

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.09.2018

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.286 of 2008
and
M.P.Nos.1 & 2 of 2008

- 1.R.Lakshmi
- 2.R.Sivaganesh
- 3.R.Ambika
- 4.R.Dhanabakiyam

[Legal heirs of late M.Ramalingam]
[Cause title accepted vide
order of Court dated 24.01.2008
made in MP.No.1 of 2008 in
SA.SR.No.51879 of 2007.]

... Appellants

Vs.

- 1.Karunambal (Died)
- 2.Nagarathinam (Died)
- 3.Thangavelu
- 4.Pushpathal
- 5.Padmavathi

[Respondents 3 to 5 brought on
record as legal representatives
of the deceased respondents 1
and 2 vide order of the Court
dated 26.09.2011 made in
MP.Nos.2, 3, 5 and 6 of 2011 in
SA.No.286 of 2008]

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 30.01.2006 made in AS.No.120 of 2004 on the file of the Additional District Judge of Coimbatore in confirming the judgment and decree dated 18.02.2003 made in OS.No.486 of 2000 on the file of the Principal sub-Judge, Coimbatore, consequently allow the Second Appeal.

For Appellants : Mr.S.R.Sundaram

For Respondents : Mr.L.Mouli for R3 to R5

J U D G M E N T

The 1st defendant in OS.No.486 of 2000 is the appellant. The suit was laid by the 1st respondent, who is now dead, seeking partition and separate possession of 1/3rd share, contending that the suit property belonged to the mother Kaliammal who died intestate on 05.01.1991. Claiming that Kaliammal left behind plaintiff and defendants as her legal heirs the plaintiff sought for 1/3rd share in the suit property.

2. The suit was resisted by the 1st defendant contending that the properties originally belong to Ramayammal mother of Kaliammal @ Lakshmi Ammal who died on 16.10.1962. It is the further claim that the said Ramayammal had executed a registered Will on 16.10.1962, in and by which, she had bequeathed the property to the children of the 1st defendant. Therefore, according to him Kaliammal, the mother of the plaintiff and the defendants did not have any right over the property. The registration copy of the Will was produced as Ex.B1, however, none of the attesting witnesses or any person acquainted with the signatures of the attesting witnesses were examined as per the legal requirement to prove of the Will under Sections 68 or 69 of the Evidence Act. Both the Courts below had disbelieved the Will, since it has not been proved in the manner known to law. After having rendered a finding at the validity of the Will, the trial Court granted decree for partition as prayed for.

3. Aggrieved the 1st defendant preferred an appeal in AS.No.120 of 2004. The lower Appellate Court also agreed with the finding of the trial Court on the question of proof of Will and dismissed the appeal. Aggrieved the 1st defendant has come forward with this Second Appeal.

4. Notice of admission was ordered on 07.03.2008, pursuant to the notice Mr.L.Mouli, learned counsel entered appearance for the respondents 3 to 5, who are the legal representatives of the plaintiff as well as 2nd defendant.

5. I have heard Mr.S.R.Sundaram, learned counsel appearing for the appellant and Mr.L.Mouli, learned counsel appearing for the respondents 3 to 5.

6. Though, Mr.S.R.Sundaram, learned counsel appearing for the appellant would make a valiant attempt to make out a substantial question of law in order to enable this Court to entertain the Second Appeal, I do not think the second appeal could be entertained since there is no question of law much less

a substantial question of law arising for consideration in terms of Section 100 of the Code of Civil Procedure.

7. The only defence that is set out in the written statement filed by the 1st defendant is that the said Ramayammal executed a Will on 16.10.1962 bequeathing her property to his children. The original of the Will has not been produced. It is claimed that the original of the Will is in the custody of the 2nd defendant who is sailing with the plaintiff.

8. Even assuming that the secondary evidence in the form of the certified copy would be admissible in evidence, I find no attempt has been made to prove the Will in terms of the Section 68 of the Evidence Act. None of the attestors have been examined. It is claimed that the attestors are dead. In the event of death of the attestors or unavailability of the attestors, it is open to the propounder of the Will to examine some person who is acquainted with the signatures of the attestors as per Section 69 of the Evidence Act. Such exercise has also not been carried out. In view of the above the Courts below are justified in concluding that the Will is not proved and decreeing the suit as prayed for.

9. In fine, the appeal fails and the same is dismissed without being admitted. There will be no order as to costs.

Sd/-
Assistant Registrar(CS II)

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Sub Assistant Registrar

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To

1. The Additional Judge,
Coimbatore.

2. The Principal Sub-Judge,
Coimbatore.

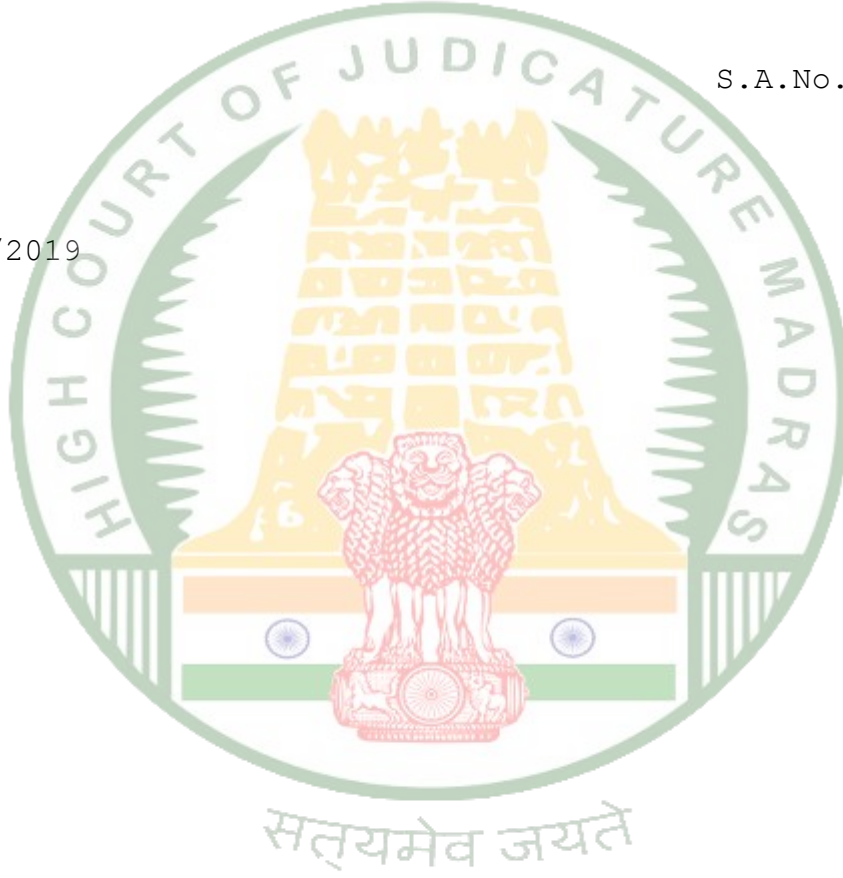
3. The Record Keeper,
VR Section,
High Court, Madras.

+2cc to Dr.Sr.Sundaram, Advocate Sr.67977

+1cc to Mr.L.Mouli, Advocate Sr.67541

S.A.No.286 of 2008

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srg 29/10/2019



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