

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 29.08.2019	Delivered on 14.10.2019
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No. 422 of 2001
and
TOS.No. 33 of 2008

C.S.No. 422 of 2001

- 1.Mrs.Chandra Sundararaj (died)
- 2.Mrs.S.Annapoorana

(Amended as per order made in
A.P.No.775/2005 dated 21.03.2006)

...Plaintiffs

Vs

- 1.C.M.Dhinakaran @ Suresh
- 2.Mrs.Annapoorana (2nd defendant transposed as
2nd Plaintiff)
- 3.Hi-Tech Spun Vessels represented by
its Proprietrix Mr.K.Aavani
- 4.N.N.Balasubramanian
(Defendants 3 and 4 impleaded as per order dated
17.09.2009 in A.No.5561/2003)

...Defendants

Prayer in C.S.No. 422 of 2001: Plaint filed under Order IV Rule1 of the Original Side Rules r/w. Order VII Rule 1 of the Code of Civil Procedure praying for a judgment and decree against the defendants as follows:-

a) for a declaration that the alleged family arrangement got signed by the first defendant in June 1994 is void, ab intio and non-est;

b) For partition of the suit properties morefully described in plaint schedules 'A' to 'D' by metes and bounds into three equal shares and allotment of 1/3rd share to the plaintiff;

90(bi) The sale by the first defendant in favour of third and fourth defendant would not bind on the plaintiff and the second defendant.

90(bii) The first sale in favour of third defendant may be adjusted against the share of first defendant to which he would be entitled to and declare that the second sale of the third defendant and the sale in favour of the fourth defendant would be subject to the result of above suit.

***(90(bi) and b(ii) amended as per order dated 17.09.2009 in A.No. 5562 of 2003)**

- c) For appointment of a Receiver;
- d) For appointment of a Commissioner;
- e) For directing the first defendant to pay to the plaintiffs the costs of this suit and
- f) For granting such further or other reliefs.

For Plaintiff : Mrs.Chitra Sampath, Senior Counsel
for Second Plaintiff

For Defendant : Mr.D.Krishnan for First Defendant

TOS.No. 33 of 2008

L.N.Praghasham

...Plaintiff

Vs.

C.M.Dhinakaran @ Suresh

...Defendant

Prayer in TOS.No. 33 of 2008: This petition filed under Sections 222, 255 and 276 of the Indian Succession Act XXXIX of 1925 for the grant of Probate. Against this petition a Caveat was filed on 10th day of July 2008 by the Caveator above named. The supporting affidavit was filed on 29th day of July 2008. As per Order of Court dated 11.09.2008 in O.P.No. 76 of 2008 the Original Petition is converted into Testamentary Original Suit No. 33 of 2008.

For Plaintiff : Mr.V.Srikanth

For Defendant : Mr.D.Krishnan

J U D G M E N T

The suit in C.S.No. 422 of 2001 is for partition and separate possession of the plaintiff's 1/3rd share in the plaint schedule 'A' to 'D' properties and for a declaration that the family arrangement dated 01.06.1994 is void, abinitio and non-est. The plaintiff had also sought for a declaration that the sale made by the first defendant of a portion of the suit 'B' schedule property is not binding on the plaintiff and the second defendant and for other reliefs.

2. The relationship of the parties in the suit is as follows:-

One C.M.Sundararaj died on 23.01.1979 leaving behind the plaintiff / his wife, the first defendant / son and the second defendant / daughter. Pending suit, the plaintiff died and the second defendant was transposed as the plaintiff.

3. According to the plaintiff, the suit 'A' Schedule property that stands in the name of the first defendant and it was allotted to him by the Tamil Nadu Housing Board. As regards the 'B' schedule property, it is claimed that the property was assigned by the government to her husband C.M.Sundararaj, who paid the consideration even during his life time. After his death on 23.01.1979, the sale deed came to be executed by the Small Industries Development Corporation on 02.03.1995 in the name of the first defendant on the basis of consent affidavits executed by the plaintiff and the second defendant. The schedule 'C' property stands in the name of the plaintiff. She had purchased it on 03.08.1999. The funds for the said purchase came out of the sale of the property that belonged to Late C.M.Sundararaj at Besant Nagar. The Suit 'D' Schedule property was actually purchased in the name of the first defendant. The first defendant however, executed a settlement deed in favour of the plaintiff on 03.06.1994. It is the claim of the plaintiff that all the properties were purchased out of the income from the 'B' schedule property, where the father

namely, Late C.M.Sundararaj carried on business. Therefore, according to the plaintiff, herself and the defendants 1 and 2, being the son and daughter of C.M.Sundararaj are entitled to 1/3rd share each.

4. The suit was resisted by the first defendant contending that the 'D' Schedule property belongs to the first defendant and the same having been settled on her by him pursuant to the family arrangement dated 01.06.1994. As regards the 'C' schedule property, the first defendant would admit that it was purchased out of the sale proceeds of the Besant Nagar flat. However, the first defendant would claim that as per the family arrangement reached soon after the death of C.M.Sundararaj, it was agreed that the Besant Nagar property was to be taken by the mother. Hence, the first defendant does not claim any share or right over the properties described in the Schedule 'C' and 'D' to the plaint.

5. As regards the 'A' schedule property, the first defendant would claim that he is the absolute owner, since he had purchased the property out of his own funds. In so far as the 'B' schedule property is concerned, the first defendant would admit the ownership of Late C.M.Sundararaj. He would however contend that the 'D' schedule property was allotted to him in the oral family arrangement that took place soon after the death of C.M.Sundararaj and

he had agreed to take over the liabilities of the business of Late C.M.Sundararaj, which is only pursuant to the said understanding. The plaintiffs 1 and 2 namely, wife and daughter of Late C.M.Sundararaj had executed affidavits expressing their consent for execution of sale deed in favour of the first defendant. Therefore, the first defendant had become the absolute owner of the 'B' schedule properties.

6. It is also the contention of the first defendant that he was aged 18 years and the second defendant was aged 15 years in 1979, when their father died. As regards the 'A' schedule property is concerned, initial allotment was made on 08.02.1984 and Rs.30,000/- was paid as advance and the remaining amount was paid at Rs.931/- per month for 8 years. The only income that was available was the rental income of the 'B' schedule property. The sale deed was executed on 03.11.1994, a portion of schedule 'A' property namely, the undivided share was acquired by the government and the compensation was deposited into Court. The enhanced compensation was paid to the first defendant in the form of RBI Bonds worth Rs.15,00,000/- have been deposited in the custody of the Court. The first defendant had also denied the claim of the plaintiff over the 'B' schedule property claiming that though the initial allotment made in favour of the father, the sale deed came to be executed only in 1994 on the basis of the

consent affidavits. The claim of the plaintiff that Rs.92,000/- was paid out of the sale proceeds of her Sridhana properties was denied by the first defendant. The second defendant, who is the daughter, supported the case of the plaintiff and also sought for partition and separate possession on her 1/3rd share.

7. Pending the suit, the plaintiff died on 10.01.2005 and the second defendant was transposed as second plaintiff. She also claimed that the original plaintiff namely, her mother had left a Will bequeathing certain properties to her. She had also appointed an Executor and the Executor had taken steps for grant of probate for the said Will. Since the first defendant opposed the grant, the original petition was numbered as TOS.No. 33 of 2008 and the same has also been directed to be taken up for hearing along with the present suit.

8. Claiming that the deceased/plaintiff had executed a Will on 19.04.2004, the executor of the Will had filed O.P.No. 76 of 2008 seeking probate. The first defendant in the suit / first respondent in the original petition filed Caveat opposing the grant. Hence, the Original Petition was converted into Testamentary Original Suit and numbered as TOS.No. 33 of 2008. The executor had claimed that the Will was executed by the testatrix on 19.04.2004 and she had died on 10.01.2005. The Will was also attested by two attesting witnesses,

who had seen the testatrix signing the Will. The Executor would also claim that the Will is true and genuine hence, he sought for probate. The said application was opposed by the first respondent in the Original Petition / first defendant in C.S.No. 422 of 2001 contending that the Will is not genuine. He had filed a written statement claiming that the Will has been created by the second defendant after the death of her mother. Certain circumstances were also pointed out as suspicious circumstances, which would have a bearing on the truth and validity of the Will. It is also claimed that the testatrix did not have testamentary power over some of the properties that she sought to dispose of under the Will. Therefore, the defendants sought for dismissal of the Testamentary Original Suit.

9. On the above pleadings, the following issues were framed in the Suit as well as the Testamentary Original Suit:-

i) Whether the property mentioned in 'A' Schedule to the plaint has been purchased by the 1st plaintiff from and out of the funds of the first plaintiff and income from the 'B' Schedule property ?

ii) Whether the 'B' Schedule property belonged to late C.M.Sundararaj, who died intestate and the sale deed executed in the name of the first defendant by SIDCO in regard to 'B' Schedule property is in trust on behalf of the other legal heirs of late C.M.Sundararaj viz., the plaintiffs and 1st defendant ?

iii) Whether the suit for partition in respect of 'B' Schedule suit property is maintainable without a prayer to set aside

the sale deed executed by SIDCO dated 02.03.1995 in favour of the first defendant ?

iv) Whether the property in 'C' schedule has been acquired from and out of the sale proceeds of the Besant Nagar Property belonging to the late C.M.Sundararaj ?

v) Whether the alleged family arrangement dated 01.06.1994 got executed by the 1st defendant is abinitio void and non-est in law for the reason that it was executed by the 1st plaintiff under coercion, duress and undue influence ?

vi) Whether the sale by the first defendant of portions of the 'B' schedule property to the defendants 3 and 4 are not binding on the plaintiffs ?

vii) Whether the plaintiffs are entitled to the relief of partition of the properties found in schedules 'A' to 'D' of the plaint ?

viii) Whether the prayer that the family arrangement is void, is barred under Article 58 of the schedule of Limitation Act, 1963 ?

ix) Whether the prayer for partition is consequential of getting the declaration that the family arrangement is void ?

x) Whether the claim of the first plaintiff in respect of the 'A' schedule property is barred under Section 4 of Benami Transactions (Prohibition) Act 1988 ?

xi) Whether the first defendant is the absolute owner of 'A' & 'B' schedule properties ?

Xii) Whether on the death of the sole plaintiff, who left a Will appointing an Executor the second defendant represent the

deceased plaintiff and continue the suit?

Xiii) Whether the suit is barred under Section 211 of the Indian Succession Act 1925 ?

xiv) To what other reliefs are the parties entitled ?

10. The following additional issues are framed for consideration in the Testamentary Original Suit :-

- i) Whether the Will dated 19.04.2004 is true and valid ?*
- ii) Whether the evidence on record dispels the suspicious circumstances alleged by the plaintiff ?*

11. I have heard Mrs.Chitra Sampath, learned Senior Counsel appearing for the second plaintiff in C.S.No. 422 of 2001, Mr.V.Srikanth, learned counsel appearing for the plaintiff in TOS.No. 33 of 2008 and Mr.D.Krishnan, learned counsel appearing for the first defendant in C.S.No. 422 of 2001 and sole defendant in TOS.No. 33 of 2008.

12. Issue No: 5 in the suit:-

This issue is taken up ahead of the other issues in as much as the plaintiff had sought for declaration that the family arrangement dated 01.06.1994 is void abinitio and non-est in the eye of law.

(i) It is the contention of the plaintiff that the family arrangement dated 01.06.1994 was obtained by undue influence and coercion. According to the plaintiff, the first defendant had consistently quarrelled with her and behaved in a ungentlemanly manner thereby coercing the plaintiff to sign on the dotted lines. He also threatened her with dire consequences, if she went out of the house to consult a Lawyer or a Chartered Accountant. The first defendant had also threatened the plaintiff stating that being the only son, it is the first defendant alone, who can take care of her and the properties. The second defendant / second plaintiff, being married daughter would not be able to take care of her of her at old age. Left without any other alternative, the plaintiff was forced to comply with unjust and illegal demands of the first defendant to sign the so called family arrangement prepared by the first defendant. After having obtained the said instrument, the first defendant was very happy and his behaviour was also very normal for some time. He also executed a settlement deed in respect of the lands at Vada Perumbakkam namely, 'D' Schedule property in favour of the plaintiff.

(ii) The plaintiff would claim that the document dated 01.06.1994,

which is styled as family arrangement is invalid for more than one reason. According to her, the document, being a document which creates an interest in presenti in immovable property, the same is void and unenforceable, as it is neither stamped in accordance with law nor registered. The plaintiff was also coerced and forced to sign the said document, since the document emanated out of coercion and undue influence the same is invalid. The first defendant had not performed the obligations that were cast upon him under the said instrument. The first defendant had not paid either maintenance, medical expenses or the travel expenses as agreed to.

(iii) Mrs.Chitra Sampath, learned Senior Counsel appearing for the second plaintiff would vehemently contend that the document namely, the family arrangement dated 01.06.1994 is inchoate instrument. Drawing my attention to the copy of the said family arrangement that has been produced as Ex.P16, Mrs.Chitra Sampath, learned Senior Counsel appearing for the second plaintiff would submit that though the second defendant / second plaintiff has been made as a party to the said instrument, she had not signed the same. She has also pointed out that the second plaintiff, who was married on the date of the instrument is described as daughter of C.M.Sundararaj and not as wife of Sadasivam. She would also contend that the document imposes reciprocal

obligations on the part of the parties to it and if it is found that all the parties had not performed his or her obligations under the document, the same cannot be enforced. It is the further claim of the plaintiff that the first defendant did not settle the debts, which he had agreed to settle under the said document dated 01.06.1994 and it was the plaintiff who was forced to sell her property at Besant Nagar that stood in her name to discharge the debts due to M/s.Sri Ram Chits.

(iv) It is the further contention of Mrs.Chitra Sampath, learned Senior Counsel appearing for the second plaintiff that the original family arrangement has not been produced. She would also submit that the first defendant has not properly explained the reasons for non-production of the original instrument. Referring to the evidence on record particularly, oral evidence of the second plaintiff i.e., P.W.1, Mrs.Chitra Sampath would submit that the family arrangement is an inchoate instrument and hence, it is invalid. Inviting my attention to the pleadings in the written statement of the first defendant Mrs.Chitra Sampath would submit that the first defendant had in fact given up his claim under the family arrangement dated 01.06.1994. In the written statement, the first defendant would claim that since Late C.M.Sundararaj died suddenly, both the defendants 1 and 2 were at tender age, the elders in the family namely, father of the 1st plaintiff / S.Dakshinamurthi Pillai and brothers of Late C.M.Sundararaj

discussed the future plans and on 11.02.1980, a family arrangement was arrived in the presence of S.Dakshinamurthi Pillai / father of the plaintiff, C.M.Rajendra Rao, C.M.Varadarajan, C.M.Seetharaman and C.M.Chandrasekaran / brothers of Late C.M.Sundararaj, N.Vinayagam and Dr.Kandasamy / sisters' husbands of the first plaintiff.

(v) As per the terms of the family arrangement, according to the first defendant, he should undergo proper training and run the factory by himself. He should also attend to the problems including the Court cases of the factory. The plaintiff should be informed about all the affairs of the factory and she would be in charge of the financial matters. After the marriage of the second defendant, the plaintiff and the second defendant should transfer their right over the 'B' schedule property in favour of the first defendant to confirm his ownership of the same. The flat at Besant Nagar belonging to C.M.Sundararaj should be transferred to the plaintiff by the defendants. The piece of land at Thirumullaivoyal, purchased by the father of the defendants in the name of the plaintiff should continue to be the property of the plaintiff. The plaintiff would be at liberty to gift any property to the second defendant.

(vi) According to Mrs.Chitra Sampath, the document dated 01.06.1994

was termed as a deed of obligations. It is also claimed that the discussions, which took place in the family were written in an agreement form by the husband of the second plaintiff, who also happens to be an Advocate. The learned Senior Counsel would also draw my attention to the specific pleading that the document dated 01.06.1994 is only a record of obligations and it is not a family arrangement as suggested by the first defendant.

(vii) Relying upon the above pleadings, the learned Senior Counsel would submit that according to the first defendant, the document dated 01.06.1994 is not a family arrangement and he would only rely upon the family arrangement that took place in 1980 in the presence of the elders in the family. Therefore, the contention of the learned Senior Counsel is that the family arrangement itself is only a record of obligations.

(viii) As regards the oral family arrangement pleaded by the first defendant, the learned counsel appearing for the second plaintiff would submit that there is no evidence to prove such an arrangement. None of the persons, who were present, even according to the first defendant, have been examined to prove such an oral arrangement. She would also submit the very fact that there is no reference to any such oral arrangement in the document dated 01.06.1994,

the theory of oral family arrangement said to have taken place on 11.02.1980 is most improbable.

(ix) Contending contra, Mr.D.Krishnan, learned counsel appearing for the first defendant would submit that the original family arrangement was with the second plaintiff and her husband. Immediately after the said document was signed on 01.06.1994, the first defendant had executed a settlement deed settling the Vada Perumbakkam property / 'D' Schedule property in favour of the plaintiff. Pointing out the fact that the said document was drafted by the husband of the second plaintiff would show that the family arrangement was acted upon. He would also point out that both the 1 and 2 plaintiffs have filed consent affidavits agreeing for the sale deed in respect of the 'B' schedule property being executed in favour of the first defendant and pursuant to the same, a said sale was also duly executed and registered on 02.03.1995. Mr.D.Krishnan would also point out that the deceased first plaintiff and the husband of the second plaintiff have figured as identifying witnesses to the said sale deed dated 02.03.1995. All these, according to the learned counsel, would show that the family arrangement dated 01.06.1994 was really acted upon and the first defendant had complied with the terms of the said agreement.

(x) Mrs.Chitra Sampath, learned counsel appearing for the second plaintiff would also draw my attention to the judgment of the Hon'ble Supreme Court in **Sita Ram Bhama Vs. Ramvatar Bhama reported in 2018 (3) CTC Page 441** wherein, the Hon'ble Supreme Court had held that on Memorandum of family arrangement which resulted in relinquishment of the rights of the legal heirs in the property of the deceased or the common ancestor is compulsorily registrable and in the absence of registration and payment of appropriate stamp duty, the document cannot be looked into. While holding so, the Hon'ble Supreme Court has observed as follows:-

"After his death Plaintiff, Defendant and their mother as well as sisters become the Legal Heirs under Hindu Succession Act, 1955 inhering the property being a Class – I heir. The document dated 09.09.1994 divided the entire property between Plaintiff and Defendant which document is also claimed to be signed by their mother as well as the sisters. In any view of the matter, there is relinquishment of the rights of other Heirs of the properties, hence, Courts below are right in their conclusion that there being relinquishment, the Document dated 09.09.1994 was compulsorily registrable under Section 17 of the Registration Act."

(xi) After referring to the earlier judgment in **Kale & Others Vs. Deputy Director of Consolidation reported in 1976 (3) SCC Page 119**, the Hon'ble Supreme Court had concluded that if the result of the family arrangement is a relinquishment of interest in immovable property by any one of the parties to the said instrument, the same will have to be compulsorily

registered. I had followed the said judgment in **Prema Suryanarayanan Vs. S.Venkataraman and others reported in 2018 (2) CTC Page 750.**

(xii) In **M.Chinnappan Vs. M.Ranganathan and others reported in 2017 (2) CTC Page 359**, I had an occasion to consider whether the family arrangement requires to be registered or not. Though the document was titled as a partition Muchalika, since the same resulted in a partition under the document and it was not a record of an earlier partition, it was held that it requires to be compulsorily registered.

(xiii) A reading of the family arrangement dated 01.06.1994 would show that the reciprocal obligations are cast on the parties. The plaintiffs 1 and 2 have in fact given up their right over the 'B' schedule property under the said instrument. Admittedly, the 'B' schedule property was assigned in favour the deceased C.M.Sundararaj and he had also paid the entire cost of the land. All that remained was execution of the sale deed alone. Whatever right C.M.Sundararaj possessed in the 'B' schedule property on the date of his death had devolved on the plaintiffs 1 and 2 and the first defendant. Therefore, the plaintiffs 1 and 2 agreed not to claim any interest over the 'B' schedule property and executed consent affidavits expressing their no objection for execution and

registration of the sale deed in favour of the first defendant. The same, in my opinion, amounts to relinquishment of whatever interest they had in the suit 'B' schedule property and such relinquishment cannot be by way of an unregistered instrument. Ex.P16 namely, the family arrangement shows that there are three parties to the same namely, the plaintiffs 1 and 2 and the first defendant, but the second plaintiff is not a signatory to the instrument. The second plaintiff was admittedly a major and she was married at the time of execution of Ex.P16. The explanation offered by the defendant that the second plaintiff has manipulated to take a xerox copy by concealing her signatures in Ex.P16 is unconvincing. A perusal of the document would show that it does not contain the signature of the second plaintiff. Though the document provides for two witnesses, no witness has signed. Therefore, the claim of the first defendant that the family arrangement dated 01.06.1994 is true and valid and acted upon does not merit acceptance.

(xiv) It will be pertinent to point out at this juncture that the first defendant himself had given up the claim based on the family arrangement dated 01.06.1994. Even in the written statement, he had pleaded that a family arrangement took place on 10.02.1980 on the first death anniversary of Late C.M.Sundararaj and the document of the year 1994 was executed only as a

document of obligations. However, in the proof affidavit, the first defendant would contend that the family arrangement dated 01.06.1994 was acted upon and it was pursuant to the same he had executed the settlement deed on 03.06.1994 settling the Vada Perumbakkam property in favour of the deceased first plaintiff and both the plaintiffs had executed consent affidavits on 02.06.1994 expressing their no objection for execution of sale deed in respect of B schedule property namely, industrial land in favour of the first defendant.

(xv) As rightly pointed out by Mrs.Chitra Sampath, learned Senior Counsel appearing for the second plaintiff, the first defendant, who had disowned the family arrangement dated 01.06.1994 in the written statement cannot be allowed to rely upon it at the time of evidence.

(xvi) Be that as it may, a reading of the family arrangement shows that it is not a mere partition between the heirs of Late C.M.Sundararaj. It records certain obligation which are in effect relinquishments of rights over the properties by the heirs of C.M.Sundararaj. While the first defendant relinquishes his share in the Besant Nagar Property, the plaintiffs 1 and 2 relinquished their right over the industrial land namely, the B schedule property. The very fact that

the family arrangement is in writing, under which the parties, who are the members of the family relinquish their interest in the property the same requires registration and proper stamping in accordance with law. In the absence of such registration and proper stamping, the document cannot be construed as valid. It is seen from the instrument itself that it was executed on 01.06.1994 and the second plaintiff has not signed it, though she figured as a party to the instrument. There are no attestors also. I have already concluded that the explanation offered by the defendant for non-production of the original is unconvincing. Therefore, I am of the considered opinion that the family arrangement dated 01.06.1994 cannot said to be a full fledged family arrangement brought about in the presence of the elders of the family in order to settle the disputes between the members of the family. The instrument which results in relinquishment of share in a particular item of property by one of the members is not valid without being registered and duly stamped under law. Hence, Issue No.5 is answered in favour of the plaintiffs and against the first defendant.

13. Issue Nos.2, 3 and 6

These issues are taken together since they relate to "B" schedule property. "B" schedule property, which is an industrial land was assigned to Late

Mr.C.M.Sundararaj, father of the second plaintiff and the first defendant under Ex.B3 dated 28.02.1974. It is also seen from Exs.P4 and P5 that C.M.Sundararaj had mortgaged the property to Small Industries Development Corporation. It is not in dispute that the conditions of the assignment dated 28.02.1974 were complied with by C.M.Sundararaj even during his life time and the payments were made by him regularly. However, the sale deed in respect of the said industrial land was executed during the life time of said C.M.Sundararaj. It is also not in dispute that the sale deed in respect of the 'B' Schedule property was executed by him. It is the further case of the parties that the sale deed could not be executed, since the land in question was not transferred in favour of the Tamil Nadu Small Industrial Development Corporation.

(ii) On 02.03.1995, a sale deed came to be executed in favour the first defendant in respect of the 'B' schedule property. The sale deed also records that the entire consideration has been paid by the purchaser in terms of the assignment deed dated 28.02.1974. It is not in dispute that the assignment made in favour of C.M.Sundararaj and the entire sale consideration was paid even during the life time of C.M.Sundararaj. The sale deed dated 02.03.1995 (Ex.P18) came to be executed in favour of the first defendant on the basis of the consent affidavits filed by the first and the second plaintiffs. It is the contention

of the plaintiffs that the fact that the sale deed was executed in favour of the first defendant would not vest any absolute title over the property in him. It is their further contention that the first defendant would hold the property only as a trustee of all the sharers. The first defendant did not chose to dispute the claim of the plaintiffs regarding the assignment in favour of C.M.Sundararaj. It is the contention of the first defendant that it was pursuant to the memorandum of family arrangement dated 01.06.1994, the plaintiffs 1 and 2 consented for transfer of the 'B' schedule property in the name of the first defendant. While dealing with the Issue No.5 (Supra), I have concluded that the memorandum of family arrangement dated 01.06.1994 is not true and valid. Therefore, the natural consequence would be to conclude that the 'B' schedule property would form part of the estate of C.M.Sundararaj and on his death it devolved on all the three heirs namely, the plaintiffs 1 and 2 and the first defendant. It is however contended by the first defendant that the plaintiffs 1 and 2 had with knowledge of what they are doing, filed consent affidavits with the Small Industries Development Corporation, pursuant to which, the Corporation had executed the sale deed in favour of the first defendant. Therefore, it is contended that the suit 'B' property belongs to the 1st defendant.

(iii) No doubt true, the plaintiffs 1 and 2 have consented for execution

of sale deed in favour of the first defendant. It is also stated that the first defendant had taken over the liabilities in respect of the 'B' schedule property. The claim of the first defendant that since he took over the liabilities of the family, the 'B' schedule property was allotted to him has not been established by acceptable evidence. It is also seen from Exs.P51 to P55 and Exs.P11, P12 and P16 which are not in dispute that the deceased first plaintiff acted as proprietor of the Chemiplant Fabrications, which was an industry run by C.M.Sundararaj in the 'B' schedule property between 1979 to 1994. Exs.P51 to P55 have emanated from Bharat Heavy Electricals Limited and the other documents namely, lease deeds i.e., Exs.P12 and P61 are not disputed. The claim of the first defendant that he had discharged the mortgage loan due to Small Industries Development Corporation is also belied by the admission of the first defendant in his written statement wherein, he had stated as follows:

"So the outstanding of more than Rs.2,00,000/- to Small Industries Development Corporation remained unpaid. When Small Industries Development Corporation refused to re-allot the B schedule property to this defendant on the ground of unpaid loan amount, the plaintiff assured this defendant that she would sell the house site at Thirumullaivoyal and clear the loan. This house site was purchased by the father of the defendants in the name of the plaintiff. It was not her personal property or Sridhana property as alleged in the plaint."

(iv) It is however contended by Mr.D.Krishnan, learned counsel appearing for the first defendant that the fact that the husband of the second plaintiff and the first plaintiff had signed as identifying witnesses in the sale deed dated 02.03.1995 marked as Ex.P18 would go to show that there was consensus between the parties to the effect that the 'B' schedule property should be absolutely owned by first defendant. This claim is based on the oral family arrangement dated 01.06.1994 marked as Ex.P16. *De hors*, the oral family arrangement, which has already been held to be invalid, the claim of the first defendant would be that the plaintiffs 1 and 2 having agreed for execution of sale deed in favour of the defendant cannot now turn around and contend that the first defendant holds the property only in trust for the other sharers. On the facts admitted and proved is clear that the 'B' schedule property definitely forms part of the estate of Late C.M.Sundararaj. There is no dispute regarding the payment of consideration by C.M.Sundararaj. The transfer that took place in the name of the first defendant on 02.03.1995 was only based on the affidavits of no objection filed by the plaintiffs 1 and 2. That by itself, in my considered opinion will not take away the right of the first and second plaintiffs to claim a share in the property. Though the first defendant had raised several contentions that he had executed settlement deeds etc., those documents have not been established by valid and acceptable evidence. On the other hand, as pointed out earlier, the

first defendant has specifically admitted that the property at Thirumullaivoyal was sold in order to settle the debts of C.M.Sundararaj over the 'B' schedule property.

(v) In the light of the above, unimpeachable evidence that is available, Issue No.2 is answered in favour of the plaintiffs and against the first defendant concluding that the first defendant holds the property in trust for the plaintiffs 1 and 2. In view of the answer to Issue No.2, Issue No.6 is also answered in favour of the plaintiffs concluding that the sale of portions of the 'B' schedule property by the first defendant will not bind the plaintiffs.

(vi) As regards the Issue No.3, the defence raised by the first defendant is that the suit for partition in respect of 'B' schedule property is not maintainable without setting aside the sale dated 02.03.1995 under Ex.P18. Mr.D.Krishnan, learned counsel appearing for the first defendant would vehemently contend that the sale under Ex.P18 dated 02.03.1995, being in favour of the first defendant, the first defendant is the absolute owner of the property and therefore unless the sale is set aside, the plaintiffs cannot maintain the suit for partition. I am unable to agree with the learned counsel appearing for the first defendant. It is the case of the plaintiffs that though the sale deed was taken in the name of the first defendant, the first defendant holds in trust

for the other heirs of C.M.Sundararaj. It is not a case where the plaintiffs seek a declaration of the title to the property or recovery of possession of the property alleging that a document which confess title is invalid. It is a settled position of law that the relief of setting aside the document would arise only in a case where the plaintiffs seek to invalidate the title which had vested in a person, who is shown as purchaser under the document. That is not the case on hand. The plaintiffs seek partition on the ground that the defendant holds the property in trust on their behalf also. Therefore, prayer for setting aside the document is not required. If the document is set aside, neither the defendant nor the plaintiffs would get title. The property will revert back to the owner namely, Tamilnadu Small Industries Development Corporation. Therefore, the plea that a decree for partition cannot be passed unless the document is set aside is liable to be rejected. Hence, Issue No.3 is also answered in favour of the plaintiffs and against the first defendant.

14. Issue No.1:-

This issue relates to the 'A' schedule property. As regards the 'A' schedule property, it stands in the name of the first defendant. The allotment was made on 08.02.1984 under Ex.D9. Prior to the allotment, the first plaintiff had also obtain an allotment on a lot basis in respect of another flat, which is

behind 'A' schedule property at Anna Nagar on 17.12.1983. The said allotment letter is marked as Ex.P10. The allotment in favour of the first defendant dated 08.02.1984 is marked as Ex.D9. It is the contention of the first plaintiff that she had given up the allotment that was made under Ex.P10 in order to retain the allotment made in the name of the first defendant. The total cost of the apartment was fixed at Rs.85,300/- and the initial deposit was about Rs.31,300/- . The balance was payable at Rs.931/- per month.

(ii) The plaintiff had claimed that she had paid the advance amount of Rs.31,300/- by selling her diamond jewellery for Rs.30,000/- and she had also continued to pay the monthly instalments from and out of the income and rents, which she got from the 'B' schedule property. The constructed apartment namely, the 'A' schedule property was handed over in the year 1986 and the instalments were paid and completed in the year 1994 and the sale deed came to be executed in favour of the first defendant on 03.11.1994. Here again, it is the contention of the first plaintiff that the 'A' schedule property was purchased out of the sale of her jewellery and the instalments were paid out of the income from the 'B' schedule property. Therefore, according to her, though the sale deed of the 'A' schedule property stands in the name of the first defendant, it was actually purchased out of her own funds and the instalments were paid from

the income of the 'B' schedule property, which admittedly forms part of the estate of C.M.Sundararaj.

(iii) Contending contra, the first defendant would claim that he was 18 years old at the time when his father died and immediately after the death in 1980, the elders met and it was agreed that the first defendant should undergo training and he should take over the business. Therefore, according to the first defendant, he started earning in the year 1980. Therefore, according to him, he had paid the initial cost of Rs.31,300/- and the monthly instalments at Rs.931/- for the 'A' schedule property out of his own income. In support of her claim that the monthly instalments payable for the 'A' schedule property were paid from and out of the income from the 'B' schedule property, the first plaintiff would rely upon the lease deeds namely, Ex.P12 dated 01.11.1989 and Ex.P61 dated 31.01.1990 executed by the deceased first plaintiff leasing out the 'B' schedule property to third parties, apart from showing that it was the first plaintiff who was effectively controlling the business till 1994. These documents would also show that there was sufficient rental income from the 'B' schedule property.

(iv) Mr.D.Krishnan, learned counsel appearing for the first defendant would however contend that it was the first defendant who was running the

business in the 'B' schedule property. He would also rely upon the Exs.D6, D7 and D8 to show that he was in fact carrying on business in the name and style of SJS Engineering Services at the 'B' schedule property with one N.Vinayagam, C.M.Dhinakaran and Mrs.Leela Vinayagam and the said firm was assessed to sales tax. The sales tax assessments for the period between 1989 and 1993 have been produced. Though the turnover of the firm is shown at Rs.1,73,186/- for the year 1987 – 1988 and at Rs.3,14,800/- for the year 1991-1992, there is nothing to show that there was sufficient income from the business. The registration certificate would show that the business itself was commenced only on 21.07.1987. The details regarding the exact shares that each partner was entitled to are not available. There is no evidence to show that there was sufficient income from the said business to enable the first defendant to pay a sum of Rs.31,300/- in the year 1984 and the allotment of the 'A' schedule property was made in his favour. As already pointed out, the firm itself came into existence only during the year 1987 to be precise on 21.07.1987.

(v) As regards the other payments, Mr.D.Krishnan, learned counsel appearing for the first defendant would contend that there is nothing to show that the monthly instalments payable for the 'A' schedule property were paid by the first plaintiff. Of course, there is no direct evidence to show that these

monthly instalments were paid by the first plaintiff. However, Mrs.Chitra Sampath, learned counsel appearing for the second plaintiff would draw my attention to the contents of the letters namely, Exs.P29 to P36 and P39, which are admittedly written prior to the suit, and require the Court to draw an inference from the said letters that the monthly instalments were also paid by the first plaintiff. The fact that these letters emanated from the first plaintiff is not in dispute. Ex.P29 is the copy of the letter addressed by the first plaintiff to the first defendant, which was marked through the second plaintiff. In the said letter, she had specifically stated that she had sold her diamond and gold jewellery and had purchased the 'A' schedule property in the name of the first defendant. She has also complained that the first defendant has not been repaying the loans borrowed from Oriental Benefit and Deposit Society. Ex.P31 is another letter dated 24.03.1999 wherein, the first plaintiff has written to her brother-in-law complaining about the fact that the first defendant had not repaid the monies payable to Oriental Benefit & Deposit Society and others. She has also complained that the first defendant is collecting the rents from the tenants and he has not paid dues payable to Oriental Benefit & Deposit Society. On 24.03.1999, the first plaintiff had sent a telegram to her brother-in-law namely, Varadarajan complaining that the first defendant is threatening to assault her. Similarly, in Exs.P32 to P36, the first plaintiff had sent several letters and

telegrams to the first defendant either seeking maintenance or complaining about his inaction in non-payment of the loan. The first defendant has not denied the contents of any of these letters. These letters would show that the first plaintiff had paid the monthly instalments for purchase of the 'A' schedule property from and out of the income from the 'B' schedule property. It is therefore, clear that the 'A' schedule property also has to be treated as part of the estate of C.M.Sundararaj.

(vi) Accordingly, the Issue No. 1 is decided in favour of the plaintiff and against the first defendant to the effect that the funds for the purchase of 'A' schedule property were provided by the first plaintiff and income from the 'B' schedule property, therefore, it also forms part of the estate of the deceased C.M.Sundararaj.

15. Issue No.10:-

This issue relates to the prohibition created by the Section 4 of the Prohibition of Benami Property Transactions Act, 1988. Section 4 of the said act, as it stood prior to the amendment of the year 2016, prevented persons from setting up claims relating to Benami after coming into force of the act. However, the transactions amongst Coparceners and persons standing in a fiduciary

capacity were exempted. After the amendment of the act in 2016, the exemptions under Section 4 were done away with by the amendment. Subsection 3 of Section 4, which in effect was the exemption clause was done away with. Subsection 3 of Section 4 prior to the amendment reads as follows:-

"Nothing in this section shall apply -

a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

(ii) However, 1988 Act as it stood defined the Benami Transaction act as follows:- Section 2(a), Benami Transaction means :-

"Any transaction in which property is transferred to one person for consideration paid or provided by another person."

The said definition was amended by the 2016 Act and the amended definition as per Section 2(9) of the prohibition of Benami Property Transactions Act, 1988 as amended by the Act 43 of 2016 reads as follows:-

"2(9)"benami transaction" means,-

(A) a transaction or an arrangement -

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by -

(i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu Undivided family;

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation:- For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in Section 53-A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,-

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered."

This amendment, in my considered opinion has the effect of removing a transaction entered into by a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee executor, partner and director of the company from being termed as a Benami transaction.

(iii) The fact that there was an allotment of another property in favour of the first plaintiff on 17.12.1983 is proved by Ex.P10 and the allotment of the 'A' schedule property in the name of the first defendant happened within about 2 months i.e., on 08.02.1984. This probablises the contention of the plaintiff that she had given up the allotment under Ex.P10 in order to enable purchase of the property allotted under Ex.D9 in the name of the first defendant. The first defendant was aged about 23 years on the date of the allotment i.e., 08.02.1984, there is no evidence to show that the first defendant was earning by doing business at the time of the said allotment. The only material produced by the first defendant to show that he was doing some business is in the form of Exs.D6, D7 and D8. From Ex.D6, it could be seen that the firm namely, SJS Engineering Services was commenced only in the year 1987. Thus, there is total lack of evidence regarding the source of income for the first defendant to have paid initial cost of Rs.31,300/- and also the subsequent monthly instalments.

(iv) On the other hand, the documentary evidence available clearly shows that it was the first plaintiff, who had paid the initial deposit of Rs.31,300/- as well as the monthly instalments at Rs.931/-. In fact, even in the letter marked as Ex.P29 dated 23.09.1998, the first plaintiff had very clearly pointed

out that the 'A' schedule property was purchased out of her own monies and the income from the 'B' schedule property. The available evidence very clearly indicates that the case of the plaintiff that the property was purchased by her from and out of the income from the 'B' schedule property is more probable and acceptable. Once it is concluded that the property was purchased from and out of the income from the estate of C.M.Sundararaj and monies that belonged to the first plaintiff in the name of the first defendant, the transaction may not take the colour of a Benami Transaction as defined under Section 2(9) of Prohibition of Benami Property Transaction Act, 1988 as amended by 43 of 2016.

(v) As already seen Section 2(9)(A)(b) (i), exempts a transaction between persons who stand in a fiduciary capacity towards the other from being termed as a Benami Transaction. Here, the transaction is between the mother and the son. Therefore, the fact that the mother had contributed funds for the purchase of the property in the name of her son having been proved, I do not think that the claim of the first plaintiff with reference to 'A' property could be said to be barred by the provisions of the Prohibition of Benami Properties Transaction Act, 1988. Hence, Issue No. 10 is answered in favour of the plaintiff and against the first defendant.

16. Issue No. 11:-

In view of the findings rendered on Issue Nos. 1,2,3,5,6 & 10, this issue is answered to the effect that the first defendant is not the absolute owner of the 'A' and 'B' schedule properties.

17. Issue No.4:-

As regards the 'C' schedule property, it is the contention of the first plaintiff that the said property was purchased in her name from and out of the sale proceeds of the property of C.M.Sundararaj situate at Besant Nagar. It is her plea that the first plaintiff was forced to sell the Besant Nagar flat, since the first defendant did not repay the monies borrowed by him from Oriental Benefit & Deposit Society, to secure which the Besant Nagar property was mortgaged in favour of the said Oriental Benefit & Deposit Society, she was forced to sell the said property. After discharging the loan with the balance of sale consideration that was available, she has purchased the 'C' schedule property in her name. Therefore, according to her, the 'C' schedule property also forms part of the estate of C.M.Sundararaj. The fact that the Besant Nagar property was mortgaged in favour of the Oriental Benefit & Deposit Society for a sum of Rs.3,00,000/- is proved by Ex.P21 (copy of the mortgage deed). Since the first defendant did not repay the mortgage loan, she was forced to sell the property.

She had also complained about non-payment of the mortgage loan by the first defendant in the letters written by her i.e., Exs.P29 to 39. The very fact that the plaintiffs have produced the original discharge receipts as well as the passbook for the loan account issued by Oriental Benefit & Deposit Society would show that the part of the sale consideration went towards repayment of the said loan borrowed by the first defendant for putting up construction in the 'B' schedule property and the remaining amount was utilized for purchase of 'C' schedule property in the name of the first plaintiff.

(ii) In the light of evidence, it is clear that though the property stands in the name of the first plaintiff she was not the absolute owner of the said property. Since the entire consideration for purchase of the said property came out of the estate of C.M.Sundararaj and therefore the plaintiffs and the first defendant would have an equal share in the suit property. Therefore, Issue No.4 is answered in favour of the plaintiffs and against the first defendant.

18. Issue No.7 :-

As regards the 'D' schedule property, this is not in dispute that the 'D' schedule property stood in the name of the first defendant and the first defendant had executed a settlement deed in favour of the plaintiff on

03.06.1994 settling the 'D' schedule property on her. The fact that the settlement deed executed by the first defendant in favour of the plaintiff is not in dispute. It is seen from the Ex.P17 dated 03.06.1994 namely, the settlement deed executed by the first defendant in favour of the first plaintiff that the 'D' schedule property was purchased in the year 1993 under a registered sale deed 13.04.1993 by the first defendant. There is no evidence regarding the source of consideration. In fact, the first defendant had executed a settlement in favour of the first plaintiff in respect of the 'D' schedule properties. The execution of the settlement is also not denied. However, the plaintiff would contend that the 'D' schedule property was also purchased from and out of the income from the 'B' schedule property and hence the same should also be treated as part of the estate of Late C.M.Sundararaj and subjected to partition.

(ii) A perusal of the plaint would show that the plaintiff has sought for a decree for partition of the entire 'A' to 'D' schedule properties. The plaintiff, who is the owner of the property as per the settlement deed dated 03.06.1994 namely Ex.P17 has come forward seeking partition of the property and also acknowledging that the said property was also purchased from and out of the income from the estate of Late C.M.Sundararaj, I do not see any difficulty in concluding that the 'D' schedule property is also liable for partition.

(iii) In the light of the above conclusions, Issue No.7 is also answered in favour of the plaintiffs concluding that they are entitled to relief of partition and separate possession of schedule 'A' to 'D' properties.

19.Issue No.8:-

This issue relates to the question of limitation. I have already concluded that the family arrangement dated 01.06.1994 has been brought about by undue influence and coercion. It is contended by the learned counsel appearing for the first defendant that the relief of setting aside the family arrangement dated 01.06.1994 is barred by limitation. He would also draw my attention to the Article 58 of the Limitation Act to contend that the period of limitation being 3 years and once it is claimed that the document was brought about by coercion and undue influence, the suit should have been filed within 3 years from the date of the document as the right to sue first accrues on the date of the document and not later.

(ii) While deciding Issue No.5, I have concluded that the family arrangement dated 01.06.1994 is void as it was executed by the first defendant under coercion and undue influence. The starting point of the limitation under

Article 58 assumes importance. It does not say that the starting point of limitation to obtain a declaration with reference to a particular document is the date of the document. The starting point is when the right to sue first accrues. Though the document was executed in 1994, things were going well till about 1998 and it was only when the first defendant showed his true colours and started ill-treating the first plaintiff, the first plaintiff came to know the effect of the instrument executed by her.

(iii) Mrs.Chitra Sampath, learned counsel appearing for the second plaintiff would contend that the document being an inchoate instrument, which is admittedly not signed by the second plaintiff is a nullity and in fact no prayer is necessary to set aside the said document. The second plaintiff can maintain the suit for partition even without a prayer for declaration, since she is not a signatory to the instrument. On the death of the first plaintiff, the second defendant has been transposed as the second plaintiff. As of today, the suit is by the second plaintiff. I have found that the second plaintiff is not a signatory to the impugned family arrangement dated 01.06.1994 and therefore the question of limitation really fades into insignificance. In view of the above, Issue No. 8 is answered in favour of the plaintiffs and against the first defendant.

20.Issue No.9:

This issue is also answered against the defendant and in favour of the plaintiff, in view of the fact that the second defendant has been transposed as second plaintiff, the relief of partition sought for is not consequential to setting aside of the family arrangement.

21.Issue Nos.12 & 13:-

Last but not the least, Mr.D.Krishnan, learned counsel appearing for the first defendant would contend that the second plaintiff cannot maintain the suit in as much as the first plaintiff had left a Will, appointing an Executor and therefore, Executor alone can maintain the suit in view of the Section 211 of the Indian Succession Act, 1925. Section 211 of the Indian Succession Act reads as follows:-

"The Executor or Administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such."

Section 211 of the Indian Succession Act in fact makes the Executor, the legal representative of a testator for all purposes. This provision can be invoked by the Executor for enforcing a right as an Executor under the Will. The same cannot be projected against the second plaintiff herein in as much as the suit is not one for partition of the estate of the testatrix namely, the first plaintiff

but it is one for partition of the estate of C.M.Sundararaj of whom the second plaintiff is also a Class – I heir. Admittedly, C.M.Sundararaj died intestate therefore, his assets would devolve on his legal heirs namely, plaintiffs 1 and 2 and the first defendant. The first plaintiff filed the suit for partition as Class – I heir of the deceased C.M.Sundararaj while the defendants 1 and 2 in the suit were also the Class – I heirs of C.M.Sundararaj. Pending suit, the first plaintiff died. The second plaintiff, who was also the Class – I heir of C.M.Sundararaj sought herself to be transposed as second plaintiff in the suit and the same was allowed. The capacity in which the second defendant in the suit sought for transposing herself as the second plaintiff is as the heir of C.M.Sundararaj, she is not claiming under the deceased first plaintiff.

(ii) As regards the Will left by the deceased first plaintiff, the Executor had already taken steps for getting it prohibited and TOS.No.33 of 2008 is already pending in this Court. Therefore, the question of Section 211 of the Indian Succession Act operating as a bar for the claim of the second plaintiff cannot be accepted, in view of the fact that the second plaintiff claims interest in the property as Class – I heir of Late C.M.Sundararaj, who died intestate. Therefore, the second plaintiff is well within her rights to prosecute the suit as heir of C.M.Sundararaj. Hence, Issue Nos. 12 and 13 are also answered in

favour of the plaintiffs and against the first defendant.

22. In the light of the answers to the issues above, the suit in C.S.No. 402 of 2001 will stand decreed declaring the family arrangement dated 01.06.1994 as void, abinitio and non-est in the eye of law, declaring the sales made by the first defendant in favour of the 3rd and 4th defendants would not bind on the plaintiff share in the suit 'B' schedule property. The property sold by the first defendant to the 3rd defendant would be allotted to the share of the first defendant. There will be preliminary decree declaring the 1/3rd each share of the plaintiffs 1 and 2 in the suit 'A' to 'D' schedule properties. As regards the sales made in favour of the 3rd defendant by the first defendant, the first sale dated 07.03.2001 is prior to the filing of the suit hence, the said property sold under sale deed dated 07.03.2001 namely, Ex.P42 would be allotted to the share of the first defendant while working out equities at the time of final decree. Considering the relationship between the parties, the parties are directed to bear their own cost. The suit in other respects will stand dismissed.

WEB COPY

TOS.No. 33 of 2008

The Will is date is dated 19.04.2004 and the testator died on 10.01.2005. Mr.V.Srikanth, learned counsel appearing for the Executor namely, the plaintiff in TOS.No.33 of 2008 would submit that the Will has been proved as required under Section 68 of the Evidence Act by examining the attesting witness namely, P.W.2. Therefore, according to Mr.V.Srikanth, once the Will has been proved, in accordance with law and the defendant is unable to bring home by reliable evidence that there was any suspicious circumstances surrounding the execution of the Will, the plaintiff namely, the Executor will have to be favoured with the grant.

2. Contending contra, Mr.D.Krishnan, learned counsel appearing for the defendant would submit that the Will is not a registered instrument. It is not as if the testator Mrs.Chandra Sundarraj, is an illiterate lady. She has been party to several registered instruments and therefore she knows the requirements and advantages of registration. In the absence of any explanation for non-registration, that by itself would amount to a suspicious circumstances. He would also point out that the Will does not reveal the place of execution. Taking me through the contents of the Will, Mr.D.Krishnan would point out the following circumstances viz., the place of execution of the Will, the presence of P.W.1 at

the time of execution, the non-mentioning of P.W.2 as scribe of the Will and the fact that P.W.2 has admitted that he has written the date of the execution. According to the learned counsel, these circumstances though taken individually may not be a suspicious circumstance in order to reject the claim for grant of probate but the cumulative effect of these circumstances would show that the execution of the Will is doubtful. Therefore, he would seek dismissal of the suit.

3. The attesting witness to the Will has been examined as P.W.2. He has deposed categorically to the effect that he had typed the Will and Mrs.Chandra Sundararaj, the testator, signed in his presence and in the presence of the other attesting witnesses namely, P.Harikrishna. It is not as if the attesting witness is stranger to the family. He is the sister's son of Chandra Sundarsraj. Therefore, he is the Cousin of the first defendant. The other attesting witness is his brother. Though P.W.2 has been cross-examined extensively, nothing has been brought about to discredit his evidence regarding the execution of the Will and the presence of P.W.2 and the other attesting witness at the time of execution of the Will.

4. No doubt, there are certain discrepancies in the evidence regarding the filling up of the date and the presence of P.W.1 at the time when the Will was

executed. The Will was executed some time in 2004 i.e., on 19.04.2004 and the witness deposed in Court some time in 2018 that is 14 years after execution. There is bound to be some discrepancy in the evidence. Mr.D.Krishnan would also point out the discrepancies in the evidence of P.W.1 regarding his presence or absence at the time of the execution of the Will. The Evidence of P.W.1 would show that he has stated that he was present at the time of when the Will was executed.

5. Mr.D.Krishnan, learned counsel appearing for the defendant would also point out that there is a very strong suspicion that the Will was written by the second plaintiff in C.S.No. 422 of 2001 by drawing my attention to the following statement in the Will.

"Later my friend Maheswari told him that it was my mother who purchased the flat is well known to everyone, he vacated the flat ..."

Mr.D.Krishnan would submit that this would show that the Will was scribed by the daughter and the not at the instructions of the mother. Mr.V.Srikanth, learned counsel appearing for the plaintiff would submit that it is only a typographical error. He would also point out that there are several such typographical errors in the Will and hence the same should not be taken very seriously. I have gone through the evidence of P.W.1 and P.W.2. The evidence, particularly, the

evidence of P.W.2 leaves no room for doubting the execution of the Will and its genuineness. The said Will is an unregistered instrument, non-registration by itself cannot be a ground to reject the grant of probate. The learned counsel would also invite my attention to Paragraph 4 of the original petition to contend that the place of execution of the Will has not been specifically stated. The fact that it has been stated at Chennai, only shows that it was executed at the residence of the testator whereas P.W.2 had deposed that it was executed at his residence. This submission is based on assumption. All that is stated in Original Petition is that the Will was executed at Chennai. P.W.2 also a resident of Chennai. P.W.2 has very categorically stated that the Chandra Sundararaj came in a Autorickshaw to his house and gave him instructions to type the Will and the same was typed by him. This evidence of P.W.2 has not been discredited in cross-examination. Therefore, I am of the considered opinion that the plaintiff in TOS.No. 33 of 2008 has proved the Will.

6. Mr.V.Srikanth, learned counsel appearing for the plaintiff would also draw my attention to the judgment of the Hon'ble Supreme Court in **Daulat Ram and Others Vs. Sodha and Others reported in AIR 2005 SSC Page 233** wherein, the Hon'ble Supreme Court had pointed out that once the propounder has discharged, the burden of proving the Will it is for the person

who alleges that it was obtained by undue influence or coercion or that it is forged to prove his claim. In the case on hand, there is no evidence much less substantial evidence on the side of the first defendant to prove the so called suspicious circumstances as alleged by the first defendant.

7. In **Gopal Swaroop Vs. Krishna Murari Mangal and Others reported in (2010) 14 SCC Page 266**, the Hon'ble Supreme Court has held that "In the matter of proof of documents as in the case of the proof of Wills, it is idle to expect proof with mathematical certainty. The test to be applied always is the test of satisfaction of a prudent mind in such matters. Applying that test to the case at hand we have no manner of doubt that the Will executed by Shri Panna Lal, which is duly registered document, is not surrounded by any suspicious circumstances of any kind and is proved to have been duly and properly executed."

8. Relying upon the above observation, Mr.V.Srikanth would contend that the deceased Chandra Sundararaj had filed a suit against the first defendant / her son seeking partition and claiming that he had ill-treated her would show that she had all reasons to execute a Will, bequeathing certain properties to her daughter and remaining properties for the Trust. Mr.V.Srikanth would also

contend that the Will is not unnatural. I have had an occasion to consider the scope of proof of a Will in TOS.No. 11 of 2015 wherein I have also followed the judgment of Hon'ble Supreme Court in **Gopal Swaroop Vs. Krishna Murari Mangal and Others (Supra)**. From the evidence that is available in the case on hand, it is clear that the probabilities justify the execution of the Will. I therefore, find that the plaintiff in TOS.No. 33 of 2008 had proved the execution of the Will to the satisfaction of the Court and is entitled to probate. Hence, both the issues in the Testamentary Original Suit are answered in favour of the plaintiff and the same would stand decreed granting probate of the Will dated 19.04.2004. The Executor would be entitled to pay the expenses of the probate from the estate of the deceased. However, there will be no order as to cost.

14.10.2019

kkn

Internet: Yes/No

Index: Yes/No

Speaking Order/Non-Speaking Order

List of Witnesses examined on the side of the plaintiff in TOS No.33 of 2008:

1. P.W.1 L.N.Praghasam
2. P.W.2 P.Ramakrishnan

List of Witness examined on the side of the defendant in TOS No.33 of 2008:

D.W.1. C.M.Dhinakaran

List of Witness examined on the side of the plaintiff in CS No.422 of 2001:

P.W.1 Annapoorna

List of Witness examined on the side of the defendant in CS No.422 of 2001:

D.W.1 C.M.Dhinakaran

List of Exhibits marked on the side of the Plaintiff:

Sl. No.		Description of Documents	Date
1	Ex.P1	Original Marriage Invitation of the 1 st plaintiff	---
2	Ex.P2	Original Marriage Invitation of the 1 st plaintiff	---
3	Ex.P3	Certified copy of Deed of Assignment	28/02/1974
4	Ex.P4	Certified copy of First Simple Mortgage	03/05/1974
s5	Ex.P5	Certified copy of Second Simple Mortgage	03/05/1974
6	Ex.P6	Original Death Certificate of C.M.Sundarraaj	---
7	Ex.P7	Xerox copy of the Legal Heirship Certificate	---
8	Ex.P8	Original Allottee Passbook in respect of Besant Nagar Flat	---
9	Ex.P9	Original Rental Agreement in respect of Besant Nagar Flat	15/06/1985
10	Ex.P10	Original Allotment letter of Tamilnadu Housing Board in respect of Flat 326/6	17/12/1983
11	Ex.P11	Legal notice issued on behalf of first plaintiff to Harish Industries	05/08/1987
12	Ex.P12	Lease deed executed between first plaintiff and Noble Industries in respect of Suit B schedule property	01/11/1989
13	Ex.P13	Certified copy of Sale deed	03/11/1984
14	Ex.P14	Certified copy of the Sale deed	12/06/1963

Sl. No.		Description of Documents	Date
15	Ex.P15	Certified copy of the Sale deed	---
16	Ex.P16	Copy of the Family Arrangement	01/06/1994
17	Ex.P17	Original Settlement deed executed by the 1 st defendant in favour of the 1 st plaintiff	03/06/1994
18	Ex.P18	Certified copy of Sale deed	02/03/1995
19	Ex.P19	Letter written by first defendant's wife to second plaintiff and her husband	22/05/1996
20	Ex.P20	Certified copy of Sale deed	02/09/1994
21	Ex.P21	Certified copy of Mortgage deed	14/11/1996
22	Ex.P22 Series (7 Nos.)	Original Receipts issued by Oriental benefits and Deposit Society	From 27/06/1998 to 19/01/1999
23	Ex.P23	Original House Loan pass book issued by Oriental Benefits and Deposit Society Ltd.	---
24	Ex.P24	Certified copy of Registered receipts issued by Oriental Benefits and Deposit Society Ltd. For discharge of Mortgage	22/01/1999
25	Ex.P25	Certified copy of Sale deed	27/01/1999
26	Ex.P26	Original Sale deed in respect of Naduvakkarai flat, C Schedule property	30/08/1999
27	Ex.P27 Series (6 Nos.)	Original Intimation Letter and payment receipts.	From 09/07/1998 to 15/11/1998
28	Ex.P28 Series (25 Nos)	Shriram Chit Intimation Letter and Payment receipts	From 27/08/1998 to 18/09/1999
29	Ex.P29	Copy of the letter written by first plaintiff to the first defendant and marked copy to second plaintiff	23/09/1998
30	Ex.P30	Original Covey sent to second plaintiff, under	---

Sl. No.		Description of Documents	Date
		Certificate of Posting for Ex.P29	
31	Ex.P31	Letter of first plaintiff to brother-in-law	24/03/1999
32	Ex.P32	Telegram sent by first plaintiff to brother-in-law	---
33	Ex.P33	Letter of 1 st plaintiff to 1 st defendant	22/02/2000
34	Ex.P34	Letter of 1 st plaintiff to 1 st defendant	26/02/2000
35	Ex.P35	Certified copy of Telegram issued by first plaintiff to 1 st defendant	08/03/2000
36	Ex.P36	Certified copy of Telegram issued by 1 st plaintiff to 1 st defendant	11/03/2000
37	Ex.P37	Original Letter sent by 1 st defendant to 1 st plaintiff	12/03/2000
38	Ex.P38	Reply letter by 2 nd plaintiff to 1 st defendant	23/01/2000
39	Ex.P39	Reply letter by 1 st plaintiff to 1 st defendant	25/03/2000
40	Ex.P40	Xerox copy of the legal-notice issued on behalf of 1 st plaintiff	22/11/2000
41	Ex.P41	Xerox copy of Acknowledgement Card	---
42	Ex.P42	Certified copy of Sale deed	07/03/2001
43	Ex.P43	Plan in Doc.No.609/01 for B Schedule property	07/03/2001
44	Ex.P44	Certified copy of Sale Deed	30/04/2001
45	Ex.P45	Certified copy of Plan in Doc.No.1189/01 for B schedule property	30/04/2001
46	Ex.P46	Certified copy of Sale deed	30/08/2001
47	Ex.P47	Certified copy of Deed	02/02/2001
48	Ex.P48	Certified copy of deed	02/02/2001
49	Ex.P49	Certified copy of Sale deed	01/02/2008
50	Ex.P50	Certified copy of Sale deed	01/02/2008
51	Ex.P51	Original letter sent by BHEL to first plaintiff	03/02/1979
52	Ex.P52	Original letter by first plaintiff to BHEL	12/12/1979
53	Ex.P53	Original letter sent by BHEL to Chemi Plant Fabrication	03/01/1980

Sl. No.		Description of Documents	Date
54	Ex.P54	Letter by first plaintiff to BHEL	21/01/1980
55	Ex.P55	Original reply letter sent by BHEL to Chemi Plant Fabrication	25/01/1980
56	Ex.P56	Reply affidavit filed by first plaintiff in A.No.882/2001 in C.S.No.422/2001	---
57	Ex.P57	Reply affidavit filed by first plaintiff in A.No.3972/2002 in C.S.No.422 / 2001	---
58	Ex.P58	Counter affidavit filed by first plaintiff in A.No.676/2004 in C.S.No.422/2001	---
59	Ex.P59	Copy of the order shown to the witness and he admits the same	---
60	Ex.P60	Copy of the letter issued by his counsel Mr.D.Krishnan and the reply dated 06/09/2001 acknowledged by D.Krishnan on 12/09/2001	07/08/2001
61	Ex.P61	The signature alone in the Lease deed	---
62	Ex.P62	Power of attorney	---

List of Exhibits marked on the side of the Defendant:

Sl. No.		Description of Documents	Date
1	Ex.D1	Affidavit filed by the plaintiff	---
2	Ex.D2	Copy of the Will served to the defendant	23/01/1979
3	Ex.D3	Reply given by the first defendant	---
4	Ex.D4	Consent affidavit in respect of B Schedule properties	---
5	Ex.D5	Original of Ex.P18	---
6	Ex.D6	Certified copy of A Form certificate in respect of M/s.S.J.S.Engineering Services	13/08/1987
7	Ex.D7	Original Sales Tax Assessment Order for the Assessment Year of 1987 – 1988.	10/01/1989

Sl. No.		Description of Documents	Date
8	Ex.D8	Original Sales Tax Assessment Order for the Assessment year of 1991 – 1992.	02/08/1993
9	Ex.D9	Original Allotment order Tamilnadu Housing Board issued dated 08/02/1984 in respect of Suit A Schedule property	08/02/1984
10	Ex.D10	Original receipt issued by Tamilnadu Housing Board	23/02/1984
11	Ex.D11	Original receipt issued by Tamilnadu Housing Board	25/02/1984
12	Ex.D12 Series (13 Nos.)	Original receipts for the payment of Installments for A Schedule property issued by Tamilnadu Housing Board for the period 1986 – 1994	---
13	Ex.D13	Original property Tax book for the period 1993 – 2001 in respect of A Schedule property	---
14	Ex.D14	Original property Tax book for the period 2002 – 2006 in respect of A schedule property	---
15	Ex.D15 Series (5 Nos.)	Original Property Tax receipts for A Schedule property	---
16	Ex.D16	Original Consent affidavit given by the first plaintiff to SIDCO in respect of B schedule property	02/06/1994
17	Ex.D17	Certified copy of the Judgment in C.S.No.288/1985	30/10/2002
18	Ex.D18	Receipt	---
19	Ex.D19	Copy of the Notice	---

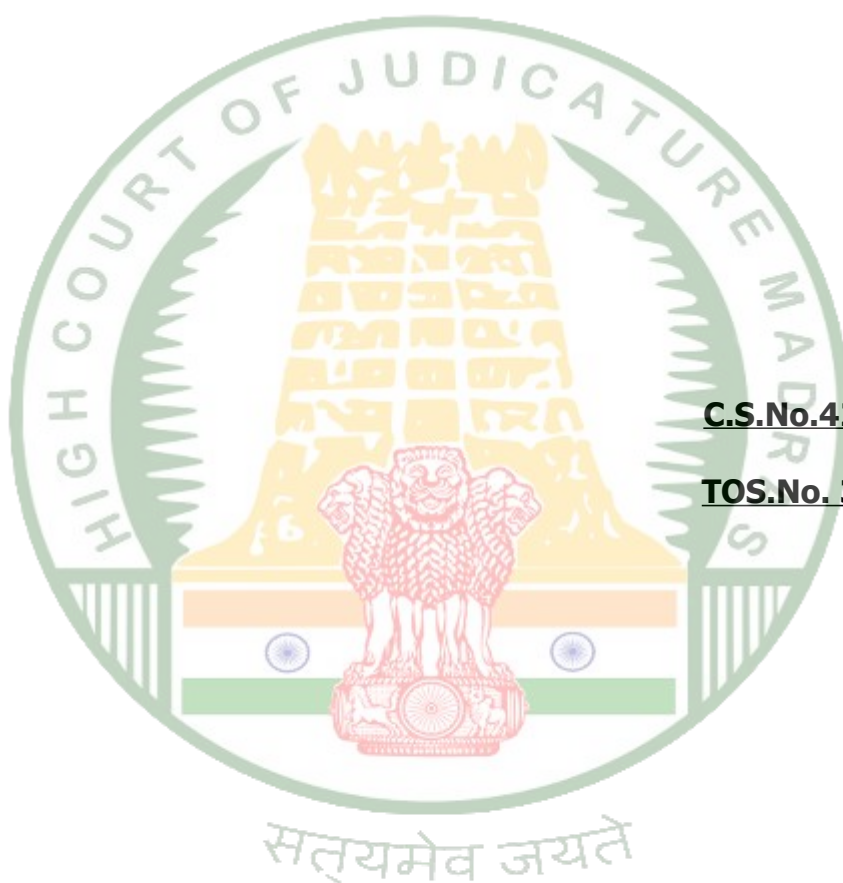
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R.SUBRAMANIAN, J.

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C.S.No.422 of 2001
and
TOS.No. 33 of 2008

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