



S.A.No.44 of 2000

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.11.2022

Pronounced on : 02.12.2022

CORAM

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

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1.Masianna Gounder (Died)
2.Nallammal
3.K.M.Senniappan
4.Venkatammal
5.Murukumani
6.Subramaniam
7.Dhanalakshmi
8.K.Alamelu Mangai
(2nd appellant are recorded as LR and appellants
3 to 8 brought on record as Lrs of the deceased
2nd appellant viz., Masianna Gounder vide order of
Court dated 19.12.2019 made in C.M.P.No.27450/2019
in S.A.No.44/2000.)

...Appellants

Versus

1.Govindasamy
2.Thenmozhi
3.Ammasaiyakkal
4.Vengamuthu Gounder (Died)
5.Devi
6.Nandakumar
7.Srinivasan
8.Sundaramoorthy



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- 9.Koteeswari
- 10.Savithri
- 11.K.V.Thirumurugan
- 12.K.V.Sadasivam
- 13.C.Boomathy
- 14.C.B.Vivekasharathi
- 15.Minor C.B.Aravind
- 16.J.Devi
- 17.Sripriya
- 18.Suganya

(RR10 to 12 brought on record as Lr's of the deceased 4th respondent viz., Vengamuthu Gounder vide order of Court dated 03.02.2021 made in C.M.P.Nos.3625, 3631 & 3628/2020 in S.A.No.44/2000.)

(RR13 to 16 brought on record Lrs of the deceased 7th respondent viz., J.Srinivasan vide Court order dated 15.07.2021 made in C.M.P.Nos.3616, 3620, 3621/2020 in S.A.No.44/2000)

(RR17 and 18 brought on record Lrs of the deceased 9th respondent viz., Koteeswari vide Court order dated 06.08.2021 made in C.M.P.Nos.3652, 3654 & 3655/2020 in S.A.No.44/2000)

... Respondents

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 18.01.1999 passed in A.S.No.98 of 1997 on the file of the Second Additional District Judge, Erode, Erode District and the judgment and decree dated 24.02.1997 passed in O.S.No.89 of 1990 on the file of the Subordinate Judge, Gobichettipalayam.



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For Appellants

: Mr.Isaac Mohanlal, Senior Counsel

for Mr.R.Agilesh

For R1 & R2

: Mr.V.Subramani

for Mr.N.Sankaravadivel

For Respondents 3,4,7 & 9

: Died (Steps taken)

For Respondents 5,
6, 8, 11-14, 16-18
R15

: No Appearance

: Minor Represented by R13

JUDGMENT

Feeling aggrieved and dissatisfied with the Judgment and Decree dated 18.01.1999 passed in A.S.No.98 of 1997 on the file of the Second Additional District Judge, Erode, Erode District, confirming the judgment and decree dated 24.02.1997 passed in O.S.No.89 of 1990 on the file of the Subordinate Judge, Gobichettipalayam, the appellants/defendants have come forward with the present appeal.

2. The respondents 1 to 3 are the plaintiffs and respondents 4 to 9 are the defendants in the suit. During the pendency of the appeal, the appellants/ defendants 1 & 2 have passed away and their legal heirs are impleaded as the appellants 3 to 8. The respondents 10 to 18 are the legal heirs of the deceased respondent Nos.4, 7 & 9.



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3. For the sake of convenience, the parties in this appeal are also herein after referred as the same nomenclature as before the Trial Court.

4. The case of the plaintiffs 1 to 3/respondents are as follows:-

Nanjappa Gounder is the father of Masianna Gounder (deceased pending Second Appeal), Vengamuthu Gounder (since deceased) 3rd defendant and late Chellappa Gounder (father of Plaintiffs 1 and 2 and wife of plaintiff 3). According to the amended plaint, both items 1 and 2 of the suit properties are joint family properties of plaintiffs 1 to 3, defendant 1 and defendant 3. The father of the plaintiffs 1 and 2, namely, Chellappa Gounder died in 1957 while he was driving a Cart belonging to the joint family. A registered partition deed Ex.B10 was executed on 11.06.1972 under which only agricultural lands of joint family were divided and Nanjappa Gounder who was allotted 'A' Schedule property, under the said partition deed, had made it in clear terms as to how the properties allotted to him should to be given to his sons D1, D3, and the plaintiffs who were the legal heirs of his late son Chellappa after his life time. Since Nanjappa Gounder wanted the suit house properties to be divided after his life time, 1st



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plaintiff who was a minor and the 2nd plaintiff was a young widow at that time, they did not want to say anything against the wishes of the elder Nanjappa Gounder who was the “Karthā” of the family. According to the plaintiffs, Nanjappa Gounder died on 28.12.1989 and after his demise, plaintiffs, the 1st defendant and 3rd defendants are entitled to 5/16 share each in the suit properties. When the plaintiffs demanded, the second defendant Nallammal who in turn replied stating that both items 1 & 2 are separate properties of Nanjappa Gounder and Nanjappa Gounder had executed a Will regarding 1 item in her favour and therefore, the plaintiffs are not entitled to any share in suit properties. But the plaintiffs claimed that suit properties are joint family properties and Nanjappa Gounder had no right to execute a Will in respect of item nos.1 and 2. Since Nanjappa Gounder had one daughter Pongiammal who died before filing the suit, the defendants 4 to 8 were added as legal representatives of the deceased Pongiammal. Therefore, the plaintiffs have filed the suit for partition and separate possession of the suit properties.

5. The case of the defendants 1 & 2/appellants are as follows:-

The suit properties are the self-acquired properties of 1st



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respondent's father Mr.Nanjappa Gounder and they were not the joint family properties as claimed by the plaintiffs. The suit properties were purchased by virtue of four registered sale deeds dated 08.03.1954, 19.01.1956, 29.02.1960 and 31.08.1967. There were two partitions, one was between the Nanjappa Gounder and Muthusamy Gounder who is the brother's son of Nanjappa Gounder on 30.05.1961. All the joint family properties were divided by virtue of the said partition deed. At the time of partition, the properties which were purchased in the name of the Nanjappa Gounder by virtue of the above four sale deeds were considered as self-acquired properties of Nanjappa Gounder. Therefore, those properties were not included in the partition deed dated 30.05.1961.

6. Subsequently, there was a second partition among the Nanjappa Gounder and his sons on 11.06.1972. In the said partition deed also the properties acquired by the Nanjappa Gounder by virtue of the above four sale deeds were not included since these properties were acquired from and out of the independent income of the Nanjappa Gounder. Further, during his life time, Nanjappa Gounder took about 20 acres of land on lease and started cultivation and the income derived from these lands, the above



mentioned four items of the properties were purchased, that is the reason why even in the partition deed dated 11.06.1972, those properties were not included as the same was not treated as joint family properties while all other joint family properties were included in the said partition deed. Since the defendants 1 and 2/appellants took care of Nanjappa Gounder during his last times and provided food and other necessities, out of love and affection, he executed a Will in favour of the 2nd defendant who is none other than the daughter-in-law of the Nanjappa Gounder. Therefore, the 2nd defendant contended that the suit is not maintainable and these properties are not available for partition. Hence, they prayed for dismissal of the suit.

7. The case of the 3rd defendant who is not supporting the case of the appellants/defendants 1 & 2 and who is also one of the sons of the Nanjappa Gounder is that his father purchased all the properties including the suit items only from and out of income derived from the joint family properties. Further, since these four items of the properties were purchased from and out of the joint family income, when the Nanjappa Gounder mortgaged items 1 and 2 of the properties before the House Building Society, Gobichettipalayam, while acting as guardian for 1st plaintiff, he



showed D1 and D3 as joint owners along with himself. Therefore, according to the 3rd defendant, these are the joint family properties and very much available for partition. He denied the Will, contending that his father had not executed any Will and he is entitled to his share in the suit properties.

8. Based on the above pleadings, the trial Court has framed the following issues, viz.,

1. Whether the suit properties are the joint family properties?
2. Whether the suit properties are the exclusive properties of Nanjappa Gounder?
3. Insofar as the item No.1 of the suit properties is concerned, whether Nanjappa Gounder executed Will on 12.12.1986 in favour of the 2nd defendant?
4. Insofar as the item No.2 of the suit properties is concerned, whether the suit is bad for non-joinder of necessary parties?
5. Whether the plaintiffs are entitled to 5/16th share in the suit properties?
6. To what reliefs, the plaintiffs are entitled?



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9. On behalf of the plaintiffs, P.Ws.1 to 3 were examined and marked Exs.A1 to A10 were marked. On behalf of the contesting defendants 1 and 2, D.Ws.1 to 4 were examined and Exs.B1 to B17 were marked and D.W.3 who supporting the plaintiffs, was also examined as D.W.5.

10. The trial Court after considering the oral and documentary evidence, came to the conclusion that both the items 1 and 2 of the schedule properties are the joint family properties. Further, it was held that Ex.B11-Will was not proved in the manner known to law and accordingly, the trial Court decreed the suit.

11. Aggrieved over the said judgment and decree passed by the trial Court, the present appellants herein preferred the appeal in A.S.No.98 of 1997 before the 1st appellate Court.

12. On consideration of the findings of the trial Court, the 1st appellate Court concurred with the conclusions reached by the trial Court and held that the items 1 and 2 schedule properties are the joint family properties and the Will was not proved in the manner known to law.



Accordingly, the first appellate Court confirmed the judgment and decree passed by the trial Court.

13. Aggrieved over the said judgment and decree passed by both the Courts below, the appellants herein preferred the present Second Appeal.

14. While admitting the present Second Appeal on 24.09.2003, this Court framed the following substantial question of law as follows:-

“Are the Courts below correct and justified in holding that Ex.B-11 had not been proved in spite of the scribe and attestors having been examined and when due execution and attestation had been proved?”

15. During the course of arguments, this Court felt it would be appropriate to frame certain additional substantial questions of law for effective disposal of the appeal. Accordingly, the additional substantial questions of law are framed by this Court on 11.11.2022:

“1. Whether the Lower Appellate Court is correct and justified in holding that the 1st item of the suit



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schedule properties are joint family properties by completely ignoring Ex.A1/partition deed dated 30.05.1961?

2. Whether the judgments and decrees passed by the Courts below are perverse and the same is liable to be set aside?"

16. Mr.Isaac Mohanlal, learned Senior Counsel appearing for the appellants, while referring to the above three substantial questions of law, would contend that both the Courts below have wrongly come to the conclusion that item no.1 of the schedule properties is joint family property, however, as far as item 2 of the schedule properties is concerned, he has fairly conceded and agreed with the findings of the Courts below that these properties are available for partition. He would contend that the item 1 of the suit properties is not a joint family property but it is a self-acquired property of Nanjappa Gounder who is the father of the 1st appellant and the father-in-law of the 2nd appellant. Further, he would contend that the Nanjappa Gounder had executed a registered Will Ex.B11 dated 12.12.1986 in favour of the 2nd appellant/daughter-in-law with regard to item 1 of the schedule property. As per the Will, item 1 of the suit property will go in favour of the



17. The learned Senior Counsel further contended that both the Courts below while holding that the item 1 of the suit schedule property is a joint family property, have completely ignored to consider the Ex.A1-partition deed dated 30.05.1961. The Nanjappa Gounder had purchased certain properties by virtue of sale deeds Exs.A2 to A5. Item no.1 of suit property is a house property to an extent of 12 cents of land. These properties are purchased from and out of the self-earned income of Nanjappa Gounder. During the year 1950, he took about 20 acres of land on lease for cultivation and thereby he earned his income and out of the said income, item 1 of the suit properties, were purchased by him. Nanjappa Gounder earned income independently from the leasehold properties and not from the joint family properties. During the year 1961, there was a partition between Nanjappa Gounder and his brother's son Muthusamy Gounder on 30.05.1961. The said document is marked as Ex.A1 since the properties under Exs.B2 to B5 were purchased under the self earned income, item no.1 properties are not included and not the subject matter of



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Ex.A1-partition deed. In similar way, when the partition was made between Nanjappa Gounder and his sons on 11.06.1972 by virtue of Ex.A10 also, these properties were not included since it was not a joint family property. Even P.W.1 in his examination, has stated that these schedule properties are self-acquired properties of his grand-father. However, he would submit that both the Courts below without considering these vital aspects, have wrongly come to the conclusion by taking into consideration of the Ex.A6 which is a mortgage deed executed by the Nanjappa Gounder along with his three sons. He would submit that there are two schedules in the mortgage deed. In the said mortgage deed both the items 1 and 2 of the suit schedule properties were included. Admittedly, the item 2 of the properties is a joint family property. Further more, due to the insistance of the concerned Bank Manager, Nanjappa Gounder was constrained to execute the Ex.A6-mortgage deed jointly along with his sons. Further, he contended that merely by virtue of the execution of the mortgage deed, the status of the self acquisition of the item 1 of the property of Nanjappa Gounder will never lost. The learned Senior counsel would also submit that even in 1972 partition among his sons, Nanjappa Gounder had clearly mentioned with regard to his share of the joint family properties to whom these properties



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will go after his lifetime. Therefore, he was very conscious at that point of time as to how his share in joint family properties should be distributed among the children, after his lifetime. The exclusion of item 1 properties from the purview of the partition in the year 1972 was only for the reason that this is his self acquired properties. However, unfortunately, these aspects were not considered by both the Courts below. He pointed out that if the plaintiffs took a stand that item No.1 is a joint family property, there is no denial on the other side whether this is a joint family property or not. It is the duty of the plaintiffs to prove that the properties were purchased from and out of the joint family income. No such proof has been made. The Courts below have held that even during the year 1956 when Exs.A2 to A4 properties were purchased, it was from and out of joint family income. If that is the case, then why the Courts below had not given any reason for non inclusion of the said properties in Ex.A1-partition deed. Therefore, he would submit that the Courts below have committed a patent error and with the available evidence, the Courts could have given a clear cut finding, but miserably, they failed to do so. Therefore, by referring to Section 103 CPC, the learned Senior counsel would submit that since the evidence available on record is sufficient, he would pray this Court to interfere with the



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findings of the Courts and determine the issue which was wrongly determined by the Courts below and by considering Exs.A1 and B10 and decide about the self-acquired status of the Nanjappa Gounder with regard to the item 1 of the properties.

18. The learned Senior counsel further submitted that the Courts below have disbelieved the execution of the Ex.B11-Will. In order to prove the Will, the defendants 1 and 2 were examined. The Will was attested by two attesting witnesses, of whom, one person, namely Krishmoorthi passed away and another, namely, Surendran was examined as D.W.2, who deposed that he has seen Nanjappa Gounder while he was signing the Will and thereafter, he has also signed. After his signature, another attesting witness, namely Mr.Krishnasamy had also signed. One Mr.Chethrapaul was examined a D.W.3, he has also confirmed that Nanjappa Gounder signed the Will and two witnesses including Surendaran, have signed as witnesses. He submitted that as per Section 68 of the Evidence Act, the defendants have taken all initiative to prove the Will and accordingly, proved the same. He pointed out that as per Section 63 of the Indian Succession Act, a document is required to be attested by two witnesses. The Will was executed by



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Nanjappa Gounder and at the time of execution of the Will, two attesting witnesses have signed to fulfill the requirement of under Section 63 of the Indian Succession Act. Since one of the attesting witnesses had passed away, another attesting witnesses was examined to prove the Will. Therefore, the learned Senior counsel submitted that the defendants proved the Will in the manner known to law. However, strangely both the Courts below came to the erroneous conclusion that the Nanjappa Gounder at the time of execution of the Will, was aged about 95 years and hence, there had been no chance for said Nanjappa Gounder all the way to come to the Sub-Registrar office to register the Will. Both the Courts below disbelieved the execution of the Will. But the learned Senior counsel pointed out that while as per Section 68 of the Evidence Act, Ex.B11-Will was proved but disbelieving the Will by the Courts below on their own whims and fancies and same is not in accordance with law. Therefore, the judgments and decrees rendered by both the Courts below are liable to be set aside on the aspect of perversity.

19. In support of his contentions, the learned Senior counsel relied upon the following decisions, viz.,



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1. ***“Padmini Vs. Easwari and Others”*** reported in (2012) 4 LW 179.
2. ***“Ramasamy Gounder @ Senban (Died) and Others Vs. Chinnapillai @ Nallammal and Others”*** reported in (2022) 3 CTC 703.
3. ***“Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta and another”*** reported in AIR (1955) SC 363.
4. ***“M.P.P.Jayagandhi Nadar and Company by partner, M.P.P.Jayagandhi Nadar Vs. Arunachalam Pillai and Another”*** MLJ Reports.
5. ***“Kumaraswamy Chettiar Vs. Veliburammal and Others”*** reported in (1998) 2 LW 766.

20. On the other hand, Mr.V.Subramani, learned counsel for the respondents 1 and 2 would submit that both the Courts below have concurrently given well considered findings and decreed the suit. Both the Courts below came to the conclusion that the item 1 of the suit schedule property is a joint family property since it was a joint family property, Nanjappa Gounder, joining with his sons, executed the mortgage deed which is marked as Ex.A6 dated 20.03.1963. Thereafter, Ex.A10-partition deed was executed among Nanjappa Gounder and his sons wherein, all the joint family properties were divided and even Nanjappa Gounder was also



provided with a share in the partition deed and in the partition deed, the Nanjappa Gounder has categorically mentioned as to how the share of the properties could be distributed among the parties after his demise. Therefore, he would contend that his intention was to make it clear about the distribution of the properties that is only the partial partition and item no.1 is also a joint family property and liable to be partitioned. Therefore, he would contend that the plaintiffs entitled for partition and both the Courts below have also rightly come to the conclusion that item no.1 is a joint family property and the plaintiffs are entitled for the decree as prayed for. Further, he would contend that both the Courts below have rightly disbelieved the Ex.B11-Will which was said to have been executed by Nanjappa Gounder in favour of his daughter-in-law (i.e.,) the 2nd defendant. There is no necessity to execute the Will in favour of his daughter-in-law excluding his sons. In fact, the Will is not at all executed but it was a created one. For the purpose of execution, the Will was supposed to have been attested in terms of under Section 3 of the Transfer of Property Act, 1882. One of the conditions narrated was that the executant should have present at the time of testator signing the Will. He would submit that both the Courts below rightly found that the executant



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had not seen while testator signing the Will. Therefore, he would contend that the Courts below took a stand that the Will Ex.B11 was not executed by Nanjappa Gounder. Further, he was about 95 years old and there was absolutely no chance for him to go all along to the Sub-Registrar Office and register the said Will. Therefore, he would contend that the Courts below have rightly disbelieved the execution of the Ex.B11-Registered Will dated 11.06.1992. With these submissions, the learned counsel would submit that no interference by this Court is required in respect of the well considered judgments and decrees passed by the Courts below and hence, he would pray to dismiss the appeal.

21. In support of his contentions, the learned counsel appearing for the respondents, would rely the following decisions, viz.,

1. ***Deity Pattabhiramaswamy Vs. S.Hanymayya and Others***, AIR 1959 SC 57.
2. ***J.Thulasirama Reddy Vs. B.Shanmugam and Others***, 2022 (3) CTC 811.



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22. Heard the learned Senior Counsel appearing for the appellants as well as the learned counsel appearing for the respondents 1 and 2 and perused the materials available on record.

23. Upon the hearing of the Mr.Isaac Mohanlal, Senior Counsel for the appellants and Mr.V.Subramani, learned counsel for the respondents 1 and 2, it appears that two issues would arise for consideration, viz., firstly, as regards the validity of the execution of the Ex.B11-Will and secondly, as regards to the determination of the joint family status in respect of item 1 of the suit properties.

24. As regards the second issue is concerned, i.e. the determination of the joint family status in respect of item 1 of the suit properties, both the Courts below have concurrently held that the item 1 and 2 of the suit properties are the joint family properties. The suit was filed for partition in respect of item nos.1 and 2 of the suit schedule mentioned properties and consequently, it was held that these properties were available for partition. As far as decision of the Courts below with regard to item 2 of the properties is concerned, both the appellants and respondents have



admitted that this is a joint family property and they are in agreement with the judgments passed by the Courts below. Now the dispute is with regard to the status of item 1 of the property alone.

25. Mr.Isaac Mohanlal, learned Senior counsel extensively made his arguments, that item 1 of the suit property is not a joint family property and liable for partition. According to him, the Courts below without considering both oral and documentary evidence available on record, have wrongly come to the conclusion that it is a joint family property, which cannot be sustained.

26. In order to prove that item 1 of the suit schedule properties is not a joint family property but a self acquired property of Nanjappa Gounder, the appellants/defendants relied upon Exs.A2 to A5-sale deeds, by which Nanjappa Gounder who is the father of the 1st defendant and grand-father of the 1st plaintiff purchased certain properties in his name. Apart from Exs.A2 to A5 documents, the appellants relied upon partition deed between Nanjappa Gounder and his brother's son Muthusamy Gounder dated 30.05.1961 which was marked as Ex.A1. The Exs.A2, A3 and A4 are



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the sale deeds which are relating to the year 1954, 1956 and 1960 which means these properties were purchased much before the Ex.A1-partition deed. Ex.A5 sale deed relating to the year 1967 i.e., before the Ex.B10-partition deed dated 11.06.1972. The Courts below mainly have taken into consideration Ex.A6-mortgage deed which is dated 20.03.1963 executed before the Gobichettipalayam Co-operative Societies Housing Bank by Nanjappa Gounder and his sons. It was admitted by all the parties that this is a mortgage deed executed by Nanjappa Gounder wherein all his three sons had signed as co-owners. Therefore, the Courts below have come to the conclusion that item 1 of the suit properties, is joint family property and since it was a joint family property, their sons were shown as co-owners and further the Courts below disbelieved the version of D.Ws.2 and 3 that only agreed lands were partitioned and not the suit properties and the suit properties are separate properties of Nanjappa Gounder. P.W.1 deposed that the leased properties were not only taken in the name of Nanjappa Gounder but also in the names of the members of the joint family. Therefore, both the Courts have come to the conclusion stating that item 1 of suit properties is a joint family property and not self-acquired property of Nanjappa Gounder.



27. On careful perusal of the entire evidence available on record and also the judgments rendered by the Courts below, this Court finds that the Courts below have ignored one main aspect which is vital to decide about whether item 1 of suit properties, is a joint family property or not, i.e., Ex.A1 partition deed. Both the Courts below held that item 2 of suit properties is a joint family property based on the recitals mentioned in the partition deed dated 30.05.1961 which was marked as Ex.A1. However, there was no mention anything about item 1 of suit properties in the said partition deed. It is pertinent to note that the item 1 of suit properties were purchased much before Ex.A1-partition. The Courts below have come to the conclusion that item 1 of suit properties is a joint family property. If at all item 1 of the suit properties was purchased from and out of the income derived from the joint family properties as claimed by the plaintiffs/respondent, there was no acceptable reason was forthcoming from the plaintiffs/respondents as to why this item 1 property was not included and made subject matter of the partition that had taken place between Nanjappa Gounder and his brother's son Muthusamy Gounder by virtue of Ex.A1. This vital aspect was completely ignored by both the Courts below and no finding was given on this aspect though all the material evidences



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are available. The Courts are bound to give a finding before coming to the conclusion whether item 1 of suit properties is a joint family property or not.

Therefore, it can be easily asserted that since Item 1 of suit properties was already purchased and very much available for partition, but it was not included in Ex.A1 partition deed means, it is not a joint family property, but exclusive property of Nanjappa Gounder. This crucial aspect was not taken into consideration and completely ignored by the Courts below.

28. A perusal of the Ex.A6-mortgage deed, makes it clear that since both the joint family properties as well as item 1 of suit properties were included, Nanjappa Gounder was constrained to include the plaintiffs as co-owners while executing Ex.A6 mortgage deed and further, in the matter of mortgaging the properties to avail loans, the creditor/banks will insist upon the loan seekers who want to avail loan by mortgaging their properties, to execute the mortgage deed by all the owners along with their legal representatives irrespective of the status of the property whether it is joint family or self acquired property so as to cast an obligation upon them to repay the same, failing which, to set off the property mortgaged by them. In such circumstances, in the present case also, when Nanjappa Gounder



approached the Cooperative Society for availing mortgaged loan, he was insisted upon to execute the mortgage deed along with his sons and in such constrained circumstances, Nanjappa Gounder had shown his sons as co-owners as already stated above, both the properties belonging to joint family and self acquired property were shown for mortgage. Therefore, merely the plaintiffs were shown as co-owners in the mortgaged deed Ex.A6, it cannot be construed or considered that the self acquired property of Nanjappa Gounder, i.e. item 1 of suit schedule properties would become joint family property and the status of self-acquired property cannot be taken away. Therefore, in view of the overwhelming evidence available on record to establish that item 1 of the suit properties is not a joint family property which was not formed as part of Ex.A1 partition deed, as rightly contended by the learned Senior counsel for the appellants/defendants, both the Courts below have wrongly come to the conclusion that it is a joint family property, which in the opinion of this Court cannot be sustained. In this regard, it is worthwhile to refer Section 103 of C.P.C., which reads as follows:-

103. Power of High Court to determine issue of fact.--In any second appeal, the High Court may if the evidence on the record is sufficient, determine any issue necessary for the disposal of the



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appeal,--

(a) which has not been determined by the lower appellate Court or both by the Court of first instance and the lower appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in Section 100.

29. Therefore, it is explicit that the powers under Section 103 C.P.C. can be exercised by the High Court if the core issue involved in the case is not decided by the trial court or the appellate court and the relevant material is available on record to adjudicate upon the said issue and in the event of the following circumstances, viz., (i) Determination of an issue must be necessary for the disposal of appeal; (ii) The evidence on record must be sufficient to decide such issue; and (iii) (a) Such issue should not have been determined either by the trial court, or by the appellate court or by both; or (b) such issue should have been wrongly determined either by trial court, or by the appellate court, or by both by reason of a decision on substantial question of law.



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30. In the present case, on careful consideration of both oral and documentary evidence adduced by both parties *vis-a-vis* the findings of the Courts below, this Court finds that though there is overwhelming evidence is available on record to establish that item 1 of the suit properties, the Courts below have miserably failed to consider Ex.A1 partition deed wherein, admittedly, item 1 of the suit properties was not included for partition that had taken place among the Nanjappa Gounder and the son of the brother of Nanjappa Gounder, though it was very much available on the date of partition for the only reason that it was not a joint family property but a self acquired property of Nanjappa Gounder. On consideration of this documentary evidence Ex.A1, it is clear that item 1 of suit properties is a self-acquired property of Nanjappa Gounder even in the year 1961. Therefore, merely because the co-owners signing the mortgage deed while mortgaging the properties both belonging to joint family and self-acquired property of Nanjappa Gounder, the status of the property in respect of item 1 will not in any way get changed as that of joint family property and thereby, the plaintiffs can seek partition over the self acquired property of Nanjappa Gounder by treating it as a joint family property. Therefore, the findings of the Courts below are liable to be interfered with.



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31. Therefore, the finding of the lower Courts have against the law settled by this Court as well as the appellate Court. This aspect was well considered by this Court in ***“M.P.P.Jayagandhi Nadar and Company by partner, M.P.P.Jayagandhi Nadar Vs. Arunachalam Pillai and Another”*** reported in (1996) 1 MLJ 251. Therefore, the findings of the Courts below by ignoring the Ex.A1 and Exs.B1 to B5 and solely relying upon Ex.A6 mortgage deed and other oral evidences which are all contrary to the material evidences, cannot be sustained. Hence, the findings of the Courts below that the item 1 of the suit properties property is a joint family property are set aside and it is held that it is a self-acquired property of the Nanjappa Gounder. Accordingly, the first additional substantial question of law is answered.

32. The next issue is with regard to the validity of the execution of Ex.B11-Will. Both the Courts below have disbelieved Ex.B11-Will on the following aspects, viz., (i) that in terms of Section 3 of the Transfer of Properties Act, the attestation has not been made; (ii) that there is no possibility for Nanjappa Gounder to execute Ex.B11-Will at the age of 95, he could travel to the Registration Office and get registered the Will.



33. The term “attestation” is defined in Section 3 of the Transfer of Property Act, 1882 as follows:-

"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary"

34. A perusal of the meaning of the "attested" as stated in Section 3 of the Transfer of Property Act, 1882, it is clear that the attestation in relation to an instrument, means, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument. Therefore, at the time of signing document by the attesting witness, the presence of executant is necessary. Therefore, the presence of the executant



is must at the time of signing the instrument by the attesting witness. Both the Courts below have come to the conclusion that D.W.2 has not deposed to the effect that the executant Nanjappa Gounder has seen the attesting witness while they were signing the documents. The above provision mandates (i) the presence of the executant while the attesting witnesses signing the instrument and (ii) in order to prove the execution, it is required that the instrument should be attested by the witnesses, who have to depose that they have seen the executant while signing the instrument. This is what required in the above Section 3 of the Act, but the trial Court wrongly construed the relevant provision and held that the executant also should have seen the attestors while they were signing the document, which is not required as per the provision which insists upon only the presence of the executant at the time of signing the document.

35. In the present case, the trial Court came to the conclusion that one of the attesting witnesses, namely, D.W.2 has deposed that he has seen while Nanjappa Gounder signing the Will Ex.B11 at the Registration Office, Gobichettipalayam. D.W.2 has categorically deposed in his deposition that Nanjappa Gounder has come to the document writer's office and he read out



the contents of the Will and thereafter he has seen the executant Nanjappa Gounder while he was signing the Will and thereafter D.W.2 also signed the document and after his signature, another witness Mr.Krishnasamy has also signed. He has further deposed that at the time of execution of the Will, Nanjappa Gounder was hale and healthy. In the cross examination, D.W.2 clearly stated that the Nanjappa Gounder requested D.W.2 to sign as an attesting witness. Accordingly, D.W.2 signed the Will as one of the attesting witnesses. The above deposition of D.W.2, is very clear that at the time of signing the document by the attesting witness, the executant was present and he has seen while Nanjappa Gounder was signing the document. On the other hand, the trial Court has wrongly interpreted that provision mandates as if that the executant should have seen while the attesting witnesses were signing the document. In fact, the provision mandates only the attestor has to witness the executant signing the document. On appreciation of the finding of the trial Court in this regard, the lower appellate Court has just confirmed the said finding. Therefore, the interpretation made by the Courts below regarding the provision of Section 3 of the Act, both the Courts below have wrongly interpreted the same and hence the same is liable to be set aside.



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36. Now the next issue is whether the Will has been proved in the manner known to law. Will has to be proved under Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872.

37. Section 63 of the Indian Succession Act, 1925 as well as Section 68 of the Indian Evidence Act, 1872 are extracted hereunder:

Indian Succession Act, 1925:

“63: Execution of unprivileged Wills.--Every testator, nor 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.



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(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.”

Indian Evidence Act, 1872:

“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 its 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



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(16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

38. A perusal of the above two provisions of law, it is clear that the Will shall be attested by two or more witnesses, each of whom has seen at the time of the testator sign or affix his mark to the Will and the Will requires to be proved by examining one of the attesting witnesses. Section 68 of the Indian Evidence Act 1972 requires that the document has to be proved by examining by any one of the attesting witness.

39. In the present case, there were two attesting witnesses, among them, one witness had passed away and hence, the remaining attesting witness was examined as DW.2. Admittedly, the Will Ex.B11 was attested by two witnesses and DW.2 has deposed that the executant Nanjappa Gounder has executed the Will and he has seen while he was signing the document. Therefore, Section 63 of the Succession Act has been duly complied and with regard to the Section 68 of Evidence Act, it is required that the document has to be proved by examining atleast one of the attesting witnesses. As stated above, one of the attesting witnesses, namely, D.W.2



was examined and he categorically deposed that he has seen the executant signing the document Ex.B11 and he also signed in the said document.

Further apart from DW.2, the scribe of the Will was also examined as D.W.4 and he also deposed stating that the executant came to his place and signed the document. Though all these aspects even established and proved the Will Ex.B11, the Courts below came to the wrong conclusion that the document was not attested properly in terms of Section 3 of Transfer of Property Act, which this Court has already held that it was only due to the wrong interpretation of the Section 3 of the Transfer of Properties Act by the Courts below.

40. In view of the above discussion, it can be easily held that the Will has been proved in the manner known to law by the appellants/defendants by adducing relevant materials and by examining the attesting witness and scribe of the Will Ex.B11 as Exs.D.Ws.2 and 3 and the Courts below have also disbelieved only on the possibility for a person who is 95 years old to travel to Registration Office and execute the Will. The 1st defendant has filed the photographs of the executant at the age of 97 when he visited Bangalore by travelling from Erode and spent time at Bangalore



and all these photographs were also completely ignored and no finding was given on this aspect. A person who is capable of travelling to Bangalore from Erode, mere travelling at the age of 95 to Registration Office is not impossible for him, while so, it is unfortunate that the Courts below have not believed the same and erroneously held despite concrete evidence is available proving the Will, that it is unbelievable that a person at the age of 95 years could have come to the Registration Office to execute the Will. There is no logic in the approach of the lower Courts. Therefore, this Court is of the view that the Ex.B11 Will has been proved in the manner known to law and the contrary findings in this regard rendered by the Courts below are liable to be set aside. Accordingly, the substantial question of law and the second additional substantial question of law are answered against the respondents/plaintiffs.

41. In the result, the Second Appeal is allowed in respect of item No.1 of the suit schedule properties alone. The Judgment and decree dated 18.01.1999 passed in A.S.No.98 of 1997 by the learned II Addl.District Judge, Erode as well as the judgment and decree dated 24.02.1997 passed in O.S.No.89 of 1990 by the learned Subordinate Judge, Gobichettipalayam



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are set aside in respect of item No.1 of the suit schedule properties alone.

Consequently, the Original Suit in O.S.No.89 of 1990 is dismissed in respect of item No.1 of the suit schedule properties alone. The parties shall bear their own costs throughout.

02.12.2022

gbi

To

1.The Second Additional District Judge,
Erode,
Erode District.

2.The Subordinate Judge,
Gobichettipalayam.



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KRISHNAN RAMASAMY, J.,

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Pre-delivery Judgment in
S.A.No.44 of 2000

02.12.2022