

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.01.2017

CORAM

THE HONOURABLE MR. JUSTICE **R.SUBRAMANIAN**

A.S.NO. 87 of 2010
C.M.P.No. 25 of 2017

M.V.Somasundaram

...Appellant

Vs.

1. Tamizharasi

2. The Special Tahsildar (LA)
Housing Board Schemes,
Gundu Salai,
Cuddalore District.

3. Sivanantham

...Respondents

Prayer:- This first Appeal has been filed under Section 96 of the Code of Civil Procedure, 1908, against the decree and judgement dated 05.01.2009 passed in O.S.No.43 of 2004 on the file of the Principal District Judge, Villupuram.

For Appellant : Mr.S.Subbiah

For Respondent : Mr.Prahalad Bhat
for R.Parthasarathy

JUDGMENT

The un-successful plaintiff in a suit for declaration and recovery of possession, is the appellant. According to the plaintiff, he

and his brother one Shanmuga Udayar are members of a joint family. In a partition that took place in the year 1932, the said Shanmuga Udayar being the elder brother has taken larger share by allotting lesser share to the plaintiff. The plaintiff thereafter joined the Royal Indian Army and after discharge from the Army returned to his native place in 1943. Since his brother, the said Shanmuga Udayar, was a very influential person, he could not take any steps against him to demand his proper share. He left the village and joined Sri Aurobindo Ashram in Pondicherry, where he stayed till the death of Holy Mother in the year 1972. Thereafter he shifted to Anandha Ashram run by Swami Geethanandha at Pondicherry and stayed there till the year 1980. During 1974, his elder brother namely Shanmuga Udayar visited the Anandha Ashram and confessed that he has deprived him due share of the property and thereafter he executed a Will on 18.01.1975 bequeathing the suit "A" schedule property to the plaintiff.

2. In 1982 the 4th defendant in the present suit Sivanantham, S/o. Shanmuga Udayar has filed a suit in O.S.No.63 of 1982 seeking partition and separate possession of his share. In the said suit he had described that the first defendant in the present suit as a concubine of Shanmuga Udayar. The said suit ended in appeal before

this Court and the Division Bench of this Court found that the first defendant is a legal heir and she is also be entitled to equal share in the suit property. Therefore a preliminary decree was passed granting 1/9th share to the first defendant.

3. The plaintiff would further contend that the said Shanmuga Udayar died on 14.05.1995 and the Will executed by him on 18.01.1975 being the only valid Will came into effect thereafter. According to the plaintiff, he is entitled to a share in the suit property as per the said Will. The defendants 1 and 2 namely wife and daughter of the said Shanmuga Udayar filed a written statement, contending that the Will set up by the plaintiff is not true. They would also contend that the said Shanmuga Udayar executed a Will in favour of the second defendant on 07.12.1993 and codicil on 02.02.1995.

4. The fourth defendant in the suit filed a separate written statement claiming that the deceased Shanmuga Udayar has executed a Will in his favour on 10.03.1995 and based on the said Will the fourth defendant filed a suit in O.S.No.58 of 2001 for declaration of his title against the defendants 1 and 2. The said suit was decreed as prayed for on 09.01.2002 as the second defendant submitted to a decree.

5. The sole plaintiff Vinayagam died and the second plaintiff was impleaded as his legal heir. The first defendant also died pending suit and the second defendant was declared as her legal heir. The Special Tashildar, Land acquisition was impleaded as party in as much as the property subject matter of the suit was acquired by the Tamil Nadu Housing Board.

6. On the above pleadings, the learned Principal District Judge, Villupuram framed the following issues :-

1. *"Whether the second plaintiff is entitled to declaration of title in respect of A and C schedule property?"*
2. *Whether the Will dated 18.01.1975 said to be executed by Shanmuga Udayar is true and valid?*
3. *Whether the Will dated 02.02.1995 said to be executed by Shanmuga Udayar is true and valid?*
4. *Whether the Will dated 10.03.1995 said to be executed by Shanmuga Udayar is true and valid?*
5. *To what other relief the second plaintiff is entitled to?"*

7. I have heard Mr.S.Subbiah, learned counsel appearing for the appellant and Mr.Prahad bhat for Mr.R.Parthasarathy, learned counsel appearing for the respondents 1 and 3 and the learned Government Advocate appearing for the second respondent.

8. Mr.S.Subbiah, learned counsel appearing for the appellant would submit that he restricts the claim to schedule A property covered by Will dated 18.01.1975.

9. From the facts narated above, it could be seen that litigation is between the legal heirs on one side and the brother on the other side. The deceased first plaintiff is the brother who claimed title under the Will dated 18.01.1975. Whereas the 4th defendant claimed possession under the Will dated 10.03.1995. The other suit is between the defendants 1&2 and the 4th defendant is O.S.No. 58 of 2001, wherein the defendants 1& 2 had accepted the Will in favour of the 4th defendant and the said suit in O.S.No.58 of 2001 was decreed in favour of the 4th defendant. Therefore, the question of validity or genuineness of the Will dated 07.12.1993 and the codicil dated 02.02.1995 need not be gone into.

10. The plaintiff, in order to succeed has to prove that (1) the Will dated 18.01.1975 is true and (2) the Will dated 10.03.1995 is not genuine. If the plaintiff fails to establish the Will dated 18.01.1975, the effect is that the Will dated 10.03.1995 is true and valid.

11. Considering the above, the following points are framed for determination in this appeal. (1) Whether the plaintiff has proved the truth and validity of the Will dated 18.01.1975 as per the requirement of Sections 68 and 69 of the Evidence Act? **On the point:-** The Will dated 18.01.1975 has been marked as Ex.A.5 and it has been attested by two witnesses. It is an admitted case that none of the two attesting witnesses are available. Therefore, the plaintiff could not comply with the requirement of Section 68 of the Indian Evidence Act. It is to be seen whether the plaintiff has complied with the requirement of the Section 69 of the Indian Evidence Act so as to prove the Will dated 18.01.1975. Section 69 from the Evidence Act reads as follows :-

"69. Proof where no attesting witness found :- If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the

*signature of the person executing the document
is in the handwriting of that person.”*

12. From the language of the Section 69 of Evidence Act the propounder of a Will, where no attesting witnesses are available, has to prove two things. (1) That the signature of atleast one attesting witness is in his hand writing and (2) The signature of the testator is in the hand writting of the testator. Unless both the requirements are satisfied if cannot be said that the Will stood proved.

13. In this background if we consider the evidence on record the plaintiff is examined as P.W.1 and one Ganadesigan was examined as P.W.2 in order to prove the Will. P.W.2 – Ganadesigan worked as Personal Assistant to the said Shanmuga Udayar, when he was a Chairman of the Villupuram Municipality. It is not disputed that the deceased Shanmuga Udayar was functioning as Chairman of the Municipality for 3 or 4 terms. P.W.2 worked as P.A to the deceased Shanmuga Udayar from 03.06.1986 to 01.03.1991. He identified the signature of the deceased Shanmuga Udayar in the Will dated 18.01.1975 which was marked as Ex.A.5. From his evidence it is clear that he was not present at the time of execution of Will and he does not know the contents of the Will. He would clearly depose that he would

identify the signature of the Shanmuga Udayar alone.

14. Mr.S.Subbiah, learned counsel appearing for the appellant would contend that the fact that the two attesting witnesses, were residing in Ashram in Pondicherry and neither the plaintiff nor the appellant could get hold of any person to prove the signature of the attestors. The learned counsel would rely upon the judgment of this Court reported in ***Mohammed Mohideen Vs. Muthukumara Thevar and another reported 1998 (1) MLJ 144***. According to the learned counsel for the appellant this Court in the said judgment had held that the proof of execution would be sufficient to satisfy the requirements of Section 69 of the Evidence Act. I am unable to agree. A reading of the said judgment shows that the person who was examined as D.W.2 in the said case to prove the Will was the scribe of the Will and he had spoken about the execution of the Will by the testator as well as the attestation by the attestors of the Will. Therefore, this Court had concluded that the Will stood proved. The said judgement cannot be taken as a precedent to hold that, this Court had concluded that the proof of signature of testator alone will be sufficient compliance with the requirements of Section 69 of the Evidence Act.

15. The learned Counsel also relied upon the judgment in ***G.Vaidehi Vs. S.Govindarajan reported in 1992 (1) LW 311.*** I find that said judgment does not help the claim of the appellant. The Division Bench had laid down that the requirements of Section 69 stood satisfied on the facts of the said case. The Division Bench while rejecting the contention that the proof of valid attestation would only come from the mouth of the attester, has held that it is sufficient if it is proved that the signature of atleast one attester is in his own handwriting. The learned counsel is unable to bring to my notice any other decision which would be helpful to him.

16. On the other hand the learned counsel appearing for the respondent invited my attention to the judgment of the Hon'ble Supreme Court in ***"Yumnam Ongbi Tampha Ibema Devi Vs. Yumnam Joykumar Singh and other reported in 2009 4 SCC 780"*** and contended that as per provisions of the Section 63 of the Indian Succession Act, the following are the requirements for the due execution of a Will:-

1. the testator should sign or affix his mark to the Will;
2. the signature or the mark of the testator should be so placed that it should appear

that it was intended thereby to give effect to the writing as a Will;

3. the Will should be attested by two or more attestors and ;
4. each of the said attestor must have seen the testator signing or affixing his mark to the Will and each of them should sign the Will in the presence of the testator.

17. Laying emphasis on the fourth requirement, the learned counsel for the respondent would contend that in the absence of the proof of signature of the attestor, the fourth requirement is not satisfied. Therefore, it cannot be concluded that the plaintiff has proved the truth and genuineness of the Will dated 18.01.1975. I agree with the learned counsel for the respondent. The evidence of P.W.2 cannot be taken as one proving the attestation of the Will. What has been proved is the signature of the deceased Shanmuga Udayar and the due attestation of the Will has not been proved. I am therefore constrained to answer the points framed against the appellant. Once the Will dated 18.01.1975 is held to be not proved, the plaintiff cannot succeed. The question whether the Will dated 10.03.1995 is true or valid pales in to insignificance.

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18. This application has been taken out by the appellant for receiving the judgment of this Court in the earlier case in A.S.No.688 of 1983 between M.Shanmuga Udayar and Sivanandam, who is the 4th defendant in the suit. In the light of the view taken in the appeal, I do not find that the said judgment is helpful to the appellant in any way. Therefore, the application is dismissed.

19. In the result, the appeal is dismissed confirming the judgement and decree of the trial Court. However, taking into account the relationship between the parties and nature of the proceedings, I make no order as to costs.

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Index : Yes
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To

The Principal District Judge, Villupuram.

R.SUBRAMANIAN, J.

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