

AS.(MD)No.143 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 28.03.2025

Pronounced On : 24.04.2025

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
AND
THE HON'BLE MR.JUSTICE M.JOTHIRAMAN**

A.S.(MD)No.143 of 2017
and
C.M.P.(MD)No.8404 of 2017

1.S.Arulanand (Died)

2.Sebasthiammal

3.Arockia Karna

4.Deva Sagaya Livins

... Appellants

(Appellants 2 to 4 are brought on record as Lrs of the deceased Sole Appellant vide Court dated 24.02.2025 made in CMP.(MD)Nos.2888 to 2890 of 2025 in AS.(MD)No.143 of 2017)

Vs.

1.Arockiamary

2.Savariammal

Chinnammal (Died)

... Respondents

1/21



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PRAYER : First Appeal filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 14.09.2016 passed in O.S.No.124 of 2014 on the file of the learned Principal District Judge, Trichirappalli.

For Appellants : Mr.P.Arun Jeyatram

For Respondents : Mr.M.Saravanan

JUDGMENT

(Judgment of this Court was delivered by **M.JOTHIRAMAN J.**)

The unsuccessful defendant has preferred the present appeal. Originally, the plaintiffs 1 to 3 have filed a suit claiming $\frac{3}{4}$ share. Pending suit, the third plaintiff died on 03.08.2015 and she was spinster, then the plaintiffs seek $\frac{2}{3}$ share in the suit properties and the defendant is entitled $\frac{1}{3}$ share. The Court below passed a preliminary decree for partition of $\frac{2}{3}$ share of the plaintiffs 1 and 2 items 3 & 4 in suit A schedule and item 1 in B schedule. In respect of items 1 & 2 in A schedule and items 2 and 3 in B schedule, the suit is dismissed. For the sake of convenience, the parties are referred to as per their rank before the trial Court.



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2. Brief case of the plaintiffs is as follows:-

The plaintiffs are the sisters of the defendant. One Anthoniammal is their mother and Sebasthiyar is their father. The suit 'A' schedule properties belonged to the mother Anthoniammal and she had been in possession and enjoyment of the same till her death on 29.07.2003. The suit 'B' schedule properties belongs to father Sebasthiyar and he had been in possession and enjoyment of the same till his death on 03.12.2010. The suit properties were purchased by their parents under sale deeds. He died intestate leaving behind the plaintiffs and the defendant. The parents had given portion of the income to the plaintiffs 1 and 2 from the suit properties and third plaintiff was in the care and custody of them since she was a spinster. The defendant is in possession of the suit property and enjoying the entire income and he is bound to render accounts in respect of the plaintiffs' share. On 17.03.2014 the plaintiffs have issued a lawyer notice demanding partition. He received the same and sent reply notice to the plaintiffs on 19.05.2014. Hence, the suit.

3. Brief case of the defendant is as follows:-



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After death of the parents, the defendant alone is in possession and paying portion of the income to the third plaintiff as stated in the Will executed by their father on 14.05.2010. During life time of his father, he had sold the properties comprised in S.F.Nos.270/1, 271/6 in 'A' schedule on 19.05.2000 and another property in the same schedule in S.F.No.274/3 also been sold by the plaintiffs, defendant and their father through sale deed dated 19.11.2009. On 12.09.1996, their father had sold property in S.F.Nos.270/7, 254/1 in 'B' schedule property. The properties were sold by their father only to meet out the debts received at the time of marriage of the plaintiffs 1 and 2. the suit is not maintainable and the same is liable to be dismissed.

4. Based on the above pleadings, the trial Court has framed the issues and recasted as follows:-

- i) Whether the suit properties mentioned in the A schedule are the ancestral property of Late Anthoniammal?*
- ii) Whether the suit properties mentioned in the 'B' schedule are the ancestral property of Late Sabestian?*
- iii) Whether the Will dated 14.5.2010 executed by Sebastian is true, genuine, valid and binding upon the plaintiffs?*



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iv) Whether some of properties have already been disposed off and if so, they have to be deleted from the suit?

v) Whether the plaintiffs are entitled to 2/3rd share in the suit properties?

vi) Whether the defendants are liable for rendition of accounts?

vii) To what further relief the plaintiffs are entitled to?

On the side of the plaintiffs, the first plaintiff herself examined as P.W.1 and marked Ex.A1 to Ex.A11. On the side of the defendant, three witnesses were examined as D.W.1 to D.W.3 and Ex.B1 to Ex.B5 were marked.

5. Findings of the trial Court:-

The suit schedule properties are self acquired properties of Anthoniammal and Sebasthiyar and not ancestral properties. Items 1 to 3 in 'A' schedule properties and items 2 and 3 in 'B' schedule properties were not partitioned in a manner known to law. The Will relied by the defendant is surrounded by suspicious circumstances. The propounder of the Will, the defendant has not chosen to enter into witness box to depose about the Wills Ex.B4 and Ex.B5.



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6.Point for determination in this appeal is that:-

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i)Whether the Wills Ex.B4 and Ex.B5 executed by the Sebasthiyar is true and genuine?

ii)Whether the plaintiffs are entitled to 2/3 share in the suit properties?

7.The learned counsel appearing for the appellant / defendant would submit that Ex.B4 and Ex.B5 Wills have been proved by examining attesting witnesses D.W.2 and D.W.3 in a manner known to law. It is not necessary that the propounder of the Will to come forward to depose evidence, but his wife has deposed evidence as D.W.1 and the same is not fatal of the case. He would submit that D.W.1 is none other than the wife of the appellant / defendant and she has knowledge about the execution of the Will and the impugned judgment and decree passed by the Court below is un-sustainable in law.

8.The learned counsel appearing for the respondents / plaintiffs would submit that the alleged Wills have not been proved in the manner known to law. The propounder of the Will, defendant did not enter into



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witness box to depose evidence. The suit schedule properties are joint family properties of Anthoniammal and Sebasthiyar and the respondents / plaintiffs are entitled to have share.

9.We have considered the submissions made on either side and perused the materials on record.

10.The relationship between the parties are admitted. The mother of the appellant / defendant Anthoniammal died on 29.07.2003. The father of the appellant / defendant Sebasthiyar died on 03.12.2010. The plaintiffs and the defendant are legal heirs of the Anthoniammal and Sebasthiyar. Ex.A1 is the sale deed dated 29.08.2008 stands in the name of the Anthoniammal Ex.A3 patta passbook stands in the name of Anthoniammal. Ex.A4 is the sale deed dated 30.09.1969 stands in the name of Sebasthiyar. Ex.A5 patta passbook stands in the name of Sebasthiyar.

11.According to the plaintiffs, suit 'A' schedule properties belongs to their mother. Suit 'B' schedule properties belongs to their father and both of them died intestate and therefore, as their legal heirs, they are



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entitled for equal share in the suit properties. On the other hand, according to the defendant, some of the properties were sold by their father in his life time and some of the properties were sold by the plaintiffs and the defendant. The properties were sold out by their father only to meet out the debt received at the time of marriage of the plaintiffs 1 and 2. Remaining items properties, the father settled in favour of the defendant by way of Wills executed by the parents. In order to prove the execution of the Wills, the wife of the defendant was examined as D.W.1. She has deposed that her husband was not in a position to depose evidence, in view of the medical complication due to old age. She would depose that their mother-in-law and father-in-law have already sold some items and remaining properties in item 4 in suit 'A' schedule, first item in suit 'B' schedule are in possession and enjoyment of the defendant. She further deposed the mother of the plaintiffs executed Will in Ex.B4 and father also executed Will in Ex.B5 in favour of the defendant and after death, the Wills came into force.

12.It is seen from the evidence that P.W.1 that she did not know about the sale deeds executed by her parents. Ex.B1 sale deed executed



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by Sebasthiar with regard items 1 & 2 in suit 'B' schedule and Ex.B2 is the sale deed executed by Anthoniammal with regard to items 1 & 2 suit 'A' schedule properties. Ex.B3 sale deed executed by Anthoniammal with regard to item No.3 in 'A' schedule property. From Ex.B1 to Ex.B3 would go to show that items 1 to 3 in 'A' schedule properties and items 2 & 3 in 'B' schedule properties have already been sold out and they are not available for partition. Perusal of Ex.A8 reply notice dated 19.05.2014 issued by the defendant wherein it has been stated that the defendant is in possession and enjoyment of the suit schedule properties after demise of his parents through Wills executed by his parents. Further it is also stated that after demise of the parents, the Will came into force.

13.Ex.A8 is the reply notice dated 19.05.2014 issued by the defendant, which reads as follows:-

1)Admittedly the schedule mentioned properties are belongs to parents of my clients. The said Sebasthiar died on 29/03/2010 and mother namely Anthoniammal W/o Sebasthiar died on 29/03/2010 as stated in your notice Para 1 & 2,

2)Selvi Chinnammal has not married and now she is in care custody of my client. After the parent's death the



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schedule mentioned properties are possession enjoyment of my client. The said possession and enjoyment of the schedule mentioned properties have come to by client through the will executed by his parents.

3)After demise of the parents will have become affected as per law the above said wills have been duly attested according to the law the said facts have very much known to your clients. The said facts have been suppressed to you by your client.

4)The remaining facts stated in your notice are not correct. After this notice your clients will file any suits the same will be defended by my client at your clients cost.

In Ex.A8, there is no mention about the date of the Wills. In the written statement, in paragraph No.6 it has been stated as hereunder:-

6.After demise of the parents of plaintiffs and defendant the defendant alone is in possession of the property is correct and paying portion of the income to the third plaintiff as if now as stated in the Will. The said Will have been given by the plaintiffs and the defendant father namely Sabasthiyar on 14.05.2010. The said Will was attested as per the law. After demise of the father of the defendant the said Will has come to force. The said Will is produced herewith and same be read as part and parcel of this written statement.



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14.It is pertinent to mention that Section 68 of the Indian Evidence Act, 1872 states as to how execution of the document required by law to be attested has to be proved. The Will requires to be attested by two witnesses. Therefore, atleast one of the attesting witnesses will have to be examined to prove the execution of the Will. Section 69 of the Indian Evidence Act, 1872 provides for situation if no attesting witnesses can be found. In this case, the defendant had examined D.W.2 and D.W.3 to prove the execution of the Will. It is relevant to cite judgment of the Hon'ble Supreme Court reported in **2025 IMSC 1, Leela Vs. Murugantham**, wherein it has been held that a Will must be proved in terms of the legal mandates made the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

15.It is relevant to refer Section 68 of the Indian Evidence Act, which reads as follows:-

68.Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting



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witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

16.It is relevant to refer Section 63 of the Indian Succession Act, which reads as follows:-

63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed



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that it shall appear that it was intended thereby to give effect to the writing as a will.

(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.

17.D.W.1 has deposed that Ex.B5 unregistered Will dated 14.05.2010 came to be executed by Sebastian in favour of the defendant in respect of itms 2 and 3 in suit 'B' schedule properties. D.W.1 deposed that the testators have clearly mentioned about spending money for solemnizing marriage of the plaintiffs 1 and 2 and third plaintiff remains unmarried and given instructions in the Will that the defendant has to give 10 bags of paddy and required money for her maintenance. Ex.B4 is the unregistered Will dated 14.08.1998 executed by Anthoniammal in respect of item 4 in suit 'A' schedule properties. D.W.2 deposed that he

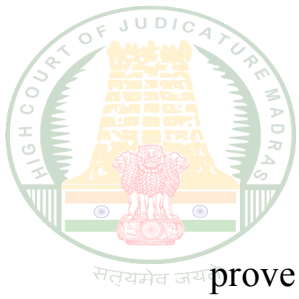


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had signed as second witness in the Will Ex.B4 along with Sebasthiyar also signed as witness and he had witness the testator Anthoniammal affixing her thumb impression in each page of the Will. In his cross-examination, he deposed that he did not know the contents of the Will. D.W.3 Savururajan has deposed that he signed as third witness in Ex.B4 Will. Anthoniammal and Sebasthiyar were present at the time of writing Ex.B4 Will and as dictated by them, the scribe Arulanandam wrote the Will and Anthoniammal affixed her thumb impression, wherein, D.W.2 signed as attesting witness and Arulanandam signed as scribe of the witness. Similarly, D.W.2 and D.W.3 deposed that they have signed as attesting witness Ex.B5 Will dated 14.05.2010. As per evidence of D.W.3, the Will has been written by Arulanandam in the presence of D.W. 2 and D.W.3 and after writing the Will, D.W.2 and D.W.3 have signed as attestors and Arulanandam signed as scribe. But, D.W.2 has given different version. He has deposed that Arulanandam had brought an already written Will in which he signed as attesting witness.

18.It is pertinent to mention that Section 69 of the Indian Evidence Act contains further requirements. The propounder must also

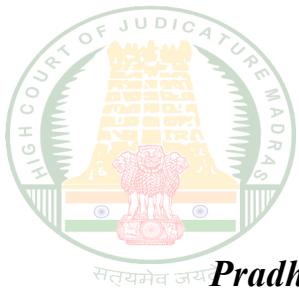


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prove that the signature of the person executing the document is in the hand writing of that person. It must be noted that the propounder of the Will, did not enter into the witness box. Evidences D.W.2 and D.W.3 absolutely insufficient to prove the execution of document. The testimony of D.W.1 also cannot be taken into account. This is for more than one reason. D.W.1 is the wife of the defendant and therefore, there is a complete paucity of evidence in this regard. In the decision reported in **(2009) 7 MLJ 476 (R.Suburathinam and others Vs. T.Govindaraj)**, wherein it has been held that Section 69 of the Indian Evidence Act, contemplates not only proving the atleast one of the attesting witnesses' signature is that of the witness's signature, but also proving that the signature of the testator is that of him. The ratio laid down in the aforesaid decision would squarely apply to the case on hand.

19.The non-examination of the propounder of the Will creates doubt. The defendant has not proved the Wills in a manner known to law and there are suspicions circumstances surrounding the Wills and the same is not removed by the defendant. It is relevant to cite judgment of the Hon'ble Supreme Court reported in **2023 (9) SCC 734, Meena**



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Pradhan and Ors Vs. Kamla Pradhan and Another wherein held how to prove the execution of Will, in this regard principles were summarised, which are reproduced as here under:-

“...10.1. The court has to consider two aspects : firstly, that the will is executed by the testator, and secondly, that it was the last will executed by him;

10.2. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied. 10.3. A will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) 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 the said signature or affixation shall show that it was intended to give effect to the writing as a will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have 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 such signatures;



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(d) Each of the attesting witnesses shall sign the will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

10.4. For the purpose of proving the execution of the will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6. If one attesting witness can prove the execution of the will, the examination of other attesting witnesses can be dispensed with; 10.7. Where one attesting witness examined to prove the will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

10.8. Whenever there exists any suspicion as to the execution of the will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last will. In such cases, the initial onus on the propounder becomes heavier;



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10.9. *The test of judicial conscience has been evolved for dealing with those cases where the execution of the will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the will while acting on his own free will;*

10.10. *One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation;*

10.11. *Suspicious circumstances must be “real, germane and valid” and not merely “the fantasy of the doubting mind [Shivakumar v. Sharanabasappa, (2021) 11 SCC 277] ”. Whether a particular feature would qualify as “suspicious” would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance, for example, a shaky signature, a feeble*



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mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit, etc.”

20.The learned counsel appearing for the respondents / plaintiffs would submit that if really Ex.B4 and Ex.B5 Wills came to be executed by their parents, the defendant would have mentioned the date of the execution in his reply notice Ex.A8. There is some force in this contention. In the written statement, the defendant has mentioned only Will executed by Sebasthiyar on 14.05.2010 and there is no mention about the alleged Will executed by the Anthoniammal dated 14.08.1998. Contradiction in the evidence of D.W.2 and D.W.3 and non-mentioning of the date of the Will Ex.B4 in the written statement and non-mentioning of the Will in reply notice-Ex.A8 are creating some suspicious circumstances. Admittedly, the propounder has not entered into the witness box. Though D.W.1, who is wife of the defendant deposed that due to old age, her husband could not give evidence, is not acceptable one. We are of the view that there is no reason to interfere with the judgement and decree passed by the trial Court. The point is answered accordingly.



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21.In the result, this first appeal is dismissed and the Judgment and Decree dated 14.09.2016 passed in O.S.No.124 of 2014 on the file of learned Principal District Judge, Trichirappalli is hereby confirmed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

(G.R.S., J.) & (M.J.R., J.)
24.04.2025

NCC : Yes / No
Index : Yes / No
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To

The Principal District Judge, Trichirappalli



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Pre-Delivery Judgement made in
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24.04.2025