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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.11.2019

PRONOUNCED ON : 12.12.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.38 of 2013

and

M.P.No.1 of 2013

Sarasa @ Saraswathy

...Appellant/Plaintiff

Vs.

1. Jayabal

2. K.Rajeswari

3. R.Subramanian

4. S.Sundarrajan

5. Sarath Babu

6. Sathish Kumar

...Respondents /Defendants

(Since the respondents 2 to 6 remained

exparte in the Court below, notice may dispensed with)

Prayer: First Appeal filed under Section 96 of Civil Procedure Code, against the judgment and decree passed in O.S.No.48 of 2002 dated 12.12.2012 on the file of the Court of District Judge, Karaikkal.

For Appellant : Mr. A. Muthukumar

For Respondent No.1: Mr. T. Saikrishnan
for M/s. Sai & Bharath

JUDGMENT

Aggrieved over the judgment and decree dated 12.12.2012 passed in O.S.No. 48 of 2002, on the file of the District Judge, Karaikkal, the plaintiff has preferred the first appeal.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. Suit for partition and future mesne profits.

4. The case of the plaintiff, in brief, is that she is the only daughter of the deceased Rathinam Chettiar through his second wife Vasantha. The first defendant is the only son of



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the deceased Rathinam Chettiar, through his first wife Saraswathy. Rajeswari and Jamuna are the daughters of the deceased Rathinam Chettiar through his first wife Saraswathy. The suit property is the self acquired property of the deceased Rathinam Chettiar and the first defendant had neglected the deceased Rathinam Chettiar and even the daughters of the Rathinam Chettiar born through his first wife did not evince interest on his well being and during his last days, it was only the plaintiff who was staying with him and Rathinam Chettiar was having food only in the house of the plaintiff and Rathinam Chettiar and the defendants were not even on talking terms and, in a sound disposing state of mind and health executed a will on 18.03.1993 bequeathing the suit property in favour of the plaintiff and the first defendant as detailed thereunder and not made any provisions to his daughters born through his first wife and the abovesaid will had been registered and prior to his death on 27.11.1998, he was not in a sound state of health and mind for about two years. The first defendant forceably took Rathinam Chettiar from the custody of the plaintiff and was keeping him under his control and the plaintiff was not even allowed to see him and on the demise of Rathinam Chettiar, the will executed by him on 18.03.1993 had come into effect. Thus, the plaintiff became entitled to the northern half of the suit property and the first defendant became entitled to the southern half. The first defendant did not take steps to allot her share of the property despite several requests made by the plaintiff and issuance of the legal notice on 01.10.1999 and on the other hand, the first defendant sent a reply notice on 07.10.1999 whereunder he had set up a will dated 02.01.1996 alleged to have been executed by Rathinam Chettiar giving the suit property exclusively to the first defendant. However, the abovesaid will projected by the first defendant is not true and hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

5. The first defendant resisted the plaintiff's suit contending that the relationship between the parties is true and put forth the case that it is false to state that he and his sisters had not looked after Rathinam Chettiar and that Rathinam Chettiar was in the exclusive maintenance of the plaintiff. Further, according to the first defendant, Rathinam Chettiar was living only with him and in a sound state of mind and health, he executed a will on 02.01.1996 bequeathing the suit property belonging to him exclusively in favour of the first defendant and the will had been registered and by way of the said will, Rathinam Chettiar had cancelled the earlier will executed by him and the case of the plaintiff that Rathinam Chettiar was not maintaining good health during his last days is false. Rathinam Chettiar died on 27.11.1988 and on his demise,



the last will executed by him on 02.01.1996 has come into force. To the notice issued by the plaintiff, the first defendant had sent a suitable reply containing true facts and the plaintiff is not entitled to seek the relief of partition without challenging the will dated 02.01.1996 executed by Rathinam Chettiar and on that ground alone, the plaintiff suit is liable to be dismissed and prayed for the dismissal of the plaintiff's suit.

6. On the basis of the abovesaid pleas put forth by the respective parties, the following issues were framed by the trial court for consideration.

1. Whether the will dated 18.03.1993 executed by Rathinam Chettiar is valid and genuine?
2. Whether the plaintiff is entitled to half share in the suit property?
3. Whether the will dated 02.01.1996 executed by Rathinam Chettiar is true and valid?
4. Whether the suit property is the exclusive property of the first defendant through the will dated 02.01.1996?
5. To what other reliefs the parties are entitled?

7. In support of the plaintiff's case, P.Ws.1 to 3 were examined and Exs.A1 to A3 were marked. On the side of the defendants, D.Ws. 1 to 4 were examined and Exs.B1 and B2 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the plaintiff's suit. Impugning the same, the first appeal has been preferred by the plaintiff.

9. The following points arise for determination in the first appeal.

1. Whether the will dated 18.03.1993 is true, valid and binding on the defendants?
2. Whether the will dated 02.01.1996 is true valid and binding on the plaintiff?
3. Whether the plaintiff is entitled to obtain partition and separate possession and future mesne profits in respect of the suit property as claimed in the plaint?
4. To what relief the plaintiff/appellant is entitled to?



5. To what relief the first defendant is entitled to?

Point Nos. 1 to 3

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10. The relationship between the parties is not in dispute. It is seen that the suit property is the separate property of the deceased Rathinam Chettiar. The plaintiff is the daughter of the deceased Rathinam Chettiar through his second wife and the first defendant is the son of the deceased Rathinam Chettiar through his first wife. It is also found and not in dispute that Rathinam Chettiar had two daughters, namely, Rajeswari and Jamuna, born through his first wife. The plaintiff had not originally impleaded Rajeswari and Jamuna as parties to the suit. It is further noted that based on the materials projected by the respective parties, the trial court, at the first instance, has dismissed the plaintiff's suit upholding the will projected by the first defendant dated 02.01.1996 by judgment and decree dated 31.03.2003. The plaintiff took up the matter on appeal before the High Court, Madras, in A.S.No.124 of 2004. In the abovesaid appeal, the following points were formulated for determination.

- i. Whether the alleged will dated 02.01.1996 said to have been executed by Rathinam Chettiar is true and valid?
- ii. Whether the suit filed by the appellant/plaintiff for partition is maintainable in the absence of the relief of declaration?
- iii. Whether the suit is bad for non-joinder of necessary parties?

In point number 1, this court has taken a view that inasmuch as the defendant has played an active role in the execution of the will and resultantly determined the abovesaid point holding that Ex.B2 will dated 02.01.1996 has to be discarded. In point number 2, this court has taken a view that the plaintiff's suit is not maintainable for non-joinder of necessary parties and in point number 3, this Court has taken a view that the plaintiff has to work out her remedy before the trial court by impleading Rajeswari and Jamuna, the two daughters of the deceased Rathinam Chettiar.

11. After coming to the abovesaid determination, this Court, in the abovesaid appeal finally determined that it is of the view that the suit property belongs to the deceased Rathinam Chettiar and by giving such a finding alone, the judgment and decree of the trial court dated 31.03.2003 has been set aside and the matter had been remitted back to the trial court with



the observation that if the plaintiff files an application to implead the two daughters of the deceased Rathinam Chettiar as parties to the suit, within three weeks, the trial court shall consider the same and pass suitable orders in accordance with law with available records and accordingly allowed the appeal in part without costs.

12. Following the abovesaid order of remand, it is found that the plaintiff has impleaded the daughters of the deceased Rathinam Chettiar, namely, Rajeswari as D2 and the leagl heirs of the other daughther Jamuna have been impleaded as D3 to D6. However, it is found that despite summons, D2 to D6 having remained absent and not participating in the proceedings, consequently, they had been set exparte and accordingly it is further noted that no further evidence had been recorded in the matter on both sides and with the available materials, the trial court by way of a judgment and decree dated 12.12.2012 had dismissed the plaintiff's suit. Impugning the same, the present first appeal has been preferred.

13. While dismissing the plaintiff's suit by way of the impugned judgment and decree, the trial court has proceeded to hold that the parties are governed by the coromendal law prevailing in Pondicherry and on that basis, the plaintiff having not sought for declaration of her right to the suit property and on that premise, the suit of the plaintiff had come to be dismissed by the trial court. However, the abovesaid reasonings of the trial court for rejecting the plaintiff's suit, as such, cannot be countenanced in any manner. In this connection, the plaintiff's counsel, placed reliance upon the decisions reported in (2016) 4 MLJ 562 (M.Kadirvelu and others vs. G. Santhanalakshmi and others), wherein it has been held that unless the parties pleaded and proved that they were renouncants, they are not entitled to claim the benefits of Section 2(2A) of Act 1956 and the position of law with reference to the same has been detailed in the abovesaid decision as follows:

Succession Laws - Female Heir - Renouncants - Hindu Succession Act, 1956 (Act 1956), Section 2(2A) - Pondicherry Administration Act, 1962 (Act 1962) - Defendants 2,3,6 and 7 are appellants herein - First Respondent / plaintiff filed suit for partition and separate possession of her 1/6 th share in suit properties and for grant of mesne profits - Trial Court found that plaintiff's father did not relinquish his right over suit properties and that he also enjoyed properties - Trial Court held that the



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plaintiff was entitled to decree as prayed for with costs - Appellants challenge plaintiff/female heir's entitlement to succeed - Whether Plaintiff, who is female heir, is entitled to claim partition, in light of Hindu Law that is applicable to Hindus within French Territory - Whether Trial court was right in decreeing suit as prayed for - Held, unless parties pleaded and proved that they were renouncants, they are not entitled to claim benefits of Section 2(2A) of Act, 1956 - without any pleading to effect that they were renouncants, one cannot claim benefit of Section 2(2A) - There was no pleading by any of parties that either parties or ancestors were renouncants - parties are not entitled to claim benefits of Section 2(2A) of Act 1956- Trial Court was right in holding that plaintiff, who is a female heir, was entitled to seek partition of her 1/3rd share - No evidence to show that plaintiff or her father was ousted out of properties - Test for establishing adverse possession as between co-sharers is of higher standard - Trial Court rightly rejected plea of adverse possession - Court finds that Trial Court was justified in granting preliminary decree for partition - No reason to interfere with judgment and decree of Trial Court - Appeal dismissed."

While coming to the abovesaid determination, this Court had distinguished the decision of this Court reported in 2012 (3) CTC 577 (Thananjayan @ Murugesan and others vs. Palani @ Boologanathan (died) and others). The law on applicability of customary Hindu law to Pondicherry Region has also been dealt with and determined by this Court in the latest decision reported in 2017(8) MLJ 451 (Muthaiyan vs. Poongathai).

14. Applying the principles of law enunciated in the abovesaid decisions and the decision reported in (2016) 4 MLJ 562, it is found that, as contended by the plaintiff's counsel, when neither the plaintiff nor the defendant has taken the plea of applicability of customary Hindu Law prevailing in Pondicherry to them, the trial court is found to have erred in holding that the parties are Governed by the Customary Hindu law and on that score further found to have erred in dismissing the plaintiff's suit. Therefore, the reasonings of the trial court in dismissing the plaintiff's suit, as such, cannot be upheld in any manner.

15. In the light of the abovesaid discussions, the only point that has to be considered in this lis is whether the will dated 02.01.1996 is the last will executed by the deceased



Rathinam Chettiar in respect of the suit property and whether the abovesaid will is true, valid and binding on the plaintiff.

16. By way of projecting the will dated 02.01.1996 marked as Ex.B2, according to the first defendant, Rathinam Chettiar had cancelled the earlier will executed by him and thereby the case had been projected by the first defendant that Rathinam Chettiar had cancelled the earlier will executed by him dated 18.03.1993 marked as Ex.A1.

17. At this juncture, the plaintiff's counsel vehemently contended that inasmuch as this Court in the first appeal in A.S.No.124/04 has determined that Ex.B2 will has to be discarded, according to him, the abovesaid finding rendered by this Court in the first appeal would be binding as resjudicata as the said finding had not been challenged in the manner known to law and therefore, according to him, the trial court has completely erred in ignoring the abovesaid determination of this Court qua Ex.B2 will and the trial court, resultantly, should have upheld the will projected by her marked as Ex.A1 and granted appropriate relief in favour of the plaintiff.

18. Per contra, the defendant's counsel contended that though the finding has been rendered by this Court in A.S.No.124/04 that Ex.B2 will has to be discarded, however, according to him, the final conclusion of this Court in the abovesaid appeal is confined to the fact that the suit property belongs to the deceased Rathinam Chettiar and by giving such a finding, this Court had remitted the matter back to the trial court by setting aside the judgment and decree of the trial court dated 31.03.2003 and further directed the trial court to give an opportunity to the plaintiff to implead the two other daughters of the deceased Rathinam Chettiar as parties within the stipulated period and thereafter consider the suit and pass suitable order in accordance with law with available records. Therefore, according to him, when the final order of this court in A.S.No.124/04 is only the order of remand directing the lis to the trial court for a fresh consideration of the materials placed on record, according to him, there is no necessity on his part to challenge the finding rendered by this Court in the abovesaid appeal qua the will projected by him marked as Ex.B2 and according to him, such a finding would not, even when being challenged, operate as resjudicata and in this connection, he placed reliance upon the decision of this Court reported in 2011 4 L.W.322 (Thamilarasi vs. Selvam). In the abovesaid decision, this court has held that the appeal lies only against the decree and not against any finding recorded by the court and held that



any finding recorded in the judgment as against the party who has succeeded in the matter shall not operate as resjudicata as provided in Section 11 of the CPC and the position of law has been rendered in the abovesaid decision as follows:

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C.P.C. Sections 96, 100/Appeal against findings by party succeeding, whether maintainable, suit for permanent injunction to restrain the defendant from in any manner interfering with her alleged enjoyment and possession of the suit property.

Second Appeal raises an important substantial question of law as to whether an appeal would lie against a mere finding at the instance of the party who had succeeded in the suit or not?

As against certain findings recorded in the judgment against the party, who has succeeded in the suit, no appeal at the instance of such succeeding party shall lie because he cannot be termed as an aggrieved person in terms of Sections 96 and 100 of CPC - An appeal lies only against the decree and not against any finding recorded by the court at the instance of the party who has succeeded in the suit - Judgements of this court in R.Maria Siluvai's case, is not a binding precedent - Judgment of the first appellate court which has reversed only certain findings and not the decree is not at all sustainable.

The trial court found the issues No.1 to 4 in favour of the plaintiff holding that the settlement deed dated 27.05.1986 is valid and that the suit property was not at all owned by the defendant and his father. The trial court, however, found under issue No.5 that the possession of the suit property was not in the hands of the plaintiff and instead it was only in the hands of the defendant. Thus, the issue No.5 was answered in favour of the defendant. Under Issue No.4, the trial court held that the defendant had not perfected his title by adverse possession. Accordingly, the issue No.4 was answered against the defendant. The issue No.6 was however decided in favour of the defendant. Thus, ultimately the suit was dismissed. As against the findings under issue Nos.1 to 4 and 6, the defendant, feeling aggrieved, preferred an appeal in A.S.No.39 of 1996 before the learned Principal Sub Judge, Nagapattinam. The plaintiff did not prefer any appeal against the decree and judgment of the trial court. The learned Principal Sub Judge by judgment and decree dated 22.01.1997 allowed the appeal and set aside the findings of the trial court in respect of issue Nos.1 to 4 and 6. It is against the same, the plaintiff has come up with this Second Appeal.



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It is the contention of the learned counsel for the appellant that the appeal preferred by the defendant, though he had succeeded in the suit, is not maintainable since appeal against the findings given on facts is not maintainable under Sections 96 and 100 of the Code of Civil Procedure.

A cursory reading of the above judgment of the Hon'ble Supreme Court would make it abundantly clear that it is the settled position of law that as against certain findings recorded in the judgment against the party, who has succeeded in the suit, no appeal at the instance of such succeeding party shall lie because he cannot be termed as an aggrieved person in terms of Sections 96 and 100 of CPC since the ultimate decree is in his favour. To put it otherwise, an appeal lies only against the decree and not against any finding recorded by the court at the instance of the party who has succeeded in the suit. In view of the law laid down by the Hon'ble Supreme Court in the above judgments, with respect, I hold that the judgments of this court in R.Maria Silivai's case cited supra, is not a binding precedent.

The first appellate court had interfered with the decree and judgment of the trial court only in respect of the findings recorded by the trial court against the defendant though ultimately the trial court dismissed the suit in favour of the defendant. In my considered opinion, the judgment of the first appellate court which has reversed only certain findings and not the decree is not at all sustainable and, therefore, the same is liable to be set aside. While setting aside the judgment of the first appellate court, I am of the view that it is also absolutely necessary for this court to clarify that the findings recorded by the trial court under issue Nos.1 to 4 and 6 would not operate as resjudicata in terms of Section 11 of CPC as held by the Hon'b'e Supreme Court in the judgment cited supra - In the result, the second appeal is allowed.

R. Maria Siluvai v. B.Sreekumari Amma and others, 1998 (2) CTC 218, held, is not a binding precedent.

P.M.A. Metropolitan v. Moran Mar Marthoma, AIR 2008 SC 2001;

Satyadhyan Ghosal v. Sm. Deorajin Debi (1960) 3 SCR 590: (AIR 1960 SC 941);

The Mysore State Electricity Board v. Bangalore Woolen, Cotton and Silk Mills Ltd., 1963 Supp (2) SCR 127: (AIR 1963 SC 1128);

Deva Ram and another v. Ishwar Chand and another 1995 SCC (6) 733; and



Banarsi and others v. Ram Phal, 2003 3 L.W. 721 = AIR 2003 SC 1989; - Referred to."

Further the position of law with reference to the abovesaid point has been outlined in the decision reported in 1983 SCC Online Bom 140 (Kasturchand v. Qazi Syed Saifuddin) as follows:

"13. Shri J.N. Chandurkar, the learned counsel for the appellant, submitted that with the finding already pronounced by Tulpule, in the remand order that the order of the Rent Controller, in fact, meant granting of permission on default of any of the two payments under the two cheques, nothing now survives for consideration and the appeal must be allowed and the claim for ejectment be decreed.

14. Shri K.H. Deshpande, the learned counsel for the respondent, relying upon Gopinath Shukul v. Sat Narain Shukul (AIR 1923 All 384). Upendra Lal v. Jogesh Chandra (AIR 1928 Cal 186) and Gogula Gurumurthy v. Kurimeti Ayyappa (AIR 1974 SC 1702), submitted that an order of remand under O.41, R.25. C.P.C. in fact, decides nothing and the finding of Tulpule. J., while remanding the case is not conclusive between the parties and it can be reopened at the time of final determination of this appeal.

15. The position of law, to my mind, is abundantly clear. The finding of Tulpule, J., recorded in the remand order, under O.41, R.25. C.P.C. though entitled to some weight, is certainly neither final between the parties nor binding on me."

19. In addition to that, the position of law with reference to the abovesaid aspect has been explained in the decision reported in (1976) 3 SCC 528 (Lonankutty v. Thomman and another) as follows:

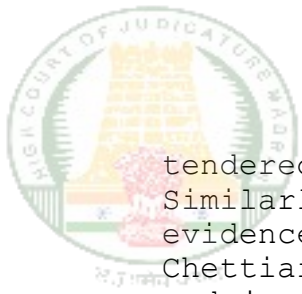
"23. It is necessary to add that the decision rendered by the High Court by its judgment of remand dated July 8, 1964 in Second Appeal No.1149 of 1960 that the contention raised by the respondent is not barred by resjudicata can be reopened in this appeal against the final judgment of the High Court. The decision of this court in Satyadhvan Ghosal v. Smt. Deorajin Debi is directly in point on this question. Relying upon certain decisions of the Privy Council it was held by this Court that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. Accordingly, the circumstance that the remanding judgment of the High Court was appealed against assuming that an appeal lay therefrom, cannot preclude



the appellant from challenging the correctness of the view taken by the High Court in that judgment."

The defendant's counsel also placed for consideration the decision reported in (1960) 3 SCR 590 (Satyadhvan Ghosal and others v. Smt. Deorajin Debi and another). Considering the principles of law outlined in the abovesaid decisions and applying the same to the case at hand, it is seen that though a finding has been rendered by this Court in A.S.No.124/04 holding that Ex.B2 will has to be discarded, however, when finally this Court in the abovesaid appeal by setting aside the judgment and decree of the trial court and remitting the matter back to the trial court for consideration of the materials afresh and dispose of the matter on merits, in such view of the matter, the abovesaid finding rendered by this Court qua Ex.B2 will would not in any manner operate as resjudicata or be a binding precedent as such on the court below and therefore, the argument of the plaintiff's counsel that the trial court is not entitled to take a contra view to the view taken by this Court qua Ex.B2 will in A.S.No.124/04, as such, cannot be countenanced in any manner.

20. The resultant position being is that we have to proceed and determine on the basis of the available materials whether the will projected by the first defendant marked as Ex.B2 is true valid and binding on the plaintiff and whether Ex.B2 will is the last will of the deceased Rathinam Chettiar. To sustain his case, the first defendant has chosen to examine the attestors of the abovesaid will, namely, S.Kanagaraj and A.Ganesan as D.W.2 and D.W.3 respectively and the scribe of the will as D.W.4. D.W.2, S. Kanagaraj, during the course of evidence has deposed that he knew Rathinam Chettiar and also knew the plaintiff and the first defendant and, Rathinam Chettiar, on 02.01.1996 solicited his presence for attestation to the will executed by him and accordingly, he had reached the office of the scribe P.Velusamy at about 9.30 a.m. and as per the request of Rathinam Chettiar, the other attestor Ganesan was also present and at that point of time Rathinam Chettiar along with his son Jeyapal and Ramanathan came and gave directions to the scribe Velusamy to prepare the said will and after noting the same, the scribe typed the will and read over the contents of the will in their presence and acknowledging the truth of the contents of the will Rathinam Chettiar had executed the will by signing in each page and thereby he, Ganesan and Ramanathan had attested the will and below the same, the scribe had signed the will and Rathinam Chettiar had informed that by way of the will he had cancelled the earlier will and he had executed the will only for the benefit of the family and he had also apprised the execution of the will subsequently to the plaintiff. Despite cross examination, nothing has been culled out from D.W.2 to disbelieve his version with reference to the abovesaid aspects



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tendered by him during the course of chief examination. Similarly, D.W.3 Ganesan, the other attester, has also tendered evidence as regards the execution of the will by Rathinam Chettiar at the office of the scribe Velusamy in his presence and in the presence of Kanagaraj, Ramanathan and the preparation of the will by the scribe Velusamy and the contents of the will being read over by the scribe to Rathinam Chettiar in the presence of all and the acknowledgment of the contents by Rathinam Chettiar and the execution of the will by Rathinam Chettiar in their presence and his attestation and the attestation of the other attestors in the will in the presence of Rathinam Chettiar and the signing of the will by the scribe at the last and further deposed that Rathinam Chettiar had informed that he had executed the will only for protecting the family property apprehending the plaintiff and her husband would not protect the property. In spite of cross examination nothing has been elicited from the mouth of D.W.3 to discredit his testimony with reference to his statement qua the will as deposed by him in the chief examination. The scribe examined as D.W.4 has also tendered evidence on similar lines and the preparation of the will by him as per the direction of the testator Rathinam Chettiar and the execution of the will by Rathinam Chettiar after acknowledging the contents of the same in the presence of the attestors and the attestation of the will by the attestors in the presence of Rathinam Chettiar and signing of the will at the last as the scribe and accordingly, it is found that the evidence of D.W.4 also corroborates and supports the evidence tendered by D.Ws.2 and 3 in all aspects pertaining to the execution of the will by the testator Rathinam Chettiar. When considering the evidence of D.Ws.2 to 4 in toto and finding them to be complementary to each other and on the analysis of the evidence in the right perspective when it is seen that the will Ex.B2 had been executed by Rathinam Chettiar only as per his direction in a fit state of mind and health and the will had been executed by him with a view to protect the property and for bequeathing the same in favour of his only son, namely, the first defendant and when it has been established beyond doubt that the will in question has been prepared only as per the instructions of Rathinam Chettiar and the evidence of the attestors, namely, D.Ws.2 and 3 satisfying the legal requirements of attestation in all aspects and when there is no element of compulsion or influence on the part of the testator by the first defendant or anyone as sought to be projected by the plaintiff, in all, it is found that the first defendant has established that Ex.B2 will has been truly executed by Rathinam Chettiar bequeathing the suit property in his favour in the presence of the attestors as per law and in such view of the matter, as rightly contended by the first defendant's counsel, based on the unimpeaching evidence of D.Ws.2 to 4 in toto, Ex.B2 will has to be held.



21. The main argument put forth by the plaintiff's counsel for discrediting Ex.B2 will is that the first defendant was also present at the time of execution of the said will. No doubt, the materials placed on record go to show the presence of the first defendant at the time of the execution of the will. However, other than his presence, when there is no other material to hold that the first defendant had exercised any sort of influence or force on Rathinam Chettiar in the execution of the will or preparation of the same or dominated the will of Rathinam Chettiar in the preparation of the will to his benefit and when it is found that Rathinam Chettiar's main object is to protect the property and give the same exclusively to his only son, namely, the first defendant and when Rathinam Chettiar had chosen to exclude not only the plaintiff but also his other two daughters born through his first wife, the full blood sisters of the first defendant, in such view of the matter, the mere presence of the beneficiary at the time of the will, the said factor alone, would not render the will in question as invalid or unacceptable. When there is no material placed that the beneficiary had taken any active role in the preparation of the will and dominated the will of the testator or forced him to write the will and on the other hand when the will in question is found to have been prepared as per the directions of the testator and the will had come to be executed by the testator on his own volition knowing the contents thereof and the testator also assigned the reason for executing the same and also for cancelling the earlier will Ex.A1 executed by him, in such view of the matter, in my considered opinion, the presence of the beneficiary at the time of the will sans any proof that he had taken active role with reference to the execution of the same in any manner as above pointed out, would not render the will unacceptable or invalid. In support of his contentions, the plaintiff's counsel placed reliance upon the decision reported in (2007) 5 MLJ 706 (Ms. Josephine Jerome and others vs. S. Santiago and another). In support of his contentions, the first defendant's counsel placed reliance upon the decision reported in (2017) 3 Mad LJ 12 (Kasthuri Bai vs. V. Ashok Kumar). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

22. In the light of the abovesaid discussions, inasmuch as the first defendant has established the truth and validity of Ex.B2 will and when by way of Ex.B2 will Rathinam Chettiar had cancelled the earlier will executed by him marked as ExA1, resultantly, I hold that the will dated 02.01.1996 is true,



valid and binding on the plaintiff and the will dated 18.03.1993 has been validly cancelled by the testator Rathinam Chettiar. I therefore, hold that the plaintiff is not entitled to obtain partition and separate possession and future mesne profits in respect of the suit property as claimed in the plaint. Accordingly, the point numbers 1 to 3 are answered.

Point Numbers 4 and 5

23. For the reasons aforestated, the judgment and decree dated 12.12.2012 passed in O.S.No. 48 of 2002, on the file of the District Judge, Karaikkal, are confirmed not for the reasons assigned by the trial court, but for the reasons aforestated and resultantly, the first appeal is dismissed. Considering the facts and circumstances of the case, there is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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