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S.A.No.144 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

|                                    |                                      |
|------------------------------------|--------------------------------------|
| Judgment Reserved on<br>12.02.2024 | Judgment Pronounced on<br>15.03.2024 |
|------------------------------------|--------------------------------------|

CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

**S.A.No.144 of 2020**  
**and C.M.P.No.3210 of 2020**

1.S.Selvaraj (Died)

2.S.Girija

3.Sridevi

..Appellants

Vs.

1.Somasundari

2.Ganasekaran

3.Kalaiselvi

4.Dhanalakshmi

5.Chandrasekaran

6.Arumugham

7.Chellamuthu

8.Chellammal

9.Kamalakannan



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10.Saravanan

11.Chandramouli

12.Vindhya

13.Velvizhi

..Respondents

*[A1 died, A2 & A3 and R12 & R13 are brought on record as LR's of the deceased A1 vide order dated 11.11.2020 made in C.M.P.Nos.18616, 18618 & 18619 of 2022 in S.A.No.144 of 2020]*

**PRAYER:** The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 08.03.2018 made in A.S.No.5 of 2007 on the file of the Subordinate Judge, Madurantakam, confirming the judgment and decree dated 29.04.2005 passed in O.S.No.82 of 1997 on the file of the District Munsif, Madurantakam.

For Appellants : Mr.S.Silambanan  
Senior Counsel  
for Mr.D.Arunachalam

For Respondents  
For R1 : Mr.V.Manohar



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## **JUDGMENT**

This Second Appeal has been filed against the judgment and decree dated 08.03.2018 made in A.S.No.5 of 2007 on the file of the Subordinate Judge, Madurantakam, confirming the judgment and decree dated 29.04.2005 passed in O.S.No.82 of 1997 on the file of the District Munsif, Madurantakam.

2.The 3<sup>rd</sup> defendant a the suit for declaration of title to the suit properties is the appellant herein, in this Second Appeal.

3.The parties are described as per their litigating status before the Trial Court.

4.The plaintiff approached the Court, claiming that one Vedhachala Mudaliar died on 30.12.1975, leaving behind his only legal heir, namely the plaintiff and that after death of Vedhachala Mudaliar, his elder brother, Subramaniya Mudaliar was managing the properties since the plaintiff was a minor. The said Subramaniya Mudaliar also died in July 1989 and thereafter, his children, namely the defendants 1 to 3 were managing the properties on



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behalf of the plaintiff. However, the defendants 1 to 3 have taken a hostile attitude against the plaintiff and they have executed a sham Sale Deed with regard to S.No.268/3, comprising 1.08 acres in Vallakottai Village, in favour of the 5<sup>th</sup> defendant, one Dhanalakshmi Ammal. The plaintiff therefore issued a lawyer's notice, calling upon the defendants 1 to 3, 5 and 6 to hand over possession of the said item of property to the plaintiff. The 2<sup>nd</sup> defendant sent a reply alleging that the plaintiff's father, Vedhachala Mudaliar had executed a Will on 23.05.1978, bequeathing his properties to the defendants 3 and 4, disinheriting the plaintiff.

5. According to the plaintiff, the said Will was not true and genuine and only in order to grab the properties of the plaintiff's father, the defendants 1 to 4 have brought about the said fabricated Will. In such circumstances, the plaintiff prayed for the relief of declaration of her title to the suit properties and also for recovery of possession.

6. The said suit was resisted by the 3<sup>rd</sup> defendant, taking shelter under the Will of Vedhachala Mudaliar and also the Will of Ammakannu Ammal, the maternal grandmother of Vedhachala Mudaliar, which is a Will alleged to



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have been executed/registered on 10.04.1941. In terms of the said Will, the grandsons, Govindaraj Mudaliar, Subramaniya Mudaliar and Vedhachala Mudaliar, had alone enjoyed the suit properties and subsequently, the said three grandsons have orally partitioned the grandmother's properties and reduced the terms of partition through a Koorchit on 07.08.1946, in and by which 'C' schedule of the property was allotted to share of Vedhachala Mudaliar, the father of the plaintiff and also stated that the said Vedhachala Mudaliar was enjoying the properties and he has sold several properties in Irumbedu Village, Madurantakam Taluk and the plaintiff has wrongly included the said properties of Items 1 to 9 in schedule 1. The 3<sup>rd</sup> defendant therefore contended that the suit properties are not available for partition as they were alienated even during the lifetime of the father Vedhachala Mudaliar. In so far as the other item of suit properties, the 3<sup>rd</sup> defendant claims under the Will said to have been executed by Vedhachala Mudaliar.

7.The 3<sup>rd</sup> defendant denied that the Will was not true and genuine and they have also stated that the 3<sup>rd</sup> and 4<sup>th</sup> defendants have already taken benefit under the Will, subsequent to the demise of Vedhachala Mudaliar and they have also sold item 6 in the schedule 2 properties to the 5<sup>th</sup> defendant



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and they have also mentioned that item 3 of schedule 2 belongs to Bhagyavathiammal and not to Vedhachala Mudaliar and therefore, viewed from any angle, the plaintiff, being well aware of the Will and also sales effected by the defendants 3 and 4, was estopped from claiming any right and consequently, prayed for dismissal of the suit for partition.

8.The 4<sup>th</sup> defendant filed a separate written statement, also claiming under the Will dated 25.03.1978 which has been executed by Vedhachala Mudaliar. The 4<sup>th</sup> defendant also prayed for dismissal of the suit.

9.The Trial Court held that the Will set up by the defendants and alleged to have been executed by Vedhachala Mudaliar on 25.03.1978 was not true and consequently, the plaintiff was entitled to the relief prayed for and partly decreed the suit in respect of 1<sup>st</sup> and 2<sup>nd</sup> schedule of the suit properties alone and for recovery of possession in respect of schedule 2 properties.

10.Aggrieved by the judgment and decree, the 3<sup>rd</sup> defendant preferred an appeal in A.S.No.5 of 2007. The First Appellate Court dismissed the



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appeal confirming the findings of the Trial Court. A Second Appeal in S.A.No.597 of 2011 was filed before this Court and this Court remanded the matter back to the First Appellate Court, giving an opportunity to both sides to lead additional oral and documentary evidence and in order to prove/disprove the Will dated 25.03.1978, which was said to have been executed by Vedhachala Mudaliar, by resorting to Sections 68 and 69 of Indian Evidence Act. On remand, the First Appellate Court reheard the appeal in line with the order of remand passed by this Court and in and by judgment dated 08.03.2018, confirmed the findings of the Trial Court that the Will dated 25.03.1978 was not valid and binding on the plaintiff as Vedhachala Mudaliar had no right to execute the Will in respect of the suit properties and therefore, dismissed the appeal, confirming the judgment and decree declaring the title of the plaintiff to the suit properties as granted by the Trial Court, the 3<sup>rd</sup> defendant has preferred the above appeal.

11. Though the above Second Appeal was not admitted, the matter was referred to mediation for exploring the possibility of any amicable settlement. However, it is seen that the parties have not been able to settle the matter and thereafter, it has been listed before this Court.



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12.Both Mr.S.Silambanan, learned Senior Counsel for Mr.D.Arunachalam, learned counsel for the appellants and V.Manohar, learned counsel for the 1<sup>st</sup> respondent have argued the above Second Appeal for final hearing,

13.Besides hearing the rival submissions advanced by the learned counsel on either side, and I have also gone through the records by way of typed set of papers, the pleadings, oral and documentary evidence adduced by the parties before the Trial Court and also before the First Appellate Court post remand by this Court.

14.The short question that needs to be addressed in the above Second Appeal is regarding interpretation of the Will of the grandmother, Ammakannuammal. If the said terms of the Will executed by Ammakannuammal on 10.04.1941 are properly appreciated and interpreted, it would throw light on the rights of the Vedhachala Mudaliar to execute any Will, much less the Will on 25.03.1978.



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15.Mr.S.Silambanan, learned Senior Counsel for the appellants would take me through the judgment of this Court in S.A.No.597 of 2011 in and by which, the Second Appeal was remanded to the First Appellate Court, in order to afford an opportunity to the defendants, especially, to establish the truth and genuineness of the Will of Vedhachala Mudaliar. The learned Senior Counsel would therefore state that the entitlement of Vedhachala Mudaliar to execute a Will was out of the scope of remand and when Vedhachala Mudaliar had admittedly dealt with the properties, which were allotted to him under the Koorchit in Ex.A1, his entitlement to execute the Will cannot be called in question. He would therefore pray for the Second Appeal being allowed.

16.Per contra, Mr.V.Manohar, learned counsel for the 1<sup>st</sup> respondent would submit that under Ex.A2, Will, Vedhachalam Mudaliar was given only a life estate and therefore, he could not have dealt with the properties of his grandmother, Ammakannuammal and being the only surviving legal heir of said Vedhachala Mudaliar, the plaintiff would become entitled to the properties and the Trial Court had rightly found the plaintiff's entitlement in certain items of the suit properties and thereby partly decreed the suit for



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partition which did not warrant any interference. He would therefore pray for the Second Appeal being dismissed.

17.I have gone through the judgment of this Court in S.A.No.597 of 2011. This Court was conscious of the fact that the suit is for declaration at the instance of the only surviving legal heir of the deceased Vedhachala Mudaliar, namely, the daughter, as plaintiff and that the defence step up was that the father of the plaintiff had executed a Will in respect of certain items of the suit properties, after alienating some other items on his own accord and in respect of the available items, he has executed his last Will, bequeathing the said properties to the defendants 3 and 4, out of which, some of the properties have also been sold by the defendants 3 and 4 and the plaintiff has not chosen to implead the purchasers of the said properties. The suit is also attacked for non joinder of proper and necessary parties.

18.This Court, while remanding the Second Appeal, after considering the arguments advanced in the said Second Appeal, found that the properties is disputably belonging to Ammakannuammal and the said Will was not produced before the Courts below. This Court also took note of the fact that



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there appears to have an clause in the said Will dated 10.04.1941, executed by Ammakannuammal, that Vedhachala Mudaliar had only a life estate and thereafter, absolute interest was given to the children of Vedhachala Mudaliar and paragraph Nos.13 and 14 of the judgment in S.A.No.597 of 2011 states the above fact and the same is extracted hereunder:

*“13.It could be seen from the records that as per the Will dated 10.04.1941, even though not produced, there is a clause in it to the effect that Vedachala Mudaliar-the father of the plaintiff was given with only life estae and the absolute interest was given in favour of the children of Vedachala Mudaliar.*

*14.If that be so, then that would be a ground for the plaintiff to lay claim over the suit properties on the ground that the Will dated 25.3.1978 (Ex.B1) executed by Vedachala Mudaliar in favour of the defendants, would be hit by that restrictive clause.*

*15.It is also the contention of the plaintiff that once the Will dated 25.3.1978-Ex.B1 executed by Vedachala Mudaliar in favour of the defendants goes away, the properties of Vedachala Mudaliar would come to her directly as the sole legal heir of Vedachala Mudaliar. According to the plaintiff, in either way her right over the suit properties has to be upheld.”*



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19.Only in the above backdrop, considering that the defendants were non suited for non production of the original Will dated 25.3.1978, the matter was remanded, only for the limited purpose of proof of the Will dated 25.3.1978, exhibited as Ex.B1, before the Trial Court. However, this Court had given directions to the First Appellate Court to give opportunity to adduce additional oral and documentary evidence on the aforesaid line and thereafter, decide the appeal afresh. In the light of the findings of this Court in S.A.No.597 of 2011, in paragraph Nos.13 to 15, it cannot be said that the scope of remand was limited only for purposes of establishing truth and genuineness of Ex.B1, Will dated 25.3.1978. The scope of remand certainly included the contentions available to the plaintiffs to establish that the testator had no right to execute the Will in the first place.

20.This brings us to the actual interpretation of the Will of the grandmother, Ammakannuammal dated 10.4.1941. On a careful reading of the Will dated 10.4.1978 executed by Ammakannuammal, I find that portion of her estate has been bequeathed to Vedhachala Mudaliar and there is a specific condition that during the lifetime of Bhagyavathiammal, wife of P.Venkatarama Mudaliar, 1/3<sup>rd</sup> of the property could be sold only for



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discharging loans and the remaining property shall be absolutely enjoyed by

Vedhachala Mudaliar, after the lifetime of said Bhagyavathiammal.

However, the parties have also understood the estate bequeathed under the Will of Ammakannuammal, in the oral partition in Koorchit dated 7.8.1976, which was exhibited as Ex.A1, even before the Trial Court. Thus, I find that the properties vested with Vedhachala Mudaliar were his absolute properties, subject only to the lifetime of Bhagyavathiammal. The interpretation to the Will of Ammakannuammal has arrived at by the First Appellate Court is totally erroneous and unsustainable. Therefore, the First Appellate Court clearly fell in error in holding that the Will executed by Vedhachala Mudaliar was not valid and binding on the plaintiff.

21.This Court, while remanding the matter, had specifically stated that the Will had to be proved by resorting to Sections 68 and 69 of Indian Evidence Act. However, without dealing with the finding with regard to truth and genuineness of the Will, the First Appellate Court has rejected the 3<sup>rd</sup> defendant's case. This finding of the First Appellate Court therefore has to be necessarily set aside.



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22.Coming to the proof of the Will, it is seen that the witnesses D.W.3 to D.W.5 have been examined to prove the Will. Admittedly, certified copy of the Will alone has been marked as Ex.B21 and the Will dated 25.3.1978 has been marked as Ex.B21. The defendants have not been able to establish as to why the original was not produced. Moreover, when it was claimed that the original Will was lost, the First Appellate Court rightly found that in the written statement, the defendants have not pleaded about the original having been lost in the year 1983. In fact, in the written statement of the 3<sup>rd</sup> defendant, the 3<sup>rd</sup> defendant has clearly stated that the original Will was with the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant, though filed a separate written statement, has not spoken about either the original Will being handed over to him or the factum of the said original Will being lost.

23.Also I do not find the evidence of D.W.3 to D.W.5, in any way establishing due execution and attestation of Will dated 25.3.1978. The First Appellate Court also rightly rejected Ex.B21, on the ground that secondary evidence was permissible, only subject to Sections 65 and 66 of India Evidence Act, which has not been complied with by the defendants in the present case. Therefore, the findings arrived at by the First Appellate Court



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that due execution of Will dated 25.3.1978 by Vedhachala Mudaliar was not proved is just and proper and based on the additional evidence adduced by the parties before the First Appellate Court, after the Second Appeal was allowed by this Court, remanding the matter for the specific purposes of proving the Will. I do not find any illegality or perversity in the said findings arrived at by the First Appellate Court warranting interference under Section 100 of Code of Civil Procedure. Moreover, I do not find any substantial question of law arising for consideration in the above Second Appeal.

24.In the result, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

15.03.2024

Index : Yes/No  
Speaking Order/Non-Speaking Order  
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To

- 1.The Subordinate Judge, Madurantakam.
- 2.The District Munsif, Madurantakam.
- 3.The Section Officer, V.R.Section, High Court, Madras.



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**P.B.BALAJI, J.**

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Pre-delivery judgment made in

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