

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON 05.07.2017

DELIVERED ON 27.07.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

And

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.368 of 2013

and

M.P.Nos.1 of 2013 and 1 of 2014

D.Vijayalakshmi ... Appellant/Plaintiff

Vs.

E.Vedagiri ... Respondent/Defendant

Prayer:

Appeal filed under Order XXXVI Rule I of OS Rules read with Clause 15 of Letters Patent praying to set aside the order and decretal order dated 30.04.2013 passed in T.O.S.No.8 of 2008 (O.P.No.870 of 1999) on the file of this Court filed Under Order XXV rule 5 read with Under Sections 232 and 276 of the Indian Succession Act, for probate the will dated 10.04.1994 executed by the deceased E.Kuppammal and allow the Original Side Appeal.

For Appellant : Mr.V.Subramani

For Respondent : Mr.K.V.Babu

J U D G M E N T

(Order of the Judgment was delivered by ABDUL QUDDHOSE, J.)

This appeal is preferred against the judgment and decree dated 30.04.2013, passed by the learned Single Judge of this Court in T.O.S.No.8 of 2008 granting probate of the Will dated 10.04.1994 executed by the deceased Kuppammal.

2.O.P.No.870 of 1999 was filed by the respondent seeking probate of the Will dated 10.04.1994 executed by the deceased Kuppammal. As one of the legal heirs of the deceased D.Vijayalakshmi, the appellant herein, who was respondent No.2

in O.P.No.870 of 1999 objected to the grant of probate by lodging a caveat, O.P.No.870 of 1999 was converted into T.O.S and came to be numbered as T.O.S No.8 of 2008.

3.The respondent, who is the executor under the Will dated 10.04.1994 executed by the deceased Kuppammal is the plaintiff and the appellant-objector to the grant of probate is the defendant in the suit T.O.S.No.8 of 2008.

4.As seen from the Will dated 10.04.1994, Kuppammal had 6 children. Four of them were sons namely a) A.Viswanathan, b) A.Vedagiri, c) A.Jeevakumar and d) A.Ganesh Kumar and the remaining two were daughters namely, a) S.Susheela and b) D.Vijayalakshmi, the appellant herein. Kuppammal's husband predeceased her on 18.02.1970. Her eldest son Viswanathan predeceased her on 19.11.1993 leaving behind his only son V.Saiprasad as his legal heir and her other daughter S.Susheela also predeceased her leaving behind her two sons namely, a) S.Palani and b) Selva Ganesh and her only daughter c) Ganesh Mahalakshmi as her legal heirs.

5.The relationship of the testatrix Kuppammal with her legal heirs are as follows:

Sl.No.	Names	Relationship
1.	A.Vedagiri	Son
2.	A.Jeevakumar	Son
3.	A.Ganesha Kumar	Son
4.	D.Vijayalakshmi	Daughter
5.	V.Saiprasad	Grandson
6.	S.Palani	Grandson
7.	S.Selvaganesh	Grandson
8.	Ganesh Mahalakshmi	Grand daughter
9.	V.Manjula	Daughter-in-law and wife of predeceased son E.Viswanathan

6.The Will of the testatrix Kuppammal states that she is 75 years old and she may not live for many more years and she is executing the Will while she is in a sound and disposing state of mind. Under the Will, the testatrix, Kuppammal has bequeathed her properties in the following manner:

a)Her absolute property being House and ground bearing Door No.6, Chinnaiya Pillai Street, T.Nagar, Chennai - 600 017

situated in Block No.109, Survey No.8378, Mambalam Village measuring 3 Grounds and 60 Sq.ft. is bequeathed in favour of

- a) Saiprasad - Grandson and son of predeceased son Viswanathan
- b) A. Vedagiri - second son,
- c) A.Jeevakumar - third son,
- d) A.Ganesh Kumar - fourth son.

All four of them have been given equal shares in the property and if any of them wants to sell his share, he has to first inform the other three and only after he receives written consent from them that they have no objection for the sale, he is entitled to sell his share to a third party. The Will also states that the testatrix Kuppammal and her husband have sufficiently provided their daughters with gift items (Seervarisai in Tamil) like Silver, Gold, Cash and others at the time of their marriage and their marriage was also conducted in a grand scale. Despite this, in order to remove the impression that nothing has been provided for her daughters under the Will, the testatrix states that her Grandson V.Saiprasad and her aforementioned three male children will have to give D.Vijayalakshmi Rs.1,50,000/- and the legal heirs of her predeceased daughter Susheela namely, a) S.Palani - Rs.50,000/-, b) S.Selvaganesh -Rs.50,000/- and c) Ganesh Mahalakshmi - Rs.50,000/- after the life time of the testatrix.

7.Under the Will dated 10.04.1994, the two attesting witnesses are 1) Mahadevan and 2) Balasundaram. The testatrix Kuppammal has left her thumb impression as proof of execution of her Will.

8.The testatrix Kuppammal died on 24.02.1997 and the executor E.Vedagiri, her son, the respondent herein applied for probate of the Will dated 10.04.1994 under Sections 222 and 276 of the Indian Succession Act before this Court on 14.12.1998. The O.P. was numbered as O.P.No.870 of 1999. All the remaining legal heirs of the testatrix and V.Manjula, the wife of the pre deceased son E.Viswanathan were made as respondents in O.P.No.870 of 1999.

9.The brief facts pleaded by the petitioner in O.P.No.870 of 1999 are as follows:

- a) Mrs.E.Kuppammal, wife of late K.Ekambaram died on 24.02.1997 at Sundaram Medical Foundation, Anna Nagar, Chennai 600 040 and she was then residing at AL - 20/10, Shanthi Colony, Anna Nagar, Chennai 600 040 and possessed of property within the state of Tamil Nadu.

- b)The Will dated 10.04.1994 of Kuppammal was duly executed by her at No.6, Chinnaiya Pillai Street, T.Nagar, Chennai 600 017 in the presence of the witnesses, whose names appear at the

foot thereof.

c) The deceased appointed the petitioner E.Vedagiri as the executor under her Will.

d)The amount of assets which is likely to come to the petitioner's hand does not exceed in the aggregate a sum of Rs.60,00,000/- and the net amount of the said assets after deducting all items which the petitioner is by law allowed to deduct is only of the value of Rs.55,00,000/-.

e)The petitioner undertakes to duly administer the property and credits of the testatrix E.Kuppammal and render true accounts to this Court for the property and the credits.

f)The deceased has left behind apart from the petitioner, the following legal heirs namely, 1) V.Saiprasad (27years), 2) D.Vijayalakshmi (55 years), 3) E.Jeevakumar (49 years), 4) E.Ganesh Kumar (44 years), 5) S.Palani (40 years) 6) S.Mahalakshmi (39 years) and 7) S.Selvaganesh (38 years).

10.The appellant in this appeal, who is the second respondent in O.P.No.870 of 1999 and the daughter of the testatrix lodged a caveat before this Court objecting to the grant of probate of the Will dated 10.04.1994. Since caveat was lodged by appellant, O.P.No.870 of 1999 was converted into a Testamentary Original Suit, which was numbered as T.O.S.No.8 of 2008 by this Court. In T.O.S.No.8 of 2008, the petitioner in O.P.No.870 of 1999 was described as plaintiff and the objector to the grant of probate D.Vijayalakshmi was described as defendant.

11.The defendant in T.O.S.No.8 of 2008 filed her written statement disputing the execution of the Will and her defences are as follows:

a)The alleged Will dated 10th April 1994 is not a Will as per law and hence cannot be probated.

b)The attestation of the alleged Will dated 10.04.1994 by Mr.Mahadevan and Mr.Balasundaram is invalid and against law.

c)The deceased E.Kuppammal normally signs in Tamil while operating her bank account and hence, the alleged LTI is not that of E.Kuppammal.

d)E.Kuppammal is not in the habit of affixing LTI and she normally puts her signature.

e)E.Kuppammal died on 24.02.1997 and the plaintiff did not declare or did not even mention about the existence of the Will and it was not at all published. During the 11th day ceremony, it was assumed that all children will have equal and simultaneous share in the property. The respondent/plaintiff never objected for such proposals. After 19 months, for the first time, the plaintiff informed the defendant over phone that

a Will is available, but failed and neglected to give a copy inspite of her son Mr.Senthil's demands. The non publication of the alleged Will for a period of four years after its execution and two years after the death of Mrs.E.Kuppammal will establish that the alleged Will is unnatural and fabricated.

f)The appellant/defendant attended to Mrs.E.Kuppammal at Sundaram Medical Foundation during 11.09.1995 to 15.09.1995 and during that period Mrs.E.Kuppammal personally informed her that she had not left any Will as per the wish of her father Mr.Ekambaram and that the appellant/defendant is being allotted half portion in the second floor in the property situated in No.6, Chinnaiya Pillai Street, T.Nagar, Chennai 600 017. Mrs.E.Kuppammal has always signed in vernacular and the projection of theory that she has affixed LTI is utter falsehood. The alleged Will has been fabricated and foisted in order to disinherit the appellant/defendant.

g)The appellant/defendant was married in the year 1969 when her father Mr.Ekambaram was alive. Mr.Ekambaram maintained the property in the name of his wife. The appellant/defendant states that Mr.Ekambaram had made it clear that his two daughters i.e., the deceased Susheela, first daughter and Mrs.D.Vijayalakshmi, second daughter will be allotted the second floor and they will be getting half share in the second floor in the aforesaid property. Mr.Ekambaram, father of this defendant died in February 1970. After the death of Ekambaram, the aforesaid property was under the control and management of Mr.E.Viswanathan, being the brother of the appellant/defendant. Mrs.E.Kuppammal, the mother of the appellant/ defendant along with their children of the predeceased sister of the appellant/defendant Mrs.Susheela were living jointly in the same property. Even earlier, the said Mrs.Susheela, who was not living with her husband was living with her children in the said property. The said Mrs.Susheela died in the year 1990. Mr.E.Viswanathan, the eldest son died in the year 1993 and thereafter, the respondent/plaintiff Mr.E.Vedagiri forcibly took control and management of the property. He collected several lakhs of rupees by way of rental advance and monthly rentals for the said property and maintained a Bank account.

h)The appellant/defendant states that after the death of her mother Mrs.E.Kuppammal on 24.02.1997 upto the 11th day ceremony, neither the appellant/defendant's brother nor the appellant/ defendant's predeceased sister's children and other brothers of the appellant/defendant did not even make a casual reference about the existence of the alleged Will. Only after 19 months, the respondent/plaintiff forwarded the affidavit of consent to be executed by the appellant/defendant for obtaining probate along with the affidavit, a xerox copy of the Will was

enclosed. The appellant/ defendant requested for verification of the original Will, for which, there was no response from the respondent/plaintiff. Until now, except the respondent/plaintiff, none of the brothers of the appellant/ defendant have indicated anything about the Will.

i) Mrs.E.Kuppammal, testatrix maintained a bank account and she used to sign and operate the account.

j) The alleged attestation by the two witnesses are the close childhood friends of the respondent/plaintiff. Mr.Balasundaram, who is one of the attesting witness is a business man. Mr.E.Vedagiri, the respondent and Mr.T.Balasundaram were running an IOC Petrol Bunk in Nungambakkam High Road in the name of Saravana Enterprises and Mr.Saravanan is the respondent/plaintiff's son and he is a benami of the respondent/plaintiff.

k) Mrs.E.Kuppammal was a chronic diabetic patient with poor vision and she was going into coma stage in the year 1994 and in 1995 and in 1997 and she died on 24.2.1997. The respondent/plaintiff filed O.P. in the year 1998 and with ulterior motive kept it pending till 2008 and O.P was converted into T.O.S. With malafides. The delay is willful and meaningful.

l) The affidavit of the attesting witness is false as it is stated that the testatrix subscribed her name. It is further false to state that the testatrix signed in English. The above false statements are made to cover up the suspicious circumstances of the alleged Will. It is further false to state that both the attesting witness visited the testatrix at her request. It is relevant to point out that the testatrix did not make any mention about any document to the appellant/defendant.

m) The value of the immovable property at No.6, Chinnaya Pillai Street is 3½ Crores per ground and the total value is 10½ crores. It is false to allege that Rs.5 lakhs was spent for funeral. The entire amount does not exceed Rs.50,000/-.

12. On the side of the appellant/defendant, the appellant/defendant deposed as D.W.1 and her son Senthil Kumar deposed as D.W.2. On the side of the respondent/plaintiff four witnesses were examined. They were the respondent as P.W.1, the attesting witness Mr.Balasundaram as P.W.2, Mr.Saiprasad, the son of the predeceased son of Mr.Viswanathan as P.W.3, the Bank Manager, P.W.4, who was issued subpoena to produce bank account opening form of the testatrix and the specimen signature card of the testatrix. On the side of the respondent/plaintiff, 20 documents were marked as exhibits and on the side of the

appellant/defendant, two documents were marked as exhibits. The details of the exhibits marked in the trial by both sides are as follows:

Respondent/Plaintiff side:

S.No.	Date	Description	Exhibit
1.	04.04.1997	Death certificate of Mrs.E.Kuppammal	Ex.P.1
2.	10.04.1994	Will of Mrs.E.Kuppammal	Ex.P.2
3.	14.12.1998	Affidavit of Assets filed in O.P.No.870 of 1999	Ex.P.3
4.	December 1998	Consent affidavit of Mr.V.Sai Prasad	Ex.P.4
5.	December 1998	Consent affidavit of Mr.E.Jeeva Kumar	Ex.P.5
6.	December 1998	Consent affidavit of Mr.E.Ganesh Kumar	Ex.P.6
7.	December 1998	Consent affidavit of Mr.S.Palani	Ex.P.7
8.	December 1998	Consent affidavit of Mrs.S.Mahalakshmi	Ex.P.8
9.	December 1998	Consent affidavit of Mr.S. Selva Ganesh	Ex.P.9
10.	December 1998	Consent affidavit of Mrs.V.Manjula	Ex.P.10
11.	10.02.1994	Rental Agreement	Ex.P.11
12.	10.02.1994	Rental Agreement	Ex.P.12
13.	10.02.1994	Rental Agreement	Ex.P.13
14.	10.02.1994	Rental Agreement	Ex.P.14
15.	14.12.1998	Affidavit of attesting witness, Balasundaram	Ex.P.15
16.		Specimen signature card of Mrs.E.Kuppammal for Savings Bank No.6326 in Central Bank of India, Teynampet Branch	Ex.P.16
17.	21.02.1994	Application for opening Bank Account in Central Bank of India, Teynampet Branch.	Ex.P.17

S.No.	Date	Description	Exhibit
18.	15.12.1998	Letter from respondent to appellant	Ex.P.18
19.	07.01.1999	Legal notice from respondent's advocate to appellant's advocate	Ex.P.19
20.	20.09.2011	Death Certificate of Mahadevan	Ex.P.20

Appellant/Defendant's side:

S.No.	Date	Description	Exhibit
1.	05.08.2009	Encumbrance Certificate	Ex.D.1
2.	25.12.1998	Legal notice issued by the appellant's advocate to respondent	Ex.D.2

13.After considering the pleadings of both the parties, the learned Single Judge framed the following issues.

"1.Whether the respondent/plaintiff is entitled to grant of probate in terms of the Will of the deceased Mrs.E.Kuppammal dated 10.04.1994?

2.To what other reliefs, the parties are entitled to?

3.Whether the Will produced by the plaintiff is genuine and legally enforceable?"

14. Excepting for the appellant/defendant, all the other legal heirs of the testatrix have filed consent affidavits giving No objection for the appointment of the respondent/plaintiff as the executor of the Will and for bequeathing the property as per the Will of the testatrix Mrs.Kuppammal. The consent affidavits have been marked as exhibits P.4 to P.9 during the chief examination of the respondent/plaintiff (P.W.1).

15.The learned Single Judge after considering the pleadings, exhibits marked at the time of trial, the depositions and after hearing the arguments of the learned counsel on both sides, did not find any surrounding suspicious circumstances in the execution of the Will dated 10.04.1994 by the testatrix Kuppammal and decreed the suit T.O.S.No.8 of 2008 on 30.04.2013 in favour of the respondent/plaintiff. The appellant/defendant aggrieved by the said judgment has preferred this appeal.

16. Mr.V.Subramani, learned counsel for the appellant would submit that the executed Will Ex-P2 is shrouded with many suspicious circumstances, which will establish that testatrix Mrs.Kuppammal never executed the Will Ex-P2. To substantiate his contention, the learned counsel submitted that:

a)The respondent/plaintiff has not satisfied the requirements of section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act for the grant of probate of the Will dated 10.04.1994 Ex-P2 of the testatrix Mrs.E.Kuppammal.

b) There was an abnormal delay of 19 months after the death of the testatrix in filing the Original Petition for grant of probate by the respondent/plaintiff.

c)The consent affidavits Exs.P.4 to P.10 given by the remaining legal heirs of the testatrix Mrs.Kuppammal are invalid.

d)The appellant/ defendant was not aware of the Will Ex.P.2 and there was a delay in publication of the Will by the executor - respondent/plaintiff.

e) The testatrix used to sign in Tamil and never affixed thumb impression in any document. The Will was not read over and explained to the testatrix and she was not aware that she was signing a Will.

f)The testatrix is a chronic diabetic patient and there is no probability of her executing the Will.

g)There is no valid attestation as per the provisions of Section 63 (c) and Section 68 of the Indian Evidence Act. The second attesting witness who has deposed as P.W.2 is a close childhood friend of the respondent/plaintiff and therefore, his evidence cannot be relied upon for the purpose of proving the Will Ex.P2.

h)In Ex.P.2 Will dated 10.04.1994, the testatrix has affixed her left thumb impression instead of affixing right thumb impression which is the normal practice.

i)The various versions given by the attesting witness P.W.2 in the affidavit filed in the O.P. regarding signature in English and the thumb impressions and contradictory statements made in the course of deposition do not satisfy the requirements regarding proof of execution and attestation. The value of the immovable property at No.6, Chinnaiya Pillai

Street, T.Nagar, Chennai - 600 017, is Rs.10 ½ crore and not Rs.60 lakh as alleged by the respondent/plaintiff in O.P.No.870 of 1999.

(j)The attesting witness P.W.2 did not know that he was attesting the Will nor was he aware as to the contents of the Will, when it was prepared and by whom it was prepared.

(k)The evidence of P.W.2 being not satisfactory, the propounder should have adduced additional evidence, which is totally lacking in the case on hand. The evidence of P.W.2 is not normal. When a document is witnessed, normally the executant signs first and the signature is attested thereafter by witnesses. In the case on hand, the witnesses sign first according to P.W.2 and thereafter, the testatrix affixed her thumb impression. Hence, there is no valid attestation of the signature or the mark of testator.

(l)The affidavit of attesting witness is not in accordance with the requirement of the Original Side Rules of High Court in terms of the note to Form 56 in the absence of any averment stating that the Will was read over and explained to the testatrix.

(m)In terms of Rule 23 of Order XXV of the Original Side Rules no grant of probate or Letters of Administration with the will annexed of any blind or obviously illiterate or ignorance person shall be made unless it is proved by an affidavit or otherwise to the satisfaction of the Court, the said Will was read over to the testator before its execution or that the testator had at such time knowledge of its contents. The respondent/ plaintiff has not complied with the above requirements and there is absolutely no evidence to that effect.

(n)The consent affidavits filed by the remaining legal heirs, which are marked as Exs.P.4 to P.10 are not valid since the deponents have not signified their consent for the grant of probate. In the light of the notice dated 25.12.1998 Ex.D.2. issued by the legal heirs of Susheela and the reply dated 7.1.1999 Ex.P.19, there cannot be any valid consent and notice of the probate proceedings ought to have been issued to the legal heirs of Susheela also.

(o)The left thumb impression of the testatrix said to have been affixed in the Will Ex.P.2 by the testatrix has not been proved beyond doubt. The left thumb impressions as found in the Will and Ex.P.11 to Ex.P.14, Ex.P.16 and Ex.P.17 do not tally. The testatrix normally used to sign in Tamil. The appellant sought to produce the partnership deed dated 10.10.1983 wherein, she has signed in Tamil but the same was not marked as

the respondent/plaintiff objected, which is now sought to be filed as an additional evidence. The respondent in Cross examination has admitted that she used to sign in Tamil. The respondent, P.W.1 deposed as follows:

"For some time Kuppammal was signing in Tamil. After sometime she was not willing to sign and was willing to affix her thumb impression."

(p)The delay in publishing and filing of the O.P. and secrecy surrounding execution of the Will has not been explained. The evidence of P.W.1 and P.W.3 regarding knowledge and existence of the Will after 19 months after the death of testatrix is a concocted story. The respondent/plaintiff being the executor appointed under the Will ought to have the knowledge of the Will. Unless the testatrix had confidence and trust in the respondent/plaintiff, she would not have appointed him as executor. The facts attributing to the delay is not credible and that is not a normal conduct of any person while appointing as an executor. The explanation given by the respondent/plaintiff in reply under Ex.P.19 to the legal notice under Ex.D.2 falsifies his contention that he came to know of the Will only after 19 months after the death of the testatrix. The respondent/plaintiff in Ex.P.19 has stated as follows:

"It is pertinent to state here that subsequent to the final ceremonies of the said Smt. E.Kuppammal, the execution of the Will by Smt. E.Kuppammal was disclosed to your clients and also to the other brothers of my client. Therefore, all the legal heirs of the deceased Smt. E.Kuppammal including my client have the knowledge of the Will executed by Smt. E.Kuppammal."

(q)The attesting witness is a close friend of the respondent/plaintiff, who has business link with the respondent/plaintiff's son. The attesting witness is an interested witness and his evidence cannot be acted upon.

(r)The testatrix had no testamentary capacity to execute the Will in view of her health condition even as admitted by the respondent/plaintiff himself in the course of Cross examination, this evidence is corroborated by other witnesses also P.W.3 and D.W.1. The respondent/plaintiff having admitted that the testatrix was admitted in hospital had not adduced any medical evidence to dispel the suspicion regarding the testatrix testamentary capacity.

(s)The testatrix had also agreed to settle the portion of the suit property in favour of the appellant and her sister.

(t)The testatrix had not made any mention about the details of jewellery in the Will Ex.P.2.

(u)The permanent address of the testatrix being in T.Nagar,

where the suit property is located wrong address found in the death certificate Ex.P.1

(v)The testatrix was not aware that she was executing the Will and she did not know the contents of the same.

(w)The attesting witness did not know that he was attesting the Will nor was he aware of contents of the Will, when it was prepared and by whom it was prepared. There is no animus attestendi. The deposition of P.W.2 that the testatrix Kuppammal did not say that he should attest the Will substantiates his arguments.

17.Mr.V.Subramani, learned counsel for the appellant relied upon the following judgments in support of his case:

1.AIR 2017 SC 494 in the case of Ramesh Verma (D) Thr Lrs. v. Lajesh Saxena (D) BY Lrs., and another. He referred to paragraphs 13 to 17 of the said judgment wherein, the Supreme Court has discussed the requirements for a valid Will.

2.2007 (5) MLJ 159 (SC) in the case of Benga Behera and Another v. Braja Kishore Nanda and Others. He referred to paragraphs 14, 28, 46 and 49 of the said judgment wherein, the Supreme Court held that the burden of proof that the Will has been validly executed and its genuineness is on the propounder. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator.

3.2003 (1) CTC 308 in the case of Janki Narayan Bhoir v. Narayan Namdeo Kadam. He referred to paragraphs 8, 9 and 10 of the said judgment. In that judgment, the Supreme Court held that in order to say that a Will has been duly executed, the requirements mentioned in clauses a, b and c of Section 63 of the Indian Succession Act are to be complied with i.e. a) that the testator has to sign or affix his mark to the Will, or it has got to be signed by some other person in his presence and by his direction b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a Will c)The most important point with which we are presently concerned in this appeal is that the Will has to be attested by two or more witnesses and each of the witness must have seen the testator sign or affix or his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgment of signature or mark, or of

the signature of such other person, and each of the witness has to sign the Will in the presence of the testator.

4.2017 (4) MLJ 1 in the case of Amaladoss Stephen v. Srimathi. Seethalakshmi Ammal and Others. The learned counsel referred to paragraphs 16 and 17 of the said judgment. In the said Judgment of the Madras High Court, the Division Bench held that the propounder of the Will will have to dispel all the suspicious circumstances by letting in sufficient evidence.

5.2007 (5) MLJ 706 in the case of Josephine and Jerome and others V. S.Santiago and Another. The learned counsel referred to paragraphs 13, 14, 16, 18 and 19 of the Division Bench Judgment of the Madras High Court. The Division Bench observed that it was necessary for the propounder of the Will to prove that the Will has been executed by the testatrix after understanding the contents thereof.

6.2017 (2) CTC 200 in the case of Parimalam and Others v. P.Mohanraj and others. The learned counsel referred to paragraphs 9 and 10 of the said judgment. The learned Single Judge of the Madras High Court held that when the attestor of the Will has not witnessed the executant signing the Will, the evidence of attestor was insufficient.

7.2015 (5) CTC 856 in the case of Hemavathy v. Udhavum Karangal rep. by Mr.Vidyasagar. He referred to paragraphs 10, 11, 14, 15, 17 and 28 of the said judgment. The learned Single Judge of the Madras High Court held that it is for the Court to find out whether the due execution and valid attestation of the Will has been proved from the evidence of the plaintiff.

18.In reply to the submissions made by the learned counsel for the appellant, Mr.K.V.Babu, learned counsel for the respondent submitted the following:

(a)There were eight respondents in the main O.P. out of which, respondent No.2 alone opposed the grant of probate and the O.P. was converted into T.O.S. The other respondents, who have given their consent for the grant of probate and their relationship with the testatrix are as follows:

Sl.No.	Names	Relationship
1.	A.Vedagiri	Son
2.	A.Jeevakumar	Son
3.	A.Ganesha Kumar	Son
4.	V.Saiprasad	Grandson
5.	S.Palani	Grandson
6.	S.Selvaganesh	Grandson

Sl.No.	Names	Relationship
7.	Ganesh Mahalakshmi	Grand daughter
8.	V.Manjula	Daughter-in-law and wife of predeceased son E.Viswanathan

The learned counsel submitted that Exs.P.4 to P.10 are the consent affidavits given by V.Saiprasad, E.Jeevakumar, E.Ganeshkumar, S.Palani, S.Mahalakshmi, S.Selvagansesh and V.Manjula respectively. He submitted that excepting for D.Vijayalakshmi, the appellant/defendant all others have given their consent for the grant of probate.

(b)The learned counsel for the respondent would further submit that during the very same relevant period of time when the Will Ex.P.2 was executed, the testatrix Kuppammal under Exs.P.11 to P.14 all dated 10.02.1994 had affixed her left thumb impression. Ex.P.11 to P.14 are the rental agreements entered into between testatrix Kuppammal and her respective tenants. Therefore, the submission of the learned counsel for the appellant that the testatrix Kuppammal has always had the habit of putting her signature in Tamil and never had the habit of affixing her thumb impression is incorrect.

(c)On 21.02.1994, a bank account was opened in the name of the testatrix Kuppammal. At the instance of the respondent/plaintiff, the Bank Manager was examined and the specimen signature form and the account opening form of the testatrix were produced and marked as Exs.P.16 and P.17 respectively. Even in Exs.P.16 and P.17, the testatrix had affixed only her left thumb impression. The appellant has also admitted this fact in her Cross examination and has not produced any evidence to disprove the same.

(d)The testatrix died only on 24.02.1997 after two years and ten months after the execution of the Will Ex.P.2. The delay for filing the probate proceedings by about 19 months from the date of death of the testatrix is properly explained. P.W.1 in his Chief examination has deposed the following:

"After the first death anniversary of my mother, the 1st respondent in O.P. Saiprasad requested me for permission to occupy the room which was occupied by my mother. 3 or 4 months after first death anniversary, Saiprasad occupied the room. While he was clearing the bureau belonging to my mother, he had found an envelope. He told me that there is an envelope containing the original documents and asked me whether he can hand over the same to me. He also told that one

closed cover is also found along with documents and he came and handed over all documents including the closed cover. I came to know about the existing Will only when I opened the closed envelope. Ex.P.2 is the original Will found in the said envelope."

Even in the Cross examination, the appellant/defendant has not been able to disprove the fact that the Will Ex.P.2 was found only after about three or four months after the first death anniversary of the testatrix. Ex.P.1 is the death certificate of Mrs.E.Kuppammal confirming the date of her death as 24.02.1997 and immediately after, the Will was found in 1998, the respondent filed probate proceedings to probate the Will Ex.P.2. Therefore, the submissions made by the learned counsel for the appellant that the delay of about 19 months in seeking probate of the Will amounts to a suspicious circumstance is incorrect.

(e) Even though there are two attesting witnesses namely, Mr.Mahadevan and Mr.Balasundaram to the Will Ex.P.2 only one of them namely Mr.Balasundaram could be examined as P.W.2 since Mr.Mahadevan, the other attesting witness died on 02.04.1997 much prior to the filing of O.P. seeking probate of the Will Ex.P.2. The death certificate of Mahadevan Ex.P.20 confirming his date of death is also marked as an exhibit. Hence, the submissions made by the learned counsel for the appellant that the respondent has not examined both the attesting witnesses intentionally is incorrect.

(f) In the testimony of P.W.2, the attesting witness clearly shows that the testatrix was having a sound and disposing state of mind and was also having good vision and health and that she only invited P.W.2 to attest the Will.

(g) The appellant, who was examined as D.W.1 in her cross examination has clearly admitted that she has not issued any notice demanding partition and further admitted that she has not filed any document to show that her mother signed documents in Tamil.

(h) In her cross examination, D.W.1 has also stated that the testatrix was in a good health condition and she was talking to her when she was admitted in the hospital.

(i) D.W.1 also admits in her cross examination that her marriage was solemnized in a grand scale as mentioned in the Will.

(j) D.W.1 in her cross examination admits that during 1994 she participated in the anniversary of her brother Mr. Viswanathan during which time, the testatrix was with her in talking terms and was hale and healthy.

(k) D.W.1 has also agreed to the suggestion during her cross examination that the Will was executed only during said relevant year 1994.

(l) Exs. P.11 to P.14, Exs. P.16 to P.17, which were executed during the relevant period when Ex. P.2 Will was executed, the testatrix has affixed only her thumb impression in all the documents, which would go to show that there is no suspicious or surreptitious circumstances to doubt the genuineness of the Will.

19. Mr. K.V. Babu, learned counsel for the respondent cited the following judgments in support of his submissions.

(i) 1997 (7) SCC 133 in the case of Misri Lal (dead) by LRs. and another v. Smt. Daulati Devi and another. The learned counsel referred to paragraph 10 of the said judgment, which is extracted hereunder:

"The learned Advocate for the respondent has submitted on behalf of the propounder, that the propounder herself was examined and two attesting witnesses were also examined on behalf of the propounder, viz. Bhupendra Nath Mukherjee and Gopal Chandra Saha and it has been contented by the learned Advocate for the respondent that both of them proved due execution of the Will. It has been further contended by the learned Advocate for the propounder that the witnesses had also given evidence on the soundness of the mind of testatrix and also about her disposing state of mind".

The learned counsel submitted that the testatrix being an old lady, it is quiet natural to affix her thumb impression instead of putting her signature. It is also natural that there will be shivering of her hand due to her advanced age. The shivering of her hand has got nothing to do with her mental state of mind and other physical ailments. Hence, the submission of the learned counsel for the appellant that the testatrix was not in a sound and disposing state of mind while executing the Will is incorrect. He submitted that the judgment of the Supreme Court referred to above is squarely applicable for the facts of the instant case.

(ii) The next decision relied upon by the learned counsel for the respondent is a Division Bench Judgment of the Calcutta High Court reported in AIR 1991 CAL 166 in the case of Sushila Bala Saha v. Saraswati Mondal. In that judgment, the Division Bench of the Calcutta High Court held in paragraph 15 that

"It is well known proposition of law that probate Court cannot go into the question of title and it is a function of the probate Court to see in the probate proceedings whether the Will has been duly executed, whether the testator at the relevant time was in sound and disposing state of mind and whether the testator had understood the nature and effect of such disposition and put his signature and/or mark to the document at his free will and volition. It is also a settled proposition of law that probate Court cannot, by consent of parties, grant probate or reject the grant of probate".

20. With reference to the decisions cited supra by the appellant, we are afraid those Judgments do not have any applicability to support the case of the appellant for the following reasons:

(i) AIR 2017 SC 494. That judgment is not applicable for the case on hand as that judgment arises out of a partition suit, where a Will was relied upon by one of the parties. The Supreme Court merely discussed the nature of the Will and as to how it has to be proved. It does not deal with facts similar to the case on hand.

(ii) 2007(5) MLJ 159 (SC) - the facts of the case are totally different from the facts of the present case on hand. In that case, the original Will was never produced and the beneficiary was a complete stranger to the testatrix and the propounder was not able to dispel the suspicious circumstances. In the case on hand, the respondent has filed the original Will and has obtained consent affidavits from all the legal heirs excepting the appellant and has also examined one of the attesting witnesses, who is alive and the Bank Manager to prove that the testatrix has been affixing her thumb impression at that point of time. Therefore, in the case on hand, the appellant has proved beyond reasonable doubt the execution of the Will Ex.P.2 and has fully discharged his burden of proving the genuineness of the Will. Hence, the judgment cited by the learned counsel for the appellant in 2007(5) MLJ 159 (SC) will not support the case of the appellant.

(iii) 2003 (1) CTC 308. In that case the Supreme Court held that the propounder has got to prove that the Will was duly and validly executed. That cannot be done by simply proving that the signature of the Will was that of the testator but must also prove the attestation were also made properly as required by Clause (c) of Section 63 of the Indian Succession Act. It is true that Section 68 of the Indian Evidence Act does not say that both or all the attesting witnesses must be examined. But, at least one attesting witness has to be called for to prove the

due execution of the Will as envisaged in Section 63. In the case on hand, the respondent has proved the genuineness of the Will by examining one of the attesting witnesses, who was alive and he has deposed that the testatrix had affixed her thumb impression only in his presence and she knows the contents of the Will and that she was in a sound and disposing state of mind while executing the Will Ex.P.2. The respondent has fully satisfied the requirements of the judgment reported in 2003 (1) CTC 308 and hence, entitled to grant of probate.

(iv)2017 (4) MLJ 1. The facts involved in that case are different from the case on hand. In that case, the testatrix as per the Will, disinherited her other sons, daughters and her husband. However, there was no explanation as to why the other heirs were disinherited. But, in the case on hand, all the legal heirs have been provided for under the Will Ex.P.2 and further, all of them have given their consent for probate excepting the appellant. Therefore, the judgment of the Division Bench of Madras High Court reported in 2017 (4) MLJ 1 referred to by the learned counsel for appellant is not applicable to support the case of the appellant.

(v)2007 (5) MLJ 706. In that case, the facts are different. There were two Wills. The first Will was registered and subsequent was an unregistered one. The propounder sought for probate only in respect of the unregistered Will. Further, the attesting witnesses have stated in that case that by the time they came, the document was already prepared and the testatrix merely signed the document in their presence. But, in the instant case, there is only one Will and the attesting witness has deposed that the contents of the Will was known to the testatrix and the execution of the Will as well as the attestation was done at the same time. Therefore, the judgment cited by the learned counsel for the appellant is not applicable for the facts of the present case.

(vi)2017 (2) CTC 200. This is a Single Judge judgment of the Madras High Court and even though it is not binding on us, we have considered the same and found to be not applicable for the facts of the instant case. In that case, the trial Court has not discussed anything about the evidence of the defendants, the attester and the scribe of the Wills and without considering the same, the trial Court gave its finding that based upon their evidence, the defendants have established the truth and validity of the Wills. Therefore, we are of the opinion that the judgment 2017 (2) CTC 200 is not applicable to support the case of the appellant.

(vii)2015 (5) CTC 856. This is a Single Judge judgment of the Madras High Court and even though it is not binding on us,

we have considered the same and found to be not applicable for the facts of the instant case. It merely has extracted an observation made in another Division Bench Judgment reported in 2004 (1) LW 546 in the case of Ayyasamy Pillai v. Rajangam and another defining, who an attesting witness is. We are in agreement with the said definition. In the case on hand, the testatrix validly executed the Will and the attesting witnesses have also validly attested the Will. The appellant has also not been able to establish as in what way the respondent has not satisfied the requirement of an attesting witness. Therefore, we are of the opinion that this judgment is also not applicable to support the case of the appellant.

21. In both the judgments, cited by the learned counsel for the respondent namely, 1997 (7) SCC and AIR 1997 Cal. 166, the principles enunciated for the grant of probate have been fully satisfied by the respondent.

22. The learned counsel for the respondent submitted that the respondent has proved beyond reasonable doubt and has fully discharged his onus of proving the Will by filing documents, which have been marked as Exs.P.1 to P.20 and by examining (a) the propounder, (b) one of the attesting witnesses who was alive, (c) grand son of the testatrix and beneficiary and (d) T. Shankar, the Bank Manager of the Bank, in which, the testatrix was maintaining a Bank Account. The appellant has marked only two documents as exhibits namely, Ex.D.1, which is an encumbrance certificate for the bequeathed property and Ex.D.2, being the legal notice issued by the appellant's advocate to the respondent on 25.12.1998. The learned counsel further submitted that all the remaining legal heirs have given no objection for the grant of probate and the appellant has also not disputed the consent affidavits in her Chief or Cross examination. Excepting for the appellant, the remaining legal heirs of the testatrix have consented to the grant of probate in favour of the respondent.

23. The learned counsel for the respondent submits that the learned Single Judge has considered judiciously each and every issue raised by the appellant and has come to the correct conclusion that the Will Ex.P.2 is not surrounded by any suspicious and surreptitious circumstance and the Will has been proved by the respondent by adducing oral and documentary evidence and the respondent has removed all suspicious circumstances raised by the appellant.

24. There is a clear finding by the learned Single Judge that the appellant has not produced any documentary evidence and not examined any witness except self interested testimony of the appellant as D.W.1 and her son as D.W.2 to substantiate her

contention raised in the written statement. The learned Single Judge has come to the correct conclusion that Ex.P.2 Will produced by the respondent/plaintiff is genuine and legally enforceable document and the respondent is entitled for grant of probate.

25. After considering the rival submissions, we are of the view that the respondent has satisfied the requirements of Section 63 of the Indian Succession Act read with section 68 of the Indian Evidence Act. The only attesting witness, who was available at the time of filing the probate proceedings, was also examined as P.W.2 by the respondent. P.W.2 has clearly stated in his testimony that he was present while the testatrix Kuppammal affixed her left thumb impression in the Will Ex.P.2 and she attested the Will along with the other attesting witness R.Mahadevan only in the presence of the testatrix Kuppammal. The appellant has not been able to disprove the testimony of P.W.1, P.W.2 and P.W.3 through her documentary or oral evidence. D.W.1, the appellant herein has clearly admitted in her testimony that both the attesting witnesses are known to her. But, she has testified that they are the childhood friends of the respondent. At the same time, during her cross examination, she has admitted that the attesting witness Mr. Balasundaram - P.W.2, who happens to be her brother's friend might have done plumbing and sanitary works in her house during construction. She has also admitted during her Cross examination that for all her family functions, if the attesting witness P.W.2 Balasundaram was invited by the respondent, he will attend. She has also testified that in her Cross examination that "I do not know whether P.W.2 stood as guarantor for the bank loan for the purchase of two-wheeler by her husband".

26. D.W.1 has also admitted in her Cross examination that her parents presented 40 sovereigns gold and also diamond ear rings at the time of her marriage. She has also admitted the fact as stated in the Will Ex.P.2 that her marriage and that of her sister were performed in a grand scale. She has further admitted that she has not filed any authorisation from respondents 5 to 7 in O.P.No.870 of 1999 for issuance of the legal notice Ex.D.2. D.W.1 has also acknowledged the fact that her relationship with the respondent was cordial and became strained only on account of the Will Ex.P.2. D.W.1 has also admitted in her Cross examination that even after filing of the probate proceedings, she invited the respondent for the engagement ceremony as well as for the marriage of her second son and the respondent had also attended the same. D.W.1 has also admitted that she has not filed any document to show that her mother testatrix used to sign in Tamil and she was not in the habit of affixing her left thumb impression. She has also admitted that no suit for partition has been filed till date for

allotment of her share. She acknowledges the fact that after filing of the probate proceedings in O.P.No. 870 of 1999 on 15.12.1998 that she should have filed a suit for partition. D.W.2 being the son of D.W.1 has also acknowledged the fact that the testatrix Kuppammal could read and write Tamil. He has also admitted that the Will Ex.P.2 was executed much earlier to his grandmother falling sick between 11.09.1995 and 15.09.1995 and hospitalised at Sundaram Medical Foundation Hospital.

27.The Will Ex.P.2 is typed in Tamil and the testatrix Kuppammal has affixed her left thumb impression. The attesting witness namely, P.W.2 and R.Mahadevan, the other attesting witness, who died on 02.04.1997 as per Ex.P.20 filed by the respondent were present at the time of execution of the Will Ex.P.2 by the testatrix Kuppammal. As the testatrix Kuppammal can read and understand Tamil, there was no necessity for the attesting witness to read the contents of Ex.P.2 to the testatrix. Being the author of Ex.P.2 she was able to read and understand the contents of Ex.P.2 by herself. D.W.2 has also acknowledged in his Cross-examination that the testatrix can read and understand Tamil.

28.M.P.No.1 of 2014 in O.S.A.No.368 of 2013 has been filed by the appellant/defendant under Order 41 Rule 27 of the Code of Civil Procedure seeking permission of this Court to produce the partnership deed dated 10.10.1983 entered into between Selvaganesh and the testatrix Kuppammal as additional evidence cannot be entertained at this stage as the document was very much available during the time of trial. The appellant could have very well filed a similar application before the learned Single Judge but, failed to do so. Further, the appellant is not a party to the deed of partnership dated 10.10.1983 and therefore, it cannot be marked as an exhibit through the appellant. The reasons stated in the affidavit of the appellant filed in support of M.P.No.1 of 2014 are also not satisfactory and we find no merit in entertaining the petition at this stage and therefore, the petition stands dismissed.

29.We are convinced that after having considered the documents and the oral evidence let in by the parties, the Will Ex.P.2 is genuine and the respondent being propounder of the Will has discharged his burden of proving the Will and no surrounding suspicious circumstances exist for the execution of the Will Ex.P.2. The contention of the learned counsel for the appellant/defendant that the Will was shrouded with suspicious circumstance cannot be accepted in the light of the fact, the relevant and required evidence has been produced on record disproving all the suspicious circumstances, which are sought to be projected. Thus, the finding recorded by the learned Single Judge of this Court cannot be found fault with.

30.We find no infirmity with the judgment and decree dated 30.04.2013 in T.O.S.No.8 of 2008 passed by the learned Single Judge granting probate of the Will Ex.P.2 in favour of the respondent and the judgment and decree is hereby confirmed. However, there shall be no order as to costs. Consequently, connected M.P.No.1 of 2013 is dismissed and the interim stay granted on 22.11.2013 shall stand vacated.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

cla/pam

To

The Sub Assistant Registrar (Original Side)
High Court, Madras-104.

+1cc to Mr.V.Subramani, Advocate Sr. 53212
+2cc to Mr.K.V.Babu, Advocate Sr. 53086

O.S.A.No.368 of 2013
And
M.P.Nos.1 of 2013
and 1 of 2014

MSM(CO)
VR(09/08/2017)

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