

IN THE COURT OF ADDITIONAL DISTRICT MUNSIF, KULITHALAI

Present : Selvi.A.Yughathymariya, B.Com, L.L.B.(Hons.,)

Additional District Munsif, Kulithalai.

Dated Thursday, the 04th day of September 2025

I.A No.11/2025 in O.S No.62/2012

1) Mymoon BiBi **(died)**

2) Sulaiman

3) Muhammed Hanifa

4) Ahsen

5) Kathija BiBi

6) Subaitha BiBi

7) Aayisha BiBi

8) Jimlath Begam

9) Faritha Begam

10) Mabu @ Mabukan

11) Sarbuthin

12) Shajahan

13) Navaas

14) Renish

15) Rasitha Begam

16) Rajiya Begam @ Banumathi

...Petitioners/1 to 4 and 8 to 19 Defendants

- Vs -

1) Jaiboon BiBi **(died)**

2) Parveen

3) A.M. Rabik Basha

4) Ammu

5) Momala

.... 1 to 5 Respondents/Plaintiffs

- 6) Indian Bank represented by its Bank Manager, Kulithalai
- 7) The Regional Manager, The Indian Bank, Kulithalai.
- 8) Sub-Registrar, Kulithalai
- 9) Pathrun @ Banu

...6 to 9 Respondents/5,6,7 and 20 Defendants

This petition has come up for final hearing on 21.08.2025 before this Court in the presence of Mr. B. Malarkannan, the Learned Counsel appearing for the Petitioners and in the presence of Mr. R.M. Sivakumar, the Learned Counsel appearing for the Respondents No. 1 to 5 and Respondent No.1 is died and Respondents No. 6, 7 and 9 are called absent and set exparte and in the presence of the Government Pleader Mr. K.S.M. Sahul Hameed, the Learned Counsel appearing for the Respondent No. 8, upon perusal of material records and having stood over for consideration till this day, this court delivers the following:

ORDER

This petition is filed under Order 18, Rule 17 r/w Section 151 of CPC in order to recall the Defendants' side witness namely DW1 for the purpose of marking of certain documents.

2) The Respondent No.1 was already died. The Learned Counsel for the Respondent No.8 has endorsed that this petition may be allowed on terms. The Respondents No.6 and 7 were already set exparte in the above suit and hence set exparte in this petition as well. Though the Respondent No.9 appeared before this Court at the outset, despite sufficient opportunities given, the Respondent No.9 had failed to file counter and failed to represent before this Court. Hence, the Respondent No.9 was also set exparte.

Brief averments in the petition:

3) The 2nd Petitioner is the 2nd Defendant in the above suit and this petition has been filed on behalf of the other Petitioners. The above suit has been filed by the

Respondents/Plaintiffs against the Petitioners herein. In the above suit, on the side of the Defendants, DW1 was examined in full and the above suit was posted for further Defendant side witnesses.

4) At the time of examining DW1 in the above suit, the agreement dated 04.05.2000, executed between the 1st Plaintiff and the 1st Defendant in respect of a compound wall, has been marked as Ex.B11. In Ex.B11, the 2nd Petitioner has attested as the 2nd witness. In order to prove the document in Ex.B11, an interim application has been filed by the Petitioners in the above suit in order to summon the first attesting witness in the Ex.B11 document namely A.Muhammed Gows, S/o. Abdhul Kaboor and the same was allowed by this Court. Upon serving of summons to the above witness, the Petitioners have come to know that the said witness was no more.

5) In order to prove the signature of the above said witness, the Petitioners have come to know that in O.S.No. 378/1996 which was filed before the Kulithalai District Munsif Court, the above said attesting witness was the 1st Defendant and he also had filed a written statement in the above suit. Therefore, the copies of the said documents were obtained by the Petitioners by now only and they are necessary to prove their case. Therefore, this petition has been filed in order to receive the above documents on the side of the Defendants and for the same it is necessary to recall the DW1 in the above suit for the purpose of marking of the above documents necessarily. The Respondents would no way get prejudiced in allowing this petition. If this petition is not allowed, the Petitioners will be put to irreparable loss and hardships. This petition has prima facie. Hence, this petition to recall DW1.

Brief averments in the counter filed by the Respondent No.3 and adopted by the Respondents No. 2, 4 and 5:

6) All allegations contained in the petition are denied as false, frivolous, vexatious and mischievous. None of the Petitioners are parties to the documents intended to be

marked by them. The rule of evidence subscribes that only the party to the document can mark it, in order to prove its genuineness and other related matters could be questioned to the party either by way of chief examination or by way of cross examination. No document can be marked when a person is not a party to the document. In order to prove the signature of a person, the signatory has to enter into the box or the person conversant with the signature has to enter and then the document could be marked.

7) The object of marking the intended document will in no way advance the case of the Petitioners, as Ex.B11 is an unregistered document relating to an immovable property. Ex.B11 is invalid and therefore the petition to mark a document signed by a person who is no more will not serve any purpose in the present case.

8) The above suit relates to the year of 2012 and certain parties to the suit have passed away. The parties to the suit are many in number and previously, the Petitioners have filed sufficient number of petitions and have taken enough adjourments. This petition is yet another attempt to frustrate the proceedings. Even assuming without admitting that the signature in Ex.B11 and the signature on the document intended to be marked are identical, even then, the question whether the signatory has originally signed the Ex.B11 document or his signature has been duplicated or the signatory signed after understanding the same or the signatory signed it in blank or under coercion are all the matters of evidence which will still remain uncertain, as the signatory is no more. Therefore, the comparison of the signature alone will never make the Ex.B11 genuine.

9) The signature in Ex.B11 and the signature in the documents which were intended to be marked are seriously disputed. Hence, this petition is liable to be dismissed.

Point for determination:

10) Whether this petition is entitled to be allowed or not?

Evidence:

11) No oral and documentary evidence were adduced on either side.

Discussion:

12) Heard both sides. Perused records. Upon perusal of records, it is seen that the above suit has been filed by the Plaintiffs/Respondents No.1 to 5 against the Petitioners herein for the relief of Permanent Injunction thereby restraining the Defendants from interfering with the possession of the Plaintiffs over the suit "A" schedule property and for a Mandatory Injunction thereby directing the Defendants to remove the constructions put up by them in the "B" schedule property and to deliver the possession of the same to the Plaintiffs. It is the case of the Plaintiffs in the above suit is that the suit "A" schedule property was originally belonged to the father of the 1st Plaintiff namely Abdhul Rahim Sayabu. After the demise of the father of the 1st Plaintiff, the 1st Plaintiff and her family members have been in the possession and enjoyment of the suit "A" schedule property by way of constructing a brick house therein.

13) The Plaintiffs further contended that the Defendants are having land on the eastern side of the suit "A" schedule property and the Plaintiffs are using the 3 1/2 feet East-West pathway which is situated to the north of the Defendants' land in order to reach their property in "A" schedule. It was the further case of the Plaintiffs that the Defendants have encroached the land of the Plaintiffs over the southern portion of the "A" schedule property to an extent of East-West 5 feet and South-North 10 feet by way of constructing a building therein. The said encroachment was shown by the Plaintiffs as "B" schedule property.

14) It was the further case of the Plaintiffs that in respect of the “A” schedule property, instead of 31 feet in the East-West, Patta has been given to an extent of 27 feet and the Plaintiffs have come to know about the same before filing the above suit only. The Plaintiffs also contended that the Defendants, with the above fraudulent Patta have attempted to construct and encroach the suit “A” schedule property. Hence, the above suit has been filed.

15) Per contra, in the counter claim filed by the Defendants in the above suit, they have contended that they have not made any such encroachment over the Plaintiffs property and have denied the plaint averments. It was the further case in the counter claim that the said 3½ feet breadth East-West pathway belongs to the Defendants and the Plaintiffs have no right over the same. They have also contended that the said 3½ feet pathway has not at all been shown by the Plaintiffs in the description of property. The Defendants further contended that the 1st Defendant had purchased a property to an extent of East-West 38 feet and South-North 39 feet vacant site within the four boundaries specified, by way of a sale deed dated 10.06.1971 for a valuable sale consideration. The 1st Defendant has also been in the enjoyment of the Government poramboke land which is situated to the east of the property purchased by her and has been in the enjoyment of the same by way of constructing a mud house with thatched roof over the same. The Defendants also contended that they had also obtained Patta for the said land and the 1st Defendant had obtained proper permission from the Kulithalai Town Panchayat for constructing a brick house over the said land during the year of 1979 and had constructed a house above the basement which was earlier put up by her vendor Akbar.

16) To the north of the 1st Defendants land, there is a 3feet South-North vacant land which was left by the 1st Defendant in order to maintain the wall constructed in her property. This apart, within her land, the 1st Defendant in the northern corner had leftout a vacant land to an extent of 5 feet from the East-West as a pathway in order to reach her house from the Panchayat Road which is situated in the east of the same.

17) The Defendants further contended that on the requisition made by the 1st Plaintiff in order to use the above 5 feet East-West pathway to reach her land, the 1st Defendant had accepted the same and on 04.05.2000, an agreement was entered into between 1st Plaintiff and the 1st Defendant for constructing a wall by constructing the same in both the lands of the 1st Plaintiff and the 1st Defendant as well. The Wall which has been shown in the suit “B” schedule property was claimed by the Defendants to have been equally belonged to the 1st Plaintiff and the 1st Defendant.

18) Being so, the Defendants had contended that when they are not in the village, the Plaintiffs had encroached the said wall by way of construction of pipeline, windows and constructed bathroom in their land and are letting out the waste water towards the 1st Defendants’ house. The Defendants further contended that the Plaintiffs thereby encroached the said common wall and disturbed their possession and enjoyment over the same. Hence, the counter claim was filed for the relief of Mandatory Injunction thereby directing the Plaintiffs to remove the encroachment put up by them as stated above.

19) This being the facts of the above case, this petition has been filed by the Petitioners/Defendants No. 1 and 4, 8 to 19 in order to recall the Defendants side witness namely DW1, for the purpose of marking of certain documents. The above stated documents were none other than the written statement filed by one of the attesting witnesses to the Ex.B11 document namely A.Muhammed Gows S/o.Abdhul Kaboor in O.S.No.378/1996 which was filed before the Hon’ble District Munsif Court, Kulithalai. Upon perusal of records, it is seen that the very purpose of filing this petition is to recall the Defendant side witness namely DW1 for the purpose of marking the above documents in order to prove the signature of the deceased Muhammed Gows who had attested as one of the attesting witnesses in the Ex.B11 document. It is also seen that the said witness to the Ex.B11 namely Muhammed Gows was died. It is also seen that the petition filed by the Petitioners in the above suit in an Interim Application in I.A.No.10/2025 in order to examine the above witness was allowed by this Court and when the witness summons was served it was

returned as the above said witness died. Therefore, in order to mark the signature of the above said witness and for proving the Ex.B11 document, this petition has been filed by the Petitioners.

20) Per contra, the major objection that has been placed on the side of the Respondents No. 2 to 5 is that the signature of a person in a document has to be marked by way of examining the person who has actually made that signature or by the persons who has been well acquainted or conversant with the signature of that person only. Apart from the signatory, no person is entitled to mark a signature of other. This apart, the major objection of the Respondents No.2 to 5 is that Ex.B11 is an unregistered document relating to an immovable property and the object of marking the intended documents will no way advance the case of the Petitioners.

21) Also, the Respondents No. 2 to 5 had vehemently objected that this petition has been filed in order to frustrate the proceedings and prolong the above suit and further contended that even when marking the signature of the witness on the documents intended to be marked without admitting the same, the question whether the said signature was actually that of the signatory or it has been duplicated or the signatory whether had put such signature after understanding the contents or whether the same has been put under a coercion etc, are all the matters of evidence which will still remain uncertain, as the signatory is no more and they further contended that the comparison of the signature alone will never make the Ex.B11 genuine.

22) Upon considering the contentions of both sides and upon considering the submissions made by the counsels for both parties, this Court is of the view that the alleged documents intended to be marked through DW1, by recalling him in the above suit is for the purpose of proving the contents and execution of the document which was marked on the side of the Defendants namely Ex.B11. It is seen very clear that in order to prove the execution of the Ex.B11 documents, this petition has been filed by the Petitioners to recall DW1. It is also seen that the intended document is none other than the written statement filed by the attesting witness to the Ex.B11 in

O.S.No.378/1996 which was filed against the said witness before the District Munsif Court, Kulithalai.

23) Upon perusal of Ex.B11, it is seen that it is an unregistered document executed between the 1st Plaintiff and 1st Defendant in respect of a wall in their property. However, this being an unregistered document, the admissibility and the reliability of the same cannot be decided in this petition and it has to be decided by this Court only at the conclusion of the trial and at the time of pronouncing judgment. However, in order to prove the execution of the document in Ex.B11 only, this petition has been filed by the Petitioners to recall DW1 and to mark certain documents.

24) At this juncture, it is pertinent to rely upon Section 68 of the Indian Evidence Act which provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of Court and capable of giving evidence. Upon perusal of Section 69, it is seen clear that if no such attesting witness can be found, it must be proved that the attestation of one attesting witness atleast is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. Therefore, upon perusal of the above provisions of law, it is seen clear that in order to prove the execution of the document which is required by law to be attested, the same shall be done by way of calling and examining one attesting witness atleast if he is alive and subject to the process of the Court and capable of giving evidence.

25) Therefore, admittedly in the case on hand the 2nd Petitioner himself has admitted that he was also one of the attesting witnesses to the Ex.B11 document. Hence, this Court is of the view when one of the attesting witnesses to the Ex.B11 document namely the 2nd Petitioner herein is alive, the said document in Ex.B11 can very well be proved by way of examining the 2nd Petitioner himself as witness before this Court in order to prove the said document as he has also attested therein. Admittedly, it is seen that the yet another attesting witness namely A.Muhammed

Gows is dead and he is no more and hence he could not be called upon by this Court for the purpose of proving the same.

26) This apart, Section 69 of the Indian Evidence Act has categorically provided that when no such witness can be found then it must be proved that the attestation of one witness atleast is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. Therefore, by applying above provisions to the case on hand it is seen that Section 69 has no application to the present case and it can not be invoked without exhausting the provision contained under section 68. Therefore, without fulfilling the provision contained under section 68, the provision contained under section 69 cannot be invoked by the parties. In that way, when one of the attesting witness to the ex.B11 document namely the 2nd Petitioner herein who is himself alive, the same has to be proved by him only.

27) Moreover, the yet another attesting witness admittedly is no more and his signature can only be marked by the person who is very well conversant with his signature. However, no such plea was taken by the Petitioners that they are very well conversant with the signature of the said attesting witness. Therefore, this Court has come to the conclusion that this petition for recalling DW1 for the purpose of marking of the documents as stated in the petition affidavit is found to be not maintainable and this Court is inclined to dismiss this petition.

Result:

In result, this petition is dismissed. No costs.

Dictated to my steno-typist, taken down by her in short hand and typed by her in the computer, corrected by me and pronounced by me in the open court on this the 04th day of September 2025.

Sd/-A.Yughathymariya
Additional District Munsif,
Kulithalai.

Petitioners side witness and documents - Nil.
Respondents side witness and documents - Nil.

Sd/-A.Yughathymariya
Additional District Munsif,
Kulithalai.

