

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	12.12.2019
Judgment pronounced on	05.02.2020

CORAM

THE HON'BLE MR. JUSTICE SETHILKUMAR RAMAMOORTHY

T.O.S. No. 40 of 2001

1.Sarojini (died)
2.Sri Rajavelu
(2nd defendant transposed as 2nd plaintiff
vide Order dated 28.03.2018 in
A.No.2474 of 2018) ... Plaintiffs

vs

1.Kamala (dies)
2.Sri Rajavelu
(Transposed from 2nd defendant to
2nd Plaintiff)
3.Smt.Sasirekha
4.Mrs.S.Saraswathi(died)
5.P.Thilagavathy ... Defendants

Prayer: Testamentary Original Suit filed under Sections 222, 276 and 290 of the Indian Succession Act 1925 and Order XXV Rule 4 of the High Court Original Side Rules, to issue Letters of Administration with the Will dated 20.04.1999 annexed may be granted to the Petitioners as son/legatee under the Will of the deceased having effect throughout the

State of Tamil Nadu.

For Plaintiff : Mr.R.Subramanian

For Defendant : Mr.Mr.V.Bhiman for D2 and D3
Mr.V.Raghavachari for
M/s.Sai Raaj Associates for D4 & D5

J U D G M E N T

This testamentary original suit is filed for the grant of letters of administration to the second plaintiff in respect of the Will dated 20 April 1999 of the late M. Subramanian to have effect throughout the State of Tamil Nadu.

2. The first plaintiff, Sarojini, was the second wife of the testator and died during the pendency of the suit. The second plaintiff, Rajavelu, was originally the second defendant and after the death of the first plaintiff, he was transposed as the second plaintiff. The first defendant, Kamala, was the first wife of the testator, who died during the pendency of the suit. The third defendant, Sasirekha, is the sister of the second plaintiff and the daughter of the first plaintiff and the testator. The fourth defendant, S.Saraswathi, was the sister of the first defendant and she was impleaded after the death of the first defendant as her legal representative. She too died during the pendency of the suit. The fifth

defendant, P.Thilagavathy, is the daughter of the fourth defendant and she was impleaded on the death of the fourth defendant as her legal representative. The first plaintiff was examined as PW-1 and nine documents were exhibited through her as Ex. P-1 to P-7 and D-1 to D-2(during cross-examination). The first defendant was examined as DW-1 and six documents were exhibited through her as Ex.D-3 to D-8. The third defendant was examined as DW-2 and 14 documents were exhibited through her as Ex.D-9 to D-23 and C-1.

3. I heard Mr.Subramanian, the learned counsel for the plaintiffs, Mr. Bhiman, the learned counsel for the third defendant and Mr.V. Raghavachari, the learned counsel for the fifth defendant.

4. The learned counsel for the plaintiffs opened his submissions with an overview of the facts of the case. He pointed out that the testator was the husband of the first plaintiff and that he executed a Will on 26 April 1999 (Ex.P-1) bequeathing the property described therein to his son, Rajavelu, who is the second plaintiff herein. In light of the fact that the testator's first wife was alive, he submitted that the first wife was joined as the first respondent in the original petition. The said first respondent/defendant lodged a caveat so as to challenge the Will and, therefore, the petition was converted into a testamentary suit.

5. In order to prove the Will, the learned counsel pointed out that the first plaintiff examined herself as PW-1 and that one of the attesting witnesses, Brinda, was examined as PW-2. The other attesting witness, Sathyanathan, had filed an affidavit in order to prove the Will but died during the pendency of the suit before recording evidence. He further submitted that the execution of the Will had not been denied by the defendants. Instead, the Will was challenged on the ground that it was obtained by undue influence and coercion. Consequently, he contended that the burden of proof, in that regard, was on the contesting defendants and that the said defendants failed to discharge the burden.

6. The next contention of the learned counsel was that the fifth defendant does not have a caveatable interest. In specific, he pointed out that the test to discern if a person has caveatable interest is to ask the question whether the person concerned would have a right to succeed, wholly or partly, to the estate of the deceased in the absence of a Will. If the answer is in the affirmative, the person concerned has caveatable interest; otherwise not. If the said question is raised in respect of the fifth defendant, the obvious answer is that the fifth defendant is not entitled to succeed to the estate of the testator even if he had died intestate because the property would devolve on the legal heirs of the

testator as per Section 15 (2)(b) of the Hindu Succession Act, 1956(HSA), and the fifth defendant does not qualify. Therefore, he submitted that the fifth defendant was joined as a party merely to facilitate carriage of proceedings and that she does not have the right to challenge the Will.

7. As regards attesting witnesses, the learned counsel contended that the law and, in particular, Section 63 of the Indian Succession Act, 1925 (ISA), does not stipulate any qualifications with regard to social or educational or employment status. As long as a person is a major and of sound mind, such person could be a witness. In support of this proposition, he relied upon the judgement of the Division Bench of the Hon'ble Kerala High Court in **Johnson and others v. Annie and another, RFA No.56 of 2011, judgment dated 16.08.2019**, wherein it was held that there is no indication in section 63 of the ISA that the legislature intended to lay down the principle that the attesting witness should have prior knowledge or information regarding the testator. He also submitted that the only requirement is that the testator should have confidence and trust in the person whom he appoints as a witness. In addition, the first defendant did not state anything in her written statement about the credibility of the attesting witnesses and, therefore, neither the fourth nor the fifth defendant can go beyond her statement. For this principle, he relied upon the judgments of the Calcutta High Court

in **Babulal N. Shukla v. Jeshankar N. Shukla, AIR 1972 Cal 494** and **Arijit Mittra v. Goutam Mitter 2008 SCC Online Cal 465**, wherein it was held that the representative of the original defendant cannot raise a defence that had not been raised earlier by the original defendant.

8. He further submitted as follows. Kamala did not initiate any proceedings to claim her share in the property and that it is not open to the fourth and fifth defendant's to make such a claim at this juncture. Kamala was given the terminal benefits of the testator, which is admitted by DW-1. In fact, the fifth defendant's husband took the pension book of the testator from the first plaintiff on 5 August 1999 under Ex.D-18. The status of the first plaintiff as the wife of the deceased cannot be disputed by the fourth and fifth defendant and the most competent person to speak about her status was her husband. In the Will, he referred to the first plaintiff as his wife in more than one place. In her evidence, DW-1 also stated that the testator lived alternately in the houses of the first plaintiff and the first defendant. Exhibit D-16 is the greeting sent by the fifth defendant's husband to the second plaintiff on the occasion of his marriage. The marriage certificate was exhibited as Ex. D-14. DW-2 also filed the birth certificate and school records (Ex. D10-12) to prove that the second plaintiff and herself are the children of the testator. The contention that DW-2 was in the court hall when the evidence of DW 1

and PW 2 was recorded and that, therefore, she is not entitled to adduce evidence is not correct because DW-2 was not examined as a witness by the plaintiff. Eventually, the learned counsel concluded his submissions by stating that, in testamentary matters, the principal issue is with regard to proof of the execution of the Will and not title or marriage. Once execution is proved by examining attesting witnesses, the Will stands proved as held in **Ganesan v. Kalanjiam, 2019 (6) CTC 85** and in the judgment reported in 2019 (5) CTC 125. On the above basis, he prayed that the suit should be decreed.

9. The learned counsel for the third defendant made submissions next. He pointed out that the first plaintiff and the testator had two children, namely, the second plaintiff and the third defendant. For the limited purpose of proving her legitimacy as the daughter of the testator, he submitted that the third defendant examined herself as DW-2. The learned counsel for the third defendant reiterated that the fifth defendant does not have caveatable interest. In this regard, he relied upon section 15 (2) (b) of HSA in order to establish that if the testator had died intestate, the subject matter of bequest would not have devolved on the fifth defendant. In order to establish that the subject matter of bequest was a self acquired property of the testator, he adverted to the allotment letter from the TNHB.

10. The learned counsel for the fifth defendant made submissions to the contrary. His first submission was that bigamy is prohibited and that, therefore, the first plaintiff does not have the status of a wife. As regards the discharge of burden of proof of the Will through the attesting witnesses, he submitted that the evidence of the attesting witness was unreliable. One attesting witness, namely, Sathyanathan, worked in a medical shop and died before he could depose. The other was 21 years old at the relevant point of time and was a friend of the third defendant. By referring to the Will(Ex.P-1), he pointed out that the testator had recorded therein that the first defendant lived with him. By referring to the proof affidavit of PW-1, he pointed out that PW-1 admitted therein that Kamala and the testator resided at No.30, First Cross Street, Ganga Nagar, Kodambakkam, Chennai- 600030, i.e. in the property bequeathed under the Will. He also pointed out that it is stated in the said proof affidavit that the attesting witness, Sathyanathan, resided at 1st Main Road, Anna Nagar, Chennai. Significantly, the learned counsel pointed out that the Will records that it was prepared after consulting his wife, whereas PW-1 stated in her cross-examination that she does not know about Ex.P-1 and when it was prepared. She further stated that she did not accompany the testator at the time of giving instruction for the Will to Krishna Mithra of Eldams Road, Chennai. By referring to the cross

examination of PW-1, the learned counsel submitted that the evidence of the witness that the testator's son left for America in 1998 contradicted the statement in the Will that the testator's son was employed at CBSI, MEPZ, Tambaram, thereby raising doubts and suspicions about the genuineness of the Will.

11. The learned counsel, thereafter, referred to the evidence of the attesting witness, who was examined as PW-2. In particular, he pointed out that PW-2 admitted that there were differences in the signature of the testator in Ex.P-1 and Ex.D-1, namely, the service register of the testator. He also pointed out that the attesting witness did not accompany the testator to the registrar's office and did not remember any details with regard to the ink colour of the pen that was used by her to sign as a witness in the Will. On this aspect, he concluded his submissions by also pointing out that the witness admitted that she had not produced any proof to show that she was associated with the family of the testator.

12. The learned counsel, thereafter, pointed out that the testator owned another property at Anna Nagar and that curiously there is no reference to the said property in the Will. As regards this property, he pointed out that it was conveyed to the first plaintiff and the third defendant under sale deed dated 3 November 2009, a few months after

the death of the first defendant.

13. He turned next to the cross-examination of DW-2. By referring to the said cross-examination, he pointed out that DW-2 pretended that she did not remember going to the sub-registrar's office in connection with the registration of the Anna Nagar property and when she was confronted with Ex.D-7, namely, the sale deed relating thereto, she had to admit that the said document contained her photographs and her signature on each page. He also pointed out that the witness admitted that the seal of the temple authorities was not affixed on the marriage certificate, Ex.C-1. He also pointed out that DW-2 initially stated that the testator's name was reflected in her mother's service register as her husband and, thereafter, admitted that his name is not reflected therein when confronted with Ex.D-2, i.e. the Service Register. He further pointed out that the witness admitted that her mother did not execute a Will in her favour.

14. With regard to the contention that the fifth defendant does not have a caveatable interest, the learned counsel submitted that the first defendant certainly did and that the fifth defendant stepped into the shoes of the said first defendant and, consequently, has a caveatable interest. On the above basis, the learned counsel submitted that the plaintiffs failed to prove the Will as per law and that the circumstances

relating to the alleged execution of the will are suspicious because all the properties are not included and the property in which the first defendant resided has been allegedly bequeathed. In effect, the bequest under the Will is unnatural and there are strong reasons to suspect the evidence of the attesting witness. Hence, the testamentary suit is liable to be dismissed.

15. The learned counsel for the 5th Defendant relied upon several judgments in support of the contention that the Plaintiffs have failed to prove the Will. It is sufficient to refer to a few of them and they are set out below:

(i) **Jarnail Singh and Ors. vs. Bhagwanti (D) thr. L.Rs. and Ors. MANU/SC/1358/2018**, wherein, at paragraphs 17 to 19, the Hon'ble Supreme Court concluded that the evidence shows that there are a number of suspicious circumstances in respect of the Will and that, therefore, the Court would not interfere with the concurrent findings of fact in this regard.

(ii) **N.Govindarajan vs. Leelavathy and others 2011(5) CTC 287**, wherein a Division Bench of this Court held at paragraph 21 that the conscience of the Court should be satisfied not only with regard to the execution and attestation of the Will in accordance with the Indian Succession Act, 1925 but also that the Will was the product of the free

volition of the testator. After advertent to several other judgments, the Court concluded that there were suspicious circumstances surrounding the alleged execution of the Will and therefore refused to interfere with the order dismissing the testamentary suit.

(iii) **B.Venkatamuni vs. C.J.Ayodhya Ram Singh and Ors. MANU/SC/4692/2006**, wherein the Hon'ble Supreme Court held that it is not sufficient to comply with the statutory requirements with regard to the execution and attestation of a Will and that the suspicious circumstances surrounding the Will are significant and should be taken into consideration.

(iv) **Vidyawati vs. Man Mohan and Ors. MANU/SC/0318/1995**, wherein the Hon'ble Supreme Court held that the legal representative of a deceased Respondent is entitled to urge all contentions that the deceased could have urged except those that are personal to the deceased.

16. By way of rejoinder, the learned counsel for the plaintiffs submitted as follows. The fifth defendant is not the legal heir of the first defendant so as to step into her shoes. The Anna Nagar property could not be included in the affidavit of assets because it is not covered by the Will and had not been transferred to the testator when the Will was executed. The marriage was proved by PW-1's evidence and documentary

evidence such as the marriage register. The pension book, Ex.D-18, establishes that pension was received by the first wife. The Will does not state that the son is currently stationed at MEPZ, Tambaram. He reiterated, in conclusion, that there are no requirements under law with regard to the status of attesting witnesses. In this regard, he pointed out that the first defendant did not dispute the status of the witnesses in the written statement and, in particular, paragraphs 7 and 10 thereof. For all these reasons, he reiterated that the suit is liable to be decreed.

17. I considered the submissions of the counsel for the respective parties and examined the records. Upon consideration of the pleadings and documents, this Court framed the following issues.

- (1) Whether the Will dated 26.04.1999 was obtained from the testator by the Plaintiff under coercion and undue influence?
- (2) Whether the Will is valid and enforceable?
- (3) To what relief is the Plaintiff is entitled?

Given the nature of the issues, I do not propose to deal with the issues separately.

18. Before examining the factual aspects, it is pertinent to bear in mind the legal position that the burden of proof with regard to the execution and attestation of the Will is on the propounder of the Will. In

addition, as held in various judgments that were cited by the learned counsel for the 5th Defendant, it is also necessary for the Court to take into consideration the alleged suspicious circumstances pertaining to the Will and decide whether the Will has been proved as per the judicial conscience of the Court.

19. Needless to say, the most important document is the Will and, therefore, I propose to begin by examining the Will. On close examination, the following is discernible from the Will: (i) the Will was executed at No.D-83, Friend's Colony, Anna Nagar, Chennai- 600102; (ii) the testator's wife is described as a person employed as the headmistress of Sri Ramakrishna Mission Sarada Vidyalaya Middle School, T.Nagar, Chennai; (iii) he has one son called Rajavelu and one daughter called S.Sasirekha; (iv) the son is said to be an engineering graduate, who is employed in CBSI, Tambaram, MEPZ; (v) One property at Door No.30, Ganga Street, Kodambakkam, Chennai -600024 is referred to therein and it is stated that it was purchased by the testator in 1964 and that the loans are fully discharged; (vi) there is an explanation as to why no bequest is made for the daughter; (vii) the property is bequeathed entirely to the son; (viii) the first wife is referred to and it is stated that she lives with the testator; and (ix) it is stated that because the wife has her own provisions no special or particular provision is made for her and that she has no children. In addition, the attesting witnesses are M.

Sathiyathan, No.22, Ambedkar Street, Tamilar Nagar, Shenoy Nagar, Chennai-30 and V. Brindha, c/o N. Ramkumar, 18/10, V.O.C. Nagar, Anna Nagar East, Chennai-102.

20. The suspicious circumstances relating to the Will that were cited by the learned counsel for the fifth defendant are: (i) there is a variation in the signature on the Will as compared to that in the service register, which is an admitted document; (ii) the testator's son was in the United States of America when the Will was executed but it is stated therein that he is employed at CBSI, Tambaram, MEPZ; (iii) no provision is made in the Will for the first wife although it is acknowledged that the testator lives with her and, in fact, lived with her in the property that is bequeathed under the Will; (iv) the Will does not deal with or refer to the property at Anna Nagar although a decree for specific performance had been obtained in respect thereof, albeit subject to stay by the appellate court; and (v) the attesting witnesses are not persons with either social standing or a close relationship with the testator and there is a huge age difference between the testator and the second attesting witness. Therefore, it becomes necessary to consider each of these grounds of challenge to the Will.

21. As regards the variation in signature, I examined the

service register closely. I find that the service register was first issued on 31.12.1953 and the signatures in the service register vary over time. Significantly, the signatures in Volume 2 of the service register, which relate to the years 1977 and 1978, more or less match the signature on the Will, which was executed on 26.04.1999. With regard to the statement in the Will that the son was employed at CBSI, Tambaram, MEPZ, whereas he was in the United States of America at the relevant point of time, PW-1 explained that he was on deputation and that he continued to be employed by CBSI, Tambaram, MEPZ. The said explanation is reasonable and I do not see any reason to reject this explanation or to infer that the Will is not genuine for that reason. The fact that no provision was made for the first wife is a relevant consideration but there is an explanation that she has her own provisions and also that she has no children. As regards the Anna Nagar property, it had not been registered in the name of the testator at the relevant point of time and that could possibly be the reason as to why it was not covered in the Will. In any event, the non-inclusion of the said property would not vitiate the Will.

22. With regard to the fact that the attesting witnesses are:

(i) a person who worked in a medical shop; and (ii) a 22 year old girl, I concur with the contention of the learned counsel for the plaintiffs that the

law does not prescribe that the attesting witnesses should have a particular or close relationship with the testator or that they should be persons of a certain social standing. The judgment of the Kerala High Court in **Johnson v. Annie** is squarely applicable in this connection.

23. As regards the evidence of the attesting witness, she categorically stated that she visited the house of the testator at the time of execution of the Will and that it was executed in her presence. Although she admits that there are variations as between the signature of the testator in the Will and that in his service register, I adverted to this variation earlier and for reasons set out above, I do not think that much weight should be attached to the same.

24. The other aspect to be considered is the contention that the property was purchased in the name of the testator from and out of funds provided by the first defendant's father. In support of this contention, oral evidence was adduced by DW-1 but I do not find any documentary evidence. In light of the fact that the property was allotted to the testator by the TNHB under allotment letter dated 4.07.1964 (Ex.D-9) and the statement in the Will that the property was developed by raising a loan and repaying the same, the oral evidence of DW-1 is not credible and I am not inclined to accept the evidence of DW-1.

25. For all the reasons set out above, I conclude that the plaintiffs have proved the Will as per law and are entitled to a decree.

26. In the result, there shall be a decree for the grant of Letters of Administration to the second plaintiff in respect of the last Will and Testament dated 26.04.1999 of the late Mr. M. Subramanian to have effect limited to the State of Tamil Nadu. A bond for a sum of Rs.25,000 shall be executed in the name of the Assistant Registrar, O.S. and the second plaintiff shall file a true and fair inventory and true accounts within six months and one year, respectively, of the date of decree.

.02.2020

Plaintiffs side witnesses:

1.Smt.Sarojini : P.W.1

2.Mrs.V.Brindha : P.W.2

Defendants side witness:

1.Mrs.P.Thilagavathy - D.W.1

2.S.Sasirekha - D.W.2

Documents Exhibited through P.W.1

1.Ex.P1 26.04.1999 Registered Will executed by the husband of the Plaintiff, namely, M.Subramanian

2.Ex.P2 01.08.1999 Death certificate of M.Subramanian

- 3.Ex.P3 12.10.1999 Affidavit signed by Mr.Sathyanathan
4.Ex.P4 12.10.1999 Affidavit signed by Mrs.Brindha
5.Ex.P5 30.10.1999 Consent Affidavit of first Defendant
6.Ex.P6 02.11.1999 Consent Affidavit of second Defendant
7.Ex.P7 - Copy of the service register of M.Subramanian
8.Ex.D1 - The signature of Ex.P1 Will by Mr.Subramanian
(marked during the cross examination of P.W.1)
9.Ex.D2 The signature of the Plaintiff
(marked during the cross examination of P.W.1)

Documents Exhibited through D.W.1

- 1.Ex.D3 16.09.1999 Photo copy of legal Heirship certificate issued in
favour of Mrs.Kamala.
2.Ex.D4 - Photo copy of Pension certificate issued in favour
of Mrs.S.kamala.
3.Ex.D5 25.10.1999 Original letter from the Corporation of Chennai
changing the name in favour of Mrs.S.Kamala, in
respect of the property at No.30(New No.18),
Ggnaga Nagar, Chennai – 34.
4.Ex.D6 - Photo copy of letter from TNEB changing the
Electricity connection in favour of Mrs.S.Kamala.
5.Ex.D7 03.11.2009 Certified copy of the Sale Deed registered as
Document No.4334 of 2009.
6.Ex.D8 24.06.2011 Certified copy of Release Deed registered as
Document No.2209 of 2011.

Documents Exhibited through D.W.2

- 1.Ex.D9 04.07.1964 Original allotment letter by TNHB in the name of
deceased Subramanian.

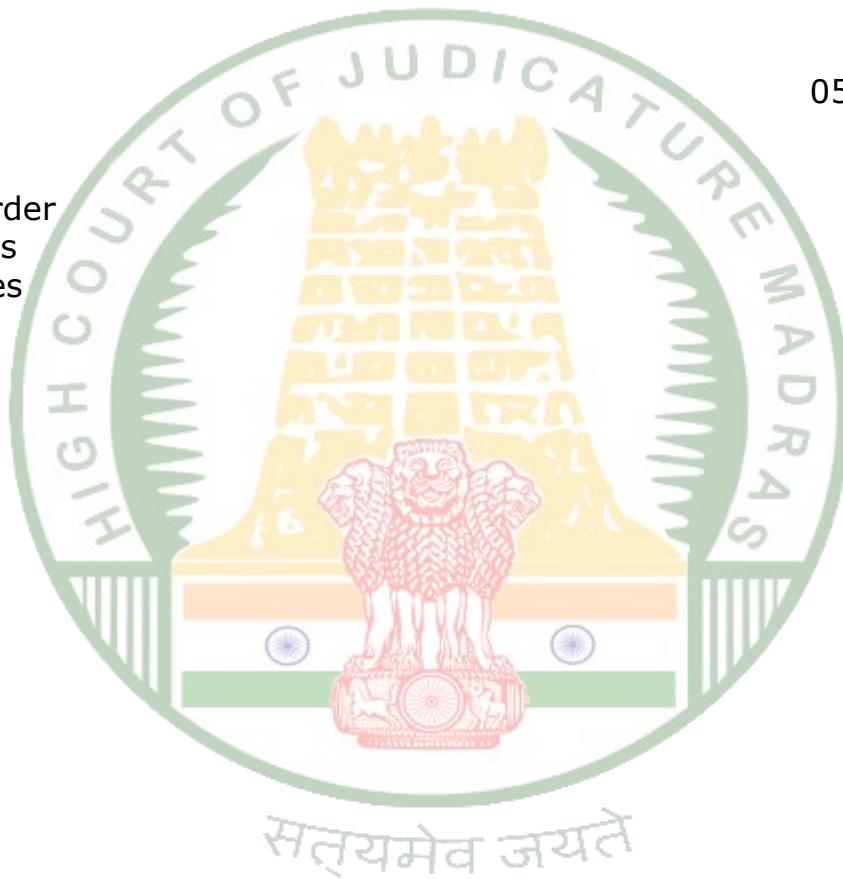
- 2.Ex.D10 24.09.1969 Original Extract of birth certificate of Sasirekha Subramanian issued by the Corporation of Chennai.
- 3.Ex.D11 15.02.1975 Original Extract of birth certificate of Rajavelu Subramanian issued by the Corporation of Chennai.
- 4.Ex.D12 - Original Progress Report SBOA school of Rajavelu XI & XII standard for the year 1990 – 1991.
- 5.Ex.D13 28.01.1994 Original marriage invitation of Sasirekha
- 6.Ex.D14 01.02.1998 Photo copy of marriage invitation of Rajavelu
- 7.Ex.D15 31.01.1998 Original Marriage greeting sent by Dr.Ponnambala Thiagarajan, Principal Dr.Sivanthi Adithanar College of Education.
- 8.Ex.D16 01.02.1998 Original marriage greeting telegram sent by P.Sambasivam.
- 9.Ex.P17 01.08.1999 Original Death certificate of deceased Subramanian who died on 01.08.1999.
- 10.Ex.D18 05.08.1999 Photocopy of receipt of the pension book of M.Subramanian
- 11.Ex.D19 22.11.2001 Original no due certificate dated 22.11.2001 issued by ICICI Bank to Sarojini
- 12.Ex.D20 29.02.2002 The original discharge of loan due certificate from Kavitha Consulancy Services.
- 13.Ex.D21 25.06.2013 Office copy of legal notice issued to Saraswaty.
- 14.Ex.D22 - Copy of photographs(series)
- 15.Ex.D23 09.04.2019 Death Summary of M.Subramanian

Court Documents Exhibited through D.W.2

1.C.W.1 22.11.2018 Marriage Register issued by Sri Gangadareswarar
and connected Temple.

05.02.2020

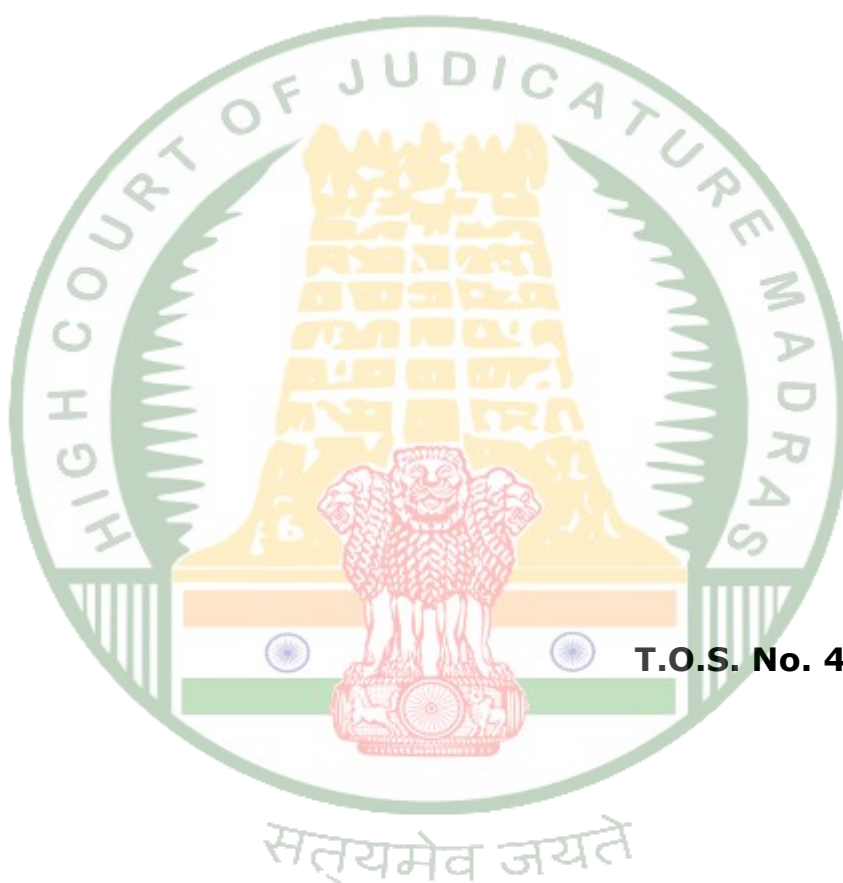
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Index: Yes
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SENTHILKUMAR RAMAMOORTHY, J.

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