

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.08.2016

Coram

The Hon'ble Mr. Justice **A.SELVAM**
and
The Hon'ble Mr. Justice **P.KALAIYARASAN**

O.S.A.No.167 of 2016

1.Karthik Meyyappan
2.Ranjini Murugan
3.Latha
4.Ramadevi
rep.by her Power Agent,
Mrs.Ranjini Murugan
5.K.Rajendran
6.Vishnu Rajendran
7.Vinayak Rajendran
8.Vikram Rajendran
rep.by their Power of Attorney
Agent Mrs.Lata Murugan

... Appellants

Cause title accepted vide order
of Court dated 20.07.2016
made in C.M.P.No.11433 of 2016
in O.S.A.Sr.No.47397 of 2016

Vs

1.Sri Sutha Devi
2.Banasankari Minor,
rep.by her mother and
Natural Guardian
Sri Sutha Devi

.. Respondents

Original Side Appeal preferred under Order XXXVI Rule 9 of O.S.
Rules r/w Clause 15 of the Letters Patent against the order dated
06.04.2016 made in T.O.S.No.26 of 2014.

For Appellants .. Mr.K.V.Babu

For Respondents .. Mr.P.B.Balaji

JUDGMENT

(Judgment of the Court was delivered by **A.SELVAM, J.**)

Challenge in this Original Side Appeal is to the judgment and decree dated 06.04.2016, passed in T.O.S.No.26 of 2014, by the learned Single Judge of this Court.

2. The respondents herein, as plaintiffs, have filed T.O.S.No.26 of 2014, praying to grant Letters of Administration in respect of a Will dated 24.11.2008. During pendency of the same, on the side of the respondents/plaintiffs, an attempt has been made to examine P.W.1 to adduce evidence and also to mark the Will, dated 24.11.2008. The appellants/defendants have raised an objection with regard to marking of the Will, dated 24.11.2008, through P.W.1 and subsequently, a reference has been made to the learned Single Judge of this Court.

3. The learned Single Judge, after considering the rival contentions raised on either side, has disposed of the matter, after giving the following observation:

"This Court permits P.W.1 to examine herself as the first witness and thereafter examine any one of the attesting witnesses or both of them to prove the execution of the Will."

Against the order passed by the learned Single Judge, the present Original Side Appeal has been filed, at the instance of the defendants, as appellants.

4. The learned counsel appearing for the appellants/defendants has repletedly contended to the effect that the Will in question has not been executed by the alleged executant and the same has been concocted by the respondents/plaintiffs. As per Section 68 of the Indian Evidence Act, 1872, coupled with Section 63(c) of the Indian Succession Act, 1925, the Will in question has to be marked only through an attesting witness. Under the said circumstances, a befitting objection has been raised and even though a reference has been made to the learned Single Judge of this Court, the learned Single Judge has not answered properly and the Will in

question cannot be marked through P.W.1. Under the said circumstances, P.W.1 is totally incompetent to mark the Will, dated 24.11.2008.

5. Per contra, the learned counsel appearing for the respondents/plaintiffs has also equally contended that as per procedure, on the side of the plaintiffs, necessary documents can be marked as exhibits and for proving the same, some more witnesses have to be examined. Under the said circumstances, on the side of the respondents/plaintiffs, an attempt has been made to mark the Will, dated 24.11.2008, but on the side of the appellants/defendants, a frivolous objection has been raised and even the learned Single Judge has not pointed out as to through whom the Will, dated 24.11.2008, has to be marked.

6. The entire contention put forth on the side of the appellants/defendants is based upon the decision of the Bombay High Court in **Walter D'Souza vs. Anita D'souza (judgment dated 14.11.2014 made in Testamentary Petition No.774 of 1997)**, wherein at paragraph No.22, it is observed as follows:

"22. Therefore, Mr. Narula is correct in his submission that if a contesting witness is not

examined first to prove the execution of the Will, it cannot be marked in evidence, and in that situation, the cross-examination of the plaintiff might well be meaningless or futile in the sense that the plaintiff may need to be recalled as a witness after an attesting witness proves due execution of the Will. In fairness Mr.D'Mello accepts that this appears to be the correct position in law."

Even a cursory look of the observation made in paragraph No.22 shows that the High Court of Bombay has observed that the disputed document has to be marked only through an attesting witness, for having effective cross-examination.

7. The learned counsel appearing for the respondents/plaintiffs has drawn the attention of this Court to the decision reported in **(2015) 5 MhLJ 587 - Yatin Gordhandas Dossa vs. Supriya Shalilesh Patel**, wherein, the very same Judge in paragraph Nos.12 and 13 has observed as follows:-

"12. The plaintiff, Yatin, led his own evidence, and that of Shanbag, one of the two attesting witnesses. The Defendant examined herself. Evidence was recorded on commission by Ms.Jerestin Sidhwa, learned Advocate of this Court. I must at this stage record my appreciation of Ms.Sidhwa's

work; systematic, organized and meticulous, it was of invaluable assistance. Before Ms.Sidhwa, some of the plaintiff's documents were taken on record and assigned identifying numbers, P1 to P8. Similarly, a compilation of the Defendant's documents were taken on record and identified as D1. I considered these documents, and by an order dated 31st October 2014, received them in evidence retaining the marking assigned by Ms.Sidhwa. (Though it is true that some of the documents (such as evidence affidavits and so on) ought not to have been marked as exhibits strictly speaking, I retained Ms.Sidhwa's marking for consistency and to avoid later confusion.). The will in question is marked Exhibit "P4". To the extent necessary, I will turn to the documents as I assess the oral evidence led.

13. I believe it would be proper to begin with the evidence of the attesting witness, Shanbag, though he was P.W.2 and it was the evidence of the Plaintiff that was led first. Apart from anything else, I do so because I have recently held that, as a matter of law, in contested testamentary matters where a testamentary writing is sought to be proved (either in a probate petition or one for letters of administration with will annexed), in a statutorily required departure from the provisions of Order XVIII Rule 3-A of the Code of Civil Procedure,1908,

the evidence of the attesting witness must be led first. (walter D'Souza v. Anita D'Souza and Ors. Judgment dated 14th November 2014 in Testamentary Suit No.33 of 1998 in Testamentary Petition No.774 of 1997)"

From a close reading of the subsequent decision rendered by the same Judge, it is made clear that in his earlier judgment, the learned Judge has completely deviated the existing procedure.

8. As narrated earlier, the issue involved in the present Original Side Appeal is nothing but simple. On the side of the respondents/plaintiffs T.O.S.No.26 of 2014 has been filed for getting Letter of Administration, on the basis of the Will dated 24.11.2008. On the side of the respondents/plaintiffs P.W.1 has been examined in part and at the time of marking the Will, dated 24.11.2008, on the side of the appellants/defendants, objection has been raised. As rightly pointed out by the learned counsel appearing for either side, the learned Single Judge has not given a specific finding as to by whom, the Will, dated 24.11.2008, can be marked.

9. It is a well settled principle of law that as per Section 63(c) of the Indian Succession Act, 1925, a Will has to be attested at least by two attesting witnesses and they must see the signature or thumb impression of the executant and in turn, the executant must see their signatures.

10. At this juncture, it would be apposite to look into Section 68 of the Indian Evidence Act, 1872. In Section 68 of the Indian Evidence Act, 1872, it is clearly stated that if a document required by law to be attested, at least one of the attesting witnesses must be examined for the purpose of proving its execution as well as attestation, otherwise, the same cannot be treated as evidence.

11. In Section 68 of the Indian Evidence Act, 1872, there is no specific mention for the purpose that a Will has to be marked through an attesting witness and the said Section says only with regard to execution as well as attestation and the same does not speak about the marking of the same.

12. The archaic procedure in civil suit is that both parties are entitled to mark respective documents on which they based their claim. It is also an acknowledged principle of law that mere marking is entirely different from proving of a particular document.

13. In the instant case, as stated in many places, an attempt has been made to mark the Will dated 24.11.2008 through P.W.1. But on the side of the appellants/defendants objection has been raised to the effect that the said Will has to be marked only through an attesting witness.

14. It has already been pointed out that even in Section 68 of the Indian Evidence Act, 1872, or in other Sections of the said Act it has not been specifically stated that a Will has to be marked only through an attesting witness. As pointed out earlier, marking of a particular document is totally different from proving its contents by a person, who is connected with the same. Therefore, it is needless to say that the Will in question can be marked through P.W.1. In other words, a will can be marked through a propounder. Further, mere marking itself would not constitute its proof. Under the said circumstances, the contention put forth on the side of the

appellants/defendants cannot be accepted. Therefore, P.W.1 can be permitted to mark the Will dated 24.11.2008. With the above observation, the present Original Side Appeal is liable to be disposed of.

In fine, this Original Side Appeal is disposed of on the basis of the observations made earlier. However, it is made clear that the Will, dated 24.11.2008, can be marked through P.W.1. Further, it is made clear that for proving its execution as well as attestation, the respondents/plaintiffs have to examine any one of the attesting witnesses, as per relevant section(s) of Indian Evidence Act, 1872.

(A.S.J.,) (P.K.J.,)
11.08.2016

Index:Yes
msk

To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

A.SELVAM,J.
and
P.KALAIYARASAN,J.
msk

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