



SA(MD)No.151 of 2018

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 26.09.2023

PRONOUNCED ON: 22.11.2023

CORAM:

THE HONOURABLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.(MD)No.151 of 2018

and

CMP.(MD) Nos.12306, 12373 of 2019 & 10323 of 2021

1. Vasuki Selvam
2. M.Manoharan
3. Manimuthusamy Family Trust,
Represented by its Managing Trustees,
Having office at
40B, Mani Buildings,
Salai Road, Trichy-3.

... Appellants/Defendants 1, 2 & 15

Vs.

1. Vetrivel
2. Arulselvi
3. The General Manager,
BSNL, Trichy.
4. Shri Maruthi Info Systems,
Represented by Mrs. Vijayalakshmi,
40B, Mani Buildings,
Manimuthu Valagam,
Salai Road, Trichy-3.

... 1st Respondent / Plaintiff



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5. Three Star International
Represented by Mr.A.K.Rajan,
40B/1, Mani Buildings,
Salai Road, Trichy.
6. Yashica Electronics,
Represented by Mr.Kannan,
40C, Lalith Block (Ground Floor)
And 40D, Logu Block (Four Rooms),
Manimuthu Valagam,
Salai Road, Trichy-3.
7. Vinayaga Lath Works,
40C, Lalith Block (Ground Floor)
Manimuthu Valagam,
Salai Road, Trichy.
8. Manitham Homeopathy Clinic,
40-C-2, First Floor,
Lalith Block (Ground Floor),
Manimuthu Valagam,
Salai Road, Trichy-3.
9. CCI Computer Education,
40-C, Second Floor,
Lalith Block (Ground Floor),
Manimuthu Valagam,
Salai Road, Trichy.
10. Paris Tailors,
Represented by Mr.A.Nagaraj,
40D, Logu Block,
Manimuthu Valagam,
Salai Road, Trichy.
11. Baby Decorators,
Represented by Mr.M.Fkoorideen,
40D, Logu Block,
Manimuthu Valagam,
Salai Road, Trichy.



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12.Eversign Printers,
Represented by Mr.A.B.Abdul Hafeez,
40D/5, Logu Block,
Manimuthu Valagam,
Salai Road, Trichy.

13.State Bank of India
Represented by its Branch Manager,
Woraiyur, Trichy.

... Respondents 2 to 13/ Defendants 3 to 14

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree passed by the learned Sessions Judge (Mahila Court), Tiruchirappalli dated 22.12.2017 made in A.S.No.26 of 2015, confirming the decree and judgement made in O.S.No.489 of 2012 dated 26.11.2014 on the file of the Principal Subordinate Judge, Tiruchirappalli.

For Appellants : Mr.S.Anand Chandrasekar
for Mr.K.Balasubramani
For Respondents : Mr.Veerakathiravan
Senior Counsel
for Mr.C.Jaganathan for R1
Mr.N.Vallinayagam
Senior Counsel
for Mr.A.N.Ramanathan for R2
Mr.K.Govindarajan for R3
Mr.T.Govindasamy for R13
No Appearance for R6 to R11
R4, R5 & R12 - Given up.



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JUDGMENT

The appellants 1 to 3 are the defendants 1, 2 and 15. The first respondent herein was the plaintiff and the 2nd respondent was the 3rd defendant. The respondents 3 to 14 are the defendants 4 to 14 before the Trial Court. The plaintiff and the defendants 1 to 3 are brothers and sisters and they are the children of Late.Manimuthusamy, who is the testator in the suit.

2. For the sake of convenience, parties will be referred according to their litigative status before the Trial Court.

The *plaint averments in brief*:-

3. The plaintiff has filed a suit for the relief of declaration to declare the Trust Deed dated 14.01.1992 is defunct, inoperative and also for the relief of declaration to declare the “D” schedule property of the Will dated 21.02.2008 belongs to him. According to the plaintiff, his father Mr.Manimuthusamy was a stubborn and strict person. During 1982, the plaintiff has paid a sum of Rs.15,000/- (Rupees fifteen thousand only) for the 3rd defendant's marriage and later on Rs.35,000/- (Rupees Thirty Five Thousand only) for the 2nd defendant to start a printing press at Tiruppur.



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Due to the same, his father Mr.Manimuthusamy became close to him. However, he was tutored by his daughters, who were close by his side. In fact, Mr.Manimuthusamy acted as per the ill-advice of the defendants 1 to 3. While so, he executed a registered Will and Trust Deed both dated 14.01.1992. However, even after 17 years, the Trust was not acted upon. The plaintiff further submits that, his father Mr.Manimuthusamy had modified the Will on 29.06.2001 and 20.06.2005. According to this plaintiff, he met with an accident on 10.05.2002 and that he had contributed a major portion of the amount for constructing the suit property and has also celebrated his father's sadhabishegam. Hence, there was a change in his father's emotions and his father has developed affection and good relationship with the plaintiff. As a result of which, his father cancelled all his previous Wills and executed his last Will dated 29.02.2008. This plaintiff submits that in the meanwhile, his father died on 09.01.2010 and after his death, when the plaintiff approached the defendants 1 to 3 for allotment of property as per the Will dated 29.02.2008, the defendants ignored the plaintiff with untenable reasons. However, during May 2012, the defendants clandestinely made two cheque payments in the plaintiff's account. The plaintiff latter came to know that the 3rd defendant had deposited the said



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amount on behalf of the defunct Trust. Therefore, this plaintiff prayed to decree the suit as prayed for.

The Written statement of the 1st defendant in brief:-

4.This defendant admits that the suit property was the self acquired property of the deceased Mr.Manimuthusamy. This defendant disputes the Will dated 21.02.2008 propounded by the plaintiff. This defendant further submits that the Trust qua “Manimuthusamy Family Trust”, created by the deceased Manimuthusamy has been functioning well as per the objective of the Trust. According to this defendant, his father Manimuthusamy never executed the Will dated 21.02.2008 and the signature found in the said Will is not the signature of the deceased Manimuthusamy. This defendant submits that the signature found in the said Will is the forged signature. Therefore, this defendant submits that the Will dated 21.02.2008 will not bind them. This defendant further submits that as per the Will dated 14.01.1992, 21.02.2008 and 20.06.2005, the suit property has been bequeathed to the Trust. As a matter of fact, his father Manimuthusamy censured the conduct of the plaintiff. This defendant also submitted that, the plaintiff’s son Mr.Manishanthavel has filed the Trust OP No.2 of 2013 before the Hon’ble District Court, Trichy, which is evident to show the existence of the Trust.



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The Written statement of the defendants 2 & 15 in brief:-

5. These defendants have filed the written statement similar to the written statement filed by the 1st defendant. However, it is the further submission of the defendants that, as per the Will dated 20.06.2005 if the plaintiff filed a suit, all the rights of the plaintiff as the heir of Late Mr.Manimuthusamy, will stand revoked. Thus, these defendants prayed to dismiss the suit.

6. Evidence, Documents and Findings of the both the Courts below:-

(a) The plaintiff has filed 19 documents before the Trial Court as Exs.A1 to A19. On behalf of the defendants, 58 documents were marked as Ex.B1 to B58. As a third party document, 2 documents have been marked as Exs.X1 and X2. On behalf of the plaintiff and the defendants, each 2 witnesses were examined as PW1 and PW2 and DW1 and DW2 respectively. As the Court witnesses, 2 witnesses were examined as CW1 & CW2.

(b) The Trial Court after gone into various aspects, has ultimately found that the Trust constituted under the Trust Deed dated 14.01.1992 become defunct. Further, the Trial Court upheld the Will propounded by the plaintiff qua Will dated 21.02.2008. As a result of which, the Trial Court



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decreed the suit. Aggrieved with the same, the defendants 1, 2 and 15 filed an appeal in A.S.No.26 of 2015, wherein the First Appellate Court confirmed the finding of the Trial Court and dismissed the First Appeal. Aggrieved with the concurrent finding, the defendants 1, 2 and 15 have filed the instant Second Appeal.

Substantial Question of law:-

7. At the time of admission, this Court has formulated the following substantial question of law:-

“1. Whether the Courts below are correct in holding that the Will in Ex.A5, dated 21.02.2008, was proved in accordance with Sections 68 and 69 of the Indian Evidence Act?

2. Whether in the facts and circumstances of the case, the Will in Ex.A5, dated 21.02.2008 allegedly executed by Manimuthusamy was free from all suspicious circumstances and whether the same was confirmed to the provisions of Section 63 of the Indian Evidence Act?

3. Whether the Courts below are justified in decreeing the suit without properly considering the effect of Ex.A1 (Ex.B1) Trust Deed, the registered document dated 14.01.1992 under which the property in question has been dedicated to the family trust?

4. Whether the Courts below are right in casting the burden of proof with regard to the genuineness of the Will in Ex.A5 to



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the defendant?

5. Whether the Courts below are right in holding that the trust deed was not acted upon, when the father of the appellant executed a trust deed in Ex.A2 (Ex.B1) and by subsequent event the trust has been acted upon and the plaintiff himself has admitted and enjoyed for two years without repudiating or returning the said amount?"

8. Submissions of the Counsel on either side:-

(a) **The learned counsel for the appellants** Mr.S.Anand Chandrasekar would contend that the Trial Court has miserably failed to take into consideration of the fact that the property would come to the Trust only after the death of Late.Manimuthusamy. The learned counsel for the appellants has contended that there are numerous suspicious circumstances such as the Will dated 21.02.2008 was unregistered, no description of property find in the Will, there is no reference as to the name of the scribe, and that the corrections have not been counter signed as mandated under Section 71 of The Indian Succession Act.

(b) The learned counsel for the appellants would also contend that the alleged attesor to the Will dated 21.02.2008 is a chance witness and his presence at the relevant time is impossible, hence the alleged attesor



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evidence is highly unreliable. The learned counsel for the appellants would further contend that, the finding given by the Trial Court as well as the First Appellate Court that in view of the non-submission of the account books of the Trust, the Trust is inoperative is a perverse finding. The learned counsel would also submit that admittedly even in the lease agreement dated 01.01.2009, which is marked as Ex.B14 there is a recital to pay rent to the Trust. The learned counsel for the appellants would submit that the finding of the Trial Court that the Trust was created only to overcome the attachment proceedings to be initiated by the Bank is perverse and without there being any pleading in the plaint. Thus, the appellants prayed to allow the Second Appeal and thereby prayed to dismiss the suit. In support of the appellants' case, the appellants relied upon the following judgements:-

1. *J.T.Surappa & Another Vs. Sri Satchidhanandendra SSPCT & Others* reported in *2008 Supreme (Kar)* 267;
2. *Rajammal Vs. Ramasami and three others* reported in *1998-1-L.W.* 451;
3. *G.Gopal and etc., Vs. G.Nagarathinam & Anr* reported in *AIR 2007 MADRAS* 28; and
4. *Karpagam and another vs. E.Purushothaman & 2 others* reported in *2010-3-L.W* 282.

(c) **On behalf of the 2nd respondent**, Mr.N.Vallinayagam, learned



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Senior Counsel would though support the arguments of the appellants, in addition to the said argument, further contended that the Will, will come into operation only after the death of the testator, Therefore, it is attached with sanctity. It is the contention of the learned Senior Counsel that in view of such legal position, it is the duty on the part of the plaintiff to dispel all the suspicious circumstances. The learned Senior Counsel would contend that even according to the plaint averments, the testator was treated by one Doctor Sethuraman, however, the plaintiff did not examine the said Doctor to prove the sound disposing state of mind. The learned Senior Counsel would draw the attention of this Court in respect of the absence of attestation to the alleged plan, which is said to have been annexed to the Will, and would further invite the attention of this Court about the absence of description of the property to the Will. The learned Senior Counsel would also submit that the very finding given by the Trial Court in respect of the inoperativeness of the Trust is perverse and prayed to interfere with the same.

(d) **Per contra**, the learned Senior Counsel Mr.Veerakathiravan, appearing on behalf of the first respondent would contend that the alleged alteration in the Will are superficial in nature, and that the testator being the



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proof reader by profession, he was having the habit of proof reading any document. Therefore, making some alteration in the Will dated 21.02.2008 cannot be a suspicious circumstance. Apart from that, the learned Senior Counsel would further submit that, even in the previous Will such type of alteration had taken place. The learned Senior Counsel would contend that the very Trust was formed only to overcome the recovery proceedings of the Bank. The learned Senior Counsel would further submit that, though initially the relationship between the plaintiff and the testator was not cordial, subsequently much water flown in the relationship in the interregnum, and that the sufferings of the plaintiff on account of major accident and also the change of attitude of the plaintiff was liked by his father Manimuthusamy, which impelled the testator to execute a Will dated 21.02.2008 providing certain property to the plaintiff.

(e) The learned Senior Counsel would submit that even according to the Will dated 21.02.2008, the plaintiff was provided only with the life estate. The learned Senior Counsel would contend that had there been a fabrication of Will, the recital might have been for absolute right. It is the submission of the learned Senior Counsel that, the delay in filing the suit was only due to the effort made by the plaintiff to resolve the issue by way of a



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compromise. It is the further contention of the learned Senior Counsel that, the sound disposing state of mind of the testator would reflect from the active participation of the testator in proof reading of the Will and from making necessary corrections in the Will. The learned Senior Counsel would contend that the corrections made in the Will is only superficial in nature and have no impact upon the ultimate bequeath of the Will. It is the submission of the learned Senior Counsel that, when there is a finding of fact by both the Trial Court as well as the First Appellate Court in respect of the due execution of the Will dated 21.02.2008, at the Second Appeal stage, this Court cannot go into the factual position. Therefore, the learned Senior Counsel prayed to dismiss the Second Appeal. In support of their contentions, they have relied upon the following judgements in respect of legal position under Section 100 of CPC:-

1. ***Dalip Singh Vs. Bhupinder Kaur*** reported in **(2018) 3 SCC 677;**
2. ***Laxmidevamma and others Vs. Ranganath and others*** reported in **(2015) 4 SCC 264;**
3. ***Hero Vinoth (Minor) Vs. Seshammal*** reported in **(2006) 5 SCC 545;**
4. ***Sayed Akhtar Vs. Abdul Ahad*** reported in **(2003) 7 SCC 52;**



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(f) The learned Senior Counsel has also relied upon the following judgements to substantiate his contention that the examination of one attesting witness is sufficient to prove the Will.

(1) Mahesh Kumar (Dead) by Lrs. Vs. Vinodkumar and others reported in **(2012) 4 SCC 387;**

(2) Sridevi and others Vs. Jayaraja Shetty and others reported in **(2005) 2 SCC 784;**

(3) Valliathai and another Vs. P. Duraisamy and another reported in **(2014) 2 MWN (Civil) 508;**

(4) Sridhandappa @ Rajappa Vs. Muniamma reported in **2014 (3) CTC 247;**

(5) Thiagarajan Vs. Muthusamy Gounder and others reported in **(2013) 3 MLJ 159;**

(6) Dhanalakshmi Vs. Karuppursamy and others reported in **(2013) 3 MLJ 655;**

(7) Mathai Samuel and others Vs. Eapen Eapen (Dead) by LRs and others reported in **AIR 2013 SC 532;**

(g) Apart from that the learned Senior Counsel also relied upon the judgment in **Chelladurai Vs. Velmurugan** reported in **2014 (4) CTC 606** to substantiate his contention that the Trial Court is competent to compare the disputed signature by virtue of Section 73 of The Indian Evidence Act. Thus, prayed to dismiss the Second Appeal.



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9. I have given my anxious consideration to either side submissions.

Analysis of the submissions of both sides:-

10. Before we embark into the disputed contentions of either side, it is imperative to answer to the submissions made by the learned Senior Counsel appearing on behalf of the 1st respondent in respect of the power of this Court under Section 100 of CPC. It is the submission of the learned Senior Counsel for the first respondent that, under Section 100 of CPC, the finding of fact cannot be reversed at the Second Appeal stage, when the Trial Court as well as the First Appellate Court recorded the finding of fact on the basis of the evidence, and when arrived at a right conclusion. It is the submission of the learned Senior Counsel that without there being any substantial question of law, the findings should not be interfered with.

11. While answering the above submission, this Court deems it appropriate to rely the judgments submitted by the learned Senior Counsel in ***Hero Vinoth's*** case [cited supra]. The relevant paragraphs are paragraphs 13, 19 & 24(iii) and the same read as follows:-

“13. Though as rightly contended by learned counsel for the appellant the scope for interference with concurrent findings of fact while exercising jurisdiction under Section 100 CPC is very limited,



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and reappreciation of evidence is not permissible (sic except) where the trial court and/or the first appellate court misdirected themselves in appreciating the question of law or placed the onus on the wrong party certainly there is a scope for interference under Section 100 CPC after formulating a substantial question of law.

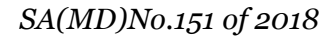
19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.

24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i)

(ii)

(iii) The general rule is that High Court will not interfere with the



Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

<https://www.mhc.tn.gov/inf/judis>



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ruling is in support of either side. Thus, based upon the above ratio, this Court is now attempting to find out the rational, correctness and legality of the findings recorded by both the Courts below.

13. While analysing the judgment of the Trial Court as well as the First Appellate Court, both the Courts have wrongly imposed the burden upon the defendants and compelled them to prove that the Will was forged one, totally ignoring the premordial responsibility of the propounder of the Will to dispel all the suspicious circumstances flowing from the disputed Will-Ex.A5.

14. Before delve into the suspicious circumstances put forth by the defendants, this Court deems it appropriate to discuss the latest legal principles in respect of the proof of Will. In this connection, as extracted in paragraph 8(e) supra, the plaintiff has relied numerous judgment in support of his case. However, this Court deems it appropriate to refer the judgment of a three-Judge Bench of the Hon'ble Supreme Court in ***Shivakumar and others Vs. Sharanabasappa and others*** reported in ***(2021) 11 SCC 277***. Wherein the Hon'ble Supreme Court, after analysing various precedents from 1946 upto 2017, including the very famous judgment of ***H.Venkatachala Iyengar Vs. B.N.Thimmajamma*** reported in ***AIR 1959 SC 443*** has



encapsulated the relevant principles governing the adjudicatory process of the Will. For ready reference, this Court deems it appropriate to extract the relevant portion of the said judgement as under:-

“12. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could be broadly summarised as follows:

*12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. **Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.***

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder



and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is “suspicious” when it is not normal or is “not normally expected in a normal situation or is not expected of a normal person”. As put by this Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind”.

12.7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion



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about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will.”

(Emphasis supplied by this Court)



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15. Let us consider the submissions of either parties, with the touch stone of the above principle. As per the above ratio, the initial burden is rest upon the parties who sets up a definite case. However, whenever any suspicious circumstances emerges, then the initial onus is upon the propounder to remove all the reasonable doubts. In the case on hand, the defendants have raised the following suspicious circumstances:-

“(i) Ex.A1, A3 & A4 namely earlier wills are registered. Ex.A5 is unregistered. No explanation in pleading or evidence why Ex.A5 was not registered.

(ii) Ex.A1, A3 & A4 contains clear description of properties. Though in the body of Ex.A5 reference is made about schedules A, AA, B, C, D, E, F no clear corresponding description of property is given. An Engineer's plan is annexed, with reference to which nothing is mentioned in Ex.A5. The said plan does not contain schedules AA, E, F mentioned in Ex.A5. No signature or seal of person who prepared.

(iii) A handwritten note is annexed to Ex.A5, which does not contain the signature of Manimuthusamy.

(iv) In Exs.A1, A3 & A4, the person who prepared the said documents is specified with particulars. In Ex.A5, who has prepared the same has not been specified.

(v) Unlike Exs.A1, A3, and A4, Ex.A5 contains too many corrections. Even the date and month pertaining to



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Ex.A5 is handwritten and added. This is against the character of Manimuthusamy, who is meticulous and disciplined in his approach as reflected by his earlier wills.

(vi) The corrections effected in Ex.A5 have not been endorsed as prescribed in Sec. 70 of Indian Succession Act in all places.

(vii) In earlier wills namely Exs.A1, A3 and A4, the testator's intention was to vest his property in family trust and the same has been reiterated. In Ex.A5, no explanation is offered for divesting the properties from family trust and vesting it in favour of children. Lack of explanation in Ex.A5 regarding the same goes against the character of Manimuthusamy; who is a stickler for details as evidenced from Exs.A1 to A4.

(viii) The attestors in Ex.A5 are not very well known persons to Manimuthusamy. PW2 claims to be a persons dealing with gold jewellery who does not have a shop and who claims to have repaired a emerald ring of Manimuthusamy. The details of other attestor, especially his acquaintanceship with testator is unknown.

(ix) Ex.A5, refers to the will dated 29.06.2001 (Ex.A3) as the first will of testator, whereas the first will of the testator is Ex.A1 dated 14.01.1992.

(x) Testator's apprehension of 1st respondent holding signed papers of testator is expressed in Exs.A3 and A4.”



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16. Though there are numerous suspicious circumstances, the Trial Court as well as the First Appellate Court did not advert into the material allegations, and swayed with superficial evidence of some invitation printed for the temple consecration (Kumbabishegam) and held that the disputed Will-Ex.A5 was proved. It is pertinent to mention here that, whenever we are adjudicating upon a Will, we are adjudicating the same after the demise of the testator. Therefore, there is a solemn duty attached to the Court to find out as to the due execution.

17. In this regard, the learned counsel for the appellants relied upon the judgment of *J.T.Surappa's* case (cited supra). Wherein the Karnataka High Court has succinctly held that unlike other documents, the Will speaks from the death of the testator. Therefore, when it is propounded or produced before the Court, the testator, who has already departed the world cannot say whether it is his Will or not. Therefore, the Court has to tread a careful path in the enquiry to be conducted with regard to the Will.

18. Now let us take Ex.A5-Will. In Ex.A5-Will, each persons have been allotted a different schedule namely, Schedule- A deals about the entire property. The Schedule-AA is the property allotted to all the legal heirs. The Schedule-B property was allotted to Vasuki. Likewise, Schedule-C was



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allotted to Manoharan and Arulselvi. Lastly, Schedule-D was allotted to the plaintiff Vetrivel. But apparently, no such Schedule is attached or mentioned to Ex.A5-Will except a sketch. While looking at the previous Wills of the testator namely Exs.A1, A3 & A4, which were admittedly executed by Late Mr.Manimuthusamy, there were schedule of property. Though the plaintiff projects the sketch in Ex.A5-Will as the Schedule, while ruminating the evidence of PW-2, who was the alleged attesor, he did not speak about the plan annexed to the Will.

19. A harmonious reading of the attesor's chief examination (PW2) would probablise a serendipitous appearance of the attesor before the testator Late.Manimuthusamy on 21.02.2008. To put it in other words, he was a chance witness. According to the attesor when he was present in the residence, some typed papers were given to the testator. He did not speak about plan. There is no evidence, as to from which source and when the sketch was received and annexed to Ex.A5-Will. Apart from that, for argument sake, if we read the entire chief examination of PW2, as true, his evidence is only in respect of page 1 to 8 of Ex.A5-Will, and there is no proof in respect of attestation or annexation of Page numbers 9 and 10. Therefore, this Court is of the firm view that the absence of description of



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property to Ex.A5-Will indubitably a suspicious circumstances and the same has not been dispelled by the propounder.

20. The another suspicious circumstances projected by the defendants is that there is a reference about the execution of the previous Will in Ex.A5-Will. According to either side submissions, Late Manimuthsamy, having vast experience and possessed with opulence of life lessons and sense of great care in respect of editing of document, as he was publishing books. Even according to the plaintiff, the indefatigable skills of editing of the testator is reflecting through various corrections made in Ex.A5-Will. When a person was projected in such a nature, the absence of reference in the Ex.A5-Will, about the first Will dated 14.01.1992 is absolutely a grave suspicious circumstance. According to Ex.A5-Will, it is referred that the first Will was executed on 29.06.2001 contrary to the admitted fact that the same was executed on 14.01.1992. The Will dated 29.06.2001 was the second Will of the testator Manimuthusamy and his 3rd Will is on 20.06.2005.



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21. If we go little further into the recitals of Ex.A5-Will, in paragraph 3, admittedly, the Will dated 29.06.2001 and 20.06.2005 were cancelled through this Ex.A5-Will. Therefore, according to Ex.A5-Will, the first Will dated 14.01.1992 was not cancelled. Therefore, though the last Will, supersede the previous Will, still the absence of reference about the first Will dated 14.01.1992 is also creating a grave suspicious circumstance, which the propounder has failed to dispel the same.

22. At this juncture, the learned counsel for the appellants relied upon the judgment of *Rajammal's* case (cited supra), where the Hon'ble Single Judge of this Court, held that the incorrect details in the Will is also the suspicious circumstances. Admittedly, there are so many corrections, which according to the plaintiff, would prove the skill of editing of Late.Manimuthusamy and his sound disposing state of mind. However, the learned counsel for the defendants by referring Section 71 of The Indian Succession Act, would contend that any alteration or interlineation or obliteration in the Will can be given effect only after such alteration is acknowledged by the signature of the testator and attesting witnesses. To put it in other words, every interlineation and alteration has to be validated like

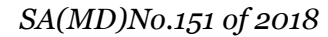


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execution of Will as per Section 63 of Indian Succession Act, and Section 68 of The Indian Evidence Act.

23. However, the learned Senior Counsel appearing on behalf of the plaintiff would invite the attention of this Court and contend that there are similar corrections and interlineation in the previous Will also, and the corrections made in Ex.A5-Will are only superficial corrections and will in noway affect the material contents of the Will. However, the earlier Will, Exs.A1, A3 and A4 were admitted by either parties. Therefore, this Court do not want to go into such corrections made by the testator in the earlier Will. At the same time, though this Court can assume or presume the testator's habit of editing the document, such assumption of the testator's conduct will not obviate, eclipse or supersede the statutory provisions enunciated under Section 71 of the Indian Succession Act. In order to give effect of any alteration and to make the Will become duly executed, such alteration has to effected, in a like manner as required for the execution of the Will.

24. In this regard, the learned counsel for the defendants relied upon the judgment of the Hon'ble Single Judge of this Court rendered in **G.Gopal's** case (cited supra). The relevant paragraph is paragraph 24 and the same reads as follows:-



Section 71 of the Indian Succession Act reads as follows:-

The alterations, interlineations or obliterations will only be given effect to only if the signature of the testator and of the attesting witnesses is made in the margin or on some part of the Will opposite or near to such alterations. Under such legal position, the effect of bracketing and the interlineations added by the endorsement “cancelled” dated 2-10-1991 remains to be determined.”



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25. Here, though it was projected before the Court that the alteration was made before execution of the Will, such contention cannot be countenanced in view of the absence of attestation to the alleged plan annexed to the Will. As discussed elsewhere in the judgment, according to PW2, he knew about the typed papers alleged to have been given by a person, but he did not speak about any sketch. To vindicate the above aspect, it is relevant to refer the cross examination of PW2. While cross examining PW2, he admitted that he signed in the last page of the Will. If we go by the admissions made by the alleged attestor, then the sketch cannot be form part of Ex.A5-Will. If that being the case, any interlineation in respect of schedule, the same should have been subsequent to the alleged execution of the Will. But, here, such alteration and interlineation have not been done in accordance with Section 71 of Indian Succession Act. Therefore, this aspect would also create a serious suspicion over the execution of the Will.

26. But, without answering the above serious of suspicion, both the Courts below have cast the burden upon the defendants and held that since the defendants have not proved the fabrication and forgery of the Will, held that the plaintiff has duly propounded the Will. It is quite curious, even when all these suspicious circumstances are not answered, both the Courts



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oblivions to the statutory requirements of the propounder's duty to dispel all suspicious circumstances, have exercised powers under Section 73 of the Indian Evidence Act and satisfied that the signature found in Ex.A5-Will and the other Wills are similar.

27. But this Court is of the view that the above finding is perverse, in view of the recitals in the previous Will. Wherein Manimuthusamy has stated that the plaintiff was in possession of some signed papers with him and that those signed papers will have no effect in the hands of the plaintiff. But this portion of the recital was not at all considered by both the Courts below, and oblivious to the above recital, has simply compared the signature in Ex.A5-Will with the other Wills and hold that the Will was duly executed. The relevant portion of the Ex.A4-Will is extracted herein:-

“19. 1993ல் வீட்டை விட்டு வெளியே போகும்போது அவனுடன்
வரவு செலவுகள் எல்லாம் நேர் செய்யப்பட்டுவிட்டது. அவனிடம் என்
கையெழுத்து பெறப்பட்ட காகிதங்கள் இருந்தால் அவைகள் எல்லாம்
செல்லாது.”

28. The learned Senior Counsel appearing on behalf of the plaintiff would vehemently contend that the emotions of the father though initially was very much strined and evasive against the plaintiff, after the plaintiff met



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with an accident, the testator has visited the plaintiff and enquired about his health. After such incident, his aversion against the plaintiff become neutralised. It is also the submission of the learned Senior Counsel that the relationship between the father and children, never gone to a far away point of no return. The submissions made by the learned Senior Counsel for the plaintiff though cannot be ignored, the Court needs evidence about resurrection of affection and blossoming of the cordial relationship with the plaintiff.

29. It is the case of the plaintiff that 2002 accident had changed the emotions of his father in his favour. But even while executing Ex.A4-Will dated 20.06.2005, the testator was consistent with his aversion against the plaintiff. Therefore, the submissions made by the learned Senior Counsel that the intervening accident of the plaintiff made the testator become ambivalent towards the plaintiff and affectionate towards the plaintiff, cannot be accepted at all. As rightly contended by the defendants, there are no evidence available as to the cordial relationship between the plaintiff and the defendants at the time of execution of Ex.A5-Will.

30. As contended by either side, when the testator having opulence of life lessons and vast experience in the vagary of life, though he recited the



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reason for the aversion against the plaintiff in all the previous Wills, the absence of any reference as to the change of emotions of the testator would only favours the defendants and to add weightage to the further suspicion over the Ex.A5-Will. Here, the plaintiff did not think fit to examine any witness to prove the transition of the emotions of the testator.

31. Therefore, this Court is of the firm view that the plaintiff has not dispelled the suspicious circumstances projected by the defendants and the suspicious circumstance has not at all been answered or not adverted by both the Courts below. Therefore, this Court is of the view that the judgment and decree of the both the Court below are liable to be interfered with, as both the Courts below recorded perverse finding of fact as to the due execution of the Will and wrongly casting burden of proof upon the defendant, without adverting into the suspicious circumstances projected by the defendant. Therefore, this Court holds that Ex.A5-Will has not been proved in a manner known to law. Hence, the substantial question of law (1), (2) and (4) are answered in favour of the appellants.

32. Coming to the substantial question of law (3) and (5) namely in respect of the existence of the Trust qua Manimuthusamy family Trust, the Trial Court and the First Appellate Court upon the following points found



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that the trust become defunct. The points are, (i) the very Trust-Ex.A2 came into existence only to safeguard the property from the recovery proceedings initiated by the Bank, (ii) no records were available as to the functioning of the Trust, (iii) more curiously the absence of Arulselvi in India.

33. Let us consider the findings of the above points one after another to demonstrate those findings are perverse.

34. Coming to the first point that Ex.A2-Trust came into existence, only to safeguard the property from the recovery proceedings of the Bank, this Court would like to refer Ex.A11, which was the suit instituted by State Bank of Trivancore during 1974 in O.S.No.773 of 1974. While seeing Ex.B52-Memo, the claim of the Bank was fully satisfied on 09.11.1994 as evidenced through the full satisfaction memo. To put it in other words, the recovery proceedings commenced in 1974 and ended in 1994. If the arguments of the plaintiff is taken into consideration that the Trust Deed-Ex.A2 came into existence only to overcome the recovery proceedings of the Bank, when the loan was discharged during 1994 through Ex.B52, the Late.Manimuthusamy could have cancelled the vesting of property with Trust in his subsequent Will Ex.A3 dated 29.06.2001 and another Will-Ex.A4 dated 20.06.2005. Therefore, the finding of fact recorded by the Trial Court,



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which was confirmed by the First Appellate Court, that the Trust came into existence only to overcome the loan transaction is perverse. At this juncture, the learned counsel for the defendants would submit that there are no pleadings in respect of the finding recorded by the Trial Court. Therefore, this Court holds that Ex.A2 did not come into existence to overcome the loan transaction.

35. The next aspect to disbelieve the Trust is, a reason of non submission of records about the functioning of the Trust since 1992 to till date. In this regard, the learned counsel for the defendants, by relying upon the Wills-Exs.A1, A3 and A4 would submit that the vesting of the property in favour of the Trust, will come into operation only after the demise of the testator and that the testator died only on 09.01.2010. They would further submit that, immediately after that, by virtue of Ex.B5 and B6, they have submitted Income Tax returns. Further, they have executed the lease deeds Exs.B19 to B21 for and on behalf of the Trust. This Court is in full agreement with the submissions made by the defendants. According to the above Wills, the property will vest only subsequent to the death of the testator Manimuthusamy and therefore, no records could be expected from the Trust since from 1992.



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36. Furthermore, even without there being any pleading, the Trial Court has found that the Trust become defunct because of the domiciliary status of Arulselvi. Both the Trial Court as well as the First Appellate Court, by relying Section 60 of Indian Trusts Act, has held that, since Arulselvi is a resident of United States of America, the Trust become defunct. If we closely read Section 60 of The Indian Trusts Act, it only deals about the rights of the beneficiary in the event of Trustees' permanent absence. The illustration to Section 60 would exemplify and demonstrate the permanent residence of any of the Trustee will not make the Trust become defunct, and only may give rights to the beneficiary for removal of such Trustee, who is permanently reside abroad, and for appointment of new Trustee. For ready reference, Section 60 of Indian Trusts Act and illustration (e) to Section 60 is extracted hereunder:-

“60. Right to proper trustees. - The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Illustrations:

(a)

(b)



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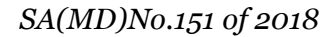
(c)

(d)

(e) *A, a trustee for B, refuses to act, or goes to reside permanently out of India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. B may institute a suit to have A removed and a new trustee appointed in his room.”*

37. At this juncture, this Court would also rely upon the latest judgment of the Hon'ble Supreme Court in ***V.Prakash Alias G.N.V.Prakash Vs. P.S.Govindaswamy Naidu and Sons' Charities Represented by its Managing Trustee and others*** reported in (2022) 9 SCC 36, wherein, according to the scheme of the concerned Trusts, no person shall be elected or hold office as a Trustee, unless he/she resides in the Madras presidency. But the Hon'ble Supreme Court held that even if the scheme of the Trust expect Trustee should reside in Madras presidency, by adequate of technology, his/her absence in Madras presidency will not debar him/her to act as Trustee. The relevant portion of the said judgment is extracted hereunder:-

“77. The requirements of physical residence, with the rapid advancement of the means of communication and transport cannot be ignored particularly when the purpose of the term “residence” in the document in question is to ensure participation in the affairs of



38. Therefore, this Court is of the firm view that Section 60 of the Trusts Act in its *stricto sensu* is not applicable to the present facts of the case.

Besides, there is no ground urged by the plaintiff that the defendant Selvi is not the citizen of India. Therefore, the absence of the defendant Selvi for certain period in India will in no way have any impact upon the functioning of the Trust. Therefore, the findings recorded by both the learned Judges below that the Trust become defunct on the ground of absence of the defendant Selvi is perverse.

<https://www.mhc.trn38942/judis>



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recorded by both the Courts below that the Trust become defunct is perverse and liable to be interfered with.

40. Before concluding, this Court would like to recapitulate the discussions made hereinabove for easy understanding.

- (i) Though there is a concurrent finding against the defendant, when there is a perverse finding without any evidence, and any findings recorded contrary to the statutory provision, this Court, under Section 100 of CPC at the Second Appeal stage, can interfere with the perverse finding recorded by the Court below;
- (ii) While doing so, this Court found that the Trial Court did not advert or gone into the legitimate reasonable suspicious circumstances projected by the defendants;
- (iii) The Trial Court has wrongly cast the burden on the defendants.
- (iv) The plaintiff did not dispel the suspicious circumstances.
- (v) Hence, this Court holds that Ex.A5-Will is not proved in a manner known to law.
- (vi) Coming to the Trust, since the Will-Ex.A5 has not been proved as a natural corollary and concomitant, Ex.A2 Trust is functioning and the reason assigned by the First Appellate Court against the functioning of the Trust are perverse.
- (vii) Thus, all the substantial questions of law are answered



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in favour of the appellants.

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CMP.No.727 of 2020

41. The appellants have filed the CMP to receive the additional documents namely, the notice issued to the Notary Public who allegedly attested in Ex.A5-Will.

42. On perusal of the documents, all the documents are subsequent to the judgment of the First Appellate Court and the reason assigned for receipt of such additional documents will not come within the purview of Order 41 Rule 27 of CPC. The remedy to receive the additional documents would arise only under exceptional circumstances. Here, the documents, which are relied are subsequent to the judgment of the First Appellate Court and the defendants had an opportunity to take such steps even at the trial stage, wherein they miserably failed to do so. Therefore, they cannot be allowed to fill up the lacunas at the Second Appeal stage.

43. For the above reasons, this CMP is liable to be dismissed.

44. In the result, this Second Appeal is allowed, thereby setting aside the judgment and decree of both the Courts below. Resultantly, the suit in O.S.No.489 of 2012 and CMP.No.727 of 2020 are dismissed. There shall be no order as to costs. Consequently, connected CMPs are closed.



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22.11.2023

Index : Yes
Speaking Order : Yes
NCC : Yes
kmi

To

1. The Sessions Court,
(Mahila Court), Tiruchirappalli.
2. The Principal Sub Court,
Tiruchirappalli.
3. The Section Officer,
VR Section, Madurai Bench of Madras High Court,
Madurai.



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C.KUMARAPPAN, J.

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22.11.2023