

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
06-04-2018	12-04-2018

Coram:

The Hon'ble Mr. **Justice N.SATHISH KUMAR****Testamentary Original Suit No.21 of 2001**

1. Kasi (died)

2. Mani

3. Senbagavalli

4. Mala

5. Manikandan

6. Chandra

[Plaintiffs 3 to 6 brought on record
as L.Rs.of the deceased 1st plaintiff]

... Plaintiffs

Versus

1. Babu@Dhanasekar

2. Dharmalingam (died)

3. Mrs.Valarmathi

4. Mrs.Padma

5. Ms. Kalaivani (died)

6. Ms. Kalyani

... Defendants

Petition filed for the grant of Letters of Administration with will annexed under Section 232 and 276 of the Indian Succession Act 1925, read with Order XXV Rule 5 of the Original Side Rules of Madras High Court, 1956.

For Plaintiffs .. Mrs. Chitra Sampath
Senior Counsel for
Mrs.P.V. Rajeswari

For Defendants .. Mr.P.K. Sabapathy
for D1 to D6

JUDGMENT

The Original Petition has been originally filed for grant of Letters of Administration based on the Will dated 07.10.1974 executed by one Mr.Thangavel Naicker and his wife Mrs.Pommi Ammal, thereafter, converted as a suit in view of the contest by the defendants.

2. The brief facts leading to filing of this suit are as follows:

2.(a) Plaintiffs 1 and 2 are originally sons of one Mr.Krishnan. The said Krishnan is the son of Testator/Testatrix viz., Mr.Thangavelu Naicker and Mrs. Pommi Ammal. 1st Plaintiff died during the pendency of the suit. His legal heirs were brought on record as Plaintiffs 3 to 6. The executants viz., Mr.Thangavelu Naicker and Mrs. Pommi Ammal, grandparents of Plaintiffs 1 and 2, have jointly executed a Will dated 07.10.1974 bequeathing the suit property in favour of Plaintiffs 1 and 2 to have and hold the same till their life time and thereafter the children of two plaintiffs shall succeed to the property absolutely

with all powers of alienation. The plaintiffs and beneficiaries were minors at the time of execution of the Will. One of the testators Mr. Thangavelu Naicker died on 17.01.1977 and Mrs. Pommi Ammal died on 15.01.1997. Hence the plaintiffs have filed a petition for grant of Letters of Administration.

2.(b) The defendants 1 to 6 are the sons and daughters of the one Mrs. Rani. The 1st defendant has filed written statement and the other defendants are also adopting the written statement of the 1st defendant by Memo dated 20.08.2001.

2.(c) It is the case of the 1st defendant that the suit property was allotted to his grandmother Mrs. Pommi Ammal by the Slum Clearance Board and the sale deed was executed on 16.09.1974. Therefore, the alleged Will dated 07.10.1974 is forged one. Mrs. Pommi Ammal being the absolute and sole owner of the property, the Will alleged to have been executed by her husband and herself is not valid. Mrs. Pommi Ammal during her life time has never executed any Will. The alleged Will is specifically denied and the same is forged and concocted document.

2.(d) It is the case of the 1st defendant that both Mr. Thangavelu Naicker and Mrs. Pommi Ammal were under the care and custody of the

defendants. Their only son Krishnan died in the year 1969. His wife Smt. Chandra, mother of the plaintiffs 1 and 2 left to her parents place immediately after the death of her husband and severed her relationship with the testator and testatrix. There is no contact between the mother of the plaintiffs and Mrs. Pommi Ammal. The plaintiffs and Mrs. Pommi Ammal were in inimical terms. There is no possibility for executing the Will by Mr. Thangavelu Naicker and Mrs. Pommi Ammal in favour of the plaintiffs.

2.(e) It is the contention of the 1st defendant that ever since the date of purchase of the property, the defendants in their capacity as grand children of Mrs. Pommi Ammal were in absolute possession and enjoyment of the property. Property tax was also assessed in the name of 1st defendant. Electricity Card, Water and Sewerage connection were also in the name of the 1st defendant. It is also submitted that Mrs. Pommi Ammal is an illiterate person and she is incapable of reading and writing. Hence the suit may be dismissed.

3. Based on the above, the following issues are framed for consideration:

1. Whether the Will dated 07.10.1974 alleged to have been executed by Mr. Thangavelu Naicker and Mrs. Pommi Ammal is true, valid and binding on the parties?

2. Whether the petitioners are entitled for issuance of Letters of Administration as asked for?

3. To what other reliefs the parties are entitled to?

4. On the side of the plaintiff P.W.1 Mr.Kasi and P.W.2 Mr. Mani were examined and Exs.P.1 to P.8 marked. On the side of the defendants, 1st defendant Mr.S. Dhanasekaran examined himself as D.W.1 and Exs.D.1 to D.12 were marked.

5. Exhibits produced on the side of the Plaintiffs:

<i>S.No.</i>	<i>Exhibits</i>	<i>date</i>	<i>Description of the documents</i>
1	P-1	07-10-1974	Registered Will
2	P-2	20-02-1969	Death Certificate of Krishnan
3	P-3	17-01-1977	Death Certificate of Mr.Thangavelu Naicker
4	P-4	15-01-1997	Death Certificate of Mrs.Pommi Ammal
5	P-5	04-12-2000	Affidavit of Mani Gounder
6	P-6	01-12-1986	Xerox copy of the Service Register of Dhanasekaran
7	P-7	03-10-1989	Xerox copy of certificate issued by the Corporation High School, CIT Nagar, in the name of Ms.Padmavathi
8	P-8	16-09-1974	Sale Deed executed in favour of Mrs. Pommi Ammal by Tamil Nadu Slum Clearance Board.

6. Exhibits produced on the side of the Defendants:

<i>S.No.</i>	<i>Exhibits</i>	<i>date</i>	<i>Description of the documents</i>
1	D-1	16-09-1974	Xerox copy of the sale deed

<i>S.No.</i>	<i>Exhibits</i>	<i>date</i>	<i>Description of the documents</i>
2	D-2	20-07-1987	Death Certificate of Mr.Singaram
3	D-3	06-09-1988	Death Certificate of Mrs. Rani
4	D-4 series	---	Voters enumeration Card (4 Nos.)
5	D-5	---	Property Tax Demand Card (Dhanasekaran & Others)
6	D-6	---	Xerox copy of Property Tax Demand Card (Dhanasekaran & Others)
7	D-7	---	Xerox copy of CMWSS Water and Sewerage tax-cum-water charge card
8	D-8	25-02-1991	Property Tax demand notice by Corporation of Madras
9	D-9	---	E.B. Card
10	D-10	---	Xerox copy of E.B. Card
11	D-11 series	---	Water and sewerage tax receipt issued by CMWSS Board (2 Nos.)
12	D-12	12-08-1997	Copy of reply sent by the first defendant to Corporation of Madras.

7. The learned Senior Counsel Mrs. Chitra Sampath submitted that the 1st and 2nd plaintiffs are the grandsons of Mr. Thangavelu Naicker and Mrs. Pommi Ammal. Mr.Krishnan is the only son of Mr. Thangavelu Naicker and Mrs. Pommi Ammal. He died in the year 1969. The suit property was allotted in the name of Mrs. Pommi Ammal by the Slum Clearance Board and the sale deed was executed in her name on 16.09.1974. Thereafter both the husband and wife viz., Mr. Thangavelu Naicker and Mrs. Pommi Ammal, taking into consideration the fact that their only son predeceased, executed a Will bequeathing the suit property in favour of their grand children for life and vested

reminders to the legal heirs. It is the contention of the learned Senior Counsel appearing for the plaintiffs that the Will was executed in the the year 1974 and the same was duly registered. P.W.2 one of the attesting witnesses was examined to prove the execution as well as the attestation of the Will. Mrs. Pommi Ammal one of the executants died in the year 1997 and the O.P. has been filed in the year 2000. The evidence of P.Ws.1 and 2 clearly proves the execution and attestation of the Will. There is no suspicious circumstance pleaded in the written statement filed by the defendants except alleging of forgery of the Will.

8. However, when the plaintiffs were ready to send the Will to Forensic Lab, it was stoutly opposed by the defendants. It is contented by the learned Senior Counsel that once the plea of forgery is raised, the entire burden lies on the defendants to establish the same. Once the execution, attestation as well as the testamentary capacity of the Testator has been established by the Propounder of the Will, then the burden shifts on the other side, who set up the case of forgery to prover the same. But, in this case, it is not done so. The evidence of one of the attesting witnesses viz., P.W.2 was examined 30 years after the execution of the will dated 07.10.1974. He clearly spoken about the execution of the Will by both the executants and submitted that the Will has been duly executed and registered in the manner known to law.

9. It is the further contention of the learned Senior Counsel that merely because the husband jointly executed the Will along with his wife Mrs. Pommi Ammal in whose name the property was registered by the Slum Clearance Board, that cannot be taken as suspicious circumstance. Husband joining with the wife in executing the document is normal, whereas Mrs. Pommi Ammal in whose name the property stood has also executed the Will. She was in sound and disposing state of mind while executing the Will. Thereafter, plaintiffs 1 and 2 lived 3 years together. Therefore, there was no circumstances even to infer that the Will was executed as a result of any influences or coercion etc.,

10. It is the further contention of the learned Senior Counsel that the 2nd defendant is also aware of the execution of the Will Ex.D.12. Legal Notice sent to the defendant to the Corporation shows that he has pleaded about the Will. Admittedly, the Will was not shown to anyone. Whereas when the objection was raised by the plaintiff for mutation of records in favour of the defendants in the corporation a reply was sent disputing the Will. This fact clearly shows that the defendants are also aware of the existence of the will. Hence, the learned senior counsel submitted that the plaintiffs are certainly entitled to Letters of Administration.

11. The learned counsel for the defendants vehemently contended that the Will is shrouded with serious suspicious circumstances. Mrs. Pommi Ammal alone is the owner of the property. Her husband joining as testator immediately after one month, after the sale deed was executed in favour of Mrs. Pommi Ammal itself is one of the strong suspicious circumstances to disbelieve the Will. It is the further contention of the learned counsel for the defendants that Mrs. Pommi Ammal was all along residing with the defendants. Exs.D.1 to D.11 documents prove the same. That being the position, there was no necessity for Mrs. Pommi Ammal to execute the Will only in favour of the grandchildren through their son, excluding the defendants who are also grandchildren through her daughter. There was no reason whatsoever assigned in the Will excluding the only daughter namely mother of the defendants Mrs. Rani.

12. It is the contention of the learned counsel for the defendants that the evidence of P.W.2 attesting witness is highly doubtful and contradictory with his affidavit. His evidence shows as if the Will was signed at the registered office. Whereas in the affidavit it is averred that the Will was signed in the residence of Mr. Pommi Ammal. This fact creates serious doubt about the Will. Similarly, the evidence of the attesting witness goes to show that the Will was presented in the registrar office before 1.00 p.m., whereas, the documents show

that the Will was presented between 2.00 and 3.00 p.m. These facts create serious doubt about the execution of the Will by Mrs. Pommi Ammal. It is the further contention of the learned counsel for the defendants that the plaintiffs have not proved the attestation as well as the execution of the Will. First, both the attestation and execution has to be proved; then only the Will can be admitted in the Court of law. P.W.2 in his evidence has not spoken about the other attesting witnesses witnessing the executants signing the document. Hence, it is the contention of the learned counsel for the defendants that the plaintiffs have not dispelled the suspicious circumstances attached to the Will. That apart, they have also not proved who are all the children of the plaintiffs 1 and 2. This is also one of the suspicious circumstances.

13. The Will itself is unnatural and the will has been presented for registration only by Mr.Thangavelu Naicker, who has no right in the property. The testatrix Tmt. Bommi Ammal who is the owner of the property has not presented the Will for registration. All these facts create serious doubt about the genuineness of the Will and the Will could be executed only by the person who is the owner of the property. That being the position, Mr. Thangavelu Naicker has also joined as one of the executants. The Will shows that the Will is the result of influence and there was no free Will on the part of Mrs. Pommi Ammal. The conduct of the Mrs.Pommi Ammal assumes significance. She was all along living

with the grandchildren viz., the defendants. Therefore, excluding them and writing the Will in favour of other grandchildren who are not at all living with them is unnatural and create serious doubt about the Will. Hence submitted that the plaintiffs have failed to dispel the suspicious circumstance surrounding the Will and the execution and attestation have also not been proved. Therefore, the learned counsel for the defendants prayed to dismiss the suit.

14. In support of his contention he relied upon the following citations:

1. **AIR 1995 SC 346** [Girija Datt Singh v. Gangotri Datt Singh]
2. **2003 (1) CTC 308** [Janki Narayan Bhoir v. Narayan Namdeo Kadam]
3. **AIR 1959 SC 443(1)** [H. Venkatachala Iyengar v. B.N.Thimmajamma and others]
4. **AIR 2006 SC 1895** [Joseph Antony Lazarus (D) by L.Rs. v. A.J.Francis]
5. **AIR 1928 CALCUTTA 565** [Madhu Molla v. Babonsa Karikar and others]
6. **2017 (2) CTC 35** [Kasturi Bai v. V. Ashok Kumar]

15. In the light of the above submissions, now this Court has to analyse the issues framed by this Court.

Issue Nos.1 to 3.

16. The relationship between the parties are not in dispute.

Originally petition was filed by the plaintiffs 1 and 2 for grant of Letters of Administration on the basis of the Will executed by the grandparents viz., Mr.Thangavelu Naicker and Mrs.Pommi Ammal on 07.10.1974. Plaintiffs 3 to 6 were brought on record after the demise of 1st plaintiff/P.W.1. Defendants 1 to 6 are the legal heirs of one Rani who is the daughter of the executants. The plaintiffs 1 and 2 have propounded the Will and the Will Ex.P.1 said to have been executed on 7.10.1974 jointly by Mr.Thangavelu Naicker and Mrs. Pommi Ammal bequeathing the suit property in favour of Plaintiffs 1 and 2 for their life and vested reminders to their Children. The main defence of the defendants in the written statement was that the suit property was originally allotted to the grandmother Mrs. Pommi Ammal by the Slum Clearance Board and the sale deed was executed on 16.09.1974 whereas the Will came to be executed on 07.10.1974. It is the further contention of the defendants that Mrs. Pommi Ammal alone is the absolute owner, the Will executed by Mr.Thangavel Naicker and Mrs.Pommi Ammal cannot be accepted and the Will is forged one. Defendants are in possession of the property along with the grandmother. Hence Will is forged one. The person propounding the Will before the Court has to prove not only the execution and attestation of the Will but also that the testator or testatrix at the relevant time was in sound state of mind. When the evidence which is in support of the Will, proved the sound disposing state of mind of the executants, the Court could be justified by making finding in favour

of the propounder. Once the Will has been proved in the manner known to law, by examining the attesting witness and also the testamentary capacity of the executants/executants, the onus of the propounder is said to be discharged on the proof of the Will. Then the onus normally shifts to the other side to prove the forgery or fraud or undue influence etc.,

17. In the above back ground when Ex.P.1 Will when carefully seen, the Will is registered on 07-10-1974 on the file of the Sub-Registrar, T.Nagar. The executants are one Mr.Thangavelu Naicker and his wife Mrs.Pommi Ammal. The recital of the Will further shows that at the time of execution of the Will, Mr.Thangavel Naicker was aged about 60 years, and Mrs.Pommi Ammal was aged about 55 years. It is also recited in the Will that though the properties were allotted in the name of Mrs.Pommi Ammal by the Slum Clearance Board, with their self earnings they put up a thatched shed and bequeathed the same to the plaintiff 1 and 2 who are the grandchildren through their son. There is a specific mention in the Will that bequeath was made in favour of the 1st and 2nd plaintiffs who were 10 years and 3 years of age respectively at the relevant point of time, only on the ground that their father had already predeceased. Therefore, the property has been bequeathed in favour of the 1st and 2nd plaintiffs for life and vested reminders to the legal heirs.

18. In the Will, two of the attesting witnesses viz., Mr.Muthu and Mr. Mani Gounder signed. One of the attesting witnesses P.W.2 Mani Gounder was testified before this Court in the year 2004. Almost 30 years after the execution of the Will, P.W.2 in his evidence has stated that Mr.Thangavelu Naicker subscribed his signature and Mrs. Pommi Ammal affixed her left thumb impression in the Will in his presence and both the executants seen the attesting witnesses were present and were signing in their presence. It is the further evidence of P.W.2 that at the time of execution of Will both Mr.Thangavelu Naicker and Mrs. Pommi Ammal were in sound disposing state of mind, memory and understanding. It is also the evidence of P.W.2 that he is not able to read and write; only he is able to sign in Tamil language. The evidence of P.W.2 that the execution of the Will by both the executants viz., Mr. Thangavelu Naicker and his wife Mrs. Pommi Ammal while in sound disposing state of mind, memory and understanding, is not even denied in the cross examination, though P.W.2 was confronted in various aspects. It is the contention of the defendants that only the attesting witnesses have given liquor to Mr.Thangavelu Naicker and influenced him to write the Will and instead of Mrs. Pommi Ammal they got another woman to the Registrar office and affixed thumb impression. The witness is totally illiterate, has been examined after 30 years of the execution of the Will. Merely because there is some inconsistencies in the cross examination with regard to timing and presentation of the document before the Registrar

office, in the view of this Court, the same is not relevant to disbelieve the Registration of the Will. Admittedly, the document has been registered before the Sub-Registrar, the endorsement of the registering authority shows that the Will was presented between 2.00 and 3.00 p.m. in the registered office and got registered. Normally the presumption will arise that all the official acts done properly. Therefore, mere inconsistencies as to the timing of the presentation of the Will cannot be given much importance.

19. The attesting witness was examined after 30 years of execution of Will. It is also stated by the P.W.2 in his evidence that another attesting witnesses had already died. His evidence also not seriously disputed in the cross examination when one of the attesting witnesses who was alive and spoken about the testamentary capacity of the executants and execution and attestation, no further requirement is needed to prove the Will. It is the contention of the learned counsel for the defendants that the attestation has not been proved in the manner known to law, P.W.2 has not spoken about other witnesses seeing the executants signing the document and also the executants seeing the other attesting witnesses signing the document. It is to be noted that P.W.2 was examined in the year 2004 after 30 years, while his chief examination clearly shows that he has clearly spoken that while he was deposing there was a question put by Court about the age of the executants. Therefore, witness could

not speak about the execution and attestation of the documents chronologically, due to interruption of court question. Whereas, after the court questioned, P.W.2 has specifically stated in his evidence that along with him another attesting witness Mr.Muthu was also very much present. His evidence goes to show that other attesting witness also present with him and seeing the execution and attestation. Therefore, merely his evidence not as verbatim as contemplated under Section 63 (c) of Indian Succession Act, it cannot be construed that there was no attestation at all. The manner in which the evidence was recorded and when the witness was deposed he was constantly interrupted. However he was able to recollect and depose about the other witness present along with him. This fact clearly shows that other attesting witness also seen not only the execution but also the attestation. Therefore, this Court is of the view that the contention of the learned counsel for the defendants cannot be given much importance in this aspect.

20. With regard to the attestation of the signature of the executant, in

AIR 1955 Supreme Court 346 [Girija Datt Singh v. Gangotri Datt Singh]

it is held as follows:

14. It still remains to consider whether the attestation of the signature of the deceased on the will, Ex. A-36 was in accordance with the requirements of [Section 63, Indian Succession Act](#). [Section 63](#) prescribes that:

"(c) 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 or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator"

In order to prove the due attestation of the will Ex. A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be witnesses who had no regard for truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves.

If no reliance could thus be placed upon their oral testimony, where would be the assurance that they actually saw the deceased execute the will in their presence and each of them signed the will in the presence of the deceased. It may as well be that the signature of the deceased on the will was appended at one time, the deceased being there all alone by himself and the attestations were made by Uma Dutt Singh and Badri Singh at another time without having seen the deceased sign the will or when the deceased was not present when they appended their signatures thereto in token of attestation. We have no satisfactory

evidence before us to enable us to come to the conclusion that the will was duly attested by Uma Dutt Singh and Badri Singh and we are therefore unable to hold that the will Ex. A-36 is proved to have been duly executed and attested.”

21. In **AIR 1959 SC 443(1)** [H. Venkatachala Iyengar v.

B.N.Thimmajamma and others] the Honourable Apex Court held thus:

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 s. 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 ss. 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, ss. 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 [s.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.

22. In **2003 (1) CTC 308 [Janki Narayan Bhoir v. Narayan**

Namdeo Kadam] the Honourable Supreme Court held as follows:

"8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) 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 these witnesses must have seen the testator sign or affix 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 acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

9.

10. *Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading*

of [Section 63](#) of the Succession Act with [Section 68](#) of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That the requirements cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of [Section 63](#) of the Succession Act. It is true that [Section 68](#) of 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 proving due execution of the Will as envisaged in [Section 63](#). Although [Section 63](#) of the Succession Act requires that a will has to be attested at least by two witnesses, [Section 68](#) of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, [Section 68](#) gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under [Section 63](#) of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of [Section 63](#), viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the

other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under [Section 63](#) of the Succession Act. Where one attesting witness examined to prove the will under [Section 68](#) of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of [Section 68](#) of the Evidence Act.”

23. In the judgment reported in **2017 (2) CTC 35 [Kasturi Bai v. V. Ashok Kumar]** it is held as follows:

32. In the judgment reported in (2005) 1 SCC 280 ([Meenakshiammal v. Chandrasekaran and another](#)), the Hon`ble Apex Court has held as follows:

"20. In the case of [Ryali Kameswara Rao v. Bendapudi Suryaprakasarao](#) [AIR 1962 AP 178] the Court while discussing the provisions of [Section 63](#) of the Succession Act, 1925, has held that the suspicion alleged must be one inherent in the transaction itself and not the doubt that may arise from conflict of testimony which becomes apparent on an

investigation of the transaction. That suspicious circumstances cannot be defined precisely. They cannot be enumerated exhaustively. They must depend upon the facts of each case. When a question arises as to whether a will is genuine or forged, normally the fact that nothing can be said against the reasonable nature of its provisions will be a strong and material element in favour of the probabilities of the will. Whether a will has been executed by the testator in a sound and disposing state of mind is purely a question of fact, which will have to be decided in each case on the circumstances disclosed and the nature and quality of the evidence adduced. When the will is alleged to have been executed under undue influence, the onus of proving undue influence is upon the person making such allegation and mere presence of motive and opportunity are not enough."

33. Similarly, in another judgment reported in (2005) 8 SCC 67 (*Pentakota Satyanarayana v. Pentakota Seetharatnam*, the Hon'ble Apex Court has observed as follows:

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

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

Taking into consideration of the above judgments and analysing the entire evidence and also considering the facts of the case, this Court does not find any suspicions circumstances surrounded in the Will

24. Though in the cross examination P.W.2 was confronted that he was instrumental in influencing Mr. Thangavelu Naicker and got the Will registered. However, D.W.1 in his cross examination shown ignorance of attesting witnesses and their relationship with Mr.Thangavelu Naicker. He has

specifically admitted that he do not know who is Mr. Mani Gounder. He do not know that he is uncle of Mrs. Chandra. Therefore, the contention of the defendants that P.W.2 was instrumental in introducing Will cannot be countenanced. It is further to be noted that except alleging the forgery, in the written statement there is no pleading whatsoever with regard to the suspicious circumstances. When the person assailing the document like Will, immediate requirement is to plead about the circumstances under which the document cannot be accepted and prove the same before the Court. But on seeing the written statement this Court is unable to find any of the suspicious circumstances raised in the written statement. Though pleading is not normally required when the suspicious circumstance is inherent in the transaction itself. That case, Court may require propounder to dispel such suspicious circumstance, even though when there is no pleading. However, on perusal of the Will this court does not find any suspicious circumstances.

25. Admittedly, the plaintiffs 1 and 2 are the sons of Late Krishnan, who is the only son of both the executants. This fact is not in dispute. The said Mr. Krishnan died in the year 1969, which is admitted by both sides. The death certificate of Late Krishnan is marked as Ex.P.2. He died on 20.02.1969, which is also not disputed by both the parties. The Will was executed in the year 1974. The recitals in the Will clearly show that the Will itself executed by the

grandparents taking into consideration of the death of their only son Mr. Krishnan. It is further evidence of P.W.1 and D.W.1 that Mr.Krishnan's wife one Mrs.Chandra due to some dispute with the mother-in-law, left the house after the death of her husband Mr.Krishnan. All these facts would have weighed the executants to make some provisions to the minor children, whose father Mr. Krishnan died in the year 1969. Therefore, merely because the executants have not made any provision for another daughter in the Will, the same cannot be seen as suspicious circumstance at all. It is normal human conduct of any human being to make some provision for the fatherless children in the family. Hence, merely because the daughter Tmt.Rani, mother of the defendants has not been given any provision in the Will that itself cannot be suspicious circumstance. The grandparents were hale and healthy at the relevant time, when they executed the Will, as per the evidence of P.W.2. One of the executants viz., Thangavelu Naicker died on 17.01.1977 as per Ex.P.3 death certificate. Mrs. Pommi Ammal, 2nd executor died on 15-01-1997. Ex.P.4 is death certificate of Mrs. Pommi Ammal. Till her death she has not complained anything about the Will. Though Exs.D.1 to D.11 show that the defendants are living in the suit property along with their grand mother viz., Mrs. Pommi Ammal, one of the executants Mrs. Pommi Ammal has not made any attempt to cancel the Will. These facts also clearly indicate that Mrs. Pommi Ammal and her husband took a conscious decision to bequeath the property only to the grandchildren born

though their son.

26. Though the exhibits filed on the side of the defendants would show that they were living in the suit property along with the grandparents. Mere possession of the property and living with the grandparents itself is not suspicious circumstances to disbelieve the Will executed in the year 1974 in favour of the grandsons born through their son. Even after, till her death, she has not cancelled the Will and mere allowing the daughter to reside in the suit property that cannot be a ground to disbelieve the Will.

27. It is the contention of the learned counsel for the defendants that the documents marked would show only the 2nd defendant was paying the tax to the suit property. It is to be noted that this documents Ex.D.4 series are voters list. Ex.D.3 is Death certificate shows that Mrs.Rani died in the suit property in the year 1988 and her husband also died in the suit property in the year 1987. The voters enumeration slips (Ex.D.4 series) shows that they are living with the grand mother. The tax have been paid in the name of 1st defendant only in the year 1996 and Ex.D.11 shows that the tax have been paid only on 27.03.1999 after the death of Mrs. Pommi Ammal. These facts clearly show that though the defendants were living with their grand mother, subsequent to the death of their grand mother only, they started to pay tax.

Therefore, merely because they paid the tax and they were in possession of the suit property itself will not be a ground to presume that the Will is the result of forgery.

28. It is the evidence of D.W.1 that he came to know about the Will for the first time only in the month of November 2000. This stand of the defendant in his evidence also falsified by its own document Ex.D.12 dated 12.08.1997. When the application was submitted by the mother of the plaintiffs 1 and 2 during the year 1997 for name change in the corporation, the defendants sent a reply stating that the Will is forged one. This fact clearly shows that the defendants are very much aware of the existence of the Will in the year 1997 itself, thereafter also they paid the tax after the death of Mrs. Pommi Ammal. At any event, this Court is of the view that the Execution of the Will has been proved in the manner known to law and the testamentary capacity also established. It is for the defendants to establish the forgery as pleaded in the written statement. When specific plea of forgery is raised by the defendants in the written statement, it is for them to establish the forgery. Ex.D.1 is the sale deed executed in favour Mrs. Pommi Ammal by the Slum Clearance Board on 16.09.1974. Immediately within one month the Will came to be executed. This fact clearly shows that the grandparents of Plaintiffs 1 and 2 not only left the Will but also handed over the title deeds to the plaintiffs. If the contention of

the defendants that the mother of the plaintiffs 1 and 2 left the property due to dispute between in-laws is true, she could not be in position to collect the original sale deed. Whereas the sale deed has been produced by plaintiffs 1 and 2. These facts clearly indicate that the grandparents not only handover the Will to the plaintiffs but also title deeds. It is curious to note that having taken plea of forgery by defendants, despite the willingness of the plaintiffs to send for the documents for comparison by the finger print expert, the defendants have in fact objected the same before the court.

29. When the matter is posted on 12.01.2018 this court passed the following order:

“The testatrix has affixed her thumb impression in the Will. The genuineness of the Will is under challenge in the Testamentary and Original Suit. Only, the genuineness of the thumb impression has to be verified by the Court. For this, an Application No.1520 of 2013 has been filed and it is still pending and this application has been filed seeking to obtain the opinion of a finger print expert with respect to genuineness of thumb impression. Only this thumb impression has to be compared with any other admitted thumb impressions of the testatrix.

2. Hence, this Court felt is Ex.P7, which is a sale deed executed by the Slum Clearance Board, can be used for such comparison. However, the learned counsel for the defendants disputes and contends that the said document cannot be used

for comparison purpose since, the admissibility of sale deed itself is under challenge and is under dispute.

3.The learned counsel for the defendants has to address this Court on the point that even if Ex.P.7, document is inadmissible, since the purpose of comparison is only with the thumb impression found therein, therefore, whether this document can be sent for comparison or not.

4.It is also seen that according to earlier orders of this Court, this application should be heard simultaneously alongwith the arguments in Testamentary and Original Suit. Both the parties are therefore to advance arguments in both the Testamentary Suit and Application No.1250 of 2013.

5.For advancement of arguments, call on 30.01.2018.”

30. The above order speaks for itself. The same clearly shows that having taken the plea of forgery, despite the availability of the original documents on contemporary period, the defendants failed to take any steps to get the thumb impression compared by the finger print experts. The above facts itself clearly shows that the defendants are reluctant to go for such exercise. Therefore, this Court has to necessarily draw adverse inference against them and hold that the plea of forgery has not been established.

31. Admittedly, Mrs.Pommi Ammal and her husband have executed the

document jointly and the Will has been registered as per law. Though registration will not proof of the Will. But the registration raises the proof of the Will. But the registration raised strong presumption that all the official act done properly and the persons executed the document were personally present in the office of the sub-registrar. Hence, this Court has no hesitation to hold that the plea of forgery raised by the defendants about the Will has not been established and the above plea has to fail.

32. Yet another contention of the learned counsel for the defendant that only Tmt. Pommi Ammal was absolute owner of the property. Her husband has no right in the property. Therefore, the will executed by them jointly is not valid. It is to be noted that even as per the evidence of D.W.1 the vacant site was originally allotted by the then City Improvement Trust in the year 1958. The sale deed Ex.P.8 executed by the Slum Clearance Board in fact, shows that the City Improvement Trust was originally dealing with property and the City Improvement Trust was dissolved and all its assets and liabilities stood transferred to the Tamil Nadu Housing Board constituted in Tamil Nadu Act 17/1961. After taking over the board, the Slum Clearance Board become the owner of the above property by Act 11 of 1971. Thereafter, they transferred the property in the year 1974 in favour of Tmt.Pommi Ammal. Though the sale deed shows that only vacant site to the extent of 1200 sq.ft.alone, was sold in favour

of Smt. Pommi Ammal on 16.10.1974, Immediately after the transfer in the name of Mrs.Pommi Ammal, she and her husband jointly executed the Will not only in respect of the vacant site covered under Ex.P.8 Sale Deed, but also the Door No.21 constructed thereon in the place allotted to them, viz., the suit house. It is to be noted that though the allotment made by the Government Departments, the sale deed would be executed at a later point of time. Till the sale is completed, the property allotted to the concerned persons would be subject to several change, etc., In this suit property a thatched house was constructed, bearing Door No.21 by allottee. This fact clearly indicate that though the sale deed was executed in the year 1974, much prior to that the allottee took possession of the vacant land and constructed a thatched shed. Therefore, she has executed the Will along with her husband at a latter point of time. Therefore, the contention of the learned counsel for the defendants that only vacant site was allotted at the earliest point of time under Ex.P.8 cannot be countenanced. It is to be noted that for these aspects there is no pleadings in the written statement.

33. It is the further contention of the learned counsel for the defendants that admittedly Mrs.Pommi Ammal alone the owner of the property. Therefore, joint execution of the Will is not valid in law. Even assuming that Tmt. Pommi Ammal alone having right to execute the Will, Mr. Thangavelu Naicker,

who is husband of Tmt.Pommi Ammal joined as one of the executants in the Will, in view of this Court, the same will not affect the validity of the Will. It is the contention of the learned counsel for the defendants that the Will has to be presented before the Registrar only by the testator as per Section 32 and 40 of the Indian Registration Act. Whereas only her husband presented the Will before the Registrar Office. Therefore, he has argued that this is also one of the suspicious circumstances. It is to be noted that Section 40 of the Indian Registration Act clearly shows that only testator or after his death any person claiming as executor or otherwise under a Will, may present it to any Registrar or Sub-Registrar for registration. Admittedly in this case, Mr. Thangavel Naicker also joined as one of the testators along with his wife, has presented the Will for registration. Therefore, merely because Mr. Thangavelu Naicker has no title, at the relevant time but the fact remains that Testatrix also present at the time of presentation of Will by her husband. Such presentation, in any way, will not invalidate the Will.

34. Admittedly, Mrs. Pommi Ammal in whose name the property was allotted, she executed the Will along with her husband Mr. Thangavelu Naicker. The execution, attestation, mental capacity of the witnesses also clearly spoken by one of the attesting witnesses. Hence, this Court holds that the Will is proved in the manner known to law and the plaintiffs are certainly entitled for

grant of Letters of Administration. The issues are ordered accordingly.

35. In the result

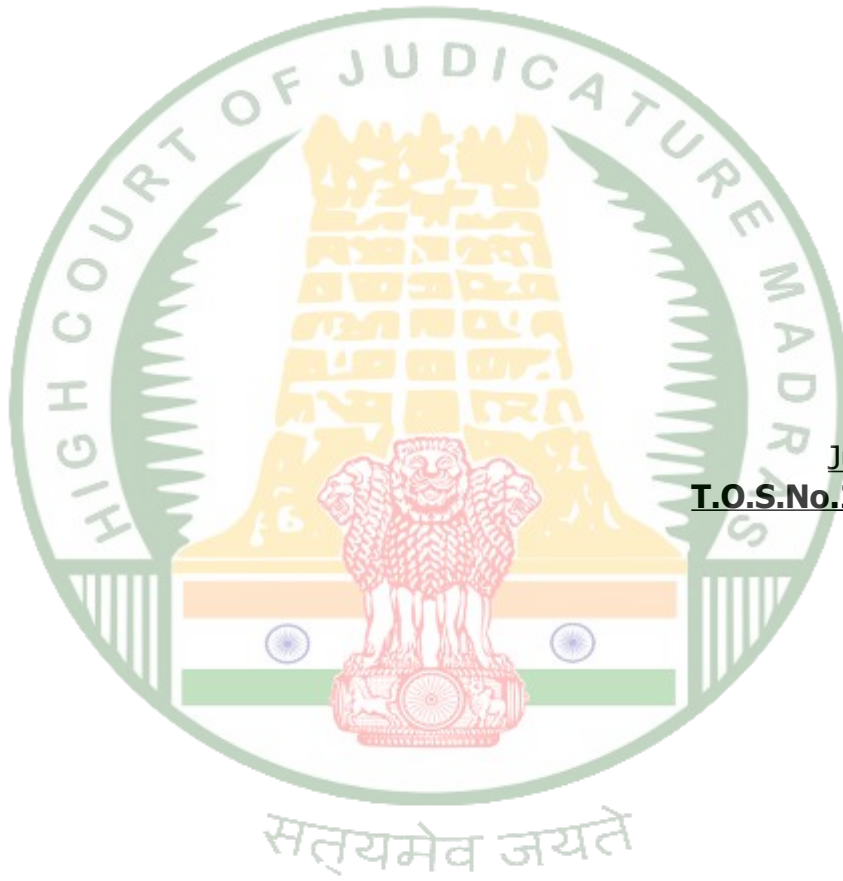
1. The suit in TOS No.21 of 2001 is decreed.
2. The letters of Administration, having the effect limited to the State of Tamil Nadu, shall be issued in favour of the Plaintiffs in respect of the property bequeathed to them in the Will dated 07.10.1974.
3. The Plaintiffs are directed to duly administer the estate of the deceased.
4. The Plaintiffs shall execute a Security Bond for a sum of Rs.25,000/- each in favour of the Assistant Registrar (O.S-II), High Court, Madras.
5. The Plaintiffs are directed to render true and correct accounts once in a year.
6. Considering the relationship between the parties, there shall be no order as to costs.

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12.04.2018

Index:Yes/No
Internet:Yes/No
ggs.

N. SATHISH KUMAR, J.
ggs.



Judgment in:
T.O.S.No.21 of 2001

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12.04.2018