



O.S.A.No.121 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 29.03.2023

Delivered on: 13.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

O.S.A.No.121 of 2017

&

C.M.P.Nos.14778 of 2017 and 15890 of 2018

1.G.Lakshmi

2.G.Gayathri

.. Appellants

Vs.

U.Saraswathi

.. respondent

Prayer:- Original Side Appeal filed under Order 36 Rule 1 of the Original side Rules read with Clause 15 of the Letters Patent, against the judgement and decree dated 20.12.2016 made in T.O.S.No.97 of 2013 (O.P.No.485 of 2013).

For Appellants : Mr.J.Srinivasa Mohan

For Respondent : Mr.N.V.Prakash



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## JUDGMENT

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(Judgment of the Court was made by P.B.BALAJI,J.)

The unsuccessful plaintiffs in T.O.S.No.97 of 2013 (O.P.No.485 of 2013) are the appellants before this Court.

2. The appellants as petitioners, filed O.P.No.485 of 2013, seeking grant of Letters of Administration with the Will of Late Dharmambal @ Pattamal, dated 06.03.2005, registered as Doc.No.14 of 2005 on the file of the Joint Sub Registrar, Chennai South, annexed. Caveat was filed by the daughter of the deceased Dharmambal @ Pattamal, intending to oppose the grant of Letters of Administration as prayed for by the appellants and consequently the O.P proceedings stood converted into a Testamentary Suit and the petitioners became the plaintiffs in the Testamentary Original Suit and the Caveator, the 1<sup>st</sup> respondent in the O.P became the sole defendant in the Testamentary Original Suit in T.O.S.No.97 of 2013.

3. The facts admitted as between the parties are as hereunder:

(1) Late Dharmambal @ Pattamal was the sister of Mr.Ganesan, who is none else than the father of the appellants herein.



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(2) The respondents in the Original Petition are the daughter of Late Dharmambal @ Pattamal and mother of the appellants respectively.

(3) Dharmambal @ Pattamal died on 27.07.2009.

4. The parties have no dispute with regard to relationship amongst themselves. It is the case of the appellants that the property which is the subject matter of the registered Will dated 06.03.2005 was actually purchased only by their father Mr.Ganesan, in the name of his only sister, the testatrix i.e., Dharmambal @ Pattammal. Only acknowledging and recognizing the fact that the testatrix was only holding the property as a benami for her brother, the Will came to be executed by the testatrix. It is the further case of the appellants that even the loan obtained for meeting a portion of the sale consideration was met only by their father Ganesan and the testatrix was not even possessed of sufficient funds to either purchase the property or service the loan.

5. It is also stated that the father of the appellants who was the sole beneficiary under the Will and recognizing the right and title flowing to him under the Will, executed a settlement deed on 20.11.2009 vide



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registered Doc.No.2193 of 2009, thereby settling the subject property in favour of the appellants, his daughters. The appellants have explained the delay in approaching the Court at para 10 of the petition stating that the original Will was not immediately available with them.

6. The respondent herein as defendant, filed a written statement denying even knowledge of execution of the Will dated 06.03.2005 and contending that the subject property was owned only by the mother of the respondent herein and infact her brother, late Ganesan, father of the appellants was paying nominal rent to the testatrix till her demise in July, 2009. It is further contended that the appellants' father was permitted to stay in the premises only because of convenience and safety issues. However, it is contended by the respondent that the brother of the deceased testatrix used to pick up quarrel with his sister, i.e the testatrix and had even threatened her before her death stating that he had with him signed blank papers of the testatrix, which were according to the respondent obtained under coercion and threat. The respondent further contended that the factum of execution of the Will itself came to her knowledge only after receiving summons from the High Court and that late Ganesan, who was



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working as a Sub-Registrar, took advantage of his position and brought about the settlement deed in favour of his daughters, the appellants herein, without even obtaining Probate of the Will of her mother. In short, the specific defence set up by the respondent was that the Will was false, fabricated and created by obtaining signatures of the testatrix in blank papers, under threat and coercion exercised by the father of the appellants.

7. The learned Single Judge framed the following issues:

- (i) Whether the Will dated 06.03.2005 stated to have been executed by Tmt.Dharmambal alias Pattammal is genuine and valid?
- (ii) Whether the plaintiff is entitled to a decree for Letters of Administration with the Will annexed?
- (iii) Relief and cost.

8. On the side of the appellants, the 2<sup>nd</sup> appellant was examined as P.W.1 and exhibits Exs.P1 to P3 were marked. On the side of the respondent, the respondent examined herself as D.W.1 and Exs.D1 to D3 were marked. The learned Single Judge, on appreciating the oral and documentary evidence available, found that the Will was not proved in the



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manner known to law and proceeded to answer all the three issues against the appellants. Aggrieved by the findings of the learned Single Judge, the appellants preferred the above intra Court Appeal on the following grounds:

a) The Will was duly executed and also registered and had been proved in the manner known to law.

b) The learned Single Judge failed to appreciate the evidence on record which clearly established due execution and attestation of the Will. The learned Single Judge erred in suspecting the genuineness of the Will on the ground that it was registered after one and half months from the date of execution.

c) The learned Single Judge ought not to have given any credence to the objections raised by the respondent with regard to the registration of the Will between 1 p.m and 2 p.m, which according to the respondent was the lunch hour and that the same also heightened the suspicion regarding the genuineness of the Will.

d) The learned Single Judge also erred in observing that the transaction being benami, no right can be claimed by the real owner in view of the provisions of the Benami Transactions Prohibition Act, 1988.



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e) The learned Single Judge erred in holding that the respondent had totally denied her signature as attesting witness in the Will, contrary to the oral evidence available on record.

f) The learned Single Judge failed to see that having pleaded undue influence and coercion, the burden was only on the respondent to prove the same, in which exercise, the respondent has miserably failed.

9. Heard Mr.J.Srinivasa Mohan, learned counsel appearing for the appellants and Mrs.N.V.Prakash, learned counsel appearing for the respondent.

10. Having heard the submissions made by the counsel on either side, this Court formulates the following points:

1) Whether the Will dated 06.03.2005 has been duly proved in the manner known to law, satisfying the requirements of Sec.63(c) of the Indian Succession Act,1925 r/w Sec.68 of Indian Evidence Act, 1872?

2) Whether the appellants can claim right to the property taking shelter under a benami transaction and whether the Will is hit by the provisions of Benami Transactions Prohibition Act, 1988?



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3) Whether there are any suspicious circumstances surrounding the execution of the Will dated 06.03.2005, in order for the Court to come to a conclusion that the Will is not free and genuine?

**Point 1**

11. This is a very peculiar case where, one of the appellants and the respondent happen to be the two attesting witnesses to the Will in dispute. Admittedly, the parties have no issue with regard to their relationship, tracing to their respective parents as well. It is now well settled legal position that irrespective of whether suspicious circumstances exist or not, the propounder who approaches the Court is primarily bound to satisfy the Court with regard to due execution and attestation as required and mandated under two enactments viz., Indian Succession Act (Sec.63(c)) and Indian Evidence Act (Sec.68).

12. In this backdrop and having regard to the submissions made by the counsel on either side, this Court has gone through the pleadings as well as the evidence let in by the parties. Much was made of by the counsel for the respondent stating that the affidavit of attesting witness filed by the second appellant along with the O.P was not even marked and the same



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was fatal to the case of the appellants with regard to proof of due execution of the Will in question.

13. This Court does not find this to be a serious infirmity which would compel the Court to refuse a grant of probate or Letters of Administration, as the case may warrant. Or.25 R.4 of the Original Side Rules, reads as follows:

*“R.4. Application for probate shall be made by a petition with the Will annexed, accompanied if the Will is not in English by an official translation thereof in English; such an application shall be in Form No.55 or as near thereto as the circumstances of the case may permit and shall be accompanied by:*

*(a) a vakalat or appointment signed by the petitioner, unless he appears in person.*

*(b) an affidavit of one of the attesting witnesses if procurable, in Form No.56.*

*(c) a notice to the Collector in Form No.57 signed by the petitioner or his advocate, and*

*(d) except in the case of applications made by the Administrator-General of Madras the affidavit of assets prescribed by Sec.55 of Madras Act and a copy of such affidavit.*



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*The notice shall as soon as the petition is admitted be signed by the Registrar and sent by him to the Collector. The copy of the affidavit of assets shall also be sent by the Registrar to the Collector.*

*The affidavit of assets shall, in addition to particulars given in Annexure A, Part I of Schedule II of the Court Fees Act, give as far as possible particulars of the survey or patta number of all lands, and shall include the rents of all lands or houses that have accrued since the date of the death of the deceased and of the debt with the names of the creditors and the dates of debts.*

Or.25 R.5 pertains to Letters of Administration, same is extracted hereunder:

*“R.5 Every application for letters of administration or for letters of administration with Will annexed shall be made by petition in Form No.58 or 59 or as near thereto as the circumstances of the case may permit and shall be accompanied by Annexures mentioned in the last preceding rule ”*

14. It is thus seen that it is only a requirement to file an affidavit of one of the attesting witnesses in Form No.56 along with the application for probate or Letters of Administration.. No where, the rules require that the



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said affidavit of attesting witness should be marked as an exhibit during the course of trial or at the time of taking evidence. Here, admittedly the second appellant happens to be one of the attesting witnesses and she has filed her proof affidavit in support of her petition seeking Letters of Administration. Therefore, merely because the affidavit of attesting witness filed along with the application for probate at the first instance has not been exhibited during trial it cannot be a ground to deny relief to the appellants. Infact, the appellants have taken out C.M.P.No.15890 of 2008 before this Court to permit the appellants to mark the affidavit of attesting witness as one of the exhibits in the case. In view of what has been stated herein above, this Court does not find any necessity to entertain this application. Accordingly, C.M.P.No.15890 of 2018 is dismissed.

15. Ex.P1-Will is admittedly a registered Will. This Court, on a perusal of Ex.P1, finds that though the Will is dated 06.03.2005 and attested by P.W.1(Second Appellant) and D.W.1(Respondent), it came to be registered before the Joint Sub Registrar, Chennai South, much later on 19.04.2005. It is seen from the registration endorsements on the reverse of the first page of the Ex.P1-Will that the testatrix had signed the Will before



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the Sub Registrar and affixed her left thumb impression and her signature was also identified by two persons viz., Kothandaraman and J.Jaya. The Will has been registered as Doc.No.14 of 2005 in Book 3 maintained by the Sub Registrar's Office. The second appellant as P.W.1, filed her proof affidavit. In the said proof of affidavit, paragraphs 5 and 8 assume relevance for the purpose of this case and they are extracted for easy reference:

*“ 5. I submit that the registered Will of the Late Dharmambal @ Pattammal was attested by me and the defendant herein, the daughter of deceased Dharmambal @ Pattammal.*

*8. I submit that the said Will of Testatrix Tmt. Dharmambal @ Pattamal was attested by myself and the defendant Mrs.U.Saraswathi who is the daughter of the Testatrix.”*

16. Apart from the filing of the proof affidavit on 13.08.2014, P.W.1 was examined in chief. She has also spoken about the attestation of the Will by herself and the respondent. Even in her cross examination on 08.09.2014, more light has been thrown with regard to the execution as well as the registration of the Will. P.W.1 has categorically stated that the



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Will was executed on 06.03.2005 and that besides her father Ganesan, the testatrix, her daughter i.e the respondent herein were also present at the time of execution of the Will. She has also stated that she did not go over to the Sub Registrar's office when the Will was registered and that she did not know the names of the persons who all went to the Sub Registrar's office. P.W.1 has denied the suggestion put to her that Ex.P1 was a forged document. A specific suggestion was put to P.W.1 that signed blank papers obtained from the testatrix was subsequently filled up to bring about Ex.P1-Will. The said suggestion has been denied by P.W.1.

17. The respondent who examined herself as D.W.1 filed her proof affidavit dated 21.11.2014. In her proof affidavit, D.W.1 reiterated the contentions pleaded in the written statement. In her cross examination, the respondent as D.W.1 had admitted that she is a Post Graduate in M.Sc., and that the plaintiffs are occupying the subject property. To a question as to whether she ever resided in the subject property, D.W.1 has stated that in 1991 she stayed there for six months and that in respect of the same, she has no proof. She has also admitted that she has not filed any documents to show that her father was man of means and had independent source of



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income to purchase the subject property. She had not filed any documents to establish that her mother was receiving rental income from her brother i.e., father of the appellants. She also stated that she never contributed any money for purchase of the property. With regard to her participation in the execution of the Will, the following portions of her evidence are crucial. When Ex.P1-Will was shown to her, D.W.1, answered:

*” the signature found in Ex.P1 looks like that of mine.”*

18. To a question posed to her with regard to endorsements on the reverse side of Ex.P1-Will and her mother signing before the Sub Registrar and affixing her LTI, the respondent has admitted to the endorsement and further stated as follows:

*“ It is true that in Ex.P1 my mother's signature is there in five places. I know Gayathri. She is my uncles' daughter. The first witness in Ex.P1 is that of Gayathri signed. The signature in my proof affidavit in the written statement and in Ex.P1 are similar and I have already told that it looks like mine”*

19. To a question, whether she has filed any documents to prove that



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Ex.P1, Will was fabricated, her answer was:

*“ I have not filed. I have not signed in Will, my mother also did not execute any Will, she also did not inform me about the alleged Will.”*

20. The very next question put to her was

*“ Can I take this that because you mother had not told you about the execution of the Will, you say that it is fabricated.*

Her answer was “yes”.

21. D.W.1 has also stated that she never took any steps claiming right in the subject property, though her mother died in the year 2009. Importantly, she has also admitted that her mother and uncle Ganesan were in cordial terms upto 2000. Regarding proof of her mother having the wherewithal to purchase the suit property, D.W.1 has only casually mentioned that she was informed by her mother orally that she purchased the property out of money received from ancestral properties, though she did not have any documents to prove the same.

22. To a question regarding what do you mean by the alleged Will



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being fabricated, her answer was:

*“It means that it is not a genuine one. Because without probating the Will, they made settlements on 20.11.2009. I have already stated that Ex.P1, Will is signed by mother. According to me, since the Will was not probated earlier, I call it as a fabricated and not genuine one. As per the contents of the Will, property is bequeathed to Ganesh, my uncle.”*

23. With regard to the mental faculties of her mother, to the questions posed to her, D.W.1 has given the following answers:

*Q.Your mother was a mentally disordered person?*

*A.No, she was not a mentally disordered person.*

*Q. Was your mother a diabetic patient, hypertension?*

*A. She was not a diabetic patient but she was suffering from hypertension*

*Q. Was your mother suffering from knee pain?*

*A. No. however she required the assistance of anybody to walk. She was not hospitalised or died in*



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*the hospital. She died in the house only due to the kidney failure.*

*Q. Did you file any medical records to show that your mother died due to kidney failure?*

*A. I have not filed any medical records.”*

24. D.W.1 has further admitted that her mother lived for four years after execution of Ex.P1-Will. D.W.1 has also admitted that her mother had no jewelleries worth mentioning, no fixed deposits, no diamonds, silver or platinum. She also admitted to the averments made by her mother in Ex.P1-Will to the effect that entire sale consideration for the subject property was paid only by her uncle Ganesan, her mother did not contribute any money, all taxes were paid only by her uncle and that the Will had been written to avoid any dispute regarding the subject property. This may not be relevant in the light of her defence that signed blank papers were used to create Ex.P1-Will.

25. Subsequently, D.W.1 has further deposed that though her case was that her uncle had been threatening her mother and also stated that he



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had with him signed blank papers, she never chose to give any complaint even after her mother's demise.

26. Placing reliance on the above oral evidence of the parties to the lis, what emerges clearly is that execution of Ex.P1-Will is not denied by the respondent herein. The only case projected was that her uncle, the father of the appellants had obtained signatures of her mother in blank papers under coercion and threat and utilised the same for bringing about Ex.P1-Will. It is an admitted case that D.W.1 has attested Ex.P1-Will, though she did not go to the Sub Registrar's office for further registration on a later date when the Will came to be registered.

27. D.W.1, who is an M.Sc graduate and also retired as Assistant General Manager from BSNL, cannot be believed to claim that she also signed on a blank paper. The fact that the Will has been subsequently registered before the Sub Registrar also is a material piece of evidence that has a bearing in this case. Normally, registration of a Will does not lend any extra credence and due execution of the Will has to be necessarily proved whether the Will is registered or not, whenever there is a contest.



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However, in a case of this nature, where it is specifically alleged that signatures were obtained from the testatrix in blank papers and the same were used to bring about the Will the factum of registration of the Will assumes relevance.

28. Sec.114 of the Indian Evidence Act, 1872 enables the Court to presume existence of any fact which it thinks likely to have happened with regard to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustration (e) appended to Sec.114 of the Act reads thus:

*“ e. That judicial and official acts have been regularly performed”*

29. In the factual background of the case on hand, on a cumulative analysis of the pleadings and oral evidence of the parties, it is clear that the Will was indeed executed by the testatrix in the presence of two attesting witnesses viz., the second appellant and the respondent on 06.03.2005. The said Will came to be registered on 19.04.2005 before the Joint Sub Registrar, Chennai South. The signature of the testatrix before the Joint Sub Registrar at the time of registration is admitted by her daughter, the



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contesting party viz., the respondent herein. If really the defence set up by the respondent that the father of the appellants obtained signatures of the respondent's mother in blank papers and using the same, fabricated Ex.P1-Will, then the registration of such a Will with the active presence and participation of the testatrix before the Sub Registrar concerned, that too on a much later date, would be most improbable, if not impossible. It is seen from the tenor of the answers given by the respondent, at more than one place, she has used the words “ I have already told” while answering questions referring to Ex.P1-Will. Infact, the only reason why the Will was termed as fabricated has also come out in cross examination, where she has categorically stated that her attack on Ex.P1-Will being fabricated was only because the said Will was not probated and that without probate her uncle, the father of the appellants executed settlement deed in favour of the appellants. The respondent is not a novice. She is a Post graduate and also held very high position in BSNL, a public sector undertaking. This Court is unable to believe her version that she and her mother signed blank papers and that such blank papers were misused to bring about Ex.P1-Will.

30. In the light of the discussions already made herein above, in



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reference to the relevance of registration of Ex.P1-Will on a subsequent date, this Court is unable to buy the version of the respondent that signatures available in blank papers were used to fabricate Ex.P1-Will.

31. Next question that falls for consideration is whether Ex.P1-Will has been duly executed, attested and proved as required under law. The learned Single Judge has found that Ex.P1 has not been duly executed or proved as mandated under law. Learned counsel for the appellants relied on a decision of the Hon'ble Supreme Court in ***Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta and another***, reported in ***AIR 1955 SC 363***, and a judgment of this Court rendered by a learned Single Judge in the case of ***M.S.Thanigachalam Pillai Vs. Rukmani Ammal and Ors***, reported in ***AIR 1989 Madras 99***, to support his arguments with regard to proof of due execution and attestation of Ex.P1-Will, as required under law.

32. In the case before the Hon'ble Supreme Court, the attack on the Will in question was on the ground that it was a result of undue influence and that the Will was not validly attested as required under law. The



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evidence of the attestors was challenged in the said case on the ground that the attesting witnesses did not mention that they signed the Will in the presence of testator. Therefore, absence of such specific evidence would have to be held fatal and consequently, the Will would have to be held invalid. The Hon'ble Supreme Court, rejecting the said argument, held that it cannot be laid down as a matter of rule that because the witnesses did not state in chief examination that they signed the Will in the presence of a testator, there was no due attestation and that it would depend on the circumstances elicited in evidence as to whether the attesting witnesses signed in the presence of the testator. The Hon'ble Supreme Court affirmed the finding of the Courts below that the Will was duly attested as required U/s. 63 of the Indian Succession Act, 1925.

33. In *M.S.Thanigachalam Pillai's* case, a learned Single Judge of this Court, on scanning the evidence of the attesting witness, in order to prove due execution of the Will in a manner contemplated U/s. 63 (c) of the Indian Succession Act, 1925 found that the attesting witness had spoken about the testatrix signing the Will and that he and the other attesting witness as well as his wife had seen the testatrix put her signature



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and ultimately held that the evidence disclosed that attestors were both present when the Will was executed by the testatrix and they had seen the testatrix execute the Will and that both the attesting witness figured as attestors to the said Will. This Court took note of the evidence of the attestor referring to execution of the Will by the testatrix in the presence of himself and another, who had figured as attestors, to be more than sufficient to satisfy the requirement of Sec.63(c) of the Indian Succession Act.

34. In the case before this Court, we have already extracted the relevant portions of the evidence, especially the chief examination of P.W.1 with regard to her clearly stating that the Will of the testatrix was attested by her and the respondent. This statement was followed up in para 5 and reiterated in para 8 of her proof affidavit to the effect that the Will of the testatrix was attested by herself and the respondent. In her cross examination, she has clearly spoken about how the Will was brought to the residence of the testatrix and described the events in seriatum, starting from the presence of various persons at the time when the Will was executed and the same being attested by herself and the respondent. In fact,



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P.W.1 has also fairly stated that she did not go to the Sub Registrar's office when the Will was registered and that she was not in a position to state the names of the other persons who went for registration of the Will. The evidence of P.W.1 is very natural and inspires the confidence of the Court.

35. The counsel for the respondent vehemently contended that the witnesses who have attested the Will have not appeared before the Sub Registrar at the time of registration and this would indicate that all was not well with the execution of the Will. It is common knowledge that the Will is not a document that is required to be compulsorily registered. The mere fact that the Will was executed on a particular date and registered subsequently on a different date would not give rise to a suspicion to invalidate the genuineness of the Will itself. Equally, it is not required that the same witnesses who attested the execution of the Will should alone go for registration of the Will and sign the document before the Sub Registrar concerned as identifying witnesses. Even in a case where a Will is executed and registered on the same day, the law does not require that same set of witnesses who attest the execution of the Will should also be the identifying witnesses before the Sub Registrar concerned at the time of



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the registration. There is no merit in the contention raised by the counsel for the respondent in this regard.

36. Coming to the evidence of the respondent as D.W.1, this Court has already culled out relevant portions of her cross examination, which clearly indicate that she has signed Ex.P1-Will as one of the attesting witnesses. The fact that she did not know about the registration of the Will and that her mother did not inform her about the same are not reasonable or justifiable grounds to hold that the execution of the Will on an earlier date is improper or invalid.

37. Learned single judge has held that D.W.1 had totally denied her signature and on that basis proceeded to find that Ex.P1-Will had not been proved in a manner known to law. This Court has already examined the evidence of D.W.1 and there is a clear and express indication that she did sign Ex.P1-Will as attesting witness, by admitting at more than one place that the signature found in Ex.P1-Will looks like her's. Infact, the very version set out in the written statement was that she signed in blank papers, thereby admitting her signature. However, in cross examination she did not



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deny her signature, but only states that signature looks like her's. Such conduct of the respondent, blowing hot and cold only exposes the hollowness in the defence setup by the respondent as Caveator, challenging due execution of the Will.

38. The probate Court is not a Court of suspicion, but more a Court of conscience. The Court should endeavour to put itself in the arm chair of the testator and find out whether, in the given circumstances, the testator would have made such bequests, or not.

39. Coming back to the facts of the present case, it is an admitted case that the appellants and their father have alone been residing in the subject property and the testatrix and her daughter were living at a different place. Even the reason assigned by the testatrix in Ex.P1-Will as to why she was giving the property to her brother Ganesan are reasoned and well founded. This also corroborates with the case pleaded by the appellants before the learned Single Judge.

40. The evidence of the attesting witnesses cannot be expected to be



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given with arithmetical precision. The fact that evidence is being given before the Court after several years after the execution of the Will should also have to be remembered by the Court while assessing the evidence adduced by the parties. This Court has already found that there is more than sufficient evidence available on record to establish the fact that Ex.P1-Will was indeed executed by the testatrix, in the presence of the second appellant and the respondent herself. Moreover, applying the ratio laid down by the Hon'ble Supreme Court in *Naresh Charan's* case and this Court's in *M.S.Thanigachala Pillai's* case, this Court has no hesitation to hold that the evidence of P.W.1, one of the attestors, coupled with the evidence of R.W.1, the other attestor satisfies the requirement of Sec.63 of the Indian Succession Act.

41. This Court has also carefully gone through the cross examination of P.W.1 and there is not even a single suggestion put to her regarding her statements in the proof affidavit with regard to her attesting the Ex.P1-Will as one of the attesting witnesses. No suggestion was also put to P.W.1 that D.W.1 did not attest the Will as the second attesting witness. In short, there is no challenge whatsoever, with regard to the categorical evidence of



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P.W.1 speaking about the manner in which the Will came to be executed and attested.

42. The learned Single Judge has proceeded mainly on the footing that D.W.1 had totally denied her signature in Ex.P1-Will, which this Court has already found to be not the correct position, after reassessing the entire evidence on record. This Court, therefore finds and holds that Ex.P1-Will has been duly executed and attested and the proof required to be adduced U/s. 63(c) of the Indian Succession Act, 1925 r/w. Sec.68 of the Indian Evidence Act, 1872 has been satisfactorily complied with. Point 1 is answered accordingly.

**Point 2:**

43. Learned counsel for the appellants submitted that the Benami Transactions Prohibition Act would not invalidate Ex.P1-Will. Learned Single Judge has observed that no one is entitled to claim a peculiar right, viz., a benami purchase, after the advent of the Benami Transactions Prohibition Act, 1988 and that the recitals of Ex.P1-Will clearly showed that Late Ganesan was in a dominating position over the Will of his sister, the testatrix.



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44. Learned counsel for the appellants relied on the ratio laid down by the Hon'ble Supreme Court in ***His Highness Maharaja Pratap Singh Vs. Her Highness Maharani Sarojini Devi and Others***, reported in ***1994 Supp (1) SCC 734***. The Hon'ble Supreme Court has laid down certain tests to guide Courts to find out whether a particular transaction is benami or not:

- (1) *The source from which the purchase money came ;*
- (2) *the nature and possession of the property, after the purchase;*
- (3) *motive, if any, for giving the transaction a benami colour ;*
- (4) *the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;*
- (5) *the custody of the title-deeds after the sale ; and*
- (6) *the conduct of the parties concerned in dealing with the property after the sale.*

45. Applying the above illustrative circumstances to the facts of the present case, it is very evident that the entire money for purchase of the



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property came only from the appellants father Mr.Ganesan, which factum also was admitted to by the respondent in cross examination. Possession of the property has also been only with the appellants and before them, with their father. The testatrix never questioned the assertion of right and title over the subject property by her brother, during her life time. Only after her life time, the respondent has taken all kinds of pleas that her mother permitted her uncle to stay on a nominal rent as it was safer to give it to a known person rather than an unknown tenant and thereby property would be secured. The respondent admitted that no steps were ever taken by her even after her mother's life time, questioning the right and possession of the appellants. All these factors would clinchingly establish that the recitals in Ex.P1-Will are only true and genuine. Therefore, there is absolutely no reason for this Court to hold that Ex.P1-Will is hit by the provisions of the Benami Transactions (Prohibition) Act, 1988.

46. At the outset it is to be noted that the Benami Transactions Prohibition Act, 1988 came into operation only on 05.09.1988. Sec.3 of the said Act (as it stood before amendment by way of Act 43 of 2016) reads as follows:



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*“3.Prohibition of benami transacations:-*

*(1) No person shall enter into any benami transaction*

*(2) Nothing in sub-section (1) shall apply to-*

*(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;*

*(b) the securities held by a-*

*(i) depository as a registered owner under sub-section (1) of Section 10 of the Depositors Act, 1996;*

*(ii) participant as an agent of a depository.*

*Explanation- The expressions “depository” and “participant” shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of Section 2 of the Depositories Act, 1996”.*

47. Sec.4 of the Benami Transactions (Prohibition) Act, 1988 reads as follows:

*“ 4. Prohibition of the right to recover property held benami:*



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*(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.*

*(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.*

*(3) Nothing in this section shall apply,-*

*(a) Where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or*

*(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.*

48. The Act came into force on 05.09.1988. The Hon'ble Supreme



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Court has already held the said Act to be only prospective in nature and at best it could be given a retro active operation. In no uncertain terms, the Courts have held that the Act would not apply retrospectively. In the instant case, the purchase of the property by the father of the appellants in the name of the testatrix is admittedly well before the Benami Transactions Prohibition Act, 1988, came into force. Moreover, under Ex.P1-Will, the testatrix has only confirmed that the property was purchased by her brother and thereby bequeathed the same to him. In such circumstances, the prohibition to claim right of title under the provisions of Benami Transactions Prohibition Act, 1988, would not come into play at all.

49. Moreover, since the Act will not apply to the subject property involved in Ex.P1-Will, it is open to a person to claim that the property was purchased benami. Now applying the tests laid down by the Hon'ble Supreme Court in *His Highness Maharaja Pratap Singh's* case referred above, it is very evident that the case pleaded by the appellants that the entire consideration for purchase of the subject property went from their father, Ganesan and that their aunt, the testatrix was only a name lender, which fact was never objected to by her during her life time. The conduct



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of the respondent in this regard also assumes relevance because there has been no challenge to either the claim of title to the subject property by her uncle Ganesan or for possession of the subject property being with her uncle and the appellants for several years. If really, the defence set up by the respondent was probable, especially given her educational background, the respondent would have never remained a silent spectator throughout, allowing her uncle to enjoy the property and even after his demise, the appellants to continue to enjoy the same without taking any legal steps to recover possession or challenge the title to the property. Point 2 is answered accordingly.

### **Point 3**

50. This Court has already found that Ex.P1-Will has been proved to be duly executed in the manner known to law. The counsel for the respondent has also argued that the execution of the Will is surrounded by several suspicious circumstances and therefore Letters of Administration should not be granted as prayed for.

51. The suspicious circumstances that are set out by the counsel for



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the respondent are

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a) the advanced age of the testatrix and her brother Ganesan being in a dominant position.

b) registration of the Will after one and half months from the date of execution.

c) different witnesses for execution and registration

d) registration of Will during lunch hours.

e) delay in filing the O.P before the Court.

52. At the outset, this Court would like to state that suspicious circumstances should be surrounding the execution of the Will and not simply suspicions thrown by a speculating Caveator at the propounder, which are totally irrelevant and not germane in deciding the fact as to whether the Will was duly executed and attested as mandated under the law.

53. With regard to the age of the testatrix and her feeble position, being dominated by her brother Ganesan, father of the appellants, this Court finds that the testatrix was living only with her daughter. The



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respondent is not only a mere literate but a post graduate and held a very high post in a public sector undertaking. It is also admitted evidence of D.W.1, the respondent, that her mother did not have any mental problems and that she was hale and healthy and that she even survived for four years after the execution of Ex.P1-Will. Merely because the testatrix was aged 71 years, it would not automatically compel the Court to infer that she was not possessed of sound and disposing mental faculties. In any event the categorical admission of the respondent as D.W.1 with regard to the mental capacity of her mother would suffice to dislodge the suspicion raised by the counsel for the respondent citing her age and subservient position under her brother Ganesan. Moreover, the respondent has also signed Ex.P1-Will as one of the attesting witnesses and in such circumstances, this point cannot be put forth on a suspicious circumstance at all.

54. Coming to the suspicion with regard to registration of the Will after a lapse of approximately one and half months and different witnesses attesting the will at the time of execution and different witnesses identifying the signature of the testatrix before the Sub Registrar, this Court finds no merit in the said contention. The law itself provides for



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registration of a document that has been executed on an earlier date.

55. Sec. 23 of the Registration Act, 1908 may be usefully referred here. Sec. 23 provides four months time from the date of execution for a document, other than a Will, to be registered. In so far as Wills, the procedure for registration is different and governed by Sec.27 of the Registration Act, 1908. Sec.27 reads thus:

*“27. Wills may be presented or deposited at any time.—A will may at any time be presented for registration or deposited in manner hereinafter provided.”*

Further, Sec. 40 of the Registration Act, 1908 reads as under:

*“ 40. Persons entitled to present wills and authorities to adopt.*

*(1) The 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.*

*(2) The donor, or after his death the donee, of any authority to adopt, or the adoptive son, may present it to any Registrar or Sub-Registrar for registration.*

56. It can thus be seen that there is a departure from a Will and other



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documents, when it comes to the question of registration. Unlike any other document, where only a four month time period is allowed for presenting the same for registration, from the date of its execution, in the case of Wills there is no time limit at all. Sec. 40 infact permits presenting a Will for registration even after the demise of the testator or testatrix. The inference, therefore, is that there is no time limit for registration of a Will which has been executed earlier. In so far as the contention with regard to two different witnesses appearing before the Registrar for identifying the signature of the testatrix, this Court has already discussed and found that there is nothing irregular in adopting such a procedure and therefore it cannot be raised as a suspicious circumstance.

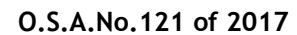
57. Coming to the next suspicious circumstance raised by the counsel for the respondent that the registration was done during lunch time and that the appellants' father who was a retired Sub-Registrar wielded his influence and power to get the Will registered, this Court is unable to see any merit in such an argument being put forth. This Court has perused Ex.P1 original Will and endorsements on the reverse of the first page of Ex.P1-Will which carries all the official endorsements. It is seen that the



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Will has been presented between 1 p.m and 2 p.m on 19.04.2005. It is not known from where the counsel for the respondent gets material that the Will was registered during the lunch break. There is no material whatsoever produced by the respondent before the learned Single Judge to clinchingly establish that the Sub Registrar's office was not functioning between 1 p.m and 2 p.m at which time Ex.P1-Will was presented for registration. In any event, the official endorsements can be safely presumed to have been carried out in the normal course of business and there is nothing to cast even a shadow of doubt on the Will being duly registered. This is one another circumstance, which this Court would like to point out and reiterate that such events being projected as suspicious circumstances, wholly misplaced. It is a case, where the Will was executed on 06.03.2005 and registered only on 19.04.2005. Suspicion, if any should be surrounding the execution of the Will on 06.03.2005 only and not regarding something that happened much later. Such contentions put forth by a Caveator and citing them as suspicious circumstances only would go to show that the Caveator is attempting to make mountains of mole hills, losing track of the germane issues that should be pleaded and proved or atleast required to call upon the propounder to dispel. "Suspicious circumstances" is not



58. The last contention raised and argued by the learned counsel for the respondent is regarding delay in approaching the Court for grant of Letters of Administration. No doubt, the testatrix died on 27.07.2009 and the O.P seeking Letters of Administration came to be filed only in March 2013. However, in paragraph 10 of the petition, the appellants have



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explained the reason for the delay. This Court finds that there is absolutely no cross examination on this aspect when P.W.1 was in the box. This Court finds that the delay has been satisfactorily pleaded and explained and there is no shred of evidence on the side of the respondent to show either that the delay was not bonafide or inordinate or to the effect that the reasons set out by the appellants was false. Moreover, this Court would also like to reiterate the position with regard to limitation and applicability of Art.137 of the Limitation Act. The Hon'ble Supreme Court in ***Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and others***, reported in ***AIR 2008 SC 2058=2008 8 SCC 463*** held that Art.137 of the Limitation Act applies to proceedings pertaining to Wills.

59. However, the practice of this Court is governed by a separate set of rules styled as the Original Side Rules. Order 25 of the Original Side Rules relates to testamentary proceedings. Rule 9 of the Order 25 runs thus:

*“ In any case where probate or letters of administration is for first time applied for after the*



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*lapse of three years from the death of the deceased, the reason for the delay shall be explained in the petition.”*

60. The departure from general law has been discussed in great detail by a Division Bench of this Court in ***S.Vatsala Vs. K.S.Mohan and Ors***, reported in ***2016 1 CTC 257***, held that the difference between testamentary proceedings conducted before a chartered High court governed by Original Side Rules and in other Courts which are not governed by any special set of rules like the Original Side Rules has been discussed thread bare. The Division Bench finally found that Or.25 of the Original Side Rules would prevail over Art.137 of the Limitation Act and it was sufficient if the delay was properly explained. In the instant case, as already discussed the appellants have clearly mentioned that non availability of the original Will was the reason for delay in filing the application seeking Letters of Administration. This pleading has gone uncontroverted in cross examination. This Court, therefore, does not find any good cause or justifiable reason to hold that the petition is belated. One further circumstance that would also go against the respondent is that if really the Will had been fabricated as contended by respondent, the appellants would



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not have slept over the matter and would have hurried to obtain orders in their favour. Therefore, on any count whatsoever, this Court is unable to find that the delay occasioned in approaching the Court, seeking Letters of Administration cannot be held to be either a suspicious circumstances or for that matter a circumstance to invalidate Ex.P1-Will.

61. Concluding, this Court would like to state that there is no straight jacket formula to ascertain or assess suspicious circumstances. All or any suspicion cannot be treated as a suspicious circumstances, thereby calling upon the propounder to dispel the same. The suspicious circumstances, raised by the Caveator seeking to attack the genuineness of the Will should be germane and surrounding the execution of the Will alone. Caveators cannot cite circumstances that are not material or relevant to execution of the Will and try to pinpoint circumstances, that have arisen post execution of the Will, like in the present case where, the Caveator has alleged that the Will was registered during lunch time or, in other cases, by trying to take advantage of any conflict in evidence adduced by the propounder or the witnesses, as long as they do not touch upon the facts surrounding due execution and attestation of the Will. Courts should apply the “arm chair”



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rule and see to it that unrelated and unwarranted circumstances are not projected to defeat the solemn wishes of a testator/testatrix.

62. More so, in the present case, the defence set up by the respondent was that the Will was brought about by undue influence and coercion. In such cases, on the propounder discharging the initial burden required to prove the Will, the onus shifts to the Caveator to prove the allegations of undue influence and coercion. This Court has already found that the Caveator has not adduced any evidence whatsoever aiding her defence that the signatures of her mother and herself were obtained in blank papers and using the said papers, the Will was brought about.

63. It is very unfortunate that the respondent having attested the Will has chosen to put forth a false case in order to challenge the Will and deny the benefits of the bequests made under the Will in very natural circumstances, by her mother, which have also been clearly explained in the recitals of Ex.P1-Will also. Point 3 is answered accordingly.



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64. In the result, the Original Side Appeal is allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition C.M.P.No.14778 of 2017 is closed.

**(S.S.S.R.J) & (P.B.B.J)**  
13.04.2023

Internet : Yes  
Index: Yes/No  
Speaking/Non-speaking order  
Neutral Citation: Yes/No

To

1.The Sub Assistant Registrar (Original side)  
High Court, Madras

2.The Section Officer  
VR Section,  
High Court, Madras



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S.S.SUNDAR, J.,  
and  
P.B.BALAJI, J

kpr

Pre-delivery judgment in  
O.S.A.No.121 of 2017

13.04.2023