



A.S.(MD)No.62 of 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 11.11.2022

PRONOUNCED ON:.02.12.2022

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

A.S.(MD)No.62 of 2014

and

M.P.(MD) No.2 of 2014

K.S.Raja

: Appellant / Defendant

Vs.

M.Indira

: Respondent / Plaintiff

PRAYER:- Appeal Suit filed under Section 96 r/w Order 41 Rule 1 and 2 of the Code of Civil Procedure against the Judgment and Decree, dated 29.07.2011 made in O.S.No.24 of 2009, on the file of the Principal District Court, Theni.

For Appellant : Mr.K.Thayumanaswamy

For Respondent :Mr.K.Sekar



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JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.24 of 2009, dated 29.07.2011, on the file of Principal District Court, Theni, decreeing the suit as prayed for.

2. The gist of the plaint is as follows:

The plaintiff and the defendant are sister and brother and are children of K.Shanmugavel Nadar and Avudaiammal. The suit property was originally purchased by the said Avudaiammal from one Virumandi Thevar, vide registered sale deed dated 29.01.1965. After the death of the said Avudaiammal, the plaintiff and the defendant succeeded to the properties as her only legal heirs. The plaintiff has been in joint possession and enjoyment of the suit property along with the defendant. Hence, the plaintiff is entitled to get $\frac{1}{2}$ share in the suit property. Though the defendant has assured the plaintiff to give her $\frac{1}{2}$ share, later he refused to give her share. Since the defendant had tried to create encumbrance, the plaintiff sent a legal notice dated 31.05.2007 to the defendant demanding partition of the suit property and allotment of $\frac{1}{2}$



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share to her. The defendant, having received the notice, has neither sent any reply nor complied with the notice demand. The plaintiff has then made a paper publication in Dinamalar dated 26.12.2007 warning the general public not to deal with the defendant in respect of the suit property and the plaintiff has also sent a copy of the paper publication to the defendant. Despite repeated request of the plaintiff for the division of the property, the defendant has not come forward to partition the suit property. Hence, the suit.

3. The defence pleaded by the defendant is as follows:

(a) The plaintiff contentions that the plaintiff and the defendant are the children of K.Shanmugavel Nadar and Avudaiammal, that their mother Avudaiammal had purchased the suit property vide sale deed dated 29.01.1965, that their father K.Shanmugavel Nadar died on 31.07.1983 and their mother Avudaiammal died on 01.02.1999 are admitted. But it is false to state that their mother Avudaiammal had died intestate. Avudaiammal at her age of 84 years while she was hale and healthy, has executed a Will on 26.01.1998 bequeathing the suit property to her son – the defendant herein and handed over the original Will to her brother A.Rajamanickam for safe custody. After the death of



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Avudaiammal, the Will dated 26.01.1998 came into force and the defendant has become the absolute owner of the suit property and that he along with his children had been in possession and enjoyment of the same. The plaintiff, at the time of her marriage, was given sufficient Sreedhana and she was given monetary help very often by his mother. The plaintiff is having no right, title or possession over the suit property.

(b) The defendant and his children have sold the suit property to one S.Ilangao and R.R.Sathyanarayanan for valuable consideration on 01.08.2007 and thereafter, they have been in possession and enjoyment of the suit property. Moreover, the defendant and his children have executed a registered Power of Attorney on 01.08.2007 permitting the said Ilango and Sathyanarayanan to sell the suit property to third parties. The plaintiff has no cause of action for filing the suit and the cause of action alleged is false. The purchasers Ilango and Sathyanarayanan are the necessary parties to the above suit and as such, their non-impleadment is fatal to the suit. Hence, the suit is liable to be dismissed.

4. On the basis of the above pleadings, the trial Court has framed the following issues:



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(1) Whether the Will dated 26.01.1998 alleged by the defendant is true and legally valid?

(2) Whether the plaintiff is entitled to get preliminary decree in respect of ½ share in the suit property, as claimed by her? and

(3) What relief, the plaintiff is entitled to?

5. During trial, the plaintiff has examined herself as P.W.1 and exhibited 5 documents ad Exs.A.1 to A.5. The defendant has examined himself as D.W.4 and examined three persons viz., Thiru.Sathyanarayanan, Thiru.Rajamanickam and Tmt.Balasaraswathy as D.W.1 to D.W.3 respectively and exhibited 3 documents as Exs.B.1 to B.3

6. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, has passed the impugned Judgment dated 29.07.2011, granting preliminary decree declaring that the plaintiff is entitled to get ½ share in the suit property and with costs. Aggrieved by the Decree and Judgment of the trial Court, the defendant has preferred the present Appeal Suit.



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7. In the Appeal Suit, the appellant/defendant has raised the following grounds:

(a) The Judgment and Decree of the trial Court is against law, weight of evidence and all probabilities of the case.

(b) The trial Court ought to have brushed aside the case pleaded by the respondent/plaintiff on the sole ground that the execution of Will – Ex.B.2 is proved in accordance with law by the witnesses to the Will.

(c) D.W.2 and D.W.3 are the attesting witnesses to Ex.B.2- Will and they are none other than the close relatives of both parties viz., maternal uncle and aunt and as such, they are the competent persons to speak about the Will and accordingly, they have deposed.

(d) The trial Court failed to see that Ex.B.2-Will clearly indicates that the testator bequeathed the suit property to the appellant/defendant and the custody of the said Will remained with the witnesses of the Will viz, D.W.2 and D.W.3 and hence, the only legal evidence to prove the execution and existence of the Will is the evidence of witnesses D.W.2 and D.W.3 and the said witnesses also deposed about the execution of Ex.B.2 – Will in favour of the appellant/defendant and the plaintiff has not disproved Ex.B.2-Will to maintain the suit for partition.



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(d) The trial Court erred in allowing the suit for partition, even after finding that the Will has been produced from proper custody and by proper person.

(e) The trial Court, after framing the specific issue whether the Will is true or not, has not given any finding on the genuineness of Will or the evidence on the side of the defendant in proving the execution of the Will.

(f) The finding and the decision of the trial Court that since the suit property was transferred by mere execution of Power of Attorney by the defendant to the third parties in 2007 without execution of sale deed and Ex.B.2 – Will is false, is untenable and unacceptable in the absence of any contra evidence.

(g) The trial Court failed to see that the suit is bad for non-joinder of necessary parties.

(h) The finding of the trial Court that there was no reference of execution of Will in the Power of Attorney dated 01.08.2007 is unwarranted and untenable in view of the fact that the custodian of the Will had divulged the same only when the respondent/plaintiff filed the suit claiming right in the suit property. Hence, the appeal is liable to be



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allowed and the judgment and decree dated 29.07.2011 made in O.S.No. 24 of 2009 are liable to be set aside.

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8. The points that arise for consideration are

(1) Whether the trial Court erred in rendering a finding that the Will was a fabricated document, despite showing that the Will was produced from the proper custody and that two attestors to the Will have given a specific evidence about the execution of Will and the absence of any suspicious circumstances surrounding the Will?

(2) Whether the trial Court erred in deciding that Ex.B2-Will was subsequently created by the defendant by reasoning that Ex.B.2-Will does not find place in the Power of Attorney dated 01.08.2007 executed by the defendant and his children in favour of third parties in respect of the suit property, despite showing that the custodian of the Will had divulged the Will only when the plaintiff filed the suit claiming right in the suit property?

(3) Whether the Will dated 26.01.1998 alleged to have been executed by Avudaiammal is true, valid and is proved?

(4) Whether the appeal is to be allowed?



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(5) Whether the respondent/plaintiff is entitled to get $\frac{1}{2}$ share in the suit property as claimed by her? and

(6) What other reliefs the parties are entitled to?

9. For the sake of convenience and brevity, the parties will be referred as per their status/ ranking in the trial Court.

Points 1 to 6:

10. The plaintiff – sister has laid the suit for partition against the defendant-brother claiming $\frac{1}{2}$ share in the suit property. Admittedly, the plaintiff and the defendant are sister and brother and are the children of one K.Shanmugavel Nadar and his wife Avudaiammal. It is not in dispute that the suit property was originally purchased by the said Avudaiammal, vide sale deed dated 29.01.1965 under Ex.A.1 and that their father Shanmugavel Nadar and mother Avudaiammal had died on 31.07.1983 and 01.02.1999 respectively. The case of the plaintiff is that her mother Avudaiammal had died intestate by leaving the plaintiff and the defendant as her only legal heirs and that therefore, the plaintiff is entitled to get $\frac{1}{2}$ share in the suit property by way of intestate succession.



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11. The defence of the defendant is that while his mother Avudaiammal was hale and healthy, she had executed a Will dated 26.01.1998 bequeathing the suit property in his favour, that after the death of his mother, the Will came into force and that therefore, he has become the absolute owner of the suit property. It is the further case of the defendant that while himself and his children have been in possession and enjoyment of the property, they have sold the same to one S.Ilango and R.R.Sathyarayanan for valuable consideration on 01.08.2007 and that they have also executed a Power of Attorney in their favour on 01.08.2007 permitting them to sell the suit property to third parties and that therefore, the said Ilango and Sathyanarayanan as owners of the suit property have been in possession and enjoyment of the same. In short, the plaintiff has claimed $\frac{1}{2}$ share in the suit property by intestate succession and whereas the defendant has claimed the entire property by testamentary succession. Hence, the only and crucial point to be decided is as to whether the Will alleged to have been executed by Avudaiammal on 26.01.1998 is true and genuine and is proved in accordance with law.

12. Before entering into further discussion, let us refer the legal proposition laid down by the Hon'ble Apex Court with reference to



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proving of Will as quoted in the decision of the Hon'ble Supreme Court in ***M.R.Ramesh (Dead) by L.Rs Vs. K.M.Veeraje Urs (Dead) by L.Rs and others*** reported in ***2013(7) SCC 490***, wherein it has been held as follows:

- “1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the ease of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.*
- 2. Since [section 63](#) of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by [section 63](#) of the Evidence Act, 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.*
- 3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.*



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4. *Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.*

5. *It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.*



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6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

13. A Will has to be proved in terms of Section 63 of the Indian Succession Act r/w Section 68 of the Indian Evidence Act. It is settled law that the person who claims any benefit under the Will (propounder) has to prove and the onus is on the propounder of the Will to satisfy the conscience of the Court that it is the last Will of a free and capable testator and that he has to remove the suspicious circumstances surrounding the Will.

14. In the case on hand, the original Will alleged to have been executed by Avudaiammal is produced and exhibited under Ex.B.2. The defendant has examined the two attestors of the Will Thiru.Rajamanickam and Tmt.Balasaraswathy as D.W.2 and D.W.3 respectively. It is the specific contention of the defendant that since two



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attesting witnesses D.W.2 and D.W.3 were called for the purpose of proving the execution of the Will and as they have deposed to that effect, there is no dispute that the requirements of Section 68 of the Indian Evidence Act was complied with and consequently, the Will under Ex.B.2 has been proved.

15. Since the propounder of the Will is duty bound to examine atleast one of the attesting witnesses to prove the execution of the Will as required under Section 68 of the Indian Evidence Act, just because the mandatory requirement under Section 68 of the Indian Evidence Act has been complied with, it cannot be stated that the Will is proved to be genuine and the Will itself stands proved. It is important that the propounder has to satisfy the conscience of the Court that the Will in dispute was the last Will of the testator and has to remove all the legitimate suspicions surrounding the Will.

16. In the present case, it is evident from Ex.B.2 that the Will is written on two plain papers and on two pages and the same is an unregistered one. As already pointed out, two persons viz., Thiru.Rajamanickam and Tmt.Balasaraswathy are shown as attesting



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witnesses and as admitted by both parties, they are the maternal uncle and maternal aunt of the plaintiff and the defendant. Admittedly, there is no signature or particulars of the scribe. D.W.2 in his cross-examination would say that the Will was executed in his house, that Avudaiammal came to his house on that day, that the Will was written by the Document Writer, that he alone had brought the Document Writer, that he does not know the name of the Document Writer, but he was a known person, that he brought the Document Writer, as instructed by her sister and that he alone had brought the other witness Balasaraswathi.

17. As already pointed out, Ex.B.2-Will does not contain the name and other particulars of the Document Writer, who had written the said Will. D.W.2 has not offered any reason or explanation for not mentioning the name of the Document Writer in the Will. As already pointed out, he would admit that though the Document Writer was known to him, he does not remember his name.

18. D.W.2 would admit in his cross-examination that he does not remember as to in which paper the Will was written, that does not remember as to who had signed at first, that he does not remember as to



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who had all subscribed their signatures, that he was not aware as to whether the Document Writer had subscribed his signature, that he does not remember as to how many signatures he had subscribed in the Will, that he does not know as to how many signatures Balasaraswathi had put in the Will, that he does not remember as to whether he had directed the Document Writer to put his signature and that he does not remember as to whether the particulars regarding who had put the thumb impressions and who had prepared the Will were not noted in the document.

19. As rightly pointed out by the learned Counsel for the plaintiff, it is pertinent to note that Ex.B.2-Will contains two thumb impressions, one in the first sheet and the other in the second sheet. But there was no endorsement about the name of the person who had put the thumb impression. D.W.3 – the other attesor of the Will, in her chief-examination would admit that she had not subscribed her signature in the document executed by Avudaiammal, that she had not subscribed her signature in the Will executed by Avudaiammal in favour of Raja - the defendant, that she does not know anything about the Will and that she does not know as to when the Will was written. Though D.W.3 in her chief examination affidavit has reiterated the contentions of the



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defendant raised in the written statement, in cross-examination she had taken a “U” turn and deposed that she had not subscribed her signature in the Will or in the document executed by the said Avudaiammal.

20. It is the specific contention of the plaintiff that the Will is not true and genuine document and the same was fabricated with an ulterior motive and malafide intention to snatch away the entire property of Avudaiammal, and that there were many mysterious and suspicious circumstances in the execution, custody and production of Ex.B.2-Will. Since the plaintiff has taken a specific stand that Ex.B.2 Will was fabricated and bogus Will, the defendant should have taken steps to prove that the thumb impressions found in Ex.B.2 are that of Avudaiammal. Admittedly, the defendant has not taken any steps in this regard and there was no explanation.

21. As rightly pointed out by the learned Counsel for the plaintiff, in the first page, the thumb impression was found on the right hand side and the attesting witness D.W.2's signature finds place on the left hand side and that too, in incomplete manner. Though “S/o” was written, the father's name does not find place below the signature. In the second



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page, as rightly pointed out by the plaintiff's side, there is much space below and over the thumb impression in the second page of the Will.

22. Now coming to the custody of the Will, according to the defendant, his mother Avudaiammal, after executing the Will had entrusted the same with her brother – D.W.2. The defendant in his cross-examination would say that he was not informed about the execution of the Will, while his mother was alive, that his maternal-uncle had informed about the execution of the Will one year after the death of his mother, that his maternal-uncle had not handed over the Will immediately, and that he gave the Will, after filing of the suit and that, that is why, he has not stated anything about the Will in the reply notice.

23. Admittedly, the defendant, after the receipt of pre-suit notice, dated 31.05.2007 under Ex.A.2 and the letter sent to him along with paper publication under Ex.A.5, has not sent any reply to the plaintiff. In the twelfth ground of appeal memorandum, the defendant has alleged that the custodian of the Will had divulged the Will only when the plaintiff filed the suit claiming right in the suit property. Admittedly, the suit was filed on 25.06.2009. As already pointed out, the defendant's



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mother Avudaiammal had died on 01.02.1999. As already pointed out, in the cross-examination, the defendant would admit categorically that he came to know about the Will one year after the death of his mother. D.W. 2, in his cross-examination would say that he gave the Will to the defendant two months after the death of Avudaiammal, that he has not informed about the Will to anybody, that he has not informed about the Will to the plaintiff, though she met him several times. According to D.W.1, the defendant came to know about the Will, two months after the death of Avudaiammal ie., two months after 01.02.1999. Considering the above, the defendant is not sure as to when he came to know about Ex.B. 2-Will and he had taken contradictory stands about the knowledge of the Will and receipt of the Will.

24. It is the specific case of the defendant that himself and his children had sold the suit property to one S.Ilango and R.R.Sathyanarayan on 01.08.2007 for valuable consideration and that they have also executed Power Attorney deed on 01.08.2007 itself permitting them to sell the suit property. Admittedly, the defendant has produced and exhibited the Power of Attorney deed dated 01.08.2007 under Ex.B.3. Though the defendant has alleged that the suit property



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was sold to the said two persons, he has not produced the copy of the sale deed. But on the other hand, in cross-examination, the defendant would say that he has executed power deed only and gave permission to sell the suit property. One of the alleged purchasers viz., Sathyanarayanan, in his chief examination affidavit, has reiterated the version of the defendant that they had purchased the property from the defendant and his children and in the cross-examination, he would say that he purchased the suit property on 01.08.2007 and he has not produced the documents to show the purchase. He would deny the suggestion that he has not purchased the property and he was not in a possession of the suit property.

25. Considering the above and the admission of D.W.4-defendant, it is clearly evident that the suit property was not sold to D.W.1 and Ilango and that the defendant and his children had executed Power of Attorney under Ex.B.3 on 01.08.2007 in respect of the suit property. D.W.1, in cross-examination, would say that he sold the suit property to one Kandasamy in pursuance of Ex.B.3 – Power of Attorney before filing of the suit. But neither the defendant in the written statement nor D.W.1 in his chief examination affidavit has whispered about the alleged sale to the said Kandasamy in pursuance of Ex.B.3 – Power of Attorney deed.



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26. Whatever it is, one other important aspect to be noted is, as rightly pointed out by the learned trial Judge that though the Power of Attorney deed under Ex.B.3 was executed on 01.08.2007, the Will under Ex.B.2 was not at all referred in the said document. But on the other hand, the defendant has alleged that himself and his children were executing the Power of Attorney in respect of the suit property, which was owned by their joint family and the relevant recitals are extracted hereunder:

“ கருவல் நாயக்கன்பட்டியிலிருக்கும் ராமத்தவர் அவர்கள் குமாரர் விருமாண்டத்தவர் என்பவரிடமிருந்து எட்களில் 1 – வது நபரின் தாயாரான ஆவடையம்மாள் பெயரால் 29.01.1965ம் ஆததியில் உதனி S.R.O.1-67-344-345-261/1965 நிர் துதாவசுப்படி கயார்ஜிதமாய் கிரயம் பெற்றுஇ அவர் அனுபவித்து வந்தும்இ அவர் காலங்சென்றமின்இ அவரின் வாரிசுப்படி எட்களுக்கு கிடைத்து அதை நாட்கள் எட்களின் பொதுக்குடும்பத்தில் வைத்து பொதுவில் அனுபவித்து வருகிற தேனடியிற்கண்ட சொத்தை நாட்கள் கிரயம் செய்ய ுவண்டியதிருப்பதில். ”.

27. As already pointed out, the contention of the defendant that he



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came to know about the Will only after the filing of the suit, as per the evidence of D.W.2 and the contradictory stand of the defendant, is proved to be false. Though the defendant was very much aware of the Will even in the year 1999, he has not offered any reason or explanation for not referring the Will in Ex.B.3- Power of Attorney deed.

28. Considering the above facts and circumstances, the finding of the trial Court that Ex.B.2 – Will was fabricated and created for the purpose of the case, cannot be found fault with. Hence, this Court is in entire agreement with the decision of the trial Court that since the said Avudaiammal had died intestate, the plaintiff is entitled to $\frac{1}{2}$ share in the suit property. Consequently, this Court concludes that the Appeal Suit is devoid of merits and the same is liable to be dismissed.

29. In the result, the Appeal Suit is dismissed and the Judgment and Decree dated 29.07.2011, passed by the Principal District Judge, Theni in O.S.No.24 of 2009 is confirmed. Consequently, the connected Miscellaneous Petition is dismissed. The parties are directed to bear their own costs.



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To

1. The Principal District Court, Theni.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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