

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 09.04.2019	Delivered on 24.04.2019
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CORAM:

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice C.SARAVANAN

Appeal Suit No.566 of 2009

1.K.Saraswathi,
W/o N.M.Kulandaivel,
D.No.136, Rajakadu 1st Street,
Surampatty Naal Road,
Erode-1.

2.Shanmugavalli,
W/o Palaniappan

3.S.Mythili,
D/o Somasundaram

4.S.Raju,
S/o Somasundaram

R2 to R4 residing at 2A2, Thangammal Nagar,
Cross-1, Maniyakaranpalayam,
Coimbatore.

... Appellants/Plaintiffs &
Defendants 11 to 13

Vs.

1.Murugesan,
President, D.No.27-29, Cheran Street,
Kangeyam Road, Chennimalai.

2.M.Suseela, W/o N.Marimuthu,
Barani Tex, D.No.9, Cholan Street,
Kangeyam Road, Chennimalai.

3.Manickam,
S/o K.A.Nachimuthu Mudaliar,
Mastec Engineers,
D.No.1, Muruganathapuram North,
Karur-1.

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4.Chandrasekar, S/o Kolandasamy Gounder,
Store, Sivalinga Asariyar Street,
Vengamedu, Karur.

5.K.M.Ravichandran,
Mastec Engineers,
D.No.1, Muruganathapuram North,
Karur.

6.M.Shanthi,
W/o M.Muthusamy(Fitter),
D.No.38, Nethaji Road,
Edayarpalayam, Vallalur Post,
Coimbatore.

7.S.Jayanthi,
W/o M.Sundaraj,
Auto Mechanical, Nataraj Mudaliar Street,
Vadivel Nagar, Kovai Road, Karur-2.

8.M.Nirmala,
W/o M.Murthy,
D.No.1, Sakthi Illam,
Near V.R.S.Rajalakshmi Thirumana Mandapam,
Periyakurichi, Neyveli.

9.T.Saroja,
W/o R.Thirunavukarasu,
Vilangurichi, Coimbatore. ... Respondents/
Defendants 1,2,4 to 10

(R2 ex-parte in the Court below and
hence, notice be dispensed with)

Appeal suit is preferred under Section 96 C.P.C., against
the judgment and decree dated 25.06.2008 in O.S.No.189 of 2006
passed by the I Additional District Judge, Erode.

For Appellants .. Mr J.Prithivi for
Mr.S.Kaithamalai Kumaran

For Respondents... Mr.S.Xavier Felin for R1

JUDGMENT

M.M.SUNDRESH, J.

The appellants are the plaintiff and have filed the above
appeal against the judgment and decree dated 25.06.2008 passed

by the I Additional District Judge, Erode, in O.S.No.189 of 2006. The said suit was filed for partition and separate possession.

2. Almost all the suit properties except one item belong to the father of the appellant and defendants 1 to 3. The other item belong to the mother. There were four daughters and son. One daughter by name Mahalakshmi pre-deceased her father. One other daughter/third defendant also died leaving behind her husband and her children, who were arrayed as defendants 4 to 10. The properties being the self acquired properties of the father and the mother, who died intestate in the year 1982 and 2006 respectively, suit was filed seeking 1/5th share in the suit properties. The appellant has also averred that till the death of the mother, the properties including the rental income were shared in common. Before filing of the suit, there was exchange of notices between the parties. Only in the reply notice to the counsel, the first respondent/first defendant placed reliance upon Exs.B1 and B2.

3. The second defendant, who is the sister of the plaintiff, was set ex-parte. The first defendant (Brother), who contested the suit, denied the entitlement of the appellants to the share and placed reliance on Exs.B1 and B2, testamentary dispossession allegedly left by the parents. Ex.B1 is an unregistered Will dated 15.08.1980 and Ex.B2 is a registered Will dated 26.11.1993. Both the Wills have been attested by D.W.1, who is also the scribe of Ex.B1. The other attester to Ex.B1 is the Lawyer, who has chosen not to come into the box to depose. The second attester of Ex.B2 is the father-in-law of the other attester. Ex.D2 was also notarised. The Notary has also examined himself as D.W.2.

4. The fourth defendant filed a written statement in tune with the stand taken by the first defendant.

5. Before the trial Court, the first appellant/plaintiff examined three witnesses on her side and marked Exs.A1 to A15. Three witnesses have been examined on behalf of the defendants and Exs.B1 to B6 were marked. The first witness is the scribe and attester of Ex.B1 and also incidentally the attester of Ex.B2. The second witness is the Lawyer, who notarised Ex.B2 and the third witness is also the Lawyer, who issued notice on behalf of the first defendant. The trial court framed the following issues for consideration.

1. Whether the plaintiff is entitled to 1/5th share in the suit properties as prayed for?
2. Whether the alleged Will dated 15.08.1980 is true, valid, genuine and binding upon the plaintiff?

3. Whether the alleged Will dated 26.11.1993 is true, valid, genuine and binding upon the plaintiff?
4. Whether the deceased Mariappa Mudaliar has incurred any debt, if it is so, whether the first defendant has discharged the alleged debt?
5. To what relief the plaintiff is entitled to?

6. The trial Court, after taking note of the submissions made by the learned counsel, fixed its mind on the core issue, whether the alleged Wills dated 15.08.1980 and 26.11.1993 are valid, genuine and binding upon the first appellant/plaintiff.

7. On the first issue, the trial Court held that though the debts were cleared by one Somasundaram by Exs.A12 to A14, who is the son-in-law of the deceased father of the plaintiff and the husband of the third defendant, they were actually paid by the deceased mother Deivanai Ammal. The trial Court, by placing reliance upon the evidence of P.W.2, further held that it is the first defendant, who discharged the debts.

8. On the question of validity, genuinity and proof of Exs.B1 and B2, the trial Court accepted the evidence of D.W.1 to D.W.3 and found that there are no suspicious circumstance surrounding. Accordingly, the suit was dismissed. Needless to state that under Exs.B1 and B2, the entire suit properties were given in favour of the first defendant. The trial Court, drew an inference on the Lawyer being an attesting witness to Ex.B1 towards his execution and genuineness, though he did not choose to appear.

9. The learned counsel appearing for the appellant would contend that there are material contradictions in the evidence of D.Ws.1 to 3 the Wills have not been proved. Ex.B2 proceeded, as if, the deceased Deivanai Ammal got all the properties under Ex.B1, which have been created for the purpose of the case. The evidence of D.W.2 has not been considered properly. P.W.2 has stated that the debt amount has been paid by the Somasundaram. This was done by effecting the sale of the jewels belonging to the deceased mother Deivanai Ammal. If this is taken into consideration, then it can only be stated that it is the mother, who cleared the debt. There is no contradiction between the chief examination and cross examination of P.W.2. Exs.A12 to A14 have been considered in proper perspective and the same was not disputed. P.W.3 also says that it is not known as to whether he sold his property to discharge the loan. Therefore, the appeal will have to be allowed.

10. The learned counsel appearing for the first respondent/first defendant made the following submissions.

When the trial Court has considered the issues and assessed the evidence available on record, the same shall not be interfered with lightly. A mere exclusion of the daughters itself cannot be a ground for doubting the testamentary dispossession. Exs.B1 and B2 have been proved in the manner known to law. It is a wish of the attestors, which has to be satisfied. There is a due compliance of Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act. In both the cases, attesting witnesses have been examined. Therefore, no interference is required. In support of his contention, reliance has been made on the following decisions.

1. Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others. (Manu/SC/0278/1963); and
2. H.Venkatachala Iyengar Vs. B.N.Thimmajamma and Others (Manu/SC/0115/1958)

11. By way of a reply, the learned counsel for the appellant would submit that it is rather strange that Ex.B2 includes the properties, which is not conveyed under Ex.B1. The non examination of the other attestor of Ex.B1 and scribe of Ex.B2 though alive, would add up to the suspicion surrounding Exs.B1 and B2. There is no evidence or averment as to how they emerged after so many years.

12. Since the trial Court concentrated substantially on Exs.B1 and B2, let us deal with them first. Ex.B1 is an unregistered Will dated 15.08.1980 executed by Mariappa Mudaliar, who is the father of the appellant and the first respondent. He died thereafter on 10.02.1982. Though there are three daughters at the relevant point of time, all the properties standing in the name of the deceased father were given in favour of the first respondent/first defendant with life interest of the wife Deivanai Ammal. However, curiously both the documents state that it is the intention of both of them that all the properties standing in their names should go to the male descendant viz., first respondent/first defendant. Ex.B1 also says that all the properties standing in the name of Mariappa Mudaliar were purchased through the joint efforts of himself and his wife. The exclusion is justified on the ground that daughters were married by spending some money. The deceased wife Deivanai Ammal was only given a limited right to run the business.

13. One more curious aspect of Ex.B1 is that the document itself says that no description of the properties are mentioned, but all the movables and immovables standing in the name of the testator would be covered by it.

14. From the above, it is clear that all the properties have been allotted to the first defendant excluding the daughters while granting life interest to run the business to the wife. We are quite conscious of the settled position of law that a testamentary Court is not a Court of suspicion and therefore, a mere exclusion of the other legal heirs especially daughters by itself would not be a ground for doubt. However, it is the duty of the beneficiary to dispel the suspicious circumstances surrounding, if they are available.

15. D.W.1 is the scribe and attester of Ex.B1. He hails from Chennaimalai, which is far away from the town of the attester by name Chithode. He is the distant relative of the wife of the testator under Ex.B1. He married the daughter of the sister of Swarnambal, mother of the plaintiff and the first defendant and who is the testator of Ex.B2. He deposed that he has not written any Will earlier and Ex.B1 was written on the advice of the deceased testator Mariappa Mudaliar. It was accordingly informed to him a month prior. It was written in the shop owned by his father situated at Erode. He has not consulted any Lawyer prior to that. The testator did not bring any title deed. He took a paper out of the note book available with him and wrote the Will. Though it was on an Independence Day he kept the shop open. He did not inform the testator that he should consult the document writer. However, he felt that a Lawyer should be consulted. But he did not do so. The deceased testator was not accompanied by his wife and son. He did not obtain the signature of the testator in Ex.B1. The Lawyer, who was the other attester was not known to him. He did not know if the attester knew about the Lawyer. However, the attester informed him to see the Lawyer, though not insisted the same at the time of writing Ex.B1.

16. The Lawyer read the Will. Though he aware number of other Lawyers available, before reaching the office of the Lawyer (Attester of Ex.B1), they were not approached. As the Lawyer had stated that two witnesses will have to sign, he himself volunteered to act as an attesting witness. No money was paid to the Lawyer. However, he was not asked to act as witness. He did not ask the document to be registered. He do not say anything about non mentioning of the schedule of the properties to be included in Ex.B1.

17. He further deposed that the deceased was in good terms with all his children. He did not know as to whether all of them came for the funeral. He went to the funeral on the next day. He did not know when the ceremony was conducted. He did not inform about Ex.B1 either to the daughter of the deceased, the son or the wife. He did not know as to how the others came

to know of it later. Nobody told him about it. The Lawyer, who attested Ex.B1 was alive.

18. While speaking about Ex.B2, P.W.1 states that he did not know as to how many items of the suit properties belonged to the deceased Deivanai Ammal. He did not inform about the first Will at the time of writing the second one though Deivanai Ammal did get only life interest under it. The erstwhile Lawyer, who attested Ex.B1 was not consulted this time nor any other Lawyer. He did not remember the production of original documents. The deceased Deivanai Ammal did not affix her signature immediately. The properties mentioned therein under Ex.B2 also the properties indicated in Ex.B1. However, he did not make any enquiry over it. He did not know as to how the same properties bequeathed under Ex.B1 in favour of the first defendant were once again done under Ex.B2 by the mother as if she was the absolute owner. It was also not known as to whether the properties actually belonged to Mariappa Mudaliar. It is only his father-in-law, who said that the Will under Ex.B2 will have to be notarised. However, one Ramasamy Mudaliar said that it should be registered. He did not know as to whether Ex.B1 was written afresh. He has further stated that both the other attester of Ex.B2 and the scribe are alive. However, he acknowledged that the first defendant is relative.

19. D.W.2 is a counsel, who notarised Ex.B2. He has also stated that D.W.1 is well known to him being his client. He has further stated that he took the parties for registration and necessary entry was made in the notary register. In his cross examination he has stated that he has not stated earlier that the deceased Deivanai Ammal was brought by D.W.1.

20. D.W.3 is the junior Lawyer of the counsel, who sent Ex.P5.

21. Ex.B2 is admittedly executed by the deceased Deivanai Ammal. This document states that no property is given in favour of the daughters as they were married of by spending considerable amount of money. The first item of the property stated to have purchased by her from her earning. This property is in the enjoyment of the first defendant. However, the properties were purchased along with the husband. In this connection, this is to be noted that very same averments made in Ex.B1 by the deceased Mariappa Mudaliar. Though his wife stated to have executed Ex.B2, it was not aware of it. This document further states that the Will Ex.B2 is executed as per the combined wish of herself and her husband. Hereagain, we have to hold that there is no explanation for that. The deceased Deivanai Ammal could have executed Ex.B2 at the earlier point of time. Accordingly, all the schedule mentioned properties, which

were given in favour of her son viz., D.W.1 were shown as her properties and bequeathed in his favour. Probably, attempt was to give sanctity to Ex.B1 and the properties covered by it. May be that is the reason why, no property has been mentioned against Ex.B1 as against Ex.B2 wherein, the properties of the deceased husband of the Deaivanai Ammal were mentioned and bequeathed to her son viz., the first defendant.

22. From the above, we have to see as to whether Exs.B1 and B2 are true, genuine and executed out of own volition.

23. Let us first take Ex.B1. D.W.1 has stated that he is the relative of the first defendant. Admittedly, the deceased Mariappa Mudaliar was living in Chithode. Ex.B1 is stated to have been made on a public holiday with D.W.1 as scribe and attester. He actually tore one paper from the note book available in his office and wrote a Will though did not know anything about writing of a Will.

24. According to him, no one was in the shop. He has not seen the original documents. Though he made a noting that the Lawyer should be consulted, but did not do so. He has stated that he did not get the signature of the deceased Mariappa Mudaliar. There is nothing to suggest them both he and other attesting witness seen each other and testator signing. He also did not know the Lawyer. There were number of Lawyers office in between. There is no reason stated as to why the testator did not take any other witness along with him. Strangely the Lawyer, who attested the document has not come to the box. Even the deceased did not ask the Lawyer to attest the documents. The Lawyer did not ask the testator to register the document. There is no reason assigned for not mentioning any of the properties under Ex.B1. It is not known as to how the first defendant knew about the existence of Ex.B1. D.W.1 has specifically stated that he did not inform any other parties for more than two decades and even after the death of the testator, who is stated to have executed the Will. He went to the funeral only the next day while not remembering the ceremony conducted. It is not a mere co-incidence that the very same person became the attesting witness in both the documents under Exs.B1 and B2. It is also strange as to how the deceased Deivanai Ammal came to the shop as was done by her husband especially when plaintiff has not told her about Ex.B1 and there is no evidence of her knowledge. D.W.1 also not stated as to how he came into possession of Ex.B1. The trial Court, in our considered view, has totally misdirected itself in placing reliance upon the reputation of the lawyer, who attested the Will. He has not chosen to come before the Court. Thus, we are unable to uphold the so called Will sought to be proved by the first respondent/first defendant.

25. Ex.B2 makes a mention about the properties, which belonged to Mariappa Mudaliar and included in Ex.B1, though no schedule was drawn. Except item No.1, the other properties stood in the name of Mariappa Mudaliar. Even Ex.B1 says that Deivanai Ammal can run business along with the first defendant. Therefore, it is rather quite inexplicable as to how she got the title of the properties. The scribe of the Will under Ex.B2 has not been examined and so also, the other attesting witness, who is none other than the father-in-law of the D.W.1. Admittedly, both of them are alive. The deceased Deivanai Ammal, even as per Ex.B2 was old and no confident of living any further. One Ramasamy Mudaliar, who is stated to have taken part in the execution of Ex.B2 was not examined. Even as per the evidence of D.W.2, D.W.1 is his client. Even Ex.B2 has not stated to have executed by the deceased Deivanai Ammal in the presence of the deceased Mariappa Mudaliar. He has also not stated that he has seen the other attesting witness signing and in his presence Deivanai Ammal has signed. He did not know anything about the properties of either Mariappa Mudaliar or Deivanai Ammal. It is quite strange how a person was able to gain confidence of Mariappa Mudaliar and Deivanai Ammal. Though D.W.2 was his Lawyer once, D.W.1 has stated that it was his father-in-law, who stated that Ex.B2 will has to be notarised. However, D.W.2 had stated that D.W.1 is known to him and he brought Deivanai Ammal.

26. We are at a loss to know as to why Ex.B2 was notarized and the learned counsel was asked to depose. The proper person to depose is the scribe and other attester of Ex.B2.

27. The reasons given for disbelieving Ex.B1 do have substantial bearing on the validity of Ex.B2. If Deivanai Ammal knew about the intention of her husband then there was no need for execution of Ex.B2 that too after a decade. Both could have executed the documents at the same time as they both wanted to give all the properties to the first defendant alone and it was a unanimous decision. We are conscious, registration per se cannot be a ground to uphold the Will. At best, it may be an additional factor provided the parameters required under Section 63 of the Indian Succession Act, 1925, read with Section Section 68 of the Indian Evidence Act, 1872, are satisfied. We do not find the required test is satisfactorily passed. There is absolutely no evidence available as to how the first defendant came to know about Exs.B1 and B2. He has also not chosen to come before the box and explain the circumstances. Therefore, we have no hesitation in holding that Exs.B1 and B2 are not proved in the manner known to law.

28. The other issue is on the amount stated to have been spent by the first defendant in discharging the loan. Much reliance has been made in this regard on the evidence of P.W.2, who stated that it is the son-in-law of the deceased Mariappa Mudaliar, who paid the debt. In support of his contention, the plaintiff has also marked Exs.P12 to P14. These documents are not disputed. From the evidence of P.W.2, it cannot be stated that a due discharge has been made only by the first defendant especially when he has not come to the box. Such a plea has been raised only by him and therefore, onus is on him to substantiate it. There is nothing on record to show that the property was appropriated by P.W.2 and the same belonged to the first defendant. Further, even P.W.3 has stated that the deceased Deivanai Ammal has asked Somasundaram to clear the dues. The evidence of P.W.3 was also to the effect that the clearance of dues was made by the son-in-law in pursuant to the letter addressed to him under Ex.P15. The first defendant did not even ask for higher share on that score by seeking a specific prayer.

29. The trial Court made partial reliance upon the portion of the evidence given by P.W.2 while ignoring the evidence of P.W.3. Even according to the first defendant, he along with his mother discharged the liability to the creditors to the tune of Rs.2,00,000/-. There is no evidence to substantiate the same except the evidence of P.W.2 to the extent that the deed was executed for a sum of Rs.75,000/-. Even if the case of the first defendant is that the deceased Deivanai Ammal has also sold all her jewels, it cannot be stated that she has done it on his behalf. The further question that would arise is that such discharge has been done, even assuming it is there, is from the earning of the first defendant or that of the joint family income.

30. The Court below did not even consider the fact that onus is heavily on the first defendant to prove the Will. We have already discussed that the evidence of D.Ws.1 and 2 which do not inspire confidence. The reliance made on the attestation said to have been made by a counsel who for the reasons known only to him declined to come to the Court despite being available cannot be taken as a proof of due execution of a Will. There are too many suspicious circumstances surrounding Exs.B1 and B2. How and when the first defendant got hold of the documents coupled with the fact of non examination of other witnesses and attestation by D.W.1 in both the documents spanning over a decade without communicating to the testator to Ex.B2 are very important factors, which cannot be ignored. As discussed above, if Deivanai Ammal was not aware of Ex.B1, it is not known as to how he go to the very same attesting witness of Ex.B1 and asking to help her to execute ExxB2 by travelling

over to Erode from Chithode. We do not wish to repeat the discussion made already as it is quite apparent that Exs.B1 and B2 can never be relied upon and the first defendant miserably failed to prove them in the manner known to law. Accordingly, we answer all the issues framed by the trial court in favour of the appellant. There is no quibble over the law laid down by the Apex Court on the construction and factors required in proving a Will as relied on by the counsel for the respondents. However, they do not help his case. Thus, judgment and decree of the Court below made in O.S.No.189 of 2006 dated 25.06.2008 stands set aside and the suit is decreed as prayed for. A.S.No.566 of 2009 is allowed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

raa

To

The I Additional District Judge,
Erode.

Copy To: The Section Officer,
V.R.Section, High Court, Madras.

+1 cc to M/s.S.Xavier Felix, Advocate, Sr.No. 39258

+1 cc to M/s.S.Kaithamalai Kumaran, Advocate, Sr.No. 40176

judgment in
A.S.No.566 of 2009

CSL/10.07.2019

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