



S.A.No.627 of 2019

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	09.07.2025
Pronounced on	02.09.2025

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.No.627 of 2019

Subramaniam

...Appellant

Vs.

1. Chellathal
2. Kuppathal
3. Ramathal
4. Lakshmi
5. Chinnathal @ Saraswathi

... Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment of Subordinate Court, Dharapuram, dated 06.08.2009 in A.S. No.33/2007 confirming the judgment and decree passed by the District Munsif Court, Dharapuram dated 13.04.2007 in O.S. No.127/2002.

For Appellant : Ms. T.R. Gayathri & Mr. S. Frangelin

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for M/s. Sarvabhauman Associates

For Respondents : No appearance

JUDGMENT

The Second appeal is directed against the judgment and decree of Sub Court Dharapuram dated 06.08.2009 in A.S. No.33/2007 confirming the judgment and decree passed by the District Munsif Court, Dharapuram dated 13.04.2007 in O.S. No.127/2002.

2. For the sake of convenience the parties are referred to as per their ranking in the trial court.

3. The 1st defendant is the appellant in this Second Appeal. The first respondent, as plaintiff, filed the suit in O.S.127/2002 claiming 1/10 share in the suit properties and separate possession and for mesne profit.

4. According to the plaintiff, the suit properties originally belonged to the mother of the plaintiff namely Malayammal and her brother who is



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the 1st defendant in the suit, who purchased the same jointly under Ex.A1 sale deed on 29.01.1985. The suit properties were possessed and enjoyed jointly by the plaintiff's mother and the 1st defendant Subramanian. While so, the said Malayammal died about 10 or 12 years back. The legal heir of Malayammal namely, the plaintiff and the defendants 2 to 5 acquired the properties under devolution and the properties have been managed jointly by the husband of the plaintiff, namely Kalisamy Gounder, and the 1st defendant.

4.1. When dispute arose between the plaintiff and the family of the 1st defendant, the plaintiff issued a legal notice (Ex.A2) on 09.02.2002 claiming half share in the properties and separate possession. The 1st defendant received the notice and sent a reply (Ex.A3) on 01.03.2002 stating that while Malayammal was alive, she executed an unregistered Will (Ex.B2) dated 27.02.1989 bequeathing her share in favour of the 1st defendant and died on 09.03.1989 and in pursuance to the Will which came into effect, the 1st defendant has been in possession and enjoyment of the property. The plaintiff issued a rejoinder (Ex.A4) on 26.03.2002



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WEB COPY claiming production of a copy of the alleged Will and that she is prepared to accept the same if it is genuine. But, there was no reply from the 1st defendant and hence the plaintiff was constrained to file the above suit for partition and separate possession.

4.2. *Per contra*, the 1st defendant in his Written statement has stated that the plaintiff was never in joint possession and enjoyment of the suit property. The plaintiff left to her matrimonial home 30 years back. The 1st defendant spent several lakhs for renovation and maintenance of the properties. The said Malayammal executed an unregistered Will bequeathing her half share in favour of the 1st defendant on 27.02.1989. The plaintiff and her sisters were given in marriage with all streedhanas and the expenses were incurred only by the 1st defendant. Therefore, the plaintiff is not entitled for any share in the suit properties. Hence, prayed for dismissal of the suit.

4.3. Before the trial court, the plaintiff examined herself as P.W.1 and marked Ex.A1 to Ex.A5. On the side of the defendants, the 1st



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WEB COPY defendant examined himself as D.W.1 and two other witnesses and marked Ex.B1 and Ex.B2.

4.4. The trial court, based on the materials on record, partly decreed the suit in favour of the plaintiff with regard to partition and separate possession as prayed for by the plaintiff and directed the plaintiff to file a separate petition with regard to mesne profit, by its judgment and decree dated 13.04.2007. Aggrieved by this, the 1st defendant preferred the Appeal Suit in A.S.No.33/2007 before Sub Court, Dharapuram. The first appellate court modified the judgment and decree passed by the trial court with regard to the shares to be allotted to the parties concerned. The relevant portion of the judgment of the first appellate court is extracted hereunder:

"16. Now coming to the question of share to be allotted to the parties concerned, it is quite relevant to see Section 15 of Hindu Succession Act 1956 wherein it is provided that,



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"The property of a female Hindu dying intestate shall devolve first upon the sons, daughters and the husband". Therefore, leaving 1/2 share in the suit properties which are exclusively owned by the first defendant, the other 1/2 share should be divided into 7 parts, one to the son (first defendant), 5 to the daughters including the plaintiff and one to the father who was alive on the date of filing of suit, since the share also relates back to the date of filing of the suit. Therefore, the plaintiff is entitled to 1/14 share only and this has been categorically canvassed in the grounds of appeal. Except this deviation, this appellate court is not able to take a different view than the one taken by the court below."

5. Aggrieved over the same, the present Second Appeal has been filed by the 1st defendant.



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WEB COPY 6. The following substantial questions of law were raised in the memorandum of appeal.

- a) When D.W.2, an attesor of the Will has clearly given evidence about the due execution and attestation of Ex.B2 Will, satisfying the essential ingredients contemplated in Section 68 of the Indian Evidence Act, whether the approach of the trial court in disbelieving his evidence is correct in law?
- b) When the 1st defendant has claimed title over the suit property on the basis of Ex.B2 Will and trial court has rendered a finding about the same, whether the approach of the 1st appellate court in not deciding about the genuineness and validity of Ex.B2 Will, it being the last court of fact, is correct in law?
- c) Whether the approach of the first appellate court in holding that in a suit for partition, the evidentiary value of a Will need not be probed in depth unlike in a suit for declaration, can be sustained in law when the claim of the 1st defendant solely rests on Ex.B2 Will?



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WEB COPY 7. The learned counsel for the appellant would submit that the courts below erred in disbelieving the genuineness and validity of the Will executed by the appellant's mother bequeathing her undivided half share in the suit property in favour of the appellant and also failed to appreciate in proper prospective manner the oral evidence adduced by D.W.2 and D.W.3 who are the attestor and scribe to the Will respectively. It is further submitted that the trial court erred in coming to the conclusion, based on the minor discrepancies, that the oral evidence of D.W.2 and D.W.3 throws suspicion about the execution of Will by Malayammal, the mother of the appellant. The trial court presumed that since D.W.2 had cultivated the land of that appellant at an earlier point of time he has motive to speak in favour of the appellant. However, no motive has been attributed for D.W.2 to speak against the plaintiff. It is his further submission that the first appellate court failed to appreciate that due to cordial relationship between parties, prior to the institution of the suit there was no occasion for the appellant to file a suit for declaration with respect to suit property or for openly proclaiming his title by effecting changes in mutation entries, etc. The first appellate court



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also erred in holding that merely by producing the Will the appellant cannot claim any right, when other attendant circumstances are against him, without specifying the said circumstances. Hence, he prayed to allow this appeal by setting aside the judgment and decree of the courts below.

8. Though the name of the respondents are printed in the cause list after serving notice, there is no representation on behalf of the respondents.

9. It is not in dispute that the plaintiff's mother Malayammal and her brother, the 1st defendant herein, jointly purchased the suit properties on 29.01.1985 under Ex.A1 Sale deed and they were in joint possession and enjoyment of the same till the death of Malayammal on 09.03.1989. As legal heirs of the deceased Malayammal, the plaintiff claims 1/10 share in the suit properties.



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WEB COPY 10. On the side of the 1st defendant it is alleged that the said Malayammal executed Ex.B2 Will in respect of her half share in favour of the 1st defendant and therefore, the plaintiff is not entitled to claim the share of Malayammal in respect of the suit properties. Therefore, it is found that the 1st defendant has contested the plaintiff's case seeking share in the suit properties on the footing that Malayammal had bequeathed her share in the suit properties in his favour by way of a Will execute by her in the presence of the witnesses. Therefore, according to the 1st defendant, based on the abovesaid Will, it is only he who had acquired absolute right over the suit properties. The 1st defendnat also renovated the superstructure in the suit property and in enjoyment of the same with his family and accordingly contended that neither the plaintiff nor the defendants 2 to 5 are entitled to claim any share in the suit property.

11. The short question to be decided in this appeal is whether the alleged Will is surrounded by any suspicious circumstances? Before that, this Court has to consider what is the true legal position in the matter of



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proof of Wills? It is well-known that the proof of Wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject.

12. The Hon'ble Supreme Court in the case of [Murthy and others v. C. Saradambal and others](#), reported in *(2022) 3 SCC 209* has held that intention of testator to make testament must be proved, and propounder of Will must examine one or more attesting witnesses and remove all suspicious circumstances with regard to execution of Will. It has been held as under:

"31. One of the celebrated decisions of this Court on proof of a will, in [H. Venkatachala Iyengar v. B.N. Thimmajamma](#) [[H. Venkatachala Iyengar v. B.N. Thimmajamma](#), AIR 1959 SC 443] is in [H. Venkatachala Iyengar v. B.N. Thimmajamma](#), wherein this Court has clearly distinguished the nature of proof required for a testament as opposed to any other document. The relevant portion of [the said judgment](#) reads as under: (AIR p. 451, para 18) "18. ... The party propounding a will or otherwise making a claim



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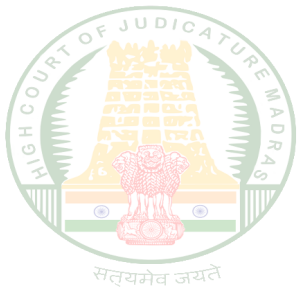
under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign



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or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus, the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by [Section 63](#) of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters."

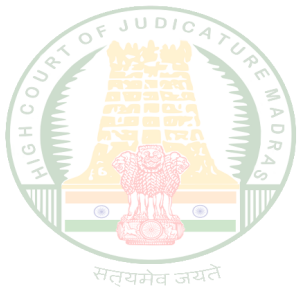


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In fact, the legal principles with regard to the proof of a will are no longer res integra. [Section 63](#) of the Succession Act, 1925 and [Section 68](#) of the Evidence Act, 1872, are relevant in this regard. The propounder of the will must examine one or more attesting witnesses and the onus is placed on the propounder to remove all suspicious circumstances with regard to the execution of the will.

13. Moreover, there is one important feature which distinguishes Wills from other documents. Unlike other documents the Will speaks from the death of the testator/testatrix, and so, when it is propounded or produced before a court, the testator/testatrix who has already departed the world cannot say whether it is his/her 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 testament of the departed testator. Even so, in dealing with the proof of Wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator/testatrix,

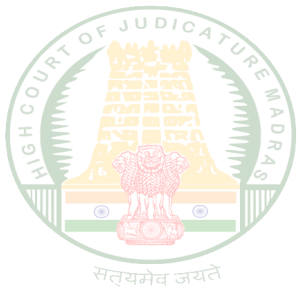


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that the testator at the relevant time was in a sound and disposing state of mind, that he/she understood the nature and effect of the dispositions and put his/her signature to the document of his/her own free will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's/testatrix's mind and his/her signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

14. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas



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circumstances may raise a doubt as to whether the testatrix was acting of her own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

15. It is in the light of these general considerations that we must decide whether the appellant is justified in contending that the finding of the courts below against him on the question of the valid execution of the will is justified or not. It is not in dispute that the testatrix was an old woman and had been ailing for some time before the will was executed.

16. According to the 1st defendant, the plaintiff was not in joint possession after her marriage and that she had left the family 30 years back and it is only the 1st defendant who had been looking after the needs of Malayammal accordingly, Malayammal had bequeathed the suit properties in his favour by way of Ex.B2 Will. It is stated that only the 1st defendant is in possession and enjoyment of the suit properties. Now according to the 1st defendant, Ex.B2 Will has been executed by



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Malayammal and the same has been attested by the witnesses and based on the said Will, the suit properties are in his exclusive possession and enjoyment. In this connection, the attestor and the scribe of Ex.B2 Will were examined as D.W.2 and D.W.3. According to him, it was the testatrix who voluntarily and willingly procured the witnesses including scribe and dictated the details of the properties to write a Will. But, the recitals of Ex.B2 Will runs as follows:

”எனக்கு தற்போது வயது சுமார் 61 ஆகிறது.
எனக்கு வயோதிகம் ஆகிவிட்டபடியாலும் கடந்த சில
மாதங்களாக அடிக்கடி உடல் நலக்குறைவு ஏற்பட்டு
மருத்துவமனையில் சிகிச்சை பெற்று வருவதாலும்
மேலும் மனித வாழ்க்கை நிலையற்றதாகையாலும்...”

17. I am unable to accept the case of the 1st defendant that an illiterate village woman, who was sick and was under treatment during the relevant period, has voluntarily and willingly procured the witnesses including the scribe, and dictated to prescribe with accurate details of



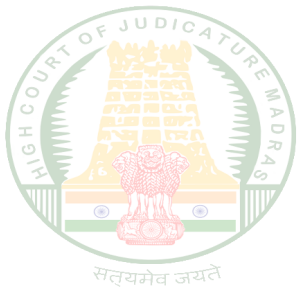
WEB COPY the properties to write a Will in the said background. It is pertinent to be noted that she died 13 days immediately after execution of the said Will.

18. Moreover, one of the attesor D.W.2 in his cross examination has deposed as follows:

“உயில் எழுதினதற்கு முந்தைய தினம் மாலை 5.00 மணிக்கு மலையம்மாள் என்னிடம் வந்து மறுநாள் உயில் எழுத கூப்பிட்டார். மலையம்மானிடம் முந்தின தினம் வேறு சாட்சி பற்றிக் கேட்டதில் நீங்களும் குப்பணாகவுண்டரும் வந்தால் போதும் என்று அவள் என்னிடம் சொன்னாள். நான், மலையம்மாள், கணவர் செல்லப்பகவுண்டர், குப்பண்ணகவுண்டர் மட்டும் தான் உயில் எழுதச் சென்றோம். செல்லப்பகவுண்டர் உயிருடன் இருந்தார்”

Furthermore, the scribe of the document examined as D.W.3 has deposed as follows:

“மலையம்மாள், அவரின் கணவரும் சாட்சிகள் இருவரும் வந்தார்கள்.”

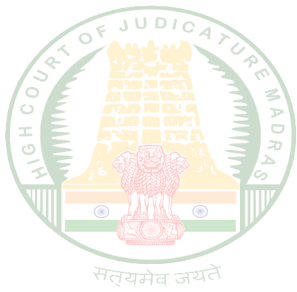


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Though the above witnesses have spoken about the presence of the husband of the testatrix at the time of execution of Will and though he was alive at the time of trial, the contesting defendant failed to examine his father to speak about the alleged Will. Moreover, D.W.2 did not say that he had seen the testatrix affixing her thumb impression in the alleged Will or the testatrix saw him signing the Will. Further it is contended on the side of the plaintiff that, the attesor D.W.2 is cultivating the lands of the contesting defendant. This fact is not rebutted on the side of the defendants. Hence, there is every possibility for him to depose in favour of the defendants. Moreover, D.W.3 scribe has deposed that the husband of the testatrix also signed the Will. On perusal of the Will, it is seen that he had not signed the Will as deposed by D.W.3. Furthermore, D.W.3 did not say that he had seen the testatrix affixing her thumb impression in the alleged Will.

19. When the genuineness of the Will is questioned, it is the duty of the propounder to dispel the surrounding suspicious circumstances, if

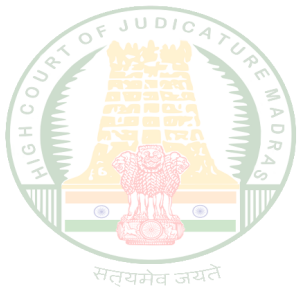


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any The unexplained and suspicious circumstances in this case were:-

- i. No plausible reason for non inclusion of the daughters in the Will.
- ii. Father of the 1st defendant was not examined.
- iii. Though the Will alleged to have been executed in front of the Sub Registrar Office, the same was not registered.
- iv. The health condition of the testatrix at the time of execution of the Will, who had died immediately 13 days after the execution of the Will.
- v. Attestor and scribe evidence is unreliable.
- vi. Manner of writing and execution of Will with technical and legal words highly doubtful since Will not in diction of testatrix herself.

Thus, in addition to proving the execution of the Will by examining the attestor and the scribe, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. The proof of execution of Will would, *inter alia*, depend thereupon. The Court must take into consideration all relevant factors. It must be found that the Will



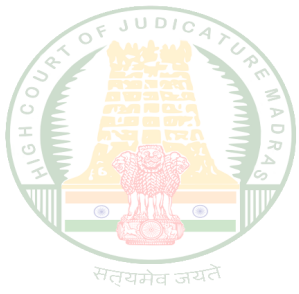
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was product of a free will. The testator must have full knowledge and understanding as regards the contents thereof. For the said purpose, the background facts may also be taken note of. In the present case, though it is the case of the 1st defendant that the husband of the testatrix was present at the time of execution of the Will and that he was alive at the time of trial, he failed to examine him. There was nothing on record to show that any step was taken to compel his appearance as a witness. Further, it is said that the Will has been executed outside the office of the Registrar. While so, it is not explained why the Will was not registered. Therefore, the alleged Will projected by the 1st defendant cannot be presumed to be genuine.

20. The discussion foregoing is sufficient to find that thick clouds of suspicious circumstances are hovering over the Will in question which have not been cleared; rather every suspicious circumstances is confounded by another. Put differently, it is difficult to be satisfied that what is literally coming out of the document in question had been the last wish and desire of the testatrix as regards succession of her estate. On the

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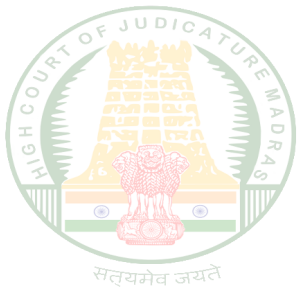
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contrary, there are cogent reasons to affirm the material findings of the trial court and the first appellate court that it cannot be said that the testatrix executed the document in question as her Will.

21. Moreover, the 1st defendant failed to prove the plea of ouster and adverse possession. Hence, the first appellate court rightly held that, when the 1st defendant is lacking evidence, it goes without saying that the parties to the suit are in joint possession and the possession of the 1st defendant is presumably for and on behalf of his sisters who are the co-sharers. On facts held, when the trial court had returned findings against the appellant after due appreciation of evidence and the first appellate court had affirmed such findings with regard to the alleged Will, I do not find any perversity or infirmity resulting in miscarriage of justice which warrants interference by this Court. There is no substantial question of law involved in the present appeal.

22. Now coming to the question of share to be allotted to the parties concerned, the findings of the first appellate court is upheld.



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23. In the result,

1. The Second Appeal is dismissed. No costs.
2. The decree and judgment of the learned Subordinate Judge, Dharapuram, dated 06.08.2009 passed in A.S. No.33/2007 modifying the judgment and decree passed by the learned District Munsif, Dharapuram dated 13.04.2007 in O.S. No.127/2002, is upheld.

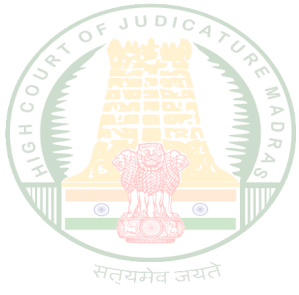
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Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
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To

1. The Subordinate Judge, Dharapuram.
2. The District Munsif, Dharapuram.
3. The Section Officer, VR Section, High Court, Madras

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Pre delivery judgment in
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