



S.A.No.2077 of 2000

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved On 12.01.2023	Judgment Pronounced On 03.02.2023
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CORAM

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.2077 of 2000

M.Madasamy (Died) ... Appellant/Appellant/
Plaintiff
2.M.Krishnammal
3.M.Rajendran
4.M.Rajalakshmi
5.M.Sakthimurugan ... Appellants 2 to 5

[Appellants 2 to 5 were brought on record as LR's of the deceased sole appellant vide order dated 30.08.2019 made in C.M.P.(MD) Nos.6465 to 6467 of 2019 in S.A.No.2077 of 2000]

-VS-

1.M.Annabackiyam (Died)
2.K.Thirumani (Died)
3.M.Selvamurugan ... Respondents 1 to 3/
Respondents/Defendants

[Memo in USR No.36411 was recorded as the 1st respondent died and respondents 2 and 3 who are already on record were recorded as LR's of the deceased 1st respondent vide order dated 09.08.2019]

4.T.Annalakshmi
5.T.Susindirakumari ... Respondents 4 & 5

[Respondents 4 and 5 were brought on record as LR's of the deceased 2nd respondent vide order dated 16.02.2021 in C.M.P.(MD) Nos.1392, 1396 and 1401 of 2021 in S.A.No.2077 of 2000]



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6.Soundravalli @ Pushpavalli

7.Jayalakshmi

8.Malliga

... Respondents 6 to 8

[Respondents 6 to 8 were suo motu brought on record as LR's of the deceased 1st respondent vide order dated 09.04.2021 made in S.A.No.2077 of 2000]

Prayer: Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 26.07.2000 made in Appeal and Cross Appeal No.199 of 1998 on the file of the Sub Court, Kovilpatti and the judgment and decree dated 09.07.1998 made in O.S.No.4 of 1996 on the file of the District Munsif's Court, Kovilpatti by allowing this appeal.

For Appellants	:	Mr.R.Devaraj
For R3	:	Mr.V.Meenakshisundaram For Mr.R.T.Arivukumar
For RR4 & 5	:	Mr.M.Arjunvarman for Mr.T.Lajapathiroy

JUDGMENT

The plaintiff in the suit is the 1st appellant. The suit was filed seeking declaration of title and injunction. The suit was decreed by the trial Court to the extent of half of the suit property. Aggrieved by the same, the 1st appellant had filed an appeal in A.S.No.199 of 1998 insofar as the portion of the decree dismissing the suit is concerned, and respondents 1 and 3 herein also preferred a cross objection in respect of the decreed



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portion. The first appellate Court reversed the findings of the trial Court insofar as the relief of permanent injunction is concerned and allowed the cross objection filed by respondents 1 and 3 to that extent. The appeal filed by the 1st appellant was dismissed by confirming the other findings of the trial Court. Insofar as the relief of declaration is concerned, the finding of the trial Court that the 1st appellant was entitled to declaration in respect of half of the suit property was confirmed by the appellate Court. Aggrieved by the same, the 1st appellant is before this Court. Pending second appeal, the 1st appellant died and his legal representatives were brought on record as appellants 2 to 5. Likewise, the legal representatives of the deceased 1st respondent were brought on record as respondents 6 to 8 and the legal representatives of the deceased 2nd respondent were brought on record as respondents 4 and 5.

Plaint Averments:

2.1. According to the 1st appellant/plaintiff, the suit properties were joint family properties of the 1st appellant and his father late Mariappan. The mother of the 1st appellant viz., Deivanai died in the year 1973 and thereafter, a misunderstanding arose between the 1st appellant and his father



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Mariappan in the year 1984 regarding the common enjoyment of the suit schedule properties. Therefore, the 1st appellant filed a suit against his father for partition in O.S.No.209 of 1984 on the file of the Sub Court, Tuticorin.

2.2. The said suit was contested by the father of the 1st appellant mainly on two grounds viz., (a) some of the suit properties were his self earned properties; and (b) the 1st appellant's father married the 1st respondent herein, who was the widow of his younger brother Kutralam. The trial Court found that all the suit properties were joint family properties and hence, liable for partition. It also found that the 1st respondent herein was not the legally wedded wife of the 1st appellant's father Mariappan. Hence, the suit for partition filed by the 1st appellant was decreed granting half share in the suit properties. The 1st appellant's father Mariappan filed an appeal before the District Court, Tirunelveli and the same was dismissed.

2.3. It was further averred by the 1st appellant that when he was taking steps to get his half share in the suit schedule property as per the preliminary decree for partition in his favour, his father Mariappan died



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intestate on 19.02.1995 leaving the 1st appellant as his sole heir to succeed to his estate and hence, the remaining half share also devolved upon him. Thus, he claimed absolute right over the entire suit schedule properties. The 1st appellant further averred that the defendants/respondents 1 to 3 herein without having any manner of right, tried to commit trespass into the suit property by force and the said action of respondents 1 to 3 constrained him to file a suit for declaration of his title and for consequential injunction.

Averments contained in the written statement:

3.1. Respondents 1 to 3 herein filed a written statement and claimed that the 1st respondent was the legally wedded second wife of the 1st appellant's father Mariappan and the 3rd respondent Selvamurugan was his son born out of the said wedlock. It was further submitted that the 2nd respondent herein is the son born to the 1st respondent through her first husband and brother of Mariappan viz., Kutralam. It was specifically pleaded by respondents 1 to 3 that after the death of Kutralam, Mariappam married the 1st respondent as his second wife. It was also pleaded that apart from the 3rd respondent, the 1st respondent also got three other daughters through the said Mariappan.



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3.2. It was also pleaded by respondents 1 to 3 that the suit properties are the self acquired properties of Mariappan and the claim of the 1st appellant that it were joint family properties was specifically denied. Respondents 1 to 3 also denied the possession of the 1st appellant over the suit properties and claimed their exclusive possession over the same. Respondents 1 to 3 also pleaded that challenging the dismissal of the appeal filed by Mariappan in A.S.No.120 of 1989, in their capacity as legal representatives of Mariappan, they preferred a second appeal in S.A.No.1377 of 1995 and the same was pending.

3.3. Respondents 1 to 3 also averred that the 1st appellant developed inimical relationship with his father Mariappan and it was also alleged that the 1st appellant and his sons committed murder of Mariappan. Respondents 1 to 3 also claimed that when the said Mariappan was alive and hale and healthy, on 09.04.1984 he had executed a registered Will bequeathing the entire suit properties in favour of respondents 1 to 3 by creating a life interest in favour of the 1st respondent with vested remainder to respondents 2 and 3. Respondents 1 to 3 also claimed that subsequent to the death of



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Mariappan, the property had been in possession and enjoyment of the 1st respondent and respondents 2 and 3, who are entitled to vested remainder. The 1st respondent also pleaded that the said Mariappan and respondents 1 to 3 had been in continuous enjoyment of the suit property for more than a statutory period by excluding the 1st appellant and hence, the 1st appellant is not entitled to lay any claim over the suit property on the ground of ouster also.

Evidence let in before the trial Court:

4. On these pleadings, the parties went to trial. The 1st appellant was examined as P.W.1 and 20 documents were marked through him as Ex.A.1 to Ex.A.20. The 1st respondent was examined as D.W.1 and one of the attestors to Ex.B.1-Will relied on by respondents 1 to 3 was examined as D.W.2. The scribe of the Will was examined as D.W.3. On behalf of respondents 1 to 3, 13 documents were marked as Ex.B.1 to Ex.B.13.

Findings of the Courts below:

5. The trial Court, on appreciation of the oral and documentary evidences, came to the conclusion based on the findings that attained



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finality in the earlier legal proceedings between the 1st appellant and his father Mariappan that the suit properties were joint family properties and the 1st respondent was not the legally wedded wife of the 1st appellant's father Mariappan. The trial Court upheld the validity of the Will. In view of the fact that the 1st appellant already obtained a decree for partition in respect of the half of the share in the suit property, the trial Court declared the title of the 1st appellant over half of the suit property and granted a decree for injunction to that extent. As stated earlier, aggrieved by the said judgment, the 1st appellant filed an appeal challenging the judgment by the trial Court in respect of the disallowed portion. Respondents 1 and 3 filed cross objection challenging the decreed portion. The first appellate Court confirmed the findings of the trial Court that the suit properties are the joint family properties and the said finding was rendered based on the findings that attained finality in the earlier proceedings. However, the first appellate Court disturbed the findings of the trial Court with regard to the legal status of the 1st respondent and held that the 1st respondent was a legally wedded wife of Mariappan. The first appellate Court also concurred with the findings of the trial Court in upholding the Will relied on by respondents 1 to 3. The first appellate Court reversed the findings of the trial Court,



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insofar as the relief of injunction is concerned on the ground that the 1st appellant, having got a decree for partition in respect of the half share, can only be treated as a co-owner of the suit property and hence, he is not entitled to maintain his prayer for injunction against the other co-owners. Therefore, the decree for declaration granted by the trial Court in respect of the half share of the 1st appellant was confirmed and the trial Court's decree granting injunction in respect of the half share was reversed. In other respects, the findings of the trial Court were confirmed. Therefore, the first appeal filed by the 1st appellant was dismissed and the cross objection filed by respondents 1 and 3 was allowed, insofar as the relief of injunction is concerned. Aggrieved by the said judgment and decree, the 1st appellant has come up by way of this second appeal.

Substantial question of law framed:

6. At the time of admission, this Court formulated the following substantial question of law:

“Whether Ex.B.1 is proved in accordance with law?”



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Arguments made by the appellants' counsel:

7.1. Mr.R.Devaraj, learned counsel for appellants 2 to 5, elaborating the substantial question of law, submitted that the findings rendered by both the Courts below are vitiated by perversity in accepting the evidence of D.W.2 in proof of the Will. It is the submission of the learned counsel that if the evidence of one of the attestors to the witness, who was examined as D.W.2, is taken into consideration as a whole, his evidence is not sufficient to prove the Will. By taking this Court to the evidence of D.W.2, the learned counsel submitted that D.W.2 had never seen the testator signing the Will and hence, the execution of the Will has not at all been proved by his version. The learned counsel further submitted that the evidences of D.W.2 and D.W.3 establish that D.W.2 is only a chance witness and he is not a relative or friend of the testator. The learned counsel in support of his contention, relied on the judgment of the Hon'ble Apex Court in ***Janki Narayan Bhoir Vs Narayan Namdeo Kadam*** reported in **2003 (1) CTC 308**.



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7.2. The learned counsel for appellants 2 to 5 further submitted that in Ex.A.1 judgment passed by the trial Court in the earlier suit for partition between the 1st appellant and his father Mariappan, there was a finding that the 1st respondent Annabackiam was not the legally wedded wife of Mariappan. The said finding was confirmed by the High Court in S.A.No.1377 of 1995. Therefore, the finding rendered by the first appellate Court as if the 1st respondent is the legally wedded wife of the said Mariappan is vitiated, as the said point cannot be re-agitated by respondents 1 to 3, in view of the bar created by the earlier finding in an adjudication between the same parties.

Contentions of the learned counsel for the 3rd respondent:

8.1. Mr.V.Meenakshi Sundaram, learned counsel for Mr.R.T.Arivukumar, learned counsel for the 3rd respondent in support of the findings rendered by the Courts below upholding the validity of the Will, submitted that Ex.B.1 was a registered Will and hence, a presumption is raised regarding the due execution of the Will in view of Section 60 of the Registration Act. In support of the said contention, the learned counsel relied on the judgment of the Division Bench of this Court in *Irudayam*



Ammal and others Vs Salayath Mary reported in ***AIR 1973 Madras 421.***

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The learned counsel submitted that certificate of registration is of some evidentiary value while considering the execution of the Will and it has to be taken into consideration along with the other circumstances. It is his further contention that the suspicious circumstances evolved out of the evidence of D.W.2 in view of the fact that he is a stranger and chance witness gets dispelled by the evidentiary value of the certificate of registration. The learned counsel tried to dispel the suspicious circumstances surrounding the Will due to the denial of testator's signature found in the Will by the beneficiary viz., D.W.1 by listing various circumstances pointing towards the genuineness of the Will. The learned counsel listed the following circumstances leading to a conclusion that the Will is genuine and duly executed:

- (a) The relationship between the 1st appellant and his father got strained from the year 1984 and the same resulted in filing of the suit for partition by the 1st appellant against his father Marippan, the testator. Therefore, there is every possibility for the testator to disinherit the 1st appellant by executing a Will in favour of the 1st respondent and the children born to her;



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(b) The testator lived for a quite long time after execution of the Will in the year 1984. The testator died only in the year 1995. In the mean time, there was litigation between the 1st appellant and the testator;

(c) The suit for partition was filed by the 1st appellant against his father viz., the testator on 14.11.1984, whereas the Will was executed and registered on 09.04.1984 prior to the filing of the suit; and

(d) The first wife of the testator viz., Deivanai and the 1st respondent are sisters and they married the brothers viz., Mariappan and his brother Kutralam respectively. On account of close relationship, the testator after death of his brother Kutralam wanted to protect his brother's wife and his children and therefore, there is nothing unnatural in execution of the Will in favour of the 1st respondent and her children.

8.2. In support of his contention, the learned counsel relied on the judgment in *Niranjan Umeshchandra Joshi Vs Mridula Jyoti Rao and others* reported in **2007 (2) CTC 172** for the proposition that the Court may not start with a suspicion and it should not close its mind to find the truth.



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Reply by the appellants' counsel:

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9. The learned counsel for appellants 2 to 5, by way of reply, submitted that the findings entered in the earlier litigation between the 1st appellant and his father regarding the joint family character of the suit property and the legal status of the 1st respondent as wife had attained finality as per the judgment of this Court in the second appeal, which was marked as Ex.B.13 and hence, the same cannot be reopened by the respondents. The learned counsel for the appellants brought it to the notice of the Court that in response to the plea raised by respondents 1 to 3 in the written statement regarding the Will, the 1st appellant filed a reply statement denying the Will. The learned counsel also relied on the judgment of the Apex Court in ***Raj Kumari and others Vs Surinder Pal Sharma*** reported in ***(2020) 2 MLJ 55*** for the proposition that the Sub Registrar, who registered the Will only put his signature on the document in discharge of his statutory duty and he cannot be considered as an attesting witness.

10. Heard the learned counsel for appellants 2 to 5, learned counsel for the 3rd respondent and the learned counsel for respondents 4 and 5. Perused the typed set of papers and other relevant records.



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Discussions:

11.1. It is an admitted case of the parties that earlier, the 1st appellant filed a suit against his father Mariappan seeking partition of the properties. In the said suit, there was a finding confirmed by the High Court to the effect that the suit properties were joint family properties. It was also found that the 1st respondent Annabackiam was not the legally wedded wife of Mariappan. The judgment passed by this Court in S.A.No.1377 of 1995, arising out of the earlier litigation between the 1st appellant and his father Mariappan under whom the respondents are claiming title, was marked as Ex.B.13. Therefore, the findings that the suit properties are joint family properties and that the 1st respondent Annabackiam was not the legally wedded wife of deceased Mariappan have attained finality. The respondents herein, who are claiming half share in the suit property under a testamentary document allegedly executed by the said Mariappan, cannot reagitate the said issues. Therefore, I agree with the submissions made by the learned counsel for the appellants that the first appellant Court ought not to have reversed the findings of the trial Court that the 1st respondent Annabackiam was not the legally wedded wife of deceased Mariappan. The



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respondents are barred from raising the very same issue in the present litigation by virtue of operation of doctrine of *res judicata*.

11.2. The main issue that has to be decided in this second appeal is relating to the validity and genuineness of Ex.B.1 Will executed by late Mariappan. The learned counsel for the appellants mainly submitted that the evidence of one of the attestors of the Will viz., D.W.2 is not sufficient to prove the Will, as he had not seen execution of the Will.

12.1. The learned counsel for the 3rd respondent mainly submitted that any doubt created by evidence of D.W.2 has to be seen in the light of the fact that Ex.B.1 is a registered Will. In other words, it is the submission of the learned counsel that registration of the Will *per se* is of some evidence to prove due execution of the Will.

12.2. In this regard, the learned counsel relied on ***Irudayam Ammal's case*** cited *supra*, wherein a Division Bench of this Court observed as follows:

“There is a general presumption about the execution



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of the will arising under S. 60 of the Indian Registration Act (vide Mullah's Indian Registration Act, 7th Edn. page 256). 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 registering officer under Section 60 of the Registration Act is relevant for proving execution. "See discussion in Sarkar's Evidence, latest 12th Edn. p. 640). As observed by the Privy Council in Md. Ihtishan v. Jamna Prasad, AIR 1922 PC 56, registration is a solemn act and if no other evidence is available, the court can and presume that the Registrar performed his duty of satisfying himself that the document presented to him for registration was duly executed by the executant and the executant was duly and properly identified before him. The same view was taken in Gopaldas v. Sri Thakurji, AIR 1943 PC 83, in which, after referring to the earlier decision of the Privy Council in Md. Intishan Ali v. Jamna Prasad (referred to above), Sir George Rankin observed that the evidence of due registration is itself some evidence of execution as against the other side. There is a full discussion on this question as to the presumption arising coupled with the presumption arising under Section 114 of the Indian Evidence Act in a Bench decision of the Mysore High Court in Hutchegowda v. Chennigegowda, [AIR 1953 Mys 49](#), in which it was held that the evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been



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executed. There is a full discussion of the relevant case law including the decision of the Privy Council in AIR 1922 PC 56 aforesaid. In Revanna v. Dr. A.V. Ranga Rao, AIR 1952 Mys 119, it was observed that in cases where it is impossible for any person to prove execution of a document on account of the death of all the persons concerned, the best and the only possible evidence that may be available is that of a certified copy of the registered document and that in such cases, a presumption could arise under Section 60 of the Registration Act along with Section 114 of the Evidence Act (see also Kashibai v. Vinayak, AIR 1956 Bom 65). It will be seen that in the ultimate analysis, the problem in each case is 'has the best evidence been adduced on the facts of each case'; in the instant case, we have not the slightest hesitation in holding that this essential test for arriving at the truth has been amply satisfied."

12.3. A close reading of the observation made by this Court in ***Irudayam Ammal's case*** would make it clear that if it is impossible for the propounder of the Will to prove due execution of the Will by another evidence, registration of the Will can be pressed into service as a *prima facie* evidence of execution. But in the case on hand, one of the attestors is alive and he had been examined as D.W.2 and therefore, in the light of his



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evidence, it has to be seen whether the Will was proved by satisfying the ingredients of Section 68 of the Indian Evidence Act, 1872. The fact that Will is registered will not prove the due execution of the Will and the same cannot be pressed into service in case of shortcomings in the evidence of attester.

12.4. A close reading of the above decision of the Division Bench would also make it clear that presumption arising under Section 114 of the Evidence Act with regard to the statutory duty by the Registering Officer viz., the Sub Registrar would only reflect the satisfaction of the officer concerned regarding the execution of the Will. The satisfaction of the Registering Officer with regard to the execution of the Will cannot be equated with that of the testamentary Court.

12.5. The Hon'ble Apex Court in ***Raj Kumari's case*** cited *supra*, held that a Registering Officer, who puts his signature on a document in discharge of statutory duty cannot be treated as an attesting witness. The relevant observation of the Apex Court in this regard is as follows:

“27. The ratio in Janki Narayan Bhoir v. Narayan



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Namdeo Kadam (supra) was reiterated in Benga Behera and Another v. Braja Kishore Nanda and Others AIR 2007 SC 1975 : (2007) 9 SCC 728 : LNIND 2007 SC 680. This judgment also examines the issue and question whether a Sub-Registrar in the matter of registration of documents under the provisions of Indian Registration Act, 1908 can possibly be treated as a witness. Reference was made to Sections 52 and 58 of the Registration Act to observe that the duty of the Registering Officer is to endorse the signature of every person presenting the document for registration and to make an endorsement to that effect, that is, to endorse only the admission or execution by the person who presented the document for registration. The Registering Officer can also endorse and certify the payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document. The expression 'attesting witness' within the meaning of Section 3 of the Transfer of Property Act and Section 63 of the Indian Succession Act means "bearing witness to a fact". The two valid conditions of attestation of documents are - (i) two or more attesting witnesses have seen the executant sign the instrument; (ii) each of them has signed the instrument in the presence of the executant. Further and importantly, attestation requires animus attestandi, that is, a person puts his signature on a document with the intent to attest it as a witness. If a person puts his signature on a document only in discharge of a



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statutory duty, he may not be considered as an attesting witness as was held in Dharam Singh v. Aso and Another AIR 1990 SC 1888 : 1990 Suppl SCC 684. Similarly, a scribe or an advocate who has drafted the document may not be the attesting witness as was held by this Court in Jagdish Chand Sharma v. Narain Singh Saini (Dead) Through LRs and Others AIR 2015 SC 2149 (supra), for attestation requires that the witness should have put his signature animus attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature.”

Therefore, the fact that certificate of registration has been issued by the Sub Registrar in respect of Ex.B.1 Will would not help the appellants to dispel the suspicious circumstances surrounding the Will or to overcome the shortcomings, if any, found in the evidence of an attesting witness. Therefore, I am unable to accept the submission made by the learned counsel for the 3rd respondent that a presumption is raised in favour of due execution of the Will in view of Section 60 of the Registration Act, especially in a case where one of the attesting witnesses is alive and he deposed before the Court.



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13.1. Now, let us move on to examine whether the evidence of the attesting witness viz., D.W.2 proves due execution of Will and the suspicious circumstances surrounding the Will are dispelled by the propounder in the facts and circumstances of the case. It is settled law, it is incumbent on the propounder of the Will to prove due execution in the manner known to law by leading sufficient evidence as to its due execution in terms of Section 63 of Indian Succession Act, 1925 read with Section 68 of Indian Evidence Act. The burden on the propounder of a Will does not stop by proving due execution, but it continues still he dispels the suspicious circumstances surrounding the Will. In the case on hand, the propounder of the Will examined D.W.2, one of the attesting witnesses, who is alive to prove the execution of the Will. It would be useful to refer to the observations of a Division Bench of this Court in **Janki Narayan Bhoir's case** cited *supra* wherein it was observed as follows:

“10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested 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



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the process of the court and capable of giving evidence. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the



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Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”



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13.2. In the case on hand, one of the attestors to the Will, who is alive was examined and the other attestor is said to be no more. A close scrutiny of the evidence of D.W.2 would make it clear that he had seen the testator signing the Will. He also deposed that he was present when the other attestor viz., deceased Ramasamy affixed his signature to the Will as attestor. Therefore, he not only proved execution of the Will by the testator, but he also proved attestation by the co-attestor. The vernacular portion of his evidence is extracted below:

“எனக்கு மாரியப்பனைத் தெரியும். மாரியப்பன் எழுதி வைத்த உயிலில் நான் கையெழுத்துப் போட்டேன். உயிலில் உள்ள கையெழுத்து என்னுடையது தான். உயிலில் சார்பதிவாளர் அலுவலகத்தில் வைத்து கையெழுத்து போட்டேன். நானும் ராமசாமி என்பவரும் கையெழுத்துப் போட்டோம். ராமசாமிக் கோனார் இறந்துவிட்டார். மாரியப்பன் தான் உயில் எழுதிக் கொடுத்தார். மாரியப்பன் கையெழுத்துப்போடும்பொழுது நான் பார்த்தேன். உயிலை எழுதியவர் சுப்பையாத் தேவர். மாரியப்பன் எழுதி நான் சாட்சி கையெழுத்துப் போட்ட பத்திரம் உண்மையானது தான். மாரியப்பன் கையெழுத்து போடும் போது நான் கூட இருந்து பார்த்தேன். பி.சா.ஆ1 நியாயமான உயில் தான்.”



13.3. After giving evidence about execution and attestation during the cross examination, D.W.2 deposed as follows:

“மாரியப்பன் உயில் பத்திரத்தில் உள்ள தாள்களில் முழுவதும் கையெழுத்து போட்டார். எத்தனை கையெழுத்து என்று தெரியாது. மாரியப்பன் கையெழுத்து போடும்பொழுது அங்குதான் ஒரு ஆளிடம் பேசிக்கொண்டிருந்தேன். சாட்சி கையெழுத்துப்போட மாரியப்பன் என்னை அழைத்தார். அதனால் மாரியப்பன் எத்தனை கையெழுத்துப் போட்டார் என்று நான் பார்க்கவில்லை. சாட்சி கையெழுத்துப்போட்ட கிழமை நியாபகமில்லை. நான் சாட்சி கையெழுத்துப்போட்டபோது 12 மணி அல்லது ஒரு மணி இருக்கும். சார்பதிவாளர் அலுவலகத்திற்குள் வைத்து மாரியப்பன் ரேகையும் வைத்தார்.”

Relying on the said portion of the evidence of D.W.2, the learned counsel for the appellants submitted that D.W.2 had not seen Mariappan signing the Will.

14. A close scrutiny of D.W.2's evidence would make it clear that he had seen Mariappan signing the Will. When he was questioned in cross examination with regard to the number of signatures put by the testator in the Will, he deposed that he had not noted how many signatures were put by



the testator, as he had been talking with a person standing nearby. Merely because he is unable to recollect figure as to the number of signatures put by the testator in the Will, we cannot come to a conclusion that he has not seen the testator signing the Will. It is settled law that the evidence of attesor has to be weighed as a whole and a truncated version of his evidence in cross examination cannot be relied on out of context. The consideration of D.W.2's evidence would certainly prove execution of the Will by the testator and attestation of the same by himself and also the other attesor. Therefore, the condition laid down by the Division Bench in ***Janki Narayan Bhoir's case*** cited *supra* is satisfied by the evidence of D.W.2.

15.1. As mentioned earlier, the burden of the propounder will not get discharged by merely proving due execution of the Will by examining the attestors. However, his burden continues till he dispels the suspicious circumstances surrounding the Will to the satisfaction of the Court. In the case on hand, the learned counsel for the appellants pointed out two suspicious circumstances viz., (a) the attesor to Ex.B.1-Will is a chance witness; and (b) the signature of the testator in Ex.B.1 was denied by beneficiary herself when she was examined as D.W.1.



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15.2. It is a normal practice, in cases of Will, the testator would select a close relative or a friend to attest the Will. Will is a solemn document which speaks the intention of the testator after his death. Therefore, it is natural that the testator would look for a trusted person to attest his Will in order to speak about his intentions regarding disposition of his estate after his death. In the case on hand, D.W.2, the attestor appeared to be a chance witness, a person engaged in the Sub Registrar's Office. Merely because one of the attestors to the Will is not a close relative or friend of the testator, we cannot come to a definite conclusion that the Will is not genuine one. The testamentary Court has to sit in the armchair of the testator and decide the genuineness of the Will. In this connection, it would be appropriate to refer to the observation of the Hon'ble Apex Court in ***Shyamal Kanti Guha (Dead) Through LRs Vs Meena Bose*** reported in ***(2008) 8 SCC 115***, which reads as follows:

“In construing the language of the will the court is entitled to put itself into the testator's armchair (Venkata Narasimha Appa Row v. Parthasarathy Appa Row, (1913-14) 41 IA 51, IA at p. 72) and is bound to bear in mind also other matters than merely the words used. It must consider the



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surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense.... But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. [Venkata Narasimha case and Gnambal Ammal v. T. Raju Ayyar AIR 1951 SC 103 : 1950 SCR 949 (SCR at p. 955)]”

15.3. In the case on hand, the relationship between the testator and the 1st appellant viz., his son got strained in the year 1984. This fact had been admitted by the 1st appellant himself in his pleadings. Further, the documentary evidences available on record conclusively prove that the 1st appellant filed a suit for partition against his father in the year 1984. Therefore, around the time the Will was executed there was a strained relationship between the 1st appellant and the testator, consequently, there is every possibility for the testator to disinherit his son, the 1st appellant herein in respect of his half share in the joint family properties.

16. As rightly contended by the learned counsel for the 3rd respondent, the testator was alive for nearly 11 years after execution of



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the Will and he died only in the year 1995. In the mean time, there was litigation between the 1st appellant and the testator. It is also an admitted case of the parties that the testator and the 1st respondent's husband Kutralam were brothers. It is also an admitted case that the 1st respondent and the first wife of the testator were sisters. On account of close relationship, the testator, after death of his brother Kutralam, probably wanted to protect his brother's wife and his son viz., the 2nd respondent and give his half share to the 1st respondent and his brother's son the 2nd respondent. While considering the genuineness of the Will, the totality of the circumstances that prevailed at the time of execution of the Will had to be taken into consideration. If the above narrated circumstances are taken into consideration with the evidence of attesor to Ex.B.1, by applying the armchair theory, I have no hesitation to come to a definite conclusion that Ex.B.1 Will stands proved. Therefore, I do not find any reason to interfere with the finding of facts rendered by the Courts below upholding the Will.

17.1. In view of the discussions made above, the substantial question of law framed at the time of admission, is answered against the appellant and the second appeal deserves to be dismissed.



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17.2. As far as the finding of the first appellate Court regarding the dismissal of the suit insofar as the relief of injunction is concerned, though appellants 2 to 5 are entitled to declaration of their half share in the suit property, it is not open to them to maintain a suit for injunction as against the co-owners of the remaining half share. Therefore, the first appellate Court rightly negated the relief of injunction prayed for by the 1st appellant/plaintiff in respect of the entire property.

Conclusion:

18. In fine,

(i) the Second Appeal in S.A.No.2077 of 2000 is dismissed by confirming the judgment and decree passed by the first appellate Court; and

(ii) in the facts and circumstances of the case, there will be no order as to costs.

03.02.2023

NCC: Yes
Index: Yes
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S.SOUNTHAR, J.

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To

- 1.The Sub Judge,
Kovilpatti.
- 2.The District Munsif,
Kovilpatti.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.

Pre-delivery Judgment made in
S.A.No.2077 of 2000

03.02.2023