



S.A.(MD) No.325 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved On 31.01.2023	Judgment Pronounced On 20.02.2023
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THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.(MD) No.325 of 2011

Leelavathi

.. Appellant/Respondent/
Plaintiff

-VS-

Chellaswami

.. Respondent/2nd Appellant/
2nd Defendant

Prayer: Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 25.01.2010 made in A.S.No.24 of 2006 on the file of the District Court, Kanniyakumari reversing the judgment and decree dated 13.04.2006 made in O.S.No.211 of 1998 on the file of the First Additional Sub Court, Nagercoil.

For Appellant : Mr.N.Vallinayagam
Senior Counsel
assisted by
Mr.T.Antony Arulraj

For Respondent : Mr.S.Meenakshi Sundaram
Senior Counsel
assisted by Mr.M.Sengu Vijay



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JUDGMENT

The plaintiff in the suit is the appellant. The suit is for partition of appellant's 1/3rd share over the suit property. The suit was partly decreed in respect of Items 1, 3 and portion of 4th Item viz., 25½ cents. On appeal filed by the defendants, the findings of the trial Court were reversed and the suit was dismissed in its entirety. Aggrieved by the same, the unsuccessful plaintiff has come up by way of this second appeal.

Plaint averments:

2.1. According to the appellant/plaintiff, the suit properties are the ancestral properties of the appellant and the respondent. Originally, the suit was filed by the appellant against her mother and brother viz., the respondent. Pending first appeal, the mother died and the appellant and respondent were recorded as legal representatives of the deceased mother.

2.2. As per the plaint averments, the properties were managed by the father of the parties, viz., Rathinasamy and he died *intestate* on 29.01.1998.



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Accordingly, the appellant claims that after death of the father, the properties devolved on her and the original defendants in the suit viz., the mother and the respondent herein.

2.3. It was further averred that the appellant got married in the year 1982 and at the time of marriage, the appellant was provided with some jewels and a sum of Rs.40,000/- and no property was given to her towards her share in the joint family properties. It was further averred in the plaint that after death of the father, the respondent herein started acting detrimental to the interest of the appellant and in spite of demands made by her for amicable partition, the respondent failed to respond and hence, she was constrained to file the suit for partition claiming her 1/3rd share in the suit property.

Averments contained in the written statement:

3.1. The respondent along with her deceased mother filed a written statement and contested the suit on the ground that the appellant was not in joint possession of the suit property subsequent to her marriage on 03.02.1982. It was also pleaded by the respondent that the appellant had



executed a release deed relinquishing her share in the joint family properties on 18.01.1982. As far as the character of the suit schedule properties is concerned, the respondent pleaded that Item-1 of the suit property was purchased by his father Rathinasamy on 14.11.1951 and hence, it ought to be treated as his self-earned property. He pleaded that Items-2 and 4 were ancestral properties of his own and it cannot be treated as ancestral properties of the appellant. It was further pleaded that Item-3 was purchased by utilising the sale proceeds of ancestral property in Item-2.

3.2. It was further pleaded by the respondent that during the lifetime of his father, Rathinasamy, he executed a Will dated 07.03.1996 bequeathing his half share in Suit Items-2 to 4 and his self-earned property Item-1 in favour of the respondent and his son. Thus, according to the respondent, the appellant was not at all entitled to claim any right over the suit property in view of the registered Will dated 07.03.1996 and registered release deed dated 18.01.1982.

3.3. It was also pleaded that at the time of marriage, the appellant was provided with 50 sovereigns of gold jewels and cash of Rs.40,000/- and in



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addition to the same, a sum of Rs.39,000/- was deposited by the respondent and his father in the savings account of the appellant on 21.10.1980 and a sum of Rs.10,000/- on 11.11.1981. The respondent also raised a plea of ouster from 18.01.1982 viz., the date of release deed by the appellant.

Evidence let in before the trial Court:

4. Before the trial Court, the appellant/plaintiff was examined as P.W.1 and the respondent was examined as D.W.1. The attesor to the Will executed by the father of the parties viz., Ex.B.8 was examined as D.W.2. The Scribe of the Will was examined as D.W.3. The Handwriting Expert was examined as D.W.4. On behalf of the appellant, no exhibits were marked and on behalf of the respondent, 12 documents were marked as Ex.B.1 to Ex.B.12. The opinion of thumb impression Expert viz., D.W.4 was marked as Ex.X.1.

Findings of the Courts below:

5.1. On appreciation of oral and documentary evidences available on record, the trial Court found that Items-1, 3 and portion of Item-4 viz., 25½ cents were the self-earned properties of the father of the parties. The trial



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Court had not given any specific finding with regard to Item-2 of the suit property with regard to the availability of the same for partition. The trial Court held that Ex.B.1 release deed executed by the appellant was proved, but however, proceeded to hold that Ex.B.1 release deed executed by the appellant in respect of the ancestral properties would not bar her right to claim share in the self-earned properties of the father. The trial Court disbelieved the Will pleaded by the respondent and hence, ultimately held that the appellant was entitled to 1/3rd share in the self-earned properties of the father viz., Items-1, 3 and 25½ cents in Item-4.

5.2. Aggrieved by the said judgment and decree, the respondent and his deceased mother filed an appeal in A.S.No.24 of 2006 on the file of the District Court, Kanniyakumari at Nagercoil. The first appellate Court upheld the validity of the Will pleaded by the respondent as well as the release deed relied on by the appellant. The first appellate Court also affirmed the view of the trial Court that Suit Items-1, 3 and part of Item-4 were the self-earned properties of the father. The first appellate Court reversed the findings of the trial Court with regard to the validity of the Will and ultimately upheld the Will and non-suited the appellant. Therefore, the



appeal filed by the respondent was allowed and the suit stood dismissed.

Aggrieved by the same, the appellant is before this Court.

Substantial questions of law framed:

6. At the time of admission, this Court formulated the following substantial questions of law:

“a) Whether the defendant ought to be non-suited for non-proving of Ex.B-8, a Will, by any attesting witness under Section 68 of Evidence Act and 63(C) of Succession Act?

b) Whether the lower Appellate Court is vitiated for having wrongly cast the burden of proof on the defendant?

c) Whether the decision of the lower Appellate Court is erred in holding that the sound state of mind of the testator while the execution of the alleged Will is incorrect? and

d) Whether the lower Appellate Court erred in giving effect to the release deed, which is not stamped and does not fulfill any basic requirements set out in law?”



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Submissions of the learned counsel for the appellant:

7.1. Mr.N.Vallinayagam, learned Senior Counsel assailed the findings of the first appellate Court mainly on the ground that the evidence of lone attestor examined by the respondent viz., D.W.2 did not prove due execution of the Will. It was his contention that the attestor must depose about the signing of the Will by the testator and the other attestor and also about the fact of presence of executant at the time of attestation by both the attestors. According to the learned Senior Counsel, evidence of D.W.2 does not satisfy the mandatory ingredients of Section 63(a) of Indian Succession Act, 1925. The learned Senior Counsel relied on the judgment of this Court in *V.Thanikachalam Vs J.Radhakrishnan* reported in **(2000) 3 M.L.J. 46** in this regard.

7.2. The learned Senior Counsel further submitted that absolutely there was no justification for disinheriting the daughter viz., the appellant herein and in the absence of any reason assigned in the Will justifying exclusion of daughter from inheritance bequeathing the suit properties in favour of the respondent alone itself is a suspicious circumstances



surrounding the Will and the same had not been dispelled by the respondent.

In this regard, the learned Senior Counsel relied on ***Shivakumar & ors. Vs. Sharanabasappa & ors.*** reported in ***2020 (4) CTC 321***. As far as the release deed executed by the appellant is concerned, the learned Senior Counsel submitted that on the date of execution of release deed, the appellant was not a member of Hindu Joint family, as neither the Tamil Nadu Amending Act 1 of 1989 nor Central Amendment (Central Act 39 of 2005) making daughter as a member of Hindu coparcenary, came into force at the time of execution of release deed.

7.3. In nutshell, it was his submission that on the date of execution of release deed, the appellant had no interest over the suit properties and she had nothing to release and consequently, the release deed was not valid. The learned Senior Counsel by taking this Court to Section 6(a) of Transfer of Property Act, 1882, submitted that a mere chance of succession or *spec successionis* cannot be a subject matter of transfer *inter vivos*. The learned Senior Counsel, further by taking this Court to Rule 21(i) of Tamil Nadu Document Writers' Licence Rules, 1982, submitted that in view of prohibition contained therein, D.W.2, should not have identified the testator



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at the time of registration of the alleged Will before the Sub Registrar and hence, the Will cannot be proved by the evidence of D.W.2.

Submissions of the learned counsel for the respondent:

8.1. Per contra, Mr.S.Meenakshi Sundaram, learned Senior Counsel appearing for the respondent submitted that just prior to the marriage of the appellant, she executed the release deed in favour of the respondent's father by relinquishing her rights over the joint family properties for a consideration and hence, she is estopped from claiming any right in the suit properties by virtue of execution of release deed. The learned Senior Counsel relied on the following judgments in support of his contention that rule of estoppel can be pressed into service as against the appellant:

- i. Gulam Abbas Vs. Haji Kayyum Ali and others* reported in *AIR 1973 SC 554*;
- ii. Shehammal Vs. Hasan Khani Rawther & Ors.* reported in *AIR 2011 SC 3609*;
- iii. Mookammal Vs. Subramanian & Ors.* reported in *2010 (2) MLJ 576 : CDJ 2010 MHC 413*;



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iv. M.Kamala & Ors. Vs. Uma Ravichandran & Ors. reported in **CDJ 2016 MHC 6010; and**

v. Elumalai @ Venkatesan & Anr. Vs. M.Kamala & Ors. reported in **2023 SCC OnLine SC 84** (affirming the view of the learned Single Judge of this Court in *M.Kamala & Ors. Vs. Uma Ravichandran & Ors* cited *supra*).

8.2. The learned Senior Counsel further, by drawing the attention of this Court to proviso to Section 6(1) of the Hindu Succession Act, 1956, submitted that the Will executed by the father of the parties came into effect on 29.01.1998 itself by death of the testator and consequently, the testamentary disposition of property had taken place nearly six years prior to the coming into force of Central Act, 39 of 2005 amending Section 6 of the Hindu Succession Act granting coparcenary status to daughters in the Hindu Joint family. Therefore, it is the contention of the learned Senior Counsel that in view of the fact that testamentary disposition of the properties had taken place prior to the coming into force of Amending Act, the appellant cannot take the benefit under the said Act and claim partition. As far as the Tamil Nadu Amendment Act 1 of 1989 granting equal status to



daughters is concerned, the learned Senior Counsel submitted that admittedly, the appellant married prior to the cut-off date prescribed in that Act. Therefore, the appellant is not entitled to take benefit even under the Tamil Nadu Amendment Act.

8.3. The learned Senior Counsel, by taking this Court to the evidence of D.W.2, attester to the Will, submitted that the evidence of D.W.2 is sufficient to prove the Will and in case of proof of Wills, mathematical precision is not at all warranted. In this connection, he relied on the judgment of the Apex Court in *Sridevi and others Vs. Jayaraja Shetty and others* reported in *AIR 2005 SC 780*.

8.4. The learned Senior Counsel, in support of his contention that evidence of D.W.2 is sufficient to uphold the Will, relied on the following judgments:

- i. Swarnalatha and others Vs. Kalavathy and others* reported in *AIR 2022 SC 1585* (in the case of Will, there is no place for the Court to see whether the distribution made by the testator was fair and equitable to all of his children); and



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ii. ***R.Sundararajan Vs. Gayathri and others*** reported in ***CDJ 2022 MHC 5715 : 2022 (3) MWN(Civil) 442*** (minor contradiction in the evidence of attestors can be ignored).

8.5. The learned Senior Counsel further submitted that the suit is bad for non-joinder of son of the respondent, who was also a beneficiary under the Will in respect of Items-1, 3 and 4. It is the submission of the learned Senior Counsel that the plea of non-joinder was specifically raised in the written statement and the first appellate Court also non-suited the appellant on the ground of non-joinder and hence, the judgment of the first appellate Court need not be disturbed. In this connection, the learned counsel relied on the judgment of this Court in ***Ganesan and others Vs. Sugantha Kundalam and others*** reported in ***(2022) 7 MLJ 673***.

Reply by the appellant's counsel:

9.1. The learned Senior Counsel for the appellant, in his reply, submitted that the appellant as an unmarried daughter signed the release deed without knowing the contents of the documents. In the absence of examination of attestors to the release deed, to prove passing of



consideration for releasing her right, the recital in the release deed, as if the appellant released her right after receiving consideration, cannot be accepted. The learned Senior Counsel further submitted that there is no evidence available on record to show that the appellant did sign the release deed after knowing the contents of the document. The learned Senior Counsel also submitted that mere admission of the document would not amount to admission of contents of the document and in this regard, he relied on the decision of the Hon'ble Division Bench of this Court in ***A.V.S.Perumal Vs. Vadivelu Asari*** reported in ***AIR 1986 Madras 341***.

9.2. The learned Senior Counsel also submitted that proviso to Section 6(1) of the Hindu Succession Act was struck down by the Karnataka High Court in ***Miss. R.Kantha and Another Vs. Union of India and Another*** reported in ***AIR 2010 Karnataka 27*** as violative of Article 14 and Article 16 of the Constitution of India. The learned Senior Counsel forcefully submitted that proviso to Section 6(1) of the Hindu Succession Act defeats the object of the Central Amending Act 39 of 2005 and hence, this Court should also take a similar view and declare the said proviso as unconstitutional.



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10. Heard the arguments of the learned Senior Counsel for the appellant and that of the learned Senior Counsel for the respondent. Perused the typed set of papers and other records.

Discussions on substantial question of law (d):

11.1. It is the submission of the learned Senior Counsel for the appellant that the release deed relied on by the respondent is not valid in the eye of law, as the appellant had no interest over the suit property on the date of release deed to relinquish her rights. In other words, it is his submission that when the release deed was executed, the appellant had only a mere chance of succession or *spec successionis* and in view of Section 6(a) of Transfer of Property Act, a mere chance of succession cannot be a subject matter of transfer *inter vivos*.

11.2. In response to that argument, the learned Senior Counsel for the respondent submitted that though a chance of succession cannot be a subject matter of transfer *inter vivos*, by executing release deed and agreeing to relinquish her share in the joint family properties for consideration, rule of



estoppel can be pressed into service against the appellant and consequently, she is barred from claiming any share in the suit property.

11.3. It would be appropriate to refer to the observations of the Hon'ble Apex Court and also this Court with regard to the application of rule of estoppel in case of release deeds involving future rights. The earliest case law in this regard is ***Gulam Abbas Vs. Haji Kayyum Ali and others*** reported in ***AIR 1973 SC 554***, wherein it was held that if a heir apparent or expectant heir apart from releasing his expected right goes further and receives consideration, his conduct would attract rule of estoppel. The relevant observation of the Hon'ble Apex Court is as follows:

“5. The real question was whether, quite apart from any transfer or contract, the declarations in the deeds of purported relinquishment and receipt of valuable consideration could not be parts of a course of conduct over a number of years which, taken as a whole, created a bar against a successful assertion of a right to property when that right actually came into being. An equitable estoppel operates, if its elements are established, as a rule of evidence preventing the assertion of rights which may otherwise exist.



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6.

7. *This is a correct statement, so far as it goes, of the law, because a bare renunciation of expectation to inherit cannot bind the expectant heir's conduct in future. But, if the expectant heir goes further and receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property inter vivos the expectant heir could be debarred from setting up his right when it does unquestionably vest in him. In other words, the principle of estoppel remains untouched by this statement.*”

11.4. In ***Shehammal Vs. Hasan Khani Rawther & Ors.*** reported in ***AIR 2011 SC 3609***, the Hon'ble Apex Court observed as follows:

“23. There is little doubt that ordinarily there cannot be a transfer of spes successionis, but in the exceptions pointed out by this Court in Gulam Abbas case [(1973) 1 SCC 1 : AIR 1973 SC 554], the same can be avoided either by the execution of a family settlement or by accepting consideration for a future share. It could then operate as estoppel against the expectant heir to claim any share in the estate of the deceased on account of the doctrine of spes successionis.”



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11.5. A learned Single Judge of this Court had occasion to consider this point in ***Mookammal Vs. Subramanian & Ors.*** reported in ***2010 (2) MLJ 576 : CDJ 2010 MHC 413***, wherein this Court observed as follows:

“20.The fair and equitable family arrangement is finally binding on the parties to the same. Though, the transfer of the chance of heir apparent succeeding to estate is prohibited under [Section 6\(a\)](#) of Transfer of Property Act. There is nothing to prevent for relinquishing a claim to inheritance for a realisation of a consideration in order to avoid future disputes. In that event, once the heir apparent relinquished the possibility of her right of inheritance for a consideration, the same is not covered under [Section 6\(a\)](#) of the Transfer of Property Act, but, the principle of estoppel under [Section 115](#) of the Evidence Act would apply.

21.In [Gulam Abbas vs. Haji Kayyam Ali](#) and others reported in AIR 1973 SUPREME COURT 554 (V 60 C 114), the Hon'ble Supreme Court has held that,

"This is a correct statement, so far as it goes, of the law, because a bare renunciation of an expectation to inherit cannot bind the expectant heir's conduct in future. But, if the expectant heir goes further and receives consideration and so conducts himself as to mislead an owner into not making



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dispositions of his property inter vivos the expectant heir could be debarred from setting up his right when it does unquestionably vest in him. In other words, the principle of estoppel remains untouched by this statement".

22.In my considered opinion, the courts below have rightly found that the plaintiff is estopped from claiming any right of the properties of the Marimuthu Thevar and therefore, has rightly negated her claim. I have no reason to interfere with the findings of the courts below. The questions of law are answered accordingly, In the result the Second Appeal is dismissed. No costs."

11.6. Similarly, another learned Single Judge of this Court in ***M.Kamala & Ors. Vs. Uma Ravichandran & Ors.*** reported in ***CDJ 2016 MHC 6010*** had an occasion to consider the applicability of rule of estoppel in cases involving of transfer of *spec successionis*. The relevant observation of the learned Judge is as follows:

"2.

The shares claimed by the plaintiff as well as the defendants 4, 5 and 6 were not denied. The dispute mainly was regarding the existence or otherwise of the suit B schedule jewellery and the validity of the release deed dated 12.11.1975 said to have been executed by Chandran, viz., the father of defendants 4 and 5 relinquishing his interest in the



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properties belonging to the Sengalani Chettiar including the suit A schedule property. The defendants 4 and 5 filed a separate written statement. Though they admitted the execution of the release deed dated 12.11.1975, they would contend that the same is not legally valid and binding on them. In as much as the properties were self acquired properties of the deceased Sengalani Chettiar and as such the deceased Chandran had no right to relinquish a chance of succession and such a transfer is bad in the eye of law, in view of Section 6 (a) of the [Transfer of Property Act](#) 1882.

9.

1) Whether the release deed dated 12.11.1975 said to have been executed by Chandran, son of Sengalani Chettiar, relinquishing his rights over the properties of Sengalani Chettiar would be legally valid and binding on his sons, namely respondents 4 and 5.

*11. This judgment of the Hon'ble Supreme Court was followed by this Court in [Mukkammal vs. Subramanian and others](#), SA (MD) No.342 of 1998 dated 19.11.2009. This Court by following the judgment of the said Supreme Court (cited *supra*) held that renunciation by her would be valid and binding, though it could be termed as invalid strongly in terms of [Section 6 \(a\)](#) of the [Transfer of Property Act](#). By applying the principles of estoppel as enunciated in [Section 115](#) of the Evidence Act, the said renunciation could be upheld."*



11.7. The above view of the learned Single Judge of this Court was subsequently affirmed by the Hon'ble Apex Court in its latest judgment dated 25.01.2010 in ***Elumalai @ Venkatesan & Anr. Vs. M.Kamala & Ors.*** reported in **2023 SCC OnLine SC 84**. The relevant observation of the Hon'ble Apex Court is as follows:

“24. It will be noticed that the father of the appellants, by his conduct, being estopped, as found by us, is the fountainhead or the source of the title declared in Section 8(a) of the Hindu Succession Act. It is, in other words, only based on the relationship between Shri Chandran and the appellants, that the right under Section 8(a) of the Hindu Succession Act, purports to vest the right in the appellants. We would think, therefore, that appellants would also not be in a position to claim immunity from the operation of the Principle of Estoppel on the basis of Section 8(a) of the Hindu Succession Act. If the principle in Gulam Abbas (supra) applies, then, despite the fact that what was purported to be released by Shri Chandran, was a mere spec successonis or expectation his conduct in transferring/releasing his rights for valuable consideration, would give rise to an estoppel. The effect of the estoppel cannot be warded off by persons claiming through the person whose conduct has generated the estoppel. We also find no merit at all in the attempt at drawing a distinction based on religion. The principle of estoppel applies without such distinction.



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25. *The only further contention which remains to be dealt with is that raised by Shri Jayanth Muth Raj, learned Counsel. He made an attempt to contend that the principle in Gulam Abbas (supra) may not be available in view of the factual matrix. It is his case that in the said case, the brothers received a benefit and thereafter gave-up the rights, which, as it was found, they did not possess at the time. The position in this case, however, is not similar. We are of the view that this argument ignores the play of the facts. Having received valuable consideration and allowed his father Shri Sengalani Chettair to proceed on the basis that he was free to deal with the property without the prospect of being haunted by any claim whatsoever as regards the property by Shri Chandran, a clear estoppel sprang into existence following the receipt of consideration by Shri Chandran. Estoppel would shut out in equity any claim otherwise either by Shri Chandran or his children, viz., the appellants."*

11.8. In the light of the various decisions referred above, let me discuss whether the rule of estoppel can be pressed into service against the appellant, as she relinquished her rights in the joint family properties. Before proceedings to decide that question, the character of the suit properties has to be decided. The appellant claims that the suit properties are ancestral properties. The respondent in his written statement raised a



plea that Item-1 of the suit property was the self-earned property of the father under Ex.B.2 dated 14.11.1951. When there is a documentary evidence to show that the property was acquired in the name of the father of the parties, it can be said that the same was self-acquired property of Rathinasamy Nadar, viz., the father of the parties. In fact, the Courts below proceeded on the footing that Item-1 property was the self-acquired property.

11.9. The learned Senior Counsel for the appellant attempted to convince this Court that the first item of the suit property should be treated as joint family properties on the ground that when acquisition of property is made in the name of Kartha of the joint family, it should be presumed as the property was purchased out of joint family funds.

11.10. The submission made by the learned Senior Counsel for the appellant is well founded. Whenever a property is acquired in the name of the Kartha of the joint family, the presumption is that the property was purchased only by utilising the joint family funds. On the other hand, in respect of the acquisition made in the name of any junior member of the



joint family, the general presumption is, it is the self-acquired property of junior member, unless there is a positive evidence to rebut the same. In the case on hand, whether at the relevant point of time viz., 1951, the father of the parties was a junior member of the family or Kartha of the family is not clear, as there is no evidence with regard to that fact. Therefore, readily we cannot come to a conclusion that even in the year 1951, the father of the parties was the senior most member of the family and he acted as Kartha and acquired Item-1 in his name. In these circumstances, due to non-availability of evidence on record to come to a definite conclusion, whether the father of the parties acted as Kartha of the family in the year 1951, I proceed to accept the findings of the Courts below that Item-1 property is the self-acquired property as proved by Ex.B.2.

11.11. As far as Items-2 and 4 are concerned, in the written statement, the respondent had averred that Items-2 and 4 were his ancestral properties. The said averment was made on a misconception that after marriage, the appellant cannot have any interest over the joint family properties. When the respondent admitted that Items-2 and 4 are ancestral



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properties, he cannot qualify the character of the same by stating that Items-2 and 4 are his ancestral properties and not that of the appellant. In fact, while making averments with regard to the Will executed by the father Rathinasamy, it was stated by the respondent that his father executed the Will in favour of him and his son conveying his undivided half share over Suit Items-2 to 4 and the self-acquired property of Item-1. Therefore, he himself admitted that Items-2 to 4 are the ancestral properties and his father had undivided half share and he acquired half share by birth. This averment should be understood in the context of law that prevailed prior to coming into force of Amending Act conferring equal coparcenary status to daughters. Further, the respondent in his pleadings had stated that Item-3 of the suit property was purchased out of sale proceeds from joint family properties. Therefore, in view of the admissions in the pleadings, there cannot be any doubt and Items-2 to 4 are ancestral properties. Therefore, I proceed to discuss the impact of the release deed executed by the appellant on a firm finding that Item-1 of the suit property is the self-acquired property of the father of the parties and Items-2 to 4 are the ancestral properties.



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11.12. In the light of the judgments referred above, it is clear that a mere chance to succeed or a right of *spec successionis* cannot be a subject matter of transfer *inter vivos*, but however, a release of *spec successionis* or a chance to succeed for a consideration would amount to estoppel. Therefore, a person, who relinquished his mere chance of succession or *spec successionis*, after receiving consideration for the same, is estopped from laying his claim after the said claim get vested in him by operation of law or otherwise. In nutshell, though the release deed executed by heir apparent in respect of his chance of succession is hit by Section 6(a) of Transfer of Property Act and hence invalid, however, his conduct of receiving consideration and relinquishing his future right would attract the rule of estoppel against him. In the case on hand, Ex.B.1 release deed was executed by the appellant in favour of his father and mother releasing her interest in the joint family property for a consideration of Rs.50,000/-. Therefore, she received consideration and released her alleged interest in the joint family properties. Now, we have to see whether the appellant had any interest or at least *spec successionis* on the date of execution of release deed. As Hindu Law stood in the year 1982, when release deed was executed, daughters were not made as coparceners. Therefore, the appellant



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had no interest in the ancestral properties of the family. As far as Item-1 is concerned, it was the self-acquired property of the father of the parties and hence, she had chance of succession. Therefore, as far as Item-1 is concerned, we can come to a definite conclusion that the appellant had *spec successionis* on the date of release. As far as Items-2 to 4 ancestral properties are concerned, she had no interest as per the law that stood at that point of time. She only had right of *spec successionis* in respect of half share of her father. In respect of other half share belonged to respondent, she not even had chance of succession or *spec successionis*. Therefore, she had chance of succession only in respect of Item-1 of the suit property and the father's half share in Items-2 to 4 on the date of release deed. More precisely, she had chance of succession in respect of half share of Item-1 and 1/4th share of Items-2 to 4.

11.13. The case laws referred to above are the authorities for the proposition that a person releasing his chance of succession or *spec successionis* is barred from enforcing his right after it get vested in him in view of rule of estoppel. As far as the half share of the respondent is



concerned, the appellant not even had chance of succession or *spec successionis*.

11.14. Now, let us proceed to see whether rule of estoppel can be pressed into service as against the benefit conferred by Central Act 39 of 2005, which was passed with an aim of achieving gender equality in law of succession. Central Act 39 of 2005 was passed to achieve the constitutional goal and to remove bias based on gender. Whether such a right acquired by the appellant can be brushed aside by applying the doctrine of equitable estoppel has to be decided. The above said case laws are authorities for the proposition that a release by heir apparent after receiving consideration would estop him from asserting his right at a later point of time. Whether Rs.1,000/- received by the appellant on the date of release deed was, in fact, in contemplation of her future right to be conferred by legislature is the question to be answered in this case. Certainly, the appellant at the time of releasing her right in the year 1982, would not have contemplated that in a future date, legislature would confer a benefit making her as a coparcener in respect of ancestral properties and by receiving Rs.1,000/-, we forego such a right. At the most, she would have only contemplated her chance of



succession in respect of the half of half share of the father's property. She would not have contemplated in respect of the entire property she would become entitled to equal share. As per the law that stood at that point of time, she had *spec successionis* in respect of 1/4th of the suit property (half of father's half share). Now, by virtue of Central Act 39 of 2005, the appellant has become a coparcener and she is entitled to equal share along with her brother viz., the respondent. Therefore, after death of the father, she is entitled to half share now. Therefore, certainly, the consideration received by the appellant in the year 1982 would not be in contemplation of giving up her *spec successionis* in respect of half share, but it was only in contemplation of giving up her *spec successionis* in respect of 1/4th share. Therefore, I come to a definite conclusion that though the appellant received some consideration, it cannot be an adequate consideration, that too, in contemplation of chance of succession in respect of half of the property. Therefore, I hold that the rule of estoppel can be invoked against her only in respect of Item-1 and half share in Items-2 to 4. In respect of remaining half share, over which at the point of releasing her share, she had no chance of succession or *spec successionis*, rule of estoppel cannot be pressed into service. Accordingly, I hold that Ex.B.1 release deed executed



by the appellant would estop her by claiming any share in Item-1 and half of Items-2 to 4. However, the same cannot be invoked in respect of remaining half of Items-2 to 4. Ex.B.1 was executed in a stamp paper of Rs.30/-. The said document was marked without any objection with regard to insufficiency of the stamp duty. Therefore, the appellant is not entitled to raise that question at a later point of time. Even at the time of arguments, the sufficiency of the stamp duty was not raised. Therefore, there is no need to go into the question with regard to the sufficiency of the stamp duty. Hence, substantial question of law (d) is answered accordingly.

Discussions on substantial questions of law (a), (b) and (c):

12.1. The respondent raised a defence that his father executed the Will bequeathing Item-1 of the suit property and his half share in Items-2 to 4 in favour of him and his son. The Will was marked as Ex.B.8. The attester to the Will was examined as D.W.2 and the Scribe of the Will was examined as D.W.3. The trial Court came to the conclusion that D.W.2, being a Document Writer, cannot attest the Will. It also found that the evidence of D.W.2 was not sufficient to prove the Will, as it has not satisfied the requirements of law. However, the first appellate Court, on



appreciation of evidence of D.W.2 and D.W.3, came to the conclusion that the Will got proved.

12.2. It is settled law, in order to prove a Will, at least one of the attestors to the document has to be examined and he must prove execution of the Will in terms of Section 63 of Indian Succession Act, 1925. Section 63 of Indian Succession Act reads as follows:

“S.63. Execution of unprivileged Wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his marks to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or



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has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

12.3. In the case on hand, the registered Will allegedly executed by the father of the parties was marked as Ex.B.8. A perusal of the same would make it clear that it was signed by the testator in all the pages and it was attested by two witnesses viz., one Rathnaraj and Sathyanarayanan (D.W.2). The Scribe of the document viz., D.W.3 also signed in the last page of the Will. In the reverse side of the first page of the Will, the registration endorsement is found wherein the testator put his signature after subscribing his thumb impression. In the reverse page, the above said Rathnaraj and D.W.2 had signed as identifying witnesses. Therefore, the ingredients of Section 63(a) and Section 63(b) of the Indian Succession Act are satisfied.

12.4. Now, let us proceed to see whether the ingredients of Section 63(c) are also satisfied in this case. A perusal of Section 63(c) of the Indian



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Succession Act would make it clear that the Will shall be attested by two or more witnesses and each of them should have seen the testator signing the Will or has seen some other person sign the Will in the presence and directions of the testator or they should have received a personal acknowledgment from the testator about his signature or mark in the Will. Secondly, each of the witnesses shall sign the Will in the presence of the testator. Therefore, each of the attestors should have seen the testator signing the Will and both the attestors should have attested the Will in the presence of the testator. These facts should be proved by calling at least one of the attestors. If both the attestors are examined, each of them can depose about the fact that they witnessed the testator signing the Will. On the other hand, if only one of the attestors is examined, the said attesor should not only depose about the fact that he witnessed the testator signing the Will, but he should also depose about the fact that the other attestors also witnessed the testator signing the Will. Likewise, he should further depose about the presence of the testator, when each of the attesor attested the Will. Now, let us proceed to see whether the evidence of D.W.2 is sufficient to satisfy these ingredients. The attesor to Ex.B.8 Will viz., D.W.2 clearly deposed that he had seen the attesor signing the Will, who



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was healthy and conscious. He also deposed that he had read the contents of the Will as per the directions of the testator Rathinasamy Nadar. He also deposed that the other attesor attested in his presence and he attested the Will as a second witness. Close scrutiny of the evidence of D.W.2 as a whole make it clear that D.W.2 attesor had seen the testator signing the Will consciously and the testator had seen the attestors signing the Will and all of them were present at the same time. The relevant portion of D.W.2's evidence in vernacular is as follows:

□நான் அதில் 2வது சாட்சி கையொப்பம் போட்டேன். பி 8ல் நான் 2வது சாட்சி. மற்ற நபர் கையெழுத்து போட்டதை நான் பார்த்தேன். சாட்சிகள் கையெழுத்து போட்டதையும் நான் பார்த்தேன். எழுதிக்கொடுத்த நபர் நான் பார்த்தபோது சுய நினைவுடன் நல்ல நிலையில் காணப்பட்டார். சாட்சி கையெழுத்து போடும்போது அவர் படித்துப்பார்த்துதான் ஒப்பம் போட்டார். பி 8ல் உள்ள என் கையெழுத்து எக்சிபிட் 12 ஆகும்.□

Therefore, perusal of D.W.2's evidence would make it clear that all the ingredients of Section 63 of the Indian Succession Act are satisfied in this case and in fact, the first appellate Court, on consideration of D.W.2's evidence, came to a factual conclusion that it proved the Will.



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12.5. The learned counsel for the appellant, by relying on Rule 21(i) of Tamil Nadu Document Writers' Licence Rules, submitted that the said Rule prohibits attestation of Will by Document Writers. In the case on hand, though D.W.2 is also a Document Writer, he is not a Scribe of the Will. The Scribe of the Will is D.W.3. His evidence also supports the evidence of D.W.2. In case, a Document Writer attests the Will or identifies the testator in the Sub-Registrar Office, violating the prohibition contained in the above Rules, certainly it will not invalidate the attestation or identification. At the most, it can only be treated as violation of code of conduct by the Document Writer. Therefore, merely because D.W.2 is a Document Writer, it cannot be presumed that it will invalidate the attestation. However, it was clarified by the learned counsel for the respondent that at the time of attestation of the Will, he did not hold the licence for document writing, but before his examination as a witness, he acquired the said licence and therefore, Rule 21(i) of the Tamil Nadu Document Writers' Licence Rules cannot be pressed into service as against D.W.2 even as violation of code of conduct.



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12.6. When an attesting witness is examined before the Court after a lapse of few years, certainly minor contradictions are bound to arise and nobody can expect to re-collect the circumstances that prevailed at the time of execution of the Will with mathematical precision. Therefore, merely because certain discrepancies or contradictions are pointed out, the evidence of an attesting witness cannot be rejected, so long as it instils confidence in the mind of the Court. It would be appropriate to refer to the observations of the Hon'ble Apex Court in ***Sridevi and others Vs. Jayaraja Shetty and others*** reported in ***AIR 2005 SC 780***, wherein the Hon'ble Apex Court observed as follows:

“11. It is well settled proposition of law that mode of proving the Will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the



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satisfaction of the court before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. (emphasis supplied)

14. The propounder of the Will has to show that the Will was signed by the testator; that he was at the relevant time in sound disposing state of mind; that he understood the nature and effect of dispositions and had put his signatures to the testament of his own free will and that he had signed it in the presence of the two witnesses who attested in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged.”

12.7. The learned Senior Counsel for the appellant submitted that absolutely there was no justification for the testator to exclude daughter and give his entire property in favour of son and therefore, the disposition made in the Will is wholly unnatural and that itself would amount to a serious suspicious circumstance surrounding the Will.

12.8. It is settled law that a mere disinheritance of a natural heir in the Will cannot be treated as unnatural disposition because the very purpose of



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executing a Will is to do away with one or other natural heir to full or to some extent. So long as exclusion of natural heir as unnatural or unconscionable, we cannot say it would amount to a suspicious circumstance. In the case on hand, the appellant got married in the year 1982 and as evidenced by Ex.B.1, just before her marriage, her father got a release deed from the appellant, whereunder the appellant relinquished her share in the joint family properties in favour of her father and mother. The real intention of the testator can be gathered from getting the release from daughter at the time of her marriage. The testator by way of abundant caution, got the release deed from the daughter at the time of marriage in respect of the family properties. It goes a long way in establishing that the testator never had any intention of giving family properties to the daughter. If disposition in favour of son under Ex.B.8 is seen, in the light of release deed obtained by the father under Ex.B.1, exclusion of daughter in Ex.B.8 Will cannot be termed as unnatural so as to shock the conscience of the person of ordinary prudence. Therefore, the contention made by the learned Senior Counsel for the appellant in this regard is rejected.



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12.9. The learned Senior Counsel for the appellant also tried to attack Ex.B.1 on the ground that the attestor to the said document was not examined to prove the contents of the document. Ex.B.1 is a release deed and that the same was marked through the appellant herein when she was examined as P.W.1. A release deed is not a document, which requires compulsory attestation as in the case of Will, Gift or Mortgage. In fact, the executant viz., the appellant admitted the same during cross examination and hence, it was marked through her. Therefore, the release deed was proved in the manner known to law. Therefore, there is no need to examine the attestors of the document, as it is not a document which requires compulsory attestation. It is a registered document. The original registered release deed viz., primary evidence is produced and the same is sufficient to prove the contents of the document. If at all it is for the person who wants to contradict the contents of the registered document, has to lead contra evidence. Therefore, the said contention of the learned Senior Counsel for the appellant is not acceptable.



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12.10. In view of the discussions made earlier, substantial questions of law (a), (b) and (c) are answered in favour of the respondent and against the appellant.

Discussions on implication of proviso to Section 6(1) of the Hindu Succession Act, 1956:

13.1. Section 6(1) of the Hindu Succession Act reads as follows:

“S. 6. Devolution of interest in coparcenary property,— (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation



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including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.”

13.2. A perusal of the above provision would make it clear that nothing contained in sub-section 6(1) shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004. The present suit has been filed by the appellant seeking partition of the suit properties in the year 1998. At the time of presentation of the plaint, the appellant was not a coparcener, as she got married prior to the cut-off date mentioned by Tamil Nadu Amending Act 1 of 1989. Her claim was only in respect of the half share of father. As far as her chance of succession to the father's interest in the coparcenary is concerned, as I discussed earlier, the release deed executed by her under Ex.B.1 would estop her from claiming any share. Therefore, on that ground, her claim against her father's interest in the coparcenary immediately preceding his death cannot be entertained, but however, during pendency of the first appeal filed by the respondent herein, Central Act 39 of 2005 came into force. Therefore, the impact of



proviso to Section 6(1) of the Hindu Succession Act has to be taken into consideration while deciding the appellant's enlarged right as a coparcener under the Central Act 39 of 2005. A close scrutiny of the above mentioned section would make it clear that the status of coparcener by birth conferred on daughters by virtue of amended Section 6(1) would not affect or reopen any testamentary disposition of property which had taken place prior to 20th December, 2004.

13.3. In the case on hand, the Will executed by the father of the parties had come into effect as early as on 29.01.1998 when the testator died. Therefore, the testamentary disposition of property had taken place well prior to 20th December, 2004 and as a necessary corollary, the appellant cannot try to challenge testamentary disposition that had already taken place by taking shelter under Section 6(1) of amended section. Therefore, the claim made by the appellant for partition is not only hit by rule of estoppel discussed earlier, but her alleged enlarged right under Section 6(1) is not available to her in view of proviso to the said section.



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13.4. The learned Senior Counsel for the appellant submitted that this proviso was struck down by the Karnataka High Court in ***AIR 2010 Karnataka 27*** and therefore, persuaded this Court to take a similar view.

13.5. Before the High Court of Karnataka, the constitutional validity of proviso to Section 6(1) of the Hindu Succession Act was challenged by filing writ petition and the same was allowed by striking down the proviso as discriminatory offending Article 14 and Article 16. However, the appellant herein has not challenged the validity of proviso to Section 6(1) of the Hindu Succession Act so far. The judgment of the learned Single Judge of Karnataka High Court reported in ***AIR 2010 Karnataka 27*** (cited *supra*), was challenged in an intra-court appeal in W.A.No.374 of 2010 and the appeal was allowed by order dated 01.04.2016 by a Division Bench of that High Court by setting aside the order passed by the learned Single Judge. Therefore, the learned counsel for the appellant cannot rely on the said judgment to persuade this Court to take a similar view.



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13.6. A reading of proviso to Section 6(1) of Hindu Succession Act would make it clear that legislature in its wisdom wants to preserve the disposition that had taken place prior to 20th December, 2004 and the object of the same is not to unsettle the settled dispositions. In the absence of any challenge to constitutionality of the said provision before this Court in the manner known to law while exercising jurisdiction under Section 100 of Code of Civil Procedure, I do not want to venture into decide the constitutional validity of that proviso. Rather, I proceed to decide the case on merits in view of the presumption of constitutionality attached to every piece of legislature made by the competent legislature.

13.7. In view of the discussions made above, substantial questions of law (a), (b) and (c), formulated at the time of admission, are answered against the appellant and in favour of the respondent. Though substantial question of law (d) was answered partially in favour of the appellant, in view of the conclusion reached in respect of substantial questions of law (a), (b) and (c), the second appeal deserves dismissal. Accordingly, the second appeal is dismissed by confirming the judgment and decree passed by the first appellate Court.



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Conclusion:

14. In nutshell,

(i) the Second Appeal is dismissed by confirming the judgment and decree dated 25.01.2010 made in A.S.No.24 of 2006 on the file of the District Court, Kanniyakumari; and

(ii) in the facts and circumstances of the case, there will be no order as to costs.

20.02.2023

NCC: Yes

Index: Yes

abr

To

- 1.The District Judge,
Kanniyakumari.
- 2.The First Additional Sub Judge,
Nagercoil.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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Pre-delivery Judgment made in
S.A.(MD) No.325 of 2011

20.02.2023