



S.A.No.612 of 1996

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.07.2022

PRONOUNCED ON : 26.08.2022

CORAM

THE HON'BLE Mr. JUSTICE C.V.KARTHIKEYAN

S.A.No.612 of 1996
&
CMP.No.20712 of 2021

1.Annapoorani (died)
2.Ramakrishnan

...

Appellants

(2nd appellant brought on record as legal representatives of the deceased sole appellant viz. Annapoorani vide Court order dated 30.11.2021 made in CMP.No.12445 of 2021 in S.A. No.612 of 1996)

Vs

1.Muthusamy (died)
2.Ponnusamy Gounder (deceased)
3.Devathal (died)
4.Nallathal
5.P.Rangathal
6.P.Deivanayagi
7.P.Jayakodi
8.P.Senthil Kumar



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(RR5 to 8 are brought on record as legal representatives of the deceased 2nd respondent vide order dated 28.06.2004 made in CMP.Nos.15977 to 15979/03)

9.M.Palaniammal
10.M.Kannimuthukumar
11.N.Deivanayagam
12.P.Selvanayagam

(RR9 to 12 brought on record as legal representatives of the deceased R1 viz., Muthusamy Gounder vide order of Court dated 11.07.2019 made in CMP.No.2016/2008 in S.A.No.612/1996)

13.Sivabakkiyam
14.Rajeshwari
15.Velliyangiri

(RR13 to 15 brought on records as legal representatives of the deceased R3 viz., Devathal vide Court order dated 16.07.2021 made in CMP.No.9327 of 2021 in S.A. No.612/1996)

...

Respondents

Prayer: The Second Appeal is filed under Section 100 of CPC, against the judgment and decree dated 07.12.1995 passed in A.S.No.69 of 1995, on the file of the Subordinate Court, Udumalpet, reversing the judgment and decree dated 04.04.1995 passed in O.S.No.797 of 1992 on the file of the District Munsif Court, Pollachi.

For Appellants

: Mr.N.Manokaran



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for Mr.D.R.Arunkumar

Respondent Nos.1 to 3 : Died

Respondents 5 to 8 : No appearance

For Respondent : Mr.C.R.Prasanan
Nos.9 to 15

JUDGMENT

The plaintiff in O.S.No.797 of 1992 on the file of the District Munsif Court at Pollachi is the appellant herein. The suit in O.S.No.797 of 1992 had been filed by the plaintiff, Annapoorani against her two brothers, Muthusamy Gounder and Ponnusamy Gounder and two sisters Devathaal and Nallathaal seeking declaration of title over the suit schedule property and consequential permanent injunction restraining the defendants from interfering with her peaceful possession of the suit schedule property.

2.The suit schedule property was vacant Punja land measuring 2.10 acres at Vettaikaran Pudur Village, Pollachi, now Thiruporur District, erstwhile Coimbatore District.

3.By judgment dated 04.04.1995, the District Munsif, Pollachi,



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decreed the suit. The defendants then filed A.S.No.69 of 1995 before the Sub Court, Udmalpet. By judgment dated 07.12.1995, the appeal suit was allowed and the decree granted in O.S.No.797 of 1992 was set aside. The plaintiff then filed the present second appeal.

4.The second appeal had been admitted on 22.04.1996 on the following substantial question of law:

“Whether the judgment of the Lower Appellate Court reversing that of the Trial Court is vitiated by its failure to consider the entire evidence and apply the correct principles of law?”

5.On hearing both the learned counsels, the following further substantial questions of law had been framed on 23.06.2022;

“1.Whether the Trial Court can presume that the attesting witnesses are not available merely because the plaintiff had not taken steps to produce them or whether it is incumbent on the part of the Trial Court to insist on the propounder of the Will to go through the process under Section 68 of the Evidence Act which states that



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the attesting witness should be called and if the attesting witness does not answer to such summons, whether the Trial Court should further take recourse to Order 16 Rule 10 of CPC and then come to a conclusion to proceed Section 69 of the Evidence Act?

2.Whether the propounder of the Will has a duty to go through the process under Section 68/ Order 16 Rule 10 of the CPC and then insist upon examination of witnesses as provided under Section 69 of the Evidence Act?

3.Whether in the absence of any attesting witness, can examination of the identifying witness in a registered document be considered to be compliance of the proof of the documents required to be proved under Sections 68/69 of the Evidence Act?”

6.Pending the second appeal, the appellant/plaintiff in the suit died and her legal representative was brought on record as second appellant. The first, second and third respondents also died and their legal representatives were brought on record as 5th to 15th respondents.



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7.O.S.No.797 of 1992 (District Munsif Court, Pollachi)

In the plaint, it had been stated that the father of the plaintiff Venkidusamy Gounder, who was the owner of the suit schedule property, had bequeathed the property by way of a registered Will dated 22.06.1969 in favour of the plaintiff. It was stated that he had executed the Will in a sound state of mind and on his own volition. It was stated that he died on 11.12.1992. It had been further stated that the defendants who were her brothers and sisters tried to dispossess the plaintiff. Under those circumstances, the suit was filed for declaration of title and for permanent injunction.

8.The first defendant filed a written statement which was adopted by the 2nd to 4th defendants. It was claimed that the suit schedule property was cultivated by the first defendant. It was specifically denied that their father Venkidusamy Gounder executed any Will much less the Will dated 22.06.1969. It was stated that the said averment in the plaint is false. It was claimed that the defendants were in possession without



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any dispute. It was stated that there was another brother Karuppusamy Gounder, who was not made a party to the suit. It was stated that the suit should be dismissed.

9.On the basis of the above pleadings, the District Munsif Court, Pollachi, framed the following issues:

1.Whether the Will dated 22.06.1969 is a true and valid document and whether it was executed by the father of the plaintiff?

2.Whether the plaintiff is entitled for the relief of declaration of title?

3.Whether the plaintiff is in possession of the suit property?

4.Whether the defendant is a lessee of the suit schedule property?

5.Whether the plaintiff is entitled for the relief of permanent injunction?

6.To what other relief?"



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10. During the course of trial, the plaintiff examined herself as PW1 and examined two other witnesses as PW2 and PW3. The first defendant examined himself as DW1 and examined one further witness as DW2.

11. The plaintiff marked Exs.A1 to A5. Ex.A5 is the Will dated 22.06.1969. The defendant marked Exs.B1 to B4. Ex.B4 is the Land Tax Receipt in the name of the first defendant.

12. On the basis of the evidence adduced, the District Munsif, Pollachi, held that the attesting witnesses to the Will Ex.A5 were said to have died and therefore, not available. The District Munsif, therefore, proceeded to compare the signatures of Venkidusamy Gounder found in the Will and his signatures found in Ex.A1 and observed that the signatures were similar. It was stated that notices had been sent to the attesting witnesses and since they did not respond, no further steps were directed. It was stated that PW2 and PW3 had stated that the plaintiff was in possession in accordance with the bequeath made under the Will.



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In view of the above reasoning, holding that the Will had been proved, the suit was decreed.

13. A.S.No.69 of 1995 (Sub-Court, Udumalpet)

The defendants then filed the aforementioned appeal suit. The Sub Judge, Udumalpet, framed necessary points for determination and re-examined the evidence available on record. It was observed that the defendants had specifically denied that their father had executed the Will. It was therefore held that the Will should be proved in manner known to law by examining the attesting witnesses. It was stated that if it is to be accepted that there are no attesting witnesses, then proceedings under Section 69 of the Indian Evidence Act should have been adopted.

14. It had been held that the District Munsif Court, Pollachi, had erred in comparing the signature and coming to a conclusion that the signatures in the Will are that of Venkidusamy Gounder. Holding that the Will had not been proved in manner stipulated by law, the appeal suit was allowed and the judgment and decree of the trial Court was set aside.



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15.S.A.No.612 of 1996 and CMP.No.20712 of 2021

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The second appeal had been admitted on the following substantial question of law and during the course of arguments, the further substantial questions of law had been framed;

“1.Whether the judgment of the Lower Appellate Court reversing that of the Trial Court is vitiated by its failure to consider the entire evidence and apply the correct principles of law?”

2.Whether the Trial Court can presume that the attesting witnesses are not available merely because the plaintiff had not taken steps to produce them or whether it is incumbent on the part of the Trial Court to insist on the propounder of the Will to go through the process under Section 68 of the Evidence Act which states that the attesting witness should be called and if the attesting witness does not answer to such summons, whether the Trial Court should further take recourse to Order 16 Rule 10 of CPC and then come to a conclusion to proceed Section 69 of the Evidence Act?



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3. Whether the propounder of the Will has a duty to go through the process under Section 68/ Order 16 Rule 10 of the CPC and then insist upon examination of witnesses as provided under Section 69 of the Evidence Act?

4. Whether in the absence of any attesting witness, can examination of the identifying witness in a registered document be considered to be compliance of the proof of the documents required to be proved under Sections 68/69 of the Evidence Act?"

16.CMP.No.20712 of 2021 had been filed by the appellant/plaintiff in the suit to examine Muthusamy S/o.Natchimuthu as PW4. In the affidavit filed in support of the said petition, it had been stated that the said Muthusamy was a relative and close friend of Venkidusamy Gounder and had accompanied him during the entire transaction relating to the execution of the Will. It was stated that therefore his evidence is required to prove the Will.



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17.A counter affidavit had been filed on behalf of the respondents stating that it was improbable that the witnesses now sought to be examined was not available from 1992 to 2021 and it was stated that the examination of witness is an attempt to set at naught a right accrued to the respondents. It had been stated that the petition, which had been filed 25 years after the filing of the second appeal, is an abuse of process of law and is not maintainable.

18.The substantial questions of law framed surrounds proof of the Will and steps to be taken, if it is found the attesting witnesses are not available. Discussion on the substantial questions of law would also cover the discussion required to address the issue raised in the CMP.

19.The facts in this case are straight forward. The plaintiff, daughter of Venkidusamy Gounder, had filed the suit against her two brothers and two sisters claiming that her father Venkidusamy Gounder had executed a registered Will dated 22.06.1969 bequeathing the suit schedule property to her.

20.The Will had been produced as Ex.A5. The respondents denied



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that their father executed such a Will and disputed its validity and stated that it is a false document. Naturally, the burden was cast heavily on the appellant /plaintiff to prove the Will in the manner known to law.

21.Section 63(c) of the Indian Succession Act, 1925, is as follows:

“63. Execution of unprivileged Wills.. . .

a.. . .

b. . . .

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 been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment 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”



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22.Section 68 of the Indian Evidence Act, 1872, reads as follows:

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

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

23.Order 16 Rule 10 C.P.C is as follows:

“10.Procedure where witness fails to comply with summons:- (1) Where a person to whom a summons has been issued either to attend



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to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court-

(a).Shall, if the certificate of the serving officer has not been verified by affidavit, or if service of the summons has been effected by a party or his agent, or

(b).may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any Court, touching the service or non-service of the summons.

(2).Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time



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and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3).In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.”

24.Section 69 of the Indian Evidence Act, 1872, which is as follows:

“69.Proof where no attesting witness



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found – *If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person.”*

25.In ***AIR 1945 Cal 350 (Amal Sankar Sen and anr. Vs. The Dacca Co-operative Housing Society Ltd.)***, the Division Bench of Calcutta High Court had laid down the procedure to be adopted, if the attesting witnesses to a Will does not appear at the time when the Will is sought to be proved during evidence. In para-7, the relevant portion is as follows:

“7.. . . . In order that Sec. 69 of the Indian Evidence Act may be applied, mere taking out of the summons or the service of summons upon an attesting witness or the mere taking out of warrant against him is not sufficient. It is only when the witness does not appear even after all the processes under Or.16 r.10 which the Court considered to be fit and proper had been exhausted that the foundation will be laid for the



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application of sect. 69 of the Indian Evidence Act. The party, namely the plaintiff, must move the Court for processes under Or.16, r.10, C.P.C, when a witness summoned by him has failed to obey the summons..

26.This judgment was referred with approval by the Hon'ble Supreme Court in ***(2008) 14 Supreme Court Cases 754 (Babu Singh and others Vs. Ram Sahai Alias Ram Singh).***

27.In ***2012-4-L.W.461 (Kamalambal (died) etc., & others Vs. Bala & 2 others)***, a Learned Single Judge of this Court held as follows:

“31. Further, as per Section 69 of the Evidence Act, only when the attesting witnesses are not found, the party can examine any person, who is acquainted with the handwriting of the attesting witnesses and to prove that the attesting witnesses are not found, effective steps must be taken by propounder by following procedures contemplated under Order 16 Rule 10 CPC and only after getting the judicial finding in that respect, it is open to the propounder to prove the Will by examining any person, who is acquainted with the handwriting of the attesting witnesses.”



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28.It is thus seen that the Will has to be proved in manner known to law under Section 68 of the Indian Evidence Act by examining the attesting witnesses. If the attesting witnesses do not respond to summons issued under Order 16 Rule 10 CPC, then after following due procedure laid down therein, any other witness as stipulated under Section 69 of the Indian Evidence Act, can be examined to prove the Will. It is imperative that Order 16 Rule 10 CPC is complied with in letter and spirit before resorting to Section 69 of the Indian Evidence Act, 1872.

29.If it is stated that the attesting witnesses have died then the said fact has to be established in manner known to law by producing their death certificates or some other credible evidence to establish death. These safeguards are mandatory. If the safeguards are not strictly followed, then it would only open a window for any unscrupulous litigant to produce a document to be a Will and examine any stranger to prove the signatures in the said document purported to be a Will. That should not be allowed.



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30.The legislature has been extremely careful in providing the nature of execution and attestation under Section 63 (c) of the Indian Succession Act, 1925. This has been further substantiated with particular stipulations under Sections 68 of the Indian Evidence Act, 1872. Further the Court has to ensure that steps are taken as laid down under Order 16 Rule 10 CPC before proceeding to Section 69 of the Indian Evidence Act. Failure to resort to any one of the aforesaid stipulations would render a finding to be returned that the Will had not been proved in manner known to law.

31.In the instant case, PW2 & PW3 during their chief examination only stated that the appellant was in possession of the suit property.

32.The witness now sought to be produced is again a stranger. The petition has been filed 25 years after the filing of the second appeal.

33.In *(2001) 7 Supreme Court Cases 503 (N.Kamalam (Dead))*



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And Another Vs. Ayyasamy and Another), the Hon'ble Supreme Court

had held as follows:

“26. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting witnesses. The signature of the attesting witness as noticed above on a document, requiring attestation (admittedly in the case of a will the same is required), is a requirement of the statute, thus cannot be equated with that of scribe. The Full Bench judgment of the Madras High Court in V.Venkata Sastri and Sons V. Rahilna Bi wherein Ramachandra Iyer, J. speaking for the Full Bench in his inimitable style and upon reliance on Lord Campbell's observation in Burdett v. Spilsbury has the following to state pertaining to the meaning to be attributed to the word “attestation” (AIR pp 113-14, paras 3-4)

“(3). . . .The definition of the term “attested” which is almost identical with that contained in Section 63(c) of the Indian Succession Act, has been the result of an



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amendment introduced by Act 27 of 1926. Prior to that amendment it was held by this Court that the word 'attested' was used only in the narrow sense of the attesting witness being present at the time of execution. In shamu Patter v. Abdul Kadir Ravuthan the privy Council accepted the view of this Court that attestation of a mortgage deed must be made by the witnesses signing his name after seeing the actual execution of the deed and that a mere acknowledgment of his signature by the executant to the attesting witness would not be sufficient. The amending Act 27 of 1926 modified the definition of the term in the Transfer of Property Act so as to make a person who merely obtains an acknowledgment of execution and affixed his signature to the document as a witness, an attester. It will be noticed that although Section 3 purports to define the word 'attested' it has not really done so. The effect of the definition is only to give an extended meaning of the term for the purpose of the Act: the word 'attest' is used as a part of the definition itself. It is, therefore, necessary first to ascertain the meaning of the word 'attest' independent of the statute and adopt



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it in the light of the extended or qualified meaning given herein. The word 'attest' means according to the Shorter Oxford Dictionary 'to bear witness to, to affirm the truth of genuineness of, testify, certify'. In Burdett V. Spilsbury Lord Campbell observed at p.417.

'What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness'.

The Lord Chancellor stated,

'the party who sees the will executed is in fact a witness to it, if he subscribes as a witness, he is then an attesting witness'.

The ordinary meaning of the word would show that an attesting witness should be present and see the document signed by the executant, as he could then alone vouch for the execution of the document. In other words, the attesting witness must see the execution and sign. Further, attestation being an act of a witness, i.e., to testify to the genuineness of the signature of the



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executant, it is obvious that he should have the necessary intention to vouch it. The ordinary meaning of the word is thus in conformity with the definition thereof under the Transfer of Property Act before it was amended by Act 27 of 1926. Before that amendment, admission of execution by th executant to a witness who thereupon puts his signature cannot make him an attestor properly so called, as he not being present at the execution, cannot bear witness to it, a mere mental satisfaction that the deed was executed cannot mean that he bore witness to execution.

(4).After the amendment of Section 3 by Act 27 of 1926, a person can be said to have validly attested an instrument, if he has actually seen the executant sign, and in a case where he had not personally witnessed execution, if he has received from the executant a personal acknowledgment of his signature, mark etc., Thus of the two significant requirements of the term ' attest' namely, (1) that the attestor should witness the execution, which implies his presence, then, and (2) that he should certify or vouch for the



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execution by subscribing his name as a witness, which implies a consciousness and an intention to attest, the amending Act modified only the first: the result is that a person can be an attesting witness, even if he had not witnessed the actual execution, by merely receiving personal acknowledgment from the executant of having executed the document and putting his signature. But the amendment did not affect in any way the necessity for the latter requirement, namely, certifying execution which implies that the attesting witness had the animus to attest.”

34. In the instant case, the suit had been instituted in the year 1992. The judgment of the trial Court was pronounced in the year 1995. The judgment of the first appellate Court was also pronounced in the year 1995. The Second appeal has been pending from the year 1996. Seeking to produce a further witness to speak about the execution of the Will which was executed in the year 1969, would only be an exercise to fill in the lacunae in the evidence. As a matter of fact, it is stated that the said person who is now sought to be examined as a further witness is also a relative. It is improbable that he can recall incidents which took place



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more than half a century earlier. It is improbable that he has surfaced half a century after the Will was executed. His evidence would not be of any assistance to determine the issues in this litigation which has been pending for the past 30 years.

35.I further hold that the District Munsif Court had committed grave error in comparing signature between Ex.A1 and the Will. Such a procedure should never be adopted by any Court to prove a Will. The procedure as stated under Section 68 and Order, 16 Rule 10 CPC and Section 69 of the Indian Evidence Act alone should be adhered to.

36.In view of the reasons stated above, I hold that the appellant has not made out any case to sustain the second appeal.

37.The substantial questions of law are answered that the trial Court must ensure that the attesting witnesses to the Will are examined as witnesses and if the attesting witnesses are not available, then, must adopt the procedure under Order 16 Rule 10 CPC and follow it scrupulously and thereafter, the witnesses as stipulated under Section 69 of the Indian



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Evidence Act, 1872 may be examined.

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38.In view of the above reasonings, the second appeal stands dismissed with costs. Consequently, CMP.No.20712 of 2021 is also dismissed.

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- 1.The Subordinate Court, Udumalpet.
- 2.The District Munsif Court, Pollachi.
- 3.The Section Officer, V.R.Section, High Court of Madras.

C.V.KARTHIKEYAN,J

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Pre-delivery judgment made in
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