



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11 .2022

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A No.263 of 2016
& C.M.P 5031 of 2016

1.Ravi

... Appellant

Vs.

1.Vasanthi

2.Family Manager Ponnusamy,

3.Pavayammal

4.Rukmani

...Respondents

PRAYER: This Second appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and decree made in A.S NO.12 of 2015 on the file of the II Additional District Judge, Erode dated 22.12.2015 as confirmed by the Judgement and decree made in O.S No.151 of 2009 on the file of Subordinate Judge, Perundurai dated 23.12.2014.

For Appellant	: Mr.G.Arumugam
For R1	: Mr.P.Valliappan
For R2	: No appearance



For R3 and R4 : Mr.N.Manokaran

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JUDGMENT

The appellant herein is the fourth defendants in suit O.S No. 151 of 2009 on the file of the Sub Judge, Perunthurai, filed by the first respondent herein/plaintiff for the relief of partition claiming $\frac{1}{4}$ share in the A or B schedule properties, by contending that suit properties are ancestral properties belonging to his father Muthusamy Gounder and died intestate leaving behind plaintiff and her brothers and sisters who are first, second and third defendant herein as his legal heirs, fourth defendant is son of the first defendant claiming right over the B schedule property by contending that his grandfather Muthusamy Gounder executed Will on 14.12.1994 in favour of him after his demise he became the absolute owner of the B schedule property thereby denied the plaintiffs right over the B schedule property and the second and third defendant remains exparte, first defendant contested the case stating that his sisters were got married long back which prior to 1986 and the ancestral properties were enjoyed by him along with his father Muthusamy Gounder. While so, 14.12.1994 there was family partition wherein half share of the properties was allotted to Muthusamy



Gounder which is shown as A schedule property herein and B schedule property was allotted to the first defendant. Thereafter, Muthusamy bequeathed the property to fourth defendant through registered Will, so the plaintiff is not entitled to claim any share in A schedule property, so first and fourth defendants totally denied the plaintiffs right over the A and B schedule property.

2. Before the Trial Court both the parties adduced their evidence and documents, after considering that the Trial Judge framed eight issues with additional issues, on considering the evidence on record held that with regard to truthfulness and genuineness of the Will the issue was decided against the fourth defendant who was the beneficiary of the said Will concluded that Will is surrounded by Suspicious circumstances and the same was obtained by mis-representation thereby concluded that B Schedule properties are also ancestral property and allotted to the plaintiff's father in which plaintiff is having $\frac{1}{4}$ share. With regard to A schedule properties Trial Court accepted that based upon the partition it was allotted to the share of the first defendants which was not much attacked by the plaintiff, With regard to A schedule properties plaintiff's claim was rejected since it belongs to the first defendant based upon the partition deed dated 14.12.1994.



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3. Aggrieved and dissatisfied over the Judgement of the Trial Court with regard to B schedule properties fourth defendant preferred an appeal and with regard to A schedule properties the plaintiff preferred an appeal in A.S No. 12 and 47 of 2015 respectively on the file of the District Court, Erode. Wherein, the lower appellate Court independently analysed the facts and evidences confirmed the findings of the Trial Court and dismissed both appeals.

4. Challenging the said findings fourth defendant preferred this second appeal by submitting that Court below failed to consider that the Will was proved by examining the attesting witness and their evidence was cogent and through which he proved the Muthusamy Gounder's/testator's state of mind at the time of the execution of the Will but the same was not appreciated by the Court below. Besides, plaintiff had knowledge about the partition deed as well as the Will Ex.B19 but she filed the suit without any such particulars, her approach to the Court is not with clean hands thereby sister is not entitled for any relief. But the Court below instead of decline to grant relief in favour of the plaintiff allotted the share in suit property as



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such is unjust and un-fair and liable to be set aside. Hence, prayed to dismiss the appeal. This Court admitted the appeals with the following substantial questions of law:

1. Whether the plaintiff/first respondent is entitled in law to seek for the alternative relief in a such for partition when both the main relief and alternative relief are for partition only and that the relief sought for as alternative relief in respect of the property is also the property included in the main relief?

2. Whether the Courts below are right in concluding that the execution of the Will(Ex.B19) is not true and will not bind the plaintiff/first respondent without applying that test as per the Sections 68 and 114 of the Evidence Act?

3. Whether the Courts below erred in law in accepting the document marked under Ex.B19 and decreeing the suit when the claim of the fourth defendant/appellant is Well established by his own evidence and evidence of D.W.3 and D.W.4, not corroborated by the plaintiff/first respondent?

5. With regard to findings rendered by the the Court below in respect of A schedule property, the plaintiff has not preferred any cross appeal. As the fourth defendant approached the Court claiming right over the B Schedule property based on Will, burden is on him to prove that Ex.B19/Will is true and genuineness with valid evidence beyond reasonable doubt.

6. The learned counsel for the appellant/beneficiaries of the Will



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submitted that before the Trial Court attesstor of the Will examined as D.W.3 who is aged about 80 years and the Will was proved as required under Section 68 of the Evidence Act. Hence onus is on the propounder of the Will was discharged by adducing satisfactory evidence that the Will was signed by the testator who was in sound state of mind with full knowledge. Further, the learned counsel for the appellant submitted that mere presence of the beneficiary of the Will at the time of the registration would not make out the case of suspicious circumstances with undue influence but the Court below without appreciating these aspects erroneously held that Will is surrounded with suspicious circumstances is perverse and misconception of law and facts thereby prayed to set aside the findings rendered by the Court below. To support his contention he relied the Judgement of the Supreme Court in in the case of **Pentakota Satyanarayana and others Vs Pentakota Seetharathnam and others in 2005 8 Scc (67)**.

24. A perusal of Ex.B9 (in original) would show that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement were, in our opinion, sufficient attestation within the meaning of the Act. The endorsement by the sub-registrar that the executant has acknowledged before him execution did also amount to attestation. In the original document the executants signature was taken by the sub-registrar. The signature and thumb impression of the identifying witnesses were also taken in the document. After all this, the sub-registrar signed the deed. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his Will or not and this aspect naturally



introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and the testament of departed testator. In the instant case, the propounders were called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document on his own freewill. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated above. It was argued by learned counsel for the respondent that propounders themselves took a prominent part in the execution of the Will which confer on them substantial benefits. In the instant case, the propounders who were required to remove the said suspicion have let in clear and satisfactory evidence. In the instant case, there was unequivocal admission of the Will in the written statement filed by P. Srirammurthy. In his written statement, he has specifically averred that he had executed the Will and also described the appellants as his sons and Alla Kantamma as his wife as the admission was found in the pleadings. The case of the appellants cannot be thrown out. As already noticed, the first defendant has specifically pleaded that he had executed a Will in the year 1980 and such admissions cannot be easily brushed aside. However, the testator could not be examined as he was not alive at the time of trial. All the witnesses deposed that they had signed as identifying witnesses and that the testator was in sound disposition of mind. Thus, in our opinion, the appellants have discharged their burden and established that the Will in question was executed by Srirammurthy and Ex.B9 was his last will. It is true that registration of the Will does not dispense with the need of proving, execution and attestation of a document which is required by law to be proved in the manner as provided in [Section 68](#) of the Evidence Act. The Registrar has made the following particulars on Ex.B9 which was admitted to registration, namely, the date, hour and place of presentation of document for registration, the signature of the person admitting the execution of the Will and the signature of the identifying witnesses. The document also contains the signatures of the attesting witnesses and the scribe. Such particulars are required to be endorsed by the Registrar along with his signature and date of document. A presumption by a reference to [Section 114](#) of the Evidence Act shall arise to the effect that particulars contained in the endorsement of registration were regularly and duly performed and are correctly recorded. In our opinion, the burden of proof to prove the Will has been duly and satisfactorily discharged by the appellants. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. In such circumstances, the onus shift to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same.



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6.1. Further he relied the Judgment of the Supreme Court

reported in 2020 16 Scc page No. 209 in the case of Dhanpat Vs Sheo Ram:

12. In support of the findings recorded by the High Court, Mr. Manoj Swarup, learned senior counsel for the plaintiff-respondent argued that in terms of [Section 69](#) of the Indian Succession Act, 1925, a Will is required to be attested by two witnesses who have seen the testator and in which the testator and two of the attesting witnesses sign in presence of each other. It is argued that Maha Singh, DW-3 had not deposed that all three were present at the same time, therefore, the finding of the High Court has to be read in that context, when the Will was found to be surrounded by suspicious circumstances as the second attesting witness was not examined. It is also argued that the original Will has not been produced and no application for leading secondary evidence was filed. Therefore, the secondary evidence could not be led by the defendant to prove the execution of the Will.

13. [Section 65\(c\)](#) of the Indian Evidence Act, 1872 4 is applicable in the facts of the present case as the defendants asserted that the original Will is lost. The [Section 65](#) reads as under:

“65. Cases in which secondary evidence relating to documents may be given. – Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-

(a) xx xx xx

(b) xx xx xx

(c) when the original has been destroyed or lost,

or

when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) xx xx xx

(e) xx xx xx

(f) xx xx xx

(g) xx xx xx

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.



xx xx xx”

14. The defendants produced a certified copy of the Will obtained from the office of the Sub-Registrar. The defendants also produced the photocopy of the Will scribed by DW 4-D.S. Panwar.

15. In a judgment reported as *M. Ehtisham Ali for himself and in place of M. Sakhawat Ali, since deceased v. Jamna Prasad, 4 for short, 'Evidence Act' since deceased & Ors.5*, the appellants-plaintiffs filed a suit on the basis of a sale deed. During trial, the stand of the plaintiffs was that the original sale deed was lost but since it was registered, secondary evidence by way of a certified copy prepared by the office of the Registrar was produced. It was not disputed that the copy produced was not the correct copy of the registered document. The suit was dismissed for the reason that the plaintiffs have not succeeded in satisfactorily establishing the loss of the original sale deed. The Court held as under:

“It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed. And if in addition he was not cross-examined, this result would follow all the more. There is no doubt that the deed was executed, for it was registered, and registered in a regular way, and it is the duty of the registrar, before registering, to examine the grantor, or some one whom he is satisfied is the proper representative of the grantor, before he allows the deed to be registered.”

7. By way of reply the learned counsel for the respondent/plaintiff submitted that on the date of alleged execution of the Will dated 14.12.1994 in defendant family a partition deed/Ex.B1 also executed besides another deed among the family members first defendant's wife and his brother also registered at the same time on same day. That apart, witness in the Will are close relatives of the first defendant besides the properties were bequeathed in favour of the fourth defendant who is the son



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of first defendant and he was also present at the time of the presentation of registration of the documents, relying all these documents the learned counsel for the plaintiffs submitted that by misrepresentation signature was obtained from the testator as if they are obtaining signature for the partition deed, without knowing its contents Muthusamy Gounder was forced to sign the Will and the factum of registration of documents were rightly caused suspicious over the minds of the Court which was not removed by the fourth defendant Will with sufficient evidence and the same was rightly appreciated by the Court below which needs no interference. Thus, he prayed to dismiss this appeal as no merits to that effect he relied the judgement of the Supreme Court in the case of ***H.Venkatachala Iyengar Vs B.N. Thimmajamma and others reported in ARR 1959 (443):***

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator.



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It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

*It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parc in *Harmes v. Hinkson (1)* " where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth ". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.*



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8. Considering the submissions on either side, the point to be decided is whether the Will was proved beyond reasonable doubt as required under Section 68 of evidence Act?

9. On considering the facts it reveals that on the date of registration of Will, another document partition deed also executed between the testator and his son/first defendant and the same was registered prior to the alleged registration of the Will B.19. According to the fourth defendant testator(father) at his own free Will and out of love and affection executed the Will in favour of him/fourth defendant with sound state of mind. To prove the same he examined the attesor of the Will as D.W.3 as per his evidence at request of the testator he went to the register office not only for the alleged Will but on that date the partition deed with regard to his family properties a deed of partition was executed and registered and subsequent to the alleged Will, apart from that he is close relatives of the first defendant. Though he stated in the chief examination that contents of the Will was read over to the attesor more particularly by the Sub register at the time of the registration of the Will. But on perusal of the Will Ex.B19 there is no single recital that Will was read over to the testator and he admitted the terms as correct. Normally during the execution of the Will, the recitals of the Will



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should be read out to the testator and it would also be a forming part of the said Will, because after death of the testator the Will is to be proved not like other documents but through the material evidence should reflect the minds of the testator at the time of the registration of the Will.

10. The Court below rightly appreciated these aspects. The learned counsel pointed out that the Will was executed in favour of the fourth Defendant/son of first defendant and at the time of the alleged registration the first defendant played a prominent role which caused suspicion over the execution of the Will, the fact also reveals that the first defendant was present at the time of the presentation of registration of the Will as he was examined as D.W.2. He deposed at the time of the registration of the Will he was not at Registrar's office he left the place went to his home thereafter he returned back to the registration office. But he admits that his house is far away from the register office but within ½ hour he went and returned back to the register office totally unacceptable. Because on perusal of the partition deed it was presented for registration before registration office at 2.30 P.m and the Will was presented between 3 to 4 p.m both the documents were presented simultaneously for registration. Immediately obtaining register number for the partition deed the said register number



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incorporated in the Will by hand written. On perusal of Ex.B19 Will the other contents of the Will were type written but the register number of the partition deed was inserted in hand written without any initial, witnesses failed to state that who made such insertion in the Will. The attestor of the Will namely D.W.3 also not deposed about the insertion. Normally any insertion made in the document, it should be mentioned in the end of the document by whom it was written but in the Will/Ex.B19 does not speak anything about the insertion. Furthermore, on perusal of the Will it was typed written and not hand written but at the end of the Will it is mentioned that drafted and attested by the document writer Shanmugam. Draft of the Will is totally different from type written of the Will so the person who typed the Will is to be mentioned in the end of the document but there is no such mention in the said Will. In the said Will reason said to be assigned by testator is that as his grand son/ fourth defendant was look after him with care, hence out of love and affection he executed Will in favour of him. But admittedly at the time of the the execution of the Will the fourth defendant was aged about only 18 years so, his contention that he maintained the grandfather at the age of 18 years is not acceptable one. In fact, testator was under the care of the first defendant and the partition deed reveals this



facts that both were lived jointly prior to the said partition.

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11. Furthermore, on the date of the registration of the Will another partition deed executed among the family member and the same accepted by the D.W.3 and D.W. 4 evidence so on the date of alleged registration of the Will two more documents of the partition registered and in between these two documents this Will was presented for registration which causes suspicious over the minds of the Court that whether the testator was known the contents of the Will or he knew the nature of the document or he signed knowing fully that he executed the Will in favour of his grand son/fourth defendant? when such strong objection was raised on the side of the plaintiff with regard to genuineness of the Will, the beneficiary/fourth defendant bound to remove the said suspicion beyond reasonable doubt with sufficient evidence. But on the side of the fourth defendant has not proved that testator was knowing fully signed the Will, because there may be a lot of possibilities that testator may taken to register office only to register the partition deed, at that time by inserting the Will they may obtained the signature from his father no reason has been assigned what necessitated the first defendant family members to execute another partition deed belongs to his wife family on the same date. Furthermore,



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witness of the alleged Will who are close relatives of the first defendants and his wife. If really testator want to transfer his properties to his grant son, he could very well implead fourth defendant as one of the party in partition deed and may allotted share to him. Circumstances reveals that the fourth defendant's father first defendants played the main role to obtain the alleged Will from his father at the time of registration of the partition deed. Though he was all along present at the time of execution of document but very cleverly stated that at the time of presentation of the Will he left the register office. The conduct of the first defendant created suspicious over the minds of the Court. So also case in hand fourth defendant not removed all these suspicious circumstances cast upon the Will beyond reasonable doubt nor the witness adduced on his side proved that Will was executed by the testator knowingly not only in sound state of mind but also with the knowledge that he executed the Will in favour of his grand son. As discussed above there is lot of probabilities that signature might have obtained from the testator as if he signed partition deed by mis-representation. Moreover, the family members of the first defendant surrendered the testator at the time of the registering the Will and the conduct of the first defendant caused suspicious over the execution of the Will and those suspicious circumstances



were not clarified nor removed by the appellant through material evidence.

Whichever case the Will has to be proved beyond reasonable doubt. The Judgement relied by the appellant is not applicable to the facts of the present case the Court below rightly appreciated this aspects hence Will was not proved by the appellant. Accordingly, question of law B is answered.

12. With regard to other question of law the plaintiff is entitled to seek alternative relief because he approached the court with two different contentions with regard to A and B schedule properties the plaintiff not preferred any cross appeal against A schedule properties. She contested the suit with regard to B schedule properties the evidences to that effect also proved the claim the court rightly appreciated these aspects which needs no interference accordingly questions of law are answered. Hence, findings rendered by the Courts below is confirmed.

13. In the result, the Second appeal is dismissed and the suit is decreed in part, accordingly preliminary decree is passed declaring $\frac{1}{4}$ share to the plaintiff and $\frac{1}{4}$ share each to the defendants 1 to 3 in respect of B



schedule properties. Consequentially connected miscellaneous petition is

closed. There shall be no order as to costs.

21.11.2022

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To

1. The II Additional District Judge, Erode.
2. The Subordinate Judge, Perundurai
3. The Section Officer,
V.R Section.



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T.V.THAMILSELVI,J.

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