Balathandayutham & Anr vs Ezhilarasan on 16 April, 2010

Bench: Asok Kumar Ganguly, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 7357 OF 2002

Balathandayutham and another ..Appellant(s)

Versus

Ezhilarasan ..Respondent(s)

J U D G M E N T

GANGULY, J.

1.Heard counsel for the parties.

2. The material facts of the case are: Late Mr. M. Ramachandran, the father of the 1st appellant as also of the plaintiff-respondent, had three sons, namely, Balathandayutham (1st appellant), Ezhilarasan (plaintiff-respondent) and one Gnanavoli and two daughters - Kalai Arasi and Isai Amudhu and his wife was Nachiar Ammal. It is not in dispute that Ramachandran acquired certain properties and in his lifetime he executed a Will which was registered on 25.09.1972. By the said Will he bequeathed certain properties, from the income of which Seva Puja and maintenance of Sri Bala Murugan Temple was to be conducted. In respect of his other properties he bequeathed the same in favour of plaintiff-respondent and his other son Gnanavoli and two daughters and giving his wife life interest.

3. Insofar as the 1st appellant is concerned, no property was bequeathed to him, inter alia, on the ground that after education he was staying apart and had not shown any interest in the family members. The case in the plaint is that since the 1st appellant, the elder brother of the plaintiff-respondent, left the family after his education and married another woman belonging to some other caste without the consent of the parents, no provision in the Will dated 25.09.1972 was made by the testator in favour of the 1st appellant. The testator Ramachandran died on 23.5.1980

and after his death, the plaintiff-respondent was in exclusive possession of the property. At that stage the 1st appellant tried to disturb the possession of the plaintiff-respondent with the help of some anti social elements. This led to the filing of the suit. In the suit, the stand of the 1st appellant was that Will dated 25.09.1972 was not genuine and the said Will had been revoked by Ramachandran by another Will dated 25.4.1980 and also thereafter by another Will dated 2.5.1980. Both the appellants claimed their rights under the so- called subsequent Wills. In his rejoinder, plaintiff-respondent claimed that the so-called subsequent Wills dated 25.4.1980 and 2.5.1980 are fabricated and at the relevant point of time Ramachandran was bedridden and did not have the capacity to execute any Will as he died within a few days thereafter on 23.5.1980. The Trial Court dismissed the suit upholding the contention of the 1st appellant. The First Appellate Court, however, allowed the appeal and decreed the suit. The stand of the 1st appellant herein, before the First Appellate Court, was that Will dated 25.09.1972 was not a genuine one and was revoked by the subsequent Will dated 25.4.1980.

4. On these facts the learned First Appellate Court held, when the execution of a Will asserted by one party is denied by the other party, then the burden is on the party who relies on the Will to prove its execution. But when execution of the Will is not denied then no burden is cast on the party who relies on a Will to prove its execution. Relying on the aforesaid principle, the First Appellate Court held, and in our view rightly, that the existence of the first Will dated 25.09.1972 has been admitted. But the appellants' case is that the same has been revoked. However, there is no attesting witness to prove Ex.B-19 dated 2.5.1980 and Ex.B-20 dated 25.4.1980, which are the two subsequent Wills. The First Appellate Court also noted that it was admitted that the subsequent Will dated 25.4.1980 is an unregistered one and attestors to the said Will were alive even though scribe was not alive. It was also admitted by the appellant that testator was not well for about four months prior to his death. Admittedly Ex.B-19 and Ex.B-20 were allegedly executed when the testator was unwell. On those facts the learned First Appellate Court held that the subsequent two Wills being Ex.B-19 and Ex.B-20 were not proved.

5. The High Court held that the finding given by the First Appellate Court that Ex.B-19 and Ex.B-20 cannot be said to have been proved in view of non-compliance with the mandatory requirement under Sections 68 and 69 of the Indian Evidence Act is a correct finding. The High Court found that the first Will which was executed in 1972 (Ex.A1) was executed while the testator was residing with the plaintiff and his wife and another son in joint family in his residential house at Villupuram but the subsequent two Wills Ex.B-19 and Ex.B-20 were executed at Cuddalore where the 1st appellant was residing. The fact remains that in the first Will no provision was made for the 1st appellant but in the second two Wills provisions were made in favour of the 1st appellant and they were allegedly executed when the testator was staying in the house of the 1st appellant. These two Wills were also executed a couple of weeks prior to the death of the testator.

6. At this juncture, the case made out by the plaintiff-respondent is very relevant. Plaintiff's case is that his father, the testator, went to a temple for attending a function and from there testator was taken by the 1st appellant to Cuddalore and coming to know this fact the plaintiff-respondent went to the house of the 1st appellant and the plaintiff-respondent went there and took the testator back to his house at Villupuram where he was staying all these years and where he ultimately died.

Therefore, both the subsequent Wills, namely, Ex.B-19 and Ex.B-20 were allegedly executed by the testator a couple of weeks before his death and when he was made to stay in the house of the 1st appellant. It appears that the attestors of both the aforesaid two Wills were all of Cuddalore and were strangers to the family. Those two Wills surfaced only at the time when the 1st appellant gave his written statement in 1994 in the suit filed by the plaintiff- respondent. According to our judgment, these are suspicious circumstances surrounding Ex. B- 19 and Ex.B-20.

7. The High Court also found on analyzing the aforesaid facts that there are suspicious circumstances surrounding the execution of Ex.B-19 and Ex.B-20 and they are required to be dispelled by the appellant. The statutory requirements under Section 68 of the Evidence Act and under Section 63 of Indian Succession Act are to be fulfilled which have not been done. In this case not a single attesting witness of Ex.B-19 and Ex.B-20 has been examined.

8. This Court also thinks that in view of the discussion made herein above that both the Ex.B-19 & Ex.B-20 are surrounded by various suspicious circumstances. When a Will is surrounded by suspicious circumstances, the person propounding the Will has a very heavy burden to discharge. This has been authoritatively explained by this Court in the case of H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors, AIR 1959 SC 443. Justice P.B. Gajendragadkar, as His Lordship then was, in para 20 of the judgment, speaking for the Three Judge Bench in H. Venkatachala (supra) held that in a case where testator's mind is feeble and he is debilitated and there is not sufficient evidence as to the mental capacity of the testator or where the deposition in the Will is unnatural, improbable or unfair in the light of the circumstances or it appears that the bequest in the Will is not the result of testator's free will and mind, the Court may consider that the Will in question is encircled by suspicious circumstances.

9. Going by this test, as we must, we find that both the Wills, Ex.B-19 & Ex.B-20 are surrounded by suspicious circumstances. The ratio in H. Venkatachala (supra) is that in such a situation the Court "would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstance naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts will be reluctant to treat the document as the last Will of the testator." [see page 452]

10. Following the aforesaid principle, this Court is constrained to hold that the appellants did not succeed in discharging its onus of removing the suspicious circumstances surrounding Ext B19 & B20. As such there is no reason for us to find any error in the judgment of the High Court.

11. In so far as execution of the Will is concerned, under Section 63 of the Indian Succession Act, 1925 it has to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence, and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. Section 68 of the Indian Evidence Act, 1872 further provides if a document is required by law to be attested it shall

not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court is capable of giving evidence. There is a proviso under Section 68 but we are not concerned with the proviso here.

12. Commenting on these provisions, this Court in H. Venkatachala (supra) laid down that Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. It was further held that Section 63 of Indian Succession Act requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This Section also requires that Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. [see pg 451]

13. The law thus laid down in H. Venkatachala (supra) is still holding field and this Court has followed the same in various other judgments. [See Madhukar D. Shende v. Tarabai Aba Shedage, (2002) 2 SCC 85; Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and others., (2006) 13 SCC 433 and Savithri and Others v. Karthyayani Amma and Others, (2007) 11 SCC 621]

14. On consideration of the aforesaid materials, the High Court affirmed the finding of the First Appellate Court that Ex.B-19 and Ex.B-20 have not been proved. The High Court, in our judgment, was right in not interfering with those findings in the second appeal as no substantial question of law has been erroneously decided by the First Appellate Court.

15. We also affirm the aforesaid finding of the High Court and dismiss this appeal leaving the parties to bear their own costs.

.....J. (G.S. SINGHVI) .....J. (ASOK KUMAR GANGULY) New Delhi April 16, 2010