

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 10.07.2019

JUDGMENT DELIVERED ON : 17.09.2019

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.2080 of 2002

1.K.Perumal (Died)

2. Pappayee

(appellant-2 is brought on record as LR the deceased sole appellant vide order of Court dated 08.08.2008 made in C.M.P.No. 1208 of 2008 made in S.A.No.2080 of 2002)

... Appellant/Plaintiff

...Versus...

1. Srinivasan

2. Manoharan

3. Saraswathy

4. Ramasamy Naidu

5. Nagammal

6. Palanisamy

... Respondents/Respondents/
Defendant

PRAYER:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.129 of 2000 dated 28.09.2001 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate Court, Salem confirming the judgment and decree made in O.S.No.199 of 1996 dated 28.04.200 on the file of the Subordinate Judge's Court, Namakkal.

For Appellant :: Mr.P.Valliappan

For Respondents :: No appearance

J U D G M E N T

The unsuccessful plaintiff is the appellant herein.

2. For the sake of convenience, the parties are referred to as per ranking before the Trial Court.

1/1

3. The plaintiff has filed the suit for partition claiming 1/9 share in the schedule of properties on the ground that the suit properties are ancestral properties and on the death of the father, the plaintiff, along with the defendants 1 & 2, are entitled to 1/3rd share in the suit properties. Furthermore, in respect of Item Nos.I & II of the suit properties, it is claimed that the plaintiff claimed 1/9th share, while, 1/4th share in Item No.III.

4. The first defendant had filed a written statement, which was adopted by the defendants 2 to 6 resisting the claim of partition, inter-alia contending that the suit properties are covered under Ex.B9-Will and they are the self-acquired properties of the father-Kuppusamy Naidu who had executed the Will by bequeathing the properties to them and after the death of the said Kuppusamy Naidu, the defendants 1 & 2 are entitled to the suit properties along with the defendants 3 to 5 who are the joint owners of the properties who having purchased the same along with their father Kuppusamy Naidu and further stated that, by virtue of the sale deed under Ex.B9, the defendants have sold the property to the 6th defendant on 30.05.1996 for valuable consideration under Ex.B11. It is further stated that sixth defendant is a bona-fide purchaser for valuable consideration.

5. Before the Trial Court, the plaintiff was examined himself as P.W.1 and also examined P.W.2 and marked Exhibits A1 to A5. On behalf of the defendants, the first defendant was examined as D.W.1 and the purchaser was examined himself as D.W.2 and the scribe of Ex.A7-Will has been examined as D.W.3 and Exhibits B1 to B11 were marked.

6. On a consideration of both oral and documentary evidence, the Trial Court has come to the conclusion that the suit properties are the self-acquired properties of the father Kuppusamy Naidu, who had executed the Will Ex.B7 on 27.02.1987 and the Will has been proved in the manner known to law. Consequently, the defendants 1 & 2 are entitled to the suit properties and they along with the D3 to D5, have sold the properties in favour of the 6th defendant who is the bona-fide purchaser for valuable consideration and accordingly, the Trial Court dismissed the suit.

7. Aggrieved by the said judgment and decree dated 28.04.2000 of the Trial Court, the plaintiff preferred A.S.No.129 of 2000 and by a judgment dated 28.09.2001, the appeal was dismissed and hence, the plaintiff has preferred the above Second Appeal.

8. The above Second Appeal was admitted on 27.12.2002 on the following Substantial Question of Law:-

"Whether the scribe's evidence alone is sufficient to prove the execution of Ex.B7-Will, in the absence of non-examination of the attestors"

9. Heard both sides and perused the materials available on records.

10. The learned counsel for the appellants would submit that in view of Exhibits A2 to A4, the plaintiff (since deceased) has demonstrated the existence of the joint family property, from and out of which, the suit properties have been purchased and the Trial Court has erroneously concluded that Ex.B7-Will was proved and made a submission in support of the substantial question of law as stated above.

11. After hearing the arguments and also perusing the documents, it is seen that the plaintiff was born to Kuppusamy Naidu through his first wife, while the defendants 1 & 2 are the sons of the said Kuppusamy Naidu through his second wife. In other words, the D1 and D2 are the step brothers of the plaintiff and the third defendant is the wife of the first defendant. D4 and D5 are the joint owners of the land in Item Nos.I and II to an extent of 1/3 each, having purchased the properties along with said Kuppusamy Naidu. The relationship between the parties as stated above is not in dispute.

12. After perusing the documents filed by both the parties, it is seen that the suit properties are standing in the name of the said Kuppusamy Naidu and the plaintiffs and defendants 1&2 are to succeed the properties on the death of the said Kuppusamy Naidu, who is entitled to 1/3rd share in the suit properties along with the 4th defendant Ramasamy Naidu and 5th defendant - Nagammal, even before filing of the suit. On the strength of Ex.B7-Will after the death of said Kuppusamy Naidu, D1 and D2 along with D4 and D5 have sold the properties to the 6th defendant.

13. Ex.B1 is a family arrangement between the plaintiff and the defendants 1 and 2 in the year 1993. P.W.1 in the cross-examination has admitted the coming into existence of the said family agreement. It remains to be stated that as per recital in Ex.B1, there was a family arrangement and the properties have been divided among the plaintiff and the

step brothers D1 and D2 and the same was reduced into writing and hence, both the Courts have admitted that in view of the recital in Ex.B1, coupled with admission of P.W.1 in the cross-examination, Ex.B1 has been received in evidence and hence, both the Courts below rightly came to such conclusion.

14. Exhibit.B6 is a partition deed entered into between the said Kuppusamy Naidu along with plaintiff and defendants 1 & 2 and after the death of the Kuppusamy Naidu, Ex.B8 is another partition deed which came into the existence in respect of the properties between the plaintiff and the defendants 1 & 2.

15. On perusing the suit properties in Ex.B1 family arrangement and Ex.B6 and Ex.B8 - partition deeds, it is seen that the suit properties are not forming part of the those properties covered under Ex.B1 family arrangement and Ex.B6 and Ex.B8.

16. As stated supra, in a partition suit filed by the son through the first wife, the defendants who are the step brothers of the plaintiff, have resisted the claim alleging that the suit properties are the self-acquired properties of their father, who had bequeathed the property under WILL.

17. To substantiate the same, they filed one family arrangement wherein, the plaintiff is also a party and there are 3 partition deeds between the brothers including the father of the parties, namely Kuppusamy Naidu as extracted above. Ex.B6 is a partition deed evidencing partition of the property between the father Kuppusamy Naidu and the plaintiff and the first defendant, while, Ex.B8 is a partition deed entered into between the parties namely, the plaintiff and the defendants 1 and 2 after the death of the father Kuppusamy Naidu.

18. Admittedly, the suit properties are not covered under the above said family arrangement and the family partition assumes significance. It remains to be stated that neither in Ex.B1 nor in Ex.B8, there was any reference to the suit properties.

19. On going through the recitals in Ex.B6-partition deed, where the father Kuppusamy Naidu is also a party, it is established that the suit properties are the self-acquired properties and what was partitioned among the parties under Exhibits B1 to B6 and Ex.B8 are only the ancestral in nature.

20. In the decision of the Apex Court reported in AIR 2007 SC 1809 [Makhan Singh V.Kulwant Singh] wherein, it has been

held that there was no presumption that the property owned by the members of the joint Hindu family could a fortiori be deemed to be of the same character and to prove such a status, it has to be established by the propounder that a nucleus of joint Hindu family income was available and that the said property had been purchased from the said nucleus and that burden to prove such a situation lay on the party, who so asserted it where the suit property had been purchased by the father from his income as an employee of the Railways and it was therefore his self-acquired property and such a property falling to his sons by succession could not be said to be the property of the joint Hindu family.

21. Following the said decision of the Supreme Court, this Court has no hesitation to hold that when the plaintiff alleges that there existed a joint family property, "the party attributing the said properties said to have been purchased from and out of the joint family funds, has to preliminarily establish not only the existence of the undivided joint family, but also that the said joint family had sufficient means so as to derive the purchase money and then only the question of presumption would arise, as held by this Court in 2002(1) HLR 465 (Mad) [Pushpavalli(B) V.Sivasankaran (v.k)].

22. On a perusal of the evidence of P.W.1, this Court finds that absolutely, there is no evidence to discharge the initial burden upon the plaintiff and hence, this Court finds that the plaintiff has failed to prove that the suit properties are the ancestral properties of the father Kuppusamy Naidu and similar finding arrived at by both the Courts below, does not warrant any interference in the absence of any illegality or irregularity.

23. As per Ex.B7, dated 27.02.1987, the defendants projected that the said Kuppusamy Naidu has executed a Will bequeathing the suit properties to and in favour of the defendants 1 and 2. After death of their father, they along with the other defendants D4 and D5 have sold the properties in favour of D6. Both the Courts below, on appreciation of evidence of D.W.2, has come to the conclusion that the 6th defendant, 6th respondent herein, is a bona-fide purchaser for valuable consideration. In the absence of any positive evidence, the said finding does not warrant any interference at this second appeal stage.

24. In order to prove Ex.B7-Will, on behalf of the defendants, they have examined D.W.3-Vijayakumar, who is the scribe of the document. It remains to be stated that D.W.3, in

his chief examination, has stated that "gj;juk; jahh; bra;jth; vd;W brhy;yp ehd; ifbaGj;J nghl;Ls;nsd;" Thus, he could stated that he signed as a scribe of the document, who prepared the document.

25. In the decision reported in AIR 1969 Supreme Court 1147 [M.L.Abdul Jabbar Sahib Vs. H.Venkata Sastri and Sons and others etc]., at para No.9, the Hon'ble Supreme Court has held as follows:-

9. "In every case the Court must be satisfied that the names were written animo attestandi", see Jarman on Wills, 8th Ed. p.137. Evidence is admissible to show whether the witness had the intention to attest.

.... Two persons who had identified the testator at the time of the registration of the Will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put "animo attestandi." An abinash Chandra vs. Dasrath Malo, ILR 56 Cal 598 = (AIR 1929 Cal 123) it was held that a person who had put his name under the word "scribe" was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a "scribe".

26. In the decision reported in 2015 (4) CTS 771 [Tamilkodi Vs. N.Kalaimani], at para No.21, this Court has held as follows:-

"[S.R.Srinivasa & others v. S.Padmavathamma, 2010 (5) CTC 364 (SC) : 2010 (5) SC 274:

"39. As noticed earlier in this case, none of the Attesting Witnesses have been examined. The scribe, who was examined as DW2, has not stated that he had signed the Will with the intention to attest. In his evidence, he has merely stated that he was the scribe of the Will. He even admitted that he could not remember the names of the Witnesses to the Will. In such circumstances, the observations made by this Court in the case of M.L.Abdul Jabbar Sahib v. M.V.Venkata Sastri & Sons become relevant. Considering the question as to whether a scribe could also be an Attesting Witness, it is observed as follows:- (SCC P.577, para 7)

"7. .. It is essential that the Witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a Registering Officer, he is not an Attesting Witness".

40. In our opinion, the aforesaid test has not been satisfied by DW2 the scribe. The situation herein is rather similar to the circumstances considered by this Court in the case of N.Kamalam v. Ayyasamy. Considering the effect of the signature of scribe on a Will, this Court observed as follows: (SCC PP.518-19, Paras 26-27)

"26. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the Attesting Witnesses...."

27. The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a Witness to the will but a mere writer of the Will. The statutory requirement as noticed above cannot, thus, be transposed in favour of the writer, rather goes against the Propounder since both the Witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the Court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself - this is again, however, not the situation existing presently in the matter under consideration".

41. The aforesaid observations are fully applicable in this case. Admittedly, none of the Attesting Witnesses have been examined. Here signature of the scribe cannot be taken as proof of attestation."

27. In the decision reported in (2001) 7 Supreme Court Cases 503 [N.Kamalam (Dead) and another Vs. Ayyasamy and another], the Hon'ble Supreme Court has held as follows:-

"A. Succession Act, 1925. S.63(c). Attestation of Wills. Overriding significance of statutory requirements. Held, signature of scribe of Will cannot be granted equality of status with signatures of attesting witnesses, which are required under S.63(c), (read with S.68, Evidence Act and S.3, Transfer of Property Act) for proving proper execution of a Will. More so where propounder has not examined attesting witnesses nor taken any other step to have them produced in court. Held, on facts, plaintiff-appellants had failed to satisfactorily prove non-availability of the two attesting witnesses. Evidence of scribe could not displace statutory requirement as he did not have necessary intent to attest. High Court rightly dismissed appeal of plaintiffs against dismissal of their suit for partition. Evidence Act, 1872, S. 68. Proof of execution of Will. Transfer of Property Act, 1882, S.3. "Attested" document. Words and phrases. "Scribe". Maxims. "onus probandi" and "animo attestandi"

28. In the decision reported in AIR 1976 Madras 4 [Rajammal Vs. Chinnathall], this Court has held that examination of scribe is not enough and the Will must be proved by at least one attesting witness.

29. In the factual situation of this case, as per Section 68 of the Indian Evidence Act, one of the attesting witnesses at least to be examined.

30. On the above factual position of this case, it is to be stated that as per Section 68 of the Indian Evidence Act, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least called for the purpose of proving its execution and subject to process of the Court and capable of giving evidence if there is an attesting witness alive.

31. "The term "attested" has not been defined in the Evidence Act. In Transfer of Property Act, the said term has been defined in Section 3 and being relevant it is quoted below.

"attested" in relation to an instrument, means (and shall be deemed always to have meant) attested by two or more witnesses each of whom has been the executant sign or affix his mark to the instrument, or has been some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

Similarly, Section 63 of the Indian Succession Act lays down the meaning of attestation as under:

"Section 63(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 acknowledgement of his signature or mark, or 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."

The question that surfaces in the perspective of above discussion, is whether a Scribe of the Will can be said to be an attesting witness who could prove a document required attestation. The self same question cropped up before Apex Court in a case in Abdul Jabbar v. Venkata Sastri AIR 1969 SC 1147. In para 8 of the said decision, the Apex Court enunciated the point in question in the following manner.

"Briefly put, the essential conditions of a valid attestation under Section 3 are : (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his

signature animo attstandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. It a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness"

32. Thus, this Court finds that in view of the multiple decisions of the Hon'ble Apex Court, neither the Registering Officer can be recorded as attesting witness nor scribe alone be treated as attesting witness for the purpose of proving the Will.

33. At this juncture, it remains to be stated that in the decision reported AIR 2002 SC 637 [Madhukar D.Shende v. Tarabai Aba Shedage], wherein the Hon'ble Apex Court has held that a scribe could be attesting witness, if he has signed just after testator. In view of the discussion in the preceding paragraphs and also the specific evidence of D.W.3 as extracted above that he signed in the document under the position of scribe and he drafted the Will in accordance with the dictation given by the testator. However, with regard to the attestation and execution thereof, his version is silent and he has not deposed that he signed just after the testator. Accordingly, following the decision of the Hon'ble Supreme Court as extracted above and also taking note of the factual position as deposed by D.W.3 and also taking note of the fact that the attesting witnesses are alive, they were not examined, for the reasons best known to the defendants 1 and 2, Attestor of the Will has not been examined nor any suggestion has been placed as to whereabouts of the attestor of the Will and hence, this Court holds that D.W.3 had not attested Ex.B.7-Will and he was only a scribe of the document and he has not signed the document with animo attestandi.

34. In view of the non examination of any one of the attesting witnesses, who are undisputedly alive, this Court is of the considered view that Ex.B.7-Will is not proved in the manner known to law and the substantial question of law is answered in favour of the appellant. In view of the discussion in the preceding paragraphs that the properties are self acquired properties of the father and in view of the above finding that the Will in favour of the defendants 1 and 2 are not proved in the manner known to law, plaintiff and defendants 1 and 2 are each entitled to their share of 1/3 in the suit properties on the death of the father and the Second Appeal is to be allowed.

35. In the result,

(I) This Second Appeal is allowed.

(II) The judgments and decrees of the First Appellate Court and the Trial Court are set aside.

(iii) No costs.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

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To
1.The I Additional District
Judge-cum-Chief Judicial Magistrate Salem
2.The Subordinate Judge's Namakkal.

copy to
The Section Officer
VR Section
High Court, Madras

+1cc to Mr.P.Valliappan Advocate sr80096

S.A.No.2080 of 2002

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