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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.01.2021

PRONOUNCED ON : 19.01.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1117 of 2008

Subbaiya Gounder

...Appellant/1st Defendant

Vs.

1.Velathal
2.Palanathal
3.Nallathal
4.Eswari

...Respondents/Plaintiff and Defendants 2 to 4

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 23.04.2008 passed in A.S.No.23 of 2007 on the file of the Subordinate Court, Dharapuram, reversing the Judgment and Decree dated 19.01.2007 passed in O.S.No.56 of 2001 on the file of the District Munsif Court, Dharapuram.

For Appellant : Ms.Rita Chandrasekar
for M/s.Aiyar and Dolia

For Respondents : No appearance
set exparte vide order dt.07.01.2021

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 23.04.2008 passed in A.S.No.23 of 2007 on the file of the Subordinate Court, Dharapuram, reversing the judgment and decree dated 19.01.2007 passed in O.S.No.56 of 2001 on the file of the District Munsif Court, Dharapuram.

2.The second appeal has been preferred by the first defendant in O.S.No.56 of 2001.

3.Suit for partition.



4. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

5. Shorn of unnecessary details, according to the plaintiff, she and the defendants 1 to 4 are the children of the deceased Ramasamy Gounder and the suit properties are the self-acquired properties of the deceased Ramasamy Gounder and Ramasamy Gounder's wife pre-deceased him and he died intestate in the year 1993 and after his demise, the suit properties had been in the possession and enjoyment of the plaintiff and the defendants in common and thus, the plaintiff is entitled to 1/5th share in the suit properties as the legal heir of the deceased Ramasamy Gounder. Of late, the first defendant in particular and the other defendants had failed to handover the share of properties derived from the suit properties to the plaintiff and hence, according to the plaintiff, she had been necessitated to demand the partition of her share in the suit properties and as her request had been not complied with by the defendants, according to her, she has been necessitated to lay the suit for partition.

6. The first defendant resisted the plaintiff's suit by filing the written statement and additional written statement and according to him, the suit laid by the plaintiff is not legally sustainable and the suit properties are not the self-acquired properties of the deceased Ramasamy Gounder. The suit properties are the ancestral properties of the deceased Ramasamy Gounder and for the purpose of discharging the debts, the suit properties were alienated in the year 1949 and 1953 with the right of re-conveyance to the third parties and subsequently, the suit properties had been again reconveyed in favour of Ramasamy Gounder during 1958 & 1959 and Ramasamy Gounder had acquired the suit properties by way of reconveyance as the manager of the family and therefore, the suit properties are only the ancestral properties of the deceased Ramasamy Gounder and further according to the first defendant, Ramasamy Gounder did not die intestate in the year 1993 as alleged by the plaintiff and on the other hand, he died on 14.12.1987 itself and further, according to the first defendant, the plaintiff and the defendants 2 to 4 had been given in marriage several years prior to the institution of the suit by providing adequate seer and articles and Ramasamy Gounder during his lifetime in a fit state of mind and health without any inducement and on his own volition, bequeathed his share in the suit properties in favour of the first defendant by way of a Will dated 12.12.1985 and the plaintiff and the defendants 2 to 4 are very well aware of the execution of the abovesaid Will by the deceased Ramasamy Gounder in favour of the first defendant and accordingly, not endeavoured to secure any share in the suit properties for



several years after the demise of the deceased Ramasamy Gounder and furthermore, according to the first defendant, after the demise of the deceased Ramasamy Gounder, he has been openly and continuously enjoying the suit properties adverse to the interest of the plaintiff and the defendants 2 to 4 and therefore, had acquired right over the suit properties by way of adverse possession also and the plaintiff and the defendants 2 to 4 had not enjoyed the suit properties at any point of time and the plaintiff is not entitled to claim the benefit as stipulated under the Amendment Act, 39 of 2005, particularly, when the deceased Ramasamy Gounder had bequeathed his half share in the suit properties in favour of the first defendant by way of a Will dated 12.12.1985 and therefore, the plaintiff's suit for partition, as such, is not maintainable and the suit is liable to be dismissed.

7. In support of the plaintiff's case, PW1 was examined and Exs.A1 & A2 were marked. On the side of the defendants, DWs1 to 4 were examined and Exs.B1 to B36 were marked.

8. On an appreciation of the materials placed on record, both oral and documentary and the submissions put forth by the respective parties, the trial Court was pleased to dismiss the plaintiff's suit. Impugning the judgment and decree of the trial Court, the plaintiff has preferred the first appeal and the first appellate Court, on a consideration of the materials placed on record by the respective parties and the submissions made, was pleased to reverse the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, granted preliminary decree in favour of the plaintiff as prayed for. Challenging the judgment and decree of the first appellate Court, the first defendant has preferred the present second appeal.

9. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

"1. Whether the finding of the lower appellate Court that there are suspicious circumstances surrounding Ex.B36 Will and it is not valid, is vitiated and liable to be set aside.

2. Whether the lower appellate Court has failed to appreciate the oral and documentary evidence in proper perspective and its findings are vitiated."



10. The relationship between the parties is not in dispute. The plaintiff and the defendants 2 to 4 are the sisters of the first defendant and the plaintiff and the defendants are the children of the deceased Ramasamy Gounder. Now, according to the plaintiff, the suit properties are the self-acquired properties of the deceased Ramasamy Gounder and inasmuch as he had died intestate, she being one of the legal heirs of the deceased Ramasamy Gounder, put forth the case that she is entitled to obtain 1/5th share in the suit properties and as the request for allotting her share in the suit properties had not been acceded to by the defendants, according to the plaintiff, she has been necessitated to institute the suit for partition.

11. Per contra, the first defendant contested the abovesaid version of the plaintiff by putting forth the case that the suit properties are the ancestral properties of the deceased Ramasamy Gounder and the first defendant and the suit properties had been alienated to the third parties for the purpose of discharging the debts with the right of reconveyance in the year 1949 & 1953 and subsequently, acquired in the name of Ramasamy Gounder as the manager of the family in the year 1958 & 1959 and therefore, according to the first defendant, the suit properties are the ancestral properties of the deceased Ramasamy Gounder and the defendants 2 to 4 and the plaintiff are not entitled to claim any share in the suit properties and furthermore, according to the first defendant, Ramasamy Gounder died only on 14.12.1987 and he did not die intestate and on the other hand, during his life time in a fit state of mind and health on his own volition bequeathed his half share in the suit properties in favour of the first defendant by way of a Will dated 12.12.1985 and following his demise, the Will has come into force and based on the same, the first defendant has acquired right in entirety over the suit properties and furthermore, the first defendant has also acquired right over the suit properties by way of adverse possession on account of long, continuous and open enjoyment of the suit properties to the knowledge of the plaintiff and the defendants 2 to 4 and thus, according to the first defendant, the plaintiff is not entitled to invoke the Amendment Act, 39 of 2005 for claiming a share in the suit properties and accordingly, sought for the dismissal of the plaintiff's suit.

12. Before advertng to the issues involved between the parties, at the foremost, we will have to decide as the nature of the suit properties i.e., whether the suit properties are the self - acquired properties of the deceased Ramasamy Gounder as



projected by the plaintiff or the ancestral properties of the deceased Ramasamy Gounder and the first defendant as put forth by the first defendant.

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13.No doubt, the suit properties had been acquired in the year 1958 & 1959 under the sale deeds in the name of the deceased Ramasamy Gounder and the certified copies of the abovesaid sale deeds have been marked as Exs.A1 & A2. The first appellate Court, on the mere acceptance of Exs.A1 & A2, proceeded to hold that the suit properties are the self-acquired properties of the deceased Ramasamy Gounder without considering the earlier conveyances made in respect of the suit properties by the deceased Ramasamy Gounder's family during 1949 & 1953. According to the first defendant, for the purpose of discharging the debts of the family, the suit properties had been alienated by the deceased Ramasamy Gounder and his father and the first defendant in favour of the third parties with the right of reconveyance and thereafter, had been acquired in the name of the deceased Ramasamy Gounder in the year 1958 & 1959 and to substantiate the abovesaid facts put forth by the first defendant, the copy of the sale deeds effected in the year 1949 & 1953 have been marked as Exs.B1 & B3 and also marked the reconveyance agreement as Ex.B2 and considering the evidence tendered by the first defendant as well as the recitals contained in Exs.B1 to B3 in toto, it is noted that as rightly held by the trial Court, the suit properties had come to be alienated to the third parties by the family of the deceased Ramasamy Gounder along with the first defendant as well as the grandfather of the first defendant with the right of reconveyance, which could be evidenced by way of Ex.B2 and thereafter, the suit properties had come to be reconveyed to the family of Ramasamy Gounder under Exs.A1 & A2. The first appellate Court has failed to consider the abovesaid documents and instead ipso facto based its determination that the suit properties are the self-acquired properties of the Ramsamy Gounder only on the strength of Exs.A1 & A2. On the other hand, as rightly contended by the first defendant's counsel, considering the documents marked as Exs.B1 to B3 and the recitals contained therein, coupled with the recitals contained in Exs.A1 & A2, it is noted that the suit properties had been alienated by Ramasamy Gounder and his father and the first defendant in favour of the third parties on the earlier occasions, subsequently, the same had come to be reconveyed to the family of the deceased Ramasamy Gounder under the reconveyance agreement and in such view of the matter, it has to be held that the reacquisition of ancestral/joint property character, upon such reconveyance, would reacquire the character of ancestral/joint family property if reconveyed back to the family/coparceners and the above position of law could be



gathered from the decision of the apex Court reported in (2019) 7 Supreme Court Cases 193 (Doddamuniyappa (Dead) Through Legal Vs. Muniswamy and others), which is extracted below:-

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"Family and Personal Laws - Hindu Law - Ancestral property/Joint family property - Effect of reconveyance to the family/coparceners, prior to which there had been a valid conveyance of the said ancestral/joint family property to stranger (s) - Reacquisition of ancestral/joint property character upon such reconveyance, which had been lost upon the conveyance to a stranger

-Property inherited from father (prior to coming into effect of Hindu Succession Act, 1956) - Reiterated, the same becomes joint family property in hands of sons and grandsons, and all male issue, even the unborn upon their taking birth -Any conveyance or compromise regarding inherited property by some coparceners/shareholders would not affect and bind the shares of the coparceners/shareholders not a party to the conveyance/compromise in question

-Further held, ancestral /joint family property which had lost this character upon a valid conveyance to stranger(s) would reacquire character of ancestral/joint family property if reconveyed back to the family/coparceners, and would thus revest in all the coparceners, including those who had been born in the meantime

-R-7 to R-9 were sons of C - R-1 to R-6 and R-10 were grandsons of C and sons of R-7 to R-9 - Suit property which was ancestral/family property, was sold by R-1 to R-9 to M with a condition that it would be reconveyed to them if M intends to sell - Later, M sold suit property to MS, and from him appellant-Defendant 1 purchased it - R-7 to R-9's suit for reconveyance against appellant-Defendant 1 was ultimately decreed, and the decree attained finality - Subsequently, execution proceedings commenced



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wherein reconveyance deed was executed and possession was handed over to R-7 to R-9 - Thus, decree got executed - Subsequently, appellant filed execution appeal - Thereupon, matter was compromised between R-7 to R-9 and appellant - R-1 to R-6 and R-10 (plaintiffs) challenged this compromise contending that it was entered into without their consent, and therefore, was not binding upon them - Trial court dismissed suit - In first appeal, High Court decreed suit holding that suit property was joint family property

-R-7 to R-9 (Defendants 2 to 4) inherited suit property from their father - Therefore, held, suit property was ancestral property in their hands, and upon delivery of possession upon reconveyance to R-7 to R-9 when their suit for the same was decreed and executed in 1974, held, it reacquired its character as ancestral/joint family property, by which time the grandsons (R-1 to R-6 and R-10) had been born - R-1 to R-6 and R-10 were neither party to the abovesaid compromise nor consented to the same, so compromise would not be binding over share of R-1 to R-6 and R-10 in suit property - However, said compromise would bind R-7 to R-9 - Mere filing of execution appeal would not take away efficacy of reconveyance decree already passed and executed by virtue of which the property concerned had reacquired its character as ancestral/joint family property - Thus, held, the right, title and interest in suit property arising out of its reacquired character as ancestral/joint family property cannot be defeated by compromise to which R-1 to R-6 and R-10 were not parties and as such compromise would not bind their shares and Civil Procedure Code, 1908 - Or.23 R.3 - Property Law - Transfer of Property Act, 1882, S.7"

14. Applying the abovestated principles of law enunciated by the Apex Court to the facts and circumstances of the case and considering the evidence adduced on behalf of the first defendant and the recitals contained in Exs.B1 to B3 and Exs.A1 to A2, all would go to point out that the suit properties are



not the self-acquired properties of the deceased Ramasamy Gounder and on the other hand, as put forth by the first defendant, the suit properties are only the ancestral properties of the deceased Ramasamy Gounder and the first defendant.

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15.The suit properties being the ancestral properties of the deceased Ramasamy Gounder and the first defendant and when it is seen that the deceased Ramasamy Gounder had passed away on 14.12.1987, which could be gathered from Ex.B8, his death certificate, what would be the nature and extent of the right of the plaintiff and the defendants 2 to 4 over the share of the deceased Ramasamy Gounder in respect of the ancestral properties has to be seen.

16.Now, according to the plaintiff, the deceased Ramasamy Gounder died intestate. Controverting the abovesaid case of the plaintiff, according to the first defendant, the deceased Ramasamy Gounder did not die intestate and on the other hand, during the course of his life time, in a fit state of mind and health on his own volition, bequeathed his half share in the suit properties in favour of the first defendant by way of a Will dated 12.12.1985 and the Will having come into existence on the demise of Ramasamy Gounder on 14.12.1987, according to the first defendant, the plaintiff is not entitled to claim any share in the suit properties by invoking the Amendment Act, 39 of 2005.

17.The plaintiff has not invoked the Amendment Act, 39 of 2005 for claiming a share in the suit properties in the plaint. The abovesaid contention has been raised by the plaintiff only during the course of arguments before the trial Court. Before considering the abovesaid contention of the plaintiff, it has to be seen whether the deceased Ramasamy Gounder had died intestate or left behind a Will in favour of the first defendant dated 12.12.1985 as put forth by the first defendant. The first defendant being the propounder of the Will dated 12.12.1985 in question marked as Ex.B36, it is the bounden duty of the first defendant to establish the truth and validity of the abovesaid Will. To establish the same, the first defendant has examined the attestors of the Will as DWs2 and 3 and the scribe of the Will as DW4 on the same date and considering the evidence of DWs 2 to 4 in unison, it is seen that they have clearly deposed that the Will marked as Ex.B36 had been executed only by the deceased Ramasamy Gounder at his instance and the recitals contained in the Will are dictated to the scribe by the deceased Ramasamy Gounder and the same was readout by the deceased Ramasamy Gounder and accepting the recitals contained therein, he had



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executed the Will in favour of the first defendant and the same had been witnessed by DWs 2 to 4 and the attestors have also attested the Will in the presence of the testator i.e. the deceased Ramasamy Gounder and considering the abovesaid evidence of DWs2 to 4 in toto, it is seen that the first defendant has established the veracity of the Will Ex.B36 in the manner known to law and despite the cross examination of DWs2 to 4, nothing has been culled out from them to disbelieve the genuineness of Ex.B36 Will. Therefore, it is noted that the trial Court has rightly appreciated the evidence of DWs 2 to 4 in the right perspective and accordingly, determined that the first defendant has established the authenticity of the Will dated 12.12.1985 marked as Ex.B36 and considering the nature of the suit properties, they being ancestral, accordingly, it is found that the deceased Ramasamy Gounder had chosen to bequeath his half share in the suit properties in favour of his son viz., the first defendant. According to the deceased Ramasamy Gounder, as recited in Ex.B36 Will, he had given his daughter in marriage by providing good seer and articles and they are living in affluent circumstances and considering the factor that it is only the first defendant, who had been maintaining the family and, in all aspects, the deceased Ramasamy Gounder had chosen to bequeath his half share in the suit properties in favour of the first defendant by way of the Will marked as Ex.B36.

18.The first defendant having established the truth and validity of Ex.B36 in the manner known to law and the suit properties being the ancestral properties of the deceased Ramasamy Gounder and the first defendant, the Will having come into operation on the demise of Ramasamy Gounder on 14.12.1987, it is noted that the right over the suit properties had crystallized in favour of the first defendant during 1987 itself and the first defendant having acquired right in entirety and absolutely over the suit properties during 1987 itself, the claim of the plaintiff that she is entitled to a share in the suit properties on the footing that the suit properties are the self-acquired properties of the deceased Ramasamy Gounder, as such, cannot be accepted in any manner.

19.It is the specific case of the first defendant that the plaintiff and the defendants 2 to 4 are very well aware of the existence of the Will executed by the deceased Ramasamy Gounder in favour of the first defendant and accordingly, not put forth any claim of share in the suit properties even after the demise of the deceased Ramasamy Gounder for several years and in fact, according to the first defendant, knowing the execution of the Will by the deceased Ramasamy Gounder in favour of the first



defendant, enraged over the same, according to the first defendant, the defendants 2 to 4 had not attended the death ceremony of the deceased Ramasamy Gounder and the other allied functions connected thereto and accordingly, also not endeavored to make any claim of share in the suit properties over a long period of time and subsequently, without any basis or right, had chosen to lay the present suit only in the year 2001 nearly 14 years after the demise of the deceased Ramasamy Gounder and therefore, according to the defendants, the plaintiff is not entitled to any claim any share in the suit properties by invoking the Amendment Act, 39 of 2005.

20.Considering the abovesaid factors in toto, when it is noted that the suit properties are the ancestral properties of the deceased Ramasamy Gounder and the first defendant and the deceased Ramasamy Gounder having bequeathed his half share in respect of the suit properties in favour of the first defendant by way of Ex.B36 Will and the truth and validity of the Will having come to be established by the first defendant in accordance with law as above discussed, as per the decision of the Apex Court reported in (2020) 9 SCC 1 (Vineeta Sharma Vs.Rakesh Sharma and others) qua the rights which could be claimed by the daughter born earlier with effect from 09.09.2005, it is noted that the provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer the status of coparcener on daughter born before or after the amendment in the same manner as son with the same rights and liabilities, however, the abovesaid rights can be claimed by the daughter born earlier with effect from 09.09.2005 with savings as provided under Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before the 20th day of December 2004.

21.Applying the abovesaid principles of law enunciated by the apex Court to the case at hand, the suit properties being the ancestral properties as put forth by the first defendant and the deceased Ramasamy Gounder having conveyed his share in respect of the suit properties in favour of the first defendant vide Ex.B36 Will and the Will having come into force, on the demise of the deceased Ramasamy Gounder in the year 1987 and thereafter, the first defendant having acquired full right over the suit properties and enjoying the same independently, which could be gathered from the documents projected by the defendants and as above discussed, the plaintiff having also not evincing any interest to claim share in the suit properties after the demise of her father and chosen to lay the present suit only in the year 2001, in all, it is seen that the first appellate Court, without adverting to the abovesaid aspects in the right



perspective both on factual matrix and the position of law, had erroneously proceeded to grant the preliminary decree in favour of the plaintiff declaring that the plaintiff has 1/5th share in the suit properties.

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22.The first appellate Court had erroneously held that the suit properties are the self-acquired properties of the deceased Ramasamy Gounder and improperly disbelieved the Will projected by the first defendant marked as Ex.B36 and as above noted, the first appellate Court had failed to consider the import of Exs.B1 to B33 and the effect of reconveyance of the suit properties to the family of the deceased Ramasamy Gounder as outlined by the apex Court in the decision reported in (2019) 7 SCC 193 (Doddamuniyappa (Dead) Through Legal representatives Vs. Muniswamy and others) and therefore, it is evident that the determination of the first appellate Court that the suit properties are the self-acquired properties of the deceased Ramasamy Goudner is liable to be set aside.

23.With reference to the Will Ex.B36, the first appellate Court has proceeded to disbelieve the Will merely and solely on a comparison of the signature of the deceased Ramasamy Gounder in the abovesaid Will with the signatures of the deceased Ramasmy Gounder in Exs.B5 and B7, as according to the first appellate Court, the signatures of the deceased Ramasamy Gounder found in Exs.B5 & B7 are not similar to the signature of the deceased Ramasamy Gounder in Ex.B36 and therefore, by invoking the power granted under Section 73 of the Indian Evidence Act, proceeded to disbelieve the Will projected by the first defendant. However, the abovesaid approach of the first appellate Court cannot be appreciated and countenanced.

24.As seen from the decision reported in AIR 1979 SC 14 (State Delhi Administration Vs. Pali Ram), it is found that though the Court is empowered to compare the disputed signatures with the admitted signatures as per Section 73 of the Indian Evidence Act, as a matter of prudence and caution, the Court should be hesitant in giving its findings with regard to the identity of the disputed signatures and the admitted signatures and it is not advisable on the part of the Court to take upon itself the task of comparing the admitted signatures with the disputed one to find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert.



25.As above seen, the first appellate Court merely on a naked eye comparison has proceeded to hold that the signature of Ramasamy Gounder found in Ex.B36 is not that of his signature, as according to it, the same did not tally with the signatures of the deceased Ramasamy Gounder in Exs.B5 and B7. However, for arriving at the abovesaid conclusion, the first appellate Court has not given any reason in what way it had come to hold that the signature found in Ex.B36 are different in characteristics and style with the signatures found in Exs.B5 & B7. In this connection, I had an occasion to deal with the subject on a different context and in the decision rendered by me which had been reported in 2017 (4) Law Weekly, page No.830 (Sankara Narayana Pillai Vs. Ignatious Selvaraj), the point in issue was discussed and determined in the following manner.

"8. For holding that the petitioner Sankara Narayana Pillai has resigned his post, the Court below is found to have compared his signatures found in the disputed documents with that of his admitted signatures and finding them to be similar, accepted the case of the contesting Trustees and declined the relief sought for by the petitioner. Aggrieved over the same, the present civil revision petitions have been preferred by the petitioner.

9. As rightly argued by the learned counsel for the petitioner, the Court below in the impugned orders have not cared to disclose or detail as to with what admitted signatures of the petitioner it had compared the disputed signatures. Therefore, it is unable to detect as to what are the admitted signatures of the petitioner with which the Court below had compared the disputed signatures and therefore, as rightly put forth by the learned counsel for the petitioner, the impugned orders are very silent with reference to the same and therefore, the impugned orders on that score are liable to be set aside. Further, according to the learned counsel for the petitioner, though the Court is empowered to compare the disputed signatures with the admitted signatures as per Section 73 of the Indian Evidence Act, in the light of the



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decision of the Apex Court and other pronouncements of the High Courts, the Court as a matter of prudence and cautions, should be hesitant in giving its findings with regard to the identity of the disputed signatures and the admitted signatures and it is not advisable on the part of the Court to take upon itself the task of comparing the admitted signatures with the disputed one to find out whether the two agree with each other and the prudent course is to obtain the opinion and assistance of an expert. With reference to the same, the learned counsel for the petitioner placed reliance upon the decision reported in AIR 1979 SC 14 [State (Delhi Administration) vs. Pali Ram]. The above aspect of the matter as put forth by the learned counsel for the petitioner is pointed out in the said decision.

10. Therefore, the Court below should be careful in comparing the disputed signatures with the admitted signatures, even assuming that the Court is empowered to take up the said task by itself, in such circumstances, when the Court is suo motu taking up the role of an expert, it should clearly point out as to what are the admitted signatures with which it had compared the disputed signatures and whether the admitted signatures have been admitted by the party concerned and that apart the Court should also give the reasons in detail as to on what basis or on what aspects, it had found similarities or dissimilarities with the admitted signatures and the disputed signatures on its comparison and the Court should also endeavour to clearly spell out the varying characteristics of the similarities or dissimilarities as observed by it so as to enable the parties to understand that the Court has approached the matter in the right perspective and determined the issue rightly one way or the other and further, the Appellate Forum also would be in a position to understand that the Court below has dealt with the said issue properly and correctly in a scientific manner as that of an expert.



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11. However, in so far as this case is concerned, it is found that no such attempt seems to have been made out by the Court below and it has simply held that on comparison of the signatures found in Exs.P2 and P3 with the admitted signatures, they being found to be similar, has resultantly declined the request of the petitioner. As seen above, the Court has not spelt out as to what are the admitted signatures of the petitioner with which it had compared the disputed signatures. Further, it is found that the petitioner has been kept in dark as to the above said endeavour of the Court below and therefore, it is highly doubtful whether at all the Court below would have compared the admitted signatures of the petitioner with the disputed signatures.

12. Further, if at all, as rightly argued, the Court had compared the admitted signatures of the petitioner with the disputed signatures, the petitioner having not produced any document containing admitted signatures before the Court below, it should be presumed that the Court would have endeavoured its comparison only based upon the signatures available in the vakalat and written statement. However, it has been held by this Court that the Court cannot direct the disputed document to be compared with the signatures available in vakalat or written statement of a party in the decision reported in 2010-1-L.W.646 [S.Chinnathai vs. K.C.Chinnadura]. Further, it has also been held in the decision reported in AIR 1996 SC 1140 [O.Bharathan vs. K.Sudhakaran and another] that the approach of the Court in taking upon the task of the expert and comparing the admitted signatures with the disputed signatures on its own without the aid of the expert or the evidence of the person conversant with the disputed signatures is not in conformity with the spirit of Section 73 of the Indian Evidence Act. Therefore, in the light of the above said legal pronouncements, when it is found that the impugned orders do not spell out as to what are the admitted signatures the

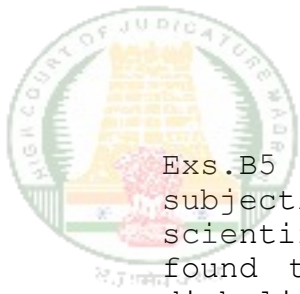


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Court had taken into consideration for comparing with the disputed signatures and further when the Court has also not given any reason whatsoever as to on what basis it has come to the conclusion that the admitted signatures and the disputed signatures are similar and further when the contesting Trustees have not established their claim that in the place of the petitioner, his brother had been elected as a Trustee and thereby one of the Trustees had been discharging his duties as the Managing Trustee lawfully, it is found that the Court below has committed an error, not sustainable in the eyes of law, in rejecting the case of the petitioner. On the mere evidence of the petitioner that he has handed over his responsibilities could not be taken as an admission that he had resigned the post of Trustee when the petitioner has stoutly denied the said fact and also disputed the resignation letter projected by the contesting Trustees as a concocted document. In such view of the matter,

the Court below is expected to send the document for scientific comparison by an expert and the Court should have been cautious and hesitant to take up the task on its own and even assuming that the Court has the power to carry out the said task, having undertaken to discharge the same, it is expected of the Court that it should give plausible and acceptable reasons as to how it has come to the conclusion that the admitted and disputed signatures are either similar or dissimilar."

26. In the light of the abovesaid situation, when it is found that the first appellate Court has not given any reason whatsoever for arriving at the conclusion that the signature found in Ex.B36 is different from the signatures of the deceased Ramasamy Gounder found in Exs.B5 & B7, I am unable to subscribe to the determination of the first appellate Court that the Will projected by the first defendant marked as Ex.B36 is surrounded with suspicious circumstances and therefore, it cannot be valid in law. When it is found that the first appellate Court has flawed in its approach and erred in holding that the signature of the deceased Ramasamy Gounder in Ex.B36 on the one hand and



Exs.B5 & B7 on the other hand, do not tally based only on its subjective satisfaction without giving any detailed and scientific analysis as required to be done as per law, it is found that the determination of the first appellate Court in disbelieving Ex.B36 Will cannot be sustained in the eyes of law and liable to be set aside. When the Court is embarking upon the comparison of disputed signature with the admitted signatures by donning the role of an expert as provided Section 73 of the Indian Evidence Act, the Court should make and provide detailed and scientific analysis and reasons as to how it has come to the conclusion that the admitted and the disputed signatures are either similar or dissimilar and without giving plausible and acceptable reasons in arriving at the conclusion as to how the signatures differ or tally, or if the Court is unable to assign any reasons worth acceptance on comparison, the Court should be hesitant to take on the role of an expert and embark upon the exercise of comparing the signatures as provided under Section 73 of the Indian Evidence Act.

27.In addition to that, the first appellate Court has not even cared to analyse and appreciate the evidence of the attestors and the scribe of the Will examined as Exs.DWs2 to 4 in any manner and purely, on the comparison of the signatures found in Exs.B36 and B5 and B7 proceeded to hold that Ex.B36 Will is not a genuine document. As above pointed out, the abovesaid approach of the first appellate Court has to be strongly deprecated and not entitled for acceptance, particularly, the first appellate Court having failed to adduce any valid and convincing reason as to how it had come to the conclusion that the signature in the two set of documents differ.

28.On the plea of adverse possession raised by the first defendant, to a query raised by this Court to the first defendant's counsel/appellant, the learned counsel appearing for the appellant would submit that the first defendant is not resting his case upon the plea of adverse possession and only basing his case upon the Will marked as Ex.B36. As above pointed out, the first defendant has established the genuineness of the abovesaid Will in accordance with law by examining the attestors and the scribe of the Will and therefore, it is seen that his claim of title to the suit properties based on Ex.B36 Will merits acceptance.

29.Though it is often stated that the defendant in a suit is entitled to raise alternative pleas, however, the first appellate Court has rejected the defence version of the first



defendant on the footing that the plea of title put forth by the first defendant based on Ex.B36 Will and the plea of adverse possession raised by him are inconsistent and contradictory pleas and the abovesaid determination of the first appellate Court cannot be easily brushed aside. In this Connection, reliance is placed upon the decision of the Apex Court and the reasons of the Apex Court rendered in 2020 SCC OnLine SC 672 (Narasamma and others Vs. A.Krishnappa (Dead)Through Lrs.). In the civil appeal concerned in the abovesaid decision, it is found that the same has been preferred by the defendant. In that case also, the pleas has been taken by the defendant based on the title as well as on the plea of adverse possession. While considering the abovesaid inconsistent pleas, the apex Court in the abovesaid decision, has held that the claim of title and the plea of adverse possession cannot simultaneously hold and outlined the legal position that the defendant is not entitled to advance the plea of title and adverse possession simultaneously and from the same date. The position of law with reference to the same has been explained by the apex Court in the abovesaid decision and the same is extracted below.

"29. We may also note that on the one hand, the appellants herein have sought to take a plea of bar of limitation vis-à-vis the original defendant claiming that possession came to them in 1976, with the suit being filed in 1989. Yet at the same time, it is claimed that the wife had title on the basis of these very documents. The claim of title from 1976 and the plea of adverse possession from 1976 cannot simultaneously hold. On the failure to establish the plea of title, it was necessary to prove as to from which date did the possession of the wife of the defendant amount to a hostile possession in a peaceful, open and continuous manner. We fail to appreciate how, on the one hand the appellants claimed that the wife of the original defendant, appellant 1 herein, had title to the property in 1976 but on their failure to establish title, in the alternative, the plea of adverse possession should be recognised from the very date.

30. We also find that the reliance placed by learned counsel for the appellants in Ravinder Kaur Grewal & Ors.⁸ is also misplaced. The question which arose for consideration before the three Judge Bench



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was whether, a suit could be maintained for declaration of title and for permanent injunction seeking protection on a plea of adverse possession, or that it was an instrument of defence in a suit filed against such a person. In fact, if one may say, there was, for a long time a consistent view of the Court that the plea could only be of shield and not a sword. The judgment changed this legal position by opining that a plea to retain possession could be managed by the ripening of title by way of adverse possession. However, to constitute such adverse possession, the three classic requirements, which need to co-exist were again emphasized, *nec vi*, i.e., adequate in continuity, *nec clam*, i.e., adequate in publicity and *nec precario*, i.e., adverse to a competitor, in denial of title and his knowledge.

31. The question which confronts us is not the aforesaid, but whether simultaneously a plea can be taken of title and adverse possession, i.e., whether it would amount to taking contradictory pleas. In this behalf, we may refer to the four judgments cited by learned counsel for the respondent herein, which succinctly set forth the legal position.

32. In Karnataka Board of Wakf case, it has been clearly set out that a plaintiff filing a title over the property must specifically plead it. When such a plea of adverse possession is projected, it is inherent in the nature of it that someone else is the owner of the property. In that context, it was observed in para 12 that "...the pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.."

33. The aforesaid judgment in turn relied upon the judgment in Mohan Lal (Deceased) Thr. LRs.10, which observed in para 4 as under:



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"4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., upto completing the period of his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

34. In order to establish adverse possession an inquiry is required to be made into the starting point of such adverse possession and, thus, when the recorded owner got dispossessed would be crucial.

35. In the facts of the present case, this fact has not at all been proved. The possession of Smt. Narasamma, the wife of the defendant, is stated to be on account of consideration paid. Assuming that the transaction did not fructify into a sale deed for whatever reason, still the date when such possession becomes adverse would have to be set out. Thus, the plea of adverse possession is lacking in all material particulars.

36. The possession has to be in public and to the knowledge of the true owner as adverse, and this is necessary as a plea of adverse possession seeks to defeat the rights of the true owner. Thus, the law



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would not be readily accepting of such a case unless a clear and cogent basis has been made out.

37. We may also note another judicial pronouncement in Ram Nagina Rai & Anr. v. Deo Kumar Rai (Deceased) by LR's & Anr. 13 dealing with a similar factual matrix, i.e., where there is permissive possession given by the owner and the defendant claims that the same had become adverse. It was held that it has to be specifically pleaded and proved as to when possession becomes adverse in order for the real owner to lose title 12 years hence from that time.

38. The legal position, thus, stands as evolved against the appellants herein in advancing a plea of title and adverse possession simultaneously and from the same date.

39. We have, thus, no hesitation in coming to the conclusion that the appeal is meritless and is accordingly dismissed with costs."

30. In the light of the abovesaid position of law enunciated by the apex Court in the abovesaid decision, it is found that the plea of title raised by the first defendant based on Ex.B36 Will and the plea of adverse possession put forth by him cannot be validly upheld in the eyes of law. Be that as it may, inasmuch as the counsel appearing for the appellant/first defendant has put forth the submission that the first defendant is resisting his case only based on the Will and not upon the adverse possession, the plea of adverse possession put forth by the defendant in the written statement and during the course of his evidence are not taken into consideration and answered in this second appeal.

31. As above discussed, the first appellate Court has failed to appreciate the oral and documentary evidence adduced



in the matter in the proper perspective and without any discussion on the evidence tendered in the matter, both oral and documentary, erroneously proceeded to hold that the suit properties are the self-acquired properties of the deceased Ramasamy Gounder and that the Will projected by the first defendant Ex.B36 executed by the deceased Ramasamy Gounder is not a true document. The abovesaid determination and findings of the first appellate Court are liable to be set aside for the reasons above discussed and accordingly, the substantial questions of law formulated in the second appeal are answered in favour of the first defendant and against the plaintiff.

In the light of the abovesaid discussions, the judgment and decree dated 23.04.2008 passed in A.S.No.23 of 2007 on the file of the Subordinate Court, Dharapuram, are set aside and the judgment and decree dated 19.01.2007 passed in O.S.No.56 of 2001 on the file of the District Munsif Court, Dharapuram are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Deputy Registrar(R)

//True copy//

Sub Assistant Registrar

sms

To

- 1.The Subordinate Judge, Dharapuram.
- 2.The District Munsif, Dharapuram.
3. The Section Officer, VR Seciton,
High Court, Madras.

+1cc to M/s.Aiyar and Dolia, Advocate SR.No.2430

S.A.No.1117 of 2008

CNR(CO)
GMY(19/11/2021)