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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.02.2021

PRONOUNCED ON : 15.02.2021

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No. 529 of 2008 &

M.P. No.1 of 2008

1. Edward (died)
S/o. Anandhanatham Pillai
...1st Appellant/Appellant/1st Defendant

2. Rajathi @ Victoria Rajathi
W/o. Simon Jean
...2nd Appellant/LR of the 1st Appellant

2nd appellant brought on record as LR of the
deceased sole appellant vide order of Court
dated 22.04.2019 in CMP No.20364/17 to
20366/17 in S.A.No.529/2008

Vs.

1. Sheelakumari
W/o. Sathiyamoorthy
...1st Respondent/2nd Respondent/Plaintiff

2. Elisabeth
W/o. Thiriyathan
...2nd Respondent/3rd Respondent/2nd Defendant

Prayer: Second Appeal filed under Section 100 of CPC, 1908
against the judgment and decree of Additional Sub Court,
Mayiladuthurai, dated 03.04.2006 made in A.S. No.6/2005
modifying judgment and decree of District Munsif Court, Sirkali
dated 26.02.2004 made in O.S. No.168/1997.

For Appellant : Mr. S. Sounthar

For Respondents

For R1 : Mr. Sarath Chandran
for M/s. KM Vijayan Associates

R2 died. Exempted from bringing LRs of R2 vide order dated
22.04.2019.



JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 03.04.2006 passed in AS No.6 Of 2005 on the file of the Additional Subordinate Court, Myladuthurai, modifying the judgment and decree dated 26.02.2004 passed in O.S. No.168 of 1997 on the file of the District Munsif Court, Sirkali.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. The first defendant in OS.No.168 of 1997 is the appellant in the Second Appeal.

4. Suit for partition.

5. Briefly stated, the case of the plaintiffs, in brief, is that the deceased first plaintiff is the brother of the defendant and the suit property belongs to the deceased first plaintiff's mother, namely, Rajammal, by way of the sale deed dated 30.11.1955, and Rajammal had three sons, namely, the deceased first plaintiff, Thairiyam and A. Edward, the first defendant. Rajammal's husband died long back and Rajammal died on 01.08.1976 leaving her three sons as her legal heirs. Thairiam died on 19.06.1997 without any issue. Hence, the deceased first plaintiff and the defendant become entitled to each 1/2 share in the suit property. The defendant is in the possession and enjoyment of the suit property on his behalf and on behalf of the deceased first plaintiff as co-owner. Hence, the deceased first plaintiff is deemed to be in the joint possession of the suit property. The defendant attempted to alienate the suit property without the consent of the deceased first plaintiff and hence the deceased first plaintiff issued a legal notice on 09.07.1997 calling upon the defendant to effect the partition and allot the due share to the deceased first plaintiff. The defendant, having received the notice, neither responded to the same nor complied with the demand therein. During the pendency of the suit, the first plaintiff died and by virtue of the registered Will executed by him dated 27.11.1997 in favour of the second plaintiff, the second plaintiff has been added as a party in the suit. During the pendency of the suit, the second defendant got impleaded herself as a party in the proceeding and accordingly prays for the grant of relief claimed in the plaint.

6. The first defendant resisted the plaintiff's suit contending that the plaintiff's suit is not maintainable either in law or on facts and admitted that the suit property belongs to Rajammal by virtue of the sale deed as put forth in the plaint and also admitted that Rajammal's husband died long back



and also further admitted that his brother Thairiyam had also died. According to the defendant, it is only Rajammal, who had brought up her children out of the income derived by her as mid-wife and the first plaintiff and the deceased brother Thairiyam, after securing employment severed their relationship with their mother, namely, Rajammal, and the defendant, and the first plaintiff was working in the police department at several places and therefore, the relationship between the first plaintiff and Rajammal was not cordial and it is only the defendant who has been looking after the mother Rajammal by providing her all the needs and Rajammal had bequeathed the suit property to the defendant by way of the Will and the Will had been written by Rajammal herself and it is a holograph Will and based on the Will, the defendant has renovated the existing superstructure in the suit property and put up the new construction and residing there with his family and therefore, the claim of the plaintiff that he is in the joint possession and enjoyment of the suit property is false. The first plaintiff had never resided in the suit property and cannot claim any share in the suit property and the plaintiff has no cause of action to lay the suit and the suit is liable to be dismissed.

7. The second defendant resisted the plaintiff's suit contending that the suit property originally belonged to Rajammal and she died leaving behind the first plaintiff, the first defendant and the husband of the second defendant as the legal heirs and the second defendant and Thairianathan married on 20.01.1971 and as the legal heir of the deceased Thairianathan, the second defendant is entitled to secure 1/3 share in the suit property. The claim of the plaintiff that he and the first defendant are entitled to each 1/2 share in the suit property is unsustainable in law. The Will dated 27.11.1997 in favour of the second plaintiff has been fabricated and at the time of execution of the abovesaid Will, the first plaintiff was not in a sound state of mind and therefore, the second plaintiff cannot lay any claim of share of the first plaintiff based on the abovesaid Will as the co-owner and the second defendant is entitled to obtain 1/3 share in the suit property and accordingly prays to dispose of the suit by allotting the due share of the second defendant.

8. In support of the plaintiffs' case P.Ws.1 to 4 were examined and Exs.A1 to A6 were marked. On the side of the defendants D.Ws.1 to 4 were examined and Exs.B1 to B15 were marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions put forth in the matter, the trial court was pleased to declare that the second plaintiff is entitled to 5/12 share and the second



defendant is entitled to 1/6 share in the suit property and accordingly granted the preliminary decree in favour of the plaintiff. Impugning the judgment and decree of the trial court, the first appeal has been preferred by the first defendant and the first appellate court, on a appreciation of the materials placed on record and the submissions projected by the respective parties, was pleased to modify the judgment and decree of the trial court by declaring that the second plaintiff and the second defendant are each entitled to 1/3 share in the suit property and challenging the judgment and decree of the courts below the first defendant has preferred the second appeal.

10. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

- 1) Whether the judgment of lower appellate court is liable to be set aside in its increasing the share of second respondent from 1/6 to 1/3 even without an appeal by her?
- 2) Whether the judgment of lower appellate court is vitiated by misreading of pleadings in its stating that the appellant had not spoken about Will in his written statement?
- 3) Whether the courts below are justified in rejecting the holograph Will after giving a finding that same appears to be written by the testator herself without inducement by third parties?

11. It is not in dispute that the suit property originally belonged to Rajammal, the mother of the first plaintiff, the first defendant and the husband of the second defendant. On that premise, the suit has come to be laid by the deceased first plaintiff originally against the first defendant alone for partition. Pending suit, the deceased first plaintiff having died, based on the Will executed by him dated 27.11.1997, the second plaintiff has been added as a party. The second plaintiff is continuing the suit further. It is also noted that the second defendant got herself impleated in the suit by filing an application claiming that she is the wife of Thairiam, the son of Rajammal. Thus it is found that the suit property admittedly being the property of Rajammal and when the parties are not at issue on that point, according to the plaintiff, as one of the legal heirs of the deceased Rajammal, she is entitled obtain her due share in the suit property. The second defendant would also claim that she is also entitled to equal share in the suit property as the legal heir of her husband. It is found that the first defendant has contested the plaintiff's case as well as the claim of the second defendant seeking share in the suit property on the footing that Rajammal had bequeathed the



suit property in his favour by way of the Will written by herself in the presence of the witnesses and therefore, according to the first defendant, based on the abovesaid Will, it is only the first defendant, who had acquired absolute right over the suit property and also renovated the superstructure put up in the suit property and enjoying the same with his family and accordingly contended that neither the first plaintiff nor the second defendant is entitled to claim any share in the suit property.

12. The Will propounded by the first defendant dated 15.03.1973 has been marked as Ex.B3. Inasmuch as the contesting parties are challenging the truth and validity of the abovesaid Will, the first defendant being the propounder of the Will Ex.B3, it is found that the first defendant is bound to establish the authenticity and validity of the abovesaid Will as required by law. To sustain his case qua Ex.B3 Will, the first defendant has examined the attestors of the said Will as D.Ws.2 and 3.

13. According to the first defendant, neither the deceased first plaintiff nor Thairiam had any connection with Rajammal after their marriage and they had left the family and it is only the first defendant who had been looking after the needs of Rajammal, accordingly, Rajammal had bequeathed the suit property in his favour by way Ex.B3 Will. It is also noted that the first defendant has remained unmarried. It is further noted that it is only the first defendant who has been in the possession and enjoyment of the suit property. Now according to the first defendant, Ex.B3 Will has been written by Rajammal in her own handwriting and the same has been attested by the witnesses and based on the said Will, the suit property is only in his exclusive possession and enjoyment. The first defendant, during the course of cross examination, would state that at the time of execution of the Will, he was not present and he came to know about the Will only during 1998. Be that as it may, inasmuch as the first defendant has propounded Ex.B3 Will and put up the case based on the same that, the plaintiff and the second defendant are not entitled to claim any share in the suit property, it is for the first defendant to establish the truth and validity of Ex.B3 Will as pointed out supra. In this connection, the attesor, Victoria Rajathi of Ex.B3 Will examined as D.W.2 has deposed that she knew the parties of the suit and it is only Rajammal who had been looking after her children and further testified that the deceased first plaintiff, after securing the job in the police department and after his marriage, had been residing elsewhere and there has been no cordial relationship between the deceased first plaintiff and Rajammal and Thairiam joined in the military service and he had also left abroad after marriage and it is



only the first defendant, who had remained unmarried, was living with his mother and further deposed that the deceased Rajammal bequeathed the suit property in favour of the first defendant by way of the Will dated 15.03.1973, which has been written by Rajammal herself and Rajammal had read over the contents of the said Will to her and the other witness, namely, Ramalingam, the family friend and both had attested the said Will and Ramalingam had attested first and she had attested next and based on the Will, it is only the first defendant who had renovated the superstructure put up in the property and it is only the first defendant who had been enjoying the suit property. Despite cross examination, nothing has been culled out from D.W.2 to disbelieve her evidence with reference to the execution of the Will by Rajammal marked as Ex.B3 and the attestation of the same by D.W.2 and another witness in the presence of the testatrix and even during the course of cross examination, D.W.2 would reiterate that Rajammal had written the Will when she and the other witness were present in the house and the Will was written in the afternoon and she had written the Will in three pages and she had attested the Will in the last page and she and the family friend were present at the time of execution of the Will and also would state that the first defendant was present and she and the other attestor had read the contents of the Will and after the same, Rajammal had kept the Will in her custody and the Will was executed on 15.03.1973 and she does not see any difference in the signature of Rajammal in the Will and therefore, considering the evidence of D.W.2, as adduced by her, both in the chief examination and during the course of cross examination, it is seen that D.W.2 has clearly averred that it is only Rajammal, who had executed Ex.B3 Will in her own handwriting and D.W.2 and Ramalingam had attested the said Will in the presence of Rajammal after reading the contents of the same and thereafter, Rajammal had kept the Will in her custody.

14. Similarly, D.W.3, Ramalingam, the other attestor of Ex.B3 Will, has also testified that the relationship between Rajammal and the first plaintiff was not smooth and cordial owing to the fact that the deceased first plaintiff was residing with his family elsewhere after securing the police job and not living with his mother and also deposed that the second son joined in the military and after marriage left to America and it is only the first defendant who has been residing in the suit property without marriage and Rajammal had bequeathed the suit property in favour of the first defendant by way of the Will written by herself on 15.03.1973 and as the family friend, she read over the contents of the Will to him as well as to the other attestor, namely, Victoria Rajathi (D.W.2), they, after reading the contents of the Will, attested the same and it is he who had attested first and Victoria Rajathi attested next and



based on the Will, the first defendant had renovated the superstructure in the suit property and enjoying the same. The evidence of D.W.3 has not been shattered by the contesting parties during the course of cross examination and even during the course of cross examination, D.W.3 has stated that it is only Rajammal, who had written Ex.B3 Will in her own handwriting and she had written without seeing any documents and does not remember in how many sheets she has written the Will and that he and D.W.2 had attested the will and at that point of time even the first defendant was present and therefore it is noted that D.W.3 was also firm in the fact that it is only Rajammal, who had written Ex.B3 Will and after apprising the same to the attestors and the attestors after reading the contents of the Will, had attested the Will in the presence of the testatrix.

15. Thus, from the evidence of D.Ws.2 and 3, it is noted that the first defendant has established the truth and validity of Ex.B3 Will as required by law. He has examined both the attestors to the Will and when the evidence of the attestors are found to be acceptable, inspiring and trustworthy and their evidence not being shown to be unreliable during the course of cross examination, in such view of the matter, the courts below are found to be not justified in not accepting the evidence of D.Ws. 2 and 3. The courts below had chosen to disregard D.W.2 on the footing that she is an interested witness i.e. according to the courts below inasmuch as D.W.2 has deposed that the first defendant had bequeathed the suit property in her favour and on that premise, according to the courts below, she had chosen to depose in favour of the first defendant. However, the Will executed by the first defendant in favour of D.W.2 qua the suit property was executed much later to Ex.B3 Will. At the time of the execution of the Ex.B3 Will, D.W.2 had no claim of interest over the suit property. It is seen that D.W.2 is the sister's daughter of Rajammal and therefore, she being the relative, naturally Rajammal would have called upon D.W.2 to be present at the time of execution of Ex.B3 Will and accordingly had also requested her to attest the Will after apprising the contents of the same. The mere fact that D.W.2 would claim right to the suit property based on the subsequent Will executed in her favour by the first defendant, that by itself, would not lead to the conclusion that she has the motive to depose in favour of the first defendant's case. When the evidence of D.W.2 is found to be natural and cogent and wholly acceptable, the abovesaid reason given by the courts below for discarding her evidence is unacceptable as such and cannot be countenanced in any manner and therefore, the contention of the first defendant's counsel that the reasonings assigned by the courts below for dumping the evidence of D.W.2 as an interested witness is found to be totally perverse and illogical.



16. The courts below had also failed to accept the evidence of D.W.3 on the footing that he is a family friend, therefore, his evidence cannot be relied upon. As rightly contended by the first defendant's counsel, normally, only the relatives and the family friends of the testatrix would be solicited to attest the will and accordingly when the fact that D.W.3 is the family friend of Rajammal not having been disputed by the contesting parties, it is but natural that Rajammal would have solicited D.W.3's presence at the time of the execution of Ex.B3 Will. In such view of the matter, merely because D.W.3 is the family friend, on that premise, the determination of the courts below to disbelieve his evidence, as such, cannot be accepted in any manner. Therefore, as rightly contended by the first defendant's counsel, the reasons assigned by the courts below for rejecting the evidence of D.W.3 are also found to be totally unacceptable and being perverse and illogical.

17. The first defendant's counsel contended that, insofar as the holograph Will is concerned, there is a greater presumption that the Will has been written by the testatrix herself in the normal course and therefore, the propounder of the Will is only required to formally prove the Will for which very little evidence is required and only for repudiating the said presumption, clear and cogent evidence is required to be adduced by the contesting parties. In this connection, he placed reliance upon the decision of the Apex Court reported in (1996) 9 Supreme Court Cases 324 - Joyce Primorse Prestor (Mrs) (Nee Vas) v. Vera Marie Vas (Ms) and others and the Apex Court in the abovesaid decision has outlined the presumption which could be taken qua the holograph Will written by the testatrix herself and the propounder is only required to formally prove the Will and there is no necessity for adducing evidence as required to be given for the proof of ordinary Will and the position of law has been outlined by the Apex Court in the abovesaid decision as follows:

Succession Act, 1925 - Ss. 61 and 63 - Genuineness of Will - Onus of proof on propounder - Holograph will - Will written by testatrix herself - Greater presumption of the Will being regularly executed arises - Thereafter propounder only required to formally prove the Will for which very little evidence is required - For rebuttal of the presumption cogent evidence is required - Court has to look to the nature of the Will, pleadings of the parties, facts admitted or proved and the presumption available - Genuineness of the Will question of fact depending upon appreciation of evidence - Due weight should be given to trial court's findings - Prosecutrix bequeathing her properties to her daughters but not to her husband who was aged 80 years and was having his own



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properties nor to her only son who was well settled in USA since long - Will executed only a few days prior to a simple surgical operation undertaken by the testatrix and she died four years thereafter - Witnesses deposing that testatrix was in sound state of mind at the time of execution of the Will - Due and proper attestation of the Will in accordance with S.63 proved - Attestors of the Will though not relations of the testatrix but well known to her - Propounder not present at the time of signing of the Will - On the basis of these findings trial court having held that there were no suspicious circumstances or undue influence, held, High Court was justified in reversing the findings by re appreciating the entire evidence, scanning minute particulars and substituting its own impressions and inferences - Evidence Act, 1872, S.68 - Will Holograph Will - Proof of - Presumption of regularity in favour of - Words and phrases - "Holograph Will"

Held:

A "holograph Will" is one which is wholly in the handwriting of the testator, while there is a presumption of regularity and due execution of a Will, in the case of "holograph Wills", the presumption is all the more - a greater presumption. The case of a holograph Will is a special case which will require a difference approach in considering the evidence in the case, to find whether the Will has been duly executed and attested. The approach to be made in such cases has been stated by the Constitution Bench in Shashi Kumar Banerjee Case. In applying the principles laid down therein to particular cases, the nature of the Will, the pleadings of the parties in the case, facts admitted or proved and the presumptions available in law, will have to be carefully given effect to. It is in this background, the evidence in the case including that of the attesting witnesses should have been examined and what was required was only to formally prove the Will, and very little evidence to prove due execution and attestation of the Will, was alone called for.

Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529, followed Ajit Chandra Majumdar v. Akhil Chandra Majumdar, AIR 1960 Cal 551 : 64 CWN 576.

...

15. While the presumption in the case of ordinary Wills is as stated above, in the case of "holograph Wills", the presumption is all the more - a greater presumption. Ex.P-1 is a "holograph Will". It is one which is wholly in the handwriting of the testator. The



Calcutta High Court in Ajit Chandra Majumdar v. Akil Chandra Majumdar (AIR Cal at p.552) stated about such a Will, thus:

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"The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of a holograph Will for the very good reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph Will than where his signature alone appears to either a typed script or to a script written by somebody else."

The writing of the Will and signature of the testator are admitted. There is also due and proper attestation in accordance with the relevant statutory provisions. No suspicious circumstance appears on the face of the document, Ex.P1. The Will appears to be moderate and rational. Viewed from the above angle, there is a great presumption - even bordering on actual proof of the due execution and attestation of the Will.

...

18. In applying the above general principles to particular cases, the nature of the Will, the pleadings of the parties in the case, facts admitted or proved and the presumptions available in law, will have to be carefully given effect to. The case of a "holograph Will" which is admittedly in the handwriting of the testator, is a special case which will require a different approach in considering the evidence in the case, to find whether the Will has been duly executed and attested. The approach to be made in such cases has been stated by the Constitution Bench in Shashi Kumar Banerjee case, at p. 532 paragraph (5). In that case, the court referred to certain undisputed preliminary facts as follows: The testator, a well known wealthy lawyer, who died at the age of 97, had executed a Will when he was 93 years' old. he had made provision for his heirs by executing a number of documents, and the Will referred to the remaining property. The Will was witnessed by two persons. The entire Will was in the handwriting of the testator, corrected in various places and the corrections were initialled by him. It was admitted that the signature at the bottom of the Will was of the testator. The dispositions were very clear and detailed and it could not be said to be an unnatural document. There was no evidence to show that the propounders took any part in the execution of the Will. After stating these preliminary facts, the Court stated



the approach to be made in the case of a "holograph Will", thus:

"Further the fact that the Will is a holograph Will and admittedly in the hand of the testator and in the last paragraph of the Will the testator had stated that he had signed the Will in the presence of each other raise strong presumption of its regularity and of its being duly executed and attested. On these facts there is hardly any suspicious circumstance attached to this Will and it will in our opinion require very little evidence to prove due execution and attestation of the Will. There is no doubt about the genuineness of the signature of the testator, for it is admitted that the signature at the foot of the Will is his. The condition of the testator's mind is also not in doubt and he apparently had full testamentary capacity right upto March 1947, even though he was an old man of about 97 when he died on 1.4.1947. There is nothing to show that the dispositions were not the result of the free will and mind of the testator. Further, the propounders (namely, the appellants) had nothing to do with the execution of the Will and thus there are really no suspicious circumstances at all in this case. All that was required was to formally prove it, though the signature of the testator was admitted and it was also admitted that the whole Will was in his handwriting. It is in the background of these circumstances that we have to consider the evidence of the two attesting witnesses.."

....

20. We are afraid that the High Court failed to give effect to the strong presumption of regularity and due execution and attestation of the holograph Will, in the instant case. Admittedly, the Will, Ex.P1, is in the handwriting of the testator, as spoken to by the 3rd defendant herself. The facts in this case in a great measure conform to the broad facts and circumstances detailed in the case of "holograph Will" in Shashi Kumar Banerjee case. In this case the 3rd defendant admitted in cross examination that her mother, Mrs. Vas "was active till the last" and that "she used to go to Mass every morning". She further stated that the Will "is in the handwriting of the testator". She stated, "I see Ext. P-1. This is the Will. It is entirely in my mother's handwriting. I am fully acquainted with her handwriting. Ext. P-1(a) is the signature of my mother.". The evidence of P.W.1, one of the attestors,



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is categoric that the Will was attested by her and a co-attestor in the presence of the testatrix and that the testatrix was in a sound state of mind at the time of execution of the Will. DW 3, advocate by profession, stated - "I am acquainted with the signature and writing of Mrs. Vas (testator). I see the Will Ext.P1. The writing in Ext. P-1 as well as the signature are of Mrs.Vas." PW 1 stated that the propounder (the plaintiff) was not present when Ex.P1, the Will, was signed and executed. By Ex.P1, all daughters have been given equal shares and the document cannot be said to be unnatural. In these circumstances, a strong or high degree of presumption of the regularity and of due execution and attestation of the Will arose. As stated by this Court in Shashi Kumar Banerjee case, it is in this background, the evidence in the case including that of the attesting witnesses should have been examined and what was required was only to formally prove the Will, and very little evidence to prove due execution and attestation of the Will, was alone called for. The High Court totally ignored the above vital aspects. On the other hand, the High Court opined that the facts of this case are entirely different from those of Shashi Kumar Banerjee case and the unique features should be scanned, in great detail. In the process, the High Court re-appreciated the entire evidence, through a microscope, as it were, and indulged in surmises and conjectures."

The abovesaid position of law relating to holograph Will as outlined by the Apex Court has also been followed by our High Court in the decision reported in 2008 4 CTC 299 (C. Ananda Sundaraman v. C. Thirupurasundari) wherein it has been held that presumption in favour of the Will is greater when it is holograph Will and influence by itself is not undue influence and undue influence must be pleaded and proved by evidence on the side of the party raising such a plea. The position of law has been outlined in the abovesaid decision as follows:

Will - Holograph Will - Genuineness of - Presumption in favour of holograph Will greater.

Indian Succession Act, 1925, (39 of 1925) - Wills - Holograph Will challenged on ground of undue influence and suspicious circumstances - Initial onus is on propounder to prove true execution and attestation of document and expel any suspicious circumstances brought forth by objector - Presumption in favour of Will greater when it is a holograph Will - Influence by itself is not undue influence - Undue influence must be pleaded and proved by evidence on side of party raising such plea.



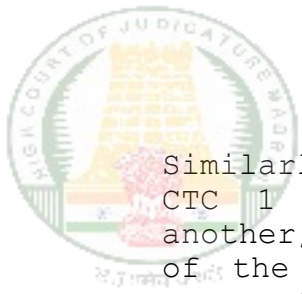
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Will of the mother challenged by son. Beneficiary is daughter. The Will is a holograph Will. The Will was challenged on the ground that the daughter exercised undue influence over the mother and there are strong suspicious circumstances like only son being disinherited when he was looking after the mother and that there are no reasons for such disinheritance. The Will was attested by two witnesses and one of them is examined to prove the Will. An advocate related to both parties was also examined. Learned Single Judge granted Letters of Administration holding that the Will stood proved.

Held, on Appeal, at the outset, the Court has to point out that the Court of testamentary jurisdiction is not the Court of suspicion, but the Court of conscience. If any circumstance is viewed with suspicion, it may look like a suspicious circumstance. In the instant case, the learned counsel for the appellant took the Court to the evidence of P.Ws.2 and 3 and pointed out the discrepancies found therein. But, after analysing the evidence, the court is of the considered opinion that those circumstance cannot be termed as suspicious circumstance at all. It is a well settled law that in a given case where the testament is brought forth for probate or Letters of Administration, the initial onus is on the propounder to prove the true execution and attestation of the document and if any suspicious circumstance is brought forth to the notice of the Court by the objector, it is available for the propounder to expel those circumstances.

Held further, Plaintiff has proved the truth, genuineness, execution and attestation of the Will and it has got to be upheld. The circumstances brought to the notice of the Court, though attractive and looked as suspicious circumstances, cannot be termed as suspicious circumstances. No interference warranted in Appeal.

- (i) B. Vengatamuni Vs.C.J.Ayothya Ram Singh, 2007 (2) LW 870
- (ii) Thankam alias Karthiyani Vss. C.Madhavan, 1999 (2) MLJ 634
- (iii) Shashi Kumar Vs. Subodh Kumar Banerjee, AIR 1964 SC 529
- (iv) Joyce Primrose Prestor (Vee Vas) Vs. Miss Vera Marie Vas, 1996 (2) CTC 315 Relied on
- (v) Savithri Vs. Karthiyayani Amma, 2008 (1) LW 255.



Similarly in the subsequent decision reported in 2009 (4) CTC 1 - Dr. Lodd Surendardas v. Lodd Narendradas and another, the Division Bench after relying upon the decision of the Apex Court referred to supra, has held that the presumption is greater in favour of genuineness of the Will when the same is holograph Will and the position of law has been outlined in the decision with reference to the same as follows:

Indian Succession Act, 1925 (39 of 1925), Sections 63 & 68 - Law of Wills - Holograph Will - Presumption greater in favour of genuineness of Will - Entire Will in handwriting of Testator - Firm and clear - Over-writings found can be attributed only to age of Testator and does not go against genuineness of Will.

The Will of 'LB' was sought to be probated. One of the sons contested the proceedings by filling a caveat. The suit was decreed and probate granted after the Learned Single Judge found that the Will was genuine. The same was challenged by the defendant in OSA on the same grounds raised in the written statement filed before the Single Judge in the Suit.

Held: The Will Ex.P1 is in the handwriting of the Testator of Lodd Balamukundas. One of the Attesting Witness, a practising lawyer of this Court P.W.3 has categorically deposed that Ex.P.1 the testament was executed by the Testator in his presence. It is pertinent to state here that neither the handwriting nor the signature of the Testator is disputed by the defendant. It is settled principle of law that in the case of holographic Will, presumption is all the more greater in favour of the genuineness of the Will. Useful reference can be had to the decision of the Apex Court in the case of Joyce Primrose Prestor v. Vera Narue Vas, 1996(2) CTC 315 (SC): 1996 (9) SCC 324. In the present case, the whole of the Will is in the handwriting of the testator. The handwriting of the Testator is clear and firm, though there are certain over-writings found in almost all the lines, which cannot be attributed to any other presumption, but to the age of the Testator and definitely not against the genuineness of the Will.

Cases referred

Indu Bala Bose v. Manindra Chandra Bose, 1982 (1) SCC 20
Joyce Primrose Prestor v. Vera Narue Vas, 1996 (2) CTC 315 (SC)
Savithri v. Karthyayani Amma, 2007 (11) SCC 621.



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Considering the abovesaid factors in toto, particularly, the position of law as regards the greater presumption which could be taken qua the holograph Will and despite the abovesaid principles of law, the first defendant being the propounder of the Will in question, when he has established the truth and validity of Ex.B3 Will by examining both the attestors to the same and the evidence of the attestors, namely, D.Ws.2 and 3 are found to be satisfactory, cogent and trustworthy in all aspects and their evidence had not been in any manner discredited or shown to be unacceptable by the contesting parties during the cross examination of the abovesaid witnesses, in such view of the matter, the courts below are found to have totally erred in rejecting their evidence as being the interested witnesses, particularly ignoring the fact that when the documents are endeavoured to be made amongst the family members such as Will, partition deed, etc., only the relatives and family friends would be solicited to stand as witnesses and accordingly when D.Ws.2 and 3 are found to be the relative and the family friend of the testatrix, it is but natural that the testatrix had solicited their presence at the time of the execution of Ex.B3 Will and requested them to stand as witnesses to the said Will and accordingly it is found that both D.Ws.2 and 3 have tendered evidence with reference to the said Will naturally and satisfactorily and therefore the reasonings of the courts below for rejecting the evidence of D.Ws.2 and 3 do not meriting acceptance in any manner and in such view of the matter, it is found that based on the evidence of D.Ws.2 and 3, the first defendant has established the truth and validity of Ex.B3 Will.

18. According to the courts below, though the first defendant would depose that he was not present at the time of the execution of Ex.B3 Will, on the other hand, D.Ws.2 and 3 have deposed that the first defendant was present at the time of Ex.B3 Will and therefore, according to the courts below, on that premise, the Will in question, namely, Ex.B3 could not be accepted. In other words, the courts below had endeavoured to determine that due to the presence of the first defendant at the time of execution of Ex.B3 Will, there would have been every element of the first defendant having influenced the testatrix in executing the Will in his favour. However, the abovesaid approach of the courts below is found to be totally unacceptable. Other than stating that the first defendant was present at the time of execution of Ex.B3 Will, nothing has been deposed by D.Ws.2 and 3 that the first defendant had tended to influence the testatrix in any manner to execute the Will in question in his favour one way or the other. When it is noted that Ex.B3 Will had been written by the testatrix herself in her own handwriting and when as above pointed out, it is only the first defendant who had been residing with his mother and looking after her needs and the other sons of the testatrix had



abandoned her and having severed their relationship with the testatrix and not having any contact with the testatrix in any manner, it is but natural that when the testatrix had chosen to execute the Will in the house, the first defendant would have been present at that point of time. Merely because the first defendant had deposed that he was not present during the course of evidence, that by itself, would not lead to the conclusion that he would have influenced the testatrix in executing the Will in his favour. Similarly, merely because D.Ws. 2 and 3 have testified that the first defendant, the beneficiary, was present at the time of the execution of the Will, it cannot be held that the Will is surrounded by suspicious circumstances and the first defendant would have exercised undue influence, coercion or fraud on the testatrix in the execution of the Will in question. The mere presence of the beneficiary at the time of the execution of the Will, by itself, would not be a factor to hold that the Will in question is shrouded with suspicious circumstances as sought to be projected by the contesting parties and in such view of the matter, from the mere presence of the first defendant, it cannot be held that he had played a prominent role in the execution of the Will in question and when from the evidence of D.Ws.2 and 3, as above pointed out, it is only the testatrix who had executed the Will on her own in her own handwriting out of her volition and willingness without any influence, pressure or coercion and when the testators had also chosen to attest the same after reading the contents of the Will, all put together, it is seen that the Will in question, namely, Ex.B3 is a genuine document and the same has been duly proved by the first defendant.

19. With reference to the position of law that the mere presence of the beneficiary at the time of execution of the Will or at the time of registration of the Will in question would not make out the case of suspicious circumstances, such as, undue influence, coercion or fraud, the same has been outlined by the Apex Court in the decision reported in (2005) 8 Supreme Court Cases 67 (Pentakota Satyanarayana and others v. Pentakota Seetharatnam and others)

Will - Onus to prove and manner of proving - Held, initial onus is on the propounder to prove execution of the Will - Thereafter it shifts to the party alleging undue influence or coercion in execution of the Will to establish its case - The onus on the propounder can be discharged on adducing satisfactory evidence that the Will was signed by the testator who was at that time in a sound and disposing state of mind, that he understood the nature and effect of the disposition and signed of his own free will - Admission of the executor that he had executed the Will and got it registered, held, could not



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be easily brushed aside - On facts held, the initial onus was discharged by the propounders and then onus shifted to the contestants - The mere fact that the beneficiaries under the Will had actively participated in the execution thereof, or that natural heirs were debarred thereby, or that the testator had a draft Will with him while going to the scribe or that he was at that time accompanied by a number of persons or that one of the beneficiaries was present at the time of registration, held, could not make out a case of suspicious circumstance, undue influence, coercion or fraud - Further held, mere presence at the time of registration does not amount to playing a prominent part - Hence, the Will, held, genuine and proved - Evidence Act, 1872, Ss.68 and 114 - Succession Act, 1925, S.63 - Words and phrases - "execution".

Held:

Since the appellants are the propounders of the Will, the initial onus will be on them to prove execution of the Will. Thereafter, the onus would shift to the respondents. They have to establish their case of undue influence or coercion. Then the onus would shift to the appellants to remove the suspicious circumstances, if any. In the instant case, the Will has been duly proved and the High Court and the lower court in their discussion have even held so. It has also been held that the testator was hale and hearty and in a sound state of mind. The Will is a registered Will. The attester and the scribe have been examined to prove the Will. The statement made by P in the written statement is one of the most important factors which authenticates the genuineness of the Will. No evidence has been led in by the respondents to show the exercise of any fraud or undue influence at the time of execution of the Will. No evidence was adduced to show that the testator was not in sound state of mind and in fact, the finding is that he was of sound mind. Thus, the evidence adduced by the appellant propounder is sufficient to satisfy the conscience of the court of law that the Will was duly executed by the testator.

The finding recorded by the High Court and the trial court with regard to the alleged suspicious circumstances are not only contrary to the facts on record but also overlooked the law governing the aspects of proof of Will. Section 68 of the Evidence Act, 1872 deals with proof of execution of document required by law to be attested. Execution consists in signing a document written out, read over and understood and to go through the formalities necessary for the validity of legal act.



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In the instant case, the propounders were called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing State of mind, that he understood the nature and effect of the dispositions and put his signature on the document of his own free will. In other words, the onus on the propounders can be taken to be discharged on proof of the said essential facts.

In the instant case, there was unequivocal admission of the Will in the written statement filed by P in the suits filed by S and K. He has also described the appellants as his sons and A as his wife. Such admissions cannot be easily brushed aside. However, the testator could not be examined as he was not alive at the time of trial. All the witnesses deposed that they had signed as identifying witnesses and that the testator was in sound disposition of mind. Thus, the appellants have discharged their burden and established that the Will in question was executed by P and that the same was his last Will. It is true that registration of the Will does not dispense with the need of proving, execution and attestation of a document which is required by law to be proved in the manner provided in Section 68 of the Evidence Act. The Registrar has made the following particulars on the Will which was admitted to registration, namely, the date, hour and place of presentation of the document for registration, the signature of the person admitting the execution of the Will and the signatures of the identifying witnesses. The document also contains the signatures of the attesting witnesses and the scribe. Such particulars are required to be endorsed by the Registrar along with his signature and date of document. A presumption by a reference to Section 114 of the Evidence Act shall arise to the effect that particulars contained in the endorsement of registration were regularly and duly performed and are correctly recorded. Therefore, the burden of proof to prove the Will has been duly and satisfactorily discharged by the appellants. In such circumstances, the onus shifts to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same.

Even in case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not



sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will.

Sridevi v. Jayaraja Shetty, (2005) 2 SCC 784, relied on

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The circumstances of depriving the natural heirs should not raise any suspicion because the whole idea behind the execution of the Will is to interfere in the normal line of succession and so natural heirs would be debarred in every case of the Will. it may be that in some cases they are fully debarred and some cases partly..

Uma Devi Nambiar v. T.C. Sidhan, (2004) 2 SCC 321, relied on

The High Court has only gone by the exclusion of K in the Will and the bequeathal of a major portion to the appellant. That is legally no ground to negate the Will. Further, once the Will is duly proved, the Will has to be given effect to. In the present case P, the testator and A were living together as man and wife. Therefore, nothing was wrong if the Will referred to A as wife of the testator. Similarly, the testator has referred to the appellants as his children in the Will. The very same stand has been maintained in the written statement filed by P.

It is quite natural for the testator to have a first draft Will in the pocket when he goes to a document writer. The trial court has made much about the draft Will aspect. That was hardly a circumstance. One of the defence witnesses said that four male persons had accompanied the testator. That was hardly a suspicious circumstance.

Even if Appellant 1, one of the beneficiary sons from the second wife, was present at the time of registration by mere fact that no case of undue influence, coercion or fraud is made out to negate the Will. Moreover, mere presence does not mean that a prominent part was played.

Therefore, it is held that the Will was a genuine document and was duly proved by the appellants.

Thakur Gokalchand v. Parvin Kumari, 1952 SCR 825;
AIR 1952 SC 231; Badri Prasad v.Dy. Director of
Consolidation, (1978) 3 SCC 527; S.P.S
Balasubramanyam v. Suruttayan, (1994) 1 SCC 460;



Sobha Hymavathi Devi v. Setti Gangadhara Swamy, (2005) 2 SCC 244; Srinivas Ram Kumar v. Mahabir Prasad, 1951 SCR 277: AIR 1951 SC 177; Tulsidas Khimji v. Workmen, (1963) 1 SCR 675: AIR 1963 SC 1007, referred to

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Considering the abovesaid principles of law outlined by the Apex Court, when it is seen that when even if there be active participation in the execution of the Will by the propounder/beneficiary, in such cases also, the same cannot by itself create any doubt either about the testamentary capacity of the testatrix or the genuineness of the Will and further it is also seen that the mere fact that the testatrix had chosen to bequeath the whole of her property in favour of the first defendant ignoring her other two sons, when from the evidence adduced in the matter considering the relationship between the testatrix and the other two sons and when her other two sons had completely abandoned her and it is only the first defendant who had been looking after her needs and welfare, it is but natural that the testatrix had chosen to bequeath the suit property belonging to her exclusively to the first defendant and therefore, the mere fact that the other two sons of the testatrix had been excluded from acquiring the suit property, that by itself, would not lead to the conclusion that Ex.B3 Will is shrouded with mystery or the same is executed under the suspicious circumstances and liable to be disbelieved. When the attestors of Ex.B3 Will had clearly explained that her other two sons were not having any contact or relationship with her after their marriage and employment in any manner and it is only the first defendant who had been looking after her and he also remaining unmarried, accordingly, the same also had been clearly recited in the Will by the testatrix and so she has decided not to bequeath any property to them under the Will and resultantly chosen to bequeath the suit property exclusively in favour of the first defendant.

20. Though the contention has been put forth by the contesting defendants that the signatures of the testatrix are varying in Ex.B3 Will, however, with reference to the same, considering the evidence of D.Ws. 2 and 3 in toto, it is found that the abovesaid defence version has been raised only for the sake of the defence and the contesting parties having not chosen to substantiate the same in any manner and from the evidence of D.Ws.2 and 3, when it is seen that it is only the testatrix who had executed Ex.B3 Will on her own volition in a sound state of mind without any influence, pressure or coercion, all put together, it is found that the first defendant has established the truth and validity of Ex.B3 Will.



21. The first appellate court has also commented that the first defendant has not spoken anything about the Will in the written statement. However, as rightly contended by the first defendant's counsel, on a reading of the written statement, it is evident that he has adverted to the Will executed by the testatrix in the written statement and therefore, it is seen that the approach of the courts below are only based on the incorrect and improper appreciation of the pleadings and the evidence adduced in the matter in accordance with law and therefore, the reasonings and conclusions of the courts below for rejecting Ex.B3 will be found to be totally unacceptable, perverse, illogical and irrational and resultantly the determination of the courts below allotting the shares to the parties by ignoring Ex.B3 Will cannot be sustained in law and accordingly holding that Ex.B3 Will is true and valid and binding on the plaintiff and the second defendant, it is held that neither the plaintiff nor the second defendant would be entitled to lay any claim of share in the suit property. The substantial questions of law formulated in the second appeal, for the reasons aforesaid, are accordingly answered in favour of the first defendant and against the plaintiff and the second defendant.

22. In the light of the abovesaid discussions, the judgment and decree dated 03.04.2006 passed in AS No.6 Of 2005 on the file of the Additional Subordinate Court, Myladuthurai, modifying the judgment and decree dated 26.02.2004 passed in O.S. No.168 of 1997 on the file of the District Munsif Court, Sirkali, are totally set aside and consequently, the suit laid by the plaintiff in O.S. No.168 of 1997 is dismissed. Resultantly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

bga

To

1.The Additional Subordinate Judge,
Myladuthurai

2.The District Munsif,
Sirkali.



3.The Section Officer,
VR Section, High Court,
Madras.

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(1cc to Mr.S.Sounthar, Advocate Sr No.8661

S.A.No.529 2008

SSD (CO)
PR (08/09/2021)