



S.A.No.1103 of 2013

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.02.2024

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

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Vittal

.. Appellant

Vs.

1.Nallammal

2.Elavarasan

3.Krishnamoorthy

.. Respondents

Prayer : This Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree in A.S.No.87 of 2007, dated 19.02.2013 on the file of the II Additional Subordinate Judge, Villupuram confirming the judgment and decree in O.S.No.519 of 2004, dated 31.10.2006 on the file of the Principal District Munsif, Ulundurpet.

For Appellant : Mr.S.Krishnasamy

For Respondents : Mr.A.Arun Babu
for Mr.B.Jawahar



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JUDGMENT

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The plaintiff is the appellant. He filed a suit for declaration of title and for permanent injunction. The properties are 16 items. There is no dispute that it belonged to one Srinivasa Kounder. Srinivasa Kounder had two sons namely Jayarama Kounder and Chinnaya Kounder. Jayarama Kounder expired on 23.06.2002. He left behind his wife Nallammal/1st defendant and his son Elavarasan/2nd defendant to succeed to his estate. They were assisted by one Krishnamoorthy, who was shown as the 3rd defendant.

2. It is the case of the plaintiff that Chinnaya Kounder, died on 04.09.2003, as a bachelor. Chinnaya Kounder is none else than his mother's brother, i.e., plaintiff's maternal uncle. Chinnaya Kounder had written a "WILL" with respect to his properties on 21.02.2003. The said "WILL" was registered on 06.03.2003. By virtue of this "WILL", the properties that came to Chinnaya Kounder, on the death of his father Srinivasa Kounder, was bequeathed to the plaintiff.



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3. The plaintiff pleaded that Chinnaya Kounder and Jayarama Kounder had orally partitioned the properties among themselves and consequently, Chinnaya Kounder became the owner of half a share. It is this half share that the plaintiff claims have come down to him by virtue of the "WILL". As he feared interference from the three defendants, he presented a suit for declaration of title and for permanent injunction.

4. On entering appearance in the suit, the defendants took a stand in the written statement that their relationship is true, however, they denied the factum of oral partition. They also denied the "WILL", dated 21.02.2003 in favour of the plaintiff. They further pleaded that Chinnaya Kounder did not die on 04.09.2003 but on a subsequent date i.e., on 05.09.2003.

5. According to the plaintiff, the defendants are in possession and enjoyment of the property after the death of Jayarama Kounder, who had been enjoying the same. The factum that Chinnaya Kounder died as a bachelor is not in dispute. He would plead that Jayarama Kounder had excluded his brother from the possession and enjoyment of the property. The defendants 1 and 2 would project a "WILL" dated 15.08.2003,



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whereunder, Chinnaya Kounder is said to have bequeathed the property in favour of the 2nd defendant/Elavarasan, his brother's son. Therefore, on account of the fact that Chinnaya Kounder had executed a “WILL” in favour of Elavarasan, the defendants would argue that Elavarasan became the absolute owner of the properties. It is pertinent to point out that nowhere in the written statement any suspicious circumstances had been pleaded by the defendants. The parties went to trial on the basis of these pleadings.

6. On the side of the plaintiff, he examined himself as P.W.1. The attesting witness by name Durairaj was examined as P.W.2, the scribe by name Nagarajan was examined as P.W.3 and one Parimalakannan, the alleged tenant of the property was examined as P.W.4. On the side of the plaintiff, Ex.A1 to Ex.A12 were marked. The 1st defendant/Nallammal examined herself as D.W.1. Mr.Krishnamoorthy, who is said to be assisting Nallammal was examined as D.W.2. Apart from that, two other witnesses were examined. On the side of the defendants, Ex.B1 to Ex.B18 were marked.



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7. On the basis of the documents that had been produced before the Court, the learned Trial Judge dismissed the suit. I have to add here that despite my strenuous effort to understand what the learned Trial Judge has stated in the judgment, I was unable to decipher the same.

8. Aggrieved by the same, the plaintiff had preferred an appeal in A.S.No.87 of 2007 to the file of the II Additional Subordinate Judge at Villupuram. The learned Appellate Judge held that the "WILL" is riddled with suspicious circumstances. The suspicious circumstances that she had listed are as follows :

(1) The plaintiff was unable to reply whether the deceased Chinnaya Kounder took treatment three days before his death.

(2) The "WILL" was registered on 06.03.2003, whereas, it had been executed on 21.02.2003.

(3) The "WILL" was registered at Thiruvennainallur along with the mortgage deed under Ex.B1 on 06.03.2003. The "WILL" could have been registered anywhere in the country, but however it had been registered along with the mortgage deed on Thiruvennainallur, which is a suspicious circumstance.



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(4) “Sealed Will” procedure was not followed.

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(5) No executor had been appointed under the "WILL".

(6) The scribe/document writer for the mortgage deed as well as for the "WILL" was one and the same person and so also the case of the attesting witness, who was also the identifying witness.

(7) The address given in the document under Ex.A1 does not tally with the address given in the document under Ex.B1.

(8) The death certificate produced by the plaintiff shows that Chinnaya Kounder died on 04.09.2003, whereas, the death certificate produced by the defendants shows that he died on 05.09.2003. Apart from that, she held that the boundaries had not been mentioned in the plaint and therefore, the plaintiff is not entitled to succeed.

9. This Second Appeal was admitted on 29.01.2014 on the following substantial question of law :

“ The trial Court dismissed the suit on the ground that out of two Wills Ex.A1 and B16, Ex.B16 is the later Will. The learned first Appellate Judge set aside Ex.B16 on the ground that the testator had not signed in Ex.B16. The appellant has also proved the registered Will Ex.A1 as per the procedure contemplated under



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Section 68 of the Indian Evidence Act. In such circumstances, whether the Courts below are correct in dismissing the suit of the plaintiff on certain irrelevant and unsustainable circumstances ? ”

10. Before I go into the alleged suspicious circumstances, it is pertinent to point out here that the defendants had projected an unregistered "WILL", dated 15.08.2003 under Ex.B16. The Trial Court had held that since the plaintiff had not taken any effort to examine the handwriting in the document under Ex.A1 and Ex.B16, it was given as one of the reasons for dismissal of the suit. This lacuna was rectified in the appeal and the documents were sent to the Forensic Science Laboratory at Chennai. The admitted signatures of Chinnaya Kounder were compared with the disputed documents, namely, Ex.A1 and Ex.B16.

11. The Forensic Science expert submitted a report that the signatures of Chinnaya Kounder found under Ex.A1 are uniform and genuine and the "WILL" projected by the defendants 1 and 2 is an act of forgery and is undependable.



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12. This categorical statement of the Forensic expert had not been controverted by the defendants. Therefore, the first plea raised by Mr.A.Arun Babu, namely, on the death of Chinnaya Kounder the property vests with his client due to Ex.B16, necessarily has to fail.

13. There is no dispute that the husband of the 1st defendant and the father of the 2nd defendant/Jayarama Kounder and the deceased Chinnaya Kounder were brothers. There is also no dispute that the properties came to them on the death of Srinivasa Kounder, their father. Whereas, a plea with respect to oral partition projected between the two brothers, namely, Chinnaya Kounder and Jayarama Kounder, the same had not been proved by the plaintiff. This substantiates the case of the defendants that Jayarama Kounder was cultivating the property for himself and on behalf of his brother Chinnaya Kounder.

14. The factum that Jayarama Kounder was cultivating the property is clear from Ex.B6 to Ex.B14. The plea of partition having failed, the plaintiff would not be entitled for a declaration that the suit schedule mentioned



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properties absolutely belong to Chinnaya Kounder and by virtue of Ex.A1 comes down to him.

15. Now I shall turn my attention to the “WILL” under Ex.A1. In order to substantiate Ex.A1, the attesting witness/Durairaj had been examined. I have gone through the evidence of Durairaj. Durairaj is clear and categorical that he saw the testator signing the document and the testator saw him and other attesting witnesses, attesting the "WILL". As against this clear statement on attestation of the "WILL", there is absolutely no cross examination of the attesting witness on this aspect. I recall the judgment of the house of Lords in *Browne v. Dunn* case reported in (1893) 6 R67, where it was held that, on crucial aspect of the case, if there is no cross examination, it is deemed to have been undisputed. This view had been approved by a Division Bench of Calcutta High Court in *AEG Carapiet v. A.Y.Derderian* case reported in AIR 1961 Cal 359, that view was approved by the Supreme Court in *CBI v. Mohd. Parvey Abdul Kaynum* case reported in 2019 12 SCC 1 see (Para No.155) in *Laxmibai v. Bhagwantbuva* case reported in AIR 2013 SC 1204.



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16. I have gone through the evidence of P.W.2 and I am satisfied with the truth and genuineness of his statements. This when seen along with the lack of cross examination on the aspect of attestation, I have to come to the conclusion that the "WILL" stands proved.

17. It is here Mr.A.Arun Babu would contend that the death certificate produced by the plaintiff under Ex.A2 and Ex.B15 do not tally. He would state that under Ex.A2, the registration of the death shows that Chinnaya Kounder was residing in Chinnakuppam, whereas, a perusal of the document under Ex.B15 would show that the death was recorded at P.Villiyannur. Therefore, he would state that places of death having been given in two different places, no reliance can be placed on the case of the plaintiff.

18. Insofar as the document under Ex.A2 is concerned, the registration was done soon after the death of Chinnaya Kounder. The date of death is recorded as 04.09.2003 and it was registered on 09.09.2003 and the



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certificate was also issued on 13.11.2003. However, a perusal of the certificate, Ex.B15, produced by the defendants would show the following discrepancies :

- (1) Srinivasa Kounder was shown as aged only 50 years.
- (2) The registration though was given as 11.09.2003.
- (3) It bears the C.A.No.964 of 2004 and the certificate itself had been issued only on 28.05.2004, by the time, the Ex.B15 had come into force, the dispute between the parties had already arisen.

19. Insofar as the "WILL" is concerned, the date of death of a person is immaterial as long as he is shown to be dead. Whether it was on 04.09.2023 or 05.09.2023, it does not make a difference because the fact remains, Chinnaya Kounder died and the issue that the Court has to decide is whether the "WILL" that he is alleged to have executed in favour of his sister's son is true and genuine. Therefore, the discrepancy in the date of Ex.A2 and Ex.B15 do not make a difference to the factum.

20. A "WILL" comes into force on the death of a person and in this particular case, both sides agree that Chinnaya Kounder died. The



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discrepancy is only on the date. Apart from that, it was admitted by both sides that Chinnaya Kounder was advanced in age, this corresponds to Ex.A2, where he is shown as 75 years old, whereas, under Ex.B15, he is shown only to be 50 years old. Therefore, I am inclined to accept that the death certificate which had been issued closer to the time of death of Chinnaya Kounder should be preferred rather than the one, which had been procured nearly one year thereafter.

21. By examination of P.W.2 and P.W.3, the plaintiff has proved that Chinnaya Kounder had executed the "WILL". It is also the burden on the plaintiff to prove that the "WILL" does not suffer from any suspicious circumstance in the time of execution.

22. According to the plaintiff, the "WILL" was executed on 21.02.2003 but registered on 06.03.2003. On 06.03.2003 itself, the defendants themselves admit that Chinnaya Kounder had executed a mortgage in favour of the wife of Vittal/plaintiff for a sum of Rs.50,000/-.



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23. Reading Ex.A1 and Ex.B1 together, one can surely come to a positive conclusion that Chinnaya Kounder was present at the Sub Registrar's Office in Thiruvannainallur and had executed Ex.A1 and Ex.B1. Mr.A.Arun Babu would state that Chinnaya Kounder was taken to the Sub Registrar's Office under the guise of executing a mortgage and the "WILL" had been obtained. This argument does sound very fascinating. However, going through the evidence of P.W.2 and P.W.3, this plea falls flat on its face. This is because the mortgage deed was executed between 12 p.m. to 1 p.m. on 06.03.2003 and after the registration of the mortgage was over, the "WILL" was registered between 1 p.m. to 2 p.m. When two documents are executed at different points of time, the Executor is not going to execute a "WILL" thinking it to be a mortgage and vice-versa. Even if the case is to be accepted, two documents had been registered on the same day and the time that had been stated by P.W.2 and P.W.3 corresponds to the time that had been given in the seal in the documents endorsed by the Sub Registrar of Thiruvannainallur.

24. Before proceeding on the suspicious circumstances, I should add that the defendants have not pleaded any vitiating circumstances in the



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written statement. During the course of arguments, it was ought to be projected that Chinnaya Kounder was suffering from several diseases and therefore, this would vitiate the execution of the "WILL".

25. I have gone through the documents produced by the defendants and I do not find any records that had been filed to show that Chinnaya Kounder was suffering from some debilitating disease preventing him from executing Ex.A1.

26. The next plea is that, the plaintiff is a resident of Pondicherry, whereas, the deceased Chinnaya Kounder was a resident of Tamil Nadu and therefore, he would not have executed a "WILL" in favour of his nephew. A "WILL" is executed out of natural love and affection in order to interfere with the natural line of succession. It matters not, whether a person is a resident of Tamil Nadu or a neighboring state, while executing a "WILL" in favour of a loved one. Therefore, I held that place of the residence of the testator has no bearing in this case.



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27. The relationship between the parties is not in dispute. For the mere fact that the plaintiff/Vittal was a resident of Pondicherry, I am not willing to hold that the execution of the document by his uncle, who was a resident of Tamil Nadu is suspicious.

28. Mr.A.Arun Babu would then argue that preference had been given to the sister's son as against the brother's son and this is also a suspicious circumstance. As I pointed out above, a "WILL" is executed only to interfere with the natural course of succession. If Chinnaya Kounder had died interstate, the properties would have vested with the legal heirs of his brother Jayarama Kounder as well as other legal heirs as enumerated under the Hindu Succession Act. In order to interfere with this line of succession, Chinnaya Kounder has preferred his sister's son.

29. As to why Chinnaya Kounder preferred his sister's son to the brother's son can only be answered by Chinnaya Kounder but unfortunately he is beyond the call of the Court or any other person. The affection that the maternal uncle has for his nephew cannot be questioned by the Court and I do not find it to be a suspicious circumstance.



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30. Mr.A.Arun Babu would then invite my attention to the condition of the Tamil Nadu Document Writers' License Rule, 1982, in order to substantiate that the document writer cannot stand as an identifying witness to a document. I have called for the original of Ex.A1. Going through Ex.A1, it is clear that the document writer did not stand as an identifying witness but had merely deposed before the Court that he had seen Chinnaya Kounder executing a document and had also seen Durairaj, the attesting witness signing the same.

31. The concept of identifying witness means that he identified the plaintiff during the time of registration. Going through Ex.A1, I do not find P.W.3/Nagarajan as having identified the persons at the time of writing the document. Therefore, the plea on Tamil Nadu Document Writers' License Rule of 1982 has to fail.

32. Insofar as the argument that the “Sealed Cover” procedure has not been followed and therefore, the “WILL” has to be held as one tainted by suspicious circumstance, I am not with Mr.A.Arun Babu here also. “Sealed



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Cover” procedure for the "WILL" is an option given to the testator at the time of registering a “WILL”. He can either execute the document and take and keep the original with himself or for the sake of safe custody, he can hand over the document to the District Registrar to be opened after his death. This is an option that was given to a party.

33. Chinnaya Kounder has chosen the first option that does not mean the "WILL" is tainted by suspicious circumstance. The test is whether the document had been attested and executed, the law does not require a "WILL" to be registered. Even if the "WILL" is registered as stated above, an option is given to the testator. The fact that he did not follow the “Sealed Cover” procedure does not mean that the execution and attestation of the "WILL" is vitiated. The Court dealing with the last “WILL” and testament of a person has to see whether the said gentleman/lady had executed the document and not whether the registration thereof is vitiated. In this particular case, the execution and attestation have been proved through the examination of P.W.2 and as pointed out above, the defendants had not even cross examined the said witness on this crucial aspect.



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34. Finally, turning to a point that was discovered by the learned Subordinate Judge, since an Executor had not been appointed, the "WILL" is vitiated. This point has to be raised only for its rejection. No law requires that in every testament, an Executor has to be appointed. That being the position, the factum that Chinnaya Kounder did not appoint an Executor in his "WILL" does not vitiate the execution thereof.

35. Mr.A.Arun Babu would further plead that since Chinnaya Kounder was being taken care by Vittal/Plaintiff and his family, there was no necessity for him to execute a mortgage deed for the purpose of getting Rs.50,000/- from the wife of Vittal and therefore, he would state that this is a suspicious circumstance. This argument also has to be fail on the following two grounds :

(1) Unfortunately for Mr.A.Arun Babu, this plea was never taken before the Trial Court nor was it put to either parties at the time of their examination. A fresh and new point raised during the course of arguments in the Second Appeal cannot be entertained.

(2) Apart from that, merely because Chinnaya Kounder had been taken care of by his sister's family, it does not mean that he has to cringe



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and beg for funds from them. As to how he wanted to put his affairs in order was entirely his discretion.

36. The execution of the mortgage deed is not in dispute before the Court. In such circumstances, the question of that being used as suspicious circumstance to disbelieve a "WILL", which had been executed subsequent to the mortgage deed does not arise.

37. In the light of the above discussion, I have to come to the conclusion that Ex.A1/"WILL" has been proved and therefore, on the death of Chinnaya Kounder, the property vested in Vittal/Plaintiff. Having come to this conclusion does not mean that the plaintiff is entitled to a decree. This is because, the plaintiff has miserably failed to prove the oral partition between Jayarama Kounder and Chinnaya Kounder. Consequently, this oral partition between the brothers not having been proved, the plaintiff/Vittal would have to be held to be in joint possession and enjoyment of the property along with Nallammal and Elavarasan, the defendants.



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38. Under Order VII Rule 7 of the Code of Civil Procedure, this Court is entitled to grant a relief which is lesser than the relief that has been sought for by the plaintiff. The higher relief of declaration having been denied by me and all the parties being before the Court, this Court is entitled to grant the relief of partition.

39. Accordingly, the Second Appeal stands allowed. The judgment and decree of the Court of the learned II Additional Subordinate Judge, Villupuram in A.S.No.87 of 2007, dated 19.02.2013 in confirming the judgment and decree of the Court of the learned Principal District Munsif at Ulundurpet in O.S.No.519 of 2004, dated 31.10.2006 are set aside.

40. The relief of declaration sought for by the plaintiff is denied. There shall be a decree for partition of the suit schedule mentioned property into two equal halves. The plaintiff will be entitled for the half share and the defendants 1 and 2 together will be entitled for the another half share of the property. Considering the close relationship between the parties, there shall be no order as to costs.



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41. The learned Principal District Munsif at Ulundurpet is directed to follow the verdict of the Supreme Court in ***Shub Karan Bubna @ Shub Karan Prasad Bubna v. Sita Saran Bubna & Ors.*** case reported in (2009) **9 SCC 689** and initiate final decree proceedings immediately on receipt of a copy of this judgment or on a production of a web copy or a certified copy thereof by either party to the proceeding. He shall initiate final decree proceedings without waiting for an application from any of the parties and shall appoint an Advocate Commissioner to suggest the mode of division. The entire proceeding for passing the final decree shall be completed within nine months from the date of initiation of the said proceeding.

27.02.2024

Index:Yes/No
Speaking Order :Yes/No
Neutral Citation:Yes/No
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To

- 1.The II Additional Subordinate Judge,
Villupuram
- 2.The Principal District Munsif,
Ulundurpet



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