

**(2011) 06 MAD CK 0430**

**Madras High Court**

**Case No:** O.S.A. No. 245 of 2010

P. Dhanakoti

APPELLANT

Vs

Devikarani @ Devaki and Others

RESPONDENT

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**Date of Decision:** June 21, 2011

**Acts Referred:**

- Benami Transactions (Prohibition) Act, 1988 - Section 4
- Evidence Act, 1872 - Section 68
- Hindu Succession Act, 1956 - Section 14

**Hon'ble Judges:** V. Periya Karupiah, J; R. Banumathi, J

**Bench:** Division Bench

**Advocate:** Kalyanasundaram for B. Venugopal, for the Appellant; N. Rajan, for R2 and M. Vijayakumar, for R3, R5 and R6, for the Respondent

**Final Decision:** Allowed

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**Judgement**

R. Banumathi, J.

This appeal arises out of the Decree and judgment in T.O.S. No. 2 of 2007 dated 03.03.2008 in and by which grant of probate in respect of "B" schedule property described in the Will dated 11.08.1995 executed by deceased A. Pattabiraman appointing the Appellant as executor of the Will was declined. Plaintiff is the Appellant herein.

2. Deceased Pattabiraman had five daughters and four sons. One of his daughter viz., Jayalakshmi, mother of Respondents 8 & 9 predeceased the deceased Pattabiraman. Wife of deceased Pattabiraman predeceased and the parents of the deceased also predeceased. Pattabiraman died on 04.09.1995 leaving the Respondents 1 to 9 as his legal heirs.

3. The genealogy of deceased Pattabiraman is as under:

4. Case of Appellant is that deceased Pattabiraman had executed his last Will and testament [Ex.P1] at Madras on 11.08.1995 bequeathing all his self acquired properties infavour of Appellant and the Respondents 1 to 9 by cancelling the earlier Will dated 15.06.1995 and the same was registered as Doc. No. 57 of 1995 in Sub Registrar Office, Triplicane. Appellant and Respondents 1 to 9 are entitled to the properties left by the deceased as per the last Will dated 11.8.1995. Appellant was appointed as the executor under the Will [Ex.P1] dated 11.08.1995. According to Appellant, the amount of assets which is likely to come to the hands of the Appellant in aggregate comes to Rs. 2,00,600/-after deducting all items which the Appellant in law is allowed to deduct.

5. Appellant-Plaintiff being the executor of Ex.P1 Will has filed O.P. No. 317 of 1999 for grant of probate. After completion of the proceedings before the Master, order of probate was granted by Justice M. Chockalingam on 08.02.2006. 2nd Respondent-2nd Defendant has filed application in A. No. 3753 of 2006 for setting aside the order of grant of probate passed in O.P. No. 317 of 1999 on the ground that name of his counsel was not printed in the cause list on the date of final enquiry proceedings in O.P. No. 317 of 1999. The order of grant of probate passed in O.P. No. 317 of 1999 dated 08.02.2006 was set aside by Justice S. Rajeswaran by an order dated 20.09.2006. The contesting 2nd Respondent-2nd Defendant filed Caveat and hence, O.P. No. 317 of 1999 was converted as T.O.S. No. 2 of 2007.

6. Non contesting Respondents/Defendants 1,3, 5, 6 and 7 have filed consent affidavits on 29.04.2005 and 22.12.2005 respectively stating that they have no objection in granting Letter of Administration to the Appellant/Plaintiff. Respondents 8 and 9 have not entered appearance in the proceedings.

7. Resisting the suit, 2nd Defendant filed written statement contending that Appellant-Plaintiff has not rendered any accounts to any of the Defendants in respect of the movable and immovable assets bequeathed and holding onbehalf of the legal heirs. According to 2nd Defendant, since the Appellant failed to perform the duties as an executor of the Will and also non-compliance of payment of property tax and maintenance of the assets, 2nd Defendant has filed suit in O.S. No. 8466 of 1995 on the file of II Asst. City Civil Court, Chennai stating that the property viz., No. 63, C.N.K. Road, Triplicane, Chennai described in the "B" schedule of the Will belonged to Radhabai Ammal, wife of deceased Pattabiraman. By the judgment dated 20.02.2003, the trial Court dismissed O.S. No. 8466 of 1995 filed by the 2nd Defendant on the ground that the deceased left the Will and the grievance of the parties will be agitated only in the High Court. Case of 2nd Defendant is that deceased Pattabiraman had only 1/10th share in the "B" schedule property viz., No. 63, C.N.K. Road, Triplicane, Chennai and the same has to be excluded. According to 2nd Defendant, the movable assets left by the deceased Pattabiraman have not been shared among the legal heirs and the same have to be shared. Appellant has also failed to pay the water and sewerage tax to the Corporation. 2nd Defendant has

paid Rs. 34,140/-towards water and sewerage tax to the Corporation to avoid action by the Corporation.

8. Based on the above pleadings, the following Issues and Additional Issues were framed by the learned single Judge:

1)Whether the Plaintiff is entitled to the grant of probate as sought for?2)To what relief is the Plaintiff entitled?

Additional Issues:

1)Is not the house property situated at New No. 63, Old No. 25, C.N.K. Road, Chepauk, Chennai-5, absolutely belonged to A. Pattabiraman, father of the parties herein?

2)Is not his last Will and Testament dated 11.08.1995 under the probate proceedings bequeathing to some of the parties herein has been acted upon and the parties being in enjoyment of their respective shares as per the said Will?

3)Has not late Sri.A. Pattabiraman, spent the movable properties listed in the Para No. 7 of the written statement of the Defendant for running his electrical contract business without leaving them behind to be shared by his descendants?

4)Has not the Defendant paid the amount of Rs. 34,140/-as mentioned in para No. 8 of his written statement towards his proportionate share for the entire ground floor portion in No. 11, Mosque Street, Chepauk, Chennai-5 under his occupation and all the parties having collectively paid the water and sewerage tax arrears amount of Rs. 1,07,794/-.

9. Appellant-Dhanakotti examined himself as PW1. 1st Defendant-Devikarani @ Devaki who had given consent affidavit was examined as PW2.V. Murugesan, who attested the Will was examined as PW3. Exs.P1 to P17 were marked. Contesting 2nd Defendant-Mohanasundaram examined himself as DW1. Encumbrance Certificates were marked as Exs.D1 and D2.

10. Upon consideration of oral and documentary evidence, learned single Judge held that execution of Ex.P1-Will [11.8.1995] has been proved as per the provisions of Section 68 of Indian Evidence Act. Insofar as, "B" schedule property to Ex.P1-Will, learned single Judge held that under Exs.P3 and P4-sale deeds, "B" schedule property was purchased by Radhabai Ammal, wife of testator and testator-Pattabiraman has not claimed in Ex.P1-Will that after the death of his wife Radhabai Ammal, he had prescribed his title to "B" schedule property by way of adverse possession. Learned single Judge further held that u/s 4 of Benami Transactions (Prohibition) Act, 1988, testator did not have any right in "B" schedule property to the Will and testator himself was entitled to bequeath only 1/10th share in "B" schedule property. On those findings, learned single Judge dismissed the suit as against "B" schedule property to Ex.P1-Will. Being aggrieved by the dismissal of

the suit as against "B" schedule property to Ex.P1-Will, Appellant has preferred this appeal.

11. We have heard Mr. Kalyanasundaram, learned Senior Counsel appearing along with Mr. B. Venugopal for Appellant. We have also heard Mr. N. Rajan, learned Counsel for 2nd Respondent and Mr. M. Vijayakumar, learned Counsel for Respondents 3, 5 and 6.

12. Before we proceed to consider the submissions, we may briefly refer to the evidence adduced to prove the execution. The impugned Will dated 11.8.1995 was executed by Pattabiraman, father of Plaintiff and Defendants. In his evidence, PW3-Murugesan, attester to the Will had clearly stated that Pattabiraman had executed Ex.P1-Will and signed in the Will and that PW3 saw the same and he signed as attester. As pointed out earlier, sons and daughters of Pattabiraman [R1, 3, 5, 6 & 7] have given consent affidavits. Respondents 4, 8, and 9 have not filed consent affidavits and they have not challenged the genuineness of Ex.P1-Will. Contesting 2nd Defendant has also not raised objection as to the execution of Will [Ex.P1], mental disposition/state of mind of testator. On the evidence of Pws.1 and 3, learned single Judge rightly held that Ex.P1-Will has been proved as per the provisions of Section 68 of Indian Evidence Act. It is pertinent to note that as against the findings of genuineness of execution of Ex.P1-Will, 2nd Defendant has not preferred any appeal.

13. Under Ex.P1-Will, testator-Pattabiraman bequeathed the properties as under:

"A" SCHEDULE - House at Bharathidasan street, Tiruvallur with six portions to R5-Smt. Mythili, R6-Mrs. Gajalakshmi and sons of late Smt. Jayalakshmi viz., Saravanan and Saminathan [R8 & R9] at 2 portions each

"C" SCHEDULE - House at Door No. 11, Mosque street, Triplicane, Chennai-600 005 giving ground floor to Sri. P. Mohanasundaram [R2]; entire I Floor to Sri.P. Dhanakotti (Appellant) and entire II Floor to Sri. P. Thiagarajan (R3).

"D" SCHEDULE - Electrical shop with stock and trade and good will of A.P.R. & Co., of 68, Wallajah Road to Sri. P. Dhanakoti (Appellant).

"E" SCHEDULE - Electrical shop at 29, Wallajah Road, Chennai-2 with good will to Sri. P. Thiagarajan (R3).

"B" SCHEDULE:-House building at No. 63, C.N.K. Road, Chennai-5 given to

(i) Smt. Devikarani @ Devaki (R1), widowed daughter I Floor, Back side;

(ii)Selvi. P. Revathi(R7) spinster daughter I Floor Front side;

(iii)Entireground floor to Sri. P. Balasundaram(R4) Electrical Engineer. Appellant Sri. P. Dhanakotti was appointed as executor of the Will.

14. Contention of 2nd Defendant/2nd Respondent is that "B" schedule property was purchased by his mother Radhabai Ammal under Exs.P3 and P4-sale deeds and after the death of Radhabai Ammal, testator Pattabiraman himself had only 1/10th share in "B" schedule property and that testator had no right to execute the Will in respect of entire "B" schedule property.

15. Learned single Judge accepted the defence of 2nd Defendant on the findings:

❖ Under Exs.P3 and P4, "B" schedule property was purchased by Radhabai Ammal and in Ex.P1-Will, there is no mention by testator Pattabiraman that the property was purchased by Radhabai Ammal, wife of the testator. The only reference in Ex.P1-Will is that Radhabai Ammal predeceased the testator.

❖ In Ex.P1-Will, testator Pattabiraman has not claimed that after the death of his wife Radhabai Ammal, he had prescribed the title to "B" schedule property by way of adverse possession.

❖ In view of Section 4 of Benami Transactions (Prohibition) Act, 1988, testator did not have any right in "B" schedule property to the Will.

❖ Since Radhabai Ammal died intestate, as per Section 14 of Hindu Succession Act the property devolved on the sharers and testator himself had 1/10th share in "B" schedule property to the Will.

16. Challenging the impugned findings, Mr. Kalyanasundaram, learned Senior Counsel for Appellant contended that under Ex.P2-Agreement, testator Pattabiraman entered into an agreement to purchase "B" schedule property. Based on which, the superstructure was purchased under Ex.P3 sale deed dated 14.07.1943 and the land was purchased under Ex.P4 sale deed dated 06.05.1946 infavour of Radhabai Ammal. It was further submitted that from 1943 to 1980 under Exs.P5 to P16 licences to build, planning permission, public demand, property tax etc. have been raised only in the name of Pattabiraman and paid by him in respect of "B" schedule property. Learned Senior Counsel would further submit that from Exs.P2 to P16, it is evident that Radhabai Ammal was only a house wife having no means of her own and that Pattabiraman purchased the property only out of love and affection in the name of his wife and enjoyed the property as his own and having enjoyed the property for 19 years more than the statutory period, he had perfected the title by adverse possession.

17. Assailing the findings in T.O.S. No. 2 of 2007, learned Senior Counsel would contend that on the death of Radhabai Ammal, succession to "B" schedule property opened on 26.12.1967 and the learned single Judge did not keep in view that the contesting 2nd Defendant did not set up his claim or filed a suit claiming share in "B" schedule property within 12 years of the death of Radhabai Ammal and as such the claim of 2nd Defendant should have been held to have been barred by Section 65(b) of Limitation Act as Pattabiraman having perfected his title by adverse

possession.

18. Drawing the attention of Court to bequeathing of the properties by the testator, learned Senior Counsel also submitted that testator equally and fairly distributed the properties and only with a view to disturb the possession and enjoyment of the Respondents 1, 4 and 7, 2nd Defendant has chosen to contest the Will. Insofar as the finding as to the applicability of Benami Transactions (Prohibition) Act, learned Senior Counsel has submitted that even assuming that "B" schedule property to Ex.P1-Will was held by Radhabai Ammal as benami of Pattabiraman, the provisions of Benami Transactions (Prohibition) Act, 1988 cannot be invoked to the transactions prior to the enactment Act 1988 as the Act does not say that it is retrospective from any particular date which is essential for giving retrospective effect. It was further submitted that when the Act has got no retrospective effect, learned single Judge erred in applying the provisions of Section 4 of Benami Transactions (Prohibition) Act, 1988.

19. Onbehalf of contesting 2nd Defendant, Mr. N. Rajan, learned Counsel has submitted that "B" schedule property to the Will was purchased by Radhabai Ammal. Contention of 2nd Defendant is that Radhabai Ammal died intestate and as such u/s 14 of Hindu Succession Act, the property devolved on the sharers and after the death of Radhabai Ammal, testator Pattabiraman had only 1/10th share over the property in "B" schedule and therefore, testator Pattabiraman could not validly execute the Will [Ex.P1] in respect of 9/10th share of "B" schedule property. It was further submitted that 2nd Defendant has already filed the suit in O.S. No. 8466 of 1995 on the file of II Assistant City Civil Court, Chennai and the same came to be dismissed on 20.02.2003 on the ground that probate proceedings are pending and the grievance could be agitated only in the High Court which is competent to pass any order under the Will. Learned Counsel for 2nd Defendant would further contend that since 2nd Defendant has challenged the title of the testator in "B" schedule property, learned single Judge rightly gone in to the question of title to "B" schedule property and based on the documents, rightly held that testator had no right to execute the Will in respect of "B" schedule property. Even though much arguments were advanced on the title of the testator to "B" schedule property, this Court cannot go into the question of title or disposing power of the testator Pattabiraman in "B" schedule property to Ex.P1-Will.

20. It is not the duty of the Probate Court to consider any issue as to the title of the testator to the property with which the Will propounded purports to deal or as to what disposing power the testator may have possessed over such property. In a proceeding upon an application for probate of a Will, the only question which the Court is called upon to determine is whether the Will is true or not, and it is not the province of the Court to determine any question of title with reference to the property covered by the Will.

21. Holding that probate Court is not competent to determine the question of title to the suit properties and referring to [Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others](#), , in [Chiranjilal Shrilal Goenka \(Deceased\) through Lrs. Vs. Jasjit Singh and Others](#), , the Supreme Court held as under:

15. In [Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others](#), this Court held that the court of probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person 16 was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate court. Therefore the only issue in a probate proceedings relates to the genuineness and due execution of the Will and the court itself is under duty to determine it and preserve the original Will in its custody. The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the executor and the valid execution of the Will. Thus it does not more than establish the factum of the Will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself.

22. Upholding the above view, in [Kanwarjit Singh Dhillon Vs. Hardyal Singh Dhillon and Others](#), , the Supreme Court held as under:

10. ... it is well settled law that the functions of a Probate Court are to see that the Will executed by the testator was actually executed by him in a sound disposing State of mind without coercion or undue inference and the same was duly attested. It was, therefore, not competent for the Probate Court to determine whether later S. Kirpal Singh had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his Will. The Probate Court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by his Will. The probate Court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by the Will were joint ancestral properties or acquired properties of the testator.

23. Grant of probate by Court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the Will unless it is duly revoked as per law. It binds not only upon all the parties made before the Court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith. The decision of the probate Court, therefore, is the judgment in rem. The probate

granted by the competent Court is conclusive of the validity of the Will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate.

24. Once a probate is granted by a competent Court, it becomes conclusive of the validity of the Will itself, but, that cannot be decisive to say that probate Court would also decide the title of the testator in the suit properties. Applying the ratio of the above decisions, question of title of the testator in "B" schedule property to Ex.P1-Will can only be decided by the competent Civil Court and on evidence. It is not the function of this Court to go into the question of title of testator with respect to the property of which Will purports to dispose.

25. Learned single Judge fell in error in going into the question of title and erred in refusing to grant probate of Will on the ground that testator had no power to dispose of "B" schedule property. Learned single Judge ought to have directed the parties to work out the remedy before the competent Civil Court.

26. Before parting with the matter, one aspect needs to be mentioned. Earlier, 2nd Defendant has filed the suit in O.S. No. 8466 of 1995 before the II Assistant City Civil Court, Chennai and the same came to be dismissed on 20.02.2003 on the ground that probate proceedings are pending before the High Court which is competent to pass orders on the Will. But on that ground probate Court cannot decide the title of the testator. It is for the parties to work out the remedy before the competent Civil Court. Ofcourse, probate of the Will granted by the High Court would be taken into consideration by the Civil Court while deciding the suit for title. Since, learned single Judge fell in error in going to the question of title and refusing to grant probate in respect of "B" schedule property to Ex.P1-Will, the judgment of learned single Judge cannot be sustained and this appeal is to be allowed.

27. In the result, the appeal is allowed and the decree and judgment of the learned single Judge in T.O.S. No. 2 of 2007 dated 03.03.2008 declining to grant probate in respect of "B" schedule property to Ex.P1-Will is set aside. Probate in respect of "B" schedule property to Ex.P1 Will [11.08.1995] is also granted. The direction of the learned single Judge as to the Letter of Administration of the deceased Pattabiraman shall hold good for "B" schedule property to Ex.P1-Will also. Consequently, connected M.P. is closed. However, parties are directed to bear their own cost.