
(2014) 03 MAD CK 0154
In the Madras High Court
Case No : TOS. No. 25/2004

Erumbi Santhanam Vallabhan

APPELLANT

Vs

Erumbi Santhanam Neeraja

RESPONDENT

Date of Decision : 19-03-2014

Acts Referred:

Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63, 63(c)

Citation : (2014) 2 LW 633

Hon'ble Judges : Aruna Jagadeesan, J

Bench : Single Bench

Judgement

Aruna Jagadeesan, J.—This suit has been filed to allow the plaintiff to prove the Will in common form and to grant the probate thereof to have effect throughout the State of Tamil Nadu to him. The case of the plaintiff is that the Testatrix E.S. Nalini died on 17.10.2002 as a spinster, leaving behind 4 brothers and 5 sisters, including the plaintiff and the defendant herein. The Testatrix resided at New No. 1, Old No. 2, VOC Street, Rajakilpakkam, Tambaram, Chennai 600073 and possessed properties in the State of Tamil Nadu. The Testatrix executed a Will dated 18.1.2002 at Sub Registrar's Office, Mylapore, Chennai in the presence of two witnesses and the said Will was registered as Doc. No. 3/2002. The plaintiff has been appointed as the Sole Executor under the said Will. The deceased bequeathed her property at Old No. 2, New No. 1, VOC Street, Rajakilpakkam, Chennai 600073 to E.V. Harinarayanan, S/o. E.S. Vallabhan and her shares in Sundaram Brake Linings Limited to her nephew A. Lakshminarasimhan and movable properties to various persons. In such circumstances, the Plaintiff sought for probate of the said Will.

2. The case of the defendant is that the Will was not duly executed and attested as required under law. The defendant came to know about the Will only from the legal notice issued by the plaintiff for probating the same. The Will is surrounded by suspicious circumstances. The testatrix is not the author of the statement made in the Will and they are made to suit the convenience of the perpetrators

of the Will and they are not true. The property was purchased in her name with the defendant's contribution, which was admitted by letter dated 14.6.1971. The Will was executed by undue influence and coercion exercised by the plaintiff and T.S. Srinivasan, husband of one of the sisters, Padmaja Srinivasan. The Will is unnatural, unfair and unjust and it is a fraudulent document. Hence, this suit is liable to be dismissed.

3. The following issues were framed consideration:-

1. Whether the Will is true, genuine and binding?
2. Whether the Testator was in a sound and disposing state of mind, at the time of execution of the Will?
3. Whether the Will was obtained by coercion, undue influence and fraud?
4. To what relief are the parties entitled to?

4. The plaintiff was examined as P.W. 1 and T.S. Srinivasan was examined as P.W. 2 and both the attesting witnesses were examined as P.W. 3 and P.W. 4. On the side of the plaintiff, Ex. P1 to P4 were marked. The defendant examined herself as D.W. 1 and her husband as D.W. 2. On the side of the defendant, Ex. D1 to Ex. D27 were marked.

5. The Testatrix E.S. Nalini died on 17.10.2002 as a Spinster. She died leaving behind four brothers and five sisters. The plaintiff is one of the brothers of the testatrix. The plaintiff as petitioner filed O.P. No. 374/2004 for probate of the last Will and Testament citing all the surviving brothers and sisters as respondents. All brothers and sisters, except the defendant Neeraja Srinivasan, expressed their no objection for grant of probate in favour of the plaintiff. The Defendant alone filed caveat and objections, as a result of which the OP was converted into this TOS. The Testatrix died leaving behind a registered Will dated 18.1.2002 appointing the Plaintiff as the Sole Executor. According to the Plaintiff, the Will was duly executed, while she was in a sound and disposing state of mind and memory and understanding. The Will was also duly registered.

6. The Will was contested by the Defendant on the ground inter alia that the same was not duly executed and attested as required under law. The witnesses were strangers to the Testatrix and were produced by T.S. Srinivasan, one of the sister's husband. The execution of the Will was surrounded by a number of suspicious circumstances. The Testatrix was not in a sound or disposing state of mind at the relevant time. The Will is a product of undue influence and coercion exercised by the Plaintiff and T.S. Srinivasan, husband of Padmaja Srinivasan. It is further contended that the bequest is also very unnatural. Further, the description of the property in the Will is not correct and part of Defendant's property has been annexed in the Will. The Will was a guarded secret and not revealed earlier.

7. The Plaintiff examined himself as P.W. 1 and both the attesting witnesses were

examined as P.W. 3 and P.W. 4. T.S. Srinivasan was examined as P.W. 2. P.W. 3, Sridhar Joshi one of the attesters to the Will identified the signature as well as that of Testatrix and the other attesting witness. He has categorically stated that he drafted the Will at P.W. 2's house and the Testatrix signed each page of the Will only at the Sub Registrar's house. He has denied that the Testatrix signed the Will only at the Hospital. He has further stated that he drafted the Will in accordance with whatever expressed by the Testatrix. He denied the suggestion that the wording used in the Will Ex. P2 is that of himself and P.W. 2 T.S. Srinivasan. He has also denied the suggestion that the Testatrix was coerced to execute Ex. P2 Will putting her under fear that she will be not be taken care of on her health condition becoming bad. To a question posed to him at the time of cross examination as to why she had signed the Will at the Sub Registrar's Office, the Will having prepared much earlier, he has answered that she wanted to execute the Will on an auspicious day. There is no material to suggest that the day, on which Testatrix signed the Will, was not an auspicious day and there is not even a suggestion to the said effect.

8. P.W. 2 has denied the suggestion put forward by the Defendant that the Testatrix was not keeping good health, when she came to the Registrar's Office and the assertion made by both the attesting witnesses are that the Testatrix signed in their presence at the Sub Registrar's Office and they have attested the same at Sub Registrar's Office. The above said relevant evidence both in chief as well as in the cross examination clearly shows that Ex. P2 Will was duly executed by the Testatrix and properly attested as required under law.

9. It has to be mentioned here that the signature of the Testatrix on the Ex. P2 Will is admitted. P.W. 3 and P.W. 4 have expressly stated that they affixed their signatures in the presence of the Testatrix, who also put her signature in the presence of these two witnesses. Their attestation is challenged on the ground that the attesting witnesses could not identify the Testatrix when photographs Ex. D21 and Ex. D22 were shown to them. At the outset, the photographs were marked without negative and there is absolutely no evidence to show as to when and where the photographs were taken. They are very old photographs and there is no evidence on the side of the Defendant in respect of these photographs even though they were examined later. Admittedly, the attesters are not family members of the Testatrix and the evidence indicated that they had met her only on a few occasions, that too, some years back. So, it is quite natural that they were not able to identify the Testatrix in the photographs taken about not less than 30 years back. Similarly, the fact that P.W. 3, the attester, who prepared the Will, saying that he does not know Mukundan, a retired Income Tax Inspector is of no significance, as he cannot be expected to remember each and every detail of a Will prepared by him for the Testatrix about 10 years back. Both the attesting witnesses are men of status and the fact that they were friends of P.W. 2 T.S. Srinivasan does not in any manner weaken their testimony. Both of them have frankly conceded in their testimony that they came to know of the Testatrix because of P.W. 2 T.S. Srinivasan and there is nothing unnatural in their being

associated as attesting witness to the Will.

10. As mandated u/s 63(c) of the Indian Succession Act, the Will must be attested by two or more witnesses. As required u/s 68 of the Evidence Act, it is not imperative to examine both the attesting witnesses, but in this case both the attesting witnesses had been examined. On scrutiny of the evidence of P.W. 3 and P.W. 4 and the evidence of P.W. 2 T.S. Srinivasan, their evidence is found reliable.

11. The evidence clearly indicated that the Testatrix was in a very sound and disposing state of mind, memory and understanding at the time of execution of the Will. No evidence, impeaching the same has been produced by the Defendant. She was not an illiterate person and in fact, she was a Teacher, who retired as a Head Mistress. D.W. 1, in cross examination, has stated that Nalini was qualified as B.Sc. and B.T. and she was always independent. It has been admitted that she was working as a Teacher in various Government Schools and retired as Head Mistress. After retirement, she was residing alone at her own house at Rajakilpakkam. D.W. 1's case is that Nalini was not in a good and sound disposing state of mind because she was suffering from stomach ache and cough from the year 2000 and became a cancer patient and was admitted in the Public Health Centre in January 2002 for few days.

12. In this regard, it is relevant to refer to the letter written by the Defendant herself to her elder brother in June 2002 marked as Ex. D18, where there is not even a whisper as to Nalini being mentally sound. On the other hand, the letter indicates that even after execution of Ex. P2 Will, Testatrix was living alone without any assistance from anyone until 17th June 2002, at least the date on which the letter was sent by the Defendant. It also shows that D.W. 1 was suggesting to appoint a cook for Nalini, as she and her husband would not be of any help to Nalini. So, the Testatrix was able to take care of herself including her daily household work upto June 2002, even after being admitted in the hospital in March 2002 for few days. The ailment of cancer suffered by the Testatrix had nothing to do with her mental faculties, as there is no material to indicate that her mental faculties were impaired by that ailment or for that reason, she was not possessed of a sound disposing mind.

13. In the instant case, P.W. 3 and P.W. 4 had categorically stated that the Testatrix was in a sound disposing state of mind, at the time when she had executed Ex. P2 Will and whatever was stated by her, was incorporated in the said Will. There is nothing on record to show that she was not in a sound disposing state of mind at the relevant time.

14. Thus, the requirements of law that the attesting witnesses and the Testatrix should affix their signatures and attest the document in the presence of each other and that the witnesses should be sure that the Will had been executed by the Testatrix voluntarily and with free disposing mind have been satisfied. The above said essential ingredients have been fully proved from the evidence of

these witnesses.

15. It has been contended by the Defendant that the Testatrix was threatened by the Plaintiff that she will not be looked after, if the Will was not executed. The plea of undue influence and coercion has to be proved by the Defendant. When once it has been proved that the Will has been executed by a person of competent understanding, the burden of proving that it was executed under influence is on the party who alleges it. The Privy Council laid it down in AIR 1949 272 (Privy Council) that undue influence in order to invalidate a Will must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the Testatrix. The burden of proving undue influence will not be discharged by mere establishing that a person has the power unduly to overbear the Will of the Testatrix. It must be shown that the power was exercised and that it was by mean of the exercise of that power that the Will has been obtained.

16. In Savithri and Others Vs. Karthyayani Amma and Others, , the Honourable Supreme Court has observed that "under influence" cannot be presumed. It has further observed that while the overall burden of proving a Will lies on those propounded it, such burden is, in general, discharged by showing that the Will has been duly executed and that the Testatrix had testamentary capacity. On these matters being shown, those alleging undue influence must prove it; for undue influence cannot be presumed.

17. In the instant case, the evidence placed on record assumes importance. The propounder had no role to play and he was not aware of the Will during the life time of the Testatrix. The evidence of P.W. 1 to P.W. 4 would prove the said fact put forth by the Plaintiff. When he was not aware of the Will, then the plea of threatening his sister and Will being obtained under influence cannot be true. Further, if really the Testatrix was threatened and coerced, there was more than one occasion for her to reveal the same to the Defendant and her husband, who were admittedly living closest to her. In fact, the Testatrix was living alone and was taking care of herself and if the plea of the Defendant is true, then definitely the Testatrix would have revealed the execution of Will under coercion or undue influence exercised by the Plaintiff on her.

18. The learned counsel for the Defendant, pointing out to the evidence of D.W. 1, contended that the Testatrix had axes to grind against the Plaintiff for his misdeeds in the urban land ceiling proceedings and she was averse towards him. His contention is without any force. There is no positive evidence in this regard to show that such undue influence was actually exercised. It cannot be inferred merely from such existence of motive, even if there is any for its exercise on the Testatrix. The burden of proving undue influence is not discharged by merely showing that a person has the power unduly to over power the will of the Testatrix. The evidence is lacking in this case. Therefore, I am of the clear view that the Defendant has failed to discharge the burden of proving her plea of undue influence and coercion.

19. The learned counsel for the Defendant contended that there were many suspicious circumstances surrounding the execution of the Will Ex. P2. The first and foremost point is that the Will was kept a top secret and no one was aware of the same until the Testatrix died. In this regard, we have to see the mind of the Testatrix and as to the intent of the Testatrix to dispose off her assets after her death in the manner provided in the Will. She has taken the assistance of P.W. 2 in preparing the Will and the earlier Will has also been mentioned. The Propounder/Executor was also not aware of the Will. It appears that in order to circumvent the provisions of the Ceiling Act and to save the land from the operation of the said Act, koorchit was prepared and filed before the said authorities. It has been stated in the Will that when the authorities tried to acquire part of the land, a koorchit was prepared evidencing the understanding with her sister Neeraja (the Defendant herein) regarding the ownership of the said piece of land. In spite of it, a portion earmarked for her sister under the koorchit namely 4200 sq. ft. was acquired by the ULC Authorities and in the remaining land, the Testatrix constructed a house in 1989 or so and she is living. It is further stated that the said property belonged to her absolutely and no one else had any right whatsoever over the property. The Testatrix has given the reason for bequeathing the property to her brother's son Harinarayanan under the Will Ex. P2 as she was looked after and taken care of by her brother Vallabhan and his son Harinarayanan is the only male heir in the line of her father Erumbi Santhanam Iyengar and she wanted to leave her house property to the said male heir.

20. The genuineness of the Will was in no way impeached or impaired from the fact that the Will was not disclosed to any one till her death. It is not for the court to decide as to what would have been the ideal decision of the Testatrix. It is clear from the recitals in the Will and also the evidence on record that it was her brother Vallabhan (P.W. 1) who was taking care of her in the evenings of her life. As is clear from the recitals in the Will, the Testatrix was also anxious to give her property to the male heir in the line of her father. In these circumstances, the appointment of her brother Vallabhan as executor and his son as beneficiary cannot be held to cast any suspicion on the genuineness of the Will.

21. The recital about performing annual ceremonies in Ex. P2 Will is nothing unnatural and even in her earlier registered Will, she has set apart amounts for the same. It is contended by the Defendant that when the eldest brother was alive, the Testatrix would not have written that P.W. 1 Vallabhan should do her final rites. As rightly pointed out, there is no such recital in the Will that Vallabhan should do her final rites and the stipulation is that the money should be given to him for meeting the expenses. It cannot be a suspicious circumstance.

22. It has been pleaded that only in order to defeat the right that accrued to the Defendant under the koorchit between her and the Testatrix. The Will has been prepared by the Plaintiff and P.W. 2. P.W. 2, who had assisted the Testatrix in

preparing the Will, has clearly stated the circumstances, under which the Will was executed by the Testatrix out of her free will and volition. It has to be pointed out here that neither P.W. 2 nor his wife, who is one of the sisters of the Testatrix, are the beneficiary under the Will. Only a xerox copy of koorchit is marked as Ex. D5. D.W. 1 has admitted in cross examination that in pursuance of the koorchit, she has not taken possession and mutated revenue records in her name. D.W. 2 also admitted that possession was not taken and records were not mutated, because of urban ceiling proceedings. The koorchit evidences a past arrangement and it is a confirmation of an earlier concluded partition said to have taken place in the year 1975. However, the ceiling proceedings had commenced much later only in 1983 and the letters dated 7.6.1983 come into existence bringing up koorchit for the first time. Admittedly, the original koorchit is not marked and it was also not submitted before the Ceiling Authorities, which is evidenced by Ex. D20.

23. The evidence on the Defendant's side revealed that D.W. 1 and D.W. 2 came to Chennai from Trichy only in 1980 and prior to 1980, the Testatrix never raised the issue of koorchit. In this regard, it is relevant to refer to Ex. D10 said to be the statement of Nalini made in 1977, which does not refer to the koorchit at all and she only claimed exemption on the ground that the property belonged to her and her brother, Vallabhan jointly. It is also relevant to state that she never chose to challenge the rejection order made by the authorities and it is the Defendant who pursued the matter thereafter through her husband by filing representation and petitions. That apart, the Testatrix never made any admission in the communications made to the ceiling authorities about the existence of a koorchit and the same was acted upon. If the letter dated 14.6.1971 and 1975 were really true, then the Testatrix need not have sought for exemption in 1977 under Ex. D10 and she would have contended that there is no excess land in view of koorchit.

24. In the earlier Wills, the Testatrix had referred to the koorchit and asserted that she is the owner of the property and that the koorchit was brought into existence only when the ceiling authorities tried to take over the excess land and that in spite of it, the excess land was taken over. In this context, the letter of D.W. 2, Ex. D4 dated 12.5.2003 is significant. It is admitted by the Defendant that she wrote the letter as dictated by her husband. It is pertinent to point that in the said letter, it is stated that the Will would act against the case put forth by him before the ceiling authorities and would render Neeraja, his wife a loser. Therefore, it is evident that the Testatrix never admitted the truth of koorchit in her Wills, even though a reference is made to it. Therefore, the contention put forth by the Defendant that the Testatrix would not have written the Will Ex. P2, because of koorchit is not tenable.

25. Similarly, the absence of boundary description in the Will is also not relevant to decide about the genuineness of the Will. No suspicion can be held to emanate from the fact that the boundary descriptions are not mentioned in the Will. It is

not essential to give details of property in the testamentary document.

26. The Honourable Supreme Court in *Madhukar D. Shende Vs. Tarabai Aba Shedage*, held that the requirement of proof of a Will is the same as any other document, save and except that the evidence tendered in proof of a Will should additionally satisfy the requirements of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, 1872. If after considering the matter before it and the material on record, the court either believes that the Will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of a particular case, to act upon the supposition that the Will was duly executed by the testator, then the factum of execution of the Will shall be said to have been proved. The Honourable Supreme Court then cautioned against allowing suspicions and suppositions to enter upon the judicial conscience where the Will is otherwise satisfactorily proved:-

The conscience of the Court has to be satisfied by the propounder of Will adducing evidence so as to dispel any suspicious or unnatural circumstances attaching to a Will provided that there is something unnatural or suspicious about the Will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of the judicial verdict positive or negative.

27. As was laid down by the Honourable Supreme Court in the above said decision, factors such as the Will being a natural one or being registered or executed in such circumstances and ambiance, as would leave no room for suspicion, assume significance. The Honourable Supreme Court has cautioned that if there is nothing unnatural about the transaction and the evidence adduced satisfied the requirement of proving a Will, the court would not return a finding of "not proved" merely on account of certain assumed suspicions and suppositions.

28. It is also clear that the court cannot go into the question as to whether the bequest is good or bad and what was in the mind of the Testatrix. The contentions raised on the side of the Defendant have not been proved and the failure to prove the same as required under law will go to show the futility in the contention and therefore, the contentions raised on the side of the Defendant cannot be accepted. The various suspicious circumstances shown by the Defendant are not proved, on the other hand, the Plaintiff has let in sufficient evidence to dispel such suspicions and hence, the contentions of the Defendant are not accepted. The issues are answered accordingly.

29. In view of the conclusions arrived at above, the plaintiff is entitled for the grant of probate on the impugned Will. In the result, this civil suit is decreed as prayed for. The probate shall be issued in favour of the Plaintiff in respect of the

impugned Will. No costs.