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(2010) 10 MAD CK 0339

Madras High Court

Case No: T.O.S. No. 28 of 2007

K. Jayarathnam		APPELLANT
	Vs	
K.G. Fredrick		RESPONDENT

Date of Decision: Oct. 27, 2010

Acts Referred:

- Evidence Act, 1872 - Section 68, 69, 70
- Madras High Court (Original Side) Rules, 1956 - Order 25 Rule 31, Order 25 Rule 5
- Succession Act, 1925 - Section 232, 276, 63
- Tamil Nadu Court Fees and Suits Valuation Act, 1955 - Section 55

Citation: (2010) 10 MAD CK 0339

Hon'ble Judges: P.R. Shivakumar, J

Bench: Single Bench

Advocate: S.Y. Raghuraman, for the Appellant; K. Premkumar, for the Respondent

Final Decision: Dismissed

Judgement

P.R. Shivakumar, J.

The Plaintiff K. Jayarathnam had filed the Original Petition u/s 232 and 276 of the Indian Succession Act r/w Order XXV Rule 5 of the Madras High Court Original Side Rules seeking the grant of Letters of Administration with the Will annexed in the matter of the last Will and testament of Dr. Beatrice Beulah (deceased). In the said petition, he had arrayed K. Dayansingh Daniel, K.G. Fredrick and K. Hosea as the three Respondents. On receipt of Judge''s summons, out of the three Respondents, K.G. Fredrick alone filed a caveat opposing the grant of Letters of Administration in favor of the Plaintiff. Hence the Original petition was converted into a Testamentary Original Suit showing the Petitioner in the original petition as the Plaintiff and the second Respondent in the OP as the sole Defendant.

2. The case of the Plaintiff, in brief are as follows:

The Plaintiff Jayarathnam, the Defendant K.G. Fredrick, K. Dyansingh Daniel and K. Hosea are the sons of late A.G. Kanakaraj. Dr. Beatrice Beulah was daughter of A.G. Kanagaraj and she died as a spinster on 15.01.2005 at No. 8 East Street, Kilpauk Garden Colony, Chennai - 10. The parents of Dr. Beatrice Beulah predeceased her. Two other brothers of Dr. Beatrice Beulah also predeceased her. As such she was survived by her brothers, namely the Plaintiff Jayarathnam and the Defendant K.G. Fredrick and two other brothers, namely Dyansingh Daniel and Hosea Late Dr. Beatrice Beulah has bequeathed her property in favor of the Plaintiff by executing a Will, while she was in sound disposing state of mind in Chennai on 19.04.1999 in the presence of witnesses. The said Will was also registered in the office of the Sub-Registrar of North Madras as document No. 50/1999. The testator has not appointed any executor under the Will. The estates that are likely to come into the hands of the Plaintiff in aggregate shall be Rs. 2,73,000/- As late Dr. Beatrice Beulah has died on 15.01.2005 leaving her last Will and testament dated 19.04.1999 bequeathing her properties in favor of the Plaintiff without appointing an executor under the Will, the Plaintiff seeks the grant of Letters of Administration with the Will annexed in favor of the Plaintiff.

3. The suit is resisted by the Defendant by filing a written statement containing allegations, which in brief, are as follows:

The Plaintiff chose to file the original petition to claim right over the property of late Dr. Beatrice Beulah on the strength of her alleged Will dated 19.04.1999. But the Plaintiff failed to implead others, who are also legal heirs of Dr. Beatrice Beulah. The two other brothers, who had predeceased Dr. Beatrice Beulah, have left behind them legal heirs and the legal heirs of those predeceased brothers are also necessary parties to the suit. One of the predeceased brothers K. Albert Amirtharaj has left behind him the following persons as his legal heirs.

1. Mrs. Pancy Amirtharaj : wife
2. Aaron Rajkumar : son
3. Rachel Joy Jayakumar : daughter
4. Sheila Lawrence : daughter and
5. Sylvia Prince : daughter.

Similarly, the other predeceased brother Edward Ebenezer has left behind him four legal heirs, who are as follows:

1. Hannah Ebenezer : Wife
2. Samuel Ebenezer : Son
3. Johnson Ebenezer : Son
4. Benjamin Ebenezer : Son

Since Dr. Beatrice Beulah died as a spinster, in the absence of testament, her property ought to have devolved upon her four brothers, who are alive and the L Rs of two other brothers, who had predeceased her. Thus the Plaintiff shall be entitled to 1/6 share alone, out of the entire estate of deceased Dr. Beatrice Beulah and each one of the other brothers, who are alive and the L Rs of each one of the predeceased brothers as a block will get a 1/6 share each. Dr. Beatrice Beulah was having equal love and affection towards all the members of her family throughout her life time. With the help of the family property money belonging to the family, part of her pension savings and the financial help from the legal heirs, the deceased Dr. Beatrice Beulah acquired properties. She also received contribution from the family property and financial help from the legal heirs towards the acquisition of her estate and for the expenses incurred by her due to illness and for her frequent foreign visits. The expenses for her travel to many other countries for education and employment, spread over for nearly forty years and for the treatment of her illness which includes several attacks of cancer since 1963, were borne by all her legal heirs and her family members. The expenses for taking her to churches at various places, assemblies and prayer meetings and to missionaries and the expenses for her funeral ceremony and for the prayer meeting were borne by the family members and all her legal heirs. Late Dr. Beatrice Beulah could not have executed the alleged will. Neither the Plaintiff nor anybody else who now support the Plaintiff did whisper about the existence of the suit Will on the date of death of Dr. Beatrice Beulah or on the date of prayer meeting ceremony on 22.01.2005. They kept quiet for more than two years and only in 2007, the Plaintiff filed the OP seeking the grant of Letters of Administration alleging that Dr. Beatrice Beulah has left the suit Will. There was no reason to eliminate other legal heirs and give preferential treatment to the Plaintiff alone. Hence, the Will is surrounded by a great deal of suspicious circumstances. The same could not be a Will executed by her out of her free Will and volition and it might have been obtained by using undue influence. It is the duty of the Plaintiff to rule out the vitiating factors of undue influence, coercion and pressure in getting the Will executed. There is an inordinate delay in approaching the Court for proving the Will. The approximate cost of the value of the estate of the deceased, which consists of a palatial bungalow with a plinth area of nearly 2000-2500 sq.ft., will come to Rs. 3 crores with a rental value of Rs. 30,000/-per month. The Plaintiff has grossly under-valued the property. The deceased died intestate on 15.01.2005 leaving the property bearing Door No. 8, East Street, Kilpauk Garden, Chennai-10 besides movable assets like furniture, jewels, bank balance, shares and other investments. With malafide intention to keep other members of the family in dark, the Plaintiff has suppressed the facts that the Plaintiff alone collects the rental income and fails to distribute the same to the other legal heirs of the deceased as per their entitlement. The alleged Will is not a valid one. The Plaintiff, who is one of the legal heirs of deceased Dr. Beatrice Beulah, is not entitled to get an absolute right over the estate of the deceased. Therefore, the suit should be dismissed with cost.

4. In the light of the above said pleadings, the following issues have been framed.

1. Whether the suit Will dated 19.04.1999 is true, valid and genuine as claimed by the Plaintiff?

2. Whether the Plaintiff is entitled to the grant of Letters of Administration based on the Will dated 19.04.1999?

3. Whether the Plaintiff is entitled to the relief as prayed for?

4. What other relief the parties are entitled to?

5. Two witnesses, including the Plaintiff, were examined as P.W.s 1 and 2 on the side of the Plaintiff, whereas the Defendant was examined as the sole witness (D.W.1) on his side. The Plaintiff produced four documents marked as Ex.P1 to P4. No document has been produced on the side of the Defendant.

Issues 1 to 4:

6. The Plaintiff K. Jayarathnam is one of the brothers of Late Dr. Beatrice Beulah. The alleged testatrix had totally six brothers including the Plaintiff.K. Jayarathnam (the Plaintiff), K.G. Fredrick (the Defendant), K. Dyansingh Daniel (PW2), K. Hosea Indrakumar, K. Albert Amirtharaj (deceased) and K. Edward Ebenezer (deceased) are the names of the above said six brothers of the alleged testator Dr. Beatrice Beulah.

7. Contending that Dr. Beatrice Beulah died leaving a Will dated 19.04.1999 as her last Will and testament bequeathing all her properties in favor of the Plaintiff alone, the Plaintiff had filed this case as original petition as O.P. No. 93 of 2007 on the file of this Court, invoking its testamentary and intestate jurisdiction, seeking grant of letters of administration with the Will annexed. However, the Plaintiff chose to array the Defendant and two other brothers who are alive, namely Dyansingh Daniel and Hosea Indrakumar as Respondents in the original petition. He had not chosen to make the legal heirs of the deceased brothers of Dr. Beatrice Beulah, who predeceased her. Out of the three brothers arrayed as Respondents in the original petition, the Defendant K.G. Fredrick filed a caveat and opposed the grant of letters of administration. Therefore, the original petition was converted into a testamentary original suit and numbered as T.O.S.28 of 2007 showing K.G. Fredrick as the sole Defendant. It is pertinent to note that Hosea, the other brother of Dr. Beatrice Beulah, who is alive, has not given any consent in writing for the grant of letters of administration in favor of the Plaintiff. Only Dyansingh Daniel, chose to swear a consent affidavit stating ''no objection'' for the grant of letters of administration to the Plaintiff, which has been marked as Ex.P3. Besides swearing such an affidavit, he has also figured as P.W.2 and deposed in favor of the Plaintiff.

8. The Plaintiffs'' case for the grant of letters of administration with Will annexed based on the alleged last Will and last testament of late Dr Beatrice Beulah said to have been executed by her on 19.04.1999, is resisted by the Defendant on the following grounds:

1) The suit is liable to be dismissed for non-joinder of necessary parties.

2)The Will is surrounded by suspicious circumstances insofar as the other persons who are closely related to the testator in equal decree have been excluded without assigning reason and it is the duty of the propounder of the Will to remove the suspicions.

3)There was enormous delay in coming out with the fact that there existed a Will and in approaching the Court for letters of administration.

4)Unless the Will is proved in the manner prescribed by law removing the suspicions surrounding the execution of the Will, the Plaintiff shall not be entitled to the grant of letters of administration with Will annexed.

5)The Plaintiff, being the propounder of the Will, should rule out undue inference, cohesion and other vitiating factors in the execution of the registration of the Will.

9. As the grant of letters of administration with Will annexed is opposed by the Defendant and the genuineness of the Will itself is disputed, the Plaintiff shall not be entitled to the grant of letters of administration as prayed for, unless he proves the Will in the manner known to law and clear all the suspicious circumstances surrounding the execution of the Will pointed out by the Defendant.

10. First of all a propounder of the Will, who seeks letters of administration with Will annexed based on the Will, ought to have furnished the names and addresses of all the next of kin of the deceased and other inherited persons, so that the Court shall make a decision as to whether all to be served with notice. Order XXV, Rule 5 of the Madras High Court original side rules relating to Testamentary and Intestate matter enlist the particulars of an application for probate or letters of administration with Will annexed.

R.5: Every application for letters of administration or for letters of administration with Will annexed shall be made by the petition in Form No. 58 or 59 or as near thereto as circumstances of the case may permit, and shall be accompanied by Annexures [(a), (c) and (d) or (a), (b), (c) and (d)] mentioned in the last proceeding rule. The enclosures referred there

a) a vakalat or appointment signed by the Petitioner, unless he appears in person
b) an affidavit of one of the attesting witnesses if procurable, in Form No. 56
c) a notice to the Collector (vide Section 55 of the Courts Fees and Suits Valuation Act XIV of 1955), and in Form of 57 signed by the Petitioner or his advocate, and
(d) except in the case of applications made by the Administrator-General of Madras the affidavit of assets prescribed by Section 55 of the Madras Act (XIV of 1955) and a copy of such affidavit.

Form No. 58 is meant for letters of administration only in case of intestate succession. Form 59 is the appropriate form for seeking letters of administration with Will enclosed. In Form 59 paragraph 8 provides for the furnishing of the particulars of the person surviving the deceased as his/her next of kin according to the law applicable, in this case Indian Succession Act, and their residential addresses. Rule 31 under Order XXV says that where letters of administration is applied for by one or more of next of kin only, there being another or other next-of-kin equally entitled thereto, the Registrar may require proof by affidavit that notice of such application has been given to such other next-of-kin.

11. When probate or letters of administration with Will annexed is granted, then the said Will shall be admitted in evidence without any further proof in any other proceedings. That being so, all persons, who are entitled to oppose the grant of probate or grant of letters of administration with Will annexed, are entitled to a notice. If a person who is a close relation of the deceased is not shown in the petition and the petition for grant of letters of administration with Will annexed is filed without disclosing the existence of such person, then that shall be a ground on which the prayer for the grant of letters of administration can be rejected. In case probate or letters of administration is obtained without disclosing his/her existence or their possible claim to be a legatee or in the absence of a testament to be a legal heir to the deceased, shall be a good ground for the revocation of the probate or letters of administration with Will annexed granted in favor of the Petitioner. It has been held so in Panchanathan v. Ellappan reported in (1995) 2 LW 852, in Jayaraman.K v. K. Rajagopalan reported in (2001) 2 CTC 466 and Muralidharan Vs. R. Raghavendran reported in (1995) 2 LW 822.

12. In this case, admittedly the deceased Dr. Beatrice Beulah had six brothers including the Plaintiff and the Defendant. Out of them four alone have been shown as parties in the petition seeking letters of administration. The other two, namely K. Albert Amirtharaj and K. Edward Ebenezer having predeceased Dr Beatrice Beulah, their legal heirs have not been shown either as Respondents in the petition. In the body of petition also they are not shown as close relatives. In fact in the absence of a Will, the legal heirs of K. Albert Amirtharaj (deceased) and K. Edward Ebenezer (deceased) would have become entitled to succeed to the properties of Dr Beatrice Beulah in stripes. All the brothers, who are now alive shall be entitled to get 1/6 share. The legal heirs of each predeceased brother together shall get 1/6. In such circumstances, they are having an interest to oppose the grant of letters of administration sought for by the Plaintiff. However, the Plaintiff has chosen not to show them in the array of parties as Respondents or in the body of the petition as next of kin. In fact the Defendant, after filing a caveat and affidavit containing the grounds on which he opposed the grant of letters of administration, filed a detailed written statement after the conversion of the petition into a Testamentary Original Suit. In the said written statement, he has furnished the names and other particulars of the legal heirs of the predeceased brothers of Dr. Beatrice Beulah and has raised a specific plea that the suit is not maintainable for non-joinder of necessary parties.

13. The Plaintiff, who was examined as PW1, was also confronted with a suggestion that the suit was not maintainable for non-joinder of necessary parties. He was also confronted with a suggestion that he had not made them parties since he wanted to get the grant of letters of administration behind their back. Even then, the Plaintiff has not chosen either to make them parties or to get their consent for the grant of letters of administration in his favor. Therefore, the contention raised by the Defendant regarding the maintainability of the suit and the objection raised by him for the grant of letters of administration on the ground of non-joinder of necessary parties and absence of notice to the legal heirs of predeceased brothers of Dr Beatrice Beulah, is well founded and the same has got to be sustained.

14. Admittedly, late Dr. Beatrice Beulah remained unmarried and died as spinster. Ex.P2-Death certificate proves that she died on 15.01.2005 at No. 8, East Street, Kilpauk Garden Colony, Kilpauk, Chennai-10. It is contended on behalf of the Plaintiff that the signature of the testatrix found in Ex.P1-Will is not disputed; the Defendant simply contends that the Will could not have been executed by the testatrix while in sound diposing state of mind and that hence the initial burden shall shift on the Defendant to prove that the testatrix was not in sound disposing state of mind as on the date of Ex.P1-Will. The answer to the said contention is that the initial burden of proving the Will i.e. to prove due execution of the Will and also the sound state of mind of the testatrix shall always be on the propounder of the Will. It has been so held by a Division Bench of this Court in G. Sekhar v. Geetha and 7 others reported in 2007(2) CTC 17. In Mrs. Josephine Jerome, Emanuvel Sasndanaraj, Antony Julith and Moses Vs. S. Santiago and S. Thomas, also, another Division Bench of this Court has held that the initial burden to prove the due execution and attestation of the Will is always on the propounder. It has also been held that the mere proof of the signature of the testatrix shall not be sufficient to prove the Will; that it is required to be proved that the hand was with the mind and that the testatrix put her signature intending to bequeath the property in the manner indicated therein.

15. In similar situation the Hon''ble Supreme Court in Lalitaben Jayantilal Popat v. Pragnaben Jomnadas Kataria and Ors. reported in 2009 (1) Supreme 339 held that Section 63(c) of Indian Succession Act, 1925 makes it mandatory that a Will is required to be attested by two or more witnesses; that as per Section 68 of the Indian Evidence Act, 1872, the propounder of the Will must prove due execution and attestation of the Will by examining at least one of the attesting witnesses, if alive, amenable to the process of court and capable of giving evidence and that since it was not proved that both the attesting witnesses either attested the Will in the presence of each other or the testator had acknowledged his signature in the presence of other witness, the will stood unproved.

16. It is true that the Will propounded by the Plaintiff in this case is a registered one. But the mere fact that the Will is a registered one or the proof of registration shall not dispense with the proof of execution and attestation of the Will in accordance with the

requirement of Section 68 and 69. The authority on this point is Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, . A document, which is required by law to be attested, has to be proved in a particular manner. Section 68 of the Indian Evidence Act, 1872 says that 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. The proviso appended to Section 68 provides an exemption from the said requirement of examining at least one of the attestors when execution of the same by the person by whom it purports to have been executed is not specifically denied. However, the proviso is made applicable to documents other than a Will and such an exemption is not applicable in case of a will. For better appreciation, the proviso is reproduced here under.

68. Proof of execution of document required by law to be attested

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, provided that it shall be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

17. Section 69 of the Indian Evidence Act, 1872 provides for the mode of proving such a document when no attesting witness is found. Section 70 also provides an exemption to Section 68. It says the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him. Section 70 is not attracted because there is no question of admission of a Will by the attestor since the Will comes into effect only on the testator''s death. Further, the proof of execution of a Will against the testator shall not arise in the case of probate or Letters of Administration, since the arrangements made in the Will by the testator is sought to be given effect to after the death of the testator. Therefore, it is quite obvious that neither Section 70 nor the proviso to Section 68 shall apply to the suit Will. To attract the application of Section 69, it should have been averred and proved that no attesting witness is alive or even if an attestor is alive, he is not subject to the process of court and capable of giving evidence.

18. In this case except the propounder of the Will, who is shown to be the sole legatee of the testatrix under the Will, examined himself as P.W.1, one of his brothers, namely Dyansngh Daniel, deposed as P.W.2. He has also signed a consent affidavit expressing ''o objection'' for the grant of letters of administration with Will annexed to the Plaintiff and the same has been marked as Ex.P3. He is neither an attestor nor the scribe, not even on who was connected with the execution of the suit will, which has been produced and marked as Ex.P1. Hence, examination of P.W.2 shall not amount to compliance with the requirement of Section 68 of Evidence Act. None of the witnesses examined on the side

of the Plaintiff (neither P.W.1 nor P.W.2) has stated in his evidence that not even a single attestor who is subject to the process of court and capable of giving evidence of Ex.P1 will is alive. In fact P.W.1, in his evidence has stated that he does not personally know who attested the suit Will. Though the Plaintiff, while deposing as P.W.1, has named the advocate who drafted the Will as Bowla Vijayalakshmi, he added that he was not going to examine the said advocate. It is also his evidence that one Sudhakar and another by name Jothi Bai, a Chartered Accountant, were the attestors of the suit will. It was also his statement during cross-examination that the said Sudhakar was working with the advocate, who drafted the Will and that was the reason why he also figured as an attestor. It was also his statement in the cross-examination that he was going to examine the attestor, namely the above said Sudhakar. By making such a statement during cross-examination, he has candidly admitted that the said attestor (Sudhakar) is alive and is capable of giving evidence. It is also not the evidence of P.W.1 that the other attestor Jothi Babi, a Chartered Accountant, is not alive. Under such circumstances, the procedure prescribed for proving the Will u/s 69 of the Evidence Act when no attesting witness is found, is not applicable to Ex.P1-Will. Therefore, as per Section 68 of the Indian Evidence Act, 1872, Ex.P1 shall not be used as evidence as none of the attesting witnesses, who are alive, subject to the process of court and capable of giving evidence, has been called as a witness by the Plaintiff for the purpose of proving Ex.P1-Will. Therefore, the inevitable conclusion that has got to be arrived at is that Ex.P1-Will has not been proved by the Plaintiff in the manner required by law.

19. It has been held in the foregoing discussions that Ex.P1-will has not been proved in the manner required by law. On that ground alone, the relief sought for by the Plaintiff, namely grant of Letters of Administration of the properties of late Dr. Beatrice Beulah with the Will annexed, has got to be rejected. In view of the same, it shall not be necessary to go into the question as to whether the Will is an unnatural Will and whether the suspicious circumstances surrounding the execution of the Will have been clearly explained so as to remove the suspicion. However, it shall not be out of place to mention here that there are suspicious circumstances surrounding Ex.P1-Will and such suspicions have not been cleared by the Plaintiff by adducing cogent and reliable evidence.

20. Late Dr. Beatrice Beulah had six brothers. Out of the six, two predeceased her and the remaining four were alive. No reason has been assigned for dis-inheritance of two among the four brothers who were alive as on the date of Ex.P1-Will and also the legal heirs of two of her brothers, who had pre-deceased her. P.W.1''s evidence is to the effect that except the immovable properties mentioned in the Will, Late Dr. Beatrice Beulah did not have any other movable or immovable property. It is also his evidence that, to his knowledge, the deceased did not have any bank account. However, P.W.2 would admit in his affidavit marked as Ex.P3 that he had got the bank pass-book of the deceased Dr. Beatrice Beulah and he could state what was the amount lying to the credit of deceased Dr. Beatrice Beulah at the time of her death. He has also filed an affidavit on 29.08.2009 and in paragraph 11 of the said affidavit he had stated that the State Bank of India paid

him Rs. 73,408.50P as the balance available in the savings bank account of deceased Dr. Beatrice Beulah. P.W.2 has also referred to the same in his testimony during cross-examination. It is also the admission of P.W.2 that deceased Dr. Beatrice Beulah had owned a car and the same was at Abudhabi. The said particulars were not dealt with in the Will. There are also contradictions between the testimonies of P. Ws.1 and 2 as to when did they come to know about the existence of Ex.P1-Will and as to when the same was made known to the other brothers of the testatrix. No convincing explanation is offered for the exclusion of other brothers and legal heirs of the pre-deceased brothers. In addition to that the value of the property itself has been given by the Plaintiff in the plaint as Rs. 2,73,000/-, whereas P.W.1 himself, during cross-examination, admitted that the market value of the property might be about rupees seventy lakhs.

21. Over all consideration of the evidence adduced on both sides in this case will go to show that there were suspicious circumstances surrounding the alleged execution of Ex.P1-Will and the propounder of the Will, namely the Plaintiff who is shown to be the sole legatee under the Will, has not cleared the suspicions by cogent and reliable evidence. He has also grossly under valued the properties covered by plaint.

22. For all the reasons stated above, this Court comes to the conclusion that the Plaintiff has not proved the Will in the manner known to law and hence the Plaintiff is not entitled to the grant of Letters of Administration with Will annexed as prayed for in the plaint and that the suit deserves to be dismissed.

23. In the result, the Testamentary Original Suit is dismissed. However, there shall be no order as to cost.