

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
(TESTAMENTARY AND INTESTATE JURISDICTION)

THURSDAY, THE 7TH DAY OF JUNE 2012

THE HON'BLE MR. JUSTICE V.PERIYA KARUPPIAH

A.No. 3102 OF 2007

IN

TOS. No. 5 OF 2000

In the matter of the Indian  
Succession Act XXXIX of 1925  
And  
IN the matter of the Last  
Will and Testament of  
Mrs.Grace Winfred - Deceased

D.J.S.Winfred  
residing at No.97,  
Apparsamy Koil Street,  
Mylapore, Madras - 600 004.

... Petitioner

-Vs.-

1. P.J.Gunaseelan Abraham
  2. Manoharan Stephen Abraham
  3. Silvia Nirmal
  4. Nirmala Santhosham
  5. Prameela Devadoss
  6. Ireen Paul
  7. Jawahar Ravindran
  8. Rai Suresh
  9. Iris Packia Durai
- All residing at  
No.7, Casamajor Road,  
Madras-8.

(Respondent are impleaded as per  
Order in A.No.3338/99 dt. 28.09.99)

... Respondents

**A.No. 3102 OF 2007**

Frank Samuel Arul

... Applicant/Proposed 10th  
Defendant

-Vs.-

<https://hcservices.ecourts.gov.in/hcservices/> D.J.S.Winfred

... Respondent/Plaintiff

2. Mr. P.J.Gunaseelan Abraham

3. Dr. Manoharan Stephen Abraham
  4. Sylvis Nirmal
  5. Prameela Devadoss
  6. Nirmala Santhosam
  7. Ireen Paul
  8. Jawahar Ravindran
  9. RoySuresh
  10. Iris Packia Durai
- .. Respondents/Respondents

Application praying that this Hon'ble Court be pleased to pass an order impleading the proposed party as 10th Defendant in the above suit enabling the Applicant to participate in the above suit proceedings.

This Application coming on this day before this court for hearing the court made the following order:

This application is filed by the applicant / 3<sup>rd</sup> party seeking to implead him as proposed 10<sup>th</sup> defendant in the suit in order to enable him to participate in the proceedings.

2. Heard Mr.S.Jegannathan, learned counsel for the applicant / 3<sup>rd</sup> party and Mr.K.Harishankar, learned counsel for the first respondent / plaintiff and Mr.S.W.Kanagaraj, learned counsel for the respondents 2 to 6 / defendants 1 to 5. No appearance for the respondents 7 to 10 / defendants 6 to 9.

3.The learned counsel for the applicant / third party would submit in his argument that the applicant was the son of one Mrs.Gladys Florence Arul, who was the sister of Mrs.Grace Winfred and both of them were daughters of Mr.S.Sathyanathan, who was the absolute owner of the suit

property. He would further submit in his arguments that the said Sathyanathan died leaving his two daughters, viz. Mrs.Grace Winfred and Mrs.Gladys Florence Arul as his only heirs to succeed to the suit property. Subsequently, the first daughter namely, Mrs.Grace Winfred, who inherited half of the suit property, died on 16.11.1990 leaving behind her four daughters, namely, Mrs.Ida Abraham, Mrs.Irene Paul, Mrs.Indra Colombus, and Mrs.Iris Packiadurai and one son D.J.S.Winfred, the first respondent / plaintiff herein. The said second daughter Mrs.Gladys Florence Arul, the mother of the applicant also died on 24.09.1933 leaving the applicant as her only son to inherit her  $\frac{1}{2}$  share of the suit property. He would further submit that however the said Mrs.Grace Winfred continued to live in the entire house, since it was not partible and the same was permitted by the mother of the applicant and the applicant out of love and affection. He would further submit that one of the daughters of Mrs.Grace Winfred, namely, Irene Paul filed a suit in O.S.No.5061 of 1995 on the file of the I Assistant City Civil Court against the other legal representatives seeking title of the entire property on the basis of a Will forging the signature of Mrs.Grace Winfred, which includes the  $\frac{1}{2}$  share of the suit property belonging to the applicant. He would further submit that the applicant was not included as a proper party in the said suit. He would further submit that since

some of the defendants disputed that the said Will was not probated, O.P. has been filed before this Court in O.P.No.446 of 1996 and it was subsequently converted into T.O.S.No.5 of 2000 and the same is pending. He would further submit that even though the applicant is entitled to  $\frac{1}{2}$  share in the suit property through his mother, he was not impleaded in the said suit as well as in this T.O.S. and he is also one of the caveatable interest holders as  $\frac{1}{2}$  share of the property belonging to him. Therefore, the applicant has to be impleaded as 10<sup>th</sup> defendant in the suit as necessary party.

4.The learned counsel for the applicant would cite a judgment of the High Court of Punjab & Haryana reported in **AIR 1975 Punjab & Haryana 184 (Arjan Singh and others .. vs.. Kartar Singh and others)** for the principle that the adding of parties is purely in the discretion of the Court. He would also cite a judgment of this Court reported in **1998 (II) MLJ 78 (Hemamalini ..vs.. Swaminathan and others)** for the principle that a person who is bound with the result of any litigation shall not be denied an opportunity to participate in the trial. He would also submit in his argument that due opportunity must be given to parties who were seeking for impleadment. He would rely upon a judgment of this Court reported in **2000 (3) MLJ 71 (Rajiah Thevar ..vs.. Siluvai Pattam and others)** for that purpose.

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He would also cite a judgment of the Hon'ble Apex Court



reported in **2010 (2) SCC 162 (Suresh Kumar Bansal ..vs.. Krishna Bansal and another)** for the principle that even the legatee of the deceased landlord under the Will yet to be probated can be impleaded in the proceedings for eviction, as a necessary party. He would also cite a judgment of the Hon'ble Division Bench of this Court reported in **2009 (5) CTC 193 (S.D. Joseph and others ..vs.. E.Ebinesan and others)** for the principle that every member, who is having interest and right, should be given an opportunity of being heard by way of impleadment. Relying upon the principles laid down by the aforesaid judgments, he would stress in his arguments that the applicant / 3<sup>rd</sup> party is a necessary party and if probate is granted in favour of the plaintiff, for the property belonging to the applicant, it would be amounting to an infringement of his right over half of the suit property and therefore, the applicant may be impleaded as necessary party to the suit.

5.The learned counsel for the first respondent / plaintiff would submit in his argument that the suit was converted from the Original Petition and the said proceedings are purely governed under the provisions of O.S.Rules. He would further submit in his arguments that when the O.P. has been filed for the grant of probate on the basis of a Will executed by the mother of the petitioner in the O.P, it was a non-contentious proceedings

and in view of the objections raised by some of the defendants, it was converted into a contentious proceedings in the form of T.O.S. and even after the conversion into a suit, the impleadment of the parties would be only governed under the relevant provisions of O.S.Rules. He would also submit in his argument that the testatrix, namely, Mrs.Grace Winfred had executed the Will and the said Will was sought to be probated and in the testamentary proceedings, the persons, who are having caveatable interest alone can be impleaded as parties and the points for consideration to be decided would be as to whether the Will said to have been executed by the testatrix Mrs.Grace Winfred was made in a sound and disposing state of mind in the presence of two attesting witnesses and was it the last Will of the testatrix ? When such a point has to be decided, the requirement of the presence of the applicant as proposed 10<sup>th</sup> defendant would be of no avail. He would further submit in his arguments that the proprietary or the right, title of the testatrix in disposing the property cannot be questioned in a testamentary proceedings. He would further submit that the Forum would be somewhere else, which may be a Civil Court and either in a suit filed by the aggrieved party or in a suit filed by any 3<sup>rd</sup> party, the applicant could have sought for impleadment. He would further submit in his arguments that the question of title of the testatrix cannot be gone into in a testamentary

proceedings and it has been laid down in the various judgments of the Hon'ble Apex Court as well this Court. He would also refer to a judgment of the Hon'ble Apex Court reported in **2008 (4) SCC 300 (Krishna Kumar Birla ..vs.. Rajendra Singh Lodha and others)** in support of his argument. He would also submit that the applicant could have filed a separate suit claiming  $\frac{1}{2}$  right in the suit property, if really his case was true and genuine, or, he may seek impleadment in a civil suit, whether the parties have subjected this property for partition and separate possession or declaration of this right whatsoever it may be. He would therefore, request the Court that the presence of the applicant as 10<sup>th</sup> defendant is not at all necessary in the testamentary suit, where the title of the testatrix cannot be questioned. He would further submit in his arguments that the judgments cited by the learned counsel for the applicant are in respect of the impleadment of the parties in regular suits pending before the Civil Court and those judgments would not be made applicable to the present case, since it is a Testamentary Original Suit (T.O.S.). Therefore, he would request the Court to dismiss the application.

6.I have given anxious thoughts to the arguments advanced on either side.

7.The relationship of parties as put forth by the applicant has not been seriously disputed. The

applicant's mother Mrs.Gladys Florence Arul and the mother of the plaintiff and defendants namely, Mrs.Grace Winfred were the daughters of one Mr.Sathyanathan. According to the submission of the applicant, the suit property was originally belonging to Sathyanathan and he died intestate and thereafter, the property devolved upon his daughters equally as they happened to be his heirs. Therefore, the applicant had claimed  $\frac{1}{2}$  share in the suit property. However, the said Mrs.Grace Winfred, the mother of the plaintiff and the defendants, was said to have bequeathed the entire property in the Will said to have been executed by her. According to the applicant,  $\frac{1}{2}$  share belonging to the applicant in the suit property derived by him on the death of his mother Gladys Florence Arul was also bequeathed away, as if, the said  $\frac{1}{2}$  share of the property also belonged to Mrs.Grace Winfred. Further case of the applicant would be that if the probate is granted as sought for by the plaintiff in this suit, the  $\frac{1}{2}$  right belonging to the applicant would also be considered as bequeathed in favour of the beneficiaries in the Will executed by Mrs.Grace Winfred and it would affect his interest. In order to avoid multiplicity of proceedings, he would request the Court to implead him as 10<sup>th</sup> defendant in this case so as to state his case.



testatrix Mrs. Grace Winfred had no right to bequeath away  $\frac{1}{2}$  right in the suit property which is stated to have belonged to the mother of the applicant, viz., Mrs. Gladys Florence Arul. Therefore, I could see that the applicant is claiming  $\frac{1}{2}$  right in the suit property by virtue of a right derived from his mother. Consequently, he is disputing the proprietary right of the testatrix in bequeathing the entire property when she is stated to have entitled to only  $\frac{1}{2}$  share in the suit property.

9. In the judgment of the Hon'ble Apex Court reported in **2008 (4) SCC 300 (Krishna Kumar Birla ..vs.. Rajendra Singh Lodha and others)**, it has been categorically laid down as follows:-

"68. In *Basanti Devi v. Raviprakash Ramprasad Jaiswal* [(2008) 1 SCC 267 : (2007) 12 SCALE 542], it is stated :

"22[21]. The Probate Court, indisputably, exercises a limited jurisdiction. It is not concerned with the question of title. But if the probate has been granted subject to compliance of the provisions of the Act, an application for revocation would also lie."

69. *Abhiram Dass v. Gopal Dass* [ILR 17 Calcutta 48] is a decision of the Division Bench of the Calcutta High Court. In that case, the District Judge admitted the objection. It was held that rival titles set up by the caveator can be gone into. Setting aside the said judgment of the District Judge, the Division Bench of the High Court held:

" ..... A person disputing the right of a deceased testator to deal with certain property as his own cannot be properly regarded as having an interest in the estate of the deceased. His action is rather that of one claiming to have an adverse interest...."

70. *Abhiram Dass* (supra) was followed by a Division Bench of the Bombay High Court in *Prijoshah Bhikaji v. Pestonji Merwanji* [12 Bom LR 366] stating:

" .....the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to

the estate, but that the person who wishes to come in as caveator must show some interest in that estate derived from the deceased by inheritance or otherwise."

71. Madras High Court also took the same view in *Rahamtullah Sahib v. Rama Rau & Anr.* [ILR 17 Madras 373] opining:

" ..... this possibility should rest on existing facts and not on mere conjecture".

10. In yet another judgment reported in **2008(1) CTC 80 (Kanwarjit Singh Dhillon ..vs.. Hardy Singh Dhillon and others) : 2007 (11) SCC 357**, it has been laid down that the question of title of the testator cannot be gone into by the probate court. The relevant passage would be as follows:-

" 10. .... The Probate Court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by his Will. The Probate Court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit

properties bequeathed by the Will were joint ancestral properties or acquired properties of the testator.

11. In **Chiranjila Shrilal Goenka v. Jasjit Singh and others, 1993 (2) SCC 507**, this Court while upholding the above views and following the earlier decisions of this Court as well as of other High Courts in India observed in paragraph 15 at page 515 which runs as under:

"In *Ishwardeo Narain Singh v. Smt. Kamta Devi*, this Court held that the Court of probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution, the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. "Therefore, the only issue in a probate proceeding relates to the genuineness and due execution of the Will and the Court itself is under duty to determine it and peruse the Original Will in



its custody. The Succession Act is a self contained code insofar as the question of making an Application for probate, grant or refusal of probate or an Appeal carried against the decision of the Probate Court. This is clearly, manifested in the fascicule of the provisions of the Act. The Probate proceedings shall be conducted by the Probate Court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes, conclusively as to the appointment of the executor and the valid execution of the Will. Thus, it does no more than establish the factum of the Will. Thus, it does no more than establish the factum of the Will and the legal character of the executor. Probate Court does not decide any question of title or of the existence of the property itself."

(Emphasis supplied)

It is made clear from the aforesaid judgments of the Hon'ble Apex Court that the testamentary court has no competency to go into the title of the testator for

arriving to a conclusion that the testator / testatrix had any title to bequeath the Will in a testamentary suit.

11. The various judgments cited by the learned counsel for the applicant reported in **AIR 1975 Punjab & Haryana 184 (Arjan Singh and others ..vs.. Kartar Singh and others)** deals with the principle of impleadment in general. The relevant passage would run as follows:-

4. .... It is well settled that sub-rule (2) of Rule 10 of Order 1 of the Code of Civil Procedure gives wide discretion to the Court to meet every case of defect of parties, but the power must be exercised on judicial principles and not arbitrarily. One of the well-known principles in this respect is that the presence of the person added must be necessary to effectually and completely adjudicate upon and settle all the points involved in the suit and that a party should not be added merely to avoid multiplicity of suits. On the concessions on mixed questions of law and fact made by the counsel for the appellants, it is clear that the impleading of Ind Kaur to the present suit was not necessary to effectually and completely adjudicate upon, and settle any of the points involved in the suit of the plaintiffs-appellants as originally instituted. Another principle invoked in the matter of deciding the application for

*impleading parties to a pending litigation is that the discretion under the above mentioned rule should be exercised in a reasonable manner so as not to cause inconvenience or embarrassment to any of the parties. .... "*

12.The reliance placed by the learned counsel for the applicant in paragraph No.17 of the judgment of this Court reported in **1998 (II) MLJ 78 (Hemamalini ..vs.. Swaminathan and others)** would run as follows:-

"17. In **P.R.Nallathambi Goundan .. vs.. Vijaya Raghavan and others, AIR 1973 Mad. 25 : 85 LW 648** in paragraph 14 of the judgment (at page 35) it has been held thus:-

" .... It would be a travesty of justice to hold that a party who is bound by the result of a litigation, though not *eo nomine* a party to the litigation, shall be denied an opportunity to draw the attention of the Court to some step, which seeks to prejudice his interests behind his back. In all such cases, it is the plain duty of the court to implead the parties concerned either under O.1, Rule 10 or in

*exercise of its undoubted,  
inherent power under Sec.151  
CPC."*

*(Italics  
supplied)*

13. Yet another judgment of this Court reported in **2000 (3) MLJ 71 (Rajiah Thevar ..vs.. Siluvai Pattam and others)** laid down the principle for impleadment of parties, which would run as follows:-

5. .... Though, the rights of parties has to be decided only in the suit with due opportunity to both the parties to be heard, still, just for the simple reason that the first and second respondents herein have been ordered to be impleaded as necessary parties to the suit proceedings as it had been done by the Court of Additional District Munsif, Valliyoor in the case in hand, it does not mean that automatically respondents Nos.2 and 3 will be granted with the relief that they seek for in the suit. Unless they had the right to get any share or right to be declared, they cannot accept any fraction of the suit property and hence, the whole affair has to be decided by the trial court with due opportunities afforded to both the parties to be heard and ultimate decision has to be arrived at based on



*the materials placed on record and upon hearing the parties fully. ...."*

14. Apart from that, the judgment of the Hon'ble Division Bench of this Court reported in **2009 (5) CTC 193 (S.D. Joseph and others ..vs.. E. Ebinesan and others)** also dealt with the impleadment of parties at paragraph No.23, which has been extracted here under:-

"23. .... So long as the appellants continue to be the members of YMCA, in the considered opinion of the Court, needless to say, they have got interest over the property, hence, they should also be given opportunity of being heard in respect of the deal, the subject matter of the litigation before the Trial Court. The reason adduced by the Trial Judge that they have come forward with an application with ulterior motive, even for a moment, cannot be accepted. In a given case like this, if the applicants want to be added as parties, the Court must see whether they are necessary parties or not and whether the subject matter could be factually adjudicated upon in the absence of parties. ...."

15. When we go through the dictum laid down by these

laid down in a regular suit towards the impleadment of parties. But, it is a case of testamentary suit, which has been dealt with by the judgment of the Hon'ble Apex Court reported in **2008(1) CTC 80 (Kanwarjit Singh Dhillon ..vs.. Hardyal Singh Dhillon and others)** : **2007 (11) SCC 357** and **2008 (4) SCC 300 (Krishna Kumar Birla ..vs.. Rajendra Singh Lodha and others)**, in which it has been held that the question of title of the testatrix cannot be decided in a testamentary suit. If the request of the applicant is heeded towards his impleadment, he would raise an objection regarding the title of the testatrix that she was not entitled to execute a Will in respect of  $\frac{1}{2}$  share of the suit property, said to have been belonged to his mother Mrs. Gladys Florence Arul. The proposed objection would be in respect of the title of the testatrix and therefore, the presence of the applicant in the suit is neither necessary nor lawful in accordance with the judgments of the Hon'ble Apex Court cited above.

16. The judgment of the Hon'ble Apex Court reported in **2010 (2) SCC 162 (Suresh Kumar Bansal ..vs.. Krishna Bansal and another)** has been cited by the learned counsel for the applicant in support of his argument that the legatee of an unprobated Will of the deceased landlord was ordered to be impleaded in the aforesaid proceedings in order to avoid multiplicity of the proceedings and the same ratio can be applied in this proceedings also and the applicant may be

impleaded. The said case dealt with by the Hon'ble Apex Court was in a Rent Control Proceedings and in respect of a legacy of an unprobated Will. In this case, the applicant is not a legatee. But, his claim is that the testatrix has no title in respect of  $\frac{1}{2}$  share of the property bequeathed by her in the impugned Will. Therefore, the facts of the case as dealt with by the Hon'ble Apex Court in the aforesaid judgment would not be helpful to the applicant to get support from the said principle. Therefore, I am of the considered view that the applicant, who sought to be impleaded as 10<sup>th</sup> defendant in this suit, cannot be impleaded as a necessary party in a testamentary suit. His remedy is elsewhere by filing a separate suit for partition and separate possession of the said property or to declare his  $\frac{1}{2}$  share in the suit property or to seek impleadment in the suit for partition filed by one of the children of Mrs. Grace Winfred stated to have been pending before the City Civil Court and not here.

17. Therefore, the application filed by the applicant / 3<sup>rd</sup> party for impleading him as 10<sup>th</sup> defendant deserves dismissal and accordingly dismissed. No costs.

Sd/-V.P.K.J  
07.06.2012

//Certified to be a true copy//  
Dated this the        day of        2012.

R.s/03.07.2012

COURT OFFICER