



S.A.No.1189 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.06.2025

CORAM:

THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Second Appeal. No.1189 of 2008
and M.P.No.1 of 2008

1. T.P.Gnanasundaram ... Appellant

-Vs-

1. M.D.Saroja (Died)

2. M.A.Manavalan

3. M.D.Subramaniam (Died)

4. Sankaran

5. Madhu

6. Siva

7. Amma Kannu

8. Jeeva

(R-4 to R-6 brought on record as LR's of the deceased first Respondent and R-7 and R-8 brought on record as L.R's of the deceased third Respondent vide Order of Court dated 16.08.2022 made in CMP.Nos.3877, 3831, 3874 & 3876 of 2021 in S.A.No.1189 of 2008)

... Respondents

Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code to set aside the Judgment and Decree dated 15.12.2006 made in A.S.No.42



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of 2001 on the file of the learned Additional District Judge, Fast Track Court - V, Tiruvallur in confirming the Judgment and Decree dated 15.02.1995 in O.S.No.287 of 1987 on the file of the learned District Munsif at Tiruttani.

For Appellant : Mr.Y.Jyothish Chander
For Respondents : No Appearance

J U D G M E N T

This First Appeal has been filed to set aside the Judgment and Decree dated 15.12.2006 made in A.S.No.42 of 2001 on the file of the learned Additional District Judge, Fast Track Court, - V, Tiruvallur in confirming the Judgment and Decree dated 15.02.1995 in O.S.No.287 of 1987 on the file of the learned District Munsif at Tiruttani.

2. The Plaintiff has filed a Suit for declaration of right and title in the Suit property and for permanent injunction restraining the Defendants from interfering with the Suit property.

3. Brief averments of the Plaint are as follows:-

The Plaintiff/Saroja is the absolute owner of the Suit property having acquired the same under a Will dated 26.02.1971 executed by the father of



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the Plaintiff. The father of the Plaintiff died two days after the execution of

the Will i.e., on 28.02.1971, the Plaintiff succeeded to the Suit property on

28.02.1971 and the Plaintiff is in possession and enjoyment of the same.

Now, the Plaintiff has laid foundation in the Suit property and installed a

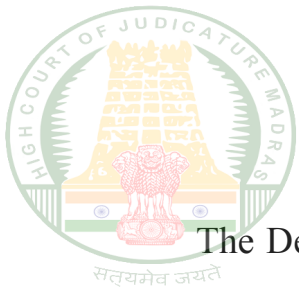
bore-well in the Suit property. The Plaintiff states to be in continuous

possession and enjoyment of the Suit property and since the Defendants

interfered in her peaceful possession and enjoyment, this Suit is filed.

4. The contents of the written statement filed by first Defendant and adopted by second and third Defendants are briefly as follows:-

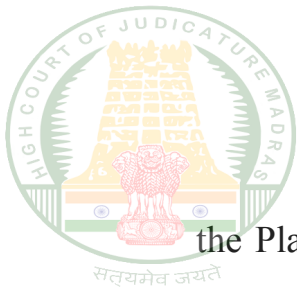
This Suit is not maintainable either in law or on facts. The Plaintiff's father executed a Will dated 26.02.1971 in favour of the Plaintiff in a sound and disposing state of mind and died on 28.02.1971. The Plaintiff succeeded to the Suit property and she has been in possession of it and she laid foundation on it and put a bore-well in the Suit property are all false and created for the purpose of this false Suit. The alleged Will is nothing but a rank forgery, that is seen from the fact. The allegation of the Plaintiff that the Defendants have no right as to title or interest in the Suit property and that they unlawfully attempted to cause loss and damage to the Plaintiff and that they are attempting to disturb her possession, are all false.



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The Defendant has been in possession and enjoyment of the Suit property by laying foundation and installing bore-well in it and he was making further constructions in it. Thus, the question of attempted trespass into the suit property does not arise at all. The Defendant contended that the Plaintiff was not in possession and enjoyment of the Suit property on the date of the Suit and it was the Defendants who were in continuous possession and enjoyment of the Suit property for more than 12 years and also have perfected the right to the Suit property by way of adverse possession also. The other house site that has been bequeathed to Janakiammal by her father Dharmalinga Mudaliar is a thatched house that has been in existence for more than 22 years, and not as a house site, she has been paying house tax for it for more than 20 years. The alleged Will dated 26.02.1971 is nothing but a rank forgery and the false boundaries given in the alleged Will in the Suit, discredit its genuineness and truth. The Defendant purchased the house site under a stamped agreement of sale on 17.03.1986 and the Plaintiff knew very well of the sale agreement. She admitted the right of the Defendants 2 and 3 to sell the same to this Defendant and she did not raise any objection and thus, she has not denied the right of this Defendant. So she is by her conduct estopped from claiming it as her own property. There is no cause of action for the Suit and



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the Plaintiffs have filed this vexatious Suit against the Defendants with a sole view to cause wrongful loss, hardship, and irreparable injury to the Defendants. Hence, the Suit should be dismissed with cost.

5. Based on the plaint averments and contentions in the written statement, the following Issues were framed in the lower Court:-

(i) Whether the Will dated 26.02.1971 in the name of the Plaintiff is valid?

(ii) Whether the Plaintiff is entitled with right and possession in the Suit property?

(iii) Whether the Plaintiff is entitled for the prayer sought for?

(iv) To what other relief the Plaintiff is entitled for?

The Additional Issue:

(i) Whether the sale deed dated 11.02.1987 is valid and binding on the Plaintiff.

6. On perusal of the records and the submission of the learned Counsel for the Plaintiff and the learned Counsel for the Defendants, the learned District Munsif had decreed the Suit.

7. Aggrieved by the Judgment and Decree of the learned District



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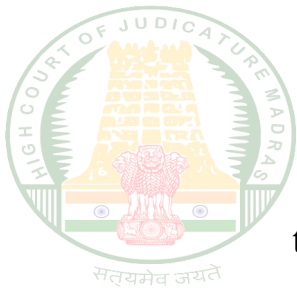
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Munsif, Thiruthani, the Defendants had filed A.S.No.42 of 2001 before the learned Additional District Judge, Fast Track Court V, Thiruvallur raising the following grounds:-

The trial Court failed to consider the fact that the Plaintiff had not proved the Will claimed by the Plaintiff as per the provisions of the Indian Evidence Act. The trial Court failed to consider the evidence of the Defendant regarding oral sale of the property to second and third Defendant by Dharmalinga Mudaliar. The trial Court failed to appreciate the evidence on the side of the Defendant that the second and third Defendant on the basis of the oral sale of the suit property by Dharmalinga Mudaliar had executed the sale deed in favour of the first Defendant as per the registered sale deed dated 11.02.1987 which is bind on the Plaintiff. Therefore, the judgment of the learned District Munsif, Tiruttani in O.S.No.287 of 1987 is perverse and is to be set aside.

8. The learned Additional District Judge had raised the following points for determination:

- (1) Whether the Will dated 26.02.1971 is true and valid and enforceable?
- (2) Whether the oral sale of suit property to second and



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third Defendant by Dharmalinga Mudaliar is proved?

(3) Is the sale by second and third Defendant to first Defendant by sale deed dated 11.02.1987 is valid and binding the Plaintiff?

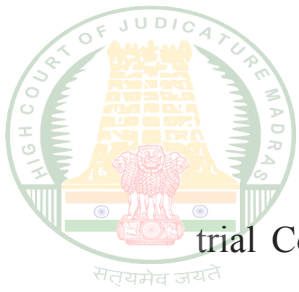
9. After hearing the arguments of both the Defendant as Appellant and the Plaintiff as Respondent, the learned Additional District Judge, Fast Track Court – V, Thiruvallur, had by judgment dated 15.12.2006 dismissed the Appeal Suit No.42 of 2001.

10. Aggrieved by the Judgment of the learned Additional District Judge, the Defendants had filed this Second Appeal before this Court by raising the following substantial questions of law:-

(i) Whether the Courts below omitted to consider the plea of adverse possession raised in the written statement by framing the issue and the Judgments are vitiated?

(ii) Whether the finding of the Courts below that Ex.A-1 Will is true and valid is erroneous and unsustainable in law”.

11. The learned Counsel for the Appellant submitted that the



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trial Court did not follow the standard of proof required for proving the Will under Section 68 of the Indian Evidence Act. The Propounder of the Will is to prove by satisfactory evidence that the Will was signed by the testator. He had relied on the ruling reported in **2022 (3) CTC 88** in the case of **Malliga Vs. P.Kumaran**. The relevant portion reads as follows:-

20. The law was once and for all settled by the Hon'ble Supreme Court in [Ramesh Verma (Dead) Through Legal representatives Vs.Lajesh Saxena (dead) by legal representatives and another] reported in 2017 1 SCC 257. The relevant portion in the judgement is extracted hereunder :-

13. A Will like any other document is to be proved in terms of the provisions of Section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.

26. The latest judgement on this issue from this Court was decided in [P.Radha Vs. Irudayadoss and others] reported in 2022 SCC online Mad 886 and it has been held as follows :-

24. The defendants have not examined any attestor



of Exhibit A.4-Will in order to comply with the provisions of [Section 68](#) of the Evidence Act. The defendants have contended that when the Plaintiff himself has admitted the execution of the Will, the question of invoking [Section 68](#) of the Evidence Act with regard to formal proof of the document is not necessary. However, I am not in agreement with the said contention in view of the judgments of the Hon'ble Supreme Court and our High Court.

25. The Hon'ble Supreme Court in a judgment reported in (2017) 1 SCC 257 in para 13 as held as follows:

“13. A will like any other document is to be proved in terms of the provisions of [Section 68](#) of the Evidence Act and the Succession Act, 1925. The propounder of the will is called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of [Section 68](#) of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.”

12. The learned Counsel for the Appellant submitted that the Trial Court failed to see that the boundaries in the Will are incorrectly mentioned, which would only establish that the Will was made hurriedly. He further submitted that the Western boundary of the schedule was



mentioned as Vardhan's house, when he was only 4 years in 1971. The Trial Court failed to see that the Plaintiff being the Propounder of the Will, has not entered the witness box to substantiate the Will and hence, Adverse Presumption under Section 114 of the Indian Evidence Act ought to be drawn against the Plaintiff as held in **AIR 1999 SC 1441** in the case of **Vidhyadhar Vs. Mankikrao and another**. The relevant portion reads as follows:-

16. It was Defendant No. 1 who contended that the sale deed, executed by Defendant No. 2 in favour of the Plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs. 500 were paid as sale consideration to Defendant No. 2. He further claimed that payment of Rs. 4,500 to Defendant No. 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by Defendant No. 1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between Defendant No. 2 and the Plaintiff was a bogus transaction.

17. Where a party to the Suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial.



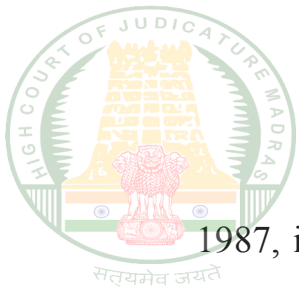
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Singh and Anr. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors., drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.

13. The learned Counsel for the Appellant submitted that the trial Court accepted the evidence of the Plaintiff, without seeing the contradictions between the witnesses as to execution of Will, health status of the testator and place of death. The Trial Court on incorrect appreciation of evidence came to the conclusion that the testator was sound and in a disposing state of mind when the testator admittedly died within 2 days of execution of Will in the Hospital. The Trial Court accepted the documentary evidence of the Plaintiff such as tax receipts of house, when the Suit property was vacant site. The Trial Court failed to see the Will under Ex.A-1 was allegedly executed on 26.02.1971 but only in the year



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1987, it was brought to light. During the interregnum period, the Plaintiff has not gone for mutation of revenue records or put up any construction over the Suit property. The Trial Court shifted the burden on the Defendants to disprove the case of the Plaintiff. The Trial Court committing the above error has decreed the Suit by a Judgment and Decree Dated 15.02.1995.

14. The learned Counsel for the Appellant submitted that the Lower Appellate Court misdirected itself by coming to conclusion that the incorrect mention of boundaries in Will, does not affect the case of the Plaintiff, as the property in dispute is admitted by both the parties. The mentioning of incorrect boundaries in the Will only establishes that the Will is fabricated. The Lower Appellate Court has only discussed the oral evidence of the Defendants and not that of the Plaintiff to substantiate the Will (Ex.A-1). The Lower Appellate Court failed to analyze, the oral evidence of P.W-2 viz., the Scribe which would categorically state that the testator has not read the Will. The Lower Appellate Court also failed to see material contradictions between P.W-1 to P.W-3 as to the time of execution of Will. The Lower Appellate Court also failed to see the oral evidence of P.W-4 viz., the grandson of the testator, would categorically state that his



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grandfather died in Chittoor and was brought back to Podaturpet whereas other witness would state the testator died at Podaturpet. The Lower Appellate Court did not consider the fact that the testator was not in good health and in a disposing state of mind, as he passed away on the 2nd day of execution of the Will. The Lower Appellate Court committing the above errors had dismissed the A.S No. 42 of 2001 Sub Court, Tiruvallur.

15. Heard the learned Counsel for the Appellant.

16. Perused the written submissions filed by the learned Counsel for the Appellant and the depositions of Plaintiff's witnesses/P.W-1 to P.W-4, and the documents under Ex.A-1 to Ex.A-22 and the depositions of Defendants' witnesses viz., D.W-1 to D.W-5 and the documents under Ex.B-1 to Ex.B-5, the Judgment of the learned District Munsif, Tiruttani and the Judgment of the learned Additional District Judge, Fast Track Court – V, Tiruvallur.

17. On perusal of the Judgment of the learned District Munsif, Tiruttani in O.S.No.287 of 1987 dated 15.02.1995 and the Judgment of the learned Additional District Judge, Fast Track Court – V, Tiruvallur in A.S.No.42 of 2001 dated 15.12.2006, the arguments of the learned Counsel



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for the Appellant that the Will alleged to have been executed by Dharmalinga Mudaliar in favour of the Plaintiff had not been proved as per

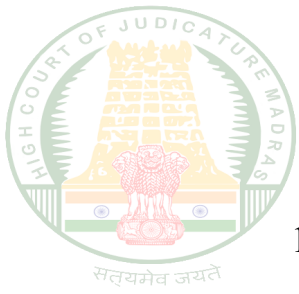
law under Section 68 of the Indian Evidence Act cannot at all be accepted.

The scribe of the Will/Padmanabha Pillai was examined as P.W-2 and the attesting witness had been examined as P.W-3. They had clearly stated that the testator/Dharmalinga Mudaliar was in a sound state of mind and when they had been cross-examined they stated that Dharmalinga Mudaliar/testator died two days after the alleged date of execution of Will.

In the course of the evidence, it was mentioned that Dharmalinga Mudaliar was suffering from jaundice at the relevant point of time and two days after execution of Will, he died. Just because the testator died two days after executing the Will, the same cannot be rejected on the ground that the testator was not in a fit state of mind. The same had been discussed elaborately by the learned District Munsif, Thiruttani while assessing the evidence, framed the following issues:-

- (i) Whether the Will dated 26.02.1971 is true and valid?
- (ii) Whether the Plaintiff is in possession of the Suit property?

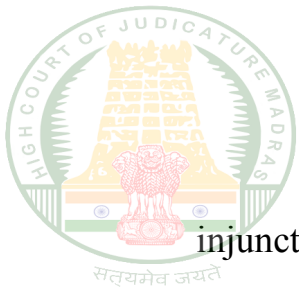
Additional Issue:- Whether the sale deed dated 11.02.1987 is true and valid and binding on the Plaintiff?



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18. He had answered the issues and additional issue against the Defendants. In the course of discussion, on Issue Nos. 1 and 2 and additional issue, the learned District Munsif, Tiruttani had in his Judgment elaborately discussed about the Will and the objection to the Will raised by the Defendants 1 to 3. The submission that the propounder of the Will had not proved it as per Section 68 of the Indian Evidence Act was rejected by the learned District Munsif on the ground that the Will although not registered, it cannot be rejected solely for that reason. Just because the testator died on 28.02.1971 two days after the execution of the Will i.e., 26.02.1971, it cannot be rejected. It cannot be concluded that the Will is forged. It is for the Defendants to prove as per Section 102 of the Indian Evidence Act, wherein it is stated that the party to the Civil proceedings who makes a specific plea such as fraud, forgery etc., it is for the party to prove. As per Section 101 of the Indian Evidence Act, the Plaintiff who knocks the door of the Court has to prove their claim through cogent oral and documentary evidence. Here, Saroja is the daughter of Dharmalinga Mudaliar and she is the Plaintiff before the learned District Munsif, Tiruttani. She had instituted the Suit seeking the relief of declaration of title to the Suit property, which is a hut and vacant site in Podatturpettai Village, Pallipet Taluk, the then Chengalpet District and for permanent

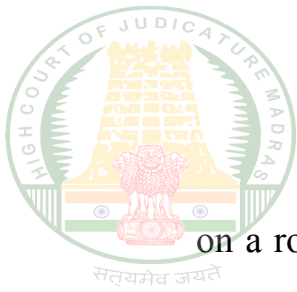


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injunction restraining the Defendants 1 to 3 from interfering with the peaceful possession and enjoyment of the property. It is the contention of the learned Counsel for the Appellant that M.D Saroja/Plaintiff who is the propounder of the Will had not entered the witness box and therefore, the Will had not been proved as per Section 68 of the Indian Evidence Act. The said contention of the learned Counsel for the Appellant cannot at all be accepted as the husband of the Plaintiff who had been examined as P.W-1, had deposed the evidence stating out the Plaint averments in his examination-in-chief, claiming title to the property on behalf of his wife through Ex.A-1 marked through his evidence, which is the original Will executed by his father-in-law (father of Saroja, Plaintiff).

19. On perusal of the Will, it is found that it is written in Telugu. The person, who had written the Will was examined as P.W-2/Padmanabha Pillai who was a document writer, he had in his evidence clearly stated that he was summoned by Dharmalinga Mudaliar and he accompanied P.W-1/Govindasamy at the residence where Dharmalinga Mudaliar had summoned the other witnesses viz., attesting witnesses. The details of the property and the words were dictated by Dharmalinga Mudaliar, the testator. The practice of the scribe/P.W-2 was that he would write it down



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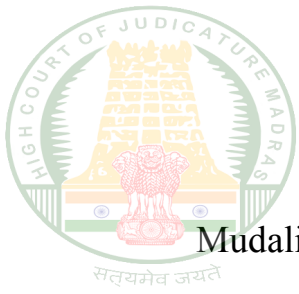
on a rough sheet of paper and read it out to the person who came to write documents so as to correct the letters and sentences. So that the fresh document does not contain any overwriting or corrections. Therefore, evidence of P.W-2/scribe is found proper. P.W-1/Govindasamy is the husband of the Plaintiff/Saroja. As per Section 120 of the Indian Evidence Act, parties to the Civil Suit and their spouses are competent witnesses.

Section 120 of the Indian Evidence Act is to be extracted hereunder:-

“120. Parties to civil suit and their wives or husbands - Husband or wife of person under criminal trial.

In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.”

Therefore, the learned Counsel for the Appellant submitted that the propounder of the Will had not proved the Will under Section 68 of the Indian Evidence Act by removing the doubt or cloud created by the circumstances surrounding the origin of the Will-specifically the fact that the testator died two days after execution of the Will which creates suspicion that he was not in a fit state of mind. However, this contention cannot at all be accepted. There is evidence through P.W-3 as existing witness and P.W-4, who was a relative who had met Dharmalinga



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Mudaliar, though he was not aware of execution of Will, he was examined

regarding the condition of Dharmalinga Mudaliar and the fact that the Will

had been proved was discussed by the learned District Munsif in the course

of assessment of evidences while answering issues 1 and 2 and additional

issue and thereby, the issues were answered against the Defendants 1 to 3.

The attesting witness who was examined as P.W-3 had in his cross-

examination stated that Dharmalinga Mudaliar was not-well. It does not

mean he was not mentally well. It means he was not physically well as

Dharmalinga Mudaliar was suffering from jaundice. Therefore, the death

of Dharmalinga Mudaliar, two days after the execution of Will does not

create a cloud as per Section 102 of the Indian Evidence Act, it is for the

person challenging the Will to prove that Dharmalinga Mudaliar was not in

a fit state of mind. That is very hard to prove next to impossible. The

Defendants had filed an Interlocutory Petition to compare the signature of

Dharmalinga Mudaliar in Ex.A-1 and get an expert opinion from the

Forensic Department regarding the signature but the same was not sent

because, sufficient number of documents containing admitted signatures of

Dharmalinga Mudaliar is to be accompanied along with Ex.A-1-the

questioned document. Therefore, it was not sent for Expert's opinion

regarding signature of Dharmalinga Mudaliar found in Ex.A-1.

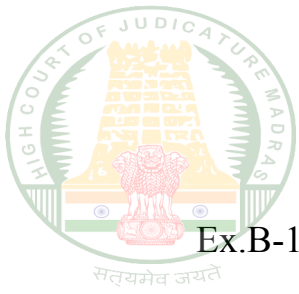


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the Will relied by the Plaintiff is forged. If that be the case, it is for them to prove. Therefore, the learned District Munsif and the learned Appellate Court Judge shifted the burden on the Defendants and decreed the Suit. Therefore, the contention that the Judgment of the learned District Munsif and the Judgment of the learned Appellate Judge confirming the Judgment of the learned District Munsif is erroneous, cannot be accepted. When a party to the proceedings makes a specific allegation like fraud, forgery, etc., it is for them to prove. It is to be noted that the written statement was filed by first Defendant, who is the purchaser of the property claiming ownership of the property through sale deed executed in the year 1987, long after execution of the Will. In the oral evidence, he claims that the second Defendant is none other than the brother of Plaintiff/Saroja. The third Defendant is the son of the brother of Plaintiff/Saroja. It is the claim of the first Defendant that he had purchased the property from second and third Defendants. The second Defendant was examined as D.W-2, he had in his evidence claimed that his father Dharmalinga Mudaliar had orally settled the Suit property in favour of second and third Defendants. Therefore, based on that, they had sold the property in the year 1987 under

19/35



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Ex.B-1 dated 11.02.1987. The claim of transfer of property was rejected by

the learned Principal District Munsif, Tiruttani while assessing evidence.

21. The claim made by the Defendants in the written statement that the Will is forged, as one of the boundaries was given as bounded on the West by Vardhan's property. As on the date of the alleged Will, Varadhan was 4 years and on the date of trial, he was aged 24 years. Therefore, it was contended that the Will was created by the Plaintiff. In the course of the evidence, it was established that the person/Vardhan was not a four years old boy but he was a grandfather of four years old/Vardhan. It is an accepted tradition in Hindu families that the name of the grandfather/grandmother is given to the grandchild. The contention of the learned Counsel for the Defendants before the trial Court, regarding Western boundary of the property given as Vardhan's property, and thereby, alleging that the Will was forged was rejected by the learned District Munsif. The claim made by the Defendants was held to be an attempt made by the Defendants to disprove that the Will had not been executed. It is for the second and third Defendants to produce document containing Dharmalinga Mudaliar's admitted signature to disprove the questioned document under Ex.A-1. Since second and third Defendants



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through first Defendant had not produced documents containing admitted

signatures of Dharmalinga Mudaliar, the attempt of the first Defendant to

disprove the Will had not materialize. Therefore, the Court is within its

power to draw adverse inference against the defence regarding the burden

of proof. As per the contentions of the Defendants, the Will is not a

genuine Will. From the cross-examination of P.W-2-the scribe and P.W-3-

attesting witness to the Will, nothing had been established to suggest that

the deceased Dharmalinga Mudaliar was not in sound state of mind while

executing Ex.A-1. On the contrary, P.W-1/husband of the Plaintiff/Saroja,

P.W-2/scribe of the Will, P.W-3/attesting witness had clearly stated that

the words were dictated by Dharmalinga Mudaliar and the boundaries were

mentioned by him. Therefore, under any circumstances, the claim made by

the Appellant before this Court and the Defendants before the learned

District Munsif that the Will is a forged Will, that it is not free from cloud

surrounding its execution, and that the Will has not been proved as per

Section 68 of the Indian Evidence Act cannot at all be accepted and it has

to be rejected. It was rightly rejected by the learned District Munsif,

Tiruttani while assessing evidence in O.S.No.287 of 1987 dated

15.02.1995 and the Judgment of the learned Additional District Judge,

Tiruvallur in A.S.No.42 of 2001 dated 15.12.2006. In the discussion of



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evidence, independent assessment of evidence was done by the learned

Additional District Judge answering the points for determination 1 to 3.

The claim of probate of Will is not applicable to the facts of this case. The probate proceedings are applicable to Municipal Towns, Corporation or Municipality and not to other areas. Therefore, the Will had not being a probate will not make a Will invalid. The Will had been proved through the scribe/P.W-2 and P.W-3/attesting witness. Also, in the evidence, it had been proved that the testator/Dharmalinga Mudaliar was suffering from jaundice at the relevant point of time. Therefore, the person apprehending death had executed Will, thereby transferring his right in favour of his daughter. Just because, the Plaintiff did not enter the witness box, the Court need not draw adverse inference against the Plaintiff. It is the right granted to the party to the civil proceedings under Section 120 of the Indian Evidence Act that either the wife or the husband of the party to the dispute is entitled to let in evidence on behalf of the party to the proceedings. Therefore, the Court need not draw adverse inference against the Plaintiff. Husband of the Plaintiff is a competent witness under Section 120 of the Indian Evidence Act. He had clearly deposed the facts resulting in filing of this Suit and he had withstood cross-examination similar to the attesting witness and scribe. Therefore, the Plaintiff had proved the Will



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through husband/P.W-1 and P.W-2, the scribe of Will under Ex.A-1 and

P.W-3, the attesting witness. The claim made by the Defendants in the

written statement that the Will is a forged one, it is for them under Sections

102 and 103 of the Indian Evidence Act to prove the specific plea. The

Defendant had attempted to prove the Will by sending the Will under

Ex.A-1 and obtaining Expert opinion from the Forensic Department, but he

had not furnished the document containing admitted signature of

Dharmalinga Mudaliar. Just because Dharmalinga Mudaliar executed a

Will in favour of his daughter/Saroja and he died two days after executing

the Will, it does not render the Will non-est. The Plaintiff had proved her

contention by examining the witnesses viz., the scribe and the attesting

witness viz., P.W-2 and P.W-3. In Second Appeal, this Court is not

expected to reassess the evidence. Hence, the substantial question of law-2

is answered. Therefore, the finding of the trial Court that Ex.A-1-Will is

true and valid. It is not an erroneous finding. On reassessment of evidence

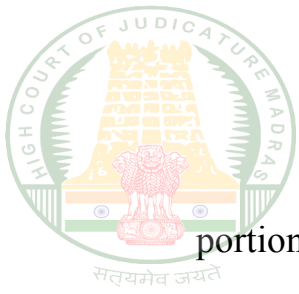
by the learned Additional District Munsif, Tiruvallur in A.S.No.42 of

2001, the Will had been proved. The attempt of the Defendant in the

Appeal to refer the document for obtaining Expert's opinion, was rejected

on the light of the reported ruling in the case of *S.Thiraviyamammal Vs.*

Vellayan and three others reported in *1996 (1) CTC 445*. The relevant



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portion is extracted hereunder:-

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Code of Civil Procedure 1908 Order 41 Rule 27 – Production of additional evidence in Appellate Court – Petition for receiving additional evidence in the Second Appeal - Appellant did not state that these evidences were not available earlier, no reason given for filing these documents before the Court's below. No averments that the Appellant was prevented from adducing these evidence in the Court below - No justification for receiving additional evidence at the stage of Second Appeal especially when there are ample evidence for effective adjudication of the case- Petition for receipt of additional evidence dismissed.

Therefore, the first Appellate Court had rejected the contention of the Defendants before the trial Court regarding the Will and had confirmed the finding of the learned District Munsif in O.S.No.287 of 1987. Therefore, the substantial question of law-2 is answered against the Appellant. The trial Court as well as the first Appellate Court had rightly shifted the burden on the Defendants to disprove the Will under Ex.A-1 dated 26.02.1971. The Plaintiff had proved the Will as per Sections 101 and 68 of the Indian Evidence Act. The claim that the deceased Dharmalinga Mudaliar did not see the witness signing the document cannot be accepted. The Plaintiff had proved the Will under Section 68 of the Indian Evidence



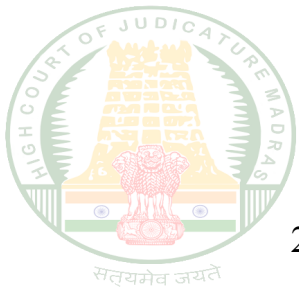
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Act, the same had been accepted by the trial Court on assessment of evidence. The ruling cited by the learned Counsel for the Appellant before the first Appellate Court was rejected and the learned Additional District Judge, Fast Track Court – V, Tiruvallur had on reassessment of evidence arrived at the same conclusion and the Will was proved under Section 68 of the Indian Evidence Act. The contention of the learned Counsel for the Appellant that both the Courts below had shifted the burden on the Defendants to disprove the Will and concluded that the Will had been proved. Therefore, the Judgments of the learned District Munsif and the learned Additional District Judge, Fast Track Court - V are erroneous, cannot be accepted. Hence, rejected. ***The Substantial Question of Law-2 is answered against the Appellant in the Second Appeal.***

22. Substantial question of law-1:-

The Defendants in the written statement claimed title to the property based on the sale deed executed by the Defendants 2 and 3 in favour of the first Defendant. Therefore, the issue was framed as: whether the sale deed dated 11.02.1987 in favour of the first Defendant is true, valid and binding on the Plaintiff?



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23. In the discussion of evidence, the learned District Munsif had clearly stated that the Defendants 1 to 3 failed to prove that the sale deed was executed in favour of first Defendant by the second and third Defendants. The second and third Defendants as D.W-2 and D.W-3 claims that Dharmalinga Mudaliar had settled the property orally to second and third Defendants when there was a document executed by Dharmalinga Mudaliar under Ex.A-1 in favour of Plaintiff/Saroja. The claim of transferring title orally by Dharmalinga Mudaliar in favour of the son/D-2 and another son/Appadurai whose son is impleaded as third Defendant based on which, the second and third Defendants claimed title to the property and had executed the sale deed under Ex.B-1 to the first Defendant was rejected by the learned District Munsif on assessment of evidence in the Judgment in O.S.No.287 of 1987. The burden to prove that the second and third Defendants had valid title on the date of execution of the registered sale deed under Ex.B-1 is on them. Therefore, that cannot be found fault with. It is not an erroneous finding. When they claim title to the property, it is for them to prove. The claim of adverse possession by the second and third Defendants cannot be accepted. To have adverse possession means a person who has no title and trespassed into the owners property. Here, the first Defendant alone had filed the written statement



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and it is adopted by the second and third Defendant. When the first

Defendant claims title to the Suit property through registered sale deed, he cannot claim adverse possession. The learned first Additional District Judge on hearing the Appeal had raised three substantial questions of law and answered against the Appellant. While discussing the ruling cited in the Judgment of learned Sub Judge, in **1996 (1) CTC 699** in the case of **Natesan Vs. Chinnachi Kandar and four others** held that –

Adverse possession- Meaning- Adverse possession means hostile possession which is expressed or implied in denial of title of true owner – such possession must be actual – exclusive, as a matter of right, peaceful, open, uninterrupted and continuous.

24. Dharmalinga Mudaliar was the owner of the property when the Defendants 2 and 3 are son and grandson of Dharmalinga Mudaliar. They cannot claim adverse possession against Dharmalinga Mudaliar. Also, they cannot claim adverse possession against Saroja/Plaintiff. When Dharmalinga Mudaliar had executed a Will transferring his right of ownership in favour of his daughter under Ex.A-1-Will dated 26.02.1971, the claim of adverse possession cannot be sustained. Failure to raise the substantial question of law by the trial Court had not caused prejudice to



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the Defendants and the pleadings in the written statement is contradicted to specific plea of the first Defendant that he had obtained the sale deed from the second and third Defendants who are none other than the brother of the Plaintiff and nephew of the Plaintiff. They cannot claim adverse possession regarding title against Dharmalinga Mudaliar and Plaintiff. Therefore, the adverse possession is contradictory to the claim made by the first Defendant. The claim of adverse possession or non-reasoning of the issue of adverse possession had not caused prejudice to the Defendants. The substantial question of law-1 is answered against the Appellant herein.

25. In the cross-examination of P.W-2 and P.W-3, they had clearly stated that Dharmalinga Mudaliar himself dictated the Will. In the cross-examination, P.W-2 admitted that Dharmalinga Mudaliar did not read it by himself. However, that would not mean the Will was not proved. He had clearly in his cross-examination stated that Dharmalinga Mudaliar asked him to read it and was satisfied by the wordings in the Will as per the dictation of Dharmalinga Mudaliar. He was satisfied and signed it. This fact was stated by P.W-3 also in his evidence. Therefore, the claim that P.W-3 admitted that Dharmalinga Mudaliar was not in good health indicates he was not physically in good health as he was suffering from



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jaundice. That does not mean, he was not in a fit state of mind. There is clear evidence that the recitals and the boundaries were mentioned by Dharmalinga Mudaliar to scribe/P.W-2. Therefore, the claim made by the Appellant that Dharmalinga Mudaliar was not in a fit state of mind is rejected in the discussion. The contention of the Defendants that the Courts below did not consider the plea of adverse possession does not cause prejudice as the Defendants' claim is based on sale deed executed in the year 1987 under Ex.A-1. Therefore, adverse possession is not attracted in this case. The claim of adverse possession itself is contradictory to the registered sale deed. Therefore, the finding of the trial Court is not erroneous. ***The substantial question of law -1 is answered against the Defendants/Appellant before this Court.***

26. The ruling cited by the learned Counsel for the Appellant in the case of ***Vidhyadhar Vs. Manikikrao and another*** reported in ***AIR 1999 SC 1441***, regarding the adverse inference to be drawn if the party to the Suit does not enter the witness box will not be applicable to the facts of this case. The Plaintiff/Saroja did not enter the witness box. However, the claim made by the Plaintiff was deposed by her husband as P.W-1/Govindasamy. He had narrated the facts leading to the filing of the Suit.



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The Plaintiff averments had been deposed by him as examination-in-chief and he had marked the documents in support of the Plaintiff under Ex.A-1 to Ex.A-22 and he had proved the Will under Ex.A-1 through the attesting witness/P.W-3 and scribe/P.W-2. Therefore, the ruling cited by the learned Counsel for the Appellant would be applicable only if the Plaintiff had failed to prove the Will through the attesting witness, P.W-3 and the scribe-P.W-2. Therefore the ruling cited by the learned Counsel for the Appellant in the case of *Vidhyadhar Vs. Manikikrao and another* reported in *AIR 1999 SC 1441* will not help.

Also, in the same ruling, it is stated as

concurrent finding of fact on question of title based on the sale deed executed in evidence on record which properly conveyed title of the property to Plaintiff-Interference by the High Court merely on the ground that in the circumstances already considered by the lower Courts, some other conclusion was possible from proved facts - Not permissible in Second Appeal.

That proposition of law is also not applicable to the facts of this case. The learned District Munsif had on proper appreciation of evidence rejected the claim of the first Defendant who had claimed title to the property based on title of the second and third Defendants who are none other than the brother and nephew of the Plaintiff. The second and third Defendants were



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examined as D.W-2 and D.W-3 who claimed oral settlement was made by

Dharmalinga Mudaliar/father of Plaintiff and second Defendant in favour of the second and third Defendants regarding the transfer of title. The Court will not accept the oral transfer and it had not been proved before the trial Court. Therefore, the learned District Munsif rejected the claim of the second and third Defendants regarding oral transfer by Dharmalinga Mudaliar. Based on the oral transfer, the sale executed by the second and third Defendants under Ex.B-1 dated 11.02.1987 by registered sale deed executed in favour of the first Defendant was also rejected. Therefore, the concurrent finding against the Defendants cannot be disturbed by this Court under Section 100 of Civil Procedure Code. The title to the Suit property based on the sale deed was not at all accepted by the trial Court had been confirmed in the first Appellate Court.

27. Therefore, the ruling cited by the learned Counsel for the Appellant in the case of *Vidhyadhar Vs. Manikikrao and another* reported in *AIR 1999 SC 1441* is not applicable to the facts of this case. Hence, rejected.

28. The ruling cited by the learned Counsel for the Appellant in the



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case of **Malliga Vs. P.Kumaran** reported in **2022 (3) CTC 88**. The

relevant portion reads as follows:-

Evidence Act, 1872, Section 68 – Proof of Will – Necessity of examining attesting witnesses – Held, that examination of attesting witness is mandatory only where the genuineness or validity of the Will is questioned – In cases where the Will has not been specifically denied or it has been admitted, it has been held that examination of attesting witnesses to a Will is unnecessary. Is applicable to the facts of this case.

As per the reported ruling, the Plaintiff had proved the Plaintiff's case by examining the scribe and attesor. The claim that the Plaintiff avoided the witness box cannot be considered against the Plaintiff. Because the Indian Evidence Act under Section 120 provides that a party to the Civil proceedings can examine the husband or wife as a competent witness. When the Indian Evidence Act provides such right, the Court cannot draw adverse inference against the Plaintiff. Therefore, the said ruling will not help the Appellant's case. The Plaintiff had proved his contention as per the reported ruling cited by the learned Counsel for the Appellant.

In the light of the above discussions, the ***substantial questions of law are answered against the Appellant and in favour of the Respondents.*** The Judgment and Decree dated 15.12.2006 made in



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A.S.No.42 of 2001 on the file of the learned Additional District Judge, Fast Track Court, - V, Tiruvallur in confirming the Judgment and Decree dated 15.02.1995 in O.S.No.287 of 1987 on the file of the learned District Munsif at Tiruttani are not perverse.

In the result, this *Second Appeal is dismissed as having no merits. No costs.* The Judgment and Decree dated 15.12.2006 made in A.S.No.42 of 2001 on the file of the learned Additional District Judge, Fast Track Court, - V, Tiruvallur in confirming the Judgment and Decree dated 15.02.1995 in O.S.No.287 of 1987 on the file of the learned District Munsif at Tiruttani are confirmed. Consequently, connected Miscellaneous Petition is closed.

24.06.2025

dh/srm

Index : Yes/No

Speaking/Non-speaking order

To

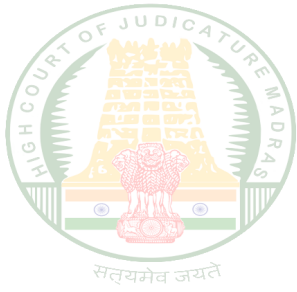
1. The Additional District Judge,
Fast Track Court, - V, Tiruvallur.
2. The District Munsif,
Tiruttani.



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3. The Section Officer,
V.R.Section,
High Court, Madras.

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SATHI KUMAR SUKUMARA KURUP, J.,

dh

Pre-delivery Judgment made in
Second Appeal. No.1189 of 2008

24.06.2025