



Rev.Aplc(MD)No.128 of 2022
in
SA(MD)No.1038 of 2008

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.08.2023

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

**Rev.Aplc(MD)No.128 of 2022
and
CMP(MD)No.8528 of 2022
in SA(MD)No.1038 of 2008**

R.Kamala Review Petitioner / Appellant

Vs.

1.M.Natarajan

2.D.Shanthi ... Respondents/Respondents

PRAYER: Review Application filed under Order 47 Rule 1 of C.P.C.,
praying this Court to review the judgment and decree passed in
SA(MD)No.1038 of 2008 dated 22.07.2021.

For Petitioner : Mr.T.Gowthaman, Senior counsel,
for Mr.R.S.Sivaram.

For Respondents : Mr.T.Mohan, Senior counsel,
for Mr.A.Haja Mohideen for R1.

R-2 given up in main SA



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ORDER

Heard the learned Senior Counsel on either side.

2. The appellants in SA(MD)No.1038 of 2008 is the review applicant herein. She was the defendant in O.S No.646 of 1996 on the file of the Sub Court, Trichirappalli. The suit was filed by her brother M.Natarajan for the relief of declaration and recovery of possession. The case of the plaintiff was that the suit property belonged to Karuppanna Muthiriar who was the elder brother of the grandfather of the parties herein. Karuppanna Muthiriar executed the suit Will dated 09.10.1955 (Ex.A1) bequeathing life estate in favour of Manikkam (Father of the review applicant and the first respondent M.Natarajan) and their mother Thailaimmai Ammal. After their lifetime, the property was to go to the plaintiff absolutely. After the death of Karuppanna Muthiriar, the Will came into effect. Thalaimmai Ammal, the mother of the parties herein predeceased their father. Manikkam passed away on 10.09.1994. According to the plaintiff, the relationship between him and his father was under strain and he was residing separately and that



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his sister, the review applicant herein was residing in the suit property along with her father. Since as per Ex.A1 Will, the property was to go to the plaintiff absolutely, the review applicant was liable to be ejected from the suit property. Since she refused, O.S No.646 of 1996 came to be instituted. The said suit was tried along with O.S No.1273 of 1994. Both the suits were dismissed by the trial court on 20.11.2003. Aggrieved by the same, the first respondent herein filed A.S No.59 of 2004 and O.S No.357 of 2005 before the Principal District Judge, Trichirappalli. The first appellate court by a common judgment and decree dated 30.12.2005 allowed A.S No.357 of 2005 filed against the judgment and decree made in O.S No.646 of 1996. Aggrieved by the same, the review applicant filed SA(MD)No.1038 of 2008. The second appeal was dismissed on 22.07.2021. Aggrieved by the dismissal of the second appeal, this review application came to be filed

3. The learned Senior Counsel appearing for the review applicant raised two grounds. The first ground is that O.S No.646 of 1996 is barred under Order 2 Rule 2 of CPC. Admittedly, the first respondent herein had filed O.S No.1273 of 1994 against the review applicant



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herein. The contention of the review applicant is that without getting leave of the court, Natarajan could not have filed a second suit against the review applicant. The second contention is that Ex.A1 Will attributed to Karupanna Muthiriar has not been proved in the manner known to law. The pointed contention of the learned Senior Counsel is that this Court failed to give effect to Section 69 of the Indian Evidence Act, 1872. This according to him is an error apparent on the face of the record. He called upon this Court to allow this review application by setting aside the judgment and decree made in SA(MD)No.1038 of 2008 dated 22.07.2021 and allow the second appeal.

4. The learned Senior Counsel appearing for the plaintiff/R1 submitted that the issue raised in this review application is no longer res integra and that it is squarely covered by the decision of the Hon'ble Division Bench of the Madras High Court reported in **(2023) 2 MLJ 684 (Boomathi v. Murugesan)**. He pressed for dismissal of this review application.

5. I carefully considered the rival contention and went through



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the materials on record. I do not find any merit in the first contention based on Order 2 Rule 2 CPC. Order 2 Rule 2 CPC is as follows :

"2.Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

The review applicant has not raised any ground in the written statement



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filed in O.S No.646 of 1996 that the suit is barred under the aforesaid provision. Any plea under Order 2 Rule 2 CPC turns on facts. This plea was not taken before the trial court. It was also not taken as a ground in the second appeal. The review applicant cannot be permitted to urge this contention at this stage. That apart, the cause of action based on which the two suits were instituted are different. In O.S No.1273 of 1994, the plaintiff prayed that he was entitled to half share in the terminal benefits payable on account of the demise of their father Manickkam. On the other hand, the cause of action based on which O.S No.646 of 1996 was filed was based on the Will dated 09.10.1955 executed by Karuppanna Muthiriar. Hence, the first contention cannot be pressed into service.

6. The second contention cannot be so easily brushed aside. The Evidence Act sets out the mode of proving a Will. Sections 68 and 69 of the Indian Evidence Act are as follows :

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



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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.]

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 hand writing of that person."

In this case, the propounder of the Will is obliged to examine at least one of the attesting witness if he or she is alive. In this case, the plaintiff categorically deposed that the attesting witnesses are no more. The learned Senior Counsel appearing for the review applicant would argue that in that event, Ex.A.1 Will should have been proved in terms of Section 69 of the Indian Evidence Act. It is obvious that the plaintiff did not prove the Will as contemplated under Section 69 of the Indian



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Evidence Act, 1872. He also did not mark the original Will. He only filed the certified copy of Ex.A1 Will. According to the plaintiff, the original Will is in the custody of his sister Kamala, the review applicant herein. This contention was advanced even in the second appeal. It was negated by me in the following terms :

“11.The learned counsel for the plaintiff Natarajan drew my attention to the decision reported in (1972) 2 MLJ 508 (Irudayammal and others Vs. Salayath Mary), in which, the Division Bench of the Madras High Court held that in such cases, the Will can be proved by other acceptable, satisfactory evidence, supplemented by such presumptions as would arise under the provisions of the Registration Act and Section 114 of the Evidence Act. In this case, Ex.A1 was registered. Hence, the general presumption arising under Section 60 of the Indian Registration Act can be pressed into service. The Division Bench observed that while it is true that registration by itself in all cases is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registration officer is relevant for proving execution. In this case, apart from the fact that Ex.A1 is a registered document, in the mortgage transactions, to which, the father of the parties Thiru.Manickam is a party, there is a clear reference to Ex.A1. More than anything else, as rightly pointed out by the learned counsel appearing for the respondent herein, the appellant herself in her written statement had admitted the



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execution of Ex.A1. Of-course, some confusion has been caused with regard to the date 09.10.1955. In fact, the Will was executed only on 21.07.1955. But the value of the property had been mentioned as Rs.910/-. That has been wrongly typed in the pleadings that the Will is dated 09.10.1955. On account of this confusion regarding dates, the trial Court chose to hold that Ex.A1 has not been proved. The first appellate Court correctly came to the conclusion that Ex.A1 had been fully proved by the plaintiff.

12.The learned counsel appearing for the appellant would draw my attention to the decision of the Hon'ble Supreme Court reported in (2017) 1 SCC 257 (Ramesh Verma (dead) through legal representatives Vs. Lajesh Saxena). Paragraph No.13 of the said decision reads as follows:-

“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.” The aforesaid decision will



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not render the ratio laid down in (1972) 2 MLJ 508 (Irudayammal and others Vs. Salayath Mary) inapplicable to the facts of the present case. In Paragraph No.13, it has been held that the mandate of Section 68 of the Evidence Act will have to be complied with even where the opposite party does not specifically deny the execution of the document. In this case, the appellant Kamala had admitted the existence and execution of Ex.A1-Will. Therefore, I would therefore go by the ratio laid down in the aforesaid Division Bench of the Madras High Court. Once I hold that Ex.A1-Will had been proved, the necessary conclusion is that Manickam was given only life estate along with his wife and the properties were to ultimately devolve on the grand nephew of the testator. Therefore, the appellant Kamala can no longer fall back on Ex.B12-Will. Ex.B12-Will has to necessarily fail in respect of the property that is the subject matter of O.S.No.646 of 1996. It is true that the father Thiru.Manickam had dealt with the property by mortgaging the same and they have been subsequently redeemed either by the father or by the appellant. The learned counsel for the appellant would state that that would come in the way of the plaintiff from getting the relief of declaration and recovery of possession. I am not persuaded by this submission. Whatever mortgage was created by Thiru.Manickam could have been valid only till his life-time. Redemption of the mortgage by the appellant is no defence.”

7. The review applicant in her written statement had admitted the



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making of Ex.A1 Will attributed to Karuppanna Muthiriar. Her stand was that it was cancelled by the very same Karuppanna Muthiriar. The cancellation could not be established. The review applicant never challenged the genuineness of Ex.A1 Will. In these circumstances, as pointed out by the learned Senior Counsel appearing for the plaintiff, the recent judgment of the Hon'ble Division Bench of the Madras High Court reported in **(2023) 2 MLJ 684 (Boomathi v. Murugesan)** would come into play. The Hon'ble Division Bench had held as follows :

“25. This Court draws the distinction between 'specifically denied', 'not specifically denied' and 'admitted'. The first two instances, namely, 'specifically denied' and 'not specifically denied', would fall within one category. Insofar as proof of a Will in both cases in this category, the Will would have to be necessarily proved by the propounder. However, where the opposite party categorically admits to the Will, the position would be certainly different. In India, we follow what is called the system 'adversarial proceedings', which is also followed in the British Courts. The foundation of this School is that parties before a Court would have to deal with facts in issue namely facts that are asserted and denied by the parties to the lis and the Court would proceed to adjudicate on such issues. When there is no dispute between the parties on certain matters, the Court



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would not venture to require proof of such admitted facts.

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

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

"58 Facts admitted need not be proved. —No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

27. Applying the definition of 'admission' as set out in Section 17 of the Indian Evidence Act, if Sections 56 to 58 are applied, it leads to the only conclusion that facts that are admitted, whether it is in oral or documentary form, are not required to be proved. These sections are categorised and incorporated as a separate Chapter, namely, Chapter III under Part II of the Indian Evidence Act regarding proof. Only where the facts would require proof of a document, like a Will in the instant case, the Court would be



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bound by the subsequent Chapters, namely, Chapter IV dealing with oral evidence and Chapter V dealing with documentary evidence. Therefore, it is axiomatic that proof as mandated under Chapters IV and V would be warranted only when there is a 'fact in issue' between the parties and cannot be extended to a case which clearly falls within the four corners of Chapter III, especially, Section 58 which is relevant for the purposes of the present case.”

8.In fact, the judgment under review has also adopted the very same approach while distinguishing the decision of the Hon'ble Supreme Court reported in (2017) 1 SCC 257 (Ramesh Verma (Dead) Through Legal representatives Vs.Lajesh Saxena (dead) by legal representatives and another). The said decision has been subsequently followed in AS No.321 of 2016 dated 18.04.2023 by a learned Judge of this Court. I must of course refer to the article of Shri.Sharath Chandran, Advocate, published in (2023) 3 MLJ 13. The learned author has criticised the decision of the Hon'ble Division Bench by pointing out that the propounder of the Will cannot be relieved of the obligation to prove the same as contemplated under Sections 68 and 69 of the Indian Evidence Act, 1872 and cannot fall back on the admission made in the pleadings.



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A catena of decisions has been cited. I must in all fairness observe that the learned author has made out a formidable case. However, on this score, I am not inclined to review the judgment passed by the me, more so, when the reasons set out therein stand reinforced by the recent judgment of the Hon'ble Division Bench.

9. This Review Application is dismissed. No costs.

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