



OSA Nos.34 & 177 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.11.2023

CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

Original Side Appeal Nos. 34 & 177 of 2022
and
CMP.Nos.2750 & 11107 of 2022

1. Mrs. Muthulakshmi
2. M.Malliga
3. S.Punitha
4. S.Arasu Prakash

.. Appellants in both OSAs

Versus

1. K.Rani
2. K.Abhinaya (Minor)
Rep.by her mother and
Natural Guardian Mrs.K.Rani

.. Respondents in both OSAs

Prayer in OSA.No.34 of 2022: This Original Side Appeal filed under Order 36 Rule 1 of the Original Side Rules read with clause 15 of the Letters Patent to set aside the order dated 10.03.2020 in A.No.5657 of 2019 in O.P.No.18 of 2018.



OSA Nos.34 & 177 of 2022

Prayer in OSA.No.177 of 2022: This Original Side Appeal filed under Order 36 Rule 1 of the Original Side Rules read with clause 15 of the Letters Patent to set aside the order dated 29.04.202 in A.No.4950 of 2021 in T.O.S.No.34 of 2019 which was modified on 16.06.2022.

For Appellants : Dr.A.Thiyagarajan, Senior Counsel
for Mr.Nallathambi in both OSAs

For Respondents : Mr.P.Ganesan in both OSAs

COMMON JUDGMENT

(Judgment of the Court was delivered by R. MAHADEVAN, J.)

The parties to the proceedings are one and the same and that, the issues involved in both the appeals are inter-connected and hence, they were heard together and are disposed of by this common judgment.

2. Brief facts, as have been averred in these appeals, are as follows:

2.1. The appellants herein are the legal heirs of one Late N.Kandasamy.

The first and second appellants are the daughters of the said Kandasamy; and the appellants 3 and 4 are the wife and son of the only deceased son of the said



Kandasamy. The deceased Kandasamy executed a Will dated 27.03.2004 in favour of all the legal heirs and he died on 07.05.2004. After his death, the appellants filed O.P.No.51 of 2006 praying for letters of administration of the said Will. The respondents herein raised objections for probate of the Will. Hence, the said O.P. was converted into TOS No.15 of 2006 on 02.02.2006.

2.2. While so, claiming that the first respondent is the legally wedded wife and the second respondent is the test tube baby of the deceased Kandasamy, the respondents herein filed OP (D) No.3299 of 2006 on 02.02.2006 praying for letters of administration of a Will dated 11.07.2002 allegedly executed by the deceased Kandasamy in their favour. There was enormous delay in re-presenting the papers in OP (D) No.3299 of 2006, but the same was condoned and the petition was numbered as O.P.No.18 of 2018. Challenging the order dated 11.04.2018 in A. No. 1305 of 2018, the appellants preferred an appeal in OSA. No.300 of 2018.

2.3. During the proceedings in OSA No.300 of 2018, this Court directed the appellants and the first respondent to file a consent affidavit for subjecting



themselves for a DNA test to prove the paternity of the second respondent K.Abhinaya (Minor) born to the first respondent and the deceased Kandasamy through test tube. Pursuant to the same, the appellants filed a consent affidavit for DNA test, but the first respondent did not file consent affidavit. Thereafter, the appeal came to be disposed of, on 14.02.2019 and subsequently, the aforesaid Original Petition filed by the respondents was converted into TOS No.34 of 2019.

2.4. In the above circumstances, the appellants filed A.No.5657 of 2019 in OP No.18 of 2018, for ordering the DNA test of the second respondent and comparing the same with the sample of the second appellant, stating *inter alia* that the first respondent came to their house as servant maid and taking advantage of old age of the parents of the appellants 1 and 2, she fabricated the documents and obtained a forged Will dated 11.07.2002 as if she is the legally wedded wife of the deceased Kandasamy and the second respondent is born to him through test tube. It was further stated that the mother of the appellants 1 and 2 was well alive at that point of time and she never gave consent to the first respondent for the marriage with the deceased Kandasamy on 21.11.2001 and



that, she died only on 19.12.2001, and hence, the alleged marriage that took place between the first respondent and the deceased Kandasamy on 21.11.2001, is null and void. That apart, all the legal heirs of the deceased Kandasamy are very well living with him and hence, there is no necessity for him to have a test tube baby with the first respondent, at the age of 60 years, who was bed ridden. Thus, according to the appellants, the first respondent in order to grab the property, resorted to unlawful ways and obtain the alleged Will dated 11.07.2002; and that, there is a cloud over the claim of the first respondent that through the marriage with Kandasamy, father of the appellants 1 and 2, the second respondent was born on 21.04.2004 as test tube baby and the said Kandasamy died on 07.05.2004 and to remove the same, it is just and necessary to order DNA test of the second respondent and compare the sample with that of the second appellant herein.

2.5. By order dated 10.03.2020, the learned Judge has dismissed the application in A No. 5657 of 2019 filed by the appellants, by observing that DNA test is not germane to the facts of this case as the dispute only relates to the validity and genuineness of the Will produced on the side of the respondents.



Challenging the same, the appellants have preferred OSA No. 34 of 2022.

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2.6. Thereafter, the respondents filed A. No.4950 of 2021 in TOS No.34 of 2019 to refer the unregistered Will dated 27.03.2004 to the handwriting expert of TNFSL along with the registered documents containing the admitted contemporaneous writings / signatures of the deceased Kandasamy, viz., (i)Original Will dated 11.07.2002 (ii)Income Tax Returns submitted by the deceased dated 18.10.2002 (iii) Original rental agreement dated 22.03.2004 between the deceased Kandasamy and 4 others which have been filed by the respondents herein along with their written statement in TOS No.15 of 2006 as Document Nos.4, 5 and 8, for comparison and opinion. According to the respondents, the deceased married the first respondent on 12.06.2002 as per the suyamariyathai seerthirutha thirumanam in the presence of the relatives and elders and the same was duly registered on 13.06.2002 in the office of SRO, Anna Nagar and she has begotten the second respondent through IVF mode after following all the formalities; and that, out of love and affection, the deceased Kandasamy Gounder executed a Will in respect of the properties mentioned therein on 11.07.2002 registered as Document No.107/2002 on the



file of SRO, Anna Nagar and he died on 07.05.2004 due to multiple organ failure. The respondents further stated that the Will dated 27.03.2004 is a forged one, as it was created with the help and conspiracy of one Muthumani, who is the husband of the second appellant and his friend Jagannathan by using one Paramasivam of Manachanallur, Thiruchirapalli, as an imposter and also using the Commissioner of Oath as a partner in the crime of forging the said will. According to the respondents, at the time of execution of unregistered Will dated 27.03.2004, the deceased was not hale and healthy and he was not in a sound state of mind to execute the same. Though the appellants have admitted the execution of the registered Will on 11.07.2002, they claimed that the said Will has been revoked by the deceased by executing the unregistered Will dated 27.03.2004, and hence, it is just and necessary to compare the signatures found in the unregistered Will with that of the registered Will and other admitted documents containing the signature of the deceased Kandasamy, so as to elicit the truthfulness or genuineness of the execution of the same.

2.7. By order dated 29.04.2022, the relief sought in A. No. 4950 of



2021 filed by the respondents was granted by the learned Judge and for the said purpose, an Advocate Commissioner was appointed and she was directed to get all the relevant documents from both the parties and thereafter, produce the same before the Tamil Nadu Forensic Science Laboratory, Chennai for comparing the disputed signatures found in the unregistered Will with that of the Registered will, Income Tax Returns and rental agreement. Subsequently, when the matter was listed under the caption “for being mentioned” on 16.06.2022, the said order was clarified, as regards the documents sought to be compared. Aggrieved by the order so passed by the learned Judge, the appellants are before this court with the appeal viz., OSA No.177 of 2022.

3. According to the learned senior counsel for the appellants in both these OSAs, considering the age of the deceased Kandasamy, there is no question of going for a test tube baby when he has already a son and daughters and therefore, in order to establish the veracity and genuineness of the contents of the forged Will dated 11.07.2002, the Court below ought to have ordered the DNA test of the second respondent to find out her paternity.



4. It is the further submission of the learned senior counsel for the appellants that the alleged marriage between the deceased Kandasamy and the first respondent is null and void, as the mother of the appellants 1 and 2 was alive at that point of time. Secondly, the first respondent already got married three times and thereafter said to have married the deceased Kandasamy. None of the earlier marriages is valid and the first respondent has created records to show as if the second respondent is a test tube baby born to her and the deceased, only with an intention to grab the property of the deceased. Without taking note of all these aspects in proper perspective, the learned Judge by the order impugned in OSA No.34 of 2022, erred in dismissing the application seeking DNA test of the second respondent and compare the samples with that of the second appellant herein. It is also submitted that the learned Judge has failed to record the submission made on the side of the appellants to compare the signature found in the consent letter dated 21.04.2004 given by the deceased Kandasamy for IVF treatment with that of the Will dated 11.07.2002 by sending the same to the Forensic Department.



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5. The learned senior counsel for the appellants also submitted that relying on the signatures of the deceased found in the unregistered rental agreement and unsigned returns will not render any assistance to form an opinion on the disputed document. Adding further, it is submitted that the learned Judge ought to have dismissed the application filed by the respondents herein praying to refer the unregistered Will dated 27.03.2004 to the Handwriting Expert of the Tamil Nadu Forensic Science Laboratory, Chennai for comparing the signatures of the deceased Kandasamy with the Will dated 11.07.2002, Income Tax Returns and Rental agreement, as the documents relied on by the respondents in bare eyes contain different signatures of Late Kandasamy and therefore, sending unreliable and inadmissible signatures for comparison to Forensic Department will not fetch prudential results. However, the learned Judge erroneously allowed the application filed by the respondents seeking to refer the disputed document to the handwriting expert for comparison with that of the admitted signatures found in the documents filed by the appellants.

6. Per contra, the learned counsel for the respondents submitted that

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the order of the learned Judge allowing the application filed by the respondents, which is wholesome in all respects, needs no interference at this stage. As regards the order rejecting the relief sought by the appellants, it is submitted that even if the paternity test of the second respondent through DNA is ordered, the appellants could not use the said DNA test successfully as the deceased Kandasamy must be alive for giving sample for the same and as such, the very DNA test claimed by the appellants itself is an illegal exercise. Therefore, the order of the learned Judge rejecting the claim for DNA test, does not require any interference by this court. In support of his contentions, the learned counsel placed reliance on various decisions, more particularly, the order of the Hon'ble Supreme Court in *Aparna Ajinkya Firodia v. Ajinkya Arun Firodia in SLP (C)No.9855 of 2022*; and the judgments of the High Court in *Naval Kishor v. D.Swarna Bhadran [2008 (1) CTC 97]* and *K.Govindarajan v. Leelavathy in OSA Nos.110 and 111 of 2010*.

7. Heard the learned counsel on either side and also perused the records carefully and meticulously.



8. By way of these two appeals, the appellants are praying to set aside the two separate orders passed by different learned Judges, one rejecting the claim of the appellants seeking DNA test of the second respondent; and another appointing an Advocate Commissioner and directing her to get all the relevant documents from the parties and produce the same before the Tamil Nadu Forensic Science Laboratory, Chennai for comparing the disputed signatures found in the unregistered Will dated 27.03.2004 with that of the admitted signatures found in the registered Will dated 11.07.2002, Income Tax Returns for the years 2001-02 and 2002-2003 and rental agreement dated 22.03.2004 and file a report.

9. In the application seeking for order of DNA test, it is stated by the appellants that the first respondent already got married in the year 1986 to one Lakshmanan who belongs to Arthur Village and from that marriage she gave birth to a girl and a boy and they have been named as Vimala Devi and Venkatesan, respectively. After getting separated from that person, she went to Kottapalayam Village near Tiruchengode as a servant maid in Sengoda Gounder's house and while working there, the said Sengoda Gounder's wife died



and immediately the first respondent captured the position of the wife of Sengoda Gounder and obtained ration card and voter ID and the said Sengoda Gounder has also transferred his house in favour of the first respondent. After the death of the said Sengoda Gounder, she married another person by name Thambi Gounder and thereafter she claims to have married the father of the appellants herein. The first respondent herself has given confessional statement in this regard before the Mallasamudram Police Station in Crime No.471 of 2004. Denying the stand of the first respondent that she married the father of the appellants 1 and 2 and that, she has got the second respondent through test tube, it is further stated by the appellants that it was not possible for their father to have a child at that old age and that, since he already has three children, there was no necessity for him to have a child, that too, a test tube baby. It is also submitted by the appellants that only if a DNA test is conducted, the truth will come to light as to the paternity of the second respondent. They have also given consent letter in the earlier proceedings for carrying out DNA test. Further, in the written statement filed by the second appellant in TOS No.34 of 2019, it is stated that if the pleadings and contents of the respondents are true, genuine and correct, there is no reason for them to shy away for the test. Thus, according to



the appellants, the stand of the respondents that DNA test should not be conducted, shows that she is craving for the property of the deceased Kandasamy Gounder.

9.1. On the other hand, the application filed by the appellants, seeking to order DNA test, was seriously opposed by the respondents.

9.2. We have perused the confessional statement filed in the typed set of papers in OSA No.34 of 2022, which contains the above averments put forth on the side of the appellants, more particularly, that her intention is only to grab the properties of the deceased Kandasamy. However, we are not inclined to go into the same in detail. As regards the subject matter in issue, we are of the opinion that ordering of DNA test by the Court will not be done in a haphazard manner, rather it requires much scrutiny of the records and ultimately, only if the Court feels that in the light of the facts of the case before it, a compelling circumstance has arisen, which necessitates DNA test to be done, it will be ordered. In the present case, the dispute only relates to the validity and genuineness of the Will produced on the side of the respondents and hence, the learned Judge has rightly held that such test is not required, by the order impugned in OSA No. 34 of 2022, which need not be interfered with by this court.



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10. With respect to the order passed by the learned Judge in A.No.4950 of 2021, which is impugned in OSA No. 177 of 2022, the learned senior counsel for the appellants submitted that relying on the signatures of the unregistered documents and unsigned returns will not render any assistance to form an opinion on the disputed document and that, sending unreliable and inadmissible signatures for comparison to Forensic Department will not fetch prudential results. It is further submitted that the Will said to have been registered before the authorities in the year 2002 is a forged one and the unregistered Will of the year 2004 which is lying in the hands of the appellants is the original one and it supersedes the earlier Will. That apart, there is no substantial difference between registered and unregistered Will in terms of complying with the provisions of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. It is also submitted that the last Will and testament would automatically override the previous Will, if any, executed and therefore, the case of the respondents that the Will dated 11.07.2002 created a right in their favour, and hence, they are entitled for the properties mentioned therein, has no legs to stand.



10.1. This Court has perused the Will dated 27.03.2004 filed in the typed set of papers, in which, there was a reference to the Will which was registered on 11.07.2002. It is stated in the Will dated 27.03.2004 that the lady Rani, the first respondent herein, is a characterless woman and the deceased Kandasamy Gounder came to know that she has cheated several persons in the pretext of marriage and has illegally grabbed properties from them in the past. It is also clearly stated in the said Will that the Will dated 11.07.2002 has been created fraudulently by cheating the deceased and with an intention to illegally grab the properties; and that, the deceased cancels the said Will dated 11.07.2002. Further, the deceased Kandasamy stated in the unregistered Will that he sent the said Rani out of the house and that, after his life time, all his properties shall be enjoyed only by his legal heirs as per the shares mentioned therein. It is categorically stated in the concluding portion of the unregistered Will that the deceased was having the right to cancel the Will, if he wishes so in future, during his life time. Thus, it can be inferred from the contents of the unregistered Will that the Will of the year 2002 has been cancelled by the subsequent unregistered Will of the year 2004. This Court also finds that the way in which the Will dated 11.07.2002 was drafted by giving major properties to the



respondents and giving tiny properties to the original legal heirs and the further mentioning of the word "Enakupiragu" in the Will would prove that the Will has been prepared cleverly in such a manner that the respondents would get the properties at any cost. Moreover, the act of the respondents in not disputing the genuineness and validity of the subsequent unregistered Will much less initiating any legal proceedings against the appellants for declaring the same as null and void, assumes significant.

10.2. It is a well settled legal position that in case of Wills, the registered Will does not ipso facto stand on a higher pedestal than the unregistered Wills, as far as their genuineness and authenticity are concerned and it is only the Will which came subsequently prevail over the former irrespective of whether the subsequent Will is registered or not. We are supported by a decision of a Division Bench of this Court in ***R. Venkataraman & Ors. v. S.T. Sundari (2016 SCCOnline Mad 27406)*** to which one of us (RMDJ) was a party. The relevant passage of the judgment is quoted below for ready reference:

*“ 9. We are in agreement with the conclusion of the learned Single Judge. We may note that non-pendency of the probate proceedings regarding the subsequent Will does not mean that the subsequent Will is not capable of being propounded, and the grant of probate would depend on as to whether the respondent is able to prove the said Will or not which is a matter of evidence. **The subsequent Will being unregistered makes no difference, as the Will is***



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not a compulsorily registrable document and the subsequent Will, albeit unregistered, which if proved, would certainly supersede the earlier Will, which was registered, as per the settled legal position.”

10.3. Further, the Hon’ble Apex Court in the case of ***Mahesh Kumar (D) by LRs v. Vinod Kumar & Ors. [(2012) 4 SCC 387]*** while considering two Wills, similar to the instant case with the first Will registered and the second Will unregistered, reiterated the principle of subsequent Will prevailing over the former. The relevant portion is extracted hereunder:

“.....The absence of a categorical recital in Will dated 10.2.1992 that the earlier Will was cancelled is also not relevant because once the execution of the second Will is held as duly proved, the earlier Will automatically becomes redundant because the second Will represents the last wish of the testator”

In the present case, the subsequent unregistered Will records the existence of the previous registered Will and hence, it is on a much better footing than the case cited above.

10.4. It is also important to point out that the Testamentary Original Suit was filed by the respondents, who are the plaintiffs therein seeking letters of administration in respect of the registered Will dated 11.07.2002 and it is only the appellants herein i.e., the defendants in the said Suit, who are seeking to rely upon the unregistered Will dated 27.03.2004 allegedly executed by the testator as the last Will about 2 years after execution of the registered Will. The law is



well settled that it is only the propounder of the Will who has to take steps by leading substantial evidence to prove the due execution of the Will, which he seeks to rely upon. Thus, in this case, it is only the appellants, who ought to have taken steps to prove the due execution of the unregistered Will dated 27.03.2004 by examination of witnesses. Whereas, the respondents have unnecessarily taken out the application to disprove the alleged unregistered Will dated 27.03.2004 even before the appellants have discharged the onus of proving the due execution of the same. Therefore, the application filed by the respondents seeking comparison of the document is premature and ought to have been dismissed by the learned Judge. In any event, expert evidence is only a mere opinion with less evidentiary value, when compared to the substantial evidence and the same cannot be treated as a conclusive proof of deciding the genuineness or otherwise of the document.

10.5. Even on the factual matrix, it is seen that the testator had initially executed a registered Will dated 11.07.2002 which is admitted by both the parties. When the testator has consciously taken steps to register the Will executed by him at the first instance, the reason why he had chosen not to register the Will dated 27.03.2004 allegedly executed by him, is a factor to be



considered based on the evidence to be adduced by the parties during trial. A Division Bench of this Court in ***J. Naval Kishore v. D. Swarna Bhadran [(2008) 1 CTC 97]*** has reckoned that such a conduct amounts to a suspicious circumstance and the relevant portion of the said judgment is extracted hereunder for better appreciation:

“ 72. We are conscious that mere registration of the Will by itself will not dispel all suspicions regarding execution and attestation of the Will. Registration of the Will by itself does not ensure the genuineness of the Will. But act of registration is a solemn act which would lend assurance to the genuineness of the Will. When Javantharaj was in the habit of obtaining legal advice and getting documents registered, Ex. P-2 Will being unregistered is yet another suspicious circumstance, which we are unable to reconcile with. ”

10.6. At this juncture, it is apposite to refer to the relevant portion of the recent decision of the Hon'ble Apex Court in ***Meena Pradhan v. Kamla Pradhan [(2023) 9 SCC 734]*** wherein the principles relating to the proof of execution of Will had been expounded and the same read thus:

“10.4 Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.”

Thus, the order passed by the learned Judge in allowing the application to refer the disputed document for forensic examination to test the signature of the testator found therein, is misconceived insofar as it misplaces the burden upon



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the respondents and is hence, liable to be interfered with and is, accordingly set aside.

11. In such perspective of the matter, OSA No. 34 of 2022 stands closed. OSA No.177 of 2022 stands allowed. No costs. Consequently, connected miscellaneous petitions are closed.

J.]

[R.M.D., J.] [M.S.Q.,

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