

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 14.06.2019

Judgment Pronounced on : 28.06.2019

CORAM :

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1572 of 2008
and CMP.No.1155 of 2018

Mylsamy. K

.. Appellant /Appellant / Plaintiff

Vs

1.K.Duraisamy
2.C.Kanagaraj
3.S.Subramaniam
4.S.Seethalakshmi

... Respondents 1-4 / Respondents / Defendants

5.K.Prabhukumar 5th Respondent

(R5 impleaded as party respondent Vide order dated
18.7.2013

made in MP.No.1/2013 in SA.No.1572/2008]

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree passed of the learned Additional District Judge and Fast Track Judge No.3, Dharapuram in A.S.No.21 of 2007 dated 17.04.2008 in confirming the judgment and decree of the learned District Munsif, Kangeyam in O.S.No.108 of 2002 dated 12.02.2007.

For Appellant : Mr.A.K.Kumarasamy, Senior Counsel
Assisted by Mr.M.R.Thangavel

For Respondents : Mr.S.V.Jayaraman, Senior Counsel
Assisted by Mr.Ma.Pa.Thangavel [R5]

RR2, 3 & 4 - No Appearance

R1 - Died

JUDGMENT

The plaintiff who lost his suit successively before the Courts below has come forward with the present appeal. The suit is laid for declaration of plaintiff's title and for injunction. Parties would be referred to by their ranks before the trial Court.

2. There are two items of suit properties, both are substantially agricultural properties. These properties originally belonged to a certain Kuppusamy Gounder.

Kuppusamy Gounder had three daughters and two sons. They are Sivagami, Kannathal, Sarathambal, the first defendant and one Shanmugam. Barring the first defendant, the other parties to the litigation are : Sivagami's son, (the plaintiff in the suit), Kannathal's son, (the second defendant), Sharadha's son, (the third defendant) and the widow of Shanmugam, the fourth defendant. The necessary facts necessary for appreciating the rival contentions are summarised as below :

- On 04.09.1964 under Ext.A18, Kuppusamy Gounder and his two sons namely the first defendant and Shanmugam, had partitioned their family properties. In that partition, Kuppusamy Gounder was allotted 'A' schedule property. The first defendant was allotted 'B' schedule property and Shanmugam was allotted 'C' schedule property. Subsequently, on 25.10.1976, Vide Ext.A1, Kuppusamy Gounder had purchased a portion of the property allotted to the first defendant under Ext.A18, partition deed. This would imply that henceforth Kuppusamy Gounder would have a larger extent namely, the one which was allotted to him under Ext.A18, and that which he had purchased under Ext.A1.
- Be that as it may, on 06.6.1985, Kuppusamy Gounder had executed a registered Will (Ext.B1) bequeathing A-Schedule property therein exclusively to the first defendant. He had bequeathed other properties to his other heirs, including the plaintiff and his sister Nirmala in Schedules B to D.
- Some ten years after execution of Ext.B1-Will, Kuppusamy Gounder is said to have executed an unregistered Will dated 24-05-1995. This Will is marked Ext.A-101. Under this Will, the testator had cancelled his Will dated 06.6.1985 (Ext.B-1). The only modification made in Ext.B-1 Will was that, the properties described in the A schedule in Ext.B-1 Will was now allotted to the plaintiff, and the first defendant was excluded entirely. As to rest, the Will remained as it was in Ext.B-1. The effect of the Will was that the testator presumably had preferred his grand son through his daughter Sivagami to his only son. For excluding his son, the Will recites some reasons which the testator was stated to have had.

3. The suit was resisted by the first defendant. His bone of contention was that the second Will Ext.A101 was a fabricated document.

4.1 The dispute went for trial, and before the trial Court both sides paraded few witnesses on their behalf besides producing considerable number of documentary. The core issue however, relates to the genuineness of testator's signature in Ext.A101. Analysing and appreciating the evidence before it, the trial Court chose to dismiss the suit. In holding that the signature of the testator in Ext.A101 is not genuine, the

trial Court has proceeded to compare the signature under Sec.73 of the Evidence Act with the admitted signatures in Exts.B-1, B-3, B-15 and Ext.A-103.

4.2 It is relevant to mention here that the plaintiff has examined a private handwriting expert as P.W.4, and the trial Court did consider her testimony but proceeded to draw strength from it to sustain its conclusion that the signature of Kuppasamy Gounder in Ext.A-101 is not genuine.

5. The first appellate Court has adopted the same line of reasoning as the trial Court and hence the plaintiff is before this Court in the second appeal.

6. This appeal was admitted on the following substantial questions of law :

- 1) Whether the application of Section 73 of the Indian Evidence Act would enable the civil Court to make a comparison of signatures made in two different period within an interval of an interval of 10 years?
- 2) Whether the Courts below could over ride Section 68 of the Indian Evidence Act by suspecting the attesting and scribe witness?
- 3) Whether it is safe to compare the signatures by the Court itself when an opinion of an expert is available more so when there are number of signature to be compared with the disputed signature?

7. The learned counsel for the appellant would argue that in understanding the genuineness of the Will, the Courts below have fallen into two serious errors :

- a) That it ought not to have ignored the expert's opinion of P.W.4. While in law, a handwriting expert's opinion may not be binding on the Court, yet the Court ought to give stronger reasons to reject it before preferring to compare it under Sec.73 of the Evidence Act. When an expert in the field is available, the Court, though has powers to compare, ought to go slow, since its own expertise in the field is generally limited.
- b) The Courts below have entirely ignored the circumstances or the settings in which the Ext-A101 has come to be executed. It is an indisputable fact now that the father and son hardly shared a cordial relationship at the time when Ext.A-101 Will was executed. Ext.A106 is a letter by the testator to his son (first defendant) and Ext.107 is the latter's reply dated 26.5.1994. These correspondences have taken place about a year prior to the execution of Ext.A101 Will on 24.5.1995. The nature of these correspondences makes bare the fact that the father and son shared some deep differences. It is now not so much about the correctness, or the merit of what

the father has alleged in Ext.A-106, or the son has responded in Ext.A-107, but is all about the father's disappointing perception of his son's conduct. When this setting stands established, then it is only natural for a testator, though a father he might be, to deny his son a share in the legacy.

8. Per contra, Mr.S.V.Jayaraman, learned Senior Counsel assisted by Mr.Ma.Pa.Thangavel, the learned counsel for the fifth respondent highlighted a few specific facts relied on by the Courts below to negate the alleged genuineness of Ex.A.101, Will. In particular he argued;

- The trial Court has given valid reasons for rejecting the expert opinion in its judgment when it has said that the variance which the disputed signature of Kuppusamy Gounder in ExtA.101 Will bears to his admitted signatures in Ext.B.1, Ext.A.103 and Ext.B.15 are such that it cannot be considered as something that will ordinarily occur over a period of time.
- The Appellate Court also has indicated that so called expert is not qualified, and both the Courts have considered that comparing the handwriting is an imperfect science.
- The first appellate Court has noted that none of the sample signatures of Kuppusamy Gounder in Ex.S.1 to S.9 documents that formed basis of expert's opinion have been produced before the Court. The nearest document which both the Courts found proximate in time to Ex.A.101 is his signature in the postal acknowledgement card (Ex.B-15), and finds the variance in both the signatures not matching.

9. The concurrent finding of the Courts below that the testator's signature in Ext.A-101 Will is a finding on fact, and that this may not be interfered with even if the reasoning supporting the said finding is a mere plausibility. Unless there is perversity in appreciating the evidence by the courts below is self-evident, even a plausible or possible view does not permit easy interference by this court.

10. The last point first. A finding based on a plausible, and not necessarily a possible inference drawn from the evidence does not permit an interference by this Court. With finding on a fact against him, the appellant shall have to travel few more paces to establish that the inference drawn is perverse, and disturbs the peace of the right thinking - the ubiquitous reasonable man who wanders through the pages of legal

by the Courts below in rejecting the handwriting expert's report and her testimony, and preferring to rely on their perceived imperfect expertise in comparing the impugned signature in Ext.A-101 with the admitted signature of Kuppusamy Gounder, was justified?

11. The learned trial Judge, in his, what this Court considers as a well crafted judgment, has analysed why P.W.4's opinion is less reliable and why its own eyes could be trusted for comparing the signatures. Ext.A-101 Will is dated 24-05-1995. The earlier Will was Ext.B-1 and it was dated 06-06-1985. For comparing the disputed signature of the testator in Ext.A101 with the admitted signatures, P.W.4 claims to have looked to as many as 12 admitted signatures of the testator. Of them three are those in Ext.B-1 Will. But the one which is proximate in time are those in 1994. They are the vakalath, summons, counter filed in a certain revenue case (1/1994) or in O.S.87/1994, as the case may be. However, none of these documents were produced before this Court, and necessarily were not confronted to the first defendant when he examined himself as D.W.1. Those that were made available are: Ext.B-1 Will, Ext.A-103 settlement deed that testator had executed in favour of plaintiff's sister Nirmala, both of which were executed on 06-06-1985.

12. Here it may be relevant to re-introduce another fact, on which the plaintiff/appellant laid considerable stress for proving a circumstance for justifying the exclusion of the first defendant in Ext.A-101 Will. This is a registered letter purported to have been sent by the testator in May, 1994, about a year next before the execution of Ext.A-101 on 24-05-1995. This was replied to by the first defendant Vide Ext.A-107. Ext.A-106 letter has two pages, and the purported signature of the testator in page 2 is marked as Ext.B-3. Ext.B-15 is the postal acknowledgement card for receipt of Ext.A-107. The signature in Ext.A-106 and the one in Ext.B-3 form part of the same letter, except that Ext.A-106, is the copy of the letter sent to the first defendant whereas Ext.B-3 is the original which the first defendant had received. The trial Court has considered Ext.B-1, B-103, Ext.B-3 as worthy material to compare the signatures therein with those in Ext.A-101 Will.

13.1 The point is: Can the Court trust its eyes more than that of the expert? As a statement of law, an expert opinion is just a piece of evidence before the court, and no conclusiveness can be attached to his opinion. It cannot be denied that an expert's opinion or view founded on years of experience, cannot be dismissed lightly because the Courts has the power to compare the signatures under sec.73 of the Evidence Act. But it depends on the competency of the expert and the trustworthiness of his opinion.

13.2 To commence with, when a hand writing expert relies on certain materials to arrive at a certain conclusion on the genuineness or otherwise of a disputed signature, it is important that those materials relied on by the expert too are placed before the Court. This will enable the Court to appreciate the competency of the expert and the credibility of the opinion given. Given the fact that comparison of handwriting is generally considered as an imperfect science as it is affected by innumerable variables including the physical and mental state of a person, the credibility factor of the opinion given by the handwriting expert cannot go untested in a forensic exercise. It is here, P.W.4 has come a cropper before the Courts below, more particularly the trial Court. She is a private expert, not appointed by the Court, who does not claim to have any qualification herself to compare handwriting, and had accessed to documents provided by the plaintiff which the latter chose not to produce before the Court, and has given an opinion on the genuineness of testator's signatures in Ext.A-101. Even if the competency element of the expert is kept aside, how to conclude that her opinion in Ext.X-3 report is credible? What is the material before the court to tilt it in favour of the said report. None.

14. Left with little choice, and not willing to abandon his responsibility, the learned trial Judge has proceeded to compare the disputed signature with those in Ext.B-1, B-3 and Ext.A103. When P.W.4, the expert was confronted with the signatures of the testator in these documents with those in Ext. A-101, and was required to compare them to the extent her naked eyes could compare them before the Court, she discovered only one variance: That the font size of the disputed signatures in Ext.A-101 Will was bigger than those in the other documents. Here, the trial Court has stepped in to inform that while in the admitted signatures, in the name 'Kuppusamy', the second alphabet from the right - 'm', could be identified, whereas in Ext.A-101, the one with the bigger fonts, this 'm' is prominently missing. The disputed signatures spell 'Kuppusay' and not Kuppusamy'. This Court repeated the exercise, and found that the observation of the Courts below on the point of missing 'm' in a free flowing signature is glaring and it does not even require a magnifying glass to make a statement on it. The inability of P.W.4 not to spot the missing 'm' is horrendous, and it exposes the quality her opinion. It is true that Ext.A-106 letter and the acknowledgement card Ext.B-15 evidencing the receipt of Ext.A107 reply are a year old since the date of Ext.A-101. But that is the only document on either side on record available for comparison. Here, this Court finds that the Courts below, more particularly the trial court, have done a commendable job in deciding this point on fact with amazing

clarity and appreciable cogency. And, the materials relied on by the appellant now to impeach their conclusion are too weak and inadequate to make an impression.

15. Turning to the oral evidence, P.W.2, the attesting witness, admits that he had deposed against the first defendant in a certain litigation few years prior to the filing of the present suit. His role may be limited but critical, more so where the document P.W.2 had attested faces an accusation of fabrication, and forgery.

16. Now, if the focus is shifted to Ext.A-106, this letter on its face states that the testator was under the care of the plaintiff. The reply of the first defendant (Ext.B-107) was more in defence of what he considered as well groomed misconception of his father, fed and nurtured by those who share company with his father. The reference was obviously to the plaintiff. It evidences common filial differences, and in expressing it, this Court does not find a wrong word in Ext.A-106 meaning disrespect to his father.

17. Let the setting be restated: Testator under the care of plaintiff; testator excludes the son and bequeaths the share he had earlier allotted to him in Ext.B-1 Will to the plaintiff. It required a Will, and it was made. The signature of the testator in it is suspect. The Will required an attester. P.W.2, teams up to complete the sequence. Does this Will inspire confidence?

18. Will is a solemn document, and hence the Court tolerates not suspicious elements clouding its proof. The plaintiff has not passed this litmus test, and the Courts below have been correct in their approach. The existence of differences between the father and son as evidenced by Ext.A-106 and Ext.A-107 are exaggerated. If a Will, its genuineness on the point of execution - the affixing of signature of the testator, comes under the cloud, nothing can save the Will.

19. In conclusion, the appeal is dismissed and the judgment and decree dated 17.04.2008, passed by the learned Additional District Judge and Fast Track Judge No.3, Dharapuram in A.S.No.21 of 2007 in confirming the judgment and decree of the learned District Munsif, Kangeyam in O.S.No.108 of 2002 dated 12.02.2007, is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

ds

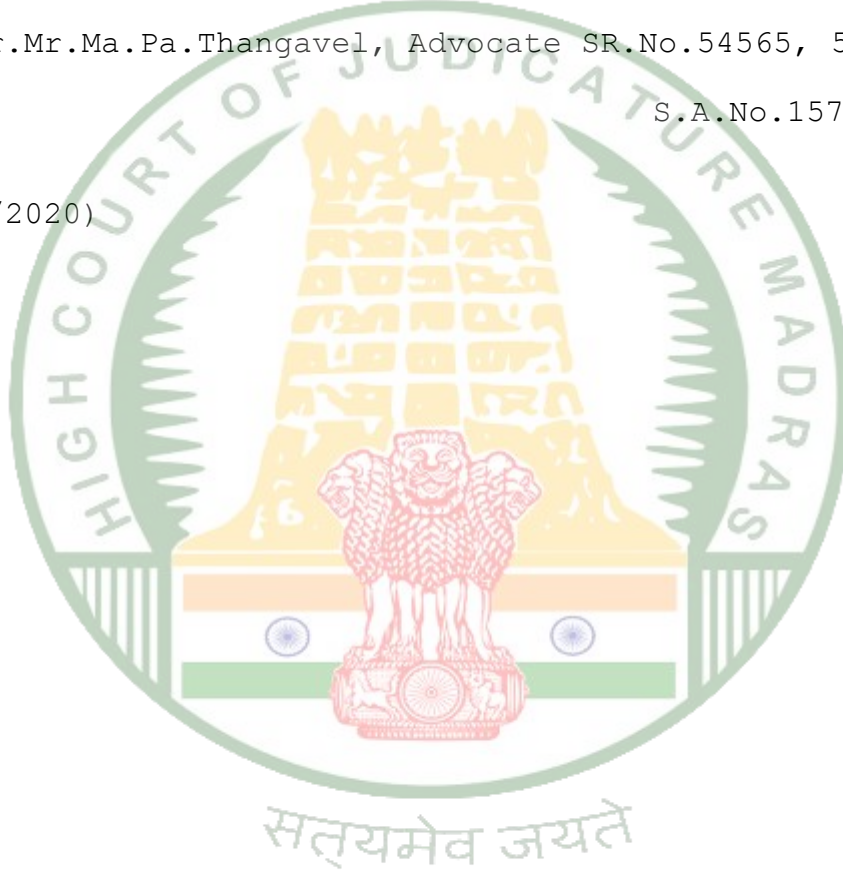
To:

1. The Additional District and
Fast Track Court No.3
Dharapuram.
2. The District Munsif Court
Kangeyam.
- 3.The Section Officer
VR Section,
High Court, Madras.

+2cc to Mr.Mr.Ma.Pa.Thangavel, Advocate SR.No.54565, 53927

S.A.No.1572 of 2008

AK (CO)
GMY (13/02/2020)



WEB COPY