

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.04.2019

CORAM:

THE HON'BLE MR.JUSTICE N. SATHISH KUMAR

S.A.No.1618 of 2011
and
C.M.P.No.5885 of 2019

Ravichandran,
S/o.Late Marappagounder,
No.7/96, Errankattuthottam,
Rangasamy Goundernoor,
Kalapatti Village,
Chinniampalayam Post,
Coimbatore.Appellant/3rd Defendant

Vs.

Ramathal (died)

Suppathal (died)

Rangathal (died)

1. Thulasiammal,
W/o,K.V.Muthusamy,
East Street, Kalangal Post,
Sulur Via., Palladam Taluk.1st Respondent/4th Plaintiff

2. M.Marappagounder (died)2nd Respondent/1st Defendant

3. M.Ganapathiappagounder,
S/o.Late Marappagounder,
No.7/96, Errankattuthottam,
Rangasamy Goundanpudur,
Hamlet of Kalapatti Village,
Chinniampalayam Post,
Civil Aerodrome Post,
Coimbatore-14.3rd Respondent/2nd Defendant

K.Duraiswamy (died)
4. Saraswathi,
D/o.Marappa Gounder,
No.7/96, Errankattuthottam,
Rangasamy Goundanpudur,

Hamlet of Kalapatti Village,
Chinniampalayam Post,
Civil Aerodrome Post,
Coimbatore-14.

5. Prema,
D/o.Marappa Gounder,
No.7/96, Errankattuthottam,
Rangasamy Goundanpudur,
Hamlet of Kalapatti Village,
Chinniampalayam Post,
Civil Aerodrome Post,
Coimbatore-14.

6. Kausalya,
D/o.Marappa Gounder,
No.7/96, Errankattuthottam,
Rangasamy Goundanpudur,
Hamlet of Kalapatti Village,
Chinniampalayam Post,
Civil Aerodrome Post,
Coimbatore-14.

7. Jayashree, D/o.Marappa Gounder,
W/o.Boopalan,
No.7/96, Errankattuthottam,
Rangasamy Goundanpudur,
Hamlet of Kalapatti Village,
Chinniampalayam Post,
Civil Aerodrome Post,
Coimbatore-14.

8. C.Kuttiappan, (died)

9. Saroja,
D/o.Kuttiappan,
Patel Road, Veerampalayam,
Kalapatti Post, Coimbatore.

10. Selvaraj,
S/o.Kuttiappan,
Patel Road, Veerampalayam,
Kalapatti Post, Coimbatore.

11. Thulasiammal,
D/o.Subbanna Gounder,
Rangasamy Goundenpudur,
Chinniampalayam Post,
Coimbatore Taluk.

12. Kandasamy,
S/o.Subbanna Gounder,
Rangasamy Goundenpudur,
Chinniampalayam Post,
Coimbatore Taluk.

13. Devaraj,
S/o.Subbanna Gounder,
Rangasamy Goundenpudur,
Chinniampalayam Post,
Coimbatore Taluk.

14. Ramalingam,
S/o.Subbanna Gounder,
Rangasamy Goundenpudur,
Chinniampalayam Post,
Coimbatore Taluk.

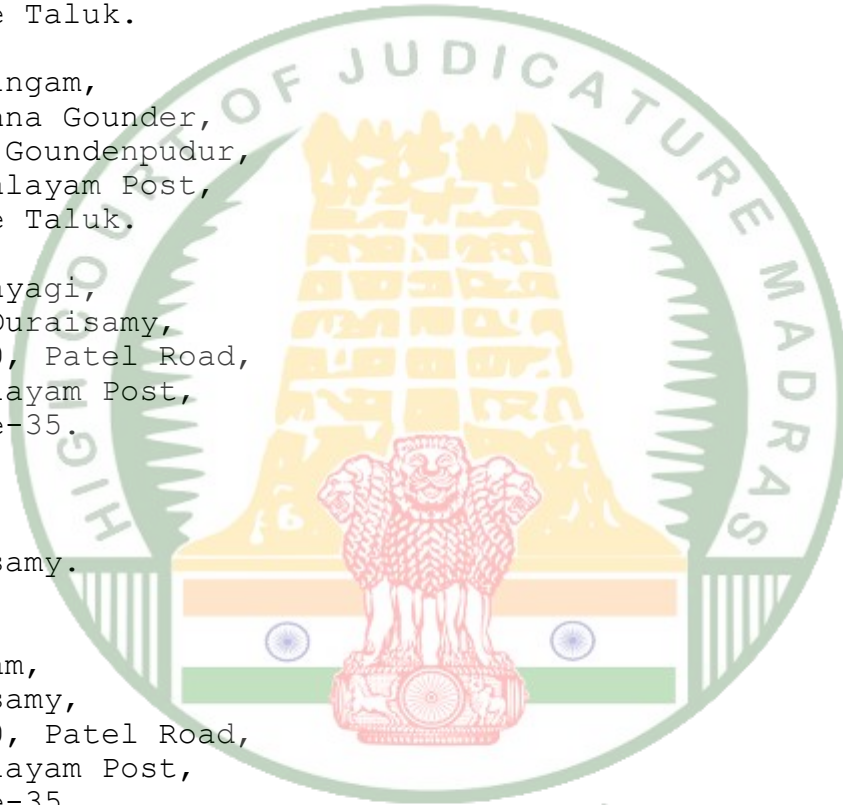
15. Loganayagi,
W/o.Late Duraisamy,
Door No.10, Patel Road,
Veeriampalayam Post,
Coimbatore-35.

16. Shyam,
S/o.Duraisamy.

17. Gowtham,
S/o.Duraisamy,
Door No.10, Patel Road,
Veeriampalayam Post,
Coimbatore-35.

(Respondents 16 and 17 declared as major and discharged from the guardianship of their mother (Loganayagi) vide order of Court dated 10.08.2017 made in CMP No.1787/17) and Respondents 9, 10 & 15 to 17 recorded as L.R's of the deceased R8 vide order dated 10.08.2017 made memo in SA No.1618/11.

18. C.Chinniyagounder,
S/o.Chinnagounder,
Door No.8m, Patel Road,
Veeriampalayam,
Kalapatti Post,
Coimbatore Taluk.



19. Boopathi,
S/o.Chinnagounder,
Door No.8m, Patel Road,
Veeriampalayam,
Kalapatti Post,
Coimbatore Taluk.

20. C.Haridass,
S/o.Chinnagounder,
Door No.2/15, Malar Avenue,
3rd street, Cheran manger,
Velankurichi, Peelamedu,
Coimbatore-4.

... Respondents 4 to 20/Defendants 5 to 21

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 15.09.2011 in A.S.No.88 of 2006 on the file of the I Additional District Court, Coimbatore, confirming the judgment and decree dated 20.02.2006 in O.S.No.1585 of 1990 on the file of the III Additional Subordinate Court, Coimbatore.

For Appellant : Mr.Haja Nazimuddin, Senior Counsel
for Mr.R.Tholgappian

For RR 1, 3-7,
9 & 11-20 : No appearance

For RR8 & 10 : Mr.N.Sridar
for Mr.R.Bharath Kumar

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 15.09.2011 in A.S.No.88 of 2006 on the file of the I Additional District Court, Coimbatore, confirming the judgment and decree dated 20.02.2006 in O.S.No.1585 of 1990 on the file of the III Additional Subordinate Court, Coimbatore.

2. The parties are referred to as per their rankings in the trial Court.

3. The brief facts leading to the filing of this second appeal are as follows:

3.1 The suit properties are said to be the self-acquired properties of V. Marappagounder. The plaintiffs 1 to 4 are the daughters and the defendants 1 and 2 are the sons of V.Marappagounder. V.Marappagounder died intestate on 13.01.1990 at the age of 93 years and after his demise, the plaintiffs 1 to

4 and the defendants 1 and 2 inherited the properties and they are entitled to equal share in the suit properties. Despite the repeated request, the defendants did not come forward for amicable partition. The defendants 4 and 9 to 11 are the legal heirs of the third plaintiff who died on 29.12.1994. The defendants 12 to 15 are the legal heirs of the deceased second plaintiff who died on 29.07.1993. The defendants 19 to 21 are the legal heirs of the deceased first plaintiff who died on 06.10.2005.

3.2 The first defendant has filed a written statement contending that the suit properties are both self acquired and ancestral properties of V.Marappagounder. The ancestral properties are dry lands and no income is derived from those lands. V.Marappagounder out of the income from his milk-business for a very long time, purchased the properties. It is his contention that V.Marappagounder had executed two registered Wills, the first one was on 16.12.1987, in which he has bequeathed the properties in favour of the defendants 1 and 2 and also in favour of the plaintiffs and the second Will was executed by him on 10.07.1989, as per the family arrangement, in which he has divided the properties and allotted the same to his sons viz., the defendants 1 and 2 and also to his grandson, the third defendant therein. The Will dated 10.07.1989, was pursuant to the family arrangement arrived at earlier by V.Marappagounder and his two sons (D1 and D2). It is further contended that the 4th defendant has entered into an agreement with V.Marappagounder for the purchase of an extent of 2 acres in Survey No.748 is not correct. Hence, prayed for the dismissal of the suit.

3.3 The second defendant has filed a written statement contending that the properties were divided and separate shares were allotted to the defendants. The suit properties are ancestral joint family properties and some of the properties were purchased in the name of the defendant's father as the Kartha of the joint family and there is no other business or source of income to the defendant's father and further contended that his father has no testamentary capacity. According to the second defendant, he has given a separate share and he is in his possession and has also constructed a new house after partition. The plaintiffs and other defendants are aware of the exclusive possession and the constructions put up by him. The alleged Will dated 10.07.1989 is not valid and binding on this defendant.

3.4 The third defendant has filed a written statement contending that the second Will executed by V.Marappagounder on 10.07.1989 while he was in the sound state of mental disposition. He has been allotted with the properties described as 'C' schedule in the Will. Further, it is contended that the division of the properties stated in the plaint is unsustainable in law and the plaintiffs are not entitled to any share in the

suit properties. Hence, prayed for the dismissal of the suit.

4. On the side of the plaintiffs PW1 and PW2 were examined and Exs.A1 to A5 were marked. On the side of the defendants, DW1 to DW6 were examined and Exs.B1 to B9 were marked.

5. After taking into consideration, the evidence adduced by the respective parties, both oral and documentary, the Trial Court framed necessary issues and held that the properties are self-acquired properties of V.Marappagounder and granted the reliefs in favour of the plaintiffs, as prayed for.

6. The finding of the Trial Court that the properties are self-acquired properties is not challenged specifically and no ground was raised in the appeal. However, the main focus before the first Appellate Court is with regard to the Will said to have been executed by V.Marappagounder, marked as Ex.B9. However, the Courts below have found that Ex.B9, the Will projected by the 3rd defendant/appellant herein, has not been proved in the manner known to law and the first Appellate Court has also confirmed the finding of the Trial Court, against which the second appeal has been filed.

7. The second appeal has been admitted on the following substantial questions of law:

"(1) When as per the Provisions of Section 42 to 46 of the Registration Act, the Will has been carefully deposited by the testator himself with the concerned registrar and the same has been on his death opened as per the contemplated procedure and registered and then produced before the Court through the concerned officer of the Registrar Office DW.3, and the Registrar also has been examined as DW.6, apart from DW.4, the attesting witness, whether the Courts below are right in holding that the Will is not proved?

(2) When the totality of the circumstances prove the due execution and genuineness of the Will, whether the Courts below are right in taking note of some discrepancies in the deposition of PW.4 and held that the Will is not proved, ignoring the other materials to prove the Will?

(3) In the circumstances of the case, should not the Courts below rely upon PW.5 who was present at the relevant time and depose about the relevant factors of

execution and attestation?

(4) Whether the Courts below are right in merely perusing the signatures in the Will and holding that they do not tally with the signature in the deposited cover, without getting the expert opinion on those documents, especially when the Courts have held that the signatures in Page 7 and 8 are tallying with the signature in the Cover?

(5) Even assuming that the Will is not proved, whether the plaintiffs are not estopped from claiming share in the suit properties, when the plaintiffs relied upon and produced Ex.A2 Muchalika dated 29.01.1990 a family arrangement which was executed in the presence of Panchayatdars under which the plaintiffs are given separate properties?

(6) When the earlier suit filed by the 3rd defendant in O.S.No.2890 of 1990 on the file of the DMC, Coimbatore based on the very same will against the Plaintiffs herein has been allowed to be decreed by the plaintiffs herein, whether the plaintiffs are not estopped from questing the same Will?"

Though several questions of law formulated, the appellant has canvassed his case only with regard to proof of the Will (Ex.B9). In fact no arguments advanced with regard to the substantial questions of law 4 to 6.

8.The petition in C.M.P.No.5885 of 2019 has been filed to implead M/s.Poppys Park Hotels Ltd., represented by its Director, Mr.Ravish Goyal, S/o.Late Kulbushan Goyal, previously having office at No.1B, Appachi Nagar, Tiruppur - 638 607 and now having the Registered Office at No.132, T.T.K.Road, Chennai - 600 018, as one of the respondents in the above second appeal, on the ground that the petitioner has purchased 1.08 acres in S.F.No.749/2 from T.K.Agarwal under a sale deed dated 09.07.1993. Similarly, another 1.25 acres in S.F.No.748/2A has been purchased from Snehalatha Agarwal. Besides, he has also purchased an extent of 1.50 acres under the sale deeds dated 19.08.1983 and 13.07.1994 from Ganapathiappan (D2).

9.According to the petitioner, the respondents had laid the suit without making him as a party to the suit and hence, he has filed the present implead petition, on the ground that the he has purchased an extent of 1.50 acres from V.Marappagounder in the year 1993, and therefore, he should have been impleaded in

the suit as a party.

10.The above petition was opposed by the 9th respondent stating that an extent of 2 acres and 33 cents were originally sold by V.Marappagounder much prior to the suit. However, the remaining extent of the property has been purchased during the pendency of the suit and those sales are hit by lis pendens. Hence, there is no need to implead the proposed party in the second appeal.

11.The learned counsel appearing for the petitioner has submitted that knowing very well that Item No.5 of the property was already sold in the year 1989 and the above property was also included in the suit, the appellant/1st respondent herein has purchased the above property from the predecessor in title, namely the original owner V.Marappagounder. It is further contended that the remaining items of properties were purchased during the pendency of the suit. He further contended that the second defendant has played fraud on him and the parties have also colluded together to non-suit the petitioner. This conduct itself shows that the parties have played fraud. Hence, put forth that the petitioner should be impleaded and the entire suit may be retried. It is his contention that the second defendant took various stand in the suit and stated that he has sold the properties on the strength of the Will, whereas, in his pleadings, he has denied the Will. His conduct would clearly show that all the parties have colluded together to deny the rights of the petitioner. The petitioner has made huge investment and therefore, he should be impleaded as a party in the suit.

12.The learned counsel for the appellant/1st respondent in the petition fairly submitted that the portion of property was sold in the year 1981 in favour of Snehalatha Agarwal and T.K.Agarwal to an extent of 2.33 acres with specific boundaries under two sale deeds, which in turn, were purchased by the petitioner. Therefore, those properties should be excluded from the schedule of properties, since, those properties were already sold by the original owner V.Marappagounder. It is further contended that the sale is not known to the respondents and therefore they have not impleaded the purchaser at that time. But those properties can be excluded from the suit. In respect of the other subsequent sale of 1.50 acres, it is his contention that those transfer was during the pendency of the suit and hence, he cannot be impleaded in the suit. The petitioner cannot simply say that fraud has been played on him. He should be aware of the right of the parties and should have purchased the property. Hence, the learned counsel for the respondents submitted that the petitioner cannot be impleaded at this stage for entire retrial and he cannot espouse the cause of the

parties, who had already failed to prove the Will. Hence, prayed for dismissal of the petition.

13. The learned counsel for the petitioner has placed reliance upon the judgment of this Court dated 06.07.1993 in Appeal No.104 of 1991 [A. Peter and 8 others Vs. Royappa and 7 others]. He has also relied upon another judgment of Calcutta High Court dated 25.01.1916 [Meah Vzir Ali Sardar Vs. Savai Behara and others], wherein it has been held as follows:

"5. As regards the other two persons Grobardhan and Indu whom the defendants put forward as their co-sharers, the adding of a co-sharers as parties, when a retrial is necessary is a matter of discretion with the Court, and it is certainly to the interest of the plaintiff as well as to the interest of every one else that there should be some finality in this litigation and that all the co-sharers should be added.

6. This brings us to a reconsideration of the very first objection that the remand was incompetent in the form in which it is made. With all respect for the decision of the learned Judges in the case of Nabin Chandar Tripathi Vs. Pran Krishna Dey 20 Ind. Cas. 39: 41 C 108: 18 C.L.J. 613, it may be pointed out that decision differs from several previous cases by which we are bound and as the learned Judges declined to refer the question to a Full Bench, because they were of opinion that it did not directly arise, the case being disposed of OK another ground, it is not, therefore, an authority for the very general proposition that there is no other possible case of remand which is not included in Order XLI.....The Consideration which we have just pointed out must lead to the conclusion that Section is not governed or limited by Order XLI alone, but it is subject to such conditions and limitations as may be prescribed in the rules and Orders and the amendment of a plaint and addition of parties in a Court of Appeal is one of the conditions prescribed in the rules and Orders. Section 107, therefore, is just as much subject to that condition as it is to the conditions laid down in Order XLI."

14.I have considered the rival submissions of the learned counsel for the petitioner and the learned counsel for the respondents and perused the materials available on record.

15.As rightly contended by the petitioner, a portion of the property which is shown as Item No.5 of 'C' schedule, comprised of an extent of 2.33 acres, with specific boundaries, was already sold in the year 1981 by the original owner V.Marappagounder. However, the above property is also included in the suit. It is the contention of the learned counsel for the respondents that since the sale made by V.Marappagounder was not known to them, they included the above property in the suit. Now they are ready to exclude the same from the suit items.

16.In view of the same, since the respondents themselves have not claimed any right over those properties sold in the year 1981, the properties covered under the sale deed dated 09.07.1993 to an extent of 2.33 acres mentioned in Item No.5 of the suit schedule is excluded from the decree and judgment. In respect of the other properties viz., 1.50 acres said to have been purchased from the second defendant under the sale deeds dated 19.08.1994 and 13.07.1994, are admittedly purchased during the pendency of the suit and hence, the petitioner is a pendente lite purchaser. It is the contention of the petitioner that the second defendant has sold the property on the strength of Ex.B9 Will. It is curious to note that the property has been sold in the year 1994 by the second defendant. Much prior to such sale, he has disputed the Will and filed a written statement in the year 1991 itself. Though in some portion of his evidence, he has stated that as if he is aware of the Will, but has not supported the Will. The learned counsel for the petitioner contended that this conduct of the second defendant amounts to fraud on him and therefore, if the Court comes to know about the fraud, it has to set aside the entire judgment and the petitioner should be impleaded in the suit to contest the matter as a bonafide purchaser for value, he should be given an opportunity.

17.Such contention of the learned counsel for the petitioner cannot be countenanced for the simple reason that the purchase is only during the pendency of the suit. The second aspect is that being a buyer, the petitioner should have made reasonable enquiry as to the rights of the parties. Merely if one of the co-owners executes a document on alleged rights based on the Will and subsequently, the same co-owner denies the Will in the proceedings between the other co-owners, it cannot be construed that all the co-owners have colluded together to non-suit the petitioner. The petitioner is a pendente lite purchaser and now he cannot be impleaded merely because his vendor has taken a different stand in the proceedings between the co-

owners. He cannot espouse the cause of others, who are relying upon the Will. As far as the purchaser is concerned, he is a total stranger to the family. He cannot either rely or deny the Will. It is for the propounder of the Will, who wants to take the advantage of the Will, has to prove the Will as per law. Therefore, the contention of the learned counsel for the petitioner that the petitioner should be impleaded in the second appeal and the matter should be remanded back to the Trial Court, for retrial, cannot be countenanced.

18. The above judgments relied upon by the learned counsel for the petitioner, factually will not help him in any manner, considering the fact that he is a pendente lite purchaser. The petitioner has purchased the property from one of the co-owners and his rights will be dependent upon the shares that may be allotted to the second defendant in the partition suit and not as per the sale deed, because the sale deed is based on the Will. Though there is no right for the co-owner to transfer his undivided share, but the purchaser cannot claim any exclusive possession based on the specific boundaries and his rights will be dependent on the shares that may be allotted to his vendor in the partition suit. However, considering the fact that the second defendant has taken a different stand and sold the properties and the purchaser step into the shoes of the vendor and whatever rights his vendor gets in the property, out of which he has to workout the same in the final decree proceedings. Accordingly, the petitioner is at liberty to get himself impleaded in the final decree proceedings and workout his remedy as per law. It is for the Trial Court to analyse and take a decision as to whether the pendente lite purchaser can seek for any equity or not and decide the issue on merits.

19. The learned counsel for the 3rd defendant/appellant would contend that the Courts below have failed to look into the evidence adduced by Easwaramurthy (DW4) and Vijya Ragunathan (DW5) with regard to the proof of Will. Though, one of the attesting witnesses has not supported the execution of the Will, the evidence of Easwaramurthy (DW4) and Vijya Ragunathan (DW5) clinchingly established the attestation and execution of the Will. It is his contention that when the attesting witness denies the execution of the Will or does not recollect the Will, he is entitled to prove the Will under Section 71 of the Indian Evidence act, 1872. He further contended that the evidence of Easwaramurthy (DW4) and Vijya Ragunathan (DW5) clearly proves the attestation as well as the execution of the Will. The said Will has been deposited with the concerned Registrar office. The above fact itself shows that the testator has the testamentary capacity at the time of writing of the Will, hence, submitted that the Will is proved by other evidence. In support of his submissions, he has also relied upon the judgments reported in

(2006) 13 SCC 449 [B.Venkatamuni Vs. C.J.Ayodhya Ram Singh and others], (2013) 7 SCC 490 [M.B.Ramesh (dead) by Lrs. Vs. K.M.Veeraje URS (dead) by Lrs.] and (2003) 2 SCC 91 [Janki Narayan Bhoir Vs. Narayan Namdeo Kadam]. It is his further contention that the Courts below have found the character of the properties. Hence, submitted that the appeal should be allowed.

20. The learned counsel appearing for the defendants/respondents herein vehemently contended that the Courts below have rightly found that the Will has not been proved in the manner known to law. At the time of execution of the alleged Will by V.Marappagounder, he was about ninety years old. The evidence of the attesting witness clearly indicates that V.Marappagounder was in critical stage and in fact, he was lying in the car and his signature was obtained. The attesting witness has not spoken about the execution of the document by V.Marappagounder. It is further contended that Paulraj (DW3) has clearly explained the circumstances under which the document came into existence. Paulraj (DW3) has not been treated hostile and no cross-examination is made in this regard. When the witness is examined to prove the attestation and explain the circumstances under which the document came to be executed, when such witness has not been cross-examined, it cannot be construed that the above witness has denied the execution of the Will or did not recollect the execution of the Will. Therefore, it is his contention that the 3rd defendant/appellant herein cannot rely upon the other witnesses to prove the Will as per Section 71 of the Indian Evidence Act, 1872. Hence, submitted that the Courts below have rightly found that the Will is not proved in the manner known to law.

21. The learned counsel appearing for the defendants/respondents further submitted that the evidence of Ravichandran (DW2), the propounder of the Will, itself has created a serious doubt as to the execution of the document. His participation in obtaining the Will has been clearly spoken by the attesting witness whereas the evidence of Ravichandran (DW2)'s indicates that he came to know about the Will after the death of his grandfather in his house when he opened the trunk box which is highly improbable and against his own case. According to him, the Will was deposited with the Registrar office. Therefore, Ravichandran's (DW2) evidence to the effect that he has seen the Will after the death of his grandfather is also doubtful in this case. Further, it is the contention of the learned counsel appearing for the defendants/respondents is that the 2nd defendant in his written statement also denied the execution of the Will (Ex.B9) by his father. The Will is shrouded with serious suspicious circumstances and the propounder has not removed the suspicious circumstances. Hence,

submitted that the appeal is liable to be dismissed.

22. I have considered the rival submissions of the learned counsel for the appellant and the learned counsel for the respondents.

23. The relationship between the parties is not in dispute. The plaintiffs 1 to 4 and the defendants 1 and 2 are the daughters and the sons of V.Marappagounder. The plaint proceeded inter alia that the properties had been purchased by V.Marappagounder as self-acquired properties whereas the first defendant took a specific defence to the effect that the properties are partially ancestral and partially self-acquired properties of V.Marappagounder. Further, the first defendant's contention that his father did not have any sufficient nucleus to purchase the properties and the suit properties had been purchased out of the income earned by his father through milk-business in essence, the first defendant in his written statement contended that the suit properties were purchased by his father out of his own income. In view of the above stand, further there is no other evidence available on record to show that the family had sufficient ancestral nucleus to purchase the properties. It has to be necessarily to be held that the properties are only a self-acquired properties of V.Marappagounder. Now, the contention of the defendants is that the properties had already been divided and there was a family arrangement, pursuant to the same, the Will came to be executed by V.Marappagounder. When analyzed to show that there is a division of properties, except the oral evidence no other aspects are available on record to substantiate the division. There must be a documentary evidence to substantiate the division of properties.

24. Be that as it may, the 3rd defendant/appellant herein has propounded Will said to have been executed by V.Marappagounder. The said Will has been marked as Ex.B9. It is his contention that in the said Will, V.Marappagounder has bequeathed the properties not only in his favour but also in favour of the first and the second defendant, his uncle. It is curious to note that the second defendant in his written statement has denied the existence of such Will. When the Will was projected by the 3rd defendant/appellant herein, the initial burden lies on him not only to prove the execution but also the attestation of the Will.

25. It is admitted by both the parties that one of the attesting witnesses Kandasamy has died and the other attesting witness Easwaramurthy (DW4) was alive. Easwaramurthy (DW4) was examined to prove the Will. Easwaramurthy (DW4) in his evidence has stated that on the date of obtaining the signature of the

testator, he was requested to come and sign the document. According to his evidence, the testator was lying in the car and he had a fracture on his hip and accordingly, at the request of one Marappagounder (D1) and others, he has signed in the Will (Ex.B9). It is to be noted that one of the defendants is also Marappagounder (D1). In his entire evidence, Easwaramurthy (DW4) never stated that the testator requested him to accompany him to be witness to the Will (Ex.B9). The entire evidence of Easwaramurthy (DW4), when carefully seen, he has not stated that he had seen the testator signing the Will in his presence or he has seen the other attesting witnesses signing the same, whereas, he has clearly explained the manner in which his signature had been put in the Will (Ex.B9). The attesting witness examined by the defendants has given explanation as to the manner in which the document came into existence. It is curious to note that though he has not spoken about either the attestation or execution of the Will by the testator, he has not been cross-examined and never treated as hostile. His entire evidence, in fact, goes against the propounder of the Will. In cross-examination by the defendants, Easwaramurthy (DW4) categorically admitted that V.Marappagounder, the testator was not in a position even to walk by himself and was illiterate. His evidence clearly indicates that V.Marappagounder was aged about 90 years and immobilized and not in a position to comprehend the nature of things himself. When a person of that age unable to comprehend the nature of the things properly, the burden lies on the propounder to prove not only the execution but also the attestation of the Will. Therefore, the evidence of Easwaramurthy (DW4) will not satisfy the requirements under law to prove the attestation and also the execution as required under Section 63 (c) of the Indian Succession Act, 1925. It is to be noted that the evidence of Easwaramurthy (DW4) who was the party to the document, has clearly explained the circumstances under which the Will (Ex.B9) came into existence. When such circumstances clearly shows that the serious suspicious circumstances inherent in the transactions. The initial burden lies on the part of the propounder of the Will not only to prove the execution or attestation but also to dispel the suspicious circumstances attached or shrouded in the above document.

26. The evidence of Easwaramurthy (DW4) which remains unchallenged by way of cross-examination clearly indicates that the testator was aged about 90 years and he was immobilized and highly illiterate person. That being the position, such a person taking rational decision in executing the Will, bequeathing the properties only in favour of his two legal heirs excluding all the others is also one of the serious suspicious circumstances attached to the Will. Further, his evidence clearly indicates that the 3rd defendant/appellant herein and his group have actively participated in preparing the Will. Though the Will was

deposited, there was no evidence as to when the testator has executed the Will, there was many reasons to suspect the Will. It is further to be noted that the Will said to have been deposited before the concerned Registrar as per Section 42 of the Indian Registration Act was deposited. Paulraj (DW3) was examined but his evidence does not show how the testator has deposited the Will. It is to be noted that the Will has to be deposited by the testator or his authorized agent. Whether the Will was originally deposited by the testator or his agent, absolutely there is no evidence. This was also one of the suspicious circumstances attached to the Will. The evidence of the propounder of the Will clearly indicates that he has seen the Will 15 to 20 days after the death of his grandfather and he has found the Will in the trunk box in his house, which itself is highly doubtful. At any event one of the attesting witnesses clearly spoken about the suspicious circumstances under which the document has been executed. His evidence clearly shows that the Will has not been executed out of own volition by testator. It is to be noted that Easwaramurthy (DW4) has not denied the signing of the document by the testator, he has explained the circumstances under which his signature was obtained. He has not denied the signature of the testator in entirety. Therefore, it cannot be construed that he has denied the execution of the Will. Only when the attesting witness denies or did not recollect the will, the question of proving the Will by any other mode by other evidence as contemplated under Section 71 of the Indian Evidence Act would arise. Easwaramurthy (DW4) has not denied the signature of himself and testator but he has clearly explained the circumstances under which it was obtained. His evidence shows that the testator has not executed the alleged Will in sound state of mind. Besides the proof of execution and attestation also not established in the evidence of Easwaramurthy (DW4). Easwaramurthy (DW4) has not confronted by the propounder by treating him hostile. No question was put to him to effect that the testator signed in his presence and other attesting witness also seen the testator signing the Will and the testator seen both the attesting witness signing the Will. Therefore, the contention of the appellant's counsel that the Will can be proved by any other manner with the aid of Section 71 of the Indian Evidence Act, 1872, cannot be countenanced, even assuming that the parties are entitled to prove the document by any other mode as contemplated under Section 71 of the Indian Evidence Act, 1872. Now the evidence of Vijya Ragunathan (DW5), so called retired Revenue Inspector has to be analyzed . In his evidence, he has stated that as if he was present at the time of executing the document. Easwaramurthy (DW4) has not supported the execution and the attestation of the document. The entire evidence of Vijya Ragunathan (DW5) when carefully seen, same does not satisfy the requirement under law. He has simply stated in his evidence that the Will was drafted

by Ponnambalam, which is found to be false and the Will was signed by the testator and the same has been signed by Easwaramurthy (DW4) as a second witness and his evidence does not show that the other witness have also signed in his presence. Even his entire evidence is taken as such, it does not satisfy the attestation as required under 63 (c) of the Indian Succession Act, 1925. It is further to be noted that how much such type of witnesses could be relied on is also to be considered. Vijya Ragunathan (DW5)'s presence or his role is nowhere mentioned in the entire proceedings. Suddenly, he was brought to the witness box as if he has witnessed the execution and the attestation of the Will. Particularly, he was examined after the attesting witness did not support the Will. Procuring such persons to support the party is not unknown in the society. His evidence is entirely scanned and his evidence is highly inconsistent with regard to the time of execution. Further his evidence to the effect that the Will has been typed by one Ponambalam Ex-Karnam of Village and the same is contrary to document, whereas in Will (Ex.B9), it is shown that it was typed by some other person. Further, Vijya Ragunathan (DW5) being the Revenue Inspector without applying leave on that particular date accompanying the testator from morning till the Will is executed also highly improbable and highly unbelievable. Therefore, his evidence cannot be reliable to prove the Will by other mode as contemplated under Section 71 of the Indian Evidence Act.

27. In the judgment of the Apex Court reported in AIR 2015 SC 2149 [Jagdish Chand Sharma Vs. narain Singh Saini (dead) through LRs. and others], wherein it has been held in paragraph 45.1 as follows:

"45.1 Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Act and Section 68 of 1872 Act. The distinction between failure on the part of a attesting witness to prove the execution and attestation of a Will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to

these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies /deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71 of the 1872 Act. Such a sanction would not only be incompatible with the scheme of Section 63 of the Act read with Section 68 of the 1872 Act but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of Act 1872 cannot be invoked to bail him (propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63 (c) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour."

Further the Apex Court has held as follows:

"In the instant case the evidence of the attesting witness and the sub-Registrar before whom the Will in question was registered does not exhibit either denial of the execution of the Will or their failure to recollect the said phenomenon and thus, does not attract the applicability of s.71 of the Evidence Act, 1872. The evidence of

said witnesses analyzed collectively or in isolation, does not evince animo attestandi, an essential imperative of valid attestation of a Will. As S.71 of the Evidence Act, 1872 by no means can be conceived of a be a diluent of the rigour of S.63 of the Act, the testimony of these witnesses fall short of the probative content to construe the Will in question to be a validly executed and attested Will as envisaged in law."

28. Similarly, in the judgment reported in AIR 2007 SC 1975 [Benga Behera and another Vs. Braja Kishore Nanda and others], wherein it has been held as follows:

"22. P.W.9, as noticed hereinbefore in his deposition, stated that Sarajumani Dasi did not put her thumb impression in his presence on the Will at the time of its execution. Whether the same would amount to denial of the execution of a Will even within the meaning of S.71 of the Indian Evidence Act is the question.

23. Section 71 of the Evidence Act reads as under:

"71. Proof when attesting witness denies the execution.-If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

24. He neither denies the execution nor has failed to recollect the execution of the Will. According to him, the testatrix had put her LTI only after he had put his signature.

25. Section 71 of the Act provides for one of the exceptions where it is not possible to strictly comply with the requirements of S.68, Sections 69, 70 and S.71 are exceptions to S.68. Section 69 provides for proof of a document where no attesting witness is found. Section 70 provides for admission of execution by party to attesting document. Section 71 deals with a situation where the attesting witness denies or does not recollect the execution of the document and only in that eventuality, the document's execution may be proved by other evidence.

26. As indicated hereinbefore, P.W.9 does not deny the execution. His statement, thus, does not satisfy the requirements of S.63(c) of the Succession Act. While appreciating evidence of a witness, we cannot go beyond the same and while doing so, we cannot raise a legal fiction that he must have done so only because the first respondent had cross-examined him on certain issues. By cross-examining one's own witness, the effect of his statement in examination-in-chief in a case of this nature cannot be ignored. Whether S.71 of the Evidence Act was applicable in the facts of the present case must be found out upon reading his evidence in its entirety."

29. In the judgment reported in (2006) 13 SCC 449 [B.Venkataamuni Vs. C.J.Ayodhya Ram Singh and others], in which the Apex Court has held that while arriving at a finding as to whether the Will was duly executed, the Court must satisfy its conscience having regard to the totality of the circumstances of the particular case. Mere proof of execution in terms of S.63, Succession act and Ss.67 and 68, Evidence Act, are not sufficient. The other facts and circumstances should also be taken note of. In another judgment reported in (2013) 7 SCC 490 [M.B.Ramesh (dead) by LRs. Vs. K.M.Veeraje URS (dead) by Lrs. and others], the Apex Court has held as follows:

"Section 71 of the Evidence Act is section connected to Section 68 of the Evidence Act and Section 63 of the Succession Act "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances" and in a way reduces the rigour of the mandatory provision of Section 68. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time cannot be read to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available.

18. That takes us to the crucial issue involved in the present case viz., with respect to the validity and proving of the will concerned. A will has to be executed in the manner required by Section 63 of the Succession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in para 11 of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time, as held in that very judgment the section cannot be read to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available.

22. In Janki Narayan Bhoir, this Court has explained the inter-relation between Section 63(c) of the Succession Act, 1925 and Sections 68 and 71 of the Evidence Act, 1872. In that matter only one attesting witness to the will was examined to prove the will, but he had not stated in his deposition that the other attesting witness had attested the will in his presence. The other attesting witness, though alive and available, was not examined. The Court noted the relevant facts in para 5 of the judgment as follows: (SCC p.96)

"5.....Prabhakar Sinkar, the attesting witness, in his deposition stated that he did not know whether the other attesting witness Ramkrishna Wagle was present in the house of the respondent at the time of

execution of the will. He also stated that he did not remember as to whether himself and Raikar were present when he put his signature. He did not see the witness Wagle at that time; he did not identify the person who had put the thumb impression on the will. The scribe Raikar in his evidence stated that he wrote the will and he also stated that he signed on the will deed as a scribe. He further stated that the attesting witnesses, namely, Wagle and Prabhakar Sinkar are alive."

25. The issue of validity of the will in the present case will have to be considered in the context of these facts. It is true that in the case at hand, there is no specific statement by PW2 that he had seen the other attesting witness sign the will in the presence of the testatrix, but he has stated that the other witness had also signed the document. He has proved his signature, and on the top of it he has also stated in the cross-examination that the other witness (Mr. Mallaraje Urs), Smt Nagammani, himself and one Sampat Iyanger and the writer of the will were all present while writing the will on 24.10.1943 which was registered on the very next day. This statement by implication and inference will have to be held as proving the required attestation by the other witness. This statement along with the attendant circumstances placed on record would certainly constitute proving of the will by other evidence as permitted by Section 71 of the Evidence Act."

30. Considering the above judgments and analyzing the entire facts particularly the evidence of Easwaramurthy (DW4) and Vijya Ragunathan (DW5), the execution as well as the attestation are not proved besides the propounder of the Will has not dispelled the serious suspicious circumstances attached to the document. Accordingly, the substantial questions of law formulated in the second appeal are answered against the 3rd defendant/appellant herein and in favour of the respondents herein.

31. For the aforesaid reasons, the judgment and decree of the Courts below are confirmed except some parts of the Item No.5 of 'C' schedule, which was sold under separate sale deed dated 09.07.1993, based on the original sale deed dated 23.06.1981.

In the result, the second appeal is dismissed and connected civil miscellaneous petition is also dismissed. No costs.

Sd/-
Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

nsd

To

1. The I Additional District Judge,
Coimbatore.
2. The III Additional Subordinate Judge,
Coimbatore.

+1cc to Mr.R.Tholgappian, Advocate SR.No.35277

+1cc to Mr.R.Bharath Kumar, Advocate SR.No.35092

+1cc to Mr.S.Gunalan, Advocate SR.No.35041

GI -II (CO)
GMY (21/06/2019)

S.A.No.1618 of 2011

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