



S.A.No.813 of 2001

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.813 of 2001

1.K.Radha
2.K.Kavitha

...Plaintiffs/Appellants/Appellants

-Vs-

1.V.Natarajan(Died)

2.Indian Overseas Bank,
Rep.by its Branch Manager,
Having business at South Main Street,
Thanjavur Town and Munsifi.

3.Bharath State Bank,
Rep.by its Branch Manager,
Having his office at Hospital Road,
Thanjavur Town and Munsifi.

4.Indian Bank,
Junction Branch,
Rep.by its Branch Manager,
Having business at Mission Street,
Thanjavur.

5.The Postmaster,
Head Post Office,
Thanjavur.

.. Defendants/Respondents/Respondents

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6.N.Rajendran

7.N.Neelavathi

8.N.Rathina Sabapathi

...LRs of the deceased first respondent

(R6 to R8 are brought on record as LR's of the deceased first respondent vide order dated 27.09.2019 made in C.M.P(MD).Nos. 9520 to 9522 of 2019 in S.A.No.813 of 2001)

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 30.08.2000 passed in A.S.No.25 of 1999 on the file of the Principal District Court, Thanjavur, confirming the judgment and decree of the Subordinate Court, Thanjavur, dated 28.01.1999 made in O.S.No.273 of 1995.

For Appellant : Mr.S.Parthasarathy
for Mr.R.Murali

For Respondents : No appearance for R2 to R4, R6 to R8
Mr.P.Subbiah
Central Government Senior Panel Counsel
for R5

JUDGMENT

The appellants are the plaintiffs in O.S.No.273 of 1995 on the file of the Subordinate Court, Thanjavur. The appellants filed the suit against the respondents for declaration of title to the properties described in 'A' and 'B'



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Schedules and restraining the first defendant/first respondent herein from interfering with the collection of amounts mentioned in 'B' Schedule property and for recovery of possession. The said suit was dismissed by the trial Court. After trial, the plaintiffs filed an appeal before the Principal District Court, Thanjavur in A.S.No.25 of 1999. The First Appellate Court, after hearing the arguments and considering the materials available on record, dismissed the appeal. Challenging the said judgment and decree passed by the First Appellate Court, the plaintiffs in the suit have filed the present second appeal.

2. This Court, while admitting this second appeal, has formulated the following substantial questions of law:

“(i) Whether the view of the Courts below on the validity of Ex.A2 is correct and is based on material?”

“(ii) Whether the Lower Appellate Court is correct in law in refusing to accept the additional evidence?”

3. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the fifth respondent.



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4. The present case is mainly based on the Will, Ex.A2 dated 01.11.1991. Both the trial Court and the First Appellate Court found that the Will was not proved in the manner known to law and based on the said Will, the plaintiffs/appellants herein cannot be entitled to the relief sought for.

5. The learned counsel appearing for the appellants would submit that both the attestors to the Will were no more at the time of examination of the witnesses during the trial before the trial Court. Therefore, the persons, who are aware of signature, were examined and the death of the attestors was also proved. He would further submit that after the death of the attestors, the Will was registered before the Sub-Registrar office concerned. However, both the attestors were examined by the Sub-Registrar and based on their evidence coupled with scribe, the Will was registered. Those proceedings were brought to the knowledge of the trial Court and the depositions of the attestors before the Sub-Registrar were not marked before the trial Court due to ignorance. Therefore, since the attestors were not alive, the Will was proved under Section 69 of the Indian Evidence Act [hereinafter referred to as “the Act”] and this was ignored by the trial Court. Hence, the appellants filed an application under Order XLI Rule 27



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C.P.C to let the additional evidence and the same was not dealt with by the First Appellate Court independently. Simply without assigning any reason, due to dismissal of the appeal, the said application was also dismissed. Since the First Appellate Court has failed to consider the said application in the manner known to law, the findings of the First Appellate Court are perverse.

6. The learned counsel appearing for the fifth respondent would submit that since he is appearing for the Postal Department, he has no independent stand or objection and he would abide by the order of this Court.

7. A careful reading of the records would show that this litigation is only based on the Will, Ex.A2. It is a settled proposition of law that a Will is a peculiar document which comes into force after the death of the attestors. Therefore, it has to be proved in the manner known to law as contemplated under Section 68 of the Act. Further, there is an enabling provision also under Section 69 of the Act. In case, the beneficiary is not able to prove the Will under Section 68 of the Act, due to death of both the attestors or any other reason, they can very well prove the same under Section 69 of the Act. Whereas, in this case, on the date of



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following Rule 28 and Rule 27 of Order XLI C.P.C and discussed with the main appeal. Therefore, non-consideration of the application filed under Order XLI Rule 27 C.P.C and non giving the adequate reason for rejection are also perverse. Therefore, the second substantial question of law is answered accordingly.

8. Since in this case, the appellants have stated that after the death of the attestors, the Will was registered and the said proceedings was very much available with the Sub-Registrar office, which is a public document. Therefore, the Lower Appellate Court ought to have given an opportunity and though the appellants failed to summon the registration proceedings from the Sub-Registrar office, they filed an application under Order XLI Rule 27 C.P.C. The Lower Appellate Court should have given the adequate reason and should have considered the same. Thereafter, the question as to whether those documents are sufficient to prove the Will or not? should have been discussed and decided by the Lower Appellate Court. Without considering the same, the Lower Appellate Court dismissed the appeal as well as the application which warrants interference of this Court. Therefore, as far as the first substantial question of law is concerned, the entire suit is based on only Ex.A2/Will. Admittedly, the Will has to be proved in



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the manner known to law. Further, it is for the plaintiffs to prove the Will. In this case, both the attestors died, but fortunately, both the attestors were examined before the Sub-Registrar while registering the Will. Therefore, the appellants should have produced the statements of the attestors made before the Sub-Registrar before the trial Court. However, they failed to do the same, when the application was filed under Order XLI Rule 27 of C.P.C. Hence, the First Appellate Court ought to have given an opportunity to the appellants to produce those documents. A careful reading of the decision of the First Appellate Court shows that no sufficient reason has been given for rejecting the application. Therefore, both the substantial questions of law are answered accordingly.

9. In the result, this Second Appeal is allowed and the judgment and decree passed by the First Appellate Court is set aside. The matter is remanded to the First Appellate Court to consider the application filed by the appellants under Order XLI Rule 27 C.P.C and give opportunity to both the parties. The First Appellate Court if necessary can take additional evidence under Order XLI Rule 28 C.P.C, regarding the depositions given by the attestors before the Sub-Registrar, during the time of registering the Will and consider the same and pass



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order or otherwise, the First Appellate Court can exercise its power and send the matter back to the trial Court for the limited purpose of recording the additional evidence and after recording the additional evidence, the same may be sent to the First Appellate Court and thereafter, the First Appellate Court shall decide the matter on the basis of the additional evidence. It is made clear that the matter is remitted back to the First Appellate Court only for the limited purpose of taking additional evidence by sending for documents from the Sub-Registrar office and mark through Competent Authority for proving the Will, Ex.A2 and consider the same and decide the appeal on merits and in accordance with law. No costs.

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NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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To

- 1.Principal District Court, Thanjavur
2. Subordinate Court, Thanjavur
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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