



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Civil Appellate Jurisdiction)

Wednesday, the Twentieth day of March Two Thousand Nineteen

PRESENT

The Hon`ble Mr.Justice R.PONGIAPPAN

CMP (MD) No.1360 of 2019

IN

AS (MD) No.368 of 2002

1 LEELA

2 SIVAKUMAR

3 MAHESWARAN (DIED) .

... PETITIONERS/APPELLANTS

Vs

1 MURUGANANTHAM

2 GANESHA MURTHY

3 KANNAN (DIED) .

4 RAJAMMAL

5 MAHALAKSHMI

6 M.GURUSAMY NADAR

7 ABDUL RAHMAN

8 MOHAMED HUSAN

9 MOHAMED IBRAHIM

10 JOTHI ALL AMEEN

11 SAKTHIAMMAL

12 M.MUTHIYA

13 ASHRAF ALI.

14 M.CHIDAMBARAM

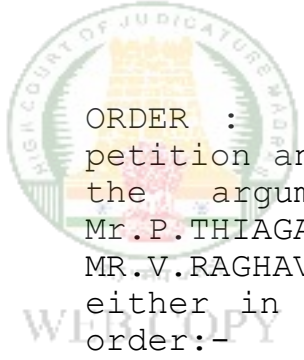
... PROPOSED RESPONDENT/

L.R. OF DECEASED 10th RESPONDENT

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to permit the petitioners to send the Ex b2 will date 6.4.1990 along with admitted signature of late Balasubramania Thandiyar available in EX A.1 family partition deed 4.12.89 to the handwriting expert namely Deputy director, Regional Forensic Laboratory, Madurai and to seek his opinion with regard to the genuinity of the signature available in EX.B.2 will dated 6.4.1990 and thus render justice.

PRAYER IN AS (MD) No.368 of 2002

To prefer this Memorandum of Grounds of Regular Appeal against the judgment and decree passed in OS.No. 142 of 1992 dated 27.09.2001 on the file of the Additional Sub Court, Tenkasi.



ORDER : This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of Mr.P.KRISHNA VENI, Senior Counsel for Mr.P.THIAAGARAJAN, Advocate for the petitioner and of MR.V.RAGHAVACHARI, Advocate for R1,R2,R4 & R5 and R3 not appeared either in person or by an Advocate, the court made the following order:-

The petitioners herein are the appellants in A.S.No.368 of 2012 and defendants 1 to 3 in O.S.No.142 of 1992, on the file of the Additional Sub Court, Tenkasi.

2. Aggrieved over the Judgment and Decree in O.S.No.142 of 1992, on the file of the Additional Sub Court, Tenkasi, dated 27.09.2001, the appellants preferred the above said Appeal before this Court.

3. During the pendency of the above said appeal, the appellants / petitioners filed this petition, seeking the relief to send the signatures found in the 'Will', which was marked as Ex.B2, executed by one Balasubramania Thanthiriar, during his life time, for Handwriting Expert.

4. The averments made in the affidavit filed by the petitioners, in brief, are as follows:-

(i) The petition mentioned appeal is arising out of the Judgment and Decree passed in O.S.No.142 of 1972, on the file of learned Subordinate Judge, Tenkasi. On completion of the trial, the learned trial Judge, decreed the Suit, granting 5/7 share to the plaintiffs, in the suit schedule property.

(ii) Before the trial Court, the case of the plaintiffs is that the suit schedule properties were originally belonged to the said Balasubramania Thanthiriar, by virtue of partition effected on 04.12.1989. The said Balasubramania Thanthiriar died on 28.11.1981, leaving his 1st wife / 4th plaintiff and 3 sons, the plaintiffs 1 to 3 and a daughter / 5th plaintiff. Further, the said Balasubramania Thanthiriar also left 2nd wife / 1st defendant and the sons born through the 2nd wife, who are the defendants 2 & 3. During the life time of said Balasubramania Thanthiriar, on his own whims and fancies, executed the 'Will', dated 06.04.1990, bequeathing his properties, in favour of the 2nd wife and the sons born through the 2nd wife.

(iii) Before the trial Court, in order to prove the Will, two witnesses were examined as D.Ws.1 and 2. The trial Court, without considering the entire evidence on record, taken the task of an expert, to compare the signatures found in the 'Will' and given a finding that the signature available in Ex.B2 - Will does not tally with the admitted signature of Late Balasubramania Thanthiriar, available in Ex.A1. So, it is necessary and also it is the duty of



the defendants to prove that the signatures found in Ex.B2 - Will, dated 06.04.1990, belongs to the said Balasubramania Thanthiriar.

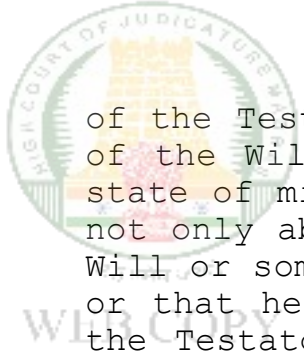
5. Resisting the claim made by the appellants / defendants 1 to 3, the 1st respondent, has filed a counter, denying the case of the defendants. It is true that on 04.12.1989, partition was effected in the family of Balasubramania Thanthiriar. As per the above said partition, the suit schedule properties was allotted to him. On 28.11.1981, the said Balasubramania Thanthiriar died intestate. On the other hand, the appellants projected the case before the trial Court, as if the deceased Balasubramania Thanthiriar, had executed the Will, on 06.04.1990 and bequeathed the properties allotted to him in the partition, dated 04.12.1989, in favour of the petitioners herein.

6. The trial Court has given an affordable opportunity to prove the execution of the alleged 'Will' to the defendants. Further, the appellants attempted to prove the said will through the evidence of D.W.2. Since the evidence given by D.Ws.1 and 2 is in contradictory nature, the trial Court came to the conclusion that the Will was not proved, as contemplated under Section 63 of Indian Evidence Act. Further, P.W.2, in his evidence clearly stated that the signature found in the 'Will' not belongs to the said Balasubramania Thanthiriar. Only thereafter, the trial Court came to the conclusion that the 'Will' was not proved, as per the [Indian Evidence Act](#) and decreed the Suit. In the said circumstances, the petition filed by the petitioners in the appeal stage, is unnecessary and it is only to drag on the proceedings.

7. I have heard the learned counsels appearing on either side and perused the materials available on record.

8. Upon considering the arguments advanced on either side, it is true, since the appeal is the continuation of the suit, the petitioners are entitled to file this application in this stage. The learned trial Judge, while at the time of deciding the issue, as to whether the Will is proved or not proved, he held that the evidence given by D.W.1 and D.W.2, in respect of execution of Will is in contradictory nature and observed that the Will was not proved. In the said circumstances, as a second chance for the purpose of proving the Will, the petitioners have filed this petition.

9. It is the case of the defendants that the admitted signatures of Balasubramania Thandaiyar is found in the partition deed, dated 04.12.1989. It is a common practice by the Forensic Science Department that for analysing the sample signatures in question, they want five or more admitted signatures. In this area alone, the petition filed by the petitioners cannot be entertained. More than that, the manner of proving the Will is only by Section 68 of the Indian Evidence Act. According to the said Act, the onus of proving the Will is on the propounder. Proof of the signatures



of the Testator, the testamentary capacity at the time of execution of the Will, whether the Testator was in a sound and disposing state of mind have to be proved. The attesting witness should speak not only about the Testator's signature or affixing his mark to the Will or somebody else signing it in his presence and by his direction or that he had attested the Will after taking acknowledgement from the Testator of his signature or mark, but also should speak that each of the witnesses had signed the Will in the presence of the testator. Section 68 of the Indian Evidence Act, is mandatory that one attesting witness at least has to be called to prove the execution. Initial burden is on the propounder of the Will to prove the execution and mere proof of attestation does not due execution in each and every case.

10. On a harmonious interpretation of relevant provisions of the Evidence Act, would make it clear that for proper proof of Will, at least one of the attesting witnesses, if alive, should have been examined and that whatever is not proved through him, should be proved through other evidence. Accordingly, I am of the considered view that the Will can be proved only by examining the Attester, who attested in the Will. Before the trial Court, the learned Additional Subordinate Judge came to the conclusion that the Will has not been proved through the evidence of D.W.2, who is the attester in the Will. So it is the duty of the appellants to argue before this Court in respect to the reliability of evidence given by D.Ws.1 and 2.

11. As already discussed, proving of signatures found in the Will alone is not sufficient to hold that the Testator executed the Will with sound state of mind. Only the witnesses can prove the said fact. In the said circumstances, without following Section 68 of Indian Evidence Act, the petitioners filed this application for sending the signature to the Handwriting Expert, for the purpose of proving the signature found in the Will - Ex.B2. Even if the signature found in the Will belongs to the said Balasubramania Thanthiriar, that is alone is not sufficient to accept that the Will is proved. Therefore, sending the Will for Handwriting Expert is unnecessary and also cause much delay in disposing the appeal

12. For the reasons stated above, this Miscellaneous Petition is dismissed.

sd/-
20/03/2019

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.



TO

THE ADDITIONAL SUBORDINATE JUDGE,
TENKASI

WEB COPY

+1. C.C. to Mr.P.THAGARAJAN Advocate SR.No.5394
+1. C.C. to MR.V.RAGHAVACHARI, Advocate SR.No.5220

ORDER
IN
CMP (MD) No.1360 of 2019
IN
AS No.368 of 2002
Date :20/03/2019

MSI/JC/SAR 4/22.03.2019/5P-4C