

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(TESTAMENTARY AND INTESTATE JURISDICTION)

TUESDAY, THE 31ST DAY OF JULY 2018

THE HON'BLE MR. JUSTICE N.SATHISHKUMAR

A.Nos.5614 & 5615 of 2018

IN

T.O.S.No.23 OF 2008

In the matter of the Indian
Succession Act XXXIX of
1925; and

In the matter of the last
Will and Testament of
R.Purushothaman - deceased.

*1.R.Loganathan (Deceased),

*2.Mrs. Savithri,
Wife of Late R.Loganathan,

*3. L.Kannamurthy,
Son of Late R.Loganathan

2 and 3 are at No.148, P.V.Koil Street,
Royapuram, Chennai 600 013.

*4. P.Hemavathy,
D/o. Late R.Loganathan,
No.40/3, Venkatesa Naicken Road,
Royapuram, Chennai 600 013.

* 5.T.Saraswathy,
D/o.Late R.Loganathan,
No.148, P.V.Koil Street,
Royapuram, Chennai 600 013.

...Plaintiffs/Applicants
(In both Applications)

-vs-

1.S.Bhaskaran,

2. Ganga Devi,
Both are residing at
No.27, Kasima Nagar,
Royapuram, Chennai 600 013.

...Defendants/Defendants
(In both Applications)

* Plaintiffs 2 to 5 are brought on record as legal representation of deceased 1st plaintiff as per order dated 08.07.2010 passed in A.No.3450 of 2010.

A.No.5614 OF 2018:

This Application praying that this Hon'ble Court be pleased to reopen the evidence of the attesting witness (PW3) Mrs.S.Rajakumari, for the purpose of marking the Attesting Affidavit as an Exhibit in TOS.No.23 of 2008.

A.NO.5615 OF 2018:

This Application praying that this Hon'ble Court be pleased to recall the attesting witness (PW3) Mrs.S.Rajakumari, for the purpose of marking the Attesting Affidavit as an Exhibit in TOS.No.23 of 2008.

These applications coming on this day before this court for hearing the court made the following order:-

These applications have been filed by the applicants, who are the plaintiffs in the suit, to recall and reopen the evidence of the attesting witness P.W.3, Mrs. S. Rajakumari for marking the attesting affidavit as an exhibit in T.O.S. No.23 of 2008.

2. The learned counsel for the applicants would submit that the deceased petitioner R.Loganathan had filed O.P. No.157 of 2001 for the grant of Letters of Administration in his favour in respect of the Will dated 20.09.1997 of his brother Late.R. Purushothaman wherein one of the

attesting witness Mrs. S. Rajakumari, in the affidavit has confirmed the execution of the Will dated 20.09.1997 of the testator Late R.Purushothaman and another attesting witness was his own wife. By order dated 17.09.2001 of this Court, the Letters of Administration was granted to the deceased petitioner R.Loganathan. The respondents/defendants, who had purchased the suit property from the testator's wife, filed application Nos.619 and 620 of 2002 before this Court seeking revocation of the letters of administration granted in favour of the deceased petitioner Late R.Loganathan. By a common order dated 30.07.2002, those applications were dismissed by this Court. Against the said common order, the defendants had filed O.S.A. Nos. 111 and 112 of 2003. Those appeals were allowed by common Judgment 18.08.2007 of this Court directing O.P. No.157 of 2001 to be converted to T.O.S No.23 of 2008. He has further stated that the petitioners/plaintiffs have filed a suit in C.S.No.227 of 1999 seeking cancellation of the sale deeds executed in favour of the defendants by the testator's wife wherein common evidence was recorded together with T.O.S.No.23 of 2008. The deceased petitioner R. Loganathan was examined as P.W.1 in T.O.S. No.23 of 2008. After his demise, his son Mr.Kannamurthy was examined as P.W.2. Thereafter, one of the attesting Witnesses P.W.3, Mrs.S. Rajakumari had resiled from the earlier affidavit which was filed by her while seeking

letter of administration in favour of the deceased petitioner in O.P.No.157 of 2001, after converting into T.O.S.No.23 of 2008. Hence, these applications are preferred by the applicants/appellants to recall and re-open her evidence for the purpose of marking the attesting witness affidavit as an exhibit in T.O.S. No.23 of 2008.

3. It is admitted fact that originally, the letter of administration was granted by this Court in favour of the deceased petitioner/plaintiff, while P.W.3, the second attesting witness had filed an affidavit as an attesting witness. The same was marked as Ex.P12 in O.P.No.157 of 2001. After this Original Petition No.157 of 2001 was converted into T.O.S.No.23 of 2008, P.W.3 was examined as one of the attesting witnesses, who had given an attesting affidavit in the previous proceedings, which was marked as Ex.P12. During her examination, except her signature, she has not admitted the contents therein. On a perusal of the entire evidence, when she was cross-examined, she made contrary statement from her earlier attesting affidavit which has been marked as Ex.P12. The specific portion of the affidavit was not brought to the knowledge during the examination.

4. It is noted that during the pendency of the suit,

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the wife of the testator in her reply notice, specifically

stated that she has denied the execution of the Will dated 20.09.1997 and took a stand that another Will dated 24.10.1997 of her Husband has been executed later. It is also to be noted that the respondents/defendants in the affidavit filed before this Court also took a stand that subsequently a Will dated 24.10.1997 was left by the testator Late.R.Purushothaman bequeathing the entire property to his Wife and they also stated in their affidavit that the efforts also have been taken to get the letter of administration in her favour. However, the above Will dated 24.10.1997 has not seen the light of the day. It is stated by the respondents/defendants in the affidavit that the purchase of the property covered by the latter Will dated 24.10.1997 executed in favour of the testator's Wife. These are all the issues involved in this Case.

5. The learned Counsel for the respondents has filed Counter affidavit resisting the claim of the petitioner. The learned Counsel for the respondents would contend that the petitioner had opportunity to cross-examine P.W.3. In order to fill lacunae in his pleadings and evidence, these applications are filed. It is devoid of merits and the same has been filed only with intention of protracting the proceedings. He relied upon the decision reported in

M/s.Bagai Construction Thr. Its Proprietor Lalit Bagai Vs.

<https://hcservices.ecourts.gov.in/hcservices/>

M/s.Gupta Building Material Store, 2013 AIR(SC) 1849. and

would further contend that at a belated stage of conclusion of evidence, the petition can not be entertained to fill the lucunae in the pleadings and evidence led by the witnesses. Though there is no controversy in regard to the ratio laid down in the Judgment, the same can not be applied to the factual Matrix of the present case. Since the probate proceedings was revoked and it was converted into TOS. Therefore, the parties have to be given sufficient opportunity to establish their respective case.

6. Admittedly, P.W. 3, one Mrs.S. Rajakumari had resiled from the earlier affidavit with regard to previous statements contained in Ex.P12 . P.W.3 has not confronted, keeping in mind Section 145 and 157 Evidence Act, I am of the view that as the issues involved in this case based on the Will and right of the subsequent purchasers of the suit property covered by the Will, appropriate opportunity to be given to reopen the evidence of attesting witness i.e. P.W.3. since she has made contra statements with regard to previous statements. Accordingly, I am of the view that though as a matter of fact, recall of witness cannot be ordered, however, keeping in mind that the issue involved in the matter is in dispute would take away the right of the legal heir of the testator, P.W.3 has to be cross examined with reference to the previous statements. Only for that purpose, I am inclined to allow the application to recall the P.W.3 for cross examination with reference to

the previous statement made by her and not for any other purpose. Accordingly, the application is allowed only for recalling P.W.3. It is also made clear that Ex.P12 can not be marked during evidence since statement of living person cannot be received as evidence. Only for the purpose of the Cross Examination for P.W.3, she shall be recalled for purpose of cross-examination only with regard to her previous statement found in Ex.P.12. It is made clear that on the day when P.W.3 recalled, her cross-examination has to be completed on the same day.

7. Issue notice to P.W.3 for her appearance on 20.08.2018.

Sd/-N.S.K.J
31/07/2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 17.09.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.