

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.11.2019

PRONOUNCED ON : 28.11.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.804 of 2008

Devayammal ...Appellant/Plaintiff
Vs.

1. Poosappan
2. P.Kolandasamy
3. Saraswathy
4. M. Lalitha
5. G. Mohanraj
6. Rahamadula
7. Rajakhan
8. Madrasa Al Aksha School
rep. By its president G.Anwar Basha

...Respondents/Defendants

Prayer: First Appeal filed under Section 96 of Civil Procedure Code, against the judgment and decree dated 24.03.2008 made in O.S.No.34 of 2006 on the file of Addl. District Judge cum Fast Track Court-I, Erode.

For Appellant : Mr. V.P. Sengottuvel.

For Respondents :

for R1 to R3 : Mr. N. Manokaran

for R4 to R8 : No appearance. Set exparte vide
order dated 05.11.2019.

JUDGMENT

Aggrieved over the judgment and decree dated 24.03.2008 passed in O.S.No.34 of 2006 on the file of the Additional District Judge, Fast Track Court No.1, Erode, 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 permanent injunction.

4. The case of the plaintiff, in brief, is that the first defendant is the brother of the plaintiff and both are the children of the deceased Athappa Gounder. The suit properties are the ancestral properties of Athappa Gounder. Sellammal is the wife of Athappa Gounder and they had two sons, namely, Poosappan, the first defendant and one Palanisamy and a daughter, namely, the plaintiff. Palanisamy died at the age of 13 years leaving behind his mother Sellammal as his only legal heir. Since the suit properties are the ancestral properties, the 1/3 share to which Palanisamy is entitled to with reference to same devolved upon his mother Sellammal, and Athappa Gounder and the first defendant were each entitled to 1/3 share in the suit properties. Sellammal died on 16.09.1999 intestate and on her demise Athappa Gounder and the plaintiff and the first defendant are each entitled to 1/3 share of Sellammal in the suit properties. On the death of Sellammal, Athappa Gounder became entitled to 4/9 share, the first defendant became entitled to 4/9 share and the plaintiff became entitled to 1/9 share in the suit properties. Athappa Gounder died on 17.12.2001 intestate leaving behind the plaintiff and the first defendant as his heirs and accordingly on his demise, the plaintiff is totally entitled to 3/9 share in the suit properties and the first defendant is entitled to the remaining 6/9 share. After the advent of the Hindu Succession Amendment Act, which came into force on 09.09.2005, the plaintiff, the first defendant, Athappa Gounder and the deceased Palanisamy are each entitled to 1/4 share in the suit properties and accordingly on the demise of Palanisamy and after the demise of Sellammal, the mother and after the demise of Athappa Gounder, as above pointed out, according to the plaintiff, she, in toto, is entitled to 1/2 share in the suit properties. The plaintiff and the first defendant are in the joint possession and enjoyment of the suit properties and no partition has been effected amongst them. The plaintiff demanded allotment of her lawful share, however, the first defendant did not come forward to effect the partition and hence the plaintiff issued a pre suit notice on 24.08.2003 calling upon the first defendant to partition and allot her share in the suit properties. The first defendant is attempting to alienate or encumber the suit properties. Further according to the plaintiff, during the pendency of the suit, the first defendant created some records in respect of the suit properties in collusion with the other defendants dated 15.04.1999, 15.04.1999, 15.04.1999, 17.09.2003 and 17.09.2003 to defeat the right and title of the plaintiff. The plaintiff is not the party to the abovesaid sale transactions and the abovesaid sale transactions would not bind the plaintiff and the abovesaid sale deeds are invalid and no right would pass under the same. The

defendants 2 to 8 are added as necessary parties to the suit and hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

5. The second defendant is the son of the first defendant and both the defendants 1 and 2 have mainly resisted the plaintiff's suit contending that the suit properties are the ancestral properties of Athappa Gounder and according to them, Athappa Gounder had only one son, namely, the first defendant and one daughter, the plaintiff and put forth the case that he had no son by name Palanisamy as alleged in the plaint and also disputed the plaintiff's case that Palanisamy died at the age of 13 years leaving behind his mother Sellammal as his legal heir and accordingly disputed the case of the plaintiff that following the demise of Sellammal and the demise of Athappa Gounder she is entitled to 3/9 share in the suit properties as averred in the plaint. Further they disputed that Athappa Gounder died on 17.12.2001 as put forth in the plaint. According to them, the suit properties are the ancestral properties of Athappa Gounder, and Sellammal was his wife and Sellammal predeceased Athappa Gounder and Athappa Gounder died on 22.12.2001 and he had executed a registered will on 13.10.1999 in favour of his grandson Kolandasamy, namely, the second defendant, in a sound disposing state of mind, out of his free will, volition and bequeathed his 1/2 share in the suit properties and on his demise, the abovesaid will came into force and the remaining 1/2 share belongs to the first defendant. Hence, the defendants 1 and 2 are the absolute owners of the suit properties. During the life time of Athappa Gounder, he, the first defendant, the second defendant and grand daughter Saraswathy, jointly sold specific extent of 1302 sq. ft. on 15.04.1999 to one Rakamathal and on the same date sold an extent of 567 sq. ft. to one Rajakhanand and an extent of 790.56 sq. ft. to one Anwar Batcha in Item No.1 of the suit properties and on 27.09.2003, the first defendant along with the second defendant and Saraswathi sold an extent of 882 sq. ft. to G. Mohanraj and 883 sq. ft. to Lalitha in the first item of the suit properties and therefore, the defendants 1 and 2 and their family members were exercising right over the suit properties by alienating the same and the claim of the plaintiff that Athappa Gounder died intestate is false and contended that the plaintiff has no claim of share in the suit properties and further putforth the case that the plaintiff had deliberately suppressed the existence of the registered will executed by Athappa Gounder in favour of the second defendant with a view to make a wrongful gain and the plaintiff's suit is bad for non-joinder of the purchasers abovestated and the items 3,5,6 and 8 are the residential houses and the plaintiff's claim with reference to the same is not sustainable in law and the suit properties are not properly

described and the plaintiff has not paid the proper court fees and accordingly sought for the dismissal of the plaintiff's suit.

6. Further in the additional written statement they would put forth the case that the claim of the plaintiff that the first defendant had created the various sale deeds in favour of the third parties is false and also disputed that the abovesaid sale deeds had not been acted upon and according to them, the defendants 4 to 8 are in the possession of the properties purchased by them and further they would also put forth that the claim of the plaintiff that she had become entitled to 1/4 share in the suit properties by virtue of the Hindu Succession Amendment Act, which came into force on 09.09.2005 is false and thereby the plaintiff, in toto is entitled to claim 1/2 share in the suit properties is false and according to them, the Hindu Succession Amendment Act would not apply to the daughter born before the enactment of the said Act and also contended that inasmuch as Athappa Gounder had executed the will on 13.10.1999 bequeathing half share in the suit properties infavour of the second defendant, the proviso to Section 6(1) of the Hindu Succession Act, 39 of 2005 would apply and the plaintiff, therefore, not entitled toclaim any share in the suit properties and the suit is liable to be dismissed.

7. The defendants 6 and 8 have resisted the plaintiff's suit contending that the plaintiff is not entitled to claim share in the suit properties as put forth in the plaint and according to them, on 15.04.1999, the sixth defendant had purchased 1302 sq. ft. in the first item for a valid consideration and following the same, he had submitted a plan to the village panchayat and obtained approval for constructing a house therein and also applied for loan to put up the construction and he had also mortgaged the property in favour of Tamilnadu Electricity Board where he is working and the house put up by him has been assessed to tax in his name and enjoying the same by paying the houestax, water tax and electricity bills, etc. On 15.04.1999, the eighth defendant purchased an extent of 790.56 sq. ft for a valid consideration from Athappa Gounder and the others and he had also purchased 5502 sq. ft. on the eastern side by virtue of the sale deed dated 31.12.1997 and he had obtained approval from the village panchayat and constructed an Arabic school and enjoying the property and the plaintiff knew about the sale transaction and not put forth any objection and hence, the plaintiff is not in the possession and enjoyment of the suit properties as claimed in the plaint and not properly paid the court fees and the plaintiff is not entitled to obtain the relief of permanent injunction and the share as prayed for and the plaintiff's suit is bad for mis-joinder of parties and liable to be dismissed.

8. The plaintiff in the reply statement reiterated that Palanisamy was born to Athappa Gounder and Sellammal and further challenged the truth and validity of the will said to have been executed by Athappa Gounder in favour of the second defendant on 13.10.1999 and according to her, the abovesaid will is a fabricated document and Athappa Gounder was ill and sick and bed ridden and suffering from diabetes and high blood pressure and not in the sound and disposing state of mind on 13.10.1999 or at the relevant point of time and he did not go to the Registrar's office and the will projected by the defendants had been created by them and Athappa Gounder was very much affectionate towards the plaintiff and he would not have any motive to deprive any share to her and the will is unnatural and suspicious and the encumbrance created by the first defendant and his children are not valid and binding on the plaintiff and the plaintiff is entitled to 1/2 share in the suit properties including the residential houses and no adverse can be taken against her and accordingly prayed for the reliefs claimed.

9. 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 plaintiff is entitled to obtain partition and separate possession of 3/9 share in the suit property?
2. Whether the plaintiff is entitled to obtain the relief of permanent injunction against the defendants in respect of the suit properties as prayed for?
3. Whether it is true that Athappa Gounder had executed the will on 13.10.1999 and the same had come into force?
4. Whether the plaintiff's suit is bad for non-joinder of the purchasers of the suit properties?
5. To what relief the plaintiff is entitled to?

Additional Issues

1. Whether the sixth defendant had purchased an extent of 1302 sq. ft. in the first item of the suit properties on 15.04.1999?
2. Whether the eighth defendant had purchased an extent of 790.56 sq. ft in the second item of the suit properties from the defendants 1 and 2?
3. Whether the plaintiff is entitled to claim partition against the defendants 6 to 8?

10. In support of the plaintiff's case, P.Ws.1 and 2 were examined and Exs.A1 to A16 were marked. On the side of the defendants, D.Ws. 1 to 6 were examined and Exs.B1 to B12 were marked.

11. 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.

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

1. Whether the plaintiff is entitled to claim partition and separate possession of 1/2 share in the suit properties as per the amended plaint?
2. Whether the plaintiff is entitled to obtain the relief of permanent injunction as prayed for?
3. Whether the will dated 13.10.1999 is true, valid and binding upon the plaintiff?
4. Whether the plaintiff's suit is bad for non joinder of necessary parties?
5. To what relief the plaintiff/appellant is entitled to?
6. To what relief the defendants are entitled to?

Point Nos. 1 to 4

13. The plaintiff is the sister of the first defendant. The second defendant is the son and the third defendant is the daughter of the first defendant. The defendants 4 to 8 are the purchasers of the suit properties. The suit has been laid by the plaintiff for partition and permanent injunction. The plaintiff is the sister of the first defendant and both the plaintiff and the first defendant are the children of the deceased Athappa Gounder. Sellammal is the wife of Athappa Gounder. The plaintiff has pleaded in the plaint that Athappa Gounder and Sellammal had two sons, namely, the first defendant and one Palanisamy and a daughter, namely, the plaintiff. The abovesaid case of the plaintiff that Palanisamy was born to Athappa Gounder and Sellammal is being seriously challenged by the contesting defendants. According to them, no son by name Palanisamy was born to Athappa Gounder and Sellammal and therefore, they would put forth the contention that the claim of the plaintiff seeking share in the suit properties through Palanisamy as the son of Athappa Gounder and Sellammal is legally unsustainable. In the light of the abovesaid rival pleas put forth by the respective parties, at the foremost, it has to be determined whether

Palanisamy is the son of Athappa Gounder and Sellammal as put forth by the plaintiff.

14. As rightly contended by the defendants' counsel, if really Palanisamy had been born to Athappa Gounder and Sellammal, the plaintiff would have endeavoured to state as to when Palanisamy had been born. The plea of the date, month and year of birth of Palanisamy is conspicuously absent in the plaint. With reference to the abovesaid case, the plaintiff would only plead that Palanisamy died at the age of 13 years leaving behind his mother Sellammal as his only legal heir. Other than that, nothing has been averred in the plaint, as regards when Palanisamy had been born and his education and the other activities. In this connection, the plaintiff, during the course of evidence, had projected two documents for sustaining her case that Palanisamy had been born to Athappa Gounder and Sellammal and the same are marked as Ex.A15 and A16. Ex.A15 is stated to be the death certificate of Palanisamy and Ex.A16 is stated to be the school leaving certificate of Palanisamy. The abovesaid documents are pressed into service for sustaining the case projected by the plaintiff that Palanisamy was born to Athappa Gounder. In this connection, the plaintiff examined as P.W.1 has admitted that her grand father is UrumanaGounder. Urumana Gounder had one son namely Athappa Gounder and daughters, namely, Karupayee Ammal, Marayee Ammal and Angayeeammal and further would depose that her aunt Angayeeammal was residing separately and Angayeeammal had a son by name Palanisamy and would state that she does not know whether the said Palanisamy was staying in her house during his studies and admitted that her aunts,abovestated, have share in the suit properties and they had not been impleaded as the parties to the suits and would further admit that she had obtained the death certificate Ex.A15 after the institution of the suit and obtained the school leaving certificate Ex.A16 just two years ago and would state further that Palanisamy had died after completing 5th standard and even before joining 6th standard. Further, P.W.2 examined on behalf of the plaintiff during the course of chief examination would claim that Palanisamy is the son of Athappa Gounder and he and Palanisamy had studied together at Bavani High school from 6th to 8th standard and Palanisamy died due to snake bite when he was studying 8th standard and before joining high school, Palanisamy was studying in Perumapalayam Middle school. During cross examination, P.W.2 has deposed that Palanisamy died due to snake bite and did not study in Perumapalayam middle school further would state that there is no school at Perumapalayam and further would also admit that there are many persons by name Athappa Gounder and would state that he does not know the name of the wife of the Athappa Gounder. On the basis of the abovesaid oral evidence and the

documents marked as Exs.A15 and A16, the plaintiff seeks to sustain the case that Palanisamy was also born to Athappa Gounder and Sellammal.

15. If really Palanisamy had been born to Athappa Gounder, as contended, the plaintiff would have disclosed as to when Palanisamy had been born to Athappa Gounder. Equally, the plaintiff would have endeavoured to cause the production of the birth certificate of Palanisamy to sustain her case that Palanisamy was born to Athappa Gounder. It has been admitted by the plaintiff that he has three aunts. If really, Palanisamy had been born to Athappa Gounder and Sellammal, as put forth by the plaintiff, the same would have been known to her aunts and in such view of the matter, as rightly contended by the defendants' counsel, the plaintiff would have endeavoured to examine her aunts to sustain her abovesaid case. But, strangely, the plaintiff, for the reasons best known to her, had not chosen to examine any one of the aunts to buttress her version. That apart, the plaintiff has not endeavoured to examine any one of the relatives of Athappa Gounder or relatives of Sellammal to sustain her plea that Palanisamy had been, indeed, born to Athappa Gounder and Sellammal as claimed by her. It has been admitted by P.W.2, there are several person by name Athappa Gounder in the village. The position being above, in such view of the matter, merely on the production of the death certificate of one Palanisamy, son of Athappa Gounder, it cannot be inferred safely that Palanisamy referred to in Ex.A15 death certificate is the son born to Athappa Gounder as sought to be projected by the plaintiff. It is found that Ex.A15 death certificate had been secured by the plaintiff after the institution of the suit and when the defendants are throwing a serious challenge to the truth and validity of the abovesaid document and contending that the abovesaid document had been created by the plaintiff to suit her case and when the plaintiff has not placed any material as to on what basis she had secured the abovesaid document, i.e., her source for obtaining the abovesaid document and further to show the truth and validity of the abovesaid document i.e., the same had been issued by the lawful authority on the basis of the records maintained in the usual course of business, all put together, as rightly determined by the trial court, no safe reliance could be attached to Ex.A15 death certificate for coming to the conclusion that Palanisamy was born to Athappa Gounder as put forth by the plaintiff.

16. The plaintiff has marked Ex.A16 claimed to be the school leaving certificate of Palanisamy. The abovesaid certificate has been issued by the head master, Middle School, Perumapalayam. The entries in the school register, as such, cannot be the basis for sustaining the authenticity of the same without any further material to hold as to on what basis the abovesaid information

had been furnished to the school. When there are several details contained in Ex.A16 as regards Palanisamy including his date of birth and when there is no material as to on what basis the abovesaid entries had been entered into the school register and when Ex.A16 certificate had been obtained by the plaintiff after the institution of the suit and when the defendants are seriously repudiating the truth and validity of the same, in such view of the matter, merely on the basis of Ex.A16, it cannot be presumed or concluded that Palanisamy is the son of Athappa Gounder as sought to be projected by the plaintiff. Further Ex.A16 reads that Palanisamy had left middle school Perumapalayam while studying in 5th standard. As to thereafter where Palanisamy had continued his education, there is no reliable proof on the part of the plaintiff. In this regard, P.W.2 examined on behalf of the plaintiff would claim that Palanisamy had studied with him from 6th standard to 8th standard in the high school and he died due to snake bite while he was studying in 8th standard. Per contra, the plaintiff, as abovenoted, during her course of evidence would state that Palanisamy had died after completing 5th standard and even before joining 6th standard. Therefore, when the material contradictions are found in the evidence of P.W.1 and P.W.2, in such view of the matter, no safe reliance could be attached to the evidence of P.W.2 for upholding the plaintiff's case.

17. To sustain the documents projected by the plaintiff marked as Exs.A15 and A16, the plaintiff's counsel would rely upon the decisions reported in

1. 1988 (Supp) SCC 604 (Birad Mal Singhvi vs. Anand Purohit)
2. 2005 (3) SCC 702 (State of Punjab vs. Mohinder Singh)
3. 2010 SCC Online Mad 4333 (Ramakrishna Reddiar vs. Sathiamurthy & Ors)
4. 2016 4 L.W. 481 (Selvamani & ors vs. Minor K. Gomathi & Anr)

Per contra, the counsel for the defendant with reference to the abovesaid position of law as regards the admissibility of the documents under Section 35 of the Indian Evidence Act, would rely upon the decisions reported in

1. 1989 (2) LW 197 DB - para Nos. 10 and 11 (Mohan and another vs. Santha bai Ammal and others)
2. 2000 (3) CTC 663 (mad) para Nos 21 (Chief General Manager, SBI vs. M. Balakrishnan & another)
3. (2009) 6 SCC 681 (Ram Suresh Singh vs. Prabhat Singh Alias Chhotu Singh and another)
4. (2006) 5 SCC 584 (Ravinder Singh Gorkhi vs. State of U.P.)

5. 1988 (Supp) SCC 604 (Birad Mal Singhvi vs. Anand Purohit).

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

18. Considering the abovesaid factors in toto, when the evidence adduced by P.W.2 as regards the birth of one Palanisamy as the son of Athappa Gounder and their joint studies as claimed by him cannot be accepted and when there are material contradictions with reference to the same, as above pointed out, and when the plaintiff had not endeavoured to examine the close relatives of the family to sustain her case of birth of Palanisamy as the son of Athappa Gounder and when it is further seen that the plaintiff has secured the documents marked as Exs.A15 and A16 only after the institution of the suit and after the lis had erupted between the parties, when the defendants are, in toto, challenging the truth and validity of the abovesaid documents and when the plaintiff had not disclosed and divulged as to on what basis or source or knowledge she had endeavoured to secure the abovesaid documents and when the plaintiff had also not endeavoured to sustain that the information furnished in Exs.A15 and A16 had been recorded based on the proper verification by the appropriate authorities and when the source of information furnished to the appropriate authorities had not been established by the plaintiff and when with reference to the same, there is no acceptable and reliable material forthcoming on the part of the plaintiff, in such view of the matter, it is seen that no safe reliance could be attached to Exs.A15 and A16 as well as the oral evidence adduced by the plaintiff for upholding her case that Athappa Gounder had a son by name Palanisamy. In the light of the abovesaid determination, the case of the plaintiff that she had derived a quantum of share in the suit properties through Palanisamy, as put forth in the plaint, does not merit acceptance in any manner.

19. The contesting defendants have projected the case that the suit properties being the ancestral properties, hence, Athappa Gounder and the first defendant had equal share in the same. That the suit properties are the ancestral properties is not disputed by the plaintiff. In this connection, the contesting defendants would project the case that Athappa Gounder during his life time had bequeathed his 1/2 share in the suit properties in favour of his grandson, namely, the second defendant, by way of the will dated 13.10.1999 and the abovesaid will has been marked as Ex.B2. The plaintiff has challenged the truth and validity of the abovesaid will and according to the plaintiff, as put forth in the reply statement, the abovesaid will had been fabricated by the defendants and it is also her case that Athappa Gounder had not executed any will in favour of

the second defendant and he was very ill and sick and bed ridden at the relevant point of time and suffering from diabetes and high blood pressure and not in a sound disposing state of mind and therefore, there is no possibility of Athappa Gounder proceeding to the Registrar's office for the registration of the will projected by the defendants and therefore, contended that the will Ex.B2 had been created by the contesting defendants.

20. In the light of the abovesaid version put forth by the plaintiff, the contesting defendants, being the propounders of Ex.B2 will, the onus is upon them to establish the truth and validity of the same in accordance with law. The plaintiff would also put forth certain suspicious circumstances surrounding the will.

21. To sustain their case that Athappa Gounder had executed the will in question Ex.B2, they had examined the attestors of the will as D.W.s 4 and 5. D.W.4 in the course of evidence would state that he knew Athappa Gounder and Athappa Gounder had solicited his presence as an attesor to the will to be executed by him in favourof his grandson, namely, Kolandasamy and accordingly he and one Mani had been to the office of the scribe, namely, Ravi and at that point of time Athappa Gounder was also present and Athappa Gounder handed over the documents to the scribe Ravi and on the basis of the same and as per the instructions given by Athappa Gounder, the scribe prepared a draft will and read over the contents of the same and Athappa Gounder had acknowledged the same and thereafter, based on the draft will, the original will had been typed and read over toAthappa Gounder by the scribe and Athappa Gounder acknowledging the truth of the same, signed the will on all the pages in their presence and he and Mani and the scribe had witnessed the execution of the will by Athappa Gounder and thereafter, Mani had attested the will and thereafter he had attested the will and the same had been witnessed by Athappa Gounder as well as the scribe and thereafter, the scribe had signed the will and the same had been witnessed by Athappa Gounder, he and the other attesor and at the time of execution of the will Athappa Gounder was in a fit state of mind and executed the will without any influence and on his own volition and informed that he intend to register the will and Ex.B2 is the will executed by Athappa Gounder. Similar is the evidence tendered by the other attesor, namely, Mani, who has been examined as D.W.5. That apart, D.W.5 would also further testify that after the execution of the will as spoken to by him, as directed by Athappa Gounder, he and one Shanmugam went to Sub Registrar's Office. Athappa Gounder had presented the will executed by him infavour of his grandson Kulandasamy to the Registrar and Athappa Gounder had signed in the will and also affixed his LTI and the same had been witnessed by him and

Shanmugam and they identified Athappa Gounder in the Registrar's office and the same had been witnessed by Athappa Gounder and they had also affixed the signatures in the Registrar's office and Ex.B2 is the will executed by Athappa Gounder. Considering the evidence of D.Ws 4 and 5, in toto, and when the plaintiff has not elicited any material from them during the course of cross examination in support of her case, particularly, for discrediting their evidence with reference to the execution of the will by Athappa Gounder and when the alleged contradictions sought to be projected in their evidence during the course of cross examination centering only on as to in which pen they had put their signature, etc., and the date of the execution of the will as such and in other words, when there is nothing pointed out during the course of cross examination that their evidence is untrustworthy and unreliable and unacceptable and on the other hand, considering the evidence of D.Ws.4 and 5, in toto, when they had in a clear manner, without any material contradictions, deposed about the execution of the will by Athappa Gounder after knowing the contents of the same as per his directions and on his own volition had executed the will in question and when it is further seen that the will in question Ex.B2 had been registered and the factum of registration had also been spoken to by D.W.5, as above pointed out, in all, considering the evidence of D.Ws.4 and 5 together, as rightly held and determined by the trial court, the contesting defendants had sustained the truth and validity of Ex.B2 will through their abovesaid evidence as per law.

22. No material contradiction as such had been projected in the evidence of D.Ws.4 and 5 for rejecting their evidence. In this connection, the counsel for the plaintiff would contend that the first defendant examined as D.W.1 would claim that he was present at the Registrar's office at the time of registration of the will, and according to him, per contra, the second defendant examined as D.W.2 would only state that his father namely, the first defendant was not present at the time of the execution of the will and he does not know who had accompanied Athappa Gounder to the Registrar's office and further he would also contend that D.W.4, during the course of cross examination would admit that at the time of execution of the will Athappa Gounder's son Poosappa was also present and Posappa Gounder was also present at the time of registration and accordingly contended that inasmuch as the first defendant was present at the time of the execution of the will and taken a major role with reference to the execution of the same, on that basis, put forth the argument that Ex.B2 will should not be relied upon. It is also his further contention that Athappa Gounder was aged about 90 years at the time of execution of the will and there is a remote possibility of Athappa Gounder visiting the Registrar's office for the purpose of registration

of the will. Further he would also contend that Athappa Gounder was not maintaining good health and suffering from diabetes and blood pressure and there is no possibility of the execution of the will by Athappa Gounder on his own volition at the old age. Further he would also put forth the argument that there is no valid reason projected for disinheriting the plaintiff from succeeding to his properties on the part of Athappa Gounder and on that score also, challenged the truth and validity of Ex.B2 will.

23. Countering the same, the counsel for the contesting defendants would contend that mere presence of the first defendant at the time of execution of the will even assuming to be true as spoken to by D.W.4 in the cross examination, that factor in isolation would not lead to the conclusion that Athappa Gounder was influenced by the first defendant qua the execution of the will and when there is no further evidence as regards any role played by the first defendant qua the execution of the will and furthermore, when the will in question had been executed only in favour of the second defendant as such, according to him, the abovesaid ground cannot at all be a suspicious circumstance for rejecting the will in question. He would also put forth the contention that in villages, there is nothing unusual in people carrying on their daily chores even at the old age and therefore, according to him, nothing unusual could be attributed on the part of Athappa Gounder proceeding to Registrar's office at his old age. Further according to him, when Athappa Gounder had given valid reasons for bequeathing his properties in favour of the second defendant, the grandson, and also for disinheriting his daughter, the plaintiff, and when the testator is competent to bequeath his properties in favour of anyone as he chooses and no exception could be taken to the same, hence, the same cannot also be a ground for disputing the will in question. According to him, the grounds projected by the plaintiff's counsel as suspicious circumstances cannot at all be construed as suspicious circumstances and therefore, according to him, based on the reliable and satisfactory evidence of D.Ws. 4 and 5, the court should uphold the truth and validity of Ex.B2 will.

24. In support of his contentions, the plaintiff's counsel, placed reliance upon the decisions reported in

1. AIR 1959 SC 443 (H. Venkatachala Iyengar vs. B.N. Thimmajamma & Ors)
2. 1996 (2) MLJ 596 (Suguna Bai Vs. Muniammal @ Dhanalakshmi & Ors)
3. AIR 2006 SC 1895 (Joseph Antony Lazarus vs. A.J. Francis).

4. 2006 (3) MLJ 1 (Capt. Marcus R. Dare Vs. Dr. Mrs. Eunice Rani Sankaran and Anr)
5. 2009 (3) SCC 687 (Bharpur Singh & Ors. vs. Shamsher Singh)
6. 2015 (8) SCC 615 (Jagdish Chand Sharma vs. Narain Singh & Ors.)

Similarly the defendants' counsel, in support of his contention, placed reliance upon the decisions reported in

1. 2008 (1) LW 255 SC para Nos 12 to 22 (Savithiri and others vs. Karthyayani Amma and others)
2. 2005 (8) SCC 67 para Nos 23,24,25 and 29 (Pentakota Satyanarayana vs. Pentakota Seetharatnam)
3. 2005 (1) CTC 443 SC para Nos, 11, 14, 15 & 18 (Sridevi and others vs. Jayaraja Chetty and Ors)
4. 2004 (5) CTC 790 SC Para No. 10 (Daulat Ram and ors vs. Sodha and others)
5. 2003 (1) CTC 308 SC Para Nos 8 to 10 (Janki Narayan Bhoir vs. Narayan Namdeo Kadam)
6. 2005 (1) CTC 11 DB Para Nos. 25, 28, 30 to 33, 36 to 38 (Janki Devi vs. R. Vasanthi)
7. 2008 (4) CTC 589 Para Nos 22 to 33 (Muniammal vs. Annadurai and others)
8. 2017 (2) CTC 35 Para Nos 28, 29, 33, and 34 (Kasthuri Bai and others vs. Ashokkumar and others)
9. 2003 (4) CTC 470 (Dr. Shantha vs. Sharada)

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

25. The plaintiff is challenging the truth and validity of Ex.B2 will. We have also to consider as to the evidence tendered by the plaintiff with reference to the will in question. In this connection, the plaintiff examined as P.W.1 during the course of examination, has stated that, she does not know directly as to whether the father had executed the will during his life time and does not know whether the said will had been registered and came to know about the execution of the will by her father only from the written statement put forth by the second defendant and she had not seen the will put forth by him till date and would further claim that she is challenging the truth of the will without seeing the same and would further state that it is true that her father, during his life time and in a fit state of mind had executed the will and she does not know whether the said will had come into force and would further admit that it is true to state that the first defendant by way of his right to the

suit properties and second defendant by way of his claim of right to the suit properties on the basis of will, are enjoying the same and the above being the evidence of the plaintiff, when it is seen that the plaintiff has, indeed, accepted the execution of the will by Athappa Gounder in favour of the second defendant and resultantly, the enjoyment of the suit properties by the defendants 1 and 2 and when it is further noted that Athappa Gounder was in a fit state of mind and health during the relevant point of time and when the plaintiff has not even perused the will in question, however, would challenge the same without any basis, as above pointed out admitted the execution of the same by Athappa Gounder in favour of Kolandaisamy in a fit state of health and mind and when the truth and validity of the will in question namely Ex.B2 had been amply established by the contesting defendants through D.Ws.4 and 5 and when other than pleading that Athappa Gounder was suffering from diabetes and high blood pressure, there is no other plea projected by the plaintiff as regards the illness on the part of Athappa Gounder and when there is nothing unusual in the villages to see the people surviving even for a very long time more than 85 to 90 years and nothing unusual could be attributed to the same as such and furthermore, when the will in question had been registered at the registrar's office and the factum of registration had also been spoken to clearly by D.W.5, as above pointed out, and when there is no material worth acceptance on the part of the plaintiff that Athappa Gounder was not in a fit state of health and mind at the relevant point of time and that apart, when it is noted that Athappa Gounder had died only on 22.12.2001, nearly two years after the execution of the will in question and when valid reasons had been incorporated in the will for disinheriting the plaintiff, i.e. the plaintiff had been provided with adequate seer in all aspects at the time of her marriage and accordingly it is found that the alleged suspicious circumstances beseting the will in question as sought to be projected by the plaintiff do not hold water and found to be totally unacceptable and when the defendants have also explained as regards the belated production of the will in a satisfactory manner and accordingly considering the principles of law outlined by the Apex Court as well as our Court in the various decisions relied upon by the plaintiff's counsel as well as the defendants' counsel in toto and applying the same to the case at hand, in my considered opinion, as rightly determined by the trial court also, it has to be held that Ex.B2 will had been, indeed, executed by Athappa Gounder bequeathing ½ share in the suit properties in favour of the grandson, namely, the second defendant Kolandasamy and it has to be further held that the contesting defendants, namely, the defendants 1 and 2 had established the truth and validity of Ex.B2 will without any doubt.

26. The defendants have also taken the plea that the plaintiff's suit is bad for non-joinder of necessary parties. However, considering the fact that the plaintiff had impleaded the purchasers subsequent to the inception of the suit and when it is neither the case of the plaintiff nor the case of the defendants that the plaintiff's aunts have share in the suit properties as such, in all, it has to be held that the plaintiff's suit is not bad for non-joinder of necessary parties.

27. Lastly, the plaintiff would invoke the Hindu Succession Amendment Act, which had come into force on 09.09.2005 and would project the arguments that there is a conflict of views in the decisions of Apex Court with reference to the same as reported in 2016 2 SCC 36 (Prakash and others vs. Phulavati and others) and 2018 3 SCC 343 (Danamma alias Suman Surpur and another vs. Amar and others). In this connection, the defendants' counsel would contend that in the case of any conflict of opinion between the decisions of two equal benches of the Apex Court, as to what should be the mode to be adopted by the High Court, has been brought out in the decision reported in 2017 3 CTC 170 (M. Krishnamoorthy vs. K. Pondeepankar) and the position of law with reference to the same as outlined in the abovesaid decision is extracted below:

"24. Now it has to be seen as to what is the duty of the High Court, when it faced such a situation of direct conflict of opinion between the decisions of Co-equal Benches of the Hon'ble Supreme Court. This question was answered by the Full Bench of Patna High Court in Amar Singh Yadav and another v. Shanti Devi and others, 1987 Patna 191. The Full Bench had observed as follows:

"24. To conclude on this aspect it has held that where there is a direct conflict between two decisions of the Hon'ble Supreme Court rendered by the Co-equal Benches, the High Court must follow up with the judgment which appears to it to sit the law more elaborately and accurately."

The Full Bench judgment of Patna High Court was followed by this Court in Neyveli Lignite Corporation Ltd., vs. Special Tahsildar (Land Acquisition) Lignite Project, 1988 (2) L.W. 79. The same view was reiterated by the Hon'ble Mr. Justice K. Sampath in Special Tahsildar (Land Acquisition), Vembakottai Reservoir Scheme, Srivilliputhur v. Seeni Naicker and two others, 1998 (2) CTC 99. Hon'ble Mr. Justice S.B. Sinha as a Judge of Patna High Court had also taken a same view in The Oriental Fire and General Insurance Company v. Panapati Devi, 1989 (2) ACC 617."

Considering the abovesaid position of law and also considering the facts and circumstances of the case at hand and the applicability of the Hindu Succession Amendment Act to the same particularly in the light of the will projected by the defendants and the Amendment Act having come into force only from 09.09.2005, in all, I deem it fit and appropriate to follow the decision reported in 2016 2 SCC 36 and accordingly hold that the plaintiff is not entitled to claim any share in the suit properties by invoking the Hindu Succession Amendment Act 39 of 2005.

28. In the light of the abovesaid discussions, I hold that the plaintiff is not entitled to obtain partition and separate possession of 1/2 share in the suit properties as put forth in the amended plaint. I further hold that the will dated 13.10.1999 is true, valid and binding upon the plaintiff. I hold that the plaintiff's suit is not bad for non-joinder of necessary parties and I further hold that the plaintiff is not entitled to obtain the relief of permanent injunction as prayed for. Accordingly, the point numbers 1 to 4 are answered.

Point Numbers 5 and 6

29. For the reasons aforesaid, the judgment and decree dated 24.03.2008 passed in O.S.No.34 of 2006 on the file of the Additional District Judge, Fast Track Court No.1, Erode, are confirmed and resultantly, the first appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

bga
Copy to

1. Additional District Judge,
Fast Track Court No.1, Erode.
2. The Section officer,
V.R. Section, High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate Sr.99657
+1cc to Mr.V.P.Sengottuvel, Advocate Sr.99787

A.S.No.804 of 2008

ssd[co]
srg 23/12/2020