



C.M.A(MD)No.299 of 2026

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 09.04.2026

PRONOUNCED ON:23.06.2026

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.299 of 2026

1.N.Swaminathan
2.S.G.Livingston
3.S.G.Gladston

: Appellants/Respondents/Petitioners

Vs.

1.V.Amirtham
2.A.Stella Parimala
3.A.Rabi

: Respondents /Petitioners/Respondents

PRAYER:- Civil Miscellaneous Appeal filed under Section 299 of Indian Succession Act against the decreetal order and fair order dated 02.02.2024, passed in I.A.No.2 of 2023 in Probate O.P.No.14 of 2023, on the file of the learned Additional District Court (Fast Track Court), Kanyakumari District at Nagercoil.



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For Appellants : Mr.M.Kannan

For Respondents :Mr.M.Dennis Joe
for R.2 and R.3

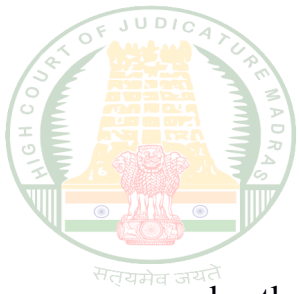
: R.1 died

JUDGMENT

This Civil Miscellaneous Appeal is directed against the order passed in I.A.No.2 of 2023 in Probate O.P.No.14 of 2023, dated 02.02.2024, on the file of the Additional District Court, (Fast Track Court), Kanyakumari at Nagercoil, rejecting the Probate O.P.

2. For the sake of convenience and brevity, the parties will hereinafter be referred as per their status/ranking in the original petition.

3. The relationship not in dispute is that the first respondent N.Swaminathan, Thangappan Nadar and Alankamony are brothers, that the respondents 2 and 3 are the sons of the first respondent, that the first petitioner is the wife, the second petitioner is the daughter and the third petitioner is the son of the deceased Alankamony and that the other



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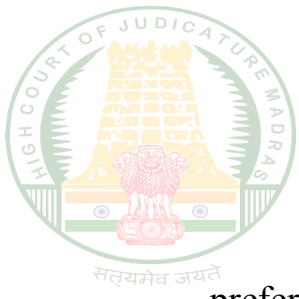
brother Thankappan Nadar died issueless. The respondents alleging that Thankappan Nadar executed a registered Will dated 13.08.1991 bequeathing his properties to his brother Swaminathan – first respondent and his sons S.G.Livingston and S.G.Gladston - the respondents 2 and 3 and that the said Thankappan Nadar died issueless on 16.07.1992 and hence, the Will became operative and the properties devolved upon the respondents, filed a Probate O.P.No.14 of 2013 before the Additional District Court, Nagercoil seeking orders to probate the Will executed by the said Thankappan Nadar. Pending the above Probate O.P., the petitioners filed a petition under Order VII Rule 11 C.P.C., seeking rejection of the Probate O.P., in I.A.No.2 of 2023. The respondents/petitioners filed their counter raising objections. The learned Additional District Judge, after enquiry, passed the impugned order dated 02.02.2024, allowing the petition filed under Order VII Rule 11 C.P.C., and thereby rejected the Probate O.P.No.14 of 2023. Aggrieved by the order of rejection, the respondents/petitioners have preferred the present Civil Miscellaneous Appeal.



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4. It is not in dispute that the respondents have earlier filed a Probate O.P.No.20 of 1992 before the Subordinate Court, Nagercoil, to probate the Will dated 23.08.1991 executed by the deceased Thankappan Nadar and obtained probate vide order dated 23.06.1993. The first respondent's brother Alankamony filed a suit in O.S.No.581 of 1993 alleging that their brother Thankappan Nadar died intestate and claimed partition and allotment of 1/2 share in the properties. The said Alankamony also filed a petition in O.P.No.27 of 1996 for revocation of probate granted in O.P.No.20 of 1992. The said Alankamony also filed a suit in O.S.No.48 of 1993 before the Subordinate Court, Padmanabhapuram seeking specific performance of the sale agreement dated 10.10.1986. The Principal District Munsif Court, Padmanabhapuram, after trial, allowed the suit in O.S.No.581 of 1993 and granted a preliminary decree for 1/2 share in the suit properties. The respondents preferred an appeal in A.S.No.77 of 1995 before the Subordinate Court, Padmanabhapuram. The said first appeal in A.S.No. 77 of 1995 came to be allowed vide judgment and decree dated 23.07.2012 setting aside the judgment and decree passed in O.S.No.581 of 1993 and remanded the case back to the trial Court. The petitioners

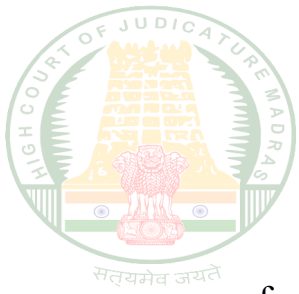


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preferred an appeal in C.M.A.(MD)No.1388 of 2012 challenging the remand order and this Court, vide order dated 06.03.2013, partly allowed the appeal and thereby setting aside the order of remand and directed the first appellate Court to forward the Will to the trial Court and directed the trial Court to record the evidence to be adduced by both sides and to submit a finding to the first appellate Court with regard to the Will dated 23.08.1991.

5. It is admitted by both parties that the learned Principal District Munsif, Padmanabhapuram, in pursuance of the directions of this Court in C.M.A.(MD)No.1388 of 2012 had submitted the findings in the form of judgment dated 04.06.2015 to the first appellate Court ie., Subordinate Court, Padmanabhapuram and that the appeal in A.S.No.77 of 1995 is pending.

6. The Subordinate Court, Padmanabhapuram conducted a joint trial in respect of the suit in O.S.NO.48 of 1993 and revocation petition in O.P.No.27 of 1996 and passed a common judgment dated 03.03.2002 dismissing the suit as well as the original petition. The said Alankamony



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preferred an appeal challenging the dismissal of O.P.No.27 of 1996 in C.M.A.No.1004 of 2002 and this Court, vide order dated 05.11.2008 set aside the order passed in O.P.No.27 of 1996 mainly on the ground that the said Alankamony was not impleaded in Probate O.P.No.20 of 1992 and that thereby revoked the probate granted in O.P.No.20 of 1992. Challenging the order of this Court, the respondents preferred a Civil Appeal in C.A.Nos.798 and 799 of 2013 and the Hon'ble Supreme Court, vide order dated 09.03.2022 dismissed the appeals and thereby confirmed the order of the High Court in revoking the probate / letter of administration

7. The learned Additional District Judge has rejected the Probate O.P.No.14 of 2023 mainly on the following three grounds:

(i) the respondents/petitioners have not produced the original Will along with O.P., as required mandatorily under Section 276 of Indian Succession Act;

(ii) the District Munsif, Padmanabhapuram in the partition suit in O.S.No.581 of 1993 has already rendered a finding that the Will dated 23.08.1991 has not been proved by the respondents/petitioners in



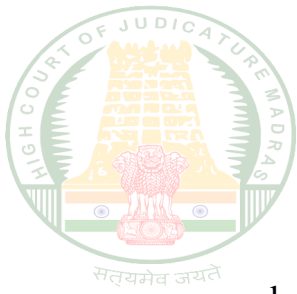
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accordance with Section 68 of Indian Evidence Act and Section 63(c) of Indian Succession Act and hence, the respondents cannot be permitted to re-agitate the very same issue in the Probate O.P., and as such, the present O.P., is barred by the principle of res judicata under Section 11 of C.P.C.

(iii) the Probate O.P., with regard to the Will executed by a Christian is not maintainable as per Section 213(2) of the Indian Succession Act.

8. No doubt, Section 276 of the Indian Succession Act contemplates that the original Will shall accompany the petition for probate. In the present case, as already pointed out, the Will had already been produced before the Civil Court in the partition suit and this Court in C.M.A.(MD)No.1388 of 2012, directed the first appellate Court to forward the original Will to the trial Court, and the trial Court was, in turn directed to submit a finding with regard to the Will to the first appellate Court for consideration of the appeal in A.S.No.77 of 1995. As rightly contended by the learned Counsel for the petitioners/respondents, the respondents/petitioners can always take appropriate steps to summon to the original Will as and when its



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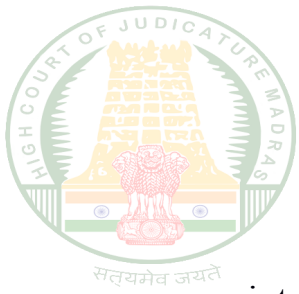
production is required in Probate O.P.No.

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14 of 2023, from the trial Court or the first appellate Court. Hence, the mere non-filing of the original Will along with the Probate O.P., in the facts and circumstances of the present case cannot by itself, constitute a ground for rejection of the main petition itself.

9. Turning now to the next finding with regard to the res judicata, the learned Counsel for the respondents/petitioners placed reliance on the judgment of the Hon'ble Supreme Court in *Srihari Hanumandas Totala Vs. Hemant Vithal Kamat and Others* reported in (2021)9 SCC 99, wherein the Hon'ble Supreme Court has specifically held that the adjudication of the plea of res judicata is beyond the scope of Order VII Rule 11 C.P.C.

10. Considering the legal position referred above, the finding of the trial Court that the Probate O.P., is barred by the principle of res judicata cannot legally be sustained. Moreover, the partition suit in O.S.No.581 of 1993 itself has not yet attained finality. As already



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pointed out, in pursuance of the directions of this Court, the trial Court has submitted its finding with regard to the Will and the appeal is pending in A.S.No.77 of 1995 before the Subordinate Court, Padmanabhapuram. Since the earlier proceedings themselves have not reached the finality, the question of invoking the doctrine of res judicata does not arise at all.

11. With regard to the finding of the trial Court based on Section 213(2) of the Indian Succession Act, it is to be noted that Section 213 requires probate or letters of administration as a condition precedent for establishing the rights of an executor or legatee only in cases covered by the said provision. Notably, the expression "Indian Christian" was inserted in Section 213(2) by the Indian Succession (Amendment) Act, 2002. A conjoint reading of Sections 213(2)(i) and (ii) makes it clear that obtaining probate or letters of administration is mandatory only in respect of Wills executed by Hindus, Buddhists, Sikhs or Jainas falling within the classes specified in clauses (a) and (b) of Section 57. Section 57(a) relates to Wills made within the territories formerly subject to the Lieutenant-Governor of Bengal or within the ordinary original civil



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jurisdiction of the High Courts at Madras and Bombay, whereas Section 57(b) applies to Wills made outside those territories in respect of immovable properties situated therein.

12. As rightly contended by the learned Counsel for the respondents/petitioners, Section 213 of Indian Succession Act does not prohibit the Mohammedan or an Indian Christian from filing a petition for probate. The question whether probate is compulsory in a given case stands on a different footing from the question whether the petition seeking probate is maintainable. Merely because the law does not mandate the obtaining of probate in certain circumstances, it does not follow that a person claiming under a Will is precluded from seeking probate before the competent Court. Since the Indian Succession Act itself provides for the grant of probate in respect of Wills executed by the Indian Christians, the above ground assigned by the trial Court for rejection of the Probate O.P., cannot be sustained.

13. Though the mere pendency of a civil suit, by itself, may not operate as an absolute bar to the filing of the testamentary proceedings,



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the peculiar facts of the present case cannot be lost sight of. As already pointed out, the respondents/petitioners had already chosen to propound the very same Will before the civil Court and sought adjudication of their rights thereunder, in the partition proceedings. The respondents/petitioners having invited the competent civil Court to adjudicate the genuineness and validity of the Will in the partition proceedings, they cannot simultaneously seek a parallel adjudication on the very same issue in a separate proceedings.

14. It is pertinent to mention that the dispute between the parties does not merely relate to their inter se rights over the properties of the testator, but the centre around the genuineness and validity of the Will itself. When the issue regarding the Will had already become the subject matter of the proceedings before the competent civil Court and the proceedings had substantially progressed, the filing of a fresh probate O.P., would result in duplication of the enquiry and create a real possibility of inconsistent findings being rendered by different Courts with respect to the same document.

15. Moreover, the respondents/petitioners have failed to show any



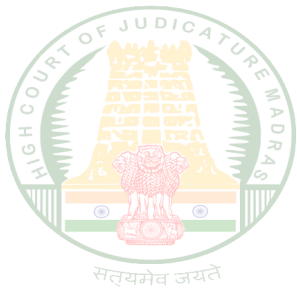
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necessity or justification for invoking the testamentary jurisdiction of the

Court at this stage, particularly when the very same Will had already been propounded by them in the pending partition proceedings and the issue regarding its genuineness was already under consideration. As rightly contended by the learned Counsel for the petitioners/respondents, the present Probate O.P., amounts to an unnecessary parallel proceedings in respect of a controversy which is already pending adjudication before the competent civil Court.

16. It is also pertinent to note that though the alleged Will relates to three items of properties, the partition suit pending between the parties concerns only one of the said items. If ultimately the competent Court upholds the Will and such finding attaining finality, it is always open to the respondents/petitioners to work out their remedy in the manner known to law with respect to the properties covered under the Will. Hence, no compelling circumstances has been made out requiring a simultaneous testamentary adjudication in the present proceedings. Though the reasons assigned for rejection of O.P., by the trial Court



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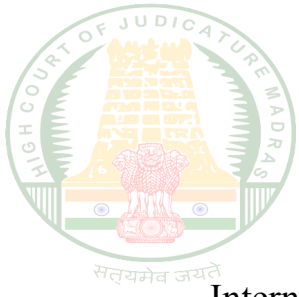
cannot be sustained, the final decision of the trial Court in rejecting the O.P., taking note of the circumstances referred above, cannot be found fault with.

17. Considering the above, this Court concludes that the Civil Miscellaneous Appeal is devoid of merits and the same is liable to be dismissed.

18. In the result, the Civil Miscellaneous Appeal is dismissed confirming the order passed in I.A.No.2 of 2023 in Probate O.P.No.14 of 2023, dated 02.02.2024, on the file of the Additional District Court, (Fast Track Court), Kanyakumari at Nagercoil, rejecting the Probate O.P. It is made clear that the appellants shall be at liberty to work out their rights in accordance with law depending upon the outcome of the pending litigations. In the facts and circumstances of the case, the parties shall bear their own costs.

23.06.2026

NCC : Yes : No
Index : Yes : No



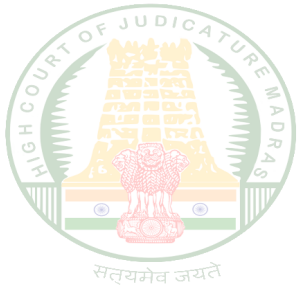
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Internet : Yes : No

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To

1. Additional District Court (Fast Track Court),
Kanyakumari District at Nagercoil.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court, Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

C.M.A(MD)No.299 of 2026

23.06.2026