

CASE NO.:
Appeal (civil) 4009 of 1998

PETITIONER:
Joseph Antony Lazarus (Dead)By Lrs

RESPONDENT:
A.J. Francis

DATE OF JUDGMENT: 03/04/2006

BENCH:
B.P. Singh & Altamas Kabir

JUDGMENT:
J U D G M E N T

Altamas Kabir, J.

One Mrs. Solomon Lazarus was the owner of Plot No. 85, Trustpuram Scheme, since re-numbered as No.9, III Cross Street, Trustpuram, Kodambakam, Madras \026600024. She died on 27th November, 1983 at Madras leaving behind her surviving two daughters, namely, Mrs. Wood and Mrs. A.J. Francis and four sons, namely, Joseph Lazarus, Cecil Lazarus, Benjamin Lazarus and Thomas Lazarus. It appears that Mrs. Solomon Lazarus executed a Will dated 5th July, 1979 in the presence of witnesses, but the same was registered with the Sub-Registrar, Kodambakam, on 7th July, 1980.

One of the sons of the deceased, Joseph Antony Lazarus applied for grant of probate of the Will on 18th October, 1984 and the same was numbered as O.P. No. 300/1984. In his application, the propounder did not disclose the names of any other persons having an interest in the estate of the deceased and consequently probate was granted to him on 18th October, 1984. One of the two daughters of the deceased, Mrs. A.J. Francis, filed an application, being No.463/1985, in the probate proceedings praying that the probate granted to Joseph Antony Lazarus be revoked since she had not been made a party to the proceedings despite being the daughter of the testatrix. On 28th February, 1985, the learned Single Judge who had granted the probate earlier, revoked the said grant and upon such revocation, the application filed by Joseph Antony Lazarus was re-numbered as T.O.S.No.11/1985 with Joseph Antony Lazarus as plaintiff and Mrs. A.J. Francis as the defendant, to consider the question whether the Will dated 5th July, 1979 said to have been executed by Mrs. Solomon Lazarus was valid and genuine or not or whether the Will had been vitiated by coercion and undue influence by the beneficiary therein.

For an understanding of the case made out by the parties, the facts in brief are set out hereinbelow:-

Mrs.A.J. Francis, the respondent in this appeal, claimed in her application for revocation of the grant of probate in favour of Joseph Antony Lazarus that her mother, Mrs. Solomon Lazarus, was working as a House Keeper in Raj Bhavan, Madras, on a meagre salary and had retired from service in the early 1950s. The elder sister of the respondent was married in 1951 and had left the family. The respondent was married to one D.A.J. Francis who was working as II Engineer on a vessel which required him to leave India from

time to time. As a result, the respondent was staying with her mother in Madras. The further case made out by the respondent is that in 1955 her husband applied to the City Improvement Trust, Mount Road, Madras, to enable him to get a house-site allotment in the city of Madras. Pursuant thereto, he was allotted Plot No.85, Trustpuram Scheme which was subsequently re-numbered No.9, III Cross Street, Trustpuram, Kodambakam, Madras- 600024, which was the subject-matter of the purported Will.

It was also the case of the respondent that in 1956 upon the City Improvement Trust insisting that only residents of the city of Madras were eligible to be included in the housing scheme contemplated by the City Improvement Trust, the respondent and her husband decided to transfer the allotment standing in the name of D.A.J. Francis to Mrs. Solomon Lazarus on the understanding that Mrs. Solomon Lazarus would be permitted to stay and enjoy the property till her life time and after her death it would be handed back to D.A.J. Francis, the respondent's husband. As the only earning member in the family at the relevant time, the respondent's husband continued to pay all the installments to the City Improvement Trust as decided in the family arrangement. On the basis of the aforesaid decision, the respondent's husband wrote to the Chairman of the City Improvement Trust on 7th May, 1956 requesting him to transfer the allotment of the plot in favour of Mrs. Solomon Lazarus. The plot was accordingly transferred in the name of Mrs. Solomon Lazarus.

Subsequently, the respondent's husband got a job in Madras but the respondent and her husband stayed in rented accommodation since the house at No.9, III Cross Street, Trustpuram, was not sufficient to accommodate all the members of the family. However, on the death of Mrs. Solomon Lazarus on 27th November 1983, the respondent requested the appellant herein to make over vacant possession of the house to her husband, but such request was met with refusal by the appellant. The respondent's husband thereupon filed a suit for declaration and possession, being O.S.No.8861/1984 before the learned Judge, 12th Court, City Civil Court, Madras, in respect of the aforesaid house property situated at No.9, III Cross Street, Trustpuram, Madras against the appellant herein and the other legal heirs of Mrs. Solomon Lazarus. The said suit is said to be pending final decision.

The respondent questioned the validity and genuineness of the Will said to have been executed by Mrs. Solomon Lazarus in respect of the aforesaid property considering the physical and mental state of the testatrix prior to her death from the year 1970 onwards. According to the respondent, the alleged Will could not have been executed by Mrs. Solomon Lazarus voluntarily and if at all the Will had been executed by her, it could only have been done under duress and coercion by the appellant herein and other family members who were residing with her at the time of her death.

On the other hand, it was contended on behalf of the appellant that the property in question belonged to the testatrix and that it was the appellant and his brother now staying in Muscat who had paid the installments of the house property and had looked after and cared for the testatrix till her death. It was in recognition of the said fact that Mrs. Solomon Lazarus had executed a Will bequeathing the said house property to the respondent and his brother, Cecil Lazarus, and made both of them executors of her said Will. The appellant also claimed that as would appear from the recitals in the Will, the testatrix had mentioned the fact that

her two daughters had been married and had been provided for and that the appellant and the said Cecil Lazarus had not only looked after and cared for her but had also paid the installments for the house in question.

It was in this background that the learned Single Judge decided the suit in favour of the appellant herein upon holding that there were no suspicious circumstances which were sufficient in itself to indicate that the Will was not genuine. On the other hand, the learned Single Judge held that the plaintiff had been able to prove the proper execution and attestation of the Will and was, therefore, entitled to grant of probate of the Will.

In arriving at the aforesaid finding, the learned Single Judge also came to the conclusion that the testatrix was sufficiently in possession of her mental faculties to execute the Will and that there was no evidence to indicate that the testatrix was under the control of the appellant herein or that she was physically or mentally incompetent to execute the Will.

Even on the question of coercion and undue influence, the learned Single Judge was satisfied that such an allegation had not been proved. The learned Judge held that the defendant, namely, the respondent herein had miserably failed to prove that influence had been exercised by the appellant herein on the testatrix and that the Will was the result of such influence.

The respondent herein preferred an appeal before the Division Bench of the High Court of Judicature at Madras, being O.S.A.No.45/1991. Upon consideration of the case made out by the respective parties, the Appeal Court reversed the findings of the learned Single Judge and dismissed the appellant's application for grant of probate on various grounds.

The Division Bench firstly noticed that at the relevant time, the testatrix was 83 years old and not fully fit physically, notwithstanding the case of the appellant that despite her physical condition, she was mentally alert and was capable of understanding everything that she did. Despite the denial by the plaintiff's wife (PW-4), who was also an attesting witness and identifying witness, that the testatrix had undergone an operation before the registration of the Will, the Division Bench found that the testatrix had in the year 1975 fallen and broken her thigh bone for which she had to be taken to Vellore and operated upon. In the year 1979, the testatrix fell down again and broke the same bone after which she had to undergo an operation and steel plates had to be inserted in her thigh.

The Division Bench also took note of the fact that of the four sons of the testatrix, the plaintiff, namely, the appellant herein (PW-1) alone was residing in the suit house and that of the three other sons, Cecil Lazarus, the only other beneficiary under the Will, was residing in Sharjah, Saudi Arabia, while Benjamin Lazarus was residing at St. Thomas Mount, Madras and Thomas Lazarus was said to be staying in Deharan, Saudi Arabia. At the time of the execution of the Will on 5th July, 1979, in the suit house only PW-2, one Mr.N.K. Sami, the plaintiff and his wife (PW-4) were present. The Will is said to have been drafted on the instructions of the testatrix by an advocate, Mr. K. Venkataraman. The Division Bench noted that neither the learned advocate who has said to have drafted the Will nor the Sub-Registrar before whom the Will was registered, had been examined as witnesses on behalf of the plaintiff/appellant. The Division Bench concluded that there was no proof that the document had ever been read over and explained to the testatrix before the same was registered.

Apart from the above, the Division Bench commented on the fact that admittedly Cecil Lazarus had gone to Sharjah in Saudi Arabia in or about the year 1963 and there was no evidence to show that he had been sending any remittance from Sharjah to the testatrix. Furthermore, although the testatrix had two other sons, besides the two beneficiaries under the Will, there is absolutely no reference to the two other sons in the Will as to why they were being excluded from the Will and were denied their share in the property.

The last circumstance which weighed with the Division Bench was the fact that the testatrix is alleged to have signed the Will as Mrs. M. Solomon Lazarus, whereas according to the respondent herein, she always signed her name as Mrs. Solomon Lazarus. It was noticed by the Division Bench that the testatrix purportedly signed as Mrs. M. Solomon Lazarus on the different pages of the Will and twice on each page once when the Will was executed and next on the request made by the Sub-Registrar before whom the Will was registered. The Division Bench took note of Ext.D-2, a postal acknowledgement, where the testatrix has signed as Mrs. Solomon Lazarus, in coming to the conclusion that there was considerable doubt about the genuineness of the disputed Will.

Since the Will came from the custody of the plaintiff, the appellant herein, (PW-1), the Division Bench also took note of the fact that the Will had not been disclosed by the appellant till such time when the respondent's husband called upon him to vacate the suit property. The Division Bench set aside the judgment and decree of the learned Single Judge on the aforesaid findings and the present appeal is directed against the said judgment of reversal of the Division Bench of the Madras High Court.

The same submissions as were advanced before the learned Single Judge of the Madras High Court in favour of grant of probate has also been advanced before us by Mr. K.K. Mani, learned advocate appearing for the appellant. The main thrust of his submission was that the testatrix was no doubt old and advanced in years, but there was no material to show that she had either lost or impaired her physical and mental faculties to such an extent as would prevent her from consciously executing the Will which had been drafted on her instructions. It was submitted that the Will had been duly proved by the attesting witnesses and by an independent witness, who was a Sub-Registrar and there was no reason to disbelieve his testimony.

On the question of two signatures appearing on each page of the Will, it was submitted that the same could not be said to have created any suspicious circumstances relating to execution of the Will since the attesting witnesses and the witness who had introduced the testatrix to the Sub-Registrar at the time of registration had all in one voice supported the case for grant of probate by deposing that the Will had been signed, executed and registered in their presence. It must be mentioned at this stage that despite service of notice no one has appeared to represent the respondent during the hearing. In such circumstances, the responsibility of looking into the genuineness of the Will becomes all the more onerous and the entire circumstances leading to the execution and registration of the Will has got to be scrutinized carefully.

It will be injudicious to suggest, as has been held by the learned Single Judge of the Madras High Court, that there are no suspicious circumstances surrounding the execution and registration of the Will. It is difficult to understand as to why the testatrix omitted to mention two of her sons in the Will

although she has taken great pains to mention the fact that the appellant herein and her other son, Cecil Lazarus, had looked after her and had paid all the installments towards the house property, even though Cecil Lazarus had gone to Sharjah as far as back as in 1963 and only the appellant was living with her in the house being the subject matter of the bequest in the Will. That the testatrix was of very advanced age is admitted. It is also established that she had suffered a fall and had broken her thigh bone twice and that she had to be operated on both the occasions and that she was keeping indifferent health from after her first fall. That by itself may not be sufficient to prove that she was incapable of executing the Will, but the defendant's contention that the appellant took advantage of the mishap and the subsequent dependence of the testatrix to influence her to make the Will in his favour and in favour of another brother who was not even residing in India will have to be taken into consideration while deciding the aforesaid question.

Apart from the above circumstances, what is perhaps of even more significance is the existence of the two signatures on each page of the Will, said to be those of the testatrix. It may be remembered that while the Will is dated 5th July, 1979, the same was registered on 7th July, 1980 after more than a year. Except for the Will, no other document has been produced by the appellant to indicate that the deceased ever signed her name as Mrs. M. Solomon Lazarus notwithstanding the fact that it was attempted to be explained that her middle name was Martha and that at times she signed her name as Mrs. M. Solomon Lazarus and at other times simply as Mrs. Solomon Lazarus. Having regard to the peculiarity of the explanation sought to be given, we examined the photo copy of the Will which was in the records and to the naked eye it is quite evident that the two signatures are entirely different and have little or no likeness whatsoever.

The last and perhaps the most significant aspect of this matter is the failure of the appellant to examine the learned advocate who is said to have drafted the Will on the instructions of the testatrix and the non-examination of the Sub-Registrar before whom the Will is said to have been presented for registration. Both the said witnesses could have conclusively proved the facts relating to the preparation, execution and registration of the Will. In the absence of any evidence, we are unable to ascertain as to whether the Will was ever read over and explained to the testatrix before she is said to have executed and presented the same for registration.

The cumulative effect of all the circumstances taken together gives rise to a genuine doubt regarding the genuineness of the Will and as to whether the same had, in fact, been executed by the testatrix and, if so, of her own free volition.

In the circumstances aforesaid, we see no reason to differ from the view taken by the Division Bench of the Madras High Court. Consequently, the appeal stands dismissed, but in the facts and circumstances of the case the parties will bear their own costs.