

**IN THE HIGH COURT OF JUDICATURE AT MADRAS****RESERVED ON : 17.10.2016****PRONOUNCED ON : 25.10.2016****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No. 105 of 2011****and****M.P.No.1 of 2011**

Saraswathi

...

Appellant

Vs.

1.M.Maruthachalam

2.M.Krishnamurthy

...

Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 03.08.2010 made in A.S.No.126 of 2009 on the file of the First Additional District Court, Coimbatore, reversal of the judgment and decree dated 02.12.2008 made in O.S.No.369 of 1998 on the file of the Sub-Court, Tiruppur.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.C.D.Sugmar  
No.1.**JUDGMENT**

The second defendant has preferred this second appeal, challenging the judgement and decree dated 3.8.2010 made in A.S.No.126 of 2009 on the file of the first Additional District Court, Coimbatore, reversing the judgment and decree dated 02.12.2008 made in O.S.No.369 of 1998 on the file of the Sub-Court, Tiruppur.

2. The suit has been laid for partition by the plaintiff.

3. The averments contained in the plaint in brief are as follows:

The suit property originally belonged to the plaintiff's father Marudha Gounder by virtue of the sale deed dated 05.09.1962. The plaintiff and the first defendant are the sons of Marudha Goundar. Marudha Gounder died intestate on 16.11.1996 leaving behind the plaintiff and the first defendant as his legal heirs. After the death of Marudha Gounder, the plaintiff and the first defendant are in joint possession and enjoyment of the suit property. Despite demands by the plaintiff for partitioning the suit property, the second defendant, who is the wife of the first defendant, had stalled the same claiming that the suit property absolutely belonged to her by virtue of the settlement deed dated 30.12.1998 executed by the first defendant. Since the defendants have not come forward to effect the partition as sought for by the plaintiff, the suit has been laid.

4. The averments contained in the written statement filed by the first defendant are briefly stated as follows:

The fact that the suit property was purchased by Marudha Gounder, is admitted. The plaintiff was leading a wayward life and he never cared for his father. Only the first defendant was

maintaining his father, till his death. On account of the old age, Marudha Goundar sold 2 acres of land to Sadayappa Goundar and the same has not been objected by his sons viz., plaintiff and the first defendant. The remaining 2 acres of land purchased by Marudha Goundar was in his possession and enjoyment and inasmuch as the first defendant was affectionate to his father and also looking after him, Marudha Goundar had executed a registered Will dated 21.03.1979 bequeathing his property and also the property sold to Sadayappa Gounder. After the death of Marudha Goundar, the defendant became the owner of the suit property by virtue of above mentioned Will and he was in possession and enjoyment of the suit property and the plaintiff was not in joint possession and enjoyment of the suit property as alleged in the plaint. The defendant had executed a registered settlement deed in respect of the suit property in favour of his wife Saraswathy, the second defendant, on 30.12.1998 and pursuant to the same, the second defendant is in possession and enjoyment of the suit property. Hence, the suit is liable to be dismissed.

5. The averments contained in the written statement filed by the second defendant are briefly stated as follows:

The suit property originally belonged to Marudha Goundar. He had executed a Will out of his own volition in the year 1979 in favour

of the first defendant and subsequently, sold half of the property covered under the Will to one Sadayappa Gounder, the remaining extent of the property devolved upon the first defendant by virtue of the Will. After the demise of Marudha Goundar, the first defendant was enjoying the suit property. On 30.12.1998, the first defendant had executed a settlement deed in favour of the second defendant and accordingly, the second defendant is in possession and enjoyment of the suit property. Original Will, which was in the custody of the second defendant, had been lost and despite diligent efforts, the same could not be traced. As the second defendant is the absolute owner of the suit property, the plaintiff has no right to claim partition in respect of suit property and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, Pws.1 and 2 were examined and Exs.A1 to A8 were marked. On the side of the defendants, DWs1 to 5 were examined and Exs.B1 to B12 were marked. Further, Exs.X1 and X2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to dismiss the suit. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred the first appeal. The first appellate court was pleased to set aside the judgment and decree of the trial court

and allowed the appeal and consequently, decreed the suit filed by the plaintiff for partition as prayed for. Aggrieved over the judgment and decree of the first appellate court, the second defendant has preferred this second appeal.

8. The second appeal had been admitted and the following substantial questions of law were formulated for consideration in the second appeal:

***(i). Whether the First Appellate Court is right in law in holding that the suit "Will" dated 21.03/1979 marked as Ex.B1 has not been proved to be genuine and valid one in spite of the fact that there was no pleading and no evidence to that effect at the instance of the plaintiff to dislodge the presumption of a registered Will under Section 114(e) of the Indian Evidence Act?***

***(ii). Whether the First Appellate Court erred in law in doubting the "Will" on the basis of the alleged conflict of testimony between D.W.2 and D.W.3 especially when the suspicion alleged are not of inherent one more so, the evidence was recorded 18 years after the date of registration?***

***(iii). Whether the First Appellate Court being a court of conscience could render the testamentary document ineffective instead of making it effective in the absence of any legal evidence to render the last Will of the deceased wholly ineffective particularly when the burden of proof to disbelieve the Will has failed to discharge the said burden?***

9. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

10. The plaintiff and the first defendant are the sons of Marudha Gounder. The second defendant is the wife of the first defendant. The parties are not at loggerheads with reference to the fact that the suit property originally belonged to Marudha Gounder, the father of the plaintiff and the first defendant and that, he had purchased the suit property under the sale deed dated 05.09.1962. Therefore, according to the plaintiff, inasmuch as Murudha Gounder died intestate, he is entitled to claim 1/2 share in the suit property and hence, he laid the suit for partition.

11. The plaintiff's case is resisted by the defendants by contending that Marudha Gounder did not die intestate as put forth by the plaintiff and on the other hand, he had, during his life time in a fit state of mind, voluntarily and out of love and affection towards the first defendant who was looking after him, executed a Will in respect of the suit property on 21.03.1979 and therefore, according to the defendants, the suit property had been bequeathed to the first defendant by Marudha Gounder and thus, the first defendant had acquired title to the suit property as per the Will dated 21.03.1979. The registration copy of the aforesaid Will dated 21.03.1979 has been marked as Ex.B1. The further case of the defendants is that the first defendant had settled the suit property in favour of the second defendant on 30.12.1998 by way of a settlement deed, which has been marked as Ex.B2 and therefore, according to the defendants, as of now, the second defendant is the absolute owner of the suit property.

12. Inasmuch as the Will has been projected by the defendants to non suit the plaintiff and inasmuch as the Will has not been admitted, it could be seen that the burden is upon the defendants to establish the validity and genuineness of the Will marked as Ex.B1.

13. The defendants have not produced the original Will and no acceptable explanation is forthcoming on the side of the defendants as to the non production of the original Will. Only, the registration copy of the Will was summoned and produced. The first defendant, in his written statement, has not spoken anything about the custody of the Will or the loss of the Will. Further, he has not stated anything in the written statement, as to why the original Will could not be produced in the Court. On the other hand, according to the second defendant, she has pleaded in the written statement that the original Will was in her custody and the same was lost and could not be traced, in spite of diligent efforts. Therefore, as per the case of the second defendant, it could be seen that the Will had been in her custody and it has been subsequently lost. The steps taken by the second defendant to retrieve the lost Will has not been explained. However, during the course of evidence, a new case has been projected by the defendants, as if the Will and other documents had been taken away by the plaintiff. If that be the true state of affairs, as rightly argued by the plaintiff's counsel, the same would have been averred by the defendants in their written statement. However, the above said new theory that the plaintiff had taken away the Will, has been projected for the first time during the course of evidence. Therefore, the lower appellate Court has rightly found that the defendants have not clearly projected any acceptable cause for the non production of the original Will.

14. Be that as it may, the registered Will having been summoned from the custody of the Sub-Registrar and DW2 having also been examined with reference to the same, it could be seen that the lower appellate Court has proceeded to examine the validity of the said Will based upon the evidence adduced by the defendants.

15. To establish the validity and genuineness of the Will, the defendants have examined one of the attestors viz. Chinnamalai Gounder as DW.3 and based upon his evidence, it is contended by the defendants that the Will should be held to be a true and genuine document and accordingly, the plaintiff's case should be rejected.

16. As rightly found by the first appellate Court, a perusal of the evidence of DW3, the attesting witness, it could be seen that his evidence does not satisfy the requirements of law to uphold the Will marked as Ex.B1. DW3, in his evidence, has not at all whispered anything about the attestation of the impugned Will by the other witnesses. Further, he has, during the cross-examination, admitted that he is not aware, who is the other witnesses and who had attested the Will and that, he is not aware, who were present at the time of preparing the Will. Therefore, it could be seen that as found by the lower appellate Court, DW3 has not spoken about the attestation of

the Will as mandate under law. Despite the shortcomings in the evidence of DW3 with reference to the attestation of the Will as required by law, the defendants have not taken any step to examine the other attester to establish the authenticity of the Will and no explanation whatsoever has been given by the defendants for non examining the other attester to augment their case. It is not the case of the defendants that other attester is not available for tendering evidence.

17. In the light of the above facts, considering the above stated nature of the evidence of DW3 with reference to the validity of the Will, as rightly found by the first appellate Court, it could be seen that the Will has not been established in accordance with law.

18. In this connection, the lower appellate Court has rightly found that the requirements of the proof of Will as contemplated under Section 63(c) of the Succession Act and Section 68 of the Evidence Act and as adumbrated by Apex Court in the decision reported in **2003 (1) CTC 308 (Janki Narayan Bhoir Vs. Narayan Namdeo Kadam)** have not been complied with by the defendants. In this connection, it is useful to refer to the principles of law adumbrated by the Apex Court to the proof of Will in the above said decision, which is reproduced as follows:

***" In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the Will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but***

***it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the Will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respect. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”***

19. Therefore, the lower appellate Court has rightly observed that despite the fact that DW3 has not satisfied legal requirements of proof of Will though his evidence as adverted to earlier, the defendants have not endeavoured to supplement his evidence by calling upon the other attesting witness available to speak about the Will in question. Considering the above facts, it could be seen that barring the unreliable evidence of DW3, which as seen supra, not found to be in accordance with the legal requirements and also, as pointed out by Apex Court in the above cited decision, the defendants having failed to establish the truth and genuineness of the Will in question by adducing further evidence, left with no other

alternative, it has to be held that the defendants have miserably failed to establish the truth and validity of the Will marked as Ex.B1.

20. Merely because the Will has been registered, would not entitle the defendants to contend that they could be absolved from examining the attesting witnesses to prove the genuineness of the Will. Further, the defendants' counsel placed strong reliance upon Section 114 (e) of the Indian Evidence Act, for raising the presumption with reference to the proof of registration of Will. When the Will in question has been impugned by the plaintiff and not admitted to be a true document, it could be seen that the defendants have to adduce clinching and concrete evidence in accordance with the requirements of Law to uphold the validity of the Will. In such circumstances, the defendants' counsel argument that the plaintiff having failed to place any material to dislodge the presumption that could be raised under Section 114 (e) of The Indian Evidence Act, the Court is duty bound to accept the case of the defendants, irrespective of the merits of the defendants' case, cannot at all be countenanced in any manner.

21. The further argument put forth by the defendants' counsel is that the testamentary Court being a Court of conscience should not proceed with the case on the presumption that the Will is not a

genuine document. This Court or the lower appellate Court has not proceeded with the case of the defendants on the premise that the Will in question is a false document. On the other hand, the Court expects the defendants to prove the validity and genuineness of the Will in question in tune with the requirements of law as mandated and as directed by the apex court in the aforesaid decision. Therefore, in the light of the above position, the authority relied upon by the defendants' counsel reported in **2001 (3) CTC 283 (Corra Vedachalam Chetty, 17, Old No.45, Strotten Muthiah Mudali Street, Madras – 600 079 and another Vs. G.Janakiraman)**, as rightly put forth by the plaintiff's counsel, would not be applicable to the facts and circumstances of the present case.

22. The further argument put forth by the defendants' counsel is that DW3 attesting witness has been called upon to speak about the Will nearly 18 years, after the registration of Will and therefore, there is bound to be some loss of memory or discrepancies in his evidence and on that sole ground, his evidence should not be disregarded. It is contended that the lower appellate Court has made a mountain out of a molehill by picking holes in the evidence of DW3 and on that basis, rejected the duly executed registered Will and in this connection, he placed reliance upon the decision reported in **(2005) 8 Supreme Court Cases 67 (Pentakota Satyanarayana and others Vs.**

***Pentakota Seetharatnam and others***). However, the above argument of the defendants' counsel does not merit acceptance, as the Will having been disputed, as required by law, the defendants should tender evidence to the satisfaction of the Court that the Will has been executed by the testator out of his own will and in a fit state of mind and voluntarily and that, the Will had been duly attested in accordance with law. The defendants having failed to adduce acceptable evidence with reference to the same through the evidence of DW3 and also, having failed to substantiate their case by examining the other attester though available, cannot be allowed to contend that the lower appellate Court has erred in pointing out the shortcomings in the evidence of DW3 with reference to the attestation of the other attesting witness in the Will. When the evidence of DW3 is lacking in vital aspects as regards the proof of the Will, it could be seen that the above arguments put forth by the defendants' counsel, would not be helpful to sustain their case.

23. It is further contended by the defendants' counsel that the Will having not been specifically denied in the plaint and also, the plaintiff having not filed any reply statement repudiating the Will put forth by the defendants in their written statements, the lower appellate court should have held that the Will in question does not require any proof for establishing its genuineness and in this connection, he relied

upon the decision reported in **(2015) 4 MLJ 452 (Selvasubramaniam Vs. Subburathinam), 2010-3-L.W.282 (Karpagam and another Vs.E.Purushothaman and two others) and (2010) 5 Supreme Court Cases 770 (Balathandayutham and antoher Vs. Ezhilarasan).**

24. A perusal of the above decisions would go to show that in all the above mentioned authorities, the respective cases have been dealt with on the basis of the facts and circumstances pertaining to the individual cases and accordingly, on such facts and circumstances, it has been found that if the attestors are not available, the Will could be established under Section 69 of the Evidence Act and therefore, it could be seen that those authorities, as rightly argued by the plaintiff's counsel, would not be applicable to the facts and circumstances of the present case. For instance, in the decision reported in **(2015) 4 MLJ 452 (Selvasubramaniam Vs. Subburathinam),** it has been found that prior to the suit, there is exchange of notice between the parties and in the said notice sent by the defendants, the Will in question was projected. In such view of the matter, the Hon'ble Judge, who dealt with the case has found that the plaintiff should have filed a reply statement repudiating the stand of the defendants in the written statement and the plaintiff having failed to file the reply statement disputing the Will in question, or adverting to the same in the plaint,

there was no necessity for the defendants to prove the Will. But in the present case, there was no exchange of notice prior to the suit. The plaintiff laid the suit for partition and the defendants have projected their case and as found earlier, that they have taken inconsistent stand about the original Will in the written statement. In such circumstances, there is no question of the plaintiff being required to file any reply statement repudiating the case of the defendants projected in the written statement. Even in the above said decision, it has been held that the reply statement in every case is not required. Similarly, in the decision reported **2010-3-L.W.282 (Karpagam and another Vs.E.Purushothaman and two others)** the focus is on the aspect, when the attesting witness could not be found, whether the execution of the Will could be proved by the witness, who is acquainted with the signature of the testator and in this connection, whether Section 69 could be invoked. Therefore, it is not stated that despite the availability of the attestors, the strict proof of Will, even without examining the attestors could be dispensed with. Similar is the position in the decision reported in **(2010) 5 Supreme Court Cases 770 (Balathandayutham and antoher Vs. Ezhilarasan)**. In so far as the present case is concerned, the plaintiff has not admitted the Will in dispute. In such circumstances, it could be seen that the above said three authorities relied upon by the defendants' counsel would not be applicable to the facts of the present case and therefore,

the defendants cannot be dispensed with to prove the genuineness and the validity of the Will marked as Ex.B1.

25. After Ex.B1, it is admitted that a portion of the properties covered under the Will has been alienated by the Marudha Gounder. As rightly found by the lower appellate Court, the testator had no intention to bequeath all the properties owned by him to the first defendant.

26. Be that as it may, inasmuch as the defendants have placed reliance upon the Will with reference to the suit property in question and having failed to establish the genuineness of the same, it could be seen that the defendants' case that the deceased Marudha Gounder did not die intestate, cannot be accepted in any manner.

27. In the light of the above reasons, I hold that the defendants have not established the truth, validity and genuineness of the Will marked as Ex.B1. As a corollary, it is held that the first defendant would not be entitled to obtain title to the suit property under the Will and therefore, he would not be competent to settle the suit property in favour of his wife namely the second defendant under Ex.B2. Therefore, it could be seen that Ex.B2 being an invalid document would not clothe the second defendant with any title over the suit

property and the second defendant would not be entitled to lay any claim of title, right or interest in respect of the suit property as projected by her.

In conclusion, I hold that the appellants have failed to establish that the substantial questions of law are involved in this second appeal. Resultantly, the second appeal is dismissed as devoid of merits. No costs. Consequently, connected miscellaneous petition is closed.

25.10.2016

Index : Yes/No  
Internet:Yes/No  
sms

To

1. The First Additional District Court,  
Coimbatore.
2. The Sub-Court, Tiruppur.

**T.RAVINDRAN,J.**

sms

**Pre-delivery order in**  
**S. A.No. 105 of 2011**  
**and**  
**M.P.No.1 of 201**

**25.10.2016**