



S.A.No.302 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2025

CORAM:

THE HONOURABLE **Mrs.JUSTICE R.KALAIMATHI**

S.A.No.302 of 2023
and
CMP.Nos.9019 & 9020 of 2023

Jayanthi

... Appellant

vs.

Manickammal (Died)

1.Suresh

2.Parthiban

... Respondents

Prayer : This Second Appeal is filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 23.06.2022 made in A.S.No.22 of 2021 on the file of II Additional District Court, Vellore @ Ranipet by confirming the Judgment and Decree dated 05.04.2021 passed in O.S.No.89 of 2012 on the file of the Subordinate Court, Ranipet.

For Appellant : Mr.B.Gurunathan

For Respondents : Mr.P.Raja

JUDGMENT

This Second Appeal has been preferred by the sole plaintiff herein against the Judgment and Decree dated 23.06.2022 passed in A.S.No.22 of 2021 by the Second Additional District Court, Ranipet.



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2. The parties are indicated herein as per their litigative status and ranking before the Trial Court.

3. According to the plaintiff, the plaintiff is the legally wedded wife of late TrJothi. Her marriage with the said Jothi was solemnized on 11.02.2001 at Sri Chokkanatha Vinayakar Temple Hall, Vilari Village, Arcot Taluk in the presence both sides' relatives. The said marriage was performed after the death of first wife of the said Jothi.

3.1. The first defendant Manickammal is the mother and second and third defendants are the sons of deceased Jothi born through his first wife. The family was being maintained by her husband Jothi till his life time. By actively doing the agricultural work, the plaintiff has also contributed to the family.

3.2. After the demise of her husband on 31.12.2006, the plaintiff had been residing along with the defendants. After the death of her husband also she has been doing agricultural work and administering the family affairs. The family debts were discharged from and out of the income of joint family nucleus. Defendants 2 and 3 attained majority thereafter, conduct of the second and third defendants got changed and they did not



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give any regard to the words of the plaintiff. Plaintiff's minor son, Selvam died on 18.06.2011.

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3.3. The plaintiff was isolated and she has been forcibly restrained by the second and third defendants from taking part in the family affairs and agricultural activities. The house and agricultural lands shown in the schedule of property stands in the name of deceased Jothi, [her husband]. As per the Hindu Succession Act, she is entitled to get her respective share in the suit properties. The plaintiff made a fixed deposit of Rs.10,000/- in the name of her son and the fixed deposit receipt is the second defendant. The entire agricultural income is being appropriated by the second defendant. The plaintiff caused to issue legal notice dated 14.02.2012 to the defendants, for an amicable settlement . Despite the receipt of notice, there is no response from the defendants. Hence, the suit for partition.

4. Per contra, it has *inter alia* been contended by the defendants that the suit properties are the ancestral properties of one Govindaraj Mudaliar who is the husband of first defendant herein. He died leaving behind his wife, the first defendant and his son Jothi. Plaintiff is the wife of the said Jothi. Since the plaintiff married the said Jothi during the life time of first wife Jeyalakshmi, the marriage between the plaintiff and the



deceased Jothi is not valid under law. Plaintiff is not a legally wedded wife of Jothi.

4.1. The deceased Jothi borrowed loans from several persons to the tune of Rs.14,00,000/- in order to lead a luxury life with the 2nd wife/plaintiff herein. The said debts are being repaid by the second defendant. The deceased Jothi executed a Will dated 04.10.2006 in favour of second defendant, bequeathing the suit properties to them. Plaintiff is not in a joint possession and enjoyment of the suit property as alleged in the plaint.

5. Based on the divergent pleadings, the Trial Court framed the relevant issues. To substantiate the plaint details, on the plaintiff's side, two witnesses have been examined and eight documents have been marked. Ex.A2 is the family card copy (for the period from 2005 to 2009). Ex.A4 dated 07.03.2007 is the copy of legal heir certificate issued pursuant to the death of Jothi. On the defendant's side, four witnesses have been examined and eight documents have been marked. Ex.B1 is the patta pass book in the name of Govindaraj, husband of first defendant Manickammal. Ex.B3 - dated 04.10.2006 Will executed by the deceased Jothi.



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6.The trial Court upon consideration of oral and documentary evidence and after hearing the arguments advanced by either side, held that the properties are the ancestral properties and that Will is a true and valid document and therefore the plaintiff is not entitled for partition and dismissed the suit.

7. Aggrieved, the sole plaintiff Jeyanthi preferred appeal in A.S.No.22 of 2021 before the Second Additional District Court, Ranipet, Vellore District.

8. Upon consideration of case records and after hearing the arguments advanced by the learned counsel on either side, the Will said to have been executed by the deceased Jothi is held to be a valid document and dismissed the appeal by confirming the Judgment of the Trial Court.

9. The following substantial questions of law are formulated for consideration :-

i) Whether the alleged will executed by Jothi (Ex.B3) is a true and valid document are not?

ii) Whether the plaintiff Jayanthi is legally wedded wife of Jothi?



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10. The sum and substance of the plaintiff's case is that the plaintiff is the legally wedded wife of deceased Jothi. The first defendant is the mother and the 2nd and 3rd defendants are the sons of deceased Jothi born through his first wife. The plaintiff's husband Jothi died on 31.12.2006. After the demise of the plaintiff's husband, she continued to reside in the matrimonial home along with the defendants .

11. The 2nd and 3rd defendants attained majority and thereafter they got changed and did not give respect to the words of the plaintiff. The third defendant created unnecessary quarrels in public places and threatened her to chase away from the matrimonial home. The plaintiff therefore lodged a complaint before Kalavai Police Station and a case was registered Crime No.139 of 2011. On 18.06.2011, her minor son, Selvam died in an unexpected incident. After the demise of her son, she left the matrimonial home and is now living with her parents. She caused to issue a legal notice on 14.02.2012 to the defendants for settlement. Hence, the suit is filed for partition and separate possession of the plaintiff's suit $\frac{1}{4}$ th share in the 'A' schedule property and for a permanent injunction restraining the defendants from alienating or encumbering the suit property and for a mandatory injunction directing the defendants to hand over the immovable properties described in the 'E' schedule of the plaint.



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12. On behalf of the defendants, it was contended that the suit properties are the ancestral properties of Govindaraj Mudaliar, who is the husband of the first defendant. The plaintiff being the second wife of deceased Jothi got married the deceased Jothi during the life time of his first wife, and the marriage is not valid. The plaintiff is not a legally wedded wife of Jothi. Jothi borrowed debts from several persons to the tune of Rs.14,00,000/-. Due to the lavishness on the part of the second wife, the plaintiff herein, the second defendant is still repaying the debt amount to several creditors. The deceased Jothi executed a Will dated 04.10.2006 in favour of the 2nd and 3rd defendant bequeathing the suit properties with limited interest. The father can execute the Will only to the extent of his share. Therefore, the plaintiff has no right to claim any share in the suit property. She is not in possession and enjoyment of the suit property and prayed for dismissal of the suit .

13. Plaintiff/P.W1 has filed her proof affidavit in line with the details of the plaint. When she was posed a question to the effect that she is the legally wedded wife of Jothi, she answered in affirmative. Ex,A.2 is the Family Ration Card issued in the name of deceased Jothi, and it pertains to the period between 2005 & 2009. The plaintiff would state that she got married Jothi after the death of his first wife. The marriage invitation of the plaintiff is Ex.A1. The date of marriage is 11.02.2001.



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14. It is the evidence of P.W.1 that after the death of his first wife only Jothi remarried her. From the cross examination of P.W.2 (Krishnan), it is deducible that only after the demise of the first wife, Jothi got married the plaintiff. As per Ex.B4 - Legal heir certificate, names of the legal heirs are Suresh, Parthiban, Jayanthi(plaintiff) Selvam and Manickammal. Based on the oral evidence of plaintiff's side coupled with Ex.A1, Ex.A2 & Ex.A4, it is concluded that the plaintiff is the legally wedded wife of Jothi.

15. Ex.B1 and Ex.B2 are the patta stand in the names of Govindaraj (father of Jothi) and Jothi respectively. As per Ex.A5, patta dated 07.03.2011, item No.2 of the 'A' schedule property stands in the name of plaintiff as well as the defendants. After the death of the said Jothi, the suit properties mentioned in the 'A' schedule devolved upon the legal heirs of deceased Jothi.

16. As regards the proof of Will, the Hon'ble Supreme Court of India has held that in ***H. Venkatachala Iyengar v. B.N. Thimmajamma and others*** reported in **AIR 1959 SC 443**, the Court, speaking through Gajendragadkar, J., laid down the following positions:-



"1. Stated generally, 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 in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed.

This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally



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receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. 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 raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

17. In ***Madhukar D. Shende vs. Tarabai Aba Shedage*** reported in ***AIR 2002 SC 637***, it has been held that "*It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. The*



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contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

18. In ***Meenakshiammal (Dead) through legal representatives vs Chandrasekaran & another*** reported in **2005 (1) SCC 280**, it has been held by the Apex Court that *"The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, is sufficient to discharge the onus. Once the propounder proves that the will was (i) signed by the testator, and (ii) that he was at the relevant time in a sound disposing state*



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of mind, and (iii) that he understood the nature and effect of the disposition and put his signature out of his own free will, and (iv) that he signed it in presence of the witnesses who attested it in his presence, the onus, which rests on the propounder, is discharged.”

19. Section 68 of the Indian Evidence Act, 1872 speaks about the attestation of documents in execution, if required in law. As per Section 63 of the Indian Succession Act, 1925, as regards execution of the Wills, stipulates that every testator shall sign or shall affix the mark to the Will and such a Will shall further be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. The conjoint reading of Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act will require at least one attesting witness to be examined and the said witness should speak not only about the testator signature or affixing his mark to the Will, but also that each of the witnesses has signed the Will in the presence of the testator.

20. As regards the onus of proof in cases of Wills, the rules of law are quite clear. The first rule is that onus probandi lies, in every case, on the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. The second rule is that: if a party writes or prepares a



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Will under which, he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, whatever their nature may be, it is for those who propound the Will to remove suspicion and to prove affirmatively that the testator knew and approved the contents of the Will. Only when this is done is the onus thrown on those who oppose the Will to prove fraud, undue influence or whatever they rely on to displace the case or to disprove the Will.

21. D.W.1 would state that his mother had borrowed money from various persons and the same was discharged by the second defendant. To prove the same, D.W.2- G.Prakasam, brother of the deceased Jothi, was examined. It is his evidence that suit properties are the ancestral properties of their father late.Govindaraj, and the suit properties were allotted to his brother, Jothi in the oral partition. He has also spoken about the execution of Will – Ex.B3 executed by Jothi in favour of 2nd and 3rd defendants. He would further state that first witness attestor to will is his cousin brother.

22. It is the specific evidence of P.W.2 that deceased Jothi executed the Will and in turn Jothi witnessed his attestation to the Will. On a careful perusal of Ex.B3 Will, it is found that the age of the attestor in the first page has not been filled up. The Will has been scribed written by one

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Ramesh. There is no mention of the second wife's name. It is not the case of the defendants that their father Jothi was inimical with the 2nd wife Jayanthi. From the cross examination of DW2, it is pellucid that Ex.B3 -Will was scribed and executed at Campus of the Sub-Registrar Office, Arcot. However, D.W.2 does not know as to why it was not registered, which raises strong suspicion. Neither the witness D.Murugesan is an attester of the Will – nor Ex.B3 is written by cousin brother of D.W.2. From the evidence of DW2, it came to be known that the beneficiary under the will, namely 2nd defendant Suresh, S/o.Jothi, has actively participated in the execution of Ex.B3 - Will which affects the case of the defendant in entirety.

23. As regards the proof of Will, the Hon'ble Supreme Court of India has held that in ***H. Venkatachala Iyengar v. B.N. Thimmajamma and others*** reported in **AIR 1959 SC 443**, the Court, speaking through Gajendragadkar, J., laid down the following positions:-

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until, as required by section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed.

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5. *It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.*

6. *If a caveator alleges fraud, undue influence, coercion etc. 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 raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."*

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or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

25. In **Meenakshiammal (Dead) through legal representatives vs Chandrasekaran & another** reported in **2005 (1) SCC 280**, it has been held by the Apex Court that "The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, is sufficient to discharge the onus. Once the propounder proves that the will was (i) signed by the testator, and (ii) that he was at the relevant time in a sound disposing state of mind, and (iii) that he understood the nature and effect of the disposition and put his signature out of his own free will, and (iv) that he signed it in presence of the witnesses who attested it in his presence, the onus, which rests on the propounder, is discharged."



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26. Section 68 of the Indian Evidence Act, 1872 speaks about the attestation of documents in execution, if required in law. As per Section 63 of the Indian Succession Act, 1925, as regards execution of the Wills, stipulates that every testator shall sign or shall affix the mark to the Will and such a Will shall further be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. The conjoint reading of Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act will require at least one attesting witness to be examined and the said witness should speak not only about the testator signature or affixing his mark to the Will, but also that each of the witnesses has signed the Will in the presence of the testator.

27. As regards the onus of proof in cases of Wills, the rules of law are quite clear. The first rule is that onus probandi lies, in every case, on the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. The second rule is that: if a party writes or prepares a Will under which, he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, whatever their nature may be, it is for those who propound the Will to remove suspicion and to prove affirmatively that the testator knew and approved the contents of the Will.



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Only when this is done the onus thrown on those who oppose the Will to prove fraud, undue influence or whatever they rely on to displace the case or to disprove the Will.

28. Suspicious circumstances are DW2, who is the Junior paternal uncle of the 2nd defendant would depose during cross examination that DW2 – Suresh (Defendant No.2/one of the beneficiary under Ex.B3-Will) சுரேஷ் கேட்டுக்கொண்டதன் பேரில் நான் சாட்சி கையெழுத்து போட்டேன்". The second attester to the Will is cousin brother of DW2 (Murugesan). The Will was prepared and executed at the Sub-Registrar Office, but it was not registered. There is no mention about the 2nd wife Jeyanthi and the son of the attester born through Jeyanthi. Had the attester given instructions to the scribe, he should have definitely mentioned about the second wife and son born through her. The fact that propounder participated in the execution of Will has to be held against the propounders. The said suspicious circumstances are not dispelled by the defendants. Therefore, Ex.B3-Will dated 04.10.2006 cannot be held to be a true document.

29. The second defendant, who is the first son of Jothi born through his first wife Jayalakshmi, would state that his father was indebted to



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various persons and on that account, obtained a loan for a sum of Rs.14,00,000/- and he has been repaying the said amount with interest.

30. To prove the details, he has examined the borrowers namely, D.W.3 Dhananjeyan and D.W4 Senthilkumar (Ex.B4, Ex.B7- Promissory notes). It is the evidence of DW3 that when Jothi was alive, Jothi received a sum of Rs.4,00,000/- from him as a loan on 03.01.2005 and executed a demand promissory note. He would further state that after the death of Jothi, his son Suresh repaid the said loan amount and the promissory note was taken by him which is marked as Ex.B4.

31. Likewise another borrower one Senthilkumar was examined as P.W.4. It is the evidence of P.W.4 that on 14.12.2004, deceased Jothi borrowed a sum of Rs.2,50,000/- and executed a demand promissory note and the same is marked as Ex.B7. He would further depose that his sons Suresh, Parthiban have attested in the promissory notes. He would further state that his son Suresh repaid the said loan amount and received the demand promissory notes. Therefore, the details of Ex.B4 and Ex.B.7 - Promissory notes have been proved by examining the respective borrowers.



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32. But the fact remains that the suit properties item no.1 (lands) have been proved to be in possession and enjoyment of the defendants No.2 & 3 after the death of Jothi. Jothi died on 31.12.2006. Almost for nineteen years, after the death of Jothi, his sons namely defendant Nos.2 and 3 are in possession and enjoyment of the suit properties. Either past mesne profits or future mesne profits from the agricultural land are sought by the plaintiff.

33. It is the evidence of DW3 Dhananjeyan, who is doing paddy business would depose that " வாதியின் கணவர் ஒரு போகத்திற்கு நன்கு விளைந்தால் 150 மூட்டை நெல் விற்பார். Therefore, the said loan amounts need not be adjusted. The properties of Jothi devolves equally upon his class-I heirs namely the plaintiff, defendants no.2 and 3. During the pendency of A.S.No.22 of 2021, the mother of Jothi, who is arrayed as first respondent/first defendant died. Therefore, shares are reduced to three. There is no evidence led in respect of schedule 'B' property. Succession opens on the date of death of deceased Jothi.

34. Based on the aforesaid discussions and observations, this Court is of the considered view that the plaintiff is entitled to 1/3 rd share in items no.1 and 2 of schedule A of the suit properties. Law is well settled that order of injunction shall not be granted against co-owners.
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35. Preliminary decree of 1/3rd share in items no.1 and 2 of 'A' schedule property is granted in favour of the plaintiff. Therefore, till the Final Decree is passed, permanent injunction not to alienate or encumber item no.1 and 2 of schedule 'A' property is granted in favour of the plaintiff.

36. In view of the above said discussions, the plaintiff is not entitled to permanent injunction in respect of schedule 'B' property.

37. In the result,

i) This Second Appeal is partly allowed. Sequel to this, Judgment and Decree dated 23.06.2012 passed in A.S.No.22 of 2021 on the file of II Additional District Court, Ranipet, stands set aside.'

ii) Preliminary decree of 1/3th share in item nos.1 & 2 of schedule 'A' of the suit properties is passed in favour of the plaintiff. In respect of the relief of permanent injunction not to interfere with the peaceful possession and enjoyment of the suit property in respect of 'A' schedule property, it suit stands dismissed.

iii) Permanent injunction not to alienate schedule 'A' suit properties till the division of properties as per the preliminary decree is passed in favour of the plaintiff.



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iv) Relief of mandatory injunction in respect of schedule 'B' property stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

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Index : Yes/No
Speaking / Non-speaking order
kkd

To

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