



A.S.No.595 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.12.2022

PRONOUNCED ON : 19.12.2022

CORAM

THE HON'BLE MR.JUSTICE D. BHARATHA CHAKRAVARTHY

A.S.No.595 of 2016

Thiruselvam

.. Appellant

Vs.

Chidambaram

.. Respondent

Prayer: Appeal Suit is filed under Section 96 of C.P.C., to set aside the judgment and preliminary decree dated 14.06.2016 passed in O.S.No.196 of 2013 passed by the learned I Additional District and Sessions Judge, Tirupur.

For Appellant : Mr. V.P.Sengottuvel

For Respondent : Mr. N.S.Sivakumar

J U D G M E N T

A. The Appeal Suit:

The Appeal Suit is filed against the judgment and decree of the learned I Additional District and Sessions Judge, Tirupur dated 14.06.2016 in O.S.No.196



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of 2013, in and by which, the suit filed by the plaintiff, for partition of the suit schedule properties by directing the division of the suit properties into two equal shares and to allot one share to the plaintiff, was decreed by the Trial Court.

B. The Case of the Plaintiff :

2. The case of the plaintiff is that the suit properties belonged to the plaintiff's father *Thiru.Angappa Mudaliar*. The defendant is his brother. *Angappa Mudaliar* died intestate on 28.09.2002 leaving behind the plaintiff, the defendant and their mother *Tmt.Ramathal*. The said *Ramathal* was not well for about 1 ½ years and finally died intestate on 07.01.2011. Therefore, the plaintiff and the defendant are entitled to ½ share in the suit properties. Even though, the properties are under joint possession and enjoyment and even a joint patta is issued in *Patta No.37*, there arose difference of opinion between the plaintiff and the defendant and therefore, it is no longer possible to enjoy the properties in common and on 02.07.2013, the plaintiff demanded partition, but, the defendant refused to come for amicable partition. Hence, the suit.

C. The Case of the Defendant :

3. The case of the defendant is that the suit properties belonged to



Angappa Mudaliar. He died intestate. The plaintiff, defendant and *Ramathal*

were entitled to 1/3rd each in the suit property. The said *Ramathal* had executed a registered Will dated 15.02.2010, by which, she had bequeathed her 1/3rd share to the defendant. Thus, the defendant is entitled to 2/3rd share in the suit properties and the plaintiff is entitled to only 1/3rd share of the suit properties. The plaintiff, at a very early age, got employed in a Hosiery company at Tirupur and thereafter, started his own Hosiery business, for which, the plaintiff's father and the plaintiff also helped by pumping, and money was accrued from the agricultural lands. As a matter of fact, the plaintiff got married and his wife is working as a teacher and he never took care of the mother even for a single day. The plaintiff had utilised the income from the agricultural property and his income in the Hosiery company and has purchased a house site in Asher Nagar, Avinashi Road, Tirupur which is worth about Rs.75 lakhs. Taking all that into consideration and since it was only the defendant who was taking care of the mother *Ramathal*, she had bequeathed her share in favour of the defendant.

D. The Reply & Rejoinder:

4. The plaintiff filed a reply denying that their mother was in a sound state of mind at the time of the alleged execution of the Will and the genuineness



and validity of the Will was disputed. An additional written statement is filed disputing the allegations in the reply statement and reiterating that the Will was valid and genuine.

E. The Issues & the Trial :

5. On the said pleadings, the Trial Court framed three issues which were recast as follows:-

- 1. Whether the Will dated 15.02.2010 is genuine?*
- 2. Whether the plaintiff is entitled for ½ share in the suit properties?*
- 3. To what relief?*

5.1. On the said issues, the plaintiff examined himself as **P.W.1** and **Exs.A-1** to **A-4** were marked. The defendant examined himself as **D.W.1** and the attesting witnesses to the Will one *Govindasamy* and *Ponnusamy* were examined as **D.W.2** and **D.W.3** and one *Sivasamy* was examined as **D.W.4**. **Exs.B-1** and **B-2** were marked on behalf of the defendant.

F. The Findings of the Trial Court:

6. Thereafter, the Trial Court proceeded to consider the case of the



parties and by a judgment dated 14.06.2016 held that the plaintiff had examined the attesting witness and the execution of the Will is duly proved. But, however in the Will, the name of the plaintiff being the other son is not specifically mentioned and no share has been allotted to him and the exclusion of the plaintiff is also not specifically mentioned in the Will. Therefore, the Trial Court considered the same as a suspicious circumstance. The Trial Court found that the defendant had not done enough to dispel the suspicious circumstance and therefore, held that the Will has not been established to be true and genuine and therefore, decreed the suit as prayed for in the plaint by granting $\frac{1}{2}$ share in the suit property by way of preliminary decree. The aggrieved defendant is before this Court.

G. The Submissions:

7. Heard, *Mr.V.P.Sengottuvel*, the learned counsel for the appellant and *Mr.N.S.Sivakumar*, the learned counsel for the respondent.

7.1. Learned counsel for the appellant would submit that in the instant case, from the cross examination of *P.W.1*, it can be seen that the plaintiff was employed in a Hosiery Company and also ran his own Hosiery business and for



that purpose, he was living in Tirupur. It was only the defendant, who joined along with his father for the cultivation of the agricultural lands. The mother was only with the defendant. Considering the fact that only the defendant took care of the mother, she had bequeathed her share by way of the registered Will. The attesting witness have clearly and categorically spoken about the fact that both the attesting witness and the testator were present at the time of execution of the Will and also at the time of presenting the same for registration and all the three of them saw the other signing / affixing the left thumb impression and the Will is duly proved. The Will clearly speaks that in view of her advanced age, the Will is written. It also states that after her demise, there should not be any disputes between her legal heirs and therefore, she is writing the Will. She had also clearly stated that after her life time, the property should go to her son, *Thiruselvam*, the defendant therein and other legal heirs should not have any claim. Therefore, the finding of the Trial Court that as if a suspicious circumstance exists in the Will itself is incorrect. In any event, by the oral testimony of *D.W.1* to *D.W.4* and cross examination of *P.W.1*, the defendant has dispelled even the suspicious circumstance if any and therefore, the Will ought to have been held as genuine by the Trial Court.



7.2. *Per contra*, Mr.N.S.Sivakumar, the learned counsel appearing on behalf of the respondent would submit that **P.W.1** in his cross examination has denied the suggestion that he never took care of the mother. It is his case that he was residing along with the defendant as well as the mother in the Village itself until the date of his marriage. Even after the date of his marriage, defendant as well as the mother used to visit his home and therefore, the contention as if he never took care of the mother is totally incorrect. Learned counsel would submit that if the Will had been genuine, the testator would have mentioned that she had two sons. The same is not specifically mentioned. Secondly, when the testator has only two legal heirs and when she is totally depriving one of the son, namely the plaintiff, she would have mentioned the reasons why she is excluding the plaintiff. Except to say that there should not be any problem between her legal heirs that too not mentioning the name of the other legal heirs, the testator has not given any reasons.

7.3. Learned counsel would rely upon the judgment of the Hon'ble Supreme Court of India in *Sivakumar and Ors. Vs. Sharanabasappa and Ors.*¹, more fully, relying upon para 11 in which, in para 11.7, the Hon'ble Supreme Court has categorically delineated as to what is the meaning of 'suspicious

¹ (2020) 4 CTC 321



circumstance' in which categorically an unjust exclusion of a legal heir and a shaky or doubtful signature etc., are set forth as suspicious circumstances.

Therefore, the Trial Court was right in taking the said circumstance as a suspicious circumstance and when the defendant has not done anything to disprove or dispel the suspicious circumstance, the Will had to be rejected.

7.4. The learned counsel also relied upon the judgment of the Hon'ble Supreme Court of India in ***Kavitha Kanvar Vs. Pamela Mehta and Ors.***², more fully relying upon para 29.2 to contend that when there is no explanation as to why the testatrix would not be interested in making proviso to one of her sons in the Will, the same would be a suspicious circumstance surrounding the Will. Therefore, he would submit that the Trial Court was completely justified in decreeing the suit, as prayed for.

7.5. The learned counsel also submitted that there is also yet another circumstance by which the Will has to be rejected. Even though there are two attesting witness to the Will, the attesting witness, *Ponnusamy* had not signed in the attestation column and he has only written his name. The same would be clear from the fact that he had subscribed his signature only in the reverse of the

² (2020) 4 CTC 429



document, at the time of registration. Therefore, Will being a document requiring attestation by two witnesses and when it is not attested by two witnesses, it is invalid.

7.6. In reply, thereof, *Mr.V.P.Sengottuvel*, the learned counsel for the appellant would submit that as a matter of fact, the said *Ponnusamy* signs in both ways and therefore, when he has clearly and categorically disposed before the Court that he had signed, the same has to be taken as his signature and the Will has to be held to be genuine.

H. The Points for Consideration :

8. Upon listening to the arguments of the learned counsel on either side and perusing the materials on records of the case, the following questions arise for consideration in this appeal.

- i. Whether ***Ex.B-2*** Will is invalid for improper attestation?
- ii. Whether, ***Ex.B-2*** Will is surrounded by suspicious circumstance and if so, whether the same is dispelled by the defendant, the propounder of the Will?
- iii. To what relief the parties are entitled?

I. On Point No.1 :



8.1. Will is required to be attested by two or more witnesses as per

Section 63 (c) of the Indian Succession Act, 1925.

8.2. The term attestation has been defined under Section 6 of the Transfer of Property Act. By attesting, the attesor, has to witness the executor of the document sign and he should affix his signature. On a perusal of the relevant column in the last page of the Will and if the same is compared with the reverse of the first page where endorsements are made during registration of the Will, it would be clear that there is no signature of the attesor in the last page of the Will. It can be seen that *Ponnusamy*, had only written his name and his father's name and his address in the Will but however, he did not sign in the appropriate column in the Will. The contention of the learned counsel for the appellant that he signs both ways, on the face of it is unacceptable. What is contained in the last page of the Will is only writing of the name and not the signature. It can be seen that it is by oversight, he had not affixed his signature, even though he was a purported witness and he having writing all his other particulars. But however when the very same Will had been presented before the Sub Registrar, he had not only written the name and address, but had also signed. From the said act and from his oral evidence, in substance, the requirement of the attestation stands



proved. As a matter of fact, a Full Bench of this Court in ***H. Venkata Sastri &***

Sons Vs. Rahilna Bi & Ors.³ has held that the act before the Sub Registrar while presenting the Will before the registration, if the person is signing with an animus to attest the document, the same can also be taken into account as a valid act of attestation and therefore, I hold that the Will is not invalid because of the defect in attestation and I answer the point accordingly.

J. On Point No. ii :

8.3. Now considering the genuineness of the Will, it can be seen that the Will is a registered Will. The execution thereof or the LTI affixed therein is not disputed by the plaintiff. The plaintiff's case is that the executant was unwell for the period of 1 ½ years before her death. This fact has been denied by the defendant stating that the said *Ramathal* was hale and healthy until her death. It is incumbent of the plaintiff to prove that his mother was sick for about 1 ½ years. He has miserably failed to prove by adducing adequate oral or documentary proof. It is true that the Hon'ble Supreme Court of India had laid down the adjudicatory process concerning proof of Will in paragraph 11 of the judgment cited by the learned counsel for the respondent in ***Shivakumar and Others*** (*cited supra*), it is useful to extract para 11.7 of the said judgment.

³ (1962) 1 Mad LJ 78



“11.7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the Testator; an unfair disposition of property; an active or leading part in making of the Will by the beneficiary thereunder etcetera are some of the circumstances which may give rise to suspicion. The circumstances above-noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the Propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the Testator and his signature coupled with the proof of attestation.”

8.4. It can be seen that some of the suspicious circumstance has also been enumerated by the Hon'ble Supreme Court of India which would include the exclusion of one of the legal heirs from bequeath. As a matter of fact, the other judgment relied upon by the learned counsel for the appellant in **Kavitha Kanwar** (cited *supra*) also fortifies that the said fact would be a suspicious circumstance. Approaching **Ex.B-2** Will with the said fact in mind, and then



considering the dispelling of the above suspicious circumstance, the following factors and materials on record weigh in this case:

(i) There are only two extents of land which are the subject matter of the suit, that is, an extent of 90 cents of land on the Southern side of the pathway and an extent of 1 acre 90 cents of the land on the Northern side of the pathway which also contains a well for irrigation. Thus, totally it is 280 cents of land and the plaintiff, defendant and the testator *Ramathal* were vested 93.3 cents each. Thus, it is only this 93.3 cents which is being bequeathed by the *Ramathal* and therefore, she had the knowledge that instead of 140 cents, the plaintiff would get 93.3 cents and therefore, this was not an exclusion in the real sense of the term;

(ii) The attendant factors that (a) one of her son is in the village, carrying on the agriculture, helping his father in the agricultural field, and thereafter, being dependant on the agricultural income; and (b) the plaintiff's being employed in the nearby town and running his business, having purchased a property in his name which is of considerable value. Normally, when one of the son is doing well and other one is little behind, it cannot be abnormal for the parents try to level up to an extent;

(iii) Even the plaintiff has admitted that he is living in Tirupur. It is not his



case that his mother use to live with him. Therefore, from the oral testimony, it is clear that the mother was always taken care of by the defendant only on day to day basis and this is also a factor which has been established by evidence;

(iv) **Ex.B-2** Will in the appropriate recital portion reads as follows:-

“என் ஆயுள் காலத்திற்குப் பிறகு கருத்து வேறுபாடுகள் ஏற்படாமல் இருக்கும் பொருட்டு இந்த உயில் சாசனம் எழுதி வைத்துள்ளேன்.

Again the Will in page 3 reads as follows:-

என்னுடைய ஆயுளுக்குப் பின் கீழ்க்காணும் சொத்துக்கள் அனைத்தும் எனது மகன் ஏ.திருச்செல்வம் தவிர வேறு எந்த ஒரு வாரிசுக்கும் எந்தவிதமான பாத்திய சம்பந்தமும், பின் தொடர்ச்சியும் பாராட்டுதலும் எப்போதும் எக்காரணத்தைக் கொண்டும் கிடையாது.

When the testator had only two sons, being a mother, it is instead of putting it in a harsh manner that her son *Chidambaram* will not get any share in the property, she had put it politely that apart from her son, *Thiruselvam*, other legal heirs will not have any legal share. Therefore, it cannot be said that the Will either suppress the existence of the other legal heir or it cannot be held that there is complete non mentioning of the name of the plaintiff in the will;

8.5. It could be seen that otherwise the Will is a registered Will, duly proved by the attesting witnesses and it was executed in sound disposing state of mind voluntarily by the testator. That being the situation, the intention of the



testator cannot be discarded for the mere asking by the plaintiff and therefore, I hold that the Will is genuine and I disagree with the finding that the suspicious circumstance is not dispelled and I answer the question accordingly.

K. On Point No. iii:

8.6. Having held that the Will is genuine, the relief which is granted to the plaintiff requires to be modified. The plaintiff will be entitled for partition of the suit property. But however, the suit property has to be divided into three equal shares and from the same, 1/3rd share has to be allotted to the plaintiff for his separate possession and enjoyment. Therefore, accordingly, the judgment and decree of the Trial Court stands modified.

8.7. In view of my above findings, I differ and set aside the finding of the Trial Court in respect of the issue No.1 that the Will is not genuine and hold that the Will is genuine. I hold that the finding of the Trial Court that the plaintiff is entitled for 1/2 share as incorrect and the plaintiff will only be entitled to 1/3rd share in the suit properties. The plaintiff will be entitled for separate possession of his 1/3 share. The plaintiff has not prayed for the mesne profits.

L. The Result :



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9. In the result,

(i). A.S.No.595 of 2016 is allowed.

(ii). The judgment and decree dated 14.06.2016 of the learned I Additional District and Sessions Judge, Tirupur in O.S.No.196 of 2013 is set aside.

(iii). O.S.No.196 of 2013 on the file of the I Additional District and Sessions Judge, Tirupur is decreed on the following terms:

(a) A preliminary decree is hereby passed directing the division of the suit properties into three equal shares by metes and bounds, duly taking into account good and bad soil and its value thereof and allot 1/3rd share to the plaintiff and the plaintiff will be entitled to separate possession of the same.

(iv). There will be no order as to costs in the Appeal Suit.

(v). In view of the judgment of the Hon'ble Supreme Court of India in ***Kattukandi Edathil Krishnan Vs. Kattukandi Edathil Valsan***⁴, the Original Suit in O.S.No.196 of 2013 is posted for further hearing on 20.01.2023 and it is

⁴ 2022 SCC OnLine SC 737



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made clear that the parties shall appear before the Trial Court for continuation of proceedings without any further notice and the Trial Court shall proceed with the final decree proceedings, if an application for final decree is already pending and even if there is no application pending, proceed further without waiting for the parties to file any such application and effect the final division as per the preliminary decree and grant separate possession to the plaintiff.

19.12.2022

AT

Index : Yes/No

To

1. The I Additional District and Sessions Judge,
Tirupur.
2. The Section Officer,
V.R. Section,
High Court of Madras.



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D. BHARATHA CHAKRAVARTHY, J.

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Pre-delivery Judgment in
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