



Crl.R.C.No.560 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	16.03.2023
Pronounced on	09.06.2023

CORAM:

THE HON'BLE Ms.JUSTICE **R.N.MANJULA**

TOS.No.36 of 2010

- 1.Smt.K.Kamala Ammal
- 2.G.Madhan Kumar
- 3.P.Parimala Ammal Alias P.Mala

... Plaintiffs

Vs.

- 1.Smt.K.Rani Ammal
- 2.Smt.K.Yasotha Ammal (deceased)
- 3.Sri.K.Senthamarai
- 4.Sri.K.Devarajan @ Dilli

(3rd and 4th defendants were impleaded as parties vide A.Nos.3468 & 3469 of 2014 by order dated 23.09.2014)

- 5.Mrs.Alamelu
- 6.K.Srinivasan
- 7.Tmt.Neelavathi

(defendants 5 to 7 are brought on record as legal heirs of the deceased 2nd defendant as per order dated 14.11.2022 in A.No.3557 of 2022)

... Defendants

PRAYER : This Suit has been filed under Section 232 and 276 of the Indian Succession Act read with Order XXXV Rule 5 of the Original Side Rules, to



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grant Letters of Administration with the Will annexed to the plaintiffs as the daughters and grandson / legatees under the Will of the said deceased E.Kuppusamy Naicker having effect limited to the State of Tamil Nadu.

For Plaintiffs : Mr.V.V.Sathya
For Defendants : Mr.J.Jaganathan for D1 & D2
Mr.V.Chandrakanthan for D3
Mr.M.S.Subramanian for D4
Mr.S.Sathish Rajan for D5 to D7

JUDGMENT

The Testamentary Original Suit has been filed to grant Letters of Administration with the Will annexed to the plaintiffs as the daughters and grandson / legatees under the Will of the said deceased E.Kuppusamy Naicker having effect limited to the State of Tamil Nadu.

2. Heard the learned counsel for the plaintiffs and the learned counsels appearing for the defendants.

3. The brief facts of the case are as follows:

The suit properties originally belonged to one late Kuppusamy Naicker who is the testator herein. The said Kuppusamy Naicker died on



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24.05.1997 leaving behind the plaintiffs 1 & 3 and the defendants 1 to 4 as his legal heirs. The second defendant Yasotha Ammal died during the pendency of the suit and her legal heirs have been brought on record as defendants 5 to 7. The 'A' schedule property is a vacant land to an extent of 0.16 cents, 'B' schedule property is a building with site and 'C' schedule property is a rice mill.

3.1. The owner of the suit properties viz., Kuppusamy Naicker had executed a registered Will dated 28.09.1995, in the presence of the witnesses when he was in a sound disposing state of mind. As per the Will, A,B,C schedule properties were bequeathed in favour of the plaintiffs 1 to 3 and the defendants 3 & 4. The testator has not appointed any executor for the said Will. Hence the plaintiffs have filed an Original Petition for grant of Letters of Administration in O.P.No.680 of 2008. Since some of the defendants contested the petition, the Original Petition has been converted into TOS and the same is numbered as TOS No.36 of 2010.

4. D5 to D7 have not filed the written statement and they are sailing along with the plaintiffs. D1 and D2 have not filed the written statement. D3



and D4 who are the sons of the testator are the contesting parties and they have filed the written statements.

5. The written statement of D3 reads as follows:

The alleged Will is a fabricated one and the said Kuppusamy Naicker has not executed any Will as alleged by the plaintiffs. The first schedule property never belonged to the family of Kuppusamy Naicker. No property in S.No.359/3 was ever owned by the late Kuppusamy Naicker. There was a partition in the year 1991 entered into between the third and fourth defendants. In the said partition deed, it is shown that the property of Kuppusamy Naicker shall devolve upon the third and fourth defendants. The said fact was admitted by Kuppusamy Naicker during his evidence deposed in the civil suit in O.S.No.162 of 1986.

5.1. After the death of Kuppusamy Naicker on 24.05.1997, his wife Kanniyammal executed a Will on 30.11.1998 in respect of the right inherited by her from her late husband. In the said Will, the share inherited by the mother Kanniyammal was bequeathed in favour of the third and fourth defendants. The daughters of Kuppusamy Naicker had been given with



sufficient properties. The funds for buying such properties have been raised by selling the properties which belonged to Kanniyammal and in the sale deeds, the daughters have also affixed their signatures.

5.2. During the alleged time of execution of the Will, Kuppusamy was not in a sound disposing state of mind. He was in the habit of taking liquor. He was admitted in the Hospital and on discharge, he was taken to Velachery by the first plaintiff Kamalammal and her husband and there, he was given with liquor in the guise of treating his cough and only by adopting such crooked means, the Will dated 28.09.1995 was concocted.

5.3. The first plaintiff is inimical towards the third and fourth defendants, in view of some monetary issues. Late Kuppusamy Naicker never lived in the daughters' house and he would just visit them on some occasions. It is false to state that the daughters had taken care of Kuppusamy Naicker. The suit second schedule property was belonging to the third defendant. Since he was working as a Village Administrative Officer, he purchased the property in the name of his father by providing funds. Just in order to grab the property, the said Will has been created. The attestors are involved in many



criminal cases and they are not respectable citizens. The Will does not show anything about how the script was written or by whom. Since the Will is not a genuine one, it has to be dismissed.

6. The written statement of the 4th defendant states as follows:

The Will is not a genuine one. There were agricultural lands belonging to the joint family measuring 2 Acres in Kannivakkam Village. The defendants 3 and 4 along with their father Kuppusamy Naicker were cultivating the agricultural lands. Kuppusamy Naicker was carrying a fuel depot in Mylapore. The said business was a joint family business. Kuppusamy had no schooling and he cannot read or write Tamil. With the labour contributed by D3 & D4 along with their father, the properties have been purchased from the joint family income. Hence during the lifetime of the father himself, the properties have been divided and two shares have been allotted to D3 & D4 under the registered partition deed dated 19.08.1981. Though Kuppusamy Naicker was not a party to the partition deed, he stood as an attester. The properties left in common are to be divided between D3 and D4 after the demise of the father. The said partition deed had come into effect and the defendants had taken the respective shares and they were in enjoyment of the same. The defendants 3



and 4 were taking care of their parents and the marriages of the plaintiffs 1 to 3 and the defendants 1 and 2 were conducted only from and out of the family income and savings. In all other aspects, the written statement of D4 is similar to the written statement filed by D3.

7. On considering the respective pleadings of the parties, this court has framed the following issues:

“(i) Whether the Will dated 28.09.1995, executed by the Testator viz., Late E.Kuppusamy Naicker, is genuine, true and valid?”

“(ii) Whether the Will dated 28.09.1995, executed by the Testator, is surrounded by suspicious circumstances?”

“(iii) Whether the wife of the Testator viz., Kanniyammal, has executed a registered Will dated 30.11.1998, bequeathing the right inherited by her from her husband, in favour of the third defendant and his brother K.Devarajan @ Dilli?”

“(iv) To what other reliefs, the parties are entitled to?”

8. On the side of the plaintiffs, Mrs.K.Kamalammal was examined as P.W.1 and Mr.S.Siva was examined as P.W.2. Exhibits P1 and P2 were marked. Ex.P1 is the death certificate of Kuppusamy Naicker and Ex.P2 is the Will executed by kuppusamy dated 28.09.1995. On the side of the defendants,



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Mr.K.Devarajan @ Dilli was examined as D.W.1 and Exhibits D1 to D8 were marked. Ex.D1 is the Will executed by Kanniammal dated 30.11.1998. Ex.D2 is the deposition of Kamalammal (P.W.1) in O.S.No.144 of 2010, before the Additional Sub Court, Chengalpet. Ex.D3 is the deposition of Kuppusamy Naicker in O.S.No.162 of 1986. Ex.D4 is the Partition deed dated 19.08.1981. Ex.D5 is the Judgment in O.S.No.162 of 1986 dated 30.04.1992. Ex.D6 is the Decree in O.S.No.162 of 1986 dated 30.04.1992. Ex.D7 is the Power of Attorney executed by Kuppusamy Naicker in favour of the first plaintiff's husband Kothandaraman. Ex.D8 is the Inland letter.

9. The learned counsel for the plaintiffs submitted that the Will has been proved from the unflinching evidence of the attesting witness P.W.2; even though the defendants have stated that the Will was forged and it was obtained when Kuppusamy Naicker was under the influence of Alcohol, such suggestion was not made to P.W.2 during his cross examination; there is no connection between the properties mentioned in the partition deed dated 19.08.1981 (Ex.D4) and the properties mentioned in the Will; hence the partition deed will not bind the interest of the parties in the Will; the suit in O.S.No.162 of 1986 has been filed for declaration with reference to the



properties mentioned in the partition deed (Ex.D4) and in which, judgment has been passed on 30.04.1992 and the same is marked as Ex.D5; hence, the suit has got no relevance to the Will in question; the 4th defendant did not produce any documents to show that he had supplied funds for the purpose of purchasing 'B' schedule property.

9.1. The Will is a registered Will and the signature of the testator was not denied; it is only alleged by the defendants 3 & 4 that the testator was not in a sound disposing state of mind when the Will was executed and his signature was obtained by the plaintiffs; there is no suspicious circumstances surrounding the Will; the plaintiffs have proved the genuineness of the Will to the satisfaction of the Court by examining the attestor; the defendants 3 and 4 have not brought out anything to raise suspicion about the genuineness of the Will; since the Will has been proved in accordance with law, the plaintiffs are entitled to receive the Letters of Administration as prayed for.

9.2. In support of the above contention, the learned counsel for the plaintiffs attracted the attention of this Court to the following decisions :

(i) Sridevi and Others Vs. Jayaraja Shetty and Others, reported in (2005)



2SCC 784.

ii) *Swarnalatha and Ors. Vs. Kalavathy and Ors., reported in AIR 2022 SC 1585*

(iii) *R.Sundararajan Vs. Gayathri and Ors., reported in 2022 (3) MWN (Civil) 442.*

10. The learned counsels for the defendants 3 and 4 submitted that the alleged Will is a fabricated one; the first schedule property of the Will in S.No.359/3 never belonged to the family of Kuppusamy Naicker; the partition deed dated 19.08.1981 entered into between the 3rd and 4th defendants would specifically provide that the properties of Kuppusamy Naicker shall devolve upon D3 and D4 after the demise of their father; the said partition deed was signed by Kuppusamy Naicker as a witness and he admitted the said fact during the suit proceedings in O.S.No.162 of 1986; after the death of Kuppusamy Naicker, his wife Kanniyammal had executed a registered Will on 30.11.1998 by bequeathing the right inherited by her from Kuppusamy Naicker in favour of D3 & D4; Kuppusamy Naicker pre-deceased his wife and hence the wife of Kuppusamy Naicker had inherited a share in the property and disposed the same by virtue of the Will dated 30.11.1998; the mother of



the defendants had sold the properties owned by her and raised funds for the marriage of the daughters; the daughters have also signed while executing the sale deeds in respect of the properties owned by the mother; hence there is no necessity to give any share to the daughters and the alleged Will is a false and a created one.

10.1. Kuppusamy Naicker was an alcoholic and during the date of execution of the Will (i.e) 28.09.1995, he was admitted in the Hospital; after discharge, he was taken to Velachery by the first plaintiff and her husband under the guise of giving treatment for the cough suffered by Kuppusamy Naicker; the first plaintiff gave liquor and while Kuppusamy Naicker was under the influence of alcohol, the Will dated 28.09.1995 had been concocted; since the first plaintiff borrowed money from the third parties and absconded without repaying the same, the 3rd and 4th defendants had to undertake to pay her debts; since the said undertaking was not kept up, the first plaintiff turned inimical towards D3 and D4.

10.2. Kuppusamy Naicker was not in cordial terms with the daughters and he never lived at the residence of the daughters or visited them;



Kuppusamy Naicker was not taken care by the first plaintiff or her son as stated by them; 'B' schedule property was purchased in the name of the father, but the funds have been provided by the 3rd defendant; the attestors are not respectable citizens and they reside near the first plaintiff's residence at Velachery; the attestors of the Will does not say that it was written by Kuppusamy Naicker; the defendants have proved the suspicious circumstances surrounding the Will and the plaintiffs have not successfully dispelled the same.

10.3. Kuppusamy Naicker fell ill and hospitalized at Christudass Hospital at Tambaram and on discharge, he was taken to the house of the first plaintiff at Velachery; the first plaintiff's husband refused to send Kuppusamy Naicker to the family house at Kannivakkam and this has resulted in a quarrel and in which, the husband of the first plaintiff Kothandaraman had attacked D3 & D4 with Arival; Kuppusamy Naicker is aware of the Survey Number and he could not have stated the Survey Number mistakenly as S.No.359/3 in the Will.

10.4. The attesting witness P.W.2 is a neighbour of the first plaintiff and



he has stated in his evidence that he took Kuppusamy Naicker in his auto to Valasaravakkam and he slept in the auto; the attesting witness does not read and write Tamil; he stated that he did not know the contents of the Will; he has stated that after 28.09.1995, he did not see Kuppusamy Naicker; P.W.2 has stated that the other witness was Arangashanmugam; but, he was not examined as a witness on the side of the plaintiffs; P.W.2 has deposed the evidence in favour of the plaintiffs at the instructions of the first plaintiff's husband Kothandaraman; on the same day of the Will, the Power of Attorney has also been executed in favour of the first plaintiff's husband and it does not have any property particulars; so, the Will is a handwork of the first plaintiff and her husband; the second plaintiff Madhan Kumar is the son of the first plaintiff and in whose favour 'C' schedule property is seen to have been bequeathed; the disposition of the property in the Will itself would show that the Will is shrouded with doubtful circumstances.

10.5. The Scribe of the Will is not mentioned and he was neither examined as a witness; there is no necessity for the executant of the Will to register the Will at Virugambakkam, if he happened to live at Velachery; the plaintiffs' witnesses have not stated who had taken back the Will from the



Sub-Registrar Office; there is no recitals in the Will to show that it has been read over to Kuppusamy Naicker; the property which are not in existence have been shown in the schedule; Kuppusamy Naicker does not know to read or write Tamil; in that case, the scribe ought to have read it over to the executant; but there is no recital to that effect; the first attesting witness is the auto driver who is having auto stand near the house of the first plaintiff and the other attesting witness Arangashanmugam is the tenant under the first plaintiff; the auto was not engaged by Kuppusamy Naicker; P.W.2 has stated that the auto was engaged by other attesting witness only; P.W.2 and Arangashanmugam stood as a witness for Ex.D7 Power of Attorney also which was executed on one and the same day; the stamp paper for the Power of Attorney was purchased by the first plaintiff's husband Kothandaraman; though Ex.D7 Power of Attorney which was registered on the same day was prepared by an Advocate at Virugambakkam, the Will was not prepared by any Advocate.

10.6. P.W.2 in his evidence has stated that he did not see Kuppusamy Naicker after 28.09.1995; but the Will was registered on 06.10.1995; the only beneficiary of Ex.P2 Will is the first plaintiff, her son and the second plaintiff; even though 'A' schedule property is seen to have been given to all the



daughters, there is no such property in existence; the permanent residence of

Kuppusamy Naicker is Kannivakkam and he never lived with the 1st plaintiff; when he was admitted in the Hospital, he had given the address of his son and that is reflected in the death certificate Ex.P1 also; the permanent residence of Kuppusamy Naicker is at Kannivakkam which is near Guduvancheri; in fact, Kuppusamy Naicker was suffering from some ailments and he was taking treatment in the Hospital at CIT Nagar; the plaintiffs managed to remove Kuppusamy Naicker from the said Hospital and took him to Virugambakkam for creating the Will.

10.7. The Original Petition has been filed after 11 years from the date of the death of Kuppusamy Naicker; there was a material contradiction in the evidence of P.W.1 and that is because of the falsity attached to the Will; the wife and the sons of the executant are excluded; the beneficiary had taken steps to get back the Will from the Sub-Registrar Office; all these circumstances would only render the Will suspicious and not genuine; hence the suit should be dismissed.

10.8. In support of the above contentions, the learned counsels for the 3rd



and 4th defendants had cited the following decisions:

- (i) *Premavathi and Others Vs. Sundararajan and Others*, reported in 2009 (3) CTC 801.**
- (ii) *H.Venkatachala Iyengar Vs. B.N.Thimmajamma and Others*, reported in AIR 1959 SC 443.**
- (iii) *Smt.Jaswant Kaur Vs. Smt.Amrit Kaur and Others*, reported in (1977) 1 SCC 369.**
- (iv) *Jagdish Chand Sharma Vs. Narain Singh Saini*, reported in (2015) 8 SCC 615**
- (v) *Shivakumar & Ors. Vs. Sharanabasappa & Ors.*, reported in 2020 (4) CTC 321**

11. The relationship between the deceased Kuppusamy Naicker who is the testator and the owner of the suit properties and the parties to the proceedings is not disputed. The 1st plaintiff, 3rd plaintiff, 1st defendant and 2nd defendant are the daughters of Kuppusamy Naicker. The 2nd plaintiff is the son of the 1st plaintiff and the defendants 3 and 4 are the sons of Kuppusamy Naicker. The 1st plaintiff has claimed that the deceased father Kuppusamy Naicker has executed a Will on 28.09.1995 in respect of the suit properties.



According to the disposition stated in the Ex.P2 Will, 'A' schedule property should be divided between four daughters of Kuppusamy Naicker who are the plaintiffs 1 and 3 and the defendants 1 and 2. 'B' schedule property has to be taken by the 1st plaintiff absolutely and 'C' schedule property shall be taken by the 2nd plaintiff who is the son of the 1st plaintiff. The defendants 3 and 4 who are the sons of Kuppusamy Naicker have not given with any rights in respect of the suit properties in the Will. At the time of the alleged execution of the Will, the wife of the deceased Kuppusamy Naicker was alive and no arrangement is seen to have been made to the wife of Kuppusamy Naicker. So, it is claimed by the defendants 3 and 4 that the Will is not beyond suspicion.

12. The learned counsel for the plaintiffs submitted that the defendants 3 and 4 did not deny the execution of the Will, but, only the sound disposing state of mind of the executant at the time of the execution of the Will. The onus to prove the testator has the capacity to decide and he had executed the Will in a free and sound disposing state of mind without any undue influence, fraud or coercion is on the propounder of the Will. The 1st plaintiff has examined herself as P.W.1, wherein she has stated that shortly before the



execution of the Will her father was ill and he was taking treatment at a Hospital in CIT Nagar where the second defendant was living. According to P.W.1, she was informed by the second defendant that her father was admitted in the Hospital and hence she went and visited him after he was discharged from the Hospital at the house of the second defendant. She has further stated that she had taken her father from the house of the second defendant to her house at Velachery and she was treating her father with the help of the doctor known to her.

13. It is claimed by D3 and D4 that Kuppusamy Naicker was not taking treatment at the Hospital in CIT Nagar. But, he was hospitalized at Christudass Hospital at Tambaram and he was directly taken from the Hospital by the first plaintiff and thereafter, she played some manipulation and got the Will executed. Some of the suspicious circumstances put forth by the defendants are listed as under:

(i) Kuppusamy Naicker never lived at the house of the 1st plaintiff in Velachery or in any of his daughters' house, but, he is a permanent resident of Kannivakkam where his sons were residing. The Will was registered at the Sub-Registrar Office at



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Virugambakkam, though it is claimed by the 1st plaintiff that Kuppusamy Naicker was living at Velachery at her house. The disposition of the property made in the Will is just to make the defendants 3 and 4 from non-inheriting the properties. Apart from that, there is no arrangement made for the maintenance of the wife of Kuppusamy Naicker, though she was alive at that point of time.

(ii) On the same day when the Will was executed, the Power of Attorney was also executed and registered in favour of the first plaintiff's husband Kothandaraman.

(iii) Though the said Power of Attorney was drafted by the Advocate, there is no particulars of the scribe in Ex.P2 Will. Kuppusamy Naicker does not know to read or write Tamil. However, there is no recitals in the Will that the contents of the Will were read over to him. The attesting witness P.W.2 did not know anything about the details of the Will and his evidence is not helpful for the case of the plaintiffs.

(iv) The other attesting witness was not examined even



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though P.W.2's evidence was not helpful to the plaintiffs. The description of the property in 'A' schedule itself is wrong and Kuppusamy Naicker did not have any property in the Survey Number as shown in 'A' schedule. In an earlier litigation in O.S.No.162 of 1986, Kuppusamy Naicker was examined as D.W.1, wherein, he has stated that he had agreed to a partition entered into between his sons and he had given the landed properties for the enjoyment of the sons by retaining the rice mill alone to him. The subject matter of the partition has also been not included in the Will and hence, it is doubtful.

14. It is the contention of the first plaintiff that her husband have got previous animosity with D3 and D4 and hence, the Will was created. It is submitted by the first plaintiff that the petition for grant of Letters of Administration has been filed after 11 years from the death of Kuppusamy Naicker. The reasons stated by the 1st plaintiff for the delay in filing the Original Petition is contradictory.

15. The learned counsel for the plaintiffs submitted that exclusion of



some of the legal heirs from inheriting the property of the deceased cannot be a sole reason to suspect the genuineness of the Will. As stated by the plaintiffs, the defendants 3 and 4 did not deny the execution of the Will but their only contention is that the first plaintiff and her husband have defrauded and got the Will executed by the testator, when he was not in a sound and disposing state of mind. So, it has to be seen whether the plaintiffs have proved that the Will has been consciously executed by the executant by fully being aware of its content and the nature of the disposition of the properties mentioned therein.

16. P.W.1 has stated in her evidence that she had misplaced the original Will and that had caused the delay in filing the Original Petition. However, it is brought to the notice of this Court that P.W.1 was examined in an earlier case in O.S.No.144 of 2010 on the file of the Additional Sub Court, Chengalpet and she deposed that her advocate was threatened by her brothers, hence, she could not file an Original Petition for grant of Letters of Administration immediately after the death of her father. The very claim of the first plaintiff is that her father was treated by the first plaintiff by her family doctor at her residence. She has also stated in her cross examination



that she could not remember the name of the doctor who treated her father.

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17. P.W.1 was subjected to a very lengthy and tiresome cross examination for several days. Though it might be natural on the part of the witness to get disturbed and give contradictory statements during such unusually long cross examination, the evidence of the witness with regard to the material aspect should be consistent and there cannot be much compromise on this minimum standard.

18. According to 1st plaintiff, her parents got separated long back and Kuppusamy Naicker was living all alone at Kumili by looking after the rice mill and her son was with him just in order to assist him. P.W.1 was aware of the fact that on the same day of the execution of the Will, the Power of Attorney was also executed in favour of the husband of the 1st plaintiff to administer the properties of the deceased Kuppusamy Naicker. However, her evidence reveals that her husband never administered the properties as per the Power of Attorney. In fact, the Power of Attorney which is marked as Ex.D7 does not have any specific property particulars, but, it contains the generalized statement that the properties belonging to Kuppusamy Naicker should be



administered by the husband of the 1st plaintiff. From the evidence of P.W.1, it is seen that she was not aware of the death of her father on the day when he died. She was informed about the same after two days by an another sister. So, P.W.1 did not participate in the funerals of her father and she came to know about the demise of her father only at a later date. Hence there is a possibility that there was some hostility between the sons of Kuppusamy Naicker and the first plaintiff and hence, they did not choose to inform about the death of their father to the first plaintiff.

19. The defendants 3 and 4 have stated that Kuppusamy Naicker was not able to read and write Tamil. But P.W.1 has stated that her father was able to read and write Tamil and he had written letters in Tamil. In Ex.P2 Will, the executant had affixed his signature and hence, it is possible that the testator might have known to read and write Tamil. P.W.1 has stated that she did not know when the Will was written by her father and handed over to her. She has stated that she was not present at the time when her father drafted the Will. P.W.1 cannot say when their father went to Sub-Registrar Office and who had accompanied him. The evidence on record does not reveal any particulars about the person who had got back the Will after it was registered.



WEB COPY 20. The attesting witness P.W.2 has stated that he did not see Kuppusamy Naicker after he was taken by him to the Sub-Registrar Office on 28.09.1995. P.W.2 is the auto driver and the neighbour of the first plaintiff and he was the only attesting witness and was examined to prove the Will on behalf of the plaintiffs. P.W.2 has stated in his evidence that the other attesting witness Arangashanmugam had engaged his auto on 28.09.1995 for going to Jaganathapuram First Main Road, Velachery. The house of the 1st plaintiff is situated in Jaganathapuram First Main Road, Velachery. P.W.2 has deposed that Kuppusamy Naicker came out of the house belonged to the 1st plaintiff and accompanied Arangashanmugam in his auto to Valasaravakkam. Since Valasaravakkam and Virugambakkam are adjacent places, it is understandable that P.W.2 is making reference about Virugambakkam Sub-Registrar Office. The evidence of P.W.2 would only show that Kuppusamy Naicker was taken by him from Velachery from the house of the first plaintiff for executing the Will. But P.W.1 had deposed that her father did not execute the Will when he was residing at her house and she was not present at the time when the Will was drafted. However, her evidence before the Court in other case in O.S.No.144 of 2010 is otherwise. The deposition of the 1st plaintiff given in



other case in O.S.No.144 of 2010 is marked as Ex.D2. In her evidence in the said case, she has stated that she was present along with the attesting witness Arangashanmugam and Siva when the Will was drafted by her father.

21. Kuppusamy Naicker died in Chengalpet Government Hospital as it appears from Ex.P1 Death Certificate. In the Death Certificate, the permanent address of the deceased was shown as Kannivakkam, Guduvancheri. The evidence of P.W.1 in the other suit is also to the effect that her father would have given Kannivakkam address, since he was permanently residing there. During the cross examination of P.W.1 in this case, she was confronted about her deposition given in the other case and for which, P.W.1 had given evasive replies.

22. The learned counsel for the plaintiffs submitted that no suspicion can be developed just because the executant of the Will was old at the time of executing the Will or that he died shortly after executing the Will. Reliance was placed upon the judgment of the Supreme Court held in ***Sridevi and Others Vs. Jayaraja Shetty and Others, reported in (2005) 2SCC 784***. The relevant paragraphs in 15 and 18 are extracted hereunder:



“15. Coming to the suspicious circumstances surrounding the will, it may be stated that although the testator was 80 years of age at the time of the execution of the will and he died after 15 days of the execution of the will, the two attesting witnesses and the scribe have categorically stated that the testator was in sound state of health and possessed his full physical and mental faculties. Except that the deceased is 80 years of age and that he died within 15 days of the execution of the will, nothing has been brought on record to show that the testator was not in good health or possessed of his physical or mental faculties. From the cross-examination of the scribe and the two attesting witnesses, the appellants have failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the testator to execute the will. Submission of the learned counsel for the appellants that the testator had deprived the other heirs of his property is not true. The family properties had been partitioned in the year 1961. The shares which were given to Dharmaraja Kadamba and Raviraja Kadamba were in possession of tenants and vested in the State Government after coming into force of Karnataka Land Reforms (Amendment) Act, 1973 whereas the properties which had been given to the daughters were in the personal cultivation of the family. The testator while executing the will bequeathed the properties which had fallen to his share in the partition



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and which he had inherited from his brother which were in his personal cultivation in favour of his two sons Dharmaraja Kadamba and Raviraja Kadamba and gave the right to receive compensation to other heirs of the properties which were under the tenants and had vested in the State Government. It is not a case where the father had deprived his other children totally from inheritance. Reasons for unequal distribution have been given in the will itself. This had been done by him to balance the equitable distribution of the properties in favour of all his children.

18. At the time of registration of the will on 11.9.1980, the scribe and the two attesting witnesses had been produced before the Registrar. Their statements were recorded and only after satisfying himself, the Registrar registered the will. The statements of the scribe and the two attesting witnesses before the Registrar are in harmony with the statements made by them in the court. Another circumstances which was stressed during the course of the arguments by the counsel for the appellants was that although it was not necessary to get the will registered, but still the respondents got it registered after a period of 4 years only to lend authenticity to the will. According to Respondent No. 13, the will was got registered on the advice of a lawyer to enable them to produce it before various authorities. Since we have



come to the conclusion that the daughters were present at the time of execution of the will by the testator and the execution of the same was disclosed at the time of final obeisance ceremony of the testator and that the will had also been brought to the notice of the appellants in the year 1978 during the proceedings before the forest authorities, the registration of the will in the year 1980 by itself does not cast a doubt regarding the execution of the will in the year 1976.”

23. The execution of the Will should be compatible to Section 63 of the Indian Succession Act.

63. Execution of unprivileged Wills – Every testator, not being a soldier employed in an expedition or engaged in actual warfare or a mariner at sea, shall execute his Will according to the following Rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(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 been 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, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

24. So far as the first condition is concerned, there is no difficulty. Because the defendants 3 and 4 did not deny the signature of their father seen in Ex.P2 Will. But, their contention is that their father was forcibly taken to the Sub-Registrar Office and was made to affix his signature by exercising undue influence and coercion by the 1st plaintiff and her husband. With regard to Rule (b), the signature of the testator as required, should appear to have been made for giving authenticity for the execution of the Will. The signatures in Ex.P2 Will is seen to have been affixed at the bottom of the page and at the conclusion of the execution. Ex.P2 Will has also been registered. Even though the above features are seen to be present, it is still not sufficient, unless the Will is attested by two or more witnesses. Such witnesses should have seen the testator signing or affixing his mark on the Will and the witnesses ought to



have signed the Will in the presence of the testator. The above aspect of the Will can only be proved by examining the attestors. Only in view of such a necessity, Section 68 of the Evidence Act mandates that a document like a Will which requires to be attested, shall not be used as evidence until one of the attesting witnesses is being examined for the purpose of proving the execution. Though the Will has to be proved in accordance with Section 68 of the Indian Evidence Act, no mathematical accuracy can be expected and it is sufficient if the proof given can be given to the satisfaction of a prudent man in the given set of facts.

25. By citing the decision of the Hon'ble Supreme Court in the case of *Swarnalatha and Ors. Vs. Kalavathy and Ors., reported in AIR 2022 SC 1585*, it is also submitted by the learned counsel for the plaintiffs that in the matter of appreciating the genuineness of execution of a Will, courts need not see whether the testator was fair and equitable to all his children. There is no disagreement on the point that the court has to see the intention of the testator and nothing else. So the court need not fret much on unequal distribution by the testator so long as it is proved beyond suspicion that the Will of the testator reflects only the intention of the testator and not his helplessness for



being a pawn of some one's desire and intention in the name and style of a Will. So the plaintiffs have the initial burden to prove that the Will is a genuine one. In this context, the learned counsel for the plaintiffs submitted that the evidence of the attesting witness is to prove primarily that the executor had signed the Will. In support of the above contention he cited the judgment of this Court rendered in ***R.Sundararajan Vs. Gayathri and Ors., reported in 2022 (3) MWN (Civil) 442.***

26. P.W.2 who is one of the attesting witnesses has stated in his chief examination that he is an auto driver. And on the alleged day of the execution of the Will, one of the attesting witnesses Arangashanmugam engaged his auto and both of them went to the daughter's house of Kuppusamy Naicker where Kuppusamy Naicker was waiting outside the house and boarded into the auto. Thereafter, he took him to Virugambakkam Sub Registrar Office. In the proof affidavit of Siva, it is stated that he was standing outside the Sub Registrar Office and have seen Kuppusamy Naicker giving some instructions to the typist to type the document and he scrutinized the same and thereafter, he went inside the Sub Registrar Office. While entering the Sub Registrar Office, Kuppusamy Naicker is said to have informed P.W.2 about his last Will and he



signed the document in front of P.W.2. The other witness Arangashanmugam was also seen to be present at the time he attested his signature. Had there not been any contradiction during the cross examination of P.W.2, the matter would have ended there . But, in the cross examination of P.W.2, he has stated those matters which are directly in contradiction to his chief examination. In the chief examination of P.W.2 he has stated that he went to the daughter's house of Kuppusamy Naicker. But in cross examination he has stated that Kuppusamy Naicker was not known to him and he did not know his daughter also. Strangely, he has stated further that 1st plaintiff's house is about ½ Km from the auto stand.

27. The cross examination of P.W.2 would further show that after dropping Kuppusamy Naicker and the other attesting witness Arangashanmugam at the Sub Registrar Office, Virugambakkam, P.W.2 slept in the auto. Even during the trip to Sub Registrar Office, P.W.2 was not aware of the purpose for which he is going to Sub Registrar Office along with Kuppusamy Naicker and other attesting witness. P.W.2 went to have lunch and thereafter went back and settled in his auto itself. Even the auto charges to P.W.2 was paid by Arangashanmugam and not by Kuppusamy Naicker. It has



been already observed that the contents of the Will does not state that it was read over to the testator and he had affixed his signature after fully understanding the impact of the Will. In fact, P.W.2 did not know the nature of the document which was signed by him. It appears from the evidence of P.W.2 that he is an auto driver and he did not have the knowledge about the documents that are being transacted at the Sub Registrar Office and he was inexperienced. The 1st plaintiff had chosen to examine him alone as the attesting witness. The evidence of P.W.2 would reveal that the other attesting witness Arangashanmugam is very much alive and was involved in Real Estate business.

28. On the same day of the execution of the Will, Ex.D7 Power of Attorney has also been executed in favour of Kothandaraman who is the husband of the 1st plaintiff. Arangashanmugam had attested both the Power of Attorney and Ex.P2 Will. Despite that, the 1st plaintiff has not chosen to examine Arangashanmugam who has a better exposure about the documents that has been registered and transacted at the Sub Registrar Office, because of his occupation in Real Estate. Further, Arangashanmugam is the tenant of P.W.1, but, for the reasons best known to the 1st plaintiff, the best among two



attesting witnesses was withheld by the plaintiffs.

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29. The learned counsel for the defendants submitted that the evidence available on record, especially with the evidence of P.W.2, neither his understanding about the Will nor his intention of signing the same as a witness can be inferred and this along with other facts already listed would only form a cloud of doubts about the Will. In support of his above submission he also relied on the judgment of Hon'ble Supreme Court in ***Premavathi and Others Vs. Sundararajan and Others, reported in 2009 (3) CTC 801.***

“12. The evidence of P.W.2 is also very evasive as to the person who informed him to go to the house of Kakkammal to Devanur village for attesting the Will. Further, it was his evidence that at the time of execution of the Will, the testatrix Kakkammal and her husband were very much present and they have taken part in the execution of the Will. P.W.2 says that five witnesses attested the Will as directed by Kabirdas Reddiar the husband of plaintiff NO.1 the beneficiary. Thus the beneficiary and her husband have taken an active role in the alleged execution and attestation of the Will and this is also one of the unexplained strong suspicious circumstance. It is evident from the available evidence that the beneficiary and her husband took



the testatrix Kakkammal in a car to the Sub-Registrar's Office for getting the Will registered. They have actively taken part in the execution of the alleged Will and its attestation, which suspicion is not cleared with sufficient reasoning.

13. The testatrix was an illiterate lady. She did not know to read and write. It is the evidence of P.Ws.1 and 2 that the testatrix dictated the recitals and the scribe wrote the Will. But in another place, P.W.2 says that Kakkammal gave the particulars and the scribe wrote the format of the Will. In respect of R.C.No. of the tractor, one of the property in the Will, there is discrepancy in the evidence of the witnesses. P.W.2 stated that the registration number of the tractor was not given by Kakkammal. The scribe noted the Registration Number from the vehicle itself. However, P.W.3 the scribe says that the RC Book of the tractor was given by the grand daughter of Kakkammal and the Registration Number was noted from the R.C.Book. Likewise, in respect of the particulars about the property at T.Nagar also, there are contradicting evidences as to who gave the details of survey number. As per P.W.3, the document was sent through Rajeswari. However, it is the evidence of P.W.1 that these particulars were given by the testatrix herself without referring to any document and no one else.

14. From the evidence of P.W.1, it is clear that



she has taken an active part in the execution and attestation of the Will. Being a beneficiary, she has to explain to the satisfaction of the Court for such association, which is totally absent in this case. Regarding the health condition of the testatrix, it was an admitted case that she was having blood pressure and sugar and it is also on evidence that on the night of the previous day to the execution of the Will i.e., on 18.1.1985, she was taken in a car from Devanur village to Madhurantham to a Doctor. The mental and sound disposing state of mind condition of the testatrix has not been established in the given set of facts. When the Will was attested by more than five persons, all from out of the village of Devanur, though legal requirement is atleast one witness has to be examined, the plaintiff would have examined atleast few more attesters so as to clear out the cloud. Apart from that, no independent witness was examined to prove the execution and attestation of Ex.P.1 Will. Not only the attestation has not been proved but also the animus to attest the Will has not been proved.”

30. The evidence on record of P.W.1 does not reveal who had handed over the Will to her and who had collected the same after it was registered at Sub Registrar Office. Simultaneously, the registration of Power of Attorney in favour of the 1st plaintiff's husband and the recitals in the Power of Attorney



along with the contradictions in the evidence of P.W.1 and 2 would not dispel the active participation of the first plaintiff's husband in getting the Will executed through his own tenant Arangashanmugam. P.W.2 has also stated that he was engaged by Arangashanmugam and even the auto charges were paid by Arangashanmugam and not Kuppusamy Naicker. P.W.1 has also concealed the fact that she was also present at the time when the draft was prepared along with the witnesses. The Will is also in type written form. The name of the persons who had drafted the document is not mentioned. Neither the contents of the Will nor the endorsement of the Sub Registrar is seen to the effect that the contents of the Will was read over to Kuppusamy Naicker and he had affixed his signature after understanding the same.

31. Even though the standard of proof for proving the Will need not be with a mathematical accuracy, the preponderance of probable circumstances surrounding the Will should be seen to be sufficient enough to remove the legitimate suspicious circumstances which have been canvassed by the defendants. It is seen from the evidence given by the deceased Kuppusamy Naicker in the suit in O.S.No.162 of 1986, at the time of deposing evidence, he was 84 years old. The date of the recording of his evidence was



02.04.1992. The Will involved in this case is dated 28.09.1995. In that case, the age of Kuppusamy Naicker at the time of executing the Will would be 87 years. The death certificate of Kuppusamy Naicker would also show that he died on 24.05.1997, on which date, he would have been 89 years old. So, the burden goes with the plaintiffs to prove that the executant Kuppusamy Naicker was hale and healthy and was in sound disposing state of mind and he does not suffer from any loss of memory due to senility or anything at the time of executing the Will and he had affixed the signature in the Will knowing the contents of the Will and the impact of the same.

32. By placing reliance on the judgment of Hon'ble Supreme Court held in *Smt.Jaswant Kaur Vs. Smt.Amrit Kaur and Others, reported in (1977) 1 SCC 369*, the learned counsel for the defendants submitted that in cases where there are doubtful circumstances surrounding the Will, the plaintiff has a huge burden to prove the uninfluenced sound state of mind coupled with his knowledge and awareness about the Will executed by him. In the said judgment it is held as under;

“3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances



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in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the



propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasizes that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

33. On the very same aspect, it is held by the Supreme Court in ***Jagdish Chand Sharma Vs. Narain Singh Saini, reported in (2015) 8 SCC 615***, that if there are doubtful circumstances, a favourable presumption as to the testator’s understanding, free and discerning state of mind cannot be made



unless the doubts are explained to the satisfaction of the court. Paragraph No.58 is extracted hereunder:

“58. The materials on record, as a whole, also do not, in our comprehension, present a backdrop, in which, in normal circumstances, the testator would have preferred the appellant to be the legatee of his property as set out in the Will, Ex. A-1, by denying his wife, children and grand children who were alive and with whom he did share a very warm affectionate and cordial relationship. Viewed in this context, the bequest is exfacie unnatural, unfair and improbable thus reflecting on the testator’s cognizant, free, objective and discerning state of mind at the time of the alleged dispensation. The suspicious circumstances attendant on the disposition, in our opinion, do militatively impact upon the inalienable imperatives of solemnity and authenticity of any bequest to be effected by a testamentary instrument.”

34. The address in Ex.P1 Death Certificate would show that Kuppusamy Naicker has permanent residence at Kannivakkam and the last days of Kuppusamy Naicker was something not known to the 1st plaintiff. There is no acceptable reason available from any quarters why the testator had chosen a place like Virugambakkam which is not proximate either to his residence or to the residence of any of his children to register the Will. No doubt, the testator



has got the liberty to get the Will registered at any Sub-Registrar's office of his convenience. However, the above aspect assumes relevance when the defendants 3 and 4 claims that the first plaintiff and her husband got the signature of the executants at certain specific circumstances and the executants did not know the impact of the document which he signed and he was just taken to the Sub-Registrar's office at the choice of the first plaintiff to accomplish her designs and the Will also does not show any details about the person who drafted or prepared or the recitals that it was read over to the 87 years old executant and he understood and accepted it before signing. This aggravates the other suspicious circumstances and hence it cannot be disregarded as something not relevant. In the instant case, the Will is registered at Virugambakkam Sub-Registrar's office which is unconnected to the residence of the executant and the said fact also adds up to the already mounted facts and circumstances already discussed above.

35. P.W.1 has stated that after her father left the house on the date of execution of the Will, he did not come back to her house and she did not know where he had gone thereafter. But her other part of the evidence would reveal that her father told her that he had registered a Will. Had her father left the house on the date of executing the Will itself, it would not have been possible



for him to collect the registered Will from the office of the Sub Registrar and hand it over to the 1st plaintiff.

36. There is an inordinate delay in filing the petition for grant of Letters of Administration. There are contradictions in the reasons stated for the delay. Even though the Will was a registered one and the signature of the executant in the Will was not denied and one of the attestors have spoken about his attestation made in Ex.P2, it is essential to prove that the execution of the Will was done by the executant by fully understanding the contents therein and he was in a mental state to understand the same. It is seen that evidence of P.W.1 is not helpful to prove the above important fact. The attesor who is an auto driver had slept after leaving the other attesor Arangashanmugam and Kuppusamy Naicker at the Sub Registrar Office. The other attesting witness Arangashanmugam, who played a prominent role in the process was not brought to the box, though he was alive.

37. It is seriously contested by D3 and D4 by stating that 'A' schedule property mentioned in the Will is not in existence and Kuppusamy Naicker did not own any property in S.No.359/3. Even then, P.W.1 has not shown any



records to show that 'A' schedule property was very much in existence and it belonged to her father. Leaving apart 'A' schedule, two more properties were found in 'B' and 'C' schedule. 'B' schedule property had been bequeathed in favour of the 1st plaintiff and 'C' schedule property was bequeathed in favour of the son of the 1st plaintiff. Shares have been given to all the daughters only from 'A' schedule property which lacks clarity. So the main and only beneficiaries of the Will is the 1st plaintiff and her son, the 2nd plaintiff. The improbable and unnatural disposition of the property in the midst of the suspicious circumstances which have been already established goes adverse to the case of the plaintiffs.

38. The propounder of the Will has failed to dispel the reasonable suspicious circumstances surrounding the Will and the evidence on the side of the plaintiffs is neither concrete nor reliable. They only expose the unnatural circumstances in which the Will came to be executed. The contents of the Will did not have the recitals as to the confirmation of the knowledge and understanding of the executant. So far as the partition deed is concerned, it was within the knowledge of the 1st plaintiff and her father. However, the same was not a registered one. The unregistered partition deed executed between



the family members cannot be considered as a document of title, unless it is a registered one and all the sharers have participated in the partition. The combined effect of these lapses and the doubtful circumstances would render the Ex.P2 Will invalid. Thus, the issues 1 & 2 are answered accordingly.

39. It is submitted by the defendants 3 and 4 that after the death of Kuppusamy Naicker, his wife Kanniammal had executed a Will in respect of the properties of Kuppusamy Naicker in such a way that the property should be divided among the defendants 3 and 4. However, the matter in issue only pertains to Ex.P2 Will with regard to which, the 1st plaintiff has sought Letters of Administration. The defendants 3 and 4 have not filed any petition for seeking any relief in respect of the other Will. Just because the Ex.P2 Will is held to be invalid, it will not result in a consequences that the other Will Ex.D1 which is executed by Kanniammal is true and valid. Hence, the issue No.3 is answered accordingly.

40. In the light of the above stated reasons, this Testamentary Original Suit seeking Letters of Administration of the Will dated 28.09.1995 in favour of the plaintiffs is dismissed. No order as to costs.



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WEB CRY Index: Yes/No

Speaking / Non Speaking Order

Neutral Citation : Yes/No

gsk

09.06.2023

APPENDIX

I. Witnesses :

<i>Plaintiffs :</i>	
P.W.1	Mrs.K.Kamalammal (1 st Plaintiff)
P.W.2	Mr.S.Siva
<i>Defendants :</i>	
D.W.1	Mr.K.Devarajan @ Dilli

II. Exhibits marked on the side of the plaintiffs:

Ex.P1	Death Certificate of Kuppusamy Naicker.
Ex.P2	The original Will dated 28.09.1995.

III. Exhibits marked on the side of the defendants:

Ex.D1	Will executed by Kanniammal dated 30.11.1998.
Ex.D2	Deposition of Kamalammal (P.W.1) in O.S.No.144 of 2010, before the Additional Sub Court, Chengalpet.
Ex.D3	Deposition of Kuppusamy Naicker in O.S.No.162 of 1986
Ex.D4	Partition deed dated 19.08.1981.
Ex.D5	Judgment in O.S.No.162 of 1986 dated 30.04.1992.
Ex.D6	Decree in O.S.No.162 of 1986 dated 30.04.1992.



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Ex.D1	Will executed by Kanniammal dated 30.11.1998.
Ex.D7	Power of Attorney executed by Kuppusamy Naicker in favour of 1 st plaintiff's husband Kothandaraman.
Ex.D8	Inland letter.

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R.N.MANJULA, J

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TOS.No.36 of 2010

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