



S.A.No.451 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.02.2023

PRONOUNCED ON : 28.04.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

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Logambal

...Appellant

-VS-

- 1.Mailathal (deceased)
 - 2.Alameluammal
 - 3.Nachimuthu Gounder
 - 4.Balakrishnan
 - 5.Thangavelusamy Gounder (deceased)
 - 6.Gandhi
 - 7.Veeravel
 - 8.Thilagavathi
 - 9.Rukmani
- 1/26



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10.Murugesan

(R6 to R10 have been impleaded
vide order dated 26.11.2018)

... Respondents

Prayer: Second Appeal is filed under Section 100 of C.P.C to set aside the judgement and decree dated 21.11.2006 made in A.S.No.57 of 2006 on the file of the Principal District Court, Erode reversing the judgment and decree dated 28.09.2005 made in O.S.No.146 of 2000 on the file of the Sub Court, Dharapuram.

For Appellant : Mr.N.Manokaran

For R1 & R5 : Died

For R2, R3, R6
R7, R9 & R10 : No appearance

For R4 & R8 : Mr.V.C.Janardhanan for
Mr.P.Muthukumarasamy

JUDGEMENT

The second defendant has filed this Second Appeal challenging the judgment passed in A.S.No.57 of 2006 on the file of the Principal District



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Court, Erode in and by which the learned Judge has reversed the judgment and decree passed by the learned Subordinate Judge, Dharapuram in O.S.No.146 of 2000.

2.The parties are referred to in the same litigative status as before the trial Court for ease of understanding.

3.The relief claimed in the suit O.S.No.146 of 2000 is as follows:-

“ஏ) தாவாச் சொத்துக்களை நலத்திகடு கலந்து 5 சமபாசங்களாக பிரித்து அதில் முன்று பங்கினை வாதிகளுக்கு பிரதிவாதிகளிடமிருந்து தனிச்சுவாதீனம் செய்து கொடுக்கும்படிக்கும்

பி) தாவாச் செலவு வாதிகளுக்கு பிரதிவாதிகளால் கிடைக்கும்படிக்கும்

இ) பின்னும் இந்த வியாஜ்ஜியத்தின் தன்மைக்குத் தக்கப்படி கோர்ட்டார் அவர்களுக்கு உசித்தமாய்த்தோன்றுகிற இதர யுத்த பரிகாரங்கள் வாதிகளுக்கு பிரதிவாதிகளால் கிடைக்கும்படி தீர்ப்புச் செய்ய வேண்டுமாய் வாதிகள் பிரார்த்திக்கிறார்கள்.”



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4.The facts as set out in the pleadings are herein below set out in a nutshell.

PLAINTIFFS' CASE:-

5.It is the case of the plaintiffs that the properties in question are the ancestral properties of their father, Sami Gounder. Sami Gounder had five children, namely Thangavelsami Gounder (the first defendant herein), Subramania Gounder (the father of the second defendant), Mailathal, Pushpathal and Alamelu ammal (the plaintiffs 1 to 3 in the suit). Pending the suit, Pushpathal had passed away and her children, Nachimuthu Gounder and Balakrishnan were brought on record.

6.The plaintiffs would submit that the properties were partitioned between Sami Gounder and his two sons, the first defendant and the father of the second defendant, Subramania Gounder under a registered deed dated 27.05.1971. Under this partition, the 'A' schedule property was allotted to Sami Gounder. On 30.01.2000, Sami Gounder died intestate and the



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plaintiffs, the first defendant and the second defendant, the predeceased daughter of the son Subramania Gounder, were each entitled to 1/5th share. The plaintiffs would submit that despite several requests, the defendants were not coming forward to execute the partition deed and consequently, they have been constrained to file the suit in question for the reliefs set out supra.

**WRITTEN STATEMENT OF THE SECOND DEFENDANT
ADOPTED BY THE FIRST DEFENDANT:-**

7.The defendants would admit that the property was the ancestral property of Sami Gounder and also there was partition in the year 1971. Thereafter, it is their case that on 15.12.1999, Sami Gounder had executed a Will bequeathing the schedule property in favour of the second defendant. They would contend that the plaintiffs had been given in marriage on account of the efforts of the father of the second defendant. The second defendant would submit that after the partition, Sami Gounder had been exercising his rights as absolute owner and in the year 1983, he had sold



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portions of the property to meet the wedding expenses of the plaintiffs.

8.The second defendant would contend that she had been taking care of her grandfather, Sami Gounder and therefore, she and her husband were residing in the property along with Sami Gounder. They were the ones, who were cultivating the lands and also developed the lands by planting nearly 150 coconut saplings, obtained electricity service connection for the Well and etc. She would submit that since Sami Gounder has executed a Will in her favour, the plaintiffs could have no right or interest in the suit property.

TRIAL COURT:-

9.The learned Subordinate Judge, Dharapuram, had framed the following issues:-

“1) பாகப்பிரிவினைக்கும் தனி சுவாதீனத்திற்கும் வாதிகள் கோரி உள்ளபடி முதல்நிலை தீர்ப்பாணை கிடைக்கத்தக்கதா?

2) வேறு என்ன பரிகாரம் கிடைக்கத்தக்கது?”



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10.Later, additional issue was framed by the learned Subordinate Judge, which reads as under:-

“லேட் சாமிகவுண்டர் 2ம் பிரதிவாதி லோகாம்பாளுக்கு
15.12.99ஆம் தேதி எழுதி வைத்த உயில் சாசனம்
உண்மையானதா?”

11.On the side of the plaintiffs, the first plaintiff had examined herself as P.W1 and one Viswanathan was examined as P.W2 and the documents on their side were marked as Ex.A1 to Ex.A3. On the side of the defendants, the second defendant had examined herself as D.W1 and one Thangamuthu, the alleged attester of the Will, Ex.B27, was examined as D.W2 and 27 documents were marked as Ex.B1 to Ex.B27.

12.The learned Subordinate Judge had framed the additional issue with reference to the validity of the Will, Ex.B27, dated 15.12.1999 and on considering the evidence, arguments and pleadings had ultimately returned a finding that the said Will is proved and dismissed the suit.



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APPELLATE COURT:-

13. Aggrieved by the said judgment and decree of the learned Subordinate Judge, Dharapuram, the plaintiffs had filed an appeal before the learned Principal District Judge, Erode in A.S.No.57 of 2006. The learned Principal District Judge had framed the following points for consideration:-

“1) Whether the Will dated 15.12.1999 is proved by the 2nd defendant/2nd respondent?

2) Whether the appellants are entitled for partition as prayed for? ”

14. Ultimately, the learned Judge had proceeded to allow the appeal and set aside the judgment and decree of the trial Court. Aggrieved by this judgment, the second defendant alone has come by way of this Second



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Appeal.

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SECOND APPEAL:-

15.The second appeal has been admitted on the following substantial questions of law:-

“a) Whether the Ex-B27/Will is valid, and whether it is proved in compliance with section 68 of the Evidence Act r/w 63 of the Indian Succession Act?

b) Whether the first appellate court is correct in law in holding that the circumstances pointed by the plaintiffs are “suspicious” circumstance, especially in the absence of any doubt about the testamentary capacity, signature of the testator, sound and disposing state of mind, more particularly in the absence of any allegation in the plaint to the effect that the Will was procured and forged?

c) Whether the first appellate court is right in law to invoke section 73 of the Evidence Act, and whether the comparison of the signature found in the Will/Ex-B27 with that of the signatures



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found in the documents marked as Ex-A3 and Ex-B9 especially those documents came into existence long prior to the date of the Will and further the evidence of attestor/D.W.2 is unshaken?”

SUBMISSIONS:-

16.Mr.N.Manoharan, learned counsel appearing on behalf of the second defendant/appellant would submit that Ex.B27 has been proved in the manner known to law, namely as contemplated under Section 63(c) of the Indian Succession Act, 1925, and Section 68 of the Indian Evidence Act, 1872 by examining D.W2, who has clearly and categorically contended that the Will, Ex.B27 has been executed by Sami Gounder in a sound disposing state of mind. He would further contend that nowhere in the plaint, the plaintiffs have denied or disputed the genuineness of the Will.

17.After the filing of the written statement, the plaintiffs have not come forward to file a rejoinder rebutting/refuting the execution of the said Will. D.W2 by his oral evidence has also proved the fact that Sami Gounder was in a sound disposing state of mind when the said Will was executed.

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That apart, no suspicious circumstance has been pleaded by the plaintiffs and in these circumstances, the learned Judge ought not to have come to the conclusion that Ex.B27, Will has not been proved and has been executed in suspicious circumstance. The learned counsel would submit that the observation of the lower appellate Court that the Will not being registered is also yet another suspicious circumstances cannot be countenanced for the simple reason that it is not mandatory for a Will to be registered.

18.Further, the endeavour of the appellate Court to compare the signature found in the Will with the admitted signatures of the testator is erroneous, as the Court cannot take on the role of an expert. Further, the finding of the lower appellate Court that the non examination of the document writer and the typist would also go to prove that the Will has not been executed in the manner pleaded by the defendants is also uncalled for. In support of his contentions, he would rely on the following judgments:-

a) ***Dhanalakshmi Vs. Karuppusamy and others*** reported in **2013-2-L.W.419.**



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b) ***Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others*** reported in ***(2005) 8 Supreme Court Cases 67.***

c) ***Dr.Shantha Vs. Sharada*** reported in ***2003 (4) CTC 470.***

d) ***Idandas Vs. Anant Ramchandra Phadke (Dead) by lrs.,*** reported in ***(1982) 1 Supreme Court Cases 27.***

19.*Per contra,* Mr.V.C.Janardhanan arguing for Mr.P.Muthukumarasamy, learned counsel appearing on behalf of the respondents 4 and 8 would contend that the only question of law that requires to be considered in the above Second Appeal is regarding the validity of Ex.B27, Will. If it is proved that the same is shrouded in suspicious circumstances and was not executed by the deceased Sami Gounder, as stated by the plaintiffs, then the plaintiffs are entitled to a share in the suit schedule properties.

20.He would submit that the second defendant as D.W1 had stated that the Will had come to her knowledge only during the 16th day ceremony after the death of Sami Gounder, when Ramasamy Gounder, the other



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attesting witness to Ex.B27, had brought it to the notice of the parties.

However, the second defendant has not chosen to examine the said Ramasamy Gounder, who is an independent witness and who, according to the second defendant, is very much available. He would submit that an adverse inference has to be drawn for his non-examination.

21.Further, the lower appellate Court has clearly found that D.W2, the second attesting witness, is an interested witness inasmuch as he is the maternal uncle of the second defendant's husband. D.W2 has contradicted his deposition regarding the events surrounding the alleged execution of the Will both in his chief-examination and cross-examination. He would also submit that the endeavor undertaken by the lower appellate Court to compare the signature was only yet another piece of evidence for arriving at a conclusion that the said Will is shrouded by suspicion. He would therefore contend that there is absolutely no ground made out for interfering with the well considered judgment and decree of the lower appellate Court and



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consequently, the Second Appeal has to be dismissed. In support of his contention, he would rely upon the following judgments:-

- a) *T.Kanniah Rao Vs. Inder Rao* reported in *1996 (II) CTC 466*.
- b) *P.Mani alias P.Balasubramaniam Vs. P.Viswanathan (deceased) and nine others* reported in *2008 (2) CTC 831*.
- c) *Murthy and others Vs. C.Saradambal and others* reported in *(2022) 3 Supreme Court Cases 209*.

DISCUSSIONS:-

22.The entire issue that engages the attention of this Court for disposing of the above second appeal is the validity of the Will, Ex.B27. The second defendant has propounded this Will stating that her grandfather, Sami Gounder, the father of the plaintiffs and the first defendant had executed the same in a sound disposing state of mind and that even prior to the execution of the Will, she had been put in possession of the property under a family arrangement dated 07.11.1984, which document has been marked as Ex.B1. The plaintiffs on the other hand have questioned the Will



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on the ground that the second defendant had taken advantage of the fact that Sami Gounder was under her care and custody till his life time to create this Will.

23.It is also the case of the plaintiffs that Sami Gounder and his daughters had a very cordial relationship. While so, there is no recital in the Will as to why Sami Gounder has disentitled the plaintiffs and his son, the first defendant and given the properties to the second defendant particularly when even under the partition of the year 1971, under Ex.A1, no property has been given to the plaintiffs and the property was only partitioned between Sami Gounder and his two sons, the first defendant and the father of the second defendant and the second defendant was already in possession of her father's share.

24.That apart, the discrepancy between the chief examination and the cross-examination of D.W2 and the fact that the other attesting witness, Ramasamy Gounder had not been examined would also throw a cloud of



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suspicion on the execution of the Will. Considering the fact that the proof of Will is mandatory even where there is no denial about the execution of the Will by the other side, this Court has to examine as to whether the Will has been proved in the manner known to law and there is no suspicious circumstances surrounding the same. To prove the execution of the Will, the second defendant has examined D.W2.

25.D.W2 is none else than the maternal uncle of the second defendant's husband. In his chief examination, the said witness would state that on the date of the execution of the Will, Sami Gounder had come all the way to his residence, which is about 3 kms., away and had informed him that he desired to have a Will executed. The following is the extract of his evidence regarding the above.

“மேற்படி உயில் கண்ணாபுரத்தில் எனது வீட்டில் வைத்து எழுதப்பட்டது. 2ம் பிரதிவாதி தாயில்லா குழந்தையாக இருப்பதாலும் என்னை பராமரிப்பதாலும் எனது சொத்துக்களை அவரது சொத்துக்களை உயில் எழுதவேண்டும் என்று கூறினார். பத்திரம் எழுதுபவரை எனது வீட்டிற்கு அழைத்து வருமாறு கூறினார். சோமசுந்தரம் என்ற பத்திரம் எழுதுபவரை கூட்டி



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வந்தேன். என் வீட்டிற்கு சாமி கவுண்டரும் பொன் பரப்பி ராமசாமி கவுண்டரும் வந்தார்கள். சாமிக்கவுண்டர் அவரது புமி பத்திரங்களை எடுத்து வந்திருந்தார். உயில்களுக்காக வாசகங்களை சாமிக்கவுண்டர் கூறினார். சோமசுந்தரம் அதனை வெள்ளை காகிதத்தில் எழுதிக் கொண்டார். சொத்து விவரங்களையும் சாமிக்கவுண்டர்தான் கூறினார். சாமிக்கவுண்டர் அதனைப் படித்துப் பார்த்தார். அது சரியாக இருப்பதாக கூறி டைப் செய்யுமாறு கூறினார். சோமசுந்தரம் வெளியில் எடுத்துச் சென்று டைப் செய்து கொண்டு வந்தார். டைப் செய்யப்பட்ட பின்பும் அதனை சாமிக்கவுண்டர் படித்துப் பார்த்தார். சரியாக இருப்பதாக கூறி அவர் கையொப்பம் செய்தார்.”

26.However, in his cross-examination, the witness would state as follows:-

“சாமிக்கவுண்டரை உயில் எழுதுவதற்கு முன்பு நான் பத்து நாட்களுக்கு முன்பு பொன்பரப்பியில் பார்த்தேன். அவர் என்னை அழைத்ததன் பேரில் நான் பொன்பரப்பில் சென்று பார்த்தேன். சாமிக்கவுண்டரின் கால் முறிந்து படுக்கையில் இருந்தார். அப்போதுதான் உயில் எழுதவேண்டும் என்று கூறினார். 2ம் பிரதிவாதி பெயருக்கு எழுத வேண்டும் என்று கூறினார். உடனடியாக எழுதுவதற்கு காகிதங்களை வாங்கி வருமாறு கூறவில்லை. ஆனால் 2ம் பிரதிவாதி பெயரில் எழுதவேண்டும் என கூறினார். மேற்படி சாமிகவுண்டருக்கு தங்கவேல் சாமிகவுண்டர் என்ற மகன் உண்டு. அவர்களது



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வாரிசுகளை தெரியும். அப்பொழுதே இதர வாரிசுகளுக்கு ஏன் கொடுக்கவில்லை என்று கேட்டேன். 20 ஏக்கர் புமியை விற்று பெண்களுக்கு செய்ய வேண்டியதை செய்துவிட்டேன் என்று கூறினார்.”

27.This clearly shows the contradiction regarding the manner of the alleged execution of the said Will. He is an interested witness, as he is the maternal uncle of the second defendant's husband and therefore, his evidence in the light of the above glaring discrepancy has to be considered cautiously.

28.It is the case of the second defendant that she has come to know about the Will only when the other attesting witness, Ramasamy Gounder had made it known on the 16th day ceremony of her grandfather's death and it is also her case in her evidence as D.W1 that the Will was produced by the said Ramasamy Gounder from her house. Therefore, an adverse inference has to be drawn on the non examination of Ramasamy Gounder particularly when it is a categoric case of the second defendant that it was



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Ramasamy Gounder, who had produced the Will for the first time after the death of Sami Gounder. The first defendant, who is the son of Sami Gounder, has not entered the witness box to support the case of the second defendant particularly when the written statement only shows that he has adopted the first defendant's written statement.

29. In the light of these suspicious circumstances, the lower appellate Court has exercised its power under Section 73 of the Indian Evidence Act to compare the signatures found in the Will with the admitted signature of the petitioner in the other documents. However, the admitted signatures are not contemporaneous to the signature in Ex.B27, Will. The second defendant as D.W1 in her chief examination would submit that she had no knowledge about the partition deed, Ex.A1. This statement *per se* is falsified by the fact that the second defendant has filed Ex.B1, which is stated to be a family arrangement under which the properties in question have been handed over to her. This document, which is dated 07.11.1984, makes a mention about Ex.A1, partition deed. It is the second defendant's



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case in her written statement that she was in possession of the property purchased to this family arrangement.

30.Further, Sami Gounder during his life time had executed the mortgage deed in favour of his daughter, the third plaintiff. In this mortgage deed, there is no mention about the alleged family arrangement dated 07.11.1984 and this mortgage is also not referred to in Ex.B27, the Will particularly when the registered mortgage has not been cancelled.

31.The lower appellate Court has extensively considered the evidence on record to come to the conclusion that the second defendant has not proved the Will. The argument of the learned counsel for the second defendant that the Will stands proved in the light of there being no denial of the same by the plaintiffs cannot be countenanced in the light of the judgment of the Hon'ble Supreme Court in ***Ramesh Verma (dead) through legal representatives Vs. Lajesh Saxena (dead) by legal representatives and another*** reported in ***(2017) 1 SCC 257***, wherein it has been held as



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follows:-

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“13.A Will like any other document is to be proved in terms of the provisions of Section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.”

32.This judgment has been followed in the judgment of the Hon'ble Supreme Court in ***P.Radha Vs. Irudayadoss and others*** reported in **2022 SCC online Mad 886**. Therefore, the substantial question of law No.(a) is answered in favour of the plaintiffs. The suspicious circumstance surrounding the Will has also been set out supra as well as by the learned



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Principal District Judge, Erode. Therefore, the substantial question of law No.(b) is answered against the plaintiffs. Admittedly, the comparison of the signature in Ex.B27 has been done with Ex.A3 and Ex.B9, which are not the contemporaneous documents and therefore, the procedure adopted by the learned Principal District Judge, Erode, is erroneous. Therefore, the substantial question of law No.(c) insofar as it relates to this is answered in favour of the plaintiffs. However, the later part of the substantial question of law No.(c) that the evidence of the attestor D.W2 is unshaken is answered against the plaintiffs in the light of the glaring discrepancy in the evidence of D.W2 in her chief as well as the cross-examination.

33.Further, the judgment relied upon by Mr.N.Manoharan in the case of *Idandas Vs. Anant Ramchandra Phadke (Dead) by lrs.*, reported in *(1982) 1 Supreme Court Cases 27* regarding the suspicious circumstances may not come to his aid, since this Court has found that suspicious circumstances that has been set out supra would clearly show that it is not a normal circumstance and the entire circumstances surrounding the



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execution of the Will appears to be suspicious. It is no doubt true that the relatives can be the attesting witnesses as set out in the judgment reported **2013-2-L.W.419**, however, in the instant case, the witness has contradicted the statement given by him in chief and cross examination and further the attesting witness, who has been in possession/knowledge of the Will and who had handed over the same to the plaintiffs, has not been examined on the side of the plaintiffs, which gives raise to a suspicious circumstance. The other judgments can be distinguished on facts.

34.In fine, the Second Appeal is dismissed. The judgment and decree dated 21.11.2006 made in A.S.No.57 of 2006 on the file of the Principal District Court, Erode reversing the judgment and decree dated 28.09.2005 made in O.S.No.146 of 2000 on the file of the Sub Court, Dharapuram is hereby confirmed. However, there shall be no order as to costs.

Index : Yes / No
speaking Order : Yes / No

28.04.2023

23/26



S.A.No.451 of 2007

Neutral Citation : Yes/No

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To

- 1.The Principal District Judge,
Erode.
- 2.The Subordinate Judge,
Dharapuram.
- 3.The Section Officer,
V.R.Section,
High Court, Madras -104.



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S.A.No.451 of 2007

P.T.ASHA, J.,

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Pre-delivery Judgment in
S.A.No.451 of 2007

28.04.2023

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S.A.No.451 of 2007