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IN THE JUDICATE OF MADRAS HIGH COURT

RESERVED ON : 18.07.2017

DELIVERED ON : 24.08.2017

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THE HON'BLE MR.JUSTICE R.SUBBIAH

and

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

A.S.No.432 of 2011

and

C.M.P.No.8005 of 2017

- 1.Jayaprakash
- 2.Durairaj
- 3.Navaneethakrishnan
- 4.Vijayashanmugham
- 5.Dr.Anand
- 6.Ramya
- 7.N.Ramasamy
- 8.N.Rajendra Kumar @ Raja
- 9.N.Radha Bai
- 10.P.Kodhandapani
- 11.K.Ramesh
- 12.K.Ravichandran
- 13.K.Sankar
- 14.K.Murali
- 15.T.Sumathi

... Appellants/Plaintiffs 3to7

Vs.

- 1.Nandhakumar
- 2.Devakrishnaraj
- 3.Bala Gangadhara Thilakar
- 4.Sathiyamoorthy
- 5.Bagyalakshmi
- 6.Chandrika
- 7.Saroja

.. Respondents/Defendants

Appeal has been filed under Section 96 of CPC r/w Order 41 Rule 1 & 1A of CPC, against the judgment and decree dated 30.08.2011 in O.S.No.43 of 2007 on the file of the Additional District Judge (Fast Track Court-I), Salem, Salem District.

For Appellants : Mr.K.S.Sankhar Murali

For Respondents: Mr.T.M.Hariharan for R1 to R4 & R7

Mr.M.Ananthakumar for R5 & R6

JUDGMENT

R.SUBBIAH, J.,

<https://hcservices.ecourts.gov.in/hcservices/>

THIS appeal has been filed by the appellants as against the judgment and decree dated 30.08.2011 passed by the learned Additional District Judge (Fast Track Court No.1), Salem,



dismissing the suit in O.S.No.43 of 2007 filed by them for passing preliminary decree for partition of the suit schedule properties.

2.The appellants herein are the plaintiffs and the respondents herein are the defendants before the Trial Court. The appellants/plaintiffs are the legal heirs of one Venugopal Chettiar who were born through his first wife Kannammal. The 7th respondent/7th defendant is the second wife of the said Venugopal Chettiar and the respondents 1 to 6/defendants 1 to 6 are the children of the said Venugopal Chettiar born through his second wife - 7th respondent/7th defendant. For the sake of convenience, hereinafter the parties will be referred to as the plaintiffs and the defendants.

3.The brief facts of the case of the plaintiffs, inter alia, are as follows

3-1.It is the case of the plaintiffs that one Rangasamy Chettiar is the common ancestor of the plaintiffs and the defendants. The wife of the said Rangasamy Chettiar was one Lakshmi Ammal. The said Rangasamy Chettiar had three sons viz., Venugopala Chettiar, Sundaravel Chettiar and Ramanatha Chettiar. The said Rangasamy Chettiar, along with his three sons, was doing dhal business as their family business in the name and style of Rangasamy Chettiar & Sons Dhal Mill, a partnership firm. The said business is a joint family business of Rangasamy Chettiar, being managed by V.R.Venugopal Chettiar, on behalf of the joint family with another partner one Duraisamy Chettiar. The said joint family was also doing yet another business with the joint family funds, as a business capital, in the name and style of Jothi & Co Tapioca factory, a partnership business, which business was also managed by V.R.Venugopal Chettiar as one of the partners. The above said Duraisamy Chettiar and one Anthonisamy Mudhaliar were also partners in the said partnership business. That apart, the said joint family was also doing another business viz., commission mundy business in the name and style of Rangasamy Chettiar Commission Mundy at Leigh Bazaar, Salem.

3-2.While so, in the year 1948, a partition was effected in the joint family of Rangasamy Chettiar at the instance of the respectable mediators, whereby the entire assets and businesses of the joint family were divided among the coparceners of the joint family and a regular partition deed was executed between the members of the family on 03.06.1948, which document was registered as Doc.No.1840/1948 at the Joint Sub-Registrar Office-III, Salem. As per the said partition, the father Rangasami Chettiar and his wife Lakshmi Ammal were allotted 'A' Schedule property of the partition deed, which was the family house, allotting them life interest in the same, with a further covenant that after their demise, the same should be devolved equally on their three sons viz., Venugopal Chettiar, Sundaravel Chettiar and Ramanatha Chettiar. The 'B' Schedule properties of the partition deed, viz., the family business Rangasamy Chettiar & Sons Dhal Mill and Jothi & Co Tapioca Factory were allotted to Venugopal Chettiar, along with the



deposits in Oriental Insurance Company & Bombay Mutual Insurance Company. Another son Sundaravel was allotted the family business "the Rangasami Chettiar Commission mandi along with deposits in Oriental Insurance Company.

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3-3.Subsequent to partition, Mr.Duraisamy Chettiar, who was also a partner of Rangasamy Chettiar & Sons Dhall Mill, joined with Venugopal Chettiar to continue to run the said Dhal Mill business. Similarly, one Anthonisamy Mudhaliar, who was a partner of Jothi & Co Tapioca Factory, joined with Venugopal Chettiar to continue to run Jothi & Co Tapioca Factory. During the period from 1948 to 1953, both the said companies, viz.,Rengasamy Chettiar & Sons Dhall Mill and Jothi & Co.Tapioca Factory earned enormous amount as profit. From and out of the said amount derived from the said partnership business, the said Venugopal Chettiar and Duraisamy Chettiar jointly purchased properties at Annadanapatti Village in S.No.17 measuring to an extent of 3.93 acres on 22.02.1951 under Doc.No.2648 of 1951 and also at Pallapatti Village in T.S.Nos.35, 36, 37 & 39 measuring to an extent of 2.19 acres on 16.08.1952 under Document No.2245/1952.

3-4.Subsequently, on 26.04.1956, Venugopal Chettiar had purchased a landed property at Pallapatti Village in his name being the kartha of his family, measuring to an extent of 0.38 cents utilizing the joint family funds and income derived from the aforesaid family business allotted to him, by virtue of a registered Sale Deed dated 26.04.1956 executed by one Kuppusami Pillai for a sale consideration of Rs.2,000/-. This property is the Item-1 of the suit schedule property.

3-5.The common ancestor Rangasamy Chettiar died in the year 1969 and his wife Lakshmi Ammal predeceased him in the year 1953. After the death of the parents, as per the covenant of the partition deed dated 03.06.1948, three sons namely Venugopal Chettiar, Sundaravel Chettiar & Ramantha Chettiar divided the property, which was allotted to their parents in the partition, into three equal shares between themselves. In the meantime, on 19.10.1959, by a registered Sale Deed vide Doc.No.3814/1959, the brother of the Venugopal Chettiar viz., Sundaravel Chettiar sold his undivided 1/3rd share in the 'A' schedule property mentioned in the registered partition deed dated 03.06.1948, to Venugopal Chettiar. Later Venugopal Chettiar constructed a three storied dwelling house from and out of the joint family funds in his 1/3rd share of land as well as in 1/3rd share of land purchased from his brother Sundaravel Chettiar. This property is shown as Item No.2 in the suit schedule properties.

3-6.In the year 1973, the partner of Rangasami Chettiar & Sons Dhal Mill, viz., Duaraisamy Chettiar died. After his death, a partition was effected between Venugopal Chettiar and the legal heirs of the deceased Duraisamy Chettiar, at the instance of the respectable mediators, and a regular registered partition deed was executed between them on 24.12.1973, which was registered as Doc.No.131 of 1974 at Salem Registrar's



Office. As per the said partition deed dated 24.12.1973, Venugopal Chettiar was allotted 'A' schedule properties of the said partition deed, wherein the properties situated at Annadanapatti Village in S.No.17 measuring to an extent of 1.89 acres and the properties situated at Pallapatti Village in T.S.Nos.35, 36, 37 & 39 measuring to an extent of 1.26 acres, in 3 items, were allotted to him.

3-7.Out of the properties allotted to him in 3 items, which are situated at Pallapatti Village, Venugopal Chettiar sold a portion of properties to one Kesavan measuring to an extent of 0.4 cents in the year 1981 for a sum of Rs.15,000/- and utilized such entire sale proceeds for the improvement of the family business. The remaining 2 items of properties situated at Pallapatti Village measuring to a total extent of 1.22 acres are more fully described as Item No.3 of the suit schedule property, wherein Venugopal Chettiar being the kartha of the family was carrying on family businesses utilizing the joint family funds in the name and style of Sri Saibaba Rice & Dhal Mill, V.R.V.Oil Mill, Sri Parasakathi Groundnut Mill, Sri Parasakthi Dhal & Flour Mills & Sri Prasakathi Kudal Appalam Manufacturing Mill, till his death. All the machineries of the aforesaid mills are described as Item No.5 of the suit schedule properties.

3-8.The properties situated at Annathanapatti Village measuring to an extent of 1.89 acres allotted to Venugopal Chettiar in the partition dated 24.12.1973, were sold by him by virtue of four separate sale deeds, details of which are as follows_

a)on 19.09.1980 a registered Sale Deed vide Doc.No.5094/1980 was executed by Venugopal Chettiar in favour of one Manoharan in respect of a portion of 1.89 acres situated at Annathanapatti Village, for a sale consideration of Rs.20,000/-

b)on 06.10.1980 a registered Sale Deed vide Doc.No.5417/1980 was executed by Venugopal Chettiar in favour of one Nedunchezhiyan and Kanagasabapathy, in respect of a portion of 1.89 acres situated at Annathanapatti Village, for a sale consideration of Rs.25,600/-.

c)on 10.12.1980, a registered Sale Deed vide Doc.No.6910/1980 was executed by Venugopal Chettiar in favour of one Ramasamy and Kanagasabapathy, in respect of a portion of 1.89 acres situated at Annathanapatti Village, for a sale consideration of Rs.15,600/-

d)on 06.02.1981 a registered Sale Deed vide Doc.No.702/1981 was executed by Venugopal Chettiar in favour of one Ramasamy and Kanagasabapathy, in respect of a portion of 1.89 acres situated at Annathanapatti Village, for a sale consideration of Rs.9,600/-.



From and out of the above said four sale proceeds received by Venugopal Chettiar, he purchased agricultural lands at Omalur Taluk, in his own name as he was the kartha of the family, by virtue of two separate sale deeds executed by one Ramasamy, as Power of Attorney of one Sinthamani Achi along with Nachammai for a sale consideration of Rs.32,500/- on 16.02.1981, one under the registered Doc.No.1425/1981 on the file of Registrar Office, Salem. The said property is the Item No.4(a) of the suit schedule properties; and another property was purchased under registered Sale Deed Doc.No.1427/1981 dated 18.02.1981, which is described as Item No.4(b) of the suit schedule properties. Venugopal Chettiar invested the balance amount available with him, after the purchase of the said agricultural lands at Omalur Taluk, for the improvement of the family businesses, being run by him as Kartha of the family. All the plaintiffs and the defendants are in joint possession and enjoyment of the joint family properties as coparceners.

3-9.While so, Venugopal Chettiar died intestate on 22.09.2006, leaving behind the plaintiffs and the defendants as his only legal heirs to succeed his estates. The entire acquisition of the joint family properties by Venugopal Chettiar has been made by utilizing the funds available with the joint family in his hands and out of the income derived from the joint family businesses allotted to him in the family partition dated 03.06.1948 and also with the help of the sale proceeds of the joint family properties sold by him. Though the properties stand in the name of Venugopal Chettiar, all of them have been acquired in his name, he being the eldest male coparcener of the joint family, who is the Kartha-Manager of the joint family and such properties have been only acquired for and on behalf of the joint family for the benefit of the joint family members.

3-10.It is further stated by the plaintiffs that even during his life time, Venugopal Chettiar was indulging in vexatious litigations in courts. After his death, the plaintiffs are not able to enjoy the family properties jointly along with the defendants; so, the plaintiffs demanded the defendants for a division of the family properties and businesses equally and allot their respective shares. But, the defendants are not amenable to comply with the demand for division of the family properties and the businesses and are evading the same. The plaintiffs 1 to 4 are entitled to get 14/169 shares each and the plaintiffs 5 & 6 are entitled to get 7/169 shares each. The plaintiffs 7 & 8 are entitled to get 7/169 shares each. In total, the plaintiffs are altogether entitled to get 84/169 shares in the joint family properties and businesses. Since the defendants are not amenable for partition, the plaintiffs have filed the suit for a preliminary decree for partition of the suit properties and for a direction directing the division of the suit properties into 169 equal shares and out of them, allot 84 shares to the plaintiffs together, and appoint a Commissioner at a later point of time by passing a final decree in the suit to divide the suit properties by metes and bounds and to allot 84/169 shares of the plaintiffs with possession.



4-1. Resisting the case of the plaintiffs, the 1st defendant has filed a written statement (which was adopted by the defendants 2, 3, 4 & 7), stating that the plaintiffs 1 to 8 are the legal heirs of late Venugopal Chettiar through his deceased 1st wife Kannammal. After the demise of his 1st wife Kannammal, the said Venugopal Chettiar married the 7th defendant-Saroja as his 2nd wife. The defendants 1 to 4 are the sons and the defendants 5 & 6 are the daughters of late Venugopal Chettiar born through his 2nd wife (7th defendant-Saroja). According to the 1st defendant, it is not true and correct to allege that the said common ancestor Rangasami Chettiar, along with his three sons, was doing dhal business as their family business in the name and style of Rangasamy Chettiar and Sons Dhal Mill. It is also false and imaginary to allege that the partnership business was the joint family business of Rangasamy Chettiar, being managed by Venugopal Chettiar. It is equally false and untenable to allege that the joint family was also doing yet another business, with joint family funds, as the business capital, in the name and style of Jothi & Co Tapioca Factory. It is not true and correct to allege that the joint family was also doing commission mundy business in the name and style of Rangasamy Chettiar Commission Munday at Leigh Bazaar, Salem.

4-2. According to the 1st defendant, it is true that in the year 1948, a partition was effected in the joint family of Rangasamy Chettiar at the instance of respectable mediators, whereby the entire assets and businesses of the family were divided among the coparceners of the joint family and a regular partition deed was executed between the members of the family on 03.06.1948, which was registered as Doc.No.1840/1948 at the Joint Sub-Registrar's Office-III, Salem. It is not true to allege that as per the said partition, the father Rangasami Chettiar and his wife Lakshmi Ammal were allotted 'A' schedule property of the partition deed, which was the family house, allotting them life interest in the same, with a further covenant that after their death, the same should be devolved equally on their three sons. The 'B' schedule properties of the Partition Deed, viz., the family businesses Rangasamy Chettiar & Sons Dhal Mill and Jothi & Co Tapioca Factory were allotted to Venugopal Chettiar, along with the deposits in Oriental Insurance Company & Bombay Mutual Insurance Company, along with debts. The debts have to be discharged by the said Venugopal Chettiar. The other allegation that another son Sundaravel was allotted the family business 'Rangasamy Chettiar Commission Mundy' along with deposits in Oriental Insurance Company, is not true and it is false. It is also not true and correct to allege that the late Venugopal Chettiar was successfully carrying on the family businesses allotted to him in the partition namely Jothi & Co, Tapioca Business with Anthonisamy Mudaliar and another business viz., Rangasamy Chettiar and Sons Dhall Mill with Duraisamy Chettiar for the period from 1948 to 1953 and earned enormous amounts.

4-3. It is further stated by the 1st defendant that the said Venugopal Chettiar has earned from own skill and hard-work in his business and not from the family property. The said



Venugopal Chettiar has started his business with his partners and out of such business, he derived the amount from the partnership businesses. Venugopal Chettiar and Duraisamy Chettiar jointly purchased properties at Annathanapatty Village in S.No.17 measuring to an extent of 3.93 acres on 22.2.1951 under Doc.No.2648 of 195 and also at Pallapatty Vilalge in T.S.Nos.35,36,37 & 39 measuring to an extent of 2.19 acres on 16.8.1952 under Doc.No.2245/1952. It is true that the said Venugopal Chettiar also purchased a landed property at Pallapatty Village in his name from his own funds. But, it is totally false and mischievous to allege that the said Venugopal chettiar was being the kartha of his family, purchased the land measuring to an extent of 0.38 cents utilizing the joint family funds and income derived from the aforesaid family business allotted to him in the partition, by paying sale consideration of Rs.2,000/-. The said property was purchased by the said Venugopal Chettiar out of his own funds. There was no joint family consisting of the said Venugopal Chettiar and the plaintiffs. The plaintiffs, who are the children and grandchildren of Venugopal Chettiar through first wife, left the said Venugopal Chettiar long back and the plaintiffs 2 & 3 swindled several lakhs of rupees of the said Venugopal Chettiar along with the business in the Leigh Bazaar, Salem, spoiling the goodwill and reputation of the said Venugopal Chettiar. Thus, the plaintiffs separated from the said Venugopal Chettiar and they have been continuing the business of the said Venguopal Chettiar with huge investment. The plaintiffs 2 & 3 have voluntarily and forcibly grabbed the business of the said Venugopal Chettiar even prior to the year 1975 and the relationship between the plaintiffs and Venugopal Chettiar got strained and they separated from Venugopal Chettiar and the defendants. The plaintiffs 2 & 3 earned several crores of rupees through the business of the said Venugopal Chettiar at Leigh Bazaar, Salem and they purchased moveable and immovable properties in their name, in the name of their family members and they are also having hand cash more than several crores. The plaintiffs have not furnished their properties in the suit and they deliberately omitted to furnish the details of their properties in the suit. When the plaintiffs sought the relief of partition alleging that the plaintiffs and the said Venugopal Chettiar are the joint family members, they are bound to furnish the particulars of the entire moveable and immoveable properties including their bank balance earned through the business. But, the plaintiffs deliberately omitted to add their properties in the suit. It clearly shows that the plaintiffs have separated themselves from the said Venugopal Chettiar and they have not participated in any family functions at any point of time.

4-4. With regard to Item No.2 of the suit schedule properties, it is contended by the 1st defendant in the written statement that the common ancestor Rangasamy Chettiar died in the year 1969 and his wife Lakshmi Ammal predeceased him in the year 1953. After the death of the parents, as per the covenant of the partition deed dated 03.06.1948, three sons viz., Venugopal Chettiar, Sundaravel Chettiar & Ramanatha Chettiar divided the properties allotted to their parents at the



partition, into three equal shares between themselves. The said Venugopal Chettiar got 1/3rd share in that family house by such division and the other two brothers also got their respective 1/3rd share each. The said Venugopal Chettiar as early as on 19.10.1959 itself purchased the 1/3rd share of the property allotted to his brother Sundaravel Chettiar in his name, out of his own funds and not being the kartha of his family. It is utter falsehood and imaginary to allege that the 1/3rd share of Sundaravel Chettiar in the family house was purchased by Venugopal Chettiar from the funds of the joint family by utilizing the income derived by him from the aforesaid businesses allotted to him at the partition. In fact, the document was executed by the said Sundaravel Chettiar for himself and on behalf his minor son as guardian, which was registered as Doc.No.3814/1959. It is true that in the year 1982, the said Venugopal Chettiar constructed a three storied terraced building over the property so purchased from his brother and over the property allotted to him, by utilizing his own funds derived by him through his separate business. But, it is totally false and surreptitious to allege that the said construction was made out of the sale proceeds of the joint family property and other joint family funds.

4-5. According to the defendants, it is true that after the death of Duraisamy Chettiar (a partner of Rangasmai Chettiar & Sons Dall Mills), a partition was effected between the said Venugopal Chettiar and the legal heirs of the deceased Duraisamy Chettiar at the instance of the respectable mediators and a regular partition deed was executed between them on 24.12.1973, which was registered as Doc.No.131 of 1974 at Salem Registrar's Office, in which the properties situated at Annathanapatti Village measuring to an extent of 1.89 acres and the properties situated at Pallapatti Village measuring to an extent of 1.26 acres, in three items, were allotted to the said Venugopal Chettiar. Since the said properties were purchased by Venugopal Chettiar and the said Duraisamy Chettiar from the income derived from their separate business, the said separate properties were divided between Venugopal Chettiar and the legal heirs of the deceased Duraisamy Chettiar. Since the said Venugopal Chettiar got the said properties viz., 1.89 acres in Annathanapatti Village and 1.26 acres in Pallapatti Village, by self acquisition, he has got every right to alienate the same and accordingly, he sold out the same without the consent of any of the plaintiffs or the defendants. It is not true and correct to allege that the properties situated at Annathanapatti Village measuring to an extent of 1.89 acres allotted to Venugopal Chettiar in the partition deed dated 24.12.1973, were sold by him by virtue of four separate sale deeds. Further, it is false and untenable to allege that out of the sale consideration to the tune of Rs.70,800/- obtained by the aforesaid sales, the said Venugopal Chettiar purchased the agricultural lands viz., Item Nos.4(a) & 4(b) of the suit schedule properties, in his own name as he was the kartha of the family at Odalur Taluk, by virtue of two separate sale deeds. It is also false and imaginary to allege that the said Venugopal Chettiar invested the balance amount available with him, after

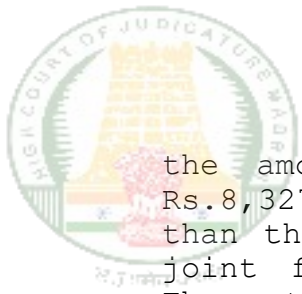


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the purchase of the said agricultural lands at Omalur Taluk, for the improvement of the family businesses being run by him as kartha of the family. It is also absurd and meaningless to allege that all the plaintiffs and the defendants are in joint possession and enjoyment of the joint family properties as coparceners, which are acquired with the funds and income of ancestral properties and businesses and they were helping their father Venugopal Chettiar in carrying on such family business. In fact, the plaintiffs never helped at any point of time and they separated from the said Venugopal Chettiar long back and they developed grudge upon the defendants and the said Venugopal Chettiar, by initiating litigations against the said Venugopal Chettiar. The plaintiffs had not helped their aged father Venugopal Chettiar and on the other hand, the plaintiffs gave more problems and continuous torture to him by initiating partition suit and also in other possible ways. In fact, the plaintiffs earlier had filed a suit for partition against the said Venugopal Chettiar in O.S.No.263 of 1994 on the file of the Sub-Court, Salem and the same was transferred to the Additional District Judge (FTC.No.1), renumbered as O.S.No.3 of 2003 and after full trial, the suit said was decreed vide judgment and decree dated 13.05.2004, against which the said Venugopal Chettiar preferred an appeal before this Court in A.S.No.502 of 2005. While so, the plaintiffs again filed the present suit for partition. Hence, the suit is not maintainable. Further, the plaintiffs have already been separated and have gone out of the family of Venugopal Chettiar and hence, their claim for partition in the suit properties is also not legally sustainable.

4-6.It is further stated by the 1st defendant that the said Venugopal Chettiar died on 22.09.2006. During his life time, the said Venugopal Chettiar executed a registered Will dated 28.03.1994, while he was in good and sound state of mind, bequeathing his estate in favour of the defendants. It is false and untenable to allege that all the plaintiffs and the defendants are in the joint possession of the suit properties being the coparceners and are in effective possession and enjoyment of the same on their own rights till today. The plaintiffs are no way connected to the suit properties and they never claimed any right or title over the suit properties at any point of time, even during life time of Venugopal Chettiar and hence, they have not chosen to include the suit properties in the previous partition suit in O.S.No.263 of 1994 on the file of the Sub-Court, Salem.

4-7.In the written statement, the 1st defendant would further state that it is utter falsehood and untenable to allege that the entire acquisition of the joint family properties by Venugopal Chettiar has been made utilizing the nucleus available with the joint family and out of the income derived from the joint family businesses, allotted to him in the family partition and also with the help of the sale proceeds of the joint family properties sold by Venugopal Chettiar. In fact, no property was allotted to Venugopal Chettiar in the family partition effected on 03.06.1948 and in the said partition, only a debt of Rs.11,188/- was allotted to Venugopal Chettiar and the value of



the amount given to him as his share was only a sum of Rs.8,327/-. So, the said Venugopal Chettiar got the debt, more than the share amount allotted to him. Hence, the question of joint family nucleus given to him is not proper and valid. The entire properties purchased by the said Venugopal Chettiar were out of his own funds derived from his separate income of his business. It is absolutely false to allege that though the properties stand in the name of Venugopal Chettiar, all of them have been acquired in his name he being the eldest male coparcener of the joint family, who is the Kartha - manager of the joint family and such properties have been acquired only for and on behalf of the joint family for the benefit of the joint family members. The plaintiffs have never acted as joint family members with the said Venugopal Chettiar. Thus, the 1st defendant sought for dismissal of the suit.

5.The 1st defendant has also filed an additional written statement, contending that the grand-father Rangasamy Chettiar was not alone a partner in business, as kartha, Manager of the family and there were outsiders as partners. The whole theory of the suit properties being joint family properties is based on the false foundation of the partition deed of the year 1948. Venugopal Chettiar was allotted in the partition deed, 1/3rd share in the house after the life time of the parents. It is only a residential building, not income earning property, even after the parents died. Venugopal Chettiar was allotted the debts due by parties (after excluding bad debts) for a sum of Rs.4577.55 plus insurance amount of Rs.750/- plus Rs.3000/- in Jothi and Co., without going into profit and loss in that business; this totalled to Rs.8327.55. But, in the toordal (Jtiufsk;) business, he was burdened with a liability of Rs.11,188.6. Thus, in the partition of the year 1948, he was given only a liability and not assets. So, Venugopal Chettiar had to start from scratch. By dint of hard work, without support of family, without funds of the family, Venugopal Chettiar earned in various businesses and purchased the properties. He partnered with outsiders and never had any family nucleus or family funds. Hence, all the suit properties are his self-acquired separate properties. The commission mundy business under Vilasam Rangasamy Chetty and Sons was run by Sundaravelu Chettiar. Toordal (Jtiufsk;) business under the Vilasam Rangasamy Chettier and Sons was run by Duraisamy Chettiar and Venugopal Chettiar. Jothi and Co., was run by Duraisamy, Venugopal Chettiar, Anthonisamy and third parties. It is not a family business. Venugopal Chettiar was running the business jointly with the third parties. The business under the Vilasam Jothi and Co., was involved in litigation and business was stopped and the Court cases were over in the year 1975 only between Venugopal and the legals heirs of Duraisamy. The house mentioned in the partition deed of the year 1948 had been sold in a court auction and later it was purchased. Rangasamy Chettiar had no income of his own. He mortgaged the house in favour of one Shanmugam. Second mortgage was executed in favour of one Thailammal. Thailammal bid in the auction and got the property. Thailammal sold the property in favour of one Rukmani. From Rukmani, four brothers including Venugopal



Chettiar purchased out of their own funds. Therefore, the house itself is the separate property of Venugopal Chettiar, and it was not joint family property, and could only be joint property. Therefore, all acquisitions and purchases of properties were all self and separate properties of Venugopal Chettiar. In the partition of the year 1948 partition, 1/3rd share in the house was allotted to Venugopal Chettiar, with debts to be discharged. No income was derived from property allotted under the partition of the year 1948. Venugopal Chettiar was living in a portion of the house allotted to him and it fetched no income. Therefore, there was no nucleus derived or available from the house property to be invested in any business or start any business. Venugopal Chettiar was not doing any business under any Vilasams allotted to him. In the partition deed of the year 1948 itself, it is clearly stated that loss was sustained in all businesses and the businesses were stopped. Therefore, it is false to say that Venugopal Chettiar was doing business from 1948 to 1953 along with Duraisamy and Anthonisamy. It is clearly stated in 1948 partition deed that in all business Venugopal sustained loss. There was no nucleus from the businesses to form basis for any joint family acquisition. The properties were purchased on 22.02.1951 by Venugopal Chettiar and Duraisamy Chettiar at Annathanapatti. The share of Venugopal Chettiar was sold away by him after the Court case was over in 1975. Half share of the property purchased by Venugopal Chettiar and Duraisamy in S.Nos.35, 36, 37 & 39 at Pallapatty was gifted away by Venugopal Chettiar in favour of his wife Saroja/D7. Venugopal Chettiar had every right to execute gift deed since it is his own separate property. The property purchased under the deed dated 26.04.1956 at Pallapatty was settled by Venugopal Chettiar in favour of the defendants. The plaintiffs have not sought for setting aside the settlement deeds. Therefore, the plaintiffs cannot question the same. The house property bearing Door No.57 at Chinna Eluthukara Street, Salem, in which Venugopal Chettiar has 2/3rd share, had already been covered under the Will executed by him. The 1/3rd share in house property was purchased out of the money of Venugopal Chettiar. It is not correct to say that 0.04 cents was sold in favour of one Kesavan for a consideration and no amount was received from the said Kesavan. The house was constructed by Venugopal Chettiar out of his separate money and contribution made by the defendants. The VRV Oil & Mill was not run by Venugopal Chettiar. It was started by the 3rd defendant Balagangadhara Thilagar and it was also closed by him. So also, Parasakthi Groundnut Oil Mill was started by the defendants and subsequently, it was closed. Kudal Appalam Business was also closed long back. The agricultural lands at Omalur were not purchased out of the alleged sale proceeds of Annathanapatty lands. Venugopal Chettiar was running a commission mundry and mineral business in partnership with one Natarajan. The Omalur property was purchased out of the separate money of Venugopal Chettiar. It is further stated by the 1st defendant in the additional written statement that the suit is barred under Order 2 Rule 2 of CPC. The subject properties in the present suit were available when the earlier suit in O.S.No.3/2003 was filed by the plaintiffs before the Fast Track Court, Salem. In any event, if really the



contentions of the plaintiffs are true, they should have filed the suit for partition during the life time of Venugopal Chettiar. The suit as framed is not maintainable. Unless the settlement deeds executed by the said Venugopal Chettiar are set aside, the present relief cannot be sought for by the plaintiff. The suit is not properly valued for court fees. The said Venugopal Chettiar did not die intestate. He executed a registered Will on 28.03.1994 and he died on 22.09.2006. Thus, the defendants sought for dismissal of the suit.

6. On the above pleading, the Trial Court has framed the following issues_

1. Whether the suit properties are joint family properties eligible to be divided between the parties to the suit?
2. Whether the Will said to have been executed by V.R. Venugopal Chettiar dated 28.3.1994 is true and valid?
3. Whether the plaintiffs are entitled to 84/169 shares to be allotted to them in the partition?
4. To what other reliefs the plaintiffs are entitled for?

Before the Trial Court, on the side of the plaintiffs no witness was examined and no document was marked. On the side of the defendants, one Umasankar, attester to the Will dated 28.03.1994 was examined as D.W.1 and the said Will was marked as Ex.B.1.

7. The Trial Court, after hearing the submissions made on either side, has dismissed the suit by rendering a finding that the suit subject properties are not joint family properties and they are self-acquired properties of the said Venugopal Chettiar and the Will-Ex.B.1 executed by the said Venugopal Chettiar is true and valid. Aggrieved over the same, the appellants have filed the present appeal.

8. Since before the Trial Court no document was marked and no oral evidence was adduced on the side of the plaintiffs, in the present appeal the appellants have also taken out an application in C.M.P.No.8005 of 2017 under order 41 Rule 27 of CPC, seeking to receive and mark the following documents

1. Registered Partition Deed, Doc.No.1840/1948, dt 03.06.1948
2. Registered Sale Deed, Doc.No.2648/1951, dt 22.02.1951
3. Registered Sale Deed, Doc.No.2245/1952, dt 16.08.1952
4. Registered Sale Deed, Doc.No.1495/1956, dt 26.04.1956
5. Registered Sale Deed, Doc.No.3814/1959, dt 19.10.1959
6. Registered Partition Deed, Doc.No.131/1974, dt 24.12.1973
7. Registered Sale Deed, Doc.No.5094/1980, dt 19.09.1980
8. Registered Sale Deed, Doc.No.5417/1980, dt 06.10.1980
9. Registered Sale Deed, Doc.No.6910/1980, dt 10.12.1980
10. Registered Sale Deed, Doc.No.702/1981, dt 06.02.1981
11. Registered Sale Deed, Doc.No.1425/1981, dt 16.02.1981
12. Registered Sale Deed, Doc.No.1427/1981, dt 18.02.1981



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13. Written Statement filed by deceased Venugopal Chettiar as 1st defendant in O.S.No.263/1994, PSJ, Salem, dated 06.06.1998

14. Testimony of Venugopal Chettiar as D.W.1 in O.S.No.3 of 2004, FTC/ADJ, Salem, dated 19.04.2004

15. Judgment in O.S.No.3 of 2003, FTC/ADJ, Salem, dated 13.05.2004

16. Decree in O.S.No.3 of 2003, FTC/ADJ, Salem, 13.05.2004

17. Judgment in A.S.No.502/2005, High Court, Madras, dt 29.08.2011

18. Decree in A.S.No.502/2005, High Court, Madras, dt 29.08.2011.

19. Order in SLP.No.1902/2012, Supreme Court of India, New Delhi, dated 06.02.2012.

In the affidavit filed in support of C.M.P.No.8005 of 2017, it has been stated by the appellants/plaintiffs that at the time of instituting the present suit (O.S.No.43 of 2007), the plaintiffs have filed the documents 1 to 12, which are now sought to be marked, along with the plaint. But, the Court below directed the respondents/defendants to let in evidence, as the 1st defendant propounded the registered Will No.40/Bk III/1994, dated 28.03.1994, said to have been executed by the deceased Venugopal Chettiar in their favour. The defendants have not examined themselves as witnesses to prove the said Will. Therefore, the plaintiffs' right to cross-examine them to uproot the misdeeds committed by them and to unearth their intentional deception, was denied. Further, in the written statement filed by the 1st respondent/1st defendant, he has admitted the documents (which are now sought to be marked) which were filed by the plaintiffs along with the plaint. Therefore, the plaintiffs have not examined themselves to disprove their initial burden of proving their case. Further, the Trial Court, while delivering the judgment, has also placed its reliance on the documents filed by the plaintiffs which are not marked. The appellants/plaintiffs are the legal heirs of the deceased Venugopal Chettiar born through his first wife Mrs.Kannammal and the respondents 1 to 6/defendants 1 to 6 are the legal heirs of the deceased Venugopal Chettiar born through his 2nd wife Mrs.Saroja/7th defendant. The plaintiffs have already instituted a suit in O.S.No.263 of 1994 on the file of the Sub-Court, Salem on 16.03.1994 for partition of the properties purchased by the deceased Kannammal (1st wife of Venugopal Chettiar) vide registered Sale Deed Doc.No.3342, dated 16.12.1955 and the said suit was transferred and renumbered as O.S.No.3 of 2003 on the file of the II Additional District Judge, Salem. The 1st defendant, after coming to know about the suit filed by the plaintiffs on 16.03.1994, pressed into service the alleged registered Will No.40/Bk III/1994 dated 28.03.1994 said to have



been executed by the said Venugopal Chettiar (deceased) as if he has bequeathed all ancestral properties and ancestral business concerns in favour of his 2nd wife and her children, excluding his sons and daughters (plaintiffs) born through his deceased 1st wife Kannammal. In the earlier suit in O.S.No.263 of 1994, the said Venugopal Chettiar filed his written statement on 06.06.1998 and further deposed evidence as D.W.1 on 19.04.2004 in O.S.No.3 of 2003 (Sub-Court O.S.No.263/1994), wherein the said Venugopal Chettiar had not at all pleaded in his written statement and deposed evidence regarding the execution of the alleged Will No.40/Bk III/1994, dated 28.03.1994. Therefore, it gives rise to a reasonable suspicion over the said Will. It is further stated by the plaintiffs/appellants that the said Will ought not to have been executed by the deceased Venugopal Chettiar. The written statement filed by him in O.S.No.263 of 1994, Sub-Court, Salem and his testimony deposed in O.S.No.3 of 2003, II Additional District Judge, Salem, are very much relevant to dispel the unnecessary cloud created by the defendants. The suit in O.S.No.3 of 2003 was decreed on 13.05.2004 and the appeal filed in A.S.No.502 of 2005 on the file of this Court was dismissed on 29.08.2011 and the SLP filed against it in SLP No.1902 of 2012 before the Supreme Court was also dismissed on 06.02.2012. Therefore, the above documents are also vital and relevant to disprove the case of the defendants and also to vouchsafe the claim of the plaintiffs for partition in respect of the suit properties. As the respondents/defendants failed to prove their case by offering themselves for cross-examination and failed to prove their initial burden of proving the execution of the Will, no onus of proof could be shifted on the plaintiffs, despite their exercise of due diligence to examine them. Thus, the plaintiffs by filing the present petition (C.M.P.No.8005 of 2017), sought for marking the additional documents on their side.

9. But, the said petition for marking additional documents was opposed by the respondents/defendants by filing a counter affidavit, contending that it is not the case of the plaintiffs that they were not aware of the documents now sought to be produced or that they could not produce the same in spite of due diligence. In fact, all these documents were tendered by them with the plaint before the Trial Court, but the plaintiffs deliberately refrained from producing them at the time of trial and marking them as exhibits on their side. The present attempt of the plaintiffs is to fill up the gap in their case. Having deliberately chosen not to produce the documents at the time of trial and having failed in the suit, now the plaintiffs cannot be allowed to turn around at the appellate stage and seek leave to produce the very same documents. The plaintiffs failed to mark the documents and to examine themselves. The plaintiffs deliberately refrained from discharging their burden cast on them. The defendants had only to establish the Will of the deceased Venugopal Chettiar. The defendants have produced the original of the Will as Ex.B.1 and have examined an attester to the Will as D.W.1. Thus, the defendants proved the Will. Hence, the Trial Court has rightly dismissed the suit. Under such circumstance, the allegations that the defendants have not



examined themselves and that the plaintiffs therefore could have not cross-examined the defendants to uproot the alleged misdeeds and the alleged deception, are all denied as puerile and self-serving. Thus, they sought for dismissal of the petition.

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10. The learned counsel appearing for the appellants/plaintiffs submitted that one Rangasamy Chettiar is the common ancestor of the plaintiffs and the defendants. Before the year 1948, he had started three businesses during his life time viz., 1) Rangasamy Chettiar and Sons Dhal Mill, 2) Jothi & Co., a Tapioca Factory and 3) Leigh Bazaar Commission Mundy. He had three sons viz., Venugopal Chettiar, Sundaravel Chettiar and Ramanatha Chettiar. He was running the said businesses as their joint family businesses along with his three sons. While so, in the year 1948, a partition deed dated 03.06.1948, registered as Doc.No.1840/1948, was entered into between the Rangasamy Chettiar and his three sons. As per the said partition Deed, 'A' schedule property viz., ancestral house property was allotted to Rangasamy and his wife for their life and thereafter, in favour of their three sons jointly. In the said partition deed, the family business of Rangasamy Chettiar and Sons Dhal Mill, Jothi & Co Tapioca Factory and a premium of Rs.750/- in Oriental Insurance Company and Bombay Insurance Company had been allotted to the shares of Venugopal Chettiar. The plaintiffs and the defendants are the legal heirs of the said Venugopal Chettiar. The plaintiffs are the legal heirs of the said Venugopal Chettiar through his first wife Kannammal. The defendants 1 to 6 are the legal heirs of the said Venugopal Chettiar through his second wife Saroja/D7. After the said partition deed dated 03.06.1948, the said Venugopal Chettiar continued to run Rangasamy Chettiar and Sons Dhal Mill, along with one Duraisamy Chettiar. Similarly, Venugopal Chettiar continued to run Jothi & Co. Tapioca Factory, along with one Anthonisamy, who was then partner of the said concern before the partition. By running such businesses, Venugopal Chettiar earned enormous amount from the year 1948 to 1953. Out of the said earnings, Venugopal Chettiar purchased some properties. The suit schedule Item No.1 property viz., an extent of 0.38 acres situated at Pallapatti Village, Salem, was purchased by Venugopal Chettiar vide a registered Sale Deed, Doc.No.1495/1956, dated 26.04.1956, out of the income earned by him through Rangasamy Chettiar and Sons Dhal Mills. On 19.10.1959, by a registered Sale Deed, Doc.No.3814/1959, Venugopal Chettiar purchased undivided 1/3rd share of his brother Sundaravel Chettiar in the 'A' Schedule property in Partition Deed dated 03.06.1948 viz., house property. Thus, the said Venugopal Chettiar was entitled to 2/3rd share in the 'A' schedule property mentioned in Partition Deed dated 03.06.1948. This property has been shown as Item No.2 in the suit schedule properties.

11. That apart, the said Venugopal Chettiar and Duraisamy Chettiar had jointly purchased an extent of 3.93 acres situated at Annathanapatti Village and an extent of 2.19 acres situated at Pallapatti Village, Salem. The said Duraisamy Chettiar died in the year 1973 and after his death, on 24.12.1973 a registered



Partition Deed, Doc.No.131/1974, was entered into between Venugopal Chettiar and the legal heirs of the deceased Duraisamy Chettiar, wherein an extent of 1.89 acres out of 3.93 acres situated at Annathanapatti Village and an extent of 1.26 acres out of 2.19 acres situated at Pallapatti Village were allotted to the shares of Venugopal Chettiar. During the year 1981, Venugopal Chettiar sold an extent of 0.04 acres out of 1.26 acres situated at Pallapatti Village, for the welfare of his joint family and he retained an extent of 1.22 acres, which is shown as Item No.3 of the suit schedule properties.

12. Similarly, the said Venugopal Chettiar sold the land measuring to an extent of 1.89 acres, which was allotted to him in the partition dated 24.12.1973, by way of different sale deeds and out of the sale proceeds, he had purchased an extent of 2.36 1/2 acres and an extent of 0.12 1/2 acres situated at Mettupatti Village, Omalur Taluk, for the welfare of the joint family, which are shown as Item Nos.4(a) & 4(b) of the suit schedule properties.

13. The learned counsel for the appellants/plaintiffs would further submit that the said Venugopal Chettiar constituted a joint Hindu family along with his sons. The appellants 1 & 2/plaintiffs 2 & 3 are the sons of Venugopal Chettiar born through his first wife Kannammal. Vijayalakshmi, Premavathi, Parimalabai and Kamalabai are the four daughters of Venugopal Chettiar born through his first wife Kannammal. The daughter Vijayalakshmi died prior to the filing of the present suit. The other daughters Premavathi (1st plaintiff), Parimalabai and Kamalabai (2nd plaintiff) died during the pendency of the suit. The appellants 3 & 4/plaintiffs 5 & 6 are the legal heirs of the deceased Vijayalakshmi. The appellants 5 & 6/plaintiff 7 & 8 are the legal heirs of the deceased Parimalabai. The appellants 7 to 9/plaintiffs 9 to 11 are the legal heirs of the deceased Kamalabai. The appellants 11 to 15/plaintiffs 13 to 17 are the legal heirs of the deceased Premavathi. As regard the respondents/defendants, the 7th respondent/7th defendant is the second wife of late Venugopal Chettiar. The respondents 1 to 4/defendants 1 to 4 are the sons and the respondents 5 & 6/defendants 5 & 6 are the daughters of the said Venugopal Chettiar born through his second wife Saroja/7th defendant. The appellants 1 & 2/plaintiffs 3 & 4 being the eldest male members of the family were managing and administering the aforesaid business concerns by assisting their father Venugopal Chettiar. After the demise of Venugopal Chettiar, the defendants refused to partition the suit properties; therefore, the plaintiffs filed the present suit for partition of their 84/169 shares in the suit properties and for separate possession thereof.

14. It is the submission of the learned counsel for the appellants/plaintiffs that in the written statement filed by the 1st defendant, registered partition deed dated 03.06.1948, sale deeds executed in favour of Venugopal Chettiar and Duraisamy Chettiar, registered partition deed dated 24.12.1973 and the sale deeds executed by Venugopal Chettiar, were admitted by the



1st defendant. In this regard, the learned counsel for the appellants/plaintiffs invited the attention of this Court to the written statement filed by the 1st defendant and submitted that it is admitted by the defendants that in the year 1948, a partition was effected in the joint family of Rangasami Chettiar at the instance of respectable mediators, whereby the entire assets and businesses of the joint family were divided among the coparceners of the joint family and a regular partition deed was executed between the members of the family on 03.06.1948, which was registered as Doc.No.1840/1948 before the Joint Sub-Registrar's Office-III, Salem. Since the existence of the joint family nucleus is admitted, there is a presumption under law that the suit item properties should have been purchased only from the joint family nucleus. In view of the admission made by the defendants with regard to the existence of the joint family nucleus in the written statement, there is no need for the plaintiffs to adduce evidence and it is for the defendants to prove that the properties were not purchased from the joint family nucleus. But, the defendants have not examined themselves as witnesses and they have not produced any evidence to show that the suit properties were not purchased from the joint family nucleus. But, the Trial Court, without considering this aspect, has come to the conclusion that the suit properties are self-acquired properties of the said Venugopal Chettiar and the plaintiffs have not produced any document to prove that the suit properties were purchased out of the joint family nucleus. The Trial Court has not at all appreciated the registered Partition Deed dated 03.06.1948, wherein it has been specifically mentioned that there are joint family businesses and properties and the allotment of the same among the parties to the said partition deed. The family businesses viz., Rengasamy Chettiar and Sons Dhal Mill and Jothi & Co Tapioca Factory along with premium of Rs.750/- in Oriental Insurance Company and Bombay Insurance Company were specifically allotted to Venugopal Chettiar. Item No.2 of the suit schedule property is the ancestral dwelling house of Venugopal Chettiar and the same was allotted to Venugopal Chettiar, after the demise of Rengasamy Chettiar and his wife Lakshmiammal. Once the joint family properties and joint family businesses were allotted to Venugopal Chettiar, it is for the defendants, who are claiming right under Venugopal Chettiar, to prove that the suit properties were purchased by Venugopal Chettiar with his own funds, without the aid of joint family nucleus. This legal aspect has not at all been considered by the Trial Court.

15.The learned counsel for the appellants/defendants would further submit that during the course of trial, a Will, dated 28.03.1994, said to have been executed by Venugopal Chettiar bequeathing all the suit schedule properties in favour of the defendants, has been pressed into service and the same was marked as Ex.B.1. In order to prove the said Will, on the side of the defendants, one Umasankar was examined as D.W.1, claiming that he is an attester to the Will-Ex.B1. The Trial Court has erroneously held that the Will dated 28.03.1994 has been proved and it is genuine and binding on the plaintiffs. Assailing the said findings of the Trial Court, the learned counsel for the



appellants/plaintiffs submitted that by virtue of Section 30 of Hindu Succession Act, the Will can be executed by the executant only in respect of his properties. In the instant case, Venugopal Chettiar has no testamentary capacity to execute the said Will, as the suit properties were purchased from and out of the joint family nucleus. The said Venugopal Chettiar can dispose of only his share in the suit properties and not the entire suit properties.

16. In this regard, the learned counsel for the appellants/plaintiffs has also relied upon the decision reported in 2005(4) CTC 457 (P.R. Kannaiyan Vs. Ramasamy Mandiri), wherein it has been held by the Division Bench of this Court as follows_

"... it is apparent that an exception is carved out in the matter relating to acquisition in the name of Karta, where it is proved that Karta had no independent income and he is in possession of some nucleus and not necessarily sufficient nucleus of the joint family property. In such a case, even where sufficient nucleus is not proved but existence of some nucleus is proved and it further proved that Karta or Manager, in whose name property had been purchased, had no independent income, the burden is shifted to the Karta to prove that the property has been acquired without the aid of the joint family and with the own separate income of the Karta or the Manager."

17. The learned counsel for the appellants/plaintiffs has also placed reliance upon the decision reported in 2006(3) MLJ 82 [Kothanramappa Vs. Thimmaiah and others], wherein it has been observed as follows_

"15. In this context, it will be useful to refer the decision of the Honourable Supreme Court in Ramaiah and another Vs. Pechi Ammal and others, 1977 TLNJ 7, wherein a Division Bench of this Court held thus_

"If the properties are acquired by a manager of a Hindu joint family and if those properties stand in his name and if such acquisitions are made in the course of his management as manager of the joint family, then the burden shifts on him to establish that such properties are his own and they are not joint family properties. In a case where such acquisitions are questioned, it is not for the challenging co-parcener to establish as already expressed by us; but it is for the challenging manager to show by independent evidence that the acquisitions made by him and in his name are the result of an independent activity of his, totally unconnected



with the joint family nucleus or its income. These are well established propositions."

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17. Even certain cases where a manager of joint Hindu family blends his self-acquired property with the property of the joint family, the effect is that all the properties so blended becomes a joint family property as held in Rajanikanta Pal and other Vs. Jagmohan Pal, 1923 (44) MLJ 561, in which the Privy Council held that_

"Where a member of a joint Hindu family blends his self-acquired property with the property of joint family, either by bringing his self-acquired property into a joint family account, or by bringing joint family property into his separate account, the effect is that all the property so blended becomes a joint family property."

18. The learned counsel for the appellants/plaintiffs would further submit that the finding of the Trial Court that the Will executed by Venugopal Chettiar is presumed to be genuine, as he died more than 12 years, after the execution of the Will dated 28.03.1994, is legally unsustainable. When Venugopal Chettiar has no authority to bequeath the entire suit properties in favour of the respondents/defendants, the existence of the Will for years together is immaterial and not germane. The Trial Court has accepted that the 2nd defendant has actively participated in the preparation of the Will, but, despite the same, held that the Will is proved by the examination of D.W.1, who was said to have stood as an attester to the Will. The testimony of D.W.1 culled out when he was cross-examined, was not properly appreciated by the Trial Court. In his cross-examination, D.W.1 has admitted that he was taken by the 2nd defendant to Leigh Bazaar at 11.00 am and he was there for one hour. Whereas the Will dated 28.03.1994 was presented for registration between 11.00 am to 12.00 am at Dhathagapatti Sub-Registrar's Office, which is 4 kilometers away from Leigh Bazaar. From the evidence of D.W.1, it is crystal clear that D.W.1 was not at all present between 11.00 am to 12.00 am at Dhathagapatti Sub-Registrar's Office. When the evidence of D.W.1 is shaky, the defendants ought to have examined another attester to the Will who is alive. Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act have not been considered by the Trial Court in proper perspective. The Trial Court has further held that the Will executed by Venugopal Chettiar is not unnatural as executant has recited the reasons for excluding his sons and daughters born through his 1st wife. The said finding of the Trial Court is unsustainable. The Trial Court has deliberately failed to consider the circumstances under which the said Will was executed by the said Venugopal Chettiar. Prior to the filing of the present suit (O.S.No.43 of 2007), the plaintiffs had already filed a suit in O.S.No.263 of 1994 on the file of the Sub-



Court, Salem against Venugopal Chettiar in respect of the properties of the 1st wife of Venugopal Chettiar viz., Kannammal. The said Will was alleged to have been executed on 28.03.1994 ie., after the filing of the suit in O.S.No.263 of 1994, which was filed on 16.03.1994. Venugopal Chettiar filed his written statement on 06.06.1998 and deposed evidence as D.W.1 on 19.04.2004 in O.S.No.3 of 2003 on the file of the Fast Tract Court, Salem (Sub-Court - O.S.No.263 of 1994). It is the submission of the learned counsel for the appellants/plaintiffs that in order to wreck vengeance against the plaintiffs, the said Will might have been pressed into service. Had the said Will been true, the said Venugopal Chettiar ought to have referred the said Will in his written statement and testimony made in the earlier suit. But, there is no reference about the said Will in the earlier suit. Therefore, the reason assigned by the Trial Court regarding the execution, validity, veracity and binding nature of the said Will is legally unsustainable and deserves no consideration at all.

19.The learned counsel for the appellants/plaintiffs would further submit that the defendants are propounding the Will of Venugopal Chettiar. They are claiming absolute right over the suit properties under the said Will-Ex.B.1. Therefore, it is incumbent on the part of the defendants/respondents to prove the execution of the Will. None of the defendants entered into the witness box and offered themselves for cross-examination. The failure to examine the defendants is fatal to their case and adverse inference has to be drawn against them. In support of his contention that the defendants being the propounders of the Will have to be examined, otherwise adverse inference has to be drawn against them, the learned counsel for the appellants/plaintiffs relied upon the decision reported in AIR 1999 SC 1441 [Vidhyadhar Vs. Mankikrao and another], wherein it has been held by the Hon'ble Supreme Court that where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. For the same proposition, the learned counsel for the appellants/plaintiffs relied upon the decision reported in (2010) 10 SCC 512 [Man Kaur Vs. Hartar Singh Sangha].

20.The learned counsel for the appellants/plaintiffs would further submit that it is for the defendants, who are all propounding the Will, to prove the Will and to show that it has not been surrounded by any suspicious circumstances. Further, the learned counsel for the appellants/plaintiffs by relying upon the decision reported in (2007) 6 MLJ 355 (SC) [Adivikka Vs. Hanamavva Kom Venkatesh] submitted that the burden of proving due and valid execution of the Will is on the propounder who has to prove the Will in accordance with the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act and if any suspicious circumstances, the same have to be explained by the propounder of the Will. Further, the non-examination of the party to the lis would lead an adverse inference.



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21. In this regard, the learned counsel for the appellants/plaintiffs has also relied upon the decision reported in 2009 (4) MLJ 681 (SC) [K.Laxmanan Vs. Thekkayil Padmini], wherein it has been held by the Hon'ble Supreme Court as follows_

"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."

Thus, by relying upon the above decisions, the learned counsel for the appellants/plaintiffs submitted that the contentions of the plaintiffs that the executant of the Will has no testamentary capacity, the Will is unnatural, the 2nd defendant's active participation in the preparation of the Will, the circumstances under which the said Will was executed ie., after filing of the suit in O.S.No.263 of 1994, the inconsistent statement of the attester and the non-examination of another attester, who is alive, have not been taken into consideration by the Trial Court. Hence, the finding of the Trial Court that the said Will is genuine, is perverse and liable to be set aside.

22. The learned counsel for the appellants/plaintiffs would also submit that the petition in C.M.P.No.8005 of 2007 has been taken out by the plaintiffs for reception of additional documents, which were filed along with the plaint, and the copy of the judgments in O.S.No.3 of 2003, A.S.No.502/2005 and SLP.No.1902/2012. The said documents are filed, not to fill up the lacuna but to remove the lacuna. The said documents do not require any oral evidence to prove the same. The respondents/defendants will not be prejudiced, if the above documents are received in evidence. The matter need not be remanded, after the receipt of the documents to be marked, as the trial Court has not disposed of the suit upon a preliminary point. Thus, the learned counsel for the appellants/plaintiffs submitted that the plaintiffs may be permitted to mark the said documents in order to remove the lacuna and to do complete justice.



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23. In support of his contention, the learned counsel for the appellants/plaintiffs has also relied upon the decision reported in AIR 1965 SC 1008 [The Municipal Corporation of Greater Bombay Vs. Lala Pacham and others], wherein it has been held by the Hon'ble Supreme Court as follows_

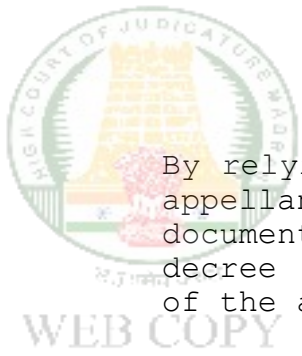
"Under Order 41, Rule 27, the appellate Court has the power to allow a document to be produced and a witness to be examined. But, the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence."

The learned counsel for the appellants/plaintiffs has placed reliance on another decision reported in (2011) 2 MLJ 635 (SC) [Malayalam Plantations Ltd., Vs. State of Kerala and another], wherein it has been observed by the Hon'ble Supreme Court as follows_

"11. If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. It is trite to observe that under Order 41, Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the Trial Court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the appellate Court to pronounce the judgment or any other substantial cause of similar nature. It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case."

Similarly, in the judgment reported in (2012) 8 SCC 148 [Union of India Vs. Ibrahim Uddin and another], it has been held as follows_

"If additional evidence is found to have important bearing on main issue, or found to be necessary to remove any lacuna in evidence and for clearing any doubt for pronouncing judgment and required in interest of justice, it may be allowed."



By relying upon the above decisions, the learned counsel for the appellants/plaintiffs prayed for receiving the additional documents in evidence in the appeal and to pass a preliminary decree granting 84/169 shares in the suit properties in favour of the appellants/plaintiffs.

24. Countering the submissions made by the learned counsel for the appellants/plaintiffs, it is contended by the learned counsel appearing for the respondents 1 to 4 & 7/defendants that in the written statement, it has been specifically denied that any income yielding nucleus was allotted to Venugopal Chettiar and it is specifically pleaded in the written statement that the businesses had incurred substantial loss; that the capital of the business has been eroded; that these facts are referred to in the very Partition Deed itself; that in fact, the debts allotted to Venugopal Chettiar far exceeds the assets allotted to him in the partition; therefore, it is incorrect to state that there was an admission in the written statement with regard to the existence of joint family nucleus. In this regard, the learned counsel for the respondents/defendants has also invited the attention of this Court to the written statement as well as the additional written statement filed by the 1st defendant and demonstrated that in the written statement it was clearly pleaded that the debts had to be discharged by Venugopal Chettiar; that the details of the debts have been set out in paragraph 18 of the very same Written Statement and in paragraph 5 of the Additional Written Statement; that it is pleaded that the debts are more than the assets and the businesses had incurred losses and they are not income yielding.

25. The learned counsel for the respondents/defendants would further submit that Item No.1 of the suit schedule property has been acquired by Venugopal Chettiar from his own funds. Suit Item No.2 is a portion of the house and comprises 1/3rd share allotted to Venugopal Chettiar after the death of Rangasamy Chettiar. It is pleaded that Venugopal Chettiar was residing in the 1/3rd portion of the house allotted to him and the same yielded no income. Further, another 1/3rd share in the house had been purchased by Venugopal Chettiar from his brother Sundaravelu Chettiar. In paragraph 9 of the written statement, it has been pleaded that on 19.10.1959, Venugopal Chettiar purchased the 1/3rd share of Sundaravelu Chettiar in his name out of his own funds. It is also pleaded that the constructions have been put up by Venugopal Chettiar, utilizing his own funds from his separate businesses; that the case of the plaintiffs that Venugopal Chettiar had no independent income is specifically refuted. The house, of which suit Item No.2 is a part, has been purchased in Court auction and it is not a joint family property. The details are set out in paragraph 8 of the additional Written Statement. Suit Item No.3 property, according to the plaint, is an extent of 1.22 acres in T.S.Nos.35, 36, 37 & 39 in Palapatti Village. Suit Item No.4 property comprises lands in Omalur Taluk, purchased by Venugopal Chettiar under two Sale Deeds dated 16.02.1981 [suit Item No.4 (a)] and dated 18.02.1981 [suit Item No.4(b)]. The said properties came to be acquired by Venugopal Chettair, when he



was carrying on business along with a stranger to the family viz., Duraisamy Chettiar. The two partners together acquired the following properties_

i) Acre 2.19 in T.S.Nos.35, 36, 37 and 39, Palapatti Village under Sale Deed dated 16.08.1952.

ii) an extent of acre 3.93 in Survey Number 17, Annathanapatti Village under Sale Deed dated 22.02.1951.

Disputes arose between Venugopal Chettiar and Duraisamy Chettiar and litigations were launched. After the death of Duraisamy Chettiar, a partition took place between Venugopal Chettiar and the legal heirs of Duraisamy Chettiar on 24.12.1973. In the said partition, the following properties were allotted to Venugopal Chettiar_

(i) Acre 1.26 in T.S.Nos.35, 36, 37 & 39, Pallapatti Village, out of which, an extent of acre 1.22 is suit item No.3.

(ii) an extent of acre 1.89 in survey Number 17, Annathanapatti Village is allotted to Venugopal Chettiar. It is the case of the plaintiffs that the said acre 1.89 land was sold by Venugopal Chettiar and out of the proceeds, he acquired Suit Item No.4 being lands in Omalur Taluk, under 2 sale deeds dated 16.02.1981 (suit Item No.4 (a), and dated 18.02.1981 [Suit Item No.4(b)]].

In paragraph 7 of the written statement, it was contended that the said Venugopal Chettiar was doing separate business with his partner and they jointly purchased the lands in Annathanapatti Village and Pallapatti Village. In paragraph 12 of the written statement, the claim of the plaintiffs that suit item 4 was acquired from the sale proceeds of the lands in Annathanapatti Village lands is specifically denied by the defendants. In paragraph 13 of Additional Written Statement, it was pleaded by the defendants that suit item No.4 was purchased from the separate business of Venugopal Chettiar in partnership with a stranger. Thus, it is contended by the learned counsel for the respondents/defendants that it is incorrect to state that the suit Item Nos.1 to 4 properties were purchased from the joint family nucleus.

26. With regard to the submission made by the learned counsel for the appellants/plaintiffs that the suit Item No.5 property comprises family business, it is contended by the learned counsel for the respondents/defendants that the said submission made by the learned counsel for the appellants/plaintiffs is far from truth. In fact, the plaintiffs are definitely aware of the fact that the businesses carried on by the family prior to the partition of the year 1948 had failed and the capital had been eroded. In fact, as the debts allotted to Venugopal Chettiar exceeded the value of the assets, the plaintiffs would have to share the loss. The businesses were carried on by Venugopal Chettiar in association with strangers and they were his separate businesses. The plaintiffs are aware of the fact that they cannot seek a partition of those businesses carried on in



partnership by their father with strangers which are definitely not joint family businesses. The particulars regarding separate businesses of Venugopal Chettiar are clearly set out in paragraphs 7 and 13 of the Additional Written Statement and paragraph 11 of the written statement. It is the definite case of the defendants that except 1/3rd share in the house allotted after the death of the parents viz., a portion of Suit Item No.2 property, all other suit properties are acquired by Venugopal Chettiar from his own income. Similarly, the learned counsel for the respondents/defendants has pointed out the relevant portions in the written statement and additional written statement, to show that there was no joint family nucleus and the properties were purchased only from the separate income of Venugopal Chettiar. Thus, the learned counsel for the respondents/defendants submitted that absolutely there is no admission in the written statement with regard to the existence of any joint family nucleus. Under such circumstance, the plaintiffs, who are contending that the suit properties were purchased by Venugopal Chettiar from joint family nucleus, ought to have adduced evidence to prove their case. But, the plaintiffs have not let in any evidence to discharge their burden.

27.The learned counsel for the respondents/defendants relied upon the decision reported in 1969(1) SCC 386 [Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh] and submitted that there is no presumption that merely because the family is joint, they have joint property. In the instant case, absolutely the plaintiffs have not chosen to adduce any evidence; therefore, there is no question of pleading that there was a joint family nucleus. Since the plaintiffs failed to establish their case, the Court below has correctly dismissed the suit. Further, the learned counsel for the respondents/defendants has also relied upon the judgement reported in (1985) 4 SCC 183 [Ratanchand Darbarilal Vs. C.I.T.], and submitted that a member of a coparcenary can carry on separate business in partnership with strangers.

28.With regard to the submission made by the learned counsel for the appellants/plaintiffs on the Will executed by Venugopal Chettiar, it is contended by the learned counsel for the respondents/defendants that no doubt that the burden to prove the Will is only on the defendants; but, they discharged their burden by examining one of the attestors to the Will as D.W.1, who is also an identifying witness before the Sub-Registrar. This is evidenced from the very endorsement of the Sub-Registrar in the Will. The Will is of the year 1994 and D.W.1 tendered evidence in 2008, after 14 years of the execution of the Will. In fact, the plaintiffs did not chose to dispute the Will and no replication has been filed by them disputing the Will. Above all, it is not even suggested to D.W.1 that Venugopal Chettiar lacked testamentary capacity or that the Will was not out of his free will.



29. Further, the learned counsel for the respondents/defendants submitted that only when the plaintiffs establish the suspicious circumstance surrounding the Will, the question of examining the propounder of the Will would arise, but, in the instant case, since no evidence was adduced by the plaintiffs disputing the Will, the Trial Court has correctly come to the conclusion that the defendants have proved the Will by examining one of the attestors to the Will. In support of his contention, the learned counsel for the respondents/defendants has also drawn the attestation of this Court to Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act .

30. In this regard, the learned counsel for the respondents/defendants also relied upon the judgment reported in 2002(1) SCC 630 [S.Sundaresa Pai Vs. Sumangala T.Pai], wherein it has been held by the Hon'ble Supreme Court that uneven disposal of assets is not a suspicious circumstance. In 2003(8) SCC 537 [Ramabai Padmakar Pathil Vs. Rukminibai Vishnu Vekhande] it has been held by the Hon'ble Supreme Court that the very purpose of executing Will is to alter the mode of succession and that reducing or depriving the share of natural heir is not a suspicious circumstance, when the bequeath is made in favour of an off-spring. Further, deprivation of natural heirs will not raise a suspicion because the whole idea behind the Will is to interfere with the normal line of succession and so natural heirs would be debarred in every case of Will. In the said decision it has been further held that examination of one attesting witness is enough to prove the Will.

31. The learned counsel for the respondents/defendants has also relied upon the decision reported in 2007 1 SCC 546 [Gurdev Kaur Vs. Kaki] and submitted that the Court does not sit in appeal over the right or wrong of the testator's decision and the role of the Court is limited to examining whether the instrument propounded as the Will is the product of free will and sound disposing mind of the testator.

32. Thus, the learned counsel for the respondents/defendants submitted that in the instant case, the Will-Ex.B.1 has been properly proved by the defendants. Absolutely, there is no infirmity in the findings of the Court below that the Will is true and genuine.

33. With regard to the submission made by the learned counsel for the appellants/defendants under Order 41 Rule 27 CPC for reception of additional documents in the appeal, it is submitted by the learned counsel for the respondents/defendants that the documents, which are now sought to be received as additional documents, were already filed along with the plaint. However, the plaintiffs did not mark the same as evidence. Hence, the present petition (C.M.P.No.8005 of 2017) for receiving additional documents in evidence in the appeal is not maintainable and the same is liable to be dismissed. In this regard, the learned counsel for the respondents/defendants has also relied upon the following decisions_



- i) AIR 1965 SC 1008 [Municipal Corporation of Greater Bombay Vs. Lala Pancham and others]
ii) (2010) 13 SCC 487 [Malayalam Plantations Limited Vs. State of Kerala]
iii) (2012) 8 SCC 148 [Union of India Vs. Ibrahim Uddin and another]
iv) (2004) 10 SCC 779 [Karnataka Board of Wakf Vs. Govt of India]
v) (2014) 13 SCC 468 [State of Karnataka Vs. K.C. Subramanya]
vi) (1980) 1 SCC 412 [Pramod Kumari Bhatia Vs. Om Prakash Bhatia]
vii) AIR 1970 MAD 160 [Palaniswami Gounder Vs. Swaminathan]

By relying upon the above decisions, the learned counsel for the respondents/defendants submitted that the plaintiffs have not made out any case for leading additional evidence in the appeal; hence, the petition is liable to be dismissed.

34. We have given our anxious consideration to the submissions made on either side and carefully perused the materials available on record.

35. In view of the above submissions made on either side, the following points arose for consideration in this appeal_

(1) Whether there is an admission by the defendants in the written statement with regard to the existence of joint family nucleus?

(2) Whether the contention of the learned counsel for the appellants/plaintiffs that since there is an admission in the written statement with regard to the existence of the joint family nucleus, there is no need for the plaintiffs to adduce evidence, and it is for the defendants to prove that the suit properties were not purchased from the joint family nucleus and the same were purchased from the separate funds of Venugopal Chettiar, is correct?

(3) Whether the defendant's have proved the execution of the Will said to have been executed by Venugopal Chettiar?

(4) Whether the plaintiffs have made out any case for reception of additional evidence under order 41 Rule 27 of CPC?

36. It is the submission of the learned counsel for the appellants/plaintiffs that in the written statement, in particularly paragraph 6, filed by the defendants, there is an admission with regard to the existence of joint family nucleus. Therefore, according to the learned counsel for the appellants/plaintiffs, when there is an admission with regard to the joint family nucleus, it is only for the defendants to prove that the suit properties were not purchased from the joint family nucleus, on the other hand they were purchased out of separate funds of Venugopal Chettiar. In view of the said submission made by the learned counsel for the appellants/plaintiffs, it would be appropriate to extract the relevant portions in the written statement filed by the defendants, which read as follows_



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"6.It is true that in the year 1948, a partition was effected in joint family of Rangasami Chettiar at the instance of respectable mediators, whereby the entire assets and business of the family were divided among the coparceners of the joint family and a regular partition deed was executed between the members of the family on 03.06.1948, which document was registered as Document No.1840/1948 at the Joint Sub-Registrar's Office-III, Salem. "

By relying upon the above said statement of the defendants made in the written statement, now the learned counsel for the appellants/plaintiffs submitted that the substantial income yielding joint family business and properties were allotted in favour of Venugopal Chettiar in the partition deed dated 03.06.1948 and the suit properties were acquired out of the joint family nucleus; that as the said facts have been admitted by the defendants in the written statement, the plaintiffs need not lead evidence to prove the same. Hence, it is for the defendants to lead evidence in order to prove that the suit properties were not purchased from the joint family nucleus.

37.But, on a careful reading of the written statement of the defendant in entirety, it could be seen that the defendants have specifically denied that in the partition deed dated 03.06.1948, income yielding business was allotted to Venugopal Chettiar. They specifically pleaded that the businesses had incurred substantial loss and that the business capital has been eroded. These facts are referred to in the very partition deed itself. In fact, the debts allotted to Venugopal Chettiar far exceeds the assets allotted to him in the partition. The relevant portion in the written statement filed by the defendants reads as follows_

"18.It is utter falsehood and untenable to allege that the entire acquisition of the joint family properties by V.r.Venugopal Chettiar have been made utilizing the nucleus of the funds available with the joint family his hands and out of the income derived from the joint family businesses, allotted to him at the family partition and also with the help of the sale proceeds of the joint family properties sold by him. It is respectably submitted that no property was allotted to Venugopal Chettiar in the family partition effected on 3.6.1948, in the said partition a debt of Rs.11,188/- was allotted to Venugopal Chettiar and value of the amount due on Rs.8,327/- was given to him as his share. So, Venugopal Chettiar got the debt more than the share amount allotted to him. Hence, the question of joint family nucleus given to him is not proper and valid. The entire properties purchased by the said Venugopal Chettiar out of his own funds derived from his separate income of his business.



Therefore, a reading of the entire written statement would show that absolutely there is no admission with regard to the existence of joint family nucleus. On the other hand, a reading of the additional written statement would show that loss was sustained in all the joint family businesses and the businesses were stopped even prior to the partition deed of the year 1948. It is also specifically pleaded by the defendants in the additional written statement that the debts are more than the assets and the businesses had incurred losses and they were not income yielding. When that being the pleadings of the defendants, absolutely We are not inclined to accept the submission made by the learned counsel for the appellants/defendants that there is an admission in the written statement of the defendants with regard to the existence of joint family nucleus.

38. It is next submission of the learned counsel for the appellants/plaintiffs that since there is an admission in the written statement with regard to the existence of joint family nucleus, the plaintiffs have not chosen to let any evidence. But, as stated above, We have held that there is no such admission in the written statement with regard to the existence of joint family nucleus. On the other hand, there is a specific defence in the written statement that no income yielding business was allotted to Venugopal Chettiar and he was given only liability and not assets and the businesses were losing propositions and Venugopal Chettiar had to start from scratch. When that being the defence of the defendants, it is for the plaintiffs to establish that only with the aid of the joint family properties/nucleus, the suit properties have been acquired by the said Venugopal Chettiar. But, in the instant case, the plaintiffs have miserably failed to do so.

39. In this regard, it would be appropriate to place a reference in the judgment reported in 1969 (1) SCC 386 [Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh], wherein it has been held as follows_

"6.... The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self acquisition to affirmatively make out that the property was acquired without any aid from the family estate. In Appcdaswami v. Suryanarayanamurti I.L.R.



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(1948) Mad. 440. (P.C.), Sir John Beaumont observed as follows :

"The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.... "

In the decision reported in 2005(4) CTC 457 [P.R.Kannaiyan (died) and others Vs. Ramasamy Mandiril], a Division Bench of this Court has held as follows—

"36. From the decisions of the Supreme Court in Mallesappa Bandeppa Desai and Anr. v, Desai Mallappa alias Mallesappa and Anr., Sankaranarayanan and Anr. v. The Official Receiver, Tirunelveli and Ors., , and also from the observations made by the Allahabad High Court in Bhagwant Kishore and Anr. v. Bishambhar Nath and Ors., and in Mayne's Treatise on "Hindu Law & Usage", and all other decisions noticed above, it is apparent that an exception is carved out in the matter relating to acquisition in the name of Karta, where it is proved that Karta had no independent income and he is in possession of some nucleus and not necessarily sufficient nucleus of the joint family property. In such a case, even where sufficient nucleus is not proved but existence of some nucleus is proved and it is further proved that Karta or Manager, in whose name property had been purchased, had no independent income, the burden is shifted to the Karta to prove that the property has been acquired without the aid of the joint family and with the own separate income of the Karta or the Manager. We hasten to add that such principle is inapplicable, where it is shown that Karta has some separate and independent income, in which event, the normal principle that it is for the person claiming a particular acquisition to the joint family property to prove that there was sufficient surplus from the joint family property from out of which the property in question could have been acquired."



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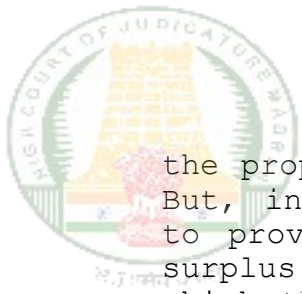
Similarly, in the decision reported in (1956) 69 Law Weekly 795 [Ramakrishna Mardi and others Vs. Vishnumoorthi Mardi], it has been held by a Division Bench of this Court as follows_

"The proposition of law is well established that it is not enough to show that the family had a nucleus of the family property in order that the later acquisitions made by the manager of the family should have the attribute of family character but what is necessary is that the nucleus must be such as to leave sufficient income therefrom after meeting the expenses as would enable the manager to acquire properties with that. ..."

In the decision reported in 1975 (II) MLJ 184 [Kandaswami Chettiar and others Vs. Gopal Chettiar and others], it has been held as under_

"17.....If a co-parcener desires to establish that property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a co-parcener should not only barely plead the same, but also establish the existence of such joint family funds or nucleus. Even if the joint family nucleus is so established, the presumption that the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding apparatus. The proof required is very strict and the burden is on the person, who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other co-parcener is to be treated as joint family property. Such burden could be said to have been discharged and the usual presumption that such acquisitions are attributable to the joint family nucleus and its income would not automatically arise, but would depend upon proof of the availability of such surplus income or joint family nucleus on the date of such acquisition or purchases. "

In the light of the above said decisions, it is clear that in the instant case, the initial burden only rests upon the plaintiffs to show the existence of joint family nucleus and that there was surplus joint family nucleus to purchase the subject properties. Only in the event of proving that there was a joint family nucleus and there was surplus of joint family nucleus and out of such income, the properties in question were purchased, the burden will shift on the defendants to prove that



the properties were not purchased from the joint family nucleus. But, in the instant case, the plaintiffs have miserably failed to prove, by adducing evidence, that there was sufficient surplus income from the joint family properties, from out of which the properties in question could have been acquired. The plaintiffs have not chosen to adduce evidence to prove that there was joint family properties, which are deriving sufficient surplus income to acquire the properties in question by the said Venugopal Chettiar. On the other hand, it is the case of the plaintiff that since in the written statement there was an admission with regard to the existence of joint family nucleus, it is for the defendants to adduce evidence to show that the suit properties were not purchased from the joint family nucleus. But, as observed supra, on a careful reading of the written statement as well as additional written statement of the defendants, it could be seen that absolutely there is no admission by the defendants with regard to the existence of joint family nucleus. Hence, the contentions made by the learned counsel for the appellants/plaintiffs in this regard cannot be accepted.

40. With regard to the execution of the Will-Ex.B.1, it is the submission of the learned counsel for the appellants/plaintiffs that Will is alleged to have been executed by Venugopal Chettiar in favour of the defendants viz., second wife and children born through her. The learned counsel for the appellants/plaintiffs would submit that earlier on 16.03.1994, the plaintiff had filed a suit in O.S.No.263 of 1994 on the file of the Sub-Court, Salem, as against Venugopal Chettiar, for partition in respect of their mother's properties. In the said suit, Venugopal Chettiar had filed his written statement on 06.06.1998 and deposed evidence as D.W.1 on 19.04.2004. Whereas the Will (Ex.B.1) is alleged to have been executed by Venugopal Chettiar on 28.03.1994. Now, according to the learned counsel for the appellants/plaintiffs, had the Will been true, the said Venugopal Chettiar would have stated about the Will (Ex.B.1) dated 28.03.1994 in his written statement filed in O.S.No.263 of 1994 (renumbered as O.S.No.3 of 2003 on the file of the Additional District Judge, FTC, Sale); further, he would have spoken about the Will (Ex.B.1) while adducing evidence as D.W.1 in O.S.No.263 of 1994 (renumbered as O.S.No.3 of 2003). But, since he has not stated anything about the Will (Ex.B.1) in the written statement and he has also not spoken about the Will in his evidence, it is clear that the said Will (Ex.B.1) has been created later point of time and pressed into service by the defendants.

41. But, from a perusal of the Will-Ex.B.1, We find that Venugopal Chettiar had very good reason for not disclosing the registered Will (Ex.B.1) in the earlier suit relating to the partition of the property. Venugopal Chettiar has given a cogent and convincing reason in the Will (Ex.B.1) for not bequeathing his property to his first wife and her children, stating that the children born through his first wife Kannammal took goodwill of his business and profits in the year 1980 itself without his willingness and as such, there was difference



of opinion between him and his children born through his first wife. The relevant portion in the Will reads as follows-

"கண்ணம்மாளின் ஆண் மக்கள் இருவரும் எனது விலாசத்தில் நடந்து வந்த டை லீபஜார் மண்டி வியாபாரத்தையம், அதன் முதலீடு, இலாபம், அதன் குட்வீல்களையம், மற்றும் வியாபாரத்தின் சகல ஐங்கம சொத்துக்களையம் அவர்களே 1980ம் வருடத்திலேயே எனக்கு விருப்பம் இல்லாமலேயே அடைந்து கொண்டிருந்தனர். இதனால் என்னுடைய மூத்த மனைவி டை கண்ணம்மாளின் ஆண் மக்களுக்கும் எனக்கும் கருத்து வேறுபாடுகள் ஏற்பட்டு ஒருவருக்கொருவர் யாதொரு பேச்சு வார்த்தை இல்லாமலும், எந்த விசேஷ காரியங்களுக்கும் ஒருவருக்கொருவர் கலந்து கொள்ளாமலேயே இருந்து வருகிறோம்."

A reading of the Will-Ex.B1 would show that Venugopal Chettiar has given cogent and convincing reason to disinherit the plaintiffs. Therefore, it is clear that Venugopal Chettiar has not referred the Will in the previous suit proceedings since the same was not relevant. Moreover, the Will is a registered one.

42.It is yet another submission of the learned counsel for the appellants/plaintiffs that on the side of the respondents/defendants, one Umasankar, alleged attesor to the Will (Ex.B.1), alone was examined as D.W.1 and he had admitted in his evidence that on 28.03.1995 he was taken by the 2nd defendant to Leigh Bazaar at 11.00 am and he was there for one hour; but, the Will-Ex.B1 was presented for registration between 11.00 am to 12.00 am at Dhathagapatti Sub-Registrars Office, which is four kilometers away from Leigh Bazaar; therefore, from the evidence of D.W.1, it is clear that he was not at all present between 11.00 am to 12.00 am at Dhathagapatti Sub-Registrar's Office; therefore, it creates a suspicious circumstance over the Will-Ex.B.1.

43.But, We find that the presence of D.W.1, attesor to the Will, before the Sub-Registrar Office would be evidenced from the endorsement made by the Sub-Registrar in the document. The relevant endorsement of the Sub-Registrar reads as follows_

"1994-ம் ஆண்டு ஏப்ரல் திங்கள் 6-ம் நாள் பகல் 11-12 மணிக்கு கிடையில் தாதுகாய்பட்டி சார்-பதிவாளர் அலுவலகத்தில் தாக்கல் செய்த கட்டணம் ரூ.200.00

<https://hcservices.ecourts.gov.in/#/உத்தரவுகள்> V.R.Venugopal Chetty எழுதிக்கொடுத்தாக ஒப்ப

கொண்டவர் இடது பெருவிரல் (குறி) V.R.Venugopal Chetty வரங்கசாமி



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செட்டியார் குமாரர் 57/599 38, சேர்மன் பிமதுரை தெரு செவ்வாய்பேட்டை சேலம்-2, இ
ன்னாரென்று ரூபித்துவர்கள் K.Ragesh (K.Rajesh)

S/o.M.Kathirvel 8, S.Lakshmi Nagar, Omalur Main
Road, Salem 636 009, B.Umasankar (B.Umasankar)

S/o.S.Balasubramaniam 7, Arya Vyasal Street, Salem-

2, 1994-ம் ஆண்டு ஏப்ரல் திங்கள் 6-ம் நாள் ஆமதுரை சாமி சார்-பதிவாளர் ப

த்தகம் 35 தொகுதி 51 முதல் 61 வரை பக்கங்களில் 1994-ம் ஆண்டின் 40-ம் எண்ணாக

பதிவு செய்யப்பெற்று 1994-ம் ஆண்டு ஏப்ரல் திங்கள் 8-ம் நாள் ஆதுரைசாமி

சார்-பதிவாளர் பத்திரத்தில்....."

From the above endorsement of the Sub-Registrar, it is clear that the D.W.1 was present in the Office of the Sub-Registrar and attested the document at the time of registration of the document. Therefore, the endorsement made by the Sub-Registrar itself would show the presence of D.W.1 at the time of registration of the document. Further, We find that the Will (Ex.B.1) is of the year 1994 and D.W.1 tendered evidence after 14 years from the date of execution of the Will. That apart, the plaintiffs have not chosen to dispute the Will at the time of trial and not even any suggestion was put forth at D.W.1 to prove that the Will is not out of the free will of the testator Venugopal Chettiar.

44.It is yet another submission of the learned counsel for the appellants/plaintiffs that the non-examination of the propounder of the Will (Ex.B.1) is fatal to the case of the defendants. But, We are of the opinion that only if there is a suspicious circumstance, the presumption would arise. In the instant case, one of the attestors was examined as D.W.1 and Will (Ex.B.1) was proved in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

45.In this regard, some of the judgments could be referred. In (2007) 1 SCC 546 [Gurdev Kaur and others Vs. Kaki and others], wherein it has been held by the Hon'ble Supreme Court as follows_

"77.The High Court has clearly deviated from the settled principle of interpretation of the Will. The Court does not sit in appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last will, that the Court looks into the nature of the bequest.

78. The learned Single Judge of the High Court has not even properly appreciated the context of the circumstances. The contents of



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the will have to be appreciated in the context of his circumstances, and not vis-a-vis the rules for intestate succession. It is only for this limited purpose that the court examines the nature of bequest. The Court does not substitute its own opinion for what was the testator's will or intention as manifested from a reading of the written instrument. After all, a Will is meant to be an expression of his desire and therefore, may result in disinheritance of some and grant to another. In the instant case, wife of the testator Bhagwan Kaur alone had lived with the deceased and only she had looked after him throughout his life. The other daughters were all happily married a long time ago and in their weddings the testator had spent huge amount of money. In his own words, he had spent more than what they would have got in their respective shares out of testator's property.

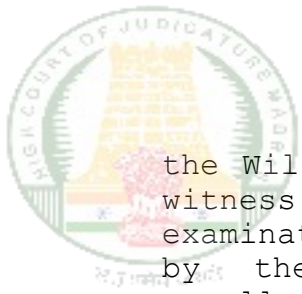
79.If a will appears on the face of it to have been duly executed and attested in accordance with the requirements of the statute, a presumption of due execution and attestation applies."

In (2003) 8 SCC 537 [Ramabai padmakar Patil Vs. Rukninibai Vishnu Vekhande], it has been held by the Hon'ble Supreme Court that the examination of one of the attestors is enough to prove the Will. The relevant portions in the said decision read as follows_

"9.... As discussed earlier, in view of Section 63 of Indian Succession Act the proviso to Section 68 of the Evidence Act, the requirement of law would be fully satisfied if only one of the attesting witness is examined to prove the Will."

In the light of the above decisions, it is clear that the examination of one of the attestors to the Will would be sufficient and the non-examination of the propounder of the Will has no significance in this matter. In the instant, the D.W.1, who is the attesor to the Will, has been examined and he has clearly spoken about the execution of the Will. Under such circumstances, We are of the opinion that in the instant case, the Will has been duly proved by the defendants. Hence, the submission of the learned counsel for the appellants/plaintiffs that the Will-Ex.B.1 has been created and pressed into service by the defendants, cannot be accepted.

46.With regard to the reception of additional documents in the appeal, it is the submission of the learned counsel for the appellants/plaintiffs that the documents sought to be marked were already produced as Doc.No.1 to 12 along with the plaint before the trial Court. The Trial Court directed the respondents/defendants to let in evidence as the propounders of



the Will (Ex.B.1). Since the defendants did not enter into the witness box to prove the Will (Ex.B.1), the right of cross-examination of the defendants to uproot the misdeeds committed by them was denied to the plaintiffs. Hence, the appellants/plaintiffs have filed C.M.P.No.8005 of 2017 seeking to receive the additional documents, which were already filed along with the plaint. Further, according to the learned counsel for the appellants/plaintiffs that the additional documents are sought to be filed not to fill up the lacuna but to remove the lacuna.

47. But, it is the reply of the learned counsel for the respondents/defendants that though the documents, which are now sought to be marked, were already filed along with the plaint, the plaintiffs had not chosen to adduce evidence during the course of trial. Now, the same documents are sought to be marked by the plaintiffs in order to fill up the lacuna in their case. Hence, the petition for reception of additional documents in the appeal cannot be entertained.

48. We are of the opinion that when the documents sought to be marked as additional documents were already available in the Court, but were not marked, the same cannot be produced as additional evidence at stage of appeal. Further, it is well settled legal principle that in the appeal, additional evidence cannot be permitted to be adduced so as to fill up the lacuna or to patch up the weak points in the case of a party. In this regard, it would be useful to refer some of the decisions.

49. In the decision reported in (2010) 13 SCC 487 [Malayalam Plantations Limited Vs. State of Kerala], it has been held by the Honourable Supreme Court as follows

"16) If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. It is trite to observe that under Order 41, Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial Court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature.

17) It is equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case. Adducing additional evidence is in the interest of justice. Evidence relating to subsequent



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happening or events which are relevant for disposal of the appeal, however, it is not open to any party, at the stage of appeal, to make fresh allegations and call upon the other side to admit or deny the same. Any such attempt is contrary to the requirements of Order 41 Rule 27 of CPC. Additional evidence cannot be permitted at the Appellate stage in order to enable other party to remove certain lacunae present in that case. "

In AIR 1965 SC 1008 [Municipal Corporation of Greater Bombay Vs. Lala Pancham and others], it has been held by the Hon'ble Supreme Court as follows_

"If the High Court, in making these observations, was referring to the provisions of O. XLI, r. 27, Code of Civil Procedure it ought not to have overlooked the mandatory provisions of cl. (b) of sub-r. (1) of r. 27. No doubt, under r. 27 the High Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. "

Similarly, in the decision reported in (2012) 8 SCC 148 [Union of India Vs. Ibrahim Uddin and another] it has been held by the Honourable Supreme Court as follows_

"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. ..



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37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment...

38. Under Order XLI, Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. ... "

A reading of the said judgments would show that when the documents sought to be marked were already available in Court, but has not been marked, same cannot be produced as additional evidence in the appeal.

50. For the purpose of producing additional evidence, there should be some evidence on record and if there is any lacuna in that evidence, in order to remove the lacuna the additional evidence can be received. It is settled principle that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case. It is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. In the instant case, when there is absolutely no evidence adduced by the plaintiff before the trial Court, the question of



removing the lacuna does not arise. Further, the documents now sought to be marked on the side of the plaintiffs were already available with them. It is also not the case of the plaintiffs that they were not aware of the documents now sought to be produced or that they could not produce the same inspite of due diligence. Though the plaintiffs produced the documents along with the plaint, they have refrained from marking the same during the course of trial. The reason stated by the plaintiffs for non-marking the said documents during the course of trial, cannot be accepted. Under such circumstances, We are of the opinion that the appellants/plaintiffs have not made out any case for reception of additional evidence in the appeal. Hence, C.M.P.No.8005 filed by the appellants/plaintiffs for reception of additional documents is liable to be dismissed.

51. For the foregoing reasons, We are of the opinion that the appellants/plaintiffs have not made out any case on merits to reverse the judgment and decree passed by the Trial Court.

In fine, the appeal fails and the same is hereby dismissed. The connected CMP is also dismissed. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

ssv
To,

1. The Additional District Judge
(Fast Track Court-I), Salem,
Salem District.

2. The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to MR. Shankarmurali, Advocate SR.61235
+ 1 cc to Mr.T.H. Hariharan, Advocate Sr.60989

A.S.No.432 of 2011
and
C.M.P.No.8005 of 2017

SCD(CO)

EU 14.09.17