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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 06.11.2019

Judgment Delivered on : 03.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

A.S.No.148 of 2010
and
M.P.No.1 of 2010

1. Rangammal @ Veerathal (died)
(deleted from the array of parties,
vide order dated 03.02.2020 passed
in Memo, dated 31.08.2018)

2. Saraswathi (died)

3. Rukmani

4. Ayyasamy

5. A.Velusamy

(Appellants 4 and 5 are brought on record
as LR's. of the deceased 2nd appellant,
vide Order of Court, dated 13.07.2018
in C.M.P.No.6971 of 2017
made in A.S.No.148 of 2010)

.. Appellants/Plaintiff

Vs.

1. Subbae Gounder @ Chinnasamy (died)

2. C.Kathirvelu

3. C.Jayakumar

4. Smt.Mani

5. Subbulakshmi

(Respondent No.5 brought on record as LR of the
deceased first respondent, vide Order of Court,
dated 13.07.2018 in C.M.P.No.6974 of 2017
in A.S.No.148 of 2010)

.. Respondents/Defendants

Appeal Suit (First Appeal) filed under Section 96 of the
Civil Procedure Code (CPC) against the judgment and decree dated
14.10.2009 in O.S.No.131 of 2007 on the file of the Additional
District Judge-cum-Fast Track Court No.1, Coimbatore.



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For appellants : Mr.M.Sriram for Mr.R.Karthikeyan

For respondents : Mr.N.Sridhar for Mr.R.Bharath Kumar
for RR-2, 3 and 5

No appearance for R-4

JUDGMENT

R.SUBBIAH, J

This Appeal Suit (First Appeal) had been filed by the appellants/plaintiffs against the respondents/defendants challenging the judgment and decree dated 14.10.2009 passed in O.S.No.131 of 2007 on the file of the Additional District Court-cum-Fast Track Court No.1, Coimbatore.

2. The said suit in O.S.No.131 of 2007 was filed by the appellants 1 to 3/plaintiffs for passing a preliminary decree of partition of the suit properties into five equal shares with reference to good and bad soil by appointing a Commissioner and allot three such shares together to the plaintiffs.

3. The trial Court, by judgment and decree dated 14.10.2009 in O.S.No.131 of 2007, dismissed the suit, against which, the present First Appeal (Appeal Suit) is filed by the plaintiffs.

4. For the sake of convenience, the parties herein are referred to as plaintiffs and defendants as arrayed in the suit before the trial Court.

5. Brief averments made in the plaint are as follows:

(a) The appellants 1 to 3/plaintiffs are sisters. The first defendant is the brother of the appellants 1 to 3/plaintiffs. The fourth respondent/fourth defendant is their another sister. The respondents 2 and 3/defendants 2 and 3 are the sons of the first respondent/first defendant. The suit properties are self-acquired properties of their father Nanjappa Gounder, who had acquired the same from his mother Pappammal. The genealogical tree of the family members of the plaintiffs and defendants are as follows:

Subbiah Gounder (died)	=	Pappammal (died 1930)
		Nanjapa Gounder (died 17.04.1970)
		=
Rangammal @ Pappammal		
		(died 04.05.2000)

Subbae Gounder @ Chinnasamy		Rangammal @ Veerathal
Saraswathi		
(first defendant)		(first plaintiff) (second



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plaintiff)

C.Kathirvel (second defendant)

C.Jayakumar (third defendant)

Smt.Mani

Rukmani

(fourth defendant) (third

plaintiff)

(b) The suit properties originally belonged to the plaintiffs' paternal grandmother Papammal, wife of Subbiah Gounder. She purchased the suit properties of an extent of 44.40 acres in S.F.Nos.420 and 421, Ettamadaai Village, Coimbatore Taluk, in the year 1972. The sale deed is dated 21.12.1927. The said Pappammal was in possession and enjoyment of the properties till she died during 1930 and her husband pre-deceased her. On the death of the said Pappammal, her son Nanjappa Gounder was in possession and enjoyment of the suit properties till his death on 17.04.1970. The said Nanjappa Gounder died intestate leaving behind his children, namely the plaintiffs 1 to 3 and defendants 1 and 4 as Class-I heirs (under the provisions of the Hindu Succession Act) and they have succeeded to the properties. Their mother Rangammal (wife of Nanjappa Gounder) was in possession and enjoyment of the properties and cultivating the lands till she died on 04.05.2000. The plaintiffs 1 and 2 and the first defendant were married before the death of their father Nanjappa Gounder and the third plaintiff Rukmani and the fourth defendant-Mani were not married.

(c) The first defendant, being the son of Nanjappa Gounder, married during 1969 and after his marriage, he was living separately. He neither took care of his father Nanjappa Gounder, nor joined his father in the cultivation of lands. He did not even spend funeral expenses for his father Nanjappa Gounder. He never showed any interest in getting his sisters married. It is the plaintiff's mother who took efforts for betterment of the family and with the available income from the lands, she performed the marriage of the third plaintiff and fourth defendant (daughters) during 1973 and 1975 respectively.

(d) The plaintiff's father Nanjappa Gounder was sick and he was an Asthma patient and was bedridden for more than about one year before his death and he died on 17.04.1970. He was aged about 75 years old when he died and he was not hale and healthy and not in a sound and disposing state of mind. Further, about three months preceding his death, he became senile and was not in a position to recognise his relatives and family members. After the death of their mother, the plaintiffs came to understand through the first defendant that their father



Nanjappa Gounder had executed two Wills just two months before his death, bequeathing the properties solely in favour of the first defendant and his children. In fact, the plaintiffs' father did not execute any Will as alleged by the first defendant. The defendants 1 and 4 played fraud in bringing about the alleged Wills. During that period, their father was unwell and bedridden and was not even in a position to move without anybody's help. The defendants 1 and 4 were exercising misrepresentation, undue influence and fraud on their father in executing the first Will. They state that within a month of the execution of the first Will, their father was stated to have executed the second Will, in which he had cancelled the first Will and bequeathed the entire property in favour of the defendants 1 to 3. During that period, the third plaintiff and the fourth defendant were not married and were living with their mother.

(e) The family did not own any other property and the only source of income was from the suit properties. Their father did not have any savings for the family for the marriage of the unmarried daughters. Their father did not make any provision in the alleged Wills for the marriages of his two unmarried daughters. Their mother Rangammal also did not own any property or had any other source of income. The father did not give any reason in the Wills for disinheriting the wife and unmarried daughters. The alleged Wills are not valid in law and they are shrouded with suspicious circumstances. Therefore, the Wills are not binding on the plaintiffs.

(f) After the death of their father, the first defendant did not take possession of the suit properties by claiming right on the basis of the second Will. He was never in possession and enjoyment of the suit properties to the exclusion of the plaintiffs. He never cultivated the lands and the plaintiffs are in joint and constructive possession of the suit properties.

(g) After the death of their mother, the plaintiffs came to understand that the defendants 2 and 3 had executed a partition deed dated 16.12.1998 with reference to a portion of the suit properties on the basis of the alleged Will, dated 27.03.1970. The first defendant was colluding with his sons, i.e. the defendants 2 and 3 and is instrumental in bringing about the partition deed. The defendants 1 to 3 are not the absolute owners of the suit properties, which are the absolute properties of their father Nanjappa Gounder. On the death of their father during 1970, the wife and children succeeded to the properties. Hence, the plaintiffs are entitled to equal share in the suit properties. Thereafter, on the death of their mother Rangammal during May 2000, her share also devolved upon the remaining sharers. Thus, the plaintiffs are entitled to 1/5 share each.

(h) After the death of their mother during May 2000, the parties expressed their willingness and desire to divide the suit properties among themselves, ignoring the partition deed,



dated 16.12.1998. The defendants 1 and 4 agreed for amicable partition, but the first defendant was postponing the same without any reason and they finally refused for the same during December 2006. Thereafter, the fourth defendant also joined him. They state that they took necessary steps to settle the matter amicably, but failed. The plaintiffs are the co-owners of the suit properties and they are in joint and constructive possession of the same. Since the defendants refused for amicable partition, the plaintiffs sent legal notice on 10.01.2007 to the defendants. The defendants sent reply dated 02.02.2007. In these circumstances, the plaintiffs have filed the suit for the relief stated supra.

6. Resisting the above case of the plaintiffs, the first defendant filed written statement, which was adopted by the defendants 2 and 3, namely the sons of the first defendant, stating as follows:

(a) It is true that the suit properties are separate properties of Nanjappa Gounder, i.e. the father of the plaintiffs 1 to 3 and defendants 1 and 4. Nanjappa Gounder died of old age and under natural circumstances. The said Nanjappa Gounder was in absolute possession and enjoyment of the suit properties. Out of his own free will and volition, he executed the registered Will dated 27.03.1970, by and under which, he bequeathed all his properties in favour of the defendants 1 to 3 herein. Under the said Will, he has mentioned the properties in Schedules A and B and he has bequeathed B-schedule items therein, absolutely in favour of his son, the first defendant and as far as A-schedule items are concerned, the same were bequeathed in favour of his grandson, the second defendant and subsequent born male issues of the first defendant, if any. After execution of the said Will, being the last Will and testament of Nanjappa Gounder, the same was duly acted upon and Revenue Records were duly changed in the name of the beneficiaries under the Will. The defendants 1 to 3 have been exercising rights of ownership over the bequeathed properties openly and to the knowledge of one and all, including the plaintiffs and the fourth defendant. The Will was promulgated and this fact has never been in dispute. The mother and sisters of the first defendant had also accepted the Will in toto.

(b) For 37 years, the defendants 1 to 3 have been in possession and enjoyment of the suit properties and no person would keep quiet for such a long time, if really there was a doubt or dispute with regard to the execution of the Will or the succession in pursuance thereof. In fact, the defendants 1 to 3 entered into a partition deed, dated 16.12.1998, by and under which, the suit properties were divided among themselves. All these facts would go to show that the plaintiffs are feigning ignorance of the admitted facts. The fourth defendant is in active collusion with the plaintiffs.



(c) The first defendant also denied the fact that he never took any interest in the family and agriculture. He further denied that he was not taking any interest in the marriage of his sisters. In fact, he had played an active role in performing their marriages. He denied that Nanjappa Gounder was sick and was an Asthma patient. It is false that the said Nanjappa Gounder was bedridden for more than one year before his death on 17.04.1970. The first defendant also denied that Nanjappa Gounder was senile and was not able to recognise his relatives and family members. Thus, he sought for dismissal of the suit.

7. Before the trial Court, on behalf of the plaintiffs, the third plaintiff Rukmani was examined as P.W.1 and one Subbulakshmi was examined as P.W.2. Exs.A-1 to A-9 were marked on the side of plaintiffs. On the side of defendants, Subbae Gounder (first defendant) was examined as D.W.1 and one Ayyasamy, the attesting witness to the Will, was examined as D.W.2. Exs.B-1 to B-36 were marked on the side of the defendants.

8. The trial Court, upon considering the oral and documentary evidence adduced before it, framed the following issues for consideration:

(i) Whether the suit properties are the self-acquired properties of Nanjappa Gounder ?

(ii) Whether two Wills that have been executed by Nanjappa Gounder, are exercised by mis-representation, undue influence and fraud ?

(iii) Whether the partition deed dated 16.12.1998 is not valid and binding on the plaintiffs ?

(iv) Whether the plaintiffs are entitled to divide the suit properties into five equal shares and to allot three such share to them ?

(v) Whether the plaintiffs are in joint possession of the suit properties ?

(vi) Whether the Court fees paid by the plaintiffs are correct ?

(vii) To what other reliefs ?

9. The trial Court while answering the above issues, dismissed the suit holding as follows:

(a) The suit properties are the self-acquired properties of Nanjappa Gounder.

(b) Ex.B-36 Will, dated 27.03.1970 is proved as true, valid and genuine and it is the last Will and testament of Nanjappa Gounder and that the Will had been duly promulgated and acted upon by the defendants 1 to 3 and the plaintiffs have not established that the Will executed by the Nanjappa Gounder was exercised by misrepresentation, undue influence and fraud.

(c) The partition deed dated 16.12.1998 is valid and binding upon the plaintiffs.



(d) The plaintiffs are not entitled to divide the suit properties into five equal shares and allot three such shares. The plaintiffs are never in joint possession and enjoyment of the suit properties. The plaintiffs are not entitled to partition.

(e) The plaintiffs are not entitled to any relief.

Aggrieved by the said findings of the trial Court in dismissing the suit, the plaintiffs have preferred the present First Appeal.

10. The learned counsel appearing for the appellants/plaintiffs submitted that it is an admitted case that the suit properties are separate properties of Nanjappa Gounder, who is the father of the plaintiffs and the defendants 1 and 4. He died on 17.04.1970 intestate, leaving behind the plaintiffs 1 to 3 and the defendants 1 and 4. According to the defendants, the father Nanjappa Gounder executed two Wills, one dated 21.02.1970 (Ex.A-9), in which he is said to have bequeathed his self-acquired properties in favour of his son, the first defendant and another daughter, the fourth defendant. Another Will is Ex.B-36, dated 27.03.1970, which was executed just after 35 days from the date of the first Will, in which he had cancelled the first Will dated 21.02.1970 and bequeathed his self-acquired properties in favour of the defendants 1 and 2 and the male issue if any that may be born to the first defendant in future. Therefore, according to the plaintiffs, they are entitled for their respective shares. But according to the plaintiffs, these two Wills are shrouded by suspicious circumstances. In this regard, the learned counsel appearing for the appellants/plaintiffs submitted that the necessity for executing the second Will just after 35 days of the execution of the first Will and just 21 days prior to the date of death of the said Nanjappa Gounder on 17.04.1970, throws suspicion on the Will. Both the Wills executed by Nanjappa Gounder not only disinherited his wife, but also his daughters, more specifically, two unmarried daughters. Absolutely, there is no explanation in the Will that the said Nanjappa Gounder had made arrangements for sustenance of his wife and unmarried daughters, nor even it has been mentioned in the Will that first defendant (son) has to perform the marriage of his daughters and look after his mother. The fact remains that there are no other properties belonging to the said Nanjappa Gounder, except the suit schedule properties. These suspicious circumstances were never removed by first defendant, who is the propounder of the Will and he has to necessarily remove the cloud of suspicion in the Will.

11. The learned counsel appearing for the appellants/plaintiffs further submitted that P.Ws.1 and 2 in their evidence stated that Nanjappa Gounder was bedridden and was suffering from Asthma. Though the first defendant (D.W.1) denied the same in his written statement and also in his cross-



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examination, but in the chief examination, he had admitted that his father was suffering from Asthma. Thus, with regard to the health condition of the said Nanjappa Gounder, the first defendant had given contradictory statement, one in written statement and in his cross-examination, and another in his chief examination. There is also no explanation in the alleged Wills as to why the said Nanjappa Gounder had disinherited his wife and daughters, specifically the unmarried daughters, when the said Nanjappa Gounder was having good relationship with his wife and daughters. Though D.W.1 had claimed that he only conducted the marriage of his sisters, he has not produced any document in proof of the same, as stated by him in his cross-examination. The learned counsel appearing for the appellants/plaintiffs further submitted that, according to the defendants, the said Nanjappa Gounder executed the first Will on 21.02.1970 bequeathing the properties in favour of the first defendant and fourth defendant, who is one of the unmarried daughters. Further, just after 35 days from the date of the execution of the first Will, the said Nanjappa Gounder had executed the second Will on 27.03.1970 by cancelling the earlier Will by bequeathing the properties in favour of the first and second defendants and the male child that may be born to the first defendant in future, without assigning any valid reason for cancelling the first Will. These circumstances are certainly suspicious circumstances, which is a cloud that has to be removed by the propounder of the Will. In this regard, the learned counsel for the appellants/plaintiffs relied upon the judgments of the Supreme Court reported in 2002 (1) CTC 244 (SC) (Madhukar D.Shende Vs. Tarabai Aba Shedage) and 2005 (1) CTC 443 (SC) (Sridevi and others Vs. Jayaraja Shetty and others) to contend that wherever a defence of fraud, coercion and undue influence is raised, the burden would be on the caveator, that is, the propounder of the Will to prove the validity of the Will. Further, in the first Will, the said Nanjappa Gounder has stated that he became aged and frequently falling sick, but the same wordings are not found in the second Will. Had he been really sick, he would have stated the same wordings in the second Will also. Moreover, during the course of cross-examination, a specific question was put to D.W.1 pointing out the signature of the said Late Nanjappa Gounder found in the first Will-Ex.A-9, and he denied the signature of his father in Ex.A-9. The learned counsel for the appellants/plaintiffs further contended that if we compare the signatures found in Ex.A-9 first Will and Ex.B-36 second Will, it could be seen that the signatures are one and the same of Nanjappa Gounder, and therefore, it is clear that the first defendant was not speaking truth while he was deposing and had been contradicting his own statement in chief examination. This contradiction gives rise to suspicious circumstances surrounding the Will and also as to why the said Nanjappa Gounder executed the Will when he was said to



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be hale and healthy and was also having good relationship with his wife, but he had disinherited his wife and daughters, specifically the unmarried daughters and also bequeathed the properties to the first defendant and second defendant without reserving anything for his wife and his daughters.

12. The learned counsel appearing for the appellants/plaintiffs further submitted that the very circumstances that Nanjappa Gounder had executed Ex.A-9 Will on 21.02.1970 and he had cancelled the same on 36th day and executed a new Will marked as Ex.B-36, dated 27.03.1970 and thereafter, he had passed away on 17.04.1970, are sufficient to draw an inference that Nanjappa Gounder was not doing well and he was having his own doubt as to whether he would stay alive for very long and that the first defendant, on knowing about his health of his father, had forced Nanjappa Gounder to execute the Will bequeathing his entire self-acquired properties in favour of the first and second defendants. These circumstances are certainly suspicious circumstances which is a cloud that had to be removed from the propounder of the Will, namely the first defendant.

13. The learned counsel appearing for the appellants/plaintiffs also relied on a decision of the Supreme Court reported in 2007 (2) CTC 172 (SC) (Niranjan Umeshchandra Joshi Vs. Mridula Jyoti Rao and others), wherein the Supreme Court held that there arises suspicion circumstance on the Will, when the deposition appears to be unnatural or wholly unfair in the light of the relevant circumstances and when the propounder himself takes prominent part in execution of the Will which confers on him substantial benefit.

14. In such circumstances, the trial Court brushed aside the facts in the present case, wherein the wife and the unmarried daughters have been disinherited and when the entire properties of Nanjappa Gounder had been bequeathed in favour of the first defendant and his sons, the same would certainly be suspicious circumstances, which had to be removed by the first defendant himself and burden cannot be shifted upon the plaintiffs. Further, the finding of the trial Court is that the Will was duly promulgated after the death of Nanjappa Gounder, but absolutely, there is no pleading in the written statement nor oral evidence as to when such promulgation was made. No independent witness was examined in this regard. The first defendant did not mention anything in the reply notice, dated 02.02.2007 and though in the written statement, it is stated that the Will was promulgated, but the actual date of promulgation was not mentioned therein. However, in the cross-examination, D.W.1 has admitted that he came to know about the Will only later, but there is no explanation as to who was in possession of the Will till then. In this regard, the learned counsel appearing for the appellants/plaintiffs submitted that the Will being a document, had to be proved by letting in



evidence and it must have been probated, but in this case, the Will had not been proved or not even been probated in accordance with law. Hence, for these reasons, he prayed that the present First Appeal may be allowed. In support of his contentions, he also relied on the following decisions of the Supreme Court:

(i) 2006 (11) SCALE 148 (B.N.Venkatamuni Vs. C.J.Ayodhya Ram Singh and others);

(ii) 1974 (2) SCC 600 = AIR 1974 SC 1999 (Surendera Pal and others Vs. Dr.(Mrs).Saraswathi Arora and another);

(iii) AIR 1964 SC 529 (Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee, since deceased and after him his legal representatives and others), and

(iv) AIR 1959 SC 443 (H.Venkatachala Iyenger Vs. B.N.Thimmajamma and others).

15. Countering the above submissions, the learned counsel appearing for the respondent/defendants submitted that though it is the specific case of the appellants/plaintiffs that Nanjappa Gounder was not hale and healthy and sick and bedridden and was not in a sound and disposing state of mind, but the same had not been proved by the appellants/plaintiffs. There is not even a question put forth to the first defendant, who was examined as D.W.1 that the testator-Nanjappa Gounder was not hale and healthy and was bedridden and was also not in a sound and disposing state of mind. On the other hand, D.W.1's evidence had clearly proved that their father executed the Will voluntarily, when he was in a sound and disposing state of mind. The learned counsel appearing for the respondents/defendants further submitted that in the year 1970, Nanjappa Gounder approached the Cotton Seed Department of Government of Tamil Nadu, having its office at Coimbatore South Taluk and gave a declaration that he is willing to cultivate for producing cotton seeds and also willing to sell the same. This would show that Nanjappa Gounder was in a position to move around without anybody's help as alleged by the plaintiffs. If he is not hale and healthy and bedridden, he would not be in a position to go to Cotton Seed Department and give the said declaration. In this regard, he also invited the attention of this Court to Ex.B-5 being the original proceedings of the District Agricultural Officer, dated 27.01.1970 and Ex.B-6 being the original form dated 16.01.1970 submitted by Nanjappa Gounder to the District Agricultural Officer. Moreover, Will--Ex.B-36 dated 27.03.1970 was a registered Will, registered in the Office of the Joint Sub-Registrar No.2, Coimbatore on 28.03.1970. Thus, it is clear that the said Nanjappa Gounder himself went to the Sub-Registrar Office for registration, which would show that he was hale and healthy and was in a sound and disposing state of mind. D.W.2 who is the attester of Ex.B-36 Will, was examined before Court and he stated that the testator (Nanjappa Gounder) was in a



sound and disposing state of mind at the time of execution and registration of the said Will. In this regard, learned counsel appearing for respondents invited attention of this Court to the evidence of D.W.1 and D.W.2 and made detailed submissions. He further submitted that though the plaintiff pleaded undue influence and fraud, they have not pursued the said pleas during their evidence or cross-examination on that aspect. In this context, he relied on the following judgments of the Supreme Court:

(i) AIR 1955 SC 363 (Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta and another);

(ii) AIR 1964 SC 529 (Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee, since deceased and after him, his legal representatives and others);

(iii) AIR 1974 SC 1999 = 1974 (2) SCC 600 (Surendra Pal and others Vs. Dr.(Mrs).Saraswathi Arora and another), and

(iv) AIR 2005 SC 233 (Daulat Ram and others Vs. Sodha and others).

16. With regard to the submission made by the learned counsel appearing for the appellants/plaintiffs that since Nanjappa Gounder has not provided anything to his daughters and Wife in the Will and this deprivation will amount to suspicion, the learned counsel appearing for the respondents/defendants submitted that it is settled law that deprivation of natural heirs itself is not a factor, which would lead to the conclusion that there exists suspicious circumstances surrounding the execution of the Will. In support of this submission, the learned counsel appearing for the respondents/defendants relied on the following decisions :

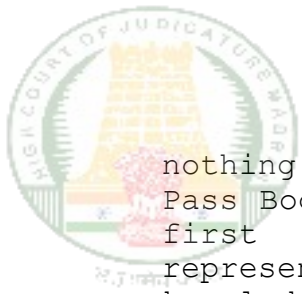
(i) AIR 1964 SC 529 (Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee, since deceased and after him, his legal representatives and others);

(ii) AIR 1995 SC 1684 (Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by LRs. and others), and

(iii) AIR 2005 SC 4362 (Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others).

17. The learned counsel appearing for the respondents/defendants also submitted that the appellants/plaintiffs have filed the suit in the year 2007 almost 37 years after the demise of their father Nanjappa Gounder in 1970, and this long delay in filing the present suit itself is fatal to the case of the plaintiffs and it is favourable to the case of the defendants.

18. Further, the learned counsel appearing for the respondents/defendants submitted that the submission of the appellants/plaintiffs that Ex.B-36 Will was promulgated only in the year 1998 and until then, the first defendant had not divulged the existence of the Will and kept it secret, is



nothing but false. The defendants filed Ex.B-7 which is Patta Pass Book issued by the Tahsildar on 19.03.1974 in favour of the first defendant and minor Kadirvel (second defendant), represented by guardian-mother Subbulakshmi. Thus, it is common knowledge that without the Will, the Revenue Authorities would not have issued the Patta Pass Book in favour of minor Kadirvel. Further Ex.B-19 is a letter dated 18.12.1984 issued by the Syndicate Bank to the Sub-Registrar, Coimbatore and it reveals that the first defendant executed a registered mortgage dated 30.09.1974 in respect of the suit properties. Ex.B-21 shows that the name of the third defendant was included in the Patta concerning the suit properties based on Ex.B-36 Will. These facts clearly show that Ex.B-36 Will in question is duly acted upon and also in the enjoyment of the beneficiaries in accordance with Ex.B-36 Will. Thus, according to the learned counsel appearing for the respondents/defendants, the beneficiaries duly discharged their burden of proving the Will in accordance with law. On the contrary, the appellants/plaintiffs failed to prove their alleged plea of undue influence, coercion, fraud, misrepresentation, alleged ill-health of the testator and his mental capacity.

19. The learned counsel appearing for the respondents/defendants further contended that the evidence of D.W.2 is sufficient for proving that there is valid attestation of the Will. In this context, he relied on a decision of the Supreme Court reported in AIR 1954 SC 316 (Sri Sri Sri Kishore Chandra Singh Deo Vs. Babu Ganesh Prasad Bhagat and others). Thus, he prayed for dismissal of the appeal.

20. Heard both sides and perused the materials available on record. Keeping in mind the submissions made on either side, we have carefully considered the same. Since we have discussed the facts in detail above, we refrain from reiterating the same any further in this appeal and only the facts which are germane are discussed hereunder.

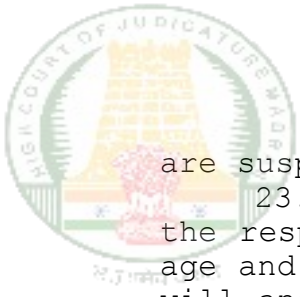
21. The only question that has to be decided in this First Appeal (Appeal Suit) is as to whether the plaintiffs have established their case that the Will was obtained by undue influence or coercion or fraud or misrepresentation by the defendants and whether the said Will is surrounded by suspicious circumstances.

22. The plaintiffs 1 to 3 and the defendants 1 and 4 are all sons and daughters of Nanjappa Gounder and Rangammal @ Pappammal. It is the admitted case of the plaintiffs as well as the defendants that the suit schedule properties are separate properties of their father Nanjappa Gounder, who died on 17.04.1970, leaving behind his wife and sons and daughters (plaintiffs 1 to 3 and defendants 1 and 4). After the demise of the said Nanjappa Gounder, his wife Rangammal @ Pappammal was in possession and enjoyment of the properties and was cultivating the lands and she died on 04.05.2000. According to the



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plaintiffs, since the said Nanjappa Gounder died intestate, all his legal heirs are entitled to equal share in the suit properties. But subsequent to the death of their mother, the plaintiffs came to know that their father was alleged to have executed two Wills, prior to two months from the date of his death. According to the appellants/plaintiffs, Nanjappa Gounder did not execute the Will as alleged by the defendants 1 and 4, who played fraud in bringing the Will into existence. It is the further case of the appellants/plaintiffs that their father was unwell and bedridden and was not in a position to move without anybody's help. The defendants 1 and 4 have been exercising misrepresentation, undue influence and fraud on their father in executing the first Will. Further, according to the plaintiffs, it is the case of the defendants that the first Will was executed in favour of the defendants 1 and 4 on 21.02.1970 (Ex.A-9) and the second Will was executed on 27.03.1970 (Ex.B-36) just on 36th day from the date of the execution of the first Will and in the second Will, by cancelling the first Will, the said Nanjappa Gounder bequeathed his self-acquired properties in favour of the defendants 1 and 2 and the male child that may be born to the first defendant in future. Therefore, according to the learned counsel appearing for the appellants/plaintiffs, the necessity for executing the second Will just 35 days after the execution of the first Will and before Nanjappa Gounder passed away on 17.04.1970, i.e. within 21 days of executing the second Will, shows that there are suspicious circumstances surrounding the Will. Hence, according to the learned counsel appearing for the appellant/plaintiffs, there is a suspicion that the first defendant would have forced Nanjappa Gounder in executing the Will. Subsequently, since the first defendant was not satisfied that the fourth defendant was given a share in the first Will, he would have presurried Nanjappa Gounder to execute the second Will. Both the Wills executed by Nanjappa Gounder not only disinherited his wife, but also his daughters, more specifically, his two unmarried daughters, namely third plaintiff and fourth defendant. Further, there was no explanation in the Will that Nanjappa Gounder had made arrangements for sustenance of his wife and unmarried daughters, nor even mentioned that the first defendant has to perform the marriage of the daughters and look after his mother. The fact remains that there was no other properties belonging to Nanjappa Gounder, except the suit schedule properties. Thus, these suspicious circumstances were never removed by the first defendant, who is the propounder of the Will and who has to necessarily remove the cloud of suspicion in the Will. That apart, it is also the submission of the learned counsel appearing for the appellants/plaintiffs that Nanjappa Gounder was sick and senile and not able to recognise even his relatives and family members. This would fortify that the defendants would have obtained the Will by undue influence and fraud and there



are suspicious circumstances surrounding the Will.

23. But it is the reply of the learned counsel appearing for the respondents/defendants that Nanjappa Gounder died due to old age and under natural circumstances and only out of his own free will and volition, he executed the last Will and testament Ex.B-36 dated 27.03.1970 while he was in a sound and disposing state of mind. In order to prove that the said Nanjappa Gounder was in a sound and disposing state of mind, the learned counsel appearing for the respondents/defendants invited the attention of this Court to the evidence of P.W.1, relevant portion of which is extracted hereunder:

"என் தந்தை இறந்து 38 வருடங்கள் ஆகிறது. என் தாயார் இறந்து 8 வருடம் ஆகிறது. வழக்கு சொத்தின் சிட்டா, பட்டா அடங்கல் முதல் பிரதிவாதி மற்றும் அவர் மகன்கள் பெயரில் இருக்கிறதா என்று தெரியாது. நாங்கள் வழக்கு சொத்திற்கு வரி செலுத்தியதில்லை.

எங்களுக்கு குடும்ப டாக்டர் இல்லை. என் அப்பாவிற்கு டாக்டரிடம் பார்க்கவில்லை.

என் தகப்பனாருக்கு உடல்நலம் சரியில்லாமல் இருந்து மருத்துவம் பார்த்ததற்கு ரெக்கார்டு இல்லை."

24. From a reading of the above evidence of P.W.1, it is clear that Nanjappa Gounder was not treated by any Doctor. P.W.1 also stated that she did not have any medical record to show that her father was suffering from any ailment and taking treatment. Moreover, no suggestion was put forth in the cross-examination of D.W.1 that the testator-Nanjappa Gounder was senile and bedridden and was not in a sound and disposing state of mind. On the other hand, the evidence of D.W.1 (first defendant) had clearly proved that Nanjappa Gounder was hale and healthy, and to substantiate the same, the defendants have marked Exs.B-5 and B-6, which are respectively the original proceedings of the District Agricultural Officer, dated 27.01.1970 and original form, dated 16.01.1970 submitted by Nanjappa Gounder to the District Agricultural Officer to show that at the relevant point of time, the said Nanjappa Gounder had approached the Cotton Seed Department of Government of Tamil Nadu having its office at Coimbatore and gave a declaration that he is willing to cultivate and produce cotton seeds and in the said declaration, he had put his signature in front of the Village Karnam. Moreover, the above documents show that, had he been senile and bedridden, as contended by the learned counsel appearing for the appellants/plaintiffs, he would not have been in a position to move without anybody's help. He would also not be in a position to go to Cotton Seed Department and give a declaration in front of the Village Karnam. Moreover, Ex.B-36 Will (second Will) is a registered one, and the Nanjappa Gounder



himself went to the Sub-Registrar Officer next day on 28.03.1970 to present the Will executed by him on 27.03.1970 for registration.

25. All the above facts would show that the said Nanjappa Gounder was in a sound and disposing state of mind and executed the Will.

26. D.W.2 Ayyasamy, the attesting witness to the Will, had also adduced evidence to the effect that the testator Nanjappa Gounder travelled in a bus to go to the Sub-Registrar Officer for registration of the said Will. For further clarification, the relevant portion of the evidence of D.W.2 is extracted hereunder:

"உயில் எழுதுவதற்கு பஸ்ஸில் தான் போனோம். எங்கள் ஊரிலிருந்து கோயமுத்துருக்கு போவதற்கு நேரடி பஸ் எதுவும் இல்லை.

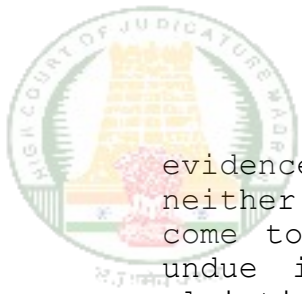
.. ..

இந்த உயில் எழுதும் போது அவருடைய பையன் சின்னசாமி இ ருந்தார் என்றால் இல்லை.

... ..

மகன் கட்டாயப்படுத்தி எழுதி வாங்கியதால் தான் மனம் உடைந்து வந்தவர் உடனே இறந்துபோனார் என்றால் சரியல்ல."

27. Therefore, the evidence of D.W.2 is very clear. He is the attesting witness to the Will and his evidence is cogent and convincing and no favourable reply to the case of the plaintiffs was brought out in his cross-examination. Therefore, D.W.2 has clearly proved the valid attestation of the Will Ex.B-36 and he clearly deposed that the testator Nanjappa Gounder signed the Will in the presence of the witness and also in the presence of the other attestors. He further deposed that the testator and the other witnesses saw his attestation and vice-versa. Therefore, it is sufficient evidence to valid attestation. In this regard, the learned counsel appearing for the respondents/defendants relied on a decision of the Supreme Court reported in AIR 1954 SC 316 (Sri Sri Sri Kishore Chandra Singh Deo Vs. Babu Ganesh Prasad Bhagat and others), wherein it is held that the attesting witness therein deposing that he had attested the mortgage bond executed by A in favour of B and that the other attestors also witnessed its execution, is sufficient evidence of valid attestation. Thus, in this case, the respondents/defendants have proved the execution of the Will, but the appellants/plaintiffs have failed to discharge their burden of proving that the Will was obtained by undue influence, fraud, coercion and misrepresentation. In fact, one Subbulakshmi, who was examined a P.W.2 on the side of the plaintiffs, is a relative of the parties to the suit and she had expressed only total ignorance about the entire transaction that had taken place between the parties. She has stated that she is not even aware of the family details of Nanjappa Gounder; on the other hand, she is closely connected with P.W.1. Her



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evidence is not useful to the case of the plaintiffs. Further, neither her evidence, nor the evidence of P.W.1, is helpful to come to the conclusion that the Will was obtained by fraud or undue influence by executing the Will. In fact, though the plaintiffs pleaded undue influence and fraud on the part of the defendants in executing the Will, the plaintiffs have not pursued the same during the course of cross-examination of D.W.1 or D.W.2 on that score. In law, the person pleading undue influence or fraud or coercion or misrepresentation, had to prove the same.

28. In the above context, it is appropriate and worthwhile to notice the following judgments of the Supreme Court, relied on by the learned counsel appearing for the respondents/defendants:

(a) AIR 1955 SC 363 (Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta and another):-

It is held that when once it has been proved that a Will had been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. It is further held in that decision of the Apex Court that it is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. If the testator retains his mental capacity, and there is no element of fraud or coercion, it has been often observed that undue influence may in the last analysis be brought under one or the other of these two categories and the Will cannot be attacked on the ground of undue influence.

(b) AIR 1964 SC 529 (Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee, since deceased and after him, his legal representatives and others):-

It is held that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act; the onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law, is sufficient to discharge the onus. Further, where the caveator alleges undue influence, fraud or coercion, the onus is on him to prove the same. It is further held that if the propounder succeeds in removing the suspicious circumstances, the Court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations.



(c) AIR 1974 SC 1999 (Surendra Pal and others Vs. Dr.(Mrs). Saraswathi Arora and another):

It is held that where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. A plea of undue influence where set up is a special plea, Section 103 of the Indian Evidence Act places the burden of substantiating such a plea on the party which sets it up.

(d) AIR 2005 SC 4362 (Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others):

It is held that the signature of registering officer and of identifying witnesses affixed to registration endorsement and the endorsement by the Sub-Registrar that the executant had acknowledged the execution before him, amounts to attestation and the executants' signatures taken by the Sub-Registrar in the document and the signature and thumb impression of the identifying witnesses were also taken in document and all the witnesses therein deposed that they had signed as identifying witnesses and that the testator was in a sound and disposing state of mind and the document also contained signature of the attesting witnesses and scribe. Then, the burden of proof to prove the Will had been duly and satisfactorily discharged by the claimants therein.

(e) AIR 2005 SC 233 (Daulat Ram and others Vs. Sodha and others):

It is held that burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud, is on the person who alleges it to be so.

29. It is also worthwhile to notice a decision of this Court reported in 2018 (7) MLJ 716 = 2018 (4) LW 781 (K.R.Sethupathy Vs. Parvathy), wherein, this Court, in regard to the execution and proving the Will, had held as follows:

"39. In this context, useful reference could be made to the decision of the Honourable Supreme Court in the case of (Sridevi and others vs. Jayaraja Shetty and others) reported in (2005) 2 Supreme Court Cases 784 wherein in para-11, it was held as follows:-

"11. It is well settled proposition of law that mode of proving the Will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by



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Section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would be again be on the propounder to explain them to the satisfaction of the Court, before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances has to be judged in the facts and circumstances of the case."

40. It is well settled that execution of the Will must be proved to the satisfaction of the Court by cogent and natural deposition of witness and the onus of proof of Will is on those who allege suspicion and fraudulent execution of the Will. . . .

... In any event, the suspicious circumstances projected or said to have existed in a case cannot be ipso facto applied in other case to nullify the genuineness a Will and the existence of suspicious circumstances and the proof thereof depends upon the facts and circumstances of each case.

41. Next it has to be considered as to whether the appellants/defendants 1 and 2 herein, by examining the two attesting witnesses, namely DWs 2 and 3, have established that the Will, Ex.B5, was proved in a manner, as required under Section 63 of Indian Succession Act and



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Section 68 of Indian Evidence Act. Before considering this point, it is necessary to look into Section 63 of Indian Succession Act, which reads as follows:-

"63. Execution of unprivileged Wills - Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction;

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator, a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Section 68 of Indian Evidence Act:

68. Proof of execution of document required by law to be attested:- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving



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the execution, if there be an attesting witness alive; and subject to the process of the Court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

43. It is well settled that unlike proof of any other document, whether registered or unregistered, a Will can also be proved, but it has a special requirement in the matter of proving its due execution in compliance with Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act. The burden of proving the existence or due execution of the Will is on the person who asserts that a Will has in fact been executed by the testator and to allay the apprehension that it has not come into existence under any suspicious circumstances surrounding the execution of the Will, meaning thereby, the Will has come into existence in the normal course and its execution was witnessed by persons who stood as attesting witness. In other words, mere proof of testamentary capacity or independent decision making to execute a Will or proof of signature of the testator alone are not sufficient to discharge the burden of proving the due execution of the Will. As mentioned above, the proof of Will is subject to fulfilment of the conditions stipulated in Section 63 of The Indian Succession Act, which lays emphasis on the requirement that while executing a Will, the testator shall first sign the Will with an intention to give effect to the covenants of the Will. The Will shall be attested by two or more attesting



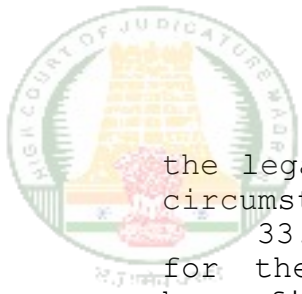
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witnesses and each of them has to see the testator putting his signature in the Will as a personal acknowledgment of his signature and thereafter, each of them shall sign the Will in the presence of the testator. As per Section 68 of The Indian Evidence Act, either one of the attesting witness is required to depose as regards the due execution of the Will."

30. From a reading of all the above judgments, it is clear that the onus is on the person who alleges undue influence, fraud, etc., in executing the Will, to prove the same. The onus and burden to substantiate the plea of undue influence or fraud, is on the party who sets up such plea. In the instant case, absolutely, the plaintiffs have not established their case, though they have taken a plea in the pleadings that the Will was obtained by undue influence and fraud, and thus, they have failed to establish the same by adducing the evidence on that aspect. On the other hand, the defendants have proved the Will as stated supra by examining the attesting witness D.W.2 and have discharged their burden of proving the Will.

31. It is yet another submission of the learned counsel appearing for the appellants/plaintiffs that the unmarried daughters and wife of the testator Nanjappa Gounder, were disinherited in the Will. He further submitted that when there is no other property except the suit schedule properties available for partition, the total disinheritance of the wife and unmarried daughter of the said Nanjappa Gounder, would create suspicion over the execution of the Will. To fortify this submission, the learned counsel appearing for the respondents/defendants relied on a decision of the Apex Court reported in AIR 1995 SC 1684 (Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by LRs. and others), wherein it is held that deprivation of the natural heirs by the testatrix, should not raise any suspicion, because, the whole idea behind the execution of the Will is to interfere with the normal line of succession and so, the natural heirs would be debarred in every case of Will, of course, it may be that in some cases, they are fully debarred and in others only partially. Further, with regard to the suspicious circumstances, the fact that the natural heirs were excluded and legally wedded wife was given lesser share is not a suspicious circumstance and the circumstances depriving natural heirs should not raise any suspicion because, whole idea behind the execution of the Will is to be interfered in normal line of succession and so the natural heirs would be debarred in every case of the Will.

32. Therefore, the submission made by the learned counsel appearing for the appellants/plaintiffs that disinheritance of

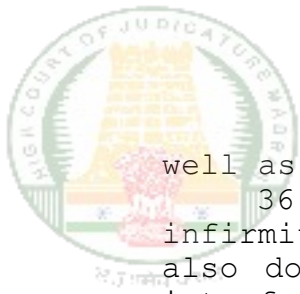


the legal heirs of the said Nanjappa Gounder, creates suspicious circumstance in the Will, cannot be accepted.

33. With regard to the plea of the learned counsel appearing for the respondents/defendants that the appellants/plaintiffs have filed the suit almost 37 years after the death of their father Nanjappa Gounder, which is a long delay, which is fatal to the case of the plaintiffs and favourable to the case of the defendants, it is to be noted that there is a delay by the plaintiffs in filing the suit, which is fatal to their case, especially in the absence of any proper explanation for the said delay.

34. Further, in the year 1998, there was a partition deed dated 16.12.1998 Ex.B-1 as stated by the defendants. Thus, according to the appellants/plaintiffs, only in the year 1998, the first respondent had divulged the existence of a Will so as to get a decree in their favour. It is the further submission of the learned counsel appearing for the appellants/plaintiffs that on a perusal of Ex.B-36 Will, dated 27.03.1970, it is seen that had the Will been executed in 1970, the same would have been promulgated immediately. In the absence of the particulars with regard to the promulgation of the Will, it has to be construed that the Will is not genuine. But we are not inclined to accept this submission for the reason that the defendants filed Ex.B-7 which is a Patta Pass Book issued by the Tahsildar on 19.03.1974 in favour of the first defendant and minor Kadhivel, represented by guardian-mother Subbulakshmi. Thus, without the Will, the Revenue Authorities would not have issued Patta Pass Book in favour of minor Kadhivel. It is further seen that Ex.B-19 is a letter dated 18.12.1984 issued by the Syndicate Bank to the Sub-Registrar, Coimbatore and it reveals that the first defendant executed a registered mortgage dated 30.09.1974 in respect of the suit properties. Moreover, Ex.B-21 shows that the name of the third defendant was included in the Patta concerning the suit properties based on Ex.B-36 Will. A cumulative effect of all the above facts clearly show that Ex.B-36 Will in question was duly acted upon.

35. Though the appellants/plaintiffs claim that after the death of Nanjappa Gounder, the mother was in possession of the suit properties, but absolutely, no document is produced to substantiate the same. Similarly, the evidence of D.W.2 shows that the testator-Nanjappa Gounder signed the Will in the presence of D.W.2 and also in the presence of the other witnesses. D.W.2 also deposed that the testator and the other witnesses saw the attestation. Therefore, the evidence of D.W.2 clearly proves that there is valid attestation of the Will. Therefore, it has to be concluded that the respondents/defendants have proved the Will--Ex.B-36, dated 27.03.1970, in accordance with law. But, as stated above, the plaintiffs have failed to prove that the said Will was obtained by undue influence or fraud or coercion or misrepresentation as



well as it is surrounded by suspicious circumstances.

36. For the reasons stated supra, we do not find any infirmity in the judgment and decree of the trial Court and we also do not find any warranting or compelling circumstances to interfere with the judgment and decree of the trial Court. Accordingly, the First Appeal is dismissed. No costs. Consequently, the Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

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To

1. Additional District Judge-cum-Fast Track Court No.1,
Coimbatore.

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

+1cc to Mr.R.Bharath Kumar, Advocate SR.No.9122

+1cc to Mr.R.Karthikeyan, Advocate SR.No.8225

A.S.No.148 of 2010

SV(CO)
GMY(02/03/2020)