

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.03.2019

PRONOUNCED ON : 23.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.Nos.181 and 182 of 2013

and

M.P.No.1 of 2013

C.Kumarasamy ..Appellant/1st Respondent/Plaintiff
(in both Second Appeals)

Vs.

1. P.Thamayanthi ..1st Respondent/Appellant/1st Defendant
(in both Second Appeals)

2. C.Murugesan ..2nd Respondent
(Second respondent is given up (in both Second Appeals)
as unnecessary party)

PRAYER in S.A.No.181 of 2013: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 31.07.2012 made in A.S.No.91 of 2011 on the file of the First Additional District Court, Erode, reversing the judgment and decree dated 26.09.2011 made in O.S.No.330 of 2008 on the file of the Second Additional Sub Court, Erode.

PRAYER in S.A.No.182 of 2013: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 31.07.2012 made in A.S.No.92 of 2011 on the file of the First Additional District Court, Erode, reversing the judgment and decree dated 26.09.2011 made in O.S.No.330 of 2008 on the file of the Second Additional Sub Court, Erode.

For Appellant : Mr.T.Murugamanickam for
M/s.Zeenath Begum (in both
Second Appeals)

For Respondents : Mr.N.Manokaran (in both
Second Appeals)

in both : R2 given up
 Appeals Second

COMMON JUDGMENT

S.A.No.181 of 2013 has been filed by the plaintiff against the judgment and decree passed by the First Additional District Judge, Erode in A.S.No.91 of 2011 dated 31.07.2012 reversing the judgment and decree passed by the Second Additional Sub Judge, Erode in O.S.No.330 of 2008 dated 26.09.2011.

2. S.A.No.182 of 2013 also has been filed by the plaintiff against the judgment and decree passed by the First Additional District Judge, Erode in A.S.No.92 of 2011 dated 31.07.2012 reversing the judgment and decree passed by the Second Additional Sub Judge, Erode in counter claim filed in O.S.No.330 of 2008 dated 26.09.2011.

3. The appellant herein had filed a suit in OS.No.330 of 2018 on the file of the Second Additional Sub Judge, Erode to divide the suit properties into three equal shares and allot one such share to him. The first defendant had filed written statement along with counter claim to declare that she is the absolute owner of the suit properties and for permanent injunction to restrain the plaintiff and the second defendant, their men, agents etc from interfering with her peaceful possession and enjoyment of the suit properties. The learned Second Additional Sub Judge, Erode by the judgment dated 26.09.2011 had passed a preliminary decree to divide the suit properties into three equal shares and allot one such share to the plaintiff. However, she dismissed the counter claim. Aggrieved by the granting of preliminary decree for partition, the first defendant had filed an appeal in A.S.No.91 of 2011 and against the dismissal of her counter claim, she filed an appeal in AS.No.92 of 2011 on the file of the First Additional District Judge, Erode. The learned Additional District Judge, Erode by the common judgment dated 31.07.2012 had allowed both the appeals and dismissed the suit. However, he allowed the counter claim and granted decree for declaration and permanent injunction as prayed for. Feeling aggrieved, the plaintiff has filed the present second appeals.

4. For the sake of convenience, the parties are referred to as described before the Trial Court.

5. The averments made in the plaint are in brief as follows:

The plaintiff and the second defendant are brothers and the first defendant is their sister. Their father Chenniappa Gounder had purchased the suit properties under the sale deeds dated 05.09.1959 and 27.04.1973. After purchase, he constructed a house in a portion of the suit properties and he has been residing there till his death. He died intestate in the year 1998 leaving behind the plaintiff, the defendants and their mother Thangammal as his legal heirs. Subsequently on 19.05.2008, the said Thangammal died intestate and hence the plaintiff and the defendants are entitled to get 1/3 share each in the suit properties. The plaintiff and the defendants are in joint possession and enjoyment of the suit properties. The plaintiff demanded the defendants for a partition of the suit properties, the defendants did not come forward for amicable partition. Hence, the plaintiff had issued a Lawyer's Notice to the defendants on 05.06.2008 calling upon them for amicable partition. After receipt of the notice, the first defendant has sent a reply notice with false averments, but, the defendants did not come forward for amicable partition and hence, the plaintiff was constrained to file the above suit for partition and separate possession of his 1/3 share.

6. The averments made in the written statement and counter claim filed by the first respondent are in brief as follows:

It is true that the plaintiff, the second defendant are brothers and the first defendant is their sister. It is also true that their father Chenniappa Gounder had purchased the suit properties under the registered sale deeds dated 05.09.1959 and 27.04.1973, but it is false to state that the said Chenniappa Gounder died intestate. Except the suit properties, all other properties were divided by the said Chenniappa Gounder, the plaintiff and the second respondent in the partition which took place on 09.09.1992, but no share was allotted to the first defendant in the said partition. The said Chenniappa Gounder had executed a registered settlement deed dated 25.08.1993, in respect of the suit properties in favour of his wife Thangammal and after her death, the first defendant has to get the suit properties as absolute owner. The said settlement deed came in to force immediately and the said Thangammal took possession of the suit properties and enjoyed the same till her death. The said Chenniappa Gounder died on 30.01.1998 and thereafter, his wife Thangammal died on 19.05.2008. After the death of the said Thangammal, as per the aforesaid settlement, the first defendant got the suit properties and she has been in possession and

enjoyment of the suit properties as absolute owner. Even though, the said Chenniappa Gounder died on 30.01.1998 till the death of his wife Thangammal, neither the plaintiff nor the second defendant claimed any right over the suit properties. Only after the death of their mother Thangammal, the plaintiff and the second defendant colluded together and filed the above vexatious suit. The plaintiff and the second defendant being the male members have taken away the original sale deeds and the settlement deed from the custody of their mother Thangammal and after her death, the plaintiff had filed the above suit suppressing the fact that the said Chenniappa Gounder had executed the settlement in favour of the first defendant. The plaintiff and the second defendant had tried to trespass in to the suit properties and hence it has become necessary for the first defendant to file counter claim to declare that she is the absolute owner of the suit property by virtue of registered settlement deed dated 25.08.1993 and to restrain the plaintiff and the second defendant by means of permanent injunction from interfering with her peaceful possession and enjoyment of the suit properties.

7. The averments made in the reply statement filed by the plaintiff are in brief as follows:

It is false to state that the plaintiff and the defendant colluded together and filed the above suit. Infact, the defendants are colluding together to defeat the lawful rights of the plaintiff over the suit properties. It is false to state that the first defendant has provided the entire needs and requirements of Chenniappa Gounder and consequently he had executed a registered settlement deed dated 25.08.1993 conveying the entire suit properties to the first defendant after the life time of Thangammal. It is false to state that after the death of their mother Thangammal, the first defendant took possession of the suit properties and she is in exclusive possession and enjoyment of the suit properties. It is also false to state that the plaintiff and the second defendant being the male members have taken possession of the original records forcibly from the custody of their mother and in order to extract money from the first defendant. The alleged settlement deed is not true and valid document, only to conceal its false nature and to conceal forgery committed by her. The first defendant pleads that the said document was not in her custody and to escape from it, she is pleading that the said documents were taken away by the plaintiff and the second defendant. Had it be true that Chenniappa Gounder executed the alleged document, it must have been in the custody of the first defendant and the above conduct of the first defendant shows that she is playing fraud and she should stop to raise untenable allegations against the plaintiff

to give lame excuses for not having custody of the alleged settlement deed. The entire suit property is in joint possession and enjoyment of the plaintiff and the defendants and therefore, the plaintiff prayed to decree the suit for partition and dismiss the counter claim filed by the first defendant.

8. The averments made in the additional written statement filed by the first defendant are in brief as follows:

It is denied that the defendants are colluding. Infact, the plaintiff and the second defendant are colluding with each other. Out of love and affection, the said Chenniappa Gounder executed a settlement deed dated 25.08.1993 conveying the entire suit properties in favour of the first defendant. The execution of settlement deed bequeathing the entire suit properties is well known to the plaintiff and others. The settlement deed also acted upon on the date of settlement itself. It is denied that the plaintiff is in joint possession and enjoyment of the suit properties. The plaintiff is never in possession and enjoyment of the suit properties at any point of time. It is true that Chenniappa Gounder executed the settlement deed giving life estate to Thangammal and after her death, the first defendant is entitled to get the properties as absolute owner. After the death of the said Thangammal, the first defendant took possession of the suit properties and she is enjoying the same as absolute owner. Without setting aside the settlement deed, the suit is not maintainable. It is false to state that settlement deed is not a genuine document. Therefore, the first defendant prayed to dismiss the suit and to decree the counter claim as prayed for.

9. Based on the aforesaid pleadings, the learned Second Additional Sub Judge, Erode had framed necessary issues and tried the suit. During Trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1. He has marked Exs.A1 to A4 as exhibits. On the side of the first defendant, the first defendant examined herself as D.W.1 and she has examined two more witnesses as D.W.2 and D.W.3 and marked Exs.B1 to B18 as exhibits. Exs.C1 and C2 were marked as court exhibits.

10. The learned Second Additional Sub Judge, Erode after considering the materials placed before her found that the first defendant failed to prove the genuineness of the settlement deed dated 25.08.1993 and consequently she rejected the counter claim and passed a preliminary decree to divide the suit properties into three equal shares and allot one such share to the plaintiff. Aggrieved by the passing of the preliminary decree for partition, the first defendant had filed an appeal in A.S.No.91 of 2011 and she also filed an appeal in A.S.No.92 of

2011 on the file of the First Additional District Judge, Erode against the rejection of her counter claim.

11. The learned First Additional Judge, Erode by the common judgment dated 31.07.2012 had allowed both the appeals and set aside the judgment and decree passed by the Trial Court in O.S.No.330 of 2008 and dismissed the said suit. He however allowed the counter claim and granted decree declaring that the first respondent is the absolute owner of the suit properties and also granted permanent injunction restraining the plaintiff and the second defendant from interfering with the peaceful possession and enjoyment of the first defendant in the suit properties. Feeling aggrieved, the plaintiff has filed the present second appeals.

12. This Court at the time of admitting the second appeals has formulated the following substantial questions of law:

" a) When Ex.B3 Settlement deed has not been proved as contemplated under Section 68-71 of the Indian Evidence Act, whether the Lower Appellate Court was correct in presuming, that its due execution was proved, merely because the certified copy thereof was produced into the Court?

2) Even assuming, but, not conceding the validity of Ex.B3 Settlement deed, whether the first respondent herein can trace title under this document in the absence of any proof of its acceptance by her?"

3) Whether the judgment of the Lower Appellate Court is vitiated in, that , it has granted the decree for permanent injunction in favour of the first respondent, in the absence of any revenue records to prove possession of the suit property? "

13. Heard Mr.T.Muruga Manickkam for M/s. Zeenath Begum, the learned Senior counsel for the appellant in both the second appeals and Mr.N.Manokaran, the learned counsel for the first respondent in both the second appeals.

14. Substantial Questions of Law 1 to 3:

The learned Senior counsel for the appellant/plaintiff has submitted that the First Appellate Court erred in reversing

the well considered judgment of the Trial Court. He further submitted that when the first respondent placed reliance upon Ex.B3 Settlement deed, then, it must be proved in the manner under Section 68 of the Indian Evidence Act. He further submitted that the first defendant failed to prove the said document by examining attestors of the said document. He further submitted that the First Appellate Court failed to see that the first defendant did not produce the original settlement deed. He further submitted that the first defendant made false allegations belatedly in the written statement that the plaintiff and the second defendant herein had taken away the original settlement deed, when such stand has not been taken in the reply notice. He further submitted that when the attesting witnesses have not even come to the court then no reliance can be placed upon under Section 71 of the Indian Evidence Act particularly, the said section contemplates the said execution may be proved by other evidence which in this case is totally lacking. He further submitted that the First Appellate Court erred in presuming that the attesting witnesses were restrained by the plaintiff when there is no such allegation to that effect. He further submitted that the First Appellate Court erred in holding Ex.A.3 is duly proved merely it has been registered. He further submitted that the First Appellate Court failed to see that there is no proof evidencing mutation of revenue records. He further submitted that the Trial Court taking into consideration of all the aforesaid facts had rightly rejected the counter claim filed by the first defendant and passed a preliminary decree for partition as prayed for, but, the First Appellate Court without appreciating the evidence in a proper perspective had set aside the judgment and decree passed by the Trial Court and dismissed the plaintiffs suit and allowed the counter claim and therefore he prayed to allow the second appeals and set aside the judgment and decree passed by the First Appellate Court and restore the judgment and decree passed by the Trial Court.

15. The learned Senior Counsel for the appellant/plaintiff in support of the aforesaid contentions, relied upon the following decisions and also filed written arguments..

(i) Siddiqui (Dead) by LRs Vs.A. Ramalingam (2011) 4 SCC 240

(ii) Rakesh Mohindra Vs. Anita Beri and Others (2016) 16 SCC 483

16. Per Contra, Mr.N.Manokaran, the learned counsel for the first respondent/ first defendant has submitted that it is not disputed that the said Chenniappa Gounder had purchased the

suit properties under two registered sale deeds dated 05.09.1959 and 27.04.1973. He further submitted that on 09.09.1992, the said Chenniappa Gounder, the plaintiff and the second defendant had partitioned the ancestral properties and in the said partition, no share was allotted to the first defendant. He further submitted that taking in to consideration of the fact that no share was allotted in the partition which took place in 1992 and also the fact that the first defendant is the only daughter, the said Chenniappa Gounder had executed a registered settlement deed dated 25.08.1993 in respect of the suit properties. He further submitted that in the settlement deed, a life interest was given to his wife Thangammal and after her death, the first defendant has to take the properties as absolute owner. He further submitted that the said document immediately came into force and the said Thangammal has been in possession and enjoyment of the suit property till her death and after her death, the first defendant got the suit properties and she has been in possession and enjoyment of the same as absolute owner. He further submitted that after execution of the said settlement deed, the said Chenniappa Gounder was alive nearly for five years and he died only on 30.01.1998. He further submitted that if really, the said settlement deed was fabricated by the first defendant, Chenniappa Gounder would have taken steps to set aside the said document. He further submitted that it is not the case of the plaintiff that in the year 1993, the relationship between the parties was strained and that being so, the first defendant could not have created any false document in the year 1993 by forging the signature of Chenniappa Gounder. He further submitted that only at the time of filing written statement, the first defendant verified and found that the original documents were taken away by the plaintiff and the second defendant from the custody of their mother and hence, the said fact was not mentioned in the reply notice. He further submitted that the first defendant had proved by her oral evidence that the plaintiff had taken away the original settlement deed from the custody of their mother and hence she is entitled to adduce secondary evidence under Section 63 of the Indian Evidence Act. He further submitted that the evidence of Sub Registrar (DW2) would clearly show that the said Chenniappa Gounder had executed the settlement deed dated 25.08.1993. He further submitted that the first defendant has taken summons to the attestors of the said document to examine them as witnesses but after receipt of the said summons, they did not turn up and hence they could not be examined as witnesses before the Court. He further submitted that the scribe was examined as D.W.3 and thereby the first defendant discharged her burden. He further submitted that the first defendant has proved her exclusive possession over the suit properties by producing patta , kist

receipts, house tax receipts and electricity receipts, but the plaintiff has not produced any document to show that he is in joint possession of the suit properties. He further submitted that the Trial Court without taking into consideration of all the aforesaid facts had mechanically rejected the counter claim and passed preliminary decree for partition, but the First Appellate Court had considered the evidence in proper perspective and allowed the appeals and set aside the judgment and decree passed by the Trial Court and allowed the counter claim and dismissed the plaintiff's suit and in the said factual findings, this court cannot interfere and therefore he prayed to dismiss the second appeals.

17. The learned counsel for the first respondent, in support of the aforesaid contentions relied upon the following decisions:

- (i) Karuppanna Gounder and Others Vs. Kolandaswami Gounder and Others - AIR 1954 (MAD) 486: 1953 (2) MLJ 717
- (ii) Kasireddy Ramayamma Vs. Kasireddy Rama Rao - AIR 2000 (AP) 29
- (iii) S. Madasamy Thevar Vs. M. Arjuna Raja AIR 2000 (MAD) 465 : 2000 (3) MLW 793
- (iv) Periasamy Vs. K. Periyasamy and Others- 2003 -3 L.W. 525
- (v) Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others -(2005) 8 SCC 67
- (vi) Renikuntla Rajamma Vs. K. Sarwanamma (2014) 9 SCC 445
- (vii) Jaspal Kaur Cheema and Others Vs. Industrial Trade Links and Others-Manu/ SC/ 0760/2017 : AIR 2017 SC 3995

18. It is an admitted fact that the plaintiff and the second defendant are the brothers and the first defendant is their sister. It is also an admitted fact that the suit properties originally belonged to their father Chenniappa Gounder by virtue of the sale deeds dated 05.09.1959 and 27.04.1973. It is also admitted fact that the plaintiff, the second defendant and their father Chenniappa Gounder had partitioned their ancestral properties under a registered partition deed dated 09.09.1992 (Ex.B4) and in the said partition deed, the suit properties were not included as they are separate properties of the said Chenniappa Gounder. It is also an admitted fact that the said Chenniappa Gounder died on 30.01.1998 and thereafter his wife Thangammal died on 19.05.2008.

19. According to the plaintiff, their father Chenniappa Gounder died intestate leaving behind him the plaintiff, the defendants 1 and 2 and their mother Thangammal. His further case is that since their mother Thangammal also died, he and the defendants are entitled for 1/3 share each in this suit properties, but, the case of the first defendant is that the said Chenniappa Gounder gifted the suit properties under a registered settlement deed dated 25.08.1993 to her mother Thangammal by giving life interest and after her death she has to get the suit properties and enjoy the same as absolute owner.

20. The plaintiff denied the execution of settlement deed by his father in favour of the first defendant in respect of the suit properties. The second defendant did not contest the case. since, the first defendant claims that her father Chenniappa Gounder had gifted the suit properties to her under the registered settlement deed dated 25.08.1993, the burden is upon her to prove the execution of the said document.

21. Section 123 of the Transfer of Property Act, 1882 regulates the mode of making a gift which reads thus:

" 123. Transfer how effected- For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the doner, and attested by atleast two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered".

22. A plain reading of the aforesaid provision of law would show that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. In the case of movable properties transfer may be effected either by a registered instrument signed as aforesaid or by delivery is valid.

23. Section 68 of the Indian Evidence Act, 1872 deals with the Proof of execution of document required by law to be attested which reads thus-

"68. Proof of execution of document required by law to be attested. If a document is

required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

24. A plain reading of the aforesaid section shows that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of court and capable of giving evidence. However, it shall not be necessary to call an attesting witness in proof of the execution or any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. In this case, the alleged executant namely Chenniappa Gounder is not alive, the plaintiff is one of his sons, he is denying the execution of the said document by his father. So, in view of the aforesaid provision of law atleast one of the attestors should have been called for the purpose of proving its execution.

25. In this case, the original settlement deed dated 25.08.1993 has not been produced before the Court. The first defendant has produced only a registration copy of the said settlement deed and marked as Ex.B.3. In Ex.B.3, it is stated that one Kandasamy S/o Karruppanna Gounder and one Palanisamy Gounder S/o.Kasianna Gounder signed as witnesses (attestors). It is admitted by the first defendant that both the witnesses are alive. In such a case, in view of the aforesaid provision of law, atleast one of the attestors should have been examined as witness before the Court. According to the first defendant, she has taken summons to the said attestors, but, after receipt of summons, they did not appear before the Court and hence, they were not examined before the Court. If the witnesses not turned up after receipt of summons, the first defendant should have filed a petition under Order 16 Rule 10 of CPC requesting the Court to issue a warrant for the arrest of such persons and produce before the court for examination. But, she has not taken

any such coercive steps for securing the said witnesses and examine before the Court.

26. As per Section 71 of the Indian Evidence Act, "if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence". At this juncture, it would be relevant to refer to the decision under Janki Narayan Bhoir Vs. Narayan Namdeo Kadam - AIR 2003 SC 761, wherein the Hon'ble Supreme Court in Paragraph No.11 has observed as follows:

"11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68, Evidence Act, to meet a situation where it is not possible to prove the execution of the Will by calling attesting witnesses, though alive. This Section provides that if an attesting witness denies its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the Will and other attesting witnesses though are available to prove the execution of the same, for the reasons best known, have not been summoned before the Court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of Will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the Will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of Will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the Will. Yet, another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the Will is to avert the claim of drawing adverse inference under Section 114. Illustration (g) of Evidence Act. Placing the best possible evidence. In the given

circumstances, before the Court for consideration, is one of the Cardinal Principles of Indian Evidence Act. Section 71 is permissive to lead other evidence in certain circumstances. But Section 68 is not merely an requirements, which the Court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of party who had done his best, but driven to a state of helplessness and impossibility cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available or not a necessary witness otherwise available and amenable to the jurisdiction of the Court and confer a premium upon his omission or lapse, to enable him to give a go-bye to the mandate of law relating to proof of execution of a Will ".

In this case, if the first defendant had taken coercive steps for securing the attestors and examined before the Court and they denied the execution of the settlement deed, then, its execution may be proved by other evidence. But, in this case, as already pointed out, the first defendant did not take coercive steps for securing the attestors and examined before the Court. Therefore, in view of the aforesaid decision, she cannot contend that she proved the said settlement deed by other evidence. Before resorting to any other procedure for proving the said settlement deed, she should have exhausted the remedies available under Section 71 of the Indian Evidence Act.

27. In Seenuappa Vs. Krishnappa and Others (2009), 6 MLJ 1113, this Court in Paragraph Nos. 24 to 26 has observed as follows:

" 24. Section 123 of the Transfer of Property Act says that in the case of gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses.

25. Section 68 of the Indian Evidence Act says that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there been

attesting witness alive, and subject to the process of the court and capable of giving evidence. The appellant/2nd defendant did not examine the attestors of Ex.B.2. The scribe of Ex.B2 was examined as D.W.2 and D.W.3 is the identifying witness. According to D.W.1, the second defendant, two witnesses namely, Ramaiah and Anjappa signed the Ex.B.2 document as attestors. The said Ramiah is the father-in-law of the appellant/2nd defendant. D.W.1 in his cross examination also admitted that his father-in-law Ramaiah and himself are in good terms. Further, he also deposed that he does not know whether the other attestor Anjappa is residing at Hosur. Therefore, even according to the appellant/2nd defendant at least one attestor, namely Ramaiah was available at the time of Trial. But, the appellant chose not to examine the said attestor. Therefore, it cannot be stated that attestors were not available at the time of trial to prove Ex.B.2 document. Instead of examining the attestors, the appellant had examined the scribe and identifying witness.

26. As decided in the above referred judgments, the evidence of D.W.2 and D.W.3 could not disclose statutory requirements. There are two significant requirements of term "attest" namely, that the attestor should witness the execution which implies his presence then and secondly, that he should certify or vouch for the execution by subscribing his name as a witness which implies a consciousness and an intention to attest. Therefore, when the attestors are available for examination, by examining the scribe and identifying witness. Here it is not a case so. Therefore, only adverse inference can be drawn against appellant/2nd defendant for the non-examination of the attestor, who was very much available at the time of Trial. "

28. It is also relevant to refer to the decision in Om Prakash (Dead) Th.his LRs Vs. Shanthi Devi AIR 2015, SC 976, wherein the Hon'ble Supreme Court in Paragraph Nos.7 , 8 and 9 has observed as follows:

" 7-8. Section 68 prescribes that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of

proving its execution. Section 123 of the Transfer of Property Act, 1882 mandates that a Gift Deed pertaining to immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 17 of the Registration Act, 1908 also requires that instruments of gift of immovable property " shall be registered.". Section 34, thereafter, requires the executants of their authorized representatives of the document executed for registration appear before the registering officer. However, the witnesses to a document need not also be the witnesses to its registration. The pandect being part X, comprising Sections 47 to 50 of the Registration Act would next be required to be adverted to. Section 47 adumbrates that the registered document will take effect from the date of its execution. Section 48 is indeed significant in that it clarifies that a registered document will probatively prevail over oral agreements, except for an agreement or declaration which does not itself mandatorily require registration provided the oral agreement is accompanied by delivery of possession. The pre-eminent Section 49 declares that if any document despite requiring registration is not so done it shall not be received in evidence or attain any legal efficacy, except in the context of a suit for specific performance, or if it is intended to be used to prove any collateral transaction. We have ventured into this lengthy and arguably avoidable analysis to accentuate on two aspects - (a) the imperative necessity to produce in evidence a written instrument where it exists; and (b) that the registration of documents does not per se, ipso facto, render it impervious to challenge or and make its reception automatic in curial proceedings.

9. The Appellant/Defendant had led evidence of himself as DW1 as well as DW2 to DW5, none of whom were either of the attesting witnesses to the Gift Deed. It has also not been clarified whether the attesting witnesses or either of them was also witness before the Sub-Registrar when the Gift Deed was accorded registration. It should be noted that law does not mandate that the attesting witnesses to a document must also be present at the time of its registration under the Registration Act. Reasons remain recondite as regards this remissness

or even as to their not being 'found ' " as postulated in Section 69, although there is a vague reference to both of them having died by the time the Defendant/Appellant had started recording his evidence. Section 60 provides for "proof where no attesting witness found" . It is at once apparent that this provision anticipates a reasonable anxiety emerging out of the peremptoriness of section 68, in that it addresses, inter alia, a situation where none of the attesting witnesses to a document (a gift deed, in this case) are alive at the time of curial investigation thereof. Not leaving litigants for lorn for proof under Section 68, Section 69 places emphasis on handwriting(s) of the putative deceased or the ' not found' attestator(s), along with the signatures of the executant. We must be quick to elucidate that the position is akin to the reception of secondary evidence, in that the successful passage from the rigours of Section 68 can be met contingent upon the proved non-availability of the attesting witnesses to a document. Litigants are, therefore, not faced with an evidentiary cul-de-sac. They can discharge their burden by proving, in the alternate mode and manners conceived by the Act, the signatures of the putative attestators along with the handwriting of the executant. The appellant herein palpably failed in proving the signatures of the attestators to the Gift Deed, and therefore, has pursued his case by evoking Section 90 as the cornerstone of his pleadings".

From the aforesaid decisions, it is clear that in view of Section 68 of 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 has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. It is also clear that when the attestors available, examination of scribe and identifying witness would not serve the purpose. In this case, the first defendant examined the scribe as D.W.3. In view of the aforesaid decisions by examining the scribe cannot prove Ex.B.3 Settlement Deed. Therefore, an adverse inference has to be drawn against the first defendant for non-examination of the attestors.

29. It is to be pointed out that the first defendant did not produce the original settlement deed dated 25.08.1993 before

the court. In Paragraph 12 of the written statement, the first defendant has stated that the plaintiff and the second defendant colluded together and taken away all the original records forcibly from the custody of their mother and in order to extract money from her, the plaintiff has filed the vexatious suit in collusion with the second defendant. The second defendant remained exparte, the plaintiff in his reply statement has denied the allegation that he colluded with the second defendant and taken possession of the original records forcibly from the custody of their mother. He further stated that he never taken away any document from the mother as alleged by the first defendant. So, the burden is upon the first defendant to prove the allegation that the plaintiff and the second defendant have taken away the original records forcibly from the custody of their mother.

30. As already pointed out that in Paragraph No.12 of the written statement, the first defendant has stated that the plaintiff and the second defendant are colluding together and they being male members taken possession of the original records forcibly from the custody of their mother, but in Paragraph No.14 of the written statement, she has stated that the plaintiff has forcibly taken away the sale deeds as well as settlement deed from the custody of their mother and filed the suit by abusing the process of law. The first defendant has taken two stands, one is that the plaintiff and the second defendant colluded together and took away the original records forcibly from the custody of their mother and another one is that the plaintiff alone forcibly taken the sale deeds as well as the settlement deeds from the custody of their mother. She has not stated when the plaintiff and the second defendant or the plaintiff alone has taken away the original documents from the custody of their mother. In the reply notice (Ex.A.4), which has been sent by the first defendant for the pre suit notice issued by the plaintiff, she did not whisper any thing about the taking away of the original settlement deed by the plaintiff from the custody of their mother. When she examined herself as D.W.1, she has stated that the plaintiff and the second defendant being the male members have stolen the original documents from the custody of their mother and filed the above suit. This statement is another contradictory statement. As already pointed out that in Paragraph 12 of the written statement, she has stated that the plaintiff and the second defendant have forcibly taken the original records from the custody of their mother, but in Paragraph 14 of written statement, the plaintiff alone has forcibly taken away the original sale deeds and settlement deed from the custody of their mother, wherein in her evidence, she has stated that the

plaintiff and the second defendant have stolen the original records from the custody of their mother. In her evidence also she has not stated when the plaintiff and the second defendant have stolen the original records from the custody of their mother. During cross-examination of P.W.1, it was suggested that the plaintiff and the second defendant took away the original records by threatening their mother. If really, the plaintiff and the second defendant took away the original records forcibly from the custody of their mother, she would have immediately informed the said fact to the first defendant and some legal action would have been initiated against the plaintiff and the second defendant, but no such action has been taken during the life time of their mother. Therefore, the contentions of the first defendant that the plaintiff and the second defendant have forcibly taken away the original records from the custody of their mother cannot be accepted.

31. In H. Siddiqui (Dead) by LRs Vs.A.Ramalingam, the Hon'ble Supreme Court in Paragraph 12 has observed as follows:

" 12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The Court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon "

32. In Rakesh Mohindra Vs.Anita Beri and others (cited supra), the Hon'ble Supreme Court in Paragraph Nos. 15 and 20 has observed as follows:

" 15. The preconditions for leading

secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted.

20. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the Original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law "

33. From the aforesaid decisions, it is clear that the preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents inspite of best efforts, unable to produce the same which is beyond their control. It is also clear that the parties sought to be produced secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted. It is also clear that it is well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law. In this case, as already stated that the first defendant has not established that the original settlement deed has been taken away by the plaintiff or the second defendant from the custody of their mother. Under the said circumstances, the first defendant is not entitled to adduce secondary evidence.

34. In Karuppanna Gounder and Others Vs. Kolandaswami Gounder and Others (cited supra) the plaintiffs gave a notice to the defendants 3 and 4 to produce the original partition deed, but, the same has not been complied with. Under the said circumstances, this Court has held that requisite essentials for adducing of secondary evidence have been properly complied with. But, in this case, the first defendant has not given any notice to the plaintiff asking him to produce the original settlement deed as contemplated under Sections 65 of the Indian Evidence Act. Therefore, the aforesaid decision will not apply to the facts of this case.

35. In Kasireddy Ramayamma Vs. Kasireddy Rama Rao, (cited supra) the plaintiff filed a suit for partition claiming that one Pothu Naidu executed a settlement deed in his favour on 24.09.1976. The defendant contested the said suit stating that the settlement deed was obtained by playing fraud and misrepresentation. The said Pothu Naidu issued a notice dated 02.10.1976 and thereafter during his life time did not take any steps to cancel the said document. Under the said circumstances, the High Court of Andhra Pradesh has held that once the title passes under a duly executed and registered document as per the provisions of the Transfer of Property Act and the Indian Registration Act, there remains no subsisting right, title or interest of whatsoever nature to fall back or to recall or to cancel any such document except by taking recourse to a civil remedy seeking cancellation as contemplated under Section 31 of the Specific Relief Act. In this case, it is not the case of the plaintiff that Ex.B3 Settlement Deed has been obtained from his father by playing fraud or misrepresentation. Therefore, the aforesaid decision will not apply to the facts of this case.

36. In S.Madasamy Thevar Vs. M.Arjuna Raja (cited supra), this Court has held that the certified copies of the documents obtained from the Registrar's office are admissible and though they are secondary evidence, it cannot be said that they are totally inadmissible and cannot be relied upon by the Courts. There is no quarrel with regard to the aforesaid preposition of law, but, for adducing secondary evidence, the conditions stated in Section 65 of the Indian Evidence Act have to be satisfied. In this case as already pointed out that the first defendant failed to prove that the original settlement deed has been taken away by the plaintiff or the second defendant from the custody of their mother. Under the said circumstances, the first defendant is not entitled to adduce secondary evidence. Therefore, the aforesaid decision will not help the first defendant.

37. In *Periasamy Vs. K.Periyasamy and Others* (cited supra) this Court has held that once it is established that the original deeds are being deliberately withheld by the party against whom they are sought to be used, secondary evidence in respect of those title deeds can be tendered and if the secondary evidence happens to be certified copies of registered document, then the contents thereof can be read in evidence by virtue of sub-section (5) of Section 57 of Registration Act. In this case, the first defendant failed to establish that the original settlement deed was taken away by the plaintiff. Further even assuming that the contents of the certified copy of registered document can be read in evidence by virtue of sub-section (5) of Section 57 of the Registration Act, still its execution has to be proved in accordance with law. In this case as already pointed out that the first respondent did not take coercive steps to examine the attesting witnesses as contemplated under Section 68 of the Indian Evidence Act. Therefore, the aforesaid decision will not help the first defendant.

38. In *Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others* (cited supra), the Original registered Will was produced before the Court and marked as Ex.B.9. One of the attestors was examined as D.W.5 and the scribe was examined as D.W.6. In the original document, the executant's signature was taken by the Sub-Registrar. The signature and the thumb impression of the identifying witnesses were also taken in the document and taking in to consideration of the aforesaid facts, the Hon'ble Supreme Court has held that the Will has been duly proved. But, in this case, the original settlement deed has not been produced. Further, the attestors also not examined before the Court. Therefore, the aforesaid decision will not apply to the facts of this case.

39. In *Renikuntla Rajamma (Dead) by Legal Representatives Vs. K.Sarwanamma* (cited supra) a Hindu woman, executed a registered gift deed in respect of an immovable property in favour of the respondent reserving to herself the right to retain possession and to receive rents of the property during her life time. The gift was accepted by the respondent. But, subsequently, the appellant revoked the gift deed by revocation deed. The respondent filed a suit assailing the revocation deed as the same invalid. It was contended that since possession was not given, the gift was not completed. But, the Hon'ble Supreme Court has held that delivery of possession is not an essential pre requisite for making a valid gift in the case of immovable properties. In this case, the very execution of the settlement deed itself is denied by the plaintiff. Under

the said circumstances, the first defendant has to prove the execution of the said document. If the execution of the said document is proved, then only, the question will arise as to whether the gift is invalid for non delivery of possession. In this case, the first defendant failed to prove the execution of the settlement deed in accordance with law and therefore, the aforesaid decision also will not help her.

40. In Jaspal Kaur Cheema and Others Vs. Industrial Trade Links and Others (cited supra) the Hon'ble Supreme Court has held that in terms of Order 8 Rule 3 of Code of Civil Procedure, the defendant is required to deny or dispute the statements made in the plaint categorically as evasive denial would amount to an admission of the allegation made in the plaint in terms of order 8 Rule 5 of the Code. In this case, the first defendant had set up a counter claim in the written statement based on the settlement deed said to have been executed by her father. The plaintiff has filed a reply statement denying the allegation that their father had executed the settlement deed in favour of the first defendant. He also denied the allegation that he has taken away all the original documents from the custody of their mother forcibly. Therefore, this Court is of the view that the plaintiff has fully complied with the requirements of Order 8 Rule 3 of CPC. So, the aforesaid decision also will not help the first defendant.

41. In this case, the first defendant has taken summons to the Sub Registrar to produce the register of thumb impressions. Accordingly, the staff from the Sub Registrar's Office, has appeared before the Trial Court and produced a certified copy of settlement deed dated 25.08.1993 said to have been executed by Chenniappa Gounder and marked as Ex.X1. The said staff also produced a certified true copy of thumb impression register dated 25.08.1993 and marked as Ex.X.2, but, the first defendant has not taken any steps to send Ex.X2 to the Forensic Lab for getting Finger Print Expert's Opinion especially when the admitted thumb impression of Chenniappa Gounder is very much available in the partition deed dated 09.09.1992 (Ex.B4). Further, as already pointed out that the first defendant did not take coercive steps to secure the attesting witnesses and examine before the Court as contemplated under Section 68 of the Indian Evidence Act. Further, the first defendant has not given any satisfactory explanation for non-production of the original settlement deed dated 25.08.1983. The Trial Court, taking into consideration of all the aforesaid facts has rightly dismissed the counter claim and decreed the suit and passed a preliminary decree for partition, but, the First Appellate Court erroneously reversed the well considered

judgment of the Trial Court and hence the judgment and decree passed by the First Appellate Court have to be set aside. Accordingly, substantial questions of law are answered in favour of the appellant/plaintiff.

42. In the result, the second appeals are allowed. The judgment and decree passed by the First Appellate Court are set aside and the judgment and decree passed by the Trial Court are restored. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The First Additional Subordinate Judge,
Erode
2. The Second Additional District Munsif,
Erode.

Copy to : The Section Officer, VR Section,
High Court, Madras.

+2cc to M/s.N.Manokaran, Advocate SR.Nos.44192 and 44193

AKM/09.12.19/23P- 6C /

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Judgments made in
S.A.Nos.181 and 182 of 2013