



A.S.No.925 of 2001

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 23.11.2022

PRONOUNCED ON:02.06.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

**A.S.No.925 of 2001
and
C.M.P.No.15513 of 2001**

S.Natarajan : Appellant / 4th Defendant

Vs.

1.Sivanandi Thevar
2.M.S.Rajeswari
3.M.S.Vasanth(died)
4.M.S.Pandi(died)
5.M.S.Manoharan
6.M.S.Subbulakshmi : Plaintiffs 2 to 7/Respondents 1 to 6

7.R.Sugantha
8.N.Ponnuvel(died)
9.N.Sankara Pandian
10.Karur Vysya Bank Ltd.,
Chinnamanur, represented by its
Branch Manager,
275, Main road,
Chinnamanur,
Uthamapalayam Taluk,
Theni District.

11.State Bank of India,
Madurai City,
represented by its Branch Manager,



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Jones Building,
East Velly Street,
Madurai.

12.N.Kadiresan
13.S.Neelamegha Thevar : Defendants 1 to 3 and 5 to 8/
Respondents 7 to 13

14.Jayalakshmi
15.P.Swaminathan
16.Rajanarayanan
17.N.Chinnadurai
18.Muthumumar
19.Angayerkanni
20.Puspham
21.P.Selvam
22.Vijaya Samundeswari : Respondents 14 to 22

(Respondents 14 to 16 are brought on record
as L.Rs of the deceased R.8, vide order dated
11.08.2022 in C.M.P.(MD)No.7140 of 2022 and
C.M.P.(MD)Nos.8560, 8561, 8563 and 8564 of 2018)

(Respondent No.17 is brought on record as LR of the
deceased R.13, vide order dated 11.08.2022 in
C.M.P.(MD)No.7140 of 2022 and
C.M.P.(MD)Nos.8560, 8561, 8563 and 8564 of 2018)

(Respondents 18 and 19 are brought on record
as LRs of the deceased 3rd respondent vide order
dated 18.08.2022 made in C.M.P.(MD)No.7491 of 2022)

(Respondents 20 to 22 are brought on record as LRs
of the deceased 4th respondent vide order dated
18.08.2022 made in C.M.P.(MD)Nos.7141, 7492 and 7493
of 2022)



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PRAYER:- Appeal Suit filed under Section 96 of the Code of Civil Procedure against Judgment and Decree, dated 08.03.2001, made in O.S.No.133 of 1992, by the Principal Subordinate Judge, Madurai.

For Appellant : Mr.K.Govindarajan
for M/s Sarvabhauman Associates

For Respondents : Mr.A.Arumugam
for R.2
: Mr.K.Kumaravel
for R.9
: Mr.V.Ramakrishnan
for R.5, R.7 and R.12
: Mr.R.Pandivel
for R.10
: Mr.M.Ramesh
for R.14 to R.17
: Mr.S.Kanmani Annamalai
for R.18 to R.22
: Mr.K.S.Sundar
for R.11
: Mr.A.Thirumurthy
for R.6

JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.133 of 192, dated 08.03.2001, on the file of the Principal Subordinate Court, Madurai.



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2. The suit is for partition.

3. For the sake of convenience and brevity, the parties will hereinafter be referred as per their status/ranking in the original suit.

4. Originally the deceased first plaintiff has filed the above suit against six defendants. Admittedly, the deceased first plaintiff is the sister of the first defendant and they are the daughters of M.K.Ponnusamy Thevar. It is not in dispute that Ponnusamy Thevar had two wives viz., Kaliammal and Dhanalakshmiammal and both of them had pre-deceased their husband M.K.Ponnusamy Thevar, who died on 16.12.1991.

5. Pending suit, the only plaintiff had died and her legal representatives had been impleaded as plaintiffs 2 to 7. Pending suit, the defendants 7 and 8 have got themselves impleaded.

6. The case of the first plaintiff is that all the suit properties were owned by the deceased M.K.Ponnusamy Thevar, that the first plaintiff and the first defendant are the only daughters of the deceased Ponnusamy



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Thevar and as such, the first plaintiff and the first defendant have inherited his properties as his only legal heirs as per the provisions of the Hindu Succession Act, that both of them are entitled to get half share each in the suit properties, that the defendants 2 to 4 were impleaded as they are relatives of their deceased father for getting a binding adjudication on them, that the defendants 5 and 6 were impleaded as the amounts mentioned in the suit schedule are in their banks in the accounts of the deceased Ponnusamy Thevar and that therefore, the plaintiff has laid the above suit for partition of the suit properties into two shares and for allotment of one such share to the first plaintiff.

7. The defence of the first defendant is that their father Ponnusamy Thevar had executed a Will dated 21.11.1991 as his last Will and testament, that the said Will was deposited by the executant in the District Registrar Office, that the said Ponnusamy Thevar, through the said Will had allotted the properties shown in “A” schedule to the first plaintiff, “B” schedule to the first defendant, “C” schedule to both the first plaintiff and the first defendant, that the first plaintiff and the first defendant have been in possession and enjoyment of “A” and “B” schedule properties respectively and are in joint possession of “C”



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schedule properties, that “C” schedule properties shown in the Will alone remain to be partitioned between the first plaintiff and the first defendant, that the said Ponnusamy Thevar in the said Will dated 21.11.1991, has provided a separate schedule “D” for the private trust that had been created by him, that the said Ponnusamy Thevar had appointed one Kathiresan, his grand daughter's husband as Managing Trustee and allotted items 5 to 12, 27, 43, 50, 66, 73, 74 and 77 to the said Trust in the “D” schedule, that the defendants 2 to 4 who are strangers to the Estate of the deceased Ponnusamy are attempting to claim themselves as trustees for the Trust of Ponnusamy Thevar, that the defendants 2 and 3 have been projecting some documents purporting to be a Will dated 02.11.1991 allegedly executed by Ponnusamy Thevar, that the Will dated 02.11.1991 projected by the defendants 2 and 3 is false and forged, that all the prior deeds or Wills have been revoked by the deceased Ponnusamy Thevar by his last Will dated 21.11.1991, that the defendants 2 to 4 have absolutely no right or any interest in any of the suit properties, that the properties mentioned in “D” schedule of the said Will which belonged to the deceased Ponnusamy Thevar had also to be partitioned between the first plaintiff and the first defendant, that the first defendant is willing to hand over the properties allotted to the Trust to



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the trustees and that therefore, the preliminary decree can be passed in terms of the Will dated 21.11.1991 by allotting “A” schedule to the first plaintiff, “B” schedule to the first defendant and half share in “C” and “D” schedule to both the first plaintiff and the first defendant.

8. The case of the defendants 2 and 3 is that the deceased Ponnusamy Thevar was a pious and religious person and philanthropist, that the said Ponnusamy Thevar during his life time had established a mandagapadi at Gowmari Amman Temple at Periyakulam and he was performing the first day Utsavam Mandagapadi in the month of Ani every year and it was his desire that the said mandagapai should be performed for ever even after his life time, that the said Ponnusamy Thevar had executed a gift settlement deed dated 23.03.1958 wherein he directed that the charities detailed in the trust deed should be performed from out of the income of the suit properties in items 28, 30 and 77, that Ponnusamy Thevar appointed Neelamegam Thevar, his brother's son, father of the defendants 2 and 3, as Managing Trustee and the line of trusteeship was also indicated therein, that the said Ponnusamy Thevar was acting as additional trustee, that the suit items 28, 30 and 77 are not



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available for partition, as the income from the said properties was earmarked for certain charities.

9. It is the further case of the defendants 2 and 3 that the said Ponnusamy Thevar, while he was in sound state of mind and health, had executed a registered Will dated 12.11.1991, wherein he bequeathed suit items 1 to 3, 13, 14, 52 and 76 in favour of the defendants 2 and 3 and their brother Chinnadurai, that after the death of Ponnusamy Thevar, the said Will has come into effect and the suit properties have become the absolute properties of the defendants 2 and 3 and their brother Chinnadurai, that as per the directions in the Will dated 12.11.1991, the defendants 2 and 3 and their brother Chinndurai had performed the obsequies of Ponnusamy Thevar, that the suit item 52 is a house property let out to adult education centre and the defendants 2 and 3 are reserving their right to proceed against the said tenant as he has not paid rent for several months, that the third item of the suit property Ambassaddar car belonged to them absolutely as per the Will dated 12.11.1991, but the same was clandestinely taken away by the first defendant, that the suit is bad for non-joinder of Neelamegam and Chinnadurai and that the plaintiff has absolutely no cause of action against these defendants.



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10. The defence of the fourth defendant is that the said Ponnusamy Thevar had two brothers viz., N.K.Sankarapandia Thevar and N.K.Ramanatha Thevar and one sister viz., Sivakami Ammal, that three brothers constituted a joint Hindu family and all of them executed a trust settlement deed on 27.02.1942 called “Poolanandeeswarar Karthigai Urchavam” in respect two of their properties, that subsequently Ponnusamy Thevar, Ramanatha Thevar and the minor sons of Sankarapandia Thevar, including the fourth defendant entered into a registered partition on 19.10.1943, that the two properties shown in the “B” schedule along with the suit item 18 and Acre 4.38 in S.No.548 and Acre 0.83 in S.No.1098 are shown as Poolanandeeswarar Karthigai Trust properties, that Ponnusamy Thevar had put up Sithivinayagar temple in 3 cents of vacant land and executed a trust settlement on 23.03.1957 called N.K.Ponnusamy Thevar Chinnamanur Sithivinayagar Koil Trust, dedicating items 5 to 12, 27, 54, 71, 72, 74 and 75 of the suit properties for the said trust, that the said Ponnusamy Thevar had appointed Palanichamy, who is the step brother of the fourth defendant as a Managing Trustee, that the said Ponnusamy Thevar subsequently, on 19.12.1964 and 12.09.1965, purchased the suit items 66, 67 and 68 and



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dedicated the same to the trust, that subsequently Ponnusamy Thevar and Palanichamy had purchased item 73 of the suit properties for the trust, that Ponnusamy Thevar, after coming to know that the Managing Trustee Palanichamy was not behaving properly, executed a supplementary trust deed dated 07.01.1975 removing the said Palanichamy and appointed the fourth defendant to be the Managing Trustee for his life.

11. It is the further case of the fourth defendant that Ponnusamy Thevar had constituted another trust on 23.03.1958 as Periyakulam Sri Gowmariamman Koil Sarudanthra and Urchava Mutual (first) Mandagapai Trust and dedicated the suit ites 28, 30, 64 and 67 for the same, appointing Neelamegam – brother of the fourth defendant as the Manaing Trustee, that on 31.03.1972, the said Ponnusamy Thevar installed and consecrated a Flag Post (Kodimaram) for Chinnamanur Sri Poolanandeeswarar Devasthanam at his expenses and he wanted to celebrate the flag hoisting ceremony in a grand scale every year and executed a trust called “Poolanandeeswarar Devasthana Chitrai Matha Bramotsava Kodiyettru Vizha Trust” on 26.03.1977 for which he dedicated the suit items 44 to 49 and 65, for which he appointed himself as the first trustee for life and thereafter, the fourth defendant and heirs to



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be the trustees of the said trust, that the first plaintiff and the first defendant knew fully well that their father had voluntarily executed all the aforesaid trusts and dedicated various items of properties and that the first plaintiff and the first defendant by colluding each other have filed the above suit for partition suppressing the formation of trusts.

12. It is the further case of the fourth defendant that the suits items 15 and 16 relate to 2C patta in the name of Ponnusamy Thevar and after his lifetime, the fourth defendant applied to the revenue officials to transfer 2C patta in his favour, but the first plaintiff has purposely added the above items as if they are available for partition, that the suit item 76 which relates to rice mill was gifted to him orally by Ponnusamy Thevar and as such, the item 76 belongs to the fourth defendant exclusively, that since Ponnusamy Thevar had no sons, he was brought up by the said Ponnusamy Thevar and he was only instrumental in making the fourth defendant to study law, that the fourth defendant was looking after the said Ponnusamy Thevar as his father, as his own father had died in 1942 itself, that in the suit item 1, which relates to the two fixed deposits of Rs.50,000/- each, the said Ponnusamy Thevar has clearly referred the fourth defendant as nominee and as such the very inclusion of the fixed



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deposits in the suit properties is not proper, that the third item Ambassaddar car had been orally gifted to the fourth defendant by the said Ponnusamy Thevar, that though the first plaintiff and the first defendant had agreed to return the car, but the same was included as item available for partition, that the first plaintiff has suppressed many real facts in the plaint, that the first plaintiff is not in possession of any of the immovable properties referred to in the plaint and that since the first plaintiff has no cause of action to file the suit and the cause of action alleged is erroneous, the suit is liable to be dismissed with exemplary costs.

13. The sixth defendant Bank has filed a written statement stating that the deceased Ponnusamy Thevar had deposited Rs.1,00,000/- on 28.11.1990 by appointing the fourth defendant as the nominee, that as per the Banking Regulation Act, the nominee alone is entitled to get the amount and that since the suit is pending, without prejudice and to avoid further complications, the Bank is ready to retain the amount till the disposal of the suit.



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14. The fifth defendant Bank has also filed a written statement stating that a sum of Rs.18,762.58/- and Rs.14,855.70/- are available in the Bank accounts of Ponnusamy Thevar and that they are ready to pay the said amounts as directed by the Court.

15. The defence of the seventh defendant is that the said Ponnusawmy Thevar had executed his last Will on 21.11.1991 by appointing the seventh defendant and one Manoharan as trustees of the properties shown in tems 5 to 8, 10, 11, 12, 27, 54, 64, 66 to 75 and 77 and as such, the first plaintiff cannot claim partition in respect of those properties, that the defendants 2 to 4 are trying to take forcible possession of the said properties, that Ponnusamy Thevar through his last Will dated 21.11.1991, had categorically cancelled all the earlier documents and that therefore, the suit in respect of the above properties is liable to be dismissed.

16. The defence of the eighth defendant is that the deceased Ponnusamy Thevar during his lifetime, established a Mandagapadi at Gowmariamman temple at Periyakulam to be performed in the month of Ani every year, that the said Ponnusamy Thevar, in order to perpetuate



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the performance of Mandagapai, had executed a registered gift settlement deed, dated 23.03.1958 and wherein he directed the charities detailed therein should be performed from out of the income of the suit properties in tems 28, 30 and 77, that after the death of Ponnusamy Thevar, the eighth defendant has become the sole trustee cum Managing Trustee and the eighth defendant has been in possession and enjoyment of the three items of the properties mentioned above and that therefore, the first plaintiff or any other person cannot claim any right in the above three items of the properties and that therefore, the suit is liable to be dismissed.

17. The defendants 2 and 3, by filing additional written statement, have raised a stand that on 12.11.1991, when Ponnusamy Thevar executed a registered Will, he was in normal health and sound state of mind, that though the fourth defendant has been shown as nominee in respect of the first item of the properties, the same has been bequeathed to the defendants 2 and 3 and their brother Chinnadurai under his registered Will dated 12.11.1991 and as such, the fourth defendant cannot claim any right over the same, that the suit item 76 has been bequeathed to the defendants 2 and 3 and their brother Chinnadurai under the Will



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dated 12.11.1991 and the claim of the fourth defendant that the same was gifted to him orally, is false and untenable, that the fourth defendant has been attempting to snatch away some of the properties of the defendants 2 and 3 which have been gifted away by Ponnusamy Thevar under the said Will and that therefore, the claim of the fourth defendant in respect of some properties is false and untenable in law.

18. The fourth defendant has raised additional defence that Ponnusamy Thevar did not execute any Will during his lifetime and he died intestate, that the said Ponnusamy Thevar was very aged, sick, senile, almost deaf, had poor eye sight and had lost his mental capacity, that he had been hospitalised for some days before 21.11.1991, that when Ponnusamy Thevar was under treatment in Sumathi Hospital, Annanagar, Madurai, his physical condition was very bad and he was not in a position to comprehend the things that were going around him or to make any Will, that the alleged Will dated 21.11.1991 is a created document and it has been brought about with the collusion of obliging friends and relatives of the other defendants.



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19. It is the further case of the fourth defendant that Ponnusamy Thevar did not execute any Will on 12.11.1991 or any other date, that the fourth defendant had filed a suit in O.S.No.276 of 1992 before the Subordinate Court, Periyakulam against the third defendant and his brother Chinnadurai in respect of the suit item 76 and the same is pending and that the claim of the defendants 1 to 3 and 7 based upon the alleged fabricated Wills dated 12.11.1991 and 21.11.1991 should be rejected.

20. The first plaintiff has filed a reply statement stating that the deceased Ponnusamy Thevar during his life time, was in sound disposing state of mind, that he was bedridden only due to his old age and then expired, that the fourth defendant has purposely filed the additional statement only to grab some of the properties of Ponnusamy Thevar, that all the properties left by Ponnusamy Thevar have to be partitioned equally between the first plaintiff and the first defendant, that Ponnusamy Thevar had never executed any Will dated 12.11.1991 and that the defendants 2 and 3 have collusively created and fabricated a forged Will with a fraudulent intention to take away those properties, without any



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right and that therefore, the suit is liable to be decreed as prayed for with costs.

21. Upon considering the above pleadings, the learned trial Judge, has framed the following issues and additional issues:

1. Whether the plaintiff is entitled to half share in the suit properties?

2. Whether the plaintiff was in possession of “A” schedule properties and the first defendant was in possession of “B” schedule properties as per the terms of the Will dated 21.11.1991?

3. Whether the plaintiff and the first defendant were in joint possession of “C” schedule properties?

4. Whether Kathiresan was appointed as trustee, as per the Will dated 21.11.1991?

5. Whether the deceased Ponnusamy had executed the gift settlement deed dated 23.03.1958?

6. Whether Neelamega Thevar was appointed as a trustee?

7. Whether Ponnusamy Thevar had appointed the seventh defendant and Manoharan as trustees?



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8. Whether Ponnusamy Thevar had executed trust deed dated 07.01.1975?

9. Whether Ponnusamy Thevar had appointed the fourth defendant as Managing Trustee?

10. To what other relief, the plaintiff is entitled to?

Additional issues:

1. Whether the Will dated 12.11.1991 is genuine and is valid?

2. Whether the said M.K.Ponnusamy Thevar was in sound state of mind to execute a Will?

3. Whether the deposit of Will dated 21.11.1991 is true and valid?

4. Whether the defendants 2 to 4 are entitled to get the first item of the deposited amount?

5. Whether the 52nd item of the suit property was in possession of the defendants 2 and 3 or in possession of the fourth defendant?

6. Whether the oral gift alleged to have been made in favour of the fourth defendant in respect of the items 3 and 70 of the suit properties is true?

22. During trial, the plaintiffs have examined the sixth plaintiff

Manoharan as P.W.1 and adduced no documentary evidence. The first



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defendant has examined herself as D.W.1 and two other witnesses Thiru.Lakshmanan and Tmt.Bashiya Kabir as D.W.2 and D.W.3 respectively and the fourth defendant has examined himself as D.W.4. On the side of the defendants, 84 documents have been exhibited as Exs.D.1 to D.84 and two witness documents as Exs.X.1 and X.2. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the impugned judgment dated 08.03.2001, granting a preliminary decree, allotting the suit items 2, 22 to 26, 33, 43 to 51 to the plaintiffs and items 1, 3, 13 to 21, 31, 32, 34 to 42, 52, 53, 55 to 63, 65 and 76 to the first defendant and the fourth item of the properties to the plaintiffs and the first defendant jointly. Aggrieved by the above judgment and decree, the fourth defendant has preferred the present Appeal Suit.

23. The appellant, in his appeal, has raised the following grounds:

(a) The trial Court has travelled beyond the pleadings of the plaintiff and has taken into consideration the matters which are not germane and has considered the issues which do not arise for consideration in a suit for partition, that the only issue to be decided in the above suit is as to whether the plaintiff is entitled to a share in the suit



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properties as Class I heir of the deceased Ponnusamy Thevar, that the trial Court has failed to consider that the legal representatives of the first plaintiff cannot take a different stand that of the original plaintiff and they are bound by the allegations and claim made in the plaint, that the first defendant has claimed shares in the property on the basis of Ex.X.1-Will alleged to have been executed by the deceased Ponnusamy Thevar, but she has not made any counter claim.

(b) Since the first plaintiff has filed the suit for partition, it is not competent for the trial Court to decide the rights of the sixth and seventh defendants under Ex.X1-Will as against the appellant/fourth defendant and that therefore, the finding of the trial Court with regard to the above aspect is totally perverse and without jurisdiction. The learned trial Judge erred in virtually passing a final decree on the basis of Ex.X.1-Will and the same resulted in grave miscarriage of justice, as the trial Court has decided about the rights to trusteeship and that too in a very perfunctory manner. The learned trial Judge ought not to have framed the issues 4 to 9 and decided the same, as the plaintiff has not sought for any relief against the appellant and that therefore, the findings rendered on those issues is unwarranted and without jurisdiction. The properties which



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were long before given away to a Trust have been included and given away to the beneficiaries under the Will and the above aspect would go to show that the testator was not in a sound disposing state of mind and he was incapable of making a Will of his properties.

(c) The learned trial Judge failed to see that the suit items 43 to 50 have already been endowed to “Poolanandeeswarar Karthigai Utsavam Trust”, but those items have also been included in the “A” schedule of the Will which was allegedly allotted to the plaintiff and that therefore, the testator had no right or interest in those properties at the time of executing the alleged Ex.X1-Will. The first defendant has failed to clear the suspicious circumstances surrounding the execution of the Will and there is absolutely no evidence to show that the testator did really know and approve the contents of the Will in question before it could be admitted for probate. The learned trial Judge erred in observing that D.W.1 to D.W.3 have proved the Will and the fourth defendant has not brought out anything in cross-examination to shake the credibility of the said witnesses. The deceased Ponnusamy Thevar was admitted in the hospital on 14.11.1991 and he is alleged to have executed Ex.X.1-Will in the hospital on 21.11.1991 and that thereafter, he was discharged from



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the hospital and then had died on 06.12.1991. The parties alleging the Will have failed to prove the mental capacity of the testator to dispose of his properties. The first defendant herself has sent a telegram under Ex.B. 2 stating that her father did not have the necessary mental capacity to execute any document. According to her, her father had executed Ex.X.1-Will on 21.11.1991 and that the first defendant and the other beneficiaries of the Will had taken active part in the execution of the Will and the same causes a serious suspicion, but that was not satisfactorily explained by the propounder of the Will.

(d) The learned trial Judge has failed to see that apart from the interested oral evidence of P.W.1 and D.W.1 to D.W.3, there is no other evidence to prove the physical and mental condition of the testator and that the first defendant had not taken any steps to produce the medical records of the deceased Ponnusamy Thevar to prove his medical condition and that the Doctor who had attended, has also not been examined. The relationship between the first defendant and the deceased Ponnusamy Thevar was not cordial at that point of time, as the maintenance suit was filed by the husband of the first defendant on behalf of his sister, who is the wife of the testator and that allotting more



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properties to the first defendant under Ex.X1-Will creates a serious doubt about the genuineness of the Will itself. Neither the plaintiff nor the seventh defendant are entitled to stake their claim in respect of the trust properties and on the frame of the suit, no relief can be granted to the seventh defendant against the appellnat, who is only a co-defendant. The seventh defendant has not given any contra evidence to the evidence given by the appellant that he is a trustee and that the right of revocation of trusteeship could have been exercised only during the lifetime of the testator and the same cannot be done by executing a Will, which comes into operation only after the lifetime of the testator.

(e) The amount in the Bank deposit should be paid only to the nominee and if the plaintiff or the first defendant claims the same, they have to agitate the same by filing an independent suit and that the trial Court has practically converted a suit for partition into a suit regarding trusteeship and granted the reliefs which are outside the scope of the suit.

24. The points that arise for consideration are:

(1) Whether the trial Court erred in framing and deciding the issues with regard to the trusteeship, which are beyond the scope of the



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suit filed for partition and that thereby exceeded the jurisdiction?

(2) Whether the trial Court erred in granting the preliminary decree on the basis of Ex.X.1-Will alleged to have been executed by the deceased Ponnusamy Thevar, despite showing that the first defendant and the other beneficiaries have failed to prove that the testator was in a sound state of mind and in a position to execute a document?

(3) Whether the preliminary decree dated 08.03.2001 passed by the learned Subordinate Judge is liable to be set aside?

(4) Whether the Appeal Suit is to be allowed?

25. Originally, the first plaintiff alone has filed the suit against her own sister – first defendant claiming partition of the properties belonging to their father N.K.Ponnusamy Thevar alleging that he died intestate. The first defendant has taken a defence that her father Ponnusamy Thevar during his lifetime had executed his last Will on 21.11.1991 under Ex.X1 bequeathing his properties to his two daughters and also allotting some properties to the trusts founded by him. To put it in short, the first plaintiff has claimed half share in the suit properties by intestate succession, whereas the first defendant has claimed some of the suit



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properties by testamentary succession. As already pointed out, the first plaintiff alleging that their relatives – defendants 2 and 4 are claiming some rights over her father's properties, impleaded them to have a binding adjudication. No doubt, as already pointed out, pending suit, the defendants 7 and 8 claiming to be trustees of the trusts founded by the deceased Ponnusamy Thevar got themselves impleaded. After the death of the sole plaintiff, her legal representatives got themselves as the plaintiffs 2 to 7 and participated in the trial.

26. It is not in dispute that the deceased Ponnusamy Thevar, while he was alive had founded three trusts viz., Varasithi Vinayagar Koil Trust, Gowmariamman Koil Trust and Poolanandeeswarar Kodimaram Trust. As already pointed out, the defendants 2 to 4, 7 and 8 are claiming to be the trustees of the above said trusts and are claiming rights over some of the suit properties, which were allegedly earmarked for the said trusts. It is pertinent to note that though the plaintiffs have originally claimed partition by alleging that Ponnusamy Thevar had died intestate, after filing of the written statemen of the first defendant, the plaintiffs have practically accepted the case of the first defendant and claimed properties as per Ex.X1 – Will. It is also pertinent to mention that the



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fourth defendant is the main contesting defendant and apart from the first defendant, the fourth defendant alone has produced evidence and that he alone has challenged the judgment and decree passed in the above suit.

27. As rightly contended by the learned Counsel for the first defendant, except the fourth defendant, the other defendants have virtually accepted the judgment and decree of the trial Court. As already pointed out, the fourth defendant has disputed the genuineness of the Will under Ex.X1 and also the mental capability of the deceased Ponnusamy Thevar to execute the Will at the relevant point of time.

28. Before entering into further discussion, let us refer the legal proposition laid down by the Hon'ble Apex Court with reference to proving of Will, as quoted in the decision of the Hon'ble Supreme Court in ***M.R.Ramesh (Dead) by L.Rs Vs. K.M.Veeraje Urs (Dead) by L.Rs and others*** reported in ***2013(7) SCC 490***, wherein it has been held as follows:

“1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the ease of



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proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since [section 63](#) of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by [section 63](#) of the Evidence Act, 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.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of



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mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”



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29. Generally, a Will has to be proved in terms of Section 63 of the Indian Succession Act r/w Section 68 of the Indian Evidence Act. Any person who claims any benefit under the Will, has to prove and the onus is on the propounder of the Will to satisfy the conscience of the Court that it is the last Will of a free and capable testator and that he has to remove the suspicious circumstances surrounding the Will.

30. In the present case, the original Will alleged to be executed by the deceased Ponnusamy Thevar is produced and exhibited as Ex.X.1. The first defendant who initially propounds the Will, has examined D.W. 2 – Lakshmanan, one of the attestors of the Will and D.W.3 – Tmt.Bashia Kabir, scribe-cum-attestor of the Will. According to them, in Ex.X1 Will, the testator has bequeathed his properties to his two daughters – the first plaintiff and the first defendant and earmarked some properties for the trusts founded by him. Admittedly, the first plaintiff and the first defendant are the only daughters of the deceased Ponnusamy Thevar and though he married one Dhanalakshmiammal, he had no issues through his second wife.

31. Admittedly, the fourth defendant is the son of one



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N.K.Sankarapandia Thevar, who is none other than the own brother of N.K.Ponnusamy Thevar. Admittedly, the fourth defendant is not a legal heir of the deceased Ponnusamy Thevar. Though the fourth defendant has taken a stand that he was fostered as a son by Ponnusamy Thevar, he has miserably failed to prove the same. In cross-examination, the fourth defendant as D.W.4 would say

□என்னை மகன் மாதிரி பாவித்து வளர்த்து வந்தார். நான் வளர்ப்பு மகன் என்று சொல்லிக் கொள்ளவில்லை. சுவிகார பையன் என்று சொல்லவில்லை. அபிமான புத்திரன் என்று சொல்லவில்லை. மகனை விட மேலாக வளர்த்து வந்ததால் பாத்தியம் கொண்டாடுகிறேன். தனிப்பட்ட சொத்துக்களை பொறுத்தவரை மகனை விட அதிகமாக அன்பு காட்டியதால் அந்த சொத்துக்களுக்கு பாத்தியம் கொண்டாடுகிறேன். அந்த பாத்தியத்தை மகனை விட சிறந்த உறவு இருந்ததால் நான் பாத்தியம் கொண்டாடுகிறேன் என்று ரிட்டன் ஸ்டேட்மெண்டில் சொல்லவில்லை. மகனை விட சிறந்த உறவு என்பது சட்டத்தில் இல்லை. நடைமுறையில் உள்ளது.□

32. Considering the above, it is clearly evident from his admissions that he was treated neither as an adopted son nor as a foster



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son by the deceased Ponnusamy Thevar. D.W.4 would admit that apart from the trusts properties, Ponusamy Thevar had not executed any document in his favour in respect of the properties of Ponnusamy Thevar. If that be so, this Court is at loss to understand, as to, on what basis he is claiming the suit properties. As rightly contended by the learned Counsel for the first defendant, even assuming that Ponnusamy Thevar had died intestate or that Will was not held to be not proved, the fourth defendant is not a legal heir or successor to the estate of Ponnusamy Thevar by operation of of any law.

33. No doubt, as already pointed out, the fourth defendant has made his claim as a trustee appointed by the deceased Ponnusamy Thevar in respect of the trust founded by him and the same can be gone into at a later point of time. Except the claim on the basis of the trustee, as rightly contended by the learned Counsel for the first defendant, the fourth defendant has no locus standi to challenge the Will, nor the arrangements made by the deceased in respect of his properties.

34. It is the specific case of the first defendant that her father was admitted in Sumathi Hospital, Madurai on 14.11.1991, that after recovery



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to some extent, he directed the first defendant's daughter to bring D.W.3 - Tmt.Bashia Kabir for executing a Will, that as per the directions of Ponnusamy Thevar, the Will was prepared and the same was executed on 21.11.1991, in the presence of D.W.2 – Lakshmanan, Pandi and Sakthi Mohan and that as per the directions of Ponnusamy Thevar, the District Registrar was called for and the Will was deposited with the District Registrar. The first defendant in her evidence would depose about the execution of the Will elaborately, as she was very much present at that time. No doubt, as rightly contended by the learned Counsel for the appellant, the participation of the propounder or the other beneficiaries in the execution of the Will is a suspicious circumstances surrounding the Will. But the mere participation of the propounder or the beneficiaries, by itself, in the absence of any other strong grounds / reasons to suspect, cannot be considered as a suspicious circumstances sufficient enough to discard the Will.

35. As rightly pointed out by the learned Counsel for the first defendant, D.W.2 and D.W.3 would depose about the execution of Ex.X-1 Will in tune with the version of the first defendant. At this juncture, it is necessary to refer the evidence of D.W.3, who drafted and



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prepared the Will and also subscribed her signature as scribe and attesor,
which is extracted hereunder:

□17.11.91ல் வழக்கறிஞர் எனது நண்பர் சான்தா. அவரது தாத்தா உயில் எழுத வேண்டும் என்பதால் நாங்கள் வந்து எழுதிக் கொடுக்கும்படி என்னிடம் கேட்டார். மறுநாள் 18.11.91 அன்று சுமதி நர்சிங் ஹோமுக்கு நான் சென்றேன். மாலை சுமார் 4 மணிக்கு சென்றேன். 14.11.91 அன்று பொன்னுச்சாமி தேவரை சுமதி மருத்துவமனையில் உள் நோயாளியாக அனுமதித்திருப்பதாக சாந்தா என்னிடம் கூறியிருந்தாள். நான் பொன்னுச்சாமி தேவரை 18.11.91 அன்று பார்த்தேன். அவரது மனநிலை நன்றாக இருந்தது. என்னை வாம்மா என்று கூப்பிட்டார். எப்படி இருக்கிறே என்று கேட்டார். என்னை ஞாபகமிருக்கிறதா என்று கேட்டேன். நீ டாக்டர் சம்சாரம் உன்னை மறக்க முடியுமா என்று கேட்டார். எதுக்கு என்னை கூப்பிட்டீர்கள் தாத்தா என்று கேட்டேன். அதற்கு ஒரு உயில் எழுத வேண்டும் என்று சொன்னார். அதற்கு எழுதிக் கொடுக்க முடியுமா என்று கேட்டார். நான் சரி என்றேன். உயில் எழுத வேண்டியது சம்பந்தமாக விவரங்களை உங்களிடம் உள்ளதா என்று கேட்டேன். நீ நாளை வந்தால் அந்த விவரங்களை தருகிறேன் என்று கூறினார். தனது பேரன் மனோகரனை கூப்பிட்டு ஊரில் பீரோவில் உள்ள மஞ்சள் பையை எடுத்து வரச் சொன்னார். மறுநாள் மாலை சுமார் 4.30 மணிக்கு அங்கு சென்றேன். நான் எழுத ஆரம்பிப்பதற்கு முன் என்னிடம் இருந்து பேப்பரை வாங்கி பிள்ளையார் சுழி போட்டுக் கொடுத்தார். நீ இந்த சுழியை போட மாட்டாய் அதனால் நான் போடுகிறேன் என்று சொல்லி பேப்பரை



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என்னிடம் கொடுத்தார். உனக்கு தமிழ்வருடம் மாதம் தெரியுமா என்று கேட்டார். தெரியாது என்று சொன்னேன். அதனால் என்னடமிருந்து அந்ந பேப்பரை வாங்கி பிரஜோப்தி கார்த்திகை மாதம் என்று போட்டுக் கொடுத்தார். முதலில் சிவகாமி பேரை போட்டுக் கொள்ளச் சொன்னார். சில சர்வே நம்பர்கள் சொல்லி இவைகள் சிவகாமிக்கு சேரவேண்டியது என்று சொன்னார். பிறகு நான் சிவகாமி உங்கள் மகள் தானே அவருக்கு ஆட்டோமெட்டிக்கா சொத்து வருமே என்று சொன்னேன். அவசரப்படாதே அம்மா சொல்கிறேன் என்று சொன்னார். பின் சுகந்தா என்று போடச் சொல்லி சில சர்வே நம்பர்கள் சொன்னார். இவை சுகந்தா அடைந்து கொள்ள வேண்டிய சொத்துக்கள் என்று சொன்னார். சில பத்திரங்களின் ஜெராக்ஸ் நகல்களை கொடுத்து அதில் கண்டவாறு சொத்து விவரங்கள் எழுதிக் கொள்ளச் சொன்னார். அதன் பின் 2 டிரஸ்ட் இருப்பதாகவும் அதற்கு சில சர்வே நம்பர்களும் சொன்னார். இதற்கு முன் நான் எழுதிய உயில் சாசனம் டிரஸ்ட் பத்திரங்களையும் இதன் மூலம் ரத்து செய்கிறேன் என்ற வாசகத்தையும் உயிலில் நீ எழுத வேண்டும் என்று கூறினார். பிள்ளையார் சுழி போடும் போது, தமிழ்வருடம், மாதம் போடும் போதும் அவருக்கு கைமிகவும் நடுங்கியது. ஆகையால் 5, 6 பக்கங்களில் கையெழுத்து போட முடியுமா என்று கேட்டபோது கையெழுத்து போட்டால் வித்தியாசப்படும் என்றும் அதனால் நான் ரேகை வைத்து விடுகிறேன் என்று அன்றே கூறினார். அவ்விதமாக வாசகங்களை கண்டு உயிலை எழுதனா என்று கேட்ட போது அவ்வாசகங்களை கண்டும் நீ உயிலில் எழுதிவிடு என்று சொன்னார். நான் மறுநாள் வருவதாகக்



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சொல்லிவிட்டு போய்விட்டேன். நவம்பர் 20ம் தேதி நான் சுமதி நர்சிங் ஹோமுக்கு மாலை சுமார் 4 மணி அளவில் சென்றேன். நான் எழுதியிருந்த டிராப்ட் உயிலை அவரிடம் படித்து காண்பிப்பதற்காக எடுத்து சென்றேன். அந்த டிராப்ட் உயிலிலேயே அவர் கூறியது போல் கைநடுக்கமாக இருப்பதால் கை ரேகை வைக்கிறேன் என்று வாசகத்தை சேர்த்து எழுதியிருந்தேன். அந்த டிராப்ட் உயிலை என்னை படித்து காண்பிக்கச் சொன்னார். நான் படித்து காண்பித்தேன். அவர் என்னிடமிருந்து உயிலை வாங்கி தானும் படித்துப் பார்த்தார். பிறகு மதுரையில் உள்ள சொத்தை பொறுத்த மட்டிலும் மட்டும் சிவகாமி மற்றும் சுகந்தாவிற்கு சேர்ந்து பாத்தியப்பும்படி தனியாக சொத்து விவரம் எழுதச் சொன்னார். இது தவிர வேறு எந்த வித திருத்தமும் செய்யவில்லை. அவர் சொன்னது போல் மாற்றங்களை செய்து, அசல் உயில் தயாரிக்கச் சொன்னார்□

36. D.W.3 would depose elaborately about her meeting with the deceased Ponnusamy Thevar, instructions given by him and the drafting of the Will. As rightly contended by the learned Counsel for the first defendant, though D.W.3 was cross-examined at length, the above evidence was not at all shaken and nothing was elicited in their favour. Moreover, D.W.3 is an Advocate by profession and her husband was working as Dean of Madurai Medical College Hospital, at that time. D.W.3 would say that she was a Member in Madurai Taluk Anti-Dowry



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Prohibition Cell, Vice President of Madurai branch Red Cross Society, life member of Nehru Yuva kendra, Legal Adviser for Madurai Land Development Bank and Vice President of Tamil Nadu State Women Congress at that time.

37. D.W.2 – Lakshmanan was an Engineer, working in the Tamil Nadu Electricity Board at the relevant point of time and he would say that when he visited Ponnusamy Thevar on 21.11.1991 in Sumathi Hospital, he was requested by the deceased Ponnusamy Thevar to stay some more time for subscribing the signature as an attesting witness to the Will to be executed by him. It is necessary to extract the evidence of D.W.2, which is as follows:

21.11.2019 ஁ததி காலையில் மருத்துவமனைக்கு சென்ற ஁பாது, பாண்டி, திருமதி.கபீர். என்஁க.பொன்னுச்சாமி ஁தவர், கதந்தா, ஁வறு ஒரு நபர். அட்கு ஁ருந்தார். பின்னால் அவர் பெயர் ஁கட்டு தெரிந்தன். அவர் பெயர் ஁ாக்டர்.சக்தி஁மாகன், சாந்தாவும் ஁ருந்தார். சிறிது ஁நரம் ஁பசிக் கொண்டு பின்பு நான் அலுவலகத்திற்கு செல்ல ஁வண்டும் என்று சொன்னன். அதற்கு என்஁க.பொன்னுச்சாமி ஁தவர் சற்று பொறு என்றும் ஁ாக்குமெண்டில் சாட்சி கையெழுத்து ஁பாட ஁வண்டும் என்று சொன்னார். அவ்விதம் நான் சொன்னவுடன் நான் தட்சியிருந்தன். அச்சமயம் திருமதி.கபீர் அவர்களை அழைத்து ஁ாக்குமெண்டை கொடுக்கச் சொன்னார். திருமதி.கபீர் ஁ாக்குமெண்டை கொடுத்த



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ஸ்ரீமதி.கபீரே படிக்கச் சொல்லி என்.க.பொன்னுச்சாமி படிக்கச் சொன்னார். அவர் படித்துக் காண்பித்து பொன்னுச்சாமி உதவரிடம் கொடுத்தார். பொன்னுச்சாமி உதவரும் படித்துப் பார்த்தார். திருமதி.கபீர் அவர்களிடம் ஸ்டாம்பு பெற உகட்டார். ஸ்டாம்படை கொடுத்தவுடன் என்.க.பொன்னுச்சாமி உதவர் கைரகை வைத்தார். என்.க., கமார் 5, 6 பக்கம் என்.க.பொன்னுச்சாமி உதவர் கைரகை வைத்தார். என்.க.பொன்னுச்சாமி உதவர் கைரகை வைக்கும் ஸ்பாது நான் பார்த்துதன். பாண்டி, திருமதி.கபீர், டாக்டர்.சக்திமாதன் ஆகியார் என்.க.பொன்னுச்சாமி உதவர் கைரகை வைக்கும் ஸ்பாது பார்த்தார்கள். ரகை வைத்தவுடன் என்.க.பொன்னுச்சாமி உதவர் என்னிடம் டாக்குமெண்டை கொடுத்து முதலில் சாட்சி கையெழுத்து ஸ்பாட்ச் சொன்னார். எக். 1 ல் 5 பக்கத்தில் உள்ள ரகை என்.க.பொன்னுச்சாமி உதவரின் கைரகை தான் அதில் முதலாவதாக சாட்சி கையொப்பம் ஸ்பாட்பட்டிருக்கும் கையெழுத்து என்னுடைய கையெழுத்து தான். அதில் 2வது சாட்சி கையெழுத்து ஸ்பாட்டிருப்பது பாண்டி கையெழுத்து தான். 3வது சாட்சியாக ஸ்பாட்டிருப்பது டாக்டர் சக்திமாதன் தான். அதில் கடைசியில் தயாரித்தவரும், சாட்சியும் என்று கையெழுத்து செய்திருப்பது திருமதி.கபீர் தான். எக். 1 ல் என்.க.பொன்னுச்சாமித் உதவர் ரகை வைத்ததை நான் பார்த்துதன். பாண்டி, சக்திமாதன், திருமதி.கபீர் கையெழுத்து ஸ்பாட்டதை நான் பார்த்துதன். நான் கையெழுத்து ஸ்பாட்டதை, என்.க.பொன்னுச்சாமி உதவர், பாண்டி, டாக்டர்.சக்தி மாதன், திருமதி.கபீர் ஆகியார் பார்த்தார்கள். பாண்டி கையெழுத்து ஸ்பாட்டதை நான் பார்த்துதன். பொன்னுச்சாமி உதவர் பார்த்தார். நான் பார்த்துதன். டாக்டர் சக்திமாதன், திருமதி.கபீர் ஆகியோர் பார்த்தாம். டாக்டர்.சக்திமாதன் கையெழுத்து செய்ததை நான் பார்த்துதன். என்.க.பொன்னுச்சாமி உதவர் பார்த்தார். பாண்டி



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பார்த்தார். திருமதி.கபீர் பார்த்தார். திருமதி.கபீர் கையெழுத்து செய்ததை என்.க.பொன்னுச்சாமி ஁தவர் பார்த்தார். நான் பார்த்தேன். பாண்டி பார்த்தார். டாக்டர்.சக்திமாக்கன் பார்த்தார். திருமதி.கபீர் கையெழுத்து ஁போட்டவுடன் பொன்னுச்சாமி ஁தவரிடம் கவரில் வைத்து சீல் வைத்து திருமதி.கபீர் அம்மாள் என்.க.பொன்னுச்சாமி ஁தவரிடம் ஒப்படைத்தார்.”

38. D.W.3 also would reiterate the above aspects in her evidence and with respect to handing over the document to the District Registrar, D.W.3 would say that

“பின் நான் உயிலை பதிவு செய்து விடலாமா என்று கேட்டேன். அதற்கு அவர் பதிவு செய்ய வேண்டாம் டெபாசிட் செய்ய வேண்டும் என்று சொன்னார். அதற்குரிய ஏற்பாடுகளை நான் செய்து விடுகிறேன் என்று கூறி விட்டு நான் வீட்டிற்குச் சென்று விட்டேன்.□ 22.11.91 அன்று காலை சுமார் 8.34 மணி அளவில் சுமதி மருத்துவமனைக்கு சென்று விட்டேன். என்னுடன் எனது குமாஸ்தா வந்தார். சுமார் 9 மணி அளவில் சுமதி மருத்துவமனைக்கு மாவட்ட பதிவாளரும் அவருடன் அவரது அலுவலக சிப்பந்திகளும் வந்தனர். சுவாமிநாதனும் வந்திருந்தார். பொன்னுச்சாமி தேவர் மாவட்ட பதிவாளரிடம், நான் வைத்திருந்த கவரை கொடுத்து அந்த கவரில் தான்



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எழுதிய உயில் இருப்பதாக கூறினார். அதை மாவட்ட பதிவாளரிடம் பாதுகாப்பு டெப்பாசிட் செய்ய வேண்டும் என்று சொன்னார். அதற்கு மாவட்ட பதிவாளர் அந்த உறையின் மேல் உயில் இருப்பதற்கான வாசகங்களை எழுத சொன்னார். எக்ஸ்.எக்ஸ்.ல் கண்ட சுவரில் அவ்விதமான விளம்புகை எழுதப்பட்டுள்ளது. அவ்விதம் எழுதப்பட்ட விளம்புகைக்கு கீழ் பொன்னுச்சாமி தேவரின் இடதுகை பெருவிரல் ரேகையை வைத்தார். அந்த விளம்புகையிலேயே 7 அரக்கு சீல்கள் வைக்கப்பட்டுள்ளதை குறிப்பிட்டிருக்கிறது. அந்த அரக்கு சீலில் என்ன தடயம் உள்ளது என்பதை குறிப்பிட்டு மாவட்ட பதிவாளரே அந்த உறையில் எழுதி கையொப்பம் செய்தார். மாவட்ட பதிவாளர் போட்ட கையொப்பம் எக்ஸ்.எக்ஸ்.1ல் உள்ள கவரில் முன் பகுதியில் உள்ளது. வைப்பீடு செய்வதற்கான கட்டணம் பெற்றுக் கொண்டதற்கு செலுத்தியதற்கும் ஆதரவாக பொன்னுச்சாமி தேவரின் ரேகையை இடது கை பெருவிரல் ரேகையை மாவட்ட பதிவாளர் அந்த சுவரில் பெற்றுக்கொண்டார். அச்சமயத்தில் இவர் தான் பொன்னுச்சாமி தேவர் என்று நிரூபிக்க சாமிநாதனும், ப.இராமச்சந்திரனும் சாட்சி கையெழுத்து செய்தனர். அந்த சுவரை மாவட்ட பதிவாளர் அவருடன்



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கொண்டு வந்திருந்த பதிவேட்டில் பதிவு செய்து அவர்
தன்னுடன் எடுத்துச் சென்று விட்டார். அந்த கவரில் 3/ 91
என்ற நீரும் அதற்கு மாவட்ட பதிவாளர் கொடுத்தார்.□

39. As already pointed out, the above evidence of D.W.1 to D.W.3 with regard to the Will, are cogent and their credibility was not shaken during their cross-examination. Nothing has been brought in the cross-examination to create doubt any suspicion as to the truthfulness of the testimony of the said witnesses. It is admitted by all the parties that the deceased Ponnusamy Thevar is a pious and God fearing person and a great philanthropist. Since he was having only two daughters, he had bequeathed some of his properties to his daughters and at the same time, he had also made arrangements for continuation of the trusts which were founded by him in the said Will itself. Though the fourth defendant has taken a stand that the deceased Ponnusamy Thevar was not mentally alright and he was not in a position to execute the document, he has not produced any iota of evidence to substantiate the same. But on the other hand, D.W.1 to D.W.3 in their evidence would say categorically that Ponnusamy Thevar was alright mentally and physically and as per his instructions, the Will was prepared and executed. As rightly pointed by



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the learned Counsel for the first defendant, except the interested testimony of the fourth defendant, he has neither examined any other witness, nor produced any materials to prove the charges. Moreover, the fourth defendant has not shown any suspicious circumstances surrounding the Will. Considering the above, the findings of the trial Court with regard to the Will cannot be found fault with.

40. Now turning to the claim of the fourth defendant as trustee, it is not in dispute that Ponnusamy Thevar had originally executed a trust settlement deed dated 24.03.1958 under Ex.B.37, appointing one Palanichamy – his brother's son as the Managing Trustee of the Varasithi Vinayagar Temple trust and appointing himself as an additional trustee. It is also not in dispute that subsequently, Ponnusamy Thevar had executed a supplementary trust deed dated 07.01.1975, under Ex.B.41 and wherein he had removed the said Palanichamy from the management and appointed the fourth defendant, who is the son of another brother as the Managing Trustee. As rightly contended by the learned Counsel for the first defendant, Ex.B.41 is not a fresh trust deed or settlement deed, but it is only a supplementary deed to Ex.B.37. It is pertinent to note that in Ex.B.41, it has been specifically mentioned that the fourth defendant



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shall conduct the trust in terms of the trust deed ie., as per Ex.B.37.

41. It is the specific case of the plaintiffs and the defendants 1 and 7 that Ponnusamy Thevar by removing the fourth defendant as Managing Trustee, had appointed the seventh defendant who is the husband of his granddaughter, as the Managing Trustee and sixth defendant – his grandson, as another trustee and directed them to manage the trust and the properties shown in “D” schedule.

42. The main contention of the appellant/fourth defendant is that after appointing the fourth defendant as the Managing Trustee under Ex.B.41 and in terms of Ex.B.37, revocation of trusteeship could have been done only during the lifetime of the testator and the same cannot be done by executing Ex.X1 - Will, which will come into effect only after the lifetime of the testator.

43. As already pointed out, Ponnusamy Thevar had reserved his right to change the Managing Trustee in the original trust settlement deed under Ex.B.37 and after finding that the fourth defendant has not properly taken care of the trusts, while executing the Will, he had



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appointed the seventh defendant and the sixth plaintiff as trustees to take care of the trusts. Moreover, in Ex.X.1- Will, the testator has specifically stated that the seventh defendant and the sixth plaintiff are directed to take care of the trusts, after his lifetime and moreover, it has also been mentioned that he is cancelling the Will and the documents relating to the trust management executed by him earlier. Considering the above, the objections of the fourth defendant which is devoid of substance, is liable to be rejected.

44. Now coming to the next contention of the appellant/fourth defendant that the trial Court has exceeded its jurisdiction by enlarging the scope of the suit and granted the reliefs which were not claimed over by the plaintiff or by the defendants. It is the specific contention of the appellant that the trial Court should not have framed the issues relating to the trusteeship and committed a grave error in deciding the above issues which are totally beyond the scope of the suit.

45. It is pertinent to note that the fourth defendant alone has filed an elaborate written statement running to 27 paragraphs. Moreover, as rightly contended by the learned Counsel for the first defendant, the



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fourth defendant alone has raised pleadings with regard to the formation of trusts, earmarking of properties, appointment of managing trustees and other trustees.

46. Considering the above pleadings of the parties and more importantly, the lengthy written statement of the fourth defendant raising trusteeship aspects, the trial Court, after framing 10 issues originally, has framed 6 additional issues covering all the aspects. During trial, the fourth defendant has examined himself as D.W.4 and exhibited 63 documents as Exs.B.19 to B.84 on his side. As rightly contended by the learned Counsel for the first defendant, the fourth defendant, by raising pleadings with respect to the trusteeship, has invited the trial Court to frame the necessary issues and by adducing evidence, has invited the jurisdiction of the trial Court to decide the above issues. When the first plaintiff and the first defendant have claimed partition of the properties belonging to their father, the trusteeship tussle was raised by the fourth defendant and more particularly, the trusteeship dispute between the fourth defendant on one side and the seventh defendant and the sixth plaintiff on the other side. The fourth defendant has adduced more documentary evidence allegedly to prove that he is a trustee and thereby



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invited the trial Court to discuss the same and to arrive at a decision.

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47. The learned Counsel for the appellant/fourth defendant has relied on the following decisions and argued that the trial Court has no power or jurisdiction to go beyond the scope of the suit:

(i) ***Vimal Kishor Shah and others Vs. Jayesh Dinesh Shah and others*** reported in ***AIR 2016 SC 3889***, wherein the Hon'ble Apex Court has held as follows:

58) When we examine the Scheme of the Trust Act in the light of the principle laid down in condition No. 2, we find no difficulty in concluding that though the [Trust Act](#) do not provide any express bar in relation to applicability of other Acts for deciding the disputes arising under the [Trust Act](#) yet, in our considered view, there exists an implied bar of exclusion of applicability of the [Arbitration Act](#) for deciding the disputes relating to Trust, trustees and beneficiaries through private arbitration. In other words, when the [Trust Act](#) exhaustively deals with the Trust, Trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the Civil Court of principal original jurisdiction for redressal of their disputes arising out of Trust Deed and the



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Trust Act then, in our opinion, any such dispute pertaining to affairs of the Trust including the dispute inter se Trustee and beneficiary in relation to their right, duties, obligations, removal etc. can not be decided by the arbitrator by taking recourse to the provisions of the Act. Such disputes have to be decided by the Civil Court as specified under the *Trust Act*.”

(ii) ***Gulabrao Balwantrao Shinde and others Vs. Chhabubal***

Balwantrao Shinde and others reported in ***AIR 2003 SC 160***, wherein the Hon'ble Apex Court has held as follows:

“ *Civil P.C. (5 of 1908), O.6, R.1 and O.7, R.7 – pleadings – Court cannot make out a new case not pleaded – Suit for partition – Plaintiff claiming only half share in property – cannot be declared owners of entire property.* ”

(iii) ***Hari Sahu alias Harihar Sahu Vs. Smt.Janha Sahu and***

Others reported in ***AIR 1996 ORISSA 99***, wherein it has been held as follows:

“*Civil P.C. (5 of 1908), O.14, Ru.1 – Unnecessary issue – Suit for partition – Framing of issue regarding adoption of defendant and adjudication thereof by trial court – Not necessary for deciding the matter – Finding of court in regard to such issue, set aside.* ”



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(iv) Marikannu Vs. Alagammal (died) and others reported in 2019-5-L.W. 170, wherein this Court has held as follows:

“Petitioner wants the Court below to decide the inter-se title over the property as between the defendants and herself. This goes beyond the scope of the suit for specific performance. The judgment of the Hon'ble Supreme Court that has been cited by the learned Counsel for the petitioner will not have no application to the facts of the present case.”

48.The above decisions cannot be made applicable to the case on hand. As rightly contended by the learned Counsel for the first defendant, since the suit was decided against him, he cannot now turn around and say that the trial Court has exceeded its jurisdiction and decided the issues beyond the scope of the suit. No doubt, the fourth defendant has raised objections at the time of arguments that the trial Court ought not to have framed those issues, as the same are beyond the scope of the suit. But the learned trial Judge, by observing that the issues came to be framed only on the basis of the pleadings filed by both sides, rejected the objections raised by the fourth defendant. Considering the



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above, this Court is of the clear view that the fourth defendant is clearly estopped from raising such objections.

49. It is not the case of the fourth defendant that he had raised objections for framing those issues at that time itself or that he has taken any steps to delete or recast the issues already framed. Moreover, the fourth defendant has not offered any reason or explanation for adducing such huge documentary evidence allegedly to prove that he is a trustee in control of the trust and the property earmarked for the trust.

50. The learned Counsel for the appellant/fourth defendant would contend that the properties already earmarked for the trusts cannot be partitioned, as the testator himself has no right or power to deal with the same.

51. P.W.1 and D.W.1 in their evidence would admit that some properties were earmarked for the trusts founded by the deceased Ponnusamy Thevar. P.W.1 would say that items 55 to 62 were allotted to the “Poolanandeeswarar Karthigai Urchavam Trust”, that Ponnusamy Thevar had been using the said properties for the said Trust till his death,



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that he had founded Gowmariamman Koil Mandagapai Trust on 23.05.1958 by giving four items of properties which includes a rice mill, that he had earmarked six items of properties to the Varasithi Vinayagar Temple Trust and that even in the year 1958, he had given items 12, 27, 54, 71, 72, 74 and 75 to the Varasithi Vinayagar Temple trust. D.W.1 in her evidence would admit that her father had allotted items 28, 30 and 77 to Gowmariamman Koil Trust.

52. As rightly pointed out by the learned Counsel for the first defendant, Ponnusamy Thevar had allotted those items of properties to the trusts in “D” schedule of Ex.X1-Will. Though the plaintiff has included 77 items of properties as suit properties, now as per Ex.X.1-Will, the trial Court has passed the preliminary decree allotting items 2, 22 to 26, 33, 43 to 51 to the plaintiffs and items 1, 3, 13 to 21, 31, 32, 34 to 42, 52, 53, 55 to 63, 65 and 76 to the first defendant and item 4 to the plaintiffs and the first defendant.

53. It is pertinent to mention that the trial Court has specifically observed that the properties shown in the “D” schedule and particularly, the properties not shown in schedule A, B. C are the trust properties and



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as such, the plaintiffs and the first defendant cannot claim partition in respect of those properties and that the seventh defendant and the sixth plaintiff are the trustees as per Ex.X.1-Will and on that basis, granted preliminary decree. As rightly pointed out by the learned Counsel for the first defendant, though the fourth defendant has claimed ownership over rice mill alleging that it was gifted to him orally by Ponnusamy Thevar, he has not produced any iota of evidence to substantiate the same. As rightly observed by the trial Judge, the gift of immovable property having value of more than Rs.100/- cannot be made orally.

54. Considering the above, the granting of preliminary decree as per Ex.X.1-Will cannot be found fault with and this Court is in entire agreement with the findings recorded by the trial Court. Consequently, this Court concludes that the Appeal Suit is absolutely devoid of merits and the same is liable to be dismissed. Considering the other facts and circumstances of the case and the relationship between the parties, this Court further decides that the parties are to be directed to bear their own costs.



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55. In the result, the Appeal Suit is dismissed. The parties are directed to bear their own costs. Consequently, the connected Miscellaneous Petitions is closed.

02.06 .2023

Index : Yes : No
Internet : Yes : No
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To

- 1.The Principal Subordinate Court, Madurai
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

A.S.(MD)No.925 of 2001

02.06.2023