

(2008) 02 MAD CK 0186
In the Madras High Court
Case No : S.A. (MD) No. 49 of 2003

Sarojini and Vijayalakshmi

APPELLANT

Vs

Mohandoss, Muthupandi Thevar and Katthanathevar

RESPONDENT

Date of Decision : 27-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 63, 68
Succession Act, 1925 — Section 63

Citation : (2008) 2 RCR(Civil) 656

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : A. Sankara Subramanian, for the Appellant; S. Subbiah for 1st Respondent, for the Respondent

Final Decision : Allowed

Judgement

K.K. Sasidharan, J.—The second appeal is directed against the judgment and decree dated 16.02.2001 in O.S. No. 90 of 1995 on the file of the District Munsif, Vilathikulam, as confirmed by the judgment and decree dated 08.01.2002 in A.S. No. 11 of 2001 on the file of the Subordinate Judge, Kovilpatti. The first respondent in the present appeal preferred a suit in O.S. No. 90 of 1995 before the trial Court for a decree of declaration and for recovery of possession in respect of the suit property. It is the case of the first respondent as plaintiff in the suit that the suit property originally belonged to his mother and the appellants herein being the defendants 1 and 2 in the suit are his sisters and his mother along with father executed a joint Will on 10.09.1981, whereby the schedule property was bequeathed in his favour. It is his further case that the mother died on 16.08.1990 and as such, the Will had come into force and accordingly, he prayed for declaration and recovery of possession, as the property was found to be in the possession of the appellants.

2. In the written statement filed by the appellants as defendants in O.S. No. 90

of 1995, they did not admit the Will stated to have been executed on 10.09.1981 and it is their case that after the death of mother, their father executed a Will on 18.08.1991, whereby there was an equitable distribution of property among all the children and, therefore, it was the contention of the appellants that the plaintiff is not entitled to the relief as prayed for. The respondents 2 and 3 stated to be the assignee under the first respondent, were declared *exparte* consequent to their nonappearance.

3. During the course of trial, the joint Will executed by Ramasamy and Nagammal, parents of the appellant, was marked as Ex.A.1. P.W.2 an attesting witness was examined to prove the Will. The Will dated 18.08.1991 executed by the father was marked as Ex.B.1 and the appellants examined D.W.2 to prove the Will.

4. The trial Court framed necessary issues and considered the validity of the Will in Ex.A.1 and Ex.B.1 and ultimately, decreed the suit as per judgment and decree dated 16.02.2001 and the said decree of the trial Court was challenged in appeal by the appellants and the appeal was also dismissed, confirming the judgment and decree of the trial Court and it is the said decree which is the subject matter of the present second appeal.

5. In the factual matrix as narrated above, I have heard Thiru. A. Sankara Subramanian, learned counsel appearing for the appellants and Thiru. S. Subbiah, learned counsel appearing for the respondents.

6. The learned counsel appearing for the appellants contended that the first respondent failed to prove the Will in accordance with Section 68 of the Indian Evidence Act. It is his further contention that the attestation of the Will has not been proved as required under law and as such, it cannot be said that Ex.A.1 was proved so as to give legal effect to the said Will. It is also contended that no benefit was derived by the father as per the joint Will and as such, the Will comes into effect only after the death of both the father as well as mother and there is also an indication to that effect in the Will itself and as such, in the absence of any consideration received by the surviving testator, it cannot be said that the Will came into effect immediately after the death of one of the testators. He had also pointed out that there is a specific clause in the Will granting liberty to either of the parties to cancel the Will with a further stipulation that the Will become operational only after the death of both the testators. The learned counsel also relied on Ex.B.1-Will stated to have been executed by the father on 18.08.1991 to show that there is no reference about Ex.A.1-Will in the said document and as such, it has to be taken that Ex.A.1-Will is a forged one and the testator was not aware of any such Will.

7. The learned counsel for the first respondent submitted that there was no serious challenge to the Will by the appellants and as such, the first respondent has proved the Will by examining P.W.2, being the attesting witness, and, therefore, the Will has to be taken as proved as required by law. He further contended that

during the course of evidence, D.W.1 herself admitted the existence of Will as per Ex.A.1 and as such, it is too late for the appellants to contend that the Will has not been proved as provided u/s 68 of the Indian Evidence Act.

8. The trial Court, while accepting the case of the first respondent, in addition to certain attending circumstances, mainly relied on the fact that there is no reference in Ex.B.1 about the cancellation of Ex.A.1-Will and as such, the trial Court held that Ex.A.1 is deemed to be in existence being the last Will of the testator.

9. The lower Court records in this case had already been summoned and I have gone through the records as well as the exhibits marked on the side of both the parties. On a perusal of Ex.A.1, it is seen that one of the testators, namely Nagammal, the mother of the appellants as well as the first respondent (hereinafter referred to as testatrix) did not sign the Will at all. In the place earmarked for the signature of the second executant, her name appears to have been written by the scribe and there is no corresponding signature in the said place. The Left Thumb Impression of the testatrix is also not found anywhere in Ex.A.1. In the reverse page meant for making endorsement by the Sub-Registrar with regard to due execution, neither the signature nor the Left Thumb Impression of the testatrix is found. However, the signature of the father is found in the Will. Ex.A.1 in original was given to the counsel for the appellants as well as the counsel for the first respondent for verification and on perusal, they have confirmed that the testatrix did not sign in Ex.A.1. However, the learned counsel for the first respondent, by placing reliance on the judgment of the Honourable Supreme Court in the case of Pentakota Satyanarayana & Others v. Pentakota Seetharatnam and others reported in 2006(2) LW 658 contended that the attestation by the Registrar is sufficient in such cases and as such, there is due execution of the Will by the testatrix.

10. The property involved in the present appeal is the second item in Ex.A.1 which was intended to devolve upon the first respondent. It is the consistent case of the first respondent that schedule-II in Ex.A.1 exclusively belongs to his mother and as such, on the basis of the Will, the property devolved on him consequent to the death of mother. In case it is proved that the mother did not sign the Will, the property left by the mother and found in Schedule-II in Ex.A.1 has to be partitioned among the legal heirs of the testatrix and in such a case the first respondent is not entitled for a decree as prayed for by him and as granted by the Court below.

11. The Will dated 10.09.1981 is a joint Will intended to take effect after the death of both the parties and the testator and testatrix had retained the power to cancel the Will. The said Will was registered before the Sub-Registrar and in order to prove the Will, P.W.2-an employee of a nearby hotel was examined. The said witness had stated that he was summoned by the first executant, namely Ramasamy, the father of the appellants to sign the Will and he also deposed that the executant told him that he is going to give the property to his son by way of

Will. The attesting witness did not speak in so many words about the execution of the Will or the factum of affixing signature by the testator in his presence. P.W.2 deposed before the trial Court that both the testators have signed the Will. But the fact remains that only the first executant has signed the Will and the testatrix did not sign and the said fact is now confirmed on verification of the original Will in Ex.A.1 in the presence of the counsel appearing on either side. Neither the Registrar nor the scribe were examined as witnesses to prove the Will.

12. Now the main point for consideration and the substantial question of law pertains to the validity of the Will in the absence of signature of one of the parties to the joint Will. It has to be seen as to whether Ex.A.1 could be construed to be a joint Will executed by both the parties even in the absence of the signature of joint executant in the Will. In case the Will is proved, the first respondent is entitled to the property in Schedule-II of the Will and in the absence of a valid Will executed by the testatrix, even if the Will executed by the father is proved, the first respondent is not entitled to get a decree as admittedly the suit property belongs to the mother.

13. The appellants relied on Ex.B.1 to show that the Will as per Ex.A.1 was fabricated as no reference of Ex.A.1 is made in Ex.B.1 and in view of Ex.B.1 dated 18.08.1991, the property has to be divided as per the recitals in the said Will. However, it is seen that only a certified copy of the Will was produced by the appellants and it is the case of D.W.1 during her evidence that the original of Ex.B.1 was with her husband. If that being the case, nothing prevented the appellants from producing the original of the Will from the custody of the husband of D.W.1 and there is no acceptable evidence to prove the execution of Ex.B.1 and therefore, no reliance could be placed on Ex.B.1 to decide the issue raised in the appeal and as such, Ex.B.1 was rightly rejected by the Court below.

14. The construction of Ex.A.1 and its legal effect on account of the death of one of the parties to the joint Will are the core issues to be decided in the appeal.

15. With respect to the issue pertaining to non-execution of Will by the testatrix, Ex.A.1 produced in original itself is conclusive to prove that the testatrix had not signed the Will at all. Merely because the Sub-Registrar has signed the Will, it cannot be said that the Will is proved and it is not necessary to prove the execution. Unlike other documents a Will has to be construed strictly as the will speaks from the death of the testator.

16. The following substantial questions of law arise for consideration in this case:

"(i) Whether Ex.A.1-Will is valid on account of the absence of signature of the testatrix?; and

(ii) Whether the Will in Ex.A.1 is proved in terms of Section 68 of the Indian Evidence Act?"

17. The learned counsel for the first respondent placed reliance on the judgment

of the Apex Court in the case of Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others, and contended that Ex.A.1 contains the signature of the Registering Officer as well as the attesting witnesses and in view of the same, the first respondent has complied with the condition as provided u/s 68 of the Indian Evidence Act.

18. In Pentakota Satyanarayana's case cited supra, the Will was signed by the testator and it was also attested by two witnesses. The Sub-Registrar had made the necessary endorsement in the Will and he had also signed the Will. It was in the said context, having satisfied that the testator as well as the attesting witnesses had signed the Will and there was also an endorsement to that effect by the Sub-Registrar, that the Apex Court observed that there was due attestation and as such, the Will was proved. The facts of the present case is totally different and as such, the judgment in Pentakota Satyanarayana's case, which was decided in the peculiar facts of the said case, had no application in the present case.

19. The Apex Court in the case of Niranjana Umeshchandra Joshi Vs. Mrudula Jyoti Rao and Others, considered the requirement of a valid Will and held thus:

"32. Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting Witness is alive subject to the process of the Court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The pro-pounder is also required to prove that the testator has signed the Will and that he had put his signature (Emphasis supplied) out of his own free will having a sound disposition of mind and understood the nature and effect hereof. 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 under influence is raised, the burden would be on the caveator. [See Madhukar D. Shende Vs. Tarabai Aba Shedage, and Sridevi & Ors. v. Jayaraja Shetty & Ors. (2005) 8 SCC 784 = 2005-2-L.W.89]. Subject to above,

proof of a Will does nor ordinarily differ from that of proving any other document."

20. Thus it is evident that to constitute a valid Will, the testator or testatrix had to sign the Will and it has to be attested by two witnesses. In the present case, the Will has not been signed by the testatrix and the scribe had only written the name of the testatrix Nagammal in every page and there is no signature or Left Thumb Impression found against the name of the testatrix. The absence of signature in the Will vitiates the whole will and as such, Ex.A.1 cannot be construed to be the Will executed by the mother of the first respondent and as such, the first respondent is not entitled to get the property of the mother as a legatee of the Will.

21. The requirement of proof of Will was considered extensively by the Apex Court in *Madhukar D. Shende Vs. Tarabai Aba Shedage*, and held thus:

"8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in *R.V.Hodge* may be apposite to some extent:

"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict - positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

22. The learned counsel for the appellants submit that even in ExA.1-Will the testator had retained the right to cancel the Will and there is also an indication that the Will would come into force only after the death of both the parties. The said contention was raised only to show that the Will had not come into force with the death of the testatrix. It is not necessary to refer to those contentions on account of the fact that Ex.A.1-Will cannot be treated to be a joint Will on account of the absence of the signature of one of the testators under whom the first respondent claims property as the legatee. The first respondent has examined P.W.2 to prove that he had attested the Will. It is the evidence of P.W.2 that he had witnessed to the execution of Will and according to him, both the testators have signed in his presence. However, the fact remains that the Will did not contain the signature of the testatrix.

23. The learned counsel for the first respondent heavily relied on the evidence of D.W.1 to show that she do not know anything about Ex.A.1 and it was his further contention that there was admission on the part of D.W.1 to the effect that her mother's name is found in Ex.A.1. There is no quarrel with regard to the statement that the name of the mother is found in Ex.A.1. But the main issue pertains to the validity of Ex.A.1 and it has to be seen as to whether the said document could be construed to be a Will executed by the testatrix in the absence of her signature. The scribe, who had written the Will, and the Sub-Registrar, who had registered the document, were not examined. The absence of the signature of the testatrix in the Will was not taken note of by the trial Court as well as the first appellate Court. In fact, the counsel for the appellants as well as the first respondent in the present appeal were also not aware of the said fact and it was noticed only when the Will was looked into during the course of hearing of the second appeal and, therefore, it cannot be said that the findings of fact recorded by the Court below are based on pleadings and evidence in the matter.

24. The Apex Court in the case of Hero Vinoth (minor) Vs. Seshammal, considered the legal effect of the terms of a document giving rise to a question of law and the scope of interference by the High Court in a proceeding u/s 100 of the CPC and held thus:

"13. Though as rightly contended by learned counsel for the appellant the scope for interference with concurrent findings of fact while exercising jurisdiction u/s 100 CPC is very limited, and re-appreciation of evidence is not permissible where the trial Court and/or the first Appellate Court misdirected themselves in appreciating the question of law or placed the onus on the wrong party certainly there is a scope for interference u/s 100 CPC after formulating a substantial question of law.

14. As was noted in Yadarao Dajiba Shrawane (dead) by Lrs. Vs. Nanilal Harakchand Shah (dead) and Others, if the judgments of the trial Court and the first Appellate Court are based on misinterpretation of the documentary evidence or consideration of inadmissible evidence or ignoring material evidence or on a finding of fact has ignored admissions or concession made by witnesses or parties, the High Court can interfere in appeal.

15. Neelakantan and Others Vs. Mallika Begum, it was held that findings of fact recorded must be set aside where the finding has no basis in any legal evidence on record or is based on a misreading of evidence or suffers from any legal infirmity which materially prejudices the case of one of the parties. (See: Krishna Mohan Kul alias Nani Charan Kul and Krishna Mohan Kul @ Nani Charan Kul and Another Vs. Pratima Maity and Others,

24. The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a

material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

25. The suit was instituted by the first respondent for declaration and recovery of possession on the basis of Ex.A.1-Will. It is the concrete case of the first respondent that the property covered by Ex.A.1-Will, which was given to him, absolutely belonged to his mother and consequent to the death of mother, the Will came into force and accordingly, he is entitled to the property as legatee of the Will. Both the Courts below proceeded on the basis that Ex.A.1-Will was executed by the testatrix and the said Will had come into force immediately after the death of the testatrix. The decree for declaration and recovery of possession were also granted on the said factual premises. But the fact remains that the testatrix did not execute Ex.A.1 and the factum of absence of the signature of the testatrix in the Will was overlooked by the trial Court as well as the first appellate Court. Therefore, it has to be concluded that while granting the decree in favour of the first respondent, the Court below ignored material evidence and, as such a case is made out warranting interference in second appeal. The approach of the trial Court as well as the first appellate Court were erroneous as both the Courts below analysed the issue on the basis that the Will is valid and genuine. No attempt was made by the trial Court as well as the first appellate Court to verify the Will for the purpose of ascertaining the validity or genuineness of the Will.

26. The, Court below failed to note that the compliance of statutory requirement alone is not sufficient to conclude the validity of the Will. It is the duty of the Court to satisfy about the genuineness or the due execution of the Will and such satisfaction could be arrived at by the Court, only in case the Will is perused by the Court, while deciding the matter. In the case on hand, both the trial Court as well as the appellate Court did not consider it necessary to inspect the Will for the purpose of satisfying as to whether the Will was duly executed. Therefore, the judgment and decree of the Court below warrants interference in the present second appeal and as such, the substantial questions of law are decided in favour of the appellants. Accordingly, the Second Appeal is allowed and the judgment and decree dated 08.01.2002 in A.S. No. 11 of 2001 on the file of the Subordinate Judge, Kovilpatti, confirming the judgment and decree dated 16.02.2001 in O.S. No. 90 of 1995 on the file of the District Munsif, Vilathikulam is set aside, and consequently, the suit filed by the first respondent in O.S. No.

90 of 1995 is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.