



S.A.(MD).No.250 of 2013

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.01.2025

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.250 of 2013

and

Cross.Obj(MD)No.3 of 2016 and
M.P.(MD)No.2 of 2013

S.A.(MD).No.250 of 2013:

- 1.Ramasamy
- 2.Ramakrishnan (Died)
- 3.Bharathiraja
- 4.Seethalakshmi
- 5.Gomathi Shankar

... Appellants

(Appellants 3 to 5 are brought on record as LR's of the deceased 2nd appellant, vide Court order, dated 17.12.2024, made in CMP(MD)Nos.18227 to 18229 of 2024 in SA(MD)No.250 of 2013)

/Vs./

- 1.Subbulatchimi @ Latchimi
- 2.Latchimi
- 3.Murugan
- 4.Velaiah Mudaliar
- 5.Mariselvam

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree, dated 27.03.2012, made in A.S.No.84 of 2010



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on the file of the Sub Court, Sankarankovil, reversing the Judgment and Decree, dated 02.11.2010, made in O.S.No.174 of 2007 on the file of the District Munsif Cum Judicial Magistrate Court, Sivagiri.

For Appellants	: Mr.F.X.Eugene
For R1	: Mr.S.Ramesh @ Ramiah
For R2 to R5	: No appearance

Cross.Obj.(MD).No.3 of 2016:

Subbulakshmi @ Lakshmi

... Cross Objector

/Vs./

1.Ramasamy
2.Ramakrishnan (Died)
3.Lakshmi
4.Murugan
5.Veliah Mudaliar
6.Mariselvam
7.Bharathiraja
8.Seethalakshmi
9.Gomathi Shankar

...Respondents

(Respondents 7 to 9 are brought on record as LR's of the deceased 2nd respondent, in view of the order of this Court, dated 17.12.2024, made in CMP(MD)Nos. 18227 to 18229 of 2024 in SA(MD)No.250 of 2013)

PRAYER: Cross Objection filed under Order 41 Rule 22 of the Civil Procedure Code, against the Judgment and Decree, dated 27.03.2012, made in A.S.No.84 of



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2010 on the file of the Sub Court, Sankarankovil, reversing the Judgment and Decree, dated 02.11.2010, made in O.S.No.174 of 2007 on the file of the District Munsif Cum Judicial Magistrate Court, Sivagiri.

For Cross Objector : Mr.S.Ramesh @ Ramiah

For R1, R7 to R9 : Mr.F.X.Eugene

R2 : Died

COMMON JUDGMENT

The present second appeal is preferred by the defendants 1 and 2 against the judgment and decree, dated 27.03.2012, passed in A.S.No.84 of 2010 on the file of the Sub Court, Sankarankovil, reversing the judgment and decree, dated 02.11.2010, passed in O.S.No.174 of 2007 on the file of the District Munsif Cum Judicial Magistrate Court, Sivagiri.

2. The plaintiff in the suit is the 1st respondent herein and the defendants 1 and 2 in the suit are the appellants herein. The defendants 3 to 6 in the suit are the respondents 2 to 5 herein. The legal heirs of the deceased 2nd



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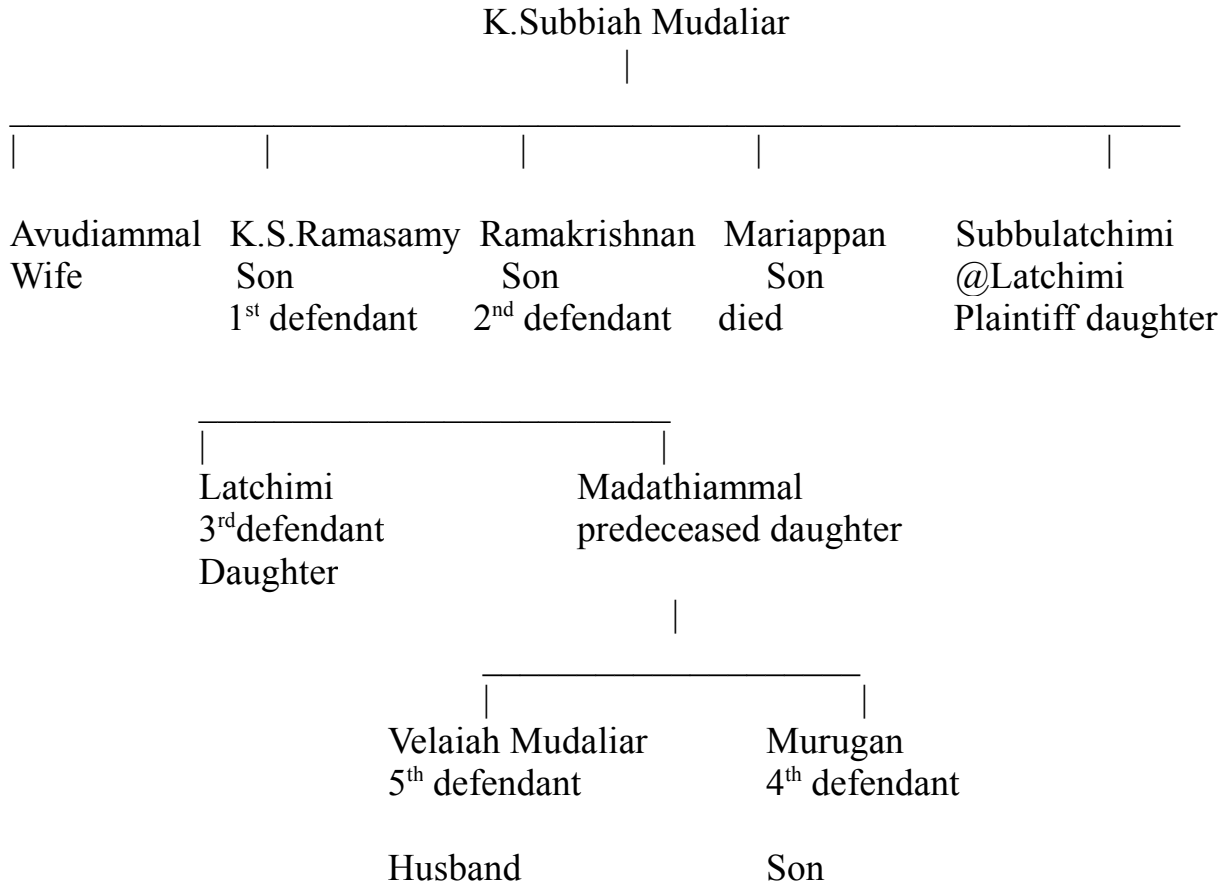
appellant herein / 2nd defendant are impleaded as appellants 3 to 5 herein. The plaintiff has filed the present cross objection. For the sake of convenience, the parties are referred as plaintiff and defendants, as per the ranking in the suit.

3. The suit is filed for partition seeking 11/35th share in the suit properties and to grant individual possession of the suit properties. The averments stated in the plaint are that the suit properties and some other properties are self-acquired properties belonged to Ramasamy Mudaliar. The said Ramasamy Mudaliar died leaving Lakshmana Mudaliar and Subbaiya Mudaliar as legal heirs and they made a partition among themselves, wherein the 1st item of the schedule properties was allotted to Subbaiya Mudaliar. Thereafter the said Subbaiya Mudaliar bought the assets in items 2 to 5 through the income earned in his business and was enjoying the same. The said Subbaiya Mudaliar married one Avudaiammal and had six children. However, one Madathiammal had predeceased Subbaiya Mudaliar and she has two sons who are arrayed as 5th and 6th respondents in the suit. Thereafter, Subbaiya Mudaliar died in the year 2000 leaving behind his wife and six children as legal heirs which is stated in the family



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tree given below:



The plaint states that the plaintiff is entitled to 1/7th share, the mother Avudaiammal is entitled to 1/7th share and the mother has executed a Will, dated 11.05.2003 bequeathing her share of 1/7th to the plaintiff and the plaintiff was enjoying 2/7th share i.e. her share along with her mother's share in the suit properties. In the meanwhile, the plaintiff's brother Mariappan died and hence the



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plaintiff is entitled to $1/5^{\text{th}}$ of $1/7^{\text{th}}$ share of Mariappan. Hence, the plaintiff is entitled $11/35^{\text{th}}$ ($1/35 - 10/35$) share in the suit properties and demanded partition, but the defendants evaded to divide the properties. On the other hand, on 10.09.2007, the defendants 1 and 2 had stated that they intended to sell the property to the 6^{th} respondent and encumber the property, further refused to divide the $11/35^{\text{th}}$ share to the plaintiff. Hence, the plaintiff has filed the present suit seeking $11/35^{\text{th}}$ share in the suit properties with independent possession.

4.1 The 1^{st} defendant has filed a written statement which is adopted by defendants 2 and 6, wherein it is stated that except para 2 to 4 of the plaint, the other paras are false and only the plaintiff ought to prove the same. The averments in para 5 regarding the legal heirs and their share is denied as false. The averments in paras 6, 7, 8 and 9 regarding execution of Will and the enjoyment by the plaintiff along with mother's property, seeking $2/7^{\text{th}}$ share along with mother's share, after demise of one of the brothers namely Mariappan, the entitlement of the plaintiff as $11/35^{\text{th}}$ share are all denied as false. The correct facts are that the plaintiff, 1 to 3 defendants are sons and daughters, the 4^{th} defendant is grandson



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and 5th defendant is son-in-law of Late. Subbaiya Mudaliar. The said Late Subbaiya Mudaliar had purchased the 3rd, 4th and 5th schedule of properties from Mariyappa Mestiri and Ganesan in the year 1992. The 1st defendant is the eldest son of the said Subbaiya Mudaliar and the 1st defendant was assisting the father in the business and agricultural activities. On 05.02.1999, Subbaiya Mudaliar had gifted the 3rd, 4th and 5th schedule of properties to his 1st son, i.e., 1st defendant, which was vacant sites. Thereafter, the 1st defendant obtained plan approval from Vasudevanalloor Municipality and obtained loan from the Cooperative Bank and constructed house which was concealed by the plaintiff deliberately.

4.2 The 2nd item in the schedule of properties admeasuring east-west 5½ thachumozham north-south 15 thachumozham is a house which was purchased from the own income of the Late.Subbaiya Mudaliar and was living in the 2nd schedule property with his family. The 1st defendant was helping the father in his business and agriculture. After the demise of the father, his wife Avudaiyammal was living there. Their son namely Mariappan has also died subsequently, the said Mariappan also lived in the 2nd schedule property until his life time. The last rites



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of Avudaiyammal and Mariappan were performed by the 1st defendant. Since the 1st defendant was having two daughters and since the 1st defendant was poor, the plaintiff and the defendants 2 to 4 granted the 2nd schedule property to the 1st defendant. As and when the 1st defendant request to register the same in his name, it was agreed that others would come and affix their signature, after agreeing to do so, now the plaintiff has preferred the present suit falsely. As far as the 1st schedule of property admeasuring 56½ cents was allotted to Subbaiya Mudaliar in the partition, when partition was made along with his brother Lakshmana Mudaliar son of Ramasamy Mudaliar. The said Subbaiya Mudaliar mortgaged the 1st item orally to his adjacent land holder, i.e., 6th defendant. Since Mariappan and defendants 1 and 2 were in poverty after the demise of Subbaiya Mudaliar, they were not able to redeem the mortgage. Therefore, defendants 1 and 2 and Mariappan decided to sell the 1st schedule property to the 6th defendant Mariselvam itself. When this decision was conveyed to the plaintiff and defendants 3 to 5, they all accepted the same. But defendants failed to come before Register Office when the 1st schedule property was sold to the 6th defendant. In 2004, the plaintiff filed a case against the defendants claiming that



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her father has agreed to pay Rs.45,000/- to the plaintiff and the case was allowed in her favour. But on appeal in A.S.No.65 of 2005, the appeal was allowed in favour of the defendants and the suit was dismissed by holding that the said receipt was created fraudulently. While the facts are being so, the plaintiff had filed the suit by concealing the facts. The plaintiff has filed the present to harass the defendants. The plaintiff is not entitled to the relief sought for in the plaint. Hence, the defendants 1, 2 and 6 prayed to dismiss the suit.

5.After considering the pleadings, the Trial Court framed the following issues:

- “1. Whether the plaintiff is entitled to 11/35 share in the suit properties?*
- 2. Whether the plaintiff is entitled to any other relief”*

The defendants 3 to 5 remained exparte. The plaintiff was examined as PW1, one Paramasivan, the attesor of the Will was examined as PW2 and one Murugaiya, the attesor of the Will was examined as PW3 and Exhibits A1 to A4 were marked. On the side of the defendants, the 1st defendant was examined as DW1 and



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Exhibits B1 to B11 were marked. After hearing the arguments of both sides and perusing the documents and depositions, the Trial Court dismissed the suit.

6. Aggrieved over the same, the plaintiff preferred an Appeal Suit, wherein the following points for consideration was formulated:

- i. The Release Deed executed in Ex.B11 would indirectly indicate that the plaintiff is having share in the plaint schedule properties, in such case whether the defendants can deny partition to the plaintiff?
- ii. Whether the Trial Court judgement is correct?
- iii. Whether the appellant is entitled to any other reliefs?

After considering the rival submissions the appeal was allowed. Aggrieved over the same, the defendants 1 and 2 have preferred the present second appeal.

7. The second appeal was admitted on the following substantial questions of law:



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“1. Whether the First Appellate Court is correct in not accepting the Exhibit B2, B10 and B11 with respect to the claim of the defendants, but accepting that the plaintiff is entitled to 1/5th share in the same property, as the plaintiff is having as successor:

2. Whether the First Appellate Court is correct in rejecting the Exhibit B2 gift deed as it is denied by the plaintiff which is against the Evidence Act that a gift deed has to be proved only when it is denied by the executor himself, even without a denial as reply statement by the plaintiff?”

8. The Learned Counsel appearing for the defendants / appellants submitted that the father Subbaiya Mudaliar had executed gift deed dated 05.02.1999 marked as Ex.B2, the said executor had not denied by the execution, hence the same need not be proved. The said contention cannot be accepted. The 1st defendant claims benefits under the said gift deed. It is settled law that person who claim benefits under the document, then the persons ought to prove the same the same was executed by the executor. The 1st defendant has not produced any witness to substantiate and prove the same. Even the other defendants / siblings have not come forward to dispose and speak about the gift deed executed in



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favour of the 1st defendant. The 1st defendant had produced 2 electricity bills, 5 tax receipts, 2 water tax receipts and 2 professional tax receipts in Ex.B4 to Ex.B7 but the 1st defendant had not clarified the same was paid to which property, whether it is item 3 or 4 or 5. Further the 1st defendant had not clarified whether there was mutation of revenue records based on the gift deed. The 1st defendant had claimed he had obtained loan from cooperative bank and the same was repaid, however the same cannot prove the title obtained through gift deed, but only would prove that the 1st defendant as an elder son was handling the property after the demise of the father. Therefore, this Court is of the considered opinion that the 1st defendant failed to prove the Ex.B2 gift deed.

9. As far as Ex.B10 is concerned the defendants have stated that the same was executed by the deceased Mariappan releasing his share to the defendants 1 and 2. But it is seen and as rightly held by the Appellate Court, that the same has not been averred in the written statement. Further Ex.B10 ought to be considered as release deed, if so then the same ought to be compulsorily registered by paying appropriate fees. When the Ex.B10 was not stated in the



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written statement and it is not registered, in such circumstances this Court is of the considered opinion that the Ex.B10 was not proved.

10. As far as Ex.B11 is concerned it is the release deed executed by Madaithiammal clan. As rightly held that said document would indicate that all the legal heirs were jointly enjoying the property and then the plaintiff and other defendants are having equal share in all the properties. However, the said Ex.B11 would bind on the Madaithiammal clan as far as their share is concerned which has been released in favour of the defendant.

11. As far as cross objections is concerned that plaintiff had submitted that the Ex.A3 Will has been proved as per law. But it is seen and as rightly held by the appellate Court that there is no marking near the thumb impression. Further both the attestors has not stated that they had seen while the mother affixing her thumb impression, which is vital point to prove the Will. Therefore, this Court is of the considered opinion that the Will has not been proved as per law.



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12. Since the Will executed in favour of the plaintiff was not proved and since the gift deed executed in favour of the 1st defendant was not proved, this Court is of the considered opinion that all the legal parties are entitled to 1/7th share in the suit scheduled properties. In short, this Court is confirming the said finding that all the parties are entitled to 1/7th share. Also confirming that the mother's share shall be divided as 1/5th and the deceased Mariappan's share shall be divided into 1/5th share. Hence, the judgment and decree passed by the Appellate Court is confirmed. However, Ex.B11 is proved and the Madathiammal share would go to defendants as per Ex.B11. The parties are entitled to file a final decree petition before the Appropriate Court for dividing the properties in meters and bounds.

13. With the above said observations, the second appeal is disposed of and the cross objection is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No

NCC : Yes / No

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TO:

1. Sub Court, Sankarankovil.
2. District Munsif Cum Judicial Magistrate Court,
Sivagiri.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

Tmg

Judgment made in
S.A.(MD)No.250 of 2013

Dated:
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