

AS.(MD)No.178 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 25.03.2025

Pronounced On : 24.04.2025

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
AND
THE HON'BLE MR.JUSTICE M.JOTHIRAMAN**

A.S.(MD)No.178 of 2019
and
C.M.P.(MD)No.9094 of 2019

A.Rani

... Appellant/Plaintiff

Vs.

1.A.P.K.Manoharan

2.A.P.K.Karikalan

... Respondents/Defendants

PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 26.03.2019 made in O.S.No.33 of 2012 on the file of the III Additional District Judge, Tiruchirappalli.

For Appellant : Mr.Shankar Murali

For Respondents : Mr.K.Govindarajan,
for
Mr.S.Vinod Sathya Lazar.



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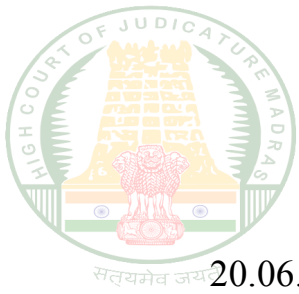
JUDGMENT

(Judgment of this Court was delivered by **M.JOTHIRAMAN J.**)

The unsuccessful plaintiff has preferred this appeal. The suit has been filed seeking partition of the suit properties and for rendition of accounts. The Court below decreed the suit partially that the plaintiff is entitled for 1/3 share in the item Nos.3 to 11 of the suit 'B' schedule properties and in respect of suit 'C' schedule properties. In respect of suit 'A' schedule properties and item Nos.1 & 2 of the suit 'B' schedule properties are dismissed. For the sake of convenience, the parties are referred to as per their rank before the trial Court.

2.Brief case of the plaintiffs is as follows:-

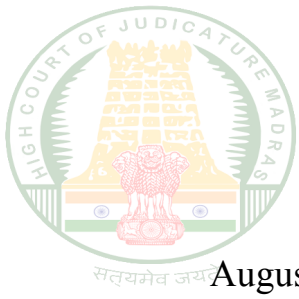
The plaintiff is the daughter and the defendants are sons of one A.P.Kulandaivelu and K.Vijayalakshmi. The suit 'A' schedule properties item Nos.1 to 7 are the ancestral properties of A.P.Kulandaivelu. The suit 'B' schedule properties item Nos.1 to 11 are self acquired properties of the said A.P.Kulandaivelu. The suit 'C' schedule properties item Nos.1 to 3 are the purchased by her father in her mother name. Her father died on



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20.06.2005 and mother died intestate on 07.04.2010. The plaintiff and the defendants are entitled to 1/3 share each. The suit properties have not been divided. The properties situated in town are under lease and rental income is being received by the defendants and income from the agricultural lands are also being received by the defendants. The suit schedule properties are in joint possession and enjoyment of the plaintiff and the defendants. After demise of plaintiff's mother on 07.04.2010, the defendants made an attempt to sell few of the suit schedule properties. Therefore, during second week of March 2007 demanded partition. The defendants represented that their father had already bequeathed item Nos. 3 and 4 of the suit 'B' schedule properties in favour of the plaintiff by way of alleged registered Will dated 15.03.2005 in Doc.No.27/2005. The defendants have also claimed that they said to have settled item Nos.1 and 2 of the 'B' schedule properties in favour of the defendants by executing two registered settlement deeds by her father. Item No.1 of the suit 'C' schedule properties was bequeathed by the mother in favour of the plaintiff through a registered Will dated 15.03.2005 in Doc.No. 28/2005. The alleged execution of the said Wills were not made known to the plaintiff. The plaintiff and her husband was residing abroad from



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August 2004 to November 2006. The alleged Will of the A.P.Kulandaivelu was not free and last testament. He was not hale and healthy and his signature ought to have been obtained by making misrepresentation when his mind was not synchronized with his actions. The plaintiff issued a legal notice dated 25.12.2011 and the defendants replied to the same on 30.01.2012. There was no family arrangements as claimed by the defendants. The alleged Will and settlement deeds are void. Hence, the suit.

3.Brief case of the defendants is as follows:-

The defendants would admit that the suit 'A' schedule properties are ancestral properties. Suit 'A' schedule properties were originally allotted to C.Perumal Gounder, parties grand father in an oral partition, between himself and his brother Ramasamy Gounder. Perumal Gounder died in the year 1968 and his wife died in the year 1970 leaving behind Srinrengan Perumal, Kulandaivel, Nachammal and Rengammal as their legal heirs. The ancestral properties of late Perumal Gounder still remains undivided and therefore, the claim of 1/3 share in the suit 'A' schedule properties is absolutely untenable. A.P.Kulandaivelu came to Tiruchirappalli in the year 1952 itself and started his career as a milk



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vendor and he also ran a coffee bar. Out of joint exertions and contributions, they had amassed wealth. They denied the allegations made by the plaintiff that their parents died intestate. The said A.P.Kulandaivelu was holding various positions in a political party and he was elected to Municipal Corporation as a Councillor for three times. The plaintiff's marriage was celebrated in a grant manner and their parents spent more than Rs.13,00,000/-. The defendants and their parents presented gold jewels weighing 200 sovereigns, silver vessels weighing 5 kgs and a Zen car and home appliances and household articles worth of several lakhs of rupees. The plaintiff's husband decided to do Post Graduation in medicine and the entire expenses were borne by the A.P.Kulandaivelu and the defendants. Before the plaintiff left for Trinidad, oral family arrangement was made in the presence of the parents, one Marudha Pillai, Namburajan, Rasool and others. Accordingly, the properties were settled among them. Therefore, A.P.Kulandaivelu and K.Vijayalakshmi had executed their last Wills bequeathing the suit properties in favour of the plaintiff. The property in Santhiveerappan Koil street was under usufructuary mortgage for a sum of Rs.3,50,000/- and the same was also paid to the plaintiff to enable her



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to redeem the property. Similarly, advance amount of Rs.50,000/-, which was payable to the tenant upon his vacating the property was also paid to the plaintiff. The plaintiff who has been collecting the rents from the tenants occupying item No.1 of the suit 'C' schedule property. On 04.02.2005, A.P.Kulandaivelu had executed two settlement deeds in Doc Nos.431/2005 and 432/2005 in favour of the defendants. The defendants had also made improvements in the suit properties and revenue records were also mutated in their names.

4. Based on the above pleadings, the trial Court has framed the issues and thereafter recasted the issues as follows:-

i) Whether the suit A schedule properties are ancestral properties in the hands of A.P.Kulandaivelu?

ii) Whether the suit C schedule properties was purchased by A.P.Kulandaivelu out of his own income, but in the name of his wife Vijayalakshmi in trust?

iii) Whether the suit B schedule property is a joint family property or it is an absolute property of A.P.Kulandaivelu?

iv) Whether it is true that there was a family arrangement in which the plaintiff and her husband had relinquished any right in the Jaffarsha Street and



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Sanhiveerappan Koil Street in favour of the defendants?

v)Whether the settlement deeds dated 04.02.2005 bearing document No.431/2004 and 432/2005 in favour of the defendants said to have been executed by A.P.Kulandaivelu, is true, valid and binding on the plaintiff?

vi)Whether the Will dated 15.03.2005 bearing document No.27/2005 executed by A.P.Kulandaivelu is true, valid and binding on the parties?

vii)Whether the Will dated 15.03.2005 bearing document No.28/2005 executed by Vijayalakshmi is true, valid and binding on the parties?

viii)Whether the suit is bad for non-joinder of necessary parties in respect of suit A schedule property?

ix)Whether the plaintiff is entitled to 1/3 share in the suit properties?

x)For any other relief?

On the side of the plaintiff, the first plaintiff herself examined as P.W.1 and Ex.A1 to Ex.A29 were marked. On the side of the defendants, the first defendant himself examined as D.W.1. One Krishnamurthy examined as D.W.2, One Namburajan has been examined as D.W.3. However, chief examination of D.W.3 alone has been done. Ex.B1 to Ex.B10 were marked. The Court Bailiff, namely, Paneer Selvam has been examined as CW.1 and Ex.X1 was marked.



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5.Findings of the trial Court:-

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The legal heirs of Perumal Gounder are necessary parties and rejected the claim in respect of 'A' schedule property. Suit 'C' schedule property is belongs to Vijayalakshmi. Suit 'B' schedule property is self acquired property. There is no family arrangement made between the parties. Will was not proved, but the settlement deeds Ex.B1 and Ex.B2 were duly proved by the defendants. Suit in respect of 'A' schedule property is hit by non-joinder of necessary parties and the suit in respect of properties covered under the settlement deeds Ex.B1 and Ex.B2 is dismissed and in respect of item Nos.3 to 11 of suit 'B' schedule property and in respect of items 1 and 2 of 'C' schedule properties, the plaintiff is entitled for 1/3 share.

6.Point for determination arises in this appeal is that:-

i)Whether the suit 'A' schedule properties are ancestral properties of A.P.Kulandaivelu and the suit is bad for non-joinder of the necessary parties?

ii)Whether the suit 'B' schedule properties is joint family properties?



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iii)Whether the settlement deeds Ex.B1 & Ex.B2 said to have been executed by A.P.Kulandaivelu is true and valid?

iv)Whether the plaintiff is entitled for 1/3 share in the suit properties?

7.The learned counsel appearing for the appellant / plaintiff would submit that the suit 'A' schedule properties was allotted to the shares of the father of the plaintiff and the same was not disputed by the defendants either in the written statement or in their evidence. Therefore, non-inclusion of other siblings of Perumal Gounder is not at all warranted. Once the Court below disbelieved the family arrangements said to have been made it ought not to have dismissed the suit with respect to the item No.1 and 2 of the suit 'B' schedule properties. When the very basic structure of the defendants' case is shattered and disbelieved, it ought not to have accepted the execution of the settlement deeds Ex.B1 and Ex.B2. The defendants claimed that registered Wills were accepted by the plaintiff and hence, the plaintiff has not disputed the registered settlement deeds. But the Court below while answering the issue Nos.5 to 7 has held that the registered Wills are not proved.



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Therefore, the Court below ought not to have held that Ex.B1 and Ex.B2 registered settlement deeds are proved. He would submit that the Court below wrongly concluded that suit 'B' schedule properties are all self acquired properties of A.P.Kulandaivelu. But the defendants in their reply notice Ex.A20 dated 31.10.2012 had stated that from and out of ancestral neculous, A.P.Kulandaivelu and the defendants purchased other properties. When a property is purchased from and out of the ancestral neculous, it remains to be the ancestral property and would not loose its character of ancestral property, simply because it was purchased in the name of the member of the joint family. Therefore, the deceased A.P.Kulandaivelu has not authority to execute settlement deeds in favour of the defendants.

8.The learned counsel further would submit that in order to prove the execution of settlement deeds, attempted to examine its attesor one Mr.Namburajan as D.W.3, who has filed only his proof affidavit. Only on first two occasions, the plaintiff sought time to cross-examine D.W.3, but he was absent for more than a year on several hearings. A mere proof affidavit of the attesor is not sufficient to prove the due execution of settlement deed. He would submit that the property covers under Ex.B1

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and Ex.B2 settlement deeds worth about Rs.30 Crores and the property covered under Ex.A19 and Ex.A20 Wills is worth about only Rs.5 Lakhs.

The first defendant categorically admitted the value of the properties covered under settlement deeds and Wills in his cross-examination. To strengthen his contention, he has relied upon the following judgments:-

a)2005 (4) LW 654 in Kurshid Begum and Ors. Vs. Amni Jan and Ors to show that the application of Section 33 of Indian Evidence Act is a matter of discretion. The Power under this Section in ordering relevancy of certain evidence is to be exercised with great caution. The Section deals with only relevancy, not with mode of proof (or) the contents thereon. Section 33 of Indian Evidence Act does not enjoin upon the Court that the Statement of a witness examined in the proceeding at the earliest stage must be believed. It only makes the statement of a witness (who is dead (or) not available at the later stage), admissible in evidence.

b)2023 4 MLJ 554 in Chinnaiah Vs. Valliammal and Ors to show that cross examination of a witness is a right given to the opposite party. The law makers have used the word "adverse party" in so far as the question of cross examination is concerned. Therefore the right to cross examine a witness was given only to the party, having adverse interest in



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the matter.

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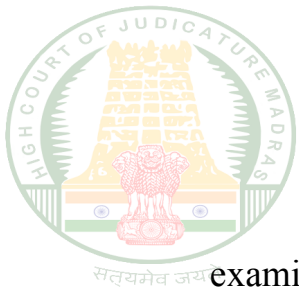
c)2015 (1) MWN (Civil) 465 in Uthaya Priya and another Vs.

Visalakshi and another to show that as per Section 68 of Indian Evidence Act, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness 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.

d)2023 (2) CTC 311 in P.Balusamy Vs. Rathnam to show that If under a Will, the property is bequeathed to some of the children and others are disinherited, then the testator has to set out the reasons in his own words. There must be a ring of truth in such reasons.

e)2023 (1) CTC 30 in S.Shanmuga Sundaram Vs. S.Mohan and another to show that the attestors necessarily to be examined to prove the settlement deed. The attesor, who was a witness to the settlement deed was not subject for cross examination and his evidence ought to have been eschewed, because, he was not available for cross examination.

9.Per contra, the learned counsel appearing for the respondents would submit that the execution of settlement deed has been duly proved and one of the attesor was examined as D.W.3. After his chief



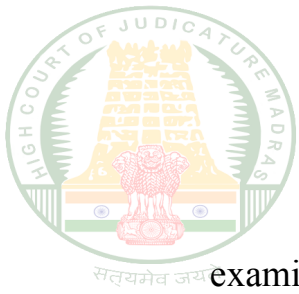
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examination, sufficient time was granted to cross examine the witness by the plaintiff side, but the plaintiff did not cross examine D.W.3 on three occasions. To strengthen his contention, he has relied upon the following judgments:-

- a)MANU/SC/2152/2001 in Satnam Singh and Ors Vs. Sadhu Singh and Ors.
- b)2005 (4) LW 654 in Kurshid Begum and Ors. Vs. Amni Jan and Ors.
- c)2019 (3) LW 758 in Dr.Sunder Vs. State of Tamil Nadu rep by the Inspector of Police, K-4, Anna Nagar Police Station, Chennai.
- d)2019 (6) CTC 683 in Govindbhai Chhotabhai Patel and Ors. Vs. Patel Ramabhai Mathurbhai.
- e)2021 (6) CTC 1723 in Kamalam Thangathai and Ors. Vs. Velammal and Ors.

10.According to the defendants, with respect to the suit 'A' schedule properties, the legal heirs of Perumal Gounder were not impleaded and as such the suit is bad for non-joinder of necessary parties and the suit 'A' schedule properties remain undivided. During cross-



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examination of P.W.1, she would state that the lands and house in Karur, was being managed by the father and her paternal uncle and after the death of the paternal uncle, her aunt Nachammal was looking after the same. She also deposed that no partition has been effected among the plaintiff's paternal uncles and aunts. The evidence of P.W.1 would reveal that the suit 'A' schedule property is ancestral property belongs to the legal heirs of Perumal Gounder, ie., A.P.Kulandaivelu and his siblings. It is also not in dispute that there is no partition among them. By considering the evidence of P.W.1, the Court below rightly come to a conclusion that the legal heirs of Perumal Gounder are necessary parties to the suit in respect of A schedule properties.

11. With regard to the suit 'B' schedule properties, according to the plaintiff, it is joint family properties and the same has been purchased out of joint family neculous. In order to prove the above said facts, no material has been placed to show that any joint family neculous was involved in the purchase of the same. It is not in dispute that A.P.Kulandaivelu was running various businesses in Trichy. With regard to the suit C schedule properties, according to the plaintiff, it was purchased by A.P.Kulandaivelu out of his own earnings in the name of



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his wife Vijayalakshmi in trust. In order to prove the above contentions, the burden lies on the plaintiff to show that it was a benami transaction and it was purchased in trust, for the benefit of the family members. It is relevant to refer the judgment of the Hon'ble Supreme Court reported in **1980 (2) SCC 327** in **Gapadibal Vs State of Mathyapradesh** wherein it was held that to ascertain whether a particular transaction is benami or not, the courts are to be guided by the following circumstances:-

- (i)The source from which the purchase money came.*
- (ii)The nature and possession of the property after the purchase.*
- (iii)Motive, if any, for giving the transaction a benami colour.*
- (iv)The position of the parties and the relationship, if any, between the claimants and the alleged benamidar.*
- (v)The custody of the title deeds after the sale and*
- (vi)The conduct of the parties concerned, in dealing with the property after the sale.*

In order to ascertain benami transaction, source of purchase money is important. It is not known whether the possession of the properties was with Vijayalakshmi or with others and not known whether the title deeds were with her or with others. It is pertinent to mention that the



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presumption available under Section 3(2) of the Benami Transaction (Prohibition) Act that the said purchase was for the benefit of the wife has not been rebutted. According to the defendants, Ex.A28 and Ex.A29 = Ex.B3 and Ex.B4, which were validly executed by their parents and their parents chosen to execute the settlement deeds in Ex.B1 and Ex.B2 in respect of certain properties in favour of the defendants. It is pertinent to mention that the defendants are not beneficiaries under the Will and therefore, they are not duty bound to prove the same in a manner known to law. The duty cast upon the defendants is to establish the due execution of settlement deed in Ex.B1 and Ex.B2 as required by law. According to the defendants, there was a family arrangement prior to the execution of the settlement deeds and Wills, before the plaintiff left for Trinidad and Tobago along with her husband. As far as settlement deeds concerned, documents are attested by D.W.3-Namburajan and Rasool. In order to prove the execution of settlement deeds, one Namburajan D.W.3 examined. D.W.2 Krishnamoorthy has not involved in the execution of the settlement deeds.

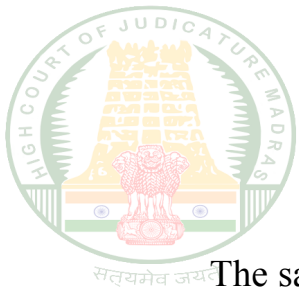
12.It is seen from the records that proof affidavit in lieu of chief examination came to be filed by D.W.3 on 08.08.2014 and the suit was



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adjourned to 13.08.2014 for cross examination. On 13.08.2014 D.W.3 was present and on request, case was adjourned to 20.08.2014. On 20.08.2014, the suit was adjourned once again for cross examination of D.W.3 to 26.08.2014 and on 26.08.2014 onwards, D.W.3 was not present and the suit was being adjourned. It is also seen from the records that on 16.09.2014, the defendants have paid witness batta to summon D.W.3 and the same was returned as un-served with an endorsement as “gone to abroad”. Subsequently, the defendants filed an interlocutory application in I.A.No.231 of 2015 seeking permission to examine Bailiff with regard to non-service of summons to D.W.3 and the same was allowed by the Court below on 21.04.2015. The Bailiff one Paneerselvam was examined as CW1 and witness summon issued by the Court below was unserved, which was marked as Ex.X1. C.W.1 in his cross examination admits that he had not reported that D.W.3 had gone to abroad but had reported that he had gone out of station. Subsequent to the above, once again witness batta has been paid to summon D.W.3, which was also returned. The defendants filed a petition in I.A.No.252 of 2016 under Order 16 Rule 10(2) and (3) of the Code of Civil Procedure r/w Section 151 of the Code of Civil Procedure to compel the appearance of D.W.3.



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The said petition was dismissed on 05.08.2016 as the said witness D.W.3 was reported dead. Family arrangement was said to have been arrived in the presence of one Marudha Pillai, Namburajan, Rasool and their parents. Marudha Pillai and Rasool claimed to be died. Both the Will and settlement deeds were said to have been attested by Marudha Pillai. A perusal of Wills shows that one Krishnamoorthy and Rasool have signed as identifying witness. At this juncture, it is relevant to cite judgment of the Hon'ble Supreme Court reported in **2023 (9) SCC 734, Meena Pradhan and Ors Vs. Kamla Pradhan and Another** wherein held how to prove the execution of Will, in this regard principles were summarised, which are reproduced as here under:-

“...10.1. The court has to consider two aspects : firstly, that the will is executed by the testator; and secondly, that it was the last will executed by him;

10.2. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied. 10.3. A will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the will or it shall be signed by some other person in his



presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

10.4. For the purpose of proving the execution of the will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6. If one attesting witness can prove the



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execution of the will, the examination of other attesting witnesses can be dispensed with; 10.7. Where one attesting witness examined to prove the will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

10.8. Whenever there exists any suspicion as to the execution of the will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last will. In such cases, the initial onus on the propounder becomes heavier;

10.9. The test of judicial conscience has been evolved for dealing with those cases where the execution of the will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the will while acting on his own free will;

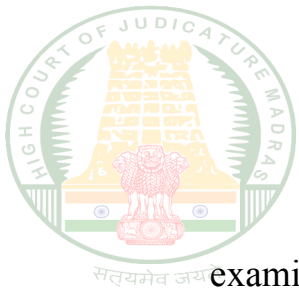
10.10. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the



propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation;

10.11. Suspicious circumstances must be “real, germane and valid” and not merely “the fantasy of the doubting mind [Shivakumar v. Sharanabasappa, (2021) 11 SCC 277] ”. Whether a particular feature would qualify as “suspicious” would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance, for example, 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, etc.”

13.It is the case of the defendants that the family arrangement was made prior to the plaintiff leaving Trinidad and Tobago, also they did not find time to stay for completing the formalities for execution of settlement deeds. D.W.2 was examined to establish family arrangement and also in support of the Wills said to have been executed. D.W.1 in his cross examination would state that family arrangement was made four days before the plaintiff left abroad. Per contra, D.W.2, in his cross



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examination deposed that the plaintiff left abroad after 1 or 2 months after the family arrangement. In this regard further, D.W.1 deposed that there was no other person except Namburajan, Krishnamoorthy and Rasool, contradicting the statement made in the written statement that Maruthapillai was present. The claim made by the defendants with regard to the family arrangements was not established with reference to the specific date on which the same was done in the presence of the witnesses. The defendants examined D.W.3, who is one of the attesor to the settlement deeds to prove due execution. However, D.W.3 was not cross-examined.

14.The plaintiff has not seriously disputed the signature of A.P.Kulandaivelu in the settlement deeds. It was pleaded and attacks only the manner of signature found in the Wills and about settlement deeds. The contention of the defendants that as per Section 33 of the Indian Evidence Act, the evidence of D.W.3 is admissible and relevant. Since the plaintiff had gone abroad, she did not cross examine D.W.3. Therefore, the evidence of D.W.3 satisfies the requirements of the Section 68 of the Indian Evidence Act also. It is also the contention of the defendants that there is no challenge with regard to the mental status



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and capacity of A.P.Kulandaivelu. Per contra, the plaintiff claimed that the mental health of A.P.Kulandaivelu from the time she left Trinidad and Tobago and also claims that settlement deeds are void. The learned counsel appearing for the plaintiff would contend that the evidence of D.W.3, who was not available for cross examination cannot be considered at all and the same has to be eschewed.

15.At this juncture, it is relevant to refer Section 33 of the Indian Evidence Act, which reads as follows:-

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.— Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:



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Provided — that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

From the reading of Section 33 of the Indian Evidence Act, 1872 enumerates conditions for admissible under Section 33 including,

a) witness is dead or cannot be found:- If the witness is deceased or cannot be located,

b)witness is incapable of giving evidence:- If the witness is physically or mentally incapable of testifying,

c)witness is kept out of way:- If witness is being withhold or prevented from testifying and

d)adverse party has had the opportunity to cross examination. If the adverse party had the opportunity to cross examination the witness during the earlier proceeding. The purpose of Section 33 is to allow the for the admission of evidence from previous proceedings, when the



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witness is unavailable or unable to testify again. This provision aims to balance the need for evidence that the potential to the opposing party.

16.A perusal of evidence of P.W.1 would go to show that she did not dispute the signature of A.P.Kulandaivelu in the settlement deeds in Ex.B1 and Ex.B2. According to the plaintiff, the health and mental condition of A.P.Kulandaivelu was not good during the execution of the Will. Further, the evidence of P.W.1 reveals that she questioned her mother about giving her smaller extent of the property, which clearly shows that the plaintiff is aware of the settlement deeds, even when her mother was alive. She did not choose to challenge the same, after knowing about the settlement deeds. She had even admitted that she had applied for mutation of revenue records by submitting copies of the Wills executing in her favour, but would claim that she does not know as to whether the revenue records in respect of the properties bequeathed to her under the Wills have been mutated or not. P.W.1 in her cross examination deposed that though her father suffered paralytic stroke, he was discharging public duties and that he was a Councillor of Tiruchi Municipality till his death. She also admits that from the time she left



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abroad, she was talking to her father twice a week. From the evidence, it is clear about the mental capacity of the person who continue to discharge as Municipal Councillor till his death. The above evidence would go to show that the properties are self acquired properties of A.P.Kulandaivelu and he was found to be sound disposing state of mind. The plaintiff failed to establish her case that there is suspicious circumstances surrounding the execution of settlement deeds.

17.From the above evidence of P.W.1, D.W.1 & D.W.2, reveals that settlement deeds Ex.B1 and Ex.B2 have been proved, which relates to item Nos.1 & 2 in suit 'B' schedule properties. As suit 'A' schedule properties are ancestral properties of deceased A.P.Kulandaivelu and his siblings, their legal heirs are necessary parties. Without impleading them no relief can be sought for by the plaintiff. As far as item Nos.3 to 11 of 'B' schedule properties and in respect of item Nos.1 & 2 in 'C' schedule properties, the plaintiff is entitled 1/3 share. The Court below rightly concluded the issues. We are of the view that there is no reason to interfere with the judgement and decree passed by the trial Court. The points are answered accordingly.



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18. In the result, this first appeal is dismissed and the Judgment and Decree dated 26.03.2019 passed in O.S.No.33 of 2012 on the file of the learned III Additional District Judge, Tiruchirappalli is hereby confirmed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

(G.R.S., J.) & (M.J.R., J.)
24.04.2025

NCC : Yes / No
Index : Yes / No
gns

To

The III Additional District Judge, Tiruchirappalli.



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G.R.SWAMINATHAN,J.
and
M.JOTHIRAMAN, J.

gns

Pre-Delivery Judgement made in
A.S.(MD)No.178 of 2019

24.04.2025