



AS.No.299/2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 24.02.2023

Delivered on 09.03.2023

CORAM

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.B.BALAJI

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Boomathi [Died]

1.Jeyaraman

2.Madan

.. Appellants /
Plaintiffs

Versus

1.Murugesan [Died]

2.S.Mani

3.K.Velu

4.Arumugam

5.C.Ganesan

6.C.Raju

.. Respondents
/ Defendants

Prayer:- Appeal Suit filed under Order 44 Rule 1 read with Section 96 of CPC against the decree and judgment passed in OS.No.169/2010 on the file of the learned Principal District Judge, Namakkal dated 26.04.2013.



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For Appellants : Mr.V.K.Vijayaragavan
For Respondents : Mr.N.Manokaran

JUDGMENT

S.S.SUNDAR AND P.B.BALAJI, JJ.

- (1) Plaintiffs 2 and 3 in the suit in OS.No.169 of 2010 on the file of the Principal District Court, Namakkal District are the appellants herein.
- (2) The mother of the 1st appellant by name Smt.Boomathi filed the suit in OS.No.169 of 2010 for partition of her one half share in all the suit properties and for consequential reliefs, including the prayer for permanent injunction restraining the defendants from alienating or encumbering the suit properties in any manner till a partition by metes and bounds.
- (3) The suit properties consist of 12 items which are described with reference to survey number, extent etc. During the pendency of the suit, the sole plaintiff by name Smt.Boomathi died and the



appellants were brought on record as legal representatives of the deceased plaintiff.

- (4) The genealogy showing the relationship between the parties is filed as Ex.A9 and it is necessary to refer to the relationship amongst the parties. The suit properties and other properties belonged to the grandfather of 1st plaintiff and 1st defendant by name Sri.Kaliyanna Gounder who died on 09.05.1998. His wife Tmt.Marayee pre-deceased him. Sri.Kaliyanna Gounder had three daughters, by name Nallammal, Perumayee and Rajammal and one son by name Rangasamy. All the four children of Sri.Kaliyanna Gounder died. It is admitted that the daughter of Nallammal, by name Rajammal was given in marriage to Rangasamy. The 1st plaintiff, by name Boomathi is the daughter of Rangasamy and Rajammal [daughter of Nallammal]. The 1st defendant is the brother of 1st plaintiff. 2nd and 3rd plaintiffs, the appellants herein, are the husband and son of the deceased plaintiff Boomathi.



(5) It is the case of plaintiffs that Sri.Kaliyanna Gounder during his lifetime executed two separate Wills dated 04.10.1991, one in favour of his daughter Rajammal and another in favour of his grandson, the 1st defendant in respect of suitP properties. It is stated further that Sri.Kaliyanna Gounder cancelled his previous Will dated 04.10.1991 executed in favour of the 1st defendant by a subsequent Will dated 07.03.1997 and bequeathed the properties once again in favour of 1st plaintiff and 1st defendant jointly. It is specifically mentioned that the Will executed in favour of daughter of Sri.Kaliyanna Gounder by name Rajammal is not cancelled by testator. The plaintiffs further contended that since the Will executed by Sri.Kaliyanna Gounder in favour of the 1st plaintiff and 1st defendant on 07.03.1997 is the last Will and testament of deceased Sri.Kaliyanna Gounder, the suit properties are the absolute properties of the 1st plaintiff and 1st defendant. As pointed out earlier, the 1st plaintiff died on 16.09.2011 and hence, the appellants were impleaded as plaintiffs 2 and 3 being the husband and son of



the deceased 1st plaintiff. Stating that the 1st plaintiff and 1st defendant are the only legatees under the Will dated 07.03.1997, the plaintiffs came forward with the suit for partition of their one half share in all the suit properties.

- (6) It is admitted that the 1st defendant sold the suit properties in favour of defendants 2 to 6. In the written statement filed by the 1st defendant, it is stated that the alleged Will stated to have been executed by Sri.Kaliyanna Gounder on 07.03.1997 is a false and a fabricated document. It is contended by the 1st defendant that the registered Will dated 04.10.1991 executed in favour of the 1st defendant is the only and the last Will executed by Sri Kaliyanna Gounder before his death. In the written statement, the 1st defendant referring to the strained relationship between Sri Kaliyanna Gounder and the 1st plaintiff, which led to the filing of a suit by Sri Kaliyanna Gounder in OS.No.172 of 1992, the 1st defendant specifically stated that it is unconceivable to believe the story of plaintiffs regarding execution of the Will dated 07.03.1997



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giving one half share to the 1st plaintiff. The 1st defendant also relied upon the mutation of revenue records and the enjoyment and contended that the suit properties are in the exclusive possession and enjoyment of 1st defendant. From the entire written statement of the 1st defendant, it is seen that the 1st defendant has described the 1997 Will as a forged document apart from raising suspicious circumstances surrounding the creation of the Will dated 07.03.1997.

- (7) The 4th defendant also filed a written statement in tune with the written statement filed by the 1st defendant.
- (8) Before the Trial Court, 1st plaintiff examined herself as PW1. One Venkatachalam was examined as PW2 and the 2nd plaintiff by name Jeyaraman was examined as PW3. Exs.A1 to A10 were marked on the side of plaintiffs. On the side of defendants, Tvl.Murugesan and Arumugam were examined as DW1 and DW2 and Exs.B1 to B9 were marked on the side of defendants.



(9) Considering the pleadings raised by the respective parties, the Trial Court framed the following issues:-

1. *Whether the plaintiff is entitled to 1/2 share in the properties?*
2. *Whether plaintiff is entitled to permanent injunction restraining the respondents from alienating or encumbering this suit property?*
3. *Whether the Will dated 07.03.1997 is executed by Kaliyanna Gounder is false and fabricated document?*
4. *Whether the Will dated 04.10.1991 executed by Kaliyanna Gounder is the last Will?*
5. *To what relief if any, the plaintiff is entitled to?*
6. *Whether defendants 2 to 6 are entitled to the property and the Sale Deed dated 05.07.2010 is valid?*

(10) The Trial Court, on the issue whether the Will dated 07.03.1997 alleged to have been executed by Sri.Kaliyanna Gounder is genuine or a fabricated one, held that the Will dated 07.03.1997 is a fake document created by forgery. The Trial Court taking note of the fact



that the testator has been shown as a person residing in Namakkal District and the fact that Namakkal District was formed only on 01.07.1997, three months after the date of Will dated 07.03.1997, held that the Will dated 07.03.1997, marked as Ex.A1 is a concocted document after elaborate discussion and appreciation of evidence, particularly referring to several suspicious circumstances. Further, the Trial Court held that the signatures of the testator in the Will are forged after comparing the same with the admitted signatures of the testator. Since the subsequent Will dated 07.03.1997 has been held to be a forged document, the Trial Court dismissed the suit after deciding all the issues against the appellants. Aggrieved by the judgment and decree of the Trial Court, the above Appeal Suit is preferred by plaintiffs 2 and 3.

- (11) Learned counsel for the appellants raised several grounds assailing the judgment and decree of the Trial Court. It is submitted by the learned counsel that the Trial Court has erroneously proceeded to compare the signatures found in the documents Ex.A1 and Ex.B1



which are executed with a long gap and held that the signatures differ. Therefore, the finding that Ex.A1-Will dated 07.03.1997 is forged, is improper. The learned counsel then submitted that the Trial Court relied upon the previous Will dated 04.10.1991 marked as Ex.B1 to dismiss the suit for partition without any evidence to prove the Will under Ex.B1. The learned counsel also submitted that the Will has to be proved by examining the attesting witnesses in terms of Section 68 of the Indian Evidence Act and Section 63[c] of the Indian Succession Act. Since admission of signature of testator does not dispense with proof by examining at least an attester of the Will to prove the previous Will, it is contended that the Trial Court ought not to have dismissed the suit by holding that the 1st defendant is the exclusive owner of all the properties by virtue of the admitted Will dated 04.10.1991. [Ex.B1].

- (12) Learned counsel for the appellants, relied upon the following judgments, in support of his contentions:-

*(a) Judgment of Hon'ble Supreme Court in **Ramesh Verma [Died]***



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through LRs Vs. Rajesh Saxena [Dead] by LRs reported in *2017 [1] SCC 257*; and

- (b) Judgment of a learned Single Judge of this Court in *Malliga Vs. P.Kumaran*, reported in *2022-2-LW-393*.
- (13) *Per contra*, learned counsel appearing for the respondents submitted that the Trial Court has considered the entire evidence available on record before holding that the subsequent Will dated 07.03.1997 is a forged one. Since the plaintiffs have specifically admitted the execution, genuineness and validity of the Will even in the plaint, it is contended by the learned counsel for the respondents that when the plaintiffs did not raise any issue on the validity or genuineness of the Will and has admitted the Will, there is no requirement to prove the Will in accordance with Section 68 of the Evidence Act especially when the Will is duly executed satisfying the requirements of Section 63[c] of Indian Succession Act. Learned counsel relied upon the plaint in OS.No.172/1992 filed by the testator Mr.Kaliyanna Gounder and 1st defendant against the 1st



plaintiff and her mother. In the plaint, it is stated that Sri.Kaliyanna Gounder had executed a Will in favour of 1st defendant herein and produced the original Will along with the plaint. The 1st plaintiff is the 2nd defendant in the previous suit and they contended that the suit properties are the ancestral properties and questioned the exclusive title of Sri.Kaliyanna Gounder.

- (14) Considering the points urged by the learned counsels appearing for the appellants and respondents and the pleadings of the respective parties before the Trial Court, this Court finds it necessary to decide the following points:-

A) Whether the Will dated 07.03.1997 is proved in accordance with law?

B) Whether the Will dated 04.10.1991 executed by Mr.Kaliyanna Gounder in favour of 1st defendant is the last Will of Mr.Kaliyanna Gounder and required to be proved in accordance with Section 68 of Evidence Act despite the plaintiff apart from admitting the Will, did not raise any issue



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on the validity or genuineness of the Will?

C) Whether the appellants are entitled to one-half share in all the suit properties?

(15) This Court heard the submissions of the learned counsel for the appellants and the learned counsel for the respondents and also perused the materials placed.

POINT [A]:-

(16) The suit for partition is filed only on the basis of the Will dated 07.03.1997 alleged to have been executed by Mr.Kaliyanna Gounder in favour of the 1st plaintiff and 1st defendant. There is no dispute with regard to the title of Mr.Kaliyanna Gounder and the fact that he died in the year 1998. Even in the plaint as well as in the proof affidavit, the plaintiffs have categorically admitted the execution of the Will dated 04.10.1991 in favour of the 1st defendant in respect of the suit properties. The 1st plaintiff is aware of the two Wills executed by Sri.Kaliyanna Gounder as a party in the previous suit filed by Sri.Kaliyanna Gounder wherein testator himself vouched to



the execution of Will. The Will is a registered Will. The relationship is not in issue. When the plaintiffs admitted the due execution of the Will which is marked as Ex.B1 dated 04.10.1991, in favour of 1st defendant, the burden lies on the plaintiffs to prove the subsequent Will especially when it is stated that the previous Will under Ex.B1 executed by Mr.Kaliyanna Gounder in favour of the 1st defendant is cancelled in the subsequent Will marked as Ex.A1. The Will under Ex.A1 dated 07.03.1997 is an unregistered Will. The Will refers to the residence of testator in Pokkampalayam village in Tiruchengode Taluk, Namakkal District. It is admitted before this Court by the appellants that Namakkal District itself was notified and formed nearly four months after the execution of the Will under Ex.A1 dated 07.03.1997. When it was pointed out to the learned counsel for the appellants, he admitted that originally Namakkal District was part of Salem District and it was bifurcated into Salem District and Rajaji District. It is further admitted that Rajaji District was thereafter named as Namakkal District only on



01.07.1997. The Trial Court has already held that the signatures found in the disputed Will [Ex.A1] dated 07.03.1997 do not tally with the signatures found in the admitted Will [Ex.B1] dated 04.10.1991. The Trial Court went further and held that the document under Ex.A1-Will dated 07.03.1997 is forged. The testator earlier filed a suit in OS.No.172 of 1992 on the file of the District Munsif Court, Tiruchengode, against his own daughter-in-law by name Rajammal and the 1st plaintiff for permanent injunction.

- (17) A perusal of the plaint would reveal that the 1st defendant was also the 2nd plaintiff in the earlier suit in OS.No.172 of 1992 and that the averments in the plaint would clearly show that Thiru.Kaliyanna Gounder was not in cordial terms with the 1st plaintiff/and her mother, Rajammal. The 1st plaintiff's mother is also the granddaughter of Thiru.Kaliyanna Gounder. The 2nd plaintiff is also one of the attesting witnesses. One Venkatachalam was examined as PW2. PW2 is not the scribe but a person who was entrusted with



typing the Will. The evidence of PW2 is contrary to the evidence given by PW3, the 2nd plaintiff. PW3, the husband of 1st plaintiff is one of the attesting witnesses. The contradiction between the evidence of PW2 and PW3 would clearly indicate that the witnesses are interested and not reliable. Considering the evidence in detail, the Trial Court came to the conclusion that the Will dated 07.03.1997 [Ex.A1] is a forged and fabricated Will and that no relief can be given in favour of plaintiffs on the basis of such forged Will. This Court finds no reason to interfere with the findings of the Trial Court, especially when this Court finds that much more need to be stated about the genuineness of the Will [Ex.A1] dated 07.03.1997. The signatures do not tally. There are differences in the signatures found in Ex.A1 and they are not uniform. It is seen that the Will under Ex.A1 dated 07.03.1997 indicates that the signature of the testator in Ex.A1 dated 07.03.1997 is less shaky compared to the signatures in the previous Will executed six years earlier. The recitals in the Will do not explain why, Thiru.Kaliyanna Gounder



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should prosecute the suit in OS.No.172/1992 till September 1996. While comparing the signature, it is seen through open eyes that the signatures found in Ex.A1 are not uniform and the discrepancies are not explained. Considering the overall circumstances and the fact that the subsequent Will is quite unnatural having regard to the admitted facts and the relationship between the testator and the 1st plaintiff, this Court has no hesitation to hold that the alleged unregistered Will dated 07.03.1997 [Ex.A1] is a fabricated document.

POINT [B]:-

- (18) In the plaint itself, the 1st plaintiff has categorically admitted the execution, genuineness and validity of the Will under Ex.B1 dated 04.10.1991 in the following lines:-

8. இறந்துபோன /ம் வாதி மற்றும் /ம் பிரதிவாதியின் பாட்டனார் காளியண்ண கவுண்டர் கடந்த 4.10.1991-ந் தேதிகளில் தன் மகள் ராஜம்மாள் மற்றும் தனது பேரனான /ம் பிரதிவாதிக்கு தன் சொத்துக்கள் குறித்து



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இரண்டு உயில்களை தனித்தனியாக எழுதி வைத்திருந்தார். பின்னர் காளியண்ண கவுண்டர் 1ம் பிரதிவாதிக்கு ஆதரவாக கடந்த 4.10.1991-ந் தேதியில் எழுதி வைத்த உயில் சாசனத்தை ரத்து செய்து விட்டு கடந்த 7.3.1997-ந் தேதியில் 1ம் வாதி மற்றும் 1ம் பிரதிவாதிக்கு ஆதரவாக ஒரு உயில் சாசனம் எழுதி வைத்துள்ளார்.

- (19) In the proof affidavit, the 1st plaintiff has categorically admitted as follows:-

எங்களின் பாட்டனார் காளியண்ண கவுண்டர் கடந்த 4.10.1991-ந் தேதிகளில் தன் மகள் ராஜம்மாள் மற்றும் தனது பேரனான பிரதிவாதிக்கு தன் சொத்துக்கள் குறித்து இரண்டு உயில்களை தனித்தனியாக எழுதி வைத்திருந்தார். அதன் பின்னர் காளியண்ண கவுண்டர் பிரதிவாதிக்கு ஆதரவாக கடந்த 4.10.1991-ந் தேதியில் எழுதி வைத்த உயில் சாசனத்தை ரத்து செய்து விட்டு கடந்த 7.3.1997-ந் தேதியில் எங்களுக்கு ஆதரவாக ஒரு உயில் சாசனம் எழுதி வைத்துள்ளார். ஆனால் தனது மகள் ராஜம்மாள் பெயருக்கு 4.10.1991-ம்



தேதியில் எழுதி வைத்த உயில் சாசனத்தை
காளியண்ண கவுண்டர் ரத்து செய்யவில்லை.

(20) Therefore, the earlier Will dated 04.10.1991 executed in favour of the 1st defendant is admitted in unambiguous terms. The execution, genuineness and validity of the Will under Ex.B1 is not disputed by the plaintiffs/appellants. In other words, the appellants have not raised the issue regarding the validity or genuineness of the Will dated 04.10.1991 [Ex.B1] in the suit. The testator himself admitted the Will in favour of 1st defendant in the plaint, in the previous suit filed by Thiru.Kaliyanna Gounder along with 1st defendant/1st respondent herein. Since there was no issue on the truth, genuineness or validity of the Will, no issue is framed by the Trial Court regarding proof of Will even though a question is framed as to whether Ex.B1-Will is the last Will of Thiru.Kaliyanna Gounder.

(21) Learned counsel appearing for the appellants relied upon the judgment of the Hon'ble Supreme Court in **Ramesh Verma through LRs Vs. Rajesh Saxena** reported in **2017 [1] SCC 257**, wherein the Hon'ble Supreme Court has held as follows:-



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"13. A will like any other document is to be proved in terms of the provisions of Section 68 of the Evidence Act and the Succession Act, 1925. 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."

- (22) Learned counsel then relied upon judgment of a learned Single Judge of this Court in ***Malliga Vs. P.Kumaran*** reported in **2022 [2] LW 393**, wherein the learned Single Judge following the judgment of the Hon'ble Supreme Court in ***Ramesh Verma's case [cited supra]*** reported in **2017 [1] SCC 257**, has held that the position of



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law on requirement of proof has been wrongly stated in a few judgments of this Court and a judgment of Division Bench of Kerala High Court. The learned Judge, in the said judgment has considered the case of a plaintiff who claimed half share in the suit property under a Will dated 05.09.1977. Though the defendant did not dispute the Will, set up title by contending that the testator and his father had orally sold their share to her. Court below granted a decree for partition on the basis of Will in favour of male heirs of testator's nephews. Since the defendant therein did not dispute the Will, the Courts below have accepted the Will on the ground that there is no issue regarding the validity of the Will. Additional question of law was framed regarding proof of Will at the time of hearing the Second Appeal. The learned Judge held that a Will should be proved mandatorily under Section 68 of the Act as it is explicit from the proviso to Section 68 of the Act. The learned Judge after referring to a few judgments dealt with the issue in the following manner:-



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"14. The Division Bench of the Kerala High Court in [Thayyullathil Kunhikannan and others Vs. Thayyullathil Kalliani and others] reported in AIR 1990 226 held as follows :-

32.Counsel for the appellant challenges this finding of the lower court. He further states that the will Ext. A1 has not been properly proved, by examining an attestor, as required by Section 68 of the Evidence Act. One of the attestors was admittedly alive. Section 68 is mandatory, and even if there is no dispute in the written statement about its validity or genuineness, formal proof of the will by examining one of the attestors is necessary before it could be acted upon. Kamalakshy v. Madhavi Amma, 1980 Ker LT 493 is cited in support of this contention, it is also stated, placing reliance on the decision in Girja Datt v. Gangotri Datt, AIR 1955 SC 346, that it cannot be presumed, from the mere signatures of two persons in the will, that they had appended their signatures as attesting witnesses. Section 68 should be complied with in order that these two persons might be treated as attesting witnesses. Counsel stresses further that the original will is not forthcoming, but only a registration,



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copy Ext. A1. Since Pokken had revoked Ext. A1, the original must have been destroyed by him, and was not therefore available for production. Counsel wants the court to presume in the circumstances, that the original has been destroyed with the intention of revoking it.

34. Order 8 Rule 5 of the C.P.C. provides that unless there is a specific denial of any allegation of fact made 10 in the plaint, it shall be taken to be admitted. Section 58 of the Evidence Act provides that no fact need be proved in any proceedings, which by any rule of pleadings in force at the time, the parties are deemed to have admitted by their pleadings. In this case, in the absence of any denial in the written statement, the genuineness and the validity of the will Ext. A1 must be deemed to have been admitted by the law of pleadings, namely Order 8 Rule 5, and therefore that fact was not required to be proved at the trial. Section 68 states that 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. The proviso to the Section which was introduced by the amending Act 31 of 1926 makes an exception in the case of any document, not being a will, which has been registered, unless its execution by the persons by whom it purports to have been executed, is specifically denied. The fact that the proviso is



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not applicable to wills, and that it does not make an exception in the 11 case of registered wills, does not lead to any inference that a will cannot be acted upon or used as evidence, unless it has been proved by examining an attesting witness. The only effect of the proviso is that registration of the will by itself does not obviate the necessity of calling an attesting witness to prove it, if it is otherwise required to be proved. The proviso does not speak of a case where a will is not in dispute. Section 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, Section 68 cannot operate to insist on-formal proof by calling an attesting witness. Section 58 has to be read as overriding Section 68 and as obviating the necessity for calling an attesting witness, unless the execution of the will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a will could be used as evidence. Phipson on Evidence 12th Edition (1976) explains the rationale behind examining an attesting witness as that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, "an agreement which may be waived for the purposes of dispensing with proof at the trial", (paragraph 1751). In paragraph 1757, the learned author points out that proof of execution of documents required by law to be



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attested is dispensed with (although the attesting witness may be alive and in Court) "when the execution has been admitted for purposes of trial". Order 8 Rule 5, C.P.C. deems the execution of the will to be admitted in the absence of any denial thereof in the written statement. Examination of an attesting witness is therefore unnecessary when the parties have not joined issue on the validity or genuineness of the will.

15.The Kerala High Court took a view that where the party has not joined issue on the validity or genuineness of the Will and has admitted the Will, there is no requirement to prove the Will in accordance with Section 68 of the Evidence Act.

16.This view taken by the Division Bench of the Kerala High Court, seems to have been reiterated by this Court also in the following judgements :-

(a) [S.Kaliyammal and others Vs. K.Palaniammal and others] reported in AIR 1999 Mad 40.

(b) [Minor Mani, rep. By next Friend / mother Ramayi Vs.Ammakannu and another] reported in 2009



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1 LW 309.

(c) *[R.Vellingiri and another Vs. R.Kannaian and others]* reported in 2008 1 CTC 130.

(d) *[Karpagam and another Vs. E.Purushothaman and others]* in 2010 3 LW 282

(e) *[Ranganathan Vs. Natarajan and others]* in 2012 1 Madras Weekly Notes (Civil) 180.

17.A close look at all the above judgements makes it very clear that examination of attesting witness is mandatory only where the genuineness or validity of the Will is questioned. In cases where the Will has not been specifically denied or it has been admitted, it has been held that examination of attesting witnesses to a Will is unnecessary.

18.The law was once and for all settled by the Hon'ble Supreme Court in *[Ramesh Verma (Dead) Through Legal representatives Vs.Lajesh Saxena (dead) by legal representatives and another]* reported in 2017 1 SCC 257. The relevant portion in the judgement is extracted hereunder :-

13.A Will like any other document is to be proved in terms of the provisions of Section 68



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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.

19.The above judgement in no uncertain terms laid down the law to the effect that a Will shall not be used as evidence until it is proved in the manner prescribed under Section 68 of the Evidence Act and this position cannot be diluted even if the opposite party has not specifically denied the execution of the Will."

- (23) First and foremost, it is to be borne in mind that before the Hon'ble Supreme Court in ***Jagdish Chand Sharma Vs. Narain Singh Saini [Dead] through Legal Representatives and Others***, reported in ***2015 [8] SCC 615***, the validity of the Will was a core issue and the



Hon'ble Supreme Court proceeded to discuss the law with regard to proof of a Will in accordance with the statute. In such context, the Hon'ble Supreme Court has held that the position with regard to proof of a Will remains the same even if the opposite party does not specifically deny execution of the same.

- (24) The above judgment has been followed by learned Single Judges of this Court in *P.Malliga Vs. P.Kumaran* reported in **2022 [2] LW 393** and *Akkinirajan Vs. Maheswari & Others* reported in **2023 [1] LW 72**.
- (25) This Court draws the distinction between 'specifically denied', 'not specifically denied' and 'admitted'. The first two instances, namely, 'specifically denied' and 'not specifically denied', would fall within one category. Insofar as proof of a Will in both cases in this category, the Will would have to be necessarily proved by the propounder. However, where the opposite party categorically admits to the Will, the position would be certainly different. In India, we follow what is called the system 'adversarial proceedings', which is



also followed in the British Courts. The foundation of this School is that parties before a Court would have to deal with facts in issue namely facts that are asserted and denied by the parties to the *lis* and the Court would proceed to adjudicate on such issues. When there is no dispute between the parties on certain matters, the Court would not venture to require proof of such admitted facts.

- (26) In this context, it would be relevant to refer to Sections 17 and 58 of the Indian Evidence Act:-

"17.Admission defined. —*An admission is a statement, 1[oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.*

"58 Facts admitted need not be proved. —*No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have*



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admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

- (27) Applying the definition of 'admission' as set out in Section 17 of the Indian Evidence Act, if Sections 56 to 58 are applied, it leads to the only conclusion that facts that are admitted, whether it is in oral or documentary form, are not required to be proved. These sections are categorised and incorporated as a separate Chapter, namely, Chapter III under Part II of the Indian Evidence Act regarding proof. Only where the facts would require proof of a document, like a Will in the instant case, the Court would be bound by the subsequent Chapters, namely, Chapter IV dealing with oral evidence and Chapter V dealing with documentary evidence. Therefore, it is axiomatic that proof as mandated under Chapters IV and V would be warranted only when there is a 'fact in issue' between the parties and cannot be extended to a case which clearly falls within the four corners of Chapter III, especially, Section 58 which is relevant for the purposes of the present case.



(28) Conscious of the above distinction, this Court now falls back on the admitted facts of the present case. In the present case, there is no dispute with regard to the earlier Will which is admitted by both the parties. In such circumstances, it was not incumbent on the Trial Court to even frame an issue with regard to proof or validity of the Will dated 04.10.1991 [Ex.B1]. In view of the above discussions alone, it is sufficient to hold that the Will dated 04.10.1991 [Ex.B1] is not required to be proved, one additional reason and important circumstance. In the present case is that the testator himself, as one of the plaintiffs, filed a suit in OS.No.172/1992. In fact, this Court finds that the original Will dated 04.10.1991 was filed as a suit document. In this context, it is relevant to refer to Section 70 of the Indian Evidence Act, which reads thus:-

"70. Admission of execution by party to attested document. —*The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a*



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document required by law to be attested.

- (29) The facts of the present case would clearly warrant relevance and applicability of Section 70 hereinabove. When the testator himself comes before a competent Court of law and admits execution of a testamentary instrument by him, in terms of Section 70, the admission of such testator shall be sufficient proof of execution as against the testator even if the document is one that requires to be attested in law.
- (30) This Court also noticed the judgments of two learned Single Judges of this Court in the case of *Vanjiammal [Died] through LRs Vs. Vidya and Others* in *CRP [PD] No.3659/2013* dated 21.04.2017 and *P.Radha Vs. Irudayadoss and Others* reported in *2022 SCC Online Mad 886*.
- (31) In *Vanjiammal's case* [cited supra], this Court in similar set of facts, relying on the ratio laid down by the Andhra Pradesh High Court in *Valluri Jaganmohini Seetharama Lakshmi and Another V.*



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Kopparthi Ramachandra Rao and Others reported in ***AIR 1994 AP 284***, held that aspects which are admitted, need not be proved and that it would be amounting to only wasting of Court's precious time. Relying on Section 58 of the Indian Evidence Act, this Court held that the principle set out in Section 58 extends not only to oral evidence but also to documentary evidence and pleadings of parties. The learned Single Judge concluded that when neither the plaintiffs nor the defendants disputed the existence of the Will and there is no denial as to the execution of the same, the requirement of proving the Will in terms of Section 68 does not arise. Similarly, in ***P.Radha's case*** [cited supra], another learned Single Judge of this Court, applying the import of Section 70 of the Indian Evidence Act, held that Section 70 would be applicable to Wills also. In that case, the testator had admitted the execution of his Will in the written statement filed in a civil suit which this Court accepted as sufficient proof of execution of the Will and held that non examination of the attestors as contemplated under Section 68 of the Indian Evidence



Act, was not fatal to the case of the propounder of the Will.

(32) In *Akkinirajan's case* [cited supra] reported in **2023 [1] LW 72**, a learned Single Judge relied on the judgment of the Hon'ble Supreme Court in the case of *S.R.Srinivasa and Others V. Padmavathamma* reported in **2010 [5] SCC 274**, and held that the Will was required to be proved even though the plaintiff in that case, had admitted in earlier proceedings regarding execution of the Will by the testator. The judgment of the Hon'ble Supreme Court relied by the learned Single Judge was a case, where the Will was not seriously objected to and in that context, rightly the Hon'ble Supreme Court held that in such cases, proof of Will cannot be dispensed with. As already mentioned hereinabove, proof would become warranted only in cases where execution of the Will has not been admitted, say in cases where execution is specifically denied or not specifically denied.

(33) This Court has applied its mind to the various principles laid down by the Hon'ble Supreme Court as well as this Court and other High



Courts, especially in the context of Section 68 of the Indian Evidence Act, proof of a Will where execution is not specifically denied and in cases where the execution is categorically admitted. The ratio laid down by the Hon'ble Supreme Court in ***Ramesh Verma's case*** [cited supra] reported in **2017 [1] SCC 257**, cannot be a precedent for the proposition where the opposite party clearly admits to the execution of the subject Will as in the instant case. Therefore, we are not in respectful agreement with the judgments in ***P.Malliga's case*** and ***Akkinirajan's case*** [cited supra] following the ratio laid down by the Hon'ble Supreme Court in ***Jagdish Chand Sharma's case***. On the contrary, we approve the ratio laid down in ***P.Radha Vs. Irudayadoss and Others*** reported in **2022 SCC Online Mad 886** and ***Vanjiammal and Others Vs. Vidya and Others*** in the order dated 21.04.2017 made in CRP.[PD] No.3659/2013. **Hence, Point [B] is answered accordingly.**



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POINT [C]:-

- (34) In view of the findings to Points [A] and [B], there is no difficulty in deciding the third point, namely, the question whether the appellants are entitled to one-half share in all the suit properties.
- (35) The Trial Court having found that the subsequent Will dated 07.03.1997 [Ex.A1] was fabricated and not a true and genuine Will, the appellants/plaintiffs are clearly not entitled to any share in the suit properties. The appellants rested their case for partition only on the subsequent Will dated 07.03.1997 [Ex.A1], while categorically admitting the earlier Will dated 04.10.1991 [Ex.B1] even in their plaint. This Court having found that the registered Will dated 04.10.1991 [Ex.B1] was admitted by the appellants herein and consequently binding on them, the said Will having been executed by late Thiru.Kaliyanna Gounder in favour of the 1st respondent herein, the appellants are not entitled to seek for partition and separate possession of any share in the suit properties. **Hence, Point [C] is answered in negative against the appellants/plaintiffs.**



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(36) In the result, the Appeal Suit stands **dismissed with cost** confirming the decree and judgment dated 26.04.2013 passed in OS.No.169/2010 by the learned Principal District Judge, Namakkal.

[SSSRJ] [PBBJ]
09.03.2023

AP

Internet : Yes

Index : Yes/ No

To

1.The Principal District Judge
Namakkal.

2.The Section Officer
VR Section, High Court
Madras.



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S.S.SUNDAR, J.,
and
P.B.BALAJI, J.,

AP

Judgment in
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09.03.2023