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A.No.282 of 2023
& A.No.3781 of 2022
in OP.No.422 of 2020

K.KUMARESH BABU, J.

These applications have been filed seeking to issue supoena to the attesting witnesses to appear and give evidence in O.P.No.422 of 2022 and to examine a third party to prove the execution of the Will.

2.A memo was originally filed on behalf of the petitioner indicating that the attesting witnesses of the Will executed by the testatrix have shifted their residence and that their whereabouts were not known. Such a memo had come to be filed on 01.02.2022. Thereafter, a sworn affidavit dated 07.09.2022 had been filed by the petitioners in the O.P. Thereafter, an Application No.3781 of 2022 has been filed seeking to permit a third party to give evidence so as to prove the execution of the Will by the testatrix.



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3. In the said affidavit, a specific averment has been made that the attesting witnesses have shifted their residence and their whereabouts were not known to the applicant/ petitioner. A further averment has been made that one Ramalingam, who was a family friend of one of the attesting witness was present at the time of the execution. But, he had also died on 31.08.2020 and therefore, to examine his wife one Umashankari to prove the signature of the testatrix. When this application was taken up for hearing on 09.09.2022, this Court had directed to follow the procedure envisaged under Order XVI Rule 10 and thereafter, follow Section 69 of the Evidence Act. The applicant had thereafter, moved an application in A.No.282 of 2022 under Order XIV Rule 8 of Original Side Rules r/w. Section 151 C.P.C., seeking to issue subpoena to the attesting witnesses.

4. When the said application was listed on 23.01.2023, this Court had directed the petitioner to take steps to ascertain the correct address of the attesting witnesses. Thereafter, it has been further listed on 06.02.2023, 20.02.2023 and 06.03.2023 for providing of details of the current address of



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the attesting witnesses. Till date the applicant had not produced the current address of the attesting witness.

5.If the supoea is directed to be issued as prayed for to the addresses mentioned against the said attesting witness in the judge's summon, the same would be returned “unserved” as they had already left. This is because, the applicant herself has admitted in the affidavit filed in support of the Application No.3781 of 2020 that the attesting witnesses whereabouts are not known. Therefore, there will be no purpose in granting an order of supoea as prayed for.

6.As regards the application to seek to examine the third party to prove that the testator has executed a Will, I am of the view that it is contrary to the procedure contemplated under Section 69 of the Evidence Act. In the present case, it is admitted by the applicant that the whereabouts of the attesting witnesses are not known. The applicant can only prove the signature of the attesting witnesses as per the procedure laid down under



Section 69 to prove the Will and not by any other means .

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7.Hence, both the application fails and is dismissed, accordingly.

However, there shall be no order as to costs.

13.03.2023

gba

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