



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.08.2022

Pronounced on : 30.09.2022

Coram

The Hon'ble Mr. Justice **C.V.KARTHIKEYAN**

S.A.No.1246 of 2011

and

M.P.No.1 of 2011

1.P.Balusamy
2.Kannammal
3.Anitha
4.Lokesh

...Plaintiffs / Appellants / Appellants
Vs.

1.Rathnam
2.Vijayamani

... Defendants / Respondents / Respondents

The Second Appeal filed under Section 100 of CPC, against the judgment and decree made in A.S.No.57 of 2009 dated 27.06.2011 on the file of the Additional District Court, Tiruppur confirming the judgment and decree made in O.S.No.6 of 2007 dated 24.04.2009 on the file of the Sub Court, Udumalpet.



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For Appellants : Mr.P.Valliappan

For Respondents : Mr.N.Umapathi

JUDGMENT

The plaintiffs in O.S.No.6 of 2007 on the file of the Sub Court, Udumalpet are the appellants herein.

2.The suit O.S.No.6 of 2007 had been filed by P.Balusamy and by the widow, daughter and son of his brother P.Kanagarajan seeking partition and separate possession of the suit schedule property and for consequential reliefs and for costs of the suit. The suit was filed against Rathanam and Vijayamani, the sisters of the 1st plaintiff P.Balusamy and P.Kanagarajan.

3.By judgment dated 24.04.2009, the suit was dismissed.

4.The plaintiffs then filed A.S.No.57 of 2009 before the Additional District Court / Fast Track Court IV, Coimbatore at Tiruppur. By judgment dated 27.06.2011, the appeal suit was dismissed.



5.The plaintiffs have then filed the present Second Appeal.

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6.The Second Appeal had been admitted on 04.10.2011, on the following two substantial questions of law:

“i).Whether the Courts below are correct in law in upholding Ex.B1-Will by ignoring the suspicious circumstances surrounding execution and attestation?

ii).Whether the Courts below are correct in law in not considering the admissions made by DW 1 to 3, which would clearly dislodge the defence?”

O.S.No.6 of 2007 (Sub Court, Udumalpet):-

7.The 1st plaintiff, P.Balusamy and his brother P.Kanagarajan, whose legal representatives were the 2nd to 4th plaintiffs and the two defendants, Rathnam and Vijayamani were the sons and daughters of Pullar Chettiar. P.Kanakarajan died on 07.01.1997. Pullar Chettiar died on 24.11.2006. There was one property left behind namely, land and house at Door No.2/184A, Kanakkampalayam Village, Udumalpet, Tiruppur. The



plaintiffs had sought partition and separate possession of the said property.

The defendants had however contended that Pullar Chettiar had executed a registered Will dated 31.10.2000. Claiming that the attestors to the said Will were strangers and that the Will was registered in the office of the Sub-Registrar, Kaniyur and further that, at the time of execution of the Will, Pullar Chettiar was not residing in the residence mentioned, and that suspicious circumstances surrounded the execution of the Will, the suit was filed seeking partition and separate possession.

8.The defendants filed a written statement in which they denied the averments regarding the alleged suspicious circumstances surrounding the execution of the Will. They stated that the Will was executed and registered in proper manner. They also stated that the Will was executed six years before the death of Pullar Chettiar. They stated that the Will is genuine. They claimed that the suit should be dismissed.

9.On the basis of the aforementioned pleadings, the following issues were framed:-



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“i).Whether the plaintiffs were entitled to the relief of

partition and separate possession?

ii).Whether the defendants would be entitled to the suit

property, in view of the Will?

iii).To what other reliefs are the parties entitled to?”

10.During trial, the 1st plaintiff Balusamy was examined as PW-1 and two other witnesses were examined as PW-2 and PW-3. The 2nd defendant, Vijayamani was examined as DW-1 and two other witnesses were examined as DW-2 and DW-3.

11.The plaintiff marked Exs.A1 to A15. Ex.A1 was the death certificate of Pullar Chettiar. Ex.A6 was the notice issued by the plaintiffs. Ex.A11 was the reply issued on behalf of the defendants.

12.The defendants marked Exs.B1 to B7. Ex.B1 was the Will of Pullar Chettiar. Exs.B2 to B7 were the house tax receipts in the name of the defendants.



13.Exs.X1 to X3 were also marked. Exs.X1 and X2 were exchange of notices between the defendants and Kandavel.

14.On the basis of the evidence adduced, the learned Sub Judge, Udumalpet, examined the circumstances which had been pointed out as being suspicious by the plaintiffs and noted that there was no allegation that the signature of Pullar Chettiar was forged. The suspicious circumstances stated were that Pullar Chettiar did not reside in the house as stated in the Will and that the defendants did not take care of Pullar Chettiar and that the Will was registered in Kaniyur Sub-Registrar office which was far away and not in Udumalpet Sub-Registrar office which was closer.

15.These circumstances pointed out by the plaintiffs were brushed aside and the learned Sub Judge found that the Will had been proved in manner known to law. It was also observed that the document writer Ravi had written the Will and that it was advantageous to register the Will at Kaniyur Sub-Registrar office since it was less expensive. It was found that the attesting witness was examined as PW-2 and the document writer Ravi was examined as PW-3 and that they had withstood cross-examination. It



was therefore held that the Will had been proved in manner known to law.

Consequently, issue No.1 was answered against the plaintiffs and the relief of partition was denied and on the other hand, issue No.2 was answered in favour of the defendants and it was held that they were entitled to the property under the Will. In the result, the suit was dismissed.

A.S.No.57 of 2009 (Additional District Court / Fast Track Court IV, Coimbatore at Tiruppur) :-

16.The plaintiffs then filed the aforementioned Appeal Suit. The learned Additional District Judge, framed as point for consideration, whether the Will dated 31.10.2000 said to have been executed by Pullar Chettiar was a true and genuine Will and whether execution had been proved in manner known to law.

17.The learned Additional District Judge again re-examined the suspicious circumstances namely, that the Will had been registered in Kaniyur Sub-Registrar office and that the sons had been disinherited of any share in the property and that there had been contradictions in the evidence of DW-2 and DW-3 and that Pullar Chettiar did not live in the address as



given in the Will. These circumstances were again re-examined by the learned First Appellate Court Judge and again they were brushed aside.

18.It was found that the difference in the distance between the Kaniyur Sub-Registrar office and Udumalpet Sub-Registrar office was around 15 miles and that it would have taken only an additional 15 to 30 minutes to reach that particular Sub-Registrar office. The evidence of DW-3 that he did not obtain any remuneration for the Will was also observed. It was stated that the reasons for bequeathing the property only to the daughters had been explained in the Will and it was therefore held that no substantial ground had been made out to differ from the judgment of the Trial Court and therefore, the Appeal Suit was dismissed.

S.A.No.1246 of 2011:-

19.The plaintiffs then filed the present Second Appeal. The Second Appeal had been admitted on 04.10.2011, on the following two substantial questions of law:



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“i).Whether the Courts below are correct in law in upholding Ex.B1-Will by ignoring the suspicious circumstances surrounding execution and attestation?

ii).Whether the Courts below are correct in law in not considering the admissions made by DW 1 to 3, which would clearly dislodge the defence?”

20.Both the substantial questions of law surround the proof regarding Ex.B1, Will.

21.For the sake of convenience the parties would be referred as plaintiffs and the defendants.

22.Heard arguments advanced by Mr.P.Valliappan, learned counsel for the appellants / plaintiffs and Mr.N.Umapathi, learned counsel for the respondents / defendants.



23. Since the discussion around the two substantial questions of law overlap they are both taken up together for consideration.

24. The plaintiffs had filed O.S.No.6 of 2007 before the Sub Court Udumalpet seeking partition and separate possession of the suit schedule property. The 1st plaintiff Balusamy and the two defendants namely, Rathnam and Vijayamani and Kanagarajan were sons and daughter of Pullar Chettiar. Kanagarajan died on 07.01.1997. The 2nd to 4th plaintiffs are his legal representatives. In effect this is a suit by the brothers against the sisters. The defendants resisted the claim for partition holding out that Pullar Chettiar who died on 24.11.2006 had executed a Will which was registered on 31.10.2000 in the office of the Sub-Registrar Kaniyur and therefore, the plaintiffs cannot seek partition and separate possession. It was claimed by them that under the Will, Pullar Chettiar had bequeathed the suit schedule properties to them / defendants.

25. Naturally, the focus of the trial and also the focus of the discussion in this Second Appeal surround the proof of the Will. The burden to prove the Will was on the defendants. They examined the 2nd defendant as DW-1



and one of the attesting witness, Maruthamuthu as DW-2 and the document writer, Ravi as DW-3.

26.The plaintiffs had consistently stated as suspicious circumstances, the disinheritance of the sons, the registration of the Will at a Sub-Registrar office which was a little far away and was not the jurisdictional Sub-Registrar office and the recital in the Will that Pullar Chettiar was residing in a particular house, when in effect, he was not residing there and that the said house was occupied by tenants.

27.Both the Courts below had not given much credence to the aforementioned suspicious circumstances and had focussed themselves on the evidence of DW-2 and DW-3 and held that the Will had been proved in manner known to law and had further observed that in the Will reasons had been given for disinheriting the sons and for bequeathing the property to the defendants.

28.Mr.P.Valliappan, learned counsel for the appellant, however, urged that the Court should examine the Will from the view point of the



testator and that mere examination of witnesses to prove the will should not be the sole bench mark to hold that the Will was executed in free mind. It was the contention of the learned counsel that a cumulative understanding of suspicious circumstances would lead to a reasonable suspicion that Pullar Chettiar had been manipulated to execute the Will.

29.The Will had been produced as Ex.B1. It is dated 31.10.2000. It had been admittedly written by the document writer, Ravi who was examined as DW-3. A reading of the Will shows that it is not in the language of any ordinary person but rather it is a document prepared by not exactly a legally trained person, but by a person who is well aware of the conundrums of law relating to Wills. If under a Will, the property is bequeathed to some of the children and others are disinherited, then the testator has to set out the reasons in his own words. There must be a ring of truth in such reasons.

30.In the instant case, the words used in the Will are certainly not the words of a person who is not exposed to legal jargon. The will is very artificial. It is in the nature of a format and its contents are too perfect to be



acceptable. DW-3, the document writer is a professional document writer.

With that experience, naturally, he would smoothen all rough edges and draft a Will in manner sought. It is a mute question, whether the Will was indeed a reflection of the mind of the testator.

31.DW-2, the attesting witness, during cross-examination had admitted that he had also attested two or three other documents in the Sub-Registrar office. To evidence that, the plaintiffs had filed Exs.A14 and A15. Ex.A14 dated 15.06.1991 is a Will executed by a stranger to the entire litigation, M.Subramanian and DW-2, a stranger to those parties had attested that Will. Ex.A15 is a mortgage deed dated 12.06.2000. DW-2 had also attested that document. The mortgage deed is in a printed format where only the names are typed. That had been attested by DW-2 and it had also been prepared by DW-3, Ravi.

32.Both the documents were registered in the office of the Sub-Registrar Kaniyur. I am not comfortable with stock witnesses or attesting a Will and with professional document writers writing a Will. Any Will must be in the words of the testator. This aspect has to be examined in its proper



perspective. A Will is a solemn document and it sets out the aspirations and wishes of the testator.

33. In the instant case, when these circumstances are examined, it is very clear that a total stranger, DW-2, V.P. Maruthamuthu had identified Pullar Chettiar before the Sub-Registrar office and had also signed as an attesting witness.

34. The first attesting witness is R. Manivasagam, S/o Rangasamy Gounder residing at No. 1/9, Krishnapuram (PO) - 642 111. If he is a known person then to avoid any suspicion, I hold that the defendants should have taken steps to examine him also before the trial court.

35. The Will had been prepared by Ravi DW-3 who had also affixed his seal in the Will as document writer. There is no touch of genuinity or expression of free thought in the Will.

36. The law provides various safeguards for the proof of the Will.



37. Section 63 of the Indian Succession Act, 1925, is as follows:-

“63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, ¹ [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has 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



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person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

38. With respect to the proof of a Will, Section 68 of the Indian Evidence Act, 1872 provides as follows:-

“68. Proof of execution of document required by law to be attested. — *If a document is required by law to be attested, it shall not be used 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 the 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



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of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

39.The provision relates to proof of execution of a document required by law to be attested. No doubt, it provides that examination of one attesting witness is sufficient to prove the Will. But when the said attesting witness is a stock witness and has an habit of attesting documents in that particular Sub-Registrar office, and when that fact had been brought to the notice of the Court, the Court should have fallen back to the proviso of Section 58 of the Indian Evidence Act, 1872 and should have directed strict proof of the Will. The right of the Trial Court to seek such proof is not limited.

40.In the instant case, when plaintiffs had produced evidence namely, Exs.A13, A14 and A15 to show that the two witnesses viz., DW-2 and DW-3 have an habit of preparing documents and attesting documents, the Court should have called upon the defendants to examine the other attesting witness namely, R.Manivasagam, S/o Rangasamy Gounder.



41. Unless the evidence of the said R. Manivasagam is also recorded, it can never be conclusively held that the Will was executed in free mind. There will always be a lingering suspicion in the minds of the parties to the litigation.

42. I hold, the Trial Court has failed to direct the trial in its proper course. The issues raised by the plaintiffs should be addressed. It is not a question of the Court giving its observations and brushing away the suspicions raised by stating that the two Sub-Registrar offices are not very far from each other on that mere examination of an attesting witness, be he a stock witness is sufficient to prove the Will. The spirit behind the provision requiring proof of a Will should be examined and addressed.

43. I hold that the Courts below should have lent their ears to the suspicions raised and should have directed examination of the other attesting witness to drive away such suspicion. This is all more necessary in a case where proof of a Will is put to test.



44.Both the learned counsels had produced precedents for their respective stands.

45.Mr.P.Valliappan, learned counsel for the appellants, pointed out judgments relating to suspicious circumstances and Mr.N.Umapathi, learned counsel for the respondents, produced judgments relating to the fact that examination of an attesting witness is more than sufficient to prove execution of a Will.

46.I have no quarrel in any of the propositions stated. But, I would rather address the core issue raised namely, that DW-2 was a stock witness who has the habit of attesting documents and identifying executors before the Sub-Registrar office, when he did not know them personally and DW-3 was an document writer, who has the skill of knave to write documents. A too perfect a document should also be viewed with askance.

47.Therefore, purely addressing the evidence before the Courts, I would set aside the judgments of the Courts below and remit the matter back for further trial and direct the Sub Judge, Udumalpet to issue process under



Order 16 Rule 10 of CPC, 1908 to the first attesting witness R.Manivasagam S/o. Rangasamy, and examine him as a witness and then on the basis of the existing evidence and the evidence so recorded, give a considered judgment on the issues raised.

48.Both the substantial questions of law surround the suspicious circumstances with respect to the execution of Ex.B1 Will and with respect to the admissions of DW-1 to DW3. To address these issues and to put the parties at ease which is one of the primary object of a trial process and of every adversarial litigation, I hold that the Trial Judge should have taken the extra step to examine the first attesting witness and satisfy himself / herself about the genuinty of evidence presented regarding the execution and proof of the Will. Unfortunately, the First Appellate Court Judge who had an obligation to re-appreciate the evidence had also not addressed this particular issue.

49.In this connection, I would fall back to the observation of the Hon'ble Supreme Court in ***Smt.Jaswant Kaur Vs. Smt. Amrit Kaur and others*** reported in ***AIR 1977 SCC 74***. The Hon'ble Supreme Court held as



follows:

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“9.In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the Court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by that testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.”

50.DW-1, has not stated why they have not invited the first attesting witness R.Manivasagam to graze the witness box. If it is found that the said witness is no more as on date, then the Trial Court may proceed to Section 69 of the Indian Evidence Act, and examine such witness as would speak to the satisfaction of the conscience of the Court. It is stated that DW-2 worked with Pullar Chettiar in a mill, but such statement had been denied



and disputed by the plaintiffs. To remove even a shroud of suspicion circumstances, it would only be just the first attesting witness is examined during the course of trial.

51.A duty is cast on the defendants to address the conscience of the Court. Both the courts below had closed their eyes and shut their conscience. Let further examination be done and let the Will be proved in entirety and every shroud of suspicious circumstance surrounding it be removed.

52.In view of the above reasons, the Second Appeal is allowed. No order as to costs.

53.The judgment and decree of the First Appellate Court in A.S.No.57 of 2009 dated 27.06.2011 on the file of the Additional District Court / Fast Track Court IV, Coimbatore at Tiruppur and the judgment and decree of the Trial Court in O.S.No.6 of 2007 dated 24.04.2009 on the file of the Sub Court, Udumalpet are both set aside and the matter is remanded back to the Trial Court for further examination of a further witness namely,



R.Manivasagam, S/o Rangasamy Gounder residing at No.1/9, Krishnapuram

(PO) - 642 111. Thereafter, fresh analysis is to be made by the Trial Court

on the entirety of the evidence available. Consequently, the connected Civil

Miscellaneous Petition is closed.

30.09.2022

Index: Yes/No

Internet: Yes/No

Speaking / Non speaking order

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To

1.The Additional District Court & Fast Track Court, Coimbatore at Tiruppur.

2.The Sub Court, Udumalpet.

3.The Section Officer, VR Section, Madras High Court.



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C.V.KARTHIKEYAN,J.

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Pre-delivery Judgment made
in
S.A.No.1246 of 2011

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