

**(2009) 04 MAD CK 0452**

**In the Madras High Court**

**Case No : T.O.S. No. 25 of 2002 and C.S. No. 325 of 2003**

P.R. Vijayarangam

APPELLANT

Vs

P.R. Ramanujam <BR>P.R. Ramanujam Vs P.R. Srinivasan  
and P.R. Vijayarangam

RESPONDENT

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**Date of Decision : 22-04-2009**

**Acts Referred:**

**Citation : (2009) 3 CTC 503**

**Hon'ble Judges : M. Jeyapaul, J**

**Bench : Single Bench**

**Advocate : S.M. Pandian, in T.O.S. No. 25 of 2002 and S.D. Balaji, in C.S. No. 325 of 2003, for the Appellant; S.D. Balaji in T.O.S. No. 25 of 2002 and S.M. Pandian, for D2 in C.S. No. 325 of 2003, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

M. Jeyapaul, J.—P.R. Vijayarangam, the plaintiff in T.O.S. No. 25 of 2002 originally filed O.P. No. 322 of 2002 seeking grant of probate. As caveat and supporting affidavit was filed by P.R.Ramanujam, the defendant therein, the Original Petition was converted into T.O.S. No. 25 of 2002. The defendant in T.O.S. No. 25 of 2002 laid a suit in C.S. No. 325 of 2003 seeking the relief of partition arraying the plaintiff in the aforesaid T.O.S as the second defendant and his brother one P.R.Srinivasan, who is not a party to T.O.S. No. 25 of 2002, as the first defendant. The first defendant P.R.Srinivasan in C.S. No. 325 of 2003 remained ex parte throughout the proceedings.

2. To avoid confusion, the plaintiff in T.O.S. No. 25 of 2002, who is the second defendant in C.S. No. 325 of 2003, is referred as plaintiff and the defendant in T.O.S. No. 25 of 2002, who is the plaintiff in C.S. No. 325 of 2003, is referred as defendant.

3. Brief contention of the plaintiff: There was a family arrangement on 7.6.1997 for partition and sale of properties of the father of the respective parties. A kur

chit dated 25.10.1998 was prepared for partitioning the properties of late P.R. Ramakrishna Mudaliar, the father of the respective parties and the same was signed not only by the respective parties but also by their late sister Selvi. P.R. Vijayalakshmi. Property bearing door No. 51, Ayya Mudali Street, Chindadripet, Chennai 600 002 was allotted to the plaintiff and the defendant and their brother P.R. Srinivasan and the property bearing door No. 54, Ayya Mudali Street, Chindadripet, Chennai 600 002 was allotted to Selvi. P.R. Vijayalakshmi, the sister of the respective parties. As the properties of the respective parties were already partitioned, the suit for partition laid by the defendant is not maintainable. Further, Selvi. P.R. Vijayalakshmi was the absolute owner of the property bearing door No. 8/1, A Block, Pammal Court, Raja Annamalai Road, Purasawalkam, Chennai. She executed a registered Will dated 9.11.2001 bequeathing those two properties to the plaintiff. The plaintiff was appointed as executor in the registered Will and he is also the beneficiary therein. As regards item 4, they were redeemed and sold away even long prior to the death of their mother and sister. Therefore, the plaintiff has sought for grant of probate and prays for dismissal of the suit laid by the defendant seeking partition.

4. Brief contention of the defendant: P.R. Srinivasan, the first defendant in C.S. No. 325 of 2003, who remained ex parte, is also a surviving legal heir of late Ramakrishna Mudaliar through his first wife Shenbagammal. Defendants and the plaintiff inherited the properties bearing door Nos. 51 and 54, Ayya Mudali Street, Chindadripet, Chennai 600 002 from their father along with their sister Selvi. P.R. Vijayalakshmi. The property at Pammal Court, Purasawalkam was inherited by the plaintiff, the defendant and late P.R. Vijayalakshmi from their mother. Flat No. 8/1, A Block, Pammal Court, Raja Annamalai Road, Purasawalkam, Chennai was exclusively given to P.R. Vijayalakshmi. P.R. Vijayalakshmi was not the absolute owner of the property bearing door No. 54, Ayya Mudali Street, Chindadripet, Chennai 600 002. A family arrangement was agreed upon between the parties. But, the release deed could not be executed as the deceased P.R. Vijayalakshmi was not in a sound state of health and mind. Therefore, the family arrangement also could not be acted upon. As far as the Pammal Court property is concerned, the plaintiff and the defendant are entitled to half share each, but, in respect of property bearing door Nos. 51 and 54, Ayya Mudali Street, Chindadripet, Chennai 600 002, the plaintiff, the defendant and the first defendant in C.S. No. 325 of 2003 who remained ex parte are entitled to 1/3 share each. P.R. Vijayalakshmi was suffering from breast cancer. She also encountered stroke which immobilized her. She could not move her left hand and left leg from the year 1988 onwards. She was also a diabetic. She was mentally disturbed on account of the above ailments and was not in a sound state of mind. She was constantly under sedation due to heavy dosage of medicine to relieve her acute pain caused due to cancer. The alleged Will is not a genuine one. There was no reason to exclude the defendant from the estate of the Testatrix. Therefore, the defendant would pray that the Testamentary Original Suit may be dismissed and the suit for partition laid by him may be decreed as

prayed for.

5. The following issues were framed in T.O.S. No. 25 of 2002:

1. Whether the registered Will dated 9.11.2001 executed by Selvi. P.R. Vijayalakshmi is genuine and valid one.
2. Whether Selvi. P.R. Vijayalakshmi was in a sound and disposing state of mind at the time of execution of the Will.
3. Whether the Will was the product of free volition of Selvi P.R. Vijayalakshmi who had voluntarily executed the registered Will dated 9.11.2001.
4. Whether the plaintiff is entitled to grant of probate as the sole beneficiary under the Will.
5. To what other relief the parties are entitled?

6. The following issues were framed in C.S. No. 325 of 2003:

1. Whether the plaintiff is entitled to the share in the suit properties as prayed for.
2. Whether the suit properties are available for partition as prayed for.
3. Whether the suit property has already been partitioned between the plaintiff and the first and second defendants under Kurai Chit dated 25.10.1998.
4. Whether the alleged Kurai Chit dated 25.10.1998 is valid and genuine and whether the same has been acted upon.
5. Whether the alleged agreement with the developers dated 25.10.1998 is valid and binding.
6. Whether the alleged Will of the deceased Vijayalakshmi dated 9.11.2001 is valid and genuine.
7. Whether the plaintiff and the first and second defendants have executed power of attorney dated 28.10.1998 in favour of the developer as alleged by the defendants.
8. To what relief is the plaintiff entitled?

7. Separate trial was taken up. So far as T.O.S. No. 25 of 2002 is concerned, on the side of the plaintiff, P.Ws.1 to 3 were examined and on the side of the defendant, the defendant alone was examined as DW1. The evidence available would disclose that Exs.P1 to P9 were marked on the side of the plaintiff and Exs.R1 and R2 were marked on the side of the defendant. But, Ex.P7 is not available on record. It appears that the learned Master has marked the receipt for registration and conveyance charges issued by the Sub Registrar as Ex.P3 by consent of both the Counsel which was later assumed as Ex.P7 which led to some confusion in the array of documents. Further, the discharge summary of the testatrix was sought to be marked by PW1 but the same was objected by the

other side. The record also does not disclose that it was marked by consent. But, the fact remains that the said document has been assigned with Exhibit Number P4. So far as C.S.325 of 2003 is concerned, on the side of the plaintiff therein, PW1 was examined and Exs.P1 to P8 were marked and on the side of the defendants, the second defendant therein was examined as DW1 and Exs.D1 to D5 were marked.

8. Though separate trial was undertaken, as both the suits are inter linked with each other and common issues have arisen in both the cases, they were taken up for common disposal.

9. Issues 1 to 3 in T.O.S. No. 25 of 2002 and issue No. 6 in C.S. No. 325 of 2003:

Learned Counsel appearing for the plaintiff would contend that both the attestors to the subject Will was examined to establish the execution and attestation of the Will by the testatrix. As they have spoken to the sound and disposing state of mind of the testatrix at the time of execution of the Will and the testatrix's understanding capacity to know the consequences of the Will at the time of execution of the same, the court will have to necessarily grant probate as sought for by the plaintiff who has been appointed as executrix under the Will, it is submitted.

10. The learned Counsel appearing for the defendant would vehemently contend that the Testatrix was mortally ill. Her ill health was taken advantage of by the plaintiff. The very fact that there was no reference as to the defendant in the subject Will would go to show that the Will was concocted by the plaintiff. Admittedly, the plaintiff had played a paramount role in the execution of the Will when the left hand and the left leg were not functioning on account of the stroke the testatrix encountered in 1988. The plaintiff has come out with a cock and bull story that the testatrix affixed her left thumb impression in the Will. There is material variation in the evidence of P.Ws.1 to 3 in T.O.S. No. 25 of 2002 as to the time of execution of the Will and the presence of the Sub Registrar at the house of the testatrix at the time of execution of the Will. It is his further submission that the suspicion surrounding the Will was not cleared by the plaintiff.

11. The subject Will was allegedly executed by P.R. Vijayalakshmi on 9.11.2001. The Will would read that the testatrix was afflicted with paralytic attack and was suffering from fracture on her left leg and on account of which she had become immobile. Of course, the Will would read that inspite of such physical incapacities, she was in a sound state of mind and her rational thinking was not blurred. Admittedly, she passed away on 2.1.2002 within about 54 days from the date of execution of the Will.

12. On a close scrutiny of the signatures of the testatrix found on each and every page of the Will, it is found that the natural texture and clarity of the signature differs from page to page. The inability to maintain the momentum and sustain the same while putting signature on various pages of the Will is found quite

obvious.

13. The plaintiff, while being examined as PW1 in T.O.S. No. 25 of 2002, would categorically state that the Registrar came to the house of the testatrix at 11.00 am for registration of the Will. In the subsequent portion of his cross examination, he had fumbled and come out with a different version saying that the Registrar never came to the house of the testatrix between 10.30 am and 5.30 pm on 9.11.2001. It is only his Assistant who came and obtained the signature of the testatrix. It is not the case of the plaintiff that he was not present at the time of registration of the Will. It is his unambiguous stand that he was present throughout the course of execution of the Will and the registration of the same.

14. The first attesting witness, who was examined as PW2, in T.O.S. No. 25 of 2002 is none other than the brother-in-law of the plaintiff and the second attesting witness, who was examined as PW3 in T.O.S. No. 25 of 2002, was the maid servant employed in the house of the testatrix. It is to be noted that the plaintiff was very much present not only at the time of preparation of the Will with the assistance of an Advocate but also at the time when the Will was registered at the house of the testatrix. There is no doubt that the plaintiff had played a very predominant role in the execution of the Will.

15. Coming back to the time of registration of the Will by the Registrar at the house of the testatrix, we will have to analyse the version of PW3 in T.O.S. No. 25 of 2002 also. PW3 in T.O.S. No. 25 of 2002, the maid servant would depose before the court that an official from the Sub Registrar's office came down to the house of the testatrix between 4.00 pm and 6.00 pm and the registration was completed between 6.00 pm and 7.00 pm. Therefore, it is found that the attesting witnesses were not sure as to the presence of the Sub Registrar at the residence of the testatrix for the purpose of registration of the Will. They have given two different versions as to the presence and also as to the time of registration of the Will.

16. The Will does not refer to the fact that the testatrix had a brother by name P.R. Ramanujam. No reason has been assigned as to why he was disinherited by the testatrix. PW3 in T.O.S. No. 25 of 2002 would depose that she smeared ink on the left thumb of the testatrix and the testatrix affixed her thumb impression in the Will. It is her admitted version that the left hand and the left leg of the testatrix were immobile on account of paralytic attack. Even to sit up on a bench, the testatrix needed others help. When the testatrix was not in a position to lift her left thumb to affix her thumb impression on the Will, we can presume that there is forcible affixture of the thumb impression of the testatrix.

17. The plaintiff would state that the Will was prepared long back and was shown to the testatrix only on 8.11.2001 a day earlier to the registration of the Will. There is no indication in the Will as to who actually prepared the Will. The prepared Will had been brought only by the plaintiff who is the beneficiary under

the Will. When the testatrix was immobile, she could not have moved out of the bed and gave instruction to the Advocate to prepare the Will. There is no evidence as to how the instruction was given by the testatrix to the Advocate for preparation of the Will prior to the registration of the same. Even the date of execution of the Will had been left blank at the last page of the Will.

18. The learned Counsel appearing for the plaintiff submitted the decision in *Palaniswami Vs. P. Vellingiri Gounder, Shanmughasundaram Rajendran, Parthiba Mahendran, Sethuramalingam and Thondamuthur Cooperative Primary Land Development Bank Ltd.*, wherein it was held by the Bench of this court that the testator had the freedom to give the property to whomsoever he liked and once it was established that the testator was in a sound and disposing state of mind, the court was not supposed to subscribe its own ethics to the manner of disposition of the Will. Even the uneven distribution of the assets among children by itself could not be taken as a suspicious circumstance. But, in such an event, the standard of scrutiny would be different more especially, when there was no reason for such uneven distribution of the assets.

19. It is in evidence that the testatrix was afflicted by mortal disease viz., cancer. To quell the rithing pain on account of cancer attack, seductives would have been freely used. But, it is seen that the plaintiff, who would contend during the course of evidence that the Doctor who attended the testatrix issued a medical certificate to establish her mental condition, has not produced any document from the Doctor nor had he examined the Doctor to establish the sound and mental status of the testatrix. The predominant role of the propounder of the Will not only in the matter of preparation of the Will but also in the matter of execution and registration of the Will throws doubt on the execution of the Will with her free will and volition. The sound and disposing state of mind in such a volatile health profile of the testatrix is found to be highly suspicious. No reason was assigned for completely disinheriting the other brother of the testatrix. In the above facts and circumstances, the aforesaid ratio does not come to the rescue of the plaintiff.

20. The Supreme Court in *Pentakota Satyanarayana and Ors. v. Pentakota Seetharatnam and Ors.* 2006-2-LW 658 has held as follows:

It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will.

21. In the instant case, right from the day of preparation of the Will to the day of registration of the same in the house of the testatrix, the plaintiff had played a pivotal role. Therefore, it is not the active participation of the propounder but the

predominant role played by the propounder culminated in the execution of the Will by the testatrix who had a miserably falling health profile. Further, his active participation alone does not give rise to the suspicion surrounding the execution of the Will by the testatrix. The other factors as detailed above also contribute largely to come to a decision that all was not well with the preparation, execution, attestation and registration of the Will by the testatrix who was almost sinking in death bed. Therefore, the above ratio also does not go to support the stand of the plaintiff.

22. A very similar case came up for consideration before the Supreme Court reported in Joseph Antony Lazarus (Dead) BY L.Rs. v. A.J. Francis 2006 (3) Supreme 259 wherein the Supreme Court held that there was no evidence or explanation as to why the testatrix omitted to refer to two of her sons in the Will executed by her. Admittedly, the testatrix was at a very advanced age. She had suffered a fall and had broken her thigh bone twice. She had to be operated upon both the occasions. She was keeping indifferent health right from her first fall. The propounder also failed to examine the Advocate who was said to have drafted the Will on the instruction of the testatrix. The Sub Registrar, before whom the Will was said to have been presented for registration, was also not examined. The Supreme Court, in the above facts and circumstances of the said case, concluded that there was suspicion surrounding the execution of the Will. The very same fact situation is reflected in the instant case also. Neither the Doctor who attended to the testatrix nor the Sub Registrar, who was said to have come to the residence of the testatrix for the purpose of registration of the Will, was examined by the plaintiff.

23. In the above facts and circumstances, the court comes to the definite conclusion that the testatrix had not executed the Will in her free, sound and disposing state of mind. Therefore, all the above issues are decided as against the plaintiff.

24. Issue No. 4 in C.S. No. 325 of 2003: Firstly it is found that the kur chit dated 25.10.1998 was not produced before this court. Probably the said document was not marked as it was not properly stamped and registered. When the kur chit dated 25.10.1998 is not filed before this court, the court is not able to test its genuineness and validity. The court cannot also decide as to whether the said kur chit was acted upon when it was not produced before this court. Therefore, the issue is decided accordingly.

25. Issue No. 5 in C.S. No. 325 of 2003: The alleged document entered into between the parties with the developers on 25.10.1998 was not produced before this court. Therefore, the court is unable to test the validity thereof. The issue is answered accordingly.

26. Issue No. 7 in C.S. No. 325 of 2003: On a perusal of Ex.D2 in C.S. No. 325 of 2003, it is found that the plaintiff, defendant and the first defendant, who remained ex parte, have executed power of attorney dated 25.10.1998 in favour

of the developer as contended by the defendant. The plaintiff has not disputed the execution of the said document in favour of the developer by all the parties to the suit. It is to be noted that the said document does not speak about the partition of the family property. The parties to the suit having averred to the fact that they are the absolute owners of the first item of the suit properties in C.S. No. 325 of 2003, executed the power of attorney in favour of the developer as found in Ex.D2 in C.S. No. 325 of 2003. When there is no material to establish that the family properties were already partitioned, the parties to the suit in C.S. No. 325 of 2003 cannot execute the power of attorney excluding the right of Selvi. P.R. Vijayalakshmi on the ground that they are the absolute owners of the first item of the suit properties in C.S. No. 325 of 2003. It is the admitted case of both the parties that Selvi.P.R.Vijayalakshmi had a share in the first item of the suit properties in C.S. No. 325 of 2003 also. But, the plaintiff sets up a plea that there was a partition in the family and as per the partition, which was recognised under the kur chit, the first item of the suit properties was allotted to the parties to the suit in C.S. No. 325 of 2003. Such a contention is found to be baseless and there is no material or evidence to support such a plea. The mere correspondence between the parties as found from Ex.D1 in C.S. No. 325 of 2003 and the power of attorney executed by the parties in favour of the developer as found from Ex.D2 in C.S. No. 325 of 2003 will not concretely establish the partition in the family.

27. It is true that the defendant, during the course of evidence, would admit that on 25.10.1998, the parties to the suit in C.S. No. 325 of 2003 and their sister Selvi P.R. Vijayalakshmi executed a kur chit and as per the kur chit, her sister was entitled to the property bearing door No. 54 Ayya Mudali Street, Chintadripet, Chennai 600 002. No amount of evidence pertaining to a document which was not at all exhibited before the court for scrutiny can be placed reliance upon by the court. When the kur chit was not exhibited as it was not stamped and registered as required under law, the oral admission made by the defendant does not alter the entitlement of the parties to the family property. In view of the above, it is held that even though the defendant has not challenged the execution of the power of attorney by all the parties to the proceedings, the power of attorney executed by the parties to the suit alleging that they were the absolute owners of the suit properties, when actually when the deceased P.R. Vijayalakshmi also had 1/4 share in the property, cannot be held as valid in the eye of law. The issue is answered accordingly.

28. Issue Nos. 4 and 5 in T.O.S. No. 25 of 2002: The Will stood not proved by the plaintiff. Therefore, the plaintiff is not entitled to grant of probate. The issues are decided accordingly.

29. Issues 1 to 3 in C.S. No. 325 of 2003: It is the admitted case of both the parties that the first defendant P.R. Srinivasan, who remained ex parte, was one of the legal heirs of Ramakrishna Mudaliar through his first wife Mrs. Shenbagammal. The plaintiff, the defendant and P.R. Vijayalakshmi were born

through the second wife of Ramakrishna Mudaliar. There is no dispute to the fact that the plaintiff and the defendant and the first defendant, who remained ex parte in C.S. No. 325 of 2003, inherited the properties bearing door Nos. 51 and 54, Ayya Mudali Street, Chintadripet, Chennai described as items 1 and 2 in the plaint schedule in C.S. No. 325 of 2003. After the demise of the parents as well as their sister P.R. Vijayalakshmi, the plaintiff, the defendant and the first defendant, who remained ex parte in C.S. No. 325 of 2003 are entitled to 1/3 share each in first and second items of the plaint schedule properties.

30. It is also not in dispute that the third item of the suit properties was inherited by the deceased P.R. Vijayalakshmi through her mother Dharmambal. Her blood brothers are the plaintiff and the defendant alone. Therefore, the plaintiff and the defendant P.R. Ramanujam alone are entitled to 1/2 share in the third item of the suit schedule properties.

31. With respect to the 4th item of the plaint schedule properties, it is found that they are gold and silver ornaments and wooden antique items. The defendant has produced Ex.D3 in C.S. No. 325 of 2003 to show that many of the jewels detailed in item 4 were pledged with the bank and auction notices were frequently issued. At any rate, there is no material to show as to whether majority gold items found in item 4 were disposed of by the bank on account of default made by the parties or they were sold away by the mother of the plaintiff after redemption. A duty is cast upon the defendant P.R.Ramanjuam to establish that the properties described in item 4 are available for partition. No evidence was let in to establish that the properties described at item 4 are available for partition. Further, the plaintiff P.R.Vijayarangam cannot be called upon to establish the negative.

32. In view of the above facts and circumstances, it is held that the suit properties were not already partitioned under the alleged kur chit, that items 1 to 3 in the plaint schedule are available for partition and that the defendant, the first defendant, who remained ex parte in C.S. No. 325 of 2003 and the plaintiff are each entitled to 1/3 share in items 1 and 2 and the plaintiff and the defendant are each entitled to 1/2 share in item 3 of the suit properties. The issues are answered accordingly.

33. T.O.S. No. 25 of 2002: The suit stands dismissed. There is no order as to costs.

34. C.S. No. 325 of 2003: The plaintiff and the defendants in this suit are each entitled to 1/3 share in items 1 and 2 of the plaint schedule properties and the plaintiff and the second defendant in this suit are each entitled to ? share in item 3 of the schedule. The plaintiff is not entitled to partition with respect to 4th item of the plaint schedule properties. Preliminary decree is passed in the aforesaid terms. Considering the scope of the suit and the relationship of the parties, each party is directed to bear his cost.