

S.A(MD)No.609 of 2012

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 30.04.2026

Pronounced on : .07.2026

CORAM

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A(MD)No.609 of 2012

Velu @ Kannan,
S/o.Subbiah Konar,
Nadu Theru,
North Valliyur,
Rathapuram Taluk,
Tirunelveli District.

...Appellant/Appellant/2nd Defendant
Vs.

1.Thirumalai Nambi,
S/o.Subbiah Konar,
Door No.18 Keezha Theru,
North Valliyur,
Radhapuram Taluk,
Tirunelveli District.

...1st Respondent/1st Respondent/Plaintiff

2. Krishnan,
S/o.Subbiah Konar
Door No.18, Back Side of Keezha Theru,
North Valliyur,
Radhapuram Taluk,
Tirunelveli District.

...2nd Respondents/2nd Respondent/
1st Defendant

PRAYER: This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree on the file of the I Additional District Judge, Tirunelveli in A.S.No.31 of 2005, dated 30.09.2005, confirming the judgment and decree on the file of the I Additional Sub Judge, Tirunelveli, dated 09.09.2003 in O.S.No.186 of 1990.



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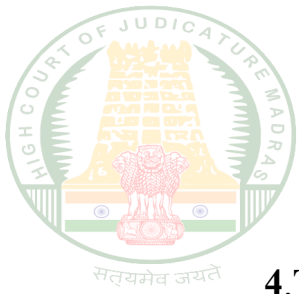
For Appellant : Mr.A.R.Kannappan
For R1 : Mr.V.George Raja
For R2 : Mr.D.Nallathambi

JUDGMENT

This Second Appeal is filed against the judgment and decree dated 30.09.2005 passed in A.S.No.31 of 2005 on the file of the I Additional District Court, Tirunelveli, confirming the judgment and decree dated 09.09.2003 passed in O.S.No.186 of 1990 on the file of the I Additional Sub Court, Tirunelveli.

2.The appellant is the 2nd defendant and the 1st respondent is the plaintiff in O.S.No.186 of 1990 on the file of the I Additional Sub Court, Tirunelveli. The 2nd respondent is the 1st defendant in that suit. The 1st respondent/plaintiff filed the suit for partition.

3.For the sake of convenience, the parties are referred to as plaintiff and the defendants in O.S.No.186 of 1990 on the file of the I Additional Sub Court, Tirunelveli.

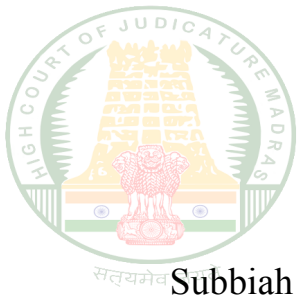


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4.The Case of the plaintiff:

The father of both parties, namely Subbiah Konar, had purchased half share of the 1st schedule suit properties through a registered sale deed dated 19.09.1952 from Ramakrishnan. The another half was purchased in the name of Masana Konar, who is the brother of Subbiah Konar. Subbiah Konar and his wife were residing along with the 2nd defendant. The plaintiff and the defendants are children of Subbiah Konar. The said Subbiah Konar executed a registered Will dated 11.04.1984, in respect of his half share properties in favour of the plaintiff and the 1st defendant. He stated the reason for ignoring the 2nd defendant and also made arrangements for his wife and daughter. As per Will, the plaintiff and the 1st defendant are entitled to a half share each in the 1st schedule of the suit property. The said Masana Konar executed a registered Will dated 07.02.1962, bequeathing his half share of property in favour of the 2nd defendant by giving life enjoyment to his wife, Pechiammal. The said Pechiammal relinquished her life estate. So, the plaintiff and the 1st defendant are entitled to half share, and the 2nd defendant is entitled to half in the properties purchased by Subbiah Konar and his brother Masana Konar. They have also jointly enjoyed the Well situated in the property which is described as 2nd schedule. The 3rd schedule property is ancestral property of



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Subbiah Konar and the same was allotted to him through a partition deed dated 01.03.1936 executed between Subbiah Konar and his four brothers. The plaintiff is entitled to a 1/4 share in the 3rd schedule. In spite of the Wills executed by Subbiah Konar and Masana Konar, there was no effective partition in respect of the suit properties. So, the plaintiff demanded for partition from defendants, but they have not partitioned the same. Hence, the plaintiff filed the suit for partition of his 1/4 share in the 1st and 3rd schedules and also for injunction for enjoying the 2nd schedule and for framing a scheme in respect of the 2nd schedule.

5.The Case of the 2nd Defendant:

The plaintiff's father, Subbiah Konar, has sold the suit 3rd schedule property to his brother Masana Konar for due sale consideration in the year 1958. So, the plaintiff is not entitled to 1/4 in the 3rd schedule property. The plaintiff's claim over the 3rd schedule is a barred one as thirty years have lapsed from 1958. There are other suits in O.S.Nos.132 of 1985, 46 of 1992, 198 of 2000 and 314 of 2000. The 2nd defendant contended in those suits that the alleged Will dated 11.04.1984 was not executed by Subbiah Konar and it is shrouded by suspicious circumstances and hence, the said Will is not a valid



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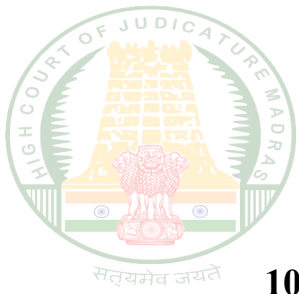
one. The averment of the plaintiff that the 3rd schedule is ancestral property of Subbiah Konar is not correct and the plaintiff is not entitled to 1/4 share.

6.The 1st defendant remained ex-parte.

7.The trial Court has tried the above suits jointly and framed issues mainly touching upon the alleged Will dated 11.04.1984 executed by Subbiah Konar and in respect of the 3rd schedule property.

8.The evidence taken in O.S.No.132 of 1985, which was filed by the 2nd defendant (herein in O.S.No.186 of 1990) against the plaintiff and the 1st defendant (herein in O.S.No.186 of 1990) for partition.

9.During trial, on the plaintiff's side (2nd defendant herein), three witnesses were examined as P.W.1 to P.W.3 and marked 2 exhibits as Ex.A.1 and Ex.A.2. On the defendant side (plaintiff herein in O.S.No.186 of 1990), five witnesses were examined as D.W.1 to D.W.5 and Ex.B.1 to Ex.B.51 were marked.



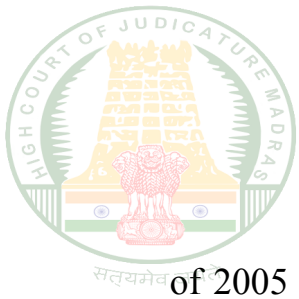
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10.After hearing both sides and after considering the evidence, the learned 1st Additional Subordinate Judge, Tirunelveli, concluded that the suit properties were separate properties of Subbiah Konar and they are not ancestral properties of Subbiah Konar and held that Ex.B.39 - Will dated 11.04.1984 executed by Subbiah Konar was proved and partly decreed the suit, granting a preliminary decree in the present suit in O.S.No.186 of 1990 entitling the plaintiff herein (defendant in O.S.No.132 of 1995) to a half share in 1st and 3rd schedule suit properties and also passed scheme in respect of 2nd schedule, however injunction was not granted by way of passed common judgment, dated 09.09.2003 in O.S.Nos.132 of 1985, 186 of 1990, 46 of 1992, 198 of 2000 and 314 of 2000.

11.Aggrieved by the judgment and decree dated 09.09.2003 passed in O.S.No.186 of 1990 on the file of the 1st Additional Subordinate Judge, Tirunelveli, the 2nd defendant therein has preferred a first civil appeal in A.S.No.31 of 2005 before the 1st Additional District Court, Tirunelveli.

12.The first Appellate Court, after hearing both sides and after perusing material records of the case, dismissed the first appeal in A.S.No.31



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of 2005 by passing judgment, dated 30.09.2005, confirming the judgment and decree dated 09.09.2003 passed in O.S.No.186 of 1990.

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13.Challenging the judgment and decree of the First Appellate Court, the 2nd defendant has preferred this second appeal and the same has been admitted on 21.09.2012 on the following substantial question of law:-

"Whether Exhibit B.39, the Will was proved as required under law with regard to section 63 of Indian Succession Act read with section 68 of the Indian Evidence Act,1872, when the only attesting witness did not satisfy the attestation of the will by him and the other attesting witness in order to prove that there was due execution of the Will?"

14.The learned counsel for the appellant/2nd defendant has submitted that the plaintiff and the defendants are brothers; their father executed Ex.B.39 Will dated 11.04.1984 bequeathing his half share in the suit properties in favour of the plaintiff, and the 1st defendant and there is no share in the property allotted to the 2nd defendant and he is excluded. There is no reason assigned for the same. The testator of the Will used to sign his name, but the Will contained a thumb impression. So, the appellant/2nd defendant filed a suit



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in O.S.No.132 of 1985 challenging the Will, and the same was dismissed; the appeals preferred by him were also dismissed. Further, the 3rd item is the ancestral property and the same is not a self-acquired property of Subbiah. Moreover, the trial Court held in paragraph No.33 that the plaintiff and the 1st defendant are entitled to 1/2 share; whereas in the final result portion, the trial Court decreed that the plaintiff is entitled to 1/2 share. The first Appellate Court has also not considered the same and simply dismissed the appeal. Hence, the second appeal may be allowed.

15.Per contra, the learned counsel for the 2nd respondent/1st defendant vehemently argued that the plaintiff has clearly prayed in his suit claiming 1/4 share in the suit properties. The trial Court has also clearly answered the first issue in paragraph No.36 that the plaintiff and the 1st defendant are entitled to 1/2 share, i.e., both are entitled to 1/4 share each in the suit properties. The very same appellant Kannan @ Velu has filed suit in O.S.No.132 of 1985 challenging the Will dated 11.04.1984 executed by his father Subbiah Konar as it has suspicious circumstances, and the said suit was dismissed. The appellant preferred an appeal in A.S.No.30 of 2005 before the first Appellate Court, and the same was also dismissed on 30.09.2005.

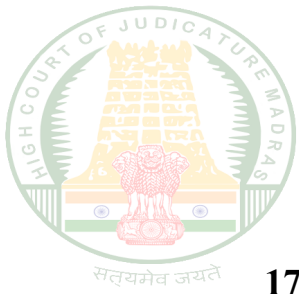


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Challenging the judgment of the first Appellate Court, the appellant preferred the second appeal in S.A(MD)No.229 of 2008 before this Court and this Court dismissed the second appeal on 13.06.2004. In those two appeals, the finding of the trial Court that the Will dated 11.04.1984, executed by Subbiah Konar, is true and valid and that it is not shrouded by suspicious circumstances was upheld. The appellant preferred SLP (Civil) No.41721 of 2024 before the Hon'ble Supreme Court and the same was also dismissed. Therefore, the question of law framed in this second appeal need not be discussed again. So, the second appeal may be dismissed.

16.The learned counsel for the 1st respondent/plaintiff has adopted sailing the arguments advanced by the 2nd respondent/1st defendant. Moreover, the suit properties are self-acquired properties of Subbiah Konar. The 3rd schedule is not ancestral property of Subbiah Konar. The Courts below clearly held that the appellant has not proved that the 3rd schedule is ancestral property of Subbiah Konar. The Will executed by Subbiah Konar is a valid one. Hence, the second appeal may be dismissed.



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the case.

17. Heard the arguments of both sides and perused the material records of the case.

18. The appellant mainly argued that the Ex.B.39 Will was not proved U/s.63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act, as the attesting witness to the Will has not satisfied the attestation. The 1st respondent/plaintiff & 1st defendant stated that the Will executed by Subbiah Konar was proved by letting in evidence through the attesting witness and scribe and they clearly explained about the thumb impression as the testator had used to put his thumb due to shakiness in his hand by producing Ex.B.40 and Ex.B.41.

19. Section 63 of the Succession Act reads thus:-

“63.Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:—

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



(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has 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 his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

19.1. Section 68 of the Evidence Act makes it clear that at least one attesting witness has to be examined to prove the execution of a Will. It is true that in the case at hand, DW2 was the attesting witness who was examined in Court. Therefore, the question is whether he had deposed to the effect that the Will in question was executed in accordance with sub clauses (a) to (c) thereunder.



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20. From perusal of records, the plaintiff has examined D.W.2 Thirneelakandan and D.W.3 Natarajan. D.W.2 has deposed that Subbiah Konar executed Ex.B.39 will dated 11.04.1984 and put his thumb impression and another witness, Subbiah, son of Velu Konar, signed as a witnesses and the scribe D.W.3 put his signature; and that each of them has seen the putting of respective signatures. D.W.3 has clearly deposed about the scribe of the Will and putting of his signature. So, the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act were clearly proved by the plaintiff and the same was also correctly appreciated by the Courts below. Another aspect of putting a thumb impression by the testator was also clearly proved by the plaintiff by letting evidence that the hands of the testator were shaken for the last two years, so he used to put a thumb impression and also marked Ex.B.40 and Ex.B.41 to substantiate the same. So, there are no suspicious circumstances in Ex.B.39 – Will.

21. It is pertinent to note here that the very same issue regarding validity of Ex.B.39 - Will was decided in O.S.No.132 of 1985 filed by the appellant before the I Additional Sub Court, Tirunelveli and the same was upheld by the first Appellate Court in A.S.No.30 of 2005 before the I Additional District



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Court, Tirunelveli by judgments, dated 09.09.2003 and 30.09.2005 respectively. The appellant herein challenged the said findings in respect of the Will in S.A(MD)No.229 of 2008 before this Court and this Court has clearly held in its judgment dated 13.06.2024 in paragraph Nos.10 to 14 as follows:

"10. In order to prove Ex.B39, the Will relied on by the defendants, one of the attestors to the document Thiru Neelakandan, D.W.2 was examined. He cogently deposed about execution of the document. The evidence of attestor was very well corroborated by evidence of scribe of the Will viz., D.W.3. The plaintiff has not succeeded in discrediting the evidence of D.W.2 and D.W.3. Both of them clearly deposed that they had seen testator putting his thumb impression in the Will and he had also seen the attestors putting their signature in the Will. Therefore, the evidence of D.W.2 and D.W.3 is sufficient to prove proper execution of the Will. Their evidence is complementary to each other, free from any material contradictions.

11.Once the due execution of the Will is proved, it is for the propounder to dispel the suspicious circumstances surrounding the Will. In the case on hand, the affixture of thumb



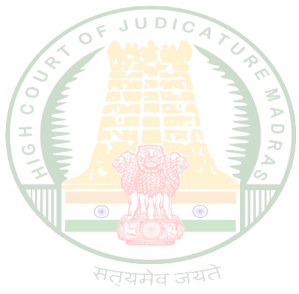
impression by testator and disinheritance of the plaintiff, who is one of the sons, were cited as suspicious circumstances. Though the learned counsel for the appellant vehemently contended that the testator was a literate person capable of putting his signature and absolutely there was no explanation for him to put his thumb impression in the will, there is no cross examination of attesor and scribe by the plaintiff in this aspect. Even P.W.1 in his evidence has not asserted that the testator used to sign and hence, there was no justification for affixing thumb impression.

12.The defendants contended that two years prior to the death of testator, his hands became shaky and hence, he was not able to sign. In such circumstances, at the time of execution of the Will, he had put his thumb impression. It was also contended by the defendants that at the relevant point of time, the testator had received money orders by affixing his thumb impression. Ex.B40 is the money order counterfoil. A perusal of the same would suggest that the testator Subbiah Konar affixed his thumb impression and received a sum of Rs.20. Therefore, Ex.B.40 proved that at the relevant point of time, the testator used to put his thumb impression in the documents.



Therefore, the explanation offered by the defendants that during last days, due to weakness, Subbiah Konar hands became shaky and he used to put thumb impression in the document, is a plausible explanation.

13. Mere disinheritance of one of the heirs per se cannot be termed as a suspicious circumstance. The very purpose of execution of the Will is to deviate from succession to the estate by operation of law. In the case on hand, even in the Will, it was clearly mentioned by Subbiah Konar that he purchased some properties in the name of his brother Masana Konar and his brother executed a Will bequeathing those properties in favour of plaintiff Kannan @ Velu. It was also mentioned that the properties given to plaintiff under the Will executed by Masana Konar marked as Ex.A1 were more valuable properties than the properties covered by Ex.B39 Will. Therefore, the testator himself had offered a plausible explanation for disinheriting the plaintiff in the Will itself. In such circumstances, the defendants succeeded in dispelling both the suspicious circumstances pointed out by the appellants.



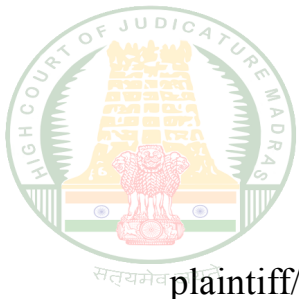
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14.Taking into consideration the entire evidence available on record, especially the unimpeachable evidence of D.W.2 and D.W.3, the Courts below came to the conclusion that the Will relied on by the defendants stood proved and the said factual conclusion is based on proper appreciation of evidence available on record. Accordingly, both the substantial questions of law framed at the time of admission are answered against the appellant and in favour of the respondents.."

22.Against the above judgment, the appellant/2nd defendant preferred Special Leave Petition (Civil)No.41721 of 2024 before the Hon'ble Supreme Court, which came to be dismissed on 03.03.2025. The learned counsel for the 2nd respondent/1st defendant has produced a copy of the order passed in the second appeal and SLP. There cannot be any contra argument put forth by the appellant/ 2nd defendant's side. As rightly held by the Courts below, the 3rd schedule was not ancestral property as the appellant/2nd defendant has not proved the same by producing acceptable material, and Ex.B.39 - Will was clearly proved by the 1st respondent/plaintiff. Therefore, the Courts below have properly discussed the case and rightly decreed in favour of the



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plaintiff/1st respondent, and there is no need to interfere with the finding of the first Appellate Court. Hence, the question of law framed in this second appeal is answered against the appellant/2nd defendant. Thus, this second appeal fails.

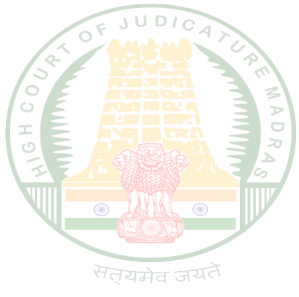
23.In the result, the Second Appeal is dismissed. The judgment and decree dated 30.09.2005 passed in A.S.No.31 of 2005 on the file of the I Additional District Court, Tirunelveli, confirming the judgment and decree dated 09.09.2003 passed in O.S.No.186 of 1990 on the file of the I Additional Sub Court, Tirunelveli, is confirmed. No costs.

.07.2026

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
VSD

To

- 1.The I Additional District Court,
Tirunelveli.
- 2.The I Additional Sub Court,
Tirunelveli.
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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P.VADAMALAI, J.

VSD

**Pre-Delivery Judgment made in
S.A(MD)No.609 of 2012**

.07.2026