



S.A.No.69 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 12.02.2024	Pronounced on: 23.02.2024
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CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.69 of 2018
and
CMP. No.1532 of 2018

Kamalam (Died)

Shanmugam (Died)

1.S.Amutha

S.Chandrasekaran (Died)

2.S.Sangeetha

3.Vijayalakshmi Alias Dhanavijaya

4.Minor Sanjay

5.Minor Dharshini

(Minors 4 and 5 rep. by guardian

mother Smt.Vijayalakshmi @

Dhana Vijaya)

(3 to 5 appellants are L.R.s. of deceased
Chnadrsekaran the 4th plaintiff in the
suit and 4th respondent in the first appeal
who died pending the first appeal)

...Appellants

Vs.

1.Sasikala

1/33



S.A.No.69 of 2016

2.Kanagapriya

3.Deepan Chakravarthy

4.Pankajam

5.Palaniammal

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the learned First Additional District and Sessions Judge of Coimbatore, dated 09.08.2016 in A.S. No.112 of 2010 reversing the Judgment and Decree of the learned Subordinate Judge of Tiruppur, dated 03.12.2009 in O.S. No.264 of 2004.

For Appellants :Mr.Nithyaesh Natraj,
for Mr.Anirudh A Sriram

For Respondents : Mr.P.Valliappan, Senior Counsel
for Mr.R.Neethiperumal

JUDGMENT

The Plaintiffs, in a suit for partition, having succeeded before the trial Court, but having lost before the First Appellate Court, are the Appellants herein.



2. For sake of convenience, the parties are described as per their rank before the Trial Court.

3. The material facts that are necessary for disposal of this Second Appeal are as hereunder:-

3(i). The suit was originally filed by Kamalam, the daughter of Pechianna Asari and P.Ramathal. As she died pending the suit, her legal representatives, viz. her husband and children were brought on record as the Plaintiffs 2 to 5. The wife of the deceased brother of the 1st Plaintiff, Duraisamy, viz., Pankajam is the 1st defendant. The wife, son and daughter respectively, of another brother of the 1st Plaintiff, P.Natarajan as defendants 2 to 4. The sister of the 1st Plaintiff, Palaniammal is the 5th defendant.

3(ii). The case of the 1st Plaintiff is that the 2 items of suit property, I and II, were purchased by her father, Pechianna Asari, by registered sale deeds dated 03.04.1973 and 13.06.1973. The Schedule-C property was purchased by the mother P.Ramathal, under a registered Sale Deed dated



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12.11.1955. The mother died intestate on 22.06.2003 and the father also subsequently died intestate on 20.04.2004. Claiming to be a Class-I legal heir, Kamalam, the Plaintiff sought for partition and separate possession of her 1/4th share in the suit properties.

4. The 1st defendant filed a written statement supporting the claim of the Plaintiff seeking partition. The 5th defendant also filed her written statement and stated that she was also entitled to an equal 1/4th share, being a daughter of Late.Pechianna Asari and P.Ramathal. However, the defendants 2 to 4, wife, son and daughter respectively, one of the brothers of the Plaintiff, viz. P.Natarajan filed a written statement, admitting the relationship set out in the plaint. These defendants denied that Late.Pechianna Asari and P.Ramathal died intestate and on the contrary stated that they had executed registered Will dated 10.06.1999 and 27.11.1996 respectively, bequeathing their respective properties to the 4th defendant, their only grandson, giving a life interest to the 2nd defendant, their daughter-in-law. Thus, these defendants alone resisted the suit for

partition taking umbrage under the Wills said to have been executed by Late.Pechianna Asari and P.Ramathal.

5. Before the Trial Court, the 4th Plaintiff examined himself as P.W.1 and marked Exhibits.A-1 to A-13 on the side of the Plaintiffs. On the side of the defendants, the defendants 1 and 2 examined themselves as D.W.1 and D.W.2. The attesting witnesses to the 2 Wills were examined as D.W.3 and D.W.4. Exhibits B-1 to B-13 were marked on the side of the defendants.

6. The Trial Court, on appreciation of the oral and documentary evidence, held that the Wills were nor proved and proceeded to grant a decree for partition.

7. On appeal by the defendants 2 to 4, the First Appellate Court reversed the findings of the Trial Court and dismissed the suit for partition, holding that the Wills of both Pechianna Asari as well as P.Ramathal had been proved.



8. Aggrieved by the reversal findings rendered by the First Appellate Court, the Plaintiffs have preferred the above Second Appeal. The above second appeal has been admitted on 26.04.2023, on the following questions of law:

“ a) Whether the defendants 2 to 4 failed to establish that the procedures and formalities required under Section 63 of the Indian Succession Act and the mode and manner prescribed under Section 68 of the Evidence Act have been complied with and that the Wills have been duly executed, whether the judgment and decree of the lower appellate court upholding the said Wills are not perverse and contrary to law?

b) When proof of attestation of the Will is a mandatory requirement under Section 63 of the Indian Succession Act and Section 68 of the Evidence Act and the defendants failed to establish that the Wills have been duly executed and attested, whether the judgment and decree of the lower Appellate Court in accepting the said Wills are sustainable in law?

c) When the testators were in continuous illness and the exclusion of daughters and the legal heirs of one son without any reasons are strong suspicious circumstances and the defendants having failed to discharge their burden to dispel the suspicion, whether the judgment and decree of the lower Appellate Court declining to grant relief to the Plaintiffs, are not against law?”

9. I have heard Mr. Nithyaesh Natraj, Counsel for the Appellants and Mr.P. Valliapan, Senior Counsel, for Mr.R.Neethiperumal, Counsel for the

contesting Respondents 1 to 3. I have also gone through the records, including the pleadings, oral and documentary evidence and the judgments of the Trial Court as well as the First Appellate Court.

10. The summary of the arguments of the Counsel for the Appellants:-

- i) The originals of both the Will were not produced.
- ii) The Wills have not been proved as required under law.
- iii) The scribe of the Wills was not examined to prove the contents of the Wills.
- iv) The Wills are shrouded by suspicion and the propounders of the Wills have not dispelled the same to enable the Courts to accept the truth and genuineness of the Wills.
- v) There is total lack of pleading with regard to the execution of the Wills and no amount of evidence can be let in, in the absence of pleading.
- vi) On 8/3/2000, Late.Pechianna Asari sold a portion of the property to the 2nd defendant and there was no necessity for any alienation, that too, to the mother of the 4th defendant, just 3 months after executing a Will in favour of the grandson, implying a totally different intention altogether.



vii) The reply sent by the 4th defendant was totally silent about the sale deed dated 08/03/2000 and the claim for partition was resisted only by claiming under the Wills.

viii) The Wills were not annexed along with the written statement.

ix) The First Appellate Court erroneously shifted the burden on the Plaintiffs since the Plaintiffs had stated that the Wills were forged documents.

11. The suspicious circumstances, according to the learned counsel for the Appellants, that were never dispelled by the propounders are:-

a) Natural heirs disinherited under both the Wills.

b) Both the Wills are verbatim same in the sense that the very same wordings and form have been used and adopted in both the Wills, except for the factual changes especially the Schedules alone.

c) The Testator as well as Testatrix were not in sound and disposing state of mind which was in fact pleaded even by the contesting defendants by stating in their written statement that they were ailing and it was only the second defendant who was taking care of them by giving treatment. These



defendants have also stated that both the Testator as well as Testatrix had been taking treatment at N.M.Hospital and Kuppusamy Naidu Memorial Hospital

d) Though attesting witness claimed to have known defendants 2 to 4 for over 15 years, the defendants claim ignorance of the Wills until 2004.

12. The learned counsel for the Appellants also placed reliance on the following decisions:

1) *N.Durga Bai and others v. C.S.Pandari Bai and another*, reported in 2017 SCC Online Mad 587

2) *Moturu Nalini Kanth v. Gainedi Kaliprasad (Dead, Through Lrs.)*, reported in 2023 SCC Online SC 1488

3) *Dhani Ram (Died) through Lrs. and others v. Shiv Singh*, reported in 2023 SCC Online SC 1263

4) *Dharman and 6 others v. Marimuthu*, reported in 1996(II)CTC-279

5) *Jaswant Kaur v. Amrit Kaur and others*, reported in (1977) 1 SCC 369

6) *Choudhari and others v. Ramkaran, through LR. and others*, reported in 2020 SCC Online Chh 1015

7) *P.Ramachandran Nair v. Suparna Tapan Das*, reported in 2003 SCC Online Bom 534

8) *Rangu Vithoba v. Rambha Dina*, reported in 1966 SCC OnLine Bom 85(Nagpur Bench)



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9) *Gurdial Kaur and others v. Kartar Kaur and others*, reported in (1998) 4 SCC 384, and

10) *Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria and others*, reported in (2008) 15 SCC 365

11) *G.Lakshmi and another v. U.Saraswathi*, reported in 2023(3) CTC 30

13. The above decisions have been relied on for fortifying the arguments advanced by the learned counsel for the Appellants with regard to proof of due execution of the Will; manner of proof of Wills under Section 68 as well as Section 69 of the Indian Evidence Act; necessity of pleadings about Will; burden being on the propounders to dispel all suspicious circumstances.

14. Mr.P.Valliappan, learned Senior Counsel appearing for the contesting respondents 1 to 3, would support the findings of the First Appellate Court with regard to the Wills and its proof having been satisfactorily shown. He would also refer to the relationship between the parties and contend that the 4th defendant, the vested remainder beneficiary, after the life time of the 2nd defendant, his mother, was the only surviving



male member of the family and hence the grand parents had executed their respective Wills, in his favour and there was nothing wrong. He would also state that when the very purpose of a person executing a Will was to alter the normal line of succession, the Wills cannot be faulted for disinheriting the natural heirs.

15. The learned Senior Counsel would further attempt to meet the arguments of the learned counsel for the Appellants with regard to the various suspicious circumstances by contending that every circumstance cannot be a suspicious circumstance and with regard to lack of pleadings, he would state that when the parties had understood the case pleaded, it would not be fatal to the case of the defendants who claimed under two registered Wills.

16. The learned Senior Counsel would also take me through the memorandum of grounds of Second Appeal and state that the grounds raised were all general and not specific in nature and therefore, no substantial questions of law arose for consideration in the Second Appeal. He would



also state that the evidence of both D.W.3 as well as D.W.4 satisfied the statutory requirements and therefore, there is absolutely no illegality or perversity in the findings arrived at by the First Appellate Court, warranting interference in Second Appeal.

17. The learned Senior Counsel would also place reliance on the following decisions in support of his submissions:

- 1) *R.Vasanthi v. Janaki Devi and others*, reported in 1999 (III) CTC 378
- 2) *C.G.Raveendran and Ors. v. C.G.Gopi and Ors.*, reported in AIR 2015 Kerala 250
- 3) *Kuldip Kaur v. Kuldip Kaur and Ors.*, reported in AIR 2019 Punjab and Haryana 9
- 4) *Pardeep Kumar v. Renu Kumari*, reported in 2019 SCC Online P&H 6833
- 5) *P.Chandrasekara Rao v. B.V.Balasubramaniam and Ors.*, reported in AIR Online 2021 Mad 470
- 6) *Shivakumar &ors. V. Sharanabasappa &ors.*, reported in 2020 (4) CTC 321

18. The above decisions have been relied on for the purposes of manner of proof of Will when none of the attesting witnesses are found; resort to Sections 69 & 71 of the Indian Evidence Act to prove a Will, when



both attesting witnesses are not available; only real and valid suspicion arising alone relevant and it is not necessary for the Court to take a fishing inquiry.

19. I have carefully considered the arguments advanced by the learned counsel for the Appellants and the learned Senior Counsel appearing for the Counsel for contesting respondents, keeping in mind the well settled principles enunciated by Courts with regard to proof of due execution of Wills.

20. Though three substantial questions of law have been framed by this Court, at the time of admitting the above Second appeal, I find them all to be inter-related. In fact, the only legal issue that survives for consideration is as to whether the two Wills, marked as Ex.B-12 and Ex.B-13 have been duly proved in accordance with law.

21. Ex.B-12 is claimed to be the Last Will and Testament of Pechianna Achari and it is dated 10.06.1999. Ex.B-13 is claimed to be the



Last Will of P.Ramathal and it is dated 27.11.1996. Admittedly both these Will are registered instruments. However, mere registration of a Will would not be sufficient to hold that the Will is a true and genuine document. The requirement of due execution and attestation of a Will under Section 63 of the Indian Succession Act, 1925 and proof of such due execution and attestation under Section 68 of the Indian Evidence Act are not done away with merely because the Will has been registered before a Registering Authority. It would be an unnecessary exercise to even refer to case law on this point as the law is now too well settled, starting right from the decision of the Privy Council in *Vellasamy Servai and others v. L.SivaramanServai*, reported in *AIR 1930 PC 24*.

22. This takes us to the moot question as to whether the Wills have been duly proved to be executed and attested as required under the Indian Succession Act and the Indian Evidence Act.

23. Section 63 of the Indian Succession Act is extracted usefully:

“ 63. Execution of unprivileged Wills.—



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Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

24. Section 68 of the Indian Evidence Act, 1872 is also extracted usefully:

“ 68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:



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[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.][Inserted by Act 31 of 1926, Section 2.]”

25. Let me now examine whether the two Wills have been proved as required under the above. Ex.B-12, dated 10.06.1999 is said to have been executed by Late.PechiannaAsari. In order to prove its due execution, D.W.3, one, Somasundaram has been examined. Ex.B-13, dated 27.11.1996 is said to have been executed by Late.Pechianna Asari. In order to prove its due execution, D.W.4, one, Arulprakash has been examined.

26. Let me first take up the Will of Late.Pechinanna Asari. D.W.3 is one of the attesting witnesses to the said Will, Ex.B-12. D.W.3 claims that he knows Pechianna Asari for over 15 years. He has stated in his chief examination that he read the Will and that the testator signed the Will in his presence and thereafter, he attested the Will, then the other attesting witness, Chinnasamy signed in his presence. He has further stated that the Testator was in a sound and disposing state of mind at the time of execution of the



Will.

27. The evidence of D.W.3 falls way short of the requirements under Section 63(c) of the Indian Succession Act. D.W.3 does not state that the Will was signed in the presence of both the witnesses and that the Testator saw the other attesting witness sign the Will. He only states that he saw the other attesting witness sign the Will. Therefore, the only attesting witness examined to prove due execution of the Will, Ex.B-12 has failed to adduce necessary and satisfactory evidence to establish that the Testator executed the Will as required under the law.

28. Coming to the Will, Ex.B-13, executed by Late P.Ramathal, admittedly none of the attesting witnesses were examined before the Trial Court. D.W.4, one, Arulprakash has been examined to prove due execution and attestation of Ex.B-13. D.W.4 was an identifying witness before the Registrar concerned, at the time of registration of the Will. He has stated that he knew P.Ramathal for about 20 years. He has only spoken about the registration formalities being done in his presence. Curiously, the said Will of P.Ramathal is dated 27.11.1996 and the said Will is said to have been



attested by two witnesses, Sangeetha and Boopathi. The said Boopathi has also signed as one of the identifying witnesses at the Registrar's office on 10.12.1996. Even though D.W.4 has also been elaborately cross examined on the side of the Plaintiffs as well as defendants 1 and 5, first and foremost, it needs to be seen as to what is the evidentiary value of his statements, in chief and cross. Admittedly, D.W.4 is not an attesting witness to the will, Ex.B-13.

29. As rightly pointed out by the learned Senior Counsel, Mr.P.Valliappan, a Will can be proved by having resort to the provisions of Section 69 as well as Section 71 of the Indian Evidence Act. However, such an avenue is not open and unconditional.

30. The relevant Sections 69 and 71 of the Indian Evidence Act are extracted hereunder:

“69. Proof where no attesting witness found.

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that



the signature of the person executing the document is in the handwriting of that person.

71. Proof when attesting witness denies the execution.

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.”

31. The fundamental requirement for Section 69 of the Indian Evidence Act to be invoked is that both the attesting witnesses are not found. Unless and until, the propounder of a Will satisfies the Court that both the attesting witnesses are not found, meaning either their whereabouts are not known or that they are not alive, resort cannot be taken to Section 69. Section 71 of the Indian Evidence Act would apply only when an attesting witness turns hostile, then a window is given to the propounder to prove due execution of the Will by letting in other evidence.

32. Here, the question of Section 71 being available to prove the Will does not even arise for the simple reason that none of the attesting witnesses were examined. This leaves us with Section 69 of the Indian Evidence Act. This Section permits proof of due execution of a Will, in cases where both



the attesting witnesses are not found, by proving two aspects, viz., 1) the signature of the person executing the Will to be in the handwriting of the said person, i.e. the Testator or Testatrix and 2) prove that the attestation of at least one of the attesting witnesses is in his handwriting. Both the conditions are mandatory and satisfying even one of the conditions would be of no avail. But here again, even before resorting to such twin proof as set out hereinabove, there is a mandatory pre-requisite. The propounders have to establish that both the attesting witnesses are dead or that they are not available for giving evidence, their whereabouts being not known and that diligent steps have been taken to procure their attendance before the Court.

33. On scanning the entire evidence, I am unable to find any evidence whatsoever that the propounders have taken steps to find out the whereabouts of the two attesting witnesses. It is not even their case that both the attesting witnesses were dead, even in which case they have to satisfy the Court in that regard, by producing their death certificates or some other acceptable evidence to clinch the factum of death of the attesting witnesses. I find that there is absolutely no evidence on the side of the defendants 2 to 4



as regards any steps taken by them to find out the whereabouts of the attesting witnesses, by either resorting to issuance of notices or having them summoned through Court process. The Apex Court, in *Babu Singh v. Ram Sahai alias Ram Singh*, reported in (2008) 14 SCC 754 has held that resort can be had to Section 69 only when the propounder moves the Court under Order XVI Rule 10 of the Code of Civil Procedure and has summons issued to the witnesses and despite the same, the witnesses do not turn up or fail to respond.

34. In the present case, as already found, the defendants 2 to 4 have not even attempted to take out any such application under Order XVI Rule 10 of the CPC to compel the attendance of the attesting witnesses. Without following this procedure, they have straight away chosen to examine one of the identifying witnesses. Moreover, in the present case, the date of execution of the Will was on an earlier date and the registration was on a subsequent date. Even if it had been a case of execution and registration being simultaneous, on the same date, atleast, the identifying witness can at least state that he saw the Testator or Testatrix sign in the Will in his



presence, which may have some evidentiary value. Here, D.W.4 has clearly stated that he was an identifying witness at the Registrar's office and that on that day, the Will had already been executed. Thus, I have no hesitation to hold that the evidence of D.W.4 is no more than a worthless piece of paper, wholly useless in so far as it pertains to proof of due execution and attestation of the Will. For all the above reasons, even Ex.B-13 Will stands unproved.

35. I proceed to also discuss the other legal issues that have been raised, though it may not have any independent bearing on the appeal, with me, already finding that both the Wills have not been proved in accordance with law.

36. Admittedly, both the Wills of Late.Pechianna Asari and P.Ramathal have not been produced in original.

37. Sections 238 to 240 of the Indian Succession Act provide for grant of Probate or Letters of Administration even in cases where a Will is lost or



destroyed. Here, both the Wills are registered instruments and it appears that only copies of the Will have been marked. The propounder has stated in her cross examination that the originals were handed over to her advocate and she does not know why it has not been filed. She also states that no reason is stated as to why the originals have not been filed in Court. Strangely, I also find that even the Wills being referred to as documents even in the proof affidavit filed by the defendants 1 and 2, when they were examined as D.W.1 and D.W.2 respectively. From the records, it is also not known whether only photostat copies were filed or certified copies were filed. It is however, suffice to state here that though a Will can be marked as secondary evidence, it would be subject to the mandate of Sections 65 and 66 of the Indian Evidence Act alone and not otherwise. The Courts below have also not even discussed this aspect as to how the copies of the Wills came to be marked in the Court. Anyhow, in view of the earlier finding that both the Wills have not been proved, in the facts of the preset case, the Wills not being filed in original or marked as exhibits in accordance with the Evidence Act may not be relevant.



38. The initial onus of proving that the Will in question was duly executed and proved in accordance with Section 63 of the Indian Succession Act always rests on the propounder of the Will and the onus of proving due execution and attestation of the Will does not stand shifted to the caveator or the person who opposes the Will on the grounds of the Will being not true and genuine or that it was brought about by coercion, fraud, forgery etc., unless and until the propounder discharges the initial onus cast upon him, by adducing satisfactory evidence that the Will was duly executed and attested in terms of Section 63 of the Indian Succession Act and proof of the same is given as contemplated under Section 68 of the Indian Evidence Act. The First Appellate Court clearly fell in error in placing the burden of proving the plea of forgery on the Plaintiff even without seeing whether the defendants 2-4 have discharged the initial burden on them.

39. The learned counsel for the Appellants also attacked the Wills citing several suspicious circumstances. Per contra, the learned Senior Counsel would argue that the instances highlighted by the learned counsel for the Appellants were not suspicious circumstances at all. When



suspicious circumstances are shown, then, mere fulfilment of the statutory requirements and primary facts would not be sufficient. The onus on the propounder would be heavier when there are legitimate suspicious circumstances, surrounding the execution of the Will and the propounder would have to dispel all such legitimate suspicion surrounding the execution of the Will, before the Will can be accepted or held to be proved.

40. Every circumstance will not be a suspicious circumstance. The Courts must be very cautious in entertaining the party opposing the Will from raising all kinds of suspicion regarding the Will. The suspicion must be legitimate and must be something which is not normal or rather abnormal and not normally expected in a normal situation or something that is not expected of a normal person. “*Suspicious circumstance*” is not defined anywhere and it would depend on the facts and circumstances of each case and the Court has to sit in the armchair of the Testator and test the Will and see if the bequests appear to be normal or natural or if the terms of the Will are such that it appears to be unnatural or unfair, then depending on the facts and circumstances of the give case, the Court will have to see if the

germane suspicious circumstances that appear to cloud the due execution of the Will are also dispelled by the propounder, in addition, the regular proof of due execution and attestation of the Will.

41. In fact in the decision relied on by the learned counsel for the Appellants, in *G.Lakshmi's case*, referred herein supra, I delivered the judgment and speaking for the Division Bench, I held as follows:-

“61. Concluding, this Court would like to state that there is no straight jacket formula to ascertain or assess suspicious circumstances. All or any suspicion cannot be treated as a suspicious circumstance, thereby calling upon the Propounder to dispel the same. The suspicious circumstance, raised by the Caveator seeking to attack the genuineness of the Will should be germane and surrounding the execution of the Will alone. Caveators cannot cite circumstances that are not material or relevant to execution of the Will and try to pinpoint circumstances, that have arisen post execution of the Will, like in the present case where, the Caveator has alleged that the Will was registered during lunch time or, in other cases, by trying to take advantage of any conflict in evidence adduced by the Propounder or the witnesses, as long as they do not touch upon the facts surrounding due execution and attestation of the Will. Courts should apply the “Arm Chair” Rule and see to it that unrelated and unwarranted circumstances are not projected to defeat the solemn wishes of a Testator/Testatrix.

62. More so, in the present case, the defence set up by the Respondent was that the Will was brought about by undue influence and coercion. In such cases, on the Propounder



discharging the initial burden required to prove the Will, the onus shifts to the Caveator to prove the allegations of undue influence and coercion.....”

42. The above decision was also unsuccessfully challenged before the Apex Court in SLP(C) No.024633 of 2023 and the Special Leave to Appeal was dismissed on 31.10.2023, thereby confirming the judgment in the above O.S.Appeal.

43. I now proceed to discuss the two substantial suspicious circumstances which have been raised in the present case.

a) **Natural heirs disinherited under both the Wills** – Court must be conscious of the purpose of a person choosing to execute or make his Last Will and Testament is only to defeat or alter the normal line of succession. Therefore, only when the Testator desires to disinherit someone wholly or partially, he would be executing a Will in the first place. In such view of the matter, merely because under the Will, a natural heir is disinherited, it would not automatically amount to a suspicion. The contention of the learned Senior Counsel that being the only surviving male legal heir, the 4th



defendant was given the properties cannot be brushed aside. No doubt, this reason is not set out in the Wills. However, it cannot be said that every Will should contains reason for the bequest or disinheritance, as the case may be. Again, such a plea of disinheritance of a natural heir has to be tested in the light of the facts and circumstances of the case only and cannot be applied as a universal rule that whenever a natural heir is disinherited, it would amount to a suspicious circumstance. In the present case, the Testator and Testatrix were blessed with 2 daughters and two sons. Both the sons predeceased the parents and one of the sons, Duraisamy was not blessed with any issues and he was survived only by his wife, Pankajam, the 1st defendant. The two daughters were both married. The other son, P.Natarajan was blessed with a son and daughter and the son alone was benefited under the Wills. Thus, in the given circumstances, it cannot be said that such a bequest would be unnatural or amount to a suspicious circumstance, warranting to disbelieve the Will itself.

b) **Both Wills verbatim same**– Just because the two Wills executed by the husband and wife are in the same format and use the same terms/words, I do not see this as a suspicious circumstance. First of all, there



is no particular form in which a Will is required to be written. Therefore, merely because a later Will has been prepared on the same lines of an earlier Will, would certainly not be a circumstance to suspect the Wills.

44. The learned counsel for the Appellants would lay emphasis on the requirement of specific pleading regarding the Will, its execution and other details in the pleadings. He would also cite the decision of the Nagpur Bench of the Bombay High Court, in the case of *Rangu Vithoba v. Rambha Dina*, reported in *1966 SCC OnLine Bom 85*, where a Learned Single Judge held that “*the plaintiff had not even alleged, much less proved, that the Will in question was duly attested or was the Last Will of the testator.*” This decision, at best, can be pressed into service only as one having persuasive value and it is not binding on me.

45. The question of proving the Will even at the time of settling the pleadings does not arise and is also not warranted. The defendants have, in their written statement, categorically asserted that the husband and wife had executed registered Wills and that they were in good disposing state of mind



at the time of execution of their respective Wills. In my view, this pleading would be sufficient in a written statement resisting suit for partition. It is not a case where the Will has been filed before the Court seeking probate or Letters of Administration, where it would necessary to state all particulars like the names of the attesting witnesses etc. I, am, therefore, in respectful disagreement with the observations made by the Learned single Judge in the above referred decision of the Nagpur Bench of the Bombay High Court.

46. In fact in the decision cited by the learned counsel for Appellants, in the case of *P.Ramachandran Nair v. Suparna Tapan Das*, reported in 2003 SCC Online Bom 534, the Court was dealing with a probate application under the Original Side of the Bombay High Court and therefore laid emphasis on proper pleadings regarding execution and attestation. That is not the case here on hand. The plea that there are Wills in place and that they alter the line of succession and disentitle the Plaintiff from a decree for partition would be more than enough and it would of course, thereafter be required to be proved in accordance with Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act. The litigant, whether the



Plaintiff or defendant in a suit, cannot be non-suited on the ground that the pleading does not specifically refer to all the primary factual details like the names of the attesting witnesses, pleading regarding execution and/or registration of the Will etc.

47. Even though I am unable to accept the contentions of the learned counsel for the Appellants on the above aspects of suspicious circumstances and absence of pleadings, in view of the fact that I have already found and held that the wills have not been proved to be duly executed and attested in the manner required under the law, the findings on suspicious circumstances and lack of pleadings are merely rendered academic. Once the wills propounded are not proved to be duly executed and attested as mandated under Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, there may not even be a requirement for the Court to labour on the question of suspicious circumstances raised, shrouding the execution of the Will with suspicion.

48. For all the above reasons, I answer the substantial questions of



S.A.No.69 of 2016

law in favour of the Appellants. The Second Appeal is allowed and the judgment and decree of the First Appellate Court in A.S.No.112 of 2010 dated 09.08.2016 on the file of the I Additional District and Sessions Judge, Coimbatore is set aside and the judgment and decree for partition granted by the Sub Court, Tirupur, in O.S.No.262 of 2004 dated 03.12.2009 stands restored. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

23.02.2024

Index :Yes/No
Internet : Yes/No
Neutral Citation :Yes/No.
Speaking order/Non-speaking order
rkp

To

1. The First Additional District and Sessions Judge, Coimbatore.
2. The Subordinate Judge of Tiruppur.



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S.A.No.69 of 2018

P.B.BALAJI, J.

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S.A.No.69 of 2018
and
CMP. No.1532 of 2018

23.02.2024