

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.08.2018

PRONOUNCED ON : 14-09-2018

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
AND
THE HONOURABLE MR. JUSTICE C. SARAVANAN

APPEAL SUIT NO. 219 OF 2014
AND
C.M.P. NO. 10989 OF 2018

1. K.P.Sethupathy
2. Loganayaki ... Appellants/Defendants 1 & 2

Versus

1. Parvathy
2. Manivel
3. K. Krishnamoorthy
4. Mani Vannan
5. Anand
6. Canara Bank
Sivagiri
Erode Taluk
represented by its Branch Manager

7. Karur Vysya Bank
Sivagiri
Erode Taluk
represented by its Branch Manager

8. Postmaster
Vilakethi Post Office
Erode Taluk, Erode

9. Pallavan Gramma Bank
Sivagiri
Erode Taluk
represented by its Branch Manager

10. State Bank of India
Kandasamy Palayam
Erode Taluk
represented by its Branch Manager

11.Erode District Cooperative Central Bank
Kodumudi
represented by its Branch Manager

12.Catholic Syrian bank
Kodumudi
represented by its Branch Manager

.. Respondents/Plaintiff & Defendants 3 to 13

Appeal filed under Section 96 read with Order 41 Rule 1 of CPC against the Judgment and Decree dated 30.07.2013 made in O.S. No. 47 of 2011 on the file of I Additional District Judge, Erode, Erode District.

For Appellant : Mr. P. Wilson, Senior Advocate
for Mr. V. Kadhirvelu

For Respondents : Mr. N. Manokaran for R1
Mr. L.P. Shanmugasundaram for R11
No appearance for RR2 to 10 & R12

JUDGMENT

R. SUBBIAH, J.

The defendants 1 and 2 in O.S. No. 47 of 2011 on the file of I Additional District Judge, Erode, are the appellants herein. The said suit was filed by the first respondent/plaintiff for partition and separate possession of the plaint schedule mentioned property, alternatively, to direct the first appellant/first defendant to pay a sum of Rs.12,000/- per month towards maintenance, till her life time. In the said suit the trial court granted a preliminary decree of partition in favour of the first respondent/plaintiff. Aggrieved by the same, the appellants/defendants 1 and 2 have come forward with this appeal.

2. The first respondent in this appeal is the plaintiff in the suit. She is the wife of one K.N. Ponnusamy. After the death of her husband K.N. Ponnusamy, she has filed the suit as against the son born to K.N. Ponnusamy through his second wife and the second wife of Late. K.N. Ponnusamy and arrayed them as defendants 1 and 2 respectively in the suit. The other defendants namely defendants 3 to 5 in the suit are the tenants in some of the properties described in the plaint schedule, who are shown as respondents 2 to 5 in this appeal. The respondents 6 to 12 in this appeal, who are arrayed as defendants 6 to 12 in the suit, are the financial institutions/Banks where the deceased K.N. Ponnusamy was maintaining savings/fixed deposit accounts as the case may be. Therefore, for the sake of convenience, the parties to this appeal shall be referred to as per their litigative status in the suit as plaintiff and

defendants. In effect, the appellants will be referred to as defendants 1 and 2 and the first respondent as plaintiff.

3. As per the plaint averments, the deceased Ponnusamy was the owner of large extent of agricultural lands and other properties in Vilakathi and Sivagiri Villages, Erode District. The deceased Ponnusamy also owned and possessed 35 acres of agricultural lands, some of which were cultivated by him personally while other properties were leased out to tenants. In addition, the deceased Ponnusamy owned a godown and rice mill which were also leased out to tenants. Out of the aforesaid properties, the deceased Ponnusamy was getting income of not less than Rs.1 lakh per month. After meeting the family expenses, the deceased Ponnusamy deposited the balance amount in the savings account which he maintained with the Banks/financial institutions. According to the plaintiff, the value of the movable and immovable properties owned and possessed by the deceased Ponnusamy was worth several crores of rupees. Thus, the aforesaid properties, which are morefully described in the plaint schedule, are the self-acquired properties of the deceased Ponnusamy.

4. According to the plaintiff, she did not beget a child through her husband Late. Ponnusamy and therefore her husband Late. Ponnusamy wanted to contract a second marriage and sought the consent of the plaintiff, but she refused to give such consent. Therefore, the deceased Ponnusamy persistently demanded the plaintiff to give her consent to enable him to contract a second marriage and in that context he exerted pressure on the plaintiff. Even though the plaintiff did not give her consent, the deceased Ponnusamy married the second defendant - Loganayaki as his second wife, without the knowledge and consent of the plaintiff. When the plaintiff came to know about the second marriage of her husband with the second defendant, she did not object to it as she wanted to maintain the family prestige and honour. According to the plaintiff, the marriage between her husband deceased Ponnusamy and the second defendant is not a valid marriage and it is void. The second defendant, on coming to know that the plaintiff is against the marriage between her and the deceased Ponnusamy, developed hatred and aversion towards the plaintiff and portrayed an inimical attitude towards her. Since the second defendant started ill-treating the plaintiff, which the deceased Ponnusamy also did not question, the plaintiff suffered immensely. The ill-treatment of the second defendant went to the extent of confining the plaintiff in a single room in the house besides disconnecting the electricity service connection provided to the room where the plaintiff was confined. While so, on 09.04.2010, her husband Ponnusamy died and after his death, the second defendant subjected the plaintiff to untold misery and

harassment. Consequently, the plaintiff was forced to leave the house and got settled temporarily in a rented house at Sivagiri. According to the plaintiff, on the death of her husband Ponnusamy, the plaintiff and the first defendant, who is the only son born through the second wife, are the only legal heirs to succeed to the estate of the deceased Ponnusamy as per the provisions contained in The Hindu Succession Act. The second defendant, who married the deceased Ponnusamy during the subsistence of her marriage with the deceased Ponnusamy, is not entitled to any share, right or interest in the properties left by the deceased Ponnusamy. The Plaintiff and the first defendant are having equal right over the properties left by the deceased Ponnusamy. In view of the attitude of the defendants 1 and 2 towards the plaintiff to ensure that the plaintiff should not enjoy the suit properties in common with them, the plaintiff demanded for amicable partition and separate possession of the suit properties. However, the defendants 1 and 2 did not consent for partition of the suit properties, on the other hand attempted to alienate some of the properties and withdraw the amounts deposited by the deceased in the Banks by ignoring the right of the plaintiff. The Plaintiff was therefore constrained to make a publication in the Tamil Daily 'Thinamalar' on 14.07.2010 cautioning the public not to deal with the properties left by her husband Ponnusamy. After seeing the paper publication, the defendants 1 and 2 have caused a belated reply on 12.08.2010 through their counsel containing facts which are contrary to truth. In the reply dated 12.08.2010, it was alleged that during his life time, her husband Ponnusamy had executed a Will dated 29.01.2009 and it was registered in the office of the Sub-Registrar, Vellakoil in the presence of attesting witness. According to the Plaintiff, the Will dated 29.01.2009 could not have been executed by the deceased because he was not in good health condition from the beginning of 2009 and it is not possible for him to execute such a Will as, at the relevant point of time, the deceased was incapable of taking any independent decision besides he had no intention to execute a Will. Taking advantage of the precarious bodily and mental condition of the deceased, the defendants 1 and 2, with the active support of their henchmen, have forged the signature of the deceased Ponnusamy and fabricated a Will dated 29.01.2009 and therefore, the Will said to have been executed by her husband will not bind her in any manner. In the above circumstances, the plaintiff has filed the suit for the relief of partition and separate possession.

5. Repudiating the plaint averments, the first defendant has filed a written statement stating that it is true that the second defendant is the second wife of the deceased Ponnusamy. However, the first defendant denied that the deceased Ponnusamy married the second defendant without the knowledge and consent

of the plaintiff. According to the first defendant, since the plaintiff could not beget a child, she was more anxious to ensure that her husband Ponnusamy should contract a second marriage so as to have a child to succeed his estate. Accordingly, the plaintiff alone arranged the second marriage of her husband Late. K.N. Ponnusamy with the second defendant on 27.10.1982 and the said marriage was solemnised at Thirumagal Thirumana Mandapam in the presence of the elders and relatives. After such marriage, the plaintiff, her husband Ponnusamy and the second defendant, who is the second wife of Ponnusamy, lived as a family till the death of the deceased Ponnusamy. It is the further case of the first defendant that the deceased Ponnusamy executed a Will on 29.01.2009 while he was in a sound and disposing state of mind and such Will was executed by him out of free will and volition. The said Will dated 29.01.2009 was the last Will and testament of the deceased. The said Will was executed in the presence of attesting witnesses and it was registered in the office of the Sub-Registrar, Vellakoil. The Plaintiff was fully aware of the execution of the Will and after the death of the deceased Ponnusamy, a copy of the same was furnished to the plaintiff in the presence of the relatives. The Plaintiff also accepted the Will dated 29.01.2009 as genuine and valid testament. As per the Will, the deceased bequeathed A schedule property mentioned therein to the plaintiff to be enjoyed by her till her life time without power of alienation and after her demise the A Schedule property shall devolve on the first defendant, who is the son born to Late. Ponnusamy and second defendant. Similarly, the B schedule property mentioned therein was allotted to the second defendant/second wife to be enjoyed by her till her life time without power of alienation and after her demise the B Schedule property shall devolve on the first defendant/son. Similarly, the property mentioned as C schedule in the Will was bequeathed to the first defendant. After the death of the deceased Ponnusamy, the Will was acted upon and the plaintiff, first defendant and second defendant have taken possession of the respective properties allotted in the Will. The property bequeathed to the plaintiff, according to the first defendant, is sufficient for her to maintain herself. The property allotted to the plaintiff is a fertile land with a Well and 20 number of fruit yielding coconut trees. The said land allotted to the plaintiff is cultivated with crops like Turmeric, Sugarcane and the income the plaintiff would get from the land will be sufficient for her to maintain herself. That apart, the deceased Ponnusamy also purchased land measuring 2 acres in the name of the plaintiff in the year 1980 and the said land is also in her possession. Subsequently, the plaintiff also sold the land measuring 2 acres for a valuable sale consideration. Therefore, the averment that the plaintiff is not in a position to maintain herself is incorrect. According to the plaintiff, the suit properties need not be partitioned,

as prayed for by the plaintiff inasmuch as even during the life time of the deceased Ponnusamy, he had executed a registered Will dated 29.01.2009 and it was also acted upon. In such circumstances, the first defendant prayed for dismissal of the suit.

6. The seventh defendant/Canara Bank represented by its Branch Manager has filed a written statement contending that the deceased K.P. Ponnusamy, during his life time, had made deposits in their bank in his individual name as well as in the joint name of his wife Loganayaki, the second defendant herein in Savings Bank Account No.5102. As per the Reserve Bank of India guidelines, on the death of K.N. Ponnusamy, the amount deposited in their bank has to be settled in favour of the respective nominees mentioned therein. However, the deceased has not nominated any one in respect of the account No. 5102. A sum of Rs.93,249.12 is available in the said account as on 31.07.2011. The Bank is ready to pay the amount with subsequent interest to the legal heir of the deceased, on proper order of the Court. In other words, the bank is ready to disburse the amount even to the plaintiff on production of a succession certificate from the competent court. It is further submitted that the seventh defendant/bank is not a proper and necessary party to the suit and therefore, prayed for dismissal of the suit as against the seventh defendant.

7. The 8th defendant/Karur Vysya Bank filed a written statement contending that the deceased Ponnusamy made various deposits in their bank, particulars of which were furnished in the written statement. According to the 8th defendant, for the deposit indicated in item No.1 of the written statement, the deceased nominated his son, the first defendant and therefore, after the death of the deceased, the sum of Rs.1,00,000/- with accrued interest was paid to the first defendant on 28.04.2010. Similarly, the deposits mentioned in item Nos. 2 to 5 were disbursed to the second defendant on 28.04.2010 and 01.06.2010 respectively inasmuch as she was indicated as nominee by the deceased. Thus, according to the 8th defendant, all the amount deposited in their bank have been disbursed to the nominees nominated by the first defendant, therefore, the eighth defendant is not a proper and necessary party to the suit and prayed for dismissal of the suit.

8. The 11th defendant/Bank has filed a written statement contending that there is no amount deposited by the deceased in their bank, either in fixed deposit account or in savings bank account and therefore, the 11th defendant prayed for dismissal of the suit.

9. In the light of the above pleadings, the trial Court

framed as many as 7 issues for consideration, which are as follows:-

- (i) Whether the plaintiff is entitled to the relief of preliminary decree for partition?
- (ii) Whether the plaintiff is entitled to the relief of maintenance from the first defendant and charge over the 'A' schedule properties in the alternative as prayed for in the suit?
- (iii) Whether the Will dated 29.01.2009 executed by Ponnusamy will bind upon the right of the parties?
- (iv) Whether the plaintiff is having sufficient means to maintain herself as contended by the defendants 1 and 2?
- (v) Whether the plea of the defendant Nos. 7, 10, 11, 12 and 13 that the suit is bad for mis-joinder of parties is correct?
- (vi) Whether the disbursement of the deposit to the first defendant by the sixth defendant will bind upon the right of the plaintiff?
- (vii) To what other reliefs the plaintiff is entitled to?

10. Before the trial court, on behalf of the plaintiff, she examined herself as PW1 and marked Exs. A1 to A13. On the side of the defendant, the first defendant examined himself as DW1, the attesting witnesses to the Will as Dws 2 and 3 and the Officer of the Cooperative Bank as DW4 and Exs. D1 to D7 were marked. The trial Court, after analysing the oral and documentary evidence decreed the suit by rendering a finding that there is a reasonable doubt as to whether the testator had executed the Will dated 29.01.2009 and as to whether he was in a sound and disposing state of mind at the time of execution of the Will and therefore, the Will executed by the testator will not bind the plaintiff. Accordingly, the trial court passed a preliminary decree for partition, however, the Court rejected the alternative prayer made by the first respondent/plaintiff to direct the defendants 1 and 2 to pay a sum of Rs.12,000/- as maintenance to her till her life time. Aggrieved by the same, the defendants 1 and 2 have filed the present appeal.

11. Pending appeal, the defendants 1 and 2/appellants herein have filed CMP No. 10989 of 2018 to permit them to mark a settlement deed dated 12.01.2009 which was attested by the deceased Ponnusamy as an Attestor, as an additional document. According to the appellants, this document is very much essential to prove the fact that till his death on 09.04.2010, the deceased was hale and healthy and was doing his normal work,

which is evident from the fact that the deceased Ponnusamy attested a settlement deed dated on 12.01.2009 as one of the attesting witnesses executed in favour of one Rathidevi. This document was sought to be marked by the appellants to show that the deceased Ponnusamy was hale and healthy at the time when he executed the Will dated 29.01.2009 in favour of the first defendant/first appellant herein. According to the appellants, they could not produce the said settlement deed dated 12.01.2009 before the trial court as they have no knowledge about the deceased attesting the settlement deed dated 12.01.2009. If this settlement deed is marked as additional document, it would prove that the deceased was in hale and healthy and was in a sound and disposing state of mind and energy at the time of execution of the Will dated 29.01.2009. Therefore, the appellants pray that they may be permitted to mark the Settlement deed dated 29.01.2009 as additional documents on their side.

12. The learned Senior Counsel appearing for the appellants would contend that the first respondent/plaintiff is the first wife of the deceased K.N. Ponnusamy. The second appellant/second defendant is the second wife of the deceased Ponnusamy and out of such wedlock, first appellant/the first defendant was born. The deceased Ponnusamy was constrained to contract a second marriage with the second defendant since there were no children born due to the marriage between the deceased Ponnusamy and the plaintiff. Therefore, with the consent and knowledge of the plaintiff, the deceased Ponnusamy married the second defendant as his second wife. According to the learned Senior counsel for the appellants/defendants 1 and 2, the suit property is the self-acquired property of the deceased K.N. Ponnusamy. Even assuming that the marriage between the deceased Ponnusamy and the second defendant is void, the first defendant, as a son, born to the deceased Ponnusamy and the second defendant has every right to succeed to the estate of the deceased. In fact, taking into consideration that the first defendant is the only son and male heir to succeed to his estate, the deceased had executed a Will dated 29.01.2009. As per the Will, the A and B Schedule properties mentioned therein were bequeathed to the plaintiff/first wife and the second defendant/second wife respectively till their life time without power of alienation and after their death, those properties will devolve on to the son/first defendant. The other properties owned by the deceased were bequeathed to the first defendant/son. The Will dated 29.01.2009 was registered in the office of the Sub-Registrar, Vellakoil in the presence of two attesting witnesses who were examined as Dws 2 and 3 before the trial Court. Before the trial Court, Dws 2 and 3 have clearly deposed about the manner in which the Will came to be executed by the deceased in the office of the Sub-Registrar, Vellakoil. Therefore, the Will

dated 29.01.2009 was proved in a manner known to law and it is in accordance with Section 63 of The Indian Succession Act and Section 68 of The Indian Evidence Act. Even though the trial Court did not conclude that the Will was ingenuine or invalid, yet, it has rendered an erroneous finding as if the Will dated 29.01.2009 will not bind the plaintiff in any manner and granted a preliminary decree of partition.

13. The learned Senior counsel for the appellants/defendants 1 and 2 would further submit that even though the plaintiff would contend that the Will was shrouded by mystery and there are suspicious circumstances leading to the execution of the Will, by referring to some insignificant minor contradiction in the deposition of Dws 2 and 3, which, according to the learned Senior counsel for the appellants, is insignificant and irrelevant and it will not in any way invalidate the registered Will executed by the testator. Furthermore, in the cross-examination of PW1, she herself has stated that the deceased was talking normally till his life time and the deceased used to go to the bank and engaged in banking transactions either to deposit or withdraw the amount from his account. Thus, this piece of admission of the plaintiff would falsify her plea in the plaint that the deceased was not in a sound and disposing state of mind prior to his death and he was not capable of taking an independent decision. Above all, the learned Senior counsel for the appellants would contend that the intention of the deceased is clear that all his estate has to devolve on his son, the first defendant and that is the reason why he has given only life interest in the properties bequeathed to the plaintiff and second defendant without power of alienation in A and B Schedule of the Will. The Will executed by the testator came into force on his death, while so, the trial Court ought not to have granted a preliminary decree of partition in favour of the plaintiff by merely holding that the Will dated 29.01.2009 will not bind the plaintiff in any manner. When the defendants 1 and 2 have discharged their initial burden as regards the existence of the Will dated 29.01.2009 by examining the attesting witnesses Dws 2 and 3, the burden shifts on the plaintiff to prove the contrary. However, the plaintiff miserably failed to prove that the Will dated 29.01.2009 is shrouded by mystery or it is ingenuine, while so, the learned Senior counsel for the defendants 1 and 2/appellants prayed for allowing the appeal.

14. In support of his contentions, the learned Senior counsel for the appellants relied on the decision of the Honourable Supreme Court in the case of (Janki Narayan Bhoir vs. Narayan Namdeo Kadam) reported in (2003) 2 SCC 91 wherein in para 10 it was held as follows:-

"Section 68 of the Evidence Act speaks of as to

how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving the execution, if there can be an attesting witness alive; and subject to the process of the court and capable of giving evidence. It flows from this section that if there can 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 © of Section 63 of the Succession Act. It is true that Section 68 of the 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 the 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 one attesting witness examined should be in a position to prove the execution of a will. To put it 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 witness in the manner contemplated therein, the examination of the 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 the 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. When 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."

15. By placing reliance on the aforesaid decision, it was contended by the learned Senior counsel for the appellants that the appellants have proved the due execution of the Will by the testator by examining the two attesting witnesses as Dws 2 and 3, and thereby complied with the mandatory requirements contemplated under Section 68 of The Indian Evidence Act.

16. The learned Senior counsel for the appellants also relied on the decision rendered by the Honourable Supreme Court in the case of (Sridevi and others vs. Jayaraja Shetty and others) reported in (2005) 2 SCC 784 wherein in para No.11 it was observed as follows:-

"11. It is well settled proposition of law that mode of proving the Will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the Court before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances has to be

judged in the facts and circumstances of each particular case."

17. By relying on the aforesaid decision of the Honourable Supreme Court it was contended that the the defendants in this case have discharged their initial burden of due execution of the Will and thereby disproved that there are no suspicious circumstances surrounding the execution of the Will executed by the testator in this case.

18. Countering the submissions of the counsel for the appellant, the learned Counsel appearing for the first respondent/plaintiff would contend that the defendants 1 and 2 failed to prove the execution of the Will in accordance with Section 63 of The Indian Succession Act and Section 68 of The Indian Evidence Act. The learned counsel for the first respondent/plaintiff would mainly contend that the deposition of Dws 2 and 3 had in fact raises a doubt as regards the due execution of the Will. It is the contention of the learned counsel for the first respondent/plaintiff that the plaintiff, in her plaint as well as her deposition as PW1 has clearly deposed about the ill health of the testator prior to his death. By referring to Ex.B5, Will, the learned counsel for the first respondent/plaintiff would contend that the testator himself has referred to his ill health in the Will and further stated that he is 74 years at the time of execution of the Will. According to the learned counsel for the first respondent/plaintiff, taking note of the health condition of the executor at the time of execution of the Will, a reasonable doubt will arise as to whether the testator had executed the Will and as to whether he was in a sound and disposing state of mind and energy at the time of execution of the Will.

19. Pointing out the inconsistencies in the deposition of Dws 2 and 3, the learned counsel for the plaintiff/first respondent would contend that DW2 and DW3 in their evidence have denied that the testator did not suffer any ill health at the time of executing the Will. They have further denied the suggestion that the testator himself has stated that he will not survive for a long time. Dws2 and 3 have also stated in their evidence that the deceased did not refer to his ill health in the Will. On the contrary, the testator himself has stated in the Will that he is 75 years old, confronting health issues and that he had every reason to believe that he will not live for a long time. Therefore, the deposition of Dws 2 and 3 is contrary to the recitals contained in the Will. Further, DW3 in his cross-examination would depose that Ex.B5 Will was typed in the stamp papers, whereas, the Will was written in a plain concur paper and it creates suspicion as to the due execution of the Will. DW2 in his evidence has stated that he, along with the

testator have affixed their thumb impression in the Will, on the contrary, DW3 has deposed that he could not remember as to how many thumb impression have been affixed by him in the Will. Further, DW2 deposed that he does not know as to how many pages he has signed. On the contrary, DW3 has stated that the Will contain six pages and that the testator had signed the last page of the Will. Whereas, the Will contains 15 pages out of which the schedule of property itself runs to 14 pages. Above all, both Dws 2 and 3 have verbatim deposed before the trial Court as regards the execution of the Will, but both of them have not stated that the testator K.N. Ponnusamy had seen them signing the Will as attestors, which is one of the fundamental requirements to prove the Will as contemplated under Section 63 of The Indian Succession Act. In this context, the learned Counsel for the plaintiff would rely on the decision of Honourable Supreme Court in (Jagdish Chand Sharma vs. Narain Singh Saini (dead) through legal representatives and others) reported in (2015) 8 Supreme Court Cases 615 wherein it was held as follows:-

"21. As would be evident from the contents of Section 63 of the Act that to execute the will as contemplated therein, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further, the signature or mark of the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect to the writing as will. The section further mandates that the will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgment of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the will in the presence of the testator. It is, however, clarified that it would not be necessary that more than one witness be present at the same time and that no particular form of attestation would be necessary.

47. That a propounder has to demonstrate that the will was signed by the testator and that he was at the relevant time in a sound disposing state of mind and that he understood the nature and effect of the disposition and further that he had put his signature to the testament on his own free will and that he had signed it in the presence of the two witnesses who had attested it in his presence and in the presence of each other, in order to discharge his onus to prove the

execution of the said document was reiterated by this Court amongst others in Surendera pal (1974) 2 SCC 600. It was held as well that though on the proof of the above facts, the onus of the propounder gets discharged, there could be situations where the execution of a Will may be shrouded by suspicious circumstances such as doubtful signature, feeble mind of the testator, overawed state induced by powerful and interested quarters, prominent role of the propounder, unnatural improbable and unfair bequests indicative of lack of testator's free will and mind etc., In all such eventualities, the conscience of the Court has to be satisfied and thus the nature and quality of proof must be commensurate to such essentiality so much so to remove any suspicion which may be entertained by prudent man in the prevailing circumstances. It was propounded further that where the caveator alleges undue influence, fraud and coercion, the onus, however, would be on him to prove the same, and on his failure, probate of the will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind.

48.

49.

50.The facts revealed that the Will was executed before the Sub-Registrar on which the signature of the testator as well as signature and thumb impression of the identifying witnesses were taken by the said authority, whereafter the latter signed the deed, in general terms, it was observed that registration of the will per se did not dispense with the need of proving its execution and the attestation in the manner as provided in Section 68 of the 1872 Act. It was enunciated as well that execution consisted of signing a document, reading it over and understanding and completion of all formalities necessary for the validity of the act involved. The facts as obtained in this decision are distinguishable from those in hand and are incomparable on many counts. No analogy can be drawn from this case to conclude that the testimony of AW3 even if read with that of AW1 and AW5 can sum up to prove valid execution and attestation of the will as stipulated by Section 63 (c) of the Act.

51.

52.It was however emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a will, in terms of

section 63 (c) of the act viz., attestation by two attesting witnesses in the manner as contemplated therein. It was exposted that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the will by the other witness, his testimony would fall short of attestation of the will by at least two witnesses for the simple reason that the execution of the will does not merely mean signing of it by the attesor but connotes fulfilling the proof of all formalities required under section 63 of the Act. It was held that where the attesting witness examined to prove the will under section 68 of the 1972 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.

57.1 Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of the 1872 Act does not in any manner efface or emasculate the essence and efficacy of Sections 63 of the Act and Section 68 of the 1872 Act. The distinction between failure on the part of an attesting witness to prove the execution and attestation of a will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71 of the Act, 1872....."

20. The learned counsel for the plaintiff/first respondent

also relied on the decision in (Dhannulal and others vs. Ganeshram and another) reported in (2015) 12 Supreme Court Cases 301 wherein it has been held as follows:-

"19. Proof of a will stands in a higher degree in comparison to other documents. There must be a clear evidence of the attesting witnesses or other witnesses that the contents of the will were read over to the executant and he, after admitting the same to be correct, put his signature in presence of the witnesses. It is only after the executant puts his signature, the attesting witnesses shall put their signatures in the presence of the executant.

20. In the instant case, the suspicious circumstances appears to be that when the will was being executed, the thumb impression over the alleged will was also taken by the beneficiaries and the document writer was shown to be scribe of the document, whereas the document was not scribed by him. However, late. Phoolbasa Bai although filed written statement before her death, but she did not whisper anything about the will in the written statement. Admittedly, the will was allegedly executed in 1977 whereas the written statement was filed some time in 1987. Taking into consideration all these facts, we do not find any error in the conclusion arrived at by the High Court. The said finding, therefore, needs no interference by this Court."

21. Reliance was also made to the decision of the Honourable Supreme Court in the case of (Adivekka and others vs. Hanamavva Kom Venkatesh (died) by Lrs and another) reported in (2007) 7 Supreme Court Cases 91 wherein it was held as follows:-

"27. We may, however, notice that in R. Venkatamuni vs. C.J. Ayodhya Ram Singh, (2006) 13 SCC 449, this Court upon considering a large number of decisions opined that proof of execution of will shall strictly be in terms of Section 63 of The Succession Act. It was furthermore held (SCC p.456, para 15)

15. It is, however, well settled that compliance with statutory requirements itself is not sufficient as would appear from the discussions hereinafter made.

It was observed (SCC p.458, para.19)

19. Yet again, Section 68 of the Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested stating that the execution must

be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the court and capable of giving evidence."

22. The learned counsel for the plaintiff/first respondent made further reliance on the decision of the Honourable Supreme Court in the case of (Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao and others) reported in 2007 (2) CTC 172 wherein it has been held as follows:-

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

32. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence, if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator (See. Madhukar D. Shende vs. Tarabai Shedage (2002) 1 CTC 244; 2002 (2) SCC 85 and Sridevi and others vs. Jayaraja Shetty and others 2005 (1) CTC 443:

2005 (8) SCC 784). Subject to above, proof of a Will does not ordinarily differ from that of proving any other document:

33. There are several circumstances which would have been held to be described by this Court as suspicious circumstances:

(a) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will

(b) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances

(c) Where propounder himself takes prominent part in the execution of the Will which confers on him substantial benefit."

23. By placing reliance on the aforesaid decisions, the learned counsel for the first respondent/plaintiff would contend that the deposition of DWs 2 and 3 in this case is wholly unreliable besides they did not satisfy the test contained under Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act. The nature of disposition of the properties conferred under the Will by the Testator in favour of the first respondent/plaintiff is also one of the suspicious circumstances that exists in this case and having regard to the same, the trial Court has rightly granted a preliminary decree of partition.

24. The learned counsel appearing for the first respondent/plaintiff would further contend that the requirements contemplated under Section 63 (c) of The Indian Succession Act read with Section 68 of The Indian Evidence Act has to be complied with to prove the execution of the Will. On a combined reading of Section 63 (c) of The Indian Succession Act read with Section 68 of The Indian Evidence Act, it would show that a person propounding the Will has to prove that the Will was duly and validly executed. It cannot be done by simply proving that the signature on the Will was that of the attester, but must also prove that the attestations were made properly as required under Section 63 (c) of The Indian Succession Act. In this case, in the chief-examination, DWs 2 and 3 have not stated that the testator K.N. Ponnusamy had seen them signing the Will as attestors as per the last limb of Section 63 (c) of The Indian Succession Act and therefore, the due execution of the Will has not been proved in this case. In support of this contention, the learned counsel appearing for the first respondent/plaintiff relied on the propositions laid down by the Honourable Supreme Court in para No.10 of the decision in (Janki Narayan Bhoir vs. Narayan Namdeo Kadam) reported in (2003) 2 SCC 91 which was also

relied on by the learned Senior counsel appearing for the appellants/defendants 1 and 2.

25. Further, tracing out the suspicious circumstances that exist in the Will executed by the testator, the learned counsel for the plaintiff/first respondent would contend that the relationship between the plaintiff and the deceased K.N. Ponnusamy was cordial and normal and therefore, there was no necessity for him to execute a Will without the knowledge of the plaintiff, who lived with him all along from the year 1964, till his death in the year 2010, for about 45 years. It was also not known as to how the defendants 1 and 2/appellants came into possession of the Will and it was not explained by them. At the time of execution of the Will, the testator was 75 years old and even in the plaint, the plaintiff had clearly described the ill health and the disease, which the deceased had suffered, owing to his old age. Further, at the time of his death, the deceased was in Coimbatore and the cause of death of the testator was not proved by the defendants 1 and 2 by examining the Doctor. Even as regards the disposition of the properties owned by the deceased, the plaintiff was given a pittance while the defendants 1 and 2 were given a lion's share. There was no necessity for the deceased to deprive the plaintiff, his first wife of her legitimate share and bequeath the major wealth in favour of the defendants 1 and 2. Further, the attesting witnesses in this case namely DWs 2 and 3 are closely related to the deceased and they are interested persons to adduce in favour of the defendants 1 and 2. Above all, the defendants 1 and 2 did not choose to examine the scribe who had drafted the Will. Similarly, the defendants 1 and 2 also did not examine the Sub-Registrar to prove the due execution of the Will to draw a presumption under Section 114 (e) of The Indian Evidence Act. While so, the court below ought to have drawn an adverse inference as contemplated under Section 114 (g) of The Indian Evidence Act for non-examining the Sub-Registrar. Further, Ex.B5, Will contain minute details pertaining to the properties located in different Villages, their Survey Numbers, new Survey Numbers, Electricity Service Connection Number, lineal measurement, Boundaries, extent of the land in acres and hectares. However, during the course of examination of DWs 2 and 3, they have deposed that the deceased had furnished all the details for preparation of the Will out of his own memory and he did not look into any document while asking the scribe to prepare the Will. Further, DW3 in his deposition has stated that except the attestors, no one had signed the Will, Ex.B5, while the fact remains that the scribe had signed in the last page of the Will, Ex.B5. These short comings in the deposition of DWs 2 and 3 causes serious doubt as to the manner in which the Will came into existence. The learned counsel for the plaintiff/first respondent would contend that even in the

plaint, the plaintiff had made reference about the ailment which the deceased suffered prior to his death. The defendants 1 and 2, however, did not produce any satisfactory evidence as to why the medical records have been withheld and no Doctor was examined with regard to the health condition of the testator. The trial Court, upon considering the entire evidence available on record has rightly decreed the suit and it calls for no interference by this Court.

26. As regards CMP No. 10989 of 2018 filed by the defendants 1 and 2 /appellant to mark the settlement deed dated 12.01.2009, the counsel for the plaintiff/first respondent would contend that the defendants 1 and 2/appellants have not come forward with any acceptable reason as to why the settlement deed dated 12.01.2009 could not be marked before the trial Court. The present petition has been filed only as an after-thought to fill up the lacuna. In any event, the trial court had no occasion to consider the settlement deed dated 12.01.2009, while so, at the appellate stage, the same need not be marked. The learned counsel for the plaintiff/first respondent therefore prayed for dismissal of CMP No. 10989 of 2018.

27. We have heard the learned counsel for both sides and perused the materials made available on record. Keeping the submissions of the counsel for both sides, the following points fall for our consideration and they are:

(i) Whether the first respondent/plaintiff has established that the Will, Ex.B5 came into existence under suspicious circumstances?

(ii) Whether the appellants/defendants 1 and 2 have established that the Will was proved as required under Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act

(iii) Whether the first respondent/plaintiff is entitled for partition and separate possession as prayed for in the suit

(iv) Whether the first respondent/plaintiff is entitled to the alternative relief of direction, directing the defendants 1 and 2/appellants to pay her a sum of Rs.12,000/- as monthly maintenance?

28. As we have dealt with the factual aspects of the case in detail, we are of the view that the same need not be dealt with any further. However, for the purpose of disposal of this appeal, only certain facts, which are required to be dealt with and which are absolutely necessary are reiterated.

29. Point Nos. (i) and (ii):- The Point Nos. 1 and 2 that fall for our consideration is almost inter-twined and inter-connected and any decision taken in one of the decision will

have an impact on the other. Therefore, the point Nos. 1 and 2 are taken up together for consideration.

30. It is the case of the first respondent/plaintiff that she is the legally wedded wife of the deceased K.N. Ponnusamy, however, due to such wedlock, there were no children born to them. Therefore, the deceased K.N. Ponnusamy intended to contract a second marriage for which he had sought the consent of the first respondent/plaintiff. It is contended that the first respondent/plaintiff did not give such consent, but notwithstanding the same, the deceased Ponnusamy married the second appellant/second defendant, as his second wife. Admittedly, on coming to know about such marriage of her husband with the second defendant, the plaintiff did not raise any protest, purportedly to keep the honour and prestige of the family. It is also an admitted fact that the first appellant/first defendant is the son born out of the wedlock between Ponnusamy and the second appellant/second defendant.

31. It is also an admitted fact that the deceased K.N. Ponnusamy is the owner of several immovable properties besides deposits made in the bank in the form of fixed deposits or otherwise. According to the plaintiff, on 09.04.2010, her husband Ponnusamy died intestate and on his death, she and the first defendant have become entitled to half a share in the estate left by the deceased and that the second defendant, who is the second wife of the deceased Ponnusamy, is not entitled to any share in the properties left by the deceased. It is the further case of the plaintiff that after the death of her husband, she was subjected to untold harassment and hardship by the defendants 1 and 2 and she was made to suffer without any resources to maintain herself. At this stage, the plaintiff came to know that the defendants 1 and 2 made attempts to alienate the properties left behind by the deceased without any legal right and with an intention to deprive her legitimate share over such property. Therefore, the plaintiff caused a paper publication in the Tamil Daily 'Thinamalar' on 14.07.2010 informing her right over the properties left by the deceased Ponnusamy inter alia cautioning the public not to deal with those properties. In response to such advertisement, the defendants 1 and 2 sent a notice dated 12.08.2010 through their counsel specifically contending that the deceased did not die intestate rather, he had left a Will bequeathing the properties owned and possessed by him. The defendants 1 and 2 have also enclosed a copy of the Will dated 29.01.2009 along with the notice dated 12.08.2010 sent to the plaintiff through their advocate.

32. It is the claim of the Plaintiff that the Will dated 29.01.2009 could not have been executed by the deceased

voluntarily, rather, the defendants 1 and 2 could have exerted pressure or coerced the deceased to execute such a Will. It was also the contention of the first respondent/plaintiff that the relationship between her and the deceased was cordial and therefore, there was no necessity for the deceased to have executed a registered Will, without her knowledge. It was further claimed that the deceased was not in a sound and disposing state of mind and physical condition to execute a Will, particularly, he was not in a stable mental condition to independently take a decision and to decide as to how the properties owned and possessed by him could be distributed. Thus, it is the contention of the plaintiff that the Will is a fabricated, forged and a sham document and it will not bind her in any manner.

33. This contention of the plaintiff was repudiated by the defendants 1 and 2 by stating that the intention of the testator was to ensure that the properties owned and possessed by him has to be held and enjoyed by the first defendant, his son and that is the reason why, the deceased executed the Will bequeathing properties to his first wife, plaintiff and the second wife, the second defendant and had given only life estate to them without power of alienation which are morefully set out in A and B Schedule of the Will.. Further, the testator was in a sound and disposing state of mind and energy to execute the Will and in order to prove the due execution of the Will, the defendants have examined the two attesting witnesses, even though, examination of one of the attesting witness is sufficient to prove the execution of the Will.

34. In the present case, though in the plaint the plaintiff has stated that the Will was forged and fabricated, during trial of the suit, the plaintiff did not dispute the signature and the thumb impression of the deceased K.N. Ponnusamy in the Will dated 29.01.2009, Ex.B5. The deceased K.N. Ponnusamy died on 08.04.2010 and atleast 15 months prior to his death, the Will dated 29.01.2009, Ex.B5, came into existence. It is also not in dispute that the Will was registered before the Sub-Registrar, Vellakoil in the presence of two attesting witnesses, DWs 2 and 3. What is alleged by the plaintiff is that the deceased was not in a sound and disposing state of mind and energy and he was not capable of taking any independent decision to write the Will at the relevant point of time. It was also alleged that the disposition of his wealth is not proportionate and rather it is disproportionate. It was further alleged that there was no necessity for the deceased to have executed a Will at all, similarly the plaintiff has no knowledge about the alleged execution of such a Will. These are some of the suspicious circumstances projected by the plaintiff surrounding the existence of the Will. Whether the testator was not in good

health at the time of execution of the Will is, therefore, required to be examined.

35. Even though the plaintiff contends that her husband was suffering due to old age and ill health, in her cross-examination, she admits that till his death, her husband used to go to Bank on his own, either for depositing the amount or for withdrawal of amount or for any other banking transaction and he did not depend on any one for such purpose. She further deposed in the cross-examination that till the death of the testator, he was conversing with her normally. Even though the plaintiff had deposed that the deceased was suffering from Urological disease, she has not produced any documentary evidence to substantiate the same. Further, the plaintiff deposed that the deceased suffered from such urological related disease atleast for 10 years and taking treatment at Coimbatore, however, not a scrap of evidence was produced to prove the same. In this context, useful reference can be made to the deposition of the plaintiff, which reads as follows:-

"என் கணவர் 9.4.2010ல் இறந்து விட்டார். எனது விருப்பத்திற்கு மாறாக என் கணவர் 2ம் திருமணம் செய்து கொண்டார் என்று வழக்கு போடவில்லை. குடும்ப கௌரவம் போய்விடும் என்பதால் வழக்கு போடவில்லை. அது காரணமல்ல என்றால் சரியல்ல. 2வது தாரம் இல்லாத போது என் கணவர் என்னிடம் பேசினார். அதனால் என் கணவருக்கும் எனக்கும் அவர் சாகும் வரை வருத்தம் எதுவும் இல்லை. அவர் இறக்கும் வரை அவருடன் பேசிக்கொண்டு தான் இருந்தேன். அவர் இறப்பதற்கு 1 மாதம் முன்பு, அவரிடம் பேசினேன். அவரிடம் நலம் விசாரித்தேன். அவர் என்னிடம் நலம் விசாரித்தார். அவர் இறக்கும் போது நான் அதே வீட்டில் தான் இருந்தேன். அவருக்கு சிறுநீரக கோளாறு வியாதி அவருக்கு 10 வருடமாகவே சிறுநீரக கோளாறு இருந்தது. கோயமுத்துரில் அவர் சிகிச்சை பெற்றுக் கொண்டார். எந்த மருத்துவமனை என்று தெரியாது. நான் மருத்துவமனை செல்லவில்லை. என் கணவர் இருக்கும் வரை பல வங்கியில் கணக்கு இருந்தது. அவர் இறக்கும்வரை அவரே வங்கியில் பணம் எடுத்துச் கொண்டும் போட்டுக் கொண்டும் இருந்தார்."

36. Therefore, the above deposition of the plaintiff would only show that the deceased was keeping good health and that he was not suffering from any terminal illness, as has been alleged by the plaintiff in the plaint.

37. As regards the nature of disposition of the property, which was also projected as one of the suspicious circumstances surrounding the Will, Ex.B5, admittedly, the testator bequeathed a land together with a well in favour of the plaintiff and another land in favour of his second wife, the second defendant in the suit. The Plaintiff and the second defendant were bequeathed such land to be enjoyed until their life time without power of alienation and after their lifetime, the house properties so bequeathed in their favour shall devolve in favour

of the first defendant, the only male heir of the testator. Therefore, the intention of the testator in bequeathing the properties owned by him makes it clear that his wealth has to be devolved on his only son after his death. In such circumstances, it cannot be said that the disposition of the wealth of the testator is not proportionate or it can be construed as one of the suspicious circumstances surrounding the Will. Therefore, we see no suspicious circumstances surrounding the Will, Ex.B5 executed by the testator in so far as it relates to disposition of share of the properties. Therefore, we hold that the Plaintiff failed to establish the suspicious circumstances surrounding the Will and that the Will came into existence in a normal circumstances, free from any suspicion. Further, we find from the deposition of DW2 that soon after the death of the testator, the Will was retrieved from the house of the testator from an iron trunk box in the presence of relatives and the contents of the Will was read over to the plaintiff and others. After inferring the particulars of the land bequeathed in her favour, the plaintiff herself has stated that what was bequeathed to her is a fertile land. Therefore also, we hold that the disposition of property is not such that it could be inferred that the Will has come into existence in a suspicious circumstance.

38. The other minor contradictions projected by the learned counsel for the first respondent/plaintiff is that the Schedule of property covered in the Will, Ex.B5 itself runs to 14 pages. However, DWs 2 and 3 have stated that the testator had furnished the details of the property out of his own memory. It is his contention that the schedule of the property in the Will contains minute details about the Survey Number, location of the property, name of the Village, Electricity Service Connection Number, lineal measurement, extent of the land or building and other pertinent details, which could not be dictated or referred to by any one without the aid of any documentary reference.

39. We are not inspired by the aforesaid submission of the counsel for the first respondent/plaintiff. The fact remains that DWs 2 and 3 in their evidence have clearly stated that the testator had brought with him certain documents, meaning thereby, the documents which are required for preparing the Will and on the strength of those material documents, the Will was purported to have been prepared by the testator. Therefore, we are of the view that this argument of the learned counsel for the first respondent/plaintiff need not be given any significance. In this context, useful reference could be made to the decision of the Honourable Supreme Court in the case of (Sridevi and others vs. Jayaraja Shetty and others) reported in (2005) 2 Supreme Court Cases 784 wherein in para-11, it was held as follows:-

"11. It is well settled proposition of law that mode of proving the Will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would be again be on the propounder to explain them to the satisfaction of the Court, before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances has to be judged in the facts and circumstances of the case."

40. It is well settled that execution of the Will must be proved to the satisfaction of the Court by cogent and natural deposition of witness and the onus of proof of Will is on those who allege suspicion and fraudulent execution of the Will. In the present case, even though several suspicious circumstances were projected such as, the Will was not duly executed, there was no necessity at all for the testator to execute the Will and that a lion's share was given in favour of the son/first defendant etc.,, we feel that the defendants 1 and 2, by examining the two attesting witnesses, have duly proved the execution of the Will. Further, the Will, Ex.B5 was registered and it had partaken the character of a genuine Will, unless the contrary is proved to the satisfaction of the Court. It is also to be indicated that the testator did not leave the plaintiff in the lurch and he had bequeathed a land in her favour to be enjoyed by her till her life time. In any event, the suspicious circumstances projected or said to have existed in a case cannot be ipso facto applied in other case to nullify the genuineness a Will and the existence of suspicious circumstances and the proof thereof depends upon the facts and circumstances of each case.

41. Next it has to be considered as to whether the appellants/defendants 1 and 2 herein, by examining the two attesting witnesses, namely DWs 2 and 3, have established that the Will, Ex.B5, was proved in a manner, as required under Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act. Before considering this point, it is necessary to

look into Section 63 of Indian Succession Act, which reads as follows:-

"63. Execution of unprivileged Wills - Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator, a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Section 68 of Indian Evidence Act

68. Proof of execution of document required by law to be attested:- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving the execution, if there be an attesting witness alive; and subject to the process of the Court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

42. In the light of the above statutory provision, it is necessary to examine as to whether the Will dated 29.01.2009, Ex.B5 executed by the deceased Ponnusamy was proved as per Section 63 of The Indian Succession Act and Section 68 of The Indian Evidence Act. As per Section 63 (c) of The Indian Succession Act, it is mandatory that the Will has be attested by two or more witnesses, each of whom has to see the testator signing the Will and each of the witnesses shall sign the Will in the presence of the testator. As per Section 68 of The Indian Evidence Act, it is mandatory to examine atleast one attesting witness. Whether these mandatory requirements are fulfilled in this case are to be seen.

43. It is well settled that unlike proof of any other document, whether registered or unregistered, a Will can also be proved, but it has a special requirement in the matter of proving it's due execution in compliance with Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act. The burden of proving the existence or due execution of the Will is on the person who asserts that a Will has in fact been executed by the testator and to allay the apprehension that it has not come into existence under any suspicious circumstances surrounding the execution of the Will, meaning thereby, the Will has come into existence in the normal course and it's execution was witnessed by persons who stood as attesting witness. In other words, mere proof of testamentary capacity or independent decision making to execute a Will or proof of signature of the testator alone are not sufficient to discharge the burden of proving the due execution of the Will. As mentioned above, the proof of Will is subject to fulfilment of the conditions stipulated in Section 63 of The Indian Succession Act, which lays emphasis on the requirement that while executing a Will, the testator shall first sign the Will with an intention to give effect to the covenants of the Will. The Will shall be attested by two or more attesting witnesses and each of them has to see the testator putting his signature in the Will as a personal acknowledgment of his signature and thereafter, each of them shall sign the Will in the presence of the testator. As per Section 68 of The Indian Evidence Act, either one of the attesting witness is required to depose as regards the due execution of the Will.

44. In this case, in order to prove the Will, both the attesting witnesses namely DWs 2 and 3 were examined. We have gone through their evidence and it would only show that their deposition is natural and cogent. Even though it is contended that both DWs 2 and 3 are related to the deceased, we find nothing to discard their evidence merely because they are related to the deceased. In fact, there is nothing wrong in the testator asking the relatives to stand as a witness to the Will,

which he proposed to execute. Further, from the evidence of DWs 2 and 3, we find that their deposition as regards the manner in which the testator had executed the Will is natural and trustworthy. In this regard, it would be worthwhile to look into the deposition of DW2, who has deposed as follows in his chief examination:-

"பின்னர் வெள்ளக்கோவில் சார்பதிவாளர் அலுவலகத்தில் அன்றைய தினமே அந்த உயில் சாசனம் பதிவுக்காக தாக்கல் செய்யப்பட்டது. சார்பதிவாளர் அலுவலகத்திலும் மேற்படி உயிலின் இரண்டாம் பக்கத்தில் கே.என். பொன்னுசாமி கையொப்பம் செய்தார். குஇன்னாரென்று ரூபித்தவர்கு என்று நானும் மற்றொரு சாட்சி செந்தில் குமாரும் கையொப்பம் செய்தோம்.

45. DW2 has reiterated the above contents in his cross-examination as well and stood firm as regards the manner of execution of the Will. The relevant portion of the cross-examination of DW2 reads as follows:-

"என்னிடம் காட்டப்படும் உயில் பத்திரத்தில் நான் சாட்சி கையொப்பம் செய்துள்ளேன். ஹை உயில்பத்திரம் பி.சா.ஆ.5 ஆகும். உயிலில் ஒவ்வொரு பக்கத்திலும் இறந்துபோன பொன்னுசாமி கையெழுத்து செய்து இருக்கிறார். அவர் கையெழுத்துபோட்டதை நான் நேரடியாக பார்த்தேன். அவர் கையெழுத்து போட்டதை என்னுடன் சேர்ந்து சாட்சி செந்தில் குமார் மற்றும் பத்திர எழுத்தர் சாட்சி கையெழுத்து போட்டுள்ளார். உயில் பக்கத்தில் 2ம் பக்கத்தில் இன்னார் என்று ரூபிக்கும் இடத்தில் முதல் சாட்சியாக நான் கையெழுத்து போட்டுள்ளேன். பத்திர அலுவலகத்திற்குள் ஹை கையெழுத்து போட்டேன் (Emphasis supplied)

46. It is evident from the deposition of DW2 that he saw the testator signing the Will and thereafter, he signed the Will as a first witness, as an acknowledgment of identification of the deceased signing the Will. Similarly, DW3 also in his deposition, both in chief-examination as well as cross-examination, has categorically asserted that he saw the testator signing the Will and upon his request, he, along with the other witness, subscribed his signature as attesting witness to the execution of Will. That apart, both the attesting witnesses have stated in their evidence that they saw each other signing the Will. Thus, it satisfies the requirement embodied in Section 63 of The Indian Succession Act.. In such circumstances, we are of the view that the appellants/defendants 1 and 2, by reason of examining DWs 2 and 3, have duly proved the execution of the Will, Ex.B5 and it is in consonance with Section 63 of Indian Succession Act.

47. It is contended by the learned counsel for the plaintiff/first respondent that DW2 in his cross-examination has stated that he has no knowledge as to what are the properties owned and possessed by the testator and what are the properties which he bequeathed in favour of the beneficiaries. Therefore,

according to the learned counsel for the first respondent/plaintiff, the deposition of DW2 casts a doubt in the manner in which the will was said to have been executed. We are not inclined to accept this submission of the counsel for the plaintiff/first respondent. A person, who was called upon to witness the execution of the document, need not verbatim have knowledge about the contents of the document and it is sufficient he identifies the executor, who executes the document, upon whose request, he signs the document as a witness. In such view of the matter, it is not necessary for a witness to know the intricacy or germane details of the contents of the document and he cannot be expected to testify the same. Accordingly, we answer point Nos. 1 and 2 in favour of the defendants 1 and 2/appellants herein.

48. Point No.(iii):- As we have held that the Will, Ex.B5 was duly executed and it's execution has been proved by the appellants 1 and 2/defendants 1 and 2 in a manner known to law, we hold that the first respondent/plaintiff is not entitled for partition, as prayed for by her in the suit.

49. As we have held that the defendants 1 and 2/appellants herein have proved the due execution of the Will Ex.B5 dated 29.01.2009, by examining the two attesting witnesses as DW2 and 3 before the trial court, we feel it unnecessary to allow C.M.P. No. 10989 of 2018, which was filed by the appellants to permit them to mark additional document during the pendency of the appeal. Accordingly, C.M.P. No. 10989 of 2018 stands dismissed.

50. Point No;(iv):- As we have decided point Nos. 1 to 3 against the first respondent/plaintiff, which would have the effect of setting aside the decree and judgment passed by the trial court in her favour, we are inclined to consider the alternative prayer sought for by her. Admittedly, after the death of the deceased, the plaintiff is residing alone. Even though the deceased had bequeathed a land in her favour without power of alienation and she could enjoy the proceeds thereof, we feel that sufficient monetary benefits has to be set apart for her to maintain herself at her advanced age befitting the status of her husband late. Ponnusamy. Having regard to the above, we are of the view that the first defendant, son, shall be directed to pay a sum of Rs.20,000/- per month till her life time, from the date of plaint, which would meet the ends of justice. Accordingly, we answer point No.(iv) in favour of the first respondent/plaintiff.

51. In the result, we allow the Appeal Suit by setting aside the preliminary decree for partition dated 30.07.2013 made in O.S. No. 47 of 2011 on the file of I Additional District Judge, Erode, Erode District. Consequently, the suit in O.S.

No. 47 of 2011 shall stand partly allowed in so far as it relates to the alternative prayer sought for by the plaintiff, by directing the first defendant in the suit to pay a sum of Rs.20,000/- per month towards monthly maintenance to the plaintiff from the date of plaint till her life time. It is made clear that in the event of failure on the part of the first defendant to pay Rs.20,000/- per month to the plaintiff, there will be a charge over the properties bequeathed in favour of the first defendant by the testator in the Will, Ex.B5. No costs. Consequently, connected Miscellaneous Petitions are closed

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

rsh

To

The I Additional Additional District Judge
Erode, Erode District.

Copy To

The Section Officer,
VR Section, High Court,
Madras-104 (2 Copies)

+1cc to Mr.N.Manokaran, Advocate, S.R.No.63986

A.S. No. 219 of 2014

SAI (CO)
CS/25/10/2018

सत्यमेव जयते

WEB COPY