



A.S(MD).No.94 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 04.08.2022

Pronounced on : 17.08.2022

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.94 of 2013
and Cross Objection (MD) No.15 of 2013

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Celeste Jayakar

... Appellant/Defendant

.Vs.

1.Olney Aaron
2.Naveen Aaron,
S/o.Olney Aaron,
No.34, Isabella Garden Lane,
Stouffville,
Ontario, OL3,
Canada,
Rep. by its Constituted Agent,
Olney Aaron (the first
Plaintiff under a power of attorney dated 28.08.2022
...Respondent/Plaintiffs

PRAYER in A.S(MD).No.94 of 2013: Appeal Suit filed under Section 96 of Civil Procedure Code, to set aside the judgment and decree dated 30.11.2012 made by the learned II Additional District Judge, Tuticorin in O.S.No.31 of 2011 and dismiss the suit.

For Appellant : Mr.K.Sekar
For Respondents : Mrs.Jessi Jeeva Priya



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Cross Objection (MD) No.15 of 2013

1.Olney Aaron

2.Naveen Aaron

S/o.Olney Aaron,
No.34, Isabella Garden Lane,
Stouffville,
Ontario, OL3,
Canada,

Rep. by its Constituted Agent,
Olney Aaron (the first

Plaintiff under a power of attorney dated 28.08.2022

... Cross Objectors/Respondents

Vs.

Celeste Jayakar

... Respondent/Appellant

PRAYER in Cross Objection (MD) No.15 of 2013: Cross Objections filed under Order 41 Rule 22 of Civil Procedure Code, to set aside the decree and judgment dated 30.11.2012, rendered in O.S.No.31 of 2011, on the file of the second Additional District Judge, Thoothukudi, in so far as it related to the dismissal of the suit as against the first Cross Objector/1st respondent is concerned, in the above appeal in A.S.No.94 of 2013, on the file of this Court, by allowing these Cross objections.

For Cross Objectors : Mrs.Jessi Jeeva Priya

For respondent : Mr.K.Sekar

COMMON JUDGMENT

This Appeal Suit has been preferred challenging the judgment and decree of the learned II Additional District Judge, Tuticorin dated



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30.11.2012 made in O.S.No.31 of 2011. The respondents in the appeal have also filed Cross Objection against the findings that the first respondent is not entitled to any share.

2. The appellant is the defendant in O.S.No.31 of 2011, on the file of the learned II Additional District Judge, Tuticorin. The respondents are the plaintiffs in the said suit. The respondents/plaintiffs filed a suit against the appellant/defendant for partition. After trial, the trial Court decreed the suit and passed the preliminary decree. Challenging the said judgment and decree, the appellant/defendant filed the present appeal before this Court.

3. The averments made in the plaint, in brief, are as follows:-

3.1. One Fanny Wilson, had two daughters, namely, Mrs.Lucky Aaron and the defendant, Mrs.Celeste Jeyakar. The first plaintiff married the eldest daughter of late Mrs.Fanny Wilson, namely, Mrs.Lucy Aaron, who died on 29.11.1999 leaving behind her husband, who is the first plaintiff and her only son, who is the second plaintiff. Mrs.Fanny Wilson died on 05.12.2009 leaving behind the plaintiffs and the defendant as her legal heirs.



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3.2. Mrs.Fanny Wilson, on 26.02.1997 executed her last Will and equally shared all the immovable properties to her two daughters. After the demise of her husband, she was residing alone at Tuticorin, till the year 2003. Due to her old age, she found it difficult to live alone at Tuticorin and manage her affairs and needed the help of someone. The defendant was employed in Kodaikanal International School and she took her mother to Kodaikanal in the year 2005. The defendant took advantage of the loss of memory power and her incapacity to manage her own affairs and on 11.08.2008, transferred all investments in fixed deposits in the joint names of late Mrs.Fanny Wilson and herself in the State Bank of India at Kodaikanal. The defendant maneuvered to get a Will fabricated and executed on 16.10.2008 and got it registered in the Office of the Sub-Registrar, Kodaikanal, as if she is the only legal heir to her mother. If Fanny Willson had sound disposing mind, memory power and mental capacity for due execution of a Will, she would not have revoked her earlier Will, dated 26.02.1997, under which, she bequeathed to both of her daughters all of her assets equally. If late Fanny Wilson had executed the Will in a sound and disposing mind, the defendant would have brought to the notice of the plaintiffs during the life time of her mother or at least soon after her demise, when particularly, she had



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the normal relationship with the plaintiffs. Therefore, the Will, dated 26.02.1997 is the true one and the last Will, dated 12.07.2008 is a fabricated one. The plaintiffs had issued two legal notices, dated 12.07.2010 and 09.05.2011 to the defendant stating that the Will dated 12.07.2008 is a fabricated one. The defendant has sent reply, dated 17.07.2010 denying the claim of the plaintiffs and asserting that the Will dated 12.07.2008 is the true and last Will of her mother. The plaintiffs have issued a rejoinder notice, dated 12.07.2011 to the defendant, stating that the defendant has not effected partition. Hence, the plaintiffs are constrained to file the suit.

4. The averments made in the written statement, in brief, are as follows:

The suit deserves to be dismissed as not maintainable and sheer abuse of process of law as there is no disclosing of the cause of action and the plaintiffs are not the legal heirs of the testatrix, namely, Fanny Wilson. The suit has been filed by the plaintiffs by alleging that the Power of Attorney was not executed in accordance with law. The elder daughter of the testatrix, namely, Mrs.Lucy Aaron died on 29.11.1999 and due to the change of circumstances, the exiting Will was revoked and



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another Will as per her wish and desire was duly executed. The allegation that the defendant maneuvered to get a Will fabricated and executed on 16.10.2008 and registered the same, was not only unfair but also false. The testatrix was in a sound disposing state of mind who drafted the Will on the guidance of a lawyer on her own accord and free volition, uninfluenced by anybody. The Will has been attested by the witnesses in the presence of the testatrix at the time of execution and registered by the Sub Registrar. The plaintiffs alleged that the Will, dated 16.10.2008 would have been brought to their notice immediately after the demise of the testatrix, if it was a genuine one. The first plaintiff did not ask for a copy of the Will as he is well aware that he was neither a legal heir not a beneficiary. Hence, the suit is liable to be dismissed.

5. On the basis of the above pleadings, the learned trial Judge framed the following issues:

- (i) Whether the suit filed by the power agent of the plaintiff is not legally sustainable?*
- (ii) Whether plaintiffs have no cause of action to file the suit.*
- (iii) Whether the Court fee paid by the plaintiff is not legally correct?*



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(iv) Whether the plaintiff is entitled to preliminary decree for partition as prayed for?

(v) To what other reliefs?

Additional Issue

(i) Whether the Will dated 16.10.2008 is valid?

6. In order to substantiate the case, on the side of the plaintiffs, two witnesses were examined as PW1 and P.W.2 and fourteen documents were marked as Ex.A1 to Ex.A14. On the side of the defendant, three witnesses were examined as DW1 to DW3 and ten documents were marked as Ex.B1 to B10.

7. On completion of trial and on hearing of arguments advanced on either side, the learned trial Judge considered the evidence available on record, decreed the suit and passed the preliminary decree. Aggrieved over that, the defendant filed the present appeal.

8. The learned counsel for the appellant submitted that though the trial Court held that the first respondent is not entitled to get any share and he is the only power agent of the second respondent and the power document has not been marked and proved that he was recognized as



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power agent of the second respondent. The said power of attorney was not duly attested as contemplated under law and the said power deed is genuine one and therefore, the suit itself is not maintainable. The first respondent admitted that during the course of cross-examination, the second respondent has not signed in the plaint and also the said power deed was also not marked and the non-filing of the power deed alone is not sufficient and the respondents failed to prove the same. As per the Section 40 of the Indian Succession Act, the first respondent is not a legal heir of Fanny Wilson, who is the testatrix of the Will (Ex.B1). Therefore, the suit is not maintainable. Further, he would submit that the first respondent has not denied the execution of Will, dated 16.10.2008 and the first respondent has not specifically pleaded regarding undue influence said to have been exercised by the appellant regarding the execution of the Will, dated 16.10.2008.

9. As per Order VI Rule 4 C.P.C that in case of undue influence, particulars must be stated with dates and items, otherwise without pleadings, mere argument will not hold the case of the party who pleads undue influence. The first respondent neither pleaded in his plaint nor laid evidence regarding undue influence. On the other hand, the appellant



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has proved the execution of Will, dated 16.10.2008 in the manner known to law by examining the one of the attestors and also in order to prove the health condition of the testatrix and also sound disposing state of mind, the appellant examined the Doctor as D.W.3, who gave a treatment to the testatrix. The attestor, who has been examined as P.W.2, is a Dormitory parent in a reputed International School, namely, Kodaikanal International School. Therefore, her evidence is impeachable and she has also given detailed version about the execution of the Will by the deceased Fanny Wilson, who is the testatrix. Though the respondents challenged the Will, dated 16.10.2008, on the ground that it was obtained by undue influence, there is no specific plea in this regard. The execution of the Will is admitted and the appellant is also examined as one of the witnesses and proved the Will. The Will is registered and therefore, it is genuine one and one of the attestors was examined and also the Will was proved in the manner known to law as per Section 68 of the Indian Evidence Act. Therefore, it is the bounden duty of the respondents to establish that the Will was executed under undue influence and there is no evidence in this case that the Will was executed by the testatrix under undue influence. Ex.B1 was proved that it was executed under Section 63 of the Indian Succession Act and it was proved under Section 68 of



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the Indian Evidence Act. Therefore, the Will is a genuine one and the Will was duly executed by the testatrix, namely, Fanny Wilson and the reason stated by the trial Court that the Fanny Wilson was not in a sound disposing state of mind at the time of alleged Will said to have been executed is against law and well settled proposition of law laid down by the Hon'ble Apex Court in various cases. Once the execution of the Will is not denied and pleaded that it was executed under undue influence, it is for the person who questioned the said Will on the ground of undue influence has to prove the same.

10. The testatrix while executing earlier Will dated 26.02.1997, both the daughters were alive and subsequently, one of her daughters, wife of the first respondent and the mother of the second respondent died on 29.11.1999 and thereafter, she was residing with the appellant during her life time she transferred all her individual accounts to joint accounts of the testatrix and the appellant herein. Since her elder daughter, namely, Lucy Aaron died and then, the only daughter/appellant is the legal heir to her and therefore, suddenly she executed the Will dated 16.10.2008 in favour of her/appellant.



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11. The trial Court without any valid reason, erroneously came to the conclusion that the Will was executed by surrounding suspicious circumstances and therefore, disbelieving Ex.B1, decreed the suit, which is against the well settled proposition of law. Therefore, the Appeal Suit is liable to be allowed and the judgment and decree have to be set aside.

12. The learned counsel for the respondents submitted that admittedly, Fanny Wilson got two daughters and Fanny Wilson executed the Will - Ex.B3. As per the Will, dated 26.02.1997, all the properties are equally bequeathed in favour of her two daughters. One of her daughters died, who is the none other than the wife of the first respondent and the mother of the second respondent. He would further submit that there is no reason to execute the subsequent Will, dated 16.10.2008 in favour of the appellant alone. He would further submit that even at the time of the execution of the alleged Will - Ex.B1, dated 16.10.2008, the age of the testatrix is 85 years and he would submit that though the appellant produced the medical records for taking treatment for the testatrix, they were produced only upto 2007 and no medical records were produced subsequent to that. He would further submit that even during the life time of the testatrix, taking advantage of the old age, the appellant



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transferred all the funds deposited in the name of the testatrix into the joint account and it is also surrounding suspicious circumstances that the testatrix would not have executed the Will with free consent and the appellant has not proved the Will Ex.B1 that it was executed by the testatrix with free consent and she has not removed the surrounding suspicious circumstances and therefore, the trial Court dismissed the claim of the appellant and decreed the suit in favour of the respondents. Hence, the Appeal Suit is liable to be dismissed. However, the trial Court failed to consider Section 109 of the Indian Succession Act 1925, that where a bequeath has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his, survives the testator, the bequeath shall not lapse, but shall take effect as if the death of the legatee had happened immediately, after the death of the testator, unless a contrary intention appears by the Will, and so, when, the legatee Lucy Aaron, who is the wife of the first respondent before the testatrix, namely, Mrs.Fanny Wilson and the Cross Objectors/Respondents are entitled to succeed to her estate and so, the 1st Cross Objector/1st respondent could not be held that he would not come under the category of lineal descendant and the Court below has completely overlooked the same, inasmuch, the Will,

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dated 26.02.1997 does not exclude the 1st Cross Objector/1st respondent as the beneficiary to the legatee. Therefore, the judgment of the trial Court is liable to be modified.

13. Heard the learned counsel appearing for the appellant, the learned counsel appearing for the respondents and perused the pleadings, issues framed by the trial Court and oral and documentary evidence adduced and produced by both parties.

14. Admittedly, the suit property belonged to Fanny Wilson. She got two daughters, namely, Lucy Aaron and Celeste Jeyakar. The said Lucy Aaron pre-deceased the Fanny Wilson on 29.11.1999. The first respondent is the husband of the said Lucy Aaron and the second respondent is the son of the Lucy Aaron. Admittedly, Fanny Wilson during the life time of Lucy Aaron had executed the Will, dated 26.02.1997 and equally bequeathed all her property in favour of both daughters, namely, Lucy Aaron and Celeste Jeyakar and the same was not a registered Will. Thereafter, Lucy Aaron died on 29.11.1999. According to the respondents, Fanny Wilson died with the last Will, dated 26.02.1997 and therefore, the respondents are entitled to $\frac{1}{2}$ share and the



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appellant is entitled to 1/2 share. According to the appellant, Fanny Wilson died on 05.12.2009. During her life time, she executed a last Will, dated 16.08.2008 and in the said last Will, an earlier Will dated 26.02.1997 was cancelled and revoked and the mother of the appellant executed the present Will dated 16.10.2008 in favour of the appellant. Therefore, the respondents are not entitled to any share. The appellant claims title under Ex.B1, dated 16.10.2008, which is the last Will of Fanny Wilson and therefore, the respondents are not entitled for any share. Hence, the suit for partition is liable to be dismissed, for which, the respondents have stated that the Will - Ex.B1 dated 16.10.2008 is not a valid one, on the ground that the testatrix has not executed the Will in a sound disposing state of mind and it is not executed by her with free consent. The appellant claims title under the Will and it is the duty of the appellant to prove the Will in the manner known to law. In order to prove the Will, the appellant examined herself as D.W.1 and marked the Will as Ex.B1 and in order to prove the said Will, she examined one of the attestors to the Will as D.W.2 and also examined one Doctor as D.W.3 and also the appellant has stated that the Will has been proved in the manner known to law.



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15. Admittedly, the said Will is a registered Will. Even it is a registered Will, the Will has to be executed as per Section 63 of the Indian Succession Act. If it is executed under the Indian Succession Act, it is duty of the propounder to prove the Will in the manner known to law. In this case, one of the attestors of the Will was examined and however, a reading of the Will shows that Fanny Wilson executed the Will during the life time of Lucy Aaron and the same was not denied by the appellant. After the death of Lucy Aaron, the disputed Will - Ex.B1 was executed in which there is no mentioning about the death of Lucy Aaron and also it is mentioned in the Will that the appellant is the only legal heir of the Fanny Wilson. However, Lucy Aaron died leaving behind the respondents and they are the legal heirs of the Fanny Wilson. Further, it is not stated any reason as to why they have not given any share to the respondents and as to why she has revoked the Will. As admitted by the appellant, the age of the testatrix, namely, Fanny Wilson was 85 years and she was taking continuous treatment. Medical records are also produced to show that she was taking treatment till 2007. The Will was executed in the year 2008. She died in the year 2009. Though the appellant stated that the appellant actively participated during the execution of the Will, the Will was executed under the undue influence of



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the appellant. Though the participation of the propounder during the execution of the Will is not a sole ground to discard the Will, the appellant stated that earlier Will, dated 26.02.1997 was revoked and subsequently, she executed a Will, dated 16.10.2008 and it is for the appellant to prove the case. Since it is a suit for partition, both the parties are plaintiffs and the defendant and vice versa. When the original owner of the property, namely, Fanny Wilson admitted the earlier Will - Ex.A3, it is the duty of the appellant to prove the subsequent Will as true and genuine and she has to remove the surrounding suspicious circumstances. Though the appellant has stated that the respondents have not pleaded and proved about the undue influence, once the respondents raised suspicious circumstances, it is the duty of the propounder to remove the suspicious circumstances. In this case, admittedly the age of the testatrix at the time of the execution of the second Will, is 85 years and the appellant has also actively participated during the execution of the Will and reason for revocation of the earlier Will has not been stated in the subsequent Will.

16. This Court finds that the trial Court rightly held that the appellant has not removed the suspicious circumstances surrounding and



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held that Fanny Wilson did not execute the Will Ex.B1 with free consent.

Though the appellant very much contended that the Power of Attorney has not been marked and admittedly, an application has been filed and Power of Attorney was also produced. Non-marking of the power of Attorney during the trial Court may not be a sole ground to disbelieve the power of attorney. Further, it is the matter between the power agent and principal and it is for the second respondent to challenge the same and therefore, in these circumstances, this Court finds that there is no merit in the appeal and this appeal is liable to be dismissed.

17. Since the earlier Will dated 26.02.1997 is proved. Lucy Aaron is the wife of the 1st Cross Objector and the mother of the second respondent. As per Section 109 of Indian Succession Act, both the cross objectors are entitled to $\frac{1}{2}$ share of the Lucy Aaron and the appellant is entitled to $\frac{1}{2}$ share.

18. The 1st Cross Objector/first respondent is entitled to $\frac{1}{3}$ rd share of Lucy Aaron's $\frac{1}{2}$ share and the second Cross Objector is entitled to $\frac{2}{3}$ rd share in the $\frac{1}{2}$ share of the Lucy Aaron.



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19. Therefore, the trial Court failed to consider Sections 109 and 33 of the Indian Succession Act and held as Luchy Aaron died intestate, the second respondent alone is entitled to $\frac{1}{2}$ share of the Luchy Aaron under Section 40 of the Indian Succession Act.

20. Section 40 of Indian Succession Act will not be applicable and Section 109 of Indian Succession Act only would be applicable, since Ex.B3 is admitted by both sides and proved by examining P.W.2 under Section 69 of Indian Evidence Act and Ex.B1 is not proved.

21. In the result, this Appeal Suit is dismissed and the judgment and decree passed in O.S.No.31 of 2011 by the learned II Additional District Judge, Tuticorin, is modified as indicated above. Cross Objection is allowed and the shares of the respondents in the appeal is modified as stated above. No costs.

17.08.2022

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Internet:Yes
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1. learned II Additional District Judge, Tuticorin
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN,J.

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