

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	21.01.2020
Pronounced on	17.02.2020

Coram:

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice KRISHNAN RAMASAMY

O.S.A.Nos.309 & 310 of 2018

A.Rajeswari

...Appellant in both O.S.As

Versus

1.B.Natarajan
2.B.Kandasamy

...Respondents 1 & 2 in O.S.A.No.309 of 2018
& Respondents 1 to 10 in O.S.A.No.310 of 2018

B.Jayavel (Died)
3.B.Chellappa
4.B.Mohanraj
5.S.Mallika
6.D.Malarvizhi
7.V.Rani
8.J.Rohini
9.J.Divya
10.J.Logaraj

...Respondents 3 to 10 in O.S.A.No.310 of 2018

Prayer in O.S.A.No.309 of 2018:

The Original Side Appeal has been filed under Order XXXVI Rule 1 of Original Side Rules r/w. Clause 15 of the Letters Patent against the order and decree dated 05.12.2017 passed in T.O.S.No.1 of 2006.

Prayer in O.S.A.No.310 of 2018:

The Original Side Appeal has been filed under Order XXXVI Rule 1 of Original Side Rules r/w. Clause 15 of the Letters Patent against the order and decree dated 05.12.2017 passed in Tr.C.S.No.318 of 2007 on the file of this Court.

Prayer in T.O.S.No.1 of 2006 : Plaintiff filed under Sections 222 and 276 of the Indian Succession Act XXXIX of 1925 read with Order 25 Rule 4 of O.S.Rules, to prove the Will dated 28.04.1997 executed by the deceased Dhanbagyam Ammal in common form, and that probate thereof to have effect limited to the State of Tamil Nadu may be granted to them.

For Appellant
in both O.S.As : Mrs.Chithra Sampath,
Senior Counsel
for Mr.T.S.Baskaran

For Respondents
in both O.S.As : Mr.B.Aravind Srevatsa

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by
KRISHNAN RAMASAMY, J.,)

These Original Side Appeals have been filed challenging the common judgment passed by the learned Single Judge of this Court in T.O.S.No.1 of 2006 and Tr.C.S.No.318 of 2007 dated 05.12.2017 respectively.

2. Originally, the appellant herein had filed a suit for partition in O.S.No.504 of 2005 before the City Civil Court, Chennai.

3. The appellant and the respondents 1 - 7 are the children of Balu Naicker and Dhanabakkiyam Ammal. The said Dhanabakkiyam Ammal died on 28.12.2003 leaving behind 5 sons viz., Natarjan, Kandasamy, Jeyavelu, Chellappa & Mohanraj and 4 daughters viz., Rajeswari, Mallika, Malarvizhi & Rani as her legal heirs and her husband Balu Naicker had predeceased her. Pending suit, Jeyavelu, one of the sons of Dhanabakkiyam Ammal had died. The respondents in O.S.A.No.310 of 2018 viz., Rohini, Divya and Logaraj are the legal representatives of the deceased Jeyavelu. According to the appellant and the respondents, the suit property was the absolute property of their deceased mother Dhanabakkiyam Ammal. Before death, the said Dhanabakkiyam Ammal had executed her last Will dated 28.04.1997 and on 29.05.1997, the same was duly registered as Document No.89 of 1997 on the file of Sub-Registrar, Anna Nagar, Chennai-600 040. The said Will was drafted by one Mr.H.N.Markandan, Advocate and executed at the residence of said Dhanabakkiyam Ammal. Mr.P.T.Gunalan & R.Gurunathan are the attesting witnesses of the Will.

4. Pending the suit, two sons of the deceased Dhanabakkiyam Ammal viz., Natarajan and Kandasamy, had filed a Original Petition in O.P.No.881 of 2005 seeking probate for the last Will and Testament of their mother Dhanabakkiyam Ammal. Except the appellant herein, the other three daughters of the deceased Dhanabakkiyam Ammal had filed consent affidavits expressing their no objection for grant of probate as prayed for. Upon a caveat being filed by the appellant herein, the said O.P.No.881 of 2005 was converted into a Testamentary Original Suit in T.O.S.No.1 of 2006. Upon the conversion of O.P.No.881 of 2005, O.S.No.54 of 2005 which was filed for partition was renumbered as Tr.C.S.No.318 of 2007 and

transferred to this Court for being tried along with T.O.S.No.1 of 2006.

5. The appellant had filed a written statement in T.O.S.No.1 of 2006 denying all the averments made in O.P.No.881 of 2005.

6. By virtue of the Will dated 28.04.1997, the said Dhanabakkiyam Ammal settled her property to and in favour of his 5 sons and she never bequeathed any property to the appellant. Subsequent to the execution of the said Will, the deceased Dhanabakkiyam Ammal had given authorization letters to Tamilnadu Electricity Board to allot separate electricity service connections to her 5 sons which is evident from the exhibits marked on the side of plaintiffs in T.O.S.No.1 of 2006 viz., Ex.P15, Electricity White Card; Ex.P16, Electricity White Card standing in the name of Mr.B.Jayavel; Ex.P17, Electricity White Card standing in the name of Mr.B.Chellappa and Ex.P18, Electricity White Card standing in the name of Mr.B.Mohanraj.

7. According to the respondents in O.S.A.No.309 of 108, on the 16th day ceremony of the deceased Dhanabakkiyam Ammal, the Will was disclosed to the 5 sons and 3 daughters of the deceased Dhanabakkiyam Ammal (excluding the appellant). Though the appellant attended the 16th day ceremony of her deceased mother, Dhanabakkiyam Ammal, however, prior to the disclosure of the Will, she left the place.

8. The main contention of the appellant is that the deceased Dhanabakkiyam Ammal has nine legal heirs viz., 5 sons (including the deceased Jeyavelu) and 4 daughters (including the appellant) and therefore, if the deceased Dhanabakkiyam Ammal wanted to execute a Will, then she might have bequeathed her property equally to her sons and daughters. Whereas, the deceased Dhanabakkiyam Ammal disinherited her 4 daughters (including the appellant) and bequeathed her property to and in favour of her 5 sons alone. There is no necessity to her to do so, however, she did so. Actually, the deceased Dhanabakkiyam Ammal was not aware of the execution of the Will and the said Will was a forged one since the same was executed under coercion and undue influence.

9. On 15.12.2010, this Court framed the following issues in the partition suit:

(i) Whether the plaintiff is entitled for a decree for partition of 1/9th share in the suit property?

(ii) Whether the claim for partition is maintainable in view of the registered will executed by late Dhanabakkiyam Ammal dated 28.04.1997 registered as Document No.89 of 1997 in the office of the Sub-Registrar, Anna Nagar, Chennai?

(iii) Whether the plaintiff is entitled for mesne profits as claimed?

(iv) To what reliefs the parties are entitled to?

10. The issues framed in T.O.S.No.1 of 2006 by this Court are as follows:

(i) Whether the registered will dated 28.04.1997 is true, valid and genuine?

(ii) Whether the registered will dated 28.04.1997 has been executed by late Dhanabakkiyam Ammal in sound disposing state of mind?

(iii) To what reliefs the parties are entitled to?

11. When T.O.S.No.1 of 2006 & Tr.C.S.No.318 of 2007 were taken up for disposal before the learned Single Judge of this Court, the learned counsel for the plaintiff in Tr.C.S.No.318 of 2007 contended that the issue relating to the validity and genuineness of the Will dated 28.04.1997 are held against the appellant, the suit for partition filed by her will have to necessarily fail. Therefore, the learned Single Judge decided the genuineness of the Will in T.O.S.No.1 of 2006, in favour of the plaintiffs and accordingly, decreed the suit in T.O.S.No.1 of 2006 and dismissed Tr.C.S.No.318 of 2007.

12. Before the learned Single Judge of this Court, in T.O.S.No.1 of 2006, on the side of the plaintiffs, second plaintiff viz., B.Kandasamy was examined as P.W.1 and Mr.P.T.Gunalan who signed the Will as an attesting witness was examined as P.W.2 and 20 documents were marked as exhibits viz., Ex.P1 to Ex.P20. On the other hand, on the side of the defendant/appellant, the defendant/appellant viz., A.Rajeswari was examined as D.W.1 and one document was marked as exhibit viz., Ex.C1. No other documentary evidence was filed on the side of the defendant/appellant.

13. After considering the submissions of both sides and perusing the oral and documentary evidences produced before it, the learned Single Judge came to the conclusion that there is no merit in the contention of the appellant/defendant in T.O.S.No.1 of 2006/plaintiff in Tr.C.S.No.318 of 2007. Hence, the learned Single Judge decreed the T.O.S.No.1 of 2006 as prayed for and dismissed Tr.C.S.No.318 of 2007. Aggrieved over the grant of probate in T.O.S.No.1 of 2006 and the dismissal of the partition suit in Tr.C.S.No.318 of 2007, the appellant preferred O.S.A.Nos.309 & 310 of 2018 respectively before this Court.

14. Mrs.Chithra Sampath, learned senior counsel for the appellant would submit that at the time of disposal of T.O.S.No.1 of 2006 and Tr.C.S.No.318 of 2007, the appellant raised some issues attacking the truth, validity and genuineness of the Will which are as follows:

(i) The testator did not know that she has executed the Will.

(ii) That the will is a forged document.

(iii) The testator was not in sound disposing state of mind.

(iv) The Will has been brought about by undue influence of the plaintiffs.

(v) There was no reason for the testator for disinheriting her daughters.

15. The counsel appearing for the respondent would submit that prior to the execution of the Will dated 28.04.1997, Dhanabakkiyam Ammal had already executed 10 mortgage deeds between the year 1947-1984 which were marked as Ex.P2 to Ex.P11. Further, P.W.1 & P.W.2 had also deposed that the Will was executed in the presence of said Dhanabakkiyam Ammal at her house and thereafter, on 29.05.1997, the same was registered in the Office of the Sub-Registrar, Anna Nagar, Chennai. Therefore, the learned Single Judge had rightly held that the testatrix of the Will i.e., deceased Dhanabakkiyam Ammal was well aware of the execution of the Will dated 28.04.1997.

16. The learned senior counsel for the appellant advanced her argument by stating that at the time of execution of the Will, the deceased Dhanabakkiyam Ammal was not aware of the content of the Will since she was an illiterate. However, all these aspects have not been considered by this Court. She would also contend that the deceased Dhanabakkiyam Ammal had executed the Will under the assumption that she is executing a mortgage deed.

17. The contention of the appellant's counsel is that the said Dhanabakkiyam Ammal was not aware of the content of the Will cannot be accepted by this Court since the said Dhanabakkiyam Ammal had already executed 10 mortgage deeds though she was uneducated. In our considered opinion, though the deceased Dhanabakkiyam Ammal was an uneducated, she was a well experienced person in executing the mortgage deeds and thus, she would not have executed the said Will without knowing the fact that she is executing a Will in favour of her 5 sons. Further, the said Will was executed in the presence of two attesting witnesses viz., Mr.P.T.Gunalan and R.Gurunathan. One of the attesting witnesses, P.W.2, Mr.P.T.Gunalan deposed that at the time of execution of the said Will, Mr.H.N.Markandan, Advocate who drafted the Will read over and explained the contents of the Will to the testatrix in Tamil and thereafter, the said Dhanabakkiyam Ammal affixed her Left Hand Thumb Impression in each page of the Will. P.W.2 also deposed that after the said Dhanabakkiyam Ammal affixed her thumb impression in all the pages of the Will, she requested him to sign the Will as attesting witness and only on her request, he signed the Will as 1st attesting witness and thereafter, Mr.R.Gurunathan had also signed the Will as 2nd attesting witness. Subsequently, on 29.05.1997, the said Will was registered in the office of the Sub-Registrar, Anna Nagar, Chennai. From the deposition of P.W.2, it is crystal clear that at the time of execution and registration of the Will, the said Dhanabakkiyam Ammal was hale and healthy and in a sound disposing state of mind.

18. After analyzing all these facts, the learned Single Judge of this Court has rightly held that the said Dhanabakkiyam Ammal is well aware of the contents of the Will. Accordingly, the first issue is answered.

19. As far as the second issue raised by the appellant's counsel with regard to the forgery of the Will is concerned, the learned senior counsel for the appellant would contend that the Will has to be proved under Section 68 of the Indian Evidence Act, however, the same has not been proved in accordance with the said provision of the Evidence Act.

20. The learned counsel appearing for the respondents would contend that the learned Single Judge rightly held that the Will was proved in accordance with Section 68 of the Indian Evidence Act. Though the Will was a registered document, as per law, it is required to be proved through at least one attesting witness. In the present case, P.W.2, one of the attesting witness was examined. P.W.2 deposed about the execution of the Will. He therefore submitted that the Court below rightly came to the conclusion that the Will was proved under Section 68 of the Indian Evidence Act. It is apposite to mention Section 68 of the Indian Evidence Act, 1872 hereinbelow:

"68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

From a reading of the above provision, it is very much clear that the Will is required by law to be attested since if not attested, the same cannot be used as evidence until at least one of the attesting witness has been called for the purpose of proving its execution.

21. In the present case, the Will is the document required to be proved through the attesting witnesses. In order to prove the execution of the Will, one of the attesting witness was examined as P.W.2. He has clearly deposed that the Will was executed in the presence of the testatrix, deceased Dhanabakkiyam Ammal. There were two attesting witnesses viz., P.W.2 and one Gurunathan. The 1st attesting witness and Mr.H.N.Markandan, Advocate who drafted the Will have passed away.

22. During the cross examination of appellant, she deposed that she came to know about the Will dated 28.04.1997, only after she filed the partition suit. Further, neither any one was examined nor any document has been marked on the side of the appellant in order to substantiate her contention that the Will was a forged document. Under these circumstances, the learned Single Judge of this Court rightly came to the conclusion that the Will was a genuine registered document and

proved in accordance with law. Therefore, the learned Single Judge rightly arrived at a finding that the Will is a Registered Document and the same is true, valid and genuine.

23. In view of the above discussion, we do not find any merit in the submission of the learned counsel for the appellant that the Will was not proved under Section 68 of the Indian Evidence Act. It is to be noted that the Will was proved in the manner known to law. Accordingly, the second issue is answered.

24. The next three issues raised by the learned senior counsel for the appellant are that the testatrix was not in sound disposing state of mind and the Will has been executed by undue influence of the plaintiffs in T.O.S.No.1 of 2006 and there was no reason for the testatrix for disinheriting her daughters.

24.1 The learned senior counsel for the appellant submitted that the testatrix i.e., Dhanabakkiyam Ammal was not aware of the contents of the Will and she was forced to sign the Will. Since the testatrix was an illiterate aged woman she believed that she is signing a mortgage deed. She signed the Will only as believing so. She would further contend that the testatrix i.e., Dhanabakkiyam Ammal had executed the said Will only in favour of her 5 sons and not in favour of her 4 daughters. The testatrix was not at all aware of the said P.T.Gunalan who was examined as P.W.2 in the present case. When the testatrix is not at all aware of P.W.2, more weightage provided for the deposition of P.W.2 in order to prove the genuineness of the Will as an attesting witness is not in accordance with law. However, the learned Single Judge had provided more weightage to the deposition of P.W.2 and granted probate of the Will. She would also contend that there are discrepancies in the residential address of P.W.2 and the said point was also not considered by the learned Single Judge of this Court in an appropriate manner. Further, there are various contradictions and discrepancies in the evidence of P.W.1 & P.W.2, regarding the manner in which the Will was executed and attested. In support of her contention, she relied on the judgment of the Honourable Supreme Court in Civil Appeal No.1351 (N) of 1973.

25. The learned counsel appearing for the respondents strongly contended that though the said Dhanabakkiyam Ammal was an uneducated woman, she executed not less than 10 mortgage deeds during her lifetime and the same were marked as Ex.P2 to Ex.P11. The said Dhanabakkiyam Ammal was well aware of the contents of the Will because she signed the Will only after the contents of the Will were explained to her in Tamil by Mr.H.N.Markandan, Advocate who drafted the Will. She was an aged woman but she was in a sound disposing state of mind at the time of execution of the Will dated 28.04.1997 and the said Will was not executed under any undue influence.

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25.1 The respondents' counsel would further argue that the said Dhanabakkiyam Ammal spent considerable amount of money for

the marriage of her four daughters. It is true that the testatrix had executed the Will dated 28.04.1997, only in favour of her 5 sons, however, the other three daughters of the deceased Dhanabakkiyam Ammal had filed consent affidavits expressing their no objection for grant of probate as prayed for. Only the appellant is opposing the grant of probate unreasonably. In support of his contention, he relied on the judgment of this Court in Corra Vedachalam Chetty and another Vs. G.Janakiraman reported in 2001 (3) CTC 283.

26. On perusal of the materials available on record, it is seen that the Will dated 28.04.1997, was executed by the testatrix viz., Dhanabakkiyam Ammal. The said Dhanabakkiyam Ammal died intestate on 28.12.2003 leaving behind her 5 sons (including the deceased Jeyavelu) and 4 daughters (including the appellant) as her legal heirs. Pending suit, Jeyavelu, one of the sons of Dhanabakkiyam Ammal died. Hence, the children of the deceased Jeyavelu viz., Rohini, Divya and Logaraj were impleaded as respondents 8 to 10 in O.S.A.No.310 of 2018. All the children of said Dhanabakkiyam Ammal got married. The testatrix, Dhanabakkiyam Ammal and her husband Balu Naicker had spent considerable amount of money for the marriage of their 4 daughters including the appellant and therefore, the said Dhanabakkiyam Ammal settled her properties only in favour of her 5 sons and not in favour of her 4 daughters. Further, the said Dhanabakkiyam Ammal had also given authorization letters to the Tamilnadu Electricity Board to allot separate electricity service connections to her sons which is clearly evident from the exhibits viz., Ex.P15 to Ex.P18.

27. It is also seen that even prior to the execution of the Will dated 28.04.1997, the said Dhanabakkiyam Ammal had already executed 10 mortgage deeds between the year 1947-1984 which were marked as Ex.P2 to Ex.P11. Therefore, it is further seen that the said Dhanabakkiyam Ammal was very well acquainted with the registration of documents. In the present case, P.W.2, Mr.P.T.Gunalan who was working as Deputy Chief Executive in Muthialpet Benefit Fund is the attesting witness of the Will deposed that the said Dhanabakkiyam Ammal approached Muthialpet Benefit Fund for the first time to raise a loan on mortgage and thereafter, whenever the said Dhanabakkiyam Ammal visited Muthialpet Benefit Fund, she used to meet him. In the year 1997, during Pongal holidays, when P.W.2 met the testatrix at her residence, she requested him to take her to Mr.H.N.Markandan, Advocate since she wanted to draft a Will in respect of her house property. Therefore, P.W.2 took the testatrix to Mr.H.N.Markandan. The testatrix expressed her intention to Mr.H.N.Markandan about writing a Will. After getting the particulars informed by the testatrix, the Advocate drafted the Will and brought the drafted Will to the house of the testatrix. In the house of testatrix, Dhanabakkiyam Ammal, the Will was read over and the contents wherein were explained by the Advocate to the testatrix in Tamil. After that, the testatrix affixed her Left Hand Thumb Impression in all the pages of the Will. Thereafter, P.W.2 signed the Will as 1st attesting witness and one Mr.Gurunathan signed the Will as 2nd attesting

witness. Subsequently, on 29.05.1997, the said Will was registered before the Sub-Registrar, Anna Nagar, Chennai. Now, P.W.2, 1st attesting witness and Mr.H.N.Markandan, Advocate who drafted the Will are no more.

28. Though the counsel appearing for the appellant raised some discrepancies and contradictions in deposition of P.W.1 & P.W.2, however, the same are not relating to the execution of the Will dated 28.04.1997. As per Section 68 of the Evidence Act, the registered documents are required to be proved by way of at least any one attesting witness. In the present case, Mr.P.T.Gunalan, 1st attesting witness was examined as P.W.2. It is evident from the deposition of P.W.2 that the said Dhanabakkiyam Ammal executed the Will dated 28.04.1997, to and in favour of his 5 sons. It is also to be noted that the Will is a registered document and the said fact was also proved in the manner known to law. Hence, there is no merit in the contention of the appellant since at the time of execution of the Will dated 28.04.1997, the said Dhanabakkiyam Ammal was in a sound disposing state of mind and the said Will was not executed under any undue influence.

29. Since the testatrix, Dhanabakkiyam Ammal spent considerable amount of money for the marriage of her 4 daughters, she has settled the entire property in favour of her 5 sons. Further, there was no proof placed by the appellant to prove that the testatrix was not in a sound disposing state of mind at the time of execution of the Will and the said Will was executed under undue influence. It is also to be noted that except the appellant, the remaining 3 daughters of the said Dhanabakkiyam Ammal have given their consent for granting probate in favour of the plaintiffs in T.O.S.No.1 of 2006. Moreover, during the cross examination of the appellant, she herself deposed that she was not at all aware of the Will until she filed the partition suit in O.S.No.504 of 2005. Apart from that, when the Will was disclosed on the 16th day ceremony of the deceased Dhanabakkiyam Ammal in presence of 5 sons and 3 daughters of the testatrix, the appellant was not present since she left the place even prior to the disclosure of the Will.

30. Therefore, the finding of the learned Single Judge of this Court that the Will was executed on 28.04.1997 by the said Dhanabakkiyam Ammal in a sound disposing state of mind and the same was registered on 29.05.1997 is just and proper. Accordingly, we concur with the finding of the learned Single Judge.

31. Considering the said facts and circumstances of the case, we do not find any infirmity in the judgment and decree dated 05.12.2017, passed by the learned Single Judge of this Court in T.O.S.No.1 of 2006 and Tr.C.S.No.318 of 2007.

32. In the result, O.S.A.Nos.309 & 310 of 2018 are dismissed and the judgment and decree dated 05.12.2017 passed by the learned Single Judge of this Court in T.O.S.No.1 of 2006 and Tr.C.S.No.318 of 2007 are confirmed. No costs.

Sd/-
Assistant Registrar(CS-I)

//True copy//

Sub Assistant Registrar

mrr

To

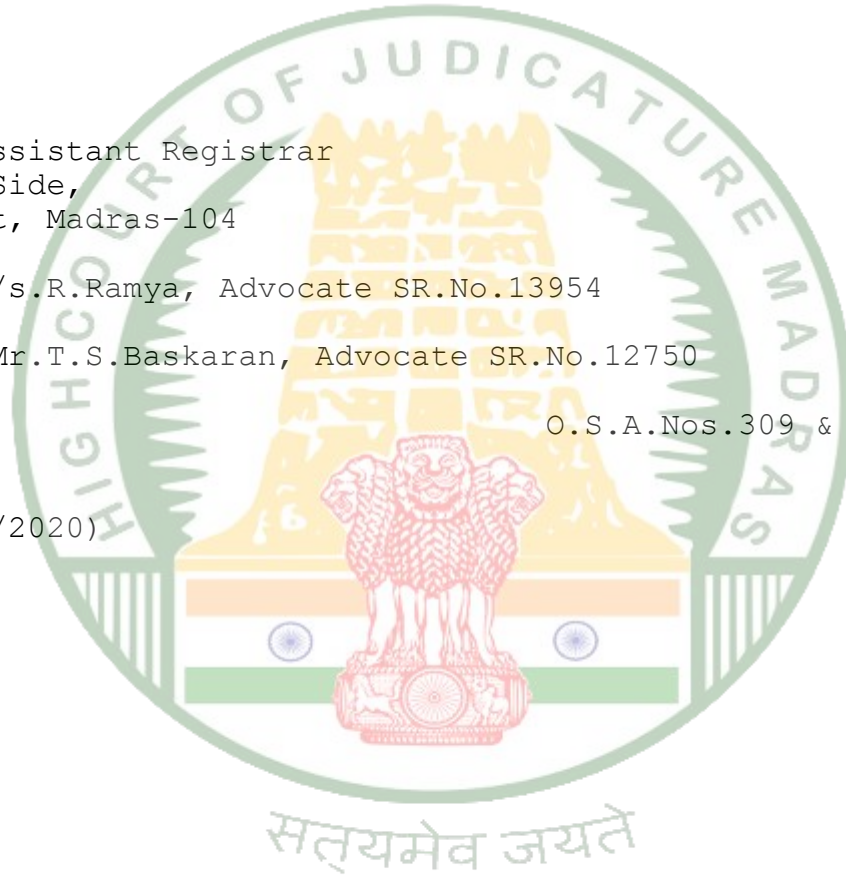
The Sub Assistant Registrar
Criminal Side,
High Court, Madras-104

+1cc to M/s.R.Ramya, Advocate SR.No.13954

+2ccs to Mr.T.S.Baskaran, Advocate SR.No.12750

O.S.A.Nos.309 & 310 of 2018

SSD(CO)
GMY(25/09/2020)



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