

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

WEDNESDAY, THE 8TH DAY OF JULY 2015/17TH ASHADHA, 1937

RFA.No. 101 of 2007 ()

AGAINST THE ORDER/JUDGMENT IN OS 598/2002 of I ADDL.SUB COURT, THRISSUR
DATED 24-11-2006

APPELLANT(S)/PLAINTIFFS 1 TO 5:

1. ELSY, D/O. KECHERIYIL LATE PORATHOORU LUWIS,
PERUMANNU DESOM, ERANELLUR VILLAGE
TALAPPILLY TALUK.

2. THRESSIAKUTTY, D/O. DO. AND
W/O.BRAHMAKULATH THEKKATH DEVASSY IN DO. DO.

3. MARY, D/O. DO. AND W/O.PELLISSERY LONAPPAN,
STAFF NURSE, IN DO. DO.

4. FEBIYOLA, D/O.IN DO. DO.

5. BRIJEETHA, D/O. DO. AND
W/O.THATTIL JOSE, IN DO. DO.

BY ADVS.SRI.K.JAYAKUMAR (SR.)
SRI.P.B.KRISHNAN

RESPONDENT(S):DEFENDANTS AND PLAINTIFF NO.6

1. FRANCIS
LATE PORATHOORU LUWIS, PENSIONER, PERUMANNU DESOM
ERANELLUR VILLAGE, THALAPPILLY TALUK.

2. JOSE, S/O. DO. STAMP VENDOR, DO. DO.

3. ALPHONSA, D/O. DO., STAFF NURSE,
IN DO. DO., PRESENT ADDRESS: P.L.ALPHONSA, NO.789
24TH MAIN, 11TH CROSS, H.S.R.LAYOUT
1ST SECTOR, AGRA EXTENSION, BANGALORE-560 034.

4. JASEENTHA, D/O. DO. TEACHER,
IN DO., PRESENT ADDRESS: C/O.ST.JOSEPH'S COLLEGE
IIND TASHKENT MARG, ALLAHABAD, UTTER PRADESH
PIN-211 001.

R,R.2 BY ADV. SRI.JAMSHEED HAFIZ
R,R.2 BY ADV. SRI.PREM DOMINIC
R,R1 BY ADV. SRI.C.CHANDRASEKHARAN
R,R4 BY ADV. SRI.N.K.SOMASEKHARAN PILLAI
R2 BY ADV. SRI.T.KRISHNAN UNNI (SR.)
R BY SRI.SAJU.S.A

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
9/6/2015, ALONG WITH RFA. 173/2007, THE COURT ON 8/7/2015 DELIVERED
THE FOLLOWING:

**T.R. RAMACHANDRAN NAIR &
K.P. JYOTHINDRANATH, JJ.**

R.F.A.Nos.101/2007 and 173/2007

Dated this the 8th day of July, 2015

JUDGMENT

Ramachandran Nair, J.

Both the appeals are from the judgment and decree in O.S. No.598/2002 of the First Addl. Sub Court, Thrissur, in a suit for partition. The suit stands dismissed on a finding that the disposition per Ext.B1 will govern the plaint schedule property. R.F.A. No.101/2007 is filed by the plaintiffs and R.F.A. No.173/2007 is filed by the first defendant.

2. Late Shri Luwis and late Smt. Rosa had nine children, out of which 6 sisters are the plaintiffs; the third defendant is another sister and the two brothers are defendants 1 and 2. The first defendant is the eldest among all children and the second defendant is the youngest among the two brothers. The property scheduled is having an extent of 60.5 cents along with the building and other improvements therein

which late Shri Luwis obtained as per partition deed No.1964/1956. The plea of the plaintiffs in short is that, late Shri Luwis was in possession of the property till his death in 1988. Before his death he had not made any provision for distribution of property among his children. Thereby, the properties devolved on his wife Rosa and the plaintiffs and defendants by intestate succession. Mother Smt. Rosa died in 1999 and she also left the world without making any provision with respect to her right in the plaint schedule property and accordingly the plaintiffs and defendants became co-owners. The plaintiffs therefore sought for division of the property by metes and bounds and to allot 6/9 shares to them and the share in profits till partition. In the building in the plaint schedule property the 4th plaintiff and defendants 1 and 2 are residing and the plaintiffs were being given the share of improvements and the second defendant has been improving the property on behalf of the other sharers. On the plea that the second defendant has been attempting to deny the rights of the plaintiffs, the suit was filed.

3. The first defendant in his written statement contended that the

said defendant and his wife were employed in Government service and they were spending the major part of salary income for the benefit of the family throughout. They were living in the family house with the parents, sisters and brother. Even though while the mother was alive, she offered to relinquish her one third right in the property in his favour, he did not readily accept it as there will be allegation that he obtained it by influencing the mother. According to him, there was a consensus among the family members to allot one half of the share in the entire property to him in consideration of his efforts in managing the family matters and in spending amounts for the family and the balance extent was agreed to be shared equally among other heirs. But, they went back from the said arrangement proposed and therefore he prayed that the suit will have to be dismissed.

4. The second defendant in his separate written statement contended that before the death the father had executed a will. He produced the will along with the written statement. According to him, as per the will half of the items of properties including the building situated in the front portion has been bequeathed in his favour and the

balance in favour of the first defendant. Stipulations have been made in respect of each of the daughters for payment of amounts to them. The details of those terms have been averred in the written statement. It is submitted that after the death of the father, the properties have jointly vested with defendants 1 and 2 and all the sharers are having knowledge about the conditions of the will and the existence of the same and nobody had any objection in the matter. He being the youngest and was remaining without any job or avocation, was granted the half right by the father. It was contended that the suit is filed at the instigation of the first defendant.

5. The third defendant in her written statement supported the contentions of the plaintiffs. The plaintiffs filed a replication contending that the will is a forged one and disputing its genuineness. The first defendant also filed a rejoinder denying the existence of a will.

6. Both sides adduced evidence in the matter and it consists of the oral evidence of P.W.1 and marking of Exts.A1 and A2 on the part of the plaintiffs. D.Ws.1 to 5 have been examined and Exts.B1 to B12

have also been produced in evidence. The trial court considered issues 1 to 3 in paragraph 8. In the light of the evidence of D.W.1 as well as D.W.2, the court below concurred with the contentions of the second defendant that the will is a validly executed one. As regards the suspicious circumstances pointed out also, the decision is in favour of the second defendant.

7. Heard learned counsel for the appellants Shri P.B. Krishnan, Shri P.B. Subramonian and Shri C. Chandrasekharan and learned Senior Counsel Shri T. Krishnanunni for the contesting respondent (second defendant).

8. Shri P.B. Krishnan, learned counsel for the plaintiffs/appellants in RFA No.101/2007 submitted that the approach made by the court below is totally erroneous. By inviting our attention to the findings rendered by the court below, it is submitted that as against the well settled principles, the court below has fastened the burden on the plaintiffs to adduce evidence to prove the invalidity of the will. It is submitted that the said wrong approach has resulted in illegally rejecting the contentions of the plaintiffs. Learned counsel further

submitted that as regards the will Ext.B1, there are several suspicious circumstances and the burden is on the second defendant to satisfy the court about the said circumstances by acceptable explanation. It is submitted that even the document Ext.B1 will show that in the last page the signature of late Luwis is shown by leaving sufficient gap which readily indicates that the will has been drafted in previously signed blank papers after adjusting the space. It is also submitted that lines have been adjusted to fit in the stipulations in signed papers which can easily be seen on a reading of the will itself. It is submitted that the signature of the testator is really one copied from Ext.B4 partition deed. The evidence of the second defendant as well as the attester, according to the learned counsel, will not give sufficient confidence to the court to uphold the will. It is submitted that going by the evidence of Dws.1 and 2 only five persons including the attester, scribe and Shri Paulose, the document writer alone were there at the time of signing the will in the testator's house. The same cannot be believed at all since the first defendant with his wife as well as two of the plaintiffs have been residing in the very same house. The first defendant was looking

after all household affairs even going by the admissions of the second defendant. No information has been passed on to the first defendant about the will by the father which itself will generate sufficient suspicion. He was the eldest son and half of the property has been bequeathed to him as per Ext.B1 and it is significant that he also contradicts the existence of a will. He was not informed of the execution of the will at any time before.

9. Shri C. Chandrasekheran, learned counsel for the appellant in R.F.A. No.173/2007 (first defendant) submitted that the important suspicious circumstances include the non communication of any matter concerning the will to the first defendant and the non registration of the will. The first defendant as well as his wife were employed and both of them were spending the salary income for the benefit of the family. After the retirement of the father he alone was spending amounts for the welfare of the family members and was meeting the expenses of the family. Therefore, keeping away the first defendant with the same itself is suspicious, as the late father was affectionate to him. Apart from the same, even going by the evidence of DW.2, he obtained the

will from the mother which itself generates suspicion. The mother would not have kept it away from the first defendant, if actually the will had been prepared. The second defendant has not conveyed anything to the first defendant about the will at any time.

10. It is pointed out that the written statement of the second defendant is dated 20.12.2002 but it was filed only on 6.3.2003. He produced the will Ext.B1 only along with the written statement. Learned counsel submitted that the will was not produced before any of the authorities by the second defendant. Even though in a previous suit O.S. No.117/1999 wherein the second defendant was mainly the defendant, these items of properties were attached he never claimed it as his own and the evidence is to the effect that the first defendant was paying the building tax. There is no plea in the proof affidavit by the second defendant that he was handling the property as his own at any time. Thus, it is submitted that several suspicious circumstances are remaining unexplained. Shri Chandrasekharan, learned counsel, submitted that the version of the second defendant is that the will was given to him by the mother after 41st day of the demise of the father and

on conclusion of the religious function on that day. Actually, if it was informed about the existence of a will after the 41st day ceremony pursuant to the death of the father, they would have filed the suit at that point of time. There is no evidence to show that in tune with the stipulations in the will, any payment has been offered to any of the sisters including the marriage expenses of the sister Jessy, who got married, after the death of the father and all expenses were met by the first defendant. Reference was made in this context, on certain parts of the depositions of the witnesses.

11. One of the aspects pointed out is the evidence by way of Exts.B7 and B8 release deeds. These release deeds have been executed by one sister and the legal heirs of another sister of the late father in favour of all his children and the mother. Both are dated 23.9.1998. It is submitted that if the properties have been bequeathed to defendants 1 and 2, it was not necessary to execute release deeds in favour of all the legal heirs including brothers and sisters. Thus, the suspicious circumstances pointed out, going by the arguments of the learned counsel, would show that the will is not a genuine one. The will

Ext.B1, was not produced before any authority before producing it in the suit. Ext.B9 contains the admitted signature of late Luwis, which varies from that contained in Ext.B1. The document writer was not examined also. The evidence of D.Ws.1 and 2 and their stand on various events regarding the preparation and signing of Ext.B1, according to the learned counsel, generates several suspicious circumstances. D.W.1's version is that only five persons including him were there in the house of the testator while signing the will, and according to D.W.2, the scribe, there were only three persons. The same is not believable, as other family members including first defendant were residing along with the father.

12. Learned Senior Counsel for the second defendant, Shri T. Krishnanunni while answering to the contentions, submitted that on a reading of the will, it can be seen that the testator had provided for payment of money to the sisters and has earmarked property in favour of the two sons. There is nothing unusual in the same. Learned Senior Counsel further submitted that the testator had provided life estate to his wife to enjoy the property. The wife died in 1999. Therefore,

going by the stipulations in the will that the properties will vest in the two brothers after her death, the obligations under the will had to be undertaken within three years from the date of death of Rosa, the mother, viz. on 13.12.1999. Thus, the second defendant along with the first defendant, had got three years and before the expiry of the three years, the suit was filed on 18.7.2002. It is submitted that the evidence adduced will show that the testator had close acquaintance with Shri Paulose, the document writer, and Shri Balakrishnan and other witnesses. Shri Paulose had finalised the contents of the will and Shri Balakrishnan is the scribe. Two witnesses have signed also, who were well-known to the testator. It is clear from the evidence of D.W.2, Shri Balakrishnan, that before signing the same, the entire portions were read over. D.W.1 has given evidence that the witnesses have signed after the testator put his signature and in the last page again the testator has put his signature. Therefore, the attestation has been proved in tune with the requirements under Section 68 of the Evidence Act. It is submitted that this is a case where till the death of the mother, nobody had asked for any right in the schedule property. It is submitted that the

stand taken in the replication that the will has not been properly executed, that the father was weak and lacked mental capacity, etc. have not been proved in evidence. Even though undue influence and coercion have been raised in the replication, no evidence has been let in in support of the same. Learned Senior Counsel referred to the contents of the depositions of various witnesses.

13. It is therefore, submitted that as far as the first defendant is concerned, the change of stand is evident and he now wants to support the other sisters. The obvious reason is that the second defendant is given the front portion of the property and he wants to unsettle the disposition only to execute the idea to deprive the 1st defendant's right.

14. Learned Senior Counsel submitted that as regards the signature of the testator, it can be seen that the same is similar to his admitted signatures. The partition deed has been produced as Ext.B4. The signature is not shaken and there is no evidence to show that he was unable to take a decision of his own. Apart from the same, the evidence of the first defendant will show that the father was healthy.

15. It is submitted that there is nothing unusual in the wordings

of the release deeds Exts.B7 and B8. Even if the second defendant had furnished stamp papers to execute a power of attorney of one of the executants, it will only imply that the second defendant being a stamp vendor, was involved in the matter as a legal heir and it was only natural to take the documents in favour of all the legal heirs. Therefore, it is submitted that nothing turns upon the execution of Exts.B7 and B8. As far as the suit filed by his wife in Sub Court, Thodupuzha where the properties were attached, even if it is true that the second defendant did not claim any right based on the will, the same is not significant. It is therefore submitted that there are no suspicious circumstances and as the execution of the will has been proved, the suit has been rightly dismissed.

16. On behalf of the plaintiffs, P.W.1 was examined. She is the third plaintiff in the suit. A summary of evidence of P.W.1 will show the following aspects: In the proof affidavit details have been given in tune with the averments in the plaint. It is stated that in the plaint schedule properties the 4th plaintiff who is remaining unmarried and defendants 1 and 2 are residing. Even though the second defendant is

taking the yield, he was giving a share of the value of improvements to the plaintiffs till the filing of the suit. She denied the execution of any will by the late father.

17. In the cross examination, she has denied the existence of any family arrangement by which half of the share in the property was agreed to be allotted to the first defendant. She admitted in cross examination that the salary income of the first defendant and his wife was being spent for the purposes of the family. According to her, the younger brother of the father is alive and neither he nor her mother had at any time disclosed about the existence of Ext.B1 will. No way is in existence to reach the rear portion of the property as described in the will. In cross examination for the second defendant, she has stated that the residential house constructed by D.W.1 is remaining closed even though the house was constructed about three years back. Apart from the items owned by the father, there were certain other items which have been disposed of for various purposes. According to her, it is not true that the second defendant became indebted due to loss occasioned in business. He was married but the marital tie has been broken which

ended in a divorce and he has one child out of the said marriage. According to her, while the father was not keeping well, and by utilising the said opportunity, Ext.B1 could have been created. He was not in a position to understand things in a proper manner. She also stated that no information was passed on regarding existence of Ext.B1 by the second defendant to them. There are 15 - 20 coconut trees in the plaint schedule property.

18. Thus, it is evident from the deposition of P.W.1 that defendants 1 and 2 and the 4th plaintiff have been residing in the house. Nobody had been given any information about existence of Ext.B1 will also.

19. Now we will come to the evidence of D.W.1 who is one of the attesters. He is a resident of Varannur and according to him, the deceased Luwis was known to him from his childhood. He was a Post Master. D.W.1 had signed the will Ext.B1 as witness No.2. He identified his signature in Ext.B1. He saw Luwis signing Ext.B1 and the other witness P.M. Kochappu also signed in his presence. According to him, both the witnesses saw the deceased Luwis signing

the will and before signing, Ext.B1 was read over to him by Shri Paulose. The deceased signed the will after it was read over in full and knowing its contents and he was fully conscious and healthy at that time and in putting his signature, he was not acting under the influence of anybody.

20. In cross examination by the first defendant, he stated that Varannur is only 4 - 5 kms. away from Kecheri. He saw Luwis at the time of signing the will deed and did not see him later. He also deposed that he knew Balakrishnan who prepared Ext.B1. They were acquainted for a period of 5 - 10 years. He denied the suggestion that the will Ext.B1 was forged by Shri Jose (second defendant), D.W.1 and Shri Balakrishnan together. According to him, he was requested to be a witness by Shri Luwis himself, when he went to his house in Kecheri. Late Shri Luwis had sent for him through his worker Shri Radhakrishnan. The residence of D.W.1 and the residential house of Luwis's mother are nearby and accordingly they were acquainted. He also stated that Luwis and himself were closely known and he is not close to the second defendant. To a specific question he answered that

at the time when Ext.B1 was signed by him, Shri Luwis, his wife Smt. Rosa, Shri P.M. Kochappu, the other witness Shri Paulose, the document writer and his employee Shri Balakrishnan and D.W.1 alone were there and nobody else was there. He was asked to come there by Shri Luwis through telephone. When he arrived, all the others were already there and the reading of the will started after he came. The children of Shri Luwis were not there and they have not heard the reading of the will or the will being signed. None of them had been there also. In cross examination for the plaintiffs, he stated that he saw Shri Luwis on the last occasion when he was in Amala Hospital. Lower down in the deposition he stated that he reached the house of Shri Luwis by 5'0 clock and by the time the will deed was brought after preparing it. He do not know who brought it there, but the document writer and the scribe were already there. He also do not know who gave advice for preparing the will. According to him, it was not prepared in a stamp paper, but in a lined paper. He also stated that the other witness Shri Kochappu is not alive and he was a stationery merchant. He also stated that in the last page Shri Luwis put his

signature in the last line. This, in short, is the summary of deposition of D.W.1.

21. Apparently, to challenge the credibility of the said witness, certain suggestions have been put to him. In the cross examination for the first defendant, he answered that he has not seen any other will and he do not know anything about the preparation or writing down of a will. He also answered that his father's properties were partitioned among his brothers and himself in a cordial manner and the tharavad property was allotted to him and paddy lands were shared by others. He also stated that regarding the partition effected there were no disputes or cases between him and others. Ext.B2, the copy of the plaint in a suit with regard to partition in his family which was pending before the Sub Court, Thrissur was marked through him. He admitted that he is the fourth defendant therein and the remaining seven others are also defendants in that suit, Ext.B3 is the certified copy of the written statement filed by him in that suit. He was asked a specific question whether he had averred therein that for the plaint schedule property he alone is entitled for right as per the will executed by his

father and that the other defendants have no right and he answered as “yes”. He was also asked as to the similarity of the will deed executed by his father and Ext.B1, and the answer is that he has nothing to offer as a comment on the same. He further explained that he has not prepared any will and he do not know who prepared it.

22. D.W.2 is the scribe, Shri Balakrishnan who deposed that Ext.B1 was written by him.

23. D.W.2 is a document writer and started the work independently eight years ago and before which he was working under Shri Paulose. According to him, Ext.B1 was written by him from the draft finalised by his senior Shri Paulose. After preparing the draft, the original was prepared. He saw Shri Luwis putting his signature in Ext.B1 and in the last page two signatures have been put by Shri Luwis. He identified the portion written in his handwriting, below the signature of Shri Luwis. He had signed in the last page of Ext.B1 and the witnesses who attested the will saw Shri Luwis signing it and Luwis also witnessed the others signing it.

24. In the cross examination, he denied the suggestion that the

will is a forged one. Regarding the gap seen in the last page above the signature of Shri Luwis, the explanation offered is that in many documents space will be left like this. He denied the suggestion that the will was prepared in blank papers previously signed by the deceased. He had no previous acquaintance with the witness, D.W.1 and the other witness. Shri Luwis has not given any instructions to him to prepare Ext.B1 and both of them have not discussed anything about Ext.B1. He wrote it based on the matter given by Shri Paulose. He further stated that the will was signed in the residence of Shri Luwis itself. The names of witnesses and the portion below it were written after reaching the said house. Both Shri Paulose and himself went together. The names of witnesses were not informed earlier. Lower down he stated that at the time when the witnesses had put their signature, only three persons were there including Shri Luwis and nobody else was there. He also stated that he is not having any previous acquaintance with Shri Jose (second defendant) He did not see the payment of any fee for preparing the will or issuing receipt for payment. He stated that in Ext.B1 as against his signature, the name of

Shri Luwis was written by Shri Luwis himself. He has not seen any prior basic documents while preparing Ext.B1. The above are the crucial portions from the deposition of D.W.2.

25. Now we will have to consider the deposition of D.W.3, the second defendant who is the propounder of the will. In the proof affidavit he has stated inter-alia that the will is one executed by the deceased on his own and without any duress and undue influence. It has come into effect after the death of the father. The same is the last will of the deceased and the plaintiffs have no right to get anything out of the schedule properties. According to him, the first defendant and his wife were Government employees and they are settled in life and as he had no particular employment, the father was worried about him. As per the will, the father had set apart major part of the property on the front portion to him and initially the first defendant had no objection to it. But later, he became jealous and went back on it and it is by colluding with his sisters, the suit has been filed. He also explained that the plea of the first defendant that the mother had agreed to release her right to him, is not correct. He also denied the averments

in the replication. According to him, the father was perfectly healthy till his death and he was mentally stable also.

26. In the re-examination of the second defendant, it is stated that Ext.B1 will was given to him by the mother in 1988 after conclusion of 41st ceremony consequent on the death of his father and all the children were aware of it. In cross examination for the first defendant, he pleaded ignorance as to why the same was not stated in the written statement and according to him, he had told about this to his counsel. To his understanding, the will came into effect after the death of the father in 1988. As per it, the two sons got the property exclusively and he had approached the Village Office for effecting mutation in their names, but they did not permit it and informed him that only after partition is effected as per the provisions of the will, the tax can be received and in their joint names also tax cannot be paid. Hence, from 1988 no tax has been paid in the Village Office. After the death of the mother also, he did not attempt to remit the tax. To a specific question, he deposed that the elder brother has been remitting tax in the name of the father, but he has not remitted the tax at any time. To a specific

question, he answered that he do not deny that after the death of the father, on behalf of all the sharers the tax was being remitted in the name of the mother, etc.. The prior title deed is with his brother. When the will was handed over by the mother, he had sought for it from the mother and she informed that the same is with the brother. To a specific question as to whether any steps were taken for effecting partition based on Ext.B1 at any time after 1988 together with his brother, he answered that no steps have been taken. Ext.B5 tax receipt for payment of tax for the year 1999-2000 dated 13.7.1999 in the name of his brother and others was marked through him.

27. D.W.3 denied the suggestion that the will was actually forged by him. To a specific question whether for establishing the right under the will, he had produced it before any authorities, he answered “no”. According to him, the building tax in the Panchayat was being remitted till 2001 in his name and the documents are with him. After 2001 the brother is remitting it and even now it remains so. He has seen the receipts showing the remittance of tax in the name of his brother. Water connection as well as phone connection in the house are in the name of

the brother and the phone connection was taken in the name of the brother for about 7-8 years approximately. According to him, the signature contained in Ext.B1 is that of his father and the name was also written by him and he had seen his signature in the Post Office records. The father had retired in 1966 from the Postal Department and while he was aged about 9 years, he had seen his signatures in the Post Office and even after he became major, he has seen them. He denied the suggestion about the discrepancies and suspicions about the signatures in the will and replied that the father himself had written his name. According to him, no other documents having the signature and handwriting of the father is with him. He is not in possession of copy of Ext.B4. Even though he had seen Ext.B4 with the father, he has not read through the contents of Ext.B4. His aunt Smt. Mary was also residing with the father and she died before the death of his mother in 1999 and thereafter the mother also died. In Ext.B4 there is a provision to take care of his aunt Smt. Mary by his father and his brother and no such provision is there in Ext.B1. According to him, as described in Ext.B1, there is a way through the western side of the property. To a

specific question he stated that during 1985 November, when Ext.B1 was executed, he was not having any particular avocation. He was conducting a bakery in the schedule building which was started in March 1986 and it was a licenced one also. For starting of the bakery, a loan was availed of. There was a case filed by Catholic Syrian Bank in respect of the loan taken from them and a case was filed by the Indian Overseas Bank also. Ext.B6 certified copy of the plaint was marked through him. The loan was availed on 25.3.1985 and the father was the surety. After the death of the father, the mother and elder brother might have been impleaded in the suit. The bakery had a licence from March 1985. To a specific question, why it was written in the will against his name, as “jobless”, he deposed that he does not know the reason. He has not shared the expenditure for the conduct of Kurbana in the church after the death of the father and mother every year, in tune with the provisions in the will. He admitted that there is no document to show that he had shared any such expenditure. He further admitted that the church usually issues receipts and all the receipts are in the name of his brother.

28. According to him, his brother was meeting the expenditure and he was sharing the same with the brother, but to show that there is no other document. According to him, the stamp vendor's licence was taken in 1989-1990. To a specific question, he answered that registered release deeds were executed for the amounts to be paid to the aunts, before the death of the mother. The release deeds were executed in the capacity as legal heirs of father. Initially he denied the suggestion that the document was executed in the name of the mother and all the children, but when he was shown the document, he stated that if it is seen as per the document, it may be correct and the document was marked as Ext.B7. Ext.B8 was also shown which is a similar release deed where all the legal heirs have joined. Even though he denied the suggestion that the stamp papers were supplied by him, when he was confronted with the power of attorney of certain executants, he stated that the stamp papers were given by him on 23.7.1998 (No.1311) and his signature is there. The mother was alive during the year 1998 when the release deeds were executed.

29. His brother Shri Francis and his wife were having

employment. To a specific question whether they were spending the salary income for the family purposes, he answered that it may not be fully correct, but amounts might have been taken from the brother and from his wife also. According to him, before execution of Ext.B1 in 1985, he was not in a position to render any financial help to the family. He had married a girl from Thodupuzha and after one year and 8 months, it was divorced and one child was begotten out of the wedlock. To a specific question he answered that the wife had filed a suit to realise an amount of Rs.7 Lakhs and the mother was alive at that point of time. In the said suit, the plaint schedule properties were attached and the mother and all the nine children were impleaded therein. He did not produce Ext.B1 before the said court. According to him, the description in that suit that the property is owned by him and other children, is only a figment of imagination of the plaintiff in that suit. The attachment was ordered after the death of the father. In cross examination of the plaintiffs, he stated that before the death, the father was treated in Amala Hospital twice as inpatient, but he denied the suggestion that he was not mentally stable and had memory loss. He

admitted that in O.S. No.117/1999 which was filed in Thodupuzha all the legal heirs were impleaded when the mother died and he has not raised any defence by disclosing the existence of the will. Through him, Ext.B9, a letter in the hand writing of the father, was also marked which was sent to one of the sisters, Smt. Mary, when she was in Zambia. Even though certain suggestions were put to him about the variations in the handwriting and signatures in Exts.B1 and B9, he denied the same. He also admits that his sisters Febiyola and Jessy were not married on the date of Ext.B1.

30. D.W.4 is the first defendant. In the proof affidavit filed by him, he reiterated his stand in the written statement. According to him, after the death of the father, the marriage of one of the sisters was conducted by him, by spending amounts and he was spending amounts for the treatment of mother for 13 years as well as the sister who remained as a spinster. He was employed as Junior Health Inspector and the wife was employed as a school teacher. After he entered service in 1963, his salary was being utilised for the expenses of the family and after his marriage the wife's salary was also being utilised similarly.

Even though the mother, who was aware of it, wanted to release one third right in the property, he did not agree to it, to avoid any allegation of undue influence on her. According to him there was a family arrangement that half of the items of property will be given to him and even though preparations were made several times, since the second defendant prolonged the matter, the same could not be finalised. He was running his business in one of the rooms in the schedule building. He has mentioned the names of certain mediators through whose intervention the family arrangement was agreed. According to him, every one were aware that after the death of the mother, the property will have to be sold and amounts will have to be shared, as otherwise it will not get proper value. In tune with the above arrangement, his wife purchased 10 cents of property and started construction of a building. According to him, the will is a forged one. There were no circumstances for executing a will. If such a will was prepared, he would have been made aware about it, since he was residing along with the father and there are no stipulations in the will, so as to keep it away from his knowledge also. According to him, one of the

witnesses, Shri Kochappu was not in good terms with the father and therefore there was no chance for him to be a witness and he denied the signature of the said witness. According to him, the second witness, Shri Chinnappan is a close friend of the second defendant and the will was prepared with his participation also. It is a strong suspicious circumstance that the will was kept without disclosing about it for a long period by the second defendant and it is also suspicious that the second defendant had not demanded partition of the property on the basis of the will. The statement that there exists a way on the western side of the property, is also not correct. The second defendant had bakery licence from 1985. He had availed bank loan for the said purpose. It is described in the will that he has no job or avocation, contrary to it. Nothing has been stated about the provision for the welfare of the aunt Smt. Mary. After about 10 years of the death of the father, the sisters of the father had executed a release deed in favour of the mother and all the children and not in favour of the beneficiaries of the will, defendants 1 and 2. According to him, Exts.B7 and B8 were prepared and got signed and registered by the second defendant

himself. Hence, his stand that Ext.B1 was handed over by the mother cannot be believed. Even in 1998 the mother had no knowledge about any will and Ext.B1 was not produced before any forum till the filing of the present suit. This also is a suspicious circumstance.

31. According to him, in the partition deed, the name of the father is written in all portions by the same person and it is not in the handwriting of their father. In Ext.B1 his name has been written by copying it from Ext.B2. The scribe, DW3 and the second defendant are so close and there is arrangement between them with regard to the purchase of stamp papers. He has marked in evidence Ext.B10 series showing the remittance of building tax from 1993 to 1998 in the name of the mother and Ext.B11 series showing remittance in his name for the period from 2001 - 2006 and Ext.B12 series showing the remittance of amounts in the Church after the death of the father and mother for Kurvana.

32. In cross examination by the plaintiffs, he denied the suggestion that the father had lost his memory five years prior to his death. He deposed that the signature in Ext.B9 is that of the father and

he is familiar with the signature of his father. According to him, he had sought for one half share as he was spending amounts for the family. But he is not seeking the same based on the will, but based on his contentions in the written statement. He had constructed a house by taking loan and has spent the entire earnings for the construction of the same. In cross examination for the second defendant, he deposed that all the others except Shri Jose are living peacefully and are friendly. His wife purchased 10 cents of land in June, 1999. According to him, it is not because of the stipulations in Ext.B1 that a house was constructed. He has seen his father preparing letters and applications and he is familiar with his handwriting. He again reiterated that he is not claiming half right of the schedule property based on Ext.B1. The father had sold certain items of properties situated in Eranellur, Kaipparambu and Choondal villages for meeting the family expenses. He also admitted that except the fourth plaintiff, all the other sisters are having separate residential houses and she is aged 52 and is not having any residential house of her own. To his knowledge, the second defendant is also not having any other house. In the schedule property

buildings have been numbered as 14/281, 14/282 ad 14/283 and he is remitting building tax for building No.14/281, viz. the house. For building No.14/283 there is no tax and Shri Jose is remitting tax in respect of the other portion. Actually in the schedule property there is only one building and till the death of the mother she was remitting tax. The second defendant is functioning as stamp vendor in one of the rooms. At the time the father was there, post office was functioning in the upper portion of the family house. He also deposed that the document writer Shri Paulose is not alive. He is residing in the schedule property and there is ration card also and in the ownership certificate issued by Choondal Panchayat his name is shown as owner. It was procured for getting electricity connection and there is no connection in the name of Shri Jose (second defendant). On the complaint made by Shri Jose, the ownership certificate was cancelled by Choondal Panchayat and the connection in the name of the father is being utilised by Shri Jose. He denied the suggestion that the expenses for the marriage of sister Jessy which was conducted after the death of the father, was shared equally by the second defendant and it is stated

that the first defendant had met the entire expenses. The mother died on 13.12.1999. The decision in the mediation was to sell the entire holdings and to share the amounts and also to give him half share of it. He denied the suggestion that he had given advice for preparing Exts.B7 and B8. He denied the suggestion about the name appearing in Exts.B1 and B4 as that of the father and whether it is in the handwriting of the same person. According to him, Ext.B1 is a forged one. It is also deposed by him that on the western side there is a width of 7 ft. between the wall of the house and compound wall and a person can easily pass through the same and there are coconut trees, bathrooms and toilet in the said way apart from a well. They were in existence even in 1985. He denied the suggestion regarding knowledge about Ext.B1 by the mother.

33. D.W.5 was examined to support the contentions of the first defendant. He is the son of a brother of deceased Rosa.

34. A reading of Ext.B1 will show that there are various stipulations therein. Going by the same, the married daughters who are residing elsewhere, were given ornaments at the time of marriage. The

unmarried daughter, the 4th plaintiff and Jessy were living with him. It is also stated that his elder son Francis is married and is living with him, apart from the younger son Jose. It is further stated that the salary income of his son Francis and his wife Alice were being utilised for the expenditure of the family. Provision has been made that if his wife Rosa survives him, she can take yield from the property and reside in the house till her death but she will not have any right to enter into transactions in respect of the property. The further stipulations are the following: 13 $\frac{3}{4}$ cents in Sy. No.277 including the well and the residential building is set apart for his younger son Jose after his death and after his wife's death. It is stated that as Shri Jose is not having any permanent employment or income, the said provision is made. The remaining properties will be shared by the sons for enabling them to get 30 $\frac{1}{4}$ cents of land each and the portion with the building and well will be enjoyed by the son Jose and the remaining item by the elder son Francis. It is stipulated that if for any reason the marriage of Jessy could not be conducted by him during his lifetime, it will be conducted by both the sons together and ornaments, etc. will be

provided to her as was given to other sisters.

35. Then, provision regarding amounts set apart for the daughters is there. A sum of Rs.2,000/- each is set apart for the daughters Elsy, Thresiakutty, Kochumary and Brijitha and a sum of Rs.60,000/- to Alphonsa as she was not given anything at the time of her marriage and a sum of Rs.2,000/- to the daughter Jessy if her marriage is conducted during his lifetime or after his death. Three years time is given for payment of these amounts to them by the two sons without any interest and they will have to obtain receipts for the same. The properties have been made as charge for the said amounts and provision is made that in case of non payment, the daughters can realise the same. It is stipulated that after his death and the death of his wife, all the religious ceremonies will be conducted jointly by the children. For the yearly expenditure in the Church for conducting Kurbanah after his death and his wife's death, the sons will spend amounts equally and with the participation of the daughters. As far as the unmarried daughter Febiyola is concerned, provision is made that she can reside along with the sons Francis and Jose from time to time

till her death and the said right cannot be obstructed by any of the sons. It is also stipulated that the expenses for her care and welfare will be shared equally by the two sons. It is further stipulated that he desires to set apart a sum of Rs.75,000/- for Febiyola to be deposited in a Fixed Deposit and if he is not able to do it before his death, the sons will jointly deposit the said amount within a period of three years after his and his wife's demise if Febiyola survives them. It is stated that the way through the western side to go to the northern side and included in the entire extent of 60 ½ cents can be used by both the sons. It is also stated that after his death and his wife's death the daughters should be paid the amounts within three years and thereafter the elder son should shift from the house in the property.

The points for determination arising in these appeals are:

- (i) Whether Ext.B1 is the last will of the testator Shri Luwis;
- (ii) Whether the propounder of the will, the second defendant has succeeded in removing the suspicious circumstances pointed out in relation to the will, Ext.B1; and
- (iii) Whether the plaintiffs are entitled for the relief of partition

in respect of the plaint schedule property.

36. Now we will come to the various contentions. The law is well settled that the burden is on the propounder to prove the execution of the will and that it is the last will of the testator. It is also the burden of the propounder to remove the suspicious circumstances by placing satisfactory materials on record and the trial court in the judgment in paragraph 13, took the view that though the burden to prove the will is on the propounder, he is not obliged to examine each and every person connected with the will. It was upon the party challenging the will to bring into the box such persons left out by the propounder if the challenger feels that such person left out is the only one who can be expected to say the truth. Much objection has been taken by learned counsel for the plaintiffs and the first defendant/appellant against the above statement of law.

37. The legal position as far as the evidence required, has been fully laid down in the decision of the Apex Court in **H. Venkatachala Iyengar v. B.N. Thimmajamma**. In paragraph 18, Sections 67 and 68 of the Evidence Act as well as Sections 59 and 63 of the Indian

Succession Act have been explained. We hereinbelow extract paragraphs 18 and 20:

“18. What is the true legal position in the matter of proof of wills ? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly,

Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained ? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribe by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to

expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed

alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.”

Going by the principles stated in paragraph 20, before the court accepts the document as the last will of the testator, all legitimate suspicions will have to be completely removed. It has been particularly specified that the initial onus is very heavy and unless it is satisfactorily discharged, the courts should be reluctant to treat the document as last will of the testator. Learned counsel for the appellants in R.F.A. No.101/2007, Shri C. Chandrasekharan relied upon the above decision as well as the decisions of the Apex Court in **Smt. Jaswant Kaur v. Smt. Amrit Kaur and others** (AIR 1977 SC 74) and **Kalyan Singh v. Smt Chhoti and others** (AIR 1990 SC 396) and that of the Calcutta High Court in **Ashutosh Seal v. Smt. Umashasi Santra** (AIR 1984

Cal. 223). In **Smt. Jaswant Kaur's case** (AIR 1977 SC 74) the principles have been stated in the following terms in paragraph 9:

“In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the Court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.”

It has been thus held that it is for the party which sets up the will to offer cogent and convincing explanation of the suspicious circumstances surrounding the making of the will. These principles have been reiterated in **Kalyan Singh's case** (AIR 1990 SC 396) in paragraph 20 which we reproduce below:

“20. It has been said almost too frequently to require repetition that a will is one of the most solemn documents known to law.

The executant of the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will. It must be stated that the factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open to the Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.”

Thus, the court is not confined only to the testimony of witnesses and the evidence produced by the propounder and it would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as

well as inherent improbabilities of the case to reach a proper conclusion in the matter.

38. In **Ashutosh Seal's case** (AIR 1984 Cal. 223) also it has been held that the suspicious circumstances will have to be removed, in a cogent and convincing manner.

39. Therefore, apart from the evidence of witnesses, it will be open to the court to look into the surrounding circumstances to find out whether the propounder has been successful in offering explanation to the satisfaction of the court before the will could be accepted as genuine.

40. Herein, the attesting witness examined is D.W.1 and the scribe is examined as D.W.2. Their narration is in tune with the provisions of Section 68 of the Evidence Act. D.W.1 whose name is shown as a witness, has specifically stated that he and the other witness signed after the testator put his signature and they have seen the testator putting his signature and the testator has also seen them putting their signatures. This is the version by the scribe also who was examined as D.W.2.

41. The whole evidence adduced gives a true picture of the family. Late Shri Luwis and Smt. Rosa had nine children. He was a Post Master and retired from service around 1966. The property obtained by him as per his family partition in the year 1956 is the subject matter of the present suit. The copy of the said partition has been marked as Ext.B4 which is of the year 1956. Among the seven sisters, the 4th plaintiff Febiyola is a spinster and the 6th plaintiff Jeseentha was yet to be married before the death of father Luwis. Defendant No.1, Shri Francis is the eldest among the children. He was a Government employee and his wife was also employed as a teacher. Plaintiffs 4 and 6, defendant No.1 and his wife and the second defendant were also residing along with the father and mother. Another sister of the father was also residing with them. The father died in the year 1988 and the mother died in 1999 and before the death of the mother, the aunt Smt. Mary also died. Even in respect of Ext.B4 partition deed, it can be seen that the two parties are the father Luwis and his brother Thoma. In respect of sister Mary, it is mentioned in Ext.B4 itself that she is residing with them and her expenses for food

and dress will be met by them in turn and that she can reside as per her choice, with any of them. The second defendant is working as a stamp vendor and is occupying one room in the front portion of the residential building for his business. He got married some time after the death of the father, but it was divorced also.

42. The evidence is also to the effect that the son Francis (DW1) and his wife were meeting various expenses of the family from their salary income. This fact is admitted by the third plaintiff who was examined as P.W.1 and D.W.3, the second defendant in his deposition. They continued to reside there even after the death of the father and mother. As far as the execution of the will is concerned, the first defendant had pleaded total ignorance about the same and according to him, he came to know about the same only when the second defendant produced it along with the written statement. The written statement of the second defendant is dated 20.12.2002 but it was filed only on 6.3.2003 and along with it the will was produced. The stand of the first defendant is that he was never consulted with regard to any of the stipulations in the will and the fact regarding execution of the will has

also not been communicated to him by the father or the mother which is totally unnatural. Learned counsel for the appellants Shri Chandrasekaran vehemently argued that this is a strong suspicious circumstances. Learned Senior Counsel for the second defendant Shri T. Krishnanunni submitted that it cannot be a suspicious circumstance as the stipulations were known only to the father who made them.

43. We find from the evidence of the second defendant that he has not offered any specific explanation as far as this aspect is concerned and has not pleaded any reason also. That the first defendant is the elder son and was managing the affairs of the family, is not under dispute. His wife's salary was also being spent for the family. The stipulations in Ext.B1 will go to his advantage also, in that he is getting half of the property. But that itself cannot be a circumstance to explain away the suspicious circumstance pointed out. Since he is also challenging the will, even though he will be benefited by getting half of the property, it is so unnatural that the father and mother had never disclosed the execution of the will from him. He being the elder son, it is only a natural thing that the father and the mother will communicate

the same to him. Even though the stand of the second defendant is that after the 41st day of the demise of the father, it was disclosed and Ext.B1 was handed over to him by the mother, he has not explained why the same was not handed over or even shown to the first defendant by her. Even his deposition will show that the other documents concerning the properties are with the first defendant. Therefore, the absence of any possible and acceptable explanations on these aspects on the part of the second defendant is clear from the evidence adduced and going by the surrounding circumstances as well as the family background of the parties also, normally the elder brother, the first defendant would not have been kept away from being informed about the preparation and execution of the will.

44. It is also surprising that at the time of execution of the will, going by the stand of the second defendant, only five people were there including the document writer, Shri Paulose, two witnesses and the scribe. That the will was signed by the father in his own house, is the evidence as per the deposition of D.Ws.2 and 3. Both the sisters Febiyola and Jessy were residing with the father at that point of time

apart from the first defendant and his wife. Therefore, their presence in the house at the relevant time is clear. If that be so, it is only natural to think that they will not be kept out of the scene at the time when the will was signed. Regarding this, there is no explanation from the part of the second defendant. He is also occupying one room for his stamp vending business. This is also significant. Therefore, if the evidence of D.W.2 is accepted, the signing of the will was totally kept as a secret by the father, but in the background of the situation of the family where all the members were residing together, this is so unnatural. There is no explanation for it. D.W.2, the scribe also deposed that the document writer Shri Paulose and himself went together. He also has not seen any other family members. This is unusual.

45. The third circumstance pointed out is the execution of two release deeds, Exts.B7 and B8 by the legal heirs of the two sisters of deceased Luwis. These documents have been executed in favour of mother Rosa and all the children together, on 23.9.1998. Even though initially D.W.2 denied his association with its execution, but later he admitted that the stamp papers were supplied by him for executing the

power of attorney. These two documents are registered also. Both these are of the same date. The contents of Ext.B7 will show that it was executed by Mary, the sister of Luwis. The properties partitioned originally belonged to the father and mother of late Luwis and as per a registered will executed in favour of Luwis and his brother Thomakutty, the properties devolved on them. Late Luwis and Thomakutty had executed a partition deed of the year 1956 (Ext.B4) and the properties scheduled in the present suit were set apart in favour of late Luwis. As per the will executed by their mother, provisions have been made for payment of certain amounts by Luwis and Thomakutty together to Mary, the sister of Luwis and as per the partition deed of 1956, the responsibility was made over to Luwis and the receipt is executed for payment of an amount of Rs.2,012/- by the legal heirs of Luwis. Ext.B8 is also a similarly worded document. Similar provisions were there in the will deed of the mother of Luwis and his brother Thoma for payment of amounts to another sister Kunjanna and the responsibility for payment was made over to Luwis as per the partition deed of 1956. The document Ext.B8 is executed by

the children of Kujanna. In both the documents, the names of all the legal heirs of Luwis have been shown. It is also stated that the receipts are being executed on payment of the amounts by them.

46. If, as per Ext.B1 the properties have been set apart for defendants 1 and 2 together, the presence of others as parties in the above documents was not necessary. It is evident that even at that point of time the second defendant has not disclosed anything about existence of the will. Apart from the same, in the will also, there would have been provision for payment of these amounts by defendants 1 and 2 together. The said circumstance is also significant. In Exts.B7 and B8 while tracing out the right of the mother along with the plaintiffs and defendants herein, what is stated is that they have obtained the property by way of succession after the death of Luwis. As rightly pointed out by the learned counsel Shri P.B. Krishnan, the same is also significant, as if, the will was already in existence, the names of defendants 1 and 2 alone need be shown in Exts.B7 and B8 as the persons on whom the properties of Luwis have devolved and it was not necessary to include the sisters and their mother. Both the documents

were executed on 23.9.1998. We find force in the above submission. Even though learned Senior Counsel for the second defendant Shri Krishnanunni submitted that merely because the release deeds have been registered in favour of all the legal heirs, especially since the mother was alive, nothing unusual need be presumed, we cannot agree.

47. This is a case where the plaintiffs and the first defendant strongly pleaded that the will never came to light before the production of the same along with the written statement of the second defendant. Therefore, the court will have to find out whether there was any previous occasion for the second respondent to produce it. That he was also associated with the release deeds Exts.B7 and B8, is clear, even though initially he pleaded ignorance about the same. As regards this aspect is concerned, according to us, there is no reasonable explanation by the second defendant.

48. Then, the next circumstance pointed out is the non production of the will in the suit filed by the former wife of the second defendant in Thodupuzha court as O.S. No.117/1999 it is admitted by him that all the legal heirs including the mother were impleaded in that suit by his

former wife and the properties scheduled herein were attached.

49. According to learned counsel Shri P.B. Krishnan and Shri C. Chandraseknaran, actually it was an occasion for the second defendant to disclose the existence of the will, that also in a pending suit. It was a suit in which he was the main defendant. The entire properties were being proceeded with by the plaintiff, his divorced wife and naturally, if the will was produced, since one half right over the property being earmarked to the first defendant, that also would have been a relevant aspect. Even though learned Senior Counsel Shri T. Krishnanunni explained that actually the second defendant wanted to avoid action against the entire extent of property, the second defendant has not offered any such explanation in his deposition. It was a properly constituted legal proceedings where there was occasion for producing the will and the non production could have been properly explained by him and no explanation was offered by him. In the written statement or in the objection filed in the said suit also, he has not claimed any right as per the will, admittedly. As held by the Apex Court in **Kalyan Singh's case** (AIR 1990 SC 396) in paragraph 22, that “the will has not

been produced for very many years before the court or public authorities even though there were occasions to produce it for asserting plaintiff's title to the property”, the same situation has arisen herein also. In that case, it was held that “the plaintiff was required to remove these suspicious circumstances by placing satisfactory material on record and he has failed to discharge his duty.” In the deposition he has not offered any explanation for these matters. Therefore, the argument raised by the learned Senior Counsel for the second defendant is not supported by any explanation of the second defendant in respect of the non production of the will at any time at least in the suit in which his wife was the plaintiff, to assert his right over the property. In the absence of any explanation, we can only hold that the suspicious circumstance has not been removed by any possible explanation. Similar is the case with Exts.B7 and B8 documents which we have already referred to.

50. There is another factor which has come to light from the cross examination of the second defendant by the plaintiffs. He was asked a specific question as to whether the Police has registered a case against

him for causing injuries to his sister Smt. Febiyola when she demanded partition, by beating her. He answered that a case has been registered, but it was not for demanding partition. Then, he further admitted that from the statement given by his sister Smt. Febiyola before the Police, it is understood that she has given a version that it was for demanding partition that he bet her. As far as this part of the evidence is concerned, it can be seen that even at that point of time he has no case that he had disclosed about the existence of the will to Smt. Febiyola also and she had also demanded partition when the alleged incident occurred. This also is significant.

51. As far as the handling of the properties is concerned, according to the evidence of D.W.2, the provisions in the will came into effect after the death of the father. The father died in the year 1988, three years after its execution. His evidence is that even though he approached the Village Office for effecting mutation, they did not agree to it. His own evidence is also that he did not approach the first defendant for effecting partition. If, as a matter of fact, the revenue authorities had asked him to come after effecting partition, it was an

occasion for him to discuss the matter with the first defendant and to disclose about the will to him. That was also not done and there is no explanation for the same. Even going by his admission, the property tax was initially being paid in the name of the mother and evidence produced by the first defendant by marking Exts.B10 and B11 series for payment of building tax from 1993 to 1998 was in the name of mother and after her death, from 2001 - 2003 in his name. Therefore, as far as the handling of properties by the second defendant is concerned, he has not asserted his right in that manner also. Of course, the second defendant's case is that he was taking yield from the improvements, viz. coconut trees, that alone cannot throw light on the above suspicious circumstance. Shri T. Krishnanunni, learned Senior Counsel argued that the mother died only in 1999 and thereafter only the sons will get a right independently, as she had the life estate over the property.

52. Learned counsel Shri P.B. Krishnan submitted that in the written statement as well as in the proof affidavit the assertion made by the second defendant is that the will came into effect after the death of

his father and therefore his understanding is material. It is clear that even after the death of the mother in 1999, upto 2002 no steps were taken by the second defendant to effect the partition between him and his brother, to effect mutation and for getting the right over the building in his favour. The same is significant.

53. As far as the will is concerned, learned Senior Counsel Shri T. Krishnanunni submitted that if this Court feels that there should have been an examination of signatures of the father by an expert, the matter can be remanded. The learned Sub Judge has compared the signature of deceased Luwis with Ext.B4 partition deed and his impressions have been recorded in the judgment. But herein, we are concerned with the more important question as to the successful removal of suspicious circumstances by the propounder of the will. Therefore, it will not be proper at this stage for a remand for the said purpose.

54. There is also no evidence as to how the testator had arranged Shri Paulose, the document writer and Shri Balakrishnan who was the scribe for preparing the will. There is no evidence to show whether it

was by the deceased father himself or through someone else. D.W.1, the attester deposed before the court that it was the deceased who telephoned him to come to his house. But, since the version of scribe, D.W.2 is that his senior Shri Paulose had made ready a draft, which was fair copied by him and he had not discussed anything with Luwis, this aspect is also significant.

55. Apart from the same, it is also significant to notice that none of the sisters have been paid any amount as per the stipulations in the will. Shri T. Krishnannunni explained that before the expiry of three years period, the suit was filed and three years period was given for effecting payment and for the first defendant to shift his residence. But if at all three years period was not over, what is significant is the absence of any steps taken by the second defendant along with his elder brother, for effecting payment to the sisters. The amounts set apart for Febiyola was Rs.75,000/- and to another sister Alphonsa, it is Rs.60,000/-. There is no evidence regarding any consultation between defendants 1 and 2 in this regard or any request made by the second defendant to the first defendant for implementing the stipulations in the

will. D.W.2 has not offered any explanation on these matters. This is significant.

56. The evidence given by the first defendant is that the sister Jessy was married away by him after the death of the father. This is not denied by the second defendant also in his evidence and he has no other version. Therefore, evidently, during the father's lifetime the marriage was not conducted. The provisions in Ext.B1 concerning payment to her will show that Rs.2,000/- is the amount stipulated. This condition is clearly not a natural one. Of course, he has stipulated in an earlier part of the will that the expenses for the marriage will be met by the sons. But normally if she had remained unmarried, that contingency would have been thought of by the father, going by the way in which the stipulation has been made in the will in favour of Alphonsa that she will be paid Rs.60,000/-. Another significant circumstance is that her marriage was conducted, going by the evidence of the first defendant, by spending amounts by him. The second defendant has no case either in the written statement or in his evidence that he has met any part of the expenses for her marriage, in

tune with the provisions in the will. In his chief examination or in cross examination, he has not stated so. Even though a suggestion was put to the first defendant that the second defendant had also contributed money, he had denied the said suggestion. Therefore, as far as this aspect also is concerned, there is no explanation by the second defendant.

57. It is clear from the partition deed, Ext.B4 that the expenses of the sister of Shri Luwis, Smt. Mary are to be met by the two brothers Shri Luwis and Shri Thoma, and she was given right to reside with any of the brothers from time to time as per her choice. The evidence is to the effect that she was residing with Shri Luwis and she died in 1999, just before the death of Smt. Rosa. Therefore, as on the date of execution of the will, going by the evidence of the first defendant, she was also residing with them. But significantly, no provision is seen made in the will to meet her expenses. As Shri Luwis was fully aware of the provisions in Ext.B4 partition deed, there would not have been any omission to provide so. This itself is also a circumstance which will show that the dispositions in Ext.B1 are not natural ones.

58. Lot of arguments have been made by the learned counsel for the appellants with regard to the features of the signatures, the gap existing in the last page of the will between the signature and the writings and the reproduction of name of deceased Luwis allegedly by copying it from the partition deed Ext.B4. It was contended that the attempt was to copy the same in the same manner as contained in Ext.B4 and the will has been prepared in blank papers and the contents have been fully filled in that manner. In the light of the conclusion reached by us that the second defendant has not been fully successful in removing the suspicious circumstances, we are not going into these aspects.

59. Even though the first defendant had set up an understanding between the legal heirs to earmark him half of the properties, there is no independent evidence regarding the same except the evidence of D.W.5. There is no cogent evidence to prove the same. Therefore, the same cannot be accepted.

For all these reasons, we hold that the will Ext.B1 is not the last will of deceased Luwis and the finding by the trial court that the will is

a genuine one, cannot be sustained. Therefore, the plaint schedule property is held as partible. The property will be partitioned in nine equal shares and the plaintiffs are entitled to get 6/9 shares. There will be a preliminary decree accordingly. All the other matters are left for decision in the final decree proceedings. The plaintiffs are permitted to file application for passing final decree. We also permit any other parties who have not sought for allotment of shares, to apply for the same after remitting the required court fee.

Accordingly, RFA No.101/2007 is allowed and the suit O.S. No.598/2002 is decreed as above. RFA No.173/2007 is partly allowed to the extent we have reversed the findings on the validity of Ext.B1 will. The parties will suffer their costs in the appeals.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(K.P. JYOTHINDRANATH,, JUDGE.)

kav/