



O.S.A.No.368 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:08.03.2023

Delivered on: 16.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

O.S.A.No.368 of 2012

&

M.P.No.1 of 2012

Carmel Shantha

.. Appellant

Vs.

1.A.Pushparaj (deceased)

2.Thanjasagaram

3.A.Selvaraj

4.P.Malcom

5.Francisca Sellammal

6.Anna Padmavathy Soosai

7.Lourdumary Shantha R.Soosai

8.Joseph Soosai

9.Sharell A.Pushparaj



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10.Sharon Pushparaj

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R9 and 10 impleaded as LR's
of the deceased 1st respondent
Viz (A.Pushparaj) vide
Court order dated 22.12.22
made in C.M.P.No.430/2018
in O.S.A.No.368/12 by
SSSRJ and AANJ

.. Respondents

Prayer:- Original Side Appeal filed under Order 36 Rule 1 of the Original
side Rules read with Clause 15 of Letters Patent against the judgment and
decree dated 27.06.2012 made in T.O.S.No.12 of 1999 and to allow this
Appeal.

For Appellant : Mr.N.C.Ramesh, Senior Counsel
for
Mr.T.Sivaprakasam

For Respondents : Mr.R.Prem Kumar
for
M/s. King and Patridge for R4 and 10

JUDGMENT

(Judgment of the Court was made by P.B.BALAJI,J.)

This intra Court Original Side Appeal is directed against the
judgement and decree in T.O.S.No.12 of 1999 dated 27.06.2012 on the file
of the Original Side of this Court.



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2. The deceased 1st respondent in this appeal filed O.P.No.376 of 1996 seeking grant of Letters of Administration with a Will dated 05.04.1994 of A.Dharmaraj annexed. The 5th defendant alone contested the request for grant of Letters of Administration and the Original Petition was converted as a Testamentary Original Suit in T.O.S 12 of 1999. The defendants 1,3,4 and 6 to 9 did not file any written statement and it was only the 5th defendant, the appellant herein who chose to contest the Will.

3. The plaint in brief:

Late A.Dharmaraj died on 28.04.1995 at Malaysia leaving behind property at Chennai. The said deceased executed his Will at Chennai, on 05.04.1997. The deceased had appointed the plaintiff, A.Pushparaj as the sole executor. However, since the said executor was residing in Malaysia and was unable to obtain Letters of Administration, he appointed one Mr.R.Subrmanian as his Power Agent to apply for grant of Letters of Administration. According to the plaintiff, the Will was the last Will and testament of late A.Dharmaraj and it was executed by him while he was in a sound and disposing state of mind and in the presence of two attesting witnesses.



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4. The written statement of the 5th defendant in brief:

The plaintiff had wilfully omitted to implead the 5th defendant in the Original Petition proceedings and there was even delay in furnishing a copy of the Will. The Will is unnatural and could not have been executed by late A.Dharmaraj, out of his own volition. The very execution of the Will on 05.04.1994 by late A.Dharmaraj was emphatically denied.

5. The Learned Single Judge framed the four following issues:

“1. Whether the suit is maintainable for the reasons that it is filed by the Power of Attorney?

2. Whether the Will alleged to have executed by A.Dharmaraj on 05.04.1999 is true, genuine or valid?

3. Whether the plaintiff is entitled for issue of letters of administration as asked for?

4. To what order/relief the plaintiff is entitled to?”



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5. Before the Learned Single Judge, the plaintiff examined himself as P.W.1 and 4th defendant as P.W.2 and marked Exs.P1 to P12. On the side of the defendants, no oral and documentary evidence was let in.

6. The learned Single Judge answering the first issue in favour of the plaintiff held that the petition filed by the Power Agent and continued by the principal subsequently was maintainable. In so far as the issues 2 and 3, the learned Single Judge, no doubt agreeing to the settled position of law that the Will has to be proved by the propounder, proceeded to weigh various facts and circumstances in the said case and found that the Will was satisfactorily proved by the propounder to be true and genuine document.

7. The 5th defendant as appellant has come by way of this Original Side Appeal raising substantial grounds numbering as many as 63 grounds. However, this Court after hearing the counsel for the appellant as well as the counsel for the respondents, feels that the Appeal hinges on a very narrow compass viz., whether the plaintiff has proved due execution and



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attestation of the Will, as required by Law.

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8. The following facts are admitted to by both parties:

1. None of the two attesting witnesses were examined to prove due execution of the Will in question.

2. One of the attesting witnesses originally filed an affidavit of attesting witnesses viz., Mr.Rathnasamy Xavier dated 30.09.1995 as required by the Original Side Rules, along with the Original Petition.

3. Admittedly, the said Rathnasamy Xavier died subsequently on 11.02.2002, before the Trial commenced in the TOS proceedings.

9. In 2006, an application was taken out to appoint an Advocate Commissioner to examine the other attesting witness Dr.M.K.Radhakrishnan, who was then residing in Brunei. Thereafter, in 2009, another application was taken out by the plaintiff to issue subpoena to the very same attesting witness who was then residing at Malaysia. Admittedly, it is seen that no further steps were taken subsequent to both the applications being allowed in favour of the plaintiff. The learned Single Judge appears to have been carried away by the fact that the Will is a registered Will and the plaintiff has taken all bonafide steps to have



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the evidence of the only available attesting witness, Dr.M.K.Radhakrishnan recorded and held therefore it was sufficient in the circumstances of the case to hold that the Will had been proved. The learned Single Judge had also further held that the affidavit of the attesting witness Mr.Rathnasamy Xavier which was filed along with the Original Petition could be taken note of in view of the Sec.69 of the Indian Evidence Act, 187 r/w. Sec.60 of the Registration Act, 1908, to aid proof of due execution of the Will.

10. This Court emphasises the mandatory requirement to prove due execution and attestation of a Will. The two relevant sections in this regard are Sec.63 of the Indian Succession Act,1925 and Sec.68 of the Indian Evidence Act, which are extracted hereunder, for the purposes of ready reference:

Sec.63 of the Indian Succession Act:

“ 63. Execution of unprivileged Wills. –Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 12 [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:–

(a) The testator shall sign or shall affix his



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mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, 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 acknowledgement 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.”

Sec.68 of the Indian Evidence Act:

“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



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of giving evidence: 1[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 been executed is specifically denied.]

11. In the instant case, due execution of the Will by the Testator, late A.Dharmaraj was totally denied. Infact, this Court also notices certain vital discrepancies in the evidence adduced by the propounder as well. The Will Ex.P.1 has been executed on 05.04.1994. However, the said Will came to be registered before the Sub Registrar only on 07.04.1994 i.e two days thereafter. The affidavit of the attesting witness Mr.Rathnasamy Xavier which was filed along with the Original Petition mentions that he was present on 05.04.1994 together with Dr.M.K.Radhakrishnan at the office of the Sub-Registrar, Santhome and that they did see the deceased execute the Will. It is not the case of even the plaintiff that the Will was executed on 05.04.1994 before the Sub-Registrar at Santhome. Admittedly, the Will has been registered only on 07.04.1994. Therefore, the averment in the



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affidavit of attesting witness of Mr.Rathnasamy Xavier that he was present before the Sub-Registrar, Santhome on 05.04.1994, is factually incorrect and the same also went untested by way of cross examination. Infact, before the Sub-Registrar on 07.04.1994, the other attesting witness Dr.M.K.Radhakrishnan, was not even present. This contradiction, even in the affidavit of attesting witness filed when Mr.Rathnasamy Xavier was alive, rocks the very foundation of the evidence that would be required to be adduced in support of proof of the Will. It is another matter that the said Mr.Rathnasamy Xavier was not alive to give evidence or to be available to allow his affidavit to be tested in cross examination. The only course open to the plaintiff was to examine the other attesting witness Dr.M.K.Radhakrishnan.

12. No doubt, the plaintiff has made attempts. Firstly, an application was taken in 2006, to examine the said Dr.M.K.Radhakrishnan on commission at Brunei. Secondly, an application was filed to issue Subpoena to Dr.M.K.Radhakrishnan, in 2009, when he had moved to Malaysia. However, the bottom line is that the plaintiff did not succeed in examining the attesting witness viz., Dr.M.K.Radhakrishnan.



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13. A reading of Sections.68 and 69 of the Indian Evidence Act, clearly shows that Will cannot be used as evidence, until one attesting witness atleast has been called for the purposes of proving the due execution of the said Will. The second part of Sec.68 serves as an exception stating that the attesting witness should be alive and subject to the process of the Court and capable of giving evidence. In this case, it is admitted by the plaintiff that Dr.M.K.Radhakrishnan was very much alive and capable of giving evidence, besides also being subject to the process of the Court which can be clearly seen from the applications taken out by the plaintiff viz., one in 2006, to appoint a commissioner and again in 2009 to issue Subpoena to enable him to be present before this Court. Sec.69 deals with cases where, no attesting witness is found and sets out a separate procedure for proof of a document, the Will in the instant case, by proving the attestation of atleast one attesting witness to be in his handwriting besides also the signature of the testator to be in his handwriting.

14. The learned Single Judge has erred in placing reliance on Sec.69 to give a benefit to the plaintiff. The statute makes it very clear that, when one



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of the attesting witnesses is alive, there can be no substitute but to examine him, in order to prove due execution and attestation of the Will. Only when the witnesses cannot be found resort can be had to Sec. 69. Merely, drawing strength from the affidavit of attesting witness filed along with the Original Petition in 1995 to hold that Will has been duly proved is not proper. Infact, taking recourse to such a procedure would only lead to miscarriage of justice. The contesting defendant without even being afforded an opportunity to test the veracity of the statements by the attesting witness in the affidavit would be forced to accept the said affidavit without any demur or protest. This is not the intention of the Indian Evidence Act. Even in the affidavit of the attesting witness of Mr.Rathnawamy Xavier, this Court has found material and serious infirmities. Allowing such an affidavit to be taken on file and to hold that the said affidavit proves the execution and attestation of the Will in question would only be highly unjust and improper.

15. The learned counsel for the respondent relied on the judgment of the Hon'ble Supreme Court reported in *V.Kalyanaswamy (D) by Lrs and another Vs. L.Bakthavatsalam (d) by Lrs and Others, 2020 SC Online*



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SC 584. The Hon'ble Supreme Court dealt with Sec.69 and held that Sec.69 of the Indian Evidence Act, is a departure from the requirement embodied in the earlier section viz., Sec. 68. The Hon'ble Apex Court on consideration of the facts in the said case before it, found that there was evidence to conform to the requirement U/s. 69 and held that requirement of proof of Will U/s. 69 stood fulfilled. This Court notices that the Hon'ble Supreme Court in the very same judgment has also held as follows:

“ 74. Though the expression used is ‘if no such attesting witness can be found, inter alia, it bears the following interpretation’. The word ‘such’ before ‘attesting witness’ is intended to refer to the attesting witness mentioned in Section 68 of the Evidence Act. As far as the expression ‘found’ is concerned, it would cover a wide variety of circumstances. It would cover a case of an incapacity to tender evidence on account of any physical illness. It would certainly embrace a situation where the attesting witnesses are dead. Should the attesting witness be insane, the word “found” is capable of comprehending such a



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situation as one where the attesting witness, though physically available, is incapable of performing the task of proving the attestation under Section 68 the Evidence Act, and therefore, it becomes a situation where he is not found.”

16. The Apex Court also has clarified that the phrase “not found” occurring in Sec.69 would cover a variety of circumstances including incapacity of a person to give evidence on account of physical illness, death of the witness, witness becoming insane etc.,

17. This Court, however in the instant case has already found that only if the mandate of Sec.68 cannot be fulfilled or met for valid reasons, set out in the section, the application of Sec.69 would come into play. This Court has already found that though one attesting witness is no more, the other attesting witness Dr.M.K.Radhakrishnan was very much alive and available. In such circumstances, there can be no departure from the requirement of proof of the Will by resorting to any other procedure, other than Sec.68 of the Indian Evidence Act r/w. Sec.63 of the Indian



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Succession Act. Even assuming that a benefit of doubt can be given to the plaintiff, holding that the attesting witness, Dr.M.K.Radhakrishnan is residing abroad and unable to come down to Madras to give evidence in support of the Will and Sec.69 can therefore be resorted to holding that “not found” can be interpreted to such a case, in the instant case the plaintiff has not fulfilled even the mandate of Sec.69. The signature of not only the testator but also signature of one of the attesting witnesses will have to be proved by examining persons connected thereto. Here, there is absolutely no evidence available in this regard. The natural consequences that follows is that the plaintiff has miserably failed to establish the truth and genuineness of the Will in question by proving due execution and attestation of the same.

18. In the opinion of this Court, the learned Single Judge ought not to have applied the ratio laid down by the Hon'ble Supreme Court in ***Babu Singh Vs Ram Sahai reported in 2008 (14) SCC 754***, to the facts of the present case to hold that the propounder can resort to mode of proof available U/s. 69 of the Indian Evidence Act. The learned Single Judge has merely found that the Will stood proved because of Ex.P.11 affidavit of



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deceased attesting witness, Mr.Rathnasamy Xavier who has stated in the said affidavit that he saw the testator sign the Will and that the Will was attested in the presence of two attesting witnesses, who also attested the Will in the presence of the testator and that further he had stated that the testator was in sound and disposing state of mind at the time of execution. In the absence of any opportunity available to the defendant to cross examine the deponent of the affidavit, the affidavit cannot be taken as evidence in support of proof of Will or its due execution and attestation.

19. The learned Single Judge has also found that the registration of the Will has not been specifically denied by the appellant/5th defendant and therefore a presumption can be drawn U/s. 114 of the Indian Evidence Act. In the considered opinion of this Court, such a finding is fallacious because registration of a Will would only raise a presumption regarding the official act of registration and nothing further. It does not in any manner come to the aid of the plaintiff to enable the Court to draw a presumption that the Will was duly executed, especially, in the instant case, where admittedly, the Will was executed on 05.04.1994 and registered two days later only on 07.04.1994. The further finding of the learned Single Judge that the



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attesting witness Dr.M.K.Radhakrishnan, was out of the country and despite being served with summons, he did not appear before the Court and therefore, the only available evidence viz., the affidavit of Mr.Rathnasamy Xavier, Ex.P.11 could be taken as a piece of evidence to prove attestation U/s. 69 of the Indian Evidence Act is also improper and does not fulfill the mandate of the law.

20. This Court has time and again held that a Will has to be proved in a manner known to law. Especially, where one of the legatees or heirs dispute the genuineness of the Will in question or the factum of due execution and attestation, the burden is primarily and very heavily on the propounder who comes to Court claiming the said Will to be true and genuine. There can be no bye-pass to the mandatory requirements of Sec. 63 of the Indian Succession Act r/w. Sec.68 of the Indian Evidence Act. This Court has already found that mere taking steps to procure the attesting witness is not sufficient to prove due execution for attestation of a Will, when it is especially contested by one of the legatees. Ultimately, this Court holds that the plaintiff has not proved due execution and attestation of Ex.P.1 Will dated 05.04.1994.



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21. In the result, the Original Side Appeal stands allowed and the judgment and decree dated 27.06.2012 made in T.O.S.No.12 of 1999 is set aside. However, considering the relationship between the parties, there shall be no order as to costs.

(P.B.B.J)

(S.S.S.R.J) &

16.03.2023

Internet : Yes

Index: Yes/No

Speaking/Non-speaking order

Neutral Citation: Yes/No

To

1.The Sub Assistant Registrar (Original side)
High Court, Madras

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



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

kpr

Pre-delivery judgment in
O.S.A.No.368 of 2012



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