



TOS No.7/2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	<i>29.10.2025</i>
<i>Pronounced on</i>	<i>07.11.2025</i>

CORAM

THE HONOURABLE DR.JUSTICE R.N.MANJULA

**TOS No. 7 of 2020
in (O.P. 490 of 2014)**

1. S.Thambaiyaa @ S.Thambiah
S/o. Late Mr.Savala Chinnamuthusamy Chetty

2. S.H.Purushotham
S/o. Late Mr.S.Hemadri Chetty

Both are residing at New No.9,
Old No.19, Chandrappan Street,
Sowcarpet, Chennai - 79.

... Plaintiffs / Petitioners

Vs.

K.R.Parvathi
W/o. Late Ramachandriah Chetty,
No.9/19, Chandappa Mudali Street,
Sowcarpet, Chennai - 79

... Defendant / third respondent

Prayer: Petition is filed under Sections 232 and 276 of Indian Succession Act 1925 r/w. to allow the petitioners to prove the Will dated 13.05.1986 of the deceased Savala Muniamma in common form and that probate be granted to the petitioner to have effect limited to the State of Tamilnadu.



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For Plaintiff(s): Mr. Manoj Sreevatsan

For Defendant(s): Mr.K.S.Kumar

JUDGMENT

The Original Petition filed by the plaintiff in O.P.No.490/2014 seeking for probate has been converted into Testamentary Original Suit in view of the caveat filed by the third respondent who is the defendant now.

2. The facts pleaded by the plaintiffs in the petition in brief:

The first plaintiff is the eldest son of the testatrix by name Savala Muniamma and the second plaintiff is her grandson born through her predeceased son by name S.Hemadri Chetty. The defendant is one among the six daughters of the testatrix. Both the plaintiffs are the executors of the Will. The testatrix died on 02.01.1993 and her husband Savala Chinnamuthusamy Chetty had predeceased her on 13.08.1984. The testatrix had four sons and six daughters. One of her sons by name Hemadri Chetty had predeceased her on 13.02.1983 and the second plaintiff is the son of Hemadri Chetty.

2.1 The testatrix had executed a registered Will dated 13.05.1986 in the presence of the witnesses by names V.Venugopal and Lokanadam who are the



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sons-in-law of the testatrix and who married the daughters by name B.L.Janaki and Pushpavalli, respectively. One of the attesting witness by name Venugopal is no more. The Will was drafted by advocate Late Mr.Gothandaraman. In the Will the testatrix had made arrangements in such a way that she bequeathed her property at Door.No.9, Old No.19, Chandrapan Street, Sowcarpet, Chennai to all the three surviving sons with the ratio of $\frac{1}{4}$ each. The fourth share of the deceased HemadriChetty would be taken by his four sons. In fact the testatrix had already executed a Will on 19.04.1972 but the same was revoked. The suit Will dated 13.05.1986 is her last Will. Hence the plaintiff sought the relief of probating the Will.

3. The averments made in the written statement of the defendant in brief:

The defendant is one of the daughters of Late SavalaMuniyamma who is said to have executed the Will dated 13.05.1986. The defendant is living in a portion of the subject property as its co-owner. The alleged Will is not true and genuine and it has been brought out at the instance of the plaintiffs to deprive the other legal heirs from getting any share in the suit property. Though Savala Muniamma had passed away on 02.01.1993, the plaintiffs have not chosen either to probate the alleged Will or render proper accounts of the income



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derived from the suit property. The testatrix died intestate during the month of January, 1993 leaving behind her 9 children and the legal heirs of her predeceased son Hemadri Chetty. The suit has been filed just to defeat the interest of the other legal heirs after 21 years of the death of the testatrix. This proceedings have been initiated and there is no reasonable grounds stated to condone the delay.

3.1 The Will has not been executed by the testatrix when she was in a sound and disposing state of mind. The testatrix was under the control of the plaintiffs and she was never allowed to do things independently. The Will is shrouded by suspicious circumstances. Savala Muniamma was not in sound and disposing state of mind at the time of the alleged execution. From the age of 58 and she was under the control of the plaintiff. The plaintiffs have not given any convincing reasons as to why the original Will is not available. The probate OP has been filed only after this defendant has filed the suit for partition. Since the plaintiff tried to sell the property without giving any share to the defendant, she has filed the suit for partition in O.S.No.1561/2014 and the same is pending. The Will has been forged and fabricated and brought out under coercion and undue influence or fraud. Only after the defendant can verify the original Will, she can add more comments on it. As the original Will itself is not produced,



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the relief sought cannot be granted.

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4. On the basis of the above pleadings, this Court has framed the following issues:

" i) Whether the Will dated 13.05.1986, is true and genuine ?

ii) To what other relief the parties are entitled ?"

5. During the course of trial, on the side of the plaintiff three witnesses were examined as P.W.1 to P.W.3 and Exs.P1 to P8 were marked. On the side of the defendant one witness was examined as D.W.1 and no documents were marked.

6. The learned counsel for the plaintiff submitted that the Will has been proved by examining surviving attesting witness and who has deposed evidence clearly about the execution of the Will. He had stated in his evidence that he had seen the testatrix signing before him and thereafter he also signed as a second attesting witness. He also stated that the testatrix was seen to be in a sound and disposing state of mind and she was healthy. The plaintiffs were aware of the Will immediately after the demise of the testatrix. As everyone has given consent to the Will, the plaintiff did not think about filing any OP



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seeking probate. The original Will disappeared all of a sudden and thereafter a partition suit has been filed by the defendant. Only then the plaintiff needed to apply for registration copy of the Will and filed the OP on the basis of the said Will. The Sub-Registrar from the Sub-Registrar Officer where the Will has been registered was summoned as P.W.3 and during her evidence, she produced the thumb impression book and the same has been marked as Ex.P8.

6.1 In the earlier Will the very same arrangement has been made by the testatrix and in the suit Will she has stated the reasons as to what propelled her to revoke the earlier Will and write the present Will. There is no unnatural or suspicion circumstances and the plaintiff had proved the Will to be true. Disinheriting a few of the legal heirs of the testatrix cannot be the only reason to doubt the genuineness of the Will.

7. The learned counsel for the defendant submitted that as per Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, the probate can be granted only on the original Will. In certain exceptional cases the certified copy of the Will has to be probated by the Court of law. In such case the plaintiff has to establish how the original Will got misplaced and what are the steps taken by him to trace out the original Will and that should also be



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let-in the evidence. In the Will itself it is stated that the Will has to be probated after the demise of the testatrix. Even the photography of the Will has not been produced before the Court. Only the registration copy of the Will has been produced. So it is not possible for the defendant to know about the genuineness of the thumb impression and the signatures of the testatrix and the attestors. One of the attesting witness who has been examined as P.W.1 has stated in his evidence that he was aware of the existence of the Will even in the year 1986. The testatrix died in the year 1993 but the petition has been filed only in the year 2014 after a delay of 21 years, which is not explained.

7.1 The plaintiff has stated that they were not aware that the Will has to be probated. Mere ignorance of the law cannot be an excuse for the plaintiff. In the Will itself it has been stated about the necessity for getting the probate. No evidence has been let in to prove the reasonableness of the delay of 21 years. Mere making an averment or pleading in the petition itself is not enough for condoning the delay. The attesting witness P.W.1 did not know the contents of the Will and he did not know where the Will was drafted and also he did not know in how many pages the testatrix had affixed her signature. The testatrix did not know English and the will has been written in English. The Will does not state how the testatrix came to understand the contents of the Will. P.W.2



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deposed in his evidence when she came to know about the Will only in the year 1986 itself. He also stated that his mother knew only Telugu. P.W.2 has stated that the attesting witness who is the son -in-law of the testatrix could have explained about the contents of the Will. One of the sons-in-law who has been examined as attesting witness P.W.1, has stated in his evidence that he knew about the contents of the Will only after seeing the Will in the Court. The Will has not been proved in accordance with Section 68, 71 and 74 of the Indian Evidence Act. The plaintiff has stated that he has knowledge about the Will in the year 1986 itself. The limitation starts from the date of his knowledge. The petition seeking probate has not been filed at least two years from the date of knowledge. So it is clearly barred by limitation. Without any proof or loss of original, the certified copy of the Will cannot be admitted.

8. There is no dispute with regard to the relationship between the plaintiffs and the defendant. The deceased testatrix Savala Muniamma is the mother of the first plaintiff and the second plaintiff is the grandson of the testatrix born through her predeceased son Hemadri Chetty. The defendant is one among the six daughters of the testatrix. The Will is dated 13.05.1986. The testatrix died on 02.01.1993. The father of the second plaintiff Hemadri Chetty predeceased the testatrix on 13.02.1983. The testators of the Will by name Venugopal and



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Lokanadam are the husbands of two daughters of the testatrix namely B.L.Janaki and Pushpavalli. The testatrix had four sons and six daughters. As per the arrangement made in the Will, the said property has been bequeathed in favour of all the three sons of the testatrix and the second plaintiff who is the son of the predeceased son of the testatrix, in equal proportion. In fact, the testatrix had already executed a Will on 19.04.1972 but that was revoked in view of the subsequent suit Will executed on 13.05.1986.

9. The testatrix died in the year 1983. The petition seeking probate has been filed only in the year 2014 i.e. after a delay of 21 years. The defendant has filed a suit for partition in O.S.No.1561 of 2014 and thereafter only the plaintiffs have filed the Original Petition seeking probate for the Will. So it is claimed by the defendant that the Will is a forged and fabricated one and brought out only to defeat the defendant's claim for partition. The Will is a registered one but the original of Will has not been produced.

10. The attesor who was examined as P.W.1 has deposed in his evidence that he stood as an attesor for the Will executed by the testatrix who was his mother-in-law. He further deposed that his mother-in-law, the testatrix had signed the Will in Telugu language and the co-attesor of the Will is his co-



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brother. So, the Will has been executed in the presence of the sons-in-law of the testatrix Savala Muniamma. P.W.1 had deposed in his evidence that the testatrix was in sound and disposing state of mind and she was in a good health condition at the time when the Will was executed.

11. As the Will has been lost and the plaintiffs could not produce the original Will, they have examined the Sub-Registrar, Sowcarpet as P.W.3. She had stated in her evidence that she had obtained the signature of the executant of the Will in the copy sheets and she had produced it before the Court to be marked as Ex.P8. Ex.P8 contains the signature as well as the thumb impression of the executant Savala Muniamma and that has been clearly stated by P.W.3. During the cross-examination of P.W.3 it was not denied by her that the thumb impression and the signature were not affixed by the testatrix. P.W.3 also identified the signatures of Venugopal and Lokanadam who are the attesting witnesses. So the execution of the Will has been proved by the plaintiffs through the examination of P.W.3. The plaintiffs have not only proved the execution of the Will but also proved the state of mind of the testatrix at the time of execution of the Will.

12. The defendant, who pleads contrary stating that the testatrix was not in



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a sound and disposing state of mind, has not adduced any contrary evidence to prove the same. None of the sisters has any objection to the Will and the arrangements made in the Will except the defendant. The defendant is the one who is staying in the suit property and she had stated in her evidence that after the death of her husband, the defendant's brothers permitted her to stay in the suit schedule property. Ex.P1 - Will is not much different from the earlier Will of the testatrix which was executed on 19.04.1972. The only reason for which the present Will has been executed may be the cause of subsequent demise of one of the sons of testatrix Hemadri Chetty.

13. In the earlier Will dated 19.04.1972 the testatrix had bequeathed the suit properties to her sons in equal proportion. The only difference that has been made in the present Will is to bequeath a portion of one of the predeceased son Hemadri Chetty to his son, the second plaintiff. One of the shares has also been bequeathed in favour of the second defendant. The testatrix has not gifted any share in the property to any other defendants. All the sisters of the first plaintiff except the defendant has given their consent. Even according to the evidence of D.W.1, she has filed a suit for partition when the brothers admitted to sell away the property. As the sisters of the first plaintiff and his brothers were not in disagreement with the arrangement made in the



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Will, it is probably the reason why the plaintiff has not approached the Court for getting the probate.

14. The strong contention taken up by the defendant is that when primary evidence, namely the original Will, is not marked and the plaintiffs tries to introduce the secondary evidence, the plaintiffs have got the burden to prove that the original Will has been misplaced or lost and that proving the secondary evidence like the certified copy of the Will cannot be accepted. The secondary evidence so produced is not adequate to prove the Will.

15. In support of his above contention, the learned counsel for the defendant has relied on the judgment of the Hon'ble Supreme Court in ***Rajeev Gupta and others Vs. Prashant Garg and others*** reported in **2025 (3) CTC 730**. The fact involved in the said case is that the plaintiff has not even made any pleading as to whether the Will has been lost or misplaced. As the plaintiff in that case had marked only the certified copy without even attempting to prove the necessity to produce the secondary evidence, the Hon'ble Supreme Court had held that in the absence of any evidence that the original Will was misplaced or lost, the secondary evidence alone cannot be produced. In the case involved in the above judgment of the Hon'ble Supreme Court the plaintiff has



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not even stated about the non-availability of the original Will or that it was lost or misplaced. In this regard it is appropriate to refer the relevant paragraphs of the above judgment which reads as under:

" 52. Significantly, the statement made in Paragraph 2 of the *Plaint* is that "Dr. Babu Ram Garg passed away in 1958 and he had executed a Will and also got it registered which is well into the knowledge of the parties". In their *Written Statement*, the Appellants denied existence of the WILL by pleading that Dr. Babu Ram Garg never executed any will. Insofar as the Appellants are concerned, there was no admission. In fact, the Plaintiffs were specifically put on Notice by the Appellants that they were disputing the WILL. The burden was on the Plaintiffs to prove the WILL. The List of Documents sought to be relied on by the Plaintiffs included Certified copy of the registered Will of Dr. Babu Ram Garg but there was no pleading in the *Plaint* as to whether the WILL was lost or misplaced. A Certified copy was only sought to be produced.

53. We may at this stage notice a few precedents on the point of a party adducing Secondary evidence in the nature of Certified copy

54. In ***Benga Behera v. Braja Kishore Nanda, 2007 (9) SCC 728***, a Coordinate Bench of this Court had the occasion to observe thus:

"31. A document upon which a Title is based is required to be proved by Primary evidence, and Secondary evidence may be given under Section 65(c) of the Evidence Act. The said Clause of Section 65 provides as under:



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"65. (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;"

Loss of the original, therefore, was required to be proved.

32. In a case of this nature, it was obligatory on the part of the First Respondent to establish the loss of the original will beyond all reasonable doubt. His testimony in that behalf remained uncorroborated."

55. Yet again, in Jagmail Singh v. Karamjit Singh, 2020 (5) CTC 490 (SC): 2020 (5) SCC 178, the law was reiterated in the following words:

"74. It is trite that under the Evidence Act, 1872 facts have to be established by Primary evidence and Secondary evidence is only an exception to the Rule for which foundational facts have to be established to account for the existence of the Primary evidence. In H. Siddiqui v. A. Ramalingam, 2011 (4) SCC 240, this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying Secondary evidence not established it is not permissible for the court to allow a party to adduce Secondary evidence."

56. We do not find from the materials on record including the Judgments of the Trial Court and the First Appellate Court as to



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whether any evidence was led that the WILL of Dr. Babu Ram Garg was misplaced or lost or not otherwise available. In the absence of evidence being led, acceptable to the court, that the original WILL was misplaced or lost or otherwise not available, the precedents above referred would apply on all fours."

16. In the instant case, it is an unregistered Will and at the time of filing the petition itself it has been stated by the petitioners that the original Will is lost. During the cross-examination of the defendant, she had admitted that she was permitted to reside in the suit property by her brothers after the demise of her husband. It is also stated that the important documents will be kept in an iron box available in the house and it is accessible to everyone in the house. As all the members of house had access to the room where the iron box has been kept, it can be the hand work of anyone in the family to cause the disappearance of the original Will. The plaintiff under such circumstances cannot be expected to prove the probabilities for the loss of original Will than establishing the above facts. He had produced the secondary evidence only after establishing the probabilities of disappearance through the evidence of D.W.1 herself.

17. The Hon'ble Supreme Court has held in the case of ***Jagmail Singh and another Vs Karamjit Singh and Others, reported in (2020) 5 SCC 178,***



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that it is trite rule that under the evidence act, facts have to be established by primary evidence and the secondary evidence is only an exception and the foundational facts for laying the secondary evidence should also be established and only then the secondary evidence can be permitted. It is worthwhile to extract the relevant paragraphs of the above judgment as below:

“ 11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original Evidence has not been furnished.

*12. The issue arising out of somewhat similar facts and circumstances has been considered by this Court in **Ashok Dulichand Vs. Madahavlal Dube and Anr.** , and it was held as under :-*

“7. ... According to Clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any



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person out of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given.”

13. In the matter of Rakesh Mohindra vs. Anita Beri and Ors. this Court has observed as under:-

“15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted.”

14. It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of H. Siddiqui (dead) by LRs Vs. A. Ramalingam , this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to



adduce secondary evidence.

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15. In the case at hand, it is imperative to appreciate the evidence of the witnesses as it is only after scrutinizing the same opinion can be found as to the existence, loss or destruction of the original Will. While both the revenue officials failed to produce the original Will, upon perusal of the cross-examination it is clear that neither of the officials has unequivocally denied the existence of the Will. PW- 3 Rakesh Kumar stated during his cross-examination that there was another patwari in that area and he was unaware if such Will was presented before the other patwari. He went on to state that this matter was 25 years old and he was no longer posted in that area and, therefore, could not trace the Will. Moreover, PW- 4 went on to admit that, “there was registered Will which was entered. There was a Katchi (unregistered) Will of Babu Singh was handed over to Rakesh Kumar Patwari for entering the mutation...”. Furthermore, the prima facie evidence of existence of the Will is established from the examination of PW-1, Darshan Singh, who is the scribe of the Will in question and deposed as under :-

“I have seen the Will dated 24.01.1989 which bears my signature as scribe and as well as witness.”

16. In view of the aforesaid factual situation prevailing in the case at hand, it is clear that the factual foundation to establish the right to give secondary evidence was laid down by the appellants and thus the High Court ought to have given



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them an opportunity to lead secondary evidence. The High Court committed grave error of law without properly evaluating the evidence and holding that the pre-requisite condition i.e., existence of Will remained unestablished on record and thereby denied an opportunity to the appellants to produce secondary evidence.

17. Needless to observe that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.”

18. If the original Will was available, the plaintiffs could not have any hesitation to produce the same and get the probate along with the said Will. So in the present case, the necessity to produce the certified copy of the Will has arisen only because of the non-availability of the original Will and the said fact has been stated by P.W.2 in his evidence. This is not a case where the plaintiffs had tried to file the certified copy of the Will without pleading about the loss of the original Will or proving that the Will is not available to be produced before the Court. This is one of the rare circumstances where the plaintiffs are compelled to produce the certified copy of the Will and the plaintiffs have also proved about the compatibility, genuineness of the Will in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence



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Act, respectively.

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19. The defendant has made a point about the delay in filing this petition. The recitals of the Will itself would read that the Will needs to be probated. Apart from the lack of knowledge, the plaintiffs' inability to produce the Will could also be the reason for the delay. As the plaintiffs have compelling circumstances to file a petition for probate after the defendant has filed the suit for partition, the delay is understandable. It is also true that none of the sisters of the plaintiffs have raised any objection about the Will, even after the petition seeking probate has been filed by the plaintiffs. As the plaintiffs have proved the necessary requirements for getting the probate, they are entitled to get the relief as prayed.

20. In the result, this Testamentary Original Suit is allowed by granting probate of the last Will of late Savala Muniamma dated 13.05.1986, to the plaintiffs, to have effect limited throughout the State of Tamil Nadu. No costs.

07.11.2025

Index: Yes / No

Speaking Order : Yes / No

Neutral Citation : Yes / No

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APPENDIX

Plaintiffs' side witnesses:

P.W.1 - Mr.Lokanandam

P.W.2 - Mr.S.Thambaiyaa @ S.Thambiah

P.W.3 - Mrs.G.Vani

List of Witnesses on the side of the Plaintiffs:

Sl.No.	Exhibits	Description
1	Ex.P1	Certified copy of the Will executed by Savala Muniamma
2	Ex.P2	Affidavit
3	Ex.P3	Original Death certificate of late Savalamuniyamma dated 23.01.1993
4	Ex.P4	Computer generated printout of death certificate issued by Corporation of Chennai of late Hemadri Chetty
5	Ex.P5	Certified copy of earlier Will executed by Savala Muniamma dated 19.04.1972
6	Ex.P6	Certified copy of sale deed dated 05.02.1951 in favour of late Savala Muniamma
7	Ex.P7	Copy of the plaint in O.S.No.1561 of 2014
8	Ex.P8	Document No.18 of 1986 contained in pages 61 to 64 of Volume 42 of Book No.3 of SRO, Sowcarpet.

Defendant side witness:

D.W.1 - Mrs.K.R.Parvathi

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DR.R.N.MANJULA, J.

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