

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 09.08.2019	Delivered on 10.09.2019
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

T.O.S. No.15 of 2005

1. P.Dhananjayan
2. N.Balasundaram

... Plaintiffs

Vs.

M.Senthilkumar

... Defendant

Prayer : Complaint filed under Sections 222 and 276 of the Indian Succession Act XXXIX of 1925 for the grant of Probate.

For Plaintiffs : Mr.T.Srikrishna Bhagavat
for Mr.V.Sivakumar

For Defendant : Mr.C.Umashankar
for Mr.S.Saravanan

J U D G M E N T

The Original Petition in OP No.8 of 2005 seeking Probate of the Will dated 29.06.2000 registered as Document No.85/III/2000, executed by Late C.G.Rajendran, who died on 07.04.2002 has been converted into Testamentary Original Suit, upon a Caveat being filed by the Sole respondent in the said Original Petition and numbered as above.

2. The case of the plaintiffs is as follows:

Late C.G.Rajendran had executed a Will on 29.06.2000 which was duly attested by two witnesses and a Codicil on 25.08.2000. Both the Will and the Codicil are registered instruments. Devaki Ammal, wife of C.G.Rajendran, the testator, died on 10.03.1996. The plaintiffs have been appointed as executors under the said Will dated 29.06.2000 and the Codicil dated 25.08.2000. In their capacity as the executors/plaintiffs had come forward with the Original Petition in OP No.8 of 2005 seeking Probate.

3. According to the plaintiffs, since one Senthilkumar had claimed

certain rights over the properties as the adopted son of C.G.Rajendran and Devaki Ammal. He was impleaded as the respondent in the Original Petition. They also claimed that the said Senthilkumar forcibly entered the house and occupied the same. Upon service, the first respondent in the Original Petition filed a caveat opposing the grant and hence the Original Petition was converted into Testamentary Original Suit.

4. Upon conversion, the caveator, who is the sole defendant in the Testamentary Original Suit filed a written statement claiming that the Will is not true and valid. It was also contended that the testator C.G.Rajendran was not the owner of the property, that was bequeathed under a Will dated 29.06.2000. It was further claimed that Devaki Ammal, who inherited the property from her mother Dhanalakshmi Ammal, had executed a Joint Will on 18.10.1989, in and by which, she along with her husband C.G.Rajendran had bequeathed the property in favour of the defendant Senthilkumar, he being the adopted son of C.G.Rajendran and Devaki Ammal. The said Will was registered as Document No.144 of 1989 in the office of the Sub Registrar, Mylapore. A Rectification document was also

executed by Devaki Ammal and C.G.Rajendran. The same was also registered as Document No.180 of 1989, in the office of the Sub Registrar, Mylapore.

5. The couple, namely, Devaki Ammal and C.G.Rajendran executed another Will on 27.11.1995, which was also registered as Document No.138/3 of 1995, again bequeathing the property in favour of Senthilkumar/the defendant. The said Will dated 27.11.1995 also recited that Senthilkumar has been taken an adoption by Devaki Ammal and C.G.Rajendran in May 1976, after performance of Datta-Homam and other religious ceremonies for his adoption.

6. After the death of Devaki Ammal, the testator namely, C.G.Rajendran had executed a document styled as a modification of the Will, attempting to modify the Will dated 27.11.1995, claiming that he had become entitled to the property. In the said Will the testator, C.G.Rajendran bequeathed the property at Mylapore bearing D.No.16, Appu Street, First Lane, Mylapore, Madras 600 004, to Senthilkumar and

excluding the property situate at D.No.12, 7th Street, Dr.Subbarayan Nagar, Kodambakkam, Chennai 24 from the earlier Will dated 27.11.1995. The said property namely, the Kodambakkam property, was bequeathed to brothers of C.G.Rajendran, namely C.G.Jayaraman and C.G.Karunakaran. Again on 14.02.1997, the said C.G.Rajendran executed another Will bequeathing the property at Mylapore to Hindu Mission Hospital, West Tambaram. The said Will was also registered as Document No.19 of 1997 in the Office of Sub Registrar, Mylapore. Finally claiming to be the sole heir of Devaki Ammal, the said C.G.Rajendran executed a third Will bequeathing the property at Mylapore to Hindu Mission Hospital at West Tambaram and he had appointed one P.T.Sambandan, as the executor under the Will, with a direction to M/s.S.Subramanian and N.Balasundaram to assist them. Not stopping there, the said C.G.Rajendran executed another Will on 29.06.2000 which was also registered as Document No. 85 of 2000 of in the office of the Sub Registrar, Mylapore. Under the last Will, namely, the Will dated 29.06.2000, the said C.G.Rajendran had appointed M/s.P.Dhananjayan, C.K.Uthaman and N.Balasundaram, as the executors of the Will. He had also directed that the property be sold and the sale

proceeds to be shared at 40% to Hindu Mission Hospital, West Tambaram, Chennai-45, 40% to Adayar Cancer Institute, Chennai-20 and 20% to Mylai Devaki Ammal and C.G.Rajendran Educational Trust.

7. The said C.G.Rajendran also executed a Codicil on 25.08.2000 to the last Will dated 29.06.2000, which was registered as document No.116/3 of 2000, in and by the said Codicil, he had removed C.K.Uthaman, as executor and directed the remaining two executors to be the executors of the Will. It is this last Will dated 25.06.2000 and the Codicil dated 25.08.2000 that are subject matter of the above Testamentary Original Suit in TOS No.15 of 2005.

8.The main defence of the defendant as could be culled out from the written statement is that the said C.G.Rajendran had no Testamentary capacity to execute the Will, since the property belonged absolutely to Devaki Ammal, she having inherited the same from her mother Dhanalakshmi Ammal. It is also contended that in view of the provisions of Section 15 of the Hindu Succession Act, 1956, the property of female

Hindu who died issueless would revert back to her parent's heirs and her husband would not have share or claim over the property. It is also gathered from the written statement that the defendant Senthilkumar had filed Original Petition in OP No.755 of 2002 seeking Letters of Administration, in respect of the Joint Will of Devaki Ammal and C.G.Rajendran, dated 27.11.1995 and the same came to be allowed directing issuance of Letters of Administration.

9. The executors of the Will of C.G.Rajendran had filed Application in A.No.1198 of 2006 in OP No.755 of 2002 seeking to revoke the Letters of Administration granted in OP No.755 of 2002. Applications in Application Nos.4414, 4415 and 4416 of 2005 were also filed in TOS No.15 of 2005, seeking various interim reliefs regarding the rents received by the defendant in TOS No.15 of 2005 as well as seeking exemption and the payment of Court Fee. By an order dated 23.11.2007, this Court had revoked the grant made in OP No.755 of 2002. This Court had also passed certain interim directions in Application No.4415 of 2005 exempting the plaintiffs in TOS No.15 of 2005 from payment of Court Fee. The other

two applications, namely Application Nos.4415 and 4416 of 2005 were closed after observing that these applications could be decided only after disposal of TOS No.15 of 2005.

10. Aggrieved by the order revoking grant, the defendant in TOS No.15 of 2005/petitioner in OP No.755 of 2002 filed an appeal in OSA No.50 of 2008. As against the order passed in Application No.4414 and 4416 of 2005, the plaintiffs in TOS No.15 of 2005 filed two Appeals namely, OSA Nos.76 and 77 of 2008. All these Appeals were taken up for consideration by the Division Bench and by an order dated 01.10.2009, the Division Bench held that the issues relating to adoption of the defendant herein, the issues relating the ownership of Devaki Ammal, the issue relating power of C.G.Rajendran to revoke the Joint Will dated 27.11.1995, the issue relating to the alleged fraud said to have been committed in obtaining the Letters of Administration in OP No.755 of 2002, should be considered and decided by way of framing necessary issues and on appreciation of evidence to be adduced by the parties at the time of trial in the Testamentary Original Suit.

11. The Division Bench also further observed that the Letters of Administration granted in OP No.755 of 2002 cannot be revoked or put an end to, till such time the issues decided in TOS No.15 of 2005. It was also made clear that the Letters of Administration granted in OP No.755 of 2002 will be in force till such time TOS No.15 of 2005 is decided. The application in Application Nos.4415 and 4416 of 2005 were also directed to be taken up for disposal along with the Testamentary Original Suit.

12. Considering the pleadings in the written statement as well as the order of the Division Bench dated 01.10.2009 made in OSA Nos.50, 76 and 77 of 2008, the following issues are framed for consideration in this Testamentary Original Suit.

1. *Whether the defendant was in fact the adopted son of Devaki Ammal and C.G.Rajendran?*

2. *Whether the Will dated 29.06.2000 and the Codicil dated 25.08.2000 are true and valid?*

3. *Whether the Testator namely, C.G.Rajendran was*

competent to revoke the Joint Will executed by him along with his wife Devaki Ammal on 27.11.1995?

4. *Whether there was any fraud committed by the defendant herein in obtaining the Letters of Administration in OP No.755 of 2002?*

13. At trial the second plaintiff was examined as P.W.1 and one of the attesting witnesses to the Will namely, Veerabrahmachari, was examined as P.W.2. The plaintiffs had produced Exhibits P1 to P45. The sole defendant Senthilkumar, was examined as D.W.1 and he has produced Exhibits D1 and D2. Exhibit C1 was also marked as Court Document.

14. I have heard Mr.T.Srikrishna Bhagavat, learned counsel appearing for Mr.V.Sivakumar for the plaintiffs and Mr.C.Umashankar, learned counsel appearing for Mr.S.Saravanan for the defendant.

Issue No.1:

15. Though the issue relating to adoption is strictly foreign to the scope of the present Testamentary Original Suit, namely TOS No.15 of 2005, which has been filed for grant of Probate of the Will of C.G.Rajendran, said to have been executed on 29.06.2000 and the Codicil dated 25.08.2000, I have framed the above issue in view of the direction of the Division Bench contained in its judgment dated 01.10.2009 made in OSA Nos.50, 76 and 77 of 2008, wherein, the Division Bench had held that the issue relating to adoption should also be gone into in these proceedings.

16. This issue relates to the adoption of the defendant by Devaki Ammal and C.G.Rajendran. Mr.C.Umashankar, learned counsel appearing for the defendant would rely upon the description in the various Wills executed by Devaki Ammal as well as C.G.Rajendran to contend that the factum of adoption has been accepted by the adoptive parents and as such, it will not be open to the plaintiffs to deny the adoption. Mr.Umashankar, learned counsel would draw my attention to the recitals in

the various Wills executed by Devaki Ammal as well as C.G.Rajendran, which have been marked as documents in these proceedings.

17. The certified copy of the Will dated 18.10.1989 executed by Devaki Ammal and C.G.Rajendran has been produced as Ex.D2. The recitals therein described the defendant as their adopted son. It is also seen that the testators have stated that they have been bringing up the defendant from the year 1976, it is also stated that the defendant was born on 14.03.1975. The Will also further recites that he was actually taken in adoption by the testators with the willingness and consent of the natural parents. The said Will is a registered document. Even in the rectification deed dated 16.12.1989 which forms part of Ex.D2, it is recited that Senthilkumar is the adopted son of Devaki Ammal and C.G.Rajendran and he has been brought up by them since May 1976. The Will dated 27.11.1995 executed by Devaki Ammal and C.G.Rajendran has been marked as Ex.P1. The said instrument recites as follows:

*"In May 1976, in his childhood, we have
adopted him as our son with the Willingness and*

*consent of his natural parents Dr.G.Muthuswami and Mrs.Jagadeswari and they have never had any objection for taking the boy in adoption as our own son and heir. **We have performed Datta-Homam and religious Ceremony for his adoption.***

Ever since, we have adopted from May 1976, he is staying with us as our own Son and brought up by us.

Our adopted son Senthilkumar is very much affectionate to us and we are also very affectionate to him. We sincerely feel that Senthil kumar as a boon for us sent by God. At present he is studying in II year B.A., Presidency College, Madras.”

18. This Will dated 27.11.1985 is also a registered instrument. After the death of Devaki Ammal and her husband C.G.Rajendran had executed a document styled as a Modification Deed of Will, the said document has been marked as Ex.P17, the same is dated 02.09.1996. Under the said

document, the deceased C.G.Rajendran had modified the Will bequeathing the property at Mylapore to Senthilkumar and the property at Kodambakkam to his two brothers namely, C.G.Jayaraman and C.G.Karunakaran. Even the said Will, recites that Senthilkumar is his adopted son. The said document is also registered as Document No.132/3 of 1996 in the office of the Sub Registrar, Mylapore.

19. However, the said C.G.Rajendran appears to have changed his mind and executed another Will dated 14.02.1997, wherein, he had bequeathed the property to Hindu Mission Hospital, Tambaram West, Chennai 600 045. There is no reference to any of the earlier Wills in the said document dated 14.02.1997. It is also a registered instrument. The testator namely, C.G.Rajendran had claimed that he had inherited the property on the death of his wife Devaki Ammal on 10.03.1996 being her sole heir. Under the said Will, the entire property is bequeathed to Hindu Mission Hospital, Tambaram West. By another Will dated 15.09.1997, the said C.G.Rajendran had amended the Will dated 14.02.1997, in that document also there is no reference to the adopted son Senthilkumar. A

further Will has been executed by C.G.Rajendran on 29.06.2000 followed by the Codicil on 25.08.2000. The said Will very clearly recites that the property in question was inherited by Devaki Ammal from her mother Dhanalakshmi Ammal. It is this Will and the Codicil which are now sought to be probated in the present Testamentary Original Suit namely, TOS 15 of 2005.

20. Mr.T.Srikrishna Bhagavat, learned counsel appearing for the plaintiffs would contend that the mere fact that the person has been described as an adopted son in the Will will not cloth him with the rights of an adopted son and the same will have to be proved by independent evidence. Therefore, according to Mr.T.Srikrishna Bhagavat, in the absence of any proof regarding the adoption, the defendant is not entitled to claim the legacy as per the Joint Will dated 27.11.1995.

21. Contending contra Mr.C.Umashankar, learned counsel appearing for the plaintiff would submit that the Will declares a person to be the adopted son and the legatee is made him then he would be entitled to

legatee even without proof of adoption. He would also draw my attention to the judgment of the Hon'ble Supreme Court in **AL.PR.Rangannathan Chettiar v. Al. PR. AL Perikaruppan Chettiar**, reported in **AIR 1957 SC 815**, wherein, the Hon'ble Supreme Court had considered the question of proof of adoption and the entitlement of the adopted son to take the legacy. While doing so, the Hon'ble Supreme Court had observed as follows:

"7. The question as to whether a disposition in such terms is to the person intended therein as a persona designata or by reason of his filing a particular legal status which turns out to be invalid is one of some difficulty and has been considered by the Courts in quite a large number of cases some of which have been cited before us. An elaborate consideration of these various cases cannot finally determine the question that arises in individual cases, which must ultimately depend on its own facts and the terms of the particular document containing the disposition."

22. After referring to two decisions of the privy council in ***Nidhoomoni D bya v. Saroda Pershad Mookerjee, 2 Ind App 253 (P C)*** and ***Fanindra Deb Baikat V. Rajeswar Das, 12 Ind App 72 at p.89 (PC)***, the Hon'ble Supreme Court had concluded that the question as to whether, the legatee who is described as an adopted son should prove the adoption beyond all reasonable doubts, in order to take the legacy or not will depend on the facts of the case and the terms of a particular document containing the disposition.

23. In view of the above pronouncement of the Hon'ble Supreme Court, it is clear that whether a person who has been described as an adopted son in the Testamentary instrument should prove the adoption before taking the legacy or the very description itself would cloth him with the rights of an adopted son will depend on fact of each case. I have referred to the contents of the various Wills executed by Devaki Ammal and C.G.Rajendran during their lifetime as well as the Wills executed by C.G.Rajendran in his individual capacity, after the lifetime of Devaki

Ammal. From the recitals in at least the two Joint Wills, which have been marked as Exs. D2 and P1, it is clear that Senthilkumar, the defendant herein, was considered and treated as the adopted Son of Devaki Ammal and C.G.Rajendran. The second Joint Will dated 27.11.1995, in fact recites about the performance of Datta-Homam and other religious ceremonies.

24. Even after the death of Devaki Ammal, C.G.Rajendran had executed a Modification Deed attempting to modify the Will dated 27.11.1995, wherein, he had again described Senthilkumar as his adopted son. The said document reads as follows:

"I along with my late wife Mrs.Devaki Ammal jointly executed a Will dated 27.11.1995 in Document No.138/3 at the office of the Sub-Registrar, Mylapore, Madras-4, to the effect that our adopted son Mr.Senthilkumar should take the properties mentioned in the Will absolutely after our life time. My wife Mrs.Devaki Ammal expired on 10.03.1996 at Madras

leaving me as her sole surviving heir to her. The Will dated 27.11.1995 in Document No.138/3 will come into force only after the demise of both my wife and myself. Since it has not become operative, I have become entitled to the properties mentioned in the Will and I have executed this Modification of the Will dated 27th November 1995 as follows:-

1. My adopted son Mr.Senthil kumar will get only the property in Door No.16, Appu Street 1st Lane, Mylapore, Madras -4 and enjoy the same at least for a minimum period of thirty years and only thereafter he shall acquire the power of disposition of the said property.”

25. A conjoint reading of the recitals in all these documents namely, the Rectification Deed dated 18.10.1999, the Will dated 27.11.1995 and the Modification Deed of Will dated 03.09.1996, registered as document No.132/3 of 1996 would show that Senthilkumar was in fact adopted by

Devaki Ammal and C.G.Rajendran and he continued to live as the adopted son of the couple along with them in their house. Mr.T.Srikrishna Bhagavat, would however, point out certain descriptions in letters written by the natural parents as well as his transfer certificate and community certificate which described Senthilkumar as the son of the his natural parents to contend that, there was no valid adoption of Senthilkumar by Devaki Ammal and C.G.Rajendran and he was always treated as the son of natural parents G.Muthuswami and Mrs.Jagadeswari. I do not think that the said description in those documents would any manner belittle the evidentiary value of the statements made by the adoptive parents in various registered instruments which have been produced by the plaintiffs themselves. Even in the document styled as Modification of the Will dated 03.09.1996, the author of the document namely, C.G.Rajendran had chosen to describe Senthilkumar as his adopted son.

26. Mr.T.Srikrishna Bhagavat, would also draw my attention to Ex.P26 which is dated 02.12.1996, written by C.G.Rajendran to the biological mother of Senthilkumar to contend that the said document would

dispel the claim of the defendant that he was adopted by C.G.Rajendran and Devaki Ammal. A Closed reading of the said letter would disclose that Senthilkumar was brought up by C.G.Rajendran and Devaki Ammal. The said letter reads as follows:

“குழந்தை செந்தில் என்னோடும், தேவகியோடும்
மிகவும் பாசத்தோடும், அன்போடும் தான் இந்த
வீட்டில் இருந்தான். எல்லோரும் வியக்கும்
வண்ணம், எங்களால் வளர்க்கப்பட்டான்”

27. It appears from the contents of the said document that Senthilkumar had fallen in bad company and had started behaving in an undesirable manner, which led to C.G.Rajendran complain to his biological mother about the conduct of the son Senthilkumar. This document dated 02.12.1996. As already pointed out even on 03.09.1996 just about three months prior to Ex.P26, C.G.Rajendran had in a registered document styled as modification deed of Will has described Senthilkumar as his adopted son. It is also in evidence that C.G.Rajendran claiming to be the sole heir of Devaki Ammal had sold the property at Kodambakkam, which

resulted in Senthilkumar filing a suit against C.G.Rajendran and the purchasers challenging the said sale.

28. Subsequently a compromise was entered into between the plaintiff and the defendants 2 and 3, in and by which, the entire dispute was compromised between them leading to Senthilkumar executing a confirmation deed of sale affirming the sale made by his father. Looking at the overall circumstances and the recitals in various documents that have been placed before the Court, I am of the considered opinion, that the defendant namely, Senthilkumar was in fact adopted by C.G.Rajendran and Devaki Ammal in the year 1976 itself and he was brought up by them as their adopted son. They have described him as their adopted son in more than one registered instrument. Till Devaki Ammal was alive Senthilkumar was living as an adopted son along with his adoptive parents namely, C.G.Rajendran and Devaki Ammal. Things seem to have drifted after the death of Devaki Ammal. Devaki Ammal had died on 10.03.1996, even on 03.09.1996 C.G.Rajendran had described Senthilkumar as his adopted son. The very fact that he has attempted to modify the Will by

bequeathing one property to his brothers would show considerable suspicion in his conduct and the influence that his brothers had over C.G.Rajendran.

29. I am therefore, of the considered opinion that Senthilkumar was in fact adopted by C.G.Rajendran and Devaki Ammal and continued to be an adopted son. Therefore, Issue No.1 is answered in favour of the defendant and against the plaintiffs.

Issue No.3:

30. This issue relates to the right of C.G.Rajendran to revoke or modify the Joint Will dated 27.11.1995. The Will dated 27.11.1995 is though styled to be a Joint Will is actually the Will of Devaki Ammal in which C.G.Rajendran also joined as a testator, out of the respect that Devaki Ammal had for her husband. It is the admitted case of the parties that the properties, which are subject matter of these proceedings originally belonged to Dhanalakshmi Ammal, mother of Devaki Ammal and on her death in the year 1977, the properties devolved on Devaki Ammal as the

only daughter of Dhanalakshmi Ammal. Therefore, Devaki Ammal was the absolute owner of the property and her husband C.G.Rajendran had no right over the property during the lifetime of Devaki Ammal.

31. Even after the death of Devaki Ammal in the absence of Senthilkumar as adopted son, the property would not be inherited by C.G.Rajendran as her husband, but it would revert to the heirs of Dhanalakshmi Ammal and her husband, as the same has been inherited by the daughter Devaki Ammal from her parents, in view of Section 15(3) of the Hindu Succession Act. Therefore, though the Will dated 27.11.1995 is styled as a Joint Will, it should only be treated as the Will of Devaki Ammal, in which C.G.Rajendran also joined as the testator. Therefore, it is not a mutual Will, so as to enable one of the testators to revoke it after the death of the other.

32. In this regard Mr.C.Umashankar, would draw my attention to the judgment of the Mysore High Court in **Leo Sequiera v. Magdalene Sequiera Bai and others**, reported in **AIR 1971 (Mysore) 143**. In the said

judgment, the Mysore High Court had considered the difference between the Mutual Will and the Joint Will and has held that, where it is shown that some of the properties belonged exclusively to the wife and the others to the husband and each one of them could have executed an independent Will in respect of his or her properties, the legacy made under such Joint Will would become operative on the death of the owner of the properties irrespective of the fact that whether the other joint testator is alive or not.

33. In the case on hand admittedly the properties belonged to the wife Daveki Ammal. As per the Will dated 27.11.1995 deceased C.G.Rajendran was only given a life estate. After the lifetime of both of them the properties have been bequeathed to Senthilkumar. Therefore, C.G.Rajendran had no right to revoke or modify the Will dated 27.11.1995 and execute another Will claiming to be the absolute owner. In ***K.S.Palanisami (dead) through Legal Representative v. Hindu Community in General and Citizens of Gobichettipalayam and others***, reported in **2017 (13) SCC 15**, the Hon'ble Supreme Court had held that the intention in a testamentary disposition has to be primarily found out

from the actual words used in the Will. The Court is not entitled to ignore clear words or add something of its own or dilute the meaning of any clear word used in the Will. The solemn duty of the Court is to find out the intention of the testator and thereafter to give effect to such intention.

34. If we are to read the Will dated 27.11.1995, in the manner suggested by the Hon'ble Supreme Court, the inevitable conclusion is that the clear intention of the testator namely, Devaki Ammal was that her husband C.G.Rajendran had no right over the property and on his death the property shall go to Senthilkumar the adopted son. Therefore, C.G.Rajendran, cannot inherit any better right in the property than what has been bequeathed to him under the Will. Therefore, the claim that C.G.Rajendran had become the absolute owner of the property on the death of Devaki Ammal is not only opposed to the terms of the Will, it is also opposed to the provisions of Section 15 of the Hindu Succession Act, 1956, inasmuch as C.G.Rajendran had claimed that Devaki Ammal has died without any issues. As already pointed out be the property that devolved on her on the death of her mother the property in the absence of

any children would revert back to her parents and not to her husband. I am therefore, of the considered opinion that C.G.Rajendran had no right to revoke or modify the Will dated 27.11.1995.

35. Hence Issue No.3 is answered in favour of the defendant and against the plaintiffs.

Issue No.4:

36. This issue relates to the proceedings in OP No.755 of 2002. The said Original Petition was allowed by this Court and Letters of Administration was granted in favour of the legatee namely Senthilkumar in respect of the Will dated 27.11.1995. It is claimed that the petitioner therein namely, Senthilkumar had played a fraud on this Court, inasmuch as he had not disclosed the subsequent proceeding as well as the subsequent Will executed by C.G.Rajendran and he has not made the executors of the Will dated 29.06.2000 and the Codicil dated 25.08.2000, as parties to the said Original Petition. As could be seen from the records the Original Petition in OP No. 755 of 2002 was filed on 30.03.1998 and a

citation to produce the original Will was issued to C.G.Rajendran.

37. An Application was taken out in Application No.294 of 1998 for issuance of citation through the Court. By order dated 24.03.1998, the Court directed the Original Petition to be numbered without the Original Will. Ex.C1 is the registration copy of the Will dated 27.11.1995 which has been produced by the Registrar concerned. Unfortunately, C.G.Rajendran died on 07.04.2002 and the Original Petition was numbered after his death. Publication was effected and this Court had granted Letters of Administration for the said Will on 28.01.2004. The Division Bench in its judgment in OSA No.50 of 2008 had held that the said grant cannot be revoked unless, it is proved that C.G.Rajendran had the right to cancel the said Will dated 27.11.1995.

38. Yet another striking feature is the recital in the modification deed of the Will dated 03.09.1996, wherein C.G.Rajendran, himself had admitted execution of the Will dated 27.11.1995 by himself and his wife Devaki Ammal. No doubt the executors of the Will of C.G.Rajendran, dated

29.06.2000 and the Codicil dated 28.05.2000 have not been made as parties. It is not brought home that the petitioner in OP No.755 of 2002/the defendant herein, was aware of the existence of the Will dated 29.06.2000 and the Codicil dated 25.08.2000, when the proceedings relating to Letters of Administration in OP No.755 of 2002 got terminated on 28.01.2004.

39. Admittedly, the Original Petition in OP No.8 of 2005 was filed only subsequently i.e., on 14.09.2004. I, therefore find that nothing has been brought up in evidence to prove that the defendant as petitioner in OP No.755 of 2002 played a fraud on Court and he had obtained the grant on 28.01.2004.

40. In view of the above findings, the Issue No.4 is answered in favour of the defendant and against the plaintiff.

Issue No.2:

41. This issue relates to the truth and validity of the Will dated 29.06.2000 and the Codicil dated 25.08.2000 which are the subject matter

of the above proceedings. The second plaintiff has been examined as P.W.1. He has actually claimed ignorance about the execution of the Will. He had said that it was his lawyer who gave him the copy of the Will and Codicil and required him to file proceedings for grant of probate of the said Will. His evidence is not useful in deciding the truth or otherwise of the Will dated 29.06.2000 and the Codicil dated 25.08.2000.

42. One Veerabrahmachari has been examined as P.W.2. He figures as attesting to the Will. The said attesting witness had in his evidence admitted the signature of the testator therein differs from page to page. He attempted to explain that it may be due to old age. He has also stated that he is a clerk working in the office of the Advocate of C.G.Rajendran. He has claimed ignorance as to who had instructed the counsel, who drafted the Will to prepare the Will. A reading of his evidence, i.e. the proof affidavit filed by the said witness D.W.2 reads as follows:

"1. I state that I am the attesting witness in the registered Will of C.G.Rajendran dated 25.08.2000 and the Codicil

dated 29.06.2000. At the request of the said C.G.Rajendran and in his presence, I was present and at the time set and subscribed our names and signatures. I have seen the said C.G.Rajendran sign the document of Will.

2. It is stated that the said C.G.Rajendran subscribed his name and signature to the above said will and was of sound and disposing mind, memory, and understanding, and to the best of my belief made and published the same of his free will and pleasure.”

A reading of the proof affidavit would show that the attesting witness has not spoken about the execution of the Will by the testator in the presence of two attesting witnesses and attestation of the Will by two attesting witnesses in the presence of the testator.

43. Section 63 of the Indian Succession Act, 1925, which provides for execution of a valid Will, reads as follows:

63. Execution of unprivileged Wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:--

- a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
- b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
- c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other

person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

A reading of the above provision would show that the following mandatory requirements will have to be complied with in execution of the Will;

- a) *The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.*
- b) *The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.*
- c) *The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the*

testator, or has received from the testator a personal acknowledgment of his signature or mark.

44. The third requirement is clearly absent. Only one attesting witness has been examined, he has not spoken about the fact that the other attesting witness signed in the presence of the testator or that the other attesting witness had obtained an acknowledgement from the testator as contemplated in Sub Clause (c) of Section 63. All that has been stated is that the testator signed in the presence of P.W.2 and P.W.2 signed in the presence of the testator.

45. The evidence in chief-examination is totally silent about the attestation by the second attester. No doubt in cross-examination, P.W.2 has stated that Arul Raj, is the other attesting witness, but the entire evidence both in Chief as well as Cross-examination is silent about the fact, as to whether, Arul Raj was present at the time when the testator executed the Will or about the fact, as to whether Arul Raj had obtained a

personal acknowledgment of the execution of the Will by the testator from him. In the absence of such evidence, it cannot be said that the execution of the Will as required under law has been proved.

46. In view of the same, I am unable to conclude that the plaintiffs have established the execution of the Will by the testator as required under law. Even though the Will is a registered instrument, in the absence of proof regarding proper execution and valid attestation and I do not think the Registration of the document alone would be sufficient to uphold the execution of the Will and grant probate for the same.

47. In view of the above conclusion, I find that the plaintiffs had miserably failed to prove the execution of the Will and its attestation, as required under Section 63 of the Indian Succession Act. Hence Issue No.2 is answered against the plaintiffs and in favour of the defendant.

48. In view of the above conclusions, I find that TOS No.15 of 2005 has to necessarily fail and it is accordingly dismissed. The grant made in OP No.755 of 2002 will stand. In the circumstances of the case there will be no order as to costs.

10.09.2019

jv

Index: Yes
Internet: Yes
Speaking order

List of the Witnesses examined on the side of the Plaintiffs :

1. P.W.1 N.Balasundaram
2. P.W.2 Veerabrahmachari,

List of Exhibits marked on the side of the Plaintiff :

Sl.No.	Exhibits	Description of documents
1	Ex.P1	The certified copy of registered joint will dated 27.11.1995 of Mrs.Devaki ammal and C.G.Rajendran

Sl.No.	Exhibits	Description of documents
		with rectification along with the typed clean copy
2	Ex.P2	The registered original will of C.G.Rajendran dated 29.06.2000 along with original registered Codicil dated 25.08.2000
3	Ex.P3	The certified copy of Plaint in OS No.6278/1997
4	Ex.P4	The certified copy of Written statement filed by the first defendant on 10.04.1998
5	Ex.P5	The xerox copy of memo of compromise dated 06.07.1998 filed by the plaintiff and defendants 2 and 3. (marked subject to the objection raised by the learned counsel for the defendant)
6	Ex.P6	The certified copy of Birth certificate of Mr.Senthilkumar
7	Ex.P7	The Death certificate of the Testator's wife Mrs.Devaki Ammal
8	Ex.P8	The death certificate of the testator Mr.C.G.Rajendran
9	Ex.P9	The affidavit of assets in OP No.8 of 2005
10	Ex.P10	The affidavit of the attesting witness for the Will
11	Ex.P11	The affidavit of the attesting witness for the Codicil
12	Ex.P12	The consent affidavit of 2 nd respondent
13	Ex.P13	The consent affidavit of 3 rd respondent
14	Ex.P14	The consent affidavit of 4 th respondent
15	Ex.P15	Series (7 Nos.) are the Caveat Petitions filed by the 1 st respondent
16	Ex.P16	The notice from the beneficiaries of the Will
17	Ex.P17	The certified copy of the Will of C.G.Rajendran dated 02.09.1996

Sl.No.	Exhibits	Description of documents
18	Ex.P18	The certified copy of the Will and Testament dated 14.02.1997 of C.G.Rajendran
19	Ex.P19	The certified copy of the Will and Testament dated 15.09.1997 of C.G.Rajendran
20	Ex.P20	The photo copy of affidavit and petition dated 22.07.1998 of Senthil kumar. (marked subject to the objection raised by the learned counsel for the defendant because it is a photo copy and no reason stated for non production of the original or the certified copy)
21	Ex.P21	The Photo copy of letter dated 31.08.1998 from Dr.G.M.Swami to the Health officer. (Marked subject to the objection raised by the learned counsel for the defendant because it is a photo copy)
22	Ex.P22	The photo copy of Transfer certificate dated 10.09.1992 (marked subject to the objection raised by the learned counsel for the defendant because it is a photo copy)
23	Ex.P23	The photo copy of Community Certificate dated 20.12.1990 (marked subject to the objection raised by the learned counsel for the defendant because it is a photo copy)
24	Ex.P24	The police complaint dated 18.04.2002
25	Ex.P25	The office copy of police complaint dated 27.06.1998 given by C.G.Rajendran
26	Ex.P26	The office copy of Registered letter dated 02.12.1996 written by C.G.Rajendran along with Acknowledgement
27	Ex.P27	The office copy of compliant dated 05.06.1993 given by Mrs.Jagadeeswari

Sl.No.	Exhibits	Description of documents
28	Ex.P28	The certified copy of order dated 05.07.2002 passed by the Hon'ble High Court in CRP No.636/1999 and CMP No.7728/2002
29	Ex.P29	The certified copy of order dated 15.03.2004 passed by the VIII Asst. City Civil Judge in I.A.No.20501/2003 in O.S.No.6278/1997
30	Ex.P30	The certified copy of Interim order dated 15.07.2004 passed in C.R.P.No.1277/2004
31	Ex.P31	The certified copy of Final order dated 16.03.2005 in C.R.P.No.1277/2004
32	Ex.P32	The certified copy of legal heirship certificate dated 24.05.1996 of the Testator.
33	Ex.P33	The certified copy of Form No.34 a dated 21.07.1997 filed before the income tax department by the Testator
34	Ex.P34	The certified copy of Sale deed dated 25.07.1997 executed by the Testator in favour of Haji Mohammed
35	Ex.P35	The certified copy of sale deed dated 25.07.1997 executed by the Testator in favour of J.Vignesh kumar
36	Ex.P36	The certified copy Corporation card
37	Ex.P37	The certified copy of Metropolitan water supply and sewerage board card
38	Ex.P38	The certified copy of Letter from Revenue Officer to the testator
39	Ex.P39	The original invitation cards of the Mylai Devaki Ammal C.G.Rajendran Educational Trust
40	Ex.P40	The original cremation payment receipt dated 07.04.2002
41	Ex.P41	The photo copy of cremation card (Marked subject to the objection raised by the learned counsel for the

Sl.No.	Exhibits	Description of documents
		defendant because it is a photo copy
42	Ex.P42	The original list of inventory dated 17.04.2002
43	Ex.P43	The photo copy of petition dated 02.05.2002 to Tahsildar along with original endorsement from Tahsildar office
44	Ex.P44	The original letter dated 06.06.2002 to Tahsildar and Inspector of Police with acknowledgment card
45	Ex.P45	The original medical bills of the Testator excluding the first page

List of the Witnesses examined on the side of the Defendant:

1 D.W.1 M.Senthilkumar

List of Exhibits marked on the side of the Defendant:

Sl.No.	Exhibits	Description of documents
1	Ex.D1	The original death certificate of my mother Mrs.Devaki ammal who died on 10.03.1996
2	Ex.D2	The certified copy of the Will dated 18.10.1989
1	Ex.C1	True copy of covering letter

jv

10.09.2019

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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.



WEB COPY

R.SUBRAMANIAN,J.

jv



Pre Delivery Judgment

T.O.S. No.15 of 2005

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10.09.2019