

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

THURSDAY, THE 29th DAY OF APRIL 2021

THE HON'BLE MR. JUSTICE R.PONGIAPPAN

TOS.No.64 of 2016
(O.P.No.723 of 2005)

In the matter of the Indian Succession
Act XXXIX of 1925; and
In the matter of the Last Will and
Testament of Kannammal – Deceased.

C.Thiyagarajan,
residing at No.18,
Appasamy Garden 4th Street,
Old Washermanpet,
Chennai – 21.

... Petitioner/Plaintiff

-vs-

T.Meenakshi,
No.14, Bundar Street,
Chennai – 1.

...Applicant /Defendant

Testamentary Original Suit praying that this Hon'ble Court be pleased
to allowed to prove the will in common form and that probate thereof to
have effect limited to the state of Tamil Nadu may be granted to him.

This Testamentary Original Suit alongwith T.O.S.No.10 of 2013
having been heard on 18.03.2021 in the presence of Mr.S.Balasubramaniam
for Mr.S.Bhuvaneswaran, Advocates for the plaintiff herein and
Mr.M.Imthias for Mr.M.Vijayakumar, Advocates for the defendants herein

and upon reading the petition/plaint filed herein and the other exhibits therein referred to and upon perusing the evidence adduced therein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of said advocates for the parties hereto and this court having observed that the defendants had taken a plea that the Wills pertaining to this case have been obtained fraudulently, they are only having the duty to prove the fraud played by the plaintiff and this court comes to the conclusion that the will pertains to this suit is not proved, in the manner known to law, **it is ordered:-**

That the Testamentary Original Suit No.64 of 2016, be and is hereby dismissed.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE, CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 29th DAY OF APRIL 2021.

Sd/-

JOINT REGISTRAR (O.S)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.

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17.05.2021

TOS.No.64 of 2016
(O.P.No.723 of 2005)

ORDER

DATED: 29.04.2021

THE HON'BLE MR.JUSTICE

R.PONGIAPPAN

FOR APPROVAL: 12.07.2021

APPROVED ON: 09.08.2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.03.2021

Pronounced on : 29.04.2021

CORAM

THE HONOURABLE Mr. JUSTICE R.PONGIAPPAN

T.O.S.Nos.10 of 2013 and 64 of 2016**TOS No.10 of 2013 (OP No.920 of 2005)**

C.Thiyagarajan ... Petitioner/Plaintiff

-Vs.-

- | | | |
|----------------|-----|--|
| 1. P.Siva | | |
| 2. E.Nitha | ... | 1 st and 2 nd Respondents. |
| 3. G.Vijaya | ... | 3 rd respondent/1 st defendant |
| 4. T.Meenakshi | ... | 4 th respondent/2 nd defendant |

Prayer: Original Petition filed under Sections 222 and 276 of the Indian Succession Act and XXXIX of 1925 read with Order XXV Rule 4 of the Original Side Rules praying for grant of probate of Will dated 23.02.2000.

For Plaintiff : Mr. S.Balasubramaniam
for Mr.S.Bhuvaneswaran

For Defendants : Mr.M.Imthias (for D1 and D2)
for Mr.M.Vijayakumar

TOS No.64 of 2016 (OP No.723 of 2005)

C.Thiyagarajan ... Petitioner/Plaintiff

-Vs.-

T.Meenakshi ... Respondent/1st defendant

Prayer: Original Petition filed under Sections 222 and 276 of the Indian Succession Act and XXXIX of 1925 read with Order XXV Rule 4 of the Original Side Rules praying for grant of probate of Will dated 15.07.1994.

For Plaintiff : Mr. S.Balasubramaniam
for Mr.S.Bhuvaneswaran

For Defendant : Mr.M.Imthias
for Mr.M.Vijayakumar

COMMON JUDGMENT

The petitioner/plaintiff in both the Testamentary Original Suit, has initially filed two Original Petitions with regard to two Wills executed by his mother late C.Kannammal in respect of two different properties viz., O.P.Nos.920 of 2005 for grant of probate of the Will dated 23.02.2000 and O.P.Nos.723 of 2005 for grant of probate of the Will dated 15.07.1994. Thereafter, on 27.03.2006 and 24.01.2016, this Court granted an order of probate in favour of the plaintiff. Later, due to the intervention of the respondents/defendants, the probate order was revoked vide order dated 13.09.2012 and 05.07.2016, and ultimately, the Original Petitions were converted into Testamentary Original Suits. Thereafter, vide order dated 03.07.2017 in A.No.2038 of 2017, joint trial of both the T.O.S. was ordered. Therefore, both the Testamentary Original Suits are taken up together and

disposed of by this common judgment.

2. Case of the petitioner/plaintiff in TOS No.10 of 2013:

(i) The petitioner C.Thiyagarajan S/o. Late Chellappa Naicker was residing at No.18, Appasamy Garden, 4th Street, Old Washermenpet, Chennai – 21. The 1st respondent Shiva, 2nd respondent R.Nithya and 3rd 4th respondents/defendants 1 and 2 are also the residents of Chennai. The testatrix C.Kannammal died on 12.06.2002 at Old Door No.18, Appasamy Garden, 4th Street, Old Washermenpet, Chennai – 21. The testatrix C.Kannammal, executed her last Will on 23.02.2000 in the presence of witnesses. The petitioner is the executor named in the said Will, as well as one of the beneficiaries of the above said Will. The petitioner is the younger son of the deceased and paternal uncle of the 1st respondent and maternal uncle of the 2nd respondent.

(ii) The amount of assets which are likely to come into the petitioner's hand does not exceed in the aggregate the sum of Rs.2,00,000/- and the net amount of the said assets, after deducting all items which the petitioner is by law allowed to deduct is only of the value of Rs.1,98,000/-.

(iii) The petitioner has impleaded all the next of kin or other persons interested as party/respondents. No application has been made to any

District Court or delegates or to any other High Court for probate of any Will of the said deceased or letters of administration with or without the Will annexed of her property and credits.

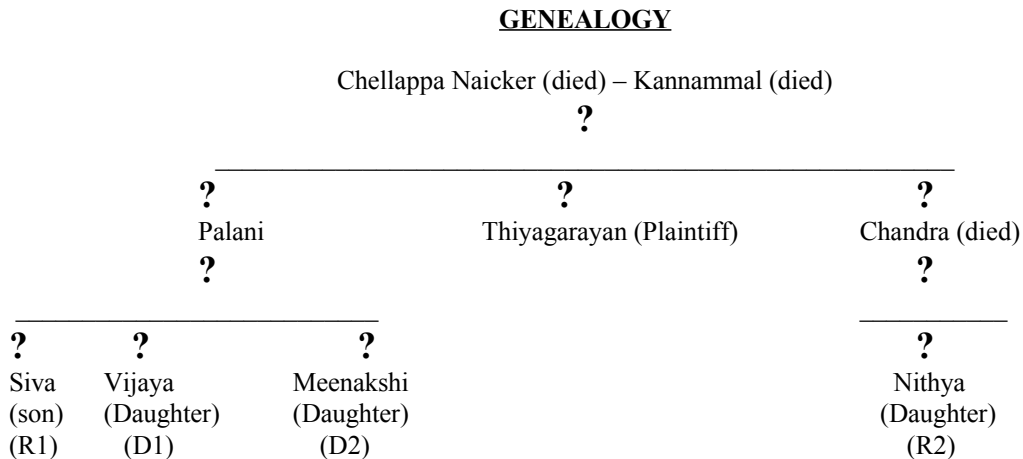
(iv) The petitioner hereby undertake to duly administer the property and credits of the said C.Kannammal and in any way concerning her Will by paying first her debts and then the legacies therein bequeathed so far as the assets will extend and to make a full and true inventory thereof and exhibit the same in this Court within six months from the date of grant of probate to the petitioner and also to render to this Court a true account of the said property and credits within one year from the said date.

(v) At the time of her death, the deceased C.Kannammal, had left her behind the petitioner and the respondents herein as her surviving legal heirs. The husband of the deceased had predeceased her. One son by name Palani predeceased her leaving the 1st respondent as his legal heir. One daughter by name Chandra also predeceased her leaving behind the 2nd respondent as her legal heir. The 1st and 2nd respondents have also filed their consent affidavit, consenting for grant of probate in favour of the petitioner herein.

3. Gist of the averments found in the written statement filed by the 4th

respondent/2nd defendant, is as follows:

(i) Defendants 1 and 2 and the plaintiffs are Class-I legal heirs of late C.Kannammal and late Chellappa Naicker. The Genealogy of late C.Kannammal and late Chellappa Naicker, is as follows:



(ii) The 2nd defendant's father by name Palani was a mentally retarded person. He left the place of residence before 10 years. Till this date, his whereabouts is not known to the world and therefore, it is presumed that he is dead.

(iii) During the life time of deceased C.Kannammal, she owned the following immovable properties

- a) House, ground and premises bearing Door No.2/22, 3rd Street Krishnappar Gramani Thottam, Old Washermenpet, Chennai – 2, measuring 3047 sq.ft.
- b) House, Ground and premises bearing Door No.4/18, 4th Street, Appasamy Garden Old Washermenpet, Chennai – 21.

(iv) As of now, both the Chellappa Naicker and Kannammal, are no more. Before the death, the deceased C.Kannammal was not in a sound

mind and she was bed ridden for three years. Due to the same it is impossible for her to write a Will and also to go to the Registrar's Office for registering the said Will. It is also submitted that the said Will filed along with this O.P.No.925 of 2005, which has been subsequently converted into T.O.S., is a forged one and not a genuine.

(v) The plaintiff and the defendant's brother Siva/1st respondent had colluded together and cunningly hatched a plan to grab the entire property of the 1st and 2nd defendant's grandmother C.Kannammal and illegally created this Will and obtained the Order to probate the Will. The plaintiff herein failed to implead the defendants 1 and 2 as a party to the testamentary proceedings that itself creates suspicion about the genuineness of the Will.

(vi) The plaintiff is trying to evict the defendants 1 and 2 from the property bearing Door No.2/22, 3rd Lane, KG Garden, Chennai-21. Therefore, the defendants filed Civil Suit in O.S.No.9940/2009 before the Court of XIII Assistant City Civil judge, Chennai, for the relief of the permanent injunction. During the month of February 2010, the plaintiff has filed the written statement in the said Suit and spoke about the Will of the defendants' Grandmother C.Kannammal. Only thereafter, the defendants gained knowledge about the Will and filed an application in A.No.1583 of 2012, to revoke the probate already granted on 27.03.2006 in favour of the

plaintiff.

(vii) According to the plaintiff, defendants 1 and 2 are the tenants under their paternal aunt's daughter Nithya. This statement was pleaded in the written statement filed by the plaintiff before the City Civil Court, Chennai in O.S.No.9940 of 2009. But there was not even a single document produced by the said Nithya, to prove that the defendants 1 and 2 are tenants under her.

(viii) The said Nithya / 2nd respondent has also sold a portion which was earlier under the occupation of defendants 1 and 2 to one Parthiban, on the basis of the earlier probate order. In respect to the same, defendants 1 and 2 have filed a suit in O.S.No.119 of 2013 for declaration against the said Nithya declaring the sale deed executed by the said Nithya in favour of one Parthiban as null and void and the said suit is pending on the file of the XI City Civil Court Judge, Chennai. The Advocate who drafted the Will and filed a probate OP and now appearing for subsequent purchaser, is one and the same.

(ix) The plaintiff and his counsel have purposely made false averments in paragraph no.7 of the petition filed in O.P.No.920 of 2005, that all the legal heirs have been impleaded and no one is left. The signature of the Testatrix found in the Will differs from the page to page and attesting witnesses who have also joined together and colluded with the

plaintiff and created this forged Will.

(x) The plaintiff has unlawfully evicted these defendants from the property bearing Door No.2/22, 3rd Lane, KG Garden, Old Washermenpet, Chennai-21, with the help of Rowdy elements and local police. The property covered under the said Will is worth about more than Rs.16 Crores as of market price. Hence, the plaintiff is using all third degree methods and illegal efforts to grab the property. Therefore, the T.O.S.No.10 of 2013, is liable for dismissal.

4. Reply Statement:

(i) The deceased C.Kannammal was hale and healthy at the time of execution of the Will and in the Sub Registrar's office her thumb impression was also obtained in the Thumb impression register. Further, the deceased herself on her own volition executed the Will and the same was also known to the defendants. After the demise of the said C.Kannammal, the defendants herein filed a Civil Suit in O.S.No.3574 of 2004 on the file of the V Assistant City Civil Court, Chennai, for partition against their brother Shiva and the same was dismissed on 04.02.2005. Without disclosing the dismissal of the suit viz., O.S.No.3574 of 2004, the defendants filed a Civil Suit O.S.No.9940 of 2009 for permanent injunction against the plaintiff and his deceased sister's daughter Nithya and the same was dismissed on merits.

(ii) After obtaining the probate order, the defendants moved away from their brother Siva's property and became a tenant under Nithya and were residing there as tenants. The suit filed in O.S.No.9940 of 2009 denying their tenancy with Nithya was dismissed on merits based on the admission made by the defendants. After dismissal of the suit, the defendants received money from the said Nithya in the presence of witnesses and vacated the portion occupied by them. In this connection they also executed a consent letter.

(iii) Only as per the instructions given by the deceased C.Kannammal, the advocate drafted the Will, while she was alive. He filed TOS before this Court as per the instructions given by the plaintiff and also he is contesting the Civil Suit in O.S.No.9940 of 2009 filed by the defendants. There is no wrong in it. Therefore, it is necessary to declare that the Will dated 23.02.2000 is genuine.

5. Case of the plaintiff in T.O.S.No.64 of 2016:

(i) The plaintiff and the defendants are all residing in Chennai City. The Will pertains to the petition was duly executed by one C.Kannammal, in Madras on 15.07.1994 in the presence of the witnesses. The petitioner is the executor named in the said Will as well as one of the beneficiaries of the above said Will. As per the said Will the petitioner is having life interest in respect of the properties mentioned in the said will and after his

life time his two children namely T.Prabhu and T.Priyanka shall take the properties absolutely.

(ii) The amount of assets which are likely to come into the petitioner's hand does not exceed in the aggregate sum of Rs.2,00,000/- and the net amount of the said assets after deducting all items which the petitioner is by law allowed to deduct is the value of Rs.1,98,000/-. There is no next of kin or other persons interest to be impleaded. No application has been made to any District Court or delegate or to any other High Court for probate of any Will of the said deceased or letters of Administration with or without the Will annexed of her property or credits.

(iii) The petitioner hereby duly under takes to administer the property and credits of the said C. Kannammal and in any way concerning her Will by paying first her debts and then the legacies therein bequeathed so far as the assets will extend and to make a full and true inventory thereof and exhibit the same in this Court within six months from the date of grant of probate to the petitioner and also to render to this Court a true account of the said property and credits within one year the said date.

(iv) The deceased at the time of her death had left her behind the petitioner as the surviving legal heirs. The husband of the deceased predeceased her. On son by name Palani died unmarried, issue less and predeceased the deceased.

6. In T.O.S.No.64 of 2016 also the 2nd defendant viz., Meenakshi, has filed a written statement in the same lines as in T.O.S.No.10 of 2013.

7. Based on the above pleadings, the following issues have been framed for consideration.

T.O.S.No.10 of 2013:

1. Whether the Will executed by Kannammal, dated 23.02.2000 is genuine?
2. Whether the testator is in sound dispose of mind at the time of execution of the Will dated 23.02.2000?
3. Whether the defendants are estopped from taking the plea that the registered Will dated 23.02.2000 is forged one?
4. Whether the defendants are legally entitled to maintain the above T.O.S. after they lost in the partition suit in O.S.No.3574 of 2004 against their brother Siva?
5. To what other reliefs, the parties are entitled to?

TOS No.64 of 2016:

1. Whether the registered Will dated 15.07.1994 executed by C.Kannammal is genuine or not?
2. Whether the Testator executed the Will while in sound state of mind?
3. Whether the Will has been properly attested in accordance with law?

8. Since both the Testamentary Original Suits have been filed in respect to the Wills executed by C.Kanammal and also for the reason that the plaintiff and the defendant are one and the same, both the suits are tried together and evidences are also been recorded commonly .

9. During the time of trial, on the side of plaintiff, five witnesses have been examined as PW1 and PW5 and on their side 14 documents were marked as Ex.P1 to Ex.P14. On the side of the defendants, the 2nd defendant T.Meenakshi, examined herself as DW1 and no documents were marked.

10. Having considered the materials placed before this Court, for the easy disposal of these two TOS, the issues already framed are recasted as follows:

(i) Whether the Wills executed by Kannammal dated 15.07.1994 and 22.03.2000, are genuine?

(ii) Whether the testatrix is in a sound state of mind at the time of execution of the Wills dated 15.07.1994 and 23.02.2000?

(iii) Is it correct to grant an order of probate in respect to the Wills dated 15.07.1994 and 23.02.2000?

11. It is not in dispute that the properties now referred in the Wills dated 15.07.1994 and 23.02.2000, are the absolute properties of the deceased C.Kannmamal, wife of Chellappa Naicker. It is also not disputed on either side that the said Chellappa Naicker and C.Kannammal gave birth to two sons and one daughter viz., Palani, Thiyagarajan and Chandra. Further, the 1st respondent-Shiva, 3rd respondent-Vijaya/1st defendant and

4th respondent- Meenakshi/2nd defendant are the legal heirs of the above mentioned Palani. In the same way, the 2nd respondent Nithya is born to the Chandra. Accordingly, the respondents 1 to 4 are the grand children of the deceased Chellappa Naicker and C. Kannammal.

12. In the said circumstances, the submission made by the learned counsel appearing for the plaintiff is that the testatrix C. Kannammal executed two Wills, as stated above and only upon the same, the plaintiff has filed two original petitions viz., 920 of 2005 and 723 of 2005 for the relief to grant probate in respect of the two Wills.

13. On the other hand, in the said Original Petitions, the 3rd and 4th respondents/defendants 1 and 2 were not added as a party to the proceedings. Only after granting an order of probate in the above referred two petitions, both the defendants 1 and 2, had filed applications to revoke the probate granted by this Court and came into the picture. Accordingly, after revoking the probate order, the 2nd defendant has filed written statement and thereafter, both the petitions were converted as T.O.S as above.

14. Therefore, in the said circumstances, after converting into TOS, in order to prove the genuineness of the Will, the plaintiff Thiyagarajan, is having an obligation to prove the genuinity of the Will. In this regard, he examined himself as PW1 and thereafter, the attesor Mr.T.Manokaran, who

attested the alleged Will dated 22.03.2000 was examined as PW2. In the same way, the attestor in respect to Will dated 15.07.1994, one Mr.Loganathan was examined as PW3. Further on the side of the plaintiff, one Mr.M.Chidambaram and K.Sitharthan, who are the practicing Advocates before this Court, were examined as PW4 and PW5, as a scribe for the Will dated 15.07.1994 and 22.03.2000, respectively. All the witnesses examined on the side of the plaintiff supported the plaintiff's case as the Wills dated 15.07.1994 and 23.02.2000 were executed by the deceased C.Kannammal as alleged in the plaint.

15. In the said circumstances, the learned counsel appearing for the defendants would contend that it is the settled legal principle that due to the execution of subsequent Will, the validity of the previous Will, goes away. The absence of specific recitals in the second Will about the cancellation of the previous Will, do not affect the validity of the second Will and in this regard, he relied on the judgment of our Hon'ble Apex Court in ***Mahesh Kumar Vs. Vinod Kumar and Ors.***, reported in **2012 (4) SCC 387** followed by this Court in T.O.S.No.6 of 2005.

16. In response to the above said submission, the learned counsel appearing for the plaintiff would contend that if the testatrix executes two Wills in respect to the same property, necessarily last Will has to be taken into account. In otherwise, here it is a case, both Wills are executed by the

Testatrix in respect to two different properties.

17. Now, on considering the said submission with the relevant records, it is true and also admitted on either side, that the Will dated 15.07.1994 and 23.02.2000 are executed in respect to two different properties. Therefore, the question of first and last Will does not arise in this case and accordingly, I am of the opinion that the submission made by the learned counsel appearing for the defendants as above is not having any force to assail the case of the plaintiff.

18. Secondly, the learned counsel for the defendants assail the genuineness of the Will on the following points.

(i) during the time of drafting the Will, the contents of the said Will were not explained to the Testatrix and without knowing the contents, she signed in the Will.

(ii) While at the time of filing the Original Petition, the plaintiff has not disclosed the names of all the legal heirs of the deceased C.Kannammal. Further in respect to the same, he had made false averments in both the Original Petitions, as except the petitioner and two respondents, no other legal heirs are available to C.Kannammal, which shows that the plaintiff had approached this Court with unclean hands.

(iii) Further in respect to the delay in filing the Original

Petitions, the plaintiff has not offered a cogent and convincing explanation to the Court.

(iv) More than that the evidence given by the plaintiff's side witnesses has so much of inconsistency and contradiction throughout their depositions and therefore, it cannot be held that the Will in respect to the Suit is a genuine and also that they were executed by the testatrix while she was in a sound state of mind.

19. Now, in this connection, it is well-known that the proof of Wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 68 of the Evidence Act and Section 63(c) of Indian Evidence Act are relevant for this purpose and the same are extracted hereunder.

Sections 68 of the Evidence Act – “If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.”

Section 63(c) of Indian Evidence Act- “The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix

his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

20. Apart from the above statutory provisions, certain test has to be satisfied for proving the execution of a Will in accordance with the Will.

These are :

- 1) Has the testator signed the Will?
- 2) Did he understand the nature and effect of the dispositions in the Will?
- 3) Did he put his signature to the Will knowing what it contained?

21. Ordinarily, when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

22. Therefore, in the above said circumstances, it is necessary to find out, whether the evidence given by the attestors in respect to the execution of the Wills, is surrounded by suspicious circumstances or not.

23. Here it is a case, in respect to the Will dated 23.02.2000, as already stated that attesor Mr.T.Manokaran was examined as PW2. While at the time of giving evidence as PW2, he has stated that he and Thiagarajan, the petitioner herein are friends and he knew the Thiagarajan as the son of C.Kannammal and that they are close to each other for the past 10 years. Further, in respect to the preparation of the Will, in his cross examination, he has stated that he had not seen when the Will was prepared. But at the same time, in his proof affidavit, he has stated that on 23.02.2000, while at the time of registering the Will, he was present together with Mr.P.Nagaraj, who is the first attesting witness and he has seen the petitioner's mother C.Kannammal putting her signature on the foot of the testamentary papers. He has specifically stated in his proof affidavit that he and the said Nagaraj has signed in the Will only as per the request of the deceased testatrix. Accordingly, the whole evidence given by PW2, establishes the fact that he did not know about when and at what time, the Will dated 23.02.2000 was prepared. Further, at any point of time, in respect to the contents of the Will he has not stated anything that the contents of the Will was read over to the testatrix.

24. On the other hand, PW2, has specifically admitted that the testatrix can read and write tamil. But in this regard, in respect to the languages known by the testatrix, the plaintiff when at the time of giving

evidence as PW1 has stated that he deny the suggestion that his mother knows to read and write tamil to some extent. Further, he has stated that till her death, his mother was residing with him. So, being the son of the testatrix, PW1, is very well aware about the knowledge having by the testatrix in respect to the languages known to the testatrix. In this regard, the evidence given by PW1 and PW2, is contradictory in nature.

25. More than that, the scribe, Mr.K.Sitharthan, a practicing Advocate who prepared the Will dated 22.03.2000 was examined as PW5. In his chief examination, he categorically held that after drafting the Will in his office, which is situated at No.6/2, Thattankulam Street, Old Washermenpet, Chennai, he went to Sub Registrar's office along with the testatrix and witnesses for registration. So, according to the said evidence, while at the time of drafting the Will both the testatrix and witnesses are available in his office.

26. But at the same time, the attester PW2, has stated in his proof affidavit that the Advocate viz., M.Chidambaram along with plaintiff's mother was seen by him only in Sub Registrar's office, Royapuram, Chennai. In this regard, he has specifically stated that the testatrix C.Kannammal asked him to come to the office on the morning on 22.03.2000.

27. Therefore, the contradiction arisen between the evidence given by PW2 and PW4, creates suspicion over the drafting of the Will.

28. In respect to the Will dated 15.07.1994, in order to prove the same, the attesor Loganathan was examined as PW3. Further the scribe Mr.M.Chidambaram, a practicing Advocate was examined as PW4. In respect to the drafting of the Will, PW4 has stated in his cross examination that on the date of registration, the testatrix and witnesses came to his chamber and all of them, went to Registrar's office from his chamber.

29. On the other hand, Mr.Loganathan, while at the time of giving evidence as PW3, has stated in his proof affidavit that he has seen the Advocate viz., M.Chidambaram along with the plaintiff's mother in the Sub Registrar's office, Royapuram Chennai. Further, he has stated that he has signed the document and thereafter he went away. In this regard, PW4, Scribe has specifically stated that after the drafting of the Will in his office, he went to Sub Registrar's office along with testatrix and witnesses for registration. Therefore, the evidence given by the attesor and the scribe are contradictory in nature, in respect to attending the Sub Registrar's office for registering the Will dated 15.07.1994.

30. Even assuming that the attesor examined on the side of the plaintiff gave evidence in support of the plaintiff, in respect to execution of the Will, here it is necessary to see the conduct of the parties, who presented

the petition before this Court, because, while at the time of filing the petition for probate of the Will, the respondents 3 and 4/defendants 1 and 2, were not added as a party in those applications.

31. After filing the petition as above, when at the time of giving evidence as PW1, the plaintiff himself has admitted that the defendants 1 and 2 are the daughters of his brother Palani. Further, he has made averments in the petition filed to grant an order of probate that except R1 and R2, no other legal heir is available for the deceased C.Kannammal. More than that in OP No.723 of 2005, even respondents 1 and 2 also were not added as a party. It shows that only after suppressing the material fact, the plaintiff has approached this Court, for the relief to grant of probate in respect to the Wills executed by the deceased C.Kannammal.

32. At this juncture, it is relevant and useful to see the judgment of our Hon'ble Apex Court in *Sasikala Pushpa and others Vs. State of Tamil Nadu*, reported in **2019 (6) SCC 477**, wherein at paragraph No.19, our Hon'ble Apex Court has held as follows:

“Fraud implies intentional deception aimed at achieving some wrongful gain or causing wrongful loss or injury to another. Intention being *mens rea*, is the essential ingredient to hold that a fraud has been played upon the Court.”

33. So, by considering the said verdict with the facts of this case, the plaintiff has filed these two petitions only with an intention to defraud the defendants 1 and 2. More than that, PW3, the attesor of the Will dated 15.07.1994 has stated in his cross examination that he know the plaintiff since 1993. Therefore, it is natural on his part that immediately after he met the plaintiff he might have stated about the execution of the Will, executed by the mother of the plaintiff in 1994. But, in this case, the plaintiff had filed these original petitions only in the year 2005, after three years from the date on which the testatrix died i.e. 12.06.2002. Therefore, it is also one of the circumstances, which went against the case of the plaintiff.

34. In this connection, it is necessary to remember the judgment of our Hon'ble Supreme Court in ***Dalip Singh Vs. State of Uttar Pradesh and Others***, reported in **2010 (2) SCC 114**, wherein our Hon'ble Apex Court has held as follows:

“1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.”

Accordingly, herein also, since the plaintiff has approached this Court with the tainted hands, he is not entitled to any relief.

35. Further, in the judgment of our Hon'ble Apex Court in *Josephine Jerome Vs.S.Santiago*, reported in **2007 (4) CTC 672**, it is held as follows:

“18. It is of course true that ordinarily when a document is written in a language known to the Executant and the signature of the Executant is either admitted or proved, it is for the Executant of the document, if alive, to explain under what circumstances the signature is appearing on the document. However, since the Will takes effect after the death of the Executant, obviously the Executant would not be in a position to accept or deny the signature. Therefore, the initial burden is always on the Propounder to prove that the testatrix has duly executed the testament which would obviously include attestation, as under Section 63 the Indian Succession Act, attestation is considered to be a part of the execution. Attestation is required to be proved in accordance with Section 68 of the Evidence Act. Mere proof of attestation does not prove "due execution" in each and every case. It is well known that an attesting witness need not know the contents of the document and he merely attests the signature of the Executant. If any Will is prepared in the presence of attesting witnesses as per the instructions of the testatrix, obviously the attesting witnesses

should be in a position to prove the execution of the Will. However, in the present case, the attesting witnesses have stated that by the time they came, the document was already prepared and the testatrix merely signed the document in their presence. It was therefore necessary for the Propounder of the Will to prove that the Will had been executed by the testatrix after understanding the contents thereof. This could have been done by proving that the document had been prepared as per the instructions of the testatrix or that the testatrix herself gone through the document or that it had been read over and explained to her or even by other surrounding and circumstantial evidence like the testatrix acknowledging that the Will had been prepared according to her instructions or even by the fact that execution of the Will had been admitted before the statutory authority such as the Sub-Registrar.”

36. Now, applying the ratio laid down in the above referred case, herein also, the evidence given by the attesor, as already observed, is entirely contrary, when compared with the evidence given by the scribe, in respect to the drafting and execution of the Will. Being a illiterate lady, only in the circumstances, when at the time the contents of the Will is read over to her in Tamil, she would be in a position of understanding the contents of the Will. In this regard also, though the evidence given by the scribe is in support of the plaintiff, the non availability of the endorsement in respect to the translation, is one of the material to assail the case of the plaintiff.

37. Further, the plaintiff had taken a stand that being the reason that the defendants had taken a plea that the Wills pertaining to this case have been obtained fraudulently, they are only having the duty to prove the fraud

played by the plaintiff. But, in this regard, the said submission is also against the verdict reported in **2007 (4) CTC 672**, which is narrated already in the earlier paragraphs.

38. Therefore, in all, in the the light of the above discussion, the case of plaintiff fails and this Court comes to the conclusion that the Will pertains to the two suits are not proved, in the manner known to law. Therefore, all the issues are decided affirmatively in favour of the defendants. Accordingly, both the Testamentary Original Suits, are dismissed.

Sd./-R.P.A.J.
29.04.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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