



S.A.No.1083 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 23 / 10 / 2024

JUDGMENT PRONOUNCED ON : 04 / 06 / 2025

CORAM:

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

S.A.NO.1083 OF 2019

AND

CMP NO.23632 OF 2019

1.D.Ranganayaki

2.P.Sarojini

... Appellants / Respondents /

Plaintiffs

Vs.

1.N.Govindarajan

2.Sundararaj

... Respondents / Appellants /

Defendants

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree dated January 29, 2019 made in A.S.No.57 of 2014 on the file of the 1st Additional Sub Court, Coimbatore, reversing the Judgment and Decree dated February 27, 2013 made in O.S.No.1894 of 2007 on the file of the I Additional District Munsif, Coimbatore.

For Appellants : Mr.N.Manoharan

For Respondents : Mr.K.Vasanthanayagan



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JUDGMENT

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This Second Appeal is directed against the Judgment and Decree dated January 29, 2019 passed in A.S.No.57 of 2014 by the 'First Additional Sub Court, Coimbatore' ['First Appellate Court' for brevity], whereby the Judgment and Decree dated February 27, 2013 passed in O.S.No.1894 of 2007 by the 'I Additional District Munsif, Coimbatore' ['Trial Court' for brevity] was reversed.

2. For the sake of convenience, hereinafter, the parties Will be referred to as per their array in the Original Suit.

PLAINTIFFS' CASE

3. The Suit Property, a residential house, along with a larger extent of properties originally belonged to one Narayanan by virtue of Release Deed dated November 2, 1963 [Registered in Document No.6238/1963]. The plaintiffs are the daughters while the defendants are the sons of the said Narayanan. The plaintiffs are in possession and enjoyment of the Suit Property. While so, Narayanan executed a Registered Will dated March 31, 1999 in favour of the plaintiffs bequeathing the Suit Property. Post his demise on February 20, 2007, the

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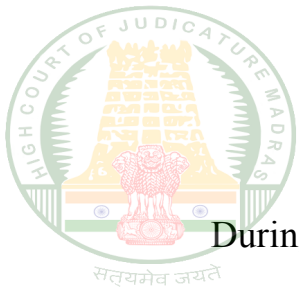
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Registered Will was duly implemented and acted upon. Since then, the first plaintiff is residing in the Suit Property with the consent of the second plaintiff. The second defendant is living in his respective share allotted through a Settlement Deed dated January 27, 1999 executed by Narayanan.

3.1. Further it is averred that all of a sudden, there arose a difference of opinion between the plaintiffs and the defendants, and the defendants forcibly tried to trespass into the Suit Property and tried to occupy the same questioning the validity of the Will. On August 19, 2007 the defendants openly proclaimed that they will trespass into the Suit Property and lock the house. Therefore, the plaintiffs filed a Suit for the relief of declaration that the Will is genuine, true, valid and binding on the defendants and permanent injunction.

DEFENDANTS' CASE

4. The defendants filed a written statement denying the allegations made by the plaintiffs. It is averred that the Suit Property, a part of larger co-parcenary property consisting of residential buildings, belonged to one Nallama Naidu alias Petha Naidu (as ancestral property).



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During Nallama Naidu's lifetime, his sons – Narayanan and Ranganathan acquired interest in the coparcenary by birth. After Nallama Naidu's demise, they both along with their mother acquired equal rights in the Nallama Naidu's share. Subsequently, Narayanan's brother - Ranganathan and his mother relinquished their respective shares in the properties and executed a Release Deed in favour of Narayanan on November 2, 1963 [Registered in Document No.6238/1963]. Thus, Narayanan became the absolute owner of the properties covered under the Release Deed and he alienated the same in favour of the second defendant by way of Settlement Deed. The property remaining intact as coparcenary property after the Settlement is the Suit Property herein. The plaintiffs got married respectively in the year 1971 and 1974 and thereby, both of them were excluded to claim any share in the Suit Property. Thus, the Suit Property is coparcenary property of the coparcenary consisting of the defendants, their male descendants and their unmarried daughters. Father Narayanan lived with the second defendant till his passing on February 20, 2007 and never executed any Will out of his free will and consent in favour of anybody, much less the Will referred to in the plaint. The defendants are in exclusive possession and enjoyment of the Suit Property. The plaintiffs



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have no right whatsoever. The defendants never trespassed into the Suit Property as alleged by the plaintiffs. Thus, the defendants sought to dismiss the Suit.

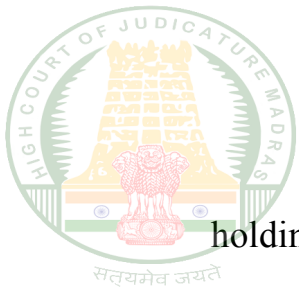
TRIAL COURT

5. At trial, first plaintiff was examined as P.W.1 and one Rangasamy, one of the attesor of the Suit Will, was examined as P.W.2 and Ex-A.1 to Ex-A.10 were marked on the side of the plaintiffs. The second defendant was examined as D.W.1 and no document was marked on the side of the defendants.

6. After full-fledged trial, the Trial Court held that the Will executed by Narayanan, who is the father of the plaintiffs and defendants dated March 31, 1999 in favour of the plaintiffs is genuine, true and valid and binding on the defendants and hence, decreed the Suit as prayed for.

FIRST APPELLATE COURT

7. Feeling aggrieved, the defendants preferred an appeal before the First Appellate Court, which, after hearing both sides, allowed the appeal and set aside the Judgment and Decree of the Trial Court, by



holding that the attesting witness (P.W.2), neither identified the signature of the testator, nor that of his or the co-attestor and therefore, the Will is not proved as per Section 68 of the Indian Evidence Act, 1872 as well as Section 63 of the Indian Succession Act, 1925.

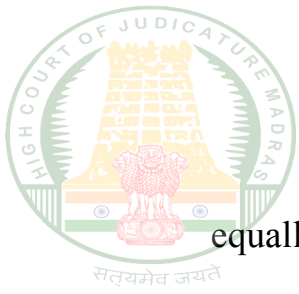
SECOND APPEAL

8. Feeling aggrieved, the plaintiffs have preferred the present Second Appeal under Section 100 of the Code of Civil Procedure, 1908. The Second Appeal was admitted on November 11, 2019 on the following substantial questions of law:

- “1. Whether the judgment and decree of the lower appellate court confirms the requirements of Order 41 Rule 31 of the Code of Civil Procedure?*
- 2. Whether the lower appellate court was right in concluding that Ex.A5, Will has not been proved in accordance with law?”*

ARGUMENTS:

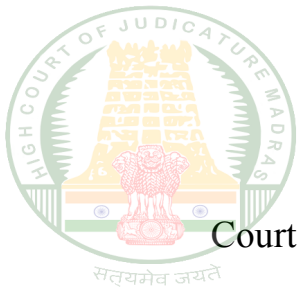
9. Mr.N.Manoharan, learned counsel for the appellants / plaintiffs submitted that the Suit Property and a contiguous property are the absolute properties of Narayanan vide Release Deed dated November 2, 1963. He executed a Registered Will – Ex-A.3 dated March 7, 1997 whereby bequeathed the Suit Property as well as the contiguous property



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equally among his sons and daughters. Thereafter, some dispute arose between the plaintiffs and the defendants, and the second defendant lodged a criminal complaint against the plaintiffs and their father - Narayanan. Thereafter, Panchayat Muchalika dated January 27, 1999 (Ex-A.2) was entered into between the parties. As per the Panchayat Muchalika, the plaintiffs father executed Ex-A.4 - Registered Settlement Deed dated January 27, 1999 in favour of the second defendant in respect of the said contiguous property. Thereafter, the plaintiffs' father executed a Registered Will bequeathing the Suit Property in favour of the plaintiffs. He further submitted that the plaintiffs examined P.W.2 – Rangasamy who is the attesting witness in Ex-A.5 – Will. P.W.2 in his chief examination, has clearly deposed about the execution of the Will. His chief examination was recorded on November 13, 2009. Due to his old age, his cross examination was conducted through an Advocate Commissioner on July 30, 2011 *i.e.*, after a lapse of nearly two years. He further submitted that the defendants have not specifically denied the attestation and execution of Ex-A.5 – Will. Further, the defendants' side did not pose any question to P.W.2 denying the execution of Ex-A.5 - Will. Non cross-examination questioning the Will would tantamount to admission of Will. The Trial

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Court correctly decreed the Suit. But the First Appellate Court, miserably failed to consider Order VIII Rule 3 of the Code of Civil Procedure, 1908 as well as the admission made by D.W.1 in respect of Ex-A.2 – Panchayat Muchalika and Ex-A.3 – Will dated March 7, 1997 and erred in dismissing the Suit. Accordingly, he prayed to allow the appeal, set aside the Judgment and Decree of the First Appellate Court and confirm that of the Trial Court.

9.1. In support of his arguments, he relied on the following Judgments:

- (i) Judgment of the Hon'ble Supreme Court in ***Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others***, reported in ***(2005) 8 SCC 67*** ;
- (ii) Judgment of the Hon'ble Supreme Court in ***Muddasani Venkata Narsaiah Vs. Muddasani Sarojana***, reported in ***(2016) 12 SCC 288*** ;
- (iii) Judgment of this Court in ***Janaki Devi Vs. R.Vasanthi and Others***, reported in ***2005(1)CTC 11***;
- (iv) Judgment of this Court in ***Boomathi Vs. Murugesan and Others***, reported in ***2023 (2) CTC 273***.

10. Per contra, Mr.K.Vasanthanayagan, learned Counsel for the respondents / defendants contended that the burden of proving the



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Will always lies upon the propounder of the Will and the Will has to be proved by examining at least one attesting witness. In this case, P.W.2, witness to Ex-A.5 - Will, did not state anything about the attestation and the free state of mind of the Executor of the Will. Further, he did not identify the signatures of the testator, co-attestor as well as his. Further, Ex-A.5 - Will was not marked through him. In these circumstances, Ex-A.5 - Will has not been proved. The Trial Court, without considering Section 68 of the Indian Evidence Act, read with Section 63 of Indian Succession Act, 1925 read with Section 3 of Transfer of Property Act, 1882 erroneously came to the conclusion that the Will in question is proved. The First Appellate Court, after considering the evidence available on record, rightly came to the conclusion that the Will in question is not proved. There is no warrant to interfere in the decision of the First Appellate Court. Accordingly, he prayed to dismiss the Second Appeal.

10.1. In support of his contention, learned Counsel for the respondents / defendants relied on the following Judgments:

- (i) Judgment of the Hon'ble Supreme Court in
Lalitaben Jayantilal Popat Vs. Pragnaben



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Jamnadas Kataria, reported in ***(2008) 17 S.C.R. 1500*** ; and

- (ii) Judgment of the Hon'ble Supreme Court in ***Dhani Ram (died) Through LRs. Vs. Shiv Singh [Civil Appeal No.8172 of 2009 decided on October 6, 2023; Neutral Citation : 2023 INSC 876]***.

DISCUSSION:

11. This Court has considered both side submissions and perused the entire evidence available on record.

Substantial Question of Law No.1

12. For ease of reference, Order XLI Rule 31 of CPC is reproduced hereunder:

"31.Contents, date and signature of judgment.—The judgment of the Appellate Court shall be in writing and shall state—

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."



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13. It is apposite to extract the prayer made in the plaint,

hereunder:

- “a) For a declaration that the registered Will No.164/1999 dated 31.03.1999 executed and left by late N.Narayanan in favour of the plaintiffs is genuine, true and valid and binding on the defendant. AND*
- b) for a permanent injunction restraining the defendants, their men, servants, agents or any other person claiming, from any way disturbing or interfering with the plaintiffs possession and enjoyment of the suit property more fully said out hereunder.*
- c) directing the defendants to pay the cost of the suit,*
- d) and grant such other and further reliefs may be deemed just and necessary of the case and render justice.”*

14. It is also apposite to extract the issues framed by the Trial

Court in the Original Suit hereunder:

- "1. Whether the suit property was the absolute and exclusive property of Narayanan, the testator of the alleged Will ?*
- 2. Whether the said Narayanan was entitled to execute a Will as alleged in the suit, bequeathing the entire suit property ?*
- 3. Whether the execution of the Will as alleged in the suit property [sic] and genuine ?*
- 4. Whether the plaintiffs are entitled for the reliefs claimed in the suit or not ?"*



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15. The case of the plaintiffs is that the Suit Property is the absolute property of Narayanan, who executed Ex-A.5 – Will as his last Will bequeathing the Suit Property in their favour. The defendants in their written statement stated that the Suit Property is co-parcenary property of their family and coparcenary consisting of the defendants and their sons and daughters excluding the plaintiffs. In such a scenario, the Trial Court ought to have rendered a finding with regard to the character of the Suit Property *i.e.*, whether it was ancestral or absolute in the hands of Narayanan. The Trial Court seems to have bundled the discussions for Issue Nos.1 to 3 together under one single heading, but it has actually proceeded to straightaway answer Issue No.3 without any discussion on Issue Nos.1 and 2. The Trial Court straightway held that the Will is proved and hence the Suit is to be decreed, without any discussion regarding the nature of Suit Property and the extent of Narayanan's right over the same.

16. A First Appellate Court has to decide the questions of law as well as those of facts. The First Appellate Court herein ought to have framed points for consideration as per Order XLI Rule 31 of CPC and

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answered the same. In this case, the First Appellate Court ought to have

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inter alia framed points for consideration as to the nature of the Suit Property in the hands of Narayanan, and as to whether the Narayanan had right to execute Will in respect of the entirety of Suit Property. But the First Appellate Court simply framed the following points for consideration:

- "(1) *Whether the plaintiffs proved the Will dated 31.1.1999?*
- (2) *Whether the Judgment and Decree recorded by the trial court is just and legal?"*

16.1. It has also not covered the aforesaid aspects in its discussion. Hence, the First Appellate Court failed to comply with Order XLI Rule 31 of CPC. The Substantial Questions of Law No.1 is answered accordingly, in favour of the appellants / plaintiffs.

Substantial Question of Law No.(2)

17. As regards the Substantial Questions of Law No.2, the defendants have not completely denied the execution and attestation of Ex-A.5 – Will, which is a registered one. They have denied only the free and voluntary execution of Ex-A.5 – Will in a sound state of mind. Be that as it may, as per Section 68 of Indian Evidence Act, 1872, a Will



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being a compulsory attestable document, is to be proved even when admitted, at least through one attesting witness. In general, the requirement for proof of execution of a Will is that at least one of the attester is examined and his/her deposition is such that the stipulations contained under Section 63 (c) of Indian Succession Act, 1925 are substantially met. For ready reference, Section 63 (c) is extracted hereunder:

"(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

18. At this juncture, it is worthwhile to refer to the *locus classicus* Judgment on proof of Will in ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma***, reported in ***AIR 1959 SC 443***, wherein Hon'ble Supreme Court has elaborately considered the law on proof of Will as hereunder:



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"18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended



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thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator; and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory



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evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated."

19. In this case, the plaintiffs examined P.W.2 who is one of the attester to Ex-A.5 – Suit Will. He filed chief affidavit before the Court on November 13, 2009. However, Ex-A.5 - Will was not marked through him nor did he identify it. The Will was not shown to him at all. When the attesting witnesses appeared before the Court, it is the duty of the plaintiffs' Counsel to put the attester into the witness box and require him to identify the Will as well as the signatures therein by showing the Will, and also mark the Will through him if not already marked. The Court also is equally duty bound and it ought to ensure proper trial. If the plaintiffs' side fails to do so, the Court must have stepped in and recorded at least a minimum in chief from the attesting witness with regard to the execution of the Will. In this case, both the plaintiffs' Counsel as well as the Court

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has miserably failed in their duty.

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20. That aside, P.W.2 was cross-examined for the first time on July 30, 2011, through an Advocate-Commissioner as he was old and unable to attend Court. The entire cross-examination reads as follows:

'எனது வயது 89. (எண்பத்து ஒன்பது). என்னால் படிக்க முடியாது. எனக்கு கண் ஆபரேஷன் செய்து 12 வருடங்கள் ஆகிவிட்டது. நான் நீதிமன்றத்திற்கு வந்துள்ளேன். எனக்கு நீதிமன்றத்திலிருந்து சம்மன் ஏதும் வரவில்லை. 1வது வாதி அழைத்துதான் நான் நீதிமன்றத்திற்கு வந்தேன். நான் நீதிமன்றத்தில் சாட்சி சொல்வதற்காக என்று என்னிடம் கையெழுத்து வாங்கினார்கள். அதில் என்ன எழுதியிருந்தது என்று எனக்கு தெரியாது. வழக்கு சம்பந்தமாக எனக்கு எதுவும் தெரியாது.

G.ரங்கசாமி ஒப்பம் /-

இன்று (30.07.2011) என் முன்னால் சாட்சிக்கு பிரமாணம் செய்துவிக்கப்பட்டு மேற்கண்டவாறு சாட்சி கூறினார்.'

21. At the time of cross-examination of P.W.2, probably due to old age, he resiles from his chief affidavit and takes a hostile stand. In such a scenario, the Counsel for the plaintiffs ought to have got



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permission from the Court and cross-examined P.W.2 to elicit the truth as per Section 145 read with 154 of Indian Evidence Act, 1872 [now Sections 148 read with 157 of the 'Bharatiya Sakshya Adhiniyam, 2023' ('BSA' for short)]. But they have failed to do so.

22. D.W.1 / second defendant in his chief and cross examination has categorically admitted Ex-A.3 – Will dated March 7, 1997, as well as Ex-A.2 - Panchayat Muchalika dated March 7, 1997 pursuant to which he obtained Ex-A.4 – Settlement Deed. In Ex-A.2 to Ex-A.4 documents, the Suit Property as well as the property covered under the Settlement Deed are described as absolute properties of father – Narayanan. But when it comes to Ex-A.5 – Suit Will, the defendants turn around and strangely contend that the Suit Property is coparcenary property. This calls for a finding on the character of the Suit Property which the Trial Court as well as the First Appellate Court have failed to provide.

23. This Court finds it apposite to observe that even while assuming a moment that the Suit Property is coparcenary property as contended by the defendants and that the plaintiffs failed to prove Ex-A.5



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— Will, even then, the plaintiffs and the defendants would be entitled to equal shares in view of Section 6 of the Hindu Succession Act, 1956 as amended by the Hindu Succession (Amendment) Act, 2005 (Act No.39 of 2005) as well as in view the ***Vineetha Sharma Principle*** [laid down by Hon'ble Supreme Court in *Vineetha Sharma Vs. Rakesh Sharma, Neutral Citation: 2020 INSC 487*]. Likewise, if they prove that it is Narayanan's absolute property and failed to prove the Will, even then, they would be entitled to equal shares along with the defendants as per Section 8 of the Hindu Succession Act, 1956.

24. Parties shall never be let to suffer for the failure of the advocate and the Court in conducting proper trial. First Appellate Court ought to have remitted the matter for proving the Will afresh as per Sections 68 or 71 of Indian Evidence Act, 1872 as the case may be [now Sections 67 and 70 of BSA respectively] read with Section 63 of Indian Succession Act, 1925, or under Section 69 of Indian Evidence Act, 1872 [now Section 68 of BSA] in the absence of any attesting witness.

25. Considering the facts and the circumstances of the case, in the interest of justice, this Court is of the considered view that it is a fit



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case for remanding to the Trial Court. Accordingly, the matter is remanded to the Trial Court under Order XLI Rule 23(A) of the Code of Civil Procedure, 1908, for conducting retrial in a proper manner, ascertaining the character of the Suit Property and proving the Will as per law. The parties are at liberty to adduce further evidence, recall and re-examine the witnesses, and in case none of the attestors of Ex-A.5 – Will is available, the plaintiffs are at liberty to prove the Will as per Section 63 of the Indian Succession Act, 1925 read with Section 69 or Section 71 of the Indian Evidence Act, 1872 as the case may be. To be noted, earlier evidence shall not be wiped out and shall stay on record.

26. It is clarified that the observations made by this Court shall not influence the decision of the Trial Court. Trial Court shall decide the case on merits untrammelled and uninfluenced by the observations made by this Court. Further, considering the age of the Suit as well that of the witnesses, and also considering the facts and circumstances of the case, the Trial Court shall endeavour to dispose of the case within nine (9) months from the date of receipt of a copy of this Judgment. Both the sides are directed to co-operate with the Trial Court for expeditious disposal of the case.

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RESULT:

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27. In fine, the Second Appeal is allowed and the Judgment and Decree passed by the First Appellate Court and the Trial Court are set aside. The Suit is remanded under Order XLI Rule 23A of Code of Civil Procedure, 1908 to the Trial Court for re-trial. Upon receipt of the case file and a copy of this Judgment, the Trial Court shall restore the case on its original file and after recording evidence, shall deliver Judgment on merits in accordance with law. In view of the facts and circumstances of this case, the parties shall bear their own costs. Consequently, connected Civil Miscellaneous Petition is closed.

04 / 06 / 2025

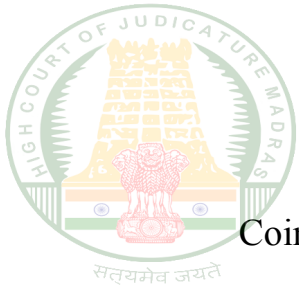
Index : Yes
Speaking Order : Yes
Neutral Citation : Yes
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To

1.The 1st Additional Sub Court
Coimbatore.

2.The I Additional District Munsif

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3.The V.R. Section
Madras High Court
Madras.



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R. SAKTHIVEL, J.

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PRE-DELIVERY JUDGMENT MADE IN

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