IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 22.03.2022

PRONOUNCING ORDERS ON : 23.03.2022

CORAM

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

SA No.241 of 2015

Malliga ..Defendant /Appellant/Appellant

Vs.

P.Kumaran ...Plaintiff / Respondent / Respondent

Prayer : Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 28.11.2014 in A.S.No.04 of 2014 on the file of the Subordinate Judge of Arni in confirming the judgment and decree dated 22.07.2013 in O.S.No.498 of 2004 on the file of the District Munsif at Arni.

For Appellant : Mr.Govind Chandrasekhar

For Respondent : Mr.S.Madhusudhanan

JUDGMENT

The defendant is the appellant in this Second Appeal.

2. The respondent/plaintiff filed a suit seeking for the relief of partition of the suit properties and for allotment of half share in favour of the plaintiff.

3. The case of the plaintiff is that the properties were originally owned by Chinnadurai Mudaliar through a registered sale deed dated 05.01.1972. He executed a Will on 09.05.1977, marked as Ex.A6 and he bequeathed the property in favour of the Male heirs of his nephews Purusothaman and Murugesa Mudaliar. The plaintiff is the son of Purusothaman and the defendant is the wife of Murugesa Mudaliar.

4. The further case of the plaintiff is that the above said Chinnadurai Mudaliar died on 03.09.1977 and as a consequence, the property was jointly enjoyed by Purusothaman

and Murugesa Mudaliar. Thereafter, the plaintiff was born in the year 2003. It is stated that the father of the plaintiff viz., Purusothaman went to madras for his avocation and requested Murugesa Mudaliar to give his share in the cultivation that is made in the property. Later, Murugesa Mudaliar died and the defendant took possession of the suit property and was harvesting the crops. It is alleged that she did not give any share to the father of the plaintiff.

3. The Plaintiff on attaining majority approached the defendant and requested to give half share in the suit property as per the Will. The defendant refused to give any share to the plaintiff. In the meantime, the plaintiff also applied for a joint patta and joint patta was issued in his name through proceedings dated 08.01.2003. Even thereafter, the defendant was not willing to give the share of the plaintiff. Left with no other alternative, the suit was filed seeking for the relief of partition and allotment of half share in the suit property.

4. The defendant filed a written statement. She took a defence that Chinnaduari Mudaliar and Purusothanam orally sold their entire share to the defendant in the year 1989 and consequently, the defendant was in possession and enjoyment of the suit property. She was also paying the kist and tax receipts were issued in her name. In view of this defence taken by the defendant, she completely denied the right of the plaintiff in the suit property.

5. Both the Courts below after considering the facts and circumstances of the case and on appreciation of oral and documentary evidence, concurrently held against the defendant and the suit was decreed. Aggrieved by the same, the defendant has filed this second appeal.

6. At the time of admitting the second appeal, this Court framed the following substantial question of law:-

(i) Whether a suit for partition is maintainable even

though the father is alive and the appellant is entitled for a share only per stripes.

7. During the course of arguments, this Court framed the following additional substantial question of law :-

(a) Whether both the Courts below were right in relying upon Ex.A-6 only based on the admission made by the defendant without the same being proved in accordance with Section 68 of the Indian Evidence Act?

8. Heard the learned counsel for the appellant and the learned counsel for the respondent and this Court also carefully considered the materials available on record and the findings of both the Courts below.

9. There is no dispute with regard to the fact that Chinnadurai Mudaliar was the original owner of the suit property. He had executed a Will and given life interest to his nephews Murugesa Mudaliar and Purusothaman and the vested reminder was given in favour of the male heirs of the nephews. It is also an

admitted case that one of the nephew viz., Murugesa Mudaliar died and his wife is the defendant in the suit. The other nephew Purusothanam is alive and he is the father of the plaintiff. On going through the entire evidence, it is seen that the said Purusothaman and his son, the plaintiff herein were residing elsewhere at Chennai for more than 30 years and they were never in possession and enjoyment of the property. Murugesa Mudaliar, till his life time was enjoying the suit property and thereafter, his wife is enjoying the suit property and is cultivating crops.

10. The document through which the plaintiff was claiming for half share in the suit property is the Will dated 09.05.1977 marked as Ex.A6, which was executed by Chinnadurai Mudaliar. Both the Courts below admitted the Will in evidence and acted upon the same, only on the ground that the defendant did not dispute the availability of the Will. In view of the same, the main focus of the arguments revolved around the admissibility of the Will without the same being proved in accordance with Section 68 of the Indian Evidence Act. That is the reason why this Court in

the course of arguments framed an additional substantial question of law in this regard and heard both the counsel.

11. Insofar the Will is concerned, the Evidence Act prescribes the manner in which a Will should be proved under Section 68 of the Act. A person who wants to rely upon a Will has to necessarily prove the Will only in accordance with Section 68 of the Act. In the absence of attesting witness, the Will has to be proved in accordance with Section 69 and 70 of the Evidence Act. Section 63 of the Indian Succession Act provides for the manner in which a Will should be executed by the testator and the requirement of attesting witnesses.

12. Section 68 of the Evidence Act only provides for an exception under the proviso to the said Section wherein it is specifically provided that it shall not be necessary to call an attesting witness in proof of execution of any document, **"not being a Will"**, which has been registered in accordance with the provisions of the Indian Registration Act, unless its execution by

the person by whom it purports to have been executed is specifically denied. It is clear from this proviso that the exception is available for any other documents other than a Will. In other words, a Will has to be proved only in accordance with Section 68 to 70 of the Indian Evidence Act.

13. The question that arises for consideration is as to whether such a proof can be dispensed with if the execution of the Will has been admitted by the defendant. To decide this issue, it will be relevant to take note of certain judgements that were cited by the learned counsel for the Appellant.

14. The Division Bench of the Kerala High Court in ***[Thayyullathil Kunhikannan and others Vs. Thayyullathil Kalliani and others]*** reported in ***AIR 1990 226*** *held as follows :-*

> ***32. Counsel for the appellant challenges this finding of the lower court. He further states that the will Ext. A1 has not been properly proved, by examining an attestor, as required by Section 68 of the Evidence Act. One of the attestors was admittedly alive. Section 68 is***

mandatory, and even if there is no dispute in the written statement about its validity or genuineness, formal proof of the will by examining one of the attestors is necessary before it could be acted upon. Kamalakshy v. Madhavi Amma, 1980 Ker LT 493 is cited in support of this contention, it is also stated, placing reliance on the decision in Girja Datt v. Gangotri Datt, AIR 1955 SC 346, that it cannot be presumed, from the mere signatures of two persons in the will, that they had appended their signatures as attesting witnesses. Section 68 should be complied with in order that these two persons might be treated as attesting witnesses. Counsel stresses further that the original will is not forthcoming, but only a registration, copy Ext. A1. Since Pokken had revoked Ext. A1, the original must have been destroyed by him, and was not therefore available for production. Counsel wants the court to presume in the circumstances, that the original has been destroyed with the intention of revoking it.

34. Order 8 Rule 5 of the C.P.C. provides that unless there is a specific denial of any allegation of fact made

in the plaint, it shall be taken to be admitted. Section 58 of the Evidence Act provides that no fact need be proved in any proceedings, which by any rule of pleadings in force at the time, the parties are deemed to have admitted by their pleadings. In this case, in the absence of any denial in the written statement, the genuineness and the validity of the will Ext. A1 must be deemed to have been admitted by the law of pleadings, namely Order 8 Rule 5, and therefore that fact was not required to be proved at the trial. Section 68 states that if a document is required by law to be attested, ii 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. The proviso to the Section which was introduced by the amending Act 31 of 1926 makes an exception in the case of any document, not being a will, which has been registered, unless its execution by the persons by whom it purports to have been executed, is specifically denied. The fact that the proviso is not applicable to wills, and that it does not make an exception in the

case of registered wills, does not lead to any inference that a will cannot be acted upon or used as evidence, unless it has been proved by examining an attesting witness. The only effect of the proviso is that registration of the will by itself does not obviate the necessity of calling an attesting witness to prove it, if it is otherwise required to be proved. The proviso does not speak of a case where a will is not in dispute. Section 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, Section 68 cannot operate to insist on-formal proof by calling an attesting witness. Section 58 has to be read as overriding Section 68 and as obviating the necessity for calling an attesting witness, unless the execution of the will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a will could be used as evidence. Phipson on Evidence 12th Edition (1976) explains the rationale

behind examining an attesting witness as that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, "an agreement which may be waived for the purposes of dispensing with proof at the trial", (paragraph 1751). In paragraph 1757, the learned author points out that proof of execution of documents required by law to be attested is dispensed with (although the attesting witness may be alive and in Court) "when the execution has been admitted for purposes of trial". Order 8 Rule 5, C.P.C. deems the execution of the will to be admitted in the absence of any denial thereof in the written statement. Examination of an attesting witness is therefore unnecessary when the parties have not joined issue on the validity or genuineness of the will.

15. The Kerala High Court took a view that where the party has not joined issue on the validity or genuineness of the Will and has admitted the Will, there is no requirement to prove the Will in accordance with Section 68 of the Evidence Act.

16. This view taken by the Division Bench of the Kerala High Court, seems to have been reiterated by this Court also in the following judgements :-

(a) ***[S.Kaliyammal and others Vs. K.Palaniammal and others] reported in*** **AIR 1999 Mad 40.**

(b) ***[Minor Mani, rep. By next Friend / mother Ramayi Vs.Ammakannu and another]*** reported in ***2009 1 LW 309***

(c) [R.Vellingiri and another Vs. R.Kannaian and others] reported in 2008 1 CTC 130.

(d) [Karpagam and another Vs. E.Purushothaman and others] in 2010 3 LW 282

(e) [Ranganathan Vs. Natarajan and others] in 2012 1 Madras Weekly Notes (Civil) 180

17. A close look at all the above judgements makes it very clear 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.

18. 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.

19. The above judgement in no uncertain terms laid down the law to the effect that a Will shall not be used as evidence until it is proved in the manner prescribed under Section 68 of the Evidence Act and this position cannot be diluted even if the opposite party has not specifically denied the execution of the Will.

20. It is also relevant to take note of the judgment of the Hon'ble Supreme Court in ***[Jagadish Chand Sharma Vs. Narain Singh Saini (Dead) through Legal representatives and others]*** in **2015 8 SCC 615**. The relevant portions in the judgement is extracted hereunder :-

21. As would be evident from the contents of Section 63 of the Act that to execute the Will as contemplated therein, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further the signature or mark of the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect to the writing as Will. The Section further mandates that the Will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgement of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the Will in the presence of the testator. It is, however, clarified that it would not be necessary that more than one witness

be present at the same time and that no particular form of attestation would be necessary.

22. It cannot be gainsaid that the above legislatively prescribed essentials of a valid execution and attestation of a Will under the Act are mandatory in nature, so much so, that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property.

22.1. In the evidentiary context Section 68 of the Act 1872 enjoins that if a document is required by law to be attested, it would not be used as evidence unless one attesting witness, at least, if alive, and is subject to the process of Court and capable of giving evidence proves its execution. The proviso attached to this Section relaxes this requirement in case of a document, not being a Will, but 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.

21. Even in the above judgement, the Hon'ble Supreme Court has reiterated the mandatory nature of Section 68 of the Evidence Act and has categorically held that the proviso to the said section provides for a relaxation of the requirement only for a document other than a Will.

22. It will also be relevant to take note of the subsequent Division Bench judgement of the Kerala High Court in ***[Sarada Vs.Radhamani]*** reported in ***2017 2 KLT 327***.

> ***1. A Will required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if he be alive and subject to the process of Court. Does this statutory mandate apply even while the execution of the Will by the person by whom it purports to have been executed is not specifically denied or expressly admitted? This is the precise question referred to the***

Division Bench by the learned single Judge for consideration in these Regular Second Appeals arising out of a preliminary decree for partition.

***14.** It is beyond cavil that a Will declaring the intention of a testator shall be attested by two or more witnesses under Section 63(1)(c) of the Indian Succession Act, 1825 (See: Babu Singh v. Ram Sahai (2008) 14 SCC 754). Therefore a Will required by law to be attested shall not be used as evidence until one attesting witness at least (if he be alive) has been called for proving its execution. The above is the mandate contained in the main body of Section 68 of the Act and no exception has been carved out for a Will which is not specifically disputed or expressly admitted.*

23. In the above judgement, the Division Bench of the Kerala High Court had fallen in line with the view expressed by the Hon'ble Supreme Court and in fact, at Paragraph 19 of the judgement, the Kerala High Court has declared the judgement in the earlier Division Bench in Thayyullathil Kunhi Kannan case

referred supra as *perincuriam*.

24. 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."

25. It is clear from the above judgement that the view expressed by the Hon'ble Supreme Court to the extent that Section 68 of the Evidence Act is Mandatory for proof of Will, has been reiterated and the same view has to be once again reiterated in this case also.

26. The above narrative leads to the unescapable

conclusion that both the Courts below erred in acting upon Ex.A6 Will without the same being proved as per the mandate prescribed under the Evidence Act and both the Courts below erroneously acted upon the Will merely based on the stand taken by the defendant. The Additional substantial question of law is answered accordingly in favour of the appellant.

27. This Court is of the considered view that there is no requirement to answer the substantial question of law that was framed at the time of admission of the second appeal, since the answer to that question will be the direct fall out of the answer that has been given to the Additional substantial question of law. In other words, the requirement to answer this substantial question of law will arise only if the Court is going to act upon Ex.A6 Will.

28. The suit itself was filed only based on the Will executed by Chinnaduari Mudaliar. The plaintiff did not plead any other case to derive the source of his right in the suit property

other than the Will marked as Ex.A6. Therefore, there is no occasion for this Court to consider any other alternative source of right in the absence of pleadings and evidence available on record. It therefore goes without saying that the main issue that was taken into consideration and decided, only revolved around the proof of Ex.A6 Will and hence, it will be left open to the plaintiff to initiate fresh proceedings and agitate his rights in the manner known to law. The judgement and decree rendered in this second appeal will not come in the way of the plaintiff while initiating such fresh proceedings and seeking for the relief in the suit property.

29. In the result, this second appeal is allowed and the judgement and decree of both the Courts below are hereby set-aside. Considering the facts and circumstances of the case, there shall be no order as to costs.

23.03.2022

Index : Yes
Internet : Yes
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To

1. The Subordinate Judge, Arni

2.The District Munsif, Arni.

Copy To:-

The Section Officer
VR Section, High Court
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N.ANAND VENKATESH.,J

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SA No.241 of 2015

23.03.2022