

(2002) 07 MAD CK 0059
In the Madras High Court
Case No : T.O.S. No. 25 of 1987

Yashoda Bai, Lodd Narendradas and Lodd Jayendradas

APPELLANT

Vs

Dr. Lodd Surendradas

RESPONDENT

Date of Decision : 25-07-2002

Acts Referred:

Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63

Citation : (2002) 07 MAD CK 0059

Hon'ble Judges : M. Chockalingam, J

Bench : Single Bench

Advocate : A. Seshan, for the Appellant; N. Varadarajan, for the Respondent

Judgement

M. Chockalingam, J.—This suit has been filed for the issue of probate in respect of the last Will and testament executed by Lodd

Balamukundas on 2.3.1975.

2. The averments in plaint are as follows:

One Lodd Balakukundas, the testator of the Will, dated 2.3.1975, died on 19.2.1981. The deceased left behind him his wife, four sons and five

daughters. The said Lodd Balamukundas executed his last Will and Testament at Madras on 2.3.1975 in the presence of the witnesses. The

plaintiffs are the sole executors named in the said Will. The amount of the assets which are likely to come into the hands of the plaintiffs does not

exceed in the aggregate sum of Rs.2,65,902/- and the net amount of the said assets after deducting all items which the plaintiffs are by law allowed

to deduct is the value of Rs.2,64,902/-. The plaintiffs undertook to duly administer the properties and credits of the said Lodd Balamukundas and

in any way concerning his Will by paying first his debts and then to the legacies

therein bequeathed so far as the assets will extend and to make full and true inventory thereof and exhibit the same before this court within six months from the date of grant of probate to the plaintiffs. Hence, for all the reasons stated above, the suit has got to be decreed as prayed for.

3. The defendant has filed a written statement stating that the Will dated 2.3.1975 alleged to have been executed by the deceased, Lodd

Balamukundas is not true, valid and binding on this defendant; that he was not in a sound disposing state of mind at the time of execution of the

Will; that there are several intrinsic and suspicious features and circumstances to show that the alleged Will is not a true and valid one; that the

building bearing Door No.25 (New No.48), Raghunayakalu Street, Madras-3 did not belong to the deceased; that it is a trust property, and

hence, the suit has got to be dismissed with costs.

4. On the pleadings by the respective sides, the following issues were framed:

1. Is the Will dated 2.3.1975 executed by Lodd Balamukundas true and genuine?

2. To what reliefs are the plaintiffs entitled to?

5. The plaintiffs have filed this suit for issue of a probate alleging that the husband of the first plaintiff and the father of the plaintiffs 2 and 3 Lodd

Balamukundas executed his last Will and Testament on 2.3.1975 at Madras in the presence of two witnesses. One of the sons of the testator Dr.

Lodd Surendradas has contested the suit by stating that the said Will is not true, valid and binding on him; that the same was not executed by his

father in a sound and disposing state of mind; that there was no valid execution and attestation, as required by law; that there are so many intrinsic

and suspicious features and circumstances to show that the alleged Will was not a true and valid one.

6. On the side of the plaintiffs, P.W.1 to P.W.3 were examined and Ex.P.1 to Ex.P.5 were marked. There was no evidence on the side of the defendant and no document was marked.

7. Arguing for the plaintiffs, the learned counsel would submit that the plaintiffs originally filed a petition seeking this court to probate the Will of

Lodd Balamukundas, the husband of the first plaintiff and the father of the second and third plaintiffs and on caveat by the defendant's side, the

same has been converted into a testamentary suit; that the testator Lodd

Balamukundas had lot of immovable properties at Madras, Thiruvellore and Ranipet; that the testator was active till his life time and was possessed of sound mind throughout; that he had number of litigations pending in Court; that for instance, two suits in O.S.Nos.4346 and 5399 of 1974 were pending on the file of the City Civil Court, Madras; that after full trial, common judgment was rendered on 18.3.1980; that the plaintiffs have filed a printed copy of the common judgment under Ex.P.3; that apart from that the tenant filed a suit in O.S.No.8662 of 1972 on the file of the City Civil Court, Madras; that a judgment, dated 5.1.1976 was rendered as found in Ex.P.4; that all his children were married and settled in life even during his life time and he used to often visit his daughters, who are in different States in north India; that he used to have trips by train; that he was managing all his properties throughout his life; that the testator, who desire to make arrangement in respect of the properties, executed Ex.P.1 Will; that Ex.P.1 would clearly reveal that it was in his handwriting; that after the preparation of the same, he has taken the said document to his standing counsel Mr. Venkatesan for execution and attestation; that in order to prove the proper execution and attestation, the plaintiffs have examined P.W.3, who is a practising lawyer and was attached to the office of Mr. Venkatesan for nearly 30 years; that the said witness has clearly spoken about the valid execution and attestation of the said document; that there are no suspicious circumstances attendant over the Will; that it is significant to note that the testator has created a life interest in favour of his wife and has given reminder to his five daughters and has not bequeathed anything to the second and third plaintiffs herein; that if the plaintiffs had desire to grab the property, they could have well exercised their influence to get any one of the properties in their favour, but they have not done so and the same would indicate that the testament was an outcome of a free will and volition of the testator and the plaintiffs 2 and 3 had no role to play in the preparation, execution and attestation of the document; that the defendant have not made out any defence except the bald assertions that the testator was not in a sound and disposing state of mind and thus the plaintiffs have proved that the Will under Ex.P.1 is a true and genuine one, as required by law, and hence, probate has got to be issued in their favour.

8. Countering to the above contentions of the plaintiffs" side, the learned counsel

for the defendant would submit that Ex.P.1 testament in respect of which, the plaintiffs have come forward with a request to issue probate is neither true nor genuine; that the plaintiffs have not proved the execution and attestation as required by law; that there was no occasion for Lodd Balamukundas to execute the testament; that it is true that the testament is in the handwriting of the said Balamukundas and it bears his signature also; that P.W.2 has admitted in his evidence that he know Mr. M.K. Hidayathullah, attesting witness examined as P.W.3, for a long time; that on a careful scrutiny of the evidence of P.Ws.2 and 3 would indicate that P.W.3 in order to oblige his friend has subscribed his signature as attesting witness after a long time, i.e. after the demise of Balamukundas; that P.Ws.1 and 2 have categorically deposed that they had no knowledge about the execution of the document and they came to know about the same after the death of Lodd Balamukundas; that on the contrary P.W.3 has deposed that they had knowledge about the execution of the Will; thus this would cast a doubt whether P.W.1 and P.W.2 had a role to play in the preparation, execution and attestation of the Ex.P.1,document; that Lodd Balamukundas, who had lot of litigations and used to attend the court every day, could not have chosen to write a Will by himself and Ex.P.1 is also an unregistered one and this would cast a doubt about the truth and genuineness of Ex.P.1 Will and thus, the plaintiffs have not proved the execution and attestation of the Will as required by law and in view of the suspicious circumstances attendant over the document, the court has to necessarily dismiss the suit.

9. The plaintiffs have come forward with a request to probate Ex.P.1 Will, an unregistered one alleging that Lodd Balamukundas, the husband of the first plaintiff and the father of the plaintiffs 2 and 3, executed the same on 2.3.1975. Admittedly, the testator Lodd Balamukundas, a native of Gujarat, who settled down at Madras, had his wife, the first plaintiff herein, four sons and five daughters. All his sons and daughters were married during his life time and no one was depending on him. He possessed lot of immovable properties, both house properties and agricultural lands, at Madras, Thiruvellore and Ranipet and till his life time he was managing the said properties. He had lot of litigations pending in Courts and he was attending the same also. Leaving behind his wife, four sons and five daughters

as heirs, Lodd Balamukundas died on 19.2.1981 as evidenced by Ex.P.2 death certificate.

10. In order to prove the testament, the plaintiffs 2 and 3 have examined themselves as P.W.1 and P.W.2 and have examined one of the attesting witnesses as P.W.3. The plaintiffs have filed an affidavit stating the consent of all his sisters for granting of probate in favour of the plaintiffs. Both P.W.1 and P.W.2 have deposed that their father Lodd Balamukundass was active and not suffering from any illness and was in a sound and disposing state of mind till his life time. P.W.1 has categorically deposed that his father was attending the maintenance of the house and all other works till his life time; that he used to visit his daughters residing in northern State for quite a number of occasions; that he used to go alone by train; that he used to go on pilgrimage; that he was managing all the family properties and used to attend the cases pending in Court; that he had two cases pending in City Civil Court in O.S.Nos.4346 of 1974 and 5399 of 1974; that Ex.P.3 is the common judgment dated 18.3.1980 rendered by the City Civil Court, Madras in O.S.No.4346 of 1974 and O.S.No.5399 of 1974; that Ex.P.4 is the certified copy of the judgment, dated 5.1.1976 in O.S.No.8662 of 1972 on the file of the City Civil Court, Madras; that in all the above suits, he has appeared before the Court and also deposed as witness. It is pertinent to point out that all the above statements by P.W.1 in his evidence are not disputed by the defendant's side.

The court is of the view that the above evidence, both oral and documentary, would be sufficient to find that the said testator was active and had sound and disposing state of mind during the relevant time.

11. One of the attesting witnesses, M.K. Hidayathullah, examined as P.W.3, who is a practising Advocate of this Court from 1972, has deposed in his evidence that he was closely associated with one Mr. A. Venkatesan right from the beginning of his service in the year 1972; that the testator Lodd Balamukundas was the client of Mr. Venkatesan; that it was the testator, who brought Ex.P.1, Will to the residence of Mr. Venkatesan and informed him that he has already prepared the Will and consulted with Mr. Venkatesan whether he had written the Will in order; that this witness gave his consent to attest the Will. Added further the attesting witness P.W.3 that the testator signed in Ex.P.1 Will in the presence of himself, Mr.

Venkatesan and other attesting witness, Dayal Prasad; that the witness signed as the first attesting witness and following the same, the second attesting witness Dayal Prasad signed in the Will in the presence of the testator; that at the time of the execution of the Will by the testator, both the attesting witnesses were present. An affidavit sworn by P.W.3 narrating all necessary facts as to the execution and attestation has been filed by the plaintiffs. From the evidence of P.W.3 it would be abundantly clear that at the time of execution of the Will, the testator was good mental and health condition. It is true that the plaintiffs have examined only one attesting witness. The defendant's side is unable to show any reason or circumstances to disbelieve his evidence. On careful scrutiny of his evidence, the court is of the view that his evidence is natural, acceptable and trustworthy, apart from the evidence as stated above.

12. Many are the circumstances pointing to the truth and genuineness of the document. According to the plaintiffs, Ex.P.1 testament is in the handwriting of the testator, Lodd Balamukundas. P.W.3 has categorically deposed that Ex.P.1 testament was executed by Lodd Balamukundas in his presence. It is significant to note that neither handwriting nor the signature of the testator in Ex.P.1 is disputed by the defendant. The

Honourable Supreme Court in a case reported in *Joyce Primrose Prestor Vs. Vera Marie Vas and Others*, has held as follows:

While the presumption in the case of ordinary Wills is as stated above, in the case of "holograph Wills", the presumption is all the more a greater presumption. Ex.P.1 is a "holograph Will". It is one which is wholly in the handwriting of the testator. The Calcutta High Court in *Ajit Chandra*

Majumdar Vs. Akhil Chandra Majumdar, stated about such a Will, thus: "The whole of this Will was written in the hand by the testator himself in

English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of a holograph Will for the very good

reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph Will than where his signature alone

appears to either a typed script or to a script written by somebody else.

The recitals in the testament would clearly indicate that it was an outcome of the free will and volition of the testator. It remains to be stated that the

Will was written by the testator himself. A perusal of the testament would reveal

that the testator has given life estate to his wife Yashodabai and thereafter the properties should go to all his five daughters, after retaining some of the properties for certain charities to be done in his name. The testament reads ""while I am in a proper health and proper mind and understanding execute this testament of last Will."" Thus it would be clear that the plaintiffs 2 and 3 were not at all beneficiaries under the Will.

13. It is not the case of the defendant that the plaintiffs had any role to play or had they participated in the preparation of Ex.P.1, Will. It remains to be stated that Ex.P.1 is a holograph Will. It is not even their case that the executors were present at the time of execution of the document. There is nothing to suggest that either P.W.1 or P.W.2 was present at the time of execution or attestation of the document. The Will, under challenge, was executed by the testator on 2.3.1975 and he died on 19.02.1981 as evidenced by Ex.P.2. Thus, it would be clear that after the execution of the document, the testator had lived for six years, during which period, he has attended his litigations and participated in the proceedings by giving evidence also before Court. Had it been true that the Will has come into existence under any influence or an outcome of any external force, the testator could have well revoked or cancelled the same. It is an admitted position that the plaintiffs 2 and 3 were living all along with the testator and if they have any intention to grab the property, they could have taken advantage of the situation and obtained the document in their favour, but they have not done so.

14. It is not the case of the defendant that the testator is tainted with any invalidating factors, like undue influence, coercion, misrepresentation, etc.

Under the stated circumstances, the contentions of the defendant's side that the testator was not in a sound disposing state of mind and there was

no valid execution and attestation cannot be countenanced. Quite evident from the discussions made above that the plaintiffs have clearly proved

by adducing oral and documentary evidence that the testator was in a good and sound disposing state of mind at the time of execution of Ex.P.1

Testament; that there was execution and attestation of the same, as required by law. While the plaintiffs have adduced sufficient evidence as stated

above, the contesting defendant has not examined himself either to contravert the plaintiffs' case or to put forth his defence. After careful scrutiny

of the available evidence, the court has to necessarily reject the contention of the defendant's side that there were suspicious circumstances

attendant over the testament. The Court may hasten to say that there are no suspicious circumstances at all, which would throw a doubt on the

truth and genuineness of the testament. It is true that P.W.1 and P.W.2 have deposed that they came to know about the Will few months after the

death of their father. The evidence of P.W.3 would indicate that P.W.1 and P.W.2 had the knowledge about the Will. It is true that it strikes a

doubt, but this cannot be a circumstance to reject the Will in the instant case in which by ample, sufficient and acceptable evidence proved to be

true and genuine. The Apex Court in a case reported in *Gurdial Kaur and others Vs. Kartar Kaur and Others*, has held as follows:

The law is well stated that the conscience of the Court must be satisfied that the Will in question was not only executed and attested in the manner

required under the Indian Succession Act, 1925, but it should also be found that the said will was the product of the free volition of the executant

who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious

circumstance, the obligation is cast on the propounder of the will to dispel suspicious circumstance.

A Division Bench of this Court comprising their Lordships R. Jayasimha Babu and K. Gnanaprakasam, JJ., in a case reported in 2001 3 CRC 283

(*CORRA VEDACHALAM CHETTY AND ANOTHER VS. G. JANAKIRAMAN*) had occasion to consider the duty of the probatory court in

testamentary jurisdiction have held as follows:

25. The testamentary Court is a Court of conscience. It is not a Court of suspicion. It is not the law that, whenever a Will is sought to be proved

in the Court, the Court should start with the presumption that the Will is not genuine, that it is fraudulent and that the person who chooses to

probate the Will must remove all such suspicious even they are not unreal. The object of the probate proceedings is not to render the testamentary

document ineffective but to make it effective and render the terms of that Will operative. In doing so, the Court has to take note of the fact that the

testator is not available to the Court to state as to whether the document in fact was his or her last Will or as to whether he or she had signed the

same and whether the attestors had signed receiving an acknowledgement from him about the execution of the Will. It is for that reason that the

Courts should be cautious while dealing with the evidence placed before them in relation to the executions and attestation, of the Will as also the

disposing state of mind of the testator.

26. This need for caution, cannot be exploited by unscrupulous caveators who choose to cull out imaginary suspicious with a view to prevent the

legatees under the Will from claiming the benefit thereunder and to render the last Will of the deceased wholly ineffective. In this context, the

conduct of the persons who raise the alleged ground for suspicions sought to be raised by such persons. In this case, the suspicion is sought to be

raised by a person who is keenly interested in making the Will ineffective and whose conduct is far from one which would inspire confidence in

truthfulness of his statements.

Needless to say that the Will is to be proved in the same manner as any other document. In addition to such proof, the requirements u/s 63 of the

Succession Act and Section 68 of the Evidence Act have to be satisfied. A duty is cast upon the court of testamentary jurisdiction to take into

account all materials available whether to believe that the testament was duly executed by the testator or such execution being probable, if the

conscience of the Court is satisfied by the propounder of the Will adducing evidence to dispel any suspicious or unnatural circumstances attached

to the Will. In the instant case, the court may hasten to say that the plaintiffs have established affirmatively that the testament is in the handwriting of

the testator, the testator was aware of the contents of the Will and was in sound state of mind while executing the Will. For all the above, the court

has to necessarily find that the challenge made by the contesting defendant is unfounded and baseless and has to hold that Ex.P.1 Will is true,

genuine and valid document.

15. In the result, this suit is decreed. Issue probate in favour the plaintiffs. There shall be no order as to costs