

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.614 of 2013

AND

SECOND APPEAL No.615 of 2013

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COMMON JUDGMENT:-

These two second appeals, under Section 100 of the Code of Civil Procedure, 1908 ('the Code', for brevity) by the unsuccessful first defendant in O.S.No.1256 of 2005 (old No.256 of 2002), who is also the unsuccessful plaintiff in O.S.No.569 of 2003 on the file of the I Additional Senior Civil Judge, Vijayawada are directed against the decrees and common judgment dated 22.04.2013 of the learned XIII Additional District Judge, Krishna District at Vijayawada passed in A.S.Nos.47 of 2007 and 48 of 2007. The learned Additional District Judge, while dismissing the said first appeals, had confirmed the decrees and common judgment dated 14.12.2006 of the learned I Additional Senior Civil Judge, Vijayawada passed in the aforementioned two suits.

2. I have heard the submissions of the learned counsel for the appellant in both the second appeals and the learned counsel for the sole respondent in S.A.No.615 of 2013, who is also the first respondent in S.A.No.614 of 2013. The said learned counsel also is representing the respondents 2 and 4 in S.A.No.614 of 2013. I have also heard the submissions of the learned counsel for respondents 5 and 6 in S.A.No.614 of 2013. The third respondent in S.A.No.614 of 2013 had died; and, it is represented that her son Putta Srinivasa Rao is the estate holder of the deceased third respondent along with other respondents and that he is already on record as a respondent. I have perused the material record.

3. At the time of admission of both these second appeals, the common substantial questions of law mentioned in ground nos.3, 5 and 8 of the

memoranda of grounds of appeal filed in these two second appeals are taken note of as the substantial questions of law involved in these appeals. The said common substantial questions of law read as under:-

The learned Judge erred in observing that the appellant/plaintiff had not mentioned about the will in I.A.No.102 of 2002 in O.S.No.1256 of 2005 (old O.S.No.256 of 2002) and therefore, it was serious suspicious circumstance surrounding the will, without mentioned what were the circumstances that created suspicion about the will.

The learned Judge ought to have seen that the counter in I.A.No.102 of 2002 cannot be treated as pleading and Written Statement filed by Appellant in O.S.No.256 of 2002 clearly pleaded about the will and the observation of the learned Judge about the suspicious circumstances is wholly erroneous and has no basis.

The learned Judge ought to have seen that there was no evidence adduced by respondent No.1 that Late Rama Rao was not in sound and disposing state of mind, except self serving oral evidence of D.W.1.

(Reproduced verbatim)

Further, during the course of hearing, with the consent of both the sides, this Court had formulated the following additional substantial question of law:-

“Whether non-consideration of exhibits A6 to A36, which are money order acknowledgments showing that money was paid to mother-in-law of appellant, by the trial Court and Court below, as proof of will being acted upon amounts to perversity and the judgments thereby rendered by both the Courts below are vitiated for non-consideration and improper appreciation of the material evidence.”

4. To begin with, it is necessary to state the introductory facts, which are as follows:-

The relationship between the parties is not in dispute. The appellant herein brought the suit in O.S.No.569 of 2003 against the sole respondent/first respondent in these two appeals for declaration that she is the absolute owner of the house property in an extent of 254 square yards with door number 23-34-1A and assessment numbers 17858-A (old 17673/A) Southern portion situate at Lakshmi Nagar, part of Vijayawada, morefully described in the schedule annexed to the plaint by

virtue of the last and final Will Deed dated 05.12.1994 executed in a sound and disposing state of mind by her husband late P. Rama Rao in her favour and for consequential perpetual injunction restraining the said respondent from interfering with her peaceful possession and enjoyment of the plaint schedule property. The said respondent had resisted the said suit by filing the written statement. The said respondent had brought the other suit in O.S.No.1256 of 2005 (old No.256 of 2002) against the appellant and others for partition of the aforementioned house property/item no.1 and another item of property in an extent of 214.7 square yards bearing door no.23-34-3 and assessment number 17673/C in municipal ward no.21 in Lakshmi Nagar of Vijayawada/Item No.2 into seven equal shares and allotment of one such separated share to him and for *mesne* profits and costs. The appellant herein had resisted the said suit for partition by filing her written statement. Defendants 2 to 6 in the said suit filed by the respondent herein had filed written statement supporting the claim of the respondent in the said suit for partition.

5. Based on the pleadings of the parties, the trial Court had settled the following issues for trial:-

Issues in O.S.No.569 of 2003:-

1. Whether the Will dated 05.12.1994 is true, valid and genuine one?
2. Whether the plaintiff has got just title, interest and possession over the suit schedule property?
3. Whether the plaintiff is entitled for injunction as prayed for?
4. To what relief?
(Reproduced verbatim)

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Issues in O.S.No.1256 of 2005:-

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1. Whether the plaintiff is entitled for partition of the plaint schedule property?
2. Whether the plaintiff is entitled for 1/4th share in the half share of the plaint schedule property?
3. Whether the plaintiff is entitled for future mesne profits from the date of filing of the suit till delivery of possession?
4. Whether the Will dated 05.12.1994 is true, valid and binding?

**5. To what relief, if any, is the plaintiff is entitled for?
(Reproduced verbatim)**

5.1 Both the suits were consolidated and common evidence was recorded in O.S.No.569 of 2003 filed by the appellant herein.

5.2 At trial, the appellant/plaintiff and her supporting witnesses were examined as PWs 1 to 4 and exhibits A1 to A42 were marked on her side. On behalf of the defendants, the respondent/1st respondent herein was examined as DW1 and exhibits B1 to B8 were marked.

5.3 On merits, the trial Court dismissed the suit of the appellant in O.S.No.569 of 2003 and decreed the suit O.S.No.1256 of 2005 of the respondent/first respondent for partition and directed division of plaint schedule property in the said suit into two equal shares and allotment of one such share to the appellant herein and allotment of the remaining half share to the others including the respondent/first respondent herein. Feeling aggrieved, the appellant had filed the aforementioned two first appeal suits before the Court below. As already noted, the Court below, by the impugned common judgment, had dismissed both the said first appeals. Therefore, the unsuccessful appellant before the Court below had preferred these two second appeals.

5.4. Since the appellant and the respondent/1st respondent in both these second appeals are the principal contesting parties, they shall hereinafter be referred to as appellant and respondent for convenience and clarity.

6. The learned counsel for the appellant submits as follows:- “The appellant is the wife of Late Ponnada Rama Rao who was a goldsmith and who did business in goldsmithy at Vijayawada. He had purchased two properties, which are the plaint schedule properties in O.S.No.569 of 2003. He had died on 05.02.1995. During his lifetime, he had executed

a Will dated 05.12.1994 in a sound and disposing state of mind bequeathing the suit properties to his wife/the appellant herein. The said Will is his last and final Will. In the said Will, he had imposed a condition that his wife, who is the beneficiary of his bequests under the Will, shall continue to pay maintenance to his mother Parvathamma. The said Will is true and valid and was acted upon. The appellant had paid maintenance to the mother of the testator by name Parvathamma as per the condition imposed in the Will. The mother of the testator was satisfied with the maintenance provided under the Will and therefore, did not claim any rights in the properties of her son during her lifetime. During the lifetime of Parvathamma, the appellant had paid maintenance @ Rs.1,000/- per month to her till her death. She was also receiving maintenance from her other sons. Evidencing the payment of such maintenance by the appellant to the mother of the testator, the money order receipts under exhibits A6 to A36 were filed and exhibited by the appellant and the same would show that the Will is true, valid and genuine and was acted upon and was also accepted by late Parvathamma, the mother of the testator. As per the bequests under the Will, the appellant alone is entitled to the plaint schedule properties in O.S.No.569 of 2003 and therefore, she is the absolute owner having right, title and interest in the said house properties. Therefore, the Courts below ought to have decreed her suit in O.S.No.569 of 2003 for declaration of title and perpetual injunction against the first respondent- P.Venkateswara Rao, who is the sole defendant in the said suit. During his lifetime, the husband of the appellant (testator of the Will) used to pay Rs.1,000/- per month as maintenance to his mother Parvathamma. Having got knowledge of the Will executed by late Rama Rao, the husband of the appellant, the first respondent had brought the other suit for partition falsely claiming that Rama Rao had died intestate. That suit O.S.No.1256 of 2005 was filed to make a wrongful gain. The contention that after the death of Parvathamma, the mother of Rama Rao, her share

devolved upon her children and as such, the respondent has got right and title to seek partition is incorrect; and, the claim for partition is unsustainable as the husband of the appellant, during his lifetime, had executed a Will dated 05.12.1994 in a sound and disposing state of mind bequeathing the plaint schedule properties to the appellant. The contention that the Will was fabricated and forged and was brought into existence or the alternative contentions that the Will might have been brought into existence on a paper containing the signature of the testator who is an ailing person and that he was physically and mentally ill and that he has not executed the said Will in sound and disposing state of mind are all false contentions. There is nothing strange or suspicious about the husband executing the Will bequeathing his properties to his wife by providing a condition to pay monthly maintenance to his mother. The averments in the suit for partition filed by the respondent are invented for the purpose of said suit. The Courts below did not properly appreciate the oral and documentary evidence, which was adduced to prove the Will that was relied upon by the appellant. The Courts below ought to have seen that the appellant had examined the attesting witnesses who had attested the Will and also the son of the scribe of the Will as PW 4 to identify the signature of the scribe, since the scribe had died. The evidence of the said witnesses sufficiently establishes the truth, validity and binding nature of the Will. The Courts below ought to have seen that as per the condition stipulated in the Will, the appellant had sent monthly maintenance of Rs.1,000/- to the mother of the testator by way of money orders and had produced the money order receipts under exhibits A6 to A36 and that the said fact sufficiently establishes the truth of the Will, as otherwise, there was no necessity for the appellant to send money orders to the mother of the testator. The Court below ought to have seen that the mother of the testator Parvathamma had never claimed any share in the suit properties during her lifetime and that the respondent had brought the suit for partition conveniently after the death

of the mother of the testator by falsely alleging that the husband of the appellant/late Rama Rao had died intestate without executing any Will. When Parvathamma had waived her right to claim a share in the properties during her lifetime, her sons and daughters have no right to seek partition of the share of Parvathamma. The Courts below grossly erred in holding that the appellant is having a half share and the mother of the deceased Rama Rao is having a half share in the properties of Rama Rao. The Courts below ought to have seen that the provisions of the Hindu Succession Act, 1956, have no application to the facts of the case, as Rama Rao had executed a Will in a sound and disposing state of mind. The Courts below had wrongly observed that the appellant did not plead in the first instance about the existence of Will in her counter filed in I.A.No.102 of 2002 in O.S.No.1256 of 2005 and ignored her pleading in the written statement filed in O.S.No.256 of 2002, wherein, she had clearly pleaded about the existence of the Will. Therefore, the observation of the Courts below that non pleading about the Will by the appellant in her counter in I.A.No.102 of 2002 is a suspicious circumstance, is totally erroneous. The appreciation of evidence by the courts below is perverse. The courts below had erred in not appreciating the principles of law applicable to the proof of a Will and had further erred in ignoring a crucial fact that the appellant is the wife of the testator. The courts below had erroneously dismissed the suit of the appellant and decreed the suit for partition of the respondent.”

7. *Per contra*, the learned senior counsel for the respondents, while supporting the decrees and the common judgment of the Courts below had submitted as follows:- “The appellant, having relied on exhibit A1-Will, had failed to prove its due execution and attestation. Both the Courts below have extensively dealt with the evidence of the two attestors and the son of the scribe of the Will, who were examined on behalf of the appellant, and have noted the discrepancies and serious inconsistencies in the testimonies of the said witnesses and had

recorded concurrent findings of fact that the Will set up by the appellant is not true, valid and binding on the respondent. A plain reading of the evidence adduced by the appellant would show that she could not establish the due execution and attestation of the Will as required under the facts and the law. The only question involved in this *lis* is as to whether the Will under exhibit A1 said to have been executed by the husband of the appellant is true and valid. Both the Courts below have recorded concurrent findings of fact supported by valid and cogent reasons that the said Will is not true and valid. In the absence of the said Will, it follows that late Rama Rao had died intestate. Therefore, all his legal heirs are entitled to shares in the property left behind by him. Late Rama Rao had admittedly died on 05.02.1995. His mother had died on 01.02.2001. Therefore, on the death of Rama Rao, his properties had devolved upon his wife (the appellant) and his mother Parvathamma. Therefore, Parvathamma is entitled to half share in the properties, which were left behind by Late Rama Rao. On her death only, her sons and daughters have become entitled to claim their respective shares in her half share. Therefore, the contention that during the lifetime of Parvathamma, no claim is made for partition cannot be countenanced. All the sons of Parvathamma admittedly were paying maintenance to her. Even Late Rama Rao had paid maintenance to his mother during his lifetime. Therefore, payment of maintenance by the appellant, who is the wife of Late Rama Rao, is not going to advance the case of the appellant that the Will is true. When the Will is not true and valid and its due execution is not established, mere payment of maintenance, as recited in the alleged Will, does not improve the case of the appellant. Even assuming for a moment that the appellant did not mention about the Will in her counter in I.A.No.102 of 2002 in the first instance is not a circumstance to doubt the genuineness of the Will, still a harmonious consideration of the evidence of the witnesses concerned with the Will makes it obvious that the said evidence is not creditworthy and is

unreliable and is not sufficient to hold that the Will is true and valid and it is duly executed and attested. On the appreciation of evidence, when a finding, which is possible and plausible is recorded by the Courts below, this Court while exercising the jurisdiction under Section 100 of the Code, cannot substitute its view even if another view is possible. The law does not permit such a course even though such view, which is different from the view taken by the Courts below, is possible. However, in the case on hand, another view is not possible and plausible. In view of the narrow compass of Section 100 of the Code and in view of the concurrent findings of fact recorded by both the Courts below after appreciating the facts correctly and the evidence in proper perspective, it cannot be said that there is perversity either in appreciation of the facts and the evidence or the law. Therefore, it cannot be said that the findings of the courts below are perverse. No circumstances and no instances from evidence are pleaded and pointed out by the appellant in support of her contentions. The questions raised in these appeals are not substantial questions of law. The issue in regard to the truth or otherwise of a Will is a pure question of fact and not a pure question of law, let alone a substantial question of law. The appeals are devoid of merit and are liable to be dismissed.”

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8. Now the questions are taken up.

8.1 As rightly contended and submitted by the learned counsel for both the sides, the only vital question in these second appeals is - ‘whether exhibit A1 Will said to have been executed by Late Rama Rao, the husband of the appellant is true and valid?’ As fairly conceded, if the Will is to be held to be true and valid, then the appellant would be entitled to succeed in this *lis*. On the other hand, if the Will is to be held to be not true, the appeals are liable for dismissal. Therefore, this Court has to examine analytically the evidence brought on record by the appellant to prove the exhibit A1 Will. Since the decision hinges on the proof or

otherwise of the exhibit A1-Will, it is necessary to first refer to the propositions of law in the precedents relied upon by the learned counsel for both the sides.

8.2 The learned counsel for the appellant had relied upon the following decisions in regard to – (i) the proof of Will; (ii) the onus of proof on the propounder; (iii) the duty of the Court while appreciating the evidence in regard to the proof or otherwise of the Will; (iv) the obligation on the part of the propounder to explain the suspicious circumstances and the requirement to remove the doubts by adducing clear and satisfactory evidence; and, the propounder's right to rely upon the other evidence to show proper execution of the Will, if one of the attestors does not support the case of the propounder.

(i) In **H.Venkatachala Iyengar V. B.N. Thimmajamma and others**^[1], the true legal position in the matter of proof of Wills was laid down as:

“Sections 67 and 68, Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss.45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of

these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory 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, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

Apart from the suspicious circumstances to which we have just referred in some cases the wills propounded disclose another

infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

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.

The Supreme Court pointed out that in discovering truth even in such cases, the judicial mind must always be open though vigilant, cautious and circumspect. The Supreme Court had also pointed out that 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.

(ii) In **Rani Purnima Debi and another Vs. Kumar Khagendra**

Narayan Deb and another^[2] while reiterating the principles, it was pointed out

that if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a Will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a Will the execution of

which he was admitting, the fact that the Will was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering.

(iii) In **Smt. Indu Bala Bose and others Vs. Manindra Chandra Bose and another**^[3] it was held -

that needless to say that any 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.

(iv) The decision in **Mathew Vs. Devassykutty and others**^[4] was relied upon in support of the proposition that when the Court is satisfied in a given case that the witness had deliberately and falsely denied that he had attested the Will, the court is entitled to look into other circumstances and the regularity of the Will on the face of it and can come to the conclusion on the question of due attestation. In this decision, while referring to a decision in **Naresh Sharan v. Paresh Sharan** (AIR 1955 SC 363), it was noted that the question whether there was due attestation will depends on the circumstances elicited in the evidence whether the attesting witnesses signed in the presence of the attestators; and the same is a question of fact and it depends upon appreciation of evidence.

(v) In **Bandaru Veeramma and others Vs. Chirravuri Ramakrishna Sarma and others**^[5], it was held that in the event of an attestor turning hostile and being declared hostile, it is permissible for the propounder of the Will to cross examine such an attesting witness and it is legitimate for such a propounder to rely upon other evidence to show that the Will has been properly executed.

(vi) In **M.B.Ramesh (D) by LRs Vs. K.M.Veeraje Urs (D) by LRs**^[6], the facts reveal that an attestor-PW2 did not make a specific statement that he had seen the other attesting witness signing the Will in the

presence of the testator, but, he had stated that the other witnesses had also signed the document; and, that the said witness while proving his signature had stated in cross-examination that the other witness and the writer of the Will were also present, while writing the Will, which was registered on the very next day. The Court has taken into consideration the statements of PW2 along with the attending circumstances and had held that the Will was proved.

8.3 There is no need to multiply and advert to any other decisions as this Court in **Pinnaka Hanumantha Rao (died per L.R) and two Ors. V.**

Garlapati Dhanalakshmi @ Andallu^[7], 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.

In this cited decision, this court has sounded a word of caution by observing that 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.

8.4 On the other hand, the learned senior counsel for the respondent had relied upon the following decisions on the aspect of the limitation of powers of the High Court while exercising the jurisdiction under Section 100 of the Code.

(i) The decision in **Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board and others**^[8] is relied upon in support of the proposition that a second appeal lies only on a substantial question of law and it is pointed out that in the case on hand, as the concurrent

findings of fact recorded by the courts below are possible and plausible and as there was no perversity on any aspect, the second appeal does not lie, as no substantial questions of law are involved.

(ii) The decision in **P.Chandrasekharan and others Vs. S.Kanakarajan and others**^[9] is relied upon in support of the proposition that the jurisdiction under Section 100 of the Code is limited and that while exercising the jurisdiction under Section 100 of the Code, what is prohibited for the High Court is to interfere with a finding of fact.

(iii) The decision in **Sugani (MST.) Vs. Rameshwar Das and another**^[10] is relied upon in support of the proposition that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last court of fact and that it is true the lower appellate court should not ordinarily reject witness accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial Court, the same is no ground for interference in the second appeal, when it is found that the appellate court has given satisfactory reasons for doing so. Having placed reliance, he would submit that in this case, both the courts below concurrently have not accepted the evidence and held that exhibit A1-Will is not proved as required under facts and law.

(iv) The decision in **Govindaraju Vs. Mariamman**^[11] is relied upon in support of the proposition that at the hearing of the second appeal, the scope of hearing is circumscribed by the questions formulated by the High Court and that the scope of exercise of jurisdiction in second appeal is limited to the substantial question of law formulated.

(v) The decision in **E.Mahboob Saheb v. N.Sabbarayan Chowdhary**^[12] is relied upon in support of the proposition that 1st appellate Court's findings of fact based on detailed consideration of

legal evidence on record cannot be interfered with in the second appeal when the findings are not unreasonable or perverse and that the High Court has no jurisdiction under Section 100 to interfere with the finding of fact and substitute its own finding in its place.

(vi) The decision in **Narayanan Rajendran and another Vs. Lekshmy Sarojini and others**^[13] was relied upon in support of the proposition that the High Court would not be justified in dealing with any second appeal without formulating the substantial question of law.

8.5 Reverting to the aspect of proof of execution of Will, it is trite to observe that 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. But, when it is the specific case that the testator had signed in the presence of the two attesting witnesses, the propounder of the will has to show by adduction of the necessary evidence of the required standard that the Will was signed by the testator in the presence of two witnesses who had 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.”

9. The evidence on record now needs to be appreciated and evaluated in the light of the above legal position.

9.1 PW1the appellant is the propounder of the Will. She had

categorically stated in her evidence that she has no personal knowledge of the execution of exhibit A1 Will by her husband.

9.2 I have carefully gone through the depositions of PWs2 to 4. **PW2** in his affidavit filed in lieu of his examination-in-chief had affirmed that he is the attesor of the exhibit A1-Will and that the second attesor PW3 is one Tirumalaraju Venkata Rama Raju and that at the time of execution of the said Will, the testator had called him to his house at about 10:00 AM and informed him that he is going to execute a Will bequeathing his properties in favour of his wife and that the testator had asked him to wait for some time and that in the meanwhile, PW3 also came to that place and that after half an hour or so and after the arrival of PW3, the testator had sent a person to bring a person who can scribe the Will and that one Gunturu Chidambaram, who is a document writer and carries on business at Sub-Registrar's office came to the house of the testator and that on his (testator's) instructions the said scribe had drafted the Will and that the said scribe, after receiving instructions had noted the same on a rough paper and that subsequently, he went to the place of his business and got the Will typed and came back and handed over the typed Will to the testator and that the said scribe had read over to the testator, the contents of the typed Will, in his (PW2's) presence and also the presence of the other attesor and that the testator had personally read over the contents of the Will and had explained his intentions and the circumstances under which he is executing the Will to both the attestors and that afterwards, the testator had signed and handed over the Will to him (PW2) and that on that, he and PW3, having gone through the contents of the Will (typed Will) attested the said Will after the testator had signed and that finally, the document writer/scribe had also signed on the typed Will prepared by him. In his cross-examination, the following points were elicited:

“There is no documentary evidence to show that I have got acquaintance with Rama Rao for the last 25 years. As on

the date of execution of the Will, Rama Rao called me and I went to the house of Rama Rao at 10:00 AM. Sometime thereafter, a friend of Rama Rao came there and I do not remember his name. I have no prior acquaintance with him and Rama Rao introduced him to me. Then, I, Rama Rao and the friend of Rama Rao were present; and, the friend of Rama Rao scribed the Will on a white paper. The scribe read over the contents of the Will to Rama Rao. I signed as first attestor and I cannot say who signed on the Will after I attested. The scribe took the draft Will and got it typed and brought back to Rama Rao. After the fair Will was brought to Rama Rao, I attested the Will first and I do not know who else signed on the Will. I was not present when others signed on the Will. I cannot say whether the remaining signatures are put (made) on that day or subsequently.”

Thus, in the cross-examination, this witness had stated that at the time when he had attested the Will, he, Rama Rao and the friend of Rama Rao i.e., the scribe, whose name he does not know, were present at that time and that he alone had attested the Will. He had categorically stated that he has signed as the first attestor and he cannot say who else had signed the Will after he had attested. He had affirmed that he had attested the Will first and he does not know who the second attestor is and that he was not present when the others signed on the Will. Therefore, his evidence on a harmonious consideration makes it clear that he did not see the other attestor – PW3 attesting the Will.

9.3 PW3 is the second attestor of the exhibit A1-Will. In his affidavit filed in lieu of examination-in-chief, he had stated that on the date of execution of the Will, the testator had called him to his house at 10:00 AM and had informed him that he is going to execute a Will in favour of his wife in regard to his properties and that by the time he had reached the house of the testator, the first attestor was already present there and that the testator had sent a person to bring a person who can scribe the Will and that Gunturu Chidambaram, who is a document writer and carries on

business at Sub-Registrar's office had come to the house of the testator and that on the instructions of the testator, he had drafted the Will and that the scribe, after receiving instructions, noted the same on a rough paper and subsequently, he had gone to the place of his business and got the Will typed and handed over the typed Will to the testator and that the said scribe had read over the contents of the Will to the testator in his presence and in the presence of PW2 and that the testator had personally read over the contents of the Will and had explained his intention and the circumstances under which he is executing the Will to both the attestors and that afterwards, the testator had signed and handed over the Will to PW2 and on that, he and PW2, having gone through the contents of the Will (typed Will) attested the said Will after the testator had signed and that finally, the document writer/scribe had also signed on the typed Will prepared by him. In his cross examination, the following points were elicited:-

“PW2 is my distant relative. PW2 resides by the side lane next to my house. One Subbaraju introduced me to Rama Rao. I cannot give the name of the shop of Rama Rao and also its address. There is no documentary evidence to show that I got prepared the ornaments by Rama Rao or purchased ornaments from Rama Rao. I was at the house of Rama Rao on the date of execution of the Will from 10:30 AM. PW2 was already present with Rama Rao by the time I went there. I know PW2 since my childhood and he is our relative and similarly, PW2 knows me. I used to visit the house of PW2 and similarly, PW2 used to visit my house. Rama Rao expressed his intention to execute the Will and asked me to attest the Will. Document writer came there, after I went to the house of Rama Rao. At that time, I, PW2, Rama Rao and document writer were present. Rama Rao gave instructions to the document writer and he prepared a draft. The document writer prepared the draft and went to his office. He returned at about 01:00 or 01:30 PM. The document writer brought the original Will prepared. The original Will was read over to the testator and the draft Will was not read over. First Rama Rao signed on exhibit A1. PW2 attested the same.

Thereafter, I attested exhibit A1. PW2 was present when I attested. He was also present when others signed on exhibit A1.”

The evidence of PW3 would disclose that he knows PW2 from childhood and that PW2 is related to PW3 and that they live in houses situated in adjacent/nearby lanes and that they know each other and they also exchange house visits. Yet, PW2 had excluded the presence of PW3 at the time when he was said to have attested the exhibit A1-Will. In fact, PW2 in his cross examination did not speak about the presence of PW3 at the time of his attesting exhibit A1 Will. PW2 was candid when he had asserted in his evidence as under: “I signed as first attester and I cannot say who signed on the Will after I attested. The scribe took the draft Will and got it typed and brought back to Rama Rao. After the fair Will was brought to Rama Rao, I attested the Will first and I do not know who else signed on the Will. I was not present when others signed on the Will. I cannot say whether the remaining signatures are put (made) on that day or subsequently.” (Emphasis supplied). Quite contrary to what PW2 had stated, PW3 had deposed that he and PW2 had attested the Will at the same time and that after PW2 had attested, he had attested the Will and that PW2 was present when he had attested the Will. PW2 stated that after the instructions were given by the testator, the contents were noted on a rough paper by the scribe and that afterwards, the scribe had gone to his place of business and got typed the Will and had returned to the house of the testator with the typed Will; while, PW3 had stated that after taking instructions, the scribe had prepared the draft Will and that the draft Will was not read over to the testator. When PW2 had excluded the presence of PW3, PW3 had deposed that PW2 was present when he had attested exhibit A1-Will and that they had at the same time attested the exhibit A1-Will. Therefore, the testimonies of PW2 and PW3 are inconsistent and not in agreement in regard to the attestation of the Will by them. PW3 is not a stranger to PW2. The evidence of PW3 shows that

he and PW2 know each other from childhood and that they are related and that they live in houses situate close by and that they also exchange house visits. Still, PW2 did not speak of the presence of PW3 when he attested the Will. Further, PW2 was categorical when he said that he cannot say who had signed on the Will after he had signed; and that after the fair Will was brought to Rama Rao, he had attested the Will first and that he does not know who else had signed on the Will and that he was not present when others signed on the Will. It is appropriate to mention here itself that in the case on hand, when PW2 did not support the case of the appellant in regard to due attestation of the Will and the attestation of the Will by the two attestors simultaneously in the presence of the testator, neither re-examination was done nor questions in the nature of cross-examination were put to this witness with the permission of the Court by requesting to treat the witness as hostile.

9.4 Thus, on a harmonious consideration of the evidence brought on record, it is clear that when the testator had signed the said Will the other attestor-PW3 was not present and that both the attestors had not signed the said Will simultaneously or at the same time and in the presence of each other. Having regard to the material and decisive inconsistencies in the depositions of the two crucial witnesses, the Courts below had recorded concurrent findings of fact that exhibit A1-Will is not true and valid. 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. But, in the case on hand it is not the specific case that the attestors had attested the Will at different times and that one of them had signed simultaneously when the testator had signed the Will and that the other attestor had signed later after receiving from the testator an acknowledgment of the testator's signature on the Will. The evidence on record when is analyzed carefully is to the effect that when PW2 had attested the Will, the other attestor was not present and had not attested the Will simultaneously and at the same time. It follows that 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. A careful and analytical examination of the facts and the circumstances associated with exhibit A1 Will and the evidence on record would lead to a conclusion that the appellant had failed to prove the due execution and the attestation of exhibit A1-Will and its truthfulness/genuineness and binding nature and that therefore, the Courts below are justified in holding against the appellant.

9.5 In **Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and ors.**, [\[14\]](#), the Supreme Court had considered the question as to whether the execution of the Will has been proved. While holding that the Will has not been proved, the Supreme Court had held as follows:

“The requirements for proving a Will have been laid down in a large number of decisions. We would, however, refer to only a few of them.

In **Janki Narayan Bhoir v. [Narayan Namdeo Kadam](#)** [(2002) Supp5 SCR 175], while dealing with the question elaborately, this Court held:

8. To say will has been duly executed the requirement mentioned in Clauses (a), (b) and (c) of Section [63](#) of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has

to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

10. Section [68](#) of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested 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. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in evidence. On a combined reading of Section [63](#) of the Succession Act with Section [68](#) of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section [63](#) of the Succession Act. It is true that Section [68](#) of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section [63](#). Although Section [63](#) of the Succession Act requires that a will has to be attested at least by two witnesses, Section [68](#) of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section [68](#) gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section [63](#) of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to

prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

(Emphasis supplied by the Supreme Court)

9.6 Before parting with the case, it is necessary to mention that the learned counsel for the appellant forcefully contended that as per recital in exhibit A1-Will executed by her husband, the appellant had sent Rs.1,000/- every month by way of money orders to the mother of the testator and that in proof thereof, the relevant documents under exhibits A6 to A36 are exhibited and that but for the recital in the said Will, she would not have sent the amount every month to the mother of the testator and that this fact establishes that the Will is true and acted upon. In the well-considered view of this Court, this contention does not merit consideration as the testator was also sending money orders to his mother during his life time and the same practice was continued by his wife after his death. Further, when the due execution and attestation of the Will and the truth and validity of the Will are not established, this circumstance relied upon by the appellant is not going to advance her

case and is not sufficient to get over the infirmity in the evidence in regard to the due attestation and proof of Will.

9.7 Having thus analytically examined the evidence brought on record in regard to exhibit A1-Will, this Court finds that the concurrent findings recorded by the Courts below are possible and plausible in the facts and circumstances of the case and therefore, it is not permissible for this Court to substitute any other view, even if any other view is possible in the matter. Since the findings recorded by the Courts below are possible and plausible on appreciation of evidence, it cannot be said that the appreciation of evidence by the Courts below is erroneous or perverse.

9.8 A feeble contention was raised on behalf of the appellant that even in the absence of a Will the children of the mother of the testator will not be entitled to a share in her half share and that the mother's half share devolves upon her sisters. However, on this aspect no substantial question of law was raised and is involved in these second appeals and therefore, this contention need not be countenanced. Be that as it may, it is not in dispute that in the absence of the Will, the mother of the testator would be entitled to a half share in his properties. Section 15 of the Hindu Succession Act, which deals with the general rules of succession in case of a female Hindu lays down that the property of a female Hindu dying intestate shall devolve first upon the sons and daughters (including the children of any predeceased son or daughter) and the husband. The order of succession and manner of distribution among heirs of a female is stated in Section 16 of the said Act. Therefore, the contention that the plaintiff and others in O.S. no. 1256 of 2005, i.e., the children of the mother of the testator are not entitled to claim a share in the share of their mother is devoid of merit and is liable for rejection in any view of the matter.

9.8 In **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and**

others ^[15] it was held as follows: 'The second appeal cannot be decided on merely equitable grounds.' 'It is not within the domain of the High Court to investigate the grounds on which findings were arrived at, by the first appellate court being the last court of fact. 'In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the apex Court, or was based upon inadmissible evidence or arrived at without evidence.' The law is well settled that concurrent findings of fact based on evidence, which were accepted by the trial Court as well as the first appellate court, cannot be disturbed more particularly when the first appellate court has given satisfactory reasons for accepting the same evidence which was accepted by the trial Court. On a careful examination of the material record, this Court does not find any perversity either in the appreciation of facts or the evidence brought on record and in the findings recorded by the Courts below.

9.9 Having regard to the reasons, this Court finds that there is no substance in the substantial questions of law raised and that therefore, the impugned decrees and the common judgment do not brook interference.

10. Viewed thus, this Court finds that there is no merit in both these second appeals and that these second appeals, which are devoid of merit are liable to be dismissed.

11. Accordingly, both these second appeals are dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in both these second appeals, stands dismissed.

M. Seetharama Murthi, J

10th December, 2015
Bvv

[1] AIR 1959 Supreme Court 443 (1)
[2] AIR 1962 Supreme Court 567 (V 49 C 86)
[3] AIR 1982 Supreme Court 133
[4] AIR 1988 Kerala 315
[5] AIR 1976 Andhra Pradesh 370
[6] AIR 2013 Supreme Court 2088
[7] 2007(2) ALD 435
[8] (2010) 13 Supreme Court Cases 216
[9] (2007) 5 Supreme Court Cases 669
[10] (2006) 11 Supreme Court Cases 587
[11] (2005) 2 Supreme Court Cases 500
[12] (1982) 1 Supreme Court Cases 180
[13] (2009) 5 Supreme Court Cases 264
[14] AIR 2009 SC 1389
[15] AIR 1999 SC 2213