



A.S.(MD).No.141 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 31.01.2024

CORAM

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN  
AND  
THE HON'BLE MR.JUSTICE C.KUMARAPPAN**

A.S.(MD).No.141 of 2016  
and  
C.M.P.(MD).Nos.9491 and 9492 of 2016

1.Pon Sumathi

2.Pon Sangeetha .. Appellants/Plaintiffs

Vs.

1.Vellaisamy

2.Bharathi

3.Jeyamani .. Respondents/Defendants

**PRAYER:** Appeal Suit filed under Section 96 r/w Order 41 Rule 1 and 2 of Civil Procedure Code, against the judgment and decree dated 21.12.2012 passed in O.S.No.64 of 2010 on the file of 2<sup>nd</sup> Additional District Court, Tuticorin.

For Appellants : Mr.M.P.Senthil

For R-1 & R-2 : Mr.G.Prabhu Rajadurai

For R-3 : No appearance

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## JUDGMENT

**DR.G.JAYACHANDRAN,J.**  
**and**  
**C.KUMARAPPAN,J.**

The present Appeal Suit is filed being aggrieved by the dismissal of the partition suit filed by the children of second wife of one Marimuthu.

2. The short point involved in this appeal, which warrants remand back to the Trial Court, are as follows:

(i) The property, which is now sought to be divided, originally belongs to one Shanmugam Aegali, who left behind two sons, by name, Rajamani and Samayandi. The plaintiffs claimed that Rajamani and Samayandi orally divided the property and the property now under dispute was allotted to Samayandi, who had two children, by name, Lakshmi and Marimuthu. The contesting parties are the descendants of Marimuthu born through the first wife Pappa and second wife Mariammal.

(ii) When the daughters born through the second wife, Mariammal, laid the suit for partition of the property, which is a residential house and agricultural land measuring 27 cents, claiming that they are entitled for



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share along with the children born through the first wife Pappa, it was contested by the defendants 1 and 2 that the plaintiffs have no right in the property and the property had been bequeathed to them by their grandfather Samayandi through a Will marked as Ex.B8. Further, it was also contended that the son and daughter of Samayandi, namely, Marimuthu and Lakshmi respectively, were not made parties to the suit and the suit suffers for non-joinder of necessary parties.

3. The Trial Court, after framing necessary issues, dismissed the suit by accepting the validity and execution of the Will marked as Ex.B8 and also on the ground of non-joinder of necessary parties.

4. Being aggrieved, the appeal suit is filed on the ground that pending appeal, Marimuthu passed away on 01.03.2022 and further, the Trial Court has miserably failed to take note of the mandatory provision of Section 68 of Indian Evidence Act, which requires testimony of one of the attesting witnesses to prove the Will.



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5. Heard the learned counsels and perused the materials available on **WEB CCR** record. The points for determination in this appeal are as follows:

(i) Whether Ex.B8 Will can be relied upon to decide the suit for partition in this case and whether non-joinder of necessary parties will take away the right of the plaintiffs if they are able to prove that they were born to Marimuthu?

6. This Court is of the view that regarding the omission of the plaintiffs not impleading the necessary parties, the demise of Marimuthu has to some extent mitigated the omission and further, the improper appreciation of Ex.B8 Will for deciding the issue requires remand of the matter back to the Trial Court giving liberty to the parties to make necessary amendment in their pleadings and let in evidence to substantiate their plea in addition to the available evidence.

7. In the result, the impugned judgment and decree dated 21.12.2012 passed by the 2<sup>nd</sup> Additional District Court, Tuticorin in O.S.No.64 of 2010 is set aside and the matter is remanded back to the Trial Court. The suit may



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be re-admitted and proceeded in accordance with law. Accordingly, the Appeal Suit is allowed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

**(G.J.,J.) (C.K.,J.)**  
**31.01.2024**

NCC : Yes / No

Index : Yes / No

Internet : Yes / No

Lm

To

1. The 2<sup>nd</sup> Additional District Court,  
Tuticorin.

2. The Section Officer,  
Vernacular Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**DR.G.JAYACHANDRAN,J.**  
**and**  
**C.KUMARAPPAN,J.**

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