

(2015) 10 MAD CK 0064

In the Madras High Court

Case No : T.O.S. No. 17 of 2003 and Tr. C.S. Nos. 621 of 2006 and 361 of 2012

V. Hanumantha Rao and Others

APPELLANT

Vs

M. Anjana Rani and Others

RESPONDENT

Date of Decision : 26-10-2015

Acts Referred:

Evidence Act, 1872 — Section 73

Citation : (2015) 10 MAD CK 0064

Hon'ble Judges : G. Chockalingam, J.

Bench : Single Bench

Advocate : R. Manickavel, for the Respondent

Judgement

G. Chockalingam, J.—T.O.S. No. 17 of 2003 has been filed by one Mr. V. Hanumantha Rao/petitioner in Testamentary Original Petition No. 10 of 2003 against the respondent, namely M. Anjana Rani. When it was in O.P. stage, the learned counsel for the respondent filed a caveat against the grant of probate and therefore, the Caveat was considered and the O.P. was converted into Testamentary Original Suit in T.O.S. No. 17 of 2003. The said suit has been filed by the plaintiff/V. Hanumantha Rao praying that he may be allowed to prove the Will in common form and that probate thereof, to have effect throughout the state of Tamil Nadu, may be granted to him.

2. Tr.C.S. No. 621 of 2006 has been filed by the plaintiff/M. Anjana Rani praying for a judgment and decree against the defendant/V. Hanumantha Rao for partition and to divide the schedule mentioned property by metes and bounds into two equal half shares and allot the plaintiff's equal half share therein separately and delivering possession of such half share to the plaintiff and also for costs of the suit.

3. Tr.C.S. No. 361 of 2012 has been filed by the plaintiff/Hanumantha Rao praying for a judgment and decree against the defendants for partition of schedule mentioned property equally by metes and bounds and handover the

plaintiff's possession thereof and pay past and future mesne profits as may be ascertained and determined by this Court from 25.04.2000 till the date of delivery of possession of the plaintiff's share of the suit schedule property and also for costs of the suit.

4. The case of Mr. V. Hanumantha Rao/plaintiff in T.O.S. No. 17/2003, as stated in the plaint, is as follows:--

"[i] The plaintiff/V. Hanumantha Rao is the son of the deceased Mrs. V. Kanthammal and the defendant/M. Anjana Rani is the daughter of the deceased Mrs. V. Kanthammal, who had executed a Will at Chennai on 31.10.1963 whereunder, she had made some bequeathments in favour of the plaintiff/V. Hanumantha Rao and the defendant/M. Anjana Rani. Under the said Will, the deceased Mrs. V. Kanthammal bequeathed the immovable property viz., house bearing Door No. 17/2, Venkataram Naidu Street, Perambur, Chennai - 11, previously forming part of and known as Perambur High Road and described as schedule "A" in the Will and vacant land in Dhane Village, Karnool District, described as schedule "B" in the said Will in favour of the plaintiff/V. Hanumantha Rao absolutely after her life time. Further, the deceased Mrs. V. Kanthammal has bequeathed fixed deposit of Rs. 3,500/- made in the Madras Purasaiwalkam Hindu Janopakara Saswatha Nidhi and recurring deposit of Rs. 3,000/- deposited with the Egmore Benefit Society III Branch Ltd., in favour of the defendant/M. Anjana Rani. Further, the deceased constituted her son/the plaintiff, namely V. Hanumantha Rao as the residuary legatee and bequeathed him absolutely all her monies and immovable properties and all other assets. After the execution of the Will, the deceased had put up a building on the remaining land at No. 17/2 situated at Venkatarama Naidu Street, Perambur, which she had purchased earlier and the said building has been assigned with Door No. 1 and Street name as Vasan Street. The plaintiff/V. Hanumantha Rao has stated in the plaint that the deceased Mrs. V. Kanthammal died at Door No. 35 (Old No. 17/2, Venkatarama Street (previously known as Venkatarama Naidu Street), Perambur, Chennai-11, on 26.04.1991 leaving the plaintiff/V. Hanumantha Rao and the defendant/M. Anjana Rani as her only legal heirs and legal representatives.

[ii] As per the Will dated 31.10.1963, the deceased Mrs. V. Kanthammal made the following bequeathments in favour of the plaintiff/V. Hanumantha Rao and the defendant/M. Anjana Rani as mentioned in the Will:--

The deceased bequeathed the house and ground No. 17/2, Present Door No. 35 (New No. 2) situated at Venkataram Naidu Street, Perambur and vacant plot of land in Dhane Village in favour of her son the plaintiff/V. Hanumantha Rao. The deceased Mrs. V. Kanthammal has bequeathed the fixed deposit of Rs. 3,500/- made in the Madras Purasaiwalkam Hindu Janopakara Saswatha Nidhi and recurring deposit of Rs. 3,000/- deposited with the Egmore Benefit Society III Branch Ltd., in favour of her daughter/the defendant/M. Anjana Rani. Further, the deceased Mrs. V. Kanthammal had bequeathed all the properties, movable and

immovable that will be belonging to her, in favour of the plaintiff. After the execution of the Will, the deceased had put up a building in the remaining land at No. 35 (Old No. 17/2, Venkatarama Street, Perambur, Chennai. After the execution of the Will and during her life time, the deceased Mrs. V. Kanthammal had disposed of the plot of land purchased by her in Dhone Village, Karnool District and withdrew the fixed deposit made in the Purasaiwalkam Hindu Janopakara Saswatha Nidhi and Recurring Deposit made in the Egmore Benefit Fund III Branch Ltd., mentioned in the Will and hence, they are not included in the Affidavit of Assets. At the time of the death of the deceased, the properties i.e., Door No. 35 (New No. 2), Venkatarama Street, Perambur, Chennai-11, and Door No. 1, Vasan Street, Perambur, Chennai-11 bequeathed by her in the Will alone were available. Except the fixed deposit and recurring deposit bequeathed in the Will in favour of the defendant/M. Anjana Rani by the deceased Mrs. V. Kanthammal during her life time, no other bequeathments is left to be given to the defendant/M. Anjana Rani. Hence, the defendant/M. Anjana Rani is not entitled to any properties mentioned in the Will. The plaintiff/V. Hanumantha Rao has further stated that the witnesses to the Will, namely R. Gopalan and A.K. Vaidhyathan have already died and hence, their affidavit as attesting witnesses cannot be procured. However, third party affidavit is filed. The plaintiff/V. Hanumantha Rao undertakes to duly administer the property and credits of the deceased Mrs. V. Kanthammal and in any way concerning her Will, by paying first her debts and then the legacies thereon bequeathed so far as the assets will extend and to make a full and true inventory thereof and exhibit the same in this Court within six months from the date of grant of probate to the plaintiff/V. Hanumantha Rao. Hence, the plaintiff/V. Hanumantha Rao has filed this suit for the relief as stated above."

5. Written statement filed by Mrs. M. Anjana Rani/defendant in T.O.S. No. 17 of 2003 reads as follows:--

"[i] The defendant/M. Anjana Rani denies all the allegations contained in the plaint and it is stated that the deceased Mrs. V. Kanthammal, wife of late V. Veeraraghavalu died on 26.04.1991, but the alleged Will was said to have been executed on 31.10.1963. The plaintiff has not stated anything as to why the Will said to have been executed by the deceased Mrs. V. Kanthammal, was kept as a secret for all the 30 years. The plaintiff has come forward with the version that only when the defendant demanded to partition the suit property by dividing the same into two equal shares, the plaintiff cooked up the Will by fabricating and forging the signature of the deceased Kanthammal and filed the suit after 13 years from the date of her death. The plaintiff has also filed a suit in C.S. No. 857 of 2003 before this Court, for partition of a house property bearing Door No. 8, Bala Murugan Street, Perambur, Chennai - 600 039, which absolutely belongs to the defendant and she acquired the same under a Deed of Settlement executed by her late father Veeraraghavalu Naidu on 22.01.1969, registered as Document No. 742 of 1969 at the S.R.O. Purasaiwalkam. The defendant states that if their parents wanted to give the suit property to the plaintiff, they would

not have executed a Will on a plain paper and handed over the same to the plaintiff and they would have only executed a Settlement Deed and got it registered at the Sub-Registrar's Office. Another property referred in the Will had already been disposed of by the deceased Mrs. V. Kanthammal even during her life time. Similarly, the fixed deposits and the recurring deposits made in the Purasaiwalkam Hindu Janapakara Saswatha Nidhi and Egmore Benefit Fund respectively, were all withdrawn by the deceased Mrs. V. Kanthammal even during her life time.

[ii] The defendant further states that the plaintiff was not living with his parents or with his mother late Mrs. V. Kanthammal. Therefore, he was not aware of the facts of the disposal of the property situated in Andhra and also the withdrawal of the fixed and recurring deposits made in the banks. The plaintiff appears to have obtained some particulars or documents relating to the above assets. Similarly, even on the alleged date of execution of the Will, the other property bearing Door No. 8, Bala Murugan Street, Perambur, Chennai - 600 039, was also owned by the defendant's parents having been purchased in the name of late Veeraraghavalu Naidu on 07.09.1962. The case of the plaintiff is that the Will was allegedly executed on 31.10.1963 in the very next year of the purchase of the other property. It is also stated by the defendant that the Settlement Deed was executed by late Veeraraghavalu Naidu in favour of the defendant on 22.09.1969. There are clear recitals that the plaintiff had already been provided with some properties. Therefore, only because the defendant's parents had left the suit property to be enjoyed and shared equally, they did not execute any document and the plaintiff has forged a Will to deprive the defendant of her half share in the suit property. The Will appears to have been prepared in white paper and the defendant's mother's signature differs in every page. The five signatures found in the forged Will were not signed by late Mrs. V. Kanthammal and they are not similar and differ from each page. The defendant denied all the allegations made in paragraphs 6 and 7 of the plaint and stated that the value of the suit property would be more than Rs. 1 Crore, as the total extent of the same is 3 grounds 1640 sq.ft. and their father late Veeraraghavalu Naidu was employed as a Revenue Officer in the Government of Andhra Pradesh and he purchased the suit property and the other properties out of his own self-acquired funds in his name and also in the name of his wife Mrs. V. Kanthammal. Similarly, the fixed deposits and the recurring deposits mentioned in the plaint were all made by late Veeraraghavalu Naidu in the name of his wife Mrs. V. Kanthammal, which were withdrawn by late Mrs. V. Kanthammal after the death of her husband. Similarly, the other properties purchased in the name of Mrs. V. Kanthammal in Andhra Pradesh, were disposed of even during the life-time of their father Veeraraghavalu Naidu. The plaintiff has deliberately valued the suit property and paid stamp duty only in respect of 1/10th of its value and did not pay the stamp duty for the other bequeathments said to have been bequeathed under the Will. There is no cause of action for filing the suit. The suit is liable to be dismissed with exemplary costs."

6. The case of M. Anjana Rani/plaintiff in Tr.C.S. No. 621/2006, as stated in the plaint, is as follows:--

"The plaintiff states that the defendant/V. Hanumantha Rao is her younger brother and the plaintiff and the defendant are the daughter and son of late V. Veeraragavalu Naidu and Mrs. V. Kanthammal. All the properties, including house, ground and premises bearing Door No. 35, Venkataraman Street, Perambur, Chennai - 11, comprised in R.S. No. 442/2 of Perambur Village measuring 7102 sq. ft., more particularly described in the schedule, originally belonged to the plaintiff's mother Mrs. V. Kanthammal, and she purchased the same under a Deed of Sale dated 17.08.1950, registered as Document No. 1827/1950 at the S.R.O. West, Madras from one P.V. Soundarajan and others and the same had been purchased in her name by the plaintiff's father late V. Veeraragavalu Naidu. The plaintiff's father V. Veeraragavalu Naidu pre-deceased his wife on 04.01.1976 leaving the plaintiff's mother Mrs. V. Kanthammal, the plaintiff and the defendant as his lawful legal heirs. The plaintiff's mother Mrs. V. Kanthammal also died intestate on 26.04.1991 leaving behind the plaintiff and the defendant as her lawful legal heirs. The plaintiff states that for the past two years, she has been demanding the defendants to effect a lawful partition of the schedule mentioned property by metes and bounds by dividing the same into two equal half shares and allotting one half share to the plaintiff. Though the defendant originally agreed to effect a partition by executing a deed of partition, he has now changed his mind and attempting to grab the entire property. The defendant has fabricated a forged Will as if it was executed by the plaintiff's mother late Mrs. V. Kanthammal on 31.10.1963 and filed a petition for probate on the file of this Court in O.P. No. 10 of 2003. Hence, the plaintiff/M. Anjana Rani has filed the suit in Tr.C.S. No. 621/2006 for the relief as stated above."

7. Written statement filed by V. Hanumantha Rao/defendant in Tr.C.S. No. 621 of 2006 reads as follows:--

"The deceased Kanthammal, the mother of the plaintiff and the defendant had executed a Will on 31.10.1963, by which, the plaint schedule property has been bequeathed to the defendant absolutely. Ever since the date of the death of Mrs. V. Kanthammal on 26.04.1991, the defendant has been owning, possessing and enjoying the plaint schedule property as absolute owner without any interruption from any quarter, including the plaintiff. It is a fraudulent statement made by the plaintiff that the plaintiff and the defendant are in joint possession of the suit schedule property. The plaintiff got married in the year 1955 to late Dr. P. Mahipathi. Ever since the date of her marriage, she has been living with her in-laws at No. 134, T.H. Road, Washermenpet, Chennai - 600 021. The Will of late Mrs. V. Kanthammal is a genuine one. Hence, the suit is liable to be dismissed with exemplary costs."

8. The case of V. Hanumantha Rao/plaintiff in Tr.C.S. No. 361/2012, as stated in the plaint, is as follows:--

"Mr. V. Veeraraghavalu Naidu, the father of the plaintiff and the first defendant, was the sole and absolute owner of the house and premises bearing Door No. 8, Plot No. 13, Balamurugan Street, Vyasarpadi, Chennai - 600 039. He died intestate on 04.01.1976, leaving behind his wife Mrs. V. Kanthammal, the plaintiff and the first defendant as his only legal heirs. Mrs. V. Kanthammal died intestate on 26.04.1991. Hence, the plaintiff and the first defendant have become the absolute owners of the schedule property with 50% share therein for each. The Settlement Deeds executed by the first defendant in favour of her sons viz., the defendants 2 to 5 and the sale in favour of defendants 6 to 9 are not valid and binding, since she has only 50% undivided interest in the suit schedule property. A notice was sent by the plaintiff on 25.03.2003 to the first defendant for partitioning the suit schedule property by metes and bounds. She acknowledged the same, but has not come forward for any amicable partition. She is not willing to divide the suit schedule property by metes and bounds. Hence, the plaintiff/V. Hanumantha Rao has filed the suit in Tr.C.S. No. 361/2012 for the relief as stated above."

9. Written statement filed by M. Anjana Rani/first defendant in Tr.C.S. No. 361 of 2012 reads as follows:--

"The plaintiff, who is the eldest son, as if he is not aware of the Settlement Deed executed by his later father Veeraraghavalu Naidu in favour of his sister/the first defendant, states that the first defendant has unlawfully settled the suit property in favour of her sons and daughters. The first defendant along with her daughter Saraswathy jointly promoted the suit property through a builder and sold several portions of the said property by way of undivided shares to the third parties, namely, the defendants 7 to 10 and the purchasers are in possession of their respective flats from the date of their purchases made in the year 2000. The first defendant also has settled the other portions to her sons, namely the defendants 2, 3, 4 and 5 and they are in possession and enjoyment of the respective portions allotted to them. The cause of action pleaded is totally incorrect and false and there is no cause of action for the plaintiff to file the suit for partition. Hence, the suit is liable to be dismissed with exemplary costs."

10. This Court, by an order dated 06.08.2012 in T.O.S. No. 17 of 2003, has framed the following issues:--

"1. Whether the Will dated 31.10.1963 was executed by Late V. Kanthammal in the presence of attestors in a sound and disposing state of mind at the time of execution of the Will?

2. Whether the Will dated 31.10.1963 is a forged document?

3. Whether the Will dated 31.10.1963 is surrounded by suspicious circumstances?

4. Whether the suit is not maintainable having been filed ten years after the alleged execution of the Will?"

11. In Tr.C.S. No. 621 of 2006, the learned VII Additional Judge, by an order

dated 12.10.2004, has framed the following Issues:--

"1. Whether the plaintiff is entitled to partition of suit property?

2. To what relief if any is the plaintiff entitled?"

12. In Tr.C.S. No. 361 of 2012, this Court has framed the following issues on 06.08.2012:--

"1. Whether the plaintiff has got any right or share in the suit property?

2. Whether the suit filed by the plaintiff without any prayer to set aside the Settlement Deed dated 22.09.1969 is maintainable?

3. Whether the plaintiff is entitled to the relief of partition claimed in the suit?"

13. Thereafter, T.O.S. No. 17 of 2003 was directed to be posted before the learned Master along with Tr.C.S. No. 621 of 2006 and Tr.C.S. No. 361 of 2012 for simultaneous trial. The plaintiff in Tr.C.S. No. 621 of 2006, namely Anjana Rani examined herself as P.W.1 and documents were marked as Exs.P.1 to P.14 to prove her case. The defendant in Tr.C.S. No. 621 of 2006, namely V. Hanumantha Rao examined himself as D.W.1 and documents were marked as Exs.D.1 to D.15 to substantiate his case.

14. In all the suits, the plaintiff and the defendant are one and the same. Hereafter, V. Hanumantha Rao is called as plaintiff and M. Anjana Rani is called as defendant in the judgment.

Issue Nos. 1 to 3 in T.O.S. No. 17 of 2003 & Issue No. 1 in Tr.C.S. No. 621 of 2006 and Issue Nos. 1 to 3 in Tr.C.S. No. 361 of 2012:

15. At the time of arguments, the learned counsel for the plaintiff/V. Hanumantha Rao has filed a memo which reads as follows:--

"The suit in C.S. No. 361 of 2012 was filed on the basis of Encumbrance Certificate marked as Ex. D.12 in which Settlement Deed dated 22.09.1969 vide Doc. No. 742/1969 SRO Purasawalkam executed by late Mr. V. Veeraraghavulu in favour of Ms. M. Anjana Rani was not reflected.

In the suit proceedings however the registered Settlement Deed has been marked as Ex. P.2.

In view of the registered Settlement Deed dated 22.09.1969 vide Doc. No. 742/1969 SRO Purasawalkam executed by late Mr. V. Veeraraghavulu in favour of Ms. M. Anjana Rani, I am not pressing my claim made for partition of the suit property which is the subject matter of the Settlement Deed dated 22.09.1969."

16. In this case, it is admitted by both sides that the plaintiff/V. Hanumantha Rao is the brother of the defendant/M. Anjana Rani and they are the children of late V. Veeraraghavulu Naidu and Mrs. V. Kanthammal. It is admitted by both sides that except the plaintiff/V. Hanumantha Rao and the defendant/M. Anjana Rani,

there is no other legal heirs to the deceased V. Veeraraghavulu Naidu and Mrs. V. Kanthammal. The properties mentioned in Tr.C.S. No. 621 of 2006 belong to the deceased Mrs. V. Kanthammal and the properties mentioned in Tr.C.S. No. 361 of 2012 absolutely belong to V. Hanumantha Rao.

17. It is useful to mention the following dates which are relevant for the purpose of deciding the issue involved in T.O.S. No. 17 of 2003. O.P. No. 10 of 2003 was presented by the plaintiff/V. Hanumantha Rao on 27.11.2002 and it was re-presented on 27.12.2002 and the same was subsequently converted as T.O.S. No. 17 of 2003. Further, the plaintiff/V. Hanumantha Rao filed a suit for partition against his sister M. Anjana Rani and her children viz., D.2 to D.6 and third parties, namely D.7 to D.10 before this Court on 25.04.2003 and it was taken on file as C.S. No. 857 of 2003. Subsequently, the said suit was transferred to the file of the City Civil Court and it was re-numbered as O.S. No. 12029 of 2010 and thereafter it was again transferred to this Court and re-numbered as Tr.C.S. No. 361 of 2012. Further, the defendant M. Anjana Rani filed a suit for partition before the City Civil Court on 22.12.2003 as O.S. No. 6422 of 2003. Subsequently, the said suit was transferred to this Court on 21.08.2006 and it was re-numbered as Tr.C.S. No. 621 of 2006.

18. In this case, at the time of arguments, since the counsel for the plaintiff/V. Hanumantha Rao submitted that he is not pressing the suit claiming partition made in Tr.C.S. No. 361 of 2012, the said suit is liable to be dismissed. Accordingly, the said Tr.C.S. No. 361 of 2012 is dismissed and the memo filed by the plaintiff/V. Hanumantha Rao in Tr.C.S. No. 361 of 2012 shall form part of the decree.

19. The learned counsel for the plaintiff/V. Hanumantha Rao vehemently contended that Mrs. V. Kanthammal, the mother of both the plaintiff and defendant, had executed a Will-Ex. D.7 in free state of mind in the presence of the witnesses and the execution of Will is proved by examination of the attesting witnesses. Since the Will executed by the deceased Mrs. V. Kanthammal is proved by attesting witnesses, the Will has to be probated as prayed for in T.O.S. No. 17 of 2003. Hence, T.O.S. No. 17 of 2003 has to be decreed as prayed for and the suit filed by the defendant for partition of the property, which absolutely belongs to the deceased Mrs. V. Kanthammal and it was bequeathed to the plaintiff, has to be dismissed.

20. The learned counsel for the defendant/M. Anjana Rani would contend that the alleged Will executed by the deceased Mrs. V. Kanthammal is not at all true one and it was fabricated for the purpose of evading and defeating the claim of the defendant's share in the property. The plaintiff has filed a petition for probate after the death of his mother with inordinate delay and there is no acceptable explanation put forth for non-filing of petition for probate within a reasonable time. The learned counsel for the defendant further contended that the Will-Ex. D.7 is unregistered one and the unregistered Will is created after the demand for partition by the defendant. Even at the time of filing of T.O.S. No. 17

of 2003, the plaintiff has specifically stated that the witnesses expired and he has filed third party affidavit to that effect. Hence, in each and every situation, the allegations made in the plaint create suspicious circumstances.

21. In view of the above suspicious circumstances, the Will is not proved as genuine and has not been executed by the deceased Mrs. V. Kanthammal in a clear state of mind. Hence, the Will is not proved by the plaintiff before this Court and the suit has to be dismissed and the suit filed by the defendant in Tr.C.S. No. 621 of 2006 has to be decreed.

22. In this case, the original Will executed by the deceased Mrs. V. Kanthammal is produced as Ex. D.7 into the Court. On a reading of the original Will, it is apparent that it was only typewritten and it was signed on 31.10.1963 by two witnesses viz., (1) Mr. R. Gopalan and (2) A.K. Vaidyanathan. The plaintiff/V. Hanumantha Rao filed a suit for partition in C.S. No. 857 of 2003 on 25.04.2003. Subsequently, it was transferred to the file of the City Civil Court and taken on file in O.S. No. 12029/10 and subsequently, it was transferred to High Court and re-numbered as Tr.C.S. No. 361 of 2012, in which, in paragraph 3 of the plaint, it is stated as follows:--

"3. One Mr. V. Veeraraghavalu Naidu, father of the plaintiff and first defendant, was the sole and absolute owner of house and premises bearing Door No. 8, Plot No. 13, Balamurugan Street, Vyasarpadi, Chennai - 600 039 (described in the schedule hereunder and hereinafter referred to as Schedule Property).

He died intestate on 04.01.1976, leaving behind his wife Smt. V. Kanthammal, plaintiff and first defendant as his only legal heirs. V. Kanthammal died intestate on 26.04.1991. Hence, the plaintiff and first defendant have become the absolute owners of the schedule property with 50% share therein for each."

23. In view of the above reading of the pleadings, the plaintiff Mr. V. Hanumantha Rao admitted that his mother died intestate on 26.04.1991 itself. Hence, the above admission cannot be reiterated now stating that the deceased Mrs. V. Kanthammal had not died intestate. Hence, the argument of the learned counsel for the plaintiff that the deceased Mrs. V. Kanthammal had not died intestate and she executed a Will, is not at all believable.

24. Further, at the time of filing the Original Petition No. 10 of 2003, in paragraph No. 11 of the said petition, the plaintiff/V. Hanumantha Rao has stated that the witnesses to the Will R. Gopalan and A.K. Vaidhyathan have already died and hence their affidavit as attesting witnesses cannot be procured. However third party affidavit is filed. Third party Mr. S. Narasiman, S/o. late G.P. Seethapathi filed affidavit which reads as follows:--

"1. A am a third party and family friend of the deceased Mrs. V. Kanthammal's family and I retired from the Engineering Department of M/s. Parry & Co.,

2. I state that I know the Testatrix Mrs. V. Kanthammal and her family personally. I also know personally the witnesses Mr. R. Gopalan and A.K.

Vaidhyanathan who have attested the Will of late Mrs. V. Kanthammal. I know that the witnesses have since deceased. I know the signatures of Testatrix and attesting witnesses very well. I have seen the Will dated 31.10.1963 of late Mrs. V. Kanthammal and I can identify the signature of Testatrix Mrs. V. Kanthammal and witnesses Mr. R. Gopalan and A.K. Vaidhyanathan in the said Will as that of them.

3. I declare that whatever stated above as true and correct. Solemnly affirmed at Chennai on this the 20th day of December 2002 and signed his name in my presence.

Before Me: Advocate, Chennai."

25. Hence, in view of the above, the plaintiff clearly stated in his petition and in third party affidavit that both the attesting witnesses in the Original Will-Ex. D.7, died to the knowledge of himself and to the third party. But surprisingly the witnesses one Mr. R. Gopalan was examined on the side of the plaintiff as one of the attesting witnesses. From the above facts, it is made clear that the plaintiff has not come with true facts and clean hands at the time of filing the probate petition. From the above facts, it is very clear that he is in the habit of giving false allegations before this Court for his benefit at any cost. Hence, his evidence is not trustworthy. On a reading of the plaint, it is seen that it is the bounden duty of the plaintiff/V. Hanumantha Rao to prove Ex. D.7-Will which was executed by Mrs. V. Kanthammal on the date mentioned thereon with free consent without influence of any party and executed the Will in a sound state of mind and the burden is heavily upon the plaintiff. To discharge the above burden of proving the Will on the side of the plaintiff, one Mr. R. Gopalan was examined as D.W.2. Even though in the petition it is stated that the attesting witness Mr. R. Gopalan is dead, subsequently he was examined as a witness. D.W.2-Mr. R. Gopalan, in his cross-examination, has deposed as follows:

"Mr. Veeraraghavalu Naidu requested me to attest in the Will. I attested in two Wills. I read over the contents and attested in two Wills. In one Will, Veeraraghavalu Naidu signed as testator and in another one, his wife Kanthammal signed as testatrix. I signed the Will in Hanumantha Rao's portion. At the time of my signing, Veeraraghavalu Naidu and his wife were present in the portion. I signed in both Wills at the same time. Mr. A.K. Vaithyanathan was also a tenant and he was working as Head Draftsman and I was working as clerk. He was not my Superior Officer. I paid Rs. 12/- as rent. I signed as the first witness in Ex. D.7 Will. I do not remember the exact time of signing the Will. I signed the Ex. D.7 Will on 15.10.1963. In another Will, I signed on 31.10.1963. Though there were two different dates, I signed one and the same date."

26. From a reading of the above deposition given by D.W.2, it is clear that D.W.2 signed the Will in Hanumantha Rao's portion. D.W.2 has specifically stated that he signed Ex. D.7-Will on 15.10.1963 which is quite contrary to the contents in Ex. D.7-Will. According to the plaintiff/V. Hanumantha Rao, the Will executed by

the deceased Mrs. V. Kanthammal is dated 31.10.1963. But contrary to the same, the attesting witness D.W.2-Mr. R. Gopalan deposed that he signed Ex. D.7-Will on 15.10.1963 and another Will was also executed by Mr. Veeraraghavalu Naidu. So, it is clearly contradictory to Ex. D.7-Will, which was executed on 31.10.1963. The contention that the Will was executed by the deceased Mrs. V. Kanthammal on 31.10.1963 as alleged by the plaintiff/Mr. V. Hanumantha Rao, is not at all believable. Further, the plaintiff/Mr. V. Hanumantha Rao himself stated in the plaint in Tr.C.S. No. 361 of 2012 that Mrs. V. Kanthammal died intestate on 26.04.1991, leaving behind himself and his sister as her sole legal heirs.

27. In view of the above admission and contrary statement of D.W.2, this Court is of the view that the alleged Will-Ex. D.7 is not at all proved as a genuine one beyond any reasonable doubt.

28. Even according to the plaintiff/Mr. V. Hanumantha Rao, he knows the execution of the Will of his father and he produced the same before the Court in the year 1993 and he got certified copy of the Will executed by his father.

29. It is admitted by both sides that Mr. V. Veeraraghavalu Naidu died on 04.01.1976 and the Death Certificate of Mr. V. Veeraraghavalu Naidu was marked as Ex. P.1 and the Legal Heirship Certificate is marked as Ex. P.11. Further, the mother of the plaintiff/Mr. V. Hanumantha Rao and the first defendant, died on 26.04.1991.

30. Learned counsel for the plaintiff/Mr. V. Hanumantha Rao contended that there are admitted signatures of the deceased Mrs. V. Kanthammal found in Exs.D.3, D.4 and D.5 under Section 73 of the Indian Evidence Act.

31. Per contra, the learned counsel for the defendant contended that the burden of the plaintiff/Mr. V. Hanumantha Rao is to prove Ex. D.7-Will and it was signed in the presence of the attesting witnesses, etc. In this case, it is very clear that even though one attesting witness was examined as D.W.2, comparison of signatures of the deceased Mrs. V. Kanthammal in Exs.D.3, D.4 and D.5 with Ex. D.7-Will does not arise.

32. Learned counsel for the plaintiff/Mr. V. Hanumantha Rao relied on the decision of the Supreme Court reported in [AIR 2007 Supreme Court 614 [Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.], wherein, in paragraph No. 33, the Supreme Court has held as follows:--

"There are several circumstances which would have been held to be described by this Court as suspicious circumstances:--

"(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

(See H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , Management Committee T.K. Ghosh's Academy Vs. T.C. Palit and Others, .)"

33. The facts of the above case are not applicable to the facts of the present case. In this case, only one attesting witness was examined and his evidence not supported the case of the plaintiff and third party affidavit also not supported the case of the plaintiff. Hence, the Will-Ex. D.7 is not at all proved in this case.

34. Learned counsel for the plaintiff contended that the defendant/M. Anjana Rani has filed an affidavit stating that she has no objection to transfer the patta in favour of his brother Mr. V. Hanumantha Rao and the same has been marked as Ex. P.14. The certified copy of the sale deed is Ex. P.14 and the Original tax payment receipt of the plaintiff was marked as Ex. P.10. Hence, the defendant has knowledge of the Will at that time itself.

35. Per contra, on the side of the defendant/M. Anjana Rani, it is contended that if the document is not a genuine one, it was created by the plaintiff/Mr. V. Hanumantha Rao for the purpose of supporting his case. Even then, the document is not supporting his case. In the document Ex. P.14-Affidavit of M. Anjana Rani, it is stated as follows:--

"I, Tmt. Anjana Rani, Wife of Dr. Mahipathy and daughter of Late. V. Veeraraghavalu, Hindu aged about 64 years, residing at No. 8, Balamurugan Street, Vyasarpadi, Chennai - 39, do hereby solemnly and sincerely affirm and state as follows:--

"I submit that my mother namely Tmt. V. Kanthammal died at Madras on 26.4.1991, leaving behind her the following persons as her surviving legal heirs.

I submit that we are the only legal heirs, who are entitled to inherit the properties of my deceased mother, and no other person or persons have any right to claim the properties of my deceased mother.

I submit that my father pre-deceased to the death of my mother and the parents of my mother predeceased her.

I submit that my father namely V. Veeraraghavalu, died at Madras on 4.1.1976. Therefore, we are the only legal heirs to inherit the properties of my deceased mother.

...."

36. Therefore, on a reading of the entire affidavit, it is clear that the defendant has not signed the document, and it was created only by the plaintiff. Further, in the above document, it is stated that the deceased Mrs. V. Kanthammal died intestate and her son/the plaintiff and daughter/the defendant, alone are the surviving legal heirs of the deceased Mrs. V. Kanthammal. Hence, it is clearly

proved that no Will was executed by the said Mrs. V. Kanthammal and she died intestate and the plaintiff and the defendant alone are the legal heirs to inherit the property of the deceased Mrs. V. Kanthammal. In view of the above said fact, the argument of the learned counsel for the plaintiff that the deceased Mrs. V. Kanthammal executed a Will dated 31.10.1963 and the plaintiff alone is entitled to inherit the property of the deceased Mrs. V. Kanthammal as per Ex. P.7, is not at all acceptable.

37. Further, if the Will is alleged to have been executed as claimed by the plaintiff, it is natural for the plaintiff to get the affidavit from the defendant mentioning the Will dated 31.10.1963. But contrary to that, according to the affidavit produced on the side of the defendant, it is seen that the deceased Mrs. V. Kanthammal died intestate and the plaintiff and the defendant alone are the legal heirs and the defendant has no objection to transfer the patta certificate to and in favour of the plaintiff. Hence, the case of the plaintiff that the deceased Mrs. V. Kanthammal executed a Will on 31.10.1963 is not at all acceptable.

38. Learned counsel for the plaintiff contended that the suit is filed within the time. He further contended that it is not necessary that the suit has to be filed within three years from the date of the death, since the defendant M. Anjana Rani gave her consent for transfer of patta and patta has also been transferred in favour of his brother. It is not necessary to apply until his sister takes partition. Hence, the suit is filed within the period of limitation.

39. Learned counsel for the respondent/defendant contended that the defendant has never admitted that she signed in the proof affidavit as alleged in the plaint. Further, even according to the case of the plaintiff, the plaintiff has knowledge of the Will from early stage. Hence, the argument of the learned counsel for the plaintiff that the suit has been filed within the time of limitation, is not at all correct. Admittedly, Mr. V. Veeraraghavalu Naidu died on 04.01.1976 and Mrs. V. Kanthammal died on 26.04.1991. Even according to the plaintiff, the Will executed by his father Mr. V. Veeraraghavalu Naidu was produced in the year 1993 itself and further the plaintiff has filed the suit for partition of the property which belongs to his father. In that suit, he admitted that his mother died intestate and the plaintiff and the defendant alone are the legal heirs and they are entitled to equal shares.

40. Further, in the alleged affidavit-Ex. P.14 dated 1.8.1998, the Will executed by the deceased Mrs. V. Kanthammal was not mentioned but in which, it is clearly stated that the plaintiff and the defendant are the only legal heirs and they have right to inherit the property of the deceased Mrs. V. Kanthammal and the defendant has no objection to give her consent to transfer the patta in favour of her brother viz., Hanumantha Rao. Hence, the argument of the learned counsel for the plaintiff that the deceased Mrs. V. Kanthammal executed a Will, is not at all acceptable. Further, even according to the plaintiff, the defendant has not admitted the existence of the Will.

41. It is useful to extract Articles 113 and 137 of the Limitation Act which reads as follows:--

PART X- SUIT FOR WHICH THERE IS NO PRESCRIBED PERIOD

PART II - OTHER APPLICATIONS

42. In this case, on a reading of the entire probate proceedings, it is seen that the plaintiff has not clearly stated about the existence of the Will, etc. But in paragraph No. 13 of the petition in O.P. No. 10 of 2003, the plaintiff has stated as follows:--

13. The petitioner states that this petition should have been filed within 3 years from the date of death i.e., 26.4.1991 of the deceased Mrs. V. Kanthammal, but could not be filed due to over sight and as well as the petitioner/executor was away from Chennai often in connection with his travelling sales man work. Now there is a delay in filing this petition for probate of Will which delay is neither wilful nor wanton but due to the aforesaid bona fide reasons and pray that the same may be condoned by this Court.

43. D.W.1-Mr. V. Hanumantha Rao, in his cross-examination has deposed as follows:

"....

I do not know who prepared Ex. D.7 and Ex. D.15, Will. I do not have any knowledge about the preparation and execution of Will, Ex. D.7 and Ex. D.15 respectively. I came to know about Ex. D.7 and Ex. D.15 only when it was handed over to me. My father and mother kept the Will in the Almirah, I came to know about the Will only after the death of my mother...."

44. In view of the above pleadings in the petition filed by the plaintiff, it is seen that the petition is not filed within three years i.e., from 26.04.1991 and only due to over-sight, he could not file the petition in time and since he is a travelling Salesman, he was not able to file the petition. Except the above stated reason, no other reason is stated by the plaintiff to file a suit after a very long time. Even though there is no pleading, as stated by the learned counsel for the plaintiff at the time of arguments that since the defendant has denied the plaintiff's right to file a suit for partition, the present petition was filed and the petition is within the time, and the same is not at all acceptable. Hence, the plaintiff has not filed the suit within three years and therefore, the suit filed by the plaintiff to probate the Will as per the Limitation Act is not within time.

45. In view of the above said discussion, the execution of Will dated 31.10.1963 of the deceased Mrs. V. Kanthammal in sound and disposing state of mind, is not proved. Hence, the issue No. 1 in T.O.S. No. 17 of 2003 is answered against the plaintiff. Since the above stated Will is not proved, the above said Will dated 31.10.1963 is a forged one and the same was not executed by the deceased Mrs. V. Kanthammal and the same is proved by evidence and the Will is surrounded

by suspicious circumstances. Hence, Issue Nos. 2 and 3 are answered accordingly.

46. Issue No. 4 in T.O.S. No. 17 of 2003:

In this case, the suit is filed after the death of Mrs. V. Kanthammal and the petition to probate the proceedings was filed only on 27.11.2002. There is no reason stated by the plaintiff in his petition for filing the probate petition after such a long time. The reason stated by the petitioner/plaintiff in his petition, is not at all proved and it is not at all acceptable. Hence, the petition filed by the petitioner/plaintiff to probate the Will after long years, is not at all maintainable. Issue No. 4 in T.O.S. No. 17 of 2003 is answered accordingly.

47. It is admitted by both parties that the suit schedule property in Tr.C.S. No. 621 of 2006 belongs to the deceased Mrs. V. Kanthammal. It has to be concluded that the Will executed by the deceased Mrs. V. Kanthammal, is not a genuine document and it is not proved. Hence, in view of the above finding of the Court that the plaintiff and the defendant are the only legal heirs of the deceased Mrs. V. Kanthammal and since the Will is not proved, the plaintiff and the defendant are entitled to 1/2 share each in the suit property. Hence, the plaintiff in Tr.C.S. No. 621 of 2006 is entitled to 1/2 share in the suit property and also entitled for preliminary decree for partition of her 1/2 share in the suit property. Since the suit in Tr.C.S. No. 361 of 2012 is withdrawn by the plaintiff, it is not necessary to answer the issues in Tr.C.S. No. 361 of 2012.

48. In the result, [i] the suit in T.O.S. No. 17 of 2003 filed by the plaintiff/Mr. V. Hanumantha Rao is dismissed. Since the parties are close relatives, they are directed to bear their own costs.

49. Issue No. 2 in Tr.C.S. No. 621 of 2006:

[ii] In the suit filed by the plaintiff/M. Anjana Rani in Tr.C.S. No. 621 of 2006, preliminary decree is passed for her 1/2 share in the suit property. Since the parties are close relatives, they are directed to bear their own costs.

[iii] The suit in Tr.C.S. No. 361 of 2012 filed by the plaintiff/Mr. V. Hanumantha Rao is dismissed as withdrawn. No costs.