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Court : Chennai

Decided On : Feb-09-1999

Reported in : (1999)3MLJ608

Appellant : B. Viswanathan and ors.

Respondent : B. Chandrasekaran and ors.

Judgement :

V. Bakthavatsalu, J.

1. The defendants 1 to 3 are appellants.
2. The plaintiff has filed a suit for partition. The case of the plaintiff is as follows:

The plaintiff and third defendant are the son and daughter of late Balasubramanian Pillai through his first wife. The second defendant is the daughter and the first defendant is the son of late Balasubramanian Pillai through his second wife. His family members have entered into a registered family arrangement on 14.11.1969. As per the family arrangement 'A' Schedule properties were allotted to the father of the plaintiff. As per the said document, he should enjoy the properties absolutely and if any surplus is available after his death 1/4th share should be taken by the third defendant and the remaining 3/4th share should be equally taken by the plaintiff and the defendants 1 to 3. Balasubramaniya Pillai died on 6.7.77 without alienating any of his property. Alienation for legal and family necessity alone was

intended in the family arrangement. The first defendant relying upon the Will dated 22.6.1977 alleged to have been executed by the said Balasubramaniya Pillai is claiming title to the suit properties. In pursuance of the will, 11th item was sold in favour of the defendants 4 and 5 on 27.10.1980. Balasubramaniya Pillai had no right to dispose of his property by a Will to a particular person. The Will was not executed in a sound disposing state of mind. The alleged Will is a fabricated one. As per the family arrangement, the plaintiff is entitled to 1/4th share in the 'A' schedule properties and the defendants 1 to 3 equally. The father of the plaintiff died on 6.7.1977. Therefore, the suit is filed for partition and mesne profits.

3. The case of the first defendant is as follows: The plaintiff is not in possession of the suit properties, The plaintiff's father has got other shares and they were not impleaded as parties to the suit. Hence, the suit is bad for non-joinder of necessary parties. The plaintiff's father's sisters filed a suit in O.S.No. 236 of 1973 before the Sub Court, Tiruchirapalli, questioning the family arrangement and the same was dismissed. The appeal filed against the said judgment in A.S.No. 75 of 1977 is pending. This defendant's father enjoyed the suit property absolutely in his own right. He can deal with the property in any way and therefore, the plaintiff has no right to question the same. In order to avoid the dispute between the parties, this defendant's father had executed the Will in favour of this defendant. He has taken possession of the property as per the Will. The plaintiff has not raised any objection. This defendant sold the 11th item in favour of the defendants 4 and 5. The defendants 2 and 3 raised some contention in their written statements.

4. The case of the defendants 4 and 5 is as follows:

The 11th item of the suit property was bequeathed to the first defendant as per the Will and it is the last Will duly attested and registered in accordance with law. These defendants purchased the property for a valuable consideration. In any event, the 11th item purchased by these defendants may be allotted to the share of the first defendant.

5. On the above pleadings, the trial court has framed six issues. On consideration of oral and documentary evidence, the trial court granted a decree for partition. Against the said judgment and decree, the first defendant has preferred an appeal

in A.S.No. 63 of 1984. The learned Subordinate Judge, Karur, by his judgment dated 3.1.1986 has dismissed the appeal. The defendants 1 to 3 have come forward with this second appeal.

6. The following substantial questions of-law were formulated while admitting the second appeal:

1. Whether the construction placed on Ex.A- 1, by the courts below is correct, and
2. Whether the conclusions of the court below that the Will is not true is sustainable in law, when the attestors have been examined including the Sub-Registrar and when there is no suspicious circumstances at all to affect the truth and genuineness of the Will?

7. The plaintiff and the third defendant are the son and daughter of late Balasubramanian Pillai through his first wife. It is not in dispute that the second defendant is the daughter and first defendant is the son of the said Balasubramanian through his second wife. It is admitted that under Ex.A-1 dated 22.11.1969, the said Balasubramanian and his family members entered into a family arrangement where under the properties were allotted to each of the members. The arrangement entered into under Ex.A-1 is as follows:

The plaintiff contends that he is entitled to the suit properties as per the terms of the above family arrangement. The first defendant claim title to the suit property by virtue of the Will Ex.B-1 alleged to have been executed on 22.6.1977. The first defendant contends that he became absolutely entitled to the suit properties and that subsequently, he sold one of the items described in the Will in favour of defendants 4 and 5. Under Ex.B-9 dated 27.10.1980. Defendants 4 and 5 claim title to item 11. The plaintiff denies the truth and validity of the Will Ex.B-1. It is the case of the plaintiff that Balasubramanian was not competent to execute any Will, since he was not given power to dispose of the property under the Will and that in view restrictive clause contained in Ex.A-1 the alleged Will is not valid in law. On the other hand, it is contended by the defendants/appellants that Balasubramanian was given absolute right in the properties and that he was entitled to dispose of the properties under the Will and that even if there is any restrictive clause, it is not

valid in law and in support of the same, he also relies upon a decision reported in *The Official Receiver, West Tanjore v. Samudravijayan Chettiar and Ors.* (1939) 1 M.L.J. 574. It is held in the above decision that donees acquired an absolute estate under the settlement deed subject to the condition that the donor should enjoy the income during her life and that the words in the deed prohibiting the alienation should be disregarded. In *Subbayyan Chettiar v. Rajaram* : (1958)1MLJ335 , it is held that the subsequent clause cannot control the full import or effect of the operative sentence which precedes it and by which the settlor had conferred an absolute estate to the wife.

8. But the appellate court has held that the recital in Ex. A-1 can be taken only that Balasubramanian was given absolute right in A Schedule property and that a condition was imposed that if any property remains surplus after his death, the property that is, 1/4th share shall devolve on the third defendant and the remaining 3/4th share on the plaintiff and defendants 1 to 3 and that he was given right only to alienate the property and not by way of testamentary disposition. The approach of the appellate court regarding interpretation of the recitals found in Ex.A-1 cannot be sustained. It is clearly recited in Ex. A-1 as in the earlier clause, it is stated that the sharers who are allotted property shall be in absolute enjoyment of the property with powers of alienation. On reading the entire recitals found in Ex.A-1, it is clear that Balasubramanian was given absolute right to dispose of the property during his lifetime. The recital will clearly show that only surplus remaining after lifetime of Balasubramanian should be divided between other sharers. Therefore, the findings of the appellate court that Balasubramanian Pillai was not empowered to dispose of the property by way of the Will cannot be accepted.

9. The fact that Balasubramanian Pillai was competent to execute the Will during his lifetime will not solve the problem created in this suit. As the plaintiff denies the genuineness of the Will, the burden is upon the first defendant to prove that the Will was executed by his father in a sound disposing state of mind. Both courts have given concurrent finding that the will is not true and that it is fabricated. The courts below have also pointed out certain suspicious circumstances surrounding the execution of the Will. As the first defendant is the propounder of the Will, every legitimate suspicion should be completely removed by him. It need hardly be

stated that the onus is on the propounder of the Will to remove all suspicious circumstances surrounding the execution of the Will. The evidence adduced by the first defendant on this aspect was scanned by the courts below with minute details and have come to the conclusion that the Will is not a genuine document.

10. Learned Counsel for the appellants assails the findings of the courts below on this aspect of the case. Learned Counsel for the appellants contended that the defendants have examined D.W.2 the scribe and attesting witness and also D. W.3 another attestor before the Sub-Registrar and D.W.4 the Sub-Registrar and that the evidence of the above witness were not properly considered by the courts below.

11. I am unable to accept the contention of the appellants that the execution of the Will has been duly proved in view of the certain clinching circumstances brought out in the evidence. As already stated, Balasubramanian during his lifetime has divided the properties under family arrangement in favour of all the sharers. If that is so, what was the necessity to bequeath the entire suit property, an extent of 7 acres, in favour of a particular sharer. The reason for executing the Will is stated in the document. It is recited that his son the first defendant has been looking after him and that in a suit filed by one of his sister namely, Kundalammal in O.S.No. 236 of 1973, she contended that family arrangement was not binding on her and that the first defendant was helping him in conducting of the above suit which ended in his favour and that the said Kundalammal filed appeal A.S.No. 75 of 1977 and that the entire proceedings on his behalf were conducted by his son the first defendant and that the plaintiff developed animosity against him and was neglecting him and that therefore, he executed the above Will. I may say at the outset, that the reason given in the Will for executing the Will in favour of the first defendant is unnatural. The plaintiff is a Teacher working at Trichy. It is seen that the first defendant was minor on the date of Ex.A-1, the family arrangement. The suit was filed by the sister of Balasubramanian in the year 1973 and that the same was disposed of on 31.8.1976. If that is so, the first defendant would have been only a boy on the date of disposal of the earlier suit. D.W.2 the scribe of the Will has stated that he also wrote promissory note for Balasubramanian. and that that he was able to attend the court and contact him for typing and writing the

documents. P.W. 1 the plaintiff has stated that he was assisting his father till the suit pending before the Sub-Court. As the first defendant was a young boy during the pendency of the above suit, it is highly improbable that he was rendering all assistance to Balasubramanian to conduct the above case.

12. There is another clinching circumstance which would show that Balasubramanian would not have, affixed his thumb impression in the Will. It is admitted that Balasubramanian was a signatory. But, in the Will only his thumb impression was affixed. D.W.2 claims to be the scribe and attesting witness of the Will. He has stated in his evidence that Balasubramanian expressed his inability to sign as his hands were shaking and that when he went to bathroom to pass urine, one Sreenivasan wrote the recital that the thumb impression is that of Balasubramanian. D.W.2 has admitted that Balasubramanian affixed his thumb impression when he was present and that when Balasubramanian was affixing his thumb impression he came to know that his hands were shaking. When thumb impression was affixed in the presence of D.W.2 he should have written the recital that it is the L.T.I of the executant. The person who wrote the words LTI has not been examined, though he was available. It is significant to note that D.W.2 did not write in the document that as hands of the executant were shaking his thumb impression and keeral were obtained in the document. D.W.2 has clearly admitted in his cross examination that he came to know that the hands of the executants were shaky only at the time when he put his thumb impression. But, in Ex.B-1, in the concluding portion of the document, it is stated that as his hands were shaky, he could not sign in the document and that therefore, he has put keeral. D.W.2 has admitted that he did not write the above recital in the document. If that is so, it has to be held that the above recital is only an interpolation. The propounder of the Will is unable to explain as to who is the author of the above sentence which are referred to above. D.W.4 the Sub-Registrar has admitted that when new sentences are written in the document, the author has to write But, he could not say as to who is the author of the above sentence. Therefore, it is doubtful whether the above recitals were written on the date of execution of the Will, or on the date of presentation of the document for registration.

13. It is admitted that the testator was suffering from diabetes prior to the date of Ex.B-1 and the said fact is also admitted in the Will. It is also admitted that the testator died few days after the date of Ex.B-1. In the above circumstances, the burden is heavy on the defendants to prove that the testator was in a sound disposing state of mind on the date of Ex.B-1. The evidence of D. W.3 is pressed into service by the defendants to prove the execution of the Will. D.W.3 is not the attester of the Will. But, he speaks to the fact relating to execution and attestation of the Will. He has categorically admitted in his cross-examination that he did not sign in the Will. He has signed only before the Sub-Registrar. The evidence of D.W.3 cannot be taken into consideration for holding that the Will was duly executed and attested in view of the suspicious circumstances noted above.

14. D.W.4 is the Sub-Registrar who registered the document. Learned Counsel for the appellants contended that the evidence of D.W.4 can be accepted to prove that the Will duly executed by Balasubramanian and that it was presented for registration. In *Labh Singh v. Piara Singh*, regarding registration of the document by the registering officer, it is held thus:

The registering officer cannot be regarded as an attesting witness if he had not appended his *animo attestandi* i.e., for the purpose of attesting the fact that he had seen the executant sign or had received from him a personal acknowledgment of his signature. He should also sign the endorsement of registration in presence of the testator.

In the instant case, the Sub-Registrar testified that he had read over the Will to the testator who admitted having executed the same. The endorsement was then thumb-marked by the testator and signed by the Sub-Registrar.

In this case, it is admitted by D.W.4 the Sub-Registrar that he registered the document after enquiring the testator. But, he is unable to say as who is the author of the last lines written in Ex.B-1. The mere fact that D.W.4 registered the document on examining the executant will not remove the suspicious circumstances regarding putting up thumb impression in the Will. Therefore, both courts below did not place any reliance upon the evidence of D.Ws.3 and 4 for holding that the testator has affixed his thumb impression in the document in a

sound disposing state of mind.

15. It is contended by the appellants that the testator is capable of putting signature and that on account of weakness, he is unable to put his signature and that he affixed his thumb impression. Learned Counsel for the appellants relies upon a decision reported in *Susila Bala Saha v. Saraswathi Mondal* : AIR1991 Cal166 . But, in this case, it is admitted that D.W.2 did not write in the document that thumb impression is that of the testator. He did not write the recital as to the reason for putting thumb impression in the document. Therefore, I am unable to accept the evidence of D.Ws. 3 and 4 for holding that the Will was duly executed by Balasubramanian and that it was duly attested.

16. It cannot be disputed that the scribe can be the attesting witness and that if the evidence regarding the attestation of the Will is spoken to by scribe, it can be accepted. *K.M. Varghese v. S.K.M. Ommen* : AIR1994 Ker85 . D.W.2 is a professional document writer. D.W.3 is not the attestator of the Will. In view of the circumstances already discussed above, the evidence of D.W.2 cannot be accepted for holding that Balasubramanian has affixed his thumb impression in the Will Ex.B-1. Therefore, I see no infirmity in the findings of the courts below that the Will is not a genuine document. If the suspicious circumstances regarding putting up thumb impression in the Will is taken into consideration along with the fact that the testator already effected family arrangement regarding the entire properties and that he had no reason to exclude the plaintiff from getting A Schedule property, it would lead to an irresistible conclusion that the Will cannot be a genuine document. The (sic) of the Will failed to dispel the sus-(sic) circumstances surrounding the execution of the Will. The courts below rightly rejected the evidence of D.Ws.2 and 3 by assigning valid reasons. As the Will Ex.B-1 is not true, it would not confer any right upon the first defendant and consequently, defendants 4 and 5 will not get any right in any of the suit items. As per family arrangement entered into under Ex.A-1, the plaintiff is entitled to his share and therefore, the suit filed by the plaintiff for partition has been rightly decreed by the courts below. I hold that there are no merits in the appeal.

17. In the result, the second appeal is dismissed. The judgment and decree of the courts below are confirmed. No costs.

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