



TOS.No.4 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	14.06.2023
Pronounced on	12.09.2023

CORAM:

THE HON'BLE Ms.JUSTICE **R.N.MANJULA**

TOS.No.4 of 2019

1.Mrs.J.Christy Rachel Sheeba
2.Mrs.L.Louis Esther Rani

... Plaintiffs

Vs.

Mr.J.Clement Silkin

... Defendant

PRAYER : This Suit has been filed under Section 232 and 276 of the Indian Succession Act read with Order XXXV Rule 5 of the Original Side Rules, to grant Letters of Administration with the Will annexed “A” may be granted to the plaintiffs as the daughters / beneficiaries under the Will of the said deceased N.John Ponniah having effect limited to the State of Tamil Nadu.

For Plaintiffs : Mr.S.S.Rajesh

For Defendant : Ms.Lita Srinivasan

JUDGMENT

The Testamentary Original Suit has been filed to grant Letters of Administration with the Will annexed “A” may be granted to the plaintiffs as



TOS.No.4 of 2019

the daughters / beneficiaries under the Will of the said deceased N.John Ponniah having effect limited to the State of Tamil Nadu.

2. Heard the learned counsel for the plaintiffs and the learned counsel appearing for the defendant.

The plaint in brief :

3. The plaintiffs are the daughters of Late.N.John Ponniah. The defendant is the son of Late.N.John Ponniah. The said N.John Ponniah died on 14.12.2013. He left behind the plaintiffs and the defendant and his wife Selvi Kethsial as his legal heirs. During his life time, N.John Ponniah along with his wife Selvi Kethisal executed a Will on 20.04.2008. No executor was appointed in the said Will. Hence the plaintiffs are seeking Letters of Administration in respect of the properties of N.John Ponniah, involved in the Will.

4. Even though the mother of the parties did not object to the prayer sought by the plaintiffs, the defendant objected the original petition and hence it got converted into Testamentary Original Suit.



The Written Statement of the defendant in brief:

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5. The defendant has filed his written statement by stating that he did not know about any Will executed by his parents; the purported affidavit filed by one of the attesting witnesses along with the Original Petition filed by the plaintiffs have got lot of corrections and it is unreliable; even before obtaining Letters of Administration, the plaintiffs have moved the Government Authorities and obtained permission to raise constructions in the property involved in the Will; the Will executed by both the parents can come into effect only after their life times; the father of the defendant is no more; even during the life time of his mother, Letters of administration has been sought and hence it cannot be granted; the father of the defendant is always desirous of giving a major share of his property to his only son; he always felt that his daughters are well settled and they did not need any properties; even if the Will is assumed to be genuine, that can come into effect only after the life time of both the parents. Hence the suit should be dismissed.

6. On the basis of the above pleadings and after hearing the learned counsels for both parties, the following issues were framed:

“(i) Whether the Will dated 20.04.2008 executed by Late Mr.N.John Ponniah and Mrs.J.Selvi Kethsial is true and valid?”



TOS.No.4 of 2019

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(ii) Whether Late N.John Ponniah was in poor state of mind while he executed the Will dated 20.04.2008?

(iii) Whether the Will dated 20.04.2008 is a mutual or a joint Will?

(iv) Whether the Suit is maintainable as Mrs. Selvi Kethsial has already disposed of her property?

(v) Whether alienations made by Mrs.Selvi Kethsial are valid?”

7. During the course of the trial, on the side of the plaintiffs, two witnesses have been examined and Exhibit P1 to P6 were marked. On the side of the defendants, the defendant examined himself as D.W1 and Exhibit D1 is marked.

The arguments of the plaintiffs in brief:

8. The learned counsel for the plaintiffs submitted that the Will which is marked as Ex.P1 is a joint Will and not a mutual Will as claimed by the defendant; the properties involved in the Will are the self-acquired properties of the father N.John Ponniah and mother Selvi Kethsial; there are six properties involved in the Will and out of which, Item Nos.1, 3, 4, 5 were self-acquired properties of the father N.John Ponniah; Item Nos.2 and 6 are the



TOS.No.4 of 2019

self-acquired property of the mother Selvi Kethsial; as per the Will, Item No.1 was bequeathed in favour of both the plaintiffs who are the daughters of Late N.John Ponniah; Item No.3 was given to the first plaintiff and Item Nos.4 and 5 were given to the second plaintiff; Item No.2 which belonged to the mother was bequeathed in favour of the defendant who is the son; however the mother subsequently executed a settlement deed in favour of the 1st plaintiff on 20.03.2017; since the Will is not a mutual Will, it has come into effect immediately on the death of their father; as the father had bequeathed his properties in favour of his daughters, they are entitled to acquire the same absolutely.

8.1. One of the attestors of the Will was examined as P.W.1 and he has also given his evidence about the genuineness of the Will; in fact, for the Christian Will, probation is not necessary; since various authorities wanted probation and the defendant also interfered in the enjoyment of the plaintiffs, the plaintiffs have filed this Testamentary Original Suit; so far as the mother is concerned, she is alive and hence, it is up to her to deal with the property stated in the Will, as per her whims and the settlement executed by the mother would automatically revoke the Will; after the amendment made to Section



213 (2) of the Indian Succession Act, 2002, the Will executed by the Indian Christian does not require probate; so technically the plaintiffs need not have filed this suit at all; since the plaintiffs have filed the suit, they have to prove that the properties subjected to the Will belonged to their father and it has been executed in a manner known to law and it is true and valid.

8.2. Though the defendant contended that the father was not in a sound state of mind at the time of executing the Will, he did not produce any rebuttal evidence to substantiate the same; the attesting witness is a very old person and he could only state that he knew the testator; the mother of the plaintiffs and the defendant, has also been examined as P.W.2 and she has stated that the Will was signed by the father of the plaintiffs and that it was jointly executed by both the father and the mother; so the plaintiffs are entitled to the relief as prayed for; in support of the above contentions of the plaintiffs, the following judgments were cited:

(i) Kochu Govindan Kaimal and Others Vs. Thayankoot Thekkot Lakshmi Amma and Others, reported in 1959 Supp (1) SCR 1.

(ii) Kuppusamy Raja and another Vs. Perumal Raja and others, reported in AIR 1964 Mad 291.



TOS.No.4 of 2019

(iii) *Dilharshankar C.Bhachech Vs. Controller of Estate Duty, Ahmedabad, reported in (1986) 1 SCC 701.*

The arguments of the defendant in brief:

9. The learned counsel for the defendant submitted that the plaintiff did not prove the signature of the father in the Will; the Will is said to have been executed in the year 2008; the father died in the year 2013; but the Original Petition has been filed only in the year 2018; the delay in filing the proceedings would make the Will doubtful; the 2nd plaintiff who was examined as P.W.1 and the mother of the parties who was examined as P.W.2 did not speak the truth; the father was working as a Joint Secretary in the Law Department and he always wished that his only son should take the house; there is a gross difference in the signature of the father found in the Will; despite the defendant had disputed the signature, the plaintiffs had not taken any steps to send the signature for forensic examination in order to prove the same; the plaintiffs have not discharged their burden to prove that the Will is a genuine one; the evidence of the attesor is of no use to the case of the plaintiffs and the attesor did not identify the signature of the father; the report of the Commissioner would show that the attesor was not even able to give a



TOS.No.4 of 2019

proper evidence; so the Will has not been proved in accordance with Section 68 of the Evidence Act.

9.1. Since the attesting witness is not capable of giving evidence, the plaintiffs ought to have comply the provision of Section 71 of the Evidence Act; but the plaintiffs have failed to do the same; however, the Court itself can compare the signatures of N.John Ponniah with the signature found in the sale deed dated 23.08.1976 in order to find out the falsity of the claim made by the plaintiffs; the plaintiffs are not law abiding people; even before the Will was probated, they started to raise constructions and that too, by violating the building regulations; so, the authorities have given notice to stop the construction; consequently, the 2nd plaintiff filed a Writ Petition in W.P.No.9390 of 2017 and on which, an order has been passed on 04.01.2018; in the said order, the Court has observed that the construction has been done by violating the building rules and the authorities has got the only option of demolishing the same; since the Will is not proved to be genuine, the suit should be dismissed.

**Discussion:**

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10. The Will is said to have been executed by the father and the mother of the plaintiffs and the defendant on 20.04.2008. The Will comprised of 6 items of immovable properties. Items 1, 3, 4 and 5 belonged to the father and he purchased those properties by virtue of the registered sale deeds dated 23.08.1976, 10.03.1992, 20.07.2007 and 04.02.2005. There is no dispute as to the fact that the suit properties belonged to the father. Item Nos.2 & 6 belonged to the mother and she had purchased the same by virtue of a sale deed dated 02.11.1995. The only contention of the defendant is that the Will is not genuine and even if it is genuine, it cannot be given effect during the life time of the other testator viz., the mother.

11. On the side of the plaintiffs, two witnesses have been examined. The 2nd plaintiff has been examined as P.W.1 and she has stated in her evidence that the Will was a joint Will and after the death of her father, that portion of the properties in the Will which the father had bequeathed to the daughters, will be inherited by them.



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12. Before proceeding to decide upon the genuineness of the Will, the riddle as to whether the Will is a joint Will or a mutual Will should be dealt. The Will has been marked as Ex.P1. As stated already there are 6 items of properties found in the Will and the recitals of the Will would read that both N.John Ponniah and Selvi Kethsial had executed the Will. There is a column drawn in the Will. The first column represents serial number of the properties and the second column represents the source of title of the testators in respect of those properties and the third column contains the names of the respective testators to whom the properties belonged and the fourth column shows in whose favour each of the property is bequeathed. Apart from the above immovable properties, the Will speaks about the other movable properties like Fixed Deposits, LIC Policies, Bank balance and Jewels etc.

13. So far as the movable assets like Bank balance, Fixed Deposit, Recurring Deposits, LIC Policies etc., they should be divided equally among all the children; but the Jewels and the other valuables should be divided between two daughters alone. The Will is seen to be signed by both the testators. So, the manner in which the properties are narrated in the tabular



TOS.No.4 of 2019

column would show as though both the testators have joined together to execute the Will in respect of the properties belonged to them in a manner desired by them.

14. The Will does not read anything about the arrangement by which the properties of the husband should be enjoyed by his wife or the properties of the wife be enjoyed by the husband, in the event of one spouse dies before the other. The names of the beneficiaries in respect of each of the property has been clearly spelt out and the spouses did not reserve any mutual benefit in the properties belonged to the other spouse. No *animus* is seen to be present in the Will in order to have any mutual arrangement between the parties.

15. If any two persons have chosen to execute a Will jointly, but without having any stake in each other's properties, it cannot be classified as a mutual Will. The mutual Will is a kind of arrangement made between two people especially the spouses taking into consideration of their own security. The arrangement in mutual Will should be in such a way that the properties of the predeceasing spouse should be inherited by the surviving spouse and only thereafter, it should go to the other beneficiaries, if any.



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16. In this regard, it is appropriate to refer the Judgment of the Hon'ble Supreme Court held in ***Dilharshankar C.Bhachech Vs. Controller of Estate Duty, Ahmedabad, reported in (1986) 1 SCC 701***. The relevant portions are extracted as under:

"52. It was emphasised that there was no evidence of mutuality. But there was enough evidence in the language of the will itself which have been set out hereinbefore that the property must remain in tact specially after receipt of benefit by one of the executants on the death of the other until the death of both of them to be able to be succeeded by the ultimate legatees. The dominant intention of the testators is evidenced from the language used. This must be judged in the facts and circumstances of each case. It was not only that on certain basis that the will was made but it was intended to remain intact to be enjoyed by the grand children. The fact that both the executants have described themselves 'joint owners' is not by itself conclusive on this point nor the use of the expression 'that the survivor shall become the owner' is conclusive. On the other hand the detailed provisions in species to be effective after the death of the survivor in different portions to be given to the different grand sons without any provision as to what was to happen in case of the diminution of the property within the life time of either of the survivor make the will 'mutual wills'.



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53. *In our opinion the dominant intention is clear i.e. the will may be revoked during the life time of both the executants but after the death of one of the executants and after benefit had been received by the survivor, the property in question must remain intact to be enjoyed by the grand children by the terms of the will which was to become effective on the death of both of the executants.*

54. *We are of the opinion that definite intention must be there but such intention need not be expressed in a separate document than the will itself. If from the will in question such a definite intention and a separate agreement can be spelled out then in our opinion it would be a case of joint and mutual will."*

17. Normally in such Wills, the rights of the executants to revoke the same during the life time of both or subsequent to the death of one of the spouses and after the other spouse had acquired the benefit. Such kind of arrangements are more often done to have the convenience of one comprehensive Will, instead of writing two Wills. This position has been elaborated in the Judgment of this Court in ***Kuppuswami Raja and another Vs. Perumal Raja and others, reported in AIR 1964 Mad 291***, wherein it is held as under:



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TOS.No.4 of 2019

"A joint and mutual Will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the mutual Will, and there need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous mutual Wills but one single document. If one single document is executed by two brothers using the expressions "our property" "our present wishes" "our Will" and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent.

On the facts, that the Will in the instant case rests upon a bilateral agreement entered into between the brothers founded upon by mutual consideration and mutual trust and confidence. It is impossible to effectuate and carry out their scheme if after the death of one, the survivor were to possess an unilateral and unqualified power to revoke or cancel or modify that arrangement. The clause "we are entitled to revoke or alter the Will during our lifetime" can in the context mean only revocation or alteration during the lifetime of both.

The several clauses in the Will contain abundant intrinsic evidence that the Will itself was the result of a mutual reciprocal arrangement. This significant recital in the Will that it was executed with a view to prevent and avoid after their death any future dispute or controversy in regard to 'our



properties' and the provision that on the birth of any issue, male or female to either of the testators, the Will shall cease to have effect, afford clinching and decisive proof of such reciprocal arrangement. The testators are sensibly alive to the restriction which they have imposed upon themselves that the Will cannot be cancelled except during their lifetime and to their mutual consent .

It is now fairly well settled that under Hindu law, it is not: competent to a member of a joint family to execute a Will in regard to his share in the joint family properties, but if all the coparceners of a joint family agree and consent a Will so executed can be given effect to as a family settlement."

18. So a component of bilateral agreement between the parties in respect of any disposition made in the Will should be present in case a Will has to be construed as a mutual Will. Of Course, in a joint Will there is no bar for one of the executants to bequeath any property in favour of the other executant. The only difference is the mutual Will would confer mutual rights upon the executants in the event of death of one of them. Hence the only determining factor is the date of death of either of the executants.



19. A clear distinction between a joint Will and the mutual Will is given in the judgment of the Hon'ble Supreme Court held in the case of ***Kochu Govindan Kaimal and others Vs. Thayankoot Thekkot Lakshmi Amma and others, reported in 1959 Supp (1) SCR 1.*** Reference has also been made to Halsbury's law of England in paragraph Nos.10 & 11 as under:

"10. A joint will, though unusual, is not unknown to law. In Halsbury's Laws of England, Hailsham's Edition, Vol. 34, p. 17, para. 12, the law is thus stated:

" A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties, or of their joint property. It is not, however, recognised in English law as a single will. It operates on the death of each testator as his will disposing of his own separate property, and is in effect two or more wills "

There is a similar statement of the law in Jarman on Wills, 8th Ed., p. 41. The following observations of Farewell J. in Duddell in re. Roundway V. Roundway (1) are apposite:

".... in my judgment it is plain on the authorities that there may be a joint will in the sense that if two people make a bargain to make a joint will, effect may be given to that document.



On the death of the first of those two persons the will is admitted to probate as a disposition of the property that he possesses. On the death of the second person, assuming that no fresh will has been made, the will is admitted to probate as the disposition of the second person's property.....

11. It was also argued for the respondents that the will might be construed as a mutual will, but that, in our opinion, is an impossible contention to urge on the recitals of the document. A will is mutual when two testators confer upon each other reciprocal benefits, as by either of them constituting the other his legatee; that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a mutual will. It cannot be argued that there is, in the present case, a bequest by the testators to themselves. There is nothing in the will to support such a contention, which would be inconsistent with the position taken by the respondents that there was a settlement of the properties inter vivos converting separate properties into joint properties. In this view, on the death of Kunhan Kaimal his properties vested in the legatees under the will dated February 10, 1906, and therefore neither Kesavan Kaimal nor his transferees under the deeds could lay any claim to them."



WEB COPY 20. To put in a nutshell, the following features should be shown to be present in order to consider a Will as a mutual Will:

- (i) The Will ought to have been executed by two executants.
- (ii) There should be a bilateral agreement between both the executants that each of them should be a legatee for the property of the other executant in the event of death of either of them.
- (iii) The arrangement should be in such a way that the surviving executant is the beneficiary for the property of the predeceasing executant.

21. The Will can even be mutual as well as joint, in case the executants deal with the properties other than the properties which are meant to be inherited by them mutually. In such case, the Will is partly mutual as against those properties in respect of which the executants have bilateral agreement between themselves and as against the rest of the properties, the Will can only be seen as a joint Will. The properties involved in the joint Wills can either be the separate properties or the properties owned jointly by the executants.



WEB COPY 22. By having the above yardsticks, it can now be tested whether the Will involved in this case is a joint Will or a mutual Will. In the case in hand, Ex.P1 Will has been executed by more than one executants who are couple. But there is no bilateral agreement between them for inheriting the properties of one by the other in the event of the death of either one of them. There is a clear distinction of title in respect of each of the properties and the properties did not own by the couple jointly. A distinct and separate arrangement is shown in respect of each of the properties of the each of the executants and the arrangement is not shown to be giving any entitlement in favour of other after the death of either of them. So in all probabilities and possibilities, the Ex.P1 Will cannot be claimed to be a mutual Will, but only a joint Will. **Thus, Issue No.3 is answered.**

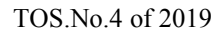
23. Since the Will is a joint Will and not a mutual Will, one of the executant who is the mother of the parties can always have a right to revoke the same by taking any action in respect of the property belonged to her and which is shown as Item No.2 in the Ex.P1 Will. Since Item No.2 is a Flat at No.18, 1st Floor of “Ahalya Apartment” No.55, Mambalam High Road,



TOS.No.4 of 2019

T.Nagar, Chennai 600 017 and in which P.W.2 mother has got an absolute title by virtue of the sale deed dated 02.11.1995. The defendant also does not dispute about the fact that Item No.2 is the self-acquired property of his mother. Even though the mother had chosen to bequeath the property in favour of his son the defendant herein under the joint Will, she is always at liberty to change her mind and deal the same as per her wishes. So the defendant cannot question the right of his mother to alienate Item No.2 during her life time. **Thus, Issue No.5 is answered.**

24. Even though one of the executants had revoked a part of the Will, in respect of Item No.2, the Will contains other properties of the father N.John Ponniah. So the defendant cannot claim that the suit is not maintainable in view of the disposal made by the mother in respect of Item No.2. So far as Item No.6 is concerned, the mother who is the owner had come to the box as P.W.2 and deposed that Item No.6 was sold by her on 20.04.2008. On the same day, Item No:2 was settled by her in favour of the 1st plaintiff. Since item Nos.2 and 6 belonged to the mother, she is at liberty to do any acts or alienations which would revoke the Will in respect of the said Item Nos.2 and 6. Since the Will contains other Items 1,3,4 & 5 which belonged to the father



25. Now, the remaining two issues are in respect of the Item ,4, & 5 belonged to the father. So the plaintiffs have got the burden to prove that the father had executed the said Will and the signature found in the said Will is that of their father.

26. The contention of the defendant is that his father had worked as a Joint Secretary to Government Department and he was always cordial with him and he even desired to give a major share of his properties to him, but the daughters and mother colluded between themselves and created a Will and it is not a genuine one. In the written statement filed by the defendant also he had stated that the Will has been concocted by the plaintiffs. During his examination as D.W1, he has stated that the father's signature is grossly different in the Will and the strokes and style of his father's signature do not tally with the signature seen in Ex.P1 Will.



WEB COPY 27. During the cross examination of D.W.1, he was confronted whether he had pleaded about the distinct differences in the signature of the father and about which he had stated in his proof affidavit. D.W.1 had answered that he did not give those details in his written statement, however, he had denied the genuineness of the Will.

28. The attesting witness was examined through appointment of an Advocate Commissioner. The Commissioner's report would show that the attester by name Mr.L.Krishnan was very old and he was in the evenings of his life and he was not able to identify the signature of N.John Ponniah, as his eye sight was very poor. In fact, the attesting witness is said to have shown gestures that he did not know the signature of N.John Ponniah and that he did not remember any Will executed by N.John Ponniah and on which he signed as an attesting witness. If the attesting witness does not recollect his participation if any, in the execution of the document, it has to be proved by other evidence as contemplated under Section 71 of the Evidence Act. But the plaintiffs did not take any steps in compliance of Section 71 of the Evidence Act.



TOS.No.4 of 2019

29. The learned counsel for the plaintiffs submitted that the plaintiffs' mother was examined as P.W.2 and she has stated about the execution of the Will and that the father of the plaintiffs had affixed his signature in the Will along with P.W.2.

30. The very contention of the defendant is that P.W.2 who is the mother is sailing along with the plaintiffs and she is hostile to his interest. The above submission of the defendant gets substantiated by the fact that P.W.2 mother who had bequeathed Item No.2 in favour of the defendant, later changed her mind and settled it in favour of the first plaintiff on 20.03.2017. Since those actions are adverse to the interest of the defendant, some independent witness ought to have been examined by the plaintiffs to establish that the joint Will has been signed by the father. Only if the plaintiffs could prove that the Will was signed by father, the burden would shift upon the defendant to prove that the father was not in a sound disposing state of mind while executing the Will.

31. The attention of this Court was attracted to the signature of the father of the parties as seen in the sale deed dated 23.08.1976 which is marked



TOS.No.4 of 2019

as Ex.P4, in which the father's signature is available. The plaintiffs cannot deny the genuineness and validity of Ex.P4, since it is their own document. Of course the sale deed is dated 23.08.1976. The signature of the father found at Page No.2 is grossly different from the signatures affixed in the Will. No doubt the Will is dated 20.04.2008 which is nearly 32 years later than Ex.P4. Had the plaintiff produced any contemporary documents containing the admitted signature of the father, it would have been possible for comparing the signature found in Ex.P1 Will. Though the defendant had categorically denied that the signature found in the Will is not affixed by the father, the plaintiffs did not take any serious steps to show the authenticity and genuineness of the signature of their father. The above proof is more essential in view of the fact that the attesting witness himself was not able to say anything about the execution of the Will or the affixing of the signature by the father of the plaintiffs.

32. As stated already, the Court itself could have compared the signature of the father in Ex.P1 Will, had the plaintiffs produced any documents containing the admitted signature of the father. Such kind of examination by the Court is not unusual and it is contemplated under Section



73 of the Evidence Act. Though the plaintiffs have got the prime burden to prove the signature of their father in the Will, they did not take any steps to send it for comparison by the Forensic Expert and get the report.

33. Had the Will was a registered one, the benefit of presumption about its genuinity could have been granted in favour of the plaintiffs taking into account of the fact that during the registration the person who had executed the document would have been necessarily present. Ex.P1 being an unregistered Will, the plaintiffs has a larger responsibility to comply the rules of Evidence for proving its genuineness. On this point, it is relevant to refer the judgment of the Hon'ble Supreme Court in ***Bhagat Ram and Another Vs. Suresh and Others, reported in (2003) 12 SCC 35***. In the said case, it is held as under:

17. We have carefully perused the submissions so made. In the case of Dharam Singh (supra), the two witnesses did not support the execution of the Will. The trial Court had relied upon the statement of the registering authority. The decision of the trial Court was reversed by the first appellate Court and the decision by latter was upheld by the High Court. In a short judgment this Court held that the appellate Court and High Court were right in their conclusion that the



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*Registrar could not be a statutory attesting witness. There is no further discussion. Presumably what was sought to be contended before this Court was that the Registrar having discharged his statutory duty ought to be treated as a statutory attesting witness; for the Registrar would not register the document unless execution of the document was admitted by the executant and acknowledged to the Registrar. In Dharam Singh's case the Court has relied on two earlier decisions of this Court in [M.L. Abdul Jabbar Sahib v. H. V. Venkata Sastri & Sons](#), [1969] 3 SCR 513 and [Beni Chand \(since dead\) now by Lrs. v. Smt. Kamla Kumar](#), [1977] 1 SCR 578. In Abdul Jabbar's case this Court has held by reference to the definition of 'attested' as given in [Section 3](#) of the Transfer of property Act, 1882 that to be an attesting witness it is essential that the witness should have put his signature *animo attestandi*, i.e. for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose e.g. to certify that he is a scribe or an identifier or a registering officer he is not an attesting witness. Prima facie the registering officer puts his signature on the document in discharging of his statutory duty under [Section 59](#) of the Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgement of his signature. The evidence adduced in*



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TOS.No.4 of 2019

the case did not show the registering officer having signed the document with the intention of attesting it nor was it shown that the registering officer signed it in the presence of the executant. In these circumstances, the Court concluded that the registering officer was not an attesting witness. Beni Chand's case (supra) deals with general principles relating to execution of the Will and does not deal with the question whether a registering officer can be an attesting witness or not. The ratio of the several decisions by the High Court of Punjab and Haryana cited at the Bar is that, in the facts and circumstances of a given case, the Registrar may also fulfill the character of an attesting witness as required by law and if, on entering into witness box as required by. [Section 68](#) of the Evidence Act, he proves by his testimony the execution of document by deposing to having witnessed himself the proceedings as contemplated by [Section 63](#) of the Succession Act, he can be an attesting witness. The certificate of registration under [Section 60](#) of the Registration Act, 1908 raises a presumption under [Section 114](#) illustration (e) of the [Evidence Act](#) that he had regularly performed his duty and therefore the facts spelled out by the endorsements made under [Sections 58](#) and [59](#) of the Registration Act may be presumed to be correct without formal proof thereof. The duties discharged by the registering officer do not include attestation or verification of attestation of will as required by the rules enacted by [Section 63](#) of the



Succession Act. An endorsement by registering officer is not by itself a proof of the will having been duly executed and attested.

34. As dealt in the above case, if the Will was registered, the plaintiffs could have got the advantage of registration and resultant presumption. Since the Will is not registered, the plaintiffs have the heavy burden to prove its genuineness and they cannot shirk away the responsibility.

35. It is the propounder who has to prove that the Will has been validly executed and the testator had signed the Will. In this regard, the Judgment of the Hon'ble Supreme Court held in ***Anil Kak Vs. Sharada Raje and others, reported in (2008) 7 SCC 695*** assumes more relevance. In the said case, it is held as under:

"49. The execution of a Will does not only mean proving of the signatures of the executors and the attesting witnesses. It means something more. A Will is not an ordinary document. It although requires to be proved like any other documents but the statutory conditions imposed by reason of [Section 63\(c\)](#) of the Act and [Section 68](#) of the Indian Evidence Act cannot be ignored.



50. *In B. Venkatamuni v. C.J. Ayodhya Ram Singh &*

Ors. [2006 (11) SCALE 148], this Court held:

"15. It is, however, well settled that compliance of statutory requirements itself is not sufficient as would appear from the discussions hereinafter made."

It was observed:

"19. Yet again Section 68 of the Indian Evidence Act postulates the mode and manner in which proof of execution of document which is required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence."

51. Yet again in *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.* [2006 (14) SCALE 186], this Court held:

"32. Section 63 of the Indian Succession Act lays down the mode and manner of execution of an unprivileged Will. Section 68 of the Indian Evidence Act postulates the mode and manner of execution of document which is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of



TOS.No.4 of 2019

WEB COPY 37. The further submission of the learned counsel for the defendant is that in the absence of proof of the Will by complying Sections 68, 69 and 71 of the Evidence Act, the attending circumstances cannot be disregarded by the Court. The plaintiffs have started to put up a construction over the suit property even before the Probate or Letters of Administration is granted in respect of the Will.

38. The defendant has produced Ex.D1, the copy of the order of the High Court made in W.P.No.9390 of 2017 to show that the plaintiffs have constructed a building over the suit property without following the Town Planning Rules and the Court had ordered to demolish the same. The said Writ Petition has been filed by the second plaintiff for challenging the notice of the Corporation Authorities which has stopped the construction work. On perusal of the order, it is seen that the plaintiffs have put up construction by violating the Town Planning Rules and they were facing troubles in the hands of the Corporation Authorities. In this regard, it is relevant to cite the Judgment of the Hon'ble Supreme Court held in *M.B.Ramesh Vs. K.M.Veeraje reported in (2013) 7 SCC 490*. In the said Judgment, it is held as under:



"25. The issue of validity of the will in the present case will have to be considered in the context of these facts. It is true that in the case at hand, there is no specific statement by PW2 that he had seen the other attesting witness sign the will in the presence of the testator, but he has stated that the other witness had also signed the document. He has proved his signature, and on the top of it he has also stated in the Cross examination that the other witness (Mr. Mallaraje Urs), Smt. Nagammani, himself and one Sampat Iyanger and the writer of the will were all present while writing the will on 24.10.1943 which was registered on the very next day. This statement by implication and inference will have to be held as proving the required attestation by the other witness. This statement alongwith the attendant circumstances placed on record would certainly constitute proving of the will by other evidence as permitted by [Section 71](#) of the Evidence Act.

26. While drawing the appropriate inference in a matter like this, a Court cannot disregard the evidence on the attendant circumstances brought on record. In this context, we may profitably refer to the observations of a Division Bench of the Assam High Court in Mahalaxmi Bank Limited Vs. Kamkhyalal Goenka reported in [AIR 1958 Assam 56], which was a case concerning the claim of the appellant bank for certain amounts based on the execution of a mortgage deed. The execution thereof was being disputed by the



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respondents, amongst other pleas, by contending that the same was by a purdahnashin lady, and the same was not done in the presence of witnesses. Though the evidence of the plaintiff was not so categorical, looking to the totality of the evidence on record, the Court held that the execution of the mortgage had been duly proved. While arriving at that inference, the Division Bench observed:-

“11.....It was, therefore, incumbent on the plaintiff to prove its execution and attestation according to law. It must be conceded that the witnesses required to prove attestation has (sic) not categorically stated that he and the other attesting witnesses put their signatures (after having seen the execution of the document) in the presence of the executants. Nevertheless, the fact that they actually did so can be easily gathered from the circumstances disclosed in the evidence. It appears that the execution and registration of the document all took place at about the same time in the house of the defendants. The witnesses not only saw the executants put their signatures on the document, but that they also saw the document being explained to the lady by the husband as also by the registering officer.

They also saw the executants admit receipt of the consideration, which was paid in their presence. As all this happened at the same time, it can be legitimately inferred that the witnesses also put their signatures in the presence of the executants after having seen them signing the instrument...

.....

.....There is no suggestion here that the



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TOS.No.4 of 2019

execution and attestation was not done at the same sitting. In fact, the definite evidence here is that the execution and registration took place at the same time. It is, therefore, almost certain that the witnesses must have signed the document in the presence of the executants.....”

39. In the above case, from the attending circumstances, favourable inference can be drawn in favour of the plaintiffs. In the case in hand the plaintiffs did not establish the circumstances surrounding the Will also in a way that would support their case. Since the plaintiffs have omitted to prove the genuineness of the Will that it has been duly signed by the father and other attesting witnesses, the plaintiffs' claim fails. **Thus, Issue No.1 is answered.**

40. When the plaintiffs have not proved that the Will dated 20.04.2008 is true and valid and that their father N.John Ponniah has affixed his signature on the Will, it becomes unnecessary to go into the other issue whether N.John Ponniah was in a sound and disposing state of mind. In fact, only when the plaintiffs could prove that N.John Ponniah has executed a Will in a manner known to law and his signature is proved, the defendant will have the burden to prove that the testator was not in a sound disposing state of mind. **Thus, Issue No.2 is answered.**



TOS.No.4 of 2019

WEB COPY **41.** Since the plaintiffs have failed to prove their case, the suit is liable to be dismissed.

42. In the result, this Testamentary Original Suit is dismissed. No costs.

12.09.2023

Index: Yes
Speaking Order
Neutral Citation : Yes
gsk



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TOS.No.4 of 2019

R.N.MANJULA, J

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TOS.No.4 of 2019

12.09.2023