

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.07.2019

PRONOUNCED ON : 20.09.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.714 of 2008
and
C.M.P. No.20774 of 2016

Umadevi ... Appellant/Plaintiff

Vs.

1. C.D.Ethirajan (Died)
2. Ponni Arasi
3. E.Vetrivel
4. Hemavathi
5. E.Jayasimman
6. E.Senthilkumar
7. V.Selvam
8. P.Kaliappan
9. G.Venkatesan
10. H.S.Dhanasekar
11. E.Varalakshmi ... Respondents/Defendants
(Cause title amended vide order of Court
dated 26.09.2008 made in M.P.No.2/2008)

(R2 to R6 recorded as LRs of deceased R1
and R11 brought on record as LR of deceased
R1 vide order of Court dated 25/03/13
made in M.P. No.1/11)

Prayer: Appeal Suit filed under Section 96 of Civil Procedure
Code as against the judgment and decree dated 17.08.2007 made in
O.S. No.681/2004, on the file of the Additional District Judge,
Fast Track Court - I, Chengalpet.

For Appellant : Mr.M.S.Subramanian

For R2 to R6 : Mr.S.V.Jayaraman, Senior Counsel
for M/s. L.N.Praghasam

For R7 to R10 : No representation/set ex parte
vide order dated 29.07.2019

For R11 : Mr.S.Sadasivan

JUDGMENT

Aggrieved over the judgment and decree dated 17.08.2007, passed in O.S. No.681/2004, on the file of the Additional District Judge, Fast Track Court - I, Chengalpet, 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, direction and profits.

4. The case of the plaintiff, in brief, is that she is the younger sister of the first defendant and they are the children of the deceased Devaraja Mudaliar and Chandra Bai and Devaraja Mudaliar died on 06.10.1973, his wife Chandra Bai died on 14.04.1981. The plaintiff and the first defendant are the only heirs of Devaraja Mudaliar and Chandra Bai. The defendants 2 to 6 are the daughters and sons of the first defendant. Devaraja Mudaliar was allotted lands in Cowl Bazar No.126 and Pozhichalur No.127, described in the A schedule under the registered partition deed dated 22.05.1950 entered into between him and his younger brother and Devaraja Mudaliar sold away some of the properties and at the time of his demise in 1973, he left behind 0.21 cents of dry lands at Pozhichalur village, main road, 0.83 cents of wet land in Cowl Bazar village in S.No.146 and S.No.163 and house site of an extent of about 13,600 sq.ft measuring 46 ft x 200 ft on the main road, Cowl Bazar in S.No.109/1. Devaraja Mudaliar and the first defendant sold 3450 sq.ft of site in S.No.109/1 in Cowl Bazar to the plaintiff's husband, P.Dhakshinamurthy, by way of a registered sale deed dated 06.03.1972, for Rs.2,000/- and the plaintiff's husband has constructed a house and living therein and the first defendant has been managing the properties left by Devaraja Mudaliar on behalf of the plaintiff also. On the death of Devaraja Mudaliar in 1973, his half share in the joint family properties was succeeded by his wife Chandra Bai, the first defendant and the plaintiff each getting $1/6^{\text{th}}$ share in the whole properties and on the death of Chandra Bai in 1981, her $1/6^{\text{th}}$ share devolve on the plaintiff and the first defendant and thus, the plaintiff is entitled to $1/4^{\text{th}}$ share in the suit properties and the first defendant and his children are entitled to $3/4^{\text{th}}$ share. In or about 1985, the first defendant sold away 0.21cents of land in the main road, Pozhichalur for Rs.30,000/- without informing the plaintiff and not paying her share. The first defendant had plotted out S.No.146 and 163 in Cowl Village into 15 plots as Rathinavel Nagar and sold 7 plots for Rs.1,30,000/- and not paid the plaintiff her due share. The first defendant has been holding these monies of the plaintiff in trust for her benefit and he has to make over the plaintiff's share in the sale proceeds. The first defendant has sold plot Nos.15,16 and 17

between 1994 and 2000 to the defendants 7 to 10 for Rs.1,38,000/- without the consent of the plaintiff and the abovesaid sales are not binding on the plaintiff or her 1/4th share. The plaintiff is entitled to 1/4th share in the abovesaid plots. The first defendant had recently started exhibiting hostility towards the plaintiff and therefore, the plaintiff, through her Advocate, caused a registered notice of demand to the first defendant on 18.06.2002. The first defendant sent a reply notice dated 15.07.2002 containing incorrect allegations. Devaraja Mudaliar was living in the house of the plaintiff and being looked after by her and he died in her house and did not execute any Will and the allegations that the first defendant had paid half of the amount of the proceeds of sale of lands and plots to the plaintiff is false. The allegation that the plaintiff did not help the father and that he was totally dissatisfied with her and the case that 50 sovereigns of gold and Rs.1,00,000/- was given to the plaintiff's husband at the time of the plaintiff's marriage and Rs.1,00,000/- was spent for the marriage and that 5 kgs of silver articles was presented and Rs.1,00,000/- was given to the plaintiff's husband for construction of house and that the land sold to the plaintiff's husband by the father as shridhana and that no sale price was paid thereof and Devaraja Mudaliar left debts to the tune of Rs.3,00,000/- are all false hence, according to the plaintiff, the need for the suit for appropriate reliefs.

5. The first defendant resisted the plaintiff's suit contending that Devaraja Mudaliar inherited the suit properties in Cowl Bazar and Pozhichalur and had allotted the part of the suit properties as a gift for the plaintiff's marriage and since the plaintiff's husband was working as a teacher and wanted to avail loan from the bank, it was insisted upon to execute a sale deed and therefore, the first defendant's father Devaraja Mudaliar was forced to accede and accept the demand of the plaintiff to execute the sale deed in favour of the plaintiff's husband. Devaraja Mudaliar fell ill and was bedridden and he was taken care of by the first defendant and during that period, Devaraja Mudaliar had executed a Will dated 02.10.1973, bequeathing the rest of the property to the first defendant other than that which was originally allotted in favour of the plaintiff and the same had been stated in the Will and the plaintiff used to demand money from her parents based on the insistence of her husband and the plaintiff had been given and spent most of the income for her and therefore, Devaraja Mudaliar had executed a Will in favour of the first defendant. The plaintiff is not entitled to any estate left by Devaraja Mudaliar. By virtue of the Will dated 02.10.1973, the first defendant has become the absolute owner of the plaint schedule property after the demise of Devaraja Mudaliar. The plaintiff had illicit relationship with Dhakshinamurthy which led to her marriage with him and the plaintiff's husband demanded the part

of the property and 50 sovereigns of gold and silver and cash as a precondition for marrying the plaintiff and accordingly, Devaraja Mudaliar was constrained to gift a portion to him and at the instance of the plaintiff, he had conveyed the same by way of the sale deed for obtaining loan and financial assistance. Being the only daughter, Devaraja Mudaliar was constrained to accede to her demand. No valuable consideration was paid by the plaintiff or her husband for the abovesaid sale deed. The alienation of the properties by the first defendant is to the knowledge of the plaintiff and the plaintiff has got nothing to do with the same, since her shares are already been settled. The claim of the joint ownership by the plaintiff qua the suit properties is false. The plaintiff has got no right over the suit properties, hence, the suit laid by the plaintiff is liable to be dismissed.

6. The first defendant has filed the additional written statement adopted by the defendants 2 to 9 whereunder a plea had been taken that the suit laid by the plaintiff is barred by limitation and the suit is also liable to be dismissed on the ground of non joinder of necessary parties.

7. The plaintiff has filed a reply statement contending that the allegations that the suit is barred by limitation and bad for non-joinder of necessary parties are false and denied and according to the plaintiff, the suit has been filed in time and all the necessary parties are before the Court and accordingly, prayed for the reliefs claimed in the suit.

8. On the basis of the abovesaid pleas, the following issues were framed by the trial Court for consideration:

1. Whether the suit is barred by limitation?

2. Whether the suit liable to be dismissed for non impleading of proper parties?

3. Whether the suit is liable to be dismissed for non inclusion of all the properties?

4. Whether it is correct to state that the plaintiff's suit is liable to be dismissed on account of the non payment of the proper Court fees for future profits?

5. Whether the Will executed by Devaraja Mudaliar dated 02.10.1973 in favour of the first defendant qua the properties after

settling the properties to the plaintiff is true and acceptable?

6. Whether it is correct to state that the plaintiff's father had given adequate seer to the plaintiff at the time of her marriage?

7. Whether it is correct to state that the plaintiff has been given her share in the sale proceeds of the 15 house sites in Rathinavel Nagar by the first defendant?

8. Whether the plaintiff is entitled to obtain the preliminary decree of partition in respect of the plaint schedule property?

9. Whether the first defendant is liable to pay the sum of Rs.40,000/- with interest at 12% per annum representing her 1/4th share in the sale proceeds of Pozhichalur land and 7 plots in S.No.109/1 in Cowl Bazar?

10. Whether the plaintiff is entitled to claim proceeds in respect of her share in the suit properties and the sale proceeds as put forth in the plaint?

11. Whether the plaintiff is entitled to the costs of the suit?

12. To what relief?

9. In support of the plaintiff's case, PWs 1 and 2 were examined, Exs.A1 to A12 were marked. On the side of the defendants, DWs 1 and 2 were examined, Exs.B1 to B4 were marked. CW1 was examined, Exs.C1 to C3 were also marked.

10. 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 without costs. Impugning the same, the present first appeal has been preferred by the plaintiff.

11. The following points arise for determination in this first appeal:

1. Whether the plaintiff is entitled to obtain partition and separate possession of 1/4th share in the suit properties as put forth in the plaint?

2. Whether the plaintiff is entitled to claim a sum of Rs.40,000/- from the first defendant with subsequent interest at 12% per annum representing her 1/4th share in the sale proceeds of Pozhichalur land and 7 plots in S.No.109/1 in Cowl Bazar, Tambaram Taluk?

3. Whether the plaintiff is entitled to her 1/4th share in the profits from the plaint schedule properties from the date of the plaint till the separate possession is given to her?

4. Whether the Will dated 02.10.1973 is valid and binding on the plaintiff?

5. Whether the plaintiff's suit is bad for non joinder of necessary parties?

6. Whether the plaintiff's suit is bad on account of partial partition?

7. Whether the plaintiff's suit is barred by limitation as put forth by the defendants?

8. To what relief the plaintiff/appellant is entitled to?

9. To what relief the defendants are entitled to?

C.M.P. No.20774 of 2016:

12. The petition has been filed under Order 41 Rule 27 of Civil Procedure Code. The case of the petitioner/appellant is that the first defendant had resisted her suit for partition by projecting the Will dated 02.10.1973 alleged to have been executed by Devaraja Mudaliar and he had examined himself as DW1 and one Ekambaram Mudaliar as DW2 who is stated to be the scribe and attester of the Will and the other attester of the Will is Tmt.Varalakshmi, wife of the first defendant and Ekambaram Mudaliar, while giving evidence, has stated that the first defendant's son Senthilkumar brought the necessary white paper for writing the Will and the said Senthilkumar was about 15 years old when the abovesaid Will was said to have been executed by Devaraja Mudaliar, however, the abovesaid case projected by DW2 is false and Senthilkumar was born on 14.06.1978 and he is the 7th child of the first defendant and his wife and the marriage of the first defendant took place on 22.08.1965 and Senthilkumar had obtained driving license dated 01.11.1999, in

which, his date of birth is mentioned as 14.06.1978 and accordingly, it is put forth that the marriage invitation card of the first defendant and the driving license of Senthilkumar are necessary documents for enabling the Court to come to the conclusion with reference to the genuineness of the Will dated 02.10.1973 projected by the first defendant and the abovesaid documents could not be produced by the petitioner/appellant in the trial Court and as the abovesaid documents are very material and necessary, hence according to the petitioner/appellant, she has been necessitated to file the abovesaid documents as additional documents in the appeal and hence the petition.

13. The respondents resisted the abovesaid petition contending that the documents sought to be received as additional evidence by the petitioner/appellant were available even when the suit was pending before the trial Court and denied the case of the petitioner that she was unable to produce the said documents in the trial Court despite her best efforts and denied the case of the petitioner that the Will dated 02.10.1973 is a concocted one. The petitioner has not given sufficient cause for not producing the additional evidence now projected before the trial Court and denied the case of the petitioner that the documents projected by way of additional evidence are necessary for disposing the appeal. The petitioner has not made out the case for the reception of additional documents under Order 41 Rule 27 Civil Procedure Code and hence the petition is liable to be dismissed.

14. The following point arise for determination in C.M.P. No.20774 of 2016:

Whether the petition is entitled for acceptance?

Point Nos.1 to 7 in A.S.No.714 of 2008 and Point in C.M.P. No.20774 of 2016:

15. It is not in dispute that the plaintiff and the first defendant are the children of Devaraja Mudaliar. It is also not in dispute that Devaraja Mudaliar died on 06.10.1973 and his wife Chandra Bai died on 14.04.1981. The defendants 2 to 6 are the daughters and sons of the first defendant. It is also not in dispute that Devaraja Mudaliar had obtained the properties in the partition effected with his brother dated 22.05.1950 and the A schedule properties described in the abovesaid partition deed had been allotted to Devaraja Mudaliar. The certified copy of the abovesaid partition deed has been marked as Ex.A3. According to the plaintiff, Devaraja Mudaliar, during his life time, had sold away some of the properties obtained by him under the abovesaid partition deed and further, according to the plaintiff, he had left 0.21 cents of dry lands at Pozhichalur village, main road and 0.83 cents of wet land in Cowl Bazar village in S.No.146 and S.No.163 and house site to the extent of

about 13,600 sq.ft measuring 46 ft x 200 ft in the main road, Cowl Bazar in S.No.109/1, at the time of his death. Therefore, according to the plaintiff, the abovesaid three items of the properties had been left behind by Devaraja Mudaliar at the time of his demise. It is also pleaded by the plaintiff that Devaraja Mudaliar had alienated the extent of 3450 sq.ft house site in S.No.109/1 in Cowl Bazar in favour of the plaintiff's husband Dhakshinamurthy by way of sale deed dated 06.03.1972 and that the plaintiff's husband had put up construction thereon and the plaintiff and her husband had been living therein.

16. Even as per the case of the plaintiff, after the death of Devaraja Mudaliar and Chandra Bai in or about 1985, the first defendant had sold away 0.21 cents of lands in the main road at Pozhichalur village for Rs.30,000/- and also put forth that the first defendant had plotted out 15 plots in S.Nos.146 and 163 in Cowl Bazar village and sold away 7 plots for Rs.1,30,000/- it is thus found that the abovesaid alienations had been effected only to the knowledge of the plaintiff. The evidence had also been adduced that the abovesaid alienations had been made to the knowledge of the plaintiff and her husband. Now, according to the plaintiff, the first defendant is liable to account a sum of Rs.40,000/- to her in respect of the abovesaid alienations towards her 1/4th share in the same which amounts to Rs.40,000/- with interest thereon. Therefore, according to the plaintiff, she is entitled to 1/4th share in the properties left behind by Devaraja Mudaliar and the first defendant is not entitled to alienate the same as the absolute owner thereof. If really the plaintiff had a lawful claim of share in the abovesaid properties left behind by Devaraja Mudaliar, when it is found that to the knowledge of the plaintiff and her husband, the first defendant had sold away the extent of 0.21 cents in Pozhichalur and 7 plots in Cowl Bazaar village during 1985 itself, the plaintiff would have immediately resisted the abovesaid alienations one way or the other and would have also endeavoured to claim partition in the said properties by putting forth the case that the abovesaid alienations effected by the first defendant in favour of others is not binding her and her shares in the said properties and accordingly, as put forth by the defendants, the plaintiff would have endeavoured to implead the purchasers of the abovesaid properties and also included the above properties for partition in the present suit. However, insofar as the present suit is concerned, the plaintiff has described the suit properties as lying in Cowl Bazaar in S.Nos.146 and 163, Plot Nos.15 to 20,22,23 extent of 15274/sq.ft. and in Cowl Bazar village in S.No.109/1 an extent of 9150 sq.ft. out of 13500 sq.ft., excluding 3450 sq.ft. purchased by the plaintiff's husband and 900 sq.ft. on which the first defendant has a house and accordingly, when it is found that the plaintiff has chosen to levy the suit against the first defendant seeking for a general partition of all the properties

left behind by Devaraja Mudaliar and when admittedly Devaraja Mudaliar is stated to have left behind the extent of 0.83 cents in Cowl Bazar village in S.No.146/163 and when the plaintiff has put forth the case that the first defendant had plotted the abovesaid extent of 0.83 cents into 15 plots and sold away 7 plots to her knowledge and to the knowledge of her husband even during 1985, in such view of the matter, if really the plaintiff has lawful share in the abovesaid properties said to have been alienated by the first defendant and if the abovesaid alienation are not binding on the plaintiff in the suit for general partition laid by her against the first defendant, as rightly put forth by the defendants, the plaintiff should have included even the abovesaid properties said to have been alienated by the first defendant during 1985 and also should have included the purchasers of the properties from the first defendant. The plaintiff cannot be allowed to put forth the case that the alienations made by the first defendant in respect of certain plots effected in favour of the defendants 7 to 10 are not binding on her and should be allowed to implead only the defendants 7 to 10 and include only the abovesaid alienated properties in the present suit for partition and when according to the plaintiff, the first defendant is not entitled to alienate the extent of 0.83 cents to others, in the suit for general partition, as similar to the case projected by her as against the alienations effected in favour of the defendants 7 to 10, as rightly contended by the defendants, the plaintiff should have, in the present suit for general partition, included even the other properties alienated by the first defendant as put forth by her in the plaint and as well as impleaded the other purchasers of the properties from the first defendant and in such view of the matter, as rightly contended by the defendants, the plaintiff having not included all the properties left behind by Devaraja Mudaliar and not impleaded all the purchasers of the properties from the first defendant, particularly, when the abovesaid alienations are to the knowledge of the plaintiff and her husband, in such view of the matter, it is found that the plaintiff's suit is bad for non joinder of necessary parties and also bad for partial partition. In this connection, the plaintiff examined as PW1, during the course of cross examination, has admitted that she has laid the present suit claiming partition in respect of the properties obtained by her father in the partition and also admitted that she has laid the suit in respect of the 0.21 cents in Pozhichalur and the site in Cowl Bazaar village with the superstructure and further stated that she had impleaded the defendants 7 to 10 as they had purchased the sites in Cowl Bazaar village from the first defendant and also admitted that other than the defendants 7 to 10, other persons also purchased the plots from the first defendant and layout had been made during 1988 and at the time of formation of the layout and the alienation of the plots by the first defendant, the plaintiff's

husband was assisting him and therefore, when it is seen that as according to the plaintiff, the suit has been laid seeking for partition in the properties left behind by Devaraja Mudaliar and when the plaintiff has not admitted the alienations effected by the first defendant in respect of the said properties, in such view of the matter, the present suit laid by the plaintiff being the suit for general partition, as per law, the plaintiff should have included all the properties left behind by Devaraja Mudaliar and also impleaded all the purchasers of the properties who had purchased the same from the first defendant, as according to the plaintiff, the alienations made by the first defendant is not binding upon her and only on that factor, she has been also chosen to implead the defendants 7 to 10 who are stated to be the purchasers of the plots from the first and second defendant. Therefore, the plaintiff cannot be allowed to take one stand against the alienations effected in favour of the defendants 7 to 10 and another stand in respect of the other alienations made in favour of the other purchasers qua the other plots in Cowl Bazar village. Furthermore, the plaintiff's husband examined as PW2 has also admitted that they had not included all the properties allotted to Devaraja Mudaliar in the partition and in such view of the matter, as contended by the defendants and determined by the trial Court, the plaintiff's suit is found to be bad for non joinder of necessary parties and also bad for partial partition.

17. The main defence projected by the defendants for sustaining their case is that Devaraja Mudaliar had bequeathed the properties in favour of the first defendant by way of the Will dated 02.10.1973, which document has been marked as Ex.B4. The plaintiff disputes the truth and validity of the abovesaid Will projected by the defendants. In such view of the matter, the defendants, being the propounders of the abovesaid Will, are bound to establish the same in accordance with law. Accordingly, it is found that the defendants had chosen to examine one of the attestors to the said Will, namely, Ekambaram Mudaliar as DW2. DW2 has, during the course of his evidence, stated that the deceased Devaraja Mudaliar is his brother and he had executed a Will on 02.10.1973 at about 11 am in favour of the first defendant bequeathing the properties and the said Will had been executed in the residence of his brother, the deceased Devaraja Mudaliar and it is he who scribed the Will as dictated by Devaraja Mudaliar and Ex.B4 is the Will executed by Devaraja Mudaliar and after the Will had been written by him, the same was read by Devaraja Mudaliar and thereafter, he had signed in both the pages of the Will and totally he had affixed two signatures and the execution of the Will had been attested by him and Varalakshmi and as the scribe of the Will, he had also signed the Will and also he had attested the Will along with Varalakshmi and he had signed as one of the attestors and the signature of Varalakshmi was witnessed by him and Devaraja

Mudaliar and his signature was witnessed by Varalakshmi and Devaraja Mudaliar and Devaraja Mudaliar was in a good state of mind at the time of execution of the Will. It is thus found that by the abovesaid evidence of DW2, the defendants have established that Devaraja Mudaliar had executed Ex.B4 Will bequeathing the properties in favour of the first defendant. DW2 being the brother of Devaraja Mudaliar, it is natural that Devaraja Mudaliar would have solicited his assistance in the execution of the abovesaid Will and accordingly, it is found that it is only DW2 who had scribed the Will as per the dictates of Devaraja Mudaliar and had also attested along with Varalakshmi. Varalakshmi is found to be the wife of the first defendant. According to DW2, as deposed by him during the course of cross examination, Devaraja Mudaliar had directed him to keep the custody of the Will and that further directed him to produce the same when necessary and the execution of the Will by Devaraja Mudaliar is not known to his wife and children and he was having the custody of the same and the first defendant having informed him about the pendency of the case and the receipt of the summon, he has disclosed the execution of the Will by Devaraja Mudaliar and handed over the same to the first defendant and despite cross examination, nothing has been culled out from DW2 to discredit his evidence in any manner. DW2 during the cross examination by the plaintiff has affirmed in his evidence that Ex.B4 was executed by Devaraja Mudaliar bequeathing the properties in favour of the first defendant in a good state of mind and good health and in such view of the matter, when as rightly put forth by the defendants' counsel, the testator would normally seek the assistance of the close associates and relatives for the execution of the Will and accordingly, he has taken the assistance of his brother and his son's wife and he has also deposed that he had the custody of the Will as directed by the testator and to produce the same as and when necessary and in such view of the matter, when it is found that when with reference to the execution of the Will by Devaraja Mudaliar as spoken to by DW2, his evidence being natural, convincing and inspiring and when nothing has been culled out from him by the plaintiff to disbelieve his version, in such view of the matter, when the defendants are required to establish the truth and validity of the Will in question by examining one of the attestors of the same as per law and when the evidence of DW2 is found to be wholly acceptable and convincing, for proving the validity of Ex.B4 Will, there is no need for the defendants to examine the other attestor Varalakshmi in support of their case. Similarly, when according to DW2, he had been directed to keep the custody of the Will and produce the same as and when necessary, in such view of the matter, when naturally DW2 had come out with the disclosure of the Will when the first defendant apprised him of the institution of the suit by the plaintiff, in such view of the matter, the contention put forth by the plaintiff that the Will,

if had been true, the same would have been disclosed at the earliest point of time and in such view of the matter, the Will had been projected very belatedly and no credence could be attached to the same as such cannot be countenanced. Particularly, when the custodian of the Will had chosen to disclose the Will only after the institution of the suit to the first defendant and when his evidence with reference to the same as above pointed out is natural and acceptable in all aspects, in such view of the matter, the trial Court is found to be wholly justified in placing reliance upon the evidence of DW2 for upholding the truth and validity of Ex.B4 Will propounded by the defendants.

18. However, in this matter, it is found that the signature of Devaraja Mudaliar was subjected to expert's scrutiny on the part of the plaintiff and the expert has given his report holding that on comparison of the questioned signature in the Will marked as Q1 and Q2 by him with the admitted signature of the testator marked as A1 to A11, according to him, the person who wrote the red enclosed signatures stamped and marked as A1 to A11 did not write the red enclosed signatures stamped and marked as Q1 and Q2 and according to him, he has come to the abovesaid determination on the footing that the standard signatures had been freely written and they agree in the handwriting characteristics on intense comparison and the questioned signatures have been imitated and show inherent signs of forgery like slow drawn movement, careful joining of letters and they differ significantly from the standard signatures in the handwriting characteristics and according to him, the characteristics differences include among other things, the skill of writing, the alignment between the letters in the signatures 'R.Devaraja' ; 'Mudaliar', the relative sizing between the letters 'R' & 'D' ; 'd' & 'l' ; 'M' & 'd', the connection between the letters in 'Devaraj', in the detailed designs such as the beginning and formation of loops and curves in the letters 'R', 'D', 'M', 'e', 'v', 'a', 'r', 'j', 'u', 'd', 'l', 'i' and on that footing, the report has been submitted by him and he has also been examined as CW1. However, as could be seen from the evidence adduced by CW1, it is found that he would only state that he had only recorded in his office note as to what are the tests adopted by him for comparison and in the report, he has only given the reasonings and he has not disclosed the tests conducted by him for comparison in Exs.C2 and C3 and also not disclosed in Exs.C2 and C3 about his experience in the forensic examination of the various documents and further admitted that there would be variations in the signature of a person in due course of time and the signature of a person would not be the same through out. However, according to him, there would be no basic differences in the signatures and there would be natural variations and changes and also further admitted that the changes would occur due to the age,

ill health and in the abovesaid circumstances, the writing speed would be slow and further admitted that he has not disclosed in his report as to in what proportion the various letters are found to be different while comparing the same and also further submitted that he has not disclosed as to in what proportion A1 to A11 had been written and also further admitted that he has not disclosed in his report as to how the signatures Q1 and Q2 had been joined and further admitted that he has not disclosed as to how the signatures A1 to A11 had been linked/joined, however, would claim that he had noted the differences in the joining and had not disclosed as to how they vary and also not disclosed in what aspects the loops found in the signatures differ and would further admit that the signatures in A1 to A11 also differ both in size as well as in style and he has not disclosed that the abovesaid differences had naturally occurred and accordingly, such being the evidence of CW1, in such view of the matter, when CW1 has not come forward as to what are the steps adopted by him for the purpose of comparison and when he has admitted that there would be changes in the signatures due to old age and ill health and when it is found that the Will in question was executed by Devaraja Mudaliar during his last days and when CW1 has not also disclosed his experience and that he he had possessed the requisite skill for comparison and when his report is found to be facing shortcomings as admitted by him, during the course of cross examination and as above noted, in such view of the matter, as rightly contended by the defendants' counsel and as rightly determined by the trial Court, in my considered opinion also, no safe credence could be attached to the evidence of the expert CW1 and his report for upholding that Ex.B4 Will had not been signed by Devaraja Mudaliar as sought to be made out by the plaintiff.

19. In this connection, it is useful to refer the decision relied upon by the plaintiff's counsel reported in (1992) 3 SCC 700 (State of Maharashtra Vs. Sukhdev singh and another) wherein the Apex Court had held that as a rule of prudence and refused to place implicit faith on the opinion evidence of a handwriting expert and such opinion evidence cannot take the place of substantive evidence and as a matter of prudence, the Court should look for corroboration before acting on such evidence and Court should not act upon the same unless substantially corroborated and the abovesaid decision of law has been outlined in the abovesaid decision as follows:

29. It is well settled that evidence regarding the identity of the author of any document can be tendered (i) by examining the person who is conversant and familiar with the handwriting of such person or (ii) through the testimony of an expert who is qualified and competent to make a comparison of the disputed writing and the admitted

writing on a scientific basis and (iii) by the court comparing the disputed document with the admitted one. In the present case the prosecution has resorted to the second mode by relying on the opinion evidence of the handwriting expert PW 120. But since the science of identification of handwriting by comparison is not an infallible one, prudence demands that before acting on such opinion the Court should be fully satisfied about the authorship of the admitted writings which is made the sole basis for comparison and the Court should also be fully satisfied about the competence and credibility of the handwriting expert. It is indeed true that by nature and habit, over a period of time, each individual develops certain traits which give a distinct character to his writings making it possible to identify the author but it must at the same time be realised that since handwriting experts are generally engaged by one of the contesting parties they, consciously or unconsciously, tend to lean in favour of an opinion which is helpful to the party engaging him. That is why we come across cases of conflicting opinions given by two handwriting experts engaged by opposite parties. It is, therefore, necessary to exercise extra care and caution in evaluating their opinion before accepting the same. So courts have as a rule of prudence refused to place implicit faith on the opinion evidence of a handwriting expert. Normally courts have considered it dangerous to base a conviction solely on the testimony of a handwriting expert because such evidence is not regarded as conclusive. Since such opinion evidence cannot take the place of substantive evidence, courts have, as a rule of prudence, looked for corroboration before acting on such evidence. True it is, there is no rule of law that the evidence of a handwriting expert cannot be acted upon unless substantially corroborated but courts have been slow in placing implicit reliance on such opinion evidence, without more, because of the imperfect nature of the science of identification of handwriting and its accepted fallibility. There is no absolute

rule of law or even of prudence which has ripened into a rule of law that in no case can the court base its findings solely on the opinion of a handwriting expert but the imperfect and frail nature of the science of identification of the author by comparison of his admitted handwriting with the disputed ones has placed a heavy responsibility on the courts to exercise extra care and caution before acting on such opinion. Before a court can place reliance on the opinion of an expert, it must be shown that he has not betrayed any bias and the reasons on which he has based his opinion are convincing and satisfactory. It is for this reason that the courts are wary to act solely on the evidence of a handwriting expert; that, however, does not mean that even if there exist numerous striking peculiarities and mannerisms which stand out to identify the writer, the court will not act on the expert's evidence. In the end it all depends on the character of the evidence of the expert and the facts and circumstances of each case.

32. It was then submitted, relying on [section 73](#) of the Evidence Act, that we should compare the disputed material with the specimen/admitted material on record and reach our own conclusion. There is no doubt that the said provision empowers the court to see for itself whether on a comparison of the two sets of writing/signature, it can safely be concluded with the assistance of the expert opinion that the disputed writings are in the handwriting of the accused as alleged. For this purpose we were shown the enlarged copies of the two sets of writings but we are afraid we did not consider it advisable to venture a conclusion based on such comparison having regard to the state of evidence on record in regard to the specimen/admitted writings of the accused Nos.1 and 2. Although the section specifically empowers the court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the Court should be extremely slow in venturing an

opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard. We have already pointed out the state of evidence as regards the specimen/admitted writings earlier and we think it would be dangerous to stake any opinion on the basis of mere comparison. We have, therefore, refrained from basing our conclusion by comparing the disputed writings with the specimen/admitted writings.

20. In the light of the abovesaid decision, when the expert's opinion is only a weak evidence and not substantive evidence and cannot be wholly relied upon without corroboration and considering the evidence of the expert examined as CW2 and the shortcoming's noted in his report and the mode of comparison opted by him and when the evidence of expert does not inspire confidence on the whole, in such view of the matter, on the basis of the opinion of the expert and without any corroborative factors to strengthen the same, in such view of the matter, in the light of the decision of the Apex Court above pointed out, I am unable to place reliance upon the evidence of the expert and his report.

21. On the other hand, coming to the ocular evidence of DW2 and in juxtaposition, considering the evidence of the expert, in all, it is found that when the evidence of the ocular evidence DW2 is found to be totally acceptable, inspiring and trustworthy and the evidence of expert not being corroborated on the part of the plaintiff with acceptable materials, in such view of the matter, in my considered opinion, the evidence of ocular witness should be accepted and relied upon and resultantly, accepting the evidence of DW2, in all, I hold that the Will dated 02.10.1973 propounded by the defendants is true, valid and binding on the plaintiff.

22. The plaintiff's counsel had put forth the contention that the case of the defendants that Devaraja Mudaliar had offered Gold, Silver articles, cash etc., to the plaintiff's husband and the plaintiff and also the other properties as recited in Ex.B4 Will cannot be true considering the position that Devaraja Mudaliar was indebted for meeting his family expenses to others and in this connection, placed reliance upon the mortgage deed executed by Devaraja Mudaliar and the promissory note executed by him marked as Exs.A10 and A12 and on that reasonings contended that the recitals contained in the Will are false and resultantly, the Court should hold that the Will propounded by the defendants is not a true and valid document. As above pointed out, the scribe cum attestor of Ex.B4 Will, DW2, had clearly deposed that he has scribed the

Will as per the dictates of the testator Devaraja Mudaliar. It is found that Devaraja Mudaliar had acquired vast properties by way of a partition deed dated 22.05.1950, marked as Ex.A3, in such view of the matter, it cannot be held that Devaraja Mudaliar was living in a penurious condition and had been required to borrow debts even to meet his family expenses. No doubt, the documents A10 and A12 are projected by the plaintiff evidencing that the same had been executed by Devaraja Mudaliar for obtaining debt to meet his family expenses. However, when there is no clear and acceptable evidence as to under what circumstances the abovesaid documents had been executed by Devaraja Mudaliar and particularly, considering the vast properties admittedly owned by Devaraja Mudaliar, in such view of the matter, merely on Exs.A10 and A12, we cannot infer that Devaraja Mudaliar would not have provided Gold, Silver articles, cash etc., to the plaintiff's husband and the plaintiff and the other properties to the plaintiff as recited in Ex.B4 Will. On the basis of Exs.A10 and A12, we cannot ipso facto hold that Ex.B4 Will would not have been a true document and therefore, the abovesaid suspicious circumstances projected by the plaintiff for discrediting the abovesaid Will cannot be accepted as such.

23. In this connection, the principles of law outlined in the decision relied upon by the plaintiff's counsel reported in (2006) 13 SCC 449 (B.Venkatamuni Vs. C.J.Ayodhya ram singh and others) are taken into consideration and followed as applicable to the case at hand.

24. As regards Ex.B4 Will and the evidence of DW2, the plaintiff's counsel would state that DW2, during the course of cross examination, has stated that the paper in which the Ex.B4 Will had been written had been purchased by Senthilkumar, the first defendant's son and he was aged about 15 years at that point of time. No doubt, the evidence on that line had been adduced by DW2. However, considering the evidence of DW2, in toto, both adduced during the course of chief and cross examination, it is found that he has very clearly deposed that it is only Devaraja Mudaliar who had executed Ex.B4 Will in his presence and the other attestors in a good state of mind and health. In such view of the matter, the abovesaid paper in which the Ex.B4 Will had been written had been purchased by Senthilkumar, the first defendant's son and he was aged about 15 years cannot be the basis for discrediting his evidence which is otherwise found to be in order. Only to stifle the evidence of DW2, on that aspect, it is found that the plaintiff has endeavoured to project additional evidence in the appeal for marking the marriage invitation card of the first defendant and the driving license of SenthilKumar, wherein, according to the plaintiff, the date of birth of Senthilkumar has been mentioned as 14.06.1978 and so he would not have been aged about 15 years

at the time of Ex.B4 Will and therefore, prayed for the reception of additional evidence projected by her in the matter.

25. However, as rightly put forth by the defendants' counsel, when the evidence of DW2 is assessed in toto and when his evidence is found to be acceptable and inspiring in all aspects, merely because he had deposed that the paper in which the Will had been scribed had been brought by Senthilkumar and he was aged about 15 years at that point of time, the abovesaid factor in isolation cannot be construed to hold that Ex.B4 Will would not at all have been executed by Devaraja Mudaliar as sought to be made out by the plaintiff. In such view of the matter, the additional evidence sought to be projected by the plaintiff, in my considered opinion, does not assume significance and not necessary for considering the issues involved in the matter, particularly, on their own, they would not be sufficient to discredit the evidence of DW2 in other aspects of the execution of the Will by Devaraja Mudaliar and the attestation of the same by him and Varalakshmi as deposed by him.

26. Furthermore, the additional evidence sought to be projected by the plaintiff are found to be of not recent origin. They are found to be available and known to the plaintiff even during the course of the proceedings before the trial Court, in such view of the matter, if the abovesaid documents have any acceptability, the plaintiff should have endeavoured to produce the documents before the trial Court. On the other hand, the plaintiff has not endeavoured to produce the said documents before the trial Court. No valid reason has been offered by the plaintiff for not producing the same before the trial Court, particularly, when it is found that the abovesaid documents had come to be issued even much prior to the filing of the suit by the plaintiff. In such view of the matter, as rightly put forth by the defendants' counsel, when the endeavour of the plaintiff to project the additional evidence does not satisfy the requirements of Order 41 Rule 27 of Civil Procedure Code in any manner, in such view of the matter and for the reasons above pointed out, the additional evidence projected by the plaintiff cannot be countenanced and accordingly, the petition laid by her with reference to the same in C.M.P. No.20774 of 2016 is liable to be dismissed.

27. A plea has been taken by the defendants that the suit laid by the plaintiff is barred by limitation. In this connection, reliance is placed upon Article 110 of the Limitation Act. Article 110 of the Limitation Act provides the time limit of 12 years for a person excluded from a joint family property to enforce a right to share therein when the exclusion becomes known to him. It is not in dispute that Devaraja Mudaliar died on 06.10.1973 and his wife Chandra Bai died on

14.04.1981. According to the plaintiff, who has been examined as PW1, she has deposed that after the demise of her father Devaraja Mudaliar, she demanded partition and the same was not given. She has also further deposed that within 1 year from the demise of her father Devaraja Mudaliar, she demanded partition and the defendants did not give her any share in the properties. Therefore, as could be seen from the above evidence adduced by the plaintiff as PW1 and when it is found that Devaraja Mudaliar died on 06.10.1973, it is found that in or about 1973 or 1974, the plaintiff had demanded partition of her share from the defendants, particularly, the first defendant. However, it has been admitted by her that the same had not been given to her. Therefore, when the defendants had refused to give the share in the suit properties as demanded by the plaintiff even during 1973/1974, if really, the plaintiff is entitled to claim any share in the suit properties or the properties left behind by Devaraja Mudaliar, immediately thereafter, particularly, on the refusal of the defendants to accede to her demand of partition of her share in the properties, the plaintiff should have come forward with the suit within the time allowed by law. However, it is found that despite the refusal of the defendants to give partition in the properties even during 1973/1974, the plaintiff is found to have levied the suit for partition only in the year 2002 and it is seen that the suit has been laid by the plaintiff only on 16.09.2002, nearly 27 years after the demand of share in the properties and on the refusal of the same, the plaintiff is found to have been come forward with the suit seeking partition. It has not been pleaded by the plaintiff that after the demand of partition made by her, she had been allowed to participate in the enjoyment of the properties or the income thereto and in such view of the matter, it is evident that the plaintiff had been excluded from the enjoyment of the properties left behind by Devaraja Mudaliar. In this connection, the plaintiff's counsel would put forth the arguments that Chandra Bai, the mother of the plaintiff, died only in the year 1981. Even after the demise of Chandra Bai, the plaintiff had not come forward to institute the suit for partition within the time allowed by law. On the other hand, nearly 20 years after the demise of Chandra Bai, she had laid the suit. The defendants had taken the plea that the plaintiff's share had already been settled and therefore, there is no question of any joint enjoyment of the properties left behind by Devaraja Mudaliar. As above pointed out, when even according to the plaintiff, the site in Cowl Bazar had been plotted out by the first defendant into various plots and he had alienated the plots from 1989 onwards to the knowledge of the plaintiff and her husband and also alienated the land in Pozhichalur in 1989 to the knowledge of the plaintiff and her husband and when the plaintiff and her husband has been the silent spectators to the said transactions and not objecting the same and even thereafter, they have not chosen to claim any partition immediately within the time allowed by law

and on the other hand, they had chosen to lay the suit only on 16.09.2002, accordingly, it is found that to the knowledge of the plaintiff and her husband, the defendants had been enjoying the suit properties on their own in their independent right by exercising full ownership over the same by way of alienations etc., and the abovesaid factors taken as a whole would clearly point out as contended by the defendants' counsel that there had been a clear exclusion of the plaintiff from the enjoyment of the properties to her knowledge and the plaintiff's demand for partition had also been refused and not given and in such view of the matter, as rightly pointed out by him, when the plaintiff has been excluded from the joint family properties, if at all she has got any right to claim any share therein, she should have instituted the suit within 12 years as and when the exclusion became known to her and when as above pointed out, the plaintiff's claim of share in the properties had been refused during 1973/74 and the defendants had been exercising full ownership of the properties to the knowledge of the plaintiff right from 1985 by way of alienating the same etc., in all, it is found that the suit having been laid by the plaintiff for partition in 2002, in such view of the matter, the plaintiff suit is found to be clearly barred under Article 110 of the Limitation Act. In this connection, the defendant's counsel placed reliance upon the decision reported in volume 77 Law weekly page 697 (Marudanayagam Pillai V.Sola Pillai) and the position of law with reference to the abovesaid point has been outlined in the abovesaid decision as follows:

Limitation Act, Art.127 - Suit for partition and separate possession - Claim of adverse possession to exclusion of co-owner - Exclusion, what is - Onus of proof - Nature of evidence - Scope.

It is settled law that lapse of time is never in itself a bar to partition and the statute of limitation will operate only from the time the plaintiff is excluded from his share and such exclusion become known to him. There can be no exclusion without a denial of the coparcener's right to a share and such denial may be express or implied. Where partition is demanded and refused or if the co parcener is expelled from the joint family, that would be clear exclusion. Once the plaintiff establishes his claim to a share in the joint family properties by showing that the family was joint and that he was a coparcener entitled to a share in its properties, the onus is on the defendant to establish exclusion to plaintiff's knowledge for over 12 years prior to suit.

22Bom 259, 4 CLJ 56,9 MLJ 128 and 53

Bom 699(712) (P.C) Relied on.

The exclusion that is contemplated under Art.127, is a conscious and deliberate act amounting to denial of the right of the particular member concerned to a share in the property analogous to ouster, and it must also have been brought home to him. To bar the plaintiff under Art.127, three questions will have to be considered, namely, (i) whether the claimant to a share was excluded from the joint family property (ii) if so excluded, when the exclusion took place; and (iii) when the exclusion, if any, became known to the claimant. The point to be noticed is that time will not begin to run against the plaintiff until he became aware that he was excluded from claiming a right to a share in the properties.

1961 S C.1474: Explained.

To constitute exclusion under Art.127, there must be an awareness or acknowledgment of the existence of the right and the claimant must be kept out of it. Clear and strong evidence would be required to hold that a person assented to his own exclusion and acquiesced in the continuance of the exclusion without asserting his right.

66 M.L.J. (S.N.) 11, 10 L.W. 156, 20 L.W. 109 (P.C.) (1959) 2 A.W.R.367, 1952 All.105, 28 L.W.919, 15 L.W.382 and (1963) 2 S.C.J.172: Referred to.

28. In the light of the abovesaid facts, when there has been clear exclusion of the plaintiff's demand of partition by the defendants and the defendants are found to have exercised full ownership of the properties in question to the knowledge of her husband, despite the above position, the plaintiff having failed to institute the suit within the time allowed by law, in such view of the matter, the plaintiff's suit is rightly held to be time barred by the trial Court.

29. In the light of the abovesaid discussions, it is found that the plaintiff is not entitled to partition and separate possession of 1/4th share in the suit properties as prayed for and also not entitled to claim the sum of Rs.40,000/- with interest said to be representing her 1/4th share in the sale proceeds of the Pozhichalur land and seven plots in S.No.104/9 in Cowl Bazar village and also not entitled to any profits from the suit land in proportion to the alleged share and in such view of the matter, it is found that considering the abovesaid discussions, in toto, the trial Court is found to be wholly justified in non suiting the plaintiff and considering the

reasonings and conclusions of the trial Court and when the same had been based upon the proper appreciation of the materials available on record as well as the principles of law governing the issues involved in the matter, in such view of the matter, the judgment and decree of the trial Court do not warrant interference.

30. For the reasons aforestated, the point nos.1 to 7 and the point in C.M.P. No.20774 of 2016 are answered against the plaintiff and in favour of the defendants.

Point Nos.8 & 9:

31. In conclusion, the judgment and decree dated 17.08.2007, passed in O.S. No.681/2004, on the file of the Additional District Judge, Fast Track Court - I, Chengalpet are confirmed and resultantly, the first appeal is dismissed with costs. C.M.P. No.20774 of 2016 is also dismissed. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sli

To:

The Additional District Judge,
Fast Track Court - I, Chengalpet,

Copy to:

The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.S.Sadasivam, Advocate SR.81039
+2cc to M/s.M.S.Subramanian, Advocate SR.80888
+1cc to M/s.L.N.Praghasam, Advocate SR.81475

A.S.No.714 of 2008
and
C.M.P. No.20774 of 2016

SAI (CO)
CB(12/02/2020)