

S.A.(MD)No.305 of 2021

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 08.01.2025

PRONOUNCED ON:21.03.2025

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

S.A.(MD)No.305 of 2021

and

C.M.P.(MD)Nos.4118 of 2021 and 10105 of 2023

1.Gomathyammal
2.A.Esakkiammal
3.M.Esakkiammal
4.Seethalakshmi

:Appellants/Appellants/Defendants 1 to 4

Vs.

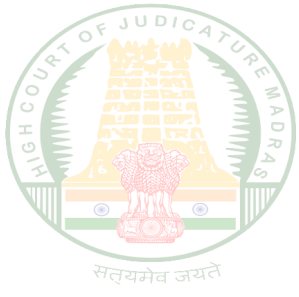
1.Ramar

: 1st Respondent/1st Respondent/Plaintiff

2.Krishnammal

: 2nd Respondent/2nd Respondent/
5th Defendant

PRAYER:- Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree of the Additional District Court / Fast Track Court, Tenkasi, in A.S.No.61 of 2019, dated 27.07.2020, confirming the judgment and decree of the Additional Subordinate Court, Tenkasi, made in O.S.No.296 of 2015, dated 03.04.2019.



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For Appellants : Mr.A.Sankararama Subramanian
for Mr.P.T.Thiraviam

For Respondents :Mr.V.Meenakshi Sundaram
for R.1
: No Appearance for R.2

JUDGMENT

The Second Appeal is directed against the judgment and decree passed in A.S.No.61 of 2019, dated 27.07.2020, on the file of the Additional District Court (Fast Track Court) Tenkasi, confirming the judgment and decree made in O.S.No.296 of 2015, dated 03.04.2019, on the file of the Additional Subordinate Court, Tenkasi.

2. The appellants are the defendants 1 to 4 and the first respondent as plaintiff has filed the above suit claiming partition and allotment of 3/8 shares in the suit property.

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



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4. The case of the plaintiff in short is as follows:

(a) The half of the suit property situated on the northern side was owned by one Subbiah Thevar, father of the plaintiff and the husband of the fifth defendant ancestrally and the remaining half share situated on the southern side was jointly purchased by the said Subbiah Thevar along with the first defendant, vide sale deed dated 27.10.1977 and that they were in joint possession and enjoyment of the suit property. The said Subbiah Thevar was having 3/4 shares and the first defendant 1/4 share in the suit property. The said Subbiah Thevar died intestate on 01.06.2015 leaving behind his legally wedded wife – fifth defendant and his son – plaintiff herein and as such, the plaintiff and the fifth defendant have become entitled to get 3/4 shares in the suit property.

(b) The said Subbiah Thevar having illegal affairs with the first defendant who got married earlier with one person from Chinnapanaiyankulam, had sent out the fifth defendant. The defendants 2 to 4 are the children born to Subbaiah Thevar through the first defendant.



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(c) Since there arose some disputes in enjoying the suit property jointly with the first defendant, the plaintiff and the fifth defendant have demanded partition and allotment their 3/4 shares in the suit property. But the first defendant was postponing the same on some pretext or the other. Hence, the plaintiff and the fifth defendant have sent a legal notice dated 22.07.2015 demanding partition and the defendants 1 to 4 have sent a reply dated 28.07.2015 with false and untenable allegations. The reply averments that the deceased Subbiah Thevar and the first defendant had executed a registered Will dated 09.07.2013 bequeathing the half share belonging to Subbiah Thevar to the defendants 2 to 4 and after the death of the said Subbiah Thevar, the Will came into force and that the defendants 1 to 4 have become the owners and are in possession of the property are false and untenable. The deceased Subbiah Thevar has not executed any Will and there was no necessity for executing the same. The first defendant had obtained the Will fraudulently by exercising undue influence. Since the Will is not legally valid and the partition demand was not acceded, the plaintiff was forced to file the above suit for partition.



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5. The defence of the defendants 1 to 4 in short is as follows:

(a) After the birth of the plaintiff, the fifth defendant having illicit affairs with another, left the home. Subbiah Thevar as per the Hindu customs and rites, had married the first defendant and due to their wedlock, the defendants 2 to 4 were born. The first defendant alone had taken care and custody of the plaintiff. The first defendant and her husband Subbiah Thevar had purchased undivided half share in the suit property on 27.10.1977 and the remaining undivided half share was belonging to Subbiah Thevar ancestrally. The first defendant and her husband had partitioned the properties orally allotting northern half share to Subbiah Thevar and the southern share to herself.

(b) The first defendant along with her husband Subbiah Thevar had executed a registered Will on 09.07.2013 in respect of the northern half share of the suit property bequeathing in favour of the plaintiff and the defendants 2 to 4 and the contention of the plaintiff that the Will is false and fraudulent document is false and incorrect. The plaintiff is entitled to get 1/4 share in the northern half of the suit property and is not entitled to get the share as claimed and that therefore, the suit is liable to be dismissed.



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6. The defendants 1 to 4 have filed an additional written statement taking further stand that the first defendant and her husband had executed another Will on 09.07.2013 itself in respect of southern half share of the suit property in favour of the defendants 2 to 4. Hence, the southern half share is owned by the defendants 1 to 4 and as such, the plaintiff cannot claim any share in the said property. The fifth defendant after leaving her husband Subbiah Thevar had married one Shanmugaiya Thevar and only thereafter Subbiah Thevar had married the first defendant and as such, the fifth defendant is not entitled to get any share in the suit properties.

7. The learned trial Judge, upon considering the pleadings of both sides, has framed the following issues:

- (1) Whether the Will dated 09.07.2013 executed by the said Subbiah Thevar is true?
- (2) Whether the plaintiff correctly paid the Court fees?
- (3) Whether the plaintiff is entitled to the relief of partition?
- (4) To what other relief, the plaintiff is entitled to?



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8. During trial, the plaintiff has examined himself as P.W.1 and exhibited 6 documents as Exs.A.1 to A.6. The defendants 1 to 4 have examined the first defendant and the third defendant as D.W.1 and D.W.2 respectively and 2 other witnesses Thiru.Mariyappan and Thiru.Muthu as D.W.3 and D.W.4 respectively and exhibited 8 documents as Exs.B.1 to B.8. Two documents came to be exhibited through witnesses as Exs.X.1 and X.2. The learned trial Judge, upon considering the pleadings and evidence both oral and documentary and on hearing the arguments of both sides, has passed the judgment dated 03.04.2019, by holding that two Wills dated 09.07.2013 were not proved in accordance with law, granted the preliminary decree declaring that the plaintiff is entitled to 17/40 shares. Aggrieved by the said judgment and decree, the defendants 1 to 4 have preferred an appeal in A.S.No.61 of 2019 and the plaintiff has filed Cross Appeal challenging some findings made by the trial Court. The learned Additional District Judge, Thenkasi, upon considering the materials available on record and on hearing the arguments of both sides, passed a common judgment dated 27.07.2020, dismissing both the appeal as well cross appeal. Challenging the dismissal of the appeal in A.S.No. 61 of 2019, the defendants 1 to 4 have preferred the present Second Appeal.



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9. At the time of admission of the Second Appeal, the following Substantial Questions of Law came to be formulated:

“i. Whether the finding arrived at by the Courts below that evidences on record does not satisfy the requirement of Section 68 of Evidence Act and Section 63 of Indian Succession Act erroneous and vitiated by no consideration of sub clause (c) of Section 63 of Indian Succession Act?

(ii) Whether the Courts below have committed a mistake in not allocating any share in the property of Late.Subbaiah Thevar holding it is his ancestral joint family property, though he is entitled to share on it as it is his separate property after notional partition and applicants No.2, 3 and 4 entitle to share along with respondents No.1 and 2?

(iii) When the case of the first appellant is that 2nd respondent eloped with another man abandoning Subbaiah Thevar and thereafter Subbaiah Thevar married first appellant and she brought up first respondent/plaintiff, the failure of second respondent to contest the suit and her



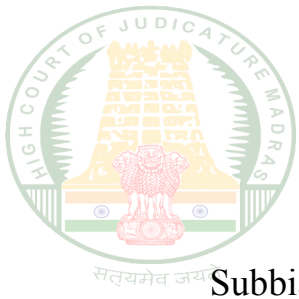
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failure to enter into witness box are fatal to her. Whether the Courts below ought to have held that the first respondent being a “Sudhra” woman is deemed to have divorced her husband under the background facts of case and she is not entitled to any share in property of her husband?”

10. The relationship not in dispute is that the fifth defendant is the wife of the deceased Subbiah Thevar and the plaintiff is their daughter and that the defendants 2 to 4 were born to the deceased Subbiah Thevar through the first defendant. It is not in dispute that the undivided half share of the suit property was owned by the said Subbiah Thevar ancestrally and the remaining undivided share belonging to his brother – Muthiah Thevar came to be purchased by the said Subbiah Thevar and the first defendant, vide sale deed dated 27.10.1977 under Ex.A.1. According to the plaintiff, his father Subbiah Thevar had illicit affairs with the first defendant and thrown out her mother – fifth defendant from the matrimonial home and that the defendants 2 to 4, were born to Subbiah Thevar and the first defendant. But according to the defendants 1 to 4, after the birth of the plaintiff, the fifth defendant had illicit affairs with one Shanmugaiya Thevar and left the matrimonial home, that



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Subbiah Thevar had then married the first defendant as per the Hindu customs and rites and due to their wedlock, the defendants 2 to 4 were born and as such, the first defendant is the legally wedded wife and the defendants 2 to 4 are the legitimate children of the deceased Subbiah Thevar. But the fact remains, the defendants 1 to 4 have not produced any iota of materials to show that the marriage between the fifth defendant and Subbiah Thevar got dissolved in a manner known to law. But in the Second Appeal, the defendants 1 to 4 have taken a stand that though the defendants 1 to 4 have taken a defence that the fifth defendant eloped with another person abandoning Subbiah Thevar, that the fifth defendant failed to contest the case and her failure to enter into witness box are fatal, that the fifth defendant being a Sudhra woman, is deemed to have divorced her husband under the background facts of the case and as such, she is not entitled to get any share in the property of her husband and that on that basis, the third Substantial Question of Law came to be formulated.

11. It is surprising to notice that such a plea was nowhere whispered earlier. In the absence of any pleadings or evidence, the said plea cannot at all be entertained at the present stage. Considering the



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evidence available on record, the trial Court as well as the appellate Court have rightly come to a decision that when the first marriage between the deceased Subbiah Thevar and fifth defendant was subsisting, the subsequent marriage with the first defendant cannot be stated to be valid and since the same is in contravention to Section 5(i) of the Hindu Marriage Act, it is to be held as null and void. Moreover, both the Courts below have rightly held that the defendants 2 to 4 are the children born out of the void marriage between the first defendant and the deceased Subbiah Thevar and are to be considered as legitimate children of the deceased Subbiah Thevar, but the only restriction is that they are not entitled to claim inheritance in ancestral co-parcenary property.

12. The main defence of the defendants 1 to 4 is that the first defendant along with her husband had executed two Wills on 09.07.2013 in respect of northern and southern half shares of the suit property. The plaintiff has specifically denied and disputed the alleged Wills under Exs.B.1 and B.8. Before entering into further discussion, it is necessary to refer the judgment 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



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in **2013(7) SCC 490**, wherein it has been held as follows:

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“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 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.

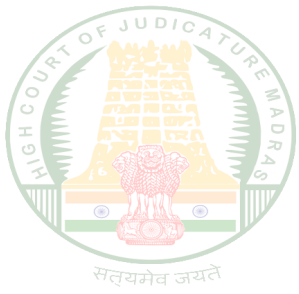
4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial



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 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



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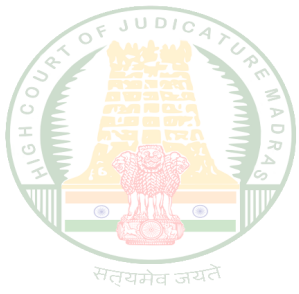


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proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

13. It is pertinent to note that 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. It is settled law that the person who claims any benefit under the Will (propounder) 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.

14. No doubt, the propounder of the Will is duty bound to examine atleast one of the attesting witnesses to prove the execution of the Will as required under Section 68 of the Indian Evidence Act. Just because the mandatory requirement under Section 68 of the Indian Evidence Act has been complied with, it cannot be stated that the Will is proved to be genuine and the Will itself stands proved.



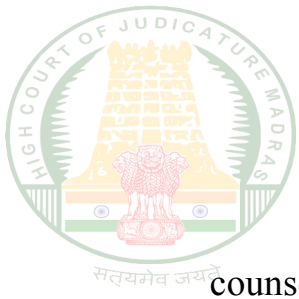
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15. In the case on hand, the defendants 1 to 4 in order to prove the execution of the Will have examined D.W.3 – Mariappan, one of the attestors of the alleged Wills under Exs.B.1 and B.8.

16. Considering the evidence of D.W.3 along with the evidence of the first defendant, the Courts below have come to a categorical finding that the defendants 1 to 4 have miserably failed to prove the Wills under Exs.B.1 and B.8.

17. The learned counsel for the appellants/defendants 1 to 4 would submit that the courts below gravely erred in holding that D.W.3's evidence does not meet the requirements of Section 63(c) of the Indian Succession Act. When read harmoniously, D.W.3's chief examination and cross-examination demonstrate that he received a personal acknowledgment from the testator regarding the signature on Exs.B.1 and B.8 and the said evidence satisfies all requirements of Section 63(c) of the said Act. The learned counsel would further submit that the courts below failed to apply the "armchair theory" to give effect to the testator's intention in Exs.B.1 and B.8 and that minor discrepancies in witness testimony should be overlooked due to the passage of time. The learned



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counsel would point out that the plaintiff is also a beneficiary under Ex.B.1, along with defendants 2 to 4, and that the first defendant and her husband did not discriminate against the plaintiff based on his mother's actions and that the courts below allegedly failed to consider this material aspect.

18. The learned counsel for the plaintiff would submit that a close examination of D.W.3's evidence, along with D.W.1's testimony, reveals that Exs.B.1 and B.8 Wills were not proved in accordance with Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act. He would further submit that even D.W.3's chief examination affidavit lacks the essential requirements under these provisions and that the courts below, having considered the evidence, rightly concluded that the defendants' Wills were not proved.

19. In his chief examination, D.W.3 would say that he signed as the second witness to the two Wills executed by Subbiah Thevar and his wife Gomathi Ammal and that they had witnessed the same and the relevant portion is extracted hereunder:



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“ஐ: உயில் ஆவணத்தில் கப்பையாத்தவர் கையெழுத்திட்டதை நான் பார்த்தன். ஐ: உயில் ஆவணத்தில் முதல் சாட்சியாக பரமசிவத்தவர் மகன் காளிமுத்து என்பவர் கையெழுத்து செய்தார். நான் 2 வது சாட்சியாக கையெழுத்திட்டுள்ளேன். நான் சாட்சி கையெழுத்து ுபாட்டதை கப்பையாத்தவரும் அவரது மனைவியும் பார்த்தார்கள்.”

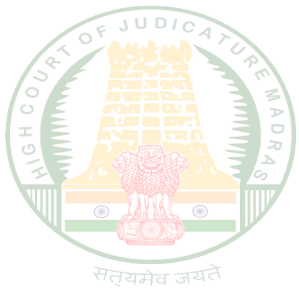
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Referring to second Will,

“அந்த உயிலில் நான் ரேண்டாவதாக சாட்சி கையெழுத்திட்டுள்ளேன். ஐ: உயில் ஆவணத்தில் முதலாவதாக காளிமுத்து என்பவர் சாட்சி கையெழுத்திட்டுள்ளார். நானும் முதல் சாட்சி காளிமுத்து கையெழுத்து ுபாட்டதை கப்பையாத்தவரும் ுகாமதி அம்மாளும் பார்த்தார்கள்.”

But in cross-examination, D.W.3 would admit

“டேக்கால் பத்திர பதிவு அலுவலகத்தில் நான் நிறைய பத்திரங்களில் சாட்சி கையெழுத்து ுபாட்டு உள்ளேன். பத்திர எழுத்தர்கள் கூப்பிடும் போழுது நான் சாட்சி கையெழுத்துபாட செல்வன் என்றால் தெரிந்தவர்களாக நேந்தால் கையெழுத்து ுபாட செல்வன். பி.வா.சா.ஆ.1 மற்றும் 8 உயிலை எழுத அந்த பத்திர எழுத்தர் என்னை கூப்பிட்டாரா என்றால் அவருடன் கப்பையா ுதவரும் என்னை கூப்பிட்டார். 9.7.2013 ுத்தியில் என்னை கூப்பிட்டார். ுராட்டில் நின்று நான் 12 குடித்து கொண்டிருந்த ுபாது கப்பையா ுதவர் என்னைகூப்பிட்டார். கப்பையா ுதவருடன் யாரும்



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வரவில்லை.”

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20. As rightly contended by the learned counsel for the plaintiff, D.W.3's testimony that he was asked to witness the Will while having tea at a roadside shop is implausible. Given that Subbiah Thevar and his wife had planned to execute two Wills regarding their property and visited the document writer's office, it strains credibility that they would arrange attesting witnesses at the office and also call someone who was coincidentally having tea nearby.

21. It is pertinent to mention that D.W.3 in his cross-examination would say that nobody accompanied Subbiah Thevar to the document writer office, whereas D.W.1 in her evidence would say that she alone accompanied her husband Subbiah Thevar and no one else was present. She would mention that no one accompanied them to the Registrar's office. As rightly pointed out by the learned Counsel for the plaintiff, D.W.3 would admit to signing the Wills at the document writer's office, after the Wills had already signed by the testators and the relevant portion is extracted hereunder for better appreciation:



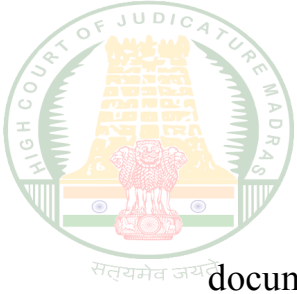
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“ராமகிரு:ணன் பத்திர அலுவலகத்தில் வைத்து தான் நான் சாட்சி கையெழுத்து ுபாட்டன். நான் எழுத்தர் அலுவலகத்திற்கு செல்வதற்கு முன்பு எழுத்தர் உயில் ஆவணத்தை எழுதி தயார் செய்து வைத்திருந்தார். நான் பத்திர அலுவலகத்திற்கு சென்ற ுபாது உயில் எழுதி அதில் கையெழுத்து ுபாடப்பட்டு ரூந்ததில் நானும் கையெழுத்து ுபாட்டன்.”

22. Considering the above, as rightly contened by the learned Counsel for the plaintiff, D.W.3 took a “U” turn and deviated from his chief examination version regarding the execution of the Will. Moreover, D.W.3 would say that the Will was written with black ink pen, is contradicted by the fact that the Wills are typed documents and the relevant portion is extracted hereunder:

“மற்படி உயில்களை எழுதிய எழுத்தர் ராமகிரு:ணன். பத்திரத்தில்தான் எழுதினார். எத்தனை ரூபாய் பத்திரத்தில் எழுதினார் என்று தெரியாது. உயில்களை பத்திர எழுத்தர் கருப்பு மை ுபனாவால் எழுதினார்.”

23. As rightly pointed out by the learned Counsel for the plaintiff, D.W.1 in her cross-examination would admit that did not bring any



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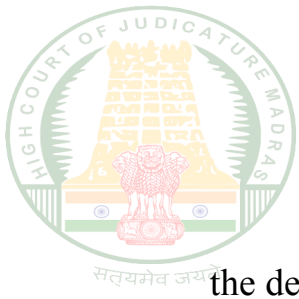
documents to the document writer's office and that they had informed that they were going to write Wills in favour of their children. She would say that

“ பத்திர எழுத்தரிடம் என் பிள்ளைகளுக்க எழுதி வைக்க ுவண்டும் என்று சொன்னாம். பத்திர எழுத்தரிடம் செல்லும்பாது ுவறு ரிக்கார்டு எதுவும் கொண்டு செல்லவில்லை. பத்திர எழுத்தர் நாட்கள் சொன்னதை தாளில் எழுதிக்கொண்டு பின்பு பத்திரத்தில் எழுதினாரா அல்லது ுநரடியாகுவ பத்திரத்தில் எழுதினாரா என்ற விபரம் எல்லாம் எனக்குத் தெரியாது. எழுதிய டேத்தில் நானும்இ சுப்பையா ுதவரும் ஒன்றாக தான் நேந்தாம். அட்கு ுவறு யாரும் லேலை. பத்திரம் எழுதிய பின்பு நான் கையெழுத்து ுபாட்டன். அதன்பின்பு நானும்இ என் வீட்டுக்காரரும் பதிவாளர் அலுவலகத்திற்கு சென்றாம். அட்கும் நானும்இ சுப்பையா ுதவர் மட்டும்தான் சென்றாம். ுவறு யாரும் வரவில்லை.”

24. D.W.3 would say that “சுப்பையா ுதவர் என்னை டீ கடையில் வைத்து கூப்பிட்டபாது அவர் கையில் ுவறு ரிக்கார்டுகள் லேலை.”

Admittedly, two Wills contained specific particulars of the properties allegedly bequeathed therein.

25. The learned Counsel for the defendants 1 to 4 would rely on



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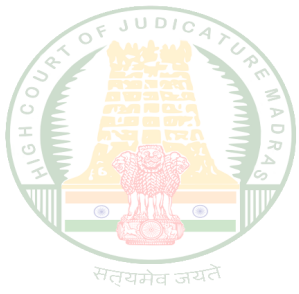
the decision of the Hon'ble Supreme Court in ***Ganesan (D) through LRs.***

Vs Kalanjiam and Others reported in ***2019(6) CTC 85***, wherein the Hon'ble Apex Court has dealt with the interpretation of Section 63(c) of the Indian Succession Act and the relevant passage is extracted hereunder:

“2. Section 63(c) of the Indian Succession Act, 1925 reads as follows :

“63 (c). The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

3. Learned counsel for the appellant submitted that the Will was not signed by the testator in presence of the two attesting witnesses. Neither had the attesting witnesses signed together in presence of the testator. Therefore, the genuineness of the Will cannot be said to have been established in accordance



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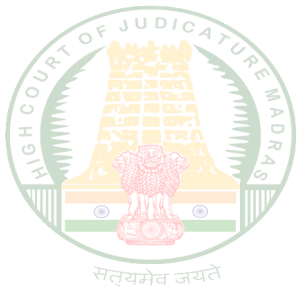


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with the provisions of *Section 63 (c)* of the Indian Succession Act, 1925.

4. Learned counsel for the defendant contended that the attesting witnesses had received from the testator a personal acknowledgement of his signature on the Will. The Will was duly registered and the attesting witnesses had signed simultaneously in presence of the Sub- Registrar after the testator had signed.

5. The appeals raise a pure question of law with regard to the interpretation of *Section 63 (c)* of the Act. The signature of the testator on the will is undisputed. *Section 63 ©* of the Succession Act requires an acknowledgement of execution by the testator followed by the attestation of the Will in his presence. The provision gives certain alternatives and it is sufficient if conformity to one of the alternatives is proved. The acknowledgement may assume the form of express words or conduct or both, provided they unequivocally prove an acknowledgement on part of the testator. Where a testator asks a person to attest his Will, it is a reasonable inference that he was admitting that the Will had been executed by him. There is no express prescription in the statute that the testator must necessarily sign the will in presence of the attesting witnesses only or that the two attesting witnesses must put their signatures on the will simultaneously at the same time in presence of each other and the testator. Both the attesting witnesses deposed that the testator came to them individually



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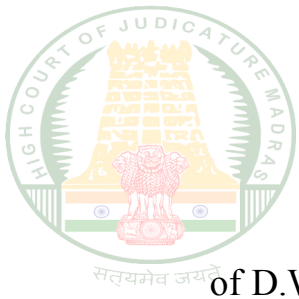
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with his own signed Will, read it out to them after which they attested the Will.

6. In *H. Venkatachala Iyengar vs. B.N. Thimmajamma and others*, AIR 1959 SC 443, it was observed : “..... 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.”

7. In *Pachigolla Venkatarao and others vs. Palepu Venkateswararao and others*, AIR 1956 Andhra 1, it was observed as follows : “There is nothing wrong, as was thought by the learned Subordinate Judge, for a testator to get the attestation of witness after acknowledging before them that he had executed and signed the Will. It is not always necessary that the attesting witness should actually see the testator signing the Will. Even an acknowledgement by him would be sufficient.”

26. In the cited decision, the attesting witnesses deposed that the testator approached them individually with his signed Will, read it out to them and then they attested it.. But in the case on hand, it is not the case

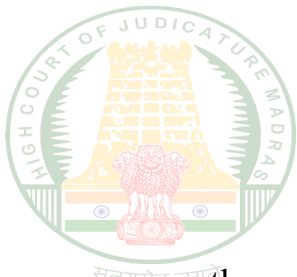


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of D.W.3 that the deceased Subbiah Thevar or his wife had informed him that they had already put their signatures. As already pointed out, in chief examination, he would say that he witnessed the signing of the Will by the deceased Subbiah Thevar and his wife, but in cross-examination, he would admit that the Wills were already signed, when he visited the document writer's office. Notably, despite the evidence of D.W.3, the defendants 1 to 4 have not chosen to examine the other witness – Muthu, or the document writer.

27. As already pointed out, the defendants 1 to 4 in their first written statement pleaded about the first Will in respect of northern half share of the suit property and not about the second Will with respect to the southern half share and that in the additional written statement, they pleaded about the second Will. It is pertinent to note that the first defendant as D.W.1 would only depose about the first Will which came to be exhibited through her as Ex.B.1 and she has nowhere whispered in her chief examination about the second Will. It is pertinent to note that when the third defendant was examined as D.W.2, the second Will came to be exhibited as Ex.B.8 and D.W.2 would say that he was not aware of the execution of the Will directly. Even according to the defendants 1 to 4,



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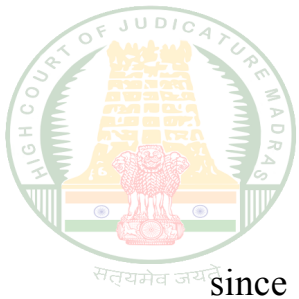
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the northern half share was owned by the deceased Subbiah Thevar ancestrally. But in the Will under Ex.B.1 regarding the northern half share, they referred that the property bequeathed therein came to be owned by them, vide sale deed dated 27.10.1977 and it was nowhere stated that the property shown therein was owned by Subbiah Thevar ancestrally. In Ex.B.8 also, regarding the southern half share of the suit

property, they stated that they owned the property vide sale deed dated 27.10.1977. However, while this document mentions that their family consisted of themselves and their three daughters, Ex.B.1 document includes the plaintiff as a member of their family.

28. Considering the evidence of D.W.3 along with the evidence of D.W.1 and other attending circumstances referred above, this Court has no hesitation to hold that the defendants have miserably failed to prove the execution of Exs.B.1 and B.8 Wills and there is absolutely nothing to interfere with the reasoned findings recorded by the Courts below.

29. Admittedly, the southern half share of the property was owned jointly by the deceased Subbiah Thevar and the first defendant and that



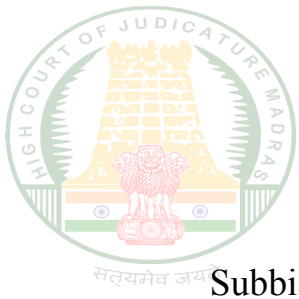
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since the Wills are held to be not proved, it has to be considered that Subbiah Thevar died intestate and as such, the first wife – fifth defendant and their daughter – plaintiff and the children born out of the wed lock between the first defendant and Subbiah Thevar – defendants 2 to 4 being the Class-I legal heirs are entitled to get $\frac{1}{5}$ share each in the southern half share belonging to the deceased Subbiah Thevar ie., $\frac{1}{5} \times \frac{1}{4} = \frac{1}{20}$ each and there is no dispute about the allotment of shares in respect of the southern half share of the suit property.

30. The learned Counsel for the defendants would argue that since the northern half share was ancestral property, a notional partition between Subbiah Thevar and his son (the plaintiff) would result in half share each and consequently, Subbiah Thevar's $\frac{1}{4}$ share would be considered his separate property, to be divided equally among his legal heirs, including the plaintiff, the fifth defendant (his first wife), and defendants 2 to 4 (his daughters through his second wife). However, the counsel would contend that the Courts below erred in not allotting a share to defendants 2 to 4.

31. The learned counsel for the plaintiff would fairly concede that



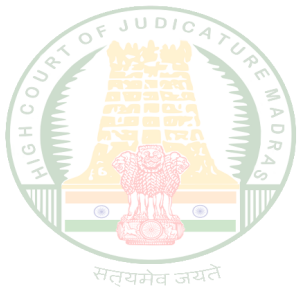
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Subbiah Thevar's 1/4 share would devolve upon his legal heirs under Section 8 of the Hindu Succession Act and therefore, the plaintiff, the fifth defendant, and defendants 2-4 would each be entitled to a 1/20 share.

32. A three Judges Bench of the Hon'ble Supreme Court, while considering a reference in ***Revanasiddappa Vs. Mallikarjun*** reported in **2023 Live Law SC 737** has held that the children born out of void / voidable marriages are entitled to inherit share in the property of their deceased parents which would have been allotted to them on a notional partition of the Hindu coparcenary property and the relevant portion is extracted hereunder:

“For the purpose of ascertaining the interest of a deceased Hindu Mitakshara coparcener, the law mandates the assumption of a state of affairs immediately prior to the death of the coparcener, namely a partition of the coparcenary property between the deceased and other members of the coparcenary. Once the share of the deceased in the property that would have been allotted to him if a partition had taken place immediately before his death is ascertained, his heirs, including the children who have been conferred with



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legitimacy under Section 16 of the Hindu Marriage Act, will be entitled to their share in the property which would have been allotted to the deceased upon the notional partition if it had taken place".

33. The Hon'ble Apex Court further held that the provisions of Hindu Succession Act must be harmonised with the mandate of Section 16(3) of Hindu Marriage Act, which stipulates that a legitimate child is entitled to rights in the properties of their parents only and not in the properties of any other person.

34. Given the above, the courts below's calculation of shares regarding the northern half share is incorrect. As rightly contended by both counsels, since the property was ancestral, a notional partition would have given Subbiah Thevar and the plaintiff half shares each ($\frac{1}{4}$ share). Upon Subbiah Thevar's death, his $\frac{1}{4}$ share would devolve upon his Class-I heirs, namely the plaintiff, the fifth defendant, and defendants 2-4, each entitled to $\frac{1}{20}$ share. The plaintiff, having an ancestral $\frac{1}{4}$ share ($\frac{5}{20}$) plus an additional $\frac{1}{20}$ share as a Class-I heir, would have a total of $\frac{6}{20}$ shares. Additionally, the plaintiff is entitled to a $\frac{1}{20}$ share



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in the southern half share, bringing their total share to 7/20. Therefore, the courts below's finding that the plaintiff is entitled to 17/40 shares is liable to be set aside and modified accordingly. Considering the circumstances and the parties' relationship, this Court decides that the parties are to be directed to bear their own costs.

35. In the result, the Second Appeal is partly allowed. The preliminary decree is passed declaring that the plaintiff is entitled to get 7/20 shares in the suit property. Consequently the connected Miscellaneous Petitions are closed. The parties are directed to bear their own costs.

21.03.2025

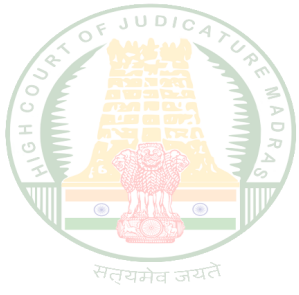
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To

1. The Additional District Court / Fast Track Court, Tenkasi,
2. The Additional Subordinate Court, Tenkasi,

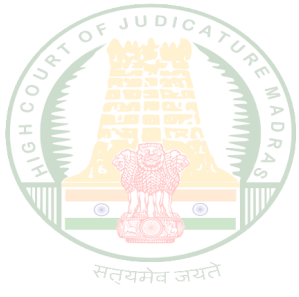
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3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

S.A.(MD)No.305 of 2021

21.03.2025