

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 20.12.2017

Judgment Pronounced on: 13.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1288 of 2000
and
CMP.Nos.2099/2003 & 612/2008

Ambalavanan ... Appellant/Plaintiff

-vs-

1.Muthukumarasamy ...1st Respondent/2nd Defendant
2.Sambandam
3.Arunthathi @ Sarojini
4.Thiyai Nayaki
5.Savithiri ... Respondents 2 to 5/
Defendant 1, 3, 4 & 5

PRAYER:

Second Appeal is filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree dated 30.03.1999 in A.S.No.75 of 1997 on the file of the Court of Principal District Judge, Nagapattinam confirming the Judgment and Decree passed in O.S.No.76 of 1994 dated 12.12.1996 on the file of the Court of Additional Subordinate Judge, Myladuthurai.

For Appellant : Mr.S.Sounthar

For Respondent No.1 : M/s.D.Veereasekaran and
Mr.J.Duraisamy.

For Respondent Nos.2 to 5 : No appearance

JUDGMENT

This Second Appeal has been filed by the plaintiff against the Judgment and Decree passed in A.S.No.75 of 1997 on the file of the Principal District Judge, Nagapattinam dated 30.03.1999 reversing the Judgment and Decree of the Additional Sub-Judge, Myladuthurai in O.S.No.76 of 1994 dated 12.12.1996.

2. The appellant herein has filed a suit in O.S.No.76 of

1994 on the file of the Additional Sub-Judge, Myladuthurai, to divide the suit properties into 18 equal shares and allot 7 such shares to him and for mesne profits. The learned Additional Sub-Judge, Myladuthurai by his Judgment dated 12.12.1996 passed a preliminary decree directing to divide the suit properties into 18 equal shares and allot 7 such shares to the plaintiff. In respect of mesne profits, he directed the plaintiff to take separate proceedings. Aggrieved by the same, the second defendant has filed an appeal in A.S.No.75/1997 on the file of the Principal District Judge, Nagapattinam. The learned Principal District Judge has allowed the said appeal with costs and set aside the Judgment and Decree passed by the trial court. As against the said Judgment and Decree, plaintiff has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are in brief as follows:
The plaintiff, the defendants 1 and 2 are the sons and the defendants 3 to 5 are the daughters of one Krishna Pillai. The said Krishna Pillai died intestate on 23.12.1993 leaving behind the plaintiff and the defendants as his legal heirs. When the said Krishna Pillai was alive, the first defendant made a request to allot his share in the family properties and accordingly on 09.10.1965, the first defendant alone got his share and the remaining properties were with the said Krishna Pillai, the plaintiff and the second defendant. To that effect, a registered partition deed was executed on 09.10.1965 itself. Thereafter the said Krishna Pillai had managed the said properties as joint family properties, in which, the plaintiff and the second defendant are co-parceners. On 04.06.1973, the said Krishna Pillai as an head of the family had made a family arrangement and as per the said family arrangement, 'A' schedule property was allotted to the plaintiff; 'B' schedule property was allotted to the second defendant. The remaining properties were retained by the said Krishna Pillai. With regard to the remaining properties, it was specifically mentioned in the family arrangement deed that a separate arrangement will be made subsequently. From the date of the said family arrangement, the remaining properties were managed by the said Krishna Pillai as undivided joint family properties.

4. In the said properties, the said Krishna Pillai, the plaintiff and the second defendant are entitled to get $1/3^{\text{rd}}$ share each. After the death of Krishna Pillai, the plaintiff and the defendants are entitled to get $1/6^{\text{th}}$ share in the share of the said Krishna Pillai and as such, the plaintiff and the second defendant are entitled to get $7/18$ shares each. The other defendants are entitled to get $1/18$ share each. The plaintiff

is enjoying the suit 'A' schedule properties as co-owner and especially, he is residing in Item 1 of the suit 'A' schedule properties. On 14.01.1994, the plaintiff had issued a lawyer's notice to the second defendant to come for an amicable partition. The second defendant, after receipt of the said notice, had issued a reply notice through his advocate dated 28.01.1994 stating that as per the family arrangement dated 04.06.1973, the suit properties were allotted to the share of their father, Krishna Pillai. He also stated that the said Krishna Pillai had executed a Will on 25.11.1991 bequeathing the suit 'A' schedule properties in favour of the second defendant and hence, the plaintiff is not entitled to seek partition. The alleged Will has been fraudulently created and the same is not valid in law. The plaintiff's father, Krishna Pillai was staying with the second defendant during his last days. Further, he was not doing well and he was suffering from blood pressure.

5. Taking advantage of the old age and mental condition of the said Krishna Pillai, the second defendant has created the Will. Hence based on the said Will, the second defendant cannot claim any right. Further, the second defendant stealthily tried to remove the movable properties which are mentioned in suit 'B' schedule and hence, the plaintiff had filed a suit in O.S.No.61/1991 on file of the District Munsif, Myladuthurai to restrain the second defendant from removing those properties and the said suit has been posted for Judgment. Since the second defendant has not come forward for dividing the suit properties, the plaintiff is constrained to file the suit for partition and mesne profits.

6. Except the second defendant, other defendants remained ex parte. The second defendant alone contested the case by filing the written statement.

7. The averments made in the written statement filed by the second defendant are in brief as follows:

It is true that the plaintiff and the defendants are brothers and sisters of their father, Krishna Pillai who died on 23.12.1993. The said Krishna Pillai executed a registered family arrangement deed on 04.06.1973, with regard to the family properties. The properties were divided by the said Krishna Pillai and 'A' schedule properties were allotted to the plaintiff and 'B' schedule properties were allotted to the second defendant. From the date of the said allotment, they have been enjoying their respective shares. Krishna Pillai reserved his rights to deal with the other properties including movable properties of the family retained by him as absolute owner.

8. On 25.11.1991, the said Krishna Pillai, while he was in sound and disposing state of mind, executed a registered Will bequeathing the suit properties and the movable properties in favour of the second defendant. Thereafter on 23.12.1993, the said Krishna Pillai died. After his death, as per the terms of the Will, the second defendant had taken all the properties. The plaintiff has got full knowledge about the execution of the Will. He also aware of the fact that the second defendant had taken possession of all the properties bequeathed in his favour by Krishna Pillai. After receipt of the lawyer's notice of the plaintiff, the second defendant has sent a reply through his advocate on 28.01.1995. Suppressing the real facts, the plaintiff has filed a suit in O.S.No.61 of 1994 on the file of the learned District Munsif, Myladuthurai for permanent injunction restraining the second defendant herein from removing the movable properties and cut the trees. He also filed an application in I.A.No.205 of 1994 seeking interim injunction and the said application was dismissed on 07.04.1994. Hence, the suit is barred by the principle of resjudicata. The properties which were retained by Krishna Pillai under the family arrangement deed dated 04.06.1993 are absolute properties of the said Krishna Pillai. As per the Will executed by him dated 25.11.1991, the second defendant became an absolute owner and he is in possession and enjoyment of the same, in which, the plaintiff cannot claim partition. Therefore, the second defendant prayed to dismiss the above suit.

9. Based on the abovesaid pleadings, the learned Additional Sub- Judge, Myladuthurai, framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and marked Exs.A1 to A12 as exhibits. On the side of the second defendant, the second defendant examined himself as DW1 and also examined three more witnesses as DW2 to DW4. He has marked Exs.B1 to B3 as exhibits.

10. Learned Additional Sub Judge, Myladuthurai, after considering the materials placed before him, found that the properties which were not covered under Ex.A9 have been treated as joint family properties by the said Krishna Pillai and his two sons viz., the plaintiff and the second defendant. He also found that the Ex.B2 Will is not a genuine Will and it was not executed by the said Krishna Pillai on his free-volition and as such, the plaintiff is entitled to get 7/18 shares in the suit properties. Accordingly, he passed a preliminary decree to divide the suit properties into 18 equal shares and allot 7 such shares to the plaintiff and also passed an order that the mesne profits to be worked out by separate proceedings. Aggrieved by the said Judgment and Decree, the second defendant has preferred an appeal in A.S.No.75 of 1997 on the file of the Principal District Judge, Nagapattinam. The learned Principal District

Judge, Nagapattinam has reversed the findings of the trial court and dismissed the suit. Aggrieved by the same, the plaintiff has filed the present second appeal.

11. At the time of admitting the second appeal, the following substantial questions of law were formulated:

"1. Whether the Judgment of the lower Appellate Court is vitiated in misconstruing the clauses of Ex.A9 and holding that suit properties are separate properties of Krishna Pillai?

2. Whether the lower Appellate Court erred in holding that Ex.B2-Will is valid and genuine overlooking the suspicious circumstances like taking active part in execution of Will by beneficiary, contradictions between the evidences of attestors and beneficiary regarding the circumstances prevailed at the time of execution, unnecessary exclusion of other sons and daughters, poor eye sight and hearing capacity of testator coupled with his age, etc.,?

3. Whether the Judgment of the lower appellate Court is vitiated in not considering admissions of DW1 to DW4 supporting the improbability of the Will, whether the lower appellate Court ignored Order 41 Rule 31 of C.P.C, while reversing the well considered Judgment of trial Court?"

12. Heard Mr.S. Sounthar, learned counsel for the appellant and M/s. D. Veereasekaran and Mr.J. Duraisamy, learned counsel for the first respondent/2nd defendant.

13. Learned counsel for the appellant has submitted that in Ex.A9, it is clearly stated that with regard to the properties, which are not mentioned in the said document, a separate arrangement will be made later and therefore, the said properties never allotted to the share of Krishna Pillai. He further submitted that the First Appellate Court has erred in holding that the said properties were allotted to the share of Krishna Pillai. He further submitted that the learned First Appellate Court Judge has failed to consider that the second defendant has actively participated in execution of Ex.B2 - Will. He further submitted that on the date of alleged execution of Ex.B2 - Will itself, a power of attorney (Ex.B3) was also executed in favour of the second defendant and that itself would show that he had an intention to take the property even before the death of Krishna Pillai. He further submitted that the learned First Appellate Court Judge has not assigned any valid reason for reversing the well considered Judgment of the trial court and therefore, he prayed to set aside the

Judgment and Decree of the First Appellate Court and restore the Judgment and Decree of the Trial Court.

14. In support of the aforesaid contentions, the learned counsel for the appellant has relied on the following decisions:

(i) Bharpur Singh and Others Vs. Shamsher Singh (2009) 3 SCC 687

(ii) S.R.Srinivasa and Others Vs. S. Padmavathamma (2010) 5 SCC 274

15. The learned counsel for the first respondent/second defendant has submitted that the joint family properties were divided through Ex.A9 and in the said document, it is clearly stated that the properties which are mentioned in 'A' schedule were allotted to the plaintiff and 'B' schedule properties were allotted to the second defendant and the properties which were not mentioned in the said document would be under the control of the said Krishna Pillai and as such, it has to be presumed that those properties were allotted to the share of Krishna Pillai. He further submitted that once partition is effected, there is no question of continuation of joint family and therefore, the plaintiff cannot claim that the properties which were not covered under Ex.A9 have been treated as joint family properties. He further submitted that the recitals of Ex.A9 would clearly show that the properties which were not mentioned in the said document have been allotted to the said Krishna Pillai and as such, he is entitled to dispose of those properties. He further submitted that admittedly, the second defendant alone took care of his parents and that the mother of the plaintiff and the defendants was suffering from cancer and the second defendant alone gave treatment. He further submitted that the said Krishna Pillai, who is being father of the parties was also living only with the second defendant in his last days and taking into consideration of all the aforesaid facts, the said Krishna Pillai had executed Ex.B2 Will bequeathing his share, which were allotted to him through Ex.A9 in favour of the second defendant. He further submitted that as directed by the said Krishna Pillai vide Ex.B2 Will, the second defendant alone performed last rites to the said Krishna Pillai and therefore, the Will came into force immediately after the death of Krishna Pillai.

16. The learned counsel for the first respondent/second defendant further submitted that it is not every influence which is brought to bear on a testator can be characterised as "undue influence" and therefore, merely because power of attorney was executed in favour of the second defendant, it cannot be said that he has unduly influenced the said Krishna Pillai to execute Ex.B2 Will in his favour and therefore, he prayed to dismiss the second appeal. In support of his contentions, he

has placed reliance upon the following decisions:

(i) Commissioner of Income Tax Vs. P.L. Karuppan Chettiar 1993 Supp (1) SCC 5820

(ii) B.Nalina and another Vs. Arumugam and Others (S.A.No.319/2007) on the file of this Court dated 27.04.2011.

(iii) Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta and Another (AIR 1955 SC 363).

17. The undisputed facts are as follows:

The plaintiff and the defendants 1 and 2 are sons and the defendants 3 to 5 are daughters of one Krishna Pillai. The first defendant who is being the eldest son has made a request to allot his share separately. Accordingly, a partition was effected on 09.10.1965 through Ex.A1, wherein, the properties which were mentioned in 'A' schedule were allotted to Krishna Pillai, plaintiff and the second defendant, 'B' schedule properties were allotted to the first defendant. The properties which were allotted under Ex.A1 have been commonly enjoyed by the said Krishna Pillai, the plaintiff and the second defendant till 1973. On 04.06.1973, the said Krishna Pillai has executed a registered family arrangement (Ex.A9). Through the said document, he has allotted certain properties to the plaintiff and the second defendant separately. The properties which were allotted to the plaintiff have been mentioned in 'A' schedule and the properties which were allotted to the second defendant have been mentioned in 'B' schedule. The properties which were not specifically mentioned in Ex.A9 are the suit properties.

18. With regard to the properties which were not mentioned in Ex.A9, it was not specifically stated that those properties were allotted to the share of Krishna Pillai. But it was stated that with regard to those properties, subsequently an arrangement has to be made. For proper appreciation, the relevant portion of the said document is extracted hereunder:-

“இது தவிர வேறு சில சொத்துகளும் என் பெயரில் இருந்து வருகிறது. குடும்பத்தில் கொடுக்கவேண்டிய, வரவேண்டிய இனங்கள் இருந்தால், அது என் பொறுப்பில் இருந்து வர வேண்டியது இதற்கு வராத குடும்ப, ஜங்கம், ஸ் தாவர சொத்துக்களை பின்னால் ஒரு ஏற்பாடு செய்து கொள்ள வேண்டியது.”

19. A reading of the aforesaid recitals would show that apart from the properties mentioned in Ex.A9, some other properties were also there and they were in the name of Krishna Pillai. In respect of those properties, an arrangement has to be made subsequently. If really the said Krishna Pillai wanted to retain those properties for his share, he would have mentioned in the said document that those properties were allotted to his share. There was no need to mention that a separate arrangement should be made with regard to those properties. Therefore, it is

clear that it was not his intention to retain those properties exclusively for his share.

20. It is also to be pointed out that the said Krishna Pillai has also mentioned in Ex.A9 that his first son (first defendant) has already got his share vide Ex.A1/partition deed dated 09.10.1965 and therefore, he had no right to claim any share in the family properties. The said recitals also would show that the first defendant cannot claim any right over the properties, which were not covered under Ex.A9 and only the said Krishna Pillai, plaintiff and the second defendant would enjoy the same as family properties. The second defendant has not produced any documentary evidence to show that from the date of Ex.A9, the said Krishna Pillai had exclusively enjoyed the properties which were not mentioned in Ex.A9. Admittedly, the plaintiff is in possession and enjoyment of one of the items of the properties viz., house bearing Door.No.1/67 which is not covered under Ex.A9 (Item -1 of suit 'A' schedule property). It shows that the suit properties were not in exclusive possession of the said Krishna Pillai.

21. In Commissioner of Income Tax Vs. P.L. Karuppan Chettiar 1993 Supp (1) SCC 5820 (supra), a partition was effected between the father and his son. After the death of father, his separate properties inherited by and divided between his widow wife and his son. It was held by the Hon'ble Supreme Court that the properties so inherited by the son has treated as his individual and separate properties.

22. In B.Nalina and another Vs. Arumugam and Others (S.A.No.319/2007) on the file of this Court dated 27.04.2011. (Supra), this court has held that once a partition is effected in the co-parcenary property, the share of each of the co-parcener wills be clear and ascertainable and once the share of the co-parcener is determined, it ceases to be a co-parcenary property. Further, it was held that once there was a split in the co-parcenary, the co-parcenary ceases to be existing thereafter and the co-parcenary will not continue because there cannot be two joint families in claiming the right over the ancestral properties.

23. In the case on hand, a partition was effected only between Krishna Pillai, the plaintiff and second defendant on the one hand and first defendant on the other hand vide Ex.A1 dated 09.10.1965. Thereafter, the properties which were allotted to the said Krishna Pillai, the plaintiff and the second defendant vide Ex.A1, not at all subjected to any partition. Only a family arrangement was made by the said Krishna Pillai vide Ex.A9 dated 04.06.1993. Through the said family arrangement, the said Krishna Pillai had allotted certain

properties to the plaintiff and the second defendant. In respect of the properties which were not mentioned in the said document, the said Krishna Pillai had specifically stated that subsequently a separate arrangement should be made. No properties were allotted exclusively for the share of Krishna Pillai. Therefore, the aforesaid decisions will not be applicable to the facts of this case.

24. The trial court, taking into consideration of the aforesaid facts, rightly came to the conclusion that those properties were not exclusively allotted to the share of Krishna Pillai and they were kept as joint family properties. But the First Appellate Court has wrongly interpreted Ex.A9 and came to the conclusion that those properties were allotted to the share of Krishna Pillai.

25. On coming to the question of execution of Ex.B2 Will, the Trial Court taking into consideration the evidence of D.W.1 to D.W.4 had come to the conclusion that since the second defendant has taken active role in execution of the Will, there is a suspicious circumstance and therefore that the said Will would not have been executed by the said Krishna Pillai on his own volition. The Trial Court also has stated that two of the attestors viz., D.Ws.2 and 3 are co-brothers and another attestor is father-in-law of the second defendant. It is also stated that the scribe of the said Will has regularly wrote documents to the father-in-law of the second defendant. It is also stated that on the date of the execution of the Will, the second defendant got power of attorney from the testator in respect of the suit properties in his favour. The Trial Court found that all these circumstances would lead to an inference that Ex.B2/Will was not executed by the said Krishna Pillai on his own volition.

26. PW1 during cross examination has admitted in his evidence that their mother was suffering from cancer and she died only in the second defendant's house. Further he has admitted that their father died only after the death of their mother. He also admitted that the second defendant was working as a Managing Director in a Transport Corporation at Karaikudi. He also admitted that his father was staying in the second defendant's house at Karaikudi for the last four months and he died only there. He also admitted that only the second defendant has performed last rites to his father. Since both the mother and father were living in the second defendant's house in their last days and it was only the second defendant who has taken care of them, naturally the father would have thought to give some properties to the second defendant.

27. Though PW1 has stated in his evidence that at the time

of death of his father, he was aged about 91 years and due to his old age, he was having hearing problem and his eye-sight was poor and his memory power was not good, he has not adduced any other evidence to show that his father was not having good memory power during the relevant period.

28. The evidence of DW1 to DW4 would clearly show that the said Krishna Pillai was having good mental condition. He was in a position to dispose of his property. DW2 and DW3 have clearly stated that in their presence, the said Krishna Pillai has signed in the Will and thereafter, they have signed as witnesses and the said fact has been seen by the said Krishna Pillai. It is also to be pointed out that the said Krishna Pillai himself has presented the Will before the Sub- Registrar for registration. The Sub-Registrar also certified in the said Will that the Will was presented by the said Krishna Pillai and he only paid registration charges.

29. It is also to be pointed out that on the same day, the said Krishna Pillai has executed a power of attorney (Ex.B3). Further Ex.B2 was executed on 25.11.1991. Admittedly the said Krishna Pillai died only after two years i.e., on 23.12.1993. Though the said Krishna Pillai lived for more than two years after execution of Ex.B2 Will, he has not cancelled the said Will during his life time. That itself would show that he had executed the said Will voluntarily.

30. In Ex.B2 Will itself, the said Krishna Pillai has stated that as to why he wanted to execute the Will in favour of the second defendant. He had clearly stated that the first son viz., the first defendant herein parted his property on 09.10.1965 itself and from that date onwards, he was living separately. He also stated that on 04.06.1993, he had executed family arrangement deed and through the said document, he gave certain properties absolutely to the plaintiff and the second defendant and the plaintiff has been living separately without having any contact with the family and he is in good position. The plaintiff is working as a Professor in a College. He also stated that the second defendant alone looked after him and he spent upto Rs.60,000/- for maintaining the family and hence, he decided to give properties to the second defendant. Therefore, this Court is of the view that the testator Krishna Pillai had voluntarily executed Ex.B2 Will.

31. In Bharpur Singh and Others Vs. Shamsher Singh (supra), the Hon'ble Supreme Court has observed in paragraph Nos.23 and 24 as follows:

"23. 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.

24. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will had duly been proved or not. It may be true that the Will was a registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with."

32. In this case, the signature of the testator is not very shaky and there is no evidence to show that his signature is not appeared to be his usual signature. Further, there is no evidence that the testator's mind was feeble and debilitated at the relevant time. As already pointed out that the disposition of the property was not unnatural. The testator has stated the reasons for disposing of the property through the Will and therefore, the aforesaid decision will not be applicable to the facts and circumstances of the case.

33. In S.R.Srinivasa and Others Vs. S. Padmavathamma (supra), the Hon'ble Supreme Court has observed in paragraph Nos.61 and 62 as follows:

"61. We have earlier noticed that in this case Indiramma was living with her mother Puttathayamma

at the time of her death. She was the sole beneficiary under the Will dated 18.6.1974. Her sisters, the original plaintiff and defendant No.4 that is, Lalithamma and Kamalamma had been excluded from the inheritance. There is no convincing reason as to why they were excluded from the inheritance. The Will merely mentions that these two ladies are well settled in their lives whereas Indiramma was not married. The Will does not specify which of the properties has been bequeathed to Indiramma, although Puttathayamma has been allotted certain specific property. Puttathayamma's son had died on 27.10.73 and the Will is stated to have been made on 18.6.1974. The Will is signed by Indiramma, even though she is the sole beneficiary under the Will. She was present in the office of the sub-Registrar at the time when the Will was registered.

62. There is also a question as to why the Will was presented for registration on two different occasions. It appears that on the date when the Will was executed Indiramma also obtained a power of attorney from her mother which would demonstrate her anxiety to come into possession of the property immediately. "

34. In the aforesaid case, the Will was presented for registration on two different occasions. Further, none of the attesting witnesses have been examined in that case. But in this case, the Will was presented only once for registration. Further, the attestors were examined before the Trial Court. Further, as already stated that in the present case, the testator gave reasons in Ex.B2-Will itself as to why his other legal heirs were excluded from the inheritance. It is to be pointed out that except the plaintiff, all other legal heirs have not claimed any right in the suit properties. They remained ex parte in all the courts. Therefore, the abovesaid decision also will not be applied to the facts and circumstances of the present case.

35. In Naresh Charan Das Gupta Vs.Paresh Charan Das Gupta and Another (Supra) Four Judges Bench of the Hon'ble Supreme Court has observed in paragraph No.10 as follows:

" It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion-it has often been observed that undue influence may in the

last analysis be brought under one or the other of these two categories-the will cannot be attacked on the ground of undue influence. The law was thus stated by Lord Penzance in - 'Hall v. Hall: (1868) 1 P and D 481 at p. 482 (C) :

"But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,-these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort,-these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's".

Section 61 of the Indian Succession Act (Act 39 of 1925) enacts that,

"A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void".

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Illustration (vii) to the section is very instructive. and is as follows:

"A, being in such a state of health as to be capable of exercising his own judgment and volition B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion but in the free exercise of his judgment and volition makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B."

36. From the abovesaid decision, it is clear that it is not every influence which is brought to bear on a testator that can be characterised as undue influence. It is also clear that it is open to a person to plead his case before the testator to make a disposition in his favour. If the testator retains his mental capacity, and there is no element of fraud or coercion, the Will cannot be attacked on the ground of undue influence.

37. In this case, the plaintiff has not specifically denied that the signatures found in the Ex.B2 Will were not that of the testator Krishna Pillai. So it appears that he has not denied the execution of the Will by the said Krishna Pillai. His only defence is that due to old age, the said Krishna Pillai was not having good memory power and hence, he would not have executed the Will voluntarily. So, it appears that his defence is that the signature was obtained by exercising undue influence by taking advantage that the deceased was staying in the second defendant's house.

38. In this case as already pointed out that the D.W.1 to D.W.4 have categorically deposed before the Court that at the time of execution of the Will, the testator was in a good mental condition and he disposed of his property on his free volition. Therefore, if there is any undue influence or fraud or coercion, that should be proved by the plaintiff only. In this case, absolutely, there is no evidence to that effect. Under the said circumstances, merely because the second defendant was also present at the time of execution of the Will it cannot be presumed that he exercised undue influence over the testator. This court is of the view that the second defendant has removed the suspicion by clear and satisfactory evidence. Therefore, the findings of the First Appellate Court that the Will was executed by the said Krishna Pillai on his own volition has to be upheld.

39. As already stated that the properties which were not mentioned in Ex.A9 never treated as separate property of the deceased Krishna Pillai. They were treated as only joint family properties by the said Krishna Pillai, plaintiff and the second defendant and as such, in the said properties, the said Krishna Pillai, plaintiff and the second defendant would get one-third share each. Therefore, the said Krishna Pillai is entitled to dispose of only one-third share in the said properties. So, Ex.B2 Will is valid only in respect of his share i.e., one third share in the said properties. In respect of other shares, the Will is not having any effect.

40. For the aforesaid reasons, the plaintiff is entitled to get one-third share in the suit properties. To that extent, the Judgments and Decrees of the Courts below have to be modified.

Accordingly, substantial questions of law are answered.

41. In the result, this Second Appeal is partly allowed. The suit properties have to be divided into three equal shares and one such share to be allotted to the plaintiff. Since the plaintiff is in joint possession, he is not entitled to ask for mesne profits. Considering the relationship between the parties, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

gv

To

1. The Principal District Judge,
Nagapattinam.
2. The Additional Subordinate Judge,
Myladuthurai.

+1cc to Mr.S.Sounthar, Advocate, S.R.No.27835

+1cc to M/s.D.Veereasekaran, Advocate, S.R.No.27591

S.A.No.1288 of 2000
and

CMP.Nos.2099/2003 & 612/2008

TM(CO)
CS/13/06/18

सत्यमेव जयते

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