

(2002) 08 MAD CK 0060

In the Madras High Court

Case No : T.O.S. No. 5 of 1995, TR.C.S. No. 556 of 2001, Application No's. 3460 and 5263 of 2000

P.N. Thanikachala Chettiar (died), P.T. Meenakshisundaram, P.T. Raman, P.T. Uma Maheswari, Appu alias Raghavendra rep. By mother and guardian next friend Uma Maheswari, P.T. Ramesh and P.T. Delli Babu APPELLANT

Vs

G. Hemavathi, Premavathi and Vijayalakshmi
P.S. Vijayalakshmi, P.S. Ashokkumar, P.S. Arunkumar and P.S. Padmapriya rep. by her natural guardian and mother Vs P.T. Meenakshisundaram, Navaneethan, Hemavathy, P.T. Raman, Sulochana, Umamaheswari, Appu rep. By mother and guardian Uma Maheswari, T. Premavathi, Dillibabu, P.T. Ramesh and Thanickachalam (died) RESPONDENT

Date of Decision : 12-08-2002

Acts Referred:

Succession Act, 1925 — Section 63

Citation : (2002) 08 MAD CK 0060

Hon'ble Judges : M. Chockalingam, J

Bench : Single Bench

Advocate : R. Natarajan, for Manicka K. Ramalingam, for the Appellant; Manjula, for S.D. Balaji, for the Respondent

Judgement

1.The suit in TOS No.5 of 1995 is filed for the issuance of probate in respect of the Will dated 22.11.1991 executed by P.T.Thiruppurammal.

2. The suit in Tr.C.S.No.556 of 2001 is filed for partition of the plaint schedule property, mesne profits and for costs.

3. The plaint averments in TOS No.5 of 1995 are as follows:

The deceased P.T.Thiruppurammal executed her last Will and Testament on 22.11.1991 in the presence of the witnesses. She died on 17.3.1992.

The petitioner is the executor of the Will and he is also one of the beneficiaries.

The petitioner has impleaded all the next kin or other persons interested as party/respondents. The petitioner undertakes to duly administer the property and credits of the deceased P.T.Thirupurammal and in any way concerning her will be paying first her debts and then the legacies therein bequeathed so far as the assets will extend and to make a full and true inventory and exhibit the same into Court. Hence, this suit has been filed for the issuance of probate in respect of the Will executed by the deceased P.T.Thirupurammal.

4. The averments in the written statement filed by the defendants 1 to 3 are as follows:

The deceased Thirupurammal did not execute the alleged Will dated 22.11.1991. The Will is a fabricated one. The deceased Thirupurammal was in the habit of signing her name till the date of her death and she never used thumb impression for execution of any documents. The deceased was affectionate towards the defendants and wanted to settle the property in their favour and there was no love between the deceased and the plaintiffs. Hence, the suit has got to be dismissed with costs.

5. The plaint averments in TR.C.S.No.556 of 2001 are as follows:

The deceased Thirupurammal died at Madras on 17.3.1992 and she was the absolute owner of house at No.25, Dharmaraja Koil Street,

Chintadripet, Chennai-2. The said deceased purchased the same by a registered sale deed dated 22.3.1961. On the death of Thirupurammal, her

interest on the plaint schedule property devolved upon the plaintiff's and defendants. The plaintiffs being the heirs of predeceased son

P.T.Subramaniam are entitled to 1/11th share in the plaint schedule property. The defendants 1 to 5, 8, 9,10 and 11 are each entitled to 1/8th

share. The defendants 6 and 7 together entitled to 1/9th share. The plaintiffs issued notice on 28.3.1992 to the defendants demanding partition and

separate possession of 1/11th share of the plaint schedule property. The defendants sent a reply denying the plaintiffs' right over the suit property.

The plaintiffs have already entered caveat in TOS No.5 of 1997 on the file of this court contesting the probate proceedings. The defendants have

no right to reply upon the alleged Will in this Court unless probate is granted by this Court. Hence, the plaintiffs have filed this suit for partition and

delivery of separate possession of 1/11th share in the suit property. The plaintiffs

and defendants are in joint possession of the property. They are also entitled for mesne profits. Hence, this suit has been filed for partition and other reliefs as asked for.

6. The averments in the written statement filed by the first defendant are as follows:

The deceased Thirupurammal executed a Will dated 22.11.1991 bequeathing all moveables and immovables to her husband P.N.Thanikachalam

Chettiar, her sons, the first defendant, the 4th defendant, P.T.Karunakaran, P.T.Delli Babu and P.T.Ramesh in equal shares. P.N.Thanikachalam

Chettiar was appointed as executor of the said Will. The said Thanikachalam Chettiar filed OP No.611 of 1994 for grant of probate of the said

Will before this Court and after filing caveat by the plaintiff herein the said OP was converted to TOS No.5 of 1995. When the matter is pending

before this court, this suit is not maintainable and unnecessary. P.N.Thanikachalam Chettiar executed his last Will and Testament on 6.5.1992 and

during his life time the property at No.12, Nainiappan Street, Chintadripet, Chennai-2 was alienated to third parties. P.T.Subramanian

misappropriated the family business money as his own. The said P.N.Thanikachalam Chettiar died on 30.5.1998 and the memo in TOS No.5 of

1995 was filed after serving the same to the counsel for the plaintiff. Therefore, the above suit is to be dismissed for not bringing the legal

representatives of the deceased 11th defendant. After the death of P.T.Subramaniam, the first plaintiff and her family left the matrimonial house

taking away several gold ornaments belonging to the joint family clandestinely. Therefore, the testatrix and the testator did not give any share to the

plaintiffs herein to the entire properties. Hence, for all the reasons stated above, the suit has got to be dismissed with costs.

7. On the above pleadings, the following issues were framed :

TOS No.5 of 1995:

1. Whether the Will dated 22.11.1991 is true, valid and genuine?
2. Whether the Will is an unnatural Will fabricated by the plaintiff to defeat the right of the defendants?
3. To what reliefs the parties are entitled to?

TR.C.S.NO.556 OF 2001:

1. Whether the plaintiffs are entitled to preliminary decree for partition in respect of their 1/11th share in the plaint schedule property and for consequential delivery of possession?

2. Whether the plaintiffs are entitled for future mesne profits?

8. Arguing for the plaintiffs the learned counsel would submit that the plaintiffs have come forward with a request for issue of probate in respect of a Will executed by her mother, dated 22.11.1991 marked as Ex.P.1; that a petition for issue of a probate on the said Will was filed by the husband of the testatrix; that on objections raised by the daughters, the O.P. was converted into a suit; that on his death the legal representatives were added; that in order to prove the testament, the first plaintiff has examined himself as P.W.1; that from whose it would be clear that during the relevant period Thirupurammal was hale and healthy and was in a good and sound disposing state of mind; that in order to make some arrangements in respect of the Will property, which exclusively belonged to her, she has created Ex.P.1, testament; that it was she who gave instructions to a lawyer Mr. Manicka K. Ramalingam; that as per her instructions, the Will has been prepared by him; that Ex.P.1 was read over and explained to her, and that after understanding and accepting the contents of the same, she has executed the same in the presence of four attesting witnesses; that the plaintiffs have examined one of the attesting witnesses as P.W.2, a practicing Advocate, who has categorically deposed as to the execution of the document by Thirupurammal and the attestation of the same by the witnesses; that from his evidence it would be abundantly clear that she executed the document only after it was read over and explained to her and she had full capacity to understand; that it is not correct on the part of the defendants to say that Ex.P.1 is a fabricated one, since it did not bear the signature of Thirupurammal, but only her thumb impression found therein; that from the evidence of P.W.1 it would be clear that Thirupurammal was originally signing the document, but due to diabetes her hands were shivering, and hence, she could not sign in the document in question, but had affixed her thumb impression in Ex.P.1 document; that she was also entered into an agreement for sale, which is marked as Ex.P.3, wherein she has affixed her thumb impression and the same would go to show that she had affixed only her thumb impression in Ex.P.1

document and the defendants are unable to show any suspicious circumstances attendant on the execution of the document; and thus, the plaintiffs have proved the truth and genuineness of the document; that the available evidence would indicate that the eldest son of Thirupurammal had misappropriated the funds from the joint family business and constructed a house; that after filing of petition for probate, the widow of the predeceased son Vijayalakshmi with her children have filed a suit for partition claiming a share in the Will property; that in view of the Will executed by Thirupurammal to whom the property exclusively belonged neither Vijayalakshmi nor her children are entitled any right or interest in the Will property, and hence, the testamentary suit filed by the plaintiffs has to be decreed issuing probate in favour of the plaintiffs and the suit for partition filed by the daughter-in-law and her children has got to be dismissed with costs.

9. Strongly opposing all the contentions put forth by the plaintiffs' side, the learned counsel for the defendants would submit that the property in question exclusively belonged to Thirupurammal; that Thirupurammal and her husband P.N.Thanikachala Chettiar had seven sons and three daughters; that out of whom two sons have predeceased her mother; that Thirupurammal had equally affection to all her children and grand children; that she was bedridden and due to diabetes her right leg was removed, and hence, she could not move about for a period of six months, and apart from that due to her sickness, she was unconscious; that she was illiterate and was not in a sound disposing state of mind, and hence, she could not have executed the Will as found under Ex.P.1; that it was a fabricated one; that the plaintiffs taking undue advantage of the sickness of Thirupurammal and in order to grab her property and with an intention to disinherit the daughters' and two sons' families have created a Will like this; that Thirupurammal was in the habit of signing the document and the said fact is also admitted by P.W.1 and there was no need or circumstances for Thirupurammal to affix her thumb impression unusually; that from the evidence of D.W.1 it would be clear that she was in the practice of signing document till her life time and the same would indicate that Ex.P.1 document was a fabricated one; that due to her illness and amputation of her leg, Thirupurammal could not move about for a period of six

months prior to her death, and hence, she could not have gone out side to give instructions to her lawyer; that after the execution of the Will, a part of the property in the Will has been sold, but neither in the agreement for sale marked as Ex.P.3 nor in the sale deed, the Will alleged to have been executed by Thirupurammal has not been referred to; that had the Will as found under Ex.P.1 executed already by Thirupurammal, certainly this should have been referred to in the agreement for sale; that the same would reveal that the Will is a fabricated one and that Thirupurammal had no knowledge about the Will at all; that the Will under Ex.P.1 is also an unregistered one; that the plaintiffs have not given explanation for not examining the other attesting witnesses and thus, the plaintiffs have not dispelled the suspicious circumstances existing over Ex.P.1 Testament, and hence, the request of the plaintiffs for issue of probate has got to be refused; that added further the learned counsel that admittedly the suit property exclusively belonged to Thirupurammal, who left behind the plaintiffs in the partition suit and the defendants as her heirs; that since she died interstate, by operation of law the plaintiffs in Tr.C.S.556 of 2001 are entitled to 1/11th share, and hence, the suit filed by the plaintiffs in Tr.C.S.556 of 2001 for partition has got to be decreed with costs.

10. The plaintiffs in testamentary suit have come forward with a request for the issue of probate alleging that the mother of the plaintiffs

Thirupurammal executed her last Will and Testament on 22.11.1991 in a sound and disposing state of mind, while the plaintiffs in Tr.C.S.No.556

of 2001 sought for partition and allotment of 1/11th share in the same Immovable property, which is a subject matter of the Will.

11. The facts that are admitted by the parties can briefly be stated as follows:

One P.N.Thanikachala Chettiar and his Thirupurammal had seven sons and three daughters. Out of seven sons, two sons, namely,

P.T.Subramaniam predeceased his mother leaving behind him his wife Vijayalakshmi and his children, namely, Ashokkumar, Arunkumar and

Padmapriya and another son P.T.Viswanathan predeceased his mother leaving behind his wife Sulochana. The other son P.T.Karunakaran also

died leaving behind his wife Uma Maheswari and minor son, Appu. Thirupurammal died on 17.3.1992 leaving behind her husband

P.N.Thanikachalam Chettiar, the other sons and daughters as her heirs. During

the tendency of the testamentary proceedings, the plaintiffs 1 to 6 have been added as legal representatives, who have prosecuted the proceedings.

12. As could be seen above, the husband of Thirupurammal originally filed a testamentary original petition seeking the issue of probate alleging that his wife Thirupurammal executed her last Will and Testament on 22.11.1991. The wife of one of the predeceased sons of Thirupurammal by name Subramaniam and his children have filed the instant suit for partition alleging that the suit property exclusively belonged to Thirupurammal; that she died intestate on 17.3.1992 and that they were entitled to 1/11th share in the entire property, and thus, it has got to be allotted. The controversy that would arise between the parties is that whether Thirupurammal executed a Will on 22.11.1991 as contended by the plaintiffs bequeathing the properties to the beneficiaries there under or she died intestate.

13. The testament under challenge was produced by the propounders and marked as Ex.P.1. In order to prove the testament, one of the plaintiffs has examined as P.W.1 and one of the attesting witnesses Mr.Sureshkumar, a practicing Advocate in the High Court as P.W.2. P.W.1 has deposed that Ex.P.1 is the original unregistered Will, dated 22.11.1991 executed by his mother Thirupurammal; that at the time of execution, his mother was residing at Old No.11, New No.12, Nainiappan Naicken Street, Chintradripet, Chennai; that Ex.P.1 was prepared by Manicka K.Ramalaingam, Advocate; that he got the said Ex.P.1 Will typed; that the same was read over and explained to his mother by the said Advocate; that the same was attested by an Auditor by name Venkata Rao, Advocate by name Manicka K.Ramalaingam, P.W.2 Sureshkumar and Vidhya Poornachari, the Advocate Clerk; that Manicka K.Ramalingam and Sureshkumar arrived first; that half an hour latter his younger brother P.T.Raman brought the other two attesting witnesses and that his mother affixed her left thumb impression in the Ex.P.1 Will in the presence of all her family members except the first defendant Hemavathi; that after his mother affixed her left thumb impression, the first attesting witness signed in Ex.P.1 Will; that the house property at No.25, Dharmaraja Koil Street, Chintadripet, Chennai exclusively belonged to the testatrix. One of the attesting witnesses P.W.2 has deposed that he has signed as the third attesting witness in Ex.P.1 Will; that on 22.11.1991 his senior Manicka

K.Ramalingam and himself went to the house of the testatrix in the afternoon; that his senior has prepared the Ex.P.1 Will and took the same to the house of the testatrix; that his senior read over and explained the said Will to the testatrix; that at that time, the relatives of the testatrix were also present along with two other witnesses; that the testatrix affixed her thumb impression in Ex.P.1 in the presence of all her relatives and all the attesting witnesses; that after the same, the first attesting witness signed in Ex.P.1 Will in the presence of testatrix and all other attesting witnesses; that thereafter the second attesting witness attested the Will in the presence of the testatrix and all other attesting witnesses; that thereafter he signed in Ex.P.1 Will as attesting witness; that the testatrix, at that time, was in a sound state of mind, was able to understand all the happenings. It is true that the propounders have examined only one of the attesting witnesses. But, it remains to be stated that the evidence of the attesting witness as to the execution by the testatrix and attestation by all the attesting witnesses is cogent and acceptable. Despite lengthy cross-examination, the defendants are unable to show any reason or circumstance to disbelieve the evidence of the attesting witness. According to P.W.1, all the relatives of the testatrix, except one of his sisters, were present at the time of execution and attestation of the document. This piece of evidence is fully corroborated by the attesting witness. As could be seen from Ex.P.1 testament, Mr.Manicka K.Ramalingam, Advocate, who was one of the attesting witnesses, drafted the same. The fact that P.W.2, practicing Advocate was attached to Manicka K.Ramalingam during the relevant period is not disputed. According to attesting witness, his senior Manicka K.Ramalingam took the Will along with him when they went to the house of the testatrix; that the said document was read over and explained to the testatrix, and then only the document was executed by the testatrix, which was followed by the attestation of all the witnesses. The Court is of the view that the plaintiffs have put forth sufficient evidence, as above, to prove the execution and attestation of the testament, as required by law.

14. The contesting defendants have opposed the request only on the ground that Ex.P.1 Testament was a fabricated one; that Thirupurammal was in the habit of signing her name till the date of her death; that she never used thumb impression for execution of any document. In view of the

evidence adduced by the plaintiffs through P.W.2, one of the attesting witnesses, stating that she affixed her thumb impression in the testament, the above contention of the defendants" side cannot be countenanced. From the evidence of P.Ws.1 and 2, it would be very clear that Thirupurammal was able to understand the happenings and she was possessed of sound and disposing state of mind; that only after the Will was read over and explained to her by the Advocate Manicka K.Ramalingam, she has executed the document. Hence, it would be futile to contend on the part of the defendant that the testatrix was either unconscious or semi conscious or was unable to understand the happenings at the time of execution of the Will. It is pertinent to note that nowhere the defendants have pleaded the same in the written statement. It is also contended by the defendants" side though not raised in the written statement that her leg was amputated due to diabetes, and hence, she could not move outside for a period of six months before her death, from the evidence of P.W.2 it would be abundantly clear that a week before the execution of the document, she came to their office with her husband. The statement of P.W.1 that during that period Thirupurammal used to visit the Doctor and also go out by Auto is not disputed by the defendants. Thus, it would be clear that a week before the execution of the document, she has gone over to the office of the Advocate, Manicka K.Ramalingam and given instructions to him for the preparation of the document. After execution of the testament under challenge, dated 22.11.1991, the testatrix had executed an agreement for sale on 20.2.1992 in favour of one Baduru Zaman in respect of a part of the house property at D.No.25, Dharmaraja Koil Street, which is the subject matter of the Will. According to P.W.1, his mother had executed a general Power of Attorney on 26.11.1992 in favour of his father. The above said sale agreement executed by Thirupurammal in favour of the third party is marked as Ex.P.3. It is pertinent to note that Thirupurammal has affixed her thumb impression in the said document. It remains to be stated that the contesting defendant have not questioned either the sale agreement or the Power of Attorney executed in favour of the husband of Thirupurammal or the subsequent sale made in favour of the agreement holder. It is contended by the plaintiffs" side that it is true that Thirupurammal was in the habit of signing all along, but she was unable to do so because she developed shivering in her hands due to Diabetes,

and hence, she used to affix her thumb impression. The evidence of P.W.1 that Thirupurammal affixed her thumb impression in Ex.P.1 testament is

fully corroborated by the evidence of P.W.2, attesting witness, when coupled with the fact that she affixed her thumb impression in an agreement

for sale made by her subsequent to the testament would point to the truth of the plaintiffs' case that during the relevant time, Thirupurammal was

unable to sign due to Diabetes and was only affixing her thumb impression. D.W.1 has candidly admitted that during the relevant time,

Thirupurammal used to talk about the family matters would clearly deny the defendants' version that she was unconscious and lost her mental

faculty.

15. The learned counsel appearing for the contesting defendants would submit that one of the strong circumstances attendant on the testament was

the exclusion of two sons' families and distribution of meagre sums to the three daughters; that Thirupurammal, who was equally affectionate to all

her children, could not have done so, and thus, this would indicate that the document is a fabricated one. It is not the case of the defendants' that

the document is an outcome of undue influence or coercion or by exertion of external force or suffering from any one of the invalidating factors. A

reading of the testament under challenge would indicate that it was a voluntary one and an outcome of volition and free will of the testatrix. The

testatrix herself has stated the reasons why she excluded the family of the first predeceased son. From the available evidence it would be clear that

after one year from the death of her husband, his wife the contesting third defendant has left the family with her children and has constructed a

house at Anna Nagar and she performed "Grahapravesam" even without inviting her father-in-law and mother-in-law. Her evidence that she was

very cordial to the father-in-law and mother-in-law and she used to meet them often has got to be rejected in view of her admission that she even

did not attend the funeral. This would indicate that the relationship of the contesting third defendant with her father-in-law and mother-in-law was

strained, and thus, Thirupurammal had reason to exclude her first son's family. It is recited in the testament that the wife of predeceased second

son had married one Nagabhushanam and was living with him. This fact is not disputed by the contesting defendant, and hence, Thirupurammal had

reasons to exclude the wife of her predeceased son, namely, Viswanathan. Insofar as the three daughters are concerned, it cannot be stated that the testatrix has excluded them. It is an admitted position that the marriage of all the three daughters were performed by the parents and were well settled in their life. Under such circumstances, there were all possibilities for the testatrix to give a direction to the executor to pay Rs.20000/- each. It is pertinent to note that the father of the contesting defendant Thanikachalam Chettiar was well alive at the time of execution of the testament and the testatrix has appointed him as executor under the document. All the above would go to show that Thirupurammal has wanted to make arrangement in respect of her property and out of her free will and volition she executed Ex.P.1 testament. Thus, the Court is unable to see any suspicious circumstances attendant over the testament and the Ex.P.1 Testament is a true, genuine and valid document. The Division Bench of this Court in a case reported in 2001 3 CTC 283 (CORRA VEDACHALAM CHETTY, 17 OLD NO.45, STROTEN MUTHIAH MUDALI STREET, MADRAS 600 079 AND ANOTHER VS. G. JANAKIRAMAN) have held as follows:

Law of Wills: Duty of probatory court in testamentary jurisdiction-Testamentary court is court of conscience-It is not court of suspicion-Court will not start with presumption that will is not genuine-Object of probate proceedings is not to render will ineffective but to make it effective and render terms of will operative-Court has to see that testator is not available to depose-Court should be cautious while dealing with evidence placed before him in relation to execution and attestation and state of mind of testator-Court cannot allow exploitation of this caution by unscrupulous caveators who choose to cull out imaginary suspicion to render will ineffective

In Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another, the Supreme Court has held thus:

The mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by S. 63 of the Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient

to discharge the onus.

Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court

accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The

suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made

in the will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the

testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the

document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a

substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and

satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be

unnatural and might cut off wholly or in part near relations. Any and every circumstance is not a "suspicious" circumstance. A circumstance would

be "suspicious" when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

If the above judicial pronouncements are applied to the present facts of the case, the court is of the view that the plaintiffs have satisfied the

conscience of the court and that the plaintiffs have dispelled all the suspicious circumstances attendant on the testament. It has to be necessarily

held that the plaintiffs have proved the Ex.P.1, Will in the manner as required by law and that Ex.P.1 Will is true, genuine and valid and the same

has been executed by Thirupurammal in a sound and disposing state of mind. Hence, the plaintiffs are entitled to the relief as asked for. Issues are

answered accordingly.

16. In the result, the suit in TOS No.5 of 1995 is decreed, leaving the parties to bear their costs. Issue probate in favour of the plaintiffs as asked

for. Consequently, connected application is closed.

17. In the result, the suit in Tr.C.S.No.556 of 2001 is dismissed. There shall be no order as to costs.