



S.A. No.773 of 2010

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.06.2025

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A. No.773 of 2010

and

M.P.No.1 of 2010 & C.M.P.No. 10908 of 2021

1. Krithika
2. Pavithra
3. Meenakshi
4. Baskaran

(Appellants 1,2 and not pressed this Second Appeal. Therefore, Second Appeal is dismissed agaisnt the appellants 1, 2 and 4 as not pressed as per the memo dated 12.08.2019 and vide court order dated 13.08.2019)

... Appellants

Vs.

1. Vinoth
2. Vinothini
3. Minor Vignesh
4. Minor Vivek



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5. Minor Vinitha
(minor respondents 3 to 5 are represented
by their registered mother and guardian
Amudha @ Meenakshi)

6. Batcha @ Murugan

.. Respondents

PRAYER : Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree made in A.S.No.35 of 2007 with I.A.No. 13 of 2009 dated 05.12.2009 on the file of District Judge, Nagapattinam in reversing the judgment and decree passed in O.S.No. 69 of 2006 dated 21.08.2007 on the file of Principal Subordinate Court, Mayladuthurai.

For Appellant : Mr.K.Thilageswaran
for 3rd appellant

For Respondents : Mr.B.Jawahar for R1 to R5
R6 - exparte



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JUDGMENT

The appellants herein are the defendants 1 to 4 in the suit in O.S.No.69 of 2006 on the file of Principal Sub-Court, Mayiladuthurai filed by the respondent/plaintiff claiming 5/7th share in the suit schedule property by passing a preliminary decree with meats and bounds.

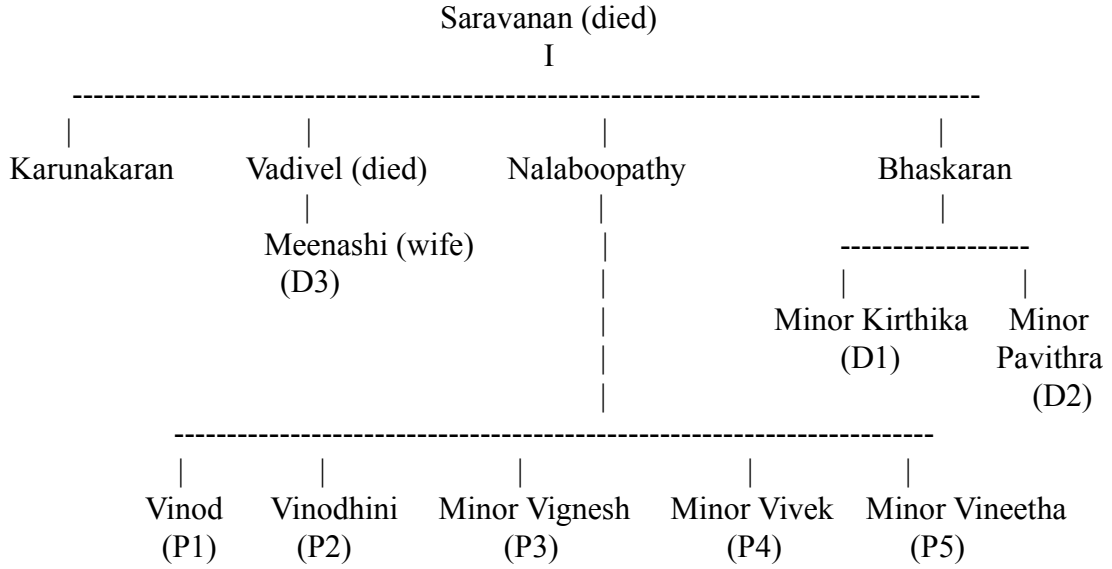
2. For the sake of convenience, the parties are denoted as per the ranking in the suit.

3. The case of plaintiff is that the suit property originally belongs to their grandfather Saravanan and he had four sons viz., Karunakaran, Vadivel, Nalaboopathy and Baskaran. The plaintiffs herein are the son and daughters of Nalaboopathy. The defendants 1 and 2 are daughters of Baskaran, 3rd defendant is the wife of Vadivel and 4th defendant is the son of Baskaran.



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4. Geneological tree is extracted hereinbelow :-



5. During the life time of the plaintiffs grandfather Saravanan, he had executed a registered Will on 10.01.1995 and the same was in custody of his son Vadivel, after his demise, his wife 3rd defendant is in possession of the said Will. The testator Saravanan executed a Will in favour of plaintiffs and defendants 1 and 2, who are his grandchildren by giving absolute right over the suit property and on 22.07.2001 the Testator was died. As per the Will, the plaintiffs and defendants have jointly enjoyed the property, however, as there is no cordiality between them, the plaintiffs filed a suit



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for division of property claiming 5/7th share and contended that the shop in first item was given for rent to the 3rd defendant, in second item, 3rd defendant was residing and backyard of the said house commonly enjoyed and for the division of property, the suit has been filed.

6. The defendants 1 to 4 have filed a written statement stating that the first item belongs to Dharumapuram Adhinam and not enjoyed by plaintiffs grandfather Saravanan. In respect of second item under lease, Saravanan's father Ramalingam Sambuvarayar cultivated the lands and on 17.08.1981, the said Ramalingam and his co-sons executed a Karavolai chit, in that, 'E' schedule was allotted to Saravanan. These defendants further submit that on 10.01.1995 Saravanan executed a Will and the same was cancelled on 05.12.1999 and executed another Will and it is a last Will of Testator Saravanan. As per the Will, the property in Survey No.63 measuring an extent of 15,192 sq.ft. along with trees and two shops in T.S.No.596 within 200 ft. was described as B schedule, which were given to Testator's son Vadivel, after his demise, the same were given to Baskaran. Therefore, the plaintiffs have no right to claim partition based on



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the Will dated 10.01.1995, which was already executed by the Testator, thereby they prayed to dismiss the suit as no merit. The reply statement was filed by the plaintiffs denying the cancellation of Will as well as execution of another Will dated 05.12.1999.

7. Considering both side submissions, the trial court framed five issues and in respect of both Wills, two issues were framed. Both parties have adduced oral and documentary evidence and attesor of the Will was also been examined. On considering the evidence on record, in respect of issue No.1, whether the suit property belongs to plaintiffs grandfather Saravanan. For that, the trial judge held that as per the evidence as well as on perusal of receipt marked as Ex.B4 reveals that building in T.S.No. 396 belongs to Dharumapuram Adhinam and in that land, he occupied as a tenant for monthly rent. Hence, item No.1 is not absolutely belong to one Saravanan and in respect of two Wills, based on the evidence of P.W.1, who admits signature found in Ex.B1 Will dated 05.12.1999 is that of Testator Saravanan. Based on that, the trial judge held that in Ex.B1 Will is proved. Accordingly, earlier Will dated 10.01.1995 was cancelled. So also, another



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witness also admits the Testator's signature made in Ex.B1, thereby the trial judge held that it is a last Will and the same has been proved by the attesor, one of witness D.W. 1, who deposed that the Testator executed the Will. In that, he has signed as one of the witness, thereby the plaintiffs are not entitled to claim share in the property. Accordingly, the suit was dismissed.

8. Challenging the said findings, an appeal suit in A.S.No.35 of 2007 was filed by the plaintiffs before the District Judge, Nagapattinam. In the Appeal Suit, Interlocutory Application in I.A.No. 13 of 2009 was filed by the plaintiffs to receive the additional documents and to produce xerox copy of Will obtained from the Registrar Office and the receipt signed by the Testator Saravanan marked as Ex.A3 and Ex.A5. On comparing the signatures of Saravanan found in those documents along with the signature found in Ex.B3 Will relied on by defendants, the first appellate judge held that on bare perusal of documents, it would clearly shows that the signatures found in Ex.A3 and A5 is not tallied with Ex.B1 and held that Ex.B1 is valid one. The first appellate judge also held that the Will Ex.B1 has also not been proved by examining another witness and the Will relied



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on by the plaintiffs is not disputed by the defendants, since Ex.B1 relied on by the defendants is doubtful one. But without proper appreciation of evidence, the trial judge erroneously held that Will Ex.B1 is proved as the signature found in that Will is admitted by P.W.1 and D.W.2 during trial, thereby held that Ex.B1 Will is not true and valid one. Accordingly, the findings of trial court was set aside and held that the Will relied on by the plaintiffs Ex.A3 is a registered Will and the same also been admitted by the defendants. Furthermore, the Will marked as Ex.A3 is not disputed by both parties. Hence, as per Will Ex.A3, the plaintiffs are entitled for 5/7th share. Accordingly, Appeal Suit is allowed and the findings of trial judge was set aside.

9. Challenging the reversal findings of the first appellate court, the defendants have preferred this Second Appeal by raising the following grounds for consideration :-

- (a) The learned District Judge failed to see that a Will is to be attested by two witnesses, but examination of one attesting witness is sufficient to prove the execution and attestation.
- (b) The learned District Judge erred in holding that the



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signatures in Ex.B1 are not that of the testator and the reasons assigned therefor are erroneous.

- (c) The learned District Judge erred in comparing the signatures of the testator in Ex.B1 along with the xerox copy of original of Ex.A3 when both the plaintiffs' witnesses admitted the testator's signatures in Ex.B1.
- (d) The learned District Judge failed to see that both the plaintiffs witness have categorically admitted in their cross-examination that the signatures in Ex.B1 were that of the testator and that therefore, the learned District Judge erred in comparing the signatures in Ex.B1 along with other documents.
- (e) The learned District Judge failed to see that the admitted signatures need not be compared either by the court or by an expert and that therefore the procedure adopted by the District Court is contrary to law.
- (f) The learned District Judge erred in taking up the hazardous task of comparing the signatures and that therefore, the



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findings rendered by the learned District Judge are unsustainable in law.

- (g) In any event, the question of comparison of signatures does not arise since the witnesses examined on the side of the plaintiffs admitted the signatures in Ex.B1 is that of the testator?
- (h) The learned District Judge erred in thinking that both the attesting witnesses should be examined and the reasons assigned therefor are erroneous.
- (i) The learned District Judge failed to see that the scribe and an attesting witness to Ex.B1 have categorically deposed that Will Ex.B1 was executed by Saravanan and that therefore, the learned District Judge ought to have upheld the findings of trial court with regard to Ex.B1.
- (j) The learned District Judge erred in holding that Ex.B1, Will creates a doubt since the non-registration of Will is not explained and the reason assigned therefor are erroneous.



(k) The learned District Judge failed to see that P.W.2, who is said to be one of the attesting witness to Ex.A3 has not categorically stated about the execution of Ex.A3 and that therefore, the learned District Judge ought to have rejected Ex.A3.

10. On considering his submissions, this Second Appeal was admitted on the following question of law :-

(i) When both the plaintiffs witnesses have admitted the testator's signature in Ex.B1 and the scribe and an attesting witness to Ex.B1 were examined, whether the lower appellate court erred in law in holding that the Will, Ex.B1 was not proved?

(ii) Whether the lower appellate court erred in law in comparing the signatures of the testator in Ex.B1 with that of Ex.A3, a xerox copy of the Will propounded by the plaintiffs, when the signatures in Ex.B1 were admitted by the plaintiffs witnesses?

(iii) Whether the lower appellate court erred in law in placing reliance upon the additional documents for holding that Ex.A3 is true Will without subjecting the plaintiffs to cross-examination?



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11. The learned counsel for appellants argue that from the evidence of D.W.1 and D.W.2, who admits the signature of Testator Saravanan found in Ex.B1 Will, which further requires no proof. Considering that, the trial court rightly declared that Ex.B1 Will is true and valid one. But, the first appellate judge erroneously disagreed with the findings of trial court holding that the signature of Testator in Ex.B1 is not tallied with the signatures found in receipt as well as xerox copy of original Will obtained from the Sub-Registrar office as such is totally illegal and liable to be set aside.

12. By way of reply, learned counsel for respondents/plaintiffs would submit that before the trial court, the plaintiffs proved that the Will relied on by them Ex.A3 is the last Will of Testator Saravanan, but it was not properly appreciated by the trial judge, but the first appellate judge independently analysed and concludes that by receiving additional documents Ex.A4 and A5 and signatures found in those documents were compared by the court below, which is permissible under law and rightly held that Ex.B1 Will is not true and valid. On the other hand, Ex.A3 Will



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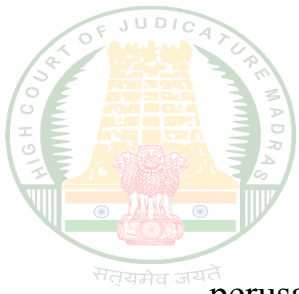
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relied on by the plaintiffs was also admitted by the defendants needs no further proof. Accordingly, the first appellate judge rightly granted the relief based on the Will Ex.A3 as such is well-reasoned needs no interference. Hence, they prayed to dismiss this Second Appeal as no merit.

13. Heard and considered rival submissions made by learned counsel for 3rd appellant and learned counsel for respondents 1 to 5 and perused the materials available on record.

14. Considering both side submissions, it reveals the fact that the plaintiffs and defendants are legal heirs of one Saravanan is an admitted fact. According to the plaintiffs, during the life time of Testator Saravanan, he had executed a Will dated 10.01.1995 through which grandchildren have shares in the suit property equally. Accordingly, the plaintiffs are entitled for 5/7th share, however as other defendants are not cooperating for partition, they have approached the court by relying copy of Will marked as Ex.A3 and also contended that original Will was under the custody of testator Saravanan's son Vadivel and now it is with his wife (D3). But, on

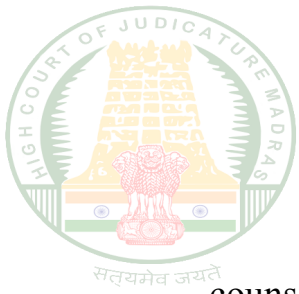
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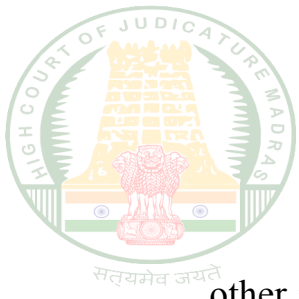
perusal of written statement filed by defendants 1 to 4, they admit the execution of Will dated 10.01.1995 by the Testator Saravanan, but contended that the said Will was cancelled by executing another Will on 05.12.1999 marked as Ex.B1. As rightly pointed out by the counsel for respondents/plaintiffs, the Will relied on by the plaintiffs dated 10.01.1995 is also admitted by the defendants. Hence, there is no necessity to prove the said Will marked as Ex.A3. However, to prove the execution of Will on the side of plaintiffs, one of attestor was examined as P.W.2, who deposed that the Testator Saravanan gave instructions to execute the said Will with sound state of mind and affixed signature in the presence of witnesses. Therefore, Will was proved as per the manner known to law. Now, the burden is shifted on the defendants to establish that Ex.B1 dated 05.12.1999 is the last Will of the Testator through which he cancelled the earlier Will dated 10.01.1995. To prove the execution of Will, on the side of defendants, one of the witness Karunakaran, who is son of Testator Saravanan is examined as D.W.2. Another son viz., Baskaran/D4 of Testator Saravanan was examined as D.W.1. One of the witness of Will Ex.B1, Gopu was examined as D.w.3. Based upon his evidence, the learned



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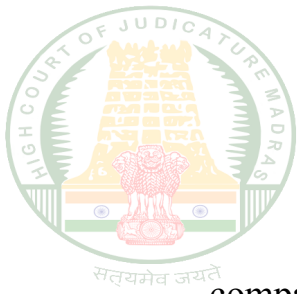
counsel for defendants argue that Will is proved and the same was rightly appreciated by the trial judge. But, on considering the evidence of Gopu, he is an advocate clerk working under one Krishnaramanujam, who was then counsel of testator Saravanan. As per his evidence, to execute the Will Testator Saravanan gave instructions at 4'o clock on 05.12.1999, who drafted the Will was attested by him. Based on that, subsequently, the said Will was typed as per his evidence. Contrary to that evidence of Karunakaran, D.W.2, who is one of son of Testator deposed that his father already had deliberations of his sons about the execution of Will and he had decided to give Rs.1 lakh each to Karunakaran and another son Nalaboopathy and shops were given to his another son viz., Baskaran. Based on the instructions given by father, he alone went and met advocate to draft a Will. Accordingly, his clerk D.W.2 called for on 05.12.1999, thereby he went to his advocate house along with his father, who came there and read over the Will and thereafter, his father Saravanan affixed his signature after it was getting typed. Admittedly, Will is to be proved by examining any one of witness as described under Sec.68 of Evidence Act. Considering the evidence of D.W.2 and D.W.3, which contradicts with each



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other in respect of execution of Will. As per the evidence of D.W.2, one of the son of Testator stated that he alone went to advocate office and gave instructions to draft the Will, but as per the evidence of D.W.3, he has stated that on 05.12.1999 Testator Saravanan gave instructions to draft the Will. The evidence of both witness not cogent in respect of instructions given by the testator to draft the Will. After the Will was typed, the Testator came to advocate office and signed, but the evidence of both witnesses not clarified whether the Will was executed at the instance of testator Saravanan. Moreover, the evidence of D.W.3 also reveals that Will was drafted and typed on the same day on 05.12.1999, on the other hand, as per the evidence of D.W.2 Karunakaran, he stated that he gave instructions to his counsel to prefer the Will. Accordingly, on 05.12.1999 he went to the office and collected the same. Therefore, the evidence of D.W.2 and D.W.3 not cogent nor established that the Testator Saravanan intended to execute the Will with sound state of mind. Though the first appellate judge concludes that Ex.B1 is surrounded with suspicious circumstances, not assigned proper reason nor analysed the evidence of D.W.2 and D.W.3 properly. However, he relied the signature found in Ex.A3 and Ex.A4



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comparing the signatures with Ex.B1 (records to be seen) and held that signatures found in Ex.B1 Will not belong to Saravanan and it is forged one. Admittedly, the court is empowered to compare signatures, accordingly, it was compared. Even otherwise the Will is not proved as per the manner known to law, the court below simply relied the evidence of D.W.1 and D.W.2, who admits the signature found in Ex.B1 is sufficient to hold that the Will is said to be proved. But, in the course of cross-examination, Ex.B1 was shown to witness, he specifically stated that it is the signature of Testator Saravanan. The said evidence alone is not sufficient to conclude that Ex.B1 is true and valid one.

15. It is settled proposition of law, the Will is to be proved beyond reasonable doubt about the execution of Will with sound state of mind of Testator, the evidence of D.W.2 and D.W.3 are not cogent and consistent, contradicts each other, which itself proves that Will is not proved beyond reasonable doubt. Accordingly, question of law (1) and (2) are answered.

16. Furthermore, in the first appeal proceedings, two additional documents are produced by plaintiffs marked as Ex.A5 and A6 and one of the document is the xerox copy of Will obtained from Sub-Registrar Office



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and another one is the receipt paid by testator Saravanan to the temple are uncontraversial documents. Therefore, those documents are rightly compared by the first appellate judge, which needs no interference. Accordingly, question of law (3) is answered.

17. In respect of first item of property, admittedly, the land belongs to Dharumapuram Adhinam and superstructure alone is belongs to Testator Saravanan. Therefore, absolute right over the land has not been claimed, only based on the Will they are entitled to share in the superstructure alone. In respect of item No.2, it was belong to Subramaniaswamy temple coming under the mutt, which was given under lease. Therefore, with the leasehold rights, the parties are permitted to enjoy the same as per the shares allotted in the Will. The plaintiffs are also claiming right over the property based on the Will and they are not claiming absolute right, but the trial court failed to appreciate the same and erroneously held that the properties are not belong to defendants as such is erroneous one. Item Nos.1 and 2 were enjoyed by Testator Saravanan, who is having possessory right and the same was conveyed through the Will Ex.A3. Therefore, the plaintiffs are entitled for 5/7th share in the suit property in respect of possessory right alone. The

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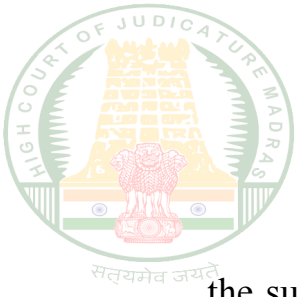


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second item in T.S.No.60 an extent of 14375 sq.ft. house, mutt along with backyard new door No.45/1, which was originally belongs to Subramaniasamy temple with whom Saravanan's father Ramalinga Sambuvarayar entered into lease for rent. Thereafter, it was divided into four equal shares, in which B schedule was given to the share of Testator Saravanan and the same was claimed through Karavolai chit executed among family members. But, admittedly, land in second item also belongs to Subramaniasamy temple, superstructure alone was belong to Saravanan. Therefore, in both items, possessory right of 5/7th share was given to both parties, but they have not produced any title deeds in respect of second item showing that it is absolutely belongs to Saravanan. So, the facts reveals that land in second item belong to Subramaniasamy temple, in which original lessee Ramalinga Sambuvarayar, father of testator Saravanan possessed and enjoyed with vast extent comes around 16000 sq.ft. Furthermore, though the first appeal was allowed in favour of plaintiffs, the detailed reasons was not assigned by the first appellate judge. Therefore, Appeal suit is dismissed as no merit. Accordingly, this Second Appeal is dismissed. Suit is decreed. The plaintiffs are granted 5/7th share with possessory right alone in

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the superstructure, but not granted absolute right in respect of land, which is belong to the temple. No costs. Consequently, the connected Miscellaneous Petitions are closed.

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Index : Yes / No
Internet : Yes / No
Speaking/Non-speaking order
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To

District Judge,
Nagapattinam.



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T.V.THAMILSELVI, J.

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