

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24-06-2016

CORAM:

THE HON'BLE MR.JUSTICE A.SELVAM
AND
THE HON'BLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.166 of 2008

M. Pattammal

.. Appellant

Vs.

1. G. Parthasarathy
2. G. Subramani

...Respondents

Original Side Appeal under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the judgment and decree dated 20-12-2007 in T.O.S.No.23 of 2002.

For appellant : Mr.M.S. Krishnan, Senior Counsel
for Mr.K.S.Ganesh Babu

For respondents : Mr. S.V. Jayaraman, Senior Counsel
Mr. T.K. Viswanath

J U D G M E N T

Challenge in this Original Side Appeal is to the judgment and decree dated 20-12-2007 passed in T.O.S.No.23 of 2002 by the learned Single Judge of this court.

2. The respondents herein as petitioners have filed O.P.No.52 of 2002 under Sections 222 and 276 of the Indian Succession Act XXXIX of 1925 and subsequently, the same has been converted into T.O.S.No.23 of 2002 wherein the present appellant has been shown as sole defendant.

3. The material averments made in the plaint can be summarized as follows:

The plaintiffs and defendant are the sons and daughter of one Govindan and he voluntarily executed a Will, dated 06-07-1990 in favour of the plaintiffs in respect of immoveable property mentioned therein. The said Govindan has passed away on 03-02-1993. After his demise, the Will, dated 06-07-1990 has

come into effect. The deceased has not executed any Will in favour of anybody except the Will dated 06-07-1990. Under the said circumstances, the present suit has been instituted praying to grant the relief sought therein.

4. In the written statement filed on the side of the defendant it is averred as follows:

The defendant has denied the various allegations mentioned in the plaint except the relationship mentioned therein. It is false to aver that the father of the plaintiffs and defendant has executed a Will dated 06-07-1990. The same has been created and forged by the plaintiffs, so as to defeat the right of the defendant in respect of her one-third share in the property mentioned in the plaint. The father of the plaintiffs and defendant died intestate. After the demise of the father of the plaintiffs and defendant, the defendant asked the plaintiffs to give her share and in order to defeat her rights, the Will, in question has been forged by the plaintiffs. The said Will has not been executed in a free state of mind of the deceased. The deceased has never mentioned the Will alleged to have been executed by him. There is no merit in the suit and the same deserves to be dismissed.

5. On the basis of the rival pleadings raised on either side, the learned Single Judge has framed necessary issues and after analysing both the oral and documentary evidence has decreed the suit as prayed for. Against the judgment and decree passed by the learned Single Judge, the present appeal has been preferred at the instance of the defendant, as appellant.

6. The crux of the case of the plaintiffs is that the property mentioned in the plaint is the absolute property of the father of the plaintiffs and defendant, by name Govindan and he voluntarily executed the Will dated 06-07-1990 in favour of the plaintiffs and he passed away on 03-02-1993 and thereafter, the Will dated 06-07-1990 has come into effect. Under the said circumstances, the present suit has been instituted for the relief sought therein.

7. The main defence put forth on the side of the defendant is that the deceased Govindan has not executed any Will and passed away, intestate. During his lifetime, he has not stated anything about the Will and the same has been created by the plaintiffs, so as to deny her rights to an extent of one-third share in the property mentioned in the plaint and therefore, the plaintiffs are not entitled to get the reliefs sought in the plaint.

8. As adverted to earlier, the learned Single Judge after considering the rival evidence available on record has decreed the suit as prayed for.

9. The main point that has to be decided in the present Original Side Appeal is as to whether the deceased viz., Govindan has executed the Will, dated 06-07-1990 in favour of the plaintiffs?

10. The learned Senior Counsel appearing for the appellant/defendant has strenuously contended that the Will, dated 06-07-1990 has been marked as Ex-P1 and for the purpose of proving its execution as well as attestation on the side of the plaintiffs, the second plaintiff by name, G. Subramani has been examined as P.W.1 and since both the attestors have passed away, the son of one of the attestors by name Ramamurthy has been examined as P.W.2 and the Advocate, who is said to have prepared Ex-P1 has been examined as P.W.3. The evidence given by them are mutually contradictory in nature and since the evidence given by P.Ws.1 to 3 are mutually contradictory and incongruous, the Court can easily come to a conclusion that Ex-P1 is nothing but a concocted Will and further on the side of the plaintiffs, the due execution as well as attestation of Ex-P1 have not been proved and the learned Single Judge without considering the vital infirmities as well as lack of evidence found on the side of the plaintiffs has erroneously decreed the suit and therefore, the judgment and decree passed by the learned Single Judge are liable to set aside.

11. Per contra, the learned Senior Counsel appearing for the respondents/ plaintiffs has argued that P.W.3, Chellamuthu is a practicing Advocate and his candid evidence is that on 06-07-1990, the deceased Govindan has executed Ex-P1 and the same has been duly attested by the attesting witnesses and since both of them have passed away, P.W.2 has been examined for the purpose of proving the signature of one of the attestors and the learned Single Judge after considering the acceptable evidence available on record has rightly decreed the suit and therefore, the judgment and decree passed by the learned Single Judge are not liable to be interfered with.

12. Before analysing the rival submissions made on either side it has become shunless to look into Section 68 of the Indian Evidence Act, 1872 and the same reads as follows:

"68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of

the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

13. From a bare perusal of the provision of the said Section, the Court can easily discern that in a case of Will, unless one of the attestors is examined for the purpose of proving its execution as well as attestation, the same cannot be treated as evidence.

14. In the instant case, the Will, dated 06-07-1990 has been marked as Ex-P1. It is an admitted fact that in Ex-P1, two persons viz., Sundaramurthy and Krishnamurthy have put their signatures as attesting witnesses and both of them have passed away. Under the said circumstances, P.W.2 viz., Ramamurthy has been examined for the purpose of proving the signature of his father, by name Sundaramurthy.

15. The main defence put forth on the side of the defendant is that the deceased Govindan has not executed Ex-P1 and the same has been created/concocted by the plaintiffs. Since such defence has been taken on the side of the defendant, burden heavily lies upon the plaintiffs to prove that Ex-P1 has been executed by the deceased voluntarily and that too in a sound disposing state of mind.

16. On the side of the plaintiffs, the second plaintiff by name G. Subramani has been examined as P.W.1. The specific evidence given by him in chief-examination is that on 06-07-1990, his father has executed Ex-P1, the disputed Will. Further, he has deposed that he has come to know the existence of the said Will, after five years from the date of demise of his father. Further, he stated in his evidence that one of the attesting witnesses by name Sundaramurthy is a friend of his father. During the course of his cross-examination, he would say that the said Sundaramurthy has attended the sixteenth day ceremony of his father. But he has not stated anything about the alleged Will, dated 06-07-1990. At this juncture, the Court has to look into Ex-P1. Ex-P1 contains a stamp paper and the same stands in the name of the second plaintiff, who is none other than P.W.1. If really the deceased has executed Ex-P1, since the stamp papers stands in the name of the second plaintiff viz., P.W.1, definitely he would have known the same, even on the date of execution.

17. It has already been pointed out that the categorical evidence adduced by P.W.1 is that one of the attesting witness, is a friend of his father and he attended the sixteenth day ceremony. But, he has not stated anything about the execution of Ex-P1. Therefore, it is quite clear that on the basis of evidence given by P.W.1, the Court cannot come to a conclusion that the plaintiffs have established the fact that Ex-P1 has come into existence beyond suspicious circumstances.

18. Now, the Court has to look into the evidence given by P.W.2. As stated earlier, the son of Sundaramurthy has been examined as P.W.2 and he simply identified the signatures of Sundaramurthy found in Ex-P1. At this juncture, the Court has to necessarily look into Section 69 of the Indian Evidence Act, 1872. It is a settled principle of law that as per Section 69 of the Indian Evidence Act, two aspects have to be established viz., the witness, who deposed evidence under the said Section must identify the signature of attesting witnesses and also the signature of the executant found therein. But, P.W.2 has simply identified the alleged signatures of Sundaramurthy, one of the attesting witnesses and therefore, the Court cannot come to a conclusion that the plaintiffs have complied with the provisions of the said Section.

19. The learned Single Judge has come to a conclusion to the effect that Ex-P1 has been executed by the deceased only on the basis of evidence given by P.W.3. It is an admitted fact that P.W.3 is none other than a practicing Advocate. In Ex-P1, it is mentioned that the same has been drafted by him. The specific evidence given by P.W.3 is that on the date of execution of Ex-P1, the executant as well as attestors have met him and subsequently, he prepared the same and even on the date of execution, the same has been registered and further in Ex-P1, both the executant as well as attestors have put their signatures in the presence of Sub-Registrar, since the same has been prepared in the Sub-Registrar's Office.

20. In fact, this Court has scanned the entire recitals found in Ex-P1. Nowhere it is stated that Ex-P1 has been executed in the presence of Sub-Registrar and both executant as well as attestors have put their signatures in his presence. If really such occurrence has taken place as deposed by P.W.3, definitely, the concerned Sub-Registrar would have made proper endorsement by way of subscribing his signature. Since no such endorsement is found place, it is needless to say that the Court cannot give much adherence to the evidence given by P.W.3.

21. At this juncture, the learned Senior counsel appearing for the appellant/defendant has befittingly drawn the attention of this Court to the decision reported in 1969(1) SCC 573 (M.L.

Abdul Jabbar Sahib Vs. M.V. Venkata Sastri & Sons and others), wherein at paragraph No.7, it is observed as follows:

"Section 3 of the Transfer of Property Act gives the definition of the word "attested" and is in these words :-

"Attested", in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his- signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary."

22. It is an acknowledged principle of law that an attester means who attested a document. A scribe of a particular document cannot be treated as an attesting witness, if he has simply written the same. But, at the same time, if he has acted in dual capacity both as a scribe as well as an attester, his evidence can be looked into for the purpose of attestation.

23. In the instant case, as pointed out earlier, P.W.3 has simply drafted Ex-P1. Since P.W.3 has simply drafted he is totally incompetent to speak about attestation. As pointed out earlier for the purpose of treating the particular Will as evidence, both execution as well as attestation must be proved. Therefore, viewing from any angle, the role alleged to have been played by P.W.3 would not lend support to the case of the plaintiffs.

24. The learned Senior Counsel appearing for the appellant/ defendant has also contended to the effect that in Ex-P1, the persons, viz., Sundaramurthy and Krishnamurthy have put their signatures as attesting witnesses. But the signatures of Krishnamurthy found in Ex-P1 are not similar.

25. In fact, this Court has collated the alleged signature of the said Krishnamurthy as an attester and also his alleged signature as identifying witness. As rightly pointed out on the side of the appellant/ defendant some vital differences are found place betwixt the said signatures. It has already been discussed and pointed out that the entire burden lies upon the plaintiffs to prove that Ex-P1 has come into existence beyond suspicious circumstances.

26. In the instant case, as marshalled earlier, various circumstances are available so as to come to a conclusion that Ex-P1 has come into existence in a suspicious circumstance. It is not an exaggeration to say that on the side of the plaintiffs requisite evidence is not available so as to repel the suspicious circumstance put forth on the side of the appellant/defendant.

27. It is a settled principle of law that even though suspicious circumstances have not been taken as a defence on the side of the contesting party, the Court can very well consider the same on the basis of available evidence. In the instant case, it is quite unnatural to depose evidence by P.W.1 that he has come to know the existence of Ex-P1 after five years from the date of demise of his father, since the concerned stamp paper stands in his name. Further, if really Ex-P1 has been executed by the deceased, since one of the attesting witnesses viz., Sundaramurthy has attended the sixteenth day ceremony of the deceased, definitely, he would have stated the existence of Ex-P1 to all the family members of the plaintiff. But, he has not done it. Further, as per evidence of P.W.3, if Ex-P1 has been written in the Sub-Registrar's Office and that too, in the presence of Sub-Registrar, definitely, some endorsements would have found place in Ex-P1. But the same has not found place. Therefore, viewing from any angle, this Court is of the considered view that the plaintiffs have failed to remove the suspicious circumstances created on the side of the appellant/defendant with regard to execution of Ex-P1. Since the plaintiffs have not discharged their burden, it is needless to say that they are not entitled to get the relief sought in the plaint.

28. The learned Single Judge without considering the rickety and fragile evidence available on the side of the plaintiffs has erroneously decreed the suit as prayed for. In view of the foregoing elucidation of both the factual and legal aspects, this Court is of the view that the judgment and decree passed by the learned Single Judge are not factually and legally sustainable and the same are liable to be set aside.

29. In fine, this Original Side Appeal is allowed with costs. The judgment and decree passed in T.O.S.No.23 of 2002 are set aside and T.O.S.No.23 of 2002 is dismissed with costs. M.P.Nos.1 of 2008 and 1 of 2014 is also dismissed.

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+ 1 cc to Mr.K.S.Ganesh Babu, Advocate SR 35192

+ 1 cc to Mr.T.K.Viswanath, Advocate SR 35579

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