



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 14.03.2022

PRONOUNCED ON : 11.04.2022

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THE HONOURABLE MS. JUSTICE R.N.MANJULA

A.S. (MD) No. 79 of 2016

Prabakaran ... Appellant / plaintiff
Vs.

Kumaresan ... Respondent / Defendant

PRAYER: Appeal Suit filed Order 41 Rule 1 & 2 r/w. Section 96 of the Civil Procedure Code, against the judgment and decree dated 18.01.2016 made in O.S. No. 105 of 2014 on the file of the II Additional District Judge, Tiruchirapalli.

For Appellant : Mr.V.V.Sathya
for Mr.M.V.Venkataseshan
For Respondent : Mr.N.Vallinayagam
Senior counsel
for Mr.N.Ponnambalam

J U D G M E N T

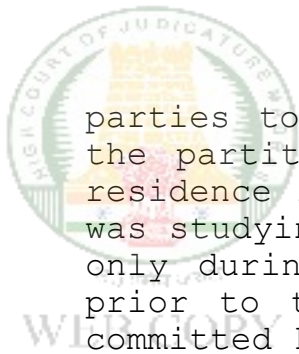
This Appeal has been preferred challenging the Judgment and Decree of the learned II Additional District Judge, Tiruchirapalli, dated 18.01.2016 made in O.S. No. 105 of 2014.

2.The plaintiff is the appellant herein. The plaintiff has filed a suit for partition of suit scheduled properties. The case of the plaintiff is that the plaintiff and defendant are sons of Periyasamy and Iyyammal; the suit property was acquired by the father of the plaintiff namely, Periyasamy; Periyasamy established a Stone Crusher Unit at Kizhakuvadi Village; he also purchased two house plots in the name of mother of the plaintiff Iyyammal on 09.09.1985; the defendant is the elder son of Periyasamy and he got his employment in Madurai and Karur; he never contributed any of his income to the family; Periyasamy died intestate on 14.11.2000 and after his death, the plaintiff, his mother and the defendant became his legal heirs and they divided the entire properties into three shares and prepared a partition chit dated 25.12.2000 to that effect; the plaintiff did not agree to the said partition arrangement; in the partition chit, only the mother of the plaintiff and defendant alone



had affixed their signatures; finally, a registered partition deed has been executed on 20.06.2001; in the said partition deed, "A" Schedule properties were allotted to Iyyammaal, "B" Schedule properties were allotted to the defendant and "C" Schedule properties were allotted to the plaintiff; after partition, each sharer had taken their respective shares and in enjoyment of the same; around the year 2003, the defendant shifted his residence from Thuraiyur to Trichy; during that course, the defendant took his mother Iyyammal along with him; though, she was residing in Trichy, she used to visit the plaintiff, who is residing at Thuraiyur; the defendant wanted to grab the property of his mother and only with that view he took his mother to Trichy under the guise of maintaining her; in the year 2003, the defendant informed his mother that 5 acres in Kudalur Village was lying vacant and that can be divided into plots by getting a layout in the name "Periyasamy Nagar"; under the pretext of making arrangements for dividing plots and getting the approval, he advised his mother Iyyammal to execute a registered Power of Attorney in his favour; Iyyammal consented to execute a power deed; the defendant misused that opportunity and prepared a registered Will in respect of the suit properties and got the signature of Iyyammal; since she was illiterate, she didn't know to write or read; Iyyammal never intended to execute any Will in favour of the defendant alone by disinheriting the plaintiff, who is her younger son; the defendant played fraud on his mother; hence, the Will dated 02.03.2003 is a void one; Iyyammal died intestate on 06.05.2013; the plaintiff came to know recently that the patta for Gudalur property stands in the name of the defendant; only thereafter, he came to know about the fraudulent execution of the Will; the plaintiff issued a legal notice to the defendant on 15.05.2014; he also called upon the defendant to share the properties of the mother into two equal shares; the defendant sent a reply notice containing false and frivolous allegations; since the defendant did not come forward to participate in the partition, the plaintiff has filed a suit for claiming half share in the suit properties.

3.The defendant contested the suit by stating that the plaintiff was only four years at the time of purchase of the property by their father; the Crusher Unit at Thuraiyur was purchased by the father in the year 1976, when the plaintiff was 12 years old; the defendant completed his graduation in the year 1983 and joined duty in the year 1987; because of the ill-health of the father, the defendant resigned his job and was staying with the parents; during first week of November 2000, the plaintiff, defendant and their mother negotiated and arrived at a compromise with regard to the properties; the plaintiff himself handed over the stamp paper for executing the partition chit; even prior to the execution of partition chit dated 25.12.2000, the plaintiff was permitted to enjoy the Crusher Unit individually; the arrangement made by the



parties towards share is identical in both the partition chit and the partition deed; the allegation that the defendant shifted his residence from Thuraiyur to Trichy during 2006 is false and his son was studying in Thuraiyur till 2005; the defendant shifted to Trichy only during 2005; the defendant was living with his parents even prior to the death of the father; no fraud or mis-representation committed by the defendant; it is false to state that the defendant defrauded his mother and got a Will from her on the guise of getting a power deed; as per the Will executed by the mother, the defendant is entitled to the suit property; hence the suit should be dismissed.

4. On the basis of the above pleadings, the learned trial Judge has framed the following issues:

(i) Whether the 3rd item of the suit property was purchased by Periyasamy in the name of Iyyamal?

(ii) Whether the partition deed dated 20.06.2001 is valid and binding on all the parties?

(iii) Whether the Will dated 02.03.2003 is true, valid and enforceable?

(iv) Whether the Will dated 02.03.2003 came into existence as averred in para 7 of the plaint?

(v) Whether the defendant was contributing his income to the family?

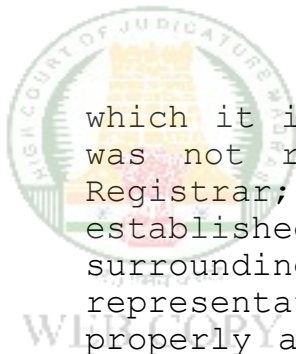
(vi) Whether the plaintiff was permitted to enjoy the crusher unit even prior to 25.12.2000 to derive good income from the said unit?

(vii) Whether the plaintiff is entitled to half share in the suit properties?

(viii) To what relief the plaintiff is entitled for?

5. During the course of trial, on the side of the plaintiff, one witness was examined as PW1 and Exs.A1 to A9 were marked. On the side of the defendant, two witnesses were examined as DW1 and DW2 and Exs.B1 to B3 were marked. On conclusion of the trial, the learned Judge dismissed the suit, aggrieved over the same, the plaintiff has filed the appeal.

6. The learned counsel for the appellant submitted that the learned Judge did not appreciate the suspicious circumstances surrounding the Will; the testator of the Will is an illiterate lady to whom the respondent had mis-represented; the Will was challenged after 10 years of the execution; the execution of the Will was not proved before the Court satisfactorily; DW2 is not a trusted witness, since he is a close friend of the respondent; there is no endorsement in the Will to show that it was read over to the testator and she admitted them to be true; DW2 has not stated that the Will was already prepared and he was not aware of the nature of paper in



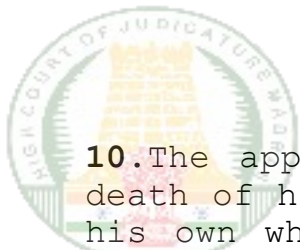
which it is written; this evidence would also reveal that the Will was not read over to the testator in the presence of the Sub Registrar; the respondent as the propounder of the Will has not established the case successfully; the suspicious circumstances surrounding the Will would probabalize the fraud and misrepresentation committed by the respondent; the evidence was not properly appreciated by the learned Judge; hence, the Judgement of the trial Court should be set aside.

7.The learned counsel for the respondent submitted that the Will executed by the mother of the respondent has been proved in the manner known to law; since the appellant / plaintiff was well settled, the mother wanted to bequeath her properties in favour of the respondent / defendant, who had taken care of her till her death; since the Will is a registered one, the Court has to apply the presumption under Section 114 of the Evidence Act; hence it should be presumed that the Will was presented for registration by the executor and excluded in accordance with law; it cannot be true that coercion continued for nearly about 10 years; the evidence of one of the attesting witness would prove the Will; the executor of the Will wanted the properties to be inherited by her elder son, who had resigned his job immediately after his father fell sick and took care of the family; the appellant / defendant being the younger son did not involve himself in any of the family commitments till the life time of the father and he only demanded partition immediately after the death of his father; in the Will itself, the executor has stated the reason as to why he did not bequeath the properties in favour of the defendant; the learned trial Judge perused the evidence on record and dismissed the suit and hence, it does not require any interference.

8.On the basis of the rival submission made by both side counsel, I feel that the following points for consideration are essential in this appeal suit.

- i) Whether the Will dated 02.03.2003 has been executed by the mother of the parties to the suit, knowing pretty well that she had executed the said Will?
- ii) Whether the judgment of the trial Court in dismissing the suit is fair and proper?

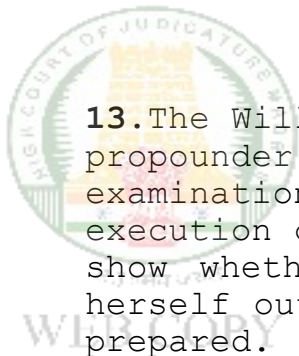
9.The fact that the appellant and the respondent are brothers is not disputed. The suit properties belonged to the father and mother of the parties to the suit. The father of the appellant was having Stone Crusher Unit and doing his business with that. The father of the appellant died intestate on 14.11.2000. Subsequent to his death, the partition had taken place between the appellant, respondent and their mother. Accordingly, they partitioned the properties among themselves and had 1/3rd share each as per the partition deed Ex.A2.



10.The appellant / plaintiff submitted that immediately after the death of his father, the defendant prepared a partition chit as per his own whims and fancies and for which the appellant / plaintiff did not agree. Since he objected to the partition chit, he did not affix his signature in Ex.A1. Subsequently, the partition deed was entered into between the parties. On perusal of Ex.A1, the partition chit, it is seen that it was signed only by the mother of the appellant and the respondent alone have affixed their signatures. The place assigned in the document for the signature of the appellant / plaintiff is seen vacant. While partition deed, Ex.A2 contained only three schedules, Ex.A1-partition chit contained four schedules. It is submitted by the appellant that Ex.A1-partition chit was prepared in accordance with the whims and fancies of the defendant and hence the appellant refused to affix his signature and insisted for a fair partition.

11.After six months, a proper partition deed was executed between the plaintiff, defendant and their mother Iyyammal. Admittedly, the mother of the appellant is an illiterate woman and she had affixed her thumb impression in the partition deed Ex.A2. In Ex.B1 Will also there is an affixture of thumb impression only. Since Iyyammal was an illiterate, Ex.A1-partition chit should have been prepared by the respondent / defendant himself who was living with her.

12.Though, Ex.A1 is not relevant to the issues that has to be settled in this suit, the conduct of the respondent / defendant to allot properties for the sharers of partition according to his whims without consulting his brother is relevant to the allegations made by the appellant. It was submitted that after the father fell ill, the respondent / defendant, who is the elder son had given up his job and came back to his native place for the purpose of taking care of the family. Since the respondent / defendant was working in ELGI Company, the crushing business of the father should have been taken care of by the appellant along with his father. The involvement of the appellant in his father's business is also apparent from the fact that, in the partition deed Ex.A2, the business premises of his father along with the machineries were allotted to his share. Since the business of the father was taken care of by the younger son, the elder son's family seemed to have opted to continue with his earlier employment. The mother of the appellant and the respondent was living along with the respondent till her life time. The alleged Will Ex.B1 is said to have got executed in the year 2003. Since Iyyammal had only two sons and they were already married and living as separate families and the business of her late husband also taken care of by one of the sons, there would not be any joint family commitment.



13.The Will was executed in favour of the respondent/defendant. The propounder of the Will was present at the time of its execution. The examination of one of the witness is sufficient to prove the execution of the Will. But the examination of the attestors does not show whether the recitals for the Will was told by the Executor herself out of her free Will. DW2 has stated that no draft Will is prepared. In that case, whether the Will has already been prepared, there is nothing to show that the contents of the Will was read over to the executant. Though the plaintiff lived separately nothing to show that there was any bitter relationship himself and his mother.

14.The learned counsel for the appellant / plaintiff submitted that the genuineness of the Will is not proved, though the Will is a registered one. The propounder of the Will was present at the time when the Will is said to have been executed. Exclusion of one of the legal heirs from inheriting the property is always a reason for suspicion unless special reasons are proved for the exclusion.

15.The learned counsel for the respondent / defendant submitted that the presence of the propounder during the execution of the Will or exclusion of one of the legal heirs need not be a valid ground for raising suspicion about the Will. In support of his above contention, he invited the attention of this Court to the judgments of the Hon'ble Supreme Court held in **Pentakota Sathyanarayana and others Vs. Pentakota Seetharatnam and others** reported in (2005) 8 SCC 67 and another judgement of this Court held in **M.Shyamsundar Vs. M.Rangaprakash and others** reported in 2011 (2) CTC 846.

16.In **Pentakota Sathyanarayana (2005) 8 SCC 67** it is held as under:

"25.It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in *Sridevi V. Jayaraja Shetty*. In the said case, it has been held that the onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the proof of signature of the testator as required by law would not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue

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influence, fraud or coercion, the onus will be on him



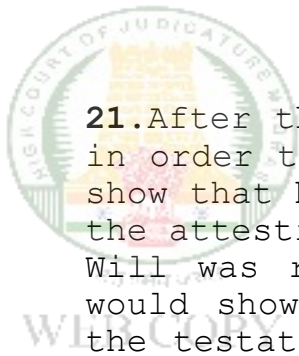
to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case."

17. However, the above observation made in the above case has to be seen in the context of its own facts. In the above case, the Will was a registered one and the registration is made with due endorsements like date, hour, place of presentation of document for registration, the signature of person attesting the execution of the Will and the signature of the identifying person were there. In Ex.B1-Will, only a written endorsement that the document was admitted to be executed is there. In the documents like Will, the executant ought to have understood the contents of the Will and affixed his signature only by understanding and accepting the same. The contents of the Will does not have any such endorsement as to the reading over of the contents to the testatrix her understanding and then her acceptance. Though the presence of the propounder *per se* will not render the Will suspicious, the other circumstances coupled with the presence of the propounder would create clouds of doubt.

18. In whichever context the propounder was present at the time when the Will was executed, the burden to dispel the suspicious circumstances and prove the testamentary capacity of the testatrix by sound understanding would be on him. When the respondent / defendant was examined as DW1, he has stated that after the demise of the father, the brothers intended to conduct his Crusher Business jointly and for which the appellant / plaintiff did not agree; because of that, there was a misunderstanding between himself and his brother.

19. He further stated that in view of that, the defendant and his mother stood on one side and his brother stood on the other side. Even when the father was alive, the respondent / defendant was having some other avocation, he did not manage the business of the father. Even in the partition deed, the business premises was allotted to the share of the plaintiff and about which, there is no dispute. The evidence on record would show that both the brothers were pursuing their own choice of occupation and there was no confusion in the Crusher Business.

20. The mother Iyyammal was an illiterate woman who only knew to affix her thumb impression. Under such circumstances, it would not be possible for her to write the contents of the Will on her own. Though the help of the scribe is needed for preparing the Will in the form which is fit for registration, the draft of the Will ought to have been prepared in the presence of testatrix and in accordance with the inputs given by her.



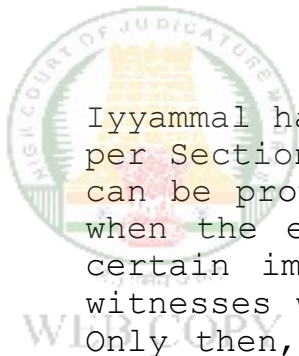
21.After the completion of the draft, it should be read over to her in order to get her informed consent. But the evidence of DW1 would show that he did not remember whether the draft was prepared. One of the attesting witnesses who was examined as DW2 would state that the Will was ready when he went for attestation. The evidence of DW2 would show that the Will was not prepared during his presence and the testatrix was brought by the defendant himself and he was near her at the time when the Will was executed. For an illiterate woman like the testatrix, it is not possible to dictate the contents of the Will in one flow and make it a pucca document for registration. Since the defendant - DW1 has stated that he was not aware of the preparation of the draft and when DW2 states that the draft was not prepared in his presence, it is essential that the scribe of the document ought to have been examined with regard to the fact whether he prepared the Will with the averments stated by the testatrix herself. The defendant has stated in his evidence that even before one week of registering the Will, the scribe came to his house to whom the testatrix gave instructions. In normal circumstances, a draft would have been prepared on the said date itself.

22.The specific contention of the appellant is that the defendant had duped his mother by stating that she needed to put her signature for getting plot approval. He managed to obtain the signature in the Will. In such circumstances, even though Ex.B1 is a registered Will, the burden would be on the defendant to prove beyond suspicion that Ex.B1-Will was executed by his mother knowingly and voluntarily.

23.The defendant has stated that his mother was not happy with the plaintiff since he was living away from her and she did not want the plaintiff to inherit the property. Though the exclusion of one of the legal heirs from inheriting the property cannot be the sole ground for suspicion, it has to be proved that the testatrix intended to exclude one of her sons and wantonly executed the Will in favour of her other son.

24.From the facts of the case in ***M.Shyamsundar Vs. M.Rangaprakash and others***, reported in **2011 (2) CTC 846**, it is seen that in the Will itself, there were recitals about her dislike towards his other legal heirs and that was obviously the reason for excluding him from inheriting the property.

25.In the case in hand, there is no recital evidencing any hatred, the testatrix had towards the plaintiff. There is no good reason stated in the Will why one of her sons should be excluded from inheriting the property. Though it is stated by the respondent that his mother wanted to compensate the lack of income suffered by the respondent, the recitals of the Will would read that both the sons of the testatrix are well settled with their respective family. DW2 attester also did not state anything about the hatred if any, the testatrix had towards the plaintiff. In fact, DW2 has stated that



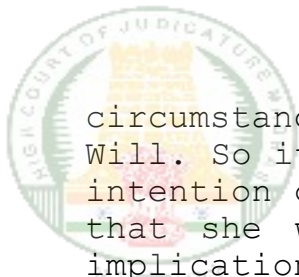
Iyyammal had same amount of love towards both of her sons. Though as per Section 68 of the Indian Evidence Act, the execution of the Will can be proved by examining at least one of the attesting witnesses, when the evidence of the attesting witness does not clarify about certain important aspects of the Will, then the scribe and other witnesses who can speak about the same ought to have been examined. Only then, the onus of the propounder of the Will could have been satisfactorily discharged with reference to the genuineness of the Will.

26. In this context, it is relevant to refer to the decision of the Honourable Supreme Court rendered in the case of **K. Laxmanan Vs. Thekkayil Padmini** reported in **2008 (6) CTC 92**. In the said judgment, it is held as under:

"20. Strong reliance was placed on this provision also by the learned counsel appearing for the parties. A bare reading of the aforesaid provision will make it crystal clear that so far as a Deed of Will is concerned, the position in law is no longer in doubt for the onus of proving the Will is on the propounder. The propounder has to prove the legality of the execution and genuineness of the said Will by proving absence of suspicious circumstances surrounding the said Will and also by proving the testamentary capacity and the signature of the testator. Once the same is proved, it could be said that the propounder has discharged the onus.

21. When there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. The aforesaid view is taken by us in consonance with the decision of this Court in Shashi Kumar Banerjee v. Subodh Kumar Banerjee [AIR 1964 SC 529] and Pushpavathi v. Chandraraja Kadamba [(1973) 3 SCC 291].

27. Though it is true that the exclusion of one of the legal heirs in the Will alone may not be suspicious circumstances, there are other



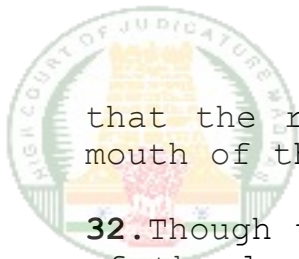
circumstances as detailed above and that would cause cloud on Ex.B1-Will. So it is obligatory on the part of the respondent to prove the intention of the testatrix in affixing her signature on the Will and that she was fully aware of the nature of the document and its implication on the disposition of her properties.

28.The attesting witness - DW2 himself has stated that the Will was not read in the presence of the sub-Registrar to the testatrix. In such circumstances, the endorsement as to the admission of the execution made in Ex.B1 would only show that the testatrix had mechanically made her thumb impression in the place shown to her. There is no explicit recitals in the Will to show that the testatrix had any bitterness with the appellant. There is no reason to exclude one of her son from doing her last rites, However there is a recital in the Will that the appellant should not do any last rites to the testatrix and the respondent alone should do them.

29.No witness has been examined on the side of the respondent to show that his mother had any strong bitter feeling towards the other son - appellant. DW2 does not even know who had told the contents for the Will. The evidence on record does not show that at any point of time before the execution, the contents of the Will were read over to the testatrix and she had affixed her thumb impression after understanding and accepting the same.

30.The respondent / defendant has studied upto MBA. Even during the initial days, he was employed in ELGI. So he would not have depended on the Crusher Business, which started and carried on by his father with his younger brother. Obviously, for this reason during the partition the business premises was allotted to the younger brother, namely, plaintiff. So the reason stated by the respondent / defendant that his mother intended to execute the Will in his favour because he had no other income can not be acceptable.

31.The specific allegation of the appellant is that no draft has been prepared before registering the Will and that has been proved from the evidence of the respondent himself. So this would show that the Will is the handwork of the respondent. The doubts surrounding the Will would probabalize that the testatrix should have affixed her thumb impression on the presumption that she was facilitating her son by signing in some documents relevant to get the approval for layout. DW1 has stated in his evidence that even the Sub Registrar did not read the contents of the Will to his mother. These facts would only confirm that Ex.B1-Will could not have got executed with the complete willingness and the understanding of the testatrix. In the above background of facts, the exclusion of one son from inheritance would only intensify the doubt about the Will. The omission to prepare a draft for a Will alleged to have been executed by an illiterate person like testatrix would itself show



that the recitals of the Will were not dictated from the mind and mouth of the testatrix.

32. Though the active role of the propounder and the exclusion of one of the legal heirs from the inheritance themselves cannot render a Will suspicious, they will intensify the doubt when other circumstances for the doubtful nature of the Will are established. Since the appreciation of the facts and circumstances of the case was not properly done by the trial Judge and that had impacted the result of the case, I feel that the judgment of the trial Court warrants interference. **Thus point No.1 answered in favour of the appellant.**

33. Since the plaintiff being one of the sons of the deceased mother, he is entitled to $\frac{1}{2}$ share in the properties of his mother along with his brother, the defendant herein. **Thus point No.2 is answered.** In the result, this Appeal Suit is allowed and the judgment and decree in O.S. No. 105 of 2014 on the file of II Additional District Court is set aside and the suit is decreed and there shall be a preliminary decree for partition in respect of the $\frac{1}{2}$ share of the plaintiff in the suit properties.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

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To

The II Additional District Judge,
Tiruchirapalli.

COPY TO:-

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.M.V. VENKATASESHAN, Advocate (SR-17820[F]
dated 11/04/2022)

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dated 12/04/2022)

**JUDGMENT MADE IN
A.S. (MD) No. 79 of 2016
11.04.2022**

KMK (CO)

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