

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.10.2020
DATE OF DECISION : 09.11.2020

CORAM:

THE HON'BLE MR. JUSTICE T.RAJA

C.M.A.No.4869 of 2019

Lakshmi

.. Appellant

Vs

1.Parvatham

2.M.Chinnasamy

.. Respondents

Prayer : Civil Miscellaneous Appeal is filed under Order 43 Rule 1(U) of the Civil Procedure Code against the order of remand made in the Judgment and Decree dated 13.08.2019 made in A.S.No.36 of 2017 on the file of the learned Sub-Court, Kangayam (A.S.No.20 of 2017 - Sub-Court, Dharapuram) reversal of the judgment and decree dated 21.03.2017 made in O.S.No.219 of 2009 on the file of the learned District Munsif Court, Kangayam.

For Appellant : Mr.N.Manokaran

For Respondents : Mr.K.S.Jayaganeshan

JUDGMENT

Heard Mr.N.Manokaran, learned counsel for the appellant, and Mr.K.S.Jayaganeshan, learned counsel for the respondents, through Video Conferencing, due to COVID-19 Pandemic.

2. The plaintiff in O.S.No.219 of 2009 on the file of learned District Munsif Court, Kangayam, is the appellant herein, and the respondents herein are the defendants 2 and 3 in the suit. The appellant herein has filed the said suit for partition and separate possession of her half share in the suit properties. The learned trial Court, by decree and judgment dated 21.03.2017, has decreed the suit as prayed for. Aggrieved by the same, when appeal was preferred by the defendants 2 and 3/respondents herein, the learned first appellant Court, by decree and judgment dated 13.08.2019 passed in A.S.No.36 of 2017, has allowed the appeal by remanding the matter back to the learned trial Court to decide the lis on merits after recording the additional oral evidence by examining one witness on the side of the defendants 2 and 3. Challenging the order of remand, the plaintiff/appellant herein has filed the present

appeal.

3. For better understanding, the parties will be referred to as per their ranking in the trial Court.

4. Mr.N.Manokaran, learned counsel appearing for the plaintiff/appellant herein submitted that the plaintiff and the second defendant (D2) are the daughters of one Chellappa Gounder, who died on 10.05.2009. The first defendant (D1) is the wife of Chellappa Gounder and the third defendant (D3) is the husband of D2 and son-in-law of Chellappa Gounder. The subject matter of suit property is the ancestral property of Chellappa Gounder. The plaintiff was married in the year 1981. There was a partition between Chellappa Gounder and his younger daughter Parvatham/D2 by way of a registered partition deed dated 10.03.1993, in and by which, 'B' schedule property was allotted in favour of D2 and 'A' schedule property was allotted to the deceased Chellappa Gounder. Whiles, deceased Chellappa Gounder had bequeathed his share of 'A' schedule property by executing a Will dated 28.05.1999/Ex.B5 in favour of D3, who is the husband of D2.

4.1. Assailing the said Will dated 28.05.1999, the plaintiff has filed the suit in O.S.No.219 of 2009 seeking partition and then to allot one such share in her favour. She has also filed one another suit in O.S.No.143 of 2010 to declare the sale deed dated 25.08.1998 jointly executed by the deceased Chellappa Gounder and his daughter/D2 in favour of one M.S.Palanisamy and M.S.Thirumoorthy as null and void. Both matters were jointly tried by the learned trial Court and finally, a common judgment dated 21.03.2017 was passed in O.S.No.219 of 2009 and O.S.No.143 of 2010.

4.2. The suit in O.S.No.219 of 2009 was decreed holding that the plaintiff is entitled to preliminary decree for partition and that the suit property shall be divided into 2 equal shares and one such share shall be allotted to her.

4.3. With regard to suit in O.S.No.143 of 2010, it was contended by the defendants 3 and 4 before the learned trial Court that the plaintiff/Lakshmi got married way back in the year 1981, therefore, by virtue of Tamil Nadu Act 1 of 1990, she cannot claim any share in the property of her father Chellappa Gounder, hence, there was no bar for the deceased Chellappa Gounder to alienate the suit property in favour of defendants 3 and 4 under Ex.B16. In view of such submission, finding that dispossession by way of sale deed dated 25.08.1998/Ex.B16 made by Chellappa Gounder and D2 was absolutely valid, she left to the Court to pass order and therefore, learned trial Court has rightly dismissed the suit in O.S.No.143 of 2010. Thus, now, the issue to be considered relates to O.S.No.219 of 2009 granting decree for partition as prayed for by the plaintiff.

5. Explaining further, learned counsel argued that the alleged Will dated 28.05.1999/Ex.B5 executed by the so-called testator/deceased Chellappa Gounder in favour of his second daughter's husband/D3 was a forged one as the Chellappa Gounder was not in a good state of mind at the relevant point of time. The wife of testator/D1 in her cross-examination as DW1 deposed that during execution of Will dated 28.05.1999/Ex.B5, she was accompanied by her husband and she did not ask for any property from her husband/Chellappa Gounder and on the other hand, she informed her husband that a Will could be executed in favour of D3. Further, she deposed that from the date of execution of Will till the date of her deposition i.e. 15.07.2014, the Will was in her custody and D3 did not know about the Will. Therefore, on the date of her examination only, the Will/Ex.B5 was marked through the D.W.1 and hence, he pleaded, learned trial Court has rightly come to the conclusion that the propounder of the Will, namely, D3 has not produced Will before it.

6. Explaining the contradiction of evidence of DW1/D1 and DW3/D2, he further argued that while the evidence of DW1 says that the said alleged Will was in her possession till her examination before the learned trial Court i.e. on 15.07.2014, but, contrary thereto, D.W.3/D2/wife of D3 deposed that the said alleged Will was given to her husband ten days after its execution by her father/Chellappa Gounder. Learned counsel has also brought to the notice of this Court one more contradictory statement of D.W.2/D2/wife of D3 that one Mr.Samiyappan, brother of D1, was in a good state of mind on the date of examination of the parties before the learned trial Court, however, for the reasons best known to them, the said Samiyappan, who was one of the attesting witnesses of the alleged Will dated 28.05.1999, was not produced before the learned trial Court to examine the same, therefore, learned trial Court came to the conclusion that there was no Will dated 28.05.1999/Ex.B5 executed in favour of D3 as pleaded by the defendants, since the proof of execution of the Will was not established. Thus, remitting the matter back to the learned trial Court would definitely give a chance to the defendants to fill up the lacunae indicated by the plaintiff, as a result, the parties would be forced to restart the litigation afresh by wasting judicial time, which is not permissible in law. Moreover, Order 41 Rule 23 of CPC also would not permit the first appellate Court to remit the case ordinarily, merely because it considered that the reasoning of the learned trial Court in some aspect was wrong, he contended.

7. Adding further, learned counsel argued that after the demise of Chellappa Gounder, no doubt, the plaintiff is entitled

for 1/3rd share of the suit property, however, after the demise of her mother/D1, share of the plaintiff got enlarged into half share. In the suit second item, the plaintiff has been residing by paying house tax, water tax, etc., namely, Ex.A6 to A10, which would go to show that the plaintiff has been in joint possession of the suit property, and on the other hand, the defendants have also adduced the alleged Will dated 28.05.1999/Ex.B5 before the learned trial Court, hence, as per Section 63(c) of the Indian Succession Act, 1925, and Section 68 of the Indian Evidence Act, 1872, propounder of the alleged Will, namely, D3 must prove the same in terms of the said provisions. D.W.2 was a scribe of Ex.B5-Will and therefore, learned trial court came to the conclusion that the evidence of D.W.2 was not reliable as it was a contradictory one. By taking note of all these aspects, he pleaded, learned trial Court came to the conclusion that Ex.B5-Will was not produced by D3 propounder before the Court and it was produced only by D1/wife of the deceased Chellappa Gounder and on the contrary, D3 has produced another Will dated 17.07.2014/Ex.B15 said to have been executed by the deceased D1 by confirming the Will dated 28.05.1999/Ex.B5 executed by the deceased Chellappa Gounder, which according to him, is a forged one.

8. By adverting to the provisions of Section 63 of Indian Succession Act and Sections 68 and 71 of the Indian Evidence Act, learned counsel argued that although, in the alleged Will, there were three witnesses, namely, Eswaramoorthy, son of Chellappa Gounder, Lakshmanan, son of Nallappa Gounder, and Samiyappan, son of Nallappa Gounder, none was examined to prove the due execution of the said Will and as per the above said provisions, the propounder has to prove the Will-Ex.B5 by examining one of the attesting witnesses. However, for non-examination of them, although the defendants took a stand that two attesting witnesses, namely, Mr.Eswaramoorthy and Mr.Lakshmanan, were not alive, and that the third witness Mr.Samiyappan was unwell, no document was produced to substantiate the said fact, hence, learned trial Court has rightly come to the conclusion that when one of the witnesses Mr.Samiyappan was alive, who was the brother of D1, not examining him, who is only the competent person to speak about the Will-Ex.B5, became fatal to the case of the defendants.

9. Therefore, he contended, going by the ratio laid down by this Court in Ramachandra Marthandam Vs. Linga Vijaya and others [2010 (4) CTC 385], which says that testator of the Will must sign it in the presence of the attesting witnesses and the attesting witnesses sign the same before the testator, which is mandatorily required, learned trial Court, drawing adverse inference for non examination of Samiyappan, who was alive, held that propounder has not taken steps to examine Samiyappan

atleast through the Advocate Commissioner, decreed the suit as prayed for. It has also taken note of the evidence of Scribe-D.W.2 of Ex.B5 deposing that he has signed the Ex.B5 only as a scribe and not as attesting witness and thereby it has rightly come to the conclusion that the Will-Ex.B5 has not come into effect as the same has not been proved.

10. In support of his submissions, he has relied on a judgment of the Hon'ble Apex Court in the case of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam [2003 (1) CTC 308] to contend that the proof of the execution of the Will and its attestation by two or more witnesses is mandatory and in the absence of proof of the attestation by examining the witnesses, no right flows from the Will. With these submissions, learned counsel prayed for allowing this appeal filed by the plaintiff.

11. Per contra, Mr.K.S.Jeyaganeshan, learned counsel for the defendants/respondents herein argued that at the time of argument in I.A.No.24 of 2017, it was brought to the notice of the Court that the only attesting witness, namely, Mr.Samiyappan, who was alive, also died and therefore, he could not be examined. Hence, a prayer was made by the defendants to examine one Mr.Loganathan, son of the deceased attesting witness Lakshmanan, who is familiar with the signature of the deceased attesting witnesses Eswaramoorthy and Lakshmanan, and finally, the said prayer was also allowed by the learned first appellate Court. Adding further, he submitted that learned first appellate Court has rightly considered the issue stating that the litigants could not be made to suffer just because they are not provided with proper legal advice in respect of proving of a Will before the Court of law and in the present case, as the suit was filed for partition, Will dated 28.05.1999/Ex.B5 alone is standing as a stumbling block for the plaintiff. Therefore, since the said Will played a crucial role in the suit, in the interest of justice, learned first appellate Court has allowed the said I.A. permitting the defendants to examine one Mr.Loganathan, son of deceased Lakshmanan (one of the attestors to the Will), to identify the signature of the deceased Chellappa Gounder and that of the deceased three attestors of the disputed Will, hence, no interference is called for in the order passed by the learned first appellant Court remanding the matter back to the learned trial Court for re-examination.

12. In support of his submissions, he has also relied on a judgment of this Court in the case of Selvasubramaniam Vs. Subburathinam [CDJ 2015 MHC 3854] and submitted that the propounder of the Will is not required to examine the attesting witnesses. Therefore, learned first appellate Court, finding that no witness to the disputed Will was examined, remanded the matter back to the learned trial Court to identify the signatures of the deceased testator as well as three other

witnesses of the disputed Will. Thus, the present appeal filed by the plaintiff questioning the well reasoned judgment and decree passed by the learned first appellate Court is liable to be dismissed.

13. Heard the parties and perused the materials available before this Court.

14. It is not in dispute that the subject matter of the suit property is the ancestral property of Chellappa Gounder, who died on 10.05.2009. The plaintiff got married way back in the year 1981. There was a partition between the deceased Chellappa Gounder and his younger daughter Parvatham/D2 by way of a registered partition deed dated 10.03.1993, by which, D2 was allotted 'B' schedule property and the deceased Chellappa Gounder was allotted 'A' schedule property. Subsequently, the deceased Chellappa Gounder is said to have bequeathed his share, by way of a registered Will dated 28.05.1999, in favour of D3, husband of D2. Apart from this, the deceased Chellappa Gounder and his daughter/D2 have also jointly executed a registered sale deed dated 25.08.1998 in favour of one M.S.Palanisamy and M.S.Thirumoorthy.

15. The plaintiff has filed two suits. Assailing the alleged Will dated 28.05.1999, she has filed a suit in O.S.No.219 of 2009 seeking for partition and then to allot one such share in her favour. Another suit in O.S.No.143 of 2010 was filed seeking to declare the sale deed dated 25.08.1998 executed in favour of one M.S.Palanisamy and M.S.Thirumoorthy as null and void. Insofar as the suit in O.S.No.143 of 2010 is concerned, by virtue of provisions of the Tamil Nadu Act (1) of 1990, as the plaintiff was married way back in the year 1981, the deceased Chellappa Gounder and D2 formed a co-parcenary, therefore, she has no right over the property sold to M.S.Palanisamy and M.S.Thirumoorthy by way of a registered sale deed dated 25.08.1998/Ex.B16 and hence, in such view of the matter, she left to the learned trial Court to decide the issue. Therefore, based on the concealment of the plaintiff, learned trial Court dismissed the suit in O.S.No.143 of 2010.

16. As I mentioned above, the plaintiff was given in marriage in the year 1981 as admitted by her in the cross-examination and her younger sister/D2 was given in marriage in the year 1990. In the year 1993, there was a partition between the deceased Chellappa Gounder and D2 vide registered partition deed dated 10.03.1993. However, the suit properties were claimed to be in joint possession of the plaintiff, D1 and D2 even after the demise of the deceased Chellappa Gounder. Therefore, when the plaintiff demanded for partition, it was denied by the defendants and thereupon, when a lawyer's notice was sent on 27.07.2009, the same was replied by the defendants

on 05.08.2009 alleging that the deceased Chellappa Gounder executed a Will dated 28.05.1999/Ex.B5 with regard to the suit property in favour of D3. Subsequently, on taking note of the execution of alleged Will dated 28.05.1999, the plaintiff has filed a suit in O.S.No.219 of 2009 seeking for partition and then to allot one such share in her favour.

17. It is the claim of the defendants that the property allotted to Chellappa Gounder through a partition dated 10.03.1993 was subsequently bequeathed in favour of D3 by the deceased Chellappa Gounder, hence, after his demise, the said Will came into force. It is also the further claim of the defendants that due to the strained relationship between the plaintiff and her husband on one hand and with Chellappa Gounder and D1 on the other hand, the plaintiff did not attend the funeral rites of Chellappa Gounder, because, she did not even meet out the medical expenditure incurred for Chellappa Gounder and the same was borne by D2. It is further averred by the defendants that D1, in order to confirm the Will dated 28.05.1999/Ex.B5 executed by the deceased Chellappa Gounder, has executed yet another Will dated 17.07.2014/Ex.B15 in favour of D3m and subsequently, she also died on 06.08.2014.

18. Now, therefore, the point for consideration is whether the alleged Will dated 28.05.1999/Ex.B5 executed by the deceased Chellappa Gounder in favour of D3 has been proved by the contesting defendants, namely, D2 and D3, as mandated under the provisions of Section 63(c) of the Indian Succession Act, 1925, and Sections 68 and 71 of the Indian Evidence Act, 1872, and for ready reference, the same are extracted hereunder:-

Section 63 of the Succession Act

63. Execution of unprivileged wills.-

Every testator, not being a soldier employed in an 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 seen some other person sign the will, in

the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or 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."

Section 68 of the Evidence Act

"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 it's execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided..."

Section 71 of the Evidence Act

"71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

19. Since the defendants have claimed that a Will dated 28.05.1999/Ex.B5 has been duly executed, the Court has to see whether the legal requirements as mandated in Section 63 of the Indian Succession of Act have been complied with i.e. the testator has to sign or affix his mark to the Will, or it has got to be signed by some other person in his presence and by his direction, and the more important legal point is that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator. Therefore, it is clear that one of the requirements of due execution of the Will is its attestation by two or more witnesses which is mandatory for proving execution of the Will.

20. Section 68 of the Indian Evidence Act, 1872, speaks about as to how a document required by law to be attested can be proved and it further says that a document required by law to be attested 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 an evidence. To make it clear, if the propounder of the Will, in the present

case, D3, says that Ex.B5 has been executed by his father-in-law/Chellappa Gounder, father of the plaintiff and D2, he has to prove that the Will was duly and validly executed by examining either one or all the attesting witnesses of the disputed Will dated 28.05.1999/Ex.B5 as adumbrated under Section 68 of the Indian Evidence Act. However, Section 68 does not say that both or all the attesting witnesses must be examined, but, atleast, one attesting witness has to be called for proving the due execution of the Will.

21. In the present case, DW2-scribe of the Will dated 28.05.1999/Ex.B5 deposed that two attesting witnesses, namely, Eswaramoorthy and Lakshmanan Gounder, were not alive, but, only third attesting witness Samiyappan, maternal uncle of D2, was alive as on his date of examination. Therefore, the propounder/D3 ought to have taken steps to examine the third attesting witness one Samiyappan when he was alive during the trial, but, on the contrary, after losing the case before the trial Court and filing appeal, they have filed an application in I.A.No.24 of 2017 before the learned first appellate Court seeking permission to examine one Loganathan, son of Lakshmanan, that too, after knowing the death of the third attestor by name Samiyappan. In this regard, it is relevant to extract below the oral evidence of DW2/D2/wife of D3 (propounder of the said Will):-

“சாமியப்பன் தற்போது வீட்டில் உள்ளார். அவர் நல்ல மனநிலையில் உள்ளார்,”

A mere reading of the above said deposition of D2 clearly says that the said Samiyappan was staying in his home and he was in a good state of mind when the trial was going on before the trial Court. Therefore, when he was very much alive and capable of giving evidence, I am of the considered view that the defendants have miserably failed to bring him to prove the due execution of the Will dated 28.05.1999/Ex.B5. Hence, there is a deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

22. Coming to Section 71 of the Evidence Act, which is also in the nature of safeguard to the mandatory provisions of Section 68, a mere reading of the same clearly says that if an attesting witness denies or does not recollect the execution of the Will, 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 and 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 available attesting witnesses should be examined when one attesting witness fails to prove due execution of the Will is to avoid the claim of drawing adverse inference under Section 114 illustration (g) of Evidence Act, because, Section 71 of the Evidence Act is permissive and enabling Section permitting a party to lead other evidence in certain circumstances.

23. In the present case, when the defendants have also deposed before the learned trial Court contrary to the evidence of D.W.2 that the said Samiyappan was alive, but was unable to move around, the defendants should have moved an application before the trial Court to appoint an Advocate Commissioner to visit the house of the said Samiyappan to find out the execution of the controversial Will dated 28.05.1999/Ex.B5, but, this was also not done by the defendants. Secondly, even if the defendants say that the said Samiyappan was alive, but, he was not in a sound state of mind so as to give evidence, yet, they should have examined Mr.Loganathan, son of the deceased attesting witness Lakshmanan, to identify the signatures of the deceased Chellappa Gounder (testator) and three attestors of the disputed Will. Again, this was also not done by the defendants. Therefore, as mandated in Section 68 of the Evidence Act, when Samiyappan, brother of D1, was alive, who can be examined as one of the attesting witnesses to prove the execution of the Will, the defendants have miserably failed to comply with the said provision. Even if he was alive and not capable of giving evidence, they should have produced Mr.Loganathan, son of Lakshmanan, to identify the signature as per Section 71 of the Evidence Act. Ironically this was also not done by the defendants. This was the lacuna of the defendants case, wherein the plaintiff succeeded, therefore, remanding the matter back to the trial Court would definitely tantamount to giving a chance to filling the lacunae of the defendants case, hence, the power of review cannot be used for that purpose. Therefore, when it is clear that none of the requirements to prove the due execution of the Will dated 28.05.1999 as mandated under Section 63 of the Succession Act and Sections 68 and 71 of the Evidence Act have been complied with, the result of non-complying the requirements of above said provisions has been vividly explained by the Hon'ble Apex Court in Janki Narayan bhoir Vs. Narayan Namdeo Kadam [2003 (1) CTC 308]. For better appreciation, relevant portion of paragraph No.10 is extracted below:-

"10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested 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 an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act....."

Consequences of not complying Section 63 of the Succession Act and Sections 68 and 71 of the Evidence Act also has also been explained in the above said judgment, which reads thus:-

"12.....We are not in a position to accept the contention urged on behalf of the respondent that the evidence of other witnesses, namely, that of the respondent and the scribe could be considered

under Section 71 of the Evidence Act. Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and other attesting witness though available has not been examined. When the document is not proved as mandatorily required under Section 68 of the Evidence Act, the provision of Section 71 of the Evidence Act, which is permissive, and enabling in certain circumstances as discussed above does not help the respondent. In Vishnu Ramkrishna & Ors. v. Nathu Vithal & Ors. [(AIR) 1949 Bom. 266], Chagla, C.J., speaking for the Division Bench in similar circumstances has stated that although Section 63 of the Succession Act requires that a will has to be attested by two witnesses, Section 68 of the Evidence Act permits the execution of the will to be proved by only one attesting witness being called....."

24. Who has to prove the Will and how? The onus to prove the genuineness of the Will always lies on the propounder by explaining the suspicious circumstances surrounding the Will. Now let us see how to prove the same. There are three ways i.e., under Section 63 of the Indian Succession Act, Sections 68 and 71 of the Indian Evidence Act. Under Section 63 of the Indian Succession Act, 1925, two or more attesting witnesses of the Will can be examined to prove the execution of the Will. If it is not possible under Section 63 of the Succession Act, then under Section 68 of the Evidence Act, 1872, one of the attesting witnesses can be examined to prove the execution of the Will. Again if the propounder finds it difficult, he can take the aid of Section 71.

25. Law does not say that if both attesting witnesses to a Will had died or for some reason are not available, that would be the end of the Will. A way forward has been given by the Legislature under Sections 68, 69 and also under Section 71 of the Indian Evidence Act, 1872. In a decision reported in (2008) 14 SCC 754-Babu Singh and others v. Ram Sahay, the Apex Court has held that where the attesting witness is either dead or out of the jurisdiction of the Court by keeping him out of the way by the adverse party or cannot be traced out despite diligent search, in such an event, the Will may be proved by examining the witnesses who were able to prove the handwriting of the testator or executants before the trial Court. Sadly, this mode also has been neglected by the propounder agonisingly. What could be done or proved under Sections 69 or 71 of the Evidence

Act before the trial Court, cannot be allowed to be done before the appellate Court. It is to be mentioned commonly that when genuineness of the Will is in question, it is the duty of the propounder to dispel the suspicious circumstances against the Will before the trial Court under Section 63 of the Indian Succession Act or under Sections 68, 69 or 71 of the Evidence Act that the Will was product of a free Will. No step has been taken to produce either primary evidence under Section 63 of the Indian Succession Act or to produce secondary evidence under Sections 68 and 71 of the Indian Evidence Act. In this case, the onus to prove the Will lies on the propounder that he failed to prove before the trial Court, resultantly, the plaintiff has succeeded. Now remanding the matter back to the trial Court would amount to giving a chance to fill up the lacuna that is impermissible in law. Consequently, the remand order gives an undeserved chance to the loser of the game to win against the winner who disproved the defendants' claim before the trial Court.

26. Therefore, in view of the aforesaid judgment, when the defendants were under legal obligation to prove the execution of the disputed Will dated 28.05.1999/Ex.B15 as per Section 68 of the Evidence Act, they should have proved the execution of the said Will by letting in evidence of surviving witness, namely, Samiyappan, but, they have failed to do so when he was alive. Thus, there was a clear deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act. Even if they are not able to comply Section 68 for the reason that the said Samiyappan was not capable of letting evidence, aid of Section 71 could have been taken by producing Loganathan, son of Lakshmanan (one of the attesting witnesses of the said Will) to identify the signatures of testator/Chellappa Gounder and three attesting witnesses before the trial Court. Sadly again, they have failed to avail the aid of Section 71. Therefore, when the defendants have miserably failed to prove the execution of the Will as mandated under Section 63 of the Succession Act and Sections 68 and 71 of the Evidence Act, after the trial was over, at the appellate stage, they cannot move any application seeking permission to examine the said Loganathan to identify the signatures of testator/Chellappa Gounder and three attesting witnesses of the disputed Will, that too, after knowing the death of 3rd attester Samiyappan. Accepting the said application for ordering remand is not legally sustainable, because it is settled law that to fill up the lacunae pointed out by other side, no remand is permissible. Lastly, plaintiff is sister of D2. D1 mother died. D3 is the husband of D2. Therefore, question of success or failure does not arise to either of the party here.

27. Thus, for the reasons stated above, the Civil Miscellaneous Appeal stands allowed. Consequently, the judgment

and decree dated 13.08.2019 passed in A.S.No.36 of 2017 by the learned first appellate Court are set aside and the judgment and decree dated 21.03.2017 passed in O.S.No.219 of 2009 by the learned trial Court are hereby confirmed. No Costs. C.M.P.No.28035 of 2019 is closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

rkm

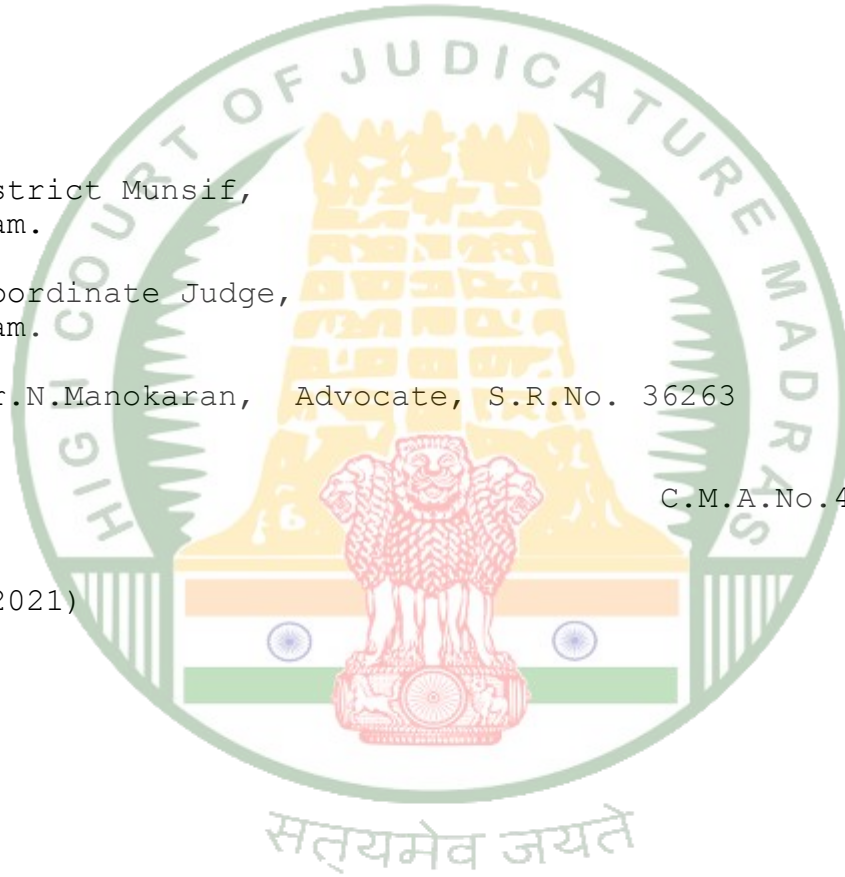
To

1. The District Munsif,
Kangeyam.
2. The Subordinate Judge,
Kangeyam.

+1cc to Mr.N.Manokaran, Advocate, S.R.No. 36263

C.M.A.No.4869 of 2019

SPD(CO)
GN(13/05/2021)



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