



2.N.Ashish Karwa

.. Respondents

Common Prayer :Appeal Suits filed under Section 96 of Civil Procedure Code, to set aside the Judgment and Decree passed in O.S.No.5 of 2010, 28 and 29 of 2011 dated 27.04.2015 on the file of the learned Principal District Judge, Tuticorin.

For Appellant : Mr.S.Meenakshi Sundaram,
Senior Counsel

(in all appeals) For Mr.M.P.Senthil

For Respondent No.1 : Mr.M.Suresh

(in all appeals) For M/s.Aiyar & Dolia

For Respondent No.2 : Mr.Bijai Sundar

(in A.S.(MD)No.166 of 2015) For Mr.M.Ramdoss

For Respondents 2 & 3 : No Appearance

(in A.S.(MD)No.167 of 2015)

For 2nd Respondent : Mr.G.Jermiah

(in A.S.(MD)No.168 of 2015) For Mr.Ghouse Kathiri

For 4th Respondent : Mr.G.Jermiah

in A.S.(MD)No.168 of 2015) For Mr.Ghouse Kathiri

COMMON JUDGMENT

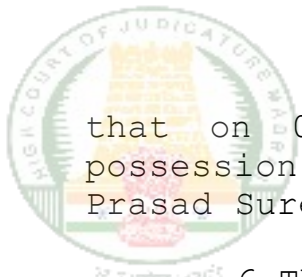
Heard the learned counsel appearing on both the sides.

2.These appeal filed against the common Judgment and Decree passed in O.S.No.5 of 2010, 28 and 29 of 2011 dated 27.04.2015 on the file of the learned Principal District Judge, Tuticorin.

3.The appellants herein are the plaintiffs in the above said suits. The respondents are the defendants. The trial Court has passed a common Judgment.

4.The case of the plaintiff in O.S.No.5 of 2010 is that the first schedule property jointly belonged to Gothawari Sureka, Hariprasath Sureka and Ram Avathar Sureka by virtue of purchase by them jointly as partners of M/s.Hari Prasath & Co., through a registered sale deed dated 07.08.1981. In the year 1984, Gothawari Sureka and Ram Avathar Sureka got the first schedule property in the oral partition and the second schedule property was given to Gothawari Sureka. On 24.11.1999, the said Gothawari Sureka executed an unregistered Will bequeathing the second schedule property in favour of the plaintiff who is the wife of her grand son namely Arun Kumar Sureka. Subsequently, on 06.02.2002, the said Gothawari Sureka died and the Will came into force.

5.The third defendant has borrowed a loan from the first defendant on 18.02.1999. The partner of M/s. Hari Prasath Sureka mortgaged the schedule property in favour of the first defendant Corporation and deposited the title deeds in favour of the first defendant Corporation and deposited the title deeds in favour of the first defendant Corporation and thereafter the third defendant did not repay the loan amount and the first defendant issued a notice on 26.09.2002 and as there was no response, it is alleged



that on 07.02.2003 the first defendant has took constructive possession of the second schedule property mortgaged by M/s. Hari Prasad Sureka and Co., and its partners.

6.The alleged constructive possession taken by the first defendant against the collateral security offered by the guarantor is invalid under Section 29 of SFC Act. The first defendant had to approach only the District Court as provided under Section 31 of SFC Act. Hari Prasad Sureka one of the partner of M/s. Hari Prasad Sureka and Co., has filed a W.P.No.5528 of 2003 and subsequently he died. Since the first defendant attempted to disturb the peaceful possession of the plaintiff. the plaintiff has filed a suit in O.S.No.114 of 2003 before the Sub Court, Thoothukudi for bare injunction. The petition in I.A.No.283 of 2003 for temporary injunction was allowed on 17.06.2003. Thereafter the suit was transferred to learned Principal District Munsif and was taken on file as O.S.No.592 of 2005 and the suit was dismissed on 03.10.2007. Then the suit was restored on 06.12.2008 and was transferred to the Additional District Munsif Court, Tuticorin. During this period, the first defendant brought the second schedule property for auction on 30.11.2007.

7.During the life time of Hari Prasad Sureka, he executed a Will in respect of the first schedule property in favour of the minor Abiyantha Sureka and the Will was also probated before the Sub Court, Thoothukudi in Probate O.P.No.16 of 2007. The minor filed an application through her mother on 29.11.2007 requesting the first defendant to stop the auction and she filed a suit in O.S.No.91 of 2008 before the Principal District Munsif Court, Thoothukudi to declare that the auction of the first defendant is null and void and for permanent injunction. Even after that suit, the first defendant called for tenders and brought the collateral security for sale on 30.11.2007. Without following the guidelines of the Hon'ble Supreme Court, the first defendant sold the property to the second defendant for a very low cost and executed a sale deed in favour of the second defendant on 03.07.2009.

8.The case of the first defendant in O.S.No.5 of 2010 is that there was a huge arrears of loan amount. The first defendant sent remainders to the third defendant to pay the instalments due. Since the third defendant failed to pay the instalments, the first defendant served notice dated 10.02.2003 under Section 29 of the State Financial Corporation Act, 1951 on the borrower and on the mortgagors informing of the taking of the possession of the first schedule property on 07.02.2003 and demand them to clear the instalments in a week. On 18.02.2003, Hari Prasath Sureka filed W.P.No.5528 of 2003 before the Principal Bench of this Court and this Court granted a conditional stay on 20.02.2003 directing the first defendant to deposit Rs.7,00,000/- within a period of eight weeks from 20.02.2003, the condition was not complied with and the stay order was vacated automatically.



9. Hari Prasath Sureka induced his daughter-in-law and filed a suit in O.S.No.114 of 2003 before the Sub Court, Thoothukudi and got an exparte injunction. The suit is pending before the District Munsif Court, Thoothukudi as O.S.No.592 of 2005. The first defendant has brought the primary security for auction sale on 11.10.2006, 27.02.2007 and on 23.08.2007. There was no bidders in the first auction and there was low bid during the second and third auction. The first defendant brought the primary and collateral security for auction sale on 20.11.2007. Since the borrower and the guarantors failed to clear the arrears, the first defendant issued notice on 19.11.2007 to the borrowers and the mortgagers for tender cum public auction sale of 74 cents at Thoothukudi and 37 acres land at Ramanathapuram to be auctioned on 20.11.2007 and the same was published in Thina Thanthi on 15.11.2007 and pamphlets are issued at Thoothukudi and Ramanathapuram. On 20.11.2007, the plaintiff in O.S.No.592 of 2005 filed a writ petition in W.P.(MD)No.9966 of 2007 before this Court but no interim order was granted by this Court. Suppressing the proceedings of writ petition, the plaintiff got an interim injunction against the defendants 1 and 2.

10. After giving notice for the auction sale, on 30.11.2007, public auction was held and the property was valued by the approved Panel Valuer who fixed the suit property at Rs.15.26 lakhs. On 16.02.2008, minor A.Abiyanta Sureka filed a suit in O.S.No.91 of 2008 before the District Munsif, Thoothukudi through her next friend and mother and prayed to release the minor property on the basis of the alleged Will dated 06.06.2006 which is said to have been executed by the Hari Prasad Sureka with regard to undivided 1/3 share in the mortgage land. No oral partition took place in the year 1984 and in order to cheat the loan transaction, the alleged Will dated 24.11.1999 was created. The plaintiff is not in possession of the suit property as the possession was taken by the defendants on 07.02.2003, after observing all legal formalities and notice was also given to the borrower and mortgagors at the time of taking constructive possession. The service of notice to the borrower and mortgagers was admitted by Hari Prasad Sureka in the affidavit filed in W.P.No.5528 of 2003 under Section 29 of the State Financial Corporation Act empowers the defendants to take action against the defaulting units for the recovery of dues. The first defendant is also entitled to take auction against the defaulting borrowers and mortgagers under Section 31 of the State Financial Corporation Act, and also entitled to invoke Revenue Recovery Act and also entitled to file suit before the civil suits for the recovery of loan dues and prayed to dismiss the suit.

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11. The case of the second defendant is that the second defendant is an innocent purchaser of A schedule property for valuable consideration at a public auction on 30.11.2007. The



auction was confirmed for a sale consideration of Rs.41 lakhs and the sale deed dated 03.07.2009 was duly executed and was registered by the first defendant in favour of the second defendant. The plaintiff suppressing the fact of filing of W.P. (MD)No.9966 of 2007, has obtained an injunction order. The Court fee paid is very low and the plaintiff is not in possession of the suit property. In the Will dated 19.11.1999, it is stated that M/s.Hari Prasad Sureka & CO., was the owner of the suit property and that if Gothawari Devi Sureka had retired from the partnership firm on 16.01.1984 and all the assets and liabilities of the Firm will continue to vest only in the Firm and the assets had not been divided or distributed among the partners. No reference was made regarding the Will dated 19.11.1999. The Will dated 24.11.1999 was not admissible under Section 68 of Indian Evidence Act. The Will would become effective only after 06.02.2002 but the testator already encumbered the property on 29.03.1999 and it is prayed that the suit is to be dismissed.

12.The case of the third defendant in O.S.No.5 of 2010 is that the suit property belongs to V.Koilpillai and he sold the property on 07.08.1981 in favour of M/s.Hari Prasad Sureka represented by its partners, namely, Gothawari Devi Sureka, Hari Prasad Sureka and Ram Avathar Sureka. On 16.1.1984 Gothawari Devi Sureka and Ram Avathar Sureka retired from the partnership Firm and they signed the deed of retirement and Hari Prasad Sureka was entitled to run the business under the old name and style and it is false to state that the suit properties are divided orally among the partners. In the Will dated 19.11.1999, it is stated that the property if any she may possess in the Firm, is bequeath to the beneficiary. The Will is created only for the purpose of the suit. Hari Prasad Sureka and the third defendant and Kishor Kumar Sureka all constituted a Hindu Joint undivided family engaged in the family business of salt. Though loan was created in the name of the third defendant, the funds was diverted and spent for development of joint family business. Under 63 of the Indian Succession Act, a Will is required to be attested by at least two attesting witnesses and to prove the execution of the Will at least one of the attesting witnesses is to be examined. The defendant got knowledge about the grant of probate certificate as per the order passed in Prob.O.P.No.16 of 2007 on 28.6.2007 only after filing of written statement by the plaintiff and her husband in O.S.No.5 of 2008 on the file of the lower Court and prayed to dismiss the suit.

13.The contention raised by the second defendant in his additional written statement in brief is follows:

The plaintiff has no locus standi to maintain the suit, since she is not having any subsisting interest in the suit. The Will dated 24.11.1999 was created only for the purpose of the suit. In another Will dated 19.11.1999, the testatrix had bequeathed the property if any that she may possess



in the firm M/s. Hari Prasad Sureka and Co., which partnership was the owner of the suit schedule mentioned property. Gothawari Devi Sureka had retired from the partnership firm on 16.01.1984 by a registered document and all the assets and liabilities of the firm continued to vest only in the firm and the assets have not been divided or distributed among the partners. The Will dated 24.11.1999 have not been executed in the manner known to law and it cannot be admitted in evidence in terms of Section 68 of the Indian Evidence Act. As the mortgage deed was executed by the partners of the M/s. Hari Prasad Sureka on 19.03.1999, it will prevail over any 'Will' executed subsequently. Even assuming that the Will dated 24.11.1999 was a genuine document, the same would become effective only after the death of Gothawari Devi Sureka on 06.02.2002 by which time the property had been encumbered as per the mortgage deed dated 29.03.1999. The plaintiff cannot invoke Section 31 of the State Financial Corporation Act as the said provision will only be available to the financial institution and not for a borrower or a third party.

14. Based on the above said pleadings, issues in O.S.No.5 of 2010 were framed by the trial Court. They are as follows:

Issues:

"1) Whether the possession taken by the first defendant in respect of second schedule property is a void-ab-initio?

2) Whether the auction conducted by the first defendant on 30.11.2007 is a void-ab-initio?

3) Whether the sale deed executed by the first defendant in favour of the second defendant by registered sale deed document No.1747/09 dated 03.07.2009 is null and void?

4) Whether the plaintiff is entitled to get permanent injunction restraining the defendants 1 and 2 in disturbing the peaceful enjoyment and possession of the second schedule property?

5) Whether the Court fee paid is in correct?

6) Whether the Court has jurisdiction to try this suit?

7) Whether the plaintiff is entitled to get any other reliefs?"

Additional Issues:

"1) Whether the plaintiff is having any locus standi to file the above suit challenging the constructive possession and execution of sale deed by D1 in favour of D2?

2) Whether the registered Will dated 19.11.1999 executed by Smt. Gothawari Devi Sureka or the unregistered Will dated 24.11.1999 alleged to have been executed by Smt. Gothawari Devi Sureka is genuine?"

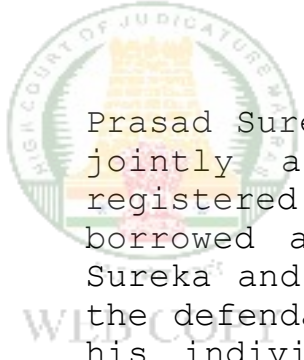


15. The case of the plaintiff in O.S.No.28 of 2011 is that the first schedule property jointly belonged to Gothawari Sureka, Hariprasath Sureka and Ram Avathar Sureka by virtue of a purchase by them jointly as partners of M/s.Hari Prasath & Co., through a registered sale deed dated 07.08.1981. The defendants 2 and 3 borrowed a loan from the first defendant for their company. For the said loan, Hari Prasad Sureka stood as a guarantor and has given the 2nd schedule property as a collateral security. During the life time of Hari Prasad Sureka, he bequeathed a 'Will' in favour of the minor plaintiff on 06.06.2006. After his death on 06.11.2006, the said 'Will' came into force. Accordingly, the above minor filed a petition to probate the above 'Will' in Probate O.P.No.16 of 2007 before the Sub Court, Thoothukudi and the same was probated and the probate certificate is being issued in favour of the minor plaintiff on 28.06.2007.

16. From the above date, the minor plaintiff is in continuous enjoyment and possession of the 2nd schedule property and the patta also is being transferred in the name of the minor plaintiff and she is also paying revenue tax for the 2nd schedule property from 08.02.2008. During the life time of Hari Prasad Sureka, the first defendant has not sent any notice of possession under Section 29 of the State Financial Corporation Act, 1951. Hari Prasad Sureka colluded with the defendants 2 and 3. The first defendant has taken a constructive possession over the 2nd schedule property which is not actually true. The notice under Section 29 of the State Financial Corporation Act stands invalid and there is no service of notice to Hari Prasad Sureka. Since the first defendant brought the property for auction after a lapse of six years from the date of issuing of show cause notice on 26.09.2006, the auction is barred by limitation under the specific provisions of the Act. There is a disputed existing between the third defendant with the father of the minor plaintiff by name Arun Kumar Sureka with regard to the partition of the properties, the defendants 2 and 3 colluded with the first defendant attempted to bring the 2nd schedule property for sale for the loan borrowed by them. The first defendant without any notice to the minor plaintiff and has not also made maximum advertisement in her locality calling for tenders for the sale of the 2nd schedule property dated 23.11.2007. The plaintiff issued a telegraphic notice dated 30.12.2007 to the first defendant, the first defendant without minding the same and in collusion with the defendants 2 and 3 is still making attempts to bring the second schedule property for sale. Since the initial proceedings of the notice by the first defendant and the subsequent actions are invalid and barred by limitation and that the defendants 2 and 3 are trying to cheat the plaintiff in collusion with the first defendant.

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17. The case of the first defendant in O.S.No.28 of 2011 is that the 1st schedule property belonged to Godawari Sureka, Hari



Prasad Sureka and Ram Avathar Sureka by virtue of purchase by them jointly as partners of M/s.Hari Prasath & Co., through a registered sale deed dated 07.08.1981. The defendants 2 and 3 borrowed a loan from the first defendant and that Hari Prasad Sureka and Co., has stood as a guarantor for the loan borrowed by the defendants 2 and 3. It is not true that Hari Prasad Sureka in his individual capacity has given the second schedule property being 1/3rd undivided share in 74 cents of land as a collateral security for the loan. The alleged 'Will' is fabricated with a malafide intention to stop the legal proceedings on the said property. The said property was mortgaged to the first defendant on 29.03.1999 which is earlier than the alleged will and the original title deeds of the said property are still available with the defendant.

18.This defendant is not party to the alleged Probate O.P.No.16 of 2007 and no notice was sent to this defendant at the time of the alleged patta transfer in the name of the plaintiff. Hari Prasad Sureka has been intimated before taking possession as well as after taking possession. The defendants 2 and 3 have committed default in repayment of loan to the first defendant and in spite of sufficient opportunities being given, the defendants 2 and 3 did not care to pay the dues so that this defendant has taken action under Section 29 of the State Financial Corporation Act. Since this defendant has invoked Section 29 of the State Financial Corporation Act, 1951, the alleged will and the probate thereafter are valid.

19.It is wrong to state that the defendant is colluding with the defendants 2 and 3 to bring the mortgaged property at Thoothukudi for auction. The properties at Ramanathapuram are more valuable than the property at Thoothukudi. The first defendant has made advertisements in newspaper for auction sale of the mortgaged property and immediately the plaintiff has sent a telegram to the first defendant as if the property was bequeathed to the plaintiff under a Will dated 06.06.2006 and therefore demanded to stop the public auction to be held on 30.11.2007. As the first defendant has taken actions under Section 29 of the State Financial Corporation Act, 1951, this Court has no jurisdiction to try this suit.

20.The case of the fourth defendant in O.S.No.28 of 2011 is that the 1st schedule property belonged to Godawari Sureka, Hari Prasad Sureka and Ram Avathar Sureka by virtue of a purchase by them jointly as partners of M/s.Hari Prasath & Co., through a registered sale deed dated 07.08.1981. The defendants 2 and 3 borrowed a loan with the first defendant for their company establishment and that the above said Hari Prasad Sureka stood as the first defendant for the loan borrowed by the defendants 2 and 3. The erstwhile owner of the 2nd schedule property by name M/s.Hari Prasad Sureka & CO., had executed a registered mortgage deed in



favour of the 1st defendant on 29.03.1999 and therefore the Will executed by late Hari Prasad Sureka in favour of the minor plaintiff on 06.06.2006 in respect of the 2nd schedule property will have no effect.

21. The first defendant to whom the second schedule property was mortgaged was not impleaded as a party in the probate proceedings and the order of probate did not bind this defendant and the grant of a probate will not confer title to the property. The 2nd schedule property was purchased by this defendant for valuable consideration at a public auction conducted by the first defendant herein on 30.11.2007. The said auction was confirmed in favour of the second defendant for a sale consideration of Rs.41 lakhs and a sale deed dated 03.07.2009 was duly executed and registered by the first defendant in favour of this defendant. After knowing the proceedings of the first defendant dated 10.02.2003 regarding the taking over of the constructive possession of the second schedule property the first defendant had filed a Writ Petition No.5528 of 2003 before this Court and has obtained an interim stay on condition to remit seven lakhs within two months from 20.02.2003. But he did not obey the order of this Court and the stay was vacated and subsequently the said writ preferred by Hari Prasad Sureka was also dismissed. The said Hari Prasad Sureka was aware of the proceedings taken by the first defendant. The plaintiff with a malafide intention to cause hardships to the first defendant as well as this defendant filed this suit by creating a forged 'Will' dated 06.06.2006. The plaintiff had failed to value the suit properly correctly for the purpose of Court fee and jurisdiction. The suit has to be dismissed with cost.

22. Based on the above said pleadings, issues in O.S.No.28 of 2011 were framed by the trial Court. They are as follows:

Issues:

"1) Whether the proceeding taken by the first defendant under the provisions of SFC Act 1961 is to be declared as void-ab-initio or not?

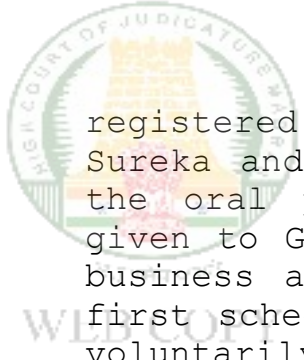
2) Whether the plaintiff is entitled for permanent injunction as prayed for?

3) Whether the plaintiff is entitled for the direction that the second and third defendants to repay and settle loan amount to the first defendant to release the minor plaintiff's property?

4) Whether the Court fee paid by the plaintiff is in accordance with law or not?

5) To what relief?"

23. The case of the plaintiff in O.S.No.29 of 2011 is that the property belonged to Godawari Sureka, Hari Prasad Sureka and Ram Avathar Sureka by virtue of purchase by them jointly as partners of M/s. Hari Prasath & Co., through a



registered sale deed dated 07.08.1981. In the year 1984 Gothawari Sureka and Ram Avathar Sureka got the first schedule property in the oral partition between them. The 2nd schedule property was given to Gothawari Sureka. Hari Prasad Sureka alone continued the business as sole Proprietor with right in the 1/3rd share of the first schedule property. On 24.11.1999, the said Gothawari Sureka voluntarily executed an unregistered Will bequeathing the 2nd schedule property in favour of the plaintiff, who is the wife of her grand son namely, Arun Kumar Sureka. Subsequently on 06.02.2002, the said Gothawari Sureka died and therefore, the Will executed by her was came into force. The plaintiff is enjoying the property by obtaining patta and paying the revenue tax.

24. Hari Prasad Sureka, sole proprietor of Hari Prasad Sureka & Co., and M/s. Krishna Trading Corporation has incurred some debts to the defendant for his business. The defendant had no right to take action against the property of this plaintiff. The defendant had sent a copy of a letter dated 10.02.2003 threatening to auction the property of Gothavari Devi Sureka also. She had no other property in her name except the plaintiff 2nd schedule property which has been bequeathed to the plaintiff. After receiving the letter the plaintiff made representation on 20.02.2003 that she is having 1/3rd share in the property and they cannot take action on it. In spite of the representation on 04.04.2003 the defendant contacted the plaintiff and threatened that unless their dues are cleared, they would take action against the second schedule property also.

25. The contention of the first defendant in O.S.No.29 of 2011 is that the schedule property originally belonged to one Kilipillai Ammal and she executed a sale deed in favour of Hari Prasad Sureka, Godavari Sureka and Ram Avadar Sureka, who are the partners of M/s. Hari Prasad Sureka. The averments that they retired and orally partitioned the property and the second schedule property was given to Godavari Sureka are all false. Hari Prasad Sureka alone continued business as sole proprietor with a right of 1/3rd share in the 1st schedule property, Anantha Kumar of M/s. Krishna Trading Corporation defaulted in repaying the loan due. He remitted a sum of Rs.2,36,902/- towards the interest upto 15.02.2002 and has failed and neglected to pay thereafter. There was an arrears of Rs.13,99,000/- towards principal and Rs.7,36,030/- towards interest in the loan account of M/s. Shri Krishnan Trading Corporation.

26. This defendant issued seven days notice on 26.09.2002 under Section 29 of State Financial Corporation Act, 1951. Since there was no response, the defendant took constructive possession of the properties mortgaged by Hari Prasad Godavari and Ram Avatar Sureka. The said Hari Prasad filed Writ Petition No.5528 of 2003 before this Court and has obtained an interim stay on condition to remit seven lakhs within a period of two months from



20.02.2003. But he did not abide the order passed by this Court and the stay was vacated.

27. Aggrieved by that, Hari Prasad Sureka has filed a suit. The property was enjoyed by the firm and its partners in common. Anantha Kuamr of M/s. Sri Krishna Trading Corporation, Ramanathapuram was in default of the loan dues. The respondent in exercise of the power conferred under Section 29 of the State Financial Corporation Act, 1951, is entitled for the recovery of a sum of Rs.21,35,900/-. The allegation that the share of Godavari is not liable for the loan dues is false. The will alleged in the plaint is latter than the mortgage right of this defendant. This defendant is entitled to recover the loan dues under Section 29 of the State Financial Corporation Act, 1951. The plaintiff has no cause of action. The Apex Court has deprecated the practice of interference by the Courts in the recovery action of this defendant corporation. The co-owners of the suit schedule property and the borrower concern are not impleaded in the suit and therefore the suit is bad for non joinder of necessary parties. The suit for permanent injunction is not maintainable without seeking the relief of declaration and recovery of possession. Since the suit 1st schedule property mortgaged with the first defendant is prior to the date of the alleged will, the defendant has taken constructive possession and the defendant is deemed to be owner of the first schedule property under Section 29 of the State Financial Corporation Act.

28. The case of the second defendant in O.S.No.29 of 2018 is that the first schedule property was jointly purchased in the name of Godawari Sureka, Hari Prasad Sureka and Ram Avathar Sureka by virtue of purchase as partners of M/s. Hari Prasad Sureka & Co., through the sale deed dated 07.08.1981. It is alleged that on 24.11.1999, the said Gothawari Sureka voluntarily executed an unregistered Will bequeathing the 2nd schedule property in favour of the plaintiff, who is the wife of her grand son namely, Arun Kumar Sureka and that subsequently on 06.02.2002, the said Gothawari Sureka died and that the Will executed by her came into force. The suit properties was purchased by M/s. Hari Prasad Sureka and Co., and after purchasing the suit 1st schedule property by M/s. Hari Prasad Sureka & Co., through its partners. Gothawari Devi Sureka and Ram Avathar Sureka retired from the partnership firm by way of a written instrument on 16.01.1984 by a registered document and all the assets and liabilities of the firm had not been divided or distributed among the partners. Since the principal borrower M/s. Sri Krishna Trading Corporation had defaulted to repay the loan, the first defendant had taken constructive possession of the suit 1st schedule property on 07.02.2003. On 06.02.2003, the first defendant brought the suit 1st schedule property for public auction under the provisions of the State Financial Corporation Act on 30.11.2007.



29. The said public auction was confirmed in favour of this defendant for a sale consideration of Rs.41 lakhs and a sale deed dated 03.07.2009 was duly executed by the 1st defendant. Therefore the plaintiff is not entitled to any relief as prayed for in the plaint and the plaintiff has filed this suit with a malafide intention. Eventhough Gothavari Devi Sureka retired from M/s.Hari Prasad Sureka & Co., on 16.01.1984 in the Will dated 19.11.1999 it is stated that she bequeathed the properties that she "may be entitled to receive" from the firm. No reference has been made regarding the Will dated 19.11.1999 and in the subsequent will dated 24.11.1999 no specific reason has been stated as the necessity of its execution. The signature of the attesting witness found in the Will dated 24.11.1999 differs from the signature of the same attesting witnesses found in the earlier registered Will dated 19.11.1999 executed by the same testatrix and prayed the suit to be dismissed with cost.

30. Based on the above said pleadings, issues in O.S.No.29 of 2011 were framed by the trial Court. They are as follows:

Issues:

"1) மாநில நிதிக் கழகச் சட்டம், பிரிவு 29ன்படி இவ்வழக்கு இந்நீதிமன்றத்தில் விசாரணை செய்ய இயலாத ஒன்றா?

2) வாதிக்கு வழக்குரையில் கோரியுள்ளபடி, வாதிக்கு வாக்குரை 2வது அட்டவணை சொத்தின் அனுபவத்தில் பிரதிவாதி தலையிடக்கூடாதென்ற உறுத்துக் கட்டளைப் பரிகாரம் பெற உரியவரா?

3) தேவையான தரப்பினரை சோக்காததால் இவ்வழக்கு பாதிக்கப்பட்டுள்ளதா?

4) வழக்கின் செலவுத்தொகை குறிக்க உத்தரவு என்ன?"

Additional Issues:

"1) Whether the plaintiff is having any locus standi to file the above suit?

2) Whether the unregistered Will dated 24.11.1999 alleged to have been executed by Smt. Gothawari Devi Sureka is genuine or not?"

31. As per the order of this Court in C.R.P.(MD)Nos.377 and 378 of 2011 and Tr.C.M.P.(MD)Nos.52 and 53 of 2011 & C.M.A.(MD) No.87 of 2011 & M.P.(MD)No.2 of 2011 dated 25.04.2011, joint trial was conducted in all the suits in O.S.Nos.5 of 2010, 28 of 2011 and 29 of 2011 and the witnesses were examined and documents were marked in O.S.No.5 of 2010. On the side of the plaintiffs, P.W.1 and P.W.2 have been examined and Exs.A1 to A13 have been marked. On the side of the defendants, R.W.1 to R.W.4 were examined and Ex.B1, Ex.B1A, Ex.B2, Ex.B2A and Ex.B3 to Ex.B80 were marked.

32. The learned trial Judge, heard the arguments advanced on both sides and considered the pleadings and evidence in the light of the points urged in the arguments submitted on behalf of the



parties. On an appreciation of evidence, the learned trial Judge answered all the issues against the plaintiffs and dismissed the suits without cost. Against the Judgement and Decree, the present appeal has been filed on various grounds set out in the memorandum of grounds of appeal.

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33. The grounds of appeal in all these appeals are the same. The brief substance of grounds of appeals is as follows:

In all the grounds of appeals, it is stated that the property set out in the plaint schedule belongs to Gothawari Sureka, Hariprasad Sureka and Ram Avathar Sureka as partners of M/s. Hari Prasad Sureka and Co., by virtue of the sale of the year 1981 and the property also dealt with among partners and as such the entire proceedings of the first respondent cannot be sustained. The alleged loan transaction between the third respondent and the first respondent took place only in the year 1999 and the property was only offered as collateral security for the loan advanced to the third respondent for the loan availed, as such the proceedings initiated merely by invoking the powers conferred under Section 29 is vitiated in entirety. The specific allegation made by the first respondent is that they have conducted a public auction for selling the principal debtor's property and nobody has come forward to purchase the property and therefore, they have taken steps to sell the property belonging to collateral security even without advert to the very scope and ambit of both Sections 29 and 31 of SFC Act, 1951. When a property belonging to the guarantor is being brought for sale by the first respondent, it is duty bound to make proper publication in the leading newspaper in Tamil and English languages in the locality where the guarantor resides and the same is also accepted by D.W.2 in his evidence. However the publication made in the newspaper marked as Ex.B34 and Ex.B38, are the newspapers which has circulation only at Madurai and as such the very conduct of the first respondent cannot be accepted. The lower Court overlooked the statutory provision contemplated under Section 29 of the SFC ACT, 1951 cannot be extended to bring the properties belonging to the guarantors.

34. The points that arise for consideration in A.S.No.166 of 2015 in O.S.No.5 of 2010 in the appeal are:

1) Whether the proceedings taken by the first defendant under Section 29 of SFC Act is void?

2) Whether the sale executed in favour of the second defendant on 03.07.2009 is null and void?

3) Whether the Will dated 24.11.1999 or the Will dated 19.11.1999 is valid?

4) Whether the appellant is entitled to get permanent injunction against the respondents?

5) Whether the appeal is to be allowed?"

35. The points that arise for consideration in A.S.No.167 of 2015 in O.S.No.28 of 2011 in the appeal are:



1) Whether the proceedings taken by the first defendant under Section 29 of SFC Act is void?

2) Whether the sale executed in favour of the second defendant on 03.07.2009 is null and void?

3) Whether the Will probated in O.P.No.16 of 2007 is valid?

4) Whether the plaintiff is entitled for a direction that the defendants 2 and 3 to repay the loan amount to the first defendant to release the minors property?

5) Whether the plaintiffs is entitled to get permanent injunction against the respondents?

6) Whether the suit is bad for non-joinder of necessary parties?

7) Whether the appeal is to be allowed?"

36. The points that arise for consideration in A.S.No.168 of 2015 in O.S.No.29 of 2011 in the appeal are:

1) Whether the proceedings taken by the first defendant under Section 29 of SFC Act is void?

2) Whether the sale executed in favour of the second defendant on 03.07.2009 is null and void?

3) Whether unregistered Will dated 24.11.1999 is valid?

4) Whether the plaintiffs is entitled to get permanent injunction against the respondents?

5) Whether the appeal is to be allowed?"

37. In these batch of cases, there are three appeal suits. Since the issue involved in all these cases are identical, they were heard together and were disposed of by this common Judgment. In A.S.No.166 of 2015 and in A.S.No.168 of 2015 Pinky Sureka is the appellant. In A.S.No.167 of 2015, the appellant is Abhiyantha Sureka who was a minor at the time of filing of the suit and was represented by her mother Pinky Sureka. The first respondent in all these cases is the TIIC. Ashish Karwa is the second respondent in A.S.No.166 of 2015 and in A.S.No.168 of 2015. He is the third respondent in A.S.No.167 of 2015. A.S(MD)No.166 of 2015 is taken as the lead case. The word 'appellant' will denote the appellant in A.S.No.166 of 2015 and the word 'respondents' will denote the respondents 1 and 2 in A.S.No.166 of 2015. The third respondent, Anatha Kumar in A.S.No.165 of 2015 will be denoted by his name. The word 'appellant' will denote either Abhiyantha Sureka or her mother Pinky Sureka as required in their respective suits.

Issue No.1 in A.S.Nos.166 to 168 of 2015:

38. The suit property mentioned in all the three suits was purchased by M/s.Hari Prasath Sureka & Co. Hariprasath Sureka, Gothawari Sureka and Ram Avathar are the partners and they belonged to a joint family. They came from Kolkatta in the year 1965 and were doing business in salt manufacturing and selling. The suit property was purchased on 07.08.1981. Certified copy of the sale deed was marked as Ex.A1. The suit property was purchased in the name of the said partnership Company.



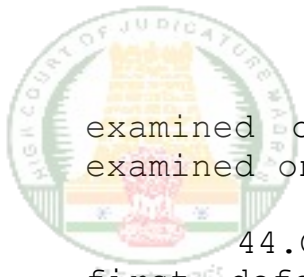
39. For manufacturing salt in the area of Ramanathapuram. M/s. Krishna Trading Corporation which is a Company run by one of the joint family members Ananthakumar Sureka borrowed a loan. For this loan, M/s. Hari Prasath Sureka & Co., offered the suit property as a collateral security and mortgaged the suit property by deposit of title deeds. Ananthakumar Sureka has not repaid the loan. The first defendant took action against the mortgaged properties under Section 29 of the SFC Act.

40. The case of the plaintiffs is that Ram Avathar Sureka and Gothawari Sureka retired from the partnership firm and remaining Hari Prasad Sureka continued the business. The appellant/plaintiff, Pinky Sureka claimed the suit property to have been bequeathed by the estwhile partner Gothawari Sureka and by Hari Prasad Sureka. Gothawari Sureka died on 06.02.2002 and Hari Prasad Sureka died on 06.06.2006.

41. On the side of the plaintiff/appellant, the following documents are marked. Ex.A1 is the copy of the sale deed in favour of Hari Prasad Sureka. Ex.A2 is the death certificate of Gothawari Devi Sureka. Ex.A3 is the patta pass book. Ex.A4 is the tax receipt. Ex.A5 adangal. Ex.A6 is the death certificate of Hari Prasad Sureka. Ex.A7 is the Probate Certificate in O.P.No.16 of 2007. Ex.A8 is the house tax receipt in the name of Abhiyanta Sureka. Exs.A9 and 10 are the telegram through advocate and its receipt. Ex.A11 is the auction notice. Ex.A12 is the sale deed in favour of Ashish Karwa. Ex.A13 is the unregistered Will executed by the Gothawari Devi Sureka.

42. On the side of the respondents 1 and 2, the following documents are marked. Ex.B1 is the copy of the plaint in O.S.No.5 of 2008. Ex.B1A is the loan sanction order. Ex.B2 is the copy of the Will executed by Hari Prasad Sureka. Ex.B2A is the Mortgage deed. Exs.B3 to B7 are the documents relating to the loan. Exs.B12 to B20, B22, B23, B27 to 31, B33, B36 to B39, B42 to B46, B49 to B51, B54 to B63, B70 and B72 are the correspondence between the first defendant and the borrower/guarantors. Ex.B21, B26 are the magazines for taking constructive possession. Ex.B32, B35, B41 and B77 are copies of the pamphlets issued for auction. Ex.B48 is a paper publication for auction. Ex.B47 is the undertaking report. Ex.B64 to B68 are the communication between the first defendant and Kishore Kumar Sureka.

43. On the side of the respondents, it is stated that earlier the appellants approached this Court Ex.B73 is the copy of order in W.P.No.5528 of 2003 and W.P.M.P.No.7123 of 2003. Ex.B74 is the order in W.P.No.9968 of 2007. Ex.B78 is the registered Will dated 19.09.2009. Ex.B79 is the copy of the order in Probate O.P.No.246 of 2012. Ex.B80 is the copy of the revocation of Probate O.P.No.172 of 2012 dated 24.01.2014. Two witnesses are



examined on the side of the plaintiff and four witnesses are examined on the side of the defendants.

44. On the side of the appellant, it is stated that the first defendant claimed right over the property by way of a mortgage said to have been executed by the firm whereas in Ex.B2A, the partners of M/s. Hari Prasad Sureka & Co., have not signed the document as partners of the said Firm. It is stated that they signed as individuals and not on behalf of the Firm. It is stated that Ex.B2A cannot be a document of guarantee executed on behalf of the Firm and the entire proceedings against the guarantor is invalid. On the side of the appellant, it is stated that there is no seal of the Company affixed in the mortgaged deed and the persons signed have not mentioned that they signed on behalf of the firm.

45. On the side of the appellant, it is stated that the second schedule property forms part and parcel of the first schedule property and that the first schedule property belonged to three individual persons by name Gothawari Sureka and Hari Prasad Sureka and Ram Avathar Sureka.

46. On the side of the appellant, it is stated that the partners of Hari Prasath Sureka and Co., did not sign the document and that in Ex.B2A was signed by a partner of Krishna Trading Company on behalf of the Company whereas the document was not signed on behalf of Hari Prasath Sukreka and Co., and the partners of the Firm have signed only in their individual capacity.

47. On the side of the respondents, it is stated that in the front page of Ex.A2 name of both the Companies were mentioned as borrowers and the names of the individuals were mentioned as partners of Hari Prasath Sureka and Co., and that a person who signed a document is to be presumed to have accepted the contents of the documents and that they cannot deny the recitals.

48. On the side of the respondent, it is stated that even in the preliminary portion of the mortgage deed, it is specifically stated that the partnership Firm is the executor and the individuals are the partners. The property was purchased only in the name of the Firm. Merely because the partners failed to affix the seal of the partnership firm, it cannot be presumed that the mortgage is not executed on behalf of the Firm.

49. On the side of the respondent, it is stated that though the appellant is disputing Ex.B2A in the plaint in O.S.No.5 of 2010, it is clearly admitted that the partners of M/s. Hari Prasad Sureka & Co., mortgaged the schedule property in favour of the first defendant Corporation and that in the plaint itself, the appellant herself has admitted that the mortgage was by the Firm



and that the mortgage deed was executed only on behalf of the Firm.

50.A perusal of Ex.B2A reveals that Gothawari Sureka and Hari Prasad Sureka and Ram Avathar Sureka have signed the document. In the mortgage deed, it is clearly stated that M/s.Hari Prasad Sureka & Co., was the executor of the document. The appellant cannot accept Ex.A1 and deny Ex.B2A. It is true that the signature of the partners was not accompanied with the seal of the Company. But the wordings in Ex.B2A, is very clear that the document was executed on behalf of the Firm. Hence, the contention of the appellant is not acceptable.

51.On the side of the appellant, it is stated that the action taken by the first defendant under Section 29 of the SFC Act is not in accordance with law. It is stated that instead of taking action against the principal borrower under Section 29 of the Act, the first defendant has taken action against the guarantor under Section 29 of SFC Act which is illegal. It is stated that the first defendant is not having any right to take action against the property of the guarantor and the first defendant has to approach only the District Court under Section 31 of the SFC Act.

52.On the side of the appellant, it is stated that the principal borrower M/s.Krishna Trading Company also offer a property and that property has to be auctioned first. The first defendant issued a notice in Ex.A11 under Section 29 of the SFC Act before conducting the auction wherein it is stated that only the properties of the borrower can be auctioned under Section 29 of the SFC Act and not that of the guarantor and that under Section 31 of the SFC Act, the first defendant has to approach only the District Court to take action against the guarantor.

53.On the side of the appellant, it is stated that the first defendant has to take action against the principal borrower then only he can approach the District Court under Section 31 of the SFC of the Act. The learned counsel appearing for the appellant relied on the Judgment passed by this Court in the case of *M.Deivamani v. Branch Manager, T.N. Industrial Investment Corporation Ltd.*, reported in (2009) 3 BankJ 609, which reads as follows:

"4.It has been brought to my notice by the learned counsel for the petitioner that recently the Hon'ble Supreme Court has held in the case of *Karnataka State Financial Corporation v. N.Narasimahaiah and others*, reported in (2008) 5 MLJ 713 (SC) that under the State Financial Corporation Financing Company can proceed against the property of the guarantor by invoking Section 31 and they cannot bring the property of the guarantor by



invoking Section 29. It is made clear in that Judgment in para 27 which reads as follows at p. 723 of M.L.J"

54. On the side of the appellant, it is stated that only through the District Court, action can be taken against the property of the guarantor and action taken under Section 29 is illegal and void and the right of the mortgager under Section 29 is only pertaining to the property of the borrower. The learned counsel appearing for the appellant relied on the Judgment passed by the Hon'ble Supreme Court in the case of *Karnataka State Financial Corporation v. N. Narasimahaiah and others*, reported in (2008) 5 Supreme Court Cases 176, which reads as follows:

"None of these provisions control each other -Contention that an implied power of Corporation to proceed against a surety or guarantor should be read in Section 29 on principle that a construction which effectuates the legislative intent and purpose must be adopted, held, not sustainable and hence rejected

37. The legislative intent, in our opinion, is manifest. The intention of Parliament in enacting Sections 29 and 31 of the Act was not similar. Whereas Section 29 of the Act consists of the property of the industrial concern, Section 31 takes within its sweep both the property of the industrial concern and as that of the surety. None of the provisions control each other. Parliament intended to provide an additional remedy for recovery of the amount in favour of the Corporation by proceeding against a surety only in terms of Section 31 of the Act and not under Section 29 thereof."

55. On the side of the appellant, it is stated that sale of the property of the guarantor under Section 29 of the SFC Act is invalid and that the auction purchaser is entitled only to get back the sale amount with interest. In support of this contention, the Judgment passed by the Hon'ble Supreme Court in the case of *Subhransu Sekhar Padhi v. Gunamani Swain and others*, reported in (2014) 12 Supreme Court Cases 368 is cited, which reads as follows:

"In view of the above, sale of the properties of the guarantors and subsequent execution of deed of transfer under Annexure 5 are liable to be quashed for being done in flagrant violation of the statutory provision contained in Section 31 of the SFC Act which we direct accordingly.

The authorities of the ninth respondent Corporation sold the properties to the appellant herein in flagrant violation of the settled position of law, therefore direct the ninth respondent to refund the amount of Rs.10,09,000/- (Rupees Ten Lakhs and Nine Thousand) to the appellant with interest



calculated @ 12% per annum. However, it is open to Orissa State Financial Corporation to recover the amounts either from the defaulter industrial concern or from such other third party against whom the Corporation has a legal right to proceed."

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56.The contention of the appellant is that under Section 29 of the Act, steps can be taken only against the borrower and not against the guarantors. On the side of the respondent, it is stated that in Ex.B2A clearly the Firm is not mentioned as a guarantor and that the word used in Ex.B2A is 'borrowers' and that the Firm is also a borrower along with Krishna Trading Company.

57.On the side of the appellant, it is further stated that there is nothing stated in Ex.B2A to denote that Hari Prasad Sureka and Co., is a borrower and that only Krishna Trading Company is a borrower and that it is not the case of the defendants that Hari Prasad Sureka and Co., is a co-borrower and that even in the written statement in paragraph no.2, it is stated that Hari Prasath Sureka and Co., is the guarantor and that the defendant cannot go beyond the pleadings.

58.On the side of the appellant, it is stated that in all the proceedings of the TIIC, it is stated that the action was taken only under Section 29 of SFC Act and nowhere it is stated that the sale proceedings was under Section 31 of the TP Act. Only the property of the borrower is to be auctioned under Section 29 of SFC Act and TIIC can approach the District Court under Section 31 of SFC Act, for taking action against the property of the guarantor.

59.It is further argued that an action against the guarantor under Section 29 is illegal and void and that the right of the mortgager under Section 29 is only against the borrower. In support of his contention, the Judgment passed by the Hon'ble Supreme Court in the case of *Karnataka State Financial Corporation v. N.Narasimahaiah and others* reported in (2008) 5 Supreme Court Cases 176 is cited, which reads as follows:

"None of these provisions control each other-
Contention that an implied power of Corporation to proceed against a surety or guarantor should be read in S.29 on principle that a construction which effectuates the legislative intent and purpose must be adopted, held, not sustainable and hence, rejected"

60.The learned counsel appearing for the appellant relied on the Judgment passed by the Hon'ble Supreme Court in the case of *Senior Promoters v. Padhi v. Gunamani Swain and Others* reported in (2014) 12 Supreme Court Cases 368, which reads as follows:

"The authorities of the ninth respondent



Corporation sold the properties to the appellant herein in flagrant violation of the settled position of law. We, therefore, direct the ninth respondent to refund the amount of Rs.10,09,000/- (Rupees Ten Lakhs nine Thousand only) to the appellant with interest calculated @ 12 % per annum. However, it is open to Orissa State Financial Corporation to recover the amounts either from the defaulter industrial concern or from such other third party against whom the Corporation has a legal right to proceed."

61.On the side of the appellant, it is stated that even in the sale notice Ex.All and in the evidence of the Officer it is stated that the action was taken only under Section 29 of the SFC Act. Even in the proof affidavit of D.W.1, it is stated that the Finance Corporation has taken action under Section 29 of SFC Act and that the Civil Court has no jurisdiction. It is further stated that possession was alleged to have been taken on 24.01.2007. After the sale dates are fixed, assessment is made and the procedure under Section 29 is not properly followed by the respondents. If the property of the Principal borrower was auctioned first, it would have fetched more amount.

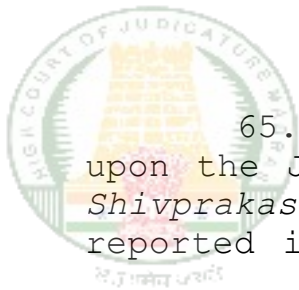
62.On the side of the appellants, it is stated that an agreement cannot confer jurisdiction on the Corporation to proceed against the guarantor under Section 29 of the Act. In support of his contention, the Judgment passed by the Gujarat High Court in the case of *Narayanbhai Raichanddas Patel v. M.D., Gujarat State Finance Corp. & Others* reported in 2009 (1) D.R.T.C. 578(Guj.) is cited.

63.The learned counsel appearing for the appellant relied upon the Judgment passed by the Andhra Pradesh High Court in the case of *C.V.Chary v. A.P. State Financial Corporation & Others* reported in 2011 (2) D.R.T.C. 624 (A.P.), which reads as follows:

"Section 29 does not empower Corporation to proceed against surety-Legislative intent manifest-Corporation can proceed against surety only in terms of Section 31 of the Act and not under Section 29"

64.The learned counsel appearing for the appellant relied upon the Judgment passed by the Kerala High Court in the case of *C.Thomas & Others v. Kerala Financial Corp., Thiruvananthapuram & Others*, reported in 2009 (1) D.R.T.C. 624 (ker), which reads as follows:

"Corporation not justified in proceeding against secured assets of guarantors under Section 29 of the Act-Corporation could have proceeded against assets of guarantors only under Section 31 of the Act."



65. The learned counsel appearing for the appellant relied upon the Judgment passed by the Bombay High Court in the case of *Shivprakash Seth & Others v. State of Maharashtra & Others*, reported in 2012 (2) D.R.T.C. 174 (Bom), which reads as follows:

"Section 29 does not empower Financial Corporation to move against surety-Section 29 empowers the Corporation to take recourse to its right in manner indicated in provision without intervention of Court.

Remedy against guarantor available under Section 31 of the Act but not under Section 29-Corporation proceeded against principal borrower under Section 29"

66. The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of *Deivamani v. Branch Manager, T.N. Industrial Investment Corpn. Ltd.*, reported in 2012 (2) D.R.T.C. 174 (Bom), which reads as follows:

"It has been brought to my notice by the learned counsel for the petitioner that recently the Hon'ble Supreme Court has held in the case of *Karnataka State Financial Corporation v. N.Narasimahaiah and others*, reported in (2008) 5 MLJ 713 (SC) that under the State Financial Corporation Act, a financing Company can proceed against the property of the guarantor by invoking Section 31 and they cannot bring the property of the guarantor by invoking Section 29. It is made clear in that Judgment in para 27 which reads as follows at p. 723 of MLJ:

'27. The legislative intent, in our opinion, is manifest. The intention of the Parliament in enacting Sections 29 and 31 of the Act was not similar. Whereas Section 29 of the Act consists of the property of the industrial concern, Section 31 takes within its sweep both the property of the industrial concern and as that of the surety.'"

67. The learned counsel appearing for the appellant relied upon the Judgment passed by Hon'ble Supreme Court in the case of *Shiv Charan Singh v. Haryana State Industrial & Infrastructure Development Corporation Limited & Another*, reported in AIR 2012 Punjab and Haryana 50 FULL BENCH, which reads as follows:

"Keeping in view the aforesaid principles, an agreement between the parties conceding a right to the Corporation to act against the guarantor under Section 29 of the Act is akin to conferment of jurisdiction to take over possession of the assets of the guarantor. Section 29 of the Act is restrictive in nature as it confers right on the Corporation to act against the industrial concern, engaged in the manufacture,



preservation or processing of goods etc., as defined as Section 2(c) of the Act alone."

68. On the side of the first respondent, it is stated that the first respondent is having every right under Section 29 of the Transfer of Property Act as the borrower and guarantors are co-obligants and are liable for the mortgage amount with interest.

69. The learned counsel appearing for the respondents relied upon the Judgment passed by the Hon'ble Supreme Court in the case of *Rajnikant Hasmukhlal Golwala and others v. Natraj Theatre, Navsari and others*, reported in AIR 2000 Gujarat 80, which reads as follows:

"22. In view of the above discussion, it is very clear that an assignee or a transferee of a partner's interest can never have a right to do business of the partnership firm.

23. Another important issue is with regard to a partner's right to transfer immovable property belonging to the firm. Section 19 of the Act deals with the implied authority of the partner as an agent of the firm. Relevant portion of the said section reads as under :

.....A partner has a right to do business and in the course of business he can deal with the property of the firm. But this right would not enable him to deal with partnership property as his own property.

Thus, Section 15 of the Act declares that subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of partnership business. This legal position precludes the possibility of any property of the firm being shown as separate property of any partner so long as the partnership subsists,

25. Looking to the provisions of the Act, it is very clear that no partner can sell any part of the assets of the partnership firm as belonging to him and this being the position, no partner can ever validly sell or dispose of any of the partnership property as his own property. Partnership property vests in the firm and it does not vest in any of the partners and therefore it would not be possible for any partner to pinpoint any portion of the partnership property as his own property.

By virtue of the provisions of Section 29 of the Transfer of Property Act, the position of a transferee of a partner's interest would not be the same as a transferee of a co-owner's



interest. Thus, there being a difference in the partnership and co-ownership, defendant No. 12 shall not have any right which his transferee (transferor) partners had in the partnership property."

70. The learned counsel appearing for the respondents relied upon the judgment passed by the Hon'ble Supreme Court in the case of *M/S. Ormi Textiles v. State of U.P. A & Ors.* reported in AIR 2008 SUPREME COURT 2177, which reads as follows:

"Rights of Financial Corporation-Right to sell property of defaulting unit-Limited to property mortgaged.

11. A mortgagee can have a right to sell a property even under the contract. The same must necessarily mean that the property to be sold is the one over which he has the right, title and interest. A sale without any right would be a nullity.

12. For proper construction of the provisions of the Act, we may notice the provisions of Section 31 thereof. It provides for an additional remedy. Whereas Section 29 confers a power to sale the property unilaterally, Section 31 provides inter alia for the same power only through the intervention of the Court."

71. The learned counsel appearing for the first respondent relied upon the Judgment passed by this Court in the case of *Karnataka State Industrial Investment & Development Corpn. Ltd., v. Cavalet Indian Ltd., & Others*, reported in (2005) 4 Supreme Court Cases 456, which reads as follows:

"(iii) In Commercial matters, the Courts should not risk their judgments for the judgments of the bodies to which that task is assigned.

(iv) Unless the action of the Financial Corporation is malafide, even a wrong decision taken by it is not open to challenge. It is not for the Courts or a third party to substitute its decision, however, more prudent, commercial or business like it may be, for the decision of the Financial Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold and this could be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

<https://hcservices.ecourts.gov.in/hcservices/> a conscious decision has to be taken as to whether action under Section 29 of the Act is called for. Thereafter, the modalities for disposal



of the seized unit have to be worked out."

72. The learned counsel appearing for the first respondent relied upon the Judgment passed by this Court in the case of *G.Kailasam and another v. The Tamil nadu Industrial Investment Corporation Limited, Chennai & Others*, reported in (2005) 2 M.L.J. 218, which reads as follows:

"It may be useful to refer the Division Bench decision of the Kerala High Court reported in *Thressiamma Varghese v. K.S.F. Corporation*, A.I.R. 1986 Ker. 222

Section 29 does not make any distinction between the assets of the industrial concern and assets not belonging to the industrial concern but nevertheless mortgaged to the Corporation. Both kinds of assets can be proceeded against under Section 29. It is not possible for us to read into Section 29 a restriction to the effect that the right conferred on the Corporation thereunder is restricted to the right to proceed only against property belonging to the industrial concern and mortgaged to the Corporation.

.....The legislature did not intent to confine the Corporation to take recourse to only a particular remedy against the defaulting industrial concern for recovery of the amount due to it.

In other words, the relief available to the Corporation under Section 29 of the Act to realise its dues in the manner prescribed therein is wider in scope than the limited relief available to it under Section 31 of the Act and the same is not controlled by Section 31 of the Act."

73. Ex.B1 reveals that the property was purchased by the Firm. Ex.B2A reveals that the said Firm Hari Prasath Sureka and Co., represented by its partner have executed a mortgage deed in favour of TIIC. Hari Prasath Sureka, Gouthawari Devi Sureka and Ram Avathar Sureka have signed the document as partners of the Firm. The words in Ex.B2A is the "borrowers" and Hari Prasath Sureka and Co., is not described as a guarantor in Ex.B2A.

74. A person who signed a document is presumed to have accepted the contents of the documents. Ex.B2A clause 11(b) empowers the mortgagor to sell the property without the intervention of the Court. As per Clause 11(b) of mortgage deed, the signators have given power to the mortgagor to sell the mortgaged property. The power to sell the property is vested with TIIC. There is no wordings to denote that the Hari Prasath Sureka and Co. is acting as a guarantor. There is nothing to show in Ex.B2A that partners of Hari Prasath Sureka and Co., have signed the document in their individual capacity. Assuming even if they



signed as individuals, they are libale and Ex.B2A is valid.

75.Hari Prasath Sureka and Pinky Sureka preferred two Writ petitions in W.P.No.5528 of 2003 and W.P.No.9966 of 2007 questioning the proceddings under Section 29 of the Financial Corporation Act before the Principal Bench of this Court and before this Court. Both the writ petitions were dismissed and no appeals were preferred against them. The order of the writ petition were marked as Exs.B73 and B74. The question of taking action under Section 29 of the Financial Corporation Act was already decided by this Court. Hence, the auction under Section 29 of the SFC Act by the respondents is valid.

Issue No.2 in A.S.Nos.166 to 168 of 2015:

76.On the side of the appellant, it is stated that the Bank can take action only against the properties of Ram Avathar Sureka and Ex.B2A is not binding upon the other family members. It is stated that even if there is a Firm, on the demise of Gouthawari Devi Sureka, the partnership automatically dissolved. There is no partnership existing at the time of auction sale and that under Section 42(c) of the Partnership Act, the partnership automatically dissolved after the death of the partner. In support of his contention, Judgment passed by the Karnataka High Court in the case of *S.S.Navalgi v. Commercial Tax Officer* reported in (1971) 2 MysLJ is cited.

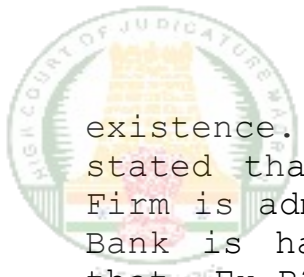
77.On the side of the appellant, it is stated that no document is filed to prove the existence of the Firm whereas the oral partition is proved by the patta Ex.A3 and that the trial Court has failed to make any decision on this document.

78.On the side of the appellant, it is stated that the plaintiff belonged to West Bengal and only Devabala law is applicable to them and Mitakshara law is not applicable. It is stated that the persons migrated from an area are governed by the law to which they belonged before migration. In support of his contention, Judgment passed by the Hon'ble Supreme Court in the case of *Vimla Bai(Dead) by Lrs. v. Hiralal Gupta and Others* reported in (1990) 2 Supreme Court Cases 22 is cited.

79.On the side of the appellant, it is further stated that Gothawari Devi Sureka who is an erstwhile partner and the right of her individual share in the property is not affected. The retirement of the mother from the Firm is not disputed and that there is no evidence regarding the existence of the Firm either at the time of mortgage or at the time of auction sale and that even if the Firm has mortgaged the property, the individual right of the partner is not at all affected.

<https://hcservices.ecourts.gov.in/hcservices/>

80.On the side of the respondents, it is stated that in Ex.B2 dated 06.06.2006, it is clearly stated that the Firm is in



existence. Ex.B78 one of the partner Gouthawari Devi Sureka has stated that she possessed a share in the Firm, so existence of Firm is admitted in the Ex.B78 also. It is further stated that the Bank is having every right to sell the mortgaged property, and that Ex.B2A clearly reveals that there is a Firm and the signatories are the partners and that the existence of the Firm is proved by Ex.B2A and the existence of the Firm is even confirmed by the pleadings of the plaintiff. It is further stated that under clause 11(b) of Ex.B2A, power is conferred upon the Bank to sell the property without the intervention of the Court and that under Section 69 of the TP Act, the mortgagor has the power to sell the property when such power is expressly stated in the mortgage. Under Section 69(3) of the TP Act, it is clearly stated that if there is any irregularities in the sale, the only remedy to the mortgagor is to claim damages from the mortgagee and the sale cannot be cancelled.

81.The learned counsel appearing for the respondents relied upon the Judgment passed by the Hon'ble Supreme Court in the case of *Addanki Narayanappa v. Bhaskara Krishnappa (dead)*, reported in AIR 1966 SUPREME COURT 1300, which reads as follows:

"Held that the interest of the partners of A family in the partnership assets was movable property and the document evidencing the relinquishment of that interest was not compulsorily registrable under Section 17 (1), Registration Act."

82.The learned counsel appearing for the respondents relied upon the Judgment passed by the Hon'ble Supreme Court in the case of *Ajudhia Pershad Ram Pershad v. Sham Sunder and Ors*, reported in AIR 1947 Lahore 13, which reads as follows:

"Section 15 declares that, again subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business. This precludes the possibility of any of the partnership property being, or being deemed to be, separate property of any partner, so long as the partnership subsists. In other words, while the partnership is in existence, no partner can point to any part of the assets of the partnership as belonging to him alone."

83.The learned counsel appearing for the respondents relied upon the Judgment passed by the Hon'ble Supreme Court in the case of *Reddi Veerraju v. Chittori Lakshminarasamma*, reported in AIR 1971 Andra Pradesh 266, which reads as follows:

<https://hcservices.ecourts.gov.in/hcservice> It, therefore, follows that, so long as there is a partnership in existence, no partner has any right to take any portion of the partnership



property, or to say that it belongs to him exclusively so as to assign or transfer the partnership property. The right that he possess in the partnership property is his right as a member of the partnership and not a right which he can claim in his individual capacity."

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84. In support of his contention, the Judgment passed by this Court in the case of *Expo Freight Pvt., Ltd., v. Supreme Overseas Exports (India) Pvt., Ltd.*, in Application No.6445 of 2018 is cited.

85. On the side of the appellant, it is stated that the sale deeds are invalid and the purchaser has no locus standi to cancel the Probate O.P., and no action can be taken against the guarantor under Section 29 of the Act and that TIIC has to approach the Court under Section 31 of the Act and that there are procedural irregularities under Section 27 of the SFC Act and that in the proof affidavit of D.W.1, it is stated that the first defendant obtained possession on 24.01.2006 but valuation of the property was done twice one on 23.08.2011 and the other on 30.11.2001 and that within a period of two months, two valuation reports were obtained by the first defendant and that the valuation was made, only after the date of sale was fixed and after the notice was issued. Even without aware of the market value, the first defendant had issued notice for auction sale and that in the sale notice upset price is not stated and that the notice is invalid.

86. On the side of the respondent, it is stated that there is no necessity to mention the upset price in the sale notice and that as there was no bidders, second valuation report was sought for by the first defendant and that there is no procedural irregularities.

87. On the side of the appellant, it is stated that only after the sale of the second schedule property, the first defendant has issued a sale notice for the sale of the properties of the principal borrower. Only after three years from the sale of the property of the guarantor, the first defendant has sold out the property of the principal borrower and that if the action against the property of principal borrower has to be taken first, the first defendant would have got a higher sale price.

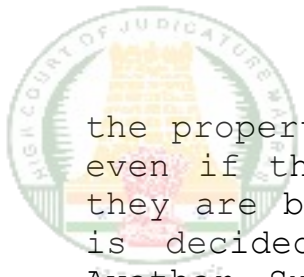
88. On the side of the appellant, it is stated that the amount offered was very low and that even in the sale proceedings, it is stated that amount offered by the second defendant is low and after negotiations a higher amount was fixed and that no copy of the minutes regarding the negotiations was filed by the first defendant. It is stated that when the second defendant is the only person who attended the auction there need not be a negotiation at all and that the auction of the first defendant is invalid.



89. On the side of the appellants, it is stated that the sale executed in favour of the second defendant is null and void as the financial Corporation has not proceeded through the District Court to sell the properties of the guarantors. It is stated that the property belonged to the individual and that the executor of the Will were now dead and the Will was also probated and there were so many procedural irregularities in the sale proceedings and that no sufficient notice was issued and that the upset price was not stated in the sale notice and that the value of the property was fixed only two months after the date of sale notice and that the sale is void.

90. On the side of the respondent, it is stated that communications were sent to the partners and paper publications were given and pamphlets were circulated and copy of the notices and acknowledgement cards are marked as Ex.B12 to B20, B27 to B31, B36 to B39, B42 to B46, B49 to B51, B54 to B63, B70, B72 and that paper publications were marked as Ex.B34, B40, B48, B69, B71. Pamphlets were marked as Ex.B32, B35, B41 and B77. It is stated that Hari Prasad Sureka filed W.P.No.5528 of 2003 and W.P.M.P.No.7123 of 2003 before this Court and the writ petitions were dismissed and that petition and order copies are marked as Ex.B24, B25 and B73. The plaintiff filed W.P.No.9966 of 2007 before this Court. The affidavit, petition and order copies are marked as Ex.B53 and B74. It is stated that there was no procedural violation in the auction and sale of the suit properties and that the property belonged to the partnership Firm and the partnership Firm Hari Prasath Sureka and Co., signed the mortgage deed as the borrower and that Clause 11(b) of the mortgage deed empowers the financial Corporation to sell the property without the intervention of the Court and that under Section 65 (c) of Transfer of Property Act, the only course available to the plaintiff is to claim compensation from the financial Corporation and the plaintiff cannot cancel the sale deed.

91. It is stated that during the year 1984, both Gothawari Sureka and Ram Avathar Sureka retired but the specific date of their retirement is not stated in the plaint. It is stated that there was an oral partition and that in the oral partition, the second schedule property was given to Gothwari Sureka. The date of this oral partition was not stated by the plaintiff. No document is filed to prove that the oral partition after the alleged retirement of the above said two partners came into effect. The property belonged only to the Firm and when all partners have signed the mortgage deed, they are all liable. Even if there was an oral partition, the executors of Ex.B2A are bound by the mortgage deed. The appellant on the first instance has claimed that Ex.B2A was signed by individuals and then she is claiming that two individuals have retired from the Firm and their share of



the property is divided. Even if the properties are so divided and even if the partners signed Ex.B2A in their individual capacity, they are bound by their signature in the mortgage deed. Hence, it is decided that the retirement of Gothawari Sureka and Ram Avathar Sureka from the Firm is not proved and both Gothawari Sureka and Ram Avathar Sureka and Hari Prasad Sureka executed mortgage deed in the year 1999 itself and even if the alleged partition is true, it is not affecting the rights of the first respondent/financial institution.

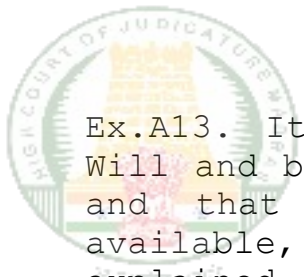
92. Even in the plaint, it is admitted that the property belongs to the partnership Firm. The appellant/plaintiff cannot go beyond the pleadings. It is the duty of the plaintiff to prove that Gothawari Devi Sureka retired from the Firm and subsequently, there was a partition among the partners. No date of retirement is mentioned in the plaint, the date of partition also is not mentioned. Unless and until the above facts are proved, the plaintiff cannot claim the property as an individual property of Gothawari Devi Sureka. There is absolutely no evidence on the side of the plaintiff to prove that there was a partition among the partners and two of the partners retired from the partnership or that the partnership is dissolved.

93. The date of dissolution of partnership is not stated in the plaint. Even assuming that the Will stated to have been executed by Gothawari Devi Sureka and by Hari Prasath Sureka were proved by the plaintiff, those Wills can be valid only subject to the mortgage. No procedural irregularities is proved by the plaintiff. The mortgaged property was already sold and sale proceeds were adjusted to the loan account. The plaintiff has no right to request for cancellation of the sale. Even if there is any procedural irregularities, she can only claim damages from the financial Corporation. The auction purchaser purchased the property for valuable consideration. Hence, it is decided that the plaintiff has failed to prove that the sale deed in favour of the auction purchaser is invalid.

Issue No.3 in A.S.Nos.166 of 2015 and 168 of 2015:

94. The plaintiff is claim a right over the suit property on the basis of an unregistered will, Ex.A13 dated 24.11.1999 executed by one of the partners of Hari Prasad Sureka and Co., namely Gothawari Devi Sureka. Gothawari Devi Sureka died on 06.02.2002 and that the Will came into force and that the plaintiff obtained patta, Ex.A3 and she is paying the tax Ex.A4 and she is in possession and that the adangal is Ex.A5. P.W.2 was examined as a witness for the execution of the will Ex.A13.

95. On the side of the respondents, it is stated that Gothawari Devi Sureka executed a registered Will on 19.11.1999 marked as Ex.B7 and that P.W.2 who is a witness in Ex.B78 and A13 denied her signature in Ex.B78 but he admits his signature in



Ex.A13. It is stated that P.W.2 and D.W.3 are witnesses to the Will and both of them are the employees of the Hari Prasad Sureka and that when family members of Gothawari Devi Sureka is available, the necessity for the employees to attest a Will is not explained and that the evidence of Hari Prasad Sureka cannot be accepted.

96.The learned counsel appearing for the respondents relied upon the judgment passed by the Hon'ble Supreme Court in the case of *Jaswant Kaur v. Amrit Kaur and Others* reported in 1976 STPL (LE) 8415 SC, which reads as follows:

"(v)The will was attested by two persons, both of whom were strangers to the testator's family and neither of whom could give a proper account of the execution of the will. In fact they contradicted each other.

(vii)The will is unnatural and unfair.

(viii)The will does not make mention of many of the near relations and descendants of the testator."

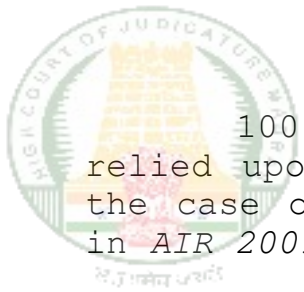
97.On the side of the respondents, it is stated that the P.W.2 and D.W.2 have deposed that Gothwari Devi Sureka and her family members did not know tamil and the necessity to write a Will in a language unknown to the testatris and her family members is not explained by the plaintiff and that hand written Will in tamil language which is unknown to the testatrix creates suspicion.

98.The learned counsel appearing for the respondents relied upon the judgment passed by this Court in the case of *N.Govindarajan v. N.Leelavathy and others* reported in 2011 (5) CTC 287, which reads as follows:

"Attestor is a classmate of beneficiary, but stranger to Testator-Evidence of Attestor to be viewed with caution-Record shows that evidence of Attestor not convincing to conscience of Court

Burden of Proof-Will-Burden of Propounder to prove that Testator had put his signature after understanding contents of document-No convincing evidence found to show that Testator had understood recitals in Will"

99.On the side of the respondents, it is stated that in the Will dated 24.11.1999, the legal heirs of Gothawari Devi Sureka were excluded. Though Gothawari Devi Sureka was having three sons, the necessity to bequeathing the property in favour of grandson's



100. The learned counsel appearing for the respondents relied upon the judgment passed by the Hon'ble Supreme Court in the case of *K. Laxmanan v. Thekkayil Padmini and Others* reported in AIR 2009 SUPREME COURT 951, which reads as follows:

"Will -Execution-Burden of proof-Lies on propounder.

Will-execution -suspicious circumstances-Testator 82 years of age at time of execution-suffering from serious physical ailments and was not mentally in a good state of mind-Vast difference in signatures of testator put on each and every page of will-Propounder unable to examine scribe and attesting witness was dead and other was medically unfit-Witness examine by propounder silent about execution and attestation of Will-No evidence led to establish mental and physical condition of testator at time of execution.

Registered document-Proof of execution-exemption from requirement of examination of attesting witnesses-Availability-suit for share in father's property-defendant pleading execution of gift deed in his favour"

101. The learned counsel appearing for the respondents relied upon the judgment passed by the Hon'ble Supreme Court in the case of *G. Lalitha v. G. Ponnuram and Others* reported in 2011 (5) CTC 262, which reads as follows:

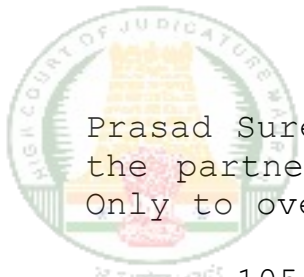
"Suspicious circumstances-When arises - perusal of Will shows that a heir excluded from inheritance"

102. On the side of the respondents, it is stated that Gothawari Devi Sureka has executed a registered Will dated 19.11.1999 marked as Ex.B78 bequeathing the same property to the plaintiff and there is no necessity for the testatrix to execute another and unregistered Will within a short period, bequeathing the very same property to the plaintiff. It is stated that the plaintiff withholds a vital document which is fatal to her case.

103. The learned counsel appearing for the respondents relied upon the judgment passed by the Hon'ble Supreme Court in the case of *S.P. Chengalvaraya Naidu v. Jagannath*, in 1994 AIR 853, which reads as follows:

"If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as the opposite party."

<https://hcservices.ecourts.gov.in/hcservices>
104. On the side of the respondents, it is stated that in the registered Will, it is stated that the testatrix has bequeathed, "whatever she possess in the partnership firm Hari



Prasad Sureka and Co., "and that this words proves the existence of the partnership firm and that the partnership was not dissolved. Only to overcome this fact the unregistered Will is created.

105. On the side of the respondents, it is stated that the appellant has failed to prove the Will and that even assuming the Will is genuine, there is nothing left for the executrix to bequeath as the property was already mortgaged to the financial Corporation and that no proof of dissolution of partnership firm is filed on the side of the plaintiff and that even if the unregistered Will is a genuine one, it may be valid only subject to the mortgage already executed by the testatrix of the Will.

106. The learned counsel appearing for the respondents relied upon the judgment passed by the Hon'ble Supreme Court in the case of *Bihar State Financial Corporation v. M/s. Chhotanagpur Minerals and Ors.* reported in AIR 2009 SUPREME COURT 1471, which reads as follows:

"18. In that view of the matter, there cannot be any doubt whatsoever that the appellant did not have any right to sell any property which was not the subject matter of the deed of mortgage. Any action taken in that behalf must be held to be wholly illegal and without jurisdiction. Appellant, therefore, was liable for payment of damages as had been opined by the Courts below."

107. On the side of the respondents, it is stated that no partner can claim any individual right over the property of the partnership firm and that Ex.B78 clearly proves the existence of partnership and that the plaintiff failed to implead the other partners and that the claim of the plaintiff is unsustainable.

108. The learned counsel appearing for the respondents relied upon the Judgment passed by the Hon'ble Supreme Court in the case of *Addanki Narayanappa v. Bhaskara Krishnappa (dead)*, reported in AIR 1966 SUPREME COURT 1300, which reads as follows:

"Held that the interest of the partners of A family in the partnership assets was movable property and the document evidencing the relinquishment of that interest was not compulsorily registrable under Section 17 (1), Registration Act."

109. The learned counsel appearing for the respondents relied upon the Judgment passed by the Hon'ble Supreme Court in the case of *Ajudhia Pershad Ram Pershad v. Sham Sunder and Ors*, reported in AIR 1947 Lahore 13, which reads as follows:

"Section 15 declares that, again subject to between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business. This



precludes the possibility of any of the partnership property being, or being deemed to be, separate property of any partner, so long as the partnership subsists. In other words, while the partnership is in existence, no partner can point to any part of the assets of the partnership as belonging to him alone."

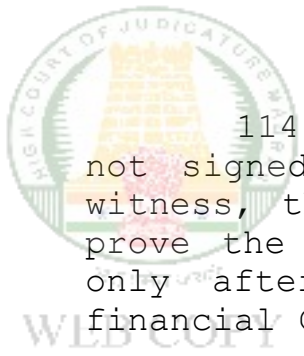
110. The learned counsel appearing for the respondents relied upon the Judgment passed by the Hon'ble Supreme Court in the case of *Reddi Veerraju v. Chittori Lakshminarasamma*, reported in AIR 1971 Andra Pradesh 266, which reads as follows:

"It, therefore, follows that, so long as there is a partnership in existence, no partner has any right to take any portion of the partnership property, or to say that it belongs to him exclusively so as to assign or transfer the partnership property. The right that he possess in the partnership property is his right as a member of the partnership and not a right which he can claim in his individual capacity."

111. In support of his contention, the Judgment passed by this Court in the case of *Expo Freight Pvt., Ltd., v. Supreme Overseas Exports (India) Pvt., Ltd.*, in Application No.6445 of 2018 is cited.

112. On the side of the appellant, it is stated that the plaintiff in O.S.No.29 of 2011 has right over the property through the unregistered Will dated 24.11.1999. The plaintiff is claiming the right on the basis of a Will executed by one of the partner in Hari Prasath Sureka and Co., Gothawari Devi Sureka. No proof for dissolution of partnership Firm is filed by the plaintiff. No proof is filed on the side of the plaintiff that there is a joint family business. The Will is an unregistered Will dated 24.11.1999. One Will is typed in English and another Will is hand written in tamil. It is the duty of the plaintiffs to prove the Will. P.W.2 is examined as a witness for the execution of the Will. He is an employee of Hari Prasath Sureka and he has denied his signature in the registered Will and he deposed that he did not know whether Gothawari Devi Sureka has signed it.

113. On the side of the respondents, it is stated that testatrix is from West Bengal. She does not know English or tamil even the members of the family do not know tamil and that when the property belonged to a partnership Firm, Gothawari Devi Sureka did not have any individual right over the property and that the Will ~~was executed by her~~ the borrowal of loan and after the execution of the mortgage deed.



114.The Will is signed by the notary public and the Will is not signed by the attesting witness. Without attestation by the witness, the Will is invalid. Mere probate of a Will does not prove the execution of the Will and that the Will was executed only after the commencement of the sale proceedings by the financial Corporation.

115.Gothawari Devi Sureka is having three sons excluding her sons and bequeathing the property to her grandsons' wife creates a cloud. The plaintiff fails to implead the other legal heirs of Gothawari Devi Sureka in this suit. When there is a registered Will in favour of the plaintiff, what is the necessity for executing an unregistered Will in a unknown language in not explained. In the registered Will it is clearly stated that the testatrix is bequeathing "whatever she posses in the partnership Firm, Hari Prasad Sureka and Co.,". Just to avoid this wordings the unregistered Will bequeathing the property in favour of the same beneficiary is created. No document is filed to prove the retirement of Gothawari Devi Sureka from the partnership Firm. There is no proof for the partition between the partners and for the allotment of the second schedule property to Gothawari Devi Sureka. Admittedly the property was purchased by the Firm and not by the individuals. Even in Ex.B2, Will, the existence of the Firm is mentioned. The registered Will dated 19.11.1999 marked as Ex.B78 clearly proves the existence of partnership. For the above reasons, it is decided that the unregistered Will dated 24.11.1999 is not valid and it does not confer any right to the plaintiff over the property, against the mortgage right of the first respondent.

Issue no.3 in A.S.No.167 of 2015:

116.On the side of the appellant, it is stated that the property belonged to Hari Prasath Sureka and Ram Avathar Sureka and Gothawari Devi Sureka and that Hari Prasath Sureka executed a Will in favour of the minor plaintiff/Abhiyanta Sureka and the financial Corporation has no right to deprive the minor plaintiff/Abhiyanta Sureka from her right in the property.

117.On the side of the appellants, it is stated that the Will dated 06.06.2006 executed by Hari Prasad Sureka was duly probated by the Sub Judge, Tuticorin in O.P.No.16 of 2007 and that the auction purchaser is a stranger and he has no locus standi to question the probate.

118.The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of *T.V.Rangaraajan & Others v. R.Veeraraghavan & Others*, reported in <https://hcservices.ecourts.gov.in/hcservices/> which reads as follows:

"One must keep in mind that the grant of probate by a competent Court operates as a judgment in



rem and once the probate to the will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. If the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation under Article 137 of the Limitation Act in proceedings for revocation of probate.

.....Therefore, if the probate is granted, the same operates in Rem and time runs from the date of the grant of the probate for purposes of limitation under Article 137 of the Limitation Act in proceedings for revocation of probate."

119. The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of *J. Malarvizhi v. D. Shankar*, reported in 2010 (2) C.T.C. 680, which reads as follows:

"26. The position is made clear by the Honourable Supreme Court in the decision cited supra that Article 137 of the Act clearly governs the situation and the applicants could file Application within three years from the date when the right to apply for setting aside of the probate or Letters of Administration accrued to them. This right obviously accrued to them right from the time the letters of Administration was granted in favour of the respondent and hence, these Applications filed in the year 2007 and 2008 respectively were apparently barred by limitation."

120. The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of *J. S. Rajkumar v. Shyna Paul*, reported in 2012 (3) MWN (Civil) 678, which reads as follows:

"His objections did not come within the parameters indicated under Section 263."

121. The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of *Ramani U. Krishnan v. Dr. Ammini Praveen Joshua @ Veena*, reported in 2005 (4) C.T.C. 165, which reads as follows:

"The applicant is neither a legal heir nor would she get an interest in the property, but for the Will. It is a well established principle that only when the person has got some interest in the property but for the Will, for any of the reasons mentioned in Section 263 of the Indian Succession Act, he can file an application for revocation of probate.

<https://hcservices.ecourts.gov.in/hcservices/>...As rightly concluded by the learned Judge, the applicant does not have a claim to cite or oppose the grant of Probate. Further, a person who is



not claiming any right under testator nor a beneficiary of a Will nor who is likely to inherit the estate of the deceased whose claim is adverse to the interest of the testator, cannot file an application under Section 263 of the Indian Succession Act, 1925 for revocation of the Probate."

122.The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of Valliammal v. S.Arumugha Gounder and another, reported in 2001 (1) C.T.C. 708, which reads as follows:

" On other cases when a third party stranger like the first defendant makes a passing reference in his defence with regard to the truth and validity and the mental status of the testator at the time of the making of the will, the Court must satisfy itself by examining the attestators because as per the Hindu Succession Act and the Indian Evidence Act, will is a document by law required to be proved by, atleast by examining one of the two attestors.

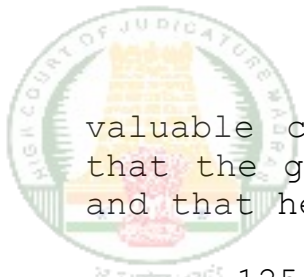
.....The other legal heirs namely the first wife and children also have not so far questioned the validity and execution of the Will by late Muthusamy Gounder. The lower Appellate Court ought to have considered the evidence adduced on the side of the plaintiff to prove the execution of the Will. Under Such circumstance the defendant who is stranger to the family will not be competent to urge other contentions to hold that there are suspicious circumstances regarding the execution of the Will."

123.The learned counsel appearing for the appellant relied upon the Judgment passed by this Court in the case of S.Ganesan v. S.Kuppuswamy & Other, reported in 2009-2-L.W. 636, which reads as follows:

" In view of the decision of the Hon'ble Apex Court reported in (2008) 4 SCC 300 (Cited supra) when a person having no cavetable interest or in any way related to the testator cannot insist upon the Will being proved strictly in accordance with Section 68 of the Indian Evidence Act. In this case, the defendants admittedly are not in any way related to the deceased and obviously they are not the legal heirs of the deceased testator and in such a case, the defendants cannot call upon the plaintiff to prove Ex.A17, the Will in accordance with Section 68 of the Indian Evidence Act."

<https://hcservices.ecourts.gov.in/hcservices/>

124.On the side of the respondents, it is stated that the third defendant purchased the property in bank auction for



valuable consideration and that he is a bonafide purchasers and that the grant of probate Will curtail his rights in the property and that he is having every right to question the Will.

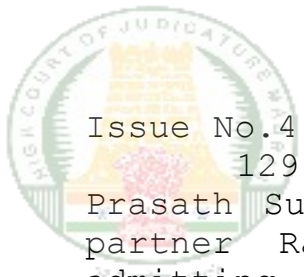
125. The learned counsel appearing for the respondents relied upon the judgment passed by the Hon'ble Supreme Court in the case of *Elizabeth Antony v. Michel Charles John Chown Lengera* reported in *CDJ 1990 SC 387*, which reads as follows:

".....considering the locus standi of a person to oppose grant, it is held that any interest, however, slight and even a bare possibility of an interest is sufficient to entitle a person to enter caveat in a probate proceedings."

126. The Will is signed by the notary public and the Will is not signed by the attesting witness. Without attestation by the witness, the Will is invalid. Mere probate of a Will does not prove the execution of the Will and that the Will was executed only after the commencement of the sale proceedings by the financial Corporation.

127. The notary public gave evidence that the registers maintained by him were destroyed as 5 years lapsed from the execution of the Will. The evidence of notary public also creates some cloud regarding the Will. As the original Will was not marked and as no attesting witness was examined, this Will cannot be said to have been proved by the plaintiff. Mere filing of Probate O.P. is not sufficient to prove the Will. Even in the Probate O.P. Nobody is impleaded as a respondent. Though there are other legal heirs, those legal heirs are not impleaded as respondents in the probate O.P. The suit property is mortgaged with the financial Corporation but the financial Corporation is not impleaded. Though the suit property is purchased by the Firm. The Firm Hari Prasath Sureka and Co., is not impleaded as party. Both Hari Prasath Sureka and Co., or the Krishna Trading Company are not impleaded as party in the Probate O.P. Even assuming the Will as genuine, a testator cannot convey better title than what he is having. The property is already mortgaged with the financial Corporation before the execution of the Will and the Will can be valid only subject to the mortgage.

128. The probate granted in O.P.No.16 of 2007 was already revoked by the learned Sub Judge, Tuticorin by his order dated 24.01.2014 in R.P.O.P.No.176 of 2012 and the revocation was confirmed by the learned Principal District Judge in C.M.A.No.8 of 2014 dated 27.04.2015. The order of the learned Principal District Judge is confirmed by this Court in C.M.S.A.(MD)No.35 of 2015 dated 16.04.2019. In the above circumstances, it is decided that the Will of the deceased dated 06.06.2006 is not proved and mortgage deed is not affected by the Will.



Issue No.4 in A.S.Nos.166 and 168 of 2015:

129.The writ petitions filed by the appellant and by Hari Prasath Sureka were already dismissed by this Court. One of the partner Ram Avathar Sureka has filed his written statement admitting the mortgage deed and admitting the case of the Corporation. As already discussed, the Wills said to have been executed by Gothawari Devi Sureka and Ram Avathar Sureka are not properly proved by the appellant. Even if those Wills are proved, those Wills are valid only subject to the mortgage. As the property was already mortgaged, as per Clause 11(b) of the mortgage deed, the financial Corporation is having the right to sell the property. The second respondent is the auction purchaser who purchased the property for valuable consideration and constructive possession was taken by the financial Corporation as per Ex.B21. The appellants is not having any right over the property and hence, the appellant is not entitled for any permanent injunction against the respondents 1 and 2.

Issue No.4 in A.S.No.167 of 2015:

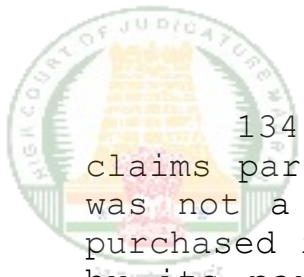
130.As discussed above, the plaintiff is not having any right over the suit property. The testator of the Will has signed the mortgage deed and the Will will be subject to the mortgage signed by the testator. The property was already sold out to the second respondent. Sale proceedings is already over and there is no question of repaying the loan amount at this stage. In the above circumstance, there is no necessity for this Court to issue an order to direct the defendants 2 and 3 to repay the loan amount to the first defendant and to release the share of the minors.

Issue No.6 in A.S.No.167 of 2015:

131.On the side of the respondents, it is stated that the suit is bad for non joinder of necessary parties. It is stated that the property belong to the firm Hari Prasad Sureka and Co., and that mortgage deed was executed on behalf of the firm and non-joinder of the firm as a party to the suit is fatal.

132.When the partnership is dissolved, there is no legal entity for the Firm and that there is no necessity to implead the Firm Hari Prasath Sureka and Co. and that a Firm is not having any individual entity only a Company is having legal entity.

133.On the side of the appellants, it is stated that in paragraph no.22 of the trial Court Judgement, it is stated that the word used is 'erstwhile partner' which clearly reveals that there is no partnership existing. A perusal of the Judgment reveals that the word erstwhile partner is used by the trial Court when the Court was repeating the wordings of the plaintiff and it is not the wordings of the Court.



134.Ex.A1 is the title deed from which the plaintiffs claims partition. The title deed, Ex.A1 reveals that the property was not a hindu joint family property and that the property was purchased in the name of a Firm named Hari Prasath Sureka and Co., by its partners. Mortgage deed was executed by the firm through its partners. Hence, Hari Prasad Sureka and Co., is a necessary party to the suit. Loan was obtained for Sri Krishna Trading Co. Hence, Sri Krishna Trading Co., and its partners are necessary parties to the suit. The other legal heirs of the deceased Hari Prasad Sureka are necessary parties. Non joinder of other legal heirs of Gothawari Devi Sureka namely Ram Avathar Sureka is fatal to the plaintiff.

135.Hence, it is decided that the suit is bad for non-joinder of necessary parties.

Issue No.5 in A.S.Nos.166 and 168 of 2015 and Issue No.7 in A.S.No.167 of 2015:

136.All the above discussed issues are decided against the appellant. Property belong to the Firm and not the individuals. No dissolution of partnership is proved. Wills are not proved. Revocation of Probate order is confirmed by this Court. Mortgage was created by the testators prior to the execution of the will. Hence, it is decided that there is no sufficient reasons to allow the appeal or to interfere in the judgment of the trial Court.

137.In the above circumstances, these appeal suits are dismissed by confirming the Judgment and decree passed in O.S.Nos.05 of 2010, 28 and 29 of 2011 on the file of the learned Principal District Judge, Thoothukudi. No Costs. Consequently, connected M.P.s are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar(CS)

To

1.The Principal District Judge, Thoothukudi.

Copy to :

The Section Officer, V.R.Section, Madurai Bench of Madras High Court, Madurai. (2Copies)

+3cc to Mr.M.P.SENTHIL, Advocate, SR.No.61450 TO 61452

+1cc to Mr.G.GHOUSE KHATHIRI, Advocate, SR.No.61151

mrn