

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.11.2020

CORAM

THE HON'BLE MR.JUSTICE N. SATHISHKUMAR

T.O.S.No.5 of 2004 in
O.P.No.593 of 2003
and
C.S.No.2 of 2005

In T.O.S. 5 of 2004

A. Charles Maria Joseph ... Plaintiff

Vs.

A.Gabriel Joseph ... Defendant

In C.S. 2 of 2005

A.Gabriel Joseph ... Plaintiff

Vs.

A. Charles Maria Joseph ... Defendant

Prayer in TOS No.5 of 2004: Testamentary Original Suit filed under
Section 222 and 276 of the Indian Succession Act, 1925 for probate and
Order XXV Rule 4 of Original Side Rules praying to allow the plaintiff to

prove the Will in common form and probate thereof to have effect throughout State of Tamilnady.

Prayer in C.S.No.2 of 2005: Civil Suit filed under Order 4 Rule 1 of Original Side Rules and read with Order VII Rule 1 of the Code of Civil Procedure praying for

a) preliminary decree of partition of the suit properties more fully described in the schedule items A to D by dividing the same into two equal shares and allot one such share to the plaintiff by metes and bounds.

b) directing the defendant to pay a sum of Rs.2,50,000/- tentatively valued being the half share of the business profit from the business under the name and style as Schomburg and Schomburg" at No.33, Halls Road, Egmore, Chennai 600 008 from the date of death of plaintiff's father till the date of plaint.

c) directing the defendant to pay a sum of Rs.50,000/- per annum being the future business profits until effecting/passing partition decree in the above suit.

In T.O.S.5 of 2004

For Plaintiff : Mr.L. Dhamodharan

For Defendant : M/s R. Latha
for Mr.K.P.Ashok

In C.S. 2 of 2005

For Plaintiff : M/s R. Latha
for Mr.K.P.Ashok

For Defendant : Mr. L.Dhamodharan

Common Judgment

The Testamentary Original Suit in T.O.S.No.5 of 2004 has been filed to probate the Will dated 01.05.1997 executed by the father of the parties herein, wherein, the defendant was given life interest in the first floor of the A schedule property with common right in it and the plaintiff was given absolute right in the remaining A Schedule property.

2. The Civil Suit in C.S.No.2 of 2005 has been filed by the defendant in T.O.S.5 of 2004, claiming equal share in the suit schedule A, B, C and D properties.

3. For the sake of convenience, the parties are referred to as per their ranking in the T.O.S.5 of 2004.

4. The plaintiff and the defendant are the sons of one late Arokiyasamy and while the father of the parties was in hale and healthy with sound state of mind had executed a Will dated 01.05.1997 bequeathing the entire suit property namely A schedule property to the plaintiff by giving absolute right, after his life time and the defendant was given a right of residence in the first floor of the A schedule property. Therefore, the plaintiff has filed this Testamentary Original Suit for Probate of the Will dated 01.05.1997.

5. The defendant has filed a counter affidavit denying the execution of the Will. It is his contention that the Will is a result of forgery, in order to grab the entire property and his father has maintained cordial relationship with both of his children. Therefore, the execution of the Will bequeathing the entire property to the plaintiff would not be possible and in view of the same, the Will is a created one. The further contention of the defendant is

that there is a long delay between the date of the Will and filing of the Original Petition for probate and that itself would prove that the Will is a forged one. He also contended that he only took care of his father and due to the intervention made by the plaintiff, he was permitted to run the business of the father and hence, prayed for dismissal of the suit.

6. The defendant also filed a suit in C.S.No.2 of 2005 for partition seeking half share in the entire suit properties namely A, B, C and D schedule properties. The above suit was also contested by the plaintiff in T.O.S.5 of 2004 stating that except the A schedule property, nothing is available for partition and the B schedule property was purchased by him in his name long back and before filing of the suit itself, the B schedule property was sold out. It is his contention that in respect of the A schedule property also, he is the absolute owner of the same, as per the Will dated 01.05.1997 and only life interest of the first floor portion in the A schedule property has been given to his brother (defendant in TOS 5 of 2004) and hence, he prayed for dismissal of the suit.

7. On the basis of the above pleadings, the following issues were framed for trial.

in T.O.S.No.5 of 2004

1. *Whether the Will dated 01.05.1997 executed by late V.J.Arokiaswamy in favour of the plaintiff is true, genuine and valid?*
2. *Whether the Will is fabricated/concocted by the plaintiff after the death of the testator by forging the signature of the testator?*
3. *Whether the Will is surrounded by suspicious circumstances?*
4. *To what other reliefs the plaintiff is entitled?*

In C.S.No.2 of 2005

1. *Whether the deceased V.J.Arokiyasamy died intestate?*
2. *Whether the suit properties are available for partition into two equal shares?*
3. *Whether the plaintiff is entitled to partition as prayed for?*
4. *To what relief is the plaintiff entitled.*

8. In both the suits, joint trial has been conducted and common evidence was recorded in C.S.No.2 of 2005.

9. On the side of the plaintiff, (defendant in T.O.S.No.5 of 2004), the plaintiff and his son were examined as PW1 and PW2 respectively and Ex.P1 to Ex.P4 were marked. On the side of the defendant (plaintiff in T.O.S.No.5 of 2004), the defendant was examined as DW1 and one another witness was examined as DW2 and Ex.D1 to Ex.D14 were marked.

10. The learned counsel appearing for the plaintiff submitted that the father of the plaintiff was hale and healthy with sound state of mind while executing the Will Ex.D1 and his brother left the father long back and was residing away from the father. However, his father made a provision for him and permitted him to reside in the first floor of the A schedule property during his life time and that the plaintiff has only taken care of his father till his death.

11. He further contended that Mr.V.Ramachandran, one of the attested witnesses to the Will is an auditor and he was examined as PW2 and in his evidence he has spoken about the execution as well as the attestation of the Will and his evidence was not shattered by the defendant

and no motive has been attributed to the PW2 during his cross examination to bring out the suspicious circumstances surrounding the Will. It is his contention that merely because the Will is not a registered one, it cannot be said that the Will is not genuine. He further contended that immediately after the death of the deceased, the Will was brought to the notice of both the sons and the defendant had also admitted for settlement and thereafter, settlement was not reached. Therefore, there was a delay in filing O.P for probate of the Will and only to counter blast, the partition suit has been filed by the defendant. His contention is that to establish the allegation of forgery and undue influence, no materials has been filed by the defendant. In support of his submissions, he relied upon the following judgments in *(i) Surendra Pal and others V. Dr.(Mrs) Saraswati Arora and another reported in 1974 2 SCC 600; (ii) Sridevi and others V. Jayaraj Shetty and others reported in 2005 1 CTC 443; and (iii) Meenakshiammal (dead) through Lts and others V. Chandrasekaran and another reported in 2005 1 SC 280* and prayed that the suit for probate of the Will has to be decreed and the suit for partition filed by the defendant has to be dismissed.

12. The learned counsel appearing for the defendant has filed written submissions by contending that the Will is a forged one and the delay in filing the suit for probate of Will itself indicates that the Will is not a genuine one. It is further contended that the Will is an unregistered document and there is no evidence to show that who had prepared the Will and who was the scribe of the Will. He further contended that, DW1 and DW2 have clearly stated that they did not know who prepared the Will and they did not know as to whether the Testator had read the contents of the Will. It is his further contention that the another attesting witness of the Will has not been examined and the DW2 is a highly interested person and he has not read over the contents of the Will at the time of attesting. He further contended that the evidence of DW1 and Dw2 is highly contradicted with each other and therefore their evidence cannot be given much importance. He further contended that when the Testator was at the age of more than 91 years and there was no dispute between the father and sons, depriving one son totally from inheritance, created suspicious circumstances. Hence, he prayed that the suit for probate of the Will has to be dismissed and the suit for partition has to be decreed.

13. Issue No. 1 to 3 in T.O.S.No.5 of 2004 and Issue No.1 in C.S.No.2 of 2005.

It is not disputed by both the parties that their father Arokiyasamy was the original owner of the property, namely the A schedule property. The evidence of DW1, who is the plaintiff in TOS.No.5 of 2004 clearly indicates that his father was living with him in the ground floor and he had contributed to the business of his father and he had taken care of his father. It is also the evidence of DW1 that the Testator was hale and healthy and sound state of mind while executing the Will and he reserved life interest in the first floor of the A schedule property to his brother (plaintiff in C.S.2 of 2005) and the remaining property to DW1 (plaintiff in TOS 5 of 2004). The reason for not giving absolute right to his brother is that he left the family long back and he got employment in the Southern Railway and well settled and he had not contributed anything to the family and the business of the father and therefore, the father had executed such a Will. The factum of working in the Railway Department is not disputed by the defendant.

14. The DW2, one of the attesting witnesses to the Will, is none other than the auditor of the Firm namely " Schomburg and Schomburg"

run by the father Arokiyasamy. It is the contention of DW2 that on the date of execution of the Will, i.e. on 01.05.1997, the Testator had called him to be present in his house for signing as a Witness in the Will and accordingly, he was present on that date and the another attesor of the Will namely Mr.Lawrance was also present and in their presence, the Testator has signed the Will and both of them had signed as Attestor in the Will and immediately after the execution of the above said Will, it was sealed with a cover and the sealed cover was handed over to the auditor, the DW2 to be kept in his proper custody. It is further stated by the DW2 that after the final rituals and ceremonies of the deceased Testator, the Will was opened on 28.03.1999 and a copy of the same was also given to PW1. The entire evidence of DW2 shows that he has not only spoken about the execution of the Will by the Testator, but also the attestation of the Will and no suspicious circumstance surrounding the Will were brought on record through his cross examination.

15. The PW1 (defendant in T.O.S.No.5 of 2004) was examined and though he was cross examined twice, thereafter, he did not appear before

this court. Thereafter, based on the application filed by PW1, his son was examined as PW2. The entire evidence of PW1 and PW2 makes it clear that till the death of the Testator, he had been maintaining his health and he was hale and healthy and sound state of mind at the time of execution of the Will. When the evidence of PW1 and PW2, who disputed the execution of the Will itself indicates that the Testator was hale and healthy, and the evidence of DW2 proves the execution of the Will, then, it is for the persons, who disputed the Will and make allegations that the Will has been executed under undue influence and it is forged etc., should prove the same.

16. A perusal of the written statement (in T.O.S.5 of 2004) as well as the plaint (C.S.2 of 2005) filed by the defendant, who is disputing the Will, shows that there was no specific pleadings as to the nature of the undue influence, coercion and fraud, as contemplated under Order VI Rule 14 of the Code of Civil procedure. Whereas, the evidence clearly indicates that one of the sons namely the defendant had left the father long back and residing in a rental house and took employment in the Souther Railway and

not contributed anything to the family or to the business of the father and only in recent days, he joined the family and residing in the first floor of the A schedule property. Therefore, merely because absolute right in the property was not given to the defendant by his father through the Will, it cannot be said that the Will was created in the suspicious circumstances. Though the Will takes away the right of succession and deviate succession, when the execution and the attestation is established as per law, the intention of the Testator has to be respected. The intention of the Testator i.e. to give the property to one of his sons, who is not well settled in the life, cannot be defeated merely on the ground that the other son was not given absolute right in the property. In fact, the Testator of the Will has taken note of the fact that the family of the defendant in T.O.S.5 of 2004 can live in the first floor of the A schedule property and had given right of residence to the defendant and his family in the first floor till their life time. That itself clearly indicates that the Testator has no intention of depriving the family of the defendant from right of residence. If really the Will is fabricated or forged, as contended by the defendant, the normal conduct of a person forging such Will would be deprived the right of others and he will

not allow the other party and his family members to reside in the first floor during their life time. That itself clearly indicates that the alleged forgery and coercion pleaded by the defendant cannot be countenanced. Therefore, this court is of the view that from the evidence adduced on both sides, particularly, the DW2 attesting witness of the Will clearly proves the execution of the Will, whereas, the defendant has not produced any materials to show that the Will is a created one and it raises some suspicious circumstances. Even in the cross examination of the DW2, nothing could be elicited to establish any circumstances, which are in the nature of suspicious to object the Will.

17. In the judgment in *Surendra Pal and others V. Dr.(Mrs) Saraswati Arora and another* reported in 1974 2 SCC 600 at paragraph 15, the Apex court has held that when reasons have been clearly given in the Will for unequal distribution and merely because the unequal distribution, made by the Testator, the Will cannot be non suited.

18. In the judgment in *Sridevi and others V. Jayaraj Shetty and others reported in 2005 1 CTC 443 at paragraph No.15*, the Apex Court has held that once the propounder proves that the will was signed by the Testator and he was in a sound disposing state of mind and put his signature out of his own free will and that he signed it in presence of the witnesses who attested it in his presence, the onus, which rests on the propounder is discharged and when the allegation of undue influence, fraud or coercion is made by the caveator, the onus is on the caveator to prove the same.

19. In the judgment in *Meenakshiammal (dead) through Lts and others V. Chandrasekaran and another reported in 2005 1 SC 280* at paragraph No.7, the Apex Court has held that the burden is lying on the caveator to establish the alleged undue influence, forged etc.

20. Having regard to the above settled position and the circumstances of the entire evidence as discussed above, this Court found that except denying the Will, no other suspicious circumstances has been

brought on record. On the other hand, the evidence of DW2 clearly proves the execution of the Will and the circumstances for not distributing equal share of the property to the defendant is also clearly explained in the Will itself. The fact that the defendant in T.O.S. 5 of 2004 was residing separately in the rented house and got employment in the Railway Department and had not contributed anything to the family have also been brought on record. However, the Testator has given a right to the defendant and his family to reside in the first floor of the A schedule property till their life time. Therefore, this court is of the view that the Will executed by the father of the parties namely V.J.Arokiyasamy has been proved in the manner known to law and the plaintiff is entitled for probate of the Will. The issues are answered accordingly.

21. Issue No. 4 in T.O.S.5 of 2004 and Issue No.2 to 4 in C.S.No.2 of 2005

The suit in C.S.No.2 of 2005 was filed for partition of the suit properties namely A, B, C and D Schedule properties. With respect to the A schedule property, which is the subject matter of the Will in T.O.S.No.5

of 2004, an order for probate of the Will was granted in favour of the plaintiff. As far as the B, C and D schedule properties are concerned, it is stated by the defendant that the schedule B, C and D properties are available to be partitioned. However, it is the case of the plaintiff (in TOS 5 of 2004) that the B schedule property is his individual property and it was purchased by him and the same was sold out, even before filing of the suit. While this fact was questioned to the PW1 and PW2 during their examination, they have stated that they do not have any document to show that these properties belonged to Arokiyasamy. Further, no other document whatsoever produced by them to prove that the C and D schedule properties are also available for partition. Though the Firm namely " Schomburg and Schomburg" was run by the father Arokiyasamy, after his death, only the plaintiff in T.O.S.5 of 2004 is continuing the business and PW1 and PW2 have also in their evidence not pleaded anything that the defendant was assisting and contributing to the business of his father. The PW1 also stated in his evidence that no document has been filed to prove that his father is the owner of the other properties and are available for partition. In the absence of any such document to prove that the defendant is entitled for

partition of the C and D Schedule properties and are amenable to partition, the relief of partition claimed by the defendant (plaintiff in C.S.No.2 of 2005) cannot be ordered. Accordingly, the issues are ordered.

22. In the result,

(i) The suit in T.O.S.No.5 of 2004 is decreed. Grant probate of the Will in respect of the plaintiff in T.O.S.No.5 of 2004. No costs.

(ii) The suit in C.S.No.2 of 2005 is dismissed. No costs.

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