

THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.C.C.A.No.38 of 2006 & C.C.C.A.No.225 of 2008

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COMMON JUDGMENT: *(per Hon'ble Sri Justice M. Seetharama Murti)*

These two first appeal suits, viz., C.C.C.A.No.38 of 2006 and C.C.C.A.No.225 of 2008 filed respectively by the defendants 1 and 2 together and the defendants 3 and 4 together are directed against the decree and judgment dated 19th September 2005 of the learned XXI Additional Chief Judge, City Civil Court, Hyderabad passed in O.S.No.329 of 1999 filed for partition of the plaint 'A', 'B', 'C', 'D', 'E', 'F' and 'G' schedule properties into five equal and equitable shares and allotment of one such separated share to the sole plaintiff.

2. Since both the first appeals arise out of a decree and judgment in one suit, the same were heard together as desired by the learned counsel for both the sides. Hence, this common judgment.

3. We have heard the submissions of the learned senior counsel for the appellants/defendants 1 and 2 in C.C.C.A.No.38 of 2006, the learned counsel for the appellants/defendants 3 and 4 in C.C.C.A.No.225 of 2008 and the learned senior counsel for the plaintiff/respondent in both these appeals. We have carefully perused the material record including the summary of written submissions filed on behalf of the appellants/defendants 1 and 2 and the plaintiff/respondent.

4. At the outset it is to be noted that the trial Court had framed the following issues and additional issues for trial:

Issues:

- i. Whether the plaintiff is entitled for partition and separate

- possession of 1/5th share in the plaint schedule properties?
- ii. Whether the Will dated 07.01.1987 is true and valid and binding on the plaintiff?
- iii. Whether the judgment and decree in O.S.No.7/1963 is binding on the plaintiff?
- iv. Whether prior partition pleaded by defendants is true?
- v. To what relief?

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Additional Issues:

- i. Whether plaintiff is in joint possession of schedule properties along with defendants 1 to 4?
- ii. Whether the court-fee paid under Section 34(2) of A.P.C.F and S.V. Act is correct and proper?

Be it also noted that while answering the said issues, the trial Court had concentrated on and dealt with the following points:

- i. Whether the properties which are subject matter of suit in O.S.No.7 of 1963 are ancestral properties?
If so, whether Plaintiff was a co-parcenar as on the date of filing of the suit in O.S.No.7 of 1963?
- ii. Whether the judgment and decree in O.S.No.7 of 1963 are binding on the plaintiff?
- iii. Whether late Vallabhadas B.Shah died intestate on 10-06-1990?
“OR”
Whether late Vallabhadas B.Shah executed will dated 7-1-1987 bequeathing his properties? If so, whether the same is true, valid and binding on the plaintiff?
- iv. Whether plaintiff is entitled to seek partition and separate possession of her 1/5th share in the plaint schedule properties as claimed?
“OR”
Whether plaintiff is entitled to seek partition and separate possession of her 1/5th share in the properties of her father late Vallabhadas B.Shah?
- v. To what relief plaintiff is entitled to?

5. At trial, the sole plaintiff and her supporting witness were examined as PWs 1 and 2 and exhibits A1 to A10 were marked on her side. The defendants 1 and 3 were examined as DWs 1 and 3 and their supporting witnesses were also examined as DWs 2 and 4 and exhibits B1 to B25 were

marked on their side. Exhibits X-1, X-1(a), X-1(b) and X2 were also marked. On merits, the trial Court had decreed the suit. The operative portion of the judgment of the trial Court as per the copy of the judgment filed in C.C.C.A.No.225 of 2008 reads as under:

“In view of my finding on Issue No.1 to Issue No.4, a preliminary decree is passed declaring that plaintiff is entitled for 1/5th share in share of late Vallabhadas B. Shah.

In the result, suit is decreed, but without costs.

Preliminary decree is passed in favour of plaintiff and against defendants declaring that plaintiff is entitled for 1/5th share in “1/5th share of late Vallabhadass” in the following properties:-

1) House at Hanumantekdi known as ‘Goverdhan Kunj’ bearing Municipal No.4-3-162 to 164 (fell to the share of Vallabhdas B.Shah as per decree in O.S.No.7 of 1963). The said property corresponds to plaint ‘A’ schedule property.

2) Item I to XVII (movables) of plaint schedule ‘G’ (fell to the share of Vallabhdas B.Shah as per decree in O.S.No.7 of 1963).

3) Vallabhdas Blocks Municipal No.180, 181, 182, 183, 184, 185, 186, 187, 188 and 189 of Block No.6, Ward No.11, garages and open land (Reference No.Q1 to Q5 P, C1 C-2, A16 and A17) situated at Nampally, Hyderabad (Part of Plaint ‘C’ schedule property).

4) Plaint ‘D’ schedule agricultural lands popularly known as Krishnakunj situated at Ramsingapur, Karwan, Hyderabad.

5) Plaint ‘E’ schedule property i.e., dwelling house bearing Municipal No.13-4-769, admeasuring 1200 sq. yards situated at Saukar Karwan, Hyderabad.

6) Plaint ‘F’ schedule property i.e., agricultural land bearing Survey No.682, admeasuring 0.38 acre situated at village and Mandal Shamshabad, Ranga Reddy district. 2) Plaintiff shall pay advoluerum court fee as per Section 34(1) of A.P.C.F & S.V.Act on the market value of properties as stated in para No.1.

7) On payment of deficit court-fee, office is directed to prepare preliminary decree. Plaintiff shall pay deficit court fee within ‘15’ days from this day.

8) Though ordinary rule is costs follow the event,

taking into consideration the nature of relationship between the parties and taking into consideration the nature of properties available for partition, I am not inclined to maculate the defendants with the costs of the suit. I therefore direct plaintiff and defendants to bear their own costs of this suit.

9) Plaintiff is at liberty to file an appropriate application for ascertainment of mesne profits of her share from date of filing of the suit till date of partition of properties of metes and bounds.” (Reproduced verbatim)

(Be it noted that the words in the quotations, namely, “1/5th share of late Vallabhadass” were added as per orders dated 28.02.2006 in I.A.No.459 of 2005.)

6. In view of the pleadings, the grounds of objection raised in the two appeal suits and the submissions of both the sides, the following points arise for determination in these first appeals.

1. Whether the judgment and decree in O.S.No.7 of 1963 on the file of the I Additional Chief Judge, City Civil Court, Hyderabad, are binding on the plaintiff?

2. Whether late Vallabhdas B.Shah died intestate on 10.06.1990 as contended by the plaintiff

‘Or in the alternative’

Whether late Vallabhdas B.Shah had executed a will dated 07.01.1987 as contended by the defendants? And if so, whether the same is true, valid and binding on the plaintiff?

3. Whether the plaintiff is entitled to seek partition of the plaint schedule properties into five equal and equitable shares and allotment of one such separated share to her in the said properties as claimed?

‘Or in the alternative’

Whether the plaintiff is entitled for a 1/5th share only in the properties of her father late Vallabhdas B. Shah and is therefore entitled to allotment of a separated 1/5th share in the properties of her late father?

4. Whether the decree and judgment (amended) of

the trial Court are not sustainable under facts and law?

5. To what relief?

7. Before taking up the points, it is pertinent to note the relationship between the parties and the summary of pleadings.

7.1 The plaintiff is the sister of the defendants 1 to 4; and, they are all the children of late Vallabhdas B. Shah and Anasuyadevi B. Shah. Late Bhagavan Dass is the father of Vallabhdas B. Shah; and, late Raja Chaturbhuj Dass is the grandfather of the said late Vallabhdas B. Shah.

7.2 The summary of the pleadings is as follows:

According to the plaintiff, the plaint 'A' to 'G' schedule properties originally stood in the name of late Raja Chaturbhuj Dass and that after his death, his said properties devolved upon his son Bhagvan Dass and that after his death, late Vallabhdas B. Shah had inherited all the said properties. In the presence of the defendants, late Vallabhdas had declared during his life time that his only daughter, i.e., the plaintiff shall be given an equal share along with his sons in the ancestral properties. Therefore, the plaintiff is under the impression that the defendants would effect partition of suit schedule properties and deliver a share to her in the said properties. However, the defendants were and are informing the plaintiff that the partition would be affected after finalization of the Urban Land Ceiling proceedings. The plaintiff had trusted and believed her brothers. Afterwards, having come to know that there are no such proceedings before the competent authority under the Urban Land Ceiling laws and as the defendants did not come forward to effect partition of the properties and allot a share to the plaintiff, the plaintiff had got issued a notice dated 10.04.1999 seeking partition of the plaint schedule properties and for allotment of 1/5th separated share to her. The defendants had sent a reply dated 19.04.1999 denying the material allegations in the notice of the plaintiff. The plaintiff having sent a rejoinder reply had filed the suit for partition having no other option.

7.3 The defendants 1 and 2 together and the defendants 3 and 4 together having filed separate written statements, though with a common line of defence, had resisted the suit by *inter alia* contending as follows: 'Late Vallabhdass B. Shah had died intestate is not correct. He had executed a Will dated 07.01.1987 appointing the 1st defendant as the executor of the said Will. The said Will is his last testament. After the death of late Vallabhdass B. Shah, the plaintiff and the defendants had inherited his properties and they are in joint possession of the same is not correct and the said averments are denied. During the life time of late Vallabhdass B. Shah, the defendant no.1 had filed O.S.No.7 of 1963 on the file of the Court of the learned I Additional Chief Judge, City Civil Court, Hyderabad seeking partition and separate possession of the joint family properties (movable and immovable). The said suit ('the former suit', for brevity) had ended in a compromise between Vallabhdass B. Shah, his sons and his wife. The joint family properties were accordingly partitioned and a share each was allotted to the parties to the said suit. Thus, a compromise final decree was passed on 10.09.1963. As per the terms of the compromise, it was accepted that a provision must be made for the marriage of the plaintiff herein. Ever since such compromise decree in the former suit for partition, the respective parties are enjoying their respective shares in their own absolute rights. During the life time of Vallabhdass B. Shah, the marriages of the plaintiff and the defendants were performed in a manner befitting to the status of the family. Considerable gifts were given to the plaintiff at the time of her marriage in the year 1969. The plaintiff had never made any claim or demand for partition of the properties either during the life time of the father or after his death. The properties that were allotted to the mother-Anasuya Devi under the decree in the former suit viz., O.S.No.7 of 1963 were sold away during her life time and she had executed a Will dated 30.09.1978 making a provision of Rs.10,000/- to the plaintiff and the said amount was also paid to the plaintiff by late Vallabhdass B. Shah being the executor of the said Will. The plaintiff had received the said amount on 28.02.1981 from her father Vallabhdass B. Shah and had passed a receipt to that effect. The plaintiff is thus aware of the partition that had taken place in the family and the execution of the Wills by

her mother and father. Therefore, she is not entitled to seek partition of the properties after execution of the Wills by the parents. The defendants 1 to 4 are in peaceful, continuous and exclusive possession of their respective shares in their independent and absolute rights. The earlier partition and the Wills were acted upon. The suit is misconceived. After, the death of late Vallabhdass B. Shah, the son of the 1st defendant had filed O.S.No.239 of 1998 on the file of the court of the learned V Additional Chief Judge, City Civil Court, Hyderabad seeking partition of the share that was held by his father, i.e., the 1st defendant herein and the said suit was decreed as per the terms of the compromise. The plaintiff is not in joint possession. The valuation of the suit and the court fee paid are not correct. The suit is not properly valued. The plaintiff ought to have properly valued the suit and paid *advolverum* court fee. The suit is highly belated and misconceived.

7.4 The plaintiff in her rejoinder had denied the Will dated 07.01.1987 said to have been executed by Vallabhdass B. Shah and had *inter alia* contended that Vallabhdass B. Shah had died intestate and that the alleged Will was fabricated and brought up by the defendants with an ulterior motive and to usurp the share of the plaintiff. In the rejoinder, it was further contended that the compromise decree in the former suit viz., O.S.No.7 of 1963 is a collusive decree and that the same is not binding on her and that even though, she was a coparcener, she was not impleaded as a party to the said suit and that therefore, the decree in the said suit is not binding on her. She had further contended that the suit in O.S.No.238 of 1998 is also a collusive suit and that the decree in the said suit is also not binding upon her.

8. POINT No.1:

8.1 To begin with, it is to be noted that in this suit for partition by the plaintiff against her brothers, the plaintiff is claiming herself to be a coparcener and is seeking an equal share on par with her brothers in the properties of the family by *inter alia* contending that the properties are ancestral coparcenary properties and that the decree in the former suit for partition is not binding on

her as she was not made a party to the said suit. Per contra, the contention of the defendants is that as per the law as was existing in the year 1963, and as per the provision of Section 6 of the Hindu Succession Act, as it stood prior to its amendments the plaintiff was not a coparcener and that, therefore, she was not rightly impleaded as a party to the said former suit and hence, the decree and judgment in O.S.No.7 of 1963 are true, valid and binding on the plaintiff herein.

8.2 Admittedly, there was a former suit by the 1st defendant against his father, mother and brothers in O.S.No.7 of 1963 for partition of the joint family properties. The plaintiff herein is not a party to the said suit. The certified copy of the final decree dated 10.09.1963 in the said suit is exhibited as exhibit B10. The same, on a perusal, would show that the following are the properties involved in the said suit.

1. House at Hanuman Tekdi, known as Govardhankunj bearing Municipal No.4-3-162 to 164 (corresponding to plaint 'A' schedule property in this suit).
2. Building bearing Municipal No.4-3-378 to 469 (corresponding to Schedule 'B' property in this suit).
3. Property bearing Municipal No.11-6-152 to 190 situate at Nampally, Hyderabad (corresponding to Schedule 'C' property in this suit)
4. Agricultural land in Survey No.174 to 181, 183 to 187 known as Krishnakunj situated at Ramsinghapura, Karwan, Hyderabad (corresponding to plaint 'D' schedule property in this suit).
5. Dwelling house bearing Municipal No.13-4-769 situated at Shoukar Karwan, Hyderabad. (Corresponding to Schedule 'E' property in this suit).
6. Agricultural land in Survey No.682 situated at Shamshabad village, Ranga Reddy District.

8.3 In view of the contentions, it is necessary to refer to the following provisions of the Hindu Succession Act, namely, the provision of Section 6 as

it originally stood prior to September 1985; the provision of Section 29 A in chapter II A in its application to the State inserted with effect from 05.09.1985; and, the provision of Section 6, which came into effect on 09.09.2005 on its substitution by Act 39 of 2005. The provisions of Section 6 as it originally stood on the statute book reads as under:

“6. Devolution of interest in coparcenary property:-

When a male Hindu dies after commencement of this Act, having at the time of his death an interest in a Mitakshra coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act

Provided that, if the deceased had left him surviving a female relative in Class I of the Schedule or a male relative specified in the class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be under this Act and not by survivorship.

Explanation 1:- For the purposes of this section the interest of a Hindu Mitakshara coparcener shall be deemed to the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2:- Nothing contained in this proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein”.

As per the said provision, the women are not members of coparcenary under the Hindu Mitakshara Law and therefore, they are not entitled to claim partition in coparcenary property and thus, daughters were excluded from coparcenary. However, to confer equal rights on Hindu women along with male members, Chapter II-A was inserted by A.P. Act 13 of 1986 with effect from 05.09.1985. The said Chapter in its application to the State of Andhra Pradesh contains the relevant sections

29A to 29C. Section 29A reads as under:

Section 29-A of the Hindu Succession Act, 1956, reads as follows:

Section 29-A: Equal rights to daughter in coparcenary property:-Notwithstanding anything contained in Section 6 of this Act:

(i) in a Joint Hindu family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a Joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son:

Provided that the share which a predeceased son or a predeceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased child of the pre-deceased son or of the pre-deceased daughter;

Provided further that the share allottable to the predeceased child of a predeceased son or of a predeceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such predeceased child of the pre-deceased son or of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of Clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

(iv) Nothing in Clause (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

A reading of the above provision makes it clear that in any joint family governed by Mitakshara, the daughter is made a coparcener equating her status to a son. The exceptions were carved out are that the marriage of the daughter should not have been performed prior to 5.9.1985 or partition should not have taken place. In the case on hand, the marriage of the plaintiff was

admittedly performed in the year 1969 and that a compromise final decree was passed in the year 1963 in the former suit though the plaintiff is not a party to the said suit.

8.4 Section 6 of the Hindu Succession Act, 1956 as amended/substituted by the Parliament by the Amendment Act, 2005 (Act 39 of 2005) reads as follows:

"6. Devolution of interest in coparcenary property:--

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,--

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if

a partition had taken place and,--

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.-- For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognize any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect--

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have

been enforceable as if the Hindu Succession Amendment) Act, 2005 had not been enacted.

Explanation.--For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation. --For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court."

Before reverting back to the facts of the instant case, it is to be noted that new Section 6 of the Principal Act extracted supra brings uniformity in the country. Although the Central Act 39 of 2005 has not expressly repealed section 29 A, which was introduced in the Hindu Succession Act by the A P State Amendment Act 13 of 1986, the said State Law is void to the extent it is repugnant to or inconsistent with the Central Law. In the decision in **Damalanka Gangaraju and Others v. Nandipati Vijaya Lakshmi and others**^[1] this Court had held that the State amendment is deemed to be repealed as the Parliament and the State Legislature made laws related to the same concurrent subject and as a conflict arises between the two enhancements. This Court also held that the conflict is resolved by Article 254 (1) of the Constitution of India, which provided that in such cases of conflict the State Law shall be void to the extent it is repugnant or inconsistent with the Central Law. It was, therefore, held by this Court that all the daughters have to be treated as coparceners entitled to equal shares, irrespective of the fact whether they are majors or minors or their marriages were performed before 05.09.1985 or subsequent thereto. Hence, having placed reliance on this provision and also the decision in **Ganduri**

Koteshwaramma and another v. Chakiri Yanadi and another [2012(2) ALD 50 (SC)] the learned senior counsel for the plaintiff/respondent had contended that the plaintiff is a coparcener and that she is a necessary party to the former suit for partition in regard to ancestral properties and that as she was not impleaded as a party to the said former suit, the final decree in the former suit is not binding upon her. What is to be noted is that the former suit was instituted way back in the year 1963 and a final decree was also passed in the year 1963 as is evident from exhibit B10. Though the new provision under Act 2 of 2005 is retro-active in its operation, it came into force with effect from 09.09.2005. Nothing in the new section shall apply to a partition, which has been effected before the 20th day of December, 2004. The explanation to the said provision says that for the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court. In the case on hand, the final decree was passed in the partition suit even long before the new Section 6 has come into force. Therefore, in the light of the fact that a partition final decree was passed in the former suit of the year 1963, it follows that the plaintiff, who is a daughter cannot successfully claim herself to be a coparcener as on the date either when the suit for partition was instituted in the year 1963 or as on the date the final decree was passed. Therefore, it follows that the final decree in the former suit for partition passed in the year 1963 is true, valid and binding upon the plaintiff herein.

8.5 There is one more aspect to be considered under this point. The learned senior counsel for the plaintiff would contend that admittedly, the mother of the parties, by name, Anasuya Devi, was added as a party to the former suit for partition and that a share was also allotted to her and that therefore, the mother, who is a female member of the family was treated on par with male members; hence, by treating the plaintiff, who is the daughter of Vallabhdas B.Shah, also on par with her brothers, she should have been impleaded as a party to the said former suit for partition; and, that in view of the impleadment of mother as a party and the non-impleadment of the

daughter, the plaintiff, as a party to the former suit, the final decree in the former suit is not binding upon the plaintiff. On the other hand, the learned senior counsel for the defendants 1 and 2 would contend that the wife of Vallabhdas B.Shah was impleaded not because she was a coparcener or that she was treated on par with the male members, but because some of the properties stood in her name and her presence to the suit was necessary to give a finality to the litigation once and for all. When the wife of Vallabhdas B.Shah, who is the mother of the parties herein is not a coparcener under facts and law, her addition as a party for right or wrong reasons to the former suit for partition does not confer a right on the present plaintiff, who is the daughter of Vallabhdass B.Shah to claim that she is also a necessary party when she is not a coparcener as on the date the former suit for partition was instituted and decreed. A careful perusal of exhibit B10, the certified copy of the decree in the former suit for partition would show that the wife of Vallabhdas B.Shah by name, Anasuya Devi, was impleaded as a party during the pendency of the suit and the house property at Troop Bazar was allotted to her and therefore, the same did not form part of the schedule of the partition decree in the former suit. In fact, the plaintiff in the present suit also did not include the said house property in the schedule of properties to be partitioned and did not claim the said house property as an ancestral property. It is not the case of the plaintiff that any fraud was played upon her in obtaining the decree in the former suit, viz., O.S.No.7 of 1963 or that the final decree in the said former suit was obtained by her father and brothers in collusion. The partition final decree in the former suit was acted upon and as per the said decree, the properties were partitioned by metes and bounds and the sharers are enjoying their respective shares in their individual capacities is borne out by record. Vallabhdas B.Shah had died in the year 1990. The instant suit was instituted in the year 1999, i.e., 26 years after the former suit for partition was decreed in terms of compromise. The plaintiff did not seek any relief in the present suit for setting aside the said final decree in the former suit. Therefore, this alternative contention that she is a necessary party to the former suit cannot be countenanced. Therefore, we find that the final decree in the former suit for partition passed in the year 1963 is true,

valid and binding upon the plaintiff herein. The point is accordingly answered.

9. POINTS 2 and 3:

9.1 The plaintiff is the daughter of Vallabhdas B.Shah and the defendants are her brothers. According to her, Vallabhdas B.Shah had died intestate. On the other hand, the defence of the defendants is that Vallabhdas B.Shah had executed a Will on 07.01.1987 and that the said Will is his last testament and that he had executed the said Will in the presence of Dr.N.D.Menon and B.Ramdev and that under the said Will, he had bequeathed the properties which had fallen to his exclusive share by virtue of the partition final decree in O.S.No.7 of 1963 and that as per the said Will, the defendants 1 to 4 are equally entitled to 1/4th share each in the house property as per the bequests in the Will and that the defendants are under an obligation to perform pooja of the family deity in the house and that the rights in the 1/5th share in the immovable properties are bequeathed equally to the defendants and that HUF movable properties and personal movable properties and cash were bequeathed in favour of two sons and the daughter of the plaintiff and that under the said Will, the 1st defendant was appointed as an executor and that the plaintiff is very much aware of the existence of the Will and that the Will executed by Vallabhdas B.Shah is true, valid and binding upon the parties and that in view of the Will executed by late Vallabhdas B.Shah the contention of the plaintiff that Vallabhdas B.Shah had died intestate is false, and that, therefore, the plaintiff is not entitled to seek partition of the properties of Vallabhdas B.Shah and claim a 1/5th share in his properties. The plaintiff in her rejoinder had denied the said Will, which was said to have been executed by Vallabhdas B.Shah and had *inter alia* contended that the defendants had fabricated and brought up the said Will to usurp her share of property.

9.2 Before proceeding further, it is necessary to refer to the broad principles, which are relevant for appreciation of evidence in regard to proof

or otherwise of a Will. In the decision in **Pinnaka Hanumantha Rao (died per L.R) and two Ors. V. Garlapati Dhanalakshmi @ Andallu**^[2], this Court having considered the ratios in various precedents on the subject had formulated the principles that emerged from the precedents as under:

“30. From the various precedents cited by the learned Counsel referred to above, the following principles broadly emerge.

1. 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 Sections [67](#), [68](#), [45](#) and [47](#) of the Evidence Act and Sections [59](#) and [63](#) of the Indian Succession Act.
2. A **Will** has to be proved like any other document except as to the special requirements of attestation prescribed by Section [63](#) of the Indian Succession Act.
3. Proof with mathematical certainty is not expected and the test to be applied would be the usual test of the satisfaction of the prudent mind.
4. The propounder would be called upon to show by disinterested, satisfactory and sufficient evidence that the **Will** was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind free from all extraneous influences, that he understood the nature and effect of the dispositions and put his signature to the document of his own free **Will** and that he had signed it in the presence of two witnesses who attested in his presence and the presence of each other.
5. The onus on the propounder to prove the due and valid execution of the **Will** can be taken to be discharged on proof of the essential facts.
6. The execution of the **Will** may be surrounded by suspicious circumstances like, --
 - (a) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.
 - (b) The condition of the testator's mind may be very feeble and debilitated.
 - (c) The dispositions made in the **Will** may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provision for the natural heirs without reasons.
 - (d) The dispositions may not appear to be the result of the testator's free **Will** and mind.
 - (e) The propounder takes a prominent part in the execution of the **Will** conferring substantial benefit on him.

- (f) The testator used to sign blank papers.
 - (g) The **Will** did not see the light of the day for long.
 - (h) Incorrect recitals of essential facts.
 - (i) The unregistered **Will** challenged as forged comes from the custody of major beneficiary.
7. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated and that inevitably would be a question of fact in each case.
8. Each and every circumstance is not a suspicious circumstance and a circumstance would be suspicious when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.
9. All such legitimate suspicions should be completely removed by the propounder before accepting the document as the last **Will** of the testator and satisfactory discharge of such initial onus is very heavy and the test of satisfaction of judicial conscience is pivotal in deciding the solemn question.
10. A **Will** is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a **Will**.
11. A testator has the freedom to give his property to whomsoever he likes and once it is established that the testator was free and had a sound disposing mind, it is no longer the duty of the Court to go further to inject its own ethics of what is or is not a moral or a fair disposition according to its own standard.
12. No hard and fast or inflexible rules can be laid down for the appreciation of the evidence and application of general and broad principles would always depend on the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.
13. Allegations of exercise of undue influence, fraud or coercion in respect of the execution of the **Will** propounded have to be proved by the person making such allegations.
14. Circumstantial evidence to prove the signature of the testator can lead to a legitimate conclusion only if it leads irresistibly to the inference that the person must have signed the document in question, but the presumption of execution of the **Will** by the testator on proof of the signature may be rebutted by proof of suspicious and unnatural circumstances.
15. The registration of the **Will** by the testator **will** be a strong circumstance to support the genuineness of the **Will**, but **will**

not by itself be sufficient to dispel all suspicions without subjecting the evidence of registration to a close scrutiny.

16. Onus as a determining factor of a case can only arise if the evidence pro and con is so evenly balanced that no conclusion can be derived therefrom, but not when a determinate conclusion can be arrived at after hearing and weighing the evidence.

17. The presumption under Section [90](#) of the Evidence Act in respect of a **Will** 30 years old and produced from proper custody, is one of due execution and attestation as well as of testamentary capacity of the testator, but does not extend to the truth of the contents of the **Will**.

18. To judge the credibility of the witnesses, the demeanour of the witnesses, surrounding circumstances and the probabilities arising out of the evidence and nature and contents of the document have to be looked into.

19. It is more usual to call a known and reliable person, a friend or a relation, to be a witness when a person is intending to execute a **Will** and advantage may be taken of the accidental presence of chance witnesses also in this connection.

20. It would be sufficient even if one attester is examined, if he speaks about all the required elements.

21. The Court has the power to compare the disputed signature with the admitted signature, which power is available under Section [73](#) of the Evidence Act, but it should not normally take upon itself such responsibility and should leave the matter to the wisdom of experts in the event of slightest doubt.

22. If the Court is capable of forming an opinion on the strength of oral and documentary evidence by undertaking comparison under Section [73](#) of the Evidence Act, the necessity to send the document for expert's opinion may not arise and the opinion rendered by an expert being only a supporting material, the Court can come to its own independent conclusion.

The above principles deduced from the cited precedents are only enumerative and not exhaustive and their application to the facts and circumstances of each case should be strictly contextual but not mechanical.

The learned senior counsel for the appellants/defendants 1 and 2 had relied upon the following decisions in regard to proof of execution of Will:

(i) **Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and Another** ^[3].

This decision deals with the guidelines and nature and extent of burden of

proof on the propounder and the duty of the propounder to show that the Will was signed by the testator and that the testator was at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. In the cited decision, it was also laid down that when the execution of the Will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other persons for doubting that the dispositions of the Will are not the result of the testator's free will and mind, in all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the Will is accepted. It was finally held that in the cited decision that ultimately it is the conscience of the Court that has to be satisfied; as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain.

(ii) **Meenakshiammal (dead) through L.Rs v. Chandrasekaran**^[4]. In this decision, the Hon'ble Supreme Court referred to the ratios in the decisions in Ryali Kameswara Rao v. Bendapudi Suryaprakasa Rao (AIR 1962 AP 178) and Madhukar D.Shende v. Tarabai Aba Shedage ((2002) 2 SCC 85) and had held in paragraph (21) as follows:

“In the case of Madhukar D.Shende v. Tarabai Aba Shedage reported in [AIR 2002 SC 637], it has been held as follows: "8. The requirement of proof of a Will is the same as any other document excepting that the evidence tendered in proof of a Will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the Court either believes that the Will was duly executed by the testator or

considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the Will was duly executed by the testator, then the factum of execution of Will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in *R v. Hodge*, 1838, 2 Lewis CC 227 may be apposite to some extent "The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." The conscience of the Court has to be satisfied by the propounder of Will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a Will provided that there is something unnatural or suspicious about the Will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict positive or negative.

9. It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. The contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural

about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

(iii) In **Sridevi v. Jayaraja Shetty**^[5], the relevant ratio was laid down as follows:

"It is well settled proposition of law that mode of proving the will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act, 1925. The onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances have to be judged in the facts and circumstances of each particular case. {For this see H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors. [(1959) Supp.1 SCR 426] and the subsequent judgments Ramachandra Rambux v. Champabai & Ors.[(1964) 6 SCR 814]; Surendra Pal & Ors. v. Dr. (Mrs.) Saraswati Arora & Anr. [(1974) 2 SCC 600]; Smt. Jaswant Kaur v. Smt. Amrit Kaur & Ors. [(1977) 1 SCC 369]; and Meenakshiammal (Dead) thr. LRs. & Ors. v. Chandrasekaran & Anr. [(2005) 1 SCC 280]"

Further, in paragraph (14) of the judgment, it was held as follows:

"The propounder of the will has to show that the will was signed by the testator; that he was at the relevant time in sound disposing state of mind; that he understood the nature and effect of dispositions and had put his signatures to the testament of his own free will and that he had signed it in the presence of the two witnesses who attested in his presence and in the presence of each other. Once these elements are

established, the onus which rests on the propounder is discharged.”

(iv) **Pentakota Satyanarayana v. Pentakota Seetharatnam**^[6]. This decision was relied upon in support of the proposition that circumstances of depriving natural heirs should not raise any suspicion because the whole idea behind the execution of the Will is to interfere in the normal line of succession and so natural heirs would be debarred in every case of the Will and that it may be that in some cases they are fully debarred and some cases partly.

(v) **Savithri v. Karthyayani Amma**^[7]. In this cited case, it was held that the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstances and that the testator lived seven years after the execution of the Will and did not cancel it, supports the validity of the Will.

(vi) **In Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and others**^[8], the Hon’ble Supreme Court while dealing with the execution of an unprivileged Will had held as follows:

“Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has

signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See Madhukar D. Shende v. Tarabai Shedage (2002) 2 SCC 85 and Sridevi & Ors. v. Jayaraja Shetty & Ors. (2005) 8 SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.”

(vii) **Mahesh Kumar (dead) by L.Rs v. Vinod Kumar**^[9]. This precedent was relied upon in support of the proposition that the signatures of two attesting witnesses to a Will are not required to be appended simultaneously.

9.3 There is no dispute with the legal propositions in the decisions relied upon by the learned counsel for the appellants. Insofar as execution of the Will by Vallabhdas B.Shah, the initial onus of proof as well as the legal burden are on the defendants who are relying upon the said Will. Exhibit B1 is the unregistered Will dated 07.01.1987 being relied upon by the defendants. The said Will deals with the personal properties of Vallabhdas B.Shah, namely, one house at Hanuman Tekdi and his movable properties besides 1/5th share of Vallabhdas B.Shah in the HUF of Raja Bahadur Chaturbhuj Dass and sons. According to the recitals in the said Will, the house property situated at Hanuman Tekdi was bequeathed to his four sons in equal shares by Vallabhdas B.Shah and the 1/5th share in the HUF of Raja Bahadur Chaturbhuj Dass was also similarly bequeathed in equal shares to his four sons by Vallabhdas B.Shah. In regard to movable properties, Vallabhdas B.Shah had bequeathed his 1/5th share by specifying as to how much amount should go to which beneficiary. Now, it is not in dispute that if this Will is to be upheld, the plaintiff would not be entitled to a decree in the

instant suit and on the other hand, if the Will is held to be not true, then the question of plaintiff's right to seek partition falls for consideration. Therefore, it is now necessary to examine the facts, circumstances and the evidence on record as regards the truthfulness/ genuineness and binding nature of the Will under exhibit B1. A Will is a document required by law to be attested. Under Section 68 of the Indian Evidence Act, exhibit B1 shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In the case on hand, the defendants had examined DW4, who is said to be a doctor and who was said to have attested exhibit B1 Will and had also further examined the son of the other attester by name Ramdev as the said attester was not alive by the time of the trial.

9.4 We have gone through exhibit B1 Will and also the evidence of the witnesses-DW2, who is the son of the attester by name Ramdevi and also the evidence of DW4, the other witness, namely, Dr.N.D.Menon, who was said to have attested exhibit B1 Will. Before we advert to the evidence, it is important to note that before filing the suit, the plaintiff had got issued a legal notice dated 10.04.1999 under the original of exhibit A1 seeking partition of the plaint schedule properties into five shares and allotment of one such separated share to her. In the said notice, she had got stated categorically that Vallabhdas B.Shah had expired on 10.06.1990 leaving behind the plaintiff and the defendants 1 to 4 as his only legal heirs and successors and that he had not executed any Will. In the reply notice under exhibit A2, dated 19.04.1999 the defendants have pleaded that as per the Will dated 07.01.1987, Vallabhdas B.Shah had bequeathed the residential house in the name of the defendants and that they held the same equally and that the defendants are entitled to 1/4th share each in the properties of Vallabhdas B.Shah and there is nothing to be partitioned as Vallabhdas B.Shah had bequeathed all his interest in the properties to his four sons, namely, the defendants. Along with the reply notice, the defendants did not supply a copy of the Will to the plaintiff. The defendants did not file the original Will being

relied upon by them into Court along with their written statement. It appears that they had only filed a copy of the said Will during the course of hearing of an interlocutory application during the pendency of the suit. When the defendants had filed their written statement referring to exhibit B1-Will, the plaintiff had filed a rejoinder denying the Will. Even during the course of evidence of PW1, the Will was not filed into Court. However, during the cross-examination of PW1, it appears that some questions were put to her regarding exhibit B1 Will. The relevant cross-examination of PW1 on this aspect of exhibit B1 Will runs as follows:

“....It is not true to suggest that the 1/5th share allotted to my father in a partition with his sons that in his life time he bequeathed his share by executing a Will in favour of his four sons. I know one B.Ramdev, who was the manager of our family. It is true that B.Ramdev used to manage the accounts of the joint family such as collection of rents and other income of the joint family. I know one Dr.Damodar Menon, who treated my father. B.Ramdev is no more and might have died 4 or 5 years ago or more or less, but I do not know the exact date and year of his death. The witness were shown signatures on the Will Deed dated 7.1.1987 executed by Vallabhdas Bhagwan Das Shah were not identified by the witness. It is not true to suggest that the Will shown to me is the Will executed by my father and purposely I have denied. I do not know the signatures of the witnesses, i.e., Dr.Damodar Menon and B.Ramdev on the Will Deed as witnesses. I know the initial signature of my father. The initials of late Vallabhdas V.Shah was put to witness to identify, the witness denied the signature, as that of her father.” (reproduced verbatim)

Thus, for the first time, the plaintiff had an opportunity to see a Will allegedly executed by her father only during her cross-examination. She had denied the execution of any Will by her father and also the signatures shown to her on the said Will dated 07.01.1987 by saying that they are not the signatures of her father. She had also stated that she does not know the signatures of Damodar Menon who had treated her father and that of B.Ramdev, who had worked as a Manager under Vallabhdas B.Shah's family. Even on the day the Will was confronted to PW1, the same was not filed into Court either with a memo or with a petition to receive documents and no request was made to the trial Court to mark the Will for identification (and subject to proof) as the Will was confronted to PW1 and the same was denied by her. In this context,

the learned Senior Counsel for the plaintiff/respondent had contended that as the alleged Will was not filed into Court on the date it was confronted to PW1, there is no clarity or certainty that what was confronted to her during her cross-examination is the very same exhibit B1 Will that was subsequently filed into Court. There was no cross examination of PW1 on the other aspects of the Will. It is not even suggested to her that exhibit B1 Will is the last testament of Vallabhdas B.Shah, her father, and that he had executed the said Will in a sound and disposing state of mind and with free will and volition. Thus, the Will was filed into court during the examination-in-chief of DW1, the 1st defendant, i.e., on 07.10.2002 and was exhibited as exhibit B1. Further, no reasons are forthcoming for filing the original Will into Court belatedly in the year 2002. This Will was admittedly not produced before any public authority at any time prior to the suit. Even **DW1** in his examination-in-chief did not state that Vallabhdas B.Shah had executed exhibit B1 Will in a sound and disposing state of mind. He had only stated that Vallabhdas B.Shah during his life time had executed Will dated 07.01.1987 in the presence of witnesses mentioned therein, i.e., Dr. N.D.Menon and B.Ramdev and that he had bequeathed the properties that had fallen to his exclusive share in the partition suit in O.S.No.7 of 1963 in favour of his four sons, i.e., defendants 1 to 4 herein and that under the said will, he (DW1) was the executor and that after the death of Vallabhdas B.Shah, he had disbursed the amounts mentioned in the Will and that the plaintiff is aware of the execution of the Will and that the Will was acted upon as the plaintiff had accepted the jewellery during the life time of her mother and the cash given as per the Will as part of the amount bequeathed by her father. Vallabhdas B.Shah was unwell for quite some time before his death is borne out by the evidence on record. DW1 I his cross examination had admitted that the right side of his father's body was paralysed and that he used to help him in wearing clothes, giving meals and medicines and also in other domestic needs and that some times, his sister (the plaintiff) also used to serve small needs of the father and that in the beginning of the paralysis attack, Vallabhdas B.Shah was in the bed for a week and that thereafter, he

(DW1) used to help him in walking and that after physiotherapy, Vallabhdas B.Shah had started walking by himself after three months. In the light of the ill-health that was admittedly suffered by Vallabhdas B.Shah, DW1 ought to have stated in his evidence that his father Vallabhdas had executed exhibit B1 Will in a sound and disposing state of mind. But, he did not do so. When it was suggested to him that as on the date of execution of the Will exhibit B1, his father was attacked with paralysis stroke and that he was unable to read and write, he had denied the said suggestion. He had denied the further suggestion that they had prepared exhibit B1 and that is the reason why the same was not registered. He had also denied the suggestion that the Will Deed is created and brought up for the purpose of avoiding the share of the plaintiff and that the signatures of the Will Deed do not belong to the father.

DW3 is the third defendant. He had also referred to exhibit B1 Will dated 07.01.1987 in his filed affidavit filed in lieu of examination-in-chief and had stated that Vallabhdas B.Shah had executed the said Will and had appointed the 1st defendant herein as the executor and that under the said Will, Vallabhdas B.Shah had bequeathed his 1/5th share in favour of his sons and grandchildren and that the said Will is the last testament of Vallabhdas B.Shah. He also did not state that Vallabhdas B.Shah was in a sound and disposing state of mind and that he had executed the Will with free will and on his own volition. In his cross-examination also, he had admitted that his father was attacked with paralysis somewhere in the year 1981 and that he does not remember as to which part of his father's body was effected with paralysis; but, he had denied the suggestion that his father was unable to see properly, sign and hear and attend to routine works in the year 1981. Thus, the evidence of DWs 1 and 3 does not inspire confidence *prima facie* about the genuineness of the Will and the sound and disposing state of mind of the testator.

9.5 Now, coming to the evidence of **DW2**, his evidence is of not much significance as he is only the son of Ramdev, who was said to have attested exhibit B1 Will, and as he has no personal knowledge about the Will and as he was only examined to identify the attesting signature of his father

B.Ramdev on exhibit B1 Will. **DW4** is the other important witness associated with the Will because he was a doctor who was said to have treated Vallabhadas B.Shah during his life time when he was unwell and was said to have attested exhibit B1 Will. Now, coming to the evidence of the attesor, his examination-in-chief which is very brief, reads as under:-

“Late Raja Vallabhdas was my patient, as such he known to me. On 7-1-1987, Raja Vallabhdas called me at his residence and he executed a Will and signed it in my presence. I am also one of the attesting witnesses of the said Will executed by Raja Vallabhdas. The other attesting witness was Mr.B.Ram Dev.” (reproduced verbatim)

Therefore, he did not state about the sound and disposing state of mind of the executant of the Will Vallabhdas B.Shah and his said cryptic deposition on a plain reading would show that he was not shown exhibit B1 Will during his examination-in-chief and he had not identified either his signature as attesor or the signatures of Vallabhdas B.Shah on exhibit B1-Will. In his cross-examination, he had admitted that late Vallabhdas B.Shah was affected with paralysis, but he does not remember which portion of the body was affected with paralysis, but it was chest and half of the body and that he does not remember how much time he was under paralysis, but it is only a matter of months. On the aspect of execution of the Will deed, his cross-examination, which is important, reads as under:

“Before signing Ex.B1 I might have read it but I do not remember. I know the plaintiff who is the daughter of late Sri Raja Vallabha Das. I do not know the scribe of the Will Deed. I am not enquired Raja Vallabha Das about the scribe of Ex.B-1. I did not enquire about the preparation of the Will Deed. I do not remember whether the plaintiff was present at the time of my signature on Ex.B-1. One of the son of late Raja Vallabha Das might be come to me to take me to his house. The person who came to me has not revealed anything about the Will but only called me. When I went to the house of late Raja Vallabha Das 3 or 4 persons were present. These 3 or 4 persons might be sons of late Raja Vallabha Das and Ram Dev. When I was called to the house of Raja Vallabha Das I expected that there might be some health problem to him. I went along with Medical apparatus. Late Raja Vallabha Das did not discuss about the allotment of shares among the family members, liabilities, assets and properties etc., I too also did not ask anything about the prior litigation pertaining to properties. I

have not asked anything about the distribution of properties with late Ram Dev. I have not enquired about the details of Ex.B-1 with Raja Vallabha Das. Out of regard and respect towards late Raja Vallabha Das signed on Ex.B-1 at his request. Except Raja Vallabha Das signature I have not seen any other signature on Ex.B-1. I have signed on each page of Ex.B-1. It is true that Ex.B-1 is the Will Deed executed by late Sri Raja Vallabha Das. There are no signatures on pages 1 to 3 after verifying the Ex.B-1. I am acquainted with the signature of late B.Ram Dev occasionally. There is no signature of late B.Ram Dev on pages 1 to 3 of Ex.B-1. By the time I signed on Ex.B.1 already one or two signatures are there on Ex.B.1. I remember that late Raja Vallabha das used to sign as in Ex.B.1. I signed and stamped Ex.B-1. Whenever and wherever I go I will carry with me the Rubber stamp of mine..... On seeing Ex.B.1 the signature of B.Ram Dev I am presuming that he might have signed on it.” [reproduced verbatim]

This witness had stated that except Raja Vallabhadass signature, he has not seen any other signature on exhibit B-1 and that he does not know in whose presence late B. Ram Dev signed on exhibit B1 and that on seeing the signature on exhibit B1-Will, he had presumed that he might have signed on it. A reading of the evidence of DW4 would show that when he allegedly attested exhibit B1 Will, Ram Dev was not present and Ram Dev did not attest the Will along with him and in his presence. His evidence in chief would show that Vallabhdas has signed the Will in his presence and then he had attested the Will. He did not speak in his examination-in-chief about the presence of Ramdev at that time; and he did not depose about Ramdev simultaneously subscribing his signature as an attesor to exhibit B1 Will. Though he (DW4) had stated that he had signed on each page of the Will of Vallabhdas B. Shah, the exhibit B1 does not contain his signatures on each page. As already noted, DW4 had categorically stated that he does not know in whose presence late Ram Dev had signed on exhibit B1 and that except Raja Vallabhdas signature he has not seen any other signature on exhibit B1. Thus, it is clear from the evidence that when the testator had signed the said Will the other attesor-Ramdev was not present and that both the attestors have not signed the said Will simultaneously or at the same time in the presence of each other. No doubt, there is no requirement under law

that more than one witness shall have been present at the same time; there is also no requirement under law that both the attesting witnesses must have subscribed the signatures to the Will at one and the same time. The requirement of law is that the Will shall be attested by two or more witnesses; and that each such witness must have seen the testator signing the Will or must have received from the testator a personal acknowledgment of his signature (if the Will is signed by the testator) and that each such witness shall have signed the Will in the presence of the testator; but, it shall not be necessary that more than one witness shall have been present at the same time. However, in the case on hand, at the foot of exhibit B1, i.e., above the signatures of the attestors/witnesses, the following endorsement appears.

‘Signed by the above named Sri Vallabhdas Bhagwandas Shah as his last Will and testament in our presence all being present at the same time. Thereafter, at his request and in presence we subscribed our respective names and signatures as attesting witness.’ [reproduced verbatim]

Thus, the evidence of DW4 is contrary to the above endorsement in exhibit B1 Will. The endorsement speaks as if Vallabhdas had signed the testament in the presence of both the attesting witnesses and that at his request and in his presence both the attesting witnesses had subscribed their signatures to the Will at the same time. However, the evidence of DW4, which is adverted to supra, is quite contrary to the contents of the said endorsement on exhibit B1 Will. Section 68 of the Indian Evidence Act provides that the propounder must prove the execution and the attestation of the Will by examining at least one of the attesting witnesses. Though examination of one attestor would be sufficient in a given case, the propounder must prove the due execution and attestation of the Will. In the case on hand, the evidence of DW4 at best would prove the attestation of the Will by him alone; and, the evidence on record does not prove the due attestation of the Will by the other witness. Per contra, the evidence on record, which is analysed supra is to the effect that when DW4 attested the Will, the other attestor was not present and had not attested the Will at the same time. No evidence at all was adduced about the due attestation of the

Will by the other attesting witness. Thus, the due attestation of the Will by two witnesses as required under law is not established. Indisputably, as per the mandatory nature of the provision, a Will is required to be attested by two or more witnesses. Only one attesting witness was examined and his evidence is silent on the aspect of the sound and disposing state of mind of the testator. The said only witness had testified that except the signature of late Vallabhdas he had not seen any other signature on the Will. He had stated that he does not know in whose presence late B.Ramdev signed on exhibit B1. He had further stated that he only presumes on seeing the signature that B.Ramdev might have signed on the Will. Exhibit B1 is a type written Will. At the end of the Will, there is neither a signature of the scribe nor of the person, who had either typewritten the Will, or of the person who had got prepared the type written Will. Who had typewritten the Will is also not known. DW4 had also stated that he does not know the scribe or the person, who had prepared exhibit B1 Will. When there is no evidence on the side of the defendants about the sound and disposing state of mind of Vallabhdas at the relevant time of exhibit B1 will and when none of the witnesses had stated that Vallabhdas B.Shah was in a sound and disposing state of mind at the time of execution of exhibit B1-Will, the defendants cannot invite this Court to speculate or infer by a process of deduction that he was in a sound and disposing state of mind. A careful and analytical examination of the facts and the circumstances associated with exhibit B1 Will and the evidence on record would lead to a conclusion that the defendants had failed to prove the due execution and the attestation of exhibit B1 Will and its truthfulness/genuineness and binding nature. The view of this Court finds support from the ratio in the decision in **Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria and Ors**^[10]. Therefore, we hold that the defendants had failed to establish that exhibit B1 Will was duly executed by late Vallabhdas B.Shah and that the same is true, valid and binding on the plaintiff. As a sequel to the said finding, we hold that Vallabhdas B.Shah died intestate.

10. Point No.4:

10.1 The trial Court had held under point no.1 that the plaintiff was not a coparcener and that the plaintiff is not a necessary party to the former suit for partition and that there is no force in the contention of the plaintiff that the final decree in the former suit for partition in O.S.No.7 of 1963 is not binding on her. The trial Court had also held that the plaintiff is entitled to a decree for partition and that she is entitled to a 1/5th share in the 1/5th share of late Vallabhdas B.Shah. In fact, under issue no.5, the trial Court has categorically held as follows:

“In view of my findings on Issue No.1 to Issue No.4, a preliminary decree is passed declaring that plaintiff is entitled for 1/5th share in share of late Vallabhadas B. Shah.

While dealing with point no.1 supra for the reasons assigned we have also recorded findings that the plaintiff was not a necessary party to the former suit for partition and that the final decree in the said suit for partition is true, valid and binding upon the plaintiff. We have also held to the effect that the plaintiff's claim that she is a coparcener and has to be treated on par with her brothers, i.e., the defendants herein cannot be countenanced as her marriage was performed in the year 1969 and a final decree for partition of the properties was passed in the year 1963. In any view of the matter, the plaintiff had not sought a declaration that the decree in the former suit is not binding upon her. On the aspect that the plaintiff cannot simply ignore the final decree in the former suit for partition without seeking a declaration that the final decree in the former suit is not binding on her, it is necessary to refer to a decision in **State of Punjab and others v. Gurdev Singh, Ashok Kumar** ^[11]. The facts of the cited case are as follows: ‘A suit for declaration was filed by a dismissed employee claiming that he continues to be in service since his dismissal was void and inoperative. The High Court has observed that if the dismissal of the employee is illegal, void or inoperative being in contravention of the mandatory provisions of any rules or conditions of service, there is no limitation to bring a suit of the above nature. In paragraph (6) of this cited decision, it is held as follows:

“6. But none the less the impugned dismissal order has at least a de facto operation unless and until it is declared to be

void or nullity by a competent body or Court. In Smith v. East Elloe Rural District Council, (1956) AC 736 at P.769 Lord Redcliffe observed:

“An order even if not made in good faith is still an act capable of legal consequences, it bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.”

In the cited case, it was further held as follows:

7. Appropos to this principle, Prof. Wade states: the principle must be equally true even where the ‘brand of invalidity’ is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the Court (see: Administrative Law 6th Ed. P. 352). Prof. Wade sums up these principles:

“The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff’s lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the ‘void’ order remains effective and is in reality valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another”.

8. It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires the Court cannot give the declaration sought for.”

Therefore, for this reason also the plaintiff is not entitled to claim a larger share, i.e., 1/5th share in the entire property without seeking a declaration that the final decree in the former suit for partition is not binding upon her. In the light of the discussion coupled with reasons and the findings recorded by this court, it follows that the plaintiff is not entitled to seek partition of the entire plaint schedule properties into five equal and equitable shares and allotment of one such separated share to her in the said properties as claimed by her. Nonetheless, she is only entitled to only a 1/5th share in the share of her

father Vallabhdas B.Shah. The point is accordingly answered holding that the plaintiff is entitled to allotment of a 1/5th separated share in the share of her father.

11. Before parting with the case, it is necessary to mention that the learned senior counsel for the plaintiff/respondent had raised a preliminary objection on the maintainability of the appeals. This contention is based on the following factual aspects. The trial Court while answering the issue no.5, namely, 'To what relief?' had recorded the following finding:

"In view of my findings on Issue No.1 to Issue No.4, a preliminary decree is passed declaring that plaintiff is entitled for 1/5th share in share of late Vallabhdas B. Shah.

However, in the result portion the trial court by mistake or oversight or for some other reason while stating that the suit is preliminarily decreed in favour of the plaintiff had declared that the plaintiff is entitled to a 1/5th share in the properties. Thus, in the result portion the words '1/5th share in the share of late Vallabhdass' were omitted. Subsequently, to keep the result portion in agreement with the findings on issues, the accidental omission or mistake was obviously corrected as per the orders dated 20.02.2006 in I.A.No.459 of 2005 and after such amendment of the operative portion it was declared that the plaintiff is entitled to a 1/5th share in the 1/5th share of late Vallabhdass. This amendment was ordered by the trial Court after the first appeal C.C.C.A.No.38 of 2006 was preferred by the defendants 1 and 2. The trial Court had ordered the amendment of the judgment and decree on the same day on which the stay orders were granted by this Court in the appeal. In fact, in the other connected appeal preferred by defendants 2 and 3 in CCC A.No.225 of 2008, the said defendants had filed the amended copy of the judgment and that appeal was preferred assailing the judgment and decree as amended. Along with the grounds of appeal, the decree copy as amended is also filed. However, since the other appeal in CCCA No.38 of 2006 was preferred assailing the un-amended decree and judgment, the preliminary objection was raised stating that the said appeal is not maintainable. The contention is that once a decree is amended the original decree ceases to

exist and that as the order amending the decree and judgment had become final, the appellants/defendants ought to have assailed the amended decree and judgment; and, hence, the appeal filed challenging the un-amended decree and judgment is not maintainable. Be it noted that the said appeal was preferred even before the decree and judgment were amended as per orders dated 20.02.2006 of the trial Court. According to the appellants, no notice was served on the application for amendment and since the amendment related to an accidental slip or omission in the result portion, the amendment ordered of the judgment and the decree is not fatal to the present appeal. One more important aspect is that the plaintiff had lodged a caveat before this court and the stay orders were granted in the appeal by this court after hearing the learned counsel for both the sides. The copy of the order dated 20.02.2006 in I.A.No.459 of 2005 of the trial court are not filed to substantiate the contentions that the trial court is not aware of the stay orders granted by this court. In any view of the matter, the other appeal was preferred after the amendment was ordered by the trial court and in that appeal, the copy of the amended judgment and decree are filed; therefore, we find that the preliminary objection is untenable. Since one of the appeals was already filed even before the decree and judgment were amended and as the decree and judgment were amended to correct an accidental slip or mistake or omission without notice to the appellants/defendants 1 and 2, they cannot be blamed for the said act of the trial court. Be that as it may since the other appeal is filed assailing the amended decree and judgment the omission to amend the appeal grounds in the other appeal to assail the amended decree and judgment is not going to affect the maintainability of the appeal. Further Order XLI Rule 33 reads as follows:

“33. Power of Court of Appeal:- The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be

exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

Under this provision, the appellate Court may pass any decree or order as the case may require provided the parties are before the Court and the questions properly arise out of the trial court's judgment. This power may be exercised notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objections. Further, where two or more decrees are passed in one suit the power can be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees. Therefore, the preliminary objection in regard to the maintainability of the appeal is untenable being devoid of merit; and, hence, the following rulings (i) Regional Controller, National Airports Authority, Bombay v. Asst. Commissioner, Belgaum Sub Division [ILR Karnataka (1990) 448]; (ii) Phoolchand and another v. Gopal Lal [AIR 1967 Supreme Court 1470]; (iii) Peddapudi Vissamma v. Pedapudi Viswabrahmam and others [AIR 1957 AP 25] and (iv) Messers. Ganpati Rai Hiralal and another v. The Aggarwal Chamber of Commerce Ltd. [AIR 1952 SUPREME COURT 409] cited in support of the said contention do not advance the case of the plaintiff any further. Therefore, the preliminary objection as regards the maintainability of the appeals is overruled.

12. Point No.4:

We have gone through the judgment and the decree of the trial court. We have also gone through the amended judgment of the trial court where only the result portion was amended to keep it in agreement with the findings on issues as already noted supra. For the reasons assigned and the findings recorded by us under points 1 to 3 supra, we find no infirmity in the amended decree and judgment of the trial court calling for interference. Therefore, we

hold that the plaintiff is entitled to a 1/5th share in the 1/5th share of her father in the plaint schedule properties as held by the trial Court as per the copy of the amended judgment and amended decree, which are filed in C.C.C.A.No.225 of 2008. The point is accordingly answered.

13. Point No.5:

In the result and in view of findings on points 1 to 4, we find no merit in these appeals and we therefore, accordingly dismiss both the appeals however, without costs, confirming the decree and judgment of the trial court amended as per orders dated 20.02.2006.

Miscellaneous petitions pending, if any, in these appeals shall stand closed.

K.C.BHANU, J

M.SEETHARAMA MURTI, J

01st June, 2015

Note:- L.R copy to be marked
(B/o)
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- [\[1\]](#) 2007 (5) ALT 447
 - [\[2\]](#) 2007(2) ALD 435
 - [\[3\]](#) (1974) 2 Supreme Court Cases 600
 - [\[4\]](#) (2005) 1 Supreme Court Cases 280
 - [\[5\]](#) (2005) 2 Supreme Court Cases 784
 - [\[6\]](#) (2005) 8 Supreme Court Cases 67
 - [\[7\]](#) (2007) 11 Supreme Court Cases 621
 - [\[8\]](#) (2006) 13 Supreme Court Cases 433
 - [\[9\]](#) (2012) 4 Supreme Court Cases 387
 - [\[10\]](#) AIR 2009 SUPREME COURT 1389
 - [\[11\]](#) 1991 AIR 2219