



TOS.No.24 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	22.06.2023
Pronounced on	24.08.2023

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

Testamentary Original Suit No.24 of 2016
in
(O.P.No.204 of 2013)

S.Viswanathan ... Plaintiff

Vs.

S.Palaniappan ... Defendant

Prayer:- Petition filed under Sections 222 and 276 of the Indian Succession Act, XXXIX of 1925 r/w order XXV Rule 4 of O.S. Rules, praying 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 the petitioner

For Plaintiff : Mr.K.V.Babu for
Mr.K.R.B.Dharanee
For defendant : Mr.T.S.Baskaran



TOS.No.24 of 2018

JUDGMENT

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The Testamentary Original Suit has been filed 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 the petitioner.

2. The averments of the plaint:

The suit property belongs to one N.K.Somasundaram by virtue of a sale deed dated 07.12.1967. The said N.K.Somasundaram had conveyed certain portions of the said property through sale to his eldest son / the plaintiff herein and his two sisters who are the respondents 4 & 5 in the Original Petition. The eastern half portion in the first floor of the building measures an extent of 588 sq.ft with an undivided share in the land and it remained under the possession of N.K.Somasundaram. He executed a registered Will dated 05.06.1996 in the presence of attesting witnesses and bequeathed the same in favour of the 1st respondent, by appointing the petitioner as the sole executor of the Will. Despite all the legal heirs of the deceased N.K.Somasundaram has been impleaded as respondents in the Original Petition, only the 2nd respondent has chosen to contest the matter by way of filing caveat and hence the petition got converted into Testamentary Original Suit.



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3. The brief facts of the written statement filed by the defendant:

The late N.K.Somasundaram had 3 sons and 2 daughters. The plaintiff and the defendant and one S.Chidambaram are the sons; S.Deivanai and S.Meenakshi are the daughters. The daughter Meenakshi and the defendant Palaniappan are twins. The defendant was a basket-ball player and he got an employment in Armed Reserved Police under sports quota in the year 1977. In the year 1981 his mother died. In the year 1982 the defendant got employment in the Government Transport Corporation. He remained unmarried till the age of 33 and he married in the year 1990. After marriage the defendant was residing at Pudupet which is nearby to his work place and thereafter in view of his transfer he was residing at various places like Madhavaram, Puzhal, etc, the defendant's father N.K.Somasundaram was close with all the children.

3.1. Even after marriage the defendant frequently visited the father. Due to his health issues, the defendant's father was confined in a room at his Nungambakkam residence. The plaintiff was residing in the other portion of the same property and he was taking care of the father. Since the defendant, his wife and children were frequently visiting the father there was no dispute or any dislike between the defendant and the father. However the plaintiff took advantage of the fact that he was living with his father in the same premises and got



the sale deed in respect of the ground floor in his favour. Though it was called as a sale deed, he did not give any consideration to the father and thereafter two sisters had also obtained settlement deed in their favour in respect of the ground and first floor portions of the property.

3.2. The second son Chidambaram was well settled at Hyderabad and he was not interested in any share of his father's property. The remaining portion of property in the first floor was in occupation of the father and he told the defendant that the same will bequeathed in favour of him. The plaintiff took advantage of his proximity and got a Will in favour of his son from the father. The father N.K.Somasundaram was not aware of the execution of the Will as his understanding capacity is very poor due to his old age. The plaintiff played a major role in the preparation and registration of the alleged Will and appointed himself as executor of the Will. The attesting witnesses were also persons arranged by the plaintiff.

3.3. The plaintiff took undue advantage of the age of the father and his dependency and executed the alleged Will. The father was very much interested to bequeath the property to the defendant. The Will was not executed by the father when he was in sound disposing state of mind. The contents of the Will also not correct as to the age of the children, etc., The defendant professes



Christianity with the consent of the father and other family members. His marriage with his wife Esther Girija was also as per the wish of his father and other family members. So there is no reason for the father to deny any share to the defendant.

4. In the reply statement filed by the plaintiff it is stated that the plaintiff's father is from a conservative family of Nattukottai Nagarathars and no member of the family would be interested in arranging a marriage for the defendant with a Christian girl. The plaintiff did not attend the marriage of the defendant. When the plaintiff was working with various branches of Indian Bank outside Chennai, the father was living independently in the Nungambakkam residence. The plaintiff's father was living independently and he did not rely on the plaintiff for any support including the financial support. It was only at the fag-end of his life, the father had developed age related health issues; even at that point he was able to manage with the assistance of a domestic help.

4.1. So any transaction done by the father is voluntary. Since the father needed some funds urgently, he sold the ground floor in the year 1987. The plaintiff has got sources to show that he had paid the sale consideration to his father. It is false to state that the plaintiff's father had informed the defendant that he would bequeath any portion of the property. The plaintiff's father was a



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conservative person and he was always unhappy with the defendant for having converted his religion and married a Christian girl. It is false to state that the plaintiff's father had sold the vacant land for the benefit of the plaintiff. The plaintiff was not even aware of the Will till the death of his father. The plaintiff's father was completely alright until his death. The Will was dated 05.06.1996 which was executed 16 years before his death and it was duly registered. So the testatrix was having hale and healthy at the time of execution of the Will.

4.2. In fact the father of the plaintiff was operating his bank account by himself even during his last days. The Will was validly executed by the father. The Will itself narrates about the defendant's conversion into Christianity and it was the reason why the plaintiff's father was upset. The father of the plaintiff did not bequeath anything to either of the sons. The suit property has been bequeathed to plaintiff's son since he was the only grandson. The defendant took no interest and he showed no concern for the father during his life time. He used to visit his father occasionally during social events.

5. On perusal of the pleadings and hearing the parties the following issues have been framed:



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(i) Whether the registered Will dated 05.06.1996 is true and valid?

(ii) Whether the testator was in sound state of mind to execute the Will at the relevant point of time?

(iii) To what reliefs the parties are entitled?

6. During the course of the trial on the side of the plaintiff 5 witnesses were examined as PW.1 to P.W.5 and Exhibits Ex.P1 to Ex.P7 were marked. On the side of the defendants the defendant was examined as DW.1 and Ex.D1 to Ex.D9 were marked.

7. The learned counsel appearing for the plaintiff submitted that though the sisters and other brothers of the plaintiff did not raise any objection, the defendant alone contesting the suit. The Will which is marked as Ex.P1 is a registered Will and it was duly attested. The Will was executed on 05.06.1996 during which time, the executor was living in Chennai. The father was hale and healthy till his life time and more particularly at the time when he executed the Will. He died only after 16 years of the execution of the Will. Even though the defendant has stated that the father was not in a sound disposing state of mind, he did not prove the same. The father had operated the bank account till his last days and he was in a fit state of mind. The defendant did not attend the funerals of the father and the father had displeasure with the defendant due to his con-



version to Christianity. The son of the attesor C.V. Lakshmi Narayanan was examined as PW.2. As the plaintiff has proved the Will, the probate has to be granted.

8. The learned counsel for the defendant submitted that no reason has been stated why the son of the attesor and not the attesor has been examined. The sisters and other brother did not object for the grant of probate, because the sisters were already benefited and the other brother is well settled. There is no displeasure with the father and in fact the father attended the marriage of the defendant. The plaintiff himself has stated that the defendant had attended all family functions. The defendant was having a good rapport with the family members. The very fact that the plaintiff was appointed as the executor would show that he had influenced the father to bequeath the property in favour of his son. Since the Will has not been duly proved the suit should be dismissed.

Discussion

9. The plaintiff has chosen to examine himself, his another brother and two sisters along with the son of an attesor as witnesses of his side. The two sisters and the other brother who were examined as PW.3, P.W.4 & PW.5 have unanimously stated that the father had executed the alleged Will as claimed by the plaintiff. The sisters have stated that they have attended the marriage of the



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defendant but they did not know whether the brothers had attended the marriage. The other brother who was examined as plaintiff's witness has stated that he did not attend the marriage of the defendant but he attended the marriage reception.

10. The plaintiff's witness PW.2 has stated that he is the son of one of the attesting witnesses by name C.K.Lakshmi Narayanan. He has stated that the other witness Jothi Raman was the brother's son of his father. He has further stated that his father died on 03.07.2021. However, the plaintiff could not examine him while he was alive, even though the suit has been filed in the year 2016 itself. Because the suit has not been ripe for trial till such time and during trial the said witness was no more.

11. It is submitted by the plaintiffs that they did not know the whereabouts of the 2nd attesting witness and he also died long ago. PW.2 has stated in his evidence that the 2nd attesting witness was his neighbour. At the time of trial both the attesting witnesses were not alive and hence the plaintiff had no other option except to prove their attestation through PW.2, who is conversant with their signatures. PW.2 being the son of one of the attesting witness C.N.Lakshmi Narayanan has identified the signature of his father affixed in the Will as attester and confirmed that it was the signature of his father. Even



though the plaintiff cannot comply the requirement contemplated under Sec. 68 of the Evidence Act, by examining the son of one of the attesting witnesses, who is conversant with the signatures of the attestors had complied the requirement of Sec. 69 of the Indian Evidence Act.

12. The Will is a registered Will and it has been executed by the testator as early as on 05.06.1996 and the testator died only after 16 years from the date of execution of the Will. The defendant had denied the genuineness and validity of the Will by stating that the father was under the influence of the plaintiff and the plaintiff had won over his Father and made him to execute the Will as per the whims of the plaintiff. When the plaintiff had accomplished his duty to prove the compatibility of the will in accordance with Sec.63(c) and its execution as per the mandate of Sec.68 of the Evidence Act, the onus will shift upon the defendant who claims that the Will has been executed not out of the free will of the executor. Excepting the self assertive statement of the defendant in his evidence along with some photographs of his marriage, no other material has been produced by the defendant to substantiate that his father was under the influence of the plaintiff.

13. On the other hand, the recitals of the Will refer about the defendant's choice to get converted into the Christianity. Some of the photographs pro-



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duced by the defendant would show that the father had participated in the marriage function of the defendant. However, the evidence of the siblings would show that even among them some had attended the marriage and some had attended only the reception. The lukewarm response from the family of the defendant would show that all is not well with them. In this background, the father had bequeathed the property in favour of his grandson by virtue of the suit Will and even prior to that he had settled two portions of the property in favour of his daughters.

14. It is claimed by the defendant that the sale made by his father in respect of one of the portion in favour of the plaintiff was without consideration. The plaintiff had given details about the payment made by him towards the sale consideration. So the father did not gift any of the portions to either of his sons, but he had chosen to give two portions to his daughters and one portion to his grandson who is said to be his only grandson. The defendant did not deny the fact that the 1st respondent was the only grandson for his father at the relevant point of time.

15. It was the consistent evidence of the PW.1 that the father never depended on anyone and he was living all alone by himself. In fact PW.1 has stated that the father was looking after himself. The bank pass book of the



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father which is produced as Ex.P3 would show that the father was able to operate the account by himself only. These facts would only show that the father was hale and healthy and he was capable of making his own decisions at the time when he executed the Will.

16. Had the father executed the Will by being a puppet at the hands of the plaintiff, he could have revoked it any time later. The sons of the testator are well placed in life and that can also be the reason why the father had not chosen to gift any property in favour of any of his son but to his only grandson. The Will being a registered Will, it could not have been registered without the presence of the testator at the Sub Registrar office and his acceptance and willingness are also the matters of confirmation by the sub-registrar during registration.

17. The defendant has stated that he was in the habit of visiting his father during special occasions like Pongal or Deepavali. However, he has stated that he did not attend the funerals of his father. The defendant was examined as DW.1 and he has stated in his evidence that he was not able to attend the cremation of his father, as his father's cremation was on 30.05.2012 and his daughter's marriage was fixed on 31.05.2012. As the beliefs about the functions like marriage and events like death are the individual's choices, nothing



much can be said about this perplexed situation is which the defendant was placed at the time of the death of his father.

18. The defendant did not produce any evidence to substantiate his allegation that the father was not in a sound and disposition state of mind or that he was under the influence of the plaintiff. Nothing is placed on record to show that the father was under the care and custody of the plaintiff and hence there was a possibility that he could have been under the influence or control of the plaintiff. It is not unusual for a grand father like a testator to opt to bequeath any property in favour of his only grandson, even without any special reasons, but only due to love and affection.

19. If the Will was executed due to foul play committed by the plaintiff, the other siblings would not have unanimously accepted the genuineness of the Will. Though the father had settled some properties in favour of the daughters, they appear to be neutral towards their brothers. The sisters of the defendant attended his marriage, though his brother was bit indifferent and attended the reception. Since the sisters did not have any hatred or partiality against any of their brothers, their neutrality cannot be viewed as just a complacent attitude, due to the settlement received by them from their father. Unless the defendant establishes any strong suspicion demolishing the totality of the above said facts



in favour of the plaintiff, there is no reason to disbelieve the genuineness of the Will.

20. The attestors who had chosen to attest the Will were the associates of the father. If the plaintiff had stage managed the execution of the Will, he would have opted to choose his own associates to attest the same. So the manner in which the Will was written and the type of the attestors who had attested the Will, along with all other attendant circumstances detailed above would only show that the Will was written by the testator at the time when he could make sound decision and exercise his own option.

21. There are also reasons to believe why the father had chosen the defendant not to inherit his assets. If the testator wished any of his legal heirs not to inherit his assets, he need not even tell any reasons. However, in the case on hand, the controversial marriage and conversion of the defendant to other faith has been stated as the reason for excluding him.

22. In the given circumstances, the Will is not found to be tainted with any strong suspicion. The Will seemed to have been executed in compliance with Sec. 63(c) of the Indian Succession Act and it has been proved in terms of Sec. 69 of the Evidence of Act. Hence I find no reason to reject the prayer sought by the plaintiff. Hence I conclude that the plaintiff has proved that the



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Will is true and genuine and the plaintiff is entitled to get the relief prayed by him. **Thus issues Nos.1,2 & 3 are answered.**

In the result, the suit in TOS.No.24 of 2016 is **decreed** by **granting a probate** of the registered Will dated 05.06.1996 of late N.K.Somasundaram, the testator to the plaintiff to have effect limited to the State of Tamil Nadu. The plaintiff shall also provide a true and fair inventory and render true and fair accounts of the properties and credits of the estate of the testatrix within six months and one year, respectively, from the date of decree. There will be no order as to costs.

24.08.2023

jrs



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APPENDIX

I. List of Witnesses Examined :

Plaintiff :	
P.W.1	S.Viswanathan
P.W.2	K.L.Baskaran
P.W.3	S.Deivanai
P.W.4	P.Meenakshi
P.W.5	S.Chidambaram
Defendants :	
D.W.1	S.Palaniappan @ Nirmal

II. List of Exhibits Marked:

S.No	Exhibits	Description of documents
1	P1	Ex.P1 is the original Will dated 05.06.1996 (Will is safety custody)
2	P2	Ex.P2 is the certified copy of Sale Deed 09.03.1987
3	P3	Ex.P3 is the original Pass Book issued by the Indian Bank.
4	P4	Ex.P4 is the 3rd party affidavit filed in O.P.No.204 of 2013 (marked through PW.2)
5	P5	Ex.P5 is the Consent Affidavit of S.Deivanai dated 19.11.2012 filed for the grant of probate(marked through PW3)
6	P6	Ex.P6 is the Consent Affidavit of P.Meenakshi dated 19.11.2012 filed for the grant of probate. (Marked through PW.4)
7	P7	Ex.P7 is the consent affidavit of S.Chidambaram myself. (marked through PW.5)
1	D1	The photograph is marked as Ex.D1 through PW.1 during the cross examination.
2	D2	The two photographs is marked as Ex.D2 through PW.1



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		during the cross examination
3	D3	The two photographs is marked as Ex.D3 through PW.1 during the cross examination.
4	D4	The two photographs is marked as Ex.D4 through PW.1 during the cross examination.
5	D5	The two photographs is marked as Ex.D5 through PW.1 during the cross examination.
6	D6	The two photographs is marked as Ex.D6 through PW.1 during the cross examination.
7	D7	The photo 2 Nos. without negative marked as Ex.D7
8	D8	The photo 1 No. without negative marked as Ex.D8
9	D9	The photo 2 Nos. without negative marked as Ex.D9

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jrs

Index : Yes/No
Internet : Yes/No
Speaking/ Non Speaking
Neutral : Yes /No

**Testamentary Original Suit No.24 of 2016 in
(O.P.No.204 of 2013)**

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