



WEB COPY



OSA.No.65 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.04.2025

PRONOUNCED ON : 24.04.2025

CORAM

THE HONOURABLE Dr.JUSTICE ANITA SUMANTH
and
THE HONOURABLE Mr.JUSTICE C.KUMARAPPAN

Original Side Appeal No.65 of 2019
and
CMP.No.6040 of 2019

1. Tmt.V.Kasthuri
2. Tmt.V.Jothi
3. Tmt.V.Lakshmi

... Appellants

-Versus-

V.Dayalan

... Respondents

Prayer:- Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent Act, praying to set aside the judgment and decree dated 30.10.2017 passed in TOS.No.28 of 2014.

For Appellants : Mr.S.Ramesh

For Respondent : Mr.Mahesh Kumar



OSA.No.65 of 2019

WEB COPY

J U D G M E N T

*(Judgment of the Court was delivered by **C.KUMARAPPAN, J.**)*

The instant OSA is filed against the order of granting Probate in TOS.No.28 of 2014 vide order dated 30.10.2017. The appellants herein are the defendants 2, 3 and 5 and the respondent herein is the plaintiff.

2. For the sake of convenience, the parties will be referred to according to their litigative status before the learned Single Judge.

3. The brief facts which give rise to the instant OSA are as follows:-

(a). One Mr.Venugopal Naidu is the absolute owner of the suit property. He had 3 daughters and two sons. The plaintiff V.Dayalan and the 4th defendant V.Pragasam are his sons. The first defendant V.Thayarammal is his wife, and the defendants 2, 3 and 5 viz., V.Kasthuri, V.Jothi and V.Lakshmi are his daughters. Mr.Venugopal Naidu died on 01.06.2004. According to the plaintiff, his father Mr.Venugopal Naidu executed a Will dated 10.05.1996, and bequeathed “B” and “C” schedule properties of the Will to the plaintiff and the 4th defendant herein respectively. According to



OSA.No.65 of 2019

WEB COPY

the Will, the plaintiff's mother Thayarammal was given life estate of “B” and “C” schedule properties, which is described as “A” schedule property. It is the further submission of the plaintiff that, since his father has given bridal gifts to the defendants 2, 3 and 5 and that they have been given in marriage to respectable wealthy families, his father did not allot shares to them. Therefore, the plaintiff has come forward with a suit seeking Probate of a Will dated 10.05.1996.

(b). The first defendant Thayarammal and the 4th defendant V.Pragasam have given consent affidavit for grant of Probate.

(c). However, the three daughters viz., the defendants 2, 3 and 5 have filed a written statement resisting the plaint averments. According to them, the suit is barred by limitation. It is their further submission that filing of the suit in the year 2013 with the delay of more than 9 years from the date of demise of the testator, would cause suspicion in the conduct of the plaintiff. It is their further submission that their father late.Venugopal Naidu never disputed their share. However, the plaintiff only with an idea to subvert the normal succession, has fabricated the Will and has filed the instant suit. According to these defendants, the alleged Will is forged and fabricated one. They would further submit that the reason assigned in the Will for exclusion



WEB COPY

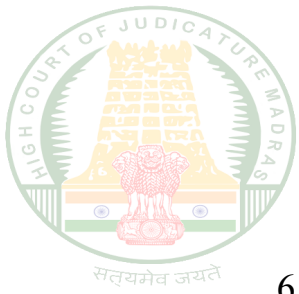
of these defendants from succession is artificial and there is no rational in excluding the daughters alone, when the sons are also well off. It is the further submission of these defendants that Venugopal Naidu was under the undue influence, duress and coercion of the plaintiff. Hence, these defendants prayed to dismiss the suit.

4. After considering the above pleadings, the learned Single Judge framed the following issues:-

- 1. Whether the Will dated 10.05.1996 executed by the deceased, namely B.Venugopal Naidu is true and valid?*
- 2. Whether the suit is liable to dismissed on account of delay and for not explaining the reasons for delay?*
- 3. To what other reliefs the Plaintiff is entitled?*

[Extracted as it is]

5. In order to prove the case of the respective parties, the plaintiff was examined as PW1 and two attesting witnesses viz., T.Sundararaj and S.Jayapaul were examined as PW2 and PW3. In support of the plaintiff's claim, he marked 3 documents as Exs.P1 to P3. On behalf of the defendants, 3rd defendant V.Lakshmi was examined as DW1 and no document was marked.



OSA.No.65 of 2019

WEB COPY

6. The learned Single Judge, after thorough appreciation of evidence and law, has decreed the suit by granting a Probate of Will on the ground that there are no suspicious circumstances, and that the testator was hale and healthy and was in sound disposing state of mind at the time of execution of the Will. The learned Single Judge has also found that the discrepancy of the first defendant's signature in the consent affidavit is only a clerical mistake. Eventually, concluded that the plaintiff has proved the Will, thus granted Probate. Aggrieved with the said order, the defendants 2, 3 and 5 have filed the instant OSA.

7. We have heard Mr.S.Ramesh, learned counsel appearing for the appellants and Mr.Mahesh Kumar, learned counsel for the respondent.

8. Mr.S.Ramesh, learned counsel for the appellants would vehemently contend that the signature of the testator found in the Will is very shaky, and that having executed the Lease deed in favour of the plaintiff for 50 years, there was no occasion arisen for the testator to execute a Will within a period of three months from the date of execution of the lease deed. He would also contend that the alleged consent affidavit of late.Thayarammal is procured by



OSA.No.65 of 2019

WEB COPY

playing fraud, which factum could be established through the discrepancy in the date of attestation given by the notary and the date written in the affidavit. The learned counsel would further contend that there is wild variance among the two attestors' evidence. To crown it all, it is the specific submission of the learned counsel that there is no explanation by the propounder for the long delay in preferring the Testamentary Original Suit. It is the submission of the learned counsel that in spite of the above numerous legitimate suspicious circumstances, there were no attempt on the part of the propounder to dispel all these suspicious circumstances. He would contend that the learned Single Judge, without going into the above core issues, erroneously arrived at a wrong conclusion. Hence, prayed to allow the appeal. In support of his contention, he relied upon the following judgments:-

1. ***H.Venkatachala Iyengar Vs. B.N.Thimmajamma and others*** reported in ***AIR 1959 SC 443***;
2. ***S.Vatsala Vs. K.S.Mohan and others*** reported in ***2016-1-L.W.577***.

9. Per contra, Mr.Mahesh Kumar, learned counsel appearing for the



OSA.No.65 of 2019

WEB COPY

respondent/plaintiff would vehemently contend that the delay in filing the TOS was only on the premise and with the belief that TOS could be filed only after the demise of the vested remainder holder as the plaintiff's mother Thayarammal was given life interest. However, she gave a consent during 2013 and as soon as she gave her consent, TOS was filed. Therefore, the learned counsel contended that the delay has been explained. It was further contended that there is no shakiness in the signature of the testator, and the very fact that the admission made by the defendants that the testator was in sound disposing state of mind would suffice to hold that the Will has been duly executed by the testator on his own volition. It was further contended that though there is a vague pleading regarding the undue influence and coercion, the same has not been proved before the Court. Hence, prayed to dismiss the OSA. In support of his contention, the learned counsel relied upon the following judgments:-

- 1. *Meena Pradhan and others Vs. Kamla Pradhan and another* reported in (2023) 9 SCC 734;**
- 2. *Madhukar D.Shende Vs. Tarabai Aba Shedage* reported in 2002 (1) CTC 244;**
- 3. *Sridevi and others Vs. Jayaraja Shetty and others* reported in 2005 (1) CTC 443;**



WEB COPY



OSA.No.65 of 2019

4. ***Rabindra Nath Mukherjee and another Vs. anchanan Banerjee (dead) by LRs and others*** reported in ***AIR 1995 SC 1684***;
5. ***Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others*** reported in ***2006-2-L.W.658***;
6. ***Savithri and Others Vs. Karthyayani Amma and others*** reported in ***(2007) 11 SCC 621***;
7. ***Ramabai Padmakar Patil (dead) by LRs and others Vs. Rukminibai Vishnu Vekhande and others*** reported in ***AIR 2003 SC 3109***;
8. ***Muniammal Vs. Annadurai (Deceased) and others*** reported in ***(2008) 8 MLJ 753***
9. ***Mary and Others Vs. Adaikkalasamy and others*** reported in ***(2008) 7MLJ 238***;
10. ***Irudayammal and others Vs. Salayath Mary*** reported in ***(1972) 2 MLJ 509***;
11. ***Corra Vedachalam Chetty Vs. G.Janakiraman*** reported in ***2001 (3) CTC 283***;
12. ***Jagadambal Vs. Sankari and 9 others*** reported in ***2011 (1) MWN (Civil) 667***;
13. ***S.Vatsala Vs. K.S.Mohan and others*** reported in ***2016-1-LW-577***;
14. ***Maria Stella and others Vs. T.Joseph Catherine and others*** reported in ***AIR 2003 MADRAS 270***;
15. ***Gulzar Ali Vs. State of H.P*** reported in ***(1998) 2 SCC***



WEB COPY

192;



OSA.No.65 of 2019



WEB COPY



OSA.No.65 of 2019

16. *Rugmini Amma and another Vs. Bhargavi Kovil and others* reported in 2000 AIHC 4677.

10. From the submissions of either side, the following points arise for our determination:-

1. Whether the due execution and genuinity of the Will dated 10.05.1996 is proved in a manner known to law?
2. Whether the plaintiff is entitled for grant of Probate?
3. To what other reliefs?

Point Nos.1 to 3

11. Before we elaborate on the merits of the matter, we deem it appropriate to refer the recent judgment of the Hon'ble Supreme Court in ***Shivakumar and others Vs. Sharanabasappa and others*** reported in (2021) 11 SCC 277, instead of the citation relied by either parties, as in the above reported case, the Hon'ble Supreme Court, after discussing various judgments covering ratio relied by either parties through their respective citations, has culled out the relevant principles governing the adjudicating process regarding the proof of Will. Therefore, we do not want to burden our judgment by referring to each of the judgments given by either side

10/24



WEB COPY

individually. The relevant portion of the **Shivakumar's** case [cited supra] is as follows:-

“12. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could be broadly summarised as follows:

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



WEB COPY

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 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



WEB COPY

*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 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]

12. While considering the execution of the Will, it is mandatory on the part of the propounder to satisfy the conditions as stipulated under Section 63 of the Indian Succession Act. For ready reference, Section 63 of the Indian Succession Act is extracted hereunder:-



WEB COPY

“63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1[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 acknowledgment of his signature or mark, or of 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.”

13. The harmonious reading of Section 63 of the Indian Succession Act would make it clear that the above Section has balkanized the execution of unprivileged Will under three categories, they are:-

“(i) 63(a) deals with Signature of the testator of the Will



WEB COPY

(ii) 63(b) deals about the animus to execute should be evidenced by placement of signature.

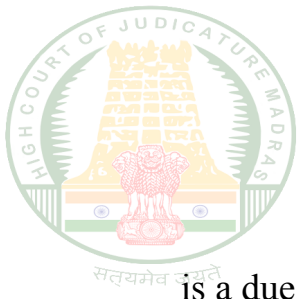
(iii) 63(c) deals about the attestation and animo attestandi.”

14. Therefore, it is mandatory on the part of this Court to find out whether the above three categories has been proved in a manner known to law. In this regard, it is appropriate to refer the attestors' evidence, who are examined here as PW2 and PW3. According to PW2-Sundararaj, he states as follows:-

“.....3. On 10/05/1996 I was present together with one Mr.S.Jayapaul, who is the 2nd witness to the Will at the house of the said B.Venugopal and both myself and S.Jayapaul saw the deceased B.Venugopal signing at the foot of the testamentary papers in Tamil language and character which is produced and marked as letter “A”.

4. There upon I and the said S.Jayapaul at the request of the deceased B.Venugopal and his presence and in the presence of each other of being present at the same time set and subscribe our respective names and signature at the foot of the testamentary paper i.e., the Will as witnesses thereof.”

Similarly, the other attesting witness had also deposed in similar line. While looking at the Will and the above evidence, we are of the firm view that there



OSA.No.65 of 2019

WEB COPY

is a due compliance to the three categories mentioned under Section 63 of the Indian Succession Act.

15. However, it was contended that there was a wild discrepancy between the evidence of PW2 and PW3 in respect of the readiness of the Will, when they were present in Venugopal Naidu's residence for attestation. No doubt the mere valid execution of the Will by itself will not make the Will become genuine. Therefore, it is the duty of the propounder to explain as to why there is a discrepancy between the two witnesses. In this regard, the learned counsel for the plaintiff would vehemently contend that the witnesses had attested the Will in the year 1996 and they were examined before the Court in the year 2016, almost after a period of 20 years. Therefore, it was contended that such minor variance bound to happen and we cannot expect a photographic memory from the witnesses, after a long lapse of time. The contention of the learned counsel for the plaintiff is reasonable and liable to be accepted, as it is humanly impossible to say the chronology of the event after lapse of 20 years. Furthermore, the discrepancy between the two witnesses is not on the core point, but only on the peripheral issue. Therefore, we are of the firm view that the discrepancy alleged are in respect of insignificant aspect, which cannot be given undue weightage.



OSA.No.65 of 2019

WEB COPY

16. It is common knowledge that the Testamentary Court is only a Court of conscience and not a Court of suspicion. Furthermore, the suspicion should be inherent legitimate suspicion, and should not be a fantasy. In the case in hand, as we already stated, the witnesses were examined after a period of 20 years. Therefore, certain discrepancy bound to happen due to the long lapse of time. In a similar circumstances, the Hon'ble Supreme Court in ***Kavita Kanwar Vs. Pamela Mehta and others*** reported in ***(2021) 11 SCC 209***, in paragraph 28 held as follows:-

“28. There is no doubt that any of the factors taken into account by the trial court and the High Court, by itself and standing alone, cannot operate against the validity of the propounded will. That is to say that, the will in question cannot be viewed with suspicion only because the appellant had played an active role in execution thereof though she is the major beneficiary; or only because the respondents were not included in the process of execution of the will; or only because of unequal distribution of assets; or only because there is want of clarity about the construction to be carried out by the appellant; or only because one of the attesting witnesses being acquaintance of the appellant; or only because there is no evidence as to who drafted the printed part of the will and the note for writing the opening and concluding passages by the testatrix in her own hand; or only because there is some discrepancy in the oral evidence led by the appellant; or only



WEB COPY

because of any other factor taken into account by the courts or relied upon by the respondents. The relevant consideration would be about the quality and nature of each of these factors and then, the cumulative effect and impact of all of them upon making of the will with free agency of the testatrix. In other words, an individual factor may not be decisive but, if after taking all the factors together, conscience of the court is not satisfied that the will in question truly represents the last wish and propositions of the testator, the will cannot get the approval of the court; and, other way round, if on a holistic view of the matter, the court feels satisfied that the document propounded as will indeed signifies the last free wish and desire of the testator and is duly executed in accordance with law, the will shall not be disapproved merely for one doubtful circumstance here or another factor there.”

17. At this juncture, it is relevant to discuss the contention of the plaintiff about the active role of the propounder in the execution of the Will, which according to the defendants, could be manifested from the fact that the attestors are his close friends. It is apparent that at the time of execution of Will, the testator is aged about 70 years. The plaintiff and the testator were residing under same roof. Therefore, naturally a father is expected to have an assistance from his son. Even for argument sake, if we accept that the plaintiff had a role in execution of Will, by itself cannot be a suspicious



WEB COPY

circumstance, unless there is a proof of unfair advantage taken by him. In the case in hand, apart from the plaintiff, another brother was also given a share, besides, his mother had a life interest. In such view of the matter, the mere presence of the plaintiff at the time of execution of the Will cannot be termed as a suspicious circumstance. In this regard, it is useful to refer the judgment of the Hon'ble Supreme Court in **Kavita Kanwar's** case [cited supra].

18. The learned counsel for the defendants would invite an another alleged suspicious circumstance to the attention of this Court in respect of the consent affidavit of Thayarammal which was submitted before the Court. According to the learned counsel, the consent affidavit was allegedly signed by Thayarammal on 20.02.2013. However, the notary had attested with anti-date on 16.02.2013. In this regard, the learned Single Judge has lucidly observed as follows:-

“35. The contention of the learned counsel for the Defendants that the affidavit of V.Thayarammal was dated prior to the date of attestation has also to be considered. A perusal of the affidavit shows that the Advocate, who identified and put his signature in black ink, had given the date as “20th”. The date



WEB COPY

was originally blank. This affidavit was filed in court on 21.02.2013. Since in the affidavit, date was blank, the Advocate had presumably with over enthusiasm given the date. However, the notary had clearly attested it on 16.2.2013. The signature of the notary is found on both the pages of the affidavit. The seal of the notary is found and round seal is also found. The date is also given. Consequently, I hold that the affidavit can be considered and there is no reason to view it with suspicion.”

19. As rightly observed by the learned Single Judge hereinabove, it could only be an inadvertent typographical error and the same cannot be enlarged to an extent of suspicion in the execution of the affidavit.

20. No doubt there is an exclusion of these defendants from the succession. The very concept of testamentary succession is only to break the regular succession. Therefore, the mere exclusion from succeeding the property by itself will not be considered as a suspicious circumstance, if there is a plausible reason for such exclusion. Here, we must see the reason for exclusion. According to the Will dated 10.05.1996, the reason for exclusion is that these defendants were given marriage in a grand manner.



OSA.No.65 of 2019

WEB COPY

Whenever the Testamentary Court looking at the Will, it must consider the Will comprehensively, as if sitting in the arm chair of the testator. While doing so, here the plaintiff was given 50 years lease over the “B” schedule property. The long lease given in favour of the plaintiff is an indication of the intention of the testator to give the property absolutely to him, which was subsequently done by the testator on 10.05.1996. Here, the execution of the lease deed for 50 years in favour of the plaintiff was admitted by the defendants. In such a scenario, allotting “B” schedule property to the plaintiff appears to be natural, in a way it vindicates the case of the plaintiff about due execution of the Will.

21. The learned counsel for the appellants has made a faint attempt that there is no proof as to whether PW2 was really an attester to the Will. While looking at the cross examination of PW2, though an answer was obtained from PW2 to the effect that no document has been filed to prove his identity before Court, a forensic insight of his cross examination would only demonstrate that their grievance is only on the non production of document, but not his very identity. As a matter of fact, they did not even put a suggestion that PW2 is not at all an attester. Therefore, in such a

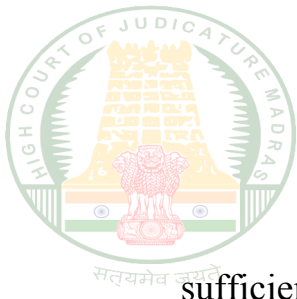


OSA.No.65 of 2019

background, the non production of document by PW2 to prove his identity before the Court will in no way affect the plaintiff's case.

22. The learned counsel for the defendants has also made a vehement argument in respect of delay in filing TOS. In the case in hand, the Will was executed during 1996 and the testator died during 2004. As rightly contended by the learned counsel for the defendants, the suit was filed 9 years after the demise of testator. It is the duty on the part of the propounder to explain as to why there was such a delay. In a case of this nature, a long delay for the Will to see the light of the day, is a ground for suspicion. But, in the case in hand, it was explained by the propounder that while executing the Will, his mother was given a life interest and that he was under the impression that a testamentary OP could be filed only after the demise of the vested remainder holder.

23. Further, it is an admitted fact that vested remainder holder was also residing in the suit property. Therefore, the intention of the propounder not to cause any embarrassment to his mother cannot be put against him. Accordingly, even if there was a delay of 9 years to file TOS, such delay was



OSA.No.65 of 2019

WEB COPY

sufficiently explained by the plaintiff. The learned Single Judge has elaborately gone into these aspects and has ultimately arrived at a conclusion that the Will dated 10.05.1996 was duly executed and proved to be valid and genuine. We are also concurring with the above finding after re-appreciation of the entire evidence. Further, the defendants also could not make out any case to deviate from such well merited findings of the learned Single Judge. Hence, all the points are decided in favour of the plaintiff.

24. In the result, this OSA stands dismissed. There shall be no order as to costs. Consequently, connected CMP is also closed.

(Dr.ANITA SUMANTH, J.) (C.KUMARAPPAN, J.)
24.04.2025

Index : Yes/No

Neutral Citation : Yes/No

Speaking order/Non speaking order
kmi

To
The Sub Assistant Registrar,
Original Side,
High Court of Madras.



WEB COPY



OSA.No.65 of 2019

Dr.ANITA SUMANTH, J.
and
C.KUMARAPPAN, J.

kmi

Original Side Appeal No.65 of 2019

24.04.2025