



S.A.No.559 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on  
20.03.2024

Judgment Pronounced on  
12.04.2024

CORAM

**THE HONOURABLE MR. JUSTICE P.B.BALAJI**

**S.A.No.559 of 2017**  
**and C.M.P.No.13792 of 2017**

Madhivanan (Died)

1.Sampath  
2.Giridharan  
3.Prema  
4.Kaviyarasan  
5.Dilip  
6.Silatha  
Appellants

..

[A6 impleaded vide order  
dated 11.04.2022 made in  
C.M.P.No.4913 of 2022 in  
S.A.No.559 of 2017]

Vs.

1.Dhanaraj  
2.Topan Roy  
3.The Joint Sub Registrar,  
Registration Department,  
Puducherry.  
..Respondents

**PRAYER:** The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 22.01.2015 passed in A.S.No.4 of 2014 on the file of the III Additional District Judge,



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Puducherry, reversing the judgment and decree dated 04.02.2014 made in O.S.No.29 of 2001 on the file of the Principal Subordinate Judge, Puducherry.

For Appellants : Mr.Venkataraman  
for Mr.N.Krishnamurthy

For Respondents : Mr.J.Cyril Mathias Vincent  
for M/s.Fox Mandal Associates

### **JUDGMENT**

The Second Appeal has been filed against the judgment and decree dated 22.01.2015 passed in A.S.No.4 of 2014 on the file of the III Additional District Judge, Puducherry, reversing the judgment and decree dated 04.02.2014 made in O.S.No.29 of 2001 on the file of the Principal Subordinate Judge, Puducherry.

2.The unsuccessful plaintiffs in a suit for declaration of their title and for recovery of possession of the suit properties from the 1<sup>st</sup> defendant. The plaintiffs additionally sought for the relief of future mesne profits and also the relief of permanent injunction restraining the 2<sup>nd</sup> defendant from taking any steps to register the Will with the 3<sup>rd</sup> defendant, namely the Joint Sub Registrar, Puducherry.

3.The parties are described as per their litigating status before the



Trial Court.

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4.The plaintiffs succeeded before the Trial Court. Aggrieved by the judgment and decree of the Trial Court, the 2<sup>nd</sup> defendant preferred an appeal in A.S.No.4 of 2014. The First Appellate Court allowed the appeal and set aside the judgment and decree passed by the Trial Court. It is aggrieved by the reversal findings rendered by the First Appellate Court that the plaintiffs have come by way of the present Second Appeal.

5.The entire issue in the Second Appeal only revolves around the proof of due execution and attestation of the alleged Will dated 25.09.1975. In fact, the plaintiffs' entire claim to title over the suit property is only based on the said Will dated 25.09.1975.

6.The suit was resisted by the 1<sup>st</sup> defendant on the ground that the testatrix, Adilakshmi had executed a subsequent Will on 15.10.1986, bequeathing the schedule of the property to the 2<sup>nd</sup> defendant and therefore no rights would flow under the earlier Will which had been superseded by the subsequent Will.

7.The 2<sup>nd</sup> defendant also filed a counter statement at the stage of deciding the permission to be granted to the plaintiffs to sue as indigent



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persons. In the said counter statement, the 2<sup>nd</sup> defendant has specifically denied the execution of the alleged Will dated 25.09.1975. That apart, the 2<sup>nd</sup> defendant has stated that the testatrix, Adilakshmi executed a Will dated 15.10.1986 in his favour, considering that he was the person who was looking after the testatrix during her old age, attending to all her medical and other needs, till her death. It is thus evident that on such denial of execution of the Will dated 25.09.1975, it was incumbent on the plaintiffs to prove the said Will to have been duly executed and attested in accordance with Section 63(c) of the Indian Succession Act r/w Section 68 of the Indian Evidence Act. Admittedly, in the present suit, none of the two attesting witnesses have been examined. However, without even an issue being framed, the Trial Court took the defendants by surprise and gave a finding that the Will dated 25.09.1975 need not be proved since it was a document which is more than 30 years old and the presumption under Section 90 of the Indian Evidence Act could be applied to the said Will. On that premise, the Trial Court decreed the suit and upheld the title of the plaintiffs and directed the 1<sup>st</sup> defendant to vacate and hand over the vacant possession of the suit property.

8.The First Appellate Court however held that Section 90 of the Registration Act would not apply to the subject Will and moreover, when



there was a subsequent Will said to have been executed by the same testatrix, as had been pleaded, though the same was also not proved, the plaintiffs could not take advantage of the weakness of the defendants' case and admittedly having not proved the Will dated 25.09.1975, reversed the judgment and decree of the Trial Court.

9. Aggrieved by the reversal findings rendered by First Appellate Court, the plaintiffs have come up by way of this Second Appeal. This Court admitted the above Second Appeal on 12.11.2019, on framing the following substantial question of law:

*“Whether the lower appellate Court was right in concluding that the appellants have not proved the execution of Ex.A15 Will in the manner known to law, when the said Will is admittedly more than 30 years old and has been produced from proper custody?”*

10. I have heard Mr.R.Vekatraman, learned counsel for Mr.N.Krishnamurthy, learned counsel for the appellants and Mr.J.Cyril Mathias Vincent for M/s.Fox Mandal Associates, learned counsel for the respondents.



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11.Mr.R.Venkatraman, learned counsel for the appellants would first and foremost contend that the judgment and decree of the First Appellate Court was against law and settled principles enunciated by the Hon'ble Supreme Court. He would place reliance on the decision of the Privy Council in *Munnalal, minor and others Vs. Mst.Kashibai and others*, reported in *AIR 1947 Privy Council page 15 = 1946 SCC Online Privy Council 27*, where the Privy Council held that Section 90 of the Indian Evidence Act would apply to the fact as to whether the testator was of a sound of mind. He would also place reliance on the decision of the Hon'ble Supreme Court in *K.V.Subbaraju Vs. C.Subbaraju*, reported in *AIR 1968 SC 947*, where the Hon'ble Supreme Court of India held that the presumption available under Section 90 would extend to the Wills, regarding due execution and attestation, provided the original Will was filed before the Court.

12.The learned counsel for the appellants would also state that even though subsequently the Hon'ble Supreme Court in *Bharpur Singh Vs. Shamsher Singh*, reported in *(2009) 3 SCC 687* and *M.B.Ramesh (D) by Lrs., Vs. K.M.Veeraje Urs (D) by Lrs.*, reported in *(2013) 9 SCC 490*, the Hon'ble Supreme Court has held that presumption under Section 90 would not apply to Wills, the learned counsel for the appellants would



draw my attention to the decision of the Full Bench judgment of the Kerala High Court in ***Raman Gopi & Another Vs. Kunju Raman Uthaman***, reported in ***2011 SCC Online Ker 4028***. I deem it fit to extract the relevant paragraphs of the Hon'ble Full Bench Judgment of the Kerala High Court:

*“54. A learned Single Judge of this Court, (R. Basant, J.) in Ganga v. Lakshmi Ammal (2008 (2) KLT 306), after referring to various decisions of the Apex Court including Central Board of Dawoodi Bohra Community's case, (2005) 2 SCC 673, summed up the practice to be followed as laid down in various decisions, in para 32 thus:*

*32. The law of precedents appears to be clear. I may only attempt to reiterate the same from principle and precedent. The following principles appear to be settled beyond controversy.*

*(i) The law declared by the Supreme Court, under Art 141 of the Constitution of India, is binding on all other courts.*

*(ii) Conflict between two decisions cannot be lightly inferred or assumed. Every attempt must be made by the courts to harmonise the various binding precedents. It will have to be assumed and presumed that, though not specifically referred to, the court was aware of all binding precedential dicta and*



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*statutory provisions.*

*(iii) If there be, and if only there be, unavoidable and irreconcilable and inescapable conflict, the question of which decision to follow and which to be reckoned as binding would arise. Then the decision of the larger bench must be followed. The position is the same whether the larger bench is prior or later in point of time. In such a situation the fact that the larger bench does not refer to the earlier decision of the smaller bench is irrelevant.*

*(iv) A smaller bench or a co-ordinate bench cannot lay down a legal proposition different from an earlier binding decision of a larger or co-ordinate bench. If there be disagreement, the smaller bench must follow the earlier binding decision and a coordinate bench is bound to refer the matter to a larger bench for its decision. The smaller bench, if it disagrees, can at best only request the Chief Justice to invoke his powers to place the matter before a larger bench. Consequently it must be assumed and presumed that no smaller or coordinate bench ever lays down or intends to lay down a principle contrary to the binding decision of an earlier larger or co-ordinate bench.*

*(v) If a smaller or co-ordinate bench refers to the decision of an earlier larger bench or co-ordinate bench and takes a decision explaining the same, such explanation/understanding of the*



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*larger/co-ordinate bench decision by such smaller or co-ordinate bench shall be followed later by all smaller or co-ordinate benches unless they resort to the course of reference as indicated in (iv) above.*

*(vi) If any smaller or co-ordinate bench unfortunately overlooks or omits to refer to an earlier binding precedent of a larger or co-ordinate bench and a conflict of the nature referred to in proposition (i) exists, such later decision has no binding sway and must be reckoned as rendered per incuriam. Such decisions per incuriam. Such decisions per incuriam cannot be followed. Subordinate courts with respect must choose to follow the earlier binding precedents notwithstanding the later per incuriam decision of the smaller or co-ordinate bench.”*

13.In ***State of Andhra Pradesh and Others Vs. Star Bone Mill and Fertilizer Company*** reported in ***(2013) 9 SCC 319***, where the Hon'ble Supreme Court laid down the mode of reckoning of the period of 30 years mentioned in Section 90 of the Indian Evidence Act and held that the period must be reckoned backward to the date of offering of the document and not any subsequent date, namely the date of the precision



of suit or appeal.

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14.He would also place reliance on the decision of the Hon'ble Supreme Court in *Narayanan Radhakrishna Menon Vs. Narayanan Sukumara Menon and Others*, reported in *2018 SCC Online Ker 150*, where the learned Single Judge of the Kerala High Court chose to follow the three Judge Bench of the Hon'ble Supreme Court in *K.V.Subbaraju's* case as referred herein supra and held that the declaration of law in *Bharpur Singh's* case as well as *M.B.Ramesh's* case as referred herein supra, cannot be a binding precedent under Article 141 of the Constitution of India. The learned Single Judge proceeded to draw the presumption available under Section 90 to the Will in question before the learned Single Judge.

15.The learned counsel for the appellants also drew my attention to the decision of the Hon'ble Division Bench of this Court in *W.P.No.26781 of 2013*, where the Division Bench recalled its earlier order that a RTI applicant must give reasons for seeking information under the RTI and modified the order *suto motu* holding that the observations in the order on the ground that error was apparent on the face of the record and being contrary to statutory provisions. The learned



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counsel for the appellants has referred to this decision since I have followed the dictum of the Hon'ble Supreme Court in ***M.B.Ramesh's*** and ***Bharpur Singh's*** case as cited herein supra holding that presumption under Section 90 of the Indian Evidence Act would not apply to Wills and by relying on the decision of the Division Bench, the learned counsel for the appellants would persuade me to recall my order and follow the ratio laid down by the Kerala High Court in ***Hariprasad's*** case as cited herein supra.

16.The learned counsel for the appellants would also place reliance on the decision of the Hon'ble Supreme Court in ***S.Bagirathi Ammal Vs. Palani Roman Catholic Mission***, reported in ***(2009) 10 SCC 464***, where the Hon'ble Supreme Court held that if there is an error apparent on the face of the record not being an error which has to be fished out and searched and if such an error was an error of inadvertence and manifest on the face of the document, then review would lie. Again this decision has been cited only for the purpose of the request made to recall and review my earlier order in ***S.A.No.789 of 2019*** dated 01.03.2024 in ***Ramasamy and others Vs. Vasantha***.

17.Per contra, Mr.J.Cyril Mathias Vincent, learned counsel for the respondents would submit that there is no patent illegality committed by



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the First Appellate Court warranting interference under Section 100 of the CPC. He would submit that it was not even the case of the plaintiffs that they would be entitled to draw a presumption under Section 90 of the Indian Evidence Act and therefore, the Will could be accepted in evidence, during the trial of the suit. The defendants were taken by surprise by the Trial Court which had *suo motu* accepted the Will drawing a presumption under Section 90, without an issue being framed and without the defendants being afforded an opportunity to answer the said issue of presumption available under Section 90 being applicable to the Will in question in favour of the plaintiffs. Therefore, the learned counsel for the respondents would submit that no interference is warranted in the Second Appeal.

18.He would also place reliance on the decision of the Hon'ble Supreme Court in ***Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee***, reported in ***AIR 1964 SC 529***, where the Constitution Bench of the Hon'ble Supreme Court has held that even if there is no plea of undue influence, fraud and coercion, when there are circumstances giving rise to doubts, the propounder would have to satisfy the conscience of the Court and suspicious circumstances regarding genuineness of signature of the testator, the condition of testator's mind, the dispositions



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made in the Will being unnatural improbable or unfair in the light of relevant circumstances etc., would have to be removed by the propounder before the Will is accepted as the last Will of the testator. The learned counsel for the respondents would also submit that even though the respondents had taken shelter under the subsequent Will dated 15.10.1986, the said Will could not be produced at the time of trial as the said Will was pending with the registration authorities. He would also bring to my notice the steps taken by the respondents to summon the said original Will, that is subsequent Will dated 15.10.1986 from the Sub Registrar's Office. He would therefore, pray for dismissal of the Second Appeal.

19.As rightly indicated at the very beginning, the only contentious issue which is to be answered in the Second Appeal is as to whether the Will in Ex.A15, propounded by the plaintiffs would be entitled to the presumption available under Section 90 of the Indian Evidence Act. Section 90 of Indian Evidence Act is usefully reproduced hereunder:

“ .....

*90.Presumption as to documents thirty years old.- where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the*



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*Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the person whom it purports to be executed and attested.*

20. In the present case, admittedly, the said Will is an unregistered Will and none of the attesting witnesses to the said Will have been examined despite denial of its execution by the 2<sup>nd</sup> defendant. The claim of the plaintiffs to title over the suit property is only under the said unregistered Will dated 25.09.1975. In view of the denial of its execution, it was necessary for the plaintiffs to prove due execution and attestation of the said Will as mandated under Section 63(c) of the Indian Succession Act r/w Section 68 of the Indian Evidence Act. The Trial Court has presumed the said Will to be true and genuine taking umbrage under Section 90 of the Indian Evidence Act. However, the First Appellate Court has disagreed with the findings of the Trial Court and held that the Will has to be necessarily proved in accordance with law, once it is denied.

21. I had an occasion to deal with this similar issue in S.A.No.789



of 2019. The relevant discussion in the said judgment is extracted herein below:

*“15. The next question that would require adjudication is with regard to Will dated 30.11.1978. Admittedly, the said Will has not been proved by examining any one of the two attesting witnesses. Only for the proposition that the Will being an ancient document that is more than 30 years old and can be presumed to be duly executed, the learned Senior Counsel has placed reliance on the decision of the privy council in Munnalal's case and learned Single Judge of this Court in Murugayee's case, where the Courts have held that if the document is more than 30 years old and comes from proper custody of beneficiary, it would also be entitled to be presumed to be duly executed, in terms of Section 90 of the Indian Evidence Act, 1872.*

*16. Section 90 of the Indian Evidence Act, 1872 is extracted hereunder for easy reference:-*

***“ 90. Presumption as to documents thirty years old.***

*Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purport to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.”*

*17. (i) The privy council in Munnalal's case referred herein supra is a three Judge Bench and in the said decision it has been held that Section 90 would also apply to Wills, especially for drawing a presumption that the testator was of sound mind. The*



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*Division Bench of the Calcutta High Court in Sarat Chandra Mondal and others Vs. Panchanan Mondal and another reported in AIR 1953 Calcutta 471 (DB) also held that Section 90 can be invoked to presume due execution and genuineness of a Will which is in controversy before a Court.*

*17 (ii). Even our High Court in Celestine Sylcabai Vs. Josephin Noranhabhai reported in AIR 1956 Madras 566 has taken a similar view. A Division Bench of our Court in Nammalvar and others Vs. Appavu Udayar and others reported in AIR 1969 Madras 283 has held that when the Will was an ancient document and the attesting witnesses not being alive and there being no suspicious circumstances, presumption available under Section 90 can be drawn to hold that the Will has been proved.*

*17 (iii). However, subsequently, the Hon'ble Supreme Court in MB Ramesh (Dead) by LRs vs. K.M.Veeraje Urs (Dead) by LRs and others reported in (2013) 7 SCC 490, following the earlier decision of the Hon'ble Supreme Court in Bharpur Singh and others Vs. Shamsher Singh reported in (2009) 3 SCC 687, held a contra position that a presumption under Section 90 would not apply to Wills.*

*17 (iv). Though the principle laid down by the Privy Council in Munalal's case referred herein supra was given a seal of approval by the Hon'ble Supreme Court in K.V. Subbaraju Vs. C.Subbaraju reported in AIR 1968 SC 947, the Hon'ble Supreme Court however in K.V.Subbraju's case, held that presumption was available only to due execution and attestation of the Will, provided that the original Will was before the Court. Though the Privy Council judgment has been rendered by a larger Bench comprising of three Judges and the Apex Court ruling in both M.B Ramesh as well as Bharpur Singh cases are by a Bench strength of two Judges, strictly the ratio laid down in M.B.Ramesh and Bharpur Singh cases cannot be taken as a binding precedent case. However, as a Single Judge of this Court, I am bound*



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*by judicial discipline and I do not think it proper to declare the decisions of the Hon'ble Supreme Court in M.B.Ramesh and Bharpur Singh as per incurium. It is for the Hon'ble Supreme Court to render a categorical pronouncement on this issue, clarifying the controversy which still remains unsettled and different Courts are rendering contradictory views.*

*17 (v). In view of the above, I am unable to accept the submissions of the learned Senior Counsel Mr.S.Parthasarathy, learned Senior Counsel appearing for the appellants and consequently, in the absence of any of the attesting witness to the Will dated 30.11.1978, being examined to prove the Will, the said Will, even though was more than 30 years old at the time of being exhibited before the Court during trial, cannot be presumed to be duly executed and attested and consequently held proved.*

*18. One another compelling reason for me not to follow the ratio of the three decisions that have been relied on by the learned Senior Counsel for the appellants with regard to the presumption under Section 90 of the Indian Evidence Act, being extended to Will is that even the plaintiff had relied upon a Will and even the said Will has been held to be not proved by the Courts. If really, the said Will is a true and genuine document, then it would certainly be a subsequently executed Will, thereby automatically revoking the earlier Will dated 30.11.1978. Therefore, I do not wish to extend any benefit of presumption to the earlier Will, ignoring the subsequent Will 27.04.2007, which was also produced before the Court in original and the attesting witnesses were also examined in support of due execution of the Will, though the Courts have disbelieved the said Will on the strength of the handwriting expert's opinion."*



22. In fact, as an author of Law of Wills - A Handbook, I Edition, 2022, I have dealt with this subject of presumption under Section 90 of the Indian Evidence Act, 1872, being available to Wills, namely testamentary dispositions. I am extracting the relevant portions from my book.

“SECTION 90 OF THE EVIDENCE ACT, 1872

*Section 90 of the Indian Evidence Act, 1872 throws open an interesting question as to whether the presumption available to 30 years old document can be extended to and drawn in respect of Wills also.*

*Section 90 of the Indian Evidence Act, 1872 is extracted herein below for better appreciation.*

*“90. Presumption as to documents thirty years old. — Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person’s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.*

*Explanation. — Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.*

*This Explanation applies also to section 81.*



### Illustrations

(a) *A has been in possession of landed property for along time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.*

(b) *A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.*

(c) *A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper."*

*As early as in 1930, the Madras High Court in Kottaiya v. Varadamma, AIR 1930 Mad 744 = 1929 SCC OnLine Mad 225, held that the presumption arising under Section 90 of the Evidence Act, 1872 would even apply to the fact that the Testator was in a sound and disposing state of mind. Much later, in Munnalal v. Mst. Kashibai, AIR 1947 PC 15 = 1946 SCC OnLine PC 27, the Privy Council observed that Section 90 of the Evidence Act would apply to the fact that Testator was of a sound mind. In fact, even the Calcutta High Court in Sarat Chandra Mondal v. Panchanan Mondal, AIR 1953 Cal 471(DB) = 1953 SCC OnLine Cal 9, held that, the presumption under Section 90 of the Indian Evidence Act, can be drawn even in cases of Wills, the genuineness of which is in controversy before a Court of law. Also held that the Court can presume that the Will was duly executed and attested when applying Section 90. Similar is the view taken by the Madras High Court in Celestine Sylcabei v. Josephine Noranhabai, AIR 1956 Mad 566 = 1956 SCC OnLine Mad 17 and also the Division Bench of the Madras High Court in AIR 1960 Mad 283 = 1959 SCC OnLine Mad 92 in Nammalvar & others v. Appavu Udayar & others where it was held that the Will being more than 30 years old and the Testator and attesting witness not being alive, in addition, there being no suspicious circumstances*



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*of genuineness of the Will and finding that the Will is also not found to be tampered, 'presumption' as stipulated in Section 90 of the Indian Evidence Act can be applied and held the Will to be proved.*

*Section 68 of the Indian Evidence Act which deals with proof of evidence of documents required by law to be attested contains a proviso that it shall not be necessary to call an attesting witness in proof of any document, not being a Will, which 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 specifically denied. Much later, the Supreme Court in (M.B.Ramesh (dead) by LRs. v. K.M. Veeraje Urs (dead) by LRs. And others, AIR 2013 SC 2088 = (2013) 7 SCC 490), following the ratio laid down in Bharpur Singh v. Shamsher Singh, reported in (2009) 3 SCC 687, held that the concept of 'presumption' regarding a document 30 years old, as stipulated in Section 90 of the Indian Evidence Act, does not apply to Wills and that a Will has to be proved in terms of Section 63 of the Indian Evidence Act, 1872.*

*However, the Privy Council in its Judgment reported in Munnalal v. Mst. Kashibai, AIR 1947 PC 15= 1946 SCC OnLine PC 27 had authoritatively held that a Will more than 30 years old and produced from proper custody, could be given the benefit of presumption under Section 90, in so far as execution and attestation of Will. However, the Privy Council held that such presumption was not available to prove testamentary capacity which had to be necessarily proved by the propounder of the Will. The Privy Council further held that in the absence of evidence as to the soundness of the Testator's mind, then proof that he had executed the Will would lead to the presumption that he was of sound mind. The Privy Council also discussed Section 114 of Indian Evidence Act, 1872 in arriving at such findings.*

*This principle laid down by the Privy Council*



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was approved by the Hon'ble Apex Court in *K.V.Subbaraju v. C.Subbaraju*, AIR 1968 SC 947. The Supreme Court in this judgment however held that the presumption under Section 90 can be drawn as to execution and attestation only of the original and not copy of Will. These judgments of the Privy Council and the Apex Court seem to have lost sight of subsequently. The Division Bench of the Delhi High Court, however, in *Subhash Nayyar v. Registrar, University of Delhi*, 2013 AIR CC 992 = 2013 SCC OnLine Del 250, followed the ratio in *Munnalal v. Mst. Kashbai*, AIR 1947 PC 15 = 1946 SCC OnLine PC 27).

The Karnataka High Court also chose to distinguish the ratio in *Bharpur Singh's* case and held that presumption under Section 90 of Indian Evidence Act would apply to Wills (*Vasant H Jayawant Bhasme v. Shankararao Bhimrao Bhasme*, ILR 2017 Kar 5433 = 2017 SCC OnLine Kar 4493).

The Kerala High Court in *Narayanan Radhakrishnan Menon v. Narayanan Sukumara Menon*, (2018) 2 KLT 553 = 2018 SCC OnLine Ker 150 had an occasion to deal with the very same issue, the Court observed that both *M.B. Ramesh's* case and *Bharpur Singh's* case, whereby Benches of two judges and whereas *K.V.Subbaraju's* case was by a three judge Bench and hence the decision rendered by the two judge Bench, not following the binding decision of a larger Bench comprising of three judge Bench could not be regarded as binding precedent under Article 141 of the Constitution of India. However, the High Court rightly sticking to judicial discipline held that it could not declare the decision of the Hon'ble Supreme Court as per incuriam.

The Rajasthan High Court, Bombay High Court, Punjab Haryana High Court as well as the Madras High Court have followed the ratio in *Bharpur Singh's* case and held that presumption under Section 90 is not applicable to Wills.



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*Analysing the above position, it can be evidently seen that Section 68 of the Indian Evidence Act, 1872 contemplates a particular mode of proof for a particular type of document. It is to be noted that Section 90 which is a general provision does not contain a non- obstinate clause it is needless to state that Section 68 cannot be treated as a general provision but it is a special provision. In this view of the matter, it can be stated that Section 68 will not be affected by Section 90 of Indian Evidence Act, 1872. This is the view expressed by the Supreme Court in Bharpur Singh's case.*

*Interestingly the view taken by the Kerala High Court seems to be the best and correct view of the issue on hand. Section 90 of the Indian Evidence Act cannot be termed as a mere general provision because it is only a special provision dealing with a particular class of document i.e., 30 years or more. Though a proviso is incorporated to Section 68 exempting Wills, no such proviso or any other similar expression has been incorporated to Section 90 of the Indian Evidence Act.*

*This issue can be viewed from yet another angle too. There can be no second opinion that Section 90 is a later provision to Section 68. Applying the settled rule of interpretation, when two different Sections are repugnant/ contradictory to each other, the latter provision will prevail.*

*In conclusion, it is not open to the lower Courts including the High Court to give a categorical and assertive pronouncement on this issue. It is now incumbent on the Apex Court to settle the controversy surrounding this. In the opinion of the Authors, applying the constitutional scheme and following judicial discipline, the right view is only that presumption under Section 90 of the Indian Evidence Act, 1872 should be extended to Wills also, especially in the light of the three judge bench judgment in K.V.Subbaraju v. C.Subbaraju, AIR 1968 SC 947,*



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*approving the ratio laid down by the Privy Council in Munnalal v. Mst. Kashibai, AIR 1947 PC 15= 1946 SCC OnLine PC 27 being binding on all Courts in the country and ought to be followed by all the Courts.*

*[Credit: Hon'ble Mr.Justice.G.R.Swaminathan of the Madras High Court, Article on "Proof Of Will And Presumption Under Section 90 Of The Indian Evidence Act: Some Conflicting Decision", dated 22.04.2020]*

Be that as it may, different Courts have been taking different stands with regard to availability of presumption under Section 90 to Wills.

23.In fact, very recently, the Hon'ble Supreme Court in ***Ashutosh Samanta (D) by LR's and others Vs. S.M.Ranjan Bala Dasi and others***, reported in **2023 Online SC 255**, has held that Wills cannot be proved on the basis of their age and presumption under Section 90 as to regularity of documents more than 30 years of age is inapplicable when it comes to proof of Wills and Wills have to be proved only in terms of Section 63 of the Indian Succession Act r/w Section 68 of the Indian Evidence Act.

24.Thus, it can be seen that the Hon'ble Supreme Court starting from ***Bharphur Singh's*** case referred herein supra, has consistently held, up to date that the presumption under Section 90 would not apply to Wills. However, a contrary view has been taken by the Hon'ble Supreme



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Court in ***K.V.Subbraju's*** case following the earlier Privy Council decision in ***Munnalal's*** case. In the interest of the litigant public and in order to have the legal position settled once and for all, I deem it fit and proper that the issue has to be necessarily decided by the Hon'ble Supreme Court, so that different High Courts do not end up giving different interpretations following the earlier three Judge Bench of the Hon'ble Supreme Court in ***K.V.Subbaraju's*** case, ignoring the ratio laid down by subsequent judgment of the Hon'ble Supreme Court in ***Bharpur Singh's*** case as well as ***M.B.Ramesh's***, case and ***Ashutosh Samanta's*** as cited herein supra.

25.In my considered opinion, especially, when it comes to unregistered Wills, the burden would be much heavier on the propounder and to allow someone to knock off valuable immovable property on the strength of an unregistered Will, without proof, merely because it has been executed more than 30 years back and would be entitled to draw presumption under Section 90 of the Indian Evidence Act would play havoc and result in deprivation of valuable rights of bonafide title holders and legal representatives who would otherwise be entitled or have been in enjoyment of the properties, by way of intestate succession or under other registered documents. Thus, I am not in agreement with the contentions



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of the learned counsel for the appellants that I am obliged to follow the decision of the Hon'ble Supreme Court with regard to interpretation of principles of precedents and be bound by the earlier three Judge Bench judgments in ***K.V.Subbaraju's***, case, ***Bharpur Singh's*** case as well as ***M.B.Ramesh's*** case are not binding precedents under Article 141 of the Constitution of India.

26. Therefore, I see no reasons to interfere with the findings rendered by the First Appellate Court and I answer the substantial question of law against the appellants. However, at the same time, in order to have a finality on this issue, I deem it just and proper to grant leave to the appellants under Section 109 of CPC which empowers the High Courts to certify that in the opinion of the High Court, the question needs to be decided by the Hon'ble Supreme Court, an appeal shall lie to the Supreme Court from any judgment, decree and final orders in civil proceeding of the High Courts. Invoking the said power available to me under Section 109 of CPC, I certify that in my opinion, the following question needs to be decided by the Hon'ble Supreme Court:-

“Whether the presumption available under Section 90 of the Indian Evidence Act, 1872, would extend to proof of due execution and attestation of a Will which is otherwise regulated by the Section 63(c) of the Indian



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Succession Act r/w Section 68 of the Indian Evidence Act.”

27.In fine, the Second Appeal is dismissed. However, leave is granted to the appellants to move the Hon'ble Supreme Court for the above question to be finally decided by the Hon'ble Supreme Court. There shall be no order as to costs. Consequently, Civil Miscellaneous Petition is closed.

12.04.2024

Index : Yes/No  
Speaking Order/Non-Speaking Order  
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**P.B.BALAJI., J.**

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To

- 1.The III Additional District Judge, Puducherry
- 2.The Principal Subordinate Judge, Puducherry.
- 3.The Section Officer, V.R.Section, High Court, Madras.

Pre-delivery judgment made in

S.A.No.559 of 2017

and C.M.P.No.13792 of 2017

12.04.2024