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S.A.No.1177 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.04.2023

CORAM

**THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN**

S.A.No.1177 of 2008

and

M.P.No.1 of 2008

1.Dhanapal

2.Rajagopal (died)

3.Selvi

(Third appellant brought on record as  
the Legal Representative of the deceased  
2nd appellant viz., Rajagopal vide order of  
this Court dated 29.01.2020 made in  
C.M.P.Nos.27206 and 27211 of 2019  
in S.A.No.1177 of 2008) ... Appellants

Vs.

Mohammed Ali  
Represented by his Power of Attorney  
Noorjahan ... Respondent

Prayer: Second Appeal filed under Section 100 of the Code of Civil  
Procedure against the judgment and decree dated 30.01.2008 in  
A.S.No.25 of 2007 on the file of the Learned Principal District



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Judge, Cuddalore confirming the judgment and decree dated 28.04.2006 in O.S.No.61 of 2004 on the file of the Learned Principal Subordinate Judge, Vridhachalam.

For Appellants : Ms.K.Jenitha

For Respondent : Mr.S.Shanmugha Sundaram

### **JUDGMENT**

The defendants in O.S.No.61 of 2004 on the file of the Principal Subordinate Court, Vridhachalam, who were the appellants in A.S.No.25 of 2007 on the file of the Principal District Court, Cuddalore, are the appellants before this Court.

2. The suit property belongs to one Arumugam Pillai. He married twice. Through his first wife Sivabakkiyam, he had two sons by name, Dhanapal and Rajagopal. Through his second wife Chellammal, he had one daughter by name Sarasu. The said Arumugam Pillai died on 01.12.1994.

3. It is the case of the plaintiff that he had purchased the property



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from Sarasu on 27.01.1997. Since the Dhanapal and Rajagopal, who are the sons of Arumugam Pillai and Sivabakkiyam are in possession and enjoyment of the property, filed the present suit for declaration of title, delivery of possession, for permanent injunction and for mesne profits. Before the trial Court, a Will said to have been executed by Arumugam Pillai in favour of Sarasu was exhibited as Ex.A6 and in order to prove the same, P.W.3 was examined. P.W.3 is none else than the husband of Sarasu. The Original Suit was decreed by the learned Subordinate Judge, Vridhachalam in O.S.No.61 of 2004, who found the Will to be true.

4. The said Judgment was appealed and was confirmed by the learned Principal District Judge, Cuddalore in A.S.No.25 of 2007 on 30.01.2008. Against the concurrent findings, the present appeal has been presented.

5. At the time of admission, the following substantial questions of law were framed:-

*“The second appeal is admitted on the following substantial questions of law:-*



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*a. Whether the Lower Courts failed to hold in law that the Will Ex.A6 has not been proved as per Section 68 of the Evidence Act?*

*b. Whether the Lower Courts erred in law in accepting the evidence of P.W.1, the power of attorney of her husband Mohammed Ali the Plaintiff with regard to matters of which, Mohammed Ali alone is having personal knowledge?"*

6. I have taken up the second question of law first i.e., namely “*whether the Lower Appellate Court erred in law in accepting the evidence of P.W.1, the Power of Attorney of her husband Mohammed Ali, the plaintiff with regard to matters of which, Mohammed Ali alone is having personal knowledge?*” This question of law need not be delved for more than a moment because of Section 120 of the Indian Evidence Act, 1872 and I am of the view, this is not a question of law at all.

7. As per Section 120 of the Indian Evidence Act, 1872, in all civil proceedings, the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against



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any person, the husband or wife of such person, respectively, shall be a competent witness.

8. Therefore, the execution of the Power of Attorney by the plaintiff Noorjahan in favour of her husband Mohammed Ali does not take away the vitality of Section 120 of the Indian Evidence Act, 1872. Therefore, I reject the second question of law against the appellants and in favour of the respondent and hold the evidence given by Mohammed Ali that can be acted upon and he was the competent witness.

9. Now, coming to the first question of law, i.e. *'whether the Will has been properly proved in accordance with Section 68 of the Indian Evidence Act, 1872 read with Section 63 of the Indian Succession Act, 1925* is concerned, I necessarily have to refer to the evidence of P.W.3. P.W.3 in his chief-examination, has stated that the Will was written by the deceased Arumuga Pillai. In cross-examination, he does not add anything further regarding attestation. In his cross-examination, all that he has stated is,



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"நாசர் பதிவாளர் அலுவலகத்தில் என் மாமனார் கையெழுத்து போடும்போது நான் பார்த்தேன். பீ அயிட்டத்தில் எவ்வளவு நிலம் கொடுக்கப்பட்ட விபரம் எனக்கு தெரியாது./45 வருடமாக தற்போது சொத்தில் யார் இருக்கிறார்கள் என்பது தெரியாது. என் மாமியார் பெயரிலும், என் மனைவி பெயரிலும் சொத்து வரி, மின்சார வரி மாறியுள்ளது. ஏ அயிட்ட சொத்து அடிமனை கிரையம் வாங்கியபோது நான் போகவில்லை. விவசாய வருமானத்திலிருந்தும், அவருக்கு மகன்கள் சம்பாதித்த பணத்தில் வாங்கியது பற்றி தெரியாது. ஆறுமுகத்திற்கு கிரையம் எழுதி கொடுக்க உரிமையில்லை. வா.சா.ஆ.6 நாங்களாக தயாரித்துக் கொண்டது என்பது தவறு. வா.சா.ஆ.9 மங்கலம்பேட்டையில் சொத்து இருந்தும் அங்கேயே பதிவு செய்யப்படாமல் கள்ளக்குறிச்சியில் எடுத்து சென்று பதிவு செய்யப்பட்டதற்கு காரணம் எதுவும் சொல்ல முடியாது. கிரைய பத்திரங்கள் எழுத பத்திரங்கள் கள்ளக்குறிச்சியில் வாங்கப்பட்டது."

Apart from these two statements, he does not speak about the aspect of attestation.

10. Mr.S.Shanmugha Sundaram, learned counsel for the respondent would vehemently argued by referring to Paragraph 17 of the



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Judgment of the trial Court that there are no suspicious circumstances surrounding the Will and the Will is a registered document and the factum that it was executed at Kallakurichi, should not make a difference and also the changes in signatures from page to page need not be given much weightage since the executor at the time of execution of the Will, was aged about 81 years old.

11. I am not in agreement with this submission of the learned counsel for the respondent. However much, I tried to persuade myself to lean in favour of the respondent, I am unable to do so because the evidence of P.W.3 falls short of the statutory requirements of both Section 63 of the Indian Succession Act, 1925 as well as Section 68 of the Indian Evidence Act, 1872.

12. I can go in to the genuineness or otherwise of the Will in the event the attestation is proved. At the first instance, I cannot jump directly into the suspicious circumstances especially when the attestation of the Will has not been proved by the plaintiff by examining the competent witnesses.



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13. Ms.K.Jenitha, learned counsel for the appellants would draw my attention to the Judgment of the Supreme Court in the case of **Janki Narayan Bhoir Vs Narayan Namdeo Kadam**, (2003) 2 SCC 91 and would state that if the mandatory requirements of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 are not met with, the Court cannot rely upon any other findings and hold the Will has been proved.

14. Being bound by the Judgment of the Supreme Court and by the statutory requirements, I am of the view that the Will has not been proved in accordance with law.

15. Leaving open to the parties to file a suit for partition if so advised inasmuch as Sarasu's shares have been purchased by Noorjahan, this Court holds that the Judgment and decree of the Courts below are liable to be set aside.

16. In fine, the Second Appeal is allowed. The Judgment and



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Decree of the learned Principal District Judge, Cuddalore in A.S.No.25 of 2007 dated 30.01.2008 in confirming the Judgment and Decree of the learned Principal Subordinate Judge, Vridhachalam in O.S.No.61 of 2004 dated 28.04.2006 is set aside.

17. Since, I am allowing the second appeal only on the ground of attestation of the Will, I feel it appropriate to direct the parties to bear their own costs throughout. Connected Miscellaneous Petition is closed.

**17.04.2023**

Index : Yes/No  
Neutral Citation : Yes/No

arb

To:

- 1.The learned Principal District Judge,  
Cuddalore.
- 2.The learned Principal Subordinate Judge,  
Vridhachalam.



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**V.LAKSHMINARAYANAN, J.**

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