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A.No.4073 of 2022

**A.No.4073 of 2022
in
T.O.S.No.6 of 2018**

G.CHANDRASEKHARAN,J.

Application No.4073 of 2022 is filed to issue subpoena to the Presbyter-in-charge, CSI Egmore Wesley Church, 958, Poonamallee High Road, Chennai to Produce the marriage register showing the signature of R.H.Joseph (Ravi Joseph) on 12.06.1984 who is no more now. The Learned Counsel for the Applicant submitted that T.O.S.No.6 of 2018 was filed for grant of Letters of Administration of the Will dated 26.03.1984 of late father A.R.Cycil. In the said Will, the Respondent's husband R.H.Joseph was one of the attesting witnesses. The second attesting witness namely S.Jaganathan, citing old age, refused to file affidavit in this matter. In the said circumstances, it has become necessary for proving the signature of R.H.Joseph, attesting witness.

2.This Application is opposed by the Learned Counsel for the Respondent on the ground that when one of the attesting witnesses is alive, it is necessary on the part of the Applicant to take steps for examining the



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attesting witness. Only in the absence of attesting witness, the other mode of proving the signature of attestor will arise. He further submitted that Respondent has not denied the signature of her husband R.H.Joseph in the Will. Therefore, it is not necessary for summoning the marriage register for proving the signature of R.H.Joseph.

3.In reply, the Learned Counsel for the Applicant submitted that in Paragraph No.6 of the counter affidavit, it is denied by the Respondent that her husband R.H.Joseph signed as one of the attesting witnesses.

4.Continuing his submission, the Learned Counsel for the Respondent submitted that Applicant is not entitled to prove the signature of Respondent's husband in the Will. He further produced a copy of the Judgment of the Hon'ble Supreme Court in the case of "**Janki Narayan Bhoir Vs. Narayan Namdeo Kadam**" reported in "**2003 2 SCC 91**" and Paragraph No.10 is extracted as follows:

“10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be



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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 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



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that Section 68 of the 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 establish a will in a court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a



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position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due



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execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”

5.Considered the rival submissions and perused the records.

6.It is seen from the submissions made by the Learned Counsel appearing for the parties, especially, Learned Counsel for the Applicant that out of the two attesting witness, one attesting witness namely, R.H.Joseph was dead and other attesting witness is an aged person and he is refusing to file affidavit in the matter. However, there is an option open to the Applicant to enforce his attendance by taking summons through the Court or taking steps for examining him through the Advocate Commissioner. It is for the Applicant to take proper steps for proving the Will.



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7. With regard to the present Application seeking permission for summoning the marriage register containing the signature of deceased R.H. Joseph, the attesting witness, it is seen from the counter affidavit filed by the Respondent that, to her knowledge, her husband R.H. Joseph did not sign as an attesting witness. At least to prove that the deceased R.H. Joseph did sign in the Will, it is necessary that the marriage register mentioned in the Application has to be summoned for comparison by the expert. This is only an exercise to find out whether the deceased R.H. Joseph signed as attesting witness in the Will or not. There is no second opinion with regard to the proposition laid down in the Judgment referred supra. The question is what is the mode of proof of Will in the absence of any of the attestors. Execution of Will has to be proved in the manner known to law. In this view of the matter, the objection raised by the Learned Counsel for the Respondent is rejected and this Application is allowed. Registry is directed to issue subpoena to the Presbyter-in-charge, CSI Egmore Wesley Church, 958, Poonamallee High Road, Chennai to Produce the marriage register showing the signature of R.H. Joseph (Ravi Joseph) on 12.06.1984 and send



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the matter to the Learned Additional Master - II.

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10.11.2022

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Dated:10.11.2022