

(1943) 08 MAD CK 0005
In the Madras High Court

Muthu Goundan and Others

APPELLANT

Vs

Pachayammal and Others

RESPONDENT

Date of Decision : 12-08-1943

Acts Referred:

Evidence Act, 1872 — Section 33

Registration Act, 1908 — Section 41(2)(a)

Citation : AIR 1943 Mad 749 : (1944) ILR (Mad) 276 : (1943) 56 LW 533 :
(1943) 2 MLJ 545

Hon'ble Judges : Krishnaswami Ayyangar, J

Bench : Division Bench

Judgement

Krishnaswami Ayyangar, J.—This appeal arises out of a suit, O.S. No. 17 of 1941, instituted by the appellants in the Court of the

Subordinate Judge of Coimbatore, for a declaration that the document which purports to be the last will and testament of one Peruma Goundan is

not genuine and had not been executed by him while in a sound disposing state of mind. The defendants to the suit were Pachayammal the widow,

Kolandai Goundan a sister's son of the testator, Kunjam-mal a brother's daughter, and one Palani Goundan, who has been appointed as trustee

of a piece of land set apart for charity by the testator in the will. There was another suit, O.S. No. 56 of 1941, which was also disposed of by the

same judgment. The latter suit was instituted by Pachayammal, the widow of the deceased testator, for the recovery of possession of an item of

property which according to her belonged to the testator and had been taken unlawful possession of by the appellant. This suit has been dismissed

by the Subordinate Judge, and there has been no appeal preferred against the decree therein. In both the suits, however, the main issue raised and

determined was whether the document, Ex. P-i, is genuine, and is the last will and testament of Peruma Goundan. Peruma Goundan had two brothers who became divided from him in 1918. Appellants 1 to 4 are the sons of one of these brothers, by name Merappa Goundan. The fifth appellant, Nanjappa Goundan, is the son of the other brother, Sinna Goundan. Peruma Goundan died on the 14th August, 1938, leaving his widow Pachayammal, and no issue, male or female. The will bears the date the 10th August, 1938, and contains bequests in favour of the several defendants. The bequests in favour of all except Pachayammal are comparatively small, the bulk of the properties being given to Pachayammal herself. Among these legatees it is perhaps necessary to refer to Kolandai Goundan, the second defendant, who is a sister's son of the testator, to whom a piece of wet land, of the extent of 1.20 acres is bequeathed. As regards the appellants, who are the brothers' sons and the reversioners to the estate, the testator gave his share in the reversion of certain properties set apart by Peruma Goundan and his two brothers for the maintenance of their mother. It is not suggested that the provisions of the will are unnatural or do not take account of persons who had a claim to the bounty of the testator.

2. The learned Subordinate Judge in an elaborate judgment has held on the evidence and the broad probabilities of the case that there was no doubt that Peruma Goundan executed the will Ex. P-I when he was in a sound disposing state of mind, and accordingly dismissed the suit. The learned advocate for the appellants has taken us through most of the evidence adduced in the case and to a large extent repeated the arguments which had been advanced in the Court below but without success. As our view of the evidence and the probabilities coincides with that of the learned Subordinate Judge, it is not necessary to discuss the evidence in any great detail. We think it sufficient to refer to the main features of the case as presented in the evidence for the purpose of the appeal.

[His Lordship discussed the evidence and proceeded:]

3. Before we leave this witness Pachayammal, it is necessary to mention a circumstance of great importance to which this as well as other witnesses speak. The importance is due to the fact that it throws a good deal of light on the mental capacity of the testator on the morning on which

the will is said to have been executed. It would seem that on the 9th August a suit was instituted against the testator and an application for attachment before judgment was also taken out. The summons in the suit and the notice of the application for attachment were brought to the deceased at about 9 a.m. on the morning of the 10th by an amin of the Court. According to Pachayammal, the testator took the summons and the notice and signed on both of them, Exs. P-3(a) and P-3(b). After service the amin took the thumb impression of the testator as he found that his hand was shaking as indeed it appears to be, judging from the signatures. The amin was examined by the District Registrar in the enquiry held by him in the appeal preferred against the order of the Sub-Registrar. The deposition of the amin has been marked as Ex. P-3. He has stated that he saw the testator on the morning of the 10th August and spoke to him. When the testator was asked to receive the summons and the notice he refused to receive them saying that he was ill whereupon the witness told him that he would have to return the summons as refused if he did not receive them. Then the witness was asked to read out the summons and the notice. They were then received by the testator who made the endorsement acknowledging the receipt. The witness has made the definite statement that the testator was fully conscious then and was able to understand what transpired and give a reply. No reason has been shown for discrediting the testimony of such an independent witness as this amin.

The only suggestion that has been made is that he was probably influenced by those who were interested in the widow or perhaps those who were inimically disposed towards the appellants. There is absolutely no warrant for this suggestion and there is not the slightest reason for holding that there was a conspiracy for the purpose of supporting a forgery, such as it is attempted to be established. It was then attempted to get rid of this valuable piece of evidence by saying that the deposition is inadmissible in evidence. The objection does not appear to have been taken in the Court below, but all the same it is perhaps open to the appellants to say that evidence which is really irrelevant cannot be made use of for the purpose of the decision. The argument is that unless the District Registrar who took the deposition was "" authorised by law to take it "" within the meaning of Section 33 of the Indian Evidence Act the deposition is inadmissible. For the purpose of showing that the District Registrar in the enquiry he held

was not authorised to take fresh evidence in appeal we were taken through some of the section of the Indian Registration Act and the rules framed

thereunder. It may be mentioned at once that the Sub-Registrar purported to hold the enquiry under Sections 41(2)(a) and 35(3)(c) of the Indian

Registration Act, 1908, on account of a denial of execution by the representatives of the deceased testator. The District Registrar when he came to

write his order dealt with the matter before him as arising out of an application u/s 73 of the Indian Registration Act in respect of an order of refusal

passed by the Sub-Registrar. If the District Registrar acted u/s 73(1) it is not denied that he had the power for the purpose of his enquiry to

summon and enforce the attendance of witnesses and compel them to give evidence as if he were a Civil Court. What is argued is that the case fell

not u/s 73 but u/s 72, because it is said that the refusal by the Sub-Registrar was not made on the ground of denial of execution by a representative

of the testator and accordingly the proceeding before the District Registrar was an appeal u/s 72. Section 72(1) enacts as follows:

Except where the refusal is made on the ground of denial of execution, an appeal shall lie against an order of a Sub-Registrar refusing to admit a

document to registration...to the Registrar to whom such Sub-Registrar is subordinate and the Registrar may reverse or alter such order.

4. It is doubtful whether the refusal in the present case was made for a reason other than a denial of execution by a representative of the testator.

However that may be, it is not necessary to pursue this matter as even assuming that the case fell u/s 72 the District Registrar would seem to have

the necessary power of taking further evidence in the enquiry held by him on appeal. In the first place, he undoubtedly has the power to take

additional evidence in cases which come within Section 73. This, as we have stated, is conceded. Secondly, light is thrown on this subject by Rules

171 and 173 framed by the Inspector-General of Registration u/s 69 of the Act. Rule 171, Clause (1) states that:

An applicant in this rule shall mean an appellant u/s 72 or party at whose instance an enquiry u/s 74 is commenced and shall include subject to

provisions of Rule 167, also an agent or a vakil.

Clause (2) : On the presentation of an appeal u/s 72 or an application u/s 73 and in the case of original enquiry u/s 74, a date shall be fixed for the

hearing of the appeal or application or for the enquiry.

Clause (3) : Such date shall be notified to the applicant and also published on the Notice Board of the Registrar's Office.

Clause 4 : Within one week of the date of such publication, the applicant shall pay the process fee necessary for the issue of notice to the opposite

party (hereinafter called the respondent) and for summonses for securing the attendance of witnesses, provided that the Registrar may extend the

time for such payment from time to time on sufficient cause being shown.

5. There can be no doubt that Rule 171 covers not only an application falling u/s 73 but an appeal falling u/s 72 as well and in regard to both these

proceedings power is reserved to the applicant to apply for and obtain the production of witnesses whom he considers necessary for his case. Rule

173 makes the matter clearer still. It says:

An appeal or application against An order of refusal to register a will presented for registration after the death of the testator may be presented by

an executor appointed under the will. The Registrar may, after the perusal of the records connected with the refusal, call for fresh evidence or issue

summonses to witnesses or remand the case to the Sub-Registrar for further enquiry.

6. Read with the previous rule, namely, Rule 172, the ""appeal"" referred to in this rule has reference to the appeal contemplated by Rule 172, and it

is in express terms provided that the Registrar has the power to call for further evidence. It is however argued that this power is available only in a

case where an appeal is presented by an executor appointed under the will. We cannot agree. Ordinarily speaking, the contesting parties to an

enquiry before the Sub-Registrar would be the persons who would appeal against an adverse order. It is quite understandable that a third party

executor may not concern himself in a dispute of this character. It seems to us that the object of the rule is that even such a third party as an

executor should have the privilege of appealing against the order of the Sub-Registrar and the rule was intended merely by way of an enabling

provision rather, than to delimit the power of the Registrar to take fresh evidence to cases of appeals by executors only. If this argument prevailed,

there will be a most anomalous situation created. A District Registrar dealing with an appeal under the same rule will have power to take fresh

evidence if the appeal is preferred by an executor but no such power where the appeal is preferred by any other party or parties. On a perusal of

the section and the rules framed under the Act we are satisfied that the District Registrar-had the necessary power. We may add that the Registrar

acting under the powers given to him by the Act is not a judicial tribunal whose powers and duties are defined by the CPC or any other statute. If

the appeal before him is merely a continuation of the original proceeding before the Sub-Registrar, as we think it was, we can see no justification

for holding that he does not possess the same powers as the Sub-Registrar himself so long as no rules of natural justice are abrogated by him.

[After discussing the other evidence His Lordship concluded;]

7. On a consideration of the evidence adduced in the case two points stand out in relief. The first is the fact that at 9 a.m. on the morning of the

10th the amin saw the testator and found him quite conscious and able to understand what was happening around him. Two days later, on the 12th

and 13th, the Doctor saw the testator and his evidence that he found the testator in a sound disposing state of mind is quite in accordance with

one's knowledge that in diseases of this description unconsciousness does not supervene till almost the last moment. We have then the fact that

Srinivasa Ayyangar the scribe, has given clear and cogent evidence of the several incidents that transpired on the 9th and 10th, evidence which has

been accepted by the learned Subordinate Judge. There is also the fact clearly made out on the evidence that on the 10th about the time that the

testator affixed his signature he was sufficiently alert in mind to notice the omission of the bequest in favour of the sister's son which he wanted

made but which had been omitted. This circumstance in our opinion clearly shows that the testator was in a position to make up his mind as to how

his properties were to be distributed and insisted on his intentions being carried out.

8. In our opinion there is no substance in this appeal, which is accordingly dismissed with costs.