(2010) 03 MAD CK 0097

Madras High Court (Madurai Bench)

Case No: A.S. (MD) No. 4 of 2000 and M.P. (MD) No. 1 of 2009

G. Wilson	APPELLANT
Vs	
Stella Mary and Ranjitham	RESPONDENT

Date of Decision: March 9, 2010

Acts Referred:

- Evidence Act, 1872 - Section 68
- Succession Act, 1925 - Section 222, 276, 277, 63

Citation: (2011) 6 RCR(Criminal) 2715

Hon'ble Judges: G.M. Akbar Ali, J

Bench: Single Bench

Advocate: D. Sadhasivan, for the Appellant; N. Krishnaveni and T.R. Rajaraman for R1, for the Respondent

Final Decision: Dismissed

Judgement

G.M. Akbar Ali, J.
The appeal is preferred against the judgment and decree dated 25.03.1992 made in O.P. No. 82 of 1989 on the file

of the District Judge, Kanyakumari District at Nagercoil.

2. The proposed O.P. was filed by the first respondent herein in respect of Will dated 11.05.1987 executed by one Gunamudayan.

3. The brief facts of the case is as follows:

The first respondent is the wife of Gunamudayan. The petitioner and the second respondent are daughter and son of the said Gunamudayan. While

the said Gunamudayan was in sound state of mind, he had executed the Will dated 11.05.1987 bequeathing the property mentioned therein in

favour of the petitioner and he died on 11.12.1988 and therefore, the Will is produced u/s 277 of Indian Succession Act for probate.

4. The first respondent had no objection in probating the Will. The second respondent contested and stated that the Will was executed under

undue influence and it is not genuine one. It is stated that the said Gunamudayan was working in an estate at Nilgris and after his retirement he was

under the care and custody of the petitioner. As he was very old and not able to act independently, the petitioner influenced the father and she

made him to sell certain properties and the sale amount was deposited in the Bank. The petitioner had also instigated him to execute a settlement

deed and the same was challenged by the respondent in O.S. No. 58 of 1988 which is pending. The petitioner has obtained the Will under undue

influence and therefore, the said Will is not a genuine Will and not executed by the executant with free state of mind.

5. Based on the above rival contentions, the learned District Judge, Nagercoil, analysed various oral and documentary evidence and in support of

various decisions of this Court and the Hon''ble Supreme Court found that the Will was duly proved and there is no undue influence over the

executant and therefore, has granted probate. Against which, the second respondent has preferred the present appeal on various grounds. The

main ground urged in this appeal is that the learned District Judge ought to have held that the first respondent has not discharged her burden of

proof that the will was not executed under undue influence and the learned District Judge ought to have considered the substantive circumstances

surrounding the alleged execution of the Will. It is also submitted that the executant was physically and mentally weak and he was not in a sound

dispossession and also on the ground that there is no Executor appointed under the Will as contemplated u/s 222 of the Indian Succession Act.

6. The point for consideration in this appeal is

i) whether the execution and the attestation of the Will is proved as required under the law?

ii) whether the Will is vitiated by undue influence by the first respondent over the executant?

iii) whether the probate can be granted to the propounder in the absence of an Executor appointed by the Will as contemplated u/s 222 of the

Act?

7. The relationship of the parties are admitted. The petitioner/first respondent and the appellant/second respondent are brother and sister and they

are the children of the said Gunamudayan, who is the executant of the Will dated 11.05.1987 and he died on 11.02.1988. The death certificate is

marked as Exs.P1 and P2. It is admitted that the said Gunamudayan, after his retirement, was living with the petitioner till his death.

8. Mr. D. Sadhasivan, the learned Counsel for the appellant would submit that the Executant namely, Gunamudayan was physically and mentally

weak and not capable of understanding and has been under the influence of the first respondent herein and has executed the alleged will and

therefore, the alleged Will dated 11.05.1987 isnot genuine. The learned Counsel pointed out that no provision was made to the wife of the

Executant and to the appellant herein and in those circumstances, it is evident that the first respondent has exercised her influence over the

executant and hence, the Will has to be rejected. The learned Counsel also pointed out that the first respondent has influenced the father to sell the

properties and the first respondent has also got a settlement deed in favour her and the date of registration of the Will, would show that the Will has

been manipulated by the first respondent. The learned Counsel contended that the mother of the parties, though arrayed as respondent, was not

examined by the first respondent and the District Court was wrong in appreciating the evidence of P.W.2 and P.W.3 regarding the execution and

attestation of the Will.

9. The learned Counsel relied on the judgment reported in Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another,

wherein this Court has held that

...The onus of proving the will was on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of

testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious,

circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine.

10. The learned Counsel also relied on Anath Nath Das and Others Vs. Sm. Bijali Bala Mondal, wherein it was held as

11. In the facts of this case the court below was not justified in observing that the document being registered, the onus was on the opposite party

(meaning the defendants) to prove that the testator had no testamentary power at the time of the execution. The Supreme Court in Rani Purnima

Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, observed that if a will has been registered, that is a circumstance which may,

having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all

suspicion regarding it where suspicious exists, without submitting the evidence of registration to a close examination. If the evidence as to

registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the

document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token,

thereof, the registration will dispel the doubt as to the genuineness of the will. But if the evidence as to registration shows that it was done in a

perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the

execution of a will or did not satisfy himself in some other way (as, for example, be seeing the testator read in the will) that the testator knew that it

was a will the execution of which he was admitting, the fact that the will was registered would not be of much value. Registration may take place

without the executant really knowing what he was registering.

11. The learned Counsel also relied on Totaram Maharu Vs. Ramabai and Others, wherein it was held that,

The propounder has to prove both due execution as well as the testamentary capacity of the testator, and that once those were established, the

onus which rests on the propounder stands discharged. If, however, there was suspicious circumstances surrounding the execution of the Will, such

as, where the signature was doubtful, or the testator was in a feeble state of mind, or the dispositions in the Will appeared to be unnatural, or

improper, or the propounder had taken a prominent part in the execution of the will which conferred substantial benefits on him, the onus was on

the propounder to explain satisfactorily those suspicious circumstances before probate could be ordered to issue, for after all, ultimately it was the

conscience of the Court that had to be satisfied.

12. On the contrary, Mrs. N. Krishnaveni, the learned Counsel for the respondent would submit that the execution and the attestation of the Will

has been proved as required u/s 68 of the Indian Evidence At and Section 63 of the Indian Succession Act. The learned Counsel pointed out that

the District Court had gone extensively into the evidence available on records and found that the execution and the attestation of the Will was

proved and there was no undue influence over the executant and found that the Will is genuine and therefore, there is no necessity to interfere with

the findings of the court below.

13. The learned Counsel relied on 2007 (11) SCC 621 (Savithri and Ors. v. Karthyayani Amma and Ors.) wherein the Supreme Court has held

as follows:

...A will like any other document is to be proved in terms of the provisions of the Succession Act and the Evidence Act. The onus of proving the

will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the will by the testator has to be proved.

At least one attesting witness is required to be examined for the purpose of proving the execution of the will. It is 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 sound disposing state of mind and understood the nature

and effect of the disposition. It is also required to be established that the he has signed the will in the presence of two witnesses who attested his

signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to

explain them to the satisfaction of the court before it can be accepted as genuine.

14. Heard the learned Counsel for the appellant and the learned Counsel for the respondent and perused the entire material on record.

15. This appeal relates to a Christian ""Will"" executed by one Gunamudayan son of Thaveedu in favour of his daughter Stella Mary Joy on

11.05.1987. Being a ""Will"" of a Christian, it has been presented before the District Court, Nagercoil, for probate in Probate O.P. No. 82 of 1989

u/s 276 of the Indian Succession Act. The wife of the executant and the only son of the executant were the respondents in the probate O.P. The

first respondent/wife of the executant sailed along with the petitioner and pending appeal, she died. The probate was opposed by the 2nd

respondent, who is the only son of the executant. It was opposed on the ground that the ""Will"" was not genuine and it was obtained under undue

influence and coercion by the daughter only to deny the rights of the son. Later, it was also attacked on the ground that the testator was not in

sound state of mind and there are suspicious circumstances surrounding the execution of the ""Will"".

16. As required under law, the propounder had examined herself and also the scribe and the two attestors to prove the ""Will"" as contemplated u/s

68 of the Indian Evidence Act. The ""Will"" was marked as Ex.A1. The contesting respondent examined himself and has stated that the ""Will"" was

created by undue influence and coercion by the daughter excluding the son and there is no provision even for the wife and the executant was not in

sound state of mind and there are suspicious circumstances surrounding the execution of the ""Will"".

17. The learned Counsel who appeared for the appellant would submit that the executant and the propounder were living together and the

executant was living under the care and protection of the propounder and therefore, undue influence was excercised to execute the ""Will"" excluding

the son. The learned Counsel also pointed out that the execution is not valid and therefore, the ""Will"" was not executed in a sound state of mind

and there are suspicious circumstances while executing the ""Will"". The learned Counsel relied on Totaram Maharu Vs. Ramabai and Others,

wherein it was held as follows:

The propounder has to prove both due execution as well as the testamentary capacity of the testator, and that once those were established, the

onus which rests on the propounder stands discharged. If, however, there were suspicious circumstances surrounding the execution of the Will,

such as, where the signature was doubtful, or the testator was in a feeble state of mind, or the dispositions in the Will appeared to be unnatural, or

improper, or the propounder had taken a prominent part in the execution of the Will which conferred substantial benefits on him, the onus was on

the propounder to explain satisfactorily those suspicious circumstances before probate could be ordered to issue, for after all, ultimately it was the

conscience of the Court that had to be satisfied.

18. The learned Counsel also relied on Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, , Smt. Jaswant Kaur

Vs. Smt. Amrit Kaur and Others, and AIR 1982 SC 236 (Anath Nath Das and Ors. v. Smt. Bijali Bala Mondal).

19. On the contrary, the learned Counsel for the respondents would submit that the ""Will"" has been executed on 11.05.1987 in favour of the

daughter and the executant died only in the year 1988 after 1. years and therefore, there is nothing to show that the executant was not well or not

in sound state of mind and the propounder had exercised undue influence or coercion. The learned Counsel submitted that the initial burden is upon

the propounder to prove the due execution of ""Will"" and once it is discharged,the onus is upon the respondent to prove that it was executed under

undue influence or coercion or there are suspicious circumstances surrounding the execution of the ""Will"". The learned Counsel relied on 2007 (11)

SC 357 (Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon and Ors.) and 2007 (11) SCC 621 (Savithri and Ors. v. Karthyayaniamma and Ors.).

20. The propounder of the ""Will"" is the daughter and the contesting respondent is the son. The father has chosen to bequeath certain properties in

favour of his daughter excluding the son. It is admitted that the executant was residing under the care and protection of the propounder. From the

evidence of P.W.1 and as well as D.W.1, it is found that the son was initially residing along with the father and after his marriage, due to some

misunderstanding, he went separately. From the evidence and as well as from the documents produced by the propounder, it is seen that the father

had other properties, which he sold to third parties under Exs.A11, 12. That being so, the father and daughter jointly have filed a suit in O.S. No.

57 of 1987 on the file of the Subordinate Judge, Kuzhithurai, against the respondent and two others for declaration of title and partition and other

relieves. Exs.A3 and A4 are the plaint and the written statement filed in the suit. The son also filed a suit against the father in O.S. No. 858 of 1988

which is also on record. However, the ""Will"" dated 11.05.1987 which is marked under Ex.A1 was executed by the father and on 19.05.1987 a

deed of settlement was also executed in favour of the daughter and both the documents were registered on 21.05.1987. It is well settled law that

the propounder has to prove the ""Will"" in accordance with law. The perusal of the evidences 1 to 4 would show that the executant namely,

Gunamudayan had executed the ""Will"" in sound state of mind and the attestors have seen that the executant signed in the document and in turn the

executant had seen the attestors singed the document and therefore, the probator has proved that the ""Will"" in accordance with Section 68 of the

Evidence Act.

21. The next question is whether the ""Will"" has been executed under undue influence by the propounder?

22. It is admitted that the propounder was residing with her parents namely, the executant and the first respondent. She was unmarried and she is

the only daughter. Whether she was in a position to influence her father to execute the ""Will"" only in her favour? It is well settled that simply

because the propounder was living along with the executant will not necessarily mean that she or he exercised such undue influence. The executant

was hale and healthy and he was in sound state of mind. This fact are proved by the conduct of the parties. He had prosecuted cases against his

son and he had been in connection with his brother and he had alienated some of his properties during the relevant period.

23. It is also admitted that the relationship between the father and the son was strained. Suits were pending between the father and the son.

However, the recitals in the deed would show that he had considered the position of the son also before bequeathing the property in favour of his

only daughter. It is also to be seen that he has bequeathed only one property under the ""Will"" and not the entire property. The remaining portion of

the property was settled under a settlement deed. The Trial Court has rightly found that had he been influenced, he would have settled both the

properties under the ""Will"" and he would not have chosen two modes of transfer of property. Therefore, these circumstances would show that

there is no undue influence by the daughter over the father.

24. As far as the suspicious circumstances surrounding the execution of the ""Will"" is concerned, the respondent was not able to bring any such

suspicious circumstances except the ""Will"" was executed on 11.05.1987 and was not registered on the same day and a settlement deed was

executed on 19.05.1987 and both the documents were registered only on 21.05.1987. The another circumstance canvassed is that the attestors

and the scribe are the same for both the document.

25. In 2007 (11) SCC 357 (cited supra), it was held that it is well settled that the functions of the Probate Court are to see that the ""Will"" executed

by the testator was actually executed by him in a sound state of mind without coercion or undue influence and the same was duly attested.

26. In my considered opinion, the propounder had proved the execution of the ""Will"" by the testator in a sound dispensing state of mind without

any coercion or undue influence and there is no suspicious circumstances surrounding the execution of the ""Will"". The alleged suspicious

circumstances by the respondents is not well founded.

27. Only when there exist suspicious circumstances, the onus would be on the propounder to explain the circumstances to the satisfaction to the

court before the will can be accepted as genuine. The burden of prove that the ""Will"" has been executed and is a genuine document is always on

the propounder and she/he is to prove that the testator has signed the ""Will"" in a sound state of mind. Sufficient evidence was let in to prove the

execution. The ""Will"" was executed in the year 1987 and thereafter, the executant had participated in various litigations against the respondents and

he died only in the year 1988, after 1 years of execution of the ""Will"". When the dispossession appears to be natural, the Will has to be accepted

and the Trial Court was right in accepting the ""Will"" and had issued probate. I have no reason to interfere with the decree and judgment of the trail

court. The points are decided accordingly. The order of the lower court is confirmed.

In the result the appeal is dismissed. No costs. Consequently, connected M.P. is closed.