



A.S.No.529 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

THE HONOURABLE **MR.JUSTICE RMT.TEEKAA RAMAN**

**A.S.No.529 of 2022**  
**and C.M.P.No.19462 of 2022**

|                                                  |                                                    |
|--------------------------------------------------|----------------------------------------------------|
| <b>Judgment reserved on</b><br><b>11.07.2024</b> | <b>Judgment pronounced on</b><br><b>03.10.2024</b> |
|--------------------------------------------------|----------------------------------------------------|

Sri.S.Kalayanasundram ... Appellant / Plaintiff

Vs.

1.Sri.R.Rajkiran

2.Smt.Rajeswari

3.Smt.Parameswari

4.Sri Rajeswaran ... Respondents / Defendants 1 to 4

**Prayer:** This First Appeal is filed under Section 96 and Order XLI Rule 1 of Code of Civil Procedure to set aside the judgment and decree passed by the learned Principal District Judge at Tirupur in O.S.No.154 of 2020.



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For Appellant : Mr.R.Ganesan

For Respondents : Mr.N.Manoharan  
for Mr.Deepanuday

### **J U D G M E N T**

For the sake of convenience, parties are referred to herein as per their ranking before the Trial Court.

2. The unsuccessful plaintiff is the appellant herein.

3(a) The plaintiff filed the suit for declaration to declare the plaintiff's right over the first item of the suit property as absolute owner and for consequential relief of permanent injunction restraining the defendants from in any way interfering with the plaintiff's peaceful possession and enjoyment over the suit property, to declare the decree in O.S.No.29/2018 of District Munsif Court of Palladam in respect of 2<sup>nd</sup> item of the suit property as null and void and not binding on the in plaintiff, declaring the unregistered Will dated 08.07.2016 in respect of the 2<sup>nd</sup> item of the suit property executed by Sankaragounder in favour of the 1<sup>st</sup> defendant as null and void and not binding on the plaintiff, declaring the deed of gift executed by the 1<sup>st</sup>



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defendant in favour of the 2<sup>nd</sup> defendant on 06.08.2019 in respect of the 2<sup>nd</sup> item of suit property as null and void and not binding upon the plaintiff and for cost.

3(b) The plaint proceeds on the basis that suit property is situated in S.F.No.298/2 at Palladam Village, Palladam Taluk.

3(c) The first item of suit property was originally owned by one Ayyasamygounder and Sankaragounder as per sale deed dated 03.04.1950. After purchase of first item of suit property, both Ayyasamy and his brother Sankaragounder both had jointly mortgaged the said property to one Mohamad Khan Sayub on 26.04.1951. The said Mohamad Khan Sayub had received the Mortgage amount with interest from one Subbathal wife of Ayyasamy and executed deed of Mortgage made over in favour of her. The said Subbathal and her husband Ayyasamy only had enjoyed the first item of suit property from 26.04.1951 to the knowledge of everyone, including Sankaragounder. The said Sankaragounder had never been in possession and enjoyment of first item of suit property till his death.



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3(d) Subbathal and her husband both have jointly sold the first item of suit property to the plaintiff on 20.08.1996 and recited that they enjoyed the suit property nearly 46 years. After purchase of the first item of suit property, the plaintiff has changed revenue records in his name and he is peacefully enjoying the first item of suit property.

3(e) The Sankaragounder filed partition suit against Ayyasamy, Subbathal and the plaintiff in the year 1998, before Sub Court, Tirupur. But, the plaint was returned by the court. The said Sankaragounder re-presented the plaint again before Sub Judge, Tiruppur with condone of 84 days delay petition. The said delay petition was numbered as I.A No.1504/1999 and finally the same was dismissed for default on 14.12.2000. After that Sankaragounder had not taken any steps against the dismissal of above application. Further, he accepted the plaintiff's lawful possession and enjoyment of the first item of suit property and he had not taken any action till this death.



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3(f) Further, the plaintiff is also enjoying the suit property as absolute owner from 1996 to till date with the knowledge of Sankaragounder and his family members and without their disturbance. The said Sankaragounder died on 10.09.2016.

3(g) The plaintiff came to know that the above first defendant filed the declaration suit against the other defendants with the support of unregistered fabricated Will dated 08.07.2016 before District Munsif Court, Palladam and the same was numbered as O.S.No.29/2018 and finally he had obtained exparte decree on 25.10.2018. Further, the first defendant had executed Deed of Gift in favour of his mother and second defendant herein on 06.08.2019

3(h) The revenue records stands in the name of the plaintiff, hence the defendants have created unregistered fabricated Will in respect of second item of suit property. Further, the first defendant suppressed previous suit, and sale deed in favour of the plaintiff and collusively filed the suit with his family members and obtained decree from Court.



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3(i) The defendants produced encumbrance certificate for the period from 1930 to 1986 only before District Munsif Court, Palladam in O.S.No.29 of 2018. Further, the first defendant purposely and wantonly had not produced encumbrance certificate from 1986 to 2018 before said court for the purpose of suppressing the sale deed in favour of the plaintiff.

3(j) The first defendant has obtained decree in O.S.No.29 of 2018 by playing fraud. Further, the plaintiff is not a party to the above suit and decree is collusive one.

3(k) In the plaint, it is further alleged that the decree and judgment in O.S.No.29/2018, fabricated alleged unregistered Will dated 08.07.2016, and deed of gift in respect of second item of property executed by first defendant in favour of second defendant dated 06.08.2019 are all not binding upon the plaintiff's right in the suit property. The defendants are not in possession and enjoyment of the suit property at any point of time.



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3(1) The plaintiff is enjoying the suit first item of suit property more than 24 years by exercising all act of ownership and possession to the knowledge of all including Sankaragounder and the defendants herein. In any event, the plaintiff has perfected his right and title to the suit property by adverse possession. Further, he also pledged the documents in respect of suit property before IDBI bank and got loan from bank on 07.09.2009 and he settled the loan amount to Bank on 15.07.2016 and same also reflected in encumbrance certificate.

4(a) The defendants 1 & 2 filed written statement. They denied the allegations made in the plaint, *inter alia* contended that The defendants state that both Ayyasamygounder and Sankaragounder @ Sankarappagounder purchased the suit property. From the date of purchase, both of them were in the enjoyment of the suit property. On 26.04.1951, both Sankaragounder and Ayyasamygounder created a simple mortgage deed in favour of Mohammed Khan Sayub undertaking to repay the sand amount with 18% interest within one year. The possession of the suit property was not handed over to the said mortgagee and remained with Ayasamygounder and Sankaragounder. After



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the period of one year, the wife of Ayyasamy, namely Subbathal allegedly created made-over deed by paying the mortgage debt to Mohamed Khan Sayub, the mortgagee of simple mortgage. Hence, the said Mohamad Khan Sayub made-over the right to recover the mortgage amount only from the Ayyasamygounder and Sankaragounder in favour of Subbathal. Hence, the said Subbathal got made-over right of simple mortgage only to recover the mortgage due only within the period of 12 years as per law.

4(b) The said Subbathal did not file any mortgage suit within 12 years from 26.04.1951 or any other steps to recover the dues. Hence, after the expiry of 12 years, the said Subbathal lost every right upon mortgage and made-over with respect of the suit property including right to recover the mortgage due. Since, the said mortgage is mere simple mortgage and not a usufructuary mortgage or conditional sale, the said mortgage charge over the property would automatically discharged and free from all encumbrance and charges. In fact, the above said alleged mortgage made-over deed was not known to the said Sanka??Gounder till his life time since the said alleged mortgage made-over was executed without knowledge of Sankaragounder and



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wilful failure to intimate the same by Subbathal to Sankaraagounder even at the time.

4(c) After the registration of made-over and subsequent failure to recover the due under due process of law within 12 years, the said alleged mortgage made-over is automatically invalid and the said Sankaragounder can ignore the same and the same would not bind him in any way.

4(d) Both Ayyasamy and Sankaraagounder were in the joint possession and enjoyment of the property and there was no regular partition or arrangement till the demise of Sankaragounder. Though the said Ayyasamy gounder and his wife Subbathal allegedly executed sale deed in favour of the plaintiff, they have title or right to sell the half share of Ayyasamy gounder only and not more. Mere mentioning the sale deed that enjoyment of the property for the period of 46 years is not correct and does not prescribe any title to the said Ayyasamy and Subbathal when there is no other ingredients fulfilled.



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4(e) It is very pertinent to note that the said Subbathal was not given any possession of the suit property by way of mortgage made-over deed. Hence, the said Subbathal could not be in the possession and enjoyment of the suit property at any point of time.

4(f) Sankarappagounder was not aware of the alleged sale deed dated 20.08.1996 till his life time but smelled their attempt to create forged document. It was clearly mentioned in the plaint filed by Sankaragounder in the year 1998. It is also pertinent to point out that the plaintiff and the said Ayyasamy gounder, Subbathal purposively evaded the pre-suit notice but appeared through counsel in the delay condonation petition.

4(g) The said Sankarappagounder was owner of half share of the property out of 2.74 acres and he also mentioned that he was in the joint possession of the suit property. The 1<sup>st</sup> defendant was forced to file a suit for declaration that Will is valid against the other defendants. After verification of all the documents, the court was pleased to grant a decree and judgment in



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favour of him. The 1<sup>st</sup> defendant executed a settlement in favour of the 2<sup>nd</sup> defendant in respect of 1¼ shares in the suit property. After verifying all the records and encumbrance certificate, the revenue authority mutated the revenue records in the name of the defendants 1 and 2. The plaintiff is well aware that the said Sankarappagounder was owner of half share and after his demise, the defendants 1 and 2 are owner of half share.

4(h) After the demise of Sankarappagounder, as per the Will, half share in the suit properties belongs to defendants 1 & 2. The alleged sale deed dated 20.08.1996 in favour of the plaintiff is sham and nominal and forged document with respect of half share of the item No.1 suit property. In fact, the plaintiff has cheated the said Ayyasamy and Subbathal and fabricated the document in his name. Hence, the said sale deed in favour of the plaintiff will not bind the said Sankaraagounder and the defendants with respect of half share. The plaintiff is not the owner of the entire property and not in the exclusive possession of the suit property at any point of time. In fact, the plaintiff obtained bank loan by misleading them and producing irrelevant documents. The present suit is filed by the plaintiff against the co-owner, co-



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sharer of the suit property which is pure abuse process of law and the suit is liable to be dismissed.

5. Reply statement was filed by the plaintiff alleging that after the suit property was mortgaged to Mohamad Khan Sayub , the 2<sup>nd</sup> defendant's father left Ayyasamy and his wife Subbathal and settled down in Singapore and was residing independently. Subbathal sold her jewels and settled the mortgage loan in the year 1954 and obtained made-over from Mohamed Khan Sayub. In the plaint, it was wrongly mentioned that Sankargounder was enjoying the property from the year 1951. From the year 1954 onwards, Ayyasamygounder's wife Subbathal after made over had jointly enjoined the property with AyyasamyGounder. Therefore, Sankaragøunder had no right whatsoever in the suit property from 1954 onwards.

6. Defendants 3 & 4 remained exparte.

7. Based upon the above pleadings, the learned Principal District Judge, Tirupur has formulated as many as ten issues.



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8. During the trial, in order to substantiate the plaintiff's case, on the side of the plaintiff, he examined himself as PW1 and the adjacent land owner was examined as PW2 and Exs.A1 to A.25 were marked. On the side of the defendants, the 1<sup>st</sup> defendant was examined as DW1 and no documents were marked.

9(a) The learned counsel appearing for the appellant/plaintiff would contend that he filed a suit seeking declaration of title in respect of 'A' Schedule Property which also contains 'B' Schedule property *inter alia* challenging the Will alleged to have been executed in favour of the defendant who is the grandson of Sangaragounder through her daughter viz., Rajeswari. Learned counsel also raised a plea that the suit for declaration on the plea of adverse possession is now recognized by the Hon'ble Supreme Court and further contended that initially the very same defendant filed a very same suit against the vendor as well as himself which was dismissed for default. The learned counsel further contended that in the year 2006, they came forward stating that there was a Will executed by Sangaragounder in favour of his



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grandson born through the daughter Rajeshwari and they filed a suit before the District Munsif Court, Palladam to declare the Will as genuine, valid and binding upon the parties and would further state that such a civil suit cannot be maintained since only probate proceedings has to be initiated before the District Court. Hence decree granted by the District Munsif Court, Palladam in O.S.No.29/2018 is without jurisdiction and consequently is null and void.

9(b) The learned counsel further contended that the Will itself is a fabricated one created after the dismissal of the earlier suit filed by Sangaragounder on 14.12.2000. He would further contend that consequent upon the decree, the son has executed a settlement deed in favour of his mother Rajeswari, daughter of Sangaragounder for the very same set of reasons which is also null and void. The learned counsel also contended that the possession of the plaintiff is known to the defendants and Sangaragounder even in the year 2000 and even much before that, the plaintiff was in possession for more than 34 years as could be seen from the sale deed given by the vendor of the plaintiff. He further contended that the plaintiff has purchased the entire extent of land from Ayyasamy Gounder,



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though he initially had 50% of the property alongwith his brother, mortgaged the same. Subsequently, the mortgage has been made-over to Subbathal, wife of Ayyasamy Gounder and in view of the Article 61 of the Limitation Act with regard to the redemption/foreclosure of mortgage, his possession has to be recognized as an adverse possession.

10(a) The learned counsel appearing for the respondents/defendants filed written argument and during the oral argument, he would contend that *animus possidendi* has not been proved by the plaintiff. Mere long possession and continuous possession would not constitute adverse possession. In the year 1999, Sankaragounder filed suit for partition claiming ½ share in the suit property whereby he has asserted his right that he is in joint possession of the suit property. Though the suit was dismissed for default even at the stage of numbering, the claim of Sankaragounder was never denied. The right of Sankaragounder is a continuing one, which would never vanish merely because the suit was dismissed for default. Between 1996 to 2016, the plaintiff had never taken to any steps to ensure his possession over the suit property. Under such circumstances, (when the



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defendant being the co-owners of the suit property, the possession of one of the co-owner cannot be termed as adverse to the other co-owners. Hence, the plaintiff is not entitled for declaration on the ground of adverse possession.

10(b) The learned counsel for the respondent further contended that the plaintiff had failed to plead and prove, his exclusive possession over the suit property, he had only purchased undivided half share in the suit property and the plaintiff had never proved, how he had purchased undivided half share of Sankaragounder, when Subbathal had only obtained made-over right from Mohamed Khan Sayub. Under such circumstances, the sale deed by Subbathal would not confer title on the plaintiff and Subathal is entitled to recover the mortgage loan, which had lapsed after 12 years. The plea of adverse possession cannot be enforced against co-owner or co-sharer. Subbathal had never proved possession over the suit property.

10(c) The learned counsel for the respondent also contended that the decree and judgment in O.S.No.29/2018 and the unregistered Will dated 08.07.2016 are between the defendants with respect to their half share in the



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suit property. Sankaragounder had every right to execute of Will in respect of his half share, even assuming the Will is not valid that would not confer right on the plaintiff. Will was duly proved by the defendant by examining the attesting witness in O.S.No.29/2018 and the plaintiff had not taken steps to summon the witnesses of the Will in the present case to prove that the Will was obtained fraudulently. The decree and judgment in O.S.No.29/2018 on the file of District Munsif Court, Palladam and the Will of Sankaragounder dated 08.07.2016 are binding upon the plaintiff and he cannot challenge the same in the present suit.

10(d) The learned counsel also made submissions that unregistered Will dated 08.07.2016 is valid in view of the judgment and decree in O.S.No.29 of 2018 and hence he should be treated as a co-owner or co-sharer of the suit property and sine he is a co-owner of the property, he is deemed to be in joint possession of the property and hence the plea of adverse possession is not maintainable. The learned counsel further submitted that based upon the pleadings that, if at all the plaintiff is the owner, only in respect of the undivided  $\frac{1}{2}$  share property for an extent of 1.37 acres and remaining 1.8



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acres belongs to the defendants 1 & 2 on the strength of the Will executed by Sankaragounder and on the strength of the decree in O.S.No.29 of 2018 and subsequent settlement deed in favour of the defendants 1 & 2.

11. After perusing the pleadings and the arguments advanced by the learned counsel on the respective sides, following points arise for consideration -

(i) Whether Subbathal and her husband Ayyasamy have become the absolute owners of the first item of the suit property pursuant to the made-over of the mortgage as per Ex.A3 ?

(ii) Whether the plaintiff has become absolute owner of the first item of the suit property based upon Ex.A4-sale deed dated 20.08.1996 and he is in possession and enjoyment of the suit property on the strength of the said sale deed ?

(iii) Whether Ex.A2 is a simple mortgage does not indicate possession, as pleaded by the defendants is true ?

(iv) Whether Ex.A4-sale deed is valid and binding upon



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the defendants in respect of  $\frac{1}{2}$  share which admittedly held by

Subbathal and her husband Ayyasamy ?

(v) Whether Ex.A14 - Will dated 08.07.2016 is true and valid ?

(vi) Whether the judgment and decree in O.S.No.29 of 2018 (Ex.A12) is binding upon the plaintiff ?

(vii) Whether the judgment and decree in O.S.No.29 of 2018 passed by the District Munsif Court, Palladam (Ex.A12) is obtained by playing fraud on the court ?

(viii) Whether the gift deed dated 06.08.2019 (Ex.A15) executed by the first defendant in favour of the second defendant is true, valid and binding upon the plaintiff ?

(ix) Whether the plaintiff is entitled for the relief of declaration, as prayed for ?

(x) Whether the judgment of the Trial Court is sustainable in law ?

12. After hearing the rival submissions and after perusing the



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documents produced before the Trial Court, I find that under Ex.A1 – sale deed dated 03.04.1950 which was in favour of Ayyasamy and Sankaragounder, the brothers, as per Ex.A2 – both of them have executed a mortgage deed in favour of Mohamad Khan Sayub on 26.04.1951 under Ex.A3. The said mortgagee Mohamad Khan Sayub had made-over the mortgage in favour of Subbathal (wife of Ayyasamy) under Ex.A4 – sale deed dated 20.08.1956. The said Ayyasamy and Subbathal have sold the entire extent of land covered under Ex.A1 through Ex.A4 to the plaintiff herein. Subsequent to Ex.A4/sale deed, kist, adangal and chitta viz. Exs.A5, A6 & A7 respectively were obtained by the plaintiff. The Trial Court has dismissed the suit in entirety.

13. Admittedly, under Ex.A4-sale deed, Ayyasamy is party to the said document. He owns undivided  $\frac{1}{2}$  share. When Ayyasamy is party to the document, presence of his wife namely Subbathal does make the sale deed invalid in entirety. The approach done by the Trial Court is erroneous in law and hence I find no hesitation to come to the conclusion that in respect of 50% of the undivided share purchased by Ayyasamy under Ex.A1, he has every



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right to convey the same to the plaintiff and hence at the first instance, the plaintiff is the owner of undivided property to an extent of 1.37 acres out of 2.74 acres. To that extent, I find that the order of the Trial court is totally unsustainable in law and the reasoning assigned by the court is hereby set aside. Points nos.(i) to (iii) are answered accordingly.

14. Mr.N.Manoharan, learned counsel appearing for the defendants would contend that under Ex.A2 – mortgage deed, it is only a simple mortgage executed by Ayyasamy and Sankaragounder and possession was never handed over to Mohammed Khan Sayub and under Ex.A3 made-over documents, collection of the mortgage amount alone has been conveyed to Subbathal (wife of Ayyasamy). Hence, adverse possession cannot be claimed against the true owner. Ex.A16 is the death certificate of Sankaragounder and Ex.A17 is the legalheir certificate. As per Ex.A17 – legalheir certificate issued on 09.12.2016, the said Sankarappa Gounder alias Sankaragounder son of Anganagounder died on 10.09.2016 leaving behind Rajeswari, his



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daughter, Rajeswaran his son and Parameswari wife of Selvamurthy, his daughter as legalheirs.

15. During the life time of the said Sankaragounder, it is projected that he has filed partition suit against his brother on the premise that he is about to sell the entire property. The suit was filed under Ex.A8 – unnumbered plaint before Principal Sub Court, Tirupur wherein the plaintiff is arrayed as third defendant, assumes significance and the suit was dismissed for default and they filed I.A.No.1504 of 1999 in CFR 9176 of 1998 marked as Ex.A9. The same was also dismissed in the year 2000. Even before filing of the plaint – Ex.A8 by the said Sankaragounder, Ex.A4 – sale deed came into existence and entire possession was with the plaintiff as it was handed over by his vendors. On perusal of the recital in Ex.A4-sale deed, I find that there is a specific recital that both the vendors under Ex.A4 – sale deed are in possession for more than 34 years and they have handed over the possession to the plaintiff under Ex.A4.



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16. The learned counsel appearing for the appellant / plaintiff would contend that as against 50% of the undivided share of Sankaragounder, the plaintiff claims adverse possession. The learned counsel appearing for the respondents/defendants would resist the said plea of adverse possession on multiple grounds which are discussed infra.

17. I had an occasion to consider whether the plaintiff can take the plea of adverse possession to claim declaration of title by **prescriptive** title and following the ratio laid down by the Hon'ble Supreme Court in **2020 (2) LW 207 [Ravinder Kaur Grewal & Ors. v. Manjit Kaur & Ors.]** it has been held that it can be used namely plea of adverse possession can be used as a sword by the plaintiff and shield by the defendant. The same is followed by me in **CMA (MD) No.744 of 2021 dated 13.04.2022 and CMP No.16741 of 2021 & 13420 of 2023 in A.S.No.266 of 2007 dated 29.04.2024.**

18(a) Now, the learned counsel for the respondents/defendants resisted the claim of title by adverse possession in respect of 50% of the undivided share namely that of Sankaragounder.



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18(b) I propose to discuss the plea of derivative title of the defendants herein. Sankaragounder, during his life time filed an unnumbered plaint before the Principal Sub Court, Tirupur and the same was dismissed as could be seen in Ex.A8. The said plaint was after two years of Ex.A4 – sale deed assumes significance. Restoration application in I.A.No.1504/1999 was also dismissed, as could be seen from Ex.A9. The defendants had projected that under Ex.A14 – unregistered Will, the Sankaragounder executed a Will on 08.07.2016 in favour of his grandson namely the first defendant who in turn had executed a gift deed Ex.A15 – (as under 06.08.2019) and they are the co-owners of the property. So is the written statement and evidence of DW1.

18(c) The plea of adverse possession and the plea of ouster between the strangers are two different things. Whether the defendants are co-owners of the property has to be ascertained. For the same, the defendants had projected the death certificate of Sankaragounder - Ex.A16, legal heir certificate - Ex.A17, unregistered Will – A14, deed of gift - Ex.A15 and encumbrance certificate - Ex.A13 produced by the first defendant in O.S.No.29 of 2018.



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WEB COPY 19. After hearing the rival submissions and on perusal of Ex.A14 – Will dated 08.07.2016, I find that it is an unregistered Will. It is the specific case of the plaintiff that the Will is created after the death of Sankaragounder with an aid of legal brain in the mofusil area and they have filed a complaint before the Bar Council on 28.10.2022. The complaint was taken by the Bar Council on Complaint No.494 of 2022, intimation letter given by the Bar Council on 24.11.2022 to the plaintiff, following which the alleged sale deed dated 24.09.2022 claims to have been executed by the 6<sup>th</sup> defendant was cancelled on 21.12.2022. Since these documents are not marked before the lower Court which came into existence after passing of the decree, I am not expressing any opinion except to say that all is not well surrounding Ex.A14 – Will which is unregistered.

20. For the reasons not known, the learned Principal District Judge, Tirupur has cast the burden of proof upon the plaintiff to show that Ex.A14 (unregistered Will in favour of first defendant) is a fabricated document.



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21. The rudimentary principle governing the proof and mode of proof of proving the Will is under Section 63 and 68 of The Indian Evidence Act and The Indian Succession Act respectively, as applicable to the facts and circumstances of the case upon the profounder/beneficiary under the Will.

22. The learned Principal District Judge, Tirupur has wrongly cast burden of proof upon the persons who disputed the Will and hence the observation made and the findings rendered by the learned Principal District Judge, Tirupur hereby stands vacated since the same is unsustainable in view of the established principle of law.

23(a) On perusal of Ex.A13, I find that a judicial proceeding was initially filed before the Principal District Judge, Tirupur on 04.12.2019 as a Probate OP. The same was returned and thereafter it appears that the first defendant chosen to file as Civil Suit as a suit in O.S No.29 of 2018 seeking the relief to declare that Ex.A14 – unregistered Will is true Will executed by Sankaragounder as genuine, valid and binding on the parties. It is not a probate proceedings. Ex.A14 is an unregistered Will. Instead of Probate



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proceedings, Civil proceedings have been initiated and hence petition has been returned by Principal District Court, Tirupur and subsequently, in the form of a suit, it is filed before the District Munsif, Palladam, some how it has been numbered as O.S.No.29 of 2018 declaring the relief sought for viz. declaration to declare the Will as genuine and valid and binding on the parties, consequential relief of permanent injunction.

23(b) On perusal of Ex.A12, I find that the first defendant in O.S.No.29 of 2018 is the mother of the first defendant herein. The second defendant is the daughter of the first defendant and the third defendant Rajeswaran is shown as son of Sankaragounder. All the three defendants have remained exparte. PW2 who is said to be the attestor of the Will was examined. An exparte decree was granted declaring the Will dated 08.07.2016 as genuine and valid. Dehorse, the procedure in the probate proceedings as contemplated under the Indian Succession Act in respect of an unregistered Will, no paper publication has been effected in respect of the alleged Will, assumes significance.



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24(a) Based upon Ex.A13 – encumbrance certificate, Ex.A15 – gift deed came into existence. Based upon Ex.A15, sale deed has been registered and subsequently, upon filing of the complaint before the Bar Council against the local Advocate at the Mofusil Centre, it appears that the sale deed has been cancelled.

24(b) It remains to be stated that the said suit was decreed on 25.10.2018. As per Ex.A4 – sale deed in favour of plaintiff, which was of the year 1996, in between 22 long years have lapsed. No explanation from the defendants as to why Sankaragounder has not taken any steps to seek recovery of possession or declaration of his title in respect of the alleged  $\frac{1}{2}$  share of the suit property remains as a mystery for the 22 long years from 1996 to 2018 and absolutely there is no whisper.

25. For the plea of adverse possession, the statutory requirement of 12 years has completed. The plaintiff has obtained Patta, Chitta and possession under Ex.A4-sale deed. Based upon Ex.A4-sale deed, Chitta and Adangal has been obtained even in the year 2009 assumes significance. In respect of 50%



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of the undivided  $\frac{1}{2}$  share in the suit property forming part of the schedule property pursuant to Ex.A4, the plaintiff has attained his possession and he is in possession of the property. A Will has been generated in the year 2016, exparte decree has been obtained in favour of the first defendant under Ex.A12 in O.S.No.29 of 2018.

26. It remains to be stated that as per Ex.A10 – original deed of title deed deposits by the plaintiff, it appears that the plaintiff has availed bank loan and in such circumstances, he had deposited the title deeds showing that he is in possession of the property, that was in the year September 2009. As per Ex.A10, he has discharged mortgage loan under Ex.A11 in the year 2016. Hence, from Ex.A10, he is in possession and cultivation of the land from the year 2009, the contra finding recorded by the Trial Court is unsustainable in law and the same is vacated.

27. The learned counsel appearing for the respondents/defendants would contend that declaration of title under sale deed and declaration of title by adverse possession are inconsistent with each other. In the pleadings, the



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plaintiff has categorically stated that as a alternate, in respect of other ½ share, he has claimed title and so is the evidence. He was let in possession under Ex.A4 as early as August 1996. Even exparte decree of declaration regarding the Will in favour of the 1<sup>st</sup> defendant is only in the year 2018. Hence, on a combined reading of Exs.A4, A5, A6, A7, A9 & A10, this Court is of the considered view that the plaintiff is in possession from 1996, till the date of filing of the suit namely 08.06.2020.

28. From 02.08.1996 till 08.06.2020, for about 24 years, the plaintiff is in possession of the property. Hence, this Court is of the considered view that the plea of ouster between the co-owners and plea of adverse possession against the strangers are different.

29.Mr.N.Manoharan, learned counsel appearing for the respondents/defendants would contend that the plaintiff has to prove his case and he has to stand on his own legs, namely pleadings and he cannot take the advantage of loop holes or weakness of the defendants and further contended that by virtue of Ex.A12 – judgment in O.S.No.29 of 2018 by the learned



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District Munsif, Palladam, the first defendant is the owner of the property and as such, the plea of adverse possession cannot be taken against the co-owner.

30. It is seen from the records that Ex.A14 is an unregistered Will dated 08.07.2016 and based upon Ex.A12, the first defendant (grandson of Sankaragounder) executed gift deed in favour of his mother namely the second defendant. The third and fourth defendant who are sons and daughters of the deceased Sankaragounder remained exparte. On perusal of Ex.A12-judgment in O.S.No.29 of 2018 by the learned District Munsif Court, Palladam, I find that the first defendant herein filed a suit to declare the alleged Will (Ex.A14) dated 08.07.2016 as true, valid and binding as against the defendants 2, 3 & 4 herein who are arrayed as defendants 1 to 3 in the said suit.

31. On perusal of Ex.A20, certified xerox copy of the plaint in O.S.No.29 of 2018, I find that initially the case was filed before the learned Principal District Court, Tirupur and the same was returned with an endorsement that no such suit can be filed to declare the Will as true and



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genuine and only a probate proceedings has to be initiated under the Indian Succession Act and the case has to be filed under the category of Probate OP.

32(a) After taking the return, it appears that they re-presented the case before the District Munsif Court and got it numbered as a civil suit. I find that the address of the plaintiff and the defendants 1 to 3 in the said O.S.No.29 of 2018 (Ex.A12 & A20) all are residing in the same address besides the defendant therein are the legalheirs of the deceased remained exparte. The attesor of the Will was also not examined in the present case, assumes significance. The Trial Court has decreed the suit as if it is money decree.

32(b) This court is conscious of the fact that this Court is not sitting as a Appellate Court as the appeal against the judgment in O.S.No.29 of 2018. Since there is a specific allegation made in the plaint as well as the in evidence that local legal brain in the mofusil area has created will after the death of the Sankaragounder, in other words, Ex.A14-Will is alleged to be a “posthumous manufactured unregistered Will” dated 08.07.2016 after the death of



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Sankaragounder. Since this court is not Acting as an Appellate Court against the order in O.S.No.29 of 2018, this Court is not expressing anything by imposing self-resstriction upon it, except to say that all is not well with Ex.A14 and A12 – judgment which is projected by the defendants as a shield to the plaintiff's prayer. Ex.A15 is the consequence of Ex.A12.

33(a) Mr.N.Manoharan, learned counsel appearing for the defendants/respondents would contend that A12 is a “judgment in rem” and hence he need not prove it again, especially as against the plaintiff. The learned Principal District Judge, Tirupur who has dealt with the matter has observed that since the plaintiff has denied Ex.A14 – Will , the burden is upon the person who denies the Will.

33(b) In the preceding paragraphs, for the reasons stated therein, this Court held that such a finding rendered by the learned Principal District Judge, Tirupur is contra to the established principle of law and the same was vacated. A person who claims benefit under the Will has to prove the Will, in the manner known to law, namely has to satisfy twin conditions contemplated



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under Section 68 of the Indian Evidence Act and Section 63 (c) of Indian Succession Act.

34. At the risk of repetition, however for the sake of clarity, since this Court is not sitting against the Appellate Court, against the judgment in O.S.No.29 of 2018, this Court finds that it is filed as a Civil Suit and the defendants also remained exparte. Without there being any observation regarding the satisfaction of Section 68-A of the Indian Evidence Act, Section 63(c) of the Indian Succession Act, the learned District Munsif has chosen to decree the suit.

35. It remains to be stated that to avail category under Section 41 of the Indian Evidence Act, to become the “judgment in rem”, it ought to be under the Probate Proceedings or Insolvency Proceedings or Matrimonial Proceedings. Any judgment in such classification and category rendered by the competent court, as specified under the Act alone can be termed as a “judgment in rem”. Admittedly, this is a civil suit and Ex.A12 is only a judgment and decree rendered in the Civil Suit. Hence, Ex.A12 will not



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qualify or fall under Section 41 of the Indian Evidence Act to become judgment in rem, as projected by the defendant. Consequently, the defendants have to prove the Will as against the plaintiff besides this reasoning, for more than one reason they have to prove the same, viz. to remove the suspicious circumstance surrounding the Will.

36. As per Section 41 of the Indian Evidence Act, the judgment of Probate Court granting the probate of Will in favour of the petitioner must be presumed to have been obtained in accordance with law under the procedure prescribed by the law and it is a judgment in rem. One of the essential feature of the Probate Court under the Probate proceedings in Indian Succession Act is the “paper publication” to make it known to the general public about the alleged existence of one such Will (subject Will) of the case to the general public and to invite for objections, if any. In Ex.A12 – judgment and decree in O.S.No.29 of 2018, no such thing have taken place since it is only a civil proceedings. Under the guise of civil proceedings, it appears that the first defendant has successfully concealed Ex.A14 from the eye of the general public and obtained an exparte decree under Ex.A12



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wherein his mother and maternal uncle were shown in the very same address and they have also remained exparte, assumes significance.

37. It remains to be stated that in respect of Section 265 of Indian Succession Act, read with Tamil Nadu Civil Court Sections 12 & 19, No doubt, the G.O.Ms.No.563 dated 28.11.1995 confers power on all Courts of District Munsifs and all Courts of Subordinate Judge to exercise the functions of a District Judge under Part X of the Indian Succession Act, 1925 within the local limits of their respective jurisdiction in respect of property, debt, security or any other thing or value specified therein. It cannot be in dispute that the testamentary jurisdiction is a civil proceeding. As a matter of fact, earlier, the Government of Tamil Nadu has issued G.O.Ms.No.563 dated 28.11.1995 investing the inferior Courts with jurisdiction of District Court for the purpose of Succession Act exercising its powers under Sub-section [1] of Section 388 of the Indian Succession Act, 1925 [Central Act XXIX of 1925]. Hence, considering the pecuniary jurisdiction, it ought to have tried as a probate proceeding by the learned Munsif and paper publication ought to have been made in respect of the alleged Ex.A14-Will. Nothing appears to be done or



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present in this case. Consequently, in all, the “fairness” in proceedings appears to be “conspicuously” absent.

38(a) In the decision reported in **2009 (5) SCC 528 [Syed Askari Hadi Ali Augustine Imam and another v. State (Delhi Administration) and another** , the Hon'ble Supreme Court has considered the “position of judgment in rem” in respect of probate certificate issued under the probate proceedings and held that the binding effect of such probate proceedings both in civil and criminal cases wherein it is observed that court to consider not only genuineness of the Will but also explanation to all suspicious circumstances surrounding thereto besides proof thereof in terms of Section 63(C) of the Indian Succession Act and Section 68 of the Indian Evidence Act.

38(b) In this case, all the established principle for proof of the Will appears to have been thrown to wind. Only if a judgment is pronounced in the probate proceedings, such judgment rendered by the probate court is the judgment in rem and it is binding on all courts and authorities. However, Ex.A22 does not qualify itself to be one such case. Hence, I have no



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hesitation to negative the contention of the learned counsel for the defendant in this regard. Hence, it is for the first defendant to prove the Will as against the plaintiff.

39(a) It remains to be stated that the plaintiff both in his pleadings as well in evidence would state that out of the total extent of 2.37 acres,  $\frac{1}{2}$  share 1.37 was purchased by him from Ayyasamy under Ex.A4 on 20.08.1993. Since the date of his purchase till the alleged date of the Will namely 08.07.2016 for about 20 years he is in possession and enjoyment of the property, as could be seen from documentary evidence viz. Ex.A5, A6, A7, A21, A22 & A24.

39(b) The elder brother Ayyasamy died on 18.12.1999 and the younger brother Sankaragounder died on 10.09.2016. The plaintiff purchased the property from Ayyaamy and Subathal on 20.08.1996. The alleged Will (Ex.A14) is dated 08.07.2016. Even calculating from the date of the sale in favour of plaintiff (under Ex.A4) namely 20.08.1996 till the date of Ex.A14 – unregistered Will dated 08.07.2016, for more than 20 years, the plaintiff is in



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possession of the property and has made vast improvement open to the general public and hostile to the alleged testament Sankaragounder who have alleged to have bequeathed to the first defendant.

40. As regards the date of Ex.A4-sale deed i.e. 20.08.1956, the plaintiff have purchased the property in entirety under the sale deed. Though this Court has observed in the preceding paragraphs that it is binding upon the first defendant on the point of title to the extent of undivided  $\frac{1}{2}$  share as that of Ayyasamy, this court is not elaborating his contention that Ayyasamy has enjoyed the property for about 46 years from 1954 but to confine itself to Ex.A4 namely 1996 to the date of the alleged Will namely 08.07.2016 which is for about 20 years, I find that the possession of the plaintiff has been duly satisfied and corroborated by the documentary evidence Exs.A5, A6 & A7 and coupled with Ex.A21, A22 & A24.

41. Admittedly the plaintiff is not the co-parcener of the property. He is a stranger to the said Sankaragounder. At this juncture, it remains to be stated that the Division Bench of this Court in the decision reported in **85**



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***L.W. 596 [Minor Ibramsa Rowther v. Sheik Meerasa Rowther]*** has

observed that there is a basic distinction between “adverse possession as between strangers” and “ouster and exclusion of co-owners”. In the case of adverse possession as against strangers, it is sufficient that adverse possession is overt and without any attempt at concealment so that the person against whom time is running, ought, with the exercise of due vigilance, to be aware of what is happening. It is not necessary that adverse possession should be brought home to the knowledge of the owner. If his rights have openly usurped (not secretly), he cannot be heard to complain that the fact of adverse possession was not brought to his knowledge. If the adverse possession is open, visible and notorious, even if the owner remains ignorant and indifferent, it is his own fault.

42. In the case of “ouster of a co-owner”, the position is entirely different. The possession of one co-owner is presumed to be on behalf of all the co-owners in view of the unity of title and possession. Of joint ownership Because of this presumption in the case of co-owners, the law requires, to constitute ouster, proof of something more than mere exclusive possession and



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exclusive receipt of income. Along with exclusive possession there must be an ouster, a hostile, open denial and an open repudiation of the other co-owner's right to the latter's knowledge. The co-owner in exclusive possession cannot render his possession adverse to the other co-owner merely by any secret, hostile animus on his own part in derogation of other co-owner's title. The "theory of lost grant" is applicable to support long continued possession for a considerable length of time and the most important element in presuming ouster is the "time factor" or "the length of time" of sole and exclusive possession by one co-owner. This 'doctrine of presumption' goes on the footing of validity, and upholds validity by supposing that everything was present which that validity required' *Omnia Proesumuntur Rite Fuisse Acta* is the principle to be observed".

43. In the Division Bench judgment of this Court reported in **98 L.W. 606 [V.Muthiah Pillai (died) and others v. Vedambal and others]** has taken the position that setting up adverse possession by the person in adverse possession is not wrong; it is not shameful on his part to do so. This plea is allowed with the laudable intention of giving a quietus to long possession. In



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fact, under the Civil Procedure Code, when a suit in ejectment or for possession, filed by the plaintiff, he is required to show prima facie that it is within time.

44. Where a stranger is in possession, it is not necessary to do so to the knowledge of the true owner, but it is sufficient if the possession is hostile, notorious and exclusive, so that the owner could perceive the same. The classical requirements of adverse possession are that the possession must be *nec vi nec clam nec precario*, that is to say, the possession required must be adequate in continuity, in publicity and in extent. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening.

45. Admittedly, after Ex.A4 coming into existence on 20.08.1996, the plaintiff as an utter stranger to the alleged testator who had bequeathed to the first defendant. The said Sangaragounder himself has filed the suit for partition against the vendor of the plaintiff under Ex.A8 which was



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unnumbered plaint which was dismissed for default. The restoration application in I.A.No.1504 of 1999 is also dismissed for default as could be seen from Exs.A8 & A9. It is significant to note that the third defendant therein is none other than the plaintiff and hence this Court comes to the conclusion that taking notice of Ex.A4 – sale deed, Sankaragounder filed the suit for partition and the same was dismissed for default without even being numbered and unnumbered plaint has also been dismissed.

46. Hence, this Court finds that Ex.A4 – sale deed is a notice to Sankaragounder and that is why it is the specific reason behind the Kalyanasundaram (plaintiff herein) is arrayed as third defendant in the unnumbered suit in CRF No.9176 of 1999 which was dismissed on 24.12.2000. The very adding of Kalyanasundaram as third defendant in the first partition suit itself is self-evident that Sankaragounder knew that Kalyanasundaram is in possession and enjoyment of the entire suit property as on 28.12.1993 and enjoying the same in exclusion of Sankaragounder since Kalyanasundaram is a stranger.

47(a) The first defendant has not even filed any document to show what



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are the steps taken by Sankaragounder to oppose the possession of the plaintiff from 1996 till he died on 10.09.2016, after about 10 years.

47(b) Now, it is projected by the first defendant that the said Sankaragounder alleged to have executed an unregistered Will Ex.A14 on 08.07.2016. As per Ex.A9 dated 14.12.2000, his partition suit was dismissed. For about 16 years, there was no legal proceedings either by Sankaragounder or by his legal heirs. In other words, for more than 12 years, no action has been taken after the dismissal of the earlier suit. By the time, Ex.A14-Will alleged to have come into existence on 08.07.2016. 16 long years have passed for the Sankaragounder to execute a Will when he knows very well that plaintiff is in possession and as per Ex.A4-sale deed from 1996. Hence, for about 20 long years, the plaintiff is in possession solely, known to general public as against the interest and rights of Sankaragounder.

47(c) Hence, I am inclined to accept the contention of the learned counsel for the plaintiff that even assuming that Ex.A14-Will is true on the date of execution, the alleged testator does not have any right or title over the



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property since he lost the same by operation of law and possession is with the plaintiff, such possession known to the said Sankarappagounder, openly and to the general public, as evident by revenue records and also judicial records, Exs.A8 & A9. For the reasons stated supra, I find that the plaintiff has successfully demonstrated the criteria for adverse possession. A perusal of the pleadings and the evidence of PW1 demonstrates that the plaintiff has taken the alternative plea of adverse possession against the defendants in respect of undivided share and hence, it cannot be termed as mutual inconsistent in view of the evidence adduced by PW1.

48. In the decision reported in *2020 (15) SCC 213 (Narasamma and others v. A.Krishnappa (dead) through legal representatives)*, the Hon'ble Supreme Court has held that there was for a long time a consistent view of the Court that the plea of adverse possession could only be of shield and not a sword. The judgment of *Ravinder Kaur Grewal [2019 (8) SCC 729]* changed this legal position by opining that a plea to retain possession could be managed by the ripening of title by way of adverse possession. However, to constitute such adverse possession, the three classic requirements, which need



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to co-exist were again emphasized, *nec vi* i.e. Adequate in continuity, *nec clam* i.e. adequate in publicity and *nec precario* i.e. adverse to a competitor, in denial of title and his knowledge. In order to establish adverse possession, an inquiry is required to be made into the starting point of such adverse possession and, thus, when the recorded owner got dispossessed would be crucial.

49. From the records as referred to above, the possession of the plaintiff has to be in public and to the knowledge of the true owner as adverse and the plea of adverse possession has to be established. Mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the true owner for the said purpose. Adverse possession requires all the three classic requirements to co-exist at the same time, namely *nec vi* i.e. adequate in continuity, *nec clam* i.e. adequate in publicity and *nec precario* i.e. adverse to a competitor, in denial of title and his knowledge.



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50. The above preposition of law has been duly complied with by the plaintiff by adducing sufficient evidence, both oral and documentary. Accordingly, I hold that the adverse possession in respect of the other share of Sankaragounder, the plaintiff has perfected his title by adverse possession from the date of Ex.A4 – sale deed dated 20.08.1996 till the date of execution of the Will, for about 20 long years and his possession is open to general public and against the Sankaragounder and the dismissal of the plaint filed by Sankaragounder wherein the plaintiff herein is arrayed as third defendant goes to show that Sankaragounder has taken notice of the Ex.A4-sale deed and impleaded him after four years of the said sale deed also assumes significance. Viewing from any angle, this court finds that the plaintiff has established his possession as adverse to the Sankaragounder for more than 20 long years.

51. In fine, suit for declaration of title on the plea of adverse possession is maintainable and Ex.A12 does is not fall under the category of “judgment in rem”, as stated in Section 41 of Indian Evidence Act. It is settled law that



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profounder of the Will has to prove the Will and has to disspell suspicious circumstance surrounding the Will. In the instant case, the defendants have not even examined the attestor of the Will in this suit and various suspicious circumstance, as discussed supra. This Court comes to the conclusion that Ex.A14-Will is surrounded by sea of suspicion and by adducing of evidence and also from the prior of conclusion discussed in the preceding paragraphs, the plea of adverse possession in respect of the  $\frac{1}{2}$  share of the property has been proved by the plaintiff.

52. The plaintiff, by virtue of the purchase admittedly got title for the  $\frac{1}{2}$  share = 1.37 acres out of 2.74 acres and remaining  $\frac{1}{2}$  share = 1.37 acres of 2.74 acres, the plaintiff has proved that he has derived title under adverse possession by enjoying the said piece of land on his own for about 15 years 6 months as on the date of the alleged Will dated 08.07.2016.

53. Sankaragounder died on 10.09.2016 and Ayyasamygounder died on 18.12.1999.



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54. From the evidence adduced on record, the Sankaragounder from whom the second defendant claims testamentary title has not taken any steps to file any suit from 24.12.2000 till his death on 10.09.2016. Having not filed any suit for recovery of possession against the plaintiff in respect of the entire property, he has lost title by operation of law.

55. The plaintiff Kalyana Sundaram is not a co-parcenor. He is a stranger purchaser of the suit property in the year 1996. The suit filed by Sankaragounder for partition is of the year 1999 dismissed on 24.12.2000. From 24.12.2000 to 10.09.2016, Sankaragounder was silent and he was watching the developments of the land by the plaintiff, from outside. Pleadings in the written statement shows that the defendants have not even, for the sake of pleadings pleaded tht they are in joint possession, assumes significance. When the defendants claim title of properties on the strength of the Will which came into force only on the death of Sankaragounder on 10.09.2016, hence from 1996 (date of sale in favour of the plaintiff), the defendants cannot be considered as co-owners or co-parceners prior to



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10.09.2016 (will came into operation) as the claim is based upon the unregistered Will.

56. Thus, I find that the starting point of adverse possession would deemed to have started from 24.12.2000, the date of dismissal of the partition suit on which date Sankaragounder lost his partition suit. Thus, I find that when we take the starting point for adverse possession from the date of dismissal of the partition suit by Sankaragounder on 24.12.2000, the plaintiff has perfected his title of  $\frac{1}{2}$  share from 24.12.2000. Viewing from any angle, the plaintiff has perfected his title to the other  $\frac{1}{2}$  share of the suit property ('B' schedule property) even prior to the alleged Will which is alleged to have come into force on 08.07.2016 (while Sankaragounder died on 10.09.2016).

57. In the result, **the Appeal Suit is allowed** setting aside judgment and decree dated 30.08.2022 made in in O.S.No.154 of 2020 passed by the learned Principal District Judge at Tirupur and the suit stands decreed in its entirety. The document, namely Ex.A14-unregistered Will dated 08.07.2016 is declared as null and void and not binding upon the plaintiff and the decree



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passed upon the said Will in O.S.No.29 of 2018 dated 25.10.2018 is also declared as null and void. Consequently, the alleged gift deed said to have been executed by the first defendant in favour of the second defendant under Doc.No.10268 of 2019 registered on the file of SRO, Palladam is also declared as null and void, not binding upon the plaintiff. No costs. Consequently, connected Miscellaneous Petition is closed.

**.10.2024**

Index : Yes / No  
Neutral Citation : Yes/No  
rgr

To

1.The Principal District Judge,  
Tirupur.

2.The District Munsif Court,  
Palladam.

3.The Section Officer,  
VR Section, High Court,  
Madras.



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**RMT.TEEKAA RAMAN, J.**

(rgr)

**Judgment in  
A.S.No.529 of 2022**

**03.10.2024**