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S.A.Nos. 81 & 82 of 2019**IN THE HIGH COURT OF JUDICATURE AT MADRAS****JUDGMENT RESERVED ON : 22 / 08 / 2024****JUDGMENT PRONOUNCED ON : 25 / 11 / 2024****CORAM:****THE HONOURABLE MR. JUSTICE R.SAKTHIVEL****S.A.NOS. 81 AND 82 OF 2019****S.A.NO. 81 OF 2019**

1.K.M.Muthusamy

2.Pavayammal

... Appellants 1 & 2 /
Respondents 2 & 3 /
Defendants 2 & 3

Vs.

1.Gokul Raghukumar

... Respondent /Appellant /
Plaintiff

2. Kongu Vellalar Institute of Technology
Trust represented by its Secretary
Engineering College Campus,
Perundurai – 638 052.

... 2nd Respondent /
1st Respondent /
1st Defendant

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree dated January 30, 2018 passed in A.S.No.105 of 2017 by the learned II Additional District Judge, Erode reversing the Judgment and Decree dated December 22, 2016 passed in O.S.No.172 of 2013 by the learned Subordinate Judge, Perundurai.

For Appellants : Mr.A.K.Kumarasamy



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S.A.Nos. 81 & 82 of 2019

Senior Counsel
for M/s.S.Kaithamalai Kumaran

For Respondent-1: Mr.T.Murugamanickam
Senior Counsel
for M/s.Zeenath Begum

For Respondent-2 : No appearance

S.A.NO. 82 OF 2019

1.K.M.Muthusamy
2.Pavayammal

... Appellants 1 & 2 /
Respondents 1 & 2 /
Plaintiffs 1 & 2

Vs.

1.K.M.Ramasamy
2.Gokul Raghukumar

... Respondents 1 &2 /
Appellants 1 & 2/
Defendants 1 & 2

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree dated January 30, 2018 passed in A.S.No.104 of 2017 by the learned II Additional District Judge, Erode reversing the Judgment and Decree dated December 22, 2016 passed in O.S.No.318 of 2009 by the learned Subordinate Judge, Perundurai.

For Appellants : Mr.A.K.Kumarasamy
Senior Counsel
for M/s.S.Kaithamalai Kumaran

For Respondents : Mr.T.Murugamanickam
1 and 2 Senior Counsel
for M/s.Zeenath Begum



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S.A.Nos. 81 & 82 of 2019

COMMON JUDGMENT

The Second Appeal in S.A.No.81 of 2019 is directed against the Judgment and Decree dated January 30, 2018 passed in A.S.No.105 of 2017 by the 'II Additional District Court, Erode' [henceforth 'First Appellate Court'] reversing the Judgment and Decree dated December 22, 2016 passed in O.S.No.172 of 2013 by the 'Subordinate Court, Perundurai' [henceforth 'Trial Court'].

2. The Second Appeal in S.A.No.82 of 2019 is directed against the Judgment and Decree January 30, 2018 passed in A.S.No.104 of 2017 by the 'II Additional District Court, Erode' [henceforth 'First Appellate Court'], reversing the Judgment and Decree dated December 22, 2016 passed in O.S.No.318 of 2009 by the 'Subordinate Court, Perundurai' [henceforth 'Trial Court'].

3. The facts, issues and parties involved in both these Second Appeals are essentially the same and both the Second Appeals are arising out of a Common Judgment. Hence, they both will be governed by this Common Judgment.



4. For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit in O.S.No.318 of 2009 before the Trial Court.

CASE OF THE PLAINTIFFS IN O.S.NO. 318 OF 2009

5. One Muthu Gounder, son of Nalla Gounder, had two sons viz., first plaintiff and first defendant, and one daughter viz., second plaintiff. Second defendant is the son of first defendant. The plaintiffs, first defendant and their father lived together as a joint family. The joint family owned the Suit Properties and other properties. The joint family properties excluding the Suit Properties were partitioned between the first plaintiff, first defendant and their father – Muthu Gounder vide Partition Deed dated October 26, 1994. The Suit Properties have been kept in common.

5.1. Muthu Gounder passed away on December 22, 2005 leaving behind the plaintiffs and first defendant as his legal heirs. In 2005, in view of the Hindu Succession Act, 1956 (henceforth 'H.S. Act') as amended by 'the Hindu Succession (Amendment) Act, 2005 (Act No.39 of 2005)' (henceforth '2005 H.S. Amendment Act'), the second plaintiff became entitled to coparcenary rights over the Suit Properties.



5.2. When the plaintiffs demanded partition, the first defendant alleged that Muthu Gounder had executed a Will bequeathing the Suit Properties in favour of first defendant's son viz., second defendant. The alleged Will is forged and fabricated as Muthu Gounder was not in a disposing state of mind at the time of its execution. Moreover, Muthu Gounder himself had only $\frac{1}{4}$ share in the Suit Properties being joint family properties and hence, he had no right to execute the alleged Will in respect of entirety of Suit Properties. Further, Muthu Gounder had filed a Suit in O.S.No.870 of 1995 on the file of IInd Additional Subordinate Court, Erode against the first defendant herein, wherein he clearly described the Suit Properties as joint family properties.

5.3. Furthermore, the Sale Deed executed by a third party in favour of Kongu Vellalar Institute of Technology Trust, the first defendant in O.S.No.172 of 2013, does not bind the plaintiffs. The defendants have also managed to mutate revenue records in their names, which are not valid and binding on the plaintiffs. The first defendant failed to reply to the Notice sent by plaintiffs. Hence, the Suit for partition and separate possession.



CASE OF THE DEFENDANTS IN O.S.NO. 318 OF 2009

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6. The defendants filed a written statement denying the averments made in the plaint. They admit the relationship between the parties. Further they admit that Muthu Gounder passed away on December 22, 2005 and that joint family properties excluding the Suit Properties were partitioned vide Partition Deed dated October 26, 1994. However, they deny that the Suit Properties are joint family properties.

6.1. According to them, the Suit Properties except Survey No.31/3 were originally purchased by Muthu Gounder's father – Nalla Gounder vide Sale Deeds dated August 5, 1922 and May 19, 1922. Muthu Gounder inherited all the Suit Properties as his separate properties. Muthu Gounder was in exclusive possession and enjoyment of these properties, paid Kist, and had revenue records in his name.

6.2. Further, Muthu Gounder executed Will dated May 20, 2002, while he was in a sound and disposing state of mind, bequeathing the Suit Properties to his grandson, the second defendant. The Will was acted upon and the second defendant is in exclusive possession and enjoyment, revenue records stand in his name, and has also been paying



Kist. Hence, the Court Fee paid under Section 37 (2) of the 'Tamil Nadu Court-Fee and Suits Valuation Act, 1955' ['T.N.C.F. Act' for short] is incorrect.

6.3. They admit that the Suit R.Survey No.31/3 is undivided and one Palaniappa Gounder is entitled to half share therein. Hence, the Suit is bad for non-joinder of Palaniappa Gounder, who is a necessary party. Thus, the defendants sought to dismiss the Suit.

CASE OF THE PLAINTIFF IN O.S.NO. 172 OF 2013

7. The plaintiff in O.S.No.172 of 2013 is the second defendant in O.S.No.318 of 2009. He has averred that the Suit Properties were bequeathed to him by Muthu Gounder vide Will dated May 20, 2002, who acquired the Suit Properties as his separate properties as stated in the written statement in O.S.No.318 of 2009. The first defendant in O.S.No.172 of 2013 claimed to have purchased a portion of Suit Property in R.Survey No.13 and on the first week of November 2007, their officials made attempts to enter into the Suit Property and the same was prevented by the plaintiff. Hence, he filed the Suit in O.S.No.172 of 2013 for declaration and consequential injunction.



CASE OF THE FIRST DEFENDANT IN O.S.NO. 172 OF 2013

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8. The first defendant therein denied the averments of the plaint therein. They contend that they purchased a portion of the Suit Property in Survey No.13 duly under Sale Deed dated January 24, 2002 and that their vendors were entitled to the said portion under Sale Deeds dated August 24, 1995 and August 31, 2000 and that the vendors under the said Sale Deed dated August 24, 1995 were entitled to the properties covered therein through Sale Deed dated March 29, 1916. Accordingly, they prayed to dismiss the Suit in O.S.No.172 of 2013.

CASE OF THE 2ND AND 3RD DEFENDANTS IN O.S.NO. 172 OF 2013

9. The plaintiffs in O.S.No.318 of 2009 are the defendants 2 and 3 in O.S.No.172 of 2013. Their written statement filed therein is essentially the plaint in O.S.No.318 of 2009 and hence, there is no need to repeat them here.

TRIAL COURT

10. Both the Suits were tried jointly. Evidence were recorded in O.S.No.318 of 2009 At trial, K.M.Muthusamy (1st plaintiff) was examined as P.W.1 and two other witnesses were examined as P.W.2 and P.W.3 and Ex-A.1 to Ex-A.5 were marked on the side of the plaintiffs. The



2nd defendant - Gokul Raghu Kumar was examined as D.W.1 and one Loganathan was examined as D.W.2 and Ex-B.1 to Ex-B.20 were marked on the side of the defendants. Affidavit and Petition in I.A.No.731 of 2015 in O.S.No.318 of 2009 on the file of Trial Court was marked as Ex-C.1.

11. After full-fledged trial, the Trial Court concluded that the Suit Properties are joint family properties. Even assuming that Suit Properties are separate properties of Muthu Gounder, the same were thrown into common hotchpot and enjoyed as joint family properties. Further, Ex-B.20 – Will dated May 20, 2002 said to have been executed by Muthu Gounder, is not proved. Hence, the plaintiffs are entitled to the reliefs sought for. Accordingly, decreed the Suit in O.S.No.318 of 2009 and dismissed the Suit in O.S.No.172 of 2013.

FIRST APPELLATE COURT

12. Feeling aggrieved by the Trial Court's Judgment and Decree, the defendants preferred the appeal in A.S.No.104 of 2017 while the second defendant preferred the appeal in A.S.No.105 of 2017 before the First Appellate Court. The First Appellate Court after hearing both sides and perusing the evidence available on record, concluded that Suit



Properties are separate properties of Muthu Gounder. Ex-B.20 - Will dated May 20, 2002 has been proved. Accordingly, allowed both appeals and set aside the Common Judgment and Decrees dated December 22, 2016 passed by the Trial Court, dismissing the Suit in O.S.No.318 of 2009 and decreeing the Suit in O.S.No.172 of 2013.

SECOND APPEAL

13. Feeling aggrieved by the Common Judgment and Decrees passed by the First Appellate Court, plaintiffs have preferred these Second Appeals.

14. The Second Appeals in S.A.Nos.81 and 82 of 2019 were admitted on January 25, 2019 and June 5, 2024 respectively on the same Substantial Questions of Law, which are as hereunder:

- “(1) *Is the Lower Appellate Court justified in upholding the validity of the WILL Ex-B.9 [Sic. B.20] when the testator was not the absolute owner of the property on the date of Ex-B.9 [Sic. B.20] / WILL?*
- (2) *When there are several suspicious circumstances surrounding the alleged execution of the WILL / Ex-B.9 [Sic. B.20] by the testator brought out in evidence, is the Lower Appellate Court justified in upholding the*



WILL without adverting to the same?"

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ARGUMENTS

15. Mr.A.K.Kumarasamy, Senior Counsel for M/s.S.Kaithamalai Kumar, learned Counsel on record for the appellants / plaintiffs would argue that the Suit Properties are joint family properties, which were not partitioned but enjoyed in common. The father of the plaintiffs and the first defendant - Muthu Gounder had filed the Suit in O.S.No.870 of 1995 on the file of IInd Additional Subordinate Court, Erode against the first defendant herein, wherein he had categorically described the Suit Properties herein as joint family properties. Hence, the second plaintiff, in view of the H.S.Act as amended by 2005 H.S. Amendment Act, is entitled to $\frac{1}{4}$ share in the Suit Properties as a coparcener by birth. Further, Muthu Gounder had no power to execute Ex-B.20 – unregistered Will dated May 20, 2002 in respect of entire Suit Properties being joint family properties. Ex-B.20 is surrounded by suspicious circumstances. At the time of its execution, Muthu Gounder was aged more than 95 years; bedridden; suffering from serious illness, poor vision and impaired hearing *etc.* Further the recitals in Ex-B.20 are against his own



pleadings filed in the said O.S.No.870 of 1995. The Trial Court rightly appreciated the evidence available on record and decreed the Suit in O.S.No.318 of 2009 and dismissed the Suit in O.S.No.172 of 2013. The First Appellate Court erroneously allowed the Appeal Suits before it reversing the Common Judgment and Decrees of the Trial Court. Accordingly, he would pray that the Second Appeals shall be allowed and the Judgment and Decree of the Trial Court shall be confirmed.

16. Mr.T.Murugamanickam, Senior Counsel for M/s.Zeenath Begum, learned Counsel on record for the defendants would argue that Suit Properties were purchased by Nalla Gounder vide Ex-B.1 - Sale Deed dated August 5, 1922 and Ex-B.18 – Sale Deed dated May 19, 1922 and hence they are his self-acquired properties. After his lifetime, it devolved upon Muthu Gounder under Section 8 of the H.S.Act as separate properties. That is why the said Suit Properties were excluded in Ex-A.1 - Partition Deed. This is further supported by the fact that there is no whisper about unpartitioned joint family properties therein.

16.1. He would further argue that though Muthu Gounder was a member of joint family, he treated the Suit Properties as his separate



properties and enjoyed them as such. The onus to prove the contra *i.e.*, the Suit Properties are ancestral properties is upon the plaintiffs. The plaintiffs failed to prove the same.

16.2. Further, he would draw the attention of this Court to Ex-B.17 and argue that it is the Suit filed by the second plaintiff against Muthu Gounder, first plaintiff and first defendant *i.e.*, her own father and brothers, in respect of Suit Properties except Survey No.31/3, seeking specific performance of Sale Agreement dated September 17, 1994. The said Suit was dismissed after full trial. The said Suit was filed collusively along with the first plaintiff herein and hence, Muthu Gounder was not in good terms with the plaintiffs. Hence, Muthu Gounder executed Ex-B.20 – unregistered Will dated May 20, 2022 in favour of his grandson *viz.*, second defendant, while he was in a sound and disposing state of mind. Therefore, there are no suspicious circumstances surrounding Ex-B.20 – Will. The defendants examined D.W.2 – Loganathan as one of the attesting witnesses to Ex-B.20, whose evidence establishes the execution of Ex-B.20.

16.3. The Trial Court erroneously decreed the Suit in



O.S.No.318 of 2009 and dismissed the Suit in O.S.No.172 of 2013, without analysing the evidence available record in the right perspective.

The First Appellate Court rightly appreciated the evidence and dismissed the Suit in O.S.No.318 of 2009 and decreed the Suit in O.S.No.172 of 2013. The verdict of the First Appellate Court does not warrant any interference. Accordingly, he would pray to dismiss these Second Appeals and confirm the Common Judgment and Decrees of the First Appellate Court.

DISCUSSION:

17. This Court has heard on either side and perused the materials available on record in light of the Substantial Questions of Law.

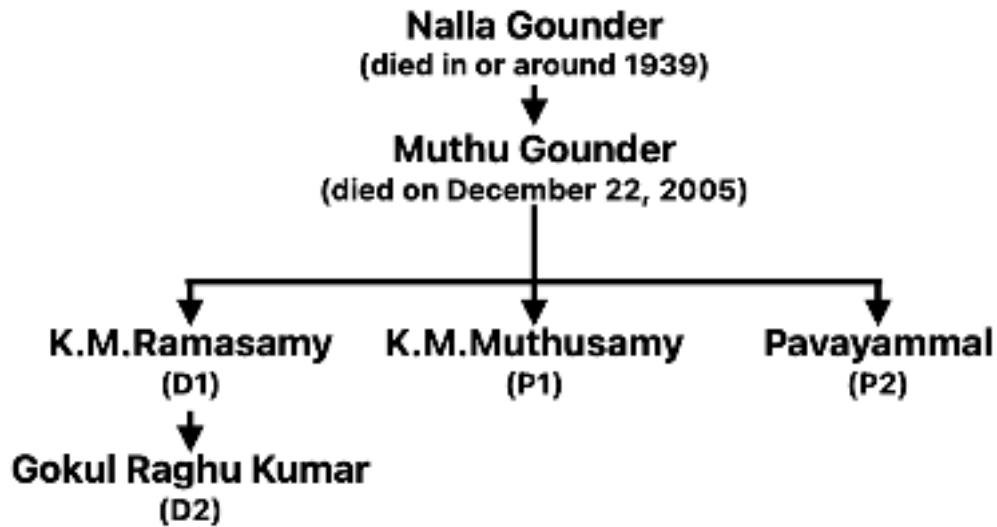
18. The admitted relationship between the parties is elucidated through the following genealogy chart for better appreciation of the facts of the case:



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19. Case of the plaintiffs is that the Suit Properties are joint family properties, which were excluded from the registered Partition that happened in 1994 vide Ex-A.1 - Partition Deed and enjoyed in common. On the date of Ex-A.1, the second plaintiff was not entitled to any right in the joint family properties. Hence, she was not given any share in the said partition. In Ex-A.1, the second plaintiff and her husband had signed as witnesses. Subsequently, in view of the 2005 H.S. Amendment Act, she became a coparcener and thus, entitled to the Suit Properties. In short, the plaintiffs are entitled to equal share in the Suit Properties which are joint family properties.

20. Case of the defendants is that the Suit Properties are



separate properties of Muthu Gounder which were purchased by Muthu Gounder's father, namely Nalla Gounder, vide Ex-B.1 - Sale Deed dated August 5, 1922 and Ex-B.18 – Sale Deed dated May 19, 1922, from and out of his own income. In other words, defendants' case is that Suit Properties are self-acquired properties of Nalla Gounder which, post his demise in or around 1939, devolved upon Muthu Gounder as separate properties. Muthu Gounder executed Ex-B.20 – unregistered Will dated May 20, 2002 in favour of his grandson / second defendant bequeathing the Suit Properties which are his separate properties. Thus, the plaintiffs have no right in the Suit Properties.

21. In this case, the first question that needs to be considered is whether the Suit Properties are joint family properties or separate properties of Muthu Gounder. It is settled law that a coparcener, even if he be in joint, may possess separate properties and no other member of the coparcenary, even his issues, acquire any interest in it by birth. Upon his passing intestate, the separate properties pass in succession in favour of his heirs and not by survivorship in favour of his surviving co-parceners. A person who pleads that properties are joint family properties or coparcenary properties, owns the initial burden.



22. In this case, nearly 18 Acres of land were partitioned under Ex-A.1 - Partition Deed dated October 26, 1994 stating that they are all joint family properties. Subsequent to Ex-A.1, Muthu Gounder filed O.S.No.870 of 1995 on the file of IInd Additional Subordinate Court, Erode, on November 9, 1995, contending that the Suit Properties herein and other properties are joint family properties. Relevant extract of the plaint in O.S.No.870 of 1995 [Ex-A.3] viz., Paragraph No.3 reads thus:

“3.The plaintiff is the father and the defendants 1 and 2 are his sons. The plaintiff and the defendants 1 and 2 constitute a joint Hindu undivided family. The properties described more fully hereunder in the property schedule belongs to the joint family of the plaintiff and his sons and the other defendants.”

23. The first plaintiff and the first defendant herein are the defendants 1 and 2 therein. They both were placed *ex-parte*. Eventually, the Suit was dismissed for default. Ex-A.5 is the dismissal decree. Hence, the plaintiffs and the first defendant are deemed to have admitted the plaint averments in the said Suit, that is to say, they have admitted the properties



of Muthu Gounder including the Suit Properties are joint family properties.

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24. Furthermore, in the plaint therein, list of documents contains 20 documents which contains nine Sale Deeds totally, including those dated May 19, 1922 [Ex-B.18] and August 5, 1922 [Ex-B.1]. Out of those nine, five are in favour of Muthu Gounder's father – Nalla Gounder and four are in favour of Muthu Gounder. Interestingly, though these Sale Deeds may give an initial impression that the properties partitioned under Ex-A.1 and the Suit Properties are separate properties in the hands of Muthu Gounder, he had listed these Sale Deeds to contend that they are all joint family properties.

25. In Paragraph No. 19 of the said plaint, it has been stated that Nalla Gounder died intestate in or around 1939. Ex-A.1 – Partition Deed was executed in 1994. Existence of Hindu joint family and properties were admitted in Ex-A.1 by the parties. Muthu Gounder also has categorically admitted so in Ex-A.3. In these circumstances, the contention of the defendants that the Suit Properties alone are the separate properties of Muthu Gounder while the rest are joint family properties is not plausible as it is unsupported by any evidence. If really the Suit Properties purchased



by Muthu Gounder's father vide Ex-B.1 - Sale Deed dated August 5, 1922

and Ex-B.18 – Sale Deed dated May 19, 1922 are his self-acquired

properties, and they devolved in the hands of Muthu Gounder as separate

properties and continued to be so, in such a scenario, the other properties

which were similarly purchased by Nalla Gounder and Muthu Gounder,

would have also probably been separate properties in the hands of Muthu

Gounder and he would not have partitioned the same under Ex-A.1

describing them as joint family properties and he would not file a Suit

contending that they are joint family properties. As held by the Trial Court,

even if the Suit Properties are the self-acquired properties of Nalla

Gounder, sometime after his demise in or around 1939, the Suit Properties

and other properties must have been thrown in the common hotchpot and

enjoyed as joint family properties, making it the reason for Muthu Gounder

and Ex-A.1 – Partition Deed describing the properties as joint family

properties. The defendants now cannot turn around and contend that the

Suit Properties are separate properties. The admission made by Muthu

Gounder in Ex-A.3 - Plaint cannot be simply brushed aside, especially

when the first defendant, who was a party therein, did not file a Written

Statement denying the averments stated therein. It is highly improbable



that the Suit Properties alone are separate properties while the other are joint family properties, especially when there is nothing to even suggest so.

This shows that all the properties were enjoyed as joint family properties. The plaintiffs have discharged their initial burden in view of Ex-A.1 and Ex-A.3 and shifted the onus onto the defendants, who failed to discharge the same satisfactorily. Hence, this Court is of the view that the Suit Properties are joint family properties.

26. The next question is with regard to the validity and genuineness of Ex-B.20 – unregistered Will dated May 20, 2002. The said Will is surrounded by the following suspicious circumstances:

- (i) When the said Suit in O.S.No.870 of 1995 came for trial in the year 2001, Advocate-Commissioner was appointed to examine and record the evidence of Muthu Gounder, owing to Muthu Gounder's age and illness. On December 8, 2001, P.W.3 – Advocate-Commissioner called on Muthu Gounder at his farm and has noted that Muthu Gounder, nearly aged 95 years at that time, was suffering from hearing deficiency and poor vision to the extent that he could not be examined. The Will is said to have been executed 6 months after the Advocate-Commissioner examined Muthu Gounder.



Naturally, with age, health condition deteriorates. In these circumstances, it is highly doubtful that Muthu Gounder was in a sound and disposing state of mind.

- (ii) The evidence of the attesting witness - D.W.2 shows that Muthu Gounder came by himself with a Deed to execute Ex-B.20 – Will, which when seen cumulatively with the Advocate-Commissioner's report *qua* Muthu Gounder's health condition, is not at all believable.
- (iii) The Stamp paper in which Ex-B.20 was executed, was purchased on March 28, 1995 in the name of Muthu Gounder, whereas Ex-B.20 is dated May 20, 2002, that is to say, Ex-B.20 was executed 7 years after the purchase of the Stamp paper.
- (iv) In Ex-A.3 - Complaint in O.S.No.870 of 1995, Muthu Gounder has stated that in some *panchayat* he signed some stamp papers and handed them over to *panchayatdars* as per prevailing custom. This aspect, coupled with the fact that Ex-B.20 was executed on a Stamp paper purchased 7 years ago, creates serious suspicion.
- (v) Further, it is the document writer who is competent to depose about the Stamp Paper on which the Will was written. He has not been examined.
- (vi) According to D.W.2 / Witness to Ex-B.20, Ex -B.20 was



executed near Registration office but it was not registered as it became late. It is true that generally a Will need not be mandatorily registered, but in view of the cumulative facts and circumstances, the said statement of D.W.2 creates serious suspicion.

(vii) Further, while it is sufficient that one of the witnesses is examined, in view of the facts and circumstances the defendants ought to have examined the other witness, namely Subramani also. But they have failed to do so.

(viii) At the time of execution of Will, its beneficiary *viz.*, second defendant was 5 years old. Hence, it is first defendant who is competent to depose about Will. But he did not enter the witness box. His non-examination also creates suspicion.

27. It is settled law that propounder has to plead and prove the Will after removing all the suspicious circumstances surrounding it. In this case, the defendants failed to clear the serious suspicious circumstances surrounding the Will. This Court deems fit to cite hereunder the Judgment of Hon'ble Supreme Court in ***H.Venkatachala Iyengar v. B.N. Thimmajamma***, reported in ***1958 SCC Online SC 31***, which is considered as *locus classicus* when it comes to law regarding proof of Will:



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“18.What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression “a person of sound mind” in the context. Section 63 requires that the testator shall sign or affix his



mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19.However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally



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introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be 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 dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of



the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.”

28. In these circumstances, even while assuming that Ex-B.20

- Will executed by Muthu Gounder who died on December 22, 2005 is true, he had only $\frac{1}{4}$ share in the Suit Properties in view of 2005 H.S. Amendment Act, hence he could not have executed it in respect of the



entirety of the Suit. This is because Ex-B.20, though dated May 20, 2002, came into effect after the demise of Muthu Gounder on December 22, 2005 i.e., after the 2005 H.S. Amendment Act came into force on September 9, 2005. Hence, even if the Will is true, it is not valid in respect of the entire Suit Properties. Further, in regard to Ex-B.20 – Will, it is fruitful to cite the decision of the Hon'ble High Court of Hyderabad at Hyderabad [as it then was] in **Smt. R.Seethamma @ Seetha Lakshmi Vs. M.Thimma Reddy** reported in **2017 SCC OnLine Hyd 163** wherein it is observed as follows:

“27. The second point arising for determination is as to whether mere execution of the Will prior to 20.12.2004 was sufficient to make a Will come within the purview of the expression disposition under the proviso to Section 6(1) of the Hindu Succession (Amendment) Act, 2005, especially when the testator admittedly died only after 20.12.2004.

... ..
... ..

48. Therefore, we are of the considered view that in cases where the testator was alive as on 20-12-2004, the Will, even if any executed by him genuinely before the said date, would not make it a case of testamentary disposition which had taken place, so as to make the case fall under the proviso and to take it out of the application of section



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6(1). In other words, a case will fall under the proviso to section 6(1), only if 2 things had taken place before 20-12-2004 namely (i) execution of a Will and (ii) the death of the testator. The execution of the Will before 20-12-2004 alone is not sufficient to take a case out of the operation of section 6(1), as no disposition under the Will would have taken place, if the testator was alive. As pointed by the Supreme Court in S.Rathinam v. Mariappan (AIR 2007 SC 2134), a Will of a man is the aggregate of his testamentary intentions manifested in writing and is not a transfer.”

29. As regards O.S.No.172 of 2013, the first defendant therein, namely Kongu Vellalar Institute of Technology Trust, though claimed that it purchased a portion of the Suit Properties in R.Survey No.13, denied the title of the plaintiff therein [second defendant herein], and traced its title through Sale Deeds, it has not examined any witness nor marked any documents in supports of its contentions. There is no evidence in support of its case. In view of the above discussion, at any rate, the alleged Sale Deed executed in its favour *qua* a portion of the Suit Properties in R.Survey No.13 would not be binding on the plaintiffs.

30. The Trial Court after a detailed discussion on the character of the Suit Properties, rightly concluded that the Suit Properties are joint



family properties. As narrated above, Ex-B.20 - Will has not been proved after removing all the suspicious circumstances surrounding it. Further, the Trial Court rightly appreciated the evidence on record and concluded that Ex-B.20 – Will was not proved. Whereas the First Appellate Court, without any discussion on the character of the Suit Properties jumped to the conclusion that they are separate properties and then it erroneously held that Ex-B.20 – Will is proved as per law. The same is perverse in law and hence, deserves to be interfered with. Hence, this Court is inclined to set aside the Common Judgment and Decrees of the First Appellate Court and confirm the Common Judgment and Decrees of the Trial Court which are correct and based on evidence. Substantial questions of law (1) and (2) are answered accordingly in favour of the appellants and against the respondents.

CONCLUSION

31. Resultantly, the Second Appeals are allowed in the following terms:

- (a)** The Common Judgment and Decrees of the First Appellate Court are hereby set aside;



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- (b) The Common Judgment and Decrees of the Trial Court are hereby confirmed, decreeing O.S.No.318 of 2009 and dismissing O.S.No.172 of 2013;
- (c) Keeping in mind the relationship between the parties, there shall be no order as to costs.

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Index : Yes
Speaking Order : Yes
Neutral Citation : Yes
TK

To

1.The II Additional District Judge
Erode.

2.The Subordinate Judge
Perundurai.



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R. SAKTHIVEL, J.

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PRE-DELIVERY COMMON JUDGMENT MADE IN

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