Karnataka High Court Sri W.E. Sambandam S/O Late W. ... vs Sri W.E. Sathyanarayanan S/O Late ... on 16 March, 2007 Equivalent citations: ILR 2007 KAR 1484, 2007 (4) KarLJ 1 Author: R Gururajan Bench: R Gururajan, C Kumaraswamy JUDGMENT R. Gururajan, J. 1. Sri W E Sambandam, has preferred this appeal aggrieved by the judgment dtd 31-3-2000 passed in O.S. No. 8386/1980 on the file of the 30th Additional City Civil Judge, Bangalore. The facts as narrated in the appeal memo are as under; Respondent-plaintiff W.E. Sathyanarayanan, has filed a partition suit in O.S. No. 8386/80 against the appellant-defendant praying for the judgment and decree for partition and separate possession of plaintiff's share in the suit schedule properties by metes and for mesne profits. In the suit, the respondent-plaintiff claimed a share in the suit property on the ground that he is a member of the family of late Sri W. Ekambaram, is entitled for a share in the property. Defendant-appellant entered appearance through counsel and filed a written statement and additional written statement. Apart from denying the right sought for by the plaintiff, defendant also took a contention that the plaintiff was adopted by his uncle and as such the plaintiff lost his right in the original family. A further ground of a will by late Ekambaram was also raised by the defendant-appellant. Learned trial Judge framed several issues for his consideration. Witnesses were examined. Several documents were filed by the parties in respect of their respective contentions. After hearing the learned trial Judge has chosen to pass the following order; Suit of the plaintiff is decreed. Plaintiff is entitled to 4/9th share in the suit schedule properties, except property bearing No. 117. The plaintiff is entitled to get his share by getting the court commissioner appointed through process of court. Draw preliminary decree accordingly. This judgment is challenged in this appeal. 2. Records were summoned and records were pursued. Heard the learned Counsel for the parties. 2.2 Sri Belliappa, learned Counsel for the appellant took us through the material on record to say that the learned trial Judge is wrong in decreeing the suit in favour of the respondent plaintiff. According to the learned Counsel, the adoption is fully proved in terms of the documentary evidence placed by the appellant-defendant. He would also invite our attention to the acquisition of property by the plaintiff in terms of the will executed in his favour by his late uncle. Learned Counsel says that the plaintiff has acquired large properties and even after acquisition of those properties, he wants a further share in the original family. He would say that the adoption has been proved and that adoption has not been properly considered by the learned trial Judge resulting in adverse judgment against him. He would also rely on a will in terms of his submission. Alternatively, he would say that in terms of the will properties were bequeathed even in favour of the plaintiff and the will would come in the way of the plaintiff-respondent. 2.3 Per contra, learned Counsel for the respondent would say that the learned trial Judge is fully justified in coming to a right conclusion on the facts and circumstances of this case. It is the contention of the respondent that the adoption was not in accordance with law. A mere notice issued on behalf of the respondent plaintiff would not prove the factum of adoption. It is further contended before us that the will is a created document and no reliance can be placed on the will. Will has created sufficient

suspicion in the mind of the court and the court in those circumstances is fully justified in not accepting the suspicious will on the facts of this case. Respondent prays for dismissal of the appeal. The learned Counsel on either side have placed reliance on several judgments. 3. During the pendency of the proceedings, three IAS were filed. From the order we see that those applications were taken up by the learned Judge before passing orders on merits. IA. No. 91 is with regard to consideration of IA. No. 92 -filed under Order 16 Rule 6, requesting the court to summon the Sub-registrar, Shivajinagar to produce the document dtd 16-3-1977. IA. No. 94 is an application filed for correction of errors. Learned Judge after noticing the material on record has chosen to hold against the defendant with specific grounds in para 16 and 17 of the order in question. No serious arguments are placed before us with regard to these IAs. The reasons given by the learned Judge in the present circumstance do not call for any interference by us. In fact, the learned Judge has given a correct finding in so far as these applications are concerned. 4. In terms of the corrected issues, issue No. 3 is with regard to adoption of plaintiff by Smt Devakiammal and with regard to the plaintiff ceasing to be a member of the Joint Family. Learned Counsel for the appellant argued before us with reference to the evidence on record and stated that the learned Judge is wrong in holding against the defendants with regard to adoption. 4.1 After hearing we have carefully perused the plaint and the evidence on record. 4.2 Plaintiff has claimed partition in his own right in terms of the plaint averments. By way of defence, an issue of adoption was raised by the defendant in the written statement. In the written statement it is stated that the plaintiff has been adopted by his mother's elder sister -Devakiammal and Sri T. Shivaprakasam. He died on 8-11-1984 bequeathing three properties in favour of the plaintiff by his last will and testament. According to the defendant, the plaintiff, by virtue of this adoption severed all the rights in the natural family and has thus lost his right, interest and title in the natural family's property. A reply statement has been filed and in the reply statement it is stated that the theory of adoption is given a go by, by the documents left by the father himself. Evidence was recorded in this regard. Plaintiff in his evidence has categorically stated that he has not a blood brother and that he was adopted by Smt Devakiammal. In so far as legal notice is concerned, he would say that when the notice was issued, he had come down to Bangalore on leave. He must have given power of attorney to his father-in-law to get the notice issued. He has further stated that erroneously he is described as the adopted son of Devaki Ammal under Ex. D-1. As against this evidence of the plaintiff, defendant has chosen to examine himself and in the examination he would say that his uncle Shivaprakasham has adopted his brother-plaintiff, when he was young. Plaintiff lost his adopted father in 1940. Smt. Devakiammal was his adoptive mother. In Ex. D-1, plaintiff admitted his adoption in at Ex. D-1(a). After adoption plaintiff was living with his adoptive mother at No. 36, Venkatappa Road, Tasker Town. In cross-examination he would admit that the contents of Ex. D-5 as correct. He has further stated that his father sold the property in wheeler road by Ex. D-5; that in Ex. D-5(a) his father referred plaintiff as joint family member and that the plaintiff was not referred to as given in adoption

to some other family; that he was not present at the time of adoption; that he could not get any documents with regard to adoption after the death of his father. 4.3 Learned trial Judge while considering issue No. 3 has chosen to hold that a mere legal notice does not wipe out the relationship in the absence of any other acceptable material available on record. In the light of the arguments, we have seen the documentary evidence. Except Ex. D-1, there is no other document available on record with regard to adoption. Admittedly, parties are Hindus. Adoption is a serious issue. It results in civil consequences. There must be acceptable evidence available on record for ceasing to be a member of the joint family. Ex. D-1 is a notice, issued to one Sri Padmanabha Achary and in the notice there is a sentence reading that "my client is the adopted son of Smt T. Devagi Ammal". As against this in Ex. D-5, the father of the parties himself does not refer to the plaintiff as the adopted son. In addition, in the will, on which strong reliance is placed by the defendant, there is absolutely no reference to the plaintiff having been adopted by Smt Devakiammal, as sought to be argued before us. The evidence on record would point out that there was no adoption at all and no acceptable materials are placed for accepting the adoption. Mere a sentence in a legal notice cannot be taken advantage of by the defendant for the purpose of denial of property rights. Learned trial Judge after noticing all these aspects of the matter rightly in our view has ruled against the defendants. In fact in the will, the father refers to the plaintiff as his son. We would rather go by what the father has said rather than by what the legal notice says, particularly in the absence of any other supportive material. In these circumstances, we accept the findings of the learned trial Judge on issue No. 3. 5. Issue No. 4 is with regard to the will dtd 16-3-1977. It is considered in para 20 onwards. The learned trial Judge by a detailed order has chosen to hold against the defendant. In the light of the argument, we have carefully seen the pleadings and the evidence on record. As mentioned earlier, the plaintiff is none other than the blood brother of the first defendant. He has sought for partition. While contesting the same, the defendant has chosen to set up a plea of will by his father. Additional statement was also filed stating that a will was executed on 16-3-1977 by late Ekambaram and at that time, he was actively practicing in Bangalore and he was a senior standing counsel to Bangalore Municipal Corporation and other private clientele. Even after execution of the will he was actively practicing till he died on 26-4-1980. This fact clearly shows that he was under no duress or coercion or fraud in the execution of the will. It is also stated that a share in the ancestral property is also bequeathed in favour of the plaintiff. A reply statement has been filed stating that the so called document, said to be a will, is not at all a true and genuine will of the deceased. Deceased was suffering from Herpes a disease which affects the nervous system and imbalances the patient mentally. The deceased was not in a sound and disposing state of mind. In fact there is no recital about his being in a sound state of health and in a position to understand as to what he was doing. All these factors invalidate the will. It is further stated that the will is a fabricated document completely engineered by the defendant. 5.1 Parties have entered witness box in respect of their respective pleas. In evidence, the plaintiff would

say that his father had two wives Tillaimmal and Radhabaiammal. Thillaimmal had a son - E Sambandam (first defendant) and a daughter Gnanabikaiammal. Sathyanarayana is the son born to Radhabaiammal. Gnanabikaiammal, died and also her husband. Their children are defendants 2(a) and 2(c). Plaintiff as well as defendant-1's father died in 1980. There is no dispute with regard to the factual aspects of the matter. In so far as Will is concerned, the first plaintiff would say that the health condition of his father was very weak in 1980. The properties are ancestral properties. Defendants 3 to 7 are the tenants in occupation of the shops shown in item No. 3 of the plaint schedule. He would say in evidence that he got certain properties in terms of the will executed by his uncle Shivaprakasham. The joint family consisted of himself, his brother and his father. In so far as will is concerned, he would say that his father was admitted to Hospital for treatment of Herpes. The signature found on this will do not appear to be the original signatures of his father. There was one Perumal Reddy, who was his father's typist residing in Chick Bazaar Road, Tasker Town, Bangalore, he had identified his father's signature before the sub-registrar and has stated that he might have signed under duress. Plaintiff would say that he has seen the original will for the first time in court; that he was given only a typed copy of the will after the death of his father; that he does not know as to who prepared the will Ex. D-2; that the will was created in suspicious circumstances. 5.2 As against PW-1, DW-1 has stated that even after discharge from hospital his father continued has practice; that one Sri W K Sundara Murthy, who was his father's cousin told him about the will and that he was told that it was written by his father himself and that he was given a typed copy of the will; that before the death ceremony of his father, xerox coy of the will was collected by the plaintiff from him; that the original was retained by Sri Sundara Murthy. The will given to me by Sri Sundara Murthy is produced as Ex. D-2; that it is a registered will. Sri T N Perumal Reddy, a retired police officer identified his father before the sub-registrar; that Sri Perumal Reddy was the typist of his father; that his father had Herpes; that his father was in St. Philomenas Hospital; that he was not present when the will was executed; that signature in Ex. D-2 differ from signature to signature. He has stated that he does not know whether there was a hand written draft will. He has denied that his father's mental condition was affected. He has further identified his father's LTM. 5.3 DW-2 is a retired Divisional Manager. He would say that Ekambaram had come to his house and met his father and discussed with regard to the will; that subsequently, DR. Venkataraman and Sri Sundaramurthy, had arrived there; that his father told him that Sri. Ekambaram had executed a will Ex. D-2; that Ex. D-2(a) is the signature of his father; that and Ex. D-2(b) is the signature of Dr. D K Venkataraman. He has expressed his ignorance as to where the will was typed. He has also expressed his ignorance as to whether Sri Sambandham had influenced over his father. 5.4 DW-3 has stated that the will was signed by Sri Ekambaram in his presence and Dr. Venkataraman and he has attested the will. His health condition was good. 5.5 The Court appointed one Sri Aswathappa as the hand writing expert. He would say that according to him the person who wrote the standard signatures S-1 to S-12 did

not write the questioned signatures 1 to 9. He was cross-examined. 5.6 With regard to the genuineness of the will, learned trial judge after discussing the evidence on issue No. 4 has ruled that on perusal of the entire evidence of DW-3, material evidence with regard to the testator witnessing the attesters putting their signatures on the will is not forthcoming, though DW-3 has stated that the testator put his signature in their presence. With regard to the health condition of the testator on the date of execution of the alleged will, even as per the stand taken by defendant No. 1 himself, health of his father was feeble and was not normal. He would say that the material evidence is opposed to natural course of conduct of an ordinary prudent man. He would also noticed the signatures in the light of the evidence of the hand writing expert. After noticing the same, he would come to a conclusion that the defendant No. 1 has failed to prove valid execution of the will dated 16-3-1977, executed by his father Sri Ekambaram. 6. Before we consider the merits of the matter, let us see the law on the subject. 6.1 Appellant has placed before us a judgment of the Supreme Court in Joyce Primrose Prestor v. Vera Marie Vas . We have gone through the facts in the said case. From the facts we see that in the said case the will was in the own handwriting of the testator and it was attested. The court also noticed that the will was handed over to DW-3 in the said case, for safe custody. PW-1 was not cross-examined on that score. Noticing the evidence on record, the trial court has answered in favour of the plaintiff with regard to the will. The High Court held that this case of the alleged will is shrouded in suspicion. Supreme Court reversed the judgment of High court and restored the order of the trial court. It is also seen from the facts of the case that the writing of the will and signatures of the attesters were admitted. It was properly executed in accordance with the relevant statutory provisions. It was in those circumstances, the Apex Court accepted the will. In the case on hand, the handwriting was doubted, in addition to the other circumstances. Therefore this judgment is not of much assistance to the appellant. 6.2 The Apex Court in the case of Venkatachala v. Thimmajamma , has ruled that apart from suspicious circumstances, the test to be applied would be the satisfaction of the prudent mind in such matters. The court ruled in para 20 as under; There may however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be shaky and doubtful and evidence in support of propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged.

Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded such pleas may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter. 6.3 In the court has ruled in para 22 as under; The will in the present case constituting the plaintiff as a sole legatee with no right whatever to the testator's wife seems to be unnatural. It casts a serious doubt on genuineness of the will. The will has not been produced for very may years before the court or public authorities even though there were occasions to produce it for asserting plaintiff's title to the property. The plaintiff was required to remove these suspicious circumstances by placing satisfactory material on record. He has failed to discharge his duty. We, therefore, concur with the conclusion of the High court and reject the will as not genuine. Therefore what is clear to us is that it is a matter of proof in case of suspicious will. It may not be out of place to mention here that courts have accepted the principle of the courts speaking for the dead in accepting the will. But such acceptance has to be to the satisfaction of the court and suspicious circumstance would be a relevant factor for holding against the defendant. The learned trial Judge as mentioned earlier, after going through the law on the subject, evidence and opinion of the hand writing expert has chosen not to accept the will. To satisfy ourselves, we have also seen the will. 6.4 Ex. D-2 (will) shows that it is not a handwritten will. But it is typed. There is no acceptable evidence forthcoming as to who typed it and when it was typed. In the will the place and date of the will is vacant and it was subsequently written as '16th' and the evidence is not clear as to who wrote '16th'. As mentioned earlier, the hand writing expert also doubted the signature of Sri. Ekambaram. We also see in page 2 that the word second' typed has been changed to 'first' and no acceptable evidence is forthcoming as to who did it and under what circumstances. A reading of the said will would also show that it is not in the normal prescribed format of a will and there are gaps in between. It also does not say that the will has been written with a sound mind in the will itself. Though the will is supposed to have been typed in 1977, no acceptable material has come on record as to why this will came to be registered only when Sri Ekambaram was in the hospital and as to where was the need for affixing the LTM of Sri Ekambaram, when he was able to sign. Even in the will, Sri Ekambaram does not say that the plaintiff is his adopted son. It is also not shown as to why preference is shown to the defendant in the matter of disbursement of properties. It cannot be forgotten that Sri Ekambaram was a leading lawyer and he was practicing on the civil side and he knows what a will is and he also knows the consequences of defects in a will. Taking into consideration the occupation and the experience of Sri Ekambaram, as rightly ruled by the learned trial Judge, suspicion has been created in the mind of the court, particularly in the light of the above referred facts. Moreover, the will has been produced after several long years. Even according to the appellant, Sri Ekambaram was well in the year 1977. If that is so, it is un-understandable

as to why he has put his LTM in the will. We must also notice at this stage Ex. D-5 which is a sale deed of a property, situated in Coxtown. This document is dtd 16-4-1979. This is the latest document compared to the will dtd 16-3-1977. Sri Ekambaram has not chosen to mention anything about the will in the said document. Taking into consideration all these aspects of the matter, learned trial Judge in his order in our view, has rightly chosen to disbelieve the will. Learned trial Judge has also noticed the case laws in the matter of suspicious character of the will. That being so, we are unable to accept the argument of the learned Counsel for the appellant that the will has to be accepted in the given circumstances. We are of the view that the learned Judge was right in his conclusion that the will cannot be accepted in the given circumstances. There are several suspicions available on record and those suspicions have not been removed in accordance with law by the defendant. It is also on record that Sri Ekambaram was suffering with Herpes at the relevant point of time. A mere registration of the will would not wipe out the suspicious character of the will. 6.5 Hence, we have no hesitation in accepting the finding of the court below on this aspect of the matter. In these circumstances, the finding on issue No. 4 is accepted. 6.6. In so far as issue No. 5 is concerned, we have seen the material on record. Plaintiff has stated in the plaint that his father has disposed of some of the ancestral property for investing in better immovable properties and one such property acquired is the land bearing No. 21-22, Muniswamy Road, Queen's Road Cross, Tasker Town, Bangalore. Defendant has denied the same and he has stated that house property bearing No. 5 and property bearing No. 13 are the only ancestral properties and rest are all self-acquired properties. 6.7 Law is fairly well settled that every family is presumed to be joint, unless the contrary is proved before a court of law. Ex. P-5 is a sale deed dtd 31-1-1942. In terms of this document, the said property was inherited by the grand-father of the plaintiff as well as the defendant No. 1 who had purchased this property in the name of Shanmugam, i.e., uncle of the PW-1. Ex. P-6 is also a copy of the sale deed dtd 26-3-1980. From the said document it is seen that the said document was executed by Sri Ekambaram as kartha of Joint Hindu Family. Ex. P-7 is another sale deed. Ex. D-3 would show that the uncle of plaintiff and defendant No. 1 purchased a property thereunder and the said property was subsequently sold. Learned Judge has chosen to refer to all these documents for the purpose of considering as to whether the case of the defendant could be accepted. He has also chosen to deal with the evidence placed before him. It is on record that the father of the plaintiff was receiving rents in respect of property No. 11, Madhava Mudaliar Road. The learned trial Judge after noticing these facts has come to a conclusion that the contention of self-acquired property has no basis. No acceptable arguments are placed before us to dislodge the finding of fact recorded by the learned trial Judge. 7. Similarly, the learned trial Judge is right in answering issue No. 6. 8. Issue 1 and 2 are considered by the learned Judge and they were rightly answered on the basis of the material on record. Learned Judge has also taken into consideration the share issue properly and ultimately the learned Judge has rightly in our view has chosen to pass the impugned judgment. 9. Before

concluding, we deem it proper to dispose of the IA filed seeking for production of additional evidence. 9.1 The appellant after argument has placed before us an application seeking to produce four documents. An affidavit is also filed in support of the same. Law is well settled that the appellant has to explain the circumstances as to how and why he was unable to produce the same before the trial court. In the affidavit no acceptable reasons are forthcoming. On the other hand, we are surprised to notice the averments in the affidavit. The original will was produced after five long years in the court. Now in the course of hearing of the appeal, the appellant would say that the documents were traced around 11 Ala on 30-1-2007. It is seen that there is one typed paper said to be a will of January 1977. There are number of corrections. Then there is another will said to be of 1975 and the last one is of February, 1977. It is understandable to us as to why this documents could not be filed earlier. In fact, these documents prima facie add more suspicion with regard to the will. At any rate, we are not inclined to allow this IA on the facts of this case. 10. In the result, the following order is passed: Taking into consideration, the pleadings, evidence both documentary and oral and the law on the subject, learned Judge rightly in our view has chosen to pass the impugned order. We do not find any good grounds to interfere with the impugned order. Appeal stands dismissed. No costs.