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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAISWAMY

S.A. (MD) Nos. 358 and 359 of 2015

and

M.P. (MD) Nos. 3 and 4 of 2015 and 4 of 2016

S.A. (MD) No. 358 of 2015

K.Murugan .. Appellant/1st Respondent/
1st Defendant

Vs.

1.K.Mariappan .. 1st Respondent/Appellant/
Plaintiff

2.Dr.V.K.Marimuthu

3.K.Ramasamy

4.K.Subramani

5.K.Murugan

6.K.Mukilan

7.Deivanai

... Respondents 2 to 7/Respondents 2 to 7/
Defendants 2 to 7

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 27.04.2015, passed in A.S.No.16 of 2014 on the file of the Principal District Court, Theni reversing the judgment and decree dated 18.02.2014 passed in O.S.No.120 of 2011, on the file of the Subordinate Court, Theni.

S.A. (MD) No. 359 of 2015

K.Murugan .. Appellant/1st Respondent/
1st Defendant

Vs.

<https://hcservices.ecourt.gov.in/hcservices/>
1.Dr.V.K.Marimuthu .. 1st Respondent/Appellant/
Plaintiff



2.K.Arunachalam
3.A.Mahalakshmi
4.V.Karuppiyah
5.K.Mariappan
6.K.Ramasamy
7.K.Subramani
8.K.Murugan
9.K.Mukilan
10.Deivanai

.. Respondents 2 to 10/Respondents 2 to 10/
Defendants 2 to 10

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 27.04.2015, passed in A.S.No.17 of 2014 on the file of the Principal District Court, Theni reversing the judgment and decree dated 18.02.2014 passed in O.S.No.148 of 2012, on the file of the Subordinate Court, Theni.

For Appellant
in both appeals : Mr.A.Arumugam
for Mr.S.Ramachandran

For Respondents
in both appeals : Mr.T.K.Gopalan
for R.1 in S.A.(MD)No.358/2015

: Mr.K.P.Narayanakumar
for R.2 in S.A.(MD)No.358 of 2015 and
for R.1 in S.A.(MD) No.359 of 2015

: R.3 to R.7 Dispensed with
in S.A.(MD)No.358 of 2015

: R.2 to R.4, R.6 to R.10
Dispensed with in S.A.(MD)
No.359 of 2015

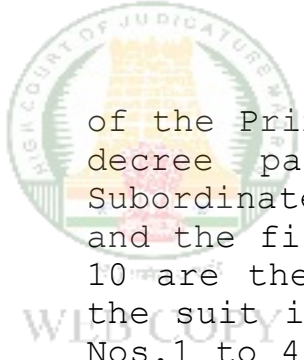
: R.5 No appearance
in S.A.(MD)No.359/2015

COMMON JUDGMENT

The Second Appeal in S.A.(MD)No.358 of 2015 arises against the judgment and decree passed in A.S.No.16 of 2014, on the file of the Principal District Court, Theni, reversing the judgment and decree passed in O.S.No.120 of 2011, on the file of the Subordinate Court, Theni. The first defendant is the appellant and the first respondent is the plaintiff and the respondents 2 to 7 are the defendants 2 to 7 in the suit. The plaintiff filed the suit in O.S.No.120 of 2011 for declaration and permanent injunction.

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2. The Second Appeal in S.A.(MD)No.359 of 2015 arises against the judgment and decree passed in A.S.No.17 of 2014, on the file

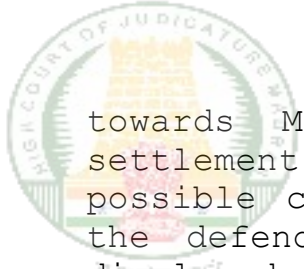


of the Principal District Court, Theni, reversing the judgment and decree passed in O.S.No.148 of 2012, on the file of the Subordinate Court, Theni. The first defendant is the appellant and the first respondent is the plaintiff and the respondents 2 to 10 are the defendants 2 to 10 in the suit. The plaintiff filed the suit in O.S.No.148 of 2012 for declaration in respect of item Nos.1 to 4 of the suit property, recovery of possession in respect of item No.1 from the defendants 1 to 4 and in respect of item Nos.2 to 4 from the first defendant, for partition in respect of item No.5 of the suit properties, for past and future mesne profits in respect of item Nos.1 and 2 to 5 of the suit properties.

3. The brief case of the plaintiff in both the suits is as follows:

(i) The first defendant and the plaintiffs in both the suits are brothers and sons of one V.Kaliappan. Dr.V.K.Marimuthu, the plaintiff in O.S.No.148 of 2012 is the eldest son and K.Mariappan, the plaintiff in O.S.No.120 of 2011 is the second son and K.Murugan, the first defendant in both the suits and also the appellant in the above Second Appeals is the third son of V.Kaliappan. The defendants 3 to 7 in O.S.No.120 of 2011 are brothers and sister and they are the children of one Kandasamy Gounder through his second wife. The said Kandasamy Gounder and the father of Kaliappan are brothers. The said Kandasamy Gounder had only one son viz., Kalimuthu through his first wife. The defendants 2 to 4 in the suit in O.S.No.148 of 2012 are tenants under the first defendant in respect of item No.1. The defendants 6 to 10 are the children of Kandasamy Gounder through his second wife.

(ii) The suit properties originally belonged to Kalimuthu, the only son of Kandasamy Gounder through his first wife. The said Kalimuthu had lived with his father upto his age of 25 years and then, got separated himself from his father after getting his share of properties from their joint family and lived separately. Then he joined with the family of his step brother V.Kaliappan ie., the father of the plaintiffs and the appellant herein. He had developed his properties got from his father, purchased properties and lived his entire life as a bachelor with the family of his step brother V.Kaliappan. He died as a bachelor on 29.12.2010. Before his death, he registered an unregistered Will dated 13.03.2005, after cancelling two registered Wills dated 25.05.2004, that were executed in favour of the first defendant and in favour of K.Mariappan, the plaintiff in O.S.No.120 of 2011. The properties owned in O.S.No.148 of 2012 were bequeathed in favour of Dr.V.K.Marimuthu, the plaintiff in O.S.No.148 of 2012. Before his death due to his old age and illness, Kalimuthu had ~~bequeathed~~ ^{devised} his ~~properties~~ ^{properties} and other properties with the management of Mariappan and Murugan. Since Murugan was the youngest son in the family, Kalimuthu and other members were very much affectionate

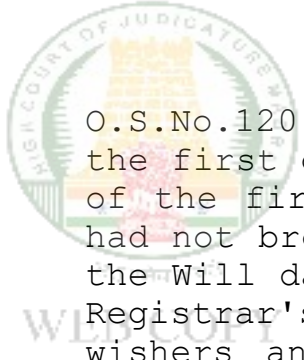


towards Murugan. At one stage, Kalimuthu wanted to make settlement of his properties with an intention to avoid the possible claims from his own step brothers and step sister ie., the defendants 3 to 7 in O.S.No.120 of 2011. Kalimuthu had disclosed the same to Murugan and immediately Murugan brought Kalimuthu to the Registrar's office and registered two Wills dated 25.05.2004, one Will in favour of Murugan in which most of the properties were bequeathed and another one in favour of Mariappan. However no property was bequeathed to Dr.V.K.Marimuthu.

(iii) As a matter of fact, Kalimuthu had not consulted with his step brother Kaliappan and his wife Chinnammal, before executing the said two registered Wills. However Kalimuthu had informed about the execution of the two registered Wills to Kaliappan and Chinnammal after some time. At that time, Kaliappan and Chinnammal had given their opinion to Kalimuthu that all the children of them would be given equitable and proper manner of distribution of the properties of Kalimuthu to avoid discrimination and misunderstanding among the children. Therefore, at the instance of Kaliappan and Chinnammal and according to the advise of his friend R.Seenivasan, who is an advocate-cum-notary, Kalimuthu had executed a subsequent Will dated 13.03.2005 bequeathing his properties to all the aforesaid three children cancelling unequivocal terms of the earlier registered Wills dated 25.05.2004. The unregistered Will dated 13.03.2005 came into effect on and from 29.12.2010 on which date Kalimuthu had died. On and from 29.12.2010, the plaintiff in O.S.No.120 of 2011 is entitled to and is in possession and enjoyment of the plaint schedule properties and he sought for the relief of declaration and injunction. The plaintiff in O.S.No.148 of 2012 has also sought for the relief of declaration, recovery of possession and also for partition of 5th item of the suit properties, relying upon the unregistered Will dated 13.03.2005.

4. The brief case of the first defendant is as follows:

According to the first defendant, the unregistered Will dated 13.03.2005 is a fabricated document. Kalimuthu had not given any property to Dr.V.K.Marimuthu, the plaintiff in O.S.No.148 of 2012, since Dr.V.K.Marimuthu was educated with the funds provided by the testator and he had lucrative practice in his profession and he is well settled in the life. The first defendant disputed the execution of the unregistered Will dated 13.03.2005. According to the first defendant, the Will is a forged one. Kalimuthu, being a bachelor, was very affectionate towards the first defendant, since he is the last son in his family and reared and nurtured the first defendant as his foster son. Kalimuthu was very independent in his life, though he was attached to the family to the plaintiff and the first defendant and he used to take decisions on his own without consulting to the opinion or advise rather to the interference of others. During his life time, Kalimuthu never entrusted the management of his properties to the plaintiff in



O.S.No.120 of 2011. Kalimuthu was managing his properties through the first defendant. Kalimuthu was not under the care and custody of the first defendant though out his life. The first defendant had not brought Kalimuthu to the Sub Registrar's office to execute the Will dated 25.05.2004. In fact, Kalimuthu had gone to the Sub Registrar's office in Bodinaickanur with the help of his well wishers and executed the Will dated 25.05.2004 on his own very will and volition and in a sound and disposing state of mind. On 16.06.2009, he handed over the said two registered Wills to the first defendant, when he went to Vasan Eye Care Centre, Madurai for taking treatment for the ailment in his left eye. He had never revealed to Kaliappan and Chinnammal about the execution of the unregistered Will dated 13.03.2005. The plaintiff had forged the impugned Will dated 13.03.2005 with the active connivance and able assistance of R.Seenivasan, Advocate-cum-Notary who is the close friend of Dr.V.K.Marimuthu, the plaintiff in the suit in O.S.No.148 of 2005 from his college days. Kalimuthu had never cancelled the registered Wills dated 25.05.2004. The said two registered Wills are the last Wills of the testator Kalimuthu. K.Mariappan was never in possession and enjoyment of the first item of the property. Dr.V.K.Marimuthu has no right, title or interest over the suit properties described in O.S.No.148 of 2012.

The testator Kalimuthu had died on 29.12.2010. On his death, the registered Wills dated 25.05.2004 has come into effect and on and from 29.12.2010, the first defendant is in possession and enjoyment of the properties that were bequeathed to him under the said two Wills as absolute and true owner. The plaintiffs cannot claim right, title, interest or possession over the properties. In these circumstances, the first defendant prayed for dismissal of the suit.

5. Before the trial Court on the side of the plaintiff, four witnesses were examined and 18 documents viz., Exs.A.1 to A.18 were marked and on the side of the defendants, three witnesses were examined and 75 documents viz., Exs.B.1 to B.75 were marked. The Court documents were marked as Exs.C.1 to C.3. The trial Court, after taking into consideration the case of both parties, dismissed both the suits. Aggrieved over the dismissal of the suits, the plaintiffs filed the appeals in A.S.Nos.16 and 17 of 2014 and the lower Appellate Court reversed the judgment and decree of the trial Court and decreed both the suits. Aggrieved over the same, the first defendant has filed the above Second Appeals.

6. Heard Mr.A.Arumugam, learned Counsel appearing for the appellant and Mr.T.K.Gopalan and Mr.K.P.Narayana Kumar learned Counsel appearing for the respondents.

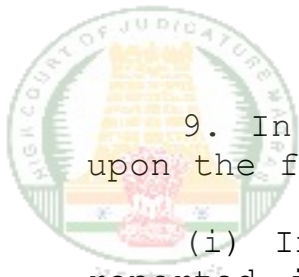
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7. At the time of admission of the above Second Appeal, the following Substantial Questions of Law arose for consideration:



3. Whether the lower appellate Court has rendered a perverse finding upholding the validity of Ex.A.3 - Will which was allegedly executed at Bodinayackanoor and authenticated by a Notary Public from Usilampatti, whereas the two previous registered Wills dated 25.05.2004 had been registered in the office of the Sub-Registrar functioning at Bodinyackanoor itself?

4. Whether the lower appellate Court committed an error in law resulting in miscarriage of justice by not considering the fact that the plaintiff in his petition under Ex.B.1 had not referred to Ex.A.3-Will?"

8. Mr.A.Arumugam, learned Counsel appearing for the appellant submitted that since Exs.A.1 and A.2 Wills dated 25.05.2004 were admitted in Ex.A.3 Will dated 13.03.2005, it is not necessary for the first defendant to prove the execution and attestation of the earlier registered Wills relied on by him. The learned Counsel submitted that the plaintiffs have miserably failed not only in proving the execution of Ex.A.3 Will dated 13.03.2005, but also in explaining the suspicious circumstance surrounding the execution and attestation of the impugned Will. The learned Counsel further submitted that Exs.A.1 and A.2 Wills being registered Wills, have more evidentiary value than Ex.A.3 unregistered Will. The learned Counsel further submitted that P.W.4, R.Seenivasan was appointed as notary by the Government of Tamil Nadu authorizing him to practice as notary only in Usilampatti Taluk of Madurai District and he is not entitled to function as notary outside the authorized area of practice. But P.W.4 had gone to Bodinaickanur of Theni District and scribed, attested and authenticated the impugned Will at Bodinaickanur in which place he was not authorized to act as notary and hence, the said notarial act of P.W.4 is a clear contravention of the order passed by the Government of Tamil Nadu. According to the learned Counsel, the evidence of P.W.4 clearly establishes the suspicious circumstance in executing Ex.A.3 Will. The learned Counsel submitted that Ex.A.3 Will was not established by the plaintiff, hence, the lower Appellate Court ought not to have reversed the judgment and decree



9. In support of his contentions, the learned Counsel relied upon the following judgments:

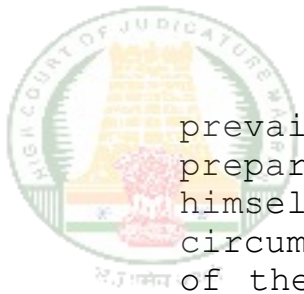
(i) In **Santhosh Hazari Vs. Purushottam Tiwari (Dead) by LRs** reported in **2001(1) CTC 505**, the Honourable Apex Court held as follows:

"While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See *Madhusudan Das Vs. Smt. Narayani Bai & Ors.*, AIR 1983 SC114). The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judges notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact."

(ii) In **Gorantla Thataiah Vs. Thotakuram Venkata Subbaiah and Others** reported in **AIR 1968 SUPREME COURT 1332**, the Honourable Supreme Court held as follows:

"It is well-established that in a case in which a will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator it is for those who prompound the will to remove that suspicion. What are suspicious circumstances must be judged in the facts and circumstances of each particular case. -If, however, the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending-7 the execution of the will and in appreciating the evidence in such a case, the court should proceed in a vigilant and cautious manner. It is observed in Williams on "Executors and Administrators", Vol. I, 13th Ed., p. 92:

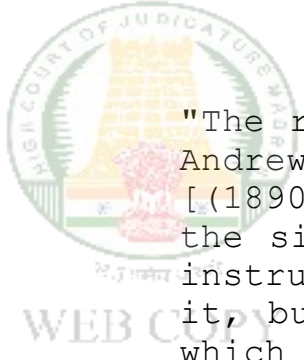
"Although the rule of Roman Law that 'Qui se scripsit haeredem' could take no benefit under a will does not



prevail in the law' of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased."

According to the decision in *Fulton v. Andrew*('), "those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing, the righteousness of the transaction ". "There is however no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further enquiry is shut out". In this case, the Lord Chancellor, Lord Cairns, has cited with approval the well-known observations of Baron Parke in the case of *Barry v. Butlin* (2). The two rules of law set out by Baron Parke are : "first, that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is- the last will of a free and capable testator"; "the second is, that, if a party *rites or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed,- and it is judicially satisfied that the paper propounded does express the true will of the deceased." In *Sarat Kumari Bibi v. Sakhi Chand & Ors.*, (3) the Judicial Committee made it clear that "the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the (1) (1875) L.R.7H.L.448. (2) (1838) 2 Moo. P.C.480,482. (3) 56 I.A. 62.

execution of the will and receives benefit under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and satisfy the conscience of the court that the instrument propounded is the last will of the testator." This view is supported by the following observations made by Lindley and Davey, L. J., in *Tyrrell v. Painton*(1):



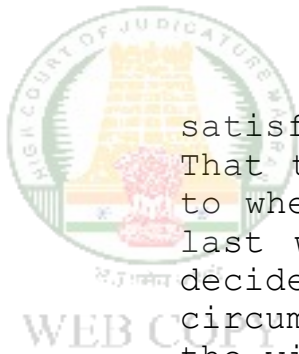
"The rule in Barry v. Butline (2 Moo. P.C.480); Fulton v. Andrew [(1875) L.R. 7,H.L. 448]; and Brown v. Fisher [(1890) 63 L.T. 465] is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will." (Lindley, L.J.).

"It must not be supposed the principle in Barry v Butlin (2 Moo. P.C. 480) is confined to cases where the person who prepares the will is the person who takes the benefit under it-that is one state of things which raises a suspicion; but the principle is that wherever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator the Court ought not to pronounce in favour of it unless that suspicion is removed." (Davey, L.J.)."

(iii) In **Smt.Jaswant Kaur Vs. Smt.Amrit Kaur and others** reported in **AIR 1977 (SC) 74**, the Honourable Apex Court held as follows:

"10(4) . Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of



satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

(iv) In **Kali Prasad Agarwalla (dead by LRs) and others Vs. M/s Bharat Coking Coal Ltd., and Others** reported in **AIR 1989 SUPREME COURT 1530**, the Honourable Apex Court held as follows:

"18. It was, however, urged for the appellants that there is no proper pleading or issue for determination of the afore-said question and the evidence let in should not be looked into. It is too late to raise this contention. The parties went to trial knowing fully well what they were required to prove. They have adduced evidence of theft choice in support of the respective claims. That evidence has been considered by both courts below. They cannot now turn round and say that the evidence should not be looked into. This is a well accepted principle."

(v) In **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam** reported in **2003(1) CTC 308**, the Honourable Apex Court held as follows:

"8. To say will has been duly executed the requirements 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."

(vi) In **Jagdish Singh Vs. Madhuri Devi** reported in **2008(3) CTC 528**, the Honourable Apex Court held as follows:

"25. At the same time, however, the appellate court is expected, nay bound, to bear in mind a finding recorded by the trial court on oral evidence. It should not forget that the trial court had an advantage and opportunity of seeing the demeanour of witnesses and, hence, the trial court's conclusions should not normally be disturbed. No doubt, the appellate court possesses the same powers as that of the original court, but they have to be exercised with proper care, caution and circumspection. When a finding of fact has been recorded by the trial court mainly on appreciation of oral evidence, it should not be lightly disturbed unless the approach of the trial court in appraisal of evidence is erroneous, contrary to well-established principles of law or unreasonable."

(vii) In **Babu Singh and Others Vs. Ram Sahai Alias Ram Singh** reported in **(2008)14 Supreme Court Cases 754**, the Honourable Apex Court held as follows:

"14. In terms of Section 68 of the Act, although it is not necessary to call more than one attesting witness to prove due execution of a Will but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more attesting witnesses need not be examined at all. Section 68 of the Act lays down the mode of proof. It envisages the necessity of more evidence than mere attestation as the words 'at least' have been used therein. When genuineness of a Will is in question, apart from execution and attestation of Will, it is also the duty of a person seeking declaration about the validity of the Will to dispel the surrounding suspicious circumstances existing if any. Thus, in addition to proving the execution of the Will by examining the attesting witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the Will would, inter alia, depend thereupon."

(viii) In **Bharpur Singh and Others Vs. Shamsheer Singh** reported in **(2009)3 Supreme Court Cases 687**, the Honourable Apex Court held as follows:

"14. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925



and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.

16. In H.Venkatachala Iyengar V. B.N.Thimmajamma case, it was also held that the propounder of will must prove:

(i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and

(ii) when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and

(iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion.

In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.

It was moreover held:-

"20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the will 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."

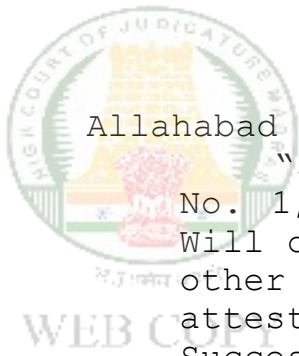
(ix) In **Balathandayutham and another Vs. Ezhilarasan** reported in **(2010)5 Supreme Court Cases 770**, the Honourable Apex Court held as follows:

"14. When a Will is surrounded by suspicious circumstances, the person propounding the Will has a very heavy burden to discharge. This has been authoritatively explained by this Court in the case of H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors, AIR 1959 SC 443. Justice P.B. Gajendragadkar, as His Lordship then was, in para 20 of the judgment, speaking for the Three Judge Bench in H. Venkatachala (supra) held that in a case where testator's mind is feeble and he is debilitated and there is not sufficient evidence as to the mental capacity of the testator or where the deposition in the Will is unnatural, improbable or unfair in the light of the circumstances or it appears that the bequest in the Will is not the result of testator's free will and mind, the Court may consider that the Will in question is encircled by suspicious circumstances."

(x) In **D.R.Rathna Murthy Vs. Ramappa** reported in **(2011)1 Supreme Court Cases 158**, the Honourable Apex Court held as follows:

"9. Undoubtedly, the High Court can interfere with the findings of fact even in the Second Appeal, provided the findings recorded by the courts below are found to be perverse i.e. not being based on the evidence or contrary to the evidence on record or reasoning is based on surmises and misreading of the evidence on record or where the core issue is not decided. There is no absolute bar on the re-appreciation of evidence in those proceedings, however, such a course is permissible in exceptional circumstances. (Vide Rajappa Hanamantha Ranoji v. Mahadev Channabasappa & Ors., AIR SC 2000 2108; Hafazat Hussain v. Abdul Majeed & Ors., (2001) 7 SCC 189; and Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., JT 2010 (5) SC 534)"

<https://hcservices.ecourts.gov.in/hcservices/>
(xi) In **Balkrishna Das Agarwal Vs. Smt.Radha Devi and Others** reported in **AIR 1989 ALLAHABAD 133**, the Division Bench of



Allahabad High Court held as follows:

"38. Coming now to the will set up by the defendant No. 1, we must bear in mind that the mode of proving a Will does not ordinarily differ from that of proof of any other document except as to the special requirement of attestation prescribed by Section 63 of the Indian Succession Act. The onus of proof rests squarely on the person propounding a Will and in the absence of any suspicious circumstances surrounding its execution, the proof of testamentary capacity and testator's signatures as required by law would normally suffice in discharging the onus. Where, however, suspicious circumstances are found to exist, the propounder of the Will must explain them and dispel all the suspicions to the satisfaction of the Court before it is accepted as genuine. This would be so even in those cases where such a plea has not been raised and on proved circumstances had given rise to doubt. In such cases also, it is for the propounder to satisfy the conscience of the Court. These suspicious circumstances may be as to the genuineness of the testator's signatures, his mental condition, the nature of disposition being unnatural and improbable or unfair in the light of the relevant circumstances or may consist of such other indications inherent in the Will as would show that the testator's mind was not free. In any of such cases, the propounder must remove all legitimate suspicions to the entire satisfaction of the Court. These rules are based on sound judicial principles and on ground of public policy as the Will often, if not always, comes under challenge only when the testator has already departed from this world and cannot, therefore, assist the Court enquiring into its genuineness in any manner."

(xii) In **Ramalakshmi alias Ranjitham Vs. Janaki and others** reported in **1993 (1) MLJ 617**, this Court held as follows:

"3. I do not think that the order of the trial court can be interfered with. When the counsel has made the endorsement he knew all the implications thereof. Therefore there is no point in saying subsequently after a week that it is necessary that two more witnesses have to be examined. It is stated that the endorsement was made inadvertently. It cannot be believed. The counsel has not filed any affidavit stating so. The petitioner is rather incompetent to say that. Then the genuineness of an alleged Will is in question and the evidence has to be let in by the plaintiff it would be just and necessary that all the witnesses who would speak as to the genuineness of the will should be examined on the same day as in this case the learned trial Judge has examined the witnesses and the counsel for the plaintiff."

4. If one witness was examined and the counsel has made an endorsement stating that the plaintiffs' side is



closed the plaintiff shall stand by that. Merely because the plaintiff states that it was due to inadvertence the counsel made the endorsement the case cannot be reopened. It is stated that by reopening the case the opposite side will not be prejudiced. It is not correct. When the first witness has been examined as to the genuineness of the Will he will know the line of the cross examination by the opposite side. If the next witness is to be examined not on the same day, but subsequently that witness will know as to what questions would be put to him in the cross examination. Therefore naturally the cross-examination will not be effective. This is how the other side would be prejudiced."

(xiii) In **Dharman and six others Vs. Marimuthu** reported in **1996(II) CTC 279**, this Court held as follows:

"17. The various decisions referred to above would go to show that if on the face of the document and the nature of the transaction covered by the document appears to be either unconscionable or unnatural one, the burden of proving that the transaction was not induced by undue influence was considered uniformly to rest with the beneficiary under the document. That apart, the various decisions noticed also point out sufficiently indicating as to what type of circumstances present in a particular or given case could be taken to provide the necessary indicia or test to form an opinion about the unnatural or unconscionable character of the transaction. In the case on hand the contents of the gift deed in question and the consequences that may be brought about if the gift under Ex.A-1 is sustained and enforced are to be analysed in the light of the principles referred to above. Some of the admitted facts and stark realities flowing there from cannot escape the attention of any judicial forum dealing with any issue before it objectively and judiciously.

The materials on record would go to show in this case at any rate, that the deceased first defendant had three daughters, who were married and have their own children, that the plaintiff is only the brother's son of the first defendant who executed the gift deed that the plaintiff had another brother and the first defendant also had a brother and that even as admitted in the very plaint itself the deceased first defendant was an inpatient in the Ariyalur Government Hospital from 22.9.77 and the plaintiff himself claims to have spent about Rs. 1,300 towards the first defendant's medical expenses, though it is not stated by him as to when he became alright or what his ailment was and when he got discharged from the hospital. Further a perusal of the gift deed Ex.A-6 would

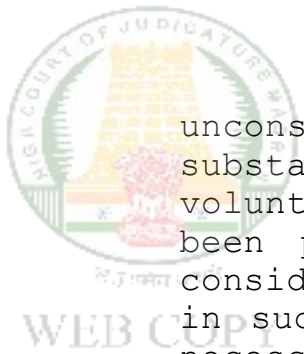
that it is not only cryptic but makes no mention of the daughters or about the so called misunderstandings between the first defendant and his



daughters or furnish any reasons for disinheriting completely his daughters and grand children. It is not also in dispute that the properties which were the subject matter of the Gift under Ex.A-6 are the only and the entire or totality of the properties owned and possessed by the first defendant and inspite of the same there is not even any recital incorporating any clause reserving any right for himself during his lifetime or any provision in the gift deed to revoke the same, if the plaintiff fails to take care of him Though normally, courts do not concern itself with a man making even an improvident gift or effecting a disposition of the property in a way that no right-minded person would be disposed to do so, such factors or circumstances appended with the execution of a gift may furnish a clue or serve as a pointer to the fact that the donor either did not intend it or that it was an unconscionable and unnatural transaction and in such circumstances the beneficiary under such transaction is bound in law to clear such suspicions or explain about the existence of some valid or other reason for such a disposition being made. It is in such circumstances, the Apex Court also on more than one occasion observed that if the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence lies heavily upon the beneficiary under the document, who was in a position to dominate the will of the other. In the case on hand, apart from the unreasonable nature of the gift as disclosed from the contents of the document and also from the facts and circumstances of the case, the reaction of the 1st defendant on coming to know of the whole affair, would show that the first defendant who executed the gift on 1.10.1977 has issued a notice through his counsel on 17.11.1977 resiling from the transaction giving out the circumstances under which such a document came to be executed, followed by the execution of a registered deed of cancellation on 25.11.1977 of the Gift deed dt. 1.10.1977. If the conglomeration of all these vital facts and important events are kept in the background of consideration as to whether the plaintiff has successfully substantiated the fact that the gift of the immovable property has been made 'voluntarily' the inevitable could be, in my view, only in the negative as has been found by the learned Trial Judge. The learned Trial Judge was prepared to give due weight to the indifferent condition of health of the executant in the light of the admissions in the plaint itself, the evidence tendered by the defendants as also some of the admissions made by the P.Ws. themselves that a person of the age and the condition of health of the deceased first defendant could not have had a sound disposing state of



mind and free will when the gift deed in question was executed. This finding of fact recorded by the learned Trial Judge has not been properly met by the learned First Appellate Judge before it could be disturbed and on the other hand, learned First Appellate Judge revelled in picking up holes and lapses in the evidence in an artificial manner unmindful of the practicalities of the situation and allowed assumptions triggered out of mere conjectures to overtake an objective adjudication to come to a conclusion that the first defendant was not only hale and healthy, but had the required sound disposing state of mind. Learned First Appellate Judge has also, in my view, miserably failed to keep into account the unnatural nature of the disposition and total absence of any reasons in the document for completely disinheriting all the daughters without even making any mention of the existence of such daughters and their heirs who would all figure as class-I heirs under the law of Succession. Thus, the method of dealing and manner of consideration of the materials on record by the learned First Appellate Judge, in my view, is grossly inadequate and thoroughly unsatisfactory and cannot have the approval of this Court, even in dealing with the same as a second Appellate Court, particularly, when the contra view and conclusions expressed by the learned Trial Judge appears to be more reasonable and convincing and conform to the legal norms and rational standards of adjudication for being readily accepted, in my view, on an over-all consideration of both the Judgments, learned First Appellate Judge in my view has failed to properly come into the grips of the relevant and vital aspects of the case as also the findings recorded by the learned Trial Judge and the reasons assigned therefor. The principles uniformly laid down in the decisions of Court as noticed above, have been totally ignored and by passed in the consideration by the first appellate judge. The fact that the Written Statement did not contain a positive accusation of any undue influence having been played by the plaintiff upon the deceased first defendant cannot be blown out of proportion in the tenth of the very admissions contained in the plaint about certain facts which would go to show beyond doubt if at all, only the dominating position in which the plaintiff was placed viz. the first defendant rather than going to exculpate the plaintiff from the charge of having exercised such undue influence. It is not the specific mention of the very word undue influence that really matters but the existence of the relevant facts in the case pleaded and proved. The absence of the word undue influence is only relevant and sufficient. As noticed earlier, the beneficiary under document of the nature under consideration in this case with an unreasonable and



unconscionable disposition is obliged not only to substantiate that the deed of gift was executed voluntarily but also without any undue influence having been practised upon the donor. If the question to be considered is as to whether the plaintiff has succeeded in such an effort, which is essential and which becomes necessary for the plaintiff/donee in this case to convince the court before he is allowed to retain the benefit of the transaction, the answer, in my view, has to be in the negative as held by the learned Trial Judge. In view of the above, I consider it more appropriate among the two judgments of the learned Trial Judge and that of the learned First Appellate Judge to opt for the view, and conclusions and findings arrived at and recorded by the learned Trial Judge, which are more convincing, acceptable and keeping in tune with the settled proposition of law in the context of a peculiar case of the nature under consideration in this case. Consequently I am unable to agree with the learned counsel for the respondent no case has been made out in this appeal for interference at the instance of the defendants."

(xiv) In **Bhagavathy Pillai and another Vs. Savarimuthu and another** reported in **AIR 1976 MADRAS 124**, this Court held as follows:

"17. The various decisions referred to above would go to show that if on the face of the document and the nature of the transaction covered by the document appears to be either unconscionable or unnatural one, the burden of proving that the transaction was not induced by undue influence was considered uniformly to rest with the beneficiary under the document. That apart, the various decisions noticed also point out sufficiently indicating as to what type of circumstances present in a particular or given case could be taken to provide the necessary indicia or test to form an opinion about the unnatural or unconscionable character of the transaction. In the case on hand the contents of the gift deed in question and the consequences that may be brought about if the gift under Ex.A-1 is sustained and enforced are to be analysed in the light of the principles referred to above. Some of the admitted facts and stark realities flowing there from cannot escape the attention of any judicial forum dealing with any issue before it objectively and judiciously.

The materials on record would go to show in this case at any rate, that the deceased first defendant had three daughters, who were married and have their own children, the plaintiff is only the brother's son of the first defendant who executed the gift deed that the plaintiff had another brother and the first defendant also had a



brother and that even as admitted in the very plaint itself the deceased first defendant was an inpatient in the Ariyalur Government Hospital from 22.9.77 and the plaintiff himself claims to have spent about Rs. 1,300 towards the first defendant's medical expenses, though it is not stated by him as to when he became alright or what his ailment was and when he got discharged from the hospital. Further a perusal of the gift deed Ex.A-6 would go to show that it is not only cryptic but makes no mention of the daughters or about the so called misunderstandings between the first defendant and his daughters or furnish any reasons for disinheriting completely his daughters and grand children. It is not also in dispute that the properties which were the subject matter of the Gift under Ex.A-6 are the only and the entire or totality of the properties owned and possessed by the first defendant and inspite of the same there is not even any recital incorporating any clause reserving any right for himself during his lifetime or any provision in the gift deed to revoke the same, if the plaintiff fails to take care of him Though normally, courts do not concern itself with a man making even an improvident gift or effecting a disposition of the property in a way that no right-minded person would be disposed to do so, such factors or circumstances appended with the execution of a gift may furnish a clue or serve as a pointer to the fact that the donor either did not intend it or that it was an unconscionable and unnatural transaction and in such circumstances the beneficiary under such transaction is bound in law to clear such suspicions or explain about the existence of some valid or other reason for such a disposition being made. It is in such circumstances, the Apex Court also on more than one occasion observed that if the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence lies heavily upon the beneficiary under the document, who was in a position to dominate the will of the other. In the case on hand, apart from the unreasonable nature of the gift as disclosed from the contents of the document and also from the facts and circumstances of the case, the reaction of the 1st defendant on coming to know of the whole affair, would show that the first defendant who executed the gift on 1.10.1977 has issued a notice through his counsel on 17.11.1977 resiling from the transaction giving out the circumstances under which such a document came to be executed, followed by the execution of a registered deed of cancellation on 25.11.1977 of the Gift deed dt. 1.10.1977. If the conglomeration of all these vital facts and important events are kept in the background of consideration as to whether the plaintiff



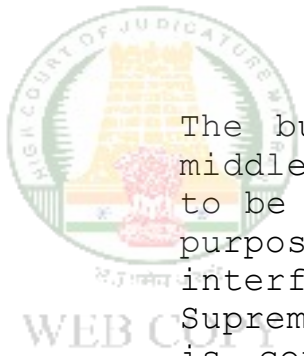
has successfully substantiated the fact that the gift of the immovable property has been made 'voluntarily' the inevitable could be, in my view, only in the negative as has been found by the learned Trial Judge. The learned Trial Judge was prepared to give due weight to the indifferent condition of health of the executant in the light of the admissions in the plaint itself, the evidence tendered by the defendants as also some of the admissions made by the P.Ws. themselves that a person of the age and the condition of health of the deceased first defendant could not have had a sound disposing state of mind and free will when the gift deed in question was executed. This finding of fact recorded by the learned Trial Judge has not been properly met by the learned First Appellate Judge before it could be disturbed and on the other hand, learned First Appellate Judge revelled in picking up holes and lapses in the evidence in an artificial manner unmindful of the practicalities of the situation and allowed assumptions triggered out of mere conjectures to overtake an objective adjudication to come to a conclusion that the first defendant was not only hale and healthy, but had the required sound disposing state of mind. Learned First Appellate Judge has also, in my view, miserably failed to keep into account the unnatural nature of the disposition and total absence of any reasons in the document for completely disinheriting all the daughters without even making any mention of the existence of such daughters and their heirs who would all figure as class-I heirs under the law of Succession. Thus, the method of dealing and manner of consideration of the materials on record by the learned First Appellate Judge, in my view, is grossly inadequate and thoroughly unsatisfactory and cannot have the approval of this Court, even in dealing with the same as a second Appellate Court, particularly, when the contra view and conclusions expressed by the learned Trial Judge appears to be more reasonable and convincing and conform to the legal norms and rational standards of adjudication for being readily accepted, in my view, on an over-all consideration of both the Judgments, learned First Appellate Judge in my view has failed to properly come into the grips of the relevant and vital aspects of the case as also the findings recorded by the learned Trial Judge and the reasons assigned therefor. The principles uniformly laid down in the decisions of Court as noticed above, have been totally ignored and by passed in the consideration by the first appellate judge. The fact that the Written Statement did not contain a positive averment of any undue influence having been played by the plaintiff upon the deceased first defendant cannot be blown out of proportion in the tenth of the very



admissions contained in the plaint about certain facts which would go to show beyond doubt if at all, only the dominating position in which the plaintiff was placed viz. the first defendant rather than going to exculpate the plaintiff from the charge of having exercised such undue influence. It is not the specific mention of the very word undue influence that really matters but the existence of the relevant facts in the case pleaded and proved that is only relevant and sufficient. As noticed earlier, the beneficiary under document of the nature under consideration in this case with an unreasonable and unconscionable disposition is obliged not only to substantiate that the deed of gift was executed voluntarily but also without any undue influence having been practised upon the donor. If the question to be considered is as to whether the plaintiff has succeeded in such an effort, which is essential and which becomes necessary for the plaintiff/donee in this case to convince the court before he is allowed to retain the benefit of the transaction, the answer, in my view, has to be in the negative as held by the learned Trial Judge. In view of the above, I consider it more appropriate among the two judgments of the learned Trial Judge and that of the learned First Appellate Judge to opt for the view, and conclusions and findings arrived at and recorded by the learned Trial Judge, which are more convincing, acceptable and keeping in tune with the settled proposition of law in the context of a peculiar case of the nature under consideration in this case. Consequently I am unable to agree with the learned counsel for the respondent no case has been made out in this appeal for interference at the instance of the defendants."

(xv) In **Rajiah Nadar Vs. Manonmani Ammal** reported in **AIR 1999 MADRAS 213**, this Court held as follows:

"23. The scope of interference of findings of fact in a Second Appeal and the rulings on the said issue are as old as the Code of Civil Procedure and in the words of the Supreme Court in Ramachandra v. Ramalinga, it is an old familiar question. The jurisdiction of the High Court under Section 100 C.P.C. is very peculiar. It is neither as wide as under Section 96 (Appeals) nor as restricted as under Section 115 C.P.C. (Revision). The term "question of law" and "substantial question of law" as occurring in Section 100 C.P.C. both prior to and after 1976 Amendment has always been understood and interpreted as to include questions of fact as concluded by the Courts below which would be vitiated if based on no evidence or on perverted evidence or on evidence resulting in conclusions which could not have been arrived at by any reasonable person or by completely ignoring the material evidence on record.



The bulk of the Second Appeal litigants, belong to the middle class and poor sections of the society and it has to be borne in mind that a Second Appeal for all practical purposes would be the final stage of the litigation and interference by or even admission of any appeal by the Supreme Court as against the judgments of the High Court, is conceivable only in a very few cases. As such the Supreme Court as well as the various High Courts have always been alive to the situation that in the interest of justice it would be necessary not to ignore improper appreciation of evidence or to turn a blind eye to glaring mis-reading of the evidence by the Subordinate Courts. In fact in the very judgments relied upon by learned counsel for the respondent such as reported in Ramachandra v. Ramalinga, and Navaneethammal v. Arjuna Chetty, it has been held that if a finding of fact had been recorded by the appellate Court without any evidence then such a finding can be successfully challenged in Second Appeal and if there were circumstances of compelling reasons warranting such interference. Therefore, the fact remains that a question of fact is not a taboo for Section 100, C.P.C. It is also well settled that an appellate Court cannot interfere and set aside the findings of the trial Court which had the advantage of watching the demeanour of the witnesses, unless there are very strong and compelling reasons to reverse the judgment."

(xvi) In **R.Vasanthi Vs. Janaki Devi and Others** reported in **1999(III) CTC 378**, this Court held that the propounder has to prove the due execution and attestation of the Will.

(xvii) In **A.Sankaranarayanan Vs. Mani** reported in **2009(3) CTC 814**, this Court held as follows:

"14. Moreover one has to see the facts and circumstances of the present case. Here is a case where admittedly the plaintiff was pregnant at the time of the marriage. Therefore the close relatives of the plaintiff were not present resulting in the exchange of garland at the temple. The mere statement that the marriage was solemnised as per the the custom and usage cannot be put against the plaintiff to say that the marriage has not been solemnised as per the custom and usage. Further the defendant has not established what is the actual custom prevailing in the community even though the plaintiff has stated that tying a Thali is part of a custom. Moreover the Court has to see the circumstances under which the marriage was solemnised. It is not the case of the defendant that the marriage has been solemnised by force or coercion but on the other hand, it is the specific case that the marriage has not taken place on that date.



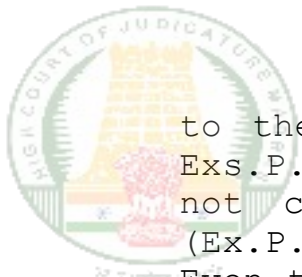
Therefore taking into consideration of the said fact, this Court finds that no interference is called for. Therefore it is to be seen that the Court below has considered the entire evidence on record before coming to the conclusion. The Court below has also considered the conduct of the parties and held that the evidence of the defendant is not believable as against the evidence of the plaintiff. In this connection it is useful to refer the recent judgment of the Supreme Court reported in 2008 1 SSC 497 Jagdishsingh vs. Maduridevi wherein the Hon'ble Supreme Court was pleased to hold that when the Court of regional jurisdiction has considered the oral evidence and recorded the findings after issuing demeanour of witness and having applied his mind, the Appellate Court will be to keep that in mind and exercise proper care and caution while disturbing the said findings of the Court below. The Hon'ble Supreme Court has also said that the Trial Court has got the chance of seeing and hearing the witnesses. Hence following the said judgment of the Hon'ble Supreme Court, this Court finds that the judgment and decree of the Court below does not warrant any interference. Accordingly the appeal is dismissed. No costs. Consequently, the C.M.P. is closed."

(xviii) In **J.S.Vasudevan Vs. R.Murari and others** reported in **2014-2-L.W.816**, this Court held as follows:

"23. The Supreme Court in K. Laxmanan v. Thekkayil Padmini, (2009) 1 SCC 354, held that even in the absence of suspicious circumstances surrounding the Will, the propounder must satisfy the conscience of the Court with regard to the due execution of Will.

"19. When there are suspicious circumstances regarding the execution of the will, the onus is also on the propounder to explain them to the satisfaction of the court and only when such responsibility is discharged, the court would accept the will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testators mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testators mind was not free. In such a case, the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the

26. The plaintiff miserably failed to explain the suspicious circumstances to clear the doubt with regard

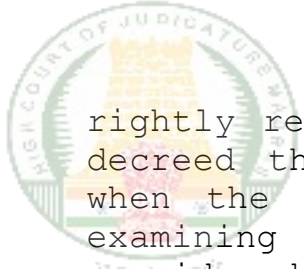


to the genuineness of the will. The receipts marked in Exs.P.2 to P.4 though indicates the execution of Will, is not clear as to whether it was the very same Will (Ex.P.1), which was referred to in the said documents. Even though the plaintiff relied on Exs.P.2 to P.4 to the effect that payments were made immediately after the death of testatrix and in accordance with the condition of will, he has come up with a case that he has seen the Will for the first time only in 2006. The evidence of P.W.1 goes contrary to the recitals in Exs.P.2 to P.4. This is more on account of the fact that the notary failed to indicate as to whether he has entered the execution of this document in his register, kept under the Notaries Act and Rule. The plaintiff has not summoned the notary register maintained by the notary. The plaintiff has just said that the notary is no more. The Will was typed keeping the place earmarked for "date" blank. It was later filled up with pen. There is no evidence before this Court as to who filled up the date and with whose handwriting it was made. The plaintiff was expected to clear all these doubts. However, the plaintiff miserably failed in all aspects to prove the doubt with regard to due execution of Will. Therefore I am of the view that the plaintiff is not entitled to a decree on the basis of the Will."

(xix) In **V.R.Kamath Vs. Divisional Controller, Karnataka State Road Transport Corporation and Others** reported in **AIR 1997 KARNATAKA 275**, the Karnataka High Court held as follows:

"7. It is mentioned at the Bar that many litigants are in far away places and it is difficult to secure their presence for attestation and in view of the urgency, some times the endorsement regarding administration of oath/affirmation might be obtained in the absence of parties and consequently the transactions may not be entered in the Register. Unfortunately, whenever exceptions are frequently made to the Rule, by relaxing the application of the Rule, the exceptions tend to replace the Rule, apart from the fact that no such exception can be made. There is no point in providing a Rule, if it is to be observed only in breach and the breach is to be justified by pleading practical difficulties and hardship. Observance of any Rule involves discipline and effort. So long as the Rules require that the transactions will have to be entered in the manner provided, they will have to be complied with."

10. Countering the submissions made by the learned Counsel for the first respondent submitted that the lower Appellate Court had
<https://hcservices.ecourts.gov.in/hcservices/> Mr.T.K.Gopalan, learned Counsel appearing for the



rightly reversed the judgment and decrees of the trial Court and decreed the suits. Further the learned Counsel submitted that when the plaintiff had proved Ex.A.3 Will dated 13.03.2005 by examining the attestors, the lower Appellate Court had rightly considered the same and decreed the suits. Further the learned Counsel submitted that the registration of the Will is not mandatory and therefore, an unregistered Will shall have the same effect as that of a registered Will. The learned Counsel also submitted that a registered Will can be cancelled or revoked by an unregistered Will. Further the learned Counsel submitted that when the notarization of a Will is not required mere affixing the seal of the Advocate which describes him as notary public shall not make the genuine Will as an invalid Will. Further the learned Counsel submitted that a Will can be established only by examining the attestors as contemplated under Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act, therefore, the attestation made by P.W.4 shall not be put against the plaintiff for proving Ex.A.3 Will. Further the learned Counsel also submitted that the affixture of the signature by P.W.4 shall not make Ex.A.3 Will suspicious. In these circumstances, the learned Counsel submitted that the judgment and decrees of the lower Appellate Court do not warrant any interference.

11. In support of his contentions, the learned Counsel for the first respondent relied upon the following judgments:

(i) In **Benga Behera and another Vs. Braja Kishore Nanda and Others** reported in **2008-1-L.W.241**, the Honourable Apex Court held as follows:

"40. It is now well settled that requirement of the proof of execution of a Will is the same as in case of certain other documents, for example Gift or Mortgage. The law requires that the proof of execution of a Will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove execution and attestation of the Will. Further, it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. (See *Madhukar D. Shende v. Tarabai Aba Shedage*, (2002) 2 SCC 85; *Janki Narayan Bhoir v. Narayan Namdeo Kadam*, (2003) 2 SCC 91 and *Bhagatram v. Suresh and Others*, (2003) 12 SCC 35)."

(ii) In **Mariammal and another Vs. P.Indirani and others** reported in **2010(1) CTC 652**, this Court held as follows:

"43. As rightly pointed out by the learned counsel appearing for the second defendant, the first appellate court has unnecessarily shifted the burden of



establishing the forgery of the Will on the second defendant. It is the fundamental law of evidence that the person who pleads forgery should come out with cogent evidence to establish the plea of forgery. The second defendant, who has come to establish the Will, Ex.B6 cannot be expected to prove the negative. It is only the person who alleges forgery will have to lead evidence touching upon such a plea. No evidence is available on record to establish that Ex.B6 was forged by defendants 1 and 2."

12. On a careful consideration of the materials available on record, the submissions made by the learned Counsel appearing on either side and also the judgments relied upon by the learned Counsel appearing on either side, it could be seen that the first defendant and the plaintiffs in both the suits are brothers and sons of one V.Kaliappan. Dr.V.K.Marimuthu, the plaintiff in O.S.No.148 of 2012 is the eldest son and K.Mariappan, the plaintiff in O.S.No.120 of 2011 is the second son and K.Murugan, the first defendant in both the suits is the third son of the said V.Kaliappan. The said K.Murugan has filed the above Second Appeals. The defendants 3 to 7 in O.S.No.120 of 2011 are brothers and sister and they are the children of one Kandasamy Gounder through his second wife. The said Kandasamy Gounder and the father of V.Kaliappan are brothers. The said Kandasamy Gounder had only one son viz., Kalimuthu through his first wife.

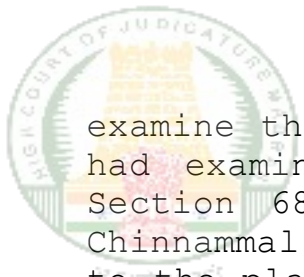
13. The defendants 2 to 4 in the suit in O.S.No.148 of 2012 are the tenants under the first defendant in respect of item No.1. The defendants 6 to 10 are the children of Kandasamy Gounder through his second wife. During his life time, the said Kalimuthu executed two Wills dated 25.05.2004 which were marked as Exs.A.1 and A.2 in favour of Murugan, the first defendant/appellant and Mariappan, the plaintiff in O.S.NO.120 of 2011. Admittedly both the Wills are registered Wills. Subsequently, Kalimuthu had executed Ex.A.3 - unregistered Will dated 13.03.2005 bequeathing his properties to all the three by cancelling the earlier registered Wills dated 25.05.2004. It is not in dispute that Kalimuthu had died on 29.12.2010. The testator Kalimuthu bequeathed his properties to the first defendant under Ex.A.1 Will and to the plaintiff in O.S.No.120 of 2011 under Ex.A.2 Will. However under those two Wills, no property was given to the second defendant viz., Dr.V.K.Marimuthu. The testator, K.Kalimuthu, is the uncle of the plaintiff and the defendants 1 and 2. Under Ex.A.3 Will dated 13.03.2005, the testator, Kalimuthu revoked the earlier two Wills and bequeathed his properties equally to all the three sons of Kaliappan viz., the plaintiff and the defendants 1 and 2.

<https://hcservices.ecourts.gov.in/hcservices> 14. In order to prove the due execution of Ex.A.3 Will dated 13.03.2005, the plaintiff examined P.W.2 and P.W.3 who are the attestors of the Will. P.W.2 was very categorical and specific

the mental
Will is

16. As already stated, notarization of a Will is not required. Similarly merely because the advocate had affixed the rubber stamp mentioning "notary" shall not make Ex.A.3 Will invalid. If a document is required to be notarised and if the notary public had gone beyond his jurisdiction and attested the document, then the stand taken by the learned Counsel for the appellant can be accepted. That apart a close friend of a beneficiary or the testator is not a disqualification for attesting the document. Admittedly, P.W.4 is a friend of K.Kalimuthu, the testator. The contention of the learned Counsel that the testator was aged 75 years and that P.W.4 was 50 years and therefore, they cannot be close friends, also cannot be accepted, for the reason that there is no bar that a person of 75 years should not have friendship with a person of 50 years.

<https://hcservices.courts.gov/in/hcservices/>



examine their mother before the trial Court. Since the plaintiff had examined two attstors and complied with the provisions of Section 68 of the Indian Evidence Act, the non-examination of Chinammal, who is the third attestor of the document is not fatal to the plaintiff's case. The first defendant could have examined their mother Chinammal on their side and disproved the case of the plaintiff. One can understand if the third attestor is a stranger to the first defendant, but, when the third attestor is their own mother and when the first defendant took a stand that Ex.A.3 Will is a fabricated and forged document, they could have examined Chinammal on their side, however they chose not to examine Chinammal on their side.

18. P.W.2, P.W.3 and P.W.4 deposed categorically and specifically about the due execution of Ex.A.3 and the mental capacity of the testator without any contradiction. Merely because P.W.4 had travelled from Usilampatti to Bodinaickanur shall not create any suspicion in the due execution of Ex.A.3 Will. Though there is no dispute with regard to the ratios laid down in the judgments relied upon by the learned Counsel for the appellant, since the plaintiff had established his case by examining the attestors of Ex.A.3 Will, the said judgments are not applicable to the case on hand. Since the testator had cancelled his earlier Wills which were marked as Exs.A.1 and A.2 in the last Will which was marked as Ex.A.3, it should be construed that Exs.A.1 and A.2 Wills are the Wills executed by the testator. I do not find any reason for disbelieving the evidence of P.W.2, P.W.3 and P.W.4. The lower Appellate Court, relying upon the oral and documentary evidences, rightly reversed the judgment and decrees of the trial Court and decreed the suit in O.S.No.120 of 2011 and passed a preliminary decree for partition in O.S.No.148 of 2012.

19. The appellant has filed the petition in M.P.(MD)No.4 of 2016 under Order 41 Rule 27 C.P.C. to receive the copy of the order dated 06.11.2015 passed by the Secretary to the Government, Law (Administration) Department, Government of Tamilnadu as additional evidence. In the affidavit filed in support of the petition, the appellant has stated that since P.W.4 had violated the provisions of Notaries Act, 1952 and unlawfully taken part in the execution of impugned Will dated 13.03.2005, he lodged a complaint to the Secretary, Law (Administration) Department, Government of Tamil Nadu, Chennai to take necessary action against P.W.4, the notary and that the State Government had cancelled the certificate of practice issued to P.W.4 and debarred him from practicing as notary. The appellant has stated that since the order was passed on 06.11.2015, the same cannot be produced before the Courts below. However the first respondent filed his counter affidavit and disputed the averments stated in the affidavit filed in support of the petition. The learned Counsel appearing for the plaintiff submitted that the order passed by the State Government dated 06.11.2015 was challenged before this Court in the writ



petition in W.P.No.41102 of 2015 and this Court had granted an order of interim stay on 05.01.2016 in M.P.No.1 of 2015 in W.P.No.41102 of 2015, and that writ petition is also pending as on today. It is also brought to the notice of this Court that subsequent to the passing of order dated 05.01.2016 in the writ petition, notary licence was also renewed by the State Government in favour of P.W.4. In these circumstances, I do not find the order dated 06.11.2015 passed by the State Government is material for deciding the issue involved in the Second Appeals. Hence, the petition filed by the appellant for marking the said document as additional document is liable to be rejected.

20. In these circumstances, I do not find any ground, much less any substantial question of law, to interfere with the judgment and decrees of the lower Appellate Court. The Second Appeals are liable to be dismissed. Accordingly, both the Second Appeals are dismissed. There shall be no order as to costs. Consequently, M.P.(MD)No.4 of 2016 is dismissed and the connected Miscellaneous Petitions are also dismissed.

Sd/-

Assistant Registrar(CS-III)

/TRUE COPY/

Sub Assistant Registrar

To

1. The Principal District Judge, Theni.
2. The Subordinate Judge, Theni.

+2 cc to MR.S.Ramachandran, ADVOCATE, SR NO:12356 & 12355
 +1 cc to MR.PT.S.Narendravasan, ADVOCATE, SR NO:12190
 +1 cc to MR.K.P.Narayanakumar, ADVOCATE, SR NO:12262

S.A. (MD) Nos.358 and 359 of 2015
03.03.2017

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MKV-Sv-MMS-SAR 2/15.3.2017/29P-7C