



S.A.No.38 of 2022

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.11.2023

PRONOUNCED ON : 10.01.2024

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.38 of 2022

1.Saraswathi
2. Kokila
3.Lakshmi Priya ... Appellants 1 to 3/Defendants 1 to 3

Vs.

1.Lakshmanan
2.Saraswathi
3.Mylathal
4.Jothimani ... Respondents 1 to 4 / Plaintiffs
5.Kuppusamy ... 5th Respondent / 4th Defendant

Prayer: Second Appeal is filed under Section 100 of C.P.C against the Judgement and Decree dated 09.07.2021 made in A.S.No.32 of 2019 on the file of the Principal District Judge, Tirupur, confirming the Judgment and Decree dated 12.12.2018 made in O.S.No.88 of 2013 on the file of Sub-Court, Udumalpet.



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For Appellants : Mr.N..Sridhar
for Mr.R.Bharath Kumar

For Respondents : Mr.V.Raghavachari,
Senior Counsel
for Mr.D.R.Arun Kumar
[R1 to R4]

For 5th respondent : Served - No Appearance

JUDGEMENT

This second appeal is preferred by defendants 1 to 3 who have suffered a concurrent judgment and decree against them.

2. In order to appreciate their grievance to the judgment and decree under appeal, it is necessary to briefly set out the facts which have given rise to the present second appeal and while setting out these facts, the parties are referred to in the same ranking as before the trial Court.



3. Plaintiff's case:

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(i) The plaintiffs had filed the suit O.S.No.88 of 2013 on the file of the Subordinate Judge, Udumalpet for partition of their 1/6th share in the suit properties and for declaration that the settlement deed dated 25.04.1996 is invalid and null and void.

(ii) It is the contention of the plaintiffs that the suit properties belonged to one Nagappan. The plaintiffs, the first defendant's Husband, Nataraj and the fourth defendant are the children of the said Nagappan. Nagappan was originally married to one Palaniammal through whom, the first plaintiff and the fourth defendant were born. After her demise, Nagappan married one Mariammal through whom, plaintiffs 2 to 4 and the first defendant's husband Nataraj were born. Nataraj died in the year 2008 leaving behind him surviving defendants 1 to 3 as his legal heirs. Nagappan had passed away earlier in the year 1997 leaving behind him surviving the plaintiffs, the aforesaid Nataraj and the fourth defendant as his legal heirs. The plaintiffs would contend



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that the first plaintiff was taking care of the family affairs along with his father and he had assisted him in performing the marriage of plaintiffs 2 to 4. The plaintiffs would contend that when plaintiffs 2 to 4 were married, they were not given adequate jewels or dowry and they were told that they would get their share in the properties. The plaintiffs would contend that the suit properties are the joint family properties of the plaintiffs and defendants. The construction was put up from out of the income of the first defendant's husband and the fourth defendant. After the first defendant's demise, it was not conducive for continuing the joint family. They were advised that after the marriage of plaintiffs 2 to 4, the suit properties could be divided.

(iii) However, contrary to this assurance, defendants 1 to 3, with the assistance of the fourth defendant, were attempting to encumber the suit properties by alienating it to the third parties. This attempt was prevented with the help of the elders in the family. Therefore on 05.04.2013, the plaintiffs had issued a legal notice calling upon



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defendants 1 to 3 to partition the suit properties. On 23.04.2013, the defendants sent a reply containing false and incorrect allegations. The defendants had stated that the plaintiffs are not entitled to the 1/6th share each as claimed by them in the suit properties.

(iv) The plaint was amended in the year 2015 by orders of this Court in I.A.No.517 of 2014 in and by which the relief to set aside the settlement deed dated 25.04.1996 alleged to have been executed by Nagappan in favour of Nataraj was included. Suitable amendments were also made to the body of the plaint.

4. Written statement of defendants:

(i) The defendants 1 to 3 had filed a written statement *inter-alia* denying the claim of the plaintiffs. They would submit that the suit properties are the self acquired properties of Nagappan, having purchased it from one Kathar Batcha Sahib on 23.03.1964 under a registered document bearing No.644 of 1964. Thereafter on 11.04.1966, the said Nagappan was allotted a house site patta in respect



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of another portion of the suit properties. Therefore, it is the contention of the defendants that both of these properties are the self acquired properties of the said Nagappan. They would contend that the said Nagappan had no ancestral properties and had not sold any ancestral properties to purchase the suit properties as alleged in the plaint. Neither had he sold the jewellery of his wife.

(ii) The defendants had denied the allegations in the plaint that the defendants had assured the plaintiffs that they would allot their share in the properties to them. They had also denied the allegation that the fourth defendant had contributed along with the first defendant's husband to put up the construction and that they attempted to alienate the property.

(iii) The defendants would further submit that they never lived together as joint family members. The defendants would further highlight the fact that in the plaint, only the property that was



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purchased by Nagappan that has been included and the property in respect of which the said Nagappan had obtained an assignment patta had not been included. The defendants would further contend that pursuant to the settlement deed dated 25.04.1996, the properties were transferred in the name of Nataraj and now the same stands in the name of defendants 1 to 3, who are residing in the property. The defendants would further submit that they are ladies. The plaintiffs and the fourth defendant are trying to disturb their peaceful possession and enjoyment of the suit property. Therefore, the defendants had lodged a complaint with the Udumalpet Police Station. They would submit that the plaintiffs and the fourth defendant have no right over the suit properties and the same has been settled by Nagappan on Nataraj, the husband of the first defendant and the father of defendants 2 and 3.

(iv) After the amendment of the plaint, an additional written statement came to be filed in which the defendants would submit that the original settlement deed is in the custody of the defendants and



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without seeing the documents, the plaintiffs have wrongly alleged that the settlement deed is a forged one. The settlement deed has been executed in a sound disposing state of mind by Nataraj. The defendants had also submitted that they were ready to have the signature of Nagappan compared by an expert.

5. TRIAL COURT:

The trial Court had framed the following issues:

1. தாவா சொத்துக்களில் வாதிகளுக்கு தலா 4/6 பாகம் உரிமை உள்ளதா?
2. வாதிகள் கோரும் பாகப்பிரிவினை வழங்கத்தக்கதா?
3. வாதிகளுக்கு கிடைக்கும் பரிகாரங்கள் யாவை?

(ii) After the amendment of the plaint, an additional issue has been framed which reads as follows:

25.04.1996 தேதிய செட்டில்மெண்ட் ஆவணம் மோசடியானது,
செல்லுதன்மையற்றது என்று விளம்புகை செய்ய வேண்டும்
என்று வாதிகள் கோரும் பரிகாரம் வாதிகளுக்கு



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கிடைக்கக்கூதா?

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(iii) The first plaintiff had examined himself as P.W1 and one Thangavel and Subramanian as P.Ws.2 and 3 and had marked Exs.A1 to A9. On the side of the defendants, the first defendant had examined herself as D.W1 and one Kowgarnisha as D.W2. The defendants had marked Exs.B1 to B22. The trial Court, on considering the evidence of record, had ultimately decreed the suit as prayed for and held that the settlement deed dated 25.04.1996 which is marked as Ex.B2 was a fraudulent one and therefore null and void.

6. LOWER APPELLATE COURT

The judgment and decree was taken up on appeal by the defendants to the Principal District Judge, Tiruppur in A.S.No.32 of 2019. The defendants 1 to 3 had also taken out an application in I.A.No.54 of 2020 for letting in additional evidence on the additional issue framed and to remand the matter to the trial Court. The



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defendants wanted to let in evidence to prove the settlement deed.

Further, the learned District Judge had observed that there is no pleading with reference to the Will dated 28.10.1987 which has been projected for the first time only during the evidence and marked as Ex.B1 and 10 years thereafter on 25.04.1996, Nagappan is stated to have executed B2-settlement deed which has been pleaded in the written statement. The learned Judge observed that defendants have failed to prove the said document and therefore, the trial Court has rightly rejected the claim of the plaintiff. With reference to the application for receiving the additional evidence, the learned Judge has observed that the defendants have not come out with the list of witnesses whom they proposed to examine to prove the settlement deed and they have also not stated whether the attesting witness to the settlement deed was alive or not. Therefore, the learned Judge has proceeded to dismiss the application for receiving the additional documents and also the appeal filed by the defendants. Aggrieved by this concurrent judgment and decree, the defendants 1 to 3 are now



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before this Court.

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7. SUBSTANTIAL QUESTION OF LAW

The following substantial question of law has been framed while admitting this second appeal, which can be summarized as follows:

"Whether the judgment that the settlement dated 25.04.1996 was forged and consequently granting the relief of declaration was correct in law when the additional issue had been raised only while pronouncing the judgment and the defendants have not been given an opportunity to lead the evidence in this regard."

Therefore, the only question that has arisen for consideration is the framing of the additional issue when pronouncing the judgment, thereby denying defendants 1 to 3 an opportunity to prove their case.

8. SUBMISSIONS OF THE LEARNED COUNSEL FOR

11/30



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APPELLANTS 1 TO 3

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(i) Mr.N.Sridhar has addressed arguments on behalf of Mr.Bharath Kumar, learned counsel for the appellants/defendants 1 to 3. The learned counsel would submit that the property in question is a self acquired property of Nagappan under Ex.B2 dated 25.04.1996. Nagappan, the original owner of the suit property, had executed a settlement deed in favour of his son, Nataraj, the husband of the first defendant and the father of defendants 2 and 3 in the year 1997 and the revenue records have all been mutated in the name of the settlee, as evidenced by Exs.B5 to B9.

(ii) The learned counsel would further submit that in the year 2015, the plaint had been amended to incorporate the pleadings that the settlement deed-ExB2 was a forged document and also to include a prayer for declaring that the settlement deed dated 25.04.1996 as null and void. He would submit that the suit was originally filed on 25.09.2013 and the written statement was filed in January 2014. In the



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original plaint, there was no relief for declaring the settlement deed as null and void. This was amended only in the year 2015 and on 11.03.2015, the amended plaint was filed. An additional written statement has also been filed wherein the defendants have submitted that they were ready to submit the document, namely, the settlement deed or any other document, for expert opinion.

(iii) The learned counsel would further argue that defendants 1 to 4 had also taken out an application for sending the settlement deed for expert opinion as contemplated under Section 68 of the Evidence Act. However, the same could not be compared as the defendants had not produced any contemporary admitted document for comparison. He would submit that both the Courts below have failed to appreciate that in their plaint, the plaintiffs have not set out the plea of fraud and forgery but have simply sought for declaration that the settlement deed is vitiated by fraud. He would argue that the pleadings are totally bereft of details as contemplated under the provisions of Order VI Rule



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4 of C.P.C. He would submit that the settlement deed in question is a registered document and the attempt of the defendants to prove the same by filing I.A.No.54 of 2020 in the first appeal before the Principal District Judge, Tiruppur had been dismissed thereby defendants 1 to 3 have lost their valuable right to prove their case. Further, no issue regarding the validity of the settlement deed has been framed by the trial Court initially and the has been framed by the trial Court only when the judgment was being pronounced, thereby depriving the defendants of their vital right to prove their case.

iv) In support of his argument regarding proof of a gift settlement deed, the learned counsel would rely upon the judgement of the Hon'ble Supreme Court reported in ***(2020) 16 SCC 255/Govindbhai Chhotabhai Patel and Others Vs. Patel Ramanbhai Mathurbhai*** where the gift deed that has been produced was called in question as a fraudulent one. The attesting witnesses had not been examined and



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therefore, it was the contention of the defendants that the mandatory requirement to prove the execution of a gift deed in terms of Section 68 of the Evidence Act had not been followed. The appellants had not specifically denied the execution of the gift deed and therefore, the argument of the respondent was that it was not necessary for the donee to examine one of the attesting witnesses. The Hon'ble Supreme Court relying upon the judgment of the Kerala High Court reported in **1984 SCC Online Kerala 174** [*Kannan Nambiar v. Narayani Amma and Others*] had observed as follows:

The Appellants have not denied the execution of the document but alleged forgery and fabrication. In the absence of any evidence of any forgery and fabrication and in the absence of specific denial of the execution of the gift deed in the manner held in Kannan Nambiar, the Donee was under no obligation to examine one of the attesting witnesses of the gift deed. As per evidence on record, the Donee was taking care of the Donor for



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many years. The Appellants were residing in the United States but failed to take care of their parents. Therefore, the father of the Appellants has executed gift deed in favour of a person who stood by him. We find that there is no error in the findings recorded by the High Court.

The Kerala High Court in **Kannan Nambiar's case** held that the denial of execution of the gift should be an unambiguous and should be categoric. The denial has to be in express terms and must be unqualified, manifest and explicit. Since there was no specific denial of the document, the Court held that the respondent therein could rely upon proviso to Section 68 of the Indian Evidence Act and in these circumstances there was no defect in not calling the attesting witness to prove the document. He would submit that the ratio laid down in the above case would apply on all fours to the case on hand and would therefore pray that this Court be pleased to allow the Second Appeal and decree the suit as prayed for.



9. SUBMISSIONS OF THE LEARNED COUNSEL FOR RESPONDENTS

(i) Per contra, Mr.V.Raghavachari, learned senior counsel appearing on behalf of the counsel for the respondents/plaintiffs would argue that the contention of the appellants/defendants that they had not been given an opportunity to prove the settlement deeds since no issue had been framed by the Trial Court cannot be countenanced since the relief that has been claimed is one to reject the settlement deed and the plaintiffs have clearly in paragraph no.10A of the plaint stated that the settlement deed dated 25.04.1996 is a fabricated one and therefore invalid. He would submit that they have also pleaded that this document therefore would not deprive the plaintiffs of their right to the suit schedule properties and therefore they sought to have the settlement deed declared as null and void.

(ii) He would submit that in the written statement for the first time the plaintiffs were put on notice about the settlement deed and that the records had been mutated in the name of defendants 1 to 3. It was



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this statement in the written statement that had prompted the plaintiffs to amend the plaint. After the amendment, the defendants have filed an additional written statement in and by which they have contended that the document is a registered one and that the plaintiffs have flippantly alleged that the document is a forged one and the said statement is not backed by evidence. Therefore, without examining the original settlement deed which is in the possession of the defendants, the plaintiffs cannot come forward with such a statement. They have also in their written statement stated that they were ready and willing to send the document for an expert opinion. Therefore, it is the contention of the learned senior counsel that the parties had knowledge about the issue in respect of which they had gone to Court and which they had to defend. The pleadings and the evidence are on the same lines. To substantiate the same, the learned Senior counsel would referred to the cross examination of D.W.1. During her cross examination, D.W.1 had clearly admitted that she is aware of as to who had attested the settlement deed which has been marked as Ex.B.2. The witness had



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also stated that her father-in-law had executed the settlement deed in order to avoid dispute cropping up between his legal heirs after his lifetime. The witness had also stated that her father-in-law was an able bodied person till his death.

(iii) The learned Senior counsel would further submit that the witness was very much aware about the fact that the property of her father-in-law after his death would devolve equally on all his legal heirs. In the proof affidavit, in lieu of chief examination, the witness had reiterated the fact that the property belonged exclusively to Nataraj, the 1st defendant's husband and the father of defendants 2 and 3 by virtue of the settlement deed executed in his favour. The witness had also referred to the statement made in para no.10 A of the plaint which according to the witness is absolutely false and baseless. The witness had reiterated the fact that she is ready and willing to send the signature for comparison. It transpires that the document has been sent for an expert opinion. However, the same could not be compared since no



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admitted signatures had been sent for comparison. Therefore, the learned senior counsel would submit that the defendants were very much aware about the issue on hand. The defendants were defending a suit for partition under Section 8 of the Hindu Succession Act and they were denying the rights of the plaintiffs on the basis that the property has been settled on them. Therefore, it is the argument of the learned Senior counsel that having failed to prove the settlement deed as contemplated under Section 68 of the Evidence Act, the Courts below have rightly rejected the case of the defendants. In support of this proposition, he would rely upon the judgment of this Court dated 07.07.2009 reported in **2009 (6) MJL page 1113 - Senappa Vs. R.Krishnappa and others.**

(iv) He would also draw the attention of this Court to the reasons given by the Trial Court for framing the additional issue after orders were reserved. The learned Trial Judge had stated that the amended relief sought to set aside the settlement deed dated 25.04.1996 on the



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ground that it is a forged and fabricated document by an oversight has been omitted to be framed as an issue. The additional issue that has been framed is *“Whether the relief claimed by the plaintiffs that the settlement deed dated 25.04.1996 was fraudulent and invalid document can be granted to them?”*

(v) He would submit that the Appellate Court had also considered the above argument by framing the following points of consideration, namely, the 3rd point which is extracted herein below:-

" 3) Whether the appellants are entitled to let in additional evidence before the appellate Court on the additional issue framed to prove the settlement deed or whether the matter requires to be remanded back to Trial Court as prayed for?"

The Appellate Court had returned a finding on this point for consideration in para no.16 to 18 of the judgment wherein the learned



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Judge has set out the opportunities that had been granted to the defendants to prove the settlement deed. The Appellate Court had taken note of the fact that the Will which had been rejected during the arguments, namely, the Will deed dated 28.10.1987 had not been pleaded by the defendants in their written statement and it was only in evidence that the same has been produced and marked. The learned Judge had also taken into account the fact that the defendants had examined D.W.2 to speak about the settlement deed. However, in the cross-examination, the witness would state that the defendants are claiming a right to the property under the Will of the year 1986. In the cross examination, the witness would state that the property has been bequeathed in favour of Nataraj by Nagappan under a Will and the defendants were claiming a right to the property only under this Will. The witness is neither an attesting witness nor an identifying witness of Ex.B.1 and her evidence cannot be considered.

(vi) The learned senior counsel would rely upon the judgement



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reported in *AIR 1963 SC 884 - Nedunuri Kameswaramma Vs*

Sampati Subba in support of his argument that failure to frame an issue is not fatal to the suit particularly when the parties were aware about the issue in respect of which they were before the Court. He would submit that both the plaintiffs and the defendants were very much aware about the issue involved in the suit. The defense to the suit for partition was the settlement deed and therefore failure to prove the settlement deed especially when the same has been challenged as being a fabricated and fraudulent document and the onus is on the defendants to prove the same. The fact that this exercise has not been done, the defendants cannot claim a right to the property on the basis of the settlement deed.

(vii) The learned senior counsel would submit that the proviso to Section 68 of the Evidence Act would not apply to the instant case since the execution of the document has been specifically denied by the plaintiffs in para. 10 A of the plaint by stating that the same is a



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fabricated document. The Appellate Court has also dealt with the same issue. Therefore, he would submit that the question of law has to be definitely answered in favour of the plaintiffs as held by both the Courts below.

10. Heard the counsels on either side.

11. **DISCUSSION:-**

(i) The only issue which requires the consideration of this Court hinges on the fact as to whether the provisions of Section 68 of the Evidence Act and its proviso regarding the examination of attesting witness would be applicable to the case on hand particularly when the additional issue has been raised just prior to the pronouncement of the judgement and whether the defendants have been prevented for doing so owing to the non-framing of the additional issue before Trial. Admittedly, the defendants who have pleaded that the property had been settled in their favour by the said Nagappan and who had marked



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Ex.B.2 had not chosen to examine the attesting witness. A reading of the above proviso would show that where the execution is not denied then there was no necessity to examine the attesting witnesses. However, the proviso clearly states that where there is a denial or where the execution is questioned then in such cases the person who propounds the document, namely, the settlement deed is bound to produce at least one of the attesting witnesses.

(ii) The judgement that has been relied on the side of the appellants, namely, the judgement of ***Govindbhai Chhotabhai Patel and Ors.*** cited supra may not be relevant to the case on hand since that was a case where the appellants had admitted the execution of the gift deed but alleged that it was forged and fabricated. This is set out in para. No.38 of the aforesaid judgement. Even the case of ***Kannan Nambiar Vs. Narayani Amma*** which was referred to in the Judgement of ***Govindbhai Chhotabhai Patel and Ors.*** by the Hon'ble Supreme Court, was a case where the respondents therein had only stated that the



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document had been executed under circumstances which would render the document invalid and that is a case where the execution of the gift deed was admitted and fraud was pleaded.

(iii) However, in the case on hand the very execution is denied. Both the plaintiffs as well as the defendants have clearly understood the fact that the execution of the settlement deed by the said Nagappan has been denied by the plaintiffs and therefore they had sought for a partition of the property. It is for this reason that the defendants had undertaken to have the document sent for an expert opinion. Further, the defendants have themselves taken steps to have the document examined by an expert and the said application was allowed. However, the same could not be compared because the admitted signature had not been produced. The plaintiffs have clearly denied the execution of the document by the said Nagappan, therefore, in these circumstances, it is imperative on the part of the defendants to satisfy the provisions of the proviso to Section 68 of the Evidence Act by examining the attesting



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witnesses to the document. An attempt was made by examining P.W.2. However, P.W.2 who in the chief examination would contend that Nagappan has executed a settlement deed, in her cross examination would go to state that the plaintiffs/defendants had filed the case only on the strength of the Will. That apart, the defendants in the course of the evidence had suddenly introduced a Will which is purported to have been executed 10 years prior to the execution of the settlement deed. The Will has also not been proved in the manner known to law.

(iv) That apart, Section 111 of the Indian Evidence Act places burden of proof of good faith of the transaction on a person who is in a position of active confidence. The said Nataraj is eldest son of the deceased Nagappan and in the absence of the settlement deed the property had to devolve equally on all the legal heirs. The defendant by introducing the settlement deed is seeking to make a deviation from the natural succession. Therefore, the onus is on the defendants to prove



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the settlement deed. Therefore even on this ground, the onus was on the defendants to prove the execution of the settlement deed by examining at least one attesting witness. The said exercise has not been done by the defendants.

v) The fact that the defendants have marked Ex.B.2 and examined P.W.2 would clearly go to show that they were very much aware that the validity of the settlement deed Ex.B.2 had to be proved by them since the plaintiffs had pleaded that it was a forged and fabricated document.

(vi) Therefore, I see no reason to interfere with the findings of the Courts below and the Substantial Question of law is held against the defendnats. In fine, the above Second Appeal stands dismissed. No costs.

10.01.2024



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Index: Yes/No

Speaking order/non-speaking order
srn/shr

To

1. The Principal District Judge, Tirupur,
2. The Sub-Court, Udumalpet.
3. The Section Officer,
V.R.Section,
High Court, Madras.



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