

**A.No.6768 of 2019
in
O.P.No.29 of 2018**

SENTHILKUMAR RAMAMOORTHY,J

This application is filed to revoke the probate granted to the first Respondent in respect of the Last Will and Testament of S.Narayani.

2. Under the said Will, an immovable property was bequeathed by allotting one portion thereof, namely, the "B" schedule property to the 2nd to 5th Applicants herein, who are the testatrix's sister's children; the second portion, namely, "C" schedule to the testatrix's husband's younger brother's son, S.Sivakumar; and the third portion, namely, the "D" schedule property to the testatrix's husband's sister's daughter, M.Parimala. The first Respondent herein is the executor of the Will and he filed O.P.No.29 of 2018. The Respondents in the said O.P. were the Applicants herein and one of the other beneficiaries, namely, M.Parimala. The said O.P. was allowed by order dated 03.07.2018, whereby probate of the Will was granted to the first Respondent herein. By this application, the Applicants seek to revoke the probate.

3. I heard the learned counsel for the Applicants and the learned counsel for the first Respondent.

4. The learned counsel for the Applicants raised the following contentions in support of the application to revoke the probate. His first contention was that the first Respondent/Petitioner did not produce the original Will in the O.P. Instead, a certified copy of the Will was produced. According to the learned counsel, in order to rely upon secondary evidence, the persons seeking to rely upon such secondary evidence should discharge the burden of proving that primary evidence could not be produced in spite of best efforts. By referring to the Petition and proof affidavit of the first Respondent, the learned counsel contended that the said burden was not discharged by the first Respondent. In this regard, he referred to paragraph 11 of the Petition wherein the first Respondent herein stated that the original Will was lost from the Petitioner's residence during the 2015 floods. Hence, a certified copy of the Will was filed with the Petition for probate of the Will. Similarly, in the proof affidavit of the first Respondent/Petitioner, who was examined as P.W.1, the averments in paragraph 11 of the Petition were repeated without providing any further details. For instance, the learned counsel submitted that the

first Respondent/Petitioner did not provide particulars as to the date of loss or specify as to where it was stored and how it was destroyed. He also did not lodge a police complaint with regard to the loss of the original Will. In support of the submission that secondary evidence cannot be relied upon without discharging the burden of explaining as to why primary evidence could not be produced, the learned counsel referred to and relied upon the judgment of the Hon'ble Supreme Court in **Rakesh Mohindra v. Anita Beri and others (Rakesh Mohindra)(2016) 16 SCC 483**. In particular, the learned counsel relied upon paragraphs 13 & 14 wherein the Court set out Sections 63 and 65 of the Indian Evidence Act, 1872 (the Evidence Act) and held that, as a general rule, documents are proved by leading primary evidence. In paragraph 15, the Hon'ble Supreme Court concluded that the party seeking to produce secondary evidence must establish that the original document was lost or destroyed or is being deliberately withheld by the party in possession of the said documents. On the facts of that case, the Hon'ble Supreme Court concluded, at paragraph 22, that all efforts were taken to comply with the requirements of Section 65 of the Evidence Act and that, therefore, the party concerned was permitted to rely upon secondary evidence.

5. By contrast, the learned counsel submitted that the first Respondent/Petitioner failed to discharge the said burden. He also relied upon a Division Bench judgment of the Delhi High Court in **Dinesh Aggarwal and others v. State and others(Dinesh Aggarwal), FAO(OS) 19 of 2019**, judgment dated 25.02.2019, wherein, the Division Bench held that the circumstances under which the original is said to have been lost or destroyed is not discernible. On that basis, in paragraph 5, it was held that unless it is proved that the primary evidence is destroyed or lost, no secondary evidence can be accepted by the Court. In addition, in paragraph 6, the Court referred to the conclusion of the learned single Judge that the loss of the original Will cannot be deduced by implication by a Court. The Division Bench accepted the said findings of the learned single Judge and concluded that the appellant should have clearly established the circumstances under which the original was lost and cannot lead secondary evidence in the absence of such evidence. A judgment of the single Judge of this Court in **Application No.7584 of 2015 in T.O.S.No.57 of 2013 and C.S.No.396 of 2012, order dated 11.08.2016** was also relied upon. In the said case, at paragraph 12, this Court held that a party claiming under the Will must satisfy the Court about the loss of the original before leading secondary evidence.

On that basis, this Court concluded that the applicant therein had not stated that he lost the Will due to reasons not attributable to his own default and negligence. Therefore, the said application was dismissed.

6. In addition, the learned counsel contended that the first Respondent/Petitioner had not joined all the necessary parties as Respondents in the Petition. By relying upon the genealogy, the learned counsel pointed out that only the Applicants herein and one of the beneficiaries under the Will, namely, M.Parimala were joined as Respondents in the O.P. On the date of filing of the O.P., various other members of the testatrix's husband's family were alive. For example, the children of the testatrix's brother-in-law, P.G.Muthu Kumarasamy, namely, M.Shanmugham, M.Rajendran and M.Mohanraj were not joined. Similarly, M.Parimala's sister, P.Tharabai, and the testatrix's younger brother-in-law's daughter, S.Varalakshmi, were not joined as parties. All these persons should have been joined as parties. For both these reasons, the learned counsel for the Applicants contended that the probate is liable to be revoked.

7. On the contrary, the learned counsel for the first Respondent made the following submissions. His first submission was that the Will is admittedly a registered Will. In the context of a registered Will, the non-production of the original is less important. As regards the reasons for such non-production, the learned counsel referred to the statement in the Petition and in the proof affidavit to the effect that the Will was lost during the 2015 floods at Chennai. In support of this submission, the learned counsel referred to the approval order dated 01.06.2016 from the Oil and Natural Gas Corporation Limited (ONGC) stating that a sum of Rs.3,00,000/- was sanctioned as interest free refundable flood advance to the officers of the company, including the first Respondent, who were affected by the floods at Chennai in December 2015. A consequential sanction letter dated 15.06.2016 from ONGC to the first Respondent was also referred to in this connection. Thus, the learned counsel submitted that it was pleaded that the original was lost/destroyed during the floods in Chennai in the year 2015 and oral evidence to that effect was also adduced in the proof affidavit. In light of such pleadings and evidence and bearing in mind that the Applicants had an opportunity to cross-examine the first Respondent/Petitioner but did not do so, the learned counsel submitted that the first Respondent/Petitioner had

discharged the burden of establishing that the Will was lost and that, therefore, the first Respondent/Petitioner is entitled to adduce secondary evidence by producing a certified copy of the registered Will.

8. With regard to the non-joinder of necessary parties, the learned counsel submitted that the admitted case of all the parties is that the property in question was originally acquired by the testatrix's parents, namely, Athimoolam Mudaliar and Visalakshi. Consequently, if the testatrix had died intestate, the only persons entitled to succeed to the estate of S.Narayani would be the Applicants herein. In other words, the Applicants herein would be the only persons with a caveatable interest. Therefore, all the Applicants were joined as Respondents in the Petition. In addition, one of the beneficiaries under the Will, namely, M.Parimala, was joined as a Respondent. As regards the other beneficiary, namely, S.Sivakumar, he died as a bachelor before the Petition was filed and, therefore, he was not joined as a party. The next contention of the learned counsel for the first Respondent was that the first Respondent/Petitioner is the executor under the Will but is not a beneficiary and, consequently, he has no personal or vested interest in obtaining probate of the Will. In addition, he is a relative of the testatrix. As a non-beneficiary, the sole

purpose of prosecuting the Petition was to fulfil his duty as an executor and thereby ensure that the Will of the testatrix is given effect to.

9. The next contention of the learned counsel was that the Will was acted upon even prior to the filing of the Petition. In support of this contention, he relied upon the list of jewels at page 1 of the typed set of papers filed on 17.10.2019 and the acknowledgement dated 10.06.2016 at page 2 thereof, wherein the first Applicant, the second Respondent and the late S.Sivakumar agreed that each of them received 56 grams of gold from the first Respondent/Petitioner, who is referred to therein as the executor. He also referred to the Deed of Undertaking dated 12.07.2016, which was executed by the late S.Sivakumar in favour of the second Respondent, M.Parimala. From this document, he pointed out that the registered Will dated 16.06.2004, which was registered under document No.54/2004, was expressly referred to therein and the agreement between the parties was recorded whereby the respective portions allotted to them under the Will were exchanged so as to provide for easy access to each of them. On that basis, the learned counsel submitted that the parties were fully aware of the existence of the Will and, in fact, acted upon and derived benefits from the Will.

10. The learned counsel, thereafter, distinguished the judgments that was relied upon by the learned counsel for the Applicants. With regard to the judgment of the Hon'ble Supreme Court in **Rakesh Mohindra**, the learned counsel pointed out that Section 65(c) enables parties to adduce secondary evidence when the original is destroyed or lost. By pleading that the original Will was lost during the floods in Chennai in the year 2015 and by adducing oral evidence to that effect, the first Respondent/Petitioner fulfilled the requirements of Section 65(c). With regard to the judgment of the Delhi High Court in **Dinesh Aggarwal**, he pointed out that the fact situation, in that case, was that the only attesting witness to the Will did not identify the signature of the testator on the Will and also did not depose with regard to the state of mind of the testator. On these facts, he submitted that a single Judge of the Delhi High Court concluded that the propounder of the Will was not entitled to rely upon secondary evidence and the said decision of the learned single Judge was not interfered with in appeal because it was not a perverse decision. With regard to the decision of this Court in Application No.7584 of 2015, the learned counsel pointed out that the fact situation was completely different. In specific, he referred to paragraph 10 of the order wherein this Court recorded that the original Will was filed in O.P.Diary

No.21843 of 2003 on 30.07.2003. After the original Will was returned by the registry of this Court on 05.05.2004, the Petitioner filed a fresh O.P.No.32331 of 2006, through the same counsel, on 21.11.2006 with a certified copy of the Will. In view of the fact that the petitioner therein had taken a return of the original Will from the registry and, thereafter, falsely contended that the original had not been taken back from the registry, the Court concluded that the Applicant is not entitled to any indulgence from the Court.

11. After rebutting the judgments that were relied upon by the learned counsel for the Applicants, the learned counsel contended that the test under Section 263 of the Indian Succession Act, 1925 (the Succession Act) is whether "just cause" is made out to revoke the grant and that "just cause" is a more stringent test than "sufficient cause". In this regard, he referred to and relied upon two judgments of the Division Bench of this Court. He relied upon the judgment in **S.V.Ramakrishnan v. P.R.Sethuraman and others, 2011 (3) MNW (Civil) 772**, wherein this Court held, at paragraph 13, that a person, who was served notice in the probate proceedings, cannot subsequently seek to revoke the probate after failing to avail the opportunity of lodging a caveat. After advertent to the fact that one of

the attesting witnesses had been examined, the Court concluded that the appellant therein could have cross-examined the said witness but did not do so. In such circumstances, the probate is not liable to be revoked under Section 263 of the Succession Act. The next judgment that was relied upon was **G.Shanmugham Chetti and another v. Chinnammal (Shanmugham Chetti), AIR 1978 MADRAS 304**, wherein the Division Bench of this Court held at paragraph 7 that the explanation to Section 263 is illustrative and not exhaustive. However, it is only in cases where a just cause is made out to revoke the probate, the Court should exercise its discretion to revoke the probate. The Court also explained that not every procedural irregularity or mere error in form and procedure can be the basis for such revocation but the infirmity should shake the foundation of the grant of probate. The last judgment that was relied upon was that of a Division Bench of this Court in **R.Sivagnanam v. P.K.Sadananda Mudaliar, AIR 1978 MADRAS 265**, wherein, at paragraph 6, this Court held that the probate should not be revoked at the instance of a person who approaches the Court belatedly on the basis that there were procedural irregularities especially in the context of the fact that the execution of the Will was corroborated by the evidence of an attesting witness. On the basis of the above submissions and

contentions, the learned counsel for the first Respondent submitted that this application is liable to be rejected.

12. By way of rejoinder submissions, the learned counsel for the Applicants submitted that the floods in 2015 did not have any impact in North Chennai where the first Respondent resided. With regard to the handing over of the jewellery in part performance of the Will, he submitted that the Will was not referred to in the said document and only the word executor was used. As illiterate persons, the Applicants did not realise the implication of the use of the word, executor. Especially in view of the absence of any particulars with regard to the alleged loss of the original Will, the learned counsel submitted that the Applicants should be provided an opportunity to challenge the Will by revoking the probate.

13. I considered the submissions of the learned counsel for the respective parties and examined the records carefully.

14. The principal question that arises for consideration is whether the Applicants have made out a case to revoke the probate as per Section 263 of the Succession Act. Section 263 reads as under:

“263. The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation: Just cause shall be deemed to exist where—

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

As held in **Shanmugham Chetti**, Clauses (a) to (e) of the explanation

to Section 263 are illustrative and not exhaustive. Nevertheless, the overarching consideration is that the Applicants should establish that there is a "just cause" to revoke the probate. Therefore, it has to be determined whether the Applicants have established "just cause". The use of the expression "just cause" may be contrasted with the use of the expression "sufficient cause" in provisions such as Order IX Rule 13, CPC, which deals with the setting aside of an ex parte decree. The same expression "sufficient cause" is also found in Section 5 of the Limitation Act, 1963. The use of the expression "sufficient cause" clearly indicates that the reasons or explanation offered by the applicant should be adequate to explain, as the case may be, the failure to attend the court proceedings or failure to perform the obligation of filing the appeal, etc. in time. To put it differently, the focus is on the applicant and the adequacy of the explanation for the earlier default. On the other hand, the use of the expression "just cause" shifts the emphasis from adequacy to justness of the reasons or cause cited in support of the application for revocation of probate. Consequently, on examining each illustration in the explanation to Section 263, it is evident that the focus is firmly on deficiencies of a substantive nature in the grant. Although I am conscious that "sufficient cause" may qualify as "just cause" in certain cases, the two

expressions are clearly not synonymous. Indeed, I am of the view that "just cause" is a higher standard or threshold than "sufficient cause" inasmuch as it becomes necessary for the Court to conclude that the interest of justice or fairness justifies revocation and it is not enough for the applicant in an application to revoke a grant in testamentary or intestate proceedings to cite adequate reasons for his/her failure to contest such proceedings earlier. The contentions of the learned counsel for the respective parties should be examined in this statutory context.

15. The two grounds on which the Applicants seek revocation are the non-production of the original Will without a proper explanation and the non-joinder of all the legal heirs.

16. The non production of the original Will is discussed first. The first Respondent/Petitioner stated in paragraph 11 of the Petition as under:

"11. The Petitioner further states that the original Will was lost in 2015 flood at the Petitioner's residence. Hence the certified copy of the Will is filed for probating the Will."

In substance, the same statement is contained in the proof affidavit of the first Respondent/Petitioner at paragraph 9 thereof. From the above, it is clear that the Petitioner pleaded that the Will was lost during the 2015 floods and that, therefore, a certified copy is filed with the Petition. As correctly pointed out by the learned counsel for the Applicants, no further particulars as to the date of loss or the manner of loss have been set out in the pleadings or in the oral evidence. In support of the counter to this application, the first Respondent relied upon documents evidencing the grant of flood related advance to the first Respondent by his employer. In these facts and circumstances, can it be said that the Applicants have made out a just cause to revoke the probate on this basis? In effect, can it be said that the reliance on secondary evidence by the first Respondent constitutes "just cause" to revoke the probate. The undisputed fact is that the Applicants were joined as Respondents in the O.P. but failed to cross-examine the first Respondent on the non-production of the original. Nevertheless, the overall facts and circumstances should be taken into consideration to determine whether this constitutes "just cause". The Petition was admittedly filed by the executor of the Will, who is not a beneficiary under the Will. Consequently, he has no vested interest in obtaining a probate of the

Will. Secondly, the Will in question is a registered Will. The registration of a Will does not tantamount to conclusive proof of a Will but it is a material fact that should be weighed in the balance. Thirdly, on perusal of the Will, the disposition is natural and the Applicants are legatees under the Will. The absence of a detailed explanation for the non-production of the original Will does not constitute "just cause" in these facts and circumstances.

17. The next reason, namely, the non-joinder of all the legal heirs remains to be considered. On perusal of the Petition, it is clear that all the Applicants and one beneficiary under the Will have been arrayed as Respondents therein. In light of the fact that the property bequeathed under the Will was originally owned by the parents of the testatrix, the first Applicant herein - who is the testatrix's sister - and, therefore, her father's heir would have succeeded entirely to the property, as per Section 15(2)(a) of the Hindu Succession Act, 1956, if the Will had not been executed. Therefore, she would be the person with caveatable interest if the "but for" test is applied and she and her children have been joined as Respondents. As regards the other beneficiaries under the Will, the only surviving beneficiary was joined as the 6th Respondent. The Petition contains a statement to the effect that the other beneficiary, namely, S.Sivakumar died on 17.05.2017

as a bachelor and his parents pre-deceased him. Thus, it is evident that the first Respondent/Petitioner joined all the necessary parties as parties to the Petition. Under the Will, the property has been bequeathed in three portions: one portion to the family of the Applicants; one to the daughter of the testatrix's husband's sister; and one to the son of the testatrix's husband's younger brother's son S.Sivakumar. Thus, it cannot be said that the bequest is unnatural.

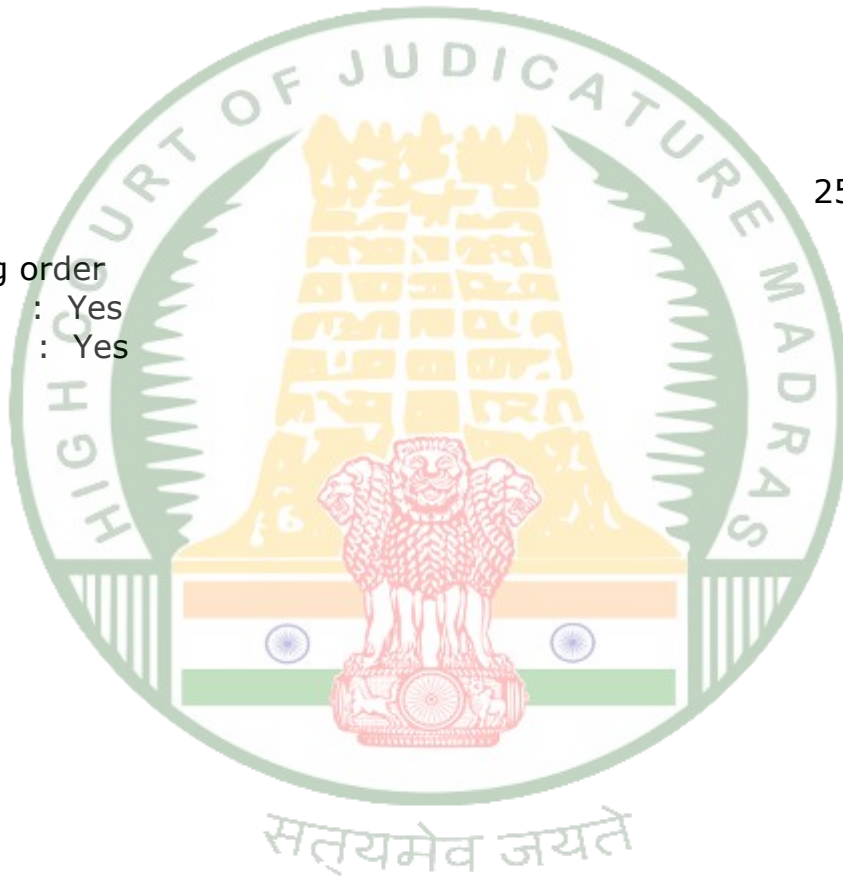
18. When the above mentioned facts and circumstances are considered in totality, I find that the reasons cited by the Applicants for revocation of the probate do not constitute a "just cause" for such revocation. In **G.Shanmugham Chetty**, the Division Bench of this Court concluded that there could be abundant material, which is acceptable to a reasonable person, to come to the conclusion that the Court was misled in making the original grant. In this case, I do not find any defect and certainly no substantial defect in the original grant. I also find that the beneficiaries under the Will acted in furtherance of the Will both by receiving their share of jewellery from the executor under acknowledgement dated 10.07.2016 and also by executing and witnessing the Deed of Undertaking on 12.07.2016. In fact, the said Deed of Undertaking was attested by one of the Applicants, namely,

R.Manoharan, as a witness. For all these reasons, I conclude that just cause has not been made out to revoke the probate.

19. In the result, this application is dismissed. No costs.

25.02.2020

Speaking order
Index : Yes
Internet : Yes

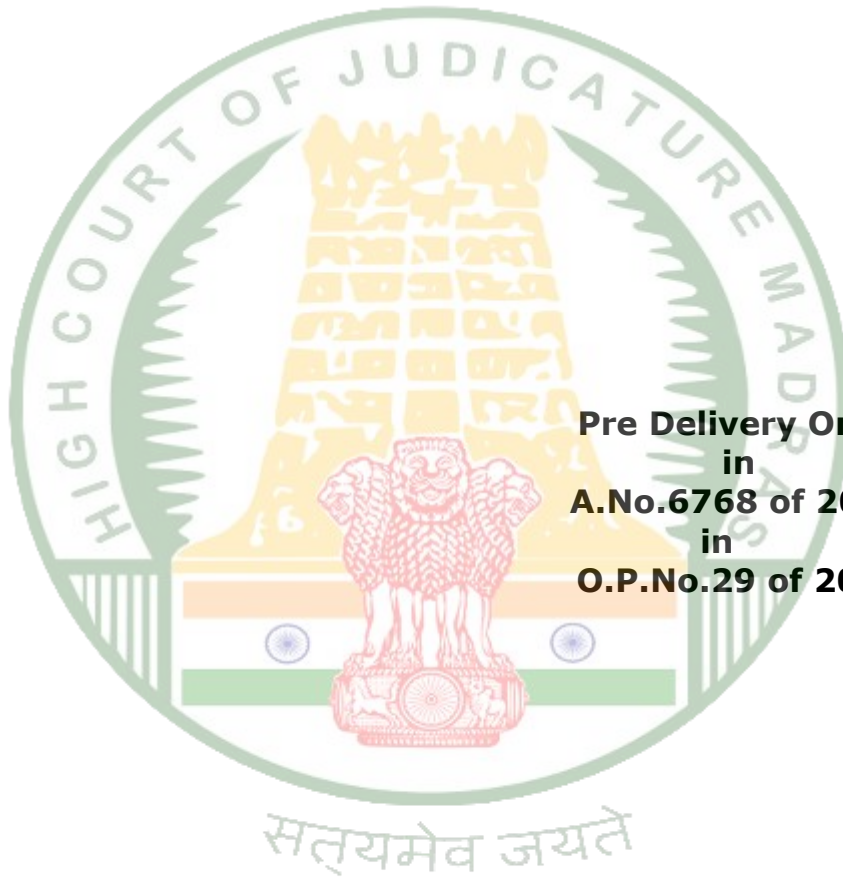


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SENTHILKUMAR RAMAMOORTHY.J,

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**Pre Delivery Order
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