

(2009) 07 MAD CK 0420

In the Madras High Court

Case No : O.S.A. No. 129 of 2001 and S.A. No. 676 of 2003

P. Mookaiyan

APPELLANT

Vs

V. Jayaraman and Others

RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Evidence Act, 1872 — Section 68

Hindu Succession Act, 1956 — Section 14(2), 15(1)

Succession Act, 1925 — Section 63

Citation : (2009) 07 MAD CK 0420

Hon'ble Judges : P.P.S. Janarthana Raja, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : P. Jayaraman, S.C. for Azhagu Shivanandan, for the Appellant; S.V. Jayaraman, S.C. and P. Anbarasan, for 1st respondent, B. Srinivasan, for respondents 2 to 4 and G. Rajasekaran, for 5th respondent in OSA. 129/01 and SA. 676/03, for the Respondent

Final Decision : Dismissed

Judgement

P.P.S. Janarthana Raja, J.—O.S.A. No. 129/2001 is filed against the judgment dated 30.01.2001 made in T.O.S. No. 23 of 1999.

2. Second Appeal No. 676/2003 is filed against the judgment and decree made in A.S. No. 118/2001 dated 14.02.2003 by the VI Additional Judge, City Civil Court, Chennai.

3. In both the appeals, as the points involved and the parties are one and the same, we dispose of the same by a common judgment. For the sake of convenience, the parties are referred to as in the suits.

4. The appellant in both the appeals is the plaintiff in the O.S. No. 7032/96 and 5th defendant in TOS. No. 23 of 1999. First respondent in OSA No. 129/02 is the plaintiff in TOS. No. 23/1999. Respondents 2 to 4 in O.S.A. No. 129/01 are defendants 1 to 3 in TOS. No. 23 of 1999. The fifth respondent in O.S.A. 129/02 and the respondent in S.A. No. 676/03 is the defendant in OS. No. 7032/96 and

fourth defendant in TOS. No. 23/1999.

O.S.A. No. 129 of 2001

5. One Krishnaveni Ammal executed a Will at Madras on 15.10.1987. She was residing at No. 42, Narasier Street, Old Washermenpet, Madras-21. Her husband Ponnusamy died on 15.03.1988. The said Krishnaveni Ammal died intestate on 07.10.1988. There is no executor in the Will. The plaintiff Jayaraman as well as defendants 1 to 3 are the beneficiaries under the Will. The said three defendants are sisters of the plaintiff-Jayaraman and all of them are sisters and brother of Krishnaveni Ammal and these three sisters have given consent to the probate. The said Krishnaveni Ammal and her husband jointly sold the eastern side portion of the property at No. 34, New Magazine Road, Vyasarpadi, Chennai on 26.08.1987 to the fifth defendant-Mookaiyan, the appellant in the present appeals. The fourth defendant-Sakina Beevi also purchased 3/4 of the share of the suit property from the three sisters of Krishnaveni Ammal/defendants 1 to 3. The fifth defendant/appellant herein also alleged that he purchased the same property by sale deed dated 11.12.1989 from the legal heirs of Ponnuswamy. Subsequently, the plaintiff-Jayaraman also sold his 1/4 share in the suit property to the fourth defendant on 12.01.1995. The plaintiff filed O.P. No. 124/1994 before this Court, in which, probate was granted. After probate of the Will, the said plaintiff sold 1/4 of his share in the suit property to the fourth defendant. Thereafter, the fifth defendant/appellant filed a petition to revoke the probate and subsequently, probate was revoked. In these circumstances, O.P. was filed seeking for Letters of Administration, which has now been converted into Testamentary Original Suit No. 23 of 1999. Defendants 1 to 3 have given consent affidavits to the letters of administration and the fourth defendant has also given her no objection. Only, the fifth defendant/appellant has disputed the genuineness of the Will. On pleadings, the trial Court framed the following issues:

1. Whether the last Will and testament dated 15.10.1987 is true, valid and binding?
2. Whether the plaintiff is entitled to get letters of administration?
3. To what relief?

After considering oral and documentary evidence, the learned single Judge decreed the suit and also issued letters of administration in favour of the plaintiff. Aggrieved by that order, the fifth defendant/appellant has filed the present appeal.

6. The learned Counsel appearing for the appellant contended that the said Krishnaveni Ammal has not executed any Will and the said Will is not true and genuine document. During the relevant point of time, the said Krishnaveni Ammal was not in disposing state of mind and she took treatment for mental ailments. Therefore, it is highly impossible that mentally ill Krishnaveni Ammal could have executed the said Will and the learned single Judge has not

considered the relevant materials and evidence and hence, the order passed by the learned single Judge has to be set aside.

7. The learned Counsel appearing for the respondents submitted that the Will is genuine one and also attested by two witnesses. One witness was examined on their side and all other legal heirs have given consent affidavits. After considering the oral and documentary evidence, the learned single Judge has correctly come to the conclusion and decreed the suit and also granted letters of administration in favour of the plaintiff. Hence, the order passed by the learned single Judge is valid and the same has to be confirmed.

8. Heard learned Senior counsel appearing on either side and perused the materials available on record.

9. In the probate proceedings, the Court has to consider the genuineness of the Will and also explanation to all suspicious circumstances surrounding thereto besides proof thereof in terms of Section 63(c) of Indian Succession Act and Section 68 of Evidence Act, 1872. The Apex Court in the case of Bharpur Singh and Others Vs. Shamsheer Singh, considered the nature of requirement for proving the Will and held as follows:

11. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in Clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses, Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator, In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testators.

12. This Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, opined that the fact that the propounder took interest in execution of the Will is one of the factors which should be taken into consideration for determination of due execution of the Will. It was also held that one of the important features which distinguishes Will from other documents is that the Will speaks from the date of death of the testator and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not: and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator,

It was also held that the propounder of will must prove:

(i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and

(ii) when the evidence adduced in support of the will is disinterested, satisfactory

and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and

(iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion.

In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.

It was moreover held:

20 There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances, The alleged signature of the testator may very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator, It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter:

13. This Court in *Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao and Others*, , held:

33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged, But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble

and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator, (See Madhukar D. Shende Vs. Tarabai Aba Shedage, . Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

34. There are several circumstances which would have been held to be described (sic) by this Court as suspicious circumstances:

(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

(See Management Committee T.K. Ghosh's Academy Vs. T.C. Palit and Others,)

15. This Court in Anil Kak v. Kumari Sharada Raje and Ors. (2008) 7 SCC 6951) opined that court is required to adopt a rational approach and is furthermore required to satisfy its conscience as existence of suspicious circumstances play an important role, holding:

52. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.

53. As an order granting probate is a judgment in rem, the Court must also satisfy its conscience before it passes an order.

54. It may be true that deprivation of a due share by (sic to) the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will.

55. Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation.

Unfortunately, the first appellate court as also the High Court did not advert to these aspects of the matter.

16. We may notice that in Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, This Court pointed out that when the Will is allegedly shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and defendant, An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that Will was duly executed by testator wherefor cogent and convincing explanation of suspicious circumstances shrouding the making of Will must be

offered.

17. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:

- i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.
- ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- iv. The dispositions may not appear to be the result of the testator's free will and mind.
- v. The propounder takes a prominent part in the execution of the Will.
- vi. The testator used to sign blank papers.
- vii. The Will did not see the light of the day for long.
- viii. Incorrect recitals of essential facts.

18. The circumstances narrated herein before are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will has duly been proved or not.

It may be true that the Will was a registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with.

10. This Bench had an occasion to deal with a similar matter in the case of *Prevamathi and three Ors. v. Sundararajan and two Ors.* reported in 2009 (3) CTC 801, wherein it has been held as follows:

5. In the case of present nature, the line of judgments of the Apex Court say in one voice that the onus of proving the Will is on the propounder. In the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court for the court to accept the Will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. There must be real, germane and valid suspicious features and not fantasy of doubting mind. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or

unfair in the light of relevant circumstances, or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes a prominent part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence.

6. The legal requirement in terms of Sections 63 of the Indian Succession Act, 1925 and 68 of the Indian Evidence Act, 1872 is now well settled. A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and Indian Evidence Act. The testamentary capacity of the propounder must be established. The execution of the Will by the testator has to be proved. Atleast, one attesting witness is required to be examined for the purpose of proving the execution of the Will. However, it is also required to be shown that the Will has been signed by the testator with his free Will and that at the relevant time he was in the sound disposing state of mind and understood the nature and effect of disposition. It is also required to be established that he has signed the Will in the presence of two attesting witnesses, who attested his signature in his presence or in the presence of each other. The deprivation of due share by the natural heirs by itself is not a factor, which would lead to the conclusion that there existed suspicious circumstances. But the background of the facts would tilt to the balance otherwise. When a will is prepared and executed under circumstances which raise the suspicion of the Court, it lies on the propounders not merely to prove the execution of the will, in the sense that it was signed by the testator, but also to adduce evidence which removes such suspicion and to satisfy the Court that the testator knew and approved of the contents of the Will, vide *Sadachi Ammal Vs. Rajathi Ammal and Others*, , *Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another*, , *Guro (Smt.) Vs. Atma Singh and Others*, , *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, , *Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another*, *Savithri v. Karthyayani Amma* (2007) 11 SCC 621), *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others*, . *Ramabai Padmakar Patil (D) through LRs. and Others Vs. Rukminibai Vishnu Vekhande and Others*, , *Pushpavathi and Others Vs. Chandraraja Kadamba and Others*, , *Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others*, and *Daulat Ram and Others Vs. Sodha and Others*, .

11. After considering the above legal principles enunciated in the above judgments, now we consider the evidence available on record. The plaintiff Jayaraman was examined as PW1. In his evidence, he deposed that the Will was executed by his elder sister Krishnaveni Ammal on 15.10.1987, which was marked as Ex.C1. The said Krishnaveni Ammal died issueless on 07.10.1988. He further stated that defendants 1 to 3, who are the sisters of the PW1 sold their respective shares to the fourth defendant. Later he himself sold his 1/4 share to

the said fourth defendant. Only thereafter, the fifth defendant/appellant filed a petition to revoke the probate. Ex.P2 is the death certificate of his sister Krishnaveni Ammal and probate was also revoked. PW2 is one Varadharajan. He deposed that he knew Krishnaveni Ammal, her parents, brothers and sisters for a long time. Krishnaveni Ammal has requested him to draft the Will. At her request, he drafted the Will on 15.10.1987, which was marked as Ex.P1. At the time of execution, there were two attesting witnesses viz., Mahendran and Dhasaradharan and in the said Will, Krishnaveni Ammal affixed her left thumb impression and the said attesting witnesses also signed. PW2 has also signed in the Will. The said will was drafted at door No. 42, Narasiyer Street Old Washermenpet, Chennai-21. Ex.C1 is the specimen signature put by the witness in the open Court. Ex.C2 is the signature of the witness put in Tamil. PW3- Mahendran is one of the attesting witnesses. In his evidence, he deposed that he signed in Ex.P1-Will, as the first attesting witness. From the above oral and documentary evidence, it is clear that Krishnaveni Ammal affixed her left thumb impression in the Will and the same was attested by two witnesses. As per Section 63 of the Indian Succession Act, 1925, a Will requires to be attested by two or more witnesses. Further, u/s 68 of the Indian Evidence Act, it is permissible to examine the attesting witnesses one who signs the document in the presence of the executant after seeing the execution of the document or after receiving the personal acknowledgement of the executant with regard to the execution of the document. Section 63 reads as follows:

63. Execution of unprivileged Wills:-- Every testator, not being a soldier employed in an expedition or engaged in actual warfare [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 been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement 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.

It is mandatory in nature that the Will is required to be signed by two or more witnesses. In this case, there is no dispute regarding the same. As per Section 68 of the Indian Evidence Act, the testamentary capacity of the propounder must

be established by examining one of the attesting witnesses. In this case, the propounder has satisfied the terms of provisions of Section 63 of the Indian Succession Act as well as Section 68 of the Indian Evidence Act and there is no dispute regarding the same.

12. Learned Counsel appearing for the appellant/fifth defendant vehemently contended that the said Krishnaveni ammal was not sound and in disposing state of mind at the time of execution of Will and he relied on the oral evidence of DW2-Doctor and Ex.D10, O.P. Chit. The Doctor, in his evidence, has deposed that the said Krishnaveni Ammal was treated as out patient on 05.03.1987 and subsequently, conceded that he has not given any treatment to her. He further stated that he could not say the extent of the disease suffered by the said Krishnaveni Ammal. Because of inconsistency in the evidence of the Doctor, the learned single Judge has rightly rejected the evidence of DW2-doctor. Further in the O.P. chit-Ex.D10, there is discrepancy in respect of address of the said Krishnaveni ammal. In Ex.D10, the address of the Krishnaveni Ammal is stated as No. 42, Perambalur Chetty Street, Old Washermanpet. Actually, the said Krishnaveni Ammal was residing at at 34/1, New Magazine Road, Vyasarpadi, Madras. It is pertinent to note that the alleged treatment was on 05.03.1987. Subsequent to that period only, the present fifth defendant, the above mentioned appellant purchased the property in the eastern portion at 34/1, New Magazine Road, Vyasarpadi, Madras on 26.08.1987 from the said Krishnaveni Ammal. The appellant could not have purchased the property if really the said Krishnaveni Ammal was suffering from mental illness. From this fact also, it is clear that Krishnaveni Ammal was sound and in disposing state of mind. Considering the above, there is nothing to doubt the mental and physical capacity of testatrix. So, the learned single Judge is correct in holding that Krishnaveni Ammal was not suffering from Psychosis and also rightly held that at the time of the execution of the Will, the said Krishnaveni Ammal was sound and in disposing state of mind. The fifth defendant, who is the appellant herein, was also unable to point out that there are suspicious circumstances in executing the Will. The said Krishnaveni Ammal has no issue. Therefore, she gave her property only to her brother and sisters. There is nothing unnatural about giving the property to one's own sisters and brother. It is also seen that the appellant/fifth defendant has not examined the brother and sisters of the said Krishnaveni Ammal. The Will surrounded by suspicious circumstances is only a pure question of fact. There is no material available on record to show that there is any suspicious circumstance. In the present case, the appellant is a stranger to the probate proceeding. Now the challenge is by the stranger. It is very difficult to comprehend that as to how a stranger or third party know the state of mind of the author of the Will. The Apex Court in the case of Madhukar D. Shende Vs. Tarabai Aba Shedage, , it has held as follows:

The weighty factor that the factum of execution of Will by Bhagubal was being denied by a rank trespasser without raising any specific pleadings and the fact that no relation of Bhagubal has chosen to lay a challenge to the Will, have been

simply overlooked. In our opinion, the High Court ought not to have sustained such a perverse finding which would result in the property of a rightful owner being lost to a trespasser.

14. A literate person can affix the left thumb impression without signing the Will and the reason for affixing thumb impression is due to nervous disability and was considered by the Supreme Court in the case of P.S. Sairam and Anr. v. P.S. Rama Rao Pisey and Ors. reported in 2004 (1) CTC. In the present case, Krishnaveni Ammal has not signed the Will as her hands were shivering at that time. So her left thumb impression was affixed in the Will. PW2 in his evidence corroborated the execution of the Will and the reason for affixing left thumb impression by Krishnaveni Ammal was due to nervous weakness. So the argument that affixing thumb impression amounts to suspicious circumstance has also been rejected.

15. The learned single Judge has considered all the relevant materials on record and came to the correct conclusion that the Will is genuine one. It is a question of fact. It is not a perverse order. Hence, the order passed by him is in conformity with law and the same has to be confirmed. Accordingly, the appeal is devoid of merits and the same is dismissed. No costs.

S.A. No. 676 of 2003

16. This Court framed the following issues at the time of admission:

(1) Whether the sale deed executed by the legal heirs of husband in favour of the appellant herein (husband and wife died without issues) as per Section 15(1) (b) of the Hindu Succession Act, 1956 is not correct?

(2) Whether Section 14(2) of the Hindu Succession Act 1956 is applicable to a widow, who is none other than a benami of her husband?

17. Both the learned Counsel fairly stated that the issue involved as well as the parties in the present second appeal and the above mentioned Original Side Appeal in O.S.A. No. 129 of 2001 are one and the same. In the said Original Side Appeal, we held that the Will executed by the Krishnaveni Ammal is valid, true and genuine. In view of the said finding given in the above Original Side Appeal, nothing remains to be adjudicated in the present Second Appeal. In these circumstances, by following the above Original Side Appeal, we answer the question against the appellant. Accordingly, the second appeal is liable to be dismissed and accordingly, it is dismissed. No costs.