Palaniammal Vs. Pappathi

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Court : Chennai

Decided On : Apr-25-2013

Judge : G.Rajasuria

Appellant : Palaniammal

Respondent : Pappathi

Judgement :
IN THE HIGH COURT OF JUDICATURE OF MADRAS DATED:

25. 4.2013 CORAM: THE HONOURABLE MR. JUSTICE G.RAJASURIA S.A.Nos.745 o

471. of 2013 and M.P.No.1 of 2011 (in SA.745 of 2011) 1.Palaniammal 2.Kandaswami .. Appellants in S.A.No.745 of 2011 Vs. 1.Pappathi 2.Vadivel 3.Palaniswami 4.Sivakami 5.Vijayalakshmi @ Vijaya 6.Sudha 7.P.Moorthy .. Respondents in S.A.No.745 o

1. Paooathi 2.Vadivel 3.Palaniswami 4.Sivakami .. Appellants in S.A.No.471 of 2013 Vs. 1.Palaniammal 2.Kandasamy 3.Vijayalakshmi @ Vijaya 4.Sudha 5.P.Moorthi .. Respondents in S.A.No.471 of 2013 Second appeals against the common judgement and decrees dated 23.9.2008 passed by the First Additional District Court, Erode, in A.S.No.80 of 2007 and Cross Appeal in A.S.No.80 of 2007, respectively, confirming the judgement and decree dated 24.3.2005 passed by the First Additional Sub Court, Erode, in O.S.No.272 of 1999. For appellants :

Mr.N.Manokaran in S.A.No.745 of 2011 Mr.P.Valliappan in S.A.No.471 of 2013 For Respondents : Mr.P.Valliappan for R1 to R4 in S.A.No.745 of 2011 Mr.N.Manokaran for R1 and R2 in S.A.No.471 of 2013 COMMON JUDGEMENT S.A.No.745 of 2011 is filed by defendant Nos.1 and 2 animadverting upon the judgement and decree dated 23.9.2008 passed by the First Additional District Court, Erode, in A.S.No.80 of 2007, confirming the judgement and decree dated 24.3.2005 passed by the First Additional Sub Court, Erode, in O.S.No.272 of 1999, which is one for partition. S.A.No.471 of 2013 is filed by the plaintiffs animadverting upon the judgement and decree dated 23.9.2008 passed by the First Additional District Court, Erode, in Cross Appeal in A.S.No.80 of 2007 confirming the judgement and decree dated 24.3.2005 passed by the First Additional Sub Court, Erode, in O.S.No.272 of 1999, which is one for partition.

2. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3. Heard both. 4.Compendiously and concisely, the germane facts absolutely necessary for the disposal of these two second appeals would run thus: (i)The appellants in S.A.No.471 of 2013, namely, 1.Pappathi, 2.Vadivel, 3.Palaniswami and 4.Sivakami, as plaintiffs, filed the suit as against as many as five defendants seeking the following reliefs: "1.for partition of the suit property into 9 equal shares and for separate possession of 8 such shares; OR IN THE ALTERNATIVE 2 for partition of the suit property into 5 equal shares and for separate possession of 4 such shares. 3.for payment of costs." (extracted as such) citing the following immovable property described in the schedule of the plaint: Schedule-B Erode Registration District, Poondurai Sub Registration District, Erode Taluk, Aval Poondurai Village - ASF.No.792/1, of an extent of 1.79.0 hectares, and assessed to R.S.4/96 (Corresponding to Old SF No.944/1) (extracted as such) (ii)The defendants resisted the suit by filing written statements. (iii)Whereupon, the trial Court framed the issues. (iv)Up went the trial, during which the fourth plaintiff examined herself as P.W.1 along with P.W.2 and marked Exs.A1 to A9. The second defendant examined himself as D.W.1 along with D.W.3 and D.W.5(5th defendant) and marked Exs.B1. (v)Ultimately the trial Court decreed the suit and passed the preliminary decree, the operative portion of which would run thus:

VERNACULAR (TAMIL) PORTION DELETED (extracted as such) 5.Challenging and impugning the judgment and preliminary decree of the trial Court, the defendants preferred the appeal, whereupon the plaintiff preferred the cross appeal. Both the appeal and the cross appeal were heard together and both were dismissed. 6.Being aggrieved by and dissatisfied with the judgments and decrees of both the courts below, the defendants 1 and 2 preferred S.A.No.745 of 2011 and as against the dismissal of the cross appeal, the plaintiffs filed the S.A.No.471 of 2013, after getting the delay condoned. As such, both the appeals are before me. 7.The gist and kernel, the pith and marrow of the relevant facts, would in a few broad stokes would run thus: (a)The plaintiff, one Kulandai Asari had two children namely Paramasiva Asari and Ammani Ammal. Kulandai Asari died leaving behind certain ancestral properties. (b)Kulandai Asari's son Paramasiva Asari, along with his two sons, namely Shanmugam and Kulandaivel, sold the said ancestral property in favour of a third party vide the sale deed dated 11.07.1956 and in that Shanmugam was one of the vendors as major. However, Kulandaivel was a minor and he was eo nomine party, represented by his father Paramasiva Asari. (c)The recitals in Ex.A1-the sale deed dated 11.7.1956 itself would connote and denote, exemplify and demonstrate that the said ancestral property contemplated under Ex.A1 was sold with the avowed object to purchase a new property. It is not very much in dispute that from out of the sale proceeds, the suit property was purchased. (d)However, Paramasiva Asari during his lifetime executed the Will dated 9.7.1969 as contained in Ex.B1-the certified copy of the Will, treating as though the entire suit property happened to be his self acquired property and whereby he bequeathed the suit property, granting out of which two acres in favour of his sons Shanmugam and Kulandaivel and the remaining extent, so to say 3 acres and 1 cent in favour of his daughter Palaniammal and also one Krishnammal, the daughter of Ammaniammal, who happened to be the sister of Paramasivam Asari. (e)At this juncture, it is just and necessary to refer to the genealogy also. (i)The said Paramasivam Asari died in the year 1976; whereas his son Shanmugam died in the year 1990 leaving behind his wife Pappathi(P1) and his three children namely Vadivel(P2), minor Palanisami(P3) and Sivakami(P4). (ii)The said Kulandaivel died during the year 1997 and as per the contentions of the plaintiffs, the said Kulandaivel died in an unmarried state and during his

lifetime he executed the unregistered Will, Ex.A3, dated 09.01.1995, bequeathing his shares in the properties in favour of his brother Shanmugam's children namely Vadivelu, Palanisamy and Sivakami. (iii)The said Palaniammal/D1, happened to be the wife of Kandasamy(D2) the son of the said Krishnammal, the daughter of Ammanaiammal. The said Krishnammal died leaving behind the said Kandasamy (D2) and his deceased son Viswanathan's wife Vijaya (D3) and Minor Sudha (D4). (iv)According to the plaintiffs, inasmuch as Paramasiva Asari had no testamentary capacity to Will away the suit property being the ancestral property, the entire Will should be treated as null and void and accordingly as per the prayer in the plaint, the suit has to be decreed. (f)Per contra, the contention of the defendants would be to the effect that Paramasiva Asari happened to be the absolute owner of the suit property, which is not the ancestral property and he had the testamentary capacity to Will away it as per the Will as contained in Ex.B1(the certified copy of the Will dated 9.7.1969) 8.S.A.471 of 2013 was filed by the plaintiffs setting out various grounds and also suggesting the following substantial questions of law: "A)When Exhibit A3 Will dated 9.5.1995 executed by Kulandaivel has been proved in accordance with Section 68 of the Evidence Act, 1872 read with Section 63(c) of the Indian Succession Act, 1925 by examining the attesting witnesses as P.W.2, who has given cogent evidence regarding the valid execution of the same, are the Courts below are correct in law in disbelieving Exhibit A-3 Will? B)Whether the Courts below are correct in law in misconstruing the evidence of P.W.1 as if she admitted the execution of Exhibit B1 Will dated 9.7.1969? C)Whether the Courts below are correct in law in not considering the admissions made by D.W's 1 to 3, which negate their case especially, when it is axiomatic that admission of the opposite party, is the best evidence of law? D)Whether the Courts below are correct in law in granting only 4/5th share instead of 8/9th share claimed by the appellants on a mis-appreciation of the oral and documentary evidence? E)When Exhibit B1 alleged Will dated 9.7.1969 has not been proved in accordance with the provisions of the Evidence Act, 1872, Section 68 of the Indian Succession Act, 1925 by examining any of the attesting witness and the valid execution is not proved, are the courts below correct in law in upholding the same? (extracted as such) 9.Whereas, the defendants 1 and 2 filed the S.A.745 of 2011 as against the dismissal of the cross-appeal on various grounds and also suggesting the

following substantial questions of law: "(A)Whether the Courts below are correct in law in decreeing the suit for partition by applying Sec.6 of the Hindu Succession Act as if, the plaintiffs 2 and 3 are entitled to claim the share of the deceased Kulandaivelu under the concept of survival coparceners? (B)Whether the courts below having upheld the validity of the Will Ex.B1, committed an error in reducing the claim of the defendants 1 and 2 over the suit properties?" (extracted as such) 10.On hearing both sides, I formulated the following substantial questions of law to the knowledge of both sides. (i)Whether the Courts below failed to hold that the Will as contained in Ex.B1 dated 9.7.1969 was not proved in accordance with Sections 68 and 69 of the Indian Evidence Act? (ii)Whether the Courts below were wrong in holding that Ex.A3-the unregistered Will 9.1.1995 was not proved despite the evidence of P.W.2 one of the attesting witnesses to the Will? (iii)Whether the Courts below were wrong in not clearly discussing the concept relating to survivorship as per which, the plaintiffs claimed to have got the share of Kulandaivel also in their favour consequent upon his death without leaving any descendants? (iv) Whether the ratio adopted by the testator to allot the entire suit property, should be mutatis mutandis adopted for allotting the shares to the parties in respect of the 1/3rd share of Paramasiva Asari? (v)Whether there is any illegality in allotting any shares to the respective parties? 11.Heard both sides in respect of those substantial questions of law. 12.All the substantial questions of law are taken together for discussion as they are interwoven and interlinked, interconnected and entwined with one another. 13.The learned counsel for the plaintiffs would pyramid his arguements, which could succinctly and precisely be set out thus: (a)The yardstick adopted for rejecting Ex.A3-the Will dated 9.1.1995 was not adopted in respect of the Will as contained in Ex.B1 dated 9.7.1969. The original Will was not produced and there is nothing to indicate and exemplify that the witnesses to the said Will were not alive during the trial; not withstanding the same, the Courts below upheld the Will. (b)P.W.2 one of the attesting witnesses to the Will-Ex.A3 clearly and categorically pulling no punches averred that he saw the testator signing the Will and that the testator saw both the witnesses signing the Will as attesting witnesses. (c)No reason much less valid reason was found set out for disbelieving Ex.A3-the Will dated 9.1.1995. (d)No reason has been furnished for non production of the original Will as contained in Ex.B1(the certified copy of

the Will dated 9.7.1969). (e)The ratio adhered to in allotting the land in Ex.B1-the Will, cannot mutatis mutandis be proportionally applied while dividing the 1/3rd share of Paramasiva Asari, as per the said Will. (f)Since Kulandaivel died in unmarried state, his share in the coparcenary got devolved upon the children of the deceased coparcener Shanmugam by way of survivorship as per Section 6 of the Act. Accordingly, the learned counsel for the plaintiffs would pray for allotting in favour of the plaintiffs 1/3rd share (the share of Shanmugam) + 1/3rd share (the share of Kolandaivel) + 2/3rd shares of 1/3rd share of Paramasiva Asari. 14.Per contra, in a bid to torpedo and pulverise the arguments as put forth and set forth on the side of the plaintiffs, the learned counsel for the defendants would advance his arguments, the warp and woof of the same would run thus: (a)Ex.A3-the alleged Will cannot be upheld because apart from it being an unregistered one, the one other attesting witness was not examined, and Kulandaivel had no necessity also to execute such a Will. (b)The concept survivorship as sought to be put forth by the plaintiffs cannot be countenanced and upheld as tenable in view of the fact that by virtue of the Hindu Succession (Amendment) Act, 2005, Palaniammal daughter of Paramasiva Asari is one of the coparceners and in such a case, she is also entitled to a share as a coparcener. (c)Alternatively for argument's sake it is taken that Paramasiva Asari had only 1/3rd testamentary capacity to will away the suit property, then mutatis mutandis the ratio adhered to by him in allotting land to the beneficiaries should be adhered to and accordingly Shanmugam's descendants would be entitled to 1/5th share and the remaining 4/5th shares should be allotted to the defendants. 15.I would like to refer to Ex.B1 the certified copy of the Will dated 9.7.1969, which would exemplify and demonstrate that the testator Paramasiva Asari assumed and presumed as though he were the absolute owner of the entire suit property ignoring the recitals in Ex.A1-the sale deed, and an excerpt from it is extracted hereunder for ready reference: VERNACULAR (TAMIL) PORTION DELETED 16 A mere running of the eye over the aforesaid excerpt would display and connote that the said Paramasiva Asari along with his two sons alienated the ancestral property, which came into their hands purely for the purpose of purchasing a new property. 17.The said Paramasiva Asari however purchased, as per Ex.A2-the sale deed dated 12.12.1956 the suit property in his own name. 18.The learned counsel for the

plaintiffs would appositely and appropriately highlight that after selling the ancestral property as per Ex.A1 dated 11.7.1956, as per Ex.A2 the sale deed dated 12.12.1956, Paramasiva Asari purchased the suit property without including the names of his sons, even though he included his sons for alienating the ancestral property as per Ex.A1. As such, the proximity of time between Ex.A1 and Ex.A2 would exemplify and demonstrate, buttress and project that the suit property was purchased as per Ex.A2 from out of the sale proceeds derived under Ex.A1. 19.On the defendants' side nothing has been highlighted as to how the suit property could be treated as the self-acquired property of Paramasiva Asari. Hence, both the Courts below correctly, without any iota or shard, miniscule or molecular extent of doubt decided that issue to the effect that the suit property should be treated as the ancestral property, over which, the said Paramasiva Asari had no absolute testamentary capacity, but only to the extent of one-third only. The Courts below, in all fairness applying the correct proposition of law held that the said Will could be held to be valid only to the extent of his 1/3rd share. 20.It is a common or garden principle of law that as per Section 30 of the Act, the coparcener can will away his share and it no more resintegra. 21.However, the learned counsel for the plaintiffs would try to attack the genuineness of Ex.B1-the Will dated 9.7.1969 on various grounds set out supra. No doubt, simply because the Will as contained in Ex.B1 emerged 30 years anterior to the filing of the suit, it cannot be treated as an ancient document enjoying the presumption as contemplated under Section 90 of the Indian Evidence Act 22.My mind is reminiscent and redolent of the following precedents in this connection: (i)The judgement of this Court reported in 2011(3) CTC 43.GOVINDARAJ V. RAMADOSS; (ii)The judgement of this Court reported in 2010-3-L.W.408 BHAGAVATHIAMMAL V. MARIMUTHU AMMAL & 6 OTHERS. Wherefore it is just and necessary to analyse as to whether the evidence concerning the Will of Paramasiva Asari, could be taken as sufficient to prove it. 23.The question whether the defendants were justified in not adequately explaining about the non-production of the original Will as contained in Ex.B1, gains significance. D.W.1 during cross-examination is presumed to have uttered out a fact to the effect that the original Will as contained in Ex.B1 was handed over to P1-Pappathi. But strictly in accordance with law, by invoking Order 11 of C.P.C, the defendants did

not resort to discovery and inspection. But one fact is clear that an explanation came forth from the defendants' side that the original Will as contained in Ex.B1 was not in their possession and that it was with Pappathi-P1, but she was not examined to contradict and torpedo such claim. 24.At this juncture, I could recollect the famous adage that for deciding the civil cases 'the preponderance of probabilities', should be taken as the ones governing the adjudication. Accordingly if viewed, it is clear that had really the original Will as contained in Ex.B1 been in the hands of the defendants, then there might not have been any valid reason for withholding the same. From the very fact that the defendants filed Ex.B1-the certified copy of the Will dated 9.7.1969, bespeaks and betokens that the original Will was not in their hands. As such, non production of original Will as contained in Ex.B1 in this case, in my considered opinion, cannot be taken as fatal. 25.The learned counsel for the plaintiffs would point out that absolutely there is no whisper from the plaintiffs' side as to why there is no averment made about the death of those two attesting witnesses to Ex.B1. 26.Axiomatically and obviously, it is clear that there is no averment concerning the death of those two attesting witnesses. But this is a singularly singular case, in which during cross-examination, there was nothing suggested to D.W.1 or D.W.2 that the attesting witnesses were alive during trial. D.W.2 happened to be the scribe who would speak about the factum of he having scribed the Will as dictated by the testator Paramasiva Asari. He would also point out that in his presence, the testator signed and that the attesting witnesses also affixed their signatures even though he did not know the identity of those attesting witnesses personally. 27.In my considered opinion, D.W.2 did not wax eloquence inconcinnity with Sections 68 and 69 of the Indian Evidence Act, as it was done by P.W.2 relating to proving of the Will-Ex.A3, nonetheless, in an over all manner, the evidence has to be read and appreciated. We should not throw the baby along with bathe water. Scarcely could it be stated that during cross-examination of D.W.2, anything was suggested that the Will itself was a fictitious one or that the two attesting witnesses were alive at that time. In such a case, in respect of a registered Will, which emerged during the year 1969, I am of the considered view that the Court need not unnecessarily develop some hypertechinical suspicions and assume as though the evidence of D.W.2 is nothing but a load of baloney fraught with falsity and mendacity and that too, in the

wake of the following decision of the Honourable Apex Court: (2005) 8 SCC 67.Pentakota Satyanarayana v. Pentakota Seetharatnam, certain excerpts from it would run thus: "25. A perusal of Ex.B9 (in original) would show that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement were, in our opinion, sufficient attestation within the meaning of the Act. The endorsement by the sub-registrar that the executant has acknowledged before him execution did also amount to attestation. In the original document the executants signature was taken by the sub-registrar. The signature and thumb impression of the identifying witnesses were also taken in the document. After all this, the sub-registrar signed the deed. Unlike other documents the Will speaks from the death of the testator and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his Will or not and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and the testament of departed testator.

26. In the instant case, the propounders were called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document on his own freewill. In other words, the onus of the propounder can be taken to be discharged on proof of the essential facts indicated above. It was argued by learned counsel for the respondent that propounders themselves took a prominent part in the execution of the Will which will confer on them substantial benefits. In the instant case, propounders who were required to remove the said suspicion have let in clear and satisfactory evidence. In the instant case, there was unequivocal admission of the Will in the written statement filed by P.Srirammurthy. In his written statement, he has specifically averred that he had executed the Will and also described the appellants as his sons and Alla Kantamma as his wife as the admission was found in the pleadings. The case of the appellants cannot be thrown out. As already noticed, the first defendant has specifically pleaded that he had executed a Will in the year 1980 and such admissions cannot be easily brushed aside. However, the testator could not be examined as he was not alive at the time of trial. All the witnesses deposed that they had signed as identifying

witnesses and that the testator was in sound disposition of mind. Thus, in our opinion, the appellants have discharged their burden and established that the Will in question was executed by Srirammurthy and Ex.B9 was his last will. It is true that registration of the Will does not dispense with the need of proving, execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act. The Registrar has made the following particulars on Ex.B9 which was admitted to registration, namely, the date, hour and place of presentation of document for registration, the signature of the person admitting the execution of the Will and the signature of the identifying witnesses. The document also contains the signatures of the attesting witnesses and the scribe. Such particulars are required to be endorsed by the Registrar along with his signature and date of document. A presumption by a reference to Section 114 of the Evidence Act shall arise to the effect that particulars contained in the endorsement of registration were regularly and duly performed and are correctly recorded. In our opinion, the burden of proof to prove the Will has been duly and satisfactorily discharged by the appellants. 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. In such circumstances, the onus shift to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus 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.

27. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in Sridevi & Ors vs. Jayaraja Shetty & Others, (2005) 2 SCC 78.= 2005-2-L.W.89. In the said case, it has been held that the onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and the proof of signature of the testator as

required by law not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case.

28. Mr.Narsimha, learned counsel for the respondents submitted that the natural heirs were excluded and legally wedded wife was given a lesser share and, therefore, it has to be held to be a suspicious circumstance. We are unable to countenance the said submission. The circumstances of depriving the natural heirs should not raise any suspicion because the whole idea behind the execution of the Will is to be interfered in the normal line of succession and so natural heirs would be debarred in every case of the Will. It may be that in some cases they are fully debarred and some cases partly. This is the view taken by this Court in Uma Devi Nambiar and Others vs. T.C.Sidhan (Dead) (2004) 2 SCC 32.= 2004-2-L.W.852. certain excerpts from it would run thus:

28. A mere perusal of the aforesaid judgement would clearly demonstrate and exemplify that a registered document is having additional evidentiary value, as it attracts the presumption of genuineness as contemplated under illustration (e) to Section 114 of the Indian Evidence Act. 29.As such, viewing in a wholesome manner, I am of the considered view that the concurrent finding of both the Courts below about the validity of the original Will as contained in Ex.B1 warrants no interference. 30.I could see considerable force in the submission of the learned counsel for the plaintiffs that the criteria applied for upholding Ex.B1 should have been applied for upholding Ex.A3-the Will. But the Courts applied a different yardstick. 31.I would like to extract hereunder the relevant portion of the deposition of P.W.2. VERNACULAR (TAMIL) PORTION DELETED 32 The above excerpts would pellucidly and palpably, clearly and unambiguously, unequivocally and unarguably highlight and spotlight the fact that strictly in accordance with Sections 68 of the Indian Evidence Act, he deposed before the Court. 33.I have repeatedly gone through the judgements of both the Courts below, but I could see no clinching reason for rejecting the evidence of P.W.2. There cannot be any two yardsticks, one for upholding the Will marked on the side of the plaintiffs and another yardstick for evaluating the validity of the Will marked on the side of the

defendants and wherefore, not to put too fine a point on it, a fortiori, both the Courts below fell into error in simply holding that Ex.A3 being an unregistered Will was doubtful. 34.To the risk of repetition and pleonasm, but without being tautalogous, I would like to point up and show up that the preponderance of probabilities would speak in favour of the validity of the Will-Ex.A3. Unassailably and incontrovertibly the testator Kulandaivel, at the relevant time, was living with the family of his deceased brother Shanmugam. It is no wonder that such a person executing a Will bequeathing his share in the suit property in favour of those persons, who looked after his welfare. Hence, I am of the considered view that both the Courts below committed serious error in doubting the validity and genuineness of the Will-Ex.A3, snubbing the evidence of P.W.2 who deposed cogently and convincingly. 35.In view of the finding of this Court that Ex.A3-the Will is a valid one, the question of even pressing into service the concept survivorship by the plaintiffs might not arise. Even then for comprehensively deciding the lis, I would like to advert to the said plea also. 36.My narration supra, would display and connote that consequent upon the death of Paramasiva Asari in the year 1976, his 1/3rd share, as coparcener is deemed to have got notionally separated for being divided and allotted as per Section 8 read with Class-I of Schedule appended to the Hindu Succession Act, 1956. 37.Shanmugam died in the year 1990, leaving behind, Pappathi-P1, Vadivelu-P2, Palanisamy-P3 and Sivagami-P4 as his legal heirs, who were entitled to his share. As such, at that time, as per the Hindu Law then prevailing, Shanmugam's son, namely, Vadivelu-P2 and minor Palanisamy-P3 and along with their uncle, so to say, Shanmugam's brother Kualanvel constituted the co-parcenary. In such a familial situation, Kulandaivel died in the year 1997; whereupon as per Section 6 of the Hindu Succession Act, Kulandaivel's share in the coparcenery got devolved upon P2-Vadivel and P3-minor Palanisamy, the remaining surviving coparceners. 38.Palaniammal-D1 cannot, invoking Section 6 of the Act, attract Section 8, read with class-I of the schedule appended to the Hindu Succession Act, 1956, because for Kulandaivel, Palaniammal could not be a Class-I heir under the Hindu Succession Act, wherefore, it has to be held that Kulandaivel's share in the coparcenery devolved upon his other coparceners, namely, Vadivel-P2 and Palanisamy-P3 by survivorship. 39.As has been held supra, as per Ex.A3-the Will

of Kulandaivel, the descendants of Shanmugam as the beneficiaries, are getting the share of Kulandaivel. 40.Alternis visibus de hors the Will-Ex.A3, by survivorship the share of Kualandaivel would go to Vadivel and Palanisamy. However, to be specific since I have held supra that the Will-Ex.A3 is valid, as per that Will of Kulandaivel, Kulandaivel's share is held to have devolved upon all the heirs of deceased Shanmugam. 41.Relating to the question as to whether the ratio adhered to by Paramasiva Asari in allotting land in favour of the beneficiaries should be applied mutatis mutandis to divide his 1/3rd share in the suit property, I would like to point out that such a principle would be more justiciable and would be in consonance and concinnity with logic and reason rather than simply holding that his 1/3rd share should be divided into three shares, ignoring the wish and will of the testator. 42.No doubt, the testator had in his mind as though the entire suit property belonged to him and that it should be divided accordingly. But now it transpired that he had testamentary capacity only with regard to his 1/3rd share in the suit property and even then, this Court cannot simply pooh-pooh or belittle, slight or snub the wish and will of the testator and wherefore to put this judgement on an even keel mutatis mutandis the ratio adhered to by him in allotting land in favour of the beneficiaries under the Will should be applied for apportioning his 1/3rd share in the suit properties. 43.Accordingly, the substantial questions of law are answered as under: Substantial Question of Law No.(i) is decided to the effect that the Courts below were correct in holding that the Will as contained in Ex.B1 dated 9.7.1969 was proved in accordance with Sections 68 and 69 of the Indian Evidence Act. Substantial Question of Law No.(ii) is answered to the effect that the Courts below were wrong in holding that Ex.A3-the unregistered Will 9.1.1995 was not proved, despite the evidence of P.W.2 one of the attesting witnesses to the Will and it is hereby held that Ex.A3 Will was proved. Substantial Question of Law No.(iii) is answered to the effect that the Courts below were wrong in not clearly discussing the concept relating to survivorship as per which, the plaintiffs claimed to have got the share of Kulandaivel also in their favour consequent upon his death without leaving any descendants. As such the concept 'survivorship' also can be ushered in favour of the plaintiff. Substantial Question of Law No.(iv) is decided to the effect that the ratio adopted by the testator to allot the entire suit property should be mutatis mutandis adopted for allotting the shares to the parties

in respect of the 1/3rd share of Paramasiva Asari. Substantial Question of Law No.(v) is decided to the effect that the ultimate conclusion arrived at by both the Courts below warrants no interference. 44.In the result, the ultimate conclusion arrived at by both the Courts below warrants no interference. However, the only modification is with regard to the upholding of the Will-Ex.A3. Accordingly, both the second appeals are disposed of. There is no order as to costs. Consequently, connected miscellaneous petition is closed. Msk To 1. The First Additional District Court, Erode.

2. The First Additional Sub Court, Erode