



O.S.A.No.291 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2022

CORAM

The Hon'ble Mr. Justice PARESH UPADHYAY
and
The Hon'ble Mr. Justice D.BHARATHA CHAKRAVARTHY

O.S.A.No.291 of 2022

E.Vijayakumar

.. Appellant

VS

1.V.Premavathy

2.D.Vijayalakshmi

3.K.Gajalakshmi

4.J.Loganayaki

5.E.Baskaran

.. Respondents

Appeal filed under Order XXXVIII Rule 1 of Original Side Rules
read with Clause 15 of Letters Patent against the order dated
28.06.2017 made in T.O.S.No.31 of 2010 (OP.No.83 of 2010).

For Appellant : Mr.P.Srinivasan

For Respondents : Mr.B.Sriivasan for R1, R3 & R5

Mr.N.Siva Raman for R4



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JUDGMENT

(Delivered by D.BHARATHA CHAKRAVARTHY.,J)

The original side appeal is filed against the common judgment and decree of the learned single Judge in T.O.S.Nos.31 of 2010 and 11 of 2010, in and by which, the learned single Judge held that the Will dated 02.07.1999 which was executed by the deceased testator was duly proved and granting letters of administration and therefore, while decreeing T.O.S.No.11 of 2010, dismissed T.O.S.No.31 of 2010 which was filed to prove the earlier Will dated 22.08.1991.

2. The property, which is the subject matter of the suit, is the house, ground and premises admeasuring 2480 sq.ft., located in Door No.39/2, Konnur High Road, Ayanavaram, Chennai-600 023. There is no dispute as to the fact that the said property belonged to the testator viz., A. Eganathan, S/o T.R.B.Ananthanatha Naicker, who having inherited the same by a Will and hence was his separate property. The said testator executed a registered Will on 22.08.1991 bequeathing the said property by dividing it into two extents and giving it to both his sons alone to the exclusion of daughters with the condition that both of his sons have to perform



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the marriage of one daughter each. It is the case of the appellant that after the execution of the said Will, accordingly, the appellant herein got the daughter viz., A.Loganayaki married and thus complied with the condition. But however, the other brother viz., the fifth respondent – Baskaran, did not perform the marriage of the other daughter viz., A.Lakshmi and till date, she is in a home and the appellant is only taking care of the said daughter also. It is the further case of the appellant that when the testator was suffering from memory loss and was unwell, in the year 1999, the second Will dated 02.07.1999 is said to have been registered, whereby the testator bequeathed the property in favour of all his seven children, including the appellant. After the registration of the second Will dated 02.07.1999, the testator lived till the year 2005 and ultimately died on 17.03.2005. Five years after the death of the testator, both sides had filed the respective original petitions for proving the respective Wills dated 22.08.1991 and 02.07.1999. Since there was caveat which was filed, both the Original Petitions were converted as Testamentary Original Suits and thereafter, taken up for hearing. On the basis of the pleadings, the learned single Judge framed the following issues:

“ 1. Whether the Will dated



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02.07.1999 alleged to have been executed by the deceased A.Eganathan is true and valid?

2. Whether the Will dated 22.08.1991 alleged to have been executed by the deceased A.Eganathan is true and valid?

3. Whether the conditions imposed in the earlier Will dated 22.08.1991 are complied with?

4. Whether the Letters of Administration could be granted regarding the Will dated 22.08.1991?

5. Whether the Letters of Administration could be granted regarding the second will dated 02.07.1999?"

3. On the said issues, both sides let in evidence. Thereafter, the matter was taken up by the learned single Judge and by the judgment dated 28.06.2017 and the learned single Judge, even while finding that the first Will was duly executed by the testator, found that when there is a second Will dated 02.07.1999 executed by the testator, the same stood superseded. The learned



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single Judge found that the non-mentioning of the earlier Will expressly the second Will by itself is not enough suspicious circumstance so also to discredit the second Will. The learned single Judge overruled the objection that the Will was not properly attested by cumulatively reading the entire evidence of the attesting witness and held that both the attesting witness and the testator were simultaneously present and they signed in the presence of each other and held that the Will was duly proved. The learned single Judge further found that the allegation was loss of memory and there was no other evidence on record so as to prove that the testator was not in sound and disposing state of mind and accordingly held that second Will was proved and therefore, in that view of the matter, dismissed T.O.S.No.31 of 2010 even while decreeing T.O.S.No.11 of 2010. Aggrieved by the same, the present original side appeal is filed.

4. Mr.P.Srinivasan, learned counsel appearing for the appellant would submit that firstly, even from the judgment of the learned single Judge, it will be clear that in the cross examination the respondents side has admitted that the deceased testator was suffering from loss of memory. Therefore, the appellant had proved that the testator was not in a sound state of mind at the time of



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execution of the second Will. He would further submit that proper attestation has to be strictly scrutinized and even from the findings of the learned single Judge it can be seen that the attesting witnesses were not categorical and there were contradictions in the evidence of attesting witnesses. Therefore, the learned single Judge ought not to have held that the second Will is proved in accordance with law. Once the second Will is not proved, the first Will not being disputed by the parties, should automatically held to be proved and the Letters of Administration ought to have been granted. The learned counsel would also submit that the first Will was known to everyone in the family and as a matter of fact the appellant performed the condition imposed on him on the first Will. Even he is taking care of the other sister, who has to be taken care of by the other brother viz., the fifth respondent - Baskaran. In the above circumstances, merely because the appellant was residing in Singapore, all the other brothers and sisters have joined together and have concocted the second Will to the detriment of the appellant. Therefore, he would submit that in view of the suspicious circumstance surrounding the second Will and in view of all the above factors, would pray that the judgment of the learned single Judge is unsustainable and the appeal needs to be allowed.



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5. We have considered the submissions made by the learned counsel appearing on behalf of the appellant and perused the materials records of the case.

6. As a matter of fact, both the Wills are registered Wills. When the second Will is registered, by operation of law, automatically the first Will stands revoked. Therefore, unless the second Will is disproved or discredited, the prayer of the appellant that the Letters of Administration should be granted to the first Will does not arise. Admittedly, as per the case of the parties, no dispute is raised as far as the first Will is concerned. As far as the second Will is concerned, there are three contentions against it. Even though the appellant filed a written statement alleging forgery, the said stand was not carried forward in the cross examination. It can be seen that the cross-examination was only regarding the suspicious circumstance and undue influence and the sound state of mind and therefore, the appellant's denial of the execution of the second Will was not categorical. Further it can be seen that it is the registered Will. The attesting witnesses are examined, who have deposed before the Court that the testator has actually executed the Will in their presence and the Will was also duly presented before the Sub Registrar and the left thumb impression of the testator was



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also obtained on the reverse of the document . It is also to be seen that it is not a case of sealed cover registration but a open Will has been registered and the document has been registered as Document No.116 of 1997 itself. Therefore, the execution of the Will by the testator has been proved. The mere non-mentioning of the earlier Will by itself would not amount to suspicious circumstance and the finding of the learned single Judge that it can be by import also, is in order.

7. As far as the submission regarding improper attestation is concerned, it can be seen that the attesting witnesses are examined and that they have deposed that they have seen the testator signing the Will and that they were present. The learned single Judge has clearly and categorically extracted that in view of the repeated questioning there was contradiction, but the very answer in the cross-examination should not be read in isolation and the whole evidence of the attesting witness viz., the chief examination and cross-examination if let in full, clearly satisfies the conditions for proving the Will and accordingly held that the Will has been proved. In our view, no exception can be taken for the finding of the learned single Judge and we hold that the contentions made on behalf of the appellant regarding the same are without any



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8. As far as the other submissions that the appellant's brother has not performed his part of the obligation and that the appellant has been performing his part of the obligation is concerned, when the testator was alive and had executed the second Will, the performance of the obligation or otherwise it becomes irrelevant and therefore, the arguments made in this regard are also without any merits.

9. As far as the sound state of mind is concerned, it is the case of the appellant that the testator was suffering from memory loss. Memory loss *per se* would mean that he will not be in a position to remember about everything in the past. That does not by itself, demonstrate or point out towards the unsoundness of the state of mind. This fact has been clearly brought out on record in the evidence of witnesses and therefore, we hold that the finding of the learned single Judge that the second Will was executed by the testator in sound state of mind also does not call for any interference.

10. In the result, finding no merits, this appeal stands



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dismissed. However, there is no order as to costs.

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(P.U., J) (D.B.C., J)
15.11.2022

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PARESH UPADHYAY, J.
and
D.BHARATHA CHAKRAVARTHY, J.

raa

To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

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