V.K.Narasimhan vs Ramathilagam on 9 June, 2023

T.
T
an

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.03.2023

PRONOUNCED ON : 09.06.2023

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

T.O.S.No.5 of 2006 and
Tr.C.S.No.283 of 2008 and
C.S.No.441 of 2010

T.O.S.No.5 of 2006
V.K.Narasimhan ...
versus

1.Ramathilagam
2.Vasantha
3.Rajalakshmi
4.Sundari ...

[Defendants 2 to 4 impleaded as per order dated 29.10.2014 in A.No.
of 2014]
PRAYER: Testamentary Original Suit has been filed under Sections 22
and 276 of the Indian Succession Act, XXXIX of 1925 and Order XXV
Rule 4 of O.S. Rules 1956 for the grant of Probate.

For Plaintiff : Mr.R.Ganesan
for M/s.S.Shyamala
For Defendant No.1 : Mr.A.Sriram
Senior Advocate
for M/s.A.S.Kailasam and Ass
For Defendant Nos.2 to 4: Mrs.Chitra Sampath
Senior Advocate
for Mr.T.S.Baskaran

1/69

https://www.mhc.tn.gov.in/judis

Tr.C.S.No.283 of 2008
Ramathilagam ...

versus

1.V.K.Narasimhan
2.Rama Rathina Janaki Ammal
3.Saroja
4.Vasantha
5.Rajalakshmi
6.Sundari ...

PRAYER: Civil Suit filed under Order VII Rule 1 of Code of Civil Procedure, praying for a judgment and decree against the defendants
(a) for partition and divide the suit property by mete seven equal shares and allot one share to the plain
(b) to direct the first defendant to put the plaintiff 1/7th share in the suit schedule property by metes
(c) to direct the first defendant to pay the plaintiff mesne profits from this date;
(d) to direct the defendants to pay the cost of the su
For Plaintiff : Mr.A.Sriram
Senior Advocate
for M/s.A.S.Kailasam and

For Defendant No.1 : Mr.R.Ganesan
for M/s.S.Shyamala

For Defendant Nos.4 to 6: Mrs.Chitra Sampath
Senior Advocate
for Mr.T.S.Baskaran

2/69

C.S.No.441 of 2010
1.G.S.Vasantha
2.S.Rajalakshmi
3.S.Sundari ...

versus

1.V.K.Narasimhan
2.P.S.Ramathilagam
3.P.S.Rama Rathina Janaki Ammal
4.Saroja ...

PRAYER: Civil Suit filed under Order VII Rule 1 & 2 read with Order XXIV Rule 1 of Original Side Rules, praying for a judgment and decr against the defendants:-

(a) to pass a preliminary decree in respect of the suit schedu that the plaintiffs are entitled to 3/7 shares in the property and direct each plaintiff;

(b) to appoint an Advocate Commissioner to effect the convenie division of the suit schedule mentioned property by me and for allocation of 577.57 sq.ft. of undivided share plaintiff;

(c) for permanent junction restraining the first defendant inc

man, agents, representatives, or any one acting on his interfering with the enjoyment of peaceful possession plaintiff portion in the property situated at Old No.3 Thambu Chetty Street, Chennai-600 001;

(d) to direct the defendants to pay the cost of the suit.

3/69

T.O
Tr.
and

For Plaintiffs : Mrs.Chitra Sampath
Senior Advocate
for Mr.T.S.Baskaran

For Defendant No.1 : Mr.R.Ganesan
for M/s.S.Shyamala

For Defendant No.2 : Mr.A.Sriram
Senior Advocate
for M/s.A.S.Kailasam and Assoc

COMMON JUDGMENT

These disputes are between the brother and sisters, who are the children of late V.K.Krishnamoorthy and who claim right over the properties of V.K.Krishnamoorthy; the father of the parties namely V.K.Krishnamoorthy had 7 daughters and 1 son; one daughter by name Lalitha predeceased him and as of now there are 6 surviving daughters and 1 son; the legal heirs of the predeceased daughter did not have any issues.

2. The son of V.K.Krishnamoorthy by name V.K.Narasimhan has filed the Original Petition in O.P.No.379 of 2005 for probating the alleged Will said to have been executed by his father on 25.12.1990 bequeathing the suit properties in favour of him; the defendants 1 to 4 are the daughters of V.K.Krishnamoorthy; since the defendants 1 to 4 are resisting the petition https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and filed by V.K.Narasimhan for probating the Will, the Original Petition filed by V.K.Narasimhan in O.P.No.379 of 2005 has been converted into Testamentary Original Suit in T.O.S.No.5 of 2006.

3. Even before the Testamentary Original Suit was filed, the first defendant Ramathilagam had filed a suit in O.S.No.3871 of 2004 before the learned V Assistant Judge, City Civil Court, Chennai, for partition of two items of the properties covered under the Will; the first defendant in the said suit is the plaintiff in T.O.S.No.5 of 2006; O.S.No.3871 of 2004 was later transferred to the file of this Court as Tr.C.S.No.283 of 2008, the rest of the defendants 2 to 6 are the sisters of the plaintiff in Tr.C.S.No.283 of 2008; even though one of the daughters, namely, Ramathilagam had already filed a suit for partition, the defendants 4 to 6 in T.O.S.No.5 of 2006, who are also the sisters of Ramathilagam had filed a separate suit in C.S.No.441 of 2010 for partition; in the said suit, the son of V.K.Krishnamoorthy is the first defendant and the defendants 2 to 4 in C.S.No.441 of 2010 are the rest of the sisters of the plaintiff therein.

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

4. For the sake of convenience, the details of the suit numbers and the parties are tabulated as under:-

Suit No. Plaintiffs Defendants T.O.S.No.5 of 2006 V.K.Narasimhan 1.Ramathilagam

2.Vasantha

3.Rajalakshmi

4. Sundari Tr.C.S.283 of 2008 Ramathilagam 1.V.K.Narasimhan

2.Rama Rathina Janaki Ammal

3.Saroja

4.Vasantha

5.Rajalakshmi

6.Sundari C.S.No.441 of 2010 1.G.S.Vasantha 1.V.K.Narasimhan

2.S.Rajalakshmi 2.P.S.Ramathilagam

3.S.Sundari 3.P.S.Rama Rathina Janaki Ammal

4.Saroja Pleadings in T.O.S.No.5 of 2006 in brief:-

5. The plaintiff is the only son of V.K.Krishnamoorthy, who owned the suit properties; the suit properties were originally owned by one Vijjala Sivakami Ammal and her husband V.Kuppusamy Iyer; after his demise, his adopted son 'V.K.Krishnamoorthy' had inherited the suit properties; during the life time of V.K.Krishnamoorthy he had executed a Will dated 25.12.1990 bequeathing the properties in favour of his only son V.K.Narasimhan; hence he had filed the Original Petition for probating the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and Will; since some of his sisters who are defendants 1 to 4 had resisted the same, the Original Petition was converted into Testamentary Original Suit. The first defendant had filed the written statement in brief:-

6. The first defendant is the eldest daughter of V.K.Krishnamoorthy, she has stated that the Will is not genuine and it is a concocted one; the plaintiff had chosen to file T.O.S. just in order to evade from giving away the shares of the sisters in the properties of their father; the first defendant had filed the suit in O.S.No.3871 of 2004 before the learned V Assistant Judge, City Civil Court, Chennai, claiming partition of 1/7th share in the suit properties; only in the written statement the plaintiff had disclosed the suit Will for the first time; the plaintiff was the adopted son of V.K.Krishnamoorthy and V.K.Krishnamoorthy was attached more to his daughters.

6.1. V.K.Krishnamoorthy had kept the plaintiff under captivation and he did not allow the father to speak with his daughters; the plaintiff had obtained signatures of the father under fraud and misrepresentation without disclosing the nature of the document executed by him; since the Will is not https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and a genuine one the plaintiff is not entitled to get any relief; the contents of the Will does not disclose the true intention of the late father V.K.Krishnamoorthy; since the father was dependant upon the plaintiff, he had taken advantage of the same by fabricating the Will. The defendants 2 to 4 had filed the written statement in brief:-

7. The father of V.K.Krishnamoorthy did not know to read or write Tamil language; the alleged Will dated 25.12.1990 is said to have been executed in Tamil; the attesting witness namely Rathinavel had made inconsistent statement about the language adopted in the alleged Will dated 25.12.1990; the suit schedule property originally belongs to V.Kuppusamy Iyer and Vijjala Sivakami Ammal who adopted the father of the parties by name V.K.Krishnamoorthy as their son; V.K.Krishnamoorthy acquired the immovable properties through his adoptive parents; there are documents available to show that V.K.Krishnamoorthy was the adopted son of the original owners of the suit properties; the husband of the 4th defendant died on 12.12.1998 and she had no issues; the plaintiff has failed to

take care of https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and the 4th defendant and he also refused for partition of the properties and hence T.O.S. should be dismissed.

Pleadings in Tr.C.S.No.283 of 2008 in brief:-

> 8. The suit for partition has been filed by the first defendant in T.O.S.No.5 of 2006; the suit property belongs to the father of V.K.Krishnamoorthy; after the demise of the father the suit property was enjoyed by both the defendants and the plaintiff; during the year 1996, the mother of the parties namely Krishnaveni Ammal had passed away;

subsequently the father and V.K.Narasimhan turned hostile and hence Ramathilagam demanded partition of her share in the suit property; she also issued a notice on 11.01.2003 to V.K.Krishnamoorthy on demanding partition; a reply notice was sent with false allegations on 12.01.2002; after the demise of V.K.Krishnamoorthy on 25.04.2003 the property devolved among the children equally; one of the daughters Lalitha had died issueless and hence the son and daughters of V.K.Krishnamoorthy are entitled to 1/7 th share in the suit properties.

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and Pleadings in C.S.No.441 of 2010 in brief:-

> 9. The suit properties are the joint family properties;

V.K.Krishnamoorthy had assured the plaintiffs (who are some of the daughters of V.K.Krishnamoorthy) that the properties will be divided among the children equally, the plaintiffs had taken good care of their father and that continued even after their marriage; since Narasimhan (son) and his wife resisted the daughters from taking care and visiting their father, one of the daughters had filed a suit (Tr.C.S.No.283 of 2008) for partition; in the pre-suit notice issued by Ramathilagam before filing the suit, a reply was sent; in the reply sent by the father, he had stated that he was the sole hereditary trustee of Sri Kothandaramaswamy and Anjaneyar Temple (one of the suit properties); the first defendant did not disclose the execution of the Will immediately after the death of his father.

9.1. The plaintiffs had issued pre-suit notice on 08.03.2010 seeking their brother to furnish the statement of accounts with regard to the suit properties in respect of the rent collected by him from the tenants thereon and they have claimed 3/7th share in the property; V.K.Narasimhan who is https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and the plaintiff in T.O.S.No.5 of 2006 and the first defendant in both the suits filed by the daughters had filed his written statement by denying that the suit properties are the joint family properties of his father; he also claimed that during the life time of the father he had executed the Will and bequeathed the suit properties in his favour.

10. On the basis of the above pleadings, the following issues were framed:-

	T.O.S.No.5 of 2006	Tr.C.S.No.283 o
1)	Whether the deceased	1) Whether the suit schedule p

V.K.Krishnamurthy has a right to ancestral property of the plaintiff and the execute alleged WILL dated defendants?

25.12.2000 to and in favour of V.K.Narashimhan, the plaintiff 2) Whether the deceased V.K.Krishnamurthy herein, in respect of ancestral has right to execute alleged WILL dated properties? 25.12.2000 in respect of ancestral property?

2) Whether WILL dated 3) Whether the plaintiff and defendants are 25.12.2000 executed by entitled partition in respect of suit schedule V.K.Krishnamurthy is true and property?

genuine?

4) Whether the claim of the plaintiffs that the plaintiffs 1 to 3 and defendants 2 to 4 are living in joint family along with the deceased father V.K.Krishnamoorthy is legally sustainable in view of Hindu Women's Right to Property Act, 1989 (Tamil Nadu Act) and Section 6(2) of Hindu Succession Act?

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and T.O.S.No.5 of 2006 Tr.C.S.No.283 of 2008

5) Is the 3rd plaintiff entitled for permanent injunction as prayed for when the portion in her occupation is not specified?

6) Is suit for partition filed by the plaintiffs 1 to 3 legally maintainable when the 2nd defendant already filed similar suit for partition pertaining to the same properties in Tr.C.S.No.283 of 2008 (O.S.No.3871 of 2004) wherein the plaintiffs 1 to 3 are ranked as defendants 4 to 6?

11. A joint trial was conducted by trying all the three suits together and common evidence was recorded in T.O.S.No.5 of 2006. The plaintiff (V.K.Narasimhan) is the propounder of the Will has been examined as P.W.1 and the attestor (Rathinavel) has been examined as P.W.2; Ex.P.1 to Ex.P.5 were marked; on the side of the defendants, the first defendant (Ramathilagam) in T.O.S.No.5 of 2006 has been examined herself as D.W.1 and 4th defendant (Sundari) as D.W.4 and Ex.D.1 to Ex.D.11 were marked.

12. For the sake of convenience, the plaintiff in T.O.S.No.5 of 2006 is referred as 'plaintiff' and the plaintiffs in Tr.C.S.No.283 of 2008 and https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and C.S.No.441 of 2010 are referred as 'defendants 1 to 4' in accordance of their order in T.O.S. No.5 of 2006.

13. Mr.R.Ganesan, learned counsel for the plaintiff submitted that the Will dated 25.12.1990 is a registered Will; the defendants did not deny the signature of the executant of the Will in their evidence; even though the Will was executed on 25.12.1990, it was registered only on 25.02.1992; during that time, the propounder of Will namely V.K.Krishnamoorthy was at Chennai; the first defendant is the eldest daughter of V.K.Krishnamoorthy and she has stated in her written statement

in T.O.S.No.5 of 2006 that her father was not properly treated by the plaintiff and that he was kept under captivation; the first defendant had sent a legal notice to her father on 11.01.2002 vide Ex.D.1 and in which she had stated that her father was joining hands with the son and evaded to execute the partition deed; the above submissions taken by the first defendant is contradictory to each other; in the reply notice sent by her father V.K.Krishnamoorthy, it is stated that suit schedule property is a temple and house; the rental income obtained from the house property is being utilized for maintenance of the temple and https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and the details have been clearly stated by her father in the reply notice dated 12.01.2002; her father died on 07.05.2003 and till such time the first defendant or other defendants did not choose to file any suit for partition.

13.1. The suit 'B' schedule property having a temple by name ‘Sri Kothandaramaswamy and Anjaneyar Temple’, cannot be subjected to partition. The suit 'A' schedule property is a house property and the father has preferred his son to maintain the temple by getting rental income from the house. So the recitals of the Will does not confer a sheer enjoyment for the plaintiff but it also attaches a duty of maintaining the temple.

13.2. One of the attestors of the Will by name Subburaman is none other than the father-in-law of the second defendant but the first defendant has been examined as D.W.1 and fourth defendant has been examined as D.W.2; though they are sisters of the second defendant Vasantha, they have wantonly denied in their evidence that they did not know the name of the father-in-law of Vasantha.

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and 13.3. One of the attesting witnesses was examined to prove the Will and he had stated in his evidence that he went to the house of V.K.Krishnamoorthy on 25.12.1990 to attest the Will prepared by him; in fact he had stated that the in-law of V.K.Krishnamoorthy called him to come and attest the Will; it is false to state that V.K.Krishnamoorthy did not know Tamil; in fact Ex.D.6 marriage invitation of the fourth defendant has been printed in Tamil; if the plaintiff's father did not know Tamil he would not have prepared the invitation in Tamil; the deceased V.K.Krishnamoorthy has got proficiency in several languages including Tamil.

13.4. The allegation of the defendants that the suit properties are joint family properties is not proved; the very object of executing the Will itself is to prefer the person to acquire the property of the testator; hence depriving some of the natural heirs from inheriting the property cannot be considered as a ground for creating suspicion over the Will; the plaintiff had discharged his burden of proving the genuineness of the Will and hence the defendants have to prove the contrary; the Will has been executed in a manner known to law and the same was proved in accordance with Sections https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and 68 and 69 of the Indian Evidence Act; since the Will is a registered Will there cannot be any forgery or concoction as alleged by the defendants; there is nothing to show that the Will is unnatural.

13.5. The mechanical evidence of P.W.2 should not be given with much significance; in the deposition of P.W.2, he had stated that he was not called upon by the testator and the testator had signed in English language and he had also stated that the other attestor by name Subburaman is

the father-in-law of one of the daughters of the testator by name Vasantha; since P.W.2 was cross-examined after 26 years, it cannot be expected that the witness remembers the collateral particulars so perfectly; the marking of the Will through the legatee can be an error of procedure and that alone can not defeat the case of the plaintiff; if the defendants contend that the intention of the testator is not correct then they have to tell what was the intention of the testator; the main intention of the testator is to see whether the temple is maintained properly and for which provision has to be made; the Will has been registered nearly after 2 years and that would show that the plaintiff is not a crook to create a false Will and get it registered immediately at his https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and convenience; even though the plaintiff himself has stated in the plaint that Subburaman is the father- in-law of Vasantha (second defendant), it was not denied in the written statement of the defendants that Subburaman is not the father-in-law of Vasantha; the defendants have not produced any records to show that Subburaman is a stranger.

13.6. When plaintiff has discharged his burden to show that the testator knew Tamil then that burden would shift upon the defendants to prove that the testator did not know Tamil; after the wife of the testator died he was taken care of by the plaintiff; so naturally the father would have thought of making such an arrangement in Will by bequeathing certain properties in favour of the son; the defendants though claim that the property is an ancestral property, the said fact was not proved; since the plaintiff has proved the genuineness of the Will, the plaintiff is entitled to get the probate as prayed; hence in all probabilities the plaintiff had proved the execution and genuineness of the Will executed in his favour by the father and hence probate has to be granted as prayed for. In support of the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and above contentions, the learned counsel for the plaintiff relied on the following decisions:-

> "[i] (2001) 9 SCC 726 (E.Madhavi Pallikkaramma and another vs. K.V.Prabhakaran Nair and others) [ii] 2004 (2) CTC 287 (Uma Devi Nambiar vs. T.C.Sidhan) [iii] 2004 (5) CTC 790 (Daulat Ram vs. Sodha and others) [iv] (2005) 8 SCC 67 (Pentakota Satyanarayana vs. Pentakota Seetharatnam) [v] (2010) 14 SCC 266 [Gopal Swaroop vs. Krishna Murari Mangal and Others) [vi] 2003 (4) CTC 470 [Dr.Shantha vs. Sharada] [vii] 2004 (2) CTC 502 [Amalorpava Mary vs. Kulandai Ammal] [viii] 2004 (3) CTC 561 [Senthilkumar vs. Dhandapani] [ix]2008 (4) CTC 299 [C.Ananda Sundaraman vs. C.Thirupurasundari] [x] 2008 (4) CTC 589 [Muniammal vs. Annadurai] [xi] 2022 (3) CTC 179 [Valliammal @ Mani vs. Sadayappan] [xii] 1998 (I) CTC 432 [Arul Jothi & Co. vs. Sri Shanmugha Trading Co.] [xiii] 2004 (5) CTC 617 [Kalaimani vs. Chinnapaiyan @ Perumal Gounder] [xiv] 2022 (2) CTC 621 [P.Ponnusamy vs. Thangamuthu] [xv] 1969 (1) SCC 386 [Mudi Gowda Gowdappa Sankh vs. Ram Chandra Ravagowda Sankh] [xvi] 1997 (II) CTC 609 [Andiappan vs. Palaniyandi] [xvii] 1998 (III) CTC 703 [K.R.Sathyanarayana Rao vs. K.R.Venkoba Rao] [xviii] 1999 (III) CTC 717 [Vembu Ammal vs. Pattuammal] https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and [xix] 2004 (4) CTC 208 [R.Deivanai Ammal vs. G.Meenakshi Ammal] [xx] 2022 (3) CTC 703 [Ramasamy Gounder @ Senban vs. Chinnapillai @ Nallammal]"

14. Mr.A.Sriram, learned Senior Counsel for the first defendant submitted that there is no dispute with regard to the relationship between the plaintiff and the defendants; the probate Court need not deal with the title dispute of the nature of the suit properties etc.; as per the law governing Wills, the Will ought to have been marked only through the attesting witness; but the plaintiff himself had marked the Will by deposing evidence; the plaintiff had stated in his affidavit that his father has already probated the Will and requested to bring the attestors to sign the Will; whereas the attesting witness who was examined as P.W.2 had stated in his evidence that the other attesting witness Subburaman had called him; P.W.2 had let in evidence that he was asked to come to the house of plaintiff's father to identify his son; so the signature was affixed by P.W.2 only to prove that V.K.Narasimhan was the son of the deceased V.K.Krishnamoorthy and not for anything else; while one of the attesting witness had not proved the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and execution of the Will in a satisfactory manner that will create suspicion over the execution of the Will.

14.1. P.W.2 did not identify the signature of other attesting witness and hence the Will has not been proved by the plaintiff in a manner known to law; the probate Court has to see whether the Will has been duly executed or whether the Will has been proved; when one of the witnesses failed to prove the attestation of the Will by the other attesting witness and if the other witness is not examined, the essential requirements under Section 68 of the Indian Evidence Act is not satisfied; the scribe of the Will was also not examined as a witness.

14.2. P.W.2 had stated that the Will was written by the testator in his own handwriting, but Ex.P.2-Will is a typed document and not a written document; it was not proved by the plaintiff that the testator was in a sound disposing state of mind at the time of executing the alleged Will; if the plaintiff fails to prove the execution of the Will satisfactorily that would automatically entitle the defendants a decree for partition; D.W.1 and D.W.2 https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and were not shown with the signature of Subburaman and they were not asked to identify the same; even if the Will is a registered one that will not dilute the burden of the plaintiff from proving attestation of the Will.

14.3. Ex.P.2-Will is a typed one and not handwritten; P.W.2 says that the Will was prepared by the testator but in the Will it is shown that one V.C.Desa Mudaliar the scribe of the Will. However, the said V.C.Desa Mudaliar was not examined as a witness; the Will is not in conformity of Section 63(c) of the Indian Succession Act, 1925 and it is not proved in accordance with Sections 68 and 69 of the Indian Evidence Act, 1872. P.W.2 has stated in his evidence that he was called upon by the testator just to identify his son and such evidence of P.W.2 is irrelevant in the context of the Will.

14.4. The requisite of Section 63(c) of the Indian Succession Act is not established, the other attesting witness is also not examined. In the affidavit of the attesting witness P.W.2 (Rathinavel) it is stated that the testamentary papers were in English language. In the cross examination of P.W.2 he has stated that he did not know the contents of the proof affidavit https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and (Ex.P.6). P.W.2 has identified his signature alone; during the examination of P.W.1 he was not confronted by showing the signature of the other attesting witness. Irrespective of the registered nature of the Will the attestation has to be

proved satisfactorily. The evidence of D.W.1 should be read as a whole and not in piece meal to the advantage of the plaintiff. So the plaintiff cannot claim that D.W.1 had admitted the signatures found in Ex.P.2-Will. D.W.1 was 83 years at the time of examination, the age of the witness should be taken into account while appreciating the same. In any case the plaintiff has not proved before the Court that the Will has been attested under Section 63(c) of the Indian Succession Act and the same is not proved in accordance with Section 68 of the Indian Evidence Act. Hence the suit should be dismissed. In support of the above contentions, the learned Senior Counsel for the first defendant relied on the following decisions:-

> "[i] (2003) 12 SCC 35 (Bhagat Ram and another vs. Suresh and others) [ii] (2003) 2 SCC 91 (Janki Narayan Bhoir vs. Narayan Namdeo Kadam) [iii] (2006) 13 SCC 449 (B.Venkatamuni vs. C.J.Ayodhya Ram Singh and others)"

15. Mrs.Chitra Sampath, learned Senior Counsel for the defendants 2 to 4 submitted that the execution of the Will was not disclosed by the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and plaintiff after the demise of the father and only in the written statement filed by him the suit filed by the first defendant for partition, the plaintiff has disclosed that the Will was executed by the testator. Normally such execution of the Will is disclosed during the ceremonies that would take place subsequent to the death of the testator. So the conduct of the plaintiff in not revealing the Will is something unnatural. The signatures in the Will are seen in a slanting position and each of the signature appears to be leading to different direction; the signature before the Registrar is found to shaking and that would show that the testator would not have the sound mental state of mind at the time of execution of the Will.

15.1. The plaintiff witnesses P.W.1 and P.W.2 did not speak about the presence of the scribe though the Will was drafted by one V.C.Desa Mudaliar. The attesting witness P.W.2 has given confusing statements about the language adopted for writing the Will. In Ex.P.6 also P.W.2 has stated that the Will has been drafted in English. Even then P.W.2 has not been shown the signatures in the Will while he was in box and questioned. P.W.2 has identified only his signatures and he has stated in his evidence that he https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and was called by other attesting witness Subburaman, but in the chief-in- affidavit it is stated that he was called upon by the executor and no evidence can be attested to the evidence of P.W.2. There are many suspicious circumstances surrounding the Will and they were not successfully dispelled by the plaintiff. P.W.2 has not stated anything about the other attesting witness.

15.2. Though it is claimed by the plaintiff that one of the attesting witnesses by name Subburaman is no more, he has not furnished the death certificate of Subburaman. P.W.2 has stated that he had attested the handwritten Will but Ex.P.2 is a typed one. P.W.2 does not know read and write. He has pleaded ignorance about the documents had he signed as a witness. The evidence of P.W.2 is full of contradictions and the Will was not marked through the attestor.

15.3. The plaintiff has to prove that the testator was in sound state of mind because at the time of executing the Will the testator was 78 years. P.W.2 being the close friend of the plaintiff is an interesting witness. P.W.1 has admitted that he was collecting the rent even during the life time of

his https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and father. The propounder has actively participated in the preparation and registration of the Will. He had stated that the propounder had asked him to bring the witnesses but P.W.2 has stated that the other attesting witness called him to act as an attesting witness. At one point of time P.W.2 was called upon by the testator. There is a huge unexplained delay in registering the Will.

15.4. Though the Will was executed on 25.12.1990 but it was registered Will on 25.02.1992. The testator did not know Tamil. Two daughters of the testator were living in the house where the alleged Will was said to have been executed. The probation petition was filed only after the partition suit was filed by the first defendant. The daughters were married even prior to 25.03.1989. The plaintiff has admitted in the written statement filed by the defendants in C.S.No.441 of 2010 about the ancestral nature of the property.

15.5. Though it is spoken that the testator was aware about the execution of the Will when he was alive. The plaintiff has categorically admitted in his written statement filed in C.S.No.441 of 2010 that the suit properties were joint family properties and the daughters were married prior https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and to the Act, 1989. Since the Will is not proved in the manner known to law the suit should be decreed as prayed for. In support of the above contentions, the learned Senior Counsel for the defendants 2 to 4 has relied on the following decisions:-

> "[i]2011 SCC Online Mad 2164 (Perumal vs. Alagammal @ Pappathi [ii] (2007) 7 SCC 225 (Apoline D'Souza vs. John D'Souza) [iii] 1997 SCC Online Mad 209 (Govindan Chettiar vs. Akilandam @ Seethalakshmi and others) [iv] 1938 SCC Online Mad 420 (Sadachi Ammal vs. Rajathi Ammal and others) [v] (2021) 11 SCC 277 [Shivakumar and others vs. Sharanabasappa and others) [vi] (2021) 11 SCC 209 [Kavita Kanwar vs. Pamela Mehta and others" Issue Nos.1, 2 & 4 in Tr.C.S.No.283 of 2008 & C.S.No.441 of 2010 and Issue No.1 in T.O.S. No.5 of 2006

16. The plaintiff has filed O.P.No.379 of 2005 for grant of probate and in view of the objection raised by the defendants the same got converted into a testamentary suit. However, the defendants have sought the relief of partition by claiming that the suit properties are ancestral in nature and all the daughters of the testator are entitled to the share in the suit property. The relationship between the parties is not disputed. However it is claimed by the first defendant that the plaintiff is the adopted son of https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and V.K.Krishnamoorthy. But the other defendants who are also sisters of the first defendant have not stated that the plaintiff is the adopted son of their father. In any case, the plaintiff is accepted as the son of the deceased V.K.Krishnamoorthy.

17. The defendants 2 to 4 who have filed a separate suit in C.S.No.441 of 2010 have made specific averments in the plaint that the suit property belonged to V.Kuppusamy Iyer, Vijjala Sivakami Ammal who are the adopted parents of their father V.K.Krishnamoorthy. Defendants 2 to 4 who are also the sisters of the first defendant have given a clear statement in the suit itself that their father was the adopted son of V.K.Krishnamoorthy original owners of the suit property. The plaintiff has

also stated that the suit property originally belongs to the adoptive parents of V.K.Krishnamoorthy and after their demise it was inherited by him.

18. There is no material produced before the Court to show that there was a joint family income or a joint family stock created by the family members for the purpose of procuring or investing in the suit property. As https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and the sole legal heir of his adoptive parents, late V.K.Krishnamoorthy has inherited the suit property. The first defendant has made averments in her plaint that her father was the adopted son of his adoptive parents. There is no dispute between the parties that their father was the adopted son of his adoptive parents by names V.Kuppusamy Iyer and Vijjala Sivakami Ammal and the property originally belonged to those adoptive parents.

19. It is the contention of the plaintiff that his father V.K.Krishnamoorthy used to refer himself with the initials “V.K.” but for the reasons best known to the first defendant has described the initials in her written statement as 'V.Krishnamoorthy'. It is seen from the written statement of D.W.1 that the father's name has been written as ‘late V.Krishnamoorthy Iyer’. However in the chief-in-affidavit of D.W.1 the father's name has rightly described as ‘late V.K.Krishnamoorthy’ only.

20. The plaintiff asserts that the suit properties are not the joint family properties. Since the defendants assert that the suit properties are joint family properties, the burden would lie upon the defendants to prove https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and that the suit properties are the joint family property. Without any fundamental proof to show the character of the property, its nature can not be presumed as joint family property. On the other hand, the presumption is only to the effect that the property is the self acquired property. The nature of the property involved in the suit has some relevance to know about its character. The suit ‘B schedule property’ is a temple and it was administered by the testator till his life time. Both 'A' & 'B' schedule properties were said to be belonging of the adoptive parents of the plaintiff's father. The said fact was not denied by the defendants as well. Since the testator was not the natural son for his adoptive parents, it has to be established whether those properties were managed or enjoyed by the testator himself or along with other brothers if any, of his adoptive father.

21. Since the defendants themselves have admitted that the properties belong to the adoptive parents of the testator, it cannot be presumed that the property was purchased from and out of the income earned from any joint family properties or stock. Had the properties were purchased by the testator by utilizing the income, if any, he derived from https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and and out of the properties belonging to the joint family comprised of testator, plaintiffs and his daughters, then there can be a straight away claim in respect of the joint family nature of the suit properties. Since the property was not purchased by the testator and it was already possessed by his adoptive parents, such an eventuality did not arise.

22. D.1 to D.4 have filed a suit for partition by claiming that the properties were joint family properties. In that case before claiming any entitlements in the suit properties, the burden is on the defendants to establish that the suit properties were joint family properties.

23. As stated already, the defendants have not produced any materials or documents to show that at any point of time the property was held jointly by the testator and any of the male family members of his adoptive father. It is not the claim of the defendants that there are certain improvements made in the properties from and out of the income earned by the joint family members or from any joint family business or occupation or at least from the income derived from any other joint family stock. In the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and absence of any such pleadings or evidence it has to be presumed that the properties were acquired by the testator from their adoptive parents as how they were. In the absence of any proof to show that the suit properties were held as joint family properties or acquired through any joint family income, it cannot be presumed that the properties are ancestral in nature and in which both the plaintiffs and defendants have got joint entitlement.

24. In support of his contention, the learned counsel for the plaintiff relied on the decision of this Court made in R.Deivanai Ammal and another vs. G.Meenakshi Ammal and others reported in 2004 (4) CTC 208 and the same has been referred in the following decisions as well:-

> "i) Vembu Ammal vs. Pattuammal reported in 1999 (III) CTC 717
>
> ii) Ramasamy Gounder @ Senban vs. Chinnapillai @ Nallammal reported in 2022 (3) CTC 703
>
> iii) Andiappan vs. Palaniyandi reported in 1997 (II) CTC 609
>
> iv) K.R.Sathyanarayana Rao vs. K.R.Venkoba Rao reported in 1998 (III) CTC 703."

25. In Vembu Ammal's case (cited supra) it is held that in the absence of any proof to show that the properties were purchased from and https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and out of joint family nucleus, no decree for partition can be granted. Even if there is a joint family in existence that alone will not lead to any automatic presumption that the property is a joint family property.

26. So far as the properties of the adoptive parents are concerned there is no bar for the adoptive parents to dispose the property in the absence of any agreement. Section 13 of the Hindu Adoptions and Maintenance Act, 1956 reads as under:-

> "13. Right of adoptive parents to dispose of their properties. - Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.

27. Since the father of the parties is an adoptive son, they are entitled to dispose the property as how they wished. The temple in suit 'B' schedule property is said to have been administered by his adoptive parents and thereafter the temple was administered by the plaintiff's father. There is no arrangement or any agreement in existence to show that the adoptive parents intended that the suit

property should be managed or enjoyed by the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and plaintiff's father jointly with any other person. No material is produced to show that there are certain conditions attached to the properties of the adoptive parents and hence they could not have disposed the property as how they liked.

28. Since both the plaintiff and defendants admitted that their father had acquired the property from his adoptive parents, it can be safely presumed that the suit properties belonged to the adoptive parents could be dealt by the adoptive parents without any restrictions. Since the adoptive parents had left the suit properties to the enjoyment of their adoptive son namely the plaintiff's father and he had also been in enjoyment of the same, there is no reason to consider the same as a joint family property. So in all possibilities and probabilities, the suit property cannot be presumed to be the joint family properties of the plaintiff and defendants but it should be considered as the self acquired properties of the plaintiff's father and hence the plaintiff's father had the right to execute the Will in respect of the suit properties. Thus the Issues No.1, 2 & 4 in Tr.C.S. No.283 of 2008 & C.S. No.441 of 2010 and Issue No.1 of T.O.S. No. 5 of 2006 are answered. https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and Issue Nos.3, 5 & 6 in Tr.C.S.No.283 of 2008 and C.S.No.441 of 2010 and Issue No.2 in T.O.S. No.5 of 2006

29. In the above background now it has to be seen whether the owner of the property namely the plaintiff's father had genuinely executed the Will Ex.P.2. If the plaintiff could successfully prove that the Will is a genuine one, the defendants who have filed the suit for partition will not get any relief as prayed by them. If the plaintiff fails to prove that the Will is genuine, then the presumption will go in favour of the defendants that the owner of the property had died intestate and being the legal heirs of the owner of the properties, the plaintiff and the defendants 1 to 4 would get their respective shares in the same.

30. The Will comprises of 2 schedules. 'A' schedule property is a building measuring 2156 sq.ft. on a site situated at Door No.38, Thambu Chetty Street (R.S.No.3338/4 of Block No.30), 'B' schedule property is at Door No.37, Thambu Chetty Street (R.S.No.338/1 to 3) and it is a temple situated for the building measuring 1887 sq.ft. along with its site.

31. As per the recital of the Will the propounder has got a duty to conduct certain festivals and maintain the temple by utilising the rental income obtained from 'A' schedule building. So it is claimed by the plaintiff https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and that 'B' schedule property is a temple which needs to be administered and not to be partitioned and hence the testator had wished his son to perform the services to the temple and in order to get income for the said purpose he had bequeathed 'A' schedule property in favour of his son.

32. The propounder was said to be present at the time when the testator had expressed to execute the Will. The defendants claimed that there are strong suspicious circumstances surrounding the Will and unless the plaintiff could dispel those circumstances the Will cannot be accepted as true and genuine. It is submitted by the defendants that the Will does not meet out the requisite of Section 63 of the Indian Succession Act, 1925. Section 63 of the said Act reads as under:-

> "63. Execution of unprivileged Wills. - Every testator, not being a soldier employed in an expedition or engaged in actual warfare [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

33. The essential requisites for attestation as stipulated under Section 63(c) of the Indian Succession Act are "(i) the Will shall be attested by two or more witnesses;

(ii) the attestators who have seen the testator or his person signs or affixes is marks to the Will;

(iii) if the Will is signed by some other person and the direction of the testator for his presence such person should also sign at the site of the attestors;

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

(iv) each of the witnesses shall sign the Will in the presence of the testator, however it is not obligatory that all the witnesses should be present at one and the same time and make their attestation in any prescribed form;

(v) so the plaintiff has a duty to prove that the Will has been executed in compliance of the above essential and fundamental requisites for executing the Will."

34. Section 68 of the Indian Evidence Act, 1872 mandates that the document like Will which requires attestation and it shall not be used as evidence until one of the attesting witness has been called for the purpose of proving its execution, if the witness is alive and capable of giving evidence. As per Section 69 of the Indian Evidence Act would state if the attesting witness is not found then it should be proved that the signature of the person executing the document is in the handwriting of that person.

35. In Bhagat Ram and another vs. Suresh and others reported in (2003) 12 SCC 35, the Hon'ble Supreme Court has held that there cannot be any other mode for proving the Will except the mode contemplated under the Indian Evidence Act. It is further held that the statement of the registering https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and authority cannot substitute the evidence of the attesting witness and hence the Will cannot be presumed to have been proved.

36. In Janki Narayan Bhoir vs. Narayan Namdeo Kadam reported in (2003) 2 SCC 91, it is clarified by the Hon'ble Supreme Court that even if one attesting witness is examined his evidence has to satisfy the requirements of attestation of the Will by the other witness also. Keeping the above standards required for the proof the execution of the Will, it has to be seen whether the plaintiff is able to discharge his burden by proving it before the Court.

37. Before adverting into the quality and validity of the proof offered by the plaintiff, the doubtful circumstances outlined by the first defendant and the defendants 2 to 4 can be listed as under for the sake of comprehensive appreciation of the evidence.

i) The plaintiff's father V.K.Krishnamoorthy does not know to read and write Tamil.

ii) The evidence of attesting witness P.W.2 is not reliable. https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

iii) The testator was aged 78 years at the time of executing the Will and was dependent on his son.

iv) The propounder has been actively participated in the execution of the Will.

v) There is a huge delay between the execution of Will dated 25.12.1990 and its registration on 25.02.1992.

vi) The signature of the testator varies from page to page.

vii) The signature of the testator before the Sub Registrar is very shaky and abnormal.

viii) There is no reason to disinherit the daughters who are also the legal representatives of the deceased testator.

ix) The probate proceedings were initiated only after the suit for partition was filed by the first defendant.

x) The Will was not disclosed by the plaintiff at any earliest or relevant point in time.

38. It is the specific submission of the defendants 2 to 4 that their father was well conversant in Tamil language and he had already executed https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and several documents in Tamil to prove the same. The plaintiff had submitted that Exs.P.3 to P.5 which are the mortgage deeds and rental agreement executed by the testator V.K.Krishnamoorthy

when he was alive. Apart from these documents there is another document which has been filed by the defendants themselves as Ex.D.6. It is the marriage invitation card of Sundari (Ex.D.4). The fourth defendant is the last daughter of V.K.Krishnamoorthy. The above document was produced by the defendants to show that the fourth defendant was married on 07.09.1989. It is the claim of the defendants 2 to 4 that the fourth defendant had married on 07.09.1989 prior to the date of the Hindu Succession (Tamil Nadu Amendment) Act has come into force and hence the testator did not have any right to settle any Will in respect of 1/3rd share jointly held by the fourth defendant.

39. It has been held already that the defendants did not prove that the suit properties are the joint family properties of the plaintiffs and the defendants 2 to 4. Ex.D.6 is the document produced by the defendants 2 to

4. The said invitation is written in Tamil language. If the testator V.K.Krishnamoorthy did not know Tamil, he would not have printed an https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and invitation in Tamil and he would not have executed all those documents which have been shown as Exs.P.3 to P.5 which are in Tamil. Even though V.K.Krishnamoorthy had the habit of signing in perfect English language, he was also conversant in Tamil. Ex.P.5 is a Rental Agreement between V.K.Krishnamoorthy and one of the tenants by name Kannan. In the said agreement, it is agreed by V.K.Krishnamoorthy that the rental dues owned by the tenant Kannan had been paid and there was no due. If V.K.Krishnamoorthy is not conversant in Tamil language, it is not possible for him to give discharge for money transaction he had with his erstwhile tenants. So the combined appreciation of the above documents namely Exs.P.3 to P.5 and Ex.D.6 would only give an inescapable presumption that V.K.Krishnamoorthy was well conversant in Tamil and hence there could not have been any difficulty for him to execute yet another document namely a Will in Tamil language.

40. The next serious contention that was put forth by the defendants 1 to 4 is that the evidence of P.W.2 is not helpful to the plaintiff to prove that the Will was executed in a manner known to law. Before https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and proceeding to the evidence of P.W.2, it should be confirmed whether the plaintiff had proved the genuineness of the signature of the testator. The first defendant who was examined as D.W.1 had deposed that the signature found in every page of the Will is the signature of his father. The learned Senior Counsels for the defendants 1 to 4 submitted that the stray admission of witnesses cannot be viewed similarly and entire evidence of witnesses should be read as a whole. If the witnesses of D.W.1 is read as a whole, it can only be inferred that D.W.1 has not admitted the execution of the Will by her father though she had admitted the signatures of her father affixed in the Will. But the burden is still upon the plaintiff to prove that the signatures have been affixed by the testator knowing pretty well that he had signed on a Will which was executed by him wherein he bequeathed the properties in favour of his son and confers right of administration in respect of the temple along with him. So the propounder has the responsibility to prove that the Will has been validly executed by the testator out of his own free will and he was in a sound disposing state of mind. The above point has been well taken by the plaintiff himself and in this regard the learned counsel for the plaintiff referred the decision of this Court rendered in https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and Daulat Ram Vs. Sodha & others reported in 2004 (5) CTC 790 wherein it is held as under:-

> "10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses 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. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and suspicion by leading appropriate evidence. The burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so."

41. The plaintiff who was examined as P.W.1 had stated in his evidence that he came to know that his father executed a Will on 25.12.1990. As per the evidence of P.W.1 he came to know about the execution of the Will only through his father but it is pointed out by the learned Senior Counsels for the defendants that in the proof affidavit of P.W.1 he had stated that his father asked him to bring the witnesses before executing the Will. But the evidence of P.W.1 should be read as a whole wherein he had stated as under:-

> "I came to know of the execution of the Will by my father on 25.12.1990. My father had already prepared the Will and requested me to bring two attestors to sign in the Will and in such circumstances I came to know of the preparation of the Will by my father. I have not stated in my proof affidavit that my father told me to bring attestors." https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

> 42. The import of evidence of P.W.1 is to the effect that after preparing the Will, the father asked the son to bring two attesting witnesses to attest the Will. Even though P.W.1 is an interested witness and the propounder, the participation of propounder in getting the Will executed alone cannot be the reason to suspect the execution of the Will.

> 43. However, learned Senior Counsel for the defendants 2 to 4 has relied on the decision of the Hon'ble Supreme Court held in Kavita Kanwar vs. Pamela Mehta and others reported in (2021) 11 SCC 209. In the said judgment, the Hon'ble Supreme Court has held that an individual factor alone cannot be considered as decisive for getting the satisfaction about the true execution of the Will. In that context it is

relevant to extract the paragraphs '28' and '29' of the above judgment:-

"28. There is no doubt that any of the factors taken into account by the trial Court and the High Court, by itself and standing alone, cannot operate against the validity of the propounded Will. That is to say that, the Will in question cannot be viewed with suspicion only because the appellant had played an active role in execution thereof though she is the major beneficiary; or only because the respondents were not https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and included in the process of execution of the Will; or only because of unequal distribution of assets; or only because there is want of clarity about the construction to be carried out by the appellant; or only because one of the attesting witnesses being acquaintance of the appellant; or only because there is no evidence as to who drafted the printed part of the Will and the note for writing the opening and concluding passage by the testatrix in her own hand; or only because there is some discrepancy in the oral evidence led by the appellant; or only because of any other factor taken into account by the Courts or relied upon by the respondents. The relevant consideration would be about the quality and nature of each of these factors and then, the cumulative effect and impact of all of them upon making of the Will with free agency of the testatrix. In other words, an individual factor may not be decisive but, if after taking all the factors together, conscience of the Court is not satisfied that the Will in question truly represents the last wish and propositions of the testator; the Will cannot get the approval of the Court; and, other way round, if on a holistic view of the matter, the Court feels satisfied that the document propounded as Will indeed signifies the last free wish and desire of the testator and is duly executed in accordance with law, the Will shall not be disapproved merely for one doubtful circumstance here or another factor there.

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

29. Keeping the applicable principles in view, we may examine the factors and circumstances which are suspicious in character and their overall impact on the document in question."

44. There cannot be any disagreement on the point that the holistic appreciation of all the circumstances should be taken up together in order to appreciate whether the plaintiff had dispelled the suspicious circumstances.

Hence the active involvement of the plaintiff alone cannot render the Will as a fraudulent one. As stated already, D.W.1 has got no doubt with the signatures that is affixed on the Will and it is confirmed by her that the signatures on the Will are that of her father V.K.Krishnamoorthy. At the time of executing the Will, V.K.Krishnamoorthy was aged 78 years and even then his signatures were found to be proper. Though the directions of the signatures were seen to be not uniform, there is no vast difference in the signature of the testator. Even if there is a minor difference in the directions, there is no gross difference between one signature to another signature. Though the

defendants have stated about the difference in the signatures, they are not too serious to get the job of comparison done by a handwriting https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and expert. It is submitted by the learned counsel for the plaintiff that in view of Section 73 of the Evidence Act, the Court itself can compare the signatures. The signature of V.K.Krishnamoorthy is also seen from the other documents executed and marked as Exs.P.3 to P.5. In fact D.W.1 had admitted the signature of her father as found in Ex.P.5. The Court can also take up such an exercise in accordance with the facts and circumstances of the case. In this regard the learned counsel for the plaintiff placed reliance on the following judgments of this Court:-

> "i) P.Ponnusamy vs. Thangamuthu reported in 2022 (2) CTC 621
>
> ii) Arul Jothi & Co. rep. by its partner M.Chinnasamy and 4 others vs. Sri Shanmugha Trading Co., rep. by its partner M.Thangavelu reported in 1998(I) CTC 432
>
> iii) Kalaimani and another vs. Chinnapaiyan alias Perumal Gounder reported in 2004(5) CTC 617."

45. The Will is dated 25.12.1990. Even though three documents (Exs.P.3 to P5) have been filed and especially the signature in Ex.P.5 was admitted by D.W.1, I feel that the signature in Ex.P.5 can be taken up for comparative exercise with Ex.P.2. In fact, Ex.P.5 is more or less relevant at a point of time also. Since it was executed on 25.11.1989 which is mostly https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and closer to the year 1990, when Ex.P.2 was executed. So even in Ex.P.5, the signature of V.K.Krishnamoorthy is seen to be little slanting though there is no difference in the strokes or design of his signature. The other signatures that was affixed by V.K.Krishnamoorthy from the year 1966 was seen to be perfect and straight. In Ex.P.5 the signature of V.K.Krishnamoorthy is not as perfect as they were in the year 1966. So, after 23 years, when the Will was executed one cannot expect that there should not be any change in his signature. Though the Court is not expected to compare 1966 year signatures of the executant with his 1989 signatures, it is felt appropriate to examine the same just for the purpose of knowing the changes that happened to his signature due to passage of time or age. However, the fashion in which V.K.Krishnamoorthy was signing in the year 1989 is seen to be almost similar to his signatures affixed in the year 1990 on the Will.

46. The Court cannot be a better substitute for a handwriting expert. However, in the absence of such comparison done by an handwriting expert, the Court is not precluded to compare the signatures in accordance with Section 73 of the Indian Evidence Act by doing a bare eye https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and examination. The Will is a registered one and hence the testator had affixed his signature before the Sub-Registrar as well. So the signatures of testator found in Ex.P.2 when compared with Ex.P.5 is seen to be almost similar and hence I feel there is no reason to suspect the genuineness of the signatures of the executant in the Will.

47. The learned Senior Counsels for the defendants 1 to 4 vehemently submitted that the Will has not been executed in accordance with Section 63(c) of Indian Succession Act, 1925 or proved in accordance with Section 68 of the Indian Evidence Act. One of the essential aspects of Section 63(c) of the Indian Succession Act is that the Will ought to have been attested by two or more witnesses who had seen the testator signing or affixing his mark on the Will and the witnesses shall also affix their signatures in the presence of the testator. Even though the plaintiff had stated about his role played in the execution of the Will, the law prescribed under Section 68 of the Indian Evidence Act should be complied by the plaintiff for proving the execution of the Will. So as per Section 68 of the Indian Evidence Act, the Will cannot be used as an evidence until one of the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and attesting witnesses is examined and gives evidence to show that the Will has been executed in terms of Section 63(c) of the Indian Succession Act.

48. One of the attesting witnesses of the Will by name Rathinavel has been examined by the plaintiff as P.W.2. The learned Senior Counsel for the defendants 2 to 4 submitted that the evidence of P.W.2 is in no way helpful to the plaintiff as he did not identify any of the signatures found in Ex.P.2 (Will). It is further submitted that P.W.2 had stated in his affidavit and proof affidavit filed at the time of filing that the Will was executed in English language. P.W.2 had stated that the Will was prepared by V.K.Krishnamoorthy by himself in his own handwriting. In reality, Ex.P.2 is a typed one and it was prepared by one Desa Mudaliar. P.W.2 had stated in his evidence given on 19.07.2016 that he was called by the executant of the Will. Though P.W.2 was able to sign in Tamil, he actually does not know either to write or read Tamil. When the witness is not able to read or write Tamil, his evidence about the language of the Will cannot be taken so seriously, if his evidence on the whole is satisfactory in respect of other material aspects.

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

49. The examination of P.W.2 was held from 19.07.2016 to 05.09.2019. D.2 to D.4 have cross-examined P.W.2 and completed the same on 11.08.2016. In fact the cross-examination of D.2 to D.4 was adopted by D.1 also. But after three years, once again P.W.2 was recalled and cross examined further by D.2 to D.4. P.W.2 had stated at one point of his cross examination that he was called upon by the testator for attesting the Will. He also deposed that the other attestor Subburaman asked him to come. The said Subburaman was known to P.W.2 and he had stated that P.W.2 was the father-in-law of one of the daughters of the executant by name Vasantha. Since the other witness Subburaman is no more, the plaintiff has no other option except to examine P.W.2 Rathinavel.

50. Vasantha, who is one of the daughters of V.K.Krishnamoorthy, is said to be living with the executant himself and the said detail cannot be denied by the defendants also. P.W.2 being an ignorant and illiterate individual he seems to have got confused on several occasions when he was cross-examined. But some essential part of the evidence of P.W.2 appears to be clear. He could

identify his signature in Ex.P.2. However he had stated https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and that he had affixed his signature to prove that the plaintiff is the son of Late V.K.Krishnamoorthy. His evidence is clear even during cross examination that the deceased V.K.Krishnamoorthy had signed at the foot of the testamentary papers in English language. At this point of time, he had added that the Will was in Tamil Language. Though P.W.2 has stated earlier that the Will was in English language, he could recall later and say that it was in Tamil language and the attestor had signed the Will at its foot and brought it to the Sub-Registrar Office nearly after two years for the purpose of registration. When he was confronted with his proof affidavit filed on 19.07.2016, he said that he is not aware of the contents of the same.

51. The learned Senior Counsel for the defendants 2 to 4 attracted the attention of this Court that P.W.2 was not aware of the contents of the affidavit and hence, adverse inference has to be taken in respect of the genuineness of the Will. The affidavit confronted with P.W.2 was the affidavit filed by him along with the Original Petition in O.P.No.379 of 2005 for probating the Will, which was later converted into this Testamentary Original Suit. So when a document like Ex.P.5 is shown to an https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and illiterate witness like P.W.2, it is not something unnatural of him to tell that he was not aware of its contents.

52. P.W.2 was running a tea shop in a portion of the suit property and hence he is the tenant of the testator. Though a piece meal reading of evidence of P.W.2 would raise eye brows, the holistic consideration of the evidence of P.W.2 would show that he had actively participated in attesting the Will and he had also seen the executant signing the Will at the bottom of each page. There is lot of stammering in the evidence of P.W.2 on account of lack of exposure to the affairs of the world. But he is able to identify the persons and recall the events to the extent possible.

53. P.W.2 has stated that the other witness Subburaman is none other than the father-in-law of Vasantha, the second defendant herein. Though P.W.2 has identified that the other attesting witnesses was the father-in-law of the second defendant and the connected C.S. No.441 of 2010 has been filed by the second defendant, she did not prefer to be https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and examined as a witness to refute that the other attesting witness Subburaman is not her father in law.

54. The first defendant has been examined as D.W.1 and stated that the temple in the suit property was being managed by her father and thereafter by the plaintiff. Even if the second defendant and third defendant might have lived at some point of time in the suit premises or engaged in activities there, the fact remains that the temple in the property was being administered only by the father and thereafter by his son, who is the plaintiff herein. D.W.1 has further stated that she did not remember the names of the husband and the father-in-law of her sister Vasantha who is the second defendant.

55. D.W.2 had stated during cross-examination that she did not remember the name of her father-in-law. It was suggested to her whether the name of the father-in-law of Vasantha was Subburaman and whether he was working as an advocate clerk. For which she answered that she did not know that. Though she could not have been aware of his name, she would have known his

occupation. Being the sister of Vasantha, it is very much https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and possible that she could have known the occupation of father-in-law of Vasantha. If he had not worked as an Advocate Clerk, D.W.2 would have given an assertive 'No' instead of 'do not know'. From such evasive evidence of D.W.1 and D.W.2 along with the non-examination of the second defendant and the explicit statement of P.W.2, it can be safely concluded that the other witness who had attested the Will was the father- in-law of Vasantha (second defendant) and he was working as an Advocate clerk. So the Will is seen to have been executed in the presence of such close relatives and thus it appears to be quite natural and probable.

56. The learned Senior Counsel for the defendants 2 to 4 submitted that the doubts on the Will intensifies with the presence of the propounder. It is further submitted that the contents of the Will was in such a manner that the testator had excluded the other legal heirs from inheritance. In support of the above contention, she relied on the judgment of this Court held in Perumal Vs. Alagammal @ Pappathi reported in 2011 SCC OnLine Mad 2164. In the said judgment it is held as under:-

> https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and "32. As such, by way of adding fuel to the fire and fanning the flame, the said Lakshmi, the wife of the beneficiary namely the plaintiff was not described as the adopted daughter of the testator, but she was only described as the daughter of Gurusamy, the alleged brother of the testator. It is also quite obvious and axiomatic from the perusal of the evidece that the alleged adoption of the plaintiff's wife by the testator was not at all proved. There is also nothing to indicate and denote as to how the testator had not chosen to execute the Will in favour of the alleged adopted daughter-Lakshmi, but she had gone to the extent of executing the Will in favour of the husband of the said Lakshmi, for which the learned counsel for the plaintiff by pointing out the evidence of the witnesses would submit that the said Lakshmi, the wife of the plaintiff was very much present at the time of the emergence of the Will, which act would signify her consent.
>
> 33. In fact, those facts will not in any way support the genuineness of the Will, but it projects a picture that the beneficiary and his wife were present at the time of scribing of the Will and also at the time of registration of the Will.

Consequently and as a sequlae, that would not dispel the suspicious circumstances, but it would add strength to the suspicion regarding suspicious circumstance." https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

57. She further relied on the decision of the Hon'ble Supreme Court in Shivakumar & others vs. Sharanabasappa and others reported in (2021) 11 SCC 277. The relevant paragraph of the above judgment is extracted hereunder:-

> " 12.7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of

> property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetra are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation." https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

58. The attention of the court was also drawn to the judgment of the Hon'ble Supreme Court held in Apoline D' Souza Vs. Jonh D' Souza reported in (2007) 7 SCC 225 as under:-

> "13. Section 68 of the Evidence Act, 1872 provides for the mode and manner in which execution of the will is to be proved. Proof of attestation of the will is a mandatory requirement. Attestation is sought to be proved by P.W.2 only. Both the daughters of the testatrix were nuns. No property, therefore, could be bequeathed in their favour. In fact one of them had expired long back. Relation of the testatrix with the respondent admittedly was very cordial. The appellant before us has not been able to prove that she had been staying with the testatrix since 1986 and only on that account she was made a beneficiary thereof. The will was full of suspicious circumstances. P.W.2 categorically stated that the Will was drafted before her coming to the residence of the testatrix and she had only proved her signature as a witness to the execution of the will but the document was a handwritten one. The original will is typed in Kannada, although the blanks were filled up with English letters. There is no evidence to show that the contents of the will were read over and explained to the testatrix. P.W.2 was not known to her. Why was she called and who called her to attest the will is shrouded in mystery. Her https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and evidence is not at all satisfactory in regard to the proper frame of mind of the testatrix. There were several cuttings and overwritings also in the will."

59. It is stated that disinheriting other legal heirs in the Will executed in the presence of propounder and his wife would only escalate the suspicious circumstances. While applying the said logic to the facts of the present case, the incidents that had taken place during the lifetime of the testator would also assume significance.

60. The first defendant had stated in her evidence that she had issued a legal notice to her father vide Ex.D.1 on 11.01.2002 seeking partition in the suit properties. In Ex.D.1 it is stated that the father was evading in one way or another and refused to get the property partitioned by joining hands with his son, the plaintiff herein. But in the written statement filed by the first defendant she has stated that her father was more affectionate and attached towards his daughters than the son. The father had given a reply notice to Ex.D.1 and denied any right of partition to the first defendant.

In the reply notice issued by the father, he has stated that the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and property was given to him absolutely and he has every right to alienate in accordance to his whims and he is not bound to give any share. So the relationship between the first defendant and her father was not cordial and it occasioned to cause a legal notice on her father for demanding partition. If the father was affectionate and considerate to his daughters, he would not have sent such a cold fashion reply, but he would have called his daughters to suggest the modalities for partition. So the above facts would make it clear that the father was not happy to give any shares in his property to his daughters.

61. It is also admitted by the defendants that the father was living along with the son only during his last days. The averments in the Will would read that the life interest has been given in respect of the suit 'A' schedule property for the wife of the testator and only after her lifetime the son of the testator can acquire the property. At the time of executing the Will, all the daughters of the executant got married and lived separately. So the testator could have thought it fit to do certain arrangement for his wife alone.

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and

62. Even from the evidence of D.W.1 it is learnt that after the demise of the mother, both her father and the plaintiff did not allow them to have cordial relationship with them. So the father could not have been very considerate in favour of his daughters at the time when the Will was executed. Since the properties comprise a temple and the plaintiff's father was administering the same and managing the temple with the income derived from the suit 'A' schedule property, it is quite natural for the father to write a Will.

63. After the demise of his wife, the testator had chosen to live along with his son. Hence it is not unnatural on the part of the plaintiff's father to think in terms of settling the suit 'A' schedule property for managing suit 'B' schedule property from and out of the rental income earned from suit 'A' schedule property. As stated already the suit property being the property belonged to the adopted father of Kuppusamy namely Kuppusamy Iyer and Sivakami Ammal, the adoptive parents have got the absolute rights to execute the Will in favour of their son, the first plaintiff. If the preference of one legal heir over the other legal heir to inherit the property of the testator https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and is found to be reasonable and acceptable, disinheriting the other legal heirs cannot by itself a suspicious one. Further, the father has bequeathed ‘A’ schedule property in favour of the mother and only after her life, the property can vest in the son. ‘B’ schedule property was bequeathed in favour of the plaintiff and he has to maintain ‘Sri Kothandarama Swamy Temple’, by doing daily pooja and conducting the annual festivals with the help of the rental income collected from the other portions in ‘B’ schedule. Despite the Will was executed in the year 1990, it got registered in the year 1992 only.

64. The learned counsel for the plaintiff submitted that if the plaintiff happened to be a crook, he would have compelled the registration of the Will as early as possible. The Will is seen to have got registered in a relaxed manner after two years from its execution. The learned counsel for the plaintiff cited various decisions of the Hon'ble Supreme Court as well as the High Court in order to

support his contention that disinheritance of some of the legal heirs cannot be the sole reason to create suspicion on the circumstances (of execution of Will) and the testator who is executing the https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and Will in terms of his own options cannot be suspected but on the other hand, it has to be presumed that the testator had intended to make certain arrangement according to his wishes and preference.

65. The Will was registered not in a hurried manner despite the propounder came to know about the execution of the Will. The learned Senior Counsel for the defendants 2 to 4 submitted that the plaintiff had not exposed the Will in an usual manner in which it would be, but he had chosen to tell about the Will only in his written statement filed by the first defendant claiming partition. In normal course, at the death of testator, the propounder would have exposed the execution of the Will by the testator during the ceremonies following the funeral of the testator. Even if the propounder had chosen to reveal the Will at a later point of time, the fact remains that it is a registered Will and the registration of the Will had taken place even during the lifetime of the father and the plaintiff had proved the genuineness of the signature affixed by the testator and the execution of the Will by examining one of the testators of the Will. The time chosen by the propounder to expose the Will can be taken as a serious adverse circumstance, had it been an unregistered one. In fact the delayed https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and registration of the Will in this case would only show that the propounder did not hassle the process of registration by giving any pressure to the executant.

66. Though the testator was 78 years old at the time of execution of Will he would have lived for more than a decade. There is no evidence to show that the testator was suffering from any physical or mental health condition which was so serious that he could not have executed the Will by being fully conscious of what is being done by him. Though the testator had lived upto 91 years, he had thought it fit to do certain arrangements when he was 78 years itself. 78 years of age is reasonable to expect any untowardness and realise the uncertainty of life. So the age of the testator at the time of executing the Will will only make the idea of the Will quite natural. All the suspicious circumstances brought out by the defendants have been satisfactorily dispelled with the convincing evidence and the other circumstances coupled with the nature of the property and the type of the Will.

67. Since the execution of the Will was proved to be natural and probable with the materials available on record, I hold that the Will dated https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and 25.12.1990 is true and genuine and hence the defendants are not entitled to the relief of partition. In view of the same, the third defendant is not entitled to the relief of permanent injunction. Thus Issue 2 of T.O.S. No.5 of 2006 is answered in favour of plaintiff and the rest of the issues are answered against the defendants.

68. In the result, the Testamentary Original Suit in T.O.S.No.5 of 2006 is decreed by granting a probate of the last Will and Testament dated 25.12.1990 of late V.K.Krishnamoorthy, the testator to the plaintiff to have effect limited to the State of Tamil Nadu. The plaintiff shall also provide a true and fair inventory and render true and fair accounts of the properties and credits of the estate of the testator within six months and one year, respectively, from the date of decree. There shall be no order as to costs.

69. Accordingly, the suits in Tr.C.S.No.283 of 2008 and C.S.No.441 of 2010 are dismissed. There shall be no order as to costs.

Speaking order
Index : Yes
Neutral Citation : Yes
sri / bkn

List of witnesses examined on the side of Plaintiff:-

1.V.K.Narasimhan - PW1

2.A.Rathinavel - PW2 List of exhibits adduced on the side of the Plaintiff:-

S.No.	Exhibits	Date	Description of documents
1	P1		Death Certificate of V.K.Krishnamurt
2	P2	25.12.1990	Will executed by V.K.Krishnamurthy t favour of V.K.Narasimhan
3	P3	19.06.1966	V.K.Krishnamurthy executed mortgage in favour of George Town Co-operativ
4	P4	19.06.1966	V.K.Krishnamurthy executed mortgage in favour of George Town Co-operativ
5	P5	25.11.1989	Rental Agreement (Oppantha Pathiram)

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

1.Ramathilagam - DW1

2.S.Sundari - DW2 List of exhibits adduced on the side of the Defendants:-

S.No.	Exhibits	Date	Description of document
1	D1	11.01.2002	Legal Notice from V.K.Krishnamurthy

defendant namely Ramathilagam in C.S.No.441 of 2 D2 12.01.2002 Reply notice from 2nd defendant namely Ramathilagam to V.K.Krishnamurthy 3 D3 18.05.1962 Mortgage Deed, Doc.No.2010 of 1962, Vijjala Sivakami Ammal and V.K.Krishnamurthy jointly https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and S.No. Exhibits Date Description of documents executed to and in favour of Golli Palli Kanagammal 4 D4 31.08.1987 Mortgage Deed, Doc.No.2607 of 1987, V.K.Krishnamurthy and 1st defendant jointly executed to and in favour of The Muthialpet Benefit Fund Ltd. 5 D5 14.06.1989 Mortgage Deed, Doc.No.437 of 1989, V.K.Krishnamurthy and 1st defendant jointly executed to and in favour of The Muthialpet Benefit Fund Ltd. 6 D6 07.09.1989 Marriage Invitation Card 7 D7 12.03.2015 Marriage Registration Certificate vide 309 of 1989 8 D8 08.03.2010 Legal Notice from Plaintiff's to the defendants along with acknowledgment card 9 D9 15.03.2010 Reply notice from 1st defendant to plaintiff along with cover 10 D10 24.03.2010 Rejoinder notice from plaintiff to 1st defendant along with acknowledgment card 11 D11 29.03.2010 Re-Reply notice from 1st defendant to plaintiff 09.06.2023 To

1.The Sub-Assistant Registrar, Original Side, High Court of Madras.

2.The Record Keeper, Original Side Records Section, High Court of Madras.

https://www.mhc.tn.gov.in/judis T.O.S.No.5 of 2006 and R.N.MANJULA, J.

sri Pre-Delivery Common Judgment made in T.O.S.No.5 of 2006 and Tr.C.S.No.283 of 2008 and 09.06.2023 https://www.mhc.tn.gov.in/judis