

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.03.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

A.S.No.159 of 2013

Selvasubramaniam

...Appellant/Defendant

Vs.

Subburathinam

...Respondent/Plaintiff

Prayer:- This Appeal suit has been filed under Section 98 C.P.C., against the judgement and decree passed in O.S.No.18 of 2011 on the file of the learned First Additional District Judge, Coimbatore dated 21.01.2013.

For Appellant : Mr.S.V.Jayaraman, SC
for Mr.Su.Srinivasan

For Respondent : Mr.S.Vinoth Kumar
for A.K.Manickam

JUDGEMENT

The defendant in O.S.No.18 of 2011 on the file of the learned First Additional District Judge, Coimbatore is the appellant herein. The respondent is the plaintiff in the suit. The respondent filed the said suit for partition and for allotment of her half share in the suit properties. The trial Court by decree and judgement dated 21.01.2013 has decreed the suit as prayed for. Challenging the same, the appellant is before this Court with this first appeal.

2.I have heard the learned counsel for the appellant and the learned counsel for the respondent and I have also perused the records carefully.

3.The case of the plaintiff in brief is as follows:-

The suit properties were all owned by one Mrs.Kuttiyammal. Mrs.Kuttiyammal had a son by name Mr.Mariappan. The plaintiff and the defendant are the daughter and son of Mr.Mariappan. According to the plaintiff, Mrs.Kuttiyammal died intestate on 04.08.1978. On her

demise, Mr.Marappan inherited the suit properties and he was enjoying the same along with the plaintiff and the defendant. Mr.Marappan died on 13.01.1992. On his demise, according to the plaintiff, she is entitled for half share in the suit properties as per the Hindu Succession Act. In this regard, the plaintiff issued a legal notice to the defendant on 17.12.2010 demanding partition and for separate allotment of her half share. The defendant sent a reply notice stating that Mrs.Kuttiyammal had executed a registered Will on 22.06.1977 bequeathing the suit properties in his favour. Thus, according to the defendant, the plaintiff had no share in the suit properties.

4.In the written statement filed by the defendant, he reiterated his stand that it is true that Mrs.Kuttiyammal was the absolute owner of the suit properties. It was further contended that out of her own volition and while in sound state of mind, she executed a registered Will on 22.06.1977, by which, she had bequeathed the suit properties to the defendant. Thus, on the demise of Mrs.Kuttiyammal on 04.08.1978, the defendant has become the absolute owner of the suit properties and he alone is in possession and enjoyment of the same. Thus, according to the defendant, the suit is liable to be dismissed.

5.Based on the above pleadings, the trial Court framed as many as three three issues which are as follows:-

"1.Whether Mrs.Kuttiyammal had executed the Will dated 22.06.1977, and if it is so, it is genuine ?

2.If the plaintiff is entitled to claim partition ?

3.To what relief, the plaintiff is entitled for ?"

6.During trial, on the side of the plaintiff, she was examined as P.W.1. On the side of the defendant, he was examined as D.W.1. One Mr.Gopal, the son of the one of the Attestors of the Will was examined as D.W.2, who has identified the signature of his father namely one of the Attestors in the Will. One Mrs.Parvathy was examined as D.W.3 who is the wife of the Scribe who scribed the Will. She has identified the signature of her husband. On the side of the plaintiff, as many as four documents were exhibited and on the side of the defendant, six documents were exhibited. Exs.X.1 to X.7 were marked as Courts documents.

7.Having considered all the above, the trial Court decreed the suit as prayed for. That is how the appellant/defendant is before this Court with this first appeal.

8. In this first appeal, it is contended by the appellant that though, Section 90 of the Indian Evidence Act is not applicable, so as to raise presumption of execution of the Will, the execution of the Will has been duly proved by the defendant by examining D.Ws.2 and 3. Thus, according to the appellant, requirements of Section 69 of the Indian Evidence Act have been satisfied and thus, the Will has been duly proved. It is further contended that the plaintiff had not disputed the Will either in the plaint or by way of filing a reply statement. It is also contended by the appellant that it is not as though the plaintiff was not aware of the existence of the Will before filing of the suit, because, it was so specifically mentioned in the reply notice issued by the defendant.

9. The learned counsel for the appellant would also point out that during cross examination, P.W.1 herself has admitted about the execution of the Will. From the above submissions made and from the pleadings and evidences available and from the judgement of the trial Court, in my considered opinion, the following points for consideration have arisen in this first appeal:-

(i) Whether the trial Court was right in holding that Ex.B.1 Will has not been proved as required under the Indian Evidence Act ?

(ii) Whether the trial Court was right in suspecting the execution of Ex.B.1 simply because, the defendant is a Stamp Vendor and the Scribe is his close associate and one of the Attester is also his close friend ?

(iii) Whether the trial Court was right in holding that the defendant has not discharged his burden to prove the Will ?

(iv) Whether the trial Court was right in granting the decree for partition in favour of the plaintiff ?

10. Mr. S.V. Jayaraman, learned Senior Counsel appearing for the appellant by referring to the grounds raised in the First Appeal would submit that in the present case, there was no dispute raised regarding Ex.B.1 Will at all. Taking me through the evidence of P.W.1 during cross examination, the learned Senior Counsel would submit that during cross examination, P.W.1 has tacitly admitted the execution of the Will. The learned Senior Counsel would further submit that the defendant has discharged his burden of proving the Will by examining D.Ws.2 and 3. The learned Senior Counsel would further submit that absolutely there is no reason to doubt the execution of the Will.

11.The learned Senior Counsel would further rely on a judgement of a Division bench of this Court in Janaki Devi v. R.VAsanthi & others (CDJ 2005 MHC 310) about which, I would make reference at the appropriate stage of this judgement.

12.Mr.S.Vinoth Kumar, the learned counsel for the respondent (an young Advocate whose performance needs appreciation) has vehemently made his submissions taking me through the entire records, in order to drive home his contentions that the trial Court was right in decreeing the suit as prayed for. He would submit that the burden to prove the execution of the Will is always upon the propounder of the Will. In this case, according to him, the defendant who propounded the Will has not proved the same to the hilt as required under the Indian Evidence Act. The learned counsel would further submit that no steps have been taken by the defendant to summon the attesting witnesses to prove the due execution. Thus, according to him, neither the requirements of Section 68 nor the requirements of Section 69 of the Indian Evidence Act have been satisfied by the defendant. He would also point out that in respect of a Will Section 90 of the Indian Evidence Act is not applicable. He would further submit that there is a vast difference between the existence of a Will and the execution of a Will. By taking me through the evidence of P.W.1, during cross examination, he would submit that the plaintiff has only admitted the existence of the Will and not the execution of the same. So far as the execution of the Will is concerned, the plaintiff has denied the same, he contended. For that, he has taken me though the further cross examination of P.W.1 wherein, she has disputed the very execution of the Will. For this proposition, the learned counsel relies on a judgement of the Hon'ble Supreme Court in S.R.Srinivasa v. V.S.Padmavathamma (2010 (5) SCC 274) wherein, the Hon'ble Supreme Court has high lighted the difference between the admission of existence of the Will and due execution and genuineness of the Will. The learned counsel would further point out that in his evidence, the defendant during cross examination has admitted that he was not even aware of the death of his father and mother. He was not aware of the time as to when did they die. From this, he would submit that he was not taking care of his own parents and thus, he would not have taken care of the deceased Mrs.Kuttiyammal at all. It is his further contention that the defendant being a Stamp Vendor who is conversant with the execution of the documents, with the help of his own close associates including the Scribe has created the Will under dispute. He would further submit that the deceased Mrs.Kuttiyammal would not have been in a sound state of mind at all at the time of execution of such a Will. He would further submit that when the defendant was not taking care of his family there would have been no occasion or reason for Mrs.Kuttiyammal to execute such a Will in favour of him thereby depriving her own son Mr.Mariappan and grand daughter namely the plaintiff in the suit from getting any share over the suit

properties. Thus, according to the learned counsel, the Will upon which, the defendant claims absolute title has not been proved and the same has been rightly held so by the trial Court which according to the learned counsel, does not warrant any interference at the hands of this Court. He would further submit that, if once, the Will goes out of consideration, as it has not been proved, then, as a corollary, the plaintiff is entitled for half share in the suit properties as per the Hindu Succession Act. On the demise of her father in the year 1992, according to the plaintiff, the trial Court was right in decreeing the suit as prayed for which does not require any interference at the hands of this Court.

13.I have considered the above submissions.

14.Admittedly, in the plaint, the plaintiff had not stated anything about the alleged Will at all. It is not as though the plaintiff was not aware of the Will. For the legal notice issued by the plaintiff prior to the filing of the suit, the defendant sent a reply notice in which, he has categorically stated that Mrs.Kuttiyammal had executed the Will on 22.06.1977 thereby bequeathing the suit properties in his favour. It is the evidence of P.W.1 that after the said reply notice, she obtained a copy of the Will and then only, she could ascertain that there was such a Will. All these things happened prior to the filing of the suit. Therefore, he would have, by all means, raised a dispute regarding the Will in the plaint itself. He has failed to do so. In the written statement filed by the defendant, he has categorically taken a plea that the Will was executed by Mrs.Kuttiyammal in sound state of mind and by virtue of the said Will, he has become the absolute owner of the suit properties on the demise of Mrs.Kuttiyammal. Even after that, the plaintiff did not file any reply statement raising a dispute regarding the Will.

15.For a moment, I may not be understood as though, I insist for such a reply statement in every case. Even without reply statement, the plaintiff can proceed with the case provided, such a dispute has already been raised in the plaint. But, in the instant case, as I have already pointed out, in the plaint, there is no dispute raised regarding the Will. Incidentally, there was also no dispute raised in respect of the Will by filing any reply statement. However, the trial Court thought it fit to frame an issue in respect of the execution of the Will, on its own, I have got my own reasons to say that the trial Court was not right in raising such an issue, when there was no dispute raised at all by the plaintiff regarding the Will.

16.In any Civil Suit, the parties are expected to place their pleas by way of their respective pleadings. From the pleadings only, the Court is required to identify the dispute. After having identified the dispute, the Court is required to frame appropriate issues. In other words, the issues would reflect the disputes. There

upon the parties are called upon to let in evidence either in proof of the issues or in disproof of the same. But, in this case, absolutely, there was no dispute regarding the Will. Therefore, in my considered view, there was no occasion or necessity for the defendant to prove the Will.

17. When this was pointed out, the learned counsel for the respondent submitted that there is a vast difference between the existence of the Will and due execution of the Will and its genuineness vide *S.R.Srinivasa v. V.S.Padmavathamma* (cited supra). Regarding this legal proposition, there cannot be any second opinion. Existence of the document is one fact and execution of the document is a different fact. In order to rely on a Will, not only its existence but, its due execution should also be proved. The requirement to prove the Will will arise when its execution is disputed. In the instant case, during the course of evidence, the existence of the Will had been admitted by the plaintiff and the execution of the same had been disputed. Therefore, the defendant would not have expected that during cross course of evidence, the plaintiff would dispute the Will. Evidence can be let in either in support or against the pleadings and not otherwise. Section 5 of the Indian Evidence Act, clearly mandates that evidence can be admitted by the Court either in respect of a fact in issue or a relevant fact which is declared to be relevant in the evidence Act itself and not of others. Therefore, whether the execution of the Will is true or not, evidence can be admitted on that issue, provided, there is a dispute on that. What I want to emphasize is that, in the instant case, in the pleadings, the plaintiff had not disputed the execution of the Will as well as its existence.

18. Assuming that absence of such pleading will not deter the Court from doing justice because, the defendant was put on notice that the execution of the Will was disputed, atleast during the evidence of P.W.1. This Court has to now examine as to whether the Will has been proved by the defendant. The trial Court has held that the execution of the Will has not been proved. I find it very difficult to agree with the said finding of the trial Court on many counts.

19. First of all, under Section 68 of the Indian Evidence Act, there is a special mode of proof of a Will. If the attestors of the Will are alive or present, then, it is necessary that one of the Attestors atleast should be examined to prove the execution of the Will. Here, in this case, there are three attestors to the Will and all of them are no more. Therefore, the defendant had to satisfy the requirements of Section 69 of the Indian Evidence Act, which states that, it would be suffice if one of the persons who knows the signature of the attestors is examined to prove that the signature was that of the attestor. In order to satisfy this requirement, in the instant case, the defendant examined D.W.2 who is the son of one

of the attestors who has identified the signature of his father found in the Will as attestor. But, the trial Court has made an observation that D.W.2 has simply stated that the signature is that of his father and he has not stated anything else. I do not understand as to what the trial Court had expected from him to speak about. He has been examined only for the limited purpose i.e., to identify the signature of his father as required under Section 69 of the Indian Evidence Act. To this extent, he has given evidence and he cannot be expected to speak about the execution of the Will. Apart from him, the defendant has examined D.W.3 who is the wife of the Scribe. She has also identified the signature of her husband. More than that, she cannot be expected to say anything else. But, the trial Court has made an observation that during cross examination, D.W.3 has admitted that she was not aware of the execution of the Will. It is true that she was not a witness to the execution of the Will. She has been examined as required under Section 69 of the Act only to identify the signature of her husband which she has also done. Thus, the defendant has satisfied the requirements of Section 69 of the Act.

20.Now, let us have a quick look into the judgement of this Court in Janaki Devi v. R.VAsanthi & others (cited supra). That was also a case where the attestors were no more. Section 69 of the Indian Evidence Act, was satisfied. In that situation, while examining the question as to whether the execution of the Will stands proved or not, the Division Bench has held that a reading of Section 68 of the Act would go to show that the attestation and execution are two different versions, one following the other. The Division Bench has further held that it is true that registration, by itself, in all cases, will not prove its execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registration officer under Section 60 of the Registration Act is relevant for proving execution. In case on hand, the Will has been registered and this is not challenged. The presentation of the Will before the Registrar and the admission of its execution made by the testator before the Registrar would prima facie prove the execution of the Will when other means of evidence is not available.

21.Applying the above principles to the facts of the present case, if we analyse the evidence, the Will is a registered document. The same was presented by the Testator for registration. The attestors are not available; Section 69 of the Act, has been satisfied by the defendant by examining the persons who have identified the signatures of one of the attestors and the Scribe. Thus, in my considered opinion, it is to be held that the Will was duly executed only by Mrs.Kuttiyammal. The contrary conclusion arrived at by the trial court deserves to be interfered with.

22.Now, turning to the suspicion raised by the plaintiff regarding the execution of the Will, I find no basis at all to raise

such suspicion. It is the contention of the learned counsel for the respondent/plaintiff that the appellant/defendant did not take care of his family including Mrs.Kuttiyammal and therefore, there would have been no reason for Mrs.Kuttiyammal to execute such a Will in favour of the plaintiff depriving her own son Mr.Mariappan from getting his share in the suit property. A close reading of the evidence of D.W.1 would go to show that he has stated that he was not aware of the death of his father and mother. But, there is no evidence that Mrs.Kuttiyammal was not maintained by him. In such circumstances, there is no reason to suspect that Mrs.Kuttiyammal would not have been maintained by the defendant.

23.Apart from that, the plaintiff in her evidence, has admitted that for the past 30 years, there was no love lost between her and the defendant. She did not claim any property all these years. Her paternal grand mother died in the year 1978 and thereafter, Mr.Mariappan, her father did not make any claim over the suit property. It is therefore, inferable that Mr.Mariappan was aware of the Will and therefore, he did not claim any share in the suit property. Mr.Mariappan died in the year 1992 itself. Even after that, the plaintiff did not make any claim for any share in the suit property. For the first time, she made a claim in the year 2011. All these circumstances would go to show that the plaintiff has made a last attempt to make a claim for the suit property due to the longstanding enmity between her and the defendant, for the past 30 years. Thus, from the evidences available, I do not find any reason to raise any suspicion regarding the Will.

24.The learned counsel for the respondent, as I have already pointed out, would submit that the defendant is a stamp vendor who is well conversant with the execution of documents and with his close associates, he has created Ex.B.1 Will. As I have already pointed out, absolutely, there is no pleading to that effect. This is only an invention made across the bar and argued to suit the convenience of the plaintiff. Assuming that the defendant is a Stamp Vendor and the attestors are his close associates, that by itself, would not go to show that the Will has been created by the defendant.

25.It is further contended by the learned counsel for the respondent that in the year 1977, Mrs.Kuttiyammal was 80 years old and therefore, she would not have been in a sound state of mind to execute the Will. For this also, there is no pleading. Assuming that in the absence of such pleading, the said question can be examined, I find no evidence at all anywhere let in by the plaintiff in respect of the soundness of the mental condition of Mrs.Kuttiyammal. Therefore, this argument also deserves to be rejected.

26.The trial Court has referred to a judgement of this Court in Karpagam & another v. E.Purushothaman & two others (2010 (3) 282)

wherein, in similar circumstances, this Court has taken the view that when the Will is not potentially denied, there is no need for the propounder of the Will to examine the attestor. But, the trial Court has not given any reason as to why the said view has not been applied to the facts of the present case. The trial Court again went on to say that non filing of the reply statement by the plaintiff is not material. This, I have already answered that it is not the expectation of this Court also in every matter, that there is a reply statement. But, going by the peculiar facts and circumstances of the case, in my considered opinion, such a reply statement should have been filed by the plaintiff denying the execution of the Will. Then, only the propounder of the Will/the defendant would be in a position to know the dispute and to prove the execution of the Will. It is not known from the case of the plaintiff, from his pleadings, as to whether he disputes the existence or the signature of the attestors or the signatures of the testator etc. Without raising any dispute regarding the Will, in the plaint and without filing any reply statement, he probably would have thought it fit to keep the defence vide open to raise any dispute at his choice during the course of evidence. This is not the correct position of law,, because, in a Civil Suit, the party should know where they stand and the party should know as to what are all the facts which are under dispute, so that, either to prove or to disprove the same. It was only in those circumstances, as I have stated, in this case, filing of reply statement disputing either the existence or execution of the Will by taking a specific plea by the plaintiff is required. But, it is not for this reason that I am reversing the decree of the trial Court but, for the reasons that the Will has been duly proved. Thus, I answer all the points framed in this First Appeal in favour of the appellant.

27.As I have already pointed out, if once, the Will is found to be proved then, as a corollary, it has to be held that the plaintiff is not entitled for any relief in the suit. Thus, the decree and judgement of the trial Court deserves to be set aside.

28. In the result, the first appeal is allowed and the decree and judgement of the trial Court in O.S.No.18 of 2011 dated 19.04.2011 is set aside and consequentially, the suit in O.S.No.18 of 2011 shall stand dismissed. However, there shall be no order as to cost.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

jbm

To

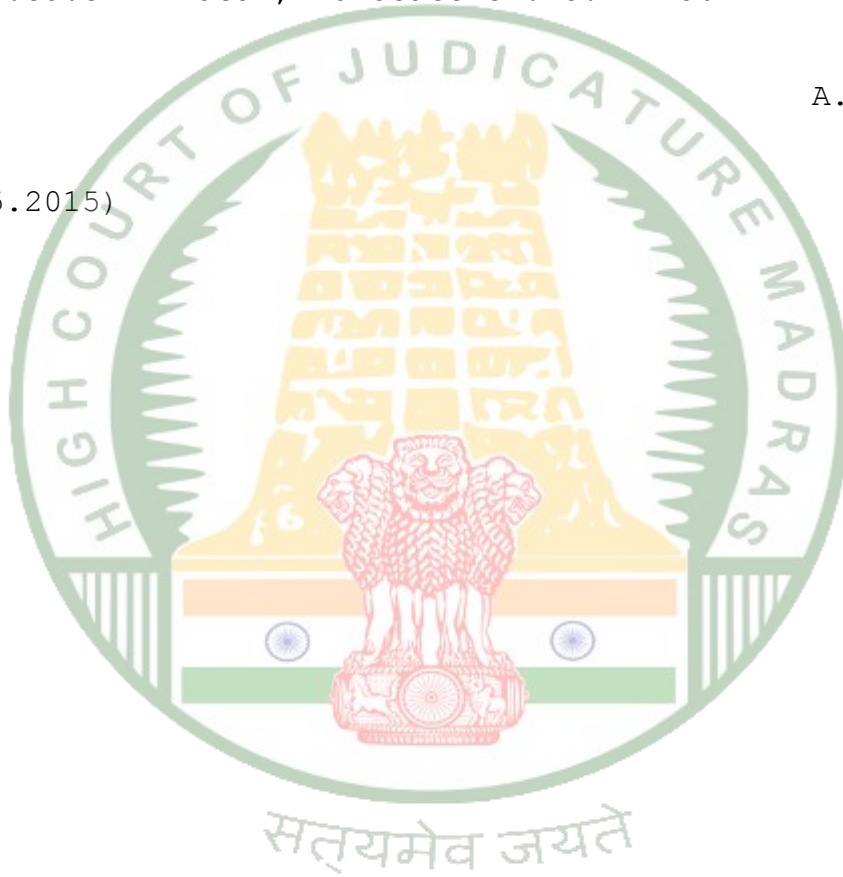
The Additional District Judge,
Coimbatore.

2 CCs to Mr.S.Vinoth Kumar, Advocate SR.No. 17258 & 17260

1 CC to Mr.Su.Srinivasan, Advocate SR.No. 17236

A.S.No.159 of 2013

UG (CO)
PSI (13.05.2015)



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