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S.A. No.1019 of 2002

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGEMENT RESERVED ON : 26 / 03 / 2026

JUDGEMENT DELIVERED ON : 14 / 07 / 2026

CORAM:

THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

S.A. No.1019 of 2002

Viswanathan

S/o.Kuruvian *alias* Munisamy

Reddipatti, Anandoor Post,

Uthangarai Taluk,

Dharmapuri District.

... Appellant /1st Respondent/
Plaintiff

Versus

1. Sivaji

2. Manoharan

3. Markandan

4. Paramathma

5. Pitchandi (Died)

Respondents 1 to 5 are sons
of Kuruvian *alias* Munisamy

6. Unnamalai

Widow of Kuruvian *alias* Munisamy

... Respondents 1 to 6 /
Appellants /
Defendants 1 to 6

7. Unnamalai *alias* Gejjiammal

Widow of Kuruvian *alias* Munisamy

... Respondent-7 /
Respondent-2 /
Defendant-7



Respondents 1 to 7 are residing at
Reddipatti,
Anandoor Post,
Uthanagarai Taluk,
Dharmapuri District.

8.P.Deepa
W/o.Late. Pitchandi

9. Minor.Mouneshwaran
S/o.Late Pitchandi

10. Minor.Dharshan
S/o.Late Pitchandi

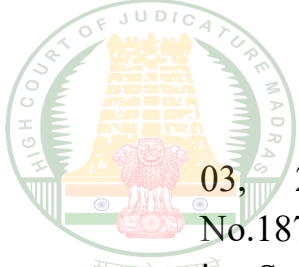
... Respondents 8 to 10 /
Legal Representative
of the deceased 5th
Respondent - Pitchandi

Respondents 8 to 10 are residing at
A.Reddipatti,
Anandoor Post,
Uthangarai Taluk,
Dharmapuri District.

Note:

1) Respondent Nos.9 and 10 are
represented by their Mother and
Natural Guardian - R.Deepa

2) Respondent Nos.8 to 10 were
brought on record as Legal
Representatives of the deceased
5th Respondent - Pitchandi vide
Order of this Court dated January



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03, 2022 made in C.M.P.
No.18757, 18762 & 18765 of 2018
in S.A. No.1019 of 2002

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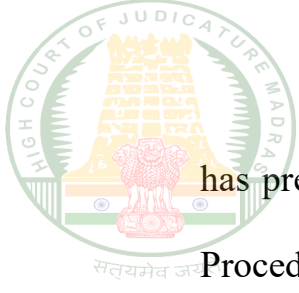
PRAYER:- Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree dated February 28, 2001 made in A.S. No.50 of 2000 on the file of the Principal District Court, Krishnagiri, reversing the Judgment and Decree dated June 30, 2000 made in O.S. No.326 of 1996 on the file of the District Munsif-cum-Judicial Magistrate, Uthangarai.

For Appellant	: Mr.S.Arjun For Mr.Kandavadivel Doraisami
For Respondents 1 to 4, 6 & 8 to 10	: Ms.V.Srimathi
For Respondent 5	: Died
For Respondent 7	: Served – No appearance

* * *

J U D G M E N T

Feeling aggrieved by the Judgment and Decree dated February 28, 2001 passed in A.S. No.50 of 2000 by 'the Principal District Judge, Krishnagiri' ['First Appellate Court' for brevity], reversing the Judgment and Decree dated June 30, 2000 passed in O.S. No.326 of 1996 by 'the District Munsif-cum- Judicial Magistrate, Uthangarai' ['Trial Court' for brevity], the first respondent therein who is the plaintiff in the Original Suit



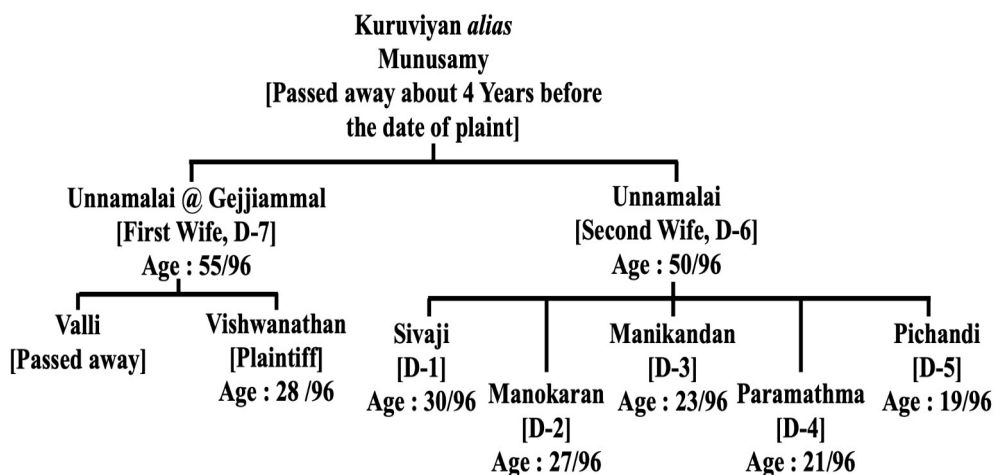
has preferred this Second Appeal under Section 100 of 'the Code of Civil Procedure, 1908' ['CPC' for short].

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2. For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit before the Trial Court.

CASE OF THE PLAINTIFF IN BRIEF

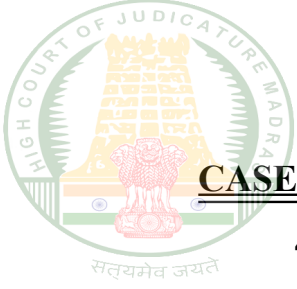
3. The suit properties belonged to one Kuruviyan *alias* Munusamy. Defendants 7 and 6 are his first and second wife respectively. The plaintiff is his son born through first wife / seventh defendant while defendants 1 to 5 are his children born through second wife / sixth defendant. The relationship between the parties as stated in the plaint is represented through the following Genealogical tree:



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3.1. Case of the plaintiff is that the suit properties were allotted to Kuruviyan *alias* Munusamy in a partition. After his demise, the plaintiff and the defendants 1 to 5 and 7 are entitled to equal share in the suit properties. Further case of the plaintiff is that at the instigation of his second wife / sixth defendant, Kuruviyan *alias* Munusamy drove away his first wife / seventh defendant and his son born through first wife / plaintiff out of his house, and hence, the plaintiff and the seventh defendant had to live separately. During his life time, Kuruviyan *alias* Munusamy agreed to give a share in the suit properties to the plaintiff, however, he subsequently passed away intestate. When the seventh defendant and the plaintiff demanded partition of the suit properties through *Panchayatdhars* during the final rites of Kuruviyan *alias* Munusamy, the defendants promised partition post the final rites, however, they later refused to do so. Hence, the plaintiff issued legal notice dated April 08, 1996, to which, the defendants replied with false allegations on April 30, 1996. Further, the defendants with a view to defeat and defraud the plaintiff's rights, attempted to alienate the suit properties. Hence, the Suit for partition claiming 1/7 share in the suit properties and permanent injunction not to make any encumbrance over the suit properties till the disposal of the Suit.

**CASE OF THE DEFENDANTS 1 TO 6 IN BRIEF**

4. The first defendant filed a written statement. Defendants 2 to 6 adopted the written statement filed by the first defendant. According to the defendants 1 to 6, Kuruviyan *alias* Munusamy never married the seventh defendant, and the plaintiff is not his son. Sixth defendant alone is the wife of Kuruviyan *alias* Munusamy and defendants 1 to 5 are alone his sons. There exist no relationship whatsoever between the plaintiff and the family of defendants 1 to 6. Hence, the plaintiff is not entitled to seek partition of the suit properties. The *contra* averments made in the plaint are all denied. Seventh defendant is none other than the niece [elder sister's daughter] of Kuruviyan *alias* Munusamy. The defendants 1 to 6 allege that the seventh defendant was leading a wayward life without listening to her parents and the plaintiff was consequently born to her.

4.1. Further case of the defendants 1 to 6 is that Kuruviyan *alias* Munusamy during his lifetime, executed a Will dated September 21, 1988 in favour of defendants 1 to 5 and passed away in the month of *Aadi* [Tamil month] 1989 in a good and sound state of mind. On and after the demise, the Will came into force and the defendants 1 to 6 are in possession and enjoyment of the suit properties. Stating so, the defendants 1 to 6 sought to



dismiss the Original Suit. Seventh defendant was set *ex-parte* before the Trial Court.

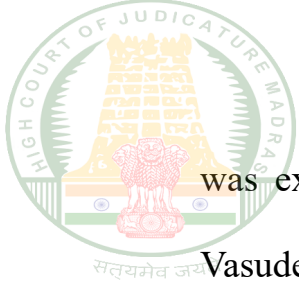
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TRIAL COURT

5. Based on the above pleadings, the Trial Court framed the following issues:

- "(i) *Is it true that the plaintiff is not the son of the deceased Kuruviyan alias Munusamy, defendants 6 and 7 are not the wives of Kuruviyan alias Munusamy?*
- (ii) *Whether the plaintiff is entitled to partition and separate possession as prayed for?*
- (iii) *Whether the plaintiff is entitled to get a permanent injunction as prayed for?*
- (iv) *Whether the Court fee is not properly valued for the Suit?*
- (v) *To what relief?"*

6. At trial, the plaintiff was examined as P.W.1, one Perumal was examined as P.W.2 and one Chennaiyan was examined as P.W.3 and Ex.A.1 to Ex.A.11 were marked on the side of the plaintiff. On the side of the defendants, the first defendant was examined as D.W.1, one Sundaram

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was examined as D.W.2, one Jeyavel was examined as D.W.3 and one Vasudevan was examined as D.W.4, and Ex.B.1 to Ex.B.9 were marked.

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7. After a full-fledged trial, the Trial Court held that the seventh defendant is the first wife of Kuruviyan *alias* Munusamy and the plaintiff is the son born to them. The Trial Court further held that sixth defendant is the second wife of Kuruviyan *alias* Munusamy and that defendants 1 to 5 are the children born to them. Further held that Ex-B.2 - Will relied on by the defendants 1 to 6 was not proved satisfactorily as per law. Upon arriving at these findings, the Trial Court concluded that the plaintiff is entitled to the reliefs of partition and permanent injunction as prayed for as against defendant 1 to 6.

FIRST APPELLATE COURT

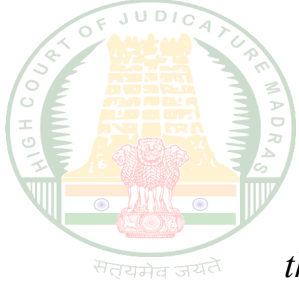
8. Feeling aggrieved, the defendants 1 to 6 preferred an Appeal in A.S.No.50 of 2000 before the First Appellate Court, which after hearing both sides, held that the suit properties and some more properties were originally ancestral properties which were allotted to Kuruviyan *alias* Munusamy in a partition. Once allotted, they acquire the character of separate properties in the hands of Kuruviyan *alias* Munusamy. Accordingly, the First Appellate Court held that the suit properties are

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absolute properties of Kuruviyan *alias* Munusamy. The First Appellate Court further concurred with the Trial Court's findings that the seventh defendant is the legally wedded wife of Kuruviyan *alias* Munusamy and the plaintiff is the son born to them, and that the sixth defendant is Kuruviyan *alias* Munusamy's second wife and defendants 1 to 5 are the sons born to them. However, the First Appellate Court differed with the Trial Court on the question of proof of Ex-B.2 - Will and held that Ex-B.2 - Will has been proved satisfactorily as per law by examining its attesting witnesses and the scribe as D.W.2 to D.W.4 respectively. There is no reason to disbelieve the evidence of D.W.2 to D.W.4. Accordingly, the First Appellate Court allowed the appeal, reversed the Judgment and Decree of the Trial Court and dismissed the Suit.

SECOND APPEAL

9. Feeling aggrieved by the Judgment and Decree passed by the First Appellate Court, the first respondent in the Appeal Suit who is the plaintiff in the Original Suit has preferred the present Second Appeal, which was admitted by this Court on June 24, 2002 on the following Substantial Questions of Law:



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"1. Whether the lower Appellate Court erred in holding that in view of the partition among the brothers the character of ancestral property would become absolute property under the provisions of Hindu Law?

2. Whether the lower Appellate Court erred in holding that Will Ex.B.2 was properly proved?"

ARGUMENTS

10. Mr.Arjun, learned Counsel appearing on behalf of Mr.Kandavadivel Doraisami, learned Counsel on record for the appellant / first respondent / plaintiff, submitted that the suit properties and some more extent of properties were originally owned by Kuruviyan *alias* Munusamy and his brothers as ancestral properties. They partitioned the same and the suit properties fell into the share of Kuruviyan *alias* Munusamy. Once allotted, the suit properties are separate properties *qua* his brothers and ancestral properties *qua* his own branch. That is to say, *qua* the plaintiff, the suit properties are ancestral properties. In this regard, he relied on the Judgments of Hon'ble Supreme Court in ***Rohit Chauhan -vs- Surinder Singh***, reported in (2013) 9 SCC 419 and ***Arshnoor Singh -vs- Harpal Kaur***, reported in (2020) 14 SCC 436. Moreover, D.W.1 / first

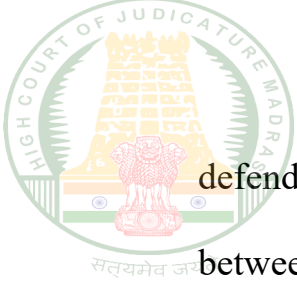
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defendant in his evidence has categorically admitted that the suit properties are ancestral properties in the hands of Kuruviyan *alias* Munusamy.

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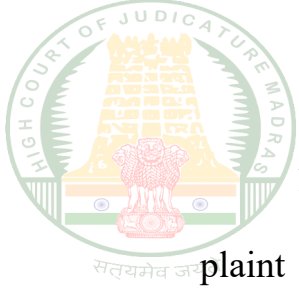
10.1. Further, he submitted that the Trial Court held that the seventh defendant is the first wife of Kuruviyan *alias* Munusamy and the plaintiff is the son born to the aforesaid couple, and also that the sixth defendant is his second wife and defendants 1 to 5 are the children born to them. The First Appellate Court framed a specific point on this aspect viz., "*Point No. (1) : Whether the plaintiff is the son of Kuruviyan alias Munusamy through the seventh defendant ?*" and concurred with the Trial Court. Defendants 1 to 6 did not prefer any Second Appeal or Cross-Objection against the Judgment and Decree of the First Appellate Court and therefore, the aforesaid finding of the First Appellate Court has reached finality.

10.2. He further argued that Ex-B.2 - Will allegedly executed on September 21, 1988, is surrounded by suspicious circumstances. He pointed out four circumstances in an attempt to establish the alleged suspicions surrounding the Will. Firstly, Kuruviyan *alias* Munusamy / Testator was age-old, illiterate, rustic and also sick at the time of alleged execution of Ex-B.2 - Will. Secondly, Ex-B.2 - Will is an un-registered document. Thirdly, active participation of the beneficiaries namely

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defendants 1 & 6, in execution of the testament. Fourthly, the proximity between the date of testament and the date of demise of the testator. In these circumstances, the Trial Court rightly concluded that Ex-B.2 - Will was not proved as per law after removing the suspicious circumstances. But the First Appellate Court without considering the aforesaid factors, erroneously concluded that Ex-B.2 - Will was proved by the defendants 1 to 6 as per law. The same is liable to be interfered with by this Court.

11. *Per contra*, Ms.V.Srimathi, learned Counsel appearing for Respondent Nos.1 to 4, 6 and 8 to 10, contended that Kuruviyan *alias* Munusamy never married the seventh defendant. The defendants 1 to 6 have categorically denied both, the alleged marriage of the seventh defendant with Kuruviyan *alias* Munusamy and the alleged paternity of the plaintiff. In such circumstances, the burden lies heavily upon the plaintiff to plead and prove that a valid marriage took place between Kuruviyan *alias* Munusamy and the seventh defendant. There are neither pleadings nor evidence available on record to prove the alleged marriage. Despite specific denial by the defendants 1 to 6, the plaintiff failed to prove the factum of the alleged marriage between Kuruviyan *alias* Munusamy and seventh defendant.

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11.1. Learned Counsel further submitted that bare reading of the plaintiff averments would clearly indicate that even as per the case of the plaintiff, the suit properties are separate properties of Kuruviyan *alias* Munusamy. Having made such an admission in the plaint, the plaintiff cannot approbate and reprobate by taking a contrary stand during the course of arguments. Further, the suit properties were acquired by Kuruviyan *alias* Munusamy in a partition among brothers and thus, the suit properties became separate and absolute properties of Kuruviyan *alias* Munusamy. Further would argue that the testator passed away about one year after the date of Ex-B.2 - Will. There was some property dispute between the testator / Kuruviyan *alias* Munusamy and his *Pangalis* [close relatives] and that is the reason why the testator decided to execute Ex-B.2 - Will. Further, a Will is not a compulsorily registrable document. D.W.2 and D.W.3, who are attestors to Ex-B.2 - Will and D.W.4 who is the scribe thereto were examined. Their evidence is cogent and proved Ex-B.2 - Will as per Section 63 of the Indian Succession Act, 1925. The First Appellate Court rightly held that the Will has been duly proved by the defendants 1 to 6. There is no warrant to interfere with the said finding.

11.2. In response to the argument advanced by the learned Counsel for the appellant *qua* non-filing of cross-appeal or cross-objection in

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respect of the First Appellate Court's finding on Point No.(1) framed by it, she referred to Order XLI Rules 22 & 33 of CPC and submitted that even in the absence of cross-appeal or cross-objection, the defendants 1 to 6 are entitled to assail the findings recorded by the First Appellate Court as well as the Trial Court. The learned Counsel went on to submit that the First Appellate Court as well as the Trial Court erred in finding that the seventh defendant is the first wife of Kuruviyan *alias* Munusamy. She strenuously contended further that there is no plea regarding the alleged marriage; there is no plea as to the where and when the marriage took place, the attendees, *etc.* Nor is there any evidence in support of the alleged marriage. Accordingly, she prayed to dismiss the Second Appeal and confirm the Judgment and Decree of the First Appellate Court, except for its finding that the alleged marriage between the seventh defendant and Kuruviyan *alias* Munusamy is proved which is liable to be set aside.

DISCUSSION

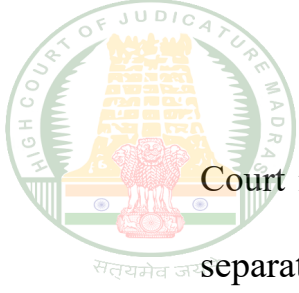
12. This Court has considered both sides' submissions and perused the evidence available on record.

13. Case of the plaintiff is that his mother, namely Unnamalai alias Gejjammal, the seventh defendant, is the legally wedded wife of

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Kuruviyan *alias* Munusamy, and that, in the said wedlock, a daughter - Valli and the plaintiff were born. Further case of the plaintiff is that

Kuruviyan *alias* Munusamy subsequently married the sixth defendant as his second wife, and through the said marriage, defendants 2 to 5 were born. The suit properties were allotted to Kuruviyan *alias* Munusamy in a partition among brothers and he along with defendants 1 to 5 and 7 are entitled equal share *i.e.*, 1/7 share, in the suit properties. The plaintiff has not made any express averment in the plaint *qua* the character of suit properties in the hands of Kuruviyan *alias* Munusamy. However, a comprehensive reading of the plaint, the narration and prayer thereof, especially the averment that the plaintiff as well as the defendants 1 to 5 and 7 are equally entitled to the suit properties, would point that the suit properties are separate properties of Kuruviyan *alias* Munusamy as per the plaintiff's case. Had the plaintiff's case been that the suit properties are ancestral properties, he would have claimed 9/16 share in the suit properties [To be noted, plaintiff's side evidence discloses a fact that plaintiff's late sister - Valli has one daughter namely Deepa]. Hence, though the plaintiff did not take an express stand *qua* character of the suit properties, from a comprehensive and cogent reading of the plaint, this

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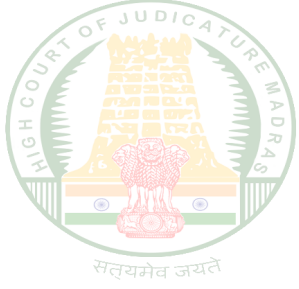
Court is of the view that according to the plaintiff, the suit properties are separate properties in the hands of father - Kuruviyan *alias* Munusamy.

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14. The defendants 1 to 6 filed written statement and denied the alleged marriage between seventh defendant and Kuruviyan *alias* Munusamy. They also denied the paternity of the plaintiff as alleged by him. According to them, sixth defendant is the sole wife of Kuruviyan *alias* Munusamy and defendants 1 to 5 are his only sons / legal heirs. Further, Kuruviyan *alias* Munusamy executed Ex-B.2 - Will in favour of defendants 1 to 5 and bequeathed the suit properties in favour of them.

15. This Court shall first decide whether the defendants 1 to 6, in order to assail the First Appellate Court's adverse finding against them that the seventh defendant is the first wife of Kuruviyan *alias* Munusamy in Second Appeal, ought to have filed a cross-objection assailing the adverse finding, when the First Appellate Court eventually ruled in favour of them by upholding Ex-B.2 - Will and dismissing the Original Suit.

16. In this regard, this Court deems fit to refer to the Judgment of Hon'ble Supreme Court in *State of A.P. -vs- B. Ranga Reddy*, reported in (2020) 15 SCC 681, whereof relevant portion reads thus:

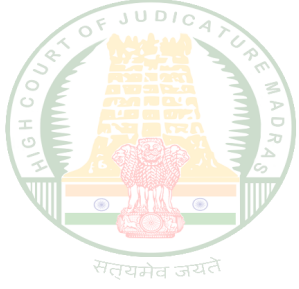


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"19. This Court while considering the amendments made in the Code in the year 1976, held that even under the amended provisions of Order 41 Rule 22 of the Code, a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objections. However, by an amendment in Order 41 Rule 22 of the Code, it is permissible to file cross-objections against the finding. The respondent may defend himself without filing any cross-objections to the extent to which the decree is in his favour. The Court held as under: (Banarsi case [Banarsi v. Ram Phal, (2003) 9 SCC 606] , SCC pp. 616-17, paras 10-11)

"10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:



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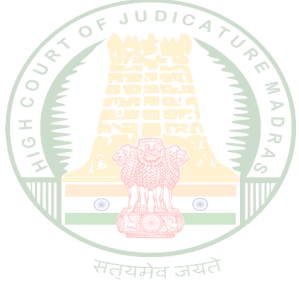
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(i) *The impugned decree is partly in favour of the appellant and partly in favour of the respondent.*

(ii) *The decree is entirely in favour of the respondent though an issue has been decided against the respondent.*

(iii) *The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.*

11. In the type of Case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of Cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objections to a finding recorded against him either while answering an issue or while

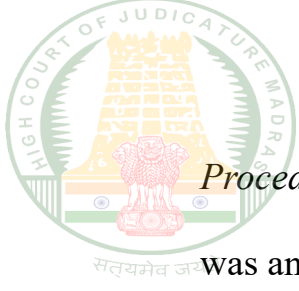


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dealing with an issue. The advantage of preferring such cross-objection is spelt out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default, the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

17. It is also apposite to cite here the Judgment of a learned Single Judge of this Court in ***Suresh Kumar Kankariya Vs. K.Jigibai***, reported in ***2022 SCC OnLine Mad 1931***. One of the Substantial Question of Law before the Court was *"Where a favourable finding has been given in favour of the plaintiff by the Courts below even though the relief was denied, whether such findings can be interfered in the Second Appeal even when a Cross Objection has not been filed by the successful party and what will be the scope of invoking Order XLI Rule 33 of the Code of Civil Procedure, while deciding the Second Appeal where the jurisdiction is circumscribed by the provisions of Section 100 of the Code of Civil*



Procedure?". Following *B.Ranga Reddy's Case* [cited *supra*], the question

was answered thus:

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"24. It is clear from the above judgments that the necessity to file a cross-appeal or a cross-objection will arise only when the impugned decree is partly in favour and partly against the respondent. Where the decree is entirely in favour of the respondent, though there is a finding against the respondent, he need not file a cross-appeal or a cross-objection and the adverse findings can be challenged in the appeal filed by the other party and the Court is entitled to decide the same. Even after the amendment that was brought in the year 1976 and an explanation was added to Order XLI Rule 22 of CPC and a right was created for filing a cross-objection against an adverse finding, the same is mandatory only where the decree is partly in favour and partly against the respondent."

18. From the above Judgments, it is clear that, in order to assail an adverse finding of the First Appellate Court or the Trial Court, the respondents in the appeal (defendants 1 to 6 in this case) are required to file an appeal or cross-objection assailing the said adverse finding, only when the decree is fully or partly against them. In other words, the respondents ought to file an appeal or cross-objection only when they are

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attacking the decree. In cases where the decree is completely in favour of them, they are entitled to assail the adverse finding to defend their case in appeal, even without preferring any cross-objection. Therefore, the defendants 1 to 6 are entitled to defend their case in Second Appeal, without the need to prefer a cross-objection to assail the adverse finding of the First Appellate Court that the seventh defendant is the first wife of Kuruviyan *alias* Munusamy, for the reason that the First Appellate Court dismissed the Suit in its entirety by allowing the appeal and thereby ruled completely in favour of the defendants 1 to 6. It cannot be said that the said finding has reached its finality as the defendants 1 to 6 have not preferred any cross-objection.

19. This Court has held *supra* that the defendants 1 to 6 are entitled to assail the adverse finding in this Second Appeal filed by the plaintiff. Now this Court shall examine whether such finding rendered by the First Appellate Court is justifiable and based on evidence. To prove that the seventh defendant is the first wife of Kuruviyan *alias* Munusamy and that the plaintiff was born to Kuruviyan *alias* Munusamy through seventh defendant, the plaintiff marked Ex-A.4 - Birth Register Extract [Certified]; Ex-A.6 - Summons issued to seventh defendant in O.S. No.270 of 1992 on the file of District Munsif Court, Harur; Ex-A.7 - Suit Register Extract in

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said O.S. No.270 of 1992; Ex-A.8 - Voter List for the Bargur Legislative Constituency for the year 1995; Ex-A.9 - Patta; Ex-A.10 - House Tax Receipt; and Ex-A.11 - Plaintiff's marriage invitation. In addition he relied on a specific portion of Ex-B.2 - Will which recites that the testament was executed in the apprehension that *Pangalis* [close relatives] and "other heirs" may assert right over the suit properties. The plaintiff also examined P.W.2 who is none other than the brother of Kuruviyan *alias* Munusamy, and P.W.3, an independent witness belonging to the locality of the parties.

20. This Court has perused all the above evidence. Among them, this Court is not inclined to consider Ex-A.4 as it is disputed by the defendants 1 to 6 by stating that it is that of second defendant - Manoharan and not plaintiff. Ex-A.4 - Certified Birth Register Extract shows that one male child was born to Kuruviyan *alias* Munusamy and one Unnamalai on February 24, 1968. It does not specify the name of the child born. Name of seventh defendant who is said to be the first wife of Kuruviyan *alias* Munusamy is Unnamalai *alias* Gejjiammal, and that of sixth defendant who is said to be his second wife is just Unnamalai. As both their names are Unnamalai and as Ex-A.4 specifies nothing more, it is unclear as to whether it is referring to sixth defendant or seventh defendant. Further, it is only mentioned that a male child was born and no name of the child has

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been mentioned. Moreover, it is a certified copy and not an original; possession of original may have lead to the inference that Ex-A.4 is that of the plaintiff. In these circumstances, the objection raised by the defendants 1 to 6 *qua* Ex-A.4 is valid. Hence, this Court is not inclined to consider the same.

21. Be that as it may, one Murugesan filed a Suit for redemption of mortgage in O.S. No.270 of 1992 against defendants 1 to 3 & 7 and the plaintiff in their capacity as the legal heirs of Kuruviyan *alias* Munusamy. Ex-A.6 is the summon issued to seventh defendant in that Suit and Ex-A.7 is the relevant portion of Suit Register. In the said Suit filed in 1992, the seventh defendant herein who according to the plaintiff is the first wife of Kuruviyan *alias* Munusamy, has been arrayed as the first defendant therein in her capacity as the wife of Kuruviyan *alias* Munusamy.

22. From Ex-A.8 - Voter List for Bargur Constituency published on December 8, 1994, it could been seen that the sixth defendant, first defendant along with his wife and defendants 3 & 4 are residing in Door No.56. It could be further seen that the second defendant and his wife are residing in Door No.56A; and that seventh defendant and the plaintiff are residing in Door No.56B. Besides, it also mentions that the husband of



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seventh defendant and the father of plaintiff, is "Munusamy". Ex-A.8 seen

in the context of the facts of this case, shows that "Kuruviyan *alias*

Munusamy" is the husband of seventh defendant and the father of plaintiff.

It also supports the plaintiff's case that the plaintiff and the defendants 1 to

7 were residing contiguously, and belies the stand of the defendants 1 to 6

that the plaintiff and seventh defendant are in no way related to them.

Needless to mention that Voter List is a public document prepared by

government officials in the course of their official duty and hence, it is

admissible in evidence; unless the contrary is proved, the entries are to be

taken as proved.

23. Ex-A.9 is the notice dated February 6, 1992 issued under Section 9 (2) of the Tamil Nadu Surveys and Boundaries Act, 1923 by the Taluk Deputy Inspector to the seventh defendant. It regards the seventh defendant as the "Munusamy's wife"

24. Ex.A.10 is a House Tax receipt issued in the year 1997. As it is issued after the filing of the present Suit, much relevance cannot be given to it. Ex-A.11 is the marriage invitation dated September 07, 1995. In the said invitation, the plaintiff has been described as the son of Late.

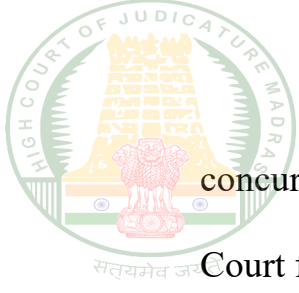
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Munusamy. As Ex-A.11 is just before the Suit, much relevance cannot be given to it as well.

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25. P.W.2 - Perumal, who is none other than the brother of Kuruviyan *alias* Munusamy, deposed that seventh defendant, the niece of Kuruviyan *alias* Munusamy, married him and the plaintiff and one daughter by name Valli were born to them. Valli passed away and she has one daughter by name Deepa. He further deposed that the sixth defendant is the second wife of Kuruviyan *alias* Munusamy and defendants 1 to 5 are the sons to Kuruviyan *alias* Munusamy through sixth defendant. He further added that the plaintiff and defendants 1 to 7 were all living as one family with Kuruviyan *alias* Munusamy and they all participated in the final rites of Kuruviyan *alias* Munusamy. The evidence of P.W.3 corroborated the evidence of P.W.2.

26. The documentary evidence in Ex-A.6 to Ex-A.8 coupled with the oral evidence of P.W.2 and P.W.3 proves the case of the plaintiff that defendants 7 and 6 are the first and second wives of Kuruviyan *alias* Munusamy respectively, and that he was born to him through first wife and the defendants 1 to 5 through the second wife. The Trial Court found so and the First Appellate Court concurred with the Trial Court. The

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concurrent findings are based on evidence available on record and this Court finds no reason to deviate from the same.

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27. Coming to the character of suit properties in the hands of Kuruviyan *alias* Munusamy, neither the plaintiff nor the defendants have taken a specific stand in this regard in the pleadings. However, as elaborated *supra* in Paragraph No.13, case of the plaintiff, as it could be inferred that from a conjoint and cogent reading of the plain averments is that the suit properties are separate properties in the hands of Kuruviyan *alias* Munusamy and the plaintiff during the course of evidence, suggested to D.W.1 that the suit properties are ancestral properties, to which suggestion D.W.1 answered in affirmation.

28. There is no evidence available on record to show that there were ancestral properties including the suit properties in the hands of Kuruviyan *alias* Munusamy and his brothers which were then partitioned. In the absence of evidence therefor, merely because the suit properties were allotted to Kuruviyan *alias* Munusamy in a partition among brothers, it does not automatically lead to the conclusion that the suit properties are ancestral in character. Further, as stated *supra*, the plaintiff's case as it

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could be inferred from the plaint is that the suit properties are separate properties of Kuruviyan *alias* Munusamy. While so, the plaintiff cannot turn around and contend that the suit properties are ancestral properties during the course of trial without any evidence to substantiate the same. The plaintiff cannot approbate and reprobate by taking unsubstantiated contrary stands. In the absence of any material evidence, merely because D.W.1 admitted the plaintiff's side suggestion that the suit properties are ancestral properties, it cannot be concluded that the suit properties are ancestral in character. As even according to the plaintiff the suit properties are separate properties of Kuruviyan *alias* Munusamy, this Court in the absence of contra evidence concludes that the suit properties are separate properties of Kuruviyan *alias* Munusamy. The Trial Court failed to render a finding on the above aspect, while it ought to have. The First Appellate Court held that the suit properties were originally ancestral properties in the hands of Kuruviyan *alias* Munusamy and his brother, and upon partition, it acquired the character of separate properties. While the First Appellate Court cannot be justified in holding that the suit properties were originally ancestral properties for want of evidence, it is right in its final conclusion that the suit properties are separate properties of Kuruviyan

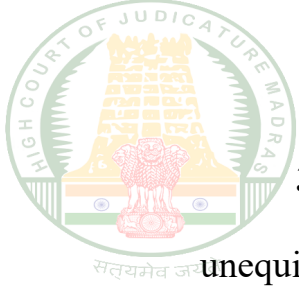
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alias Munusamy. *Substantial Question of Law No.(1) is answered accordingly.*

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29. As far as proof of Ex.B.2 - Will is concerned, Kuruviyan *alias* Munusamy is entitled to bequeath the suit properties or dispose them of as he desires as they are his separate properties as held above. In the present case, it is alleged that Ex-B.2 - Will was executed in the year 1988 on September 21 and is an admitted fact that the testator passed away in the year 1989. It is also admitted that Kuruviyan *alias* Munusamy had affixed only his left thumb impression on Ex.B.2. Further, it is admitted that, at the time of the execution of Ex-B.2 - Will, he was of advanced age and was suffering from illness.

30. D.W.1 / first defendant in his evidence has deposed that on the date of Ex-B.2 - Will, the testator - Kuruviyan *alias* Munusamy was sick and that the testator was taken to Hospital that day and only then he was taken to D.W.4 - Scribe's Office to affix his thumb impression on Ex-B.2 - Will *i.e.*, for its execution. He further deposed that the Sub-Registrar Office is situate close to the office of D.W.4. According to him, as the medical expenses that day were huge, he could not afford to register the testament.



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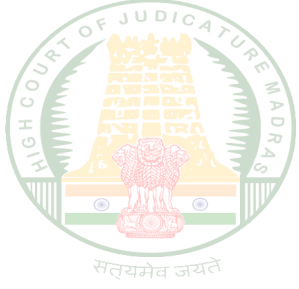
31. D.W.2 and D.W.3 are the attestors to the testament. They have unequivocally deposed about the execution of Ex-B.2 - Will in tune with the defendants 1 to 6's case. They further deposed about the presence and participation of defendants 1 and 6 throughout in the execution of Ex-B.2 Will. They also supported the version of D.W.1 / first defendant that as they did not have sufficient money, Ex-B.2 could not be registered that day.

32. D.W.4 who is the Scribe to Ex-B.2 - Will has deposed that at the time of execution of Ex-B.2 - Will, sixth defendant was present. He further deposed that, when he sought for registration of Ex-B.2, the testator replied that Ex-B.2 - Will may be registered tomorrow as he is sick. Two facts are pellucid from the evidence of D.W.1 to D.W.4. One, the testator was severely sick at the time of execution of Ex-B.2 - Will. The severe nature of the sickness could be inferred from the evidence of D.W.1 / first defendant that the hospital expenses were huge that he could not carry out registration of Ex-B.2 Will that day, and also from the evidence of D.W.4 - Scribe that the testator decided to have the registration of Will the next day for he was sick. Two, defendants 1 and 6 actively participated in the execution of Ex-B.2 - Will. Further, the testator is an illiterate and rustic person of advanced age and it is natural for him to affix thumb impression

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instead of adducing signature. While it would not be a concern under normal circumstances, given that the testator was severely sick at the time of execution of Ex-B.2 - Will and also given the proximity of his date of death and the date of Ex-B.2 - Will, it raises a question as to whether the testator was in a fit and sound state of mind to understand the nature of his act. In these circumstances, the burden lies heavily upon the defendants 1 to 5 to remove the suspicious circumstances surrounding the testament and prove it as per Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. The evidence of D.W.2 to D.W.4 who are the attesting witnesses and scribe, are not sufficient to prove the free, sound and disposing state of mind of the testator as well as the voluntary execution of the testament. The non-registration of Ex-B.2 - Will, in the facts and circumstances of this case, creates serious suspicion around the free and voluntary execution of Ex-B.2 - Will in a sound & disposing state of mind by the testator.

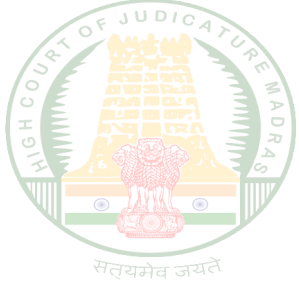
33. In this regard, it is just and necessary to rely upon the Judgment in the case of *H.Venkatachala Iyengar -vs- B.N.Thimmajamma*, reported in *AIR 1959 SC 443*. The relevant portion of the said Judgment is extracted hereunder:



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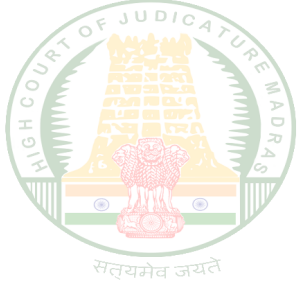
"18. What is the true legal position in the matter of proof of wills ? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will 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 s. 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 ss. 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



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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 s. 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

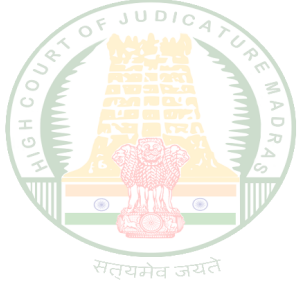


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certainty. The test to be applied would be the usual test of the satisfaction of the, prudent mind in such matters.

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 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

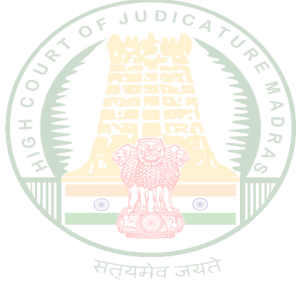


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would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

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

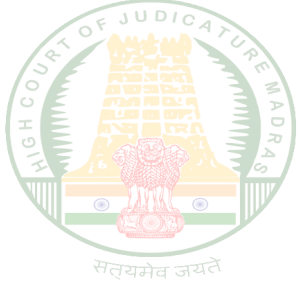


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treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; 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.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the

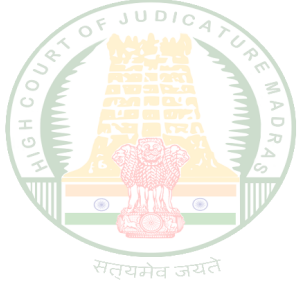


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reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the



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facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harmes v. Hinkson (1946) 50 CWN 895 " where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth ". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

34. The above case law advances the principle that while in general formal proof of a Will is sufficient, when the testator or the testatrix is of advanced age and when the Will is surrounded by suspicious circumstances, the propounder of the Will must take extra care and go an extra mile to prove the Will by removing the suspicious circumstances surrounding it. The principle is squarely applicable to the case on hand and the defendants 1 to 6 being the propounders of Ex-B.2 - Will, ought to have taken steps to prove the free, voluntary, sound and disposing state of

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mind of the testator but they failed to do so. In these circumstances, this

Court is of the view that the Trial Court rightly arrived at the finding that

Ex-B.2 - Will was not proved satisfactorily as per law. But the First

Appellate Court without assigning any sufficient reason, simply jumped to

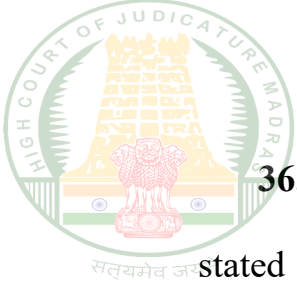
the conclusion that the testament has been proved as per law. The same is

liable to be set aside. *Accordingly, the Substantial Question of Law No.(2)*

is answered in favour of the plaintiff.

35. There is no quarrel with the legal principles advanced in the case laws relied on by the learned Counsel for the appellant. As in the case on hand, it was not established that the suit properties were ancestral properties divided among Kuruviyan *alias* Munusamy and his brothers, the aforesaid case laws are not applicable to the case on hand.

36. Now that Ex-B.2 - Will has not been proved, upon the demise of Kuruviyan *alias* Munusamy, the suit properties, which are his separate properties as held above, would devolve upon his legal heirs as per Section 8 of the Hindu Succession Act, 1956.

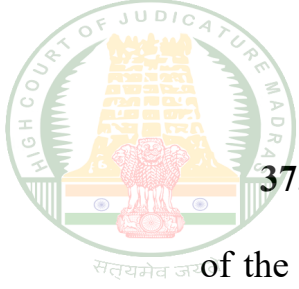
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36.1. The plaintiff in the plaint as well as in his evidence as P.W.1, has stated that he had a sister named Valli (late) who has a daughter by name Deepa. P.W.2 has also corroborated the same. However, the plaintiff has not impleaded the legal heir of late Valli as party to the Suit. The legal heir who is said to be residing in the same locality as the plaintiff and defendants 1 to 7, did not choose to implead herself in the Suit. Nor has the defendants 1 to 6 raised the plea of non-joinder of necessary party. The Suit was filed in 1996 and about 30 years has lapsed. Hence, this Court chooses to refrain from rendering any finding or observation on the rights of legal heir(s) of plaintiff's late sister - Valli.

36.2. Accordingly, the plaintiff and the defendants 1 to 5 & 7 *qua* legal heirs of Kuruviyan *alias* Munusamy under Section 8 of the Hindu Succession Act, 1956, would each be entitled to 1/7 share in the suit properties. As regards the relief of permanent injunction against the defendants 1 to 6 not to alienate the suit properties, a limited injunction shall be granted against the defendants 1 to 6 not to alienate the plaintiff's share in the suit properties or cause prejudice thereto.

CONCLUSION:

37. Resultantly,



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37.1. The Second Appeal is allowed in part. The Judgment and Decree of the First Appellate Court made in A.S. No.50 of 2000 is set aside. The Judgment and Decree of the Trial Court in O.S. No.326 of 1996 is modified to the extent described below:

(i) The plaintiff is entitled to 1/7 share in the suit properties.

(ii) A limited injunction shall be granted against the defendants 1 to 6 not to alienate the plaintiff's share in the suit properties or cause prejudice thereto.

37.2. To the above extent, a Preliminary Decree is passed.

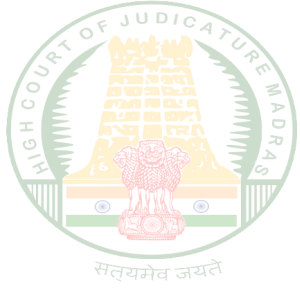
37.3. In view of the facts and circumstances of this case, there shall be no order as to costs in this Second Appeal.

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Index : Yes
Speaking Order : Yes
Neutral Citation : Yes
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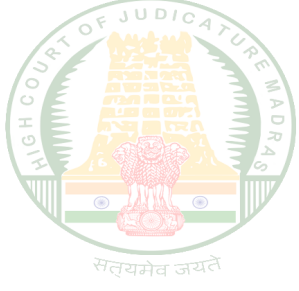
1. The Principal District Judge, Dharmapuri.
2. The District Munsif-cum-Chief Judicial Magistrate, Uthangarai.



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R. SAKTHIVEL, J.

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PRE-DELIVERY JUDGMENT MADE IN
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