



A.S.(MD)Nos.44, 45, 46 and 170 of 2011

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
08.12.2022	04.01.2023

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE SUNDER MOHAN**

A.S.(MD)Nos.44, 45, 46 and 170 of 2011

and

M.P.(MD)Nos.1 and 2 of 2011 in A.S.(MD)No.44 of 2011

and

M.P.(MD)Nos.1 and 2 of 2011 in A.S.(MD)No.45 of 2011

and

M.P.(MD)No.1 of 2011 in A.S.(MD)No.46 of 2011

and

M.P.(MD)No.1 of 2011 in A.S.(MD)No.170 of 2011

A.S.(MD)No.44 of 2011:-

Sukumari Prathibha

... Appellant

vs.

- 1.E.Ponnuswamy Nadar
[Died, Memo filed vide USR.5030/2015]
- 2.Kumari Thangam, W/o.E.Ponnusamy
- 3.Indira Priyadharshini, D/o.E.Ponnusamy
- 4.Raniki Jhancy Lakshmi Bai, D/o.E.Ponnusamy
[R2 to R4 are LR.s. of the deceased R1; and R3 and R4 are
declared as majors as per the order dated 04.01.2023]
- 5.Selvan Swamy Dhas Raman, S/o.Chenbaga Raman Nadar
- 6.Pancheeswaran @ Bose, S/o.Chenbaga Raman Nadar

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7.Seetha Raman @ Raja, S/o.Chenbaga Raman Nadar

8.Aijaya Kumar, S/o.Sukumarakurup

9.B.Mini, D/o.Omana Amma

... Respondents

PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 21.02.2011, made in O.S.No.98 of 2008, on the file of the District Court, Kanyakumari at Nagercoil.

For Appellant : Mrs.N.Krishnaveni
Senior Counsel
for Mr.C.Arul Vadivel @ Sekar

For Respondents 2 to 4 : Mr.G.Prabhu Rajadurai

For 5th Respondent : Foreign Envelope Due

For Respondents 6 to 9 : No Appearance

A.S.(MD)No.45 of 2011:-

Sukumari Prathibha

... Appellant

vs.

1.E.Ponnuswamy Nadar

[Died, Memo filed vide USR.5031/2015]

2.Selvan Swamy Dhas Raman, S/o.Chenbaga Raman Nadar ... Respondents

PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 21.02.2011, made in O.S.No.23 of 2009, on the file of the District Court, Kanyakumari at Nagercoil.



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For Appellant

: Mrs.N.Krishnaveni
Senior Counsel
for Mr.C.Arul Vadivel @ Sekar

For 2nd Respondent

: Foreign Envelope Due

A.S.(MD)No.46 of 2011:-

Sukumari Prathibha

... Appellant

vs.

1.E.Ponnuswamy Nadar

[Died, Memo filed vide USR.5032/2015]

2.Kumari Thangam

3.Indira Priyadharshini

4.Raniki Jhancy Lakshmi Bai

[R2 to R4 are LR's. of the deceased R1; and R3 and R4 are
declared as majors as per the order dated 04.01.2023]

... Respondents

PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 21.02.2011, made in O.S.No.88 of 2010, on the file of the District Court, Kanyakumari at Nagercoil.

For Appellant

: Mrs.N.Krishnaveni
Senior Counsel
for Mr.C.Arul Vadivel @ Sekar

For Respondents 2 to 4 : Mr.G.Prabhu Rajadurai

A.S.(MD)No.170 of 2011:-

1.E.Ponnuswamy Nadar

[Died, Memo filed vide USR.4947/2015]

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2.Kumari Thangam, W/o.E.Ponnuswamy

3.Indira Priyadharshini

D/o.E.Ponnuswamy & Kumari Thangam

4.Ranikia Jhancy Lakshmi Bai

D/o.E.Ponnuswamy & Kumari Thangam

[Appellants 2 to 4 are LR's. of the deceased first appellant;
and appellants 3 and 4 are declared as majors
as per the order dated 04.01.2023]

... Appellants

vs.

1.Sukumari Prathibha, W/o.E.Ponnuswamy

2.Selvan.Swamy Dhas Raman, S/o.Chenbagaraman

3.Pancheeswaran & Bose, S/o.Chenbagaraman

4.Seetharaman @ Raja, S/o.Chenbagaraman

5.Aijaya Kumar, S/o.Sukumarakurup

6.B.Mini, D/o.Omana Amma

... Respondents

PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 21.02.2011, made in O.S.No.98 of 2008, on the file of the District Court, Kanyakumari at Nagercoil.

For Appellants 2 to 4 : Mr.G.Prabhu Rajadurai

For 1st Respondent : Mrs.N.Krishnaveni
Senior Counsel
for Mr.C.Arul Vadivel @ Sekar

For Respondents 2 & 3 : Dismissed. vide order, dated 04.07.2018.

For Respondents 4 to 6 : No Appearance



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COMMON JUDGMENT

**DR.G.JAYACHANDRAN, J.
and
SUNDER MOHAN, J.**

Prelude:-

E.Ponnuswamy Nadar and his erstwhile wife Sukumari Prathibha are the main contesting parties in these batch of four First Appeals arising from three Original Suits, namely, O.S.Nos.98 of 2008 and 23 of 2009, filed by E.Ponnuswamy Nadar and O.S.No.88 of 2010 filed by Sukumari Prathibha. The ancillary parties to the suits are the second wife of E.Ponnuswamy Nadar, Kumari Thangam and her two children, namely, Indira Priyadharshini and Raniki Jhancy Lakshmi Bai. They are all sailing with E.Ponnuswamy Nadar.

2. Whereas Sukumari the erstwhile wife of E.Ponnuswamy Nadar and his nephew Selvan Swamydhas Raman, claiming the joint Power of Attorneys for E.Ponnuswamy Nadar and the parties, who have purchased the properties from them on the strength of a General Power of Attorney, alleged to have been executed before a Solicitor and Notary at Australia on 14.05.2003, sail together with Sukumari Prathibha.



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Facts relevant in each of the suits and its outcome:-

3. The background for this litigation is that E.Ponnuswamy Nadar married Sukumari Prathibha on 10.12.1969. They were gainfully employed at Uganda as Teachers, then, shifted their family to Australia, where Sukumari Prathibha continued her teaching profession and E.Ponnuswamy Nadar quit the teaching profession, engaged himself in restaurant business. They invested the income in the properties located at Kollam District, State of Kerala, Kanyakumari District and Chengalpattu District, both in the State of Tamil Nadu. The properties were purchased jointly in the name of E.Ponnuswamy Nadar and Sukumari Prathibha. When their marital relationship got strained, it ended up in dissolution of marriage by the decree of divorce passed by the Family Court, Australia, on 13.09.1990.

4. In respect of their properties at Australia, it appears that they have settled it by way of a compromise decree, which was passed subsequently. In the circumstances, E.Ponnuswamy Nadar has left Australia and came down to India, married Kumari Thangam as his second wife, on 07.04.1993. Ten years later, in



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the end of the year 2002, he went back to Australia to settle all his financial matters. At that time, it is stated that he suffered Parkinson disease and got admitted at Rozelle Hospital, Car Church & Glover Streets, Leichhardt, New South Wales - 2040, Australia and got discharged on 17.05.2003. When he was admitted in the Hospital, he was taken care by his erstwhile wife Sukumari Prathibha. Few days before his discharge from the hospital, a General Power of Attorney was executed by E.Ponnuswamy Nadar on 14.05.2003 in favour of his erstwhile wife Sukumari Prathibha and his nephew Selvan Swamydhas Raman.

5. The said General Power of Attorney was executed in the presence of Tom A. Doumanis, Public Notary, Level 7, 9 Hunter Street, Sydney, New South Wales 2000, Australia. He has also given the statutory declaration to that effect and annexed his Notarial Witness Certificate. The said General Power of Attorney executed in Australia was presented before the Sub-Registrar Office, Periamedu, Chennai in India, for collection of stamp duty. On 22.02.2005 collecting Rs.100/-, after adjudication, Certificate under Section 32 of the Indian Stamp Act was granted to this General Power of Attorney.



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6. E.Ponnuswamy Nadar first filed a suit before the Principal Munsif Court, Kollam, in C.S.No.743 of 2003 against Selvan Swamydhas Raman, Sukumari Prathibha, Ajayakumar and B.Mini in respect of Item No.1 of the property mentioned in O.S.No.98 of 2008. The said property is located at Kollam. That suit was filed for declaration and possession of the property, which was jointly purchased in the name of E.Ponnuswamy Nadar and his erstwhile wife Sukumari Prathibha under the Sale Deed dated 06.02.1984. In that suit, E.Ponnuswamy Nadar alleged that Selvan Swamydhas Raman claiming himself as Power Agent of E.Ponnuswamy Nadar and Sukumari Prathibha, had sold the property to Ajayakumar and B.Mini. Therefore, claiming that the Sale Deed, dated 09.06.2003, executed by Selvan Swamydhas Raman in favour of Ajayakumar and B.Mini, as null and void, laid the suit for declaration and other consequential reliefs. However, the said suit later came to be dismissed for default and the Application filed by E.Ponnuswamy Nadar for restoration of the said suit was also dismissed.

7. The suit in O.S.No.98 of 2008 filed before the District Court, Kanyakumari @ Nagercoil, 19 properties which were purchased jointly in the



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name of E.Ponnuswamy Nadar and Sukumari Prathibha at various places were shown in the schedule of the plaint. The property in Item No.1 situated at Kollam and subject matter of C.S.No.743 of 2003 and Item Nos.2 to 4, which are situated at Colachel and subject matter of O.S.No.50 of 2006, pending on the file of the Sub-Court, Padmanabhapuram, were also included in the suit only to emphasis E.Ponnuswamy Nadar's right over the same, but no particular relief sought in respect of properties in Item Nos.1 to 4 in the subsequent suit. E.Ponnuswamy Nadar sought half share in respect of other properties enumerated as Item Nos.5 to 19 as per the title document.

8. The suit in C.S.No.743 of 2003 filed in Principal Munsif Court, Kollam, in respect of Item No.1 as pointed out earlier, was dismissed for default. The suit in respect of Item Nos.2 to 4 filed before the Sub-Court, Padmanabhapuram, was taken on file as O.S.No.50 of 2006 and later, transferred to the District Court, Kanyakumari District and re-numbered as O.S.No.23 of 2009. The properties shown as Item Nos.2 to 4 are located at Colachel, Manavalakurichi Village. In that suit, E.Ponnuswamy Nadar contended that after divorcing Sukumari Prathibha as per Australian law, he returned to India and married Kumari Thangam on 07.04.1993. Through her, two daughters namely, Indira



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Priyadharshini and Raniki Jhancy Lakshmi Bai were born. At the time of divorce, there was a oral partition between him and his first wife and the properties purchased jointly in their names were given to him. He executed a Will in favour of his two daughters on 26.12.2003, in respect of his half share in Item Nos.2 and 3. In respect of Item No.4, he executed a Settlement Deed in favour of his second wife, Kumari Thangam. In respect of his remaining half share, he had also executed a Will in favour of his second wife, Kumari Thangam on 06.09.2005.

9. Alleging that there was a oral partition effected between him and his co-owner Sukumari Prathibha, E.Ponnuswamy Nadar sought for the relief to demarcate as per the oral partition as 'A' and 'B'. He has further alleged that there is a dwelling house in the said property and renovation is going on in the building without his permission, taking advantage of his illness and admission in the Hospital. On enquiry, he came to know that Selvan Swamydhas Raman, at the instance of Sukumari Prathibha, is carrying on alteration in the said property. On further verification, he has come to know that a settlement deed been executed by Sukumari Prathibha and Selvan Swamydhas Raman in favour of Sukumari Prathibha on 09.03.2005, on the file of the Sub-Registrar Office, Colachel, and the same has been executed on the strength of the Power of Attorney alleged to

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have been executed at Australia by E.Ponnuswamy Nadar in favour of Sukumari Prathibha and Selvan Swamydhas Raman on 22.02.2005. Alleging that he has not executed any Power of Attorney or authorized anybody to execute any document in favour of any person, the Settlement Deed executed by Sukumari Prathibha in favour of Selvan Swamydhas Raman is void, hence, the suit.

10. On her part, Sukumari Prathibha has filed O.S.No.88 of 2010 against E.Ponnuswamy Nadar, his second wife Kumari Thangam and her two children, Indira Priyadharshini and Raniki Jhancy Lakshmi Bai, for a decree of partition and possession of half share over the properties measuring an extent of 63 ½ cents of land and building situated at Mondaikaadu Panchayat, which was held by E.Ponnuswamy Nadar and Sukumari Prathibha jointly by virtue of the Gift Deed, dated 09.11.1981 and a Sale Deed, dated 15.09.2004.

11. According to Sukumari Prathibha, who is the plaintiff in O.S.No.88 of 2010, out of 77 cents of land, 13.5 cents of land is the ancestral property of E.Ponnuswamy Nadar and the remaining 63 ½ cents of land vest with herself and E.Ponnuswamy Nadar jointly by virtue of a Gift Deed and Sale Deed. Alleging



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that without her knowledge, E.Ponnuswamy Nadar has executed a Settlement Deed in respect of this property in favour of his second wife and her two children on 15.09.2004, which is void in the eye of law. Therefore, ascertaining her half share over 63 ½ cents of land as a co-owner, the said suit has been filed.

12. According to E.Ponnuswamy Nadar as a plaintiff in O.S.Nos.98 of 2008 and 23 of 2009, he worked as a Teacher in Uganda and an Entrepreneur in Australia amassed wealth and invested in properties, which are subject matter of the suits. He divorced Sukumari Prathibha as per Australian law, came to India and married Kumari Thangam and begotten two children. When he went to Australia to dispose of his assets and settle the financial matters, in connivance with the local authorities, Sukumari Prathibha and his nephew Selvan Swamydhas Raman admitted him in the Hospital as if he is mentally ill and obtained documents. The alleged General Power of Attorney, dated 14.05.2003 and signatures in blank papers were obtained from him before he was taken to India. Selvan Swamydhas Raman, who escorted him to India grabbed all his travel documents and left him in his second wife's house. He misusing the documents executed at Australia, sold the property shown as Item No.1, which is situated at



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Kollam, as if E.Ponnuswamy Nadar had executed a General Power of Attorney in favour of him and Sukumari Prathibha on 14.05.2003 at Australia and also created a Settlement Deed based on a fake Power of Attorney alleged to have been executed by E.Ponnuswamy Nadar on 22.02.2005.

13. The suits filed by E.Ponnuswamy Nadar has been contested by Sukumari Prathibha on the ground that the properties were jointly purchased in their names from and out of her earnings as a Headmistress in Uganda and as a licensed Teacher in Australia. She alleges that E.Ponnuswamy Nadar is a man of vices, womanizer and had no income worthy for investment. Due to his vices, he fell under the scanner of Police for offence of bigamy and to safeguard him, she consented for divorce and the same is only a paper decree.

14. Sukumari Prathibha, who is one of the defendants in O.S.No.98 of 2008 and O.S.No.23 of 2009 [formerly O.S.No.50 of 2006] and the plaintiff in O.S.No. 88 of 2010, alleges that taking advantage of the paper decree of divorce, E.Ponnuswamy Nadar came to India and at the instigation of Kumari Thangam, created documents depriving her share in the property. It is also her claim that the two daughters of Kumari Thangam were not born to E.Ponnuswamy Nadar.



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15. The sum and substance of the litigation is that the properties, which were purchased jointly in the name of E.Ponnuswamy Nadar and Sukumari Prathibha were dealt by E.Ponnuswamy Nadar solely alleging that there was a oral partition. Whereas, E.Ponnuswamy Nadar has also executed General Power of Attorney Deed in favour of Sukumari Prathibha and Selvan Swamydhas Raman, at Australia in the presence of Tom A.Doumanis, Public Notary, on 14.05.2003 and subsequently, registered at the Sub-Registrar Office, Periamedu in India. Based on this General Power of Attorney, Sukumari Prathibha and Selvan Swamydhas Raman have ventured to alienate the suit properties. Who among the two had through evidence probabilized their case? is the point to be taken up for consideration.

16. Out of 19 items of properties listed in O.S.No.98 of 2008, Item No.1 is the subject matter of the suit in C.S.No.743 of 2003, on the file of the Principal Munsif Court, Kollam and Item Nos.2, 3 and 4 are the subject matter of O.S.No. 50 of 2006, on the file of the Sub-Court, Padmanabhapuram, which was later transferred to the District Court, Kanyakumari @ Nagercoil and re-numbered as O.S.No.23 of 2009. The subject matter of O.S.No.88 of 2010, on the file of District Court, Kanyakumari @ Nagercoil, is in respect of 63 ½ cents of land,

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situated at Mondaikaadu Panchayat. Partition relief sought in respect of the properties not covered under the other two suits.

17. The trial Court has framed issues in all the three Original Suits separately based on the pleadings and conducted joint trial. The trial Court has recorded common evidence in all the three Original Suits and the Interlocutory Applications filed therein. E.Ponnuswamy Nadar, who is the plaintiff in two Original Suits [O.S.Nos.98 of 2008 and 23 of 2009], mounted the witness box and examined as P.W.1 and one Thiraviam Nadar, P.Kumari Thangam, R.Gopalakrishnan and Rajendran were examined as P.W.2 to P.W.5 respectively. 42 Exhibits were marked on the side of the plaintiffs. The first defendant Sukumari Prathibha in O.S.No.98 of 2008 [plaintiff in O.S.No.88 of 2010] was examined as D.W.1 and five other witnesses were examined on behalf of the defendants. 30 Exhibits were marked on the side of the defendants. The Commissioner's Report and Plans were marked as Exs.C.1 to C.4.

18. The Court below in so far as Item No.1 is concerned, which is the subject matter of the suit filed before the Principal Munsif Court, Kollam,



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dismissed the relief claimed by E.Ponnuswamy Nadar as against the defendants 5 and 6 in the suit in O.S.No.98 of 2008, on the ground that they are the subsequent purchasers of the property from the Power Agent Selvan Swamydhas Raman, they were impleaded subsequent to the filing of the suit. The prior suit filed at Kollam will act as a bar under Order II Rule 2 of C.P.C. even though the suit dismissed for default under Order IX Rule 9 of C.P.C.

19. The trial Court held that while both were arrayed as defendants in the suit initiated at Principal Munsif Court, Kollam, in C.S.No.743 of 2003, for declaration and possession, they were not impleaded as defendants originally when the composite suit filed, but subsequently, they were impleaded and arrayed as defendants 5 and 6 in O.S.No.98 of 2008. Therefore, no relief can be sought against them. However, as against the other two defendants namely, Sukumari Prathibha and Selvan Swamydhas Raman, the trial Court allotted the property to Sukumari Prathiba and directed her and Selvan Swamydhas Raman to pay E.Ponnuswamy Nadar half of the sale consideration received from the defendants 5 and 6.

20. In respect of Item Nos.6 and 7, which are housing sites at Mudichur, the Court below taking note of the fact that two Plots out of four Plots purchased



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WEB jointly have already been sold by E.Ponnuswamy Nadar solely. Therefore, the remaining two Plots, which were jointly purchased along with the first defendant Sukumari Prathibha, will be her share. Hence, Sukumari Prathibha can have absolute right over Item Nos.6 and 7 of the property. In respect of Item Nos.5 and 8 to 19, the trial Court granted the relief of half share in the properties as prayed for.

21. Item Nos.2 to 4, which are subject matter of O.S.No.23 of 2009 [formerly O.S.No.50 of 2006], the trial Court party allowed the relief sought for and declared that the plaintiff E.Ponnuswamy Nadar is entitled for half share in these three properties, which includes a building in Item No.4.

22. In respect of the suit in O.S.No.88 of 2010 filed by Sukumari Prathibha against E.Ponnuswamy Nadar and others, the trial Court taking note of the fact that out of 63 ½ cents of land, only 35 cents of land has been purchased jointly by E.Ponnuswamy Nadar and Sukumari Prathibha and therefore, she is entitled for half share in 35 cents of the land.



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- i) to refer the daughters of Kumari Thangam for DNA test;
- ii) Sukumari Prathibha not to use the surname E.Ponnuswamy Nadar;
- iii) to strike off the pleading of E.Ponnuswamy Nadar; and
- iv) the counter claim made by E.Ponnuswamy Nadar were all declined by the trial Court.

Submissions by the learned Senior Counsel Tmt.N.Krishnaveni appearing for Sukumari Prathibha/appellant in A.S.(MD)Nos.44 to 46 of 2011 and first respondent in A.S.(MD)No.170 of 2011:

24. Being aggrieved by the common judgment and preliminary decree passed by the trial Court in O.S.Nos.98 of 2008, 23 of 2009 and 88 of 2010, Sukumari Prathibha has preferred A.S.Nos.44 to 46 of 2011 respectively, on the ground that the trial Court erred in invalidating the General Power of Attorney executed at New South Wales, Australia, in accordance with the Conveyancing Act, 1919 of New South Wales, Australia. The said Deed marked as Ex.B.10 got registered in India as per Section 33(1)(c) of the Registration Act, 1908. Since the Deed was executed before the Notary Public, it is to be admitted and



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recognized without any further proof as per Section 33(4) read with Section 85 of the Indian Evidence Act. Initially, the General Power of Attorney was presented and executed before the Solicitor of Supreme Court of New South Wales, Australia and the same was registered and authenticated by a Certificate of Notary. While so, the General Power of Attorney executed in favour of Sukumari Prathibha and Selvan Swamydhas Raman is valid and admissible in evidence as a public document in accordance with Sections 74 and 78(4) of the Indian Evidence Act. The trial Court erred by ignoring Ex.B.10 General Power of Attorney and Ex.B.15 and Ex.B.16 Settlement Deeds, which were registered based on the General Power of Attorney.

25. Regarding Item No.5 in the suit schedule, it is contended that though E.Ponnuswamy Nadar himself has agreed to transfer his interest in the said property in favour of Sukumari Prathibha, the trial Court has omitted to consider his admission and erred in declaring E.Ponnuswamy Nadar is entitled for half share in Item No.5 along with Item Nos.8 to 19. Similarly, in respect of Item Nos. 6 and 7 Plots, situated at Mudichur, having admitted that two other Plots, which are larger extent, being unilaterally sold by E.Ponnuswamy Nadar and taking note



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of the fact that the remaining Plots have been exclusively given to Sukumari Prathibha/the appellant in A.S (MD) Nos. 44 to 46 of 2011 and the first respondent in A.S.(MD)No.170 of 2011, the trial Court failed to note that larger share has been sold by E.Ponnuswamy Nadar, which are Plot Nos.66 and 67, totally measuring two grounds and 1702 sq.ft., whereas two other grounds left to co-owner in Plot Nos.68 and 69, measures only two grounds and 1049 sq.ft. He sold more land [653 sq.ft.] and therefore, a proper adjudication ought to have been done by the trial Court, which the trial Court has miserably failed to do so. It is further contended that in this connection, E.Ponnuswamy Nadar has agreed to transfer his interest in Item No.5, Plot No.80, Rajendra Apartments, in Puliyoor Village, Kodambakkam, Chennai, to compensate the extra land he sold in Mudichur, but this aspect has not been taken note by the Court below.

26. The learned Senior Counsel appearing for Sukumari Prathibha/appellant further contended that the trial Court ought not to have rejected the General Power of Attorney executed in Australia, which is a genuine and properly authenticated document by a Certificate of the Notary and subsequently, validated in India on payment of stamp duty. The property shown in Item Nos.1 to 5 were transferred on the strength of the said General Power of



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Attorney and therefore, the transactions made based on the valid General Power of Attorney ought not to have been nullified. Further, the observation of the trial Court that all these properties were jointly possessed by E.Ponnuswamy Nadar along with Sukumari Prathibha itself is a factual error.

27. In respect of Item No.1, the direction to Sukumari Prathibha to pay 50% of the sale consideration received has also been questioned on the ground that the trial Court failed to take note of the suit filed by E.Ponnuswamy Nadar before the Principal Munsif Court, Kollam, and the same has been dismissed for default. While so, the pleadings on behalf of Sukumari Prathibha in respect of Item No.1 that on the strength of General Power of Attorney given by E.Ponnuswamy Nadar, the property was sold to the existing tenants, who were impleaded as defendants 5 and 6 (Ajayakumar and B.Mini) and account was rendered to him long back by Selvan Swamydhas Raman ought to have accepted by the trial Court.

28. Further, the learned Senior Counsel contended that the trial Court after setting aside the Settlement Deeds executed under Exs.B.15 and B.16 as void, ought not to have directed Sukumari Prathibha to remove the superstructure put



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up in Item No.4 of the suit property. It is also contended that the Discharge Letter, dated 17.05.2003, issued by Rozelle Hospital, New South Wales, marked as Ex.A.35 has not been properly appreciated while considering the validity of the General Power of Attorney executed by E.Ponnuswamy Nadar, when he was in the Hospital. The Discharge Letter refers about the execution of General Power of Attorney to settle the financial matters of E.Ponnuswamy Nadar, which vouchsafe the genuineness of the General Power of Attorney [Ex.B.10]. While so, the trial Court erred in declaring the General Power of Attorney as invalid. The building in Item No.4 in Colachel was constructed by Sukumari Prathibha and to prove the same, Exs.B.17 to B.21 were marked, which are building tax receipts and electricity bills. However, the trial Court has not appreciated these documents properly, which indicate the exclusive possession of the property shown in Item No.4 of the schedule with Sukumari Prathibha.

29. The learned Senior Counsel further submitted that Exs.B.13 and B.14 Settlement Deeds executed by E.Ponnuswamy Nadar in favour of Kumari Thangam and her daughters on 26.12.2003 admits that Item Nos.8 to 19 jointly belongs to him and his first wife Sukumari Prathibha. Obviously, he did not include Item Nos.2 to 4, since he was aware of the fact that the same has been



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orally given to Sukumari Prathibha as a sign of gratitude for all the financial help she extended when he was taking treatment in Hospital for his Parkinson disease. Therefore, Item Nos.2 to 4 have been sought for division, by filing a separate suit at Sub-Court, Padamanabhapuram and these properties are shown in the subsequent suit.

30. The appellant in A.S.(MD) Nos. 44 to 46 of 2011 (Sukumari Prathibha) particularly concerned about the building in Item No.4, which alleged to have been constructed by Sukumari Prathibha. It is apprehended that by the decree, the building, which was constructed exclusively with her source of income, will be demolished.

31. Regarding the partial decree passed in O.S.No.88 of 2010, the suit which was filed by Sukumari Prathibha in respect of 63 ½ cents of land, it is contended that the trial Court erred in allotting half share in 35 cents of land out of 63 ½ cents of land, without appreciation of evidence and failed to note that the building has been constructed on the piece of land jointly purchased by her and E.Ponnuswamy Nadar. While she is entitled for the entire building, which stands in the said land, since she has constructed the building at her own cost without



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any reference to the building. In respect of her suit and the character of the suit property, the trial Court, on considering the evidence, has observed that the claim of Sukumari Prathibha as plaintiff in the suit in respect of the property, which is subject matter in O.S.No.88 of 2010, though claimed to have been purchased from and out of the joint income and construction so put up from the sale proceeds of the property held by them in Australia, no evidence has been laid before the trial Court to appreciate the said claim. The evidence of D.W.5- Thanganadar, own brother of Sukumari Prathibha was not held to be reliable and he admits that he has animosity against E.Ponnuswamy Nadar.

32. Out of 77 cents of land, 13 ½ cents of land is admittedly the ancestral property of E.Ponnuswamy Nadar and out of remaining 63 ½ cents of land, only 35 cents vest with herself and E.Ponnuswamy Nadar jointly by virtue of the Sale Deed. Accepting the allegation without her knowledge, E.Ponnuswamy Nadar has executed a Settlement Deed in respect of this property in favour of his second wife and her two children on 15.09.2004, which is void in the eye of law insofar as her half share in 35 cents, ascertaining her half share over 35 cents of land as a co-owner, decree has been passed.



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33. Under the strength of Exs.B.23 and B.24, only 35 cents of land appeared to have been purchased jointly by E.Ponnuswamy Nadar and Sukumari Prathibha and for the rest of the lands, the said Sukumari Prathibha has no right or title. Taking note of the fact that E.Ponnuswamy Nadar under Ex.B.22 has executed the Settlement Deed in favour of Indira Priyadharshini and Raniki Jhancy Lakshmi Bai, dated 15.09.2004, considering the fact that the co-owner can challenge the alienation done without her consent and seek for partition without seeking cancellation of the said sale deed effecting alienation without her knowledge, the alienation to the extent of 35 cents alone was nullified.

Submissions of Thiru.G.Prabhu Rajadurai, learned Counsel appearing for the appellants 2 to 4 in A.S.(MD)No.170 of 2011/respondents in other three appeals.

34. E.Ponnuswamy Nadar/the first appellant in A.S.(MD)No.170 of 2011 and three others also had a grievance against the common judgment and decree passed in O.S.Nos.98 of 2008, 23 of 2009 and 88 of 2010 insofar as the disallowed portion in respect of Item No.1 and Item Nos.6 and 7. Alleging that the trial Court erred in holding the suit against the defendants 5 and 6



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(Ajayakumar and B.Mini), the subsequent purchasers of Item No.1 of the suit schedule property as barred by limitation by virtue of Order IX Rule 9 of C.P.C. Regarding rejection of his plea, seeking declaration over the entire property contrary to the fact that the properties were purchased by him and Sukumari Prathibha, challenges the disallowed portion of the plaint and also the dismissal of his petition to strike out certain portions of the plaint, by filing A.S.(MD)No. 170 of 2011 before this Court.

35. Pending appeals, E.Ponnuswamy Nadar died on 31.03.2015 leaving behind his second wife Kumari Thangam and two daughters Indira Priyadharshini and Raniki Jhancy Lakshmi Bai [Respondents 2 to 4 in A.S.(MD)Nos.44 and 46 of 2011 and Appellants 2 to 4 in A.S.(MD)No.170 of 2011] as his legal heirs and Memos, dated 04.11.2015 and 16.11.2015, have also been filed to that effect. The said Memos are taken on record. Since already the legal heirs are parties to the proceedings, no further steps are required to bring them on record. Perusal of records reveals that at the time of filing the suit in O.S.No.98 of 2008, the plaintiffs 3 and 4/Respondents 3 and 4 in A.S.(MD)Nos.44 and 46 of 2011 and Appellants 3 and 4 in A.S.(MD)No.170 of 2011, namely, Indira Priyadharshini and Raniki Jhancy Lakshmi Bai, were aged about 9 years and 7 years respectively



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and therefore, they were represented by their Mother. Now, we are in 2023, by this time, they would have attained majority. The learned Counsels also submitted that they have attained majority. In view of the above, the respondents 3 and 4 in A.S.(MD)Nos.44 and 46 of 2011 and the appellants 3 and 4 in A.S. (MD)No.170 of 2011, namely, Indira Priyadharshini and Raniki Jhancy Lakshmi Bai are declared as majors.

Points for determination:-

36. After hearing the above submissions of the learned Counsels, the following points for determination framed:-

(i) Whether the trial Court is correct in holding that the properties purchased jointly in the name of E.Ponnuswamy Nadar and Sukumari Prathibha are not the exclusive properties of E.Ponnuswamy Nadar as claimed in his plaint?

(ii) Whether the trial Court erred in deciding the merits of the case in respect of Item No.1 in the suit schedule of plaint in O.S.No.98 of 2008, when the earlier suit in C.S.No.743 of 2003 filed by the plaintiff E.Ponnuswamy Nadar before the Principal Munsif Court, Kollam, dismissed for default?



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WEB COPY (iii) Whether the trial Court is correct in holding the General Power of Attorney marked as Ex.B.10 executed at Australia as invalid in respect of the properties in India?

(iv) Whether the trial Court erred in disallowing the claim of the plaintiff E.Ponnuswamy Nadar, seeking half share in Item Nos.6 and 7 of the suit schedule property?

(v) Whether the trial Court erred in allowing the claim of Sukumari Prathibha in respect of the property mentioned in her suit schedule in O.S.No.88 of 2010 restricting 35 cents and disallowing in respect of remaining 28 ½ cents?

37. The trial Court substantially held in favour of E.Ponnuswamy Nadar who could demonstrate the General Power of Attorney marked as Ex.A.29 = Ex.B.10 is not an enforceable deed in India. While appreciating the evidence and for arriving at the said conclusion, the trial Court has considered the legality of the General Power of Attorney executed by E.Ponnuswamy Nadar while he was in the Hospital at Australia and the conduct of his erstwhile wife and his nephew, who made use of the General Power of Attorney to create encumbrance to the property, which has been jointly held by E.Ponnuswamy Nadar and Sukumari



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Prathibha. Taking note of the fact that the property described in Item No.1 at Kollam, has been alienated in favour of the defendants 5 and 6 based on the alleged General Power of Attorney executed by E.Ponnuswamy Nadar on 16.05.2003, but the General Power of Attorney document not produced before the Court. So, the trial Court held that the said transaction is not a valid transaction. However, taking note of the fact that dispute in respect of this property has already been agitated in a separate suit initiated by E.Ponnuswamy Nadar and got dismissed, the subsequent purchasers were impleaded as defendants later and attempt to re-agitate the same cause of action against them. Hence, dismissed the suit as against the third party purchasers also impliedly ratified the transaction and directed the first defendant [Sukumari Prathibha] to pay half of the sale consideration to the plaintiff [E.Ponnuswamy Nadar].

38. As far as Item Nos.2 to 4 are concerned, which are covered under a separate suit in O.S.No.23 of 2009, the contention of E.Ponnuswamy Nadar that these properties transferred in favour of Sukumari Prathibha by Selvan Swamydhas Raman is void and in the said property, he is entitled for half share as per the title deed. Ex.B.15 is a Settlement Deed registered at Kodambakkam Sub-Registrar Office, on 02.03.2005, executed by Selvan Swamydhas Raman in

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favour of Sukumari Prathibha based on the General Power of Attorney Ex.B.10.

Ex.B.16 is the Settlement Deed, dated 09.03.2005, registered before the Sub-Registrar Office, Colachel, in favour of Sukumari Prathibha in respect of Item Nos.2 to 4. To show that a superstructure is located in Item No.4 of the suit property, for which, Sukumari Prathibha paying taxes, Exs.B.17 to B.21 are relied upon. The trial Court rejecting the plea of E.Ponnuswamy Nadar that he is the absolute owner of the property, but the title of the property stood jointly in his name and the name of his erstwhile wife, Sukumari Prathibha, the failure on the part of E.Ponnuswamy Nadar to prove that he had purchased the property from and out of his exclusive income and later through oral partition, he became the absolute owner, held that he and Sukumari Prathibha are the joint owners of the property. At the same time, alienation of the property on the strength of the General Power of Attorney alleged to have been executed by E.Ponnuswamy Nadar at Australia, the deed marked as Ex.B.10 held as *non-est* in the eye of Indian law, since the General Power of Attorney has no validity as far as the property in India is concerned and it has not been duly re-registered in India as per the law of the land. For the same reason, the suit of Sukumari Prathibha in O.S.No.88 of 2010 in respect of 63 ½ cents of land, situated at Mondaikaadu



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Panchayat, which was claimed to have been purchased under the Sale Deed, was taken into consideration and held that 35 cents alone available for partition and rest of the land, which was received as gift by E.Ponnuswamy Nadar and being part of the ancestral property, the trial Court disallowed the suit claim.

39. Insofar as Item Nos.5 and 8 to 19 are concerned, which are subject matter of the plaint in O.S.No.98 of 2008, the trial Court took note of Ex.B.14 Settlement Deed, dated 26.12.2003, executed by E.Ponnuswamy Nadar in favour of his second wife Kumari Thangam and Ex.B.13 of even dated Settlement Deed executed by E.Ponnuswamy Nadar in favour of Indira Priyadharshini and Raniki Jhancy Lakshmi Bai, his daughters born through Kumari Thangam and a similar act on the part of Selvan Swamydhas Raman and Sukumari Prathibha creating the settlement deed in respect of the entire property on the strength of the General Power of Attorney, which is held to be unenforceable in India, has arrived at a right conclusion that the parties, who have purchased the properties jointly are entitled to share the property equally. Unilateral alienation of the entire property by one of the party is void.



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40. E.Ponnuswamy Nadar and Sukumari Prathibha admittedly got married in the year 1969 and both had their own independent income. During the subsistence of the marriage, the suit properties were purchased jointly in their name. While E.Ponnuswamy Nadar claims that it was purchased only from and out of his income and Sukumari Prathibha is only a name lender. However, being a co-owner, he is entitled for half share, but the same has been attempted to be deprived by his erstwhile wife in connivance with his nephew by fabricating a General Power of Attorney Deed alleged to have been executed in Australia while he was admitted in the Hospital.

41. Sukumari Prathibha in contra alleges, E.Ponnuswamy Nadar was a spendthrift, interested in elections and had no income worth to save and it was she who working as a Teacher in Uganda and Australia, purchased the property jointly in her name and E.Ponnuswamy Nadar's name. At Australia, she took care of him in the hospital when he was seriously ill and spent for his treatment. Further, he had financial commitments in Australia, for which, it was necessary for him to appoint her and his nephew as Power Agents.



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42. Though E.Ponnuswamy Nadar claims that the properties, which are the subject matter of the three Original Suits, were purchased jointly in his name and in the name of his erstwhile wife, Sukumari Prathibha but exclusively from and out of his income, the fact remains that after divorcing his wife, he settled the properties with her, which he held jointly along with his erstwhile wife in Australia, but no such settlement was arrived in writing in respect of his property in India. The only document, which is relied by his erstwhile wife, is the General Power of Attorney, executed at Australia on 14.05.2003. The said General Power of Attorney consists of two parts and it reads as below:-

"GENERAL POWER OF ATTORNEY

Part 1

THIS POWER OF ATTORNEY is made on the 14th day of May, 2003, by NADAR PONNUSWAMY of Rozelle Hospital, Balmain Road, Balmain

1. I appoint SUKUMARI PONNUSWAMY and SELVAN ROMAN of 29 Woodland Road, Ashfield, to be my joint attorneys to exercise, subject to any conditions and limitations specified in Part 2 of this Instrument, the authority conferred on them by Section 163B of the Conveyancing Act, 1919, to do on my behalf anything I may lawfully authorise an attorney to do.



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2. *In the exercise of the authority conferred on them by Section 163B of the Conveyancing Act, 1919, my attorneys are authorised to execute an assurance or other document, or do any other act, whereby a benefit is conferred on them, or either of them to the exclusion of the other of them.*

3. *This general power of attorney is given with the intention that it will continue to be effective notwithstanding that after its execution I suffer loss of capacity through unsoundness of mind.*

Part 2

CONDITIONS AND LIMITATIONS

This general power of attorney is given to my attorneys jointly to the intent that any exercise of the power must be by BOTH OF THEM."

This document admittedly executed when E.Ponnuswamy Nadar was under treatment in a Hospital at Australia. In the Discharge Letter Ex.A.35 claimed to be issued by Rozelle Hospital, New South Wales, Australia, there are two signatories. But none of the signatories have been examined in the trial Court to authenticate the content and on a perusal of it, we find that when it is supposed to be signed by two persons, one Dr.S.Gunther, Registrar and another Dr.G.Halliday,



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Attending Psychiatrist. An initial on the top of the name Dr.S.Gunther, Registrar, is seen, but none have signed above the name Dr.G.Halliday, Attending Psychiatrist. The space is left blank. The said Dr.G.Halliday was attending as Medical Officer as per the Discharge Letter. The very incompleteness in the Discharge Letter itself, creates a doubt about it and lends credence to the allegations leveled by E.Ponnuswamy Nadar in his plaint that when he went to Australia, he was forcibly taken to the Hospital by Sukumari Prathibha and Selvan Swamydhas Raman in connivance with the Officials in Australia and he was confined there. For that plea, there is no evidence, however, the Discharge Letter marked as Ex.A.35 may be taken note of, since the said Discharge Letter also has a bearing, to test the validity and genuineness of the General Power of Attorney, which is the fulcrum of the entire case.

43. From the Discharge Letter, we find that E.Ponnuswamy Nadar has been referred by Burwood Court and found to be grandiose, deluded and not coping in the community. It is observed that he was living alone in a rented flat. Regarding his financial status, it is observed that he has numerous properties and has been issued with notice of eviction and re-possession. He had a past history of Psychiatric illness. There is a reference about a person, who claims to be the



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nephew of E.Ponnuswamy Nadar interested in his property and forcing them to discharge him, so that, he can take him to India. Probably, this reference may be about Selvan Swamydhas Raman, who was present in Australia at the relevant point of time and posing as his nephew. He in fact, brought E.Ponnuswamy Nadar back to India after getting the General Power of Attorney in his favour and in favour of erstwhile wife of E.Ponnuswamy Nadar. There is also a reference in the said Discharge Letter about the General Power of Attorney executed in favour of his erstwhile wife and his nephew Selvan Swamydhas Raman to enable him to settle the financial matters through the erstwhile wife as his Power of Attorney.

44. It is the contention of Sukumari Prathibha that the house built at Colachel was from the proceeds of selling the Restaraunt at Australia. It is the further contention of Sukumari Prathibha that Kumari Thangam is not the second wife of E.Ponnuswamy Nadar, Indira Priyadharshini and Raniki Jhancy Lakshmi Bai are not the daughters born to Kumari Thangam through E.Ponnuswamy Nadar and DNA Test must be conducted to ascertain the paternity. It is also contended by her that the decree of divorce between her and E.Ponnuswamy Nadar is sham and nominal one and in order to save E.Ponnuswamy Nadar from the charge of bigamy, she consented for paper decree.



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45. Obviously, both the parties have pleaded contrary to their written documents on several aspects. The law of the land is very clear that there cannot be a plea contrary to a document, unless and until any oral agreement entered between the parties is to clear the ambiguity in the written document. The trial Court while appreciating the evidence has rightly applied Chapter VI of the Indian Evidence Act, 1872, which deals with exclusion of oral by documentary evidence. The Miscellaneous Petition filed to conduct DNA Test was also rightly rejected in view of Section 112 of Indian Evidence Act.

46. Though E.Ponnuswamy Nadar claims that the properties purchased exclusively from and out of his income but jointly in the name of his erstwhile wife Sukumari Prathibha, the relief sought in O.S.No.98 of 2008 is only half share over the plaint schedule Item Nos.5 to 19 by metes and bounds. In O.S.No. 23 of 2009, which is in respect of Item Nos.2 to 4, he claims declaration of title and to demarcate 'A' schedule property from 'B' schedule property. Item No.3 in O.S.No.23 of 2009 is Item No.4 in O.S.No.98 of 2008. In this property, there is a building with electrical connection. The suit is filed to declare his right based on the title deeds, which are marked as Exs.A.19, A.20 and A.21. All the three deeds



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WEB COPY indicate that the properties were purchased jointly by E.Ponnuswamy Nadar and Sukumari Prathibha.

47. It is contended by Sukumarai Prathibha that the building in Item No.4 was constructed from and out of the sale proceeds of the Restaurant sold at Australia, but no document or evidence relied on by her in support of the said contention. She has also contended that based on the General Power of Attorney, dated 14.05.2003, executed by E.Ponnuswamy Nadar in favour of Sukumari Prathibha and Selvan Swamydhas Raman, a Settlement Deed was executed by Sukumari Prathibha and Selvan Swamydhas Raman in favour of Sukumari Prathibha on 09.03.2005, whereas, E.Ponnuswamy Nadar claims that these properties were settled in favour of his second wife and her children. It is for the parties in the final decree proceedings to first ascertain the survey number in which the building is located and if it falls in the 35 cents of land which is meant for partition, then appropriate order will be passed by the Executive Court.

48. In respect of the observation regarding the property at Kollam morefully described in Item No.1 of the suit schedule. This Court endorses the



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submission of the learned Senior Counsel for the appellant/Sukumari Prathibha, that having held the prior suit for the property located at Kollam, Kerala, is a bar for subsequent suit, what applies to the purchasers (defendants 5 and 6) equally applies to the other defendants also. Therefore, the decree against the appellant to pay 50% of the sale consideration is set aside. E.Ponnuswamy Nadar is at liberty to pursue his suit in C.S.No.743 of 2006 (Principal Munsif Court, Kollam) to its logical end and any observation made in this suit regarding the property which is the subject matter of C.S.No.743 of 2006 filed prior to this composite suit will have no relevance.

49. This Court holds that the trial Court erred in considering the merits of the transactions involved in respect of suit schedule Item No.1 property when no relief sought by the plaintiff and had preserved his right to pursue the prior suit filed in the neighboring State where the property is located.

50. As observed by this Court, the General Power of Attorney, which was marked as Ex.A.29 = Ex.B.10 is the fulcrum of the case and only based on this document, Sukumari Prathibha and Selvan Swamydhas Raman have dealt



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with the suit properties. If this General Power of Attorney is not a valid document, then, all the other transactions, which have emanated based on Ex.A.29 = Ex.B.10 will fall. Hence, it is essential to test whether the trial Court's finding about Ex.A.29 = Ex.B.10 is invalid document for the property in India is sustainable.

51. The contention of the learned Senior Counsel representing the appellant/Sukumari Prathibha that the General Power of Attorney, dated 14.05.2003, was duly executed at Australia in accordance with the procedures required as per law of Australia. Later, the said document was presented before the Sub-Registrar Office, Periamedu, on 22.02.2005 and Rs.100/- paid under Section 32 of the Indian Stamp Act, which is sufficient to validate the General Power of Attorney.

52. A reading of Ex.A.29 = Ex.B.10 indicates that it was executed by E.Ponnuswamy Nadar, appointing Sukumari Prathibha and Selvan Swamydhas Raman as his Attorneys to exercise any lawful act on behalf of him subject to conditions and limitations specified in Part-2 of the document. The sole



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condition imposed under Part-2 of the document is that, the Attorneys to exercise the power jointly. This document does not specify any particular act or any property. No doubt, the General Power of Attorney has been executed in the presence of one Christopher Matthew Zucker, Solicitor, Sydney. At a later point of time, one Tom Anthony Doumanis has certified the true copy of the said document. This document has been executed in terms of Section 163(B) of the Conveyancing Act, 1919 of Australia. The said document has been presented before the Sub-Registrar Office, Periamedu, on 22.02.2005, for adjudication regarding deficit stamp duty. After collecting Rs.100/- under Section 32 of the Indian Stamp Act, 1899, the Sub-Registrar has certified the collection of deficit stamp duty pursuant to the adjudication. This Certificate under Section 32 of the Indian Stamp Act is not a validation for the General Power of Attorney executed in a foreign land. A detailed procedure has been set out through the Memorandum issued by the Ministry of External Affairs for validating the foreign deed of General Power of Attorney executed by Non-Resident Indian, residing outside India, for the property in India. The law in India does not recognize a Power of Attorney executed in a foreign land to authorize the Attorneys living in that foreign country but in respect of the immovable property situated in India.



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WEB COPY The purpose of executing the Power of Attorney in a foreign country to administer the property in India can be achieved only if the Power of Attorney resides in India and represent the Principal who live abroad. Authorizing a Non-Resident Indian does not carry any purpose or meaning for executing the Power of Attorney.

53. The document executed in a foreign country ought to have been effected in India and it has to be validated in India in the manner known to law. Section 32 of the Registration Act, 1908, mandates every document to be registered under this Act shall be presented at the proper Registration Office by the person executing or claiming under the same, or, by the agent of such person, representative or assign, duly authorized by Power of Attorney executed and authenticated in the manner mentioned in the said Act.

54. A reading of the provisions under the Registration Act, 1908, makes it clear that the presentation of the document at proper Registration Office by the persons, who are parties to the document is the rule with certain exceptions. Section 33 of the Registration Act, 1908, recognizes the parties to the document



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to be represented by their agent, but the Registration Act, 1908, no way permits registering a Power of Attorney in the absence of the Executant. For clear understanding, Sections 32 and 33 of the Registration Act, 1908, are extracted below:-

"32. Persons to present documents for registration.—*Except in the cases mentioned in [Sections 31, 88 and 89], every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,—*

(a) by some person executing or claiming under the same, or in the case of a copy of a decree or order, claiming under the decree or order, or

(b) by the representative or assign of such person,
or

(c) by the agent of such person, representative or assign, duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned.

33. Power of attorney recognizable for purposes of Section 32.—*(1) For the purposes of Section 32, the following powers of attorney shall alone be recognized, namely—*

(a) if the principal at the time of executing the



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power of attorney resides in any part of [India] in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;

(b) if the principal at the time aforesaid [resides in any part of India in which this Act is not in force], a power of attorney executed before and authenticated by any Magistrate;

(c) if the principal at the time aforesaid does not reside in [India], a power of attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistratem Indian Consul or Vice-Consul, or representative of the Central Government:

Provided that the following persons shall not be required to attend at any registration office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (a) and (b) of this Section, namely—

(i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend:

(ii) persons who are in jail under civil or criminal process; and

(iii) persons exempt by law from personal appearance in the Court.



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Explanation.—In this sub-section, "India" means India, as defined in clause (28) of Section 3 of the General Clauses Act, 1897 (10 of 1897)].

(2) In the case of every such person, the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power of attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

(3) To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

(4) Any power-of-attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or Court hereinbefore mentioned in that behalf."

55. Coming back to Ex.A.29 = Ex.B.10, it is a General Power of Attorney executed at Australia and valid within the territory of Australia, where the Conveyancing Act, 1919, is applicable. By no stretch of imagination, this



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document can be treated as a General Power of Attorney duly executed in India to enable the Attorneys to deal with the immovable properties within India, just because a stamp duty of Rs.100/- has been collected by the Sub-Registrar, Periamedu, on 22.02.2005. A peculiar fact, which gets unraveled on scrutinizing the endorsement on Ex.A.29 = Ex.B.10 made by the Sub-Registrar, Periamedu, indicates that the adjudication conducted by him leading to collecting the stamp duty under Section 32 of the Indian Stamp Act, 1899, has been conducted as per Section 31 of the Registration Act, 1908, which indicates that the document was accepted for deposit at the private residence of Sukumkari Prathibha at No.B1/7, Rajendra Apartments, Rengarajapuram, Kodambakkam, Chennai – 24.

56. For better appreciation, Section 31 of the Registration Act, 1908, is also extracted below to have a holistic view on the illegality perpetuated by Sukumari Prathibha to knock away the share of E.Ponnuswamy Nadar, making use of a document executed at Australia, which is valid only within the territory of Australia.

"31. Registration or acceptance for deposit at private residence.—In ordinary cases, the registration or deposit of documents under this Act shall be made only at the



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office of the officer authorized to accept the same for registration or deposit:

Provided that such officer may on special cause being shown, attend at the residence of any person desiring to present a document for registration or to deposit a will, and accept for registration or deposit such document or will."

57. Thus, it is clear as crystal in Ex.A.29 = Ex.B.10, the document claiming to be a General Power of Attorney executed at Australia, as per the law of Australia, without reference to any immovable property in India or elsewhere, had been presented at the residence of Sukumari Prathibha, located at Rengarajapuram, Kodambakkam, Chennai – 24, which falls within the jurisdiction of Sub-Registrar Office, Kodambakkam, but Sub-Registrar, Periamedu, who has no territorial jurisdiction, where Sukumari Prathibha's residence has been adjudicated, the issue of deficit stamp duty and collected Rs.100/- and certified accordingly, on 22.02.2005. Presumably, Rs.100/- has been collected as stamp duty, since Entry 48 of the Schedule – I of the Indian Stamp Act, 1899 as amended by the Tamil Nadu Act 39 of 1992 with effect from 01.07.1992, prescribes Rs.100/- as stamp duty for a Power of Attorney



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authorizing not more than five persons to act jointly and severally in more than one transaction or generally.

58. Obviously, the document, which has no enforceability in India, has been relied upon, just because the Sub-Registrar, Periamedu, who has no territorial jurisdiction over the property or the party to the document had collected Rs.100/- under Section 32 of the Indian Stamp Act, 1899. As pointed out earlier the provision of Section 32 of the Indian Stamp Act, 1899, would clearly show that collection of stamp duty is not a valid registration of the document. Therefore, this Court holds that the decision of the trial Court invalidating the transfers carried out based on Ex.A.29 = Ex.B.10 is perfectly valid and in accordance with law. To add Ex.A.29 = Ex.B.10 General Power of Attorney surrounds with enough suspicion on the face of its reading, which has been highlighted by the learned counsel appearing for E.Ponnuswamy Nadar, the Discharge Letter issued by Rozelle Hospital Ex.A.35 adds more doubts about the valid execution of the said document with full consent and knowledge of E.Ponnuswamy Nadar, who had admittedly, suffered Parkinson disease and the document was executed while he was in the Hospital and the Discharge Letter



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indicates that one of his relatives, calling nephew has been interested in taking him away from the hospital and on close supervision, there is a suspected potential exploitation and also there is an indication that the said General Power of Attorney was executed by E.Ponnuswamy Nadar with an intention to settle his financial matters resolved in his absence. The relevant portion of the Discharge Letter, is extracted below for better appreciation.

"It became evident that a friend of Mr.Ponnuswamy's (an immigration consultant) who claimed to be a "nephew", had prepared a certificate of employment for him and had taken out several credit cards in Mr.Ponnuswamy's name. He apparently owed Mr.Ponnuswamy a considerable amount of money. He repeatedly asked staff if he could take Mr.Ponnuswamy out of hospital and purchase airline tickets for them to travel to India together. Visits by this gentleman were closely supervised as there were concerns of potential exploitation. Outgoing and income phone-calls were also limited especially those concerning purchasing properties.

As Mr.Ponnuswamy's mental state settled, efforts were to made to assist him in acquiring a Visa for India. It became clear that it would be some time before the Perpetual Trustee could settle the matter of his properties. His ex-wife



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was hence given Power of Attorney so that his financial matters could be resolved in his absence."

Therefore, the execution of General Power of Attorney in the hospital itself surrounds with suspicion even assuming that it is valid and executed only in respect of the properties situated at Australia and for other financial matters to be dealt with in his absence.

59. Above all, the said General Power of Attorney cannot be a valid document in India to deal with the properties in India, for the simple reason that the document executed in a foreign country in respect of the property in India, when the Executant E.Ponnuswamy Nadar has left Australia, where the General Power of Attorney was executed reached India within three days from the date of execution of the General Power of Attorney and he is capable of dealing the property himself without any aid or assistance or any persons, is doubtful.

60. For the aforesaid reason, this Court affirms that the finding of the trial Court in respect of Ex.A.29 = Ex.B.10 that the said document is *non est* in law and any right emanated from this document is also *non est* in law.



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61. In the result, the points for determination are answered as below:-

(a) Point Nos.i and iv:-

The suit properties were purchased jointly by E.Ponnuswamy Nadar and Sukumari Prathibha at different point of time. None of the parties could establish that it was purchased from and out of the sale consideration paid by them excluding the other co-owner. The sale deeds confer title to E.Ponnuswamy Nadar and Sukumari Prathibha jointly in clear and unambiguous terms. Therefore, the trial Court has rightly concluded that E.Ponnuswamy Nadar and Sukumari Prathibha have equal share in the properties and in respect of Item Nos. 6 and 7 of the suit schedule, since E.Ponnuswamy Nadar has sold two Plots out of four Plots at Mudichur though there is a small difference in the extent, has held that as far as Item Nos.6 and 7 to be excluded from the decree of partition, since more or less the extent of property adjacent to Item Nos.6 and 7 has been sold independently by E.Ponnuswamy Nadar. Though admittedly, E.Ponnuswamy Nadar sold two Plots, which are larger extent, taking into account the facts, the conclusion of the trial Court does not bristle with any infirmity, but have all the trappings of fair appreciation of fact to meet the ends of justice, particularly, when the plea of Sukumari Prathibha that E.Ponnuswamy Nadar agreed to permit her to



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deal with Item No.5 of the suit schedule property has been left without any proof.

Hence, the points for consideration (i) and (iv) are decided accordingly and the same needs no interference.

(b) Point No.ii:-

The trial Court ought not to have dealt with Item No.1 of the suit schedule property when the plaintiff himself has not made any claim over it except claiming it as one among property, which is to be divided. In respect of the specific pleading by the plaintiff that Item No.1 of the property is the subject matter of C.S.No.743 of 2003, on the file of the Principal Munsif Court, Kollam, the trial Court has erroneously ventured to deal with this property and had passed certain observations, which are beyond the scope of the pleading and relief sought for. Hence, those observations are eschewed. The parties are at liberty to pursue the suits before the appropriate forum *de hors* of the finding of this Court. Accordingly, Point No.(ii) is answered.

(c) Point No.iii:-

Ex.A.29 = Ex.B.10 executed at Australia without any reference to immovable property in India and not been duly registered in India, is not worth



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the paper it carries. Hence, the trial Court is right in holding that Ex.A.29 = Ex.B.

10 is an invalid document and the consequence to be followed.

(d) Point No.v:-

The property on Mondaikaadu carries three different characters. One ancestral property to an extent of 17 ½ cents and another document gifted to E.Ponnuswamy Nadar and the last one sale deed in respect of 35 cents purchased jointly by Sukumari Prathibha and E.Ponnuswamy Nadar. While Sukumari Prathibha has no title over the remaining property except 35 cents, the trial Court has rightly held that she is entitled for half share in the 35 cents and nothing more. Regarding the building in the suit property, this Court has already observed that the division about the building will arise only when it is ascertained that the said building is located on the 35 cents of land, in which, Sukumari Prathibha and E.Ponnuswamy Nadar have right jointly. This fact can be ascertained during finalization of the proceedings and therefore, warrants further order.

(e) In respect of Item Nos.5 and 8 to 19 though Sukumari Prathibha has probably projected oral partition and alienation based on the General Power of



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Attorney Ex.A.29 = Ex.B.10, having held that Ex.A.29 = Ex.B.10 itself is invalid, any other conveyance based on Ex.A.29 = Ex.B.10 also necessarily to be declared as invalid and *non est*. As far as the oral arrangement alleged by Sukumari Prathibha in respect of Item No.5, no evidence is available on record to probalilise her theory. Regarding the building in Item No.4 and the source of putting the construction, it is presumed that the same was constructed and renovated jointly by the title holders of the vacant land.

62. In the result,

(i) A.S.(MD)No.45 of 2011 filed by Sukumari Prathibha against the judgment and decree passed in O.S.No.23 of 2009, is dismissed. No costs.

(ii) A.S.(MD)No.46 of 2011 filed by Sukumari Prathibha as against the judgment and decree, in O.S.No.88 of 2010 is dismissed. No costs.

(iii) A.S.(MD)No.44 of 2011 filed by Sukumari Prathibha against the judgment and decree in O.S.No.98 of 2008, in respect of Item No.1, wherein she is directed to pay 50% of the sale consideration for the property at Kollam which she sold without the knowledge of the co-sharer is set aside. The parties are directed to work out their remedy in the suit in C.S.No.743 of 2008, on the file of



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the Principal Munsif Court, Kollam. With this modification, the remaining judgment and decree is confirmed. Accordingly, A.S.(MD)No.44 of 2011 is partly allowed. No costs.

(iv) In view of the judgment and decree passed in A.S.(MD)Nos.44 to 46 of 2011, A.S.(MD)No.170 of 2011 filed by E.Ponnuswamy Nadar against the judgment and decree in O.S.No.98 of 2008, in disallowing the relief in respect of Item No.1 of the property and in respect of half share in 35 cents of land at Mondaikaadu, which is subject matter of O.S.No.23 of 2009, is dismissed. No costs.

(v) Consequently, connected Miscellaneous Petitions are closed.

NCC : Yes
Index : Yes / No
Internet : Yes / No
SMN2

[G.J., J.] [S.M., J.]
04.01.2023

To

- 1.The Principal District Judge,
Kanyakumari at Nagercoil.
- 2.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

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DR.G.JAYACHANDRAN, J.
and
SUNDER MOAHN, J.

SMN2

PRE-DELIVERY COMMON JUDGMENT MADE IN
A.S.(MD)Nos.44, 45, 46 and 170 of 2011

DATED : 04.01.2023