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S.A.No.17 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.03.2026

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THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.17 of 2021
and C.M.P.No.323 of 2021

K.Jothivelu

... Appellant

vs.

M.Balachandran

... Respondent

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and Decree of the learned Subordinate Judge, Arakkonam dated 31.01.2020 made in A.S.No.40 of 2017 reversing the judgment and decree of the learned District Munsif, Arakkonam dated 29.06.2017 made in O.S.No.125 of 2007 by allowing the second appeal.

For Appellant : Mr.Jeremiah Gregory John

For Respondent :Mr.K.Myilsamy

J U D G M E N T

The unsuccessful defendant in the suit is the appellant.

2. The respondent/plaintiff filed a suit for partition claiming half share in the suit property. The suit was dismissed by the trial Court and the



First Appellate Court decreed the suit as prayed for by the plaintiff.

Aggrieved by the same, the defendant has come before this Court.

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3. According to the respondent/plaintiff, the suit property originally belonged to Hindu joint family consisting his father Mahadeva Mudaliar, the defendant's father Kumarasamy Mudaliar and one Adhimoolam Mudaliar. The plaintiff's grandmother Manickammal was also living with them. There was a partition on 07.05.1986 in the family and item Nos.1 and 2 of the suit properties were allotted to the share of Adhimoola Mudaliar, under 'C' schedule to the partition deed. Item No.3 of the suit property was allotted to the above mentioned Manickammal for life with vested remainder to Adhimoola Mudaliar. The property allotted to Manickammal for life was described in schedule 'D' to the partition deed. Thus the present suit has been filed in respect of properties described in schedule 'C' and 'D' to partition deed dated 07.05.1986.

4. It is the further case of the plaintiff that Adhimoolam died intestate on 16.11.2006 without any issues. As per the Hindu Succession Act, the plaintiff and defendant are entitled to half share each in the suit property as class-II heirs. It is also pleaded that the sister of plaintiff died



long back and sisters of the defendant already gave up their rights.

Therefore, according to the plaintiff, he and the defendant are entitled to half share each in the suit property. Hence the suit was laid for partition of half share. He also sought for injunction restraining the defendant from alienating the suit property.

5. The appellant/defendant filed a written statement and resisted the suit claim mainly on the ground that Adhimoolam and Manickammal executed a registered Will on 02.08.1988 bequeathing the suit properties to the defendant. According to the defendant, after death of Adhimoolam and Manickammal, the Will came into force and he has been in possession and enjoyment of the property.

6. Before the trial Court, the plaintiff was examined as PW.1 and two other witnesses were examined as PW.2 and PW.3. On behalf of the plaintiff, four documents were marked as Exs.A1 to A4. The defendant was examined as DW.1. The attesor to the Will was examined as DW.2. The Sub Registrar in whose office the Will relied on by the defendant was registered had been examined as DW.3. On behalf of the defendant, seven documents were marked as Exs.B1 to B7. The certified copy of the Will was marked as Ex.X1 through DW.3.



7. The trial Court on appreciation of evidence available on record came to the conclusion that the Will relied on by the defendant was true. The trial Court also found that the plaintiff could not maintain a suit for partition during the lifetime of his father and hence dismissed the suit. Aggrieved by the same, the plaintiff has preferred A.S.No.40 of 2017 on the file of Subordinate Judge, Arakonam. The First Appellate Court reversed the above findings of the trial Court and decreed the suit as prayed for. Aggrieved by the same, the defendant has come before this Court.

8. At the time of admission, this Court formulated the following substantial questions of law for consideration by order dated 18.01.2021:

- a) Whether the Lower Appellate Court was correct in law in shifting the burden on the appellant to establish that the respondents father was died?;*
- b) Whether the Lower Appellate Court was correct in law in the application of Order 1 Rule 13 CPC to the facts of the case?;*
- c) Whether the Lower Appellate Court was correct in law in having lost sight of the proviso to Order 1 Rule 9 CPC?;*



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d) *Whether the Lower Appellate Court had correctly applied the provisions of Section 68 of Indian Succession Act while holding that Ex.B1 Will was not proved?*

9. The learned counsel appearing for the appellant would contend that the Will relied on by the defendant was proved by examining one of the attestors and the Sub Registrar who registered the documents. Therefore, the First Appellate Court had committed an error in decreeing the suit. He further submitted that PW.1 clearly admitted that his father was alive at the time of filing of the suit. Therefore, during the lifetime of father, the plaintiff could not maintain a suit for partition.

10. The learned counsel appearing for the appellant has not advanced any arguments on questions of law 'b' and 'c'. Therefore the said questions of law have not been considered.

11. A perusal of the evidence of the attesor to the Will who was examined as DW.2 would indicate that his evidence is not useful to prove the Will. In his evidence, he has clearly stated that he has not seen Adhimoolam Mudaliar and Manickammal signing / affixing thumb impression in the Will.



He also has not stated anything regarding the attestation of the Will by the other attester. In such circumstances, the evidence of DW.2 is not at all useful to prove due execution of the Will in terms of Section 68 of Evidence Act r/w Section 63 of Indian Succession Act.

12. DW.3 is the present Sub Registrar of the Registrar's Office in which the Will relied on by the defendant was registered. He clearly admitted during the course of cross examination that at the time of registration of the Will, he was not the Sub Registrar in that office and he assumed office only in the year 2014. However, Ex.B1 Will was dated 02.08.1988 and the same was registered on the very same date before the Sub Registrar's Office. Therefore, DW.3 is not a competent person to speak about execution of Will as he assumed office only in the year 2014.

13. In view of the above discussion, the submission made by the learned counsel for the appellant that the Will was proved on the basis of the evidence of DW.2 and DW.3 is rejected. The First Appellate Court rightly came to the conclusion that the defendant failed to prove the Will relied on by him and the said finding requires no interference by this Court.



14. In the long cause title of the plaint, the plaintiff described himself as son of Mahadeva Mudaliar (late). Therefore, according to the plaintiff, his father was not alive on the date of presentation of the plaint. The said fact has not been specifically denied by the defendant in the written statement. During the course of evidence, PW.1 in his cross examination denied the suggestion of defendant that he had driven out his father from the house and further deposed that he left the house on his own. Merely because PW.1 in his evidence also stated that his father left the house on his own, we cannot presume that he was alive on the date of presentation of the plaint. As mentioned earlier, in the long cause title, the plaintiff described himself as son of Mahadeva Mudaliar (late). The said description has not been denied by the defendant in the written statement. In the absence of plea by the defendant that father of the plaintiff was alive on the date of presentation, it is not open to him to say that plaintiff's father was alive. As mentioned earlier, there is no specific admission in the evidence of PW.1 that the father of the plaintiff was alive on the date of presentation of plaint. Therefore, the other submission made by the learned counsel for the appellant that the plaintiff admitted his father was alive is not acceptable. In the absence of any specific plea in the written statement, disputing the said fact, the plaintiff need not produce any positive evidence to show that his father was dead on the date of presentation of the plaint.



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15. In view of the discussions made earlier, the questions of law ‘a’ and ‘d’ framed at the time of admission are answered against the appellant. Accordingly, the Second Appeal stands dismissed. Consequently, the connected civil miscellaneous petition is closed.

12.03.2026

Index : Yes / No
Speaking order : Yes / No
Neutral Citation : Yes / No
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To

1.The Subordinate Judge, Arakkonam.

2.The District Munsif, Arakkonam.

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S.SOUNTHAR, J.

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