

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Second Appeal No.706 of 2014
And
Cross objections (SR) no.9299 of 2015

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JUDGMENT:

This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 by the unsuccessful defendants 1 to 4 is directed against the decree and judgment dated 30.06.2014 of the learned I Additional District Judge, Rajahmundry passed in A.S.No.17 of 2006, whereby the learned Additional District Judge while dismissing the said first appeal had confirmed the decree and judgment dated 21.12.2005 of the learned Principal Senior Civil Judge, Rajahmundry passed in O.S.no.235 of 2000 filed by the sole plaintiff/ 1st respondent herein for declaration that she is the legal heir of late Murugaraj Singh and that she is entitled to succeed to the plaint 'A' and 'B' schedule properties and for recovery of the possession of the plaint 'B' schedule movable properties and the plaint 'A' schedule house property after ejecting the defendants 1 to 4 therefrom and for damages for use and occupation of plaint 'A' schedule property @ Rs.2,000/- from the date of the suit till the delivery of plaint 'A' schedule house property and for costs.

1.1 Be it noted that that the Court below had also held *inter alia* that the 6th defendant being the illegitimate son of the plaintiff's father is a co-owner along with the plaintiff and that he is also entitled to a share, as per law, in the plaint 'A' schedule property along with the plaintiff and dismissed the suit of the plaintiff insofar as the plaint 'B' schedule movable properties. Having been aggrieved of the said findings, the plaintiff/1st respondent had filed cross objections.

2. I have heard the submissions of the learned counsel for the appellants/defendants 1 to 4 and of the learned senior counsel for the 1st respondent/plaintiff. I have perused the material record. None appeared for the respondents/defendants 5 and 6, who remained *ex parte* throughout.

3. At the time of admission of this second appeal, this Court has taken note of the following questions mentioned in the grounds of objection as the substantial questions involved in the second appeal. The said questions read as under:

- a) **Whether the decree and judgment of the lower Court is vitiated in deciding the vital question of validity of the Registered Will Ex.B2 in the light of Section 62 to 68 of the Indian Evidence Act and Section 14 of the Transfer of Property Act without even noticing the fact that there is no pleading challenging the execution of the Will Ex.B2 by the plaintiff in the suit?**
- b) **Whether the decree and judgment of the lower Court is vitiated in coming to a wrong conclusion that Ex.B2 is shrouded in suspicious circumstances in the absence of any challenge to the same?**
- c) **Whether the decree and judgment of the lower Court is vitiated by non-consideration of material evidence available on record, consideration of irrelevant information, misunderstanding and misguided on principles of law and by its perverse reasoning?.**

(Reproduced verbatim)

4. To begin with, it is necessary to refer to the pleadings of the parties.

4.1 The averments in the plaint, in brief, are as follows:

The plaintiff is the daughter of late Murugaraj Singh and his wife Devika Rani. Her parents worked as teachers. The mother of the plaintiff died on 23.5.1998 leaving behind the plaintiff and her father. Murugaraj Singh, the father of the plaintiff having retired as a teacher died intestate on 06.10.2000. The marriage of the parents of the plaintiff took place on 07.09.1969 and the said marriage was subsisting during the life time of the mother of the plaintiff. The suit was originally filed against the defendants 1 to 4. However, the defendants 5 and 6 came on record on an application filed by them for their impleadment, which was allowed on 04.02.2003. The alleged marriage between the 5th defendant-Durgabai and the father of the plaintiff is not valid. The allegation that the marriage between the father of the

plaintiff and the 5th defendant took place on 5.10.1981 is not correct. The said marriage is a void marriage being a bigamous one as the mother of the plaintiff, who is the wife of Murugaraj Singh, was alive and her marriage with Murugaraj Singh was subsisting by the date of the said marriage of the 5th defendant with the father of the plaintiff. The 5th defendant is the kept mistress of the father of the plaintiff and the 6th defendant is their illegitimate son. The defendants 5 and 6 are not Class I heirs and they are not entitled to claim any property of the plaintiff's father by way of inheritance. Any orders of maintenance granted in the proceedings in M.C.no.11 of 1982 are invalid and inoperative and do not bind the plaintiff. The said proceedings do not confer any status of a wife and son on the defendants 5 and 6 and they are not entitled to claim any share in the properties of the father of the plaintiff by way of inheritance. The plaintiff was given in marriage to B.M.V.Bhavani Singh on 06.02.1998. Her parents performed her marriage according to the Hindu rites and the customs prevailing in the community. Her husband is a permanent resident of Dwaraka Tirumala. The plaintiff has been residing with her husband at Dwaraka Tirumala ever since her marriage. Late Murugaraj Singh has got two sisters, by names, K.Sivakumari Bai and Ram Kumari Bai. They owned a tiled house at Jambupatnam, which is described in plaint 'A' schedule. Both the sisters of the plaintiff's father predeceased him. The plaintiff's father settled at Jambupatnam after his retirement. The plaintiff's father made improvements to the said house and converted the tiled house into a terraced house. He had invested his money in fixed deposits at Andhra Bank, West Godavari and the details of the same are stated in plaint 'B' schedule. He had kept his valuables and jewellery in a locker, which he is having in Andhra Bank at West Gonagudem. He possessed a motorcycle, Refrigerator, Colour T.V etcetera as also mentioned in the plaint 'B' schedule. The father of the plaintiff had died intestate while enjoying the plaint 'A' and 'B' schedule properties. The 1st defendant is the husband of the 2nd defendant and the defendants 3 and 4 are their daughters. They profess Christianity whereas the plaintiff and her parents are Hindus and they profess Hinduism. The plaintiff's father had let out a portion of the plaint 'A' schedule

house to the 1st defendant about two years prior to the institution of the instant suit. The 1st defendant with an evil intention to grab the entire property of the father of the plaintiff subjected him to mental agony and harassment and did not allow the plaintiff to see her father during his last days. The plaintiff had reliably learnt that her father died under suspicious circumstances on 06.10.2000. The death of her father was not even intimated to her. The plaintiff was informed about her father's death by one Ch.Rambabu of Jambupatnam on the morning of 7th October 2000. The 1st defendant without informing the death of her father to the plaintiff had hastily tried to cremate the body with the help of antisocial elements. The plaintiff was denied access and was prevented from entering the house and seeing the dead body of her father. She had immediately given a telegram and lodged a complaint with the police about the suspicious death of her father. A case in Crime no.79 of 2000 of Korukonda Police Station was registered and it was under investigation. Taking advantage of the absence of the plaintiff, the defendants 1 to 4 took away the valuables in the house and had even tried to encash the fixed deposits and tried to open the bank locker of the father of the plaintiff. They even went to the extent of claiming 'A' schedule property by inheritance. They are not entitled to claim any portion in the plaint 'A' and 'B' schedule properties. The plaintiff is the sole legal heir entitled to succeed to the assets of her late father, Murugaraj Singh. The defendants 1 to 4 are also proclaiming that the plaintiff's father had conveyed the properties in their favour. No such conveyances were ever executed by the father of the plaintiff. Even if the said defendants fabricate and bring into existence any such documents, they are not true, valid and binding upon the plaintiff. There is no occasion or necessity or compulsion for the plaintiff's father to execute any such documents in favour of the defendants 1 to 4, who belong to another religion and are utter strangers. The documents, if any, brought into existence by the said defendants are inoperative under law.

Since the defendants 1 to 4 are tenants of the portion of the plaint 'A' schedule house and as they had denied the title of the plaintiff to the plaint schedule properties, they are trespassers in the eye of law and are liable to

be evicted. The plaintiff is entitled to claim damages for use and occupation in respect of the plaint 'A' schedule property and seek eviction of the defendants 1 to 4 from the plaint schedule property. Hence, the suit is filed.

5. The defence of the 1st defendant in his written statement, which is adopted by the defendants 2 to 4, in brief, is as follows:

The material allegations in the plaint are false. Late Murugaraj Singh brought the family of the defendants 1 to 4 into the schedule house and kept them in that house to assist him and to look after him. It is false to contend that late Murugaraj Singh let out a portion of the plaint schedule property to the 1st defendant about two years prior to the institution of the suit and that the defendants 1 to 4 are residing in the schedule house as tenants of late Murugaraj Singh. In view of the said contention of the plaintiff, this Court has no jurisdiction to try the suit. No notice was issued prior to the institution of the suit. The suit is not maintainable. It is false to contend that when the plaintiff wanted to see her father in his last days, the defendants 1 to 4 had objected. Few days before the death of late Murugaraj Singh, the plaintiff came to the suit house with a view to take away the said Murugaraj Singh by force from the plaint 'A' schedule house and at that time, all the villagers and the defendants 1 to 4 had raised a protest. Late Murugaraj Singh vehemently refused to go along with the plaintiff. He gave a police report against the plaintiff for her atrocities on him. It is false to state that the defendants 1 to 4 did not inform about the death of late Murugaraj Singh. Immediately after the death of Murugaraj Singh, the defendants 1 to 4 had informed the plaintiff. It is false to contend that the 1st defendant had hastily tried to cremate the body of late Murugaraj Singh with the help of antisocial elements. When the plaintiff came to the place after the death of late Murugaraj Singh, the defendants 1 to 4 did not object for the plaintiff performing the funeral. After conducting post mortem, the plaintiff had refused to receive the body of her late father from the police. The defendants 1 to 4 received the body and cremated the same as per the Hindu rites and customs. The plaintiff has no courtesy at least to follow the funeral and last rites performed by the defendants 1 to 4. Defendants 1 to 4 did not take away

any movables or valuables of late Murugaraj Singh and they had never tried to encash his fixed deposits. The plaintiff is fully aware that late Murugaraj Singh executed a registered Will and that as per the said Will, the defendants 1 to 4 are entitled to the properties of late Murugaraj Singh. Late Murugaraj Singh nominated the 1st defendant as a nominee for his fixed deposits. Contrary allegations in the plaint are false. Late Murugaraj Singh executed a registered Will 09.08.2000 bequeathing his properties to the defendants 1 to 4. He had also executed a Codicil for clarification. The plaintiff has no right and title in respect of the plaint schedule properties. The plaintiff did not succeed to the properties of her father in view of the registered Will and the Codicil. Late Murugaraj Singh executed the said registered Will in a sound and disposing state of mind bequeathing all his properties in favour of the 1st defendant. The 'A' schedule house property devolved upon the late Murugaraj Singh as per the registered Will dated 27.11.1984 executed by Sivakumari Bai, his late sister. Thus, the property is the self-acquired property of late Murugaraj Singh. All the movable properties and cash of late Murugaraj Singh are his self-acquired properties. The movable properties shown in 'B' schedule do not belong to late Murugaraj Singh and they are the absolute properties of the 1st defendant. The plaintiff and her mother have no connections or relations with late Murugaraj Singh for over 25 years prior to his death. He is not having cordial relationship with the plaintiff and her mother. The plaintiff never visited her father and never looked after his welfare. She did not even give him a glass of water to drink. However, she is claiming right in the property to make a wrongful gain. The defendants 1 to 4 are residing in the plaint 'A' schedule property lawfully and as per the wishes of late Murugaraj Singh. They are not unauthorized occupants. The claim for damages is untenable. The suit is liable to be dismissed.

6. The 5th defendant had filed a written statement, which was adopted by the 6th defendant. The defence of the defendants 5 and 6 is as follows:

The 5th defendant had filed M.C 11 of 1982 on the file of the Court

of the learned Additional Judicial Magistrate of First Class, Saluru against her husband late Murugaraj Singh for grant of maintenance. The said petition was allowed and maintenance was awarded. The deceased Murugaraj Singh had never denied the fact that the 5th defendant is his wife. The allegation that the marriage between the 5th defendant and late Murugaraj Singh was a bigamous marriage and it is not valid and that the 5th defendant is only his kept mistress are all false. The 6th defendant is the son of late Murugaraj Singh and he was born under lawful wedlock between the 5th defendant and late Murugaraj Singh. The defendants 5 and 6 are the legal heirs of late Murugaraj Singh. They are entitled to succeed to the estate of Murugaraj Singh. The marriage between late Murugaraj Singh and the 5th defendant was performed on 05.10.1981. After the marriage, the 5th defendant joined late Murugaraj Singh and lead marital life with him. Later, she came to know that late Murugaraj Singh is having illicit intimacy with a woman at Rajahmundry. When she had opposed the conduct of late Murugaraj Singh, late Murugaraj Singh demanded dowry from her parents, abused her in filthy language and beat her indiscriminately. On 19.8.1982, late Murugaraj Singh necked her out from the matrimonial home. At that time, she was pregnant. Later, she gave birth to the 6th defendant. Having no alternative, she had taken shelter in the house of her parents and had ultimately, filed M.C 11 of 1982 against her husband late Murugaraj Singh; and he had given an undertaking to pay maintenance. The plaintiff and defendants 1 to 4 are trying to grab the property left by her husband late Murugaraj Singh, though they have nothing to do with the said property. The defendants 5 and 6 are entitled to succeed to the estate of late Murugaraj Singh. The alleged Will set up by the defendants 1 to 4 is a rank forgery and is one brought into existence. The suit is liable for dismissal.

7. Taking into consideration the above pleadings of the parties, the trial Court had framed the following issues and additional issues.

(i) **Whether the plaintiff is legal heir of Murugaraj Singh?**

(ii) **Whether the plaintiff is absolute owner of the plaint**

schedule properties?

- (iii) Whether the plaintiff is entitled to seek recovery of possession of plaint A and B schedule properties after ejecting the defendants?**
- (iv) Whether the plaintiff is entitled to claim damages for use and occupation of the rate of Rs.2,000/- from the date of suit of plaint A schedule property and for recovery of plaint B schedule movables?**
- (v) To what other relief?**

Additional Issues:

- (i) Whether the fifth and sixth defendants are entitled to share the plaint schedule properties?**
- (ii) To what relief?**

(Reproduced verbatim)

8. The defendants 5 and 6 had remained *ex parte*. At trial, Pws 1 to 6 and DWs 1 to 8 were examined and exhibits A1 to A43, B1 to B49 and X1 to X3 were marked. The trial Court while decreeing the suit of the plaintiff had *inter alia* held that the plaintiff is the daughter of Murugaraj Singh and that exhibit B2 Will dated 09.08.2000 and the Codicil dated 02.10.2000 said to have been executed by Murugaraj Singh are not true, valid and binding and that the plaintiff is one of the co-owners of the plaint schedule properties along with defendants 5 and 6. Having answered issues 1 and 2 accordingly, the trial Court held under issue no.3 that the plaintiff is entitled to seek recovery of the possession of the plaint 'A' schedule house after ejecting the defendants 1 to 4 therefrom and damages from the date of the suit and gave liberty to the plaintiff to file an application for grant of succession certificate for recovery of 'B' schedule movable properties, if any, traced and available. The operative portion of the judgment of the trial Court reads as under:

"In the result, the suit shall be decreed partly in favour of the plaintiff declaring that she is the absolute co-owner of the plaint A schedule property and that defendants 1 to 4 shall vacate the plaint A schedule property within one month from the date of judgment in this suit and deliver vacant possession of the same to the plaintiff and that the plaintiff is entitled to recover a sum of Rs.500-00 per month for use and occupation of plaint A schedule property by the defendants 1 to 4 from the

date of filing the suit till the date of delivery of possession of plaint A schedule property to the plaintiff with a liability to account the share of the defendants 5 and 6. The plaintiff is at liberty to initiate proceedings for obtaining succession certificate for recovery of her share in B schedule movable properties if any traced. The rest of the suit claim shall be dismissed, but without costs under the circumstances of the case.”

(Reproduced verbatim)

9. As already noted, the first appeal preferred by the defendants 1 to 4 was dismissed by the Court below while partly allowing the cross-objections of the plaintiff in respect of claim against the 5th defendant. The decree of the 1st appellate Court reads as under:

- (i) That the appeal be and the same is hereby allowed in part setting aside the findings of the learned trial Judge in O.S.no.235/2000 on issue no.4 and issue no.3 insofar as plaint ‘B’ schedule property is concerned, and additional issue no.1 in respect of the suit claim of 5th defendant is concerned.
- (ii) that the rest of the appeal is dismissed confirming the findings of the trial Judge on issue no.1, issue no.3 in respect of plaint ‘A’ schedule property is concerned.
- (iii) that the cross objections filed by the 1st respondent/plaintiff is partly allowed on additional issue no.1 in respect of claim against D5 is concerned and the cross objections on issue no.2 is dismissed.
- (iv) that the suit is hereby decreed in part declaring that the plaintiff and D6 alone are co-owners of the plaint ‘A’ schedule property and insofar as suit claim in respect of ‘B’ schedule property is concerned it is dismissed;
- (v) that the claim for damages for use and occupation for plaint ‘A’ schedule property is concerned it shall be dealt by separate proceedings.
- (vi) that each party do bear their own costs.”

(Reproduced verbatim)

The aggrieved defendants 1 to 4 had preferred this second appeal; and, the plaintiff who is aggrieved insofar as the finding of the Court below that the 6th

defendant, who is held to be illegitimate son of the 5th defendant and late Murugaraj Singh, is a co-sharer along with her of the plaint 'A' schedule property, filed cross objections.

10. The learned counsel for the defendants 1 to 4 while reiterating their pleaded defence would *inter alia* contend as follows:

The Courts below did not properly appreciate the material facts and the evidence brought on record. The Courts below ought to have seen that the plaintiff did not file a rejoinder to the written statement filed by the defendants 1 to 4 and did not deny the defence therein and therefore, the suit of the plaintiff is liable for dismissal. The trial Court ought to have seen that the circumstances in which the exhibit B2, registered Will, came into existence at the behest of the testator go a long way in establishing that there are no suspicious circumstances shrouding the Will, the execution of which is not disputed by the plaintiff in the entire proceedings by filing a rejoinder. The Courts below erred in presuming that exhibit B2 Will is shrouded in suspicious circumstances. The Courts below ought to have seen that when once execution is admitted and is not disputed, the contents therein cannot be doubted. The Will being a registered Will, the Courts below ought to have presumed that it is proved in accordance with law. The Courts below ought to have seen that the testator proceeded all the way from Jambupatnam to Korukonda to execute and register the Will would show that the Will was executed with free Will and consent and on his own volition and therefore, the genuineness of the Will need not be doubted. The Courts below having noticed that the Will dated 07.08.2000 is registered on 09.08.2000 failed to take note that sufficient time for relinquishment was available to the testator before the Will is registered. The time lag between the execution of the Will and its registration dispels the suspicion, if any, in regard to the execution of the exhibit B2-Will. The entire discussion regarding the suspicious circumstances in which the Will is allegedly shrouded is unwarranted and unnecessary in the facts and circumstances of the case as the Will is a registered Will. The Courts below have misguided themselves and misunderstood the facts and misconstrued the evidence. The Courts below

ought to have seen that the testamentary succession is one of the modes of succession and that a testator can dispose of his self acquired property by means of a testament. The Courts below ought to have seen that the aspirations and sentiments of a testator should be respected by the Courts of law. The Court below ought to have seen that the relationship between late Murugaraj Singh and the plaintiff, who is his daughter, and his wife, that is the mother of the plaintiff, are strained and there are no cordial relationship between the plaintiff and Murugaraj Singh and that the 1st defendant and his family were all along staying with the family of Murugaraj Singh at his instance and they were assisting and aiding him and that therefore, Murugaraj Singh had developed volumes of love and affection towards the family of the defendants 1 to 4. By virtue of exhibit B2 Will, the defendants 1 to 4 have become entitled to the plaint 'A' schedule property and also the movable properties of Murugaraj Singh. The Courts below ought to have seen that the Will executed by Murugaraj Singh in a sound and disposing state of mind was duly registered by him after attending the office of the Sub Registrar after admitting due execution of the same. The Court below having rejected the claim of the plaintiff insofar as 'B' schedule properties and having partly dismissed the suit is not justified in decreeing the suit insofar as plaint 'A' schedule properties. The reasoning of the Courts below in support of the findings recorded in the concurrent judgments are perverse and unsustainable.

10.1 The learned counsel for the defendants 1 to 4 had placed reliance on the following decisions:

- (1) **Rabindra Nath Mukherjee v. Panchanan Banerjee (dead) by L.Rs** ^[1]
- (2) **Savithri v. Karthyayani Amma** ^[2]
- (3) **Mahesh Kumar (dead) by LRs v. Vinod Kumar and others** ^[3]
- (4) **Sri Chintala Satyanarayana v. Smt. Chintala Kistamma** ^[4]
- (5) **Jacobson v. Jamaica Times, Lim.** ^[5]
- (6) **T.Laxman Kumar v. G.Laxmikantha Reddy** ^[6]
- (7) **G.Narayanan v. R.N.Rajagopalan and others** ^[7]
- (8) **Uma Devi Nambiar v. T.C.Sidhan** ^[8]
- (9) **Meenakshiammal (dead) v. Chandrasekaran** ^[9]

11. The learned senior counsel appearing for the plaintiff while supporting the decree and judgment of the trial Court insofar as 'A' schedule property had assailed the decree and judgment of the Court below insofar as the finding that the 6th defendant, who is the illegitimate son of late father of the plaintiff, is also entitled to a share in the properties of the father of the plaintiff and that he is the co-owner along with the plaintiff. The submissions of the learned counsel for the plaintiff, in brief, are as follows: "The Courts below had rightly believed the case of the plaintiff that she is the daughter of Murugaraj Singh and that exhibit B2-Will propounded by defendants 1 to 4 is not true, valid and binding on the plaintiff and that the plaintiff is entitled to seek eviction of the defendants 1 to 4 from the plaint 'A' schedule property. The Court below, however, had erroneously held that the suit is liable for dismissal insofar as 'B' schedule property. When the Court below has come to the conclusion that the plaintiff is entitled to seek a decree insofar as 'A' schedule property, the Court below on the same analogy ought to have held in favour of the plaintiff in regard to 'B' schedule property and ought to have decreed the suit in regard to 'B' schedule property also instead of dismissing the suit. The Court below ought to have seen that the marriage between Murugaraj Singh and Devika Rani, who is the mother of the plaintiff, is subsisting and that, therefore, the marriage, if any, between Murugaraj Singh and the 5th defendant is a bigamous marriage and that therefore, the said marriage is void and hence, the 5th defendant cannot be treated as legally wedded wife of Murugaraj Singh and that she is only his kept mistress and as such, the 6th defendant is not entitled to succeed to the estate of Murugaraj Singh and therefore, the Court below ought to have held that the plaintiff alone is entitled to succeed to the properties of Murugaraj Singh. The finding of the Court below that the 6th defendant being an illegitimate son of Murugaraj Singh is entitled to a share along with the plaintiff in plaint 'A' schedule properties and that he is a co-owner of the property along with the plaintiff is incorrect. Therefore, the second appeal be dismissed and the cross-objections filed by the plaintiff be allowed".

12. I have gone through the pleadings, the oral and documentary evidence and I have given earnest consideration to the facts and the submissions.

13. Dealing first with the plaint 'A' schedule property, it is to be noted that Murugaraj Singh is the owner of the plaint 'A' schedule property is not in dispute. The plaintiff is claiming that she is the daughter of Murugaraj Singh and that Murugaraj Singh had died intestate on 06.10.2000 and that her mother, who died on 23.5.1998, had predeceased her father and that therefore, on the death of Murugaraj Singh, she being his only legal heir, had succeeded to the plaint 'A' schedule property and that she is the absolute and exclusive owner thereof and that the 1st defendant and his family having entered into a portion of the plaint 'A' schedule property as tenants on taking the same on lease from her father, Murugaraj Singh, had denied her title after the death of her father and had claimed rights in the property without any manner of right and that therefore, she is constrained to file the suit for declaration that she is the daughter of late Murugaraj Singh and that she alone is entitled to succeed to his properties and for eviction of the defendants 1 to 4 from the plaint 'A' schedule property and for recovery of damages. The 5th defendant is claiming that she is the wife of late Murugaraj Singh and that she gave birth to the 6th defendant under lawful wedlock with Murugaraj Singh and that therefore, the defendants 5 and 6 are only entitled to the plaint 'A' schedule property. However, having filed the written statement, they had remained *ex parte*. The defendants 1 to 4, who are Christians by religion, are admittedly not related to Murugaraj Singh, who is a Hindu by religion. Their defence is that the plaintiff and her mother had no cordial relationship with late Murugaraj Singh and that late Murugaraj Singh brought the family of the defendants 1 to 4 into the schedule house and kept them in that house to assist him and to look after him and that out of love and affection, which he had developed towards the defendants 1 to 4, he had executed a registered Will 09.08.2000 bequeathing his properties to the defendants 1 to 4 and that he had also executed a Codicil for clarification and

that the plaintiff has no right and title in respect of the plaint 'A' schedule property and that the plaintiff did not succeed to the properties of her late father in view of the registered Will and the Codicil executed by him in a sound and disposing state of mind bequeathing all his properties in favour of the 1st defendant and his family members and that the plaintiff never visited her father and never looked after his welfare and that the defendants 1 to 4 are residing in the plaint 'A' schedule property lawfully and as per the wishes of late Murugaraj Singh and that they are not unauthorized occupants and that the suit is liable to be dismissed.

13.1 A reading of the pleadings and the evidence brought on record leads to a safe conclusion that the plaintiff is the daughter of late Murugaraj Singh. In fact, the defendants 1 to 4 did not seriously challenge the said finding. Indeed, the concurrent findings of the Courts below recorded on proper appreciation of the facts and the evidence brought on record that the plaintiff is the daughter of Murugaraj Singh do not warrant interference.

13.2 According to the plaintiff, her father had died intestate. Therefore, while denying the relationship of the 6th defendant with her father, she claims exclusively the plaint 'A' schedule house by way of intestate succession. Per contra, the defendants 1 to 4 placing reliance on the registered Will exhibit B2 dated 09.08.2000 said to have been executed by Murugaraj Singh claim that they are the owners of the plaint 'A' schedule property in view of the bequests under the said registered Will. They also place reliance on a Codicil said to have been executed by late Murugaraj Singh, though the same is not exhibited. They submit that under the Codicil, the testator had clarified the bequests under the Will. However, on a consideration of the material facts and the evidence brought on record, both the Courts below had recorded a concurrent finding of fact that the Will is not true and valid and that it is shrouded in suspicion. Accordingly, the Courts below disbelieved the Will that was relied upon by the defendants 1 to 4. Undeniably, in the absence of a Will and a Codicil, the defendants 1 to 4 would not be entitled to claim any right, title and interest in plaint 'A' schedule house property and the

property devolves upon the legal heirs of late Murugaraj Singh. Therefore, the vital and important question is as to whether the exhibit B2-Will and the Codicil (not exhibited) are true, valid and binding on the parties to the suit.

13.3 Before answering the substantial questions of law and incidentally the above said question, it is necessary to state that the learned counsel for the defendants 1 to 4 had placed reliance on certain precedents dealing with the appreciation of evidence in regard to proof of Will. I have gone through the precedents cited and mentioned supra. There is no need to refer to all the precedents as in the decision in **Pinnaka Hanumantha Rao (died per L.R) and two Ors. V. Garlapati Dhanalakshmi @ Andallu**^[10], this Court having considered the ratios in various precedents on the subject had formulated the principles that emerged from the precedents as under:

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

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

free Will and mind.

(e) The propounder takes a prominent part in the execution of the Will conferring substantial benefit on him.

(f) The testator used to sign blank papers.

(g) The Will did not see the light of the day for long.

(h) Incorrect recitals of essential facts.

(i) The unregistered Will challenged as forged comes from the custody of major beneficiary.

7. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated and that inevitably would be a question of fact in each case.

8. Each and every circumstance is not a suspicious circumstance and a circumstance would be suspicious when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

9. All such legitimate suspicions should be completely removed by the propounder before accepting the document as the last Will of the testator and satisfactory discharge of such initial onus is very heavy and the test of satisfaction of judicial conscience is pivotal in deciding the solemn question.

10. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will.

11. A testator has the freedom to give his property to whomsoever he likes and once it is established that the testator was free and had a sound disposing mind, it is no longer the duty of the Court to go further to inject its own ethics of what is or is not a moral or a fair disposition according to its own standard.

12. No hard and fast or inflexible rules can be laid down for the appreciation of the evidence and application of general and broad principles would always depend on the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.

13. Allegations of exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded have to be proved by the person making such allegations.

14. Circumstantial evidence to prove the signature of the testator can lead to a legitimate conclusion only if it leads irresistibly to the inference that the person must have signed the document in question, but the presumption of execution of the Will by the testator on proof of the signature may be rebutted by proof of suspicious and unnatural circumstances.

15. The registration of the Will by the testator Will be a strong circumstance to support the genuineness of the Will, but Will not by itself be sufficient to dispel all suspicions without subjecting the evidence of registration to a close scrutiny.

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

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

contents of the Will.

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

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

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

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

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

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

13.4 The evidence brought on record in regard to exhibit B2-Will of late Murugaraj Singh has to be examined, keeping in view the above undisputed legal position. Since the defendants 1 to 4 are total strangers to Murugaraj Singh and as Murugaraj Singh is a Hindu and the defendants 1 to 4 are admittedly Christians, the onus of proof is heavy upon the defendants 1 to 4 to prove the genuineness of exhibit B2 Will being relied upon by them. It is also to be noted that the plaintiff is the daughter of Murugaraj Singh; and, the defendants 5 and 6 are the holders of a decree for maintenance against Murugaraj Singh; yet under the said Will, the natural heir, namely the daughter, and also the defendants 5 and 6 are totally deprived of a share and no property was bequeathed to them. Though they were deprived of a due share under exhibit B2-Will, the said fact by itself is not a factor that would lead to a conclusion that the Will is not true or genuine. However, the facts and circumstances of the case and the further fact that the Courts below had concurrently disbelieved the version of defendants 1 to 4 require this Court to carefully examine the defence pleaded by the defendants 1 to 4 and the evidence brought on record in regard to the truthful nature of exhibit B2 Will.

13.5 Before proceeding further, it is necessary to examine as to whether the defendants 1 to 4 proved the due attestation of the exhibit B2 Will. In this regard 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.” It is also trite to note that in a case where the attestors signed the Will at a later point of time, the propounder of the Will has to show by adduction of the necessary evidence that the two attestors received personal acknowledgment of the signature of the testator at the time of signing the Will as attestors.

13.6 It is profitable to call in aid the decision in **Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and ors.** ^[11], wherein while considering the question as to whether or not the execution of the Will has been proved; and, while holding that the Will in that cited case has not been proved, on the requirement of proof of Will, 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) Supp 5 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 now 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 an 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 an 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)

Keeping in view the legal position, I have carefully gone through the entire evidence and particularly that of DW1 and of the attestors of the said Will. DW2 is one of the attestors; and he is none other than the brother-in-law of the 1st defendant, the propounder of the Will. DW3 is another attestor and he is admittedly related to the 1st defendant. Though the attestors are related to DW1, he had denied his relationship with them. DW2, the attestor had stated in his examination that DW1 is his sister's husband. The evidence of the witnesses discloses that the Will was executed, signed and attested on 09.08.2000. However, DW2 had also stated that he cannot say the date on which exhibit B2 was drafted, but admitted that exhibit B2 appears to have been written on 07.08.2000. Nonetheless, in the introductory portion of exhibit B2, it was mentioned that it was written on 09.08.2000. DW3 had stated that he has no acquaintance with DW1; but, admitted in the latter part of his cross-examination that his father informed him that DW1 and DW2 are related to him and that he did not know about the relationship of DWs 1 and 2 with him till his father had informed him about the relationship. This witness stated in his

cross-examination that R.M. Singh did not inform him about the execution of the Will prior to 09.08.2000. In fact, as already noted, exhibit B2 appears to have been drafted and executed on 09.08.2000 as per the recitals in the introductory paragraph of the said Will. However, the scribe has put the date 07.08.2000 under his signature in the last page of the Will. It is not the case of defendants 1 to 4 that the scribe had wrongly put the date or that in the date the figure '9' is appearing as '7' though it is in fact '9'. The defendants 1 to 4 had also proceeded on the basis that the date put by the scribe on the Will is 07.08.2000 and that the Will was executed on 07.08.2000 but the Will was registered on 09.08.2000. The evidence of the two attestors discloses that the Will was attested by them on 09.08.2000. However, the evidence and the defence of the 1st defendant, on a perusal reveal that it was executed on 07.08.2000. Therefore, a doubt arises as to whether the testator and the scribe on one hand and the two attestors on the other signed the Will on the same day. In this context, it is necessary to recall the case of the appellants/defendants 1 to 4 as reiterated in their grounds of objection urged in the Second Appeal, which is as follows: 'The Courts below having noticed that the Will dated 07.08.2000 is registered on 09.08.2000 failed to take note that sufficient time for relinquishment was available to the testator before the Will is registered. The time lag between the execution of the Will and its registration dispels the suspicion, if any, in regard to the execution of the exhibit B2 Will.' Thus, even according to the case of the defendants 1 to 4 the Will was executed on 07.08.2000 is undeniable. However, in view of the evidence of the attestors, the fact of the matter is that the attestors were not present with the testator on 07.08.2000 when the Will was allegedly executed as their evidence discloses that they had attested the Will on 09.08.2000, i.e., on the date of registration of the Will. It is not the case of the defendants 1 to 4 that the testator and the scribe signed the Will on 07.08.2000; and that on 09.08.2000, the attestors had received a personal acknowledgment of the signature of the testator on the Will and then attested the Will on that day, i.e., on 09.08.2000. Thus, the evidence brought on record shows that the testator and the scribe signed on the Will on 07.08.2000 and that the attestors signed the Will on 09.08.2000. Hence, it follows that the due attestation of the Will by

the two witnesses as required under law is not established. 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. Thus, there is no evidence in the case on hand satisfying the factual and legal requirements in regard to due attestation of the Will by the two attestors, DWs 2 and 3. When the due attestation of the Will is not proved as required under law, the contention that there is proof that the testator went to the Sub-Registrar's office on 09.08.2000 and the Will was duly registered is of no avail.

13.7 Further, as also noted by the Courts below, there is also no consistency or uniformity in the signatures of the testator on the Will. The signatures at the foot of each page said to be of the testator are totally at variance with the signature of the testator on the last page underneath the last sentence of the Will. DW1 pleaded ignorance of the preparation of the Will and states that he was not present at the time of execution of the Will and that he came to know about the Will on 26.09.2000. However, DW2 deposed that he informed the DW1 about the execution of the Will on 09.08.2000. Even though it is the case of the DW1 that he was living with the testator in his house, DW3 who had deposed that he was frequently visiting the house of the testator had further testified that he does not know of the relationship of the testator with the DW1. The evidence brought on record is vague and unclear about the date of the execution of the Will, i.e., the preparation of the Will, the signing of the Will by the testator and the due attestation by the attestors. Thus, the evidence of DWs 1 to 3 on an over all consideration does not inspire confidence. The Court below on an analysis of the evidence regarding the health condition of the Murugaraj Singh by the date of exhibit B2 Will had also held that he was not in a sound state of health having been afflicted with throat cancer and paralysis. Both the Courts below having carefully considered the evidence of the material witnesses had categorically held that the Will is shrouded in suspicious circumstances and therefore, the

defendants 1 to 4 could not prove the due execution of exhibit B2 Will and that exhibit B2 Will is not true and valid.

13.8 It is vital to note that the defendants 1 to 4 having placed reliance on a Codicil dated 02.10.2000 did not produce the said Codicil into Court. The law is well settled that under a Codicil, the testator can change the bequests under the original Will. Unless the Codicil is produced before the Court and the recitals and bequests in the Codicil are laid bare it is not possible to know whether the bequests in the Will had remained unchanged and are final. Hence, the non-production of the Codicil is fatal to the defence of the defendants 1 to 4, even assuming for a moment that the Will is true. On this ground alone, the claim based on the Will of the defendants 1 to 4 in respect of the plaint 'A' schedule house property of Murugaraj Singh is liable to be rejected.

13.9 Further, in the original written statement filed by the 1st defendant, it is stated as follows: "Murugaraj Singh was living alone since the time the girl whom he had married had left him with the female child that was born to her. About 6 or 7 years prior to the filing of the written statement (April, 2001), Murugaraj Singh while going on a cycle fell down on the road due to paralytic stroke. The 1st defendant, who was his former student saw him in that situation and took him to a hospital and got him treated. Later, Murugaraj Singh explained his situation and requested the 1st defendant to live with him and look after him; and he had fostered the 1st defendant as his son and since then, the 1st defendant lived with him and looked after his welfare." The defendants 1 to 4, therefore, state that in the above said background, they had come to live with late Murugaraj Singh in the plaint 'A' schedule house. However, at trial, DW1 (the 1st defendant) deposed on this aspect as follows: 'In the month of May 1996, while I was going on motorcycle to Gokavaram from Atchutapuram, I saw the R.M.Singh lying on the ground having fallen from his motorcycle. I sprinkled water on his face and brought him to senses. When asked, he had replied that he had a reeling sensation and fell down. I brought him to my house in Atchutapuram. He was with me

on that day till the evening. Thereafter, I took him on my motorcycle and dropped him at his house at Jambupatnam. I got him treated with a doctor at Jambupatnam and stayed with him on that night. On the next day, I left for Atchutapuram after R.M.Singh recovered. Subsequently, I used to meet him and enquire about his well being. About two months later, he came to me and told me that there is no one to look after him and asked me to come over to Jambupatnam and reside with him in his house. I had consulted my wife; and, about ten days later, I and my wife and my daughters shifted residence to the house of R.M.Singh at Jambupatnam.” Thus, at the time of evidence, the 1st defendant had given a totally different version in regard to circumstances that led him and his family to join Murugaraj Singh at his house at Jambupatnam. In his further cross-examination on the said aspect, he had deposed as follows: “I saw R.M.Singh in the year 1996 while I was working as RTC Conductor and found him on the road side in between Veerlankapalli and Gokavaram. There were no houses near the said place, where R.M.Singh had fallen down. It is a RTC bus route. I saw him at about 12 noon. Till I saw him, nobody looked after the said R.M.Singh. I asked one person Sunkar man, who was working in the field, to help me. In the evening, I took him to my house and thereafter, I took him to an RMP doctor. Except on that day, I did not attend on him prior to 1996. The averment at paragraph 3 in the written statement filed by me that R.M.Singh fell down due to paralytic stroke is not correct.” Thus, the prevarication in the deposition of DW1 on the crucial aspect, which lead to him and his family joining the house of Murugaraj Singh is one of the strong suspicious circumstances, which also weighed with the Court below. He (DW1) had further deposed as under: ‘I cannot give the door number of the house in which I lived along with Murugaraj Singh’. This statement makes his version that he lived with the testator from 1996 till his death in June 2000 highly doubtful. Thus when the foundation laid in the defence in regard to the circumstances under which the defendants had joined the house of Murugaraj Singh at Jambupatnam is thoroughly shaken by the inconsistent versions in the very testimony of the DW1, the case of the defendants 1 to 4 in regard to their joining the house of Murugaraj Singh and living with him and they looking after Murugaraj Singh

and the execution of the exhibit B2 Will by Murugaraj Singh on developing love and affection towards them all become decidedly distrustful. After having thus gone through the evidence, this Court is satisfied that there is no irregularity or illegality in the appreciation of evidence by the Court below and that in the facts and circumstances of the case, the Courts below are justified in recording the finding that the Will set up by the defendants 1 to 4 is not true and that it is shrouded in suspicious circumstances. Accordingly, this Court finds that the said concurrent finding does not warrant interference in this second appeal.

14. There is one more crucial aspect on the validity of the exhibit B2 Will. The recitals in the Will show that first a right was given to the defendants 1 and 2 to enjoy the property during their life times; and that after their life times rights were given to their unmarried daughters (the defendants 3 and 4) to enjoy the portions of the house during their life times; and that after their life times rights to enjoy for life are given to their unborn children; and that there after the rights to enjoy for life are given to the children of the unborn children of the defendants 3 and 4 with right to Will away but without any rights of alienations. Thus, under the Will the ultimate legatees, that is, the children of the unborn children of the unmarried defendants 3 and 4, were given only right to execute Will in respect of the house property covered by the Will but any one of them is not given a right to alienate the property. Thus, there is a restriction against alienation and the testator under the Will intended that the house property shall remain intact without being alienated. It was categorically stated in the Will that no one has a right of alienation. Therefore, the recitals in the exhibit B2 Will show that the property was not bequeathed to any person with absolute rights. When the testator never intended to give the property to anybody with absolute rights it shall be deemed that the Will is invalid and that the property is not disposed of by the Will. The view of this Court finds support from the ratio in the decision in **Monoharri Dassi v. Shookmoy Chandra Das [(1885) ILR 11 PC 684]**. The facts of the case show that testator in his Will has stated as follows:

“As regards the enjoyment of the profits, I do hereby

provide that my houses, zamindari, talooks, and other immovable properties, and my business of various descriptions, and the capital stock thereof, shall always remain intact as at present, and my heirs, sons, sons' sons, and great-grandsons, and so on in succession, shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the immovable property, to close any business, to misappropriate the capital stock thereof, or to divide the same. If anyone succeeds in doing so, or will do so, it shall be disallowed by the authorities."

In the back drop of the said facts, the question that fell for consideration was – 'what was the intention of the testator in this provision of his will?' While answering the said question it was held as follows:

"He says distinctly, "my estate shall remain intact," and then he proceeds to say, as regards the enjoyment of the property, the estate remaining intact, my heirs, sons, etc., "shall be entitled to enjoy the profits thereof." These words appear to their Lordships to indicate that he was not going to give away the estate, but that all he intended was to give the enjoyment of the profits to the persons mentioned in the will. His object appears to have been to create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment of the profits of it, which would not be allowed by Hindu law. It is true, if the bequest had been of rents and profits, and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it; but what their Lordships have to do is to find the intention, looking at the whole of the provisions of the will; and they gather from those words that it was not his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate and has added a clause against alienation, in which case the clause against alienation would be void, but the provision here against alienation is confirmatory of the other part of the will.

When we come to the subsequent clauses, they further confirm this view of his intention. Having said that the profits are to be enjoyed, he, in the subsequent paragraphs, provides for what he considers and intends to be the mode of the enjoyment; and it is very material to notice that in the eighth paragraph he assigns a six-annas portion for the family worship of the idols, and also for the maintenance of the family whilst they continue joint, leaving a ten-annas share which, as long as the family remained joint, would not be, as he supposed, expended at all. What he does with that is to provide that it shall simply accumulate. He does not dispose of it in any way, but as long as the family remains joint it accumulates; again confirming the view that his intention was that the estate itself should not be disposed of.

The whole question really resolves itself into what was the intention of the testator to be gathered from the will? Their Lordships think that this was his intention, and that is the construction which must be put upon the will. This is the view which has been taken by both the lower

Courts, The Subordinate Judge, a Hindu gentleman, quite acquainted with the customs of Hindu families, considered that that was the intention, and that being contrary to Hindu law, the will was an invalid will, and that the plaintiff was entitled to recover the share of the property which would belong to her husband, supposing the property not to be disposed of by the will."

Section 14 of the Transfer of Property Act reads as follows:

Rule against Perpetuity:

No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity has been incorporated in Section 114 of the Indian Succession Act, 1925 which reads thus:

114 Rule against perpetuity.- No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

15. Assuming that the Will in question is formally valid, it is to be noted that that the beneficiary contemplated by the description given in the Will does not exist at the time of the death of the testator or other material time. This is a case of impossibility or failure created by the very bequests in the Will. The persons surviving by the time of the testator's death were not given absolute rights. Contrary to the bequests in the Will and the Will of the testator any person/beneficiary cannot be heard to say that he or she is entitled to take the estate with absolute rights. When it is clear from the recitals in the Will that the testator had no mind to settle the property with absolute rights or vested remainder rights on the defendants 1 to 4, they cannot be conferred any such rights contrary to the Will of the testator. Therefore, the bequest under the Will is void because it violates a statutory mandate laid down in the Succession Act. Therefore, it follows that the legal heirs of the late Murugaraj Singh are entitled to succeed to the property left

behind by him on the supposition that the property has not been disposed of by the Will, even if the Will were to be true.

16. Since the defendants 1 to 4 are strangers and are not related to late Murugaraj Singh, when once the Will set up by them is held to be not true and valid and when they could not establish any other right to remain in possession, it follows that the plaintiff is entitled to seek their eviction from the plaint 'A' schedule property. Viewed thus, this Court finds that there is no substance in the substantial questions of law and hence, the second appeal is liable to be dismissed.

17. The learned counsel for the defendants 1 to 4 had vehemently contended that the plaintiff had not filed a rejoinder to the written statement and had thus not denied the Will relied upon by the defendants and hence, it shall be treated that the plaintiff had admitted the pleas in the written statement. In the first place it is to be noted that the plaintiff had specifically pleaded in her plaint that her father died intestate. In **Veerasekhara Varmarayar v. Amirthavalliammal** [AIR 1975 Mad 51], it was held as follows: "The law does not compel the plaintiff to file a rejoinder challenging the allegations made in the written statement. The failure to file a rejoinder cannot be treated as an admission of the plea in the written statement." In **T. Bheem Reddy and others v. Smt. P. Laxmi Bai** [2012 (5) ALT 345] it was held as follows: 'There is no provision under CPC by which the plaintiff is obliged to deny the averments made by the defendants in the written statement. In the absence of any such provision, it cannot be said that the plaintiff has to file a rejoinder denying the averments made in the written statement.' Hence the contention of the defendants 1 to 4 has no acceptable merit and the said contention is accordingly rejected.

18. Now, coming to the cross-objections, the plaintiff is not disputing the fact that the 5th defendant is the kept mistress of her late father Murugaraj Singh and that the 6th defendant is their son, though illegitimate. The trial Court having referred to Section 16 of the Hindu Marriage Act, had held that though the marriage is not legitimate, the child born becomes legitimate child

of the deceased and that such child can succeed to the property of the father as a legitimate child. The Court below called in aid the decision in **Rakala Surya Prakasa Rao v. Rakala Venkateswara Rao**^[12] wherein it was held as follows: **“In conclusion, we hold that by virtue of S. 16 (1) of the Hindu Marriage Act, 1955 as amended in 1976, the illegitimate son can be equated with his natural sons and treated as coparceners for the properties held by the father whether the property be originally joint family property or not. The only limitation is that during the lifetime of the father, the illegitimate son of a void marriage is not entitled to seek a partition. He can seek a partition only after the death of the father.”** The Court below had held that the 6th defendant, who is not the legitimate son of late Murugaraj Singh can be treated as a coparcener of his father, whether it is joint family or not and that he cannot seek partition during the life time of his father, but, on the death of late Murugaraj Singh, he is entitled to a share along with the plaintiff and hence, the plaintiff and the 6th defendant are co-owners of the plaint ‘A’ schedule property. Having examined the facts and the evidence and also the reasoning of the Court below, this Court does not find any reason calling for interference with the said finding of the Court below. Accordingly, this Court holds that the cross objections of the plaintiff are liable for dismissal.

19. It is trite to mention that in regard to the relief of damages, the Court below held that the said aspect shall be dealt with in a separate proceeding in accordance with law.

20. Having analytically examined the evidence brought on record in regard to exhibit B2-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. Having regard to the

afore stated reasons this Court finds that there is no substance in the questions raised and that the substantial questions are devoid of merit and that the judgment of the Court below wherein findings well supported by positive and sustainable reasons are recorded does not brook interference.

21. Accordingly, the Second Appeal and the Cross-objections are dismissed confirming the decree and judgment of the Court below. The appellants/defendants 1 to 4 are granted four (4) months time from the date of receipt of a copy of this judgment to vacate and handover vacant possession of the plaint 'A' schedule house property to the plaintiff. It is needless to mention that failing such compliance, the plaintiff is entitled to recover the possession of the said property in accordance with the procedure established by law.

There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

15th July, 2016
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[\[1\]](#) AIR 1995 SUPREME COURT 1684

[\[2\]](#) AIR 2008 SUPREME COURT 300

[\[3\]](#) 2012 (4) ALD 71 (SC)

[\[4\]](#) 1996 ALT (3) 22 (D.B)

[\[5\]](#) AIR 1921 Privy Council 198

[\[6\]](#) 2004(6) ALT 493

[\[7\]](#) AIR 1987 MADRAS 75

[\[8\]](#) (2004) 2 Supreme Court Cases 321

[\[9\]](#) (2005) 1 Supreme Court Cases 280

[\[10\]](#) 2007(2) ALD 435

[\[11\]](#) AIR 2009 SC 1389

[\[12\]](#) 1992 (1) APLJ 453 (DB)