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CMA No.18 of 2020 & CMP No.182 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM :

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CMA No.18 of 2020 & CMP No.182 of 2020

Judgment reserved on 04.01.2024	Judgment pronounced on 17.04.2024
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K.Balasuubramaniam

...

Appellant

Vs

1.Chinnusamy

2.Sivaprakasam

3.Loganathan

4.Balasubramani

5.KAilasam

6.Kannammal

7.Senthilkumar

8.Indumathi

9.Minor Pradeev Raj

Rep.by mother Indumathi

10.Santhi @ Santhavathi

11.Ammakannu

12.Sagunthala

...

Respondents

Prayer : Civil Miscellaneous Appeal filed under Section 299 of Indian Succession Act, 1925 against the order and decreetal order dated 26.07.2019 passed by the Additional District (Fast Track Court), Mettur in Probate O.P.No.196 of 2008.



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CMA No.18 of 2020 & CMP No.182 of 2020

For Appellant : Mr.S.Rajendrakumar
For Respondents : Mr.A.K.Kumarasamy
Senior Counsel for
Ms.J.Prithivi for R1 to R3
R4 to R12 : No appearance

ORDER

The unsuccessful petitioner in probate proceedings is the appellant herein.

2. For the sake of convenience, the parties are referred to as per their ranking in the Probate OP.

3. The petitioner filed Probate O.P No.196 of 2008 before the Principal District Court, Salem and subsequently made over to I Additional District Judge, (Fast Track Court), Mettur on administrative grounds.

4. The subject matter of the Will is alleged to have been executed by Kandasamy Gounder and appellant herein is the grand son through daughter. The contesting respondent is the son of Kandasamy Gounder and the second respondent is the son of the first respondent/grandson of the said Kandasamy Gounder through son.



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5. The brief facts that are necessary for determination of the appeal are as under -

5(i) As per the petition, the schedule of property absolutely belongs to Kandasamy Gounder s/o Chinappa gounder who is the maternal grandfather of the petitioner and the said Kandasamy Gounder acquired the property by virtue of a Registered Partition Deed bearing No.5790 of 1973 that are described as 'A' schedule property in the said partition deed. It is alleged that on 13.08.2003, the said Kandasamy Gounder had executed a Will in favour of the Probate Petitioner in respect of the property which was attested by a notary public and executed in the presence of two witnesses namely Kandasamy and Ranganathan. Supporting affidavits were also filed. The said Kandasamy Gounder died on 07.10.2003 at Karuppa Reddiyur Kattu Valavu and the death certificate was also filed. During pendency of Probate Proceedings, some of the respondents have also died and hence their legalheirs were brought on record and some of the persons who agitated in the property were also added as parties. The main contestants are the respondents 1 & 2 before the Trial Court.



5(ii) It is the specific case of respondent herein that 'A' schedule property in the partition deed registered as Regn.No.5790 of 1973 and allotted to Kandasamy Gounder is admitted but it is denied that the Will was executed by Kandasamy Gounder in favour of the first respondent herein. Kandasamy Gounder is the father of the first respondent and grand father of the second respondent. Kandasamy Gounder had four brothers namely Rathinam, Subramaniam, Kuppusamy, Rasapan and two daughters namely Periya Pappa and Chinna Papa. The first respondent's father divided his property into six equal shares and allotted four shares to his sons and retained one such share for himself and the remaining one share was allotted to his wife Periyammal. Kandasamy Gounder divided his share into four equal shares and allotted to his sons in the year 2002 itself and therefore, pursuant to the oral allotment, they are in possession and enjoyment of the property and hence the alleged Will is ranked forgery. Kandasamy Gounder died on 07.10.2003 is admitted.

5(iii) It is the specific case of the first respondent that Kandasamy Gounder was bedridden from 2002 to till his death. He was unable to move anywhere and he was unconscious till his death and hence the alleged Will is forged and fraudulent



one. The father of the Probate Petitioner was a Village Administrative Officer (VAO). Hence, in connivance with some unscrupulous persons, he has created the Will. The alleged Will was executed in a suspicious circumstances and the same was not registered. It was created by the Probate Petitioner for getting unlawful gain with the help of his close relative. Kandasamy Gounder usually puts his signature and his alleged thumb impression has created a suspicious circumstance. The other legal heirs of the Kandasamy Gounder were not impleaded as parties in the petition. The other respondents also have taken a similar stand.

6. During the trial, the petitioner examined himself as PW1, one of the attestor of the alleged Will (Ex.P11) was examined as PW2. Ex.P1 is the death certificate of Kandasamy Gounder. Ex.P11 is the original Will (viz subject matter). Other documents marked as Exs.P2 to P10 are the communications and the supporting affidavits. On behalf of the respondents. RW1 to RW3 were examined and Exs.R1 to R15 were marked.



7. After hearing both oral and documentary evidence, the learned Additional District Judge, Mettur has accepted the evidence of PW2 and also calculated the period of limitation from the date of death of Kandasamy Gounder namely 07.10.2003 and has held that since the petition has been filed on 21.08.2008, after three years of coming to know of the Will is available. The Court has dismissed the Probate Original Petition (POP) as time barred. Hence, the present appeal.

8. Heard the learned counsel appearing for the appellant and the learned Senior Counsel appearing for the respondents 1 to 3.

Legal position :-

9(i)(a) A Will is a commitment, desire, inclination and intention to bequeath and dispose of properties in the future, in favour of the beneficiary. When the will is made, the law requires that there should be sound disposing mind, both at the time when the instructions for preparation of the will is given and when the will is executed, but it would appear that if the will is shown to have been drawn in accordance with the instructions given while the testator was of sound disposing mind, it is sufficient that, when he executes it, he appreciates that he is being asked to



executed a will, a document drawn in pursuance of those instructions shall remain valid.

9(i)(b) It is presumed that the testator was sane at the time when he made his will but if the question of his insanity or mental incapacity is contested, the initial onus is on the propounder to prove that the testator was of sound disposing mind and have the required mental capacity at the time when he made his will. While there must be a vigilant examination of all the evidence, if the Court feels that there is no doubt substantial enough to defeat a grant of probate, then the grant must be made.

9 (ii) The law requires that at the time of bequeath the testator has a disposing mind so that he is able to make a disposition of his property with understanding and reason. In the decision of this Court in *H.Venkatachala Iyengar v. B.N.Thimmajamma*, the following circumstances were held to be relevant for determination of the existence of the suspicious circumstances:

34.....(i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the will;

(ii) when the disposition appears to be unnatural or wholly unfair in the



light of the relevant circumstances; and

(iii) where propounder himself takes prominent part in the execution of will which confers on him substantial benefit".

9(iii) It is trite law that the burden of proof is on the propounder to prove that the will has been voluntarily executed, that the testator has signed the will and put his signature or his own free will having sound disposition of mind, understanding the nature and effect thereof and that the will is a genuine document. The onus of the propounder may be discharged if he succeeds in bringing on record sufficient cogent evidence in this regard and removing all suspicions.

9 (iv) It is paramount duty of the propounder to explain away the suspicions circumstances attending the execution of the will. This burden gets heightened when a caveat is entered challenging the will as forged or vitiated by undue influence, etc. These principles are elaborately stated by the Supreme Court in ***H.Venkatachala Iyengar v. B.N.Thimmajamma***. In the said case, the Court clearly distinguished the nature of proof required for a Will as opposed to any other document reads as under :

"18. Under Section 67, if a document is alleged to be signed

by any person, the signature of the said person must be proved to be in



his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant."

9 (v) Similarly, Sections 59 and 63 of the Succession Act are also relevant.

Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this Section indicate, what is meant by the expression 'a person of sound mind' in the context. Section 63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills.



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9(vi) It is for those who propound the will to remove that suspicion. Whenever a Will is prepared under circumstances which raised a reasonable suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed *Tyrrell v. Painton*.

9 (vii) On the point of limitation, the Supreme Court in *Kunvarjeet Singh Khandpur's* case explained the concept of right to apply for probate in the context of Article 137 of the Limitation Act, 1963. It was held that an application for grant of probate and letters of administration is in effect seeking permission of the court by the executor to perform the legal duty and discharge the instruction of the testator as mentioned in the Will and same is a 'continuous right' which can be exercised 'at any time' after the death of the testator as long as the right to do so survives and the object of the trust exists or any part of the trust if created remains to be executed.

9(viii)(a) The application for grant of probate or letter of administration is not

governed by any article of the Limitation Act. The crucial expression in the



petition is "right to apply". In view of what has been stated by this Court, Article 137 is clearly applicable to the petition for grant of letters of administration. As rightly observed by the High Court in such proceedings the application merely seeks recognition from the court to perform a duty because of the nature of the proceedings it is a 'continuing right'.

9(viii)(b) One must keep in mind that the grant of probate by a competent court operates as a judgment in rem and once the probate to the will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. If the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation under Article 137 of the Limitation Act in proceedings for revocation of probate.

9 (ix) There is no outer limit for filing of application for probate and the time would commence from the date when the right to apply accrues. The right to apply under Article 137 of the Limitation Act for the purpose of limitation has to be contextual and it would apply from the date on which the right to apply accrues



which is variable and would depend upon the facts of the case. It would vary from case to case. The date of death was not reckoned to be the date when the right to apply "accrues".

Facts of the case :

10(i) As per Ex.P5, the date of the Will is 13.08.2003. Admittedly, Kandasamy Gounder died on 07.10.2003. This Probate OP was filed on 21.08.2008.

CMP No.182 of 2020

10(ii) Pending appeal, the petitioner also filed CMP No.182 of 2020 for receipt of additional documents under Order XLI Rule 27 CP r/w Section 151 CPC. It is a returned petition in OP No.196 of 2008 in SR No.37347 dated 26.04.2005.

10(iii) In the said CMP, in the counter filed by the respondent it is alleged that a partition deed dated 24.11.1973 was executed between Kandasamy Gounder and his male legal heirs. As per the partition deed, the family properties were divided into 6 equals and 4 shares were allotted to male legal heirs of Kandasamy Gounder, one share was allotted to the second wife of Kandasamy Gounder and another share was

retained by the said Kandasamy Gounder himself. The property retained by



Kandasamy Gounder was subsequently divided by sons' families of Kandasamy

Gounder in the year 2002 itself by oral partition and they have been in possession and enjoyment as per the partition in the year 1973 and 2002.

10(iv) The petitioner filed Probate OP No.196 of 2008 based on a forged Will.

The first respondent and other male legal heirs of Kandasamy Gounder strongly contested the Will and the District Judge, Fast Track Court, Mettur dismissed the petition on the ground of limitation.

Counter in CMP:

10(v) The averments with respect to the misplacement of the first page of the Will and that it was traced only after 3 years in petitioner's counsel's office are all false and concocted. The petitioner cannot fill up the lacuna by producing returned OP papers and that production of returned papers does not imply that the petitioner can override the Limitation Act.

10(vi) It is further alleged in the counter that the petitioner has filed the

Original Petition with improper court fees and the same was returned for payment of



deficit court fees. The papers were not returned for non-filing of first page in the

Will as stated by the petitioner in the CMP affidavit. The papers were returned more

than four times and the petitioner has not taken any sincere efforts to rectify the

defect, such as payment of deficit court fees and there had been an exorbitant delay

in representation which the law of limitation strongly condemns.

11. The Lower Court records were perused wherein we find that the original petition in the above said SR No.34347 was returned for the following reasons -

Sl.No.	Date of Return	Reasons for Return
1	03.01.2005	1. Deficit court fee 2.Court fee 3.Prayer (7, 12,13 para connection) 4.market valuation petition 5.payment of probate fees
2	Re-presented on 31.01.2005	
3	28.03.2005	1. Previous return not complied
4	10.04.2007	1.Representation delay 536 days 2.Previous return – 1, 5 not complied (03.01.2005) 3.S.No.151/3 not mentioned in the Will
5	06.06.2005	1. Previous return 1,2,4 & 5 not complied with (23.01.2005) 2.No.1 - original will dated 13.08.2003 not received alongwith



Sl.No.	Date of Return	Reasons for Return
		OP.
6	23.06.2008	1. 28.03.2005, 06.06.2005 reply endorsement to be made 2.10.04.2007 has to be complied with 3.Delay execution petition for representing this petition.
7.	09.08.2008	Delay excuse petition has to be filed

12. Hence, I find that the reasons stated in the petition for receipt of additional document at the Appellate Stage, petition having filed under Order XL1 Rule 27 CPC on the ground that they have filed the present OP on 21.08.2008 as if it is for the first time they came to know about the Will. As per the earlier application in SR No.37247, it is averred that on 08.07.2004, they issued paper publication based upon the Will and hence I find that the present application filed on 21.08.2008 is after three years of his knowledge. Instead of representing the returned OP paper, they have filed a fresh application suppressing the earlier application which amounts to suppression of material fact namely material suppression.



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13. The Trial Court has dismissed the Probate OP as time barred, recking the period of limitation 3 years from the date of death without referring to the knowledge of the Will. Since the reasons stated in the affidavit filed in support of the petition does not tally with the returns made by the Lower Court in the said document, this Court is of the considered view that the necessary ingredients under Order XLI Rule 27 of CPC has not been complied with since the very same document is very much available with the office of the Advocate. It is also within the knowledge of the petitioner and hence I do not have any hesitation to reject the said contention. Accordingly, CMP No.182 of 2020 is devoid of merits as the same suffers from material suppression and hence, CMP No.182 of 2020 stands rejected.

14. On the point whether the petitioner has proved the validity and genuineness of the Will as regards under Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act, the petitioner has examined himself as PW1, one of the testator was examined as PW2. Initially he admitted his signature in Ex.P5-Will. In the cross examination, he has fairly admitted as under.



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என்னை சாட்சி சொல்வதற்கு பூவராகவன் அழைத்தார். அவருக்கு உயில் எழுதும்போது 80 வயதிற்கு மேல் இருக்கலாம். 13.08.2003 ஆம் தேதி கந்தசாமி கவுண்டர் உயில் எழுதுவதற்கு ரங்கநாத கவுண்டருடன் என் வீட்டிற்கு மகிழுந்தில் வந்தார். அவர்கள் வரும்போது காலை 9.00 மணி இருக்கும். அவர்களுடன் சத்தியமூர்த்தி என்கிற பத்திர எழுத்தரின் அலுவலகத்திற்கு வந்தேன். அது மேட்டுர் சார்பதிவாளர் அலுவலகத்திற்கு அருகில் உள்ளது. சத்தியமூர்த்தியுடன் வசந்தி என்பவர் இருந்தார். கந்தசாமி கவுண்டர் கையெழுத்துப் போட்டதை நான் பார்த்ததில்லை அவர் கைரேகை வைத்துதான் நான் பார்த்திருக்கிறேன். அந்த பத்திரங்களுக்கு சட்டபூர்வ அங்கீகாரம் அளிக்கும் வழக்கறிஞரின் பெயர் எனக்கு நினைவில்லை. இதற்கு முன்பு நான் கையெழுத்திட்டு வந்தேன் என்றும், வயது முதிர்வின் காரணமாக கைநடுக்கத்தின் காரணமாக கைரேகை செய்கிறேன் என்று எழுதப்பட்டுள்ளது என்றால் சரிதான்.

15. During the cross examination, on behalf of the respondents 3 & 4, he had admitted that he is totally a stranger which reads as follows -

நான் என் வாழ்க்கையிலேயே 2 பத்திரங்களில் மட்டுமே சாட்சி கையெழுத்து போட்டுள்ளேன். கந்தசாமி கவுண்டருக்கு எத்தனை



மனைவியர் என்று எனக்குத் தெரியாது. அவருக்கு எத்தனை பேர்க் குழந்தைகள் இருந்தனர் என்பது எனக்குத் தெரியாது. எனக்கும், கந்தசாமி கவுண்டருக்குமிடையே வியாபாரம் மற்றும் பணத் தொடர்பு எதுவும் கிடையாது. அவர் எதுவரை படித்துள்ளார் என்று எனக்குத் தெரியாது. கந்தசாமி கவுண்டரின் பேரன் கிராம நிர்வாக அலுவலராக இருந்ததாகக் கேள்விப்பட்டேன். கந்தசாமி கவுண்டர் மூக்கு கண்ணாடி அணிந்திருப்பார்.

16. With regard to the physical and mental status of the testator at the time of execution of Ex.P5 – Will, he could answer as under -

நல்ல உடல்நிலையுடன் இருப்பதாக உயிலில் எழுதப்பட்டுள்ளது சரியா?

உடல்நலம் குன்றியிருப்பதாக சொல்லியிருப்பது சரியா? என்றால் இரண்டும்

சரிதான். கந்தசாமி கவுண்டரின் கைரேகையை யார் பிடித்து வைத்தது என்பதை நான் சொல்லமுடியுமா என்றால், எனக்கு நினைவில்லை. ரங்கநாதன், கந்தசாமி கவுண்டர் மற்றும் நான் ஆகியோர் முதன் முதலாக அன்றுதான் ஒன்று சேர்ந்தோம் என்றால் சரிதான். (emphasis supplied)

17. During the cross examination of contesting respondent RW1, so also during the cross examination of RW3 and thus this Court finds that the evidence of

RW2 the testator does not inspire confidence of this Court. Hence, this Court holds



that the petitioner has committed a fraud upon this Court in suppressing the material fact about the earlier OP and also filed false affidavit with regard to the alleged return made in numbering of of the application are found to be false after summoning of the court. The documents returned by the Trial Court as could be seen from the endorsement made in the return petition and he has not disclosed the facts and various rejections made therein in the petition or in his affidavit , the petition was dismissed on the point of limitation.

18. It appears that in order to make a ground in the appeal, he has introduced and invented a new case and filed the CMP which was dismissed for the reasons stated supra.

19. In view of the reasoning discussed in the preceding paragraphs, this Court finds following circumstance are grave, suspicious in nature; to sum up;

(a) The testator Kandasamy Gounder was aged 95 years when he died on

07.10.2003 whereas the alleged unregistered Will is said to have been executed in



less than two months prior to his death. It remains to be stated that both in the petition and chief examination, the beneficiary under the Will – PW1 is silent in respect of how he had knowledge about the possession of the Will and he never whispered how he had the knowledge and how he got possession of the Original Will. Only in the cross examination, he comes with an explanation as to how he got the knowledge assumes significance.

(b) When the Will came to his possession through Ranganathan, one of the attesor who died pending trial, he could very well stated in the petition as well as in the chief examination and hence the fact which is material as to coming to know about the existence of the Will and taking custody of the Will was never disclosed anywhere in the petition or in the chief examination of PW1 assumes significance.

(c) Though PW2-attesor states that he know about attesor Kandasamy for 40 years, he is not aware of the age and particulars of his family members and the number of wives and location of the house and the contents of the Will



as recited in Ex.P11. Kandasamy Gounder is unwell is found to be contrary to the deposition of PW1 & PW2 who deposed that the testator was hale and healthy while the recital in Ex.P11-Will is found to be otherwise. No reason has been assigned in the execution of the Will in favour of the grandson born through the daughter ignoring male descendants of the Kandasamy Gounder though this factor in isolation cannot be a matter for creating a suspicion but in cumulative association with other matters, creates doubt in the mind of the Court.

20. The evidence of PW2 does not inspire the confidence for the reasons stated in the preceding paragraphs and hence both on the point of limitation as well as on the point that oral evidence of PW2 does not pass the test of reliability and credibility. I find no merits in the Civil Miscellaneous Appeal and hence the order of dismissal passed by the Trial Court is confirmed for various other grounds for different reasoning as discussed supra.



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21. In the result, this Civil Miscellaneous Appeal is dismissed confirming the order and decretal order dated 26.07.2019 passed by the Additional District Judge (Fast Track Court), Mettur in Probate O.P.No.196 of 2008. Consequently, connected Miscellaneous Petition is dismissed. No costs.

17.04.2024

Index : Yes/No

Speaking / Non-Speaking Order

Neutral Citation : Yes/No

rgr

To

1. The Additional District Judge,
Fast Track Court, Mettur .

2.The Section Officer,
VR Section, High Court, Madras.



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CMA No.18 of 2020 & CMP No.182 of 2020

RMT.TEEKAA RAMAN,J.,

rgr

Judgment in
CMA No.18 of 2020

17.04.2024