

S.A.(MD)No.361 of 2020

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 10.04.2026

DELIVERED ON : 12.06.2026

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.(MD)No.361 of 2020

and

C.M.P.(MD)Nos.4237 & 4238 of 2020 & 4703 of 2026

Kannan

... Appellant

Vs.

N.Subramanian (Died)

1.S.Chandra

2.S.Rajesh Kumar

3.S.Ramani

4.N.Mahadevan

5.V.Jeyam

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, praying to set aside the judgment and decree dated 13.12.2019 passed in A.S.No.79 of 2018 on the file of the Sub Judge, Thirumangalam, reversing the judgment and decree dated 16.08.2018 passed in O.S.No.150 of 2008 on the file of the District Munsif Judge, Thirumangalam.



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For Appellant : Mr.G.Prabhu Rajadurai
For Respondent No.1 : Died
For Respondents 2 & 3 : Mr.N.Tamilmani
For Respondents 4 & 5 : No appearance

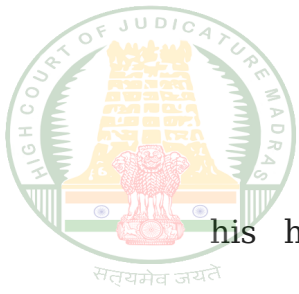
JUDGMENT

This Second Appeal is at the instance of the plaintiff who had succeeded before the Trial Court and suffered an adverse finding before the First Appellate Court.

2.I have heard Mr.G.Prabhu Rajadurai, learned Counsel for the appellant and Mr.N.Tamil Mani, learned Counsel for the respondents 2 & 3.

3.The brief facts that are necessary to decide the second appeal are as hereunder:

3.1.The plaintiff claimed that the suit property originally belonged to one Narayana Iyer, he having purchased the same under sale deed dated 21.07.1967 and the plaintiff being the son of Narayana Iyer, along with his siblings, who are defendants 1 to 3. The said Narayana Iyer was running a tea shop and from and out of



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his hard earned income and savings, he purchased the suit property and put up construction of the building. According to the plaintiff, his father executed a registered Will on 28.10.1985, bequeathing the suit property to the plaintiff, the defendants 1 and 3 and his wife Thangammal and another property bearing No.3, N.G.O. Colony, Chinnachokkikulam, in favour of the plaintiff. Father Narayana Iyer died on 01.12.1987 and the plaintiff has been in enjoyment of the property in Door No.3 independently, as well as the in joint possession of the suit property with defendants 1 and 3 and Thangammal. Thangammal also died on 06.06.1998.

3.2.The first defendant is running a business under the name and style of “Mani's Weigh bridge”, in a portion of the suit property. Narayana Iyer had availed a loan from the fourth defendant during his life time and had mortgaged the suit property by depositing the title deeds to the fourth defendant. The fourth defendant filed a suit in O.S.No.193 of 1986 and obtained a preliminary decree in the suit on mortgage. Final decree application in I.A.No.777 of 1990 was also subsequently, allowed and execution petition filed by the fourth defendant against the plaintiff and defendants 1 and 2 is pending.



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3.3.According to the plaintiff, after the death of Narayana Iyer, defendants 1 & 2 are collecting rents from the tenants, who are defendants 5 to 13 and the defendants have evaded sharing of rents with the plaintiff. After exchange of legal notices and the fifth defendant seeking to obtain an order for depositing the rent before the Rent Controller, the plaintiff admitted to mediate the disputes. However, the defendants 1 and 2 have refused to come forward for any amicable partition and hence, plaintiff has filed a suit for partition of the suit property into 4 equal shares and allot one share to the plaintiff.

3.4.The suit was resisted by the first defendant stating that the father Narayana Iyer did not have any independent source of income and only from the joint business income, Narayana Iyer purchased the property and also construction was only from and out of the income from the family business, which was run by Narayana Iyer, Subramaniam and Mahadevan, right from December 1962. According to the first defendant, his father and defendants 1 and 2 had entered into a partnership deed on 05.01.1956 and subsequently, the third defendant was also inducted into the said partnership business and from and out of the



income accruing from the said partnership business, several properties have been acquired.

3.5.It is the specific contention of the first defendant that the Mani's Cafe, is only a joint family business and not the absolute business of the father Narayana Iyer or independent business of Narayana Iyer. The first defendant disputes the Will dated 28.10.1985 and also contends that the relief of partition in respect of suit property alone, leaving out the NGO colony property is bad for partial partition. The 12th defendant, one of the tenants filed a written statement stating that he was inducted by the second defendant under an oral tenancy agreement and rent of Rs.7,000/- has been regularly paid to the second defendant. The 12th defendant states that he has no right or interest except the tenancy right and seeks for dismissal of the suit as against the 12th defendant.

3.6.The trial Court, based on the above pleadings, proceeded to frame the following issues:

“ 1. வாதி கோரும் பாகப்பிரிவினைப் பரிகாரம்
அவருக்கு கிடைக்கத்தக்கதா?



2. 5 முதல் 12 பிரதிவாதிகளிடமிருந்து பெற்ற
வாடகை சம்பந்தமான கணக்குகளை 1இ 2 பிரதிவாதிகள்
வாதியிடம் ஒப்படைக்க வேண்டுமா?
3. வாதி பெறும் இதர பரிகாரம் யாது?

3.7.At trial, on the side of the plaintiff, plaintiff examined himself as P.W.1 and one Raju as P.W.2 and marked Exs.A.1 to A.15. On the side of the defendants, the first defendant examined himself as D.W.1 and marked Exs.B.1 to B.12.

3.8.The Trial Court appreciating the pleadings as well as oral and documentary evidence found that the plaintiff was entitled to the relief of partition and decreed the suit granting a preliminary decree in respect of 1/4th share of the plaintiff in the suit property. Aggrieved by the said preliminary decree and findings of the trial Court, the first defendant preferred First Appeal in A.S.No.48 of 2017. Pending the First Appeal, the first defendant died and his legal representatives were impleaded as appellants 2 to 4. The Appellate Court, re-appreciating the evidence held that the plaintiff had not proved the Will under which he claims absolute right in respect of the property at NGO colony and also believed the version of the defendants that there has already been division in the family



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even in the year 1982 and the parties have orally divided the suit property. It is as against the said reversal findings, the present Second Appeal has been filed.

3.9. Pending the Second Appeal, C.M.P.(MD)No.4703 of 2026, has been taken out by the petitioner / appellant for the purposes of receiving and marking the original Will dated 28.10.1985, executed by father Narayana Iyer, as an additional document in the Second Appeal. The said application is taken up and being decided along with the appeal.

4. The Second Appeal is admitted on the following substantial questions of law:

1) Whether the Courts below are correct in law in placing the entire burden upon the plaintiff even after the plaintiff produced the title document Ex.A.1 and revenue records Ex. A.2 and A.11, all standing in the name of the plaintiff and in the absence of contra evidence by the defendants?

2) Whether the First Appellate Court was right in holding that the Will had not been duly



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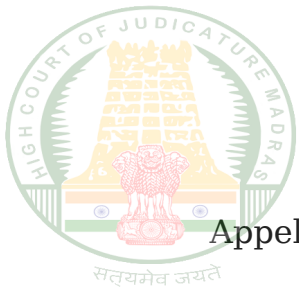


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proved in accordance with Section 63(c) of the Indian Succession Act and Section 68 of the Indian Evidence Act?

3) Whether the First Appellate Court was right in law in setting aside the decree for partition on mere oral assertion that the properties were divided under an unregistered family arrangement?

5.Mr.Prabhu Rajadurai, learned Counsel appearing for the appellant would contend that the father Narayana Iyer had executed a registered Will on 28.10.1985, in favour of his wife and four children, in respect of the suit property and in respect of another property owned by him, which he had bequeathed absolutely to the plaintiff and therefore, there was no necessity for the plaintiff to include the said property in the partition suit. It is also his submission that by adducing satisfactory evidence, plaintiff has satisfied the mandate of Section 68 of the Evidence Act regarding truth and genuineness of the said Will and the trial Court had rightly appreciated the pleadings and evidence and believed the said Will, upholding due execution and attestation of the same. He would however, state that on erroneous grounds, the First



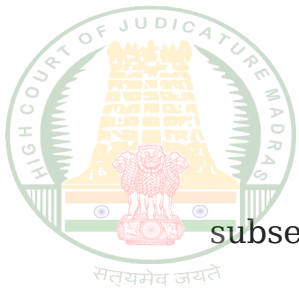
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Appellate Court has chosen to disbelieve the Will and the reasons assigned are totally unsustainable in the eye of law.

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6.It is further contended by Mr.Prabhu Rajadurai, learned Counsel for the appellant that for non-production of the original of the Will, the plaintiff has been non-suited by the First Appellate Court and when the plaintiff had succeeded before the Trial Court, there was no occasion for the plaintiff to have produced the original Will before the First Appellate Court. He would further state that the Will is only a registered Will and elaborate cross-examination of the attesting witness in support of the Will has already been done on the side of the respondents and therefore, no serious prejudice would be caused to the respondents, if the original Will is received as evidence and it is filed only by way of bounden action to avoid a technical objection that the original Will is not before the Court.

7.Mr.Prabhu Rajadurai, would further state that though it was vehemently contended by the defendants that Narayana Iyer did not possess any funds and the properties were acquired only out of the joint exercise and income accruing from the joint business conducted by the father and the defendants 1 and 2 and



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subsequently third defendant as well, the defendants have miserably failed to prove that such joint business was successfully carried out on and the income from and out of the said business was available to be applied for acquisition of various properties.

8.Mr.Prabhu Rajadurai, learned Counsel would further state that the insofar as the plea of oral partition as well, the plaintiff did not admit the contents of the unregistered document filed on behalf of the defendants and it was only his signature that was admitted and that alone was marked as Ex.B.6 and in such circumstances, he would contend that no reliance could be placed on the document itself and the recitals of the said document cannot be looked into for any purposes, whatsoever. However, according to Mr.Prabhu Rajadurai, the First Appellate Court has gone into the recitals of Ex.B.6 and also evidence of P.W.2, examined on the side of the plaintiff with regard to the oral partition and disbelieving the Will that it was brought about under suspicious circumstances and original also not being produced and also giving a seal of approval for the alleged plea of oral partition in 1982, going by the evidence of P.W.2, has reversed the well considered judgment of the Trial Court. It is therefore, the submission of the learned Counsel for the appellant that the Second Appeal deserves to be allowed.

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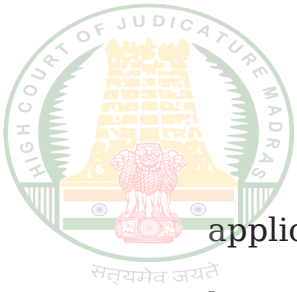


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9.Mr.Prabhu Rajadurai, learned Counsel for the appellant has relied on the judgment of the Hon'ble Supreme Court in the case of ***Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills (Refineries) and others*** reported in **(2010) 8 SCC 423**, for the proposition that the Appellate Court sitting in First Appeal was not in error in permitting the original certificate of registration to be received as additional evidence, since it was in the interest of justice and there was sufficient satisfactory basis for the same under Order 41 Rule 27(1)(b) of CPC.

10.Per contra, Mr.Tamilmani, learned Counsel for the respondents would take me through the evidence of the attesting witnesses and his cross examination and state that the evidence adduced was not sufficient to satisfy the requirements of Section 68 of the Indian Evidence Act and in this regard, the First Appellate Court has rightly held that the Will has not been proved and it is also surrounded by suspicious circumstances. Mr.Tamilmani, would further contend that insofar as C.M.P.(MD)No.4703 of 2026, there is absolutely no explanation as to why the original Will was not filed during trial and even pending Second Appeal and even with regard to custody, there was no explanation put forth in the present



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application filed under Order Order 41 Rule 27 of CPC. Therefore, he would state that the mandatory requirements of Order 41 Rule 27 of CPC have not been met and the original of the Will of father Narayana Iyer cannot be ordered to be received as additional evidence, that too, in Second Appeal.

11.Mr.N.Tamilmani, would further state that the plaintiff's own witness P.W.2 admitted about the oral partition effected in the family in the year 1982 and therefore, there can be no better evidence for non-suiting the evidence for relief of partition, by way of argument in demurer, when the Will has not been proved. The plaintiff has also not included the property under which he claimed absolute rights namely NGO Colony property and sought for partition and in the absence of such exercise, suit is also bad for partial partition. Mr.Tamilmani, further states that the plaintiff's evidence is highly unsatisfactory and he was not even aware of the nature of the business or the manner of acquisition of the properties, though he claims an equal share along with the defendants 1 to 3. He would further state that though there was a pre-suit notice issued by the plaintiff in Ex.A.9, the same was suitably replied vide Ex.A.10 and Ex.A.11, clearly denying the Will, under which, the plaintiff seeks a claim and despite the said reply,



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even a re-joinder was not sent by the plaintiff and he would therefore, state that adverse inference would have to be drawn against the plaintiff in this regard.

12.Mr.N.Tamilmani, would further submit that Ex.B.6, 1982 partition has been admitted by the plaintiff himself and under such circumstances, the plaintiff cannot be entitled to any share in the suit property, since the property has already been divided even in the year 1982.

13.Mr.N.Tamilmani, has relied on the decision of the Hon'ble Supreme Court in ***K.G.Shivalingappa (Dead) by LRs and others Vs. G.S.Eswarappa and others***, reported in **2004 (4) CTC 143**, where, the Hon'ble Supreme Court held that a partition amongst Hindus could be effected orally, but if the parties reduce the same to writing to a formal document, which is intended to be evidence of partition, then the document would be required to be compulsorily registered under Section 17(1)(b) of the Registration Act. The Hon'ble Supreme Court held that if it is seen from the partition deed that the document did not evidence any partition by metes and bounds, then it would be outside the purview of Section 17(1)(b) of the Registration Act.



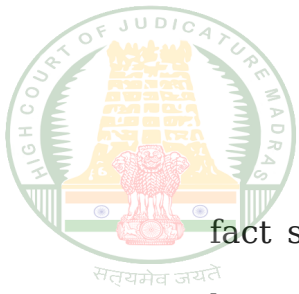
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14.I have carefully considered the submissions advanced by the learned Counsel for the parties.

15.Two points arise for consideration in the Second Appeal but before going into the said legal issues, I will first take up the application for adducing additional evidence.

16.The appellants have taken out C.M.P.(MD)No.4703 of 2026, to receive the original Will dated 28.10.1985, executed by the father of the appellant Narayan Iyer, as an additional document. The said original Will dated 28.10.1985, is a registered instrument. Registration copy of the said Will has already been exhibited even before the Trial Court. An attesting witness to the said Will has also been examined on the side of the plaintiff. The Trial Court found the evidence adduced in support of the proof of Will to be satisfactory and complying with the requirements of law and upheld the truth and genuineness of the Will. However, the First Appellate Court, reversed the said findings of the Trial Court and went on to hold that the execution of the Will was surrounded by suspicious circumstances and that, earlier the Will had also not been filed. On this ground, the judgment of the Trial Court was in



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fact set aside. In such circumstances, the present application has been taken out for filing the original Will dated 28.10.1985, certified copy of which has already been marked before the Trial Court.

17.Mr.Prabhu Rajadurai, learned Counsel contended that no prejudice would be caused, if the original Will is received and marked as Exhibit in the Second Appeal, as there is sufficient evidence on record with regard to execution of the Will and the defendants were also permitted to elaborately cross examine the attesting witnesses regarding the said Will. He would further state that the original was necessitated only on the First Appellate Court commenting that the original Will has also not been marked. However, Mr.Tamilmani, learned Counsel appearing for the respondents would state that even in the present application, no satisfactory reasons has been assigned, as to why the original Will did not sustain all along and there is also no averments pertaining to the custody of the original Will. He would therefore, state that it is a clear violation of the mandate of Order 41 Rule 27 of CPC and he therefore, prayed for dismissal of the application.

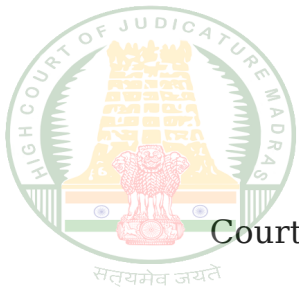


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18.I have considered the said submissions regarding receipt of original Will as additional evidence in the Second Appeal. No doubt, Order 41 Rule 27 of CPC, imposes stringent conditions for receipt of additional documents at the appellate stage. However, the Appellate Court is entitled to permit additional evidence, if the Court is of the opinion that the document is required in the interest of justice. Being a registered document, I do not see how custody of the original Will and non-mentioning of the same in the affidavit is fatal to the case of the petitioner / appellant. Equally, being a registered Will and the certified copy of the very same Will having already been marked before the Trial Court and also tested at trial, absolutely no prejudice would be caused to the respondents, if the original of the Will is now received in the Appeal.

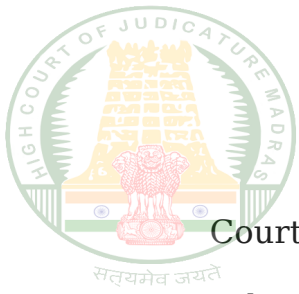
19.The Hon'ble Supreme Court in the case of ***Shalimar Chemical Works Limited***, also held that when the Court had permitted originals of certificates of registration of trade mark to be received as additional evidence, in the interest of justice, such receipt of additional evidence cannot be faulted. I do not see any prejudice caused to the respondents as well, since it is the very same Will, as a certified copy, that was exhibited before the trial



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Court and the attesting witness was also examined and cross examined at length. Therefore, it is not a case where the defendants have lost the opportunity to test the document, which is now sought to be received as additional evidence. For the foregoing reasons, I am inclined to allow C.M.P.(MD)No.4703 of 2026. The original Will of late Narayana Iyer is received and marked as Ex.A. 16.

20.Now, coming to the substantial questions of law, one relates to the plea of oral partition taken by the defendants to defeat the claim for partition made by the plaintiff. It is the contention of the appellant that in respect of the suit property, the property was bequeathed by the father Narayana Iyer, jointly to his wife Thangammal and his four children equally. After the demise of the mother of the parties, each of the children are entitled to an equal 1/4th share. However, the claim for partition in respect of the suit property is refuted on two grounds. Firstly, the Will under which the plaintiff claims is disputed and secondly, it is contended that there has already been an oral partition. When the defendants set up such a case of an oral partition and the same having been acted upon as well, it is for the defendants to establish the said oral partition by adducing strong and satisfactory evidence before the



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Court. The trial Court found that such evidence was wanting on the side of the defendants and there was a clear failure to prove the plea of oral partition. However, the First Appellate Court has overturned the said findings of the trial Court on two grounds namely:

- (i) Relying on Ex.B.6 and
- (ii) Relying on evidence of P.W.2.

21.ExB.6, as can be seen from the document was only the signature of the plaintiff and not the document itself. In such circumstances, the First Appellate Court clearly fell in error, looking into the contents of the unregistered partition deed and relying on the recitals made thereunder, to accept the plea of oral partition. Though, Mr.Tamilmani has relied on the decision of the Hon'ble Supreme Court in ***K.G.Shivalingappa's*** case, referred hereinabove, I do not see how the said unregistered document could be admitted in evidence. The document is not in the nature of a record of the past transaction, but under the very same document, the parties have allegedly effected a division of the suit property. In such circumstances, the first Appellate Court ought not to have placed any reliance on the document which was not even marked as an exhibit, to hold that the parties have already entered

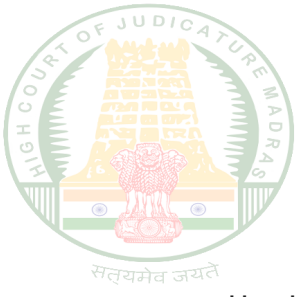


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into an oral partition.

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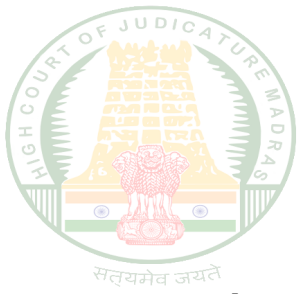
22.There is absolutely no evidence on the side of the defendants to establish that such oral partition had been acted upon. The trial Court, on rightly appreciating the evidence on record, rendered a clear finding that the defendants have failed to prove the alleged oral partition. Therefore, the First Appellate Court should not have given any credence to the evidence of P.W.2, touching the subject of oral partition. P.W.2 is not a family member and he is only an attesting witness to the Will executed by Narayana Iyer. Merely because P.W.2 has been examined on the side of the plaintiff, the First Appellate Court should not have fallen back on his evidence to hold that oral partition had been proved. The evidence of P.W.2 with regard to the oral partition is at best hearsay, *ipse dixit* and certainly, unworthy of placing reliance. For the foregoing reasons, I am inclined to set aside the findings of the First Appellate Court with regard to the oral partition having been taken place and consequently, the plaintiff not being entitled to the share in the suit property. Substantial question of law 1 is accordingly, answered in favour of the appellant.



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23.Coming to the proof of Will, P.W.2 is admittedly one of the attesting witnesses to the said Will. He has been examined and I have scanned his evidence carefully. His evidence clearly establishes the fact that the Will was duly attested and executed in the manner required under Section 63(c) of the Indian Succession Act and Section 68 of the Indian Evidence Act. Unfortunately, the First Appellate Court has relied on evidence of P.W.2 and commented that the attesting witness had not deposed that the Will was read over to the testator and the testator did not admit the contents to be true and therefore, the Will cannot be held to be executed by Narayana Iyer in a sound and disposed state of mind. The First Appellate Court has also extracted a stray sentence in the cross examination of P.W.2, where P.W.2 states that at the time of execution of the Will, Narayana Iyer's physical health was not well. For better appreciation, the evidence of P.W.2 is extracted hereunder:

“.... உயில் எழுதும்பொழுது கே.எஸ்.நாராயண ஜியரின் உறவினர்கள் யாரும் இல்லை. மணீஸ் கபே லாட்ஜை வாதி கண்ணன் தான் பராமரித்து வந்தார். கண்ணன் அழைத்ததால் தான் நான் உயில் ஆவணத்தில் ஒரு சாட்சியாக கையொப்பம் இட்டுள்ளேன் என்றால் சரியல்ல கே.எஸ்.நாராயண ஜியர் தான் அழைத்தார். கே.எஸ்.நாராயண ஜியர் என்னை அழைக்கவில்லை என்றால் சரியல்ல. உயில் எழுதும் பொழுது கே.எஸ்.நாராயண ஜியர் உடல்நிலை சரியில்லாமல் இருந்தார் என்றால் சரிதான்.”



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The First Appellate Court has unfortunately held this to be a suspicion surrounding the execution of the Will and that it has not been dispelled.

24.Neither Section 63(c) of the Indian Succession Act nor Section 68 of the Indian Evidence Act require the contents of the Will to be read over to the executant, namely the testator or the testatrix. Therefore, there is absolutely no merit in the finding of the First Appellate Court that merely because P.W.2 has not stated that the Will was read over to Narayana Iyer, the Will cannot be held to be proved. Equally, the reliance placed on the health condition is also wholly misplaced. The attesting witness has only stated that P.W.2 was not doing physically well at the time of execution of the Will. What is required for proof of due execution and attestation of the Will is only the mental capacity of the testator. There is absolutely no impediment or embargo that the testator / testatrix should also be hale and healthy physically. Unfortunately, the First Appellate Court, based on the said statement of the attesting witnesses has gone to the extent of even holding that the execution of the Will itself was surrounded by suspicion.



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25.At the risk of repetition, from the Chief Examination as well as Cross Examination of P.W.2, I find that the Will of Narayana Iyer has been duly proved to be executed and attested in the manner known to law. The findings rendered by the First Appellate Court are clearly perverse and liable to be interfered with under Section 100 CPC.

26.The First Appellate Court has also commented on the plaintiff not joining the first defendant for protecting the property from being brought to sale by the bank, with whom the property had been mortgaged. Merely because one co-owner had approached the Court against bringing the entire property for sale, I do not see that the plaintiff not joining hands with the first defendant being of any relevance to imply that only because the plaintiff did not have any right in the suit property, he did not join in seeking an injunction against the bank. These findings of the First Appellate Court are clearly perverse and liable to be set aside.

27.For all the above reasons, the appellant is entitled to succeed and substantial questions of law are answered in favour of the appellants.



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28.In the result, this Second Appeal is allowed and the judgment and decree in A.S.No.79 of 2018, on the file of the Sub Judge, Thirumangalam dated 13.12.2019 is set aside and the judgment and decree in O.S.No.150 of 2008, on the file of the District Munsif, Thirumangalam dated 16.08.2018 is restored. There shall be no order as to costs. C.M.P.(MD)No.4703 of 2026, is allowed and C.M.P.(MD)Nos.4237 & 4238 of 2020 are closed.

12.06.2026

Index : Yes / No

NCC : Yes / No

MR

Note: Registry, to mark the additional document as Ex.A.16.



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To

1.The Sub Judge,
Thirumangalam.

2.The District Munsif,
Thirumangalam.

3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.B.BALAJI, J.

MR

PRE-DELIVERY JUDGMENT MADE IN

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