



registration is done on a later date, takes effect under Section 47 of the Registration Act on the date on which it is executed.

4. In so far as a Gift cum Settlement Deed is concerned, there are three main ingredients. There should be a donor, there should be a donee and there should be an acceptance implying handing over possession. The document in the instant case had complied with all conditions and had also been registered.

5. Subsequently, it appears that there was an unilateral cancellation of the Settlement deed on 04.01.1988. Such unilateral Cancellation Deed, had been questioned by the appellant in a suit and that is the 3rd substantial question of law to be addressed in the Second Appeal.

6. The 2nd substantial question of law which had been formulated on which the Second Appeal had been admitted is whether, there had been vesting of title of the property on the wife under the Settlement Deed. Therefore, these two questions of law can be addressed only during the arguments in the Second Appeal.

7. It is contended by Mr.Muthukumarasamy, learned counsel for the respondents that it is their consistent stand that the Settlement Deed had not been acted upon. That is a line of argument which has to be addressed at the time of arguing the Second Appeal itself, since the 2nd question of law revolves around that particular point.



8. To continue the narration further, it appears that the 1st respondent, after executing the Settlement deed appears to have executed a Sale deed on 23.03.1988 in favour of the 2nd respondent. The 2nd respondent is his brother's son.

9. It must be pointed out that the appellant and the 1st respondent did not have any children. Therefore, a small competition had arisen among the legal heirs of the 1st respondent through his brothers and the legal heirs of the appellant through her sisters to get the properties and to enjoy the properties.

10. The beneficiary under the Will is a relative on the side of the appellant. The purchaser of the property/2nd respondent is a relative of the 1st respondent. These aspects will have to be examined only at the time of the Second Appeal, since, the 1st substantial question of law is whether, the settlement had been executed recognizing pre-existing liability for maintenance. If the obligation towards pre-existing maintenance is recognised, then Section 14 (1) of the Hindu Succession Act comes into play.

11. Issues between the parties had actually arisen since the 1st respondent, after executing the Settlement deed had ventured into executing further documents. He first executed, along with the appellant, a sale deed for a portion of the property namely 16 cents in Item No.1 and Item No.5 in favour of the 3rd respondent. This Sale deed was on



01.04.1985. Then, he executed a Cancellation deed on 04.01.1988. For good measure, he also sold the property to the 2nd respondent on 23.03.1988. The validity of all these documents can be examined only in the Second Appeal.

12. The appellant died. Naturally, the legal representatives should be brought on record. But, she had no legal representative apart from the 1st respondent who is her husband with whom she had a strained relationship from the year 1966 when she filed a petition seeking maintenance before the competent Judicial Magistrate Court.

13. A Will had been produced and that Will was directed to be tested by a learned Single Judge of this Court, by an order dated 17.11.2009.

14. The learned Single Judge was of the opinion that the Will should be put to test and should be proved in manner known to law. The Will should be proved under Section 68 of the Indian Evidence Act, by examining the attestors. If the attestors are not available, then after going through the procedure under Order 16 Rule 10 CPC, the Court should take recourse to Section 69 of the Indian Evidence Act.

15. The parties were relegated back to the Trial Court. The propounder of the Will was examined as P.W.1. The Will was marked as Ex.P1. One of the attesting witnesses, Mannangatti was examined as



P.W.2. The second attesting witness had died and therefore, his wife Kasiammal was examined as P.W.3.

16. The learned Single Judge of this Court had further directed that the findings should be recorded and a report should be given by the Trial Court. Unfortunately, only the docket sheet is available and in that, it had been endorsed that the Will had been proved. The findings are not available. Therefore, with the consent of both the learned counsels, this Court had undertaken the exercise of examining the evidence recorded to determine whether the Will had been proved in manner known to law.

17. Mr.N.Suresh, learned counsel for the petitioner stated that necessary witnesses had been examined and the learned counsel rested his case on the evidence recorded and invited the Court give findings on the nature of the evidence recorded.

18. Mr.Muthukumarasamy, learned counsel for the respondents on the other hand pointed out that P.W.3.Kasiammal, in her chief examination stated that her husband was called upon to sign as a witness. But in cross examination, she stated that she knew directly about the attestation of the Will. It was also pointed out by Mr.Muthukumarasamy, learned counsel that the execution of the Will and the registration of the Will took place on the same day itself. It was also stated that the Will had been prepared by one Palanisamy and one Senthil had typed it. It must be pointed out that to prove a Will, the legislature has stated under Section 68 of the Indian Evidence Act, that the attestors should be examined.



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19. A person who identifies the executant before the Sub Registrar or even the Sub Registrar or even the Scribe are strictly not relevant witnesses. If the attestors speak to the attestation of the Will, then, to a little extent, the Will can be held to have been proved in manner known to law.

20. In the instant case, the first attesting witness was available and he had been examined. The second attesting witness is said to have died and the death certificate, Ex.P2 had been produced by his own wife. Therefore, there cannot be any doubt of that particular fact. She was examined as P.W.3.

21. The only suggestion which was put to the propounder of the Will was that a stranger was produced as executant of the Will before the Registrar at the time of registration. If that point had to be pressed further, then, the onus shifts to prove that suspicious circumstance to the person who doubts the Will. Summons could have been issued to both Palanisamy, who prepared the Will and Senthil who typed the Will and also to the Sub Registrar to examine whether the Will was registered through proper procedure and regarding the identification of the person who executed the Will. Unfortunately, no such steps had been taken by the respondents.



22. It is also to be noted that once the attesting witness have spoken, then, a reasonable presumption can also be brought under illustration (e) of Section 114 of the Indian Evidence Act, that registration was done in manner known to law. The Will has been registered.

23. Therefore, I would return a finding that the Will had been proved in manner known to law.

24. The next issue which has to be examined is the delay aspect. It is stated by Mr.Muthukumarasamy, learned counsel that there has been a delay of 949 days in bringing on record the legal representatives. In the order dated 17.11.2009 at para 7, the learned Single Judge had very specifically stated that *“the expression “sufficient cause” should not be construed very strictly. Whether delay in filing application has been satisfactorily explained or not could be examined at a later stage.”*

25. The learned counsel for the respondents had referred to para 6 of the said order. The observation of the learned Single Judge was as follows:

“6.The respondent resisted the applications denying the genuineness of the Will and that based on the Will, petitioner cannot be impleaded as legal representatives in the Second Appeal. It was further submitted that there is an enormous delay of 928 days for filing the applications to set aside the abatement. Further contention of respondent is that in any event based on the Will, petitioner/appellant cannot be impleaded as a legal representative at this



stage of Second Appeal.”

Thereafter, the learned Single Judge had stated that whether the delay had been explained or not can be examined at a later stage.

26. In the affidavit filed in support of these applications, it had been stated that by the Will which has now held to be proved dated 12.01.2000, the appellant had bequeathed the property to him. It had been stated that due to inadvertence and illiteracy, he could not inform the counsel about the death of the appellant, and therefore, there was a delay of 928 days. Very specifically the appellant had stated that owing to inadvertence, he did not bring to the fact of the death of the appellant. But, he had produced the Will. The fact that since he is a beneficiary under the Will, he steps into the shoes of the appellant cannot be disputed or denied. The only aspect is the question of delay in filing these applications.

27. It is also to be noted that the Second Appeal had been admitted and substantial questions of law had been framed. This shifts the burden to this Court to answer the substantial questions of law. The parties should know as to where they stand and when they had raised substantial questions they expect answers from the Court.

28. Short-circuiting the Second Appeal on the ground of delay, in my opinion, would not be to the advantage of any one of the parties. The Will stands proved. Quite independently, the beneficiary can still lay a suit on the basis of the Will and claim inheritance on the basis of the Will and still claim a right of declaration over the properties. That would only bring about multiplicity of proceedings. It is only advisable that the present



appeal itself is heard on its merits and the substantial questions of law as framed are answered.

29. With respect to the delay, in the counter affidavit, it had been stated that an application had been filed on an earlier occasion in October 2006, and a copy was served on the counsel by letter dated 07.12.2007, but that application was not pursued further and then the present application had been filed. There is no mention in the counter about the reason given, namely illiteracy and that it was a false reason. It is only stated that an earlier application had been filed in the year October 2006.

30. Taking an over all view of the matter, particularly throwing the burden on the Court to answer the substantial questions of law and more particularly, since the Will has been held to be proved which gives right to the beneficiary under the Will to pursue further the Second Appeal, I would allow these applications.

31. It must also be mentioned that under Order 22 Rule 9 of the Code of Civil Procedure, where an assignee steps in, he can still claim that his right should be examined on the basis of the document which grants assignment. Here, he claims right under the Will which had granted such right to pursue further to seek declaration of title.

32. Therefore, I would condone the delay, set aside the abatement and allow all these applications.



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C.M.P.Nos.882, 883 & 884 of 2009

C.V.KARTHIKEYAN, J.

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33. Mr.Muthukumarasamy, learned counsel sought an observation to be made that any opinion if made touching upon the merits of the Second Appeal, can be taken to have been mentioned with intention to decide only these applications and not any issue in the main Second Appeal.

29.08.2022
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C.M.P.Nos.882, 883 & 884 of 2009
in S.A.No.1133 of 2001
and C.M.P.Nos.47, 48 & 49 of 2015