

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(TESTAMENTARY AND INTESTATE JURISDICTION)

THURSDAY, THE 24TH DAY OF SEPTEMBER 2020

THE HON'BLE MS. JUSTICE P.T.ASHA

A.No.1492 of 2020
in
T.O.S.No.4 of 2019

In the matter of the Indian Succession
Act, XXXIX of 1925, and
In the matter of last Will and
Testament of N.John Ponniah –
(Deceased)

1. Mrs.J.Christy Rachel Sheeba
W/o. Jebaraj
No.272, New No.4, Patel Street,
Ramakrishna Nagar, Alwarthirunagar,
Chennai 600 087.

2. Mrs.J.Louis Esther Rani
W/o. Gladwin Thinakaran
No.272, New No.4, Patel Street,
Ramakrishna Nagar, Alwarthirunagar,
Chennai 600 087.

: Applicant/Plaintiffs

-Vs.-

Mr.J.Clement Silkin
S/o. Late John Ponniah
B-65, Periyar Nagar 6th Street,
Chennai 600 082.

: Respondent/Defendant

<https://hcservices.ecourts.gov.in/hcservices/> This application praying that this Hon'ble Court be pleased to
appoint a Commission to record the evidence of Mrs.J.Selvi Kethsial, aged

about 74 years, residing at No.272, New No.4, Patel Street, Ramakrishna Nagar, Alwarthirunagar, Chennai 600 087 within the time frame fixed by this Hon'ble court.

This application coming on this day before this court for hearing the court made the following order:

The present application has been moved by the plaintiffs in a contentious cause seeking to examine De Bene Esse J.Selvi Kethsial, who was originally impleaded as the 1st respondent in the probate proceedings. After the probate proceedings were treated as a contentious cause and renumbered as a Testamentary Original Suit, the 1st respondent was not impleaded as a defendant as she had not filed a caveat as contemplated under Order XXV Rule 51 of the Original Side Rules.

2. Facts of the case:

i. The Testamentary suit has been filed by the applicants seeking grant of Letters of Administration of the Will executed by late N.John Ponniah the father of applicants and respondents herein.

ii. It is their case that the said John Ponniah had executed a Will dated 20.04.2008 along with his wife J.Selvi Kethsial, the 1st respondent in the Original Petition. Thereafter, John Ponniah died on 14.12.2013 leaving behind him surviving his wife Selvi Kethsial and daughters, the applicants herein and his son, the respondent herein. As the father had not appointed

an Executor for the said Will the applicants had come forward with the petition for grant of Letters of Administration in O.P.No.917 of 2016. The respondent on entering appearance in the proceedings had filed a caveat and thereafter the Original Petition was treated as a contentious cause and numbered as a Testamentary suit in T.O.S.No.4 of 2019.

iii. Written statement of the respondent:

The respondent would submit that he is unaware about the execution of the joint will by his parents. He would state that out of the two attesting witnesses one is no more and even he was unable to identify the document and the signature of the Testator. He would further submit that although probate proceedings were pending the applicants had clandestinely obtained permission from the authorities to construct on the property which they allege is granted to them under the Will. The Will dated 20.04.2008 is a mutual Will which can take effect only after the death of both. Even assuming the Will is proved then the respondent is entitled to the flat at T.Nagar, Chennai. He sought for a dismissal of the suit.

3. Facts just preceeding the conversion of the petition into a contentious cause:

the appointment of a Commissioner to record the evidence of the attesting witness Mr.L.Krishnan as he was 79 years old and had become frail. This witness was also sought to be examined De Bene Esse. By an order dated 11.03.2019 this Court was pleased to order the said application by appointing an Advocate Commissioner to record the evidence of the attesting witness L.Krishnan. Pursuant to the above orders the Advocate Commissioner has proceeded to examine the witness and has filed a report dated 08.04.2019. It is after the filing of this report that the written statement has been filed.

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i. The applicants have now come forward with the instant application to appoint a Commissioner to record the evidence of Mrs.J.Selvi Kethsial. In the affidavit filed in support of the application it is contended that the witness seeks to record her evidence out of turn as she is aged about 74 years and as her health condition is deteriorating. It is further stated that the respondent will not in any manner be prejudiced as the mother is open for cross examination.

ii. The respondent has filed a counter inter alia contending that the witness L.Krishnan has clearly deposed that he is unaware of the signatures

in the Will. He would further contend that the Will can only be considered a mutual and irrevocable one which cannot be altered after the death of one of the testators. He would state that the Will can be probated only after the death of the 2nd testator as well. The respondent would contend that in August 2019 when the applicants sought to examine the said Selvi Kethsial he had objected and the matter posted before the Court. After elaborate arguments were advanced before this Court and orders reserved as to whether the said witness could be examined this application has come to be filed. The respondent would also contend that even as per the recitals of the Will, the property at T.Nagar was to be taken by respondent herein, however the mother has settled the same in favour of the applicants and they have also put up an unauthorised construction thereon.

iii. A proof affidavit of the said Selvi Kethsial has also been filed along with this application. A perusal of the same would indicate that the Will which was not proved through the attesting witness or marked was sought to be marked through her as Ex.P.1.

5. Submissions:

(a) Mr.S.S.Rajesh, learned counsel appearing on behalf of the applicants would briefly touch upon the background of the case. He would submit that the joint will executed by deceased John Ponniah and Selvi

Kethsial consisted of six properties. Five properties belonged to the father and one to the mother. The mother's property was bequeathed to the son, the respondent herein and the father's to the daughters, the applicants herein. He would submit that even during his lifetime, John Ponniah had alienated four properties and retained just one. After the father's death the mother settled her property on the daughter and thereafter the petition for grant of Letters of Administration was filed. After the attesting witness was examined, the respondent on entering appearance and filing caveat, the Original Petition was converted into a Testamentary suit. He would submit that the attempt to examine the mother was objected to by the respondent and therefore the matter was posted by the learned Master before the Court for appropriate orders on 29.08.2019. He would submit that the examination of the mother was necessary to substantiate as to why the respondent / son was left out. He would contend that in the instant case witness is old and frail and her health was deteriorating day by day and therefore she is sought to be examined.

He would rely upon the following Judgements:

- i) ***1996 (2) CTC 429 – Samidurai & four other Vs. Kanakayal***
- ii) ***1999 (2) CTC 310 – Ramasamy Gounder and three others Vs.***

Muthayammal and another.

iii) *AIR 1965 Mad 266 – N.Mohamed Hussain Sahib Vs. The Chartered Bank, Madras and another.*

iv) *2009 SCC Online Cal 2613 – In the goods of Narendra Nath Mitra Sunil Krishna Mitra Vs. Debasish Kumar Sinha and another*

v) *AIR 2015 Cal 252 – Ashrant Bhartia & Another Vs. Jagmohan Kejriwal and others.*

vi) *2010 SCC Online Cal 403 – Dilip Kumar Gooptu and others Vs. Smt. Sunanda Malik and others*

vii) *Unreproted Judgement of the Calcutta High Court in G.A.No.3287 of 2018 with T.S.No.8 of 2018 – In the goods of Champalal Bhandari (deceased) and Hiralal Bhandari Vs. Bhawarlal Bhandari.*

viii) *ILR 2003 Kar 1507 – Channabasappa Yallappa Karaddi Vs. Hanamappa Channabasappa Karaddi*

ix) *2005 (1) Mah LJ 623 – Daulat Jehangir Mehta Vs. Miss Piloo Dadabhoy Broacha and others.*

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(b) Per contra, Mrs.Lita Srinivasan, learned counsel appearing on behalf of the respondent would submit that the applicants have not paid the Court fees. She would submit that the attempt to put the mother into the box is only to somehow mark the Will since the attesting witness has given

the mother is not an attesting witness and therefore she is not the competent witness to speak on the Will as per Section 63 of the Succession Act and Section 68 of the Evidence Act. That apart, after the petition for grant of Letters of Administration has been filed the settlement deed was executed. She would further contend that even without obtaining the Letters of Administration the applicants had put up constructions that too without obtaining approval from the authorities. She would also contend that no valid reasons are put forward by the applicants for the examination De Bene Esse of J.Selvi Kethsial. She would therefore pray for the dismissal of the application.

6. Discussion:

i) Order XXVI of the Original Side Rules deals with examination De Bene Esse. Rule 1 contemplates that a De Bene Esse examination can either be for examination of the witness in Court or through a Commission under Section 76 and Order XXVI Rule 4 of the Code of Civil Procedure, hereinafter called the Code. The procedure to be adopted for the examination is as per Order XVIII of the Code.

ii) Order XVIII Rule 16 (1) of the Code provides as follows:

“16. Power to examine witness immediately. (1) Where

a witness about to leave the jurisdiction of the Court, or other

sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in the manner hereinbefore provided”

iii) Therefore a reading of the above provisions indicates that after the institution of the suit on an application by the party to the suit or by the witness himself / herself the Court can direct the evidence of such witness to be taken upon the following contingencies:

- (a) *Where the witness is about to leave the Jurisdiction of the Court, or*
- (b) *other sufficient cause being shown.*

iv) This position was reiterated in the Judgement of this Court in ***N.Mohamed Hussain Sahib Vs. The Chartered Bank, Madras and another – AIR 1965 Mad 266.***

In yet another Judgement of this Court reported in ***1999 (2) CTC 310 – Ramaswami Gounder and three others Vs. Muthayammal and another*** the learned Judge has held that a witness can be examined De Bene Esse

provisions of Order XVIII Rule 16 of the Code. In that case the scribe of the “Will” was examined de bene esse as he was sick.

v) In this backdrop when the instant application is perused it is seen that the applicants seek to examine J.Selvi Kethsial for the following reasons:

“Whiles, due to the age related ailments, the health condition of the mother is deteriorating day by day and she is also willing to depose evidence before this Honourable Court”.

vi) However, the applicants have not filed any documents to show that the mother is suffering health problems and that her health is deteriorating from day to day. The procedure contemplated under the provisions of Order XVIII Rule 16 of the Code for examination of a witness De Bene Esse is not automatic but should be granted only if the conditions prescribed therein is satisfied. Considering the fact that the applicants have not proved their contention that the witness's health is deteriorating day by day by producing her medical reports, this Court is not inclined to allow the said petition. Further, the applicants have also stated that the witness is 74 years of age and therefore she should be examined De Bene Esse. Age in the modern world is but a number with increased longevity being the norm.

7. In fine A.No.1492 of 2020 is dismissed and the Testamentary Suit is directed to be listed before the learned Master on 16.10.2020 for recording evidence.

Sd/.P.T.A.J.
24.09.2020

//Certified to be a true copy//
Dated this the day of 2020.

SU./25.09.2020

COURT OFFICER(O.S.)

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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