

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 19.08.2019

JUDGMENT DELIVERED ON : 05.11.2019

CORAM
THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.174 of 2001

1.Lakshmi Devi Ammal
2.Padmavathi
3.Selvaraj
4.Balakrishnan

... Appellants/Plaintiffs

...Versus...

1.Ezhumalai (Died)
2.Ramadoss Naicker (Deceased)
3.Thullakkannam
4.Kannappan
(RR3 and 4 brought on record as L.Rs of the deceased
1st respondent vide order of Court dated 31.03.2006
made in C.M.P.Nos.12344 to 12346 of 2004)
5. Lakshmi
6.Ramu
7.R.Gnanamurthy
8.R.Pandarinathan
9.Vitta Bai
10.Sankarammal
11.Lakshmi
(RR5 to 11 brought on record as L.Rs of the deceased R2
vide order of Court dated 25.10.2017 made in C.M.P.Nos.
107 and 108 of 2009 in S.A.No.174 of 2001)

...Respondents/Defendants

PRAYER:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.94 of 1998 dated 18.08.1999 on the file of the Sub-Court, Madhuranthakam reversing the judgment and decree made in O.S.No.62 of 1996 dated 28.11.1997 on the file of the District Munsif's Court, Madhuranthakam.

For Appellants:: Mrs.Hema Sampath,Senior Counsel
For Mrs.R.Meenal

For R2 to R11 :: Mr.N.A.Nissar Ahmed

J U D G M E N T

The unsuccessful plaintiffs are the appellants herein.

2. For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

3. The plaintiffs have filed a suit for declaration to declare Ex.A1 and Ex.A2(=Ex.B1)-Will alleged to have been executed by Kuppusamy Naicker in favour of the defendants 1 and 2 as null and void and consequential relief of Permanent Injunction restraining the defendants from alienating and encumbering the suit properties.

4. The plaint proceeds on the basis that:-

(i) one Kannappa Naicker had two sons, namely Manicka Naicker and Kishtappa Naicker. The properties of their father were divided between the two brothers and the suit properties were allotted to Manicka Naicker, the grand father of plaintiffs 1 and 2 and the great-grandfather of plaintiffs 3 and 4.

(ii) The suit properties are the ancestral and joint family properties of plaintiffs' father Kuppusamy Naicker and themselves. The plaintiffs have been in enjoyment of the suit properties. Adangal stood in their name. The first plaintiff is a child widow and was taken care of by her father.

(iii) The plaint further proceeds that taking advantage of the old age of Kuppusamy Naicker (83 yrs), defendants 1 and 2, who are his brothers, threatened him and demanded execution of registered Will, which is not binding on the plaintiffs.

(iv) Plaintiffs 1 and 2 and their paternal uncle, the 2nd defendant joined together and executed a sale deed for two items of land. This clearly shows that the suit properties were in the joint enjoyment of the parties. The plaintiffs came to know of the alleged Will. Then O.S.No.62 of 1996 was filed by the plaintiffs before the District Munsif Court, Maduranthakam.

5. The claim was resisted by the defendants inter-alia, contending that sale deed shows that 60 cents of land was purchased by Kuppuswamy Naicker. The suit properties are the self-acquired properties of Kuppusamy Naicker and some items were obtained in a family arrangement between his brothers and him. No doubt, patta stood in his name. The second defendant also was in possession and was paying the revenue charges. The Will was executed when Kuppusamy Naicker in sound and disposing state of mind and without any compulsion. The plaintiffs did not take care of Kuppusamy Naicker and the other brothers also did not take care of him. The second defendant alone took care of

him till his death. The last rites were performed by the second defendant. The first defendant is not a necessary party.

6. Before the Trial Court, 5 issues are framed and there is a specific issue as to Whether Ex.B1 Will dated 2.2.1993 is true, valid and genuine?

7. On behalf of the plaintiffs, the first plaintiff has examined herself as P.W.1 and Village panchayathar was examined as P.W.2 and the Sale Deed dated 26.4.1994 executed by the plaintiffs along with the defendant in favour of Santhi lal was marked as Ex.A1. The alleged Will, the subject matter of the suit dated 02.02.1993 is marked as Ex.A2. On behalf of the defendants, the second defendant was examined as D.W.1 and son of the first defendant was examined as D.W.2 and the Villager was examined as D.W.3 and Exs.B1 to B8 were marked.

8. After scrutiny of the oral and documentary evidence, the learned District Munsif has decreed the suit, holding that:-

(i) Except for 60 cents purchased under Ex.B2 there is nothing to show that the suit properties were self acquisitions of Kuppuswamy Naicker and that he could execute a Will for the properties

(ii) The Will was attested by the second defendant's sons and the first defendant's son. They are interested witnesses.

(iii) There was no independent witness to prove the due execution and attestation of the Will.

(iv) There was no evidence to show that Kuppuswamy Naicker was in a sound state of mind on the date of execution.

(v) The scribe was not examined.

(vi) There is no evidence that the second defendant was taking care of Kuppuswamy Naicker. Though D2 had stated that the first plaintiff was present at the time of execution she had not attested it.

(vii) The sale under Ex.B2 shows that the plaintiffs have rights in the property. The Will is not proved as required under the Indian Succession Act and the Evidence Act.

9. Aggrieved against the said judgment and decree, the defeated defendants have preferred A.S.94/1998 and the Sub-court, Madurantakam has allowed the appeal holding that:-

(i) Merely because the attestors of the Will were the children of the beneficiary, it cannot be held that the Will is invalid.

(ii) There is no evidence to show that the testator was not in a sound and disposing state of mind.

(iii) Though Kuppuswamy Naicker had a head injury, it could not be said that he was not in good health at the time of execution of the will. The Will shows that he was residing with his brothers.

(iv) The recitals in the Will show that the properties had been divided among Kuppuswamy Naicker and his brothers.

(v) Merely because patta was not transferred it could not be said that the second defendant had not taken possession. Consequently, the suit filed by the plaintiffs was dismissed and hence, the Second Appeal by the plaintiffs.

10. At the time of the admission, the following Substantial Questions of Law were framed.

1. Whether in law the lower appellate court was right in overlooking that Ex.B1 Will was not proved as required under section 68 of the Evidence Act and Section 63 of the Indian Succession Act?

2. Whether in law the lower Appellate Court was not wrong in brushing aside the fact that it was unnatural for a father to disinherit his daughters and bequeath the properties to his brother?

11. Pending Second Appeal, some of the respondents have died and their legal heirs are brought on record and cause title was amended to that effect.

12. The learned counsel for the appellants/plaintiffs would submit that the judgment of the Trial Court is well considered and hence, the same has to be restored, while, the learned counsel for the respondents/defendants contended that the judgment of the Lower Appellate Court is well considered and made submissions in support of the judgment of the Lower Appellate Court and sought for confirmation.

13. This Court has given its anxious consideration to the following decisions relied on either side:- i) CDJ 2004 SC 1195 [Meenakshimammal (dead) through L.rs and others versus Chandrasekaran and another] ii) CDJ 2010 SC 346 [Balathandayutham & another Versus Ezhilaras] iii) CDJ 1954 SC

015 [Naresh Charan Das Gupta Versus Paresh Charan Das Gupta & another iv) CDJ 1992 MHC 273 [Jayalakshmi Ammal Versus K.Lakshmi Iyengar represented by Power Agent M.Jayaramiyar v) CDJ 2009 MHC 4244 [Sugumal Duraisingh Versus Annamalai Ammal].

14. Relationship between the parties are not in dispute and the nature of the property i.e., the subject matter of the suit is also not in dispute and thus, the point for consideration in the Second Appeal is whether Ex.A2=(Ex.B1) Will dated 02.02.1993 alleged to have been executed by Kuppusamy Naicker (father of the plaintiffs 1&2) and elder brother of the defendants 1&2 is true and valid.

15. As per the submissions of the learned counsel for the appellants/plaintiffs, Ex.B1 Will was not binding upon them. It has not been executed when the testator was in sound and disposing state of mind and specifically averred that the same was obtained forcefully by the second defendant from the testator and also drew my attention to the age of the testator at the time of the execution as 83 years as mentioned in Ex.B1 Will and he was old and as he fell down and suffered head injury. He also draw my attention to the recital in Ex.B1 Will that testator was not keeping good health.

16. To test, the truth and validity of Ex.B1 Will, first and foremost the propounder of the will has to prove that the Will was duly and validly executed as contemplated under Section 68 of the Indian Evidence Act and under Section 63 of the Indian Succession Act. In an attempt do so, one of the attestors of the Ex.B1 was examined as D.W.2, who is admittedly son of the second defendant, (who is the younger brother of the testator), and also beneficiary under the Will.

17. On perusal of the evidence of the D.W.2 in the witness box in the chief examination, this Court finds that he has not whispered anything regarding the execution of the Will by the testator in his presence or testator signing in his presence.

18. All that he would say is that the testator executed Will in favour of his younger brother Ramadoss namely his father and the date of the Will and he has signed the Will and also deposed name of the other two witnesses in the said Will namely Gnanamoorthy and Ramu.

19. On perusal of Ex.B1 Will, it is seen that 3 witnesses have attested the said Will namely i) Gnanamoorthy, S/o.Ramadoss, ii) Kannapan, S/o.Elumalai Naicker, iii) Ramu, S/o.Ramadoss. In other words, all the attesting witnesses are none other than the sons of the first defendant and the second

defendant who are beneficiary under the Will and the same assumes significance, on the background of the case, as discussed infra.

20. After going through the evidence of D.W.2, the attessor, I have no hesitation to hold that his evidence does not pass the test as required under Section 68 of the Indian Evidence Act and under Section 63 of the Indian Succession Act for more than one reason. He has not only failed to whisper anything regarding the alleged execution of the Will by the testator nor his mental status, but, he has not even whispered as to his attestation.

21. To test the truth and validity of the Will, it has to pass the test of Section 68 of the Indian succession Act. However, mere satisfaction of the said provisions will not prove the Will automatically. The propounder of the Will as to dispel the suspicious circumstances surrounding the Will, if any, has averred by the parties to the lis. In the instant case, it is the specific case of the plaintiffs that the wife of the testator, to whom they are only two daughters, have predeceased and one of the daughter is a widow with two kids and while the other daughter is married and living in Chennai and in such circumstances, the father (testator) was living in the village and taking advantage of his loneliness and advanced age of 86 years at the time of the execution, his brothers viz., defendants 1 and 2 have clandestinely obtained Ex.B1- Will and thus, the burden of proof is upon the defendants to dispel the suspicious circumstances.

22 (i). In this regard, it is useful to refer the decision of the Supreme Court reported in 2010 (14) SCC 266 (Gopal Swaroop Vs. Krishna Murari Mangal), wherein, the Apex Court held as follows:-

“ 17. A careful analysis of the provisions of Section 63 would show that the proof of execution of a Will would require the following aspects to be proved:

(1) That the testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of the testator.

(2) The signature or mark of the testator or the signature of the persons signing for him is so placed as to appear

that the same was intended thereby to give effect to the writing as a Will.

(3) That the Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some other person signing the Will in the presence and by the direction of the testator or has received from the testator a personal acknowledgment of the signature or mark or the signature of each other person.

18. ... All that needs to be examined is whether the requirements stipulated in Section 63 and distinctively enumerated above has been satisfied in the instant case by the appellant propounder of the Will.

19. Our answer to that question is in the affirmative."

22.(ii) The Hon'ble Supreme Court in the decision reported in 1992 (2) SCC cases 507 [Guro (smt) v.Atma Singh and others) has held as follows:-

"3. With regard to proof of a Will the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. Where, however there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine. Such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit. The presence of suspicious circumstances makes the initial onus heavier and the

propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator (S.Venkatachala Iyengar Vs.B.N.Thimmajamma 1959 Supp (1) SCR 426: AIR 1959 SC 443), Rani Poornima Devi Vs.Kumar Khagendra Narayan Dev (1962 (3) SCR 195: AIR 1962 SC 567 and Jaswant Kaur Vs.Amrit Kaur (1977 (1) SCC 369: 1977 (1) SCR 925)."

22(iii). Further, in the decision reported in 2009 (3) SCC 687 [Bharpur singh and others V.Shamsher Singh], the Apex Court has held as follows:-

"17.....

34. There are several circumstances which would have been held to be described (sic) by this Court as suspicious circumstances:-

(i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) where the propounder himself takes prominent part in the execution of Will which confers on him substantial benefit"

(see H.Venkatachala Iyengar Vs.B.N.Thimmajamma (AIR 1959 SC 443) and T.K.Ghosh's Academy Vs.T.C.Palit (1974 (2) SCC 354: AIR 1974 SC 1495)."

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 disposition 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 herein before 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 been duly 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.

23. It is well-known that the proof of Wills present a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting.

24. For proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant.

25. When a third party stranger (like the first plaintiff herein) makes a passing reference in his pleading defence with regard to the truth and validity and the mental status of the testator at the time of making of the Will, the Court must satisfy itself by examining the attestors because as per the Indian Succession Act and the Indian Evidence Act, Will is a document by law required to be proved at least by examining one of the two attestors. The Indian Succession Act also makes it mandatory that Will must be attested by at least two persons. The Evidence Act provides that for the purpose of proving the document which the law requires to be attested by two witnesses, at least one has to be examined to prove the execution of the said document.

26. The learned counsel for the appellants has made submissions that it is unnatural for a father to disinherit his daughters- plaintiffs 1&2 and bequeath his property to his brothers namely defendants 1 and 2.

27. Per contra, the learned counsel for the respondents made his submissions on the substantial question of law (ii) as stated that in the present case, there is an evidence available through D.W.2 so as to prove the valid execution and attestation of Ex.B1 Will.

28. Now, this Court would like to have the glimpse over the alleged circumstances marshalled by the learned counsel for the appellants/plaintiffs. The first and foremost point is that, in Ex.B2, no reasons have been assigned so as to exclude the daughters of the testator from inheriting the property and on perusal of Ex.B1 Will, it has been clearly mentioned that at the time of the execution of the same, the testator has been residing in the care and custody of the propounder of Ex.B1.

29. It is no doubt true that a person is having unfettered right of disposing his property debarring a daughter from inheritance under a Will, on any stated circumstances are approved in legal pronouncements, however, in case of widowed daughter, it may not be so. It has to be viewed with suspicion in the absence of any special circumstance either be stated in the Will or explained by witness.

30. A person, be a younger or aged or senior citizen, may indulge in debarring his daughter from inheriting his/her property, on a stated reason recital therein, however to debar, a widowed daughter, that too with kids, there must be strong reason or special circumstance to do so. This Court is conscious of the fact that by a Will, the line of succession, as per codified personal Law, will be deviated or varied to

another beneficiary and guarantee as well. Further, every person is having unfettered right in disposing of his property as he likes and no quarantine can be imposed. A Will by its legal nature, may result, in fact, the natural heirs either being excluded or a lesser share being given to them, that by itself without anything more (emphasis supplied) cannot be held to be suspicious circumstance.

31. In the Indian Society, more so, in the southern states, the father's love and affection for his daughter is natural unmeasurable as it is in abundance and the same need not be over emphasised.

32. Given the cultural root and strong affection of a father to a daughter, such a fabric of affection of father and daughter that are woven in the society, the alleged Will by father debarring a widowed daughter, that too with young widow with kids, has to be viewed with suspicion, more so, without any recital of reason therefor or explanation by witness thereto.

33. Thus, this Court finds that the wife of testator-Kuppusamy Naicker, pre-deceased him and he is widower and the first plaintiff who is the young widowed daughter of the testator has been debarred from inheritance. Besides, the another daughter namely the second plaintiff too was debarred from inheritance, there is no recital for reason for deviance of inheritance. As observed earlier, this Court is conscience of the fact that a Will, in its legal consequence in all paralyse, likely to deviate the line of succession as prescribed in the codified personal law either the line of succession will be disturbed or deviated or the quantum of share may be varied. In some especial cases, the person may also be debarred from inheritance for the property.

34. For the reasons stated supra, this Court finds that there is not even any whisper found in the Ex.B1 Will alleged to have been executed by the father at the age of 83 wherein he had debarred his widowed daughter and her kids, while, assigning the property to his younger brothers, the same appears to be unnatural and suspicious circumstances as to the truth and genuineness of the Ex.B1. This fact coupled with the facts that are discussed infra gives raise to suspicious circumstance casting serious doubts as to the truth and genuineness.

35. P.W.1 in his evidence has also stated that his paternal uncle have represented that they are selling the property accordingly, she and her sister signed in Ex.A1 sale deed which was jointly executed along with defendants 1 & 2 in favour of one Santhi lal wherein, both the plaintiffs and the defendants 1 and 2 have signed the document along with their

respective kids namely D.W.1 and D.W.2. It is her further evidence that only from the said document, they came to know about the alleged Ex.B1 Will, as if said to have been executed by their father namely Kuppusamy Naicker. At the time of the execution of Ex.B1, the testator is aged about 83 years and he also suffered head injury on fall and he was looked after by D1 and D2. Admittedly, all the 3 attester of Ex.B1 Will are none other than the sons of the beneficiary, namely sons of D1 and D2 herein also assumes significance and casts sea of suspicious surrounding the Will.

36. The evidence of one of the son of the first defendant also does not satisfied the requirement of Section 63 of Indian Evidence Act and 68 of Indian Succession Act as discussed supra also assumes significance.

37. D.W.3 one of the independent witnesses has not deposed regarding anything as to the genuinity of the Will except by the fact deposing the fact that the lands have been managed by D1 and D2 who are the brothers of the deceased testator. Though the testator died on 17.11.1993 and suit was filed on 16.02.1996. Till such time, the defendant for the reasons best known has not effected mutation of name in the revenue records also assumes significance.

38. As stated supra, for the reasons known, they have not effected any mutation to their name after the death of the testator and in the absence of any being showing either in the pleading nor deposed in his evidence by D.W.1, the Trial Court has rightly come to the conclusion that the defendants have not sure about the truth and genuinity of the document has not effected mutation of name in revenue records nor effected any explanation on that score. Furthermore, without disclosing Ex.B1 Will, they have arranged to sell a portion of the property covered under Ex.B1 along with another portion of their property and made a composite deed and obtained the signature of the plaintiff as could be seen from Ex.A1 also shows the attitude of the defendant that it is only a exercise to cover up the Will and hence, non-disclosure the Will for many long years, also caused serious suspicious has to be coming into the existence of the Ex.B1 Will. Thus, by their conduct as described supra, the beneficiary under the Will (namely D1 and D2) and attester of the Will being none other the son of beneficiary D1 coupled with facts that despite passing several years revenue records has not been muted in their names coupled with the facts already discussed supra, this Court holds that the Lower Appellate Court has committed an error in overlooking fact that Ex.B1 Will was not proved as required under the provisions of Sections 68 of the Indian Evidence Act and 63 of the Indian Succession Act and hence, the first substantial question of law is answered and in

affirmative in favour of the appellants/plaintiffs.

39. The testator Kuppusamy Naicker, who is the wife had predeceased him had two daughters namely, the plaintiffs 1&2 Lakshmi Devi Ammal and Padmavathi and his first daughter is a young widow with kids and while, the second daughter (second plaintiff) is living in Chennai whose the defendants are the his younger brother. The schedule of property is measuring acre 14.79 cents situated in Perunthurai village, Cheyyar Taluk, Chengai M.G.R.District, New Kancheepuram District. The said Kuppusamy Naicker died on 17.11.1993, Ex.B1-Will dated 02.02.1993 and the suit was filed on 16.02.1996.

40. As observed earlier, the defendants has not let in any valid reasons for debarring the widowed daughter much less any witness or whisper as to any reason for debarring young widowed daughter in the Will by the testator who is none other than his elder brother and hence, this Court finds that it is totally unnatural for a father to disinherit his daughter, especially widowed daughter and bequeathed the entire property of 14.79 acres to the brother and accordingly, I hold that it is a suspicious circumstances, which caused dent and sea of suspicion surrounding the Will and in the absence of any positive evidence to suspicious circumstance, this Court has no other go except to hold that Ex.B1 is not true and genuine, the same is fabricated and accordingly, held to be invalid in law. Resultantly, the same is not binding upon by the plaintiffs/appellants by answering the substantial question of law (ii) in affirmative in favour of the plaintiffs.

41. On factual grounds, the position of a person with property appears to be in peril. As age advances and their wards staying away from elders after marriage due to the reason of modern societal living, the position of such person especially senior citizens with weak physical and fiscal condition are to depend upon are deplorable as they have to depend upon close relatives or person living in the close neighbourhood. Thereby, resulting in registration of Will in their favour, debarring natural heirs under the personal law appears to be on the raise.

42. In this view of the matter, both substantial questions of law are answered in affirmative in favour of the plaintiffs and held against the defendants.

43. In the result,

(i) This Second Appeal is allowed.

(ii) The judgment and decree of the First Appellate Court in A.S.No.94 of 1998 on the file of the Sub-Court,

Madhuranthakam is set aside.

(iii) The judgment and decree passed by the trial Court in O.S.No.62 of 1996 on the file of the District Munsif's Court, Madhuranthakam is restored.

(iv) No costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge,
Madhuranthakam.

2.The District Munsif,
Madhuranthakam.

Copy To

The Section Officer,
V.R. Section, High Court,
Madras.(2 copies)

+2cc to Mr.R.Subramaniam, Advocate, S.R.No.91823

S.A.No.174 of 2001

SAI (CO)
GN(21/07/2020)