

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2015

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THE HONOURABLE MS. JUSTICE R. MALA

A.S.No.711 of 2008

Judgment reserved on 23.07.2015	Judgment pronounced on 29.07.2015
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Beryl Dhinakaran

.. Appellant/Plaintiff

Vs

1.D.Albert

2.Dr.D.Bennet

3.Brinda Nirmal

4.E.Sukur

5.D.Austin

.. Respondents 1 to 5/
Defendants 2, 3, 4, 6 & 7

S.A.Ali (5th defendant)
(Since deceased)

6.Ponnammal Thomas

.. 6th Respondent/Proposed Party

Prayer: First Appeal filed under Section 96 of the C.P.C., against the judgment and decree dated 05.12.2007 in O.S.No.712 of 1996 on the file of the II Additional Court, City Civil Court, Chennai.

For Appellant : Mr.K.Hariharan

For Respondents

R1 to R3 : Mr.R.S.Varadarajan

for M/s.Ram and Rajan Associates

R5 : Mr.J.Justin Solomon

R4 : No appearance

JUDGMENT

The First Appeal arises out of the judgment and decree against the judgment and decree dated 05.12.2007 in O.S.No.712 of 1996 on the file of the II Additional Court, City Civil Court, Chennai.

2.The averments made in the plaint are as follows:

The plaintiff and the defendants 2 to 4 and 7 are the children of late S.M.Deivasigamani. The first defendant is the widow of late Dr.S.M.Deivasigamani. The said late Dr.S.M.Deivasigamani married one Mrs.Alice and the plaintiff and defendants 2 and 7 were born through

her. She died in the year 1942. Thereafter, on the advice of the maternal grandmother of the children, the said late Dr.S.M.Deivasigamani married the first defendant as his second wife and defendants 3 and 4 were born through her. The said Dr.S.M.Deivasigamani was a Doctor by Profession and was employed as Health Officer and later was promoted as District Health Officer. The first defendant gave step motherly treatment to the children born through the first wife, namely, Mrs.Alice and they were not given proper education. Per contra, the defendants 3 and 4, who were born through the first defendant were given better education. The said late Dr.S.M.Deivasigamani purchased item No.1 of 'A' Schedule properties with the financial assistance of contribution of funds from plaintiff's maternal side and by disposal of jewels of Mrs.Alice. Thereafter, with the due share of income from family properties given by the father of late Dr.S.M.Deivasigamani, he constructed the building in item No.1 of 'A' Schedule properties. Later, he purchased item No.2 of 'A' Schedule properties out of his share from the family property and shops were built up. During his lifetime, some shops were sold and two shops were still available. During the period of service, the said late Dr.S.M.Deivasigamani developed illicit intimacy with one Kanchana @ Ammani, who worked as Personal Assistant to him in the Office. The 7th defendant as a young boy questioned the activities of his father and prevented his father from giving away the properties to her. As the said Dr.S.M.Deivasigamani become old, he want to give the properties to all his children. He was already affected by eye sight due to cataract in both eyes. He died intestate on 12.11.1994. when the 7th defendant requested for equitable distribution of the estate among the heirs but the defendants 1, 3 and 4 were evading and did not give proper reply. Hence, the plaintiff issued lawyer's notice dated 12.01.1995 demanding partition of all properties. The second defendant sent a reply on 03.02.1995 containing false allegations. The plaintiff sent a rejoinder dated 15.02.1995 setting out the true facts. The defendants 1 to 4 made a claim as if that item No.1 of 'A' Schedule properties was settled in favour of the third defendant under three settlement deeds. Further, the defendants 1, 2 and 4 collusively with the object of defeating the plaintiff's right, brought about two sale deeds and sold the item No.2 of 'A' Schedule properties as if they were the only legal heirs of the said Dr.S.M.Deivasigamani. The defendants 5 and 6 are the purchasers of item No.2 of 'A' Schedule properties. Hence, the plaintiff filed the suit for partition and pray for the decree. At the time of filing the suit, the 7th defendant joined the plaintiff and filed the suit. Subsequently he was transposed as 7th defendant.

3.The gist and essence of the written statement filed by the defendants 1 to 4 are as follows:

The suit is not maintainable both in law and facts. The relationship is an admitted one. Both the parties are belonging to Indian Christians. The question of ancestral or joint family

property which is alien to the Law governing Indian Christians does not arise at all. The plaintiff was brought up by the first defendant and her father Deivasigamani since the age of three years and was given proper education in various standard schools in Vellore, Chengalpattu where their late father was working as Health Officer. Due to her ill health she was forced to stay with her grandmother for some time as her father and the first defendant were on transferrable job. The plaintiff had hearing problem and had to undergo two surgeries at CMC, Vellore. After marriage also she was taken care of by the first defendant. The property has not been purchased out of the income from the joint family. During the lifetime of Deivasigamani, he provided his children with fair allocation of their shares of his self acquired property. The first plaintiff D.Austin was provided with land and house at Puzhdivakkam as well as fixed deposit of Rs.10,000/- and another fixed deposit of Rs.25,000/- was withdrawn by the first plaintiff during time of his father's last days by getting his thumb impression. The second plaintiff was given marriage with adequate cash and jewellery apart from providing her with land and building at Krishna Nagar, Virugambakkam. An autorickshaw bearing registration No.TN 09 A 6919 standings in the name of the second defendant. There is not joint family movable and immovable properties. As regards the house and ground No.15, I Street, Zachariah Colony, Kodambakkam, Madras, is absolutely belonging to Deivasigamani which has already been settled in favour of the third defendant on 21.01.1981, 03.07.1984 and 26.08.1985. The plaintiffs are well aware of the said fact. So the averment in the plaint that Dr.S.M.Deivasigamani never did and could execute any such settlement deed to anybody and that the signatures must have been forged, impersonated, false, fabricated and vexatious does not hold water. The plaintiffs are also aware of the fact that the late Dr.S.M.Deivasigamani while he was hale and healthy and in sound state of mind executed three registered settlement deeds and Mrs.Leela Abraham (the aunt who was supposed to have come for a Panchayat) was the witness for the settlement deeds. Under the document dated 21.01.1981 Dr.S.M.Deivasigamani settled the main house constructed on the vacant land purchased by him in September 1946 long before his father Mr.Manuel's death in favour of the defendant, subject to life interest in favour of the settlor i.e. Dr.S.M.Deivasigamani and his wife first defendant. On the death of the settlor on 12.11.1995 his life interest in the property settled under the document dated 21.01.1981 came to an end and therefore the plaintiff's father has no right, title or interest in the property settled under the said document. On 20.08.1984 he settled the portion, an extent of 1960 sq.ft. lying to the north and on the rear side of the property settled under the document dated 21.01.1981 in favour of the third defendant absolutely. Similarly under the settlement deed dated 03.07.1985, an extent of 1648 sq.ft. including the car shed has been settled in favour of the third defendant. The third defendant has been in possession and enjoyment of the property settled under the deeds dated 20.08.1984 and 03.07.1985 ever since. So, the plaintiff is not entitled to any share in item No.1 of 'A' schedule property.

Hence, they prayed for dismissal of the suit.

4.The gist and essence of the written statement filed by the fifth defendant are as follows:

The suit is not maintainable either in law or on facts. The allegations made by the plaintiffs in para-1 to 10 of the plaint do not concern this defendant and hence he is not traversing the same. As he was regularly paying the rent to the said late Deivasigamani and also maintaining the shop portion, the said Deivasigamani was agreed to sell the shop to him. Since the said Deivasigamani fell sick, he could not execute the sale deed in favour of this defendant. Later he instructed the defendants 1, 2 and 4 to execute the sale deed. Therefore, the sale deed was executed in favour of this defendant on 27.07.1995. This defendant was not aware of the pendency of the litigation. Since he suffered financial constrain, he was constrained to sell the shop to one Soundararajan for the same consideration of Rs.30,000/-. Since this defendant is not in possession of the shop, the suit filed against him is liable to be dismissed for mis-joinder of this defendant. Therefore, he prays for dismissal of the suit.

5.The gist and essence of the written statement filed by the sixth defendant is as follows:

One Sathar entered into a sale agreement with the father of the plaintiffs namely, Deivasigamani and since the father got financially brokedown, he received Rs.14,552/- from this defendant and attorned the sale agreement in favour of this defendant. The said Deivasigamani also acknowledged the amount and promised that he would execute the sale deed in favour of this defendant as soon as he paid the remaining balance of Rs.10,000/-. After the death of Deivasigamani, his legal heirs, the defendants 1, 2 and 4 executed the sale deed in favour of this defendant after having received the balance amount on 27.07.1995. From that date onwards, he is a bonafide purchaser. Therefore, he prayed for dismissal of the suit.

6.The gist and essence of the written statement filed by the seventh defendant is as follows:

The three settlement deeds dated 21.01.1981, 20.08.1984 and 03.07.1985 executed by the late Deivasigamani are sham and nominal documents. No mutation of names of the owner in the revenue records has been effected. Though no part of the said property was settled in favour of the seventh defendant, he was permitted to possess a part of the said property even after the suit was filed. The ownership of the said property remained with late Deivasigamani only, hence, the said property is also available for partition among his legal heirs and as such this defendant is entitled to allotment of 1/5th share in the said property. So the two sale deeds executed by the defendants 1 to 4 in favour of fifth and sixth defendants would

not bind his 1/5th undivided share in the said property and he is entitled to have division and allotment of his 1/5th share in the said property. Therefore, he prays for division of the properties as aforesaid and allotment of 1/5th share to him.

7.The Trial Court after framing necessary issues and considering the oral and documentary evidence granted preliminary decree in respect of 'B' Schedule property, namely, the Bank Deposit which stands in the name of late Dr.S.M.Deivasigamani and dismissed the suit in respect of 'A' and 'C' Schedule properties. Against which, the present appeal has been preferred.

8.The learned counsel appearing for the appellant would submit that the appellant as a plaintiff filed a suit for partition stating that her father late Dr.S.M.Deivasigamani married one Mrs.Alice and through her, the appellant/plaintiff, 2nd defendant and 7th defendant were born. After the death of the said Mrs.Alice, the said Dr.S.M.Deivasigamani married the first defendant/first respondent and through her, defendants 3 and 4 were born. Further it was stated that Dr.S.M.Deivasigamani has no sufficient income and out of the income received from the joint family property at Nagercoil, he purchased the property and made construction. He further stated that the appellant's father wants to give equal share to all the children, but whereas Item No.1 of A Schedule Properties has been settled in favour of the third defendant under three settlement deeds under Exs.B4 to B6 (copies of settlement deeds) and Exs.B7 to B9 (original settlement deeds). To prove the settlement, the attestors of Exs.B7 to B9 were not examined before the Trial Court. This Court by invoking Order 41 Rule 28 CPC passed an order dated 28.03.2012 directing the Trial Court to examine the attestors of the documents and directing the respondents to prove the document by invoking Sections 68 and 69 of the Indian Evidence Act. In pursuance of that, after 28.03.2012 D.W.3 to D.W.5 were examined to prove the attestation of Exs.B7 to B9, P.W.1 was recalled and Exs.B12 to B18 were marked. He would further submit that defendants 5 and 6 are the purchasers of item No.2 of 'A' Schedule properties from defendants 1, 2 and 4. After issuance of notice, they filed a suit and in the reply, correct particulars of settlement deed has not been given. The learned counsel appearing for the appellant further submitted that Settlement Deeds were not acted upon and possession was not given to the third defendant in respect of Ex.B7 and so, it is not a settlement deed and only a will and no equitable distribution has been made. To substantiate his arguments, the learned counsel appearing for the appellant relied upon the following decisions:

1. AIR 1978 Madras 78 (Doraiswami vs. Rathnammal and others)
2. AIR 1982 Madras 281 (1) (Ponnuchami Servai vs. Balasubramanian and others)
3. 2008 (14) SCC 754 (Babu Singh and others vs. Ram Sahai alias Ram Singh)

4. 2009 (1) SCC 354 (K.Laxmanan vs. Thekkayil Padmini and others)

Hence he pray for setting aside the judgment and decree passed by the Trial Court and pray for 1/6th share in the suit properties.

9. Resisting the same, the learned counsel appearing for the respondents would submit that admittedly both the appellant and the respondents 1 to 4 are Indian Christians and so, there is no question of joint family property. He would also submit that the property has been purchased by the father Dr.S.M.Deivasigamani and building has been constructed. Hence, if he died intestate, Indian Succession Act alone has been applicable and on that basis they are claiming share. But during the lifetime of the father, he has every right to settle the property. He further submitted that Ex.B7 is not a will and it is only a settlement. He has also relied upon Sections 19 and 21 of Transfer of Property Act and submits that mere postponement of the delivery of possession will not vitiate the settlement deed. He further submitted that since there is no specific denial in respect of the settlement deed, there is no necessity to prove the attestation. However this Court by order dated 28.03.2012 has given direction to the Trial Court and also to the parties to prove the attestation by invoking Sections 68 and 69 of the Indian Evidence Act. But that has not been challenged by the appellant. Since the attestors were died, their legal heirs were examined to prove the attestation as D.W.3 to D.W.5 by invoking Section 69 of the Indian Evidence Act. D.W.3/Rajkumar Victor Abraham was examined to prove the signature of Leela Abraham, D.W.4/Albert was examined and D.W.5/Saroja was examined to prove the signature of one of the attesor Ramasamy. So, the attestation has been proved in accordance with law and the plaintiff has not come to the Court with clean hands and she has suppressed the material facts. He further submitted that once in the reply notice it was specifically mentioned that during the lifetime of the father, the father has executed the settlement deed, the plaintiff has not given any notice to call for the original settlement deed or copy of the settlement deed and without seeing the original document no plea of forgery or fabrication cannot be taken. He further submitted that the suit is not maintainable without prayer for setting aside the settlement. To substantiate his arguments, the learned counsel appearing for the respondents relied upon the following decisions:

1. 2010 (5) CTC 113 (P.K.Mohan Ram vs. B.N.Ananthachary and others)
2. AIR 1929 Madras 670 (Venkatasubramaniya Iyer vs. Srinivasa Iyer)
3. AIR 2014 SC 2906 (Renikuntla Rajamma (D) by LRs. vs. K.Sarwanamma)
4. The Madras Law Journal 1979 (Ramaswami Naidu vs. M.S.Velappan and others)

5. AIR 2000 SC 2857 (Rosammal Issetheenammal Fernandez (Dead) by LRs. and others vs. Joosa Mariyan Fernandez and others)
6. 1979 (2) MLJ 88 (Ramaswami Naidu vs. M.S.Velappan and others)

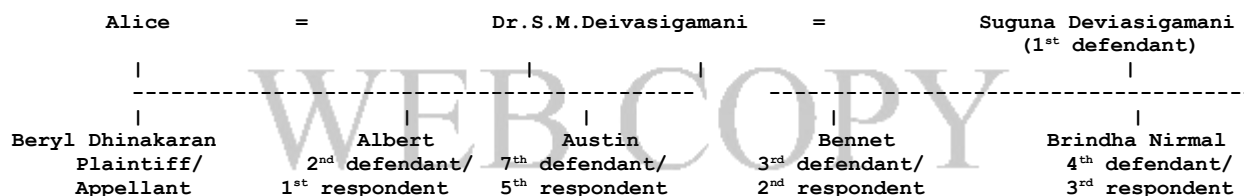
He would also submit that the suit is barred by limitation because before the Panchayat those documents were shown to them and even though Panchayat was admitted then only suit has been filed. He further submitted that the appellant/plaintiff has blow hot and cold and no person shall be put into surprise and opportunity must be given to him to put forth the defence. He further submitted that the Trial Court has considered all the aspects in proper perspective and came to the correct conclusion. Hence, he prayed for dismissal of the appeal.

10. Considered the rival submissions made on both sides and perused the material records and both oral and documentary evidence.

11. After hearing the arguments of both sides counsel, the following points for determination are framed:

1. Whether Exs.B7 to B9 are true and genuine documents?
2. Whether Exs.B7 to B9 are duly executed, validly attested, accepted and acted upon?
3. Whether Ex.B7 is a Settlement or a Will?
4. Whether the appellant is entitled to 2/15th share in item No.1 of 'A' Schedule properties?
5. Whether the appellant is entitled to 2/15th share in item No.2 of 'A' Schedule properties?
6. Whether the appellant is entitled to share in 'C' Schedule properties?
7. Whether the decree and judgment of the Trial Court is sustainable?
8. To what relief the appellant is entitled to?

12. The genealogy is necessary for the disposal of the case, which is as follows:



Point Nos.1 & 2:

13. The admitted fact is that the appellant and the respondents 1 to 3 and 5 are governed by Christian Law and so, there is no question of ancestral joint family. Even though in the plaint it was

specifically mentioned that the father of the later Dr.S.M.Deivasigamani, namely, Manuel was the rich landlord in Kanyakumari Near Nagercoil, it is immaterial. Admittedly these properties have been purchased in the name of Dr.S.M.Deivasigamani and building has been constructed. So, it is a property of Dr.S.M.Deivasigamani and it is not disputed. In respect of item No.2 of 'A' schedule properties, no one raised the little finger because the property has been sold by defendants 1, 2 and 4 in favour of defendants 5 and 6. The subsequent purchasers have not advanced any argument. The only point raised by the third defendant/second respondent who got the item No.1 of 'A' Schedule properties by way of alleged settlement deeds, namely, Exs.B7 to B9. So, the point to be decided is whether Exs.B7 to B9 are true and genuine document? But admittedly, it is pertinent to note that during the trial the attestors of the documents were not examined. It is also pertinent to note that one of the attestor of Exs.B7 to B9 was Leela Abraham, who is none other than the maternal aunt of the appellant. She died during the pendency of the suit.

14.As already stated that third respondent has not taken any steps to prove the attestation stating that there is no specific denial. But this Court by order dated 28.03.2012 passed a detailed order and given direction to both the parties and also to the Trial Court to record evidence and to give an opportunity to the third respondent to prove the attestation by invoking either Section 68 or 69 of the Indian Evidence Act. That order has not been challenged and so, it attained finality. In such circumstances, there is no quarrel that as per Section 69 of the Indian Evidence Act and Section 123 of the Transfer of Property Act and also as per Section 63 of the Indian Succession Act, attestation to be proved for will or settlement. But admittedly it was not done before the Trial Court and then only on the basis of the order passed by this Court, additional witnesses D.W.3 to D.W.5 were examined, D.W.1 and P.W.1 were recalled and examined and also documents were marked. So, the argument in respect of non-examination of the attestor before the Trial Court is not relevant at this stage. However, the decisions relied upon by the learned counsel appearing for the appellant has been considered by this Court.

15.The learned counsel appearing for the appellant relied upon the decision relied upon the decision reported in AIR 1978 Madras 78 (Doraiswami vs. Rathnammal and others), wherein it was held that proving of attestation is different from proving of execution of the will. It is appropriate to incorporate paragraph No.11, which reads as follows:

"11.D. W. 2 merely identifies the signature of Palani Navithan found in Ex. B-1 as that of his father. The mere fact that the signature of Palani Navithan is proved, in our opinion, is not sufficient to prove the due execution of the will. The evidence

of this witness is relied on for proving the signature of one of the attesting witnesses and thus enable the third defendant to adduce secondary evidence regarding the due execution of the will. The evidence of D. W, 2 will be relevant only for purposes of Section 69 of the Evidence Act. Section 69 will come into play only when no attesting witness can be found. In this case, as already stated, an attesting witness D. W. 4 has been examined and he has denied his attestation of the document. Therefore Section 69 can have no application. The evidence of D. W. 2, therefore, even if accepted, will not help the third defendant."

16.He has also relied upon the decision reported in 2008 (14) SCC 754 (Babu Singh and others vs. Ram Sahai alias Ram Singh). It is appropriate to incorporate paragraph No.18, which reads as follows:

"18.Whereas, however, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved."

17.He has also relied upon the decision reported in 2009 (1) SCC 354 (K.Laxmanana vs. Thekkayil Padmini and others). It is appropriate to incorporate Paragraph Nos.18 and 19, which reads as follows:

"18.It is only as against the judgment and findings that the items of property covered by Ext. B2 and B3 are available for division that the second appeal was preferred by the fifth defendant in the High Court of Kerala. Therefore, the properties covered by Ext. B1 and B4 namely items 1 to 3, 13 and 14 are no longer in dispute and the conclusions arrived at by the first appellate court that the said items are not available for division are final and binding on the parties. What is in dispute and is open to further litigation are only the properties covered by Ext. B2 and B3 which were held by both the appellate courts to be available for division. Since we are concerned with the legality of execution of Deed of Will and Deed of Gift, Section 68 of the Act would have some relevance, which reads as follows:-

"68. Proof of execution of document required by law to be attested. - If a document is required by law to be attested, it shall not be used as evidence until 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.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Strong reliance was placed on this provision also by the learned counsel appearing for the parties. A bare reading of the aforesaid provision will make it crystal clear that so far as a Deed of Will is concerned, the position in law is no longer in doubt for the onus of proving the Will is on the propounder. The propounder has to prove the legality of the execution and genuineness of the said Will by proving absence of suspicious circumstances surrounding the said Will and also by proving the testamentary capacity and the signature of the testator. Once the same is proved, it could be said that the propounder has discharged the onus.

19. When there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. The aforesaid view is taken by us in consonance with the decision of this Court in Shashi Kumar Banerjee v. Subodh Kumar Banerjee [AIR 1964 SC 529] and Pushpavathi v. Chandraraja Kadamba [(1973) 3 SCC 291]"

18. The learned counsel appearing for the respondents also relied upon the decision reported in AIR 2000 SC 2857 (Rosammal

Issetheenammal Fernandez (Dead) by LRs. and others vs. Joosa Mariyan Fernandez and others). It is appropriate to incorporate paragraph No.10, which reads as follows:

"10.Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered is not specifically denied. Therefore, everything hinges on the recording of this fact of such denial. If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply. In the present case as we have held, there is clear denial of the execution of such document by the plaintiff, hence the High Court fell into error in applying the said proviso which on the facts of this case would not apply. In view of this the very execution of the gift deed Exhibit B-1 is not proved. Admittedly in this case none of the two attesting witnesses has been produced. Once the gift deed cannot be tendered in evidence in view of the non-compliance of Section 68 of the Indian Evidence Act, we uphold that the plaintiff has successfully challenged its execution. The gift deed accordingly fails and the findings of the High Court contrary are set aside. In view of this no right under this document accrue to the concerned respondent over Schedule A property which is covered by this gift deed."

19.But this Court by order dated 28.03.2012 has considered several decisions of this Court and the Hon'ble Apex Court and came to the correct conclusion that it is the duty of the beneficiary of the will or settlement deed to prove the attestation as per Sections 68 and 69 of the Indian Evidence Act. So, the argument advanced by the learned counsel appearing for the appellant that the attestors have not been examined before the Trial Court does not merit acceptance. Admittedly there is no appeal against the order passed by this Court on 28.03.2012. In pursuant to the order of this Court dated 28.03.2012 since the attestors were not available, by invoking Section 69 of the Indian Evidence Act, the person who will be acquaintance with the signature of the deceased attestors were examined as D.W.3 and D.W.5. One of the attestors of Exs.B7 to B9 is Leela Abraham, who died during the pendency of the suit, her death certificate has been marked as Ex.B11 and her signature was identified by D.W.3. Another attestor for Exs.B7 and B8 was Sundaramoorthy and his death certificate has been marked. Another attestor in Ex.B9, namely, Ramasamy who death certificate has been marked as Ex.B10 and his signature was identified by his daughter, D.W.5/Saroja. The said Sundaramoorthy died much prior and no one is available to identify his signature. So, as per Section 69 of the Indian Evidence Act D.W.3 and D.W.5 have identified the signatures of the deceased attestors Leela Abraham and Ramasamy. So, I am of the

view that the attestation has been proved in accordance with law because both the witnesses were subjected to cross examination.

20.The learned counsel appearing for the appellant would submit that the proof of attestation is different from proof of execution, execution has to be proved and he relied upon the decision reported in AIR 1978 Madras 78 (Doraiswami vs. Rathnammal and others), wherein in the documents there are two attestors D.W.2 is the son of the attestor and he identified the signature in Ex.B1. But whereas D.W.4, who is the attestor, was examined and he denied the attestation of the document. In such circumstances, the execution has to be proved. But here in the present case in hand, it is not the case that one of the attestor appeared before the Court and disputing the attestation. So, the above citation is not applicable.

21.He has also relied upon the decision reported in 2008 (14) SCC 754 (Babu Singh and others vs. Ram Sahai alias Ram Singh), wherein it was held that mere statement of counsel of the plaintiff that the attesting witness was won over by the opposite party not sufficient to prove his absence by invoking Section 69 of the Indian Evidence Act. But here the facts of the case is entirely different. Admittedly all the three attestors of the three documents have been died. So, the above citation is not applicable to the facts of the present case.

22.In the decision reported in 2009 (1) SCC 354 (K.Laxmanan vs. Thekkayil Padmini and others), it was held that there is no specific denial. But here admittedly in the earlier paragraph, whether there is specific denial or not who has to prove the settlement deed has already been decided and order has been passed on 28.03.2012, by invoking Order 41 Rule 28 CPC and direction has been given to the Trial Court to record additional evidence. In such circumstances, the above citation is not relevant to the facts of the present case and no relevance can be made at this stage. In Exs.B7 and B8 Leela Abraham and Sundaramoorthy are the attestors and in Ex.B9 Leela Abraham and Ramasamy are the attestors. So, the attestation has been proved in accordance with law under Section 69 of the Indian Evidence Act and execution has been proved by D.W.1. It is pertinent to note that D.W.4/Albert in his evidence has stated that Exs.B7 to B9 contained his father's signature. He further submitted in his cross examination that his father has executed the settlement deed in favour of his brother/third defendant. So, the family members also aware of the fact. In such circumstances, I am of the view that the third defendant/second respondent has proved the due execution and valid attestation of Exs.B7 to B9 and the oral evidence of D.W.1 has proved that Exs.B7 to B9 have been accepted by him and acted upon by him.

23.The learned counsel appearing for the appellant would submit that the document is a forged document and impersonation has been done because during the relevant time, her father

Dr.S.M.Deivasigamani suffered with diabetes, immobilized and also suffered with cataract and so, his vision is poor. In the plaint also, the appellant/plaintiff pleaded the same. But whereas the learned counsel appearing for the respondents would submit that without seeing the document how he can raise the plea that the document is a forged document. Admittedly, P.W.1 in her evidence has stated that she has not seen the document. She has also not issued any notice to the third defendant to produce the original or copy of the document to verify whether it contains her father's signature. But without doing so, in the plaint itself, in paragraph No.7 she has stated the signature in the document must be forged or impersonated. But the argument does not hold because not only the beneficiary and also the son of the deceased Dr.S.M.Deivasigamani has deposed about the same. In such circumstances, I am of the view that the respondents herein has proved that Exs.B7 to B9 are true and genuine documents. Furthermore, the execution of Ex.B7 has been mentioned in Ex.B8. Ex.B7 came into existence on 21.01.1981 and Ex,B8 came into existence on 28.08.1983. Ex.B9 came into existence on 03.07.1985 and in that execution of earlier settlement deeds viz., Exs.B7 and B8 has been mentioned. Furthermore, it is pertinent to note that D.W.1 in his evidence has clearly stated that from the year 1984 to 1986 his father Dr.S.M.Deivasigamani has travelled to Singapore twice. It is also pertinent to note that in Ex.B16 dated 16.03.1995, the said Leela Abraham has stated that the entire property was given to Bennet and she has attested the same. She has admitted that the entire property was given to the third respondent which shows that Dr.S.M.Deivasigamani was hail and healthy at the time of execution of settlement deeds because he was in a position to travel to Singapore by air. In such circumstances, I am of the view that Exs.B7 to B9 are true and genuine documents.

24.The learned counsel appearing for the appellant mainly focusing the non-examination of Leela Abraham, who is the attesor of all the three documents who has given the letter Exs.B14 to B16 and they wantonly not examined the said Leela Abraham. He would also submit that if she was examined before the Trial Court she would have supported the case of the appellant/plaintiff. But the above argument does not hold good because Exs.B14 to B16 were the documents marked by the appellant through the cross examination of D.W.3 instead of A series. The alleged Exs.B14 and B16 taken place on 12.03.1995 and 16.03.1995. If really the appellant/plaintiff wants to prove those documents he may very well examine her before the Court. It is not the point to be decided whether the father has given equal distribution but the point is whether the father has died intestate leaving item No.1 of 'A' schedule properties, whether the settlement deeds Exs.B7 to B9 are true and genuine and whether it is duly executed, validly attested, accepted and acted upon has to be considered. But this Court considering the evidence of D.W.3 submit that signature in Exs.B7 to B9 are belonging of Leela Abraham. In such circumstances, I am of the view that non-examination of Leela Abraham will cause prejudice to the respondent does not merit

acceptance. As discussed supra, Exs.B7 to B9 are true and genuine documents duly executed, validly attested, accepted and acted upon. Point Nos.1 and 2 were answered accordingly.

Point No.3:

25.Now, this Court has to decide whether Ex.B7 is a Will or Settlement deed? The learned counsel appearing for the appellant would submit that as per Ex.B7 possession has not been given immediately and in Ex.B7, it was specifically mentioned that "In pursuance of the aforesaid desire, the settlor, subject to a life interest for himself doth hereby convey, grant, transfer a life interest to the First Settlee and the remainder to the second settlee absolutely". In Ex.B7 the first settlee was Suguna Deviasigamani and the second settlee was Bennet. So, the learned counsel mainly focusing that Ex.B7 is only a will because immediately possession was not handed over and it was not accepted and acted upon and further, there is no mutation of revenue records. Hence, his argument is that Ex.B7 is not a settlement and it was not accepted and acted upon if at all it will be a Will. For this proposition, he relied upon the decision reported in AIR 1982 Madras 281 (1) (Ponnuchami Servai vs. Balasubramanian and others), wherein it was held that every document has to be construed with reference to the language it contained. A testamentary bequest is revocable as the interest contemplated therein is intended to pass only after the lifetime of the testator, while a settlement or a gift which comes into operation immediately is irrevocable. It is appropriate to incorporate paragraph Nos.6 to 8, which reads as follows:

"6.The question whether a particular document is a testamentary or a non-testamentary instrument has been gone into in several cases. It is enough to mention two of the latest Bench decisions, namely, (1) Commr of Gift Tax Madras v. C. Thiruvengkata Mudaliar, ILR (1977) 1 Mad 53: (1977 Tax LR 1187) and (2) Ramasami Naidu v. M. S. Velappan, (1979) 2 Mad LJ 88. Though the second decision does not refer to the first, to which I was a party, still the principles enunciated in both the decisions are not materially different. Normally speaking, every document has to be construed with reference to the language it contained and therefore a decision construing one document cannot be an authority for construing another document except to the extent that the said decision may lay down certain principles or guidelines. The principles enunciated in this class of cases is that a testamentary bequest is revocable as the interest contemplated 4,herein is intended to pass only after the lifetime of the testator, while a settlement or a gift which comes into operation immediately is irrevocable. Even if a Will contains a clause that it is not revocable the law makes it

revocable whereas in a gift or settlement if there is a clause that the settler or donor can revoke it, still it will remain irrevocable under the law, because the done obtains his interest in the property on the execution of the document itself. Consequently, whether a particular document contains a provision as to whether it is revocable or irrevocable is not decisive of the question whether it is a Will or a gift. Similarly, the caption or the nomenclature given by the parties to the transaction is again not decisive of the question as to whether it is a Will or a gift. If a particular document provides for immediate transfer of the interest from the original owner to somebody else, notwithstanding the fact that the parties called it a Will, it would operate only as a gift. Similarly if a document contains provisions which showed that the disposition would come into existence only on the death of the executant of the document even if the parties call it a settlement, it would be only a Will. The fact of registration alone would not render the document a settlement if it, in other respects, is a Will. Thus, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to examine the nature of the disposition under the document to see whether it had transferred any interest in praesenti in favour of the settlee or whether it intended transfer of interest in favour of the beneficiary only on the death of the executant.

7. It is in the light of these principles that I have to examine Ex. B. 1. The document is in Tamil and has been written by a Karnam. The executant is the first defendant and it purports to be in favour of the plaintiff, represented by both the father as well as the mother. The opening portion of the document shows that both the father and the mother executed the settlement as guardians, but the settlement deed does not contain the signature of the mother. It refers to the plaintiff, being the only son and there being no other male heir and also to the love and affection the first defendant bore to the plaintiff. It contemplates the enjoyment of the properties by the first defendant as the guardian and the income from the properties was to be utilised by the first defendant and the plaintiff and also by his wife and his other heirs. The properties were not alienable either by the first defendant or his wife. After his lifetime, and on the plaintiff attaining majority, the properties were to be taken absolutely by the plaintiff. The document contemplates also the income being utilised not only for the maintenance of the first defendant's family, but also for the marriage of the plaintiff's only

sister. The document declares that in the suit properties no female heir of the first defendant or his wife had any interest. This is a significant statement. The document was executed after the Hindu Succession Act 1956 came into force. Under that Act, female children have a share on the death of the father. If it was only a Will there was no need to make this statement as a will could alter the statutory course of succession. The declaration in this form suggests that the female heirs and the wife did not have any interest in the property even during his lifetime. If it was not intended to be operative in praesenti, there was no scope or need for making this statement. It is also stated that the settlement is irrevocable. In the context of this document, this statement of its irrevocability would only mean that the first defendant was content to reserve only a right to the income so as to maintain himself and his family during his lifetime, and gave up all his other rights forthwith. The giving up of his right to alienate the properties is also consistent only with its being a transaction, vesting the property in praesenti on the plaintiff.

8. It is necessary to remember that this document came into existence immediately after the first defendant executed a release deed in favour of the father Ramaswami Aiyar and his brother Balasubramaniam. The first defendant did not himself go into the witness box and there are allegations about his wayward life, which remain uncontradicted by the only person who could speak on it. The settlement was executed on the very next day after he obtained the properties from his father. The sequence of events indicates its being a part of a scheme to see that the first defendant did not deal with the property to the detriment of the minor. The fact that he executed the revocation deed and a sale deed in about a year after the settlement shows how the first defendant would behave if he were left free to deal with the property. There is no evidence to prove that the first defendant was really indebted at the time when Ex. B-1 came into existence and that there was any actual attempt to defeat that claims of the creditors. His allegations in the revocation deed that his wife was squandering the income have been made only to suit the execution of the document. When the daughter was a minor, there could be no question of any preparation for her marriage. Yet the failure to make such preparation is trotted out as an excuse for the revocation deed which was to be followed within a week or so by the sale in which there is no provision for investing part of the consideration

for the marriage. It is also in evidence that he was living with a concubine in the same village. There could be no cause for wonder in these circumstances to find that the first defendant found an earliest opportunity to execute the sale deed. Thus the circumstances under which Ex. B.1 came into existence go 'to show that it was executed with a view to see that the first defendant did not squander away the properties obtained by him as a result of the release from the joint family."

26. So, it is true that the construction of the document to be considered even though the nomenclature is settlement. In Ex. B7 it was specifically mentioned that the settlor settled the property in their favour which contains 1948 sq.ft. main building in front on the land now in his possession and enjoyment. It was also mentioned that "Now that the settlor is desirous of settling a portion of the 'A' Schedule property to an extent of one ground and 120 sq.ft. with the main building thereon to the settlees mentioned above and is fully described in 'B' schedule property". He has also stated that life estate has been retained by him and after that to the first defendant and then to the third defendant/second respondent.

27. At this juncture, the learned counsel appearing for the respondents relied upon the decisions reported in AIR 1929 Madras 670 (Venkatasubramaniya Iyer vs. Srinivasa Iyer), wherein it was held that from the tenor of the document it was not a will but a settlement and so subsequent transfer transactions between the parties should be, if possible, interpreted consistently with the document as a settlement. It is appropriate to incorporate the relevant portion, which reads as follows:

"It is contended by the appellant that the document is a will since the only operative portion of it is that which bequeaths the property to the plaintiff and his heirs after the death of the widow. Both the lower Courts have rejected this contention and held the document to be a settlement. I think it is clear from the tenor of the document that it is not a will. It mentions considerable property which is not disposed of by it at all. It does more than bequeath property to the plaintiff after the widow's death. He obtains by it certain rights in presenti, for example, the right as covenanted with him that the widow will not alienate the property during her lifetime. He himself is given the right to recover the unpaid kists from her income and to have the pattah transferred to his name. There is no language indicating that the widow was retaining with her any power to revoke the document, while the surrender of her right to alienate during her lifetime indicates that she did not reserve

any power to revoke. These points combined with the facts that the parties intended the document to be a settlement and styled it as such and that it was handed over to the plaintiff and not retained with the widow are sufficient to indicate that the widow was merely retaining a life-interest in the property and was transferring to the plaintiff the vested remainder. It is not of much help to refer to reported rulings in a case of this kind when the decision has to be based on the wording of a particular document, but documents of very similar wordings were held to be settlements and not wills in *Rajammal v. Authiammal* [1910] 33 Mad. 304 and in *Gangaraju v. Somanna* A.I.R. 1927 Mad. 197. These come nearer to the present case than those in *Venkatachala Chetty v. Govindaswamy Naicker* A.I.R. 1924 Mad. 605, *Thakur Ishri Singh v. Baldas Singh* [1884] 10 Cal. 792 quoted by the appellant. I can see no ground for holding that the lower appellate Court made any error of law in regarding Ex. C. on the face of it as a settlement and not a will."

28.He has also relied upon the decision reported in 1979 (2) MLJ 88 (*Ramaswami Naidu vs. M.S.Velappan and others*), wherein it was held that some of the important tests laid down in the decided cases to decide whether the instrument is Will or Settlement. It is appropriate to incorporate the relevant portion, which reads as follows:

"Some of the important tests laid down in the decided cases appear to be--

(i)the nomenclature used by the settlor in styling the document;

(ii)the express dispositive words used which touch upon the time when the vested interest is created;

(iii)the reservation of the power of revocation in the instrument;

(iv)the effect of the reservation of a life estate in favour of the executant under the instrument;

(v)registration of the document under the appropriate law."

29.The above said two judgments has been followed by the Hon'ble Apex Court in the decision reported in 2010 (5) CTC 113 (*P.K.Mohan Ram vs. B.N.Ananthachary and others*), wherein it was stated what is vested interest and what is contingent interest and distinction between both and distinction between settlement deed and will. It was also held that strait-jacket formula has not been evolved for construction of instruments, the intention appearing both by expressed language employed in instrument and by necessary implication and prohibition if any, contained against revocation

thereof and form or nomenclature of instrument is not conclusive and Court is required to look into the substance of instrument. It is appropriate to incorporate paragraph Nos.13, 14, 16 and 17, which reads as follows:

"13. Having noticed the distinction between vested interest and contingent interest, we shall now consider whether Ex.A-2 was a Settlement Deed or a Will. Although, no strait-jacket formula has been evolved for construction of such instruments, the consistent view of this Court and various High Courts is that while interpreting an instrument to find out whether it is of a testamentary character, which will take effect after the life time of the executant or it is an instrument creating a vested interest in praesenti in favour of a person, the Court has to very carefully examine the document as a whole, look into the substance thereof, the treatment of the subject by the settlor/executant, the intention appearing both by the expressed language employed in the instrument and by necessary implication and the prohibition, if any, contained against revocation thereof. It has also been held that form or nomenclature of the instrument is not conclusive and the Court is required to look into the substance thereof.

14. Before proceeding further, we may notice the judgments on which reliance was placed by learned counsel for the parties. In Gangaraju v. Pendyala Somanna (supra), the learned Single Judge was called upon to construe deed dated 27.2.1917 executed by one Kristnamma. The learned Single Judge referred to the contents of the document and observed:

"The document on the face of it is of a non-testamentary character. It was so stamped and so registered. It is called a dakal dastaveju, which means a conveyance or settlement deed. It is true that a document which is not a Will in form, may yet be a Will in substance and effect; but as was held in Mahadeva Iyer v. Sankarasubramania Iyer (1), if an instrument is a deed in form, in order to hold that it is testamentary or in the nature of a Will, there must be something very special in the case; and unless there are circumstances which compel the Court to treat an instrument in the form of a deed as a Will, the Court will not do so. The leading argument of the appellant is that the document created no estate in praesenti. A more literal translation of the fourth sentence in para 2 of the document is:

Therefore, on account of my affection for you, I

have arranged that after my death the property shall belong to you.

It is certainly very difficult to derive from these words any immediate interest created in favour of the plaintiff. But the line between a Will and a conveyance reserving a life estate is a fine one, and it would be hard to define in some cases where the document has been held to be non-testamentary, wherein the personal interest which was transferred consists. A more easily applied test is that of revocability. There is nothing in the suit document to show that Kristnamma reserved the right to revoke it. On the contrary there is an undertaking not to alienate any part of the property during his lifetime. I consider that this is equivalent to a promise not to revoke the instrument, because if the executant intended to reserve that right he could not consistently have parted with the right to alienate. The same intention to give finality to the deposition is suggested by Ex.3, which is a conveyance of a portion of the property executed jointly by Kristnamma and the plaintiff. The fact that the plaintiff was required to join is significant, and in the schedule the property is described as that which was conveyed by Kristnamma to him. This document seems also to lend some colour to the view that an immediate conveyance of interest was intended in Ex.F. I think that Kristnamma had the intention not to revoke the conveyance and this has always been regarded as one of the most important tests."

(emphasis supplied)

16. In *Ramaswami Naidu v. Gopalakrishna Naidu* (supra), the High Court laid down the following broad test for construction of document:

"The broad tests or characteristics as to what constitutes a will and what constitutes a settlement have been noticed in a number of decisions. But the main test to find out whether the document constitutes a will or a gift is to see whether the disposition of the interest in the property is in praesenti in favour of the settlees or whether the disposition is to take effect on the death of the executant. If the disposition is to take effect on the death of the executant, it would be a will. But if the executant divests his interest in the property and vests his interest in praesenti in the settlee, the document will be a settlement. The general principle also is that the document should be read as a whole and it is the substance of the document that matters and not the form

or the nomenclature the parties have adopted. The various clauses in the document are only a guide to find out whether there was an immediate divestiture of the interest of the executant or whether the disposition was to take effect on the death of the executant."

"If the clause relating to the disposition is clear and unambiguous, most of the other clauses will be ineffective and explainable and could not change the character of the disposition itself. For instance, the clause prohibiting a revocation of the deed on any ground would not change the nature of the document itself, if under the document there was no disposition in praesenti."

(emphasis supplied)

17. In Ramaswami Naidu v. M.S. Velappan and others (1979) 2 M.L.J.88, the Division Bench of the Madras High Court referred to the documents which were subject matter of consideration before it and observed:

"In the instant case the first plaintiff was already in charge of the properties as trustee to perform the obligations created under it and continued them after the lifetime of Meenakshi Ammal. There are also positive words whereby it was made clear that the properties should be vested in Velappan and his heirs for them to enjoy the same absolutely....."

These two dispositive clauses create an interest in praesenti. The question is whether the postponement of such proprietary rights already vested in Velappan and his heirs, to the lifetime of Meenakshi Ammal, would make any difference. The Explanation to Section 19 of the Transfer of Property Act, providing that a vested interest is not defeated by the death of the transferee before he obtains possession, makes the legislative intent clear that such a vested interest, merely for the reason that it becomes vested after the lifetime of the settlor, would not make it a settlement not being in praesenti. We are therefore unable to agree with the contention that the interest that Velappan, the first plaintiff, obtained under the instrument is not a vested one and that it could be defeated because it is postponed till after the lifetime of Meenakshi Ammal.

In the instant case the document itself is styled as a settlement deed. It has been registered. The right to enjoy the properties and secure the benefits and the

temple honours as trustee under it have become a fait accompli even during the lifetime of Meenakshi Ammal. There is therefore no ambulation in the matter of the vesting of the interest in the first plaintiff by any declaration or use of words either express or implied.
(emphasis supplied)

30.He has also relied upon the decision reported in AIR 2014 SC 2906 (Renikuntla Rajamma (D) by LRs. vs. K.Sarwanamma), wherein it was held that delivery of possession is not essential prerequisite for making valid gift in the case of immovable property. It is appropriate to incorporate paragraph Nos.14, 17 and 19, which reads as follows:

"14.The above leaves no doubt that the law today protects only rules of Muhammadan Law from the rigors of Chapter VII relating to gifts. This implies that the provisions of Hindu Law and Buddhist Law saved under Section 129 (which saving did not extend to saving such rules from the provisions of Section 123 of the T.P. Act) prior to its amendment are no longer saved from the overriding effect of Chapter VII. The amendment has made the position more explicit by bringing all other rules of Hindu and Buddhist Law also under the Chapter VII and removing the protection earlier available to such rules from the operation of Chapter VII. Decisions of the High Court of Mysore in Revappa v. Madhava Rao and Anr. AIR 1960 Mysore 97 and High Court of Punjab and Haryana in Tirath v. Manmohan Singh and Ors. AIR 1981 Punjab and Haryana 174, in our opinion, correctly take the view that Section 123 supersedes the rules of Hindu Law insofar as such rules required delivery of possession to the donee.

17.We are in respectful agreement with the statement of law contained in the above passage. There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. As noticed earlier, Section 123 does not make the delivery of possession of the gifted property essential for validity of a gift. It is true that the attention of this Court does not appear to have been drawn to the earlier decision rendered in Naramadaben Maganlal Thakker (supra) where this Court had on a reading of the recital of the gift deed and the cancellation deed held that the gift was not complete. This Court had in that case found that the donee had not accepted the gift thereby making the gift incomplete. This Court, further, held that the donor cancelled the gift within a month of the gift and subsequently executed a Will in favour of the appellant

on a proper construction of the deed and the deed cancelling the same this Court held that the gift in favour of the donee was conditional and that there was no acceptance of the same by the donee. The gift deed conferred limited right upon the donee and was to become operative after the death of the donee. This is evident from the following passage from the said judgment:

"7.It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his lifetime.."

19.In the case at hand as already noticed by us, the execution of registered gift deed and its attestation by two witnesses is not in dispute. It has also been concurrently held by all the three courts below that the donee had accepted the gift. The recitals in the gift deed also prove transfer of absolute title in the gifted property from the donor to the donee. What is retained is only the right to use the property during the lifetime of the donor which does not in any way affect the transfer of ownership in favour of the donee by the donor."

31.So, once the donor retained is only the right to use the property during his lifetime which does not in any way affect the transfer of ownership in favour of the donee by the donor. Considering the above citations along with the construction of Ex.B7,

even though the settlor has retained the possession i.e. life estate to himself and thereafter the first settlee life estate, he vested the absolute estate to his son. Therefore, Ex.B7 is only a settlement and not a will. So, applying the dictum of the Hon'ble Apex Court reported in AIR 2014 SC 2906 (Renikuntla Rajamma (D) by LRs. vs. K.Sarwanamma), I am of the view that Ex.B7 is the settlement deed and not a will. Point No.3 is answered accordingly.

Point No.4:

32.As already held the father has purchased the property and mortgaged the property under Exs.B1 and B2 and made construction. It is also pertinent to note D.W.1, namely, the third defendant/second respondent has sent 2000 \$ on 10.12.1975 and the documents Exs.B1 and B2 were proved that the house has been constructed by him. As already stated in the Christian Law there is no joint family and ancestral joint family properties. Dr.S.M.Deivasigamani purchased a total extent of 9868 sq.ft. in Patta No.1848 and on 26.09.1946 he made construction and also sold 3740 sq.ft. to one Dawood Beevi on 26.07.1978 as per sale deed No.2314/78 which shows that it is his separate property and he dealt with the property. Further, this Court has already held that Exs.B7 to B9 are true and genuine documents and it was duly executed, validly attested and accepted and acted upon. In such circumstances, on the date of death of Dr.S.M.Deivasigamani item No.1 of 'A' schedule properties is not owned by him/Dr.S.M.Deivasigamani and it is property of the third defendant/second respondent. So, the appellant/plaintiff is not entitled to any share in item No.1 of 'A' schedule properties. Point No.4 is answered accordingly.

Point No.5:

33.In respect of item No.2 of 'A' schedule properties is concerned, Exs.A4 and A5 has been filed which shows that after the death of the father item No.2 of 'A' schedule properties has been sold. D.W.1 in his evidence has stated that his mother/first defendant, brother/second defendant, his sister/fourth defendant and himself have executed the sale deed in favour of defendants 5 and 6 since Dr.S.M.Deivasigamani died intestate. But the appellant/plaintiff and the 7th defendant are not party to the sale deed and so, the sale deed shall not bind the plaintiff and the 7th defendant. Hence, the appellant/plaintiff is entitled to 2/15 share in item No.2 of 'A' schedule properties. Even though the defendants 5 and 6 filed a written statement they are not let in any oral evidence and the original documents have not been filed. The suit was filed on 14.06.1995 and the sale deeds came into existence on 27.07.1995. So, during the pendency of the suit Exs.A4 and A5 came into existence i.e. after filing of the suit. Then only they were impleaded as parties. So, I am of the view that the appellant/plaintiff is entitled to 2/15 share in item No.2 of 'A' schedule properties. Point No.5 is answered accordingly.

Point No.6:

34.It is admitted by both sides that at the time of filing the suit, the appellant filed an application for appointment of Commissioner to take inventories and the Commissioner also filed a report. Even though the case of the appellant is that all the movables has been given to the children during the lifetime of Dr.S.M.Deivasigamani, but whereas at the time of taking inventories, some of the properties mentioned in 'C' schedule properties were there. Hence, the appellant is entitled to 2/15th share in the same. Point No.6 is answered accordingly.

Point Nos.7 and 8:

35.In view of the answer given to Point Nos.5 and 6, the judgment and decree of the Trial Court in respect of dismissal of item No.2 of 'A' schedule properties and the items mentioned in 'C' schedule properties i.e. inventories mentioned in the Commissioner report are hereby set aside. The appellant is entitled to preliminary decree in respect of item No.2 of 'A' schedule properties and also items mentioned in 'C' schedule properties in Commissioner report along with 'B' schedule properties, bank deposits which stands in the name of the father. Point Nos.7 and 8 were answered accordingly.

36.Considering the facts and circumstances of the case, I am of the view that the appellant is entitled to 2/15 share in item No.2 of 'A' schedule properties and also items mentioned in 'C' schedule properties in Commissioner report along with 'B' schedule properties, bank deposits which stands in the name of the father and the appellant is not entitled to any share in item No.1 of 'A' Schedule properties.

37.In fine,

- First Appeal is partly allowed.
- The decree and judgment passed by the trial Court is modified as follows:
 - (i)The appellant is entitled to 2/15 share in item No.2 of 'A' Schedule properties and the items mentioned in 'C' schedule properties in the Commissioner report along with 'B' schedule properties, bank deposits which stands in the name of Dr.S.M.Deivasigamani.
 - (ii)The finding of the Trial Court that the appellant is not entitled to any share in item No.1 of 'A' schedule properties is hereby confirmed.
- Considering the relationship, the parties are directed to bear their own costs.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

cse

To

1.II Additional Judge, City Civil Court, Chennai.

2.The Record Keeper, V.R.Section, High Court, Chennai.

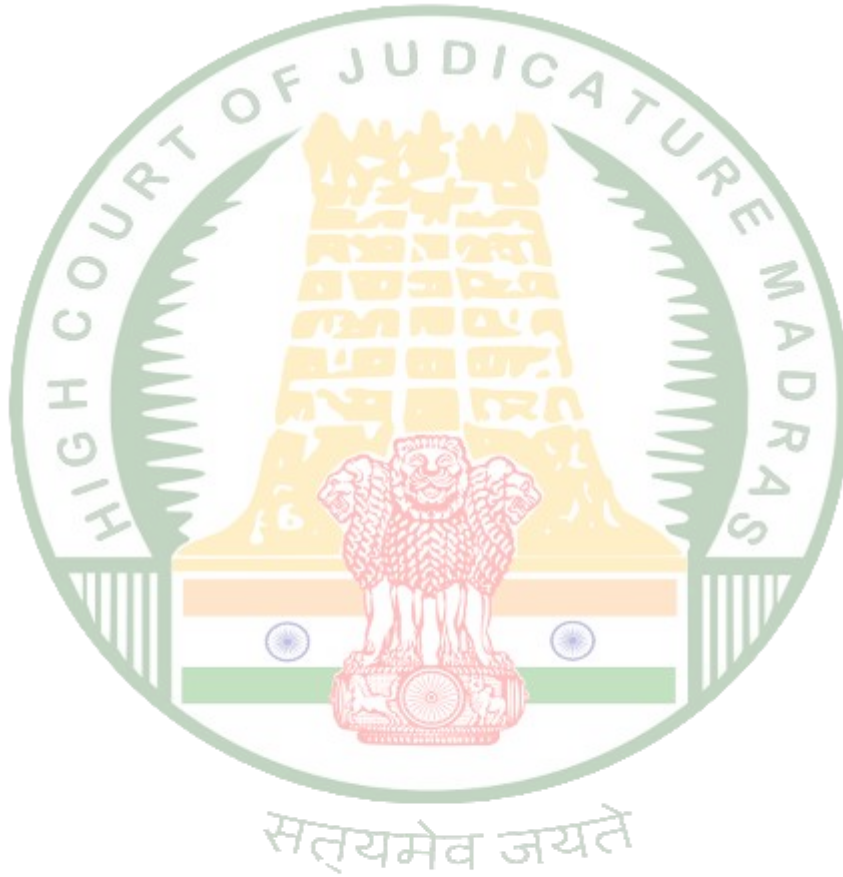
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2 cc to Mr. K.Hariharan, Advocate Sr.No.38773

A.S.No.711 of 2008

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