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**IN THE COURT OF SENIOR CIVIL JUDGE & JMFC
NANJANGUD**

Present : **Sri. Kamalaksha D., B.A., LL.B.,**
Senior Civil Judge & J.M.F.C.,
Nanjangud.

Dated this the 6th day of December 2025

O.S./72/2017

Plaintiffs : N.Rani and another

-V/s-

Defendants : N.S.Shivakumari and others

I.A. XII

Applicant : Karthik
..... defendant No.4
(By Sri. M.J.S., Adv.)

-V/s-

Opponent: Rani and another
... plaintiffs
(By Sri. J.D., Adv.)

**ORDER ON I.A. XII UNDER SECTION 71
OF INDIAN EVIDENCE ACT**

The defendant No.4 has filed the said application to prove the registered Will as per Section 71 of Evidence Act.

2. In the affidavit the 4th defendant has sworn that, his grandfather N.N.Sakalaeshappa executed registered Will in his favour. So, the defendant No.4 has to prove the genuineness of Will because the plaintiffs are denying its validity. That the Will is devoid of the details of the witnesses like their full name, father's name, address, age etc. Due to lapse of time, the defendant No.4 unsuccessful in his attempt to trace them. Even the deed writer Shamanna is deceased long back. Hence, the defendant No.4 unable to trace the witnesses even through the deed writer. It is further sworn that, if the defendant No.4 is unable to prove the Will, then he will lose the property mentioned in the registered Will. It is not possible him to prove the Will as per Section 68 of Evidence Act. Therefore, he prays to allow him to prove the Will as per Section 71 of Evidence Act.

3. The plaintiff No.2 filed objections stating that, the application itself is not maintainable, because the defendant No.4 has not explained proper reason to take the help of Section 71 of Evidence Act to prove the Will. It is further submitted that, the applicant has not come before the court with clean hands and the applicant swearing the false affidavit and the contents of the affidavit are totally away from truth. The application is filed only to drag the matter, because the defendants simply prolonging the matter by filing one or another application continuously. The application is not in accordance with the provision of law. Hence, prays to dismiss the application.

4. Heard the arguments. Perused pleadings and materials placed on record. The points that arise for my consideration are:

1. Whether the defendant No.4 has made out grounds to permit him to prove the Will as per Section 71 of Evidence Act?
2. What order ?

5. The above points are answered as follows :-

Point No.1 : In the affirmative

Point No.2 : As per final order
for the following:-

REASONS

6. **Point No.1** :- The suit is filed for the relief of partition and separate possession. The plaintiffs have taken contention that, the suit schedule properties are the joint family properties, whereas the 4th defendant has taken contention that N.N.Sakaleshappa had executed Will on 25.03.1996 pertaining to the suit schedule properties. Therefore, N.N.Sakaleshappa allotted the properties in favour of Karthik S/o late N.S.Chandrashekar. The defendant No.4 has produced Will and it is marked as Ex.D.5. The learned counsel for the defendant No.4 argued that because of lapse of time he could not trace out the necessary information like author of the Will deed, signatories etc. Therefore, he prays to allow the application.

7. On the other hand, the plaintiffs deny the application stating that it is attempt to drag the proceedings. However, it is pertinent to note that the plaintiffs never denied the validity and existence of the Will deed. Section 71 of the Indian Evidence Act states that, if an attesting witness called to prove a document denies or does not remember its execution. The proof of execution of document can be proven using other evidence. This Section serves a safeguard to the mandatory requirement of calling an attesting witness under Section 68, providing an alternative way to prove the document when the witness fails to confirm execution. This rule is invoked when the attesting witness, despite being called to court for purpose of proving the document execution, denies it or claims not to remember it. The court can then resort to other form of evidence to prove that the document was indeed executed properly. It allows a party to prove the document execution by using Section 71 of Evidence Act. In the present matter, the applicant says that because of lapse of time he could not trace out the attesting witness, author of

Ex.D.5. As mentioned above, propounder of the Will can take the help of Section 71 when its attesting witness denies to give evidence about the execution of the such Will. But in the present matter, the socalled attesting witness is not know to the propounder of the Will. Strictly speaking, the 4th defendant cannot take assistance of Section 71 of Indian Evidence Act, because the said Section applies if attesting witness denies to give evidence on questioned Will.

8. Suppose the applicant/ defendant No.4 is not given chance to prove Ex.D.5 Will it would definitely cause injustice. If Sakaleshappa really executed Will then the defendant No.4 being the propounder or beneficiary may enjoy the properties shown in Ex.D.5. Suppose the Will is not proved then the plaintiffs can take share in the properties mentioned in the Will deed. Therefore, if the application is allowed it will not cause any injustice to the plaintiffs, because they can deny or rebut the Will in evidence. Suppose the application is rejected, it will

completely drive out the defendant No.4 to prove the validity of Ex.D.5 Will. Hence, point No.1 is answered **in the affirmative.**

9. **Point No.2:-** In view of the findings on the above point, this Court proceeds to pass the following:

ORDER

I.A.XII filed by the defendant No.4 under Section 71 of Indian Evidence Act is allowed. The defendant No.4 is hereby permitted to prove the Will as per Section 71 of Evidence Act.

(Dictated to the stenographer, transcribed by her on computer, revised, corrected and then pronounced by me in open Court on this the 6th day of December 2025).

(Kamalaksha D.)
Senior Civil Judge & J.M.F.C.,
Nanjangud.