

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 25.06.2018

JUDGMENT PRONOUNCED ON : 14.08.2018

CORAM: THE HONOURABLE MR.JUSTICE N.SESHASAYEE

A.S.NO.633 OF 2007
AND CMP.NOS.14805 & 14950 OF 2017

1.R.Narayansamy (Deceased)
2.R.Lakshmanan
3.N.Sivakami (Died)
4.R.Padmavathi
5.N.Naresh Kumar

... Appellants/3rd & 4th
Defendants

(3rd Appellant died vide order of court dated
07.06.2017 made in CMP.No.6326 of 2017
in A.S.No.633 of 2007)

[Appellants 3 to 5 brought on record as L.Rs of
deceased first appellant Vide order of the Court
dated 17.06.2010 made in MP.4 of 2007 in AS.No.633/2007]

Vs

1.S.Mohanasundaram
2.S.Somasundaram
3.S.Vatsala Devi
4.R.Konnappan (Deceased)
5.Saraswathy
6.Lawrence
7.Sundaramoorthy
8.Kilbert Arokiadass
9.Suresh
10.Nagaraj
11.Murugan
12.K.N.Raja
13.A.Arokiaswamy
14.M.Kadher Mohideen
15.Ganesan
16.Irudayaraj
17.Lakshmanaswamy
18.Karuppuswamy
19.John Amirtham
20.Karuppannan
21.Subramaniam

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22.Veeramani
23.M.Ravi
Subaraga Traders
No.522, N.S.R.Road, Coimbatore - 641 011.

24.M.Ravi
Indian Engineering Works
No.523, N.S.R.Road
Coimbatore.

25.C.Arulkumar
Proprietor
Senni Andavar Metal Works
522-B, N.S.R.Road
Coimbatore - 641 011.

26.Selvanayagam
Proprietor
Orsan Enterprises
552-B, N.S.R.Road
Coimbatore - 641 011.

27.Ramasamy
Proprietor
Nath Chits
552-B, N.S.R.Road
Coimbatore - 641 011.

28.M/s.Krishna & Co.
552-B, N.S.R.Road
Coimbatore - 641 011.

29.Raju Spray Paints
By its Proprietor Rajan
No.153, Sivasubramania Road
R.S.Puram, Coimbatore - 641 002.

30.Muthammal

31.K.Balasubramaniam

32.K.Rajan

33.K.Mahalingam

34.K.Venkatesan

... Respondents

[Respondents 6 to 29 deleted Vide order of Court dated 17.06.2010 made in MP.No.3/2009 in AS.No.633/2007]given up

[Respondents 30 to 34 brought on record as Lrs of deceased 4th respondent Vide order of Court dated 16.06.2017 made in CMP.Nos.7895 to 7897/2017 in AS.No.633/2007]

Prayer :- First Appeal filed under Section 96 of C.P.C., to set aside the decree and judgment dated 25.07.2006 made in O.S.No.571 of 2004 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore.

For Appellants : Ms.G.Thilakavathi, Senior Counsel
Assisted by Ms.D.Kamatchi

For Respondents : Mr.V.Subramaniam
for Mr.S.P.Yuvaraj [RR2 & R3]
Mr.N.Chandra Raj
for Raj & Raj Associates [RR30 to R34]
RR6 to R29 - deleted as per order of
this court dated 17.06.2010 in MP.3
of 2009 in A.S.No.633 of 2007.

JUDGMENT

The 3rd and 4th defendants in O.S.No.571 of 2004 on the file of III Additional District Court, Coimbatore, (It was originally laid as O.S.No.1600 of 1992 before Sub Court, Coimbatore before it was transferred to III Additional District Court) have preferred this appeal challenging the preliminary decree passed in a suit for partition. For the sake of convenience, parties would be referred to by their rank before the trial court.

2.1 The dispute is over four items of properties that stood in the name of a certain Rangasamy. The properties described in the "A" and "B" schedules in the plaint are house sites and residential buildings. "C" and "D" schedule properties go together; "C" schedule is described as plot measuring 80 cents with building thereon, and 'D' schedule is a partnership firm which operated in the 'C' schedule property.

2.2 The properties in A, B and C schedules to the plaint were purchased respectively under Exts.B-1 and B-2 sale deeds, both dated 21.12.1940, Ext.B-3 dated 26.02.1946, and Ext.B9 dated 22.09.1959. All the properties were purchased in the name of Rangasamy. Rangasamy had four sons and two daughters, of who plaintiff Shanmugam was his elder son followed by Konappan (second defendant), Narayanasamy (third defendant/first appellant) and Lakshmanan (fourth defendant/second appellant). His two daughters are Sivagami (fifth defendant) and Saraswathi (sixth defendant).

3. The case of the plaintiff, supported by his brother Konappan, the second defendant, is that their father Rangasamy was running a butcher stall, that all the four sons contributed extensively to the business, that the entire properties belonged to the joint family, and sought partition of the suit

properties. The suit was laid against Rangasamy and his three sons and two daughters. During the pendency of the suit, Rangasamy died on 11.11.1993. The plaintiff Shanmugam too has died, and his heirs were impleaded as additional plaintiffs 2 to 5.

4. Long after the death of Rangasamy, defendants 3 and 4, the appellants herein, have filed their written statement in which they propounded a registered Will, said to have been executed by Rangasamy on 12.10.1987. The will excluded both the plaintiff and the second defendant Konappan entirely. They also contended that the suit properties are the self acquired properties of Rangasamy.

5. Before the trial court, the third plaintiff, Mohanasundaram, the elder son of Shanmugam, has entered the witness box as P.W.1. Besides, the plaintiff also examined the fifth defendant Sivakami, (who chose not to contest the suit) as P.W.2. For the defendants 3 and 4, the third defendant examined himself as D.W.1 and produced the Will executed by Rangasamy. This Will was marked as Ext.B12. To prove the Will, the contesting defendants have examined Ramaswamy as P.W.2, who is one of the attestors of the Will. On evaluating the evidence, the trial Court has held :

- That the suit properties are joint family properties and this could be gathered from Exts.B-10 and B-11, both of which are reply notices of the first defendant and defendants 3 and 4 issued respectively to the suit notice of the plaintiff, where they concede that the suit properties are joint family properties.
- That Ext.B12, Will is not genuine, for:
 - The testator, in his reply notice (Ext.B-11) had not disclosed the Will. Nor had he filed a written statement disclosing it. Nor the contesting defendants 3 and 4 chose to disclose it in Ext.B-10, their reply notice.
 - That defendants 3 and 4, the joint legatees under Ext.B-12 Will, have collusively laid O.S.117/1997 against each other, resting the cause of action on the Will, taints the Will with suspicion.

- In Ext.B-10 notice, defendants 3 and 4 have made a joint statement that their father Rangasamy's vision was affected and that he was affected physically, but in his testimony D.W.1 had deposed that Rangasamy's had perfect vision, and this raises just doubt about Rangasamy's health status.
- D.W.1 would testify first that he came to know of the Will some three months before the demise of the testator and later would contradict that and say that he came to know of the Will after the demise of the testator.

6. Points for consideration:

1. Whether suit properties are ancestral in character?
2. Whether Ext.B-12 Will is genuine?

7. If the approach of the trial court is analysed it has not entered a finding doubting the factum of execution of the Will. It doubted the genuineness of the Will on the ground of exclusion of plaintiff and the second defendant from obtaining a legacy under the Will. There is evidence that the testator had fallen from a bus, which D.W.1 and P.W.2 would admit. However, the trial court has not drawn any adverse inference from this fact for doubting the the mental disposition of the testator.

8. Mrs.G.Thilakavathi, learned Senior Counsel appearing for the appellants argued:

- All the properties were purchased by Rangasamy in the year 1940, and the last one was purchased in 1959, when plaintiff and second defendant would have been young boys of tender age and it is inconceivable that they could have contributed their labour in the business of their father in order to hold that the properties that Rangasamy had purchased, assume the character of joint family or ancestral properties.
- In a case where the genuineness of Ext.B-12 Will occupies the core of the controversy, the trial court has not

framed a pointed issue on it. The Ext.B12, Will cannot be suspected for the reason that according to DW2, the attester of the Will, both Rangasamy, he and the other attester have all gone to the Sub-Registrar's office at about 10 a.m. in the morning and stayed there till evening, which would indicate that the testator was in a sound state of mental disposition. This evidence of DW2 is not controverted by the plaintiff.

- Even after the disclosure of the Will in the written statement, the plaintiff chose not to dispute it by filing any additional pleadings, indicating any circumstances which law may consider as suspicious enough to vitiate the genuiness of the Will. No issue too was pointedly framed by the trial Court on this aspect. Besides, Rangasamy lived for another five to six years since the date of execution of the Will which itself would be an attending circumstance to indicate that the Will is genuine.
- Even though D.W.1 and D.W.2 may admit that Rangasamy had fallen from the bus, none of the witnesses including D.W.2 have spoken to the fact that because of the fall, Rangasamy has lost his mental disposition.

Reliance was placed on the authorities of the Hon'ble supreme court in Andisamy Chettiar Vs. Subburaj Chettiar (indiankanoon.org/doc/1549187) and Uma Devi Nambiar & Ors. Vs. T.C.Sidhan (Dead) (indiankanoon.org/doc/28977353).

9. The Respondents 1 to 3 and Respondents 28 to 32, who respectively are the plaintiffs, and the heirs of the deceased second defendant, however would contend that:

- No valid reasons or explanations are forthcoming as to why Rangasamy had excluded two of his sons from succeeding to his estate. Even the circumstances are not adequately and convincingly built to enable an inference as to why Rangasamy chose to exclude his two other sons.
- Secondly not only P.W.2, one of the sisters of the warring brothers, but also D.W.1, the third defendant himself would admit their father Rangamsamy had fallen from bus few years prior to execution of the Will. The second defendant had issued suit notice and this was replied under Ext.B10, dated 18.3.1991 by defendants 3 & 4, the legatees under the

impugned Will in Ext.B12. In that reply notice, they admit that due to failing health and problem in his vision, Rangasamy had been living with them from 1982. Given his advancing age and in the absence of any proof that Rangasamy's vision had improved over the years, it is inconceivable that he will be in the best of faculties for executing a Will freely and in a sound state of mental disposition.

- Secondly neither in Ext-B10 reply notice issued by Rangasamy nor in Ext.B11 reply notice issued by defendants 3 & 4, the Will was referred to. Though this by itself might not be vital in the context of other attending circumstances, it would gain significance. As to when the third defendant came to know about the execution of will there are internal contradictions in the testimony where he would say

10. Countless are the judgements that have been delivered on what constitutes a genuine Will. Every conceivable angles affecting and testing it have already been explored. Settled and unshakable principles of law does not require the aid of authorities to sustain their continuity. Hence, reference to authorities are dispensed with, at least in this case, except to the minimum extent warranted.

11. One argument advanced by Mrs. Thilagavathi, the learned senior counsel appearing for the appellants is that the plaintiffs have not filed any additional pleadings/rejoinder denying or impugning the genuineness of Ext.B-12 Will. This argument, however, loses its weight since in Ramesh Verma (d) through LRs., Vs Lajesh Saxena (deceased) through LRs. [2017-2-LW 576 (SC)], the Hon'ble Apex court has held to the contra. It reads:

"13.....the mandate of section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement."

The contention of the learned counsel consequently pale into insignificance. To this it may be added that registering a Will merely, is no insulation against the need for proving its genuineness, in the sense that the testator has executed it in a sound state of mental disposition. See Kasthuri bai Vs.

12. As broad principle it may be stated that in a testamentary jurisdiction, Court functions as the conscience-keeper of the testator. When a Will is propounded before it, Courts does not suspect it, but attempts to satisfy its conscience on: (a) If the Will before it was executed by the testator, and in this process it attempts to eliminate the possibility of fabrication of a Will; (b) If in executing the Will the testator is guided solely by his free Will. Here the court attempts to eliminate the possibility of any fact that may tend to interfere with his free Will. This includes that which goes tangential to the ordinary course of human conduct, and infuse it with an element of artificiality. And, in either case, Courts summons the all virtuous, yet one who conducts himself consistent with the ordinary course of human conduct - the reasonable man of law, to lead it to its conclusion.

13. Law insists that the propounder of the Will examines at least one attesting witness to prove its execution. Here an attester, with requisite animus attestendi is required to be examined as per Sec.68 of the Evidence Act. His evidence, if satisfactory, chiefly eliminates the possibility of fabrication of a Will, but it may or may not be useful to decide if the Will is a product of testator's free will. In understanding it, any circumstance that affects the Will, which a reasonable man of law considers as deviating from the ordinary course of human conduct is generally accepted as a ground for suspecting the Will. Human minds and its angularities are the signatures of one's personality and they cannot be straight-jacketed. It is nigh difficult to decode a human intent in executing a Will posthumously. The reasonable man of law provides certain parameters merely as to what the normal and ordinary course of human conduct generally are. A propounder of the Will is not bound by those parameters as he is required to explain those facts that might establish why a particular testator is different, and what prompted him to do that which he has done. It is hence, the propounder of the Will is cast with the burden to explain

why the Will should be believed despite the intent of the testator as disclosed in his Will does not match ordinary course of human conduct.

14.1 The circumstance here is testator excluding two of his sons from inheritance under the Will. They are his natural heirs.

The ordinary course of human conduct guides the court to the presumption that a father would not discriminate his children. If Ext.B-12 Will were to be trusted, then it on its face shows that the father had discriminated against two of his son from inheriting his estate. This father however, might have had reasons to be different and intended to deny his two sons of his properties. What then are the facts the propounder of the Will has paced before this court to hold that the testator had reasons to discriminate two of his four sons?

14.2 D.W.1 testifies that the testator had been cordial in his equation with the two sons who Ext.B-12 Will excludes. Secondly, the Will does not spell out a reason for the testator for excluding two of his sons who are identically placed alongside his other two sons. Thirdly, if this Court looks to other pieces of evidence, a critical piece comes from Ext.B-10 reply notice dated 18-03-1993, which was issued after the suit was laid, in which the defendants 3 and 4 (the appellants herein) would state that since 1982 Rangasami's health was not in good shape and that he had problem with his vision. The Will however, was executed in 1987. If one has to reckon the situation since 1982, given the fact that Rangasamy was no young in 1987, it would be difficult to hold that his vision might have improved over the years. It is therefore, not so much about Rangasamy falling from the bus, or he going to the sub Registry for registering the Will that matters as significantly as the factum of his possible failing faculties, more particularly his vision that becomes critical in evaluating if the evidence on record suggests that the Will in question was a product of Rengasamy's free Will. What was his health status even going by the statements of these defendants has not been explained. Fourthly, this very document also indicates that the father/testator began living with these defendants since 1982. There therefore arises a just suspicion, when an ageing father, who had been cordial to all his sons, but apparently had some health issues indicating a possible dependency on the two of his sons with whom he lived, had excluded his two other sons in his Will. Given this circumstance, does the intent of the testator to exclude them appears natural, especially when the available evidence points to the fact that his equation with them was as cordial as it was with the two sons who obtained the legacy under the Will? The propounders of the Will in this case have not been able to explain this away convincingly. Necessarily the suspicion that clouds the Will continues.

15. As indicated, while there cannot be a presumption that every Will is necessarily suspicious, and that Court should scan a Will through the lens of suspicion, if there exists any aspects

which brings the Will under a shade of suspicion, then it is imperative that the propounder of the Will should travel a few additional paces beyond proving its execution within the meaning of Sec.68 of the Evidence Act, and should satisfy the conscience of the Court that the Will is beyond suspicion. Ext.B-12 Will, that the appellants have propounded is caught right here in whirlpool of just suspicion.

16. In the result, the appeal is dismissed and the decree and judgment dated 25.07.2006 made in O.S.No.571 of 2004 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Coimbatore, is hereby confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To:

1. The Additional District and Sessions Court
Fast Track Court No.III,
Coimbatore.

Copy To

The Section Officer
High Court, Madras.

- +lcc to Ms.D.Kamatchi, Advocate, S.R.No.56461
- +lcc to Raj & Raj Associates, Advocate, S.R.No.56205
- +lcc to Mr.S.P.Yuvaraj , Advocate, S.R.No.56042

A.S.No.633 of 2007

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