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S.A.No.868 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.07.2025

CORAM

THE HONOURABLE MRS.JUSTICE R. KALAIMATHI

S.A.No.868 of 2012

1. Jayakumari
2. P.M.Mahendran
3. P.Parimalam ...Appellants/Plaintiffs

Vs.

1. Rani
2. K.Santhoshkumar
3. K.Balasubramaniam ...Respondents/Defendants

PRAYER:- This Second Appeal is filed under Section 100 of Code of Civil Procedure, 1908, to allow the appeal and to set aside the judgment and decree made in A.S.No.9 of 2008 dated 25.03.2011 on the file of the Additional District Judge, Fast Track Court No.III, Coimbatore, confirming the judgment and decree made in O.S.No.401 of 2005 dated 05.04.2007 on the file of the Court of the II Additional Sub-Judge, Coimbatore.

For Appellants : Mr.V.Ashok Kumar

For Respondents : Mr.S.Mukunth
Senior Counsel
for Mr.Ramkumar



S.A.No.868 of 2012

JUDGMENT

This Second Appeal is focused against the judgment and decree dated 25.03.2011 passed in A.S.No.09 of 2008 by the Additional District Judge (Fast Track Court No.III), Coimbatore.

2. The parties are indicated herein as per the litigative status and ranking before the Trial Court.

3.1. The plaintiffs have preferred this Second Appeal. According to the plaintiffs, the suit property originally belongs to Venkatarama pannadi and his sons– Ponnaiyan, Karuppusamy, Arumugam and Palanisamy. When his sons were minors, the suit property was purchased by Venkatarama pannadi. Therefore, the property has to be considered as ancestral property. The suit property devolved upon Ponnaiyan. The 1st plaintiff is the wife of Ponnaiyan and the marriage between them took place on 12.12.1968, when the 1st wife namely Mangalam was alive. The second marriage of Ponnaiyan was performed with the consent of the 1st wife. The plaintiffs no.2 and 3 are the son and daughter of Ponnaiyan born through the second wife/ first plaintiff.



S.A.No.868 of 2012

WEB COPY

3.2. It is the further case of the plaintiffs that the first wife Mangalam was very cordial with the plaintiff during her lifetime. The 1st defendant is the daughter of Ponnaiyan. Defendants No.2 and 3 are the sons of 1st defendant.

3.3. During the lifetime of Ponnaiyan, he settled the suit property in favour of the plaintiff through an oral family arrangement, for which the first wife gave consent. Before registering the family arrangement, Ponnaiyan died on 02.06.2001. Mangalam predeceased Ponnaiyan. The plaintiffs are the legal heirs of late Ponnaiyan and to that effect legal heir certificate is also produced. The plaintiffs are in possession of the suit property for more than 35 years and improvements have also been made by spending huge money.

3.4. The defendants filed a suit in respect of O.S.No.732 of 2002 before the I-Additional Sub Court, Coimbatore and got an ex-parte decree by giving a wrong address. Upon receipt of notice in E.P. Proceedings for the hearing on 25.06.2003, it came to their knowledge. On petition by the plaintiffs, the ex-parte decree was set aside.



S.A.No.868 of 2012

WEB COPY

3.5. The plaintiffs are entitled to 2/3rd share and the 1st defendant is entitled to 1/3rd share in the suit property. However by long possession, the plaintiffs have perfected title by adverse possession also. Suit is laid for the relief of partition, permanent injunction restraining the defendants from taking steps in E.P.No.225 of 2003 in O.S.No.732 of 2002 on the file of II-Additional Subordinate Court, Coimbatore.

4.1. Per contra, the defendants would inter alia contend that the marriage between the 1st plaintiff and Ponniayan is denied and the 2nd and 3rd plaintiffs are the legal heirs of late Ponnaiyan through the 1st plaintiff is also denied. It is totally incorrect to state that for the 2nd marriage of the Ponnaiyan with the 1st plaintiff, consent was given by the 1st wife Mangalam. All other details given in the plaint are denied. The plaintiffs wantonly delayed the E.P. proceedings and remained ex-parte and hence delivery of possession was ordered.

4.2. The suit property originally belonged to Ponnaiyan as he purchased the property on 09.04.1945 through a registered sale deed and in a subsequent oral partition took place among his brothers, a portion of the suit property fell to the share of Ponnaiyan and he also purchased a portion



S.A.No.868 of 2012

through sale deed dated 05.03.1984. Thereby, he became absolute owner of the property. A Will was executed by him on 21.03.2001 in favour of the defendants no.1 and 2. Ponnaiyan was living with the defendants from April 2001 till his death. Mangalam Ponnaiyan was working in Air Force Hospital in Coimbatore. After her demise, Ponnaiyan was receiving the family pension. The 1st defendant is the only daughter born through Mangalam and Ponnaiyan. 1st plaintiff was servant in the house and she was permitted to occupy a portion of the property without any rent. After the death of Ponnaiyan, the 1st plaintiff promised to vacate the same. But she did not vacate the suit property.

4.3. At the instigation of the 1st plaintiff, the tenants in the building were not paying the rent and RCOP proceedings were initiated against them. The defendants are living in the rented house and they want to occupy the suit property. The defendants issued a legal notice dated 13.10.2001 to the 1st plaintiff to vacate the premises. The 1st plaintiff evaded the notice and managed to return the same. As the plaintiff is claiming right over the property, the 2nd and 3rd defendants filed a suit in O.S.No.732 of 2002 for the relief of declaration, recovery of possession and for damages for use and occupation. As the plaintiffs did not appear in the said suit (arrayed as



S.A.No.868 of 2012

defendants), ex-parte decree was passed on 22.11.2002. Subsequently, E.P.No.225 of 2007 was filed and it is pending for an order of delivery. Hence the suit is not maintainable as it is hit by principle of res judicata.

5. The Trial Court formulated appropriate issues. At trial, five witnesses have been examined and thirteen documents have been marked. On the defendant's side, two witnesses have been examined and eight documents have been marked. The Trial Court upon consideration of oral and documentary evidence and after hearing the arguments advanced by either side observed that the plaintiffs have failed to prove to the effect that how the property came to the hands of Ponnaiyan and for not adding the brothers of Ponnaiyan and the marriage between the plaintiff and the Ponnaiyan is not proved and non-suited the plaintiffs.

6. Aggrieved, the plaintiffs preferred appeal in A.S.No 9 of 2008 before III-Additional District Court, Coimbatore. In consideration of the case records and the arguments advanced by both sides, it was held that it is a joint family property of the deceased Ponnaiyan and his brothers: "there is no evidence let in" to show that the deceased Ponnaiyan partitioned the property with his other brothers. It is also held that relationship between the



S.A.No.868 of 2012

deceased Ponnaiyan and the 1st plaintiff was a live-in relationship. The Will said to have been executed by Ponnaiyan in favour of the 2nd and 3rd defendants was held to be valid and binding upon them. Therefore, it was concluded that the plaintiffs cannot claim any interest over the suit property.

7. As regards the proof of Will, the Hon'ble Supreme Court of India has held that in ***H. Venkatachala Iyengar v. B.N. Thimmajamma and others*** reported in **AIR 1959 SC 443**, the Court, speaking through Gajendragadkar, J., laid down in that case the following positions:-

“1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, 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.

3. Unlike other documents, the will speaks from the



S.A.No.868 of 2012

death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed.

This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and



S.A.No.868 of 2012

therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

8. The Hon'ble Supreme Court in *Meena Pradhan and others Vs. Kamla Pradhan and another* (Civil Appeal No.3351 of 2014 dated



S.A.No.868 of 2012

21.09.2023), after referring the judgments H.Venkatachala Iyengar v. B.N.Thimmajamma, 1959 Supp (1) SCR 426 (3 Judge Bench), Bhagwan Kaur v. Kartar Kaur, (1994) 5 SCC 135 (3 Judge Bench), Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003) 2 SCC 91 (2 Judge Bench), Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh, (2009) 4 SCC 80 (3 Judge Bench) and Shivakumar v. Sharanabasappa, (2021) 11 SCC 27 (3 Judge Bench), the following principles have been formulated as requirements for proving the validity and execution of the Will:-

“i. The court has to consider two aspects: firstly, that the Will is executed by the testator, and secondly, that it was the last Will executed by him;

ii. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

iii. A Will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a Will;



S.A.No.868 of 2012

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have 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 acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

iv. For the purpose of proving the execution of the Will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

v. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the Will in the presence of the testator;

vi. If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with;

vii. Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;



S.A.No.868 of 2012

WEB COPY

viii. 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.

ix. The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the Will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the Will while acting on his own free Will;”

9. Section 68 of the Indian Evidence Act, 1872 speaks about the attestation of documents in execution, if required in law. As per Section 63 of the Indian Succession Act, 1925, as regards execution of the Wills, stipulates that every testator shall sign or shall affix the mark to the Will and such a Will shall further be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. The conjoint reading of Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act will require at least one attesting witness to be examined and the said witness should speak not only about the testator signature or



S.A.No.868 of 2012

affixing his mark to the Will, but also that each of the witnesses has signed the Will in the presence of the testator.

10. As regards the onus of proof in cases of Wills, the rules of law are quite clear. The first rule is that onus probandi lies, in every case, on the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. The second rule is that: if a party writes or prepares a Will under which, he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court and whatever their nature may be, it is for those who propound the Will to remove suspicion and to prove affirmatively that the testator knew and approved the contents of the Will, and it is only where this is done that the onus is thrown on those who opposed the Will to prove fraud or undue influence or whatever they rely on to displace the case or proving the Will.

11. In ***Meenakshiammal (Dead) through legal representatives vs Chandrasekaran & another*** reported in **2005 (1) SCC 280**, it has been held by the Apex Court “*The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the*



S.A.No.868 of 2012

will, proof of testamentary capacity and proof of the signature of the testator, as required by law, is sufficient to discharge the onus. Once the propounder proves that the will was (i) signed by the testator, and (ii) that he was at the relevant time in a sound disposing state of mind, and (iii) that he understood the nature and effect of the disposition and put his signature out of his own free will, and (iv) that he signed it in presence of the witnesses who attested it in his presence, the onus, which rests on the propounder, is discharged.”

12. In ***Madhukar D. Shende vs. Tarabai Aba Shedage*** reported in ***AIR 2002 SC 637***, it has been held that “*It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. The contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for*



S.A.No.868 of 2012

suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

13. Therefore, the conscience of the Court has to be satisfied by the propounder of the Will adducing evidence in order to dispell suspicious or unnatural circumstances attaching to a Will provided that there is something unnatural or suspicion about the Will.

14. Ex.B5 is the registered sale deed dated 09.04.1945 executed in favour of Venkatraman and his minor sons: Ponnaiyan, Krishnasamy, Arumugam and Palanisamy by one Shankarappan and his sons: Karupannan and Rangasamy in respect of Town Survey No.10/1105 out of dry land of acre 2.38.

15. Ex.B6 is the registered sale deed dated 05.03.1984 executed in favour of V.Ponnaiyan by the above said S.Rangasamy S/o. Sankaran in



S.A.No.868 of 2012

respect of Coimbatore Town Survey No.10 /1105 for an extent of 62 ½ sq.ft of land. From a careful perusal of Ex.B5 and Ex.B6, it is evident that a portion of the suit property was purchased by Ponnaiyan's father on behalf of his minor sons four in number: 1. Ponnaiyan 2. Karuppusamy 3. Arumugam and 4. Palanisamy. Therefore, a part of the suit property has been purchased by V.Ponniyan, S/o. Venkataraman by registered sale deed 05.03.1984 from the above said S.Rangasamy S/o. Sankaran.

16. In respect of the execution of Will, One Kumarasamy, second attester to Ex.B1-Will has been examined as D.W.2. It is his evidence that the said Ponnaiyan who is no more now, used to come to his Tea Shop and he knows about the Will executed by Ponnaiyan. On the day before the date of execution of Will, Ponnaiyan came to his shop and called him to attest the said Will. At his request, he went to the register office where Ponnaiyan and Karuppasamy were there. Ponnaiyan already prepared the Will. Thereafter, 2nd defendant/Kumarasamy and Karuppasamy read the Will. The property details were taken from the title documents. In the said Will, Ponnaiyan has signed and thereafter, D.W.2 and Karuppasamy attested. He has deposed that both the witnesses witnessed Ponnaiyan signing the Will. Ponnaiyan also saw D.W.2 attesting in the Ex.B1-Will. Sub



S.A.No.868 of 2012

Registrar also read the Will and when he asked Ponnaiyan, he stated that the contents found in the Will were correct. He has also stated that he has executed the Will in respect of his ancestral property and his self acquired property in favour of Balasubramaniam and Santhoshkumar. During his cross examination, nothing advantageous to the defendants was elucidated by the plaintiffs' side. He has reiterated the chief examination details during his cross-examination. Therefore, from the evidence of D.W.2, execution of Will has been duly proved.

17. It is the evidence of D.W.1-Rani that her father got a part of the property through partition and another part of the property was purchased by him on 05.03.1984 through a registered sale deed. It is her further evidence that he executed a Will in favour of her sons defendants no.2 and 3 – Balasubramaniam and Santhoshkumar on 21.03.2001.

18. From the perusal of the judgment copy made in O.S.No.732 of 2002 on the file of Subordinate Court, Coimbatore, it is pellucid that the present defendants had filed a suit against the plaintiffs before the I-Additional Subordinate Court, Coimbatore in O.S.No.732 of 2001 for the relief of declaration and for delivery of vacant possession of the suit



S.A.No.868 of 2012

property. It is an exparte decree passed in favour of the plaintiffs. It is not known, whether pursuant to the said judgment and decree, execution proceedings were initiated, as it is not stated in the written statement.

19. As regards the nature of the properties, the first item of the suit property is purchased by the father of Ponnaiyan in Ex.B5 dated 09.04.1945. The second item of the property was purchased by Ponnaiyan on 05.03.1984. It is the case of the plaintiff in respect of the first item of the suit property that fell to the share of Ponnaiyan. Therefore, as regards the deceased Ponnaiyan, the first item of property is his separate property. Both the properties are separate properties of Ponnaiyan. There is no proscription for Ponnaiyan to execute the Will in favour of his grandsons, namely defendants no.1 and 2 herein.

20. As regards the marriage of the 1st plaintiff with Ponnaiyan, even if the 1st plaintiff married Ponnaiyan with the consent of Ponnaiyan's 1st wife Mangalam, it is not legally valid for the simple reason, as per Section 494 of IPC marrying a woman during the lifetime of the first wife is an offence. Therefore, the 1st plaintiff's contention that by consent she married Ponnaiyan, the above said commission of offence cannot be mitigated.



S.A.No.868 of 2012

WEB COPY

21. As the Will is proved to be true, valid and binding upon the beneficiaries, then the stand of the plaintiffs that Ponnaiyan died intestate falls on the ground and the plaintiff cannot claim any interest over the suit property. In Ex.B1-Will, the first item is property covered under Ex.B5 and the second item is covered under Ex.B6.

22. Therefore, the said finding of the first appellate court to the effect that the plaintiffs are not entitled for any of the reliefs sought for in the plaint is a well reasoned judgment. This Court does not find any good reason to upset the findings of the First Appellate Court. No substantial question of law arises for consideration.

23. Based on the aforesaid observations and discussions, this Second Appeal stands dismissed. Sequel to this, the judgment and decree dated 25.03.2011 passed in A.S.No.9 of 2008 passed by the learned Additional District Judge, Fast Track Court No.III, Coimbatore stands confirmed. There is no order as to costs.

31.07.2025

Index:Yes/No

19/21



S.A.No.868 of 2012

Speaking/Non-speaking order

Internet:Yes

Neutral Citation:Yes/No

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R.KALAIMATHI, J.

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Copy to

1. The Fast Track Court No.III, Coimbatore.

2. The II Additional Sub-Court, Coimbatore.

S.A.No.868 of 2012

20/21



WEB COPY



S.A.No.868 of 2012

31.07.2025