

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on
02.07.2018

Delivered on
11.07.2018

CORAM:

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice N.ANAND VENKATESH

Original Side Appeal No.310 of 2017

K.S.Sathyanarayanan Appellant/Plaintiff

Vs.

1.D.Yasodha

2.V.Komaleeswari

3.S.Vasanthi

.... Respondents/Defendant

Original Side Appeal is filed under Order XXXVI Rule 1 of the O.S. Rules read with Clause 15 of the Letters Patent to set aside the Judgment and Decree dated 04.01.2017 made in T.O.S.No.39 of 2006.

For Appellant : Mr.K.Harishankar

For Respondents : Mr.P.B.Balaji

JUDGMENT

N. ANAND VENKATESH., J.

This intra-Court Appeal has been filed against the Judgment and Decree dated 04.01.2017, passed in T.O.S.No.39/2006 wherein the learned Single Judge had dismissed the suit filed by the appellant for grant of Probate of the Will dated 05.05.1968, executed by the testatrix Tmt.Navamani Ammal.

2.The case of the Appellant:

The suit property was the absolute property of the testatrix by virtue of the Sale Deed dated 07.08.1940, executed in her favour. The testatrix and her husband had borrowed amounts from the Egmore Benefit Society for the purpose of construction of the house in the vacant land and out of the borrowed money, the entire construction consisting of a Ground Floor, First Floor and Out-house were constructed and entire family was enjoying the property. The testatrix and her husband K.M.Swaminatha Mudaliar had 8 children; 4 sons and 4 daughters. K.M.Swaminatha Mudaliar even during his life time executed a Will dated 15.08.1966 [Ex.P-10], categorically confirming that

his wife Tmt.Navamani Ammal will have absolute rights to deal with the property.

2.1.Tmt.Navamani Ammal during her lifetime executed a Will dated 05.05.1968 [Ex.P-2], wherein, her 4 sons were the beneficiaries and the eldest son K.S.Sathayanarayanan, the appellant herein was appointed as the Executor of the Will. There were three attesting witnesses to the Will. Tmt. Navamani Ammal died on 22.01.1969, and the Corporation of Madras issued a Death Certificate [Ex.P-1].

2.2.After the demise of Tmt. Navamani Ammal, the executor of the Will wrote a letter dated 22.06.1969 [Ex.P-12] to the Corporation of Madras for mutation of records relating to the property in favour of four sons of Tmt.Navamani Ammal in accordance with the Will executed by her. K.M.Swaminatha Mudaliar died on 02.11.1972. Subsequently, during the year 1974-75, the revenue records pertaining to the property were mutated in the name of 4 sons of Tmt. Navamani Ammal. All the four sisters were well aware about the execution of the Will.

3.While so, a legal notice dated 10.03.2004 [Ex.P-7], was issued on behalf of the respondents claiming for 1/8th share in the property of Tmt.Navamani Ammal. A detailed reply notice dated 27.03.2004 [Ex.P-8], was issued on behalf of the appellant, his three brothers and also one of the sister R.Mallika refuting the claim made by the respondents on the ground that the respondents are well aware about the existence of the Will and that the respondents are married and well settled and are living in their matrimonial house and the claim made by them is absolutely baseless.

4.Since the beneficiaries under the Will expected that the respondents will proceed further to claim their share and in which case the same has to be defended by virtue of the Will, they took steps to Probate the Will in order to prove it in the Court of Law. A petition in O.P.No.614 of 2006 was filed for grant of Probate along with the consent affidavits given by three brothers and one sister R.Mallika [marked as Exs.P-3 to P-6]. After notice was issued in the Original Petition, caveat was entered by the respondents who also filed the affidavit of objection. Consequent upon the same, the O.P. was converted into T.O.S.

5.The case of the Respondents:

Tmt. Navamani Ammal died intestate and there was no occasion for her to execute any Will. The alleged Will executed in the year 1968, has not seen the light of the day for almost four decades and the theory of Will has been brought forth only to deprive the daughters their share in the property. The Will

has been fabricated with the help of the signed blank papers left by Navamani Ammal and Will is not a genuine one.

5.1.The conduct of the brothers after the death of Navamani Ammal itself will show that there was no Will left behind by Navamani Ammal. When the suit property was mortgaged in the year 1981 and 1983 before Egmore Benefit Society Limited [Exs.D-1 to D-4], all the eight children of Navamani Ammal executed the mortgage in their capacity as the co-sharers of the suit property which only confirms that Navamani Ammal did not leave behind any Will. Therefore, the T.O.S is liable to be dismissed.

6.The learned Single Judge on the basis of the pleadings framed the following issues:

- 1.whether the Will dated 05.05.1968 is true and genuine?
- 2.Whether the claim for probate is barred by limitation?
- 3.To what other reliefs are the parties entitled to?

7.The appellant examined himself as PW-1, and he also examined the attesting witness T.C.Murugesan and Exs.P-1 to P-15 were marked on the side of the appellant. The second respondent examined herself as DW-1 and Exs.D-1 to D-4 were marked on the side of the respondents.

8.The learned Single Judge on appreciation of the oral and documentary evidence and on consideration of the facts and circumstances of the case was pleased to dismiss the T.O.S on the ground that the execution of the Will has not been proved, and a Will has been created for the purpose of this case, and therefore, the appellant is not entitled for grant of Probate.

SUBMISSIONS:

9.Submissions made by the learned Counsel for appellant:

- The Navamani Ammal did execute a Will dated 05.05.1968 in favour of her sons and the respondents who knew about this fact right from the beginning, with a view to claim a share in the property, have chosen to deny the very Will itself.
- The first respondent was married much prior to the death of the Navamani Ammal and the second and third respondents were married in the year 1970 and 1983 respectively; and after the marriage they are living with their family comfortably. R.Mallika who was the youngest sister was supported and she got married with the help of her four brothers and the property was even mortgaged for meeting the marriage expenses. It is only the four brothers who are in possession and enjoyment of the property even after

the demise of Navamani Ammal.

- The revenue records of the Corporation were mutated in favour of four sons in the year 1974-75 and Exs.-12, P-13 series, P-14 and P-15 will clearly reveal the fact that after coming into force of the Will, the four brothers became the absolute owners of the property.
- The fact that one of the sister R.Mallika also gave her consent for the Probate of the Will clearly shows that all the four sisters are aware about the existence of the Will.
- The mortgage of the property happened originally in the year 1959 even before the demise of the testatrix and such mortgage continued even subsequent to her demise for meeting the marriage expenses of the two unmarried daughters.
- The terms of the Mortgage Deed [Exs.D-1 to D-4] are all printed and standard formats prepared by the mortgagee and it is mechanically signed by all parties with the only intention to get the loan amount in order to meet the urgent family expenses. Therefore, the mere signing by all the daughters in the Mortgage Deed by itself cannot efface the existence of the Will.
- The learned Single Judge failed to take note of the entire testimony of DW-1 who had admitted to several facts including the signature of Shri.M.Varadarajan [MU.Va] who was the other attesting witnessing in the Will.
- The learned Single Judge failed to take note of the fact that the respondents did not plead specific instances of suspicious circumstances and whatever suspicious circumstances was cited in the judgment were given as a finding in the judgment by the learned Single Judge and the appellant did not have an opportunity to meet the instances quoted by the learned Single Judge with regard to the suspicious circumstances.
- The learned Single Judge ought to have read the evidence of the attesting witness as a whole and went wrong in picking and choosing statements made by in the witness and hold against the appellant.
- Attesting witness has categorically stated that the testatrix was also present at the time of execution of the Will and the mere fact that MU.Va dictated the contents of the Will, will not vitiate the execution of the Will since he was a respectable person and was a mentor of the family to whom the whole family had the greatest respect.
- The respondents did not dispute the signature of the testatrix, the signature of the attesting witness and the signature of the father K.M.Swaminatha Mudaliar and the theory that all these persons were involved in fabricating a Will is too far fetched. The property Tax Assessment Card [Exs.P-14 and P-15] will clearly disclose the fact that the beneficiaries under the Will are shown as the

assessee and the assessment of the property tax and the payment of same has been done by the appellant and his brothers.

- The learned Single Judge has rejected the claim of the appellant based upon conjecture and surmises and has not taken into account the probabilities of the case.

The learned counsel for the appellant placed reliance upon the following judgments.

- 1) H.Venkatachala Iyengar .Vs. B.N.Thimmajamma & Others reported in [AIR 1959 SC 443]
- 2) A.K.Gopal & Others .Vs. S.Vasanthan reported in (1993) 1 LW 580
- 3) Sashi Kumar Banerjee & Others .Vs. Subodh Kumar Banerjee & Others reported in [AIR 1964 SC 529]
- 4) Dr.Santha .Vs. Sharada reported in (2003) 4 CTC 470

10. Submissions made by the learned counsel for Respondents:

- The execution of the Mortgage Deed by all the legal heirs of the deceased Navamani Ammal even after the alleged Execution of Will, clearly shows that there was no Will in existence.
- Exs.D1 to D-4 clearly shows that the parties have made a declaration therein that there was no Will, whatsoever, in existence at the time of the Mortgage in the year 1983-84. The non-existence of the Will has been specifically accepted by the appellant in the Mortgage Deed itself, and therefore, the alleged Will Ex.P-2 was created at a later point of time only to deprive the daughters their due share in the property.
- A cursory look at the Will shows that it has been made ready at a later point of time by taking advantage of blank signed papers. There was very little space to even accommodate the signature of the attesting witness at the bottom of the Will. These facts clearly created a very serious doubt about the very document itself.
- The attesting witness has categorically admitted that the Will was dictated by MU.Va and written by a scribe S.Kannan and there was absolutely no contribution on the part of the testatrix. That apart, the attesting witness also states he was not aware whether the testatrix signed in his presence. Therefore, the factum of Execution of Will itself is doubtful in this case.
- The learned Single Judge has discussed each and every point in extenso and has come to the conclusion that the appellant is not entitled to the relief of grant of Probate and the appellant has not made out any case in this appeal to interfere with the findings of the learned Single

Judge, and therefore, this Original Side Appeal deserves to be dismissed.

The learned counsel for the respondent placed reliance on the following judgments:

1. Dhannulal and Ors .Vs. Ganeshram and another reported in [2015 (3) CTC 222]
2. M.Pattammal Vs. G.Parthasarathy and Another reported in [2016 (5) MLJ 689]
3. Janki Narayan Bhoir .Vs. Narayan Namdeo Kadam reported in [2003 (1) CTC 308]

11.This Court has carefully considered the rival submissions made on either side and also the materials placed on record. The following points arises for determination in the appeal:

- 1)Whether the Will dated 05.05.1968 is a genuine document?
- 2)Whether the appellant has proved the will in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act?
- 3)Whether the learned Single Judge has properly appreciated the materials on record before rejecting the claim of the appellant for Probate of the Will?

DISCUSSION:-

12.It is an admitted fact in this case that Navamani Ammal is the owner of the property and she had four sons and four daughters at the time of her demise. It is also an admitted case that her husband K.M.Swaminatha Mudaliar passed away in the year 1972, after the demise of Navamani Ammal. It is also the admitted case of the respondents that the signature that is found in the Will is that of Navamani Ammal, and the signatures of the three attesting witnesses in the Will are that of K.M.Swaminatha Mudaliar, MU.Va and T.C.Murugesan [PW-2].

13.The point of dispute that has been raised on the side of the respondents is that a cursory look at the Will clearly shows that it has been prepared at a later point of time with the help of signatures that were available on blank papers. In order to substantiate this point, the respondents would further rely upon Exs.D-1 to D-4 which was executed in the year 1983-84, in which each of the co-sharers have signed and in a specific column [found in page 74 of the Index to typeset of documents volume II] for the question Is there any Will or other document affecting the property? The categorical answer is 'No'. This according to the learned counsel for respondents clearly shows that there was no Will and if at all there was a Will executed,

at least during the year 1981-83 it would have come to light. The very story of the existence of a Will was projected only in the year 2004, when the daughters asked for a share in the property. Therefore, according to the learned counsel for the respondents, the Will all of a sudden showed its face after nearly four decades from the date of the alleged execution.

14. It becomes necessary for this Court to independently appreciate the oral and documentary evidence in order to finding an answer for the first issue in the points for determination.

15. The three questions that needs answer to decide whether the Will set up by the propounder is the last Will of the testator are;

- (i) Has the testator signed the Will?
- (ii) Did he understand the nature and effect of the dispositions in the Will ? and ;
- (iii) Did he put his signature in the Will knowing what it contained?

16. The answers for these questions will determine the nature of finding on the question of Proof of Wills. The test to be applied for the proof of Will would be usual test of the satisfaction of a prudent mind in such matters. The propounder must 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 of his own free wil. The onus on the propounder can be taken to be discharged on proof of the essential facts mentioned herein above.

17. In this case, the executor of the Will has examined himself as PW-1. In the proof affidavit he narrates the entire facts which has already been taken note of by this Court. The Will in question has been marked through him. As already stated above, there is no dispute with regard to the signature of the testatrix in the Will. It is also not the case of the respondents that the testatrix was not in a sound and disposing state of mind or that she did not execute the Will out of her own free will. The only case that has been projected by the respondents is that the Will has been fabricated at a later point of time by misusing blank signed papers. The only question that was put to PW-1 regarding the same and the answer given by PW-1 is extracted herein below:

"The original title deeds are with Egmore benefits society limited. It is correct to state that in 1981 we borrowed loan from Egmore benefits society limited. Ex.D-1 is the photo copy of the mortgage deed dated

04.05.1981 witness admits his signatures in the documents (Marked subject to the objection raised by the plaintiff counsel). It is correct to state that we again borrowed money in December 1983 from Egmore Benefits Society Limited. Ex.D-2 is the photo copy of the mortgage deed dated 08.02.1983. The original Patta for the suit property has been deposited with Egmore Benefits Society Limited. I have not taken any steps regarding Patta after the death of my mother. I deny the suggestion that the Patta has been mutated in the names of all brothers and sisters. Ex.D-3 is the photo copy of the application dated 13.04.1983 for borrowing loan from Egmore Benefits Society Limited. Ex.D-4 is the photo copy of the application form dated 25.04.1983 for borrowing loan from Egmore Benefits Society Limited.

It is correct to state that there is no space for the witnesses to sign in the second page of Ex.P-2 therefore the witnesses have inserted the signatures in the available space. I deny the suggestion that using blank papers signed by my mother we have created Ex.P-2 Will. I deny the suggestion that is there reason why I have not taken any steps to probate that Will for the past 40 years".

18.It is therefore important for this Court to see if infact blank signed papers were used for fabricating the Will in question. For this purpose the evidence of the attesting witness gains significance.

19.The attesting witness in the proof affidavit specifically states as follows:

"1. I knew and was well acquainted with the deceased Tmt.Navamani Ammal wife of Late Thiru.K.M.Swaminatha Mudaliar. Thiru.K.M.Swaminatha Mudaliar was a friend of mine known for number of years.

2.On the 5th day of May 1968 I was present together with Sri.M.Varadarasan, Sri.K.M.Swaminatha Mudaliar at the house of Sri.M.Varadarasan. The scribe of the Will Thiru.Kannan was also present at the residence of Thiru.M.Varadarasan on that day. We did then and there see the said deceased, set and subscribe her name at foot of the

testamentary paper in the Tamil language and character hereunto annexed and marked with the letter A and declare and publish the same as such and for her last Will and testament.

3. That thereupon I this deponent and the said Sri.M.Vadarasan, Sri. K.M.Swaminatha Mudaliar did at the request of the said deceased and in her presence and in the presence of each other all being present at the same time set and subscribe our respective names and signatures at the foot of the testamentary paper as witnesses thereto.

4. That the name and signature subscribed at the foot of the testamentary paper is of the party executing the same is in the proper handwriting of the said deceased and the names and signatures also subscribed and written at the foot of the same or in the proper and respective handwritings of the said Sri.M.Varadarasan, Sri.K.M.Swaminatha Mudaliar and of me this deponent respectively.

5. That at the time the said deceased so subscribed her name and signature to the said will as aforesaid late Tmt.Navamani Ammal was of sound and disposing mind, memory and understanding and to the best of my belief made and published the same of her free will and pleasure."

20. The attesting witness was aged about 81 years at the time when he was examined as a witness and he was the only attesting witness who was alive at that particular point of time. He specifically talks about his relationship with K.M. Swaminatha Mudaliar and MU.Va. He also talks about the signature found in the Will to be that of the testatrix and also about the signature of the attesting witnesses. He also speaks about the sound and disposing mind and also the memory and understanding of the testatrix and her free will while executing the document.

21. This attesting witness was cross examined in the presence of an Advocate Commissioner by the learned counsel for the respondents. In the course of cross examination he specifically states that the Will was written at MU.Va's house and Tmt.Navamani Ammal was present at the time of execution of Will at MU.Va's house. He also specifically mentions about the presence of K.M. Swaminatha Mudaliar and MU.Va and they signing the Will in their capacity as the attesting witness. Taking the evidence of Thiru.T.C.Murugesan as a whole, it is very clear that the testatrix did sign the Will, and the Will was attested

by three persons and the scribe of the Will was Mr.Kannan who wrote as dictated by MU.Va. Incidentally, Mr.M.Varadarajan (MU.Va) was a renowned Tamil scholar, author and academician and also the winner of Sahitya Academy Award for Tamil, for his novel Karithundu. This prolific writer has published various Novels, Plays, Essays and Short Story collections. The attesting witness who himself is a 81 year old man who is not a beneficiary in the Will speaks clearly about the execution of the Will by the testatrix and the presence of the other attesting witnesses. It must be borne in mind that the Will was executed in the year 1968, and this attesting witness was examined in December 2011, after nearly 43 years. Therefore, some small discrepancies here and there in the evidence will not take away the essence of what was stated by him in his evidence. There is no reason for him to utter falsehood about the execution of the Will more particularly when the entire transaction has happened in the presence of the testatrix and a renowned Tamil scholar MU.Va. The learned single Judge has failed to take note of these essential factors while deciding about the genuineness of the Will executed by late Tmt.Navamani Ammal.

22.On the over all evidence available on record, it is clear that all the three questions referred to supra stands answered on the affirmative. Therefore, this Court can safely come to the conclusion that the subject matter Will has been proved to be the last Will of the testatrix.

23.This Court takes the support from the celebrate decision in H.Venkatachala Iyengar .Vs. B.N.Thimmajamma & Others reported in [AIR 1959 SC 443] in which it has been held as follows:-

"18.What is the true legal position in the matter of 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. The party propounding a will or otherwise making a claim 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 Indian 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 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.

19. However, there is one important

feature which distinguishes wills from other documents. 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 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, 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 of his 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 mind and his 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.

23 Jarman on " Wills " says that " the general rule is that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator'." He adds that, "if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid." Similarly, Williams on " Executors and Administrators " has observed that, " generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; and evidence of the will having been read over to the testator or of instructions having been given is not necessary." On the other hand, Mr. Viswanatha

Sastri, for respondent No. 1, contends that the statements on which the appellant has relied refer to wills which are free from any suspicions and they cannot be invoked where the execution of the will is surrounded by suspicious circumstances. In this connection, it may be pertinent to point out that, in the same text books, we find another rule specifically mentioned. "Although the rule of Roman Law ", it is observed in Williams, " that " Qui se scripsit haeredem" could take no benefit under a will does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased "

24. This judgment has been followed by this Court in A.K.Gopal & Others .Vs. S.Vasanthan reported in (1993) (1) LW 580 and Dr.Santha .Vs. Sharada reported in (2003) 4 CTC 470.

25. The theory that has been propounded by the respondents that the Will has been fabricated in a blank signed document again does not hold water since the Will not only has the signature of the testatrix but also has the signature of three attesting witnesses and none of these signatures are disputed by the respondents. It therefore becomes too difficult for this Court to accept the theory projected by the respondents since there was no need for a blank document to have the signature of the testatrix and also three attesting witnesses. The reason as projected by the learned Single Judge that the Will was accommodated in two pages even without leaving any space for the attesting witnesses to sign, and therefore, the Will was a created Will, does not merit acceptance by this Court. That factor by itself cannot be a reason to question the execution of the Will more particularly when the Will contains the admitted signatures of the testatrix and the attesting witnesses.

26. We will now proceed to answer the next issue in the points for consideration. The requirement under Section 63 (c) of the Indian Succession Act is that the Will shall be attested by two or more witnesses, each of whom has seen the

testator sign or affix his mark to the Will and each of the witnesses has signed the Will in the presence of the testator. In the present case as mentioned above, the attesting witness has spoken about the testatrix signing the Will in his presence and he along with two other attesting witnesses, in turn signing in the presence of the testatrix. This attesting witness has also been examined in accordance with Section 68 of the Indian Evidence Act, for the purpose of proving the execution of the Will.

27. One important factor which has weighed in the mind of the learned Single Judge to come to the conclusion that the testatrix did not execute this Will is that she did not contribute anything from her side with regard to the contents of the Will. The attesting witness in his evidence has stated that Mr. Kannan, the scribe, wrote the Will and M. Varadarajan dictated the contents of the Will and the Will was prepared at the house of M. Varadarajan. This Will was signed by Namani Ammal. Therefore, Navamani Ammal was not even aware about the contents of the Will, and therefore, the entire Will is non-est in the eye of law.

28. In order to decide this issue, it is necessary to analyse the evidence of DW-1 who is the second respondent in this appeal. DW-1 in her evidence states as follows:

".....I got employment in the school through Thiru. Mu. VA (M. Varadharajan). He was the correspondent for the school. He was earlier the head of Tamil Department in Pachaiappa's College. He was related to our family. He was a very respectable person in society. All of us in our family had great regard for Thiru. MU. VA. The signature in the bottom of page 2 of the Will is that of Thiru. MU. VA. I do not know the other signatory Mr. Murugesan. I deny the suggestion that a respectable person such as MU. VA would not have been party to preparing a bogus Will. Witness adds: I do not know under what circumstances he attested the Will.

....I know that even when my mother was alive, the property, subject matter of the Will was mortgaged & loans were raised from Egmore Benefit Society. I do not know whether my parents had raised loan from Egmore Benefit Society for constructing the suit property. For all improvements such as laying drainage etc., my father used to raise loans from Egmore Benefit Society. After the death of my mother, during my marriage my father

approached Egmore Benefit Society for further loan and as it was not available, my father borrowed from Thulasibai."

29. The above extracted portion of the evidence of DW-1 clearly shows that MU.Va was the mentor of the family. It is but natural that MU.Va took an active part in preparation of the Will not for his benefit but for the benefit of the entire family. MU.Va dictating the contents of the Will and the same being signed by the testatrix does not by itself lead to the conclusion that the testatrix was not aware about the contents of the Will. When MU.Va dictated the Will, the testatrix was in fact present as per the evidence of the attesting witness. The testatrix was aware about what was dictated by MU.Va and only thereafter she had signed the Will. Therefore, what is important is not who wrote the Will or who dictated the Will but the most important factor is whether the testatrix understood what the Will contained and the nature and effect of the dispositions in the Will and thereafter signed it. When this important factor is satisfied the Court can safely come to the conclusion that the Will had been duly executed. There is no doubt in the mind of the Court that the testatrix and her family who had great regard for MU.Va, had understood whatever was dictated by MU.Va and the testatrix had affixed her signature after completely understanding the contents of the Will.

30. There is yet another issue that has weighed in the mind of the learned Single Judge while rejecting the claim of the appellant. It is regarding the execution of the Mortgage Deed by all the brothers and sisters which is evidenced under Exs.D-1 to D-4. Admittedly, in this case there was subsisting mortgage from the year 1959 onwards which was executed by the testatrix and her husband for the purpose of constructing a house in the suit property and it continued even after the death of the testatrix and her husband K.M.Swaminatha Mudaliar. Exs.D-1 to D-4 are pre-printed/formatted mortgage deeds over which the mortgagor has no say. If a mortgagor wants to avail loan from a financial Company, they have to comply with and sign documents which are prepared by the mortgagee Company and the mortgagor does not have a say on the contents of the Mortgage Deed. A careful reading of the Mortgage Deed shows that loan was taken for the purpose of meeting immediate family expenses and to conduct the marriage of one of the sisters K.S.Vasanthi. At that point of time, there was no dispute between the parties and the Will was not Probated. If the Will had been shown the mortgagee would have insisted for a Probate which in turn would have delayed the entire loan process. Therefore just because the brothers and sisters signed the Mortgage Deed, that by itself cannot be taken to be a determining factor to hold that there was no subsisting Will at that point of time.

31.The following extracts from the evidence of PW-1 and DW-1 will give a clearer picture on this issue.
Evidence of PW-1:

"9. I state that later on along with our father we have participated in conducting the marriage of R.Mallika (4th Respondent) and D.Yasoda (1st respondent) and the 3rd respondent S.Vasanthi got married in the year 1983. As stated earlier, the two daughters namely R.Mallika and D.Yasoda were married even during the lifetime of my mother late Navamani Ammal. Therefore, the bequest of the property was made in favour of the 4 sons. Even for the purpose of the marriage of the two daughters, the immovable property had to be mortgaged and funds were raised. Subsequently, the marriage of the 3rd daughter was conducted in 1983 by the sons by borrowing funds from the Egmore Benefit Society and other private money lenders. In the year 1971 amounts were borrowed for family expenses including the marriage of the daughters from private money-lenders. On 07.05.1971 one such loan was raised from a private money-lender and finally discharged by the sons. The evidence of the same is available in the form of discharged Promissory Note dated 07.05.1971 and the same may be marked as Ex.A-11.

10.All the mortgage loans and amounts borrowed from private money lenders were all repaid by the sons and therefore the property was bequeathed in favour of the sons.

....The original title deeds are with Egmore benefits society limited. It is correct to state that in 1981 we borrowed loan from Egmore benefits society limited. Ex.D-1 is the photo copy of the mortgage deed dated 04.05.1981 witness admits his signatures in the documents (Marked subject to objection raised by the plaintiff counsel). It is correct to state that we again borrowed money in December 1983 from Egmore Benefits Society Limited. Ex.D2 is the photo copy of the mortgage deed dated 08.02.1983. The original Patta for the suit property has deposited with Egmore Benefits Society Limited. I have not taken any steps regarding Patta after the

death of my mother. I deny the suggestion that the Patta has been mutated in the names of all brothers and sisters. Ex.D-3 is the photo copy of the application dated 13.04.1983 for borrowing loan from Egmore Benefits Society Limited. Ex.D-4 is the photo copy of the application form dated 25.04.1983 for borrowing loan from Egmore Benefits Society Limited.

Evidence of DW-1:

"... I was 28 years old when my mother died in the year 1969. Two of my elder sisters Mallika and Yesodha were married during the life time of my mother. On 09.03.1970 I got married. My father was alive at the time of my marriage. For my marriage expenses my father had taken a loan from one Thulasibai and all my brothers and sisters including myself signed for borrowing the said loan. I was working as a teacher up to 1972 and along with my husband I was residing in the same property which is subject matter of the Will. Up to 1985, I was residing in the said property. Thereafter I moved to Anna Nagar to a house constructed by my husband. Thereafter another loan of Rs.8000/- was also taken from the said Thulasibai at the insistence of the plaintiff, for his business purpose the total loan borrowed was Rs.15000/-. My father was alive when the subsequent loan was raised. Thereafter we mortgage the property in favour Egmore benefit Society and raised further loan to settled to earlier loans taken from Thulasibai. Even when we obtained loans from Egmore benefit society all my brothers and sisters including myself have signed in the mortgage document.

... I got employment in the school through Thiru.MU.Va (M.Varadharajan). He was the correspondent for the school. He was earlier the head of Tamil Department in Pachaiappa's College. He was related to our family. He was a very respectable person in society. All of us in our family had great regard for Thiru.MU.Va. The signature in the bottom of page 2 of the Will is that of Thiru.MU.Va. I do not know the other signatory Mr.Murugesan. I deny the suggestion

that a respectable person such as MU.VA would not have been party to preparing a bogus Will. Witness adds: I do not know under what circumstances he arrested the Will."

..I know that even when my mother was alive, the property, subject matter of the Will was mortgaged & loans were raised from Egmore Benefit Society. I do not know whether my parents had raised loan from Egmore Benefit Society for constructing the suit property. For all improvements such as laying drainage etc., my father used to raise loans from Egmore Benefit Society. After the death of my mother, during my marriage my father approached Egmore Benefit Society for further loan and as it was not available, my father borrowed from Thulasibai.

32.From the above evidence it is clear that the family was regularly taking loans in order to meet the financial contingencies. Therefore, the manner in which the Mortgage Deed was executed and signed by the parties will not have any impact on the execution and existence of the Will in question. This Court should also take into consideration about the fact that it was the brothers who were repaying the loan.

33.There is one more important factor that must be taken note of in this case. After the demise of the testatrix, the appellant and his brother have got the records of the Corporation mutated in their favour.

Exs.P-12 to P-15 clearly demonstrates the fact that the revenue records stood in the name of the appellant and his brothers and the property tax was also paid by them. Ex.P-12 letter shows that after the death of Navamani Ammal, her sons who are the beneficiaries under the Will have represented to the Corporation of Madras for changes to be made in the records by virtue of the Will executed in their favour. The learned Single Judge doubted this letter on the ground that the original copy of the letter itself was filed and if really the same has already been sent to the Corporation, only a copy of the letter will be available with the appellant, and therefore, it is highly doubtful that the Corporation really acted upon this letter. One important factor that emerges out of this letter is the signature of K.M.Swaminatha Mudaliar on behalf of the minor son Damodaran. This factor makes it clear that this letter could not have been prepared or fabricated at a later point of time. Dehors this letter, it can be seen that even in the proceedings before the taxation appeals committee, which is a quasi judicial body, the

appellant and the brothers have appeared and represented in the year 1975, in their capacity as the owners of the property. Subsequently, the property tax card also shows the name of the appellant and brothers as the assesseees of the property. At no point of time the respondents have raised any issue in this regard. This available evidence clearly shows that the appellant and his brothers have acted upon the Will and got the revenue records mutated in their names and are also paying the property tax. The respondents have not raised any dispute regarding the same. It is therefore too late in the day for the respondents to question the genuineness of the Will which was acted upon by the beneficiaries immediately after the death of the testatrix.

34.The very fact that one of the sister has completely supported the claim made by the beneficiaries under the Will by filing a supporting affidavit clearly proves the fact that all the sisters knew about the existence of the Will and the beneficiaries of the Will and for reasons best known, three sisters alone decided to claim a share in the property by feigning ignorance about the Will.

35.The decisions stated by the learned counsel for the respondents does not in any way support the stand that has been taken by the respondents in the present case. This Court is of the considered opinion that the Will in question has been duly executed by Navamani Ammal and the same has been duly attested by witnesses and the Will has been duly proved by the propounder. The suspicious circumstances raised by the respondents on the ground that the Will was executed four decades back, the Will has been fabricated in a blank signed papers and the very execution of the Mortgage Deeds in the year 1981 and 1983 defies the existence of the Will, has all been properly explained and rebutted and appellant has sufficiently discharged the onus of proving the Will and dispelling the suspicious circumstances raised by the respondents.

36.We accordingly hold that the appellant has proved the Will in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

37.We are therefore of the considered opinion that the learned Single Judge did not properly appreciate the evidence available on record and the facts and circumstances of the case while rejecting the claim made by the appellant. For all the reasons stated supra, we are not in agreement with the findings of the learned Single Judge. Accordingly, the judgment and decree passed by the learned Single Judge made in T.O.S.No.39/2006 dated 04.01.2017, is hereby set aside.

38.This Original Side Appeal stands allowed, and consequently T.O.S.No.39/2006 dated 04.01.2017, is allowed as prayed for. The appellant is entitled for grant of Probate of the Will dated 05.05.1968, executed by the testatrix Tmt.Navamani Ammal. In the facts and circumstances of the case, there will be no order as to costs.

Sd/-
Assistant Registrar (CS VII)

//True copy//

Sub Assistant Registrar

KP

Copy to:

The Sub. Asst. Registrar
Original Side,
High Court, Madras.

+1cc to Mr.P.B.Ramanujam, Advocate SR.No.45044
+2cc to Mr.K.Harishankar, Advocate SR.No.45046

O.S.A. No.310 of 2017

RJ (CO)
GN(10/08/2018)

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