

IN THE COURT OF THE SUBORDINATE JUDGE, UDHAGAMANDALAM.

Present: Tmt. G. Bharathi Prabha, B.A., B.L.,

Subordinate Judge

Udhagamandalam

(J.O.Code: TN01448)

Friday, the 19th day of June, 2026

O.S.No.113 of 2023

CNR No.TNNS02-000147-2023

1. T.M.Bala Subramani
2. T.M.Sivaraman (Since deceased)
3. R.Kamala Devi
4. S.Ashok Kumar
5. Ananda Sivaraman

... Plaintiffs

-Vs-

T.M.Ganesan

... Defendant

This suit coming on 04.06.2026 for final hearing before this court, in the presence of Mr.C.Sasikumar, B.A., B.L., Advocate for the plaintiffs, and M/s.N.NarayananKutty,B.A(Law),LL.B., Advocate for the defendant and upon perusing the records and arguments and having stood over till this day for consideration, this Court delivered the following:-

JUDGMENT

The plaintiffs filed a suit for declaring the plaintiffs are the absolute owners of the suit schedule properties as per the Wills dated 20.10.1993, registered as Doc.Nos. 32/1993 and 33/1993 respectively in the office of the Sub-Registrar, Udhagamandalam, Joint II and directing the defendant herein to handover vacant possession of the suit schedule property to the plaintiffs and for costs of the suit.

2. The plaintiffs contented that, the suit schedule property originally belonged late T.S.Madia Gowder the father of the plaintiffs and the defendant. The said late T.S.Madia Gowder during his life time executed his Wills in respect of the schedule mentioned property with his desire that his properties devolve smoothly, one in favour of the 1st plaintiff and another in favour of the 2nd plaintiff dated 20.10.1993, registered as Doc.Nos.32/1993 and 33/1993 respectively in the office of The Sub-Registrar, Udhagamandalam, Joint-2. The above said late T.S.Madia Gowder had also executed another will in favour of the defendant dated 24.04.1994 registered as document No.18/1994 in the office of The Sub-Registrar, Udhagamandalam Joint-2. The above said late T.S.Madia

Gowder died on 02.09.1995. As per the Wills dated 20.10.1993, registered as Doc.Nos.32/1993 and 33/1993 respectively in the office of The Sub-Registrar, Udhagamandalam, Joint-2 the suit schedule property was allotted equally to both the plaintiffs. As per the Will dated 24.06.1994 registered as Doc.No.18/1994 in the office of The Sub-Registrar, Udhagamandalam Joint-2 the defendant was allotted with a house bearing Door No.5/154 situated at Dhavanai, within Kadanad panchayat. As there was a litigation pending in respect of the house property allotted to the defendant in I.A.No.649/2013 in O.S.No.299/1985 on the file of The District Munsif Court, Udhagamandalam the defendant has not occupied the said house property allotted to him and he is residing in the suit schedule property. After complaints made by plaintiffs to the police officials the defendant had given undertaking to the plaintiffs and also to the police officials that he will hand over possession of the suit schedule property after above said litigation ends. The litigation regarding the defendants house was ended in favour of the plaintiffs and the defendant family on 17.12.2018 and thereafter when the plaintiffs demanded the defendant to vacate the suit schedule property and to hand over possession to them the defendant wanted four years time to vacate the suit schedule property, after a period of four years when the plaintiffs demanded the defendant for vacant possession of the suit schedule property the defendant failed to comply the demands of the plaintiffs. The defendant is illegally occupying the suit schedule property with no other option the plaintiffs come with the present suit. Hence the suit.

3. The defendant contended that, the suit is false, frivolous vexatious and the same is not maintainable in law or on facts of the case. The plaintiffs do not have title to the property to seek possession and the suit is bad for not having sought declaration of title. The plaintiffs filed a suit before District Munsif Court, Udhagamandalam in O.S.No.61/2022 relating to the same suit schedule property and in the earlier suit they had asked for a prayer to handover the suit schedule property in 2 equal shares in the building bearing Old Door No.5/270 and New Door No.5/211 to the plaintiffs and 3 cents of vacant land in the suit schedule property to the 1^a plaintiff and the same was not pressed. On the perusal of the prayer in doth, the plaint is evident that the plaintiffs are blowing hot and cold. The prayer in earlier suit under Para 16(a) is very vague and in the present suit it is even more vague as there is a cloud on the title of the plaintiff and therefore a suit for possession without

declaration of title is not maintainable. The document marked as Document No.4 in the plaint namely certified copy of the mediation report in O.S.299/1985 dated 17.12.2018 was not pleaded or filed along with the earlier suit and therefore adverse inference has to be drawn with regard to the said document. As mentioned by the plaintiffs in Para No.5 a complaint was lodged by the plaintiff using their influence against the defendant in the land grabbing and the defendant was threatened and forced to sign on a white paper that he will vacate the house in 4 months in which the defendant was in possession for more than 32 years. The defendant complained to the SP. These facts were not stated by the plaintiffs when the case was filed before the District Munsif Court, Udhagamandalam. The defendant has been residing in the suit schedule property for more than 32 years to the exclusion of the plaintiffs. The plaintiffs were never in actual possession and enjoyment of the suit schedule property. The defendant is living in the suit schedule property along with his wife and children from the year 1990. This suit schedule property was just a godown in the year 1990 and the defendant renovated and built a house and shifted his wife and children to the suit schedule property. The defendant has been exercising acts of ownership and the possession of the defendant is continuous, interrupted without any objections or interference from any person whom so ever including the plaintiffs. The possession of the defendant is not alone continuous for more than 32 years but hostile to that of the plaintiffs and therefore the defendant has also acquired title by adverse possession. He has all supporting documents to prove that he has been living in the suit schedule property for more than 32 years and the supporting documents as Ration Card, Aadhaar Card, House Tax Receipts and Election ID proves the place of the residence of the defendant as Old Door No. 5/270C and New Door No.5/211, Kadanadu, Dhavani Village. A person can execute only one will and it is the last will and testament which will take effect and all the other previous wills if any will be invalidated. The plaintiffs in Para 3 of the plaint has pleaded that the defendants father has executed three registered wills namely Document No.32/1993 executed on 20/10/1993 and registered another will on the same day that is on 20/10/1993 as Document No.33/1993 and therefore the plaintiffs father has also executed another will on 24/6/1994 registered as Document No.18/1994 where in certain properties have been bequeathed to the defendant. On the execution of the registered will bearing No.18/1994 dated 24/6/1994 all the previous wills stood cancelled and no right flows from the same. The properties will not devolve on

any person as per Document No.32/1993 and Document No.33/1993 and the residue of the properties covered by the registered Document No.18/1994 will devolve in accordance with succession governing Hindus. The father is made a Will pertaining to a property over which he has no right even though it belongs to his wife and therefore no rights will flow from the said will in respect of the said property. The plaintiffs and the defendant's father had two wives through the first wife he has a son namely Krishnamoorthy and through the second wife namely madhiammal he has three sons namely 1.Balasubramani, 2.Sivaraman, 3.Ganesan and a daughter namely Vijayalakshmi. The plaintiffs has suppressed this fact and filed a suit without enclosing the legal heir certificate. Therefore the defendant is filing the legal heir certificate issued by the Thasildar in support of the same. Without prejudice to what is stated above the prayer sought for cannot be granted and the same is invalid in law. It is stated that without obtaining a preliminary decree for partition, the suit scheduled property cannot be shared between the plaintiffs leaving behind other legal heirs. The defendant states that the plaintiffs have not produced any document of title or revenue records of the suit schedule property. The payment of tax has been manipulated by the plaintiff by getting the same transferred in their name which has hitherto been paid by the defendant in his father's name. Hence, he prayed to dismiss the suit with cost.

4. On the basis of the above pleadings, the following issues are framed:-

Issues:

1. Whether the suit is hit by resjudicata?
2. Whether the defendant is entitled to the suit property through adverse possession?
3. Whether the Will executed by plaintiffs' and defendant's father dated 20.10.1993 in Doc.Nos.32/1993 and 33/1993 and on 24.06.1994 in Doc.No.18/1994 are valid and he has right to bequeath the suit property?
4. Whether the plaintiffs are entitled for declaration of title over the suit schedule property as prayed for?
5. To what other relief the plaintiff are entitled for?

5. **Additional Issue:**

1	Whether the plaintiffs are entitled to possession of the suit schedule property as prayed for?
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6. As the parties to this case had sufficiently participated in trial by let in evidence and have argued in length as to the reliefs sought for in the plaint, the additional Issue does not require reopening of the suit for the purpose giving opportunity to both side, hence, with the available evidence on record and the arguments advanced by either side, this case is considered for final disposal. The plaintiffs, in order to prove their case, examined 1st plaintiff as PW1 through proof affidavit and marked the Ex.A1 to Ex.A9 and one Mrs.T.M.Vijayalakshmi was examined as PW2 through proof affidavit and marked Ex.A10 to Ex.A12. On the side of the defendant, the defendant was examined as DW1 through proof affidavit and Ex.B1 to Ex.B4 were marked.

Issue No. 3:

7. The plaintiffs contend that the suit schedule property originally belonged to their father, Late T.S. Madia Gowder. During his lifetime, he executed two registered Wills dated 20.10.1993, registered as Document Nos.32/1993 and 33/1993 before the Sub-Registrar, Udthagamandalam Joint-II, under which the suit schedule property was bequeathed equally to the two plaintiffs. Subsequently, he executed another registered Will dated 24.06.1994, registered as Document No.18/1994, whereby a separate house property bearing Door No.5/154 at Dhavanai, Kadanad Panchayat, was bequeathed to the defendant. Late T.S. Madia Gowder died on 02.09.1995. Since litigation relating to the house allotted to the defendant was pending in I.A.No.649 of 2013 in O.S.No.299 of 1985, the defendant continued to reside in the suit schedule property. After police intervention, the defendant allegedly undertook to vacate the suit property after the disposal of the said litigation. The litigation ended on 17.12.2018 in favour of the family. Even thereafter, the defendant sought four years' time to vacate but failed to hand over possession after the expiry of the said period. Alleging that the defendant is in unlawful occupation, the plaintiffs have filed the present suit seeking recovery of possession.

8. In contra the defendant denies the plaintiffs' claim and contends that the suit is not maintainable either in law or on facts. He states that the plaintiffs have no valid title to the property and in the absence of a prayer for declaration of title, the suit for possession alone is not maintainable. He further contends that the plaintiffs had earlier filed O.S.No.61 of 2022 regarding the same property and had not pressed the relief claimed therein, and therefore the present suit is inconsistent with the earlier proceedings. He claims to have been

in continuous, open, exclusive and hostile possession of the suit property since 1990, during which period he renovated the existing godown into a residential house and has been residing there with his family. He relies upon documents such as ration card, Aadhaar card, election identity card and house tax receipts to establish his long possession and claims to have perfected title by adverse possession. The defendant also challenges the validity of the Wills relied upon by the plaintiffs. Once their father executed the subsequent registered Will dated 24.06.1994, the earlier Wills dated 20.10.1993 stood revoked. He further contends that some of the properties covered under the Wills did not belong exclusively to the testator and therefore could not have been validly bequeathed. He also states that the deceased had children through two wives and that all the legal heirs have not been impleaded. Without first obtaining a decree for partition, the plaintiffs cannot claim exclusive possession of the suit property. He also disputes the plaintiffs' title documents and alleges that the revenue records and tax entries have been manipulated in their favour.

9. The entire case of the plaintiffs is based on the registered Wills dated 20.10.1993. According to them, these Wills confer title over the suit property upon them. Therefore, it is for the plaintiffs to prove that the Wills were duly executed and attested in accordance with law.

10. Under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, a Will has to be proved by examining at least one attesting witness, if such witness is alive and capable of giving evidence. In the present case, though the plaintiffs have produced certified copies of the registered Wills, they have not examined any of the attesting witnesses to the Wills. No explanation has been offered for their failure to examine the attesting witnesses. Mere production of a registered Will is not sufficient to prove its execution.

11. The entire case of the plaintiffs is based on the Wills said to have been executed by their father, Late T.S. Madia Gowder. According to the plaintiffs, Late T.S. Madia Gowder executed two registered Wills dated 20.10.1993 in Document Nos.32/1993 and 33/1993 in their favour, whereby the suit schedule property was bequeathed equally to them. The plaintiffs have also admitted that their father subsequently executed another registered Will dated 24.06.1994 in Document No.18/1994 in favour of the defendant in respect of another property. The defendant has not denied the execution of the Will dated

24.06.1994. His specific defence is that the Will dated 24.06.1994 is the last Will executed by Late T.S. Madia Gowder and that the earlier Wills cannot be relied upon independently. He has also contended that the properties not covered under the last Will would devolve upon all the legal heirs. He has further disputed the right of the testator to bequeath certain properties by contending that some of the properties belonged to his wife. In view of the rival pleadings, the first question before this Court is whether the Wills relied upon by the plaintiffs have been proved in accordance with law.

12. The mere fact that the Wills are registered does not dispense with the statutory requirement of proving them in the manner known to law. Registration of a Will may be a circumstance supporting its genuineness, but registration alone is not proof of due execution and attestation. Unless the requirements of Section 68 of the Indian Evidence Act are satisfied, the Court cannot treat the Wills as duly proved. The evidence of PW1 and PW2 is also not sufficient to prove the execution of the Wills. Neither of them is an attesting witness to the Wills. Therefore, their oral evidence cannot substitute the legal requirement of examining at least one attesting witness.

13. The learned counsel for the plaintiffs argued that the defendant has not denied the execution of the two registered Wills dated 20.10.1993 executed by Late T.S. Madia Gowder in favour of the plaintiffs. According to the plaintiffs, the defendant himself has admitted that their father executed the said Wills and has only contended that the subsequent Will dated 24.06.1994 is the last and valid Will. Therefore, it is contended that the execution of the Wills dated 20.10.1993 stands admitted and there was no necessity for the plaintiffs to examine the attesting witnesses to prove the Wills.

14. A careful reading of the written statement shows that the defendant has not admitted the validity of the Wills dated 20.10.1993. His specific case is that though the earlier Wills were executed, the subsequent registered Will dated 24.06.1994 is the last Will executed by the testator and, therefore, the earlier Wills cannot confer any right upon the plaintiffs. Thus, the defendant has disputed the legal effect and enforceability of the earlier Wills. More importantly, a Will stands on a different footing from other documents. Section 68 of the Indian Evidence Act makes it mandatory that a Will shall not be used as evidence unless at least one attesting witness has been examined to prove its execution, if such witness is alive and capable of giving evidence. This requirement is a statutory requirement

and cannot be dispensed with merely because the opposite party has not specifically denied the execution of the Will.

15. The Hon'ble Supreme Court has consistently held that the execution and attestation of a Will must be proved in the manner prescribed under Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act before any right can be claimed under it. The burden always lies on the propounder of the Will to prove its due execution. Hon'ble High Court of Judicature, Madras in SA No.241 of 2015 Malliga Vs. P.Kumaran has held that

“19. A close look at all the above judgements makes it very clear that examination of attesting witness is mandatory only where the genuineness or validity of the Will is questioned. In cases where the Will has not been specifically denied or it has been admitted, it has been held that examination of attesting witnesses to a Will is unnecessary.

20. The law was once and for all settled by the Hon'ble Supreme Court in [Ramesh Verma (Dead) Through Legal representatives Vs.Lajesh Saxena (dead) by legal representatives and another] reported in 2017 1 SCC 257. The relevant portion in the judgement is extracted hereunder :-

“13. A Will like any other document is to be proved in terms of the provisions of Section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.”

21. The above judgement in no uncertain terms laid down the law to the effect that a Will shall not be used as evidence until it is proved in the manner

prescribed under Section

68 of the Evidence Act and this position cannot be diluted even if the opposite party has not specifically denied the execution of the Will.

22. It is also relevant to take note of the judgment of the Hon'ble Supreme Court in [Jagdish Chand Sharma Vs. Narain Singh Saini (Dead) through Legal representatives and others] in 2015 8 SCC 615. The relevant portions in the judgement is extracted hereunder :-

“21. As would be evident from the contents of [Section 63](#) of the Act that to execute the Will as contemplated therein, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further the signature or mark of the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect to the writing as Will. The Section further mandates that the Will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgement of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the Will in the presence of the testator. It is, however, clarified that it would not be necessary that more than one witness be present at the same time and that no particular form of attestation would be necessary.

22. It cannot be gainsaid that the above legislatively prescribed essentials of a valid execution and attestation of a Will under the Act are mandatory in nature, so much so, that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property.

22.1. In the evidentiary context [Section 68](#) of the Act 1872 enjoins that if a document is required by law to be attested, it would not be used as evidence unless one attesting witness, at least, if alive, and is subject to the process of Court and capable of giving evidence proves its execution. The proviso attached to this Section relaxes this requirement in case of a document, not being a Will, but 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.”

23. Even in the above judgement, the Hon'ble Supreme Court has reiterated the mandatory nature of [Section 68](#) of the Evidence Act and has categorically held that the proviso to the said section provides for a relaxation of the requirement only for a document other than a Will.

24. It will also be relevant to take note of the subsequent Division Bench judgement of the Kerala High Court in [Sarada Vs.Radhamani] reported in 2017 2 KLT 327.

1. A Will required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if he be alive and subject to the process of Court. Does this statutory mandate apply even while the execution of the Will by the person by whom it purports to have been executed is not specifically denied or expressly admitted? This is the precise question referred to the Division Bench by the learned single Judge for consideration in these Regular Second Appeals arising out of a preliminary decree for partition.

14. It is beyond cavil that a Will declaring the intention of a testator shall be attested by two or more witnesses under [Section 63\(1\)\(c\)](#) of the Indian Succession Act, 1825 (See: [Babu Singh v. Ram Sahai](#) (2008) 14 SCC 754). Therefore a Will required by law to be attested shall not be used as evidence until one attesting witness at least (if he be alive) has been called for proving its execution. The above is the mandate contained in the main body of [Section 68](#) of the Act and no exception has been carved out for a Will which is not specifically disputed or expressly admitted.

25. In the above judgement, the Division Bench of the Kerala High Court had fallen in line with the view expressed by the Hon'ble Supreme Court and in fact, at Paragraph 19 of the judgement, the Kerala High Court has declared the judgement in the earlier Division Bench in [Thayyullathil Kunhi Kannan](#) case referred supra as per incuriam.

26. The latest judgement on this issue from this Court was decided in [P.Radha Vs. Irudayadoss and others] reported in 2022 SCC online Mad 886 and it has been held as follows :-

24. The defendants have not examined any attestor of Exhibit A.4-Will in order to comply with the provisions of [Section 68](#) of the Evidence Act. The defendants have contended that when the plaintiff himself has admitted the execution of the Will, the question of invoking [Section 68](#) of the Evidence Act with regard to formal proof of the document is not necessary. However, I am not in agreement with the said contention in view of the judgments of the Hon'ble Supreme Court and our High Court.

25. The Hon'ble Supreme Court in a judgment reported in (2017) 1 SCC 257 in para 13 as held as follows:

“13. A will like any other document is to be proved in terms of the provisions of [Section 68](#) of the Evidence Act and the Succession Act, 1925. The propounder of the will is <https://www.mhc.tn.gov.in/judis> called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of [Section 68](#) of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.”

27. It is clear from the above judgement that the view expressed by the Hon'ble Supreme Court to the extent that [Section 68](#) of the Evidence Act is Mandatory for proof of Will, has been reiterated and the same view has to be once again reiterated in this case also.

28. The above narrative leads to the unescapable conclusion that both the Courts below erred in acting upon Ex.A6 Will without the same being proved as per the mandate prescribed under the [Evidence Act](#) and both the Courts below erroneously acted upon the Will merely based on the stand taken by the defendant. The Additional substantial question of law is answered accordingly in favour of the appellant.”

16. In the present case, the plaintiffs are claiming exclusive title to the suit property solely on the basis of the Wills dated 20.10.1993. Therefore, it was their duty to

prove the Wills in accordance with law by examining at least one attesting witness. Admittedly, no attesting witness has been examined, nor has any explanation been offered for such non-examination. Hence, this Court is of the view that the plaintiffs cannot avoid the statutory requirement of proving the Wills merely by contending that the defendant has admitted their execution. Such an argument is contrary to the mandatory provisions of Section 68 of the Indian Evidence Act.

17. It is also pertinent to note that the Will dated 24.06.1994 itself contains a recital that the testator had executed separate Wills in favour of his sons and daughter. However, such recital by itself does not dispense with the legal requirement of proving each Will independently in accordance with law. Even if the recital refers to earlier Wills, the plaintiffs must still prove the Wills on which they base their claim.

18. The defendant has argued that the Will dated 24.06.1994 being the last Will, the earlier Wills automatically stood cancelled. This Court is of the view that it is not necessary to decide that question in the present suit. The plaintiffs have sought recovery of possession solely on the basis of the Wills dated 20.10.1993. Since those Wills have not been proved as required under law, the plaintiffs cannot derive any title from them. Therefore, this Court need not decide the legal effect of the subsequent Will dated 24.06.1994 or the devolution of the remaining properties. The defendant has also contended that the testator had no right to bequeath certain properties as they belonged to his wife. No satisfactory evidence has been placed before this Court by either side to conclusively determine the ownership of those properties. Therefore, this Court is not inclined to record any finding on that contention, as it is not necessary for deciding the present suit.

19. Thus, this Court holds that the plaintiffs have failed to prove the Wills dated 20.10.1993 in Document Nos.32/1993 and 33/1993 in the manner required under Section 68 of the Indian Evidence Act. In the absence of such proof, the plaintiffs cannot claim title to the suit schedule property on the strength of those Wills. Consequently, the plaintiffs have also failed to establish that they are entitled to recover possession of the suit property from the defendant. Accordingly, Issue No.3 is answered against the plaintiffs.

Issue No.1:

20. It is admitted that the plaintiffs had earlier filed O.S. No.61 of 2022 in respect of the same property. The certified copy of the decree has been produced by the plaintiffs

themselves and marked as an exhibit. In the earlier suit, the plaintiffs had sought partition and separate possession of the suit properties. In the present suit, they seek recovery of possession of the very same property on the basis of the Wills. Though the nature of the relief is different, the dispute relates to the same property and arises out of the same alleged rights.

21. The plaintiffs have not produced the judgment or the order passed in O.S. No.61 of 2022 to show that the Court had granted them permission under Order XXIII Rule 1(3) of the Code of Civil Procedure to institute a fresh suit. The burden to establish such permission is upon the plaintiffs, especially when they have chosen to file another suit after withdrawing the earlier one. In the absence of the order permitting withdrawal with liberty to file a fresh suit, and when the decree merely records that the suit was dismissed as withdrawn, the conduct of the plaintiffs assumes significance. The plaintiffs have also not explained in the plaint why the earlier suit was withdrawn or under what circumstances the present suit came to be filed.

22. Even assuming that this Court refrains from recording a finding that the present suit is barred under Order XXIII Rule 1 of the Code of Civil Procedure in the absence of the withdrawal order, the withdrawal of the earlier suit without producing the order granting liberty is certainly a circumstance that goes against the plaintiffs. It further weakens their case, particularly when they have also failed to establish their title by proving the Wills in accordance with law.

23. Though a suit dismissed as withdrawn does not operate as **res judicata**, the plaintiffs, who rely upon the earlier proceedings, have failed to establish that they had obtained permission to institute a fresh suit. This omission assumes importance, particularly when the present suit concerns the same property and substantially the same dispute between the parties. However, this Court does not rest its decision solely on that ground. Even otherwise, the plaintiffs have failed to prove the Wills dated 20.10.1993 by examining any of the attesting witnesses as required under Section 68 of the Indian Evidence Act. The earlier suit was dismissed as withdrawn. Such dismissal does not amount to a decision on the merits and therefore does not operate as *res judicata*.

24. Accordingly, Issue No.1 is answered against the defendant. However, the plaintiffs have failed to establish that they had obtained liberty to institute a fresh suit after

withdrawing the earlier suit, and this circumstance has been taken into consideration while deciding their entitlement to the relief claimed.

Issue No.2:

25. The burden of proving adverse possession is on the defendant. To succeed on such a plea, the defendant must establish that his possession was open, continuous, exclusive and hostile to the true owner for the statutory period. Mere long possession is not sufficient. The defendant must further prove that he was holding the property with an intention to deny the title of the true owner and that such hostile possession was within the knowledge of the true owner. In the present case, PW1 has admitted during his cross-examination that the defendant has been in possession of the suit property since the year 1990. The defendant has also produced documents to show his residence in the suit property for several years. However, the defendant has also pleaded that the last Will dated 24.06.1994 is the valid Will and that the properties not covered by the said Will would devolve upon all the legal heirs. Thus, the defendant himself claims a right over the property as one of the legal heirs.

26. When a person claims title as a legal heir or co-owner, the burden is heavy to establish that his possession subsequently became hostile to the knowledge of the other co-owners. Except stating that he has been in possession for more than 30 years, the defendant has not produced satisfactory evidence to prove ouster or to establish the exact point of time from which his possession became adverse to the plaintiffs. In the present case, the defendant has pleaded that he has been residing in the suit schedule property along with his wife and children from the year 1990. According to him, when he entered the property, there was only a godown and he renovated it into a residential house by spending his own money. He has also stated that he has been paying house tax and has produced documents such as ration card, Aadhaar Card, Election Identity Card and house tax receipts to show that he has been residing in the suit property for several years. The evidence of PW1 also assumes importance. During his cross-examination, PW1 has admitted that the defendant has been in possession of the suit schedule property from the year 1990. This admission supports the defendant's case regarding his long possession of the property.

27. However, long possession alone is not sufficient to establish adverse possession. The defendant has to prove that his possession was hostile to the title of the true

owner throughout the statutory period. In the present case, the defendant has taken another specific defence that the Will dated 24.06.1994 executed by Late T.S. Madia Gowder is the last and valid Will. According to him, the properties not covered under the said Will would devolve upon all the legal heirs in accordance with the Hindu Succession Act. Thus, the defendant himself claims a right in the property as one of the legal heirs of Late T.S. Madia Gowder. When a person claims that he is entitled to the property as a legal heir or co-owner, such possession is normally treated as lawful possession and not hostile possession. To succeed in a plea of adverse possession against other co-owners, the defendant has to prove an act of ouster. In other words, he has to establish that he had openly denied the rights of the other co-owners and that such denial was known to them for the statutory period. Except making a general statement that he has been in possession for more than 30 years, the defendant has not produced any convincing evidence to show the exact point of time from which his possession became hostile to the plaintiffs. There is also no satisfactory evidence to prove that he had openly asserted an exclusive title against the plaintiffs or that the plaintiffs were excluded from the property by an act amounting to ouster.

28. The documents produced by the defendant, such as ration card, Aadhaar Card, Election Identity Card and house tax receipts, only establish that he has been residing in the suit property. They do not by themselves prove that his possession was hostile to the rights of the plaintiffs.

29. Therefore, this Court is of the view that the defendant has proved his long possession over the suit schedule property but has failed to establish all the essential ingredients required to perfect title by adverse possession. Accordingly, Issue No.2 is answered against the defendant.

Issue No.4:-

30. The plaintiffs have sought a declaration that they are the absolute owners of the suit schedule property on the strength of the Wills dated 20.10.1993 said to have been executed by their father, Late T.S. Madia Gowder. Therefore, the burden is upon the plaintiffs to establish their title by producing satisfactory and legally admissible evidence.

31. As already discussed while answering Issue No.3, the plaintiffs have based their entire claim on the Wills dated 20.10.1993 registered as Document Nos.32/1993 and 33/1993. Though the said Wills are registered documents, the plaintiffs have not examined

any one of the attesting witnesses to prove their due execution and attestation as required under Section 68 of the Indian Evidence Act. No explanation has been offered by the plaintiffs for not examining the attesting witnesses. Therefore, the Wills relied upon by the plaintiffs have not been proved in the manner known to law. The plaintiffs have also admitted that their father executed another registered Will dated 24.06.1994 as Document No.18/1994. In the said Will, the testator has stated that he had executed separate Wills independently in favour of his sons and daughter. However, that recital by itself does not prove the earlier Wills. Every Will has to be independently proved in accordance with law before any right can be claimed under it. Since the plaintiffs have failed to prove the Wills on which they rely, they cannot seek a declaration of title on the basis of those documents.

32. It is also seen from the records that the plaintiffs had earlier filed O.S. No.61 of 2022 in respect of the same property. The certified copy of the decree has been produced by the plaintiffs themselves. The decree shows that the said suit was dismissed as withdrawn. The decree does not disclose that liberty was granted to institute a fresh suit. Though the earlier suit by itself does not operate as *res judicata*, the plaintiffs have not produced the order passed in the earlier suit to show that they had obtained permission to file a fresh suit. This circumstance also creates doubt regarding the manner in which the present claim has been pursued.

33. It is a settled principle of law that a plaintiff seeking a declaration of title must succeed on the strength of his own title and not on the weakness of the defendant's case. Even if the defendant fails to prove every defence raised by him, the plaintiffs cannot be granted a declaration unless they independently establish their title by acceptable evidence. In the present case, the plaintiffs have failed to prove the Wills in accordance with law and have therefore failed to establish their title over the suit schedule property. Consequently, they are not entitled to the relief of declaration of title. Accordingly, Issue No.4 is answered against the plaintiffs.

Additional Issue No.1:

34. Once the plaintiffs have failed to establish their title, the burden does not shift to the defendant to prove adverse possession. It is a settled principle that in a suit for recovery of possession based on title, the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case. Therefore, irrespective of whether the

defendant has perfected title by adverse possession, the plaintiffs are not entitled to a decree for recovery of possession because they have failed to prove the very source of their title. The plaintiffs have sought recovery of possession of the suit schedule property from the defendant on the ground that they are the absolute owners of the property under the Wills dated 20.10.1993 executed by their father, Late T.S. Madia Gowder. Therefore, before claiming possession, the plaintiffs must first establish their lawful title over the suit property.

35. As already discussed while answering Issue No.3, the plaintiffs have failed to prove the Wills dated 20.10.1993 in Document Nos.32/1993 and 33/1993 in the manner required under Section 68 of the Indian Evidence Act. Though the Wills are registered documents, no attesting witness has been examined to prove their execution and attestation. Therefore, the plaintiffs have failed to establish that they acquired title to the suit property under the said Wills. Further, PW1 has admitted during his cross-examination that the defendant has been in possession of the suit schedule property from the year 1990.

36. The plaintiffs have contended that the defendant was allowed to occupy the suit property only as a temporary arrangement till the litigation relating to the property allotted to him was concluded. According to them, after the disposal of the said litigation, the defendant agreed to vacate the suit property but failed to do so. However, except the oral testimony of PW1 and PW2, no reliable documentary evidence has been produced to establish that the defendant's possession was only permissive. Though the plaintiffs have referred to an undertaking said to have been given by the defendant before the police, the same has not been proved in accordance with law. It is also seen that the plaintiffs had earlier filed O.S. No.61 of 2022 in respect of the same property and subsequently withdrew the suit. The certified copy of the decree produced by the plaintiffs shows that the suit was dismissed as withdrawn. The plaintiffs have not produced the order passed in the said suit to establish that they had obtained liberty to institute a fresh suit. Though this circumstance alone may not be sufficient to non-suit the plaintiffs, it is a relevant factor while appreciating their conduct and the overall merits of their claim. Hence, this Court holds that the plaintiffs have failed to establish their entitlement to recover possession of the suit schedule property. Accordingly, Additional Issue No.1 is answered against the plaintiffs.

Issue No.5:-

37. Having regard to the answers to the issues nos. 1 to 4 and additional issue

above, the plaintiffs are not entitled to any other reliefs in this case. This issue is answered accordingly.

38. In the result,

The suit is dismissed. Considering the facts, circumstances of the case and the relationship of the parties, the parties are directed to bear their own cost.

Dictated to Steno-Typist, typed by him directly in computer, corrected and pronounced by me in open court, on this the 19th day of June, 2026.

**SUB JUDGE,
UDHAGAMANDALAM.**

I. Plaintiffs Side Witnesses:

PW1 – Thiru. T.M.Bala Subramani (1st plaintiff)

PW2 - Tmt. T.M.Vijayalakshmi

II. Plaintiffs Side Exhibits:

Ex.A1	20.09.1993	Will	Original
Ex.A2	20.09.1993	Will	Original
Ex.A3	24.06.1994	Will	Original
Ex.A4	17.12.2018	Mediation report in OS.No.299/1985	Certified copy
Ex.A5	-	House Tax Receipts(5 Nos)	Original
Ex.A6	14.03.2023	Chitta extract	Online copy
Ex.A7	-	Electricity Board Card	Original
Ex.A8	10.02.2023	Judgment in OS.No.61/2022	Copy
Ex.A9	10.02.2023	Decree in OS.No.61/2022	Copy
Ex.A10	-	Aadhar card in T.M.Vijayalakshmi	Xerox copy
Ex.A11	20.09.1993	Will	Xerox copy
Ex.A12	-	Patta No.976	Online copy

III. Defendant Side Witnesses:

DW1 – Ganesan (defendant)

IV. **Defendant Side Exhibits:**

Ex.B1	-	Family card	Xerox copy
Ex.B2	-	Aadhar card in defendant	Xerox copy
Ex.B3	-	House Tax Receipts (7Nos)	Xerox copy
Ex.B4	-	Electricity Bills(6Nos)	Xerox copy

**SUB JUDGE,
UDHAGAMANDALAM.**

Sub Court, Udhagamandalam
Copy of Judgment

O.S.No. 113 of 2023

Dated 19.06.2026