



SA(MD)No.771 of 2009

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated: 13/03/2025

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

SA(MD)No.771 of 2009

Rathinam : Died/1st Appellant/
Plaintiff
1.R.Thamarai
2.R.Kannan
3.R.Kannagi
4.R.Karthick : Appellants 1 to 4/
Appellants 2 to 5/
Lrs of the Plaintiff

Vs.

1.Settu
2.Angammal
3.Parimanam
4.P.Balasubramanian
5.P.Sivakumar
6.P.Periyasamy : Respondents/Respondents/
Defendants

PRAYER:-Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree dated 30/04/2009 made in AS No.176 of 2008 on the file of the Court of the Principal District Judge, Tiruchirappalli, confirming the judgment and decree, dated made in OS No.402 of 2003 on the file of the II Additional Subordinate Judge, Tiruchirappalli, and pass such further or other orders.

For Appellants : M/s.J.Mariya Roseline
For R1 and R2 : No appearance
For R3 to R6 : Mr.I.Vel Pradeep



SA(MD)No.771 of 2009

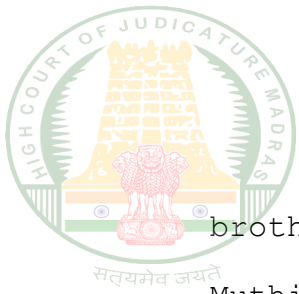
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This Second Appeal is filed against the judgment and decree, dated 30/04/2009 passed in AS No.176 of 2008 by the Principal District Judge, Tiruchirappalli, confirming the judgment and decree, dated passed in OS No.402 of 2003 by the II Additional Subordinate Judge, Tiruchirappalli.

2.The averments in the plaint in brief:-

Kulanthivelu Muthiraiar married one Ammani Ammal. She died without any issues. So, he married one Mottai Ammal. During the subsistence of the second marriage, again, he married Kunjammal. Through Kunjammal, he had a child by name Mariyayee. When she was aged about 6, Kunjammal died. Again, he married during the subsistence of the second marriage one Angammal as the 4th wife. That Angammal is shown as the second defendant in the suit. Mariyayee was married to one Parimanam, the third defendant herein. The defendants 2 and 3 are sister and brother. The defendants 4 to 6 are the childrens of Mariyayee and Parimanam. Mariyayee died five years back. Kulandivelu Muthiraiar purchased the property in the name of the second defendant Angammal for her maintenance. Kulandaivelu Muthiriar's elder brother was one Malaiyandi Muthiriar. The plaintiff and the first defendant are the



SA(MD)No.771 of 2009

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brother's son of Kulandaiveu Muthiriar. Kulandaivelu Muthiriar executed a Will, on 30/09/1977 in favour of the plaintiff and the first defendant. It was validly executed, acted upon after the death of Kulandaivelu Muthiriar, since he died on 08/07/1987.

3.After that, the plaintiff and the first defendant were in enjoyment. Even in the Will, Kulandaivelu Muthiriar made a provision for the maintenance of the second wife Mottai Ammal. Mottai Ammal died 10 years back. So, except the plaintiff and the 1st defendant, no other persons have any right or title over the properties. The plaintiff demanded partition of half share with the first defendant. At that time, the defendants 2 to 6 made claim over the properties. So, the suit is laid for partition and separate possession of his half share and costs.

4.**Statement filed by the third defendant:-** The Will, dated 30/09/1977 was canceled by another Will, dated 05/9/1986. By that document, he bequeathed the suit property in favour of the defendants 4 to 6. The Will. dated 30/09/1977 is no more in existence, never came into force. So, neither the plaintiff, nor the first defendant has got any right in the properties. Even the original



SA(MD)No.771 of 2009

Will was not produced in the court. The plaintiff and the first defendant did not behave properly with Kulandaivelu Muthiriar as expected. So the Will was validly cancelled by Kulandaivelu Muthiriar. Prays for dismissal of the suit.

5. On the pleading of both parties, The trial court framed the following issues:-

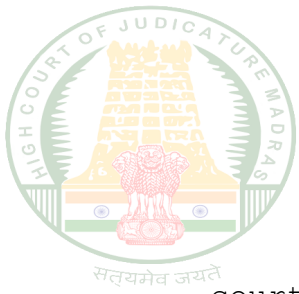
(1) Whether the Will, dated 30/09/1977 is true and valid?

(2) Whether the Will, dated 05/09/1986 is true, valid and acted upon?

(3) Whether the plaintiff is entitled to the relief of partition as prayed for?

(4) To what relief, the plaintiff is entitled?

6. On side of the plaintiff, he was examined himself as PW1 and 4 documents were marked. On the side of the defendants, the third defendant was examined as DW1 and 5 documents marked.



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SA(MD)No.771 of 2009

7. At the conclusion of the trial process, the trial court dismissed the suit without costs. Against which, Appeal in AS No.176 of 2008 was filed before the Principal District, Tiruchirappalli, which also came to be dismissed, concurred with the judgment and decree of the trial court.

8. Against which, this second appeal is preferred by the appellants.

9. At the time of admission, the following substantial questions of law were framed:-

(1) Whether the courts below are right in holding that when the Will is admitted still it requires proof of execution under Section 68 of Indian Evidence Act?

(2) Whether the Courts below are right in holding that the appellants have failed to prove the execution of Will when under Section 68 of Indian Evidence Act, admitted fact need not be proved?

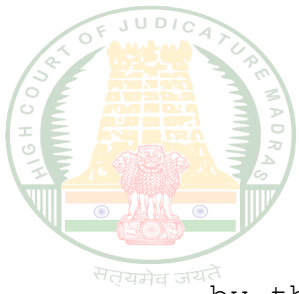


10.Heard both sides.

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11.Before we enter into the main issue, the admitted facts may be kept in mind. One Kulanthivelu Muthiraiar was married to one Ammani Ammal. She was his first wife. There was no issue to them. Later, Kulanthaivelu Muthiraiar married Mottai Aammal as second wife. During the subsistence of the second marriage, he married one Kunjammal. Through Kunjammal, he had a daughter by name Mariyayee. Mariyayee was married to the third defendant herein. To them, the defendants 4 to 6 were born. Later, Kulanthivelu Muthiraiar married the second defendant Angammal as is 4th wife. The defendants 3 and 4 are brother and sister. The first wife Ammani Ammal died without any issues. Now the third wife, Kunjammal died. Now Mariyayee is also dead. This is the admitted facts of both sides.

12.Now the plaintiff says that the third marriage performed by Kulanthivelu Muthiraiar with Kunjammal and later with Angammal are not valid under law, since the second marriage between him and Mottai Ammal was subsisting on the date of the subsequent marriages. We need not concentrate much upon this point, whether all the marriages were invalid under law. This issue is beyond the scope of the subject matter.



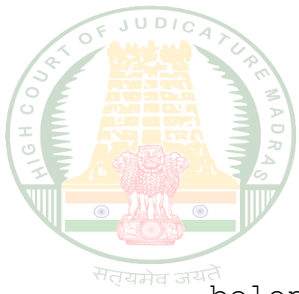
SA(MD)No.771 of 2009

WEB COPY

13.Now, the plaint is based upon the Will executed by the Kulandaivelu Muthiraiar, on 30/09/1977 bequeathing the suit property in favour of the plaintiff and the first defendant herein. Now, according to him, a provision was made for the maintenance of Mariyayee. Now Mariyayee is also no more. Now, they became the absolute owner of the property. Partition must be effected between the plaintiff and the first defendant.

14.The first defendant remained ex-parte for obvious reasons. The defendants 2 to 6 alone contested the matter. According to them, Kulandaivelu Muthiraiar during his life time, thought it fit to cancel the Will in favour of the plaintiff and the first defendant and executed the Will in their favour by cancelling the earlier Will.

15.It is a short statement. Based upon the same, the trial court framed the issues. At the conclusion of the trial process, the trial court accepted the Will under Ex.B2, dated 05/09/1986 in favour of the defendants 4 to 6 and dismissed the suit filed by the plaintiff. Against which, appeal was preferred before the District Court, it also came to be dismissed by confirming the decree and judgment of the trial court. Against, which this second appeal is preferred.

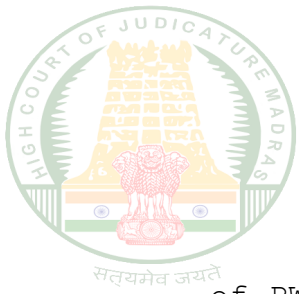


SA(MD)No.771 of 2009

WEB COPY

16.The fact that the suit property originally belonged to Kulandaivelu Muthiraiar is admitted by both sides. Which one of these two Wills are genuine, true or acted upon is the point to be considered. Now, both the courts concurrently held that Ex.B2 was validly executed while Kulandaivelu Muthiraiar was in sound disposing state of mind, thought it fit to cancel Ex.A1 and validly executed Ex.B2. Now the substantial question of law is framed as if the trial court as well as the appellate court did not consider the fact that by virtue of execution of Ex.B2, the execution of Ex.A1 was admitted by Kulandaivelu Muthiraiar himself, so there is no necessity for the plaintiff to examine any one of the attesting witnesses to Ex.A1 to prove the Will as per section 68 of the Indian Evidence Act.

17.When the execution of both documents are in dispute, it is the primary duty of the plaintiff to prove the execution of Ex.A1 by examining any one of the attesting witnesses. *Dehors*, the cancellation deed and the execution of the Will in favour of the defendants 4 to 6. Merely because the recital will show the cancellation by the subsequent Will, the duty cast upon the propounder of the Will to prove the same by examining any one of the witnesses is not taken away.



SA(MD)No.771 of 2009

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18.Now in this context, we will go to the evidence of PW1. He would say that the Will, dated 05/09/1986 is a fabricated one. Kulandaivelu Muthiraiar never cancelled the Will, dated 30/09/1977 in their favour. When that is his consistent and strong plea, he ought to have examined any one of attesting witnesses to prove Ex.A1. The contention that since the execution of Ex.A1 is admitted in Ex.B2, he need not examine any one of the attesting witnesses is not correct on record. As mentioned in his evidence, he strongly denies the execution of Ex.B2.

19.Now we will go further. He would say that the original Will was missing, so he produced the certified copy. When the plaintiff traces his title and right on the basis of the Will, unless the non-availability of the original document is established, secondary evidence under section 65 of the Indian Evidence Act is not permissible under law. Here, absolutely there is no evidence to show that the original document was misplaced or missing. This was pointed out by the trial court as to the inconsistent plea. In this regard, he would say that even before filing of the suit, the original document was missing. But during the course of cross examination, he will contradict himself by saying that the original Will was retained by Kulandaivelu Muthiraiar. So, the non-



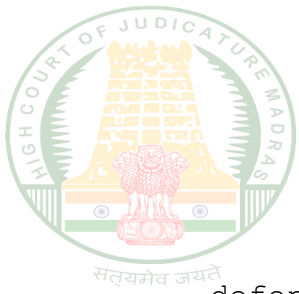
SA(MD)No.771 of 2009

WEB COPY

availability or missing of the original document was not properly established by the appellants/plaintiffs. So, this is the serious issue, which was rightly taken up by the trial court and the appellate court.

20.During the course of cross examination, he would admit that Kulandaivelu Muthiraiar executed a deed in favour Mariyayee and her children bequeathing all of his properties. So, during his cross examination, he goes against his pleadings. Again, he would say that the document, dated 05/09/1986 is not true. So, the contradictory plea taken by the plaintiff during the course of the evidence does indicate that he is not consistent in his plea.

21.Now regarding the availability and non-availability of the attesting witnesses, he would say that even before filing of the suit, all the attesting witnesses were dead. But no death certificates were produced or no steps were taken to prove that Ex.A1 was validly executed by Kulandaivelu Muthiraiar, by complying the provision under section 69 of the Indian Evidence Act, no steps were taken by the appellant in this regard. It was validly and correctly appreciated by the trial court that Ex.A1 was not proved as per law. So, no interference is called for on that finding.



SA(MD)No.771 of 2009

WEB COPY

22.Now we will go to the evidence on the side of the defendants. DW1 is the third defendant. As mentioned above, he is the husband of Mariyayee and the father of the defendants 4 to 6. He is one of the attesting witnesses to Ex.B2. He would say that one Venkatachari has signed as attesting witness. But Venkatachari died. Kulanthaivelu Muthiriar appeared before the Sub Registrar and admitted his thumb impression in the Will. After satisfying the requirement, the Sub Registrar validly registered the document. At that time, he was hale and healthy and was in sound disposing state of mind. He was cross examined to the effect that except A1, no other document in the form of Will was executed by the Kulandaivelu Muthiraiar and Ex.B2 is a fabricated document; The Will under Ex.A1 was already acted upon and so, Ex.B2 never came into effect.

23.Now we will go to the point of attestation. DW1 even though party to the suit, is not a direct beneficiary under Ex.B2 and beneficiaries are the childrens. In the Will, it has been stated that he already executed a Will in favour of the plaintiff and the first defendant.



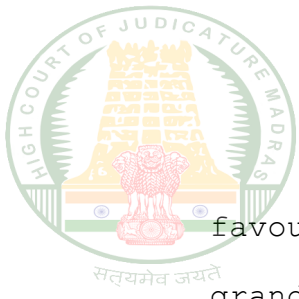
SA(MD)No.771 of 2009

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24.He has narrated the entire life story, which runs like this. He married one Ammani Ammal first time. She died without any issue. He married Mottai Ammal as the second wife. But she separated from him and living separately. So, he married Kunjammal. Through her, Mariyayee was born. But within a week from the date of birth of Mariyayee, Kunjammal died. So, he compelled to marry Angammal for taking care of the children. She was taken care by Angammal. Now Mariyayee was married to Angammal brother's Parimanan(DW1). Now they are happily living and begotten three children. The properties absolutely belonged to him.

25.This narration of the life story does indicate that Kulanthaivelu Muthiraiar was a genuine person and not a person who indulged in illegally marrying more woman as projected by the plaintiff.

26.Now he would further say that the reason for the cancellation of Ex.A1. In 1977, he executed a Will in favour of the plaintiff and the first defendant. But subsequent to that, the plaintiff and the first defendant started creating trouble to him. They indulged in selling the property even during his life time. So, he changed his mind, bequeathing and creating life interest in



SA(MD)No.771 of 2009

favour of Mariyayee and after attaining majority, the grand-children must get absolute right.

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27.So, this appears to be a genuine reason stated by the Kulandaivelu Muthiraiar. We can also verify the genuineness of this statement or averments in the Will from the facts brought on record, while examining DW1.

28.It was suggested to DW1 that because of the sale effected by DW1 and Angammal through A3 and A4, the Will came into effect in 1977 itself. So, Ex.B2 did not come into force.

29.As mentioned in the plaint, Kulandaivelu Muthiraiar died, on 6/07/1987, which fact is not denied by both sides. When this being so, how the plea was taken that Ex.A1 came into effect in 1977 itself is not known. So, this clearly shows that an attempt was made by the plaintiff and the first defendant to encumber the property even during the life time of Kulanthaivelu Muthiraiar.

30.We can take another angle also. When the grand-childrens are available to Kulandaivelu Muthiraiar, the reason for execution of Ex.A1 in favour of the plaintiff



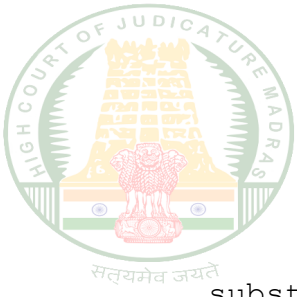
SA(MD)No.771 of 2009

WEB COPY

and the first defendant also assumes importance. In Ex.A1 even though, it was not validly proved by the plaintiff, it has been stated by him that he was taken care by the first defendant and the plaintiff properly; Neither Mariyayee nor her childrens have any right in the property; He has created interest in favour of the 4th wife and the 2nd wife, of course with some conditions.

31.The reason for exclusion of the his direct legal-heirs is not specifically stated by him. It has been simply stated that a provision is made by him to the 4th wife and no right is available to Mariyayee and her childrens. Due to the absence of the attesting witness to the document, this court is not in a position to verify the mental state of Kulandaivelu Muthiraiar at that time.

32.Now we will go to the reason under Ex.B2 for cancellation of Ex.A1. It is quite, but natural that a person will choose his own legal heirs than that of the brother and childrens of brother. So, this appears, because of change of mind and character of the first defendant and the plaintiff, it was cancelled. Why the first defendant remained *ex-parte* as mentioned above is very obvious. Even before this court, he has not appeared and supported the case of the plaintiff.



SA(MD)No.771 of 2009

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33.So, for all these reasons stated above, both substantial question of law are answered that no illegality, either by the trial court or by the appellate in appreciating Ex.A1 in a proper perspective are committed. Accordingly, both the substantial questions of law are answered against the appellants.

34.In the result, this second appeal fails and the same is **dismissed** with costs, confirming the judgment and decree of the courts below.

13/03/2025

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To,

- 1.The Principal District Judge,
Tiruchirappalli.
- 2.The II Additional Subordinate Judge,
Tiruchirappalli.
- 3.The Section Officers,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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SA(MD)No.771 of 2009

G.ILANGO VAN, J

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SA (MD) No. 771 of 2009

13/03/2025