



A.S(MD)No.95 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.04.2026

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

AND

THE HONOURABLE MS.JUSTICE R.POORNIMA

A.S(MD)No.95 of 2017

and

C.M.P(MD)No.6016 of 2017

Arumugam

... Appellant /
Defendant

Vs.

Thiruvariyan (Died)

... Respondent /
Plaintiff

2.Gomathi

3.Subbulakshmi

4.Vijayakumar

***(R.2 to R.4 are brought on record
as LR's of the deceased sole
respondent vide order of this
Court dated 27.10.2025)***

... Respondents

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent Act to set aside the judgment and decree passed in O.S.No.81 of 2014 dated 29.06.2016 on the file of the Principal District Court, Tirunelveli.

For Appellant : Mr.H.Arumugam

For Respondents : No Appearance for R.2 to R.4



WEB COPY



A.S(MD)No.95 of 2017

JUDGMENT

(By G.R.Swaminathan J.)

The defendant in O.S No.81 of 2014 on the file of the learned Principal District Judge, Tirunelveli is the appellant herein. Though the legal heirs of the plaintiff have been served and their names are also printed in the cause list, they have not chosen to enter appearance either in person or through counsel. The suit was one for partition.

2.The case of the plaintiff was as follows:

The plaintiff and the defendant are siblings. The suit property is a movable property (a bus along with a permit). It admittedly belonged to Lakshmi Ammal, the mother of the parties. On 24.10.1997, Lakshmi Ammal executed a registered Will bequeathing the suit property in favour of the plaintiff and the defendant. Lakshmi Ammal passed away on 12.11.2004 and thereafter, the Will came into force. The plaintiff and the defendant are in joint possession and enjoyment of the property. The plaintiff sought his half share in the suit property. Since the defendant did not come forward for partitioning the same, O.S No.81 of 2014 came to be instituted.

3.The defendant contested the suit principally on the ground that as admitted by the plaintiff himself, there was a partition between the



A.S(MD)No.95 of 2017

parties on 16.11.2011 in respect of the family estate. While according to the plaintiff, the suit property was not the subject matter of the said partition, according to the defendant / appellant herein, the suit property was also the subject matter of the partition and that the plaintiff had given up his half share in the suit property upon receipt of consideration to the tune of Rs.30,00,000/- (Rupees Thirty Lakhs only) along with the interest of Rs.90,000/- (Rupees Ninety Thousand only).

4. Based on the rival pleadings, the Court below framed the following three issues :

- i) Whether the defendant paid the plaintiff's share amount of Rs.30,00,000/- in the suit property and interest of Rs.90,000/- for the delayed payment?
- ii) Whether the plaintiff is entitled to file partition suit?
- iii) Whether the plaintiff is entitled to the relief of partition of $\frac{1}{2}$ share in the suit property?
- iv) To what relief the plaintiffs are entitled to?

5. In support of his case, the plaintiff examined himself as PW.1 and Exs.A1 to A3 were marked. The defendant examined himself as DW.1 and marked Ex.D1 (photocopy of the renewal of the permit). After considering the evidence on record, the Court below vide judgment and decree dated 29.06.2016, granted preliminary decree for partition of the



A.S(MD)No.95 of 2017

plaintiff's half share in the suit property. Aggrieved by the said preliminary judgment and decree, this appeal has been filed.

6.The learned counsel appearing for the defendant / appellant pointed out that apart from the parties herein, Lakshmi Ammal was blessed with four other daughters. But for the Will (Ex.A1) dated 24.10.1987, the suit property would devolve in equal measure on all the six children. Only on account of the Will, the plaintiff is in a position to claim half share in the suit property. However, the Will was not proved by examining even a single attesting witness. If, according to the plaintiff, the attesting witness had passed away, recourse ought to have been taken under Section 69 of the Indian Evidence Act, 1872. In support of this contention, the learned counsel for the appellant relied on the following decisions:

- a) (2022) 1 SCC 115 (V.Prabhakara Vs Basavaraj.K & Another),
- b) (2017) 1 SCC 257 (Ramesh Verma Vs Lajesh Saxena & Another)
- c) 2025 (5) CTC 738 (Ramesh Chand Vs Suresh Chand & Another)
- d) 2022 (3) CTC 88 (Malliga Vs P.Kumaran)

The learned counsel for the appellant submitted that a bare look at the aforesaid decisions would show that even if the defendant had not



A.S(MD)No.95 of 2017

contested or even admitted the execution of the Will, still the propounder of the Will is obliged to prove the Will in terms of Section 68 / Section 69 of the Indian Evidence Act, 1872 and that failure to do so would be fatal.

6(i). Since there is no appearance on the side of the respondents, we ourselves carefully went through the entire evidence on record.

7. At the very outset, it has to be pointed out that the ground now urged before us by the learned counsel appearing for the appellant has not been set forth in the memorandum of appeal. Order 41 Rule 2 of CPC reads that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. If the additional ground raises a pure question of law, the appellate court in normal circumstances ought to permit the counsel to argue the point though it has not been taken in the memorandum of appeal (vide **Chittoori Subbanna v. Kudappa Subbanna, 1966 1 MLJ 67**).

8. We carefully went through the contents of the written statement filed by the appellant. Not only the appellant had not contested the due execution of Ex.A1 Will dated 24.10.1997 and admitted its execution, it was equally his case that the Will had come into force following the



A.S(MD)No.95 of 2017

demise of Lakshmi Ammal in the year 2004. That is why, the Court below did not frame any issue regarding the due execution of the Will (Ex.A1). In all the decisions relied on by the learned counsel appearing for the appellant, either the opposite party did not deny the due execution of the Will or had admitted the execution of the Will. In the case on hand, the appellant had gone one step further. He had also stated that the Will had come into force. Therefore, in the technical sense of the term, the plaintiff cannot even be called as a “propounder” of the Will. The expression “propound” has been defined as offering something for consideration, deliberation or debate. “Propound a Will” is instituting an action for obtaining probate in solemn form (P.Ramanatha Aiyar's Advanced Law Lexicon). The plaintiff was not seeking any relief on the strength of Ex.A1 Will. On the other hand, the basis of the plaint was that he had half share in the suit property. The defendant also conceded that the plaintiff originally had half share in the suit property but that he had given it up in lieu of the consideration paid by him. Thus, it was never in issue if the plaintiff had half share. The issue was whether it had been relinquished or to put it in more appropriate terms, whether the defendant had purchased the share of the plaintiff.

9. Section 68 of the Indian Evidence Act, 1872 (corresponding to Section 66 of the Bharatiya Sakshya Adhiniyam, 2023 (BSA) mandates



A.S(MD)No.95 of 2017

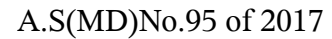
that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. Sections 68 and 69 of the Evidence Act deal with proof of Wills. Section 68 only means that unless the Will has been proved in the manner laid down in Section 68/69 of the Act, it shall not be used as evidence. The expression “as evidence” is significant. A party to a suit adduces evidence only to prove or disprove a fact in issue. “Facts in issue” means and includes any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding necessarily follows. As per Order 14 Rule 1 of CPC, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. In the case on hand, the plaintiff did not rely on Ex.A1 Will to prove that Lakshmi Ammal did not die intestate. There was no need to use Ex.A1 as evidence to prove that Lakshmi Ammal did not die intestate. Both the parties treated this “as a given”. There is a concept called “axiom”. Axiomatic is something self-evident that it calls for no proof. That Lakshmi Ammal did not die intestate was taken as an axiomatic proposition and hence the question of having to prove the said fact by using Ex.A1 as evidence did not arise at all. As per Section 58 of the Evidence Act, admitted facts need not be proved. But Section 68 of the Evidence Act demands



A.S(MD)No.95 of 2017

proof of Will even if it is admitted. While even an admitted fact may have to be proved, an axiomatic fact transcends proof and does not require to be proved. When the plaintiff and the defendant have proceeded on the premise that their mother executed a registered Will and that the same had already come into force, the question of invoking Section 68 of the Act does not arise at all. On facts also, we are satisfied that the Will had already come into force. That is why the contest was only between the two brothers. The sisters were nowhere in the picture. The sisters had not even staked any claim on the suit property. Therefore, the plaintiff cannot be subjected to the rigour of Section 68 of the Indian Evidence Act, 1872. Considering these aspects, we decline to grant leave to the appellant's counsel to canvas the additional ground.

10.As already mentioned, the appellant rested his entire defence on the theory of relinquishment. According to the appellant, there was a partition between the parties in the year 2011. According to the plaintiff, even though the defendant had agreed to pay Rs.30,00,000/-, he had not made the said payment. Thus, the entire burden lay only on the defendant to show that he had made the payment of Rs.30,00,000/-. The defendant had examined only himself as a witness (DW.1). No documentary evidence had been marked. Rs.30,00,000/- is not a small



11. The suit property is a bus with route permit. It cannot be partitioned. There has to be a bidding between the parties and the highest bidder will take the suit property. In these preliminary decree proceedings, we are concerned only with the share of the parties. In view of the reasons assigned by the court below, the plaintiff is entitled to half share in the suit property. The court below had correctly approached the issue. No ground has been made out to interfere with the same. We do not find any merit in this appeal.

[G.R.S., J.] [R.P, J.]
01.04.2026

9/11



WEB COPY



A.S(MD)No.95 of 2017

To

The Principal District Court,
Tirunelveli.



WEB COPY



A.S(MD)No.95 of 2017

G.R.SWAMINATHAN, J.

AND

R.POORNIMA, J.

MGA/skm

A.S(MD)No.95 of 2017

01.04.2026