



A.S.No.523 of 2018 and C.M.P.No.13248 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.02.2023

DELIVERED ON : 29.03.2023

CORAM

THE HON'BLE MR. JUSTICE **S.VAIDYANATHAN**
AND
THE HON'BLE MRS. JUSTICE **R.KALAIMATHI**

A.S.No.523 of 2018
and C.M.P.No.13248 of 2018

Alister Faria .. Appellant/2nd Defendant
Vs.

1. Phyllis Va
2. Jeanette Peters
3. Margret Fernandaz
4. Sandra Cranston
5. Ansel Raj
6. Diena .. Respondents No.1 to 6 /
Plaintiffs No.1 to 6
7. Hasel Irudayaraj .. 7th Respondent/1st Defendant

Prayer:- First Appeal is filed under Section 96 of CPC r/w Order 41 Rule 1 of CPC to set aside the Judgment and Decree dated 13.06.2017 passed by the learned I Additional District Judge, Coimbatore in O.S.No.56 of 2016.

For Appellant : Mr.M.L.Joseph
for M/s Chennai Law Associates
For Respondents : Mr.A.Thiyagarajan

JUDGMENT

(Judgment was delivered by **R.Kalaimathi, J.,**)

Having aggrieved by the Judgment and Decree passed by the



learned I Additional District Judge, Coimbatore in O.S.No.56 of 2016

dated 13.06.2017, the appellant/2nd Defendant has preferred this appeal.

2. The facts which are not in dispute are as mentioned under:

- Titus Faria and his wife Andrey Faria had seven children. The Plaintiffs No. 1 to 4 and the first defendant are their daughters. Plaintiffs 5 and 6 are the children of their 5th daughter viz., Late Edna Raj. Their only son is the second defendant viz., Alister Faria, who is the appellant herein.
- The suit property is only one property namely Plot ad-measuring 2791 sq.ft with a terraced building measuring 660 sq.ft and with a tiled roof building thereon with 320 sq.ft bearing Door No.20 at Sanganur Village, Sub Registration District of Ganthipuram, Coimbatore Taluk in S.F.Nos.526/B2, 534, 533/B2- Punjai Acre 5.55 in K.Ramasamy Nagar-1, Manickam Street.
- This property was purchased by the father viz., Titus Faria on 30.01.1995 by means of a conveyance deed dated 30.01.1995



registered vide Document No.515 of 1995.

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3. It is the case of the plaintiffs that the suit property was purchased by the father of the plaintiffs Titus Faria and in the capacity of an exclusive owner of the said property, on 21.08.2000, he executed a registered (last) Will vide Document No.403 of 2000, through which bequeathed the schedule mentioned property to his wife and children with a condition that his children should not sell the schedule mentioned property during the life time of his wife Andrey Faria and after her death – the property should be equally divided among all the children by means of sale. On the request of plaintiffs for effecting partition by issuing legal notice dated 12.10.2015, calling upon the defendants to effect partition by means and bounds, the same was returned as “Refused and Unclaimed”. The defendants stooped down to neglect the plaintiffs. The plaintiffs 1 to 4, plaintiffs 5 and 6 together are all entitled for five equal shares out of seven equal shares. Hence, the suit.

4. Whereas, on behalf of the defendants except the above said



details as mentioned supra, it was counteracted by stating that execution of Will by their father late Titus Faria has been questioned. It is the further case of the defendants that in 1978, as the second defendant namely Alister Faria got a job in Nirmala Industries, Coimbatore and was residing with his parents, was continuing to pay the monthly installments to the housing society out of his income and was also maintaining his parents. Thereby, Alister Faria incurred a cost of Rs.5,00,000/- for developing and renovation besides construction of compound. When Titus Faria was alive, he was having a wish to give the entire property in favour of the second defendant/appellant, since he who was maintaining the property and also attending to his needs. In order to grab the property, the plaintiffs have created a Will and the defendants prayed to dismiss the suit as there is no cause of action for the same.

5. Based on the above said details, the following issues were framed by the Trial Court:-

“ (i) Whether the Will dated 21.08.2000 is true, valid and executed by Mr.Titus Faria?



(ii) Whether the plaintiffs are entitled for partition and allotment of 5/7 share in it?

(iii) To what other relief?"

6. Based on the grounds elaborated in the memorandum of Appeal, the learned counsel for the appellant/2nd defendant would contend that the Trial Court failed to appreciate the factual circumstances and false evidence was produced by the plaintiffs. The Will is not proved in accordance with law. It was further contended that Ex.B4 document is very crucial document to the case, which substantiates the major contribution of the appellant towards the developments in the suit schedule property. The appellant is in continuous possession and enjoyment of the suit property.

7. Per contra, learned counsel for the respondents/plaintiffs vehemently contended that for the property left, Titus Faria had executed a last Will dated 21.08.2000. After the death of the testator and life estate holder, Will came into force and execution of the Will was duly proved by examining P.W.2 viz., R.Pradeep Kumar, Advocate. With regard to



the contention of the defendants that the second defendant, Alister Faria spent a sum of Rs.5,00,000/- towards the maintenance and renovation of the suit property, the Trial Court had rightly held that Ex.B4 (Payments received by Jay Ram Builders from Alister Faria), maintenance amount for construction of suit schedule property received by Jay Ram builders is not a believable one for the reasons that though the payments were said to have been made, it was signed by D.W.2 by same pen on various dates and the Trial Court rightly held that the execution of the Will is duly proved by the plaintiffs and five shares out of seven shares was allotted for the plaintiffs, which needs no interference.

8. Based on the above said details, the following points for consideration arisen, as mentioned hereunder:-

(i) Whether the Trial Court was incorrect in holding that the Will was duly proved as per law or not?

(ii) Whether it was incorrect on the part of the Trial Court by granting 5/7 shares in the suit property to the plaintiffs?



(iii) Whether this appeal is to be allowed or not?

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9. Heard the rival submissions of both sides' Learned Counsels and perused the materials available on record.

10. Before delving into the facts of the case, it is relevant to refer to the law of testamentary succession. Well established principles of law as regards the Will is that the Will is presumed to have been properly executed when:

(i) The testator must have a sound disposing mind free from all extraneous influence; until contrary is proved.

(ii) The Will should be executed in accordance with the provisions of the Act as incorporated under Section 63 of the Indian Succession Act r/w Sections 67 and 68 of the Indian Evidence Act.

(iii) The testator should have signed or affixed his mark to the Will in the presence of two witnesses, who are required to see the testator's sign or affixing his mark on the Will and each of the witnesses who sign the Will in the presence of the testator;



(iv) The existence of suspicious circumstances make the owners to prove very heavy and such circumstances are required to be removed by propounder before the documents are extended as last Will of the testator;

(v) The mode of proving the Will does not originally differ from that of proving another document except the special circumstances as incorporated in Section 63 of the Indian Succession Act;

(vi) In order to ascertain the free disposing mind free from extraneous considerations, the whole of contending circumstances in a particular case are required to be taken note of.

11. There is one crucial feature that distinguishes Wills from the other documents. The Will speaks from the death of the testator. As the testator is no more, the Court which sits on the testator's mind will make the Will as more sacred document. The Court who deals with the Will is expected to sit on the armed chair of testator and expected to decide the veracity of his document, namely whether it is his Will or not.



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12. Firstly, it is the duty of the propounder to establish by cogent and satisfactory evidence that the Will was signed by the testator, at the relevant point of time he was in a sound and disposition state of mind, understood the nature of disposition and effective dispositions he made and thereafter put his signature to the documents on his own free will without anybody's compulsion.

13. It is pertinent to note that during the cross examination of P.W.2, he has stated that though Titus Faria had come along with his daughter and son-in-law, from the evidence of P.W.2, it is made clear that at the behest of one Fernandaz who is the close friend of P.W.2, he prepared the draft of the Will. It is relevant to extract the cross examination of P.W.2.

"உயிலை எழுதிய டைட்டஸ் பாரியா என்பவரை அவரது மருமகன் பெர்னான்டஸ் என்பவர் மூலமாக தெரியும். மேற்சொன்ன பெர்னான்டஸ் எங்கள் காலனியில் குடியிருந்தார். டைட்டஸ் பாரியாவின் மகள் மார்க்கரெட் என்பவருடைய கணவர் தான் Tiber Fernandaz ஆகும். பெர்னான்டஸ் வசிக்கும் இடமும், டைட்டஸ் வசிக்கக்கூடிய இடமும் வெவ்வேறு என்றால் சரிதான். பெர்னான்டசும்



A.S.No.523 of 2018 and C.M.P.No.13248 of 2018

அவரது மனைவி மார்க்கரெட்டும் தான் டைட்டஸ் பாரியா என்பவரை என்
வீட்டிற்கு அழைத்து வந்தார்கள்."

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14. From the evidence of P.Ws.1 and 2, it appears that at the time of execution of the suit Will, the age of the testator was 90 years and he was in good health. The suspicious circumstance is Titus Faria was 90 years old on the date of execution of Will, he was brought to the Advocate by his daughter, Margret Fernandaz and son-in-law, Fernandaz. The said Fernandaz is a close friend of P.W.2 viz., R.Pradeep Kumar. It is a strong suspicious circumstance which was not dispelled. More so, such suspicious circumstance makes the initial onus very heavy on the propounder. Even without any plea from the caveator, the said circumstance raises a huge doubt as to whether the testator was acting on his own free will in executing the Will and obviously propounder has to remove the said suspicion from the mind of the Court by cogent and satisfactory evidence.

15. When the execution of Will is denied, then the burden lies on the propounder to prove the due execution of the Will. It is also to be



noted that the onus lies upon the propounder, can be said to have been discharged on proof of these essential facts.

16. In the matters of proof of Will, the Hon'ble Supreme Court of India has held in ***Jagdish Chand Sharma Vs Narain Singh Saini (Dead) through his legal heirs and others*** reported in ***2015 8 SCC 615*** as follows:

“That a propounder has to demonstrate that the Will was signed by the testator and that he was at the relevant time in a sound disposing state of mind and that he, understood the nature and effect of the disposition and further that he had put his signature to the testament on his own free will and that he had signed it in presence of two witnesses who had attested it in presence and in the presence of each other, in order to discharge his onus to prove due execution.

”

17. Section 67 of the Indian Evidence Act speaks about the proof of signature and handwriting of person alleged to have signed or written document which is produced by a person who has been the said person



signed before him. Section 68 speaks about the attestation of documents in execution, if required in law. As per Section 63 of the Indian Succession Act, as regards execution of the Wills, which lays down that every testator shall sign or shall affix the mark to the Will and such a Will shall further be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. The combined reading of Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act will require at least one attesting witness to be examined and the said witness should speak not only about the testator signature or affixing his mark to the Will, but also that each of the witnesses has signed the Will in the presence of the testator.

18. In order to substantiate the plaint details, on the plaintiffs' side, the third plaintiff - Margret Fernandez was examined as P.W.1. She had filed her proof affidavit in line with the details of plaint. Through her, Exs.A1 to A9 have been marked. From the evidence of R.Pradeep Kumar, Advocate who has been examined as P.W.2, it is discernible that as per the instructions of Titus Faria, during the month of August 2000, his draft



Will which contained five pages was accepted by Titus Faria. Therefore, it is made clear that this witness namely P.W.2 was examined in order to prove that as per the instructions of Titus Faria, the suit Will was drafted.

19. But, no witness connected with the suit Will was examined by the plaintiffs' side in compliance with Section 68 of the Indian Evidence Act and Section 63 of Indian Succession Act. Moreover, the above said surrounding circumstances were not dispelled by the plaintiffs side. Therefore, it is concluded that the execution of the Will was not proved in the manner known to law.

20. As regards the veracity of Ex.B4 document (Account statement given by the Civil Engineer (D.W.2)), in order to show that D.W.2 received money for the purpose of effecting repairs in the suit property from Alister Faria, the learned Trial Judge has observed that the writings and the signature made in the said documents in all pages are found to be in the same ink colour and he was of the view that this was created for the purpose of this case. His observation is fully acceptable for the reason



that the writings are said to have been made on different dates, varying from 26.02.2009 to 26.10.2010. On eight occasions, the writings have been made with signature of D.W.2. On all the dates, the same Ink/pen would have been used is now the question. Therefore, in view of the above said observations, we are inclined to align with the view of the Trial Court and it is held that Ex.B4 is not a bonafide document.

21. As regards the succession, it may devolve in two ways,

(i) By Testamentary Succession i.e. When the deceased leaves a Will bequeathing his property to specific persons.

(ii) By Intestate Succession i.e. When the deceased has not left a Will, the law governing the deceased (according to his religion) steps in, and determines how his estate will devolve.

22. It is pertinent to note that the last Will said to have been executed by Titus Faria was held as not proved by the propounder. Christians in general are governed by the Indian Succession Act, 1925 for



succession purposes. There is no dispute as to the fact that all the parties are Christians. As per Section 25 of the Act, succession would be based on “per capita”, (equal division of shares) when they are of the same degree of relationship. The Act recognizes three types of heirs for Christians: the spouse, the lineal descendants and the kindred.

23. It is also worth to note that the heirs to Christians shall take the property as tenants-in-common and not as joint tenants. The Plaintiffs are lineal descendants and kindred.

24. In fine, all the children of Titus Faria are entitled to get equal share in the suit property. Accordingly, the plaintiffs who are admittedly lineal descendants of the deceased Titus Faria are entitled to have 5 / 7 shares in the suit property. During the final decree proceedings, the parties are at liberty to file a relevant application to order for sale of the property enabling them to enjoy the fruits of the decree, if necessary.



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A.S.No.523 of 2018 and C.M.P.No.13248 of 2018

25. Based on the aforesaid observations, this appeal is disposed of.

Consequently, connected miscellaneous petition is closed. No costs.

(S.V.N.J) (R.K.M.J)

29.03.2023

Speaking/Non-speaking order

Index : Yes/No

Internet : Yes/No

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A.S.No.523 of 2018 and C.M.P.No.13248 of 2018

**S.VAIDYANATHAN, J.
and
R.KALAIMATHI, J.**

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To

The I Additional District Judge, Coimbatore.

Pre-delivery Judgment made in

A.S.No.523 of 2018 and C.M.P.No.13248 of 2018

29.03.2023



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A.S.No.523 of 2018 and C.M.P.No.13248 of 2018