

HON'BLE SRI JUSTICE M.S.K.JAISWAL

APPEAL SUIT No.2145 of 1991

JUDGMENT:-

Plaintiff No.2 and plaintiff No.3 who is the legal representative of the 1st plaintiff, have preferred this appeal against the judgment and decree passed in O.S.No.167 of 1982 on 21.12.1990 by the learned Principal Subordinate Judge, Tenali, insofar as it has gone against them.

2. During the pendency of the suit, plaintiff No.1 died and plaintiff No.3, who is the mother of plaintiff Nos.1 and 2, came on record as his sole legal representative. The respondents No.1 to 3 are the defendants No.1 to 3 in the suit. The parties will be referred to as arrayed before the trial Court.

3. The backdrop of the case, leading to the filing of this appeal, is as under:-

The suit was filed for partition of plaint 'A' and 'A-1' schedule properties into three equal shares and to allot one share each to the plaintiffs and for partition of plaint 'B' and 'C' schedule properties into twelve equal shares and to allot two such shares each to the plaintiffs and also to direct the 2nd defendant to render an account for the profits received by him from 24.09.1979 in respect of 'B' schedule properties.

The suit was decreed only in respect of plaint 'A' schedule property which became final and was dismissed in respect of the remaining claim.

4. The averments of the plaint, in brief, are as under:

Defendants 1 and 2 are the sons of one Nagendram. Plaintiffs 1 and 2 are the sons of defendant No.1 and plaintiff No.3 is the wife of defendant No.1. Defendant No.1 and his sons are members of Joint Hindu Family of which the 1st defendant is the manager. Defendant No.3 is the son of defendant No.2. Defendant No.1 filed a suit being O.S.No.20 of 1959 on the file of the Subordinate Judge, Tenali, for partition against the 2nd defendant and their father Nagendram, and the said suit ended in compromise on 30.11.1959, as per which, the plaint 'A' schedule property fell to the share of defendant No.1 and 'B' schedule property fell to the share of his father Nagendram. It is averred that the 1st defendant acquired 1/8th share in the rice mill from out of the income of plaint 'A' schedule, which is plaint 'A1' schedule. Anne

Nagendram died intestate on 24.09.1979 and on his death, plaint 'B' and 'C' schedule properties devolved upon his sons i.e., defendants 1 and 2 and, therefore, the plaintiffs are entitled to a share in the said properties being ancestral properties. Since defendant No.2 has been managing the plaint 'B' schedule properties on behalf of the joint family ever since the death of Nagendram and receiving the rents and profits therefrom, he is liable to render accounts for the profits and rents received by him from 1979. Since the attitude of defendants 2 and 3 is detrimental to the plaintiffs and since defendants 2 and 3 brought into existence a forged Will regarding the plaint 'B' schedule, the suit is filed for partition and profits.

5. Admitting the relationship between the parties and denying the averments made in the plaint, the first defendant filed a detailed written statement mainly stating that his father Nagendram died on 24.09.1979 after executing his last Will and testament on 10.09.1979 in a sound and disposing state of mind bequeathing part of 'B' schedule properties and half of the 'C' plaint schedule properties in his favour, while leaving remaining items in 'B' and 'C' plaint schedule properties to the 2nd defendant; that he attended during the last days of illness of his father and after his death he performed obsequies; that on knowing the execution of Will dated 10.09.1979 by his father, the 2nd defendant brought into existence a forged Will dated 02.09.1979 alleged to have been executed by his father Nagendram; that in view of disputes arose thereon, the matter was referred to arbitrators with all the alleged Wills and documents; that as the defendants 2 and 3 are in possession of 'B' schedule property, they are liable to account for the income accrued there from to him in view of Will dated 10.09.1979 executed by his late father in his favour; that he filed suit being O.S.No.20 of 1959 for partition of joint family property when his father refused to deliver the property gifted to him and the said suit ultimately ended in compromise and finally he stated that the 2nd defendant in collusion with the concubine of his father-Nagendram took possession of the property and managing the same. Hence, the 1st defendant sought for dismissal of the suit.

6. Defendants 2 and 3 filed a written statement denying the averments made in the plaint and contended that the father of defendant No.2 i.e., Anne Nagendram died on 24.9.1979 after executing his last Will and testament dated 02.09.1979 in a sound and disposing state of mind bequeathing all his properties in favour of the 3rd defendant, who is the son of defendant No.2; that as the 3rd defendant was a minor

by the date of death of said Nagendram, the 2nd defendant took possession of the properties; that item No.1 of B schedule was constructed jointly by late Nagendram and the 2nd defendant and that the 2nd defendant attended in the last days of illness of Nagendram while he was admitted in Vijaya Nursing Home, Madras, due to brain tumor; that the 1st defendant never visited the said Nagendram even in his death bed; that prior to the execution of last Will and testament dated 02.09.1979, the said Nagendram executed a Will on 01.12.1969 bequeathing all his properties then existing in favour of the 3rd defendant in a sound and disposing state of mind and neither the 1st and 2nd defendants nor the plaintiffs got any right in the said properties; that the 1st defendant brought into existence a forged Will two months after the death of Nagendram alleging that subsequent to the execution of the Will dated 02.09.1979 late Nagendram executed another Will on 10.09.1979 bequeathing part of the property in his favour; that in view of disputes arose thereon, the matter was referred to arbitrators with all the alleged Wills and documents and that before the arbitrators delivered their award, the 1st defendant having given notice to all the parties as well as arbitrators, withdrawn himself from the arbitration proceedings, and even as of today, the Wills as well as agreements of reference are still in the custody of the arbitrators. It was further stated in the written statement that 1/8th share in plaint 'A' schedule Mill was the self acquired property of the 1st defendant, who sold away the same to the 2nd defendant for a sum of Rs.10,000/- in January 1979; that the 1st defendant or the joint family of plaintiffs had no subsisting interest in the said 1/8th share and that the plaintiffs are not entitled for partition of the properties. Hence, defendants 2 and 3 sought for dismissal of the suit.

7. On the above pleadings, the following issues have been framed by the Court below:

1. Whether the plaintiffs are entitled for partition of plaint 'A1', 'B' and 'C' schedule properties?
2. Whether the Wills dated 01.12.1969 and 02.09.1979 set up in favour of the 3rd defendant are true, valid and binding on the plaintiffs?
3. Whether the sale of 'A1' schedule property in favour of the 2nd defendant is true, and valid and is binding on the plaintiffs?

4. Whether the Court fee paid is correct?

5. To what relief?

The following additional issues have also been framed:

1. Whether the Will dated 10.09.1979 executed by late Nagendram is true, valid and binding on the parties?

2. What are properties that are liable for partition?

3. To what share, if any, are the plaintiffs entitled in the schedule properties?

4. Whether defendant No.1 sold away his 1/8th share in the plaint 'A1' schedule property to defendant No.2 for a consideration of Rs.10,000/-?

8. In support of their case, the plaintiffs examined P.Ws.1 to 5, but no document was marked. On behalf of defendants, D.Ws.1 to 10 were examined and Exs.B-1 to B-172 were marked. Further, Exs.X-1 to X-3 were marked through P.W.6 and Exs.C-1 to C-37 were marked by the Commissioner, who examined the handwriting expert Ashok Kashyap (P.W.5).

9. On a consideration of the entire evidence both oral and documentary adduced on either side, the Court below held that the plaintiffs failed to establish that they are entitled to a share in plaint 'A1, B and C' schedule properties, however, they are entitled to claim a share in plaint 'A' schedule property and accordingly decreed the suit in respect of plaint 'A' schedule property only and dismissed the suit in respect of other properties, relying on Exs.B-166 and B-167 Wills set up by defendants 2 and 3. Aggrieved by the same, the present appeal has been preferred by plaintiffs 2 and 3.

10. It is contended by the learned Counsel appearing for the appellants/plaintiffs 2 and 3 that the Wills-Exs.B-166 and B-167 alleged to have been executed by late Anne Nagendram are forged one and are brought into existence by the 2nd defendant with the assistance of D.Ws.3 to 5 subsequent to the death of the said Nagendram. He further contended that a perusal of the contents of Ex.B-166 and that of Ex.B-167 clearly go to show that the recitals in Ex.B-167 go contrary to the recitals in Ex.B-166 and that there is no reference to the earlier Will Ex.B-166

anywhere in Ex.B-167. He further contended that there is no evidence either oral or documentary regarding the alleged enmity between Nagendram and the 1st defendant's family. He further contended that the 1st defendant filed O.S.No.20 of 1959 for partition against the 2nd defendant and their father Nagendram and on 30.11.1959 the same was compromised and a compromise decree was passed under which the present 'A' schedule property fell to the share of the 1st defendant and 'B' schedule property fell to the share of Anne Nagendram and out of the properties fell to the share of the 1st defendant, he gifted Ac.3.00 to his eldest daughter towards her pasupukumkuma and an extent of Ac.8-79 cents described in 'A' schedule is the joint family property of the plaintiffs and the 1st defendant, in which each of them would get 1/3rd share; that with the income of 'A' schedule property, the 1st defendant acquired 1/8th share in the rice mill, which is 'A-1' schedule and so the plaintiffs got 1/3rd share in 'A-1' schedule property.

11. On the other hand, the learned Counsel for the 1st defendant contended that the father of the 1st defendant viz., Nagendram died on 24.09.1979 after executing a Will dated 10.09.1979 bequeathing part of 'B' schedule properties and half of 'C' schedule property in his favour, while leaving remaining items in 'B' and 'C' schedule properties to the 2nd defendant. He further contended that the 2nd defendant brought into existence a forged Will dated 02.09.1979 alleged to have been executed by his father. He further contended that since the father of the 1st defendant refused to deliver the property gifted to him, the 1st defendant filed a suit being O.S.No.20 of 1959 for partition of joint family property and the same was ultimately ended in compromise. He further contended that the 2nd defendant in collusion with the concubine of his father took possession of the property and managing the same.

12. The learned Counsel for defendant Nos.2 and 3 contended that Nagendram executed the Will under Ex.B-166 on 01.12.1969 in his own handwriting under which he bequeathed all his properties to defendant No.3 with absolute rights after his life time and again on 02.09.1979 by way of abundant caution, he executed another Will under Ex.B-167, which is an unregistered Will, wherein he bequeathed

his entire property to defendant No.3 alone. He further contended that the recitals in Ex.B1 show the existence of Ex.B-166-Will and nowhere in the written statement of the 1st defendant it is shown that the relationship between himself and his father was cordial. He further contended that the 1st defendant after having knowledge of Ex.B-166-Will incorporated a sentence in Ex.B1, which indicates that Nagendram executed and scribed an unregistered Will in 1969. He further contended that if really the said Nagendram executed Ex.B1-Will he would have mentioned the date of the Will and hence the non-mentioning of the date of the said Will would show the suspicious circumstances of the said Will.

13. The points that arise for consideration are as to (1) whether the Wills set up by defendants 1 and 2 under Exs.B-1, B-166 and B-167 are true, valid and binding and if so, whether they are binding on the parties?; and (2) Whether 'A-1' schedule property is available for partition?

14. **Point No.1:-** The appellants are plaintiffs 2 and 3 in O.S.No.167 of 1982 which was filed in October, 1982 originally by Anne Sambasiva Rao and Anne Krishnprasad. Anne Sambasiva Rao died unmarried. Therefore, in the year 1988, the 3rd plaintiff – Anne Sulochana Devi, who is the mother of both the original plaintiffs, came on record.

15. The respondents No.1 to 3 were the defendants No.1 to 3. While D.1 – Anne Kameswara Rao is the father of the original plaintiffs, D.2 is the brother of D.1 and D.3 is the son of D.2. The 2nd appellant/3rd plaintiff is the wife of D.1.

16. The suit is for partition of the plaint schedule properties. Plaint 'A' schedule consists of six items of different extents of lands in different survey numbers and they are situated at Chiluvuru village, Duggirala Sub-District, Guntur District. Plaint 'A-1' schedule comprises of Sri Anjaneya Turmeric, Rice Mill situated at Ravendrapadu village, Duggirala Sub-District, Guntur District. Plaint 'B' schedule consists of two items. Item No.1 is a residential house constructed on a land admeasuring 763 Sq.Yds., situated at Seetaramapuram, Mogalrajapuram, Vijayawada. Item No.2 of plaint 'B' schedule consists of three bits of agricultural land. They are situated in Sy.Nos.210, 205 and 85-A situated at Vadlapudi village, Mangalagiri Sub-District, Guntur District. These lands are to an extent of about Ac.11-00. Plaint 'C' schedule consists of a sum of Rs.17,785/- lying in Central Bank of India, Governorpet Branch,

standing in the name of Anne Nagendram, S/o.Bapaiah.

17. Plaintiffs are claiming $1/3^{\text{rd}}$ share in plaint 'A' and "A-1" schedule whereas in plaint 'B' and 'C' schedules, the plaintiffs claim $2/12^{\text{th}}$ share each. The trial Court decreed the suit insofar as plaint 'A' schedule is concerned and dismissed insofar as it is in respect of plaint 'A-1', 'B' and 'C' schedules.

18. Anne Nagendram went in adoption to one Bapaiah. Anne Nagendram had two sons namely Kameshwara Rao (D.1) the eldest and Kamalakara Rao (D.2) was the youngest. Anne Nagendram was possessed of vast extents of lands. The 1st defendant filed O.S.No.20 of 1959 on 02-04-1959 on the file of the Subordinate Judge, Tenali for partition. In that suit, Anne Nagendram was D.1, Kamalakara Rao (D.2 herein) was the 2nd defendant, the 3rd defendant is said to be a lady who has been kept and maintained by Anne Nagendram and D.4 was one China Adeyya, who is said to be a partner of 'A-1' schedule Rice Mill. Ex.B.3 is the certified copy of the plaint in O.S.No.20 of 1959. That suit was in respect of various properties and ultimately on 30-11-1959, that suit was compromised and Ex.B.11 is the compromise decree. The relevant portion of the decrees, insofar as present suit is concerned, is to the effect that about Ac.11-679 of land fell to the share of the 1st defendant herein and about Ac.11-60 of land fell to the share of the 2nd defendant herein and about Ac.10-00 of land was retained by Anne Nagendram. Ac.11-00 of land that fell to the share of D.1 herein in O.S.No.20 of 1959 is the plaint 'A' schedule property in the present suit. The property that fell to the share of D.2 herein is not the subject matter of the present suit. 'B' schedule of the present suit comprises of the land that fell to the share of Anne Nagendram in the compromise decree with an addition of a residential house said to have been constructed subsequent to compromise partition decree.

19. The appellants/plaintiffs being the wife and son of D.1 herein are claiming $1/3^{\text{rd}}$ share in the plaint 'A' schedule which admittedly fell to the share of D.1 in the compromise decree. Therefore, the other defendants are not claiming any share in 'A' schedule, which the learned trial Court has decreed in favour of the plaintiffs/appellants.

20. The 'C' schedule property consists of a net cash of Rs.17,785/-, which D.2 has already withdrawn from the bank.

21. The property in dispute remains 'A.1' and 'B' schedules. As already stated, 1/8th share in the Turmeric and Rice Mill - 'A-1' schedule and 'B' schedule comprises of about Ac.11-00 of land and the residential house.

22. It may be stated here that there is no controversy that 'B' schedule herein are the properties that fell to the share of Anne Nagendram in the partition decree. Admittedly, Anne Nagendram died on 24-09-1979 leaving behind the two sons viz., Kameshwara Rao (D.1) and Kamalakra Rao (D.2). In the normal course, the property left behind by Anne Nagendram has to be divided amongst the two sons, if it is to be intestate succession. Will, if proved, is an instrument which dislodges the intestate succession. In the instant case, both the sons of Anne Nagendram have propounded three wills said to have been executed by Anne Nagendram, which are marked as Ex.B.1, Ex.B.166 and Ex.B.167. Ex.B.1 is propounded by D.1 and it is dated 10-09-1979. Ex.B.166 and Ex.B.167 are the two wills propounded by D.2 and they are dated 01-12-1969 and 02-09-1979.

23. There is no dispute that as per Ex.B.11, the compromise decree, D.1 got about Ac.11-679 cents; D.2 got about Ac.11-60 cents; and Nagendram got about Ac.10-00 of land. Subsequently, Nagendram is said to have acquired some other properties which are part of plaint 'B' schedule.

24. The main contention of the 2nd and 3rd defendants is that it is D.1 who is behind the litigation and he has set up his sons for claiming a share in the properties of Nagendram which have been bequeathed by Nagendram in favour of D.3. It is submitted that, as a matter of fact, the deceased 1st plaintiff and the 2nd plaintiff were not even born by the date the original suit for partition was filed by D.1, which culminated in the decree-Ex.B.11. In the plaint that is filed, there is an extensive reference to the said suit bearing O.S.No.20 of 1959 filed by D.1 and there is also reference to the terms of compromise. Manifestly, these facts were not within the knowledge of the deceased 1st plaintiff and the 2nd plaintiff, who even by the date the present suit which is filed on 04-10-1982 they were just about 22 and 21 years. Having referred to the compromise decree in the plaint, when it came to evidence, the 2nd plaintiff, who examined himself as PW.1, categorically admitted that he do not know anything about O.S.No.20 of 1959 filed by D.1 against Nagendram, that even by the date of filing of the present suit also, he do not know anything about O.S.No.20 of 1959 and that he do not even know as to whether there is reference to

O.S.No.20 of 1959 in the plaint filed by him. This aspect strengthens the contention of the 2nd and 3rd defendants that it is D.1 who is behind his sons in getting the present suit for partition filed.

25. Both the parties have adduced oral evidence to show the nature of relationship that existed in between the eldest son/D.1 with Nagendram during his life time. According to D.2 and D.3 and also from the recitals of the wills – Ex.B.166 and Ex.B.167, propounded by D.2 and D.3, the relationship in between the father and son was not cordial, more particularly, ever since the 1st defendant filed a suit for partition bearing O.S.No.20 of 1959. When O.S.No.20 of 1959 was filed by D.1, he was just about 25 years. One admission from the mouth of D.1, who examined himself as D.W.1, clearly shows that the relationship between D.1 and his father was substantially strained, the admission is to the effect that he (D.1) filed a Writ of Habeas Corpus against his father – Nagendram in the A.P.High Court alleging that Nagendram was pressurising the mother of D.1 (Nageshwaramma) to obtain some documents with regard to her properties and confined her. D.1/D.W.1 further admits that his mother (Nageshwaramma) was produced before the High Court and as per the representation made by his own mother before the High Court, that she was not confined by her husband(Nagendram) or pressurized by him, the said Writ Petition was dismissed. This clearly demonstrates the strained relationship in between the son/D.1 and the father-Nagendram, even after O.S.No.20 of 1959 ended in compromise on 30-11-1959.

26. So far as D.1 is concerned, who is apparently sailing with the plaintiffs, Ex.B.1 dated 10-09-1979 is produced and it is contended that whatever properties were owned and possessed by Nagendram after family partition, part of it was bequeathed in favour of D.1 and the reminder to the 2nd defendant. It is also on record that within less than a month after the death of Nagendram, discussions and disputes started between the brothers and their children about the properties of Nagendram and as a matter of fact, voluminous evidence has been placed on record to show that both the brothers – D.1 and D.2 entered into an agreement and appointed three respectable persons as mediators to settle the dispute and all the three wills namely Ex.B.1, Ex.B.166 and Ex.B.167 were handed over to the elders for settling the disputes, but within few days thereafter, it is also admitted that D.1

backed out of the arbitration proceedings and issued notices calling upon the arbitrators not to mediate in the dispute. Long thereafter, the present suit came to be filed. In the plaint filed on 04-10-1982, there is no reference, whatsoever, to Ex.B.1. On the other hand, a perusal of the plaint shows that the plaintiffs were aware about the wills being propounded by D.2 and D.3 which they, however, termed as fabricated and forged. It is also admitted by PW.1 that by the date the suit was filed, the 2nd plaintiff-PW.1, the deceased 1st plaintiff and their mother – 3rd plaintiff were staying together along with their father D.1. As a matter of fact, it is in the evidence of PW.1 that he was assisting his father – D.1 in the agricultural operations, he having discontinued his studies in the year 1977 itself. However, the deceased 1st plaintiff was pursuing a course in Madras. Therefore, the plaintiffs cannot feign ignorance about Ex.B.1 if really it was in existence. It is also on record that even though suit was filed on 04-10-1982, the 1st defendant herein remained *ex parte* and D.1 who examined himself as D.W.1 admits in his evidence that for more than three years after the suit was filed, he remained *ex parte* in the suit and only thereafter, he started contesting the suit. D.1 filed his written statement on 16-02-1986. D.2 and D.3, on the other hand, filed their written statements as long back as on 31-07-1983 as against the plaint being filed on 04-10-1982. By the time D.1 filed his written statement, almost all the material pleadings were before the Court. In view of, what is stated above, D.1 cannot be said to be not aware about the pleadings of the plaint and the written statement filed by D.2 and D.3. He was also aware that his sons were claiming share in the properties both belonging to D.1 (plaint 'A' schedule property) and Nagendram (plaint 'B' and 'C' schedule properties). Curiously, in the written statement filed by D.1 on 16-02-1986, he pleaded the Court to dismiss the suit of the plaintiffs insofar as 'B' and 'C' schedule properties are concerned. This, in fact, is the contention of D.2 and D.3 which is to the effect that the plaintiffs are not entitled to any share in plaint 'B' and 'C' schedule properties. It is also pertinent to mention here that D.1 gave his evidence as D.W.1 in December, 1988 and even though there was extensive reference to three wills said to have been executed by Anne Nagendram, one propounded by D.1 himself and two others by D.2 and D.3, he asserts in the cross-examination made by the plaintiffs that Anne Nagendram died intestate and therefore, himself (D.1) and the 2nd defendant were the only legal heirs of his father. A significant suggestion that is made on behalf of the plaintiffs to their father D.1 is that D.1 has brought into existence the will – Ex.B.1 to deprive the

plaintiffs of their legitimate share in the properties of Nagendram. D.1/D.W.1 further admits that the wills set up by him and his brother D.2 were referred to the arbitrators by name M.Venkateshwara Rao, Y.Venkateshwara Rao and M.Kameshwara Rao. It may also be stated here that the 2nd plaintiff/PW.1 in his evidence denied the suggestion made to him by D.1 that Nagendram executed Ex.B.1 on 10-09-1979.

27. Though it is contended by D.1 that his father Anne Nagendram executed Ex.B.1 bequeathing some share in his lands. D.1, however, failed to prove the execution of Ex.B.1 and the learned trial Court has disbelieved the same. That finding of the lower Court holding Ex.B.1 to be a forged and fabricated document has not been challenged and it became final.

28. Ex.B.166 dated 01-12-1969 is the will said to have been executed by Anne Nagendram. It is a holographic will. Anne Nagendram himself scribed the will. As per the said will, he bequeathed all his landed properties in favour of D.3, who is the son of D.2. Even though, a feeble attempt has been made by the 1st defendant to deny the said will Ex.B.166, but it is admitted that D.1 is aware that his father Anne Nagendram has executed a will in the year 1969 (Ex.B.166). As already stated, in Ex.B.166, Anne Nagendram has bequeathed his landed property in favour of D.3. According to D.2, Anne Nagendram executed another will on 02-09-1979, which is Ex.B.167. This is about 22 days prior to the death of Anne Nagendram. According to D.2, this is the last and final will of Anne Nagendram. As per the said will, Anne Nagendram bequeathed all his landed property, the residential house and other properties in favour of D.3, who is the son of D.2. In view of the voluminous oral and documentary evidence adduced and elaborate arguments advanced, the crucial point is as to whether defendants 2 and 3 could prove the execution of Ex.B.167 on 02-09-1979, by and under which, the entire plaint 'B' and 'C' schedules has been bequeathed in favour of D.3. As noticed above, if Ex.B.167 is excluded, there is a will Ex.B.166 which is a holographic will, dated 01-12-1969, the legatee therein is the 3rd defendant. Therefore, if Ex.B.167 is proved, the plaint 'B' and 'C' schedule properties will go to the 3rd defendant and if not, along with D.2 and D.3, D.1 and his sons (the plaintiffs) will be entitled to a share in the residential house, which was not covered by Ex.B.166, dated 01-12-1969.

29. The oral and documentary evidence on record show that Anne Nagendram has given different properties to the other family members including Chittela Venkata

Ratnam, who is said to have been kept and maintained by Anne Nagendram.

30. Learned Counsel appearing for the appellants/plaintiffs submits that the wills – Ex.B.166 and Ex.B.167 are not proved and the suspicious circumstances are not explained and hence plaint 'B' and 'C' schedule properties are available for partition. The defendants failed to examine the material witnesses namely Venkata Ratnam, the concubine of Anne Nagendram, Hanumanta Rao, who lived with Nagendram, the mediators and arbitrators who tried to mediate the dispute prior to the suit, after the death of Anne Nagendram, and the Village Karanam, who is said to have scribed the will – Ex.B.167, and that the non-examination of the above witnesses is fatal to the case of the defendants.

31. Insofar as Ex.B.166, dated 01-12-1969 is concerned, it is contended that the attestors to the said document are strangers and Anne Nagendram would not have taken the strangers to act as attesting witnesses, more particularly, when there were several relatives of Nagendram residing around his house.

32. According to the appellants, D.W.3 is a resident of Mallampally village and he claims to be a turmeric broker. The another attesor Subba Rao is a resident of Kanumuru village. The presence of D.W.3 at Vijayawada on the date of Ex.B.166 is doubtful. It is also submitted that there is no draft for Ex.B.166 and it is most unlikely that Nagendram could have drafted himself without any assistance. The fact that Venkata Ratnam and Hanumantha Rao were residing in the same house, who were not taken as attesting witnesses to Ex.B.166 is a circumstance which belies Ex.B.166.

33. The contention of the defendants No.2 and 3 is that, admittedly, it is D.2 who has been in possession of the plaint 'B' schedule properties which fell to the share of Nagendram. It is he who took care of his father, more particularly, when he fell sick. Hanumantha Rao is the grandson of the brother of Nagendram and he was staying and studying with Nagendram. Venkata Ratnam was the woman living with him. Documents are produced to show that certain properties were registered in favour of Hanumantha Rao and Venkata Ratnam. The fact that they were not taken as attesting witnesses to Ex.B.166 even though they are residing in the same house cannot be taken as a suspicious circumstance for disbelieving Ex.B.166.

34. The attesting witness D.W.3 to Ex.B.166 clearly gave reason for his presence at the time when Ex.B.166 was executed. Admittedly, Nagendram and Adeyya were

having Turmeric, Rice Mill and therefore D.W.3 being a broker in turmeric was having dealings with Nagendram. It is also on record that Nagendram was raising turmeric crop in about Ac.5-00 of land. He was an independent witness and therefore Nagendram has thought it wise to prefer an independent witness to be an attester rather than Venkata Ratnam his concubine and Hanumanta Rao, the boy being brought up by him and the neighbouring residents who were relatives.

35. In addition to the above, Ex.B.166 was also examined by an hand-writing expert – Ashok Kashyap (PW.5) and he opined that Ex.B.166 is a genuine document. He has compared the signature of Nagendram on Ex.B.166 with several documents and gave the opinion. Even though, PW.5 – the expert admits about certain discrepancies, but his conclusive evidence is Ex.B.166 is the will which contain the signature of Nagendram. As already stated, there is no dispute that Ex.B.166 is in the own handwriting of Anne Nagendram. As already stated, D.1 – the father and husband of the appellants admits that he is aware about a will said to have been executed by Anne Nagendram in the year 1969 which apparently is Ex.B.166. There is no force in the contention of the learned Counsel appearing for the appellants that the admission made by D.1, who is the father and husband of the plaintiffs, will not bind the appellants/plaintiffs insofar as the admission of execution of Ex.B.166 of Anne Nagendram is concerned.

36. As already noticed, the suit was originally filed by the two sons of the 1st defendant. When the suit was filed in the year 1982, both the sons of D.1 were aged less than 23 years. Therefore, when Ex.B.166 came to be executed on 01-12-1969, the two sons of D.1 were aged less than 10 years. Their father D.1 is the best person who is expected to know about the execution of a document in the year 1969. When he admits knowledge about his father executing Ex.B.166 in the year 1969, the sons cannot say that the said admission made by D.1 is not binding on them.

37. As already noticed, once Ex.B.166 is proved, the plaintiffs cannot claim any share in 'B' and 'C' schedule properties, except the residential house, which is not covered in Ex.B.166. Exactly 10 years thereafter and just about three weeks prior to his death, Anne Nagendram executed Ex.B.167 on 02-09-1979 bequeathing all his properties which includes plaint 'B' and 'C' schedules in favour of the 3rd defendant,

who is the son of the 2nd defendant. The reason as to why he is bequeathing all his properties in favour of D.3 are clearly spelt out by the testator in Ex.B.167. Briefly stated, the translation of Ex.B.167 dated 02-09-1979, as produced by the appellants, reads as under:-

W I L L (02-09-1979)

‘This will is got written (Vrainchina) by Anne Nagendram, adopted son of Bapaiah, R/o.Sitharampauram, Vijayawada Town of Krishna District in a sound mind.

Now I am about 70 years old. My wife Nageswaramma passed away four years back. I have two sons by name Kameswara Rao and Kamalakara Rao only. I have no female issues. Recently in February, 1979, I underwent surgery for removal of tumour in my mind. Since then, I am not well. Hence, I apprehend that I may not live long and have decided to take a decision about my movable and immovable properties during my lifetime. Thus, I got this will drafted.

My elder son filed suit in Tenali Court with regard to our joint family properties in 1979 and we compromised. In the said compromise myself and my sons partitioned the joint family properties. I got about Ac.10-00 of both wet and dry lands situated in Reendrapadu and Pedavadlapudi villages. I came to Vijayawada in the next year i.e., 1960. Since then, my younger son has been cultivating my lands and his lands jointly. Myself and my younger son jointly constructed double storied house (meda) bearing Door No.33-14-9/5, situated in Sitharamapuram, Vijayawada. Myself and my younger son have been conducting all the affairs jointly. My younger son has been taking care of me and my personal necessities during my ill health also. Therefore, I have got special affection on him and therefore, all my movable and immovable properties are bequeathed to Bhavani Prasad, son of my younger son after my lifetime with all rights. I have reserved my right to revoke this will if I feel necessary. This *will* will come into effect after my lifetime. This will is got written (Sammithina Vrainchina) with my consent.”

38. The plaintiffs, in their evidence, admit that D.2 and Nagendram were living together and it was D.2 who had been cultivating the lands of Nagendram during his life time and even after his death till date it is D.2 who is in possession of plaint 'B' schedule properties.

39. Learned Counsel appearing for the appellants contends that in Ex.B.167, dated 02-09-1979, there is no reference to Ex.B.166, dated 01-12-1969, executed by Anne Nagendram. Non-reference to a previous will or stating that the earlier will being

superseded cannot be taken as a suspicious circumstance for disbelieving the subsequently executed will since by friction of law, all the wills executed prior to the last testamentary disposition of a testator will get superseded provided the last will is proved in accordance with law. In **MAHESH KUMAR v. VINOD KUMAR**, the Supreme Court in para 47 observed as under:-

“The mere fact that Kailash Chand lives at a distance of about four furlong from the house of Bal Kishan (father-in-law of the appellant) has no bearing on the issue relating to the validity of the will nor the non-examination of the persons belonging to the same community has got any relevance. The absence of a categorical recital in the will dated 10-2-1992 that the earlier will was cancelled is also not relevant because once the execution of the second will is held as duly proved, the earlier will automatically becomes redundant because the second will represents the last wish of the testator.”

40. In Ex.B.167 the testator Nagendram has clearly referred to the previous partition decree and also records that the house property was constructed by Nagendram and his younger son viz., D.2 jointly. It also places on record the fact that it is D.2 who had been living with him taking care of him, and conducting the affairs of the properties jointly.

41. It is no doubt true that the handwriting expert-PW.5 opined that Ex.B.167 do not contain the signature of Anne Nagendram and it appears to be a forged document. However, the expert-PW.5 admits that the discrepancies that are found by him in Ex.B.167 when compared to the admitted signatures of the attesor Nagendram are possible due to old age, sickness or any other ailment. There is no dispute about the fact that the said will Ex.B.167 was executed just about three weeks prior to the death of Nagendram. Before that he underwent operation of his brain due to a tumour. He was undergoing treatment in different hospitals, both at Madras and Vijayawada. As already stated, the handwriting expert – Pandit Ashok Kashyap/PW.5 opined that Ex.B.166 is genuine whereas Ex.B.1 and Ex.B.167 are not. The expert has marked the questioned signature on Ex.B.167 as Q2 and he gave the following reasons for opining that Q2 is not the genuine signature of Anne Nagendram:-

1. The signature Q2 is written slowly, cautiously and hesitatingly with inherent signs of forgery like suspicious pen lifts and concealed pre-touchings.

2. There are fundamental differences in respect of hand-writing characteristics like pictorial effects, speed, moment, pressure, shading, line quality, skill, style, spacing, sizing and slant and formations all described in pages 6 to 8 of my report. I compared the signature Q2 with the letters in A.1 to A.10. I compared separately each of the letters in Q2 with letters in A.1 to A.10. I have given the reasons for differences in para No.2 i.e., pages 7 and 8. Individually at length I did not discuss the differences of individual letters in Q2 and A.1 to A.10 in para 2 or at any part of my report. Now I can give the differences. They are as follows:-

1. The horizontal stroke in 'aa' shows the hook at its termination in a very hesitating manner in Q2 besides the penlifts of unnatural nature in 'aa' are quite conspicuous by their absence in the admitted signatures of A.1 to A.10.

In the letter 'ne' and its 'Ottu', considerable hesitation is witnessed in Q2. Further the "Ethavam" in conjunction with 'na' 'vottu' shows sharp decline in Q2 not in A.1 to A.10.

3. The "Deergham" in 'Naa' is effected with considerable hesitation in Q2. In the very beginning there is a suspicious pen lift in the base and so also in 'Deergham'. This is not the case in admitted signatures.
4. In the letter "ge" and its "Ethvem" there is considerable hesitation in Q2 and the line quality in the body-cure in Q2 is very defective.
5. 'AM' in Q2 very shakely written with usual defects of forgery.
6. The letter 'da' 'ra vathu' and 'am' in Q2, they are considerably hesitatingly written when compared with other admitted signatures."

It is also pertinent to place on record the following explanation offered by the expert when he was specifically asked certain questions:-

Q:- When do tremors occur?

Ans:- Generally in the handwriting of old people with advanced age. It may also occur soon after an accident due to lack of muscular coordination in a person of any age. Mental instability or in handwritings or illiterate people particularly after middle age. Besides this the most important circumstance connected with tremour is low grade forgery where hesitation on the part of forger may degenerate into the development of tremour.

Q. Does tremour also occur when a person is under drug influences or sedation or intoxication.

Ans:- There are very bright chances.

Q.:- Is there any possibility for a tremour to take place when an old aged person has undergone a brain operation for a tumour and at the final days of his life on death bed?

Ans.:- It may all depend on the physical and mental condition of the person.

42. It may be recalled that the admitted case is that Anne Nagendram had been suffering with brain tumour and he underwent major surgery in November, 1978. He was under constant medication. By 1979, he was more than 70 years old. Therefore, I feel that the grounds on which the expert/PW.5 concluded that Ex.B.167 is a forged and not a genuine document cannot be accepted, more particularly, in view of the fact that D.2 and D.3 have produced legally acceptable evidence to show that the said document was executed by Anne Nagendram in the presence of two attesting witnesses, who are examined as D.Ws.4 and 5. As already stated, D.Ws.4 and 5 are the independent respectable persons in whom Anne Nagendram reposed confidence for taking them as attesting witnesses to the will and their evidence is inspiring and even though they are elaborately cross-examined, nothing concrete is elicited from them for disbelieving that they have any reason for giving false evidence to the effect that in their presence Anne Nagendram executed Ex.B.167 and they attested the same as attesting witnesses. It is also on record that Anne Nagendram at the time of execution of Ex.B.167 was sufficiently alert mentally and was capable of executing the will.

43. D.W.4 is the ex-munsif of Ravendrapadu. May be there are some disputes in between the father of D.W.4 and Anne Nagendram, but it is admitted by D.W.4 that he has got nothing against D.1. It is asserted by D.W.4 that since he was a Village Munsif, it is Nagendram who sent for him through the 2nd defendant. It is the Village Karanam who took D.W.4 to the house of Nagendram.

44. Another attesting witness is D.W.5. He claims to be a tenant of Nagendram but he has not produced any document to show that he was a tenant of Nagendram. It is in the evidence of D.W.5 that he was living in one portion of the down stairs and in

another portion one Mallikarjuna Rao was living since 1976 but he do not know what Mallikarjuna Rao was doing. D.W.5 claims that he was meeting Nagendram almost everyday. D.W.5 could not give the names of other occupants of the house of Nagendram. Merely because, D.W.5 could not give the names of the co-tenants and other neighbouring residents of Nagendram, he cannot be said to be a planted witness by the 2nd defendant. DW.5 was giving evidence ten years after Ex.B.167 was executed. D.W.5 categorically asserts that he attested Ex.B.167 and he denied the suggestion that Ex.B.167 was brought into existence after the death of Nagendram. It is in the evidence of D.Ws.4 and 5 that the Village Karanam prepared a draft of the will to the dictation of Nagendram and after the Village Karanam read over the same to Nagendram, Nagendram gave it to D.W.4 for getting it typed. D.W.4, no doubt, could not give the place where he got the will Ex.B.167 typed. It is on record that the Village Karanam who prepared the draft was a document writer. It is in the evidence that when Nagendram asked the Village Karanam to prepare the fair copy of the will, the Village Karanam told that since his handwriting is not good, he advised the will to get it typed and accordingly he entrusted to D.W.4 for getting it typed.

45. It is no doubt true that the Village Karanam, who prepared the draft and read over the contents thereof to Nagendram, has not been examined. The rough draft prepared by Village Karanam is also not produced. In Ex.B.167 it is clearly mentioned that the draft of the will has been prepared by Village Karanam. On this ground, the otherwise cogent testimony of DW.4 cannot be doubted.

46. When D.W.4 the attesting witness of Ex.B.167 was in the witness box, what is suggested to him is that there are disputes in between his family and the family of Nagendram since 1962. If that were to be the reason, neither Nagendram would have called him to act as attesting witness nor D.W.4 would have come to the Court and give evidence in support of Ex.B.167.

47. The material witnesses insofar as Ex.B.167 is concerned are D.Ws.4 and 5. As far as Ex.B.167 is concerned, DW.4 who is an attestor of the will is admittedly the munsif of Revendrapadu and he was called for by late Nagendram and he was asked to attest and that DW.4 is known to Anne Nagendram's sons since several years and he is not in any way related to the defendants 1 and 2 and no motive can be attributed to DW.4. DW.4 clearly stated that Anne Nagendram executed Ex.B.167

on 02-09-1979 in a sound and disposing state of mind and he saw the testator signing in Ex.B.167 and there is nothing to disbelieve the testimony of this witness. DW.5 is a tenant in the house of Nagendram and he also attested in Ex.B.167 and this witness is also not related to any one and he is a lecturer working in a college at Vijayawada at the time of execution of Ex.B.167 and he also corroborated the evidence of DW.4. In para 6 of the plaint it is shown that R.H.V.Purushotham Rao is a close friend of the 2nd defendant and he is in the occupation as a tenant. Therefore, DW.5 by name R.H.V.Purushottam Rao is the tenant in a portion of the 'B' schedule house at Vijayawada and it was not mentioned anywhere in the plaint that DW.5 is not in occupation of the house portion during the life time of Nagendram. The first defendant also filed a petition for reopening his evidence after examining DW.5 and adduced further evidence by examining DW.6 by name A.Ramalaxmana Rao. DW.6 stated that there are four portions in the down stairs and that he is residing in one portion. A.Venkata Rao is residing in one portion and Kaza Mallikarjuna Rao was residing in the third portion and the fourth portion of the down stairs and the evidence of this witness shows that DW.5 was not a tenant during the life time of Nagendram. The witness admitted that there are four portions and unless there are four tenants, there cannot be four portions. When there are four portions in the down stairs there must be four tenants and he did not reveal the name of DW.5 purposely, probably at the instance of the 1st defendant. So the evidence of D.Ws.4 and 5 has to be accepted. The non-examination of the scribe of Ex.B.167 cannot be taken into consideration in view of the evidence of the two attestors. So apart from the evidence that was adduced by defendants No.2 and 3, the admissions made by the plaintiffs, DW.1 and his witnesses and the suggestions made to witnesses on behalf of the defendants 2 and 3 and the other surrounding circumstances, it can be held without any hesitation that both the wills Exs.B.166 and 167 are true and genuine and are executed by late Anne Nagendram in a sound and disposing state of mind whereunder all his properties were bequeathed to the 3rd defendant only.

48. It is no doubt true that D.2, the father of the legatee under Ex.B.167, has called the attesting witness D.W.4 but taking into consideration the fact of the sickness of Nagendram by itself cannot be taken as a suspicious circumstance. As discussed above, there being no reference to Ex.B.166 in Ex.B.167 also cannot be taken as a circumstance creating suspicion about the execution of Ex.B.167. As already

noticed, Ex.B.166 is in respect of only landed properties but whereas Ex.B.167 comprises of the land as well as the residential house, which came into existence after Ex.B.166, dated 01-12-1969. The beneficiary under both the wills, executed in 1969 and 1979, is the same namely the 3rd defendant. It is not as though that there is any change in the

intention of the testator in bequeathing all his properties in favour of D.3 either in 1969 or in 1979, except for the above. The intention of Nagendram in both the wills is unambiguously to bequeath all his properties to D.3.

49. Insofar as Ex.B.166 and Ex.B.167 propounded by D.2 and D.3 is concerned, the 2nd plaintiff as PW.1 deposed that when once a will is executed by his grandfather – Nagendram in 1969 (Ex.B.166), there is no necessity or need to execute another will in 1979 (Ex.B.167) and that for this reason, he is of the view that both the wills (Ex.B.1 and Ex.B.167) are not true and genuine. What could be culled out from this statement of PW.1 that he is admitting of Ex.B.166 but denying the execution of Ex.B.1 and Ex.B.167 on the ground that there was no need for it.

50. Learned Counsel appearing for the appellants/plaintiffs relied upon various authorities which laid down the well settled principles governing the cases covered by wills. There are catena of authorities which laid down as to what are the aspects to be taken into consideration while appreciating the truthfulness or otherwise of a will. The authorities that are relied upon are:-

In **PENTAKOTA SATYANARAYANA (2005) 8 SCC 67**, the Supreme Court held as under:-

“Since the appellants are the propounders of the Will, the initial onus will be on them to prove execution of the Will. Thereafter, the onus would shift to the respondents. They have to establish their case of undue influence or coercion. Then the onus would shift to the appellants to remove the suspicious circumstances, if any. In the instant case, the Will has been duly proved and the High Court and the lower Court in their discussion have even held so. It has also been held that the testator was hale and hearty and in a sound state of mind. The Will is a registered Will. The attestor and the scribe have been examined to prove the Will. The statement made by *P* in the written statement is one of the most important factors which authenticates the genuineness of the Will. No evidence has been led in by the respondents to show the exercise of any fraud or undue influence at the time of execution of

the Will. No evidence was adduced to show that the testator was not in sound state of mind and in fact, the finding is that he was of sound mind. Thus, the evidence adduced by the appellant propounders is sufficient to satisfy the conscience of the Court of law that the Will was duly executed by the testator.”

In **H.VENKATACHALA IYENGAR’s case (AIR 1959 SC 443(1))**, the Supreme Court at para 22 held as under:-

“It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.”

In **GORANTLA THATAIAH’s case (AIR 1968 SC 1332)**, the Supreme Court at para 6 held as under:-

“It is well established that in a case in which a will is prepared under circumstances which raise the suspicion of the Court that it does not express the mind of the testator it is for those who propound the will to remove that suspicion. What are suspicious circumstances must be judged in the facts and circumstances of each particular case. If, however, the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the Court should proceed in a vigilant and cautious manner.”

In **BHARPUR SINGH’s case (2009)3 SCC 687)**, the Supreme Court held at para 23 as under:-

“Suspicious circumstances like the following may be found to be surrounded in the execution of the will:

- i. The signature of the testator may be very shaky and doubtful

or not appear to be his usual signature.

- ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- iv. The dispositions may not appear to be the result of the testator's free will and mind.
- v. The propounder takes a prominent part in the execution of the will.
- vi. The testator used to sign blank papers.
- vii. The will did not see the light of the day for long.
- viii. Incorrect recitals of essential facts."

In **S.R.SRINIVAS's case (2010) 5 SCC 274**) the Supreme Court held as under:-

"In the present case, none of the attesting witnesses have been examined. The scribe, who was examined as DW.2, has not stated that he had signed the will with the intention to attest. In his evidence, he has merely stated that he was the scribe of the will. He even admitted that he could not remember the names of the witnesses to the will. In such circumstances, the test that the witness should have put his signature *animo attestandi*, has not been satisfied. Therefore the signature of the scribe could not be taken as proof of attestation. The execution of a will can be held to have been proved when the statutory requirements for proving the will are satisfied. Thus, it is evident that the will has not been duly proved.

There is no admission about the genuineness or legality of the will either in the plaint in the subsequent suit or in the evidence of PW.1.

It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless successfully withdrawn or proved to be erroneous. The legal position with regard to admissions and their evidentiary value has been dilated upon in many cases. On the basis of law stated therein, it is not possible to agree with the High Court that there was no need for independent proof of the will, in view of the admissions made in the subsequent suit and the evidence of PW.1. In fact there is no admission except that *P* had executed a will bequeathing only the immovable properties belonging to her in favour of *I*.

The first appellate Court has correctly observed that the aforesaid admission was only about the making of the will and not the genuineness of the will. Similarly, PW.1 only stated that he had come to know about the registration of the will of his grandmother favouring / through the written statement of defendant 1. The statements contained in the plaint as well as in the evidence of PW.1 would not amount to admissions with regard to the due execution and genuineness of the will.”

In **SRIDEVI’s case (2005) 2 scc 784**), the Supreme Court held as under:-

“In this case, the scribe, in his testimony has categorically stated that the Will was scribed by him at the dictation of the testator. The two attesting witnesses have deposed that the testator had signed the Will in their presence while in sound disposing state of mind after understanding the nature and effect of dispositions made by him. That he signed the Will in their presence and they had signed the Will in his presence and in the presence of each other. In cross-examination, the appellants failed to elicit anything which could persuade the Court to disbelieve their testimony. It has not been shown that they were in any way interested in the propounders of the Will or that on their asking they could have deposed falsely in Court. Their testimony inspires confidence. The testimony of the scribe and the two attesting witnesses is fully corroborated by the statement of the handwriting expert. The Will runs into 6 pages. The testator had signed each of the 6 pages. The handwriting expert compared the signatures of the testator with his admitted signatures. He has opined that the signatures on the Will are that of the testator. Thus the Will had been duly executed.”

51. The evidence that is placed on record on behalf of the defendants clearly proves the execution of Ex.B.167 by Anne Nagendram and there are no suspicious circumstances which make the will Ex.B.167 to be document which cannot be relied upon. Learned trial Court has therefore correctly appreciated the evidence on record and held that Ex.B.167 is proved. In view of that finding, the plaintiffs cannot claim any share insofar as the plaint ‘B’ and ‘C’ schedule properties are concerned even though there is no dispute that they are entitled to a share in ‘A’ schedule property which admittedly fell to the share of their own father in the compromise decree.

52. **Point No.2:-** The next aspect of the matter is about ‘A-1’ schedule property. Admittedly, the ‘A-1’ schedule property belonged to D.1. However, it is D.2, who claims to have purchased the share of D.1 in the Rice Mill, for a consideration of

Rs.10,000/- in January, 1979, but the 2nd defendant failed to produce any oral or documentary evidence to show that it is D.2 who has purchased the plaint 'A-1' schedule property from D.1. D.2 admits that there is no document for the said purchase. He did not even obtain a receipt for the consideration said to have been paid by him to D.1. Even though the transaction is in between two brothers, considering the nature of relationship they had, it is difficult to believe that D.2 purchased the share of D.1 in 'A-1' schedule property without there being any evidence. No other evidence is produced to show that it is D.2 who purchased 'A-1' schedule property from D.1. The said transaction is said to have taken place in the presence of one Mokkalapati Kameshwar Rao but he is not examined. Admittedly 'A-1' schedule property is the property of D.1 which is said to have been sold by D.1 in favour of his brother D.2 but the plaintiffs are not parties to the said transaction. In the absence of their being any registered instrument conveying 'A-1' schedule property in favour of D.2, the same cannot be accepted as having been proved. Admittedly, there is no document evidencing the said purchase. It is no doubt admitted that ever since the death of Nagendram i.e., in the year 1979, D.1 did not visit the Rice Mill and it is in possession of D.2 and it is he who is looking after the affairs of the Rice Mill. That by itself cannot be taken as establishing the fact of there being sale of the share of D.1 in the Rice Mill in favour of D.2. Merely because D.1 has not claimed any share in the profits of the Rice Mill, nor he visited the same, it cannot be presumed that D.1 has divested himself of all his rights over the share in the Rice Mill, which belongs to him. The Court below has erred in holding that the sale of 'A-1' schedule property by D.1 in favour of D.2 as proved and denied the relief of partition of 'A-1' schedule property.

53. In view of the foregoing discussion, it is held that the plaintiffs are entitled to partition of plaint 'A' and 'A-1' schedule properties, which admittedly belongs to D.1. However, they are not entitled to any share in the schedules 'B' and 'C' properties, which originally belong to Nagendram and by virtue of the will – Ex.B.167, they were bequeathed in favour of D.3 who is the son of D.2. Therefore, the plaintiffs are not entitled to any share. The Judgment and Decree of the trial Court is liable to be set aside in part holding that the plaintiffs are entitled to the share in plaint 'A' and 'A-1' schedule properties but not in respect of 'B' and 'C' schedule properties.

54. In the result, the appeal is allowed in part to the extent stated above. In the circumstances of the case, parties to bear their own costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M.S.K.Jaiswal, J

September, 2015

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