IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:15.06.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.2118 of 2002

Judgment reserved on 08.06.2015	Judgment pronounced on 15.06.2015

1.Saraswathi Ammal
2.Muralidharan (Died)
3.Chandra
4.Ranjini
5.Minor Prathiba
6.Minor Divakaran ..Appellants/defendants
(Minors 5 and 6 are rep. by
guardian mother Ranjini)

(Appellants 3 to 6 brought on record as legal heirs of the deceased 2nd appellant and 4th appellant appointed as guardian of Minor Appellants 5 and 6 vide order of Court dated 30.8.2011 made in CMP.Nos.345 of 2011 in S.A.No.2118/2002)

Vs

G.Durairaj .. Respondent/Plaintiff

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 20.09.2002 made in A.S.No.64 of 2001 on the file of the Principal District Court, Tiruvannamalai, reversing the judgment and decree dated 10.04.2001 and made in O.S.No.37 of 1996 on the file of the Additional Sub-Court, Tiruvannamalai.

For Appellants : Mr.Subramanian for
Mr.T.R.Rajaraman
MS.P.R.Supraja

For Respondent : Mrs.Jayashree Narasimhan

JUDGMENT

The second appeal arises out of the judgment and decree dated 20.09.2002 made in A.S.No.64 of 2001 on the file of the Principal District Court, Tiruvannamalai, reversing the judgment and decree dated 10.04.2001 and made in O.S.No.37 of 1996 on the file of the Additional Sub-Court, Tiruvannamalai.

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

(i)The suit property originally belonged to the plaintiff's paternal uncle Balasubramania Chettiar. After marriage, the first defendant namely, Saraswathi Ammal did not live with Balasubramania Chettiar and had left him. She was living at Valavanoor along with her brother. The second defendant is the adopted son of the first defendant. The first defendant, who worked as a Teacher has now retired from service. The first defendant filed a suit for maintenance against her husband Balasubramania Chettiar in O.S.No.412 of 1962 on the file of the Principal District Munsif Court, Tiruvannamalai and obtained decree on 31.08.1962. Thereafter, she filed E.P.No.402 of 1988 for realisation of the maintenance arrears amount.

(ii)Being his brother's son Balasubramania Chettiar used to be affectionate with the plaintiff, and the plaintiff used to assist him. So the said Balasubramania Chettiar requested the plaintiff to pay the E.P. amount due to the first defendant. Thereupon, the plaintiff filed E.A.No.88 of 1990 seeking permission to pay the amount due to the decree holder and after permission was granted by the Court, the plaintiff herein paid the entire maintenance amount payable by Balasubramania Chettiar to the first defendant.

(iii) On 28.12.1990, Balasubramania Chettiar in a sound and disposing state of mind, voluntarily executed a Will bequeathing all his properties in favour of the plaintiff. In the 3rd week of January 1994, Balasubramania Chettiar handed over that Will to the plaintiff and he died on 29.01.1994. So the Will dated 28.12.1990 came into effect from 29.01.1994. The plaintiff took possession of the suit property as its absolute owner and has been in lawful possession and enjoyment of the same.

(iv)In or about 15.02.1996, the first defendant who never looked after her husband Balasubramania Chettiar for more than 35 years started claiming rights over the suit property and that the first defendant attempted to trespass into the suit property. Therefore, the plaintiff has filed a suit for declaration of title and interest over the suit property and for permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and for costs. Thus, he prayed for decree.

3.The gist and essence of the written statement filed by the first defendant and adopted by the second defendant are as follows:

(i)The suit is unsustainable either in law or on facts. Originally, the suit property belonged to the husband of the first defendant namely, Balasubramania Chettiar and the first defendant is living at Valavanoor along with her brother. She also filed a suit in O.S.No.412 of 1962 and obtained decree and filed E.P.No.402 of 1988 for realisation of maintenance arrears.

(ii) The said Balasubramania Chettiar never executed a Will in favour of the plaintiff. Taking advantage of the fact that the first defendant is residing at Valavanoor, the plaintiff took forcible possession of the suit property.

(iii)Balasubramania Chettiar's brother is Ramasamy Chettiar, whose wife is the sister of the first defendant. Due to misunderstanding, Balasubramania Chettiar and first defendant were living separately. The Will is a forged one. The said Balasubramania Chettiar is having two brothers namely, Gnanasambandam and Ramasami Chettiar and they are having number of children. So there is no necessity for him to execute the Will in favour of the plaintiff. After attending the funeral, the first defendant went away locking the house and the plaintiff broke open the lock and tried to take possession of the suit property. The suit is barred by the provisions of Order II Rule 2 of C.P.C. Therefore, the defendants prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1 to P.W.3, D.W.1 and Exs.A1 to A6 and Exs.B1 to B5, dismissed the suit. Aggrieved against the judgment and decree passed by the trial court, the plaintiff preferred an appeal in A.S.No.64 of 2001 on the file of the Principal District Court, Tiruvannamalai.

5.The learned First Appellate Court has considered the arguments advanced on either side and framed necessary point for consideration and reversed the Judgment and Decree passed by the Trial Court and allowed the appeal preferred by the plaintiff. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the appellants/defendants.

6.At the time of admission, the following substantial question of law has been framed:

" 1.Whether the learned Principal District Judge is right in holding that the Will was duly executed and attested as per the provisions of the Act when the suspicious circumstances clearly go to show that the Will has been fabricated to defeat the claim of the first defendant?

2.Whether the present suit is not barred in view of the provisions contained under Order 2 Rule 2 CPC and Order 9 Rule 9 CPC in view of the dismissal of the earlier suit in O.S.No.283 of 1994 and O.S.No.633 of 1994 on the file of the District Munsif Court, Tiruvannamalai?"

7.Challenging the findings of the first appellate Court, learned counsel for the defendants/appellants submits that the first appellate Court has failed to consider that the propounder was not proved the Will and he was not dispelled the suspicious circumstances. He further submits that the suit is barred by the provisions of Order II Rule 2 of C.P.C. and Order IX Rule 9 C.P.C. The plaintiff/respondent has already filed a suit in O.S.No.283 of 1994 for bare injunction against the first defendant and also another suit in O.S.No.633 of 1994 for injunction restraining the defendants 1 to 3 therein not to encumber or alienate the suit property and both the suits were dismissed for default on 19.02.1996. Thereafter only, the present suit has been filed. Hence, the suit is hit by the provisions of Order IX Rule 9 C.P.C. and Order II Rule 2 C.P.C., because the plaintiff has not filed the suits for declaration of title. To substantiate his arguments, he relied upon the following decisions:

(i)1945 (1) MLJ 58 (Periambal Chettiar vs Sundarammal);
(ii)1996 (2) MLJ 596 (Suguna Bai v. Muniammal @ Dhanalakshmi annd others);
(iii)(1990) 3 SCC 364 (Ram Piari v. Bhagwant and others);
(iv) 2013 (1) MWN (civil) 224 (Virgo Industries (Eng.) P. Ltd. v. Venturetech Solutions P. Ltd.);
(v)AIR 1965 SC 295 (Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd. and others);
(vi) 2012 (2) CTC 543 (G.Alagarsamy v. R.Seenivasan);
(vii) 2010 (2) CTC 631 (Ranjith Ammal v. Sivasubramanian);
(viii) AIR 2004 (Gujarat) 83 (Gujarat Electricity Board, Baroda and others v. Saurashtra Chemicals, Porbandar);

8.Resisting the same, learned counsel for the respondent/plaintiff submits that Ex.A3/Will has been proved by way of examining P.W.2 and P.W.3 who are attestors of the Will. The Will has been executed by Balasubramania Chettiar in favour of the plaintiff/respondent on 28.12.1990 and Balasubramania Chettiar died on 29.01.1994 after three years. So the plaintiff/respondent is in possession and enjoyment of the suit property. Hence, he prayed for dismissal of the second appeal. To substantiate his arguments, he relied upon the following decision:

(i)AIR 2005 SC 780(Sridevi and others v. Jayaraja Shetty and others);
(ii)1992 (2) LW 520 (S.P.Thirunavukkarasu v. S.P.Loganathan and another);
(iii)AIR 1982 SC 133 (Smt.Indu Bala Bose and others v. Manindra Chandra Bose and another);
(iv)AIR 1965 SC 354 (Ramchandra Rambux v. Champabai and others);
(v)1998 (2) MLJ 127 (Valliammal and others v. Palaniammal (deceased) and another);

9.Learned counsel for the plaintiff/respondent further submits that the suit is not hit by Order II Rule 2 C.P.C. To substantiate his arguments, he relied upon the following decision:

(i)AIR 1996 SC 378(1) (Deva ram and another v. Ishwar Chand and another);
(ii)AIR 1980 SC 161 (1) (Kewal singh v. Mt.Lajwanti);
(iii)AIR 2003 Madras 208 (S.Ganesan v. S.Issac (deceased by LR's) and others);

(iv)AIR 2005 Karnataka 70 (Sri Chinnappa v. Corporation of the City of Bangalore)
(v)AIR 2009 Kerala 188 (Josey Francis v. Sunoj K.Balan);

10.Considered the rival submissions made on both sides and perused the materials available on record.

11.The admitted facts of the case are as follows:
Originally, the suit property belonged to one Arumuga Chettiar, who had three sons namely, Gnanasambandam chettiar, Ramasamy Chettiar and Balasubramania Chettiar and they got their shares vide partition deed under Ex.B3. As per Ex.B3, C schedule property was allotted to Balasubramania Chettiar. The respondent/plaintiff is the son of Gnanasambandam chettiar. The first defendant and wife of Ramasamy chettiar are own sisters. The first defendant is the wife of Balasubramania chettiar and she left the matrimonial home and filed O.S.No.412 of 1962 for maintenance and that suit was decreed on 31.08.1962. Thereafter, she filed E.P.No.402 of 1988 for claiming maintenance amount from 11.10.1975 to 11.10.1987, in which, the plaintiff/respondent filed an application under Ex.A2 to deposit the amount by him as third party and that was allowed on 24.01.1990. So Balasubramania Chettiar, who is the testator, lived along with the respondent/plaintiff.

12.Substantial question of law No.1:
“Whether the learned Principal District Judge is right in holding that the Will was duly executed and attested as per the provisions of the Act when the suspicious circumstances clearly go to show that the Will has been fabricated to defeat the claim of the first defendant?”

It is the case of the respondent/plaintiff that Balasubramania chettiar has bequeathed the property to the respondent/plaintiff by executing Ex.A3 Will on 28.12.1990 and the testator Balasubramania chettiar died on 29.01.1994. His death certificate was marked as Ex.A4. On that date itself, the plaintiff/respondent is in possession and enjoyment of the suit property as a legatee.

13.The case of the defendants/appellants is that the first defendant left the matrimonial home and she is the legal heir of the said Balasubramania chettiar. So the first defendant is entitled to the suit property and that she disputed the genuineness of the Will. The second defendant/second appellant herein is the adopted son of the first defendant.

14.It is well settled principle of law that propounder of Will ought to have proved the genuineness of the Will and also dispelled the suspicious circumstances surrounding the Will.

15.At this juncture, it is appropriate to consider the following decision relied upon by the learned counsel for the appellants/defendants:

(i)In 1945 (1) MLJ 58 (Periambal Chettiar vs Sundarammal), wherein it was held that if the Will found to be genuine, the plaintiff is entitled to alternative claim of maintenance. Para-1 is extracted hereunder:

> "1.This appeal arises from a suit brought by the widow of one Pachayappa Chettiar against the first defendant who succeeds to the property of Pachayappa Chettiar by virtue of a will executed by him on the 6th January, 1942. First defendant is the maternal uncle of the testator. In his will the testator specifically states that his wife the plaintiff has no claim to succeed to his property. The plaintiff and her husband had not lived together from 1929 until the date of the husband's death. In 1930 there was a magisterial order under the Code of Criminal Procedure against the husband for the payment of maintenance to the plaintiff, but the effect of this order was nullified by subsequent civil litigation undertaken by the testator in a suit in 1931 for the restitution of conjugal rights. In that suit he obtained a decree which was confirmed on appeal in 1933. After 1933 no serious attempts appear to have been made to persuade the plaintiff to live with the : husband and no proceedings were taken through Court to execute the decree. The validity of the will was attacked by the plaintiff in the course of her suit, but it has been found that the will was genuine and valid. The plaintiff's alternative claim, therefore, to be granted maintenance out of the husband's estate was considered and it was held that she was entitled to maintenance."

The above decision is not relevant for this case.

(ii)In 1996 (2) MLJ 596 (Suguna Bai v. Muniammal @ Dhanalakshmi annd others), it was held that propounder of Will ought to have dispelled the suspicious circumstances in the Will for disinheriting a natural heir, held to be a suspicious circumstances. Para-24 is extracted hereunder:

> "24. I have already said that in Ex.B-8, no provision is made to the widow who was all along living with him. It is also the admitted case of defendants 2 and 3 that both of them used to reside with the appellant or the fourth defendant in turns and they were mutually loving each other. Even her name is not mentioned in Ex.B-8. I am not saying that merely because the wife has not been provided, the Will has to be discarded. But it is settled law that the execution of the Will itself pre-supposes a change in the normal rule of succession. If it disinherit a natural heir, it is a suspicious circumstance which has to be explained."

(iii)In (1990) 3 SCC 364 (Ram Piari v. Bhagwant and others), wherein it was held that Will alleged to have been executed one day before death of the testator bequeathing all his properties to the sons of one of his two daughters while totally disinheriting the other daughter. So propounder of the Will ought to have dispelled the suspicious circumstances.

16.Learned counsel for the respondent/plaintiff has relied upon the following decision:

(i)In AIR 2005 SC 780(Sridevi and others v. Jayaraja Shetty and others), wherein it was held that reasons were given for making unequal distribution and hence, it cannot be taken as suspicious circumstance. Both attesting witnesses had proved sound and disposing state of testator. Para-14 to 16 are extracted hereunder:

> "14.The propounder of the will has to show that the will was signed by the testator; that he was at the relevant time in sound disposing state of mind; that he understood the nature and effect of dispositions and had put his signatures to the testament of his own free will and that he had signed it in the presence of the two witnesses who attested in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. DW-2, the scribe, in his testimony has categorically stated that the will was scribed by him at the dictation of the testator. The two attesting witnesses have deposed that the testator had signed the will in their presence while in sound disposing state of mind after understanding the nature and effect of dispositions made by him. That he signed the will in their presence and they had signed the will in his presence and in the presence of each other. In cross-examination, the appellants failed to elicit anything which could persuade us to disbelieve their testimony. It has not been show that they were in any way interested in the propounders of the will or that on their asking they could have deposed falsely in Court. Their testimony inspires confidence. The testimony of the Scribe (DW-2) and the two attesting witnesses (Dws-3 and 4) is fully corroborated by the statement of hand-writing expert (DW-5). The will runs into 6 pages. The testator had signed each of the 6 pages. Hand-writing expert compared the signatures of the testator with his admitted signatures. He has opined that the signatures on the will are that of the testator. In our view, the will had been duly executed.
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> 15.Coming to the suspicious circumstances surrounding the will, it may be stated that although the testator was 80 years of age at the time of the execution of the will and he died after 15 days of the execution of the will, the two attesting witnesses and the scribe have categorically stated that the testator was in sound state of health and possessed his full

physical and mental faculties. Except that the deceased is 80 years of age and that he died within 15 days of the execution of the will, nothing has been brought on record to show that the testator was not in good health or possessed of his physical or mental faculties. From the cross-examination of the scribe and the two attesting witnesses, the appellants have failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the testator to execute the will. Submission of the learned counsel for the appellants that the testator had deprived the other heirs of his property is not true. The family properties had been partitioned in the year 1961. The shares which were given to Dharmaraja Kadamba and Raviraja Kadamba were in possession of tenants and vested in the State Government after coming into force of Karnataka Land Reforms (Amendment) Act, 1973 whereas the properties which had been given to the daughters were in the personal cultivation of the family. The testator while executing the will bequeathed the properties which had fallen to his share in the partition and which he had inherited from his brother which were in his personal cultivation in favour of his two sons Dharmaraja Kadamba and Raviraja Kadamba and gave the right to receive compensation to other heirs of the properties which were under the tenants and had vested in the State Government. It is not a case where the father had deprived his other children totally from inheritance. Reasons for unequal distribution have been given in the will itself. This had been done by him to balance the equitable distribution of the properties in favour of all his children.

16.Counsel for the appellants argued that Respondent No. 13 had taken prominent part in the execution of the will as he was present in the house at the time of the alleged execution of the will. We do not find any merit in this submission. Apart from establishing his presence in the house, no other part is attributed to Respondent No.13 regarding the execution of the will. Mere presence in the house would not prove that he had taken prominent part in the execution of the will. Moreover, both the attesting witnesses have also stated that the daughters were also present in the house at the time of execution of the will. The attesting witnesses were not questioned regarding the presence of the daughters at the time of the execution of the will in the cross-examination. The presence of the daughters in the house at the time of execution of the will itself dispels any doubt about the so-called role which Respondent No. 13 had played in the execution of the will. They have not even stepped into the witness box to say as to what sort of role was played by Respondent No. 13 in the execution of the will."

(ii)In 1992 (2) LW 520 (S.P.Thirunavukkarasu v. S.P.Loganathan and another), wherein it was held that factum of someone being deliberately disinherited not a reason to discredit the Will unless some undue influence or some fraud is established. It is appropriate to incorporate para-7 and 9, which are extracted hereunder:

"7. We shall be re-writing the judgment of the trial Court if we do not refer to the contentions raised on behalf of the appellant and deal with the contentions independently. Learned counsel for the appellant has stressed much upon the authority of the Supreme Court in Venkatachaliah v. B. N. Thimmajamma (AIR 1959 SC 443). In a judgment delivered only a few days ago in O.S.A. No. 166 of 1983, we have quoted the relevant observations of the Supreme Court and stated how we understand the principles therein. It will be appropriate if we extract the very same passages. The Supreme Court has said:
"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, 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 hand-writing, and for proving such a hand-writing under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the hand-writing 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 he satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the

three illustrations to this section indicate what is meant by the expression 'a person of sound mind' in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writings 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 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 certainly. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters."

9.On the touchstone of the above observations of the Supreme Court, we have ourselves repeatedly asked as to what are the suspicious circumstances. Learned counsel appearing for the appellant has reiterated the very circumstances which have been fully adverted to by the learned trial Judge such as the fact that the testator was residing with his second wife at Mylapore and while the executors of the will were frequently visiting him or staying with him, the appellant had been living separately and had been kept away from the family affairs. This has been gone into in some detail by the learned single Judge to hold in our opinion rightly, that though they had a common business, all the brothers and father were living separately, which fact is fully established by the evidence of P.W.1, which evidence has remained uncontradicted. The other ground urged has been that the will is unnatural because no provision has been made for all the family members inasmuch as the appellant has been completely disinherited. This, however, has been an argument of desperation in the sense that although in the will nothing has been provided for the appellant, the appellant, who never enjoyed the affection of his father (testator), has however not been completely ignored and under the subsequent settlement deed, which we have noticed, substantial property has been given to him by his father (testator). This, however, is no ground to doubt the testament. Unless it is shown that someone was deliberately disinherited under some undue influence or on account of some fraud the Court should not deny the will. Except the deposition of D.W.1 in this behalf, there is no other evidence on record and the learned trial Judge has rightly not relied upon his evidence to hold that the testator had no testamentary capacity or that he acted under the undue influence of the executors of the will."

(iii)In AIR 1982 SC 133 (Smt.Indu Bala Bose and others v. Manindra Chandra Bose and another), wherein it was held that a circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal situation or is not expected of a normal person. Para-7 and 8 are extracted hereunder:

"7.This Court has held that the mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Successions Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the disposition 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 suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations.

8. Needless to say that any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person. Learned counsel relied on the decision of this Court in the case of Rani Purnima Devi and Another v. Kumar Khagendra Narayan Dev reported in (1962) 3 SCR 195 : (AIR 1962 SC 567) (supra). In this case the will in question gave the entire property by the testator to a distant relation of his to the exclusion of the testator's widow, sister and his other relations, and even his daughter, who would be his natural heirs, but subject, of course, to the condition that the legatee would maintain the widow and the sister of the testator. The testator's signatures were not his usual signatures, nor in the same ink as the rest of the will; the testator used to sign blank papers for use in his cases in court and he used to send them to his lawyer through his servants; the testator did not appear before the Sub-Registrar for the purpose of registration of the will but the Sub-Registrar sent only his clerk to the residence of the testator for the purpose of registration; there were 16 attesting witnesses who attested the will, but of them, only 4 interested witnesses were examined to the exclusion of disinterested witnesses. The above are undoubtedly suspicious circumstances, circumstances creating doubt in the mind of the Court. In spite of these circumstances, it was held by the Trial Court that the will was duly executed and attested. On appeal, the High Court affirmed the order of the Trial Court. On further appeal, this Court held that the circumstances were suspicious and were not satisfactorily explained and hence held that "the due execution and attestation, of the will were not proved."

(iv) In AIR 1965 SC 354 (Ramchandra Rambux v. Champabai and others), it was held that propounder should remove suspicion. Para-10 reads as follows:

"10.This decision has been recently referred to in a Judgment of this Court in Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee, Civil Appeal No. 295 of 1966 decided on September 13, 1963 (AIR 1964 SC 529). There, Wanchoo J. who spoke for the Court, has observed as follows :

"The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S.63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition 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. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested." "

(v)In 1998 (2) MLJ 127 (Valliammal and others v. Palaniammal (deceased) and another), it was held that the plaintiff has proved his case by acceptable evidence that the Will was executed and proved in the manner known to law. Para-35 reads as follows:

"35.To sum up in the light of the pleadings of the parties and the evidence let in by both sides, I am of the view that the suspicious circumstances said to have taken place in the execution of Ex.A-3 by the respondents are unacceptable. As a matter of fact, the plaintiff has produced better evidence to prove the will. Both the attestors were examined, one of the attestors, namely, P.W.2 belongs to other community and the other attestor, namely P.W.3 is related to both the branches. The scribe was also examined. The witnesses examined on the side of the plaintiff have explained the mental capacity of the testator. The case of undue influence was given up by the defendants. The evidence also shows that the testator educated three daughters of the other branch. He made sincere attempt for the marriage of the first daughter (Kannagi) through Koothayi Ammal and also performed the marriage of the second daughter Manimekalai. Apart from the above fact, the due execution and the signature of the testator has been accepted by the defendants in their pleadings. In such circumstances, the plaintiff has proved his case by acceptable evidence that the will-Ex.A-3 has been executed and proved in the manner known to law. ....”

17.Now this Court has to decide whether the first appellate Court has rightly held that the Will is true and genuine? The first defendant/first appellant is the wife of Balasubramania chettiar and no share has been given to her. Learned counsel for the appellants submits that there is suspicious circumstances surrounded the Will, which was executed in favour of the plaintiff, since the first defendant alone is only the legal heir of Balasubramania chettiar.

18.On perusal of Ex.A3 Will, it reveals that the first defendant left the matrimonial home and she filed the suit for claiming maintenance and respondent herein alone has paid the maintenance amount. So reason has been assigned by the testator Balasubramania chettiar as to why he has bequeathed the property in favour of the respondent by disinheriting his wife. Furthermore, genuineness of the Will has been proved by way of examining P.W.2 and P.W.3. On going through the evidence of P.W.2 and P.W.3, which inspires confidence. So I am of the view, there is no reason for discarding their evidence.

19.It is pertinent to note that Ex.A3 Will executed on 28.12.1990 and Balasubramania chettiar died on 29.01.1994 nearly after three years. D.W.1/first defendant in her evidence deposed that she does not know as to whether her husband executed any Will. So the evidence of P.W.1 to P.W.3 and D.W.1 clearly proved that after D.W.1 left the matrimonial home, her husband Balasubramania chettiar was under the care and custody of the respondent/plaintiff and the plaintiff alone has paid the maintenance amount to the first defendant, after the first defendant has filed execution petition for maintenance and the same has been evidenced by Ex.A2. That factum was also incorporated in Ex.A3 Will. In such circumstances, I am of the view, the first appellate Court has rightly held that Ex.A3 Will is true and genuine. Propounder of the Will has dispelled all the suspicious circumstances. So the finding of the first appellate Court that Ex.A3

Will is true and genuine is hereby confirmed. The substantial law of question No.1 is answered against the defendants/appellants.

20.Substantial question of law:2:

"Whether the present suit is not barred in view of the provisions contained under Order 2 Rule 2 CPC and Order 9 Rule 9 CPC in view of the dismissal of the earlier suit in O.S.No.283 of 1994 and O.S.No.633 of 1994 on the file of the District Munsif Court, Tiruvannamalai?"

Learned counsel for the defendants/appellants submits that the plaintiff/respondent has already filed a suit in O.S.No.283 of 1994 for permanent injunction and its plaint was marked as Ex.B4. He also filed another suit in O.S.No.633 of 1994 for injunction restraining the defendants not to encumber or alienate the suit property and its plaint was marked as Ex.B5. He further submits that both the suits were dismissed for default on 19.02.1996 and the same were evidenced by Exs.B1 and B2. At the time of filing both the suits in O.S.Nos.283 and 633 of 1994, the plaintiff has not sought for the relief of declaration of title. In such circumstances, the plaintiff ought to have filed an application seeking permission to amend the prayer to include the relief of declaration of title, but the plaintiff/respondent herein has not filed any such application seeking permission. So the present suit filed by the respondent/plaintiff is barred by limitation. Once the suit is dismissed for default, the respondent/plaintiff instead of filing application to restore the suit, has filed the present suit, which is hit by constructive res-judicata and Order IX Rule 9 of C.P.C. To substantiate his arguments, he relied upon the following decision:

(i)In AIR 1965 SC 295 (Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd. and others), it was held that Order IX Rule 9 C.P.C. precludes a second suit in respect of "the same cause of action" where the first suit is dismissed for default of appearance of the plaintiff. Para-29 and 30 are extracted hereunder:

> "29.A cause of action is a bundle of facts on the basis of which relief is claimed. If in addition to the facts alleged in the first suit, further facts are alleged and relief sought on their basis also, and he explained the additional facts to be the allegations about possession and dispossession in October, 1934, then the position in law was that the entire complexion of the suit is changed with the result that the words of O.IX, R.9 "in respect of the same cause of action" are not satisfied and the plaintiff is entitled to reagitate the entire cause of action in the second suit. In support of this submission, learned counsel invited our attention to certain observations in a few decisions to which we do not consider it necessary to refer as we do not see any substance in the argument.
>
> 30.We consider that the test adopted by the Judicial Committee for determining the identity of the

causes of action in two suits in Mohammed Khalil Khan v. Mahbub Alli Mian, 75 Ind App 121: (AIR 1949 PC 78) is sound and expresses correctly the proper interpretation of the provision. In that case Sir Madhavan Nair, after an exhaustive discussion of the meaning of the expression "same cause of action" which occurs in a similar context in para (1) of O.II R.2 of the Civil Procedure Code observed:

"In considering whether the cause of action in the subsequent suit is the same or not, as the cause of action in the previous suit, the test to be applied is are the causes of action in the two suits in substance - not technically - identical" "

(ii)In 2012 (2) CTC 543 (G.Alagarsamy v. R.Seenivasan), it was held that whether bar created under Order 9, Rule 9 of C.P.C. would also be applicable to assignee or a transferee of plaintiff who instituted earlier suit and dismissed for default. Bar under Order 9, Rule 9 can be invoked against legal representative or assignees or transferees of plaintiff, who filed earlier suit. It is appropriate to incorporate para-16, which runs as follows:

"16. The decree passed in Original Suit No.384 of 1995 has been marked as Ex.B10. Admittedly Original Suit No.384 of 1995 has been instituted for identical relief by the predecessor in title of the plaintiff against the present defendant and other and the same has been dismissed for default. At this stage, a nice legal question arises "as to whether the bar created under Order 9, Rule 9 of the Code of Civil Procedure, 1908 would also be applicable to assignee or transferee of plaintiff who instituted earlier suit and dismissed for default."

But the above decision is not applicable to the facts of the present case, because the plaintiff/respondent herein alone has filed a suit in O.S.No.283 of 1994 for injunction restraining the defendants from interfering with the plaintiff's possession and enjoyment and filed another suit in O.S.No.633 of 1994 for injunction restraining the defendants not to encumber or alienate the suit property and the same were dismissed for default as per Exs.B1 and B2. But the present suit is filed for declaration of title and injunction, which is a comprehensive suit.

(iii)In 2010 (2) CTC 631 (Ranjith Ammal v. Sivasubramanian), it was held that the plaintiff filed the previous suit against the same defendant on same set of facts and it was dismissed under Oder 9 Rule 8 C.P.C., the present suit on same cause of action is not maintainable. Para-16 to 20 are extracted hereunder:

"16.The learned counsel appearing for the appellant/defendant has befittingly drawn the attention of this court to the decision of the Hon'ble Apex Court in Suraj Rattan Thirani and others v. Azamabad Tea Co.

Ltd and others, AIR 1965 Supreme Court 295, wherein the Hon'ble Apex Court has held as follows:

"Beyond the absence in Order 9, Rule 9 of the words referring "to those claiming under the plaintiff" there is nothing to warrant the argument, that Rule 9, which speaks of the plaintiff being precluded from bringing a fresh suit creates merely a personal bar against the plaintiff in the first suit. It has neither principle, nor logic to commend it. It is not easy to comprehend how A who had no right to bring a suit or rather who was debarred from bringing a suit for the recovery of property could effect a transfer of his right to that property and confer on the transferee a right which he was precluded by law from asserting. The word plaintiff in the rule should therefore in order that the bar may be effective include his assigns and legal representatives".

17.From the close perusal of the decision mentioned supra, it is needless to say that Order 9, Rule 9 of the Code of Civil Procedure, 1908 can also be invoked against the legal representatives or assignees of the plaintiff, who filed earlier suit.

18.In the instant case, the present plaintiff has claimed title to the suit property only through the plaintiff found in Original Suit No.16 of 1983. Therefore, as per the dictum passed by the Hon'ble Apex Court in Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd and others, AIR 1965 Supreme Court 295, it is needless to say that the entire arguments advanced by the learned counsel appearing for the respondent/plaintiff is not legally tenable.

19.It has already been stated in many places that the present suit is clearly barred under Order 9, Rule 9 of the Code of Civil Procedure, 1908 in view of the dismissal of the suit filed in Original Suit No.16 of 1983 under Order 9, Rule 8 of the said Code. Therefore the first substantial question of law formulated in the present Second Appeal is decided in favour of the appellant/defendant. Since the first substantial question of law is decided in favour of the appellant/defendant, the second substantial question of law formulated in the present appeal need not be decided.

20.The trial Court after considering the legal point involved in the present suit has rightly dismissed the suit. But the first appellate Court has erroneously come to a conclusion that the present suit is not barred under Order 9, Rule 9 of the Code of Civil Procedure, 1908 in view of the dismissal of the suit filed in Original Suit No.16 of 1983 under Order 9, Rule 8 of the said Code. In view of the foregoing enunciation of both the factual and legal aspects, the conclusion arrived at by the first appellate court is erroneous and the same is liable to be set aside."

The above decision is not applicable to the facts of the present case, because the suit in O.S.No.16 of 1983 is filed for declaration of title and injunction and the same was dismissed for default. At this juncture, it is appropriate to incorporate Order 9, Rule 8 C.P.C., which runs as follows:

"8.Procedure where defendant only appears— Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

In the case on hand, as per Ex.B4, the suit in O.S.No.283 of 1994 is filed for permanent injunction restraining the defendants not to interfere with the plaintiff's peaceful possession and enjoyment of the suit property. As per Ex.B5, the suit in O.S.No.633 of 1994 was filed for injunction restraining the defendants not to encumber or alienate the suit property and the present suit is for declaration of title and injunction. In such circumstances, the above decision is not applicable to the facts of the present case.

(iv)In AIR 2004 (Gujarat) 83 (Gujarat Electricity Board, Baroda and others v. Saurashtra Chemicals, Porbandar), wherein it was held that the suit was dismissed for default under Order 9, Rule 8 C.P.C. and no attempt has been made to get the suit restore. Fresh suit on same cause of action is barred under Order IX Rule 9 C.P.C. and it was not barred by res-judicata, but it is barred by Order II Rule 2 of C.P.C. Para-5 and 6 are extracted hereunder:

"5. .. ..It is true that this rule is not really a matter of substance, but it simply deprives the plaintiff claiming his remedy and does not vest any right in favour of the defendant, but in absence of permission, defendant can positively make a grievance that he has been wrongly vexed again for the same alleged wrong. Again the phraseology used in sub-rule (3) of Rule-2 of Order 2 of CPC creates implied bar. Undisputedly, the plaintiff company even its say is accepted as it is, was entitled to more than one relief including declaration and other consequential reliefs on the day on which the first suit was filed and it was entitled to sue the defendant Board for all or any of such reliefs. Some commission in praying such reliefs even inadvertently, would go to the root of the 2nd suit if the same is filed on one or the same cause of action. It is not the say of the plaintiff that proper permission of the Court was obtained when earlier first suit was filed. For any of the reliefs which have been now claimed in the present suit, the effect may be either of commission or of relinquishment of part or of total claim, but the effect would be the same. According to us, finding recorded by the lower Court is incorrect that the 2nd suit is based on a distinct and/or separate cause of action. It is settled that when the plaintiff in a suit based on accounts, omits some item, he cannot sue again in respect of the item so omitted. It is likely that several transactions may have given rise to one cause of action or there may be more than one cause of action based on the same transaction from one single account, but even where there are different contracts or entries in the account, yet if they form full or part of one transaction, breach of all such contracts or improper entries of accounts, should be construed as only one cause of action so far as the scheme of O.2 R.2 of CPC is concerned. It is not the case that on the date of filing of the first suit, the plaintiff was not aware about the actual amount which he could have claimed as amount erroneously or illegally recovered by the defendant Board. In the first suit, the substantial claim was against the defendant Board and not against the State of Gujarat. . . .”

6. The plea raised by the defendant Board that the 2nd suit is even otherwise time-barred also needs consideration. As per the facts mentioned, while dealing with the findings recorded by the learned Lower Court in reference to Issue Nos.9-A & 9-B and 5, it is clear that without prejudice to the contentions raised by the defendant Board and for the sake of arguments if it is accepted that the removal of the 2nd meter on 22.1.1987 is an additional factor, then also the receipt of 1st bill on the strength of placement of 3rd meter, could be the latest date for the purpose of deciding the issue of limitation i.e. issue No.5, because the 2nd meter has been removed undisputedly on 12-1-1987 and the present suit has been filed on 30.1.1991. It is not on record that when first bill was received by the plaintiff company after removal of the 2nd meter. Learned Lower Court, while dealing with the

issue of limitation, has accepted the say of the plaintiff that the suit is based on accounts and as excess amount has been recovered by the defendant Board from the plaintiff and amount required to be shown as credit, has not been shown, the question of limitation does not arise. The learned Lower Court has erroneously held that the suit of the plaintiff is within time as the same is based on accounts which is continuous one. It is not correct to say that recovery made by adjusting the amount on 1.5.1983 has any relation with the act of removal of 2nd meter in the month of January 1987. So, on this sole ground of limitation, learned Lower Court ought to have dismissed the claim of the plaintiff treating it to be time-barred."

21.Learned counsel for the plaintiff/respondent has relied upon the following decision:

(i)In AIR 1996 SC 378(1) (Deva ram and another v. Ishwar Chand and another), it was held that the suit for recovery of price money of the suit land was dismissed. Subsequent suit by the plaintiffs for recovery of possession on ground that they were owners of land, distinctive cause of action in subsequent suit is not barred under Order II Rule 2 C.P.C. It is appropriate to extract para-23, which reads as follows:

"23.In the previous suit, which was instituted by the respondents, an issue, namely, Issue No.5 was framed on the status of the appellant as to whether they were the tenants of the land in suit under the respondents but in the subsequent suit this issue was not raised as the appellant who were the defendants in the subsequent suits did not plead that they were the tenants under the respondents. What they pleaded was that they were in possession since a long time namely from Samvat 2005 and had, therefore, acquired title by adverse possession. Consequently, in the subsequent suits, the issue which was raised and tried in the previous suit was not raised, framed or tried and no finding, therefore, came to be recorded as to whether the defendants were tenants of the land in suit. It is true that the instant suit which is the subsequent suit, is between the same parties who had litigated in the previous suit and it is also true that the subject matter of this suit, namely, the disputed land, is the same as was involved in the previous suit but the issues and causes of action were different. Consequently, the basic requirement for the applicability of rule of res judicata is wanting and, therefore, in the absence of pleadings, in the absence of issues and in the absence of any finding, it is not open to the learned counsel for the appellants to invoke the rule of res judicata on the ground that in the earlier suit it was found by trial court that the appellants were the tenants of the land in dispute under the respondents.”

(ii)In AIR 1980 SC 161 (1) (Kewal singh v. Mt.Lajwanti), it was held that amendment seeking revival of cause of action under Section 14(1)(e) was not barred by Order 2, Rule 2 C.P.C. But this decision is not applicable to the facts of the present case. Because the land lady basing her suit claims on three distinct causes of action (i.e.) under Sections 14A(1) and 14(1)(e) and (f). Subsequently, land lady by amendment seeking to revive cause of action. So it was not hit by Order 2 Rule 2 C.P.C. and question of constructive res-judicata did not arise. So the above decision is not applicable to the facts of the present case.

(iii)In AIR 2003 Madras 208 (S.Ganesan v. S.Issac (deceased by LR's) and others), it was held as follows:

> “In order that a plea of the bar under Order 2, Rule 2(3), C.P.C. should succeed, the defendant who raised the plea must make out (1) that the second suit was in respect of the same casue of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed; (4) that the cause of action and the parties to the second suit shall be the same as in the first suit. ”

(iv)In AIR 2005 Karnataka 70 (Sri Chinnappa v. Corporation of the City of Bangalore), wherein it was held that the suit has been filed for declaration of title and injunction. But earlier suit was filed only for injunction. Question of plaintiff's title was not in issue in earlier suit. So it is not hit by Order 2 Rule 2 of C.P.C. Para-10 is extracted hereunder:

> “10.The plaintiff has produced Ex. P. 2 the sale deed obtained by his father. There is no contra evidence to show that the vendor of Ex. P. 2 had no title over the property at the time of sale. The fact that plaintiff had failed to prove possession in 1982 does not mean that he is precluded from proving possession in the present suit and more so the possession of the plaintiff is specifically admitted by the defendant. In that view of the matter, the judgment and decree of the Trial Court is bad in law. The appeal is allowed with costs. The judgment and decree of the

Trial Court is set aside. The suit of the plaintiff is decreed.”

(v)In AIR 2009 Kerala 188 (Josey Francis v. Sunoj K.Balan), in para-2, it was held that in earlier suit for perpetual injunction apprehension that defendant would alienate suit property to somebody else, gave rise to cause of action. Whereas cause of action in latter suit of specific performance was default of defendant to perform his part as agreed. Suit based on separate and distinct cause of action, is not attracted by Order 2 Rule 2 C.P.C.

22.On perusal of cause of action given in the suits under Exs.B4 and B5, it reveals that the plaintiff/respondent got the suit property by way of Ex.A3 Will executed by Balasubramania chettiar on 28.12.1990 and he died on 29.01.1994. As per Ex.B4, in para-9 of the plaint in O.S.No.283 of 1994, it was stated that the first defendant and her men are influential persons and threatened the plaintiff that they would dispossess the plaintiff from the suit property. Hence, the plaintiff filed the suit for bare injunction restraining the defendants not to interfere with the plaintiff's peaceful possession and enjoyment of the suit property. In Ex.B5/suit in O.S.No.633 of 1994, it was stated that the defendants 1 and 2 attempted to create encumbrance over the suit properties and hence, the plaintiff filed the suit for injunction restraining the defendants not to encumber or alienate the suit property.

23.On perusal of the present suit in O.S.No.37 of 1996, it reveals that the suit was filed for declaring the plaintiff's absolute title and interest over the suit property and granting permanent injunction restraining the defendants and her men from interfering with the plaintiff's peaceful possession and enjoyment of the suit property. In such circumstances, I am of the view, the present suit is not hit by Order II, Rule 2 C.P.C. and Order IX, Rule 9 C.P.C. The first appellate Court has rightly held that the suit filed by the plaintiff/respondent is not barred by the provisions of Order II, Rule 2 and Order IX, Rule 9 C.P.C. Thus, substantial question of law No.2 is also answered against the defendants/appellants.

24.Considering the facts and circumstances of the case along with the above decision, I am of the considered opinion, Ex.A3 Will is true and genuine, on that basis, the plaintiff/respondent as a legatee entitled to the suit property and he is in possession and enjoyment of the suit property. Furthermore, the suit filed by the plaintiff/respondent is not barred by the provisions of Order II, Rule 2 and Order IX, Rule 9 C.P.C. The first appellate Court has considered all the aspects in proper perspective and rightly came to the conclusion. Hence, the judgment and decree passed by the first appellate Court does not suffer any illegality or irregularity and it does not warrant any interference and they are hereby confirmed.

25. In fine,

- Second Appeal is dismissed.
- The decree and judgment passed by the first appellate Court are hereby confirmed.
- There is no order as to costs.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1.The Principal District Judge, Tiruvannamalai.

2.The Additional Sub-Judge, Tiruvannamalai.

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

+1 cc to M/s.T.R.Rajaraman, Advocate,SR.29287

+1 cc to M/s.Jayashree Narasimhan, Advocate,SR.28927.

Mp(co)
krd 9/7

Pre-delivery Judgment in
S.A.No.2118 of 2002