



A.S.(MD)No.76 of 2012

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

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**Reserved on : 09.01.2024**

**Delivered on : 01.02.2024**

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN**

**AND**

**THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN**

**A.S(MD).No.76 of 2012**

**and**

**Cros.Obj.(MD)No.21 of 2023**

**and**

**C.M.P(MD)Nos.9612 and 9613 of 2023**

**and**

**M.P(MD)No.4 of 2014**

**A.S(MD)No.76 of 2012**

**MaheSwari**

**... Appellant/Plaintiff**

**Vs.**

**1.Kamalam**

**2.Marimuthu**

**3.Nagarajan**

**4.Kasthuri(Died)**

**5.Chidambara Bharathi**

**6.Muthukumar**

**7.Mahesh Mani**

**(R5 to R7 are brought on record as Lrs  
of the deceased 4<sup>th</sup> respondent vide  
Court order dated 15.09.2022)**

**... Respondents/Defendants**



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Prayer: This First Appeal is filed under Section 96 of the Code of Civil Procedure, against the decree and judgment dated 07.06.2011 made in O.S.No. 36 of 2004 on the file of the learned Principal District Judge, Virudhunagar, at Srivilliputhur, allow this appeal and decree the suit in respect of suit items 1 to 48, 50 to 52 and 56 as prayed for in the plaint.

|               |                                                     |
|---------------|-----------------------------------------------------|
| For Appellant | : M/s.S.Parthasaathi                                |
| For R1 and R3 | : M/s.V.Meenakshi Sundaram<br>for M/s.D.Nallathambi |
| For R5 to R7  | : M/s.N.Mohamed Asif                                |
| For R2        | : No appearance                                     |
| For R4        | : Died                                              |

**Cros.Obj.(MD)No.21 of 2023**

|             |                                                                            |
|-------------|----------------------------------------------------------------------------|
| 1.Kamalam   | ...1 <sup>st</sup> Appellant in Cros.<br>Appeal/1 <sup>st</sup> Respondent |
| 2.Nagarajan | ...2 <sup>nd</sup> Appellant in Cross<br>Appeal/3 <sup>rd</sup> Respondent |

Vs.

|                                        |                                                                                       |
|----------------------------------------|---------------------------------------------------------------------------------------|
| 1.Maheswari                            | ...1 <sup>st</sup> Respondent in Cross<br>Appeal/Appellant                            |
| 2.Marimuthu                            | ...2 <sup>nd</sup> Respondent/2 <sup>nd</sup><br>Respondent/2 <sup>nd</sup> Defendant |
| 3.Kasthuri(Died)                       | ...3 <sup>rd</sup> Respondent/4 <sup>th</sup><br>Respondent/4 <sup>th</sup> Defendant |
| 4.Chidambara Bharathi                  |                                                                                       |
| 5.Muthukumar                           |                                                                                       |
| 6.Mahesh Mani                          |                                                                                       |
| (R4 to R6 are brought on record as Lrs |                                                                                       |



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of the deceased 3<sup>rd</sup> respondent vide  
Court order, dated 13.10.2023)

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Prayer: This Cross Objection is filed under Order 41 Rule 22 r/w. Section 96 of the Civil Procedure Code, against the decree and judgment dated 03.06.2011 made in O.S.No.36 of 2004 on the file of the learned Principal District Judge, Virudhunagar, at Srivilliputhur, as far as the suit item Nos.49, 53, 54, 55 and 57.

|                |                                                     |
|----------------|-----------------------------------------------------|
| For Petitioner | : M/s.V.Meenakshi Sundaram<br>for M/s.D.Nallathambi |
| For R1         | : M/s.S.Parthasaathi                                |
| For R4 to R6   | : M/s.N.Mohamed Asif                                |
| For R2         | : No appearance                                     |
| For R3         | : Died                                              |

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### **COMMON JUDGMENT**

**DR G. JAYACHANDRAN,J.**  
**AND**  
**C.KUMARAPPAN,J.**

The appellant herein is the plaintiff before the trial Court. The respondents 1 to 4 are the defendants before the trial Court. The respondents 5 to 7 are the legal representatives of the deceased 4<sup>th</sup> respondent/4<sup>th</sup> defendant.



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2.The Instant first appeal has been filed at the instance of the plaintiff against the preliminary decree passed by the trial Court, on 03.06.2011 in a suit for partition.

3.For the sake of convenience the parties will be referred to according to their litigative status before the trial Court.

**Pleadings before the trial Court:**

4.The brief facts which are necessary for the disposal of the instant first appeal is as follows:

According to the plaintiff, the first defendant is the mother of the plaintiff and the defendants 2 to 4. The plaintiff and the defendants 2 to 4 are the children of one Balasubramanian through first defendant. She submits that the suit property is the self acquired property of her father Balasubramanian. Therefore, she come forward with the suit for partition claiming 1/5<sup>th</sup> share in the suit property.



5.The said suit was resisted by the **third defendant** by filing written statement, which was **adopted by the defendants 1 and 2**. According to them, the suit property is not a self acquired property of their father late Balasubramanian. It is their submission that the suit properties were originally belonged to one Serandia Mudaliar, who was the great grandfather of the plaintiff as well as the defendants 2 to 4. The said Serandia Mudaliar died on 07.09.1969. They further submits that during the life time of Serandia Mudaliar, a partition was effected between Serandia Mudaliar and his three children viz., Chellam @ Serandia Mudaliar, Subramanian and one Malaiarasan, by virtue of the partition deed, dated 22.11.1944. The plaintiff and the defendants 2 to 4 father late Balasubramanian is the son of late Chellam @ Serandia Mudaliar. According to them, the suit property is the ancestral coparcenary property, and that the defendants 2 and 3 are the coparceners, along with their father Balasubramanian. Whereas the plaintiff and the fourth defendant being the daughters of the said Balasubramanian cannot claim any right in the suit property as a coparcener. It was further submitted that the plaintiff was married on 25.11.1979 and that, ever since the date of marriage, she has been residing along with her husband. Further they also took a defence of ouster. It is the



contention of this defendants that the suit items 49 and 53 had already been sold to the third party. Therefore, contended that since the subsequent purchaser had not been impleaded as a party to the suit, the instant suit is hit by the doctrine of non-joinder of necessary party.

6.These defendants have also contended in their additional written statement that their father Balasubramanian has executed a settlement deed, dated 06.10.2001 in respect of item No.57 of the suit property. Therefore, by virtue of the settlement deed, the third defendant became the absolute owner of the Item 57 of the suit property.

7.The **fourth defendant** has also filed a separate written statement, wherein she has stated that the item Nos.53, 54, 55 and 57 are not the ancestral properties and the same were the absolute property of the said Balasubramanian, and that, during the life time of their father late Balasubramanian, he was in sound disposing state of mind and has executed a registered Will, dated 05.10.2001 bequeathing the suit property item 53 to the second defendant. Similarly the suit property items 54 and 55 were bequeathed



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to the third defendant. Therefore, after the demise of the said Balasubramanian on 28.12.2001, the above items of suit properties vested with the second and third defendants. Therefore, according to the fourth defendant the plaintiff cannot have any right over the same.

8. After came to know about the alleged Will executed by the said Balasubramanian through the written statement, the plaintiff has filed the **reply statement**. Wherein she has disputed the due execution of the Will. It was also further contended that for a period of 9 years prior to the date of death of her father Mr. Balasubramanian, he has been suffering from paralytic stroke and his entire right hand and right leg was fully paralyzed. Therefore, it was contended that the alleged Will propounded by the defendants are false and fabricated. Thus, the plaintiff prayed to decree the suit. Whereas the defendants prayed to dismiss the suit.

#### **Issues framed by the trial Court:**

9. The trial Court, after having considered the pleadings on either side, has framed the following issues:



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“(1) தாவா சொத்துக்கள் வாதி மற்றும் 2, 3, 4 பிரதிவாதிகளின் தந்தையும். 1ம் பிரதிவாதியின் கணவருமாகிய இறந்து போன பாலசுப்பிரமணியம் என்பவருக்கு சுய பாத்திய உரிமையில் பாத்தியப்பட்ட சொத்துக்களா?

(2) தாவா சொத்துக்களில் இலக்கம் 53இ 54இ 55இ 57 மற்றும் 49 ஆகிய சொத்துக்கள் தவிர இதர சொத்துக்கள் பூர்வீக சொத்துக்கள் என்ற நிலையில் உள்ளதா?

(3) /தாவா 53 வது இலக்க சொத்தை 2ம் பிரதிவாதிக்கும். 54. 55வது இலக்க சொத்துக்களை 3ம் பிரதிவாதிக்கும் பாத்தியப்படுத்தி 5/10/01 அன்று பாலசுப்பிரமணியம் எழுதி வைத்தாக சொல்லப்படும் உயில் ஆவணமானது சட்ட நிலையில் செல்லத்தக்கதா?

(4) /தாவா 49 வது இலக்க சொத்தை பொறுத்து 7/12/01 தேதியிட்டு காலம் சென்ற பாலசுப்பிரமணியம் 2ம் பிரதிவாதிக்கு எழுதி வைத்ததாக சொல்லப்படும் உயில் ஆவணம் சட்ட நிலையில் செல்லத் தக்கதா?

(5) /தாவா 57வது இலக்க சொத்தை பொறுத்து ஒரு தானசெட்டில்மெண்ட் ஆவணத்தை பாலசுப்பிரமணியம் 3ம் பிரதிவாதிக்கு எழுதி வைத்துள்ளார் என்பது சட்ட நிலையில் மெய்ப்பிக்கப்பட்டுள்ளதா?

(6) /2ம் பிரதிவாதியிடமிருந்து தாவா 49வது இலக்க சொத்தை பொறுத்து 13/03/02 அன்று கிரையம் பெற்றதாக சொல்லப்படும் ஒரு தேவேந்திரன் என்பவரை அசல் வழக்கில் அவசியமான வழக்காடியாக சேர்க்காத காரணத்தினால் வாதியின் வழக்கு பாதிப்படைந்துள்ளதா?

(7) /தாவா சொத்துக்களை பொறுத்து 2. 3 பிரதிவாதிக்கு எதிரிடை கவாதீன அனுபவ உரிமையானது வாதிக்கு எதிராக ஏற்பட்டுள்ளதா?

(8) /வாதிக்கு வழக்குரையில் கோரியுள்ளவாறு தாவா சொத்துக்களை பொறுத்து 1/5 பாகம் கோரி பெறுவதற்கும் அவ்வாறே முதல்நிலை தீர்ப்பாணையை கோரி பெறுவதற்கும் சட்ட நிலையில் உரிமையுள்ளதா?

(9) /தாவா சொத்துக்களை பொறுத்து தமிழ்நாடு நீதிமன்ற கட்டண சட்டப்பிரிவு 37(2)ன் கீழ் கூட்டு கவாதீன அனுபவ அடிப்படையில் தாவா சொத்துக்களை மதிப்பீடு செய்து வாதியால் நீதிமன்ற கட்டணம் செலுத்தப்பட்டுள்ளது சட்ட நிலையில் ஏற்கத் தக்கதா?



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(10) / வாதிக்கு நீதிமன்றத்தால் வழங்கப்படக் கூடிய இன்னமீர்  
நிவாரணங்கள் யாவை?

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### **Evidence and Documents:**

10. Before the trial Court, on the side of the plaintiff, one witness was examined as P.W.1 and three documents were marked as Ex.A.1 to Ex.A.3. On the side of the defendants, four witnesses were examined as D.W.1 to D.W.4 and 66 documents were marked as Ex.B.1 to Ex.B.66.

### **Findings of the Trial Court:**

11. The trial Court, after having considered the oral and documentary evidence, has arrived at a conclusion that except the items 49, 53, 54, 55 and 57 of the suit property, the other item of suit properties are ancestral in character. Further, the trial Court has also disbelieved the Will propounded by the defendants 2 and 3, and also disbelieved the Settlement Deed alleged to have executed by the late Balasubramanian. Thus, the trial Court has eventually found that the items 49, 53, 54, 55 and 57 are only the self acquired property of late Balasubramanian. Hence, the trial Court partly decreed the suit in favour of the plaintiff by granting 1/5th share in respect of the suit property items 49, 53,



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54, 55 and 57 and in other items of properties, granted 1/15th share.

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12. Aggrieved by the same, the plaintiff has filed the instant first appeal. Whereas the first and third defendants have preferred the Cross Objection against the finding of the trial Court in respect of the Wills, dated 05.10.2001(Ex.B54) and 07.12.2001(Ex.B55). To put it in other words, against the finding in respect of the suit items 49, 53, 54, 55 and 57, this cross objection was filed by the defendants 1 and 3.

13. Along with this Cross Objection, the first and third respondents herein have also filed an application in C.M.P(MD)No.9613 of 2023 under Order 41 Rule 27 of C.P.C., to receive the additional documents viz., Original Settlement deed, dated 06.10.2001 and the Original Sale Deed, dated 03.04.1974.

#### **Submissions on either side:**

14. The learned counsel for the plaintiff/appellant would contend that, though the plaintiff/appellant has pleaded and made herculean task to prove the



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suit properties as the absolute property of her father, which contrary to their pleadings has suffered a finding that except Items 49, 53, 54, 55 and 57, the other items of properties are ancestral and coparcenary in character. However, the learned counsel for the plaintiff during his argument by invoking the ratio of the Hon'ble Supreme Court in *Vineetha Sharma-Vs-Rakesh Sharma and others*, reported in **2020(5) CTC 302**, has submitted before this Court that she is in full agreement with the finding of the trial Court in respect of the character of the suit properties. It was also submitted by the learned counsel for the appellant/plaintiff that though the defendants' grandfather and their grandfather's brother partitioned the property of their father Serandia Mudaliar and their deceased brother Malaiarasan through Ex.B.2 and Ex.B.3, the same cannot have any bearing in this suit, as there is no proof to the correlation of the property referred to under Ex.B2 and Ex.B.3 with that of the suit property referred to in the plaint.

15.Further, the learned counsel for the plaintiff would further contend that the parties who propound the Will has to dispel all the suspicious circumstances. Whereas the defendants 2 and 3 though propounding two Wills



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Ex.B.54 and Ex.B.55 has not discharged their onerous burden in dispelling the suspicious circumstances over the execution of the said Wills. The learned counsel for the plaintiff would also further contend that the defendants 2 and 3 did not examine the attesor of the said Wills and the original Will have also not been filed and marked before the trial Court. It was also contended by the learned counsel for the plaintiff that the alleged settlement deed cannot be given effect to, as the defendant did not submit even the original settlement deed, and that, at the relevant point of time, the father of the plaintiff viz., Balasubramanian was suffering from paralysis and there was no occasion for him to execute the such settlement deed. The learned counsel would also further contend that the said Balasubramanian died within two months from the date of execution of the alleged settlement deed. Therefore, it is the contention of the learned counsel for the appellant that the finding in respect of the suit items 49, 53, 54, 55 and 57 is liable to be confirmed, and in respect of the other properties by invoking the ratio of *Vineetha Sharma's case (cited supra)*, the learned counsel seeks partition as a coparcener by birth along with his sister on par with their two brothers. Hence, prayed to allow the first appeal.



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16.Per contra, the learned counsel appearing on behalf of the defendants would contend that, though the suit property was ancestral property belongs to Serandia Mudaliar, during his life time, there was a partition between himself and his three sons, and that after the demise of Serandia Mudaliar and his last son Malaiarasan, their property, was again divided through Ex.B.2 and Ex.B.3 between the plaintiff's grandfather Chellam @ Serandia Mudaliar and his brother Subramanian. Therefore, the learned counsel for the defendants contended that the properties referred to in Ex.B2 and Ex.B.3 has to be treated as self acquired properties of the said Balasubramanian, and the division should be in accordance with Section 8 of the Hindu Succession Act. The learned counsel for the defendants would also further contend that though originals of Ex.B.54 and Ex.B.55 Wills have not been submitted before the trial Court on account of submission of its registration copy the same is attached with the presumption under Section 60 of the Registration Act and Section 114 of the Indian Evidence Act. Therefore, unless a rebuttal evidence is let in by the plaintiff to discredit the credibility of the registration copy of the Will, the same has to be believed and must be given effect to. The learned counsel for the defendants would also further submit that the finding in respect



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of item 57 of the suit property on the basis of non-production of the original settlement deed is erroneous, and he would further invite the attention of this Court in respect of filing an application under Order 41 Rule 27 of C.P.C., to receive the original copy of settlement deed, dated 06.10.2001-Ex.B.66 and its parent document. The learned counsel for the defendants would also contend that the non-examination of the attesor to the settlement deed cannot be a ground to disbelieve the same, as the same is attached with the presumption under Section 60 of the Registration Act. On the strength of the above contention, the learned counsel for the defendants has prayed to pass a preliminary decree for 1/5<sup>th</sup> share each in respect of the properties referred to in Ex.B.2 and Ex.B.3 partition deed. Similarly in respect of the property referred to in Ex.B.1, the defendant prayed to pass a preliminary decree of 1/15<sup>th</sup> share each to the plaintiff, the first and the fourth defendants. In respect of the defendants 2 and 3 prayed to pass a preliminary decree for 6/15<sup>th</sup> share.

17.I have given my anxious consideration on the submission made by either side.



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18. After having considered the pleadings, documents and the submissions made by either side counsel, the following points arise for our determination:

(i) Whether the plaintiff can claim portion in the suit property, as coparcener.

(ii) Whether the defendant has proved the due execution of the Wills dated 05.10.2001 and 07.12.2001 qua Ex.B.54 and Ex.B.55 respectively.

(iii) Whether the defendant has proved the due execution of the settlement deed, Ex.B.66.

(iv) Whether the sale deed executed by the second defendant in respect of the suit items 49 and 53 will bind upon the plaintiff.

(v) Whether the plaintiff is entitled for portion as prayed for.

(vi) To what other reliefs he is entitled.

**Point No.1:**

19. Before we delve into the merits of the case, this Court deems it appropriate to consider the application filed by the defendants 1 and 3 under Order 41 Rule 27 of C.P.C. In the said application, the first and third defendants



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filed two documents, such as original settlement deed and the sale deed. It is pertinent to mention here that the relief under Order 41 Rule 27 C.P.C., is an exceptional relief and can be granted only within the contours provided in the provision of C.P.C under Order 41 Rule 27(1)(a) and (aa), or whether such documents are essential for substantial cause to pronounce judgment. Admittedly, the original of the settlement deed Ex.B.66 were in the reach of the defendants 2 and 3 at the relevant point of time. But the defendants did not submit the same under the pretext that the same was mortgaged with M/s.Tamil Nadu Mercantile Bank Limited, Vilathikulam Branch. Now the originals have been filed. But this Court would like to emphasise the reason for non-production before the trial Court on the ground of alleged mortgage. Such reason assumes much significance. But still there are no proof either before this Court or before the trial Court to prove the alleged theory of mortgage. Therefore, in the absence of such proof, the non-production of original settlement deed before the trial Court could have been for some other reason best known to the defendants 2 and 3. Further this Court cannot find any material to show the exercise of due deligency by the defendants 2 and 3 either before the trial Court or before this Court while filing this application. Hence,



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this Court is of the firm opinion that the reason set-forth for the filing of the application under Order 41 Rule 27 of C.P.C., is not within the parameters as provided under the statute. It is also made clear that the provisions under Order 41 Rule 27 of C.P.C., cannot be used to fill up the lacuna. Hence, C.M.P is devoid of merits and liable to be dismissed In this regard, it is useful to refer the judgment of the Hon'ble Supreme Court in *Union of India-Vs-Ibrahim Uddin*, reported in **2012(8) SCC 148**.

20.Reverting back to facts of this case, it was the contention of the plaintiff that the suit property was the absolute property of the plaintiff's father Balasubramanian. Whereas, the trial Court, after having considered Ex.B.1 to Ex.B.3, has found that except the suit items 49,53, 54, 55 and 57, all other properties are ancestral in character and coparcenary property. The trial Court passed the judgment on 03.06.2011. Subsequently the Hon'ble Supreme Court in *Vineetha Sharma's case (cited supra)* has expounded ratio as to how Section 6 of the Hindu Succession Act is to be interpreted. For ready reference this Court deems it appropriate and to make more seemly, inclined to extract the relevant portion of the judgment.



“137.Resultantly, we answer the reference as under:

**137.1.** The provisions contained in substituted [Section 6](#) of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

**137.2.** The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in [Section 6\(1\)](#) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

**137.3.** Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

**137.4.** The statutory fiction of partition created by proviso to [Section 6](#) of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the [Schedule to the Act](#) of 1956 or male relative of such female. The provisions of the substituted [Section 6](#) are required to be given full effect. Notwithstanding that a preliminary decree has been



passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

**137.5.** In view of the rigor of provisions of Explanation to [Section 6\(5\)](#) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the [Registration Act, 1908](#) or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly.”

21.As per Section 6 of the Hindu Succession Act, 1956 as amend during 2005, the Daughters also became coparcener as that of the sons. Therefore, the learned counsel for the plaintiff/appellant though failed to prove the nature of the suit as self acquired properties of late Balasubramanian, by taking advantage of serendipitous pronouncement of judgment in *Vineetha Sharma's case (cited supra)*, has conceded the converse finding of the trial



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Court about ancestral nature of all of the item of suit property, except items 49, 52 to 55 and 57.

22.However the learned counsel for the defendants by relying the partition deed Ex.B.2 and Ex.B.3 has contended that their grandfather Chellam @ Serandia Mudaliar derive his share in the property of late Serandia Mudaliar and late Malaiarasan, who are the great grandfather of the plaintiff and brother of his grandfather, as their self acquired property. Therefore, plaintiff's grandfather, and after his demise, in the hands of plaintiff's father Balasubramaian that property should continue as self acquired property without any coparcenary character. Therefore, by virtue of Section 8 of the Hindu Succession Act, both the plaintiff and the defendants are entitled to have a share of 1/5<sup>th</sup> each.

23.At this juncture the argument of the learned counsel for the plaintiff/appellant, assumes importance. He would draw the attention of this Court about the cross examination of D.W.1. While cross-examining D.W.1, he expressed his inability to correlate between the properties referred to in



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Ex.B.2 and Ex.B.3 with that of the suit properties referred to in the plaint. The

relevant portion of the admission is as follows:

“..... பி.வா.சா.2 ல் சொல்லப்பட்டிருள்ள சொத்துக்கள்.....  
அடையாளம் காட்டி சாட்சியம் அளிக்க இயலாது.....”

24. Therefore, as rightly contended by the learned counsel for the appellant, though the argument of the respondents appears to be attractive, this Court is not in a position to grant any relief, as there is no correlation of the suit property and the properties referred to in Ex.B.2 and Ex.B.3. As a matter of fact, the identity of the suit property was admitted by the defendant and that there is no dispute in this regard. Therefore, if any decree is passed based upon Ex.B.2 and Ex.B.3 then as rightly contended by the learned counsel for the plaintiff the same became unexecutable. Therefore, this Court is not persuaded with the submission made by the learned counsel for the defendants. There is also a different perspective to the above finding. Though the submission of the defendant is legal defence, there is no foundation in the pleading to raise such defence at the appellate stage. Beside their stand is contrary to their pleadings.



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25. In such background, when the plaintiff admits the defendant's case of ancestral nature of suit property at appellate stage, and when such acknowledgment during the argument supports the finding of the trial Court which is in accordance with the documents and evidence. Hence, this Court inclined to confirm the finding of the trial Court in respect of ancestral nature of all the suit property, except items 49, 52 to 55 and 57. Hence, this Court is of the firm view that the finding of the trial Court is perfectly in order. Therefore, this Court confirms the finding of the trial Court and holds that, except 49, 52 to 55 and 57, the other items of suit properties are the ancestral in character. Hence, as per the ratio of *Vineetha Sharma case(cited supra)*, the plaintiff is entitled to have share in the ancestral property as like son qua defendants 2 and 3.

### **Point No.2**

26. The Wills Ex.B.54 and Ex.B.55 was propounded by the defendants 2 and 3. According to the plaintiff, the testator was suffering from paralytic stroke and was not in sound disposing state of mind. Even in the registration copy of the Will, there is a reference that though the testator used to



sign in all documents, due to paralytic attack, he affixed his thumb impression.

It is also relevant to refer that the Wills were executed while the testator was undergoing serious health issues. Therefore, as rightly contended by the learned counsel for the appellant/plaintiff, there are numerous suspicious circumstances surrounding in the execution of the Wills. Therefore, there is onerous responsibility rest upon the propounder to dispel all the suspicious circumstances. Whereas the defendants have miserably failed to dispel the suspicious circumstances and also failed to prove the due execution of the Wills by examining the attestors. It is also pertinent to mention here that the non-production of the original Wills would also assume much significance and cause grave suspicion over the execution of the said Wills. Therefore, this Court is of the firm view that the finding recorded by the trial Court in disbelieving the Will Ex.B.54 and Ex.B.55 is supported by evidence. Further no foundation has been laid to invoke Section 69 of the Evidence Act.

27.At this juncture, the learned counsel for the defendant would contend that since the Wills were registered, the same is attached with the presumption as provided in Section 60 of the Registration Act, and Section 114



of the Indian Evidence Act. In this regard, the learned counsel for the defendants would rely upon the judgment of the Division Bench of this Court in ***Irudayam Ammal and others-Vs-Salayath Mary***, reported in ***AIR 1973 Mad 421(v 60 C 131)***. Through which, it was contended that the act of registration is a prima facie proof of due execution of Wills, unless there is a contra evidence. The relevant portion of the judgment is as follows:

*“.....It is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registering officer under [Section 60](#) of the Registration Act is relevant for proving execution. (See discussion in Sarkar's evidence latest 12th Edn., p. 640). As observed by the Privy Council in [Md. Ihtisham Ali v. Jamna Prasad](#), AIR 1922 PC 56, registration is a solemn act and if no other evidence is available the court can presume that the Registrar performed his duty of satisfying himself that the document presented to him for registration was duly executed by the executant and the executant was duly and properly identified before him. The same view was taken in *Gopaldas v. Sri Thankurji*, AIR 1943 PC 83, in which after referring to the earlier decision of the Privy Council in AIR 1922 PC 56 (referred to above) Sir George Rankin observed*



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*that the evidence of due registration is itself some evidence of execution as against the other side. There is a full discussion on this question as to the presumption arising from the fact of due registration, coupled with the presumption arising under [Section 114](#) of the Indian Evidence Act in a Bench decision of the Mysore High Court in [Huthegowda v. Chennigegowda](#), AIR 1953 Mys. 49, in which it was held that the evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed.*

*There is a full discussion of the relevant case law including the decision of the Privy Council in AIR 1922 PC 56 aforesaid. In [Revanna v. Dr. A. V. Ranga Rao](#), AIR 1952 Mys 119, it was observed that in cases where it is impossible for any person to prove execution of a document on account of the death of all the persons concerned the best and the only possible evidence that may be available is that of a certified copy of the registered document and that in such cases a presumption could arise under [Section 60](#) of the Registration Act along with [Section 114](#) of the Evidence Act (see also [Kashibai v. Vinayak](#), ). It will be seen that in the ultimate analysis, the problem in each case is 'has the best evidence been adduced on the facts of each case'; in the instant case we have not the slightest hesitation in holding that this essential test for arriving at the truth has been amply satisfied." .....*



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28. But in the above reported judgment, the original of Will was not with the propounder and the same was in the hands of the rival party. Further only to defeat the right of the propounder, the rival party avoided in production of the original Will. Only in that contest, the Division Bench of this Court has held that the production of the registration copy is sufficient, in the absence of other evidence. But, in our case, the facts are altogether different, wherein the propounder has possession of the original Will. But the propounder contend that it has been lost. But, to prove such loss of Will, no iota of evidence submitted before the trial Court. Therefore, this Court is of the firm view that the non-production of the original Will, and the non-examination of the attester is fatal to the defendants case. Hence, this Court confirms the finding of the trial Court that the defendants have miserably failed to prove the due execution of wills, Ex.B.54 and Ex.B.55.

### **Point No.3**

29. Nextly the regarding the execution of settlement deed. The trial Court has found that due to non-production of the original settlement deed and upon absence of proof regarding mortgage, has disbelieved the settlement deed-



Ex.B.66. It is pertinent to mention here that the trial Court has arrived such findings for not only on the ground of non-production of the original, but also taking into consideration of conduct of the defendants in not producing the relevant records to prove the alleged mortgage, and also taking into consideration of the health condition of the settlor, at the relevant point of time and the immediate death of the settlor within short span of time from the date of settlement deed-Ex.B.66. Though this appeal has been filed during 2012, the application to receive the additional document has been filed after a period of long delay of 11 years. Further, no attesor to the said settlement deed was examined before the trial Court inspite of the fact that the plaintiff has specifically denied the execution of settlement deed. Hence, this Court is of the firm view that the finding recorded by the trial Court that the settlement deed has not been proved, is based on material and the said finding is perfectly in order. Hence, this Court even while reappreciating the evidence do not want to interfere with the said findings.

#### **Point No.4**

30.Some of the suit property qua items 49 and 53 were sold to few third parties, by the second defendant. He sold the property based upon the



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alleged conferment of right upon the second defendant, through the Wills dated 05.10.2001 and 07.12.2001. This court for the previous points, has held that both the Wills have not been proved in a manner known to law. As a concomitant the sale deed which solely rest upon the unproved Will, will not confer any title to the buyer. Therefore, the sale deed executed by the second defendant for items 49 and 53 will not bind upon the plaintiff.

### **Point No.5**

31.In view of the above detailed discussion, in respect of the self acquired property of the said Balasubramanian viz., Item Nos.49, 53, 54, 55, and 57, the plaintiff and the defendants 1 to 3 are entitled for 1/5<sup>th</sup> share each, and the legal heirs of the fourth defendant will jointly entitled to have a share of 1/5<sup>th</sup> share. In respect of the other property, viz., items 1 to 48, 50 to 52 and 56, the plaintiff and the defendants 2 and 3 are entitled 6/25 share and the first defendant is entitled to 1/25<sup>th</sup> share. Similarly, the legal heirs of the fourth defendant viz., the respondents 5 to 7 will jointly entitled to have a 6/25 share of the fourth defendant.



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32.In the result, the appeal is partly allowed as indicated in the preceding paragraph and the cross objection is dismissed. The Civil Miscellaneous petition in C.M.P(MD)No.9613 of 2023 is also dismissed and C.M.P(MD)No.9612 of 2023 and M.P(MD)No.4 of 2014 are closed. No costs.

**(G.J.,J.) (C.K.,J.)**  
**01.02.2024**

NCC:Yes/No

Index:Yes/No

Internet:Yes/No

To

1.The Principal District Judge,  
Virudhunagar,  
at Srivilliputhur.

2.The Section Officer,  
Vernacular Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**DR G. JAYACHANDRAN,J.**  
**AND**  
**C.KUMARAPPAN,J.**  
**Ns**

**A.S(MD).No.76 of 2012**  
**and**  
**Cros.Obj.(MD)No.21 of 2023**  
**and**  
**C.M.P(MD)Nos.9612 and 9613 of 2023**

**01.02.2024**