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A.S. (MD) No.10 of 1995

IN THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 25.03.2024

PRONOUNCED ON : 07.06.2024

CORAM:

THE HONOURABLE MR. JUSTICE P.DHANABAL

A.S. (MD) No.10 of 1995

and

C.M.P.(MD) Nos.1938 and 2856 of 2024

J. Senthilvel S/o. Jothilingaswamigal ... Petitioner

vs.

1. Visalakshi W/o. Varadaraja Mudaliar @
Sachidanandaswamigal
 2. Vairavan S/o. Varadaraja Mudaliar @
Sachidanandaswamigal
 3. Jothimani D/o. Varadaraja Mudaliar @
Sachidanandaswamigal
 4. Rajalakshmi D/o. Varadaraja Mudaliar @
Sachidanandaswamigal
 5. Minor Rajamanickam (died) S/o. Varadaraja Mudaliar @
Sachidanandaswamigal
- [Memo recorded vide order dated 26.09.2018] ... Respondents

PRAYER: The Appeal Suit is filed under Section 96 of Code of Civil Procedure as against the judgment and decree dated 08.03.1994 passed in O.S. No.22 of 1986 on the file of the learned Subordinate Judge, Devakottai.



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For Petitioner : Mr. M. Kannan
For Respondents : No appearance.

JUDGMENT

This appeal suit has been preferred as against the decree and judgment passed in O.S. No.22 of 1986 on the file of Sub Court, Devakottai dated 08.03.1994 wherein the appellant herein, has filed a Suit for the relief of declaration and recovery of possession. The Trial Court has dismissed the Suit.

2. The brief averments of the Plaint are as follows:-

The Suit properties belong to a Trust created by one Meyyathal, daughter of Eswaramoorthi @ C.T. Vairavan Ambalam of Karaikudi, by a registered Will dated 22.05.1971. The said Meyyathal died few months after the execution of said registered Will. The object of the Trust are (i) poor feeding in the months of Purattasi, Vaikasi and Thai, on the Ramalinga Swamigal in Purattasi, Salaipravesam of the said Vallalar Swamigal in Vaikasi and Thaipooosam day in the month of Thai every year (ii) conduct of varavazhipadu on Friday every week and Thiruppalliyezhuchi throughout the month of Margazhi, every year and



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also (iii) maintenance of Amarjothi i.e., light (deepam) brought from Vadaloor by Meyyathal to her house at Karaikudi and kept burning there eternally. The said Meyyathal had founded the said Trust some years back and had been carrying on the Trust, herself acting as the Trustee and she executed a Will date d 12.06.1961 appointing the 1st defendant and his lineal descendants as Trustees. Thereafter, the said Meyyathal revoked the said Will date 12.06.1961 by an another registered Will dated 22.05.1971. In the said Will, the said Meyyathal appointed the Plaintiff's father Thillai Arul Jothilinga Swamigal residing at Vadaloor as Trustee and directed that the said properties should vest in the said Thillai Arul Jothilinga Swamigal as Trustee on her death and that he should carry on the said charity perpetually with the income therefrom. Further, in the said Will, the Meyyathal also directed that the said Thillai Arul Jothilinga Swamigal would be at liberty to nominate any other person as Trustee in his place either by Will or otherwise. After the demise of Meyyathal, the Thillai Arul Jothilinga Swamigal, who had been residing at Vadalur, became Trustee of the said Trust formed by Meyyathal. The said Thillai Arul Jothilinga Swamigal appointed the 1st defendant as his representative or agent to carry on the affairs of the said Trust on his behalf and he also handed over the original Will executed by Meyyathal on 22.05.1971.



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Since the 1st defendant is having the custody of the said Will, a registration copy of the said Will is produced as document. The said Thillai Arul Jothilinga Swamigal attained Mahaparinirvana (Siddhi) in the year 1975. While he was alive, he executed an unregistered Will dated 25.04.1975 by nominating the Plaintiff as Trustee for the Trust as per the Will executed by Meyyathal dated 22.05.1971 and also revoked the power granted by him earlier to the 1st defendant to act as his representative. The Plaintiff was a minor at the time of death of Thillai Arul Jothilinga Swamigal and one Venkatesu, Son of Pavadai Pillai of Melakuppam had been appointed by the said Thillai Arul Jothilinga Swamigal to officiate as Trustee of the said Trust in the place of the Plaintiff during his minority. The said Venkatesu did not, however, act as Trustee of the said Trust at any time. The Plaintiff was studying in College and has just now come to know about the affairs of the said Trust and he finds that the objects of the said Trust have not been carried out for the last few years. The 1st defendant, misusing the possession of the Trust and confidence reposed in him by Thillai Arul Jothilinga Swamigal, took forcible possession of the said properties and did not handover the same to the Plaintiff. The 1st defendant has let out several items of properties to tenants and realised rents and appropriated the same for himself without utilising any portion thereof for



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the performance of the Trust. Therefore, he filed the Suit.

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3. The brief averments of the Written statement filed by the 1st

defendant are as follows:-

The Plaintiff's claim is objected to and the Plaintiff is not entitled any relief whatsoever. The Plaintiff's description as son of Thillai Arul Jothilinga Swamigal is objected to. He has no better status than and that as a person claiming to be follower of Jothilinga Vallalar. It is denied that the Suit properties are Trust properties and the execution of Will dated 22.05.1971. Previously the Suit in O.S. No.17 of 1984 was filed by 3 persons at the instance of the Plaintiff herein against this defendant and also arraying the present Plaintiff herein as 2nd defendant in the said Suit and the same was dismissed on 09.10.1985. While so, the present Suit for similar relief is not maintainable. The said Meyyathal was not carrying any Trust nor was any Trust founded. In fact, the said Meyyathal had bequeathed the property mentioned in "A" Schedule and the ordinary vessels and articles belonging to her absolutely in favour of this defendant by means of registered Will dated 12.10.1961, which is her last Will. She had expressed her wish in the said Will for doing some welfare activities



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like conducting Guru Pooja in the month of Purattasi, Poorva Paksha Dasami for Vairavan Ambalam, father of Meyyathal and performance of Guru Pooja on Amarapaksha Navami of Aani month for Meyyammai @ Nachi mother of Meyyathal. Similarly in each year, the birthday celebration of Sri Ramalinga Swamigal in the month of Purattasi Salai Pravesam in the month of Vaigasi, Thaipooosam are to be celebrated in the house of Meyyathal with Bhajan and feeding of the poor. She had also expressed her wish to conduct water shed charity in Sekkalai Road. There is no Trust in the real sense of the terms and suit properties are not Trust properties. The averments in the plaint that though a Trust has been created by a Will dated 12.06.1961, the 1st defendant and his lenial discendants have been appointed as Trustees are incorrect and also it is denied that the Will dated 12.06.1961 was revoked by the Will dated 22.05.1971. Thillai Arul Jothilinga Swamigal became the Trustee of the alleged Trust and as if the defendant was constituted as his representative or agent to carry on the affairs of the alleged Trust are denied as false and also denied that the alleged original Will dated 22.05.1971 was handed over to the defendant and the defendant is having custody of the Will. It is also denied that the Thillai Arul Jothilinga Swamigal executed a Will dated 25.04.1975. It is also denied that the defendant took forcible possession of



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the alleged Trust properties. In fact, this defendant is absolutely entitled to the properties and in lawful possession thereof through the Will executed by Meyyathal dated 12.06.1961. The Plaintiff has no concern in the Suit properties. He is not entitled to declaration as prayed for. Neither Thillai Arul Jothilinga Swamigal nor the Plaintiff had never been in possession and enjoyment of the Suit properties in their own right. The defendant has also been properly carrying out the wish expressed by Meyyathal in her Will dated 12.06.1961. The defendant was treated by the said Meyyathal as her son with affection and it was she who got the defendant married and the defendant became the full owner of the properties as per Will dated 12.06.1961. Therefore, there is no question of any misappropriation “trustee de santrar” arising here. The defendant is not liable to render accounts to anyone. Therefore, the Suit is liable to be dismissed.

4. The gist of Written statement filed by the defendants 3 and 6 are as follows:-

The Suit is not maintainable either in law or on facts. Already additional written statement was filed by the 1st defendant while he was in sound state of mind, executed a registered Will dated 13.08.1986. The said



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Will is the last Will of the 1st defendant. After the demise of the 1st defendant, the Will came into effect. As per the Will, the 3rd and 6th defendants alone are the owners of the suit properties. The Suit properties are absolute properties of the 1st defendant and he enjoyed the properties separately as his absolute properties and after his demise, 3rd and 6th defendants are enjoying the properties. The Plaintiff has no any right over the properties. The 5th defendant was minor, but without appointing the guardian, the Suit is filed. The 2nd, 4th and 5th defendants are not entitled to any share over the properties. Hence the Suit is liable to be dismissed.

5. The 3rd defendant also filed an additional written statement stating as follows:-

The allegation in the Plaint that the 1st defendant was appointed as representative or agent to carry on the affairs of the alleged Trust on behalf of Thillai Arul Jothilinga Swamigal is denied. After the demise of Meyyathal, the 1st defendant had been in possession and enjoyment of the suit properties without any interruption for more than statutory period and thereby they have acquired the properties by way of open exclusive



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possession. As per the allegation in the plaint, the 1st defendant is not a Trustee. As per the Will dated 12.06.1961 executed by Meyyathal, no Trust is formed in respect of the suit properties and the 1st defendant is not appointed as Trustee. But the entire properties were given to the 1st defendant absolutely to him. Therefore, the 1st defendant is not a Trustee and could not claim to be a Trustee. While so, the Suit might even filed for recovery of possession from the agent and valued therefor and the Court fee should have been paid for recovery of possession on the basis of market value under Section 25(a) of Tamil Nadu Court Fee Act. While the 1st defendant is not a Trustee, the valuation and Court fee paid under Section 28 of Tamil Nadu Court Fee Act is not correct. The Suit is barred by limitation since it has been filed after 12 years from the date of death of Meyyathal in the year 1972 and the defendants 3 and 6 acquired the title by prescription as stated supra and the 1st defendant or the defendants 3 and 6 are not “trustees de santrar”. Therefore, the declaration of title is also barred by limitation and is not maintainable.

6. Based on the above said pleadings, the Trial Court has framed following issues and additional issues:-



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“எழுவினாக்கள் -

- 1) மெய்யாத்தாள் 22.05.1971ம் தேதி எழுதி வைத்ததாகச் சொல்லப்படும் உயில் உண்மையா? சட்டப்படி செல்லக்கூடியதா?
- 2) வழக்கிடைச் சொத்துக்கள் - டிரஸ்ட் சொத்துக்களா?
- 3) ஜோதிலிங்க சுவாமிகள் 25.04.1975ம் தேதி எழுதி வைத்ததாகச் சொல்லப்படும் உயில் உண்மையா? சட்டப்படி செல்லக்கூடியதா?
- 4) இவ்வழக்கு எதிர் வழக்குரையில் கண்ட காரணங்களுக்காக செல்லத்தக்கதில்லையா?
- 5) வாதிக்குக் கிடைக்கக்கூடிய பரிகாரம் என்ன?

06.07.1989ல் வனையப்பட்ட கூடுதல் எழுவினா-

தாவாச் சொத்து 1ஆம் பிரதிவாதி இறந்த பிறகு 3,6 பிரதிவாதிகளுக்குப் பாத்தியப்பட்டதா?

கூடுதல் எழுவினாக்கள் -

1. நீடனு போகம் மூலம் பிரதிவாதிகளுக்கு சிறந்த பாத்தியம் ஏற்பட்டுவிட்டதா?
2. வழக்கு காலாவதி ஆகிவிட்டதா?
3. வழக்கிற்கு முன் தீர்ப்பு தடை உள்ளதா?”

7. Before the Trial Court, on the side of Plaintiff, he examined PW1 to PW4 and marked Ex.A.1 and Ex.A.2. On the side of defendants, they examined DW1 to DW3 and marked Ex.B.1 to Ex.B.14. After considering the evidences adduced on both sides, the Trial Court has dismissed the Suit. Aggrieved over the decree and judgment of the Trial Court, the unsuccessful Plaintiff has filed this appeal on the following grounds:-

1. The Judgment and decree of the Court below are contrary to law, weight of evidence and the probabilities of the case.



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2. The findings of the Court below that no Trust was created under Ex.B.2, that the properties were bequeathed absolutely to the 1st defendant, that recitals regarding performance of charities and obligations in Ex.B.2 do not create a Trust, but are only expressions of the wishes of the Testators, are completely erroneous and unsustainable.

3. The Testatrix is a baktha and follower of Ramalingaswamigal and therefore she has stipulated certain conditions in Ex.B.2. The Trial Court has failed to see that as an ardent devotee, the Testatrix has in fact founded a Public Trust for the welfare of the public at large and the finding of the Lower Court in contra, is erroneous and unsustainable.

4. The Court below ought to have seen that the original of Ex.A.2 Will was entrusted with the 1st defendant and that the 1st defendant is concealing the same.

5. The Court below failed to see that the Plaintiff has produced a registration copy of Ex.A.2 Will and has examined its attestor PW3, who has categorically deposed regarding the execution of Ex.A.2 Will.

6. The Court below has completely misdirected itself on



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criticizing that no power executed by Thillai Arul Jothilinga Swamigal in favour of the 1st defendant has been produced into Court; even assuming without admitting that such power executed in writing, it must be with the 1st defendant; the Court below has totally misconstrued the case of the appellant and the evidence on record to conclude that the appellant pleads that such power was given to the 1st defendant by Jothilinga Swamigal in writing.

7. The further contention of the Court below that the appellant is concealing the original of Ex.A.2 to prevent it being compared with the signatures in Ex.B.2 is almost perverse and smacks of special pleading for the respondents / defendants, the appellant / plaintiff has nothing to gain personally in any event , it is the respondents / defendants who are interested in concealing the original of Ex.A.2.

8. The further conclusion of the Court below that it has not been properly explained or established by the appellant / plaintiff as to why Meyyathal had to cancel Ex.B.2 by executing the original of Ex.A.2 is equally erroneous and unsustainable.

9. The Court below erred in assuming that as the first defendant was married even prior to Ex.B.2 there was no need to execute



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the original of Ex.A2 subsequently.

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10. It is for the testatrix to decide and nominate persons to carry out the objects of the Trust created and the Lower Court erred in testing the decision of the Testatrix in this regard.

11. By no stretch of imagination can the evidence of PWs 1 & 3 be construed as certifying the 1st defendant with proper and creditable performance of the charities; the assumption of the Trial Court in this regard proceeds on an improper and incorrect appreciation of the evidence of PWs 1 and 3.

12. The assumption of the Trial Court that PW3 is a person interested in the Plaintiff and is not worthy of credence is erroneous; neither the Plaintiff or PW3 have anything to gain personally and they are only interested in saving the Trust for public benefit.

13. The observation of the Trial Court that Ex.A.1 is suspicious as Venkatesh did not take steps under Ex.A.1 and as the appellant came to know of Ex.A.1 only during the pendency of the O.S. No.17 of 1984 and the conclusion that Ex.A.1 could have been created at the time of O.S. No.17 of 1984 are completely erroneous and unsustainable.



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14. Equally erroneous is the criticism that no documents have been filed to prove that Thillai Arul Jothilinga Swamigal was enjoying the properties after the death of the Meyyathal; the above criticism proceeds on a total lack of understanding of the case of the appellant and is completely erroneous and unsustainable.

15. The Court below erred in accepting Ex.B.3 Will and the Court below ought to have rejected the unaccepted testimony of PW2.

16. The finding of the Court below that the respondents / defendants have perfected Title by adverse possession as well, as the Suit is filed 12 years beyond the date of death of Meyyathal is almost perverse.

17. The further finding of the Court below that the Suit is barred by limitation is completely erroneous and almost perverse.

18. The Court below ought to have seen that the respondents / defendants have not established Ex.B.2 as required under law.

19. The Court below ought to have accepted the clinching evidence of PWs 1 to 4, the criticism of the evidence of PWs 1 to 4 is unawaiting and the reasonings of the Court below to discredit the evidence of PWs 1 to 4 are erroneous and unacceptable.

8. The learned counsel appearing for the appellant would contend



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that the appellant herein, being a Plaintiff, has filed a Suit for the relief of declaration that the Plaintiff is the present Trustee of the Trust created by a Will by Meyyathal dated 22.05.1971. The 1st defendant and his heirs are not entitled to be incharge of the said Trust and as a consequential relief ordering the defendants 2 to 6 to put the Plaintiff in possession of the properties described in the Schedules A and B and also to render the accounts to the Plaintiff in respect of the management of Trust.

8(i) Originally the properties belonged to Meyyathal and she created a Trust through Will dated 22.05.1971 by nominating the father of the Plaintiff Thillai Arul Jothilinga Swamigal as Trustee to the Trust and the said Meyyathal died after few months from the date of execution of Will and thereby, the said Will came into force after demise of said Meyyathal. The said Meyyathal was leading life of an ascetic and performing various charities in accordance with the principles of Saint Vallalar at Karaikudi. In order to help her to perform the charities, the Thillai Arul Jothilinga Swamigal sent his sishyar who was an ascetic by name Sachithanantha Swamigal, who is the original defendant in the Suit. The said Sachithanantha Swamigal who was a Sanyasi came to reside with the



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Testator at Karaikudi and they were performing the Sudhdha Sanmargam Charitable works.

8(ii) In Ex.B.2, registered Will dated 12.10.1961, it is clearly mentioned that, in the Purvashramam, the original defendant Sachithanantha Swamigal was known as Varadharaja Mudhaliyar, son of Manickam before he became a renunciate and entered the order of Sanyasi. As per the Will dated 12.10.1961, the 1st defendant has to perform charities. Therefore, the Will clearly mentioned that he was a Sishyar of Jothilinga Vallalar Swamigal.

8(iii) The primary intention of the execution of Ex.B.2 Will was for performance of the charities by Sanyasi Sachithanantha Swamigal who is the Sishyar of Jothilinga Vallalar Swamigal. While so, the said Sachithanantha Swamigal broke his vow of Sanyasi and entered into family life by getting married. This caused a doubt in the mind of the testator that he will not perform the charities. Therefore, she executed a registered Will dated 22.05.1971, Ex.A.2 and thereby cancelled the earlier Will, Ex.B.2.



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8(iv) In Ex.A.2, there is a clear mention about Sachithanantha Swamigal, who was known as Varadharaja Mudaliyar in his purvashramam, would perform the charities and now as he has become a Grahastha, she has become doubtful that he will not after her lifetime perform the charities. Thereby, she cancelled the earlier Will, Ex.B.2 and executed a Will dated 22.05.1971, Ex.A.2. As per the Will, the 'A' schedule property was bequeathed in favour of Sachithanantha Swamigal with condition to perform Guru pooja for her father and mother. The 'B' schedule property has been bequeathed in favour of Jothilinga Vallalar Swamigal to lead Dharma Salai as a Trustee and the Trust shall be administered by the Jothilinga Vallalar Swamigal and he can nominate any person as a Trustee either by Will or otherwise. Ex.A.2 was executed in sound mind by Meyyathal and she also imposed certain conditions in respect of the properties. Hence there is nothing suspicious or doubtful regarding Ex.A2.

8(v) Since the 1st defendant Sachithanantha Swamigal was a Sishyar of Jothilinga Vallalar, 'A' schedule property was given to the



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Sachithanantha Swamigal, the Guru Jothilinga Vallalar Swamigal entrusted the performance of the charities to the original defendant under his supervision and he visited Karaikudi after the demise of the testator. The Jothilinga Vallalar Swamigal handed over the original copy of the Ex.A2 Will to the 1st defendant in order to enable him to carry on the affairs of the trust on his behalf and for the reference and use in proceedings whenever necessary. Therefore, the defendant was made his agent or representative to carry on the affairs of the Trust. The said Ex.A.2 was attested by one M.K. Ganesan and Chinnathambi. The said Chinnathambi had expired and the 1st witness M.K. Ganesan was examined as PW3 and he deposed about the execution and attestation of Will and thereby, the said Will Ex.A.2 has been proved in accordance with law. PW4 has clearly stated that the testator Meyyathal spoke to her regarding the execution of Ex.A2 Will and legally also admitted that the complaint has been given for commission of fraudulent deeds.

8(vi) The trial Court failed to consider the evidence of PW3. The trial Court had come to the conclusion that the Suit properties are not trust properties. The trial Court failed to consider that the testatrix is a devotee



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and follower of Ramalinga Swamigal and thereby she stipulated certain conditions in Ex.A.2. The prime object of the Will is for performance of charities, poojas and bhajans for public benefit. Further as per the Will dated 22.05.1971, Ex.A.2, the major portion of the charity has been bestowed for public purpose. Therefore, the trial Court failed to consider Ex.B.2 and Ex.A.2 together to conclude about the Trust. The Trial Court failed to consider the original Will dated 22.05.1971 was handed over to the 1st defendant by Thillai Arul Jothilinga Swamigal. The plaintiff's side witnesses also have stated about the Will in question and also have stated about the handing over of the Will to the 1st defendant. Further, the Trial Court misconstrued that the Plaintiff has stated about the Thillai Arul Jothilinga Vallalar Swamigal executed any written power deed in favour of the 1st defendant. In fact, the Thillai Arul Jothilinga Vallalar Swamigal has authorized his Sishyar, the 1st defendant to take care of the objects of the Trust as agent and handed over the original Will, Ex.A2. The trial Court failed to consider that since Sachithanantha Swamigal got married, the earlier Will was cancelled by a subsequent Will by the testatrix. The Trial Court failed to consider that the Ex.A.1 Will was duly executed by Thillai Arul Jothilinga Swamigal. The Plaintiff's side witnesses have



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categorycally deposed about the execution of Wills Ex.A.1 and Ex.A.2, but the Trial Court has failed to consider the same. The Trial Court erred in coming to the conclusion that the defendants are entitled to the properties and also there is no limitation period has been prescribed for filing a Suit by the Trustee for recovery of trust properties and the Trial Court has erroneous impression that the title of the property has been prescribed adversely and hence the Suit for recovery of possession is barred by limitation. Therefore, the judgment and decree passed by the Trial Court are liable to be set aside.

9. No representation on the side of respondents, despite notice served on them. Ample opportunities were given to the respondents, but there is no representation. Therefore, this Court after hearing appellant's side and perusing the available records, pronounced the judgment on merits.

For the sake of convenience and brevity, the parties hereinafter will be referred as per their status / ranking in the Trial Court.

10. Upon hearing the appellant's side and perusing the records, the **points for determination** in this appeal are as follows:-



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- (i) Whether the Will dated 22.05.1971 is executed by Meyyathal as alleged by the Plaintiff?
- (ii) Whether the trust was created by Meyyathal?
- (iii) Whether the Will executed by Meiyathal in favour of the 1st defendant dated 12.06.1961 and created any Trust, is proved in accordance with law?
- (iv) Whether the Thillai Arul Jothilinga Swamigal executed a Will dated 25.04.1975 in favour of the Plaintiff?
- (v) Whether the Suit is barred by limitation?
- (vi) Whether the Suit is barred by principles of resjudicata?
- (vii) Whether the 1st defendant executed a Will dated 13.08.1989 in favour of the 3rd and 6th defendants
- (viii) Whether the Plaintiff is entitled to decree for declaration and consequential relief of recovery of possession?
- (ix) Whether the Plaintiff is entitled to relief of rendering accounts from the defendants?
- (x) Whether this appeal has to be allowed or not?.



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11. Point No.1:

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The Plaintiff has filed a Suit for declaration that the Plaintiff is the Trustee and recovery of possession of the suit properties stating that the suit properties are the trust properties and the trust property was bequeathed in favour of the Trust through a registered Will dated 22.05.1971 and the Trust was created and the same was founded some years back and the Meyyathal had been carrying on the Trust herself, acting as Trustee and thereafter she executed a Will dated 12.06.1961 appointing the 1st defendant as her legal descendant as Trustee. Thereafter she revoked the said Will dated 12.06.1961 by a registered Will dated 22.05.1971. The defendants have denied the execution of Will dated 22.05.1971 and according to the defendants, the properties were bequeathed in favour of the 1st defendant by Meyyathal through Will dated 12.06.1961. According to the Plaintiff, the Will dated 22.05.1971 is the last Will and according to the 1st defendant, Will dated 12.06.1961 is the last Will of the Meyyathal. There is no dispute that the Meiyathal died in the year 1972. Therefore, the Plaintiff is put to strict proof of the Will executed by Meyyathal dated 22.05.1971.



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11(i) In order to prove the same, the Plaintiff has not produced the original copy of the Will dated 22.05.1971. The original Will was not produced for the reason that the original was handed over to the 1st defendant by Thillai Arul Jothilinga Swamigal. As per the Will dated 22.05.1971, the Thillai Arul Jothilinga Swamigal was appointed as Trustee and the said Thillai Arul Jothilinga Swamigal nominated the 1st defendant to manage the Trust properties. Therefore, he handed over the original Will to the said 1st defendant. Thereby, the original Will was not produced by the Plaintiff. The said contention was denied by the 1st defendant. While so, the Plaintiff has to prove that the original Will was handed over to the 1st defendant.

11(ii) According to the Plaintiff, the Thillai Arul Jothilinga Swamigal handed over the original Will to the 1st defendant. In order to prove said fact, the Plaintiff has not taken any steps to produce the Will, which is said to be under the custody of the 1st defendant in accordance with law. The Plaintiff has not even issued notice to the 1st defendant to produce the original Will before the Court. There is no any witness examined in respect of the alleged handover of the Will to the 1st



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defendant and PW1 has no knowledge about the execution of the Will and he stated that after the demise of the Thillai Arul Jothilinga Swamigal i.e., after 4 to 5 years from the demise of Thillai Arul Jothilinga Swamigal, he came to know about the Will and PW1 also stated that he does not know about the handing over of the Will by Thillai Arul Jothilinga Swamigal to the 1st defendant. Therefore, the contention of the Plaintiff that the original Will was handed over to the 1st defendant by Thillai Arul Jothilinga Swamigal is not acceptable one.

11(iii) The Plaintiff has not stated any proper reasons for non-production of the original Will. He only produced the copy of the Will. Though the certified copy is also secondary evidence and can be admitted under Section 65 of Evidence Act, since the original document was not produced and the reasons stated by the Plaintiff was not acceptable. The presumption under Section 114 of Evidence Act can be drawn as against the Plaintiff that if the Will is produced, it is against him and since it is against him, it was not produced.

11(iv) Further on the side of Plaintiff, he examined PW3, who is the



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attesting witness of Ex.A2, Will dated 22.05.1971. PW3 is none other than the earlier Plaintiff, who filed Suit for the same relief before the Court and the Plaintiff failed to examine another attesting witness, who attested the Will. When one of the attesting witnesses is suspicious, it is the duty of the Plaintiff to examine other witness. It is well settled law that though as per Section 68 of Evidence Act, any one of the attesting witnesses is sufficient to prove the execution of documents, which is compulsorily attested, the Plaintiff failed to produce the original document and thereby, the signature of testatrix has not been identified by the attesting witness and the Plaintiff has not taken any steps to call for the records from the Registrar office to prove that Meyyathal only executed the Will dated 22.05.1971 by cancelling the earlier Will. Therefore, the Plaintiff failed to prove the execution of Will dated 22.05.1971.

11(v) Further, there are suspicion over the Will and the same has not been removed by the Plaintiff. The Plaintiff was examined as PW1 and he deposed before the Court that he did not know about the execution of Will in person and he came to know about the Will in the year 1971. By that time, the said Meyyathal was alive and the properties were under the possession of the 1st defendant. The 1st defendant was in possession over the suit properties during the life time of Meyyathal and the said Will was



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attested by one M.K. Ganesan. The said Ganesan, Annapoorani Achi and Chinnathambi used to come to Ashram and they filed a Suit in O.S. No.17 of 1984 against the 1st defendant herein and the Plaintiff herein is the 2nd defendant in that Suit. Therefore, he himself admitted that he did not know about the Will executed by Meyyathal. However, he saw the Will and the same was kept in Vadalur Ashram and thereafter, it was not there. Therefore, there is no evidence to show that original Will was given to the 1st defendant.

11(vi) The attesting witness of the said Will is none other than one of the Plaintiffs in the earlier Suit filed by them as against the 1st defendant. Moreover, PW3, who is said to be attesting witness of the Will has stated in the cross examination that he did not know about the earlier Will and he knows only about the Ex.A.2 and the Will was prepared at Karaikudi and prior to one week of execution of Will, Meyyathal stated that there is misunderstanding between the 1st defendant and the Meyyathal and thereby, she stated that she has to execute Will and he also admitted that before execution of Will, the 1st defendant was leading his matrimonial life and he also admitted that since the 1st defendant was



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converted to family man, the Will was executed and he also stated that he did not remember that who were all present at the time of execution of Will. Therefore, there are suspicious circumstances and no reasons stated as to why the 1st Will was cancelled when the 1st defendant got married prior to the date of execution of 1st Will in the year 1961. Moreover, even according to the Plaintiff, the first Will in the year 1961 was cancelled due to the reason that the 1st defendant got married and he would not perform the poojas, then how in the 2nd Will in the year 1971, bequeathed the properties of 'A' schedule to the 1st defendant to do the Guru Pooja to the father and mother of Meyyathal, has to be explained by the Plaintiff, but no proper explanation to that regard. Therefore, the reasons stated by the Plaintiff that since the 1st defendant got married, the 1st Will was cancelled and the 2nd Will was executed, is not an acceptable one. Thus, **point no.1** is answered accordingly.

12. **Point No.2 and 3:-**According to the Plaintiff, the Trust was created by Meyyathal and the properties were bequeathed to the Trust through a Will dated 22.05.1971. This Court, in the previous point decided that Will dated 22.05.1971 has not been proved by the Plaintiff. It



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is an admitted fact that the Meyyathal had executed a Will in favour of the 1st defendant dated 12.06.1961. The above said Will has not been denied by the Plaintiff and according to the Plaintiff, the said Will was cancelled through a subsequent Will dated 22.05.1971. The said second Will was not proved by the Plaintiff. However, the defendant examined DW3, who is the attesting witness of the Will dated 12.06.1961. The said Will was also marked as Ex.B.2. DW3 has categorically deposed about the execution and attestation of Will, Ex.B.2. Therefore the defendant has proved that the Will, Ex.B.2, was executed by the Meyyathal in favour of the 1st defendant.

12(i) In the said Will there were some conditions imposed by the testatrix to perform some pooja activities. Those activities are not sufficient to hold that the Trust was created by Meyyathal. There is no averment in the said Will to constitute Trust. Moreover, even according to the Plaintiff, Meyyathal had created Trusts and she acted as Trustee and therefore, the 1st defendant was appointed as Trustee. Nowhere in the Will dated 12.06.1961 stated about the alleged formation of Trust and Trustee of the Trust.



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12(ii) On careful perusal of the conditions mentioned in the Will, it shows that Meyyathal is the devotee of Vallalar and she also treated the 1st defendant as her son and the 1st defendant lived along with her for more than 17 years and some conditions were imposed in the Will that he has to conduct Guru Pooja for her father and mother and also he has to perform some bhajans and to offer food to the poor people and also he has to create water pandal to the public and he also has to perform ritual rights to her. Therefore, the above said conditions are only conditions, but not comes under Charitable Trust and the properties are not conveyed for the Trust purpose and the properties of Meyyathal had been bequeathed in favour of the 1st defendant and he also enjoyed the properties and thereafter, he has been performing the conditions stipulated in the Will. To that effect, DW1 was examined and he also deposed about the conditions complied by him. DW1 is none other the son of the 1st defendant and he deposed before the Court that the he is the 3rd defendant in the Complaint and the 1st defendant is his father and Meyyathal had executed a Will in favour of his father and Meyyathal died in the year 1972 and after the death of Meyyathal, the properties were under the enjoyment of his father and after the demise of



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Meyyathal, his father did her death ceremonies and he also constructed Samadhi for the said Meyyathal and his father had been performing his duties as mentioned in the Will. Therefore, the 1st defendant enjoyed the properties as his exclusive properties and he also complied the conditions as mentioned in the Will.

12(iii) Even according to the Plaintiff, the 1st defendant is not a Trustee and Thillai Arul Jothilinga Swamigal was appointed as Trustee and he permitted the 1st defendant to manage the properties. While so, it is the duty of the Plaintiff to prove that the Trust was created and is in existence and the properties were bequeathed in favour of the Trust. But the Plaintiff failed to prove that the properties were dedicated for the Trust and there was existence of the Trust as alleged by the Plaintiff. Therefore, the Plaintiff failed to prove that the Trust was created through the Will dated 12.06.1961 executed by Meyyathal. Thus, the points 2 and 3 are answered accordingly.

13. Point No.4: According to the Plaintiff, Thillai Arul Jothilinga Swamigal had executed a Will dated 25.04.1975 in favour of the Plaintiff.



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The said Will has been produced as Ex.A.1 and in order to prove the said Will, the attesting witness PW2 was examined and he deposed about the execution and attestation of Will. However, already this Court in the previous points decided that the Will dated 22.05.1971 was not proved by the Plaintiff. According to the Plaintiff, Thillai Arul Jothilinga Swamigal was authorised as Trustee through the Will dated 22.05.1971, but the said will itself has not been proved by the Plaintiff. Therefore, the Plaintiff cannot claim any right through the present Will, since the earlier Will was not proved by the Plaintiff. Thus the Point No.4 is answered accordingly.

14. Point No.5: The Plaintiff has filed a Suit for declaration and recovery of possession as against the defendant and according to the Plaintiff, the Suit properties are belonged to the Trust and in the said Trust, Meyyathal was acted as Trustee during her lifetime and she executed a Will dated 22.05.1971 and as per the Will, the Thillai Arul Jothilinga Swamigal was appointed as Trustee and the properties are dedicated to Trust. As per the Will, the said Thillai Arul Jothilinga Swamigal appointed the 1st defendant as representative or Power Agent to manage the properties. Thereby, the 1st defendant was in possession and



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enjoyment of the properties. The Plaintiff has not denied the Will executed in favour of the 1st defendant dated 12.06.1961. It is also admitted that Meyyathal died in the year 1972. While so, the Plaintiff ought to have filed the Suit within 12 years from the date of death of Meyyathal, but they have filed the Suit in the year 1986. According to the Plaintiff, Meyyathal had executed a Will dated 22.06.1971 by appointing Thillai Arul Jothilinga Swamigal as Trustee. Thereafter, the said Thillai Arul Jothilinga Swamigal appointed the 1st defendant to manage the properties. But the said Jothilinga Swamigal had not filed any suit as against the 1st defendant. Even as per the case of Plaintiff, the 1st defendant was in possession of the property during life time of the Meyyathal and she cancelled the Will and executed another Will in the year 1971, while so, how the Thillai Arul Jothilinga Swamigal could appoint the same 1st defendant as the representative of the Thillai Arul Jothilinga Swamigal, has to be explained by the Plaintiff, but no any explanation to that regard. Even according to the Plaintiff, the said Thillai Arul Jothilinga Swamigal had executed a Will in the year 1975 by appointing the Plaintiff as Trustee, since he was minor at the time of execution of Will, one Paramasivam was appointed as Trustee. While so, during the life time of Thillai Arul



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Jothilinga Swamigal himself, they know about the possession of the 1st defendant. Therefore, immediately after the demise of Meyyathal, the possession of the 1st defendant is adverse to the Plaintiffs. But they have not taken any steps within 12 years from the date of death of Meyyathal. Therefore, the Suit is also barred by limitation. Thus, **point no.5** is answered accordingly.

15. Point No.6: According to the Plaintiff, he filed a Suit for declaration and recovery of possession as against the defendants. But according to the defendants, already in respect of same property, one Ganesan and others filed a Suit in O.S. No.17 of 1984 stating that for the relief of removal of the 1st defendant from the management of Suit properties and to appoint either the 2nd defendant or any such person as to the Court who appointed as Trustee in respect of the properties and for management of Trust created by Meyyathal and for directing the 1st defendant to render accounts. But the said Suit was later not pressed. Since the Suit was not decided on merits and the parties in both Suits are also not one and the same, the Suit is not hit by the principles of *resjudicata*. Thus the point is answered accordingly.



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16. Point Nos.7 and 8: The Plaintiff has filed a Suit for declaration and recovery of possession declaring that the Plaintiff is the present Trustee of the Trust created by Will of Meyyathal dated 22.05.1971 and the 1st defendant and his heirs are not entitled to be incharge of the said Trust and as consequential relief of ordering the defendants 2 to 6 to put the Plaintiff in possession of the properties and to render accounts. According to the Plaintiff, the Trust was created by a Will dated 22.05.1971 and this Court in previous points decided that the Will dated 22.05.1971 was not proved by the Plaintiff and there is no proof to prove that the Trust was created by Meyyathal. Therefore, the Plaintiff is not entitled to the relief of declaration that the Plaintiff is the present Trustee of the Trust created through Will dated 22.05.1971. Further, according to the defendants, Meyyathal bequeathed properties in favour of the 1st defendant through Will dated 12.06.1961 and the said Will was also proved by examining DW3, who is the attesting witness and the said Will was also admitted by the Plaintiff and now the defendants were in possession and enjoyment of the properties and the same was admitted by the Plaintiffs and thereby, they sought for recovery of possession by



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admitting the possession of the defendants and according to the defendants, after the demise of the 1st defendant, they are enjoying the properties based on the Will executed by the 1st defendant dated 13.08.1986. In order to prove the said Will dated 13.08.1986, the defendants have examined DW2, who is the attesting witness of the Will executed by the 1st defendant dated 13.08.1986. Moreover, the Plaintiff has not denied the execution of Will dated 13.08.1986 and only contention of the Plaintiff is that the 1st defendant is not entitled to the properties through Will executed in the year 1961 and the said Will was subsequently cancelled through an another Will in the year 1971, but this Court already decided that the Will executed in the year 1971 was not proved and the Will executed in the year 1961 was duly proved in accordance with law. Therefore, the Will dated 13.08.1986 was duly proved by the defendants and as per the said Will, the 3rd and 6th defendants are in possession and enjoyment of the suit properties. Already this Court also decided in the previous points that the Suit is not filed within the period of limitation and already the defendants have been in enjoyment and possession of the properties based on the Will. Therefore, the Plaintiff is not entitled to the relief of declaration and recovery of possession as prayed for in the Suit.

Thus, the points are answered accordingly.



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17. **Point No.9:** As far as rendering of accounts are concerned, since the Plaintiff has not proved the Will and the existence of Trust and the properties are bequeathed through the Will dated 12.06.1961 by Meyyathal in favour of the 1st defendant and the 1st defendant also executed a Will in favour of the 3rd and 6th defendants through a Will dated 13.08.1986 and based on the Will, the 3rd and 6th defendants are in enjoyment and possession of the properties, the Plaintiff is not entitled to the relief of rendering accounts as prayed for in the Plaint. Thus the point is answered accordingly.

18. **Point No.10:** Before the Trial Court, the appellant has filed a Suit for relief of declaration and recovery of possession before the Trial Court they examined PW1 to PW4 and on the side defendants, they examined DW1 to DW3 and based on the evidence adduced on both sides, the Trial Court dismissed the Suit by holding that the Plaintiff has not proved the existence of the alleged Trust and they also failed to prove the Will dated 22.05.1971 executed by Meyyathal in favour of the Thillai Arul Jothilinga Swamigal and once the Will dated 22.05.1971 is not proved, no



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question of execution of Will in favour of the Plaintiff dated 25.04.1975 would arise and the defendants have proved the Will dated 12.06.1961 executed by Meyyathal in favour of the 1st defendant and based on the Will, the 1st defendant acquired the properties as his absolute properties and thereafter, he executed a Will in favour of the 3 and 6th defendants through Will dated 13.08.1986 and the said Will was proved by the defendants. Therefore, the defendants are under possession and enjoyment of the properties as their absolute properties. The above said aspects are rightly discussed by the Trial Court and therefore, the decree and judgment passed by the Trial Court are in order. There is no perversity or infirmity found in the judgment and decree passed by the Trial Court. Therefore, this Court has no warrant to interfere with the judgment and decree passed by the Trial Court.

19. Therefore, as discussed supra, this Court is of the opinion that this appeal has no merits and deserves to be dismissed.

20. Accordingly, the Appeal Suit is dismissed. No costs.

Consequently, the connected miscellaneous petitions are closed .



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To

The Subordinate Judge, Devakottai.

P.DHANABAL,J

(mjs)

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