



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.11.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA  
AND  
THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

O.S.A.No.140 of 2018

1.Indumathi  
2.P.Madhusudhan  
3.Jayashree  
4.P.Viswambar  
5.P.Nandanandhan  
6.Sarasija M.Shankar  
7.Vasundra Badrinath Gupta

... Appellants/defendants

Versus

1.P.P.R.Viswanathan (deceased)  
2.K.Subramania Mohan  
3.Mrs.Prema Viswanathan  
4.Mrs.G.Jayanthi

(R3 & R4 were brought on record  
as LR's of 1<sup>st</sup> Respondent vide order dated 01.02.2021  
in CMP.No.919/21 in OSA.No.140/18)

... Respondents/Plaintiffs

Prayer: Original Side Appeal has been filed under Order XXXVI Rule 11 of Original Side Rules read with Clause 15 of the Letters Patent Act against the decree and judgment dated 10.01.2018 passed in T.O.S.No.18 of 2013 (O.P.No.73 of 2009) by the learned Single Judge.

For Appellants : Mr.S.Parthasarathy, Senior Counsel  
for Mr.P.K.Sivasubramaniam

For R2 to R4 : Mr.R.Subramanian  
R1 - died



## JUDGMENT

(Judgment of the Court was delivered by T.RAJA, J.)

Challenging the impugned judgment and decree dated 10.01.2018 passed in T.O.S.No.18 of 2013 by the learned Single Judge granting a probate in respect of the Will dated 14.12.2001 and the subsequent Codicil dated 14.01.2008 in favour of the respondents 1 and 2 herein, the appellants have filed the present appeal.

2. For the sake of convenience, the parties will be referred to as arrayed in T.O.S.No.18 of 2013. Brief facts leading to the filing of the appeal are stated below:

The plaintiffs were appointed as executors by one Voora Sri Devamma under the Will dated 14.12.2001, registered as Document No.111 of 2001 on the file of Sub-Registrar, T.Nagar, and the subsequent Codicil dated 14.01.2008. She was the second wife of Voora Sri Ramulu Chetty, who died on 16.01.1941. She died on 11.05.2008. The first plaintiff is the sister's son of the deceased testatrix and the second plaintiff is the brother's son of the deceased testatrix. During the life time of the testatrix, she had executed a Will dated 16.07.1998, registered as Document No.89 of 1998, however, the said Will was subsequently revoked and the deceased testatrix executed the present Will dated 14.12.2001, bearing Document No.111 of 2001, bequeathing her immovable properties to the plaintiffs and the defendants, besides bequeathing other immovable properties in favour of her relatives. In view of subsequent developments, the deceased testatrix executed a Codicil dated 14.01.2008, bequeathing her immovable properties to the plaintiffs and the defendants and other immovable properties in favour of her relatives. By the said Will and Codicil, the plaintiffs were appointed as Executors by the deceased testatrix. The Will dated 14.12.2001 was attested by one Mr.S.U.Kannan and Mr.M.Suresh Kumar. The Codicil dated 14.01.2008 was attested by Mr.Giridharan and Mr.S.L.Muthiah.

3. It is further averred that originally, the plaintiffs had filed O.P.No.73 of 2009 seeking probate of the Will dated 14.12.2001 and the subsequent Codicil dated 14.01.2008. In the said OP, the respondents 1 to 6 therein were other children of the brother of the testatrix and they had given consent for grant of probate. Therefore, this Court, by judgment dated 18.04.2009, had also passed orders granting probate. However, other legal heirs of P.Andalamma, who is none other than



daughter of the first wife of Voora Sri Ramulu Chetty, had filed A.No.6575 of 2009 seeking to revoke the grant of probate and this Court, by order dated 16.06.2011, had allowed the said application and directed that the Will and Codicil of the deceased testatrix must be proved in a manner known to law and thereby converted O.P.No.73 of 2008 into TOS and by this way, the impugned T.O.S.No.18 of 2013 came into existence.

4. During the trial, on the side of the plaintiffs, two witnesses were examined and six exhibits were marked. The first plaintiff/P.P.R.Viswanathan was examined as P.W.1. S.U.Kannan, who was one of the attesting witnesses to the Will dated 14.12.2001, was examined as P.W.2. S.L.Muthiah, who was one of the attesting witnesses to the Codicil dated 14.01.2008, was examined as P.W.3. Giridharan, who knew the deceased testatrix and who was an another witness to the Codicil dated 14.01.2008, was examined as P.W.4. Ex.P1 is the original Will dated 14.12.2001, Ex.P2 is the original Codicil dated 14.01.2008. Ex.P3 is the death certificate dated 21.05.2008, Ex.P4 is the copy of the partition deed dated 25.09.1997 and Ex.P6 is the copy of the rectification deed dated 28.02.2005. On the side of the defendants, P.Madhusudhan, who is the third defendant, was examined as D.W.1. Ex.D1 to Ex.D3 were marked by the defendants. Ex.D1 is the copy of the notice dated 16.02.2016, Ex.D2 is the copy of the first Will dated 16.07.1998 and Ex.D3 is the copy of the statement of accounts.

5. On perusal of the aforesaid oral and documentary evidences, learned Single Judge, by the impugned judgment and decree dated 10.01.2018, decreed the suit as prayed for holding that the plaintiffs are entitled to the grant of probate. Aggrieved by the same, the defendants have filed the present appeal. Pending appeal, the first plaintiff/P.P.R.Viswanathan expired on 14.06.2020 and thereafter, his wife and daughter were brought on record and they are arrayed as respondents 3 and 4 in this appeal.

6. Assailing the impugned judgment and decree, Mr.S.Parthasarathy, learned Senior counsel, representing Mr.P.K.Sivasubramaniam, learned counsel for the defendants/appellants herein, submitted that the husband of the deceased testatrix had already executed his Will dated 07.04.1941 expressing his desire to adopt his first wife's son Abiramudu. However, after the adoption, Abiramudu died on 11.06.1950. But, the plaintiffs/respondents herein suppressing the names of legal heirs of the deceased fraudulently obtained an order of probate in O.P.No.73 of 2009, dated 18.04.2009,



depriving the rights of the defendants/appellants to challenge the genuineness and probative value of the Will dated 14.12.2001 and the subsequent Codicil dated 14.01.2008. It is further submitted that the Will and Codicil of the deceased Voora Srideviamma are fabricated documents and they are not executed by the deceased testatrix as she was not in sound state of mind, hence, the plaintiffs/respondents, who are claiming as executors, are not the legal heirs of the deceased testatrix and therefore, they are not entitled to an order of grant of probate of the Will and Codicil.

7. Continuing further, learned Senior counsel argued that although the Will dated 14.12.2001/Ex.P1 was attested by two witnesses, namely, S.U.Kannan and M.Suresh Kumar, the second witness was not examined. It is further argued that if two witnesses are alive, but, not examined as mandatorily required under Section 63 of the Indian Succession Act, then the deficiency in complying with such provision would show that the plaintiffs have failed to prove the execution of the Will/Ex.P1 by examining those witnesses. Thus, on the specific ground of non-compliance of mandatory provision under Section 63 of the Indian Succession Act, learned Single Judge ought to have dismissed the suit.

8. It is further argued that the Will/Ex.P1 was duly registered, but, the Codicil/Ex.P2 was unregistered one and the attesting witnesses did not know each other and again, they did not know contents of the Will as well. Further, when the deceased testatrix knew only Telugu language, it is now known how she is said to have signed in Tamil, therefore, it is clear that both Will and Codicil are fabricated and forged documents.

9. In support his submissions, learned Senior counsel has relied upon the judgments reported in AIR 1940 MAD 315 [Sadachi Ammal Vs. Rajathi Ammal and others]; AIR 1959 SC 443 [H.Venkatachala Iyengar vs. B.N.Thimmajamma and others]; AIR 1962 SC 567 [Rani Purnima Debi and another vs. Kumar Khagendra Narayan Deb and another]; 1997 (3) LW 673 [Govindan Chettiar (died) vs. Akilandam alias Seethalakshmi and 24 others]; 2001 (7) SCC 503 [N.Kamalam 9dead) and another vs. Ayyasamy and another]; and 2006 (13) SCC 433 [Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao and others] for a proposition that when there were suspicious circumstances and the propounder had taken part actively, then the Will cannot be believed. Learned Senior counsel has also relied on one another judgment in the case of Suguna Bai Vs. Muniammal @ Dhanalakshmi and others [1996 (2) MLJ 596] to contend that when attestation to a Will is sought to be



proved, naturally, the witness must say that the document contains either the thumb-impression or signature of the attester and that he has also signed in token of the attestation and he must identify the signature as seen in the document. But, in the present case, the attesting witnesses, namely, P.W.2, P.W.3 & P.W.4 to the Will/Ex.P1 and Codicil/Ex.P2, did not identify their respective signatures found in the said documents. Therefore, the impugned judgment and decree passed by the learned Single Judge is liable to be interfered with.

10. Per contra, Mr.R.Subramanian, learned counsel for the plaintiffs/respondents herein, submitted that while the deceased testatrix was in sound state of mind, she had executed a Will dated 14.12.2001/Ex.P1 bequeathing her immovable properties to the plaintiffs and the defendants. However, during her life time, since she had disposed of some of the movable properties, she had executed Codicil dated 14.01.2008/Ex.P2. Under the Will and Codicil, the plaintiffs were appointed as Executors and therefore, they are the administrator of the properties as executors and beneficiaries under the Will. During trial, attesting witnesses of Ex.P1 and Ex.P2 were examined. During the cross examination, P.W.3 stated that the deceased testatrix was in sound state of mind. It is further submitted that the attesting witnesses saw the signing of documents by the deceased testatrix and they have also signed those documents in her presence. Thus, the question of non-compliance of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidences Act does not arise.

11. Continuing further, learned counsel for the plaintiffs/respondents herein submitted that the third defendant, who was examined as D.W.1, while deposing, accepted that the Will and the Codicil have been acted upon and amounts were distributed as per the said documents. He further deposed that Ex.P1 was executed by the deceased testatrix as she came personally to execute the same before the Registrar in the year 2001. Therefore, while the third defendant himself admitted the execution of the Will and Codicil by the deceased testatrix, the submission of the learned Senior counsel that there was a suspicious circumstances surrounding in execution of the Will and Codicil is not tenable, hence, the impugned judgment and decree passed by the learned Single Judge does not call for interference, he pleaded.

12. Heard the learned counsel appearing on either side and perused the materials available before this Court.



13. The sole issue raised in this appeal is whether the Will/Ex.P1, dated 14.12.2001, and the subsequent Codicil/Ex.P2, dated 14.01.2008, have been executed in a manner known to law as adumbrated in Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. Before delving into the issue, for better appreciation of the case on hand, it is apposite to extract below the said provisions:-

Section 63 of the Indian 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..."

14. Section 63 of the Indian Succession Act speaks that 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. It further states 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. In this case, admittedly, the deceased testatrix had executed a Will dated 14.12.2001 bearing Document No.111 of 2001 on the file of Sub-Registrar, T.Nagar, Chennai, and this was marked as Ex.P1. The said Will was attested by two witnesses, namely, S.U.Kannan and M.Suresh Kumar. Before the Court below, S.U.Kannan was examined as P.W.2 and in his proof affidavit, he had stated that he saw the deceased testatrix signing the Will, besides, stating that he along with M.Suresh Kumar signed in her presence. He further stated that the deceased testatrix read the document in the Sub Registrar office and signed the Will and the testatrix knows Tamil and she spoke to him in Tamil. Section 68 of the Indian Evidence Act 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. In the case on hand, although as per 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. Therefore, although the Will had been attested by two witnesses, P.W.2/S.U.Kannan was examined and as stated above, he deposed that he saw the testatrix signing the Will. With regard to Ex.P2/Codicil dated 14.01.2008, the plaintiff had examined P.W.3 and P.W.4, both attesting witnesses. Thus, legal requirement for execution of the Will as adumbrated under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act has been complied with and as rightly held by the learned Single Judge, the plaintiffs have proved the execution of Ex.P.1 and Ex.P2 in the manner known to law.



15. In Janki Narayan Bhoir Vs. Narayan Namdeo Kadam [(2003) 2 SCC 91], the Hon'ble Apex Court, while dealing with Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, has vividly simplified as to how a Will has to be executed and how execution of such Will can be accepted. For better appreciation, relevant portion thereof 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



WEB COPY

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....."

As highlighted above, although Will had been attested by two witnesses, one witness, namely, S.U.Kannan was examined as P.W.2 and therefore, the requirement as per Section 68 of the Indian Evidence Act has been met out.

16. Learned counsel for the respondents/plaintiffs brought to our notice to the evidence of DW1/third defendant. During the cross examination, he admitted the execution of the Will/Ex.P1 as follows:-

"I also accept that Ex.P1 Will was executed by deceased Voora Sri Devi Ammal where she came personally to execute the same before the Registrar in the year 2001. Ex.P3 is the death certificate of Voora Sri Devi Ammal. I accept after the demise of Voora Sri Devi Ammal that a sum of Rs.5,000/- was distributed in terms of the Will dated 14.01.2008 to around 26 persons which was confirmed by me in Ex.P5."

17. It is seen from the records that D.W.1 was examined after the cross examination of P.W.2, P.W.3 and P.W.4. Despite that, he fairly admitted the execution of Ex.P1/Will and Ex.P2/Codicil, besides stating that both documents had been acted upon and amounts were distributed as stated in those documents. Thus, as rightly held by the learned Single Judge, we have no hesitation to hold that deceased testatrix/Voora Sri Devammal had executed Ex.P1 and Ex.P2.

18. Before parting with the issue, it is to be noted that the entire issue cropped only after execution of the Will dated 14.12.2001 in view of dispute arisen in giving a share to the defendants. But, the record shows that even before the execution of the said Will, the deceased testatrix had executed a partition deed dated 25.09.1997 in favour of the defendants and this was marked as Ex.P4 and the same was confirmed through the rectification deed dated 28.02.2005 marked as Ex.P6. Therefore, as the defendants were allotted with their respective shares through the said partition deed dated 25.09.1997, the deceased testatrix bequeathed the remaining portions through the Will dated 14.12.2001. Therefore, by taking note all these factual aspects, learned Single Judge has rightly held that the plaintiffs are entitled to the grant of probate as prayed for.



19. Thus, for the reasons stated above, we do not find any error or illegality in the impugned judgment and decree passed by the learned Single Judge. In fine, the Original Side Appeal stands dismissed. No Costs.

SD/-  
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

rkm

To

The Sub Assistant Registrar,  
Original Side,  
High Court, Madras.

+6cc to Mr.B.Suresh, Advocate SR.59345  
+2cc to Mr.R.Subramanian, Advocate Sr.59688

O.S.A.No.140 of 2018

nmi[co]  
srg 25/01/2022