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S.A.No.248 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.11.2023

PRONOUNCED ON :13.12.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.248 of 2017

Mayilsamy Gounder (died)

...Appellant

A2.M.Kalaivani, W/o.Mayilsamy Gounder

A3.M.Shankar Mahesh, S/o.Mayilsamy Gounder

A4.M.RubinKumar, S/o.Mayilsamy Gounder

(A2 to A4 are residing at

Old.No.75/2, New.No.2/60,

Devaragapuram, (Kannimar Kovil Street),

Coimbatore – 641 109.

[sole appellant died, A2 to A4 B/R as LR's of the deceased sole appellant viz.,

Mayilsamy Gounder vide Court Order dated 20.07.2022 made in

CMP.No.4469/22 in S.A.No.248 of 2017(TVTSJ)]

Vs.

Amaravathi Ammal

...Respondent

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 12.01.2016 made in A.S.No.107 of 2013 on the file of the Court of Principal Subordinate Judge, Coimbatore, reversing the judgment and decree dated 07.03.2013 made in O.S.No.2430 of 2007, on the file of the Principal District Munsif, Coimbatore.



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For Appellant : Mr.N.Sridhar
for M/s.R.Lakshmi Narasimhan

For Respondent : Mrs.Hema Sampath
Senior Advocate
for M/s.A.Ramkumar

J U D G M E N T

The defendant in the suit is the appellant. The respondent herein filed a suit for declaration of title, recovery of possession and also for permanent injunction restraining the appellant/defendant from alienating or encumbering the suit properties. The suit was dismissed by the trial Court. The appeal filed by the respondent/plaintiff was allowed and the suit was decreed as prayed for. Aggrieved by the same, the defendant has come by way of this Second Appeal.

2. According to the respondent/plaintiff, the appellant is the elder brother of respondent and both of them were children of one Ramasamy Gounder. The said Ramasamy Gounder had two other sons and one of them namely Shanmuga Sundaram was not mentally alert. The said Shanmuga Sundaram was under the care and custody of Ramasamy Gounder during his life time and after his death, he was under the care of mother Annammal till



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her death during March 2007. It was claimed by the respondent that during his life time Ramasamy Gounder expressed his desire to give his properties to respondent, who was his only daughter. It was claimed by the respondent that the appellant herein schemingly, by taking advantage of age of Ramasamy Gounder, got a registered Will executed by Ramasamy Gounder in his favour on 30.06.2005, even without knowledge of mother Annammal. Subsequently, Ramasamy Gounder cancelled the registered Will in favour of appellant by a document dated 11.07.2005. Thereafter, the Ramasamy Gounder had executed another Will on 12.07.2005 bequeathing the suit properties to his only daughter namely respondent with a direction to respondent to maintain mother Annammal and son Shanmuga Sundaram out of the income from the properties. It was claimed that Ramasamy Gounder died on 14.07.2005. The respondent also claimed that though the appellant was aware of the Will executed by Ramasamy Gounder in favour of respondent refused to give possession of suit properties and consequently a notice was sent to him calling upon him to surrender possession. Though he received the notice failed to give reply and hence the respondent was constrained to file a suit for above said relief.



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3. The appellant herein filed a written statement denying execution of Will dated 12.07.2005 allegedly executed by Ramasamy Gounder in favour of respondent. The appellant denied both the Will dated 12.07.2005 and the cancellation document dated 11.07.2005 allegedly executed by Ramasamy Gounder as forged one. It was further claimed by the appellant that Ramasamy Gounder died on 14.07.2005 just two days after execution of alleged Will dated 12.07.2005 set up by the respondent. The appellant claimed that Ramasamy Gounder executed a registered Will in his favour on 30.06.2005 and thus claimed right over the suit property and sought for dismissal of the suit.

4. Before the trial Court, the respondent was examined as PW.1, the attester to the Will relied on by the respondent, Ex.A1 dated 12.07.2005 and the document dated 11.07.2005 cancelling earlier Will dated 30.06.2005 was examined as PW.2. The other attester to Ex.A1 Will was examined as PW.3. The Notary Public before whom Ex.A1 Will said to have been executed was examined as PW.4. The brother of plaintiff and defendant one Karuppusamy was examined as PW.5. On behalf of respondent, the Will under which, she claimed right was marked as Ex.A1. The document dated



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11.07.2005 cancelling earlier Will relied on by the appellant was marked as

Ex.A5. The death certificate of Ramasamy Gounder was marked as Ex.A2.

The pre-suit and the postal acknowledgment card were marked as Exs.A3 and A4. The appellant/defendant was examined as DW.1, the attester to Ex.B15 Will dated 30.06.2005 relied on by appellant was examined as DW.2, the scribe of the said Will Ex.B15 was examined as DW.3. The registered Will under which the appellant claimed the right was marked as Ex.B15. The appellant also marked fourteen other documents as Exs.B1 to B14. Besides, these documents, four other documents were marked as Exs.X1 to X4 through PW.4.

5. The trial Court on consideration of oral and documentary evidence available on record, came to the conclusion that Ex.A1 Will relied on by the respondent, Ex.A5 cancellation deed relied on by the respondent and Ex.B15 Will relied on by the appellant were not proved and as a consequence dismissed the suit. Aggrieved by the same, the respondent/plaintiff preferred an appeal in A.S.No.107 of 2013 on the file of the Principal Subordinate Court, Coimbatore.

6. The First Appellate Court came to the conclusion that Ex.A1-



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Will and cancellation deed Ex.A5 were properly proved based on the evidence of attesor to the document and consequently reversed the findings of the trial Court and allowed the second appeal. Aggrieved by the same, the defendant has come before this Court.

7. At the time of admission, this Court formulated the following substantial question of law by order dated 19.04.2017:

“Whether the evidence adduced by the respondent would satisfy the requirements of proof prescribed under the Indian Succession Act, the Indian Evidence Act and the Registration Act and prove the due preparation, execution and attestation of Ex.A5 unregistered cancellation deed and Ex.A1 unregistered Will, clear the suspicious circumstances surrounding the preparation, execution and attestation of the same and entitle her to get a decree in the suit as prayed by her?”.

8. The learned counsel appearing for the appellant submitted that though in the plaint, the respondent claimed that the appellant got a Will in his favour on 30.06.2005 from his father Ramasamy Gounder, even without knowledge of mother, when she was examined as PW.1 deposed, as if she acquired knowledge about the Will by information given by her mother.



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Further, she deposed that before the death of Ramasamy Gounder, she visited him and he had shown Ex.A1 Will and Ex.A5 cancellation document to her.

Therefore, evidence of PW.1 goes against her averments in the plaint. The said discrepancy creates a serious suspicion about the genuineness of Will relied on by her. The learned counsel further submitted that PW.3 in his evidence deposed that he helped testator to affix his thumb impression in the Will. However, the other attester to the document, PW.2, deposed testator himself affixed his thumb impression in the Will. Therefore, the evidence of two attestors namely P.W.2 and P.W.3 are mutually destructive with regard to the fact how testator affixed his thumb impression in the Will. The learned counsel further submitted that as per evidence of one of the attester P.W.3, on 12.07.2005 he visited Advocate's office and then proceeded to Ramasamy Gounder's house at about 11.00 a.m., with pre-prepared Will and cancellation deed. However, P.W.4-Notary Public in his evidence stated that he reached Ramasamy Gounder's house by 4 ó Clock in the evening and Ramasamy Gounder gave him to pre-prepared Will.

9. The learned counsel for the appellant vehemently contended



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that in view of the material contradictions between the evidence of PW.2, P.W.3 and PW.4., Ex.A1 Will and the cancellation document A5 were not properly proved. The learned counsel further submitted that PW.5 deposed Ex.A1 Will and cancellation deed were executed at Sub Registrar's Office. The said statement of PW.5 goes against the evidence of PW.2 to PW.4. The learned counsel further submitted that PW.1 failed to explain how she got possession of Ex.A1 Will and cancellation deed Ex.A5. When she was questioned about the same, she evasively answered only his son would know about that fact. Therefore, the learned counsel submitted that Ex.A1 Will and cancellation deed as Ex.A5 were not properly proved and consequently the judgment and decree passed by the First Appellate Court are liable to be set aside.

10. The learned Senior Counsel appearing for the respondent submitted that both the parties admitted registered Will executed by testator in the year 1991 giving properties to his only daughter/respondent and in Ex.A1 Will also the suit properties were given to respondent only. Therefore, giving the suit property to the respondent as against other sons of testator cannot be termed as un-natural while considering the nature of disposition made in admitted Will executed by testator in the year 1991. The learned Senior



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Counsel by taking this Court to the evidence of DW.2, attesor to Ex.B15 Will relied on by appellant, submitted that DW.2 clearly admitted that he had not seen the testator signing the Will. Therefore, Ex.B15 Will relied on by the appellant was not at all proved.

11. The learned senior counsel further submitted that the First Appellate Court on appreciation of evidence of both the attestors to Ex.A1 Will and the Notary Public before whom it was executed came to a factual conclusion that Ex.A1 Will relied on by the respondent was proved along with Ex.A5 cancellation deed and the said findings requires no interference. The learned senior counsel further submitted that even in the absence of cancellation deed, Ex.A5, execution of subsequent Will by testator under Ex.A1 would revoke his earlier Will namely Ex.B15.

12. In support of his contention, the learned counsel relied on the following Judgments:



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S.No.	Citation
1.	(2010) 14 SCC 266 Gopal Swaroop Vs.Krishna Murari Mangal
2.	(2005) 11 SCC 189 Durga Vs. Anil Kumar
3.	AIR 1991 Cal 166 DB Sushila Bala Saha Vs. Saraswathi Mondal
4.	AIR 1989 All 75 Smt. Chandana Vs. Gyan Chand and others
5.	(2002) 2 SCC 85 Madhukar D Shende Vs Tarabai Aba Shedage
6.	AIR 1955 SC 566 Anil Behari Ghosti Vs Smt.Latika Bala Dassi and others
7.	AIR 1960 Ker 1 FB Sri Devi Amma and others Vs.Venkitaparasurama Ayyan and others
8.	Judgment of the Madras High Court on 21.08.2019 in T.O.S.No.59 of 2016 S.Vineeth Vs. S.Saravanan
9.	(2022) 1 SCC 115 V.Prabhakaran Vs. Basavaraj
10.	2016 -4-L.W 646 Karthik Meyyappan and others Vs. Sri Sutha Devi and another

13. The respondent/plaintiff has filed a suit seeking declaration of



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title, recovery of possession and also for injunction restraining the appellant from encumbering the suit property. There is no dispute that the property originally belong to Ramasamy Gounder. The respondent herein claimed right over the suit property under Ex.A1 Will dated 12.07.2005. Therefore, as a plaintiff it is incumbent on her to prove the proper execution of Will and it is also her duty to dispel the suspicious circumstances surrounding the execution, if any. In order to discharge her burden, the respondent examined the two attestors to the Will as PW.2 and PW.3 and the Notary Public before whom the Will was executed as PW.4. Will is a document which requires compulsory attestation. Hence under Section 68 of Indian Evidence Act it has to be proved by examining atleast one of the attestor. A close scrutiny of the evidence of PW.1 to PW.5 would reveal that Ex.A1 Will was marked through PW.1. She deposed in support of her averment in the plaint. The first attestor to Ex.A1 Will was examined as PW.2. Though PW.2 referred to Will of Ramasamy Gounder dated 12.07.2005 in his proof affidavit when he was examined before the Court no attempt was made to show Ex.A1 Will to the witness and he never identified his signature in the Will. The Will was marked through PW.1 beneficiary of the Will on 03.06.2010. The proof affidavit of PW.2 was prepared on 27.07.2010. Therefore, when proof affidavit of PW.2 was



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prepared, Ex.A1 was not in the custody of respondent/plaintiff or her Advocate, but it was in the custody of Court. Though PW.2 speaks about the attestation in his proof affidavit, when he was examined in chief before the Court no attempt was made to show Ex.A1 to the witness to enable him to identify the signature in the Will. However, in cross examination, PW.2 says he signed as a first witness in Ex.A1 Will. From this we cannot come to a definite conclusion that Ex.A1 Will was shown to the witness and he identified the signature. Likewise, other attestor PW.3 also talks about his attestation in the proof affidavit. However, he was not examined in chief before the Court and no attempt was made by the learned counsel for the respondent to show Ex.A1 which was already in custody of the Court to the witness to enable him to identify his signature. Even PW.3 during his cross examination deposes, he signed as a second witness in Ex.A1. Therefore, it is not clear, whether Ex.A1 Will which was marked through PW.1, beneficiary under the Will, was infact shown to the witnesses(PW.2andPW.3) to enable them to identify their signature in the Will. This Court in ***GovindanChettiar Vs.Akilandam*** reported in ***Manu/TN/1608/1997*** held in cases where Will is proved by the beneficiary unless the Will is shown to the attestor and he identifies his signature in the Will it could not be taken as Will was proved by the attestor.



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14. As discussed earlier in this case, whether Will was shown to the attestors PW.2 and PW.3 is doubtful. The Ex.A1 Will was not shown to the attestors namely PW.2 and PW.3 during their chief examination in Court. In fact only proof affidavit was filed and there was no chief examination in the Court. However, they deposed about their signature in Ex.A1 Will in cross examination. In these circumstances, very proof of Will by PW.2 and PW.3 is highly doubtful. In any case, in view of the fact both the attestors deposed about the signature in Ex.A1 Will in cross examination, I do not want to come to the conclusion, the Will was not shown to the witnesses and hence the respondent failed to prove the same. I proceed on the basis, the Will was shown to the witnesses and their signature was identified by them.

15. The Will was said to have been executed on 12.07.2005. As per Ex.A2 death certificate of testator, he died on 14.07.2005, just two days after execution of unregistered Will. Both PW.2 and PW.3 clearly deposed that testator suffered fracture in the leg and he was in bed rest. In fact, both PW.2 and PW.3 deposed that in the guise of taking testator to hospital, the appellant had taken him to Sub Registrar's Office and got a registered Will executed in



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his favour on 30.06.2005. Therefore, it was clear on the date of execution of Ex.A1 unregistered Will in favour of respondent, testator's health was fragile as he suffered fracture and he was in bed rest. The same was fortified by evidence of PW.3 as he deposed that at the time of affixing his thumb impression, testator could not affix his thumb impression firmly due to weakness and hence he assisted him to affix his thumb impression. Therefore, from the evidence of PW.3, it was clear that testator was not in a position to affix his thumb impression on his own and he required assistance of others. However, PW.2 in his evidence deposed that the testator affixed his thumb impression on his own. Therefore, there is a serious contradiction with regard to the version of PW.2 and PW.3 as to whether attestor affixed his thumb impression on his own or he was assisted by PW.3 to affix his thumb impression.

16. PW.5 brother of the parties deposed that Ex.A1 Will was executed by testator in Thondamputhur Registrar's Office and he was present when it was executed. However, it is clear from the face of Ex.A1, it was an unregistered Will and the said fact was also admitted by the respondent/plaintiff. PW.2 and PW.3 the attestors to the Will do not speak



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about the presence of PW.5 at the time of execution of Will.

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17. The respondent as PW.1 deposed that she visited her father two days prior to date of death and testator had taken Ex.A1 and A5 from the bureau and had shown the same to her. She further deposed that when she attended funeral of testator Ex.A1 and A5 were not given to her. When she was specifically questioned about how she got custody of Exs.A1 and A5, she answered evasively that only her son could answer the same. Therefore, PW.1 is not able to show how she got custody of Ex.A1 and A5. She also deposed when Ex.A1 and A5 were shown to her by testator two days prior to his death, her mother and other brother Shanmugasundaram were present. However, in her plaint pleadings she averred that the appellant got the Will executed without knowledge of mother. Hence, there is a contradiction with regard to the evidence of PW.1 before the Court and her plaint averment.

18. From the discussions earlier, it is clear that the following suspicious circumstances surrounding the Will have not been satisfactorily



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dispelled by the respondent/plaintiff:

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(a) Testator died just two days after the Will and it was admitted by PW.2 and PW.3 testator suffered a fracture and he was in bed rest; PW.3 deposed, he assisted testator to fix his thumb impression in the Will. In such circumstances, the mental capacity of the testator to make valid disposition was not proved by respondent/plaintiff in a satisfactory manner;

(b) There is a serious contradiction with regard to the manner in which the thumb impression was affixed by testator in Ex.A1 Will. PW.2 deposed that testator himself affixed the thumb impression. However, PW.3 deposed that he assisted testator to affix the thumb impression;

(c) The beneficiary of the Will PW.1 failed to explain how she got custody of Exs.A1 and A5. When she was specifically questioned regarding this during cross examination she answered evasively by saying only her son could answer the question and her son was not examined;

(d) When testator executed a registered Will on 30.06.2005 bequeathing the suit property in favour of appellant what was the necessity for



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him to cancel the same within eleven days that too by way of an unregistered

Will was not satisfactorily explained;

(e) When testator had three sons and one daughter apart from his wife at the time of his death. Why he preferred the respondent to the exclusion of other children was not at all explained by the respondent. Though the learned Senior counsel appearing for the respondent submitted that even under 1991 Will testator had given the suit property to the respondent and hence there is nothing un-natural in preferring respondent to exclusion of other heirs, the said 1991 Will was not produced before the Court to explain the nature of disposition made under the said document;

(f) As per the admitted case of both the parties one of the sons of testator namely Shanmugasundaram was mentally challenged and testator's wife was living at the time of his death. In such circumstances, execution of Ex.A1 Will in favour of his daughter namely the respondent to the exclusion of mentally challenged son and wife is un-natural on the face of it. Though in the Will, a direction was given to the respondent to take care of said Shanmugasundaram and wife of testator, there is no evidence available on



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record to show that the respondent was in a position to fulfill such a direction;

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(g) As per the preamble portion of the Will, testator Ramasamy Gounder was living at Devarayapuram Village, Coimbatore South Taluk at the time of execution of the Will. As per the preamble portion of the proof affidavit and plaint, the first respondent was living in Vettaikaranpudhur, Pollachi Taluk. It is also admitted by PW.1 when she was examined before the Court that at the time of death of her father she was in Vettaikaranpudhur and she visited her father (testator) two days prior to death and her father had shown Ex.A1 and A5 to her from taking them from Bureau. She also admitted her father's health was not good at that point of time. Therefore, it is clear the testator was living in his house at Devarayapuram at the time of death and the first respondent was away at Vettaikaranpudhur. In such circumstances, the recitals in Ex.A1 Will, as if the respondent was taking care of testator, mentally challenged Shanmugasundaram and testator's wife Annammal etc., by administering the suit properties is highly un-natural and not acceptable to this Court;

19. It is settled law, the propounder of the Will should not only prove the Will by examining the attestor to the testamentary document, he



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should also dispel the suspicious circumstances surrounding the Will. In the case on hand, as pointed out earlier there are material contradictions in the evidence of PW.2 and PW.3 with regard to the execution of the Will. Further very proof of Will through PW.2 and PW.3 is doubtful as it is not clear, whether Ex.A1 Will, which was marked through PW.1 was shown to PW.2 and PW.3 when they entered box. Further in view of the various suspicious circumstances mentioned above, this Court is unable to affirm the findings of the First Appellate Court that Ex.A1 Will stood proved. Therefore, the said findings of the First Appellate Court are set aside by answering the substantial question of law framed at the time of admission in favour of appellant and against the respondent.

20. As far as Ex.B15 is concerned, the attesor to Ex.B15 was examined as DW.2 to prove the said documents. Though DW.2 attesor to Ex.B15 in his chief examination deposed that Ramasamy Gounder executed Ex.B15 registered Will bequeathing the suit property to the appellant, during cross examination, he deposed he was not aware, whether Ramasamy Gounder put his signature or thumb impression under Ex.B15 Will. He also deposed that when Will was executed he had gone out. The relevant portion of DW.2's



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evidence reads as follows:

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“பதிவாளர் அலுவலகத்திற்குள் என்னிடம் கையெழுத்து வாங்கினார்கள். அப்பொழுது மயில்சாமி கவுண்டரும் உடன் இருந்தார். என்ன பத்திரம் எழுதினார்கள் என்று நான் படித்துப் பார்க்கவில்லை. ராமசாமி கவுண்டர் கையெழுத்து போட்டாரா என்று எனக்கு தெரியாது. அவர் வண்டியில் இருந்தார். நாங்கள் மினி ஆட்டோவில் வந்தோம், ஏங்களை மயில்சாமி கவுண்டர் கூட்டி வந்தார். பத்திரம் பதிவு செய்யும் போது மயில்சாமி முபவதும் பத்திர அலுவலகத்திலேயே இருந்தார். பதிவு செய்த பத்திரத்தில் என்ன எழுதியிருக்கிறது என்று என்னிடம் சொல்லவில்லை நான் அதனை படித்தும் பார்க்கவில்லை. ராமசாமி கவுண்டர் பத்திரத்தில் கையெழுத்துப் போட்டாரா கைரேகை வைத்தாரா என்று நான் பார்க்கவில்லை. அப்பொழுது என்னை வெளியே போகச் சொல்லிவிட்டார்கள்.”

21. Reading of the above extracted portion of DW.2's evidence clearly proves that the evidence of DW.2, attesor, is not sufficient to prove Ex.B15 Will. Therefore, this Court comes to the conclusion that the Will relied on by the appellant was also not proved. As far as the earliest Will dated 14.06.1991 referred to by the respondent in her plaint is concerned, though she claimed said Will was executed Ramasamy Gounder bequeathing his property in favour of the respondent, she failed to produce the same before the Court. Therefore, the said Will was also not proved in accordance with law.



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To

1. The Principal Subordinate Judge, Coimbatore.
2. The Principal District Munsif, Coimbatore.

Pre-delivery order made in

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