



C.M.A.(MD)No.648 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated : **10.09.2024**

CORAM :

**THE HONOURABLE MR.JUSTICE SUNDER MOHAN**

**C.M.A(MD)No. 648 of 2023**  
**and C.M.P(MD)No.8370 of 2023**

1.M.Manikandan

2.Aarthi

... Appellants/Respondents 2 & 3

**Vs.**

1.Maheswari

..1<sup>st</sup> Respondent/Petitioner

2.Rajini Mahalingam

3.M.Nagalingam

4.Jambukeswari

...Respondents 2 to 4/Respondents 1, 4 & 6

**PRAYER:** Civil Miscellaneous Appeal is filed under Section 299 of the Indian Succession Act, 1925, against the fair order and decreetal order dated 11.04.2022 passed in Probate O.P.No.2 of 2015 (CNR No. TNTPO1-004229-2015) on the file of the II Additional District Court, Tiruchirappalli.

For Appellants : Mr.Mr.D.Rajkumar

for Mr.J.Ashok  
For R1 : Mr.S.Meenakshi Sundaram  
Senior Counsel  
for Mr.M.Senguvijay

R2, R3 : No appearance

R4 : Exparte



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## **JUDGMENT**

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The appeal has been filed challenging the grant of probate to the 1<sup>st</sup> respondent herein in respect of the Will dated 14.09.2005 executed by the deceased testator.

2. The facts leading to the filing of the above appeal are as follows:

a) The testator of the Will, Mr.O.P.Muthaiah had several movable and immovable properties;

b) He had executed Will dated 14.09.2005 in favour of the 1<sup>st</sup> respondent herein and one Parameshwari. The testator died on 21.01.2015. The 1<sup>st</sup> respondent, one of the beneficiaries, sought for probate of the Will. She had impleaded the wife and children of her deceased brother Mahalingam, her other brother Nagalingam and the husband of her other sister namely, Jeyagandhi as the respondents in the probate petition;

c) The appellants are the children of the said Mahalingam. They filed a counter stating that the petition for probate is not maintainable as all the legal heirs of the deceased testator have not been impleaded; that the signature in the Will of the testator is not genuine; that the testator



had executed another Will dated 16.11.2009 in favour of the appellants and a few other persons in respect of his properties, by which he had revoked his earlier Will and therefore, the 1<sup>st</sup> respondent is not entitled to grant of probate.

3. Before the trial court, the 1<sup>st</sup> respondent has examined 6 witnesses including herself and one of the witnesses to the Will and marked Ex.P.1 to Ex.P.40. The appellant had examined the 1<sup>st</sup> appellant as P.W.1 and P.W.2 besides marking Ex.R.1 and Ex.R.2.

4. The trial court rejected the contentions of the appellants and granted probate of the Will dated 14.09.2005.

5. The learned counsel for the appellants submitted that the grant of probate is liable to be set aside for the following reasons:

- i) The 1<sup>st</sup> respondent had not impleaded all the legal heirs in the petition for grant of probate;
- ii) The signature of the testator in Ex.P.1 has been denied by his own wife, who was examined as P.W.3;
- iii) The testator had executed another Will in favour of the



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appellants dated 16.11.2009 thereby revoking the Will that is sought to be probated.

iv) The 1<sup>st</sup> respondent had not complied with the provisions of Section 263(c) of the Indian Succession Act and therefore, the probate has to be revoked.

**6.a)** The learned Senior Counsel appearing for the 1<sup>st</sup> respondent, per contra, submitted that even though some of the legal heirs were not impleaded, their affidavits were marked as Ex.P.8 to Ex.P.11 and therefore, it cannot be said that probate was sought for without notice to the legal heirs of the testator.

**6.b)** The learned Senior Counsel further submitted that P.W.3, who was aged 92 at the time of her deposition, had made two contrary statements in her deposition. In one place, she denied the signature and in other place, admitted the signature of the testator in the Will; and the other portions in her evidence would show that the Will is genuine; that the Will marked as Ex.R.2 has not been established in the manner known to law and hence, the trial court had rightly rejected the said Will; that even assuming that the appellant had violated any of the provisions of the



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Indian Succession Act warranting annulment or revocation of the Will, the same cannot be decided in an appeal challenging the grant of probate; and that it is for the appellant to file an appropriate application for revocation of Will, which has to be adjudicated on its own merits.

7. The points for consideration in the instant appeal are as follows:

a) Whether the grant of probate is erroneous for not impleading all the legal heirs of the deceased testator in the petition for probate;

b) Whether the 1<sup>st</sup> respondent had proved the Will dated 14.09.2005;

c) Whether the appellant had proved the Will dated 16.11.2009 and by the said Will, the testator had revoked the earlier Will dated 14.09.2005; and

d) Whether the 1<sup>st</sup> respondent had violated the provisions of Indian Succession Act warranting revocation of the grant of probate.

8. As regards the 1<sup>st</sup> point, the admitted facts are that the deceased testator had four sons namely, Mahalingam, Nagalingam, Jambulingam and Dharmalingam and three daughters namely, Jeyagandhi, Parameshwari and Maheswari. Admittedly, at the time of filing of the



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petition, Mahalingam was no more and the legal heirs of the Mahalingam were impleaded as the respondents. Nagalingam was impleaded as the respondents. However, Jambulingam was not impleaded as respondent. Likewise, Jeyagandhi, one of the daughters, was not alive at the time of filing the petition, and her husband, one R.Shanmugam was impleaded as the respondent. The other daughter Parameshwari was not impleaded as party admittedly. The said Shanmugam also died pending disposal of the petition for probate and his legal heirs were thereafter impleaded as party. Thus, in effect, Jambulingam and Parameshwari were not made as parties. However, the question of non-joinder of the two legal heirs in the petition for probate does not arise since both Parameshwari and Jambulingam had filed affidavits, Ex.P.8 and Ex.P.9 respectively, before the trial court, by which, they had stated that they had no objection whatsoever in allowing the petition for probate and that the Will executed by the testator was a genuine Will.

**9.** The appellants had not sought for cross-examining either the said Parameshwari or Jambulingam. It is also not their case that the affidavits are not genuine. In such circumstances, this Court is of the view that merely because these two legal heirs were not impleaded as the



respondents, the order granting probate cannot be set aside. The point No.1 is answered accordingly.

**10.** As regards the 2<sup>nd</sup> point, the 1<sup>st</sup> respondent had marked the Will, Ex.P.1, which has been attested by two witnesses. P.W.2 is one of the witnesses to the Will. The Will is a registered Will. The 1<sup>st</sup> respondent had also examined P.W.4 and P.W.6 to prove the registration. P.W.2, the witness, who attested the Will had stated that she along with one Jegadheesan had signed the Will in the presence of the testator and the testator had signed the Will in their presence. The Will thus has been established in accordance with law. It is also proved by the 1<sup>st</sup> respondent that the other witness was no more.

**11.** The learned counsel for the appellant pointed out that in a portion of the evidence of the deceased, P.W.3, who was aged 92 years at the time of her deposition, stated that the signature in the Will was not that of her husband. In other portion of her deposition, it is seen that she had admitted the signature of her husband. The evidence of P.W.3 would further reveal that the testator had executed the Will in a sound state of mind by taking into consideration the interest of all his legal heirs. That apart, P.W.6 was examined by the 1<sup>st</sup> respondent to prove that the Will



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was registered on the file of the Sub Registrar's Office. In such circumstances, this Court is of the view that the finding of the Tribunal that the 1<sup>st</sup> respondent has proved the Will is in accordance with law and hence deserved to be confirmed. The point No.2 is answered accordingly.

**12.** As regards the third point, it is seen that the Will dated 16.11.2009 is an unregistered Will. The evidence of the witness to the said Will, namely, R.W.2, who is a stranger does not inspire confidence. The other witnesses to the Will was not examined. Further all the other legal heirs have supported the Will dated 14.09.2005. There is no reference to the earlier Will, which was a registered Will in the Will relied upon by the appellants.

**13.** For all the above reasons, the Will relied upon by the appellants marked as Ex.R.2 was disbelieved by the trial court and rightly so. The point No.3 is answered accordingly.

**14.** As regards the 4<sup>th</sup> point for consideration, it is the submission of the learned counsel for the appellants that the 1<sup>st</sup> respondent, to whom the probate was granted had willfully and without any reasonable cause



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violated the condition stipulated in Section 263(e) of the Indian Succession Act. Section 263 of the Indian Succession Act deals with revocation or cancellation of the probate, if the person, to whom the probate is granted, does not comply with the condition within a period of one year from the grant of probate willfully.

15. The question as to whether there is subsequent violation after the grant of probate cannot be decided in an appeal challenging the grant of probate. It is open to the appellant to proceed in accordance with law in the event of any violation warranting revocation or annulment of grant of probate. The point No.4 is answered accordingly.

16. Hence, this Court is of the view that the grant of probate in favour of the 1<sup>st</sup> respondent is in accordance with law and hence, the order passed by the trial court is confirmed.

17. In fine, this appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

**10.09.2024**

Index : Yes / No  
Neutral Citation : Yes / No  
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To

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1. II Additional District Court, Tiruchirappalli.

2. The Section Officer,

V.R.Section,

Madurai Bench of Madras High Court, Madurai.



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**SUNDER MOHAN, J.**

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**Judgment made in**  
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