

Jayachandran, and ors. Vs. Vidyavathi, and ors.

Jayachandran, and ors. Vs. Vidyavathi, and ors.

SooperKanoon Citation : sooperkanoon.com/904550

Court : Chennai

Decided On : Sep-28-2010

Judge : R.Subbiah, J.

Acts : Code Of Civil Procedure (CPC) - Section 100

Appeal No. : Second Appeal No.312 of 2005 and C.M.P.Nos.4602/2005 and 99/2006

Appellant : Jayachandran, and ors.

Respondent : Vidyavathi, and ors.

Advocate for Def. : Mr.H.D.Dhanasing Durai, Adv.

Advocate for Pet/Ap. : Mr.Ravikumar Paul, Adv.

Judgement :

1. Defendants 1 to 4 are the appellants and they filed this Second Appeal aggrieved over the decree and judgment dated 30.01.2004 passed by the learned Principal District Judge, Chengalpattu, in A.S.No.21 of 2003, whereby the decree and judgment dated 04.09.2002 passed by the learned Subordinate Judge, Ponneri, in O.S.No.99 of 1998 were set aside. For the sake of convenience, the parties herein are referred to as they were arrayed in the trial court.

2. The brief facts giving rise to this appeal are as follows:

The 3rd respondent herein is the plaintiff, who filed the pauper suit in O.S.No.99 of 1998 before the Sub Court, Ponneri, against the defendants, who are the appellants, respondents 1 and 2 herein and her mother, for a partition and separate possession of her 1/8th share in the suit property. The plaintiff and defendants 1 to 6 are the children of late Kothandapani and Unnamalai Ammal, the 7th defendant and all constituted members of a Hindu Joint family. Kothandapani Gramani died on 15.05.1980 and during his lifetime, he had purchased an extent of 0.36 cents in dry S.No.54 in Kottivakkam village for a sum of Rs.300/- on 24.03.1945 from one Gurusamy Nadar from and out of his self earned amount. Ever since the date of purchase, Kothandapani Gramani was in possession and enjoyment of the suit property and he had also constructed a well built tiled house as well as shops, which have been let out to various parties on rent. Since the suit property was the self acquired property of late Kothandapani Gramani, on his death, the plaintiff as well as the defendants were each entitled to an equal share under section 8 of the Hindu Succession Act. But, the 1st and 2nd defendants, the brothers of the plaintiff, were in possession of the suit property in entirety detrimental to the interest of the plaintiff and the other defendants, who are the daughters and the widow (Unnamalai Ammal) of the deceased Kothandapani Gramani and they were also enjoying the income from the rented shops. The plaintiff was occupying about only 1-1/2 cents in the suit property and residing there in a thatched hut till 1989. Similarly, the 6th defendant was also residing in the suit property separately. There was a common bath room in the suit property and defendants 1 and 2 obstructed them from using the bathroom. The plaintiff and the 6th defendant were driven out of the suit property. Hence, the plaintiff filed the suit for partition and separate possession of her 1/8th share. Pending suit, the 7th defendant (the mother of the plaintiff and the other defendants) died, and as such, the plaintiff amended the prayer in the plaint by modifying her share as 1/7th share.

3. Resisting the suit, defendants 1 and 2 filed a written statement stating that the suit property was not the self acquired property of their father Kothandapani Gramani and the same was originally purchased by Kothandapani Gramani and his brother Kishtappa Gramani jointly and since Kothandapani Gramani happened to be the elder, the sale deed has been taken in his name and after purchase, the

property was in joint possession of Kothandapani Gramani and his brother Krishtappa Gramani. After the purchase, Kothandapani Gramani constructed a tiled house on the western side of the suit property and similarly Krishtappa Gramani also constructed a house and was residing with his brother Kothandapani Gramani. Hence, Kishtappa Gramani was entitled to half share in the suit property. Kishtappa Gramani, while he was in a sound disposing state of mind, executed a registered Will dated 25.09.1989, bequeathing his undivided half share in the suit property in favour of defendants 1 and 2 (sons of Kothandapani Gramani and Unnamalai Ammal). The said Kishtappa Gramani died on 25.10.1993 and after the death, his wife Dura Ammal was residing with the 1st defendant. The plaintiff was well aware of the said Will executed by Kishtappa Gramani. Hence, defendants 1 and 2 were entitled to half share in the suit property by virtue of the Will executed by Kishtappa Gramani and the plaintiff and the other defendants were jointly entitled to equal share only in the other half share in the suit property. As such, the plaintiff was entitled to 1/8th share in 0.18 cents alone and not in 0.36 cents, as claimed by her.

4. The 1st defendant filed an additional written statement, adopted by defendants 2 to 4, stating that the 7th defendant, viz., Unnamalai Ammal died on 22.05.2001 pending suit. During her lifetime, the 7th defendant, while in a sound and disposing state of mind, executed a registered Will dated 04.12.1996 bequeathing her undivided share in the suit property in favour of defendants 1 and 2 only and as such, the plaintiff was entitled only to 1/16th share in the suit property. Under such circumstances, the plaintiff's subsequent claim in the amended plaint seeking 1/7th share is not sustainable.

5. Defendants 5 and 6 filed a written statement stating that the suit property was the self-acquired property of their father Kothandapani Gramani and they were entitled to 1/7th share each in the entire suit property.

6. On the basis of the above said pleadings, the trial court framed six issues and in order to prove the case of the plaintiff, she examined herself as P.W.1 and marked Ex.A-1 and on the side of the defendants, defendants 1 and 5 to 7 were examined as D.Ws.1 to 4 besides examining four other witnesses as D.Ws.5 to 8 and

marked Exs.B-1 to B-30. The trial court, on a consideration of the entire evidence on record both oral and documentary, had come to the conclusion that the suit property was the joint family property of Kothandapani Gramani and Kishtappa Gramani and as such, Kishtappa Gramani had a legal right to execute the Will dated 23.09.1989 (marked as Ex.B-23), bequeathing his half share in the suit property in favour of defendants 1 and 2 and similarly, the 7th defendant had bequeathed her share in the suit property by way of a Will dated 04.12.1996 marked as Ex.B-30 in favour of defendants 1 and 2 and as such, the plaintiff was entitled to 1/16 the share in the suit property. On an appeal by defendants 5 and 6 before the Principal District Court, Chengalpattu in A.S.No.21 of 2003, the lower appellate court had set aside the decree and judgment of the trial court by disbelieving the said two Wills and had granted a preliminary decree holding that the plaintiff as well as defendants 5 and 6 were equally entitled to 1/7th share in the suit property. Aggrieved over the same, the present appeal has been filed by defendants 1 to 4.

7. At the time of admission of the second appeal, this Court has framed the following substantial questions of law for consideration:

1. Whether the learned Judge was right in law in disbelieving the Will Ex.B-30 on account of an error regarding the contents of the Will on the part of the attesting witness in spite of the clear evidence of the attesting witness regarding the execution of the Will by the testatrix in his presence ?

2. Whether the lower appellate Judge was right in law in disbelieving the Will Ex.B-23 in spite of compliance with Sections 63 ad 68 of the Evidence Act ?

8. Learned counsel for the appellants (defendants 1 to 4) submitted that both the courts below have come to the conclusion that the suit property was the joint family property. Aggrieved over the said finding, no appeal has been filed by the plaintiff and, as such, the finding with regard to the status of the property has become final. The paternal uncle of defendants 1 and 2, viz., Kishtappa Gramani had bequeathed his half share in the suit property in favour of them and similarly, Unnamalai Ammal, the mother of defendants 1 and 2 bequeathed her share in the suit property in favour of defendants 1 and 2. Under such circumstances, the

share of the plaintiff and the defendants in the balance portion of the property had to be decided after excluding the shares of defendants 1 and 2, which they got through two Wills. The trial court by correctly placing reliance on the Wills marked as Ex.B-23 and B-30, came to the conclusion that the plaintiff was entitled to 1/16th share, but the lower appellate court disbelieved the Wills and thereby came to the conclusion that the share had to be allotted to the parties by considering the entire suit schedule property and decreed the suit granting 1/7th share in favour of the plaintiff. In this regard, the learned counsel for defendants 1 and 2 submitted that the Wills in question had never been in dispute before the courts below.

9. By inviting the attention of this Court to the grounds in the Memorandum of Appeal filed by defendants 5 and 6 before the lower appellate court, the learned counsel for defendants 1 to 4 submitted that out of 15 grounds raised in the memorandum of appeal, 14 grounds were raised only as against the finding of the trial court as to whether the suit property was the joint family property and only a vague ground was raised as ground No.15 with regard to the Wills. Similarly, in the evidence, P.W.1 made only the evasive statement to the effect that the Will was not proved. Except this, no serious dispute was raised by the plaintiff as well as defendants 5 and 6 before the courts below with regard to the Wills. But the lower appellate court had not taken into consideration the Wills for the reasons that the stamp papers were in the name of defendants 1 and 2 and no share was allotted to the wife of Kishtappa Gramani in the Will; moreover, the Will was registered in the Sub Registrar's Office outside the jurisdiction of the property where it was situated. Attacking the said reasonings, the learned counsel further submitted that when no serious dispute was raised with regard to the Wills, the lower appellate court, on surmise, has raised a doubt on the validity of the Wills and thereby rejected Exs.A-23 and 30, which is legally not sustainable and is liable to be set aside. In support of his contentions, the learned counsel has relied upon the decision reported in (2005) 1 SCC 280.

10. Resisting the above contentions of the appellants, the learned counsel for defendants 5 and 6 as well as the plaintiff (respondents 1 to 3 herein) submitted that it was not established by defendants 1 to 4 by adducing tangible evidence that the late Kishtappa Gramani had a legal right to execute the Will in respect of his

half share in the suit property. Under such circumstances, the reasonings given by the lower appellate court for disbelieving the Wills cannot be questioned. Moreover, if 1/16th share has been allotted, they will get only a very meagre extent of 1-1/2 cents in the suit property, which will not be useful in any way.

11. Heard the learned counsel for the parties and perused the materials on record.

12. It was the case of the plaintiff (3rd respondent herein) that the suit property was originally purchased by her father Kothandapani Gramani in and by a sale deed dated 24.03.1945 marked as Ex.A-1 and that the suit property was the self acquired property of Kothandapani Gramani and as such, the plaintiff and the other defendants were entitled to equal share in the same. Per contra, it was the case of defendants 1 and 2 that the suit property was the joint family property of Kothandapani Gramani and his brother Kistappa Gramani and Kothandapani Gramani being the elder, the sale deed happened to be taken in his name; however, the suit property was in the joint possession of Kothandapani Gramani and his brother Kistappa Gramani.

13. After going through the materials, I find that though the courts below had come to a conclusion that the suit property was the joint family property, against which, no appeal has been filed by the plaintiff. Therefore, the issue with regard to the joint family property had reached its finality. But, it is the further case of defendants 1 and 2 that Kistappa Gramani by way of Will Ex.A-23 had given his half share to defendants 1 and 2 and similarly, pending suit, Unnamalai Ammal had also bequeathed her 1/16th share in the balance portion of the property in favour of defendants 1 and 2. Therefore, the trial court had come to the conclusion that the plaintiff cannot claim her share in the entire extent of 0.36 cents and she can claim only in 0.18 cents and thus, allotted 1/16th share in the entire extent of the suit property. But, the lower appellate court had disbelieved the Wills and thereby negated the case put forth by defendants 1 and 2 regarding the Wills executed in their favour and held that the plaintiff and the defendants were entitled to 1/7th share in the entire suit property. Now, in view of the different findings given by the courts below, the question that has to be decided is, whether the judgment of the lower appellate court in disbelieving the Wills is legally sustainable or not ?

14. As contended by the learned counsel for defendants 1 to 4 (appellants), no serious dispute was raised by the plaintiff with regard to the aforesaid Wills. The only case of the plaintiff before the courts below was that the suit property was the self acquired property and not the joint family property; but the said contention was negated by the courts below and against which, no appeal was filed. The lower appellate court had assigned its own reasonings for disbelieving the Wills and the relevant paragraphs in the judgment dated 30.01.2004 are extracted hereunder:

"20. On a careful scrutiny of the evidence adduced by defendants 1 and 2 and the deceased wife of Kishtappa Gramani examined as DW3 nothing had been explained about the participation of D1 and D2 in the transaction of execution of the Will by Kishtappa Gramani in Ex.B-23 Will and for the exclusion of DW3 the wife of Kishtappa Gramani from inheriting the property of Kishtappa Gramani.

22. When the testator Kishtappa Gramani and his wife were living under the mercy of defendants 1 and 2 the presumption of undue influence in giving consent for execution of the Will could be drawn. The purchase of stamp papers of the Will Ex.B-23 by the defendants 1 and 2 had taken much interest to get the half share of the suit property by exercising undue influence and thereby obtained the execution of the said will in Ex.B-23 in the suspicious circumstances. The question of suspicious circumstances would further go strong since the Will was taken to Ponneri Sub-Registrar Office for registration whereas the relevant Sub-Registrar Office is at Ennore....."

15. It is not in dispute that the testator Kishtappa Gramani was living along with defendants 1 and 2 at the relevant point of time, but this cannot be taken as the reason for rejecting the Will. On a perusal of the evidence, I find that Kishtappa Gramani and his wife were looked after by defendants 1 and 2 at their old age. Therefore, the reasons assigned by the lower appellate court for rejecting the Wills executed by Kishtappa Gramani, in my considered opinion, are nothing but a surmise, particularly in the circumstances when the Wills were not in serious dispute. Moreover, both the Wills were the registered documents in accordance with law. In this regard, it would be appropriate to extract the relevant paragraphs from the decision cited by defendants 1 to 4 reported in the case of

MEENAKSHIAMMAL (DEAD)THROUGH L.RS. ..vs.. CHANDRASEKARAN AND ANOTHER ((2005) 1 SCC 280), which are as follows: "21. In the case of Madhukar D. Shende v. Tarabai Aba Shedage (2002) 2 SCC 85 it has been held as follows: (SCC pp. 91-92, paras 8-9)

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 Succession Act, 1925 and Section 68 of the 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 (1838) 2 Lewis CC 227) may be apposite to some extent: The mind is 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 ingenious 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.

16. Following the said observations made in the decision and taking into consideration the facts and circumstances of the case on hand, I am of the view that when the execution of the Will Ex.B-23 was proved by defendants 1 and 2 by examining the attesting witness D.W.5, more so, when both the Wills were not in serious dispute, the reasons assigned by the lower appellate court to reject the finding of the trial court appear to have been drawn only on surmise and not based on legal evidence. Therefore, I have no hesitation to hold that the reasons assigned by the lower appellate court for rejecting the Wills are liable to be set aside and the substantial questions of law are answered in favour of the appellants (defendants 1 to 4). For the reasons stated above, the second appeal is allowed and the decree and judgment of the lower appellate court are set aside and the decree and judgment of the trial court are confirmed, holding that the plaintiff is entitled to get 1/16th share in the suit property. No costs. Consequently, connected miscellaneous petitions are closed.