

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 31.07.2017

Judgment Pronounced on : 07.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.554 of 2006
and CMP.No.6857 of 2006

1.Ganesan
2.Balakrishnan

... Appellants/
Defendants 2 and 3
/Respondents 1 and 2.

Vs.

1.Palaniammal
2.Umadevi

... Respondents/
Plaintiffs/Appellants.

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 12.08.2005 passed by the learned First Additional District Judge, Coimbatore, in A.S.No.69 of 2004, reversing the Judgment and decree of the learned First Additional Subordinate Judge, Coimbatore, dated 06.11.2003 in O.S.No.440 of 1994.

For Appellants : Mr.S.Subbiah, Senior counsel
for Mr.R.Selvaraj.

For Respondents: Mr.C.R.Prasanan & Mr.A.Palaniappan
for R1 and R2.

JUDGMENT

This second appeal arises out of the judgment and decree dated 12.08.2005 passed by the learned First Additional District Judge, Coimbatore, in A.S.No.69 of 2004, reversing the Judgment and decree of the learned First Additional Subordinate Judge, Coimbatore, dated 06.11.2003 in O.S.No.440 of 1994.

2. Brief facts of the case is as follows:-

The plaintiffs are the daughters of the first defendant/mother. The defendants 2 and 3 are the sons of the first defendant. The entire suit property was

purchased on 15.11.1958 in the name of 1st defendant and one Soundararaj. The sale consideration for the same was paid by selling Joint Family property and ancestral property of the Plaintiffs and Defendants. The Plaintiffs and defendants were in Joint Possession and enjoyment of the suit property measuring 10 cents 404 sq.ft. Subsequently, as per the Partition dated 30.08.1975, northern side of the property measuring 5 cents 202 sq.ft. Was allotted jointly to the Plaintiffs and Defendants, while the remaining property was given to Soundararaj. Hence, the plaintiffs are entitled to get share in the suit properties. The defendants used to pay share to the plaintiffs. But, later they refused to give the share to the plaintiffs. Hence, the plaintiffs demanded the partition, but, the defendants refused to effect partition. Hence, the suit.

3. The defendants contested the suit by denying the rights of the plaintiffs on the ground that the first defendant/mother had executed a Will on 05.12.1986 in a sound and disposing state of mind, by which she has bequeathed the suit property to her husband for life time enjoyment and thereafter, gave absolute right to the defendants 2 and 3. The plaintiffs are also aware of the said Will. Hence, the suit is not maintainable and Defendants seek dismissal of the suit.

4. After contest, the trial Court dismissed the suit. Aggrieved upon that the plaintiffs preferred the first appeal before the lower appellate Court. After contest, the lower appellate Court allowed the appeal by setting aside the decree and judgment of the trial Court and decreed the suit for partition of $\frac{1}{2}$ share to the Plaintiff. Aggrieved over the same, the Defendants have preferred this Appeal. Hence, the second appeal.

5. At the time of admission, this court has framed the following substantial questions of law.

1) When the first defendant has stated in para 24 of the written statement specifically admitting the execution of the Will in a sound disposing state of mind with free Will and without any force and also giving the reason for such execution excluding the daughters in para 23 of written statement, whether the lower appellate Court is correct in disbelieving the execution of the Will?

2) When the attesting witnesses are dead and the scribe of the Will who was present at the time of execution states about the due execution of the Will by the testator in the

presence of the attesting witnesses and also attestation of the attesting witness in the presence of the testator whether the lower Appellate Court is correct in granting the relief to the plaintiffs contrary to the evidence on record?

6. The learned counsel appearing for the appellants/defendants would submit that the deceased first defendant/mother had executed a Will on 05.02.1986, which is marked as Ex.B5. The above said fact was narrated in para 24 of the written statement filed by the defendants in the suit. The executant of Will, the 1st defendant herself admitted the execution, but the lower appellate Court disbelieving the same and decreeing the suit in full, is not sustainable under law. The learned counsel appearing for the appellants would further submit that as both the attesting witnesses were dead, the scribe of the Will who was present at the time of execution had narrated about the execution of Ex.B.5 Will by the testator and the signature made by the executant of the Will in the presence of attestors and also about the attestors attesting the Will in the presence of testator. Thus, it is contended by the Appellants that the execution of the Will is duly proved and as such, the first appellate Court erred in granting relief to the plaintiffs, contrary to the evidence on record. Hence, the appellants seeks to entertain the appeal.

7. Per contra, the learned counsel appearing for the respondents would submit that proof of execution of the Will is contemplated under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act and the defendants/appellants have miserably failed to comply with the same. Even though one of the attestors was alive, he was not examined. Further, they failed to establish whether the said attesting witness Arumugam is alive or not. Hence, the lower appellate Court upheld the contention of the plaintiffs and decreed the suit by setting aside the decree and judgment of the trial Court by allowing the appeal. As such, it is contended that there is no infirmity in the findings of the lower appellate Court. Therefore, the Respondents/Plaintiffs plead that this appeal has no merits and the same has to be dismissed.

8. I have heard the rival contentions and perused the materials available on record.

9. The scope of the appeal is very limited. On the side of the appellants/Defendants, they have raised two

substantial questions of law. The first one is when testator herself has admitted the execution of Ex.B5-Will in Para 24 of her written statement, there is no need or necessity for further proof of execution of Ex.B.5-Will. It is also pointed out that compliance of Section 68 of the Evidence Act, is not possible as the attestors of the Will are no longer alive. Hence, son of one of the Attestors to the Will was examined as D.W.1 and he identified his mother's thumb impression and the said evidence is sufficient to prove the genuineness of Ex.B.5-Will. It is thus contended that requirements under Section 69 of the Evidence Act is also complied with. In such circumstances, the Appellants contend that the trial Court arrived at correct conclusion, but the first appellate Court reversed the findings of the trial Court without any acceptable reasoning. This is the specific contention of the appellants. In support of the said contention, the learned counsel appearing for the appellants/defendants, relied on the decision reported in 2005 (8) SCC 67 in PENTAKOTA SATYANARAYANA AND OTHERS Vs. PENTAKOTA SEETHARATNAM AND OTHERS, where in it has held as follows:-

"Admission of the Executor that he had executed the Will and got it registered, held could not be easily brushed aside."

In the above said case, the executant of the Will/himself was party to the suit and he himself filed his written statement, wherein, he has narrated about the execution of the Will and about registering the same. In the above said Ruling, it is stated in Paragraph 24 as follows:-

".....All the witnesses deposed that they had signed as identifying witnesses and that the testator was in sound disposition of mind. Thus, in our opinion, the appellants have discharged their burden and established that the Will in question was executed by Srirammurthy and Ext.B-9 was his last Will. It is true that registration of the Will does not dispense with the need of proving execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act...."

As per the above Ruling itself, it is clear that even though the testator narrated about the execution of the Will and registration of the Will in the written statement, it has to be proved as per Section 68 of the Evidence Act. So, the above said ruling clearly speaks about the manner of proof of Will and the same is not in favour of the

Appellants/defendants in proving the substantial questions of law raised by the appellants.

10. The next Ruling, referred on the side of the appellants is with regard to Section 69 of the Indian Evidence Act, reported in 1998 (2) L.W. 144 in MOHAMMED MOHIDEEN Vs. MUTHUKUMARA THEVAR AND ANOTHER. In the above said case, the scribe was examined as D.W.2 was examined and he has narrated about the execution of the Will and the attestors signing in it. The same was accepted as sufficient in compliance of Section 69 of the Evidence Act. However, the learned counsel appearing for the respondents relied on the Apex Court verdict reported in 2010 (5) SCC 274 in S.R.SRINIVASA AND OTHERS Vs. S.PADMAVATHAMMA, to contend that examining the scribe alone is not sufficient to prove the Will. In the said Ruling it is held as follows:-

"Examination of scribe of Will who had not signed the Will with intention to attest, held not sufficient to satisfy the statutory requirement of examination of at least one attesting witness for proving the Will."

So, as per the above Supreme Court verdict, the evidence of scribe cannot be treated as evidence of attestors. As such, it is for the appellants herein to establish that Ex.B.5 Will has been proved with proper evidence.

11. On the side of the appellants, he has relied on a Apex Court decision reported in 2005 (1) SCC 280, in MEENAKSHIAMMAL(DIED) THROUGH LRS AND OTHERS Vs. CHANDRASEKARAN AND OTHERS, it is contended that in the absence of any doubtful circumstances, if general health condition and signature of Testator is proved, the same is sufficient to prove the Will. In the above said Ruling, it is wherein it has held as follows:-

"In absence of suspicious circumstances surrounding the execution of will, proof of (a) testamentary capacity, and (b) signature of testator, as required by law, sufficient to discharge the onus."

12. The learned counsel appearing for the appellants also relied on a reported decision in 2009(11) SCC 1, in RUR SINGH(DEAD) THROUGH LRS AND OTHERS Vs. BACHAN KAUR, wherein, it is held as follows:-

"We have noticed herein before that the Will was attested by nine independent persons. Three of them in fact had been examined. The High Court while holding that a doubt is cast on

its validity by reason of active participation of one of the sons, failed to notice that nine other independent witnesses attested the Will. We, therefore, fail to attach much importance to the fact that although Gurbachan Singh, Sarpanch scribed the Will in Urdu, he at more than one place signed in English. In a village, a person may be more proficient in the vernacular language than English although he may be able to sign his name in English. "

In the said case, 9 independent witnesses have attested the Will and out of them three witnesses were examined. As such, even though one of the beneficiaries also attested, Ex.A.5, will not make execution of the Will suspicious. The learned counsel appearing for the appellants also relied on the decision reported in 2008 (8) MLJ 647, in THAYAMMAL Vs. PONNUSAMY AND ANOTHER, 2006 (3) MLJ 633 in G.JAYARAMAN AND OTHERS Vs. RANGANAYAGI AND OTHERS and 2012 (4) SCC 387 in MAHESH KUMAR (DEAD) BY LRS. Vs. VINOD KUMAR AND OTHERS, wherein, it is held that one of the attestors had to be examined and the same is sufficient. The another Ruling referred on the side of the appellants is reported in 2007 (11) SCC 621 in SAVITHRI AND OTHERS Vs. KARTHYAYANI AMMA AND OTHERS, with regard to propounder himself taking part in execution of the Will. This fact is not applicable to the facts of this case. Even though, the testator himself admitted about the execution of the Will in the written statement, the same will not have much value at that time. Importance of the Will has to be considered only after the demise of the testator. Even though the initial burden lies upon the propounder of the Will, then the onus shifts on the person who alleges the Will was forged or obtained under undue influence or coercion. In this aspect, the learned counsel appearing for the appellants relied on a reported decision in 2005 (1) SCC 40 in DAULAT RAM AND OTHERS Vs. SODHA AND OTHERS. As such, it is to be seen in the case on hand, whether the defendants have proved the execution of Will as per Section 69 of the Evidence Act. As far as the first substantial question of law is concerned, the arguments of the appellants side is not sustainable, as per the Ruling referred by themselves.

13. As per Section 68 of the Indian Evidence Act at least one attesor of the Will had to be examined. In this aspect, the learned counsel appearing for the respondents relied upon the reported decision in 1995(II) CTC 476 in KASHIBAI AND ANOTHER Vs. PARWATIBAI AND OTHERS, in which it was held that the document required to be attested under law cannot be used as evidence, unless attesting is proved. As per the above Apex Court verdict without proof of

attesting, the Particular document cannot be used in evidence. In the present case on hand, D.W.2 was examined to identify the thumb impression of his mother Periakkal who is the one of the attesor. Hence, the appellants/defendants contend that Requirements under Section 69 of the Evidence Act was complied with and Ex.B.5 Will is proved. In support of his argument, the learned counsel appearing for the appellant relied on the decision reported in 2015 (3) LAW WEEKLY 7 [SELVASUBRAMANIAM Vs. SUBBURATHINAM]. In the above said case, son of one of attesor identified the signature of his father found in the Will as attesor and wife of the scribe identified the signature of her husband. So, the Court came to the conclusion that Section 69 of the Evidence Act was complied with. On the basis of above said Ruling, it is to be seen as to whether the propounder of the Will namely, the defendants have proved the Ex.B.5-Will in the present case of not, has to be considered.

14. In this case, one Vellingri was examined as D.W.2, who has stated that in Ex.B5, his mother's LTI is found and is the son of Perriakkal who is the attesor. The said Periakkal is none other than the own sister of the testator Naachammal. Thus the said D.W.2 is the 2nd defendant's mother's sisters son and as such, he cannot be considered as independent witness. Further it is clear from D.W.2 evidence that he himself is closely associated with the defendant and thus his evidence cannot be relied upon. It is also pointed out that in his cross examination D.W.2 has admitted that he personally do not know about his mother signing in the Will and his mother only told him about that. D.W.1 also stated that his mother was aged about 74 years at that time and elder to Nachammal. D.W.2 also admitted that his mother was illiterate and she was assisting Nachammal in executing the Will. It is apparent from the same that D.W.2 is a close relative of defendants and as such, he is to be considered only as intersted witness. The independent witness for the Will is one Arumugam who is the second attesor. D.W.1 stated about the said Arumugam which reads as follows:-

இந்த 9-ம் தேதி நான் உயில் சாட்சி ஆறுமுகத்தை
ஆவாரம்பாளையம் ராஜகோபால் லேஅவட்டில் உள்ள வீட்டில்
பார்த்தேன். அங்கே விசாரித்தபோது சாட்சி ஆறுமுகம் இ
றந்துவிட்டதாக சொன்னார்கள் .

The defendants have not taken any steps to find out as to whether he was really dead or not and to prove the same, the defendants have not taken any steps to produce the death certificate or examined the legal heirs of the said Arumugam to identify the signature of the said Arumugam.

The first appellate Court disbelieved the evidence of D.W.2 and further held that Nachchamal has no knowledge of the execution of the Will and she sought the assistance of others. However, D.W.3 scribe stated that Nachchammal was in sound disposition of state of mind. Admittedly, the scribe evidence is not sufficient to prove the Will. Admittedly the independent Witness was not examined to prove the Will and the evidence of D.W.2 cannot be considered as sufficient to prove the Will, since he is an interested witness. Hence, the court below arrived at the conclusion that Ex.B.5 Will is not proved.

15. It is clear that as per the Ruling reported in 2015 (3) LAW WEEKLY 7, Will had to be proved as per Section 68 and if only all the attestors are died, in such circumstances only the Will have to be proved as per Section 69 of the Evidence Act. However, in the case on hand, the defendants examined only D.W.2 who is an interested as well as close relative of D.W.1 the beneficiary under Ex.B.5-Will. Hence, the evidence of D.W.2 was discarded by the lower appellate Court. As per the Ruling of the Hon'ble Supreme Court in AIR 1959 SC 443 in M.VENKATACHALA IYENGAR Vs. B.N.THIMMAJAMMA AND OTHERS, without removing the suspicious circumstances, it cannot be held that Will is proved. Relying on the said principle, the first appellate Court came to the conclusion that the inconsistent evidence of D.W.2 and D.W.3 cannot be relied upon and concluded that the Ex.B.5- Will is not duly proved as per Section 68 and 69 of the Evidence Act. The learned counsel for the appellant relied on the decision reported in 2009 (3) SCC 687 in BHARPUR SINGH AND OTHERS Vs. SHAMSHER SINGH, wherein it is held as follows:-

"Though the Will was a registered only, the propounder, held, must prove due execution of the Will, propounder must also prove the sound and disposing state of the testator's mind and signature.

16. In this case, even though Ex.B5 is a registered Will and the first defendant herself admitted about the execution of Ex.B5 in the written statement para No.24, even then it has to be proved under Section 68 of the Evidence Act. Mere registration and admission of the testator is not sufficient to claim right through the Will. Thus, it is mandatory under Section 68 of the Evidence Act to prove the Will atleast one attestor is to be examined. For this provision, there is exemption under Section 69 of the Evidence Act. When attestors are dead, the person identifying the signature of the attestors have to be

examined. In this case, out of two attestors one of the attestor Arumugam is an independent person and is not related to the defendants. Whether the said Arumugam is alive or not is not proved by the defendants except the interested testimony of D.W.1. Even he is not categorical as to whether the said Arumugam is alive or not. As such, it cannot be said that the said Arumugam was dead and it must be proved through the process of the Court. However, the defendants failed to do so. Hence, the first appellate Court discarded the evidence of D.W.1 and not accepted the case of the defendants, reversed the findings of the trial Court. Therefore, for the reasons stated above, this Court is of the considered view that there is no error or infirmity in the findings of the first appellate Court. In view of the above said discussion, this Court comes to the conclusion that the defendants miserably failed to prove the execution of Ex.B5-Will. As such, the conclusion of the first appellate Court that the execution of the said Will and voluntary character of the document has not been proved is based on proper appreciation of evidence and the same needs no interference.

17. In the light of the above said discussion, the finding rendered by the first appellate Court as against the defence raised by the defendants is found to be correctly determined and the same do not warrant any interference. Accordingly, the substantial questions of law are answered against the appellants/defendants 2 and 3. Thus, the Second Appeal has no merits and the same cannot be entertained. The Point is answered accordingly.

18. In the result, the Second Appeal is dismissed. The Judgment and Decree dated 12.08.2005 in A.S.No.69 of 2004 passed by the learned First Additional District Judge, Coimbatore is confirmed. Considering the relationship between the parties, the parties are directed to bear their own costs. Connected CMP is closed.

Sd/-

Assistant Registrar (CO)

//True copy//

Sub Assistant Registrar

rrg/nvsri

To

1.The First Additional District Judge,
Coimbatore.

2.The First Additional Subordinate Judge,
Coimbatore.

3.The Section Officer, V.R.Section, High Court, Madras.

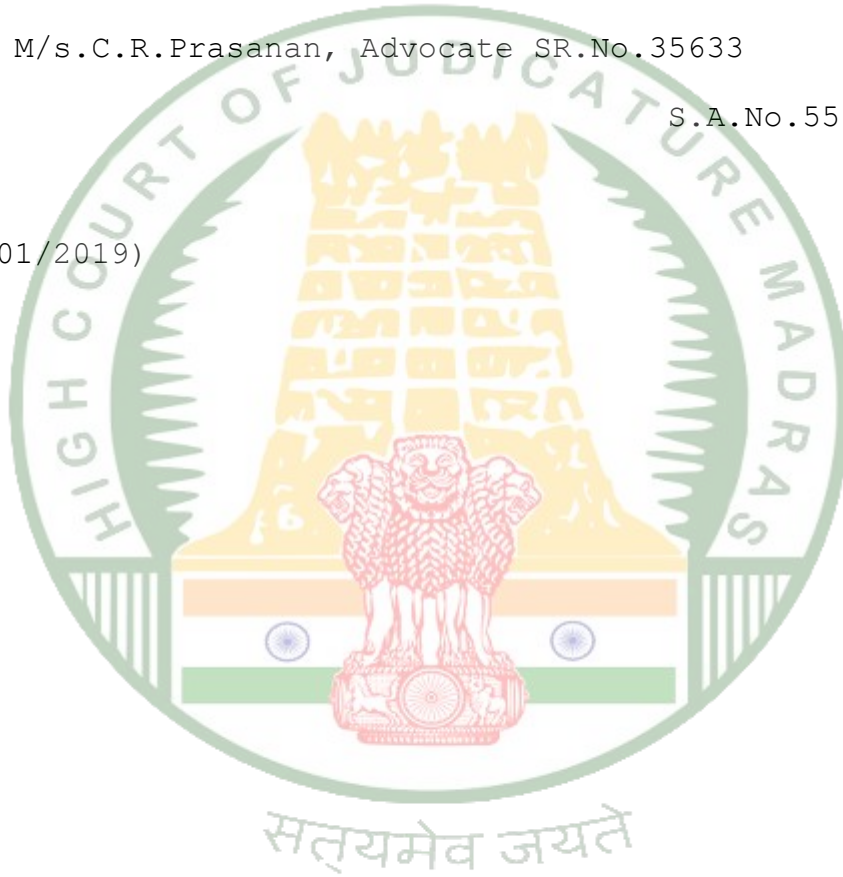
+1cc to Mr.V.Vijayakumar, Advocate SR.No.35142

+1cc to M/s.C.R.Prasanan, Advocate SR.No.35633

S.A.No.554 of 2006

KJ (CO)

GMV (03/01/2019)



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