

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 29.08.2019

JUDGMENT PRONOUNCED ON : 09.09.2019

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.227 of 1999

and

TOS.No.23 of 2008

C.S.No.227 of 1999:

- 1.R.Loganathan (Deceased)
- 2.L.Kannamurthy
- 3.P.Hemavathy
- 4.T.Saraswathy
- 5.Savithri (Deceased)

[The 5th plaintiff has been brought on record as the legal representative of the deceased first plaintiff and further the plaintiffs 2 to 4 have been recorded as the legal representatives of the deceased first plaintiff as per order dated 08.07.2010 in A.No.3449 of 2010]

[The plaintiffs 2 to 4 are recorded as the legal representatives of the deceased 5th plaintiff Savithri, as per order dated 11.11.2014 in A.No.6979 of 2014.]

... Plaintiffs

Vs.

1.P.Ranganayaki

2.Gangadevi

3.S.Bhaskaran

... Defendants

PRAYER : Plaintiff filed under Order IV Rule 1 of Original Side Rules, read with Order VII, Rule 1 and 2 of the Code of Civil Procedure, praying for the following judgment and decree:-

- (a) for cancellation of the two Sale Deeds bearing Document Nos.522/99 and 523/99 executed by the first defendant on 15.02.1999 in favour of the second and third defendants respectively in the sub-Registrar's Office, Royapuram, Chennai - 600 013;
- (b) restraining the first, second and third defendants, their men, agents, representatives, legal heirs, servants or any other person claiming through the first, second and third defendants, by an order of permanent injunction from further alienating the suit in any manner whatsoever and
- (c) for costs of the suit.

T.O.S.No.23 of 2008:

1.R.Loganathan (Deceased)

2.Savithri

3.L.Kannamurthy

4.P.Hemavathy

5.T.Saraswathy

[Plaintiffs 2 to 5 are brought on record as legal representatives of deceased 1st plaintiff as per order dated 08.07.2010 made in A.No.3450 of 2010]

[Plaintiffs 3 to 5 are recorded as the legal representatives of the deceased 2nd plaintiff as per order dated 11.11.2014 made in A.No.6978 of 2014]

... Plaintiffs

Vs.

1.S.Bhaskaran

2.B.Ganga Devi

... Defendants

PRAYER : Petition filed under Section 232 and 276 of the Indian Succession Act, XXXIX of 1925, for grant of Letters of Administration with the Will annexed. As per order of this Court dated 18.08.2007 in O.S.A.Nos.111 and 112 of 2003, Letters of Administration granted on 17.09.2001 in O.P.No.157 of 2001 was revoked and the Original Petition has been converted into Testamentary Original Suit No.23 of 2008.

For Plaintiffs : Mr.C.A.Diwakar

For Defendants : Mr.S.Parthasarathy, Senior Counsel
for Mr.Rajasekar

J U D G M E N T

The case of the plaintiffs in T.O.S.No.23 of 2008 is as follows:-

1. The 1st plaintiff R.Loganathan had filed O.P.No.157 of 2001 seeking Letters of Administration with a copy of the Will annexed for the Will said to have been executed by late Purushothaman on 20.09.1997. The Testator Purushothaman died on 01.04.1998.

2. According to the plaintiffs, the said Purushothaman had married one Ranganayaki. The couple did not have any issues out of the said marriage. It is claimed that Purushothaman had executed a Will bequeathing his properties in favour of the plaintiff and his legal heirs giving a life estate to the said Ranganayaki with a right to collect the rental income. She was prevented from either mortgaging or selling property during her life time.

3. The Original Petition was presented on 15th March 1999. Even before the Original Petition could be numbered Ranganayaki w/o. Purushothaman died on 19.10.1999. Therefore, she was deleted from the party array in the Original Petition.

4. The Original Petition came to be allowed granting Letters of Administration with a Will annexed on 27.09.2001. In the interregnum

Ranganayaki had sold the property subject matter of the Will to the defendants 1 and 2 in the suit. Hence, the defendants 1 and 2 had filed applications for revocation of the Letters of Administration in A.Nos.619 and 620 of 2002. The application for revocation was dismissed by a Single Judge of this Court by order dated 30.07.2002.

5. The same was challenged in O.S.A.Nos.111 and 112 of 2003. The Division Bench by its judgment dated 18.08.2007 reported in 2007 (4) LW 740 held that the grant made without notice to the purchasers is not just. Upon the said conclusion, the Division Bench set aside the order of the learned Single Judge allowing the application for revocation and directed the Original Petition to be converted as a Testamentary Original Suit. Upon such conversion, the Original Petition was renumbered as T.O.S.No.23 of 2008 and the same was required to be disposed of on merits and in accordance with law.

6. Pending the said Testamentary Original Suit, the 1st plaintiff R.Loganathan died and his legal representatives were brought on record as defendants 2 to 5 by order dated 08.07.2010 passed in A.No.3450 of 2010. The 2nd plaintiff Savithri W/o. Loganathan also died and the plaintiffs 3 to 5 were recorded as the legal representatives of the deceased 2nd plaintiff by order dated 11.11.2014 made in A.No.6978 of 2014.

7. The defendants have filed their written statement in T.O.S.No.23 of 2008 contending that the Will is not true and genuine. It was also claimed that the Will has been brought about by the 1st plaintiff in the Testamentary Original Suit. It is also the contention of the defendants that Ranganayaki had sold the property under the sale deeds dated 15.02.1999 registered as Doc.Nos.522 and 523/1999. It is also the contention of the defendants that they had purchased the property for a valuable consideration and they have been in possession of the property.

8. On the above pleadings, this Court framed the following issues in the Testamentary Original Suit:-

1. *Whether the Will dated 20.09.1997 is true, genuine and valid?*
2. *Whether the petitioner is entitled to Letters of Administration as prayed for?*
3. *To what reliefs are the petitioners entitled to?*

9. Even before the Original Petition was numbered the 1st plaintiff in T.O.S.No.23 of 2008 viz., Loganathan along with his three children filed a suit in C.S.No.277 of 1999 seeking cancellation of the sale deeds dated 15.02.1999

executed by Ranganayaki in favour of the defendants in T.O.S.No.23 of 2008. They had also sought for permanent injunction restraining them from alienating or encumbering the suit property.

10. The case of the plaintiffs in the suit in C.S.No.227 of 1999 was that in view of the will dated 20.09.1997 executed by Purushothaman, the plaintiffs as the legatees under the Will are the absolute owners of the property and Ranganayaki had only life estate. It was therefore contended that since Ranganayaki had only a life estate, she had no powers to alienate the property in favour of the defendants in T.O.S.No.23 of 2008. The suit was filed against Ranganayaki and the defendants in T.O.S.No.23 of 2008.

11. Pending the suit, the 1st plaintiff Loganathan died and his wife Savithri was brought on record as 5th plaintiff by order dated 08.07.2010 made in A.No.3449 of 2010. The said Savithri also died subsequently and the other plaintiffs viz., plaintiffs 2 to 4, her children were recorded as her legal representatives by order dated 11.11.2014 made in A.No.6979 of 2014.

12. The said suit was resisted by the defendants 2 and 3 contending that the Will is not true and genuine and that they are bonafide purchasers for value without notice of any such Will. It was also the contention that the suit filed for cancellation of sale deeds even during the life time of Ranganayaki was not

maintainable.

13. On the above pleadings, this Court had framed the following issues for determination in the suit:

1. *Whether the plaintiffs are entitled to get the prayer for cancellation of two sale deeds executed by the first defendant in favour of the second and third defendants?*
2. *Whether the plaintiffs are entitled to get consequential permanent injunction against alienation by the defendants?*
3. *Whether the defendants 2 and 3 are bonafide purchasers?*
4. *To what relief the plaintiffs are entitled?*

14. Both the Testamentary Original Suit in T.O.S.No.23 of 2008 and the suit in C.S.No.227 of 1999 were taken up for trial jointly since the issues, parties and the properties involved were common.

15. At trial, the 1st plaintiff Loganathan was examined as PW1. After his death his son, the 2nd plaintiff was examined as PW2. The attesting witness to the Will Rajakumari was examined as PW3. The 2nd defendant was examined as DW1. Ex.P1 to Ex.P21 were marked on the side of the plaintiffs and Ex.D1 and

Ex.D2 were marked on the side of the defendants.

16. I have heard Mr.C.A.Diwakar, learned counsel appearing for the plaintiffs in both the Testamentary Original Suit in T.O.S.No.23 of 2008 and the suit C.S.No.227 of 1999 and Mr.S.Parthasarathy, learned Senior Counsel instructed by Mr.Rajasekar, learned counsel appearing for the defendants in both the proceedings.

17. From the facts narrated above, it is seen that the decision in the Testamentary Original Suit will also govern the result of the suit in C.S.No.277 of 1999. If the Will dated 20.09.1997 is found to be true and genuine, it will follow that the sale by Ranganayaki in favour of the defendants would be invalid. On the other hand, if the Will is found to be not true or not genuine, Ranganayaki being the sole heir of Purushothaman would be entitled to the property and she had every right to dispose of the same. Hence, I am taking up the issue No.1 in the Testamentary Original Suit ahead of the issues in the suit.

Issue No.1 in T.O.S.No.23 of 2008:-

18. This issue relates to the validity of the Will executed by Purushothaman. The Will is an unregistered instrument. It is attested by two witnesses. The first witness is Ranganayaki W/o. Purushothaman and the

second witness is one Rajakumari W/o. R.Sundaramoorthy. PW1, R.Loganathan in his evidence has deposed that he was not present at the time of execution of the Will. He would claim that he was informed of the Will by Ranganayaki after the death of Purushothaman. He would also state that Ranganayaki gave the original Will to him. It is also the claim of PW1 that it was Dr.Soundararajan who typed the Will. He had also deposed that Dr. Soundararajan did not inform him about the Will. He however corrects himself and says that Dr. Soundararajan informed him about the Will.

19. It is further deposed that the second attesting witness to the Will Rajakumari W/o. Sundaramoorthy informed him that she had attested Ex.P1 Will. Though it is pointed out that there are several contradictions in the evidence of Loganathan, his evidence is not helpful in deciding on the truth or genuineness of the Will.

20. PW2, the 2nd plaintiff in T.O.S.No.23 of 2008 has been examined to talk about the incompetency of Ranganayaki to convey the property to the defendants under the sale deed dated 15.02.1999. His evidence also is not very helpful in deciding the genuineness or otherwise of the Will dated 20.09.1997 said to have been executed by Purushothaman.

21. One of the attesting witnesses Ranganayaki had died even before the Original Petition could be numbered. The other attesting witness Rajakumari had disowned the attestation. She did not appear to tender evidence and she was summoned to the court to depose, she being the attesting witness of the Will. The said Rajakumari even in her chief examination has said that she was not present at the time of execution of the Will. As regards the execution of the Will, her evidence reads as follows:-

“On perusal of the Ex.P1 Will, the 2nd attesting witness is myself and the signature is of mine. The name of the testator's wife is Mrs.P.Ranganayaki. At the time of execution of the Will I was not present. Mr.Purushothaman's brother came to my house and got my signature in the Will. As requested by Mr.Purushothaman's brother I affixed my signature in Ex.P1 Will.”

(Emphasis applied)

22. In view of this evidence she was allowed to be cross examined by the counsel for the plaintiffs. In cross examination, she had admitted that she was a tenant residing in a portion of the Testator's house at No.192, Sooryanarayana Chetty Street, Royapuram. She had admitted her signature specifically. But she had also very clearly said that she signed the Will at the request of Loganathan and she was not present at the time when the Will was executed.

She has also denied the suggestion made by the counsel for the plaintiffs that she continued as a tenant even after the property was sold to the defendants and she had vacated the house only because of the case. She had also deposed that she did not come to court out of fear and she came to court after receiving the summons.

23. She has also admitted that on 24.09.2013, she had filed an affidavit into court giving an undertaking that she will appear before the learned Additional Master - II to tender evidence on 26.09.2013. It is not in dispute that she appeared on that day to tender evidence. Despite lengthy cross examination, the counsel for the plaintiffs is unable to elicit any admission as to attestation from PW3 Rajakumari.

24. The law relating to proof of Will is governed by Sections 68 to 71 of the Evidence Act.

- Section 68 requires atleast one of the attesting witnesses should be examined to prove the Will.
- Section 69 governs a situation where the attesting witnesses could not be procured or made available to tender evidence, it permits the propounder to prove that the signatures of the Testator and atleast one of the attesting witnesses is in the

hand of the Testator and that of the attesting witness.

- Section 71 of the Evidence Act provides that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

25. Inasmuch as PW3, the only attesting witness available had denied execution of the document. It is for the propounder to prove its execution through other evidence.

26. Mr.C.A.Diwakar, learned counsel appearing for the plaintiffs would vehemently contend that the plaintiffs have proved the execution of the Will by other evidence. As I have already pointed out, the evidence of PW1 and PW2 are not very helpful in proving the execution of the Will. Both of them have categorically stated that they were not present at the time of execution of the Will. PW1 had stated that it was Ranganayaki W/o. Testator who had handed over the Will to him. He would also add that he was not in talking terms with Ranganayaki. His evidence in this regard reads as follows:-

*“I know the details of Ex.P1 Will in the year
1997. Ranganayaki told me about the Ex.P1 Will
after the death ceremony of Purushothaman,
Ranganayaki gave Ex.P1 Will to me.”*

At a later point in cross examination PW1 has deposed as follows:-

“ Ranganayaki handed over Ex.P1 Will to me.”

“ Ranganayaki is the second wife of Purushothaman so I was not in talking terms with Ranganayaki”

(Emphasis applied)

27. Though it is claimed that the Will was typed by Dr. Soundararajan no effort was made to examine the said Dr.Soundararajan. PW2 Kannamurthy had filed his proof affidavit on 13.12.2010. He was also cross examined on 02.02.2011 and 16.03.2011. Though he claims that his relationship with Purushothaman was very cordial, he had said that his knowledge of the Will is only through his father. He had said that it was his father who told him about the execution of the Will by his brother Purushothaman. He had said that his father will not indulge in fabricating the Will. He had deposed that he knew the signatures of Ranganayaki because he used to have the signatures of Ranganayki in the forms for deposit, but the said forms were not produced.

28. PW2 has deposed that Dr. Soundararajan is a friend of his father and the Testator, and he is now working at Rainy hospital, Royapuram. As already pointed out no attempt was made to examine the said witness Dr.Soundararajan who is supposed to have typed the will.

29. After examination of PW3, PW2 was again recalled and he has filed the additional proof affidavit. In the additional proof affidavit he has claimed that the attesting witness viz., Rajakumari is under the influence of the defendants. He has also been cross examined and the said evidence tendered after the examination of Rajakumari is also not useful in deciding the truth or genuineness of the Will.

30. Mr.C.A.Diwakar, learned counsel appearing for the plaintiffs would however contend that Ranganayaki W/o. The Testator figures as first attesting witness in the Will. She had issued a reply notice to the notice issued by Purushothaman under Ex.P6. Drawing my attention to the contents of the said notice, Mr.C.A.Diwakar would contend that Ranganayaki though had instructed her counsel to issue the said reply notice had not stated therein that she had not attested the Will. He would also point out that in the reply notice there is a specific admission of the signatures of the Testator, inasmuch as it is stated that the signatures of Purushothaman was taken in a blank paper when he was not mentally all right and therefore the Will is void and non-est.

31. Relying upon the above claim made in the reply notice Mr.C.A.Diwakar would contend that the fact that the Will was attested by Ranganayaki was not denied by her in the reply notice and therefore it should be taken that the Will has been proved.

32. The requirements of law insofar as proof of Wills has to be strictly complied with. The options available to the propounder are

a) to examine any one of the attesting witnesses.

b) in the absence of the attesting witnesses, to examine any person and demonstrate that the signature of the Testator and the signature of atleast one of the attesting witnesses are in the handwriting of the Testator and the attesting witness.

c) in the event the attesting witness denies or is unable to recollect the execution of the document, prove the document by other evidence.

(Emphasis applied)

33. In the case on hand, the third requirement would have to be satisfied because the attesting witness had denied execution of the Will by the Testator. If we look at the evidence available in the case on hand, I find that the plaintiffs have miserably failed to prove the Will by other evidence. PW1 had

claimed that the Will was typed by one Dr.Soundararajan, who happens to be a friend of PW1 as well as the testator. PW2 has said that Dr. Soundararajan was at the time of deposition working in Rainy Hospital, Royapuram. Therefore, PW2 was aware of the whereabouts of Dr.Soundararajan. Despite the same, no effort has been taken to have Dr.Soundararajan examined.

34. PW2 has admitted that he has got contemporaneous signatures of Ranganayaki, the first attesting witness to the Will. No efforts have been taken by the plaintiffs to have the signatures found in the Will dated 20.09.1997 to be compared with the admitted signatures which were available with PW2. I find total dearth of evidence on the side of the plaintiffs to establish the truth and validity of the Will.

35. Though Mr.C.A.Diwakar, learned counsel appearing for the plaintiffs would draw my attention to various inconsistencies in the evidence of the defendants and attempt to contend that the Will should be held to have been proved, I am unable to accept his suggestion or adopt such an approach as the proceeding is a Testamentary Original proceeding, where the propounder is bound to prove the Will. The defendants can just deny the Will and sit tight without even examining any witness or tendering other evidence. Even the so called inconsistencies pointed out by Mr.C.A.Diwakar do not have a bearing on the execution of the Will. It is true that there are certain inconsistencies in

the evidence relating to the filing of the Revocation Petition and other procedural aspects which in my considered opinion will not aid the plaintiffs in claiming that the Will should be upheld.

36. The fact that Ranganayaki had not denied her attestation in the Will in the reply notice may not also help the plaintiffs, inasmuch as the statutory requirements under Section 68, 69 and 71 have to be complied with strictly by the propounder of the Will.

37. Mr.S.Parthasarathy, learned Senior Counsel appearing for the defendants would submit that from the evidence of PW3 it is clear that even Section 63 of the Indian Succession Act has not been properly complied with. Section 63 requires a Will to be attested by two witnesses who had seen the Testator signing the Will and the Testator had in turn seen the attesting witnesses affixed their signatures in the Will. The evidence of PW3 extracted above would show that Section 63 was not complied with. Therefore, according to Mr.S.Parthasarathy, the Will has not been proved. As already pointed out the plaintiffs have not proved the Will as required under law.

38. As rightly pointed out by Mr.S.Parthasarathy, learned Senior Counsel appearing for the defendants, the evidence of PW3 creates a considerable

cloud over the alleged execution of the Will. The effect of the the evidence of PW3 is that Section 63 of the Indian Succession Act itself is not satisfied inasmuch as she had deposed that she was not present when the Will was signed by the Testator and that she has not seen the Testator affixing his signature to the Will. In the light of the said evidence I find that the plaintiffs have miserably failed to prove the Will. Therefore, the issue No.1 in the Testamentary Original Suit is answered against the plaintiffs and in favour of the defendants.

Issue No.2 in T.O.S.No.23 of 2008:-

39. Since I have held that the plaintiffs have failed to prove the Will, it follows that they are not entitled to Letters of Administration.

Issue No.1 in C.S.No.227 of 1999:-

40. Since I have already held that the plaintiffs have failed to prove the Will they will not be entitled to any right over the property. Even during her life time. Ranganayaki had sold the property in favour of the defendants on 15.02.1999 under two registered sale deeds. The very basis on which the plaintiffs have come forward with the suit for declaration is that Ranganayaki had only a life estate as per the Will and she is not competent to alienate the property. Now that I have held that the Will is not been proved in a manner

known to law, Ranganayaki being the Class-I heir of the deceased Purushothaman who had succeeded to the property as absolute owner thereof on the death of Purushothaman and therefore she is entitled to alienate the

property. Hence, issue No.1 in the suit is answered against the plaintiffs and in favour of the defendants.

Issue No.2:-

41. Second issue relates to the second prayer in the suit which is one for permanent injunction restraining the defendants from alienating the property. I am unable to comprehend the very prayer. There cannot be a permanent injunction restraining a person from alienating the property. Injunction for alienation can be sought for only as an interim relief. I therefore find that the plaintiffs are not entitled to permanent injunction restraining alienation of the property. Hence, issue No.2 in the suit is answered against the plaintiffs and in favour of the defendants.

Issue No.3:-

42. This issue relates to the bonafides of the defendants 2 and 3. Once the Will is found to have been not proved, the question as to whether the defendants 2 and 3 are bonafide purchasers fades into insignificance. Hence, I

conclude that the above issue has become redundant.

43. In the light of the above findings, both the Testamentary Original Suit in T.O.S.No.13 of 2008 and suit in C.S.No.227 of 1999 are dismissed. However, in the circumstances of the case there will be no order as to costs.

.09.2019

dsa

Index : Yes/ No

Internet : Yes/ No

Speaking order/ Non-Speaking order

List of the Witnesses examined on the side of the Plaintiffs:-

PW1 - R.Loganathan

PW2 - Kannamurthy

PW3 - S.Rajakumari

List of Exhibits marked on the side of the Plaintiffs:-

<i>Sl.No.</i>	<i>Exhibits</i>	<i>Description of documents</i>	<i>Date</i>
1	Ex.P1	Xerox copy of the Will	20.09.1997
2	Ex.P2	Death Certificate of R.Purushothaman	10.09.1998
3	Ex.P3	Paper publication in Daily Thanthi	27.12.1998
4	Ex.P4	Legal notice issued by the plaintiffs' counsel	25.01.1999
5	Ex.P5	Paper publication in Maalai Murasu	30.01.1999

Sl.No.	Exhibits	Description of documents	Date
6	Ex.P6	Reply notice issued by the 1 st defendant's counsel	07.02.1999
7	Ex.P7	Certified copy of the Sale deed in Doc.No.522/1999	15.02.1999
8	Ex.P8	Certified copy of the Sale deed in Doc.No.523/1999	15.02.1999
9	Ex.P9	Order made in OA.No.214 of 1999	09.08.2000
10	Ex.P10	Affidavit and Judges summons in A.No.619 of 2002 and 620 of 2002 in C.S.No.227 of 1999	20.02.2012
11	Ex.P11	Death Certificate of P.Ranganayaki	17.11.1999
12	Ex.P12	Certified copy of the attesting affidavit of S.Rajakumari	21.08.2000
13	Ex.P13	Family card of R.Sundaramurthy	1983-2003
14	Ex.P14	Order passed in A.No.2980 of 2011 in TOS.No.23 of 2008	29.06.2011
15	Ex.P15	Order passed in A.No.3644 of 2013 in TOS.No.23 of 2008	27.08.2013
16	Ex.P16	Order passed in A.Nos.4808 and 4809 of 2013 in TOS.No.23 of 2008	22.11.2013
17	Ex.P17	Order passed in OSA.No.392 of 2013	18.12.2013
18	Ex.P18	Certified copy of Agreement for Sale	13.01.1999
19	Ex.P19	Certified copy of Agreement for Sale	13.01.1999
20	Ex.P20	Certified copy of Judges summons and affidavit in A.No.619 of 2002 in OP.No.157 of 2001	15.02.2002
21	Ex.P21	Certified copy of Judges summons and affidavit in A.No.620 of 2002 in OP.No.157 of 2001	15.02.2002

List of the Witnesses examined on the side of the Defendants:-

DW1 - B.Gangadevi

List of Exhibits marked on the side of the Defendants:-

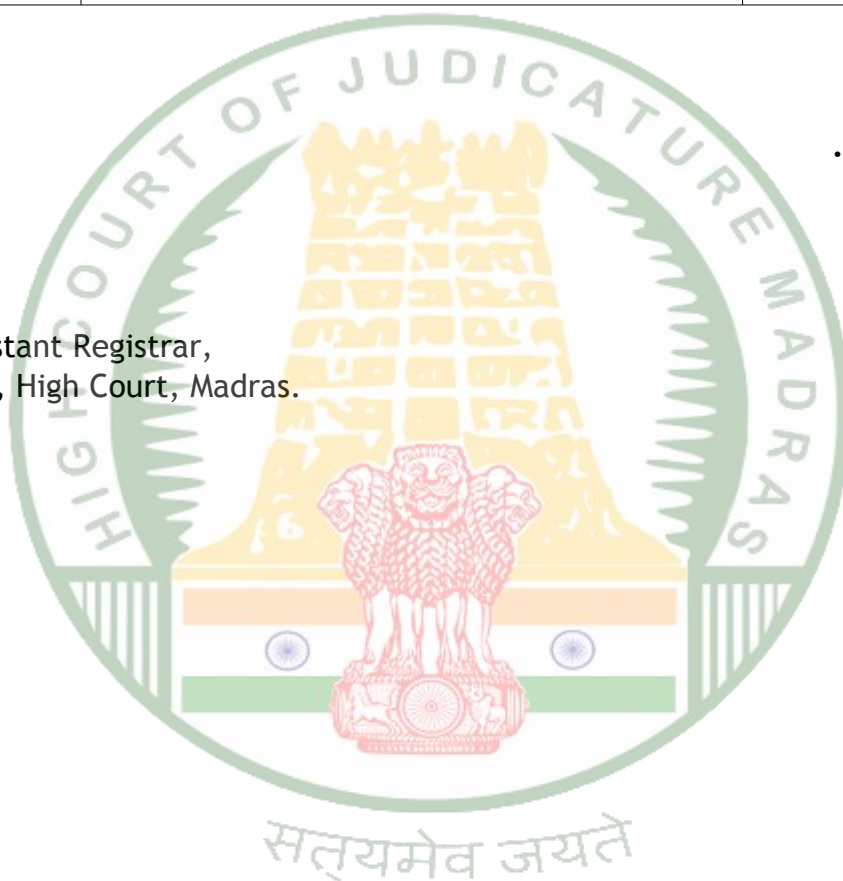
<i>Sl.No.</i>	<i>Exhibits</i>	<i>Description of documents</i>	<i>Date</i>
1	Ex.D1	Receipt of Doc.No.522 of 1999	02.06.1999
2	Ex.D2	Receipt of Doc.No.523 of 1999	02.06.1999

dsa

.09.2019

To

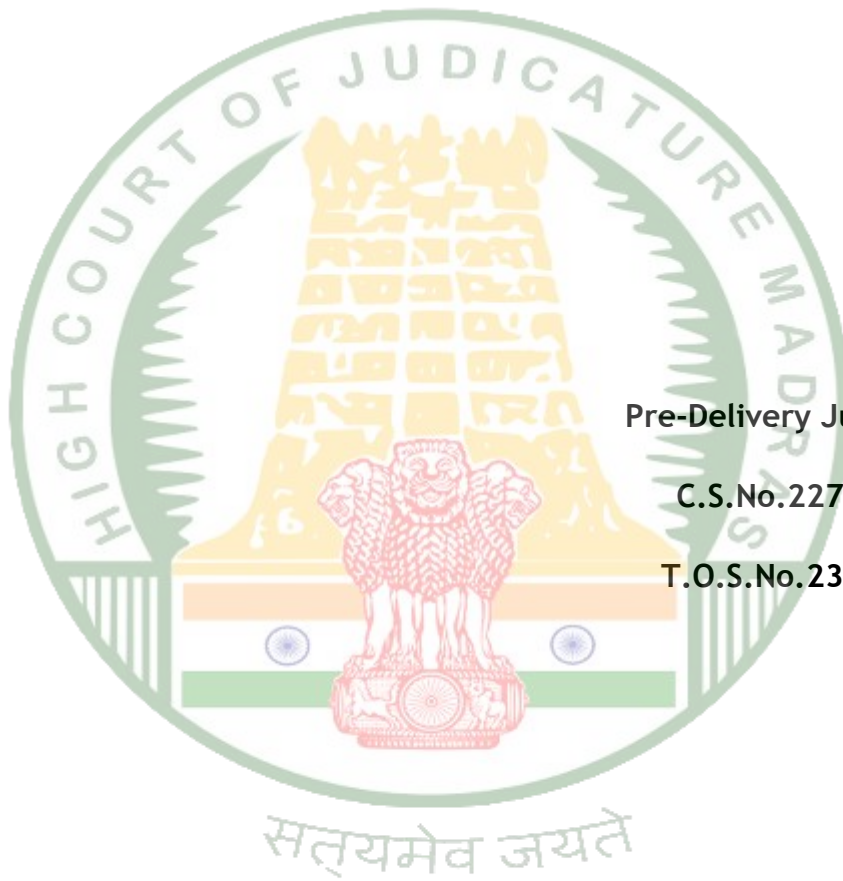
The Sub Assistant Registrar,
Original Side, High Court, Madras.



WEB COPY

R.SUBRAMANIAN,J.

dsa



Pre-Delivery Judgment
in
C.S.No.227 of 1999
and
T.O.S.No.23 of 2008

WEB COPY

09.09.2019