



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.10.2021

CORAM:

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

AS(MD)No.115 of 2008

1.S.Velayuthaperumal Pillai
S/o.Sankaranarayana Pillai (died)

2.S.Sundarachi W/o.K.Murugesu Pillai

3.S.Padma alias Pathini W/o.A.C.Kuttalam Pillai

4.P.Sivakami Ammal (died)
W/o.Sankaranarayana Pillai

... Appellants /
Defendants 2 to 5

5.K.Malayammal W/o.Late Velayutham Pillai

6.V.M.Rajkumar S/o.Late Velayutham Pillai

7.V.M.Gomathi D/o.Late Velayutham Pillai

8.V.M.Kumar S/o.Late Velayutham Pillai

...Appellants 5 to 8

(Appellants 5 to 8 are brought on record
as LRs of the deceased first appellant vide
order dated 18.08.2021)

(Appellants 1 & 3 & Respondents 1&2 are recorded
as LRs of the deceased appellant – 4 vide
order dated 10.02.2010).



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vs.

1.S.Mathavan Pillai S/o.Sankaranarayana Pillai

2.Subramania Pillai S/o.Sankaranarayana Pillai

3.T.Sivakami D/o.P.Thanumalaya Perumal Pillai

N.Nataraja Pillai

S/o.Mathavan Pillai

... Respondents 2 to 4 /
Defendants 1, 6 and 7

Prayer : Appeal Suit is filed under Section 96 of the Civil Procedure Code, against the judgment and decree passed in O.S No.107 of 2004 on the file of the District Court, Kanyakumari at Nagercoil dated 22.10.2007.

For Appellants : Mr.V.Raghavachari, Senior Counsel
for Mr.M.P.Senthil

For Respondents : Mr.K.V.Subramanian, Senior Counsel
for Mr.P.Thirumahilmaran for R1
No appearance for R2 to R4

JUDGMENT

The contesting defendants in O.S No.107 of 2004 on the file of the District Judge, Kanyakumari at Nagercoil filed this appeal. The suit was for partition and injunction. The first respondent herein filed the said suit. The



defendants 2, 3 and 5 filed a common written statement. The 4th defendant also filed written statement opposing the suit prayer. Based on the rival pleadings, issues were framed. The plaintiff examined himself as PW.1. Exs.A1 to A25 were marked. On the side of the defendants, three witnesses were examined. Exs.B1 to B22 were marked. After consideration of the evidence on record, the learned Trial Judge passed preliminary decree on 22.10.2007 holding that the plaintiff is entitled to 1/7th share in the suit schedule properties and that he is entitled to get partition and separate possession by metes and bounds. Permanent injunction was also granted against the second defendant. Aggrieved by the same, the contesting defendants filed this appeal.

2. Heard the learned Senior Counsel on either side.

3. The case of the plaintiff/R1 is as follows :

One Sankaranarayanan had three sons and three daughters. The plaintiff, D1 and D2 are the sons while D3 and D4 are the daughters. The fifth defendant was his wife while the sixth defendant is the granddaughter born through a daughter who had passed away. The seventh defendant is his nephew. The plaintiff schedule properties were obtained by Sankaranarayanan Pillai through gift deed No.1812/1954 and Will No.6/1961 from his father Subramania Pillai. Sankaranarayanan Pilla lived in a joint family. The suit



properties are his undivided joint family properties. Out of the three sons, D1 and D2 were given education whereas the plaintiff alone took care of the agricultural lands. Taking this into account, Sankaranarayanan Pillai executed gift deed No.592 of 1990. Under pressure from the second defendant, Sankaranarayana Pillai had executed a sham and nominal Will No.45/1990 but cancelled the same later. Sankaranarayanan Pillai died on 11.04.1997. He was suffering from severe ailments even earlier. However, he was coercively made to execute Will No.8 of 1997. Sankaranarayana Pillai was not in a sound disposing state of mind when he executed the said Will. Since the second defendant interfered with the plaintiff's peaceful possession and enjoyment of the residential house, after issuing suit notice, the petitioner filed the aforesaid O.S No.107 of 2004 seeking the relief of partition and separate possession of his 1/7th share.

4.The contesting defendants in their written statements questioned the coparcenary status. The suit schedule properties were the absolute properties of Sankaranarayana Pillai. The defendants 2, 3 and 5 filed written statements controverting the averments in the plaint. According to them, Will No.8 of 1997 was the last and final testament executed by Sankaranarayana Pillai and that it was executed in a sound disposing state of mind. Vide gift deed No. 592 of 1990, an area of 3 cents was already given to the plaintiff. The said



final Will executed is valid and genuine. They pressed for dismissal of the suit. The fourth defendant also filed written statement on the same lines as that of the defendants 2, 3 and 5.

5.The trial court framed the following issues :

1.Whether Will Deed No.8/1997 was executed by Sankaranarayana Pillai in a free disposing state of mind and voluntarily and whether the same is a genuine document?

2.Whether the suit schedule properties are undivided Hindu Joint Family properties ?

3.Whether the plaintiff is in enjoyment of item No.1 in door No.11/27 House in Mylaudy with Water connection No.5 and electricity Board No.2057

4.Whether the plaintiff is entitled to 1/4th share in the suit properties?

5.Whether the plaintiff is entitled for an order of injunction with regard to the Electricity Board E.B No.205 and Mylaudy Town Panchayat Water connection No.5 as against the 2nd defendant ?

The trial court came to the conclusion that Will No.8 of 1997 is not a true and genuine document. Once the said Will is eschewed, the suit properties become liable to partition. The Trial Court also rendered a finding that the suit Schedule properties are Hindu joint family properties. The late



Sankaranarayana Pillai had a wife, three sons and three daughters. One of the daughters is no more. The sixth defendant was the daughter of the deceased daughter. Hence, the plaintiff was held entitled to 1/7th share. Preliminary decree was accordingly passed.

6.The point for determination arising in this appeal is whether Ex.B22 Will dated 27.01.1997 is valid and genuine and whether the propounders of the Will have proved the same.

7.The original Will was marked as Ex.B22. It was registered as D No.8 of 1997 on the file of the Sub Registrar, Kottaram. The Will was attested by one V.Krishnapillai and Vallinayaga Pillai. It was prepared by one L.Perumal Pillai on instructions of the testator. The defendants had examined Vallinayagam Pillai (Attestor) as DW.3. The trial court rejected the evidence of the attesting witness (DW.3) on the ground that he had deposed that the Will document was handwritten with pen. Admittedly, Ex.B22 is a typed document. Sankaranarayana Pillai had not put the date along with his signature. Therefore, the trial Court doubted the very genuineness of the document that was presented for registration. The trial Judge also declined to believe the suggestion put forth by the contesting defendants that a handwritten Will was originally prepared and that the same was stolen by the plaintiff.



8. Another reason set out in the impugned judgment is that an item of property (Survey No.269/6) allotted to the fifth defendant (wife of the testator) was already gifted to the plaintiff in the year 1990 under Document No.592/1990. The learned Trial Judge held that this indicated that the testator was not in a proper frame of mind. The testator also failed to include one of the items belonging to him. The scribe Perumal Pillai as well as the typist who prepared Ex.B22 were not examined. These aspects led the trial court to conclude that Ex.B22 cannot be accepted.

9. The learned Senior Counsel appearing for the plaintiff submitted that each of the reasons assigned by the trial court are sound. He relied on a catena of decisions. [(1992) 2 SCC 507 (*Guro (smt) vs. Atma Sing and ors*, (2009) 4 SCC 780 (*Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar singh*), 2010 (5) CTC 364 (*S.R.Srinivasa and ors vs. S.Padmavathamma*), 2020 0 Supreme (SC) 375 (*Kavita Kanwar v. Mrs.P.Pamela Mehta*, 1962 2 MLJ 27 (*Rani Purnima Debi v. Kumar Khagendra Narayan Deb*).

10. The propositions laid down in the case-laws cited by the learned Senior Counsel for the plaintiff/R1 are beyond cavil. They are binding on this Court. But the question turns more on evidence and less on propositions. What this Court has to see is whether the reasons assigned by the learned



trial Judge can pass muster. Section 68 of the Indian Evidence Act, 1872 sets out the mode of proof of a document requiring attestation. It is as follows :

“68.Proof of Execution of documnet required by law to be attested.

If a document is required by law to be attested it shall not be sued 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, and subject to he process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian [Registration Act,1908](#) (16 of 1908), unless its execution by the person by whom it purports to have been executed is specially denied.”

11.As already noted, one of the attesting witnesses was examined as DW.3 (Vallinayagam Pillai). From a reading of his testimony, the following can be culled out :

- DW.3 was one of the attesting witness
- On 27.01.1997, the testator Sankaranarayana Pillai took him to the office of the SRO, Kottaram.



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- Sankaranarayana Pillai gave instructions to the scribe to write down the Will

- The Will was registered between 3 and 4 P.M on 27.01.1997
- The other witness was Krishnapillai who is no more.
- The testator Sankaranarayana Pillai signed the Will in their presence and witnessed the attestors attesting the document. Likewise, the attesting witnesses also saw the testator fixing his thumb impression
- When Sankaranarayana Pillai wrote the Will, he was in good physical and in a sound disposing state of mind.
- DW.3 was aged about 76 years when he deposed as witness. He was also one of the witnesses in the 1961 Will through which the testator got some of the suit items.

12.The said witness was extensively cross-examined. There was re-examination and there was a second cross-examination. DW.3 had stood his ground. He categorically denied the suggestion put forth in the cross-examination that he did not witness the testator putting his signature and that the testator did not see the attesting witnesses putting their signatures. He also denied the suggestion that the testator was not in a sound disposing state of mind. It is necessarily to be noted that while the Will was registered on 27.01.1997, DW.3 was examined on 03.07.2007. There was a gap of ten



years. DW.3 was aged 76 years when he deposed as witness. DW3 had filed the proof affidavit. Even in the proof affidavit, the expression employed was "Will was written". I had a look at the original Will Ex.B22. It is a registered document. Therefore, presumption under Section 60 of the Registration Act will definitely apply. Of course, on the strength of the said presumption, one cannot come to the conclusion that the Will has been proved. Proof of Will has to be only by examining the attesting witness. One of the attesting witness was examined. He stood his ground. He denied all the suggestions put forth by the counsel for the plaintiff in the cross-examination. Merely because he had employed the expression "Will was written" and had not specifically stated that the Will was presented in a typed format, no adverse conclusion can be drawn against the propounders of Ex.B22 Will.

13.What clinches the case against the plaintiff is the testimony of the wife of the testator who was examined as DW.1. She had stated that the plaintiff who was their youngest son never listened to the parents. He was also educated like others up to B.A. But the plaintiff did not clear the examination. She stated that her husband was in a sound disposing state of mind when he executed Ex.B22. She had also stated as to how the plaintiff had harassed her. She was extensively cross-examined. But she stood her ground. Copy of the police complaint given by her against the plaintiff was



also marked as Ex.B1. She had stated therein that the plaintiff had relieved her of her gold chain and that he had detained her and also denied her food. She had also stated that on the strength of Ex.B22 Will dated 27.01.1997, the legatees are enjoying their respective shares. In the Will, the testator had made individual bequeaths. "A" schedule is for the wife Sivakami ammal. "B" schedule is for Subramania Pillai. "C" schedule is for Velayutham Pillai. "D" schedule is for the plaintiff. "E" schedule is for daughter Sundarachi. "F" schedule is for another daughter. "G" schedule is for the granddaughter Sivakami. "H" schedule is for the nephew Natarajan Pillai. It can be seen therefrom that the testator had the interests of all the parties in mind and had made an equitable arrangement. The averments made by the plaintiff in the cross-examination are to the effect that his father had gifted to him the agricultural lands measuring 75 cents, a coconut grove and a house site measuring three cents. He further admitted that when these settlements were made in his favour, D1 and D2 were not given any property. He also accepted that neither his mother nor his siblings questioned the settlement made in his favour. The plaintiff further admitted that in the first Will dated 29.08.1990 executed by his father, he was not bequeathed any property. He also conceded that his mother lodged Ex.B1 police complaint against him before Anjugiraram Police Station and that he had agreed to return the same within six months. He also admitted that in the Will as well as the gift deed



executed by his grandfather in favour of his father, his father was not described as "Karnavar".

14. After a careful perusal of the evidence adduced by both the parties, I have to necessarily come to the conclusion that the learned trial Judge has failed to take note of certain obvious facts. There is absolutely no suspicious circumstance. The relationship between the plaintiff on the one hand and the parents on the other was not cordial. That is why, in the first Will executed by the father in the year 1990, no bequest was made in favour of the plaintiff. Yet, in the final testament, certain items were allotted in favour of the plaintiff also. In the said testament, it is mentioned that the plaintiff was given a few items as gift earlier. Those items can very well remain with the plaintiff. The plaintiff also admits the same. The plaintiff in his testimony had also accepted the correctness of the various recitals in respect of the property set out in Ex.B22. "D" schedule bequeathed in his favour in Ex.B22 contains two items. He has admitted that he is residing in the house bequeathed to him as per Ex.B22 still. Likewise, the respective legatees are enjoying the properties allotted to them. This single admission in the cross-examination is sufficient to reject the allegation as regards the genuineness of the Will.



15. The learned trial Judge has failed to advert to the testimony of the wife of the testator as well as the vital admissions made by the plaintiff himself in his testimony as PW.1. The wife of the testator had also stated that the legatees are enjoying the properties allotted to them. Merely because there is discrepancy in the evidence of DW.3 that the Will was handwritten whereas Ex.B22 was typed, Ex.B22 could not have been rejected as a whole. The plaintiff also failed to adduce any evidence regarding the physical or mental condition of the testator. More than anything else, the trial court also failed to apply the presumption set out in Section 60 of the Registration Act. It reads as under :

“60. Certificate of registration.—

(1) After such of the provisions of sections 34, 35, 58 and 59 as apply to any document presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word “registered”, together with the number and page of the book in which the document has been filed.

(2) Such certificate shall be signed, sealed and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsement, referred to in section 59 have occurred as therein mentioned.”



16. It is true that merely because a Will has been registered, the need to prove the same as per Section 68/69 of the Indian Evidence Act cannot be dispensed with. In this case, the propounders have examined the attestor. Thus, the prime requirement of Section 68 of the Act has been complied with. The discrepancy pointed out does not go to the root of the matter. More than anything else, the wife of the testator had deposed against the plaintiff and in support of the Will. The plaintiff had also admitted that the respective legatees are in enjoyment of the allotted shares. The learned Trial Judge failed to advert to any of these aspects. The properties were the absolute properties at the hands of the testator. He had already parted with some of them in favour of the plaintiff. Since the other children as well as the wife were not given any items, the testator thought it fit to execute a Will. The Will was duly registered. The choice of one of the attestors is also significant. When the testimony of the said attestor is in consonance with the statutory requirements, that should have been the end of the matter. The testator's wife had already deposed in favour of the propounders of the Will.



17.I have therefore no hesitation to come to the conclusion that the reasons assigned by the trial court are perverse warranting interference.

The impugned judgment and decree passed by the trial court are set aside.

The appeal is allowed. The suit is dismissed. No costs.

06.10.2021

Internet : Yes/No

Index : Yes/No

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To

1.The 1st Additional District Judge, Madurai.

2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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G.R.SWAMINATHAN, J.

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