

A.S(MD)Nos.42 of 2014 and 149 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 26.09.2024

CORAM:

**THE HONOURABLE MR.JUSTICE P.VELMURUGAN
AND
THE HON'BLE MR.JUSTICE K.K.RAMAKRISHNAN**

**A.S.(MD)Nos.42 and 149 of 2014
and
CMP(MD)Nos.1 and 1 of 2014**

A.S(MD)Nos.42 of 2014:

Srinivasachari

.. Appellant /1st Defendant

Vs.

1.Varalakshmi

Jayalakshmi (Died)

2.Dhanalakshmi (Died)

Keshavachari (Died)

3.Jayaraman (Died)

4. Jayaprakash(Died)

5.Jayapriya

6.Chandrleka

.. Respondents 2 to 8/
Defendants 2 to 6

7.M.Vijayalakshmi

8.K.M.Karthikeyan

9.Kavitha

10.Minor Harish Kannan

.. Respondents



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[Minor R10 is represented by his mother / natural guardian Kavitha viz., 9th respondent herein]

[R7 and R8 are brought on record as LR's of the deceased 2nd respondent vide Court order dated 10.11.2022 made in CMP(MD)Nos. 10533, 10536, 10538 and 10539 of 2022 in AS(MD)No.42 of 2014 by MSRJ & NAVJJ]

[R9 and R10 are brought on record as LR's of the deceased 4th respondent vide Court order dated 10.11.2022 made in CMP(MD)Nos. 10533, 10536, 10538 and 10539 of 2022 in AS(MD)No.42 of 2014 by MSRJ & NAVJJ]

[Memo dated 03.11.2022 (Filed on 04.11.2022) in USR No.31211 is recorded as 3rd respondent died, and the respondents 4 and 5 who are already on record are recorded as LR's of the deceased 3rd respondent vide Court order dated 10.11.2022 made in AS(MD)No.42 of 2014 by MSRJ & NAVJJ]

PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code, against the judgment and decree dated 31.01.2024, passed in O.S.No.140 of 2008 on the file of the III-Additional District Judge, Tiruchirappalli.

For Appellant : Mrs.AL.Gandhimathi
Senior Counsel
for Mr.C.Mahadevan

For Respondents : Mr.H.Lakshmi Shankar for R1
: R2 to R4- Died
: No appearance for R5 to R6
: No appearance for R7 & R8
: Mr.D.Kirubakaran for R9 & R10



A.S(MD)Nos.42 of 2014 and 149 of 2014

A.S(MD)Nos.149 of 2014:

Varalakshmi

.. Appellant / Plaintiff

Vs.

1.Srinivasachari

.. 1st Respondent/ 1st Defendant

Jayalakshmi (Died)

2.Dhanalakshmi (Died)

Keshavachari (Died)

3.Jayaraman (Died)

4. Jayaprakash(Died)

5.Jayapriya

6.Chandrakeka

.. Respondents 2 to 6/
Defendants 2 to 6

7.M.Vijayalakshmi

8.K.M.Karthikeyan

9.Kavitha

10.Minor Harish Kannan

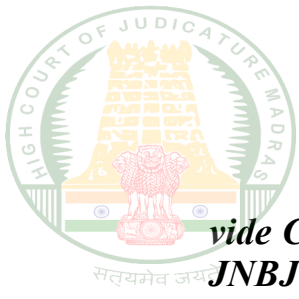
.. Respondents

[Minor R10 is represented by his mother / natural guardian Kavitha viz., 9th respondent herein]

[R7 and R8 are brought on record as LR's of the deceased 2nd respondent vide Court order dated 13.10.2022 made in CMP(MD)Nos. 9515, 9517, and 9519 of 2022 in AS(MD)No.149 of 2014 by JNBJ & NAVJJ]

[R9 is brought on record as LR of the deceased 4th respondent vide Court order dated 13.10.2022 made in CMP(MD)Nos.9522, 9523 & 9524 of 2022 in AS(MD)No.149 of 2014 by JNBJ & NAVJJ]

[Memo dated 08.10.2022 (Filed on 12.10.2022) in USR No.28545 is recorded as 3rd respondent died, and the respondents 4 and 5 who are already on record are recorded as LR's of the deceased 3rd respondent]



vide Court order dated 13.10.2022 made in AS(MD)No.149 of 2014 by JNBJ & NAVJJ

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[R10 is brought on record as LR of the deceased 4th respondent vide Court order dated 14.03.2024 made in CMP(MD)Nos.2992 of 2024 in AS(MD)No.149 of 2014 by VBSJ & KKRKJJ]

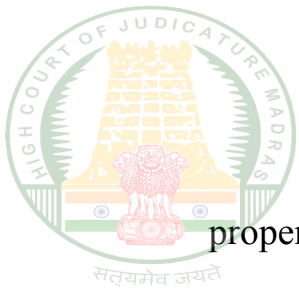
PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code, against the judgment and decree dated 31.01.2024, passed in O.S.No.140 of 2008 on the file of the III-Additional District Judge, Tiruchirappalli.

For Appellant	: Mr.H.Lakshmi Shankar
For Respondents	: Mr.Mrs.AL.Gandhimathi Senior Counsel for Mr.C.Mahadevan for R1
	:Mr.D.Kirubakaran for R9
	: No appearance for R5, R6, R7 & R8
	: R2 to R4- Died

COMMON JUDGMENT

(Judgment of the Court was made by **P.VELMURUGAN, J.**)

The plaintiff filed a suit for partition in O.S.No.140 of 2008, on the file of the III-Additional District Court, Trichirappalli, claiming 6/20 share in A-Schedule properties and 1/5 share in the B-Schedule



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properties. A-Schedule Properties are immovable properties and B-Schedule properties are movable properties.

2. After trial, the trial Court passed preliminary decree by allowing 1/4th share in the A-Schedule properties and the suit was dismissed regarding the B-Schedule properties. Challenging the said judgment and decree passed by the trial Court, the plaintiff filed an appeal in A.S.(MD)No.149 of 2014 and the first defendant filed a separate appeal in A.S.(MD)No.42 of 2014. Since both the appeals are arising out of the same judgment in O.S.No.140 of 2008 on the file of the learned III-Additional District Judge, Trichirappalli dated 31.01.2014, both these appeals are heard together and disposed of by way of this Common Judgment.

3. For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

4. The case of the plaintiff as per the plaint filed by the plaintiff before the trial Court is that the suit properties and some other properties are originally allotted to the father of the plaintiff one Rengachari under a registered partition deed dated 26.03.1967 in which the share of



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Rengachari was described as A-Schedule properties. Thereafter

Rengachari enjoyed the said properties along with his wife and children.

On 27.03.1968, the 4th defendant/one of his sons, namely, Kesavachari, relinquished his right over the above said properties under a registered release deed. Thereafter, on 10.09.1993, Rengachari died intestate leaving behind his wife Neelavathy, another son namely, Srinivasachari and three other daughters namely, the plaintiff and the defendants 2 and 3. The plaintiff and defendants 2 and 3 with their mother Neelavathy entered into a partition vide registered partition deed dated 13.03.1995. Thereafter, the suit properties were jointly allotted in favour of the plaintiff, defendants 1 & 2 and their mother. Their shares have been described as A-Schedule properties. B-Schedule properties in the above said partition was allotted in favour of the 3rd defendant. Subsequently on 22.03.1995, the 5th item of the A-Schedule was jointly sold by the plaintiff, defendants 1 & 2 and their mother Neelavathy in favour of one Sangilimuthu. So, except the 5th item of the A-Schedule properties, other items were jointly enjoyed by them. Therefore, the plaintiff is entitled to 1/4th share over the A-Schedule properties. The defendants 1 & 2 and mother Neelavathy are entitled to 1/4th share each, over the A-Schedule properties. Subsequently, on 08.09.2007, their mother Neelavathy died intestate leaving behind the plaintiff and the defendants 1 & 2. Thus the



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plaintiff and the defendants 1 & 2 are equally entitled to get their 1/4 share each, in the A-Schedule properties. Therefore, the plaintiff and the defendants 1 & 2 are entitled to 6/20 share each and 3rd and 4th defendants are entitled to 1/20 share each. Mother Neelavathy wore gold and diamond jewels during her life time. All the jewels of their mother are in the custody of the first defendant. The said jewels are described as B-Schedule properties in the suit and therefore, the plaintiff and the defendants 1 to 4 are entitled to ¼ share in the B-Schedule properties. The plaintiff sent a legal notice on 13.05.2008. The first defendant sent a false reply through his advocate on 27.06.2008 and claiming that the first defendant sold the item Nos.7, 8 and 9 of the A-Schedule properties on the strength of Power of Attorney executed by the plaintiff and therefore, the plaintiff was constrained to file a suit for partition.

5. The brief facts of the first defendant as per the written statement filed by him before the Trial Court is as follows:

5.1. It is an admitted fact that the 4th defendant had relinquished his right under registered release deed dated 27.03.1968 in respect of the properties allotted to Rengachari under the partition deed dated 26.03.1967. It is further admitted that Rengachari died on 10.09.1993



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leaving behind his wife Neelavathy, Srinivasachari, plaintiff, defendants 2 and 3 as his legal heirs to succeed to his Estate. The plaintiff and the defendants 2 and 3 had executed a registered general Power of Attorney dated 10.06.2002 in favour of the first defendant and based on the said Power of Attorney, the first defendant sold item Nos.7, 8 and 9 of the A-Schedule properties in favour of the third parties. Therefore, the plaintiff is not entitled to get any share in the item Nos.7, 8 and 9 of the A-Schedule properties. The plaintiff concealed the fact that their mother Neelavathy executed a registered Will in favour of the first defendant on 03.09.2007 in a sound and disposing state of mind in respect of her 1/4th share in items 1 to 6 of the A-Schedule properties. Hence, based on the Will, the plaintiff is not entitled to 1/4th share of item Nos.1 to 6 in the A-Schedule properties. The jewels mentioned in the B-Schedule properties never existed at all and the said Neelavathy never owned or possessed any of the jewels as mentioned in the B-Schedule properties. Based on an oral partition entered in the first week of November 2007 in respect of the remaining properties in the A-Schedule properties, an extent of 850 sq.ft in item No.2 of the A-Schedule properties were allotted to the plaintiff. Right from the said oral partition, the plaintiff is in exclusive possession and enjoyment of the property allotted to her. Hence, the plaintiff is not entitled to any share in the suit properties. Further, the



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plaintiff had concealed and suppressed these facts and has filed the present suit. There is no cause of action and therefore, the suit is liable to be dismissed with exemplary cost. The first defendant also filed the additional written statement under Order 8 Rule 9 in which he also reiterated all the averments made in the original written statement. In addition to that, he has stated that the mother Neelavathy executed an unregistered Will in favour of the first defendant in sound disposing state of mind in respect of 1/4th share in item Nos.1 to 6 of A-Schedule properties. The said unregistered Will includes item No.10 of the suit properties now included in the suit and partition filed by the plaintiff and he denied the share of the plaintiff.

6. Based on the pleadings, the Trial Court framed the following issues:

1. Whether the plaintiff is entitled to preliminary decree for 6/20 shares in A-Schedule suit properties?
2. Whether the plaintiff and the second defendant have executed a general Power of Attorney in favour of the first defendant with regard to item Nos.7, 8 and 9 of the A-Schedule properties?
3. Whether the Will executed by Neelavathy on 03.09.2007 in favour of the 1st defendant is true, valid and genuine?



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7. After completing the framing of the issues, during the trial, in order to substantiate the cases of the parties, on the side of the plaintiff, the plaintiff examined himself as PW1 and seven documents were marked as Ex.A1 to Ex.A7. On the side of the defendants, two witnesses were examined. The first defendant examined himself as DW1 and the attester to the alleged Will was examined as DW2 and five documents were marked as Ex.B1 to Ex.B5.

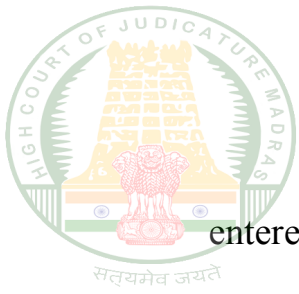
8. After the trial and hearing of the arguments advanced by the parties, the Trial Court decreed the suit in part and granted 1/4th share in respect of A-Schedule properties except item Nos.7,8 & 9 and as far as the B-Schedule properties are concerned, the suit was dismissed. Therefore as stated above, the plaintiff and the first defendant have filed the present appeals separately.

9. The learned counsel for the plaintiff would submit that the suit properties and some other properties were originally allotted to the father of the plaintiff one Rengachari under a registered partition deed dated 26.03.1967 in which the share of Rengachari was described as A-Schedule properties. Thereafter Rengachari enjoyed the said properties



along with his wife and children. On 27.03.1968, the 4th defendant/one of his sons, namely, Kesavachari, relinquished his right over the above said properties under a registered relinquish deed. Thereafter, the suit properties and other properties were jointly allotted to the plaintiff, defendants 1 and 2 and their mother Neelavathy. The B-Schedule properties were separately allotted to the 3rd defendant in the said partition. Thereafter, on 23.02.1995, the 5th item of the A-Schedule properties was jointly sold by the plaintiff, Neelavathi, and defendants 1 & 2 to a third party one Sangilimuthu. Thereafter, their mother Neelavathy died on 08.09.2007 leaving behind the plaintiff and defendants 1 to 4. After the death of the mother her 1/4th share devolved upon the plaintiff and the defendants 1 to 4 and they are entitled to 1/4th share in their mother's 1/4th share. Since their mother executed an unregistered Will in favour of the first defendant, the first defendant is entitled to the larger extent and there is no existence of B-Schedule properties and therefore, the suit is liable to be dismissed.

10. The plaintiff and the second defendant executed a Power of Attorney in favour of the first defendant and the first defendant sold the property in item Nos.7, 8 and 9 of the A-Schedule properties. Further he would submit that the Trial Court failed to consider the oral partition



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entered into between the parties in the first week of November, 2007 through which an extent of 850 sq.ft in item No.2 of the A-Schedule properties was allotted to the share of the plaintiff and the A-Schedule property was originally allotted in favour of the plaintiff and defendants and later the plaintiff and the second defendant had executed a general Power of Attorney in favour of the 1st defendant through which item Nos. 7, 8 and 9 of the suit properties were already sold and the remaining properties were already partitioned in the year 2007 itself.

11. The plaintiff denied that their mother Neelavathy had never executed a Will in favour of the first defendant. When the mental capacity of the testator is in question, the evidence needs to be clear and specific in respect of the testator's sound disposing state of mind and also that the Will was made voluntary by the testator and the document must reflect the true intentions of the deceased person. The Trial Court has committed an error in concluding that there are no suspicious circumstances surrounding the Will. Without properly considering the entire evidence on record with regard to the execution of Ex.B5-Will, the Trial Court has completely ignored and misread the very purpose of Ex.A7-Medical Records of the mother and committed an error in analyzing the relevant things in Ex.A7. The testator was inpatient in the



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hospital from 01.09.2007 to 06.09.2007 as per Ex.A7, which clearly creates a doubt about the genuineness and due execution of the Will on 03.09.2007. It is not the case of the first defendant that his mother executed a Will while she was in the hospital. On the other hand, the first defendant/ Srinivasachari as DW1-says that the Will was executed in the house and the only person allowed to have been present with their mother is the second defendant, who has not attested in the Will and none of the family members have witnessed the execution of the Will by their aged and ailing mother. The Trial Court has completely ignored various suspicious circumstances, which arise from the evidence on record. The evidence of DW2 does not support the case of the first defendant and not proved the due execution of the Will. Though pleadings and sufficient materials are available, the Trial Court has failed to decree the suit with regard to item Nos.1 to 6 and 10 in accordance with the relief sought for in the plaint. Therefore, the plaintiff has filed the present appeal in A.S(MD)No.149 of 2014.

12. The case of the first defendant reads as follows:

12.1. The learned counsel for the first defendant would submit that admittedly, the 4th defendant relinquished his right under a registered release deed dated 27.03.1968, while his father was alive. Therefore,



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after the death of their father Rengachari, the plaintiff and defendants 1 to 3 and their mother became entitled to the properties of Rengachari.

Thereafter, the third defendant also got her share through the partition between the plaintiff and the defendants 1 & 2 and their mother. Therefore, the third defendant is also not entitled to the share in the suit property. The plaintiff along with the second defendant executed a Power of Attorney in favour of the first defendant, based on which they sold the property in item Nos.7, 8 and 9 to third parties. Therefore, item Nos.7, 8 and 9 are not available for partition. However, the above said items have been wrongly impleaded in the suit. Subsequently, the plaintiff and the defendants 2 & 3 by way of an oral partition, divided the properties. The plaintiff has been in exclusive possession and enjoyment of the properties that were allotted to her. Further, as far as the share of the mother is concerned, she had executed a Will in favour of the first defendant. Therefore, as per the Will, the plaintiff is not entitled to any share from the mother's share and there is no jewels existing as on the date of filing of the suit or the date of death of the mother. Therefore, the plaintiff is not entitled to any share in the B-Schedule properties. The plaintiff is entitled to 1/4th share in item Nos.1 to 6 alone and not entitled to any other suit property. The learned Trial Judge accepted the relationship, the execution of Power of Attorney and the sales with regard to item Nos.7, 8



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and 9 and also accepted the Will. However, the learned Trial Judge failed to consider the fact that there was already a oral partition between the plaintiff and the defendants 1 & 2 in the first week of November 2007 and based on the said oral partition, an extent of 850 sq.ft in item No.2 of the A-Schedule properties was allotted to the share of the plaintiff. Therefore, the plaintiff is not entitled to any partition. Subsequent to the oral partition between the parties, the plaintiff has been in exclusive possession and enjoyment of the property allotted to her. The conduct of the parties shows that the plaintiff suppressed several facts and has not come to the Court with clean hands and hence, the suit ought to have been dismissed in entirety. Therefore, the first defendant has filed the present appeal in A.S.(MD)No.42 of 2014.

13. Admittedly, one Rengachari is the original owner of the suit properties who got the suit A-Schedule properties and other properties under a registered partition deed dated 26.03.1967 entered between Rengachari and his brother. Further, it is the admitted case of the parties that the 4th defendant relinquished his right over the property and executed a registered relinquish deed on 27.03.1968. Admittedly, Rengachari died on 10.09.1993 leaving behind his wife Neelavathy, the plaintiff and the defendants 1 to 4. After the death of Rengachari, since



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the 4th defendant had already executed a relinquish deed, he is not entitled to any share in the properties left by Rengachari. Thereafter, on 13.03.1995, a partition was entered between the third defendant as one party and the plaintiff, the defendants 2 & 3 and their mother Neelavathy as another party, and the same was also registered. In the said partition, A-Schedule was allotted to the plaintiff's party and B-Schedule was allotted to the third defendant. Thereafter, mother Neelavathy, the plaintiff and the second defendant had jointly executed a registered general Power of Attorney dated 10.06.2002 in favour of the first defendant. Based on the Power of Attorney, the first defendant sold the item Nos.7, 8 and 9 of the A-Schedule properties. Therefore, the item Nos.1 to 6 and 10 are the available A-Schedule properties for partition. The trial Court did not believe the existence of B-Schedule properties of the suit and dismissed the suit as against the B-Schedule properties. Both the parties accepted the Power of Attorney and also the sales of item Nos.7, 8 and 9 in the A-Schedule properties.

14. Now from the reading of the entire materials and the grounds of appeal filed by both the plaintiff and the first defendant in their respective appeals and also from the arguments advanced by the counsel on both sides, the points that arise in this appeal are as follows:



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1. Whether the plaintiff is entitled to 6/20 share in item Nos.1 to 6 and 10 of the A-Schedule property?

2. Whether as held by the Trial Court, the plaintiff is entitled to 1/4th share alone in item Nos.1 to 6 and 10 of the A-Schedule property? and,

3. Whether the first defendant has proved the Will alleged to have been executed by her mother Neelavathy in sound disposing state of mind?

15. The specific case of the plaintiff is that the plaintiff and the defendants 1 to 4 are the sons and daughters of one Rengachari. They derived the property from the said Rengachari. A partition deed was entered between the plaintiff and the defendants 1 and 2 along with their mother as one party and the third defendant as the second party, vide a registered partition deed dated 13.03.1995. In the said partition, A-Schedule properties were allotted to the first party, namely, the plaintiff's party and B-Schedule properties were allotted to the second party, namely, the third defendant. Therefore, the plaintiff, defendants 1 & 2 and their mother are equally entitled to 1/4th share. Thereafter, their mother Neelavathy died leaving behind the plaintiff and the defendants 1 to 4 and therefore, the mother's 1/4th share would go to the plaintiff and



the defendants 1 to 4. Hence, the plaintiff and the defendants 1 and 2 are entitled to 6/20 share in A-Schedule properties which are immovable properties and they got right from Ex.A2-the registered partition deed dated 13.03.1995 and the defendants 3 and 4 are entitled to 1/20 share from the mother's share and since B-Schedule properties are movable properties, all the parties, ie., plaintiffs and the defendants 1 to 4 are each entitled to $\frac{1}{4}$ share in the B-Schedule properties.

16. The specific case of the first defendant is that since the plaintiff and the defendants 1 and 2 along with their mother Neelavathy got the A-Schedule properties under a registered partition deed dated 13.03.1995, they sold the item Nos.7, 8 and 9 of the A-Schedule properties. Further, through an oral partition entered between the plaintiff and the defendants 1 to 3 along with their mother, the second item of A-Schedule properties was allotted to the plaintiff. Further, during the lifetime of their mother, she had executed an unregistered Will in respect of her $\frac{1}{4}$ share in favour of the first defendant. Therefore, the plaintiff is not entitled to any share and hence, the suit filed for partition is not maintainable even if it is assumed that the plaintiff is entitled to $\frac{1}{4}$ share in item Nos.1, 3 to 6 alone and not from the other properties.



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17. Therefore, from the oral and documentary evidence, Ex.A2-partition deed dated 13.03.1995 was not in dispute. The plaintiff, the defendants 1 & 2 and their mother were entitled to $\frac{1}{4}$ share was also not in dispute. The dispute is that according to the plaintiff, she is entitled to $\frac{6}{20}$ share. At the same time, according to the first defendant, since already an oral partition and their mother also executed an unregistered Will, she is not entitled for any partition even assuming that excluding the item Nos.1, 3 to 6 are liable for partition and entitled to only $\frac{1}{4}$ share. The release deed dated 27.03.1968-Ex.B1 said to have been executed by the 4th defendant in favour of his father while he was alive is not in dispute. During the cross examination, the plaintiff had admitted the execution of the general Power of Attorney dated 10.06.2022 executed by the plaintiff and the second defendant along with their mother which was marked as Ex.B2. Based on the said Power of Attorney, they sold the item Nos.7, 8 and 9 of the A-Schedule properties and the said sale deeds were marked as Ex.B3 and Ex.B4.

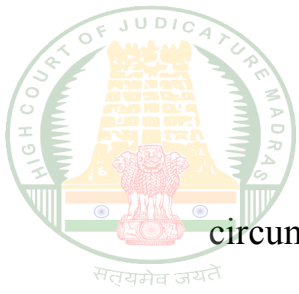
18. Therefore, from the oral and documentary evidence, it is clear that the items 7, 8 and 9 of the A-Schedule properties are not available for partition. As far as the oral partition is concerned, though the first



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defendant pleaded oral partition, he has not produced any materials to show that there was an oral partition. The first defendant has stated that mother Neelavathy had executed a Will in favour of the first defendant in respect of her $\frac{1}{4}$ share. In this regard, before the trial Court, he examined himself as DW1 and one attester to the Will was examined as DW2. Since DW1 is the propounder of the Will and DW2 is the attester who has stated that the Will was executed by Neelavathy, mother of the first defendant and he had attested the document. However, the execution of the said Will was denied by the plaintiff. Therefore, it is for the first defendant, who has to prove the Will. Therefore, before arriving at the proposition of share, the Court has to see as to whether the Will said to have been executed by the mother is genuine and whether the first defendant has proved the Will.

19. The law is well settled that the conscience of the Court has to be satisfied by the propounder of the Will that the Will in question has been executed and attested in the manner required under the Indian Succession Act. The Will is executed altering the mode of Succession. In other words, if a person wants his properties to go to his natural heirs, there is no necessity at all for executing a Will. Even though mere presence of natural heirs cannot always held to be suspicious



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circumstances. When suspicious circumstances exist about the valid execution of a Will, it is the duty of the person seeking declaration about the validity of the Will to dispel such suspicious circumstances and he has to remove all the suspicious circumstances which would raise some genuine doubt having regard to the nature of the transaction, relationship of parties and other surrounding circumstances to satisfy the Court.

20. Once the burden of prove is discharged by the propounder in terms of Section 63 of the Succession Act and Section 68 of the Evidence Act, and by adducing *prima facie* evidence proving the competence of the testator, the onus is on the contestant opposing to show *prima facie* the existence of suspicious circumstances so as to shift the onus on the propounder to dispel them. Without knowing the circumstances, which according to the contestant are suspicious, how will the propounder be able to dispel them and to convince the Court about its genuineness and validity.

21. It is relevant to refer the decisions of the Hon'ble Supreme Court in the case of ***DEREK A C LOBO & ORS. v. ULRIC M A LOBO (DEAD) BY LRS. & ORS. (Civil Appeal No.5094 of 2011)*** vide order dated 07.12.2023, the Hon'ble Supreme Court has held as follows in para 15 and 16 of the judgment:



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A.S(MD)Nos.42 of 2014 and 149 of 2014

“15. Now, we will refer to the cited suspicious circumstances. In the light of the decision in *Gurdial Kaur v. Kartar Kaur*² there can be no doubt with respect to the position that when suspicious circumstances exist about the valid execution of a Will, it is the duty of the person seeking declaration about the validity of the Will to dispel such suspicious circumstances. In this context, we think it not inappropriate to refer to a decision of the High Court of Madhya Pradesh, in *Nathia Bai v. Gangaram*.³, with which we agree, rendered relying on the decisions of this Court in *Meenakshiammal (Dead) through Lrs. v. Chandrasekharan*⁴ and in *P.P.K.Gopalan Nambiar v. P.P.K.Balakrishnan Nambiar*, that a party challenging the execution of a Will as suspicious must plead the suspicious circumstances and then only the propounder would legally be bound to remove these suspicious circumstances.

In *Nathia Bai* s case it was held thus:

11. The Will is required to be proved just like any other document by adducing the additional evidence to prove the ingredients as envisaged under Section 63(c) of the Succession Act by examining the attesting witness according to Section 68 of the Evidence Act. It is also well settled that the propounder of the Will is required to prove the Will by removing all suspicious circumstances. Thus, if suspicious circumstances would have been pleaded by the defendants, then only the plaintiffs, who are the propounder of the Will, were legally bound to remove those suspicious circumstances. The contestant opposing the Will, according to me, was required to bring the material on record so that the Will can be said to be a suspicious document and in that event the onus would shift back on the propounder of the Will to satisfy the Court by adducing positive evidence that the Will is not suspicious&&.

(Underline Supplied)

In the decision in ***Meenakshiammal* s case**(supra), it was held in paragraphs 19 and 20 thus:

19. In the case of *Chinmoyee Saha v. Debendra Lal*



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Saha⁶ it has been held that if the propounder takes a prominent part in the execution of the will, which confers a substantial benefit on him, the propounder is required to remove the doubts by clear and satisfactory evidence. Once the propounder proves that the will was signed by the testator, that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the disposition and put his signature out of his own free will, and that he signed it in presence of the witnesses who attested it in his presence, the onus, which rests on the propounder, is discharged and when allegation of undue influence, fraud or coercion is made by the caveator, the onus is on the caveator to prove the same.

20. In the case of *Ryali Kameswara Rao v. Bendapudi Suryaprakasarao*⁷ this Court while discussing the provisions of Section 63 of the Succession Act, 1925, has held that the suspicion alleged must be one inherent in the transaction itself and not the doubt that may arise from conflict of testimony which becomes apparent on an investigation of the transaction. That suspicious circumstances cannot be defined precisely. They cannot be enumerated exhaustively. They must depend upon the facts of each case. When a question arises as to whether a will is genuine or forged, normally the fact that nothing can be said against the reasonable nature of its provisions will be a strong and material element in favour of the probabilities of the will. Whether a will has been executed by the testator in a sound and disposing state of mind is purely a question of fact, which will have to be decided in each case on the circumstances disclosed and the nature and quality of the evidence adduced. When the will is alleged to have been executed under undue influence, the onus of proving undue influence is upon the person making such allegation and mere presence of motive and opportunity are not enough.

(Underline supplied)



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A.S(MD)Nos.42 of 2014 and 149 of 2014

The decision in **Madhukar D. Shende v. Tarabai Aba Shedage**, in so far as it is relevant, reads thus:

8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in R. v. Hodge may be apposite to some extent:

The mind is apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by



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A.S(MD)Nos.42 of 2014 and 149 of 2014

legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict positive or negative.

9. It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of not proved merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

(Underline supplied)

In the decision in **P.P.K.Gopalan Nambiar s case(supra)**, this Court held in paragraph 4 thus:

4. On appeal, the sub-ordinate Judge has given various reasons to accept the validity of the will.



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A.S(MD)Nos.42 of 2014 and 149 of 2014

One of the reasons is that it is a registered will and the endorsement by the Registrar would show that the testator was in a sound disposing state of mind and that it was executed out of her free will and that, therefore, the discrepancy in the evidence of DW 2, an attessor does not vitiate the validity of the will. On appeal, the learned Single Judge without going into the evidence, has stated in one sentence that he agrees with the reasoning of the trial court and does not agree with the reasoning of the appellate court. We are at a loss to appreciate the view taken by the learned Judge. The High Court also stated that the whole of the estate given to the son under the will would itself generate suspicious circumstance. It is difficult to accept the reasoning of the learned Judge. Admittedly, the will was executed and registered on 1-11-55 and she died 8 years thereafter in the year 1963. When the appellant had propounded the will in his written statement, nothing prevented either the respondent or any of the contesting defendants to file a rejoinder i.e. additional written statement with leave of the court under Order 8, Rule 9 pleading the invalidity of the will propounded by the appellant. Nothing has been stated in the pleadings. Even in the evidence when the appellant was examined as DW 1 and his attestation was as DW 2, nothing was stated with regard to the alleged pressure said to have been brought about by the appellant to execute the will. In the cross-examination by the first respondent, no attempt was even made to doubt the correctness of the Will.

5. Under these circumstances, the suspicion which excited the mind of the District Munsif is without any



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basis and he picked them from his hat without fact-foundation. The Subordinate Judge had rightly considered all the circumstances and upheld the will. The High Court, without examining the evidence, by merely extracting legal position set out by various decisions of this Court has upset the finding of the fact recorded by the Subordinate Judge in one sentence. It is trite that it is the duty of the propounder of the will to prove the will and to remove all the suspected features. But there must be real, germane and valid suspicious features and not fantasy of the doubting mind.

(Underline supplied)

16. In the light of the aforesaid decisions, it can be safely said that once the burden to prove is discharged by the propounder in terms of Section 63 of the Succession Act and Section 68 of the Evidence Act, and by adducing prima facie evidence proving the competence of the testator, the onus is on the contestant opposing to show prima facie the existence of suspicious circumstances so as to shift the onus on the propounder to dispel them. Without knowing the circumstances, which according to the contestant opposing are suspicious, how will the propounder be able to dispel them and to convince the court about its genuineness and validity. We are saying that the contestant opposing the Will has to raise surrounding suspicious circumstances specifically and not vaguely or in a general manner. A case of well-founded suspicion has to exist to cause shifting of onus back to the propounder once he discharged his burden to prove the execution of the Will. We may hasten to add that we shall not be understood to have held that failure of the party/parties to plead suspicious circumstances would automatically make the court to take a Will as validly proved even where the circumstance(s) raising doubt is inherent in the



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A.S(MD)Nos.42 of 2014 and 149 of 2014



document. Certainly, in such circumstances the propounder has to convince the court and dispel such suspicious circumstances.

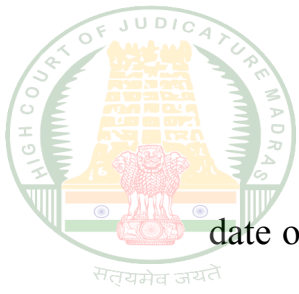
22. In this case, the first defendant has pleaded that though mother Neelavathy had got $\frac{1}{4}$ share in the A-Schedule properties, the mother along with other sisters executed a Power of Attorney, based on which, they sold item Nos.7, 8 and 9 of the A-Schedule properties. Regarding the other items, the mother has executed an unregistered Will in favour of the first defendant. Therefore, the first defendant is entitled to the $\frac{1}{4}$ share of the mother. Therefore, it is for the first defendant as a propounder has to prove the case. In order to prove the case, the first defendant has examined one of the attestors to the Will DW2, who has spoken about the execution of the Will. Though the first defendant by examining DW2-the attestor of the Will has discharged his onus, the plaintiff has disputed the Will by raising suspicious circumstances. Therefore, it is for the plaintiff to discharge her onus about the proof of suspicious circumstances. In order to prove the suspicious circumstances, the plaintiff herself examined as PW1 and also to prove that the first defendant is entitled to $\frac{6}{20}$ share, PW1 has marked Ex.A1 to Ex.A7. As far as the suspicious circumstances surrounding the Will is concerned, the plaintiff marked Ex.A7-the discharge summary. A perusal of Ex.A7



shows that mother Neelavathy was admitted in the hospital on 01.09.2007 and she was discharged from the hospital on 06.09.2007. The alleged Will said to have been executed on 03.09.2007. Therefore, Ex.A7 shows that the mother was admitted in the hospital on the date of the alleged Will said to have been executed. In Ex.A7 dated 06.09.2007, it is mentioned as follows:

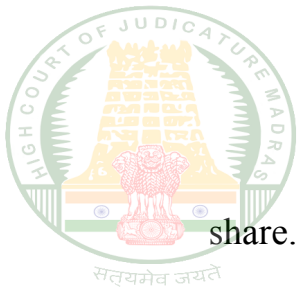
*“Nature, prognosis, need for periodic follow up, continued drug therapy and its complications (**Role of Coronary Angio/Revasculariation**) explained to patient's son Mr.Srinivasachari.”*

23. The same was intimated to the first defendant Srinivasachari also. Further, when the plaintiff was examined herself as PW1, she had stated about the suspicious circumstances surrounded and also spoken about Ex.A7, which was marked later. The first defendant, in his proof affidavit, has only stated about the averments made in the written statement and he never challenged Ex.A7 and he has also not given any explanation regarding Ex.A7. The first defendant has not challenged Ex.A7. Therefore, the plaintiff has discharged her burden that at the time of the alleged Will said to have been executed by the mother, she was in the hospital as inpatient and taking treatment. However, the reading of the evidence of PW2, who is the attesor of the Will stated that on the



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date of the Will, the testator called him only in her house whereas Ex.A7 and the evidence of PW1 clearly show that on the date of the alleged execution of the Will, she was admitted in the hospital and was taking treatment as inpatient. Ex.A7- discharge summary clearly shows the nature of treatment and the condition of the patient namely, the testator of the Will. Therefore, from the oral and documentary evidence of the plaintiff, this Court finds that the plaintiff has discharged her burden that there was a surrounding suspicious circumstances. Therefore, the onus has been shifted to the first defendant to remove the suspicious circumstances whereas upon reading of the entire oral and documentary evidence, this Court finds that the first defendant has not removed the surrounding suspicious circumstances. Under these circumstances, the first defendant has not proved the Will. Therefore, the mother's $\frac{1}{4}$ share would go to the plaintiff and the defendants 1 to 4. The plaintiff is already entitled to $\frac{1}{4}$ share by way of Ex.A2-partition deed. Since she admitted the Power of Attorney-Ex.B2 based on which item Nos.7, 8 & 9 in A-Schedule properties were sold, the plaintiff is not entitled to any share in item Nos.7, 8 and 9 in the A-Schedule properties. Therefore, the plaintiff is entitled to the $\frac{1}{5}$ share from the mother's $\frac{1}{4}$ share. Therefore, totally, the plaintiff is entitled to $\frac{6}{20}$ share and the first defendant is entitled to $\frac{6}{20}$ share and the second defendant is also entitled to $\frac{6}{20}$



share. The defendants 3 and 4 are entitled 1/20 share.

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24. However, the Trial Court has held that the Will-Ex.B5 was proved and therefore, the first defendant is entitled to $\frac{1}{4}$ share of the mother and the plaintiff is entitled to $\frac{1}{4}$ share except item Nos.7, 8 and 9 in the A-Schedule properties and also held that the plaintiff is not entitled to any share in B-Schedule properties since B-Schedule properties were not proved by the plaintiff. Challenging the same, the plaintiff filed the appeal in A.S(MD)No.149 of 2014.

25. A perusal of Ex.B5 and also the evidence of PW2 shows that though the propounder of the Will-PW1, in order to prove the Will-Ex.B5, examined one of the attestors as PW2. The proof affidavit was filed by the first defendant and the same was produced before the Court and he was not examined in chief in the Court and he was also not summoned and the first defendant himself brought him as a witness. In this regard, it is pertinent to mention that the Will is testamentary in nature. The Will comes into force only after the death of the testator and therefore the propounder has to prove the Will in this case. The propounder was not present at the time of the execution of the Will and therefore, the propounder came to know about the Will at a later point of



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time. In fact PW2-the attestor is not a party to the suit and he is not a party witness and therefore, the cases of this nature especially, when the Will is disputed and surrounded by suspicious circumstances, the Will has got to be proved in the manner known to law. Under these circumstances, the party should not bring the attestor as their side witness to prove the Will and therefore, the attestors have to be summoned by the Court and the attestors have to be examined in chief by the Court and not by way of filing the proof affidavit. In this regard, it is pertinent to record the decisions of the Hon'ble Supreme Court in the case of Salem Bar Association, **Tamilnadu v. Union of India case-I**, it is held that:

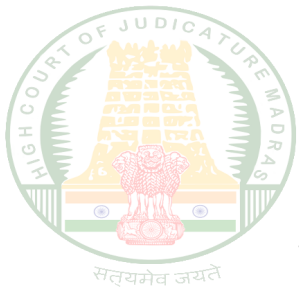
“Amendment of Order XVIII Rule 4 provides that in every case, the examination-in- chief of a witness shall be on affidavit. The Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re- examination in open court has not been disturbed by Order XVIII Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner.



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The scope of Order XVIII Rule 4 has been examined and its validity upheld in [Salem Advocates Bar Association's](#) case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in [Salem Advocates Bar Association's](#) case, it has been held that the trial court in appropriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint Commissioner to record cross- examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud,



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forgery, serious disputes as to the execution of the will etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witness. That may be so but, In our view, the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. It may also be noted that Order XVIII Rule 4, specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner. The report notices that in some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. We would, however, leave it to the High Courts to examine this aspect and decide to adopt or not



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such a procedure. Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, we feel that generally the expenses incurred towards the fee payable to the Commissioner is likely to be less than expenditure incurred for attending the Courts on various dates for recording evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and, therefore, in reality in most of the cases, there could be no additional burden. Amendment to Order XVIII Rule 5(a) and (b) was made in 1976 whereby it was provided that in all appealable cases evidence shall be recorded by the Court. Order XVIII Rule 4 was amended by Amendment Act of 1999 and again by Amendment Act of 2002. Order XVIII Rule 4(3) enables the commissioners to record evidence in all type of cases including appealable cases. The contention urged is that there is conflict between these provisions.”

26. The attestors to the Will cannot be treated as party witnesses. They are independent witnesses and must be examined-in-chief, with their evidence recorded in Court, and not by way of filing a proof affidavit. Therefore, in cases of this nature, if any document is disputed and any witness claims as attestor to the document or plea of fraud or any suspicious circumstances raised, the Court has to permit the examination



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in chief to be recorded in the Court instead of accepting the proof affidavit for chief examination.

27. Since this Court has held that the Will Ex.B5 was not proved by the first defendant, the plaintiff is entitled to 6/20 share. Therefore, the appeal filed by the plaintiff in A.S(MD)No.149 of 2014 is partly allowed. No Costs. Consequently, connected miscellaneous petition is closed.

28. As far as the appeal filed by the first defendant is concerned, the first defendant has not proved the Will as well as the oral partition and therefore, the appeal filed by the first defendant in A.S(MD)No.42 of 2014 is dismissed. No Costs. Consequently, connected miscellaneous petition is dismissed.

(P.V.,J.) (K.K.R.K.,J.)
26.09.2024

Internet: Yes/No
Index: Yes
NCC: Yes/No

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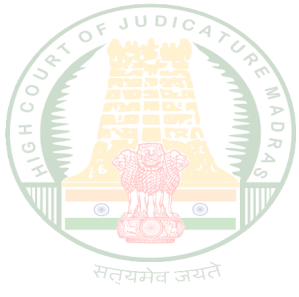
A.S(MD)Nos.42 of 2014 and 149 of 2014

To

1.The III-Additional District Judge,
Tiruchirappalli.

2.The Registrar General,
Madras High Court,
Chennai.

3.The Registrar (Judicial),
Madurai Bench of Madras High Court,
Madurai.



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A.S(MD)Nos.42 of 2014 and 149 of 2014

**P.VELMURUGAN, J.
and
K.K.RAMAKRISHNAN, J.**

PJL

A.S.(MD)Nos. 42 and 149 of 2014

26.09.2024