

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 02.02.2023

PRONOUNCED ON : 24.03.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.(MD).Nos.193 of 2016 and 384 of 2014

and

M.P.(MD).No.1 of 2014

S.A.(MD).No.193 of 2016:

1.Mary Amitharaj

2.Vincent Theigaraj

3.Philomene Robert

... Appellants

Vs

1.V.George Peter

2.V.Maria Jesu (Died)

3.V.Francis Xavier

4.Michael Maria Rethinam

5.M.Maria Vinola

(R4 and R5 are brought on record as LR's of

deceased 2nd respondent vide Court order dated 12.03.2018 made in C.M.P.(MD).Nos.2382 to 2384 of 2018 in S.A.(MD).No.193/2016)

6.Maria Evangeline

7.Viswath Antony Arockiaraj @ F.Viswathraj

8.Viswath Arul Rajan

... Respondents

(RR 6 to 8 are impleaded vide Court order dated 19.01.2021 made in C.M.P.(MD)No.2010 of 2020 in S.A.(MD).No.193/2016)

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code, praying to set aside the Judgment and Decree passed by the Court of the Principal District Judge, Virudhunagar District at Srivilliputhur in A.S.No.02 of 2012 on 30.10.2013 in reversing the well considered Judgment and Decree passed by the Court of the Subordinate Judge, Srivilliputhur in O.S.No.310 of 1996 on 30.09.2011 and allow this Second Appeal.

For Appellants : Mr.S.Parthasarathy
Senior Counsel
for Mr.G.Marimuthu

For R1 : Mr.J.Bharathan
for I.Velpradeep

For R2 : Mr.A.Sivaji

For R4 and R5 : Mr.K.Govindarajan

For R7 : Mr.S.Ponsenthilkumar

For R8 : Mr.S.C.Herold Singh

S.A.(MD).No.384 of 2014:

V.Francis Xavier ... Appellant

Vs

1.V.George Peter

2.Mary Amirtharaj

3.Vincent Theigaraj

4.Philomene Robert

5.V.Maria Jesu (Died)

6.Michael Maria Rethinam

7.M.Maria Vinola ... Respondents

*(Respondents 6 and 7 are brought on record as
LRs of the deceased 5th Respondent vide Court
order dated 04.01.2018 made in C.M.P.(MD).No.
7855 of 2017)*

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code, praying to set aside the judgment and decree in A.S.No.2 of 2012 on the file of the Principal District Judge, Virudhunagar District at Srivilliputhur dated

30.10.2013 reversing the judgement and decree in O.S.No.310 of 1996 on the file of the Sub Court, Srivilliputhur dated 30.09.2011.

For Appellant	:	Mr.A.Sivaji
For R1	:	Mr.J.Bharathan for I.Velpradeep
For R2 to R4	:	Mr.S.Parthasarathy Senior Counsel for Mr.G.Marimuthu
For R6 and R7	:	Mr.K.Govindarajan

COMMON JUDGMENT

These Second Appeals are arising out of judgment and decree passed in A.S.No.2 of 2012 on the file of the Principal District Court, Virudhunagar District at Srivilliputhur reversing the decree for partition granted by the Trial Court in O.S.No.310 of 1996 on the file of Sub Court, Srivilliputhur.

2. The parties are referred in this judgment as per their ranking in Second Appeal in S.A.(MD).No.193 of 2016.

3. The Second Appeal in S.A.(MD).No.193 of 2016 is filed by the plaintiffs in the suit. The suit was filed for partition against the respondents. The suit was decreed by the Trial Court and the findings of the Trial Court were reversed by the First Appellate Court on appeal filed by the 1st respondent. Therefore, the plaintiffs have come up by way of this second appeal.

4. The Second Appeal in S.A.(MD).No.384 of 2014 is filed by 4th defendant in the suit aggrieved by the judgment and decree passed by the First Appellate Court upholding the Will pleaded by the 1st respondent.

Plaint Averments:

5. According to the appellants in S.A.(MD).No.193 of 2016/plaintiffs, the suit properties originally belonged to their father S.Viswasam Nadar. He died intestate on 28.10.1996 leaving behind his daughters, the appellants/plaintiffs and 3 sons, respondents/defendants 3, 2 and 4, apart from his wife, deceased 1st defendant in the suit. The appellants claimed that

after the death of S.Viswasam Nadar, they had been possession and enjoyment of suit properties as co-owners along with the respondents. It was also alleged that though appellants requested for effecting partition by metes and bounds, the respondents evaded their request and hence, the appellants were constrained to file a suit for partition against the respondents and also their deceased mother claiming 6/18 share. Pending Suit, the mother of the parties viz., 1st defendant in the suit Maria Thangammal passed away and hence, after her death, appellants herein, claiming equal share along with the respondents, amended plaint seeking 3/6 share in the suit properties.

Averments found in Written Statement:

6. The 1st defendant in the suit viz., mother of the appellants and respondents filed a written statement wherein she claimed that S.Viswasam Nadar during his life time executed a Will on 26.08.1993 bequeathing suit properties to her and hence, she claimed absolute right over the suit properties and sought for dismissal of the suit.

7. The 2nd respondent/2nd defendant herein filed a written statement and claimed that S.Viswasam Nadar executed a Registered Will registered as Document No.56/93 on the file of Sub Registrar's Office, Eraniel in respect of his properties in Tamil Nadu and executed another Registered Will registered as Document No.76/95 on the file of Sub-Registry, Pattom, Tiruvanandapuram regarding his properties at Kerala including the plaint 1st Schedule Property and hence, plaintiffs have no right over the suit properties. It was further averred by him that he was not beneficiary under the Will executed by S.Viswasam Nadar and hence, he was not a necessary party to the suit as suit properties were not given him under those Wills.

8. The contesting 1st respondent/3rd defendant filed a written statement disputing the averments in the plaint that the suit properties were self acquired properties of S.Viswasam Nadar and he died on 28.10.1996. However, 1st respondent specifically denied the averment made by the appellants as if, S.Viswasam Nadar died intestate. It was specifically averred by the 1st respondent that S.Viswasam Nadar during his life time, when he

was hale and healthy, executed a Registered Will dated 05.06.1995 registered as Document No.76/95 on the file of Sub-Registry, Pattom, Tiruvananthapuram bequeathing 1st Schedule of the Suit Properties in his favour subject to the life interest of deceased 1st defendant viz., the mother of the parties. He also claimed that in respect of portion of 1st Schedule Property, 2 cents of land and first floor of the building, S.Viswasam Nadar executed a Settlement Deed dated 19.02.1996 in his favour and same had been acted upon by mutation of revenue records. Thus, on the basis of the Will pleaded by him, the contesting 1st respondent prayed for dismissal of the suit.

9. The 3rd respondent/4th defendant in the suit filed a written statement and claimed that S.Viswasam Nadar executed a Will in Document No.2/89 registered on the file of Sub Registrar Office at Pattom, Kerala bequeathing Suit 1st Schedule Property in favour of sons of 4th defendant. It was asserted by him that 1989 Will executed by S.Viswasam Nadar in favour of his sons was his last Will and on that ground he sought for dismissal of the suit. As

far as 2nd Schedule of the Suit Properties were concerned, the 4th defendant admitted in his written statement that the same was available for partition as S.Viswasam Nadar did not execute any Will in respect of those properties. He also paid separate court fee claiming equal share in the 2nd Schedule of the Suit Property. On these pleadings, the parties went to the trial.

10. On behalf of the appellants/plaintiffs, the 3rd plaintiff was examined as PW.1 and no documents were exhibited on the side of the appellants. On behalf of the respondents, the 1st respondent/3rd defendant was examined as DW.1 and the attesor to the Will relied on by him viz., Ex.B2 was examined as DW.2. The 3rd respondent/4th defendant was examined as DW.3. The attesor to the Will pleaded by 4th respondent was examined as DW.4. The mother of the parties viz., the deceased 1st defendant was examined as DW.5. On behalf of respondents, 39 documents were marked as Ex.B1 to B39. The signature of DW.2 was marked as Ex.C1.

11. The Trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that neither the Will pleaded by 1st respondent Ex.B2 nor the Will pleaded by 4th defendant Ex.B32 were proved. The Trial Court on entering a finding that S.Viswasam Nadar died intestate decreed the suit granting half share (3/6).

12. Aggrieved by the same, the 1st respondent herein alone filed an appeal in A.S.No.2 of 2012 on the file of Principal District Court, Virudhunagar at Srivilliputhur. The First Appellate Court reversed the findings of the Trial Court and came to the conclusion that the Will pleaded by the 1st respondent viz., Ex.B2 stood proved and consequently, allowed the appeal and dismissed the suit. Aggrieved by the same, the plaintiffs in the suit have come before this Court in S.A.(MD).No.193 of 2016. The 3rd respondent herein/4th defendant in suit has filed a separate second appeal in S.A.(MD).No.384 of 2014 challenging the judgment and decree passed by the First Appellate Court.

13. This Court at the time of admitting the second appeals formulated the following substantial questions of law:-

“i) Are not the reversing judgment and decree of the lower appellate court contrary to law when the Will B2 and settlement deed B7 do not relate to the suit 2nd item?

ii) Is the lower appellate court correct in law in holding that the Will under Ex.B2 is valid and the last Will when admittedly a settlement deed was executed after the said will, that too, the Will was not validly proved in a manner to law?”

14. Mr.S.Parthasarathy, learned Senior Counsel appearing for appellants in S.A.(MD).No.193 of 2016 and respondents 2 to 4 in S.A.(MD).No.384 of 2014 elaborated the substantial questions of law by stating that Ex.B2-Will relied by 1st respondent was executed in Malayalam and on the other hand the wife of testator viz., mother of the parties, who was examined as DW.5 had categorically admitted that testator had no

knowledge in Malayalam. The learned Senior Counsel by taking this Court to the evidence of DW.1 also submitted that though DW.1 in his chief examination deposed that testator was very well conversant with Malayalam, in his cross examination, he deposed that he was not fluent in Malayalam. Therefore, by relying on the evidence of DW.1 and DW.5, the learned Senior Counsel forcibly submitted that when testator was not fluent in Malayalam execution Ex.B2-Will in Malayalam is doubtful and the same is a serious suspicious circumstance surrounding the Will. The learned Senior Counsel also by taking this Court to the contradiction in the evidence of attester to Ex.B2-Will which were pointed out by the Trial Court in its judgment, submitted that Will has not been proved in accordance with law as required under Section 68 of Indian Evidence Act, 1872. The learned Senior Counsel also assailed the Will-Ex.B2 on the ground that there was no mention about the reason for disinheriting the appellants/plaintiffs' daughters of the testator in the Will. The learned Senior Counsel further submitted that the failure to give reasons for disinheriting the daughters makes the disposition under the Will as unnatural one. In this connection, he

relied on the judgment of this Court in ***Dharman vs. Marimuthu*** reported in ***1996 – 2 – L.W. 600***.

15. Mr.A.Sivaji, learned counsel for the appellant in S.A.(MD).No. 384 of 2014 while supporting the arguments of learned Senior Counsel for the appellants in S.A.(MD).No.193 of 2016 supplemented the same by submitting that Ex.B2-Will was allegedly executed by testator only in respect of 1st Schedule of the Suit Property and hence, in the absence of any testamentary documents concerning 2nd Schedule of the Suit Property, the First Appellate Court after upholding Ex.B2-Will ought not to have set aside the decree for partition granted by the Trial Court in respect of 2nd Schedule of the Suit Property.

16. Per contra, Mr.J.Bharathan, learned counsel appearing for contesting 1st respondent tried to sustain the findings of the First Appellate Court by submitting that the appellants' own witness PW.1 categorically admitted that testator S.Viswasam Nadar had wide range of business activity

at Kerala and hence, his knowledge in Malayalam language cannot be doubted. The learned counsel further submitted that as per the evidence of PW.1 S.Viswasam Nadar's family lived at Tiruvanandapuram for long time and Will was executed and registered at Tiruvanandapuram. Therefore, there was nothing strange in executing the Will in Malayalam. The learned counsel by taking this Court to the evidence of DW.2, the attester to the Ex.B2-Will submitted that his evidence clearly proved the due execution of Will and nothing was culled out in his cross examination to doubt the evidence of attester.

17. The learned counsel by referring to the written statement filed by the 2nd defendant submitted that 1st and 2nd appellants were provided with 33 cents of vacant land each in Kovilpatti Town by S.Viswasam Nadar and 3rd appellant was provided with cash by way of premium in LIC policy. He also referred to the averments regarding gift given to the appellants at the time of marriage in the form of 125 sovereign of gold, cash and household articles. Thus, it is the submission of learned counsel that the appellants/daughters of

the testator were given sufficient seer articles at the time of marriage befitting the status of the family and hence, disinheritance of the appellants cannot be termed as suspicious circumstance surrounding the Will. The learned counsel relied on the judgment of the Hon'ble Apex Court in ***Dhanpat vs. Sheo Ram*** reported in ***(2020) 16 SCC 209*** for the proposition that mere absence of reference to the nature heir, who were disinherited in the Will cannot be treated as a suspicious circumstance surrounding the Will. The learned counsel also relied on the judgment of the Hon'ble Apex Court in ***V.Prabhakara vs. Basavaraj K*** reported in ***(2022) 1 SCC 115*** for the proposition that testamentary court is not a court of suspicion and mere exclusion of either brother or sister *per se* would not create a suspicion unless it is surrounded by other circumstances creating such an inference.

18. In his reply, the learned Senior Counsel for the appellants by pointing out the statement made by DW.2 attesor to Ex.B2-Will in his cross examination submitted that he deposed that he did not sign Ex.B2. It is the submission of the learned Senior Counsel that when attesor denied his

signature in Will unless the other attesor to the Will is examined, Will cannot be treated as proved.

Discussion on Question of Law No.2:

19. It is settled law in case of proof of Wills, it is for the propounder of the Will to prove the same by calling atleast one of the attesor to the Will. In cases, where there are suspicious circumstances surrounding the Will, the burden on the propounder will not get discharge by mere examination of attesor to the Will and the same will continue till he dispel those suspicious circumstances. One main contention raised by the learned Senior Counsel for the appellant was that the attesor DW.2 denied his signature in Ex.B2-Will and hence, the Will was not proved in accordance with law. It is settled law that the evidence of a witness has to be weighed as a whole and inference cannot be drawn based on a stray statement of the witness in his cross examination. In the light of the said position, let as examine the evidence of DW.2 attesor to the Ex.B2-Will.

20. The DW.2 in his chief examination clearly deposed that he attested Ex.B2-Will. He identified his signature as Kuttappan S/o. Neelakandan. He also deposed clearly about the health and mental capacity of the testator. In chief examination, he clearly deposed that he had seen testator signing the Will and the said testator had seen the signing of the Will by him and another attester. He also said that he had seen the attestation by another attestator namely Phzhkaran S/o. Punjan. During the cross examination, he deposed about his attestation of Will. He was cross examined extensively regarding attestation and withstood the cross examination. In fact, he denied the suggestion that he did not attest Ex.B2-Will and the signature found in Ex.B2 was not his signature.

21. During cross examination, he identified his signature in Ex.B2-Will. It was recorded by the Trial Court that witness identified his signature in Ex.B2 by putting a round mark by pencil over his signature in Ex.B2. Therefore, there is no doubt that DW.2 identified his signature in Ex.B2-Will and his evidence about attestation also withstood the cross

examination. However, when he was cross examined by 4th defendant's counsel, there is one sentence in his cross examination as if, he deposed that his signature did not find place in Ex.B2. It is not clear that what was the question put to him and what was his answer to that question. The Trial Court which recorded the evidence of DW.2 clearly mentioned that DW.2 identified his signature in Ex.B2 by putting a round mark surrounding his signature in Ex.B2.

22. In such circumstances, a single statement in his evidence during cross examination by 4th defendant, which does not go well with context, cannot be sole ground to discredit the evidence of DW.2. Hence, the arguments advanced by the learned Senior Counsel in this regard is not acceptable to this Court.

23. The learned Senior Counsel by pointing out the evidence of DW.5 that her husband/testator had no knowledge in Malayalam submitted that it is a serious suspicious circumstance surrounding the Will. DW.5 is the

mother of the parties and wife of testator. A perusal of written statement filed by her would make it clear that she filed a suit for bare injunction restraining the appellants and defendants from interfering with her peaceful possession and enjoyment over the suit properties in O.S.No.289 of 1997. She relied on a separate Will dated 26.08.1993 and claims absolute right over the suit properties. Therefore, it is clear that the relationship between the 1st respondent and DW.5 was not cordial and she set up a rival claim under different Will.

24. In these circumstances, much reliance cannot be made on the evidence of DW.5 as if, testator had no knowledge in Malayalam. On the contrary, appellants' own witness, PW.1 admitted about the knowledge of testator in Malayalam. PW.1 in her evidence deposed that she was born and brought up at Tiruvanandapuram. Her father/testator died at Tiruvanandapuram. All the appellants and respondents got married at Tiruvanandapuram. She specifically admitted that the house in the Suit 1st Schedule Property was constructed for residential use of testator at

Tiruvanandapuram. She obtained her B.Sc., degree from the college at Tiruvanandapuram. She also admitted her father had main business at Kerala and Tamil Nadu. Thus, well pronounced admissions of PW.1 would make it clear that testator had wide range of business activity at Tiruvanandapuram and he resided at Tiruvanandapuram for best part of his life along with his children. Infact, he put up a house in 1st Schedule of the Suit Property for his residential use. Therefore, the contention of the learned Senior Counsel for the appellant as if, testator had no knowledge in Malayalam cannot be accepted in the light of the evidence of appellants own witness PW.1. DW.1, the attesor to Ex.B2 deposed that testator had knowledge in Malayalam.

25. Though DW.1 in his cross examination deposed that testator can read Malayalam a little and he cannot read it fluently. In the light of the evidence of attesor that the terms of the Will was dictated by the testator and the same was prepared by the scribe and the testator put his signature in the Will after it was being read over to him, I hold lack of fluency in

Malayalam may not go against the 1st respondent in this case in the light of the fact that Will was executed and registered at Tiruvanandapuram and the testator had spent best part of his life at Tiruvanandapuram. There is an ample evidence of records to show that he had enough knowledge in Malayalam to understand the same. Therefore, the suspicious circumstance pointed out by the learned Senior Counsel is dispelled by evidence of PW.1, DW.1 and DW.2.

26. In view of the discussions made earlier, I hold the 1st respondent succeeded in proving Ex.B2-Will pleaded by him. The findings of the fact arrived at by the First Appellate Court in this regard requires no interference by this Court and the question of law No.2 is answered against the appellants.

Discussion on Question of Law No.1:

27. A bare perusal of Ex.B2 relied on by 1st respondent would make it clear that the said testamentary document was executed only in respect of 1st

Schedule of the Suit Property. There is no evidence available on record to show that there is any other testamentary document covering 2nd Schedule of the Suit Property. Ex.B2-Will pleaded by 4th respondent was disbelieved by the Trial Court and the said finding was not assailed by the 4th respondent by filing first appeal. Therefore, the 4th respondent cannot challenge the said finding in this second appeal. In any event, this Court concurred with the findings of First Appellate Court with regard to genuineness of Ex.B2-Will.

28. In the absence of any valid testamentary document by S.Viswasam Nadar in respect of 2nd Schedule of the Suit Property, the appellants and respondents who are children of S.Viswasam Nadar are entitled to equal share in the 2nd Schedule of the Suit Property. The First Appellate Court committed a serious error in setting aside the decree for partition granted by the Trial Court with regard to 2nd Schedule of Suit Property when Ex.B2-Will pleaded by the 1st respondent was confined to 1st Schedule of the Suit Property.

29. Accordingly, the judgment and decree passed by the First Appellate Court in respect of 2nd Schedule of the Suit Property is liable to be set aside and the judgment and decree of the Trial Court is restored in respect of 2nd Schedule of the Suit Property. Accordingly, the question of law No.1 is answered in favour of the appellants.

In fine:-

- (a) Both the Second Appeals are partly allowed by setting aside the judgment and decree passed by the First Appellate Court in so far as the 2nd Schedule of the Suit Property is concerned.
- (b) The judgment and decree passed by the First Appellate Court is confirmed in so far as the 1st Schedule of the Suit Property is concerned.

(c) The suit is decreed in so far as the 2nd Schedule of Suit Property is concerned by granting half share to the appellants and the suit is dismissed in respect of the 1st Schedule of the Suit Property.

(d) The connected miscellaneous petition is closed.

(e) In the facts and circumstances of the case, there will be no order as to costs.

24.03.2023

NCC: Yes/No
Index: Yes/No
dm

To

- 1.The Principal District Judge,
Virudhunagar District at Srivilliputhur.
- 2.The Subordinate Judge,
Srivilliputhur.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

S.A.(MD).Nos.193 of 2016 and 384 of 2014

S.SOUNTHAR, J.

dm

Pre-delivery common judgement in
S.A.(MD).Nos.193 of 2016 and 384 of 2014

24.03.2023