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AS.No.90 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2025

CORAM:

THE HONOURABLE Mr.JUSTICE C.KUMARAPPAN

A.S.No.90 of 2018

Rajkumar

... Appellant/Defendant

-Vs-

Rajamani @ Vennila

... Respondent/Plaintiff

PRAYER: First Appeals filed under Section 96 of the Code of Civil Procedure praying to set aside the Judgement and preliminary decree dated 13.10.2017 in O.S.No.92 of 2015 on the file of the II Additional District Court, Salem.

For Appellant : Mr.D.Shivakumaran

For Respondent : Mr.S.Kalyanaraman

J U D G M E N T

The instant Appeal Suit arising against the decree and judgment passed by the II Additional District Court at Salem dated 13.10.2017 in O.S.No.92 of 2015.



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2. The Appellant and the respondent are the defendant and the plaintiff in the suit. The parties will be referred to according to their litigative status before the Trial Court.

3. Short facts which are necessary for disposal of this appeal is as follows:-

(a). The suit property originally belonged to one Mr.Elumalai by virtue of the Partition deed dated 24.12.1990. He died on 29.01.1993. His wife Pappathi @ Pappa also died on 10.08.2005. According to the plaintiff, after the demise of Pappathi @ Pappa, the only legal heirs for late Elumalai are the plaintiff and the defendant. Therefore, the plaintiff came up with the suit for partition to divide the suit property into two equal shares and for allotment of one share.

(b). The said suit was resisted by the defendant by contending that during the life time of his father late Elumalai, he has executed a Will dated 07.03.1992, wherein the entire property was bequeathed to him and in the said Will, there is a justifiable reason for exclusion of the plaintiff, as the arrangement was made to provide 20 sovereigns of gold and a sum of



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Rs.3,00,000/- in cash, by imposing an obligation on their mother. It was further stated that a sum of Rs.2,00,000/- was paid to the plaintiff's husband to purchase a vehicle. Hence, prayed to dismiss the suit.

4. On the above pleadings, the learned Additional District Judge framed the following issues:-

1. Whether the suit properties are the joint family properties of the plaintiff and the defendant?
2. Whether the Will dated 07.03.1992 executed by Elumalai is true valid and acted upon?
3. Whether the plaintiff is entitled to get preliminary decree for partition as prayed for?
4. Whether the plaintiff is entitled to get permanent injunction as prayed for?
5. To what relief?

5. At Trial, the plaintiff was examined as PW1. Exs.A1 to A9 were marked. On behalf of the defendant, he himself was examined as DW1 and one of the attesor was examined as DW2 and marked Exs.B1 to B6.

6. After considering both oral and documentary evidence and having considered the submissions made by either side, the Trial Court decreed the



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suit in favour of the plaintiff. Aggrieved with the said finding, the defendant is before this Court by way of this Appeal.

7. Heard Mr.D.Shivakumaran, learned counsel for the appellant and Mr.S.Kalyanaraman, learned counsel for the respondent.

8. The learned counsel for the appellant would vehemently contend that in order to prove the Will under Ex.B6 dated 07.03.1992, the attesor was examined and through the attesor, the execution of Will has been proved in accordance with Section 63 of Indian Succession Act and Section 68 of the Indian Evidence Act. He would also further contend that there are no suspicious circumstances in the execution of the Will and further, the mere non registration of the Will is in no way a suspicious circumstance and that the execution of Will would arise only to alter the natural course of succession. He would further contend that, the Will itself has a justifiable reason to exclude the plaintiff from succession. But, ignoring the settled legal position and contrary to the evidence, the Trial Court erroneously decreed the suit. Hence, he prayed to allow this appeal.



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9. Per contra, the said contention was stoutly objected by the respondent by relying upon the non registration of the Will besides he also would contend that though their father Mr.Elumalai died on 29.01.1993, almost for a period of more than 25 years, no mutation was effected by her brother qua the defendant. Therefore, the alleged Ex.B6-Will is a fabricated one and the same was pressed into service only to defeat the rights of the plaintiff. He would also contend that the learned Trial Judge has gone into all the suspicious circumstances of the Will and has arrived at a right conclusion. Therefore, prayed to dismiss the instant appeal.

10. From the submissions made by the either side counsels, the following points arises for determination in this appeal.

(i) Whether the plaintiff is entitled for a decree for partition as prayed for?

(ii) Whether Ex.B6 Will was proved in a manner known to law?

Point Nos.1 & 2

11. It is an admitted fact that the plaintiff and the defendant are the only legal heirs to their father late Elumalai. Further, it is equally admitted by both



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parties that the suit property absolutely belongs to their father Elumalai. In short, the case of the plaintiff is intestate succession, the defence of the defendant is the testamentary succession. Therefore, the entire issue revolves around the proof of Will [Ex.B6] propounded by the defendant. If the defendant is able to prove Ex.B6 Will, then the plaintiff is not entitled for the partition. Therefore, we must find out, whether Ex.B6-Will has been proved by the defendant in accordance with law.

12. Before we delve into the merits of this case, this Court deems it appropriate to refer the judgment of a three-Judge Bench of the Hon'ble Supreme Court in *Shivakumar and others Vs. Sharanabasappa and others* reported in (2021) 11 SCC 277. Wherein the Hon'ble Supreme Court, after analysing various precedents from 1946 upto 2017, including the very famous judgment of *H.Venkatachala Iyengar Vs. B.N.Thimmajamma* reported in AIR 1959 SC 443 has encapsuled the relevant principles governing the adjudicatory process of the Will. For ready reference, this Court deems it appropriate to extract the relevant portion of the said judgement as under:-

“12. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could



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be broadly summarised as follows:

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12.1. Ordinarily, 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. ***Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.***

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of



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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 give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is “suspicious” when it is not normal or is “not normally expected in a normal situation or is not expected of a normal person”. As put by this Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind”.

12.7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into



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operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will.”

(Emphasis supplied by this Court)

13. While perusing the evidence, keeping in mind with above ratio, in order to prove the Will, the defendant has examined attesor [DW2]. Apart from examining the attesor, it is incumbent upon the propounder of the Will to dispel all the suspicious circumstances, shrouded the Will. Accordingly, the suspicious circumstances urged by the plaintiff needs consideration. In the case in hand, though Elumalai died on 29.01.1993, until filing of the suit in the year 2015, the defendant did not take any steps to mutate the property. The very Will suddenly surfaced only after filing of the instant suit. But, this long delay was not explained by the defendant. Further, as we know, the



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registration of Will is not compulsory. But, in the above background the non registration of the Will also assumes significance. But, this suspicious circumstance has not been dispelled by the propounder qua defendant.

14. It is in this background, the findings rendered by the Trial Court disbelieving the Will [Ex.B6] is perfectly in sync with the settled legal principle. Further, the defendant could not make out any infirmity in the Trial Court decree so as to interfere by this Court. Accordingly, we may safely conclude that the case of testamentary succession projected by the defendant become non starter and fails. As a concomitant, by way of intestate succession, the suit property has to be divided between the plaintiff and the defendant equally. In the case in hand, the Trial Court has rightly considered these aspects and granted decree for partition as prayed for, in favour of the plaintiff. Therefore, the present Appeal Suit is liable to be dismissed.

15. In the result, the Appeal suit stands dismissed. There shall be no order as to costs.

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Index : No
Speaking Order

NCC : No

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To
The II Additional District Judge,
Salem.



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C.KUMARAPPAN, J

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