IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2024

CORAM :

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

Second Appeal No.339 of 2019
and C.M.P.No.5014 of 2019

1.Marathal (Died)

2.Shanmugam

.. Appellants

(1st appellant died. 2nd appellant brought on record as LR of the deceased Sole Appellant vide Court order dated 02.02.2017 made in C.M.P.No.9537 of 2016 in S.A.SR.No.984 of 2012 by MMSJ)

-Vs-

1.Kanniammal (Died)

2.Chinnammal

3.Ponnammal

4.M.Sureshkumar

5.Velathal

6.Maithili

7.Lakshmi

8.Sivakami

9.K.Rajamani .. Respondents

(R1 – Died, R3 (already on record) and R9 brought on record as LR of the deceased R1 vide Court order dated 23.08.2023 made in C.M.P.No.9203 of 2023 in S.A.No.339 of 2019 by TVTSJ)

Prayer : Second Appeal under Section 100 of Civil Procedure Code, to set aside the judgment and decree of the learned Principal Subordinate Judge at Tiruppur, dated 30.06.2011, in A.S.No.14 of 2009 reversing the judgment and decree of the learned District Munsif – cum – Judicial Magistrate at Palladam, dated 29.01.2009, in O.S.No.235 of 2006.

For Appellants : Mr.R.Srinivas, Senior Counsel
for Mr.S.Sithirai Anandan

For Respondents : Mr.R.Selvakumar - for R3 and R4
: Mr.D.Babu Varadharajan - for R9
: RR 5 & 6 - Not Ready in Notice
: RR 7 & 8 - exparte vide court order dated 06.03.2023
: RR 1 & 2 - Died, Steps taken

Amicus Curiae : Mr.Sharath Chandran

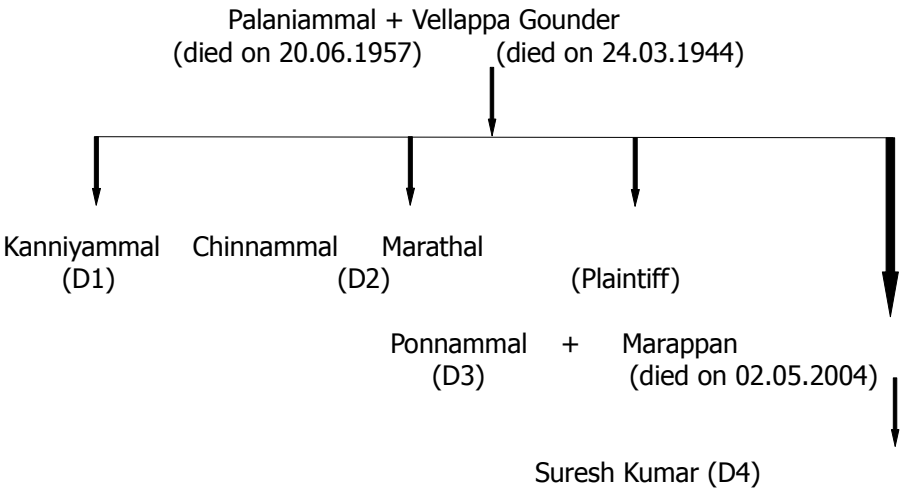
JUDGMENT

The present Second Appeal arises out of the judgment and decree, dated 30.06.2011, passed by the Court of the Principal Subordinate Judge at Tiruppur in A.S.No.14 of 2009 in reversing the judgment and decree of the

Court of the District Munsif–cum–Judicial Magistrate at Palladam in O.S.No.235 of 2006 dated 29.01.2009. The 1st appellant before me is the plaintiff in the suit in O.S.No.235 of 2006.

2. For the sake of convenience, the parties will be referred to as per their rank in the suit.

3. One Vellapa Gounder married one Palaniammal. From the wedlock, three daughters and one son were born. The daughters are Kanniyammal, Chinnammal, Marathal and the son is one Marappan. The plaintiff/Marathal is the youngest of three sisters. For easy understanding, the genealogy chart is extracted hereunder :



4. Palaniammal purchased Item I of the suit schedule mentioned property on 12.05.1946. Item II of the suit schedule mentioned property was purchased by her on 31.07.1947. Both the purchases were made after the death of her husband/Vellappa Gounder on 24.03.1944. There is no dispute that she was the absolute owner of the property.

5. Accepting the relationship between the parties, the plaintiff claimed that as she is the 3rd daughter of Palaniammal and Vellappa Gounder, she is entitled to 1/4th share in the property. She would state that defendant Nos.1 and 2 are entitled to 1/4th shares each and defendant Nos.3 and 4 together should take 1/4th shares. She pleaded that she convened a Panchayat on 20.07.2006 calling upon the defendants to equitably divide the property and to hand over her share. As they did not do so, she presented a suit for partition.

6. On being served with the summons, defendant Nos.1 and 2 filed a written statement in common and defendant Nos.3 and 4 filed a written statement in common.

7. The case of defendant Nos.1 and 2 supports the case of defendant Nos.3 and 4. They accepted their relationship with the plaintiff but their simple plea was that on 10.08.1956, Palaniammal executed an unregistered "WILL" bequeathing the property in favour of her only son/Marappan. They would also plead that on the death of Palaniammal on 20.06.1957, Marappan took possession of the property and he had been in enjoyment of the same ever since till his death on 02.05.2004.

8. On the basis of these pleadings, the learned trial Judge framed the following issues :

"1. தாவாச் சொத்துக்கள், 12.05.1946 தேதியிட்ட கிரைய ஆவணம்.615/1946, மற்றும் 31.07.1947 தேதியிட்ட கிரைய ஆவணம் 1227/1947-ன்படி பழனியம்மாள் என்பவருக்கு சுயமாக பாத்தியப்பட்டதா?

2. தாவாச் சொத்துக்களை, பழனியம்மாள் 10.08.1956 தேதியில் ஒரு "உயில்" ஆவணத்தின்படி தனது மகன் மாரப்பன் என்பவருக்கு எழுதிக் கொடுத்துவிட்டாரா?

3. தாவாச் சொத்துக்களில் வாதி 1/4 பாகம் கோரவும், தனி சுவாதீனம் கோரவும் உரிமை இருக்கிறதா?

4. வாதிக்கு கிடைக்கும் பரிகாரம் என்ன?"

9. On the side of the plaintiff, she examined herself as P.W.1 and one Palani Gounder as P.W.2. She marked Ex.A1 to Ex.A3. On the side of the defendants, the 3rd defendant/Ponnammal examined herself as D.W.1 and the 4th defendant/M.Sureshkumar as D.W.2. The attesting witness of the "WILL" of Palaniammal was the eldest daughter/Kanniammal and in that capacity, she was examined as D.W.3. The 2nd defendant/Chinnammal was examined as D.W.4 and one Uppiliappan was examined as D.W.5. On the side of the defendants, Ex.B1 to Ex.B8 were marked. Ex.B1 and Ex.B2 are the original sale deeds under which Palaniammal purchased the properties on 27.04.1946 and 31.07.1947. The revenue records were marked as Ex.B3 and Ex.B4, and the original of the "WILL" of Palaniammal was produced as Ex.B5 by D.W.1. The other records are the death and legal heirship certificates of Marappan, and Ex.B8 are revenue records reflecting mutation from the name of Marappan to the name of defendant Nos.2 and 3.

10. The learned Trial Judge, on the basis of his appreciation of oral and documentary evidence, came to the conclusion that the "WILL" of Palaniammal had not been proved by D.W.3, and therefore, he held that the partition suit would have to be decreed as prayed for.

11. On appeal, on the basis of the very same evidence, the learned appellate Judge took a diametrically opposite view, and was satisfied that the "WILL" had been proved. He further held that the "WILL", being more than 30 years old as of the date of the production before the Court, is entitled to the benefit of Section 90 of the Indian Evidence Act. Therefore, he allowed the appeal and dismissed the suit.

12. Against this reversal of the judgment, the present Second Appeal has been presented before this Court.

13. This Court issued notice regarding admission on 12.03.2019, and Mr.R.Selvakumar entered appearance on behalf of the contesting defendant Nos.3 and 4.

14. The Second Appeal was admitted on 12.12.2023 on the following substantial questions of law :

> *"Whether the First Appellate Court is justified in invoking the presumption available to the old documents under Section 90 of Evidence Act for the Ex.B5, Will propounded by defendants?"*

15. During the course of the appeal, as the appellant had passed away, her legal heir was brought on record for whom Mr.S.Sithirai Anandam appears. Similarly, Kanniammal/1st defendant had passed away and her legal heirs have also brought on record.

16. On the basis of question of law that had been framed, I have encountered a doubt whether "WILL" can be proved by way of presumption under Section 90 of the Indian Evidence Act. Consequently, I appointed Mr.Sharath Chandran, an *amicus curiae* in the matter.

17. I heard Mr.R.Srinivas, learned Senior Counsel for Mr.S.Sithirai Anandam, appearing on behalf of the appellants, Mr.R.Selvakumar, appearing on behalf of the 3rd and 4th respondents, Mr.D.Babu Varadharajan, appearing on behalf of the 9th respondent and Mr.Sharath Chandran, the learned amicus.

18. During the course of the appeal, Mr.R.Srinivas would suggest that the question of law, originally framed, can be in addition to the fundamental question that he would raise as follows :

"When Ex.B5 "WILL", dated 10.08.1956, had not been proved in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, whether the lower appellate Court is correct in law in upholding Ex.B5 "WILL"? "

19. According to Mr.R.Srinivas, in terms of Section 63 of the Indian Succession Act, a "WILL" must be attested by two or more witnesses, each of them should see the testator sign or affix her sign on the "WILL". In addition, each of the witnesses shall sign the "WILL" in the presence of the testator. He would point out that the manner of proof of execution and attestation under Section 63 of the Indian Succession Act will have to be proved by examining at least one attesting witness and the evidence of the attesting witness must satisfy the requirements of Section 68 of the Indian Evidence Act.

20. He would take me through the evidence of D.W.3/Kanniammal and would contend that her evidence does not satisfy the requirements of the aforesaid Sections. He would plead that the consistent plea of all the defendants is that Marappan got the property absolutely, whereas, a perusal

of Ex.B5 would show that Marappan only got a life estate, and the estate vested absolutely only to the sons to be born to Marappan. He would state that the defendants themselves are not clear about the "WILL", and this is the circumstance which the Court would have to look into.

21. He would then draw my attention to the evidence of D.W.5/Uppiliappan to submit that when a loan was raised over the suit schedule mentioned properties, the "WILL" was not handed over to Mr.Uppiliappan and it was only Ex.B1 and Ex.B2 that had been given as security for the loan.

22. Reading the evidence of D.W.2, he would plead that at the time of transfer of Patta in favour of defendant Nos.3 and 4, the "WILL" had not been produced. He would plead as a sheet anchor of his argument that there is a delay in projection of the "WILL", namely from the year 1957 to 1996, when Marappan succeeded before the revenue authorities in mutating the revenue records and the explanation on the "WILL" not having been given earlier, it is a suspicious circumstance to reject the "WILL".

23. He would read out the evidence of D.W.1 and D.W.3 to state that there is an inherent contradiction on who had possession of the "WILL" and therefore, this would be an additional circumstance supporting the plea of the "WILL" having been fabricated by the 1st defendant in order to help her daughter/the 3rd defendant and her grandson/the 4th defendant.

24. He would then say that when these suspicious circumstances exist, the defendants should have examined one Rangappa Gounder, who is the alleged 2nd attesting witness, and that not having been done, it is fatal to the case of the defendants. Finally, he would plead that the "WILL" is artificial in its disposition and therefore, it ought not to be relied upon by the Court.

25. Rejecting these arguments, Mr.R.Selvakumar would submit that D.W.3/the attesting witness had examined herself and in clear and categorical terms deposed about the testator/Palaniammal signing the "WILL" and affixing the signature. He would state that much weight had been thrown by the trial Court about the inability of D.W.3 to speak about the scribe, and that is irrelevant for the facts of the case.

26. Relying upon the age old principle that where a person is not specifically confronted with the evidence, it is deemed to be admitted, he would point out that no suggestion had been put on behalf of the plaintiff regarding the presence of D.W.3 or the fact that she did not see the execution or attestation. On these grounds, he would say that the trial Court had misappreciated the evidence that had been let in before it, whereas, the lower appellate Court had correctly appreciated the evidence as the final Court of law and fact, and therefore, he would seek for this appeal to be dismissed.

27. In reply, Mr.R.Srinivas would rely upon the judgment of the Supreme Court in ***Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee [AIR 1964 SC 529]***, in particular Paragraph No.5 to state that if the requirements of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act are not complied with, the only option available to the Court is one of rejecting the "WILL". He would therefore state that here is a case which would directly attract the application of this authority, and would submit that this Court must allow the appeal.

28. I have carefully considered the submissions made on either side

and have perused the materials on record.

29. The case that is presented is a simple suit for partition. To defeat the claim of the plaintiff, the defendants 3 and 4 have projected a 'WILL'. There is no dispute on the title to the property nor is there any dispute in the relationship between the parties. If I were to come to the conclusion that Ex.B5 'WILL' has been proved, then necessarily the Second Appeal would have to be dismissed. On the contrary, if I were to come to a conclusion that Ex.B5 has not been proved, the plaintiff will be entitled to a decree for partition. The issue that I have to deal with is with regard to the truth and genuineness of Ex.B5.

30. This Court, while dealing with a 'WILL' sits as a Court of conscience and not as a Court of suspicion I cannot and should not start with a presumption that the 'WILL' is not genuine or tainted with suspicious circumstances. Once I come to a conclusion that the 'WILL' has been proved in terms of Section 63 of the Indian Succession Act, then it falls on the appellant / plaintiff to prove there existed suspicious circumstances at the time of execution of the 'WILL', which would have to be explained

satisfactorily by the propounders.

31. Palaniammal and Vellappa Gounder had three daughters and one son. The family was residing in the rural area of Tamilnadu. Palaniammal's husband Vellappa Gounder passed away on 24.02.1944 when Marappan, the predecessor-in-title of defendants 3 and 4, was only two years old. Palaniammal was suffering from breast cancer and had taken treatment at the General Hospital at Coimbatore in and around 1955 and 1956. The couple had their three daughters. All of them had been married and each of the daughters had also begotten children. Therefore, the only person who, in case of the death of the mother, would be an orphan and not have been provided for would have been their son, Marappan.

32. It is the case of the defendants that Palaniammal had decided to write a “WILL” and had engaged the services of a scribe and had summoned the attesting witness by name Rangappa Gounder from a neighbouring village called Vagairapalayam. The “WILL” was written by the scribe in the presence of the daughters as well as the other attesting witness. They would plead that as Palaniammal and Vellappa Gounder had provided sufficiently

for their daughters, Palaniammal decided to bequeath her properties in favour of Marappan.

33. If I had the power to see through the impenetrable clouds of time, it would have been easy for me to come to a conclusion. The Almighty has not vested with me such powers. By the time the dispute that had arisen in the family, nearly 50 years had gone by from the date of death of Palaniammal. Palaniammal died on 20.06.1957 and the suit came to be filed on 26.07.2006. I have to take into consideration while dealing with "WILL", the length of time that had lapsed from the time it was written to the time the attesting witness deposed about it in 2008. I necessarily would have to give leeway to the lapses in the memory of the attesting witness and still, if I find out the evidence satisfies the conscience of the Court, I have to uphold the "WILL".

On Artificiality

34. From the evidence of P.W.1, D.W.3 and D.W.4 viz., the sisters of Marappan, it becomes clear that all of them were married and settled even during the lifetime of their mother. The evidence of the three sisters of

Marappan also points out to the fact that Marappan was unemployed, as he ought to be, since he would have been 12 to 14 years old when Palaniammal died. It is but natural for a mother who has lost her spouse 13 years earlier, leaving behind him, herself, three daughters and a son aged about 2 years, to make some provision for her son. Palaniammal is no exception. By the time she wrote the "WILL", she was suffering from cancer and therefore she would have obviously wanted to make some provision before she went to meet her maker. She writes in Ex.B5 that she is making a provision for the son, however he will not have a right of alienation but only will have a life estate and the properties would vest absolutely with the sons born to Marappan.

35. From the situation that was Palaniammal was placed, I do not find anything artificial in a mother making a provision for her son's survival, especially a minor son, who had lost his father at the age of two. I also notice that the daughters were settled and were happily living with their respective husbands. The family is not a rich one, but with limited holdings. Therefore, she decided to bequeath the property in favour of Marappan.

36. It is here that I have to consider the argument of Mr.R.Srinivas that

all the defendants presumed that the property absolutely vested with Marappan when it was not so in terms of Ex.B5. A careful perusal of the written statement that had been filed by the defendants 3 and 4 would show that it was never pleaded that the property absolutely vested with Marappan. All that they would only state is that Palaniammal had bequeathed the property to Marappan. The fact that the bequeath existed, cannot be disputed. In any event, since the suit has arisen from mofussil area, I cannot demand the same high standards that would be demanded from the pleadings which arises in a city. Nonetheless, my reading of the written statement does not support the plea of Mr.R.Srinivas that the defendants had pleaded that the property absolutely belonged to Marappan.

37. Palaniammal was careful in not giving the entire property to her minor son. She had been a wise woman. She gave life estate to Marappan and vested the remainder to the grandsons. By this, she prevented Marappan from alienating the property during his life time. I am able to see sense in the same. As pointed out above, because Marappan was about 12-14 years old on the death of his mother, he would have been younger at the time of writing the “WILL” which was an year earlier. Therefore, I do not find

anything artificial in the bequeath that has been made by the mother who was suffering from cancer, in favour of her only son.

Custody of the 'WILL'

38. Turning to the point of custody of the "WILL", the original of Ex.B5 was produced by the defendants. D.W.3, during the course of her examination has specifically deposed that the "WILL" had been handed over by her to Marappan on the death of their mother. She did so on the advice of the village elders. Had D.W.3 / first defendant produced the "WILL", perhaps I could have accepted the argument of Mr.R.Srinivas. However, the "WILL" was produced by D.W.1 / Ponnammal, wife of Marappan, in whose custody the "WILL" was kept. It is natural that the wife has the custody of the "WILL" on the death of her husband. The original being in her custody does not in any way shake the case as regards the possession of the "WILL" as pleaded by the defendants.

39. Mr.R.Srinivas had invited my attention to the evidence of D.W.1 and D.W.3 to argue that there exists a contradiction on the possession of the "WILL". I do not find any. D.W.3 had deposed that she had handed over

the "WILL" to Marappan and D.W.1 has stated that the "WILL" was kept by her husband and herself and has been produced in the court. The preponderance of probabilities point out the sequence of events being that, after writing the "WILL", it came into the possession of the eldest daughter in the family ie., the third defendant. She had handed it over to her brother on the death of the mother and it was kept by Marappan. On his marriage, it came into joint possession of himself and his wife. Since there is no contradiction in the evidence of D.W.1 and D.W.3, the submission of Mr.R.Srinivas on the point that there are suspicious circumstances on the original being produced by D.W.1 does not deserve acceptance.

Attestation

40. Insofar as the attestation is concerned, as I have already noted, the "WILL" is of the year 1956 and the evidence in the suit was tendered in the year 2008. A Court cannot expect a swiss clock kind of precision in the evidence that is given by the attesting witness, especially after the lapse of 50 years. In fact, if D.W.3, the attesting witness had recalled the date, time and the other intricate details of the attestation, I would have disbelieved her evidence because, by no stretch of imagination a person, unless and until she

possesses the power of recall of a super computer, can give all details after the lapse of half a century.

41. On the date of execution of the document, D.W.3 was in her late twenties. When she gave the evidence, she was aged about 77. Despite the same, she would depose clearly. The relevant portions of her evidence are extracted hereunder:

> *"அந்தச் சொத்தைப்பொருத்து என் தாயார் பழனியம்மாள் அவரது மகன் மாரப்பனுக்கு வீட்டிலேயே வைத்து உயில் ஆவணம் எழுதி வைத்தார்.*
>
> *... ...*
>
> *என் தாயார் ஒரு உயில் எழுதி அதில் ரேகை வைத்தார்கள். படித்துப்பார்த்து நானும் ரேகை வைத்தேன். உயில் ஆவணத்தில் மூன்று பக்கத்தில் உள்ள ரேகைகள் என் தாயார் பழனியம்மாளுடையது. உயில் ஆவணத்தில் 3 பக்கத்தில் என் தாயாரின் ரேகைக்கு கீழ் நான் ரேகை வைத்துள்ளேன். உயில் ஆவணத்தின்படி சொத்து மாரப்பனுக்குச்சேரும் என்று என் தாயார் எழுதி வைத்துள்ளார்.*
>
> *... ...*
>
> *என் தாயார் உயிருடன் இருந்த காலத்தில் அவர் இறப்பதற்கு முன்பு மாரப்பனுக்கு உயில் ஆவணம் எழுதிவைத்துள்ளார். எந்த தேதியில் என்ன வருடம் உயில் ஆவணம் எழுதினார் என்று*

தெரியாது.

... ...

உயில் ஆவணம் எழுதும்போது நானும் என் சகோதரிகளும் மாரப்பனும் என் கணவரும் இருந்தோம். உயில் ஆவணத்தில் நான் ஒருத்தி மட்டும் சாட்சி கையெழுத்து போட்டேன்.

... ...

உயில் ஆவணம் எழுதியவரின் வயது சுமார் 50/60 வயதிருக்கும். வாகரையாம்பாளையத்தைச் சேர்ந்தவர் உயில் ஆவணத்தில் சாட்சி கையெழுத்து போட்டுள்ளார். உயில் ஆவணம் எழுதியவரை எங்கிருந்து கூட்டி வந்தார்கள் என்று தெரியாது."

42. D.W.3 has been cross examined in detail by the plaintiff. She has clearly deposed that Palaniammal had made the necessary preparation for execution of the "WILL". She had summoned the scribe for writing the same, who, on the date of execution of the document would have been 50 to 60 years old. She would state that, when her mother wrote the "WILL", her children were around her and she had affixed her left thumb impression on the "WILL" and thereafter D.W.3 affixed her left thumb impression. D.W.3 would also plead that the "WILL" was attested by one gentleman from Vagairapalayam. This, in my view, satisfies the requirements of Section 63(c) of the Indian Succession Act. The execution of the "WILL" by

Palaniammal is noted. D.W.3 has deposed there were two attesting witness to the "WILL" and that Palaniammal affixed her left thumb impression followed by D.W.3 and by the other attesting witness from Vagairapalayam.

43. Giving some room for the lapse of time, I do not find anything undesirable or artificial in the evidence that has been given by D.W.3. In fact, no suggestion has been put on the attestation or rather the lack of it during the cross examination of D.W.3. There is no cross examination on the non-disposing state of mind of Palaniammal, nor is there a suggestion by the plaintiff that the fingerprint found on the "WILL" is not that of Palaniammal. If the argument that is raised by Mr.R.Srinivas in the Second Appeal that the document had been fabricated by the first defendant in order to benefit her daughter the fourth defendant is to be true, then such questions would have necessarily been put to her.

44. On this aspect, I have to refer to the classic judgment of the Calcutta High Court in ***A.E.G.Carapiet -vs- A.Y.Derderian (AIR 1961 Cal 359),*** which has been consistently approved and applied by Supreme Court in ***M.B.Ramesh -vs- K.M.Veeraje Urs and Others, (2013) 7 SCC 490.*** A

Division Bench of Calcutta High Court, following the practice in England, had held that in case there is no cross examination on crucial aspects of the facts in issue, then the Court can assume that the said evidence is admitted. From the above discussion, I am clear that D.W.3 had not only proved the execution, but also the attestation of the "WILL" by competent witnesses.

45. The position of law as laid down by the Supreme Court in ***M.B.Ramesh -vs- V Veeraje Urs (2003 (7) SCC 490)***, in particular paragraphs 23 to 25 directly applies to the facts of the present case. As pointed out in that judgment, a Court dealing with a "WILL", which is long separated from the date of execution to the date of demand of proof, the Court is entitled to, by necessary implications and inferences, as to the proof of attestation by the other witnesses.

Suspicious Circumstances

46. Facing this difficulty, Mr.R.Srinivas would submit that the "WILL" is riddled with suspicious circumstances as it surfaced after 40 years and it had not seen the light of the day at least from 1957 till 1996 and even thereafter when loans were taken from D.W.4 for the purposes of the

family expenses. He urges that though one attesting witness is sufficient to be examined, in light of these gaps in the evidence, the defendants ought to have examined Rangappa Gounder, the other attesting witness. According to Mr.R.Srinivas, these amount to suspicious circumstances, which should constrain this Court to reject Ex.B5.

47. The plea of Mr.R.Srinivas that there are suspicious circumstances surrounding the "WILL" does not deserve much of discussion for the simple reason that, all the circumstances pleaded by Mr.R.Srinivas are subsequent to the execution of the "WILL". Suspicious circumstances, as understood in law of probate, means that they should exist at the time of execution of the "WILL". The law is not unaware of the concept of 'shy WILL'. These are a category of "WILL" which see the light of the day only when a dispute arises between the parties.

48. Here, it may be relevant to cite the decision of the Calcutta High Court in the case of **Moti Lal Shaw v. Mandadari Devi, AIR 2005 Cal 10,** wherein the Court enunciated that the long delay in presentation of "WILL" need not always raise a suspicious on the execution of the "WILL". In such

cases, the Court must consider the totality of the circumstances in order to assess if the long lapse of time in the presentation of "WILL" was to evade the drawing of any adverse influence against the "WILL".

49. P.W.1 viz., the plaintiff has admitted in clear and categorical terms that Marappan had mutated the revenue records like Patta, Chitta and Adangal to his name from 1957 till his death on 02.05.2004. It is also not in dispute that the plaintiff and Marappan were residents of the same village viz., Sengothipalayam. From the records, it is clear that at least from 1996 Marappan asserted his independent right over the property. As long as Marappan was alive, his sister / the plaintiff did not take any steps against his assertion of right or possession over the suit schedule mentioned properties. The fact that Marappan did not utilize the "WILL" before D.W.4 for the purpose of raising a loan in fact supports the case of the defendants. In Marappan's mind, he was very clear he was the owner of the property and therefore, he only handed over original sale deeds standing in the name of his mother for the purpose of raising the hand loan. It was not a case of mortgage by deposit of title deeds. It was a simple hand loan for Rs.3,50,000/-. Original documents had been handed over to D.W.4, a friend

of the fourth defendant, as a security for raising the loan. As between a debtor and a creditor, the creditor would have been satisfied if he gets some security for the amount he is advancing and he need not always necessarily get the documents when the assertion of Marappan is that he is the owner of the property. It is not that D.W.4 is an utter stranger. As is seen from the records, D.W.4 is a close friend of the fourth defendant. These circumstances reveal that the presentation of the "WILL" after 40 years is not to evade the drawing of any adverse interference, but because the necessity to present the same did not arise till then.

50. When Section 68 of the Indian Evidence Act makes it very clear that when there are several attesting witnesses, examination of one would be sufficient for the purpose of proof of the "WILL" executed under Section 63(c) of the Indian Succession Act. D.W.3 is an attesting witness. Hence, the fact that Rangappa Gounder was not examined becomes irrelevant. Yet again, I have to note that the "WILL" was executed in the year 1957 and the dispute arose only in the year 2007. Therefore, the circumstances that have been pointed out to the Court that suspicious circumstances existed in the execution of the "WILL" of Palaniammal, does not excite any suspicion in

me.

51. A further fact that I have to take note of is that the plaintiff pleaded she is in joint and constructive possession of the property along with the other defendants. This plea has obviously been raised in order to avoid payment of court fee in terms of Section 37(1) of the Tamil Nadu Court Fees and Suit Valuation Act, and to take the benefit of Section 37(2). Had the plaintiff Marathal given any evidence that she was in joint possession by the production of joint Patta or Adangal or some village accounts to show that she had also contributed her labour in cultivating the land, I would have called upon the defendants to substantiate their case further. Though there exists a plea of constructive possession, from Exs.A1 to A3 (Ex.A3 in fact stands in the name of Marappan), nothing has been forthcoming from the plaintiff in order to substantiate her plea. This shows that, in the light of Exs.A3, B3, B4 and B8, it was Marappan and after him, the defendants 3 and 4 who have been in possession and enjoyment of the property. From the above discussion, I do not find any merit in the appeal. The additional question of law framed by me yesterday is answered against the appellant and in favour of the respondents.

“WILL”, Section 90 and Judicial Imbroglio

52. The substantial questions of law that has been framed in this appeal at the time of admission is whether a "WILL" can be proved under Section 90 of the Indian Evidence Act. Since there were conflicting views, I appointed Mr. Sarath Chandran as amicus curiae to assist this Court in rendering the verdict on this position.

53. The learned amicus curiae took me through the position of law across the Atlantic as well as the position that prevails in the United Kingdom and India. He also traced the history of treatment of Section 90 by the courts through ages. This court has to appreciate the excellent research work done by the learned amicus curiae.

54. Insofar as the United States is concerned, the position of law is that if a document is more than 30 years old and are not affected by any alteration, a mere production of the document is sufficient. The attesting witnesses, who are called subscribing witnesses in the United states, are presumed to be dead. The law that governs that country states that the mere production of the said document is sufficient and the document proves itself.

55. Curiously enough this presumption that is raised for ancient documents including "WILLS" persist, even if evidence is let in by the contesting party that the subscribing / attesting witnesses are alive. The law of presumption has been developed to that effect in that country as the law presumes that the subscribing witness is dead.

56. Insofar as England is concerned, more or less the same rule is followed because the Court had viewed it would be "*on the great difficulty, nay, impossibility, of proving the handwriting of the party after such a lapse of time*"

57. James Fitzjames Stephen in his Digest of the Law of Evidence would state that if a document purports to or proves to be more than 30 years, is produced from any custody, which the judge considers as proper, the Court has to presume the signature and every part of such document which purports to be in the handwriting of the particular person is of that person and this presumption extends to execution as well as the attestation of

the said document.

58. The earliest report, that one can refer to, is the judgment in ***Doe Oldham v. Wolley, (1828) 8 KB 22***. Lord Tenterden C.J. viewed the rule of computing the thirty years from the date of a deed is equally applicable to a "WILL". He would state that the principle, on the basis of which the deeds are received in evidence without the proof of execution, is that the witnesses may be presumed to have died. It was argued before him that when the attesting witnesses are proved to be alive, then they must be called. This argument was rejected by the Lord Tenterden C.J. "*as a trap for a non-suit*". He holds that the party producing the "WILL" might not know about the existence of the witness until the time of the trial and the defendant, who would have come to know the fact that the attesting witnesses are alive, would have kept this knowledge as a secret in order to defeat the plaintiff. On this conclusion, he rejected the appeal. It therefore becomes clear that the courts in England have always presumed that the execution and attestation proves itself without examination of an attesting witness, if an ancient document is produced from a proper custody.

59. Yet again this issue arose before the Court of Common Pleas in 1862. It was the case of ***Andrews versus Motley 1862 NS 128***. Lord Williams J. dealing with this issue held as follows:

> *"The rule that in instrument more than thirty years old shall be presumed to have been duly executed, if it purports so to have been, is founded on the great difficulty that must arise in some cases, and the impossibility in many others, after the lapse of time, of proving the handwriting of parties making the instrument or attesting it. Therefore it is that the execution is to be presumed, provided the instrument is produced from such a custody as might naturally be expected."*

60. The Supreme Court of United States dealt with a similar issue in ***Elisha Winn and Others vs. William Patterson, 1835 9 P 516***. The Judgment was pronounced by no less than the high authority of Justice Joseph Story, the great Constitutionalist and the author of books on equity.

He would hold, after referring to Phillips on Evidence and Starkie on Evidence, that the presumption of execution and attestation of a document after a 30 year period is fixed, due to the experience of the Court that the witnesses may be dead. He found that the rule was adopted for common convenience and since it would be difficult for proving the due execution of a deed after the long interval of time. The learned Judge went on to hold that the said presumption not only applies to the grants of land, but to all other deeds including "WILLs" as long as it comes from the custody of the proper party claiming to it or one entitled to its custody.

61. Since I have travelled abroad to see the position of law as far as the United States and the United Kingdom, it would be in the fitness of things that I also refer to the position of law that prevails in the teardrop island, Sri Lanka.

62. A Division Bench consisting of Mr. Wendt, J. and Mr. Sampayo, A.J. held that the word "document" defined in the Ceylon Evidence Ordinance is large enough to include a "WILL" and therefore, the

presumption created by Section 90 applies to a "WILL" also. In order to arrive at this conclusion, they would refer to Section 90 of the Indian Evidence Act and the judgment of Calcutta High Court in ***Mukkerji v. Pal Sritiranna, I.L.R. 5 Cal 886***. The Division Bench followed the view of the Calcutta High Court and held that the presumption must be drawn with great caution and when the document is free of any suspicion of being fabricated.

63. I shall now turn my attention to the primary source of law namely Section 90 of the Indian Evidence Act. Section 90 reads as follows:

> **"90. Presumption as to documents thirty years old.**
>
> Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purport to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
>
> Explanation. - Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be;

but no custody is improper if it proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This explanation applies also to Section 81."

64. The word "document" as found under Section 90 has to be understood as per Section 3 of the Indian Evidence Act. The definition is wide. The word "document" means any matter expressed or described upon any substance by means of letter, figure or marks or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

65. A reading of Section 90 shows that it does not exclude a "WILL" from its operation. Insofar as the "WILL" is concerned, it requires execution and attestation. As per Section 90, if any document which is more than 30 years old and it is produced from proper custody, the Court may presume that the signatures on every part of such document is that of the person who executed the document and if it is a document which requires execution or attestation, it was duly executed and attested by the persons who is said to

have executed and attested this document. Therefore, by the very texture of Section 90, documents which require attestation, such as mortgage, settlement deed or "WILL" are not excluded. This Section had been grafted into the Indian Evidence Act only as a rule of necessity and convenience.

66. There are and will be cases where it will be difficult for a person, relying upon a document, to prove the same by direct evidence as in examination of attesting witnesses. This Section does away with that difficulty that a party might encounter in proving the handwriting, execution and attestation after a lapse of three decades and above.

67. At this juncture, I would usefully refer to the judgment of the Calcutta High Court in ***Excowree Singh Roy & Others v. Kylash Chunder Mookerji, (1873) 21 WR 45 = CDJ 1873 Cal HC 001.*** Justice F.A.Glover observed as follows:

> *"... Section 90 of Act 1 of 1872 (the Evidence Act) provides that where a document is or purports to be more than 30 years old, if it be produced from what the Court considers to be produced from what the Court considers to be proper custody, it may be*

presumed that it was executed and attested by the parties whose signatures it bears. Now, this Kubooleut is dated in 1235, and therefore purports to be about 45 years, old and a witness, a mohurrir of the plaintiff's swears to its having been in his custody as keeper of the plaintiff's records for the time of his service, namely, for the last 15 years. It this man's evidence is credible it shows that the deed has come from proper custody, namely, from the custody of the plaintiff's servant, who was entrusted with the keeping of the zemindaree papers. There was no necessity for requiring direct evidence of the genuineness of the kubooleut."

68. At this stage, I would have to note here that the legislature of Uttar Pradesh has amended Section 90 and has reduced the years of presumption from 30 years to 20 years. May be there is a relationship between life expectancy of a person and the purpose of fixing a certain period for the document to get the benefit of Section 90.

69. To what extent can such a presumption be raised? The presumption under Section 90 is not a wide one. The presumption that the

Court can draw from the document is only with respect to signature, execution or attestation of the document. The presumption does not extend to the correctness of the statement found in such documents nor that the contents of the documents are true. Such statement regarding past events and the contents would have to be proved like any other facts. See, ***Mohmedbhal Rasulbhai Malek and others v. Amirbhai Rahimbhai Malek, 2000 SCC Online Guj 200.***

70. Having dealt with these preliminaries, I will now turn to the views of the Privy Council, the Supreme Court and this Court, while applying Section 90 to "WILLS" and otherwise.

71. The Privy Council, dealt with this issue in ***Basant Singh v. Brij Raj Saran Singh, ILR (1935) 57 All 494 (***Privy Council). It held that a Court can presume about the attestation and execution of the "WILL" under Section 90, provided it is produced from a proper custody. Having laid down this proposition, they went on to hold that the said presumption cannot be drawn to a copy. They would approve the view of the Madras High Court in ***Seethayya v. Subramanya Somayajulu, (1929) I.L.R., 52 Mad., 453***.

72. The Privy Council was yet again troubled with this position in ***Munnalal v. Kashibai, (1945-46) 73 IA 223***. The bench consisting of Lord Simonds, Mr.M.R.Jayaker and Sir John Beaumont was called upon to decide whether the presumption under Section 90 of the Indian Evidence Act is available to a “WILL” and if such presumption extends to the presumption of testamentary capacity of the testator. Answering this issue, the board held that the presumption under Section 90 would apply to a “WILL” and this presumption extends to even the testamentary capacity of the testator. They reached this conclusion because of the express provision under Section 90 which states that the “WILL” is "duly executed and attested". They would also rely upon Section 114 of the Indian Evidence Act to hold that a Court may presume the existence of the fact which is likely that a man who performs a solemn and rational act of the execution of the “WILL” in the presence of the witnesses does so, since he is sane and understands what he is about to do.

73. These judgments were tested before the Supreme Court in ***Sital***

Das vs. Sant Ram and others, 1954 1 SCC 654. This is a judgment which was rendered by four judges of the Supreme Court. Mr.Justice B.K.Mukharjea, speaking for the Mr.Justice Vivian Bose, Mr. Justice Ghulam Hasan and Mr. Justice T.L.Venkatarama Aiyer held that the view that had been taken in Basant Singh cited supra is a correct. In other words, they had approved the view that the presumption under Section 90 applies to the execution and attestation of the "WILL" and also the testamentary capacity of the testator, but the same benefit cannot be extended to secondary evidence under Section 65, if no foundation for the receipt of the said document had been placed before the Court.

74. The view taken by the Privy Council in ***Basant Singh's case*** was again approved by the three Judges bench of the Supreme Court in ***Kalidindi Venkata Subbaraju v. Chintalapati Subbaraju, AIR 1968 SC 947***. Mr.Justice Shelat, speaking for the bench, held that the view taken in ***Basant Singh***'s case that the presumption is not available to a certified copy is correct, but did not disagree with the view that the said presumption cannot be drawn to an original "WILL". The position that the presumption is

available to the "WILL" stood the test of time till 2009.

75. In 2010, a two Judges bench of the Supreme Court in ***Bharpur Singh v. Shamsher Singh, (2009) 3 SCC 687*** held that presumption under Section 90 is not available to a "WILL". A careful reading of ***Bharpur Singh***'s case would show that the attention of the learned Judges had not been drawn to the position of law laid down by the Supreme Court by the four and three Judges benches and also that of the Privy Council.

76. Subsequently, the two Judges bench in ***M.B. Ramesh v. K.M. Veeraje Urs, (2013) 7 SCC 490*** and another two Judges bench in ***Ashutosh Samanta v. Ranjan Bala Dasi, 2023 SCC OnLine SC 255*** held that the presumption of a document, which is more than 30 years, is not attracted to a "WILL".

77. I have gone through the judgment in ***M.B.Ramesh***'s case carefully. I find that in the facts of that case, the attesting witness was examined as PW2 and the Court was satisfied with the evidence of the attesting witness. Even before that bench, the view of the four Judges bench of the Supreme

Court has not been placed for consideration. The same situation prevails even in the latest view expressed by the Supreme Court in ***Ashutosh Samanta's*** case referred to *supra*. As would be seen later, if the attesting witness has been examined, the presumption under Section 90 will not arise. This is because Section 90 of the Evidence Act has made a specific departure from the position in the United Kingdom and the United States of America.

78. Turning now to the view of this Court, I find several judgments prior to 2009 holding that the presumption under Section 90 regarding "due execution" and "attestation of a document" had been extended to a "WILL" also. The only limitation being the same to be produced from a proper custody. As to whether the custody is proper or not is a matter which depends on the facts and circumstances of each case. I do not want to repeat this position other than giving a list of judgments, which had held that such presumption is available to a "WILL":

(a) ***Swarna Kotayya v. Karacheti Vardhamma, AIR 1930 Mad 744***;

(b) ***Gaday Venkata Ratnam v. Gadey Sitaramayya, AIR 1950 Mad 634***;

(c) ***Celestine Silva Bai v. Josephine Noronha Bai, AIR 1956 Mad 566***;

(d) ***Nammalwar v. Appavu Udayar, AIR 1960 Mad 283 (DB)***;

(e) ***Dhanapal Chettiar v. Govindaraja Chetty,*** **(1961) 74 LW 261**;

(f) ***M. Gurulingam v. Nityanandan, 2000 SCC OnLine Mad 931***; and

(g) ***Murugayee v. Suguna Sambandam, 2011 5 CTC 813***.

79. The change in position of law that the presumption under Section 90 is not available to a "WILL" entered the precincts of this Court only after the judgment in ***Bharpur Singh***'s case. The list of these cases are as follows:

(a) ***M.R. Ramamurthy v. Radha, (2010) 6 CTC 589***;

(b) ***Govindaraj v. Ramadoss, (2011) 3 CTC 433***;

(c) ***N. Manickam v. R. Saraswathi, AIR 2017 Mad 35***;

(d) ***Vasantha v. Thirugnanammal, 2017 SCC OnLine Mad 22395***;

(e) ***Dakshinamurthy v. Dhanabal, 2021 SCC OnLine Mad 2798***; and

(f) ***Madhivanan v. Dhanaraj, S.A.No.559 of 2017 dated 12.04.2024***.

80. I am alive to the situation that my brother Mr. Justice P.B.Balaji has granted leave to file an appeal under Section 109 of the Code of Civil Procedure on the very issue that I am answering.

81. At that stage, I asked myself a question as to why I am proceeding further to answer this issue. If there are conflicting views of the Supreme Court, should that Court be troubled for a solution on all occasions? I think not. The way found has been shown by the Supreme Court itself. This is by virtue of the judgment of the Supreme Court itself in ***Pandurang Kalu Patil v. State of Maharashtra, (2002) 2 SCC 490***. Mr. Justice K.T.Thomas speaking for himself and Mr. Justice S.N.Phukan approved the view taken by a Full bench of Bombay High Court in ***State of Bombay v. Chhaganlal Gangaram Lavar, AIR 1955 BOM 1***. I only have to extract the said

paragraph for the lucidity and clarity of the judgment which cannot be added to by me. Mr. Justice M.C.Chagla held as follows:

> *"... so long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are still binding upon us, and when we say that the decisions of the Privy Council are binding upon us, what is binding is not merely the point actually decided but an opinion expressed by the Privy Council, which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given."*

82. When the Privy Council has consistently taken a view that the presumption of due execution and attestation under Section 90 of the Evidence Act is available to a "WILL" and it also includes the testamentary capacity of the testator and when the view of the Board has been approved by the Supreme Court itself by the four Judges bench and three Judges bench respectively, I would necessarily have to follow that said view.

83. For the sake of completion of the narration, I should refer to the view of Mr.Justice P.Somarajan, the Kerala High Court. He has taken a view in ***Kumari @ Mary Francis v. Baby, 2022 (5) KLT 614*** that the view that has been laid down in ***Bharpur Singh***'s case without noticing the legal position settled in ***Kalidindi Venkata Subbaraju***'s case cannot be held to be a binding precedent.

84. In the light of the above discussion, I would answer the second question of law holding that a "WILL" produced from a proper custody and if it is over the period of 30 years and if it not shown the attesting witnesses are alive, the presumption under Section 90 applies.

85. Insofar as this case is concerned, DW3 the attesting witness had been examined and the plaintiff has not cross examined her on the crucial aspects. I am satisfied with the evidence given by her. Hence, I need not drawn presumption under Section 90 to conclude that the "WILL" stands proved.

86. In this regard, it is pertinent to reproduce the view of Mr.Justice B.N.Rau, the eminent jurist who played a great role in the drafting of the Constitution of India. In **Mahendra Nath Surul -vs- Netai Charan Ghosh (ILR 1943 1 Cal 392),** speaking for a bench, he held as follows:

> " *This being the state of the evidence, the question arises whether S.90 of the Indian Evidence Act does or does not apply to the case. The will was undoubtedly made more than thirty years ago - in fact more than seventy years ago - and it has been produced from the proper custody. There is nothing in the terms of the Section to limit its application to non-testatmentary documents; but our attention has been called to the decision in Shyam Lal Ghosh -vs- Rameswari Bosu (1) where this Court observed that the rule laid down in the Section did not apply to proof of a will in the probate Court. The learned Judges went on, however, to point out that in any event the rule was merely discretionary, since the Section says "the Court may presume" and that in that particular case there were other circumstances to show that the will was not genuine. Evidently, therefore, the observation that the rule did not apply (even as a matter of discretion) to proof of wills was obiter, and it appears to have been treated as such in a subsequent case in this Court, Gobinda Chandra Pal v. Pulin Behary Banerji (2), where it was held that the Section does apply to wills as much as to other documents. The only ground given for the observation to the contrary in the earlier decision is that if the Section were applicable to wills, it would become unnecessary to prove wills executed more than thirty years before the testator's death, even where some of the subscribing witnesses might be alive. This does not necessarily follow; the presumption mentioned in S.90 is not obligatory : the Court may or may*

not make it according to the circumstances of the case. Where some of the attesting witnesses are alive and the proponent of the will omits to examine them, the Court may prefer to make the presumption mentioned in S.114 illu (g) rather than the one in S.90. The proponent may also be hit by the provisions of S.68.

.....

Having regard to the definition of the words "may presume" in S.4, we think is clear that where the Court chooses to make the presumption authorised by S.90, no further proof of the facts is necessary under S.69. We regard them as proved."

I would with all humility respectfully follow this verdict.

Conclusion

87. To conclude,

(i) if an attesting witness is available, then he/she should be examined in terms of Section 68 of Evidence Act;

(ii) if the said witness is not available, then the route under Sections 69 to 71 is available to the profounder;

(iii) if the “WILL” is more that 30 years old and produced from proper custody, Section 90 is available to the Court to draw a presumption regarding its “due execution” and “attestation”;

(iv) if the “WILL” is more that 30 years old and produced from proper custody, it is shown that the attesting witnesses are alive and not produced

before the Court, it may resort to presumption under Section 114 illustration (g) instead of one under Section 90.

(v) the presumption under Section 90 or under Section 114 illustration (g) should be guided by the principle governing "may presume" under Section 4 of the Indian Evidence Act, 1872.

88. In the light of the above discussion, the Second Appeal fails and the same is dismissed. The judgment and decree of the Court of the Principal Subordinate Judge at Tirupathur in A.S.No.14 of 2009 dated 30.06.2011 in reversing the judgment and decree of the learned District Munsif-cum-Judicial Magistrate, Palladam in O.S.No.235 of 2006 dated 29.01.2009 stands confirmed. As the parties are closely related, I am not inclined to impose costs.

89. Before parting with the judgment, I would place on record my appreciation for Mr.Sharath Chandran, learned Amicus Curiae for assisting this Court by providing insights on the question whether a "WILL" can be proved by way of presumption under Section 90 of the Indian Evidence Act.

26.07.2024

KST/nl

Index : Yes/No
Neutral Citation : Yes/No
Speaking Order / Non-speaking order

To

1. The Principal Subordinate Judge at Tiruppur,
2. The District Munsif–cum–Judicial Magistrate at Palladam

V. LAKSHMINARAYANAN, J.

nl

S.A.No.339 of 2019

26.07.2024