

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **21.04.2017**

CORAM:

THE HONOURABLE MR.**JUSTICE DR.P.DEVADASS**

C.R.P.(P.D.) No.3659 of 2013 and
MP.No.1 of 2013

Vanjiammal(died)

1.Jaya
2.Senthil
3.Venkatesan
4.Kannaki
5.Sivaraman
6.Kannaki
7.Hema
8.S.S.Sakunthala

...Petitioners

Vs

1.Vidya
2.Tamil Arasu @ Ulaganathan
3.G.D.Babu @ Sundhar
4.Chandran
5.T.R.Ramakrishna
6.Meenakshi
7.Marappan
8.Vijayalakshmi
9.Krithika
10.Senthil
11.Thangaraj
12.Seenivasan
13.Sivakami
14.Dhanabagyam

...Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against fair and decreetal order dated 12.08.2013

passed in I.A.No.515 of 2012 in O.S.No.157 of 2004 on the file of the Sub Court, Gobichettipalayam.

For Petitioners	: Mr.A.K.Kumaraswamy, Senior Counsel for Mr.S.Kaithamalai Kumaran
For R1	:Mr.V.K.Gowtham

ORDER

This revision arises out of dismissal of I.A.No.515 of 2012 in O.S.No.157 of 2004 on the file of the Sub Court, Gobichettipalayam, Erode District.

2.The said Interlocutory Application came to be filed by the defendants 1 to 5, 9, 10, 11 & 13.

3.The plaintiff and the defendants traced their relationship through Annamalai Mudaliar, whose wife is Valliammal. Plaintiff filed the suit claiming share in suit item Nos.1 to 4.

4.In the plaint, the plaintiff speaks about a Will dated 16.06.1976 executed by Annamalai Mudaliar. The Will has been attested by two witnesses. Annamalai Mudaliyar is now no more. In the list of documents, document No.11 is the said Will.

5. Defendants 2, 4 & 5 have filed their written statement. They have also referred to about the said Will. They have also pleaded about a prior suit and disposal of the same. Defendants 9, 10, 11 & 13 have also filed written statement. They have also referred to about the said Will of Late. Annamalai Mudaliar.

6. Necessary issues were framed. The suit was put on trial. Plaintiff examined herself as PW1. Her proof affidavit has been received in evidence. Her chief examination is in part.

7. At this juncture, defendants 1 to 5, 9, 10, 11 & 13 have filed I.A.No.515 of 2012 under Section 151 of CPC to mark the plaint document No.11, namely the Will dated 16.06.1976 of Late. Annamalai Mudaliar without formal proof through PW1. Plaintiff filed counter that the Will is a document to be proved at least by examining one attesting witness, as per Section 68 of the Indian Evidence Act. Further, the attempt of the petitioner to mark the said certified copy of the Will through PW1 is not permitted under law.

8. The trial court after hearing both sides, dismissed the said I.A.

referring to the decision rendered in O.S.No.321 of 1991 between the concerned parties, wherein, the validity of the Will was not upheld and it had also held that it is impermissible to mark the Will through the first respondent/plaintiff/PW1 without adopting the mode prescribed under Indian evidence Act.

9.The learned Senior counsel for the revision petitioners would contend that the Will in question has been listed by the plaintiff in the suit as one of the suit documents. The execution of the Will by the common ancestor has been mentioned by the plaintiff herself in plaint pleadings. The defendants are not disputing the said Will. In fact, the defendants have also mentioned about the said Will in their written statement. There is no dispute about the existence of the Will. Thus, the existence of the Will is not a controverted aspect.

10.The learned Senior Counsel for the revision petitioners further submitted that when in their pleadings, both the parties have also set up their case also based on the Will, then it is an admitted fact. In such circumstances, as per Section 58 of the Indian Evidence Act, the facts admitted need not be proved.

11.The learned Senior Counsel for the revision petitioners also contended that in such view of the matter, an occasion to follow the provisions under Section 68 of the Indian Evidence Act to mark the Will by examining any one of the attesting witness will not arise.

12.In this connection, the learned Senior counsel for the revision petitioners cited ***Valluri Jaganmohini Seetharama Lakshmi and another Vs. Kopparthi Ramachandra Rao and Others (AIR 1994 AP 284)***.

13.The learned Senior Counsel for the revision petitioners would also submit that in such circumstances, the requirement in Section 68 of the Indian Evidence Act will not apply to this case. The said Will can be proved by letting in a certified copy of the same, since the defendants are not in possession of the same. When the plaintiff/ PW1 has not come forward to mark the Will, it can be marked through the cross examination of PW1.

14.On the other hand, the learned counsel for the respondent/plaintiff submitted that it cannot be denied that what is sought to be marked, is a testamentary dispossession, which can be

admitted in evidence only by the mode of proof as provided in Section 68 of the Indian Evidence Act.

15.The learned counsel for the respondent also submitted that the admission of the existence of the Will is not equivalent to admission of proof of execution of the Will. They cannot be interchangeable. They are not synonymous.

16.In this connection, the learned counsel for the revision petitioners cited ***A.V.S.Perumal Vs. Vadivelu Asari (99 L.W. 115).***

17.The learned counsel for the respondents would also submit that in a prior litigation the validity of the said Will has not been approved by the Court. There ends the matter.

18.I have anxiously considered the rival submissions, perused the impugned order, the materials on record and the decisions cited.

19.The execution of the Will is regulated by the provisions of the Indian Succession Act. Proof of the same is regulated by the provisions

of the Indian Evidence Act. The Act also deals with documentary evidence which has been classified as primary evidence and secondary evidence. As per Section 68 of the Indian Evidence Act, the Will has to be proved by examining at least one of the available attesting witnesses. However, the said requirement of law will not arise when the execution of the Will is not specifically denied.

20. Certain aspects which everybody knows, need not be proved by wasting Court's time. Close on the heels, is the principle that facts admitted need not be proved. This principle is incorporated in Section 58 of the Indian Evidence Act. This principle extends not only to oral evidence, but also to evidence in writing. It includes through pleadings of the parties also. However, this Court is always has the power to call for proof even in admitted aspect also.

21. Documents are classified as public documents and private documents under the Indian Evidence Act. There are documents which are required to be registered. There are some documents, their registration is optional. Will comes under this category. Certified copy of a registered document can be obtained. A certified copy delivered by an Authorized Officer becomes a replica of the original document. A

combined reading of Sections 74, 75, 76 of the Indian Evidence Act forms a base for these premises. A certified copy of the Will will become a secondary evidence under the Indian Evidence Act.

22.The factual matrix in ***Valluri Jaganmohini Seetharama Lakshmi and another Vs. Kopparthi Ramachandra Rao and Others (AIR 1994 AP 284)*** is similar to the case before us. The contentions placed by the parties before the Andhra High Court are also similar to the arguments placed before us by the learned counsel. The Andhra High Court held as under:

"Facts admitted need not be proved:-No fact need be proved, if any proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings."

As such, an admission in pleadings as to execution of document dispenses with the necessity of proof of execution even though such document was one required by law to be in certain form or proved in a certain way".

23. In ***A.V.S.Perumal Vs. Vadivelu Asari (99 L.W.115)***, a learned Single Judge of this Court held that even though there was consent for marking a document, without examining a witness for the said document, it cannot be relied on. This was challenged before a Division Bench. But a Division Bench held that a document can be marked with the consent of the parties, but the contents of the same have to be proved by letting in required evidence.

24. Keeping the above principles in our mind, let us approach the case at our hand.

25. In the instant case, as already stated, while referring to the factual matrix, neither the plaintiff nor the defendants have disputed the existence of the Will executed by late Annamalai Mudaliar. In fact, the plaintiff as well as the defendants in their pleadings have spoken about the said Will. They referred to the said Will and they have also relying upon the Will in putting forth their respective cases. So there is no specific denial as to the execution of the Will. In such circumstances, the proviso to Section 68 of the Indian Evidence Act applies. As per that requirement, to examine at least one attesting witness will not apply to this case.

26. Further, Section 58 of the Indian Evidence Act, is also applicable namely the fact admitted need not be proved. The principles laid down in ***Valluri Jaganmohini Seetharama Lakshmi and another Vs. Kopparthi Ramachandra Rao and Others (AIR 1994 AP 284)*** squarely applies to the facts of this case.

27. The certified copy of the said Will is with the revision petitioner. They are not having the original Will. The certified copy becomes a secondary evidence of proof of the existence of the primary evidence. A certified copy of a Will is a carbon copy of the original Will. **(See : A.V.S.Perumal Vs. Vadivelu Asari (99 L.W.115).** But the proof of the contents of the Will, substance of the Will, cannot be taken as proved. That has to be established by the parties by relevant, acceptable, legal evidence.

28. Now, PW1/plaintiff is in the witness box. Her evidence is in part. A witness cannot be asked to become a witness adverse to himself. An opposite party can always consent if a party could not mark a document through his opponent he can mark the same through his witnesses or in a manner known to law.

29. Now, in this case, the Will dated 16.06.1976, executed by late Annamalai Mudaliar, can be proved without formal proof. That is what the scope of the Interlocutory Application filed by the defendants. Factually, it will arise when PW1 was subjected to cross examination by the defendant/revision petitioner.

30. It has been contended by the respondents that the validity of the Will has not been accepted by a Court in the some connected proceedings. Still the Will remains to be a document. Still it remains to be a piece of evidence. The validity of a document is different from the relevancy and proof of the document.

31. In this view of the matter, the trial court has not viewed the matter in proper perspective. Thus, the dismissal of I.A. is unsustainable in law.

32. This Court also visualizes a situation when confronting PW1 with a certified copy of the Will, PW1 may took a defiant stand and may refuse to open her mouth. In such an event, she cannot be forced to open her mouth and the certified copy of the Will cannot be put into

her mouth. But that cannot an end of it. If she closes her mouth, the defendants witness can open her mouth. When such a situation arises, as we have elaborately discussed, letting in the certified copy of the Will of Annamalai Mudalier does not require formal proof.

33. In view of the foregoings, ordered as under:

(1) this revision succeeds.

(2) The order and decretal order dated 12.08.2013 passed in I.A.No.515 of 2012 in O.S.No.157 of 2004 by the trial Court are set aside.

(3) The revision petitioner can mark the certified copy of the Will dated 16.06.1976 through PW1 in his cross examination without a formal proof.

(4) In case need arises, the revision petitioners can mark the certified copy of the said Will either through their witness or in a manner known to law.

(5) In the circumstances, there is no order as to costs.

(6) Consequently, connected miscellaneous petition is closed.

34. Accordingly, the civil revision petition is disposed of.

21.04.2017

Index:Yes/No
dn

To

- 1.The Principal District Judge,
Erode.
- 2.The Sub Judge,
Gobichettipalayam.

Copy to

The Director,
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DR.P.DEVADASS J.

(dn)

C.R.P.(P.D.) No.3659 of 2013

21.04.2017

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