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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.04.2019

PRONOUNCED ON : 03.06.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.Nos.935, 938 and 939 of 2005
and
C.M.P. Nos.13011 and 12969 of 2005

S.A.No.935 of 2005

Dr.S.Senthilkumar

...Appellant/Plaintiff

Vs.

A.R.Venkidusamy

...Respondent/Defendant

S.A.No.938 of 2005

S.Senthilkumar

...Appellant/1st Defendant

Vs.

1. A.V.Jeganathan

.. 1st Respondent/Plaintiff

2. Dr.Eswari

3. The Branch Manager,
Erode District Central Cooperative Bank,
Kavundapadi, Erode District.

4. D.Jeganathan

5. The superintending Engineer,
Tamilnadu Electricity Board,
Erode

6. Marayal

7. Senbagam

8. Minor Sowmiya
Minor Rep.by Her Mother
Natural Guardian Senbagam



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9. Minor Balaji
Minor Rep.by his Mother,
Next Friend Kasthuri

...Respondents 2 to 9/
Defendants 2 to 9

S.A.No.939 of 2005

Dr.S.Senthilkumar

...Appellant/Plaintiff

Vs.

1. A.V.Jeganathan
2. Senbagam

...Respondents 1 & 2/
Defendants 1 & 2

Prayer in S.A.No.935 of 2005:

Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 28.04.2005 made in A.S.No.74 of 2004 on the file of the Sub Court, Bhavani, confirming the judgment and decree dated 17.12.2003 made in O.S.No.229 of 2001 on the file of the First Additional District Munsif Court, Bhavani.

Prayer in S.A.No.938 of 2005:

Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 28.04.2005 made in A.S.No.82 of 2004 on the file of the Sub Court, Bhavani, confirming the judgment and decree dated 28.10.2003 made in O.S.No.64 of 2001 on the file of the Second Additional District Munsif Court, Bhavani.

Prayer in S.A.No.939 of 2005:

Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 28.04.2005 made in A.S.No.83 of 2004 on the file of the Sub Court, Bhavani, confirming the judgment and decree dated 28.10.2003 made in O.S.No.87 of 2001 on the file of the Second Additional District Munsif Court, Bhavani.

For Appellant : Mr.N.Manokaran in all the appeals

For Respondents : In S.A.No.935/2005
Mr.V.Raghavachari
In S.A.No.938/2005



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Mr.V.Raghavachari for R1
Mr.P.Valliappan for R2.
R3 to R9 - No appearance. Set exparte
vide order dated 12.04.2019
In S.A.No.939/2005
No appearance. Set exparte vide order
dated 12.04.2019.

COMMON JUDGMENT

In these matters, the three wills said to have been executed by A.M.Rangasamy Gounder dated 04.06.1999, 15.02.2000, 29.08.2000 are put in issue. It is not in dispute that by way of the registered partition deed dated 24.02.1974 executed between A.M.Rangasamy Gounder and his two sons A.R.Vengudusamy and A.R.Viswanathan, the properties covered in the abovesaid three wills are allotted to the share of A.M.Rangasamy Gounder . It is also not in dispute that A.M. Rangasamy Gounder died on 12.11.2000 and that he had two sons, namely, A.R.Vengudusamy and A.R.Viswanathan and one daughter by name Easwari. Kuppayammal is the wife of A.R.Vengudusamy and A.V.Jeganathan is the son of A.R.Vengudusamy and Kuppayammal. A.V.Ramamurthy is the son of A.R.Viswanathan and A.V.Ramamurthy has died and he is survived by his wife Shenbagam and daughter Sowmya. Senthil Kumar is the son of Easwari.

2. The suit in O.S.No.64 of 2001 has come to be laid by A.V.Jeganathan and A.V.Ramamurthy against Senthil Kumar and others for declaring that the will dated 04.06.1999 is the last, genuine and valid testament of the deceased A.M.Rangasamy Gounder and for the consequential permanent injunction. The abovesaid suit has been stoutly resisted by Senthil Kumar contending that the will dated 04.06.1999 had been revoked by A.M.Rangasamy Gounder by a will dated 15.02.2000 and also further pleaded that the will dated 15.02.2000 had also been cancelled and revoked by the testator by way of another will dated 29.08.2000 and accordingly contended that the plaintiffs in O.S.No.64 of 2001 are not entitled to obtain the reliefs prayed for. It is found that pending suit, the second plaintiff A.V.Ramamurthy having died, his wife and daughter having not joined hands with the surviving plaintiff A.V.Jeganathan, it is found that Shenbagam and minor Sowmya, the legal representatives of the deceased A.V.Ramamurthy had been arrayed as the defendants 7 and 8 in the abovesaid suit and they have filed the written statement supporting the will dated 29.08.2000 and accordingly it is seen that they had sailed along with Senthil Kumar in contending that it is only the will dated 29.08.2000 which is the last will of the deceased A.M. Rangasamy Gounder.



3. The Suit in O.S.No.87 of 2001 has been laid by Senthil Kumar against A.V.Jaganathan and Shenbagum for the relief of permanent injunction in respect of the suit properties described therein and for obtaining the said relief, he relied only upon the will dated 29.08.2000. A.V.Jaganathan, the first defendant in the abovesaid suit has challenged the truth and validity of the will dated 29.08.2000 contending that the abovesaid suit of Senthil Kumar is only laid as a counter blast to the suit laid by him in O.S.No.64 of 2001 and accordingly prayed for the dismissal of the said suit. Shenbagum, the second defendant had supported the case of Senthil Kumar in the said suit. It is found that Senthil Kumar has laid the suit against A.R.Vengudusamy in O.S.No.299 of 2001 for evicting him from the suit property by pleading the landlord tenant relationship between the two parties. For claiming the ownership of the property in dispute, he has relied upon the will dated 29.08.2000 and the defendant A.R.Vengudusamy has challenged the truth and validity of the abovesaid will and contended that Senthil Kumar is not the owner of the property described therein and therefore, not entitled to seek and obtain the reliefs as prayed for in the said suit.

4. It is found that all the abovesaid three suits had been separately tried and accordingly it is seen that evidence had been recorded separately in all the three suits. It is further seen that as far as O.S.No.64 of 2001 and 87 of 2001 are concerned, they were simultanelusly tried in the court of Second Additional District Munsif Court, Bhavani and the abovesaid two suits had been disposed of by the trial court by way of a common judgment dated 28.10.2003. The suit in O.S.No.229 of 2001 has been tried by the I Additional District Munsif Court, Bhavani, and the said suit has been disposed of on 17.12.2003. Based on the materials placed on record by the respective parties, both oral and documentary, it is found that O.S.No.64 of 2001 has been dismissed and the suit in O.S. No.87 of 2001 has been decreed as prayed for and O.S.No.229 of 2001 has been decreed as prayed for. Challenging the judgment and decree passed in O.S.No.64 of 2001, A.V.Jaganathan has preferred the first appeal in A.S.No.82 of 2004, challenging the judgment and decree passed in O.S.No.87 of 2001, A.V.Jaganathan has preferred the first appeal in A.S.No.83 of 2004 and challenging the judgment and decree passed in O.S.No.229 of 2001, A.R.Vengidusamy has preferred the first appeal in A.S.No.74 of 2004. Insofar as A.S.No.82 of 2004 and 83 of 2004, the first appellate court holding that the will dated 29.08.2000 has not been established by examining the attestors to the same as per law and further holding that the parties thereto had to work out their remedies only by way of the partition in respect of the properties left behind by A.M. Rangasamy Gounder, accordingly proceeded to dismiss both the appeals in A.S.Nos. 82 and 83 of 2004 by way of



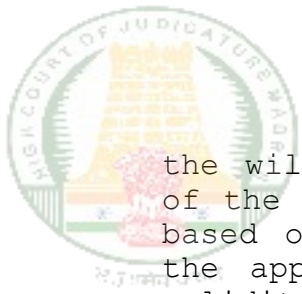
the common judgment and decree dated 28.04.2005. On the same lines, the first appellate court has also entertained the appeal preferred by A.R.Vengidusamy and resultantly reversed the judgment and decree passed by the trial court in O.S.No.229 of 2001. Impugning all the abovesaid three judgment and decree of the first appellate court in the three matters, the present second appeals have come to be laid by Senthil Kumar.

5. At the time of admission of the second appeals, the following substantial question of law was formulated for consideration.

"In the absence of challenge to the subsequent registered wills dated 15.02.2000 and 29.08.2000 executed by the same testator, could a declaration be asked for in law that the earliest will dated 04.06.1999 executed by the same testator alone is valid?"

6. The appellant Senthil Kumar has challenged the truth and validity of the will dated 04.06.1999 in O.S.No.64 of 2001. Similarly, the respondent A.V.Jaganathan has disputed the truth and validity of the will dated 29.08.2000 and contended that the same is a fabricated document. Though there are no clear pleas put forth by the respective parties challenging the truth and validity of the will dated 15.02.2000, however, considering the plaint of the appellant Senthil Kumar in O.S.No.87 of 2001, particularly, the recitals contained in para 9 of the abovesaid plaint, he has put forth the case that the will dated 15.02.2000 has been declared as cancelled and revoked by way of the will dated 29.08.2000 and inasmuch as the will dated 29.08.2000 speaks about the cancellation of the previous will dated 15.02.2000 accordingly contended that there is no validity in any manner and in any event for the previous two wills dated 04.06.1999 and 15.02.2000 inasmuch as the testator had executed the will dated 29.08.2000. The import of the abovesaid pleas of the appellant Senthil Kumar would only lead to the conclusion that he has also questioned the truth and validity of the will dated 15.02.2000.

7. In the light of the abovesaid pleas put forth by the respective parties, challenging the wills projected by one or the other and contending that the wills projected by the rival parties are not true and valid documents and fabricated and also contending that by way of the last will dated 29.08.2000, the testator had cancelled and revoked the earlier two wills dated 04.06.1999 and 15.02.2000 and as at present when it is seen that A.V.Jaganathan has claimed the relief in his suit only based upon the will dated 04.06.1999 and the appellant Senthil Kumar has based his suits abovestated claiming the reliefs based on



the will dated 29.08.2000, the resultant position is that none of the abovesaid parties had sought for the reliefs prayed both based on the will dated 15.02.2000. However, as above noted, the appellant Senthil Kumar is not accepting the truth and validity of the will dated 15.02.2000, as according to him, the abovesaid will had been cancelled by the testator by virtue of the last will executed by him dated 29.08.2000.

8. With the abovesaid factual matrix, it appears that the parties had proceeded with the trial and accordingly it is found that the parties had been endeavouring to tender evidence in all these matters, mainly concentrating only upon the truth and validity of the last will of the testator, namely, the will dated 29.08.2000 and accordingly the evidence adduced in the matters centers mainly upon the abovesaid will. The abovesaid will is found to have been attested by the two attestors, namely, Chinnappa Gounder and K.C.Devanan. The abovesaid two attestors had not been examined. It is not the case of the appellant Senthil Kumar that the abovesaid two attestors are dead. The reasons for non-examining the abovesaid two attestors for sustaining the truth and validity of the will dated 29.08.2000, according to the appellant Senthil Kumar, are that though he had taken the summons to the abovesaid witnesses for examining them in the matter, inasmuch as the summons sent to the witness K.C.Devanan and one Venkatachalam had been refused to be received by them and as the summons sent to Chinnappa Gounder could not be served on account of his non availability at that point of time, it is put forth that the concerned bailiff had, on the abovesaid endorsements, returned the summons to the court. It is further put forth by the appellant Senthil Kumar that thereafter, he had moved the court concerned for arresting the witnesses Venkatachalam and K.C.Devanan and serve the summons on the witness Chinnappa Gounder and according to him, the arrest warrant could not be executed on the witnesses Venkatachalam and K.C.Devanan as at that time, when the bailiff went to enforce the warrant, the abovesaid witnesses were not available. The bailiff concerned hence returned the warrants to the court. Further it is also stated that the summons sent to Chinnappa Gounder again for service could not be served on him as again he was not available for service and the bailiff had returned the summons with the necessary endorsement to the court. Accordingly, it is put forth and contended by the appellant Senthil Kumar through his counsel that he had taken all the steps available to him under law for effecting the service of summons on the attestors and also endeavoured to arrest them for the purpose of examining them in the court in support of his case, however, as the same had ended in vain as abovestated, according to him, he had been necessitated to examine the scribe of the will namely, Selva Kumar and the Sub Registrar, Palani Muthu, who had registered the will involved in



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expedition or engaged in actual warfare (or an airman so employed or engaged,) or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(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 been some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of 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.

Therefore, the combined reading of the Section 68 of the Indian Evidence Act and the Section 63 of the Indian Succession Act would go to show that insofar as the truth and validity of the will in question, it shall be necessary to call the attesting witness in proof of the same and only in circumstances where the attesting witnesses are not alive or if such attesting witnesses could not be found or in other words could not be summoned by the party concerned for one reason or the other, it is found that the recourse could be made to Section 69 of the Indian Evidence Act, which reads as follows:

Section 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 hand writing, and that the signature of the person executing the document is in the handwriting of that person.

Thus it is seen that on the abovesaid position of law, where the attesting witnesses are dead and could not be found or could not be summoned one way or the other, the parties should endeavour to examine the will or the other documents required to be attested under law by proving that the attestation of one attesting witness atleast is in his handwriting and that the signature of the person executing the document is in the hand



writing of that person. In such view of the matter, it seen that if according to the appellant Senthil Kumar, he is unable to summon and bring/examine the attestors to establish his case as abovestated, his remedy is found to be only by invoking Section 69 of the Indian Evidence Act and establish his case as provided thereunder.

9. Be that as it may, the grounds projected by the appellant Senthil Kumar for not examining the attestors of the will dated 29.08.2000, as abovestated, according to him, has also been spoken to by the concerned process server Raj Kumar examined in the matter matter. It is found that the processor Raj Kumar has been examined as C.W.1 and he had tendered evidence on the abovesaid lines.

10. On a perusal of the evidence of the process server Raj Kumar, it is found that he had endeavoured to effect the service of summon to K.C. Devanan and witness Venkatachalam on 07.10.2003 and according to him, they had refused to receive the summons. Similarly he had endeavoured to effect the service of summons to the witness Chinnappa Gounder on 06.10.2003, however, the same could not be served on account of his non availability. As regards the execution of the warrant against the witness Venkatachalam and Devanan, it is found that he had endeavoured to enforce the same on 16.10.2003, however, the same could not be enforced on account of their non availability. As regards the service of summon again on the witness Chinnappa Gounder, it is found that he had endeavoured to effect the service on him on 14.10.2003 but could not serve him on account of his non availability.

11. Order 16 Rules 10, 11, 12 and 13 of Code of Civil Procedure provide for the procedure to be contemplated where the witness fails to comply with the summons and the procedure to be adopted if the witness thereafter appears and if the witness despite the same, fails to appear and the mode of attachment which could be effected. Order 16 Rules 10, 11, 12 and 13 of Code of Civil Procedure reads as follows:

10. Procedure where witness fails to comply with summons - (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the court -

(a) shall, if the certificate of the serving officer has not been verified by affidavit, or if service of the summons has been effected by a party or his agent, or



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(b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any court, touching the service or non service of the summons)

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no court of small Causes shall make an order for the attachment of immovable property.

11. If witness appears attachment may be withdrawn. - Where, at any time after the attachment of his property, such person appears and satisfies the court, -

(a) that he did not, without lawful excuse fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend, the Court shall direct that the property be released from attachment and shall make such order as to the costs of the attachment as it thinks fit.



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12. Procedure if witness fails to appear - (1) The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

(2) Notwithstanding that the Court has not issued a proclamation under Sub-rule (2) of rule 10, nor issued a warrant nor ordered attachment under sub-rule (3) of that rule, the Court may impose fine under sub rule (1) of this rule after giving notice to such person to show cause why the fine should not be imposed.

13. Mode of attachment - The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment debtor.

Therefore, on a conjoint reading of the abovesaid provisions of law, it is found that if the summons could not be served on the witness concerned or despite the service, he has failed to appear in obedience to the orders of the Court, the party is found to be not left without any other remedy. It is seen that the party should endeavour and prevail upon the court to issue the proclamation with reference to the same and also the party should endeavour to arrest the said person as provided therein and also take appropriate steps further to attach the property of the said witness who fails to turn up despite the orders of the court and also further endeavour to cause the attached property to be sold as determined by the court. In such view of the matter, when the various steps had been envisaged under the abovesaid rules of Order 16 of the Code of Civil Procedure, in such view of the matter, as rightly contended by the counsel appearing for the respondent A.V.Jaganathan, if for one reason or the other, the arrest warrant could not be enforced against the witness concerned, the appellant Senthil Kumar should have



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further prevailed upon the court and insisted that the warrant should be reissued against the defaulting witness and ensure and secure the attendance of the said witness for establishing his case. In addition to that, the concerned court should have also endeavoured to ensure that its direction to the witness concerned to appear in the court and tender evidence is complied with in spirit and call upon the appellant Senthil Kumar to take further appropriate steps as provided under Order 16 Rules 10, 11, 12, and 13 of Code of Civil Procedure. It is not the case of the appellant Senthil Kumar, the abovesaid witnesses are not possessed of any properties. Furthermore, merely because the witnesses concerned could not be served or could not be arrested at the time when the bailiff concerned went to enforce the warrant or serve the summons, the same does not prevent the appellant Senthil Kumar from seeking the fresh issuance of warrant / fresh issuance of summons again and again for ensuring the enforcement of the warrant and service of the summons on the witnesses one way or the other. On the other hand, the appellant Senthil Kumar is found to have remained contended merely on the non availability of the witnesses concerned at the time when the process server went to serve the summons or enforce the warrant of arrest. When we come across various cases, wherein the civil courts are also seeking the assistance of the police machinery for enforcing their orders one way or the other and when we come across various cases, when the parties concerned are also moving the courts for providing police assistance for enforcing the orders of the civil court, in such circumstances, in my considered opinion, the appellant Senthil Kumar should have resorted to the assistance of the police machinery and urged the court to utilise the police machinery for enforcing the warrant / service of the summons on the witnesses concerned. Furthermore, in my view, the concerned court should have endeavoured and ensured that its orders of direction to the witnesses concerned are strictly obeyed and if they are found to be avoiding the same for one reason or the other deliberately, should have further, on its own, solicited the assistance of the police machinery for enforcing the warrant / service of the summons. When the power of the courts concerned is omnipotent, particularly, when as provided under Section 151 of CPC, when the courts concerned have inherent power to make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court and when there is no law prohibiting the civil courts from utilising the police machinery one way or the other and for enforcing its orders either on its own or on the application of the parties concerned, in such view of the matter, merely because the witness concerned were not available at the relevant point of time when the process server went to enforce the arrest warrant / serve the summons, it cannot be stated that there is a complete end of the matter and on the other hand, further steps



should have been taken in the matter either on the initiative of the party or on the own volition of the court to ensure that the witnesses concerned appear in the court and tender evidence as called upon to do so.

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12. Other than the mere statement of the process server as regards the genuineness of his endorsement that the witness concerned has refused to receive the summons or not available at that time when he endeavoured to serve the summons or not available when he endeavoured to serve the arrest warrant, the appellant Senthil Kumar had not endeavoured to examine the said witnesses in whose presence the endorsement of the bailiff concerned are said to have been made. The above factors also assume importance when it is seen that one of the attestors to the abovesaid will concerned had been examined in O.S.No.229 of 2001 and therefore, on the face of it, we cannot accept the statement of the process server for upholding that the appellant Senthil Kumar had been precluded from examining the attestors concerned.

13. In such view of the matter, the counsel for the appellant Senthil Kumar cannot be allowed to contend that the appellant Senthil Kumar had taken all the steps available to him under law for enforcing the attendance of the witnesses and therefore, he could not be blamed for non-examining the attestors concerned, as such, and the same cannot be countenanced, when it is seen that the abovesaid endeavours detailed above had not been attempted and followed and not ventured to be carried on by making appropriate applications in the court concerned as per law.

14. The above factors gain importance inasmuch as when it is seen that one of the witnesses who is said to be inaccessible even by way of the arrest is found to have been examined by the same appellant Senthil Kumar in the suit laid by him in O.S.No.229 of 2001 as P.W.2 and the said witness is found to be examined on 20.10.2003. It is thus found that the case projected by the appellant Senthil Kumar as if the attestors to the will dated 29.08.2000 are not at all available for arresting them, cannot, at all, be countenanced, when it is found that one of the attestors to the said will has, on summons, appeared in O.S.No.229 of 2001 on behalf of the appellant Senthil Kumar and tendered evidence with reference to the will dated 29.08.2000. On a perusal of the evidence of the said witness, it is seen that he has completely disowned the case of the appellant Senthil Kumar as regards the will dated 29.08.2000 and other than admitting his signature contained therein, he has completely disowned the other factors, qua the said will and in fact, he has pleaded complete ignorance whether the said will had been executed by A.M.Rangasamy Gounder on 29.08.2000.



Despite the abovesaid position, the appellant Senthil Kumar, had not chosen to assail his evidence by treating him as a hostile witness and cross examine him as provided under law other than putting suggestion to him in the course of chief examination. The abovesaid witness has not been treated as a hostile witness and cross examined by the appellant Senthil Kumar and on the other hand, he had been cross examined by A.R.Vengudusamy, the defendant, in the abovesaid suit. However, the respondent A.V.Jaganathan is not a party in O.S.No.229/01. Therefore, the respondent A.V.Jaganathan has been precluded or unable to cross examine the abovesaid witness when he had chosen to tender evidence in O.S.No.229 of 2001.

15. Be that as it may, when considering the abovesaid factors, in toto, when it is found that the attestors to the will dated 29.08.2000 could have been called upon and directed to tender evidence by the appellant Senthil Kumar by invoking the modes provided under Order 16 Rules 10,11,12 and 13 of Code of Civil Procedure and the mere factor that at the particular point of time, when the process server endeavoured to serve or arrest, they were not available, it cannot be stated that the said witnesses could not be examined once for all and the doors are totally shut precluding the appellant Senthil Kumar from examining them, therefore, the appellant Senthil Kumar is entitled to resort to the proving of the execution of the will otherwise as provided under law. On the other hand, when in toto, it is found that the appellant Senthil Kumar has failed to enforce the attendance of the said witnesses in the suits in O.S.No.64 of 2001 and 84 of 2001 and on the other hand, when he had been able to examine one of the attestors in O.S.No.229 of 2001, in such view of the matter, in my considered opinion, the appellant Senthil Kumar cannot be allowed to establish the truth and validity of the will dated 29.08.2000 by summoning the other witnesses, namely, the scribe, who had written the will concerned and the Sub Registrar concerned, who had registered the will concerned. When the party who is propounding his will is permitted to examine the other witnesses other than the attestors concerned, only in the circumstances as set out under Sections 68, 69 and 71 of the Indian Evidence Act and when the appellant Senthil Kumar has failed to establish the position that the attestors to the abovesaid will had totally remained inaccessible to the court process one way or the other, on the other hand, one of the attestors to the abovesaid will had been examined by him in the other suit i.e. O.S.No.229 of 2001 and when the appellant Senthil Kumar is found to have not resorted to the other modes for enforcing the attendance of the said witnesses as provided under order 16 Rules 10, 11, 12 and 13 of the Code of Civil Procedure and by repeatedly requesting the court concerned to reissue the warrant or serve the summons or solicit the assistance of the police machinery for enforcing the



warrant / service of summons, in all, it is found that the mode adopted by the appellant Senthil Kumar for establishing the truth and validity of the will dated 29.08.2000 through the other witnesses, cannot have the legal sanction and approval and on the abovesaid grounds, the evidence tendered by the scribe and the Sub Registrar concerned, cannot, at all, be looked into for upholding the truth and validity of the will dated 29.08.2000.

16. In addition to that, when the scribe of the abovesaid will is only the scribe of the said will and he is not described as the attestator to the said will in the impugned document, in such view of the matter, the evidence of the scribe as if he had put his signature in the said document as the person having the same mind set of the attestor, during the course of the evidence, would not entitle him to acquire the status of the attestor as contemplated under law and in such view of the matter, the contention put forth by the counsel appearing for the appellant Senthil Kumar that the evidence of the scribe should be accepted in the place of the attestor as such, cannot be accepted. If really, the scribe had signed the will both in his capacity as the scribe and the attestor, necessary indication pointing to the same should have been incorporated in the concerned document. On the other hand, when the will describes the scribe as the person who had prepared and typed the will and nothing more than that, the evidence adduced by the scribe as if he had signed the will with the same mind set of the attestor, cannot, at all, be countenance and resultantly, for the reasons aforesaid, his evidence cannot be accepted and his evidence cannot be treated on par with the evidence of the attestor.

17. Similar is the evidence of the Sub Registrar. The Sub Registrar is also found to have spoken about the execution of the document only in his capacity as the Sub Registrar concerned and in that capacity, has admitted that he had registered the document and when it is seen that he has tendered evidence that he had not signed in the document as a witness to the execution of the document by the testator as well as a witness to the attestation of the document by the attestors concerned, in such view of the matter, furthermore, when the Sub Registrar concerned has also not tendered evidence based on the official records, in such view of the matter, no safe credence could be attached to the evidence of the Sub Registrar concerned.

18. Considering the decisions reported in

- 1) (2007) 9 SCC 728 (Benga Behera and another vs. Braja Kishore Nanda and others)



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- 2) (2008) 14 SCC 754 (Babu Singh and others vs. Ram Sahai Alias Ram Singh),
- 3) AIR 1932 Mad 148, 1931-34-LW663 ((Talluri) Peda Manikyam vs. Vantabattina Periagadu and Ors) and
- 4) 1984-97-LW190, (1984)2MLJ 160 (Pichai Pillai Konar vs. Krishnaswami Konar and Ors.)

when it is found that the appellant Senthil Kumar is not entitled to the recourse to establish the truth and validity of the will dated 29.08.2000 by other evidence, particularly, when the attestors are accessible to the court process and he had also endeavoured to examine one of the attestors in the other suit and when it is further seen that the Apex Court had described the scribe as well as the registering officer cannot be treated on par with the attesting witness as detailed in the abovesaid decisions, in all, it is found that no safe reliance could be attached to the evidence tendered by the abovesaid witnesses for upholding the truth and validity of the will dated 29.08.2000.

19. The counsel for the appellant in support of his various contentions and contending further that the appellant Senthil Kumar is entitled to examine the scribe and the Sub Registrar in support of his case for proving the will dated 29.08.2000 relied upon the decisions reported in

1. 2015-3-LW7, (2015)4 MLJ 452 (Selvasubramaniam vs. Subburathinam).
2. 2010-3-L.W. 282 (Karpagam and another vs. E.Purushothaman & others)
3. 2009-4-L.W. 912 (Kamala Menon Cochran vs. K.P.Ramachandra Menon & 6 others)
4. 2003 (4) CTC 470 (Dr. Shantha vs. Sharada)
5. 2005 (1) CTC 11 (Janaki Devi vs. R.Vasanthi and others)
6. 2005 (8) SCC 64 (Pentakota Satyanarayana & Ors vs. Pentakota Seetharatnam & ors)
7. (2008) 8 MLJ 647 (Thayammal vs. Ponnusamy and another)
8. (1982) 1 SCC 20 (Indu Bala Bose and others vs. Manindra Chandra Bose and another)
9. 1995 Supp (2) SCC 664 (P.P.K. Gopalan Nambiar vs. P.P.K. Balakrishnan Nambiar and others)
10. (2003) 2 SCC 91 (Janki Narayan Bhoir vs. Narayan Namdeo Kadam)

In all those cases concerned, the propounder of the will concerned had been permitted to resort to the mode of the other evidence for sustaining the truth and validity of the wills concerned on determining that the attestors to the said will are either died or totally inaccessible to the process of the court, in such circumstances, it is seen that, in the abovesaid



decisions, reliance had been made on the evidence of the other witnesses tendered by the propounder of the will concerned. But, insofar as this case is concerned, when it is seen that the appellant Senthil Kumar has failed to resort to all the avenues open to him for securing the presence of the attestors concerned as provided under law either through compulsive process or otherwise and when it is seen that he has, indeed, examined one of the attestors in O.S.No.229 of 2001, as rightly determined by the first appellate court, it is found that the appellant Senthil Kumar has endeavoured to enact a scene or drama as if the attestors to the will dated 29.08.2000 cannot at all be secured through the process of the court and thereby endeavoured to sustain his case by resorting to the other modes i.e. by examining the scribe and the Sub Registrar. When the abovesaid avenues are not available to the appellant Senthil Kumar as above pointed out, particularly, when the availability of the attestors concerned is possible and when it is seen that they could be secured by the court concerned by the process of the court and with the aid of the police machinery one way or the other and also by initiating action against the properties belonging to them and when the abovesaid modes had not been availed of by the appellant Senthil Kumar and in such view of the matter, when the scribe and the Sub Registrar concerned could not be treated on par as that of the attestors, particularly, their evidence could not be relied upon when the appellant Senthil Kumar had the opportunity of securing the attendance of the attestors concerned as above pointed out, in such view of the matter, the abovesaid decisions relied upon by the counsel appearing for the appellant Senthil Kumar would not be applicable to the facts and circumstances of the present case.

20. It has been argued by the counsel for the respondent A.V.Jaganathan that on the basis of the evidence tendered by the attesor K.C.Devanan in O.S.No.229 of 2001, this court should reject the will dated 29.08.2000 and pass appropriate orders as per law. Countering the same, it is contended by the counsel appearing for the appellant Senthil Kumar that the evidence recorded in O.S.No.229 of 2001 could not be read in evidence in the other two suits, as according to him, in all the three suits, separate trials had been conducted, by examining the witnesses independently in all the three suits. Strictly speaking, the evidence recorded in O.S.No.229 of 2001 could not be read in evidence in the other two suits and thereby, on that basis, we cannot dispose of the matters as per law. Furthermore, there is also another obstacle in the matter. Insofar as O.S.No.229 of 2001, the respondent A.V.Jaganathan is not a party. So, when A.V.Jaganathan had been unable to cross examine the said witness in support of his case one way or the other, atleast for sustaining the will projected by him, in such



view of the matter, I do not find it fit, at this stage, to rely upon the abovesaid evidence of the attesor in O.S.No.229 of 2001 for disposing of these matters as such.

21. As abovenoted, the parties had been approaching these matters only concentrating upon the will dated 29.08.2000. As further noted above, the wills dated 04.06.1999 and 15.02.2000 are also put to challenge one way or the other. In such view of the matter, if straight-a-way it has to be held that the will dated 29.08.2000 had not been proved by the appellant Senthil Kumar as such, for the reasons abovestated, the next question that would arise for consideration is whether the wills dated 15.02.2000 and 04.06.1999 have been proved by the respondent A.V.Jaganathan as per law. The respondent A.V.Jaganathan had also failed to examine the attestors to the abovesaid wills one way or the other for sustaining his case. Similarly, the other parties involved in these matters had also not endeavoured to examine the attestors to the abovesaid two wills dated 04.06.1999 and 15.02.2000. In such view of the matter, particularly, when there is a serious challenge thrown against the truth and validity of the abovesaid two wills also, in my considered opinion, unless the attestors to the abovesaid wills are examined and allowed to tender evidence one way or the other, as at present, we cannot determine the truth and validity of the abovesaid wills.

22. Insofar as O.S.No. 229 of 2001 is concerned, despite the evidence of the attesor concerned completely disowning the case of the appellant Senthil Kumar, the trial court, in the abovesaid suit, had accepted the case of the appellant Senthil Kumar based on the common judgment and decree passed in O.S.Nos 64 of 2001 and 87 of 2001. But the court concerned had not gone into and considered the evidence of the attesor K.C.Devanan, on the other hand, without even marking the common judgment rendered in O.S.Nos.64 of 2001 and 87 of 2001 in O.S.No.229 of 2001 and in particular, when the defendant in the abovesaid suit, namely, A.R.Vengudusamy, is not a party in the abovesaid two suits, still the trial court in the said suit had endeavoured to consider the abovesaid common judgment and thereby upheld the case of the appellant Senthil Kumar as if he is the owner of the property described therein. The abovesaid approach of the trial court is found to be totally erroneous and against the provisions of law.

23. It is found that it is not the case of the respondent A.V.Jaganathan that the attestors to the wills dated 15.02.2000 and 04.06.1999 are not available for examination. However, they had not been examined for one reason or the other. As above noted, the parties had been mainly concentrating only upon the truth and validity of the will dated 29.08.2000.



24. A.M.Rangasamy Gounder is found to have chosen to dispose of his properties by way of the execution of the wills. It is thus found that rival parties had been projecting their case as if he has executed the wills in respect of the properties belonging to him. Therefore, when a person who makes a will and thereby intend that his properties should devolve by testamentary succession and not devolve upon his legal heirs as per general law, in such view of the matter, when we find that the three wills are said to have been executed by A.M.Rangasamy Gounder, in my considered opinion, it would not be correct in directing the parties to resort to the partition of his properties as per the general law. On the other hand, the first appellate court should have endeavoured to ensure as to which of the three wills executed by A.M.Rangasamy Gounder is true and valid and accordingly dispose of the matters. Only in the event of the coming to the conclusion that all the three wills said to have been executed by A.M.Rangasamy Gounder are not true and valid, in such circumstances, it is found that the parties could be directed to seek the mode of partition as per natural succession and general law and when the abovesaid eventuality has not reached and as at present, the truth and validity of the three wills are yet to be considered and determined one way or the other, in such view of the matter, in the interest of justice and for enabling all the parties concerned to examine the attestors of the wills propounded by them, particularly, to enable the appellant Senthil Kumar to take further steps, as above pointed out, to secure the presence of the attestors and examine them and particularly to enable the respondent A.V.Jaganathan to examine the attestors of the wills propounded by him as well as enabling the parties concerned to examine the attestors to the will dated 15.02.2000 one way or the other and thereby establish their case and when as at present, it is seen that the evidence had not been tendered in the matter as regards the wills concerned, particularly, as provided under law by examining the attestors to the said wills, in such view of the matter, in the light of the above observations made, in the fitness of things, the judgment and decree of the courts below in all the three matters are set aside and the matters are remitted back to the trial court concerned for enabling the parties to adduce further evidence for sustaining the truth and validity of the wills involved in the matter one way or the other as per law so as to enable the courts concerned to determine as to which of the three wills said to have been executed by A.M.Rangasamy Gounder and projected in the matter is true and valid and accordingly, the courts concerned should endeavour to enable the parties to adduce further evidence as above indicated and thereupon decide the issues involved in the matter afresh in accordance with law. The suit in O.S.No.229 of 2001 is also directed to be remitted back to the II Additional Court District Munsif Court, Bhavani so as to enable the same



court to consider and determine the issues involved in all the three matters as per law. Accordingly, the second appeals are disposed of. No costs. Consequently, connected miscellaneous petitions are also closed.

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Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

bga

Copy to

1. The Sub Court, Bhavani.
2. First Additional District Munsif Court, Bhavani.
3. Second Additional District Munsif Court, Bhavani.

+2cc to Mr.N.Manokaran, Advocate, S.R.No.44770 & 44772

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.44576

+1cc to Mr.P.Valliappan, Advocate, S.R.No.44561

+1cc to Mr.N.Manokaran, Advocate, S.R.No.44771 (10.12.2019)

S.A.Nos.935, 938 and
939 of 2005

TM(CO)
CS/18/10/2019