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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.12.2021

PRONOUNCED ON : 23.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1339 of 2011

and

M.P.No.1 of 2011

M.Subramaniam

...Appellant/Respondent/Plaintiff

Vs.

Sellammal

...Respondent/Appellant/Defendant

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 26.07.2011 made in A.S.No.12 of 2010 on the file of the learned Additional Subordinate Judge, Virudhachalam, reversing the judgment and decree dated 15.09.2009 made in O.S.No.44 of 2004 on the file of the learned I Additional District Munsif, Virudhachalam.

For Appellant : Mr.S.Mukunth
M/s.Sarvabhauman Associates.

For Respondent : Mr.V.Anand

J U D G M E N T

This appeal is focused as against the judgment and decree dated 26.07.2011 made in A.S.No.12 of 2010 on the file of the learned Additional Subordinate Judge, Virudhachalam, reversing the judgment and decree dated 15.09.2009 made in O.S.No.44 of 2004 on the file of the learned I Additional District Munsif, Virudhachalam.

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



3. The laconic averments made in the plaint, are as follows:

(i) The suit properties and other properties originally belonged to one Govindasamy Gounder. The wife of the said Govindasamy Gounder viz., Chellammal was not looking after him and she used to go to her mother's house. Hence, the said Govindasamy Gounder was living with the plaintiff. The said Govindasamy Gounder, executed an unregistered Will dated 28.08.2003 in a sound disposing state of mind without any undue influence. After executing the Will, the said Govindasamy Gounder has died on 19.12.2003 and after his death, the Will came into effect and the plaintiff got title to the suit properties. Afterwards, the plaintiff is in the possession and enjoyment of the suit schedule property. The defendant is trying to grab the suit property unlawfully without considering the Will executed in favour of the plaintiff. Hence, this suit is filed for declaration, declaring that the plaintiff is the absolute owner to the suit schedule property and for consequential injunction.

4. The case of the defendant, as averred in the written statement, is as follows:

It is admitted that the suit properties belongs to the Govindasamy Gounder and that he was in possession and enjoyment of the same. It is not correct to say that his wife has not looked after the said Govindsamy Gounder and that he was living with the plaintiff. The defendant denies the alleged Will dated 28.08.2003 and contend that it is a forged Will and the signature found in the Will is not that of the said Govindasamy Gounder. The defendant also contend that the suit properties are not in the possession and enjoyment of the plaintiff. The suit properties are in the possession and enjoyment of the defendant alone. Hence, the suit filed by the plaintiff is liable to be dismissed.

5. Based on the above averments, the learned I Additional District Munsif, Virudhachalam, framed necessary issues and tried the suit. On the side of the plaintiff, five witnesses were examined as PW1 to PW5 and eight documents are marked as Ex.A1 to Ex.A8. Similarly, on the side of the defendant, DW1 and DW2 examined and eighteen documents were marked as Ex.B1 to B18. Apart from those documents, two Court documents were marked as Ex.X1 and Ex.X2.



6. Having considered the materials placed before her, the learned I Additional District Munsif, Virudhachalam, came to the conclusion that the plaintiff is entitled to the decree of declaration, as prayed for, in otherwise, in respect to the relief of injunction sought for by the plaintiff, the trial Court refused to grant the same.

7. In the appeal preferred by the defendant, in A.S.No.12 of 2010, the learned Additional Subordinate Judge, Virudhachalam, reversed the findings arrived at by the trial Court and set aside the judgment rendered by the learned I Additional District Munsif, Virudhachalam.

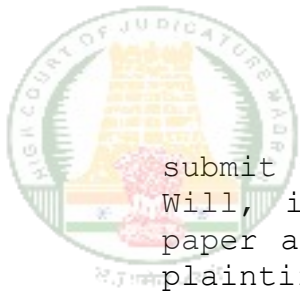
8. Feeling aggrieved over the same, the plaintiff is before this Court with the present Second Appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. When the Will Ex.A1 is proved in the manner known to law, is the lower Appellate Court right in reversing the judgment and decree of the trial Court assuming a suspicious circumstances?

2. Is the lower appellate Court correct in discrediting the Will on account of certain corrections etc., made in the stamp paper overlooking the fact that the attestors and scribe have given cogent evidence about those corrections and have clearly spoken about the Testator's sound disposing state of mind and his intentions to bequeath the property to the appellant?"

9. Heard Mr.S.Mukunth, the learned counsel appearing on behalf of the appellant/plaintiff and Mr.V.Anand, the learned counsel appearing on behalf of the respondent/defendant and perused the materials available on record.

10. The learned counsel appearing for the appellant/plaintiff would contend that before the trial Court in order to prove the Will, the Scribe has been examined as PW2, further, the witnesses who attested in the said Will have given evidence as PW3 and PW4. They have clearly deposed about the putting up of signature by the Testator and therefore, doubting about their evidence is unnecessary. The lower appellate Court without considering the whole evidence given by them, concluded the appeal that the Will has not been proved. He would further



submit that since there is no mandatory rules, for preparing the Will, in the prescribed format, executing the same in a stamp paper available at that time, is not a ground to disbelieve the plaintiff's case.

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11. Further submission of the plaintiff is that though there was a correction in the Will, after made correction, the same was endorsed in the bottom of the Will itself and therefore, the said aspect is also not a best ground to disbelieve the execution of the Will. The lower appellate Court without considering the same in proper perspective erroneously decided as the Will has not been proved and the said finding is liable to be set aside.

12. Per contra, the learned counsel appearing for the respondent/defendant would contend that the trial Court while at the time of disposing the suit in an unbiased manner looked into the circumstances found in and around the execution of the Will, further, in respect to the correction found in the Will, no explanation is offered from the plaintiff's side. More than that, in respect to purchasing the stamp paper, the evidence given by DW2 creates a doubt, as the said stamp paper was purchased by the Testator as alleged by the witness and thereby, the circumstances narrated above is quite clear that the Will produced in this case has not been executed by the said Govindasamy Gounder, as alleged by the plaintiff.

13. The rival submissions made by the learned counsel on either side, are considered.

14. Since the substantial questions of law raised in this appeal are in respect to the proof of Will, it would be necessary to see the judgment of our Hon'ble Apex Court in Ramachandra Rambux Vs. Champabai and others, reported in AIR 1965 SC 354 wherein in paragraph No.6 our Hon'ble Apex Court has held as follows:

"6. The High Court rightly pointed out that the nature of proof which was required in a case of this kind was that laid down by the Privy Council in Sarat Kumari Bibi v. Sakhi Chand [AIR 1929 PC 45), where it has been stated that in all cases in which a will is prepared under circumstances which arouse the suspicion of the Court that it does not express the mind of the testator, it is for the propounder of the will to remove that suspicion.



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15. Further, in respect to proof of a Will, in the same judgment, our Hon'ble Apex Court has held as follows:

"9. Dealing with the mode of proof of a will, this Court has observed in H. Venkatachala Iyengar v. B. N. Thimmajamma and Others (1959 Supp (1) SCR 4261):

"As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator, who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of the wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be 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 to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated."

16. Now applying the principals set out in the above referred case, here is the case, it is not in dispute, the attestors, who attested in the Will are the relatives of plaintiff, further, PW4, travelled quite a long distance from Edaiyur and after reaching Virudhachalam signed as a witness in the Will.



17. The sum and substance of the evidence given by PW1 to PW4, is that while at the time of executing the Will, the Testator has met the PW2, who is the document writer and requested to execute the present Will. Though, the said evidence given by PW2, in respect to the execution of the Will, is satisfactory in nature, the same has not been registered after execution. It is the evidence given by PW2 that the alleged Will was executed in Virudhachalam Sub Registrar's office. Further, the day on which the alleged Will was executed, is a working day for Sub Registrar's office. Therefore, the said circumstances, now narrated by PW2, would create a doubt, after executing the Will in the Sub Registrar's office, why the same has not been registered immediately. It is one of the circumstances which creates a doubt over the execution of the Will.

18. The further evidence given by PW2 before the trial Court is that in the alleged Will (Ex.A1) there was a gap in between the signature of the Testator and the signature of the attestors. Furthermore, he gave evidence as there was a gap between the second and third line of the last page in the Will.

19. Now, on considering, the said evidence, especially, on going through the alleged Will, it appears some unnecessary gap is found at the end of the Will and this is also one other circumstances, which creates a doubt, whether the Will was executed as alleged by PW2 to PW4 or not.

20. It is the case of the plaintiff that, being the reason the defendant has left the family of the testator (Govindasamy Gounder), the Testator decided to execute the present Will in favour of the plaintiff. In this regard, though it was contended as the defendant left the Testator (Govindasamy Gounder), in order to prove the same, no evidence is available on the side of the plaintiff. In fact, in his cross examination, PW1 states that some of the properties owned by the Govindsamy Gounder is in the name of his wife Chellammal. Further, it was admitted by the plaintiff that the third item of the schedule of property was in the name of the mother-in-law of the Govindsamy Gounder. So, it cannot be said that due to the reason the defendant left the family, the Testator decided to execute the Will in favour of the plaintiff.

21. In otherwise, being the reason, the said Govindasamy Gounder is a money lender, if he had the intention to execute the Will in respect to his property, it is not necessary for him to add the property in the schedule of the Will, which stands in



the name of his mother-in-law. The said circumstances would show and create a doubt as whether the Testator had full knowledge and was in a sound state of mind, at the time of executing the Will.

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22. Though it was contended on the side of the plaintiff that the plaintiff alone spent huge amount towards the medical expenses for the Testator, in his cross examination, he has stated that he is not having any document to show that he spent huge amount towards the medical expenses. Hence, the non production of the medical record coupled with the fact that PW2 and PW3 are the close relatives of the plaintiff, it would be sufficient to disbelieve the case of the plaintiff.

23. One another aspect which is necessary to be seen in this case is that, on the top of the stamp paper, which is used for executing the Will, the name of Govindasamy Gounder, was found place. In respect to the same, the Sub Registrar, Virudhachalam gave evidence. The records maintained by the stamp vendor V.T.Manoharan, would show the stamp paper pertains to the Will was sold to one Geetha, Virudhachalam and not in favour of T.Govindasamy Gounder. Therefore, the said evidence would also create a cloud over the case of the plaintiff as to what would be the necessity to the testator to purchase a blank stamp paper which is sold to some other person, for executing the present Will. Hence, the same also create a doubt whether the stamp paper pertains to the Will was purchased by the Testator as alleged by PW1 and PW2. This is also one of the circumstances, which falsify the case of the plaintiff.

24. It is a trite law that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus.

25. But, in the case on hand, there is lot of suspicious circumstances as above and in respect to the same, the propounder has not given any explanation. It is for the propounder to satisfy the conscience of the Court. But, the propounder herein has not fulfilled his duty and therefore, this Court is of the considered opinion that the reasoning given by the lower appellate Court to dispute the Will is found correct



and accordingly, it cannot be held that the Testator has written the alleged Will in a sound state of mind and also he had the intention to bequeath the property to the appellant/plaintiff. Hence, the substantial questions of Law are answered, as above.

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26. In fine, the Second Appeal is dismissed. The judgment and decree dated 26.07.2011, made in A.S.No.12 of 2010 by the learned Additional Subordinate Judge, Virudhachalam, is confirmed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1.The Additional Subordinate Judge, Virudhachalam.

2.The I Additional District Munsif, Virudhachalam.

Copy to

The Section Officer

VR Section

High Court, Madras 104.

+1 CC to M/s. Sarvabhman Associates, sr 69703.

S.A.No.1339 of 2011

RSV(CO)

SP(14/02/2022)