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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 25.01.2022

PRONOUNCED ON: 02.02.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.1565 of 2011

Annadurai ... Appellant/Defendant

versus

Ganesan ... Respondent /Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 07.04.2011 made in A.S.No.91 of 2010 on the file of the Principal Sub Court, Mayiladuthurai, reversing the judgment and decree dated 22.02.2010 made in O.S.No.373 of 2004 on the file of the learned Principal District Munsif, Mayiladuthurai.

For Appellant : Mr.N.A.Nassir Hussain
for Mr.N.A.Nissar Ahmed

For Respondent : M/s.Sasikala Ramadoss

J U D G M E N T

This Second Appeal is focused as against the judgment and decree dated 07.04.2011 passed in A.S.No.91 of 2010 by the learned Principal Subordinate Judge, Mayiladuthurai, reversing the judgment and decree dated 22.02.2010 in O.S.No.373 of 2004 passed by the learned Principal District Munsif, Mayiladuthurai.

2.The suit is for recovery of possession, directing the defendant, to surrender possession of the entire suit properties.

3.For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.



4. The laconic averments made in the plaint, are as follows:

[i] The suit schedule properties originally belongs to one Dharmalingam, who has died on 26.08.1998. When he was alive, he executed a Will dated 10.08.1998, through which, he bequeathed the entire suit properties to the plaintiff. The defendant Annadurai is the brother of the plaintiff Ganesan. Apart from the plaintiff and the defendant, the deceased Dharmalingam, blessed with 3 daughters. The marriage of the three(3) daughters were celebrated by the plaintiff alone. The marriage of the defendant was also met by the plaintiff. After the marriage, the defendant went away from the family and residing at Thoppu Theru, Manolmedu Village.

[ii] The Will alleged to have been executed by the said Dharmalingam, which came into effect immediately after his death i.e. on 26.08.1998. The suit first item bears R.Survey No.7/6 and it measures 9 cents = 27 kulis. In the said property, there was a residential thatched house is located. The house is situated in a total extent of 2 kulis. The remaining extent are lying vacant and in the possession of the plaintiff. During the time of his father's death, after knowing the fact that the said property is in the possession of the plaintiff, the defendant came and occupied the same. Afterwards, he continued to remain in the possession and refused to vacate the same.

[iii] The location of the house is shown in the plaint plan as ABCD. The house portion was marked as AEFG, DA portion is a vacant land under the possession of the plaintiff. The remaining suit lands are in the possession of the plaintiff. The defendant do not have any right over the ABCD portion and he is bound to vacate the house and handover the possession to the plaintiff.

[iv] The Will dated 10.08.1998 is a last Will and testament. In the Will dated 10.08.1998, there was some mistake in Survey Number in respect to the suit second item of the property. Though the plaintiff requested the defendant to vacate the said house, the defendant did not response to the same. Therefore, the plaintiff is constrained to file the suit for the recovery of possession of ABCD portion. After filing the suit baring the portion ABCD, the remaining portion was also encroached forcibly by the defendant and he is in occupation. For the notice dated 29.12.2007 sent by the plaintiff, there was no response from the defendant. Hence, the suit.

5. The case of the defendant, as averred in the written statement, is as follows:



[i] The suit properties are not the absolute properties of the deceased Dharmalingam. The suit properties were purchased by Dharmalingam by utilising the earnings of the plaintiff and the defendant. The deceased Dharmalingam never executed any Will as alleged. The deceased Dharmalingam died intestate. The alleged Will is a forged one. It is not correct to state that the plaintiff alone celebrated the marriage of his 3 sisters. The plaintiff himself conducted his marriage against the wishes of his parents and after marriage, he left the parents.

[ii] The suit first item of the property is in the possession and enjoyment of the defendant. The house tax is assessed in the name of the defendant. The electricity connection also stands in the name of the defendant. The defendant alone is paying the kist. The plaintiff is not entitled to any relief. Hence, the suit filed by the plaintiff is liable for dismissal.

6. From the above averments, the learned Principal District Munsif, Mayiladuthurai, framed necessary issues and tried the suit. On the side of the plaintiff, P.W.1 to P.W.5 were examined and marked 31 exhibits as Ex.A.1 to Ex.A.31. Similarly, on the side of the defendant, 2 witnesses were examined as D.W.1 and D.W.2 and marked 6 exhibits as Ex.B.1 to Ex.B.6.

7. Having considered the materials placed before him, the learned Principal District Munsif, Mayiladuthurai, by judgment and decree dated 22.02.2010, came to the conclusion that the alleged Will dated 10.08.1998, is not proved and hence, the prayer sought out by the plaintiff cannot be entertained and ultimately, dismissed the suit. In the appeal preferred by the plaintiff in A.S.No.91 of 2010, the learned Principal Subordinate Judge, Mayiladuthurai, reversed the findings arrived at by the trial Court and ultimately, granted a decree in favour of the plaintiff.

8. Feeling aggrieved over the findings arrived at by the lower appellate Court, the defendant, is before this Court with the present Second Appeal. The Second Appeal was admitted on file, after formulating the following substantial questions of law;

"1. Whether the lower appellate Court erred in law in shifting the burden of proof of Will from plaintiff/propounder of the Will to the defendant ?



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2. Whether the judgment of lower appellate Court is liable to be set-aside in it's ignoring material contradictions in the evidence of PW2 and PW3 with regard to timing of execution and registration of Will ?

3. Whether the propounder of Will is entitled succeed without dispelling the suspicious circumstances surrounding the Will ?”

9.Heard Mr.N.A.Nassir Hussain, learned counsel for Mr.N.A.Nissar Ahmed appearing for the appellant and M/s.Sasikala Ramadoss, learned counsel appearing for the respondent and also perused the materials available on record.

10.The plaintiff and the defendant are brothers. Their father Dharmalingam has died on 26.08.1998. The plaintiff is his elder son and defendant is his younger son. Apart from the plaintiff and the defendant, the said Dharmalingam blessed with 3 daughters.

11.In respect to the relationship alleged, there is no denial on the side of the defendant. In respect to the suit schedule property, it is the case of the plaintiff that the suit schedule property, is the absolute property of his father, and during his lifetime, on 10.08.1998, he executed a Will, through which, he bequeathed the suit property to the plaintiff.

12.Per contra, it is the case of the defendant that the suit schedule property, is not an absolute property of the said Dharmalingam. Only by utilising the earnings of the plaintiff and the defendant, the suit schedule property has been purchased in the name of Dharmalingam. While deciding the said issue, both the Courts below came to the concurrent findings that the suit schedule property, is the absolute property of the deceased Dharmalingam. In respect to the said findings, there was been no challenge through this appeal. However, before the trial Court, in order to prove his contention, the plaintiff produced two documents as Ex.A.1 and Ex.A.2, among them vide Ex.A.1 Deed of Assignment dated 30.07.1973, the portion of the suit schedule property was assigned to the defendant, and the remaining properties are purchased by the said Dharmalingam vide Sale Deed dated 29.12.1959 [Ex.A2]. In the said circumstances, since the defendant has not challenged the said documents, it should be decided necessarily that the said Dharmalingam, is the absolute owner of the suit schedule property.



13. It is the case of the plaintiff that through the registered Will dated 10.08.1998, the said Dharmalingam bequeathed the entire suit property in favour of the plaintiff and accordingly, after the death of his father, the plaintiff becomes the owner of the suit schedule property. In this regard, in respect to proving of Will, the lower Appellate Court accepted the evidence given by P.W.2 and P.W.3 and held that, the alleged Will dated 10.08.1998, is proved.

14. In respect to the said findings, before this Court, the learned counsel for the appearing for the appellant / defendant would contend that the Will alleged to have been executed by the said Dharmalingam, is not proved in terms of Section 68 of the Indian Evidence Act, 1872 and Section 63 (c) of the Indian Succession Act, 1925. The plaintiff, who is the beneficiary of the Will himself stated in his evidence as the signature found in Ex.A.3 is having some variation, when compared with other admitted signatures found in Ex.A.24 Postcard. Since P.W.2 and P.W.3, who are the attestors and his scribe, gave evidence as during the time of executing the Will, the said Dharmalingam is in a sound state of mind. If such evidence is true one, the signature found in Ex.A.3 must be the same, without any variation further, here, it is a case, the plaintiff himself admitted that there was a mistake in the Will, particularly, in respect to the Survey Numbers of the land, therefore it cannot be said the alleged Will is proved as required by law.

15. The other contention raised by the learned counsel for the appellant is that, in the plaint itself, the plaintiff admitted that the defendant immediately after the death of the deceased Dharmalingam takes over the possession of the house property. Afterwards, the present suit has been filed in the year of 2004, with huge delay and therefore, the same is also create a doubt whether the alleged Will, is a genuine or not. According to him, the above narrated circumstances are creating a doubt over the case of the plaintiff, thereby the propounder is having the duty to eliminate the suspicious circumstances. In support of his submissions, the learned counsel for the appellant relied on the following judgments;

- "[i] ANATHULA SUDHAKAR vs. P.BUCHI REDDY (DEAD) BY LRS. AND OTHERS reported in (2008) 4 SCC 594
- [ii] ANIL KAK vs. KUMARI SHARADA RAJE AND OTHERS reported in (2008) 7 SCC 695
- [iii] KALYAN SINGH vs. CHHOTI AND OTHES reported in



AIR 1990 SC 396

[iv] PUSHPA BALA JAGAM vs. K.ANANDA KUMAR AND OTHERS reported in 2010-3-L.W. 769

[v] ROBERT PRABHAKAR vs. DAVID EBENEZER reported in 2006 (5) CTC 351"

16.No doubt, all the judgments relied on by the learned counsel for the appellant categorically held that the propounder of the Will has to prove due execution and attestation of the Will, in the absence of any suspicious circumstances.

17.If the propounder is failed in removing the suspicious circumstances by placing satisfactory material on record necessarily it would be decided as the Will could be said to be not genuine.

18.In general, in respect to the suspicious circumstances, in the judgment of BHARPUR SINGH vs. SHAMSHER SINGH reported in (2009) 3 SCC 687 our Hon'ble Apex Court has held as follows;

"Suspicious circumstances like the following may be found in the execution of a will: (i) the signature of the testator may be very shaky and doubtful or not appear to be his usual signature; (ii) the condition of the testator's mind may be very feeble and debilitated at the relevant time; (iii) the disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason; (iv) the dispositions may not appear to be the result of the testator's free will and mind; (v) the propounder takes a prominent part in the execution of the will; (vi) the testator used to sign blank papers; (vii) the will did not see the light of the day for long, and (viii) incorrect recitals of essential facts. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the will had been duly proved or not. Keeping in view the peculiar facts and circumstances of this case, the impugned judgment of the High Court as also the first appellate court are set aside and the matter is directed to be considered afresh."



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19. On the other hand, in the same judgment, it was also held that, the propounder of a Will must prove:

"(i) that the will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and (ii) when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of propounder, and (iii) if a will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein."

20. Now, applying the principles set out in the above referred judgments with the factual aspects of this case, here, it is a case, the Will alleged to have been executed by Dharmalingam, is a registered Will. In order to prove the same, one of the attester (Pandian) was examined as P.W.2. The scribe, who prepared the Will gave evidence as P.W.3. Both P.W.2 and P.W.3 gave categorical evidence that the Will dated 10.08.1998 was prepared and registered by Dharmalingam, in a sound state of mind. Further, it was narrated by P.W.2 that only in his presence, the attester signed in the Will and thereafter, the same was presented for registration.

21. Now, on analysing the suspicious circumstances narrated by the learned counsel for the appellant, it is true that P.W.1 in his evidence admitted that, there was a variation in the signature of Dharmalingam. In this regard, the lower Appellate Court while at the time of disposing the appeal correctly held that, by considering the age of the documents (Ex.A.24 and Ex.A.3), there may be a chance of occurring variation and the same should not be considered as suspicious circumstances.

22. The other circumstances indicated by the learned counsel for the appellant is that, there was a mistake found in the Will in Survey Number, which was mentioned in Ex.A.3. Now, on cursory looking of the said mistake committed, it is apparent that the sub-division number alone has not been mentioned, in otherwise,



the Survey Number pertains to the property, which is in favour of the plaintiff, is one and the same. Therefore, the same cannot be termed as suspicious circumstances. In otherwise, filing the suit, after a considerable delay, is not a material contradiction for considering the nature of the Will executed by the said Dharmalingam.

23.This is a peculiar case wherein the sister of the plaintiff and the defendant appeared before the trial Court and gave evidence in support of the plaintiff's case. She specifically stated in her evidence as the plaintiff alone arranged her marriage and maintained her parents. Further, the defendant himself admitted in his evidence as in 1982, he sent a letter to the attesor Dharmalingam, wherein he asked some money for maintaining his family. He specifically admitted that in the year 1983, he earned Rs.4,000/- alone as his monthly income.

24.On the other hand, it is not in dispute that the plaintiff was working as an employee in Treasury. So, it is probable that the plaintiff alone maintained his family. P.W.4, who is the sister of P.W.1 also gave a similar evidence as P.W.1 alone maintained his family. Therefore, obviously, if a person by utilising the personal income managed the family, the elder member of the said family may develop an intention to give his property to the person, who has worked for the benefit of the family. Therefore, the circumstances found around the family of the plaintiff also, is in support of the plaintiff's case.

25.The another contention raised by the learned counsel for the defendant is that, though 3 persons were signed as witnesses in the Will, only one attesor was examined as P.W.2. The other witnesses signed as a witness in the Will have not been examined on the side of the plaintiff and therefore, it would create a suspicious circumstances in the plaintiff's case.

26.By considering the said submissions with the relevant records, it is settled proposition of law that in terms of Section 68 of the Indian Evidence Act, for proving the Will, the evidence of one attesor is more than sufficient, here, it is a case, the attesor and his scribe were examined as P.W.2 and P.W.3 and therefore, non-examination of other attesor, is not a fatal to the case.

27.Furthermore, being the reason that after the marriage, the defendant went away from the family. The said circumstances also went in favour of the plaintiff's case, who is alone managed the family. Therefore, the documents relied on by the



plaintiff coupled with the evidence given by P.W.1 to P.W.5 make out a case as only by the reason that the plaintiff has managed the family, the Testator being the father of the plaintiff bequeathed the entire property by executing the Will dated 10.08.1998. In otherwise, the Testator has not worried about the welfare of the defendant and only in the said circumstances, the alleged registered Will has been executed. The lower Appellate Court by considering the said aspects, traversed in the same line and set aside the judgment rendered by the trial Court wherein, the learned Principal District Munsif, Mayiladuthurai, dismissed the suit.

28. Therefore, in the light of the above discussions, the substantial questions of law raised, are all answered in favour of the respondent / plaintiff and thereby, the Second Appeal is dismissed. The judgment and decree dated 07.04.2011 passed in A.S.No.91 of 2010 by the learned Principal Subordinate Judge, Mayiladuthurai, is hereby confirmed. However, there is no order as to costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

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To

1. The Principal Subordinate Judge,
Mayiladuthurai.

2. The Principal District Munsif,
Mayiladuthurai.

Copy to
The Section Officer,
VR Section, High Court,
High Court, Madras.

+1cc to M/s. Sasikala Ramadoss, Advocate Sr.6403
+1cc to M/s. N.A. Nissar Ahmed, Advocate Sr.6787

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