

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.1164 OF 1999

JUDGMENT:

The unsuccessful plaintiff had filed this Second Appeal under Section 100 of the Code of Civil Procedure, 1908 assailing the decree and judgment dated 26.10.1999 in A.S.No.19 of 1992 on the file of the learned Senior Civil Judge, Amalapuram, whereby the learned Senior Civil Judge while allowing the aforementioned Appeal had set aside the decree and judgment dated 04.03.1992 in O.S.No.9 of 1986 on the file of learned Munsif Magistrate, Mummidivaram filed by the sole plaintiff/appellant against the sole defendant/respondent for declaration of plaintiff's title and for grant of perpetual injunction restraining the defendant, her men and followers from interfering with the plaintiff's peaceful possession and enjoyment of Ac.0.05 cents in R.S.No.276/1 of Ananthavaram Village of Gramakantham, Mummidivaram Mandal, East Godavari District, more fully described in the schedule annexed to the plaint.

2. I have heard the submissions of the learned counsel for the appellant/plaintiff ('the plaintiff', for brevity) and perused the material on record. Despite listing the matter for dismissal, none appeared for the respondent/defendant ('the defendant', for brevity).

3. At the time of admission of the Second Appeal, this Court has taken note of the substantial questions of law as mentioned in ground no.2, which are as follows :-

1. Whether the failure of the mention about the existence of Will on the earlier occasion warrants the conclusion that the Will was not made by the testator?
2. Whether the non-mention of Ex.A1 Will in Ex.B1 reply notice is fatal to the case of the plaintiff?
3. Whether the judgment in O.S.No.111 of 1964 operates that Marinamma was not the absolute owner of the property and was the only co-owner?

[Reproduced verbatim]

4. For adjudication of the *lis* and determination of the substantial questions of law, it is necessary to refer briefly to the pleadings of both the parties.

5. The case of the plaintiff is this: 'One Marinamma @ Maridamma is the paternal aunt of the plaintiff being the sister of his father Bullaiah. She is the owner

of the plaint schedule property. During her life time, she had executed a Will dated 03.06.1985 under exhibit A1 in a sound and disposing state of mind. She had died on 03.07.1985. All through she was living with her brother, who is none other than the father of the plaintiff. The plaintiff had performed her last rites. The said Will was acted upon. The defendant, who is the daughter-in-law being the wife of one Kondal Rao who is the adopted son of said Marinamma, has no right, title and interest over the plaint schedule property. She had openly proclaimed in the village that she will take forcible possession of the plaint schedule property and made attempts to trespass into the property. Therefore, the plaintiff is constrained to file the suit.

6. Per contra, the defence of the defendant is that her husband is the adopted son of the said Marinamma and that during the life time of her husband, he and Marinamma together filed O.S.No.111 of 1964 on the file of the Court of the District Munsif, Amalapuram against one Nakka Chandranna and others for partition of the ancestral properties and that the said suit was decreed declaring that the plaintiffs therein are entitled to a half share in the schedule properties and that the present property is the very same property and that the same being the ancestral property it fell to the share of her husband-Kondalarao along with his mother. The defendant being the wife of the said Kondalarao is entitled to a share along with her mother-in-law and that she is a co-owner, and, that her mother-in-law has no right to execute the Will being relied upon by the plaintiff and that the said Will was created by the plaintiff to knock away the ancestral property, and that, therefore, the suit is liable to be dismissed.

7. Based on the above pleadings, the trial Court had framed the following issues :-

1. Whether the plaintiff is entitled for the declaration of title to the schedule property ?
2. Whether the plaintiff is entitled for permanent injunction against the defendant ?
3. Whether the judgment in O.S.No.11/64 on the file of Principal District Munsif's Court, Amalapuram binds the plaintiff ?
4. To what relief ?

8. At trial, the plaintiff and his supporting witnesses including the attestors and

scribe of the Will were examined as PWs1 to 5 and exhibit A1-the Will dated 03.06.1985 said to have been executed by Marinamma, exhibit A2-the copy of the voters list and exhibit A3-the death certificate of Marinamma were marked. The sole defendant and her supporting witness were examined as DWs1 and 2 and exhibit B1-the reply notice, exhibit B2-the printed copy of the judgment in the former suit O.S.111 of 1964, exhibit B3-the certified copy of the extract of the suit register in O.S.111 of 1964 and exhibit B4-the office copy of registered notice were marked.

9. As already noted, on merits, the trial Court had decreed the suit. However, the Court of First Appeal had reversed the decree and judgment of the trial Court while allowing the first appeal.

10. The learned counsel for the plaintiff would contend that the trial Court had accurately considered the facts and properly appreciated the evidence and had rightly decreed the suit by believing exhibit A1 Will; and, that the defendant did not attack the Will except saying that it is a created Will; and, that the Court below had erroneously disbelieved the Will on the grounds that there was no mention of it at any time earlier to the suit and that the existence of exhibit A1-Will was even not mentioned in exhibit B1-reply notice; and, that the Court below ought not to have given importance to the decree and judgment in the former suit and ought not to have held that the property is a joint property as the decree and judgment in the former suit are not binding on the plaintiff as he was not a party to the said suit; and, that the Court below had further erred in holding that the plaintiff is a co-owner and in dismissing the suit; and, that the judgment and decree of the Court below are erroneous and that the Court below ought not to have reversed the decree and judgment of the trial Court which are well reasoned and well considered.

11. To begin with, it is to be first determined as to whether or not the Court below was right in holding that Marinamma has no right to execute the Will in respect of the entire property. In this regard, it is to be examined as to whether the property is the exclusive property of Marinamma as contended by the plaintiff or whether it is the joint property of Marinamma and her adopted son-Kondal Rao in view of the defence that the same fell to their share pursuant to preliminary and final decrees in a suit for partition which was earlier filed. Exhibit B2 is the printed copy of judgment in OS.No.111 of 1964 (hereinafter referred to as 'the former suit') on the file of the District Munsif Court, Amalapuram. Exhibit B3 is the certified copy of the

extract of suit register in the said suit. The said documents on a perusal would bring to the fore the following facts: 'That after the death of Maridi, the husband of Nakka Marinamma, some disputes had arisen and, therefore, the said Marinamma and her said adopted son had filed the former suit against Nakka Chandranna and others for partition of the joint family properties and for allotment of a share to the plaintiffs therein. The subject matter of that suit was Ac.0.15 cents of land in Survey No.276 of Anathavaram village. The said suit was preliminarily decreed on 30.07.1965 directing the division of the said property into three equal shares and allotment of one such separated share to the plaintiffs therein. A first appeal in AS.No.87 of 1965 filed by the unsuccessful defendants therein was dismissed on 29.10.1968 by the learned Judge of the Sub-Court, Amalapuram. And, later a final decree was passed, and, Ac.0.05 cents was accordingly allotted to the share of Marinamma and Kondal Rao, who is no other than the husband of the defendant herein. The said Ac.0.05 cents of property is the subject matter of the present suit. After the final decree in the said suit, the said Kondal Rao had died leaving behind him his wife, the defendant herein, and his children. Therefore, they were impleaded as plaintiffs 3 to 6 in the execution proceedings in EP 39 of 1971 in the former suit and the property was delivered through the Amin of the Court on 07.04.1971.' This overwhelming evidence by all means is sufficient to safely conclude that the plaint schedule property is the joint property of Marinamma and his adopted son Kondal Rao and that on the death of Kondal Rao the defendant along with her children has become entitled to right, title and interest in the plaint schedule property along with Marinamma, her mother-in-law. Therefore, it follows that Marinamma has got no exclusive right in the property. As a sequel it must be held that she has no right to execute exhibit A1-Will in respect of the entire Ac.0.05 cents of property i.e., the plaint schedule property. Therefore, the claim of the plaintiff based on the Will for the entire property cannot be countenanced even assuming for a moment that the said Will is proved to be true.

12. Before approaching the next issue as to whether exhibit A1-Will being relied upon by the plaintiff is true or not; and, before proceeding to deal with the relevant factual aspects and the evidence brought on record it is necessary to refer to the settled principles of law, in general, in regard to the appreciation of the evidence concerning Wills.

In the decision in **Pinnaka Hanumantha Rao (died per L.R) and two Ors.**

V. Garlapati Dhanalakshmi @ Andallu^[1], this Court having considered the ratios in various precedents on the subject had formulated the principles that emerged from the precedents as under:

“30. From the various precedents cited by the learned Counsel referred to above, the following principles broadly emerge.

1. 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 Sections [67](#), [68](#), [45](#) and [47](#) of the Evidence Act and Sections [59](#) and [63](#) of the Indian Succession Act.

2. A Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section [63](#) of the Indian Succession Act.

3. Proof with mathematical certainty is not expected and the test to be applied would be the usual test of the satisfaction of the prudent mind.

4. The propounder would be called upon to show by disinterested, satisfactory and sufficient evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind free from all extraneous influences, that he understood the nature and effect of the dispositions and put his signature to the document of his own free Will and that he had signed it in the presence of two witnesses who attested in his presence and the presence of each other.

5. The onus on the propounder to prove the due and valid execution of the Will can be taken to be discharged on proof of the essential facts.

6. The execution of the Will may be surrounded by suspicious circumstances like, --

(a) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.

(b) The condition of the testator's mind may be very feeble and debilitated.

(c) The dispositions made in the Will may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provision for the natural heirs without reasons.

(d) The dispositions may not appear to be the result of the testator's free Will and mind.

(e) The propounder takes a prominent part in the execution of the Will conferring substantial benefit on him.

(f) The testator used to sign blank papers.

(g) The Will did not see the light of the day for long.

(h) Incorrect recitals of essential facts.

(i) The unregistered Will challenged as forged comes from the custody of major beneficiary.

7. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated and that inevitably would be a question of fact in each case.

8. Each and every circumstance is not a suspicious circumstance and a circumstance would be suspicious when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

9. All such legitimate suspicions should be completely removed by the propounder before accepting the document as the last Will of the testator and satisfactory discharge of such initial onus is very heavy and the test of satisfaction of judicial conscience is pivotal in deciding the solemn question.

10. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will.

11. A testator has the freedom to give his property to whomsoever he likes

and once it is established that the testator was free and had a sound disposing mind, it is no longer the duty of the Court to go further to inject its own ethics of what is or is not a moral or a fair disposition according to its own standard.

12. No hard and fast or inflexible rules can be laid down for the appreciation of the evidence and application of general and broad principles would always depend on the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.

13. Allegations of exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded have to be proved by the person making such allegations.

14. Circumstantial evidence to prove the signature of the testator can lead to a legitimate conclusion only if it leads irresistibly to the inference that the person must have signed the document in question, but the presumption of execution of the Will by the testator on proof of the signature may be rebutted by proof of suspicious and unnatural circumstances.

15. The registration of the Will by the testator Will be a strong circumstance to support the genuineness of the Will, but Will not by itself be sufficient to dispel all suspicions without subjecting the evidence of registration to a close scrutiny.

16. Onus as a determining factor of a case can only arise if the evidence pro and con is so evenly balanced that no conclusion can be derived therefrom, but not when a determinate conclusion can be arrived at after hearing and weighing the evidence.

17. The presumption under Section 90 of the Evidence Act in respect of a Will 30 years old and produced from proper custody, is one of due execution and attestation as well as of testamentary capacity of the testator, but does not extend to the truth of the contents of the Will.

18. To judge the credibility of the witnesses, the demeanour of the witnesses, surrounding circumstances and the probabilities arising out of the evidence and nature and contents of the document have to be looked into.

19. It is more usual to call a known and reliable person, a friend or a relation, to be a witness when a person is intending to execute a Will and advantage may be taken of the accidental presence of chance witnesses also in this connection.

20. It would be sufficient even if one attester is examined, if he speaks about all the required elements.

21. The Court has the power to compare the disputed signature with the admitted signature, which power is available under Section 73 of the Evidence Act, but it should not normally take upon itself such responsibility and should leave the matter to the wisdom of experts in the event of slightest doubt.

22. If the Court is capable of forming an opinion on the strength of oral and documentary evidence by undertaking comparison under Section 73 of the Evidence Act, the necessity to send the document for expert's opinion may not arise and the opinion rendered by an expert being only a supporting material, the Court can come to its own independent conclusion.

The above principles deduced from the cited precedents are only enumerative and not exhaustive and their application to the facts and circumstances of each case should be strictly contextual but not mechanical.

13. Now reverting to the facts of the case, it is not in dispute that the initial onus of proof and the legal burden are on the plaintiff to prove the exhibit A1-Will dated 03.06.1985 said to have been executed by late Marinamma. The plaintiff-PW1 is the propounder. And, he had examined PWs 2 to 4 who are the attestors and the

scribe of the said Will. At the outset it is worthy to note that the defendant had first got issued a legal notice dated 08.12.1985, under the original of exhibit B4, to the plaintiff claiming a right in the suit schedule property. The plaintiff had got issued a reply dated 13.12.1985 under the original of exhibit B1. It is averred therein that the suit schedule property is acquired under registered settlement deed dated 28.02.1979 and that the same was acted upon. However, in the suit the said case pleaded in the reply notice was given a go by and was not pressed into service. Further, in the said reply notice, there was no mention about the exhibit A1-Will, though the reply notice under exhibit B1 was issued about six months after the alleged execution of the said exhibit A1-Will. The non mention about the exhibit A1-Will in exhibit B1 reply notice of the plaintiff goes a long way and gives rise to a serious suspicion about the existence of the Will as on that date and its truthful nature. Further, the Will was not referred to anywhere and was not produced before any local body or any competent authority at any earlier point of time. Moreover, in the Will the source of title to the property mentioned in the Will is not stated. Further, if the Will were to be true and genuine, Marinamma who knew fully well that she is not the exclusive owner of the entire property would have executed the Will in respect of her share of the property only and would not have executed the Will in respect of the entire suit schedule property. The alleged Will was executed in respect of the entire property over which Marinamma has no right is a circumstance which suggests that Marinamma is not the author and the executant of the Will. Though it is sought to be contended that Marinamma had executed the Will giving the property to the plaintiff out of love and affection, since his father, who is the brother of Marinamma, had looked after her during her last days, such a version is not pleaded in the plaint and it is not even stated that the testatrix lived with the plaintiff and his father during her last days. Even PW1 did not depose that Marinamma lived with him at any point of time and that he and his father looked after her welfare either prior to the Will or till her death. This version was only introduced in the oral evidence adduced at trial, on the side of the plaintiff. The specific case of the defendant is that for about three months prior to her death, Marinamma was bed ridden and was not in a sound and disposing state of mind and was not able to attend to her daily chores. The recitals in the Will would lay bare that the testatrix was of 72 years of age and that the right side of her body was affected with paralysis and that both the limbs on the right side were non functional. However, contrary to the said recitals, PWs 2 to 4, who were examined to prove the due execution of the Will by Marinamma had stated that at the time of

execution of exhibit A1-Will she was hale and healthy. Further, PWs2 to 4 had stated that Marinamma was about 60 years of age but, not 72 years of age as stated in the Will. Kondal Rao, the husband of the defendant, during his life time worked in the Electricity Department and he and his family were shifting from place to place on account of his transfers and postings at different places. Nonetheless, it is the case of the defendant that after the death of her husband-Kondal Rao, she along with her children had come down to the suit village and started living in that village. She had further deposed that she had looked after the welfare of Marinamma till her death. Though the copies of the voters' lists were exhibited to show that the defendant and Marinamma lived in different houses with numbers 8-101 and 8-100/1, but, not in one house, the fact remains that the defendant came back to the suit village, after the death of her husband. The Court below for valid reasons having disbelieved the version of the plaintiff that he and his father had looked after the welfare of Marinamma till her death, had given due weight on this aspect to the evidence of DW2, the brother of Kondala Rao, and had accepted the version of the DW1 that she had looked after her mother-in-law till her death. This defence of the defendant is more probable as there was no possibility of any other person looking after Marinamma during her last days, when she was laid up with paralysis. According to the defendant, the plaintiff had forcefully entered into the house in the suit property by breaking open the lock put by her. PW4, the scribe of exhibit A1-Will is the person in the occupation of the said house as a tenant since 16 years prior to the date of his deposition before the trial Court. PWs 2 and 3 are admittedly the relatives of the PW1 being brothers by courtesy. Thus, all the three witnesses cannot be said to be independent witnesses or disinterested witnesses. It is borne out by the evidence brought on record that PW1 had secured the presence of the attestors and the scribe of the Will and had taken active part and played prominent role in the making of the Will under which he alone had derived the whole benefit to the exclusion of the defendant. Though there is a recital in the Will that the testatrix has no daughter and son, it is note worthy that there is not even a mention that she has a daughter-in-law; and there was no recital as well for disinheriting the daughter-in-law. It is not the case of the plaintiff that Marinamma was having disputes much less serious disputes with the defendant, who is her daughter-in-law. No plausible explanation was offered and is forth coming for disinheriting the daughter-in-law. In fact there was no reason what so ever for Marinamma for disinheriting her own daughter-in-law, who is having three children. Thus the Will set up by the plaintiff is shrouded in so many suspicious

circumstances. All such legitimate suspicions which should be completely removed by the propounder before seeking the acceptance of the exhibit A1-Will are not removed in this case. And, the plaintiff had failed to satisfactorily discharge the initial onus, which is very heavy.

14. On an earnest consideration of the facts and the evidence, this Court is of the considered view that the case of the plaintiff did not pass the test of satisfaction of judicial conscience, which is pivotal in deciding the solemn question.

15. Having regard to the reasons supra, this Court is satisfied that the Court below had appreciated the facts accurately and the evidence in the correct perspective. Hence, this Court finds itself in agreement with the well reasoned factual finding recorded by the Court below that the plaintiff could not establish the genuineness of the exhibit A1-Will.

16. Viewed thus, this Court finds that no interference with the decree and judgment of the Court below is called for in this Second Appeal.

17. For all the above reasons, this Court holds that no substantial questions of law are involved and that there is no substance in the questions raised and that the Second Appeal is devoid of merit and is liable to be dismissed.

18. In the result, the Second Appeal is dismissed. No costs.

Miscellaneous Petitions, if any, pending in the appeal shall stand closed.

JUSTICE M. SEETHARAMA MURTI

18.06.2015
ssp

[\[1\]](#) 2007(2) ALD 435