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OSA No.19 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.09.2023

CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

Original Side Appeal No.19 of 2023

Bakthavachalam (Deceased)

1.B.Krishnamurthy
2.B.Karmegam
3.B.Janarthanan

.. Appellants

Appellants 1 to 3 are legal representatives of the
deceased Bakthavachalam
and are residing at
No.15/16, Ganapathy Street,
Royapettah, Chennai - 14.

(Cause title accepted *vide* order dated 25.11.2021)

Versus

1.Kalyani
2.Anusuya

.. Respondents

Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Order XXV Rule 5 of the Original Side Rules of High Court Madras r/w 232 and 276 of the Indian Succession Act, 1925 and Clause 15 of the letters Patent against the order and decree passed by the learned Judge dated 28.11.2014 in O.P.No.108 of 2013.

For Appellants : Mr.R.Rajarajan

For Respondents : Mr.E.P.Senniyangiri
for R1 and R2

* * *



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JUDGMENT

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(Judgment of the Court was delivered by R. MAHADEVAN, J)

This Original Side Appeal has been filed challenging the order dated 28.11.2014 passed by the learned Judge, thereby dismissing the petition in O.P.No.108 of 2013 filed for grant of probate in respect of the Last Will and Testament of the deceased Lakshmi Kanthaammal.

2.Originally, the aforesaid original petition was preferred by one K.Bakthavasalam, who is the brother of the testatrix Lakshmi Kanthaammal and he died on 05.01.2016 leaving behind his wife / second respondent, daughter / first respondent and sons / appellants herein. Therefore, the appellants being the legal heirs of the petitioner in the probate proceedings, are pursuing the case before this court.

3.According to the appellants, the testatrix Lakshmi Kanthaammal owned properties viz., (i) premises bearing Door No.15 Old No.14/1 Ganapathy Mudali Street, Royapettah, Madras -600 014, in S.No.1161 admeasuring 1555 sq.ft, (ii)business at shop no.143, Avvai Shanmugham Salai (Lloyds Road), Gopalapuram, Chennai - 600 086, and (iii) family articles, furnitures and other materials and movable in her residence. Her husband by name Jayarama Pillai died on 27.12.1976 and they have no issues, out of wedlock. During her life time, the testatrix Lakshmi Kanthaammal, out of her own free will and in a sound disposing state of mind, had executed a Will registered as Document No.11/1985 dated 11.02.1985 to and in



favour of her brother Bakthavatsalam, in the presence of three attesting witnesses, viz., Angamuthu, Somasundhar and Ranganathan; and she died on 21.10.1989.

Thereafter, her brother Bakthavatsalam had acquired the properties mentioned in the Will and continued to be in possession and enjoyment of the same, but unable to raise any loan. Hence, the said Bakthavatsalam filed the petition in O.P.No.108 of 2013 for grant of probate. He was examined as P.W.1 and one of the attesting witnesses by name Ranganathan was examined as P.W.2. Exs.P1 to P5 documents were marked in support of his claim. The learned Judge, upon hearing both sides, dismissed the original petition on 28.11.2014 by holding that none of the attesting witnesses was examined and the petitioner Bakthavatsalam has not established the genuineness of the Will. The relevant passage of the said order is extracted below for ready reference:

"26. In fact, the propounder of the Will has to establish that the Will was executed by the deceased testator / testatrix in a sound disposing state of mind, without threat or coercion, in the presence of two witnesses, who are attestors to the Will. The burden is upon the petitioner to establish that the Will was executed by the deceased Lakshmi Kanthammal, since he has claimed rights under the Will, by examining at least one of the attesting witnesses to the Will. Admittedly, no attesting witness was examined to prove the execution of the Will and it is stated by the petitioner that the whereabouts of the attesting witnesses are not known to him. As per Section 63 (1) (c) of the Succession Act and Section 68 of Indian Evidence Act, the aforesaid reason would not be a defence to prove the Will. As it is a registered Will, at least the Court can presume that the person, who signed or affixed the thumb impression was in a sound disposing state of mind, while registering the Will, in view of the presumption under Section 114 (e) of Indian Evidence Act, being the official act of registration. However, the Sub-Registrar would not be a competent person to identify the testator, in spite of the presumption and further, even there is possibility for impersonation in affixing signature of LTI and therefore, the burden is heavily upon the propounder or the person claiming right through the Will, to establish that the Will was executed by the testator / testatrix stated in the Will and not by any other person.

27. In the instant case, there is no evidence to establish that the testatrix had affixed her signature / LTI in the Will. The neighbour or the



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relatives cannot be examined to identify the signature, making the person handwriting expert, even without producing any admitted signature for comparison. If at all the party can produce any public documents containing the signature of the testator / testatrix and could have sent the Will to any expert through Court for comparing the signature and the LTI, in view of the legal presumption under Section 114 (e) of the Indian Evidence Act, so far as the person who signed or affixed his LTI was in a sound disposing state of mind, as it is a registered Will.

28. The petitioner has not taken any steps to prove that the Will was executed by Lakshmi Kanthammal by examining at least one of the attesters, hence, on the aforesaid circumstances, in view of Section 63 (1) (c) of Succession Act and Section 68 of Indian Evidence Act, the Court is of the view that the petitioner has not established the genuineness of the Will and therefore, the claim made in the Original Petition is not legally sustainable and accordingly, the same is liable to be dismissed.

29. In the result, this Original Petition is dismissed. However, it is made clear that in the absence of proving the Will, all the legal heirs of the deceased are entitled to claim their respective shares, as per Hindu Succession Act. No order as to costs."

Aggrieved by the aforesaid order of the learned Judge, the sons of the deceased petitioner Bakthavatsalam, who were the respondents 1 to 3 in the original petition, have come up with this appeal, arraying the other legal heirs viz., daughter and wife of the deceased as respondents 1 and 2 therein.

4. The learned counsel for the appellants would submit that the testatrix Lakshmi Kanthaammal executed her last and final Will dated 11.02.1985 on her own free will and in a sound state of mind, in respect of her properties to and in favour of the appellants' father Bakthavatsalam, who is her brother and taking care of her, after the death of her husband. It was clearly stated in the Will that her brother Bakthavatsalam is to enjoy the properties during his lifetime, and after his demise, his legal heirs viz., the appellants herein, shall inherit the properties mentioned therein absolutely with equal shares and full power of alienation and



disposal. The Will was duly executed and registered as Document No.11 of 1985 with the Sub-Registrar's Office at Mylapore, in accordance with Section 213 of the Indian Succession Act, 1925, and it was witnessed by three attesting witnesses, namely R. Angamuthu, K.A.R. Somasundhar, and Ranganathan. The original Will was presented before the Court and was marked as Ex.P1; and one of the attesting witnesses by name Ranganathan was examined as PW2. However, the learned Judge erroneously dismissed the original petition for probate on the ground that the propounder of the Will Bakthavatsalam, did not examine any of the attesting witnesses as required under Section 68 of the Indian Evidence Act. It is further contended that the learned Judge failed to consider the testimony of Ranganathan, one of the attesting witnesses, who stated in his deposition about the due execution of the Will by the testatrix Lakshmi Kanthaammal in his presence, along with the presence of other two attesting witnesses. Importantly, the said Ranganathan is not only an attesting witness, but also the paternal uncle of Lakshmi Kanthaammal's husband. The said Ranganathan categorically stated in his deposition that he personally accompanied the testatrix to the Registrar's office to ensure the proper execution and registration of the Will. However, the learned Judge overlooked the deposition of P.W.2 (Ranganathan) and unjustifiably concluded that the propounder failed to establish the genuineness of the Will and ultimately, dismissed the probate petition. Stating so, the learned counsel prayed to set aside the order of the learned Judge and pass appropriate orders in this appeal.



5. The learned counsel appearing for the first and second respondents would submit that the respondents 1 and 2 have no objection to grant letters of administration for the registered Will in favour of the appellants, who are the brothers of the first respondent and sons of the second respondent.

6. Heard the learned counsel on either side and perused the materials available on record.

7. There is no dispute that the properties mentioned in the Will owned by the testatrix Lakshmi Kanthaammal; her husband Jayarama Pillai predeceased her on 27.12.1976; and they did not have any issues. It is also not in dispute that the testatrix out of her own volition and in a sound state of mind, had executed the Will registered as Document No.11 of 1985 on 11.02.1985 on the file of SRO, Mylapore. It is explicitly stated in the said Will that her brother Bakthavatsalam, should take the properties mentioned therein and enjoy the same till his life time; and after his life time, his sons viz., Krishnamurthy, Karmegham and Janardhan (i.e.) the appellants herein, should take the properties absolutely with equal shares and full power of alienation and disposal. The testatrix Lakshmi Kanthaammal passed away on 21.10.1989. Thereafter, her brother Bakthavatsalam sought probate by filing O.P. No. 108 of 2013, which was dismissed by the learned Judge, holding that none of the attesting witnesses had been examined to prove the execution of the Will to and in favour of the said petitioner. Hence, this appeal by the sons of the deceased petitioner.



8. At the outset, it is pertinent to refer to the position of law in respect of the issue involved herein. Section 68 of the Indian Evidence Act mandates that a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution; a Will should be proved in accordance with section 68; and the onus of proving the same is on the propounder of the Will. This was clearly stated by the Hon'ble Supreme Court in the following decisions:

Savithri v. Karthyayani Amma [(2007) 11 SCC 621 at page 629]

"...A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and the Indian Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exists suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before it can be accepted as genuine."

Ramesh Verma (Dead) through LRs v. Lajesh Saxena (dead) by LRs and another [(2017) 1 SCC 257]

"13. A Will like any other document is to be proved in terms of the provisions of section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement."



9. In the instant case, during the proceedings in OP.No.108 of 2013, the death certificate of the testatrix Lakshmi Kanthaammal was marked as Ex.P1, as per which, she died on 21.10.1989; the original Will dated 11.02.1985 executed by the testatrix in respect of her properties, to and in favour of her brother Bakthavatsalam, was marked as Ex.P2; the death of the husband of the testatrix was examined as Ex.P3, according to which, he died on 27.12.1976; the consent letter given by the legal heirs of Bakthavasalam was marked as Ex.P4 and Ex.P5 is the affidavit of asset showing the net value of the properties mentioned in the Will as Rs.39,00,000/-. That apart, the said Bakthavasalam / petitioner in OP.No.108 of 2013 was examined as P.W.1, who averred in his deposition that the testatrix is her elder sister and she on her own will and in a sound disposing state of mind, executed Ex.P2 Will on 11.02.1985 in his favour, as per which, he acquired life interest over the properties mentioned therein and hence, he sought to probate the said Last Will and Testament executed by the deceased. One of the attesting witnesses by name D.Ranganathan was examined as P.W.2 and he stated in his deposition that he knew the testatrix, who had no children and who had executed a Will on 11.02.1985, in which, he signed as one of the witnesses. He also affirmed that at the time of executing the Will, the testatrix was in good health and of sound mind. For better appreciation, his deposition is extracted below:

"I know the testatrix Lakshmikantha as she was my paternal aunt. She executed her law and testament on 11.02.1985 in the presence of R.Angamuthu and K.A.R.Somasundar and in my presence. I am one of the nearest relative of testatrix Late Lakshmi Kanthammal. I know that she was not having any issues and she was living with her brother viz., Bakthavatchalam K, after the demise of her husband. She was not educated and she used to put her thumb impression only. I used to visit her during her old age, as she did not have any children. I know about the Will written



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by her on 11.02.1985 and registered in the office of the Sub-Registrar at Mylapore, bequeathing the properties to the above said her Bakthavatchalam and his children. Accordingly, she executed a Will on 11.02.1985. I have also signed as one of the witnesses in the said Will. I have seen the testatrix affixing her left thumb impression in my presence. At the time of execution of the Will, the testatrix was hale and healthy and disposing state of mind. Ex.P6 is my affidavit in this regard."

Thus, it is evident from the oral and documentary evidence as referred to above, that the testatrix Lakshmi Kanthaammal executed the Will on 11.02.1985 on her own volition and in a sound disposing state of mind in respect of her properties to and in favour of her brother Bakthavasalam. Ex.P2 Will was attested by three witnesses viz., Angamuthu, Somasundar and Ranganathan. The execution of the Will was duly proved by the propounder by examining P.W.2 Ranganathan, one of the attesting witnesses to the Will, as required under section 68 of the Indian Evidence Act. However, the learned Judge erroneously dismissed the probate petition without looking into the evidence of P.W.2, by the order impugned herein, by holding that the propounder did not take any steps to prove the execution of the Will by at least examining one of the witnesses to the same.

10. It is also pertinent to point out at this juncture that the respondents 1 and 2 / daughter and wife of the petitioner Bakthavasalam, filed separate affidavits dated 04.02.2023, expressing their consent / no objection for grant of letters of administration for the registered will in favour of the appellants herein. It is further stated by the learned counsel in unison that there are no other legal heirs except the appellants and the respondents 1 and 2, to claim right over the properties mentioned in the Will executed by the testatrix.



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11. Taking note of all the above, this court is of the opinion that it was proved that Ex.P2 Will is true, genuine and valid document and the appellants, being the legal heirs of the petitioner Bakthavasalam, are entitled for the grant of Letters of Administration, in respect of the properties mentioned therein.

12. Hence:

(a) the order passed by the learned Judge in OP.No.108 of 2013 is set aside and this Original Side Appeal is allowed.

(b) the letters of administration shall be issued in favour of the appellants in respect of the properties mentioned in the Will.

(c) The appellants are directed to duly administer the said properties of the deceased.

(d) each of the appellants is also directed to execute a security bond for a sum of Rs.25,000/- (Rupees twenty five thousand only) in favour of the Assistant Registrar (O.S-II), High Court, Madras.

(e) The appellants are further directed to render true and correct accounts once in a year.

No costs.

[R.M.D., J.] [M.S.Q., J.]
13.09.2023

Index: Yes.
Speaking order
Neutral Citation: Yes.

r n s

Copy to: The Sub Assistant Registrar, (Original Side),
Madras High Court, Chennai.

<https://www.mhc.tn.gov.in/judis>



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