

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.02.2020

DATE OF VERDICT : 28.02.2020

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

S.A.NO.823 OF 2002

1.T.Venkataraman (died)

2.T.Rajagopalan

... Appellants/Plaintiffs

Vs.

1.T.Sethuraman

2.R.Bhaghirathi

3.M.Lakshmi

4.Sharadasiridar

5.Girija Venkat Slairam

... Respondents/Respondents

(Note: Respondents 4 & 5 brought on record as legalheirs of the 1st appellant vide order dated 22.11.2018 made in CMP No.13 to 15 of 2014 in SA.No.823 of 2002 (SMSJ)).

Prayer:-

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree passed in A.S.No.28 of 2001 on the file of the Principal District Judge, Nagapattinam dated 14.08.2001, as confirmed by the judgment and decree passed in O.S.No.163 of 1999 on the file of Principal Subordinate Judge, Mayiladuthurai dated 21.11.2000.

For Appellants : Mr.T.R.Rajagopalan, Senior Counsel
for Mr.S.Gopalaratnam

For Respondents : Mr.A.Muthu Kumar for R1
M/s.D.Chitra Maragatham for R2
R3 to R5 - Notice served

J U D G M E N T

This second appeal is preferred as against the judgement and decree passed in A.S.No.28 of 2001 on the file of the Principal District Judge, Nagapattinam dated 14.08.2001, as confirmed by the judgment and decree passed in O.S.No.163 of 1999 on the file of Principal Subordinate Judge, Mayiladuthurai dated 21.11.2000.

2.For the sake of convenience, the parties are referred to

as per their ranking in the trial Court.

3.The case of the plaintiffs in brief is as follows:

3.1.The suit is filed for partition. The plaintiffs and the defendants are the sons and daughters of one K.R.Thiyagaraja Iyer, who died intestate on 03.08.1999. The said property originally belonged to one Ramaiah, the paternal grandfather of the plaintiffs and defendants. On demise of Ramaiah, the suit property was inherited and devolved to their father K.R.Thiagarajan Iyer. The plaintiffs and the first defendant along with their father constituted a joint Hindu Family. The said property was treated as a joint family undivided property. In the year 1993, the movables and cash belonged to joint family property were orally divided and the suit property alone was kept in common and agreed to divide later. The second plaintiff filed a suit for partition in O.S.No.186 of 1994 in respect of the suit property including his father and the two brothers and the same was 'dismissed for default' on 16.04.1997. In the said suit, the plaintiffs father filed a written statement stating that the suit house is his own property. Therefore, after his demise, the plaintiffs and the defendants are being his only legal heirs have inherited the suit property jointly and they are entitled to equal share namely $1/5^{th}$ in the suit property. Hence the Suit.

4.The first defendant resisted the plaintiffs case and filed separate written statement, stating that the first defendant and his father never constituted a Hindu Joint Family. The suit property was never inherited by Thiagarajan Iyer from his father. Their grandfather namely K.Ramiah was employed in the Railways and he had purchased the suit property and also other property at Thittachery Village. During his life time, he executed registered Will on 23.03.1960 bequeathing the suit property along with nanja lands in favour of his sons namely father of the plaintiffs and the defendants. During life time of their father, he executed Will dated 28.06.1993, attested by witnesses and it was registered one and allotted the suit property in favour of the first defendant alone. Therefore, the plaintiffs are not entitled to have any share over the property. Their father out of love and affection in favour of plaintiffs already given Indiravikas bond for a sum of Rs.40,000/-, fixed deposit for a sum of Rs.46,000/-, diamond worth Rs.30,000/-, one pair of chain, two bangles weighing $10 \frac{1}{2}$ sovereigns worth Rs.35,000/- and also silver articles worth Rs.6,400/- to the second plaintiff. Similarly, the first plaintiff was also given 15 sovereign of jewels and Rs.46,000/- by way of cash. Thereafter, the first defendant was alone living with his father in the suit property for the past 20 years. There was no common kitchen among the parties as pleaded in the plaint. Therefore,

the suit property exclusively belongs to the first defendant and no question of division of the same. The second plaintiff already filed a suit in O.S.No.186 of 1994 for partition and the same was dismissed on 13.08.1996. Though it was subsequently restored, again 'dismissed for default' on 16.04.1997. Further the plaintiffs are fully aware of the execution of the will dated 28.06.1993, in favour of the first defendant. Therefore, without even any pleading about the said Will, suit itself is not maintainable and prayed for dismissal of the suit.

4.1.The second and third defendants filed separate written statement and stating that the second and third defendants are also entitled to have 1/5th share in the suit property and supporting the case of the plaintiffs.

4.2.The plaintiffs filed a reply statement to the written statement filed by the first defendant stating that their father late Thiagarajan Iyer did not mention anything about the Will dated 28.06.1993 in his written statement filed in O.S.No.186 of 1994. In fact, the said written statement was adopted by the first defendant herein. Therefore, the alleged Will dated 28.06.1993 could not have been executed by their father late Thiagarajan Iyer, out of his free will and consent. It should have been obtained not only undue influence exercised by the first defendant and also misrepresentation, fraud etc. Further, alleged Will dated 28.06.1993 could not have been executed since already he executed registered Will dated 15.02.1976 and also from the Codicil document executed by him out of his free will on 11.06.1998 by his own hand-writing and prayed for decree of the suit.

4.3. The first defendant again filed additional written statement by stating that there is no need to mention about the Will executed by him on 28.06.1993 in the written statement filed by the late Thiagaraja Iyer. The Will dated 15.02.1976 is revoked by the subsequent Will on 28.06.1993. Further the document dated 11.06.1998 is not correct and it is not at all a Codicil and prayed for dismissal of the suit.

5.On the side of the plaintiff, P.W.1 and P.W.2 were examined and nine documents were marked as Ex.A.1 to Ex.A.9. On the side of the defendants, they examined D.W.1 to D.W.3 and were marked Ex.B.1 to B.7. Based on the materials placed on record, both the oral and documentary evidences adduced by the respective parties and the submissions made by the learned counsel, the Trial Court dismissed the suit. Aggrieved by the same, plaintiffs preferred an Appeal Suit in A.S.No.28 of 2001 and the same was dismissed and confirmed the judgment and decree passed by the Trial Court. Aggrieved by the same, the plaintiffs

preferred this second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed:-

"(i) Whether a member of Joint Hindu Family can execute a Will bequeathing Joint Family property in favour of another member of Joint Hindu Family?

(ii) Whether the Courts below are right in non-suiting the plaintiffs on the basis of Ex.B4 Will which has been obtained by practice of undue influence and fraud?

(iii) Whether by execution of Ex.A7, B4 Will has not been cancelled?

(iv) Whether the first defendant has satisfactorily proved due execution of the Will as per the relevant provisions of Indian Evidence Act?"

7. Mr. T.R. Rajagopalan, learned Senior Counsel appearing for the plaintiffs submitted that one K. Ramiah acquired the suit property along with the other properties. All the properties are self acquired by him. He bequeathed the properties in favour of his son, K.R. Thiagarajan, who is none other than the father of the plaintiffs and defendants. Though the said K.R. Thiagarajan was working and subsequently he was dismissed from service and he was living on the income of the plaintiffs.

8. On 19.09.1971, he executed a registered will. Thereafter, he executed another will dated 15.02.1976 and provided equal rights to the three brothers namely plaintiffs and the first defendant along with life time interest to his wife. Therefore, he could not have executed their registered will dated 19.09.1971 in favour of the first defendant alone. Further Ex.A7 dated 11.06.1998, Thiagarajan Iyer, decided to cancel the will dated 22.06.1993 and intended to give 1/4th share to plaintiffs and half share to first defendant.

9. Without considering these aspects, both the Courts below decided against the plaintiffs. He further submitted that the first defendant admittedly was living with the deceased K.R. Thiagarajan for the past 20 years. Therefore, he influenced him and obtained the alleged Will at the age of 87 years and fabricated the Will in his favour. Further the first defendant did not prove the Will as required under Section 63 (C) of the Evidence Act, to support the Will dated 28.06.1993. Therefore, plaintiffs also entitled to have their respective shares and prayed for allowing the suit filed by the plaintiffs.

10. Per contra, Mr. A. Muthukumar, learned counsel for the

first defendant submitted that though the plaintiffs are fully aware of the execution of the Will dated 28.06.1993, no where mentioned about the said Will in the plaint. Further they did not even mentioned about the letter written by their father, which was marked as Ex.A7. Only after filing the written statement by the first defendant by way of additional reply statement, they have mentioned about the Will. Even according to the plaintiff, after the letter dated 11.06.1988, Ex.A7 no where mentioned about the said document in the subsequent letters, which were marked as Ex.B5 and Ex.B6 and therefore, the said letter was prepared by plaintiffs only for the purpose of filing the suit. When the execution of the Will dated 28.06.1993, categorically admitted by the plaintiffs, it need not be proved. Even in the Will, their father stated about the proportion of the other shares to the plaintiffs as well as the other daughters and they have duly received their respective shares. It is also clearly proved in their evidence. Further the letters marked by defendant as Exs. B1, B2, B3, B5 & B6 which were sent to the father by the plaintiffs. It categorically proved the intention of the plaintiffs and compelled the father to change the Will. In fact, in one letter they already made revised Will and compelled him to register the same.

11.The learned counsel for the first defendant cited the following judgements in support of his contentions as follows:

i) In Second Appeal No.1128 of 1984 in the case of S.Kaliyammal and others Vs. K.Palaniammal and others.

ii) In Second Appeal No.828 of 2007 in the case of R.Vellingiri and another Vs. R.Kannaian and others reported in 2008 (1) CTC 130.

12.Heard Mr.T.R.Rajagopalan, learned counsel appearing for the appellants and Mr.A.Muthu Kumar for R1 and Mr.D.Chitra Maragatham for R2.

13.The suit is for partition. The plaintiffs and the defendants are the sons and daughters of K.R.Thiagarajan. He died intestate on 03.08.1999. Originally, the suit property was belonged to one Ramiah, who is paternal grand father of the plaintiffs and the defendants. On the death of the Ramiah in the year 1960, the suit property was inherited by the plaintiffs and defendants father K.R.Thiagarajan. Thereafter, he also inherited some other properties, jewels and cash.

14.As stated above, the father of the first defendant had absolute right over the suit property and as such, he can very well bequeathed the suit property in favour of the first defendant, which is a registered one. His father already

executed a registered Will dated 15.02.1976, which was marked as Ex.A2. Subsequently, by way of the Will dated 28.06.1993, the earlier Will was revoked by his father. In the said Will a sum of Rs.92,000/- bequeathed in favour of the plaintiffs and it should be divided equally by them. Though the plaintiffs did not state anything about the said Will in their plaint, in their additional reply statement they have mentioned about the Will and also mentioned about the subsequent letter written by their father, which was marked as Ex.A7 dated 11.06.1988. The PW.1, categorically deposed that in the Ex.A7 the letter dated 11.06.1998 his father had written about the Will dated 28.06.1993. Further, he deposed that he is aware of the fact that after the first Will in the year 1976, his father again had written another Will in the year 1993. In the subsequent letter written by the PW.1, he mentioned about the Will dated 28.06.1993. He further deposed as follows:

“28.6.93ல் ஒரு உயில் ஏற்பட்டது என்பதை ஒப்பக் கொள்கிறேன். 28.6.93 அந்த உயில் வேண்டாம் என்று என அப்பா சொல்லிவிட்டார். வா.சா.ஆ.7 பற்றி எனக்கு எதுவும் தெரியாது. வா.சா.ஆ.7 சென்னையில் வைத்து அண்ணாநகரில் வெங்கடராமன் என் அண்ணன் வீட்டில் வைத்து எழுதப்பட்டது. வா.சா.ஆ.7ல் 28.6.93 உயில் மாற்ற எண்ணியிருப்பதாக கண்டுள்ளது.”

15.He also admitted about receipt of many bank deposits and jewels and it is categorically corroborated by PW.2 also. Therefore, the Will executed by their father dated 28.06.1993 is a valid one and proved by the first defendant.

16.In this regard, the learned counsel for the first defendant cited the judgement, in the case of S.Kaliyammal and others Vs. K.Palaniammal and others and the relevant paragraphs are extracted hereunder:

“11. When the specific plea of the plaintiffs is that the husband of the defendants 3 and 4 has got the will executed by Nanjammal under fraud and undue influence, then naturally the burden is on the plaintiffs to establish the same. But unfortunately there is absolutely no evidence to prove the averments made in the plaint. In fact except the averments made in the plaint that the will was executed by Nanjammal by fraud and undue influence, there is no other material to come to the conclusion that the will has been executed under undue influence. Even in the evidence, P.W. 1 has stated as follows :--

3/4 பிரதிவாதிகளும் அவர்களது பருஉடலும் ஆசை வார்த்தை காட்டி நஞ்சம் மாளை

ஏமாற்றி பொய் உயில் ஒன்றை கிருஷ்டினை செய்திருக்கிறார்கள். அந்த உயில் எங்களைக் கட்டுப்படுத்தாது. Even as per the evidence it is admitted that the will has been executed by Nanjammal but it was only under fraud and undue influence.

14. In the judgment reported in Rakkammal v. Meeyappan Ambalarn, (1991) 2 Mad LW 491 it has been held as follows :

"Here again, the pleadings, namely, the objections put forth on behalf of the first respondent are totally devoid of particulars. Under the law, it is necessary to plead fraud specifically and give particulars of the fraud. The burden of proof of fraud is on the person, who alleges fraud, which should be proved by cogent evidence. Courts have always laid down that in the matter of proof of fraud, suspicion cannot take the place of proof and fraud should be proved by direct cogent evidence. Conjectures and suspicions cannot take the place of proof. The same principles govern the allegations of collusion also."

From the above principles, it is clear that the bold averments in the plaint alone may not be sufficient evidence to come to the conclusion that the will has been obtained by fraud or undue influence.

15. The counsel for the appellants referred to the judgments reported in Bhagwan Kaur v. Kartar Kaur, to contend that the decision on the due execution of the will is not primarily arriving at a finding of fact, as it has a admixture of law due to the specific requirements of Section 63 of the Indian Succession Act, 1925 towards due execution. I am of the opinion that, only when the execution of the will is denied by a party, then the burden is on the party who relies upon the will to prove the execution of the same. When the execution is not denied, it is unnecessary to compel the person who relies upon the document to let in evidence to establish the execution, since the admitted facts need not be proved. As already stated when the plaintiffs pleaded that the will has been executed by the said Nanjammal by fraud and undue influence, it the duty of the plaintiffs to establish the same. In the absence of any evidence to support the plea of the plaintiffs, it has to be held that the will executed by Nanjammal in favour of the defendants 3 and 4 is valid."

17. The learned counsel for the defendant cited an another

judgment in the case of R.Vellingiri and another Vs. R.Kannaian and others reported in 2008 (1) CTC 130 and the relevant paragraphs are extracted hereunder:

"10. It is pertinent to point out that defendants 1 to 4 remained exparte and no written statement has been filed and therefore the genuineness and validity of Ex.A-2-Will was not at all in issue. The question to be decided is even when the validity of Ex.A-2-Will had not been questioned by the defendants, yet, whether it is necessary to prove Ex.A-2 as contemplated under Section 68 of the Indian Evidence Act. In this context it will be useful to refer to a Division Bench decision of the Kerala High Court in the case of Thayyullathil Kunhikannan Vs. Thayyullathil Kalliani reported in A.I.R.1990 Kerala 226 wherein in paragraph 34 of the said decision, it is laid down as follows:-

"34. Order 8 Rule 5 of the C.P.C. provides that unless there is a specific denial of any allegation of fact made in the plaint, it shall be taken to be admitted. Section 58 of the Evidence Act provides that no fact need be proved in any proceedings, which by any rule of pleadings in force at the time, the parties are deemed to have admitted by their pleadings. In this case, in the absence of any denial in the written statement, the genuineness and the validity of the will Ext.A1 must be deemed to have been admitted by the law of pleadings, namely Order 8 Rule 5, and therefore that fact was not required to be proved at the trial. Section 68 states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive. The proviso to the Section which was introduced by the amending Act 31 of 1926 makes an exception in the case of any document, not being a will, which has been registered, unless its execution by the persons by whom it purports to have been executed, is specifically denied. The fact that the proviso is not applicable to wills, and that it does not make an exception in the case of registered wills, does not lead to any inference that a will cannot be acted upon or used as evidence, unless it has been proved by examining an attesting witness. The only

effect of the proviso is that registration of the will by itself does not obviate the necessity of calling an attesting witness to prove it, if it is otherwise required to be proved. The proviso does not speak of a case where a will is not in dispute. Section 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, S.68 cannot operate to insist on formal proof by calling an attesting witness. Section 58 has to be read as overriding S.68 and as obviating the necessity for calling an attesting witness, unless the execution of the will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a will could be used as evidence. Phipson on Evidence 12th Edition (1976) explains the rationale behind examining an attesting witness as that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, "an agreement which may be waived for the purposes of dispensing with proof at the trial". (paragraph 1751). In paragraph 1757, the learned author points out that proof of execution of documents required by law to be attested is dispensed with (although the attesting witness may be alive and in Court) "when the execution has been admitted for the purposes of trial". Order 8 Rule 5 C.P.C. deems the execution of the will to be admitted in the absence of any denial thereof in the written statement. Examination of an attesting witness is therefore unnecessary when the parties have not joined issue on the validity or genuineness of the will".

A reading of the above said decision clearly shows that the examination of an attesting witness to a will is unnecessary when the parties have not joined issue on the validity or genuineness of the Will. As pointed out above, the validity and genuineness of Ex.A-2-Will was not at all in issue in the above suit. Therefore, as laid down in the above said decision, the examination of one of the attesting witness to Ex.A-2-Will is not necessary.

11. In the decision reported in the case of S. Kaliyammal Vs. K. Palaniammal and reported in

A.I.R.1999 Madras 40 a learned Judge of this Court in paragraph 15 of the judgement has observed as follows:

"I am of the opinion that, only when the execution of the Will is denied by a party, then the burden is on the party who relied upon the Will to prove the execution of the same. When the execution is not denied, it is unnecessary to compel the person who relies upon the document to let in evidence to establish the execution, since the admitted facts need not be proved"

Therefore, the substantial question of law that has been formulated in the memorandum of grounds of Appeal is answered against the appellants.

12. In the decision reported in Purna Bai vs. Ranchhodas, AIR 1992 AP 270 (referred to supra), which was relied upon the learned counsel for the appellants, the question that arose for consideration is whether the admission of execution of a particular document extends to the execution of another document recited in the former document. While considering that question, the Division Bench has held that inasmuch as the attestation is not proved, the admission cannot extend to the execution of the Will, but the facts of this case are totally different from the facts of the case cited supra and therefore the above said observation of the Division Bench is not applicable to the facts of this case."

18. This Court held that only when the execution of the Will is denied by a party, then the burden is on the party who relied upon the Will to prove the execution of the same. When the execution is not denied, it is unnecessary to compel the person who relies upon the document to let in evidence to establish the execution, since the admitted facts need not be proved.

19. In the case on hand, PW.1 and PW.2 categorically admitted the execution of the Will and the averments of the Will. After the Will executed by their father, they compelled their father to change the Will according to their wish. It is also proved from the letters written by the plaintiffs which were marked as Ex.P1, Ex.P2, Ex.P3, Ex.P5 & Ex.P6. Therefore, the Courts below rightly held that the plaintiffs are not entitled to any share from the suit property.

20. In view of the above discussion, this Court does not find any valid reason to interfere with the findings rendered by the Courts below as such the Courts below have analysed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons, concluded rightly by upholding the case of the first defendant. Accordingly, this Court is of the considered opinion that no substantial questions of law involved in this appeal. Be that as it may. All the substantial questions of law, formulated by this Court in this Second Appeal, are answered in favour of the defendants and against the plaintiffs.

21. In fine, this Second Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

Pns

To:-

1. The Principal District Judge,
Nagapattinam.
2. The Principal Subordinate Judge,
Mayiladuthurai.
3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

+1cc to Mr.A.Muthu Kumar, Advocate, S.R.No.17099
+1cc to Mr.S.Gopalaratnam, Advocate, S.R.No.17671

S.A.No.823 of 2002

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