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OSA Nos. 248 and 249 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.10.2023

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

Original Side Appeal Nos. 248 and 249 of 2021

O.S.A. No. 248 of 2021

1. D. Venkataraman
2. D. Parthasarathy
3. D. Vishnupriya
4. D. Dakshinamoorthy .. Appellants

Versus

1. R. Srinivasan
2. Uma Devi .. Respondents

O.S.A. No. 249 of 2021

1. D. Venkataraman
2. D. Parthasarathy
3. D. Vishnupriya .. Appellants

Versus

1. R. Srinivasan
2. Uma Devi .. Respondents

O.S.A. No. 248 of 2021:- Original Side Appeal filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent against the Order dated 26.05.2020 made in T.O.S. No. 51 of 2018 on the file of this Court.

O.S.A. No. 249 of 2021:- Original Side Appeal filed under Order

<https://www.mhc.tn.gov.in/judis>



OSA Nos. 248 and 249 of 2021

XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent against the Order 26.05.2020 made in T.O.S. No. 29 of 2015 on the file of this Court.

For Appellants : Mr. M.K. Kabir, Senior Advocate
for M/s. Akhil Akbar Ali Associates
in both the appeals

For Respondents : Mr. K.R. Tamizhmani, Senior Advocate
for Mr. V. Srinivasa Babu for R1

R2 set exparte

COMMON JUDGMENT

(Judgment of the Court was delivered by **R.MAHADEVAN, J**)

Both these original side appeals arise out of a common order dated 26.05.2020 passed by the learned Judge in T.O.S. Nos. 51 of 2018 and 29 of 2015 respectively.

2. The dispute surrounding these two appeals relate to two registered Wills. The first Will was dated 21.10.1981 registered as document No. 54 of 1981 on the file of the Sub-Registrar, Periamet, executed by one B.Varadarajulu, who died on 27.01.1982. The other Will was dated 10.05.2002 registered as document No. 82 of 2002 on the file of the Sub-Registrar, Anna Nagar, executed by the wife of the aforesaid Varadarajulu / V.Sakuntala Devi, who died on 02.04.2011.

<https://www.mhc.tn.gov.in/judis> 3.(i) According to the appellants, one Kadiramma was their maternal



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grand mother. The said Kadiramma had a sister by name Sakuntala Devi and she had two daughters viz., D.Meenakshi and B.L.Uma Devi. The said Meenakshi is the mother of the appellants 1 to 3 herein. The fourth appellant in O.S.A. No. 248 of 2021 is the husband of Meenakshi / father of the appellants 1 to 3.

(ii) It was further stated by the appellants that the said Sakuntala Devi was married to one Varadarajulu. However, out of their wedlock, no children were born. Therefore, Sakuntala Devi and Varadarajulu had decided to adopt Meenakshi, mother of the appellants as well as her sister Uma Devi as their foster daughters and nurtured them. In other words, Meenakshi and Uma Devi are the two daughters born to Kadiramma (i.e.) sister of Sakuntala Devi. The contesting first respondent in these appeals is one of the sister's son of Varadarajulu, husband of Sakuntala Devi.

(iii) The appellants also stated that the aforesaid Varadarajulu was employed in the Corporation of Chennai and out of his income, he and his wife had jointly purchased the land and building bearing Door Nos.4 and 5 (old Door No.49-B), Pulla Reddy Avenue, Shenoy Nagar, Chennai-600 030, by way of a sale deed dated 22.05.1956 registered as document No. 659 of 1956 on the file of the Sub-Registrar, Madras (West). After purchasing the property, the couple had constructed a building. In fact, the said Sakuntala Devi and her husband Varadarajulu had performed the marriage of Meenakshi, mother of the



appellants, with one Dakshinamoorthy (fourth appellant in OSA No. 248 of 2021) and out of the wedlock, the appellants 1 to 3 were born.

(iv) It was further stated by the appellants that Varadarajulu, during his life time, had executed a Will dated 21.10.1981 registered as document No. 54 of 1981 on the file of the Sub-Registrar, Periamet. As per the Will, his wife Sakuntala Devi was given life estate and after her life time, a portion of the property viz., upstairs bearing Door No.4, Pulla Reddy Avenue, and the open ground therein together with staircase and shed in the downstairs, will be entitled to the first respondent in these appeals. The remaining portion of the property namely ground floor bearing Door No.5, Pulla Reddy Avenue and the ground, garage etc., will be bequeathed to Meenakshi, mother of the appellants 1 to 3. In the said Will, a common passage was also earmarked for the use of both parties. While so, on 27.01.1982, the said Varadarajulu died and on his death, his wife Sakuntala Devi enjoyed it till her death on 02.04.2011. Thereafter, the property came to be vested with Meenakshi, mother of the appellants and Srinivasan, first respondent herein, as per the Will.

(v) It was also stated by the appellants that when they were taking steps to probate the Will executed by the deceased Varadarajulu, they received a notice from the first respondent seeking citation for production of the Will dated 10.05.2002 said to have been executed by Sakuntala Devi. On receipt of such notice only, the appellants came to know that Sakuntala Devi also



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executed a Will on 10.05.2002, which was registered as document No.82 of 2002 on the file of the Sub-Registrar, Anna Nagar, and they were not aware of the existence of such a Will or the contents thereof. They applied for a certified copy of the Will dated 10.05.2002 executed by the said Sakuntala Devi, wherein she had referred to the earlier Will dated 21.10.1981 executed by her husband Varadarajulu and thus, she had acknowledged the truth and validity of the Will executed by her husband. It is in those circumstances, the appellants have filed OP No. 673 of 2017 to probate the Will dated 21.10.1981 of the deceased Varadarajulu.

4. The Original Petition was opposed by the first respondent, as a result of which, it was converted into a Testamentary Original Suit and numbered as T.O.S. No. 51 of 2018. Thereafter, the first respondent herein filed a Written Statement stating that the testator Varadarajulu was not keeping good health and was not in a sound and disposable state of mind. He died on 27.01.1982, within three months and 6 days of executing the Will dated 21.10.1981. During his life time, it was the first respondent, who was taking care of Varadarajulu as well as his wife Sakuntala Devi by residing in the first floor of the same premises. Even though the appellants said to have been aware of the Will dated 21.10.1981 of the deceased Varadarajulu, they did not probate it for more than two decades until the death of Sakuntala Devi on



02.04.2011. After the death of Sakuntala Devi, the executors mentioned in the Will dated 10.05.2002, were not interested in probating the Will and therefore, the first respondent had filed OP No. 805 of 2012. Since the appellants herein filed Caveat and opposed the Will dated 10.05.2002, the said original petition viz., OP No. 805 of 2012 was converted into T.O.S. No. 29 of 2015. In any event, the Will dated 21.10.1981 of the deceased Varadarajulu has not been probated for more than two decades and the appellants should have furnished explanation for the delay in filing the Original Petition for probate after 21 years.

5. In both the suits namely T.O.S. No. 51 of 2018 and T.O.S. No. 29 of 2015, witnesses were examined and documents were marked. In TOS No. 29 of 2015, on behalf of the plaintiff, one V. Prabhakaran was examined as PW1 and Exs. P1 to P4 was marked. On the side of the defendants, one D.Parthasarathy was examined as DW1 and Exs. D1 to D3 were marked. In the suit in T.O.S. No. 51 of 2018, the fourth appellant in OSA No. 248 of 2021, viz., D. Dakshinamoorthy was examined as PW1, but no witness was examined on the side of the defendants. Exs. P1 to P3 and Ex.D1 documents were marked.

<https://www.mhc.tn.gov.in/judis> 6. The learned Judge, after hearing the submissions of both sides and



on appreciation of the oral and documentary evidence, passed a common judgment dated 26.05.2020 thereby decreeing the suit in T.O.S. No. 29 of 2015 and granted letters of administration in favour of the plaintiff therein/first respondent herein, in respect of the last Will and Testament of the deceased Sakuntala Devi. Consequently, T.O.S. No. 51 of 2018 filed by the appellants to probate the Will dated 21.10.1981 of the deceased Varadarajulu was dismissed. While so, it was observed by the learned Judge that the Will dated 21.10.1981 has not been proved as required under Section 63 of the Succession Act as well as Section 68 of the Evidence Act by examining the attesting witnesses or adducing evidence of other persons who were acquainted with the signature of the testator and the attesting witnesses to the Will. The relevant portion of the common judgment dated 26.05.2020 of the learned Judge is extracted below, for better appreciation:

"18. In light of the above evidence, can it be said that the Will of Varadarajulu was proved in accordance with law? The contention of the learned senior counsel for the Plaintiffs in T.O.S. No.51 of 2018 is that the doctrine of election applies and that the Will of Varadarajulu cannot be disputed either by Sakuntala Devi or the legatees of the Shenoy Nagar Property under the Will of Sakuntala Devi. In particular, the submission of the learned senior counsel is that the Will of Sakuntala Devi refers expressly to the Will of Varadarajulu at paragraph 8 thereof. The said paragraph 8 is extracted supra. On perusal of paragraph 8, it is clear that the Will of Varadarajulu is referred to therein, including a reference to the fact that it is a registered Will and that a life interest was conferred on Sakuntala Devi in respect of the Shenoy Nagar Property under her husband's Will. From the above, can it be concluded that Sakuntala Devi derived the benefit of a life estate under the Will of Varadarajulu and elected to accept the benefit under the said Will? I am unwilling to accept the said contention for two reasons. The first reason is that Section 180 of the Succession Act applies to a situation where a person receives a bequest under a Will and the said Will also, without title or authority,



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deals with a property belonging to such legatee. In such situation, once the said legatee accepts the bequest under the Will, the legatee cannot dispute the validity of the other disposition under the Will. The doctrine of election turns on the principle that a person should not be allowed to approbate and reprobate by accepting the beneficial aspects of a document and rejecting the adverse aspects of the same document. This is evident from paragraph 8 of the judgment of the Honble Supreme Court in Mani Mani and from paragraphs 4 and 7 of the judgment in Nagarathinam. For example, if Varadarajulu had bequeathed two properties under his Will, one of which was owned by Varadarajulu and the other being jointly owned by Varadarajulu and Sakuntala Devi, if Sakuntala Devi had derived title to the property owned entirely by Varadarajulu by virtue of the Will, she would be precluded from challenging the disposition in respect of the other property, which is jointly owned. However, in this case, the only property dealt with under the Will of Varadarajulu is the Shenoy Nagar Property, which stands in the joint names of Varadarajulu and Sakuntala Devi, as per the relevant registered sale deed. Moreover, from the evidence on record, it cannot be inferred that Sakuntala Devi acquired title to the Shenoy Nagar Property under the Will of Varadarajulu. Consequently, the doctrine of election does not apply in this situation. The second reason is that Srinivasan did not, even arguably, elect directly. He cannot be said to have elected indirectly also because his claim is on the basis of joint ownership of the Shenoy Nagar Property by Varadarajulu and Sakuntala Devi, the succession to her husband's share by Sakuntala Devi, upon his death, and the subsequent bequest in favour of Srinivasan under her Will. In other words, his claim is not contingent on recognising the life estate of Sakuntala Devi under the Will of Varadarajulu. Therefore, the doctrine of election would not, in any event, apply to or impact Srinivasan, the Defendant in T.O.S. No.51 of 2018.

19. The next question that arises for consideration is whether the Will of Varadarajulu stands incorporated by reference in the Will of Sakuntala Devi. In order to decide whether one document is incorporated by reference in another document, the document should be examined closely so as to ascertain the intention from the language used therein. In this case, the document in question is the Will of Sakuntala Devi. On perusal thereof, I find that it certainly does not expressly state that the Will of Varadarajulu is incorporated by reference. This leads to the next question as to whether the Will of Varadarajulu is incorporated by implication. On perusal of paragraph 8 of the Will of Sakuntala Devi, I find that it is stated therein that to the knowledge of Sakuntala Devi, the Will of Varadarajulu was not probated/ letters of administration were not obtained. It is further stated that the legatees are at liberty to apply to the Court for letters of administration. It also states that if the Will is not filed in Court for obtaining letters of administration, she is advised that the property would be entirely hers.

20. From paragraph 8 of the Will, it is clear that Sakuntala Devi had full knowledge about the execution and registration of a Will by her



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husband, Varadarajulu, on 21.10.1981. It is also evident that she was reasonably aware about the contents of the Will, including the nature of bequest as regards the Shenoy Nagar Property. In fact, paragraph 8 expressly adverts to the fact that she was given life interest in the Shenoy Nagar Property. Given the fact that Sakuntala Devi proceeded to state that she is advised that the property would be entirely hers in the absence of a probate or letters of administration, I am of the view that she did not intend to incorporate her husband's Will by reference in her Will. Such implication would be contrary to her stated intention of dealing with the Shenoy Nagar Property on the basis that she is the sole owner of such property. Thus, I conclude that it cannot be said that the Will of Varadarajulu was incorporated by reference into the Will of Sakuntala Devi.

21. Nevertheless, the question arises as to whether the Will of Varadarajulu stands proved by the references to the said Will in the Will of Sakuntala Devi or by the alleged admission or non-denial thereof by Srinivasan. This is a more complicated question in as much as there is a reference in paragraph 8 of the Will of Sakuntala Devi to the Will of Varadarajulu, including the date of execution thereof and to the fact that it is a registered Will. Indeed, even the content of the Will of Varadarajulu is described in paragraph 8 in reasonable detail. It also needs to be borne in mind that the said Will of Varadarajulu is a registered Will. The Will of Varadarajulu was executed on 21.10.1981 and he expired within three months thereafter on 27.01.1982. In these facts and circumstances, can it be concluded that the Will has been duly proved in spite of the absence of any evidence with regard to either the execution of the Will by Varadarajulu or the attestation thereof by the named attesting witnesses? In my view, the references to the Will of Varadarajulu in paragraph 8 of the Will of Sakuntala Devi clearly indicate that she was aware of the Will and its contents. However, the person contesting the Will of Varadarajulu is Srinivasan and not Sakuntala Devi. As regards Srinivasan, in my view, it cannot be concluded that he admitted the execution or genuineness of Varadarajulu's Will merely because he propounds the Will of Sakuntala Devi and her Will refers to Varadarajulu's Will. Therefore, it has to be examined separately as to whether Srinivasan admitted the execution and genuineness of the Will of Varadarajulu either directly or indirectly. Srinivasan, the Defendant in T.O.S. No.51 of 2018, stated at paragraph 3(c) of his written statement that Varadarajulu was not keeping good health and was not in a sound disposing state of mind at the time of alleged execution of the Will dated 21.10.1981. He also stated that he was taking care of the day-to-day needs of Varadarajulu and Sakuntala Devi and was residing in the first floor of the same house at the relevant point of time. More importantly, in paragraph 4 of the written statement, he denied the statements in paragraphs 5, 6 and 7 of the plaint, which deal with the Will of Varadarajulu, and stated that the 'alleged Will executed by Shri. B. Varadarajulu dated 21.10.1981 registered as Doc. No.54/1981 before SRO, Periamet is not admitted by this defendant and same was not



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executed by Shri. Varadarajulu while he was in a sound and disposable state of mind.' It is in view of the aforesaid denial that issues 1 and 2 were framed by this Court in respect of the Will of Varadarajulu. Thus, the situation in this case cannot be equated with that in *Thayyullathil Kunhikannan* wherein the Court concluded that there was an admission of the Will and that, therefore, it could be considered as an admitted fact as per Section 58 of the Evidence Act and Order VIII Rule 5 CPC. By contrast, such a conclusion cannot be drawn on the basis of the evidence in this case. Therefore, the evidence of the propounder of Varadajulu's Will should be examined so as to decide if the Will was proved.

22. From the evidence of Dakshinamoorthy, who was examined as P.W.1, I find that he admitted that he had no personal knowledge about the preparation and execution of the Will of Varadarajulu. In fact, he admitted that he was not consulted with regard to the preparation of the Will although he lived in the same house. In light of the complete lack of evidence with regard to the execution of the Will of Varadarajulu, including its attestation, I am of the view that the said Will cannot be said to have been proved in accordance with Section 63(c) of the Succession Act read with Sections 68 and 69 of the Evidence Act merely because it is a registered Will and because it is referred to in paragraph 8 of the Will of Sakuntala Devi. In effect, issues 1 and 2 are decided against the Plaintiffs in T.O.S. No. 51 of 2018. Therefore, I conclude as under:

(i) The Will of Sakuntala Devi has been proved in accordance with law and the Plaintiff in T.O.S. No.29 of 2016 is entitled to a decree as prayed for.

(ii) The Will of Varadarajulu has not been proved in accordance with law and, therefore, T.O.S. No.51 of 2018 is liable to be dismissed.

23. In the result,

(i) T.O.S.No.29 of 2015 is decreed. Consequently, letters of administration shall be granted to the Plaintiff in respect of the last Will and Testament of V.Sakuntala Devi to have effect throughout the State of Tamil Nadu. The Plaintiff shall execute a bond for a sum of Rs.25,000/- in the name of the Assistant Registrar, Original side, High Court, Madras. The Plaintiff shall also provide to this Court a full and fair inventory and a true account of the estate within a period of 6 months and one year, respectively, from the date of grant.

(ii) T.O.S.No.51 of 2018 is dismissed.

(iii) In the facts and circumstances of the case, the parties shall bear their own costs."

7. Aggrieved by the aforesaid common judgment dated 26.05.2020, the present two appeals are filed.



8. (i) Mr. M.K. Kabir, learned Senior counsel for the appellants submitted that the learned Judge, without any basis, disbelieved the existence of the Will dated 21.10.1981 of the deceased Varadarajulu. The learned Senior counsel invited the attention of this Court to para No.8 of the Will dated 10.05.2002 of Sakuntala Devi, wherein it was stated that the Will dated 21.10.1981 of Varadarajulu has neither been probated nor have letters of administration obtained and the legatees are free to do so. In case, it is not filed for letters of administration, she has been advised that in accordance with law, the property will be entirely hers and therefore, in para No.9, she had varied the bequest made by her husband in his Will dated 21.10.1981 in respect of the property at Shenoy Nagar. Whereas, the fact remains that both the Wills executed by Varadarajulu and Sakuntala Devi are registered documents. In her Will, Sakuntala Devi neither rejected the Will of her husband nor exercised her right to the half share by stating that she is not the name lender as stated by her husband. She has accepted the Will in full and that is the reason in para Nos. 7 and 8 of her Will, she has referred to the bequest made by her husband in the Will dated 21.10.1981.

(ii) Referring to Section 14(2) of the Hindu Succession Act, the learned Senior counsel for the appellants submitted that the testator Varadarajulu had only given life interest to his wife Sakuntala Devi in the Will dated 21.10.1981. In terms of sub-section 2 of Section 14, the life estate



granted is a restricted estate and therefore, it cannot under any circumstances get enlarged into an absolute estate of Sakuntala Devi to vary the bequeath made by her husband Varadarajulu. In this context, the learned Senior counsel relied on the decision in ***Sadhu Singh v. Gurudwara Sahib Narike and others [(2006) 8 Supreme Court Cases 75]*** wherein it was held that the life estate given to the wife under the Will of the husband, cannot get enlarged into an absolute estate under Section 14(1) of the Hindu Succession Act and therefore, the widow cannot gift away or deal with the property of her husband and she has to take it subject to the terms of the Will.

(iii) The learned Senior counsel for the appellants further proceeded to contend that Sakuntala Devi, while executing the Will dated 10.05.2002 did not challenge the disposition of the property by her husband in the Will dated 21.10.1981 and accepted that she is only a name lender of the property of her husband. In the light of such acceptance, Sakuntala Devi cannot vary the bequest made by her husband. In other words, having elected to accept a restricted estate, she herself refrained from dealing with the property of her husband. In this context, reliance was made to the decision of the Supreme Court in ***Mani Mani and others v. Mani Joshua [(1969) 1 Supreme Court Cases 828]*** wherein it was held that if the legatee has been given any benefit under the Will and his own property has also been disposed of by that very Will, he must relinquish all his claims under the Will, if he chooses to retain



his property. The rule of English Law which applies to the principle of compensation to election is not recognised in Section 180 of the Succession Act. Further, in order to raise a case of election under a Will, it must be clearly shown that the testator intended to dispose of the particular property over which he had no disposing power. This intention must appear on the face of the Will either by express words or by necessary conclusion from the circumstances disclosed by the Will. The presumption, however, is that a testator intends to dispose of his own property and general words will not usually be construed so as to include other property.

(iv) The learned Senior counsel for the appellants also placed reliance on the decision of the Supreme Court in *Anil Kak v. Kumari Sharada Raje and others [2008 (7) Supreme Court Cases 695]* wherein it was held that when a document is referred to as an integral part of another document, that document is incorporated by reference, then, the document must be in existence and the Executor must know what the other document, which he intends to incorporate in the Will, contains. It is also contended that the recitals in the Will could be relied on, as a statement made in a document within the meaning of Section 32 (7) of the Evidence Act. However, the learned Judge discarded the same on the ground that the Will has not been proved independently.

(v) The learned Senior counsel for the appellants also submitted that



in the written statement filed by the contesting first respondent, he admitted the execution of the Will by Varadarajulu, but he stated that the testator was not in a sound and disposing state of mind at the time when he executed the Will. If that be so, the burden is on the first respondent to prove that the testator was not in a sound and disposing state of mind. When the Will is admitted, it does not require to be proved under Section 68 of the Evidence Act. As per Section 58 of the Evidence Act, a fact, which is admitted by the parties, needs not be proved in any proceedings. Even under Section 68 of Evidence Act, the Will is required to be proved by atleast one Attesting witness for the purpose of proving its execution, if there be an attesting witness alive. When the wife of the testator Sakuntala Devi herself admitted about the Will executed by her husband, no further proof is required to be adduced to prove the execution of the Will by Varadarajulu.

(vi) The learned Senior counsel for the appellants further contended that the Will dated 21.10.1981 is not an unregistered Will, but a registered one before the competent Sub-Registrar in the presence of two attesting witnesses. Even to prove the nature of the execution, on behalf of the appellants, the Sub-Registrar concerned was summoned to produce the copy of the Will. Thus, when such steps were taken by the appellants, the learned Judge ought not to have disbelieved the execution of the Will for want of examination of the attesting witnesses. In this context, reliance was placed on the decision of the



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Kerala High Court in *Thayyullathil Kunhikannan and others v. Thayyullathil*

Kalliani and others [AIR 1990 Kerala 226] as well as the decision of the High Court of Delhi in *Shama Sethi v. State and others [ILR (2010) 2 Delhi 544]* to contend that Section 68 of the Evidence Act 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 present case, except the vague defence of the first respondent that the testator was not in a sound and disposing state of mind, there is nothing on record that could invalidate the genuineness of the Will.

(vii) With respect to the delay in initiating the probate proceedings, the learned Senior counsel for the appellants submitted that the law of Limitation will not apply in rigor, because the right to apply for Letters of administration is a continuing right which can be exercised at any time after the death of the testator. The application for grant of probate only seeks the permission of the Court to perform a duty cast by the testator on the executor / legatee with a view to discharge the duties enshrined therein. In this context, reliance was placed on the decisions in (i) *S. Krishnaswami and others vs. E. Ramaiah*

[AIR 1991 Madras 214] (ii) *Vasudev Daulatram Sadarangani v. Sajni Prem*



Lalwani [AIR 1983 Bombay 268]* and (iii) *Kunvarjeet Singh Khandpur v.

Kirandeep Kaur and others [2008 (8) Supreme Court Cases 463] to contend that mere delay cannot be attributed against the appellants especially when the first respondent was also a legatee under the same Will and he had also moral duty to apply for the grant of letters of administration, which he never performed. Thus, according to the learned senior counsel, when the first respondent himself is one of the legatees under the Will who has failed to initiate probate proceedings at the earliest point of time, he has no *locus standi* to contend that the Will has not been probated by the appellants for two decades. While so, in the peculiar facts and circumstances, the delay will not invalidate the genuineness of the registered Will dated 21.10.1981 of the testator, which the learned Judge did not take note of. The learned Judge also failed to consider the fact that the wife of the deceased / Sakuntala Devi had executed a Will on 10.05.2002, in which, she had clearly referred to the Will dated 21.10.1981 executed by her husband Varadarajulu. Therefore, the Will dated 10.05.2002 of Sakuntala Devi is sufficient enough to hold that the appellants have proved the existence of the Will dated 21.10.1981 of the deceased Varadarajulu.

(viii) The learned Senior counsel for the appellants further submitted that the execution of the Will dated 21.10.1981 of the deceased Varadarajulu does not require compliance of Section 63 of the Indian Succession Act or



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Section 68 of the Indian Evidence Act in the teeth of the Will dated 10.05.2002 executed by Wife of the testator by prominently referring to the Will of her husband. There is nothing to disbelieve the contents of the Will dated 10.05.2002 of Sakuntala Devi, while so, the contents thereof would operate as sufficient proof for the existence or execution of the Will dated 21.10.1981 of deceased Varadarajulu and that, the beneficiaries of the Will dated 10.05.2002 are bound by the contents contained thereof, especially the one relating to the existence of the Will dated 21.10.1981. The learned Judge had given much credence to the delay in initiating the probate proceedings relating to the Will dated 21.10.1981 by ignoring the fact that the original Will was in the custody of his wife for about 20 years and only after the death of Sakuntala Devi on 02.04.2011, the probate proceedings could be initiated. In such circumstances, according to the learned Senior counsel, there is no specific proof for existence or execution of the Will dated 21.10.1981 is required. The Will dated 21.10.1981 is a registered Will and by efflux of time, it is not known as to whether the attesting witnesses are alive or not. The learned Judge himself has referred to the fact that the examination of the officials of the Sub-Registrar may not be required inasmuch as by efflux of time, they could only depose from the records available in the office of the Sub-Registrar. Having come to such a conclusion, the learned Judge ought to have decreed the suit in TOS No. 51 of 2018, instead of dismissing it.



(ix) The learned Senior counsel for the appellants also submitted that

Sakuntala Devi, being the wife of the testator Varadarajulu is the competent person to refer to the Will executed by her husband in the Will executed by her. While so, no other concrete proof is required to prove the Will dated 21.10.1981 of the deceased Varadarajulu. It is further submitted that the learned Judge did not appreciate that the first respondent, having accepted a part of the property bequeathed under the Will dated 10.05.2002 by Sakuntala Devi, is by virtue of doctrine of election as envisaged under Section 180 of the Succession Act, bound by the nature of bequeath of the property covered under the Will dated 21.10.1981 of the testator Varadarajulu. The details of the Will dated 21.10.1981 of the testator Varadarajulu have been aptly referred to by the Wife in her Will dated 10.05.2002 and hence, there is no independent evidence required for proof of the Will dated 21.10.1981. In any event, by efflux of time, the attesting witnesses could not be traced or the person who had knowledge of the attesting witnesses signing the Will, could not be produced by the appellants, however, that by itself will not be a ground for rejecting their claim. Without considering all these aspects, the learned Judge erred in concluding that the Will dated 21.10.1981 has not been proved in accordance with Section 63 of the Indian Succession Act as well as Section 68 of Evidence Act.

With these submissions, the learned Senior counsel for the appellants prayed for allowing these appeals by setting aside the order passed by the learned



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9.(i) Per contra, Mr. Tamilmani, learned Senior counsel appearing for the first respondent submitted that the first respondent is a Senior Citizen, aged 84 years. In spite of the common judgment passed by the learned Judge, which is impugned in these appeals, the first respondent could not enjoy the fruits of the decree. The appellants have filed the present appeals only to harass the first respondent and nothing more. The appeals are devoid of merits and they will have to be dismissed.

(ii) On merits, it is submitted by the learned Senior counsel for the first respondent that the appellants failed to prove the execution of the Will dated 21.10.1981 of the deceased Varadarajulu, as required under Section 63 of the Succession Act and Section 68 of the Evidence Act. Pointing out such deficiency on the part of the appellants, the learned Judge rightly concluded that they have not taken any steps, even to examine a person who is acquainted with the signature of the testator and that of the attesting witnesses. This is the most fundamental requirement for proof of Will. When the appellants seek for enforcement of the Will, the burden is heavily on their shoulders to prove the due execution of the same as required under law. Thus, the learned Judge has rightly held that merely because Sakuntala Devi referred to the Will dated 21.10.1981 in the Will executed by her on 10.05.2002, it will not be considered



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as sufficient proof in the absence of any independent witness who had seen the due execution of the Will dated 21.10.1981. The learned Judge also considered the defence of the first respondent herein /defendant in his written statement at paragraph 3 (c) that the deceased Varadarajulu was not keeping good health and was not in a sound and disposing state of mind at the time of the alleged execution of the Will. When such being the defence raised, the appellants ought to have taken all steps to prove the due execution of the Will. Upon their failure to do so, the learned Judge has rightly dismissed the suit in T.O.S. No. 51 of 2018 filed by them and it does not call for any interference by this Court.

(iii) The leaned Senior counsel for the first respondent invited the attention of this Court to the deposition of D. Parthasarathy (second appellant in these appeals), examined as DW1 in TOS No. 29 of 2015. DW1 has stated that he does not know anything about the Will dated 21.10.1981 and it is only his father who is aware of the same. However, the appellants have not taken any steps to examine the father of DW1. According to the learned Senior counsel, the appellants did not oppose T.O.S. No. 29 of 2015, since they will get more valuable house property at Kilpauk, if the Will dated 10.05.2002 is probated. That is also one of the reasons for the appellants not to take any steps to get the Will dated 21.10.1981 probated. The learned Judge also observed that T.O.S. No. 29 of 2015 has not been seriously contested by the appellants for obvious reasons.



WEB COPY (iv) The learned Senior counsel for the first respondent also invited the attention of this Court to the evidence of Dakshinamurthy, fourth appellant in OSA No. 248 of 2021, who was examined as PW1 in TOS No. 51 of 2018. On going through the answers elicited from the cross-examination of PW1 in TOS No. 51 of 2018, it would be clear that he has no knowledge about the execution of the Will at all. He has nowhere stated in his evidence that he made efforts to trace the attesting witnesses. He also feigned ignorance as to whether the attesting witnesses are alive or not. He merely stated that he has a duty cast upon him to get the Will probated and therefore, the probate proceedings were initiated.

(v) The learned Senior counsel for the first respondent further submitted that it was repeatedly stated by the appellants that Sakuntala Devi in her Will dated 10.05.2002 has prominently referred to the Will dated 21.10.1981 of her husband and therefore, the execution of the Will dated 21.10.1981 is proved. According to the learned Senior counsel, in the Will dated 10.05.2002, Sakuntala Devi has not admitted the execution of the Will dated 21.10.1981 of her husband or the genuineness of the same. She has clearly stated that the beneficiaries have not moved the Court and if they so desire, they may apply for letters of administration. Thus, it is clear that the appellants cannot merely rely upon the statement of Sakuntala Devi in the Will



dated 10.05.2002, but they must independently prove the execution of the Will.

Even assuming that there was an admission, such admission is not clear, specific, cogent and categorical, as required. In this context, the learned Senior counsel placed reliance on the decision of the Supreme Court in **Karan Kapoor v. Madhuri Kumar [(2022) 10 Supreme Court Cases 496]**, wherein, it was held that grant of relief under Order 12 Rule 6 of the Code of Civil Procedure based on an admission is discretionary. However, such discretion has to be exercised only if the admission so made is specific, clear, cogent and categorical, otherwise, the Court can refuse to invoke the discretionary power vested in it. Similarly, in **S.R. Srinivasa and others v. S. Padmavathamma [(2010) 5 Supreme Court Cases 274]**, the Supreme Court had an occasion to consider that the attesting witnesses to the Will have not been examined. It was however contended in that case that reliance was placed on the evidence adduced in a subsequent suit about the execution of the Will. The Supreme Court held that the Scribe, who was examined as DW2, stated that he had signed the Will with an intention to attest and his evidence is of no significance. Therefore, it was held that the test that the witness should have put his signature *animus attestandi*, has not been satisfied. It was further held that execution of the Will can be held proved only if the statutory requirements for proving the Will are satisfied. On the other hand, the reliance placed on the evidence tendered in another suit cannot be held as a proof for due execution or



genuineness of the Will.

WEB COPY (vi) With respect to the delay in initiating the probate proceedings, the learned Senior counsel for the first respondent placed reliance on the Judgment of the Division Bench of this Court dated 07.01.2016 passed in O.S.A. Nos. 10 and 72 of 2013, wherein, referring to the law laid down by this Court in *S.Krishnaswami v. E. Ramaiah [1990 (1) LW 337]*, it was observed as follows:

“24.In an application for grant of probate/letters of administration, no right is asserted or claimed by the applicant, but still it has been held that Article 137 applies. The right to apply for probate or letters of administration accrues everyday till the Will remains unprobated as it is a continuing cause of action. Being a continuous right, as long as the right is not extinguished, it can be exercised at any time after the date of death of deceased. No doubt, the longer the delay, stronger would be the suspicion.”

By pointing out the above decision, the learned Senior counsel for the first respondent submitted that though there is no limitation prescribed, a probate proceedings must be initiated before the right gets extinguished. In the present case, the right was extinguished on the death of Sakuntala Devi. The statement of Sakuntala Devi in para No.8 of the Will dated 10.05.2002 about the Will executed by her husband dated 21.10.1981, cannot be taken as proof of the Will of her husband and the Will dated 21.10.1981 has to be proved strictly in accordance with law.

(vii) Notwithstanding the above submissions, the learned Senior



counsel for the first respondent submitted that the property at Shenoy Nagar was constructed about 60 years back and presently, the building is in a dilapidated condition and not fit for human habitation. It is very unsafe to reside in the property at Shenoy Nagar. Therefore, the learned Senior counsel submitted that in the interest of justice, the property at Shenoy Nagar can be divided into two equal parts as per the last wishes of Sakuntala Devi as also Varadarajulu so that each one may re-construct the building as per their desire. Accordingly, the learned Senior counsel for the contesting first respondent prayed for dismissal of these appeals.

10. We have heard the learned Senior counsel for the appellants as well as the learned Senior counsel for the first respondent in these appeals and also perused the materials available on record.

11. On appreciation of the facts as detailed above, it is evident that the controversy in these appeals is centered around the proof and/or genuineness of the Will dated 21.10.1981 executed by the deceased Varadarajulu in respect of the property at Nos. 4 and 5, Old Door No.49-B, Shenoy Nagar, Chennai. It is also evident from the records and admitted by both sides that this property was purchased by the deceased Varadarajulu on 22.02.1956 in the joint name of himself and his wife V. Sakuntala Devi. It is in respect of this property, the



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deceased Varadarajulu had written a Will dated 21.10.1981 bequeathing life interest to his wife Sakuntala Devi. After the death of Varadarajulu, his wife Sakuntala Devi enjoyed the said property until her life time. After her death, the Will dated 21.10.1981 was sought to be probated by the appellants in O.P. No. 673 of 2017, which was subsequently converted into T.O.S. No. 51 of 2018 at the instance of the first respondent in these appeals.

12. The first respondent raised objection for probating the Will dated 21.10.1981 stating that the Will could not have been executed by the deceased at all inasmuch as he was not in a sound and disposing state of mind and energy at that point of time. According to him, the Will was not executed by the deceased on his own volition especially he died on 27.01.1982 viz., within three months and 6 days of the alleged execution of the Will dated 21.10.1981. It is further contended on the side of the first respondent that the Will was not probated within a reasonable time and therefore, the present attempt on the part of the appellants to probate the Will dated 21.10.1981, after a long lapse of time, should not be entertained. The first respondent herein has also filed O.P. No. 805 of 2012 to probate the Will dated 10.05.2002 executed by Sakuntala Devi, wife of Late. Varadarajulu and at the instance of the appellants herein, the said Original Petition was converted into T.O.S. No. 29 of 2015.

13. In both the Testamentary Original Suits, evidence was let in. On analysing the evidence both oral and documentary, the learned Judge



disbelieved the existence of the Will dated 21.10.1981 of the deceased Varadarajulu inasmuch as it was not proved in accordance with Section 68 of the Evidence Act. This conclusion of the learned Judge has been vehemently assailed by the learned senior counsel for the appellants mainly on the ground that when the wife of the deceased Sakuntala Devi, who was given only life estate under the Will dated 21.10.1981, had herself referred to the Will dated 21.10.1981 in the Will dated 10.05.2002 executed by her.

14. By grant of probate, the Court only endorses that the said Will has been executed by the testator in disposable state of mind, without threat or force or undue influence. The court is not called upon to go into the title of the testator while deciding the probate or the objections to it. In this regard, it will be useful to refer to the judgment of the Apex Court in **Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors., [(1993) 2 SCC 507]**, wherein, it was observed in paragraph 15 at page 515, as under:

"In Ishwardeo Narain Singh v. Smt. Kamta Devi this Court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate court. Therefore, the only issue in a probate proceeding relates to the genuineness and due execution of the will and the court itself is under duty to determine it and peruse the original will in its custody. The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the



probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus, it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself".

Thus, it is clear that the execution of the Will should be proved in accordance with Section 68 of the Evidence Act and the onus of proving the same is on the propounder of the Will.

15. Before Proceeding further, it will be useful to refer to Sections 68 and 69 of the Evidence Act, 1872, which read as follows:

"Section 68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

"Section 69. Proof where no attesting witness found.

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

16. From the above provisions, it is apparent that the execution of the Will is to be primarily proved as contemplated by examining atleast one of attesting witnesses. The registration of the Will not *ipso facto* prove the valid



execution. If the attesting witness is not available for examination, then, the Will can be proved by examining any other person who has to confirm the signature of the attesting witness to be in that of his/her handwriting and also that the signature of the testator is in his handwriting. It is pertinent to mention at this juncture that the examination to identify the handwriting of the attesting witness is permissible if the unavailability of the attesting witness is either due to death or due to the fact that he cannot be traced or brought to court on account of action of the adverse party or not in a position to depose at all. In this context, it will be useful to refer to the following judgments:

(i) *Savithri v. Karthyayani Amma [(2007) 11 SCC 621 at page 629]*

“...A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and the Indian Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exists suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before it can be accepted as genuine.”

(ii) *Ramesh Verma (Dead) through LRs v. Lajesh Saxena (dead)*

by LRs and another [(2017) 1 SCC 257]:

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

(iii) **Dhani Ram (died) through Lrs and others v. Shiv Singh [2023**

Livellaw (SC) 862: 2023 SCC Online SC 1263]:

“21. It is well settled that mere registration would not sanctify a document by attaching to it an irrebuttable presumption of genuineness. The observations of this Court in *Rani Purnima Debi v. Kumar Khagendra Narayan Deb* [AIR 1962 SC 567] which were referred to by the Himachal Pradesh High Court, are of guidance in this regard and are worthy of extraction. These observations read as under:

“There is no doubt that if a Will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a Will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a Will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the Will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a Will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the Will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering. Law reports are full of cases in which registered Wills have not been acted upon
... Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a Will; though the fact that there has been registration would be an important circumstance in favour of the Will being genuine if the evidence as to registration establishes that the testator admitted the execution of the Will after knowing that it was a Will the execution of which he was admitting.”

22. We may also refer to *Janki Narayan Bhoir v. Narayan Namdeo*



Kadam [(2003) 2 SCC 91], wherein this Court held that, to prove that a Will has been executed, the requirements in clauses (a), (b) and (c) of Section 63 of the Succession Act have to be complied with. It was pointed out that the most important point is that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will or must have seen some other person sign the Will in the presence of and by the direction of the testator or must have received from the testator a personal acknowledgment of his signature or mark or of the signature or mark of such other person and each of the witnesses has to sign the Will in the presence of the testator. It was further held that, a person propounding a Will has got to prove that the Will was duly and validly executed and that cannot be done by simply proving that the signature on the Will was that of the testator, as the propounder must also prove that the attestations were made properly, as required by Section 63(c) of the Succession Act. These observations were affirmed and quoted with approval by this Court in its later judgment in Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria [(2008) 15 SCC 365].”

17. The Apex Court in the Judgment reported in ***Babu Singh v. Ram Sahai*, [(2008) 14 SCC 754]** laid down the circumstances under which the genuineness of the Will can be proved under Section 69 in the following terms:

“17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69 i.e. by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.”

18. The Evidence Act, 1872 also lays down the mode of proof of a document, in case the same is denied by the attesting witness in Section 71 of the Act, which reads as follows:

“Section 71. Proof when attesting witness denies the execution: If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.”



18.1. In this connection, it will be useful to refer to the Judgment of the Apex Court in ***Ashutosh Samanta (D) by LRS. And others v. Sm. Ranjan Bala Dasi Ors. [Civil Appeal No. 7775 of 2021, 2023 SCC Online SC 255]*** in which, it was held as follows:

“14. There are often situations when wills which otherwise may have satisfied the requirements of being attested, as provided by law, cannot be proved in terms of the said two provisions, for the reason that the attesting witnesses are not available, or if one of the witnesses denies having attested the will. Sections 69 and 71 of the Evidence Act, 1872 then come to the aid of the propounder.”

19. In the recent Judgment in ***Moturu Nalini Kanth v. Gainedi Kaliprasad (Dead) through LR***s [2023 Livelaw (SC) 998: 2023 SCC Online SCC 1488], after analysing the earlier judgment, considering the effect of registration and the scope of Sections 68, 69 and 71 of the Evidence Act and the mode of discharge of proof, it was held by the Supreme Court as under:

“19. In turn, Sections 68 and 69 of the Indian Evidence Act, 1872 (for brevity, ‘the Evidence Act’), read as under:

‘68. Proof of execution of document required by law to be attested. - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

Section 69. Proof where no attesting witness found. - If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.’



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stamp of validity and it must still be proved in terms of the above legal mandate. In *Janki Narayan Bhoir v. Narayan Namdeo Kadam* [(2003) 2 SCC 91], this Court held that the requirements in clauses (a), (b) and (c) of Section 63 of the Succession Act have to be complied with to prove a Will and the most important point is that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will or must have seen some other person sign the Will in the presence of and by the direction of the testator or must have received from the testator a personal acknowledgment of his signature or mark or of the signature or mark of such other person and each of the witnesses has to sign the Will in the presence of the testator. It was further held that, a person propounding a Will has got to prove that it was duly and validly executed and that cannot be done by simply proving that the signature on the Will was that of the testator, as the propounder must also prove that the attestations were made properly, as required by Section 63(c) of the Succession Act. These principles were affirmed in *Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria* [(2008) 15 SCC 365]. .

21. More recently, in *Ramesh Verma (Dead) through LRs. v. Lajesh Saxena (Dead) by Lrs.* [(2017) 1 SCC 257], this Court observed that a Will, like any other document, is to be proved in terms of the provisions of the Evidence Act. It was held that 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 of 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. It was noted that this is the mandate of Section 68 of the Evidence Act and the position would remain the same even when the opposite party does not deny the execution of the Will.

22. Long ago, in *H. Venkatachala Iyengar v. B.N. Thimmajamma* [AIR 1959 SC 443], a 3-Judge Bench of this Court noted that there is an important feature which distinguishes Wills from other documents as, unlike other documents, a Will speaks from the death of the testator and, therefore, when it is propounded or produced before a Court, the testator who has already departed from the world cannot say whether it is his Will or not. It was held that the onus on the propounder to prove the Will can be taken to be discharged on proof of the essential facts, such as, 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 dispositions; and that he put his signature to the document of his own free will. It was, however, noted by the Bench that there may be cases in which the execution of the Will is surrounded by suspicious circumstances and the same would naturally tend to make the initial onus very heavy and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last Will of the testator.



23. Again, in *Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Lrs.* [(2015) 8 SCC 615], this Court held as under:

‘57. A will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer res integra, that it carries with it an overwhelming element of sanctity. As understandably, the testator/testatrix, as the case may be, at the time of testing the document for its validity, would not be available, stringent requisites for the proof thereof have been statutorily enjoined to rule out the possibility of any manipulation. This is more so, as many a times, the manner of dispensation is in stark departure from the prescribed canons of devolution of property to the heirs and legal representatives of the deceased. The rigour of Section 63(c) of the Act and Section 68 of the 1872 Act is thus befitting the underlying exigency to secure against any self-serving intervention contrary to the last wishes of the executor.

57.1. Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of the 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Act and Section 68 of the 1872 Act. The distinction between failure on the part of an attesting witness to prove the execution and attestation of a will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident.’

24. Earlier, in *Bhagat Ram v. Suresh* [(2003) 12 SCC 35], this Court observed as under:

‘12. According to Section 68 of the Evidence Act, 1872, a document required by law to be attested, which a Will is, shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if available to depose and amenable to the process of the court. The proviso inserted in Section 68 by Act 31 of 1926 dispenses with the mandatory requirement of calling an attesting witness in proof of the execution of any document to which Section 68 applies if it has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is



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specifically denied. However, a Will is excepted from the operation of the proviso. A Will has to be proved as required by the main part of Section 68.'

25. *Thereafter, in Benga Behera v. Braja Kishore Nanda [(2007) 9 SCC 728], this Court held thus:*

'40. It is now well settled that requirement of the proof of execution of a will is the same as in case of certain other documents, for example gift or mortgage. The law requires that the proof of execution of a will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove execution and attestation of the will. Further, it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant.'

26. *Much more recently, in Ashutosh Samanta (Dead) by LRs. v. SM. Ranjan Bala Dasi [(2023) SCC OnLine SC 255], this Court noted that where the attesting witnesses died or could not be found, the propounder of the Will is not helpless, as Section 69 of the Evidence Act would be applicable. On facts, this Court found that others who were present at the time the testator and the two attesting witnesses signed the Will were examined and the Will was also supported by a registered partition deed which gave effect to it. Considering these circumstances in totality and as none of the heirs of the testator contested the grant of letters of administration, this Court held that there could be only one conclusion, i.e., that the Will was duly executed and the propounder was successful in proving it. Notably, there was no contest to the Will and that is a distinguishing factor when compared with the case on hand.*

27. *On the same lines, in Ved Mitra Verma v. Dharam Deo Verma [(2014) 15 SCC 578], having found that the attesting witnesses had died, this Court held that the examination of the Sub-Registrar, who had registered the Will and who spoke of the circumstances in which the attesting witnesses as well as the testator had signed on the document, would be sufficient to prove the Will in terms of Section 69 of the Evidence Act.*

28. *However, in Apoline D' Souza v. John D' Souza [(2007) 7 SCC 225], this Court had noted that Section 68 of the Evidence Act provides for the mode and manner through which execution of a Will is to be proved and held that proof of attestation of a Will is a mandatory requirement. Referring to the earlier judgment in Naresh Charan Das Gupta v. Paresch Charan Das Gupta [AIR 1955 SC 363], which held to the effect that merely because the witnesses did not state that they signed the Will in the presence of the testator, it could not be held that there was no due attestation and it would depend on the circumstances elicited in evidence as to whether the attesting witnesses signed in the presence of the testator, this Court held that the mode and manner of proving due execution of the Will would indisputably depend upon*



the facts and circumstances of each case, and it is for the propounder of the Will to remove the suspicious circumstances.

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29. *In Bhagavathiammal v. Marimuthu Ammal [2010 (2) Madras Weekly Notes (Civil) 704], a learned Judge of the Madurai Bench of the Madras High Court observed that the difference between Section 68 and Section 69 of the Evidence Act is that, in the former, one attesting witness, at least, has to be called for the purpose of proving execution and in the latter, it must be proved that the attestation of one attesting witness, at least, is in his handwriting and the signature of the person executing the document is in the handwriting of that person. It was rightly observed that Section 69 of the Evidence Act does not specify the mode of such proof and, in other words, the handwriting can be spoken to by a person who has acquaintance with the handwriting or the signature can be proved by comparison with the admitted handwriting or signature of the person executing the document.*

30. *Applying the above edicts to the case on hand, we may note that neither of the attesting witnesses to Ex. A10 Will Deed, viz., Pydi Appala Suranna and B. A. Ramulu, was examined before the Trial Court, in compliance with Section 68 of the Evidence Act. Pydi Appala Suranna was stated to have expired by the time the trial commenced and the whereabouts of B. A. Ramulu were not known. Therefore, Section 69 of the Evidence Act could have been made use of to prove the Will but no witness was examined who was familiar with the signature of either of the attesting witnesses and who could vouch for the same or produce an admitted signature before the Trial Court. The mere marking of Exs. C1 & C2 affidavits was not sufficient to satisfy the requirement of Section 69 of the Evidence Act. More so, as Balaga Sivanarayana Rao (PW 6), the scribe of those affidavits, said that Pydi Appala Suranna did not sign Ex. A10 Will in his presence and he could not say whether the signature therein was that of Pydi Appala Suranna. Similarly, K.V. Ramanayya (PW 13), who attested Ex. C2 affidavit, supposedly of Pydi Appala Suranna, said that he did not even know Pydi Appala Suranna and, therefore, he could not vouch for his identity. No evidence was adduced to prove the signature of the other attesting witness, B. A. Ramulu.*

31. *The contention that Section 69 of the Evidence Act does not require actual proof of the handwriting of at least one attesting witness and proof of the signature of the executant being in that person's handwriting cannot be accepted. Ashutosh Samanta (supra) and Ved Mitra Verma (supra) also did not hold so and, in any event, both are distinguishable on facts. In one, there was no contest to the Will and in the other, the Sub-Registrar himself adduced acceptable evidence in purported discharge of the mandate of Section 69 of the Evidence Act. Presently, no such clinching evidence has been produced to satisfy that mandate. It may be noted that PW 11, who was from the Registration Department, admitted that he did not know Venkubayamma personally and could not even recall her age. Therefore, his evidence that he witnessed the signing of Ex. A10 Will has no import in*



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establishing its genuineness and validity. Ex. A19 Will Deed dated 26.05.1981 was marked in evidence by NaliniKanth's guardian, Pasupuleti Anasuya, but it was not proved as per Section 63 of the Evidence Act. Kaliprasad said that he had never seen it. Therefore, merely because Kaliprasad was shown as the sole legatee therein, it cannot be accepted as genuine. In consequence, the signatures and thumb marks therein and available with the Registration Department, in connection therewith, cannot be assumed to be those of Venkubayamma. We may also note that this document was not of any particular antiquity as it was executed on 26.05.1981, just about a year before Ex. A10 Will dated 03.05.1982. Therefore, comparison of Exs. X1 & X2 thumb marks with the thumb marks available with the Registration Department in the context of Ex. A19 Will does not prove anything.

32. For the purposes of Section 69 of the Evidence Act, it is not enough to merely examine a random witness who asserts that he saw the attesting witness affix his signature in the Will. The very purpose and objective of insisting upon examination of at least one attesting witness to the Will would be entirely lost if such requirement is whittled down to just having a stray witness depose that he saw the attesting witness sign the Will. The evidence of the scribe of the disputed Will (PW 6) also casts a doubt on the identity of the executant as he specifically stated that a woman was sitting at a distance but he could not tell whether she was Venkubayamma and he could not also tell whether Venkubayamma had signed the document. In effect, Ex. A10 Will was not proved in accordance with law and it can have no legal consequence. NaliniKanth's claim of absolute right and title over Venkubayamma's properties on the strength thereof has, therefore, no legs to stand upon and is liable to be rejected.

33. In addition thereto, the suspicious circumstances that surround Ex. A10 Will render it highly unbelievable. Venkubayamma performed Kaliprasad's marriage in February, 1982, i.e., just a few months before the alleged adoption ceremony and execution of Ex. A9 and Ex. A10. PW 2, Nalini Kanth's natural father, also stated so. He also said that Kaliprasad was residing with Venkubayamma at the time of the adoption. These being the admitted facts, Kaliprasad being fully disinherited under Ex. A10 Will is surprisingly odd and opposed to normal behaviour. The disowning of her own grandson by Venkubayamma is a suspicious circumstance that remained unexplained. Unless there was some catastrophic incident which estranged her from him during those two months, it is not believable that Venkubayamma would have cast out her own grandson and excluded him from her Will. A passing sentence in Ex. A10 Will that he became uncaring towards her and was placing her in difficulties is not sufficient to explain this total disinheritance of a grandson within a few months of performing his marriage. More so, when the witnesses' evidence confirmed that he was with her and was on amicable terms throughout.

34. That apart, Venkubayamma stated in Ex. A10 Will that the adopted child would perform her funeral rites, pinda pradaan and other annual



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shastric ceremonies of her ancestors. As already noted earlier, the adopted child was of less than one year age at that time and Venkubayamma was in her 70s, if not more. If so, this expectation on her part, if at all believable, was wholly unrealistic. Significantly, Kaliprasad stated that it was he who performed the obsequies of Venkubayamma, his grandmother. Further, the scribe of Ex. A10 Will (PW 6) categorically stated that the instructions for scribing it were given by some other woman and not Venkubayamma, whereas Pasupuleti Anasuya (PW 1) stated that it was Venkubayamma, herself, who had given such instructions. So many suspicious circumstances surrounding Ex. A10 Will make it very difficult for us to accept and act upon the same, even if it had been proved as per law.

It is therefore clear from the above judgments that the law on the subject is no longer *res integra*. A Will should be proved in accordance with section 68 of the Indian Evidence Act. If only the attesting witness could not be examined for some legitimate or acceptable reason, the recourse under Section 69 or 71 is available to the propounder of the Will. The propounder cannot straight away take shelter under Section 69 or 71 and claim that the burden or proof has been discharged by alternate methods.

20. In the case before us, the appellants have applied for probate after nearly 26 years. They have not examined either of the attesting witness and no plausible reasons were given for not examining the attesting witness. Even though the Will was registered, it was after three decades when the staff from the office of the Sub-Registrar was examined based on records and therefore, they are not competent to speak about the circumstances under which the Will was registered or they were present when such Will was presented for registration. Though there is no time limit to present the Will for probate, steps



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must be taken within reasonable time. In the present case, the appellants have claimed that the original Will was with Sakunthala Devi and hence, they could not file an application for probate at the earlier point of time. Such a contention, in the opinion of this court, cannot be countenanced, in view of the fact that the appellants have not claimed that they were neither aware of the existence of the Will nor that a copy was not available with them. Sections 237 and 238 of the Indian Succession Act, 1925 also provide for situations when the original Will could not be produced. The provisions of the Original Side Rules of this Court also deal with situations, where probate or letters of administration can be sought even without a Will. Further, the first respondent has raised a suspicion about the disposing state of the testator Varadarajulu, who is said to have passed away after three months of execution of Will. Though there is a reference to the Will of Varadarajulu in the Will of Sakunthala Devi, that by *ipse dixit* would not prove the valid execution as required under law. The Learned Judge has in detail considered the doctrines of reference and implication. When the law requires a particular fact to be proved by a particular mode, the said doctrines as rightly held by the Learned Judge would not come to the aid of the appellants, as the recourse to such doctrines can also be made only in consonance with Sections 68, 69 and 71 of the Evidence Act, 1872 as held in the preceding paragraphs. Considering the above facts and the law settled on this point, we do not find any valid reasons to



interfere with the order of the Learned Judge in TOS No.51 of 2018.

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21. As far as the Will executed by Sakuntala Devi is concerned, the appellants are not disputing the execution or the discharge of the burden of proof. Their case is more on the ground that Sakunthala Devi cannot alter the Will of her husband and convey what was not available to her. As the law on the scope of probate proceedings is well settled as enumerated in the judgments referred to above and held by us, the Court, while considering the cases for probate of Wills, cannot go into the right of the testator to dispose the property. The Court can only consider, whether the Will executed by the testator was actually executed by him/her in a sound disposing state of mind without coercion or undue influence and the same was duly attested. The probate court is also not competent to determine the question of title to the suit properties. The Court also cannot go into the nature of ownership over the property. In view of the same, as the execution of the Will by Sakunthala Devi stood proved, we are not inclined to interfere with the order of the Learned Judge in TOS No. 29 of 2015.

22. Before parting, we make it abundantly clear that this Court cannot and has not decided the title and right of Sakunthala Devi in respect of the properties mentioned in the Wills. Any findings rendered hereinabove or by the



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Learned Judge, can be treated only as regards the discharge of the proof for the purpose of probate proceedings. In case, the appellants have any grievance about the right of Sakunthala Devi to deal with any of the properties, it is always open to them to work out their remedy, in the manner known to law.

23. With the aforesaid observations, both the original side appeals are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

(R.M.D., J) (M.S.Q., J)
03.10.2023

Index : Yes/No
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