

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.12.2013

CORAM

THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN

A.S.No.1204 of 1995 and Transfer A.S.No.220 of 2002

A.S.No.1204 of 1995:

Subramaniam ... Appellant/Defendant.

-vs-

01. Sivagangai (Died)
02. Saroja
03. Vasantha (Deceased)
04. Kabali
05. Prema
06. Natarajan

(RR2 to 6 brought on record as LR's
of deceased sole respondent vide
order of Court dt. 11.9.09 made in
CMP Nos.20736 to 20738 of 2009)

07. Boovaragasami
08. Sasi
09. P.Ganesh
10. Kannan

(RR7 to 10 brought on record as LR's
of deceased R3 vide order of Court
dt.24.6.2013 made in CMP Nos.1596
to 1598 of 2009)

.. Respondents/Plaintiffs.

Appeal under Section 96 of the Code of Civil Procedure, against
the judgment and decree dated 31.5.95 made in O.S.No.105 of 1989
passed by the learned Subordinate Judge, Mayiladuthurai.

For Appellant :: Mr.S.Sounthar

For Respondents :: Mr.A.Muthukumar for
R2, R4 to R6
No appearance for R7 to R10

Tr.A.S.No.220 of 2002:

Subramanian

.. Appellant/Plaintiff.

-vs-

1. Sivagangai Ammal (Deceased)
2. Saroja
3. Kabali
4. Prema
5. Natarajan
6. Boovaragasamy
7. Sasi
8. P.Ganesh
9. Kannan

(RR2 to 9 brought on record as LR's of deceased sole respondent vide order of Court dt. 24.6.13 made in CMP Nos.1586 to 1588 of 2009) .. Respondents/Defendant.

Transfer Appeal under Section 96 of the Code of Civil Procedure, against the judgment and decree dated 31.5.95 made in O.S.No.91 of 1990 passed by the learned Subordinate Judge, Mayiladuthurai.

For Appellant :: Mr.S.Sounthar

For Respondents :: Mr.A.Muthukumar for
R2 to R5

No appearance for R6 to R9

COMMON JUDGMENT

The plaintiff in O.S.No.91 of 1990 and the defendant in O.S.No.105 of 1989 on the file of Sub Court, Mayiladuthurai is the appellant in both the appeals. The appellant filed O.S.No.91 of 1990 for declaration of title and for recovery of possession on the basis of a Will executed by his mother dated 5.5.69 in his favour. The defendant in that suit is his sister and she filed O.S.No.105 of 1989 for partition of the suit property that belonged to her mother by stating that her mother died intestate. The trial Court tried both the suits together and rendered a common judgment, decreeing the suit filed by the first respondent in O.S.No.105 of 1989, and dismissed the suit filed by the appellant in O.S.No.91 of 1990. Aggrieved by the same, these two appeals were filed.

2. The case of the appellant, as pleaded in O.S.No.91 of 1990, is as follows. The property belonged to his mother Sivakami Achi and while she was in a sound and disposing state of mind, on 5.5.69, she executed a registered Will in his favour, giving life interest in respect of a portion of the property in favour of her sister Sambalatchi and vested remainder to the plaintiff-appellant and the appellant was enjoying the property after the death of his mother as the owner. The first respondent-defendant, who is the sister of the appellant, was allowed to reside in a portion of the suit property as a tenant on a monthly rent of Rs.100/- and she committed default in the payment of rent and therefore, R.C.O.P.No.30 of 1986 was filed by the appellant-plaintiff for eviction of the tenant and that petition was dismissed, as his sister claimed a right over the property and therefore the suit was filed for declaration and for recovery of possession.

3. The first respondent-defendant filed a statement contending that she filed the suit in O.S.No.105 of 1989 for partition and thereafter, the appellant filed a suit for declaration and recovery of possession and her mother Sivakami Achi died intestate and she did not execute the alleged Will, as her mother was blind and deaf for more than 21 years prior to her death and she was also not in a sound and disposing state of mind and that the mother was looked after by the daughter viz., the first respondent and therefore, the appellant is not entitled to the relief of declaration and since the property belonged to the mother, she is entitled to half share in the suit property.

4. On the basis of the above pleadings, the following issues were framed:-

- (i) Whether the Will produced by the plaintiff is valid and genuine?
- (ii) Whether the plaintiff is enjoying the property as per the contents of the Will?
- (iii) Whether the plaintiff is not entitled to the relief of recovery of possession as the property belongs to both the plaintiff and the defendant as claimed by the defendant?
- (iv) To what relief the plaintiff is entitled to?

5. The very same pleadings were reiterated by both the parties in the other suit and in O.S.No.105 of 1989, the following issues were framed:-

- (i) Whether the Sivakami Achi executed a Will as alleged by the defendant and whether the Will is a valid and true one?
- (ii) Whether the plaintiff is residing in a portion of the suit property as a co-owner?
- (iii) Whether the plaintiff is not entitled to

partition?

(iv) Whether the plaintiff is entitled to future mesne profits and if so, how much?

(v) To what relief the plaintiff is entitled to?

6. The evidence was taken in O.S.No.91 of 1990 in respect of both the suits and the plaintiff in O.S.No.91 of 1990 was referred to as the plaintiff in the judgment rendered by the trial Court.

7. On the side of the plaintiff, two witnesses were examined and ten exhibits were marked and on the side of the defendant, she examined herself and marked eight documents.

8. As the issues (i) and (ii) in both the suits are identical, they were tried and the trial Court held that the alleged Will executed by Sivakami Achi was not a true and valid Will and the plaintiff is not enjoying the property as the full owner and the defendant is entitled to half share in the suit property. The third issue in O.S.No.91 of 1990 was also answered against the plaintiff holding that he was not entitled to get the relief of recovery of possession and the issue no.(ii) in O.S.No.105 of 1989 was answered in favour of the first respondent holding that she was residing in the suit property as the legal heir of Sivakami Achi and the issue regarding mesne profit was answered against the first respondent and the trial Court held that the plaintiff was not entitled to the relief of declaration and recovery of possession, and decreed the suit in O.S.No.105 of 1989 and passed a preliminary decree, giving rise to the present appeals.

9. It is submitted by the learned counsel for the appellant that the trial Court, without properly appreciating the provisions of Section 63 of the Indian Succession Act, erred in holding that the Will executed by Sivakami Achi was not a true and valid Will and it was not proved to have been executed according to the provisions of Section 63 of the Indian Succession Act. The learned counsel submitted that admittedly, the Will was not signed by the testatrix and it contained only the mark of the testatrix and evidence was let in by P.W.2, one of the attesting witnesses, to the effect that the mark was made in the presence of the testatrix and as per her direction by the scribe and that amounts to sufficient compliance of Section 63(a) of the Indian Succession Act. He also submitted that when the Will was registered before the Sub Registrar, the testatrix affixed her thumb impression and two witnesses identified the testatrix and these aspects were not properly considered by the trial Court. He also relied upon a Full Bench judgment of this Court in Dasureddi, minor by guardian Audilakshmi Ammal v. M.Venkatasubammal, 39 L.W. 588 and a Division Bench judgment of this Court in Irudayam Ammal and others v. Satayath Mary, 86 L.W. 122 in support of his contentions.

10. On the other hand, Mr.Muthukumar, learned counsel for the legal heirs of the deceased first respondent submitted that the trial Court rightly held that the Will was not proved as true and valid by the appellant and the attesting witness viz., P.W.2 did not state that he attested the Will, and he only admitted his signature, and unless the attesting witness had the animus to attest the Will, he cannot be considered as a attesting witness and P.W.2 did not state that he signed the document as attesting witness and therefore the Will was not proved as per the requirements of Section 63 of the Indian Succession Act and that was properly appreciated by the Court below. He also submitted that in the absence of any signature or thumb impression in the Will, it cannot be considered that the Will was executed by the testatrix and admittedly the thumb impression of the testatrix was not found in the Will and only before the Sub Registrar, she affixed her thumb impression and the registration of the Will cannot be taken into consideration as the proof of execution and all these aspects were considered by the trial Court for holding that the Will was not a true and valid Will and the same was not proved to have been executed as per the provisions of Section 63 of the Indian Succession Act. He also submitted that after the suit filed by the appellant was dismissed and the suit filed by the first respondent for partition was decreed, the appellant applied for stay of passing of a final decree in C.M.P.No.17180 of 1995 and interim stay was granted, an Advocate Commissioner was appointed and he also suggested the mode of division and the past mesne profit was assessed at Rs.21,300/-. Therefore, the first respondent filed C.M.P.No.2366 of 1997 for a direction directing the appellant to pay Rs.21,300/- towards the past mesne profit and Rs.300/- per month towards her share and it was ordered by this Court directing the appellant to pay a sum of Rs.10,000/- to the first respondent and that condition was not complied with. Therefore, this Court vacated the interim stay and the final decree was passed in I.A.No.550 of 1995 on 20.9.99 by allotting the eastern half of the suit property to the first respondent. The appellant did not file any appeal against the final decree and therefore, the final decree had become final. He also submitted that the appellant sold the eastern half of the property allotted to the first respondent to one Udhayakumar under a registered sale deed dated 29.5.2000. The first respondent filed E.P.No.25 of 2001 for delivery of possession pursuant to the final decree and she also took possession of the eastern half of the suit property and therefore, the appellant cannot be granted any decree. He further submitted that the subsequent events can be taken into consideration by this Court and also relied upon a Full Bench judgment of this Court in RM.Subramaniam v. N.Sundaram Iyer, AIR 1963 Madras 217 and a Division Bench judgment in Ms.Josephine Jerome and others v. S.Santiago and another, (2007) 5 MLJ 706 as well as the judgment in Rajammal v. Raja Magindira Kottai Nayaka Thelungal alias Baliya Kulathavar Sangam, Kancheepuram represented by its President, 1981 T.N.L.J. 553 in support of his contention that the attestation has to be proved in accordance with Section 68 of the Evidence Act

and a mere proof of attestation does not prove the due execution of the document, as it depends upon the facts of each and every case. Therefore, he submitted that there is no need to interfere with the findings of the trial Court.

11. On the basis of the above submissions, the following points for consideration arise in these appeals:-

- (i) Whether the appellant proved that the Will was executed by his mother, as alleged by him?
- (ii) Whether the Will was a valid one, as it does not contain the signature or thumb impression of the testatrix?

12. Admittedly, the Will-Ex.A7 does not contain the signature or thumb impression of the testatrix-Sivakami Achi. It only indicates "இந்த-----கீரல் சிவகாமி ஆச்சி கையாட்டு". No doubt, before the Sub Registrar, the thumb impression of Sivakami Achi was obtained and two witnesses identified her before the Sub Registrar and one of the witnesses was also one of the attesting witnesses to the Will. The Will-Ex.A7 was attested by Mr.T.S.Kulandaivel Mudaliar and Mr.Ramalingam Chettiyar and the scribe was Mr.Rathna Pathar. The said Kulandaivel Mudaliar also identified the testatrix-Sivakami Achi before the Sub Registrar and another identifying witness was one Mr.Marimuthu Pillai. Mr.Ramalingam Chettiyar, one of the attesting witnesses to the Will, was examined in R.C.O.P.No.30 of 1986 filed by the appellant to evict the first respondent and he was also examined as P.W.2 in O.S.No.91 of 1990 to prove the execution of the Will. While examining himself as a witness in the said suit, he admitted his signature in the Will-Ex.A7 and also stated that he signed the Will in the house of Mr.Kulandaivel Mudaliar and at the time of attesting the Will, the appellant's mother, Sivakami Achi was in that house and he signed as a witness thinking that the document was a promissory note and he also denied his evidence given in R.C.O.P.No.30 of 1986 when portions of the evidence were confronted to him and they were marked as Exs.A8 to A10. While giving evidence in R.C.O.P.No.30 of 1986, he has stated that the Will was executed by the mother of the appellant and he was present at the time of execution of the Will and he signed in that Will and the Will was written by Mr.Rathna Pathar and he read the contents of the Will and as per the direction of Sivakami Achi, "fPuy; " was written and that was completed by the scribe Mr.Rathna Pathar. These portions are marked as Exs.A8 to A10 and while examining as a witness in these two suits, he denied the evidence given in R.C.O.P.No.30 of 1986. The other attesting witness Mr.Kulandaivel Mudaliar was stated to be dead and one of the identifying witnesses-Marimuthu Pillai was also examined in R.C.O.P.No.30 of 1986 and his evidence was marked as Ex.A1. According to me, the evidence of Marimuthu Pillai will not help the appellant and that cannot be used to arrive at a conclusion that the Will was validly executed by Sivakami Achi, when Marimuthu Pillai was not the attesting witness and he only identified the executant before

the Sub Registrar. Therefore, to prove the Will, we have the evidence of P.W.2.

13. With this background, we will have to see whether the Will-Ex.A7 was a true and valid one and it was executed as per the provisions of Section 63 of the Indian Succession Act. Section 63 of the Indian Succession Act reads as follows:-

"63.Execution of unprivileged Wills.--Every testator, not being a soldier employed in an expedition or engaged in actual warfare (or an airman so employed or engaged,) or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall 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."

As per Section 63(a), the testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction. In this case, there is no evidence that the testatrix affixed her mark to the Will or it was signed by some other person in her presence and by her direction. Further, under Section 63(b), the signature or mark of the testatrix shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. As stated supra, the Will-Ex.A7 did not contain the signature or thumb impression and there is only the wordings "இந்த-----கீரல் சிவகாமி ஆச்சி கைநாட்டு". As per the Full Bench judgment in Dasureddi's case reported in 39 L.W. 588, when the testator, after the Will has been written and read out to him, touches the pen and gives it to the writer directing him to affix his mark and the writer affixes the mark with the endorsement that it is the mark of the named testator and writes his own name at the foot of the Will, the Will has been validly executed. In that judgment, it was held thus:-

"On the question whether the writing at the foot of the Will "This scratch-the mark of Rangammal" admittedly written by Kothandarama Pillai amounts to his signature of the testatrix's name both the learned Judges have agreed that it is to be so regarded and I entirely agree. The habit of illiterate persons in the Tamil country who can only make marks but who wish to authenticate their documents by the instrumentality of others is precisely what happened in this case. The pen is touched and handed over to the person who makes the mark and adds the memorandum that this is the mark of the executant. The meaning and object of that act is to authenticate the document as that of the person whose name is written. Such being the case there can be no doubt as the learned Judges have held that Kothandarama Pillai did sign Rangammal's name to the will. As already stated, that he did so in her presence and under her direction is proved. The will was therefore validly executed and that is my answer to the point referred."

The same view was reiterated in the judgments in Chilamakuri Chinna Pullappa v. Guruka Chinna Buyanna and others, 1961 (2) Andhra Weekly Reporter 162 and in Karri Nookraju v. Putra Venkatarao and others, AIR 1974 A.P. 13.

14. Therefore, from the above judgments, if a mark has been made by the scribe as per the direction of the testatrix in the Will in the presence of the testatrix and the witnesses, it amounts to a valid execution of the Will. But that is not sufficient to prove the Will in this case. In this case, the scribe was not examined to prove that as per the direction of the testatrix, he wrote the wordings "இந்த-----கீர்ல் சிவகாமி ஆச்சி கைநாட்டு". As held by the Full Bench in Dasureddi's case, there is also no evidence to show that the pen was touched by the testatrix and given to the scribe to write the Will. The attesting witness-P.W.2 also did not support the case of the appellant to the effect that the Will was executed by Sivakami Achi and he attested the document. He only admitted his signature in Ex.A7 and he also stated that he signed the document believing the same as promissory note in the house of Mr.Kulandaivel Mudaliar. The evidence of P.W.2 recorded in R.C.O.P.No.30 of 1986 and the admissible portions in that evidence are marked as Exs.A8 to A10 and they are as follows:-

"Ex.A8 - மனுதாரருக்கு அவர் தாயார் உயில் எழுதி வைத்தார். அதில் நான் கையெழுத்திட்டுள்ளேன். உயில் எழுதும் போது நான் இருந்தேன்.

Ex.A9 - உயில் ரத்தினம் பத்தர் எழுதினார். படித்துக் காட்டினார்.

Ex.A10 - சிவகாமி கூறி கீறல் எழுதப்பட்டது. அதை ரெத்தின பத்தர் பூர்த்தி செய்தார்."

P.W.2 did not say that the other attesting witness also signed in the Will and that was also signed by the testatrix. As per Section 63(c) of the Indian Succession Act, the Will shall 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 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. The law regarding the attestation of Will by witnesses has been succinctly dealt with in the judgment reported in 2003 (1) CTC 308 (SC) in the matter of Janki Narayan Bhoir v. Narayan Namdeo Kadam as follows:-

"10.....Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though Will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a Will. To put in other words, if one attesting witness can prove execution of the Will in terms of the clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in this evidence has to satisfy the attestation of a Will by him and the other attesting witness in order to prove there was due execution of the Will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the Will by other witness also it falls short of attestation of Will at least by two witnesses for the simple reason that the execution of the Will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the Will under Section 68 of the Evidence Act fails to prove the due execution of the Will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the Will by the other witness there

will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act."

In the judgment reported in (2009) 4 SCC 780 in the matter of Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others, it is held as follows:-

"12. The attestation of the Will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested (sic attesting) witness should put his signature on the Will *animo attestandi*. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a Will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.

13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the Will. The attesting witness should speak not only about the testator's signature or affixing his mark to the Will but also that each of the witnesses had signed the Will in the presence of the testator."

15. Therefore, if one attesting witness was examined and if he did not speak about the attestation by the other attesting witness, there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act and the Will is not said to have been proved as per law. In this case, as stated above, P.W.2, while examined as a witness in the suit, did not speak about the attestation by the other witness or the due execution of the document by the testatrix. In R.C.O.P.No.30 of 1986, he admitted the execution of Will by testatrix as referred to above. Even then, he did not speak about the other requirements of attestation by the other witness. Hence, in my opinion, the propounder of the Will failed to prove due execution of the Will as per the provisions of Section 63 (c) of the Indian Succession Act and Section 68 of the Indian Evidence Act. Therefore, the plaintiff is not entitled to the relief of declaration and recovery of possession and the points for consideration are answered accordingly.

16. In the result, both the appeals are dismissed and the judgment and decree of the trial Court are confirmed. There shall be no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ss

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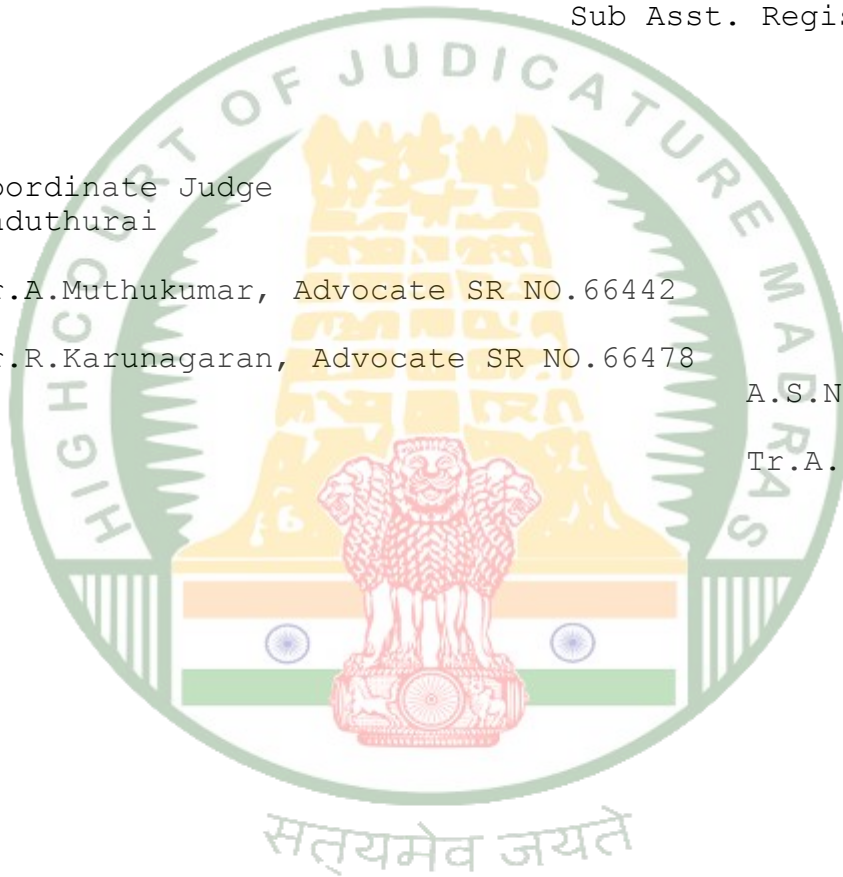
1. The Subordinate Judge
Mayiladuthurai

1 CC To Mr.A.Muthukumar, Advocate SR NO.66442

1 CC To Mr.R.Karunagaran, Advocate SR NO.66478

A.S.No.1204 of 1995 &
Tr.A.S.No.220 of 2002

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