



SA No.1078 of 2013

IN THE HIGH Court OF JUDICATURE AT MADRAS

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DATED : 09-01-2025

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

Second Appeal No. 1078 of 2013

and

M.P.No.1 of 2015

D. Pappathy

.. Appellant

Versus

1. D.Arumugam

Nanjappan (Died)

Ramasamy (Died)

2. Pushpa

3. Rajendran

Prakash (Died)

Udayakumar (Died)

4. Thulasiammal

5. Nanjammal

6. Ranganayaki

7. Kanaka

8. Vijayalakshmi

9. Gajalakshmi

.. Respondents

Second Appeal filed under Section 100 of Code of Civil Procedure to set aside the Judgment and Decree dated 25.02.2013 passed in A.S.No.17 of 2012 on the file of the learned Principal District Judge, Coimbatore reversing the judgment and decree dated 29.09.2011 rendered in O.S. No. 212 of 1993 on the file of the I Additional Subordinate Judge, Coimbatore.

For Appellant

:

Mr. M.Muthappan

for Mr. A.G. Rajan



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For Respondent 1 : Mr. A.E. Ravichandran
for Ms. C. Usha
For Respondent 4 : No appearance

JUDGMENT

The present Second Appeal arises out of the judgment and decree dated 22.02.2013 passed in A.S. No. 17 of 2012 on the file of the learned Principal District Judge, Coimbatore reversing the judgment and decree dated 29.09.2011 made in O.S. No. 212 of 1993 on the file of the learned I Additional Subordinate Judge, Coimbatore.

2. The Plaintiff in O.S. No. 212 of 1993 is the Appellant in this Appeal. She has filed the suit as against the Defendants 1 to 13 for a partition to divide the plaint described property into 6 equal shares with reference to good and bad soil, allot one such share to her, to appoint an Advocate Commissioner to divide the suit properties and to allot the legitimate share to her, to direct the Defendants to pay the future mense profits till the date of allotment and for costs.

3. It is stated in the plaint that the Plaintiff, Defendants 1, 2, 3, 8 and late. Chinnaamy are the children born to late. Dasa Gounder. In other words, the deceased Dasa Gounder had 4 sons and 2 daughters. The Defendants 4, 5, 6 and 7 are the legal heirs of the deceased Chinnaamy, brother of the Plaintiff.

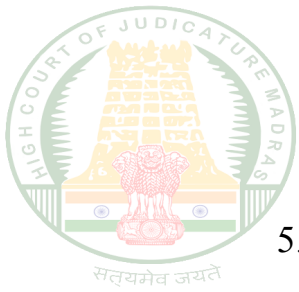


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On 29.11.1998, the said Dasa Gounder died leaving behind the Plaintiff and Defendants 1 to 8 as his legal heirs. It is stated that the A Schedule described property of the plaintiff was purchased through a registered sale deed dated 26.11.1945 by the deceased Dasa Gounder. Subsequently, the deceased Dasa Gounder purchased B Schedule property of the plaintiff through a registered sale deed dated 17.12.1957 in his name. On 22.06.1976, through a registered sale deed, the father of the Plaintiff and Defendants 4, 5, 6, and 7 had purchased the C Schedule property. Thus, the properties described as A, B and C in the schedule of the plaintiff was the self-acquired property of her father. Therefore, after the death of her father on 29.11.1988, the Plaintiff approached the Defendants directly and through Panchayatarams for amicable partition of the properties described under Schedule as A, B and C but it was refused by the Defendants. On the other hand, the Defendants attempted to alienate the properties and therefore, the Plaintiff sent a notice dated 09.04.1992 to the Defendants 1 and 8 calling upon them to divide and allot 1/6 share in the plaintiff described properties. Though the Defendants 1 and 8 received the notice, they did not give any reply and therefore, the Plaintiff has filed the suit.

4. During the pendency of the suit, the second Defendant died and therefore, his legal heirs were brought on record as Defendants 9 to 13.



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5. On notice, the third Defendant filed a written statement contending that the deceased Dasa Gounder purchased the A, B and C Schedule properties out of the income earned by the third Defendant as an Ex-Serviceman in Indian Army. According to the third Defendant, he sent a major portion of his salary to his father and out of the same, he purchased the properties described in the Schedule hereunder. His father has no independent source of income and in fact, he finds it extremely difficult to nurture his six children. On the other hand, after marriage, the Plaintiff had took with her the gold ornaments of her mother. The Plaintiff has, therefore no right to claim a share in the plaint described properties and prayed for dismissal of the suit.

6. Later, an additional written statement was filed by the third Defendant in which it was stated that the deceased Dasa Gounder executed a registered Will dated 25.11.1988 whereby he bequeathed some of the properties owned by him to his children. As per the Will dated 25.11.1998, the A Schedule property was given to the first Defendant, the B Schedule property was given to the male children of Late. Chinnasamy namely the Defendants 5, 6 and 7. The C Schedule properties was given to the second Defendant (since deceased) and the D Schedule was given to the third Defendant. It was also stated that on the strength of the Will, the third Defendant had sold a portion of the land measuring 1 acre and 40 cents and



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retained the remaining lands in the D Schedule property. Similarly, the others, to whom A, B and C Schedule properties were allotted under the Will have also alienated some portions of the lands. According to the third Defendant, such alienations have taken place in the year 1991-1992 and therefore, the suit filed by the Plaintiff is not maintainable. Accordingly, the third Defendant prayed for dismissal of the suit.

7. The eighth Defendant, who is one of the daughters of late. Dasa Gounder, filed a written statement contending *inter alia* that after the death of her father, all his children are entitled to 1/6 share in the suit property. The eighth Defendant also submitted that the Plaintiff and other legal heirs of Dasa Gounder are equally entitled to a share in the plaint described properties and it cannot be deprived in any manner. It is also stated that if a decree for partition is granted, the eighth Defendant is ready to pay the Court fee proportionate to her share.

8. During trial, the Plaintiff examined herself as P.W-1 and marked Ex.A-1 to Ex.A-13. On behalf of the Defendants, the third Defendant examined himself as D.W-1 and three other witnesses were examined as D.W-2 to D.W-4 and Ex.B-1 to Ex.B-6 were marked. On appreciation of the oral and documentary evidence, the trial Court concluded that the Will said to have been executed by the deceased Dasa Gounder was not proved in a manner



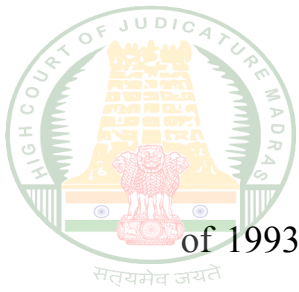
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known to law. To substantiate the execution of the Will, D.W-2, Officer of the Registration Office was examined but the trial Court discarded his testimony as insignificant. The Defendants also examined D.W-3, one of the attesting witnesses to the Will but his testimony was inconsistent with reference to the place of execution of the Will. Therefore, it was held by the trial Court that the genuineness of the Will has not been proved by the Defendants. The trial Court also noted that the Will is said to have been executed in the hospital few hours prior to the death of the testator and it gives suspicion as to the genuineness of the Will. Even though it was argued that necessary charges have been paid to the office of the Sub-Registrar and the Sub-Registrar himself came to the hospital for execution of the Will, the trial Court refused to accept the Will as genuine in the absence of any records from the office of the Sub-Registrar, to substantiate the same. The trial Court also referred to the deposition of first Defendant in his cross-examination, wherein he has stated that he was not aware of the hospitalisation of his father from 10.11.1988 to 19.11.1988 or the treatment given to him. As the Defendants failed to prove the manner in which the Will was executed, the trial Court held that the Plaintiff has proved her claim for partition. Accordingly, the trial Court passed a preliminary decree for partition on 29.09.2011.

9. Assailing the judgment dated 29.09.2011 passed in O.S. No. 212

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of 1993, the third Defendant alone preferred A.S. No. 17 of 2012 before the learned Principal District Judge, Coimbatore. The first appellate Court, on scrutinising Ex. B-1 and Ex.B-2 concluded that the Plaintiff married a person of her choice and that was the reason she was not given any share in the Will. The first appellate Court also held that the eighth Defendant, who supported the case of the Plaintiff by way of written statement, did not step into the witness box. On the other hand, it was the eighth Defendant, who signed as a witness in the Will. By placing reliance on the certificate presented for registration of the Will, the Appellate Court accepted the plea of the third Defendant and held that the Will is true and genuine. The appellate Court also, on going through the recitals in the Will has held that the testator has consciously excluded the Plaintiff and the eighth Defendant from giving any share and he has clearly stated that his sons and grandsons alone are entitled to a share in the properties owned by him. Accordingly the Appellate Court reversed the judgment and decree passed by the trial Court and allowed the appeal.

10. Aggrieved by the Judgment and Decree dated 25.02.2013 passed in A.S. No. 17 of 2012, the Plaintiff is before this Court with this second appeal.

11. The learned Counsel for the Appellant/Plaintiff submitted that the



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suit was filed by the Plaintiff for partition. The Defendant-3 in the suit is the brother of the Plaintiff who alone had filed the first appeal before the first appellate Court. The other brothers of the Plaintiff did not assail the preliminary decree for partition passed by the trial Court. The Defendant-8 in the suit is the elder sister of the Plaintiff. The Defendant-3 had filed Written Statement and contested the suit. It is the claim of the Defendant-3 that their father had executed a WILL which was registered and as per the WILL, the male heirs alone are entitled to a share in the immovable properties.

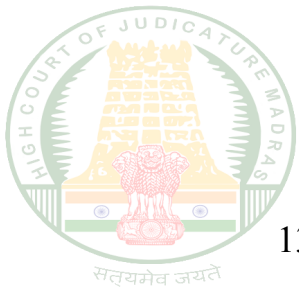
12. The learned Counsel for the Appellant-Plaintiff also invited the attention of this Court to the discussion of evidence of the parties, particularly the claim of the Defendant-3 as D.W-1, The third Defendant claimed that he had been in Military Service at the time of his father's death and out of the salary amount sent by him, the suit properties have been purchased in the name of his father. The third Defendant also claims that he attended his father, when he was in hospital. He also claims that his father, during treatment in the hospital, had handed over the WILL to him, whereas he claims that it was a registered WILL. When the father of the Plaintiff was under treatment in Hospital, on 25.11.1988 the WILL was executed and it was presented before the Sub-Registrar concerned on 28.11.1988 and it was registered on 29.11.1988. In the WILL, there were two attesting witness. One



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of the attesting witnesses was examined as D.W.-2. The eighth Defendant is also one of the attesting witness. The learned I Additional Subordinate Judge, Coimbatore observed that the Defendants failed to prove the execution of the WILL by not summoning the documents from the office of the Sub-Registrar concerned to show the manner in which the Will was registered. Further, the third Defendant was unable to explain why Dr.Kumar had attested the WILL. However, the said Doctor Kumar was not summoned and he was not examined as witness. The person who was examined as D.W-3 was the attesting witness who claimed that he had visited the hospital to see the father of the Plaintiff and Defendant-3 undergoing treatment. However, in his deposition, he has stated that the Will was executed in the hospital itself. On the basis of inconsistent plea of DW3, the learned I Additional Subordinate Judge, Coimbatore arrived at a conclusion that the WILL had not been proved as per Section 68 and 69 of the Indian Evidence Act. Also, the learned I Additional Subordinate Judge, Coimbatore had arrived at a conclusion that if the WILL had been true and genuine, the other brothers of the Defendant-3 would have contested the suit, but, they remained *ex parte*. On assessment of evidence available before the learned I Additional Subordinate Judge, Coimbatore, the contention of the Defendant-3 in the Written Statement was rightly rejected and a preliminary decree for partition was granted.



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13. The learned counsel for the Plaintiff/Appellant further submitted that the third Defendant alone filed Appeal in A.S.No.17 of 2012 before the learned Principal District Judge, Coimbatore. In the discussion of the evidence by the learned Principal District Judge, Coimbatore, it was concluded that the presumption is that it is a registered WILL and it is proved by examining D.W-3 and thereby rejected the contention of the Plaintiff. The learned Counsel for the Plaintiff further submitted that the reasonings assigned by the appellate Judge in Paragraph 15 to 18 are *per se* illegal, unreasonable and arbitrary and therefore, the learned counsel prayed for allowing this appeal, by setting aside the Judgment and Decree passed by the Appellate Court and to restore the well considered Judgment and Decree passed by the trial Court.

14. Per contra, the learned Counsel appearing for the Respondent- 1 in this appeal/third Defendant in the suit, submitted that there is no suspicious circumstances surrounding the execution of the Will. D.W-3 Jayagopal was one of the attesting witnesses to the Will. The testimony of D.W-3 clears the air of controversy surrounding the Will. D.W-2 Rajasekar served as Assistant in the office of the Sub-Registrar Office and he deposed about the registration of the WILL in the Sub-Registrar Office. Dr. Kumar, who treated the deceased Dasa Gounder is also an attesting witness, but he was not examined.

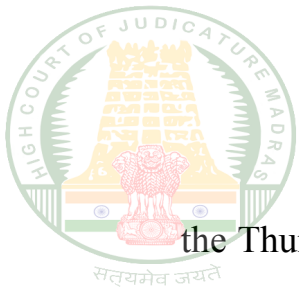
It is the contention of the learned Counsel appearing for the Respondent-1 is



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that the suit was instituted in the year 1993 and the evidence was recorded in the year 2009. Further, Late. Dasa Gounder executed the Will thereby granted shares in the property to his sons by clearly excluding his daughters, the Plaintiff and 8th Defendant. If Dasa Gounder had executed a Will whereby the entire property was allotted to the Defendant-3, then it can give rise to a suspicious circumstances. Here, he had allotted shares of the immovable property to his sons and grand sons born to his deceased son Chinnasamy and therefore, it cannot be said that the Will is ingenuine or there is no scope for the deceased to have executed the Will. It is to be noted that except the third Defendant, the other sons, who are the Defendants in the suit, remained *ex parte*. Also another point to be noted is that Defendant-8 is another sister of Plaintiff and she had attested the Will. However, the Plaintiff has not chosen to examine her as a witness in the suit. On the other hand, the eighth Defendant, having signed the Will as one of the witnesses, filed a written statement supporting the claim of the Plaintiff and sought for a share in the suit properties. Further, after filing of written statement and Additional Written Statement by the Defendant-3 Arumugham, bringing to the notice of the Court the execution of a registered Will, the Plaintiff has not filed any reply statement repudiating the execution of the Will. During trial, the Plaintiff or Defendant-8 Thulasiammal has not filed any application to deny



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the Thumb impression of their father Dasa Gounder in the Will or doubted the execution of the WILL. Under those circumstances, it is natural that the suspicious circumstances does not arise in this case. Therefore, the first Appellate Court is wholly justified in holding that the WILL claimed by the Defendant-3 in the written statement was a genuine WILL. Merely the daughter/Defendant-8 who is the sister of the Plaintiff had not been examined or daughters were not granted shares it will, it will not create suspicious circumstances or invalidate the Will. Moreover, the learned Counsel appearing for the Respondent-1 invited attention of this Court that the Trial Court had framed Issues. Issue '3' relates to the Will viz., *"Whether the father of the Plaintiff and the Defendants executed any WILL as alleged by the 3rd Defendant."*

15. Subsequently, the learned Sub Judge, Coimbatore had raised additional issue which reads that *"Whether as per WILL dated 25.11.1988, the father has bequeathed specific shares of all his properties to specific persons mentioned in the WILL."*

16. The learned counsel for the first respondent-third Defendant submitted that the said additional issue is unwarranted. The learned Counsel for the Respondent-1 submitted that after filing of written statement and



additional written statement by the Defendant-3, the Plaintiff had not filed any reply statement denying the execution of WILL by their father. If she had filed any reply statement, then the Learned Additional Subordinate Judge, Coimbatore is justified in framing additional issue. When there is no reply statement filed by the Plaintiff, in the absence of any pleading denying or disputing execution of the WILL, the framing of Additional issue by the learned Additional Sub Judge, Coimbatore itself is erroneous.

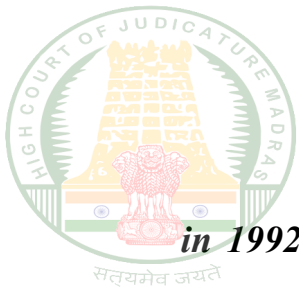
17. The learned Counsel for the Respondent-1 further submitted that the learned Additional Sub Judge, Coimbatore in the course of discussion of evidence observed that it is the right thumb impression of the father of the Plaintiff and the Defendants. Whether right thump impression or left thumb impression it will not create or lead to suspicious circumstances. As per Section 63(a) of Indian Succession Act, 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. Therefore, the suspicious circumstances raised by the learned Additional Sub Judge, Coimbatore is unwarranted and erroneous. The 3rd Defendant had summoned the staff of the Sub-Registrar Office as a Witness. D.W-2, Rajasekar had deposed regarding the execution of the registered WILL. Further, the identity of the testator was established by Dr. Kumar before the Sub-Registrar who treated Dasa Gounder in his hospital. The other



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witness N. Jayagopal also signed as an attesting witness before the Sub-Registrar. The fact of registration and issuance of a certificate of registration was proved by D.W-2 Rajasekar, the staff of the Sub-Registrar office concerned based on the records available in the Sub-Registrar Office. Even otherwise, the registration of WILL or any document gives a impression that it is duly registered. The presumption is always in favour of the registered document. While so, ignoring those facts and circumstances, the trial Court erroneously passed a preliminary decree for partition. The learned Principal District Judge, Coimbatore in the discussion of evidence in Para.10 to 18 had placed reliance on the rulings relied by the learned Counsel for the Defendants in *Jayalakshmi Ammal vs Lakshmi Ayangar* reported in **1992 (2) Law Weekly 523** wherein it was held that if the WILL is presented for registration by its executant and registered properly in accordance with law, the reliability or executability of the Will cannot be questioned. The appellate Court also relied upon another ruling of Hon'ble Supreme Court of India in the case of *Rabindra Nath Mukherjee and another vs V.Pachannan Banerjee* reported in **AIR 1995 Supreme Court 1684** wherein it was held that genuineness of the WILL cannot be doubted only on the ground that daughters were disinherited. The learned Principal District Judge, Coimbatore had also referred to the judgement in the case of *Jayalakshmi Ammal vs Lakshmi Ayangar reported*



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in **1992(2) Law Weekly 523** and held that the Court is not entitled to make surmises and assume anything contrary to document (WILL) and set aside the preliminary decree passed by the trial Court.

18. The learned Counsel appearing for Respondent-1 relied upon the rulings in **2010 SCC online Madras 5553 in the case of C.S.Devakumar vs K.S.Krishna Kumar and others** and in the case of **Selvasubramaniam vs Subburathinam reported in 2015(3) Law weekly 7**. The facts of the case in **Selvasubramaniam vs Subburathinam** reported in **2015(3) Law weekly 7** and submitted that those case are squarely applicable to the facts of this case. The relevant portion of the said judgment reads thus.

"14. Admittedly, in the Complaint, the Plaintiff had not stated anything about the alleged WILL at all. It is not as though the Plaintiff was not aware of the WILL. For the legal notice issued by the Plaintiff prior to the filing of the suit, the Defendant sent a reply notice in which, he has categorically stated that Mrs.Kuttiyammal had executed the WILL on 22.06.1977 thereby bequeathing the suit properties in his favour. It is the evidence of P.W.1 that after the said reply notice, she obtained a copy of the WILL and then only, she could ascertain that there was such a WILL. All these things happened prior to the filing of the suit. Therefore, he would have, by all means, raised a dispute regarding the WILL in the complaint itself. He has failed to do so. In the Written Statement filed by the Defendant, he has categorically taken a plea that the WILL was executed by Mrs.Kuttiyammal in sound state of mind and by virtue of the said WILL, he has become the absolute owner of the suit properties on the demise of Mrs.Kuttiyammal. Even after that, the Plaintiff did not file any reply statement raising a dispute regarding the WILL.

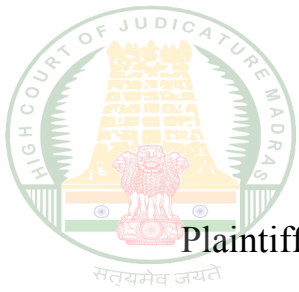


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insist for such a reply statement in every case. Even without reply statement, the Plaintiff can proceed with the case provide, such a dispute has already been raised in the plaint. But, in the instant case, as I have already pointed out, in the plaint, there is no dispute raised regarding the WILL. Incidentally, there was also no dispute raised in respect of the WILL by filing any reply statement. However, the trial Court thought it fit to frame an issue in respect of the execution of the WILL, on its own, I have got my own reasons to say that the trial Court was not right in raising such an issue, when there was no dispute raised at all by the Plaintiff regarding the WILL."

19. The learned counsel for the first respondent also submitted that the Defendant-3 filed written statement denying the claim of the Plaintiff in the suit and stated that Dasa Gounder executed the Will in favour of his sons. However, the Plaintiff had not filed any reply statement to the written statement. Therefore, in the light of the reported rulings mentioned supra, the learned Counsel appearing for Respondent-1 seeks to dismiss the Second Appeal as having no merits.

20. The learned Counsel appearing for the Appellant, by way of reply to the submissions of the learned Counsel for the Respondent-1, submitted that the facts in the reported ruling in the case of **Selvasubramaniam vs Subburathinam** reported in **2015 (3) L.W.7** is not applicable to the facts of the case. In that case, the Plaintiff caused a pre-suit notice which was acknowledged by the Defendants and they sent their replies intimating the Plaintiff about the execution of the WILL by the testator. In this case, the



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Plaintiff had sent pre-suit notice seeking partition which was received by the Defendants, but they have not sent any reply. Therefore, the facts of the reported ruling will not support the case of the respondent in this Second Appeal. Further, it is not necessary that reply statement has to be filed in every case when new facts are introduced by way of written statement. In any event, merely because a reply statement was not filed by the Plaintiff, it will not weaken the plea raised by her in the plaint and prayed for allowing the second appeal.

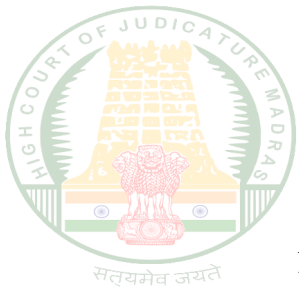
21. Heard the learned counsel for the Appellant/Plaintiff and the learned counsel appearing for the contesting first respondent-third Defendant and perused the materials placed on record.

22. At the time of admission of this second appeal on 10.03.2016, the following substantial questions of law are framed for consideration:-

(i) Whether the first Appellate Court is right in rendering a finding that the said WILL is genuine in the admitted fact that it is the Right Thumb impression of the Testator and not the Left Thumb Impression of the Testator.

(ii) Whether the affixing of the Right Thumb Impression in the said WILL on the date of death of the testator amounts to proper execution as provided under Section 63 of the Succession Act.

(iii) Whether the Appellate Court has properly understood and followed the principles laid in "**Gobalan vs Chandri**



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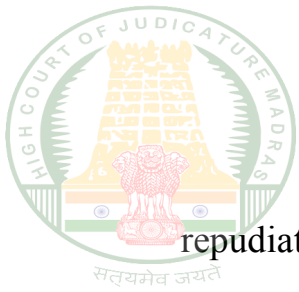
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A.F.A.No.47 of 2002 decided on 07.06.2013 (2013 (3) Kerala Law Times 69) wherein it was held that "As per Section-63 of the Indian Succession Act, 1925 - Even the absence of any specific denial of execution of a WILL or even an admission of its existence will not absolve the duty of the propounder of a WILL to prove its genuineness and dispel all the suspicious circumstances surrounding it's execution.

23. The Plaintiff has filed the suit for partition and allotment of 1/6 share to her. Admittedly, before filing the suit, a pre-suit notice was sent but the Defendants did not send any reply.

24. The Plaintiff, Defendants 1, 2, 3 and 8 are the surviving children of the deceased Dasa Gounder. One of the sons of Dasa Gounder by name Chinnaamy pre-deceased his father. Therefore, the children of Chinnaamy were arrayed as Defendants 4, 5, 6 and 7. It is pertinent to mention that the Plaintiff and the eighth Defendant are the daughters born to late. Dasa Gounder and rest of the children are sons born to him.

25. On notice in the suit, the third Defendant projected a theory that his father Dasa Gounder had executed a Will dated 25.11.1988 whereby all his male heirs viz., sons and grandsons were given a share in the plaint described property to the exclusion of the Plaintiff and the eighth Defendant. When a written statement was filed by the third Defendant indicating the Will dated 25.11.1988 executed by his father, the Plaintiff did not file a reply statement



repudiating the averments relating to the Will.

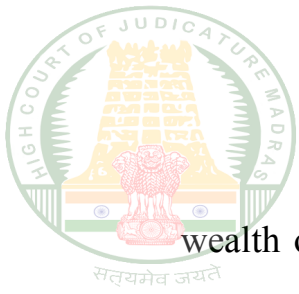
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26. During trial, the Will was disbelieved and suspected mainly on the ground that it was executed on the same day when the deceased Dasa Gounder died. In other words, the Will was executed on 25.11.1988, on which date, the testator died. Whether the execution of the Will on the same date of death of the testator will give rise to a suspicion as to the execution or genuineness of the Will? This is the main controversy involved in this appeal.

27. It must be noted that there is no bar for a testator to execute a Will a few days or few hours prior to his or her death. All that is required to be shown is that the Will was executed free from any suspicious circumstances. Further, the Will must be proved through the surviving attesting witness and it is one of the mandatory requirements to be fulfilled by the person who seeks to prove the genuineness of the Will as per Section 63 of The Indian Succession Act and Section 68 of The Indian Evidence Act. In case, if the Will is registered, it partakes the character of a genuine Will and its ingenuineness must be specifically pleaded and proved before the Court.

28. In this case, the deposition of D.W-3 assumes importance. D.W-3 visited the testator in the hospital and at that time, the testator said to have expressed his willingness to bequeath his wealth to his sons and grandsons.

<https://www.mhc.tri90wfrjudis> D.W-3 also deposed that the testator expressed his intention to dispose his



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wealth only to his sons and grandsons in various propositions and asked him to handover the Will to Govindammal, a document writer in Oondipudur.

After the Will was prepared, the testator put his thumb mark in the Will in the presence of D.W-3. The identity of the testator was made clear by Dr.Kumar, who treated him in the hospital. It is pleaded before this Court on behalf of the Appellant-Plaintiff that Dr. Kumar was not examined as a witnesses before the trial Court. First of all, it is not necessary to examine Dr.Kumar, who only identified the testator in the hospital. Further, it was explained by the Appellant-third Defendant that Dr. Kumar shifted from the hospital and his whereabouts could not be ascertained and consequently, summons could not be sent. This explanation, in the opinion of this Court is bona fide. Even otherwise, attempts have been made to examine Dr.Kumar, but the Appellant-third Defendant could not succeed in such attempt. Therefore, this Court holds that non-examination of Dr. Kumar will not in any manner weaken the defence projected by the Appellant-third Defendant.

29. The eighth Defendant is one of the daughters of the testator and she was also the other attesting witness to the Will. The Will was later presented to the office of the Sub-Registrar for registration and it was duly registered. The certificate of registration was also marked through D.W-2, an Assistant working in the office of the Sub-Registrar. Ex.B6, copy of the Will



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was also marked through D.W-2. In fact, on the same day of affixing the thumb impression in the Will on 25.11.1988, the testator died. Or in other words, few hours after the Will came to be executed, the testator died. Given the manner in which the Will was executed by the testator in the hospital, after having been identified by Dr.Kumar and the Will having been attested by D.W-3 and the eighth Defendant, daughter of the testator, this Court is of the view that the execution of the Will has successfully passed through the litmus test contemplated under Section 63 of The Indian Succession Act and Section 68 of The Indian Evidence Act. Therefore, this Court holds that merely because the testator died on 25.11.1988 few hours after executing the Will, it will not be taken as a suspicious circumstances surrounding the Will or to hold that the due execution of the Will has not been proved. Therefore, the judgment and decree passed by the trial Court, is liable to be interfered with by this Court.

30. As rightly pointed out by the learned Counsel appearing for the Respondent-1, as per Section 63(a) of Indian Succession Act, 1925, 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. Here, the WILL executed by the testator was registered before the competent Sub-Registrar,



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after following the due procedures required for registration of the Will. The

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Doctor who treated the testator duly identified the testator and signed the Will for the purpose of identifying the testator. That apart, D.W-3 is one of the attesting witnesses to the Will and he had spoken about the execution of the WILL. He also deposed that the testator does not want his children to wage a pitched battle for his wealth after his death and therefore asked him to prepare a Will. He also deposed that it is the intention of the testator to give his wealth to his male descendants to the exclusion of his female children. Therefore, it is clear that the intention of the testator was very clear that his wealth has to go only to his sons and grandsons. Further, before the registering authority, Dr. Kumar identified the testator for registering the WILL. There is evidence through D.W-3 that the Sub-Registrar visited the hospital to register the WILL. It is in evidence of D.W-1 that he paid the necessary charges to the Sub-Registrar concerned to summon him to appear before the Court along with relevant records to prove the registration of the WILL. But, unfortunately the Sub-Registrar did not appear and his staff namely Rajasekar appeared and filed the registration copy of the WILL and it was marked during trial.

31. To prove the WILL as per Section 63(a) of Indian Succession Act, it must be shown that the Will is attested by two or more witnesses who had seen the testator sign or affix his signature or thumb impression.



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Similarly, the testator must see the witness subscribe his or her signature in the document. This is one of the requisite for proof of a Will. In this case, as per Section 63 of Indian Succession Act, D.W-3 Jayagopal was examined to prove the Will. By reason of examination of one of the witnesses to the Will, the Defendants have successfully proved the execution of the Will.

32. The learned Sub-Judge, Coimbatore by raising additional issues without any pleading on the side of the Plaintiff disputed the genuineness of the Will. As rightly pointed out by the learned counsel for the first respondent-Defendant No.3, the framing of additional issue itself is unwarranted. When the third Defendant had clearly stated the execution of the WILL in his written statement and also examined one of the attesting witnesses to the Will, this Court is of the view that it is sufficient to prove the due execution of the Will.

33. The Defendant-8 is sister of the Plaintiff and she is also one of the attesting witness to the Will. As pointed out by the learned Principal District Judge, Coimbatore, for the reasons best known, she did not enter the witness box to support the claim of the Plaintiff. In fact, it is the eighth Defendant, who has filed a written statement supporting the claim of the Plaintiff for partition of the suit properties. In her written statement, there is nothing to

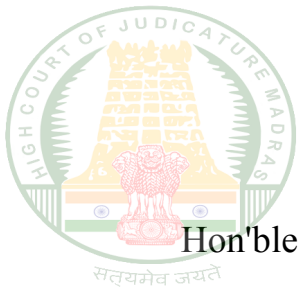


show that she was one of the attesting witnesses to the Will. The eighth

Defendant did not say anything about the Will in her written statement. As an attesting witness, she is competent to speak about the due execution of the Will. On the other hand, she has merely filed a written statement supporting the case of the Plaintiff, without referring to the Will executed by her father/testator. Therefore, the learned District Judge had drawn an adverse inference against the conduct of the Defendant-8, which, in the opinion of this Court, is proper.

34. As rightly contended by the learned Counsel for the Respondent-1, the Plaintiff had not filed any petition to subject the WILL for expert opinion regarding thumb impression of the testator. Also, as observed by the learned Principal District Judge, Coimbatore all the other Defendants had remained *ex parte* in the Trial. Those circumstances were not considered by the learned Additional Subordinate Judge, Coimbatore, when he had rejected the WILL on the ground it is suspicious and ingenuine. The suspicious circumstances was cleared by the Plaintiff by examining witnesses D.W-2 and D.W-3. In the light of evidence of D.W-2 and D.W-3, the learned Principal District Judge, Coimbatore is right in arriving at a conclusion that the WILL had been proved.

35. The learned Principal District Judge relied on the rulings of the



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Hon'ble Supreme Court of India as well as the Judgment of this Court to arrive at a conclusion that merely because the daughters have been disinherited it does not create suspicious circumstances. Also the learned Principal District Judge, Coimbatore observed that both the daughters have been married and that was also mentioned in the WILL. The learned Principal District Judge, Coimbatore in his judgment relied on the ruling of this Court in the case of **Jayalakshmi Ammal vs K.Lakshmi Iyengar** reported in **1992 (2) Law Weekly 523**, wherein it is held that the Court is not entitled to make surmises and assume anything contrary to the document (WILL). In this case, Ex.B-1 and Ex.B-2 were relied by the learned Principal District Judge, Coimbatore wherein the Plaintiff herself stated that she married against the wishes of her family. That is the reason why, the Plaintiff was excluded in the Will and she was not given any share in the property. Further, the WILL came into existence prior to the passing of the amendment to Section 6 of Hindu Succession Act. Therefore, as on the date of execution of the WILL (Ex.B-4) dated 25.11.1988, Section 6 of the Hindu Succession Act has not been amended giving a right, share and interest to the female heirs. Therefore, Section 6 of the Hindu Succession Act, after amendment, has no bearing for a decision in this appeal.

36. The learned Principal District Judge, Coimbatore on re-

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appreciation of evidence rejected the finding of the learned I Additional Subordinate Judge, Coimbatore regarding the genuineness of the WILL and held that it was duly proved. The Appellate Court is right in rendering a finding that the WILL is genuine. As rightly pointed out by the learned Counsel for Respondent-1, for argument sake if it is accepted that the right hand thumb impression of the testator was made in the WILL it will not invalidate the due execution of the Will. The fact that Dr. Kumar and Defendant-8 Thulasiammal, D/o.Dasa Gounder are witnesses to the execution of the Will along with Jayagopal, D.W-3 itself is sufficient to hold that the Will is genuine. Under those circumstances, the substantial questions of law are answered in favour of the Respondents and against the Appellant.

In the result, **the Second Appeal is dismissed.** The Judgment of the learned Principal District Judge, Coimbatore in A.S.No.17 of 2012 dated 25.02.2013 is upheld. Consequently, connected miscellaneous petition is closed. No Costs.

09-01-2025

Index: Yes/No

Internet: Yes/No

Speaking Order/Non-speaking Order

gvn



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To
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1. The I Additional Subordinate Judge,
Coimbatore.
2. The Principal District Judge,
Coimbatore.
3. The Section Officer,
Vernacular Record Section,
Madras High Court,
Chennai – 600 104.



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SATHI KUMAR SUKUMARA KURUP, J

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Judgment in
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