

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.07.2016

Delivered on: 11.08.2016

Coram:

The Hon'ble Mr.Justice A.SELVAM

and

The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.266 of 2010

& M.P.No.1 of 2010

M.Kuppusamy Naicker
(deceased rep. by L.Rs.

1. Murugammal
2. Mallika
3. a.Gowri
4. K.Ganesan
5. K.Nagalakshmi
6. K.Chitra

(Cause Title accepted vide
order of this court dated 08.06.2010
made in MP.No.1/10 in OSA.SR.13601/10) ... Appellants/Plaintiffs

Vs.

1. M.Mani
2. M.Vadivelu
3. M.Raamakrishnan

... Respondents/Defendants

This Appeal is preferred under Order XXXVI Rule 1 of
O.S.Rules r/w Clause 15 of the Letters Patent Act against the
order of this Court dated 2.9.2009 in T.O.S.No.35 of 2004.

For Appellants : Mr.R.Singaravelan
Senior Counsel for
Mr.A.R.Suresh

For Respondents : Mr.A.Palaniappan

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED
BY A.SELVAM, J.)

This Original Side Appeal has been directed against the Judgment and Decree dated 2.9.2009 passed in Transfer Original Suit No.35 of 2004 by the learned Single Judge of this Court.

2. The deceased appellant herein, as plaintiff, has instituted T.O.S.No.35 of 2004 on the file of this Court, praying to give Letters of Administration in respect of the Will dated 24.5.1990, wherein the present respondents have been shown as defendants.

3. In the plaint, it is averred that the property in question is the absolute property of one Annammal, wife of Seetharama Naicker and she passed away on 25.7.1991. Before her demise, she has voluntarily executed a Will dated 24.5.1990 in favour of the plaintiff. Since the executant has passed away on 25.7.1991, the Will have come into effect. Under such circumstances, the present suit has been filed for getting the relief sought therein.

4. In the written statement filed on the side of the first defendant, it is averred that the first defendant has denied the execution as well as attestation of the Will mentioned in the plaint. The defendants 1 to 3 are the brothers of the plaintiff. The plaintiff is nothing but an elder brother. The property mentioned in the plaint is the absolute property of Annammal and she purchased the same by using family income. She has not executed any Will during her life time much less on 24.5.1990 and 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, necessary issues have been framed and after considering the available evidence on record, the learned Single Judge has dismissed the suit. The judgment and decree passed by the learned Single Judge are being challenged in the present Original Side Appeal.

6. Before contemplating the rival submissions made on either side, the Court has to narrate the following admitted facts:-

It is an admitted fact that the property in question is the absolute property of Annammal, who is none other than the elder sister of the mother of plaintiff and defendants and she passed away on 25.7.1991.

7. The consistent case put forth on the side of the plaintiff is that before her demise, she voluntarily and also in a sound and disposing state of mind, has executed a Will dated 24.5.1990.

8. The defence put forth on the side of the defendants is that the said Annammal has not executed any Will much less on 24.5.1990 and she passed away at the age of 90 and therefore, the Will in question is nothing but a concoction.

9. Since such kind of defence has been taken on the side of the defendants, the entire burden lies upon the plaintiff to prove that the Will in question has been duly executed and attested as per law.

10. The learned counsel appearing for the appellants/plaintiff has contended to the effect that the original owner of the property mentioned in the plaint has voluntarily and also in a sound and disposing state of mind has executed a Will dated 24.5.1990 and the same has been attested by two attesting witnesses, namely Ganesan and Ravi. The said Ganesan has been examined as P.W.2 and his specific evidence is that the deceased Annammal has voluntarily executed the Will dated 24.5.1990 and the same has been attested by him and one more attesting witness, by name Ravi and the learned Single Judge, without considering the overall evidence adduced by P.W.2, has erroneously dismissed the suit and therefore, the judgment and decree passed by the learned Single Judge are liable to be set aside.

11. Per contra, the learned counsel appearing for the respondents/defendants has contended that in the instant case, the legal aspects of execution as well as attestation have not been proved on the side of the plaintiff and the learned Single Judge, after considering the vital infirmities found on the side of the plaintiff, has rightly dismissed the suit and therefore, the judgment and decree passed by the learned Single Judge are not liable to be interfered with.

12. The consistent case put forth on the side of the original plaintiff is that on 24.5.1990, the absolute owner of the property mentioned in the plaint has voluntarily and also in a sound and disposing state of mind, executed the Will in question. Since the document in question is nothing but a Will, the Court has to look into the following sections of law.

13. Section 63(c) of the Indian Succession Act, 1925 reads as follows:

"(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

14. Even a cursory look of the said provision, it is made clear that each and every Will has to be attested by at least two or more attesting witnesses. They must see the signature of the executor and further they must put their signatures in the presence of the executor.

15. Section 68 of the Indian Evidence Act, 1872 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.

[Provided that it shall 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.]"

16. A mere reading of the said provision would clearly go to show that if a document is required by law to be attested, it shall not be used as evidence, until one attesting witness has been examined for the purpose of proving the due execution.

17. With these legal backdrops, the Court has to look into the evidence given by P.W.2. It is an admitted fact that P.W.2 is nothing but a son of the original plaintiff. As adverted to

earlier, in the Will dated 24.5.1990, one more person by name Ravi has put the signature as one of the attesting witnesses, but he has not been examined. Considering the relationship between the original plaintiff and P.W.2, the evidence given by P.W.2 has to be scrutinized more carefully and also dispassionately.

18. In fact, this Court has perused each and every line of deposition of P.W.2 and ultimately found that P.W.2 does not say that he and other attesting witness have put their signatures in the presence of Annammal. Further, he does not say that Annammal has put her thumb impression in their presence. Further, it is seen from his evidence that even prior to arrival of office of a scribe, the Will in question has been written. Therefore, it is quite clear that on the side of the original plaintiff, the statutory duties cast upon him have not been discharged.

19. Further, it is pertinent to note that at the time of alleged execution of the Will dated 24.5.1990, the executant, viz., Annammal has reached the age of 90 and therefore, it goes without saying that she has attained senility. Further, it is seen from the records that till her demise, she has been under the care and custody of the original plaintiff. Under the said circumstances, by way of taking advantage of her anility, the original plaintiff might have created the Will dated 24.5.1990. Therefore, it is needless to say that the original plaintiff has failed to establish that the Will in question has been executed by the executant in a sound and disposing state of mind.

20. Even though, on the side of the respondents/defendants, various decisions are relied upon, this Court is of the view to look into the apt decision reported in (2015) 8 SCC 615 (Jagdish Chand Sharma vs. Narain Singh Saini (Dead) through legal representatives and others.), wherein the Hon'ble Supreme Court has analyzed Sections 71, 68 of the Indian Succession Act, 1925 and ultimately found that execution of a Will cannot be sought to be proved by other evidence under Section 71 on failure of attesting witness to prove by credible evidence the execution and attestation, as required under section 68 of the Indian Evidence Act read with Section 63(c) of Indian Succession Act, 1925.

21. It has already been pointed out that first of all the original plaintiff has to establish the due execution and attestation as per Section 63(c) of Indian Succession Act, 1925 by way of examining one of the attesting witnesses, then only the Court can come to a conclusion that the said Will can be taken as an evidence as per the provision of Section 68 of the Indian Evidence Act, 1872. Even though an attempt has been made on the side of the original plaintiff by way of examining P.W.2, his evidence is not in consonance with the provisions of Section

63 of the said Act. Therefore, it is quite clear that due execution as well as attestation of the Will dated 24.5.1990 have not been uniformly established on the side of the appellants/plaintiff.

22. The learned Single Judge, after considering the lack of evidence with regard to execution and attestation of the Will dated 24.5.1990, has rightly dismissed the suit. In view of the discussions made earlier, this Court has not found any acceptable force in the contentions put forth on the side of the appellants, whereas the contentions put forth on the side of the respondents is really having subsisting force and altogether, the present Original Side Appeal deserves to be dismissed.

In fine, this Original Side Appeal is dismissed with cost. The judgment and decree dated 2.9.2009 passed by the learned Single Judge in Transfer Original Suit No.35 of 2004 are confirmed. Consequently, the connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

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The Sub Assistant Registrar
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High Court, Madras

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