



**S.A.(MD) No.56 of 2004**

**WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**DATED : 07.06.2024**

**CORAM:**

**THE HONOURABLE MR.JUSTICE S.SOUNTHAR**

**S.A.(MD) No.56 of 2004**

1.Rani  
2.Revathi  
3.Manikandan

... Appellants

-VS-

R.Saravanan

... Respondent

**PRAYER:** Appeal against the judgment and decree, dated 11.12.2003, passed in A.S.No.8 of 2003 on the file of Subordinate Judge, Karur, confirming the judgment and decree, dated 26.11.2002, passed in O.S.No.797 of 1999 on the file of District Munsif, Karur.

For Appellants : Mr. P.Thiagarajan  
for Mr.T.R.Rajaraman

For Respondent : No appearance



**S.A.(MD) No.56 of 2004**

WEB COPY

### **JUDGMENT**

The third defendant and the legal representatives of the deceased fourth defendant are the appellants.

2. The respondent/plaintiff filed a suit for partition, claiming half share. The suit was decreed by the trial Court and the findings of the trial Court were confirmed by the first appellate Court. Aggrieved by the concurrent findings of both the Courts below, the appellants are before this Court.

3. According to the respondent/plaintiff, the suit property originally belonged to one Bagyathammal and one Sundarammal. The defendants 1 and 2, who are not arrayed as parties in this Second Appeal, are the children of Sundarammal. Admittedly, the case of the plaintiff was that Bagyathammal executed a Will, dated 07.08.1992, bequeathing her share in the suit property in his favour. The plaintiff is the grandson of Bagyathammal through his second son – Ramalingam. The first appellant was arrayed as the third defendant and the husband of the first appellant – Thirunavukkarasu was arrayed as the fourth defendant. The said Thirunavukkarasu is the paternal



**S.A.(MD) No.56 of 2004**

WEB COURT

uncle of the plaintiff. It was claimed by the plaintiff that when he demanded partition of his half share based on the Will executed by Bagyathammal after her death, the defendants initially agreed for the same, thereafter, they failed to partition the property and, hence, the above said suit was filed.

4. The first defendant filed a written statement and the same was adopted by the other defendants. In the written statement, the defendants denied the validity and genuineness of the Will executed by Bagyathammal in favour of the plaintiff and sought for dismissal of the suit. In the additional written statement filed by the third defendant and adopted by the fourth defendant, they raised a plea of non-joinder of necessary parties, apart from denying the Will, executed by Bagyathammal in favour of the plaintiff.

5. Before the trial Court, the plaintiff was examined as P.W.1 and two attestors to the Will, relied on by him, were examined as P.Ws.2 and 3. On behalf of the plaintiff, 11 documents were marked as Exs.A-1 to A-11. The defendants 1 and 3 were examined as D.W.1 and D.W.2. One Marimuthu was examined as D.W.3. On behalf of the defendants, 10 documents were marked as Exs.D-1 to D-10.



**S.A.(MD) No.56 of 2004**

WEB COPY

6. The trial Court, on appreciation of oral and documentary evidence, upheld the validity of the Will and decreed the suit as prayed for. The plea of non-joinder of necessary parties, raised by the defendants 3 and 4, was negatived. Aggrieved by the same, the defendants 3 and 4 filed an appeal in A.S.No.8 of 2003. Pending the appeal, the fourth defendant – Thirunavukkarsu died and his legal representatives were brought on record. The first appellate Court affirmed the findings of the trial Court and dismissed the appeal. Aggrieved by the same, the appellants have come by way of this Second Appeal.

7. At the time of admission, this Court formulated the following substantial questions of law, by an order, dated 17.08.2004 :

*(1) Is the learned Subordinate Judge correct in decreeing the suit for partition based on Ex.A-1 Will, when the testatrix had no disposable right herself in the suit property ?*

*(2) Is the learned Subordinate Judge correct in decreeing the suit, when the defendants have been in long, uninterrupted and continuous possession and got right by adverse possession ?*



**S.A.(MD) No.56 of 2004**

WEB COPY

8. Heard the arguments of the learned counsel for the appellants.

9. When the matter came up for hearing on 04.06.2024, Mr.K.Govindarajan, the learned counsel, who originally filed vakalat for the sole respondent, reported that he handed over the papers to the respondent with change of vakalat. Though the name of one Lakshmi Sankar is printed in the Cause List as the new counsel for the respondent, the vakalat filed by him was returned by the Registry for certain defects and there was no representation on behalf of the said counsel. Therefore, the Registry was directed to verify whether any counsel entered appearance with valid vakalat on behalf of the respondent and print the name of the correct counsel. The Registry was also directed to print the name of the respondent if nobody entered appearance on his behalf. Today, when the matter is listed, the name of the respondent as well as the names of the earlier counsel and the new counsel, whose vakalat was returned by the Registry, are printed in the Cause List. However, there is no representation for the respondent.

10. The learned counsel for the appellants submitted that the respondent/plaintiff claims right over the Will, executed by Bagyathammal; however, all the heirs of Bagyathammal were not impleaded in the suit and, in such circumstances, the Courts below ought not to have decided the validity



**S.A.(MD) No.56 of 2004**

WEB COPY

of the Will, in the absence of all the heirs of Bagyathammal. The learned counsel, also, by taking this Court to the evidence of P.Ws.2 and 3, submitted that there are material contradictions in the evidence of the attestors to the Will and, hence, the Courts below ought not to have upheld the validity of the Will, based on the shaky evidence of P.Ws.2 and 3. Since the appellants have not raised any plea of adverse possession in their pleadings, the second question of law, framed by this Court at the time of admission, was not pressed by the learned counsel.

11. Based on the arguments advanced by the learned counsel for the appellants with regard to non-joinder of necessary parties, which was also dealt with by the Courts below, the following additional substantial question of law arises for consideration in this Second Appeal :

*(3) "Whether the Courts below are legally justified in deciding the validity of the Will, executed by Bagyathammal, in the absence of all the heirs of Bagyathammal ?*

12. The suit was filed by the respondent, claiming half share in the suit property, based on the Will, allegedly executed by Bagyathammal, which was marked as Ex.A-1. The plaintiff, when he was examined as P.W.1,



**S.A.(MD) No.56 of 2004**

marked the genealogy of Bagyathammal's family as Ex.A-4. A perusal of the same would suggest that Bagyathammal had five sons and one daughter. The plaintiff is the grandson of Bagyathammal through her second son – Ramalingam. The plaintiff is also having five siblings, namely, four sisters and one brother. As per the admitted case of the plaintiff, after the death of Bagyathammal, in the absence of Will pleaded by him, the half share of Bagyathammal will go to her six children, including the plaintiff's father – Ramalingam. Therefore, by setting up a Will, in effect, the plaintiff wants to disinherit other children of Bagyathammal and also his own siblings. However, the other heirs of Bagyathammal and the plaintiff's siblings were not impleaded in the suit, except the fourth defendant. When the plaintiff was examined as P.W.1, he also admitted that Bagyathammal had other siblings, by name, Sarasal, Veerappan, Kumaraswamy and Paramasivam. Therefore, the validity of the testamentary document, relied on by the plaintiff, can be gone into only in the presence of all the heirs of Bagyathammal. The Courts below erroneously observed that the suit was filed for partition only against the children of Sundarammal and, therefore, all the legal heirs of Bagyathammal need not be impleaded. When the Courts below decided the validity of the Will, executed by Bagyathammal, in favour of the plaintiff, all the heirs of Bagyathammal as well as the siblings of the plaintiff should have



**S.A.(MD) No.56 of 2004**

WEB COPY

been impleaded as parties and the validity of the Will can be effectively decided only in the presence of all the other heirs. The Courts below committed a serious error in holding that the suit is not bad for non-joinder of necessary parties. Therefore, the additional substantial question of law (3) is answered in favour of the appellants and against the respondent. In view of the answer to the additional substantial question of law (3), this Court is not inclined to go into the validity of the Will and answer the first question of law in the absence of other heirs of Bagyathammal.

13. Accordingly, this Second Appeal stands allowed. In view of the answer to the additional substantial question of law, the judgment and the decree passed by the Courts below are set aside. It is needless to say that the dismissal of the suit on the technical point of non-joinder of necessary parties will not come in the way of the respondent/plaintiff filing a fresh suit by impleading necessary parties. No costs.

**07.06.2024**

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

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**S.A.(MD) No.56 of 2004**

To:

- 1.Subordinate Judge,  
Karur.
- 2.District Munsif,  
Karur.
- 3.Section Officer,  
V.R. Section,  
Madurai Bench of Madras High Court.



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***S.A.(MD) No.56 of 2004***

**S.SOUNTHAR, J.**

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**S.A.(MD) No.56 of 2004**

**07.06.2024**