



A.S.(MD)No.4 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 03.03.2025

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
and
THE HONOURABLE MR.JUSTICE M.JOTHIRAMAN**

**A.S.(MD)No.4 of 2016
and
C.M.P.(MD)Nos.165 of 2016 & 15765 of 2024**

1.K.Chandrakani

2.K.Maragatham

3.K.Vani Devi

4.K.Lakshmi Devi

5.K.Santhanamuthumari

... Appellants /
Defendants

Vs.

1.S.Vijaya @ Viji

2.Ambiga

3.Arasi

... Respondents /
Plaintiffs



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Prayer : Appeal Suit filed under Section 96 of Civil Procedure Code against the judgment and decree passed in O.S.No.61 of 2012 on the file of I Additional District Judge, Tuticorin dated 07.09.2015.

For Appellants : Mr.H.Thayumanaswamy

For Respondents : Ms.K.Shwathini
for Mr.G.Prabhu Rajadurai

JUDGMENT

(Judgment of the Court was made by G.R.Swaminathan J.)

Heard both sides.

2.The defendants in O.S.No.61 of 2012 on the file of the First Additional District Judge, Tuticorin are the appellants herein. It was a suit for partition. The suit property belonged to one Shanmugavel Nadar. The said Shanmugavel Nadar passed away in the year 1975 leaving behind a son (Kumaresan) and 7 daughters. Kumaresan got married to the first appellant Chandrakani. Through the said wedlock, 4 sons and 7 daughters were born. Shanmugavel Nadar had executed a registered Will on 05.04.1972. The suit properties were bequeathed by Shanmugavel Nadar in favour of his grand children (born and to be born through his son Kumaresan). Unfortunately, all the 4 grand sons born to Kumaresan



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and Chandrakani died intestate. They were also unmarried. All of them had predeceased Chandrakani (first appellant herein). According to Chandrakani, in view of the operation of the Will and demise of her 4 sons, the entire property had devolved on her. Chandrakani had executed settlement deeds in favour of defendants 2 to 5. In other words, four daughters of Chandrakani were the beneficiaries of her munificence. The remaining 3 daughters who were left out filed a partition suit in O.S.No.61 of 2012. The first plaintiff examined herself as PW1. One Sathananthan was examined as PW2. Ex.P1 to Ex.P9 were marked. Chandrakani examined herself as DW1. The second defendant who is one of the daughters of Chandrakani was examined as DW2. Ramachandra Boopathi was examined as DW3. Ex.B1 to Ex.B11 were marked. After considering the evidence on record, the trial Court passed preliminary decree on 07.09.2015 granting 3/12th share in favour of the plaintiffs. Challenging the same, this appeal has been filed.

3.During the pendency of the appeal, Chandrakani passed away. The appellants have filed C.M.P(MD)No.11239 of 2023 for reception of additional evidence.



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4.The learned counsel for the appellants reiterated all the contentions set out in the memorandum of grounds of appeal. He pointed out that the Will executed by Shanmugavel Nadar was produced before the Court below at the time of evidence. Unfortunately, it was not formally marked. As a result, the Court below treated it as an unmarked document and proceeded on the premise as if the Will executed by Shanmugavel Nadar was not in the picture at all. He pointed out that in the said Will, Shanmugavel Nadar had bequeathed properties in favour of his daughters and that it was also duly acted upon. He therefore called upon this Court to permit the appellants to bring additional evidence on record for an opportunity to prove the Will executed by Shanmugavel Nadar. He submitted that that alone would effectuate the actual intention of the original testator.

5.Per contra, the learned counsel for the plaintiffs / respondents submitted that the impugned judgment and preliminary decree passed by the Court below do not call for interference.



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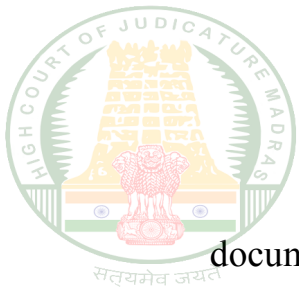
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6.We carefully considered the rival contentions and went through the evidence on record.

7.Two points arises for determination: a) Whether C.M.P(MD)No. 11239 of 2023 filed under Order 41 Rule 27 of CPC deserves to be allowed; b) Whether the allocation of share made by the Court below is justified.

8.The case of the appellants is centred on the premise that the Will dated 05.04.1972 executed by Shanmugavel Nadar has already been acted upon and that they should be given one more opportunity to prove the same. According to the appellants, the said document was left unmarked through inadvertence. We are not impressed with this argument.

9.As rightly pointed out by Ms.Swathini, learned counsel for the respondents, this exercise was already undertaken. The appellants had filed I.A.No.74 of 2014 before the Court below for marking the



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document. The said IA was dismissed. Aggrieved by the same, the appellants had filed C.R.P(PD)(MD)Nos.2557 to 2559 of 2014 and the same were also dismissed. If the appellants had not filed any revision before this Court questioning the refusal of Court below to mark the said document, they can certainly raise it as a point of attack under Section 105 of CPC. But then, having challenged the order before the High Court in revision and having been unsuccessful, it may not be open to the appellants to once again file the very same document as additional evidence.

10.The learned counsel for the respondents points out though this issue was raised in the decision reported in **(2015) 1 SCC 665 (Surjit Singh & Others Vs Gurwant Kaur & Others)**, the point was left undecided. But then, the learned Judge of this Court in S.A.Nos.1721 and 1858 of 2000 dated 21.02.2019 had held that if any revision is filed challenging the interlocutory order and in the said revision, the interlocutory order is confirmed, it is not open to the appellant to challenge the said interlocutory order in the appeal filed against the decree. It was also made clear that the interlocutory order which is



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confirmed by the High Court in revision will operate as res judicata. We

respectfully agree with the aforesaid legal proposition laid down in the aforesaid decision. Therefore, the first point is answered against the appellants and the petition for adducing evidence stands dismissed. If the appellants had produced the original Will before us and had given convincing explanation as to why it could not be produced before earlier probably our approach would have been different. Since the very same document is sought to be produced before us by way of additional evidence we have chosen to negative the appellants' request.

11.The case of the appellant is based on the Will executed by Shanmugavel Nadar. Since the appellants are the propounders of the Will, they are obliged to prove the same in the manner laid down in the Section 68 of the Indian Evidence Act, 1872. They had failed to do so. Therefore, the Court below was justified in proceeding on the premise that there was no Will in operation as far as the suit schedule properties are concerned.



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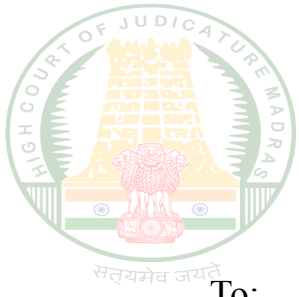
12.It is not in dispute the the suit schedule properties belong to Shanmugavel Nadar. Following his demise, it is devolved on his son Kumaresan. Kumaresan passed away in the year 1989. He left behind his wife, 4 sons and 7 daughters as his surviving legal heirs. Thus, the suit properties devolved on as many as 12 persons. Each of them was entitled to 1/12th share. All the four sons died unmarried and intestate. Hence their shares devolved on the mother Chandrakani / first appellant herein. The first appellant herein had 5/12th share in the suit schedule properties. She was entitled to settle her share in the suit properties. That is why the Court below held that the plaintiffs together were entitled to 3/12th share. The approach adopted by the Court below is arithmetically sound and legally correct. Interference is not warranted.

13.This Appeal Suit is dismissed accordingly. No costs. Consequently, connected miscellaneous petitions are closed.

(G.R.S. J.) & (M.J.R. J.)
03.03.2025

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
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I Additional District Judge,
Tuticorin.



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and

M.JOTHIRAMAN, J.

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