

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	22.01.2020
Judgment pronounced on	26.05.2020

CORAM

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

**T.O.S.No.29 of 2015
and
T.O.S.No.51 of 2018**

R.Srinivasan

... Plaintiff

(in T.O.S.No.29 of 2015 and
first Defendant in
T.O.S.No.51 of 2018)

VS

1.D.Venkataramanan
2.D.Parthasarathy
3.Mrs.D.Vishnupriya

... Defendants 1, 2 and 3
(in T.O.S.No.29 of 2015 and
Plaintiffs 1,2,3 in
T.O.S.No.51 of 2018)

4.Dakshinamoorthy

... 4th Plaintiff in
T.O.S.No.51 of 2008

Prayer in T.O.S. No.29 of 2015: Testamentary Original Suit filed under
Sections 232 and 276 of the Indian Succession Act 1925 to allow the

Plaintiffs to prove the Will and for grant of Letters of Administration thereof to have effect throughout the State of Tamil Nadu may be granted to the Plaintiff.

Prayer in T.O.S.No.51 of 2018: Testamentary Original Suit filed under Sections 232 and 276 of the Indian Succession Act 1925 and Order XXV Rule 5 of O.S. Rules for grant of Letters of Administration with the Will annexed of the properties and credits of the deceased may be granted to the Plaintiffs as children of deceased Meenakshi beneficiary under the Will of the deceased limited to the State of Tamil Nadu.

For Plaintiffs : Mr.K.R.Tamizhmani
for Mr.V.Srinivasa Babu
(Plaintiff in T.O.S.No.29 of 2015
Defendant in TOS.No.51 of 2018)

For Defendants : Mr.M.K.Kabir, senior counsel for
Mr.Akhil Akbar Ali
(Plaintiffs in TOS.No.51 of 2018
Defendants in TOS.No.29/2015)

COMMON JUDGMENT

An interesting question as to whether one Will is incorporated by reference in another Will and, consequently, whether the former Will stands proved when the latter Will is proved arises for consideration in these testamentary suits. These two testamentary suits pertain to the last Will and Testament of D.Varadarajulu (Varadarajulu/testator), which is the

subject matter of T.O.S. No.51 of 2018, and that of V.Sakuntala Devi (Sakuntala Devi/testatrix), which is the subject matter of T.O.S. No.29 of 2015. The testator in T.O.S. No.51 of 2018 is the husband of the testatrix in T.O.S. No.29 of 2015. One of the items of property bequeathed under the above mentioned two Wills is common and, therefore, both the suits were heard jointly and are being disposed of by this common judgment.

2. The relevant facts are as follows. Varadarajulu and his wife, Sakuntala Devi, had no children. Therefore, they raised Sakuntala Devi's sister's daughters, namely, D.Meenakshi (Meenakshi) and B.L. Uma Devi(Uma Devi) as their foster daughters. In addition, Varadarajulu's sister's son, R. Srinivasan (Srinivasan), lived with and looked after them. During the life time of Varadarajulu, the property bearing Old Nos.64 and 66, New No.49-B, Old Door No.4 & 5 and New No.60, Pulla Reddy Avenue, Shenoy Nagar, Chennai – 600 030 (the Shenoy Nagar Property) was purchased in the joint names of Varadarajulu and Sakuntala Devi on 22.05.1956 and the sale deed was registered as Document No.657 of 1956 at the Office of the Sub Registrar, Madras West. The three children of Meenakshi, namely, D. Venkataramanan, D.Parthasarathy and D. Vishnupriya, and her husband, Dakshinamoorthy, are the Plaintiffs in T.O.S. No.51 of 2018 and Srinivasan is the Defendant. In turn, Srinivasan is the Plaintiff in T.O.S. No.29 of 2015 and the aforesaid three children of

Meenakshi are the Defendants therein. Apart from the Shenoy Nagar Property, Sakuntala Devi inherited and owned a property at Door No.28, Temple Street, Alagappa Nagar, Kilpauk, Chennai-600 010, comprising about 4 grounds and 400 square feet of land and the house constructed thereon (the Kilpauk Property).

3. The Plaintiffs in T.O.S. No.51 of 2018 propound a Will of Varadarajulu, which is stated to be executed on 21.10.1981, and registered as Document No.54 of 1981 with the SRO, Periamet. According to the Plaintiffs in T.O.S. No.51 of 2018, the Shenoy Nagar Property was purchased entirely out of the funds of Varadarajulu. Under this Will, the testator had bequeathed the said property to his wife, Sakuntala Devi, to enjoy during her life time. After her life time, the first floor portion bearing Door No.4, Pulla Reddy Avenue and the open ground therein together with the staircase was bequeathed absolutely to Varadarajulu's sister's son, Srinivasan. The ground floor bearing Door No.5, Pulla Reddy Avenue and the ground and garage was bequeathed absolutely to Meenakshi, the mother of the Plaintiffs in T.O.S. No.51 of 2018. Varadarajulu passed away on 27.01.1982 at the above mentioned property where he was residing. The Plaintiffs in T.O.S. No.51 of 2018 state that the Will of Varadarajulu was in the possession of Sakuntala Devi. She died on 02.04.2011 at Selvarangam Hospital, Anna Nagar, Chennai. Thereafter, Meenakshi passed away on 14.11.2006 leaving

behind the Plaintiffs in T.O.S. No.51 of 2018 and her husband as her surviving legal heirs. The Plaintiffs were in the process of taking steps to obtain letters of administration in respect of the Will of Varadarajulu after the death of Sakuntala Devi. At that time, they received a notice from Srinivasan in Application No.69 of 2012 seeking a citation for production of the Will dated 10.05.2002 of Sakuntala Devi. On receipt of such notice, the Plaintiffs became aware that Sakuntala Devi had executed a Will dated 10.05.2002, which was registered as Document No.82 of 2002 with the SRO, Anna Nagar. The Plaintiffs obtained a certified copy of the Will of Varadarajulu, thereafter, because they do not have the original. The Will of Sakuntala Devi refers to Varadarajulu's Will dated 21.10.1989 and also acknowledges the genuineness and validity of the said Will. In these facts and circumstances, T.O.S. No.51 of 2018 was filed.

4. On the other hand, as stated earlier, the subject matter of T.O.S. No.29 of 2015 is the last Will and Testament dated 10.05.2002 of Sakuntala Devi, which was registered as Document No.82 of 2002 on the file of the Sub Registrar, Anna Nagar, Under this Will, the Shenoy Nagar Property was bequeathed as follows: life estate in one half of the property to Meenakshi and Uma Devi and absolute interest to Meenakshi's children, namely, D.Venkataramanan, D.Parthasarathy and D.Vishnupriya (collectively Meenakshi's children) thereafter. The other half of the

Shenoy Nagar property was bequeathed to Srinivasan absolutely. According to Srinivasan/the Plaintiff in T.O.S. No.29 of 2015, a rough sketch was annexed to the Will, whereby portion B was bequeathed to the Plaintiff and portions A1, A2, A3 and A4 were bequeathed to Meenakshi and Umadevi jointly, by way of a life estate, and thereafter, to Meenakshi's children.

5. One more property was included in the bequest and this is the Kilpauk Property. This property was bequeathed to Umadevi and Meenakshi for their life time and, thereafter, absolutely to Meenakshi's children.

6. According to Srinivasan, the testatrix had appointed Meenakshi and Umadevi as the executrix. However, Meenakshi expired on 14.11.2006. Therefore, Srinivasan called upon Umadevi to probate the Will on many occasions. In fact, by registered notice dated 11.10.2011, Srinivasan called upon Umadevi to carry out her obligation as executrix of the Will within 15 days from the date of receipt of the notice. By the said notice, Umadevi was also informed that if she does not file an appropriate petition before the High Court, Srinivasan would initiate appropriate proceedings. However, the registered notice date 11.10.2011 was returned with the endorsement "refused". In the facts and

circumstances, Srinivasan states that he was constrained to initiate proceedings for the grant of letters of administration. According to Srinivasan, the original Will is not available with him and, therefore, an application was filed for issuing a direction to the Defendants to produce the original Will. Both the above suits came to be filed in the above mentioned facts and circumstances.

7. I heard Mr.M.K.Kabir, the learned senior counsel for the Plaintiffs in T.O.S. No.51 of 2018 and the Defendants in T.O.S. No.29 of 2015, and Mr.K.R.Tamizhmani, the learned counsel for the Defendant in T.O.S. No.51 of 2018 and the Plaintiff in T.O.S. No.29 of 2015.

8. Mr. Kabir commenced his submissions by pointing out that the Will of Varadarajulu was executed on 21.10.1981. The subject matter of bequest under the said Will is the Shenoy Nagar Property, which is a self-acquired property of Varadarajulu. Although the said property was purchased in the joint names of Sakuntala Devi and Varadarajulu, the entire sale consideration for the purchase of the property was contributed by Varadarajulu. In support of this submission, the learned senior counsel referred to the said Will. In the said Will, it is stated as under:

“Though the Sale Deed mentions my wife
V.Sakuntala Devi as one of the purchasers of the

property, the entire consideration for the property was paid by me as the same was deducted from and out of my salary and no part of the consideration was contributed by my wife Sakuntala Devi and all taxes including Income-tax and maintenance of the same was met from my funds and as such she is only a benami name lender without any right or interest in the property. My wife V.Sakuntala Devi is absolutely entitled to another property bearing door No.28, Temple street, Alagappa Nagar, Madras-10."

By referring to the aforesaid portion of the Will, the learned senior counsel emphasised that it is clearly stated therein that Sakuntala Devi is only a benami name lender in respect of the Shenoy Nagar Property without any right or interest in the property. The learned senior counsel pointed out that the Will provided that a life interest was created in favour of the testator's wife in respect of the Shenoy Nagar Property with the right to receive the rents and profits from the property during her life time. Thus, although it was recorded in the Will that the wife was only a benamidar in respect of this property, the testator, Varadarajulu, created a life interest in favour of his wife under his Will. The wife accepted such life interest and continued to occupy the property after the death of her husband, Varadarajulu, on 27.01.1982 and, in fact, lived there until her death on

02.04.2011. According to the learned senior counsel, the wife of the testator thereby elected to accept her husband's Will and acquired a life estate in the Shenoy Nagar Property on that basis. Once such life interest was elected, accepted and acted upon by the wife, the husband's Will cannot be subsequently challenged. With regard to the doctrine of election, the learned senior counsel referred to Section 180 of the Indian Succession Act, 1925 (the Succession Act). Section 180 of the Succession Act reads as under:

“ 180. Circumstances in which election takes place.—

Where a person, by his will professes to dispose of some thing which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefit which may have been provided for him by the Will.” सत्यमेव जयते

By relying upon Section 180, the learned senior counsel reiterated that Sakuntala Devi acquired a life estate in the Shenoy Nagar Property by virtue of the Will and continued to occupy and enjoy the property on the basis of the said Will, after the demise of her husband on 27.01.1982, and until her death on 02.04.2011. Therefore, the doctrine of election clearly applies. As a result, no claims can be made in respect of the Shenoy

Nagar Property by the legatees under the Will of Sakuntala Devi in a manner inconsistent with the Will of Varadarajulu. In support of this contention, the learned senior counsel referred to the judgment of a Division Bench of this Court in **S.Nagarathinam v. S.Balakrishnan and 13 others 1994 – 1 - L.W. 133 (Nagarathinam)**, wherein the doctrine of election was discussed. The Court held, inter alia, as follows in paragraph 4:

“This section corresponds to S.35(1) of the [Transfer of Property Act](#) which deals with the doctrine of election. The main principle is that there is an obligation on the legatee who takes a benefit under a Will or other instrument to give full effect to that instrument and if he finds that instrument purports to deal with something which it is beyond the power of the donor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect. He must elect either to retain his own property or to relinquish his own and take in its place property given to him by the Will. The doctrine of election rests on the principle that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. Election under [S. 180](#) arises wherever the legatee derives some benefit from

the Will to which he would not be entitled except for the Will. In such a case he has to elect whether to confirm the Will or dissent from it. He cannot accept and reject the same instrument. This is the foundation of the law of election."

In addition, in paragraph 7, the Division Bench referred to the judgment in **Mani and others v. Mani Joshua 1970(1) S.C.R. 71** and concluded that "if a legatee has been given any benefit under a Will and his own property has also been disposed of by that very Will, the legatee must elect either to confirm such disposition or to dissent from it, and in the latter case, he must relinquish all his claims under the Will if he chooses to retain his own property." By relying upon the aforesaid judgments, Mr. Kabir concluded his submissions by contending that the Will of Varadarajulu cannot be disputed by Srinivasan.

9. Mr. Tamizhmani made submissions to the contrary. He opened his submissions by pointing out that there is no explanation for the delay in filing O.P. No.673 of 2017, which was later converted into T.O.S. No.51 of 2018. Similarly, he contended that there is no explanation as to why neither of the attesting witnesses were examined. In particular, there is no explanation as to whether they are alive or dead and as to the steps taken to trace them. He also pointed out that the 4th Plaintiff in

T.O.S. No.51 of 2018, Mr.D.Dakshinamoorthy, was examined as P.W.1. During his cross-examination, he stated that he had no personal knowledge about the preparation and execution of the Will of Varadarajulu. He also agreed that Varadarajulu did not consult him with regard to the execution of the Will and its registration. In fact, he stated that he did not know whether Varadarajulu had any confidence in him. Mr.Tamizhmani, therefore, contended that the Will of Varadarajulu was not proved as per law. He also pointed out the original Will was not produced and that the failure to produce the same was not explained. From the cross-examination of Dakshinamoorthy, he pointed out that P.W.1 stated that he did not know as to what happened to the 100 sovereigns of gold jewellery owned by Sakuntala Devi although he admitted that he arranged the funeral and performed the last rites. He also referred to the evidence of P.W.1 in T.O.S. No.29 of 2015. In particular, he pointed out that an ambulance was arranged to take Sakuntala Devi to the Sub Registrar's Office for the execution of Ex.P1 Will and that Mr.D.Parthasarathy (Parthasarathy)(the second Plaintiff in T.O.S. No.51 of 2018), V.Prabhakaran and Saravanan followed in an auto. He also referred to the evidence of Parthasarathy, who was examined as D.W.1 in T.O.S. No.51 of 2018. In particular, D.W.1 stated that he did not know anything about the contents of paragraph 5 of the Petition/Plaint in T.O.S. No.51 of 2018 wherein the Will and its registration were referred to. He

also admitted that he was not personally aware about the contents of paragraph 6 of the Petition/Plaint wherein the details of the bequest under the Will of Varadarajulu are referred to. With reference to a specific question as to whether he had seen the original Will executed by Varadarajulu, Parthasarathy admitted that he had never seen the original Will. He also referred to a question relating to when and where the copy of the Will was traced and to the answer of Parthasarathy to the effect that it was traced from Sakuntala Devi's locker after her death. In response to a follow up question as to whether the said copy of the Will is available now, Parthasarathy said that it is available in the house and he needs time to produce it. From the cross examination on 19.07.2019, the learned counsel pointed out that Parthasarathy admitted that he had not read the certified copy of the Will of Varadarajulu.

10.The next contention of Mr.Tamizhmani was that election was neither pleaded nor proved. With regard to the Will of Sakuntala Devi, he contended that the said Will was acted upon by the Defendants in T.O.S. No.29 of 2015 by occupying the Kilpauk Property, which was bequeathed under Sakuntala Devi's Will. Therefore, the doctrine of election would apply to the Defendants in T.O.S. No.29 of 2015 and not to the Plaintiff. He also referred to the written statement of Srinivasan in T.O.S. No.51 of 2019 and, in particular, to paragraphs 3-C and 4, wherein

it was stated that Varadarajulu was not keeping good health and was not in a sound and disposing state of mind. It was further stated that he expired on 27.01.1982, i.e. within three months and 6 days from the date of execution of the alleged Will dated 21.10.1981.

11. With regard to the case law that was relied upon by the learned senior counsel for the Plaintiffs in T.O.S. No.51 of 2018, he pointed out that Section 180 of the Succession Act would only apply if Sakuntala Devi exercised her rights over the Shenoy Nagar Property as a life estate holder under the Will of her husband, Varadarajulu. As a matter of fact, she occupied and enjoyed the property in the capacity of joint owner of the property and not as a life estate holder under her husband's Will. He also referred to the principle that although the Limitation Act does not apply to testamentary proceedings, the greater the delay, the greater the suspicion.

12. The learned senior counsel, Mr.Kabir, made submissions, next, by way of rejoinder. He referred to the evidence of P.W.1 in T.O.S. No.29 of 2015 and pointed out that the questions that were put to P.W.1 during the cross examination on 19.06.2019 proceeded on the assumption that Varadarajulu had executed a Will. By drawing reference to the Will of Sakuntala Devi, the learned senior counsel contended that

the said Will refers extensively to the Will of Varadarajulu. Paragraph 8 of the Will of Sakuntala Devi reads as under:

"8.Since we had no issues of our own, we were affectionate and attached to the children of my sister as well as the sister of my husband. My sister Kathiramma's daughters D.Meenakshi and B.L.Umadevi have been living with us and have been helping us and even now are taking care of me. My husband decided even when he was alive that we would bequeath our properties to our specified relatives. Accordingly with respect to the aforesaid Shenoy Nagar property in the joint names of myself and my husband, my husband Mr.V.Varadarajulu had executed and registered a Will dated 21st October 1981 by which he had bequeathed the life interest in the entire property, namely, both Door No.4(No.66) and Door No.5(No.64), Pulla Reddy Avenue, Shenoy Nagar to myself and after my life time the property bearing Door No.4 on the First Floor of the said property with some vacant land area in the front to his sister's son Mr.R.Srinivasan, son of Raja Naidu to be inherited by him as his absolute property and the Ground Floor of the said property bearing Door No.5 with the entire vacant land surrounding the house to my sister's daughter D.Meenakshi, wife of Mr.Dakshinamoorthy to be inherited and taken by her as her absolute property. My husband died on 27.01.1982 and to my knowledge, till this day the said Will has not been probated nor Letters of Administration

with Will obtained for the estate of my late husband. The legatees under the Will of my husband if they so desire to apply to the Court for Letters of Administration with Will for the estate of my husband, they are at liberty to do so. In case the said will is not filed in the Court for appropriate Letters of Administration, I am advised that in accordance with law the property will be entirely mine."

By relying upon the aforesaid paragraph 8 of the Will, the learned senior counsel submitted that the Will of Varadarajulu stands incorporated by reference in the Will of his wife, Sakuntala Devi. On this issue, he referred to and relied upon **Volume 17 of the 4th Edition of the Halsbury's Laws of England**, wherein incorporation of documents is dealt with and, in particular, it is stated as follows:

"817. Incorporation of documents. In certain cases documents referred to in a testator's will or codicil, though not themselves duly executed, may be incorporated in the will and included in the probate. Such a document must be strictly identified with the description contained in the Will; but extrinsic evidence is admissible for the purpose of identification. The reference must be to a document as an existing document and not to one which is to come into existence at a future date. If the will can be construed as referring equally to an existing or future document, extrinsic evidence is not admissible.

The onus of proving the identity of the document and its existence at the date of the Will lies upon the party seeking to establish it, but the court will draw inferences from the circumstances surrounding the execution of the will.”

He also referred to the judgment of the House of Lords in **William Henry Singleton v. Thomas Tomlinson and others (Singleton), Volume III, ICLR 404**, wherein the House of Lords stated that “in certain cases, a document which is referred to in a Will is virtually incorporated in it. Such a document may be looked at if it is clearly identified by the description given of it in the Will provided it was in existence at the time when the Will was executed.”

13. According to the learned senior counsel, both these requirements are fully satisfied in this case. Paragraph 8 of the Will of the Sakuntala Devi clearly refers to the Will of her husband and even states that such Will was executed and registered. With regard to the bequest under the Will, it is stated that a life interest was bequeathed in favour of the wife and an absolute estate in favour of her husband's sister's son R.Srinivasan and Sakuntala Devi's sister's daughter, D.Meenakshi. Therefore, he submitted that it is not necessary to prove the Will of Varadarajulu, which is incorporated by reference in the Will of Sakuntala Devi and, consequently, stands proved along with the Will of Sakuntala

Devi. In addition, he contended that it is not necessary to prove a Will by examining an attesting witness if the execution and registration thereof is admitted. On this proposition, he relied upon a judgment of the Division Bench of the Kerala High Court in **Thayyullathil Kunhikannan v. Thayyullathil Kalliani (Thayyullathil Kunhikannan), AIR 1990 Kerala 226**, where it was held, at paragraph 34, that if the Will is not disputed in the pleadings, it is an admitted fact as per Section 58 of the Indian Evidence Act, 1872 (the Evidence Act) and Order VIII Rule 5 CPC and, consequently, is not required to be proved in accordance with Section 68 of the Evidence Act. In this regard, he also relied upon a judgment of the Delhi High Court in **Shama Sethi v. State 2010 (3) AD (Delhi) 298**.

14.Mr.Tamizhmani rebutted the above contentions by referring to Section 92 of the Evidence Act. He pointed out that oral evidence cannot be adduced to contradict documentary evidence in the form of the registered sale deed jointly in the names of Varadarajulu and Sakuntala Devi. He also pointed out that Sakuntala Devi did not accept the life estate under her husband's bequest and instead occupied and enjoyed the Shenoy Nagar Property as the joint owner thereof. By referring to the judgment of the Hon'ble Supreme Court in **S.R.Srinivasa and others v. S.Padmavathamma (2010) 5 SCC 274**, he pointed out that mere

registration of a Will is not sufficient and that it is necessary for the propounder of the Will to explain the suspicious circumstances relating to its execution. In particular, he relied upon paragraph 42 of the said judgment so as to emphasise the distinction between admitting that a Will is in existence and admitting the genuineness of the Will. In this case, he pointed out that Sakuntala Devi's Will refers, in paragraph 8, to the Will of Varadarajulu but the genuineness of the Will is not admitted. Consequently, the Plaintiffs in T.O.S. No.51 of 2018 were required to discharge the burden of proving the Will and completely failed to do so. In particular, he concluded by stating that they did not prove the Will by examining the attesting witnesses or even by leading secondary evidence as regards the handwriting/signature of the testator and the attesting witnesses.

15. I considered the submissions of the learned senior counsel/counsel for the respective parties and examined the records. Upon considering the pleadings, the Court framed the following issues in the two suits:

1. Whether the Will dated 21.10.1981 is true and valid?
2. Whether the Plaintiffs in TOS No.51 of 2018 are entitled to letters of administration?
3. Whether the Will dated 10.05.2002 is true and valid?

4. Whether the Plaintiff in TOS No.29 of 2015 is entitled to letters of administration?

16. I propose to deal with issues 3 and 4 that relate to the Will of Sakuntala Devi first. From the evidence on record, it appears that the Will of Sakuntala Devi was executed on 10.05.2002 and registered as document No.82 of 2002 before the Sub Registrar, Anna Nagar, on 10.05.2002. The bequest under the Will consists of two properties, namely, the Shenoy Nagar Property and the Kilpauk Property. The Kilpauk Property is stated to be inherited by the testatrix from her brother. The said property is bequeathed under the Will of Sakuntala Devi to her elder sister's daughters, Umadevi and Meenakshi for their life time. After their life time, absolute interest in the said property is bequeathed to the children of Meenakshi, namely, D.Venkataramanan, D.Parthasarathy and D.Vishnu Priya. The testatrix admittedly died on 02.04.2011. Upon her death, the beneficiaries in respect of the Kilpauk Property are admittedly in occupation and enjoyment of the Kilpauk property and there is no dispute with regard to the said Kilpauk Property. The dispute is confined to the Shenoy Nagar Property. The reason for such dispute is the fact that this property is also the subject matter of bequest under the Will of Sakuntala Devi's husband, Varadarajulu. The Will of Varadarajulu is expressly referred to in paragraph 8 of the Will of Sakuntala Devi. The

Will of Sakuntala Devi is attested by two witnesses, namely, V.Prabhakaran and K.Thiyagarajan. In order to prove the Will, one of the attesting witnesses, namely, V.Prabhakaran, filed a proof affidavit and deposed that the parties to the litigation are his relatives. He further deposed that Sakuntala Devi informed him that she desires to execute a Will on account of her age and ill-health and requested him to be an attesting witness. Accordingly, on 10.02.2002, he stated that he visited the office of the Sub Registrar and helped her to register the Will by being an attesting witness to the Will. He further deposed that Sakuntala Devi was of a sound and disposing state of mind and memory and that the Will was executed without undue influence. Thus, it is evident that the Will of Sakuntala Devi has been proved as per law. In fact, the Defendants in T.O.S. No.29 of 2015 are not seriously contesting the validity and genuineness of the Will. Indeed, they do not deny that they are in occupation and enjoyment of the Kilpauk Property by virtue of the Will. Hence, issues 3 and 4 are decided in favour of the Plaintiff in T.O.S. No.29 of 2015.

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17. Therefore, the only question to be decided is whether the Will of Varadarajulu has been proved in a manner known to law. As per Section 63(c) of the Succession Act read with Section 68 of the Evidence Act, any attested document is required to be proved by examining at least

one of the attesting witnesses unless such attesting witnesses are dead or are not in a position to lead evidence or are outside the process of the Court. In case the attesting witnesses are dead, as per Section 69 of the Evidence Act, the propounder of the Will is, nevertheless, required to prove the Will by adducing the evidence of other persons who were acquainted with the signature of the testator and that of the attesting witnesses. In this case, it is the admitted position that the attesting witnesses were not examined. It is unclear as to whether the attesting witnesses are dead because the Petition/Plaint in T.O.S. No.51 of 2018 does not contain any information about the attesting witnesses. In view of the fact that it is a registered Will, the officials of the Sub Registrar's Office could have been summoned as witnesses subject to the limitation that it is a Will of the year 1981 and the witness could only have spoken from the record. In any case, this was admittedly not done. The only witness who was examined on behalf of the Plaintiffs in T.O.S. No.51 of 2018 is D.Dakshinamoorthy, and he was examined as P.W.1. The said Dakshinamoorthy stated during his evidence that he was not consulted about the Will and that his wife was also not consulted. In response to the following questions with regard to the Will of Varadarajulu, he stated as under:

Q: Were you living with Varadarajulu and family at the time
of Ex.P1 Will?

A: Yes, as part of the same family, we were living there.

Q: Do you have any personal knowledge about the preparation and execution of Ex.P1 at the time of its registration/execution?

A: No

Q: Did Mr.Varadarajulu have any consultation with you regarding execution of Ex.P1 Will or informed you about the registration immediately thereafter?

A: No

Q: Even though you claim you were part of the same family why did not Varadarajulu consult you about the Ex.P1?

A: I don't know

Q: Can I take it that Varadarajulu had no confidence in you and that was the reason he did not consult to you?

A: I don't know

Q: It is correct similarly your wife was also not consulted or informed about Ex.P1 will by Varadarajulu?

A: I don't know.

18. In light of the above evidence, can it be said that the Will of Varadarajulu was proved in accordance with law? The contention of the

learned senior counsel for the Plaintiffs in T.O.S. No.51 of 2018 is that the doctrine of election applies and that the Will of Varadarajulu cannot be disputed either by Sakuntala Devi or the legatees of the Shenoy Nagar Property under the Will of Sakuntala Devi. In particular, the submission of the learned senior counsel is that the Will of Sakuntala Devi refers expressly to the Will of Varadarajulu at paragraph 8 thereof. The said paragraph 8 is extracted supra. On perusal of paragraph 8, it is clear that the Will of Varadarajulu is referred to therein, including a reference to the fact that it is a registered Will and that a life interest was conferred on Sakuntala Devi in respect of the Shenoy Nagar Property under her husband's Will. From the above, can it be concluded that Sakuntala Devi derived the benefit of a life estate under the Will of Varadarajulu and elected to accept the benefit under the said Will? I am unwilling to accept the said contention for two reasons. The first reason is that Section 180 of the Succession Act applies to a situation where a person receives a bequest under a Will and the said Will also, without title or authority, deals with a property belonging to such legatee. In such situation, once the said legatee accepts the bequest under the Will, the legatee cannot dispute the validity of the other disposition under the Will. The doctrine of election turns on the principle that a person should not be allowed to approbate and reprobate by accepting the beneficial aspects of a document and rejecting the adverse aspects of the same document. This

is evident from paragraph 8 of the judgment of the Hon'ble Supreme Court in **Mani Mani** and from paragraphs 4 and 7 of the judgment in **Nagarathinam**. For example, if Varadarajulu had bequeathed two properties under his Will, one of which was owned by Varadarajulu and the other being jointly owned by Varadarajulu and Sakuntala Devi, if Sakuntala Devi had derived title to the property owned entirely by Varadarajulu by virtue of the Will, she would be precluded from challenging the disposition in respect of the other property, which is jointly owned. However, in this case, the only property dealt with under the Will of Varadarajulu is the Shenoy Nagar Property, which stands in the joint names of Varadarajulu and Sakuntala Devi, as per the relevant registered sale deed. Moreover, from the evidence on record, it cannot be inferred that Sakuntala Devi acquired title to the Shenoy Nagar Property under the Will of Varadarajulu. Consequently, the doctrine of election does not apply in this situation. The second reason is that Srinivasan did not, even arguably, elect directly. He cannot be said to have elected indirectly also because his claim is on the basis of joint ownership of the Shenoy Nagar Property by Varadarajulu and Sakuntala Devi, the succession to her husband's share by Sakuntala Devi, upon his death, and the subsequent bequest in favour of Srinivasan under her Will. In other words, his claim is not contingent on recognising the life estate of Sakuntala Devi under the Will of Varadarajulu. Therefore, the doctrine of election would not, in any

event, apply to or impact Srinivasan, the Defendant in T.O.S. No.51 of 2018.

19. The next question that arises for consideration is whether the Will of Varadarajulu stands incorporated by reference in the Will of Sakuntala Devi. In order to decide whether one document is incorporated by reference in another document, the document should be examined closely so as to ascertain the intention from the language used therein. In this case, the document in question is the Will of Sakuntala Devi. On perusal thereof, I find that it certainly does not expressly state that the Will of Varadarajulu is incorporated by reference. This leads to the next question as to whether the Will of Varadarajulu is incorporated by implication. On perusal of paragraph 8 of the Will of Sakuntala Devi, I find that it is stated therein that to the knowledge of Sakuntala Devi, the Will of Varadarajulu was not probated/ letters of administration were not obtained. It is further stated that the legatees are at liberty to apply to the Court for letters of administration. It also states that if the Will is not filed in Court for obtaining letters of administration, she is advised that the property would be entirely hers.

20. From paragraph 8 of the Will, it is clear that Sakuntala Devi had full knowledge about the execution and registration of a Will by

her husband, Varadarajulu, on 21.10.1981. It is also evident that she was reasonably aware about the contents of the Will, including the nature of bequest as regards the Shenoy Nagar Property. In fact, paragraph 8 expressly adverts to the fact that she was given life interest in the Shenoy Nagar Property. Given the fact that Sakuntala Devi proceeded to state that she is advised that the property would be entirely hers in the absence of a probate or letters of administration, I am of the view that she did not intend to incorporate her husband's Will by reference in her Will. Such implication would be contrary to her stated intention of dealing with the Shenoy Nagar Property on the basis that she is the sole owner of such property. Thus, I conclude that it cannot be said that the Will of Varadarajulu was incorporated by reference into the Will of Sakuntala Devi.

21. Nevertheless, the question arises as to whether the Will of Varadarajulu stands proved by the references to the said Will in the Will of Sakuntala Devi or by the alleged admission or non-denial thereof by Srinivasan. This is a more complicated question in as much as there is a reference in paragraph 8 of the Will of Sakuntala Devi to the Will of Varadarajulu, including the date of execution thereof and to the fact that it is a registered Will. Indeed, even the content of the Will of Varadarajulu is described in paragraph 8 in reasonable detail. It also needs to be borne

in mind that the said Will of Varadarajulu is a registered Will. The Will of Varadarajulu was executed on 21.10.1989 and he expired within three months thereafter on 27.01.1982. In these facts and circumstances, can it be concluded that the Will has been duly proved in spite of the absence of any evidence with regard to either the execution of the Will by Varadarajulu or the attestation thereof by the named attesting witnesses? In my view, the references to the Will of Varadarajulu in paragraph 8 of the Will of Sakuntala Devi clearly indicate that she was aware of the Will and its contents. However, the person contesting the Will of Varadarajulu is Srinivasan and not Sakuntala Devi. As regards Srinivasan, in my view, it cannot be concluded that he admitted the execution or genuineness of Varadarajulu's Will merely because he propounds the Will of Sakuntala Devi and her Will refers to Varadarajulu's Will. Therefore, it has to be examined separately as to whether Srinivasan admitted the execution and genuineness of the Will of Varadarajulu either directly or indirectly. Srinivasan, the Defendant in T.O.S. No.51 of 2018, stated at paragraph 3(c) of his written statement that Varadarajulu was not keeping good health and was not in a sound disposing state of mind at the time of alleged execution of the Will dated 21.10.1981. He also stated that he was taking care of the day-to-day needs of Varadarajulu and SakuntalaDevi and was residing in the first floor of the same house at the relevant point of time. More importantly, in paragraph 4 of the written

statement, he denied the statements in paragraphs 5,6 and 7 of the plaint, which deal with the Will of Varadajulu, and stated that the "alleged Will executed by Shri. B. Varadarajulu dated 21.10.1981 registered as Doc. No. 54/1981 before SRO, Periamet is not admitted by this defendant and same was not executed by Shri. Varadarajulu while he was in a sound and disposable state of mind." It is in view of the aforesaid denial that issues 1 and 2 were framed by this Court in respect of the Will of Varadarajulu. Thus, the situation in this case cannot be equated with that in **Thayyullathil Kunhikannan** wherein the Court concluded that there was an admission of the Will and that, therefore, it could be considered as an admitted fact as per Section 58 of the Evidence Act and Order VIII Rule 5 CPC. By contrast, such a conclusion cannot be drawn on the basis of the evidence in this case. Therefore, the evidence of the propounder of Varadajulu's Will should be examined so as to decide if the Will was proved.

22. From the evidence of Dakshinamoorthy, who was examined as P.W.1, I find that he admitted that he had no personal knowledge about the preparation and execution of the Will of Varadarajulu. In fact, he admitted that he was not consulted with regard to the preparation of the Will although he lived in the same house. In light of the complete lack of evidence with regard to the execution of the

Will of Varadarajulu, including its attestation, I am of the view that the said Will cannot be said to have been proved in accordance with Section 63(c) of the Succession Act read with Sections 68 and 69 of the Evidence Act merely because it is a registered Will and because it is referred to in paragraph 8 of the Will of Sakuntala Devi. In effect, issues 1 and 2 are decided against the Plaintiffs in T.O.S. No. 51 of 2018. Therefore, I conclude as under:

(i) The Will of Sakuntala Devi has been proved in accordance with law and the Plaintiff in T.O.S. No.29 of 2016 is entitled to a decree as prayed for.

(ii) The Will of Varadarajulu has not been proved in accordance with law and, therefore, T.O.S. No.51 of 2018 is liable to be dismissed.

23. In the result,

(i) T.O.S.No.29 of 2015 is decreed. Consequently, letters of administration shall be granted to the Plaintiff in respect of the last Will and Testament of V.Sakuntala Devi to have effect throughout the State of Tamil Nadu. The Plaintiff shall execute a bond for a sum of Rs.25,000/- in the name of the Assistant Registrar, Original side, High Court, Madras. The Plaintiff shall also provide to this Court a full and fair inventory and a true account of the estate within a period of 6 months and one year, respectively, from the date of grant.

(ii) T.O.S.No.51 of 2018 is dismissed.

(iii) In the facts and circumstances of the case, the parties shall bear their own costs.

26.05.2020

Plaintiff's witness in T.O.S.No.29 of 2015:

Mr.V.Prabhakaran - P.W.1

Defendants' witness in T.O.S. No.29 of 2015:

Mr.D.Parthasarathy - D.W.1

Plaintiff's witness in T.O.S.No.51 of 2018:

Mr.D.Dakshinamoorthy - P.W.1

Plaintiff's exhibits in T.O.S. No.29 of 2015

<i>Sl.No</i>	<i>Exhibits</i>	<i>Date</i>	<i>Particulars of Documents</i>
1.	Ex.P1	10.05.2002	Certified copy of the Will executed by V.Sakuntala Devi.
2.	Ex.P2	21.09.2012	Photocopy of Death Certificate of B.Varadarajulu.
3.	Ex.P3	02.05.2011	Photocopy of Death Certificate of V.Sakuntala Devi
4.	Ex.P4	21.10.1981	Copy of last Will and Testament of B.Varadarajulu

Defendant's exhibits in T.O.S. No.29 of 2015:

<i>Sl.No.</i>	<i>Exhibits</i>	<i>Date</i>	<i>Particulars of Documents</i>
1.	Ex.D1	21.08.1981	Certified copy of the Will executed by B.Varadarajulu
2.	Ex.D2	29.01.1982	Photocopy of Death Certificate of B.Varadarajulu.
3.	Ex.D3	28.04.1989	Original Registered Will executed by V.Sakuntala Devi

Plaintiff's Exhibits in T.O.S.No.51 of 2018

<i>Sl.No.</i>	<i>Exhibits</i>	<i>Date</i>	<i>Particulars of Documents</i>
1.	Ex.P1	21.10.1981	Certified copy of the Will executed by B.Varadarajulu
2.	Ex.P2	21.09.2012	Computer generated copy of Death Certificate of B.Varadarajulu.
3.	Ex.P3	02.05.2011	Computer generated copy of death certificate of V.Sakuntala Devi

Defendants' exhibits in T.O.S. No.51 of 2018:

<i>Sl.No.</i>	<i>Exhibits</i>	<i>Date</i>	<i>Particulars of Documents</i>
1.	Ex.D1	22.02.1956	Certified copy of the Sale Deed in Doc.No.659/1996

26.05.2020

Speaking/Non Speaking order

Index: Yes/No

Internet: Yes/No

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T.O.S.No.29 of 2015 and
T.O.S.No.51 of 2018

SENTHILKUMAR RAMAMOORTHY, J.

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Pre-Delivery Common Judgment
in
T.O.S.No.29 of 2015
and
T.O.S.No.51 of 2018

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26.05.2020