



S.A.No.527 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**JUDGMENT RESERVED ON : 29.07.2022**

**JUDGMENT DELIVERED ON: 11.10.2022**

C O R A M

THE HONOURABLE Ms.JUSTICE P.T.ASHA

**S.A.No.527 of 2021**

Akkinirajan

.. Appellant

-Vs.-

1. Maheswari
2. Visalakshi
3. Shenbagavalli
4. Sudha
5. Balasubramaniam
6. A.Shanmugasundaram

.. Respondents

**PRAYER:** This Second Appeal is filed under Section 100 of C.P.C., against the Judgment and Decree dated 07.06.2019 in A.S.No.13 of 2018 on the file of the Subordinate Judge, Udumalpet, reversing the judgment and decree dated 28.04.2018 in O.S.No.490 of 2012 on the file of District Munsif, Udumalpet.



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For Appellant : Mr.AR.L.Sundaresan,  
Senior Counsel  
for Ms.A.L.Gandhimathi

For Respondents 1 to 4 : Mr.V.Prakash Babu

For Respondents 5 and 6 : Mr.K.Selvaraj

### **JUDGMENT**

The plaintiff in a suit for partition is the appellant before this Court, challenging the reversal of the judgment and decree of the learned District Munsif, Udumalpet in O.S.No.490 of 2012 by the learned Subordinate Judge, Udumalpet in A.S.No.13 of 2018.

2. The facts in brief which are essential for disposing of the above second appeal are herein below set out and the parties are referred to in the same litigative ranking as before the trial Court.

3. The Second Appeal was admitted by this Court on 12.08.2021 on the following substantial questions of law:

*(a) Whether the first appellate Court correct in reversing the judgment and decree of the trial Court*



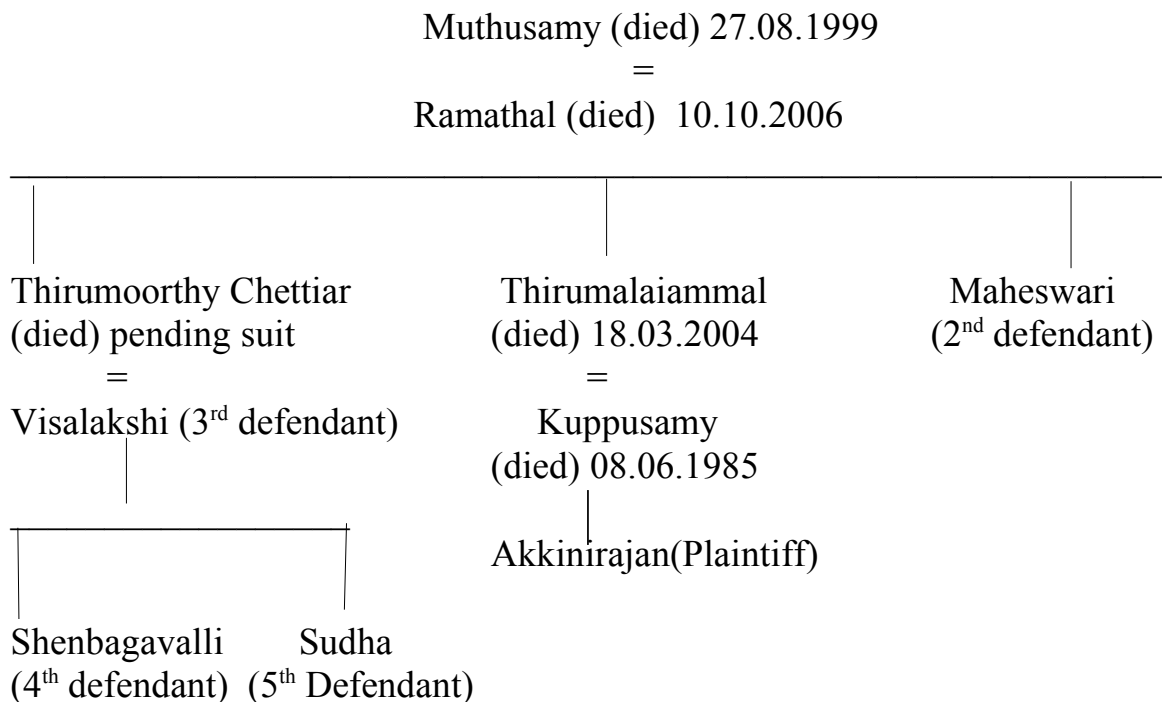
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*especially when Exs.B24 and B25 have not been proved  
in the manner known to law?*

*(b) Whether the learned Subordinate Judge is  
correct in not considering the fact of total disinheritance  
of the daughter?*

*(c) Whether the learned Subordinate Judge is  
correct in finding that the Will proved in the absence of  
the evidence of the attestors of the Will?*

4. The Genealogy is herein below reproduced for appreciating the  
relationship between the parties:





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**5. Plaintiff's case:**

It is the case of the plaintiff that “A” schedule suit property was purchased by his maternal grandfather, Muthusamy Chettiar under a Sale Deed dated 23.11.1958 and “B” schedule suit property was purchased by his maternal grandfather, Muthusamy Chettiar and maternal grandmother, Ramathal under two separate Sale Deeds dated 28.02.1972. It is the further case of the plaintiff that the said Muthusamy Chettiar died on 27.08.1999, his mother Thirumalaiammal, pre-deceased her parents on 18.03.2004. Thereafter, Ramathal, the maternal grandmother, passed away on 10.10.2006. His father, Kuppusamy also passed away on 08.06.1985. Admittedly, the suit properties are self acquired properties of the said Muthusamy Chettiar and Ramathal. On their death, the plaintiff and the defendants 1 and 2 became entitled to a 1/3<sup>rd</sup> share each. Since the plaintiff was not able to enjoy the properties jointly with other co-owners, he had requested the defendants through common friends to effect a partition. Originally, the defendants had informed the Panchayatars that the partition would take after 06.08.2012, but they reneged on their promise. However, the plaintiff came to learn that the defendants were attempting to alienate



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the properties. Therefore, they had come forward with the instant suit for a partition and separate possession of their 1/3<sup>rd</sup> share in the suit schedule properties.

6. **Written statement of the defendants:**

The first defendant had filed a written statement, which was adopted by the second defendant. It is their contention that the suit is nothing but an abuse of process of Court, as several true facts were suppressed. They would admit that the properties are the self-acquired properties of both Muthusamy Chettiar and Ramathal. However, they would submit that, on 03.06.1987, the said Muthusamy Chettiar had executed a Will bequeathing the entire properties to the children of the first defendant with the life interest in favour of the first defendant. Muthusamy Chettiar thereafter passed away on 27.08.1999 without revoking the Will. The mutation of the Revenue Records were done in the name of the fourth defendant, Shenbagavalli. It is the contention of the defendants that they have been enjoying the properties exclusively by seeking crop loan from the Cooperative Banks, for which, they had mortgaged the suit properties. It is



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their further contention that on 28.02.1972, an undivided  $\frac{1}{2}$  share in an extent of 23.39 acres, which is described as “B” schedule properties, was purchased by Ramathal. On 01.12.1989, Ramathal had executed a Will, bequeathing life interest on the first defendant and absolute right on the children of the first defendant. The said Ramathal passed away on 10.10.2006. With the demise of Ramathal without revoking or cancelling the Will, the first defendant and his children became entitled to the properties. It is also their contention that they have been jointly in enjoyment of the suit properties. They had further contended that from the date of the death of the testators, they have been in exclusive possession and enjoyment of the properties for over two decades. That apart, it was also their contention that certain persons from whom Ramathal had borrowed money, had instituted suits for recovery of money in O.S.Nos.84, 90 and 91 of 2009 against the plaintiff and the legal heirs of the said Ramathal. Therefore, they sought for dismissal of the suit.



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**7. Reply statement of the plaintiff:**

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To the written statement, the plaintiff had filed a reply statement denying the Will and placing the onus upon defendants 1 and 2 to prove the same. They had once again reiterated the main contentions of their plaint and had contended that the suit has to be decreed.

8. The Trial Court, on considering the pleadings, had framed the following issues:-

“1. வாதிக்கு வழக்கு சொத்துக்களில் 3ல் 1

பங்குரிமையுள்ளது என்பது உண்மையா?

2. வாதிக்கு கிடைக்கத்தக்க வேறு நிவாரணம்

என்ன?”

9. Thereafter, on 08.03.2017, the following additional issues were framed:

“1. வாதியின் தாய்வழி பாட்டனார் திரு.முத்துசாமி

செட்டியாரின் 03.06.1987ம் தேதியிட்ட உயில் ஆவணம்

உண்மையானதா? அது வாதி மற்றும் பிதிவாதிகளை

கட்டுப்படுத்தக்கூடியதா?



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2. வாதியின் தாய்வழி பாட்டனார் திருமதிராமரத்தாள்

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01.12.1989 தேதியிட்ட உயில் ஆவணம் உண்மையானதா? அது

வாதி மற்றும் பிரதிவாதிகளை கட்டுப்படுத்தக்கூடியதா?”

10. An application was taken out by the plaintiff for a direction to the defendants to adduce the evidence first, since they had taken a defence that the said Muthusamy Chettiar and Ramathal have not died intestate, but have executed a testamentary deed (Will) in favour of the first defendant and his children. Therefore, the fourth defendant was examined as D.W1, 6<sup>th</sup> defendant as D.W2, one Ananthakrishnan as D.W3, Duraisamy as D.W4, Kathiresan as D.W5 and one Gnanasekar as D.W6. Exs.B1 to B29 were marked on the side of the defendants. The plaintiff had examined himself as P.W1 and marked Exs.A1 to A21.

#### **11. Trial Court:**

The Trial Court ultimately decreed the suit by holding Exs.B24 and B25-Wills are fabricated documents since Exs.B24 and 25 have not been proved in the manner known to law. Considering the fact that both the



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parties have admitted that the suit properties are the self acquired properties of the said Muthusamy Chettiar and Ramathal, the trial Court decreed the suit for partition.

**12. Lower Appellate Court:**

Challenging the said judgment and decree, the defendants 1 to 4 have filed an appeal in A.S.No.13 of 2018 on the file of the Subordinate Court, Udumalpet. The learned Subordinate Judge took a view that though the attesting witnesses have not been examined, however since the plaintiff has accepted the said Wills-Exs.B24 and B25 and as he has not denied the same by examining witnesses and producing contra evidence, there is a presumption that the Will is proved. The learned Judge has further observed that the fact that no bequest has been made in favour of the second defendant's daughter cannot be a reason for disbelieving the Will as observed in the judgment and decree of the trial Court. Further, the learned Judge had observed that nearly 12 years have lapsed since the execution of the Will. That apart, the lower appellate Court held that Patta has been granted in favour of 1<sup>st</sup> and 4<sup>th</sup> defendants which would prove the Will has



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been acted upon. Aggrieved by this reversal, the plaintiff has filed the present second appeal and the same has been admitted on the substantial questions of law set out supra.

**13. Submission of the learned counsel for the appellant:**

Mr.AR.L.Sundaresan, learned Senior Counsel appearing on behalf of Ms.A.L.Gandhimathi, learned counsel for the appellant would submit that both Wills have not been proved as per the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. He would submit that D.W3 is only the scribe of the Will. The witness would submit that he had written the Will whereas the testator has contented that he has executed the Will. D.W4 who has been examined to prove Ex.B24-Will is the son of the second attesting witness. However, no documents have been filed to show his relationship to the deceased Shanmugavadivelu and there is no proof that he has been let in on the side of the defendants that the attesting witness of Exs.B24 and 25 are no more. He would further submit that the active involvement of the propounder in

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execution of the Will also creates suspicious circumstances which is further proved by the following factors;

- (i) there is no proof to show that the Will has been executed and attested in the manner known to law and that
- (ii) the Will has been marked through the scribe and not through the attesting witness.

Therefore, he would submit that once it is proved that the Will has not been proved in the manner known to law, since it is an admitted fact that the properties are the self-acquired properties of one Muthusamy Chettiar and Ramathal, necessarily intestate succession has to automatically come into play, which means that the plaintiff, as a legal representative of Thirumalaimmal, is entitled to a 1/3<sup>rd</sup> share along with the first defendant and the second defendant. The learned Senior Counsel would, in support of his submissions, rely on the following Judgements:



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| <i><b>Sl.No</b></i> | <i><b>Citation</b></i> | <i><b>Title</b></i>                                  |
|---------------------|------------------------|------------------------------------------------------|
| 1                   | 2001 (7) SCC 503       | N.Kamalam (dead) and another Vs.Ayyasamy and another |
| 2                   | 2007(5) CTC 318        | J.Mathew (died) and Others Vs. Leela Joseph          |
| 3                   | 2010(5) SCC 274        | S.R.Srinivasa and others Vs.Padmavathamma            |
| 4                   | 2016(3) LW 719         | M.Pattammal Vs.G.Parthasarathy and Another           |

**14. Submission of the learned counsel for the respondents 5 and 6:**

(i) Per conta, Mr.K.Selvaraj, learned counsel appearing on behalf of the respondents 5 and 6 would submit that the attesting witnesses have not been examined, as they are no more. In the application for sending subpoena to the Sub Registrar's Office, it has been clearly stated that the witnesses are dead and in the reply statement, the plaintiff has not denied the said statement. That apart, D.W1 in his chief examination has also stated that an application under Order 41 Rule 27 of C.P.C was filed at the appellate stage to receive additional documents, which was however not entertained as the lower appellate Court was of the view that there was no necessity to file documents, since the death was admitted. He would further submit that Ex.B27, which is the thump impression of the finger print

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register has been called for from the Sub Registrar Office to compare with the thumb impression of the second attesting witness. He would submit that Ex.B25-Will of Ramathal has been referred to in Ex.A6, written statement filed in the suit O.S.No.91 of 2009 on the file of the Sub Court, Udumalpet, which has also been signed by the plaintiff. He would draw the attention of the Court to paragraph No.7 of the said written statement, which reads as follows:

*“7. The defendants further put to the plaintiff to the strict proof of the execution of the document by comparing the admitted thumb impression of the deceased Ramathal by the opinion of a finger print and handwriting expert”.*

(ii) The suit in which the written statement has been filed was one for recovery of money borrowed by Ramathal. The defendant (plaintiff herein was the 3<sup>rd</sup> defendant therein) had taken a plea that the signatures contained therein did not belong to Ramathal and they had pleaded that the document is a forged document. In this context, the said statement has been made and therefore, he would submit that the plaintiff has admitted the



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execution of the said document. As regards Ex.B24, he would state that the scribe has adduced evidence as D.W3 and the son of one of the attesting witnesses has been examined as D.W4. With reference to Ex.B24 in the earlier proceedings, the plaintiff has himself admitted the execution of the said document. That apart, the scribe has also been examined and the document is a registered one. He would further submit that the plaintiff has not pleaded fraud with reference to the execution of the said Will in his plaint. Exs.B24 and 25 have been sufficiently proved. The learned counsel would rely upon the following judgments in support of his contentions:

| <b><i>Sl.No</i></b> | <b><i>Citation</i></b> | <b><i>Title</i></b>                                                     |
|---------------------|------------------------|-------------------------------------------------------------------------|
| 1                   | 2005 (8) SCC 67        | Pentakota Satyanarayana and Others Vs.Pentakota Seetharatnam and others |
| 2                   | 1997 (II) CTC 369      | Mohammed Mohideen Vs. Muthukumara Thevar and another                    |
| 3                   | 2014(15) SCC 578       | Ved Mitra Verma Vs. Dharam Deo Verma                                    |
| 4                   | 91 LW 210              | Valliammal (died) and Others Vs.Palaniswamy and Others                  |

15. Heard the learned counsel on either side and perused the

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materials available on record.

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16. **Discussion:**

(i) The admitted fact of both parties is that the properties in question are self-acquired properties of their parents. The plaintiff would submit that both the Muthusamy Chettiar, his maternal grandfather and maternal grandmother, Ramathal, had died intestate. The statement is refuted by the defendants, who would submit that Muthusamy Chettiar and Ramathal had executed a Will bequeathing the life interest to their son, the first defendant and later to his children. Therefore, the only issue for consideration of this Court and which has been set out in the substantial questions of law is, whether two Wills, marked as Exs.B24 and B25 are valid, executed in the manner known to law and attested and witnessed as submitted by the defendants. Ex.B24-Will is sought to be proved by examining D.W3, who is the scribe of the Will-Ex.B24 and also through D.W4, the son of the one of the attesting witnesses, who had witnessed Ex.B24. The narrative of the pleadings and the oral evidence would indicate that the defendants have not proved Ex.B25-Will by examining



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either the attesting witness or the scribe. The defendants seek to claim a right under Exs.B24 and B25-Wills and it is their contention that by examining the scribe and the son of the attesting witness Ex.B24 has been proved. As regards Ex.B25, they would state that the document has been accepted as true and binding by the plaintiff in an earlier suit, where reference was made to the Will-Ex.B25 and there is no rebuttal to the same. Therefore, coupled with the fact that both the Wills have been registered, it has to be presumed and accepted that the Wills are valid one. In the cross examination of D.W3, he has admitted that he has endorsed that he has only drafted the document and beyond that he has not acted as an attesting witness. . As stated earlier, Ex.B25 has not been proved by examining the attesting witnesses or by adopting the procedures as contemplated under Section 69 of the Indian Evidence Act. The same has been accepted by the lower appellate Court only on the ground that there is reference to the Will of Ramathal in the earlier suit where the plaintiff and the defendants were parties and the said written statement has been signed by the plaintiff as the third defendant therein. The defendants, who propound the same, have not examined the attesting witness and there is nothing on record to show that



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the attesting witnesses are no more or that they are incapable of adducing evidence.

(ii) D.W4, son of one of the attesting witnesses of Ex.B24 in his cross examination has not stated that his father is no more and further, he has not adduced the evidence to prove the signature of his father in Ex.B24 of the Will. That apart, there is no evidence to confirm that the witness is indeed the son of Shanmugavadivelu, who is one of the witnesses of Ex.B24. Therefore, his evidence cannot be relied upon to come to the conclusion that Ex.B25 has indeed been executed by the said Muthusamy Chettiar. Considering the substantial questions of law that have been framed in the second appeal, the Court has to first consider the manner in which the Will has to be proved. For this purpose, the following provisions of law have to be taken into consideration.

(iii) Section 63(c) of the Indian Succession Act provides as follows:-

*63(c) The Will shall be attested by two or more witnesses,*

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*each of whom has seen the testator sign or affix his mark to the Will or has seen 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 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.*

(iv) Section 68 of the Indian Evidence Act provides the proof of execution of a document which under law is required to be attested and the same 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*



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*been executed is specifically denied.*

(v) In Section 3 of the Transfer of Property Act, 1882, the word “attested” means as follows:-

*“3. Interpretation clause.—....[“attested”, in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;]”*

Therefore, from a conjoint reading of the above provisions, it is clear that a Will has to be attested by two or more witnesses. The witnesses shall each see the testator affixing his signature or mark on the Will or that another person authorised by the Testator has put the signature. The signatures have to be affixed in the presence and on the direction of the testator. The

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testator has personally informed the witnesses that the signature found in the document is his signature and each of the witnesses have signed the Will in the presence of the testator and either of the witnesses can be called upon to prove the execution of the Will by the testator, nor have the Will attested. These provisions comply with the definition of the word attested as found in Section 3 of the Transfer of Property Act, which states where the attesting witnesses are not available either by reason of the death or by reason of not being able to trace them, in such circumstances, Section 69 of the Indian Evidence Act provides the mode of proof of document, which reads as follows:

***“69. Proof where no attesting witness 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.”***

(vi) In the judgment reported in ***1969 (1) SCC 573 [M.L Abdul***



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**Jabbar Sahib v. H.V Venkata Sastri and Sons**), the Hon'ble Supreme Court

had discussed the definition of the word “attested” as found in Section 3 of the Transfer of Property Act. In the judgment reported in **2001 (7) SCC 503 [N. Kamalam (Dead) And Another vs Ayyasamy & Another]**, the Division Bench of the Hon'ble Supreme Court was considering the latin expression “*onus probandi*” and “*animo attestandi*”, which are the two basic features, that have to be considered by the civil courts while exercising the testamentary jurisdiction: The Bench has stated that the *onus probandi* lies in every case, where a party propounds a Will and in such a case, the Court's conscience has to be satisfied that this is the last Will executed by a Testator out of his free Will and with full comprehension that the signature that is affixed on a document, is his Will. Once the execution is proved by the plaintiff, then the onus with reference to the execution of the Will stands discharged provided the propounder is able to adduce the evidence to show that the Will bears the signature and mark of the testator and the same has been duly attested by a attestator as contemplated in the provisions extracted supra. The learned Judges have also relied upon the judgment of an earlier judgment of the Hon'ble Supreme Court reported in **AIR 1959 SC 443**



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**[H. Venkatachala Iyengar v. B.N. Thimmajamma & Others]** and

discussed the proof of Wills and held as follows:

*“5....Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.”*

After relying upon the various judgments with reference to attestation the learned Judges observed that the requirement of the attestation is statutory in nature and cannot be done away with. The learned Judges discussed the role of scribe in paragraph 26 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*



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*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 the scribe.*

Ultimately, taking into account the factual matrix of the case referred therein, the Bench had found that the Wills in question do not contain the necessary ingredients to show that the witnesses have attested the Will as contemplated under Section 3 of the Transfer of Property Act. In the case on hand, a perusal of Exs.B24 and B25 would clearly demonstrate that the witnesses have not attested the Will in the manner known to law as per the above provisions of law. The scribe has also signed the document only as a person, who has drafted the Will and nothing beyond that.

(vii) In another judgment of the Hon'ble Supreme Court reported in **2010 (5) SCC 274**, cited supra, the Bench was considering the case, where the plaintiff had not seriously objected to the execution of the Will and it was only the scribe, who was examined to prove the same. In paragraphs 15 and 16 of the said judgment, the crux has been set out, which are reproduced

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herein below:

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*“15. The will dated 18-6-1974 was produced by Defendant 1, during evidence. The trial court observed that the plaintiffs have not seriously disputed the execution of the will by Puttathayamma in favour of Indiramma. Defendant 1 had examined the scribe of the will as DW 2 to prove the will. It has been held that the appellants in fact admitted the execution of the will in a subsequent suit being OS No. 233 of 1998 which was filed by the appellants herein as the legal heirs. In view of the testamentary succession, Indiramma became the absolute owner of the schedule property. Since the husband of Indiramma had predeceased her, the property would devolve upon his children under Section 15(1)(b) of the Hindu Succession Act, 1956 (hereinafter referred to as “the Act”). It would not devolve on the appellants and Defendant 4 under Section 15(2) of the Act.*

*16. The trial court further noticed the claim made by the first defendant during trial that Indiramma had executed a will in his favour dated 2-10-1984, bequeathing the schedule property to him. The trial court further noticed that though Defendant 1 had got the will dated 2-10-1984 marked as exhibit, he had not chosen to examine any of the attesting witnesses to the document. Defendant 1 had earlier not instituted any proceedings to prove his title over the schedule property pursuant to the alleged will. Consequently, the claim of Defendant 1 over the schedule property has also been negatived. However, in view of the finding that the appellants and Defendant 4 cannot inherit the property of*



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*Puttathayamma under Section 15(2) of the Act, the suit has been dismissed.*

The learned Judges, after considering the dictum laid upon various judgments with reference to proof of the Will, observed that in the case on hand, attesting witnesses had not been examined and the scribe who had been examined has not stated that he has signed the Will with the intent of attest, and gave their finding in paragraph 41 as follows:

*“41. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here, the 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 OS No. 233 of 1998, and in the evidence of PW 1.”*

In the instant case, the lower appellate Court has reversed the judgment of the Trial Court and held that the procedures contemplated under Section 63(c) of the Indian Succession Act and Sections 68 and 69 of the Indian



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Evidence Act do not require compliance, since the plaintiff himself has admitted in the earlier proceedings and the scribe has deposed to the execution of the Will by the Testator.

17. In view of the above discussion, it is clear that the defendants have not proved the execution of Exs.B24 and B25 in the manner known to law. The substantial questions of law are answered in favour of the plaintiff. Therefore, the judgment and decree of the lower appellate Court has to be necessarily set aside and accordingly, the same are set aside and the judgment and decree of the trial Court shall stand confirmed. Consequently, this Second Appeal is allowed. There shall be no order as to costs.

**11.10.2022**

Index : Yes/No

Speaking order/non-speaking order

srn

To

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

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**P.T.ASHA, J.,**

srn

**Pre-delivery Judgment in**  
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