

(2011) 08 MAD CK 0319

Madras High Court

Case No: Second Appeal No. 747 of 2007 and M.P. No. 1 of 2007

Kasthuri

APPELLANT

Vs

N. Rajendran and Others

RESPONDENT

Date of Decision: Aug. 26, 2011

Acts Referred:

- Evidence Act, 1872 - Section 68
- Succession Act, 1925 - Section 63

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

Bench: Single Bench

Advocate: V. Raghavachari, for the Appellant; T.R. Shanmugam, for RR 1 to 4, for the Respondent

Final Decision: Dismissed

Judgement

R.S. Ramanathan, J.

The Plaintiff is the Appellant.

2. The Plaintiff filed the suit for partition of 5/8 share in the suit property. The case of the plaintiff/appellant was that the suit property belonged to her father Narayana Pillai who died in the year 1952 leaving behind his widow Yasodammal, two daughters viz., the Plaintiff and the third Defendant and two sons viz., defendants 1 and 2 and after the death of the father, the mother became entitled to half share in the property and on 23.2.1995, she bequeathed her half share in the property in favour of the Plaintiff/appellant and a Will was executed by her mother while she was in a sound and disposing state of mind and the Plaintiff/appellant is having 1/4 share on her own accord and as per the bequest under the Will, she is entitled to half share and therefore, she is entitled to 5/8 share in the property and therefore, filed the suit for partition.

3. Defendants 1 and 2 contested the suit disputing the alleged Will executed by their mother Yasodammal in favour of the Appellant/plaintiff and further contended that

the Will relied upon by the Plaintiff/appellant must be a fabricated one and it was not validly executed and Yashodammal, had already executed a Will in the year 1992 in favour of Defendants 1 and 2 and therefore, she would not have executed the Will relied upon by the plaintiff/appellant and therefore, the Plaintiff/appellant would not get any right in the suit property.

4. The Trial Judge, accepted the case of the plaintiff/appellant and held that the Plaintiff/appellant proved the execution of the Will by Yasodammal by examining the attesting witness and the Will was validly executed by Yasodammal and under the Will, the Plaintiff/appellant got half share in the property and therefore, the Plaintiff is entitled to half share in the property and decreed the suit.

5. Respondents 1 to 4 filed appeal before the appellate court and the first appellate court held that the plaintiff/appellant has not proved that the Will was validly executed by Yasodammal and the Plaintiff/appellant cannot claim any right under the Will. Hence, the second appeal.

6. The following substantial questions of law were framed at the time of admission:

1. Whether the lower appellate court is correct in law in holding that Ex.A2 Will was not executed by the Plaintiff's mother willingly and in a conscious state of mind in the absence of any evidence.

2. Whether the lower appellate court is correct in law in not appreciating the provisions of Hindu Women Property Rights Act 1937 for deciding the property right of Yasodammal?

7. It is submitted by the Learned Counsel appearing for the Appellant Mr. V. Raghavachari that the lower appellate court, without properly appreciating the evidence of PW2, the attesting witness and the evidence of PW1, erred in holding that the Will was not proved by the plaintiff/appellant. The Learned Counsel for the Appellant further submitted that there is no suspicious circumstance in the execution of the Will and the mother gave property to her daughter under the Will disinheriting the other heirs and the same cannot be termed as a suspicious circumstance and it is the evidence of P. Ws.1 and 2 that the Will was executed by Yasodammal and an Advocate prepared the draft as per the dictation of Yasodammal and one of the attesting witnesses was examined as PW2 and he has also given oral evidence regarding execution of the Will by Yasodammal and it was not proved that Yasodammal was not in a sound and disposing state of mind at the time of execution of the Will and therefore, the lower appellate court ought to have held that the Will was validly executed by Yasodammal and dismissed the appeal filed by Respondents 1 to 4. He also relied upon the judgment reported in [Bharpur Singh and Others Vs. Shamsher Singh](#), [Uma Devi Nambiar and Others Vs. T.C. Sidhan \(Dead\)](#), [Crystal Developers Vs. Smt. Asha Lata Ghosh \(Dead\) through LRs. and Others](#), [Pushpavathi and Others Vs. Chandraraja Kadamba and Others](#), the judgment of this Court in A.S. No. 207 of 1961 and Gopal Swaroop v. Krishna Murari

Mangal and Ors. (2011 SAR (SC) 35) in support of his contention.

8. On the other hand, the Learned Counsel for respondents 1 to 4 contended that the lower appellate court has rightly rejected the Will holding that there are suspicious circumstances surrounding the execution of the Will and the propounder viz., the Appellant took active part in the execution of the Will and regarding the evidence of PW2, it cannot be said that the Will was executed by Yasodammal, after understanding the contents of the document. The Learned Counsel for the Respondents, therefore, submitted that the Appellant/plaintiff failed to prove the Will in the manner known to law and in the absence of the Will, the Appellant/plaintiff is not entitled to claim any share.

9. The Learned Counsel for the Appellant submitted that there was no plea taken by Respondents 1 to 4 about the mental capacity of the testatrix at the time of execution of the Will and they have only doubted the thumb impression found in the Will, Ex.A2 and Ex.A2 alongwith other admitted documents containing the thumb impression of Yasodammal viz., the earlier Will executed by Yasodammal Ex.B4, registered mortgage deed executed by Yasodammal alongwith her children in favour of Rafiuddin Khan Saheb on 7.12.1963 under Ex.B4 were sent to handwriting expert and the handwriting expert gave opinion that the thumb impression found in Ex.A2 Will is similar to the thumb impression found in Ex.A4 another Will executed and the mortgage deed and therefore, contended that when the thumb impression of Yasodammal found in the Will Ex.A2 was a genuine one, it cannot be contended by the Respondents that the Will was not validly executed by Yasodammal and this was not properly appreciated by the lower appellate court.

10. Heard both sides. In this appeal, we will have to see whether the Will, Ex.A2 was validly executed by Yasodammal. It is the specific case of the appellant/plaintiff that Yasodammal, while in a sound and disposing state of mind, executed the Will bequeathing her half share in the suit property in her favour. To prove the execution of the Will, the Appellant/plaintiff examined PW2, one of the attesting witnesses to Ex.A2. Therefore, we will have to see whether Ex.A2 was proved by the appellant/plaintiff as validly executed by Yasodammal.

11. Admittedly, at the time of execution of Ex.A2, Yasodammal had two sons and two daughters. It is also admitted that prior to the execution of Ex.A2, Yasodammal had already executed a registered Will bequeathing the suit property to her sons viz., Defendants 1 and 2. It is also seen from the evidence of P. Ws.1 and 2 that the appellant/plaintiff, the legatee under the Will played a dominant role in the execution of the Will. Therefore, we will have to see whether the Appellant/plaintiff has proved the due execution of the Will having regard to the above circumstances.

12. Mr. Raghavachari, Learned Counsel for the Appellant submitted that the conduct of the mother disinheriting the other legal heirs and giving the property to one legal heir cannot be considered as a suspicious circumstance and the Will was executed

only to deviate from the normal rule of succession and therefore, the fact that two sons and one daughter were disinherited under the Will cannot be held against the Appellant to arrive at a conclusion that the Will was executed in a suspicious circumstance. He further submitted that as per the provisions of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, the Will has to be proved by examining one of the attesting witnesses and in this case, PW2 was examined to prove the due execution of the Will and it was not suggested to him that he colluded with PW1 in fabricating the Will and therefore, in the absence of any suggestion to PW2, the lower appellate court ought to have accepted the evidence of PW2 and upheld the Will. He, therefore, submitted that in the absence of any suggestion to one of the attesting witnesses while he was in the box that he has conspired to forge the Will alongwith PW1, it cannot be stated that the Will was not proved.

13. A reading of the judgments relied upon by the Learned Counsel for the Appellant would make it clear that a duty is cast upon the propounder of the Will to prove the valid execution of the Will and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the attester as required by law is sufficient to discharge the onus which is placed upon the propounder of the Will. Where there are suspicious circumstances, the propounder of the Will has to expel them away to the satisfaction of the Court and when the dispositions made in the Will being unnatural, improbable or unfair, that would also give an indication that the testator's mind was not free and in that case, it is the duty of the propounder to remove the suspicious circumstances from the mind of the court.

14. In the judgment reported in [Bharpur Singh and Others Vs. Shamsheer Singh](#), the Honourable Supreme Court laid down the following instance as suspicious circumstance:

- (i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;
- (ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;
- (iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

15. In the judgment reported in [Uma Devi Nambiar and Others Vs. T.C. Sidhan \(Dead\)](#), it was held as follows:

A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the

fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar* it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. (See *Pushpavathi v. Chandraraja Kadamba*.) In *Rabindra Nath Mukherjee v. Panchanan Banerjee* it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of will. of course, it may be that in some cases they are fully debarred and in some cases partly.

16. Bearing in mind the principles laid down in the above judgments, we will have to see whether the plaintiff/appellant has proved valid execution of the Will. As stated supra, admittedly, under Ex.A4, Yasodammal executed a registered Will bequeathing the property in favour of his two sons in the year 1992. It is also admitted that Yasodammal was living with the first respondent and no reason has been stated in Ex.A2 Will for not giving any share to the other heirs and for preferring the Appellant. In Ex.A2, there was no reference to the earlier Will executed by Yasodammal. If really Yasodammal had intended to cancel the earlier Will, she would have mentioned in Ex.A2 that the earlier Will Ex.A4 was executed in certain circumstances and having regard to the subsequent conduct of the parties, she did not want to give effect to the said Will and therefore, the present Will was executed by her in favour of the Appellant. Unfortunately, in Ex.A2, nothing has been stated about the earlier Will. The conduct of PW1 also proves suspicion about the execution of the Will. It is not the case of the plaintiff/appellant that the Will was executed by Yasodammal while she stayed in her house. According to the evidence, Yasodammal went to the court building, contacted an Advocate, dictated the terms of the Will which was written by the Advocate and after typing, Yasodammal signed the Will in the presence of the attesting witnesses who also witnessed the signing of the Will by Yasodammal by affixing her thumb impression and Yasodammal had also seen the witnesses signing the Will and the Will was also attested by the Advocate and notarised by the other Advocate. Nevertheless, no attempt was made to examine the Advocate who had drafted the Will and also signed in the Will.

17. On the other hand, PW2 was examined to prove the valid attestation and having regard to the evidence of PW2, it is made clear that he is a person who has given evidence to the dictates of PW1. It is the evidence of PW2 that he was asked to come to the court building by the plaintiff/appellant. He had further stated that the appellant was present at the time of executing the Will and the following evidence

would also prove that the Will could not have been signed by Yasodammal after knowing the contents of the Will. He has stated that Yasodammal dictated the Will and that was taken note of by the Advocate and Kasthuri, the Appellant/plaintiff took the draft for typing and after typing, the Plaintiff/appellant brought back the paper and Yasodammal affixed her thumb impression. PW2 did not state that after the Will was typed by the Appellant/plaintiff, the Will was read over to Yasodammal and thereafter, she affixed the thumb impression. Therefore, having regard to the fact that the appellant had taken active part in the execution of the Will, in the absence of any evidence that the Will was read over to the testatrix after it was typed and no reason was stated to disinherit the other heirs and no reason was stated as to why the Will was not registered when Yasodammal had gone to the extent of going to the court to draft the Will and had earlier executed a registered will, according to me, the above suspicious circumstances have not been cleared by the Appellant.

18. Further, in the Will, the witnesses did not write their father's name and address. Therefore, considering all these circumstances and the non-examination of the Advocate who drafted the Will and in whose presence the Will was executed by Yasodammal and the Plaintiff/appellant having taken a dominant role and no reason was stated for disinheriting the other legal heirs and the same was stated in the earlier Will, Ex.A4 and there is no evidence that the Will was read over to Yasodammal after it was typed would prove that the Will would not have been executed by Yasodammal after having understood the contents of the Will and the lower appellate court was, therefore, right in holding that the Will was not proved by the plaintiff/appellant and the Will could not have been executed by Yasodammal while she was in a sound and disposing state of mind after understanding the contents of the Will. Further, merely because the thumb impression in the Will tallies with the thumb impression found in the other admitted documents, we cannot draw a presumption that the Will was validly executed. I, therefore, hold that the plaintiff/appellant failed to prove the due execution of the Will in the manner known to law and she has not removed the suspicious circumstances surrounding the execution of the Will. Hence, the first substantial question of law is answered against the Appellant.

19. Admittedly, the property belonged to the father of the Appellant and he died in the year 1952 and the property was his separate property. Therefore, on his death in the year 1952, the mother and the three sons inherited equal share in the property and the mother got 1/4 share and after the death of one of the sons, without leaving any issue, the mother became entitled to half share in the property and in the absence of any Will, her half share devolved upon her two sons, two daughters. Therefore, the plaintiff/appellant is entitled to 1/8 share in the suit property.

20. Though a Will was marked by the Respondents as Ex.A4, as it was not proved by examining the attesting witnesses, Respondents 1 to 4 will get no share under

Ex.A4. Therefore, the second substantial question of law is answered in favour of the Appellant holding that as per the provisions of the Hindu Women's Right to Properties Act, Yasodammal was entitled to claim equal share alongwith her sons and therefore, she became entitled to 1/4 share and on the death of one of the sons, she became entitled to half share and that half share devolved upon her legal heirs viz., the Plaintiff and Respondents 1 to 5. Therefore, the Plaintiff is entitled to 1/8 share in the property. Hence, the judgment and decree of the lower appellate court is modified and the Plaintiff is entitled to 1/8 share in the suit property.

21. In the result, the second appeal is partly allowed and a preliminary decree for partition of 1/8 share of the appellant/plaintiff is passed. No costs. The connected miscellaneous petition is closed.