



S.A. Nos.619 & 916 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2023

CORAM

THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

S.A. Nos.619 & 916 of 2015

S.A.No.619 of 2015

1 L.Vijayarangan

2 L.Prabakaran

3 L.Baskaran

4 L.Kalyanasundaram

5 L.Gunasundaram

6 L.Kotteswaran

7 L.Subramani

... Appellants

Vs

1 R.Palani

2 Banumathi

3 Vimala

4 Lalitha

5 Renugopal

1/25



S.A. Nos.619 & 916 of 2015

6 Ashok Kumar

7 Sudhakar

8 Girija

9 Chandrasekar

.. Respondents

Prayer:- Second Appeal has been filed under Section 100 C.P.C., against the judgment and decree dated 08.01.2015 passed in A.S.No.73 of 2012 on the file of learned Principal District Judge, Vellore, whereby it had partly modified with regard to the half share of item II of the suit schedule property made in the decree and judgment dated 09.11.2012 passed in O.S.No.474 of 1994 on the file of learned Subordinate Judge, Vellore.

S.A.No.916 of 2015

1 R.Palani

2 Lalitha

3 Renugopal

4 Ashok Kumar

5 Sudhakar

6 Girija

7 Chandrasekar

.. Appellants

2/25



S.A. Nos.619 & 916 of 2015

Vs.

WEB COPY

1 L.Vijayarangan

2 L.Prabakaran

3 L.Baskaran

4 L.Kalyanasundaram

5 L.Gunasundaram

6 L.Kotteswaran

7 L.Subramani

8 Banumathi

9 Vimala

... Respondents

Prayer:- Second Appeal has been filed under Section 100 C.P.C., against the judgment and decree dated 08.01.2015 passed in A.S.No.73 of 2012 on the file of learned Principal District Judge, Vellore, by reversing and modifying the the judgment and decree dated 09.11.2012 passed in O.S.No.474 of 1994 on the file of learned Subordinate Judge, Vellore.



WEB COPY



S.A. Nos.619 & 916 of 2015

For Appellants in

S.A.No.619 of 2015 : Mrs.Chitra Sampath,
Senior Advocate for
Mr. N.Senthil Kumar

For Respondents in

S.A.No.619 of 2015 : Mr.K.V.Ananthakrushnan
for R1, 4 to 9

R2 & R3 – No appearance

For Appellants in

S.A.No.916 of 2015 : Mr.K.V.Ananthakrushnan

For Respondents in

S.A.No.916 of 2015 : Mrs.Chitra Sampath,
Senior Advocate for
Mr. N.Senthil Kumar
for R1 to 7

COMMON JUDGEMENT

The appellants herein are the legal heirs of deceased original plaintiff R.Loganathan. Challenging the findings rendered by the first appellate judge in A.S.No. 73 of 2012 arisen out of the decree passed in O.S.No.474 of 1994, on the file of Sub-Court, Vellore. The respondents herein are the



S.A. Nos.619 & 916 of 2015

defendants in the suit. The defendants also aggrieved over the findings of first appellate judge, preferred an appeal in S.A.No.916 of 2015.

2. For the sake of convenience, the parties are referred as per the ranking in the suit.

3. The original plaintiff filed a suit for declaration and consequential relief of permanent injunction against his two brothers and two sisters. During the pendency of the proceedings, the plaintiff died and his legal heirs were impleaded as plaintiffs 2 to 9 in the suit. So also, the 1st defendant died, his legal heirs were impleaded as defendants 5 to 10.

4. The case of original plaintiff is that the entire suit property as listed in the plaint schedule (item Nos. 1 to 5) are absolute properties of his father C.R.Rathinam and during his life time, he executed a registered Will dated 01.01.1987 in a sound and disposing state of mind bequeathing the properties in favour of his eldest son/1st plaintiff for his life time and after the life time of 1st plaintiff, in favour of 1st plaintiff's sons (seven) and sons



S.A. Nos.619 & 916 of 2015

to be born to the 1st plaintiff in future absolutely. Subsequently, the testator died on 13.01.1991 leaving the aforesaid Will as his last Testament.

Accordingly, the 1st plaintiff R.Loganathan got interest over the property and he is in possession of the same as a life interest holder. He is running the cycles and spares business in item No.1 of the suit property and paying tax to the concerned authorities. For the other item Nos. 3 to 5, he is paying kist and transferred the patta in his name. The 2nd defendant was permitted to occupy two rooms in the rear side of Item No.2 of the suit property. So, he bound to vacate and hand over the same to him. Hence, the defendants 1 to 4 have caused the issue of notice, for which, they gave a reply. In spite of that, the defendants attempted to cause interference. Hence, the suit was filed.

5. The contention of defendants is that the suit property is not an absolute property of his father C.R.Rathinam and claimed all the properties are joint family properties. Further, they are also disputing the alleged registered Will executed by the father of 1st plaintiff stating that their father was not in a sound disposing state of mind at his last days and taking



S.A. Nos.619 & 916 of 2015

advantage of the same, the 1st plaintiff has fabricated the Will. Furthermore, some of the properties are belonged to his mother Manickammal, but the plaintiffs erroneously claimed that those properties are absolute properties of C.R.Rathinam and they claimed share in that property also. Accordingly, they prayed to dismiss the suit.

6. Before the trial court, both parties have adduced oral and documentary evidence and the plaintiffs have also examined one of the witness of the Will as P.W.2 to prove genuineness of the Will and on the side of defendants, 3 witnesses were examined. On considering both oral and documentary evidence, the trial judge concludes that in the Will (Ex.A1) dated 01.01.1987 no reason was assigned for not allotting the properties to other sons and daughters of the testator, besides original Will also not been produced. So also, the evidence of P.W.2 not established that the testator affixed his signature after understanding the contents of the Will. Accordingly, the Will was in filled form. Furthermore, the nature of property was analysed by the trial judge and based on the documents, trial judge concludes that the property is the self-acquired property of



S.A. Nos.619 & 916 of 2015

C.R.Rathinam, in which, all his sons and daughters are equally entitled to the share in the properties. Hence, the declaration suit filed by the plaintiff was dismissed.

7. In the meanwhile, original plaintiff died and his legal heirs were impleaded before the trial court itself. Challenging the same, they have preferred an appeal in A.S.No.73 of 2012 before the learned Principal District Judge, Vellore, wherein the first appellate judge analysed both oral and documentary evidence and on the evidence of P.W.2, it would amply prove that the execution of the Will and non-production of original Will is not fatal to the proceedings, since the plaintiffs able to establish that the original Will was read over during the panchayat. As per Sec.63 of Indian Evidence Act, it would prescribe that when the primary evidence is not available, the secondary evidence can be taken into consideration. Accordingly, the certified copy of the Will, Ex.A1 is permissible, thereby the first appellate judge concludes that the Will is valid in respect of suit properties in Item Nos.1,3,4 and 5 and half portion of item No.2 as those properties are absolute properties of C.R.Rathinam and remaining half



S.A. Nos.619 & 916 of 2015

portion of item No.2, since it belongs to C.R.Rathinam's wife, Will was not accepted. Accordingly, the suit was decreed in respect of item Nos.1,3,4 and 5 and half portion of item no.2 and the remaining half portion of item No.2,the trial court's decree was confirmed. Challenging those findings with regard to item No.2 of the suit property, plaintiffs preferred an appeal in S.A.No.619 of 2015 and challenging the findings of first appellate judge, the defendants preferred an appeal in S.A.No.916 of 2015.

8. The learned counsel for Appellants/defendants in S.A.No.916 of 2015 would submit that both the courts below erroneously concludes that entire suit properties are self-acquired properties of C.R.Rathinam and his wife Manickammal and not a joint family property inspite of evidence adduced on their side. Further, he would also submit that the lower appellate judge failed to take note of the fact that the plaintiffs neither plead nor in the pre-suit notice stated anything about the loss of original Will and only at the time of trial, the possession of the Will was informed to the court. In the absence of pleadings and evidence, the first appellate judge erroneously concludes that the original Will was lost, and thereafter as a secondary



S.A. Nos.619 & 916 of 2015

evidence, the certified copy of Ex.A1 is admitted. Based on that, the first appellate judge decreed the suit in favour of plaintiffs as such is totally unfair and the same is liable to be set aside. Further, he would also submit that the lower appellate judge failed to take note of the discrepancies committed by P.W.2 Attestor about the execution of the Will, but inspite of that the declaration of Will as valid, as such is totally improper appreciation of evidence as well as law. Accordingly, he prayed to set aside the findings of lower appellate judge by confirming the findings of the trial court and the Second Appeal in S.A.No.916 of 2015 is admitted on the following question of law :-

- a) *Did not the appellate court went wrong by relying on the evidence of the defendants to prove the loss of the original Will when no evidence or pleading made by the plaintiffs for loss of the Will?*
- b) *When the trial court on evidence and demour of the witness P.W.2 found that the original Will was not executed in the presence of witnesses, the appellate court ought not to have held that the Will is proved?*



WEB COPY

c) *The attesting witness PW.2 clearly stated in his cross-examination that he did not see the testator executing the 'Will'.*

As per law, under Sec.63 of Succession Act, the attesor must prove that he saw the testator affixing his signature and thereafter, at his request, he attested the 'Will'?

d) *Did not the appellate court misunderstood the scope of Sec.62, 63 and 65(c) of the Evidence Act and wrongly applied the same without applying the principles of law made in Sec.63 of Indian Succession as to the execution of 'Will' and wrongly gave probative value against Sec.63 of the Indian Succession Act and decreed the suit?*

e) *When all the other sons are excluded does it not create suspicious circumstance that the 'Will' was not duly executed and proved after understanding the contents?*

9. The learned counsel for appellants/plaintiffs preferred the Second Appeal in S.A.No.619 of 2015 with regard to the declaration of half share in Item No.2 of the suit property, would submit that the lower appellate judge



S.A. Nos.619 & 916 of 2015

after upheld the validity of the Will declared to grant entire share of item No.2 in favour of plaintiffs and allotting half share, as such is totally erroneous one and the same is liable to be set aside. Accordingly, the Second Appeal is admitted on the following question of law :-

“Whether the lower appellate court was right to hold that late C.Rajarithnam is not the owner of half of the item No.2 of the suit schedule property when there is no rival claim to the effect?”

10. Brief facts of the case is as follows :-

The original plaintiff R.Loganathan, being eldest son of C.R.Rathinam filed a suit for declaration declaring that entire suit properties are the absolute properties of his father and during his life time, he executed a Will and accordingly, he became life interest holder and after him, his sons are entitled to enjoy the entire suit properties absolutely, but the defendants falsely claiming right over the properties as if it is a joint family property. So, he filed a suit for declaration. The foremost point is to be decided is whether the suit properties are self-acquired properties of



S.A. Nos.619 & 916 of 2015

C.R.Rathinam or joint family properties of C.R.Rathinam family.

According to original plaintiff, his father was running a cycle shop with a fund provided by his wife Manickammal and she purchased item no.2 of the property on 29.07.1954 and thereafter, she settled the property in favour of her husband C.R.Rathinam on 24.06.1957. Thereafter, he enjoyed the property as absolute owner. Item No.2 of the suit property was originally purchased by C.R.Rathinam and his brother in the year of 1933 (Ex.B3) and after that there was a partition effected among brothers. Thereafter, the said Manickammal purchased half front portion from two brothers (Ex.B4) in the year of 1945. Subsequently, her husband C.R.Rathinam had purchased remaining half of item no.2 of the suit property. Thus, point is to be decided is whether all the items of suit properties are self-acquired properties of C.R.Rathinam or joint family properties as claimed by the defendants. As per Ex.B1 and B2, first item of property was purchased by Manickammal and she executed a settlement deed in favour of her husband C.R.Rathinam as such item Nos.1 and 2 of the property is separate properties of C.R.Rathinam, since it was purchased by him and his brother and thereafter, a partition was effected among them. Subsequently, C.R.Rathinam's wife



S.A. Nos.619 & 916 of 2015

Manickammal purchased half share from other two brothers, but there is no proof that Manickammal having separate income. So, the plaintiffs content that his father alone purchased the properties in the name of his wife and one portion was purchased by him. So, the entire suit properties belong to C.R.Rathinam as his self-acquired properties. So also item No.3 to 5 are purchased by C.R.Rathinam through a sale deed (Ex.B6). Thus, the plaintiffs able to establish that those properties are self-acquired properties of their father C.R.Rathinam, but the trial court failed to appreciate the fact.

11. As the defendants claimed all the properties are joint family properties, the burden is on them to prove that those sale deeds stand in the name of his father C.R.Rathinam are purchased out of joint family funds. But, admittedly, the first item was purchased by plaintiffs' mother and wife of C.R.Rathinam and then she executed a Settlement deed in favour of her husband through Ex.B2. So, as per the said settlement deed, their father became absolute owner of the suit properties and it cannot be deemed as a joint family property. In respect of item No.2, it was purchased by C.R.Rathinam and his brothers, at that time, the plaintiffs were minors and there is no proof that it was purchased by their father with the help of joint



S.A. Nos.619 & 916 of 2015

family income. As per the partition held among brothers, one portion was allotted to C.R.Rathinam and the remaining portion was subsequently purchased by him in the year of 1963, at that time, the plaintiffs were minors. So also, there is no proof that those properties purchased out of joint family income. Coming to Item Nos.3 to 5 of suit properties, it was also purchased by C.R.Rathinam, but admittedly there is no evidence that it was purchased from joint family fund. Now, the defendants not produced any materials to establish that there was a joint nucleus to purchase the properties. Therefore, all the properties are separate properties of C.R.Rathinam and his wife Manickammal. The trial court has rightly appreciated those facts, but the first appellate judge held that item No.2 belongs to C.R.Rathinam and Manickammal through a sale deed stands in both of their names, thereby held that in item no.2 of suit property, half of the share belong to Manickammal, but concludes that item No.1 of suit property is the separate property of C.R.Rathinam. So also item Nos.3 to 5 of suit properties are also separate properties of C.R.Rathinam. So, except half share in item no.2, entire properties are self-acquired properties of C.R.Rathinam.



S.A. Nos.619 & 916 of 2015

12. Furthermore, now, based on Ex.A1, the plaintiffs claimed entire suit properties stating that the testator C.R.Rathinam during his life time with sound state of mind executed a Will in favour of his eldest son R.Loganathan, original plaintiff giving life interest holder and then given all the rights of 1st plaintiff to sons of Loganathan. Admittedly, certified copy of Will was produced and original Will was not produced. As rightly pointed out by the defendants counsel that there is no pleading with regard to the loss of Will stated in their pre-suit notice, without which the evidence adduced by the plaintiffs was erroneously appreciated by the lower appellate judge. Hence, he prayed to set aside those findings.

13. On perusal of records, it reveals that the certified copy of the Will alone was produced and the original Will was not produced. The reason assigned by the plaintiffs is that after the death of their father, a panchayat was held, at that time, the original Will was read over by panchayatar and handed over to one Swaminathan. Thereafter, the original Will was not returned. So, he produced certified copy of the Will and marked as Ex.B1. The said Swaminathan is the panchayat head, who conducted the panchayat among the plaintiffs and defendants after the death of the said



S.A. Nos.619 & 916 of 2015

C.R.Rathinam. If really, the Will was handed over to the panchayat head Swaminathan, the original plaintiff ought to have taken steps to summon him to produce the original Will before the court, but he has not taken any steps to summon the said Swaminathan for cause production of original Will. No reason assigned for not taking such steps before the trial court on the side of plaintiffs. On the other hand, they content that the original Will was lost and so, they are entitled to produce certified copy or xerox copy of the Will. Accordingly, lower appellate judge by relying Sec.63 of Indian Evidence Act, held that if the original Will, primary evidence is not available, secondary evidence can be taken into consideration. As rightly pointed out by the defendants counsel, the Will was not lost. According to the plaintiffs, it was handed over to one of the panchayatar. If so, the normal procedure is that to summon the said panchayatar for cause production of original Will. But, the plaintiffs have not taken such steps as discussed above. So, Sec.63 is not applicable to the facts of the case, since because the Will is under the custody of some third party as per the contention of plaintiff. Furthermore, at the time of filing the case or in the pre-suit notice, the plaintiff have not stated anything about the original Will. Only during



S.A. Nos.619 & 916 of 2015

the trial, he stated that the original Will was not with him. Thereafter, he produced certified copy of Will. During the trial proceedings, he produced certified copy of Will (which is xerox copy of filling paper of Will, which was kept in Registrar Office) marked as Ex.A34. Based on that, the first appellate judge held that though the original Will was not produced, but it was substituted by secondary evidence by the plaintiff is sufficient. But, it is not the case of loss of Will. So, the findings of the first appellate judge to that effect as such is improper appreciation of evidence and facts and the same is liable to be set aside. For that, the following ratio in the authority relied on by the plaintiffs in ***Civil Appeal No.1960 of 2020 in the case of Dhanpat vs. Sheo Ram (deceased) through LR. And others***, but it is not supporting their contentions for the above said reasons :-

“30. In respect of an argument that some of the natural heirs were not even mentioned in the Will, therefore, the Will is surrounded by suspicious circumstances is again not tenable. Mr.Rishi Malhotra, learned counsel for the appellant referred to the judgment of this court reported as Rabindra Nath Mukherjee and another vs. Panchanan Banerjee (dead) by LR. And others. 14 wherein it has been held that Will was executed for the exclusion of the natural heirs. The suspicious



circumstances found by the High Court to deprive the natural heirs by the testatrix was not found to be sufficient. The court held as under :-

4. As to the first circumstance, we would observe that this should not raise any suspicion, because the whole idea behind execution of will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of Will; of course, it may be that in some cases they are fully debarred and in others only partially. As in the present case, the two executors are sons of half-blood brother of Saroj Bala, whereas the objectors descendants of a full blood sister, the disinheritance of latter could not have been taken as a suspicious circumstance, when some of her descendants 14 (1995) 4 SCC 459 are even beneficiaries under the Will.”

14. With regard to execution of Will, the contention of defendants is that Will was not proved by the plaintiffs beyond reasonable doubt and the same is surrounded with suspicious circumstances, since original Will was not produced at the time of filing nor it was assigned with any reason for not allotting shares to other sons and daughters by the testator, thereby, they are



S.A. Nos.619 & 916 of 2015

disputing the validity of the Will. To prove the Will, the plaintiffs examined P.W.2, who is one of attestor of the Will. Based on that, he claimed that Will is proved as per Sec.68 of Indian Evidence Act. But, the learned counsel for defendants would submit that the evidence of P.W.2 not stated about the execution of Will and it is not sufficient to prove that the Will was executed by the Testator. The evidence of P.W.2 was perused and it reveals that he was known to the Testator for 10 years before execution of Will, but he deposed about the execution of Will as well as attestation as follows :-

“உயிலை எழுதி வைத்தவர் பெயர் ரத்தின கவுண்டர் தான். உயில் எழுதியது யார் என்று தெரியாது. உயில் எழுதுவதற்கு பத்திரங்கள் எல்லாம் யார் வாங்கி வந்துள்ளார்கள் என்று தெரியாது. பத்திரம் எழுதப்பட்டது என்பது தெரியாது. பத்திரம் எந்த தேதி, எந்த மாதம் எழுதப்பட்டது என்று தெரியாது. பத்திரத்தை எங்கு பதிவு செய்தார்கள் என்று தெரியாது. ரத்தின கவுண்டர் ஆங்கிலத்தில் கையெழுத்துப் போடுவாரா என்று எனக்குத் தெரியாது.”

So, the evidence of P.W.2 clearly reveals that he has not known directly the signature affixed by the testator in the said Will. Impliedly, the Testator has not signed in the presence of attestors. All the attesting witnesses said to be signed subsequently. Furthermore, P.W.2 also not aware about the Will and whether the Will was written as per the direction of Testator nor he was known about a person, who has written the Will. Furthermore, he was not



S.A. Nos.619 & 916 of 2015

certain that whether the beneficiary Loganathan was there at the time of execution of Will. Admittedly, the Testator was under the custody of original plaintiff/beneficiary. So, he bound to remove all the suspicious circumstances casted over the Will. But except P.W.2, no other witness was examined on the side of plaintiffs to prove the validity of Will. Admittedly, C.R.Rathinam was not in sound state of mind at the time of his last days and he suffered with urinal problem, the same was assented during evidence of his sons. Furthermore, no reason was assigned for not allotting share to other sons and daughters and though during previous occasion, he intended to give share to P.W.2, but the same was cancelled. That being so, the Testator has not assigned any reason for not giving the properties to other sons and daughters in the said Will. The evidence of P.W.2 was also not proved that the Will was signed by the Testator in the presence of attestor. So, the Will is under suspicious circumstances and the same was not removed beyond reasonable doubt by the plaintiffs. This aspect was rightly appreciated by the trial judge, but the lower appellate judge erroneously concludes that P.W.2 evidence is sufficient to prove the genuineness of Will as such is totally erroneous and liable to be set aside.



15. The ratio laid down in the following authorities relied on by the learned counsel for appellants, though agreeable, but not applicable to the facts of the present case :-

*“This Court in **O.S.A. No.17 of 2002** in the case of **J.Mathew (died) and others vs. Leela Joseph**, held in para 20 as follows:-*

“20. A perusal of the aforesaid decisions makes it clear that mere proof of signature of the Will and proof of attestation thereof by the two attesting witnesses as envisaged in Section 63 of Indian Succession Act and as required to be proved under Section 68 of the Evidence Act may not amount to proof of execution of the Will. The propounder of the Will is required to prove that the testator has signed the Will after understanding the contents thereof or after understanding the nature of disposition. Keeping in view the aforesaid well settled principle, it has to be seen whether the plaintiff has proved the execution of the Will. As already indicated, evidence of the attesting witness merely proved the signature of the Testator and also proved the attestation of the two attesting witnesses. But, from the said evidence, it is not at all apparent that the Will has been signed by the Testator after understanding the contents thereof. This conclusion is not the end of the matter.”



S.A. Nos.619 & 916 of 2015

*“The Apex Court in **W.P. (C) No.3467 of 2003** in the case of **Benga Behera and another vs. Braja Kishore Nanda and others**, held in para 35 as follows:-*

“35. If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of Sec. 3 of Transfer of Property Act and Sec.63 of the Succession Act. The term “attestation” means :-

“to 'attest' is to bear witness to a fact. The essential conditions of valid attestation are (i) two or more witnesses have seen the executant sign the instrument (ii) each of them has signed the instrument in presence of the executant.”

Hence, the plaintiffs have not proved the Will by giving cogent evidence that the Testator affixed his signature in the presence of attesor. Therefore, the findings with regard to validity of Will held by the lower appellate judge is liable to be set aside as such is erroneous one. Accordingly, the question of law Nos. (a), (b), (c), (d) and (e) in S.A.No. 916 of 2015 are answered. Therefore, the findings of the lower appellate judge is set aside. In another appeal in S.A.No. 619 of 2015 filed by the plaintiffs with regard to half share in the item No.2 of suit property as discussed above, based on the Will, the plaintiffs claiming absolute right in the item No.2, but as per



S.A. Nos.619 & 916 of 2015

findings in S.A.No.916 of 2015, the Will is not proved by the plaintiffs beyond reasonable doubt. Accordingly, the suit was dismissed. So, they are not entitled to claim half share in the suit properties based on the said Will. Accordingly, the appeal filed by the plaintiffs in S.A. No.619 of 2015 is dismissed and appeal filed by the defendants in S.A.No.916 of 2015 is allowed and consequently, the Suit is dismissed. As the properties are self-acquired properties, sons and daughters of C.R.Rathinam having equal share in the suit property. Therefore, the declaration relief claimed by the plaintiffs in the entire suit properties belongs to them absolutely as per the Will is not maintainable. No costs.

13.07.2023

Index : Yes/No
Internet: Yes/No
Speaking/Non Speaking order
rpp

To

Principal District Judge, Vellore.

24/25



WEB COPY



S.A. Nos.619 & 916 of 2015

T.V.THAMILSELVI, J.

rpp

S.A. Nos.619 & 916 of 2015

13.07.2023