
(2011) 02 MAD CK 0175
In the Madras High Court
Case No : S.A. No. 1070 of 2000

Rukkammal and Others

APPELLANT

Vs

Mottaiyammal @ Gengiammal and Others

RESPONDENT

Date of Decision : 03-02-2011

Acts Referred:

Succession Act, 1925 — Section 63

Citation : (2011) 1 LW 934

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : S. Parthasarathy for Sarvabhauman Associates, for the Appellant; S. Rajasekar, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—The Plaintiffs 1 to 3, 5 and 7 to 9 in O.S. No. 130 of 1992 on the file of the Subordinate Court, Krishnagiri are the

Appellants.

2. Originally four Plaintiffs filed a suit for partition claiming 4/6th share in the suit properties. The case of the Plaintiffs was that the properties are

the self acquired properties of Munia Naicker @ Peddappan, their father who died on 7.10.1968 intestate and the Plaintiffs 1 to 4, the 1st

Defendant and the mother of the Defendants 2 to 4 were the daughters of late Munia Naicker @ Peddappan and as their father died intestate,

each of them entitled to 1/6th share in the suit properties.

3. The 1st Defendant contested the suit stating that their father did not die intestate as alleged by the Plaintiffs and when he was in a sound

disposing state of mind, he executed a Will dated 7.1.1963 bequeathing the suit properties in favour of the 1st Defendant, as the 1st Defendant

was not provided well at the time of marriage and the 1st Defendant was looking after the welfare of the father and the Will came into effect after

the death of her father and the Will was also accepted by the Plaintiffs in the Panchayat and therefore the Plaintiffs are not entitled to the relief as

prayed for.

4. The trial Court Judge disbelieved the Will and decreed the suit for partition and the first appellate Court believed the Will and allowed the

appeal and dismissed the suit for partition. Hence, the Second Appeal is filed.

5. The following substantial question of law was framed at the time of admission of the Second Appeal by this Court: Whether the finding rendered

by the lower appellate Court with regard to Ex.B1 Will overlooking the numerous suspicious circumstances is vitiated ?

6. Mr. S. Parthasarathy, the learned Senior Counsel appearing for the Appellants submitted that the evidence of Dws. 1 to 4 would prove that the

Will was not the last testamentary disposition of the father and the propounder of the Will the 1st Defendant/ 1st Respondent had taken active part

in the execution of the Will and there were suspicious circumstances in the manner of execution of the Will and these factors were not appreciated

by the lower appellate Court. Mr. S. Parthasarathy, the learned Senior Counsel appearing for the Appellants brought to my notice the evidence of

Dws. 2 and 3 and submitted that even according to the evidence of Dws. 1 to 3 the father had directed the scribe to write in the Will giving one

acre to each daughters namely the Plaintiffs 1 to 4 and the mother of the Defendants 2 to 4 and in the Will nothing has been mentioned about the

properties to be given to the other daughters. It is further submitted that all the witnesses on the side of the 1st Defendant have deposed that the 1st

Defendant and her husband were present at the time of execution of the Will and they took active part and as held by our High Court and Hon"ble

Supreme Court that when a propounder had taken active part in the execution of the Will that is one of the suspicious circumstances in the

execution of the Will and therefore the Will cannot be believed and once the Will goes, all the daughters get equal share in the properties. The

learned Senior Counsel for the Appellants relied upon the Judgments reported in *Bharpur Singh and Others Vs. Shamsher Singh, ; Benga Behera*

and *Anr. v. Braja Kishore Nanda and Ors. AIR 2007 SC1975 S.R. Srinivasa and*

Ors. v.S. Padmavathamma 2010 (5) SCC 274, Babu Singh

and Others Vs. Ram Sahai @ Ram Singh, in support of his contention that when there were suspicious circumstances and the propounder had

taken active part, the Will cannot be believed. Mr. S. Parthasarathy, the learned Senior Counsel appearing for the Appellants further submitted that

though one of the attesting witnesses had given evidence about the factum of attestation he did not identify his signature in the Will and in such

circumstances, there is no valid attestation and the propounders have not proved the attestation of the Will in the manner known to law and in

support of that he relied upon the judgment reported in Suguna Bai Vs. Muniyammal @ Dhanalakshmi and Others, Govindan Chettiar (Died) v.

Akilandam @ Seethalakshmi and 24 Ors. 1997 (3) LW 673

7. Mr. S. Parthasarathy, the learned Senior Counsel appearing for the Appellants submitted that the lower appellate Court believed the case of

ouster pleaded by the 1st Defendant and when the Will goes all the daughters are entitled to equal share and they are the co-owners and in the

case of co-owners the enjoyment of properties by one co-owner and among the enjoyment of properties of all co-owners and unless ouster is

pleaded and proved one co-owner cannot claim title to the exclusion of others and in this case no evidence has been let in to prove the ouster and

he relied upon the Judgments reported in Darshan Singh and Others Vs. Gujjar Singh (Dead) by Lrs. and Others, , Govindammal v.R. Perumal

Chettiar and Ors. 2006 (11) SCC 600 Therefore Mr. S. Parthasarathy, the learned Senior Counsel appearing for the Appellants submitted that

even according to the evidence of Dws. 1 to 4 the propounder had taken the active part , the wishes of the testator was not reflected in the Will

relied upon by the 1st Defendant and there is no valid attestation for the Will and hence the 1st Defendant cannot claim her exclusive right over the

suit properties.

8. The learned Counsel for the 1st Respondent Mr. S. Rajasekar submitted that the evidence of Dws.1 to 4 cannot be read in isolation and the

reading of the evidence of Dws.1 to 4 would make it clear that the Will was executed by the testator voluntarily and even though the propounder

namely the 1st Defendant and her husband were present at the time of execution of the Will that will not amount to suspicious circumstances, as

admittedly the father was living with the 1st Defendant and he was taken care of by the 1st Defendant and her husband and the reason for

excluding the other daughters were also spoken to by the witnesses and the other daughters were given in marriage in an affluent family and the 1st

Defendant was not given in marriage to a person who is affluent and considering all these aspects, the father had decided to give the suit properties

to the 1st Defendant and the witnesses have also spoken about the Panchayat wherein the Plaintiffs admitted the Will and the Plaintiffs also

admitted in evidence about the Panchayat held as spoken to by the witnesses on the side of the Defendants and considering all these aspects the

lower appellate Court had rightly upheld the Will.

9. Mr. S. Rajasekar the learned Counsel for the 1st Respondent further submitted that even though the attesting witnesses did not identify his

signature in the Will, he has spoken about the attestation of the Will in evidence and according to Section 63 of the Indian Succession Act, the

attestation has been properly proved by the examination of one of the attesting witnesses and therefore it cannot be stated that the Will was not

properly attested. He further submitted that admittedly the 1st Defendant was in exclusive possession of the properties ever since the death of her

father in the year 1968 and till 1992 no steps were taken by the Plaintiffs and the mother of the Defendants 2 to 4 and it is not the case of the

Plaintiffs that they were given any share of income from the suit properties and therefore the 1st Defendant has also proved the ouster and hence

the Appellants are not entitled to the relief prayed for.

10. Heard both side counsel.

11. The father Munia Naicker @ Peddappan was the owner of the properties and he had six daughters and he died on 7.10.1968 are admitted.

Four daughters filed the suit for partition stating that the father died intestate and they are entitled to 1/6th share each in the suit properties. The 1st

Defendant disputed the claim stating that the father did not die intestate and he left behind the Will dated 7.1.1963 by which the properties were

bequeathed to her. Therefore the burden is on the 1st Defendant to prove that the Will was executed by the father while he was in a sound and

disposing state of mind.

12. Mr. S. Parthasarathy, the learned Senior Counsel appearing for the Appellants

did not question the sound disposing state of mind of the testator at the time of execution of the Will and as a matter of fact there is no evidence questioning the mental capacity of the testator at the time of execution of the Will. Therefore, at the time of execution of the Will it can be held that the testator was in a good sound and disposing state of mind. Dws.2 and 3 were the attesting witnesses to the Will. The Will is an unregistered one and according to the evidence of Dws.2 and 3 that the testator gave instructions to DW4 the scribe and after the scribe read over the Will the testator affixed his thumb impression and it was attested by Dws.2 and 3. Dws. 2 and 3 spoke about the Panchayat and the Muchilika executed in the Panchayat and gave evidence that the other daughters of testator were given one acre each in the Panchayat. Dws. 2 and 3 also deposed that the 1st Defendant and her husband were present at the time of execution of the Will. DW2 has stated in his evidence that the testator instructed the scribe to write in the Will giving one acre of land to each of the daughters and the remaining properties to be given to the 1st Defendant and as per the direction of the testator the scribe had written the Will and that was duly executed and attested. DW2 would further state that the testator had also instructed to the scribe to write in the Will that after his death his last rights should be performed by the 1st Defendant and when the scribe questioned the testator the reason for giving lesser extent of properties to other daughters and giving the major portion to the 1st Defendant that was replied by the testator that the other daughters were given 10 sovereigns at the time of marriage and therefore they were given one acre and all these were stated in the Will and the Will was read over to the testator and he signed. DW3 the other attesting witness also corroborated the evidence of DW2 with respect to the statement of the testator directing the scribe to write one acre of property to be given to each daughter and the remaining properties to the 1st Defendant and also the 1st Defendant should take care of the testator till his death. The scribe was examined as DW4 and he also stated that the testator directed him to write in the Will giving one acre each daughter and the remaining properties shall be taken by the 1st Defendant and he has also written so in the Will. Therefore, from the evidence of D Ws. 2 to 4 it is made clear that the 1st Defendant was present at the time of execution along with her

husband and the testator directed the scribe to write down in the Will his intention to give one acre of property to other daughters and the

remaining properties to the 1st Defendant and that was read over and accepted by the testator and thereafter he signed. But a reading of the Will

Ex.B1 would prove that no such wishes of the testator were stated in the Will. There is no reason for the exclusion of other daughters in preference

to the 1st Defendant and no reason has been stated for giving the entire properties to the 1st Defendant.

13. The specific case of the 1st Defendant was that the other daughters were provided well at the time of marriage, she was not given the same

gifts and therefore she was given the entire properties. But in evidence of DW1 would admit that the other daughters are also poor people and they

are not rich. When the Defendant witnesses 2 to 4 have specifically stated that the testator had directed the scribe to write in the Will about the

properties to be given to the other daughters and the scribe had also written the same and that was executed and attested by the witnesses, and

when those recitals were absent in Ex.B1 it would lead to the presumption that Ex.B1 was not the Will executed by the testator and the Will

dictated and executed by the testator was suppressed and another Will was produced by the 1st Defendant. Further, it is admitted by all the

witnesses on the side of the Defendants that the Will was executed in the Sub Registrar's office and no valid reason has been stated for non-

registering the Will. Though it is stated by the witnesses that when the Will was executed it was around 5.30 PM and therefore it was decided to

have the Will registered on the next day, DW1 did not state any reason for non-registering the Will on the next day. Further, the 1st Defendant

relied upon Ex.B6 the Muchilika and contended that in the Muchilika the Will was mentioned and the daughters agreed to take one acre and

therefore it cannot be contended that the Will was not proved and the Plaintiffs and the other daughter Susila had accepted the Will before the

Panchayat and hence the Will has been proved and therefore the Plaintiffs cannot claim any share . No doubt, D Ws. 2 to 4 have spoken about the

Panchayat Muchilika Ex.B6. But admittedly, in the Panchayat Muchilika Ex.B6, the signature of the Plaintiffs 1 to 4 and the other daughter Susila

were not obtained. Further the 1st Defendant was not able to state the properties given to other daughter as per the wish of the testator. If the

other daughters were given one acre of property as decided by the testator, then the case of the 1st Defendant would have been accepted.

Admittedly, the Plaintiffs and the mother of the Defendants 2 to 4 were not given any properties and therefore it cannot be stated that the Will was

executed by the testator in the manner as alleged by the 1st Defendant. Therefore, in the absence of any signature of the Plaintiffs 1 to 4 and the

mother of the Defendants 2 to 4 in Ex.B6 would also lead to the conclusion that Ex.B6 cannot be relied upon by the 1st Defendant and Ex.B6 is

also not binding on the Plaintiffs.

14. As I have held that having regard to the evidence of Dws.2 to 4 that the Will Ex.B1 was not the Will executed by the testator as the

instructions of the testator regarding the properties to be given to other properties were not found in Ex.B1, I hold that Ex.B1 is not the Will

executed by the testator and the 1st Defendant cannot claim any right over the suit properties under the will. The Judgments relied upon by the

learned Senior Counsel for the Appellants regarding suspicious circumstances are not applicable to the facts of the case. As I have held that Ex.B1

Will was not executed by the testator, the 1st Defendant cannot claim any right over the suit properties under the Will and the Plaintiffs are entitled

to the relief prayed for. Therefore, the substantial question of law is answered in favour of the Appellants.

15. Hence, the judgment and Decree of the first appellate Court are set aside and the judgment and Decree of the trial Court are restored and the

Second Appeal is allowed. No costs.