

IN THE HIGH COURT JUDICATURE AT MADRAS

Judgment Reserved on : 18.09.2017

Judgment Pronounced on : 28.04.2018

CORAM

THE HONOURABLE MR. JUSTICE S.BASKARAN

SECOND APPEAL No.119 of 2014

1.Thambiran Naicker

2.D.Rajamani

3.D.Mani Velu

4.D.Kandhan .... Appellants/Defendants 2 to 5

Vs.

1.S.Narayanasamy

2.N.Gajendran .... Respondents 1 and 2  
/Plaintiffs 1 and 2

3.S.Baskar .... Respondent No.3  
/Defendant No.1

This Second Appeal is filed under Section 100 of CPC, against the Judgment and decree dated 30.07.2013 passed by the learned Subordinate Judge, Kancheepuram, in A.S.No.77 of 2011, reversing the judgment and decree dated 08.08.2011 passed by the learned District Munsif Cum Judicial Magistrate, Sriperumpudur in O.S.No.1632 of 2008.

For Appellants : Mr.T.Sundarvadanam

For Respondents: Mr.Vasudevan for R1 and R2

Mr.R.Thanjan for R-3

JUDGMENT

The above second appeal arises out of the Judgment and Decree dated 30.07.2013 passed by the learned Subordinate Judge, Kancheepuram, in A.S.No.77 of 2011, reversing the judgment and decree dated 08.08.2011 passed by the learned District Munsif Cum Judicial Magistrate, Sriperumpudur, in O.S.No.1632 of 2008.

2. Brief facts of the plaintiff's case is as follows:-

The 1<sup>st</sup> Plaintiff is the brother of one Chockkammal and Pankajammal who are not only sisters but also the wives of one Kanniah Naciker who died on 04.03.1979. Since Kanniah Naicker was having no issues through both his wives, viz., the above said Chockkammal and Pankajammal, he bequeathed his self acquired properties in the name of his second wife Pankajammal. Accordingly, the said Pankajammal took possession of the property and enjoyed the same along with her sister Chockkammal, who is the first wife of the said Kanniah Naicker. When Chockkammal married Kanniah Naicker, her younger brother who is the 1<sup>st</sup> plaintiff herein was a child and he was adopted by Chockkammal as a son and she only took care of him. Subsequently, the 1<sup>st</sup> Plaintiff lived along with Chockkammal and Pankajammal and after demise of Kanniah Naicker, the 1<sup>st</sup> Plaintiff was taking care of the family as he was the only male member of the family. Pursuant to the Will executed by Kanniah Naicker in favour of his second wife Pankajammal, she enjoyed the property and subsequently the said Chockkammal and Pankajammal executed a Will jointly in respect of some properties in favour of the 2<sup>nd</sup> Plaintiff Gajendran who is the son of the 1<sup>st</sup> Plaintiff Narayanasamy and the remaining property is still in the name of Chockkammal and Pankajammal. Since Chockkammal and Pankajammal died without any issues, the suit properties now belongs to the 1<sup>st</sup> Plaintiff as he is the only legal heir of the said Chockkammal and Pankajammal. The defendants are distant relatives of Kanniah Naicker and are residing nearby. When the Plaintiffs tried to raise crops, the defendants prevented them claiming that suit property belonged to them as they are the legal heirs of late Kanniah Naicker. As the defendants have no right or interest in the property, the Plaintiffs have come forward with the suit seeking declaration that they are absolute owners of the Property and for consequential injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the property by the Plaintiffs.

3. On the other hand, the defendants who are the brothers' sons of Kanniah Naicker denied the rights of the plaintiffs and denied the Will. The averments in the Plaint alleging that Kanniah Naciker executed a Will during his life time is not true. The claim of the 1<sup>st</sup> plaintiff that he was taking care of Chockkammal and Pankajammal is denied. Both of them were taken care of by the defendants only. The averment in the Plaint that Pankajammal executed a Will in favour of the 2<sup>nd</sup> Plaintiff is denied. The defendants are second class heirs of late Kanniah Naicker and they alone are entitled to succeed to his Property. The claim of the Plaintiffs regarding adoption of the 2<sup>nd</sup> plaintiff and execution of Will by Kanniah Naicker is false. The defendants thus sought for dismissal of the suit.

4. Before the trial court, the 1<sup>st</sup> Plaintiff examined P.W.1 and produced documents Ex.A.1 to Ex.A.9 to prove his claim. On the side of the defendants, D.W.1 and D.W.2 were examined and documents Ex.B.1 to Ex.B.4 was produced. On the basis of the available evidence on record, the trial court dismissed the suit. Aggrieved upon that the Plaintiffs preferred First Appeal and the First Appellate court, after hearing both sides, by allowing the appeal set aside the decree and judgment of the trial court and decreed the suit as prayed for with cost throughout. Aggrieved upon that, the defendants 2 to 5 have preferred this Second Appeal.

5. At the time of admission of the Second Appeal, this court framed the following substantial questions of law:-

1)Whether the finding of the first appellate Court is correct in accepting the certified copy of the Will Ex.A9?

2)Whether Ex.A9 is proved as genuine document by

respondents 1 and 2?

3)Whether the finding of the first appellate Court accepting the alleged adoption without any proof is legally correct?

4)Whether the first appellate Court is right in legal inference that Section 15(2)b of Hindu Succession Act is applicable or not in respect of female properties inherited from their husband deceased Kanniah Naicker?

6. I have heard the rival contentions and perused the materials available on record.

7. The Plaintiffs/respondents who are father and son claims the suit property as their own on the basis of Will said to have been executed by Pankajammal and Chockkammal in favour of the 2<sup>nd</sup> Plaintiff and on the basis of adoption of 1<sup>st</sup> Plaintiff as her son by the said Chockkammal, wife of Kanniah Naciker. The trial court, after considering the evidence available on record found that the claim of the Plaintiffs cannot be entertained since the original of Ex.A.9-Will said to have been executed in favour of the 2<sup>nd</sup> Plaintiff, has not been produced before the court and no

reason is stated for non production of the original. The trial court also found that the 1<sup>st</sup> Plaintiff who is the Propounder of the Will alone is examined and none of the other Attesting witnesses of Ex.A.9-Will have come forward to depose before the court. Thus, the trial court pointed out that as per the provisions under Section 68 of the Evidence Act, the Plaintiffs failed to prove the genuineness of Ex.A.9-Will and their claim under the Will cannot be entertained. The trial court also found that the alleged claim of the 1<sup>st</sup> Plaintiff regarding his adoption by Chockkammal is not proved and as such, he is not entitled to succeed to the properties as legal heir of Chockkammal and Pankajammal. On such finding, the suit was dismissed by the trial court.

8. (a) However, in appeal, the First Appellate court upheld the contention of the plaintiffs and reversed the findings of the trial court and decreed the suit as prayed for with costs throughout on the ground that Ex.A.9-Will is 30 years old document and the genuineness cannot be questioned, since it is a registered Will and the testator of the Will who lived for eight years after registration of the Will has not cancelled Ex.A.9. Thus, the First Appellate Court held that Ex.A.9-Will cannot be a forged one and the same is the last Will of the testator. Further, the Court also observed that the possession and enjoyment of the suit properties is with the Plaintiffs only and the defendants never filed any civil suit claiming partition to prove their claim. Hence, the First Appellate court upheld the contention of the Plaintiffs and reversed the trial court findings.

(b) Aggrieved over the said finding of the First Appellate Court which decreed the suit as prayed for by reversing the Judgment and decree of the trial court, the defendants 2 to 5 have come forward with the present Second appeal.

(c) The learned counsel for the appellants/defendants contends that the First Appellate Court erred in reversing the finding of the trial court on the basis of the revenue records produced as Ex.A.10 to Ex.A.22 by the Plaintiffs and that too filed only before the First Appellate Court. It is further contended that the First Appellate Court failed to appreciate the fact that the suit property in Item Nos.15 and 16 in Schedule A was obtained by way of Partition by Manicka Naicker and after his death, the same was inherited by his son Kanniah Naicker and as such, the said property is a joint family property and Appellants are entitled to succeed to the same. The First Appellate Court also failed to consider the fact that there is no proof for the effective adoption of the 1<sup>st</sup> Plaintiff

by the said Chockkammal or Pankajammal. The Execution of Ex.A.9-Will being not proved, the First Appellate Court ought not to have reversed the finding of the trial court. Thus, the Appellants sought for dismissal of the suit by entertaining the Second Appeal.

9. (a) In the case on hand, the fact that the suit properties originally belonged to Kanniah Naicker and subsequently his two wives viz., Chockkammal and Pankajammal and they have no issues is admitted by both sides. Likewise the fact that Chockkammal and Pankajammal are sisters is also admitted. It is also established from Ex.A.6-Death Certificate that Kanniah Naicker died on 04.03.1979 while Chockkammal and Pankajammal died on 07.02.2001 and 14.06.2005 respectively as evidenced by Ex.A.5 and Ex.A.7-Death certificates. The fact that 1<sup>st</sup> Plaintiff is the father of the 2<sup>nd</sup> plaintiff and 1<sup>st</sup> Plaintiff is the brother of Chockkammal and Pankajammal is also admitted. However, while the 2<sup>nd</sup> Plaintiff claims some of the suit properties on the basis of Ex.A.9 Will executed by Chockkammal and Pankajammal in his favour, the 1<sup>st</sup> Plaintiff claiming himself to be the adopted son of Chockkammal, states that the property not included in Ex.A.9 Will but owned by Chockkammal and Pankajammal belongs to him as he is the only legal heir. In such circumstances, it is to be seen as to whether the Plaintiffs have proved the execution and genuineness of Ex.A.9 Will before the Court.

(b) The Plaintiffs alleged that Pankajammal executed Ex.A.9 Will dated 03.12.1997 in favour of the 2<sup>nd</sup> Plaintiff Gajendran in respect of suit schedule properties. In the Plaint, there is no specific averment as to on which date and where the Will was executed. Likewise, there is nothing in the plaint as to whether the original Will was available or the same was lost and if so, when the original of Ex.A.9 Original Will was lost. The Plaintiffs have produced only certified copy of the Will as Ex.A.9. In the Plaint, nothing is mentioned as to what happened to the original Will executed by Pankajammal. The trial court also pointed out that the 1<sup>st</sup> Plaintiff who deposed as P.W.1, in his cross examination, after stating that he is having original Will with him, contradicted himself by subsequently stating that he is not having the original Will with him. Thus, the non production of original of Ex.A.9 and no explanation being offered as to what happened to the original creates suspicion over the genuineness of the Will. Further the 1<sup>st</sup> Plaintiff who is the father of the 2<sup>nd</sup> Plaintiff who is the beneficiary under Ex.A.9 Will is the Attesting witness to the said document.

(c) In the light of the above said facts, P.W.1 can only be considered as Propounder of the Will. Nothing is stated by the Plaintiffs as to why the other Attesting witness was not examined. It is clear from the evidence on record that P.W.1 has taken leading part in preparing the Will under which his son, the 2<sup>nd</sup> Plaintiff is the beneficiary. Even assuming that P.W.1 genuinely attested the document, his evidence does not inspire the confidence of the court. In his cross examination, P.W.1 has stated that he is unaware as to whether Ex.A.9-Will was written in a Stamp Paper and he do not know who wrote the contents of the Will. Further P.W.1 deposed in the court that at the time of execution of the Will by Chockkammal and Pankajammal, they signed in the document, whereas, it is clear from Ex.A.9 Will that both of them only put the thumb impression and no signature was found in it. It is therefore clear that P.W.1 is not aware of execution of Ex.A.9 Will and the evidence given by him only creates more suspicion about the execution of Ex.A.9-Will. Further, the scribe of the Will also was not examined. In such circumstances, it is clear that the Plaintiff has failed to prove the genuineness and execution of Ex.A.9-Will in the manner known to law.

10) As stated above, the Plaintiffs having failed to produce the original Will has not stated any acceptable explanation for non production of the original Will. They have not stated anything in the Plaint as to why the original Will could not be produced in court. It was only during the course of evidence, the Plaintiffs stated that the original Will has been lost. However, nothing is stated about lodging of any complaint with the Police or any other step taken to trace out the original Will. As such, the learned counsel for the defendants contended that in the light of Section 90 of Evidence Act, the certified copy of the Will exhibited as Ex.A.9 is inadmissible in evidence. The learned counsel for the defendants relying upon the Ruling reported in 2017 1 CTC 165 [Saraswathi Vs. M.Maruthachalam], contended that in the absence of any proof for the loss of original Will and acceptable explanation for non production of original, Ex.A.9-certified copy of the Will is not admissible in evidence. In the said Ruling, it is held as follows:-

" 13. The defendants have not produced the original Will and no acceptable explanation is forthcoming on the side of the defendants as to the non production of the original Will. Only, the registration copy of the Will was summoned and produced. The first defendant, in his written statement, has not spoken anything about the

custody of the Will or the loss of the Will. Further, he has not stated anything in the written statement, as to why the original Will could not be produced in the Court. On the other hand, according to the second defendant, she has pleaded in the written statement that the original Will was in her custody and the same was lost and could not be traced, in spite of diligent efforts. Therefore, as per the case of the second defendant, it could be seen that the Will had been in her custody and it has been subsequently lost. The steps taken by the second defendant to retrieve the lost Will has not been explained. However, during the course of evidence, a new case has been projected by the defendants, as if the Will and other documents had been taken away by the plaintiff. If that be the true state of affairs, as rightly argued by the plaintiff's counsel, the same would have been averred by the defendants in their written statement. However, the above said new theory that the plaintiff had taken away the Will, has been projected for the first time during the course of evidence. Therefore, the lower appellate Court has rightly found that the defendants have not clearly projected any acceptable cause for the non production of the original Will."

Further, it is contended by the learned counsel for the defendants that only if it is proved that the original Will is lost, the certified copy is admissible in evidence to prove the contents of the original, but not the execution of the original. In support of the same, he relied upon the Ruling reported in AIR (37) 1950 Madras 634 [C.N.269] [Gadey Venkata Ratnam (deceased) and others Vs. Gadey Sitaramayya and others], wherein it is held as follows:-

"In view of the above ruling of the Privy Council we are of opinion that the view expressed by the Full Bench of this Court in Subrahmania Sowmayajulu Vs. Y.Seethayya, 46 Mad.92 : (AIR (10) 1923 Mad 1(F.B.) that the presumption under S.90, Evidence Act, with regard to documents 30 years old arises in the case of copies as well as originals, and that if a copy is proved to be a true copy a presumption may be made of the genuineness of the original itself, is no longer good law, though Mr.Somasundaram argues that it is good law. It follows that the defendant must prove the execution of the original will by Venkataratnam in some way known to law, at least by approved, circumstantial evidence. "

Thus the learned counsel for the defendants contends that the conclusion of the First Appellate Court which is contrary to the above said Ruling is not sustainable.

11. The First Appellate Court, while reversing the judgment of the trial court has held as follows:

"because even though the original will was lost and the third party attesting witness PW1 was examined and the certified copy of the will was marked as Ex.A9 as secondary evidence. Further the above said will was also registered one. Hence there is no chance for forged the same. Further the above said will was not cancelled till the life time of testator Pankajammal. Further the will was executed in 1997. But the testator died in 2005. Hence for the last nearly 8 years the will was not cancelled by the testator."

Except for the said reasoning, the First Appellate Court has not stated anything else for accepting the secondary evidence Ex.A.9 certified copy of the Will. In the case on hand, as stated earlier, there is no pleading regarding as to what happened to the original of Ex.A.9-Will. As such, in the absence of any evidence regarding the loss of original of Ex.A.9 Will and no acceptable explanation given by the Plaintiffs for non production of original of Ex.A.9 Will, the said document is not acceptable in evidence, since the Plaintiffs neither pleaded nor proved the loss of original of Ex.A.9-Will. In such circumstances, following the above said Ruling, relied upon by the defendants, it is clear that the Plaintiffs have failed to prove that the original of Ex.A.9 Will was lost and therefore, Ex.A.9 which is only a certified copy cannot be taken into consideration and the finding of the First Appellate Court to the contrary is unsustainable.

12. (a) The next point to be considered is as to whether the Plaintiff has proved the execution of Ex.A.9-Will by examining the Attestors. Section 68 of the Evidence Act reads as follows:-

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast 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 Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.]

(b) The learned counsel for the Plaintiffs pointing out the said provision viz., Section 68 of the Evidence Act, contended that one of the attesting witness to Ex.A.9 who is the 1<sup>st</sup> Plaintiff herein was examined as P.W.1 and the same is sufficient to fulfil the legal requirement under Section 68 of the Evidence Act, to prove the execution of Ex.A.9 Will. The learned counsel for the Plaintiffs relied upon the Ruling reported in (2010) 14 SCC 266 [Gopal Swaroop Vs. Krishna Murari Mangal and others] to contend that examination of one attesting witness is sufficient to prove the execution of the document. In the said Ruling, it is held as follows:-

" 15. From a conjoint reading of the two provisions extracted above it is evident that a Will is required to be attested by two or more witnesses each of whom has seen the Testator signing or affixing his mark on the Will or has seen some other person signing the Will in the presence and by the direction of the Testator or has received from the Testator a personal acknowledgment of the signature or mark or his signature or the signature of such other person and that each of the witnesses has signed the Will in the presence of the Testator. Section 68 of the Evidence Act is against the use of a Will in evidence unless one attesting witness has been examined to prove the execution.

17. A careful analysis of the provisions of Section 63 would show that proof of execution of a Will would require the following aspects to be proved:

(1) That the Testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of the Testator.

(2) The signature or mark of the Testator or the signature of the persons signing for him is so placed has to appear that the same was intended thereby to give effect to the writing as a Will.

(3) That the Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some other person signing the Will in the presence and by the direction of the Testator or has received from

Testator a personal acknowledgement of the signature or mark or the signature of each other person.

(4) That each of the witnesses has signed the Will in the presence of the Testator."

Likewise, the learned counsel relied upon the Ruling reported in (2004) 11 SCC 320 [P.S.Sairam and another Vs. P.S.Rama Rao Pissey and others]. Further, he relied upon the Ruling reported in (2004) 1 MLJ 634, [Amalorpava Mary and another Vs. Kulandai Ammal and others] wherein, it is held as follows:-

"That the evidence of one of the attesting witnesses that the other witnesses was present and attested the same in the presence of the testators will be sufficient. The Court unable to accept the reasoning of the learned District Judge in dismissing the petition merely on the ground that the other attesting witness was not examined. In the light of the evidence of P.W.1, the Court held that the petitioners have proved the due execution of the Will Ex.P.1 and entitled Letters of Administration in respect of the estate of the deceased "I" with the Will dated 29.01.1969."

Hence, relying upon the above said Ruling, the learned counsel for the Plaintiffs contended that under Section 68 of the Evidence Act, it is sufficient if one of the attesting witness is examined and in the case on hand, the Plaintiffs by examining P.W.1 has discharged his burden of proving the execution of Ex.A.9 Will.

(c) Now, in the case on hand, it is to be analysed as to whether the ratio laid down by the Apex Court has been followed while proving the genuineness of Ex.A.9 Will. In this connection, it is pertinent to observe the Ruling of the Apex Court reported in (2008) 14 SCC 754 [Babu Singh and others Vs. Ram Sahai alias Ram Singh], wherein, it is held as follows:-

"14. In terms of Section 68 of the Act, although it is not necessary to call more than one attesting witness to prove due execution of a will but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more attesting witnesses need not be examined at all. Section 68 of the Act lays down the mode of proof. It envisages the necessity of more evidence than mere attestation, as the words "at least" have been used therein. When genuineness of a will is in question, apart from execution and attestation of will, it is also the duty of a person seeking declaration about the validity of the will to dispel the surrounding suspicious circumstances existing, if any. Thus, in addition to proving the execution of the will by examining the attesting

witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the will would, inter alia, depend thereupon. "

13. In the case on hand, the 1<sup>st</sup> Plaintiff who is the father of the 2<sup>nd</sup> Plaintiff was examined as P.W.1. Admittedly, the sole beneficiary under the Ex.A.9 Will is the 2<sup>nd</sup> Plaintiff. Further, the 1<sup>st</sup> Plaintiff is claiming title over the remaining property of Pankajammal and Chockkammal as the legal heir of said Chockkammal. It is not disputed that the 1<sup>st</sup> Plaintiff participated in making the Will by Pankajammal and Chockkammal. In such circumstances, the learned counsel for the defendants contended that non examination of the other attesting witness is fatal to the claim of the Plaintiffs. It is further contended by the learned counsel for the defendants that in the case on hand, the original Will has not been produced and the same itself will create suspicion over the execution of the document. In support of the same, the defendants relied upon the Ruling reported in AIR 2006 Bombay 33 [Sheshrao M.Kuratkar (D) by LRs., V. Keshavrao M.Kuratkar], wherein it is held as follows:-

"Succession Act (39 of 1925), S.63- Evidence Act (1 of 1872), S.63, S.67, S.68 - Will - Proof of execution - Documentary evidence - Original will was with party but not produced in Court - Certified copy produced - It by itself cannot be held as proper evidence - Original document must be on record to show that signature of testator is so placed that it would appear that testator wanted to create same document - Its non-production creates doubt about execution of Will and it cannot be presumed that it was last will of testator - Will was 30 years old document - No presumption of law can be drawn in respect of document-which is 30 years old - Will can be said to be not duly proved. "

The learned counsel for the defendants also relied upon the Ruling reported in 1977 1 SCC 369 ( JASWAN KAUR VS. AMRIT KAUR), wherein, it is held as follows:-

"Cases in which the execution of the will is; surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the Will was made, or that those like the wife and children of the testator who would normally receive their due share in

his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator. Even in the absence of pleas, i.e. fraud, undue influence, coercion, etc., the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free Will. And then it is part of the initial onus of the propounder to remove all reasonable doubts in the matter. By applying the aforesaid principles to this case, we have to analyze whether the will has been duly proved."

Thus, the defendants would contend that the First Appellate Court erred in concluding that the evidence of P.W.1 alone is sufficient for proving execution of Ex.A.9 Will. The First Appellate Court by permitting the Plaintiffs to produce additional evidence marked as Ex.A.1 to Ex.A.22 also took into consideration the fact that Ex.A.9 is Registered Will and is more than 30 years old document; the examination of P.W.1 alone as attesting witness is sufficient to prove the genuineness of the document. The same is challenged by the defendants following the above said Rulings (cited supra).

14. In the case on hand, the only attesting witness who deposed as P.W.1 is the 1<sup>st</sup> Plaintiff and the beneficiary under the Will is his son, the 2<sup>nd</sup> Plaintiff. As stated earlier, the 1<sup>st</sup> Plaintiff is claiming absolute right over the remaining properties of the Testators Chockkammal and Pankajammal in his capacity as adopted son of Chockkammal. Thus, both the Plaintiffs are beneficiaries one under the Will and the other as legal heir of Chockkammal and Pankajammal. In such circumstances, as rightly pointed out by the defendants, the burden is on the Plaintiffs to remove any suspicion over Ex.A.9 Will and to prove the genuineness of the same.

15. In the case on hand, while deposing as P.W.1, the 1<sup>st</sup> Plaintiffs has stated in his cross examination that he is having the original of Ex.A.9 with him and is also going to examine the other attesting witness. However, he has failed to produce the original and also did not examine the other attesting witness. Nothing is stated by the 1<sup>st</sup> Plaintiff as to whether the other attesting witness is available or not. There is no material to show that any step was taken to summon the other attesting witness. As stated earlier, the evidence of P.W.1 reveals that he is unaware about the execution of Ex.A.9 Will since both the

Testators have put their thumb impression but P.W.1 stated that both of them signed in the Will and further P.W.1 stated in his cross examination that he did not remember as to whether he signed first or in the last as attesting witness in the said Will.

16. Further, the learned counsel for the defendants pointed out that on 03.12.1997 when Ex.A.9 Will is stated to have been registered in Sriperumbudur Sub Registrar Office, on the same date, the said Pankajammal executed sale deed in favour of 2<sup>nd</sup> Plaintiff as evidenced by Ex.B.4 and the same was also registered in the same office. The Plaintiffs suppressing the said sale, has included the said property in "A" Schedule of the Plaint which they are claiming under Ex.A.9 Will. Thus, the defendants contend that suspicious circumstances surrounding execution of Ex.A.9 is not dispelled and under such circumstances, examination of P.W.1 alone is not sufficient to prove the claim of the Plaintiffs. As P.W.1 is the Propounder and also father of the 2<sup>nd</sup> Plaintiff who is the sole beneficiary under Ex.A.9 Will, non-examination of other attesting witness is fatal to the Plaintiffs claim. Further the learned counsel for the defendants pointed out, in such circumstances, the Plaintiffs being the Propounder, is not the competent person to sign as an Attester in Ex.A.9 Will. In support of the same, he relied upon the Ruling reported in AIR 1932 Madras 272 (VENKATARAMAYYA Vs. NAGAMMA]. Further Pointing out the fact that nothing is mentioned about the fact of non-availability of the other attesting witness, the defendants contended that the Plaintiffs failed to take necessary steps to prove the attestation in the Will. In this regard, it is pointed out that the steps to be taken to prove the attestation is explained in the RATANLAL & DHIRAJLAL THE LAW OF EVIDENCE 23rd Enlarged Edition Reprint 2011 at page 967:

"Where the plaintiff got issued the summons to the attesting witnesses under Order XVI, Rule 8 CPC and they were not served, it was held that the responsibility of the plaintiff did not end and that he must take coercive steps under Order XVI Rule 10 CPC, for securing their attendance in court; if that was not done, it would not amount to compliance with Section 68, regarding proof of attestation. (R.Nammayamma Vs. K.Musalayya (1980) 2 An

WR 350). Failure to call an attesting witness where it is not established that all of the attesting witnesses are dead or are incapable of giving evidence, is a fatal defect, and the document cannot be held to have been proved. (Ananta Raghu Ram Vs. Rajah Bommadevara AIR 1958 AP 418.).

Further the Supreme court in Abdul Jabbar Vs. Venkata Sastri Case (AIR 1969 SC 1147) held that the act of attestation must be done animo attestandi i.e. with the intention to attest; the fact that one's name is on the document does not make him an attesting witness, irrespective of the purpose for which it is there.

17. Admittedly in the case on hand, the Plaintiffs has not stated anything about steps taken by them to examine the other attesting witness. Further as he himself is the Propounder, the evidence of P.W.1, in view of the reasons stated earlier, is not sufficient to prove the attestation and the suspicious circumstances surrounding the execution of Ex.A.9 Will is not cleared by the Plaintiffs. As such, it is apparent that the Plaintiffs have not let in sufficient evidence to prove the genuineness of Ex.A.9 Will. In such circumstances, following the Ruling relied upon by the appellants/defendants 2 to 5, it is evident that genuineness of Ex.A.9 Will is not proved and the suspicious circumstances surrounding the execution of Will is not removed by the Propounder.

18. It is further contended by the learned counsel for the Plaintiffs that Ex.A.9 Will is a registered will and it is more than 30 years old and as such, the genuineness of the same cannot be challenged. It is further contended by the learned counsel for the Plaintiffs that the said document having been already exhibited by consent, the same cannot be challenged at this stage. In support of the same, the Plaintiffs relied upon the Ruling reported in AIR 1973 Rajasthan 263 [Kalyan Singh Vs. Chhoti and others]. He also relied upon the Ruling reported in AIR 1972 Orissa 200 [Collector, Cuttack Vs. Rajib Bhol], wherein, it is held as follows:-

"Once the certified copies of original documents are admitted as secondary evidence without any objection and are marked as exhibits, no objection regarding admissibility of such evidence can be raised on the ground that proper service of notice to produce the originals was not made."

19. On the other hand, opposing the same, the learned counsel for the defendants contends that in the case on hand, the original Will is not produced and nothing is mentioned either in the Pleadings or in the evidence about non-production of the original and in such circumstances, even if certified copy of the registered Will is produced, the same cannot be acted upon. It is further contended that registration alone will not establish the genuineness of the Will. Further as the Propounder of the Will is the 1<sup>st</sup> Plaintiff himself and the beneficiary under the said Will is the 2<sup>nd</sup> Plaintiff, suspicion

surrounds the execution and in such circumstances, the defendants contend that the genuineness of the Will is to be proved beyond reasonable doubt which the Plaintiffs have failed to do so. The learned counsel for the defendants relied upon the Ruling of the Apex Court reported in AIR 1962 SC 567 [Rani Purnima Debi and another Vs. Kumar Khagendra Narayan Deb and another] to contend that mere registration alone is not sufficient to dispel the suspicion raised against the said document. In the said Ruling, it is held as follows:-

" If a Will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a Will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the Will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as for example, by seeing the testator reading the will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would not be of much value. Registration may take place without the executant really knowing what he was registering."

Likewise, he relied upon the Ruling reported in AIR 2006 Bombay 33 [Sheshrao M.Kuratkar (D) by LRs Vs. Keshavrao M.Kuratkar]. Likewise, he relied upon the Ruling reported in 2017 1 CTC 165 [Saraswathi Vs. M.Maruthachalam and others] wherein, it is held as follows:-

"20. Merely because the Will has been registered, would not entitle the defendants to contend that they could be absolved from examining the attesting witnesses to prove the genuineness of the Will. Further, the defendants' counsel placed strong reliance upon Section 114(e) of the Indian Evidence Act, for raising the presumption with reference to the proof of registration of Will. When the Will in question has been impugned by the Plaintiff and not admitted to be a true document, it could be seen that the defendants have to adduce

clinging and concrete evidence in accordance with the requirements of Law to uphold the validity of the Will. In such circumstances, the defendants' counsel argument that the plaintiff having failed to place any material to dislodge the presumption that could be raised under Section 114(e) of the Indian Evidence Act, the Court is duty bound to accept the case of the defendants, irrespective of the merits of the defendants' case, cannot at all be countenanced in any manner. "

In the same way, the learned counsel for the defendants also relied upon the Ruling reported in 2008 2 LW 196 [P.Mani Alias P.Balasubramaniam Vs.P.Viswanathan (deceased) and 9 others] wherein it held as follows:-

" 42.Undoubtedly, Will is one of the most solemn document known to law. The mere fact that Ex.P.1-Will dated 17.09.1986 is registered will not by itself be enough to dispel all suspicion regarding it, where suspicion exists, without submitting the evidence of registration to a closer scrutiny before Court of Law. The issue whether the Will relied on by the propounder is proved to be the last Will of the testatrix has to be decided in view of Section 67, 68 of the Indian Evidence Act, notwithstanding the fact that the opinion of experts and of individuals acquainted with the handwriting of the testatrix are quite relevant, as per Section 45 and 47 of the Evidence Act. Equally, Section 89 and Section 63 of the Indian Succession Act are quite relevant"

In the case on hand, admittedly, the Registering Officer of Ex.A.9 Will is not examined and the other attesting witness is also not examined. In such circumstances, the contention of the defendants that mere registration alone is not sufficient to sanctify the said Will is to be accepted and the First Appellate Court erred in holding that Ex.A.9 is proved since the same was a registered Will and is more than 30 years old. The said finding of the First Appellate Court is unsustainable for the reasons stated above.

20. It is contended by the Plaintiffs that the property is in possession and enjoyment of the Plaintiffs and no step was taken by the defendants to claim right over the suit properties. While admitting the fact that no civil suit was filed by the defendants seeking claim over the property, it is pointed out that the Testator of the Will died in 2005 and the dispute over the property claim arose only on 02.03.2006 when the Plaintiffs lodged a Police complaint against the defendants and thereafter filed the present suit on 25.04.2006. Thus, the defendants contend that it was only after the death of the Testator of the Will, they acquired right and there is no delay on their part as

alleged by the Plaintiffs. Further it is contended that the Plaintiffs have to succeed on the strength of their own case and not on the weakness of the defendants' case. In support of the same, the learned counsel for the defendants relied upon the Ruling of the Apex court reported in (2014) 2 SCC 269 [Union of India and others Vs. Vasavi Cooperative Housing Society Limited and others] wherein, it is held as follows:-

" 15. It is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness. If any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

19. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against (sic them), in the absence of establishment of the Plaintiff's own title, the plaintiff must be non-suited."

It is apparent from the same that the Plaintiffs have to succeed by proving their case. In the case on hand, the Plaintiffs are claiming title over the property on the basis of Ex.A.9 Will and by claiming that the 1<sup>st</sup> Plaintiff is the adopted son of deceased Chockammal.

21. As discussed earlier, execution of Ex.A.9 Will is not proved beyond doubt. The Plaintiffs have not let in any evidence regarding the adoption as claimed by them. It is pointed out that the 1<sup>st</sup> Plaintiff is the brother of the deceased Chockammal and as such, the claim of the Plaintiffs appears to be strange that Chockammal could have adopted her own brother as her son. It is further pointed out that neither in the Pleadings nor in evidence, anything specific is stated about the date of adoption or mode of adoption. Further, no evidence is available on record to prove the factum of adoption as alleged by the Plaintiffs. Thus, it is to be presumed that plea of adoption was abandoned by the Plaintiffs since no evidence was let in in that regard. As such, the claim of the Plaintiff on both counts, is not established and the finding of the First Appellate Court to the contrary is unsustainable.

22. The learned counsel for the defendants also pointed out that the Plaintiffs originally failed to produce all the documents before the trial court and only before the First Appellate Court, they sought to produce Ex.A.10 to Ex.A.22 and the same is not proper. In support of the same, he relied upon

the Ruling of the Apex Court reported in (2012) 8 SCC 148 [Union of India Vs. Ibrahim Uddin and another], wherein it is held as follows:-

"37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq Vs. Mohd.Iqbal and Mohd. All and Co.)"

23. Refuting the same, the learned counsel for the Plaintiffs contended that it is not only the Plaintiffs, but the defendants also produced additional documents in Ex.B.5 to Ex.B.8 and the applications filed under Order 41 Rule 27 of CPC by both was entertained on consent. However, there is nothing on record to show that the documents produced before the First Appellate Court was not available at the time of trial. Further, as the burden is on the Plaintiffs to prove the execution of the Will, they ought to have produced all the available evidence before the trial court itself, but they failed to do so for no palpable reason. As such, the contention of the defendants is to be accepted.

24. In the light of the above said discussion, it is apparent that the Plaintiffs miserably failed to prove the factum of adoption as alleged in the Plaint and also failed to clear the suspicion surrounding Ex.A.9 Will. As such, Chockkammal and Pankajammal having died intestate and it is an admitted fact that the suit properties was inherited by them from their husband Kanniah Naicker and both of them died issueless, the property will be inherited only by the Legal Heirs of Kanniah Naicker. It is evident from Ex.B.1 Geneology that the defendants are sons of deceased Kanniah Naicker's uncle [father's brother]. The same is corroborated by D.W.2 in his evidence. Further nothing was elicited from D.W.1 or D.W.2 during their cross examination to discredit the contents of Ex.B.1 Geneology. As such, in the absence of any legal heir available to the deceased Chockkammal and Pankajammal, the suit properties which originally belonged to their husband Kanniah Naicker will revert back to his successor as per Section 15 (2) (b) of the Hindu Succession Act and the Plaintiffs who are not the legal heirs of Kanniah Naicker or his wives cannot claim any right over the suit property. The conclusion of the First Appellate Court to the contrary on the ground that the defendants have not taken any step to claim the right over the

property is not sustainable.

25. For the reasons stated above, all the substantial questions of law raised in this appeal is answered in favour of the appellants/defendants 2 to 5. As such, the conclusion of the First Appellate Court is unsustainable and the same is set aside. The Point is answered accordingly.

26. In the result, the Second Appeal is allowed with costs. The Judgment and Decree dated 30.07.2013 in A.S.No.77 of 2011 passed by the learned Subordinate Judge, Kancheepuram, is hereby set aside and the judgment and decree of the trial Court dated 08.08.2011 made in O.S.No.1632 of 2008 is restored.

s/d-  
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

rrg/nvsri

To

- 1.The Subordinate Judge,  
Kancheepuram.
- 2.The District Munsif Cum Judicial Magistrate,  
Sriperumpudhur.
- 3.The Section Officer, V.R.Section, High Court, Madras.

+1 CC to Mr.T. Sundaravadanam, Advocate sr 31991.

+1 CC to Mr. Vasudevan, Advocate sr 32358.

+1 CC to Mr.R. Thanjan, Advocate sr 32345

TM(CO)  
SP(09/10/2018)

S.A.No.119 of 2014

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