

THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on : 09.02.2026	Judgment pronounced on :30.03.2026
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THE HON'BLE MR. JUSTICE P.B.BALAJI

A.S. No.917 of 2024
and CMP. No.24109 of 2024

1.A.Krishnasamy Gounder
 2.K.Vivek

..Appellants

Vs.

1.M.Kowsalyadevi
 2.A.Ramasamy Gounder
 3.A.Nataraj Gounder
 4.N.Suresh Kumar
 5.S.Paneerselvi
 6.S.Madankumar
 7.S.Dhanalakshmi
 8.S.Rajalakshmi
 9.P.Lakshmi
 10.V.Rathinam
 11.S.Saraswathi

..Respondent

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure, to set aside the judgment and decree dated 25.03.2024 in O.S. No.84 of 2012 on the file of the I Additional District Judge, Coimbatore and allow the above First Appeal.

For Appellants : Mr.S.Ashwin Prashanth for
 Mr.P.Ponbalaji



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For Respondents : Mr.P.Valliappan,
Senior Counsel for
M/s.PV Law Associates for R1
Mr.K.P.Jotheeswaran for R3 and R4
Mr.M.Abdul Wafiq for R2, R9 to R11
No Appearance for R5 to R8

JUDGMENT

The defendants 4 and 5 in the suit for partition are the appellants, aggrieved by the preliminary decree granted by the Trial Court in O.S. No.84 of 2012.

II. PLEADINGS:

2 (1). Complaint in brief:

The plaintiff is the daughter of the second defendant, through the second defendant's first wife, Thulasimani and the defendants 1 to 4 are sons of Arumuga Gounder, who died intestate in or about 1994. First item of the suit property is the ancestral and joint family property of deceased Arumuga Gounder and defendants 1 to 4. In a partition deed dated 23.02.1952, Arumuga Gounder was allotted 'C' Schedule, the said partition having been entered into amongst the brothers and mother, Valliammal. On the death of Arumuga Gounder, the defendants 1 to 4 succeeded to the estate and have been enjoying the first item of suit property. From and out of income derived from the 1st item,



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Item 2 was acquired through sale deed dated 27.11.1996. The plaintiff was married on 28.10.1992 and in terms of amendment to Section 29 of the Hindu Succession Act by Act 1 of 1990, the plaintiff is entitled to 1/8th share in both Items 1 and 2. The plaintiff and the defendants have been in joint possession and enjoyment of the suit property ever since from the death of Arumuga Gounder. The defendants who were sharing the income from the suit properties to the plaintiff, suddenly stopped paying the income for the last one year, prior to filing of the suit. The plaintiff issued a notice 29.12.2010 and a reply notice was sent on 10.11.2011 making false and vexatious claims. The claim of the father Natarajan that the first item of suit property is a self acquired property of Arumuga Gounder and that Arumuga Gounder executed a Will on 20.02.1996 in favour of his grandson is not true. The Will has been brought about with ulterior motive to defeat the plaintiff's right for partition. The alleged Will has also not been acted upon and the beneficiary, the 5th defendant, son of the 4th defendant was never in possession and enjoyment of the properties at any point of time. The Will is a fabricated document and not binding on the plaintiff.

2.1(2). With regard to suit Item II as well, the plaintiff states that the property being treated as the self acquired property and settlement being effected by the second defendant in favour of his son is invalid and not binding



on the plaintiff. The settlement was in fact brought about after the issuance of the pre-suit notice claiming partition. The settlement deed had also not been acted upon. The plaintiff is therefore entitled to the relief of partition.

2(2). Written Statement and Additional Written Statement of the 2nd-defendant adopted by the defendants 1, 4, 5 and 7 to 10 in brief:

The relationship between the parties is admitted. The suit properties are not joint family properties of Arumuga Gounder. Hence, the provisions of Section 29(a) by Amendment Act 1 of 1990 would not apply. The first item of the property absolutely belonged to Arumuga Gounder and he had every right to bequeath the same under the Will. Accordingly, the Will dated 20.02.1996, in favour of grandson Vivek, is valid and binds the plaintiff. The second defendant was working in Tiruppur from 1973 and he was running Peeli Knitting Company and was earning well till 1996 and only out of the said income from his Knitting Company, the second defendant purchased item II. The II item of the property is the absolute property of second defendant and he had every right to settle the property on his son. The suit is therefore liable to be dismissed. Further, the settlee viz., son of the second defendant, Sureshkumar is not added as a party and hence, the suit is liable to be dismissed on the ground of non joinder of necessary parties as well. The plaintiff settled down with her mother



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from 1981 onwards and thereafter, there has been no contact between the plaintiff and the defendants. The plaintiff's self serving claims that the defendants have been paying share of their income is denied. These defendants pray for dismissal of the suit.

2.(3)Written Statement and Additional Written Statement filed by the 5th defendant and defendants 11 to 13, in brief:

The first Item of Property belongs to Arumuga Gounder and it was his self acquired property and the Will dated 20.02.1996 is a true and genuine document. Similarly, the second item of property, is the absolute property of second defendant and plaintiff cannot have any stake over the same. The plaintiff is living separately and has no contact with the defendants. The father, Arumuga Gounder celebrated the marriages of defendants 11 to 13 as a dutiful father. Both suit items I and II are not ancestral properties. Hence the suit is liable to be dismissed.

2(4) Issues:

Based on the pleadings, the Trial Court has framed the following issues:-



(i) *Whether the I item suit property is joint family property of the plaintiff and defendants or absolute property of Arumuga Gounder?*

(ii) *Whether the I item property is available for partition?*

(iii) *Whether the suit is bad for non-joider of necessary parties?*

(iv) *Whether the II item suit property is purchased from the income of the I item suit property and whether the sale is treated as joint family property?*

(v) *Whether the plaintiff is entitled for partitona nd 1/5 share in it?*

(vi) *To what other reliefs the plaintiffs, is entitled to?*

Additional issues framed on 05.04.2018 as follows:-

(i) *Whether the Will dated 20.02.1996 executed by Arumuga Gounder is valid, true and binding on the plaintiff?*

(ii) *Whether the settlement deed dated 04.01.2011 is true, valid and binding on the plaintiff?*

2(5). Trial:

On the side of the plaintiff, plaintiff examined herself as P.W.1 and marked Ex.A1 to Ex.A8. On the side of the defendants, five witnesses were examined and Ex.B1 to B14 were marked.



2(6). Decision of the Trial Court:-

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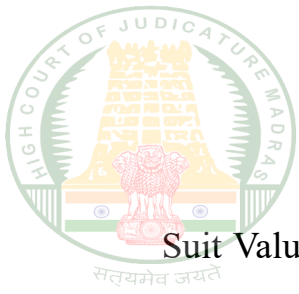
The Trial Court found that the Will has not been proved in the manner known to law and that the properties in Items I alone was the ancestral property and granted a preliminary decree in favour of the plaintiff. Insofar as Item II, the Trial Court found it to be the absolute property of the second defendant and dismissed the suit.

3. The present APPEAL:-

I have heard Mr.S.Ashwin Prashanth for Mr.P.Ponbalaji, learned counsel for the appellant. Mr.P.Valliappan, learned Senior Counsel for M/s.P.V.Law Associates for the first first respondent, Mr.K.P.Jotheeswaran, learned counsel for the respondents 3 and 4 and Mr.M.Abdul Wafiq, learned counsel for the respondents 2, 9 to 11.

4. Arguments of the learned counsel for the appellant:-

The learned counsel for the appellant Mr.S.Ashwin Prashanth, would firstly contend that the suit for partition was grossly undervalued and the plaintiff admittedly was out of possession from 1981, which factum was established at trial and therefore, the plaintiff could not have taken any advantage by valuing the suit under Section 37(2) of the Tamil Nadu Court Fee



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Suit Valuation Act, 1955. In this regard, the learned counsel has also taken me through the evidence relating to the residence of the plaintiff. The learned counsel has also taken me through the evidence of P.W.1 as well as D.W.2 and D.W.3, with regard to the proof of Will. Relying on the Hon'ble Division Bench judgment of this Court in the case of *Paneerselvan @ Nellappan (Died) and others Vs. Amsavalli and another*, in A.S. No.527 of 2007 dated 08.12.2025, the learned counsel for the appellant states that the Will had been proved as required under Section 68 of the Evidence Act, read with Section 63 of the Hindu Succession Act, and the Trial Court has erroneously come to the conclusion that the Will had not been proved, on irrelevant consideration of facts and materials. The learned counsel for the appellant would also states that the settlement deed in favour of defendants 2 to 6 has not been challenged and the same is fatal to the case of the appellant.

5. Arguments of the learned counsel for the respondents:-

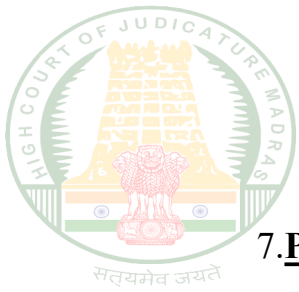
Per contra, Mr.P.Valliappan, learned Senior Counsel would firstly contend that the father of the plaintiff who was arrayed as the second defendant in the suit has not preferred an appeal and when the plaintiff sought for partition only from the estate of the second defendant and the second defendant has accepted the judgment of the Trial Court, the Appeal filed by the appellants is not



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maintainable. He would further state that though the first appellant chose to examine himself, he has not marked the Will. Referring to the evidence of D.W.3, the attesting witness, Mr.P.Valliappan, learned Senior Counsel would state that his evidence does not in any manner satisfy the mandate of Section 63(c) of the Hindu Succession Act and Section 68 of the Indian Evidence Act. The learned Senior Counsel referring the Section 30 of the Hindu Succession Act would state that the Settlement Deed was void and the plaintiff need not challenge the settlement deed separately.

6. As regards Court Fee, the learned Senior Counsel would contend that the issue of Court fee is a matter between the Court and the plaintiff and in any event, if the plaintiff is able to establish that the plaintiff had a right in the suit properties than the plaintiff is deemed to be in joint possession and thereby, she would certainly be entitled to invoke Section 37(2) of the Court Fees Act. The learned Senior Counsel would further state that even though the plaintiff was denied her claim for partition, in respect of Item II of the suit property, the plaintiff has accepted the verdict of the Trial Court and has not chosen to prefer an Appeal as against the disallowed portion. The learned Senior Counsel has also relied on the decision of this Court in *N.Marithoppai (Died) and others Vs. Alamelu and another*, reported in 2025 (1) MWN (Civil) page 130.



7. Points for consideration:-

WEB COPY I have carefully considered the submissions advanced by the learned counsel on either side. Based on the arguments advanced by the learned counsel on either side, I frame the following points for consideration:-

(i) Whether the plaintiff has established that Item I of the suit property was an ancestral property, thereby entitling her to seek partition?

(ii) Whether Arumuga Gounder had any right to execute a Will and if so, whether such Will has been proved as required under law and what is the effect of such Will?

8. Points (i) & (ii):-

Considering the fact that there is no Cross Appeal filed by the plaintiff with regard to dismissal of the suit in respect of Item II, the present appeal is limited to Item No.I and hereinafter, will be referred to as suit property for the sake of convenience. The relationship between the parties is not in dispute. Arumuga Gounder was blessed with four sons Ramasamy, Natarajan, Shanmugasundaram and Krishnasamy viz., defendants 1 to 4. The plaintiff is the daughter of Natarajan, grand daughter of Arumuga Gounder, through his first wife, Thualsimani and the said Natarajan, married for the second time one



Selvi, through whom, he was blessed with daughter Rubia and 6th defendant Sureshkumar. Another son of Arumuga Gounder, Shanmugasundaram, died leaving behind defendants 7 to 10. 5th defendant is the son of Krishnasamy, the fourth defendant. The defendants 11 to 13 are daughters of deceased Arumuga Gounder. The suit property was originally owned by one Rangasamy Gounder and after his demise, in a partition deed, dated 23.02.1952, the first item of the property was allotted to Arumuga Gounder, which was described as Schedule C to the partition deed.

9. It is the contention of the respondent/plaintiff that the property that fell to the share of Arumuga Gounder, in the 1952 partition deed was an ancestral property and not the self acquired property of the said Arumuga Gounder. The said partition deed has been exhibited as Ex.A1. The partition deed has been entered into amongst Arumuga Gounder and his four sons viz., defendants 1 to 4. It is not in dispute that Schedule C in the said partition deed was allotted to Arumuga Gounder. If the character of the property is ascertained, it will straightaway provide an answer as to whether the property was the ancestral property of Arumuga Gounder or not. Scanning the evidence in this regard, I find from Ex.A1, partition deed that three sons and their mother have decided to partition the joint family property amongst themselves, in the presence of



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Panchayatdars. Ex.A3 and Ex.A4, mortgage deed have also been filed to evidence that the suit property was in joint possession and enjoyment of the members of the family. The second defendant is a party to Ex.A4, mortgage deed and he has admitted to execution of the mortgage deed, along with his father Arumuga Gounder and his brothers. Mortgage deeds Ex.A3 and Ex.A4, have been executed on 14.09.1966 and 04.05.1983 by Arumuga Gounder along with his sons. Therefore, Arumuga Gounder himself has not treated the suit properties as his absolute properties.

10. In the light of the above, the fact that the partition took place prior to the commencement of Hindu Succession Act, 1956 and by the conduct of the parties, it is clear that the property was treated only as the joint family property and therefore, the plaintiff being a daughter, acquires a birth right, pursuant to Amendment Act 1 of 1990. Admittedly, she was unmarried on the date of the Act coming into force. Therefore, it is to be treated only as a joint family property and admittedly, there has been no partition or division after the demise of Arumuga Gounder, excepting for ofcourse the alleged Will claimed to have been executed by Arumuga Gounder, bequeathing the property to 5th defendant son, of fourth defendant. Therefore, the suit property was the ancestral property of Arumuga Gounder and the plaintiff was certainly entitled to seek partition,



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being the daughter of Natarajan. The plaintiff being granddaughter of Arumuga Gounder and daughter of second defendant was certainly entitled to a right by birth. In fact, it is relevant to take note of the argument of the learned Senior Counsel Mr.P.Valliappan, at this juncture that the plaintiff has claimed partition under the second defendant and the suit has been decreed and the second defendant having not chosen to prefer an appeal against the preliminary decree, would certainly affect the very maintainability of the appeal filed at the instance of the defendants 4 and 5.

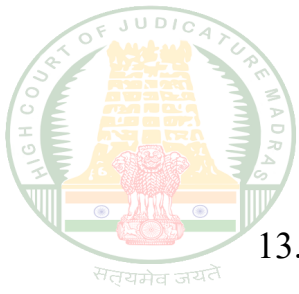
11. Now coming to the proof of Will, it is the contention of the defendants that the Arumuga Gounder treating the suit property as his self acquired property had executed a Will. Admittedly, the original Will was not produced before the Court. There is no explanation as to the whereabouts of the original Will. However, since the Will was a registered instrument, the registration copy of the Will was marked as Ex.B1. In order to prove the due execution of the said Will, D.W.3, one of the attesting witnesses has been examined. On examining the evidence of D.W.3, I find that the attesting witness has not even deposed that he witnessed the execution of the Will by a Testator and in turn, the Testator saw the attesting witnesses signed in the Will. This is the fundamental and mandatory requirement for proof of a Will. Mere



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registration of the Will does not improve the case of the person claiming under the Will and it is now well settled law that mere registration would not dispense with proof of Will under Section 68 of the Evidence Act, read with Section 63 of the Indian Succession Act. Even in chief examination, D.W.3, excepting for stating that he is aware of the execution of the Will by Arumuga Gounder in favour of his grandson, Vivek and that he has witnessed the execution of the said Will and that the Will was registered on the file of the Sub Registrar, his evidence does not meet the requirement of Section 63 of the Hindu Succession Act. Therefore, when the evidence of attesting witness does not meet the requirement for proof of Will, the Will cannot be held to be proved in a manner known to law. The Trial Court has rightly appreciated the evidence of D.W.3, in this regard.

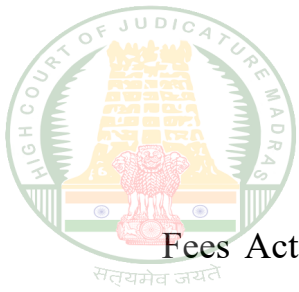
12. In coming to conclusion that the Will is not proved and it is not binding on the plaintiff. The Trial Court at the same time, has rightly found that the second item of the property was not established by the plaintiff to have been acquired by the second defendant out of income from the joint family property viz., the I item of the suit property and that the second defendant was only a name lender. The findings arrived at by the Trial Court are therefore in order and do not require interference in appeal.



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13. Coming to the decision relied on by the learned counsel for the appellant, *Paneerselvan @ Nellappan (Died) and others Vs. Amsavalli and another*, in A.S. No.527 of 2007 dated 08.12.2025, the Hon'ble Division Bench of this Court held that registration of the Will would create a presumption regarding genuineness. On going through the decision, I find that the Hon'ble Division Bench in fact, pointed out the factum of registration only as an additional factor. After having come to the conclusion that there has been compliance of the requirements under Section 63 (c) of the Succession Act. However, in the present case, I have already found that there is no satisfactory evidence regarding due execution of the Will in the first place. In such circumstances, I do not see how this decision will apply to persuade me to hold that merely because the Will is registered, it would amount to a presumption that the Will is genuine.

14. In *N.Marithoppai's* case (referred herein supra), this Court dealing with payment of appropriate Court in a suit for partition, referring to Section 37, held that co-owner need not be in actual possession and law presumes that every co-owner is in constructive possession of the suit properties along with other co-owners, unless ouster or exclusion is proved and the plaintiff being in deemed possession is entitled to value the suit under Section 37(2) of the Court



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Fees Act. The ratio laid down by this Court, following the decision of the Hon'ble Supreme Court in *Neelavathi and others Vs. N.Natarajan and others*, reported in 1980 (2) SCC 247 would apply in all force, to the facts of the present case.

15. Therefore, for all the above reasons, I am satisfied that the plaintiff has established suit property to be an ancestral property, thereby entitling her to a share. The Trial Court has rightly granted a preliminary decree in respect of suit item I alone and the same does not warrant any interference.

16. In fine, the First Appeal is dismissed. Consequently, connected Miscellaneous Petition is also dismissed. No costs.

30.03.2026

Neutral Citation Case: Yes / No
Speaking / Non-speaking order
Index: Yes/No
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To

1. The I Additional District Judge, Coimbatore.
2. The Section Officer,
V.R.Section, High Court of Madras.



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P.B.BALAJI.J.

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Pre-delivery judgment made in
A.S. No.917 of 2024
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