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A.No.4262 of 2022 in T.O.S.No.12 of 2021

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in
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Reserved on 26.10.2022	Pronounced on 04.11.2022
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G.CHANDRASEKHARAN, J.

This application is filed to eschew the proof affidavit dated 10.08.2022 and the averments in the proof affidavit in paragraph 9, 13 to 27 and eschew the documents to be marked as Exhibits A1, A5, A6, A11, A12, A13, A14, A15, A16 and A17.

2.The learned counsel for the applicants submitted that the respondent filed O.P.No.164 of 2020 for grant of letters of administration in respect of the alleged Will and Testament of late C.Shyamalavalli. Since the applicants had entered caveat, O.P.No.164 of 2020 was converted into Testamentary Original Suit and numbered as T.O.S.No.12 of 2021.

3.The defendants have filed detailed written statement. Issues had been framed and the matter was pending before the learned Master for



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recording of evidence. PW1 filed proof affidavit and it contained irrelevant particulars and details, which are alien to the testamentary proceedings. The only issue which arise for consideration of this Court is that whether the alleged Will projected by the plaintiff is true, genuine and it was executed by the testatrix on her own volition or not? However, the plaintiff had mentioned about various civil litigations which are pending before the Courts. Suit filed in C.S.No.252 of 1996 by the applicants' father's aunt Smt.Saraswathi Ammal and paternal grandfather's sister is pending before this Court. The suit filed by the respondent in C.S.No.476 of 2008 is also pending before this Court. Late.Shyamalavalli filed a suit in C.S.No.949 of 2004 against her son Late.C.Sathyanarayanan, father and mother of the defendants for dissolution of partnership and rendition of accounts. T.O.S.No.1 of 2004 was filed by their late father C.Sathyanarayan prior to filing of O.P.No.255 of 2022 on the basis of the last Will and Testament of late E.K.Pattabirama Reddiar, dated 22.10.1982. The respondent produced nearly 17 documents treating the testamentary proceedings as a civil suit. Ex.A1 Will of Late C.Shyamalavalli has to be received only through the



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attesting witness. Exs.A5 and A6 are the photocopy of first Will of Late C.Shyamalavalli and cancellation of the Will. Photocopies cannot be received as evidence. Late C.Shyamalavalli was not capable of understanding English. Since the jurisdiction of this Court is confined only to the genuineness and validity of the Will, other irrelevant particulars or details which are alien are totally unnecessary for adjudication of the issue involved in this case are to be eschewed. Therefore this petition.

4.The learned counsel for the respondent submitted that there is no provision in C.P.C. to eschew the evidence. The applicants made several allegations running to 23 paragraphs of 16 pages written statement, with the documents, inviting reply statement. After filing the reply statement, issues were framed. The proof affidavit is filed on the basis of the averments made in the plaint, written statement and reply statement. Even in the application filed for eschewing the evidence, several alien factors had been brought in. If the allegations made in the written statement are not denied and not controverted, the applicants would claim



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that the uncontroverted allegations are deemed to be admitted. Therefore, a detailed proof affidavit is filed. The Will was already identified at the time of filing. The respondent filed documents to disprove the defendants' case and substantiate her case. Even before marking the documents, this application is filed. The applicants are squatting on the properties and the respondent is prevented from enjoying the property. O.P.No.255 of 2022 was filed to probate the Will dated 22.10.1982 alleged to have been executed by E.K.Pattabirama reddy. The suit in C.S.No.157 of 2021 filed on the basis of the Will dated 22.10.1982 was rejected by this Court. This application is an abuse of process of law and therefore, is liable to be dismissed.

5.In reply to the submissions, the learned counsel for the applicants submitted that elaborate pleadings are not necessary. The suit in C.S.No.476 of 2008 and C.S.No.949 of 2004 are pending before this Court. The evidence tendered by a witness in a judicial proceedings or before any person authorized by law, is relevant only under certain circumstances. The evidence of R.D.Suryaprakash tendered in



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T.O.S.No.1 of 2004 may not be of any legal consequences or effects.

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Power of Attorney and the application in A.No.1367 of 2013 in C.S.No.949 of 2004 is of no relevance in testamentary proceedings. The order passed in A.No.242 of 2021 in C.S.No.157 of 2021 cannot be looked into since the appeal against the order is admitted by the Division Bench . The evidence tendered by S.Nirmala cannot be looked into as she will be examining herself as a witness in this case. The orders passed in A.Nos.7187 to 7190 of 2019 are subject matter of OS Appeal and it cannot be looked into now. Patta dated 17.01.2019 and the sale deed dated 01.07.1988 cannot be the subject matter of enquiry in the testamentary proceedings. Thus, he prayed for dismissal of this application.

6.In support of his submissions, the learned counsel for the applicants pressed into service the following judgment and the relevant portion is extracted hereunder:

Shalimar Chemical Works Limited. vs. Surendra Oil & Dal Mills (Refineries) and others, reported in ***(2010) 8 SCC 423***



15. On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have “marked” as exhibits the xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility. The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded.

7. In support of his submissions, the learned counsel for the respondent pressed into service the following judgments and the relevant portions are extracted hereunder:

1. Bipin Shantilal Panchal vs. State of Gujarat, reported in (2001) 3 SCC 1

12. As pointed out earlier, on different occasions the trial Judge has chosen to decide questions of admissibility of documents or other



items of evidence, as and when objections thereto were raised and then detailed orders were passed either upholding or overruling such objections. The worse part is that after passing the orders the trial court waited for days and weeks for the parties concerned to go before the higher courts for the purpose of challenging such interlocutory orders.

13. It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fallout of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the



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benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last



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stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence-taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection,



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without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

16. We, therefore, make the above as a procedure to be followed by the trial courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence.

2.J.Vasantha Vs. Johnson reported in **2016 – 3 – L.W.743.**

9.The point for consideration is whether abmissions, the recording of answers of the petitioner with objections is correct or not.

10. This issue is no longer res integra. The said issue was already settled by number of Judgments of the Hon'ble Apex Court as well as this Court. It is settled that the evidence, both oral and documentary should not be shut down at the initial stage itself. The same has to be taken on file subject to objections. The said evidence has to be



*considered on merits at the time of final hearing
and either rejected or sustained.*

8.Considered the rival submissions and perused the records.

9.Appendix II Form 59 of Madras High Court Original Side Rules provides the format for the petition for letters of administration. It is submitted by the learned counsel for the applicants that the pleadings are to be confined to this format and not beyond that. However, the pleadings in this testamentary proceedings went beyond the scope of the lis and included many things, like previous litigations, which are not germane to the issues as to whether the Will was executed by the testatrix and whether the plaintiff was entitled for the grant of letters of administration.

10.It is true that perusal of the petition averments shows that apart from stating the execution of the impugned Will by Late C.Shyamalavalli on 11.08.2010, certain other averments are made with regard to the pendency of the civil litigations, namely, C.S.Nos.252 of 1996, 476 of



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2008, 949 of 2004 and T.O.S.No.1 of 2004. Reference is also made with regard to the execution of the earlier Will by the Testatrix on 12.11.2003, its revocation in the year 2000 and the execution of the present Will. These averments cannot be considered outside the scope of the enquiry. However, the main scope of enquiry in this case is whether the testatrix Late C.Shyamalavalli had executed the Will dated 11.08.2010.

11. When it is claimed by the learned counsel for the applicants that the petition averments are made with irrelevant particulars and details, written statement of the applicants is very elaborate running to 16 pages. Not only the averments made in the petition are denied, disputed, certain new facts had also been referred in the written statement. For a five page petition, the written statement runs into 16 pages. As rightly pointed by the learned counsel for the respondent that if the allegations in the written statement are not denied and explained, the applicants would claim that the uncontroverted allegations would be deemed to have been admitted. Thus, the filing of the lengthy proof affidavit, in the facts and circumstances of the case, cannot be faulted.



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12.With regard to marking of documents Exs.A1, A5, A11 to A17, these documents are not yet marked. Plaintiff filed proof affidavit that 17 documents would be marked. A perusal of these documents shows that the impugned Will is shown as the first document. It is the original Will. There is no wrong in marking this Will through PW1. Marking is different from proof of document. The Will can be proved only if an attesting witness is examined, but it is not necessary that the Will should be marked only through attestor and it can be marked through the proponent/beneficiary under the Will. Therefore, the objections of the applicants in this regard is rejected. Document Nos.2, 3 & 4 are the originals of the death certificates of C.Shyamalavalli, P.Chakrapani Reddiar & E.K.Pattabirama Reddiar respectively. There is no legal impediment in marking these documents.

13.Document No.5 is the Will dated 12.11.2003 of C.Shyamalavalli and Document No.6 is the cancellation of Will dated 03.08.2004. Both these documents are xerox copies. Xerox copies of



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documents cannot be marked. Similarly, Document Nos.7, 8, 9 are the xerox copies of the legal heirship certificate of P.Chakrapani Reddiar & E.K.Pattabirama Reddiar and C.Sathyanarayanan respectively. Xerox copies of the documents cannot be marked. If a party wants to mark xerox copies, non availability of originals must be explained. It appears that there is no explanation or reason given for non availability of originals of Document Nos.5 to 9. In the absence of any acceptable, legal explanation for non production of originals, these documents cannot be permitted to be marked.

14.Document No.10 is the death certificate of C.Sathyanarayanan. It can be received in evidence. Document No.11 is A.No.242 of 2021 in C.S.No.157 of 2021. It can be received in evidence. Document No.12 is the power of attorney and A.No.1367 of 2013 in C.S.No.949 of 2004. This document can also be received in evidence. Document No.13 is the evidence of Nirmala. The evidence of Nirmala, who is a living person, can be used only for contradiction or corroboration. The entire evidence as such cannot be received in evidence. Similarly, Document No.17, the



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deposition of R.D.Suriyaprakash can be used only for the purpose of contradiction or corroboration. The entire evidence as such cannot be received in evidence. Document No.14 is the order passed in A.No.7187 to 7190 of 2019 in C.S.No.476 of 2010. Though it is claimed that the appeal is admitted against the order, that does not mean that this order cannot be received in evidence. Therefore, this document can be received in evidence. Document Nos.15 and 16 are the patta and sale deed to show the title of the property. We are not going to decide title in this case. However, these documents can be received in evidence for showing the title and to decide the rival claim on the Will.

15.In this view of the matter, this Court is of the considered view that it is not necessary to eschew the proof affidavit dated 10.08.2022, especially paragraph Nos.9, 13 to 27. Documents can be received in evidence as indicated above. Accordingly, this application is allowed in part.

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Index: Yes/No



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Internet : Yes/No

Speaking Order/Non-Speaking Order

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Pre-Delivery Order in
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