

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.10.2016

PRONOUNCED ON : 24.10.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.30 of 2008

1.Alamelu
2.Kaliyaperumal
3.Elangovan
4.Alvanthar Konar
5.Poongodhai Ammal
6.Kaliyaperumal ...Appellants

Vs

Kuppayee Ammal ... Respondent

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of the learned Additional Subordinate Judge, Vridhachalam made in A.S.No.56 of 2005 dated 20.04.2006 confirming the judgment and decree of the learned Principal District Munsif, Vridhachalam in O.S.No.322 of 1999 dated 05.11.2004.

For Appellants : Mr.S.Parthasarathy, Senior
Counsel for Mr.J.Ramakrishnan

For Respondent : Ms.AL.Gandhimathi

JUDGMENT

The appellants are the defendants in O.S.No.322 of 1999 on the file of the learned Principal District Munsif, Vridhachalam. The said suit was filed for declaration, injunction and for mesne profits by the respondent herein.

2.The facts centres around the dispute leading to the second appeal are as follows:-

One Mr.Jayaraman Konar died issue less on 02.11.1995 leaving behind his wife who is the first defendant in the suit. Tmt.Kuppayee Ammal, The plaintiff in the suit is one of his three sisters. According to the plaintiff, during the life time of Mr.Jayaraman Konar, he executed a Will dated 19.01.1995, bequeathing his properties to his wife and three sisters reserving the life interest to the plaintiff, the first defendant and Ms.Lakshmi Ammal, who is another sister of Mr.Jayaraman Konar. After their life time, the properties were to devolve upon the sons of the plaintiff viz., Mr.Rajendran and Mr.Venkatesan. After execution of the Will dated 19.01.1995, the said Mr.Jayaraman Konar died on 02.11.1995. While so, the first defendant, the wife of Mr.Jayaraman Konar, in connivance with her

sister's husband, has alienated one of the suit schedule properties and also attempted to interfere with the peaceful possession and enjoyment of the plaintiff. Hence, suit for declaration, injunction and mesne profits was filed by the plaintiff.

3.The case was contested by the defendants. The second defendant, on his behalf and as the Power Agent of the first defendant, filed written statement. He was also examined as D.W.1 during trial. The other defendants who were the subsequent purchasers of one of the suit schedule properties from the first defendant, through the second defendant as the Power Agent of the first defendant, also contested the suit by filing their respective written statements.

4.The trial Court after framing relevant issues, touching upon the dispute between the parties, examined five witnesses on behalf of the plaintiff and three witnesses on behalf of the defendants. 40 exhibits were marked on the side of the plaintiff and 31 exhibits were marked on the side of defendants. The sale deed in favour of Mr.Poomalai Konar dated 22.07.2002, was marked as Ex.X.1 in the course of examining one of the witness.

5.After considering the above materials, the trial Court has allowed the suit holding that Ex.A.1 Will dated 19.01.1995, executed by Mr.Jayaraman Konar, has been proved in the manner known to law and as per the Will, the schedule mentioned properties are devolved upon the plaintiff to be enjoyed till her life time and after her death to her sons.

6.Aggrieved by the said judgment and decree of the trial Court, the appellants herein preferred an appeal before the First Appellate Court which was dismissed confirming the judgment and decree of the trial Court.

7.Aggrieved by the concurrent judgment of the Courts below, the defendants have preferred the present second appeal. At the time of admission, this Court has framed the following substantial questions of law:-

“1.Whether the courts below have erroneously cast the burden of disproving the will marked as Ex.A1 on the appellant/first defendant ?

2.Whether the courts below have committed an error in not properly considering

the suspicious circumstances surrounding the Will brought out by the appellant/first defendant?

3. Whether the courts below failed to rely on the admission found in Ex.B1 complaint to the effect that the deceased Jayaraman died intestate and thus gave a perverse finding regarding the genuineness of Ex.A.1-Will?"

8. Mr. S. Parthasarathy, learned Senior Counsel appearing for the appellants pointing out the discrepancies and contradictions in the evidence of the scribe - P.W.2 and the witness - P.W.3 to the Will Ex.A.1 and submitted that the Will is shrouded with suspicion and therefore, the Courts below ought to have disbelieved the case of the plaintiff. Some of the discrepancies pointed out by the learned Senior Counsel appearing for the appellants are as under:-

(i) The Will dated 19.01.1995 though written on a non judicial stamp paper, and it was prepared at the Registrar's Office, it was not registered. Contradictory reasons were given by the witnesses for not registering the Will.

(ii)The propounder of the Will actively participated in the preparation of the Will and P.W.2 admits that plaintiff's husband Mr.Venugopal gave instruction for preparing the Will and not the testator. Though there were five witnesses to the Will only one witness was examined.

(iii)The plaintiff before filing the suit, gave a complaint to the Police on 13.05.1998 alleging that Mr.Jayaraman Konar died 'intestate' leaving the properties into the possession of the plaintiff. The first defendant and her henchmen are disturbing her possession. This version of plaintiff in the police complaint – Ex.B.1 is quite contrary to the pleadings in the suit wherein, the plaintiff claims right over the suit properties on the strength of the alleged Will Ex.A.1 dated 19.01.1995.

9.To substantiate the aforesaid contentions, the learned Senior Counsel appearing for the appellants has relied on the following judgments:-

**(i)H.Venkatachala Iyengar v.
B.N.Thimmajamma (AIR 1959 SC 443(1));**

- (ii) **Hafazat Hussain v. Abdul Majeed**
(2001 (7) SCC 189);
- (iii) **Bharpur Singh v. Shamsheer Singh**
(2009(3) SCC 687);
- (iv) **S.R.Srinivasa v. S.Padmavathamma** (2010(5) SCC 274);
- (v) **Union of India v. Ibrahim Uddin**
(2012 (8) SCC 148)
- (vi) **Dhannulal v. Ganeshram**
(2015(12) SCC 301);”

The learned Senior Counsel submitted that the Courts below have erred accepting Ex.A.1 - Will as genuine and therefore, the second appeal has to be allowed and the decrees of the Courts below have to be set aside and the suit has to be dismissed.

10.Per contra, Ms.A.L.Gandhimathi, learned counsel appearing for the respondent submitted that the discrepancies in the deposition of witnesses are very trivial which are bound to happen due to efflux of time. The execution of Will by Mr.Jayaraman Konar on 19.01.1995, has been substantially proved through the document and ocular evidence of P.Ws.1,2 & 3. The presence of propounder of the Will during execution of the same “*per se*”, cannot be termed as

"suspicious circumstances" and it all depends upon the facts and circumstances of each case.

11.It is further submitted by the learned counsel for the respondent that it is an admitted and proven fact that there was no cordial relationship between Mr.Jayaraman Konar and his wife/the first defendant. There was no issues to them. The first defendant Mrs.Alamelu, wife of Mr.Jayaraman Konar, used to frequently go to her sister's house and act in accordance with the wish of her sister's husband, who is the second defendant in the suit. During the last years of Mr.Jayaraman Konar, he was living with the plaintiff, he was taken care by his sisters and their children. Therefore, to give equitable justice to his wife as well as to his sisters, Mr.Jayaraman Konar has bequeathed his properties to all his sisters and his wife through the Will dated 19.01.1995 and also reserved the life interest over the properties to the plaintiff and the first defendant. Since, the first defendant had no issues of her own, Mr.Jayaraman Konar has rightly reserved the life interest of his wife/the first defendant and vested interest upon the sons of the plaintiff. This cannot be construed as a suspicious circumstances to throw away the last wish of the deceased person viz., Mr.Jayaraman Konar.

12.The dispute in this case centres around the narrow compass,

Whether the Will Ex.A.1 is proved by the plaintiff in the manner known to law. While the plaintiff categorically relies upon her right over the suit properties, through the Will executed by Mr.Jayaraman Konar on 19.01.1995, the defendants in their written statement, outrightly denies the execution of the Will by Mr.Jayaraman Konar. The specific case of the defendants is that, after the death of Mr.Jayaraman Konar, the plaintiff and her sisters barged into the house of Mr.Jayaraman Konar and took away the documents and unsigned papers which have been misused to prepare the Will. However, this contention has been falsified by the plaintiff through independent witnesses viz., P.W.2 – Mr.Subramaniam, the Scribe of the Will and P.W.2 Mr.Viswanathan who is one of the attesting witness to the Will.

13.Section 63 of the Indian Succession Act described the rules for executing an unprivileged Will. The primary requirement is that the testator shall sign or shall affix his mark to the Will and the Will shall be attested by two or more witnesses each of whom shall seen the testator signing or affixing his mark to the will.

14.Section 68 of the Indian Evidence Act, prescribes the

condition for proof of execution of document required by law to be attested. So on a combined reading of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, a person who propounds a Will should prove the execution of the Will by the testator through atleast one of the attesting witness who has seen the execution of the Will by the testator.

15.The Hon'ble Supreme Court and the High Courts in catena of judgments has also illustrated those that suspicious circumstances found to be surrounded in the execution of the Will. No doubt proof of a will stands in a higher degree in comparison of the other document. It requires a clear evidence of attesting witnesses that the content of the will were read over to the executant and he after admitting the same to be correct, put his signature, in the presence of witnesses.

16.The Court should bear in mind that generally the degree of proof in a civil case need not be beyond reasonable doubt but on preponderance of probabilities. In so far as the proof of Will, the higher degree of proof required is to find out "Whether there is any suspicious circumstances surrounds in the execution of the Will".

17.In this case, the mandatory witness is P.W.3 who is one of the attesting witness to the Will - Ex.A.1. He has categorically stated

in his chief examination that Mr.Jayaraman Konar informed him the day before about the proposed execution of the Will and they all went to the Sub Registrar's Office on 19.01.1995. Mr.Jayaraman Konar instructed the Scribe (P.W.2) about the content of the Will and the Scribe (P.W.2) read over the Will to Mr.Jayaraman Konar. Mr.Jayaraman Konar affixed his signature in the alleged Will and the witnesses saw him signing the same. The defendants have cross examined this witness at length.

18.The Hon'ble Supreme Court in **Bharpur Singh v. Shamsheer Singh** (2009(3) SCC 687) has listed out the suspicious circumstances which shall lead to reject a Will. The circumstances are as under:-

“Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:

- i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.
- ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.

- iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- iv. The dispositions may not appear to be the result of the testator's free will and mind.
- v. The propounder takes a prominent part in the execution of the Will.
- vi. The testator used to sign blank papers.
- vii. The Will did not see the light of the day for long.
- viii. Incorrect recitals of essential facts."

19. The Hon'ble Supreme Court has also cautioned while listing suspicious circumstances that they are not exhaustive but subject to offer of reasonable explanation. The existence of such reasonable explanation must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will has been duly proved or not. In the case on hand, the defendants who have questioned the very execution of the Will and raised doubt upon the signature of the testator has not even examined any person conversant with the signature of the testator to prove their claim. Neither there is evidence to prove that late Mr. Jayaraman Konar was

in the habit of signing blank papers and same were taken away by the plaintiff to prepare the Will which was marked as Ex.A.1. It is very surprising that the first defendant neither filed written statement on her own nor offered herself to be examined as witness.

20.This Court on analysing the depositions of P.Ws.1,2 and 3 cumulatively, in respect of the execution of the Will, though find certain contradictions find that they are not worth to disbelieve the genuineness of the Will. The doubt raised by the learned Senior Counsel for the appellants that it is unnatural for Mr.Jayaraman Konar at the age of 50 to execute the Will depriving his wife, substantial portion of the property, is also dispelled by the subsequent death of Mr.Jayaraman Konar within 10 months from executing the Will.

21.It is evident from the statement made by the witnesses that the first defendant was not keeping good relationship with Mr.Jayaraman Konar. There was no issues to them. Therefore, dividing the properties to his wife and siblings by Mr.Jayaramam Konar, cannot be construed as an unfair or impossible dispossession of the properties.

22. The learned Senior Counsel appearing for the appellants heavily relies upon the content of Ex.B.1 which is the copy of F.I.R., registered based on the complaint given by the plaintiff to the Police. Relying upon the lines in the complaint that "The deceased Mr. Jayaraman Konar died intestate. In support of his submission, the learned Senior Counsel referred the following passage in the judgment rendered by a Division Bench of this Court in **G.Sekar v. Geetha** (2007(2)CTC 17).

"It is no doubt true that P.W.4 belongs to a noble profession and ordinarily great weight is to be attached to such evidence. However, apart from the fact that several contradictions are available from the evidence, P.W.4 cannot be characterised as an independent witness as it is she who had given the reply notice Ex.D-3 on behalf of the propounder of the Will. At the time when she gave the reply, there is no whisper in such reply that in fact she had drafted the Will and attested the same. These are many of the

aspects appearing from the evidence of P.Ws. 1 to 4 which create sufficient doubt regarding the due execution of the Will. It is of course true that many of the contradictions may appear to be innocuous in isolation. But, when all these contradictions are considered together along with the fact that thumb impression was given by the executant, even though he was obviously signing the document, and the fact that in the typed Will line-spacing in different pages appear to be irregular, they create sufficient doubt regarding the due execution and genuineness of the Will."

23.This Court finds the above said judgment has no relevance to the above said judgment to the facts of the present case. A letter or a notice by an Advocate, cannot be equated to a complaint to the Police given in the name of the plaintiff. This Court finds on perusal of a certified copy of Ex.B.1 - the complaint, has not even been signed by the plaintiff. Further, one should keep in mind that an illiterate lady cannot be expected to know the legal meaning of the words "died intestate". Therefore, the said words "died intestate" used in Ex.B.1 can stand against the plaintiff to disbelieve the Will duly executed and attested and proved through witnesses.

24. Yet another suspicious circumstance pointed out by the learned Senior Counsel for the appellants to suspect the Will is that the presence of the propounder during the execution of the Will. If the propounder alone was present at the time of execution of the Will and forced the testator to execute the Will as per his dictum, this Court have a reason to suspect the Will. In this case, it is high-lighted during cross examination of P.W.3 that merely 10 persons were present at the time of execution of the Will and five of them have signed as witnesses to the Will. While so, there is no reason for the Court to infer that the propounder had influenced the testator and as a result, the Will in question has been executed by the testator without free will or mind.

25. The learned Senior Counsel for the appellants further pointing out the contradictions between the statements of the witnesses regarding non registration of the Will though, prepared at the Registrar's Office, submitted that while one of the witness stated that due to want of fund, they were not able to register the Will, the other witness had stated that it was too late for the day to get the Will registered, at the Registrar's office and therefore, they have returned back to the Village. Though two different reasons were

elucidated for not registering the Will, the fact remains that, the Will was executed on a particular day at a particular place. The fact of execution is more important and not the reason for not registering the will. The two different reasons elucidated are not contradictions in true sense. They are not mutually exclusive to each other. Both the reasons may be true and on this score the genuineness of the Will cannot be impeached.

26.For the above said reasons, this Court finds no ground to interfere with the judgments of the Courts below. This Court holds that there is no error in the observation of the Courts below that having disputed the execution of the Will by Mr.Jayaraman Konar on the ground that it was prepared on blank signed paper neither the first defendant nor the other defendants have let in evidence to substantiate the same. This Court finds no suspicious circumstances surrounding the Will brought out by the respondent and the Courts below have rightly held so and the substantial question of law framed are held to be unsustainable.

27.In the result, the second appeal is dismissed and the decrees passed by the Courts below are confirmed. Since the parties are closely related, there shall be no order as to costs.

24.10.2016

jbm

Index: Yes/No

To

1.The Additional Subordinate Judge,
Vridhachalam.

2.The Principal District Munsif,
Vridhachalam.

Dr.G.JAYACHANDRAN.J.,

jbm

**Pre Delivery Judgment made in
Second Appeal No.30 of 2008**

24.10.2016