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S.A No.495 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.10.2022

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A No.495 of 2014

Arumugam (Deceased)

(Cause title accepted vide order of Cour dated 21.04.2014 made in M.P No.1 of 2014 in S.A No.99165 of 2011)

A.Saraswathi ... 2nd Defendant/Appellant/Lrs of Appellant

Vs.

1.Jayalakshmi

... Plaintiff/Respondent / Respondent

2.Sengodan @ Sengottaiyan

... 1st Defendant/2nd respondent/ 2nd respondents

PRAYER: This Second appeal filed under Section 100 of the Code of Civil Procedure against the judgement and decree dated 28.01.2010 passed in A.S No. 134 of 2008, on the file of Sub Court, Rasipuram, Confirming the Judgment and Decree dated 31.10.2006 passed in O.S No. 39 of 2005 on the file of the Additional District Munsif Court, Rasipuram.

For Appellant : Mr.Jagdish
For Respondents : Mr.R.Jayaprakash



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JUDGMENT

The appellant herein is the legal heirs of deceased Arumugam who is second defendant in suit O.S No. 39 of 2005 on the file of the District Munsif Court, Rasipuram filed by the first respondent/ plaintiff Jeyalakshmi for the relief of declaration to declare her right over the suit property by virtue of Will dated 28.06.1991 and for delivery of possession of properties from the defendants 1 and 2 who are her brothers. The first defendant submits that he has no objection to grant relief in favour of the plaintiff but the second defendant denied the plaintiffs right over the property and also admitted the Will executed by his father on 28.06.1991 but the said Will was cancelled by his father for the reason that the plaintiff married her own sister's husband. Thereafter his father created another un-registered Will on 24.12.1997. Based upon the Will dated the defendants created partition deed dated 13.10.2003 themselves.

2. The Trial Court framed issues with regard to both the Will said to be executed by her father MuthuGounder and on analysing the facts and evidence the Trial Court finally held that alleged second Will dated



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24.12.1997 is not proved by the defendants and the alleged partition deed dated 13.10.2003 also would not bind the plaintiffs. Consequently, the Trial Court declared the Will dated 28.06.1991 (marked as Ex.A1) is valid and genuine thereby decreed the suit in favour of the plaintiff as prayed for.

3. Aggrieved over the same the second defendant preferred an appeal in A.S No. 134 of 2008, wherein Lower appellate Court also analysed the facts, evidence and also documents on either side, held that the Will relied by the defendants has not been proved and the Will relied by the plaintiffs was admitted by the defendants hence the plaintiff was not bound to prove the Will, accordingly based upon the Ex.A1/Will plaintiff is entitled for the relief as she prayed for, hence appeal was dismissed by Lower Appellate Court by confirming the Trial Court findings.

4. Challenging the concurrent findings rendered by the Courts below the second defendant preferred this second appeal contending that the both Court miserably failed to appreciate the circumstances around Ex.A1 Will as there was mis-understanding between the plaintiff and her father MuthuGounder since the plaintiff failed to look after him left the house and married her own sister's husband against his father wish hence her father



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executed another Will dated 24.12.1997 in favour of his second sons/defendant herein. He also contend that he proves the execution of Will by examining one of the attestor D.W.2 in respect of the last Will, But Court below instead of appreciate the said witness, totally dis-believing the Will is misconception of law and facts, that apart the plaintiffs miserably failed to prove her Will independently by examining witness as written required under Section 68 of evidence Act, as well as section 63 of Hindu Succession Act. Hence findings of both the Court below liable to be set aside as unjust and erroneous one and prayed to set aside the same.

5.This Court admitted this second appeal with the following substantial questions of law:

- i. Whether the Courts below are right in granting the relief of declaration in favour of the 1st respondent/plaintiff based on Ex.A1 in the absence of proper oral evidences for proper execution?
- ii. Whether the Courts below are correct and proper in holding that the plaintiff has established her right over the suit property by way of Ex.A1, contrary to the provisions of Section 68 of Indian Evidence Act as well as Section 63 of the Hindu Succession Act?

6. The brief facts of the case are as follows:

The plaintiff Jayalakshmi and defendants 1 and 2 are daughter and sons of one Muthugounder, the suit properties were self acquired



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property of the said Muthugounder purchased out of his own income. He has executed a Will dated 28.06.1991 in favour of the plaintiff by bequeathing the suit properties. Later, her father died on 22.01.1998 thereafter the Will came into force as such she became absolute owner of the property. But the defendants has no right over the property caused interference and also created another Will dated 24.12.1997 and executed partition deed in their favour as if they alone had a right over the properties. Hence the suit.

7. The first defendant submitted a memo stated that he has no objection to grant relief in favour of the plaintiff. The Second defendant in his written statement stated that Ex.A1/Will executed by his father was not acted upon for the reason that the plaintiff got married her own sister's husband against the father's wish. Hence, his father cancelled the Will and executed a another un-registered Will/Ex.B1 dated 24.12.1997 in favour of the defendants. Thereafter, the defendants entered into partition on 13.10.2003 which was marked as Ex.A9 and enjoyed the suit properties thereby they denied the plaintiffs right over the suit properties.



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8. The learned counsel for the appellant/second defendant submitted that Ex.A1 Will relied by the plaintiff was not proved by the plaintiff by examining the witnesses as required under Section 68 of Evidence Act and also as per Section 63 of Hindu Succession Act. In spite of that the Court below erroneously upheld the Will as valid one though in respect of legal requirements concerned due examination of Will not complied by the plaintiff. Hence, the findings of the Court below liable to be set aside to support his contention he relied the following ratio laid down by the Supreme Court reported *in Ramesh Verma (Dead) by Lrs Vs Lajesh Saxena (Dead) by Lrs in 2017 (1) SCC 251*:

13. A Will like any other document is to be proved in terms of the provisions of Section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.

15. It is not necessary for us to delve at length to the facts of the matter as also the evidence adduced by the parties before the High Court. Suffice it to note that the execution of the Wills has to be proved in accordance



with **Section 68** of the Indian Evidence Act.

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9. Further relied another Judgement reported in **2010 (5) SCC 274** in the case of **in S.R. Srinivasa and others Vs S.Padmavathamma**:

25. In the case of H. Venkatachala Iyengar v. B.N. Thimmajamma, [1959 Supp (1) SCR 426] Gajendragadkar J. stated the true legal position in the matter of proof of Wills. The aforesaid statement of law was further clarified by Chandrachud J. in the case of **Jaswant Kaur v Amrit Kaur [(1977) 1 SCC 369]** as follows:

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since **Section 63** of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by **Section 68** of the Evidence Act, 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.

26. Applying the aforesaid principles to this case, it would become evident that the Will has not been duly proved. As noticed earlier in this case, none of the attesting witnesses have been examined. The scribe, who was examined as DW.2, has not stated that he had signed the Will with the intention to attest. In his evidence, he has merely stated that he was the scribe of the Will. He even admitted that he could not remember the names of the witnesses to the Will. In such circumstances, the observations made by this Court in the case of M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons, [(1969) 1 SCC 573], become relevant. Considering the question as to whether a scribe could also be an attesting witness, it is observed as follows:



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"It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

27. In our opinion, the aforesaid test has not been satisfied by DW.2 the scribe. The situation herein is rather similar to the circumstances considered by this Court in the case of *N. Kamalam v. Ayyasamy*, [(2001) 7 SCC 503]. Considering the effect of the signature of scribe on a Will, this Court observed as follows:

28. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a Will can be held to have been proved when the statutory requirements for proving the Will are satisfied. The High Court has however held that proof of the Will was not necessary as the execution of the Will has been admitted in the pleadings in O.S.No.233 of 1998, and in the evidence of P.W.1.

29. The contention that the execution of the Will has been admitted by the appellants herein had been negated by the First Appellate Court in the following manner:

"What is admitted under EXD 36 i.e. plaint in O.S No: 233/98 at Para 7 is only about the will and not the genuineness of the will. During evidence of PW 1, it is elicited in the cross examination that he came to know about the will of Puttathayamma as it was revealed in the written statement and that Puttathayamma might have written the will dated 4-7-74. But PW 1 has not admitted the genuineness of the will anywhere in his evidence. Therefore the contention of the learned Advocate for the first respondent that the execution of the will is admitted and therefore its genuineness is to be presumed cannot be accepted"

30. The aforesaid findings are borne out from the record produced before us, which we have perused. There is no admission about the genuineness or legality of the Will either in the plaint of OS No.233 of 1998 or in the evidence of PW1. The High court committed a serious error in setting aside the well



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considered findings, which the first Appellate Court had recorded upon correct analysis of the pleadings and the evidence.

35. Examined on the basis of the law stated above we are unable to agree with the High Court that there was no need for independent proof of the Will, in view of the admissions made in OS No.233 of 1998 and the evidence of PW1. In fact there is no admission except that Puttathayamma had executed a Will bequeathing only the immovable properties belonging to her in favour of Indiramma. The First Appellate Court, in our opinion, correctly observed that the aforesaid admission is only about the making of the Will and not the genuineness of the Will. Similarly, PW1 only stated that he had come to know about the registration of the Will of his grandmother favouring Indiramma through the written statement of the first defendant. The aforesaid statement is followed by the following statements "Other than that I did not know about the Will. She was not signing in English. I have not seen her signing in Kannada. There was no reason for my grand mother to write a Will favouring Indiramma." Even in the cross- examination he reiterated that "I know about the will written by Puttathayamma on 18.6.1974 bequeathing the properties to Indiramma only through the written statement of the first defendant." In view of the above we are of the opinion that the High Court committed an error in setting aside the well-considered finding of the First Appellate Court. The statements contained in the plaint as well as in the evidence of PW1 would not amount to admissions with regard to the due execution and genuineness of the Will dated 18.6.1974.

10. By way of reply the learned counsel for the plaintiffs/respondent submitted the in their written statement itself these defendants admits the execution of Will, hence no proof is necessary to prove the execution of the Will and the Court below rightly appreciated these aspects which needs no interference, to support their case he relied the ratio laid down following Judgements reported in *2009 law weekly page*



309 in the case of Minor Mani, Rep by next Friend/Mother Ramayi Vs 1.

WEB COMMENTS: Ammukannu and others:

*15. Yet another reasoning given by the lower appellate Court in not giving credence to Ex.P.1, Will, is that none of the two attestors, though alive, has been brought into the box to speak about the execution of the said exhibit. Of course, **Section 68** of the Indian Evidence Act contemplates that if a document is to be used as a piece of evidence, at least, one attesting witness has to be called to the box for the purpose of proving its execution. But, in the instant case, D.W.2 has categorically deposed that he is in possession of a portion of the suit property by virtue of Ex.P.1, Will. D.W.2, when he accepts his possession of a portion of the suit property by virtue of Ex.P.1, Will, is estopped from disputing the execution of the same exhibit as regards bequeathing of the suit property to the plaintiff. Thus, the reliance placed by the counsel for the respondents on a catena of decisions to the effect that as per **Section 68** of the Evidence Act, at least one attesor to the document should have been examined cannot be made applicable to the case on hand for the reason that even in one of those judgments relied on by him in Penumetcha Peddiraju's case (1990 (1) ALT 17), it has been candidly held that when the execution of the Will is admitted and when the attestors are dead, evidence of a person who is acquainted with the handwriting of an attesor can be sufficient proof, and there is no necessity of calling for the attestors in compliance with the provisions of **Section 68** of the Evidence Act; if a party admits execution of a document, no proof is necessary and also in view of the fact that in the instant case, the execution of Ex.P.1, Will, has categorically been admitted by both the defendants themselves.*



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11. On Considering the rival submissions, the plaintiff very

much relied the admission made by the defendants in thier written statement about the execution of Ex.A1/Will argued that admitted facts need not be proved. Considering that, on perusal of the written statement in paragraph 3 and 5, second defendant admits that his father Muthugounder executed a registered Will dated 28.06.1991 in favour of the plaintiff. The appellant submission is that the plaintiff married her own sister's husband against her father's wish hence the said Will was cancelled and his father executed another un-registered Will Ex.B1. According to the defendants Ex.B1 is last Will so burden is on him to prove the said Will was last Will executed by his father. To prove the execution of the Ex.B1/Will, on the side of the defendants attesor of the Will is examined as D.W.2, he deposed that at the time of the execution of the Will Muthugounder was unable to walk and also un-well. Both the Court below concluded that D.W.2 not stated about the said Muthugounder was in sound and disposing state of mind. Thereby, concluded that Ex.B1 was not proved by the second defendant, that apart in the partition deed Ex.A9 there is no mentioning about the Ex.B1 Will and the recitals are shown as if that the Muthugounder was died intestate, hence the Court below held that if really Ex.B1 Will was executed it should have



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been mentioned in the partition deed/Ex.A9 but there is no such particulars about the Will in Ex.A9, which itself proves that subsequently it was created by the Second Defendant for un-lawful gain. Hence, validity, truthness and genuineness of Ex.B1/Will is doubted, and not accepted as valid Will by the Courts below. The Case of the plaintiff is that as per the Ex.A1 registered Will after death of her father she became an absolute owner of the suit properties. The Law requires due execution of the Will is to be proved by the propounder examining any one of the attesor as per the section 68 of the Evidence Act. But on the side of the plaintiff no witness was examined to prove the execution and genuineness of the Ex.A1 dated 28.06.1991.

12. The learned counsel for the plaintiffs submitted that since the defendants admits the execution of Ex.A1/Will in their written statement as it is the admitted fact which need not be proved, hence there is no necessity for the plaintiffs to prove the EX.A1/Will. As discussed above, the second defendant in his written statement stated that his father executed the registered Will in favour of the plaintiff and also contended that subsequently his father cancelled the Ex.A1/ Will. But the admission made

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by the defendant is only about the making of the Will and not the genuineness of the Will. On due examination of the witness, the propounder has to show that testator was in sound disposing state of mind and put his signature in the document with consent and knowledge, and the said document not to be used as evidence until one attesting witness atleast has been call for the purpose of proving its execution as it mandated under Section 68 of evidence Act. But the plaintiffs not taken any steps to examine any one of the contesting witness to prove the above said facts with regard to genuineness of Ex.A1 Will. Mere admission on the part of the defendants would not discharge the plaintiff to prove the legal requirements concerned in due examination of the Will. The Judgement relied by the appellant is squarely applicable to the facts of the present case. The Judgmement relied by the plaintiff/respondent is not applicable to the fact of the present case for the reason that the defendant not categorically admitted the genuineness and truthness of the Will as discussed above. Since the plaintiffs failed to prove the execution of the Will as well as its genuineness independently by examining any one of the witnesses. But both the Court below simply decreed the suit by relying the written statement about the execution of the Will made by the defendants without appreciating the entire contents of the



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written statement. It is totally erroneous one. When the law requires the plaintiffs to prove the truth and genuineness of the Will independently but she failed. Both the Court below gave much weight to the admission made in the written statement and granted relief in favour of the plaintiff by ignoring the legal requirements and also forget the proposition that admission is based upon the opposite party can rely upon and that is not conclusive.

13. Hence, the findings rendered by the both the Court below are misconception of law and facts is liable to be set aside. Accordingly the questions of law are answered. Therefore, the second appeal is allowed and the findings rendered by both the Courts below is hereby set aside. Hence the suit is dismissed. No costs.

18.10.2022

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To

1. The Sub Court, Rasipuram
2. The Additional District Munsif Court, Rasipuram.

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T.V.THAMILSELVI,J.

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