



S.A.No.1378 of 2011

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.06.2023

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

S.A.No.1378 of 2011

and

M.P. No.1 of 2011

1. Nagendran (died)

2. K. Suresh Kumar

3. N. Vijayarani

...Appellants

Sole appellant died. Appellants 2 and 3 brought on record as LRs of the deceased sole appellant viz., Nagendran vide Court order dated 22.04.2021 made in CMP No.19270/2019 in .A. No.1378/2011.

Vs.

1. V. Vijayalakshmi

2. Rajeswari

3. Savithiri

4. Sankari

5. Canara Bank

Thiruvannamalai

Rep. by its Manager

Kosamada Street

Thiruvannamalai Town

6. Karur Vysya Bank Ltd.

Tiruvannamalai



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- Rep. by its Manager
Sannathi Street
Thiruvannamalai Town
7. Indian Overseas Bank
Tiruvannamalai
Rep. by its Manager
Big Street
Tiruvannamalai Town
8. The Co-operative Urban Bank Ltd.
Tiruvannamalai Branch
Rep. by its Manager
Sannathi Street
Tiruvannamalai Town
9. The Head Post Office
Rep. by its Post Master
Tiruvannamalai Town
10. The Tahsildar
Tiruvannamalai
Tindivanam Road
Tiruvannamalai Town
11. The Municipal Commissioner
Tiruvannamalai Municipal Office
Sannathi Street
Tiruvannamalai

... Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 26.04.2011 passed in A.S. No.2 of 2007, on the file of the District Judge, Thiruvannamalai, upholding the decree and judgment dated 27.10.2006 passed in O.S. No.109 of 2004, on the file of the Principal Subordinate Judge, Thiruvannamalai.



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For Appellants : Mr.K.V. Ananthakrushnan
For R1 : Mr. R. Agilesh
For R2 : No appearance.

JUDGMENT

The 1st appellant/ 1st defendant has filed the present Second Appeal. During the pendency of this appeal, the 1st appellant died and therefore his legal heirs were brought on record as appellants 2 and 3. One Sivagamasundari (1st plaintiff) filed a suit in O.S. No.109 of 2004 on the file of the Principal Subordinate Judge, Tiruvannamalai, for partition of the suit properties into 5 equal shares and to allot one such share to her and also for a Permanent Injunction against the defendants. During the pendency of the suit the said Sivagamasundari died and her daughter V. Vijayalakshmi (2nd plaintiff) was brought on record as legal heir of the plaintiff.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.



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3.The facts of the case of the 1st plaintiff in nutshell are as follows:

- 1) The 1st defendant and the defendants 2 to 4 are the younger brother and sisters of the 1st plaintiff and she had two elder brothers namely Chandrasekar and Thulasidasan Mudaliar. Thulasidasan Mudaliar died during the year 1995. Chandrasekar married one Komalavalli and she deserted him. Though a child was born to them, it died within a few months of its birth.
- 2) The 1st plaintiff occupied the suit A schedule property, which is a Government land, and constructed a thatched house and thereafter demolished the same and constructed a tiled house bearing Door No.99 and also paid property tax and house tax.
- 3) Subsequently, the Government during the year 1970 assigned the said land in favour of the 1st plaintiff. Thus, the A schedule property is the absolute property of the 1st plaintiff.
- 4) The 1st plaintiff's brother Chandrasekar purchased A schedule property from her by virtue of two sale deeds dated 30.03.1992 (Ex.A5 and Ex.A6). However, the house tax assessment and



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electricity service connection stand in the name of the 1st plaintiff till date.

- 5) Chandrasekar is having another concrete terraced house bearing Door No.99-A (B schedule property) and he was keeping the A schedule property under lock and key. The B schedule property is on the southern side of the A schedule property.
- 6) The C schedule property, which is a terraced house bearing Door No.82/2B belonged to Chandrasekar and he leased out the same to the 1st defendant Nagendran on a monthly rent of Rs.1,000/-.
- 7) Chandrasekar was working as an Accountant in the Tamil nadu Electricity Board, Tiruvannamalai Town, and he was earning a sum of Rs.7,000/- per month towards his salary and after his retirement, his pension was at Rs.5,740/- per month.
- 8) The 1st plaintiff has a daughter. Since her brother chandrasekar's wife deserted Chandrasekar and he also did not have any child, he treated the 1st plaintiff's daughter as his foster daughter and also gave her in marriage to one Dhayalan on 31.05.1985.
- 9) Chandrasekar deposited various amounts with the defendants 5 to



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10) Chandrasekar died on 21.04.2004 and his death extract is marked as Ex.A10.

11)The 1st plaintiff and the defendants 1 to 4 are the class II legal heirs.

12)The 1st plaintiff demanded the 1st defendant to divide the suit properties and since the same was not acceded to by the latter, she caused a legal notice on 13.07.2004 (Ex.A11) to the 1st defendant as well as to the defendants 5 to 9.

13)The 1st defendant received the said notice as evidenced by the postal acknowledgment card dated 15.07.2004 (Ex.A12) and sent a reply notice dated 20.07.2004 (Ex.A24), which according to the 1st plaintiff, contained false allegations.

14)According to the 1st defendant late Chandrasekar during his life time executed a Will dated 15.06.1995 (Ex.B8), which according to the 1st plaintiff, is a forged document and the same is fabricated only for the purpose of defeating the claim of the 1st plaintiff.

15) In fact, she (1st plaintiff) alone took care of late Chandrasekar and



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therefore there was no necessity for him to execute a Will in favour of the 1st defendant. Hence the suit.

4.The suit was resisted by the defendants 1 to 4 on the following grounds :

- i. All the allegations contained in the plaint are false.
- ii. Late Chandrasekar got the order of assignment in respect of the A schedule property in the name of the 1st plaintiff out of love and affection and in pursuance of the said order, the house tax assessment stood in the name of the 1st plaintiff.
- iii. The 1st plaintiff did not construct a tiled house as alleged in the plaint and Chandrasekar alone constructed the said house.
- iv. The 1st defendant was taking care of Chandrasekar till his demise and Chandrasekar executed a Holographic Will on 15.06.1995 (Ex.B8) out of his own will and volition and also while he was in a sound state of mind. Under the said Will he had bequeathed all the properties in favour of the 1st defendant .
- v. Since the 1st plaintiff was deserted by her husband Vadivel



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Mudaliar, Chandrasekar and the defendants 1 to 4 permitted her to reside in the A schedule property with her daughter (2nd plaintiff) and Chandrasekar signed in the school records of the 2nd plaintiff Vijayalakshmi only as a guardian.

vi. The 1st plaintiff originally did not stake any claim in respect of A, B and C schedule properties, but only after receiving the reply notice, she had made a claim in respect of all the immovable properties of late Chandrasekar. The B, C and D schedule properties are imaginary.

vii. They, therefore prayed for the dismissal of the suit with compensatory costs.

5. The defendants 5 to 9 in their written statement had contended that all the Fixed Deposits of late Chandrasekar were disbursed to the 1st defendant who was shown as nominee by late Chandrasekar.



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

- i. "Whether the plaintiff is entitled to 1/5 share in the suit properties?
- ii. Whether the suit properties belonged to the 1st defendant as per the Will dated 15.06.1995?
- iii. Whether the Will dated 15.06.1995 is true and valid?
- iv. To what relief the parties are entitled?"

7. In the trial Court, the 2nd plaintiff examined herself and her husband and marked Ex.A1 to Ex.A30. The 1st defendant examined himself and four other witnesses and marked Ex.B1 to Ex.B23. A letter dated 24.08.2006 of the Superintending Engineer, Tamil Nadu Electricity Board, Thiruvannamalai, along with enclosures containing the signatures of late Chandrasekar, was marked as Ex.C1.

8. The learned trial court Judge, after analysing the oral and documentary evidence adduced on both sides, decreed the suit filed by the plaintiffs and passed a preliminary decree for partition of the suit



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properties into 5 equal shares and to allot one such share to the 2nd plaintiff in respect of all the items except Item Nos. 4,5 and 6 of the D schedule properties with costs, vide his decree and judgment dated 27.10.2006 on the ground that the 1st defendant had not proved the Will Ex.B8 to the satisfaction of the Court and therefore, the plaintiff is entitled for partition as stated above.

9. Aggrieved over the decree and judgment of the trial court, the 1st defendant filed an appeal in A.S.No.2 of 2007 before the District Court, Tiruvannamalai. The learned District Judge, Tiruvannamalai, after analysing the oral and documentary evidence adduced on both sides dismissed the appeal filed by the 1st defendant, vide his decree and judgment dated 26.04.2011.

10. Now the present Second Appeal is filed by the 1st defendant. My learned predecessor framed the following substantial questions of law at the time of admitting the present Second Appeal.



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- i. "Have not the Courts below gone wrong in giving advice as to how the Will has to be executed and gave guidelines for drafting the "Will" to disbelieve the execution of the holograph Will Ex.B8?
- ii. Have not the Courts below committed an error in relying on the statement of a hostile witness who admitted the signature of testator to discredit the execution of "Will"?
- iii. Have not the Courts below erred in not exercising the power under Section 165 of the Indian Evidence Act to Cross examine the hostile witness to bring out the truth instead of remaining as a referee. The courts below are fact finding authorities and not mere spectators?
- iv. Have not the Courts below were under wrong illusions and misconception that since good language is not employed in writing the "Will" in English and non registration create a suspicious circumstance to disbelieve the "Will"?
- v. Had not the Courts failed in its duty in not referring the admitted documents and holograph "Will" to handwriting expert under Section 47 of the Indian Evidence Act to decide the "Will", but



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vi. Had not the courts below approached the case with bias and prejudicial?

vii. manner to reject the holograph "Will" rather than to find out the truth?"

11. Heard Mr.K.V. Ananthakrushnan, learned counsel for the appellant and Mr. R. Agilesh, learned counsel for the first respondent.

12. Mr.K.V.Ananthakrushnan, learned counsel for the appellant contended that the "Holograph Will" is one which is wholly in the handwriting of the testator and there is a presumption of regularity and due execution of the said Will. He would further contend that both the courts had not appreciated the oral and documentary evidence adduced on both sides especially when the 1st defendant / appellant had pressed into service the Holographic Will executed by late Chandrasekar.

He also relied on the decision in *Joyce Primrose Prestor (Mrs) (Nee Vas) vs. Vera Marie Vas (Ms) and others reported in (1996) 9*



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Supreme Court Cases 324 and contended that when the Holograph Will Ex.B8 was in the custody of the 1st defendant and one of the attestors had identified the signature of the testator, the courts below should have dismissed the suit filed by the plaintiff. He also relied on the decision in ***Shashi Kumar Banerjee and others vs. Subodh Kumar Banerjee since deceased after him his legal representatives and others*** reported in ***AIR 1964 SC 529*** and contended that suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. Only in such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. His further submission is that the First Appellate Court had given much emphasis for the English language adopted in the Holograph Will (Ex.B8) and on that score alone had held that there are suspicious circumstances surrounding the Will. The First Appellate Court also did not state how the signature of

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Chandraseker differs with his own writings which was marked as Ex.C1.

13. Per contra Mr.R. Agilesh, learned counsel for the first respondent contended that both the courts below, after analysing the oral and documentary evidence, had concurrently held that Ex.B8 Will has not been proved in the manner known to law and decreed the suit in favour of the plaintiffs. According to him, there are no substantial questions of law involved in the present Second Appeal and therefore, the same is liable to be dismissed.

14. When the plaintiff Sivagamasundari (since deceased), the sister of the defendants 1 to 4 had sought for 1/5 share in all the suit properties, the 1st defendant Nagendran had pressed into service the Will dated 15.06.1995 (Ex.B8) and had asserted that late Chandrasekar executed a holograph Will when he was in sound state of mind. The 2nd plaintiff is the daughter of the 1st plaintiff and she was impleaded after the death of the 1st plaintiff.



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14.1. The relationship between the parties is not disputed. The 1st plaintiff and the defendants 1 to 4 are Class-II legal heirs of late Chandrasekar. It is also admitted that Class-I legal heirs of late Chandrasekar predeceased him. It is further admitted that the suit properties except 4,5 and 6 of D schedule properties are all the properties of late Chandrasekar.

14.2. In order to prove the Will, the 1st defendant examined himself and also one of the attestors Rajendran as D.W.2. Though D.W.2 did not support the case of the 1st defendant and turned hostile to him, he admitted the signature and writings of late Chandrasekar on the Will Ex.B8. Rajendran (D.W.2) is the son-in-law of the 2nd defendant Rajeswari. Another attestor Kannan, who is no more is the brother-in-law of the 1st defendant. The contention of the 1st defendant is that though the Will was executed in the year 1995, he came to know of the Will only a week prior to the death of Chandrasekar and during the course of cross examination he admitted that Chandrasekar died on 21.04.2004 and till the year 2004, he was keeping good health and that he alone took him to



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doctor on 20.04.2004. The specific contention of the learned counsel for the appellant is that since Ex.B8 is a Holograph Will a different approach should be made in considering the due execution of the Will and once the signature and the writings of the testator is admitted, the Will has to be held as a true and a valid document.

14.3. The 1st defendant apart from producing the Holograph Will Ex.B8 also had adduced Ex.B9, which is said to be a draft Will prepared by one Viswanathan, a retired Magistrate. The draft Will was prepared in the year 1996 while the disputed Will is dated 15.06.1995. Therefore the contention of the 1st defendant that based on the draft Will the Holograph Will was prepared by late Chandrasekar, cannot be accepted. Apart from that, as already observed, one of the attestors to the Will Ex.B8, namely Rajendran, who was examined as D.W.2 turned hostile to the case of the 1st defendant. However, he admitted the signature of late Chandrasekar in the Holograph Will. The trial court in paragraph 20 had analysed the evidence of D.W.2 and other witnesses and the the observations of the trial court are extracted hereunder:



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"20. Let it be, mere proving the signature alone is not sufficient to hold that the Will is a genuine one. The Will must be executed in the presence of 2 witnesses to the knowledge of the executant, they must attest the document. Ex.B8 Will has been attested by two witnesses one is Kannan, another is Rajendran. One of the witnesses Kannan is no more. Other witness Rajendran has been examined as D.W.2. He failed to support the execution of the Will, on the other hand admits his signature and he pleads ignorance about the execution of the Will. He has been treated as hostile and cross examined by the first defendant. From the evidence of D.W.2 it seems D.W.2 is the son-in-law of the 2nd defendant. In his cross, he says that the first defendant adopted the son of the second defendant by name Suresh Kumar. It appears there were some mis understanding between D.W.2 and his brother-in-law Sureshkumar after the death of his father-in-law



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Kannan. Anyhow D.W.2 has not chosen to support the first defendant. It may be argued that since he was enemically disposed now is avoiding to give evidence. Such an argument appears to be very strong. As already stated mere proving of signature of a witness or the executant is not sufficient to decide the genuineness of the Will. Other surrounding circumstances of this case has to be considered. The alleged Sureshkumar was examined as D.W.3 in this case. He gave evidence and marked some documents to prove the signature of his father Kannan. No doubt the signature of Kannan found in other documents tallies with that of the signature in Ex.B8. The marriage invitation of Sureshkumar has been marked by the plaintiff as Ex.A28, which has been admitted by D.W.1. In the said invitation Sureshkumar has been referred as an adopted son of Chandrasekaran and the first defendant. D.W.1 in his cross with reference to adoption, denies such



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adoption. D.W.2 admits such adoption of Sureshkumar by the first defendant. D.W.3 Sureshkumar in his cross admits that he has been referred as adopted son in his marriage invitation. Admittedly Chandrasekaran as well as the 1st defendant are not having any children. If the Will is genuine, the property will go to the first defendant, in turn it will go to Sureshkumar, the son of the second defendant herein. So the ultimate beneficiary is Sureshkumar (D.W.3 herein). The attestors to Ex.B8 is his father and his brother-in-law. So, the very close relatives of the beneficiary took part in the alleged Ex.B8 Will. So it is one of the suspicious circumstances in the execution of the Will. The said Will might have been created with the help of very close relatives in order to benefit the first defendant in turn his adopted son Sureshkumar. Under such circumstances, merely on the basis of proving the signature of Rajendran, Kannan, we cannot come to the conclusion



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The trial court further held that since the Will itself is a Holograph Will much importance need not be given to the formal proof of execution of the same. However, in order to ascertain whether the writings on the holograph Will are that of late Chandrasekar, his signatures and other writings were called for from the Tamil Nadu Electricity Board where Chandrasekar was working and they were marked as Ex.C1. Ex.C1 contains nearly 20 pages. Both the Courts below had compared the admitted signatures of Chandrasekar in Ex.C1 with Holograph Will Ex.B8 and had held that Ex.B8 is not a true and valid document. The trial court in paragraph No.21 had made the following observations:

"21. The defendant contends that the Will itself is a holograph Will and hence much importance need not be given to the formal proof of execution, etc. The plaintiff denies the Will in entirety. No doubt, the signature found in Ex.B8 tallies with the other admitted signatures of Chandrasekaran. The next question arose is whether the



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Will is a holograph Will of Chandrasekaran or created Holograph Will? For that writings of the Chandrasekaran has to be proved by the propo under of the Will. The defendant produced the Ex.B3 series. In Ex.B3 some handwritten letters and charge papers are available. Whether the said letters were written by the said Chandrasekaran or written by some other person and signed by Chandrasekaran? absolutely there is no evidence. The plaintiff sent for documents from the department where Chandrasekaran worked at last. They were marked as Ex.C1. The said Ex.C1 contains nearly 20 pages. There were difference between the receipts issued by Chandrasekaran in writings. So which one is the admitted hand-writing of Chandrasekar, there is no evidence. The defendant ought to have summoned some of the colleagues or subordinates of the deceased Chandrasekaran to prove the hand writing of



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Chandrasekaran. The defendant filed the Ex.B3, it contains the letter addressed to the Registrar, Garmas Share Registry limited in hand-writing and handing over notes of Chandrasekaran to one Srinivasan, in the hand-writing. Whether the hand-writings are that of Chandrasekaran or not? As already stated, there is no direct evidence. Even on verifying those documents relied by the defendant with the disputed Will, it appears the writings are not one and the same. Especially, the letter 'S' found in Ex.B8 differs from place to place in the said Will. The language used in the Will Ex.B8 is also not upto the mark. The person is qualified upto SSLC need not venture upon executing the Will in English. He can very well execute the Will in his own language. Similarly there is no bar for Chandrasekaran for executing the Will with the help of a scribe, even he can register the Will also. All along he lived alone without any encumbrance and



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commitments. That being so, the execution of a Will with half baked knowledge in English, on the basis of post dated draft Will all would probablise the un-genuineness of Ex.B8 Will. Apart from that the first plaintiff was a destitute woman. The plaintiffs are neglected by Vadivel Mudaliar and they were under the care and custody of Chandrasekaran till his death. Under such circumstances, there is no reason to exclude them from inheriting the properties of Chandrasekaran. Similarly the first defendant is also not having any issues. Under such circumstances, bequeathing the property in favour of his brother who had no male or female descendants also appears to be highly improbable. Ex.B8 Will does not contains the signature of the executant on the first page. So, there is every possibility for creating the Ex.B8 with the signatures of Chandrasekaran to suit the convenience. Under the circumstances, this Court finds it is not safe to



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14.4. The first appellate court on its part had also compared the writings in Ex.C1 with that of Ex.B8 and had clearly held that Ex.B8 was not executed by late Chandrasekar. It is also intriguing to note that D.W.2 (one of the attestors) is the son-in-law of the 2nd defendant, who during the course of cross examination had deposed that the 1st defendant had adopted one Sureshkumar (D.W.3), who is the son of the 2nd defendant. Though Sureshkumar (D.W.3) identified the signature of his father late Kannan, one of the attestors of the Will Ex.B8, a perusal of the entire evidence on record shows that if the Will is held to be true and genuine, the ultimate beneficiary would be Sureshkumar (D.W.3), who is the adopted son of the 1st defendant. D.W.2 also did not speak about the due execution and attestation in Ex.B8. No doubt it is true that the presumption in respect of a holograph Will is all the more a greater presumption. However, in the instant case, both the courts below after comparing the signatures and writings of late Chandrasekar with his



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admitted signatures in Ex.C1 with Ex.B8 had come to the definite conclusion that Ex.B8 Will is not executed by late Chandrasekar. The decision in *Joyce Primrose Prestor (Mrs) (Nee Vas) vs. Vera Marie Vas (Ms) and others* (cited supra) may not apply to the facts of the present case since in the said case, both the courts below had concurrently held that the holographic Will was executed by the testatrix in sound state of mind and the High Court had interfered with the same. In the said decision it is held that much importance need not be given with regard to the formal proof of execution of Holograph Will. In fact in the said case, the execution of the Will (writings and signatures on the holographic Will) was admitted by the opposite party, but, the High Court held that there are certain suspicious circumstances attendant on the Will and such an observation made by the High Court was set aside by the Supreme Court.

14.5 The learned counsel for the appellant did not show as to where the assessment of the Courts below had gone wrong. His only contention is that one of the attestors had admitted the signature of the



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testator and that the son of the another attesor was examined as D.W.3.

When both have admitted the signature of late Chandrasekar, both the courts below should have held that Ex.B8 Will is proved by the 1st defendant. Such a reassessment of the evidence cannot be done under Section 100 CPC, moreso, when the assessment and appreciation of evidence by both the courts below cannot be said to be perverse. It is now well settled that concurrent findings of facts of trial court and first appellate court cannot be interfered with by the High Court in exercise of its jurisdiction under Section 100 CPC. The power of High Court to interfere in Second Appeal under Section 100 CPC is limited solely to decide substantial questions of law if at all the same arises in the case. The Supreme Court in catena of decisions held that where finding of facts by the lower appellate court are based on evidence, the High Court, in Second Appeal cannot substitute its own findings on re appreciation of evidence merely on the ground that another view was possible. In the instant case, there is no mis appreciation of evidence as contended by the learned counsel for the appellant. The trial court had the advantage of seeing the witness and watching his demeanour and had given a definite



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finding of fact and it was upheld by the first appellate court.

15. In view of the reasons stated by me, the Second Appeal is dismissed.

16. In the result,

i. the second appeal is dismissed. No costs.

Consequently, connected civil miscellaneous petition is closed.

ii. the decree and judgment dated 26.04.2011 passed in A.S. No.2 of 2007, on the file of the District Judge, Thiruvannamalai, and the decree and judgment dated 27.10.2006 passed in O.S. No.109 of 2004, on the file of the Principal Subordinate Judge, Thiruvannamalai, are upheld.

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R. HEMALATHA, J.
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To

1. The District Judge, Thiruvannamalai,
2. The Principal Subordinate Judge, Thiruvannamalai.
3. The Section Officer, VR Section, High Court, Madras.

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and

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