

S.A.No.1093 of 2015

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

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Reserved On: 28.08.2026

Delivered On: 10.09.2026

CORAM

**THE HONOURABLE DR JUSTICE G. JAYACHANDRAN**

S.A.No.1093 of 2015  
& M.P.No.1 of 2015

M.Pandiarajan,  
S/o.Murugaiah Pillai,  
Kokkaladi Village,  
Pamani,  
Thiruthuraipoondi Taluk,  
Tiruvavarur District.

... Appellant

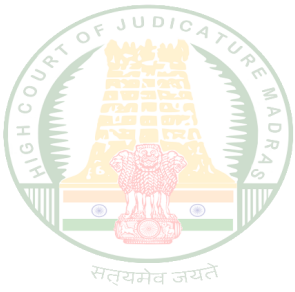
vs.

1. Tmt.Andal,  
W/o.Govindasamy,  
Rokkakuthagai,  
Thiruthuraipoondi Taluk,  
Tiruvavarur District.

2. Tmt.Ambika,  
W/o.Gunasekaran,  
Vettaikaraniruppu,  
Keelvelur Taluk,  
Nagapattinam District.

... Respondents

**Prayer:** Second Appeal filed under Section 100 of Civil Procedure Code, pleaded to set aside the judgment and decree dated 07.10.2013 passed in A.S.No.34 of 2012 on the file of the Sub-Court, Mannargudi confirming the judgment and decree dated 21.11.2011 in O.S.No.73 of 2010 on the file of the District Munsif Court, Thiruthuraipoondi and allow this appeal.



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S.A.No.1093 of 2015

For Appellant : Mr.S.Nagarajan

For Respondents : Mr.S.Vigneshwaran,  
for Mr.S.Arivazhagan.

## **J U D G M E N T**

The appellant/defendant is the brother of the respondents/plaintiffs.

The Second Appeal is directed against the concurrent findings of the Courts below in the suit for partition filed by the two sisters against their sole brother.

2. For convenience parties are referred as found in the plaint.

According to the plaint, the plaintiffs and the defendant are the children of Late Sundarathachi and Late Murugaiah Pillai. Their mother, Sundarathachi, died intestate in the year 1991, leaving behind 12 properties mentioned in the 'A' schedule of the plaint. Their father, Murugaiah Pillai, died intestate on 18.09.2009, leaving behind 26 properties in two villages, morefully described in the 'B' schedule of the plaint. The properties were in joint possession and enjoyment of the parties till the demise of the father. After the demise of the father, when the plaintiffs through notice dated 07.12.2009, sought for their shares of  $\frac{1}{3}^{\text{rd}}$  each as per the Hindu Law of Succession, the defendant refused. Hence, the suit for partition to divide the properties into



S.A.No.1093 of 2015

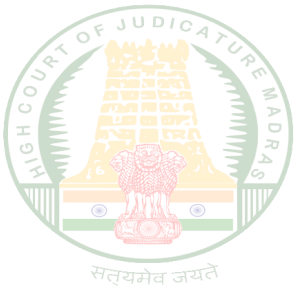
three and allot  $\frac{1}{3}$ <sup>rd</sup> share to each of the plaintiffs.

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3. As per the written statement filed by the defendant, the relationship of the parties admitted. However, claim of share in the properties denied by the defendant based upon two *Wills*, one dated 02.10.1953 executed by the maternal grandmother, Subbammal and another dated 09.08.2005 executed by Murugaiah Pillai. The defendant claim exclusive rights over the properties left by the parents through these *Will*. Further it is pleaded incorrectness of the statements with regard to several items of property mentioned in the suit schedule which were either not owned by the parents or already sold during their lifetime. Hence, the incorrectness renders the suit bad. That apart, the plea of ouster and suppression of the knowledge about the *Wills* were other grounds taken as a ground for dismissal of the suit.

4. The Trial Court framed the following issues for consideration:

1. Whether the plaintiffs are entitled to  $\frac{1}{3}$ <sup>rd</sup> share each in the 'A' and 'B' Schedule properties?
2. Whether the plaintiffs holds any valid *Will* in his favour?
3. What other reliefs the parties are entitled to?



S.A.No.1093 of 2015

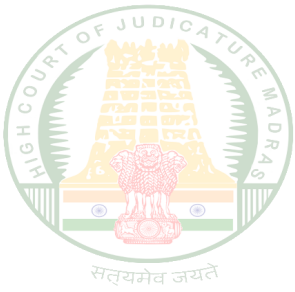
5. On behalf of the plaintiffs, the first plaintiff, Tmt.Andal was

examined as P.W.1. Ex.A1 to Ex.A8 were marked on the side of the plaintiffs.

On behalf of the defendant, five witnesses were examined and Ex.B1 to Ex.B.18 were marked in support of his case.

6. After considering the oral and documentary evidence, the Trial Court held that some of the properties mentioned in the plaint already been sold by Murugaiah Pillai, the father of the parties and some of the properties were purchased in the names of the minor children of the defendant, for which the grandfather Murugaiah Pillai is only their guardian. Excluding those properties, the trial Court allowed the suit for partition by holding the plaintiffs are entitled for 1/3rd share each. Accordingly, preliminary decree was passed.

7. The judgment and decree dated 21.12.2011 passed in O.S.No.72 of 2010 came up for consideration before the Sub-Court, Mannarkudi in A.S.No.34 of 2012 filed by the defendant.



S.A.No.1093 of 2015

8. The First Appellate Court framed the following points for

consideration:

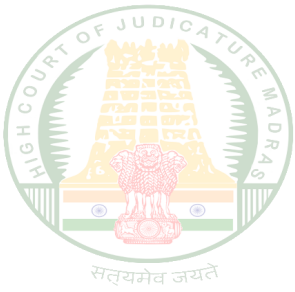
(i) *Whether the trial Court was justified in disbelieving the Will?*

(ii) *Whether the judgment of the trial Court warrants interference?*

9. The First Appellate Court, after discussing the evidence held that the interpretation of Ex.B15 *Will* is correct and justified the trial Court's decision in disbelieving the *Will* Ex.B17. Hence, held there is no need to interfere in the judgment and decree of the trial Court.

10. Challenging the concurrent findings of the Courts below, the defendant preferred the Second Appeal, which is now under consideration.

11. When the matter came up for admission, this Court thought it fit that the matter may amicably be settled through mediation since the disputing parties are siblings. Hence, the matter was referred to the District Court Mediation and Conciliation Centre at Nagapattinam. However, the Mediation failed, the matter was sent back to Court for consideration on merits.



S.A.No.1093 of 2015

**12.** On perusing the grounds of appeal, the following substantial

questions of law framed:

(i) Whether the defendant's plea of ouster was properly appreciated by the Courts below in the light of the admission of 1<sup>st</sup> plaintiff in the cross examination?

(ii) Whether the Courts below have properly interpreted Section 63(c) of the Indian Succession Act to examine the intention of the testator of the *Will* Ex.P.15 dated 02.10.1953 and Section 68 of the Indian Evidence Act while testing the genuineness of the *Will* Ex.B.17, dated 09.08.2005?

(iii) Whether the Courts below erred not framing the issues regarding non-impleading of necessary parties?

**13.** Ex.B.15 is the *Will* executed by Subbammal. In this *Will*, Subbammal has mentioned about her family details, including her elder daughter and her younger daughter, Sundarathachi and had expressed her intention to devolve the property mentioned in the *Will* in favour of her daughter, Sundarathachi and thereafter to the two daughters of Sundarathachi.



S.A.No.1093 of 2015

In anticipation that, in future, if Subbammal have any male or female children,

they will also get the property. Therefore, the intention of Subbammal is clearly spelt out in the *Will* that her property must go to plaintiffs and if any child or children were born, whether male or female, they should also get share in the property. The defendant is the son of Sundarathachi born after the Will.

14. The Court below has read these provisions, which is clear and simple without any unambiguity, so held that the property held by Sundarathachi through the *Will* of her mother, Subbammal, has to be shared equally among the children of Sundarathachi, namely, the two plaintiffs and the defendant.

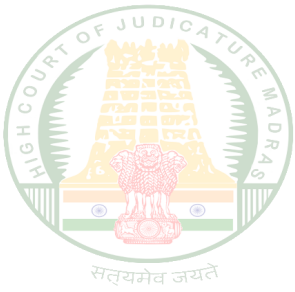
(i) Section 63 of the Indian Succession Act, 1925, reads as below:

***“63. Execution of unprivileged Wills.—***

*Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—*

*(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*

*(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed*



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S.A.No.1093 of 2015

*that it shall appear that it was intended thereby to give effect to the writing as a Will.*

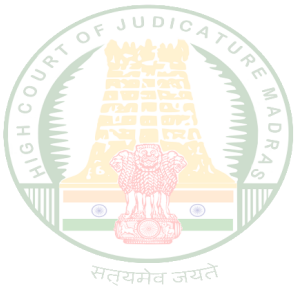
*(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”*

(ii) Section 68 of the Indian Evidence Act, 1872, reads as below:

***“68. Proof of execution of document required by law to be attested.***

*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, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:*

*Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration*



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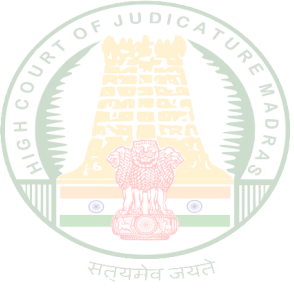


S.A.No.1093 of 2015

*Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”*

These two provisions are in respect of how a *Will* to be executed and how it should be proved in the Court of law.

**15.** It is pertinent to note that, (P.W.1) the 1<sup>st</sup> plaintiff had categorically deposed that after her marriage in the year 1971, they have not been in joint enjoyment of the property for more than 40 years. It is also elucidated in her cross-examination that she had not even attended the funeral of her father, since she was not informed about his death. Even after receipt of the reply notice denying her share in the property and the disclosure of two Wills, the proper parties who had interest in the property were not impleaded. The eight documents relied by the plaintiffs are Chitta, Adangal and applications given to the Tahsildar for issuance of Chitta and Adangal. The Chitta and Adangal are for fasli years 1416 & 1417 (2006 – 2007) in the name of Sundarathachi, long after the death of Sundarathachi, cannot be of any evidentiary value for consideration since it stands in the name of dead person showing her as the person in occupation of the land and cultivation.

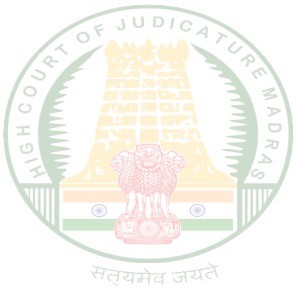


S.A.No.1093 of 2015

16. To understand the intention of the Testatrix, Subbammal, from the

recital in Ex.B.15 executed on 02.10.1953, we have to apply the ‘*armchair rule*’. When Subbammal wrote the *Will* Ex.B15, her daughter Sundarathachi had only two daughters. Taking into consideration the law of inheritance prevailing before codification of Hindu Law and also visualising the probability of further more children to her, either male or female, the testatrix had said, her properties mentioned in the *Will* shall devolve on her daughter Sundarathachi and after her demise to her two daughters born to her. In the event of any further child/children, either male or female, the property shall devolve on all the children of Sundarathachi, (whether male or female). The crucial expression used in the *Will* Ex.B.15, is as below:-

“என் மூத்த பெண் இறந்து போன பக்கிரியம்மாளுடைய பெண்ணான அபூர்வத்திற்கு தற்போது 8 வயதாகிறது. ஷை அபூர்வத்தின் விவாஹத்திற்கு இந்த உயிலில் கண்ட சொத்துக்களின் வருமானத்திலிருந்து சுந்திரம்மாள் ரூ.100 (நூறு ரூபாய்) செலவு செய்ய வேண்டியது. ஷை சுந்திரத்திற்கு தற்போது ஆண் வார்ஸ்கள் இல்லாமலிருப்பதால் இனி ஆண் வார்ஸ்கள் உண்டானாலும் இல்லாமலிருந்தாலும் ஷை சுந்திரத்துக்கு பிறகு ஷை சொத்துக்களை ஷை சுந்திரத்தின் ஆண் அல்லது பெண் வார்ஸ்கள் சர்வசுதந்திரங்களுடன் அடைந்து கொள்ள வேண்டியது.”



S.A.No.1093 of 2015

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**17.** Thus, the intention of the testatrix, Subbammal, that all the heirs of Sundarathachi, whether male or female has to get her property, is very clearly spelt in her *Will*, Ex.B.15. Therefore, if the case of the plaintiff that Sundarathachi died intestate and the property inherited by her from her mother, Subbammal, who also died intestate, is held proved, then after the demise of Sundarathachi in the year 1991, the succession had opened. Contrarily, if the *Will* Ex.B15 is held proved, then also 'A' Schedule properties have to devolve on the grandchildren (male or female) of Subbammal. Either way, the properties left behind by Sundarathachi has to go to her children, who are the litigating parties. Thus, the plaintiffs are co-owners without any doubt. Hence, the right of the plaintiffs to claim share is preserved. The defendant, however, deny any share to them in respect of 'A' schedule property on the ground that the plaintiffs are not in joint enjoyment and were ousted from enjoyment with their knowledge decades ago.

**18.** On the death of Sundarathachi on 21.05.1991, succession opened either intestate or by testament. The plaintiffs have not chosen to claim share in the property till the end of the year 2009. The notice seeking partition, marked as Ex.A7 was issued on 07.12.2009 and thereafter, the suit been laid on



S.A.No.1093 of 2015

06.08.2010 and taken on file as O.S.No.72 of 2010 by the District Munsif,

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Thiruthuraipoondi. The plaintiffs have pleaded that they were in continuous possession and joint enjoyment of the property even after the death of their mother, till causing the pre-suit notice, Ex.A7. However, the said assertion is denied by the defendant.

19. The 1<sup>st</sup> plaintiff, Tmt.Andal was examined as P.W.1. In the cross-examination she admits that there is no evidence to show that, she and her sister were in joint enjoyment of the suit property along with their brother and there is no document to prove they were in joint enjoyment and there is no patta in respect of the property stands jointly in their names. Under the *Will* of Subbammal, 11 items of property were shown. Whereas, in the plaint, while listing the properties of Sundarathachi under schedule 'A', 12 items been mentioned and particularly, the 1<sup>st</sup> item in the 'A' schedule is the property in S.No.248/6A. This property in fact is the property of Murugaiah Pillai and not the property of Sundarathachi or her mother Subbammal. This property been sold to one Kothandapani by Murugaiah Pillai during his lifetime and this fact has been pleaded in the written statement. But then, by relying upon the Chitta for fasli year 1417, marked as Ex.A1 and the Adangal for fasli year 1416,



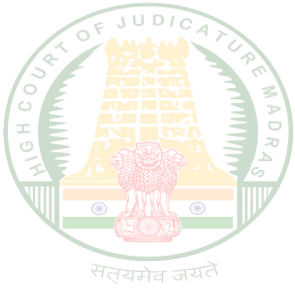
S.A.No.1093 of 2015

marked as Ex.A2, both issued in the name of dead person, the plaintiffs claims

share in S.No.248/6A. Likewise, in respect of S.No.257/2, which is shown in

item No.12 in the 'A' schedule, the case of the defendant is that this is not an exclusive property of Sundarathachi, but the property held jointly by Sundarathachi and Kothandapani under the joint patta. This said survey number is neither found in the *Will* of Subbammal nor in the Chitta relied by the plaintiffs, issued in favour of Sundarathachi. This apparent omission and commission in the pleadings as well as the admission of the plaintiffs that she got married in the year 1971 and thereafter she is living with her husband at Thiruthuraipoondi and never been enjoying the income jointly, gains significance. The relevant portion of the cross-examination of P.W.1, reads as below:

“எனக்கு திருமணமாகி எத்தனை ஆண்டுகள் ஆகிறது என்றால் 1971ல் திருமணமானது. நான் திருமணமானவுடன் என் கணவருடன் திருத்துறைப்பூண்டியில் வசிக்கிறேன் தாவா சொத்துக்கள் கொடுக்கை, கொக்காலடி கிராமங்களில் உள்ளது. நான் தாவா சொத்துக்களை கூட்டனுபவம் செய்ததற்கு வரவு செலவுகணக்கு எழுதி வைத்தள்ளேனா என்றால் இல்லை. கூட்டனுபவம் செய்து வருமானம் அடைந்தோமா என்றால் இல்லை. அச் சொத்துக்களிலிருந்து திருமணமாகி



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S.A.No.1093 of 2015

போனதிலிருந்து

எவ்வித

வருமானமும்

அடைந்ததது இல்லை.”

20. It is a settled principle of law that a co-owner is a co-owner of the lands in question, his possession, however long it might be, unless it is adverse to the other co-owners, cannot confer on him any right. **[Reference: Maharajadhiraj of Burdwan, Udaychand Mahatab Chand v. Subodh Gopal and Others reported in AIR 1971 SC 376.]** Therefore, the plea of ouster as against co-owner has to be decided based on pleadings and proof and not on length of time.

21. In the instant case, the partition suit in respect of properties held by Sundarathachi, who died in the year 1991 is laid on by the daughters in the year 2010, claiming that they were in joint possession. In **Mohaideen Abdul Kadir and Others v. Mohammad Mohaideen Umma by Agent Habeeb Mohammad Thambi and Others reported in I.L.R. (1970) 2 Mad. 636**, the Division Bench of this Court had considered the doctrine of ouster between co-owners, with special reference to the time factor of sole and exclusive possession of one co-owner in the background of the other co-owner's continuous and complete inaction and non-participation in the income for a



S.A.No.1093 of 2015

considerable length of time. Referring the quote of an English Jurist, the Bench has endorsed his view that, *“ouster can well be presumed from exclusive possession of one co-owner and non-participation in the profits of the property by the other co-owner for a considerable length of time, for several decades or several generations, as after such a length of time, hostile assertion and repudiation to the knowledge of the co-owner concerned cannot be proved but can only be inferred.”*

**22.** It is also gainful to refer *N.Vartha Pillai vs. Jeevarathnammal* reported in *A.I.R. 1919 P.C. 44*, in which the *Privy Council* has held that if a co-owner has been in exclusive possession and in receipt of the rents and income from the property for a considerable length of time and the other co-owner was, throughout, inactive, it will be legitimate for the Court to raise the presumption of ouster and that the length of time is a relevant and important factor in coming to a conclusion one way or the other on the question of ouster.

**23.** In this case, apart from the admission of P.W.1, the plaint as such suffers factual incorrectness in respect of properties available for partition which also lends a strong inference of ouster. The properties were never with



S.A.No.1093 of 2015

their parents and sold by the father during his lifetime and the properties of the daughters of the defendant are also shown as properties to be divided even without impleading them as parties, despite knowledge of those facts through the pre-suit notice and the written statement, this adds force to the plea of ouster.

**24.** Therefore, considering the pleadings, the evidence as well as the own admission of the first plaintiff cumulatively, it is without any doubt that the plaintiffs are ousted from claiming any share in the properties of their mother, which are mentioned in the 'A' schedule of the plaint.

**25.** The Courts below erred in not considering the testimony of P.W1 and the exhibits in the Chitta and Adangal.

**26.** Next, while examining the *Will* of Murugaiah Pillai, marked as Ex.B.17, the Courts below doubted the genuineness of the *Will* since the attesting witness have not deposed that the testator signed the *Will* in their presence. They have only deposed that the *Will* was brought by Murugaiah Pillai to their home and they signed the *Will* which is adequate to prove a *Will*



S.A.No.1093 of 2015

as per Section 68 of the Indian Evidence Act.

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**27.** Section 68 of Indian Evidence Act, mandates that an attesting witness beside identifying his signature should also depose about the affixure of signature by the testator in their presence. In this case, we find both the attesting witnesses to the *Will* marked as Ex.B.17 had not deposed about witnessing the testator signing the *Will*. Hence, there is lacuna in proving the execution of *Will* Ex.B.17.

**28.** However, on reading the recitals in Ex.B.17, we find that Murugaiah Pillai had not given any property to his son, who is the sole defendant in the suit. He had given few properties to his daughters (the plaintiffs) and some properties to his grandchildren, who are the daughters of the defendant.

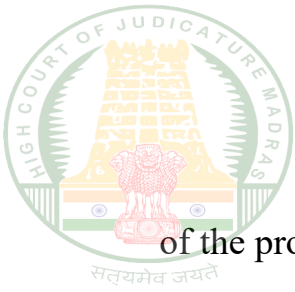
**29.** Regarding the *Will*, Ex.B17, executed by the father Murugaiah Pillai, the Courts below have found that the properties listed in the 'B' schedule as properties of Murugaiah Pillai are not wholly correct. It is also seen from documents, like Ex.B2 to Ex.B10, how Murugaiah Pillai acquired the properties



S.A.No.1093 of 2015

and how he dealt it during his lifetime. The properties sold by Murugaiah Pillai

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S.A.No.1093 of 2015

of the properties either symbolic or constructive.

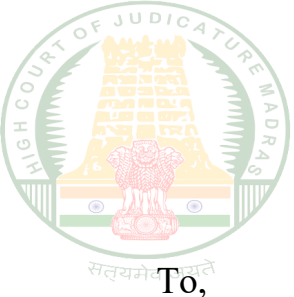
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**30.** As a result of the above reasoning, this Court holds that, the suit for partition is primarily bad for not impleading of the proper and necessary parties insofar as the 'B' schedule properties are concerned. The plaintiffs have lost their right to claim share in the 'A' schedule properties in view of ouster, though the intention of the testatrix was to give her properties to all her grandchildren born through her daughter, Sundarathachi. Accordingly, the substantial questions of law are answered in favour of the defendant.

**31.** In fine, the *Second Appeal stands allowed*. The judgment and decree passed by the trial Court in O.S.No.73 of 2010, dated 21.11.2011, as confirmed by the First Appellate Court in A.S.No.34 of 2012 dated 07.10.2013, are set aside. Considering the relationship between the parties, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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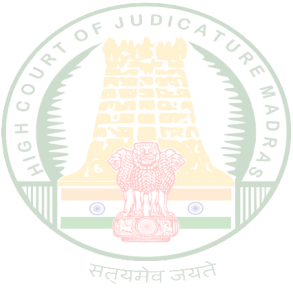
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| Index            | :Yes.    |
| Neutral Citation | :Yes/No. |
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S.A.No.1093 of 2015

To,

1. The Sub-Court, Mannargudi.  
2. The District Munsif Court, Thiruthuraipoondi.



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S.A.No.1093 of 2015

**Dr. G.JAYACHANDRAN, J.**

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Pre-Delivery judgment made in  
S.A.No.1093 of 2015

Judgment delivered on  
10-09-2026