



S.A.(MD).No.249 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Reserved on : 13.04.2023

Pronounced on : 20.04.2023

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A.(MD).No.249 of 2017

and

C.M.P.(MD).No.5226 of 2017

1.Balamurugan (Died) ... Appellant/ Appellant/ 1st Defendant

2.Parvathi

3.Minor.Janani ... LR's of the deceased sole appellant

(A2 and A3 are brought on record as LR's of deceased sole appellant vide Court order dated 02.03.2020 made in C.M.P.(MD).Nos.959 to 961 of 2020 in S.A.(MD).No.249 of 2017)

Vs.

1.Chandra

2.Pattammal ...1 & 2 Respondents/1 & 2 Respondents/
Plaintiffs

3.Bhuvaneswari ... 3rd Respondent/3rd Respondent/2nd Defendant

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree dated 10.11.2016 passed in A.S.No.6 of 2016 on the file of the Principal Sub Court, Tenkasi, modifying (partly allowing) the judgment and decree dated 07.12.2015 passed in O.S.No.252 of 2009 on the



S.A.(MD).No.249 of 2017

file of the Additional District Munsif Court, Tenkasi by allowing this Second Appeal.

For Appellants : Mr.V.Meenakshisundaram

For Respondents : M/s.J.Roshini
for Mr.D.Srinivasaragavan

JUDGMENT

This Second Appeal has been filed challenging the findings of the Courts below. The legal representatives of the deceased first defendant in the suit O.S.No.252 of 2009 on the file of the Additional District Munsif Court, Tenkasi are the appellants herein. The respondents 1 and 2 are the plaintiffs in the suit. The third respondent is the second defendant in the said suit. The suit was filed seeking for the relief of declaration of the plaintiffs' title over the suit schedule property and for permanent injunction to restrain the first defendant from interfering with the plaintiffs' peaceful possession and enjoyment of the suit schedule property. In the forthcoming paragraphs, the parties are described as per their litigative status in the suit.

2. As seen from the plaint, the suit schedule property originally belonged to Muthupillai and he had bequeathed the same by way of a registered Will dated 30.07.1969 during his life time in favour of Ramakrishnapillai, who is the



S.A.(MD).No.249 of 2017

husband of the first plaintiff and the father of the second plaintiff and the second defendant. According to the plaintiffs, Muthupillai died in the year 1973 and the Will dated 30.07.1969 came into force and the plaintiffs are in possession and enjoyment of the suit schedule property as absolute owners for more than 35 years by paying the taxes.

3. It is further contended by the plaintiffs that the beneficiary under the above said Will, namely, Ramakrishnapillai had executed a family arrangement deed dated 29.05.2009 in favour of the first plaintiff, second plaintiff and the second defendant. Based on the family arrangement deed dated 29.05.2009, the plaintiffs traced their title over the suit schedule property and claimed ownership. According to them, the first defendant, who is the brother of Ramakrishnapillai, has no right over the suit schedule property in view of the registered Will dated 30.07.1969 referred to supra.

4. However, as seen from the written statement filed by the first defendant, he denies the execution of the Will dated 30.07.1969 by Muthupillai and that Ramakrishnapillai was the beneficiary under the said Will. According to the first defendant, the said Will is a forged and a fabricated document. According to him, after the life time of Muthupillai, his legal heirs, namely,



S.A.(MD).No.249 of 2017

Pattammal, Subbammal and Valliammal partitioned the properties in the year 1980 and the suit schedule property was allotted to Pattammal. According to the first defendant, after the death of Pattammal in the year 1995, the suit schedule property devolved upon her legal heirs, namely, Ramakrishnapillai and the first defendant. It is further contended by the first defendant that the other female legal heirs of late Pattammal have released their shares and therefore, the first defendant as the brother of Ramakrishnapillai is entitled for half share in the suit schedule property. The first defendant has also pleaded that he has also filed a suit for partition seeking for his half share in the suit schedule property in O.S.No.289 of 2009 before the Principal District Munsif Court, Tenkasi. In the additional written statement filed by the first defendant, it is also pleaded that the suit schedule property is undervalued and the value declared in the plaint is more than the pecuniary jurisdiction of the Court.

5. Based on the pleadings of the respective parties, the Trial Court framed issues. On the side of the plaintiffs, four witnesses were examined, namely, P.W.1 to P.W.4 and four documents were filed, which were marked as exhibits A1 to A4. On the side of the first defendant, one witness was examined, namely, the first defendant himself as D.W.1 and two documents were filed, which were marked as exhibits B1 and B2. Through the official from the Sub



S.A.(MD).No.249 of 2017

Registrar's office (P.W.4), one document was filed, namely, the certified copy of the registered Will dated 30.07.1969 executed by Muthupillai as Ex.X1.

6. The Trial Court, namely, the Additional District Munsif Court, Tenkasi, after considering the oral and documentary evidence available on record, has decreed the suit as prayed for by the plaintiffs in its judgment and decree dated 07.12.2015 in O.S.No.252 of 2009. Aggrieved by the same, the first defendant in the suit preferred a first appeal in A.S.No.6 of 2016 on the file of the Principal Sub Court, Tenkasi. The First Appellate Court, namely, the Principal Sub Court, Tenkasi found that the Will dated 30.07.1969 was proved by the plaintiffs as per Section 69 of the Indian Evidence Act, but as per the recitals in the Will, since it was found that the plaintiffs and the second defendant are entitled only for a life estate, it was declared that they are not entitled for absolute right to own the suit schedule property, but were entitled only for life interest. The First Appellate Court by its judgment and decree dated 10.11.2016 in A.S.No.6 of 2016 partly allowed the first appeal by modifying the judgment of the Trial Court dated 07.12.2015 and passed a decree that the plaintiffs and the second defendant are only entitled for a declaration of their right of life interest and permanent injunction. Aggrieved by the findings of the Courts below, this Second Appeal has been filed by the first defendant in the



S.A.(MD).No.249 of 2017

suit in O.S.No.252 of 2009. During the pendency of the Second Appeal, the first defendant died and his legal representatives have been brought on record by orders of this Court.

7. This Court on 20.06.2017 admitted the Second Appeal by formulating the following substantial questions of law:

"a) Whether the evidence of PW2 is consistent with the requirements of Section 69 of the Indian Evidence Act, 1872?

b) Whether the presumption under Section 114 (e) of the Indian Evidence Act, 1872, can have over riding effect as to the requirements of Section 69 of the Indian Evidence Act?"

8. The learned counsel for the appellants after drawing the attention of this Court to Section 69 of the Indian Evidence Act would submit that the plaintiffs will have to satisfy twin conditions. Whenever the attestors to the Will are dead and as per Section 69 of the Indian Evidence Act, 1872, he would submit that it must be proved that

a) the attestation of one of the attesting witnesses at least is in his handwriting and

b) the signature of the person executing the document is in the handwriting of that person.



S.A.(MD).No.249 of 2017

He then drew the attention of this Court to the deposition of P.W.2, the daughter of one of the attesting witness Ayyapillai who is no more, who has deposed that the signature found in the Will is the signature of her father (Ayyapillai) and is in his handwriting. The learned counsel for the appellants would submit that since the plaintiffs have not proved the signature of the testator, namely, Muthupillai, as per the mandatory requirement under Section 69 of the Indian Evidence Act, 1872 as P.W.2 has only commented upon the signature of one of the attesting witness and not the testator, the plaintiffs have failed to satisfy the twin conditions of proving the signature of one of the attesting witness as well as that of the testator, namely, Muthupillai. Therefore, according to him, the plaintiffs have not proved the Will and not entitled for the declaratory relief that they are the owners of the suit schedule property. The learned counsel for the appellants would also submit that erroneously the Courts below have applied Section 90 of the Indian Evidence Act, which deals with presumption as to documents 30 or more years old and Section 114(e) of the Indian Evidence Act, which enables the Court to presume that the judicial and official acts have been regularly performed, as the disputed Will is a registered Will. He would submit that neither Section 90 nor Section 114(e) of the Indian Evidence Act applies to a Will. He would also submit that mandatorily, the plaintiffs will have to satisfy the statutory requirements of Section 69 of the Indian Evidence Act by proving



S.A.(MD).No.249 of 2017

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.

9. The learned counsel for the appellants relied upon the following authorities in support of his submissions:

a) A judgment of a learned Single Judge of this Court in the case of ***Kasthuri Bai and others Vs. V.Ashok Kumar and others*** reported in **2017 (2) CTC 35**, to substantiate his contention that, mere proof would not suffice that the plaintiffs are able to prove the signature of the attesting witness, but they have also got to prove the signature of the testator as per the provisions of Section 69 of the Indian Evidence Act, 1872.

b) A judgment of the Hon'ble Supreme Court in the case of ***Bharpur Singh and others Vs. Shamsher Singh*** reported in **(2009) 3 SCC 687**, to support his contention that Section 90 and Section 114(e) of the Indian Evidence Act dealing with presumptions are not applicable to a Will.

c) A judgment of the Hon'ble Supreme Court in the case of ***Ashutosh Samanta (D) by LRs and others Vs. SM.Ranjan Bala Dasi and others***, decided on 14.03.2023 in ***Civil Appeal No.7775 of 2021***, to support his contention that Wills cannot be proved on the basis of Section 90 of the Indian Evidence Act only on the basis of their age and that the presumption under



S.A.(MD).No.249 of 2017

Section 90 as to the regularity of documents more than 30 years of age is inapplicable when it comes to proof of Wills, which have to be proved in terms of Section 63(c) of the Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 or under Section 69 of the Indian Evidence Act, where both the attesting witnesses may have died or cannot be found.

10. Per contra, the learned counsel for the respondents/plaintiffs would submit that, the requirement of Section 69 of the Indian Evidence Act has been complied with by the plaintiffs by examining P.W.2, P.W.3 and P.W.4. She would submit as follows:

a) The registered Will of the year 1969 has been challenged by the first defendant after 40 years.

b) All the signatories to the Will including the testator are dead.

c) The signature of one of the attesting witness was identified/proved as required under Section 69 of the Indian Evidence Act through P.W.2, his daughter, Dhanalakshmi.

d) The death of another attesting witness was confirmed through P.W.2.

e) For drawing presumption under Section 114 of the Indian Evidence Act, a certified copy of the Will was also marked through P.W.4, the official from the Sub Registrar's office.



WEB COPY

f) The Lower Appellate Court has also held that the first defendant has failed to establish suspicious circumstances over the execution of the Will. Except examining himself as D.W.1, no other witness was brought before the Trial Court in support of the first defendant's contention that the Will is a forged and fabricated document and it was never executed by Muthupillai.

g) The Lower Appellate Court has also rightly culled out certain facts, namely, the year of birth of the first defendant, i.e., 1982 and therefore, the first defendant cannot have any right to create any suspicion over a document, namely, the registered Will of the year 1969.

Discussion:

11. Section 69 of the Indian Evidence Act, 1872 reads as follows:

“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.”

As seen from Section 69, if execution of Will could not be proved by examining the attestor or in the absence of non-availability of attestors, to prove the Will, secondary evidence could be adduced by proving the



S.A.(MD).No.249 of 2017

handwriting of one of the attesting witnesses and signature of the executant of the document to be in the handwriting of that person. Therefore, the twin conditions have to be satisfied for proving a Will under Section 69 of the Indian Evidence Act when no attesting witness is found, namely, a person who has acquaintance of the signature of one of the attesting witnesses and also the person executing the document, should identify both the signatures found in the subject Will.

12. In the case on hand, P.W.2, by name, Dhanalakshmi, who is the daughter of Ayyapillai, one of the attesting witnesses to the Will (Ex.A3), has deposed in her chief examination as follows:

□என் தகப்பனாரின் பெயர் அய்யாபிள்ளை. என் தகப்பனார் காலமாகி சுமார் 20 வருடங்கள் இருக்கும். என்னிடம் காண்பிக்கப்படும் உயில் ஆவணம் என் தாத்தா முத்துப்பிள்ளை எழுதிவைத்த உயில் ஆவணம் ஆகும். அது வா.சா.ஆ.3. வா.சா.ஆ.3 உயிலில் உள்ள கையெழுத்து என் தகப்பனாருடைய கையெழுத்தாகும். என் தகப்பனாரின் கையெழுத்தை காண்பிக்கும் ஆவணத்தை கொண்டு வந்துள்ளேன். அந்த ஆவணம் என் குடும்பத்தில் பாகப்பிரிவினை செய்த போது என் தகப்பனார் கையெழுத்து போட்ட ஆவணம் ஆகும். அது வா.சா.ஆ.4.□

As seen from her deposition, P.W.2, the granddaughter of the testator Muthupillai, has confirmed that the signature found in the subject Will of



S.A.(MD).No.249 of 2017

Ayyapillai, her late father and one of the attesting witness, is only his signature.

She has also deposed that the Will shown to her is the Will of Muthupillai, who is her grandfather.

13. When P.W.2 has deposed that the Will is that of Muthupillai, her grandfather and the signature of one of the attesting witness, namely, Ayyapillai, her father, found in the Will is his signature, it can be established and proved that the plaintiffs have discharged their burden of proving the Will as per the provisions of Section 69 of the Indian Evidence Act for the following reasons:

a) Apart from the evidence of the plaintiffs that the subject Will is a genuine Will, there is no other evidence produced by the first defendant to disprove the contents of the Will.

b) It is also not a case where P.W.1 to P.W.4 have made contradictory statements with regard to the execution of the Will by Muthupillai. P.W.1 to P.W.4 have all categorically deposed that the subject Will was executed only by Muthupillai.

c) Since the plaintiffs have discharged their initial burden of proving the Will as per Section 69 of the Indian Evidence Act, the burden to disprove the same has been shifted to the first defendant, who alleges that the Will is a



S.A.(MD).No.249 of 2017

forged and fabricated document. Excepting for examining the first defendant, as a witness (D.W.1), there are no independent witnesses examined on the side of the first defendant to disprove the contents of the Will and the signatures found therein.

d) The Will is a registered Will and is of the year 1969. The Will dated 30.07.1969 (Ex.A3) has also been acted upon and a family arrangement deed dated 29.05.2009 has also been entered into between the plaintiffs and the second defendant subsequently. The property tax receipt for the assessment years 2008-09 (Ex.A2) dated 27.03.2009 also stands in the name of Ramakrishnapillai, the beneficiary under the Will (Ex.A3) dated 30.07.1969. The plaintiffs and the second defendant are admittedly his legal heirs, who have entered into a family arrangement dated 29.05.2009 (Ex.A1) subsequent to the death of Ramakrishnapillai.

e) No documentary evidence has been produced by the first defendant to prove that he is in possession of the suit schedule property. He has produced only the family card and voters identity card, but has not produced any revenue records to show that he is in possession of the suit schedule property.

f) The suit has been filed in the year 2009, that too, only by the plaintiffs and not by the first defendant. No counter claim has also been filed by the first defendant in the suit, but instead, he has chosen subsequently to file a separate



S.A.(MD).No.249 of 2017

suit for partition in O.S.No.289/2009, the outcome of which is unknown and the details of the said suit are also not furnished in the pleadings of the first defendant.

g) There are no suspicious circumstances established by the first defendant through oral and documentary evidence to disprove the contents of the registered Will of the year 1969 executed by Muthupillai excepting for the self-serving statements made by the first defendant in his deposition without any supporting evidence that the subject Will is a forged and fabricated document. Further, the first defendant (D.W.1) was not even born in the year 1969 and therefore, he is not the competent witness to depose that the Will is a forged and a fabricated document.

h) The official from the Sub Registrar's Office, where the Will was registered, has also been examined as P.W.4. He has also deposed that the Will was registered only in their office and through him also, the certified copy of the Will (Ex.X1) was marked.

i) Section 69 of the Indian Evidence Act does not stipulate that the signature of the person executing the document is in the handwriting of that person has to be proved in a particular manner. Hence, it is sufficient if by the collective appreciation of evidence available on record, it is proved that signature of the person executing the document is in the handwriting of that



S.A.(MD).No.249 of 2017

person. The Courts below have properly appreciated the evidence available on record and have come to the right conclusion that the Will has been proved by the plaintiffs.

j) The registered Will of the year 1969 on the face of it also appears to have been duly executed and attested in accordance with Section 63 of the Indian Succession Act. Therefore, the maxim “*omnia praesumuntur rite esse acta*” comes into play which means in the absence of evidence to the contrary

(a) something which should have been done was in fact done, or

(b) something which has been done was done by complying with all the relevant requirements under law.

14. When the first defendant has miserably failed to prove that the Will is a forged and fabricated document through oral and documentary evidence, that too, when the plaintiffs have discharged their initial burden of proving the Will under Section 69 of the Indian Evidence Act, the Courts below have rightly held that the subject registered Will executed by Muthupillai in the year 1969 is a genuine Will under which Ramakrishnapillai is a beneficiary and from whom the plaintiffs have derived title over the suit schedule property. The twin conditions required to be satisfied under Section 69 of the Indian Evidence Act, 1872 for the purpose of proving the Will in the absence of both the attesting



S.A.(MD).No.249 of 2017

witnesses, have been satisfied by the plaintiffs through their oral and documentary evidence by proving that the signatures of the testator and the attesting witnesses found in the subject Will are their genuine signatures and that a valid will was executed. From the evidence available on record, no suspicious circumstances have been established by the first defendant for disproving the contents of the Will. Having satisfied with the requirements of Section 69 of the Indian Evidence Act for proving the Will, the plaintiffs are entitled for the relief of declaration and permanent injunction as rightly granted by the Lower Appellate Court, namely, the Principal Sub Court, Tenkasi, in A.S.No.6 of 2016 by its judgment and decree dated 10.11.2016.

15. The decisions relied upon by the learned counsel for the appellants with regard to Section 90 of the Indian Evidence Act dealing with presumption of ancient documents and Section 114(e) of the Indian Evidence Act dealing with presumption in respect of certain facts have no bearing to the facts of the instant case, since the plaintiffs have undoubtedly been able to prove on their own merit through their oral and documentary evidence that the subject Will is a genuine Will executed by Muthupillai in the year 1969 under which Ramakrishnapillai is the beneficiary from whom the plaintiffs have derived title over the suit schedule property. It is no doubt true as laid down by the



S.A.(MD).No.249 of 2017

decisions relied upon by the learned counsel for the appellants that Section 90 of the Indian Evidence Act and Section 114 of the Indian Evidence Act will not apply to a Will as any Will will have to be proved only in accordance with the provisions of Section 68 to Section 73 of the Indian Evidence Act. There was no necessity for the Courts below to apply Section 90 or Section 114 of the Indian Evidence Act for the purpose of decreeing the suit in favour of the plaintiffs as the plaintiffs have discharged their initial burden of proving the Will through their oral and documentary evidence, which has not been rebutted by the first defendant through any independent oral and documentary evidence. The only rebuttal made by the first defendant was through his pleadings in the form of written statement and through his oral evidence (D.W.1), the first defendant himself, who is not an independent witness. As held by the decisions relied upon by the learned counsel for the appellants, namely, the case of *Bharpur Singh and others Vs. Shamsher Singh* reported in (2009) 3 SCC 687 and the case of *Ashutosh Samanta (D) by LRs and others Vs. SM.Ranjan Bala Dasi and others*, a decision rendered in *Civil Appeal No.7775 of 2021* on 14.03.2023, Section 90 and Section 114 of the Indian Evidence Act dealing with presumptions cannot be applied to Wills. But despite the same, this Court is of the considered view that since the plaintiffs have been able to prove the Will as per the provisions of Section 68 to 73 of the Indian Evidence Act



S.A.(MD).No.249 of 2017

through their oral and documentary evidence, which has not been rebutted by the first defendant by any independent oral and documentary evidence, there was no necessity for the Courts below to apply either Section 90 or Section 114 of the Indian Evidence Act, which deals with presumptions for the purpose of proving the subject Will by the plaintiffs.

16. Even though Section 90 and Section 114 of the Indian Evidence Act has been erroneously applied by the Courts below, but since the final result of the Courts below is correct as the plaintiffs on their own merit have been able to prove that the subject Will executed by Muthupillai is a genuine and a valid Will. No contra evidence has also been produced by the first defendant to prove that the signature of the testator and the attesting witnesses found in the subject Will is not their respective signatures. The first defendant has only deposed that the subject Will is a forged and fabricated document without any documentary evidence and without examining any independent witness. Since the Will has been proved in accordance with Section 69 of the Indian Evidence Act and there is also no evidence to prove suspicious circumstances for the execution of the Will, this Court is of the considered view that both the Courts below were right in holding that the Will has been proved by the plaintiffs and is a genuine one.



S.A.(MD).No.249 of 2017

WEB COPY

17. For the foregoing reasons, the substantial questions of law formulated by this Court while admitting the Second Appeal are answered against the appellants by holding that the plaintiffs have proved the Will through their oral and documentary evidence as required under Section 69 of the Indian Evidence Act, 1872 and there was no necessity to apply Section 114(e) of the Indian Evidence Act, which deals with presumption by Courts with regard to certain acts by the Courts below as the oral and documentary evidence available on record proves the existence of the subject Will. The decision of the Lower Appellate Court that the subject Will has been proved by the plaintiffs is correct, but the reasons for coming to the said conclusion by applying Section 90 and Section 114 of the Indian Evidence Act is wrong as Section 90 and Section 114 of the Indian Evidence Act does not apply to a Will.

18. In the result, there is no merit in this Second Appeal. Accordingly, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

20.04.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
Lm



S.A.(MD).No.249 of 2017

WEB COPY

To

- 1.The Principal Sub Court,
Tenkasi.
- 2.The Additional District Munsif Court,
Tenkasi.
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.(MD).No.249 of 2017

ABDUL QUDDHOSE, J.

Lm

Judgment made in
S.A.(MD).No.249 of 2017

20.04.2023