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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.09.2021

CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SA NO.843 OF 2012
AND MP NO.1 OF 2012

1.Shanmugam
2.Nagarajan

... Defendants/ Appellants/ Appellants

VS.

1.Jagadesh
2.Gunasekar

...Plaintiffs/Respondents/Respondents

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure against the judgment and decree of the Principal District Court, Namakkal, dated 30.01.2012 made in A.S.No.77 of 2011 confirming the judgment and decree of Sub Court, Rasipuram dated 05.10.2010 made in O.S.No.337 of 2008.

For Appellants : Mr.S.Sounthar

For Respondents : Mr.K.R.Krishnan

JUDGMENT

Aggrieved over the concurrent findings of the Courts below, the unsuccessful defendants have preferred the above Second Appeal. The respondents are the plaintiffs.

2.The Suit was filed for declaration of title and delivery of possession. The plaintiffs claimed that they have derived title by virtue of a Gift Settlement Deed dated 29.09.2005. Originally, the property was purchased by one Nallayammal @ Nallammal, who is the grandmother of the plaintiffs. She purchased the property under a registered Sale Deed dated 12.07.1957 and enjoyed the same as her own. During her lifetime, she bequeathed the property in favour of her daughter Dhanalakshmi under registered WILL bearing Document No.23/2005 dated 22.03.2005 at the Office of the Sub Registrar, Rasipuram. The said Nallayammal @ Nallammal died on 28.06.2005. On the death of the testator, the WILL had taken effect and the legatee Dhanalakshmi became the absolute owner. The said Dhanalakshmi was living with her mother, the testator of the



WILL, in a portion of the Suit property as she was deserted by her husband. Thereafter, by virtue of a Settlement Deed dated 29.09.2005, the plaintiffs' mother had settled the property in favour of the plaintiffs. The plaintiffs approached the defendants who are the sons of Nallayammal @ Nallammal and brother of Dhanalakshmi and maternal uncle of the plaintiffs to vacate and deliver possession of the portion occupied by them. After exchange of notices and after the denial of title of the plaintiffs by the defendants, they filed a Suit for declaration of title and delivery of possession.

3. In the written statement, the execution of the WILL was denied as fraud and forged. The property was purchased by their father in the name of the mother and therefore, the sons are entitled to a share in the property. The daughter was given in marriage with all Sridhanas and therefore, the daughter cannot claim any right. Their sister has taken their mother to Rasipuram for the purpose of getting a Ration Card in mother's name on 22.03.2005 and without the knowledge of the mother, she registered the WILL. The mother has not bequeathed the property in sound and disposing state of mind, but could have executed without any knowledge. The defendants are in possession and enjoyment of the Suit property and the plaintiffs' mother was not in possession of the property. The Settlement Deed executed by the mother of the plaintiffs without having possession and without having title is not sustainable in law.

4. The Trial Court relying on the evidence of the attessor-P.W.4 has held the WILL was proved and declared title in favour of the plaintiffs and ordered delivery of possession. The Appellate Court confirmed the judgment and decree passed by the Trial Court.

5. This Second Appeal was admitted on 26.07.2012 on the following substantial questions of law:-

(i) Whether the Ex.A3 WILL was proved as required under Section 68 of Evidence Act when it was not marked through attessor and no attempt was made to show the same to PW4 attessor when he was examined before the Court?

(ii) Whether the evidence of PW4 would prove Ex.A3 WILL when it was not identified by him before Court?"

6. Heard the submissions made on either side and perused the materials available on record.

7. The first and foremost question to be decided is as to whether the WILL has been proved in the manner known to law or not?



8.It is well settled that as per Section 68 of the Indian Evidence Act, 1872, the WILL has to be proved atleast by examining one attesting witness. Section 67 of the Indian Evidence Act, 1872 specifies the manner in which the signature and handwriting of the person signed the document.

9.P.W.4 is the attesor of the WILL. At the outset, the evidence of P.W.4 reveals that the WILL was not at all presented to him either during his chief examination or during cross examination for identifying the signature of the testator or his signature. On the other hand, he has mechanically deposed that the said testator has signed and executed the WILL in sound and disposing state of mind and affixed her thumb impression on each and every page. They witnessed the testator affixing her thumb impression and on her request, he attested the WILL and she has seen the attesor signing the WILL. It was registered in the Office of the Sub Registrar on payment of Rs.600/- by the testator and she has affixed her thumb impression as proof of execution of the WILL and P.W.4 and one Palanivel stood as witnesses for the same.

10.But, during cross examination, P.W4 would state that he and one Raman son of Kandasamy had witnessed the WILL. P.W.4 is the husband of the beneficiary namely Dhanalakshmi. Nallayammal @ Nallammal is the mother-in-law of P.W.4. The entire property was settled in favour of his wife excluding the two sons. There is no evidence as to why the sons of the testator were excluded and as to why the daughter was preferred over the sons of the testator. He would also depose that he has built a house in Chittoor Village and the family resides there. But strangely, the case of the plaintiffs is that their father had deserted her mother and their mother was living alone with the grandmother in a portion of the Suit property.

11.At this juncture, it is relevant to note that this Court in SUGUNA BAI VS. MUNIAMMAL @ DHANALAKSHMI AND OTHERS [1996 (2) MLJ 596] relying on a judgment of the Hon'ble Supreme Court in PARSINI (DEAD) THROUGH LRS. VS. ATMA RAM [1996 (3) SUPREME 261] has held as under:

"15.In a very recent judgment of the Supreme Court reported in Parsini (dead) through L.R.S. v. Atma Ram (1996)3 Supreme 261 the principle that the burden is on the propounder to remove all doubts regarding the genuineness of the Will was reiterated. In that decision, it was held thus:

The burden is on the propounder of the Will to remove all the doubts regarding the genuineness of the Will.



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19. Even though there are six attestors, D.W.5 is the only witness who has been examined, and no explanation is offered by the defendants as to why the other attestors have not been examined. I am not for a moment saying that all the attestors have to be examined for proof of a Will. The evidence of one witness Will be sufficient to prove the execution, provided that witness is in a position to speak as regards the entire procedure that was taken at the time of execution. If the witness who deposed before court is not in a position to speak to the entire procedure of execution and attestation, naturally, some other attestor also should have been examined. In this case, no explanation is offered or no step has been taken to cure that lacuna.

20. In A.Rangaswami Pillai v. Subramania Pillai in paragraph 6 of the judgment, a Division Bench of this Court has held thus:

...Under Section 63 (c) of the Indian Succession Act, a Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator. Therefore, proof of due execution requires that either one or more of the attesting witnesses should prove the execution by the testator and the attestation by each of them. This is also the ratio of the judgment of a Division Bench of the Bombay High Court in Roda Framroze v. Kants Varjivandas A.I.R. 1946 Bom. 72".

12. In the instant case, there was an allegation of fraud and forgery in execution of the WILL. Admittedly, P.W.4 who is the son-in-law of the testator played a major role in its execution. The beneficiary was none other than his wife. In that event, there can be a legitimate suspicion that he played fraud on the testator and that the testator has not executed the WILL in a sound and disposing state of mind. Thus, such suspicious circumstances shall be dispelled by the propounder of the WILL. Unless the onus is satisfactorily discharged, the Courts will be reluctant to accept the genuineness of the WILL.



13. In that view of the matter, it is seen as to whether the propounder has dispelled the suspicious circumstances. There is no evidence to show that the testator had bequeathed of the property in a sound and disposing state of mind. The attesting witness would simply state that the testator has affixed her thumb impression and he had witnessed the same. But, it is crucial that one more attesting witness witnessed the execution of the said WILL. That independent witness was not examined. In the chief examination, P.W.4 would state that it was attested by one Palanivel. It was prepared by one Ravichandran, document writer. One Raman is the other attesting witness to the WILL. Neither the document writer nor the other attesting witnesses were examined. Crucially, one more witness namely Palanivel has also witnessed the execution made by the testator. He was also not examined as a witness. In that event, it can be inferred that the propounder has not discharged the onus to the satisfaction of the Court.

14. As discussed above, the defendants are the sons of the testator of the WILL. There is no explanation as to why they were excluded and the daughter was preferred.

15. In the judgment in RAJ KUMARI AND OTHERS VS. SURINDER PAL SHARMA [CIVIL APPEAL NO.9683 OF 2019 DECIDED ON 17.12.2019] the Hon'ble Supreme Court has observed as under:

"..... After referring to H. Venkatachala Iyengar (supra), this Court in Jaswant Kaur (supra) had laid down the following propositions of law:

" (4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial



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onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator. (5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator."

16.As per Section 67 of the Indian Evidence Act, 1872, the attester must prove his signature, handwriting or signature. As discussed above, during the examination of P.W.4, the WILL was not presented to the witness. He neither identified the signature of the testator nor his signature in Ex.A3 - WILL. He has not even seen the WILL when he was in the witness box to identify the signatures. In that event, it is very clear that the attester, namely P.W.4 has failed to prove the execution of the WILL, in the manner known to law. Therefore, the findings of the Courts below that the WILL was proved by cogent evidence is perverse and incorrect. The question of law is answered in favour of the appellants. Therefore, the judgment and decree passed by the Courts below are liable to be set aside.

17.Accordingly, the judgment and decree dated 30.01.2012 passed in A.S.No.77 of 2011 by the learned Principal District Judge, Namakkal confirming the judgment and decree dated 05.10.2010 passed in O.S.No.337 of 2008 by the learned Sub Judge, Rasipuram are set aside.

18.In fine, the Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

TK



To

1.The Principal District Judge
Principal District Court
Namakkal.

2.The Sub Judge
Sub Court
Rasipuram.

+1cc to M/s.K.R.Krishnan, Advocate, S.R.No.45766

+1cc to M/s.S.Sounthar, Advocate, S.R.No.45953

SA NO.843 OF 2012

BP(CO)
SB(06/12/2021)