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A.S(MD)No.85 of 2020



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 09.01.2024

Delivered on : 12.03.2024

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
AND**

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

**A.S(MD).No.85 of 2020
and
C.M.P(MD)No.17335 of 2023**

1.R.Devaki
2.V.Lakshmi Praba
3.S.Revathi

...1 to 3 Appellants/
2 to 4 Plaintiffs

R.Malathi(Died)
4.D.Rajeseakaran
5.R.Prakash

...4th Appellant/6th Plaintiff
...5th Appellant/8th Plaintiff

Vs.

1.D.Ganesan(Died)
2.S.Meera Bail
3.N.Visalatha
4.S.Giridaran
5.S.Gowthaman

...1to5 Respondents/ 1 to 5
Respondents

6.T.Ragavan
7.S.Jalaja
8.S.Muralidaran
9.R.Vanaja

...6 to 9 Respondents/7to10
Defendants

10.N.Chandrasekaran

...10th Respondent/1st
Plaintiff

11.R.Aravindh

...11th Respondent/7th
plaintiff

12.G.Indira
13.G.Jegannathan
14.Saratha Babu



15.Maya Ganesan
(R12 to R15 are brought on record as
LRS of the deceased 1st respondent
vide Court order dated 09.02.2023)

Prayer: This First Appeal is filed under Section 96 of the Code of Civil Procedure, against the judgment and decree dated 06.01.2020 passed in O.S.No.23 of 2016 on the file of the learned I Additional District Court, Tuticorin.

For Appellants	: Mr.V.Meenakshisundaran
For R4 to R6&R8	: Mr.G.Prabhu Rajadurai, for M/s.Ajmal Associates
For R3,R7,R9 to R15	: No Appearance
For R1	: Died
For R2	: Ex-parte

J U D G M E N T

**DR G. JAYACHANDRAN,J.
AND
C.KUMARAPPAN,J.**

The instant first appeal has been filed against the judgment and decree, dated 06.01.2020 passed in O.S.No.23 of 2016 by the First Additional District Court, Thoothukudi.

2.The appellants 1 to 3 are the plaintiffs 2 to 4 before the trial Court. The appellants 4, 5 and the respondent 11 are the children of the deceased 6th plaintiff. The respondents 1 to 5 are the defendants 1 to 5 before the trial Court. However, after the demise of the first respondent/first defendant Ganesan, his legal heirs were impleaded as



respondents 12 to 15. The sixth defendant Anushiya, is the mother of the appellants 1 to 3 and the sixth respondent herein. Though she died, her legal heirs are already on record as appellants 1 to 3 and the respondent No.6. The respondents 7 to 10 are the defendants 7 to 10 before the trial Court. The tenth respondent herein is the first plaintiff before the trial Court.

3.For the sake of convenience the parties will be referred to according to their litigative status before the trial Court.

4.Shun of unnecessary details the relevant facts which are necessary for the disposal of the instant appeal is as follows:

The first schedule suit property was purchased in the year 1933 in the name of A.R.A.S Arumugasamy Nadar from and out of the income derived from the joint family property. Thereafter, in the oral partition, the said property devolved upon one A.R.A.S Duraisamy Nadar. Similarly, though the second schedule property was originally purchased by A.R.A.S Subbiah Nadar, the same was ultimately allotted to one A.R.A.S Duraisamy Nadar. Whereas items 3 and 4th of the suit property has been purchased by A.R.A.S Duraisamy Nadar. The fifth schedule property was the ancestral property of A.R.A.S Duraisamy Nadar. The



seventh schedule property is also belonged to A.R.A.S Duraisamy Nadar.

Similarly, though sixth schedule property stands in the name of Senbagamoorthy, since the same was purchased from and out of the sale proceeds of the alienation of the joint family property, the said property is also available for partition to the plaintiffs 2 to 5 through A.R.A.S Duraisamy Nadar. The plaintiffs further submit that in the instant suit, the legal heirs of one Arunachalam, who was also the descendants from A.R.A.S Duraisamy Nadar, has not been impleaded since they have released their right and title in the suit property by executing a release deed. Therefore, the legal heirs of Arunachalam are not entitled for any share in the suit items 1 to 7. To put it in other words, the legal heirs of the remaining 5 sons of A.R.A.S Duraisamy Nadar, who are the plaintiffs and the defendants are entitled to have 1/5th share each through their respective fathers qua branch.

4.2.It is also the submission of the plaintiffs that the suit items 8 and 9 of the schedule property are the absolute property of one Mr.Thilagarajan, who is one of the son of late A.R.A.S.Duraisamy Nadar. In which, the plaintiffs 2 to 4 and the sixth and seventh defendants are each entitled to 1/6th share. The plaintiffs further submit that the withdrawal of the suit in O.S.No.10 of 2011 will in no way be



the *res judicata* for instituting the instant suit as in that suit, a liberty was given to file a fresh suit. Hence, the plaintiffs prayed to decree the suit as prayed for.

5.The said suit was resisted by the first defendant, seventh defendant and ninth defendant by each filing separate written statement. The fourth and fifth defendants though have not filed written statement, they have filed a memo adopting the written statement filed by the seventh and ninth defendants.

6.The first defendant in his written statement has categorically admitted the plaint pleadings. The seventh defendant, who is the brother of the plaintiffs 2 to 5 and the son of one Mr.Thilagarajan, has stoutly resisted the suit. The seventh defendant has disputed the allegation, in respect of alienation and the purchase made by the legal heirs of A.R.A.S Duraisamy Nadar, in respect of joint family. It was also the contention of the seventh defendant that the eight and ninth items of the suit property are the self acquired property of his father D.Thilagarajan and that, late D.Thilagarajan has executed a Will on 24.01.2005. Therefore, the eight and ninth items of the suit property and the share of late Thilagarajan in the other joint family property, will absolutely belongs to the first



defendant by virtue of the Will dated 24.01.2005. The seventh defendant has also contended that the suit filed by the first plaintiff in O.S.No.82 of 2015 and the suit in O.S.No.1680 of 2015 filed by the plaintiffs 2 to 5 before the first Additional Munsif Court, Thiruvananthapuram and the suit in O.S.No.10 of 2011 filed by the legal heirs of the first defendant before the II Additional District Judge, Tuticorin, would bar the instant suit by the principles of *res judicata*. Hence, the seventh defendant prayed to dismiss the suit.

7.The ninth defendant is also the grandson of A.R.A.S Duraisamy Nadar through one of his son Shanmugam. To put it in other words, the ninth defendant is the paternal uncle's son of the plaintiffs 2 to 5 and the seventh defendant. In his written statement while admitting the release deed dated 02.11.1987 executed by the descendants of one Arunachalam vide release deed, dated 02.11.1987, has pleaded that the plaintiffs 2 to 4 were not party to the said document. Hence, he also prayed to dismiss the suit.

Evidence and Documents and Finding of the Trial Court:

8.Before the trial Court, on the side of the plaintiffs, eight witnesses were examined as P.W.1 to P.W.8, and 56 documents were



marked as Ex.A.1 to Ex.A.56. On behalf of the defendants, four witnesses were examined as D.W.1 to D.W.4 and two documents were marked as Ex.B.1 and Ex.B.2. As a third party documents, seven documents have been marked as Ex.X.1 to Ex.X.7.

9.Before the trial Court, the following four issues have been framed and the same are extracted as it is:

“1.வாதிகள் கோரியுள்ள பாகப்பிரிவினைக்கான முதல்நிலை தீர்ப்பாணை வாதிகளுக்கு கிடைக்கக் கூடியதா?

2.வாதிகளுக்கு கிடைக்கும் இதர பரிகாரங்கள் என்ன?

கூடுதல் எழுவினாக்கள்

1.காலஞ்சென்ற திலகராஜன் 24.01.2005ல் தமக்கு பாத்தியம்பட்ட சொத்துக்களைப் பொறுத்து உயில் எழுதி வைத்துள்ளாரா? அந்த உயில்படி 7வது பிரதிவாதி திலகராஜனுக்கு பாத்தியம்பட்ட சொத்துக்களை அடையத்தக்கவாரா? அந்த உயில் ஆவணம் பொம் என்பது சரியா?

2.காலஞ்சென்ற A.R.A.S.துரைசாமி நாடார் அனைத்து சொத்துக்களைப் பொறுத்தும் பதிவு செய்யப்பட்ட உயில் எழுதி வைத்துள்ளாரா? அந்த உயில்படி நடேசன் மகனும் 1ம் வாதியும் மற்றும் துரைசாமி நாடாரின் மற்ற மகன்களும் சமமாக அடைந்து கொள்ள வேண்டியது என்பது சரியா?”

10.While arriving at the conclusion for the above issues, the trial Court has found against the plaintiffs. However even without framing



any issues in respect of the *res judicata*, the trial Court found that O.S.No.10 of 2011 and other two suits which have been filed before the Kovilpatti Court and Thiruvananthapuram Court, will in no way be bar for filing of the present suit. In addition to that, without even framing any issues, the trial Court has also gave a finding that the suit is bared for non-joinder of necessary parties, as the descendants of one branch qua Arunachalam Nadar's legal heirs have not been impleaded. Thus eventually the trial Court dismissed the suit in toto.

11. Aggrieved with the above finding, the plaintiffs 2 to 4 and the legal heirs of the fifth defendant has filed the instant appeal.

12. The learned counsel appearing on behalf of the appellants/plaintiffs would vehemently contend that the defendants have not seriously disputed the character of the suit items 1 to 7 as the joint family property, and that they also not seriously disputed about the release deed executed by Arunachalam Nadar, who is one of the son of late A.R.A.S Duraisamy Nadar. It is the submission of the learned counsel that without framing any issues, the trial Court has wrongly dismissed the suit on the ground of non-joinder of necessary parties. It was also contended by the learned counsel for the appellants that the



alleged Will executed by late Mr.D.Thilagarajan who is the father of the plaintiffs 2 to 5 and 7th defendant's has not been proved in the manner known to law and that there are numerous legitimate suspicious circumstances in the execution of the said Will. The learned counsel would further contend that though the burden is heavily upon the propounder of the Will qua the seventh defendant to dispel all the suspicious circumstances, has miserably failed in his duty in dispelling the suspicious circumstances. Hence, the learned counsel for the appellants would pray to allow this appeal and thereby prayed to decree the suit as prayed for.

13.Per contra, the learned counsel appearing for the respondents would contend that by examining the attesting witness D.W.2, the seventh defendant has effectively proved the Will, and that there are no suspicious circumstances in the execution of the Will. It is the further contention of the learned counsel that the alleged suspicious circumstances projected by the plaintiff is nothing but a fantasy. The learned counsel for the defendants would further contend that it is the duty of the plaintiffs to implead all the legal heirs of A.R.A.S Duraisamy Nadar, since the properties are the joint family property of A.R.A.S Duraisamy Nadar. Therefore, submitted that the non-impleadment of the



legal heirs of one of the son of late A.R.A.S Duraisamy Nadar namely late Arunachalam's legal heirs, is fatal to the case. Thus, contended that the finding recorded by the trial Court is well merited and does not deserve any interference by this Court. The learned counsel further would contend that the previous suit in O.S.No.10 of 2011 before the First Additional District Court, Thoothukudi and other suits filed before Kovilpatti Court and Thiruvananthapuram Court will not be bar to the instant suit under the principles of *res judicata*. Hence, he prayed to dismiss the appeal.

14.We have given our anxious consideration on the submissions made by either side.

Analysis of the submissions:

15.Having considered the submissions of either side, pleadings and oral and documentary evidence, this Court deems it appropriate to answer the following points for determination:

- (i)Whether the suit is hit by principles of *res judicata*.
- (ii)Whether the suit is liable to be dismissed on the ground of non-joinder of necessary parties
- (iii)Whether the seventh defendant has proved the Will, dated 24.01.2005 executed by D.Thilagarajan.
- (iv)Whether C.M.P(MD)No.17335 of 2023 is to be allowed



(v) Whether the plaintiffs are entitled for partition as prayed for,

and

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(vi) to what other relieves.

Point No.1

16. The defendants 7 and 9 would contend that the suit in O.S.No. 10 of 2011 filed before the District Court, Thoothukudi, by the legal heirs of one Thilagarajan and his brother Ganesan and the suit in O.S.No. 1618 of 2015 filed by the said Thilagarajan's daughters, who are the plaintiffs 2 to 4 before Thiruvananthapuram Court, will bar the instant suit. Apart from that, they have also raised an objection that the suit in O.S.No.82 of 2015 filed by one Mr.Chandrasekaran, who is the first plaintiff herein, will also bar the instant suit. While closely scrutinizing the suit in O.S.No.82 of 2015 filed by the first plaintiff, it is not in respect of all the properties and it was only against the seventh item of schedule property. But according to the appellants the said suit was withdrawn.

17. Coming to the other suit in O.S.No.1618 of 2015 and O.S.No. 10 of 2011, the defendants contend that the matter which has arisen in the previous suit is directly and substantially similar to the subsequent proceedings. But, according to the plaintiffs, these suits were also



subsequently withdrawn. Here on the face of it, except his pleadings, the defendants has not submitted any document to demonstrate or establish that the other suit will make instant suit became bar under Section 11 of C.P.C. The trial Court, taking into consideration of all the above aspects cumulatively, has given a finding that the suit is not hit by the principles of *res judicata* and such finding has not been challenged by the defendants 7 and 9. Therefore, such unchallenged finding will bind upon the 7 and 9 defendants. Hence, this Court concludes that the instant suit is not hit by the principles of *res judicata*.

Point No.II

18.Though there is no specific defence put-forth by the defendants and no specific issues were framed, the trial Court arrived at a conclusion that in view of non-impleadment of the legal heirs of one Arunachalam Nadar, who was one of the son of A.R.A.S Duraisamy Nadar, dismissed the suit for non-joinder of party. However, according to the pleadings of the plaintiffs, A.R.A.S.Arunachalam Nadar has already executed a release deed, dated 02.11.1987, which is marked as Ex.A.22. Therefore, the plaintiffs contended that by virtue of Ex.A.22-release deed, the legal heirs of Arunachala Nadar has no right or title over the joint family property of A.R.A.S Duraisamy Nadar. In paragraph No.12 of the plaint,



it has been pleaded as follows:

“12.காலஞ்சென்ற A.R.A.S.துரைசாமி நாடாரின் வாரிசுகளில் ஒருவரான திரு.து.அருணாசலம் தனது பங்கை பொறுத்து எவ்வித ஏற்பாடும் செய்யாமல் இறந்து போனார். காலஞ்சென்ற அருணாசலம் அவர்களின் வாரிசுகள் 31.03.1987 மூலம் குடும்ப ஏற்பாட்டின்படியும் 02.11.1987 தேதியிட்ட பாகபாத்திய விடுதலை ஆவணம் மூலம் சில சேத்துக்கள் பாகம் பிரித்து எடுத்து கொண்டு மற்ற பொது குடும்ப சொத்துகளிவ பதிவு செய்யப்பட்ட விடுதலை எழுதி கொடுத்துள்ளனர்.”

19.Such specific pleadings has been admitted by the first defendant Mr.Ganesan, who is the none other than the brother of Arunachalam Nadar. Similarly the seventh and ninth defendants have also not specifically denied such pleadings. Even the ninth defendant though he made a vague allegation in respect of factum that the plaintiffs 2 to 4 were not parties to the said release deed, has not disputed the plaintiff's contention that in furtherance of release deed the legal heirs of Arunachalam Nadar have no right in respect of the items 1 to 7 of the suit property. However, in a pedantic manner, the trial Court without even framing any issues and when the factum affirmed by the plaintiffs in the plaint has not denied by the defendants, and when there has no semblance of necessary to frame the issue, has given a wrong finding that the suit is hit by the principles of non-joinder of necessary parties.



20.It is pertinent to mention here that though this Court still to adjudicate the validity of Ex.B.1-Will, even while perusing Ex.B.1 Will, the release deed executed by Arunachalam Nadar, which has been pleaded in the plaint, has been vindicated in Para No.10 sub-class(iv) of Ex.B.1-Will. Wherein it is referred to as 1/5th share in bigger family mentioned at para 9. If Arunachalam Nadar has any right, there would have been the recital in the Will to that effect that 1/6 share as A.R.A.S.Duraisamy Nadar has 6 sons. Therefore, this Court is of the firm view that there is an assertion in the plaint that Arunachala Nadar has executed the release deed, which pleading has not been challenged. Therefore this Court is of the firm view that the factum of execution of release deed by Arunachalam Nadar in respect of 1 to 7 items of property is undisputed fact. Therefore, the non-impleadment of Arunachalam Nadar's legal heirs will in no way be an impediment to decide this suit on merit. Thus, the finding recorded by the trial Court that the suit is hit by non-joinder of necessary parties is perverse findings and liable to be interfered with.

Point No.III

21.The seventh defendant, who is the son of one Mr.Thilagarajan, has propounded the Will, dated 24.01.2005. According to the plaintiffs



averments, the suit items 8 and 9 were the absolute property of late Thilagarajan. It is contended by the seventh defendant that by virtue of Will, dated 24.01.2005, his father Thilagarajan, bequeathed the entire items of 8 and 9 schedule of property and his 1/5th share in items 1 to 7 to him exclusively. Therefore, contended that the plaintiffs 2 to 4 have no right to seek partition. However, the plaintiffs 2 to 4 have seriously disputed the existence of Will and have raised numerous legitimate suspicious circumstances in respect of execution of Will dated 24.01.2005.

22.Before we dwell in to the suspicious circumstances projected by the plaintiff, the following dates are relevant.

- (i)The Will was allegedly executed on 24.01.2005.
- (ii)It appears that the same was subsequently registered on 07.03.2005.
- (iii)Few months latter on Thilagarajan died on 06.07.2005.

23.According to the plaintiffs, the legitimate suspicious circumstances in respect of the execution of Will is as follows:

- (i)The seventh defendant has pleaded a Notary attested Will, dated 24.01.2005 in his written statement (Ex.A.23) of the suit in O.S.No.10 of 2011.



(ii) Though the testator Thilagarajan was a respectable person and having independent bungalow in a posh area, the execution of Will at the residence of the mother-in-law of the attester-D.W2 cause suspicious.

(iii) The Will surfaces only after a long gap of 15 years at the time of examination of the seventh defendant as D.W.1 in the present suit.

(iv) At the time of execution of Will, the testator has been admitted in the hospital at Madras.

24. Now let us consider the above suspicious circumstances one after another and find out whether the seventh defendant has dispelled the above suspicious circumstances.

25. Before we get into the factual aspects, this Court would like to refer the judgments relied by the appellants. The learned counsel for the appellants has relied upon the judgment of the Hon'ble Supreme Court in ***H.Venkatachalaierengar-Vs-B.N.Thimmajamma and others***, reported in ***(1959)AIR(SC)443***, this is an oft quoted and landmark judgment on the point of law relating to the execution of Will. According to the factual position of the said reported judgment, the Will was not prepared and executed at the usual place of residence of the testator, but in another city, which was found to be one of the suspicious circumstances.



26.The learned counsel for the appellants/plaintiffs has also relied upon the judgment of the Hon'ble Supreme Court in ***Rani Purnima Debi and another-Vs-Kumar Khagendra Narayan Deb and another***, reported in ***AIR 1962 SC 567***, in the said judgment, the Hon'ble Supreme Court has held that the mere registration of the Will by itself is not sufficient to dispel the suspicious circumstances.

27.He has also relied upon the judgments in ***Indu Bala Bose and Others-Vs-Manindra Chandra Bose and Another***, reported in ***(1982)1 SCC 20*** and in ***Kanyan Singh-Vs-V.Smt.Chhoti and Others***, reported in ***AIR 1990 SC 396*** and in ***Gurdial Kaur & Ors.-Vs-Kartar Kaur & Ors.***, reported in ***1998-2-L.W.134***, wherein the Hon'ble Supreme Court has consistently held that it is the duty of the propounder to dispel all the suspicious circumstances and the burden is heavily upon the propounder.

28.Similarly in ***Shivakumar & Ors.,-Vs-Sharanabasappa & Ors.***, reported in ***2020(4) CTC 321 SC***, the Full Bench of the Hon'ble Supreme Court after discussing various judgment has culled out the relevant principles governing the adjudicatory process concerning proof of a Will. The relevant portion of the judgment is follows:



11. *For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a Will could be broadly summarised as follows:—*

1. *Ordinarily, a Will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of Will too, the proof with mathematical accuracy is not to be insisted upon.*

2. *Since as per [Section 63](#) of the Succession Act, a Will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.*

3. *The unique feature of a Will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a Will.*

4. *The case in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases*



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where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

5. If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may give rise to the doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

6. A circumstance is “suspicious” when it is not normal or is ‘not normally expected in a normal situation or is not expected of a normal person’. As put by this Court, the suspicious features must be ‘real, germane and valid’ and not merely the ‘fantasy of the doubting mind.’

7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the Will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances above-noted



are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the Will of the testator is surrounded by suspicious circumstance/s. While applying such test, the Court would address itself to the solemn questions as to whether the testator had signed the Will while being aware of its contents and after understanding the nature and effect of the dispositions in the Will?

9. In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will.”

29. The learned counsel has also relied upon the judgment of the learned Single Judge of this Court in ***Vasuki Selvam and Others case*** to which one of us, has held that whenever the Will is under adjudication,



the Court has to tread a careful path in the enquiry to find out due execution of Will.

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30.Keeping in mind with the above legal principles, let us proceed to analyse the suspicious circumstances one after another. This Court is of the firm view that upon the reasons to be stated infra the Will dated 24.01.2005 is shrouded with suspicious circumstances and the seventh defendant, who is the propounder of the Will has miserably failed to dispel the suspicious circumstances and has not proved the Will in the manner known to law.

31.Coming to the first suspicious circumstances, it is the contention of the plaintiffs that the seventh defendant set up a Will dated 24.01.2005, which was allegedly executed on 24.01.2005, and has surfaced only through the written statement filed by him in O.S.No.10 of 2011 and the written statement has been marked in the present suit as Ex.A.23 wherein the seventh defendant has pleaded as follows:

“உண்மையில் 11வது பிரதிவாதியின் தகப்பனார் திலகராஜ் 24.01.2005 - ல் தனது பாகத்தை தனது மகனுக்கு விட்டு கொடுத்து ஒரு நோட்டரி ப்பஸிக் ஆல் Attested செய்யப்பட்ட உயில் ஆவணத்தை எழுதியிருக்கிறார்.”



32. But absolutely no Will is available before this Court allegedly attested by notary. The Will dated 24.01.2005, which is available before this Court, was registered one after 41 days of the date of execution of the Will qua on 07.03.2005. In the suit in O.S.No.10 of 2011, the defendant(Ragavan) has filed the written statement(Ex.A.23) on 19.10.2011 as evidenced through the seal. Therefore, as on the date of filing of the written statement(Ex.A.23), had there been a registered Will which was executed on 24.01.2005, he had every opportunity to state the same in Ex.A.23-written statement. Therefore, this Court is of the firm view that until filing of the written statement in the present suit, the seventh defendant(Ragavan) having apprehension over propounding of the alleged registered Will, that is why he has taken a different stand and attempted to propound another notarized Will dated 24.01.2005. But for the reason best known, the seventh defendant has come up only with the registered Will dated 24.01.2005, which was registered on 07.03.2005. There are no reasoning not even the attempt made by the defendants as to why and how such pleading crept in O.S.No.10 of 2011.

33. The above suspicious circumstances would further strengthen by yet another suspicious circumstances inherently available in Ex.B.1-Will. If we read Ex.B.1-Will, in the introduction of the said Will, it has



been recited that the deceased Thilagarajan (Testator) was “residing at A-24, Lakshmi Nivas, Jewahar Nagar, Thiruvananthapuram-41. Whereas at the last page, it is referred that the said Thilagarajan subscribed his signature and the witnesses attested the Will at Hose No.D-1, ALSA SPRING FIELDS Jagathy, Thycaud Village. For ready reference, this Court deems it appropriate to extract what is recited in page No.4 of the Will:

“Signed by the said D.Thilagarajan as his last will and testament, in our presence, all being present at the same time. I hereafter at his request and in his presence and in the presence of the each other we subscribed our respective names, at Hose No.D-1, ALSA SPRING FIELDS, Jagathy, Thycaud Village, this is the Sub-Registrar Office, Chalai, Thiruvananthapuram.”

34.In respect of the address *Hose No.D-1, ALSA SPRING FIELDS Jagathy, Thycaud Village*, when the plaintiffs cross-examined D.W.2 L.S.V.Manian, who is one of the attestor of the Will-Ex.B.1 states as follows:

“ALSA Spring Fields, Jagathy, Thycaud, என்பது திருவனந்தபுரத்தின் புற நகர் பகுதியா என்றால் திருவனந்தபுரத்தின் ஒரு பகுதி அந்த விலாசத்தில் உள்ள வீடு என்னுடைய மாமியார் வீடு எனது மாமனார் 2008ல் இறந்து போய்விட்டார். ஆவரும் என்னோடு சேர்ந்து ஏற்றுமதி தொழில் செய்தார். இப்போது அந்த வீட்டில் எனது மாமியார் குடியிருக்கிறாரா என்றால் குடியிருந்தார்.”



35. More curiously the another attester one Mr.Thiyagarajan is none other than the co-brother of D.W.2-L.S.V.Manian. It is an admitted fact that the testator has an independent house in Jawahar Nagar, Thiruvananthapuram-41 and also a member in Rotary Club and has also a respectable person and having managed a big business conglomerate, when a testator having such a midas touch structure cannot be expected to go to the attester residence, that too which was at his terminal age and who died within six months from the date of the alleged execution of the Will to the attester's mother-in-law residence to sign the Will. This circumstances would raise a serious suspicion in the execution of the Will. Such conduct cannot be expected from a normal person in a normal circumstances. Therefore, the same would cause grave suspicious circumstances. Here again, the propounder of the Will has not attempted to answer or explain this suspicious circumstances and satisfied with his reticence. Thus, once again he failed to dispel the same.

36. It is pertinent to mention here that the attester has stated that he has signed two documents, one in Ex.B.1-Will and another in the Sub-Registrar Office. But both the signatures have been subscribed on the same day. But, while seeing Ex.B.1-Will, the alleged signature found in the last page of the Will, according to the recitals of the documents such



signature was made on 24.01.2005. But Ex.B.1-Will was admittedly registered latter on 07.03.2005. If we accept D.W.2 submission that he attested Ex.B.1-Will on the date when the Will was registered(07.03.2005) then naturally there cannot be any attestation on 24.01.2005. This contradiction has also not been explained by the seventh defendant who is the propounder of the Will.

37.It is an admitted fact on the date of registration of the Will, the Sub-Registrar has not seen any document to identify either the attestor or the testator. In such background the suspicious circumstances, which has been discussed herein above assumes greater importance.

38.It is the specific case of the propounder-D.W.1 that the Will was executed on 24.01.2005. The execution of the Will has been dealt in Section 63 of the Indian Succession Act. This Court deems it appropriate to extract Section 63 of Indian Succession Act for ready reference:

“63. Execution of unprivileged Wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—



(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

39. Section 63 of the Indian Succession Act has balkanized the execution of unprivileged Will under three categories.

(i) 63(a) deals with Signature of the testator of the Will

(ii) 63(b) deals about the animus to execute should be evidenced by placement of signature.

(iii) 63(c) deals about the attestation and amino attestendi.



40.It is pertinent to mention here that the proof of Will is different from the proof of any other document. In the cases of Will, if the Court believes the due execution of Will, such finding resurrects and give immortality to the last wishes of the testator. Therefore, the duty of the Court is onerous and sacrosanct to see whether is there any attempt to make the testator to become a prey to the skilled operator. Here in this case, the proclivity of the unexplained suspicious circumstances enumerated herein above are the discrepancy to indicate the possible vulnerability of the testator to become the prey of the 7th defendant.

41.Apart from that, this Court could able to find impossibility of the execution of Will on 24.01.2005 at Thiruvananthapuram, since Thilagarajan(testator) was admitted before the M.V.Hospital for Diabetes (P) ltd., at Madras between 17.01.2005 and 29.01.2005, as proved through Ex.A.48 the discharge summary of the deceased Thilagarajan. However, Ex.A.48 was seriously objected by the seventh defendant. But, the plaintiffs have proved Ex.A48 by examining P.W.7 employee of Insurance Company and proved that reimbursement of medical expenses for the Bill-Ex.A.48. Such factum vindicated through Ex.A.51-Bank passbook. Therefore, this Court has no hesitation to hold that from 17.01.2005 to 24.01.2005, the deceased Thilagarajan was not at all in



Thiruvananthapuram. On the relevant date, qua 24.01.2005 he was in the hospital at Madras. Therefore, the above suspicious circumstances also would make Ex.B.1-Will become very much doubtful.

42.Though the plaintiffs have raised all the suspicions circumstances before the Trial Court, the trial Court did not advert into those suspicions circumstances and failed to appreciate the evidence in its right perspective. The trial Court has dealt the proof of Will like a magic, just finding the proof from “**No Where**” to “**Now Here**”, just like pushing back the letter “w” to the previous letter. Therefore, this Court is of the firm view that Ex.B.1-Will cannot be relied and liable to be ignored.

Point No.IV:

43.The appellants have filed an application under Order 41 Rule 27 Cr.P.C., seeking leave of the Court to receive the deed of declaration of release deed dated 31.03.1987. This document is referred to in Ex.A. 22-release deed. Since this Court had already recorded the finding that the suit is not bad for non-joinder of necessary party on the basis of Ex.A.22, there is no necessity arise to receive the additional document filed along with C.M.P(MD)No.17335 of 2023. Further, the very reasons



stated in the affidavit is not within the conduce of Order 41 Rule 27

Cr.P.C. Apart from that, if this document is received at this stage, the

respondents must be given an opportunity to controvert this document.

Therefore, based upon the above reasons, this Court is not inclined to

allow the C.M.P(MD)No.17335 of 2023.

Point No.V:

44.Admittedly, there is no serious dispute in respect of the character of all the suit properties. Further, this Court has also held that Ex.B.1-Will is liable to be ignored. Hence, as a natural corollary, the plaintiffs are entitled for decree as prayed for. In view of the above discussion, this Court is of the firm view that the instant appeal is liable to be allowed.

45.Hence, the appeal is allowed, thereby suit in O.S.No.23 of 2006 is decreed as prayed for and the connected C.M.P(MD)No.17335 of 2023 is dismissed. Considering the relationship between the parties no order passed as to cost.

(G.J.,J.) (C.K.,J.)
12.03.2024

NCC:Yes/No
Index:Yes/No
Internet:Yes/No
Ns



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A.S(MD)No.85 of 2020

DR G. JAYACHANDRAN,J.
AND
C.KUMARAPPAN,J.
Ns

To

1.The I Additional District Court,
Tuticorin.

2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

A.S(MD).No.85 of 2020

12.03.2024