

P. Somasudaram Vs. Devaki Srinivasan and Others

P. Somasudaram Vs. Devaki Srinivasan and Others

SooperKanoon Citation : sooperkanoon.com/1173312

Court : Karnataka

Decided On : Nov-27-2014

Judge : K.L. Manjunath & a.V. Chandrashekara

Appeal No. : R.F.A.No. 1354 of 2008

Appellant : P. Somasudaram

Respondent : Devaki Srinivasan and Others

Judgement :

(Prayer: RFA Filed U/S 96 Of The Cpc Against The Judgement And Decree Dt. 5.8.08 Passed In Os No.766/97 On The File Of The Xxii Addl. City Civil Judge, Bangalore, Partly Decreeing The Suit For Partition And Separate Possession And Mesne Profits.)

1. Lone defendant of an original suit bearing O.S.766/1997 which was pending on the file of XXII Addl. City Civil Judge, Bangalore is before this Court. Present appeal is filed under Section 96 of CPC challenging the judgment and decree passed in O.S.766/1997 against him on 5.8.2008 in O.S.766 /1997.

2. Parties will be referred to as per their ranking before the Trial Court.

3. Suit filed for relief of partition and separate possession of property as described in the schedule 'A' and 'B' appended to the plaint has been decreed as prayed for granting 1/8th share each to the plaintiff Nos. 1 to 7 and the defendant. The Trial

Court has directed to hold enquiry in respect of mesne profits as provided under Order XX Rule 12 of CPC.

4. Facts leading to filing of suit are as follows:

Schedule "A" and "B" are the immovable properties with building and other constructions namely garage, lumbar room, out house, toilets, dwelling portions in upstairs of the house. The property in question is situated in No.997, New No.7, 23rd Main road, 37th Cross, 4th T Block, Jayanagar, Bangalore. Schedule "B" is portion of schedule "A" namely Ground Floor of the main house measuring 8 squares, including garage and office room attached to the premises. Schedule "C" are securities, fixed deposits, stocks and shares etc.

Plaintiffs and defendant are the children of Late Sri.Pechimuthu and his wife Manikkam, who were residents of Bangalore City. Parents of plaintiffs and defendant constituted a joint family. The plaintiffs' father Pechimutnu died on 7.1.1995 in the family house described as schedule property leaving behind plaintiffs and defendant and their mother P. Manikkam as his legal heirs. Mother of the plaintiffs and defendant died on 15.3.1995 in the same house. Pechimuthu retired from the service in the year November 1974. He was working as Assistant Engineer in Telecom Department. Out of his earnings, he purchased suit house from the Karnataka Housing Board bearing No.997, 23rd Main, 37th Cross, Jayanagar, 4th T Block, Bangalore which is item No.1. Apart from this, he got marginal land attached to the house from CITB Bangalore.

The case of the plaintiffs is that they have contributed to the maintenance of the family and for the expansion of the family house in order to augment the resources. According to them, the pension amount that Pechimuthu was getting was very meager. The site on which house is built measures 40x60 feet and the marginal site measures 40x30 feet. Plaintiffs and defendant have lived and enjoyed the suit properties as one common unit.

Since plaintiffs were employed in different places and since defendant was employed in Bangalore, he was staying with parents. He is stated to have induced lot of faith and confidence in the parents on account of his continuous presence

and showing help. He wanted to grab the family properties. Thus, a lot of amount has been invested by their parents in the name of the defendant and they are found in schedule "C" and "D".

After the death of their parents, dispute arose when the defendant attempted to stall the rents flowing in from the tenants. Since defendant skirted giving pinpricks by joining hands with the tenants, rents have not been paid by the tenants. After the death of their mother Manikkam in March 1995, plaintiff Nos. 1, 3 and 5 informed the tenants orally that they should pay rents including the arrears to Smt.Bhanumathi Panchaksharam, plaintiff No.3., as she was appointed as the care taker of the suit schedule property. In spite of writing letters, tenants did not pay arrears of rent and tenants were induced by the defendant not to pay rents, Defendant started claiming his share on the basis of the Will stated to have been executed by Late Pechimuthu in his favour. If Will is stated to be in existence, it is the outcome of undue influence played by him on his ailing father in order to knock off the property belonging to the joint family. Even when obsequies ceremonies of parents were held, this was not disclosed to them and they came to know for the first time when O.S.8438/1995 was filed against the tenants and plaintiff No.4 claiming arrears of rents. After the death of parents, defendant is stated to have vacated schedule "A" and occupied the premises in the first floor on Spartacus Cooperative Housing Society Limited, RBI colony, near Swagath Talkies, "Tilaknagar" deserting the schedule house. Hence, key of the house was handed over to plaintiff No.3. According to plaintiffs, their father had executed a Will on 5.8.1978 and corrected it in 198-1 and kept it. They came to know that Pechimuthu has executed another will in 1992 attested by Sri.Bhartat Dasan and Mrs.Vasanti Bharathi and kept the same in the office of the family house. He has written another Will in November 1994 and it was shown to Sri.Jayakumar and Sri.Uma Manohar, plaintiff Nos.5 and 6 and they were made to believe that the alleged will appended to be not genuine one and it is not the last will as it has superseded the -wills executed in the year 1992 and 1994. Plaintiff Mo.3 is stated to be residing in the first floor and has been looking after the affairs of the family and maintaining the said house. With these pleadings they had requested the Court to grant 1/8th share each to the plaintiffs and defendant.

Defendant has filed detailed written statement denying all the material averments in regard to the Will executed by Pechimuthu in his favour. He has admitted the relationship between himself with the plaintiffs. Averment that certain structures were put up in the property in question with the tacit, consent and knowledge of all the children of Pechimuthu and Manikkam for the beneficial enjoyment in future has been subsequently denied. According to him, plaintiff Nos.1, 3 and 4 had filed the suit in O.S.8438/1995 in respect of "A" schedule property against the tenants and himself mentioning them as defendant Nos. 1 to 4 claiming arrears of rent and also sought for injunction from interfering with the alleged enjoyment and possession of the schedule property. He had resisted the suit claim of the plaintiffs. On consideration of entire evidence placed on record, the Court was not inclined to pass an order of injunction. According to him, Pechimuthu was the absolute owner of the schedule property and executed the Will dated 19.8.1990 bequeathing one portion in his favour and another portion in favour of plaintiff No.5-Jayakumar, his brother.

After the death of Pechimuthu, himself and plaintiff No.5 have succeeded to the above property as per the Will and the said Will is stated to be the last Will of Pechimuthu being executed by him when he was in a sound disposing state of mind. Portion which was in occupation of tenants were allotted to the share of the defendant and the tenants atoned the tenancy in his favour as per the Will. Thus, he has become the absolute owner of the property connected with the Will. According to him, original Will was handed over to plaintiff No.5 and Xerox copy of the same was given to him and plaintiff No.5 is in possession of original Will written in Tamil language and the same is attested by Dr.Venkatesh Negalur and his wife Rama Negalur, who were tenants in occupation of one the tenements. They have sworn to two affidavits in respect of a Will executed in favour of plaintiff No.5 and defendant.

According to him, plaintiffs have never whispered about the 3 Wills executed in the year 1978, 1992 and 1994, when the suit was filed by them in O.S.8438/1995. According to him, these Wills are false and forged documents and have never come into existence. Plaintiff No. 1 opened the locker which was in the name of Pechimuthu and removed all the jewellery and kept them for himself and thereafter

booty of the same came to be shared amongst the plaintiffs. According to him, the approximate value of the jewellery was worth more than Rs.20 to 25 Lakhs. It is his averment that plaintiffs are not entitled for partition and separate possession of schedule 'A' and 'B' properties. He has averred that plaintiffs and defendants are stated to be entitled for fixed deposits, securities, stocks and shares described in schedule 'C'. Suit is frivolous and false. Hence, with, these pleadings, he requests for dismissal of the suit.

5. On the basis of the above pleadings, following issues came to be framed:

1. Whether the plaintiffs prove that the suit schedule properties are the joint Hindu Family properties of the plaintiffs and the defendant?
2. Whether the plaintiffs prove that they have also contributed to the maintenance and the expansion of the suit schedule 'A' and 'B' properties?
3. Whether the plaintiffs prove that they were in joint possession and enjoyment of the suit schedule properties as on the date of filing the suit?
4. Whether the plaintiffs are entitled to partition and separate possession of their 1 / 3rd share each in the suit schedule properties?
5. Whether the plaintiffs prove that the defendant is liable to give accounts in respect of the income of suit schedule properties?
6. Whether the defendant proves that the suit A' and 'B' schedule properties are the self acquired properties of his deceased father?
7. Whether the defendant further proves that his father executed the Will dated 19.8.1990 in favour of himself and his brother plaintiff No.5?
8. Whether the defendant proves that the valuation of the suit property is not proper and the court fee paid is insufficient?
9. What decree or order?

Additional Issue:

Whether the plaintiffs prove that the suit 'C' and 'D' suit schedule properties are the properties left behind by Pechimuthu in which all of them have a share?

6. Plaintiff No.5 is examined as PW-1 and he did not tender himself for cross examination and as such his evidence has been eschewed. Mr.Jaganmohan is examined as PW-2. 148 documents have been produced and marked on behalf of the plaintiffs. Defendant himself is examined as DW-1 and the attesor to Ex.P-141 Smt.Rama Neglur is examined as DW-2 and as many as 10 exhibits have been marked on behalf of the defendant.

7. After hearing the learned counsel for the parties, the learned Judge of the Trial Court has answered issues 1, 3 and 6 in the affirmative and remaining issued have been answered in the negative. In so far as issued No.5 is concerned, finding is deferred with liberty to raise in FDP proceedings. It is this judgment which is called in question on various grounds as set out in the appeal memo. While decreeing the suit, the learned Judge has come to the conclusion that the properties absolutely belonged to Pechimuthu and Will relied upon by the plaintiffs is not proved in accordance with law. The learned Judge has further opined that the original Will at Ex. P-141 is not produced before the Court and that no foundation is laid to lead secondary evidence as contemplated under Section 65 of the Evidence Act. It is further opined that mere production of Will would be insufficient and it should be proved to the hilt by warding off all suspicious circumstances and that the Will has not been proved in accordance with law as mandated under Section 63 of Hindu Succession Act and Section 68 of Evidence Act. It is further opined that evidence of testators is not in compliance with the proof of will.

Several grounds have been urged in the appeal memo challenging the judgment and decree.

8. It is vehemently contended by the learned counsel for the appellant before us that the Trial Court has failed to draw adverse inference under Section 114(g) of Evidence Act, in the light of important witness Jayakumar not rendering himself for cross examination more particularly in the light of assertion of defendant that original of Ex.P-141 is -with him. It is argued that no notice for producing original

Will was required to be given to PW-1 Jayakumar since contents of written statement are implied notice for production of the same. It is argued that useful admissions culled out from the mouth of PW-2 have been ignored and that serious contradictions found in the oral evidence of PW-2 have also been ignored. It is argued that the plaintiffs have purposefully withheld the original Will from the purview of the Court. It is argued that the defendant has complied with the mandate of Sections 63 and 68 of Evidence Act by examining the testator, who is very well conversant with the deceased and his family members. It is further argued that the Trial Court has not assessed the evidence on the touch stone of intrinsic probabilities and it has adopted wrong approach to the real state of affairs. The learned counsel for the appellant has argued that perversity and illegality are evident in the very judgment and therefore absolute interference is called for in this judgment. The judgment and decree of the trial Court is stated to be opposed to law, facts and probabilities.

9. The learned counsel for the plaintiffs/respondents has relied upon the following decisions:

- a) 2011 (6) KLJ 494
- b) (2010) 5 SCC 274
- c) AIR 2004 SC 436
- d) Air 1966 SC 1457
- e) AIR 2007 SC 1721
- f) AIR 1971 SC 423
- g) (2010) 8 SCC 423
- h) (2009) 2 SCC 570
- i) (2009) 6 SCC 681
- j) (2007) 5 SCC 730

10. After hearing elaborate arguments of the learned counsel for the parties and after perusing the records, the points that arise for our consideration are as follows:

1. Whether defendant has laid foundation to lead secondary evidence under Section 65 of Evidence Act in regard to Will dated 19.8.1990 marked as Ex.P-141?
2. Whether the said Will marked as Ex.P-141 has been proved in accordance with law to be the last Will of deceased Pechimuthu executed while he was in sound disposal of mind?
3. Whether any interference is called for, if so, to what extent?

Reasons:

11. Whole controversy in the case revolves around Ex. P-141 which is the Xerox copy of the Will stated to have been executed by late Pechimuthu in favour of plaintiff No.5-Jayakumar and defendant on 19.8.1990 in the presence of Dr.Venkatesh Negalur and his wife Rama Negalur. The said English translation of the same is appended and it is found in ink page 219 of the Trial Court file. Rough sketch of the schedule "A" is also appended to the plaint. Two Xerox copies of the affidavits of Dr.Venkatesh Negalur and his wife Rama Neelur are also appended and they have sworn before Nagalakshmi.B.S, Advocate and Notary on 6.11.1995. English translation of Ex. P-141 is not seriously disputed and it forms part of the record. While making discussion on the oral and documentary evidence, the learned Judge has failed to take note of the English translation copy of the Will dated 19.8.1990. Said copy has been translated by Sri.Loganathan N.B. Advocate, N.52, Veerapillai Street, Bangalore.

12. The decision of this Court in the case of Smt.Saraladevi v. Patric Augustine D'Souza reported in 2011(6) KLJ 494 (DB) has been relied upon by the learned counsel for the appellant to contend that defendant has failed to prove the existence of the original Will and that no proper foundation is laid to lead secondary evidence. As per the facts of the said case, the Trial Court had committed a serious error in holding that defendant has proved the Will and finding

of the Trial Court is not based on proper application of evidence. In the said case, the defendant was the propounder of the Will and did not produced the Will and had not made any attempt to search or trace the will or to lead secondary evidence. As per the facts of the said case, no acceptable evidence had been placed on record about the very existence of the original Will and therefore, this Court in the case of Saraladevi has held that no foundation is laid to lead secondary evidence as per Section 65 of Evidence Act. Even otherwise, except Ex.D-1 Xerox copy of the Will, no other secondary evidence had been adduced in to prove that the Will was executed by deceased Lizza.

13. Section 65 of the Evidence Act is relevant and same is extracted here in below:

65. Cases in which secondary evidence relating to documents way be given -

Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable tim-c;

(d) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the m eaning of Section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1 India to be given in evidence²;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole- collections.

In cases (a), (c) and (a), any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

14. The defendant has specifically averred in his written statement that his father chose to execute a Will on 19.8.1990 in the presence of Dr.Venkatesh and his wife Rama Neglur and that he was in a sound disposing state of mind. According to him, one portion has been bequeathed in his favour and another portion has been bequeathed in favour of Jayakumar. It is also averred that Jayakumar plaintiff No.5 is in possession of the original Will and that he gave him one Xerox copy of the Will. It is not as though defendant has taken such stand when the suit was filed in O.S.766/1997. It is to be seen that he has made such an averment way back in 1995 when the suit was filed by Bhanumathu Panchaksharam, Kulashekaran and Smt.Devaki Srinivasan, present plaintiff Nos.3, 4 and 1 respectively for recovery of rents from defendant Nos. 1 to 3 therein and against him seeking permanent injunction restraining defendant Nos. 1 to 3 from paying rents to defendant No.4 and restraining defendant No.4 from receiving any rents either past arrears or future rents from defendant Nos. 1 to 3.

15. Ex. P-140 is the original plaint filed in O.S.8438/1995 by Smt.Bhanumathu Panchaksharam, Sri.Kulashekaran and Smt.Devaki Srinivasan on 14.12.1995.

Ex.P-142 is the application filed under Order 39 Rules 1 and 2 and Section 94 of CPC by the plaintiffs therein in O.S.8438/1995 supported by an affidavit sworn to by Bhanumathi Panchaksharam seeking an order of injunction against the defendants from interfering with their peaceful possession and enjoyment of the schedule property. Ex.P-144 is the application filed under Order 39 Rules 1 and 2 of CPC supported by an affidavit sworn to by Smt. Bhanumathi Panchaksharam seeking an order of injunction against defendant No.4 therein Sri.P.Somasundaram from collecting rents from defendant Nos. 1 to 3. Ex.P-145 is the objections statement filed by the defendant No.4 Somasundaram. Ex.P-146 is another application Order 39 Rules 1 and 2 of CPC supported by an affidavit sworn to by Sri.P.Kulashekaran for mandatory injunction against defendant No.4 to put them in possession of the plaint schedule "B" which is ground floor of a house measuring 8 squares. Ex. F-14 7 is the objections filed by defendant No, 4 against the application filed by the plaintiffs under Order 39 Rules 1 and 2 of CPC. Ex.PI48 is the list of documents filed by the plaintiffs on 14. j 2.1995 in the objections filed to the applications in O.S.8438/1995.

16. The present defendant has taken up a specific stand that his father has executed a Will in his favour and in favour of his brother plaintiff No.5 Jayakumar on 19.8.1990 and Xerox copy of the same has been given to him by Jayakumar and Jayakumar has retained the original Will. This is found in paragraph 2 of the objections filed in O.S.8438/1995 by this defendant and this is evident from Ex. P-143.

17. Infact plaintiffs therein had got issued legal notice to the tenants calling upon them to pay arrears of rents and pay future rents to them. They had subsequently made it clear to the plaintiffs therein that Manikkam their mother had orally told them to pay rent to the defendant No.4. Ex.P128, 129, 130 and 131 are the legal notices got issued by the plaintiffs therein to tenants Krishna Marty, Omkar Murthy, Ganapathi Hegde. Krishna Murthy had replied on 2.11.995 to the Advocate of the plaintiffs therein vide Ex.P-132 that soon after the death of Pechimuthu, he had offered rent to Manikkam who inturn had advised to pay the same to Somasundaram. Accordingly, he had been paying rent regularly to Somasundaram and Somasundaram had succeeded to the property and he had

referred to a Will relied upon by the defendant. Portion of Ex.P-132 dated 12.11.1995 is relevant and same is extracted in its entirety for better appreciation of facts of the case.

"To:

Smt. Shantha Challappa

Advocate

Batchu Arcade

17/ 5, Lakshmana Mudaliar Street,

II Cross, Commercial Street,

Bangalore-560001

Madam,

Your notice dated 9.10.1995, issued on behalf of your client Smt. Bhanumathy, W/o Sri. Panchaksharam, residing at No. 997, I Floor, 23rd Main, 37th Cross, 4th 'T' Block, Jayanagar, Bangalore, to my client Sri. Krishnamurthy, residing at No. 997, Rear Portion, Left Wing, 23rd Main, 37th Cross, 4th 'T' Block, Jayanagar, Bangalore-560041, is placed my hands with instruction to reply as under:-

It is true that my client was a tenant under Late Sri. S. Pechimuthu, during his life-time and continues to be a tenant in the same premises even now. Even during his life-time, Sri. S Pechimuthu has confided in my client that the portion in which my client is residing has been willed away in favour of his 2nd son, P. Somasundaram and rents should be paid to Smt. Manickam, W/o S. Pechimuthu, after his death (Sri. Pechimuthu) during her lifetime and thereafter to Sri. P. Somasundaram. Thus soon after the death of Sri. Pechimuthu, my client offered the rents to Smt. Manickam, who in turn advised my client to pay the same to Sri.P. Somasundaram. Accordingly my client has been paying rents regularly to Sri. P. Somasundaram as he has succeeded to the property.

My client tells me that he has personal knowledge about the will as it was told to him by Sri. Pechimuthu and my client was also an attesting witness to another will where the movables were disposed of by Sri. Pechimuthu.

Hence, my client does not recognize your client or any anyone or more persons, the claims to represent, as the Land Lords. Thus my client is not obliged to pay rents to your client. As my client is not in arrears of rent, he is not obliged to pay any other money demanded in notice under reply.

My client tells me that, in fact, your client is herself a tenant and was paying rent to Sri. Pechimuthu. The other claim that she has been appointed as a caretaker is also not true.

Thus it is obvious that your client has deliberately furnished you incorrect facts with ulterior motives. Kindly advise her not to precipitate the matter further.

If, in spite of this reply, should your client proceed to a Court of Law, the same will be defended by my client and your client alone will be responsible to the costs and consequences thereof.

Cost of this reply is Rs.250/ -

Yours faithfully (L.S. Subbajayaram)"

18. Similar are the contents of reply of Omkar Murthy another tenant in Ex.P-135. Ex.P-137 is the replica of the reply notice got issued by Ganapathi Hegde,

19. On reading these 3 reply notices of the tenants, it is evident that not only this defendant had taken up the plea of Will being executed in his favour and in favour of Jayakumar and also tenants were made known and hence they had resisted to pay rents to plaintiffs therein, since defendants had become the owner of the portion of the property, on the basis of the will.

20. What is argued before this Court by learned counsel for the respondents-plaintiffs is that if plaintiff No.5 Jayakumar was in possession of the original Will Ex. P-141, in the light of- not taking steps to get it produced; no adverse inference could be drawn against the plaintiffs under Section 14(g) of Evidence

Act. It is in this regard, Saraladevi's case is relied upon.

21. As already discussed, defendant had already taken up plea of Will being executed in his favour by Pechimuthu, on 19.8.1990. He has further averred that original of the same is with Jayakumar, plaintiff No. 5 herein and he has given Xerox copy of the same to the defendant and the same is produced not only in the suit, but also in the suit filed against him earlier. Infact, the entire file of original suit filed earlier been summoned under Order 13 rule 10 of CPC. Therefore, original plaint, applications and objections filed thereto are part of records in the present case as exhibits.

22. Jayakumar, the brother of the defendant is plaintiff No.5 in the present case. He has filed his affidavit in lieu of examination-in-chief and the contents of the affidavit so filed are nothing but reiteration of the plaint contents. He has not tendered himself for cross examination. If a part7, who tenders examination-in-chief, but does not tender for cross examination, it is no evidence in the eye of law. If the defendant had not cross examined plaintiffs, it can be said that assertion of the plaintiffs found in the affidavit filed in lieu of examination in chief has become unchallenged and this is not so in this case. Therefore, the Trial Court has rightly ignored the affidavit filed in lieu of examination in-chief of PW-1.

23. It is very relevant to look to certain portions of the cross examination of Jaganmohan, who is examined as PW-2. Contents of the affidavit of PW-2 in lieu of examination-in-chief are identical to the contents of the affidavit filed by Jayakumar in lieu of examination-in- chief. Jayakumar has referred to the earlier suit filed in O.S.8438/1995 for recovery of arrears of rent from the tenants and for mandatory injunction against defendant No.4. In his cross examination conducted on 21 11.2005, PW-2 has feigned ignorance of the present place, where plaintiff No.5 is staying. He does not rein ember as to when he met him last. He has deposed that he met PW-1 in the year 2005 in Bombay and he retired from service. After retirement, he has continued to stay in Bombay before instituting the suit. PW-2 had talked to his brothers and sisters and he has admitted about the earlier that suit filed by plaintiff Nos.1, 3 and 4 namely Bhanumathu Panchaksharam, Kulashekaran and Smt.Devaki Srinivasan. He has admitted the

suggestion put to him that O.S.3438/1995 had been filed by the present plaintiff Nos. 1, 3 and 4 relating to same immovable property involved in the present suit, as true. He has feigned ignorance about other directions sought for in the said suit filed against the tenants. He has admitted about the notice got issued by the plaintiffs therein prior to filing of O.S.8438/ 1995 calling upon tenants to pay arrears of rents. On confronting these exhibits i.e., Exs.p-135, 136, and 137, he has admitted that tenants had sent replies to the plaintiffs and that they had replied to the plaintiffs therein about Pechimuthu bequeathing portion of the property let out to them in favour of the defendant Somasundaram and hence they were liable to pay rent to Somasundaram only. Application filed for temporary injunction came to be dismissed by order dated 23.5.1996. Even MFA 1491/ 1996 was dismissed by this Court. He has feigned ignorance about of the dismissal of the suit on merits. On reading the contents of paragraph-4 of cross examination held on 21.11.2005, it is evident that though he was not a party to the suit in O.S.8438/1995, he knew the facts of the said case very well.

24. What is argued before this court by the learned counsel for the plaintiffs-respondents is that secondary evidence is not admissible in a mechanical manner, or as a matter of course. He has relied upon the procedure in regard to the production of secondary evidence as per Section 65(c) of the Evidence Act. He has argued that existence and execution of the document must, of course, be proved. According to him, if primary evidence is not available for the reasons set out in Section 65, Evidence Act, only then secondary evidence is admissible. Of course before adducing secondary evidence, proper foundation has to be laid for not producing primary evidence. Only after non- production of primary evidence is satisfactorily accounted for, as reiterated by this court in the case of M.T.SIDDASHETTY and ANOTHER .VS. P.H.GOWDA and ANOTHER (ILR 2010 KAR 3480), secondary evidence would be permitted to be adduced.

25. In the present case, there is a clear foundation in the written statement filed by the lone defendant to the effect that the original of Ex.P141 is with PW2-the 5th plaintiff and that he had given him a xerox copy of the will executed by Pechimuthu. As already discussed, even in the earlier suit filed against him by few plaintiffs, he had taken a specific stand that the original will was with Jayakumar

and he had given him only a xerox copy of it.

26. It is useful to rely on the decision 01 the Rajasthan High Court reported in AIR 1971 RAJASTHAN 303 (MIRA BAI .v. JAZ SINGH 7 OTHERS). Dwelling upon Section 66, Evidence Act which deals with notice to produce it is held that 'the mortgage deed must be in possession of the mortgagee and from the nature of the case, the defendant must be aware that he would be required to produce the original mortgage deed. In such circumstances, the court may also come to the conclusion to dispense with the notice.'

27. In the present case, the xerox copy of the will has been got marked by confronting the same to PW2 on 19.12.2006. When it was confronted, plaintiffs counsel had taken objection stating that the same cannot be treated as secondary evidence in view of Section 66, Evidence Act not permitting xerox copy of the document to be treated as secondary evidence. The exact portion of the order regarding marking of the document is found in page 11 of his deposition dated 19.12.2006 and the same is reproduced herewith:

The learned counsel for defendant seeks permission to confront the Xerox copy of the will produced in O.S.8438/95 to the witness on the basis that it can be treated as secondary evidence. Such request is rejected, since Sec.63 of the Evidence Act does not permit xerox copy of the document to be treated as secondary evidence in the absence of availability of the original for comparison. The learned counsel for defendant submits that the witness would admit, except that the copy of the will dated 198/1980, no other will marked subject to admissibility and proof.'

Of course objection has been taken at the earliest point of time on behalf of the plaintiffs that the document is inadmissible in evidence. But anyhow the said document has been marked subject to admissibility and proof.

28. In the case of SURENDRA KRISHNA ROY and ANOTHER .v. MIRZA MAHAMMAD SYED ALI MUTAWALI and OTHERS (A.I.R. 1936 PRIVY COUNCIL 15) , it is specifically held that 'the purpose of notice is to give the party an opportunity by producing the original to secure the best evidence by its contents and therefore the court has absolute power to dispense with notice under Sections

65 and 66.' It is further held in the said decision that 'the only purpose of notice under Sections 65 and 66, Evidence Act is to give the party an opportunity by producing the original to secure, if he pleases, the best evidence of the contents. Secondary evidence is admissible when the party offering evidence of the contents, cannot, for any reason not arising from his own default or neglect, produce the original document in a reasonable time and under Section 66, the court has absolute power when it thinks fit, to dispense with notice under these sections.'

29. Apart from the provisions of sub-sections (1) to (6) of Section 66 of the Evidence Act, there is also a general proviso stating that 'in any other case, notice can be dispensed with when the court thinks fit.' In the case of SURENDRA KRISHNA ROY (supra), it is held that 'when in the previous litigation it was held, that the document in question was in possession of the plaintiff's father; there was no reason to prove it was in the possession of the defendant. In the present suit, thus notice to produce was a mere formality

30. In the facts and circumstances of the present case, the defendant has taken a specific plea in the written statement that the original of the will executed by Pechimuthu was in possession of the 5th plaintiff and that only xerox copy had been given to him. Even in the reply notice issued by the tenants of the schedule property to some of the plaintiffs herein, there is reference about the will relied upon by this defendant and they had refused to pay rents to them i.e., plaintiffs therein and expressed willingness to pay rents to the legatee. Ultimately the applications filed under Order XXXIX Rules 1 and 2, C.P.C. by the plaintiffs in the earlier suits came to be dismissed and therefore they were not able to get the relief of injunction against the 4th defendant from claiming any rent from tenants, whether past or future.

31. Mr. Jaganmohan who is examined as PW2 has pleaded ignorance as to whether the will shown to him by his brother-Jaykumar was the original or not. He did not even ask him (PW1) to give the will for being produced in the present case. This has been culled out from his mouth while cross-examining PW2 on 19.12.2006. The same is found in page 11 of his cross-examination.

32. Further useful admissions culled out from the mouth of PW2 would probabalize the case of the defendant that the original will is with PW1 and Xerox copy was given to him, i.e. defendant. PW2 is said to have talked to Jayakumar before filing the suit. He has gone to the extent of stating the reason for filing the suit. He has deposed that since they were harassed, they were compelled to file the suit. He has admitted the suggestion put to him that Jayakumar-5th plaintiff in the present case showed him the will produced in O.S.8438/95. The present suit, according to PW2, came to be filed on account of harassment by the police. He has further admitted that the will shown to him was executed by his father-Pechimuthu and he did not dispute the will that was shown to him by Jaykumar. He has feigned ignorance about the suggestion that Jaykumar knows more about the will. He has pleaded ignorance about the suggestion put to him as to whether his father has disposed of the properties owned and possessed by him through the will.

33. PW2 has further pleaded ignorance about the share given to him or anybody under the will dated 19.8.1990 (Ex.P141). Therefore, considering all these important omissions culled out from the mouth of FW2 who is none other than the own brother of PW1 with whom he had sufficient talk before filing the suit, reasonable inference that could be drawn from the circumstances of the case is +hat plaintiffs are in possession of the original of Ex.P141 and that no notice was absolutely required in the present case, as per Section 66 of Evidence Act.

34. It is also relevant to scan the evidence of the defendant who is examined as DW1. He has relied on the contents of the written statement the affidavit filed in lieu of examination-in-chief. In his cross- examination, DW1 has admitted the suggestion put to him that he has been collecting rents from tenants who are in occupation. He has volunteered that the rent he has been collecting is on the basis of the will and present tenants are Raghavendra, Srikant and another person whose name he does not remember. He has further admitted that he knows reading and writing Tamil and his father also knew reading and writing Tamil very well.

35. What is argued before this court is that Pechimuithu had written several -wills before his death and DW1 pleads ignorance. When the plaintiffs are not relying on

the wills said to have been executed by Pechimuthu, this does not assume much significance. Admittedly DW1 came to know about the will before the death of his father. On looking to the cross- examination of DW1, it is evident that nothing has been culled out from his mouth about his assertion that the original of Ex.P141 is with PW1-Jaykumar and that xerox copy only was given to him. Virtually major portion of the assertion found in his examination-in- chief has remained unchallenged. On re-assessing the entire oral and documentary evidence on record, we are of the considered opinion, that the defendant has laid a firm foundation in respect of leading evidence under Section 65 of the Evidence Act, and the trial court has failed to exercise its jurisdiction to dispense with production of the original will, as per Section 66 of Evidence Act.

36. Learned judge of the court below has attached more significance to the will being a Xerox copy and hence opined it as inadmissible. He has not assessed the evidence on the touchstone of intrinsic probabilities in regard to Sections 65 and 66, Evidence Act. What is observed by the learned judge is that only Xerox copy of the will is in Tamil and its translation either in Kannada or English is not produced. We are unable to accept that the English translation of the will is not produced. In fact it was produced before the trial court and hence it is part of the record sent to the Court. Learned judge has failed to notice this important aspect. Learned judge has mainly relied on one sentence found in the cross-examination of DW1 that he does not have any evidence to show that the will was in the custody of the 5th plaintiff. According to the learned judge, even DW2, attesor of Ex.P141 has not said anything about the same.

37. An attesor is not expected to say anything about the custody of the document. It is a matter between PW1 and DW1. It is further held that the defendant should have issued notice to him (5th plaintiff) under Sections 65 and 66, Evidence Act calling upon him to produce the original instead of tendering photocopy of the document as secondary evidence. According to the learned judge, this is the mandate of law and that has not been complied with.

38. We have made elaborate discussion about the power of the court to dispense with the original of the will in the present case. In The Law of Evidence by Ratanlal

and Dhirajlal (23rd enlarged edition), it has been held as follows:

'Sometimes from the pleadings found in the written statement that the original is in possession of the adverse party, he will be required to produce or net can be gathered.'

In the present case there is a specific averment in the written statement that the original will is with the 5th plaintiff. This averment is found at an undisputed point of time in 1995 when few of the plaintiffs herein has filed the suit against 3 tenants and this defendant.

39. In AIR (39) 1952 Nagpur 47 between KUNDANBAI and OTHERS .v. VENUBAI and OTHERS, the High Court of Nagpur has held that 'proviso to Section 66 lays down that in certain cases notice is not essential to render secondary evidence admissible. Two such cases are (1) where from the nature of the case, the adverse party must know that he will be required to produce the document and (2) when the court thinks fit to dispense with the notice.' In the present case, we have, after a detailed discussion made above, specifically held that the court has power to dispense with notice.

40. As already discussed, the decision of the Division Bench in the ca.se of SARLA DEVI (supra) is not applicable to the facts of the present case and is clearly distinguishable on facts. Thus we hold that the trial court is not justified in coming to the conclusion that the defendant has not laid foundation to lead secondary evidence under Section 65, Evidence Act and that he has not issued any notice under Section 66, calling upon the plaintiffs to produce the original will. The approach adopted by the learned judge in the present case is not proper. In fact, the best person, i.e. PW1 has not tendered himself for cross-examination. Against him a serious averment is made by the defendant that he is in possession of the original will. Though he has denied its possession in his affidavit filed in lieu of examination-in-chief. Learned judge has not made use of another important provision of the Evidence Act. In the light of material witness i.e., PW1 not tendering himself for cross-examination, under section 114(g) of Evidence Act, an adverse inference will have to be drawn holding that he is in possession of the will and he has purposefully not produced tne same, lest he and other plaintiffs would

be exposed.

41. The other plaintiffs who have joined 5th plaintiff cannot take advantage of the absence of the plaintiff and contend that PW1 is not in possession of the will. In fact this assumes more importance in the light of the assertion of PW2 when Ex.P141 was confronted to her. She is one of the attestors to Ex. P141 along with her husband. In her deposition, she has identified the xerox copy of the will attested by her. She has deposed that in token of identification of the said document, she once again put her signature on the affidavit, xerox copy of which was shown to her.

42. Learned counsel for the respondents-plaintiffs has vehemently argued that the will requires proper proof as per the mandatory provisions of Section 63, Indian Succession Act and Section 68. Evidence Act. He has argued that the evidence of DW2 is not sufficient to vouchsafe the authenticity of the will. He has further argued that Ex.P141 was not produced at any point of time and that no foundation is laid for establishment of right to give secondary evidence, and therefore copy of the same is not admissible in evidence. Relying upon the Constitutional Bench of the Hon'ble Apex Court in the case reported in AIR 1966 SC 1457 between ROMAN CATHOLIC MISSION .v. STATE OF MADRAS, learned counsel for the respondents-plaintiffs has argued that therefore is no will in the eye of law and therefore the question of proof does onto arise.

43. Relying on another decision of the apex court in the case of J.YASHODA .v. SHOBHARANI (AIR 2007 SC 1721), he has argued that there was no possibility of the xerox copy marked as Ex.P14i being compared with the original and therefore Section 65(a), Evidence Act has not been satisfied. It is further argued that mere marking of a document as an exhibit does not dispense with its proof, more particularly when the burden is upon the propounder of the will to prove it to the hilt. It is argued that photocopy of the will should have been rejected at the threshold and hence reliance is placed o the decision of the Hon'ble Apex Court in the case of SHAALIMAR CHEMICAL WORKS LIMITED .v. SURENDRA OIL and DAL MILLS (REFINERIES) AND OTHERS [(2010) 8 SCC 423]. Relying on another decision reported in (2009) 6 SCC 681 (RAM SURESH SINGH .v.

PRABHAT SINGH, it is contended that photocopy of the document in the absence of the original is not admissible in evidence. In the commentary on Evidence Act by Dhirajlal and Ratanlal (23rd Enlarged Edition) 2013, in the last sentence, it is observed as follows:

'Sometimes from the pleadings, implied notice to the adverse party showing that he will be required to produce the document can be inferred.'

As per the discussion in the case of RAMSURESH SINGH, respondent no.1 had claimed himself to be a juvenile. An inquiry was held to ascertain his age. The original register maintained by the Government primary school was produced and according to its contents, his date of birth was 10.2.1997. It was contended that the said entry was made at the instance of the father of the juvenile, A certificate was issued on 23.2.2000 so as to enable him to take admission in another school. The certificate granted by the principal of the latter school was only a xerox and it was filed inasmuch as the original evidence had not been produced. On these facts, it was held that no foundation was laid about production of Xerox copy of the certificate. Even otherwise there was no obstacle for obtaining one more certified copy from the school which had maintained the register. Under these facts and circumstances, it was held to be inadmissible. Hence, the said decision is clearly distinguishable on facts. Thus we answer Point No.1 in the affirmative.

Point No.(2):

44. The moment we hold that the defendant has laid a firm foundation under Section 65, Evidence Act and no notice was required as per Section 66, we will have to see whether the said document marked as Ex.P141 has been proved in accordance with law. How a will has to be proved has been dealt at length by the Hon'ble Apex Court in the case of VENKATACHALA IYENGAR .v. THIMMAJAMMA (AIR 1959 SC 443).

What is held in the said decision is that one of the attestors must necessarily be examined to vouchsafe the will and the testator must have signed in the presence of the attestor, and the attestor is expected to prove that the testator was in sound disposing state of mind when the will came into existence. It is not the case of the

plaintiffs that the defendant and 5th plaintiff had taken active participation in the will being executed by Pechimuthu; nor it is their case that no cogent reasons are forthcoming in the said will to exclude the otherwise natural heirs. In the will in question, the testator has specifically stated that his wife-Manikkam would be entitled to use the property till her death and thereafter his 2nd son-Somasundar would be entitled to succeed to the site measuring 60' x 36', and the ground floor property constructed thereon. It is further mentioned in paragraph 7 of the will that his third son-Jayakumar would absolutely succeed to enjoy the first floor in the property bearing No.997.

45. In the translated copy of the will found at page 219 of the trial court records, the testator has spoken about the sons and daughters he has, their marital status and economic status Admittedly he has 5 sons and 3 daughters and his wife was alive at that point of time. He has specifically mentioned all his sons with their respective wives were living in prosperity and dignity similarly his daughters were also living with their life partners happily surrounded with children and wealth.

46. While cross-examining DW1, nowhere it is suggested to him that some of the plaintiffs are in utter financial difficulties, or that they are not in a good financial position. Apart from this, he has admitted the suggestion as true that during the lifetime of his parents, the relationship between him and all plaintiffs was cordial.

47. In order to prove the will, Rama Neglur, wife of Dr.Venkatesh has been examined. She has filed affidavit in lieu of examination-in-chief stating that Pechimuthu was in sound disposing state of mind as on 19.8.1990 and the will was written in Tamil at his instance; that she and her husband put their respective signatures as attestors only after the contents of the will were read over to the testator. She has further stated that the testator was satisfied that the contents were as desired by him. She has deposed that Pechimuthu put his signature first and thereafter herself and her husband subscribed their signatures on his direction. She has identified the signature of her husband-Dr.Venkatesh on the original will as also Xerox copy. She further deposed that the xerox copy was shown to her on 6.11.1995 and after examining the same, they have sworn to their respective affidavits. She has got marked her affidavit sworn to on 6.11.1995

before the notary as Ex.D10 and the signature at Ex.D10(a), She has also identified Ex.P141-xerox copy of the will and has identified her signature at Ex. P141(a) and that of her husband.

48. Admittedly DW2 and her husband were tenants of a portion of the schedule house, which fact is not seriously disputed by the plaintiffs. DW2 was able to speak Tamil though she was unable to write in that language. She knew Pechimuthu very well and it is her case that she was conversing with him both in English and Tamil and knew the defendant and his brothers and sisters and also came to know of the suit being filed after the death of the parents of the plaintiffs and defendant. To a specific question as to who prompted her to swear to the affidavit on 6.11.1995, she has answered that the defendant handed over the copy of the will and asked her if she could identify her signature or not on the will. After identifying her signature, he requested her to swear to an affidavit and accordingly she swore to the affidavit. The suggestion put to her that on 6.11.1995 she swore to the affidavit at the instance of her husband has been specifically denied. Though she has been cross-examined at length, nothing has been culled out to disbelieve her deposition. Her assertion even in the examination-in-chief in regard to the mental and physical health of Pechimuthu on 19.8.1990 and subscribing signature only after understanding the contents of the same, have virtually remained unchallenged.

49. Ex.D10 is the affidavit sworn to by Rama Neglur and Ex.D10(a) is the signature of DW2 on the affidavit sworn to on 6.11.1995. The xerox copy of the will in question came to the custody of the defendant at the instance of the 5th plaintiff, i.e. PW1 soon after the death of their mother and that has been spoken to by DW1. The authenticity of the will is vouchsafed by the evidence of DW2, a disinterested witness. She has deposed that it probably took about a year or 1 V2 hours to prepare the will and her husband and Pechimuthu were present. Nothing is culled out from her version to probabalize that the beneficiaries under the will were present or had taken active participation in the process of the will.

50. Suffice to state there is no reason to disbelieve the version of a disinterested witness who is the attesor to the will in question. It is not even been suggested to

her that neither herself nor her husband were present -when the original will came into being and that it was not signed by Pechimuthu and that he was not of sound disposing state of mind at that time.

51. Looking to the totality of the case, we are of the considered opinion that the defendant has placed acceptable and cogent evidence not only in regard to the foundation about leading secondary evidence under Section 65, Evidence Act, but also in regard to proof of the said will to the hilt. Hence we answer point no. (2) in the affirmative.

52. Looking to the facts and circumstances of the case and on re-assessing the entire oral and documentary evidence, we are of the opinion that the decisions relied on by the learned counsel for the plaintiffs are distinguishable on facts and hence they are not helpful to their case. There we answer Point No.2 in the affirmative.

53. In the light of findings on point nos.(1) and (2), the appeal has to be allowed by setting aside the judgment and decree dated 5.8.2008. It has to be held

that the defendant is entitled to the portion of the immovable property bequeathed in his favour by his father-Pechimuthu vide Ex.P141 and the remaining property will have to be divided amongst the plaintiffs and the defendant equally, i.e. 1 /8th share each as the 5th plaintiff-Jaykumar who is also the legatee under Ex.P141 has joined other plaintiffs claiming equal share by giving up his right as per Ex. P141

54. Insofar as enquiry to be conducted under Order XX Rule 12. C.P.C. to ascertain mesne profits is concerned, such exercise is not permissible in law in a suit filed for partition and separate possession. Though a property of the joint family may be in physical possession of a member belonging to the joint family, but others will be deemed to be in constructive possession of the property and therefore, actual possession held by one of the family members cannot be construed as unlawful possession so as to hold an enquiry under Order XX Rule 12, C.P.C. In fact the relevant provision is Order XX Rule 18, C.P.C. directing rendition of accounts in respect of the remaining property after excluding the

property bequeathed by Pechimuthu in favour of the defendant-Somasundaram. Hence the appeal will have to be allowed in part.

ORDER

The appeal is allowed in part. The judgment dated 5.8.2008 passed in O.S.766/97 is modified holding that the defendant has become the absolute owner of the immovable property bequeathed in his favour by his father-Pechimuthu vide Ex.P141 and there shall be an enquiry regarding rendition of accounts under Order XX Rule 18, C.P.C. relating to the remaining immovable property after excluding the immovable property bequeathed in favour of the defendant. The xerox copy of Ex.P141 shall form part of the decree for identification of the property bequeathed to the defendant in respect of which he is declared as the legatee/owner.

Insofar as dismissal of the plaint with regard. 10 items of immovable properties in Schedule 'C and D' to the plaint is concerned, it is affirmed. The judgment of the trial court stands modified accordingly.

In view of the relationship between the parties, there is no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com