

Janaki Devi Vs. R. Vasanthi and ors.

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Court : Chennai

Decided On : Dec-09-2004

Reported in : 2005(1)CTC11; (2005)1MLJ357

Judge : K. Govindarajan and ;M. Thanikachalam, JJ.

Acts : [Indian Succession Act, 1925](#) - Sections 63 and 68; [Evidence Act, 1872](#) - Sections 68, 69 and 71; Madras High Court Original Side Rules - Order 25, Rule 9; [Registration Act, 1908](#) - Sections 52, 58, 59 and 60

Appeal No. : O.S.A. No. 224 of 1999

Appellant : Janaki Devi

Respondent : R. Vasanthi and ors.

Advocate for Def. : T.R. Rajagopalan, Sr. Adv. for ;P. Peppin Fernandes for Respondent Nos. 3 to 7 and ; A. Tamizharasan, Adv.

Advocate for Pet/Ap. : G. Rajagopalan, Sr. Adv. and ;S. Chandrasekaran, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

M. Thanikachalam, J.

1. The unsuccessful first respondent in T.O.S. No. 10/91, unable to resist the claim of the petitioner/plaintiff/the first respondent herein, who sought for, grant of letters of administration, in respect of the Will dated 4.7. 1974, executed by one Lakshmi Bai, is the appellant.

2. Brief facts leading to the grant of letters of administration are as follows:

(a) Tmt. Lakshmi Bai, who died on 22.6.1981 had executed a Will on 4.7.1974, at Madras, in favour of the plaintiff/first respondent herein, which was her last Will, attested by one Kanmani and A.T. Venkatesan. The plaintiff/first respondent is the step sister of the executant, Tmt. Late Lakshmi Bai. Out of love and affection, she executed the Will in favour of the plaintiff/first respondent, cancelling the previous Will executed by her, in favour of Vasudevan, and another previous Will in favour of Kannan Lal Prasad.

(b)The plaintiff/first respondent herein filed a suit in O.S. No. 886/1993, on the file of the District Munsif Court, Villupuram, against the tenant of the property, by name Kannan, on the basis of the Will, which was exhibited there as Ex.A.1. But, the said suit was dismissed on the ground that the Will was not probated.

(c)The plaintiff/first respondent's husband was not well and the first respondent was also under bed rest, from September 1984 to June 1989, which prevented her, from filing the petition or to take steps, to probate the Will, and the delay was not wanton.

(d) Lakshmi Bai had executed the Will, while she was in a sound disposing state of mind, under which the plaintiff/first respondent was given, the right of management over the properties, covered under the Will, as well as the properties described in the petition. As per the Will, the plaintiff/first respondent alone has to continue the Dharmam, charges and others are not entitled to be in management of the properties. The appellant herein also filed a suit against the plaintiff/first respondent and other respondents, questioning the validity of the Will. Under the above circumstances, it is prayed, that letter of administration, should be granted for the administration of the estate, according to the Will.

(e) The appellant in her written statement, branding the Will dated 4.7.1974, as a rank forgery had stated that the plaintiff/first respondent is not the sister of the deceased Lakshmi Bai, that according to the Trust deed, the plaintiff/first respondent cannot be one of 'the persons, who can manage the Trust, since she is a stranger to the family, that the execution, attestation, registration of the Will are all surrounded by suspicious circumstances, which should be cleared by the petitioner, before she obtains any order, that the explanations for not taking steps to get the Will probated are all imaginary, that the plaintiff/first respondent could not have born to Rajaram Prasad and that under the terms of the Will dated 26.3.1941 executed by Rajaram Prasad, a life estate was given to his daughter, Lakshmi Bai and after her life time to her heirs, which could not be curtailed by the fabricated Will.

(f) The respondents 2 to 6 herein, disputing the Will projected by the plaintiff/first respondent, reiterating the history of the Trust, its obligations, and duties would contend, that except these respondents, nobody is having any right, title or interest what so ever, for carrying on the administration of the properties of Lakshmi Bai, including the plaintiff/first respondent herein and that since the Will itself is a forged one, the plaintiff/first respondent is not entitled to claim any relief, under the guise of Will, preventing the lawful successors, to inherit the estate.

3. The learned Single Judge, on the basis of the pleadings, had framed the following issues, for consideration and they are:

1. Whether the Will dated 4.7. 1974 is genuine, true and invalid?

2. Whether the petitioner is entitled to Letters of Administration?

3. To what relief the petitioner is entitled to?

4. The learned Judge, evaluating the materials placed before him, came to the conclusion, that the plaintiff/first respondent had proved the execution of the Will, despite the fact the attestors have died, as contemplated under law and that the plaintiff/first respondent is entitled to the grant of letters of administration, as claimed, since the question of title cannot be gone into, under this proceedings. In

this view, the suit was decreed, ordering the issue of letters of administration, in favour of the plaintiff/first respondent, which is under challenge in this appeal.

5. Heard the learned Senior Counsel, Mr. G. Rajagopalan for the appellant, the learned Senior Counsel, Mr. T.R. Rajagopalan, for the first respondent and the learned counsel, Mr. A. Tamizharasan for respondents 3 to 7.

6. The learned Senior Counsel for the appellant, while assailing the judgment submitted,

(i) that there is no explanation for the delay in taking steps for obtaining probate, as contemplated under Order 25, Rule 9 of the Madras High Court Original Side Rules,

(ii) that the Will is not proved, as contemplated under law, since none of the attesting witnesses has been examined, to prove the execution of the Will, as well as the valid attestation,

(iii) that since it is said that the attestors are dead, the execution of the Will is also not proved, by identifying the signatures of the attestors as well as the executant, as that of the persons attested and executed, and

(iv) that since the Will has not been properly proved, as mandated by law, letters of administration granted in favour of the plaintiff/the first respondent, is liable to be set aside, which are supported by other respondents, who are supporting the appellant, in a way.

7. The learned Senior Counsel appearing for the first respondent, countering the above arguments submitted, that in view of the admissions made by the appellant and other contesting respondents, regarding the execution of the Will by Lakshmi Bai, in other proceedings, the oral evidence of P.W.1 alone is sufficient to prove the execution of the Will, since she has identified the executant's signature and the attesting witnesses' signatures, being the person present at the time of the execution of the Will, as well as at the time of the registration of the same and, that she had explained the delay in not taking immediate steps, to get the Will probated, that the delay may not have any significance in this case, because of the

fact the execution of the Will is proved, as contemplated under law and that the learned Judge, considering all these points, has correctly appreciated the evidence, granted a decree as prayed for, which requires affirmation, not interference by this Court.

8. From the above submissions and considering the plea and counter plea of the parties, the point that arises for consideration in this appeal is,

Whether the Will dated 4.7.1914 marked as Ex.A 1 is proved, as required under law, entitling the plaintiff/first respondent, for the grant of letters of administration ?.

Point:

9. One Lakshmi Bai, the daughter of Rajaram @ Rajaram Prasad, who was managing the Kemabai Trust had executed a registered Will in favour of the plaintiff/first respondent herein on 4.7.1974. The said Lakshmi Bai died on 22.6.1981 i.e. more or less 7 years from the date of the alleged execution of the Will. The plaintiff/first respondent claiming that she is the step sister of Lakshmi Bai, further contending, that out of love and affection, Lakshmi Bai had executed the Will in her favour, cancelling the previous Wills, thereby making the Will dated 4.7.1974 as her last Will, has filed the petition for grant of letters of administration, since certain immovable properties were bequeathed to her and the same has to be administered as per the wishes of the legatee.

10. The contesting respondents including the appellant, opposed the petition, generally denying the execution of the Will, labeling the same as forged one, not questioning, on the ground of fraud specifically or on the ground that Lakshmi Bai was not in a sound disposing state of mind, to execute a valid Will, understanding its effect, etc.

11. The learned Single Judge considering the rival contentions of the parties, as herein before mentioned, uphold the execution of the Will, thereby ordering the grant of letters of administration, which is under challenge.

12. It would be better, to remember the pleadings in the petition, as well as in the written statement to appreciate the rival contentions of the parties, while assessing

the evidence adduced in support of their rival contentions. The plaintiff/first respondent has specifically pleaded that Lakshmi Bai executed the Will, on 4.7.1974, which was registered on the same day, before the Sub-Registrar's Office, T. Nagar, which was attested by one D. Kanmani S/o. Dinakar Raj and A.T. Venkatesan, S/o. Thanigachala Mudaliar. It is also further pleaded, that the said two attestors are now dead. Though the executant of the Will by name Lakshmi Bai died on 22.6.1981, admittedly, the petition was not filed, to probate the Will within the reasonable time, whereas the same was filed, elsewhere in the year 1990, thereby showing some considerable delay also. To explain this delay, certain allegations are made in paragraph-7 of the petition, wherein it is stated that the petitioner was under bed rest from September 1984 till June 1989 and that apart, her husband was also busy in his business, which prevented the plaintiff/first respondent, to move the Court, for appropriate relief.

13. The appellant has stated in her written statement, that the Will does not bear the signature of Lakshmi Bai and it is a rank forgery. It is not the case of the appellant that at the time of the execution of the alleged Will in favour of the plaintiff, Lakshmi Bai was not doing well or bed ridden or she was not in a sound disposing state of mind, being mentally upset. Thus, it is seen, only a plea of forgery alone has been projected, to invalidate the Will. The other contesting respondents, questioned the validity of the Will on the ground that Lakshmi Bai has no right over the properties mentioned in her Will dated 4.7.1974 and in this view, she cannot execute the Will in favour of a stranger validly, with respect to the properties, not specifically belonged to her.

14. In the year 1986, the appellant herein as plaintiff, on behalf of Kemabai Trust had filed the suit in O.S. No. 142 of 1986 on the file of the Subordinate Judge of Villupuram, for framing a scheme, for proper administration and maintenance of Kemabai Chattram and for other reliefs, wherein the plaintiff herein by name Vasanthi, was shown as 19th defendant. While tracing out the history of Kemabai Trust, how Rajaram Prasad vested the interest in favour of his daughter, Lakshmi bai to manage the properties and maintain the Trust, it is stated that Lakshmi Bai had executed a Will in favour of Vasanthi wife of Fernandes and the relevant portion reads:

'That will also did not take effect, as another Will was executed by her on 4.7.1974 in favour of R. Vasanthi, wife of Fernandez (18th defendant).'

True, it is further pleaded, that the execution, valid attestation and acceptance of the Will is not admitted, though, the execution of the Will dated 4.7.1974 by Lakshmi Bai in favour of Vasanthi was admitted by the appellant herein.

15. The respondents 2 to 6 herein have filed another suit on the file of the Subordinate Judge, Villupuram in O.S. No. 58/1989, impleading the plaintiff as 4th respondent and the suit was aimed, for declaration that the plaintiffs therein are fit and proper person, as trustees, for the management and administration of Kemabai Trust, with powers of control, collect and receive the income of its properties, etc. with other ancillary reliefs. The respondents 2 to 6 herein, while tracing out the history of Kema Bai Trust, had specifically pleaded in paragraph-8 of the plaint, regarding the execution of the Wills by Lakshmi Bai. While narrating the previous Wills dated 26.3.1941 and 19.10.1955, it is said 'afterwards that was also being cancelled by a third Will dated 4.7.1974..... However, the said Lakshmi Bai's third Will was executed on 4.7.1974 in favour of one alleged sister, Vasanthi under suspicious circumstances'. It is further pleaded that the Will dated 4.7.1974 was created with false recitals, regarding relationship with her and how Lakshmi Bai had no right to execute a Will, in favour of Vasanthi, a girl whose parentage is not known, so as to come under this orbit of hierarchy. Thus it is seen, not only the appellant, but also the other respondents in the suit viz., respondents 2 to 6, have specifically admitted the execution of the Will, in favour of the plaintiff/first respondent. In this backdrop, remembering the above pleadings, which are binding upon the parties, not explained otherwise, it should be seen whether the execution of the Will is proved, since law mandates that if a person wants to rely upon a Will, it should be proved as contemplated under the Evidence Act, where mode of proof also specified, such as by calling at least one attesting witness or in the absence of availability of the attesting witness, how the same has to be proved, by adopting other methods.

16. The [Indian Succession Act, 1925](#), regulates how a Will should be executed, in order to have its enforceability. A Will is said to be duly executed when the following

conditions are satisfied, viz.,

- (i) The testator shall sign and affix his mark to the Will,
- (ii) Signature and mark of the testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will,
- (iii) the Will shall be attested by two or more witnesses, and
- (iv) each of the said witnesses must have seen the testator sign or affix his mark to the will and each of them should have signed the Will in the presence of the testator.

17. The law is so settled, unquestionably that it is the duty of the propounder of a Will, to prove the due execution of the same, removing all the suspicious features if any, or removing the cloud of suspicion, if any, created by other side showing that the testator was so conscious, at the time of the execution of the Will, was aware of the fact that he or she had executed the Will, only in order to give effect of the same, it was attested by not less than two attesting witnesses, seeing the testator signing or having the personal knowledge of the signature of the testator. It is also said, if the beneficiary under the Will takes predominant role, while preparing the Will or getting the Will prepared, executed and registered, there may be some suspicion regarding the Will, which should be removed by the propounder or the beneficiary, as the case may be, showing that irrespective of the fact that the beneficiary was present, she or he had not influenced the testator, to execute the Will against the wish, depriving the legitimate right of any person, in case of non testamentary succession.

18. The amount of proof or request proof regarding the execution of the Will, to satisfy the conscience of the Court would depend upon the capacity of the testator such as mental fitness, physical fitness, the nature of the Will itself, such as registered or unregistered, the language of the Will, such as the said language is known to the testator, the nature of the signature and attestation, creating doubt or affirmation, provisions made under the Will such as excluding the legitimate heirs or preventing the line of successor, or favouring a third party against naturality and

the existence of any other suspicious circumstances, depending upon the health condition, other improbabilities if any. Thus, the plaintiff has to satisfy the Court by letting in sufficient acceptable evidence, to prove the due execution of the Will.

19. The Will, Ex.P.1 has to be proved as required under law with regard to Section 63 of the Indian Succession Act read with Section 68 of the Indian [Evidence Act, 1872](#). In certain circumstances, where it is not possible to prove the Will under Section 68 of the Evidence Act, it can be proved as contemplated under Sections 69 and 71 of the Evidence Act. A combined reading of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, makes it clear that a person propounding the Will has to prove that the Will was duly and validly executed. It cannot be done by simply proving the signatures on the Will were that of the attestors, but it must be proved that the attestations were made properly as required by clause (c) of Section 63 of the Indian Succession Act. Under Section 68 of the Indian Evidence Act, a concession has been made to prove and establish a Will, only by examining one attesting witness, even though the Will has to be attested by two witnesses, mandatorily. But, in his evidence, he has to satisfy the attestation of the Will by him and the other attesting witness, in order to prove that there was due execution of the Will. Sections 69 and 71 of the Indian Evidence Act is an exception to the general rule contained in Section 68 of the Indian Evidence Act. Under Section 69 of the Indian Evidence Act, if no attesting witness is found, it can be proved by other evidence that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. Section 71 of the Indian Evidence Act is to meet the situation, where it is not possible to prove the execution of a Will by calling the attesting witness, though alive, or when the attesting witnesses have been called, they deny or fail to recollect the execution of the document. In that way, Section 71 of the Indian Evidence Act is incorporated to safeguard the mandatory provisions of Section 68 of the Indian Evidence Act. Section 71 of the Indian Evidence Act is only to give assistance and come to rescue of a party who has taken steps to get attesting witness to give evidence, but he failed or such witness denied or failed to recollect the execution of the Will. This is only with a view to prove the due execution by 'other evidence'. In support of the above legal position, Some useful reference may be made to the following

decisions to have the guideline, in testing a Will.

20. In *Indu Bala v. Mahindra Chandra*, : [1982]1SCR1188 , the Hon'ble Supreme Court has laid down what is the mode of proof in order to dispel the suspicious circumstances, and how the onus lies on the propounder to explain certain circumstances. It is observed in paragraph-7 of the judgment as follows, affirming the previous decisions:

'If the propounder himself takes a prominent part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations.

It is also made clear in Paragraph-8, what is the suspicious circumstances which reads:

'A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or not expected of a normal person.

21. In *Kalyan Singh v. Chhoti*, : AIR 1990 SC396 it is held, failure on the part of the plaintiff to remove suspicious circumstances, by placing satisfactory materials on record should lead to the conclusion that the Will is not genuine. At paragraph-20, it is stated as follows:

'It has been said almost too frequently to require repetition that a Will is one of the most solemn documents known to law. The executant of the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will. It must be stated that the factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open

to the Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.'

22. In *Kashibai v. Parwatibai*, : (1995)6SCC213 it is held, when no witnesses had deposed that the Will was signed by the deceased, in his presence or he had attested the document, it should be held, the execution of the Will was not proved, as contemplated under Section 68 of the Evidence Act. The Hon'ble Supreme Court has also considered Section 63 of the Indian Succession Act, as well as Section 68 of the Indian Evidence Act, including the definition for attestation as well as execution, wherein it is observed:

'A reading of Section 68 will show that 'attestation' and 'execution' are two different acts one following the other. There can be no valid execution of a document which under the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the fact of execution is of no avail. Section 63 of the [Indian Succession Act, 1925](#) also lays down certain rules with regard to the execution of unprivileged Wills. Clause (c) of Section 63 provides that the Will shall be attested by two or more witnesses, each one of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark or the signature of such other person; and each of the witnesses should sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.'

23. A Division Bench of this Court in *Ammu Balachandran v. O.T. Joseph*, : AIR1996 Mad442 , while considering the suspicious circumstances, viz., that some pages of the Will were not signed by the testator, has taken the view that one signature on the last sheet, made with the intention of executing the Will is sufficient. The Division Bench has observed, that Section 63 of the Indian Succession Act only says that the signature or mark of the testator or the signature

of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as Will. The signature or mark of the testator can be either at the commencement or at the end, but it must be so placed that it shall appear that it was intended to give effect to the instrument as a Will. It is further observed, where the other side alleges undue influence, fraud or coercion, it is for them to prove the ingredients and satisfy the Court that the document produced in Court is defective for those reasons. Further, it is said, delay in propounding the Will also, may be considered as one of the suspicious circumstances and considering this point, it is held, that even if there is any delay, if the same is properly explained, that cannot be treated as a suspicious circumstance for denying a probate.

24. In *Kannian v. Sethurama*, AIR 2000 SC 3522 it is held, by the Hon'ble Supreme Court that the scribe of a Will could not be regarded as an attesting witness and the examination of the scribe will not satisfy the requirement of Section 68 of the Evidence Act.

25. In an unreported decision of this Court in *Maria Stella v. Joseph Catherine*, : AIR2003 Mad270 in C.M.A. No. 1020 of 1990 dated 11.7.2002, one of us (K. Govindarajan, J.) has held, considering the previous decisions, as well as the effect of Section 68 of the Indian Evidence Act and the factum of registration of the Will, that it is clear that it is not necessary to give positive evidence to prove that the testatrix did see the attesting witnesses put their signatures or that attesting witnesses saw the testatrix sign the document. Where there is proof of signature, everything else is implied till the contrary is proved. In the absence of witnesses who are either dead or cannot be brought to Court or cannot recollect the facts, the second evidence is permitted. It is also further observed, relying on a Division Bench of this Court in *Irudayammal v. Salayath Mary* : (1972)2MLJ508 , that it is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registration officer under Section 60 of the Registration Act is relevant for proving execution.

26. Keeping the above principles of law, as well as the pleadings, as pointed out supra, the execution of the Will in this case viz., Ex.P.1 has to be considered.

27. The learned counsel for the appellant submitted that Order 25, Rule 9 of Madras High Court Original Side Rules, is not complied with in this case, and the non-explanation of the delay, with materials should be construed as one of the unavoidable circumstances, to cast shadow upon the Will, to eclipse the same. Order 25, Rule 9 of the Madras High Court Original Side Rules says:

'In any case where probate or letters of administration is for first time applied for after the lapse of three years from the death of the deceased, the reason for the delay shall be explained in the petition.'

In the case on hand, it cannot be said, that this requirement is not complied with, since paragraph-7 of the petition gives some explanation, for the delay. The submission of the learned Senior Counsel for the appellant, that during the relevant period viz., from September 1984 to June 1989, the plaintiff/first respondent could not have been in bed rest, since she was attending the Court in the connected proceedings, fails to inspire us, to reject the explanation offered, considering the fact that the petitioner had proclaimed and propounded the Will, as and when occasion had arisen for her to do so. Admittedly, this petition or plaint has been filed, after three years from the date of death of the testator, since she died on 22.6.1981. If the plaintiff had been silent, not even whispering about the Will, when occasion had arisen, then the inaction on the part of the plaintiff for more than three years in not taking the steps, to probate the Will, could be viewed with suspicion. In this case, admittedly, on the basis of the Will, probably thinking that the Will need not be probated, a suit has been filed by the petitioner, before the District Munsif Court, Villupruam against one Kannan, who was the tenant of the property, for certain reliefs and in those proceedings, this Will was exhibited as Ex.A 1, thereby showing, the plaintiff had taken action, immediately, to preserve the property, over which right has been given, indicating that the plaintiff had no intention, to suppress the Will or conceal the same, from the eyes of others. True, ultimately the suit has been dismissed on the ground, that the Will could not be acted upon, as it was not probated and that is why the present case is filed,

though not immediately, but within the reasonable time, explaining the delay. As held by the Division bench of this Court, in Ammu Balachandran's case, if the execution of the Will is proved, the delay in taking steps to probate the Will, will not loom large, since Order 25, Rule 9 of Madras High Court Original Side Rules has not prescribed any period of limitation and probably, it aims to give explanation alone.

28. In Corra Vedachalam Chetty v. G. Janakiraman, 2001 (3) CTC 283, a Division Bench of this Court had considered the aspect of failure to produce Will for probate immediately after the demise of testator and its effect, wherein it is held as follows, which is squarely applicable to the present case also:

'The fact that the Will was not produced immediately after the demise of the testator for the purpose of probate, does not by itself render the Will fraudulent or untrue. So also the fact that the Will came from the custody of the daughter, beneficiary does not render the Will untrue when the evidence exists to show that the Will was in fact, the last Will of the testator.'

29. For the reasons which we are going to assign hereunder, the execution of the Will is duly proved and therefore, on the ground of the delay in filing the petition for probate alone or letters of administration, entertaining indelible suspicion, a doubt could not be entertained, as if the Will was fabricated by the plaintiff. Hence, this defence deserves rejection.

30. Ex.P.1 is a registered Will and it should have its solemnity, under Section 60 of the Registration Act, though it will not relieve the propounder from proving the execution of the Will, by examining the attester as contemplated under Section 68 of the Indian Evidence Act. When the plaintiff/first respondent has pleaded regarding the attestation of the Will, naming the two attestors, it was not challenged either by the appellant or by other contesting respondents in the written statements specifically. Further, when the plaintiff has pleaded that the attestors are dead, not challenged. Therefore, it should be taken as an admitted fact that none of the attesting witnesses is alive, to comply with the mandatory provisions of Section 68 of the Indian Evidence Act.

31. The legislators in their wisdom, with forethought expecting this kind of circumstance, enacted Section 69 of the Evidence Act, giving guidelines, how a document, which requires attestation should be proved, where no attesting witness is found. Under Section 69 of the Indian Evidence Act, if no attesting witness is available, and all the attesting witnesses are dead, law contemplates proof, that the attestation of one attesting witness at least, in his hand writing and that the signature of the person executing the Will is in the hand writing of that person. It does not say specifically what kind of proof should be made available, such as by examining certain category of person. In the absence of any such specific direction, this fact could be proved, as any other fact, which is required to be proved under the Evidence Act. Therefore, if a person had seen the testator signing in the Will, as well as attesting witnesses signing in the Will, he could speak the execution and the attestation of attesting witnesses, are in their hand writings and the signature of the person, who executed the document is in the hand writing of that person. Preciously, this is the procedure adopted by the propounder in this case, speaking the execution of the Will, attestation, etc., not challenged.

32. The petitioner as P.W.1 has categorically deposed, that the draft Will was written in her house, after it was typed, in the presence of attesting witnesses by name Kanmani and another, the executant signed in the Will, while so the witnesses had seen Lakshmi Bai signing the Will and Lakshmi Bai had seen the two attesting witnesses signing the Will, as attestors. It is the specific further assertion of P.W.1 that she had seen Lakshmi Bai signing the Will and also affixing her left thumb impression in the presence of the Sub Registrar at the time of registering the Will. The above evidence given by P.W.1 has not been challenged, as seen from the cross examination. The submission of the learned counsel for the appellant, that since the appellant had taken the stand of forgery, she cannot deny the execution, attestation, spoken by P.W.1, is unacceptable to us. At least by way of suggestion, to cast cloud upon the evidence given by P.W.1, they should have challenged the evidence of P.W.1, regarding the execution of the Will by Lakshmi Bai, attestation by two witnesses and the registration also. In the absence of any such denial, regarding the execution of the Will by Lakshmi Bai and its attestation, it should be held, that the oral evidence of P.W. 1 is more than

sufficient, to prove the validity of the due execution of the Will, as contemplated under Section 69 of the Indian Evidence Act. The oral evidence of P. W. 1 coupled with the admission of the appellant as well as the other contesting respondents, regarding the execution of the Will by Lakshmi Bai, in the other connected proceedings as hereinbefore mentioned, are proof sufficient, to conclude unhesitatingly, that Ex.P1 is the last Will executed by Lakshmi Bai, in favour of the plaintiff/first respondent.

33. The evidence given by P.W.1, in this case, makes out a case, as if the propounder of the Will had taken dominant role in the execution of the Will, as well as its registration, which could be termed as one of the suspicious circumstances. This suspicion automatically vanished and cleared by the inaction on the part of the testator. During the life time, the testator, would have taken action, if she thought, that the Will was brought out by P.W.1, without her knowledge. No action has been taken. The testator viz., Lakshmi Bai died on 21.6.1981, whereas she had executed the Will on 4.7.1974, thereby indicating her life came to end after 6 years. It is not the case of the contesting respondents or the appellant that from 1974, Lakshmi Bai was not in a sound disposing state of mind, bed ridden or unable to understand the day-to-day activities or failed to attend the administration of the trust, etc. This being the position, considering the date of execution, as well as the date of death of the testator, the reasonable inference that could be drawn is that though the beneficiary had participated in the execution of Will, she had not brought out the Will against the wishes of the testator and if at, all only at the instance of the testator, P.W. 1 should have taken part at the time of the execution of the Will, which in our considered opinion, failed to create any shadow of doubt about the genuineness of the Will.

34. The submission of the learned counsel for the appellant, that Lakshmi Bai used to sign in Tamil, whereas Ex.A1 does contain the signature in English and this circumstance should be taken as one of the suspicious circumstances, to doubt about the genuineness of the Will, has no base for its acceptance, considering the plea in the written statement itself. In paragraph-2 of the written statement, the appellant has stated, while referring the Wills dated 26.3.1941 and 19.10.1955, that in the first Will, Lakshmi Bai is said to have signed in Tamil, while

in the second Will in English, thereby showing that Lakshmi Bai was in the habit of signing her name not only in Tamil, but also in English. Therefore, the fact that Ex.A1 does contain the signature of Lakshmi Bai in English or in many documents, she had signed in Tamil, cannot be a ground to doubt about the genuineness of Ex.A1, considering the fact, its execution is well proved, as indicated by us, as well as correctly by the learned Judge also.

35. The plaintiff/first respondent claims, that she is the step sister of Lakshmi Bai, which is very much challenged. In this proceedings, the relationship of the parties was not in issue, warranting any findings. Lakshmi Bai could very well execute a Will, even in favour of a stranger, if she had the right and in this view, the claim of the plaintiff/first respondent, that she is the step sister of Lakshmi Bai alone assuming incorrect, cannot be taken into account, to doubt about the genuineness of the Will, since it is otherwise proved. Therefore, the attempt made by the learned counsel for the appellant, taking us to the evidence, age of Lakshmi Bai and Rajaram @ Rajaram Prasad, failed to persuade us to create any doubt over the genuineness of the Will, regarding the executant and in this view, this point is also liable to be rejected.

36. Ex.P.1 original Will was registered on the same day of the execution and the attestors alone have identified the testator before the Sub Registrar, for registration. Since forgery was alleged, to prove the execution of the Will as well as its acceptance before the Sub Registrar by Lakshmi Bai, the plaintiff had taken the steps, to examine the thumb impression of Lakshmi Bai in Ex.P.1, comparing the same with the thumb impression available in the Registrar's office. The finger print expert, who has been examined as P.W.2, has given evidence about the similarity, and we do not find any reason to discard his evidence, only on the ground, that the compared thumb impressions are not having similar appearance by size. The size of thumb impression would depend upon the manner of taking and affixing. When the finger was rolled on both sides, the space covered by the impression may be larger, when the thumb was just pressed and taken away, the space covered may be less and only in this way, it appears to our mind, there is some difference in size and it will not change the characteristic of the thumb impressions, which was found by the hand writing expert, similar. The oral

evidence given by the finger print expert would make it clear further, that Lakshmi Bai had been to Registrar's Office, registered the document, thereby accepting the execution of the document viz., Ex.P.1 and that is why, the thumb impression found in Ex.P.1 and the thumb impression found in the book maintained by the Sub Registrar's Office tallied. True, the signature of Lakshmi Bai in Ex.P.1 was not compared with the admitted signature of Lakshmi Bai and the reason is not known. However, by proving the thumb impression, the registration of the document by Lakshmi Bai is proved, which would prove that Lakshmi Bai had admitted her signature in the Will, thereby admitting its execution also.

37. Sections 52 & 58 of the Registration Act, imposes certain duties upon the registering authority, followed by endorsement by registering officer under Section 59 and certificate of registration under Section 60 of the Act, recognising these acts as solemn one. In this case, in Ex.P.1 endorsements were made, not challenged, which could be taken as evidence, to prove the due execution also, in the absence of evidence available, through the mouth of the attesting witnesses, since they are dead, on identification of their signatures, though registration by itself could not prove the due execution of the document.

38. The above view is further strengthened by a Division Bench of the Privy Council in Gopal Das v. Sri Thakurji, , wherein Their Lordships have held that the endorsement showing presentation and execution, admitted by the testator before the Registrar are sufficient to certain extent to prove the execution of the Will itself, provided it is not shown that the testator, who had admitted the execution of the document, is not an impostor.

39. In Irudayammal v. Salayath Mary, : (1972)2MLJ508 , a Division Bench of this Court has held that certificate of registration under Section 60 of the Registration Act is relevant for proving the execution, wherein it is observed as follows:

'It is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registration officer under Section 60 of the Registration Act is relevant for proving execution.'

40. In *Huthegowda v. Chennigowda*, AIR 1953 Mys. 49, the following view was taken by a Division Bench:

'Evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed.'

41. We have already given a finding regarding the genuineness of the execution and its registration on the basis of the unchallenged evidence given by P.W.1 and considering these proved facts supported by the above rulings, it should be further held, in view of Sections 52(1)(a), 58 & 60 of the Registration Act, the certificate issued by the Registrar would certainly, constitute sufficient evidence to prove the document, its execution also to some extent. For the foregoing reasons, we are fully satisfied, that the requirements of conditions in proving a Will, as mentioned *supra* are well established, and the burden of proof also discharged by the plaintiff, deserving her, to receive the order, for letters of administration.

42. The submission of the learned counsel for the appellant, as well as other contesting respondents, that Lakshmi Bai has no right to execute the Will, or she has no interest in the properties covered under the Will are all not within the scope of this suit and if these defences are available, it is for the appellant and the other contesting respondents, to agitate the same before the appropriate forum, since they have already filed the suit, questioning this Will and in this view, it may not be proper for us to give any finding, regarding the validity of the Will, except saying its execution is proved, entitling the plaintiff to get an order, for letters of administration.

43. The learned single Judge, considering all these points in detail, in the light of the above settled legal position, came to an unerring conclusion, that the execution of the Will is proved, in which finding, we are unable to see any perverse in nature or any error either on law or on facts, warranting our interference, to upset the findings. In this view, we find no reason, to conclude the appeal is meritorious, whereas it should be held, that the appeal is not meritorious, entitling its dismissal.

In the result, the appeal is dismissed, confirming the judgment passed by the learned Single Judge in T.O.S. No. 10/1991, but under the facts and circumstances of the case, directing the parties to bear their respective costs.

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