

In Re: Andal Ammal

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Court : Chennai

Decided On : Nov-04-1967

Reported in : (1968)1MLJ356

Appellant : In Re: Andal Ammal

Judgement :

ORDER

T. Ramaprasada Rao, J.

1. The Plaintiff in this suit filed O.P. No. 35 of 1966 for the grant of Letters of Administration with the will annexed to the property and credits of her deceased father Rayapadi Nallasubbaiya under Section 232 of the Indian Succession Act and under the relevant rules framed in the Original Side of this Court. It was sought to be proved in the common form but as persons interested came on record and attacked the validity of the will, it became necessary for the plaintiff to prove the will in solemn form. The defendant having entered a caveat and opposed the grant, the Original Petition was converted into a Testamentary Original Suit, T.O.S. No. 7 of 1966, and this is the suit which is now being adjudicated upon.

2. The plaintiff's case is that Exhibit P-2 is the last will and testament of her father Rayapadi Nallasubbsiya and the said, will was executed by him duly at Madras on the 16th day of February, 1955 in the presence of witnesses and the same has

also been registered in the office of the Sub-Registrar of Sowcarpet as Document No. 3 of 1955 in Book III. The deceased left, besides the plaintiff, another daughter Chengammal who is the defendant in this action. The plaintiff states that the will having been executed in accordance with the prescribed mandates of the statute, she is entitled to the grant as prayed for. The defendant, however, filed a written statement stating that the grant ought not to be made in favour of the plaintiff on the ground that no will as alleged by the plaintiff was executed by the deceased, and even if it was so executed by the deceased, it was under the influence of the plaintiff and the will was not executed whilst the deceased was in a free and disposing state of mind. Her main grievance is that as no provision has been made to her and as there is no reason for such differentiation there is a presumption that the will have been brought about by the undue influence brought to bear upon the deceased by the plaintiff, her husband and others. Hesitantly the defendant pleaded that on the date of death of the deceased his absolute title to the property was in jeopardy as by then the High Court in A.S. No. 136 of 1957, held that the properties which are the subject-matter of the will were the properties of the wife of the deceased. I used the word hesitantly because the judgment of this Court in A.S. No. 136 of 1957 was reversed in L.P.A. No. 13 of 1961, the judgment in which was pronounced by this Court on 7th March, 1963. Exhibit P-1 is the judgment in the said Letters Patent Appeal. Thus, the relevant dates for purposes of Chronology are

- (1) 16th February, 1955 the date of will,
- (2) 26th September, 1956 the date of judgment of the first Court in which the defendant claimed that the properties were that of her mother's,
- (3) 28th October, 1960, the date of the appellate decree in A.S. No. 136 of 1957, High Court, Madras,
- (4) 19th January, 1962, the date of death of the deceased, and
- (5) 7th March, 1963, the date of judgment in L.P.A. No. 13 of 1961. I may at once dispose of the last contention of the learned Counsel for the defendant that on the date of death of the deceased he cannot be deemed to have necessary title to the

suit properties which enabled him to deal with the properties in a testament. This is an argument without any substance, because on 7th March, 1963, the title of the deceased to the properties was upheld by this Court and on such upholding it dates back to the date of the will, namely, 16th February, 1955. It is also to be noted that on 16th February, 1955, the deceased had the necessary power to subject his properties under a testamentary disposition and that capacity to dispose of the properties by a will having been ultimately upheld by this Court, it cannot be contended by the defendant that the will should fail because of an intermediary decision of this Court in A.S. No. 136 of 1957 wherein his title was not approved.

3. Rightly, therefore, this Court framed the only issue arising on the pleadings,, which runs as follows:

Is the will purported to have been executed by Rayapadi Subbayya executed by him while he was in a sound and disposing state of mind?

4. On the frame of the issue, the onus is on the defendant. But as initially the burden is on the plaintiff who has come up to prove the will in solemn form, the plaintiff opened the case and examined the witnesses on her side. As already stated by me, the will was executed on 16th February, 1955 and registered on 17th February, 1955. The testator lived for seven long years thereafter and died on 19th January, 1962. P.W. 1 one of the attesting witnesses, who impressed me very much, would state that he knew the family of the testator for a considerable length of time and that he attested the will. The plaintiff originally sought to prove the will in a common form and in the said proceedings, P.W. 1 filed an affidavit to the effect that he was present along with the other attesting witness, Tulasi Das, on 16th February, 1955 at the house of the deceased at No, 30, Kutti Maistry Street and that he and the other attesting witness did see the deceased set his right thumb impression at the foot of the testamentary paper Exhibit P-2. This was sufficiently explained by him in the witness box. He admitted candidly that he was not present when the will was signed by the testator by affixing his right thumb impression. But he would state that as soon as he was called to attest the instrument, he expressed a desire that he would read the will and read it loudly to

the testator himself so that he could find out from him whether the testator was acknowledging it as his own. His evidence is that on the testator having no objection for this witness reading out the will, he read out the same to him and the testator is said to have told him that he agreed to the contents. This is a case in which the attesting witness swears that the testator acknowledged the will as his own, and the normal inference is that the right thumb impression affixed on the said will has been so affixed by the testator out of his own free will and volition and that was the thing which he unreservedly expressed to the witness P.W. 1 when he read over the testamentary instrument to him. This is, therefore, a case in which the testator acknowledged the correctness of the will and therefore the thumb impression affixed thereto and this is definitely permissible in law. The object of attestation is for the testator to know that he has ocular evidence of the instrument having been subscribed by the witnesses. In so far as the attesting witnesses are concerned, the only statutory requisite is that they should have the necessary animus attestandi or intention to attest this document. In the instant case the witnesses attested the testament so that they could bear witness to the fact that the will was acknowledged to be the will of the deceased. Such acknowledgment by the testator to P.W. 1 that he has made the will and therefore signed the same is equivalent to actually executing the will in the presence of the witnesses. In fact, the proposition that if one of the attestors speak to the signature of the testator, then it is enough and no further probe is necessary to satisfy whether the signature as acknowledged has been affixed. As pointed out by a Full Bench of this Court in *Ganshamdoss v. Gulab Bi Bai* : AIR1927 Mad1054 a personal acknowledgment of execution need not necessarily be restricted to an express statement to that effect, but may include words or conduct, or both, on the part of the testator which may be construed unequivocally as such an acknowledgment. In this case, by the conduct of the testator it is proved that he has acknowledged the will and therefore the necessary inference has to follow that the testator has duly executed the will by affixing his right thumb impression. P.W. 3 would state that in spite of her efforts she is unable to get the second attesting witness. But there is evidence of P.W. 1, which I accept, that he attested the will of that. The second witness Tulasidoss was also present and he attested the same in the presence of the testator. I am therefore satisfied that the will has been duly

executed and has been duly signed by the deceased.

5. On other aspect in this case is that this is a registered will. P.Ws. 2 and 4 prove such registration. They were the identifying witnesses in the office of the Sub-Registrar. They also speak to the fact that the testator affixed his left thumb impression before the Sub-Registrar and they identified the testator as such witnesses. P.W. 2 made certain interlineations at the instance of the sub-Registrar. But this is obviously with the consent of the, testator. The interlineations referred to the writing in Tamil at or near the right thumb impression of the deceased, in Exhibit P-2 to the effect that the thumb impression was the right thumb impression of the testator. There were certain other formal corrections and nothing can be said to be incriminatory in so far as these corrections are concerned. One thing emerges from the evidence of P.Ws. 2 and 4 that there was an Unequivocal acknowledgment of the will by the deceased, before the Sub-Registrar and in their presence. P.W. 4 Dr. Habibullah Baig, who is a sitting member of the Madras Legislative Assembly and a Councillor of the Corporation of Madras, states that the testator was his patient and that he was. in sound health and mind, at the time when he caused, the registration of the will. P.W. 4 would also say that a day or two prior to the registration, the testator wanted to settle the properties on his daughter, and when he was called on that day to go to the sub-Registrar's Office he readily consented because he was very well acquainted with the testator and his family. P.W. 2 was a clerk in the office in which the deceased, was working. He also corroborates that the testator acknowledged the will in the Sub-Registrar's Office and that he was the person who made the interlineations at the instance of the Sub-Registrar. Apparently what, the witness means, is that the Sub-Registrar wanted him to write that it was the right thumb impression of the deceased. The testator was present at that time. It is impossible to conceive that P.W. 2 did not formally consult the testator who was present, to write as against the right thumb impression, that it was so of the testator. The normal presumption would be that such a consultation was made and indeed, P.W. 2 made the interlineations and the writing with the consent of the testator.

6. The will having been duly registered in the office, of, the Sub-Registrar, another presumption 'in favour, of its validity arises in law. It cannot be disputed that the

identifying witnesses, P.Ws. 2 and 4 were present in the office of the Sub-Registrar, with the animus to attest. Even the Sub-Registrar is reported to have queried the testator whether the instrument was his and. executed by him. This is referred to by P.Ws. 2 and 4. Therefore, the ratio in the Full Bench decision of this Court in Venkata Sastri V, Rahina Bee : (1962)1MLJ78 , applies. The opinion of the Full Bench was that the signatures of the attesting officer would amount to valid attesting signatures to the document if the conditions necessary for a valid attestation have been satisfied and the persons affixing the signatures as the animus, to attest. Even on this principle I am of the view that the will in this case has been duly executed and duly Attested and has been proved in the solemn form by the plaintiff.

7. The case of the defendant is that as, her interests have been totally disregarded, a presumption against the validity of the will arises and that it should be deemed to have been the result of undue influence exercised by the plaintiff. P.W. 3, who was always living with the deceased. The onus probandi regarding the proof of wills cannot be better stated except to adopt the passage of Baron Parke in Barry, v. Butlin (1838) 2 Moore 430 which has become a locus classicus running as under:

These rules are two: the first, the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and. jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

In so far as the first rule is concerned, the plaintiff has satisfied this Court that the will as propounded is the last will of a free and. a capable testator. As regards the second, though the will is propounded by the person who takes the benefit under it, yet the defendant has not discharged her burden in establishing that the

circumstances under which the will was executed appear to be suspicious and that it was secured by the imposition of Undue influence of P.W. 3. The dependant did not go into the box, nor has she examined any one to prove, her case. The issue as framed casts the burden of proving the same on the defendant. No attempt has been made. On other hand, the evidence of P.W. 4 who is a doctor is that the testator was sound in health and mind on the date when he registered the will. Excepting for the bare pleading in this case, the defendant has not sought to prove that there is any element of suspicion in the matter of the execution and contents of the will in question. I accept the evidence of P.Ws. 1, 2 and 4 and find-that the will has been duly executed when the testator was in sound health and in a disposing state of mind and on the only issue framed in the suit, in favour of the plaintiff and against the defendant.

8. The suit is therefore decreed, and. Letters of Administration shall issue with the will Exhibit P-2 annexed thereto as the legatee under the will of the deceased to have effect throughout the State of Madras on her furnishing personal security as is usual As the parties are close relations, there will be no order as to costs.