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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.06.2025

Pronounced on : 25.07.2025

Coram

The Hon'ble Mr. Justice **C.V.KARTHIKEYAN**

T.O.S.No.68 of 2013

1.A.Selvaraj

...Plaintiff

Vs

1.M.Dhanakoti (Died)
2.M.Veeraraghavan
3.Amuthavalli
4.Suseela
5.Datchayini

...Defendants

Defendants 3 to 5 impleaded as per the order of this Court dated 26.07.2023 in A.No.3726 of 2023.

Prayer: This Testamentary Original Suit filed under Sections 232 & 276 of the Indian Succession Act XXXIX of 1925, the petitioner praying to grant Letters of Administration.

For Plaintiff : Mr.C.Ramesh



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For Defendants : Dr.S.Krishnamurthy

JUDGMENT

The plaintiff A.Selvaraj had initially filed O.P.No.311 of 2012 under Sections 232 & 276 of the Indian Succession Act, 1925 seeking grant of Letters of Administration of the Will annexed dated 05.12.1995 said to have been executed by Narayanaswamy Naikar who died on 11.01.1996. In the Original Petition, he impleaded the legal heirs of Mari Naicker the deceased son of Narayanaswamy Naikar as respondents 1 to 5. Thereafter, since caveat was filed, O.P.No.311 of 2012 was converted as Testamentary Original Suit by order dated 04.02.2013.

2.The defendants did not file their written statement within the stipulated time and were set exparte. By judgment dated 09.03.2018, on appreciating the evidence let in by the plaintiff, the suit was decreed as prayed for.

3.The defendants then filed an application to condone the delay in



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filing the application to set aside the exparte decree and to revoke the judgment dated 09.03.2018. Both these applications were allowed on payment of costs. Thereafter, the defendants filed their written statement.

4.In the plaint, it had been contended that Narayanaswamy Naicker the paternal uncle of the plaintiff, had executed a Will dated 05.12.1995 bequeathing the 1/2 share of the property mentioned in the schedule to the plaint to the plaintiff. Narayanaswamy Naicker died on 11.01.1996. The suit was filed seeking Letters of Administration of the Will. The defendants were the legal representatives of Mari Naicker, son of the testator Narayanasamy Naicker.

5.In their written statement, they claimed that the property at No.3, Kamarajar Street, Thiruvalluvar Salai, Vannia Teynampet, Chennai – 18 was purchased by Narayanaswamy Naicker as vacant land and thereafter, small houses were constructed for residence and also to be let out on tenancy. The vacant land was used as a cow yard. Later further constructions were put up and leased out to shops. It had been contended that Narayanaswamy Naicker and his son Mari Naicker were living in the said premises. Narayanaswamy



Naicker died on 11.01.1996. Mari Naicker died on 03.11.2011. It had been stated that the defendants came across a xerox copy of a registered Will dated 28.09.1995 wherein, the property had been bequeathed absolutely to his son and the 1st defendant. The Will was witnessed by Srinivasan and Kanniappan, close friends of Narayanaswamy Naicker. It had been stated that the defendants did not know that the Will had to be probated.

6.It had been further stated that the plaintiff was the son of Arumuga Naicker, brother of Narayanaswamy Naicker. It had been stated that the Will projected by the plaintiff had been created with ill motive to grab the property. The identity of the witnesses are not known. It had been further stated that the Will had been typed in English language and signed by the deceased in Tamil. It had been further stated that Narayanaswamy did not know English. It had been stated that it was the defendants who were looking after Narayanaswamy in his last days. It had therefore been stated that there was no possibility of Narayanaswamy bequeathing a share of the property to the plaintiff. It had been stated that the suit should be dismissed.

7.The 2nd defendant adopted the written statement filed by the 1st



defendant.

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8.A learned Single Judge of this Court had framed the following issues on 02.09.2022:

i).Whether Will dated 05.12.1995 is true and genuine?

ii).To what other reliefs, the parties are entitled?

9.During the course of trial, the plaintiff examined himself as PW-1. He also examined Mrs.E.Sarasu as PW-2. The plaintiff also marked Exs.P1 to P7. Ex.P1 was the Original Will dated 28.09.1995. Ex.P2 was the Original Will dated 05.12.1995. Exs.P3 and P4 were exchange of notices between the parties. Ex.P7 was the copy of the Death Certificate of Narayanaswamy Naicker.

10.The defendants did not examined any witness. They did not mark any documents.

11.Heard arguments advanced by Mr.C.Ramesh, learned counsel for



the plaintiff and Dr.G.Krishnamurthy, learned counsel for the defendants.

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12.Mr.C.Ramesh, learned counsel for the plaintiff stated that the original Will dated 05.12.1995 had been produced as Ex.P2. There were two witnesses in the said Will namely, Syed Kasim and K.Arumugam. Both the witnesses were not available and the plaintiff was not able to examine them. The learned counsel stated that therefore, the plaintiff had examined as PW-2 / E.Sarasu who was a third party to the proceedings and the daughter of the second attesting witness, K.Arumugam. She identified the signature of the second attesting witness K.Arumugam. The learned counsel stated that therefore the Will had been proved in manner known to law under Section 69 of the Indian Evidence Act, 1872.

13.In this connection, the learned counsel placed reliance on the judgment of the Hon'ble Supreme Court reported in **(2012) 4 SCC 387, Mahesh Kumar (Dead) by LRs. Vs. Vinod Kumar and others** and placed specific reference to the observation given in paragraph 47 that the absence of a recital in the latter Will that the earlier Will was canceled was not relevant since the execution of the second Will was duly proved and



therefore, the earlier Will automatically becomes redundant. This observation was relied on by the learned counsel since in Ex.P2 there was no mention about the earlier Will which was marked as Ex.P1 dated 28.09.1995. Under that Will, Narayanaswamy Naicker had bequeathed the suit property in entirety to his son and to the 1st defendant. The learned counsel further stated that the non examination of both the attesting witnesses would not be fatal to the case since both the attesting witnesses were not available and the plaintiff had examined the daughter of the second attesting witness who identified the signature of her father. The learned counsel therefore argued that the suit should be decreed and Letters of Administration must be granted.

14.Dr.G.Krishnamurthy, learned counsel for the defendants, however disputed these contentions . The learned counsel stated that there was an obligation on the plaintiff to prove the Will in accordance with law. The learned counsel argued that there must be strict compliance of the provisions as enunciated under Section 63(c) of the Indian Succession Act, 1925 and further of Sections 68 and 98 of the Indian Evidence Act, 1872. The learned counsel pointed out that in the Will there was no mention about the earlier



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Will and further argued that the deceased was aged 85 years at the time of his death and there was no document produced by the plaintiff to show that he was of sound and disposing state of mind at the time of execution of the Will. Further the Will had been executed in the year 1995 and the petition seeking probate had been presented on 24.04.2012 nearly after 16 years and more after the death of the testator. The explanation given is not convincing. He further pointed out that Narayanaswamy Naicker did not know English but the Will had been typed in English. He also pointed out that the unavailability of the attesting witnesses must be proved by the plaintiff before resorting to examine a third party as witness. The learned counsel argued that PW-1 himself had admitted that he did not know the first attesting witness Syed Kassim. The learned counsel stated that the Will had been prepared by the plaintiff with aim to grab the property. The learned counsel therefore urged that the suit should be dismissed.

15.I have carefully considered the arguments advanced and perused the material on record.

Issue No.1:



16.This issue is whether the Will dated 05.12.1995 said to have been executed by Mr.Narayanaswamy, the paternal uncle of the plaintiff, who died on 11.01.1996 was a true and genuine document.

17.Even before examining the evidence on record, it would only be appropriate to state the relevant provisions of law.

18.Section 63(c) of the Indian Succession Act, 1925 is as follows:

“63.Execution of unprivileged wills:

(a).....

(b).....

(c).The will shall be attested by two or more witnesses, each of who has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, 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.”



WEB COPY 19. Section 67 of the Bharatiya Sakshya Adhiniyam, 2023 which is equivalent to Section 68 of the Indian Evidence Act, 1872 is as follows:

“67.If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.”

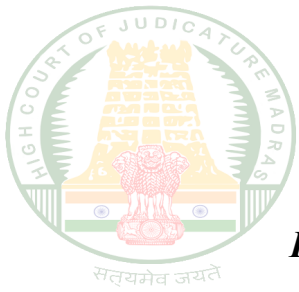
20. Section 68 of the Bharatiya Sakshya Adhiniyam, 2023 which is equivalent to Section 69 of the Indian Evidence Act, 1872 is as follows:

“68.If no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of this person executing the document is in the handwriting of that person.”



WEB COPY 21.In (2023) 8 SCC 537, *Ramabai Padmakar Patil (Dead) Through LRs. and others Vs. Rukminibai Vishnu Vekhande and others*, the Hon'ble Supreme Court had held as follows:

*“5. it will be useful to briefly notice the legal position regarding acceptance and proof of a Will. **Section 63 of the Indian Succession Act** deals with execution of unprivileged Wills. It lays down that 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. It further lays down that the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person sign the Will, in the presence and on the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. **Section 68 of the Evidence Act** mandates examination of one attesting witness in proof of a Will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the court while dealing with a case based upon a Will has been examined in considerable detail in several decisions of this Court viz. **H. Venkatachala Iyengar v. B.N. Thimmajamma [AIR 1959 SC 443]** , **Rani Purnima Debi v. Kumar Khagendra Narayan Deb [AIR 1962 SC 567]** and **Shashi Kumar Banerjee v. Subodh***



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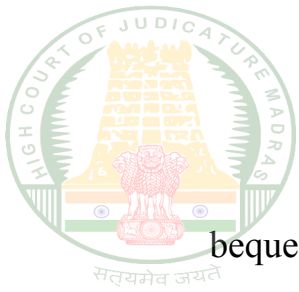
Kumar Banerjee [AIR 1964 SC 529] . It will be useful to reproduce the relevant part of the observations made by this Court in the Constitution Bench decision in Shashi Kumar Banerjee [AIR 1964 SC 529] which are as under: (AIR p. 531, para 4)

*“The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. **Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine.** Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. **The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant***



circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations.” (Emphasis Supplied)

22. In the instant case, the plaintiff, has sought grant of Letters of Administration of the Will dated 05.12.1995 said to have been executed by his paternal uncle Narayanaswamy. The Will had been marked as Ex.P2. In the said Will, which is typed in English in three sheets, the first two sheets are on Five Rupee Non-Judicial Stamp Papers. The testator Narayanaswamy had stated that he was of sound mind and health and had voluntarily executed the Will. He had however further stated that he was 85 years and during the last few months was growing weaker on account of old age. He



bequeathed 50% share of the suit property by the Will to the plaintiff who was his brother's son. In the Will he further stated that he had been growing weaker due to old age and was not able to even move. He further stated that the plaintiff was looking after his medical treatment and other necessities.

23. These statements in the Will contradict the earlier statement that he was of sound mind and health. He was obviously a very weak man aged about 85 years. The Will had been signed at the end of the page in Tamil. There were two witnesses to the Will. The first witness has not been examined and it is not known why he had not been examined by the plaintiff. The daughter of the second witness Mrs.E.Sarasu had been examined as PW-2. In her affidavit, she did not state when her father, the second attesting witness died.

24. During her cross examination, she was asked the following question:

“Q3: What was the age of your father when he died?”

A: I do not know.”



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25.This answer is very surprising. She did not even know the age of her father when he died.

26.For question No.9, she had answered as follows:

“Q9: Have you produced any proof to show that you are the daughter of Arumugam?”

A: Not produced. Witness Adds: I have Death Certificate and Aadhar Card.”

Again the Death Certificate and Aadhar Card had not been produced as documents.

27.For question Nos.10, 11 and 12 she had answered as follows:

“Q10: Do you know the age of Selvaraj?”

A: I do not know.

Q11: Have you seen Selvaraj?

A: Yes. He is from my Village.

Q12: Do you know Narayanaswami Naicker?

A: I do not know.”



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28.It is thus seen that even though she claimed that Selvaraj was from her village she did not know his age and she also did not know the testator Narayanaswamy.

29.Thereafter, her proof affidavit was shown to her and she asked whether she knew about the contents of the proof affidavit. Question No.14 is as follows:

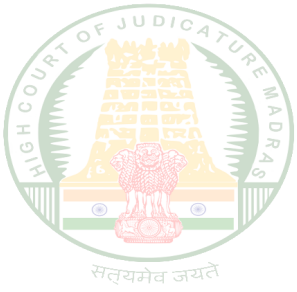
“Q14: Proof Affidavit is shown to the witness. Do you know the contents of the Proof Affidavit?”

A:I do not know the contents, I have signed in the Proof Affidavit.”

30.It is thus evident that the witness did not know the contents of the proof affidavit but had only signed the same. The evidence of the witness is wholly unsatisfactory.

31.Section 63(c) of the Indian Succession Act, 1925 outlines the requirements of the attestation of the Will. It states that the Will must be attested by two or more witnesses, each of whom had,

- i).seen the testator signing the Will.
- ii).seen each of the other signing the Will in the testator's presence.



iii).Each witness must sign the Will in the testator's presence.

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32.This provision is mandatory. In the Will in Ex.P2, it had only been stated that the testator had put his signature in Tamil in the presence of the witnesses and they also affixed the signature at the request of the direction of the testator and explaining the contents in Tamil. This is hardly sufficient. They must also have said that each one of them also signed in the presence of each other. I hold there is no proper compliance of the requirements under Section 63(c) of the Indian Succession Act, 1925. There is further no explanation given for not examining the first attesting witness.

33.In the Will, the testator himself had stated at more than one place that he was growing weaker on account of old age and was also unable to even move.

34.There is also no explanation given as to why the Will was typed in English when obviously the testator did not know English. If the contents of the Will had been read over to the testator and explained to him in Tamil then, it is mandatory that the attesting witnesses must be examined.



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35.The evidence of PW-2 would not come to the rescue of the plaintiff. She did not know her father's age when he died. She did not know the testator. She did not know the age of the plaintiff.

36.All the above are suspicious circumstances which surround the execution of the Will which compel the Court to scrutinize it extremely deeply before giving a stamp of approval.

37.The learned counsel for the defendants had placed reliance on the judgment of the Hon'ble Supreme Court reported in ***AIR 2023 SC 4787, Dhani Ram (died) Through LRs. And others V. Shiv Singh***. In that particular case, even though the Will was registered, the contents were scribed in English and the testatrix had affixed her signature in Hindi on each page. The attesting witnesses had also not stated that they signed the Will in the presence of the testatrix. The Hon'ble Supreme Court had held as follows in paragraph No.23.

“23.Viewed in the context of the legal requirements and the law laid down by this Court, we find that neither of the



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attesting witnesses in this case fulfilled the mandate of Section 63(c) of the Act of 1925 to prove the Will. Though Lok Nath Attri claimed that Leela Devi affixed her signatures in the Will in their presence, which was vehemently denied by the other attesting witness, Chaman Lal, the fact remains that Lok Nath Attri also did not state that he affixed his signatures in the Will in the presence of Leela Devi. This is one of the compulsory requisites of Section 63(c) of the Succession Act.”

38. Additionally, the Will had been executed in the year 1995. The testator Narayanaswamy had died in the year 1996. Ex.P2 Will dated 05.12.1995 surfaced only in the year 2012. In the petition, the only explanation given by the plaintiff is that the Will was handed over to him by the father Arumuga Naicker and he was not able to trace it immediately. This explanation is extremely unsatisfactory. Further there is no mention in the said Will of the earlier Will of Arumuga Naicker which had been marked as Ex.P1 dated 28.09.1995 which is a registered Will. All these factors point out to the only conclusion that the Will had not been proved in manner known to law.



WEB COPY 39. Further during his cross examination PW-1 answered as follows:

“Q11: When the Will was handed over to you?”

A: It was not handed over to me.”

It is seen that he had not properly explained as to how he got possession of the Will.

40. He further stated as follows in question No.13:

“Q13: Are you aware of the contents of your proof affidavit?”

A: I am not aware of the contents.”

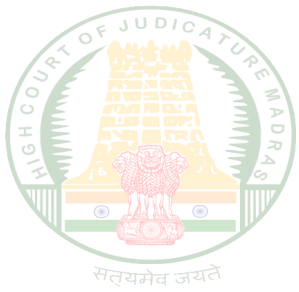
He was thus not aware of the contents of his own proof affidavit.

41. He had also admitted that the earlier Will was a registered Will. He had stated as follows to question No.21:

“Q21: It is correct to state that the First Will was registered on 28.09.1995 by Narayana Swami Naicker?”

A: Yes.”

42. He further did not disclose the existence of the Will in his reply notice dated 11.05.1998. The questions regarding the same are as follows:



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“Q23: A Legal Notice dated 23.03.1998 was issued by one Mari and you have issued Reply Notice for the same on 11.05.1998. it is correct?”

A: Yes.”

Q24: It is correct to state that you have given instructions to your Lawyer to issue Reply Notice?

A: Yes.

Q25: You have not stated in that Reply Notice with regard to the Will involved in this case?

A: I do not know.

Q26: You have stated in your Reply Notice that all the properties are Joint Family Property in which you also have share over it. It is correct?

A: Yes.”

43. With respect to the first attesting witness he had answered as follows:

“Q28: Who is Syed Kasim?

A: I do not know him.”



Thus he did not know the first attesting witness.

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44. With respect to how he came to the knowledge of the Will he had answered as follows in question Nos. 32 to 39:

“Q32: Who informed you about the Ex.P2 Will?

A: One Advocate Mr. Viji informed me.

Q33: Where is he living?

A: He is living at Tambaram and practising in Madras High Court.

Q34: When and where did you meet him at first?

A: In the year of 2013, I went to his house and met him.

Q35: It is correct to state that you came to know about the Will in the year of 2013?

A: Yes.

Q36: Whether he called you or you went to meet him?

A: I voluntarily went to meet him.

Q37: Do you know him before met him at first?

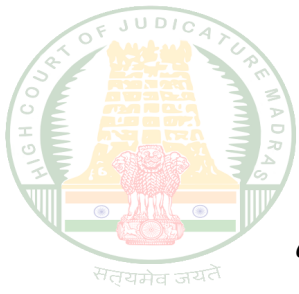
A: I know him.

Q38: How do you know him?

A: My sister-in-law was residing near his house.

Q39: Whether he has given the Will alone or along with other documents?

A: There was a bundle but I do not know what are all the



documents.”

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45.However, in the petition, he had stated that the Will was kept in safe custody by his father Arumuga Naicker and prior to his death the Will was handed over to him. Thus the plaintiff had not come to Court by disclosing the true facts relating to the discovery of the Will. In the plaint he had stated that his father had handed over the Will Ex.P2 to him. During his cross examination he stated that it was handed over by an Advocate Mr.Viji who was not examined as witness.

46.In view of the above reasonings, I hold that the Will is neither genuine nor true and the same had not been proved in manner known to law. Issue No.1 is answered against the plaintiff.

Issue No.2:

47.In view of the reasons advanced with respect to issue No.1, I hold that the relief sought by the plaintiff will have to be rejected and cannot be



granted.

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48.In the result, the Testamentary Original Suit stands dismissed. No costs.

25.07.2025

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Index : Yes/No
Neutral citation : Yes/No
Speaking order : Yes/No

List of witnesses on the side of plaintiff:

P.W.1 – Mr.A.Selvaraj

P.W.2 – Mrs.E.Sarasu

List of witnesses on the side of defendants:

Nil.

List of Exhibits:



Ex.P1	28.09.1995	Original Will executed by the testator Mr.Narayanaswamy Naicker.
Ex.P2	05.12.1995	Original Will executed by the testator Mr.Narayanaswamy Naicker.
Ex.P3	23.03.1998	Copy of the notice issued by the 1 st defendant's husband to the plaintiff.
Ex.P4	11.05.1998	Copy of reply notice issued by the plaintiff's advocate to the notice dated 23.03.1998.
Ex.P5	04.01.2013	Paper Publication effected in Makkal Kural.
Ex.P6	19.01.2013	Paper Publication effected in New Today.
Ex.P7		Computer generated copy of death certificate of Mr.Narayanaswamy Naicker (QR code available)

25.07.2025

C.V.KARTHIKEYAN,J.,

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Pre-delivery Judgment
in
T.O.S.No.68 of 2013

25.07.2025