



S.A No.415 of 2016

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.04.2023

CORAM:

THE HON'BLE MRS. JUSTICE T.V.THAMILSELVI

S.A Nos.415 & 416 of 2016

1.Regina Rita
2.Leena Premkumari @ Leela Natha

.. Appellants in S.A NO. 415 of 2016

1.Regina Rita
2.Leena Felix

...Appellants in S.A No. 416 of 2016

Vs.

1.A.Benetiet John Bosco
2.Pandian
3.A.Xavier
4.Peter
5.John
6.Arulraj
7.K.Sekar
8.Xavier
9.C.Subash
10.M.Mariyaraj
11.Kumari
12.A.William Arul Prakash (died)

(R12 died, No necessity to implead his legal heirs, memo recorded vide



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court order dt 02/08/2022 made in S.A No.415 of 2016 (TVTSJ)

...Respondents in S.A No. 415 of 2016

1.A.Benetiet John Bosco

...Respondents in S.A No. 416 of 2016

PRAYER in S.A No. 415 of 2016: This Second appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree in A.S No.9 of 2014 dated 06.07.2015, on the file of III Additional District and Sessions Judge, Coimbatore reversing the judgment and decree in O.S No. 796 of 2010 dated 11.09.2013, on the file of 1st Additional Subordinate Judge, Coimbatore.

PRAYER in S.A No. 416 of 2016: This Second appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree in A.S No.10 of 2014 dated 06.07.2015, on the file of III Additional District and Sessions Judge, Coimbatore partly allowed the judgment and decree in O.S No. 530 of 2012 dated 11.09.2013, on the file of 1st Additional Subordinate Judge, Coimbatore.

For Appellants
(in both appeals) : Mr. S.Kamadevan
For R1 to R10
: Mr.A.E.Ravichandran



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COMMON JUDGMENT

The second appeal in S.A No. 415 of 2016 has been filed against the judgement and decree in A.S No.9 of 2014 dated 06.07.2015, on the file of III Additional District and Sessions Judge, Coimbatore reversing the judgment and decree in O.S No. 796 of 2010 dated 11.09.2013, on the file of 1st Additional Subordinate Judge, Coimbatore. Another second appeal in S.A No. 416 of 2016 has been filed against the judgement and decree in A.S No.10 of 2014 dated 06.07.2015, on the file of III Additional District and Sessions Judge, Coimbatore partly allowed the judgment and decree in O.S No. 530 of 2012 dated 11.09.2013, on the file of 1st Additional Subordinate Judge, Coimbatore.

2. Originally suit in O.S No. 1249 of 2006 was filed on the file of the Additional sub-Judge, Coimbatore, by the first respondent in these second appeals for the relief of declaration. Later the said suit was re-numbered as 530 of 2012. Thereafter, the suit in O.S No. 796 of 2010 was filed by the appellants in S.A No. 415 of 2016, on the file of the Sub Judge, Coimbatore, for the relief of declaration and permanent injunction. Thereafter the said suits O.S No. 530 of 2012(originally O.S No. 1249 of



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2006) and O.S No.796 of 2010 were tried jointly before the Sub Court, Coimbatore, since the subject matter of the suit properties and the parties are same. After considering the oral and documentary evidence the Trial Court allowed the suit filed by the appellate herein (i.e O.S No. 796 of 2010) and the dismissed the suit (i.e., O.S No. 530 of 2012) filed by the first respondent herein. Aggrieved over the same, the first respondent herein filed and others filed A.S No. 9 and 10 of 2014, on the file of the III Additional District and Sessions Court, Coimbatore. After considering the oral and documentary evidence the lower appellate Court allowed A.S No. 9 of 2014 and partly allowed A.S No. 10 of 2014. Challenging the same the plaintiff in O.S No. 796 of 2010 and the respondent in O.S No. 530 of 2012 preferred these second appeals.

3. For the sake of convenience the parties are denoted as per the suit in O.S No. 796 of 2012 since the suit properties and the parties are one and the same.

4. The brief facts of the case are as follows:

The plaintiffs Regina Rita and Leena Felix are the sister of the A.Benedict John Bosco and A.William Arul Prakash, their parents are Rajammal @ Agnesammal and Arputhasamy. Iteme No. 1 and 2 of the suit



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properties are self acquired properties of their mother Rajammal through purchase as per the sale deeds dated 26.01.1964 and 13.07.1965, after the purchase she altered the super structure and constructed the terrace building and let out to the tenants. During her life time she executed a registered Will dated 24.08.2001 in respect of item No. 2 of the suit property in favour of the plaintiff. So also on 07.11.2001 she registered another Will in respect of item No. 1 of the suit property in favour of the plaintiff absolutely and equally. Thereafter her mother Rajammal died on 23.04.2002 hence the two Wills executed by her was came into force. Subsequently based on the above said Will mutation of name of the plaintiffs in the City Municipal Corporation, Coimbatore have been made in their favour. Against which, the first defendant filed a suit in O.S No. 1249 of 2006. In fact, the first defendant/plaintiff's brother residing in the first item of the suit property who was permitted to collect the rent from the tenants since the plaintiffs were resided at Bombay and abroad, with a view to grab the property the first defendant colluded with tenants he refused to hand over the rent to the plaintiffs and also claimed ownership based on the Will said to have been executed by his mother on 23.11.2000. But the plaintiffs claimed ownership of the suit property based on the Will dated 24.08.2001 and 07.11.2001.



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Hence the plaintiff filed the suit for the relief of deliver of possession and for declaration and other consequential relief against their brother first defendant. Admittedly the first defendant filed suit O.S No. 1249 of 2006(thereafter renumbered as O.S No. 530 of 2012) on the file of the District Munsif Court, Coimbatore, stating that as per the Will dated 23.11.2000 executed by their mother 3/8 share each was given to the plaintiffs/sisters and 2/8 share given to the first defendant in the first item of the suit property, with regard to item No.2 of the suit property 1/3 share each was given to the plaintiffs and 1/3 share was given to the first defendant. Since the settlement was already made to the second defendant hence he is not entitled to share in the item 2 of the suit property. Hence he filed suit for declaration based on the Will dated 23.11.2000.

5. After considering the oral and documentary evidence the Trial Court allowed the suit filed by the appellant herein (i.e O.S No. 796 of 2010) and the dismissed the suit (i.e., O.S No. 530 of 2012) filed by the first respondent herein. Aggrieved over the same, the first respondent herein filed and others filed A.S No. 9 and 10 of 2014, on the file of the III Additional District and Sessions Court, Coimbatore. After considering the oral and documentary evidence the lower appellate Court allowed A.S No. 9



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of 2014 and partly allowed A.S No. 10 of 2014. Challenging the same the plaintiff/sisters in O.S No. 796 of 2010 and the respondent in O.S No. 530 of 2012 preferred these second appeals.

6. The learned counsel for the appellants submitted that lower appellate Court failed to take note of the fact that Will relied by the plaintiffs was proved by examining one of the attesor as required under Section 68 of Evidence Act and the evidence of P.W.2 also clearly proved that both the Will executed by the testator with sound state of mind without any coercion which was rightly appreciated by the Trial Court but the lower appellate Court erroneously concluded that the Will was surrounded with suspicious circumstances. By relying the slight contradiction deposed by P.W.2 with regard to preparation of those Will. Further the lower appellate Court erroneously concluded that Will relied by the defendant marked as Ex.B2 and B3 does not required proof since it was admitted by the plaintiff/daughter of the attesor. Accordingly those Wills are declared as genuinene as such is misconception of law and facts for the reason that defendant also bound to prove the Will by examining any one of the attesor as per Section 68 of Evidence Act but the defendant failed to comply the same in respect of the suit filed by the brother in 530 of 2012 was decreed in



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his favour it is totally perverse and liable to be set aside.

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7. The learned counsel for the respondent/brother of the plaintiff submitted that their mother executed the Will dated 23.11.2000 through which he entitled to the suit properties which was rightly appreciated by the lower appellate Court which needs no interference. With regard to the will relied by the appellant they failed to prove the Will beyond reasonable doubt. Hence he prays to dismiss these appeals.

8. This Court admitted the appeals with the following substantial questions of law:

1. Whether the lower appellate Court is justified and correct in holding that the appellants have not proved the execution of the registered Wills in Ex.A23 and Ex.A24 in terms of Section 63 of Indian Successions Act r/w 68 of the Indian Evidence Act?

2. Whether the lower appellate Court is correct and justified in holding that the evidence adduced by the P.W.2 is with contradictions to hold that the same is unbelievable and thereby he had not satisfactorily proved the execution of Ex.A23 and Ex.A24?

3. Whether the lower appellate Court is correct and justified in holding that the P.W.2 had not identified the signature founds in Ex.A23 and Ex.A24, when the same were marked through him and also spoken about its execution?

9. Whether the lower appellate court is correct and justified in granting a decree in favour of the first respondent declaring that the Wills dated 23.11.2000 marked as Ex.B2 and Ex.B3 are proved and also binding



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on the appellants when there is no independent evidence satisfactorily placed to prove its execution?

10. Considering the submissions on either side, it reveals that daughters of Rajammal/appellants herein claiming share over the suit property based on the EX.A23 and Ex.A24 executed by their mother. On the other side son of Rajammal/respondent herein claiming right over the suit property based on the Will dated 23.11.2000 executed by his mother. Hence both the parties claiming right over the suit property based on the three different Wills. Therefore the burden is casted upon both the parties to prove the genuineness of the Wills on which they relied. Furthermore, the relationship between the parties are admitted. It is undisputed fact that the suit properties was belongs to their mother Rajammal absolutely. The plaintiffs relied the Will Ex.A23 and Ex.A24 dated 24.08.2001 and 07.11.2001 to prove the same they examined attestor of the said two Wills as P.W.2. who deposed as follows:

.....ராஜம்மா ரிஜிஸ்டரில் கையெழுத்திட்டுப் போட்டு ரேகையும் வைத்தார்கள். ராஜன் தயாரித்த உயில் ராஜன் என்பவரும் வில்லியம் என்பவரும் படித்து காட்டினார்கள். அதனை கையெழுத்திட்டு முன்னர் படித்து காட்டினார்கள். ராஜன் என்பவர் உயிலை கம்ப்யூட்டரில் டைப் செய்தார்கள். அவருடைய அலுவலக உதவியாளர் பிரின்ட் எடுத்தார்கள்.

..... அவர் பின்னர் பத்திரப் பதிவு அலுவலகத்தில் வைத்துதான் கையெழுத்திட்டு



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போட்டார். வா.சா.ஆ.23 என்பவருடைய எழுத்தாளர் கீதா என்பவர் ஆவார். பத்திர எழுதும் அலுவலகத்தில் நான் கையெழுத்து எதுவும் போடவில்லை. பின்னர்தான் கையெழுத்துப் போட்டேன் கீதாதாணி தயார் செய்த பத்பிரத்தில் புகைப்படம் ஒட்டினார். ஆதற்கு கீழ்தான் ராஜம்மா கையெழுத்து இட்டார்.....

.....வா.சா.ஆ.23 உயிலிலும் கீதாராணி என்பவர்தான் ராஜம்மா என்பவருக்கு உயிலை படித்துக் காட்டினார். பத்திரப்பதிவு அலுவலகத்தில் ராஜம்மா வா.சா.23 பதிவு செய்யும்போது 2இ 3 கையெழுத்து போட்டார்.....

11. Therefore the evidence of P.W.2 clearly reveals that as per the instruction of the Rajammal both the Wills were executed and read over to her. Thereafter, she signed the Will in the presence of all the witness and the witnesses also signed in the Will in register office. The said Wills were type written Wills wherein Rajammal put her signature in the register office and also signed and affixed her thumb impression and the both the Wills were prepared by one Rajan and the both the Wills were got registered on the same date. But P.W.2 attesor of the Will deposed that Will was printed in the stamp paper but it was printed in the green sheet not in the stamp paper by relying the said variation of these evidence lower appellate Court held that attesor has not deposed about the correct fix of the execution thereby concluded that will is surrounded with suspicious circumstances. However, the Trial Court rightly analysed the facts and evidence of the attesor P.W.2 and ignoring this contradiction holding that since witness



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were examined after 12 years of execution of the Wills hence it could not be expected that the Witness would say each and every thing line by line. As rightly pointed out by the Trial Court, since the wills were executed 12 years back hence the witness only remind about the particular incident not expected exactly about which paper the Wills were typed. But the lower appellate Court instead of appreciating P.W.2 witness erroneously dismissed the suit. Further the first defendant in his evidence admitted the execution of these Wills by testator Rajammal. Therefore findings of the lower appellate Court with regard to P.W.2 is totally erroneous. On the other hand with regard to Ex.A23 and Ex.A24 his evidence is sufficient enough to conclude that testator Rajammal was in sound state of mind while executing the Will. Furthermore, at the time of execution, plaintiff was not accompanied her, one of her son willson was accompanied and attestor also went to that place as per the request made by the testator besides she affixed her signature after the Will was read over therefore execution of the Will was proved beyond reasonable doubt. Accordingly second appeals are allowed question of law 1,2 and 3 are answered.

12. The lower appellate Court also holding that Will executed by the Rajammal marked as Ex.B2 and B3 in favour of the defendants are



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true and valid one since because plaintiffs not denied the execution of all the Wills. The contention of the plaintiffs is that while executing Ex.A23 and Ex.B.24 their mother cancelled the earlier Will EX.B2 and Ex.B3. However, the lower appellate Court came to the conclusion that the Will relied by the defendants need not be proved since it was admitted by the plaintiffs. But on perusal of the objection filed by the plaintiffs in that written statement it was stated that they were not aware about true and genuineness of execution of the said Will but they contend that it was the last Will executed by her mother earlier Will was cancelled. But as per the plaint averments in O.S 1249 of 2006 these defendants relied those Wills Ex.B2 and Ex. B3 claiming that their mother executed Will in favour of himself and his two sisters thereby he approached the Court for the relief of declaration prior to the suit filed by the plaintiffs. Whatsoever, the Defendants bound to prove the Will Ex.B2 and Ex.B3 which was relied by him in order to prove his right over the property as he also approached the court for the relief of declaration. But the defendants not taken any efforts to prove those Will as per Section 68 of Evidence Act. But the lower appellate Court simply held that Will is genuine one by relying the plaint averments that Will already cancelled by the mother while executing Ex. A.23 and



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Ex.A.24, even assuming that Will was admitted by the plaintiffs but the duty casted upon the defendant to prove the Will as such is true as per Section 68 of Evidence Act, is mandatory one, even entire evidence of the plaintiff clearly reveals that they have not admitted the execution of the Wills Ex.B2 and B3 but the lower appellate Court ignoring the said legal proposition decreed the suit in favour of the defendants by relying Ex.B2 and Ex.B3 is totally perverse and liable to be set aside. Accordingly both the appeals are allowed. Thus, the findings of the lower appellate court is set aside. Thus the suit in O.S No.796 of 2010 is allowed and the suit in O.S No. 530 of 2012 filed by the defendants is dismissed. Further the defendants are directed to vacate the suit premises within a period of three months from the date of receipt of a copy of this Judgement.

13. In result, these second appeals are allowed. No cost. Consequentially connected miscellaneous petition is closed.

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T.V.THAMILSELVI,J.

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To

1. The III Additional District and Sessions Judge, Coimbatore.
2. The 1st Additional Subordinate Judge, Coimbatore.
3. The Section Officer,
V.R Section,

SA.Nos.415 & 416 of 2016
M.P No. 1 of 2013

28.04.2023



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