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A.S.No.634 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :26.07.2022

PRONOUNCED ON :12.10.2022

**CORAM :
THE HONOURABLE MS.JUSTICE V.M.VELUMANI
AND
THE HONOURABLE MR.JUSTICE S.SOUNTHAR**

**A.S.No.634 of 2016
in CMP.No.18201 of 2016**

Dr.Beena Suresh

... 1st Defendant/Appellant

Vs

1.Pradeep Kumar
2.R.Ramachandran

... Respondents

Prayer: First Appeal filed under Section 96 of Civil Procedure Code, praying to set aside the judgment and decree dated 20.04.2016 in O.S.No.118 of 2010, on the file of the I Additional District Court, Coimbatore.

For Appellant : Mr.M.V.Venkateseshan
for M/s.V.V.Sathya

For Respondents : Mr.D.Krishna Pradeep
for M/s.N.Damodaran



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JUDGMENT

S.SOUNTHAR.J.,

The unsuccessful first defendant in suit for partition in O.S.No.118 of 2010, on the file of the District Court, Coimbatore has come up with this appeal.

2. Gist of the plaint averment:

According to the 1st respondent/plaintiff, the appellant is his sister and the 2nd respondent is his brother. The mother of the parties, namely, Sarada Devi had immovable property in Alleppey. She sold it for valuable consideration and out of the sale proceeds, she purchased the suit property as a vacant site under sale deed dated 30.03.2005 and she put up a building thereon consisting of ground and first floor. She died intestate on 31.12.2008, leaving the first respondent/plaintiff, the respondents and father of the parties C.S.Ramakrishna Pillai as her surviving legal heirs. The father of the parties died subsequently on 14.12.2009, thus the appellant/1st defendant is entitled to 1/3rd share in the suit property. The first respondent issued pre-suit notice



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on 02.11.2009 calling for amicable division, as the appellant and other respondent did not co-operate for partition of the properties. The appellant/first defendant issued a reply on 28.11.2009 claiming absolute right over the suit property, on the basis of an alleged unregistered Will dated 20.08.2007, allegedly executed by late Sarada Devi, claiming that the said testamentary document is forged one, the 1st respondent /plaintiff has laid the suit for partition.

3. Gist of the averments contain in the written statement of the Appellant:

The appellant admitted in the written statement that immovable property of Sarada Devi in Alleppey was sold and the suit property was purchased by her as a vacant site. However, the appellant/D1 denied the averments in the plaint that the entire sale proceeds were utilized to purchase the vacant site and put up construction thereon. The appellant claimed that the immovable property at Alleppey was sold for a sum of Rs.54,58,040/-. Her mother decided to give Rs.15,00,000/- each to her three children and the balance amount of Rs.9,58,040/- was utilized to purchase the house site. The



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appellant further claimed that Rs.15,00,000/- earmarked for the share of appellant was also utilized by her mother for construction of the building in the vacant site purchased. Since that amount was not sufficient to meet the expenses, the appellant contributed some more amount towards construction. The second respondent received his share of Rs.15,00,000/- and the first respondent was paid major portion of his share by periodical payments and the balance amount of Rs.4,50,000/- which remained unpaid was deposited in the name of first respondent's father as fixed deposit showing the first respondent's name as nominee. The appellant also claimed that she had taken care of her mother and father and met their day-to-day expenses of providing food and shelter. The appellant claimed that since the entire amount earmarked for her share was utilized for putting up construction in the suit property her mother decided to give the property exclusively to her and executed a Will dated 20.08.2007 marked as "Ex.B11". The appellant further claimed that mother died on 31.12.2008 and it was a wish of her father that the Will executed by mother should be read only after first death anniversary of Sarada Devi. Even before that date, the first respondent issued a legal notice claiming partition on 02.11.2009 and hence her father



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informed all the three children about the Will executed by Sarada Devi and it was opened in the presence of an Advocate Notary on 22.11.2009, thus she claimed absolute right over the suit property and prayed for dismissal of the suit.

4. The first respondent filed a reply statement denying the averments found in the written statement of the first defendant/appellant that she and her husband contributed for purchase of the property and construction thereon. The first respondent also denied the testamentary document relied on by the appellant.

5. The second respondent filed a written statement denying the Will and disputing the mental capacity of testatrix to execute the Will as she was ill at the relevant point of time.

6. On these pleadings, the parties went to trial. The 1st respondent/plaintiff was examined as PW.1 and he marked Exs.A1 to A3 on his side. The appellant/1st defendant examined herself as DW.1. The attesor



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to Ex.B11 Will was examined as DW.2. The person who was present at the time of opening of the Will was examined as DW.3. The second respondent examined himself as DW.4. On behalf of the appellant Exs.B1 to B26 were marked.

7. The trial Court on consideration of oral and documentary evidence available on record had held that the Will relied on by first defendant/appellant was not proved and hence, granted decree for partition as prayed for and aggrieved by the same, the first defendant has come up with this appeal.

8. The learned counsel for the appellant/1st defendant assailed the judgment passed by the trial Court on the ground that Ex.B11 Will stands proved by evidence of DW.2 one of the attester to the document. The learned counsel for the appellant/1st defendant submitted that one of the reasons for disbelieving the Will by the trial Court was non-mentioning of existing Will by the father of the parties in the letter written by him on 07.11.2009, marked as Ex.B8. He submitted that Ex.B8 was not in response to the legal notice



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issued by the 1st respondent/plaintiff. He submitted that non-mentioning of the Will in the letter of father by itself cannot be treated as a suspicious circumstance. He further submitted that Ex.B8 letter written by father was not in response to the notice issued by first respondent/plaintiff. The learned counsel further submitted that comparison of the signature of the testators found in the Will and sale deeds by the trial Court is un-called for, when the Will stands proved by clear evidence of DW.2 attesor. The learned counsel mainly submitted that the trial Court completely ignored the evidence of attesor, while rejecting the defence raised by the appellant.

9. The learned counsel relied on the following decisions in support of his contention ;

(i) (2014) 15 SCC 570 reported in *Leela Rajagopal and others Vs Kamala Menon Coharan and others*;

(ii) (1974) 2 SCC 600 reported in *Surendra Pal and others Vs Dr.MRS.Saraswati Arora and another*;

(ii) (1996) 2 SCC 704 reported in *O.Bharathan*



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Vs K.Sudhakaran and another.

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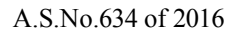
10. The learned counsel for the first respondent/plaintiff submitted that though the Will was allegedly executed on 20.08.2007, till first respondent issued a notice demanding partition on 02.11.2009, the existence of the Will has not come to light. The mother of the parties died intestate on 31.12.2008 and first respondent issued a legal notice claiming partition under Ex.A2 on 02.11.2009. The notice was received by appellant on 06.11.2009 as evidenced by postal cover filed along with copy of notice marked as Ex.B7. In the letter dated 07.11.2009 written by father of the parties who lives along with the appellant, there was no mention about the Will. It creates serious suspicion about true existence of Will. Had the Will been in existence on that date, certainly the father would have mentioned about the existence of the Will in the letter he had written on 07.11.2009. The appellant issued reply only on 28.11.2009 mentioning the Will which creates doubt that the Will should have been prepared subsequent to the issue of legal notice. The learned counsel further submitted that the main reason allegedly mentioned by the appellant's mother for dis-inheriting both of her sons was appellant provided funds for construction of the building. But, however, there is no evidence available on



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record to show that the appellant provided funds for construction of the building situated in suit property. The learned counsel also had taken us to the another letter, written by father of the parties, which was marked as Ex.B15, dated 23.11.2009, wherein, the father of the parties demanded a stamped receipt for having received Rs.10,50,000/- towards his share in the sale proceeds of the mother's property and acceptance of mother's Will dated 20.08.2007. The learned counsel submitted that the request for acknowledgement of mother's Will that too in a non-judicial Stamp paper creates another suspicion about the true execution of the Will. He elaborated it by stating that, if the Will was a true one, then there was no necessity for demanding acknowledgement from the first respondent.

11. The learned counsel, by taking us to the discussion of the trial Judge, submitted that the trial Judge also mentioned that there was no evidence for distribution of Rs.15,00,000/- each to the share of first respondent/plaintiff and other legal heirs of the deceased Sarada Devi as another suspicious circumstances surrounded the Will. He also submitted that the trial Judge by comparing signature found in the Will along with admitted



12. On the basis of the pleadings, the evidence available on record and contentions of the counsel, the following points are arising for consideration:

(ii) Whether the first respondent is entitled to 1/3rd share in the suit property as held by the trial Court?;

The appellant, who propounded Ex.B11-Will, tried to prove the



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same by examining one of the attestors to the Will, namely, DW.2. He deposed about the execution of the Will by testatrix in his cross examination.

He admitted that he was residing just two houses away from the house of appellant and he had good rapport with the husband of the appellant. The appellant is the sole beneficiary of the Will, the dwelling house in the name of deceased mother had been given to the appellant to the exclusion of two sons. Even as per the admitted case of the parties both testatrix and her husband namely the father of the parties were under the care of appellant at the time of execution of the Will. Therefore, the admitted facts are the testatrix who was under the care and custody of the sole beneficiary, executed the Will and it was attested by her husband and father of the parties namely Ramakrishna Pillai and one of the neighbours of the appellant. The father of the parties is no more to come before the Court. The other attestor is none other than the neighbour of the beneficiary who admitted that he had good rapport with the husband of the beneficiary. It deter us from accepting the evidence of DW.2 in *toto*. Therefore, we feel it is not safe to uphold the Will only on the basis of evidence of DW.2. Even otherwise, the propounder to the Will is bound to dispel various suspicious circumstances surrounding the Will. The



propounder is not only under the obligation to prove the Will by calling upon one of the attestors to the same but he is also under the obligation to dispel suspicious circumstances surrounding the Will. Then only the initial burden on him in propounding the Will can be taken as discharged. The judgment relied on by the learned counsel for the appellant reported in 1974 (2) SCC 600 in Surendra Pal and others Vs Dr.Mrs.Saraswati Arora and another, supports this proposition, which read as follows:

7.The propounder has to show that the will was signed by the testator: that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions



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appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the will are not the result of the testator's free will and mind. In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the will is accepted. (Emphasis Supplied). Again in cases where the propounder has himself taken a prominent part in the execution of the will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the Court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain. (Emphasis Supplied). See *H. Venkatachala Tyengar v. B.N. Thimmajamma and Ors.* [1959] Su 1 S.C.R. 426; (1) and *Rani Purnima Devi and Anr. v. Kumar Kbagendra Narayan Dev and Anr.* MANU/SC/0020/1961 : [1962]3SCR195 . In the latter case this Court, after referring to the principles stated in the former case emphasised that where there are suspicious circumstances the onus will be on the



propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine; (Emphasis Supplied). and where the caveator alleges undue influence, fraud and coercion the onus is on him to prove the same. It has been further pointed out that the suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will which may be unnatural or unfair or improbable when considered in the light of the relevant circumstances. If the caveator does not discharge the burden which rests upon him in establishing the circumstances which show that the will had been obtained by fraud or undue influence, a probate of the will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind. The observations of the Privy Council in *Motibai Hormusjee Kanga v. Jamsetjee Hormusjee Kanga A.I.R. 1924 P.C. 28* support the above proposition. Mr. Ammer Ali observed at p. 33 "It is quite clear that the onus of establishing capacity lay on the petitioner. It is also clear that if the caveator impugned the will on the ground that it was obtained by the exercise of undue influences, excessive



persuasion or moral coercion, it lay upon him to establish that case." In the light of what has been stated if the various requirements of a valid will are established, then as observed by the Privy Council in Motibai Hormusjee Kanga's case A.I.R. 1924 P.C. 28 at p. 33 'A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition."

14. In the case on hand, there are number of suspicious circumstances surrounding the Will. They are:

(i) The Will has not seen the light of the day for nearly one year even after the death of the testatrix;

(ii) There is no sound reason for dis-inheriting both the sons, in respect of a dwelling house, especially, in the absence of any evidence to show that beneficiary contributed to the construction in the suit property;

(iii) At the time of execution of Will the testatrix was under the care and custody of the sole beneficiary;

(iv) The attesting witnesses is neighbour of the sole beneficiary, having good rapport with the husband of the sole beneficiary even as per her admission in witness box;



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(v) In reply letter written by father of the parties under Ex.B9, dated 07.11.2009, subsequent to receipt of legal notice by 1st respondent/plaintiff there was no mention about the Will.

15. These suspicious circumstances surrounding the Will were not sufficiently explained by the propounder of the Will in this case. Merely because one of the attestor to the Will examined before the Court supports the execution of the Will, the propounder cannot succeed unless she satisfactorily explained the various suspicious circumstances surrounding the Will.

16. The learned counsel for the appellant relied on the decisions of the Hon'ble Apex Court reported in (2014) 15 SCC 570 reported in Leela Rajagopal and others Vs Kamala Menon Coharan and others. In support of his contention that merely because some heirs are excluded, the deposition under the Will cannot be vitiated. He further submitted that the single feature or circumstance cannot be the basis for disbelieving the Will. The relevant observations of the Hon'ble Apex Court in the above case cited is as follows:

A Will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a



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Will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the Court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the Court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a Will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before us.

17. A close reading of the above decision makes it clear that the Will cannot be disbelieved only on the basis of single feature or similar circumstances. But it is the cumulative effect of unusual features and circumstances, which weigh with the Court in the determination of the validity of the Will. We do not reject the Will based on the single feature, but taking into consideration various suspicious circumstances pointed out by us,



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considering the totality of the circumstances, we come to a conclusion that

Will propounded by the appellant cannot be accepted.

18. The learned counsel for the appellant further submitted that the trial Court ought not to have rejected the Will by comparing the signature of the testatrix found in the Will along with admitted signatures found in the sale deed. In support of his contention, he relied on 1996 (2) SCC 704 reported in O.Bharathan Vs. K.Sudhakaran and another and 2021 (1) LW421 reported in Subbaiya Gounder Vs. Velathal and others. In the said decision, the trial Judge undertook the exercise to decide hundreds of disputed signatures by comparing the same in an election petition, while deciding the validity of votes polled. In that context, the Hon'ble Apex Court had held that in the peculiar context of that case, learned Judge was not right in deciding hundreds of disputed signatures by comparing the counterfoils by himself to declare the votes as void. Therefore, the said decision may not be useful to the appellant. In the case on hand the variations found in the signature of testatrix is taken into consideration as one of the factor while deciding validity



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19. In the decision reported in 2021 (1LW) 421, this Court set aside the judgment passed by the lower Court by observing that the lower Court failed to give valid and convincing reason as to how it had come to a conclusion that the disputed signatures vary with admitted signature. Further, in that case, the evidence of attestor and sign of the Will were not taken into consideration and the validity of the Will was decided only based on comparison of the signature. In the case on hand, the learned trial Judge did not rest his findings only based on comparison of the signature. He has also pointed out other circumstances for disbelieving the Will. Even, while analysing the signature found in the Will with the admitted signature of the testatrix, he discussed the variations and style of strokes found in the signature of the testatrix in the Will and ultimately, gave the finding that letter “G” and “S” found in the disputed signature, varies with the admitted signature. Therefore, the said decision relied on the appellant counsel is not useful to him.



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20. The first respondent/plaintiff issued a pre-suit notice under

Ex.A2 calling upon the appellant and second respondent to amicably agree for partition. As per the postal cover enclosed with the copy of the notice, which was marked as Ex.B7, by the appellant, the pre-suit notice was received by her on 06.11.2009. The father of the party who resides with the appellant on the next day sent a letter to first respondent under Ex.B8, wherein, he mentioned about apportionment of sale proceeds from sale of the mother's property at Alleppey. A reading of the letter of father makes it clear that the property dispute in the family started brewing but however strangely there was no mention about the Will executed by mother. We feel that there is considerable force in the arguments of learned counsel for the respondent that had there been a Will in existence on the date of Ex.B8, certainly the father of the parties would have mentioned the Will in his letter. The Non-mentioning of Will in the letter written by father on 07.11.2009 creates a serious doubt about the existence of the Will on that date.

21. The person who was allegedly present at the time of opening of the Will on 22.11.2009 was examined as DW.3. A close scrutiny of his



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evidence explains about the unnatural aspect in the case of the appellant.

DW.3 in his evidence deposed that Will was opened on 22.11.2009 in the presence of appellant, her husband, father of the parties, who was living along with the appellant, notary public and a professional photographer. He deposed that the entire proceedings of opening of the Will and a reading of the same by notary public was videographed. He also deposed that notary public issued certificate regarding opening of the Will. The video recording was marked as Ex.B14 and the certificate issued by the notary public was marked as Ex.B13. The video recording of the process of opening the Will and reading of the same is highly unnatural. The purpose of reading of the Will is only to inform the family members about the mandate of the testatrix. There is no necessity for video graphing the same. The process of recording the opening of the Will and reading of the same by notary public creates a doubt that the Will is stemmed out of broad based scheme by the beneficiary.

22. As rightly pointed out by the learned counsel for the respondent, there is no evidence on record to show that the sole beneficiary of the Will contributed her money for the purpose of construction of the building



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in the suit property. Further, there is no acceptable evidence on record to show that the sale proceeds were equally distributed to the heirs of testatrix.

The notary public who attested the Will and the one who opened the Will are one and the same. He is a material and key witness in the facts and circumstances. However, the appellant had not chosen to examine him. The trial Court, while analysing the evidence available on record, held that there was no clear evidence to show that what was the actual sale consideration received by testatrix by selling her property at Alleppey. The Trial Court pointed out that in the written statement the appellant mentioned the sale proceeds as Rs.54,58,040 /-. However, in the letter written by the father of party dated 07.11.2009 and 23.11.2009 marked as Ex.B7 and B15, the sale consideration was mentioned as Rs.61,60,000/-. Therefore, there is no clear evidence as to what was the actual sale consideration received by testatrix. The trial Court also pointed out that there was no evidence to show that the sale consideration was divided among the heirs of testatrix as claimed by the appellant.

23. In view of the discussions made above, we find that the finding of the trial Court that the appellant failed to prove Ex.A1-Will requires



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no interference by this Court. Accordingly, points 1 and 2 are answered against the appellant and consequently, the appeal fails. Taking into consideration the close relationship of the parties, there shall be no order as to costs.

24. In nutshell,

(i) The appeal is dismissed by confirming the judgment and decree dated 20.04.2016 made in O.S.No.118 of 2010, on the file of First Additional District Court, Coimbatore;

(ii) There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

(V.M.V.J) (S.S.J)

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