of the Master shows that the chief examination was deferred at request, it appears that there was no further chief examination. The said witness had been cross examined on 14.06.2011 by the learned counsel for the 3rd respondent in the Original Petition as well as the 1st respondent.

18. Mr.T.S.Baskaran, learned counsel appearing for the defendant in TOS.No.5 of 2011/ plaintiff in CS.No.557 of 2010 would vehemently contend that the evidence of the attesting witness does not satisfy the requirements of Section 68 of the Evidence Act. Mr.T.S.Baskaran, learned counsel would point out that Section 68 of the Evidence Act read with Section 63 of Indian Succession Act would require an attesting witness to depose that the testator subscribed his or her signature to the Will in the presence of the attesting witnesses and the attesting witnesses affixed their signatures in the presence of the testator.

19. Relying heavily upon Section 63 of the Succession Act and Section 68 of the Evidence Act Mr.T.S.Baskaran would contend that the evidence in chief examination of the attesting witness viz., PW1 is wholly insufficient to conclude that the statutory requirements of the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act have been satisfied.

20. Contending contra Mr.M.S.Mani, learned counsel appearing for the plaintiff in TOS.No.5 of 2011 would vehemently contend that the affidavit of attesting witness filed in the Original Petition, though not made part of the record by marking it in Evidence, can be looked into and the evidence of the attesting witness in chief examination only supplements the affidavit which has already been filed into Court. Pointing out that in the affidavit of the attesting witness had very clearly stated that the testator subscribed his signature to the Will in the presence of the attesting witnesses and the attesting witnesses attested the documents in the presence of the testator.

21. Mr.M.S.Mani, learned counsel would submit that the execution of the Will by late Mr.V.T.Jayaraman has been proved satisfactorily. Mr.M.S.Mani would also point out that there has been no cross examination of the said witness regarding his presence or otherwise at the time of execution of the

22. I have considered the rival submissions. No doubt true, the attesting witness has not spoken about his presence or the presence of the other attesting witness at the time of execution of the Will in his chief examination. But as rightly pointed out by the counsel for the plaintiff in TOS.No.5 of 2011, the affidavit of attesting witness was filed and it forms part of the record in the Original Petition in OP.No.650 of 2010 which has been converted as TOS.No.5 of 2011. Even in the chief examination extracted above, the witness has specifically said that he is aware that Mr.V.T.Jayaraman had executed the

Will and that Mr.V.T.Jayaraman was in sound and disposing state of mind at the time of execution of the said Will. Though, the witness has been extensively cross examined by the counsel for the respondent there is not even a suggestion to the effect that the attesting witness was not present at the time of the execution of the Will. Section 68 of the Evidence Act reads as follows:-

"68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its

execution, if there be an attesting

witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

23. All that Section 68 requires is that an attesting witness should be examined to prove the execution of the Will. I am therefore of the considered opinion that the combined effect of the affidavit of the attesting witness and the chief examination would satisfy the legal requirements of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act with reference to proof of the Will.

24. It should be pointed out at this juncture that both the sons of late Mr.V.T.Jayaraman had not chosen to contest the proceeding. Though, the 1st defendant in CS.No.557 of 2010 filed a written statement setting up a Will and his counsel cross examined the attesting witness, they have not chosen to participate at subsequent stages of the trial.

25. I am therefore of the considered opinion that the plaintiff in TOS.No.5 of 2011 had proved the execution of the Will. Hence, the above issues viz., Issue No.1 in TOS.No.5 of 2011 and additional issue No.2 in CS.No.557 of 2010 are answered in favour of the plaintiff in TOS.No.5 of 2011.

Issue No.1 in CS.No.557 of 2010:-

26. it is the claim of the plaintiff in TOS.No.5 of 2011/ 3rd defendant in CS.No.557 of 2010 that the plaintiff in CS.No.557 of 2010 was in fact given in adoption to one Mr.M.Viswanathan even when she was 3 years old and therefore she cannot claim as the legal heir. In order to prove the said contention regarding adoption, the 3rd defendant in CS.No.557 of 2010/ plaintiff in TOS.No.5 of 2011 has produced the copy of the Reserve Bank Journal for the period between January and March 1989 as Ex.P5. In the said Journal, the marriage photograph of the plaintiff in CS.No.557 of 2010 appears and she is described to be the daughter of Mr.M.Viswanathan.

27. The invitation of the marriage of the daughter of the plaintiff in CS.No.557 of 2010 has been marked as Ex.P7. In the said invitation the bride is described as the grand daughter of Mr.M.Viswanathan. Claiming that the plaintiff herself had described her daughter as grand daughter of Mr.M.Viswanathan, thereby, meaning that she is the daughter of

3rd defendant in CS.No.557 of 2010 would contend that the claim of adoption made by the 3rd defendant should be accepted.

28. Per contra Mr.T.S.Baskaran, learned counsel appearing for the plaintiff in CS.No.557 of 2010 would submit that Senior School Leaving Certificate, passport, Pan card which have been marked as Exs.D7, D8 and D9, the plaintiff in CS.No.557 of 2010 has been described only as the daughter of Mr.V.T.Jayaraman and not as the daughter of Mr.M.Viswanathan. Therefore, according to Mr.T.S.Baskaran, the claim of adoption has to be rejected.

29. Mr.T.S.Baskaran would also contend that there is no direct evidence of giving and taking which is an essential element for proof of adoption. It is the settled law that since adoption seeks to displace the natural succession will have to be proved beyond reasonable doubt. Conflicting descriptions in the documents would only lead to the presumption that there was no adoption.

30. As already pointed out in the case on hand there is no proof of actual giving and taking and further the 1st defendant in the suit who is the son of Mr.V.T.Jayaraman though had filed a written statement had not raised the defence of adoption. I therefore find that there is total lack of evidence to conclude that the plaintiff in CS.No.557 of

Therefore, issue No.1 in the suit is answered in favour of the plaintiff and against the defendants.

Additional Issue No.1 in CS.No.557 of 2010:-

31. Since I have upheld the Will dated 22.01.1996, the plaintiff cannot claim intestate succession and seek 1/4th share in the properties of Mr.V.T.Jayaraman. Hence Additional Issue No.1 is answered against the plaintiff in CS.No.557 of 2010.

Additional Issue No.3:-

32. The question of granting mesne profits does not arise since it has been found that the plaintiff in CS.No.557 of 2010 is not entitled to any share in the suit properties.

Issue No.2 in TOS.No.5 of 2010:-

33. It is already been found that the plaintiff in TOS.No.5 of 2011 had proved the Will and hence she is entitled to Letters of Administration with Will annexed.

34. In fine, the suit in **CS.No.557 of 2010** is **dismissed** and Testamentary Original Suit in **TOS.No.5 of 2011** is **decreed** granting Letters of Administration with a copy of the Will annexed in favour of the plaintiff in TOS.No.5 of 2011. The plaintiff in TOS.No.5 of 2011 shall execute a security bond for a sum of Rs.25,000/- (Rupees twenty five thousand only) in favour of the Assistant Registrar (O.S.II), High Court, Madras. Considering the relationship between the parties there shall be no orders as to costs.

**List of the Witnesses examined on the side of the Plaintiff
in TOS.No.5 of 2011:**

PW1 - M.Bhuvaneswaran

PW2 - Amba Shankari

**List of Exhibits marked on the side of the Plaintiff in
TOS.No.5 of 2011:**

Sl.N o.	Exhibit s	Description of documents	Date
1	Ex.P1	The original unregistered Will	22.01.1996
2	Ex.P2	The death certificate of V.T.Jeyaraman, the Testator	07.02.2010
3	Ex.P3	The photocopy of death certificate of Smt.Rajalakshmi	26.01.1968
4	Ex.P4	The acknowledgment signed by Mrs.Usha on behalf of her husband J.Gowri Shankar	--
5	Ex.P5	The photograph of Sugantha Priya in page No.9 of Reserve Bank Journal dated 1989 January-March	--
6	Ex.P6	The death certificate of A.R.Srinivasan, who is one of the attesting witness in the Will	27.07.2010
7	Ex.P7	The invitation issued in the event of marriage of Sneha Priya	--
8	Ex.P8	The copy of income tax returns	--
9	Ex.P9	The pension payment pass book of V.T.Jeyaraman	--

**List of the Witnesses examined on the side of the Defendants
in TOS.No.5 of 2011:**

DW1 - Sugantha Priya

**List of Exhibits marked on the side of the Defendants in
TOS.No.5 of 2011:**

Sl.N o.	Exhibit s	Description of documents	Date
1	Ex.D1	The photograph in respect of the puberty function of Sugantha Priya	--
2	Ex.D2	The diary for the year 1996	--
3	Ex.D3	The acknowledgment card	--
4	Ex.D4	The statement of accounts from 01.01.2008 to 10.08.2010 in respect of the accounts of V.T.Jeyaraman	--
5	Ex.D5	The letter from the Co-operative Bank	05.08.2014
6	Ex.D6	The legal notice issued on behalf of M.Sugantha Priya	15.03.2010
7	Ex.D7	Defendant's senior school certificate	31.07.1982
8	Ex.D8	The photocopy of the first page of defendant's passport	--
9	Ex.D9	The photocopy of the defendant's pan card	--
10	Ex.D10	The legal notice issued on defendant's behalf	19.01.2010
11	Ex.D11	The reply notice issued on behalf of plaintiff	28.01.2010
12	Ex.D12	The rejoinder notice issued on defendant's behalf	23.02.2010
13	Ex.D13	The one page of the telephone directory containing plaintiff's name	--
14	Ex.D14	The application submitted under RTI Act with postal acknowledgment	05.05.2015
15	Ex.D15	The reply received under RTI Act	07.07.2015

Sd./-R.S.M.J
02/04/2019

//Certified to be true copy//
Dated at Madras this the day of 2019.

JJ 08/07/2019

COURT OFFICER(O.S.)

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