

(1998) 04 MAD CK 0098

In the Madras High Court

Case No : Second Appeal No. 1128 of 1984

S. Kaliyammal and Others

APPELLANT

Vs

K. Palaniammal and Others

RESPONDENT

Date of Decision : 03-04-1998

Acts Referred:

Evidence Act, 1872 — Section 114
Succession Act, 1925 — Section 63

Citation : AIR 1999 Mad 40 : (1998) 3 MLJ 361

Hon'ble Judges : Jagadeesan, J

Bench : Single Bench

Advocate : S.V. Jayaraman for Nicholas, for the Appellant; T.R. Mani for C.R. Prasanna, for the Respondent

Final Decision : Dismissed

Judgement

Jagadeesan, J.—The plaintiffs in O.S. No. 325/81 of the file of Sub-Court, Coimbatore are the appellants herein. They filed the said suit for declaration that the will executed by one Nanjammal dated 12-9-65 is not valid and it will not affect the rights of the plaintiffs over the suit property and for partition of the suit properties into five equal shares and to allot one such share to them. Their case is that the suit property originally belonged to one Nanjammal, wife of Ponniah Gounder. Sami Gounder is her son. The first plaintiff is the wife of the said Sami Gounder. The plaintiffs 2 to 4 are the sons. Sami Gounder died in the year 1966. The defendants 1 and 2 are also the sons of the said Nanjammal and the defendants 3 and 4 are her daughters. The defendants 3 and 4 both married one Ponnay Gounder. Nanjammal died in the year 1974. Though she was living with her sons, occasionally she stayed with her daughters, the defendants 3 and 4 and on one such occasion the defendants got the thumb impression of their mother Nanjammal in a blank paper and thereafter prepared a will, bequeathing all the properties in favour of the defendants 3 and 4. The will is not valid and the plaintiffs are entitled for their respective shares.

2. The defendants 3 and 4 filed the written statement which was adopted by the defendants 1 and 2. In the written statement the defendants contended that the will had been executed by their mother Nanjammal in favour of the defendants 3 and 4 on her own accord and there was no undue influence or coercion on the part of the defendants 3 and 4. Pursuant to the will, after the death of Nanjammal the defendants 3 and 4 put forth their claim and the patta has been changed in their name. The defendants 3 and 4 are in possession and enjoyment of the suit property.

3. On the above pleadings, the parties have examined the second plaintiff as P.W. I and marked Exs. A-1 to A-14. On behalf of the defendants 3 and 4 their husband had been examined as D.W. 1 and through him, the documents Exs. B-1 to B-26 were marked. After elaborately discussing the evidence in detail, the trial Court had decreed the suit by its judgment and decree dated 11-11-82. The defendants took up the matter on appeal in A.S. 65/83 on the file of the District Court, Coimbatore. The District Judge, after considering the evidence came to a different conclusion and allowed the appeal, thereby dismissing the suit filed by the plaintiffs. The lower appellate Court has found that the will executed by Nanjammal in favour of the defendants 3 and 4 is true and valid. Aggrieved by the same, the present second appeal has been filed by the plaintiffs.

4. On behalf of the appellants it was contended that the execution of the will has not been proved by examining the attesting witnesses. Since the will has not been proved legally, the lower appellate Court ought to have accepted the findings of the trial Court and dismissed the appeal. Apart from this, even if the explanation of the defendants is to be accepted that the attesting witnesses are no more, it is for the defendants to establish the same by producing some material evidence to that effect i.e., some independent evidence ought to have been examined of at least the death certificate in respect of the attesting witnesses ought to have been filed. Even otherwise in case of the death of the attestors, somebody who is familiar with the signature of the attesting witnesses and the testator ought to have been examined. In the absence of any evidence, the lower appellate Court is not correct in finding that the will is valid. Further when there are three sons and two daughters, there is absolutely no explanation for the testator to execute the will bequeathing the property in favour of her daughters alone.

5. On the contrary, on behalf of the respondents, it has been contended that in the plaint as well as in the evidence, the plaintiffs have admitted the execution of the will by the testator Nanjammal. When once the execution of the will is admitted, then the burden is on the plaintiffs to establish that the will has been executed by the testator under undue influence or coercion or fraud. The plaintiffs have not let in any evidence in these aspects and as such the judgment of the lower appellate Court, finding that the will is valid, cannot be interfered with. Apart from this, it is also contended that the defendants 1 and 2 who are the co-owners of Sami Gounder. They admitted the execution of the will by the

mother Nanjammal and their admission will be binding on the said Sami Gounder. Hence the plaintiffs who are the legal representatives of Sami Gounder cannot question the validity of the will executed by Nanjammal.

6. I carefully considered the contentions of both the counsel. The short question involved in this second appeal is whether the will executed by Nanjammal in favour of the defendants 3 and 4 has been proved. The main contention of the counsel for the appellants is that the plaintiffs have denied the execution of the said will by Nanjammal.

7. On the contrary it is contended on behalf of the defendants that the execution of the will by Nanjammal has been admitted by the plaintiffs and their only plea is that the will has been executed by the said Nanjammal by coercion and undue influence. Hence it is unnecessary to prove the execution of will.

8. The lower appellate Court has found that Ex. B-26, the will is valid on the ground that the will has been given effect to in accordance with intention of the testator. Immediately after the death of the testator, the revenue records has been changed in the name of the defendants 3 and 4 and they have produced number of documents to establish their possession. The plea of the plaintiffs that the will was executed under undue influence has not been established by the plaintiffs and on that ground the lower appellate Court has allowed the appeal.

9. To consider the plea of the parties, I am of the view (that) (sic) it is necessary to refer to the averments made by the plaintiffs in the plaint. The relevant paragraphs 6, 7 and 11 of the plaint are as follows :

"Nanjammal lived, with her sons at Kalapanaickenpalayam and used to visit her daughters at Edaiyapalayam and stay there for some days also.

While "so on one of these visits to Elaiyarapalayam the husband of the defendants 3 and 4 namely the Kavunday Gounder. By practising fraud and undue influence on Nanjammal who was aged 75 years, and in weak state of health appear to have obtained her thumb mark on a paper by some misrepresentation, got en-grossed on alleged will thereon purporting to have been executed by her and took to the Sub-Registrar's office and got it registered.

The alleged will- by the said Nanjamma is fraudulent document brought about by the husband of the defendants 3 and 4 by the exercise of undue influence and fraud practised on her and by the machinations of the said Kavunday Gounder."

10. From the above pleadings, it is clear that there is no specific denial by the plaintiffs with regard to the execution of the will by Nanjammal. A perusal of the above extracted portions in the plaint would clearly establish that the plaintiffs had impliedly admitted the execution of the will by the said Nanjammal and their only plea is that Nanjammal has executed the disputed will only under undue influence and fraud played by the husband of the defendants 3 and 4. It is the further plea of the plaintiffs that Nanjammal was residing with the sons and she was visiting her daughters only in lucid intervals and on one such occasion the

will has been brought out by the husband of the defendants 3 and 4.

11. When the specific plea of the plaintiffs is that the husband of the defendants 3 and 4 has got the will executed by Nanjammal under fraud and undue influence, then naturally the burden is on the plaintiffs to establish the same. But unfortunately there is absolutely no evidence to prove the averments made in the plaint. In fact except the averments made in the plaint that the will was executed by Nanjammal by fraud and undue influence, there is no other material to come to the conclusion that the will has been executed under undue influence. Even in the evidence, P.W. 1 has stated as follows :--

(Vernacular matter omitted)

Even as per the evidence it is admitted that the will has been executed by Nanjammal but it was only under fraud and undue influence.

12. In fact it may be worth to refer some of the judgments on this aspect. In the judgment reported in Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, it has been held as follows (at page 283) :

"We turn next to the question of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Ct. ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6, Rule 4, Civil P.C."

13. In the judgment reported in Karuppayee Ammal v. Karuppiyah Pillai, (1987) 2 Mad LJ 138 it has been held as follows :

" "Undue influence" or as it is sometimes called Moral coercion as distinguished from physical coercion, according to Sir Frederick Pollock "consists in any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment." Two things have to be proved in order to raise a presumption of undue influence. Firstly, that the relationship between the contracting parties was such, that one was in a position to dominate the will of the other. Secondly, that the position was used to obtain an unfair advantage If these two things are proved, then a presumption of undue influence arises and the burden is cast upon the party to show that he has not taken advantage of his

position, and that the other party has and independent legal advice in the matter. Such advice must be proved to have been given before the transaction. If this be proved, the transaction will stand. Otherwise it will be avoided."

14. In the judgment reported in *Rakkammal v. Meeyappan Ambalarn*, (1991) 2 Mad LW 491 it has been held as follows :

"Here again, the pleadings, namely, the objections put forth on behalf of the first respondent are totally devoid of particulars. Under the law, it is necessary to plead fraud specifically and give particulars of the fraud. The burden of proof of fraud is on the person, who alleges fraud, which should be proved by cogent evidence. Courts have always laid down that in the matter of proof of fraud, suspicion cannot take the place of proof and fraud should be proved by direct cogent evidence. Conjectures and suspicions cannot take the place of proof. The same principles govern the allegations of collusion also."

From the above principles, it is clear that the bold averments in the plaint alone may not be sufficient evidence to come to the conclusion that the will has been obtained by fraud or undue influence.

15. The counsel for the appellants referred to the judgments reported in *Bhagwan Kaur v. Kartar Kaur*, (1994) 5 SCC 135 to contend that the decision on the due execution of the will is not primarily arriving at a finding of fact, as it has a admixture of law due to the specific requirements of Section 63 of the Indian Succession Act, 1925 towards due execution. I am of the opinion that, only when the execution of the will is denied by a party, then the burden is on the party who relies upon the will to prove the execution of the same. When the execution is not denied, it is unnecessary to compel the person who relies upon the document to let in evidence to establish the execution, since the admitted facts need not be proved. As already stated when the plaintiffs pleaded that the will has been executed by the said Nanjammal by fraud and undue influence, it the duty of the plaintiffs to establish the same. In the absence of any evidence to support the plea of the plaintiffs, it has to be held that the will executed by Nanjammal in favour of the defendants 3 and 4 is valid.

16. Apart from this, the other circumstance also can be taken into consideration. The defendants 1 and 2 who are the other sons of the said Nanjammal, the testator, have admitted the execution of the will and they support the defendants 3 and 4. The plaintiffs have not alleged anything against the defendants 1 and 2 in respect of their conduct in supporting the defendants 3 and 4. In the absence of any adverse remarks in respect of the conduct of the defendants 1 and 2, since their interest in the property bequeathed under the will is also involved, I see no ground to differ from the findings of the lower appellate Court. Though the lower appellate Court has not discussed in detail and dismissed the appeal for other reasons, I do not think it is necessary to remit the matter to the lower appellate Court for fresh consideration. Hence the available materials are sufficient enough to dispose of the appeal.

17. For the above stated reasons, I confirm the judgment and decree of the lower appellate Court and accordingly the second appeal, is dismissed. There will be no order as to costs.