

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	25.02.2020
Delivered on	28.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR
S.A. (MD)Nos.513 of 2013 and 907 of 2013

and

M.P. (MD)Nos.1 of 2013, 1 of 2014, 1 of 2015
in S.A. (MD)No.513 of 2013
and M.P. (MD)Nos.2 of 2013, 1 of 2015 and
C.M.P. (MD)No.9746 of 2017
in S.A. (MD)No.907 of 2013

S.A. (MD)No.513 of 2013:

- 1.A.Krishnammal (Died)
- 2.V.Muthu Krishnan
- 3.MA.Murugesh Raja
- 4.S.Maheshwari

[Appellants 3 and 4 brought on record as
Legal Representatives of the deceased first
appellant, vide Court order dated 17.09.2019,
made in C.M.P. (MD)Nos.5761 to 5763 of 2019]

: Appellants/Respondents 2&3/
Defendants 2&6

Vs.

- 1.Subbulakshmi
- 2.Ramasubramania Raja
- 3.Rajeshwari
- 4.P.K.Subramania Raja

...Respondents 1 to 3/Appellants/
Plaintiffs 2 to 4
... 4th Respondent/1st Respondent/
1st Defendant

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree passed in A.S.No.68 of 2011, dated 18.01.2013 on the file of the Third Additional District and Sessions Court, Tirunelveli, reversing the judgment and decree passed in O.S.No.109 of 2003, dated 17.08.2011 on the file of the Sub Court, Ambasamudram.

For Appellants

: Mr.Veera.Kathiravan,
Senior Counsel,

For Respondents 1 to 3

For M/s.Veera Associates
: Mr.S.Meenakshi Sundaram,
Senior Counsel,

For Respondent No.4

For Mr.R.Mani Maran
: Mr.D.Nalla Thamby



S.A. (MD)No.907 of 2013:

1.P.K.Subramania Raja
2.Saraswathi Ammal
3.Ravi Sankar Raja

: Appellants/Appellants 1 to 3/
Defendants 1,3&5

WEB COPY

Vs.

1.Subbulakshmi
2.Ramasubramaniaraja

3.L.Rajeswari
4.A.Krishnammal
5.Sorimuthu
6.Muthu Krishnan

: Respondents/
Respondents 2 to 7/
Plaintiffs 2 to 4 and Defendants 2,4&6

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 18.01.2013 passed in A.S.No.71 of 2011, on the file of the Third Additional District and Sessions Court, Tirunelveli, modifying the judgment and decree dated 17.08.2011, passed in O.S.No.109 of 2003, on the file of the Sub Court, Ambasamudram.

For Appellants	: Mr.D.Nalla Thambi
For Respondents 1 to 3	: Mr.S.Meenakshi Sundaram, Senior Counsel, For Mr.R.T.Arivukumar
For Respondents 4&6	: Mr.Veera.Kathiravan, Senior Counsel, For M/s.Veera Associates
For Respondent No.5	: Mr.A.Arumugam

C O M M O N J U D G M E N T

Aggrieved over the reversal finding of the first Appellate Court, declaring that the suit second schedule 1, 2, 3 and 6 item of the properties belong to the plaintiffs, the appeal in S.A.(MD) No.513 of 2013 came to be filed by the defendants 2 and 6 in O.S.No.109 of 2003.

2. Aggrieved over the concurrent finding of the Courts below, S.A.(MD)No.907 of 2013 is filed by the defendants 1, 3 and 5.

3. Both the appeal suits arose out of the judgment and decree passed in O.S.No.109 of 2003 on the file of the Sub Court, Ambasamudram.



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

5. The plaintiffs' case, in brief, is as follows:

The suit properties originally belonged to the husband of one Chellammal. The mother of the said Chellammal and the first plaintiff's mother were sisters. The first defendant is the sister's son of the first plaintiff. The husband of Chellammal died issueless and the first plaintiff has taken care of the said Chellammal. Chellammal has left the Will dated 21.10.1992 while in sound disposing state of mind in favour of the first plaintiff bequeathing the suit properties. Thereafter, the first plaintiff has gone out to Rajapalayam for his work. The first defendant has been appointed to take care of the said Chellammal by the first plaintiff at Ambasamudram for monthly salary. Chellammal and the first plaintiff had jointly deposited a sum of Rs.45,000/- at the Central Bank of India, Ambasamudram, besides, the first plaintiff has opened S.B. Account in the name of Chellammal in Account No.4147. Chellammal died on 15.3.2001, prior to her death, she was bedridden for more than a year and more than three months, she was at comatose stage. After the demise of Chellammal, the first defendant was acting against the plaintiffs and caused disturbance from enjoying the suit properties. The first plaintiff, therefore, issued a legal notice on 06.10.2001. The first defendant did not give any reply. Whereas, the fourth defendant has issued reply notice with false averments. The alleged power deed dated 12.01.2001 and the Will dated 28.02.2001, are all denied. Chellammal was in the hospital prior to 12.01.2001. She was not in state of mind to execute any document. The documents have been created with forgery by impersonation. Besides, Chellammal was not in a position to take any decision at the relevant point of time. Hence, the suit.

6. The first defendant filed a written statement and the same was adopted by the defendants 3, 4 and 5. Admitting the relationship, it is the contention of the first defendant that it is false to state that the first plaintiff had taken care of Chellammal and the said Chellammal executed a registered Will dated 21.10.1992 in favour of the first plaintiff. Similarly, it is denied that the first defendant has been appointed as the servant for taking care of Chellammal. It is stated by the first defendant that Chellammal was residing at Ambasamudram till her death and few days prior to her death, she was admitted in Shifa Hospital, Tirunelveli and taken to Rajapalayam, thereafter, she died in a few days. It is denied that Chellammal was bedridden for more than a year prior to her death and she was in comatose stage for more than three months. The properties were never in possession of the plaintiffs. The properties of Chellammal situated at Mela Ambasamudram Thilagarapuram Street are in possession of the first defendant. The first defendant is residing

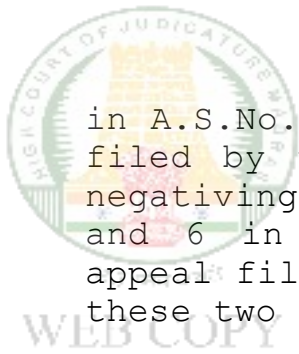


at Door No.5. Door No.6 is under the enjoyment of the fourth defendant as tenant. On 12.01.2001 Chellammal executed a registered general power of attorney in favour of the first defendant. In pursuance of the above said power, the first defendant has sold the property to one Krishnammal. The alleged impersonation and forgery is also denied. Besides, Chellammal also executed a the Will dated 28.02.2001 while sound state of mind and registered the same. As per the Will, the first defendant is in possession of the properties. He has also sold the properties bearing Door Nos.18-A and 18-B in favour of the fourth defendant on 05.10.2001. Chellammal never lived in Rajapalayam. The succession certificate was obtained by the first plaintiff fraudulently without adding other legal heirs. Hence, he prayed for dismissal of the suit.

7. The second defendant also filed a written statement and the sixth defendant adopted the same. Admitting the relationship and the title of Chellammal to the suit properties, it is denied that after the demise of the husband of Chellammal, the first plaintiff had taken care of the said Chellammal and the said Chellammal executed a Will on 21.10.1992. The allegation that Chellammal was not well for more than a year prior to her death is also denied. Chellammal had executed a power of attorney in favour of the first defendant on 12.01.2001. Pursuant to the power of attorney, the first defendant has received the rent from the second defendant and given receipt for the same. The first defendant has also sold the property through the sale deeds dated 19.02.2001, 21.02.2001 and 28.02.2001. On and from the date of sale deeds, the second defendant is in possession and enjoyment of the same. The first defendant sold the properties in S.F.No.328 with an extent of 0.5 cents to the sixth defendant through the sale deed. The first defendant has sold the property to the second and sixth defendants with the knowledge of the said Chellammal. Thus, she prayed for dismissal of the suit.

8. On the above said pleadings, the Trial Court has framed four issues. On the side of the plaintiffs, P.W.1 and P.W.2 were examined and Exs.A.1 to A.7 were marked. On the side of the defendants, D.W.1 to D.W.4 were examined and Exs.B.1 to B.19 were marked.

9. Based on the pleadings and evidence, the Trial Court decreed the suit in part and granted declaration in respect of item Nos.1 and 2 in the first schedule and item Nos.4 and 5 in the second schedule and dismissed the suit in respect of item Nos.1 to 3 and 6 shown in the second schedule of the suit property, disbelieving Ex.B.1-Will propounded by the first defendant dated 28.02.2001, as against which, the plaintiffs have filed an appeal in A.S.No.68 of 2011 and the defendants 1,3 and 5 filed an appeal



in A.S.No.71 of 2011. The first Appellate Court allowed the appeal filed by the plaintiffs in respect of the Trial Court Judgment negating the relief of declaration as far as item Nos. 1 to 3 and 6 in the second schedule are concerned and dismissed the appeal filed by the defendants 1,3 and 5, aggrieved against which, these two Second Appeals have been filed.

10. While admitting the Second Appeal in S.A.(MD)No.513 of 2013, the following substantial questions of law were framed for consideration:

"(i) Whether the suit filed for simple declaration admitting the sale deeds in Exs.B.3 to B.6 and without asking the relief of cancellation of sale deed or declaration about the nullity of sale is maintainable?

(ii) When Ex.B.2 power of attorney is a registered one whether the lower appellate court is right in shifting the burden of proof on the appellants to prove Ex.B.2 as a valid one ignoring that the plaintiffs have not proved it's invalidity and not sought for any relief to cancel the same?

(iii) When the properties were sold even during the life time of Testator through power of attorney agent whether the legatee of the Will get any right over the same based upon the Will in Ex.A.7 and that too when Ex.A.7 has not been proved by the plaintiffs in a manner known to law?

(iv) Whether the first appellate court is right in invoking Section 73 of Indian Evidence Act, 1872 in the facts of the present case?

(v) Whether the lower appellate court has committed error not considering the bona fide of appellants in purchasing the property for valuable consideration while reversing the judgment and decree of trial court?"

11. Likewise, S.A.(MD)No.907 of 2013 was admitted on the following substantial questions of law:

"(i) Whether the judgment and decree of the lower appellate court granting a decree of declaration and recovery of possession in respect of 1 to 3 and 6 items of suit 2nd schedule properties is correct when these appellants herein have clinchingly proved the execution of registered power of attorney deed dated 12.01.2001 and the subsequent sale deeds in Exs.B.3 to B.6 through oral evidence and documentary evidence and hence the judgment and decree of the lower appellate court warrants



interference under Section 100 CPC?

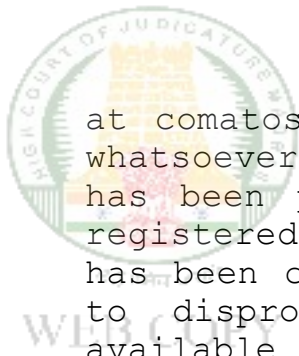
(ii) Whether the judgment and decree of the courts below in respect of the Will dated 28.02.2001 (Ex.B.1) is correct, simply because of the reason that there is no recitals in the said Will about the cancellation of earlier Will dated 21.10.1992 by the testator and when the Will dated 28.02.2001 is the last Will of the testator Late.Chellammal and hence the judgment and decree of the courts below in respect of Will dated 28.02.2001 warrants interference by this Court?

(iii) Whether the non examination of the attesting witness to the Will dated 28.02.2001 is fatal when the Will dated 28.02.2001 is proved in the previous Rent Control Proceedings and the findings of the Courts below in respect of the validity of Ex.B.1 Will dated 28.02.2001 is correct and warrants interference under Section 100 CPC?

(iv) Whether the lower appellate court is correct in reversing the judgment of the trial court and thereby decreed the suit in toto by overlooking the available oral and documentary evidence on record and without giving any independent reasons for findings and hence the judgment of the Lower Appellate Court warrants interference under Section 100 C.P.C.?

(v) Whether the lower appellate Court is correct in rejecting the additional evidence produced by these appellants under Order 41 Rule 27 C.P.C. when the same are vital documents and the same can be received in the interest of justice to decide the real *lis* between the parties and hence judgment of the lower appellate Court warrants interference under Section 100 C.P.C.?"

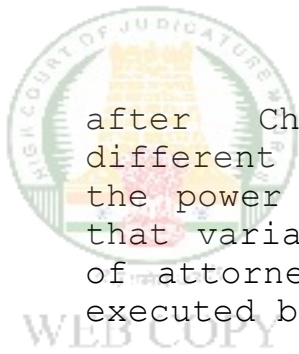
12. The learned Senior Counsel appearing for the appellants in S.A.(MD)No.513 of 2013 submitted that though the first plaintiff has propounded the Will dated 21.10.1992, the deceased Chellammal was never taken care of by the legatee. She was all along living in Ambasamudram. The first defendant, being the sister's son of the first plaintiff, had taken care of Chellammal. Therefore, Chellammal has executed a power of attorney Ex.B.2 dated 12.01.2001, while she was in sound state of mind giving a general power to the first defendant to deal with the properties. Pursuant to the power of attorney dated 12.01.2001, under Exs.B.3 to B.6, the properties have been purchased by the appellants during the life time of Chellammal. Though it is the contention of the plaintiffs that Chellammal was not well and was



at comatose stage for one year, absolutely, there is no evidence whatsoever available on record to prove the same. Whereas, Ex.B.2 has been proved by one of the attesting witnesses and it is a registered document. When the execution of the power of attorney has been clearly proved, the entire burden lies on the plaintiffs to disprove the execution. Further, no materials whatsoever available on record to show that the power of attorney is the result of fraud or undue influence or coercion, etc. Similarly, the allegation that the power of attorney has been registered by forgery is also not established. Chellammal has taken a conscious decision not only executing the general power of attorney but also left the registered Will in favour of the first defendant subsequently.

13. Adding further, it is contended that since the subsequent Will has not been proved, due to non-examination of the attesting witnesses, it cannot be said that the sale made during the life time of Chellammal is invalid, unless the plaintiffs prove that the power of attorney is the result of forgery. D.W.4 is the neighbour of Chellammal and he has clearly spoken about the mental faculties and execution of the document by Chellammal in the Registrar's Office. Merely because Chellammal died after two months later, it cannot be said that the power of attorney is suffered from any infirmities. Hence, it is his contention that the first Appellate Court has wrongly placed the burden on the defendants to prove the signatures. It is his contention that merely because some variance in the signature in every page, that cannot be a ground to disbelieve the registered document. Admittedly, Chellammal was aged lady. Therefore, it is normal for having variance in the signature, due to age factors. That itself cannot be put against the appellants to hold that the power of attorney is not validly executed. The power of attorney is a registered document as per law. Unless forgery is established, registered document cannot be invalidated. The first Appellate Court has placed the burden wrongly on the defendants rather than the plaintiffs. It is contended that as far as Exs.B.3 to B.6 sale deeds are concerned, the title was already conveyed by the power agent of Chellammal. Thus, the first Appellate Court has not appreciated the facts properly. Furthermore, the suit filed without cancelling those documents is also not maintainable. Hence, he prayed for allowing the appeal in S.A.(MD)No.513 of 2013.

14. Per contra, the learned Senior Counsel appearing for the respondents 1 to 3 in both the appeals submitted that the first plaintiff and the first defendant are close relatives. Chellammal has executed a Will dated 21.10.1992 bequeathing her properties in favour of the first plaintiff. It is his contention that the first defendant was appointed on monthly salary to look



after Chellammal. Since the first plaintiff was residing in different place, taking advantage of the closeness and relative, the power of attorney has been created. Further, it is contended that variation in the signature found in every page of the power of attorney itself clearly shows that the document has not been executed by Chellammal.

15. The learned Senior Counsel further submitted that D.W.1 himself admitted that in the month of February, Chellammal was admitted in the hospital and died on 15.03.2001. Such being the position, the alleged power of attorney dated 12.01.2001 is highly improbable and in fact, this probalised the plaintiffs' case that Chellammal was not well all along and she was not having mental ability to execute the document. Therefore, it is his contention that merely because the power of attorney was registered in favour of the first defendant, it cannot be presumed that the said document was executed by Chellammal. Further, it is his contention that the evidence of D.W.1 and D.W.4 clearly show that Chellammal could not have been executed the document. The first Appellate Court has thoroughly analyzed the entire facts and rightly come to the conclusion. Hence, it is contended that when the power of attorney shrouded with serious doubt, the same would not convey any title to the appellants. Further, it is his contention that the subsequent Will dated 28.02.2001 projected by D.W.1 is also highly improbable and the same is not proved in the manner known to law. It is his contention that in the power of attorney-Ex.B.2, schedule of property has been included later point, in accommodating the single space. That itself clearly shows that the document has been fraudulent created and not executed by Chellammal. Hence, it is submitted that the judgment of the first Appellate Court is well balanced and it does not require any interference at the hands of this Court.

16. S.A.(MD)No.907 of 2013 though filed by the defendants 1, 3 and 5, they have not argued the appeal before this Court. In fact, they seek leave of this Court to withdraw the appeal.

17. Whereas, the fourth defendant in the suit/fifth respondent in the second appeal has filed an application to transpose himself as the additional appellant in the above Second Appeal.

18. This Court, while hearing the arguments, informed both the counsel that since the fourth defendant is the purchaser from the first defendant, he can canvass the appeal on merits. Therefore, no order requiring to transpose the fourth defendant in the suit/fifth respondent in the second appeal as appellant is required. Further, no withdrawal of the appeal is also necessary. Both sides agreed and advanced their arguments. In view of the



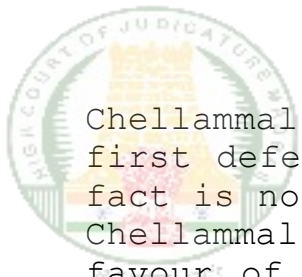
same, leave for withdrawal of the appeal by the appellants is refused and the application filed by the fourth defendant in the suit/fifth respondent in the second appeal in C.M.P.(MD)No.9746 of 2017 is also dismissed.

19. The learned counsel appearing for the fifth respondent in S.A.(MD)No.907 of 2013 has canvassed the case of the appellants on the ground that the first defendant was prosecuting the case on behalf of the fourth defendant even in the Trial Court. But the first defendant has failed to examine the attesting witnesses properly to prove the subsequent Will dated 28.02.2001, based on which, the fifth respondent herein has purchased the property from the first defendant. It is the contention of the learned counsel that he was *bona fide* believing the first defendant that he will safeguard the interest of the fifth respondent herein. Therefore, he did not file any appeal as against the judgment of the Trial Court as well as the first Appellate Court. It is not known whether notice was served to the fifth respondent. Whereas, in the Second Appeal stage, the first defendant has not prosecuted the appeal. This itself clearly shows that he has not taken care to safeguard the interest of the fifth respondent. Therefore, it is his contention that the Court, being the Court of conscience, as far as the Will is concerned, even there is negligence on the part of the parties to lead evidence to prove the Will, the Court can give an opportunity to lead evidence to prove the subsequent Will. In support of the submissions, he has relied upon the judgments reported in **AIR (36) 1949 Bombay 266 [Vishnu Ramkrishna v. Nathu Vithal]** and **2013 SAR (Civil) 574 [M.B.Ramesh (D) By Lrs. v. K.M.Veeraje Urs (D) By Lrs. & Ors.]**. Therefore his contention is that one more opportunity has to be given for the fifth respondent to prove the Will before the Trial Court.

20. In reply, the learned Senior Counsel appearing for the plaintiffs 2 to 4/respondents 1 to 3 in both the appeals submitted that having filed written statement, no appeal was filed against the judgment of the Trial Court and he was keeping silent all these years and in fact, pursuant to the Trial Court decree, possession was also taken in execution proceedings from the fifth respondent. Therefore, it is his contention that the Second Appeal stage, he cannot seek for re-hearing the entire suit. Having slept over and failed to prosecute the defence in the Trial Court, he cannot seek for examination of the attesting witnesses at this stage. Hence, he prayed for dismissal of the appeal in S.A.(MD) No.907 of 2013.

21. I have considered the submissions made on either side and perused the materials available on record.

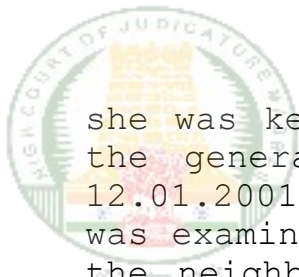
22. Admittedly, it is not disputed that the mother of



Chellammal and the first plaintiff's mother were sisters. The first defendant is the sister's son of the first plaintiff. This fact is not in dispute. It is the case of the first plaintiff that Chellammal died testate and left the Will dated 21.10.1992 in favour of the first plaintiff and she was all along in care and custody of the first plaintiff. However, the first plaintiff, due to his business, is residing at Rajapalayam. As he was not able to come to Ambasamudram, in order to help Chellammal, he has appointed the first defendant on monthly salary to look after her. Hence, it is contended by the plaintiffs that after the death of Chellammal, the first plaintiff is entitled to the entire properties left by Chellammal under the Will dated 21.10.1992. It is their contention that Chellammal died on 15.03.2001 and one year prior to her death, she was unwell and she was bedridden and almost, at comatose stage. After her death, as the first defendant was acting against the interest of the first plaintiff, the first plaintiff issued a legal notice, for which, the fourth defendant issued a reply notice stating that Chellammal has executed a general power of attorney on 12.01.2001 and the properties were also dealt with by the first defendant. It is the main contention of the plaintiffs that the power of attorney dated 12.01.2001 is created by impersonation and also by forgery and thus, the plaintiffs sought for the relief of declaration that they are entitled for the entire suit properties. Whereas, the defendants, denying the Will dated 21.10.1992, contended that Chellammal till her death was residing at Ambasamudram and only few days before her death, she was admitted in the hospital and thereafter, went to take treatment to Rajapalayam, where she died. It is their contention that she has executed the general power of attorney in favour of the first defendant, while she was in sound state of mind, besides, she also executed a Will dated 28.02.2001.

23. The first Appellate Court disbelieved the Will dated 28.02.2001, which is marked as Ex.B.1. Whereas, the Trial Court has believed Ex.B.2-power of attorney and decreed the suit partly and dismissed the suit in respect of item Nos.1 to 3 and 6 in the suit second schedule. The Courts below mainly disbelieved the Will on the ground that none of the attesting witness has been examined to prove the execution. Further, the Scribe examined by the defendants has also not spoken about any attestation and execution, besides, on the date of the Will, as per the evidence of D.W.1, Chellammal was admitted in the hospital and thereafter, she died on 15.03.2001. Therefore, on the above ground, the Will dated 28.02.2001-Ex.B.1 was rightly disbelieved by the Court below.

24. Whereas, it is the specific contention of the defendants that till Chellammal was admitted in the hospital on 28.02.2001, Chellammal was all along residing in Ambasamudram and



she was keeping mental faculties and she has voluntarily executed the general power of attorney to deal with the properties on 12.01.2001. To prove the execution of power of attorney, D.W.4 was examined, who is one of the attesting witnesses and he is also the neighbour of Chellammal residing at Ambasamudram. The entire evidence of D.W.4, when carefully perused, in his evidence, he has categorically stated that Chellammal has voluntarily executed the power of attorney in favour of the first defendant while sound state of mind. She herself appeared before the Registrar's Office and executed the document. The cross-examination of D.W.4, when entirely read, this Court is unable to find any circumstances to lead that a document is not executed by Chellammal. Thus, his evidence clearly indicated that Chellammal was keeping mental faculties and capable of taking rational decision, on her own and executed a power of attorney. When the execution of the power of attorney has been proved in the manner known to law and the evidence of the attesting witness shows that at the relevant point of time, the executant was keeping mental faculties to execute such document and the same was registered as per law, then the burden is on the plaintiffs to disprove the above factum of execution. It is to be noted that the power of attorney Ex.B.2 was registered before the Sub-Registrar. When the document was registered and the registration is done according to law, there is a presumption that all the official acts done properly.

25. It is the specific case of the plaintiffs that the power of attorney was the result of impersonation and forgery, besides, the executant, namely Chellammal was bedridden and taking treatment and she was not able to take any decision on her own. To countenance such contention, there is no material whatsoever placed before the Court by the plaintiffs. If really Chellammal was under the comatose stage, there must be some materials to show that she was taken treatment and she was in the hospital at the relevant point of time. No materials whatsoever placed before this Court to disprove the execution spoken by D.W.4 and D.W.1.

26. It is the specific case of D.W.1 that only in the last week of February, Chellammal was fell ill and she was admitted in the hospital. Further, it is the specific case of the defendants that Chellammal was all along residing at Ambasamudram. The first plaintiff has never taken care of Chellammal and Chellammal was residing with the first defendant. In this regard, the evidence of P.W.1, when perused, P.W.1 himself admitted that Chellammal was residing in Ambasamudram. Therefore, when the relationship of the parties, such that the first defendant is also the sister's son of the first plaintiff, appointing him as a servant to look after Chellammal is highly improbable, in view of the relationship of the parties. D.W.4's evidence also clearly indicates that Chellammal was residing in Ambasamudram, till she was admitted in



the hospital. When the execution has been proved in the manner known to law and the document was registered as per law, the entire burden lies on the plaintiffs to prove that the power of attorney was the result of forgery and impersonation.

27. Further, it is not the case of the plaintiffs that the power of attorney was registered in undue influence, or fraud or coercion, etc. In the absence of any pleading and evidence as to the undue influence, fraud and coercion, etc., then the burden lies on the plaintiffs to disprove the factum of execution proved by the defendants. The evidence of D.W.4 also clearly proves that Chellammal was in a sound state of mind. Such being the matter, the entire burden shifted on the plaintiffs to show that the document is the result of impersonation and fraudulently created by the first defendant. No materials whatsoever filed to disprove the same. Further, to contend that Chellammal was not keeping sound mind, at the relevant point of time, therefore, she could not have been executed the power of attorney voluntarily, no evidence adduced by the plaintiffs. Though it is pleaded by the plaintiffs that Chellammal was not keeping good health for the last one year and last three months before her death, she was in comatose stage, there are no medical records to prove the said fact and no evidence was adduced by the plaintiffs in this regard. Further, to countenance that the power of attorney was the result of impersonation and forgery, absolutely, there is no evidence on the side of the plaintiffs. When the execution and the registration have been proved in the manner known to law, the burden is on the plaintiffs to prove that the document is the result of impersonation. No attempts whatsoever made to examine the officials from the Registration Department to prove their contention. Whereas, D.W.1 and D.W.4 evidence and Ex.B.2 clearly show that the document has been registered in the manner known to law. The first Appellate Court has given undue importance to the variance in the signature of Chellammal in some places in the document.

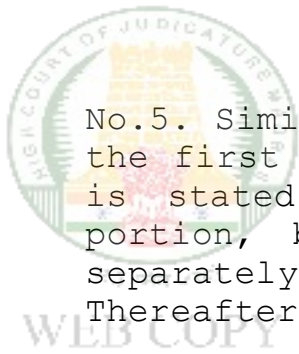
28. It is the admitted case of both sides that Chellammal was aged about 80 years and variance in the signature is bound to occur when the aged person signs the document. It cannot be ruled out. Therefore, merely because there were some variance in the signature, while executing the document, it cannot be said that the entire document is not executed by Chellammal. When the plaintiffs have failed to prove that Chellammal was bedridden and comatose stage for three months, when the registered document proves her presence in the Registrar's Office and the execution of the document also proved by the attesting witness, merely on the basis of the allegations and some variance in the signature, it cannot be said that the entire document is the result of impersonation and fraudulently created. Therefore, the first



Appellate Court has wrongly placed the burden on the defendants to prove the document. The purpose of examining the attesting witness itself is to prove the factum of execution of the document by the executant in the presence of attesting witness. When the attesting witness has clearly spoken about the execution of document and he has also spoken about that the contents were read over by the document writer and the document itself clearly shows that Chellammal went to the Registrar's Office and executed the document and put her thumb impression, besides putting the signature, such approach of the first Appellate Court placing the burden on the defendants to prove the signature by comparison, is against the well settled law. Much emphasis was placed with regard to the schedule of property incorporated in Ex.B.2.

29. The learned Senior Counsel appearing for the respondents 1 to 3 in both the appeals vehemently contended that the schedule as typed in single space itself created serious doubt. In this regard, it is to be noted that in the body of power of attorney, it is clearly recited that the executant has given power to the first defendant to deal with all the properties belonged to the executant. Therefore, merely because schedule of property was typed in single space, it cannot be said that the power of attorney is not executed by Chellammal. D.W.4 is not only the attesting witness but also identified Chellammal before the Registrar. D.W.4 is the neighbour residing in the same locality. There was no motive whatsoever established against D.W.4 for giving a false evidence against the plaintiffs. The recitals in the power of attorney deals with the entire properties. Therefore, merely on the basis of some admission on the side of the defendants that there is no reference in the power of attorney in respect of the properties covered under Exs.B.3, B.4 and B.6, the entire document cannot be non-suited.

30. The parties are governed by the pleadings and evidence. Admittedly, both sides are close relatives of Chellammal. As already indicated, it is not the case of the plaintiffs that the power of attorney is the result of undue influence, etc. In the absence of any plea as to the undue influence, the pleadings of the plaintiffs have to be proved in the manner known to law. The specific plea of the plaintiffs that Chellammal was in the hospital and was in the comatose stage for three months prior to her death has not been established. Whereas, it is the specific case of the defendants that only in the last week of February, she fell ill, thereafter, she died on 15.03.2001. The entire evidence of P.W.1, when carefully perused, it is also substantiated the allegation of the defendants. It is the specific case of the defendants that only few days prior to her death, she was admitted in the Shifa Hospital at Tirunelveli and P.W.1 has also admitted that Chellammal was residing separately in Ambasamudram in Door

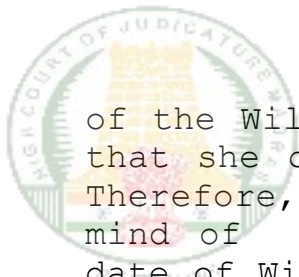


No.5. Similarly, it is also admitted in the cross examination that the first defendant is residing in the above Door No.5. Though it is stated that after suit, he has encroached upon the said portion, but, the fact remains that Chellammal was residing separately in Ambasamudram till she was admitted in the hospital. Thereafter, she was taken to Rajapalayam.

31. The contention that the first defendant was appointed as servant to Chellammal is also not established. There is no evidence to show that Chellammal was not well and she could not have executed the power of attorney. Whereas, the defendants have proved the execution of power of attorney in the manner known to law. The plaintiffs have not discharged their burden of disproving the factum of execution proved by the defendants. Such being the fact, the finding of the first Appellate Court placing the burden wrongly on the defendants to prove the signature, in the considered view of this Court, is not according to law. Based on the above document, Exs.B.3 to B.6 were executed during the life time of Chellammal in the month of February (Exs.B.3 to 5) and March (Ex.B.6) itself. No relief was sought to cancel Exs.B.3 to B.6 by the plaintiffs.

32. The first Appellate Court, in paragraph No.18, has held that the defendants have not taken any steps for comparison of signatures of the deceased Chellammal with her admitted signature found in the prior documents through Expert and it is the duty of the defendants to take steps for comparison of signatures. But, the defendants have failed to take steps for comparison of signatures found in Ex.B.2 and wrongly placed the burden on the defendants. Such finding of the first Appellate Court is erroneous according to law. When the execution has been proved, the burden shifts on the other side to disprove the same. The document was registered as per law and the allegation contained in the plaint as to impersonation and fraud also is not established. Further, to show that Chellammal was not keeping good health and no mental faculties, no materials whatsoever filed. In such view of the matter, the finding of the first Appellate Court reversing the judgment of the Trial Court in respect of the suit second schedule item Nos.1,2,3 and 6, is not according to law.

33. Now, coming to the contention with regard to Ex.B.1-Will, though the Will has been propounded by the first defendant, according to him, the Will dated 28.02.2001, is the last Will. Therefore, the Will dated 21.10.1992-Ex.A.7 superseded. Though the Will-Ex.B.1 propounded by the first defendant, it is to be noted that the Will is said to have been executed on 28.02.2001. The evidence of D.W.1 itself clearly indicated that Chellammal was seriously ill in the last week of February and she was admitted in the Shifa Hospital, Tirunelveli, thereafter, she died. On the date

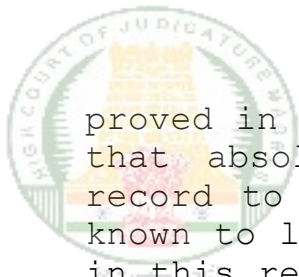


of the Will, Chellammal was seriously ill and the same indicates that she could not have executed the Will at the particular day. Therefore, it is for the propounder to prove the sound state of mind of Chellammal, but his own evidence indicates that on the date of Will, she was seriously fell ill and taken to the hospital and admitted, thereafter, she died on 15.03.2001. Therefore, Ex.B.1 cannot be given much importance. The Courts below have rightly held that the Will has not been proved. That apart, it is relevant to note that despite the availability of the attesting witnesses, none of the attesting witnesses has been called for to prove the Will.

34. It is well settled that the Will cannot be admitted in evidence, unless at least one of the attesting witnesses is examined to prove the Will. But, none of the attesting witnesses has been examined by the Court below, despite availability. Therefore, Ex.B.1 cannot be looked into for any other purpose. Though the Scribe of Ex.B.1 was examined, it is to be noted that resorting other mode of proof of the Will under Sections 69, 70 and 71 of the Indian Evidence Act, 1872, will come into play only when the attesting witness was not alive or their whereabouts are not known. However, the defendants have examined the Scribe as D.W.2, who has only drafted the Will. D.W.2 is the lawyer practising in Ambasamudram. In his evidence, he has stated that he has drafted Ex.B.1-Will. Except this, he has never spoken anything about either attestation or execution of the document by the testatrix. Therefore, his evidence is no way helpful to the defendants to prove the subsequent Will. There was no reason as to why the other attesting witness has not been examined. Therefore, in the absence of attesting witness and Ex.B.1 also shrouded with suspicion as to the execution, when on the date itself, testatrix fell ill seriously and admitted in the hospital, the Will cannot be true at all. Thus, the finding of the Courts below with regard to Ex.B.1-Will is well balanced and does not require any interference.

35. As far as the Will-Ex.A.7 is concerned, P.W.2, one of the attesting witnesses, was examined and he is a practising lawyer. He has clearly spoken about the execution of the Will. D.W.1, in his evidence, has not disputed the Will Ex.A.7. Both the Courts below have clearly found that Ex.A.7 has been proved in the manner known to law. The evidence of P.W.2 not only proves execution but also attestation. In view of the above, the finding of the Courts below believing Ex.A.7 also does not require any interference.

36. It is the contention that the substantial question of law was framed as to mere non-examination of the attesting witness to the Will dated 28.02.2001 is fatal, when the Will was



proved in the previous Rent Control Proceedings. It is to be noted that absolutely, there is no evidence whatsoever available on record to show that the subsequent Will is proved in the manner known to law. Further, it is to be noted that no document is filed in this regard. Even assuming that the Will is also proved in some other Rent Control Proceedings filed against some third party, it cannot be said that the above finding will dispense with the proof of Will in the present suit. Therefore, in the absence of any evidence to show that the Will has been produced in the earlier Rent Control Proceedings, it is difficult to believe Ex.B.1. At any event, the propounder himself admitted on categorical terms, that on the date of Will-Ex.B.1, the executant was fell ill seriously and taken to the hospital and subsequently, died within fifteen days. In such view of the matter, the Will dated 28.02.2001-Ex.B.1 cannot be received in evidence in the absence of proof as per law.

37. It is also contended that the first Appellate Court has rejected the additional evidence. It is to be noted that the first Appellate Court has given a reason and the defendants were keeping silent for more than one year. Therefore, to fill up the *lacunae*, at a later point of time, witnesses cannot be permitted. This Court is also of the view that additional evidence cannot be allowed which is only to fill up the *lacunae* at a later stage. It is not the case of the defendants before the first Appellate Court that the witnesses could not be secured during trial and their availability were known to them only at a later point of time. Therefore, when the application was considered on merits and dismissed, the same cannot be a ground to receive additional evidence at the appeal stage. It is relevant to note that in Ex.B.1, one of the witnesses is none other than the son-in-law of the first defendant. D.W.1's evidence clearly indicates that he has actively participated in drafting the Will and taking the executant to the Registrar's Office and his evidence also clearly indicated that she fell ill seriously on the same day. Further, his evidence also clearly indicated that the thumb impression was obtained in the Advocate's office in the Will. It is to be noted that in Ex.B.1, thumb impression alone was obtained.

38. It is also relevant to note that the power of attorney was executed on 12.01.2001 and executant was able to sign. Whereas the Will Ex.B.1 said to have been executed on 28.02.2001, in which, thumb impression alone was obtained. This aspect clearly creates serious doubt about Ex.B.1. Further, the Will was registered only on 05.03.2001, whereas, the evidence of D.W.1 itself clearly shows that in the last week of February, 2001 itself, Chellammal was admitted in the hospital at Ambasamudram known as 'Sakthi Hospital' and after few days, she was admitted in Shifa Hospital, Tirunelveli. Subsequently, she died on 15.03.2001.



Therefore, Chellammal executing the Will on 05.03.2001 is also highly doubtful and, therefore, even if the attesting witness was examined, that will not be sufficient to dispel the suspicious circumstances in registering the document.

39. In AIR (36) 1949 Bombay 266 [Vishnu Ramkrishna v. Nathu Vithal], it has been held as follows:

"In dealing with the case of a will the High Court in appeal has to approach the problem as a Court of conscience. The High Court must be satisfied whether the document put forward is the last will and testament of the testator. If the High Court finds that the wishes of the testator are likely to be defeated or thwarted merely by reason of want of some technicality the High Court as a Court of conscience would not permit such a thing to happen. The mere fact that the propounders of the will are negligent and grossly negligent in not complying with the requirements of S.63, Succession Act, and proving the will, should not deter the High Court from calling for the necessary evidence in order to satisfy itself whether the will was duly executed or not."

40. In 2013 SAR (Civil) 574 [M.B.Ramesh (D) By Lrs. v. K.M.Veeraje Urs (D) By Lrs. & Ors.], at Paragraph Nos.13 and 14, it is held as follows:

"13. The first submission on behalf of the appellant has been that the learned judge of the high Court has erred by framing the question of law, in the manner in which he has. It was submitted that when the trial court and the first appellate court have given a concurrent finding about the invalidity of the will, it was a finding of fact, and the High Court could not have disturbed the finding of fact by framing a question of law as to whether the finding was bad in law, and perverse or contrary to the evidence on record. Reliance was placed, in this behalf, on the observations of this Court in Narayanan Rajendran Vs. Lekshmy Sarojini reported in 2009(5) SCC 264. That apart, it was submitted that in any case, the findings of the Courts below could not in any way be categorized as perverse, since they were not contrary to the evidence on record.

14. We may, however, note in this behalf that as held by a Constitution Bench of this Court in Chunilal Mehta Vs. Century Spinning and Manufacturing Company reported in AIR 1962 SC 1314, it is well settled that the construction of a document of title or of a document which is the foundation of the rights



of parties, necessarily raises a question of law. That apart, as held by a bench of three judges in Santosh Hazari Vs. Purushottam Tiwari reported in 2001(3) SCC 179, whether a particular question is a substantial question of law or not, depends on the facts and circumstances of each case. When the execution of the will of Smt.Nagammani and construction thereof was the subject matter of consideration, the framing of the question of law cannot be faulted. Recently, in Union of India Vs. Ibrahim Uddin reported in 2012(8) SCC 148, this Court referred to various previous judgments in this behalf and clarified the legal position in the following words:-

"67. There is no prohibition to entertain a second appeal even on question of fact, provided the Court is satisfied that the findings of the Courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse."

41. Admittedly, there is no dispute with regard to the above question of law.

42. As already discussed, execution of the Will is highly doubtful on the available evidence and despite several opportunities given to the parties, none of the attesting witnesses was examined and the parties are keeping quiet and further, the fifth respondent in S.A.(MD)No.907 of 2013, who has argued the appeal, has also not filed any appeal as against the judgment and decree of the Court below.

43. Considering the facts and circumstance as narrated above and also on perusal of the entire evidence, as discussed above, this Court is of the view that the Will projected and filed as Ex.B.1 is highly doubtful, as the testatrix fell ill seriously on the same day and admitted in the hospital and could not have executed the Will on 05.03.2001. All these facts clearly show that the Will has not been proved in proper manner. Accordingly, all the substantial questions of law are answered.

44. In the result,

(i) S.A.(MD)No.513 of 2013 is allowed and the judgment and decree of the Trial Court dated 17.08.2011, in O.S.No.109 of 2003, are, hereby, restored.

(ii) S.A.(MD)No.907 of 2013 is dismissed, restoring the judgment and decree of the Trial Court.

No costs. Consequently, the connected miscellaneous petitions in



M.P.(MD)Nos.1 of 2013, 1 of 2014 and 1 of 2015 in S.A.(MD)No.513 of 2013 and M.P.(MD)Nos.2 of 2013 and 1 of 2015 in S.A.(MD)No.907 of 2013 are closed.

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Sd/-

Assistant Registrar (CS-III)

/ /2020

Sub Assistant Registrar(CS)

SML

To

1.The Third Additional District and Sessions Judge,
Tirunelveli.

2.The Subordinate Judge,
Ambasamudram.

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+1 cc to MR.A.ARUMUGAM , Advocate SR.No.9556

Common Judgment made in
S.A. (MD)Nos.513 of 2013 and 907 of 2013

Delivered on:

28.02.2020

KM/(27.05.2020) 19P 11C