

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.181 OF 2000

JUDGMENT:

Deceased appellant No.1 viz., B. Narayanappa herein was the sole plaintiff in O.S. No.9 of 1980 on the file of Subordinate Judge, Penukonda. He filed the suit for partition and separate possession of his half share in item Nos.1 to 9 and 16 and 7/16th share in item Nos.10 to 15 of plaint 'A' schedule properties originally against defendant Nos.1 to 4.

2. During the pendency of suit, defendant Nos.5 and 6 viz., Adilakshamma and Venkatamma, respectively, were added as per orders in I.A. No.499 of 1980, dated 04.08.1980; defendant Nos.7 to 9 viz., Pedda Anjinappa, Hanumanthappa and Gangamma, respectively, were added as per orders in I.A. No.1049 of 1980, dated 01.12.1980; since defendant No.9 was minor by then, she was represented by her father as guardian, who is defendant No.7, as per orders in I.A. No.1050 of 1980, dated 01.12.1980; and defendant Nos.10 to 12 viz., Lakshmappa, Thimmappa and Papamma, respectively, were added as per orders in I.A. No.526 of 1981, dated 08.07.1981.

3. The trial Court, on 15.10.1981 granted decree in the above suit as under:

“That the plaintiff's right for partition and separate possession of his half share in item Nos.1 to 9 and 16, and 7/16th share in item Nos.10 to 15 of

the plaint 'A' schedule properties be and hereby is declared.

That the defendants do put in possession of the same to the plaintiff.

That the plaintiff be at liberty to move the Court by way of separate proceedings for partition and separate possession of his share (as referred to in the above 1st clause) by metes and bounds and with reference to good and bad soil; and

That each party do bear its own costs.”

4. The plaintiff and defendant Nos.6 to 9, aggrieved over the finding recorded by the trial Court on issue No.5 upholding the Will - Ex.B-2 dated 10.03.1969, preferred a regular appeal in A.S. No.17 of 1985 on the file of the Additional District Judge, Hindupur.

i) During the pendency of appeal suit, since appellant No.2 viz., Venkatamma, who is defendant No.6, died, her legal representative was impleaded as appellant No.6 as per orders in I.A. No.628 of 1987, dated 23.12.1987. Even, respondent No.3 viz., Besta Venkatappa, who is defendant No.4, died during the pendency of appeal suit and his legal representatives were brought on record as respondent Nos.8 to 13 as per orders in I.A. No.71 of 1997, dated 17.12.1997.

ii) The learned lower appellate Court, by the judgment and decree dated 31.08.1999, dismissed the appeal suit, affirming the findings recorded and conclusion arrived at thereon by the trial Court.

5. Aggrieved over the said dismissal decree, all the appellants, except appellant No.3 - defendant No.7 - Pedda Anjinappa, preferred the present second appeal, arraying the said appellant No.3 as respondent No.14.

i) During the pendency of the present second appeal, appellant No.1 died and his legal representatives were brought on record as appellant Nos.6 to 13 as per the order dated 19.03.2015 in S.A.M.P. No.2588 of 2014.

ii) The present second appeal was dismissed against respondent Nos.2 and 4 to 8 for default by the order, dated 21.06.2002, at the stage of admission.

6. For convenience sake, the parties will be hereinafter referred to as arrayed in the original suit.

7. The facts needed for disposal of the present second appeal are as hereunder:

i) Deceased defendant No.1 viz., B. Aswarthappa is the father of the deceased plaintiff. Smt. Sanjeevamma, admittedly, was the first wife of defendant No.1. Defendant No.2 - B. Aswarthamma is the second wife of defendant No.1. Smt. Sanjeevamma and defendant No.2 are cousins and their fathers are natural brothers. Defendant No.3 viz., B. Thimmappa is the brother of defendant No.2. Defendant No.4 is the sister's son of defendant No.1. The death of Smt.

Sanjeevamma had taken place four years prior to filing of the original suit.

ii) The plaintiff's case is that, since defendant No.1 was illiterate and not worldly-wise, defendant No.2 has set up defendant No.1 to act against his interest to make his (plaintiff) life, in the joint family house, unbearable, and even obtained a sham and nominal deed calling it as a gift deed, dated 26.07.1966 - Ex.B-1, concerning item Nos.1 to 3 of plaint 'A' schedule and the gift deed being a gift of an undivided coparcenary property, is void and invalid and does not confer any right on defendant No.2.

iii) The plaintiff also states that defendant No.3 has also obtained a sham and nominal document terming it as a deed of simple mortgage for alleged consideration of Rs.4,500/- concerning item Nos.4, 5 and 6 of plaint 'A' schedule, though, defendant No.1 had no necessity to execute any mortgage, much less, to contract a debt and defendant No.3 had absolutely no means to lend any amount. The plaintiff, thus, terms that the transactions under both the gift and mortgage are collusive and brought into existence with the sole intention of depriving him (plaintiff) of his legitimate rights in the suit properties.

iv) Concerning defendant No.4, the plaintiff claims that he is a sharer in item Nos.10 to 15 of plaint 'A' schedule having $1/8^{\text{th}}$ share in them and the remaining $7/8^{\text{th}}$ share belongs to the plaintiff and other

defendants. Claiming that the plaint 'A' schedule properties are joint family ancestral properties and he has half share therein, pleading joint possession and enjoyment of plaint 'A' schedule items, and since repeated demands made by him having been proved abortive, filed the suit seeking partition and separate possession.

8. Defendant Nos.2, 3 and 4 filed separate written statements.

i) Precisely, defendant No.2's case is, while the plaintiff was a minor, his mother filed a suit in O.S. No.67 of 1960 on the file of Subordinate Judge, Anantapur, *in forma pauperis* for partition and separate possession of his alleged share in the suit properties and the suit was dismissed and, therefore, the suit was not maintainable.

a) According to her, defendant No.1 married Sanjeevamma, the mother of the plaintiff, in or about 1935 and both of them lived together only for 4 or 5 years and out of their marital tie, defendant No.5 viz., Adilakshmamma, was born and later, Smt. Sanjeevamma deserted her husband and began to lead unchaste and immoral life and, thus, she states that the other children including the plaintiff are not the children of defendant No.1.

b) According to her, the very same pleas were put forth by defendant No.1 in his written statement in the said suit i.e., O.S. No.67 of 1960. She denies the stand of the plaintiff that the plaint 'A' schedule properties are ancestral properties. She claims that the plaintiff is not a member of the joint family at all. She sets up the plea

that item Nos.1, 2, 5 and half of item Nos.6, 8 and 9 of the plaint 'A' schedule are self-acquired properties of defendant No.1. Originally, the said items belonged to Adeppa, junior paternal uncle of defendant No.1, and on the death of Adeppa, they devolved upon his widow Lakshamma and defendant No.1 succeeded to them as a reversioner of Adeppa and, therefore, the plaintiff is not entitled to any share in these properties, even if the plaintiff is considered as a legitimate son of defendant No.1.

c) She also propounds that the Will under Ex.B-1 was executed by defendant No.1, while in a sound disposing state of mind out of love and affection bequeathing all his properties in her favour on 10.03.1969, and it was the last testament of defendant No.1. Therefore, it is her case that defendant No.1 was owning only item Nos.3, 4 and 7 and the other half of item No.6 belongs to *Kapus* and never belonged to the family of defendant No.1.

d) According to her, item Nos.10 to 16 shown in schedule 'A', located in Kodigenahalli, were not in possession of defendant No.1 or the plaintiff for the last 40 years, as those properties belonged to defendant No.4, who has been in possession and enjoyment thereof by paying cist regularly. She states that the gift deed dated 26.07.1966 under Ex.B-1 in her favour, gifting item Nos.1 to 3 and half of item No.8, is not sham and nominal and the said gift was accepted and acted upon by her. She denied the stand of the plaintiff that defendant No.1 never incurred any debts and supports the mortgage executed by

defendant No.1 for discharge of antecedent debts contracted for family necessities and binding upon her and on the plaintiff even, if the plaintiff is to be treated as a son of defendant No.1.

e) Concerning item Nos.10 to 16, her stand is that, they have been always in possession of defendant No.4, and thereby sought to dismiss the suit with costs.

ii) Defendant No.3, in his written statement, denied the allegation that the mortgage deed is sham and nominal document as sought to be viewed by the plaintiff, *inter alia*, contending that the said mortgage was fully supported by legal necessity and it was for the benefit of the estate and sought the Court to uphold his status as mortgagee, dismissing the suit against him.

iii) The written statement filed by defendant No.4 is almost on the lines of the defence put forth by defendant No.2. His stand is that the plaintiff is not entitled to 7/8th share in item Nos.10 to 16, and he has been in exclusive possession and enjoyment thereof openly, continuously without any interruption to the knowledge of all including defendant No.1 by paying cist for more than 40 years and perfected his right in any event.

a) He states that when defendant No.1 was minor in or about 1928, the maternal uncle of defendant No.1, by name, Moda Hanumanthappa, when attempted to lay a claim over item Nos.10 to 15 before the Revenue Authorities, his claim was rejected and

defendant No.1 during his life time did not claim any interest in the said items and even in O.S. No.67 of 1960, in his statement, he (defendant No.1) had clearly admitted that he (defendant No.4) is in exclusive possession of these items. It is also according to him that he removed the entire old house in item No.16 and constructed a new house spending about Rs.20,000/- and the plaintiff is perfectly aware of new constructions and, therefore, sought to dismiss the suit with costs.

iv) Defendant Nos.7 to 9, when they came on record as legal representatives of defendant No.5 along with defendant No.6, filed their common written statement; while denying defendant No.2 as the wife of defendant No.1, contended that defendant No.2 is not entitled to any share in the properties of defendant No.1, and that defendant Nos.6 to 9 and the plaintiff alone are entitled to a share in the properties of defendant No.1. Thus, they admitted the stand of the plaintiff that he is the son of defendant No.1.

a) As could be seen from the averments mentioned in the written statement, they sail with the plaintiff and finally they sought to decree the suit with costs.

v) Defendant Nos.10 to 12, who came on record as necessary parties, filed their written statements.

vi) Defendant Nos.10 and 11, in their written statement, would contend that they purchased Ac.0-81 cents of dry land out of Acs.1.01

cents in Survey No.156-4, situated in Kodigenahalli village for a consideration of Rs.300/- on 01.07.1964, which land is locally called as '*Upparamallu*' and have been in possession and enjoyment of the said extent. Defendant No.4 never raised any crops in it, but used it as a sheep-pen. Since it is nearer to the village of Subbarayunipalli, hamlet of Kodigenahalli, and since defendant Nos.10 and 11 did not own a house, they purchased that extent for constructing house and they have constructed a *pucca* house spending about Rs.15,000/- about 13 years prior to filing their written statement and paying house tax regularly using a portion of the land for hayrick yard, and defendant No.4 had been in uninterrupted possession to that extent over a period of 30 years, and neither the plaintiff, nor defendant No.1 ever enjoyed it, nor did they claim any right in that survey number.

vii) Defendant No.12, in his written statement, states that he purchased Ac.0.20 cents of dry land out of Acs.1.01 cents in Survey No.156-4 on 01.07.1964 for a consideration of Rs.50/- and has been in possession and enjoyment thereof ever since his purchase and he has built a house by removing the hut about two years prior to filing the written statement by spending about Rs.5,000/- and paying house tax regularly.

9. The trial Court has settled as many as 13 issues on 14.8.1970, which are as under:

- “1) Whether the suit is not maintainable on account of the dismissal of O.S.No.67/60 on the file of this Hon’ble Court?
- 2) Whether the plaintiff is not the son of the 1st defendant?
- 3) Whether items 1,2,3 and ½ of item 6,8 and item 9 are the self-acquired properties of late Aswarthappa as they are acquired by his succession to his junior paternal uncle?
- 4) Whether the plaintiff is entitled to file this suit as he is not the proper legal representative of the 1st defendant?
- 5) Whether the will dated 10-3-1969 is true valid and binding on the plaintiff?
- 6) Whether the properties items 10 to 16 belonged to the plaintiff or the 1st defendant?
- 7) Whether the 4th defendant is entitled to the items 10 to 16 and whether he has perfected his title to the same by adverse possession?
- 8) Whether the gift deed dated 20-6-66 in favour of the 2nd defendant is a sham and nominal document?
- 9) Whether the 2nd defendant is not entitled to the properties covered by the gift deed dated 20-6-66?
- 10) Whether the plaintiff is not entitled to a share in the plaint schedule properties?
- 11) Whether the mortgage in favour of the 3rd defendant is true, valid and binding?

12) Whether the 4th defendant is entitled to any of the properties?

13) To what relief is the plaintiff entitled? ”

10. On 27.01.1981, the trial Court settled two additional issues, thus:

“i. Whether D-5 and D-6 are entitled to a share in the suit property?

ii. Whether D-6 to D-9 are not liable for costs?”

11. As could be seen from the judgment of the trial Court, subsequently defendant No.3 did not take part in trial and he was set *ex parte* on 30.06.1980.

12. Before the trial Court, besides plaintiff examining himself as PW.1, has also examined seven more witnesses as PWs.2 to 8 and marked Exs.A-1 to A-3. On behalf of the defendants, defendant Nos.2 and 6 examined themselves as DWs.1 and 9, respectively, besides examining seven more witnesses as DWs.2 to 8 and marked Exs.B-1 to B-67. Exs.C-1 to C-4 were marked by the trial Court and Exs.X-1 to X-9 through the witnesses.

13. On issue No.1, the trial Court recorded a finding that the suit is not hit by Section 11 of the Code of Civil Procedure, 1908 (for short ‘CPC’) and maintainable even though, the suit in O.S. No.67 of 1960 on the file of the Subordinate Judge, Anantapur, was dismissed for default.

i) Issue Nos.2 and 4 were taken up together for discussion by the trial Court. On issue No.2, the trial Court gave a positive finding that the plaintiff is son of defendant No.1. The trial Court also answered issue No.4 in favour of the plaintiff.

ii) On issue No.5, which relates to execution of Will, Ex.B-2, by defendant No.1 in favour of defendant No.2, having elaborately discussed the evidence on record, both, oral and documentary, let in by the defendants side, in the light of the submissions made by the respective learned counsel, upheld the Will, but, however, recorded a finding that the said Will is valid to the extent of defendant No.1's share in the suit properties.

iii) On issue No.3, the trial Court did not believe the stand of defendant No.2, and rejecting the stand that item Nos.1, 2, 5, 8, 9 and half of item No.6 are self-acquisitions of defendant No.1 by succession, recorded a finding in favour of the plaintiff.

iv) On issue No.8, recorded a finding that the gift deed by defendant No.1, dated 26.07.1966, is a genuine document and, accordingly, answered it in favour of defendant No.2.

v) On issue No.9, held that defendant No.2 is not entitled to the properties mentioned in the gift deed dated 26.07.1966 and accordingly held the issue in favour of the plaintiff.

vi) Issue Nos.6, 7 and 12 were taken up together by the trial Court. On issue No.6, the trial Court held that the plaintiff and defendant No.1 are entitled to $7/8^{\text{th}}$ share in item Nos.10 to 15 of plaintiff 'A' schedule properties and that item No.16 belonged to them and, accordingly, answered the issue in favour of the plaintiff. On issue No.7, the trial Court recorded a finding that defendant No.4 has not perfected his title to item Nos.10 to 16 of plaintiff 'A' schedule by adverse possession, but, however, held that he is entitled to $1/8^{\text{th}}$ share in item Nos.10 to 15 of plaintiff 'A' schedule, but he is not entitled to any share in item No.16 of plaintiff 'A' schedule properties and, accordingly, answered the issue in favour of the plaintiff. On issue No.12, the trial Court held that defendant No.4 is entitled to $1/8^{\text{th}}$ share in item Nos.10 to 15 of plaintiff 'A' schedule properties and, accordingly answered it.

vii) On issue No.11, the trial Court held that the mortgage in favour of defendant No.3 is true and valid and that the same is binding on the plaintiff and defendant No.2 to the extent they are in possession and enjoyment of the properties of defendant No.1 and accordingly, answered it in favour of defendant No.3.

viii) On issue No.10, the trial Court held that the plaintiff is entitled to half share in item Nos.1 to 9 and 16, and $7/16^{\text{th}}$ share in item Nos.10 to 15 of plaintiff 'A' schedule properties and accordingly, answered the issue.

ix) On additional issue No.1, the trial Court, based on the finding recorded on issue No.5, held that defendant Nos.5 and 6 are not entitled to any share in the suit properties.

x) On additional issue No.2, the trial Court held that defendant Nos.6 to 9 are not liable for costs.

xi) Thus, answering the issue No.13, the trial Court decreed the suit by the judgment, dated 15.10.1981, granting a preliminary decree for partition and separate possession of the plaintiff's half share in item Nos.1 to 9 and 16 and 7/16th share in item Nos.10 to 15 of plaintiff 'A' schedule properties, with a direction that item No.14 of plaintiff schedule property to be allotted to the share of defendant No.4 at the time of making final decree.

14. The aforesaid judgment and decree were challenged by the plaintiff and defendant Nos.6 to 9 mainly touching issue No.5 dealing with the Will - Ex.B-2, dated 10.03.1969, propounded by defendant No.2 before the appellate Court.

15. The learned appellate Court formulated the point for consideration in A.S. No.17 of 1985 thus:

“Whether the Will dated 10.3.1969 is true, valid and binding on the plaintiff.”

16. On re-appraisal of evidence on record and the finding recorded by the learned trial Court, the learned lower appellate Court

did not agree with the appellants' stand and affirmed the finding recorded by the trial Court upholding the Will and dismissed the appeal in A.S. No.17 of 1985 on 31.08.1999.

17. Aggrieved over the judgment and decree of the learned lower appellate Court in A.S. No.17 of 1985, dated 31.08.1999, appellant Nos.1, 2 & 4 to 6 preferred the present second appeal raising the following substantial questions of law in Paragraph Nos.1 to 5.

- “1. Whether the will Ex.B2 dated 10-3-1969 is legally valid and binding in the absence of proper attestation on the document?
2. Whether issue relating to genuineness of a will cannot be raised by the plaintiff without filing rejoinder when the defendant relies on an unregistered will in defence?
3. Whether in the facts and circumstances of the case non production of the will before the court during the life time of its executant who is a party to the case, create enough suspicion to doubt its genuineness?
4. Whether the execution of a will in the presence of persons who do not know executor create sufficient suspicion to doubt its genuineness?
5. Whether in the absence of proper explanation for execution of a will at a far off place and in the presence of unknown persons would create a sufficient suspicion to doubt its genuineness?”

18. Even S.A.M.P. No.11548 of 2000 was filed by the appellants to permit them to raise the following additional substantial questions of law.

- “i) Whether the Courts below are correct in accepting will dt.10.3.1969 bequeathing the entire joint family property in favour of the 2nd defendant affecting the interest of the plaintiff?
- ii) Whether the 1st defendant is competent to execute the will (Ex.B-2) dt.10.3.69 bequeathing the joint family property in favour of the 2nd defendant depriving the plaintiff of his share in the said property? ”

19. At the time of admission on 17.09.2002, this Court keeping in view, the main grounds and additional grounds, somehow, referred to ground Nos.1, 2 and 3 of the grounds of appeal, treating them as substantial questions of law raised, but did not actually formulate the substantial questions of law as such. Therefore, it necessitated to formulate the substantial questions of law in view of the law declared by the Hon'ble Supreme Court in **Hardeep Kaur v. Malkiat Kaur** [(2012) 4 SCC 344], and accordingly, the following substantial questions of law are formulated:

- (i) Whether the Will under Ex.B-2, dated 10.03.1969, executed by defendant No.1 in favour of defendant No.2 is legal, valid and binding in the absence of proper attestation?

- (ii) Whether the plaintiff is prevented from questioning the genuineness of Ex.B-2 - Will without filing rejoinder when defendant No.2 propounded an unregistered Will?
- (iii) Whether the finding recorded upholding the Will and restricting it to the extent of defendant No.1's share in the suit properties by the trial Court, as affirmed by the appellate Court, is patently perverse?

20. Since the additional substantial questions of law, referred to in the above, would, in fact, answer the aforesaid three substantial questions of law formulated, there is no need to formulate further questions of law projected by the appellants.

21. Sri V. Ravinder Rao, learned Senior Counsel appearing for the appellants, would submit that the Court of first instance recorded a finding that the property devolved on the 1st defendant as reversioner was brought into common stock and acquired the status of joint family property and has attained finality since defendant No.2 has not questioned the same. He would further submit that the cardinal principle under Hindu Law that a coparcener including a father cannot devise joint family property or any part thereof by Will and, since, the property passes by survivorship to other coparceners on his death and nothing would be left open, which the Will can operate, was completely sidelined by both the Courts below and is contrary to what has been laid down by the Hon'ble Apex Court in **M.N. Aryamurthi**

v. M.L. Subbaraya Setty (dead) by his legal representatives¹, Kalyani (dead) by L.Rs. v. Narayan² and Rohit Chauhan v. Surinder Singh³.

i) Incidentally, the learned Senior Counsel's submission has been that both the Courts deviated in holding that the Will would operate to the extent of the share of deceased defendant No.1 in the suit schedule properties. He would submit that the trial Court, in fact, rejected the claim of defendant No.2 based on the Gift Deed dated 26.07.1966 by adopting the same rationale relying on the judgment rendered by this Court.

ii) The learned Senior Counsel also would submit that the lower appellate Court proceeded on a wrong premise that the plaintiff did not file a rejoinder to question genuineness of the Will. According to the learned Senior Counsel, the law is well-settled that even in the absence of plea by the opposite party doubting genuineness of the Will, the propounder has to prove the Will, and clear all suspicious circumstances as declared by the Hon'ble Apex Court in **Smt. Jaswant Kaur v. Smt. Amrit Kaur⁴, S.R. Srinivasa v. S. Padmavathamma⁵, and Ramachandra Rambux v. Champabai⁶.**

iii) The learned Senior Counsel would submit that interpretation of construction of document of title can be a valid

¹ AIR 1972 SC 1279

² AIR 1980 SC 1173

³ (2013) 9 SCC 419

⁴ (1977) 1 SCC 369

⁵ (2010) 5 SCC 274

⁶ AIR 1965 SC 354

substantial question of law which also includes a Will as held by the Hon'ble Apex Court in **M.B. Ramesh (D) by LRs v. K.M. Veeraje Urs (D) by LRs**.⁷

iv) The learned senior counsel, in relation to attendant suspicious circumstances surrounding Ex.B-2 - Will, referring to the evidence on record, more particularly, evidence of D.Ws.1, 2 and 4 would refer to the ruling in **Kalyan Singh v. Smt. Chhoti**⁸, wherein, the Hon'ble Apex Court in the context of appreciation of evidence, laid down that validity of the Will cannot be determined by merely considering the evidence of propounder and that the Court should look into surrounding circumstances as well as the inherent improbabilities of the case.

v) The learned Senior Counsel also would refer to the ruling in **Smt. Indu Bala Bose v. Manindra Chandra Bose**⁹, in the context of on whom *onus probandi* lies and that onus is on the propounder of the Will to explain away suspicious circumstances to the satisfaction of the Court before the Court accepts the Will as genuine and even where the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court and the suspicious circumstances may be as to genuineness of the signatures of the attestor even, and, a circumstance would be suspicious when it is not normal or is not

⁷ 2013 (4) ALD 104 (SC)

⁸ AIR 1990 SC 396

⁹ AIR 1982 SC 133

normally expected in a normal situation or is not expected of a normal situation or is not expected of a normal person.

22. These have been the submissions made by the learned Senior Counsel pointing out that the findings recorded by the Courts below are patently perverse do constitute substantial questions of law, and, therefore, requests to set aside the judgment and the decree passed by the lower appellate Court.

23. The learned senior counsel for appellants has also referred to certain rulings in relation to execution of a 'Will' and the guidelines stated by the Hon'ble Supreme Court in relation to nature and extent of burden of proof on the propounder, and when stands discharged, effect of suspicious circumstances and the test of satisfaction of conscience of the Court. He places reliance in **Surendra Pal v. Dr. (Mrs.) Saraswati Arora**¹⁰. He also places reliance in **Meenakshiammal (dead) through L.Rs. v. Chandrasekaran**¹¹ in the very same context. He would refer to the ruling in **V.K. Surendra v. V.K. Thimmaiah**¹² for the proposition that *Karta* has no right to change the joint family properties by transferring the same under a Will or a Gift without consent of other coparceners.

24. The learned senior counsel further refers to the decision of the Hon'ble Supreme Court in **Thamma Venkata Subbamma (dead)**

¹⁰ (1974) 2 SCC 600

¹¹ (2005) 1 SCC 280

¹² (2013) 10 SCC 211

by **L.R. v. Thamma Rattamma**¹³, in the context of gift of undivided share by a coparcener is void. So as to apply the same analogy to a Will executed by a coparcener, he relies in **Sangavarapu Venkata Subbaiah Sarma v. Karuthota Galib Saheb**¹⁴ where it was observed that a coparcener can Gift or Will away coparcenary property to the extent of his share and execution of settlement deed in respect of specific item of property by a coparcener or execution of a Will by him bequeathing the entire property is not valid, and until coparcenary property is divided by metes and bounds, no coparcener can alienate any specific item of property.

25. The learned senior counsel also would refer to the ruling of the Hon'ble Supreme Court in **Hardeep Kaur v. Malkiat Kaur**¹⁵ as to formulation of substantial question of law before hearing and disposal of appeal is a *sine qua non* for exercise of jurisdiction under Section 100 of CPC and holding that the High Court is bound to formulate substantial question of law at initial stage itself, if it is satisfied that matter deserves to be admitted and then to be heard and decided such questions and even at the time of hearing of second appeal, it is open for the High Court to re-formulate substantial question of law or formulate fresh substantial question of law or hold that no substantial question of law is involved.

¹³ AIR 1987 SC 1775

¹⁴ 1997 (4) ALT 274

¹⁵ (2012) 4 SCC 344

26. In relation to the proposition that interpretation of construction of a document of title can be a valid substantial question of law, in **M.B. Ramesh**⁷, relied on by the learned senior counsel for the appellants, the Hon'ble Supreme Court while observing that a particular question, whether a substantial question of law or not depends on facts and circumstances of each case and when execution of Will and construction thereof was subject matter of consideration, framing question of law cannot be faulted, held in paragraph No.14, thus:

“14. We may, however, note in this behalf that as held by a Constitution bench of this Court in *Chunilal Mehta v. Century Spinning and Manufacturing Company*, AIR 1962 SC 1314, it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties, necessarily raises a question of law. That apart, as held by a bench of three Judges in *Santosh Hazari v. Purushottam Tiwari*, 2001 (2) ALD 40 (SC) = (2001) 3 SCC 179 = AIR 2001 SC 965, whether a particular question is a substantial question of law or not, depends on the facts and circumstances of each case. When the execution of the Will of *Smt. Nagammanni* and construction thereof was the subject matter of consideration, the framing of the question of law cannot be faulted. Recently, in *Union of India v. Ibrahim Uddin*, (2012) 8 SCC 148, this Court referred to various previous judgments in this behalf and clarified the legal position in the following words:-

“67. There is no prohibition to entertain a second appeal even on question of fact, provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse.”

27. In fact, the learned senior counsel appearing for contesting respondent also relies on the very same decision and lays emphasis on the proposition laid down in **H. Venkatachala Iyengar v. B.N. Thimmajamma**¹⁶ which was referred to and the extracted paragraph No.18, thus:

“18. What is the true legal position in the matter of proof of wills ? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the

¹⁶ AIR 1959 SC 443(1)

execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind " in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with

mathematical certainty. The test to be applied would be the usual test of the satisfaction of the, prudent mind in such matters.”

28. In **Smt. Indu Bala Bose**⁹, in the context of on whom the *onus probandi* lies to dispel the suspicious circumstances, the learned senior counsel refers to paragraph No.7, thus:

“7. This Court has held that the mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Successions Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the disposition 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 testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial

benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. (See AIR 1964 SC 529, [1959] Suppl. 1 SCR 426 & [1962] 3 SCR 195).”

Explaining what amounts to a suspicious circumstance, the Hon’ble Supreme Court in paragraph No.8 expresses thus:

“8. Needless to say that any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

Learned counsel relied on the decision of this Court in the case of *Rani Purnima Devi v. Kumar Khagendra Narayan Dev* reported in (1962) 3 SCR 195. In this case the will in question gave the entire property by the testator to a distant relation of his to the exclusion of the testator's widow, sister and his other relations, and even his daughter, who would be his natural heirs, but subject, of course, to the condition that the legatee would maintain the widow and the sister of the testator. The testator's signatures were not his usual signatures, nor in the same ink as the rest of the will; the testator used to sign blank papers for use in his cases in court and he used to send them to his lawyer through his servants; the testator did not appear before the Sub-Registrar for the purpose of registration of the will but the Sub-Registrar sent only his clerk to the residence of the

testator for the purpose of registration; there were 16 attesting witnesses who attested the will, but of them, only 4 interested witnesses were examined to the execution of disinterested witnesses. The above are undoubtedly suspicious circumstances, circumstances creating doubt in the mind of the Court. In spite of these circumstances, it was held by the Trial Court that the will was duly executed and attested. On appeal, the High Court affirmed the order of the Trial Court. On further appeal, this Court held that the circumstances were suspicious and were not satisfactorily explained and hence held that "the due execution and attestation, of the will were not proved."

29. In **Kalyan Singh**⁸, the Hon'ble Supreme Court while referring to that the factum of execution of validity of the Will cannot be determined merely by considering the evidence produced by the propounder, held in paragraph No.20 thus:

"20. It has been said almost too frequently to require repetition that a will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider

circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.”

30. In the same context, in **Smt. Jaswant Kaur**⁴, while observing that where execution of a Will is shrouded in suspicion, its proof ceases to be a simple *lis*, the Hon’ble Supreme Court held in paragraph Nos.9 and 10 thus:

“9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple *lis* between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.

10. There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in *R. Venkatachala Iyengar v. B.N. Thirumajamma & Others* (1959 Supp. 1 SCR 426 : AIR 1959 SC 443).

(1) The Court, speaking through Gajendragadkar J., laid down in that case the following propositions :--

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

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.”

31. In the context of legal position as to admission of execution of Will and evidentiary value, the Hon'ble Supreme Court in **S.R. Srinivasa⁵**, held in paragraph No.29 thus:

“29. The learned counsel further submitted that in view of the admission about the execution of the Will made in the subsequent suit, it cannot possible be held that the Will was not duly proved. According to the learned counsel, admissions are the best form of evidence. Unless it is effectively rebutted, the same can be relied upon. He relies on the following judgments:-

- (1) Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi (AIR 1960 Supreme Court 100);
- (2) Nagindas Ramdas v. Dalpatram Iccharam (AIR 1974 SC 471; and
- (3) Gautam Sarup v. Leela Jetly (2008) 7 SCC 85.

In paragraph No.36, the factual aspect was referred to in the light of the provisions of Section 15(2)(a) of Hindu Succession Act, 1956, thus:

“36. As noticed earlier by virtue of Section 15(2) (a) of the Act, the appellants would inherit the property in dispute. This right is sought to be defeated by defendant No.1 on the basis of the Will dated 18.6.1974, allegedly executed by Puttathayamma. Defendant No.1 being the sole beneficiary under the Will claims that the plaintiffs can not claim to “inherit” the property on the basis of intestate succession. Undoubtedly, therefore, it was

for defendant No.1 to prove that the Will was duly executed, and proved to be genuine.”

In paragraph No.38, the Hon’ble Supreme Court referred to the ruling in **H. Venkata Chala Iyengar**¹⁶, and extracting the principles laid down, clarified the true legal position in the matter of proof of Wills in **Jaswant Kaur**⁴.

32. The learned senior counsel appearing for the appellants places reliance on what has been expressed by the Hon’ble Supreme Court in the context of what is contemplated by the provisions of Section 58 of Evidence Act with reference to the provisions of Order - VIII Rule - 5 of CPC, where, it envisages that even the vague or evasive denial may be treated to be an admission and the provisions of Order - XII Rule - 6 of CPC held in paragraph No.47 thus:

“47. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in *Gautam Sarup v. Leela Jetly* [(2008) 7 SCC 85] wherein it was observed as follows: (SCC pp.90 & 94, paras 16 & 28)

"16. A thing admitted in view of Section 58 of the Evidence Act need not be proved. Order 8 Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order 12 Rule 6 of the Code of Civil Procedure may also be

decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom. ...

* * *

"28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

While dealing with genuineness of the Will, the learned senior counsel for the appellants refers to the ruling in **Addepalli Venkata Laxmi v. Ayinampudi Narasimha Rao**¹⁷, where executant died immediately after execution and only one of the attestors, out of three, was examined who was said to be closely related to beneficiary under the Will, a Division Bench of this Court held in paragraph No.10 thus:

“10. The entire case rests on the family settlement alleged to have been set up by both the parties.

¹⁷ AIR 1994 AP 72

The will that has been set up by the parties under Ex.A-2 has also got a material bearing. The validity of the will has to be determined on the correctness or otherwise of the statements that have been made by the attestors. The surrounding circumstances preceding the execution of the will have to be gone into to arrive at a finding on the validity of the will executed while disposing of the property in favour of the a particular party or person. It is to be seen that on the death of Subrahmaniam, his two wives have become helpless and they are not having any male assistance to look after their family affairs and properties. Venkatalaxmi, who is the first daughter of Paripurnamma, was married in December, 1944. Since a male member has joined the family through their first daughter Venkatalaxmi, it is common in all the Hindu families (*Sic.* families) that they will naturally take the assistance of their first male member. So, taking assistance of the son-in-law at the time when the other children are minors and are not able to look after the family affairs, cannot be a reason to state that the son-in-law has invested money of his own and constructed the 'Daba' house; but that money must have come either from Veeramma or Paripurnamma. Not even an iota of evidence has been placed to show the source of income for the construction of 'Daba' house in Bose Road by Sri Subbarao either in the year 1948 or 1949. In Ex.A-2 will, it has been mentioned that the house had also fallen to the share of Veeramma. When the house itself has not been in existence in 1944 i.e. at the time when the alleged family settlement had taken place, it cannot be said that the house, which is said to have been constructed either in the year 1948 or 1949, was also allotted to her in the year 1944 and this is a vital

circumstance to throw the case of the plaintiff. Another strong circumstance that has been taken by the trial Court is that in the will it has been stated that the plaintiff has not been given any property either moveable or immoveable and so, Veeramma is willing away the property that fell to her share. This recital in Ex.A-2 belies the factual version that has been spoken to or admitted by both the parties, as Ac.1-45 cents of wet land in Chinaravuru village has already been given to the plaintiff. That means, Venkatalaxmi has either directly or through a document come into possession of Ac.1-45 cents of land. This land was purchased in the name of his first wife Veeramma by late Subrahmaniam and this land has ultimately come into possession of Venkatalaxmi. It is very surprising to note that when that land was already given to her at the earliest point of time how a recital to that effect had found its place in Ex.A-2. Perhaps in a hurry mood, as Veeramma was taken ill and was not in a position to move about, Ex.A-2 might have been got into existence and got the same registered at Tenali even though the place of Registration (execution is not) is at Tenali. The explanation that has been given for this is that she was taken ill and was taken to Guntur and while she was undergoing treatment, Ex.A-2 was executed. If that is so, there is no particular reason to take Veeramma all the way to Guntur, particularly when the distance is very little and had the facility of taking her to Guntur and bringing her back on the very same day itself. But the evidence of P.Ws. 4 and 5 is otherwise. In their evidence they stated that they are ignorant about the factum of stay of Veerama in connection with her treatment for jaundice, or the Doctor who treated Veeramma. If the disease with

which Veeramma was suffering requires treatment by a specialist, definitely the name of the Doctor or the specialist would have taken note of by P.Ws. 3 and 4. The treatment that has been provided to Veeramma or the purpose of their visit to Guntur are genuine or not cannot be entertained at this stage. It is to be noted that immediately after the execution of the will under Ex.A-2, Veeramma died. If such is the situation, the mental faculty at the time of execution of the deed has to be explained particularly, when she was at the fag-end of her life and death took place immediately after the execution of the same. Examination of one attesor has been commented upon by the lower Court. Admittedly, Ex.A-2 is attested by three persons. P.W. 3 is one among them. The law is that all the attestors have to be examined when the will is executed in suspicious circumstances. Admittedly, along with P.W. 3 another attesor was also alive but he was not examined for the reasons best known to the plaintiff. When one of the attestors who is closely related to the husband of the plaintiff and is found to be interested witness and has given self-interested testimony, the common thing that is expected is that at least one independent person who is not related to the person in whose favour the properties are willed should be examined to dispel the suspicious circumstances throwing a doubt on the genuineness of the will. These circumstances naturally throw a doubt and accordingly, the lower Court arrived at the conclusion that much relevance cannot be attached to the evidence of P.W. 3. So, viewing the case from any angle, it can be said that the lower Court has rightly come to the conclusion that Ex. A-2 is not the will that has been executed by Veeramma in a sound and disposing state of mind. When Ex. A-2 does not

reflect the true state of affairs, the lower Court was quite justified in arriving at the conclusion that it is not properly executed.”

33. In **Surendra Pal**¹⁰, the Hon’ble Supreme Court, while observing that the propounder has to show that the Will was signed by the testator, explains to when the onus, which rests on the propounder to discharge, and, cases in which execution of Will itself is surrounded by suspicious circumstances and cases, where the propounder himself has taken a prominent part in execution of the Will, which confers on him substantial benefit, in paragraph No.7, thus:

“7. The propounder has to show that the will was signed by the testator ; that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the will are not the result of the testator's free will and mind.

In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the Court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain. See (1) H. Venkatachala Iyengar v. B. N. Thimmajamma, and (2) Rani Purnima Devi v. Kumar Khagendra Narayan Dev. In the latter case this Court, after referring to the principles stated in the former case emphasised that where there are suspicious circumstances the onus will be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine; and where the caveator alleges undue influence, fraud and coercion the onus is on him to prove the same. It has been further pointed out that the suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will which may be unnatural or unfair or improbable when considered in the light of the relevant circumstances. if the caveator does not discharge the burden which rests upon him in establishing the circumstances which show that the will had been obtained by fraud or undue influence a 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. The observations of the Privy Council in *Motibai Hormusjee Kanga v. Jamsetjee Hormusjee Kanga* (AIR 1924 PC 28) support the above proposition. Mr. Ammer Ali observed at p. 33]

It is quite clear that the onus of establishing capacity lay on the petitioner. It is also clear that if the caveator impugned the will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lay upon him to establish that case.

In the light of what has been stated if the various requirements of a valid will are established, then as observed by the Privy Council in *Motibai Hormusjee Kanga's* case at p. 33:

A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition.

34. In **Meenakshiammal¹¹**, the Hon'ble Supreme Court while observing that the propounder is burdened to satisfy the conscience of the Court where the circumstances give rise to doubts concerning execution of Will, held in paragraph No.16, thus:

“16. We do not find any merit in this civil appeal. The onus of proving 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, is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the

Court before it accepts the will as genuine. Even where the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be regarding the genuineness of the signature of the testator, the condition of the testator's mind, the disposition 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 testator's mind was not free. In such a case, the Court would normally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator.”

35. The observation of the Hon”ble Supreme Court in **M.N. Aryamurthi**¹, in paragraph Nos.8, 9 and 10 relied on by the learned counsel for the appellants thus:

“8. On reading the document as a whole, there can be hardly any doubt that Lachiah was wanting to make a will. It was drafted by his family lawyer. The whole form of the document is of a will. It is attested by two witnesses. Executors are appointed and a number of bequests have been made which were to take effect after his death. In the beginning and at the end, Lachiah described the document as his Will which he was making in his old age, while in good mental state. The will shows his awareness that, if the family properties were regarded as joint family properties, he would not be in a position to make any disposition of the same by a will. So, although two of his elder sons had contributed largely to the family acquisitions, all those acquisitions, he insisted, were his self-acquired properties, over which, he claimed, he had absolute power of disposition. As a matter of fact, if the

properties as claimed by him had been self-acquired, there is no doubt that the document would have absolutely operated as the last will and testament of Lachiah Setty. But unfortunately, Luchiah, though a father, could not, under the Hindu law, dispose of, by will, joint family property or any part thereof and as a will it was clearly inoperative on the various dispositions made by him (See Parvatibai v. Bhagwant Pandharinath ILR 39 Bom 593. This latter case has questioned the correctness of a previous decision of that Court in Appan Patra Chariar v. V.S. Srinivasa Chariar ILR 40 Mad 1122. The decisions proceed on the principle which was well-settled in Vital Putten v. Yamenamma (1874) 8 M.H.C.R. 6, and Lakshman Dada Naik v. Ramachandra Dada Naik (1879) ILR 5 Bom. 48 (P.C.) that a coparcener cannot devise joint family property by will, because, on the date of his death when the will takes effect, there is nothing for the will to operate on, as, at the moment of his death, his interest passes by survivorship to the other coparceners.

9. It is true that, in some cases, the Privy Council had given effect to a "will" by a coparcener when the depositions had been made with the consent of the other coparceners (See Brijraj Singh. v. Sheodan Singh (1913) 40 Ind APP 161, and Lakshmi Chand v. Anandi 53 Ind App 123. But, in both these cases the will was given effect to not as a will but as a family arrangement which was acted upon.

10. The plaintiffs have, therefore, clutched at the above decisions and submitted that, since the sons had agreed to the dispositions made in the will, the will should be given effect to as a family arrangement. When a document which is

unexceptionable as a will - that is to say, a testamentary document, revocable by the testator at his sweet-will is supposed to embody a family arrangement, we are transported into a different realm where the intentions and objects of the maker or makers of the document are quite different. As pointed out in Halsbury's Laws of England, 3rd Edition, Vol. 17, at p. 215:

A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

This view of a family arrangement has been approved by this Court in *Maturi Pullaiah v. Maturi Narasimham* AIR 1966 1936, where it is pointed out that:

“though conflict of legal claims in praesenti or in futuro is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, courts will more readily give assent to such an arrangement than to avoid it. “It will be, therefore, seen that, in the first place, there must be an agreement amongst the various members of the family intended to be generally and reasonably for the benefit of the family.

Secondly, the agreement should be with the object either of compromising doubtful or disputed rights, or for preserving the family property, or the peace and security of the family by avoiding litigation or for saving its honour. Thirdly, being an agreement, there is consideration for the same, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and goodwill amongst the relations (See Ram Charan Das v. Girija Nandini Devi (1965) 3 SCR 841). The question, therefore, is whether the father and sons in this case had been really motivated by the above objects when the father purported to make the "Will" which would then be a misnomer for an agreement embodying a family arrangement. As to this, we are constrained to say there is very little either in the will or the pleadings or the evidence led in the case. In construing a document, whether in English or in vernacular, the fundamental rule is to ascertain the intention from the words used. The surrounding circumstances are to be considered. But that is only for the purpose of finding out the intended meaning of the words which have actually been employed (See Ram Gopal v. Nand Lal 1950 S.C.R. 766. The Will here does not show that there was any occasion for making a family arrangement. The Will itself discloses that all the sons were on amicable terms, there were no distensions, no contrary claims and no reasonably anticipated disharmony. On the other hand, the father exhorts the sons to continue to remain joint and undivided for the greater glory of the family as one unit. It is true that in para 20 he states that all his children had solicited him to make suggestions with a view that no differences or ill-feelings should arise amongst themselves. But that is only a manner

of speaking, because such forebodings of differences and ill-feelings are inherent in every joint family. In the absence of any evidence of even a whisper of disharmony in the family, the statement that the children had solicited him to make suggestions is, to our minds, only a flourish. But what is important to note is that the father does not propose a partition or a severance of status. On the contrary, he exhorts the sons to live united as members of a joint family on the same cordial terms which prevailed till then, A father in a Mitakhshara joint family has the undoubted right to divide the family property at any moment during his life, whether his sons consent or do not consent to the division. The only limitation on his power is that the division directed by him must be a fair one in which he gives his son an equal share with himself. The will does not show that he wanted to exercise any such power and, since a partition was very far from his mind, he merely made his own "suggestions" as to what he would regard as proper if, in some remote future, the members of the family thought about severance of status. These suggestions, if acted upon, would have given plaintiff Nagappa a 4 anna share, defendant No. 1 a 2-anna share and his wife Rukminiamma a 2-anna share, while the other eight sons would have got only an anna share each. This would have been a very unequal partition. Two of the sons would have got much more than they were entitled to on a partition and the mother, who was not entitled under the Hindu Law as it prevailed in Mysore in 1933 to any share on partition in the family, would have got 2 anna share. If these suggestions had been acted upon voluntarily by the various parties perhaps there would have been some point in the contention raised on behalf of the

plaintiff. The father Lachiah died in January, 1936 and the family continued to be joint till a submission was made to the Arbitrators in 1940. But as long as the suggestions were not acted upon, they remained mere suggestions of the father, and, in our opinion, paras 18 and 19 of the Will can only be read as embodying the exhortations and recommendations of an affectionate father to his dutiful sons to act in a particular manner in particular circumstances. The father, it is obvious, did not contemplate a severance of the joint family status in the foreseeable future. Deaths of sons were not unlikely to occur which would have completely upset the shares suggested by him in para 19. Secondly, a situation, like the one we have in this case where only one of the members of the family wanted to separate from the others, was bound to create a difficult problem. A son, in disregard of his father's exhortation to remain joint, desires to separate, while the other sons, in obedience to the father's wishes, do not desire to separate. In such a case, the latter would be able to retort to the former. "Since you disregard the father's wishes that we should continue to be joint, we are discharged from the necessity of obeying father's wishes with regard to shares in partition." A problem of this kind would inevitably create difficulties in the matter of sharing the family property as suggested by the father and, for that reason also, the contents of para 19 are better construed as "suggestions" of the father as expressly stated by him in para 20. In short, the contents of paras 18 and 19 are merely in the nature of exhortations or recommendations, not binding like a contract for want of mutuality or consideration, though the sons have endorsed under the Will that

they had read the will and had attested it whole heartedly agreeing to act accordingly.”

It was a case where the Will was executed on 01.01.1933 and appeals preferred were in 1956 and the factual aspect would clearly show that the sons of Testator had also contributed for acquiring properties, which took the character of joint family properties, but the testator executed the Will.

36. In **Kalyani**², relied on by the learned senior counsel for the appellants, the Hon’ble Supreme Court while expressing doubt whether a Hindu father can impose family arrangement save direct evidence of consent of each of his sons to be effective after his death, held in paragraph No.16, thus:

“16. Defendant 1 who contested the suit in terms stated that Ext.P-1 was not effective as a will. He then stated that Ext.P-1 purports to partition the property between the two tavazhies represented by Karappan's two wives and their respective male offspring. It may, however, be stated that nowhere in the written statement he has put forth the contention that Ext.P-1 evidences a family arrangement assented to by all affected thereby. That case appears to have been made out by the High Court for the first time and since the plaintiff has been non-suited on the finding that Ext.P-1 was a family arrangement which provided for a coparcenary of four sons of the first wife of Karappan, retaining inheritance by survivorship amongst the four members it is necessary to examine the contention whether Ext.P-1 provides for a family arrangement consented to by all

concerned. An ineffective will sometimes though not always, if otherwise consented by all adult members, may be effective as a family arrangement but as the father of a joint Hindu family has no power to impose a family arrangement under the guise of exercising the power of partition, the power which undoubtedly he has but which he has failed to effectively exercise, cannot in the absence of consent of all male members bind them as a family arrangement. What constitutes family arrangement has been fully examined by this Court in *M.N. Aryamurthy v. M.D. Subbaraya Setty* (1972) 4 SCC 1. Broadly stated, it is that there must be an agreement amongst the various members of the family intended to be generally and reasonably for the benefit of the family and secondly the agreement should be with the object either of compromising doubtful or disputed rights or for preserving the family property or the place and security of the family. Both these ingredients appear to be absent in this case. In *Brijraj Singh's case* (supra) a father purported to make a will in which he recorded a partition of the joint family property amongst his three sons. He did not take a share for himself and simultaneously gave double share to his eldest son. There were usual recitals of partition and allotment of shares and it was further stated that in anticipation of execution of the deed various shares were put in possession of property allotted to each of them. This was done two months prior to the execution of the so-called will. The document was held ineffective as a will but on evidence it was found that all concerned had acquiesced in the arrangement evidenced by the deed and the deed was intended to operate from the date of its execution and, therefore, it evidenced a family arrangement contemporaneously made and

acted upon by all the parties and hence binding. Similarly in *Lakshmi Chand v. M.T. Anandi* 53 Ind App 123, two brothers having no male issue and constituting a joint Hindu family governed by Mitakshara, signed a document, described therein as an agreement by way of will. The document provided in effect that if either party died without male issue, his widow should take a life interest in a moiety of the whole estate and that if both the parties died without male issue, the daughters of each, or their male issue, should divide the father's share. The document was registered. A few days after its execution one brother died, and his widow was entered as owner of a moiety of the estate. Subsequently the other brother sued for a declaration that the document was null and void. Privy Council held that the document could not operate as will but that as a co-sharer in a Mitakshara joint family with the consent of all his co-sharers he could deal with the share to which he would be entitled on a partition and was binding as family arrangement. To be effective as a family arrangement the deed must be one intended to operate from the date of its execution, a feature wanting in Ext.P-1, and it must be assented to and acquiesced in and acted upon by all affected thereby. At the time of execution of Ext.P-1 there is no evidence as to who were the adult members of the family other than Karappan who consented to the alleged family arrangement. One thing, however, may be pointed out that defendant 1 gave his age as 87 years on December 29, 1959, when his evidence commenced. Presumably he must have been born in 1872. But there is no evidence about the age of other children of Karappan. The only evidence as to the consent of the male members is that after the death of

Karappan all male members acted according to the wishes of Karappan as disclosed and ordained in Ext.P-1. Assuming it to be so, Ext.P-1 was to operate after the death of Karappan and not from the date of execution. The High Court after referring to Brijraj Singh's case (supra) overlooked the fact that in accepting the deed before it, the Judicial Committee was impressed by the fact that it was intended to speak from the date on which it was written and not future date, viz., death of the writer. Ext.P-1 in terms reserves to Karappan his right to deal with the property at his sweet will and was to be operative after his death. The High Court completely overlooked this material difference. Assuming that Ext.P-1 was to be treated as family arrangement after the death of Karappan, the absence of any evidence of agreement amongst family members entitled to a share, to the terms of Ext.P-1 when it was executed, the absence of any dispute at or about the time Ext.P-1 was executed amongst the members of the family sought to be settled by Ext.P-1; and the absence of evidence that arrangement was necessary for the security of the family or property would wholly negative the contention that Ext. P-1 would furnish evidence of family arrangement. We have grave doubt whether a Hindu father can impose family arrangement save (with) direct evidence of consent of each of his sons, to be effective after his death. Therefore, Ext.P-1 does not furnish evidence of family arrangement.”

37. In **Thamma Venkata Subbamma**¹³, the disposition was by way of gift of undivided share by a coparcener, the Hon'ble Supreme Court declaring it void, held in paragraph Nos.12 to 15 thus:

“12. There is a long catena of decisions holding that a gift by a coparcener of his undivided interest in the coparcenary property is void. It is not necessary to refer to all these decisions. Instead, we may refer to the following statement of law in Mayne's Hindu Law, Eleventh Edition, Article 382:-

"It is now equally well settled in all the Provinces that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid A coparcener cannot make a gift of his undivided interest in the family property, movable or immovable, either to a stranger or to a relative except for purposes warranted by special texts."

13. We may also refer to a passage from Mulla's Hindu Law, Fifteenth Edition, Article 258, which is as follows:--

"Gift of undivided interest.-- (1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which preclude the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners."

14. It is submitted by Mr. P.P. Rao, learned Counsel appearing on behalf of the respondents, that no reason has been given in any of the above decisions why a coparcener is not entitled to alienate his undivided interest in the coparcenary property by way of gift. The reason is, however, obvious. It has been already stated that an individual member of the joint Hindu family has no definite share in the coparcenary property. By an alienation of his undivided interest in

the coparcenary property, a coparcener cannot deprive the other coparceners of their right to the property. The object of this strict rule against alienation by way of gift is to maintain the jointness of ownership and possession of the coparcenary property. It is true that there is no specific textual authority prohibiting an alienation by gift and the law in this regard has developed gradually, but that is for the purpose of preventing a joint Hindu family from being disintegrated.

15. The rigor of this rule against alienation by gift has been to some extent relaxed by the Hindu Succession Act, 1956. Section 30 of the Act permits the disposition by way of will of a male Hindu in a Mitakshara coparcenary property. The most significant fact which may be noticed in this connection is that while the Legislature was aware of the strict rule against alienation by way of gift, it only relaxed the rule in favour of disposition by a will the interest of a male Hindu in a Mitakshara coparcenary property. The Legislature did not, therefore, deliberately provide for any gift by a coparcener of his undivided interest in the coparcenary property either to a stranger or to another coparcener. Therefore, the personal law of the Hindus, governed by Mitakshara School of Hindu Law, is that a coparcener can dispose of his undivided interest in the coparcenary property by a will, but he cannot make a gift of such interest.”

The Hon’ble Supreme Court, in fact, held that Section 30 of Hindu Succession Act, 1956, in the context of a male Hindu, in a coparcenary property, is permitted to dispose of his undivided interest and, thus, ruled that a coparcener can dispose of his undivided interest in the

coparcenary property by a Will, but, he cannot make a gift of such interest. The said proposition will be adverted to at a later stage in the context of concurrent findings recorded by the Court below restricting interest of the testator to the legatee to the extent of half share, to which, the testator, had he been alive, would be entitled to.

38. In the very same context, in **Sangavarapu Venkata Subbaiah Sharma¹⁴**, the Hon'ble Supreme Court while holding that execution of settlement deed in respect of specified item of property by a coparcener or execution of Will by him bequeathing entire coparcenary property is not valid until the coparcenary property is divided by metes and bounds, but a coparcener can gift or Will away coparcenary property to the extent of his share, held in paragraph Nos.38, 51 and 52, thus:

“38. The next fact which arises in this litigation is of the Will executed by first defendant in favour of the 6th defendant. The Will is produced on record by first defendant as Ex.B-16. By the Will dated 23-6-1973 the entire property was bequeathed by the first defendant in favour of 6th defendant. The learned Counsel Mr. Poornaiah appearing on behalf of the appellant herein submitted at the Bar that the Will has to be ignored in toto for the reason that the Will comes into operation only after the death of the first defendant. It was also submitted by the learned Counsel for the appellant that the entire property cannot be bequeathed by the first defendant by ignoring the rights of the plaintiff, who was the adopted son of first defendant. In support of the

aforesaid contention, the learned Counsel Mr. C. Poornaiah appearing for the appellant relied upon a ruling reported in Pariki Subbireddy and another v. Pariki Chinna Reddemma and Ors., 1996 (2) An.W.R. 19 = 1996 (3) ALD 98 (D.B.). It is the judgment of the Division Bench of this Court in which it was held as follows:

"Section 30 of the Hindu Succession Act provides for testamentary succession saying that a Hindu may dispose of his property by way of testamentary disposition and explanation to the section clarifies that the interest of male Hindu and Mitakshara coparcenary property is, notwithstanding anything contained in the Act or any other law for time being in force, to be deemed to be property capable of being disposed of by him within the meaning of the section. From this, submission is advanced that as specific provision was made in Section 30 enabling a male Hindu coparcenary to dispose of the property by testamentary disposition, the logical conclusion to be reached is that a bar operates in respect of all other types of disposition of property by Hindu male coparcener including gifts. It cannot be accepted as no canon of interpretation of statutes lends support to the proposition advanced. The effect of Section 4 would only affect any existing law so far as specific provision to the contrary is made in the Act itself. There is no provision in the Hindu Succession Act prohibiting gift by coparcener of his undivided interest in the coparcenary whereas such right inheres in him under the existing Hindu Law. Such right will continue unabated as it is not prescribed by any provision of the statute. The effect of Section 30 of the Hindu Succession Act cannot be stretched in the

manner it is sought to, to cover also matters which were not dealt with by that section."

Before discussing the validity of the Will, this Court would like to discuss as to whether the 6th defendant was legally married to the first defendant and its effect?

51. To summarise the entire discussion, this Court holds that the plaintiff-appellant was validly adopted by the first defendant and his 1st wife. The plaintiff-appellant became the coparcener with the first defendant having undivisible half share in the property. Ex.B-16 Will is inoperative in law for the reason that the testator had bequeathed the entire property in favour of 6th defendant without any legal rights. It is further held by this Court that the marriage between the first defendant and the 6th defendant is a valid marriage. Then the Settlement Deed Ex.B-9 is inoperative in law as the Settlement Deed was executed by the first defendant in favour of sixth defendant by ignoring the rights of the plaintiff and he had executed the Settlement Deed in respect of the specified item of property without any legal right.

52. Thus, considering the entire evidence and the conclusion arrived at, this Court holds that the plaintiff-appellant is entitled to half share in 'A' schedule properties. The remaining half share would devolve on the plaintiff and the 6th defendant by succession and each one of them will get equal share in the remaining property which would have been allotted to the first defendant if he would have been alive."

39. In **Rohit Chauhan**³ while observing that a coparcener has no definite share in the coparcenary property, but he has an undivided interest in it and it enlarges by deaths and diminishes by births in the family and not static, the Hon'ble Supreme Court held in paragraph No.11, thus:

“11. We have bestowed our consideration to the rival submissions and we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before the commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.”

40. In **V.K. Surendra**¹², the Hon'ble Supreme Court while observing that *Karta* has no right to change the nature of joint family property by gift or Will without consent of other coparceners, had occasion to deal with powers of *Karta* and held that *Karta* has no right to change the nature of joint family property transferring the same under a gift or Will without consent of other coparceners.

41. On applicability of principle of *resjudicata*, the learned senior counsel referring to the decision in **Smt. Ganga Bai v. Vijay Kumar**¹⁸, relies on what has been expressed by the Hon'ble Supreme Court in paragraph Nos.14 to 17, thus:

“14. It is necessary first to understand the nature of the appeal filed by defendants 2 and 3 in the High Court and the relief they sought therein. That appeal was in terms filed only against the finding recorded by the trial court that the partition between defendant 1 and his sons was a sham and colourable transaction intended to defeat or delay the creditors. The Memorandum of Appeal as filed originally contained seven grounds, each of which was directed against the finding given by the trial court on the question of partition. The Memorandum contained a note that as the subject-matter in dispute was not capable of being estimated in terms of a money value, a fixed court fee of Rs.20 was paid thereon. Only one prayer was originally made in the Memorandum of Appeal that the partition deed be declared as genuine. Counsel for defendants 2 and 3, furnished to the registry of the High Court a written explanation as

¹⁸ AIR 1974 SC 1126(1)

required by Rule 171 of the High Court Rules that as defendants 2 and 3 were only challenging the finding recorded by the trial court on the question of partition and as they were merely seeking a declaration that the partition was genuine, the fixed court fee of Rs. 20 was properly paid.

15. It is thus clear that the appeal filed by defendants 2 and 3 in the High Court was directed originally not against any part of the preliminary decree but against mere finding recorded by the trial Court that the partition was not genuine. The main controversy before us centers round the question whether that appeal was maintainable. On this question the position seems to us well-established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

16. Under section 96(1) of the Code of Civil Procedure, save where otherwise expressly provided by the Code or by any other law for the time being in force, an appeal lies from every decree passed by any court exercising original jurisdiction, to the court authorised to hear appeals from the decisions of such court. Section 100 provides for a second appeal to the

High Court from an appellate decree passed by a court subordinate to the High Court. Section 104(1) provides for appeals against orders of the kind therein mentioned and ordains that save as otherwise expressly provided by the Code or by any law for the time being in force an appeal shall lie "from no other orders". Clause (i) of this section provides for an appeal against "any orders made under Rules from which an appeal is expressly allowed by rules". Order 43, Rule 1 of the Code, which by reason of clause (i) of section 104(1) forms a part of that section, provides for appeals against orders passed under various rules referred to in clauses (a) to (w) thereof. Finally, Section 105(1) of the Code lays down that save as otherwise expressly provided, no appeal shall lie from any order made by a court in exercise of its original or appellate jurisdiction.

17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under, rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No.72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court."

42. In the same context, the learned senior counsel for the appellants also relies on the expression of the Hon'ble Supreme Court in paragraph Nos.19 and 26, in **Deva Ram v. Ishwar Chand**¹⁹, thus:

¹⁹ (1995) 6SCC 733

“19. Learned counsel for the appellants next contended that the finding recorded by the trial court in the previous suit on Issue No.5 that the appellants were the tenants of the land in suit under the respondents since Samvat 2005 should be treated to be still available to them and on that basis they can legally plead that the suit of the respondents for possession of the land in suit was liable to be dismissed. It is contended that the finding on Issue 5 was reversed by the lower appellate court in an appeal which was ultimately decided in their favour and, therefore, it was not possible for them to challenge the findings of the lower appellate court in any higher forum for the simple reason that an appeal under Section 96, or, for that matter, under Section 100 of the Civil Procedure Code, lies only against a decree and not against a finding. In this situation, it is contended, the appellate judgment insofar as it relates to the finding on Issue No.5, is liable to be ignored. It is pointed out that if this is done, the original findings recorded by the Trial Court on the status of the appellants that they are the tenants of the land under the respondents, would revive and operate as res judicata against the respondents who cannot be granted the relief of possession.

26. It is provided in Section 96 of the C.P.C. that an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeal from the decision of such court. So also, Section 100 provides that an appeal shall lie to the High Court from every decree passed in appeal. Thus sine qua non in both the provisions is the "decree" and unless the decree is passed, an appeal would not lie under Section 96 nor would it lie under Section 100 of the Civil Procedure Code. Similarly,

an appeal lies against an "order" under Section 104 read with Order 43 Rule 1 of the Civil Procedure Code where the "orders" against which appeal would lie have been enumerated. Unless there is an "order" as defined in Section 2(14) and unless that "order" falls within the list of "orders" indicated in Order 43, an appeal would not lie.

43. In **L. Janakirama Iyer v. P.M. Nilakanta Iyer**²⁰, the Hon'ble Supreme Court while observing that where Section 11 of CPC is applicable, it would not be permissible to rely upon the general doctrine of *res judicata* held in paragraph No.16, thus:

"16. That takes us to the question of *res judicata*. The argument is that on general grounds of *res judicata* the dismissal of the suit (O. S. No. 30 of 1943) filed by defendants 1 to 6 should preclude the trial of the present suit. It has been fairly conceded that terms of Section 11 of the Code cannot apply because the present suit is filed by the creditors of defendants 1 to 6 in their representative character and is conducted as a representative suit under o. 1, r. 8; and it cannot be said that defendants 1 to 6 who were plaintiffs in the earlier suit and the creditors who have brought the present suit are the same parties or parties who claim through each other. Where Section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provisions of Section 11 and no other. In our opinion therefore, there is no substance in the ground that the present suit is barred by *res judicata*."

²⁰ AIR 1962 SC 633

44. In **Sajjadanashin Sayed MD. B.E. EDR. (D) by LR. v. Musa Dadabhai Ummer**²¹, the Hon'ble Supreme Court explaining the words "directly and substantially in issue" occurring in Section 11 CPC, held in paragraph Nos.10 to 12 thus:

"10. The points that arise for consideration are:

(i) What is meant in Section 11, CPC by an issue being collaterally or incidentally in issue as distinct from being directly and substantially in issue?

(ii) Whether the decision of the District Judge, Surat in Appeal No.80 of 1931 operates as res judicata in the present proceedings?

(iii) Whether the decisions of the Assistant Charity Commissioner dated 19.1.1967 in Inquiry No.14/64 filed by Peer Mohammed Fruitwala and Inquiry No.3/65 filed by Sayed Hasan Sayed Mohammed El-Edroos holding the properties in respect of Dargahs at Ahmedabad, Baroch and Surat not to be public trust are res judicata in the present proceedings?

Point No.1:

11. The words 'collaterally or incidentally in issue' have come up for interpretation in several common law jurisdictions in the context of the principle of res judicata. While the principle has been accepted that matters collaterally or incidentally in issue are not ordinarily res judicata, it has however been accepted that there are exceptions to this rule. The English, American, Australian and Indian Courts and Jurists have therefore proceeded to lay down certain tests to find out if even an earlier finding on such an issue can be res judicata in a later proceeding. There appears to be a common thread in the tests laid down in all these

²¹ (2000) 3 SCC 350

countries.* We shall therefore refer to these developments.

Matters collaterally or incidentally in issue:

12. It will be noticed that the words used in Section 11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only 'collaterally or incidentally' in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

45. Per contra, Sri, N.V. Suryanarayana Murthy, learned Senior Counsel appearing for the contesting respondent, would submit that the short question that falls for consideration in the present Second Appeal, based on the substantial questions of law 1 to 3, would be, whether Ex.B2-Will, dated 10.3.1969, executed by the deceased defendant No.1 bequeathing his properties to defendant No.2, who is none other than his second wife, is true or not and whether the same is vitiated by any suspicious circumstances, which the propounder i.e., the second defendant viz., Smt. B. Aswarthamma did not remove.

i) The learned Senior Counsel would submit that virtually both the Courts below tendered concurrent findings that there was no plea that Ex.B2 - Will was not true. The learned senior counsel would

submit that the Court of first instance settled Issue No.5 touching Ex.B2 - Will and the learned lower appellate Court formulated only point in relation to Ex.B2 - Will and relying on the evidence of DWs.1 and 2, scribe and D.W.4, surviving attestor, out of the two attestors, concurrently found that Ex.B2 - Will is not vitiated by any of the numerous suspicious circumstances argued by the learned senior counsel for the appellants during the course of arguments basing upon unsubstantiated suggestions to DWs.1, 2 and 4.

ii) The learned Senior Counsel would submit that the question that Ex.B2 Will dated 10.3.1969 is true or not is a pure question of fact, and, therefore, the present Second Appeal ought to be dismissed in *limini* as concluded by the concurrent findings of fact regarding truth of Ex.B2 Will, relying on a catena of decisions in **Smt. Malkani v. Jamadar**²², **Vrindavanibai Sambhaji Mane v. Ramchandra Vithal Ganeshkar**²³, **Nalinakshi N. Rai and Others v. Indira Shetty**²⁴ and **K. Vittal Rao v. S.K. Laxmi Bai**²⁵.

46. The learned Senior Counsel referring to ground No.2 would submit that the genuineness of Will would raise a question whether the issue relating to genuineness of the Will cannot be raised by the plaintiff without filing a rejoinder when the defendant relies upon un-registered Will. Learned Senior Counsel's submission has been that the Will is not compulsorily registerable and, therefore,

²² AIR 1987 SC 767

²³ AIR 1995 SC 2086

²⁴ (1999) 9 SCC 248

²⁵ 2013 (2) ALD 386

nothing turns up on Ex.B2 being un-registered Will and in support of his submission, he relies on the ruling of a Three-Judge Bench in **Rani Purnima Debi v. Kumar Khagendra Narayan Deb**²⁶.

47. The learned Senior Counsel would submit that the father of the plaintiff, who is the 1st defendant, died during pendency of the suit and the plaintiff claimed half share equally with his father, and, on 02.07.1970, step-mother of the plaintiff who is defendant No.2-Smt. Aswarthamma tendered Ex.B2, Will, along with her written statement claiming entire half share of defendant No.1 and, therefore, the plaintiff ought to have amended his plaint under Order VI Rule 17 of CPC alleging that the second defendant is entitled to half share out of half share of the 1st defendant i.e., one-fourth (1/4th) of the suit properties, but, not his (defendant No.1) entire half share, by disputing the Will and alleging that the 1st defendant died intestate and that under the Hindu Succession Act, 1956, he (deceased plaintiff) was entitled to half share of defendant No.1's half share and, as such, his (deceased plaintiff's) share in the suit property gets enlarged to three-fourth but not half as claimed by him in the plaint when his father, defendant No.1, was alive, but, the plaintiff did not amend the plaint and he did not also file a rejoinder seeking leave under Order VIII Rule 9 of CPC. which was in force on the date of plaint i.e., 03.08.1968 till it was omitted by the Amendment Act, 1999; but, the plaintiff in his deposition as P.W.6 stated that defendant No.1 did not

²⁶ AIR 1962 SC 567

execute any document providing for succession of his property after his death and, therefore, in the absence of a plea in that behalf, his (PW.6's) evidence has to be eschewed as held in **Manchineni Venkayya v. Manchineni Seshayya**²⁷.

48. The learned senior counsel appearing for the contesting respondent, in order to substantiate the submissions made by him referred to in the above, has also referred to and relied on rulings of the Honourable Apex Court and various High Courts.

49. Firstly, where, concurrent findings have been recorded by the Courts below as to due execution and attestation of Will, the Apex Court will not interfere with findings of fact so reached. Second, uncontroverted averments deemed to have been admitted in relation to the pleadings. Third, the proof of execution of a Will and its genuineness and what constitutes suspicious circumstances surrounding a Will and the onus of proving the Will lying on the propounder of the Will. Fourth, the rule of estoppel and applicability of principle of res judicata.

50. The learned senior counsel places reliance in **Smt. Malkani**²². It was a case where it was contended that Will was not genuine, but had been procured by fraud. In that context, the Honourable Apex Court, while observing that the concurrent findings

²⁷ AIR 1954 Andhra 29 (Vol.41, C.N.16)

of the Courts below as to due execution and attestation of Will do not warrant interference, held in paragraph No.3, thus:

“3. After hearing the learned Counsel at considerable length, we find it difficult to interfere with the findings of fact reached. There is no dispute with the proposition laid down in the cases relied upon, but the difficulty is about its application to the facts and circumstances of the present case. The learned Additional District Judge had taken the care of observing that the only circumstance brought out was that the defendants who were the beneficiaries under the will, Exh. D-1, had taken an active part in its execution. But he rightly observed that that by itself was not sufficient to create any doubt either about the testamentary capacity of Mst. Pari or the genuineness of the will. It is quite evident that the testatrix was determined in bequeathing the property to her husband's brother's sons to the exclusion of the plaintiff. It is brought out in evidence that the plaintiff had on July, 25, 1972 made a report to the Tehsildar alleging that her mother Mst. Pari had been abducted by the defendants and that they were about to get a conveyance executed by her in their favour. Thereafter on August 23, 1972 i.e., just a day before the execution of the will, she instituted a suit being Civil Suit No. 491/72 claiming a declaration of her title as against her mother Mst. Pari. These circumstances taken together clearly give rise to an inference that the plaintiff knew that her mother was about to execute a will and she tried to prevent her from doing so. But this did not prevent Mst. Pari from executing the will on the next day. After

the execution of the will, Mst. Pari admittedly came and lived with the plaintiff till her death on January 1, 1973. If the allegation that the defendants had procured the will by fraud were to be believed, it was but expected, according to the ordinary course of human conduct, that Mst. Pari would have made a report to the authorities against the defendants or revoked the will. The fact remains that she did not execute another will during her life time. This evidently shows that the will, Exh. D-1, was a genuine will and was intended to be acted upon.”

51. In the context of proof of a Will, the learned senior counsel referred to the ruling in **Vrindavanibai Sambhaji Mane**²³. The Honourable Apex Court had an occasion to deal with a case where circumstances like (1) propounder taking prominent part in execution of a Will which confers substantial benefits on him; (2) shaky signature; (3) feeble mind which is likely to be influenced; (4) unfair and unjust disposal of property not occurring. Referring to the findings of trial Court and appellate Court held in paragraphs ‘7’, ‘8’ and ‘9’ thus:

“7. The Trial Court held that the Will was not proved as it was not entirely satisfied about the testimony of attesting witnesses. It decreed the suit. In appeal, however, the District Court at Pune, after analysing the entire evidence, has, by a detailed reasoning come to the conclusion that the Will has been properly proved by the appellant. The Appellant Court accepted the testimony of the two attesting witnesses as properly proving the Will. The Court further observed that without any basis,

the Trial Court ought not to have rejected the testimony of the two attesting witnesses who were not shaken in cross-examination though there might be minor discrepancies. Both these witnesses were known to the testatrix. They have deposed that they were called by her on 25th of July, 1963 to her residence for the purpose of attesting her Will. The Appellate Court came to the conclusion that there was nothing suspicious about the circumstances relating to the execution of the Will or the testimony given by the two attesting witnesses. The Appellate Court also noted that the plaintiff did not take any plea challenging the genuineness of Babubai's signature on the Will nor was it alleged that the Will was a forged document prepared after the death of Babubai by the appellant to obtain her property. There was also no plea of any undue influence being exercised by the appellant over Babubai to get a Will executed in her favour.

8. In order to satisfy its conscience the Appellate Court has also looked at the undisputed signatures of Babubai which were available on Exhibits 54 to 56 which are rent receipts signed by Babubai. After comparing these signatures with the signature on the Will, the court observed that the signature on the Will is genuine. As there was no challenge to the genuineness of the signature of Babubai on the Will, neither party led any expert evidence on this aspect.

9. The only "suspicious circumstance" relied upon by the plaintiff was, that the Will was not produced by the appellant immediately after the death of Babubai, or at the earliest possible opportunity. It was not produced till she filed her written statement in March 1968. There was a police complaint filed in December 1964 when the plaintiff had tried to take

possession of Babubai's room. On this occasion the appellant or her husband did not make any statement relating to the existence of a Will in their favour. In the proceedings before the City Survey Officer, a statement was given by the husband of the appellant. He also did not make any reference to the Will of Babubai in favour of the appellant.”

and in paragraph Nos. ‘15’ and ‘16’ held thus:

“15. There is also a large body of case law about what are suspicious circumstances surrounding the execution of a Will which require the propounder to explain them to the satisfaction of the court before the Will can be accepted as genuine. A Will has to be proved like any other document except for the fact that it has to be proved after the death of the testator. Hence, the person executing the document is not there to give testimony. The propounder, in the absence of any suspicious circumstances surrounding the execution of the Will, is required to prove the testamentary capacity and the signature of the testator. Some of the suspicious circumstances of which the court has taken note are: (1) The propounder taking a prominent part in the execution of a Will which confers substantial benefits on him; (2) Shaky signature; (3) A feeble mind which is likely to be influenced; (4) Unfair and unjust disposal of property. (See in this connection: *H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors.* (1959 Supp. (1) SCR 426), *Indu Bala Bose & Ors. V. Manindra Chandra Bose & Anr.* (1982 (1) SCR 1188 at p. 1192) and *Guro (Smt.) v. Atma Singh & Ors.* (1992

(2) SCC 507 at p. 511). Suffice it to say that no such circumstances are present here.

16. Learned Advocate for respondents 1 to 5 has submitted that Babubai was only fifty years of age when she died. She was enjoying normal health. There was no reason for her to make the Will. But in the Will itself Babubai has mentioned that she is suffering from physical weakness although she is not a very old person and hence she is making the Will. In any case, motive for making the Will is not really relevant. The fact that testatrix made a Will at the age of fifty cannot be considered as a suspicious circumstance reflecting on the genuineness of the Will.

held in paragraph No.'17', thus:

17. In the premises, the High Court was not right in reappraising evidence in Second Appeal and coming to the conclusion that the Will was not genuine or was not proved. The appeal is, therefore, allowed. The judgment and order of the High Court is set aside and the judgment and order of the first Appellate Court is restored. There will, however, be no order as to costs."

52. In **Nalinakshi N. Rai**²⁴, relied on by the learned senior counsel for the contesting respondent, in the context of what constitutes a substantial question of law, the Honourable Apex Court held that the question whether the Will executed by Babu Shetty in favour of Narayana of his one-fourth share under Ex.D-1 can be believed or not, is not a question of law much less a substantial question of law.

53. In **K. Vittal Rao**²⁵ relied on by the learned senior counsel appearing for the contesting respondent, a learned Single Judge of this Court ruled emphasising that the Court has to judge the truth or otherwise of Will by evaluating the evidence and probabilities while sitting in same armed chair of the deceased, held in paragraph No.‘5’ thus:

“5. It is contended by the appellants’ Counsel that the Courts below failed to take note of the fact that if really *Venkat Swamy* died intestate, the brothers and mother would not have failed to include the suit property also as one of the properties available for partition. While considering truth or otherwise of Ex.B13 Will, the Court has to judge the same from evidence and probabilities while sitting in the same armed chair of the deceased. The circumstances which were prevailing subsequently after death of *Venkat Swamy* at the time of Ex.A9 partition deed, cannot be relevant to decide truth or otherwise of Ex.B13 Will. In my opinion, the Courts below have properly assessed the entire material on record and came to a right conclusion in favour of the plaintiffs and against Ex.B13 Will. I find no error much less legal error in the decision arrived at by the Courts below.”

54. The learned senior counsel also places reliance in **Rani Purnima Debi**²⁶, wherein, the Honourable Supreme Court while examining the effect of registration in the context of execution and genuineness of a Will, held in paragraph No.‘16’, thus:

“16. The High Court was also conscious of the fact that the evidence as to the execution and attestation of the will was not very adequate, for the learned Chief Justice observed that the evidence on the point of actual execution might not be very adequate; but the view taken by the High Court was that more evidence was not necessary in view of the pleadings of the parties. In this connection the High Court relied on Dwijendra Narayan Deb's acceptance of the will in favour of the respondent. This in our opinion was not justified so far as the appellants were concerned, for an admission of Dwijendra Narayan Deb who must now be held to have put forward a forged Will could not be an added circumstance to support the inadequate evidence led by the respondent. We are further of the opinion that the High Court was not justified in excusing the inadequacy of the evidence to prove the due execution and attestation of the Will on the basis of the pleadings of the parties. It is true that the appellants did not say in so many words that the Will propounded by the respondent was a forgery as they did about the Will propounded by Dwijendra Narayan Deb; even so the appellants had put the respondent to strict proof of due and legal execution and attestation of the Will and there was an issue to that effect. This was not a case where the due and legal execution and attestation of the will was admitted and the only disputes were that the testator had not a sound disposing state of mind or had acted under undue influence or coercion. Though the appellants did not go to the length of characterising the will as a forgery as they did in the case of the will propounded by Dwijendra Narayan, they certainly put the respondent to strict proof of legal and due execution and attestation of the will. In such

circumstances it was the duty of the respondent, particularly in the presence of suspicious circumstances which have been noted by the High Court, to prove the due execution and attestation of the will by satisfactory evidence which would lead Court to the conclusion that the suspicious circumstances had been dispelled. We do not see how the evidence which has been characterised by the High Court as inadequate would suffice to dispel the suspicious circumstances which undoubtedly are present in this case. We have no hesitation in coming to the conclusion, apart from the question of registration with which we shall deal presently, that if the evidence which has been produced in this case were all the evidence available to prove the due execution and attestation of the will, there could be no doubt that the respondent had failed to satisfy the Court and dispel the suspicious circumstances which were undoubtedly present in this case.”

55. Then, while observing that if a Will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness, but, the mere fact that a Will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination, held in paragraph No.‘23’, thus:

“23. There is no doubt that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the

evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering. Law reports are full of cases in which registered wills have not been acted upon (see for example, *Vellaswamy Sarvai v. Sivaraman Servai*, ILR 8 Rang 179: (AIR 1930 PC 24), *Surendra Nath v. Jnanendra Nath Lahiri*, AIR 1932 Cal 574 and *Girja Datt Singh v. Gangotri Datt Singh*, (S) AIR 1955 SC 346. Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a Will; though the fact that there has been registration would be an important circumstance in favour of the Will being genuine if the evidence as to registration establishes that the testator admitted the execution of the Will after knowing that it was a Will the execution of which he was admitting.”

56. In the context of consequence of failure to file rejoinder by the plaintiff disputing the Will, the learned senior counsel places reliance in **Manchineni Venkayya**²⁷, wherein, it was held that it is well settled that parties ought not to be permitted to raise new points not covered by the pleadings or the issues.

57. The learned senior counsel also relies in **Pratima Chowdhury v. Kalpana Mukherjee**²⁸, wherein, the Honourable Supreme Court, while holding that the pleadings are complete only after the plaintiff files rejoinder to written statement, referred to four salient pre-conditions that have to be satisfied before invoking the rule of estoppel and held in paragraph Nos. '26' and '27', thus:

“26. First and foremost, it surprises us that Co-operative Tribunal, as also, the High Court excluded from consideration, the factual position expressed in the rejoinder filed by the appellant (before the Arbitrator). In excluding the aforesaid factual position, the Co-operative Tribunal and the High Court did not rely on any provision of law nor was any reliance placed on any principle accepted and recognized in legal jurisprudence. It is not a matter of dispute, that after Kalpana Mukherjee and the Society were permitted to file written replies before the Arbitrator, the rejoinder filed thereto on behalf of Pratima Chowdhury, was permitted to be taken on record. It is not in contention, that in the written replies filed before the Arbitrator, Kalpana Mukherjee had adopted inter alia the stance, that consideration was paid to Pratima Chowdhury in lieu of the transfer

²⁸ AIR 2014 SC 1304

of flat no. 5D to her name, even though the documents relied upon by the rival parties, expressed otherwise. A number of documents not mentioned in the Dispute Case filed by Pratima Chowdhury were also relied upon by Kalpana Mukherjee. Pleadings between the parties could be considered as complete, only after Pratima Chowdhury was permitted to file a rejoinder (in case she desired to do so). She actually filed a rejoinder which was taken on record by the Arbitrator. Both parties were permitted to lead evidence, not only on the factual position emerging from the complaint filed by Pratima Chowdhury and the written replies filed in response thereto (by Kalpana Mukherjee, and the Society), but also, the factual position highlighted by Pratima Chowdhury in her rejoinder affidavit. It is, therefore, not on the basis of the pleadings of the parties, but also on the basis of the evidence led in support of the aforesaid pleadings, that the Arbitrator had recorded his findings in his award dated 5.2.1999. We are therefore of the view, that the Arbitrator had acted in accordance with law, and therefore the exclusion from consideration, of the factual position asserted by Pratima Chowdhury in her rejoinder, by the Co-operative Tribunal and the High Court was wholly unjustified. The factual narration by Pratima Chowdhury, could not be excluded from consideration, while adjudicating upon the rival claims between Pratima Chowdhury and Kalpana Mukherjee. The instant aspect of the decision of the High Court, is therefore liable to be set aside, and is accordingly set aside. Just the instant determination, would result in a whole lot of facts which were not taken into consideration by the adjudicating authorities, becoming relevant. Despite that, we feel, that remanding the matter for a denovo

consideration, would place a further burden on the parties. Having heard learned counsel at great length, we shall settle the issues finally, here and now.

27. The Co-operative Tribunal in its order dated 16.5.2002 had invoked the principle of estoppel, postulated in Section 115 of the Indian Evidence Act. The High Court affirmed the conclusions drawn by the Co-operative Tribunal. In addition to the above principle, the High Court invoked the principles of equity and fairness. Insofar as the latter principles are concerned, we shall delve upon them after examining the contentions of the rival parties, as equity and fairness would depend upon the entirety and totality of the facts. The above aspect can therefore only be determined after dealing with the intricacies of the factual circumstances involved. We shall, however, endeavour to deal with the principle of estoppel, so as to figure whether, the rule contained in Section 115 of the Indian Evidence Act could have been invoked, in the facts and circumstances of the present case. Section 115 of the Indian Evidence Act is being extracted hereinabove:-

“115. Estoppel.- When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the

ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.”

It needs to be understood, that the rule of estoppel is a doctrine based on fairness. It postulates, the exclusion of, the truth of the matter. All, for the sake of fairness. A perusal of the above provision reveals four salient pre conditions before invoking the rule of estoppel. Firstly, one party should make a factual representation to the other party. Secondly, the other party should accept and rely upon the aforesaid factual representation. Thirdly, having relied on the aforesaid factual representation, the second party should alter his position. Fourthly, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position. Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position. In our considered view, none of the ingredients of principle of estoppel contained in Section 115 of the Indian Evidence Act, can be stated to have been satisfied, in the facts and circumstances of this case. Herein, the first party has made no representation. The second party has therefore not accepted any representation made to her. Furthermore, the second party has not acted in any manner, nor has the second party altered its position. Therefore, the question whether the restoration of the original position would be iniquitous or unfair does not arise at all. Even if consideration had passed from Kalpana Mukherjee to Pratima Chowdhury, on the basis of the representation made by Pratima Chowdhury, we could have accepted that Kalpana Mukherjee had altered her position. In the facts as

they have been presented by the rival parties, especially in the background of the order passed by the Arbitrator, that no consideration had passed in lieu of the transfer of the flat, and especially in the background of the factual finding recorded by the Co-operative Tribunal and the High Court, that passing of consideration in the present controversy was inconsequential, we have no hesitation whatsoever in concluding, that the principle of estoppel relied upon by the Co-operative Tribunal and the High Court, could not have been invoked, to the detriment of Pratima Chowdhury, in the facts and circumstances of the present case. Insofar as the instant aspect of the matter is concerned, the legal position declared by this Court fully supports the conclusion drawn by us hereinabove. In this behalf, reference may be made, firstly, to the judgment rendered by this Court in *Kasinka Trading v. Union of India*, (1995) 1 SCC 274: (AIR 1995 SC 874), wherein this Court noticed as under:-

“11. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making

it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties.”

The above sentiment recorded in respect of the principle of estoppel was noticed again by this Court in *Monnet Ispat & Energy Ltd. v. Union of India & Ors.*, (2012) 11 SCC 1, wherein this Court expressed its views in respect of the principle of estoppel as under:-

“289. As we have seen earlier, for invoking the principle of promissory estoppel there has to be a promise, and on that basis the party concerned must have acted to its prejudice.”

The ingredients of the doctrine of estoppel in the manner expressed above were also projected in *H.S. Basavaraj (D) by his LRs. & Anr. v. Canara Bank & Ors.*, (2010) 12 SCC 458 : (2009 AIR SCW 7567), as under:-

“30. In general words, estoppel is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be estopped from going back on the word given. The principle of estoppel is, however, only applicable in cases where the other party has changed his position relying upon the representation thereby made.”

As already noticed hereinabove, none of the ingredients of estoppel can be culled out from the

facts and circumstances of the present case. In view of above, we hereby set aside the determination by the Co-operative Tribunal, as also the High Court, in having relied on the principle of estoppel, and thereby, excluding the pleas/defences raised by Pratima Chowdhury to support her claim.”

58. In the context of well settled proposition that uncontroverted affidavit averments are deemed to have been admitted, the learned senior counsel places reliance in **State of A.P v. National Academy of Construction, Hyderabad**²⁹, wherein, the Honourable Division Bench of this Court, in paragraph No. ‘8’, held thus:

“8. In all the affidavits accompanying the writ petitions, the petitioners made categorical averment that the contract they entered into with concerned official does not include any such clause. This allegation remains uncontroverted in the counter-affidavits. In the absence of any denial in the counter-affidavits applying the principles of non-traverse, we have to hold that insofar as these appeals are concerned, the contracts by the appellants with the respondents do not contain any clause authorizing the R&B Department to deduct the contribution for NAC. It is well settled that the uncontroverted affidavit averments ordinarily are deemed to have been admitted. In writ petitions the dispute is decided based on “affidavit evidence”, and hence this principle has considerable significance (see *C.S. Rowji v. State of A.P.*, AIR 1964 SC 962, *Naseem Bhanu v. State of U.P.*, 1993 Supp (4) SCC 46 and *Hindustan Petroleum Corporation Ltd v. Darius Shapur Chenai*, 2005 (6) ALD 53 (SC) = 2005 AIR

²⁹ 2010 (5) ALD 591 (DB)

SCW 4796). The appellants have also not placed before us the copies of the agreements which allegedly contain such a binding clause.”

59. For the proposition that where the plaintiff himself accepts execution of Will, but questions its legal validity in respect of certain properties, provisions of Section 58 of Evidence Act would be applicable, but not Section 68, the learned senior counsel appearing for the contesting respondent places reliance in **Valluri Jaganmohini Seetharama Lakshmi v. Kopparthi Ramachandra Rao**³⁰, wherein, Honourable Division Bench of this Court, in paragraph Nos. ‘9’ and ‘10’, held thus:

“9. On the basis of the above pleadings, the following triable issues were framed by the trial Court:

(a) Whether Seethamahalaxmi had only life interest in the plaint schedule property and her interest is not enlarged under Section 14(1) of Hindu Succession Act, 1956?

(b) Whether in any view, Seethamahalaxmi became entitled to Item No. 1 of plaint schedule under registered Will dated 30-8-1957 of her husband Venugopal Rao?

(c) To what past and future profits, if any, the plaintiff is entitled?

The other issues framed are superfluous. The plaintiff chose not to adduce any oral evidence. As such, the question of adducing any rebuttal evidence by the defendants did not arise at all. With consent, Exs. A1 to A9 and Exs. B1 and B2 were marked. The trial Court, on hearing the arguments advanced on either

³⁰ AIR 1994 AP 284

side, held that Ex. A1 was not in lieu of maintenance claim of late Seethamahalahxmi and as such, Section 14(2) of Hindu Succession Act, 1956 was applicable and not Section 14(1) and that consequent to the death of Seethamahalahxmi, the properties reverted back to the plaintiff and that the plaintiff is entitled to recover the possession of the suit schedule properties. With regard to mesne profits, even after holding that there is no proof with regard to the mesne profits, the trial court reserved the same to be decided in a separate application. Defendants 1 and 2 carried the matter in appeal to this High Court and the learned single Judge has framed an additional issue raised by the counsel for the plaintiff during the course of the arguments. After narrating the pleadings and contentions, the learned Judge says "Therefore, the two questions that arise for consideration in this appeal are -- (1) Whether the acquisition falls under Section 14(1) or Section 14(2) of Hindu Succession Act, 1956, and (2) Whether the execution of the Will dated 30-8-1957 in favour of Seethamahalahxmi is proved". The second aspect referred to above was never the subject matter of the suit at all. As stated above, the plaint itself was filed on the premises that the Will deeds were executed by Venugopal Rao in favour of Seethamahalahxmi and in turn by Seethamahalahxmi in favour of the 1st defendant. But the validity of the Will executed by Venugopal Rao with regard to bequeathing Items 1 and 3 of the suit schedule properties was questioned on the ground they were in possession of Seethamahalahxmi only as life estate. With regard to Item No. 2, the contention was that since the said item was not specifically mentioned in the Will dated 30-8-1957 executed by Venugopal Rao in favour of Seethamahalahxmi, the

plaintiff was entitled to recover the possession of the same. While filing a plaint, the plaintiff is obliged to meet the requirements of Order VII, Rule 1(e) of C.P.C. which warrants the statement of facts constituting the cause of action and when it arose. It is pertinent to mention that cause of action is the back-bone of the entire lis and unless there is no cause of action, no lis can be initiated. The plaintiff is obliged to state his cause of action and when it arose. In the instant case, the facts constituting the cause of action are that in so far as Items 1 and 3 are concerned, Seethamahalahxmi held only life estate even though Item No. 1 was bequeathed under a Will executed by Venugopal Rao and that in so far as Item No. 2 is concerned, the same was not at all covered by the Will executed by Venugopal Rao in favour of Seethamahalahxmi and that the date of her death was the date of cause of action for entitlement of recovery of possession of the plaint schedule properties. The defendants were obliged **only** to answer the same and they did file a written **statement** countering the pleas of the plaintiff. Only those could be contentious issues and they were framed. There was no contention raised by the plaintiff with regard to the genuineness of the Will. As such, the plaintiff called upon the defendants only to answer the legality of the Will in so far as the suit schedule properties are concerned while approving the rights of the defendants under the Will with regard to the rest of the properties. What is more, the plaintiff himself files the certified extracts of the Will deeds dated 30-8-1957 executed by Venugopal Rao in favour of Seethamahalahxmi and dated 14-10-1980 executed by Seethamahalahxmi in favour of the 1st defendant. But the learned single Judge accepting the contention raised on behalf of the

plaintiff held that inasmuch as the Will is not proved in accordance with the provisions of the Indian Evidence Act, the same cannot be taken cognizance of and that the plaintiff is entitled for the relief of recovery of possession even on that count. With respect to the learned single Judge, we do not agree with this finding on the said issue. In fact, the learned Judge ought not to have entertained the said contention at all as the appeal is a continuation of the suit. It is not as if a plea was raised in the suit and a contentious issue was framed and the same went unanswered. It is also not such of the cases where the pleas have been raised, but issue is not framed and there is ample evidence on record from which the appellate court, if convinced, frames an additional issue and adjudicates. The instant case is such that the plaintiff himself admits the genuinity of the Will and the binding nature thereof for all other items of property excepting the suit schedule properties comprising three items. The plaintiff calls upon the defendants only to answer with regard to the validity of the Will in so far as the suit schedule properties are concerned. The cause of action, therefore, was confined only with regard to the legal validity of the Will confined to the suit schedule properties and not with regard to its truthfulness or genuineness of execution. While not raising any dispute regarding execution of the Will and the rights and title of the 1st defendant regarding other bequeathed properties, the legal dispute was raised regarding the operation of the Will over Items 1 to 2 of suit schedule properties. Thus, it is obvious that the genuinity of the Will was not the cause of action at all. When that was not the cause of action, rightly, the same was not raised an issue and as such there was no issue framed in that

regard. That is the reason precisely, for the plaintiff not adducing oral evidence and only to choose to argue the matter straightway pointing out the recitals of the relevant documents and to construe the same correctly in accordance with law. Section 58 of the Evidence Act, 1872 reads:

“Facts admitted need not be proved:-- No fact need be proved, if any proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.”

As such, an admission in pleadings as to execution of document dispenses with the necessity of proof of execution even though such document was one required by law to be in certain form or proved in a certain way.

10. But, Mr. Anantha Babu, the learned counsel appearing for the respondents, strenuously contends that S. 58 of the Indian Evidence Act is general while S. 68 is specific and that specific provision always prevails over a general provision and that as such even though the Will is admitted in the instant case, the same binds only the executant under Section 70 of Indian Evidence Act and does not bind the plaintiff, who is a stranger to the Will. He has cited the decisions rendered in *Girja Datt v. Gangotri Datt* AIR 1955 SC 346 , *H. Venkatachala v. B. M. Thimmajamma* AIR 1959 SC 443 , *Surendera Pal v. Saraswati*, AIR 1974 SC 1999 and *Beni Chand v. Kamla Kunwar* AIR 1977 SC 63 . But, in all the judicial precedents referred to above, there was a specific denial with regard to the execution of the

Will and there was a contentious issue raised in that regard and oral evidence was adduced on that aspect and the trial courts had adjudicated on the said issue and findings were recorded. Those factors are totally absent in the instant case. Execution of the Will was not at all denied by the plaintiff and on the other hand it is admitted, but the validity with regard to the suit items was challenged and that was stated to be the cause of action and the date of cause of action is the death of late Seethamahalahaxmi, who was holding the possession of the said suit schedule properties. If the factum of execution of Will was disputed, certainly, the other items of the properties covered by the Will could have been claimed. But, that is not done in the instant case. The plaintiff by admitting the execution of the Will questioned the legal validity of the same only with regard to three items (suit schedule properties), and asked the relief of possession. It is no doubt true that special provision always overrides the general provision. But, in the instant case, special provision is not at all applicable. It is also true that proviso to Section 68 is not applicable in the case of a Will. Section 68 of the Indian Evidence Act reads:

"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 its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence."

As the Will is a document required by law to be attested, it shall not be used as evidence until at least one attesting witness is examined. That is only when either plaintiff seeks for a relief propounding a Will or when the defendant raises a specific plea setting up the Will as a defence to the claim made by the

plaintiff. But, where the plaintiff himself accepts the execution of the Will, but chooses to contest only on legal aspects touching upon the validity of the bequeathment of certain properties, Section 68 of Indian Evidence Act does not come into play and is totally inapplicable. The words 'it shall not be used as evidence' contained under Section 68 of the Indian Evidence Act, are very significant while considering this aspect. In the instant case it is not that the defendant sought to use the Will as defence, but on the other hand, it is the plaintiff, who himself has filed the Will admitting the execution, but questioning the legal validity of the same in so far as certain properties are concerned. In that view of the matter, Section 58 of the Indian Evidence Act is applicable for the instant case and Section 68 is totally inapplicable. In the circumstances, we hold that the additional issue raised in the appeal ought not to have been permitted to be raised and we further hold that there was no obligation on the part of the defendants-appellants to prove the execution of the Will dated 30-9-1957 by Venugopal Rao in favour of his wife Seethamahalahaxmi.”

60. On factual side in regard to the evidence that examination of one of the attestors, as to due attestation of a Will, is sufficient, the Honourable Apex Court, in **Mahesh Kumar (dead) by LRs. v. Vinod Kumar**³¹, while observing that examination of one of the attesting witnesses is sufficient and the statement by one of the attesting witnesses that he did not know when other attesting witness came is no ground to hold that Will is not duly attested when both

³¹ 2012 (4) ALD 71 (SC)

witnesses categorically stated that testator had read out and signed Will in their presence and thereafter they had appended their signature, held in paragraph No. '18', thus:

"18. We shall now consider whether the appellant had succeeded in discharging the onus of proving that Will dated 10.2.1992 was validly executed. For deciding this question it will be useful to notice some of the precedents in which this Court had considered the mode and manner of proving a Will. In one of the earliest judgments in *H. Venkatachala Iyengar v. B. N. Thimmajamma* (supra), the three Judge Bench noticed the provisions of Sections 45, 47, 67 and 68 of the Indian Evidence Act, 1872 and Sections 59 and 63 of the 1925 Act and observed:

"Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved

like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

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

onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

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

acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

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

61. In regard to the duty cast on the propounder of the Will to remove all the suspicious features, for which there must be real, germane and valid suspicious features and not fantasy of the doubting mind, the Honourable Apex Court held in paragraph No. '20', thus:

“20. In *Uma Devi Nambiar v. T.C. Sidhan* (AIR 2004 SC 1772), the Court held that active participation of the propounder/beneficiary in the execution of the Will or exclusion of the natural heirs cannot lead to an inference that the Will was not genuine. Some of the observations made in that case are extracted below:

“A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar*, AIR 1995 SC 1852 = 1995 AIR SCW 2884, it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the court has to give effect to the

Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. (See Pushpavathi v. Chandraraja Kadamba.) In Rabindra Nath Mukherjee v. Panchanan Banerjee, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly.”

62. The learned senior counsel has also referred to what has been observed by the Honourable Apex Court in paragraph Nos. ‘25’, ‘28’ and ‘30’, which read thus:

“25. From what we have noted above, it is clear that the appellant succeeded in discharging the onus of proving that the Will dated 10.2.1992 had in fact been executed by Shri Harishankar and he had signed the same in the presence of the attesting witnesses who also appended their signatures in his presence. The fact that Shri Harishankar was in a sound state of health (physically and mentally) is established from the statement of Respondent No. 2 who categorically denied the suggestion that the mental and physical condition of his father deteriorated 5-6 months prior to his death or that he had lost his mental balance. In his statement, Respondent No. 1 did not suggest that the physical and mental health of his father was not good at the time of execution of Will dated 10.2.1992. Not only this, he made the following important admissions:

- i) The parents were living with the appellant and during the illness of mother the appellant's wife used to look after her.
- ii) The expenses incurred in the funeral of the mother were paid by the appellant.
- iii) The Board of Revenue decided the case of mutation in favour of the appellant and he did not challenge the order of the Board of Revenue.
- iv) Shri S.K. Agarwal is related to him and he was his counsel before the Board of Revenue.
- v) The application for impleadment filed by him in the suit instituted by the appellant against the tenant was dismissed by the trial Court and the order of the trial Court was upheld by the High Court.
- vi) That the appellant was paying municipal tax / nazul tax and rent in respect of the property which fell to the share of Shri Harishankar.

26.

27.

28. The other reasons enumerated by the learned Single Judge for holding that the execution of Will was highly suspicious are based on mere surmises/conjectures. The observation of the learned Single Judge that the possibility of obtaining signatures of Shri Harishankar and attesting witnesses on blank paper and preparation of the draft by Shri S.K. Agarwal, Advocate on pre-signed papers does not find even a semblance of support from the pleadings and evidence of the parties. If respondent No. 1 wanted to show that the Will was drafted by the advocate after Shri Harishankar and attesting witnesses had signed blank papers, he could have examined or at least summoned Shri S.K. Agarwal,

Advocate, who had represented him before the Board of Revenue. On being examined before or by the Court, Shri S.K. Agarwal could have testified whether he had prepared the Will on pre-signed papers. However, the fact of the matter is that it was neither the pleaded case of respondent No. 1 nor any evidence was produced by him to prove that Shri Harishankar and the attesting witnesses had signed the blank papers and, thereafter, Shri S.K. Agarwal prepared the Will.

29.

30. The fact that the appellant was present at the time of execution of Will dated 10.2.1992 and that the testator did not give anything to respondent Nos. 1 and 2 from his share in the joint family property are not decisive of the issue relating to genuineness or validity of the Will. The evidence produced by the parties unmistakably show that respondent No. 2 had separated from the family in 1965 after taking his share and respondent No. 1 also got his share in the 2nd partition which took place in 1985. Neither of them bothered to look after the parents in their old age. The attitude of respondent Nos. 1 and 2 left Shri Harishankar and his wife with no choice but to live with the appellant, who along with his wife and children took care of the old parents and looked after them during their illness. Therefore, there was nothing unnatural or unusual in the decision of Shri Harishankar to give his share in the joint family property to the appellant. Any person of ordinary prudence would have adopted the same course and would not have given anything to the ungrateful children from his / her share in the property.”,

The learned senior counsel would, therefore, contend that the Will in the case at hand is, thus, a Will with all requisite attributes of a valid Will.

63. In **M.B. Ramesh**⁷, the Honourable Supreme Court, while answering the question whether execution of a Will by the testator, aged 40 years, describing herself as getting old amounts to suspicious circumstance, held that such a statement cannot be construed as suspicious circumstance and it depends on perception of author about condition of his/her health since the learned senior counsel would lay emphasis on what has been observed by the Honourable Apex Court in paragraph Nos. '23' and '24', it would be appropriate to extract what has been held by the Honourable Apex Court in the said paragraphs, thus:

“23. The approach to be adopted in matters concerning wills has been elucidated in a decision on a first appeal by a Division Bench of Bombay High Court in **Vishnu Ramkrishana v. Nathu Vithal** reported in AIR 1949 Bom 266. In that matter, the respondent Nathu was the beneficiary of the will. The appellant filed a suit claiming possession of the property which was bequeathed in favour of Nathu, by the testatrix Gangabai. The suit was defended on the basis of the will, and it came to be dismissed, as the will was held to be duly proved. In appeal it was submitted that the dismissal of the suit was erroneous, because the will was not proved to have been executed in the manner in which it is required to be, under Section 63 of Indian Succession Act. The High Court was of the view that if at all there was any deficiency, it was because of not examining more than one witness, though

it was not convinced that the testatrix Gangabai had not executed the will. The Court remanded the matter for additional evidence under its powers under Order 41 Rule 27 Code of Civil Procedure. The observations of Chagla C.J., sitting in the Division Bench with Gajendragadkar J. (as he then was in Bombay High Court) in paragraph 15 of the judgment are relevant for our purpose:

“15. We are dealing with the case of a will and we must approach the problem as a Court of Conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a Court of Conscience would not permit such a thing to happen. We have not heard Mr. Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the propounders of the will were negligent - and grossly negligent in not complying with the requirements of Section 63 and proving the will as they ought to have should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not.....”.

24. As stated by this Court also in R. Venkatachala Iyengar (AIR 1959 SC 443) and Smt. Jaswant Kaur (AIR 1977 SC 74), while arriving at the finding as to whether the Will was duly executed, the Court must satisfy its conscience having regard to the totality of circumstances. The Court's role in matters concerning the wills is limited to examining whether the instrument propounded as the last will of the deceased is or is not that by the testator, and whether it is the product of the free and sound disposing mind [as observed by this Court in paragraph 77

of **Gurdev Kaur v. Kaki** reported in 2007 (1) SCC 546 : (AIR 2006 SC 1975 (Para 76)). In the present matter, there is no dispute about these factors. The issue raised in the present matter was with respect to the due execution of the will, and what we find is that the same was decided by the trial Court, as well as by the first appellate Court on the basis of an erroneous interpretation of the evidence on record regarding the circumstances attendant to the execution of the will. The property mentioned in the will is admittedly ancestral property of Smt. Nagammanni. She had to face a litigation, initiated by her husband, to retain her title and possession over this property. Besides, she could get the amounts for her maintenance from her husband only after a Court battle, and thereafter also she had to enter into a correspondence with the appellant to get those amounts from time to time. The appellant is her stepson whereas the respondents are sons of her cousin. She would definitely desire that her ancestral property protected by her in a litigation with her husband does not go to a stepson, but would rather go to the relatives on her side. We cannot ignore this context while examining the validity of the will.”

64. As to on whom the burden of proof rests to prove a Will, the learned senior counsel places reliance in **Harmes v. Hinkson**³², wherein, the Privy Council, while explaining the meaning of the expression ‘Burden of proof’, holds thus:

“The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing

³² AIR (33) 1946 Privy Council 156

and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.”

65. The Privy Council also referred to the Rules as to ‘burden of proof’ with reference to the provisions of Section 101 of the Evidence Act and explained the Rules thus:

“The rules formulated and reaffirmed in (1838) 2 Moo PC 480, i.e. (1) 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 and (2) that if a party writes 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 jealous 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 are rules which enjoin reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion a resolute and impenetrable incredulity. He is never required to close his mind to truth. The first rule requires that the conscience of the Court must be satisfied. Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact. The second rule warns the Judge that the evidence of the witness who drew the will must be received with caution, but this does not mean that it must be rejected altogether. The burden of proof may be discharged. The adverse presumption may be rebutted. The rule is not to be understood as meaning that at some point, which the law can define, the Judge will be in a position to say that the presumption has become conclusive against the will, so that, if he were trying the case with a jury, it would be right to direct them that they must pronounce against it. If this were the meaning of the rule, it would involve the untenable proposition that it is a question of law whether or not presumption of fact has been rebutted. That question must always be one of fact and the true meaning of the rule is that unless the tribunal is finally satisfied that its initial suspicions were unfounded the burden of proof remains undischarged and the presumption must prevail.”

66. The learned senior counsel refers to what has been stated by the Privy Council in paragraph No. '23', thus:

“23. It was said, however, that the learned Judge had erred in law because he had not given enough weight to the various circumstances of suspicion which admittedly were present. It had to be conceded that from the outset he had professed to regard the will as "a document charged with suspicion," but in effect it was contended that if he had really been suspicious, he had not been suspicious enough. Complaint was made that he too readily believed Mr. Hinkson, found excuses for his conduct and sometimes benevolently intervened during his cross-examination. Their Lordships have given full consideration to these criticisms but, with all respect to those learned judges who have expressed them, they are satisfied that there is no sufficient ground for them, and no ground at all for saying that the learned Judge either overlooked or disregarded the relevant rules of law. Those rules enjoin a reasonable skepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth. Their Lordships agree with the majority of the Supreme Court that no error in law has been established.”

67. In regard to presumption that the testatrix/testator had knowledge of the contents of the Will, the learned senior counsel places reliance in **H. Venkatachala Iyengar**¹⁶ and refers to what has been observed by the Honourable Apex Court in paragraph Nos. '16' to '22', which read thus:

“16. It would be convenient at this stage to refer briefly to the reasons given by the courts below in support of their respective findings. The learned trial judge put the onus of proving the will on the appellant but he observed that "the proof that is necessary to establish a will is not an absolute or a conclusive one. What is required is only such proof as would satisfy a prudent man." The learned judge then considered the evidence of the two attesting witnesses and the scribe and observed that " there can absolutely be no doubt that P.W.3 wrote Ex.A at the time when it is said to have been written ". He was of the opinion that the evidence of the scribe fully corroborates the evidence of P. W. I and P.W.2. The learned judge then mentioned the fact that P.W.4 who supported the appellant is no other than the husband of Lakshamma's granddaughter. The evidence of the appellant himself was considered by the learned judge and his conclusion was that "it had to be taken that Ex.A is a will executed by Lakshamma and the signatures, Exs.A-1 to A-5 are those of Lakshamma". The argument urged by respondent 1 that Lakshamma could not have understood the contents of Ex.A was rejected by the learned judge and he observed that " when it is proved -that Exs.A-1 to A-5 are signatures of Lakshamma and that she executed Ex.A, it is to be presumed that the testatrix had the knowledge of the contents of the will ". In the end the learned judge thus recorded his finding: " In view of the evidence and the presumption referred to above I think we did not have any hesitation in holding that Lakshamma executed Ex.A having fully understood the nature of Ex.A and the recitals made therein ".

17. The High Court, on the other hand, has taken a contrary view. The High Court thought that the evidence adduced by the appellant to prove the execution of the

will was not satisfactory. It then examined the said evidence in some detail, criticised the discrepancies appearing in the said evidence, considered the probabilities and concluded that, on the whole, the said evidence would not justify the finding that the will had been duly executed by the testatrix. The High Court also thought that the appellant's version about the instructions given by Lakshamma to him in the matter of the execution of the will was highly improbable; and, according to the High Court, the whole evidence of the appellant appeared to be unsatisfactory. The High Court then considered the question of onus and observed that since the appellant's sons had received a substantial benefit under the will and since he had taken a leading part in its execution, the onus was heavy on him to remove the suspicions attending the execution of the document and to establish that Lakshamma had really understood its contents, had approved of them and had put her signatures on it when she was in a sound and disposing state of mind. It that the High Court also felt that the dispositions made by the will were unnatural and improbable; in particular it took the view that since the appellant had come into the family of Annaji by adoption it was very unlikely that his sons should have received such a substantial benefit under the will. In fact the judgment of the High Court appears to indicate that the High Court was inclined to hold that the testatrix may not have been in a sound and disposing state of mind at the material time. It is on these findings that the High Court reached its final conclusion that the appellant had failed to prove the due and valid execution of the will.

18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the

subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under S.67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss.45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Ss.59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression " a person of sound mind " in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in

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

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

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

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 document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders

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

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

circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parc in *Harmes v. Hinkson*, 50 Cal W N 895 : (AIR 1946 P C 156) "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth ". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

68. The learned senior counsel also, in the very same context, refers to the findings of the Honourable Supreme Court in paragraph No. '39', thus:

"39. In this connection we would like to add that the learned trial judge appears to have misdirected himself in law inasmuch as he thought that the proof of the signature of the testatrix on the will raised a presumption that the will had been executed by her. In support of this view the learned judge has referred to the decision of the Calcutta High Court in *Surendra Nath v. Jahnavi Charn*, I L R 56 Cal 390 : (AIR 1929 Cal 484). In this case no doubt the Calcutta High Court has held that on the proof of the signature of the deceased or his acknowledgment that he has signed the will he will be presumed to have known the provisions of the instrument he has signed; but Mr. Justice B. B. Ghose, in his judgment, has also added that the said presumption is liable to be rebutted by proof of suspicious circumstances and that undoubtedly is the true legal position. What circumstances would be

regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case. Unfortunately the learned trial judge did not properly assess the effect of suspicious circumstances in the present case to which we have already referred and that has introduced a serious infirmity in his final conclusion. Incidentally we may also refer to the fact that the appellant obtained a power of attorney from the testatrix on the same day; and that has given rise to the argument that the appellant was keen on taking possession and management of the properties under his control even before the death of the testatrix. There is also another circumstance which may be mentioned and that is that the Sub Registrar, in whose presence the document was registered on the same day, has not been examined though he was alive at the date of the trial. On these facts then we are inclined to hold that the High Court was justified in reversing the finding of the trial court on the question of the due and valid execution of the will.”

69. Turning to the applicability of *res judicata*, the learned senior counsel places reliance in **Sheodan Singh v. Daryao Kunwar**³³, more particularly, observations in paragraph No.‘13’, thus:

“13. Re. (iv) : this brings us to the main point that has been urged in these appeals, namely, that the High Court had not heard and finally decided the appeals arising out of suits Nos. 77 and 91. One of the appeals was dismissed on the ground that it was filed beyond the period of limitation while the other appeal was dismissed on the ground that the appellant therein had not taken

³³ AIR 1966 SC 1332 (1)

steps to print the records. It is therefore urged that the two appeals arising out of suits Nos. 77 and 91 had not been heard and finally decided by the High Court, and so the condition that the former suit must have been heard and finally decided was not satisfied in the present case. Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit. But none of these considerations apply in the present case, for the Additional Civil Judge decided all the four suits on the merits and decided the issue as to title on merits against the appellant and his father. It is true that the High Court dismissed the appeals arising out of suits Nos. 77 and 91 either on the ground that it was barred by limitation or on the ground that steps had not been taken for printing the records. Even so the fact remains that the result of the dismissal of the two appeals arising from suits Nos. 77 and 91 by the High Court on these grounds was that the decrees of the Additional Civil Judge who decided the

issue as to title on merits stood confirmed by the order of the High Court. In such a case, even though the order of the High Court may itself not be on the merit the result of the High Court's decision is to confirm the decision on the issue of title which had been given on the merits by the Additional Civil Judge and thus in effect the High Court confirmed the decree of the trial court on the merits, whatever may be the reason for the dismissal of the appeals arising from suits Nos. 77 and 91. In these circumstances though the order of the High Court itself may not be on the merits, the decision of the High Court dismissing the appeals arising out of suits Nos. 77 and 91 was to uphold the decision on the merits as to issue of title and therefore it must be held that by dismissing the appeals arising out of suits Nos. 77 and 91 the High Court heard and finally decided the matter for it confirmed the judgment of the trial court on the issue of title arising between the parties and the decision of the trial court being on the merits the High Court's decision confirming that decision must also be deemed to be on the merits. To hold otherwise would make res judicata impossible in cases where the trial court decides the matter on merits but the appeal court dismisses the appeal on some preliminary ground thus confirming the decision of the trial court on the merits. It is well-settled that where a decree on the merits is appealed from, the decision of the trial court loses its character of finality and what was once res judicata again becomes res sub judice and it is the decree of the appeal court which will then be res judicata. But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming into the trial court's decision given on merits, the appeal court's decree cannot be res judicata, the result would be that even though the decision

of the trial court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be res judicata. We cannot therefore accept the contention that even though the trial court may have decided the matter on the merits there can be no res judicata if the appeal court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties. We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal.

70. In the context of principle of res judicata and its applicability in subsequent stage of same proceeding, the learned senior counsel also placed reliance in **Y. B. Patil v. Y. L. Patil**³⁴, wherein it was held thus:

“Principles of res judicata can be invoked not only in separate subsequent proceedings; they also get attracted in subsequent stage of the same proceedings. Once an order

³⁴ AIR 1977 SC 392

made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding.

The High Court at the time of the decision of the earlier writ petition on December, 18, 1964 recorded a finding and gave directions to the Revenue Appellate Tribunal not to reopen the questions of fact in revision. The Tribunal while passing the order dated September 12, 1967 complied with those directions of the High Court:

Held that the Appellants were bound by the judgments of the High Court and it was not open to them to go behind that judgment in the appeal to the Supreme Court against the decision of the High Court in the subsequent writ petition. No appeal was filed against that judgment and it became final.”

71. The learned senior counsel also placed reliance in **General Manager, South Central Railway, Secunderabad v. D. Vijayalakshmi**³⁵ referring to the expression of a Division Bench contained in paragraph No.‘45’, thus:

“45. In so far as third question is concerned, in view of the failure to file writ appeal against the judgment in the writ petition filed by the Railways questioning the second and third notifications, the appellants are not entitled to question the said judgment in other connected writ petitions as the judgment in the writ petition has attained finality and the said finality can be taken away only in accordance with law. The finality of the findings recorded in the connected writ petition due to non-filing of appeal, precludes this Court from proceeding with the present writ appeals. Therefore, on this ground also we

³⁵ 2009 (2) ALT 775 (D.B)

cannot interfere with the impugned judgment, as per the law laid down by the Supreme Court in the case of *Premier Tyres Limited v. Kerala State Road Transport Corporation.*”

72. On the very same subject, the learned senior counsel also places reliance in **Dharmavarapu Venkata Ramana v. Addanki Rajya Lakshmi**³⁶ as to applicability of the principle of *res judicata* for revisions. In the said decision, the observations made in paragraph No.‘5’ by a learned Single Judge of this Court read thus:

“5. The revision cannot be maintained, on account of a reason, which of course, may be technical in nature. The petitioner filed two applications, being I.A.Nos.67 and 68 of 2011, and both of them were dismissed, through a common order. In case the petitioner intended to pursue further remedies, he ought to have filed two revisions against the two decretal orders passed in both the I.As. Failure to file a revision against one of them would lead to a situation where the other becomes final and that in turn would operate as *res judicata*.”

73. The learned senior counsel also placed reliance in **R.V.S. Vara Prasad v. Dr.V. Ramdas (Died) per L.Rs**³⁷ rendered by a Division Bench of this Court in the context of a Will that came up for consideration in an earlier suit. In paragraph Nos.‘24’ and ‘25’, it was held thus:

“24. Take for instance, an issue pertaining to the validity of a Will fell for consideration in a suit for partition between a set of parties. The same issue arose

³⁶ 2011 (6) ALT 31

³⁷ 2014 (1) ALT 488 (D.B.)

for consideration in a suit for recovery of possession, to which certain other persons, in addition to the parties to the earlier suit; are also parties. The findings in the earlier suit for partition on the validity of the Will, would operate as *res judicata*, on the same issue in the subsequent suit, notwithstanding the fact that all the parties and all the issues are not common in both the suits.

25. Viewed from this angle, the finding in O.S.No.58 of 1976, as to the possession over the suit schedule property would operate as *res judicata*, in the present suit. This, despite the fact that the earlier suit for injunction-simplicitor, and the subsequent one is for declaration of title and recovery of possession.”

74. On the very same aspect in **K. Sri Rekha v. K. Vijay Krishna**³⁸, a learned single Judge of this Court, while observing that even if the C.R.P. filed earlier was dismissed as withdrawn and not on merits, held that the order therein constitutes *res judicata* and such dismissal has the effect of confirming the decision of the lower court.

75. The principle of *res judicata* is insisted upon by the learned senior counsel in the context of the appeal in A.S.No.16 of 1985 being dismissed by the lower appellate Court and when defendant No.4 through his L.Rs carried the matter to this Court in S.A.No.492 of 2000, the same was dismissed for non-prosecution on 12.12.2002 and the said dismissal order while confirming the judgment and decree passed by the trial Court, which was affirmed by the lower appellate Court, since attained finality, would bar the present Second Appeal, as

³⁸ 2012 (3) ALT 264

the issue in regard to the Will was dealt with elaborately and concurrent findings have been recorded by the Courts below.

76. The learned senior counsel appearing for the appellants in the present second appeal brought to notice of this Court that defendant No.4 viz., Bestha Venkatappa, in the original suit, preferred another regular first appeal in A.S. No.16 of 1985 on the file of Additional District Judge, Hindupur, against the plaintiff arraying him as respondent No.1 and rest of the defendants in the first appeal. The respondents therein filed cross-objections and both were decided by the learned Additional District Judge, Hindupur, on 31.08.1999, dismissing the first appeal and confirming the judgment and decree passed by the trial Court.

77. Aggrieved over dismissal of the first appeal, defendant No.4, whose death occurred during pendency of the first appeal in A.S. No.16 of 1985, his legal representatives came on record, and, thus, they preferred S.A. No.492 of 2000 on the file of this Court. In fact, on one of the dates of hearing of the present second appeal (S.A. No.181 of 2000), this Court directed the registry to list S.A. No.492 of 2000 along with the present second appeal (S.A. No.181 of 2000), but, somehow, it appears that they were listed separately. This Court, in S.A. No.492 of 2000, having found that the appellants have not taken out notices to the respondents, passed a conditional order on 21.06.2002 granting four (4) weeks time for compliance and recorded that in default, the second appeal stands dismissed. When the said

order worked out, C.M.P. No.23473 of 2002 was filed along with delay condonation Miscellaneous Petition. The said C.M.P. was filed with a request to set aside the order dated 21.06.2002. On 04.12.2002, though, delay was condoned by allowing C.M.P. No.23473 of 2002, however, CMP No.23757 of 2002 was dismissed recording thus:

“Heard

I am not inclined to accept the request of the learned counsel for the petitioner to set aside the order dated 21.06.2002, passed by this Court in this appeal.

Accordingly, the application is dismissed.”

78. Virtually, the aforesaid order amounts to not only dismissing S.A. No.492 of 2000 preferred by the legal representatives of defendant No.4, but by necessary implication also, confirming the judgment and decree passed in A.S. No.16 of 1985, by which judgment and decree, the very appeal suit A.S. No.16 of 1985 was dismissed confirming the judgment and decree passed by the trial Court i.e., the learned Senior Civil Judge's Court, Penugonda. Thus, the order passed in S.A. No.492 of 2000, since appears to have not been questioned, virtually dismissal order amounted to affirming the judgment and decree in O.S. No.9 of 1990, passed by the learned Subordinate Judge. The very same judgment and decree were challenged by the plaintiff and after his demise by his legal representatives in A.S. No.17 of 1985, which was also dismissed confirming the judgment and decree passed by the trial Court, against

which judgment and decree, the present second appeal is preferred by the legal representatives of the plaintiff and defendant Nos.6, 8 and 9 in the original suit.

79. Thus, when once the judgment and decree passed by the trial Court in O.S. No.9 of 1990 has attained finality by virtue of dismissal of S.A. No.492 of 2000, whether the present second appeal in S.A. No.181 of 2000 can be adjudicated upon probing into whether the findings recorded by the learned trial Court and the learned lower appellate Court, on appreciation of evidence, are legally infirm or patently perverse giving rise to substantial questions of law on factual aspect requires advertence in the context of principle of *res judicata* insisted upon by the learned senior counsel appearing for the contesting respondent and the reply argument advanced by the learned senior counsel appearing for the appellants in the light of the rulings relied on by them referred to hereinabove.

80. The ruling in **Smt. Ganga Bai**¹⁸ is inapplicable for the reason that only a finding of the trial Court that partition was not genuine was questioned by defendant Nos.2 and 3 therein.

81. Even the decision in **Deva Ram**¹⁹ is inapplicable for the reason, though the legal representatives of defendant No.4 challenged the findings recorded against their interest, but, while the appeal in A.S. No.16 of 1985 was disposed of by the learned lower appellate

Court, it affirmed the judgment and decree of the trial Court in all respects even dealing issue No.5 touching Ex.B-2 Will.

82. The ruling in **L. Janakirama Iyer**²⁰ is also inapplicable for the reason, defendant Nos.1 to 6 in the former suit therein filed a latter suit in their representative character and conducted as a representative suit under Order - I Rule - 8 of CPC. In fact, the said ruling was based on the argument that on general grounds of *res judicata*.

83. In **Sajjedanashin Syed**²¹, the Hon'ble Supreme Court was explaining the words "directly and substantially" and the words "collaterally or incidentally", and, if the matter was in issue directly and substantially in an earlier litigation and decided against a party, then the decision would be *res judicata* in a subsequent proceeding, and, if, however, it was only collaterally or incidentally in issue and decided in an earlier proceeding, the findings therein would not ordinarily be *res judicata* in a latter proceeding where the matter is directly and substantially in issue. Thus, the present decision is also inapplicable for the reason that issue No.5 was earlier dealt with in both the suits by one and the same lower appellate Court and recorded finding on Ex.B-2 and S.A. No.492 of 2000 is preferred against the judgment and decree.

84. On the other hand, the law declared in **Sheodan Singh**³³ relied on by the learned senior counsel appearing for the contesting respondent, where, in fact, two appeals were dismissed, one on the

ground of bar by limitation and the other on the ground that the appellant therein had not taken steps to print the records, but, since decision of the High Court dismissing the appeals arising out of suits No.77 and 91, the High Court heard and finally decided the matter confirming the judgment of the trial Court on the issue of title arising between the parties and the decision of the trial Court being on merits, the High Court's decision, confirming that decision must also be deemed to be on merits and to hold otherwise would make *res judicata* impossible in cases where the trial Court decides the matter on merits, but the appellate Court dismisses the appeal on some preliminary ground, thus confirming the decision of the trial Court on merits. Thus, the afore-extracted expression of the Hon'ble Supreme Court in paragraph No.13 of the said judgment, would aid the submission of the learned senior counsel that failure to get S.A. No.492 of 2000 restored would bar the present second appeal by principle of *res judicata*.

85. Even the ruling in **Y.B. Patil**³⁴ favours the contesting respondent. The ruling in **D. Vijayalakshmi**³⁵ also favours the contesting respondent. The decision in **Dharmavarapu Venkata Ramana**³⁶, even stretches applicability of the principle of *res judicata* to revisions. The ruling in **R.V.S. Vara Prasad**³⁷ is a direct decision where validity of a Will was considered in a suit for partition between a set of parties. The very same issue arose for consideration in a suit for recovery of possession to which certain other persons were also

added as parties and the Division Bench of this Court held that the findings in the earlier suit for partition on the validity of the Will would operate as *res judicata*. When that has been the law declared by the Division Bench of this Court, dismissal of S.A. No.492 of 2000 certainly would be *res judicata* in the present second appeal. The decision in **K. Sri Rekha**³⁸ would further amplify, where CRP was dismissed as withdrawn and not on merits, but, still held that the said order constitutes *res judicata*, as, such dismissal has effect of confirming the decision of the lower Court.

86. There is yet another circumstance, which supports the stand taken by defendant No.2 that the principle of *res judicata* applies to the present second appeal. Defendant No.2 filed cross-objections in A.S. No.16 of 1985 questioning the findings recorded by the learned trial Court on issue Nos.2, 4, 6 and 9.

87. Issue Nos.2, 4, 6 and 9 read thus:

- “2. Whether the plaintiff is not the son of the 1st defendant?
4. Whether the plaintiff is entitled to file this suit as he is not the proper legal representative of the 1st defendant?
6. Whether the properties items 10 to 16 belonged to the plaintiff or the 1st defendant?
9. Whether the 2nd defendant is not entitled to the properties covered by the gift deed dated 20-6-1966?”

88. The learned lower appellate Court, in fact, taken up discussion on findings on these issues and also by its independent analysis of evidence on record formulated the points for determination. The learned lower appellate Court in A.S. No.16 of 1985 formulated as many as 14 points for consideration, thus:

“1) Whether the suit is not maintainable on account of the dismissal of O.S.No.67/60 on the file of Sub-Court, Anantapur.

2) Whether the plaintiff is not the son of the D-1.

3) Whether items 1, 2, 3 and half of items 6, 8 and 9 are the self-acquisitions of late Aswarthappa as they are acquired by his succession to his junior paternal uncle.

4) Whether the plaintiff is entitled to file the suit as he is not the proper legal representative of the 1st defendant.

5) Whether the will dated 10.3.1969 is true, valid and binding on the plaintiff.

6) Whether the properties items 10 to 16 belonged to the plaintiff or the 1st defendant.

7) Whether the 4th defendant is entitled to the items 10 to 16 and whether he has perfected his title to the same by adverse possession.

8) Whether the gift deed dated 20.6.66 in favour of 2nd defendant is a sham and nominal document.

9) Whether the 2nd defendant is not entitled to the properties covered by the gift deed dated 20-6-66?

10) Whether the plaintiff is not entitled to a share in the plaint schedule properties.

- 11) Whether the mortgage in favour of the 3rd defendant is true, valid and binding?
- 12) Whether the 4th defendant is entitled to any of the properties.
- 13) Whether D-5 and D-6 are entitled to a share in the suit property.
- 14) Whether D-6 to D-9 are not liable for costs.”

89. Thus, the lower appellate Court not just confined to the claim of the appellants therein, who are legal representatives of the deceased defendant No.4, but also on the ‘gift’ as well as ‘mortgage’ and more particularly, the ‘Will’ by formulating point No.5 in assessing whether the said Will is true and its validity and binding effect on the plaintiff/respondent No.1 therein.

90. Then, having taken up all these points for discussion, affirmed the findings recorded by the trial Court and so far as the Will is concerned, elaborately discussing the evidence on record, more particularly, the evidence of DWs.1, 2 and 4 and the answers given by them in their cross-examination, recorded a definite finding that there is no convincing evidence on behalf of the plaintiff in the cross-examination of DWs.2 and 4 to come to a conclusion that DWs.2, 4 and 6 created Ex.B-2 and that Ex.B-2 is not a true document. Thus, disbelieved the stand taken by the plaintiff that the Will is a fabricated document and thereby answered the point in favour of defendant No.2 and against the plaintiff.

91. When, thus, positive findings have been recorded by the learned lower appellate Court in A.S. No.16 of 1985 and dismissed the appeal and cross-objections filed by defendant No.2, so far as issue Nos.2, 4, 6 and 9 are concerned, it has to be held, invariably, that the plaintiff leaving apart all other parties except defendant No.2, who stands first in the list of aggrieved parties, surprisingly, has not chosen to prefer any second appeal against the said judgment and decree passed in A.S. No.16 of 1985 and allowed the findings recorded therein to attain finality. No doubt, it may be argued that the findings recorded by the trial Court on the issues were challenged by the plaintiff in A.S. No.17 of 1985 and aggrieved by the judgment and decree passed by the learned lower appellate Court in A.S. No.17 of 1985 since preferred the present second appeal, the same would suffice to view that the judgment and decree passed in A.S. No.16 of 1985 has not attained finality, but, it is difficult to accede to such a view. So, consequence of failure to challenge the definite findings recorded on the points determined by the learned lower appellate Court, more particularly, touching the Will, Ex.B-2, and confirming the finding recorded by the learned trial Court as to its validity and binding effect besides its genuinity and allowing it to attain finality, would certainly, bar to prosecute the present second appeal, though, the deceased defendant No.4 preferred A.S. No.16 of 1985 challenging the findings recorded on item Nos.10 to 15. The submission that the scope is restricted to only those items, cannot be a ground to hold that the judgment and decree in A.S. No.16 of 1985

would be *res judicata* for the present second appeal. When once the competent Civil Court vested with appellate jurisdiction records positive findings, which adversely affect a party, certainly, the party, who is put to disadvantage on account of those findings, cannot remain as a silent spectator and invariably ought to challenge the said findings. Thus, the plaintiff was obligated with filing of yet another second appeal questioning the findings recorded in A.S. No.16 of 1985 that stood adverse to the legal representatives of the plaintiff. In the absence of challenge to the findings recorded by the learned lower appellate Court in A.S. No.16 of 1985, which did adversely affect the rights of the deceased plaintiff's legal representatives or the stand taken by him, it cannot be said that *res judicata* is inapplicable in view of filing of present second appeal by the plaintiff. Therefore, viewed from any angle, certainly, not only dismissal of second appeal in S.A. No.492 of 2000, but also failure to challenge the findings recorded in A.S. No.16 of 1985, more particularly, on point No.5, would be *res judicata* to decide the very same issue, which is projected as substantial question of law in the present second appeal. Hence, on this ground alone, the present second appeal is liable to be dismissed even without entering into the arena of merits touching genuinity or validity and binding nature of Ex.B-2 Will.

92. Still, looking at the suspicious features projected by the appellants herein, even on merits, it is doubtful, even, at this stage, whether can it be said that defendant No.2 being the propounder

obligated to dispel them or whether can they be really construed as suspicious circumstances giving rise to inherent improbabilities in relation to execution of Ex.B-2 by the deceased defendant No.1 in favour of defendant No.2.

93. The suspicious features pointed out by the learned senior counsel appearing for the appellants are:

1. The testator who is a normal resident of Kotnur village near Hindupur is claimed to have proceeded all the way to Ananthapur and executed the will on 10.03.1969.
2. It is not stated by DW.1, DW.2 or DW.4 as to whether defendant No.1 proceeded to Ananthapur only for execution of will or for any other purpose.
3. Admittedly defendant No.1 was sickly person suffering from *asthama*. He is alleged to have handed over the Will to defendant No.2 three (3) days after execution. He expired within fifteen (15) days after execution of the Will. It is also admitted by defendant No.2 that he was not in a position to walk more than five yards. It is difficult to believe that such a sickly person travelled all the way to Ananthapur and executed the document in the presence of persons with whom he has no acquaintance.

4. It is in the evidence that the testator stayed in the house of Dr. B. Venkata Swamy at another port at the time of executing the Will. However, the nature of relationship or acquaintance of the testator with the said Dr. B. Venkata Swamy is not deposed by any witness. Defendant No.2, DW.1 stated that the testator had no relatives in Ananthapur. DW.4 the witness to the Will stated that Dr. B. Venkata Swamy is a relative of the testator. There is an inherent contradiction in the stand of defendant No.2, DW.1 and DW.4. It is not the case of defendant No.2 that the testator went to Ananthapur and stayed with Dr. B. Venkata Swamy for treatment.
5. DW.2, scribe of the Will, and DW.4, one of the witnesses have never seen the testator earlier to execution of the Will. There is nothing on record as to why the testator had to execute the Will at a far of place and in the presence of total strangers.
6. It is on record that Hindupur Town is just three (3) kilometres away from Kotnur, the village of testator, and that there is an office of the Sub-Registrar and document writers are also available at Hindupur. If the testator was desirous of executing a Will, he could have done so at Hindupur. There is no need for him to travel all the way to Ananthapur with precarious health condition.

7. Nothing is stated by DW.1, DW.2 or DW.4 as to why Besta Giddappagari Narayanappa, third witness to the Will who is not a resident of Ananthapur was present at the time of execution of Will. Whether he accompanied the testator to Ananthapur or has relationship with the testator.
8. Admittedly, DW.2 the scribe of the Will is an experienced document writer. However, the document does not read as if it is prepared by a trained document writer. Any trained document writer would have stated in the document about the manner of execution of the Will i.e., that it is signed by the testator in the presence of witnesses and vice versa. The first page of the will does not bear the thumb impression of the testator. The scribe being an experienced document writer should have obtained the thumb impression of the testator on the first page also. He would have used an ink pad to obtain the thumb impression of the testator.
9. In a town like Ananthapur, thumb impression of the testator was obtained by using cart grease instead of an ink pad. The scribe of the Will its two witnesses being educated persons could have easily secured an ink pad for taking signature of the testator on the Will. Apparently, cart-grease is used to avoid comparison of the thumb impression of the testator on

the alleged Will with his other thumb impressions on record in the Court in earlier suit.

10. DW.1, defendant No.2 stated that the testator had no relatives in Ananthapur. DW.4 stated that Dr.B. Venkata Swamy is related to the testator. DW.2 stated that he does not know whether Dr. B. Venkata Swamy has any relationship with the testator. Admittedly, the testator stayed in the house of Dr.B. Venkata Swamy at Ananthapur and executed the Will. With such serious contradictions about relationship or acquaintance between the testator and Dr. B. Venkata Swamy, execution of Will by the testator is very much doubtful.

94. The decision in **Indu Bala Bose**⁹ refers to onus *probandi* lying on the propounder and the suspicious circumstances pointed out by the Hon'ble Supreme Court may be as to genuineness of signatures of the testator, the condition of the testator's mind, the disposition 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 testator's mind was not free, and, in such a case, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator.

95. In **Kalyan Singh**⁸, the Hon'ble Supreme Court further added that it would also be open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of evidence adduced by the party and the propounder shall produce trustworthy and unimpeachable evidence to establish genuineness and authenticity of the Will.

96. In **Smt. Jaswant Kaur**⁴, the Hon'ble Supreme Court also held that cases in which the Will is surrounded by suspicious circumstances on a different footing; some of them may be on account of shaky signature, a feeble mind and an unfair and unjust disposition of property and the propounder himself taking a leading part in making of Will under which he receives a substantial benefit.

97. In **S.R. Srinivasa**⁵, relied on by the learned senior counsel appearing for the appellants, the value of the admission about execution of the Will was dealt with and it was held that the propounder of the Will has to prove that the Will was duly executed and proved to be genuine.

98. The principles laid down by the Hon'ble Apex Court in **H. Vnkatachala Iyengar**¹⁶ were already referred to in the above and also the expression of the Hon'ble Apex Court in **Jaswant Kaur**⁴, further clarifying the true legal position in the matter of proof of Wills.

99. In **Addepalli Venkata Laxmi**¹⁷, relied on by the learned senior counsel appearing for the appellants, the executant died immediately after execution and one of the attestors, who was alone examined as a witness, was closely related to the beneficiary under the Will, and, in that context, the suspicious feature was culled out and disbelieved the Will under Ex.B-2 therein.

100. The decisions in **Surendra Pal**¹⁰ and **Meenakshiammal**¹¹ relate to the principle that the propounder is burdened to satisfy the conscience of the Court where the circumstances give rise to doubts concerning execution of Will.

101. When examined the above extracted suspicious features, in the light of the legal principles, and the features, which are stated to be suspicious features in the aforesaid decisions, and the onus lying on the propounder, and, as to when the onus gets discharged, though, apparently, the aforesaid circumstances appear to be suspicious, but, they cannot be viewed as serious suspicious circumstances vitally affecting execution of Ex.B-2. One of the circumstances pointed out by the learned senior counsel appearing for the appellants that instead of using 'ink-pad', 'cart-grease' was used to obtain thumb impression of defendant No.1 and the motive behind in using the cart-grease, according to the learned senior counsel, is to avoid comparison of the thumb impression of the testator on the alleged Will i.e., other thumb impressions on record available with the Court in the earlier suit in O.S. No.67 of 1960. One thing is pertinent to note that the deceased

plaintiff - appellant No.1, despite raising suspicious feature in using cart-grease, did not at all attempt to call for opinion of the handwriting expert by referring Ex.B-2 to the expert. In such an event, certainly, the said submission would not gain any prominence.

102. The other ground that there is no explanation from defendant No.2, propounder of the Will, as to why the deceased defendant No.1 stayed at the house of Dr. B. Venkata Swamy and whether he is related to the testator and the evidence of DWs.2 and 4 would not spell out any relationship between the testator and Dr. B. Venkata Swamy, and, thus, it creates enormous doubt, which accounts for a suspicious feature in doubting genuineness of execution of Ex.B-2, when the evidence of DWs.1, 2 and 4 is intrinsically examined, it is clear that DWs.2 and 4 were executive members of Poor Men's Association and Dr. B. Venkata Swamy at whose residence Ex.B-2 was executed was the president of the said association. The evidence of DWs.2 and 4 would clearly show that at the dictation of testator, DW.2 has subscribed the Will and thumb impression of the testator was affixed in their presence and they signed in Ex.B-2. The learned lower appellate Court on this aspect of the case dealt with elaborately assessing the answers given by DWs.2 and 4 in their cross-examination and the assertions made by PW.6, the deceased plaintiff and the answers given by him in his cross-examination, and derived probability that the plaintiff despite knowing the fact that Ex.B-2 was executed by the testator, still did not

whisper in his plaint anything touching Ex.B-2 and even when written statement was filed by defendant No.2 by annexing thereto Ex.B-2 Will, the plaintiff, who claimed partition of the properties and allotment of half share therein as the son of the first wife of the deceased defendant No.1, did not dispute the Will by questioning the same by filing a rejoinder. This, according to the learned lower appellate Court, accounts for a strong probability probablising the case of the defendants that the Will is genuine and the plaintiff was completely aware of execution of Ex.B-2 by deceased defendant No.1.

103. Yet another probability derived by the learned lower appellate Court was that though, the plaintiff claimed that in collusion with defendant No.3 Ex.B-2 was created, but the fact remains that defendant No.3 did not contest the suit at all and the collusion and creation of Ex.B-2 was suggested to DW.4 by the learned counsel for the plaintiff. The learned lower appellate Court found that the evidence of DWs.2 and 4 cannot be discarded as they cannot be construed as interested in either party as they were strangers to the parties and they were introduced by late Dr. B. Venkata Swamy, they being members of one and the same association. It is no doubt true, the burden to dispel all suspicious circumstances surrounding the Will is always and invariably cast on the propounder of the Will, but, it would not end thereat; when the propounder is successful in proving the Will removing the cloud of suspicion, the onus gets discharged and shifts to the party, who resists the claim of the opposite party

based on the Will. When viewed in that direction, certainly, failure to file rejoinder controverting the allegations levelled in the written statement of defendant No.2 as to execution of Will by the deceased defendant No.1 in her favour would amount to admission on the part of the plaintiff as to due execution and due attestation of the Will besides proof of contents therein.

104. The learned senior counsel appearing for the contesting respondent while contending that the propounder did not at all take any part in execution of Ex.B-2 and a reading of the Will clearly indicates that the testator was not of feeble mind, likely to be influenced by others and there is no unfair and unjust disposition of the property under that Will and as could be seen from the suggestion made to DW.4 that in collusion with defendant No.3, they all created and executed Ex.B-2 amounting to fraud, the expression of the Hon'ble Supreme Court in **Vrindavanibai Sambhaji Mane²³** and **Smt. Malkani²²** become relevant and since concurrent findings have been recorded by the Courts below upholding the Will under Ex.B-2 and due execution and attestation thereof is proved, the said findings do not warrant interference.

105. In the context of failure to file rejoinder would amount to admission, the learned senior counsel take support from the rulings in **Manchineni Venkayya²⁷**, **Pratima Chowdhury²⁸**, and **National Academy of Construction²⁹**, where it was held that non-filing of rejoinder and uncontroverted affidavit averments are deemed to have

been admitted, and, therefore, failure to file rejoinder in the present case by the plaintiff despite the Will was filed along with the written statement of defendant No.2 is sufficient to view that the plaintiff did not dispute the Will, but admitted the Will.

106. When concurrent findings are recorded upholding Ex.B-2, the attesor and scribe are strangers, but they had occasion to attest the Will at the house of Dr. B. Venkata Swami, as they all belong to one and the same association i.e., Poor Men's Association, as mentioned in the above, certainly, it cannot be said that defendant No.2 had played a prominent role in getting Ex.B-2 executed by the testator. Even looking at the suggestion made to DW.4 that at the behest of defendant No.3, Ex.B-2 is fabricated or got up, certainly, the plaintiff ought to have summoned defendant No.3 and examined, even though, did not controvert the written statement averments in regard to execution of Will by late B. Ashwarthappa (defendant No.1) irrespective of the fact whether, without there being a plea can it be looked into or otherwise.

107. Thus, when the findings recorded by the Courts below are based on appreciation of evidence in proper perspective, and in accordance with evidentiary rule, certainly, they cannot be construed as legally infirm, and, therefore, it cannot be said that the said findings suffer from utter perversity giving rise to substantial questions of law inviting indulgence of this Court.

108. Thus, viewed from any angle, there is absolutely no perversity at all in the concurrent findings recorded by the Courts below nor there is any patent illegality in the findings recorded. Therefore, even on merits, it is difficult to accede to the submission of the learned senior counsel for the appellants.

109. Turning to yet another argument advanced by the learned senior counsel for the appellants that a coparcener including *karta* of a joint family cannot devise “by Will”, the joint family property or any part thereof since the property passes by survivorship to other coparceners on his death and nothing would be left open which the Will can operate, which according to the learned senior counsel, the Court below completely ignored is concerned, the learned senior counsel appearing for the appellants relied on the rulings in **M.N. Aryamurthi¹, Kalyani², Rohit Chauhan³, V.K. Surendra¹², Thamma Venkata Subbamma¹³ and Sangavarapu Venkata Subbaiah Sarma¹⁴** and the principles enunciated adverted to hereinabove. But, the question is how far the same can be made applicable to the fact-situation occurring in the instant case, more particularly, when examined the recitals contained in Ex.B-2 Will.

110. The argument of the learned senior counsel appearing for the contesting respondent is that the provisions of Section 30 of Hindu Succession Act permits a coparcener to bequeath his unlimited share and the fact that the testator herein did not consider the plaintiff as his son, and, therefore, Ex.B-2 Will cannot be invalidated.

111. In **Thamma Venkata Subbamma**¹³ relied on by the learned senior counsel appearing for the appellants, the Hon'ble Supreme Court while dealing with the dispositions by way of gift of undivided share by a coparcener, incidentally dealt with disposition by way of Will by a male Hindu in a Mitakshara coparcenary property in the context of introduction of Section 30 of Hindu Succession Act. The expression of the Hon'ble Supreme Court contained in paragraph No.15 in **Thamma Venkata Subbamma**¹³ was extracted hereinbefore. The Hon'ble Supreme Court observes that the most significant fact, which may be noticed, is that while the legislature was aware of the strict rule against alienation by way of 'gift', it only relaxed the rule in favour of disposition by 'Will', the interest of a male Hindu in a Mitakshara coparcenary property and the legislature did not, therefore, deliberately provide for any 'gift' by a coparcener of his undivided interest in the coparcenary property either to a stranger or to another coparcener, and, therefore, the personal law of the Hindus governed by Mitakshara School of Hindu Law is that a coparcener can dispose of his undivided interest in the coparcenary property by a Will, but cannot make a gift of such interest.

112. When the contents of Ex.B-2 are examined, they would reflect that the testator, in fact, did not treat the plaintiff as his son and there was reference to the plaintiff that the plaintiff got filed two suits earlier with all incorrect allegations and even including the property situate at Kodigenahalli and thereby he was executing the Will as he

was also suffering from '*asthama*'. Thus, when the testator did not treat the plaintiff as his son; the testator, when executed Ex.B-2 bequeathing the entire plaint schedule items shown thereunder in favour of defendant No.2 cannot make the 'Will' void *abinitio*. It is only after the findings tendered in the original suit that the plaintiff is the son of the testator through his first wife, though, according to the contesting defendants, not through the deceased defendant No.1, both the Courts below upholding the validity of the Will to the extent of half share bequeathed thereunder cannot be construed as legally infirm. Had the testator accepted the plaintiff as his son through his first wife in Ex.B-2, certainly, Ex.B-2 would have become void. Therefore, concurrent findings recorded by the Courts below that under Ex.B-2, only half share of the testator deemed to have been conveyed to the legatee cannot be faulted.

113. No doubt, the learned senior counsel did submit that the Courts below having rejected the gift in favour of defendant No.2 by her husband, the deceased defendant No.1, on the ground that a coparcener cannot gift coparcenary property until it is divided, ought to have applied the same principle in regard to Ex.B-2 and, thus, patent error creeps in, and, therefore, it accounts for patent illegality in the finding recorded on Ex.B-2 under issue No.5. But, for the aforesaid reasons, more particularly, in view of the provisions of Section 30 of Hindu Succession Act and in view of the typical case at hand, where the testator did not accept the plaintiff as his son, the

concurrent findings recorded by the Courts below limiting the effect of the Will to the extent of half share to which the deceased defendant No.1 was entitled to then, cannot be faulted.

114. Hence, the rulings relied on by the learned senior counsel for the plaintiff referred to in the above that a coparcener cannot Will away any portion of joint family property cannot be made applicable to the typical situation occurring under Ex.B-2.

115. It is unnecessary to refer to and examine applicability of the rulings relied on by both sides as to competency of the testator in bequeathing the properties under Ex.B-2 in detail. Therefore, even that ground is unavailable to the appellants herein and to question the judgment and decree passed by the Courts below on that ground.

116. Thus, the questions of law formulated to treat them as substantial questions of law, in fact, cannot be construed as substantial questions of law even, since there is no patent illegality in the findings recorded by the Courts below that crept in. Therefore, these questions do not give rise to involvement of any substantial question of law.

117. Therefore, the present Second Appeal fails, and is, accordingly, dismissed confirming the judgment and decree under challenge. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in the present Second Appeal stand closed.

A. SHANKAR NARAYANA, J

June 20, 2018.
MGR/GBS/VV/PV

