IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:30.01.2009

Coram:

THE HONOURABLE MR.JUSTICE G.RAJASURIA

A.S.No.629 of 1996

S.Ganesan ... Appellant/Plaintiff

vs.

1.S.Kuppuswamy
2.S.Parthiban ... Respondents/Defendants

Appeal preferred against the judgment and decree dated 20.11.1995 passed in O.S.No.380 of 1990 by the Subordinate Judge, Kancheepuram.

For Appellant : Mr.N.D.Bahety

For respondents : Mr.R.Chandrasekaran
for M/s P.V.S.Giridhar and
Sai Associates

JUDGMENT

This appeal is focussed as against the judgement and decree 20.11.1995 passed in O.S.No.380 of 1990 by the Subordinate Judge, Kancheepuram, which is one for delivery of possession of the suit properties, for mesne profits and for damages for illegal use and occupation of the properties.

2.The epitome and the long and short of the case of the plaintiff, as stood exposited from the averments in the plaint as well as from the documents and submissions made by the learned counsel for the appellant/plaintiff would run thus:-

(a) The property described in the 'A' schedule of the plaint was allotted to the share of one K.Chinna Kannu Reddy, as per Partition Deed dated 27.2.1966(Ex.A2).

(b) 'B' and 'C' schedule properties were allowed to be occupied by defendants 1 and 2 respectively, who are none but the brother-in-laws of the plaintiff, under leave and licence, by the said Chinna Kannu Reddy,

(c) Chinna Kannu Reddy, during his life time executed a registered 'Will' dated 25.7.1993 in favour of the

plaintiff, bequeathing the 'A' scheduled property, which includes 'B' and 'C' scheduled properties of the plaint. In fact, the plaintiff happened to be the adopted son of the said Chinna Kannu Reddy.

(d) After the death of Chinna Kannu Reddy on 29.7.1985, as revealed by Ex.A3-the death certificate, the plaintiff became the absolute owner of the suit properties.

(e) Notice was sent revoking the licence granted in favour of D1 and D2, which, instead of evoking positive response from them, resulted in they sending replies, setting up untenable claims. A rejoinder also was sent by the plaintiff. Hence, the suit for obtaining delivery of possession of the suit properties; for mesne profits and for damages for illegal use and occupation of the properties by the defendant.

3. Inveighing and impugning, refuting and remonstrating the case of the plaintiff, the defendants filed the written statement and addition written statements, the gist and kernal, the pith and marrow of them would run thus:-

(i) the properties, which are under the occupation of the defendants were purchased by them, as per Section 9 and 54 of the Transfer of Property Act, from the said Chinna Kannu Reddy by virtue of oral sale, as those properties were less than Rs.100/-.

(ii) the defendants acquired prescriptive title over the suit property by virtue of their continuous, uninterrupted and open enjoyment as owners of the said properties for more than 20 years.

(iii) The defendants are not in possession and enjoyment of the suit properties under the alleged leave and licence referred to in the plaint.

(iv) At the time of purchase of those properties from Chinna Kannu Reddy 20 years ago, they paid a sale consideration of Rs.90/- in total and it was in a dilapidated condition, after such purchase, the defendants reconstructed the house.

(v) over and above that, they also occupied a sizable extent of poramboke land, adjoining the said property.

(vi) Absolutely there was no liability to pay any damages for use and occupation as claimed in the plaint.

Accordingly, the defendants prayed for dismissal of the suit.

4. The trial Court framed the relevant issues. During trial, the plaintiff examined himself as P.W.1 and Exs.A1 to A17 were marked on his side. On the defendants' side D1 examined himself as D.W.1 along with one other person as D.W.2 and no document was marked on the defendants' side.

5. Ultimately, the trial Court dismissed the suit. Being aggrieved by and dissatisfied with the judgement and decree of the trial Court, the appellant preferred this appeal on the following grounds among others.

(a) the judgement and decree of the trial Court are against law and weight of evidence.

(b) the trial Court, after correctly disbelieving the version of the defendants that they purchased the properties under oral sale, fell into error in expecting the plaintiff to prove his title over the suit property.

(c) the trial Court was also not justified in holding that Ex.A17-the 'Will' was not proved as per law.

Accordingly, the appellant/plaintiff prayed for setting aside the judgement and decree of the trial Court and for decreeing the original suit as prayed for.

6. The parties are referred to here under, for convenience sake, according to their litigative status before the trial Court.

7. The points for consideration are as to:

(i) Whether the Will Ex.A17 cannot be relied on by the plaintiff for want of probating it as per Indian Succession Act?

(ii) What was the quantum of evidence required to be adduced by the plaintiff to make the Court to act upon Ex.A17-the 'Will' and whether such evidence is available in support of the plaintiff's case?

(iii) Whether the plea of oral sale, as put forth by the defendants, was proved by them?

(iv) Whether the plaintiff is the adopted son of deceased Chinna Kannu Reddy and whether he is entitled to the reliefs as prayed for in the plaint?

(v) Whether there is any infirmity in the judgement and dismissal decree of the trial Court?

8. The warp and woof, the nitty-gritty of the arguments of the learned counsel for the appellant/plaintiff, succinctly and precisely could be portrayed to the effect that the trial Court, after correctly negativing the plea of oral sale as put forth by the defendants, adopted a wrong approach in expecting that the 'Will' should have been proved by the plaintiff strictly as per Section 68 of the Indian Evidence Act, when in fact, such strict proof of the 'Will' is not required when the defendants are not in any way related to the testator of the 'Will', namely, Chinna Kannu Reddy; no probating of the 'Will' is also required in the facts and circumstances of this case; the plaintiff established himself as the legal heir of deceased Chinna Kannu Reddy, but the trial Court held otherwise, ignoring the documentary and oral evidence available in favour of the plaintiff and accordingly, he prayed for setting aside the judgement and decree of the trial Court.

9. Pithily and precisely, the arguments of the learned counsel for the respondents/defendants could be parodied to the effect that the plaintiff is not justified in laying claim over the suit property based on the Will which has not been probated as per the provisions of the Indian Succession Act; Sections 57 and 213 of the Indian Succession Act are clear on the point that such unprobated Will executed within the city of Chennai cannot be the basis for laying claim over the subject matter referred to in the Will; the plaintiff is having absolutely no right to seek for the relief prayed in the suit.

POINT NO:1

10. The plaintiff being the beneficiary and propounder of the Will placed reliance on Ex.A17, the Will to claim right over the suit property. A bare perusal of Ex.A17 would leave no doubt in the mind of the Court that Ex.A17 was executed in Chennai city having permanent residence in Chennai City as revealed by evidence in this case and it was registered at the Office of the Sub Registrar within Chennai city. In such a case, Section 57 of the Indian Succession Act is attracted. For ready reference, it is reproduced hereunder:

> "57. Application of certain provisions of Part to a class of Wills made by Hindus, etc.- The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-
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> (a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and

Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and

(c) to all Wills and codicils made by any Hindu, Bhuddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):

Provided that marriage shall not revoke any such Will or codicil."

11. No doubt, the immovable property contemplated in the Will is situated outside Chennai city, but the testator having his regular place of aboard in Chennai before his death and at the time of executing the Will executed Ex.A17 and thereby attracted Section 57 of the Indian Succession Act, which mandates that such a Will should be probated. But in this case, unassailably and incontrovertibly the said Will was not probated. The consequence of such non probating of the Will is found depicted in Section 213 of the Indian Succession Act. Section 213 is reproduced hereunder for ready reference:

"213. Right as executor or legatee when established.- (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This section shall not apply in the case of Wills made by Muhammkadans or Indian Christians, and shall only apply-

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the [ordinary original civil jurisdiction] of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immovable property situated within those limits].

12. It is therefore crystal clear that Ex.A17 in the absence of it having been probated cannot be relied on by the propounder of the

Will for placing reliance on it to seek recovery of possession. The learned counsel for the defendants would fruitfully cite the decision of the Hon'ble Apex Court reported in AIR 1962 SC 1471 [Mrs.Hem Nolini Judah (since deceased) and after her legal representative Mrs.Marlean Wilkinson vs. Mrs.Isolyne Sarojbashini Bose and others]. An excerpt from it would run thus:

> "7. We have already pointed out that though it was said that Dr Miss Mitter had executed a will in favour of her mother Mrs Mitter in June, 1925 bequeathing the house in dispute to her, no probate or letters of administration were ever obtained by Mrs Mitter. It is true that Mrs Mitter in her turn made a will in favour of the appellant and she obtained letters of administration of that will. In that will the house in dispute was mentioned as the property of Mrs Mitter and was bequeathed to the appellant and in the letters of administration granted to her this property was mentioned as one of the properties coming to her by the will of her mother. The question therefore that arises is whether it was necessary before the appellant could take advantage of the bequest in favour of Mrs Mitter that letters of administration of the will of Dr Miss Mitter should have been obtained by Mrs Mitter. Section 213(1) which governs this matter is in these terms:-
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> "(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed."
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> This Section clearly creates a bar to the establishment of any right under will by an executor or a legatee unless Probate or letters of administration of the will have been obtained. It is now well-settled that it is immaterial whether the right under the will is claimed as a plaintiff or as a defendant; in either case Section 213 will be a bar to any right being claimed by a person under a will whether as a plaintiff or as a defendant unless Probate or letters of administration of the will have been obtained: (see Ganshamdoss Narayandoss v. Gulab Bi Bai, ILR 50 Mad 927: (AIR 1927 Mad 1054((FB). But it is urged on behalf of the appellant that this Section will not bar her because she obtained letters of administration of the will of her mother Mrs Mitter under which she is claiming and that it was not necessary for Mrs Mitter to have obtained Probate of the will of Dr Miss Mitter in her favour. Now it is not in dispute that the grant of Probate or letters of administration does not establish that the person making the

will was the owner of the property which he may have given away by the will, and any person interested in the property included in the will can always file a suit to establish his right to the property to the exclusion of the testator in spite of the grant of Probate or letters of administration to the legatee or the executor, the reason being that proceedings for Probate or letters of administration are not concerned with titles to property but are only concerned with the due execution of the will. Therefore, when the plaintiff-respondent contended in effect that the appellant could not establish her right to the full ownership of this property on the basis of the will of Mrs Mitter because Mrs Mitter had not obtained Probate or letters of administration of the will of Dr Miss Mitter, she was really contending that Mrs Mitter was not the full owner of this property so that she could dispose it of as she willed. The plaintiff-respondent was thus disputing the title of Mrs Mitter to dispose of the entire disputed house by her will on the ground that Mrs Mitter was not the sole owner of this house after the death of Dr Miss Mitter. In order therefore that the appellant should succeed on the basis of the letters of administration of the will of Mrs Mitter which had been granted to her with respect to this house, she had to show that Mrs Mitter was the full owner of this house at the time she made the will in her favour. Now the appellant could show this by other evidence; but if the appellant wanted to rely on any will of Dr Miss Mitter in favour of Mrs Mitter, in proof of full ownership of Mrs Mitter of this house, it would amount to this that the appellant was saying that Mrs Mitter was the owner of the house as the legatee under the will made by Dr Miss Mitter. The appellant would thus be asserting the ownership of Mrs Mitter of the whole house as a legatee, and this is what sub-section (1) of Section 213 clearly forbids, for it says that no right as a legatee can be established in a Court of Justice, unless the Probate or letters of administration have been obtained of the will under which the right as a legatee is claimed. It is true that so far as the will of Mrs Mitter in favour of the appellant is concerned, she has obtained letters of administration of that and she can maintain her right as a legatee under that will; but that will in her favour only gives her those properties which really and truly belonged to Mrs Mitter, that will however does not create title in the appellant in properties which did not really and truly belong to Mrs Mitter but which Mrs Mitter might have thought it fit to include in the will. Therefore, as soon as the appellant, in order to succeed on the basis of the will in her favour of which she obtained letters of administration, alleges that Mrs Mitter was full owner of the property able to will it away to her, she had to prove the title of Mrs

Mitter to the property. Now if that title rests on Mrs Mitter's being a legatee of Dr Miss Mitter the appellant will have to prove that Mrs Mitter had the right as a legatee under the will of Dr Miss Mitter. As soon as the appellant wants to prove that, Section 213 will immediately stand in her way for no right as an executor or a legatee can be proved unless Probate or letters of administration of the will under which such right is claimed have been obtained. The words of Section 213 are not restricted only to those cases where the claim is made by a person directly claiming as a legatee. The Section does not say that no person can claim as a legatee or as an executor unless he obtains Probate or letters of administration of the will under which he claims. What it says is that no right as an executor or legatee can be established in any Court of Justice, unless Probate or letters of administration have been obtained of the will under which the right is claimed, and therefore it is immaterial who wishes to establish the right as a legatee or an executor. Whosoever wishes to establish that right, whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might have derived title, he cannot do so unless the will under which the right as a legatee or executor is claimed has resulted in the grant of a Probate or letters of administration. Therefore, as soon as the appellant wanted to establish that Mrs Mitter was the legatee of Dr Miss Mitter and was therefore entitled to the whole house she could only do so if the will of Dr Miss Mitter in favour of Mrs Mitter had resulted in the grant of Probate or letters of administration. Admittedly that did not happen and therefore Section 213(1) would be a bar to the appellant showing that her mother was the full owner of the property by virtue of the will made in her favour by Dr Miss Mitter. The difference between a right claimed as a legatee under a will and a right which might arise otherwise is clear in this very case. The right under the will which was claimed was that Mrs Mitter became the owner of the entire house. Of course, without the will Mrs Mitter was an equal heir with her daughters of the property left by Dr Miss Mitter, as the latter would be taken to have died intestate, and would thus be entitled to one-fourth. It will be seen from the judgment of the High Court that it has held that the appellant is entitled to the one-fourth share to which Mrs Mitter was entitled as an heir to Dr Miss Mitter and granted the plaintiff-respondent a declaration with respect to only half the house. Therefore, the High Court was right in holding that Section 213 would bar the appellant from establishing the right of her mother as a legatee from Dr Miss Mitter as no Probate or letters of

administration had been obtained of the alleged will of Dr Miss Mitter in favour of Mrs Mitter. The contention of the appellant on this head must therefore fail.

13. The aforesaid excerpt and the reading of the entire judgment would highlight and spotlight the proposition that in the absence of probating Will or obtaining letters of administration relating to the Will executed in cities like Madras, the propounder of the Will or the beneficiary under the Will cannot claim any right.

14. In the words of the Hon'ble Apex Court, such Will like Ex.A17 unaccompanied by probate or letters of administration, it is immaterial, where the right under the Will is claimed as a plaintiff or as a defendant, in either case, Section 213 of the Indian Succession Act will be a bar to any right being claimed by a person under such Will, where as a plaintiff or as a defendant unless probate or letters of administration of the Will have been obtained. The same proposition is found reiterated and enunciated in the decision of the Hon'ble Apex Court reported in (2008)4 SCC 300 [Krishna Kumar Birla v. Rajendra Singh Lodha and others]

15. As such, it is beyond any pale of controversy that a Will executed within Chennai city, but not probated or accompanied by letters of administration cannot be relied on by the beneficiary to lay claim over a property based on such Will. However, the learned counsel for the plaintiff cited the decision of the Hon'ble Kerala High Court reported in AIR 2001 KERALA 184 [Cherichi v. Ittianam and others] and tried to canvass his point that parties like the defendants who have nothing to do with the testator and his property, cannot put forth the plea of absence of probate or letters of administration as contended by them in this case.

16. A bare perusal of the cited decision of the Kerala High Court would at once make the point clear that the said decision is in concinnity and in consonance with the judgment of the Hon'ble Apex Court cited supra and it in no way supports the proposition as put forth by the learned counsel for the plaintiff. Placing reliance on an unprobated Will or a Will unaccompanied by letters of administration for a purpose other than laying claim over the subject matter of the Will as beneficiary is different. Here the plaintiff is relying on Ex.A17 for the purpose of recovering the suit property as a beneficiary under the unprobated Will Ex.A17. Hence the Point No.1 is decided as against the plaintiff, but in favour of the defendants that Ex.A17 Will cannot be relied on by the plaintiffs for the purpose of evicting the defendants.

POINT NO.2:

17. In the wake of point No.1 having been decided as against the plaintiff, this point relating to the quantum of proof required to prove Ex.A17 loses its significance. However, for the purpose of

comprehensively deciding the appeal, I would like to discuss on merits this point also.

18. In view of the decision of the Hon'ble Apex Court reported in (2008)4 SCC 300 (cited supra)when a person having no cavetable interest or in any way related to the testator cannot insist upon the Will being proved strictly in accordance with Section 68 of the Indian Evidence Act. In this case, the defendants admittedly are not in any way related to the deceased and obviously they are not the legal heirs of the deceased testator and in such a case, the defendants cannot call upon the plaintiff to prove Ex.A17, the Will in accordance with Section 68 of the Indian Evidence Act. Ex.A17 is a registered Will and in such a case, the decision of the Hon'ble Apex Court reported in 2006(2)LW 658 SC [Pentakota Satyanarayana & others vs. Pentakota Seetharatnam & others] is relevant and an excerpt from it would run thus:

> "25. A perusal of Ex.B9 (in original) would show that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement were, in our opinion, sufficient attestation within the meaning of the Act. The endorsement by the sub-registrar that the executant has acknowledged before him execution did also amount to attestation. In the original document the executants signature was taken by the sub-registrar. The signature and thumb impression of the identifying witnesses were also taken in the document. After all this, the sub-registrar signed the deed. Unlike other documents the Will speaks from the death of the testator and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his Will or not and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and the testament of departed testator.
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> 26. In the instant case, the propounders were called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document on his own freewill. In other words, the onus of the propounder can be taken to be discharged on proof of the essential facts indicated above. It was argued by learned counsel for the respondent that popounders themselves took a prominent part in the execution of the Will which will confer on them substantial benefits. In the instant case, propounders who were required to remove the said suspicion have let in clear and satisfactory evidence. In the

instant case, there was unequivocal admission of the Will in the written statement filed by P.Srirammurthy. In his written statement, he has specifically averred that he had executed the Will and also described the appellants as his sons and Alla Kantamma as his wife as the admission was found in the pleadings. The case of the appellants cannot be thrown out. As already noticed, the first defendant has specifically pleaded that he had executed a Will in the year 1980 and such admissions cannot be easily brushed aside. However, the testator could not be examined as he was not alive at the time of trial. All the witnesses deposed that they had signed as identifying witnesses and that the testator was in sound disposition of mind. Thus, in our opinion, the appellants have discharged their burden and established that the Will in question was executed by Srirammurthy and Ex.B9 was his last will. It is true that registration of the Will does not dispense with the need of proving, execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act. The Registrar has made the following particulars on Ex.B9 which was admitted to registration, namely, the date, hour and place of presentation of document for registration, the signature of the person admitting the execution of the Will and the signature of the identifying witnesses. The document also contains the signatures of the attesting witnesses and the scribe. Such particulars are required to be endorsed by the Registrar along with his signature and date of document. A presumption by a reference to Section 114 of the Evidence Act shall arise to the effect that particulars contained in the endorsement of registration were regularly and duly performed and are correctly recorded. In our opinion, the burden of proof to prove the Will has been duly and satisfactorily discharged by the appellants. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. In such circumstances, the onus shift to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same.

27. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the

genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in Sridevi & Ors vs. Jayaraja Shetty & Others, (2005) 2 SCC 784 = 2005-2-L.W.89. In the said case, it has been held that the onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and the proof of signature of the testator as required by law not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case.

28. Mr.Narsimha, learned counsel for the respondents submitted that the natural heirs were excluded and legally wedded wife was given a lesser share and, therefore, it has to be held to be a suspicious circumstance.We are unable to countenance the said submission. The circumstances of depriving the natural heirs should not raise any suspicion because the whole idea behind the execution of the Will is to be interfered in the normal line of succession and so natural heirs would be debarred in every case of the Will. It may be that in some cases they are fully debarred and some cases partly. This is the view taken by this Court in Uma Devi Nambiar and Others vs. T.C.Sidhan (Dead) (2004) 2 SCC 321 = 2004-2-L.W.852.

19. In view of the aforesaid trite proposition of law, even though the the two attesting witnesses of Ex.A17 were not examined on the plaintiff's side in accordance with Section 63 of the Indian Evidence Act, nonetheless, it cannot he held that the plaintiff has not proved the due execution of the Will Ex.A17 by the testator.

20. The learned counsel for the defendants cited the decision of this Court reported in 2007(5) CTC 513 [L.Bakthavatsalam and others vs. R.Alagiriswamy (died) and others) so as to highlight the point that a Will has to be proved in accordance with Section 63 of the Indian Evidence Act. To the risk of repetition without being tautologous, I would state that the said decision is not applicable to the facts and circumstances of this case for the reason that the Will is sought to be pressed into service as against the defendants who are not the legal heirs or in any way interested in the suit property having some covetable interest in it.

21. The learned counsel also cited the decision of the Hon'ble Apex Court reported in AIR 1959 SC 443 [H.Venkatachala Aiyengar v. B.N.Thimmajamma and others]. The same comments afford for highlighting the inapplicability of the decision of this Court reported in 2007(5)CTC 513 (cited supra) shall also be applicable to the aforesaid decision of the Hon'ble Apex Court cited by the learned counsel for the respondents.

22. The learned counsel for the plaintiff would appropriately and appositely would cite the decision of this Court reported in (2001) 1 TNLJ 71 [Valliammal vs. S.Arumugha Gounder and another] to buttress his stand that truth and validity of a Will cannot be questioned by a stranger to the family of the testator. It is therefore crystal clear that in this case, the defendants contention that the Will Ex.A17 was not proved in accordance with Section 63 of the Indian Evidence Act fails to carry conviction with the Court. Accordingly, this issue is decided to the effect that the plaintiff proved the due execution of the Will Ex.A17 by the testator, however in view of the decision under point No.1, such unprobated Will cannot be relied on by the plaintiff in support of his claim and prayers in the plaint.

POINT NO.3:

23. This point is with regard to plea of oral sale as put forth by the defendants relating to the suit property. A bare perusal of the lower Court's judgment would reveal that the trial court in its discussion under points 1 and 2 elaborately dealt with the plea of oral sale and disbelieved it. It is the contention of the defendants that for a sum of Rs.90/-, the suit property with a dilapidated building thereon was purchased by them and they renovated the building and started enjoying the same. Absolutely there is no iota or speck, shred or shard, miniscule or dot of evidence in support of the plea of oral sale. I am constrained to hold that no man having head over shoulder would ever be able to believe that for a sum of Rs.90/- the suit property with an alleged dilapidated building was purchased by the defendants after 1966.

24. The fact remains that as per Ex.A2, the partition deed dated 27.02.1966, the suit property and other properties were allotted to the share of the admitted original owner, namely Chinna Kannu Reddy and even at that time those properties were worth Rs.9,000/-. The lower Court correctly under paragraph 9 of the judgment analysed the improbabilities in the plea of oral sale and gave a coup de grace to it, which warrants no interference by this Court. The lower Court also dealt with the plea of prescription relating to 'B' and 'C' schedules of the property and negatived it under issue no.3. The contention of the defendants that over and above the suit property they have also enlarged their occupation in the adjoining poramboke property is not at all germane for deciding this case. As per the plaint, the plaintiff prays for evicting the defendants from 'B' and 'C' schedule properties of the plaint. The 'B' schedule property is described as one measuring an extent of 200

sq.ft. and the 'C' schedule property is measuring an extent of 800 sq.ft. and nothing more. Whereas, the contention of the defendants is to the effect that they have also occupied an extent of 11 cents of porombake land. As such, the plea of the defendants as against the prayer of the plaintiff in the plaint do not hang together relating to the extent of property over which the plaintiff lays claim. Accordingly this point is decided to the effect that the defendants have not proved their plea of oral sale or their right to occupy the suit property. Accordingly, this point is decided as against the defendants.

POINT NO.4:

25. This point is relating to the right of the plaintiff to recover 'B' and 'C' scheduled properties of the plaint. Even though under point No.1 I have held that based on the Will the plaintiff cannot seek any relief in the suit, nonetheless, it is to be found out as to whether in any other capacity the plaintiff can claim the reliefs. The learned counsel for the plaintiff would stress upon the fact that the defendants failed miserably in proving their pleas; over and above that they exposed themselves that they had put forth false pleas of oral sale etc.; such illegal occupiers of the suit property can be evicted by the Court at the prayer of the plaintiff and that too when the plaintiff is the adopted son of deceased Chinna Kannu Reddy.

26. The records would exemplify and evince that absolutely there is no molecular or miniscule extent of evidence to prove that the plaintiff is the adopted son of Chinna Kannu Reddy. By way of adding fuel to the fire and fanning the flame in addition to making worse the plea of the plaintiff, the very recital in the Will would unambiguously and unequivocally demonstrate that the plaintiff is the foster son of the deceased Chinna Kannu Reddy. An excerpt from Ex.A17 - the Will is extracted hereunder for ready reference.

> "எனக்கு வயது சுமார் 75 ஆகிறது. நீ என்னுடைய உடன் பிறந்த சகோதரியாகிய அம்மாகண்ணு அம்மாளின் குமாரனாகிய செங்கழனி என்பவரின் குமாரனாகிய எஸ்.கணேசன் என்பவனை நான் எனக்கு சந்ததிகள் ஒருவரும் இல்லாததினால் என் வளர்ப்பு குமாரனாக எடுத்துக் கொண்டு அது முதல் நாங்கள் ஜீவிதமாய் இருந்து வருகிறோம். நான் என்னுடைய வளர்ப்பு குமாரனாகிய எஸ்.கணேசன் என்பவனுக்கு நல்ல முறையில் படிக்கவைத்தும், உத்தியோகத்தில் அமர்த்தியும், என்னுடைய சொந்த செலவினாலேயே அவனுக்கு திருமணம் செய்து வைத்தும் அவன் என்னுடனேயே ஜீவிதமாய் இருந்துவருகிறேன்."

27. The term 'valarpu magan' in Tamil would connote foster son and not adopted son. But simply, the plaintiff cannot wriggle out of his liability to prove that he is the adopted son of Chinna Kannu Reddy by merely pleading that he is the adopted son. Apart from examining himself, no other witness was examined on his side to buttress and fortify his plea of adoption. Precisely there is nothing to indicate that he was treated as the adopted son by Chinna Kannu Reddy. In fact, in the very plaint itself the plaintiff described himself as the son of

his biological father viz., Sengazhani Reddy. If at all the plaintiff is really the adopted son of Chinna Kannu Reddy, in the cause title of the plaint his name should have been indicated therein as son of Chinna Kannu Reddy. Even in the Will Ex.A17, he was described only as the biological son of Sengazhani Reddy.

28. As such, absolutely there is nothing to display and evidence that the plaintiff de hors the Will Ex.A17 possesses any right to evict the defendants, eventhough the defendants have not proved their right to continue in possession of the suit property. As has been already held above, based on the Will - Ex.A17, the plaintiff cannot seek any relief in this suit. Accordingly, this point is decided as against the plaintiff.

POINT NO.5:

29. In view of the ratiocination adhered to in deciding the aforesaid points, I could see no infirmity in the judgment and decree of the trial Court and consequently the appeal is dismissed. However, there shall be no order as to costs.

Sd/-
Asst.Registrar

/True Copy/

Sub.Asst.Registrar

gms/msk

To

1.Subordinate Judge, Kancheepuram

Copy to : The Section Officer,
V.R.Section, High Court, Madras.

+ 1 CC to Mr.N.D.Bahety,Advocate,SR.4665
+ 1 CC to M/s.P.V.S.Giridhar & Sai Associates,SR.4517

KV(CO)
EM/12.2.09