



A.S.(MD).No.182 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Dated: 22.03.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD) No.182 of 2016

and

C.M.P(MD) No.11542 of 2016

V.Ganesan

... Appellant/Defendant

Vs.

1.Ramachandran (Died)

2.V.Pitchaiah

3.V.Vadivelu

... Respondents/Plaintiffs

4.R.Pappathi

5.Muthulakshmi

6.R.Saravanan

7.Balasaraswathi

(Respondents 4 to 7 are impleaded vide Court order dated 11.03.2022 made in C.M.P.(MD).No.11259 of 2018 in A.S.(MD).No.182 of 2016 by RNMJ)

Prayer : This Appeal Suit has been filed under Section 96 of C.P.C., to set aside the judgment and decree made in O.S.No.42 of 2014 on the file of the Principal District Court, Tirunelveli, dated 18.11.2015.

For Appellant	: Mr.N.Vignesh for Mr.H.Arumugam
For R1 & R3	: Mr.V.Meenakshi Sundaram
For R4 to R7	: No Appearance
For R1	: Died (Steps Taken)



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JUDGMENT

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This appeal has been preferred as against the Judgment and decree passed by the Principal District Court, Tirunelveli, in O.S.No.42 of 2014, dated 18.11.2015, wherein, the respondents 1 to 3/plaintiffs herein have filed a suit for partition and separate possession and the suit was decreed in favour of the the respondents 1 to 3/plaintiffs. Aggrieved against the same, the present appeal has been preferred by the appellant/defendant.

2.For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking before the trial Court.

3.The brief averments made in the plaint are as follows:

The plaint schedule properties belonged to the father of the plaintiffs and defendant, Velliah Mooppanar through Registered Sale Deeds dated 24.12.1966, 30.06.1968 and 13.08.1969 respectively and by right of partition under a Registered Deed of partition dated 02.05.1983. From the date of purchase and the partition onwards, the said Vellaiah Mooppanar was in possession and enjoyment of the properties as absolute owner. The said Vellaiah Mooppanar died intestate on



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01.01.1988 leaving behind his wife, Palavesammal, the plaintiffs and the defendant as his legal heirs. The mother, Palavesammal also died intestate on 18.01.1998 leaving behind the plaintiffs and the defendant alone as her legal heirs. After the death of the father and mother of the plaintiffs and the defendant, they jointly inherited the said properties as legal heirs and they are in joint possession and enjoyment of the same. Since all the plaintiffs and the defendant are co-owners of the said properties, each are entitled to $\frac{1}{4}$ share of the properties. Due to business avocations and employment, all the plaintiffs were staying away from the plaint schedule properties. After the demise of the mother Palavesammal, the defendant as a co-owner, is also the possession of all other co-owners i.e., the plaintiffs herein. The electricity connection to the plaint schedule properties are still in the name of the father, Vellaiah Mooppanar. Since, the plaintiffs wanted to partition the plaint schedule properties, they demanded the defendant for the partition on the first week of November 2013. But, the defendant has not amenable for partition. Hence, the plaintiffs issued a notice to the defendant on 16.12.2013. The defendant sent a reply notice on 24.12.2013. In the reply notice, the defendant stated that the mother Palavesammal voluntarily



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executed a Gift Deed in his favour on 07.12.1990. The said Gift Deed is denied as it is a forged one by alleging that the mother of the plaintiff Palavesammal was not in a position to move away from the house since she was a chronic Diabetic Patient and hence, there is no chance to execute the Gift Deed as alleged by the defendant. In the reply notice, the defendant stated that the first plaintiff got Rs.25,000/- from the defendant and the other plaintiffs on 07.09.1994 and released his share in the plaint schedule properties and the first plaintiff have no share in the plaint schedule properties are all denied. The first plaintiff neither released his right in the plaint schedule properties nor executed any such Deed for the alleged release of his right in the plaint schedule properties. The further allegation that the defendant was entitled to $\frac{1}{2}$ share in the plaint schedule properties is false and the defendant is entitled to $\frac{1}{4}$ share each in the plaint schedule properties. Therefore, the plaintiffs filed a suit for partition.

4. The brief averments of the written statement filed by the defendant are as follows:

The suit is not maintainable either in law or on facts. The plaintiffs



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are not entitled to relief as prayed for in the plaint. The averments made in the paragraphs 3 & 4 of the plaint are correct and the date of death of the father and mother are admitted. It is false to state that the mother of the plaintiffs and the defendant died intestate leaving behind the plaintiffs and the defendant alone as legal heirs. The plaintiffs are not in joint possession in the plaint schedule properties along with the defendant. The plaint averments that the Gift Deed dated 07.12.1990 is a fraudulent concocted document since the mother was chronic Diabetic Patient during the life time of the father and her movement was restricted during the life time of the father is denied as false. In fact, the plaint schedule property originally belonged to Vellaiah Mooppanar and he died intestate leaving behind his wife Palavesammal, the plaintiffs and the defendant as his legal heirs. As per the Hindu Succession Act, the plaintiffs, the defendant and their mother Palavesammal were entitled to 1/5 share in the plaint schedule property. The mother executed a Registered Gift Deed in respect of her undivided share on 07.12.1990 in favour of the defendant. The Palavesammal has executed the said Gift Deed voluntarily. At the time of execution of Gift Deed, the Palavesammal was hale and healthy. The Gift Deed was accepted and



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possession of the plaint schedule property was handed over by the Palavessamal to the defendant and the Gift Deed was acted upon immediately. Therefore, as per the Gift Deed, the defendant is entitled to 2/5 share in the suit property. Further, the first plaintiff has executed Released Deed on 07.09.1994 after receiving a sum of Rs.25,000/- from the defendant and other plaintiffs. Therefore, the first plaintiff is not entitled any share in the plaint schedule property. As per Section 37(3) of Tamil Nadu Court Fee and Suit Valuation Act, 1955, the defendant paid court fee in respect of his undivided 2/5 share in the plaint schedule properties. Hence, he prayed to pass preliminary decree regarding 2/5 share of the defendant in the plaint schedule property and to dismiss the suit with cost.

5. Based on the above said pleadings, the trial Court has framed the following issues.

1. Whether the registered Gift Deed dated 07.12.1990 is genuine and valid?

2. Whether the court fee paid under Section 37(2) of the Tamil Nadu Court Fee and Suit Valuation Act is correct?



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3. Whether the plaintiffs are to be granted Preliminary Decree for partition and Separate Possession of $\frac{1}{4}$ share each in the suit properties?

4. Whether the defendant is to be granted Preliminary Decree for partition of $\frac{2}{5}$ share?

5. To what relief the plaintiffs are entitled to?

6. To what relief the defendant is entitled to?

6. Before the trial Court on the side of the plaintiffs, first plaintiff was examined as P.W.1 and the second plaintiff was examined as P.W.2 and Exs.A1 to A8 were marked. On the side of the defendant, the defendant was examined as D.W.1, the scribe to the document (gift deed) was examined as D.W.2 and the son-in-law of the second attesor was examined as D.W.3 and Exs.B1 to B3 were marked.

7. After analyzing the evidence adduced on both sides, the trial Court has decreed the suit in favour of the plaintiffs and passed preliminary decree in respect of the $\frac{1}{4}$ share of the plaintiffs.



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8. Aggrieved over the said judgment and decree, the present appeal has been preferred by the defendant on the following grounds:-

i) The Judgment and Decree of the Trial Court is against law, weight of evidence and facts of the case.

ii) The Trial Court has failed to consider the plaintiffs accepted Ex.B1 Gift Deed but pleaded that it is a forged one, thus the burden is on them to prove the document as forged one but the Trial Court erroneously shifted the burden on the defendant.

iii) The Trial Court ought to have held that admittedly, the attesting witnesses are no more and thus the evidence of DW-3, who is the son-in-law of the 2nd attester Shahul Hameed proved the requirement of proving the signature of the attesting witness as contemplated under Section 69 of Indian Evidence Act, 1872.

iv) The Court below has failed to consider that the proviso to Section 68 of Indian Evidence Act, 1872 clearly says that in respect of a registered document except a Will, it shall not necessary to examine the



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attesting witness in proof of execution of document unless the execution by the person by whom it purports to have been executed is specifically denied. In the present case, the execution was not denied by the executor and therefore, the provision under Section 68 and 69 will not apply.

v) The finding of the Court below that the signature of attesor in Ex.B1 was not shown to DW-3 and thus there is no compliance of proof of signature as per Section 69 is erroneous in law. As stated above invoking Section 69 itself not correct to the present case and further, the above reason not a ground to discard the evidence of DW-3.

vi) The Court below ought to have accepted the evidence of DW-2, the scribe of Ex-B1 as his evidence categorically confirms the execution.

vii) The finding of the Court below regarding the payment of money for purchasing stamp and the date of execution contradict between the evidence of Dw-1 and DW-2 is wholly unnecessary since there is no evidence on the part of plaintiffs to prove the document is a forged one.



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viii)The finding of the Court below that when DW-1 himself deposited on behalf of the mother in the suit in O.S.No.454 of 1991 saying that she could not come out of house it is doubtful as to how she could have come to Sub-Registrar Office and executed a document is erroneous and not based upon the sound principles of law.

ix)The Court below even though found that Ex-B1 was executed on 09.12.1999 and the above deposition was given on 08.01.1997 i.e., after 7 years it should not have doubted the evidence and as well as the appearance of the executor for registration.

x) The finding of the Court below that the payment of court fee under Section 37(2) is correct on the basis of principles of law that the possession one co-owner is for the possession of other co-owner is also erroneous. In this regard the Court below has failed to consider that the plaintiffs admitted that they were away from the suit properties for a long time.

xi)The Court below has failed to frame proper issues and decide the same in accordance with law.



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xii) The Court below has misread the oral and documentary evidence as against the settled principles of law.

xiii) The Court below ought to have passed a preliminary decree, declaring that the defendant is entitled to 2/5 share and accepting the Ex-B1.

xiv) In any point view the judgment and decree of the Court below is liable to be set-aside.

9. The learned counsel for the appellant and the learned counsel for the respondents filed their written argument.

10. The learned counsel appearing for the appellant would contend that the properties originally belonged to the father of the plaintiffs and the defendant namely, Vellaiah Moopanar and he died intestate on 01.01.1988 leaving behind the plaintiffs, the defendant and their mother Palavesammal as his legal heirs. The Palavesammal died on 18.01.1998 leaving behind the plaintiffs and the defendant as legal heirs. During her



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life time, she executed a Gift Deed in favour of the defendant on 07.12.1990 i.e., after the demise of her husband Vellaiah Moopanar in respect of her undivided 1/5 share. The said Gift Deed was duly executed and registered and acted upon. The possession was also delivered to the defendant on the date of execution of the Gift Deed itself. Therefore, the plaintiff is entitled to 2/5 share over the plaint schedule properties. The plaintiffs have denied the above said Gift Deed. In order to prove the Gift Deed, the defendant has examined the witness of D.W.2 and D.W.3. But, the trial Court disbelieved the evidence of D.W.3 and held that the defendant failed to prove that a person, who attested in the Gift Deed. The plaintiffs have also not specifically denied the execution of Gift Deed. Their contention is that the mother of the plaintiffs and the defendant was not in a position to execute the Gift Deed. The plaintiffs have failed to prove their contention. To prove the case, the defendant himself examined as witness and also examined D.W.2 & D.W.3. However, the trial Court did not consider the same. There is a specific averments in the plaint in respect of the Gift Deed that it was obtained by playing fraud and thereby, the plaintiffs admitted the execution of gift deed, whileso, the burden to prove the fraud lies on the plaintiffs. But,



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they failed to prove the alleged fraud. The trial Court without considering these aspects, erroneously decreed the suit that each the plaintiffs and the defendant are entitled to $\frac{1}{4}$ share in the plaint schedule properties.

10.1. The learned counsel for the appellant has relied upon the following Judgments of the Honourable Supreme Court of India as well as this Court:-

i) Ved Mitra Verma Vs. Dharma Deo Verma reported in (2014) 15 SCC 578.

ii) Rajeswari Ammal Vs. Arunachalam and 2 others reported in 2010 (1) MWN (Civil) 137.

iii) Muddasani Venkata Narsaiah (Died) Vs. Muddasani Sarojana reported in 2016 (12) SCC 288.

11. The learned counsel appearing for the respondents/plaintiffs would contend that there is no dispute in respect of the relationship between the parties and the property was originally belonged to the father of the plaintiffs and the defendant. After his demise, the plaintiffs, the defendant and their mother are equally entitled to $\frac{1}{5}$ share. The mother of the plaintiffs died intestate on 18.01.1998 and after the demise



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of the mother, the plaintiffs and the defendant each are entitled to $\frac{1}{4}$ share of the plaint schedule properties. But, the defendant pleaded that the mother has executed a registered Gift Deed on 07.12.1990. But, the said Gift Deed has not been proved in accordance with law. According to the defendant, the attesor of Gift Deed said to have been died and in order to prove the signature of the deceased attesor in the Gift Deed, the defendant has examined D.W.3, who is the son-in-law of the second attesor and the scribe was examined as D.W.2. Since, the identity of D.W.3 was not proved, the trial Court has disbelieved the deposition of D.W.3. The mother of the plaintiffs and the defendant was affected by chronic Diabetic and she was not in a position to move out side and the same was admitted by the defendant in the earlier proceedings. The defendant has admitted the said fact in the evidence tendered before the Court in other proceedings that their mother was unable to come to the Court and thereby, the defendant has deposed on behalf of her. The plaintiffs also denied the Gift Deed dated 07.12.1990. In order to prove the same, the plaintiffs 1 and 2 were examined as P.W.1 and P.W.2 and produced Ex.A1 and Ex.A2 and the trial Court after considering the evidence adduced by both sides, disbelieved the evidence of D.W.3 and



hold that the Gift Deed dated 07.12.1990 was not proved. Therefore, the trial Court after considering the evidence, correctly disbelieved the evidence of D.W.3 and hold that the defendant failed to prove his case. Thereby, decreed for partition and separate possession of each $\frac{1}{4}$ share in the suit schedule properties. Therefore, the present appeal is liable to be dismissed.

11.1. To support of his contention, he has relied upon the following Judgments of the Honourable Supreme Court of India as well as the judgments of this Court:-

i) Ramasamy Gounder Vs. Sellappan reported in 2001 (4) CTC 23.

ii) Kasthuri Bai & Others Vs. Ashok Kumar & Others reported in 2017 (2) 35.

iii) Om Prakash (dead) thr. His Lrs. Vs. Shanthi Devi & Others reported in 2015 (3) L.W. 476.

iv) C.Kumarasamy Vs. P.Thamayanthi & Another reported in 2019 (5) LW 128.



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12. This Court heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents and also perused the records.

13. Points for consideration in this appeal are,

i) Whether the mother of the plaintiffs and the defendant executed the Gift Deed dated 07.12.1990 and the same was acted upon or not?

ii) Whether the plaintiffs are entitled to $\frac{1}{4}$ share over the suit properties?

iii) Whether the defendant is entitled to $\frac{2}{5}$ share over the suit properties?

iv) Whether the judgment and decree passed by the trial Court is sustainable in law and on facts?

v) Whether the appeal is allowed or not?

vi) To what relief the appellant is entitled to?

14. Point No.1: *Whether the mother of the plaintiffs and the defendant executed the Gift Deed dated 07.12.1990 and the same was acted upon or not?*

In this case, there is no dispute in respect of the relationship of the parties and the nature of the properties. It is admitted fact that the



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property was belonged to the father of the plaintiffs and the defendant. It is also admitted fact that the mother of the plaintiffs and the defendant died after the demise of the father. Thereby, the plaintiffs and the defendant and their mother are entitled to 1/5 share in the plaint schedule properties. After the demise of mother, according to the appellant, the mother of the appellant and the respondents executed a Gift Deed dated 07.12.1990. The above said execution of Gift Deed in favour of the appellant was denied by the respondents/plaintiffs. Therefore, the appellant/defendant in order to prove the same, examined as D.W.1 and also deposed about the execution of Gift deed. Already, the plaintiffs sent a notice to the defendant. The defendant in the reply notice, stated about the said execution of Gift Deed and also demanded partition over the suit property for 2/5 share in the suit schedule properties. During the cross-examination also he stated that at the time of execution of Gift Deed, his mother and the witnesses were also appeared and the Gift Deed was executed on 08.12.1990. Further, the defendant also produced the said Gift Deed executed in his favour and marked as Ex.B.1. On perusal of Ex.B.1, it reveals that it was executed on 07.12.1990. It was attested by two witnesses. To prove the attestation of Ex.B.1, the defendants has



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examined the son-in-law of one of the attesting witness as D.W.1, since the witness is no more, the identification of the signature of his uncle, who is the one of the attesting witness of the Will. The defendant has not examined another attesting witness, who attested in Ex.B.1, Gift Deed. Per contra, he examined the scribe of the Ex.B1 as witness. If the attesting witness died, then the witness, who identified the signature of attesting witness ought to have identified the signature of the testators also as per Section 69 of Evidence Act.

14.1. The learned counsel appearing for the appellant argued that as per Section 68 of the Indian Evidence Act, 1872, the attesting witness is not mandatory while the plaintiffs were not specifically denied the execution of Ex.B.1, Gift Deed.

14.2. The respondents/plaintiffs have not specifically denied the execution of gift deed and P.W.1, during the cross-examination stated that his mother was also having 1/5 share of the property and his mother never revealed about the execution of the gift deed and thereby, he had denied the execution of gift deed. Further, P.W.2 also submitted that his



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mother would sign in Tamil only because she is a illiterate woman and she did not reveal the execution of Gift Deed, thereby, they are denying the Gift Deed. Therefore, as per Section 68 of Indian Evidence Act, it is not mandatory for examine any one of the attesting witnesses.

14.3. The learned counsel appearing for the respondents would content that the execution of Gift Deed dated 07.12.1990 itself stoutly denied by the respondents/plaintiffs. Whiles, as per Section 68 of the Indian Evidence Act, the defendant ought to have examined atleast one of the attesting witness. But, he has not examined. He only examined D.W.3 alleging that he is the son-in-law of the one of the attesting witness of Ex.B.1.

14.4. In the plaint itself, they denied that the Gift Deed is forged one and the mother Palavesammal has not executed Gift Deed in favour of the appellant/defendant on 07.12.1990 and her mother was a chronic Diabetic patient even during the life time of the father. Further, the defendant also admitted that he has already gave evidence in O.S.No.42 of 2014 on behalf of the mother due to her illness and specifically



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admitted that her mother was not in a position to come to the Court.

Therefore, the respondents/plaintiffs have denied the execution of gift deed. When there is a specific denial on the part of the respondents/plaintiffs, the burden is upon the appellant/defendant to prove the execution, attestation and genuineness of the Gift Deed dated 07.12.1990.

14.5. On careful perusal of records, it is observed that in the plaint itself, the respondents/plaintiffs denied the execution of the Gift Deed, therefore, it is the duty of the appellant/defendant to prove the execution of alleged Gift Deed and further, the appellant/defendant has not taken any steps to examine another attesting witness to the said Gift Deed. Moreover, the appellant/defendant in his cross-examination, admitted that “**மி.சா.ஆ.1 உள்ள சங்கதிகளை என் அம்மா சொல்லி எழுதச்சொன்னார். எனது அம்மா அதை படித்து பார்க்கவில்லை. இன்றைய வரையிலும் மி.சா.ஆ.1 – ஐ அடமானம் வைத்து நான் கடன் எதுவும் வாங்கவில்லை. இன்றைய வரையிலும் தாவா சொத்திற்கு தீர்வையாவும் என் அம்மா பெயரில் உள்ளது. என் பெயருக்கு மாற்றுவதற்கு நான் முயற்சி செய்யவில்லை**”. Therefore, the evidence of D.W.1, in his evidence admitted that he has not taken any steps to transfer the mutation of records in his name. Further, according to the



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respondents/plaintiffs, the mother of the plaintiffs was not in a position to move out side from the house due to her illness. The said fact was also admitted by the appellant/defendant in the deposition given in O.S.No. 454 of 1992 on the file of the District Munsif Court, Tirunelveli. Therefore, it is the duty of the appellant/defendant to prove that his mother had sound mind and she was fit to move out side from the house.

14.6. The learned counsel appearing for the appellant further argued that in respect of admission made by the defendant is concerned the evidence was produced in O.S.No.42 of 2014 in the year 1997 and the Gift Deed was executed in December 1999. Therefore, the evidence cannot be taken as proof that the mother of the appellant was not in a position to move. However, the appellant has not taken any steps for name transfer in respect of property obtained through the said Gift Deed, and the same was also admitted by D.W.1 through cross examination.

14.7. Since the respondents/plaintiffs have denied the execution of Ex.B.1, the same has to be proved in accordance with law. They have not examined the attesting witness of Ex.B.1, Gift Deed. Therefore, the



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appellant/defendant has failed to prove the execution and attestation of
Ex.B.1.

14.8. The learned counsel for the appellant has relied upon the judgment of the Hon'ble Supreme Court in the case of **Ved Mitra Verma Vs. Dharam Deo Verma** reported in **(2014) 15 SCC 578** wherein the Hon'ble Supreme Court in paragraph 13 held as follows:-

“13.The attesting witnesses having died, the Sub-Registrar, who had registered the will was examined as P.W.3. He was examined on commission and in response to the questions posed to him, particularly, Question 2, he had set out the circumstances in which the attesting witnesses as well as the testator had signed on the document. This part of the evidence has been elaborately considered by the High Court to record its satisfaction that the execution of the will has been proved on the basis of the evidence of the Sub-Registrar i.e., P.W.3. Having considered the aforesaid aspect of the matter, we are of the view that the satisfaction recorded by the High Court does not suffer from any apparent infirmity or fundamental error which would require correction in the exercise of our jurisdiction under Article 136 of



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14.11. On careful perusal of the judgment, it will be applicable to the present case. In the above case also, the Sub-Registrar was not examined.

In the case on hand, the defendant has not examined the Sub-Registrar and the another attesting witness.

14.12. The learned counsel for the appellant, relied upon the judgment of the Hon'ble Supreme Court in the case of **Muddasani Venkata Narsaiah (Dead) Through Legal Representatives Vs. Muddasani Sarojana** reported in **(2016) 12 SCC 288** wherein the Hon'ble Supreme Court in paragraph 13 held as follows:-

“ 13. Coming to the question whether execution of sale deed in favour of plaintiff had been proved, the High Court had held that the sale deed has not been proved for want of examination of Buchamma. The High Court had ignored the pleadings of the parties and the evidence on the question of execution of sale deed which establishes that sale deed had been executed by Buchamma in favour of the plaintiff. In the written statement filed on behalf of the defendants, that the authority of Buchamma to execute the sale deed in favour of the plaintiff was put into question. Defendant 3 Sarojana in her deposition in court did not deny the fact



that sale deed was executed by Buchamma in favour of the plaintiff. She has stated that she was not aware whether Buchamma has executed any sale deed in favour of the plaintiff. She only asserted that she was the adopted daughter of Yashoda.

14.It is settled law that denial for want of knowledge is no denial at all. The execution of the sale deed was not specifically denied in the written statement. Once the execution of the sale deed was not disputed it was not necessary to examine Buchamma to prove it. The provisions contained in Order 8 Rule 5 require pleadings to be answered specifically in written statement. This Court in Jahuri Sah v. Dwarika Prasad Jhunjhunwala has laid down that if a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of existence of fact, not even an implied denial. Same decision has been followed by the Madhya Pradesh High Court in Dhanbai v. State of M.P. The High Court of Madhya Pradesh in Samrathmal v. Union of India, relying on P.L.N.K.L. Chettyar Firm v. Ko Lu Doke and Lakhmi Chand v. B. Ram Lal Kapoor Vakil, had also opined that if the defendant did not know of a fact, denial of the knowledge of a particular fact is not a denial of the fact and has not even the effect of putting the fact in issue.”



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14.13. On careful perusal of the judgment, it will not be applicable to the case. Because, in this case, the plaintiffs specifically denied the execution of Gift Deed and thereby, the above said case law will not be applicable to the present facts of the case.

14.14. The learned counsel for the respondents has relied upon a judgment of this Court in the case of **Ramasamy Gounder Vs. Sellappan** reported in **2001 (4) CTC 23** and paragraph No.14 of the said judgment is held as follows:-

“14.I have no hesitation in holding that the original of Ex.B1 was a sham and nominal document, that the recitals were fictitious and no rights flowed under the document in favour of the second defendant. Only, if the original of Ex.B-1 is accepted, then the question would arise as to whether the release by Chellappa Goundar in favour of the second defendant under the original of Ex.B-5 could be challenged by the plaintiff. It is settled law that there could be no gift of undivided share by a coparcener.”

14.15. On careful perusal of the judgment, it is clear that there could be no gift of undivided share by a coparcener. In the case on hand



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also it is admitted by the defendant that the property belonged to his father and after his demise, it is common for the plaintiffs and the defendant and his mother and he also admitted that his mother executed Gift Deed of her undivided 1/5 share to him. Therefore, even according to the appellant / defendant, the Gift Deed was executed in respect of undivided share of his coparcener mother. In view of the said judgment, the mother of the defendant could not execute Gift Deed in respect of her undivided share.

14.16. The learned counsel appearing for the respondents also relied upon the another judgment in the case of **Kasthuri Bai & Others Vs.Ashok Kumar & Others** reported in **2017 (2) 35** and paragraph No. 15 of the said judgment is extracted hereunder:-

“15.On a reading of the above section, it is clear that to prove the hand writing of the attesting witness, the person, who has acquaintance with the signature of such attesting witness as well as the signature of the executor has to be examined before the Court of law. If D.W.3 has identified the signature of the executor as well as one of the attesting witnesses, then it could be easily inferred that the Will has been properly proved as required under law.



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But in this case, D.W.3 has not identified the signature of the person, who executed the aforementioned document. Therefore, merely because DE.W.3 identified his father's signature, who was one of the attesting witnesses in the Will, it cannot be concluded that the Will has been proved in the manner known to law as he has failed to identify the signature of the testatrix in the Will. Therefore, the execution of the Will dated 25.09.1969 has not been established by the plaintiffs in TOS.No.14 of 2011.”

14.17. On careful perusal of the above said judgment, it is clear that to prove the hand writing of the attesting witness, the person, who has acquaintance with the signature of such attesting witness as well as the signature of the executor has to be examined before the Court of law. In the case on hand, the defendant failed to examine any one of the attesting witnesses or other witnesses, who acquainted with the signature of the attesting witnesses as well as the testators/executors.

14.18. The learned counsel appearing for the respondents also relied upon the another judgment of the Hon'ble Supreme Court of India in the case of **Om Prakash (dead) thr.His Lrs. Vs. Shanthi Devi &**



Others reported in **2015 (3) L.W 476** and paragraph No.9 of the said judgment is held as follows:-

“9.The Appellant/Defendant had led evidence of himself as DW1 as well as DW2 to DW5, none of whom were either of the attesting witnesses to the Gift Deed. It has also not been clarified whether the attesting witnesses or either of them was also witness before the Sub-Registrar when the Gift Deed was accorded registration. It should be noted that law does not mandate that the attesting witnesses to a document must also be present at the time of its registration under the Registration Act. Reasons remain recondite as regards this remissness or even as to their not being 'found' as postulated in Section 69, although there is a vague reference to both of them having died by the time the Defendant/Appellant had started recording his evidence. Section 69 provided for 'proof where no attesting witness found'. It is at once apparent that this provision anticipates a reasonable anxiety emerging out of the peremptoriness of Section 68, in that it addresses, inter alia, a situation where none of the attesting witnesses to a document (a gift deed, in this case) are alive at the time of the curial investigation thereof. Not leaving litigants forlorn for proof under Section 68, Section 69 places emphasis on handwriting(s) of the putative



deceased or the 'not found' attestator(s), along with the signatures of the executant. We must be quick to elucidate that the position is akin to the reception of secondary evidence, in that the successful passage from the rigours of Section 68 can be met contingent upon the proved non-availability of the attesting witnesses to a document. Litigants are, therefore, not faced with an evidentiary cul-de-sac. They can discharge their burden by proving, in the alternate mode and manners conceived by the Act, the signatures of the putative attestators along with the handwriting of the executant. The Appellant herein palpably failed in proving the signatures of the attestators to the Gift Deed, and, therefore, has pursued his case by evoking Section 90 as the cornerstone of his pleading.”

14.19. On careful perusal of the above said judgment also it is clear that if the attesting witnesses or testators/executors is died, hand writing of the putative deceased are not found attestator along with the signature of the executors have to be proved.



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14.20. The learned counsel appearing for the respondents also

relied upon the another judgment in the case of **C.Kumarasamy Vs.**

P.Thamayanthi & Another reported in **2019 (5) LW 128** and paragraph

No.24 of the said judgment is held as follows:-

“24.A plaint reading of the aforesaid section shows that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of court and capable of giving evidence. However, it shall not be necessary to call an attesting witnesses in proof of the execution or 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. In this case, the alleged executant namely, Chenniappa Gounder is not alive, the plaintiff is one of his sons, he is denying the execution of the said document by his father. So, in view of the aforesaid provision of law atleast one of the attestors should have been called for the purpose of proving its execution.”



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14.21. On careful perusal of the above said judgment also it is clear that once the execution of document is denied, if the document is compulsory attested document, then atleast one of the attestor should have been called for the purpose of proving its execution. In this case, the defendant has not examined anyone of the attesting witnesses as required under Section 68 and failed to examine any witness who acquainted the signature of the deceased attesting witness as well as the testators as mandated under Section 69 of the Indian Evidence Act.

14.22. In view of the above said discussion, this Court is of the opinion that the defendant has miserably failed to prove the execution, attestation of Ex.B.1, failed to prove the document Ex.B1 was acted upon and the mother of the defendant cannot execute Gift Deed in respect of her undivided share as coparcener.

15. **Point No.2:-** *Whether the plaintiffs are entitled to 1/4 share over the suit properties?*

In this case, the plaintiff being the son of the deceased Vellaiah Mooppanar have filed a suit for partition of $\frac{1}{4}$ share over the suit



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property. According to the plaintiffs, the deceased Vellaiah Mooppanar have one wife and 4 children, who are the plaintiffs and the defendant.

There is no dispute in respect of number of legal heirs of the deceased Vellaiah Mooppanar and the wife of the Vellaiah Mooppanar namely, Palavesammal, the mother died on 01.01.1998. Therefore, the property has to be divided into 4 equal shares and each plaintiff and the defendant are entitled $\frac{1}{4}$ share. But, the defendant has taken a plea that the deceased mother executed a Gift Deed in his favour on 07.12.1990. This Court in the previous point decided that the defendant has failed to prove the execution of attestation of alleged Gift Deed in accordance with law and the mother of the defendant can not execute Gift Deed in respect of her undivided share. Therefore, the plaintiffs and the defendant each are entitled to $\frac{1}{4}$ share over the suit property. Thus, the point No.2 is answered.

16. Point No.3 : *Whether the defendant is entitled to $\frac{2}{5}$ share over the suit properties?*

The defendant has filed written statement stating that his mother executed Gift Deed in his favour on 07.12.1990. Thereby, he is entitled



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to 2/5 share over the suit property and this Court already in the previous point decided that the Gift Deed executed in his favour was not proved and the same was not acted upon. Therefore, he is not entitled to 2/5 share over the suit property and he is entitled to only $\frac{1}{4}$ share of the suit property. Thus, the point is answered.

17. Point Nos.4 & 5 : *Whether the the appeal has to be allowed or not? & Whether the judgment and the decree passed by the trial Court are sustainable in law and on facts?*

The plaintiffs have filed a suit for partition of their $\frac{1}{4}$ share of the property before the trial Court. The defendant filed a written statement that the mother has executed Gift Deed on 07.12.1990. Thereby, the defendant is entitled to 2/5 share over the property. The trial Court also framed proper issues and after elaborate discussion and after referring the evidence of both sides came to the conclusion that the defendant has failed to prove the execution and attestation of Ex.B.1 and the evidence of D.W.3 is unbelievable and the defendant has not proved the Gift Deed in accordance with law and it was also not acted upon. This Court, in the previous points discussed and decided that the defendant failed to prove



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the execution and attestation of Gift Deed and mother of defendant can not execute Gift in respect of undivided coparcener property. The judgment passed by the trial Court is well reasoned and thereby, there is no infirmity or perversity found in the judgment and decree passed by the trial Court and it does not warrant interference. Therefore, the appeal has no merits and is liable to be dismissed. Thus, the points are answered.

18. Point No.6 : *To what relief the the appellant is entitled to?*

Already, this Court in the previous points 1 to 5, decided that each plaintiffs and the defendant are entitled to $\frac{1}{4}$ share over the suit property. Thereby, the appellant is not entitled any other relief through this appeal. Thus, the point is answered.

19. In the result, this appeal is dismissed by confirming the decree and judgment passed in O.S.No.42 of 2014 on the file of the Principal District Judge, Tirunelveli, dated 18.11.2015. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

22.03.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
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35/36



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P. DHANABAL,J.

dss

To:

1. The District Judge,
Karur.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

A.S(MD) No.182 of 2016

and

C.M.P(MD) No.11542 of 2016

22.03.2024