

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

A.S.Nos.1482 of 1994 &
215 of 2000

Between:

Venkata Suryanarayana Raju and others.

...Petitioner

VERSUS

P.Rama Devi and others.

...Respondents

DATE OF JUDGMENT PRONOUNCED: 29.1.2018

SUBMITTED FOR APPROVAL:

THE HONOURABLE SRI JUSTICE A.V.SESHA SAI

1. Whether Reporters of Local Newspapers
May be allowed to see the Judgment?

Yes/No

2. Whether the copies of judgment may be
Marked to Law Reporters/Journals?

Yes/No

3. Whether Their Lordship wish to see the
Fair copy of the judgment?

Yes/No



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< GIST:

> HEAD NOTE:

!Counsel for Appellants: Sri M.Adinarayana Raju

^ Counsel for Respondents: Sri V.S.R.Anjaneyulu

? Cases referred:

1. AIR 1991 Delhi 325
2. AIR 1982 Allahabad 273
3. AIR 1973 Madras 473
4. AIR 1998 Rajasthan 223
5. (2003) 7 SCC 336
6. AIR 1976 Madras 222
7. AIR 1929 Allahabad 817
8. AIR (33) 1946 Lahore 399
9. 1978 (1) Madras Law Journal 505
10. AIR 1996 Gujarat 197
11. 2002 AIHC 4201 (AP)
12. AIR 2002 Karnataka 191
13. AIR 2003 SC 4368
14. 2011(2) ALT 551
15. 2001(6) ALD 143
16. (2015) 8 SCC 615
17. AIR 1962 SC 567
18. AIR 1974 AP 13
19. 2002(4) ALD 277 (DB)
20. AIR 2003 SC 761
21. AIR 1990 SC 396
22. (1994) 5 SCC 135
23. AIR 1977 SC 74

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

A.S.Nos.1482 of 1994 &
215 of 2000

COMMON JUDGMENT:

Since these two appeals arise out of one suit and as the parties are also the same, this Court deems it appropriate to dispose of these appeals by way of this common judgment.

2. Defendants 1, 3 and 4 in O.S.No.26 of 1986 on the file of the Court of Subordinate Judge, Eluru, West Godavari District are the appellants. A.S.No.1482 of 1994 is directed against the judgment and preliminary decree of partition dated 8.8.1994 passed by the said Court. A.S.No.215 of 2000 is against the order and final decree dated 2.4.1998 passed by the said Court in I.A.No.1382 of 1994.

3. First respondent herein instituted the said suit for partition of the schedule properties. Suit schedule property is an extent of Ac.26-01 cents in Survey No.827/4 (old Survey No.793/4) of Pedavegi village, Eluru Taluk, West Godavari district. Though, the plaintiff initially claimed 1/5th share, later in view of the death of Defendant No.2-father pending suit, eventually claimed 1/4th share. For the sake of convenience and brevity, this Court deems it appropriate to refer to the parties as arrayed in the Court below.

4. Plaintiff is the sister of Defendant No.1 and daughter of Defendant Nos.2 and 3 and Defendant No.4 is the wife of Defendant No.1 and sister-in-law of plaintiff. Defendant No.5 is the brother of plaintiff's husband. Defendant No.6 is the sister of plaintiff and another daughter of Defendant

Nos.2 and 3. The case of the plaintiff, as per the pleadings available on record, is as follows.

5. Defendant No.1 on behalf of plaintiff and Defendant Nos.1 to 4 purchased the plaint schedule property of Ac.26-01 cents by way of Ex.A1 Agreement of Sale dated 2.7.1983 from one Sri Munukuntla Satyaveereswara Sarma for a total consideration of Rs.3,20,000/- and paid the said sum and Defendant No.1 obtained delivery of the said property on 24.9.1983. Defendant No.1 leased out the same to Defendant No.5 and inducted him into possession of the schedule property. Defendant No.1 represented to the plaintiff that at the time of division of schedule properties, plaintiff would be given northern side portion, in which a shed was existing towards her 1/5th share. A service connection bearing No.370 was also obtained for the said shed in the name of plaintiff. Subsequently, Sri Munukuntla Satyaveereswara Sarma executed Ex.A2 registered sale deed dated 9.3.1984 in favour of plaintiff and Defendant Nos.1 to 4 for an extent of Ac.23-01 cents for a consideration of Rs.1,85,000/-. The family of Defendant Nos.1 to 3 had Ac.3.60 cents at Pallipalem of Mummidivaram Taluk, East Godavari District and out of which Ac.1.00 cents of land was given to the plaintiff as *pasupu-kumkuma* by Defendant Nos.2 and 3 and Defendant Nos.2 and 3 sold Ac.3.60 cents for Rs.70,000/- per acre and with the said sale proceeds and with the amount borrowed from Defendant No.5, Defendant No.1 purchased the plaint schedule property, but the defendants did not pay anything from 24.8.1983 towards the share of the plaintiff. The plaintiff would be entitled for 1/5th share out of the plaint schedule property though the sale deed was obtained for Ac.23.01 cents since the property was wrongly shown in lesser extent to deprive the plaintiff. With the above pleadings and praying for partition of the plaint schedule properties and seeking allotment of 1/5th, the

plaint came to be instituted. Defendant No.1 filed a written statement and Defendant Nos.2 to 4 filed a memo, adopting the said written statement. The case of the Defendant Nos.1 to 4 is as infra:

6. Plaintiff and her husband requested the Defendants to sell away Ac.0.95 cents of land situated at Pallepalem, which was gifted to the plaintiff as *pasupu-kumkuma* orally when the Defendant Nos.2 and 3 decided to sell away their lands and Defendant No.3 sold away the said Ac.0.95 cents for Rs.21,000/- to one Smt.P.S.Padmavathi Devi by way of Ex.B3 registered sale deed dated 29.12.1983. Plaintiff and her husband requested Defendant Nos.1 to 3 to give 1/12th share out of Ac.23.01 cents and Defendant Nos.1 to 3 agreed to give 1/12th share and accordingly Ex.A2 sale deed dated 9.3.1984 was obtained for Rs.1,85,000/- in the name of Defendant Nos.1 to 4 and plaintiff. Thus, the plaintiff got 1/12th share out of Ac.23.01 cents and as per the advice of Vasthu Shastra Pandit, electricity service connection was taken in the name of plaintiff and Defendant No.5 has nothing to do with the schedule land. Plaintiff instead of showing her 1/12th share out of Ac.23.01 cents showed Ac.26.01 cents deliberately with a malafide motive to have unlawful gain.

7. Defendant No.5 did not file any written statement. After the institution of the suit, Defendant No.2-father of plaintiff died and Defendant No.6 is added as his legal representative. After amendment to the plaint, Defendant No.1 filed additional written statement stating that Defendant No.2 (father) executed Ex.B7 registered will dated 20.10.1986, as such, Defendant No.1 alone is entitled for all the properties of Defendant No.2. Defendant Nos.3 and 4 filed a memo, adopting the said additional written statement and Defendant No.6 filed a written statement supporting the case of Defendant

No.1. Basing on the pleadings available, the learned Subordinate Judge, framed the following issues for trial:

- (1) Whether the plaintiff is entitled to seek partition of plaint schedule property into four equal shares and entitled to 1/4th share?
- (2) Whether the plaintiff is entitled to profits, if so, at what rate?
- (3) Whether the plaintiff is entitled to damages and if so, to what amount?
- (4) Whether the Will propounded by Defendant No.1 dated 20.10.1986 of the Defendant No.2 is true?
- (5) To what relief is the plaintiff entitled?

8. During the course of trial, plaintiff examined herself as P.W.1 and filed Exs.A1 to A22 documents and on Defendants' side, Defendant No.1 examined himself as D.W.1 and D.Ws.2 to 4 were examined and Exs.B1 to B7 were marked. The learned Subordinate Judge on 8.8.1994 passed the following preliminary decree.

- (1) That a preliminary decree is hereby granted.
- (2) That the plaint schedule land covered by Ex.A2 which is Ac.23.01 cents of land be partitioned into five equal shares and that the plaintiff be entitled to one such share.
- (3) That the defendants do pay to the plaintiff a sum of Rs.5,935/- towards proportionate costs of the suit.
- (4) That the rest of the suit claim be and the same is hereby dismissed.
- (5) That the plaintiff is at liberty to file a separate petition under Order 20 Rule 12 of CPC.

9. In A.S.No.1482 of 1994 the said judgment and preliminary decree of partition dated 8.8.1994 are under challenge. Cross objections have also been filed by the plaintiff to the extent the preliminary decree went against her. Pending these appeals, Defendant No.3-mother died and Defendant

No.1 filed an application to declare him as legal representative by setting up a will dated 20.10.1986. This Court called for a report on the said will and the learned Subordinate Judge submitted a report also which is available on record.

10. Heard Sri M.Adinarayana Raju, learned counsel for Appellants and Sri V.S.R.Anjaneyulu, learned counsel for Plaintiff/Cross Objector, apart from perusing the material available before the Court.

11. Submissions/contentions of Sri M.Adinarayana Raju, learned counsel for Appellants:

(1) Preliminary decree of partition granted by the learned Subordinate Judge is erroneous, contrary to law, weight of evidence and probabilities of the case.

(2) The learned Subordinate Judge ought to have held that the plaintiff would be entitled only for 1/12th share in Ac.23.01 cents as per the understanding and the consideration advanced on behalf of plaintiff while purchasing the property.

(3) The learned Subordinate Judge having rejected the case of the plaintiff that her Ac.1.00 cents of land was sold for Rs.70,000/- while observing that it was sold at Rs.21,000/- per acre, ought not to have granted 1/5th share in the land.

(4) The learned Subordinate Judge having found that P.W.1 admitted in her evidence that she did not advance any amount for purchase of schedule land except Rs.25,000/-, ought to have found that the plaintiff would be entitled only for 1/12th share.

(5) The decree granted by the learned Subordinate Judge, granting 1/5th share in favour of plaintiff is contrary to the provisions of Section 45 of Transfer of Property Act, 1882 (for short 'T.P. Act') and since the plaintiff contributed only Rs.21,000/- towards purchase of Ac.23.01 cents, plaintiff would be entitled for her share proportionately, but not equal share as per the second limb of Section 45 of T.P. Act.

(6) Except the personal testimony of P.W.1, no other oral evidence was adduced by the plaintiff.

(7) Ex.B3 sale deed fetched only Rs.21,000/- and plaintiff is only a joint owner, but not co-owner.

(8) Pending appeal, mother passed away and during her lifetime, she executed a registered will deed dated 20.10.1986, bequeathing her entire share in favour of Defendant No.1 only.

In support of his submissions and contentions, the learned counsel places reliance on the following judgments:

- (1) Chiranjilal and another v. Bhagwan Das and others¹
- (2) Mohan Lal v. Board of Revenue²
- (3) Guruswami Asari and others v. Raju Asari and others³
- (4) Gyan Chand v. State and others⁴
- (5) State of Maharashtra and another v. B.E.Billimoria and others⁵
- (6) Tehmina Dinshaw Tehrani v. The Official Assignee and another⁶

12. Submissions/contentions of Sri V.S.R.Anjaneyulu, learned counsel for Plaintiff/Cross Objector:

(1) Once there is an agreement of sale i.e. Ex.A1 dated 2.7.1983 for Ac.26.01 cents, one member of the family cannot claim exclusiveness in respect of a part of the same, as such, the learned Judge should have

¹ AIR 1991 Delhi 325

² AIR 1982 Allahabad 273

³ AIR 1973 Madras 473

⁴ AIR 1998 Rajasthan 223

⁵ (2003) 7 SCC 336

⁶ AIR 1976 Madras 222

granted decree, directing partition of entire extent of Ac.26.01 cents instead of Ac.23.01 cents.

(2) When Exs.A1 and A2 do not indicate specific contributions, it cannot be concluded that the plaintiff would be entitled in proportion to the contributions and the same would be contrary to Section 45 of T.P. Act.

(3) No evidence was adduced on behalf of Defendants to show that the plaintiff agreed for 1/12th share.

(4) No body was examined to prove the sale consideration, which Ex.B3 fetched.

(5) Defendant No.1 could not prove Ex.B7 Will in accordance with the provisions of Indian Evidence Act and the Indian Succession Act.

(6) The findings of the learned Subordinate Judge on Ex.P1 will dated 20.10.1986 alleged to have executed by the mother are erroneous and contrary to law.

In support of his submissions/contentions, the learned counsel takes the support of the following judgments:

- (1) (Saiyad) Abdullah v. Ahmad and others⁷.
- (2) Nanak, deceased, represented by Umra and others v. Ahmad Ali⁸
- (3) C.V.Ramaswami Naidu and others v. C.S.Shyamala Devi and others⁹
- (4) Durlabhji Dhanjibhai Patel and others v. Competent Authority and Deputy Collector, Surat and others¹⁰

⁷ AIR 1929 Allahabad 817

⁸ AIR (33) 1946 Lahore 399

⁹ 1978 (1) Madras Law Journal 505

¹⁰ AIR 1996 Gujarat 197

- (5) Nalamuru Nadipi Subbanna v. Kataru Chennamma and others¹¹
- (6) Smt.M.Printer and others v. Marcel Martins¹²
- (7) State of Maharashtra and another v. B.E.Billimoria and others¹³
- (8) V.Rajamma v. A.Rami Reddi and others¹⁴
- (9) Veeramallayyagari V.Sitaram v. Payala Chandrasekhar, Minor Guardian Payala Siddaiah and others¹⁵
- (10) Jagdish Chand Sharma v. Narain Singh Saini (dead) through Legal Representatives and others¹⁶
- (11) Rani Purnima Debi and another v. Kumar Khagendra Narayan Deb and another¹⁷
- (12) Karri Nookaraju v. Putra Venkatarao and others¹⁸
- (13) Gondrala Sithamahalakshmi and another v. Pulipati Rajarao and others¹⁹
- (14) Janki Narayan Bhoir v. Narayan Namdeo Kadam²⁰
- (15) Kalyan Singh v. Smt.Chhoti and others²¹
- (16) Bhagwan Kaur v. Kartar Kaur and others²²
- (17) Smt.Jaswant Kaur v. Smt.Amrit Kaur and others²³

13. In the above background, the points that emerge for consideration of this Court are -

- (1) Whether the findings recorded by the learned trial Judge as to the entitlement of the shares are in accordance with Section 45 of Transfer of Property Act, 1882 ?

¹¹ 2002 AIHC 4201 (AP)

¹² AIR 2002 Karnataka 191

¹³ AIR 2003 SC 4368

¹⁴ 2011(2) ALT 551

¹⁵ 2001(6) ALD 143

¹⁶ (2015) 8 SCC 615

¹⁷ AIR 1962 SC 567

¹⁸ AIR 1974 AP 13

¹⁹ 2002(4) ALD 277 (DB)

²⁰ AIR 2003 SC 761

²¹ AIR 1990 SC 396

²² (1994) 5 SCC 135

²³ AIR 1977 SC 74

(2) Whether the plaintiff is entitled to ask for partition of the entire extent covered by Ex.A1 Agreement of Sale ?

(3) Whether the finding on Ex.B7 registered Will dated 20.10.1986 is in accordance with law ?

(4) Whether Defendant No.1 could successfully prove execution of Ex.P1 Will dated 20.10.1986 ?

(5) To what reliefs the parties are entitled to ?

POINTS 1 & 2:

14. The contention of the learned counsel for the appellants, Sri Adinarayanana Raju is that since the plaintiff contributed only a sum of Rs.21,000/- which was fetched by sale covered by Ex.B3 Sale Deed dated 29.12.1983, plaintiff would be entitled only a proportionate share in the property covered by Ex.A2, but not for equal share as per first limb of Section 45 of T.P. Act, as such, the entire decree is liable to be set aside. Strongly resisting the said contention, it is maintained by the learned counsel for the plaintiff, Sri V.S.R.Anjaneyulu that the situation in the instant case squarely falls under second limb of Section 45 of the T.P. Act, as such, plaintiff would be entitled to equal share on par with other co-purchasers. In elaboration, it is submitted that in the absence of any specification as to the shares and in the absence of any particulars as to the contributions made, the natural corollary would be entitlement to equal shares by all the co-owners.

15. In order to consider and examine and adjudicate the said aspect, it would be apt and appropriate to refer to Section 45 of Transfer of Property Act, 1882, which reads as under:

“Section 45 - Joint transfer for consideration

Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.”

16. In the instant case, it is beyond the pale of any controversy that Ex.A2 Sale Deed dated 9.3.1984 is in the names of the plaintiff and Defendants 2 to 4 and admittedly the recitals contained therein would not speak of any shares for which the respective parties are entitled to, nor they indicate as to the contributions made by the parties to the said document. The second limb of Section 45 of T.P. Act, in manifest and vivid terms, mandates that in the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property. In this context, it may be appropriate to refer to the judgments cited by the learned Advocates.

Coming to the judgments cited by Sri M.Adinarayana Raju

17. In *Tehmina Dinshaw Tehrani v. The Official Assignee* (6 supra), the Madras High Court at paragraph 3 held as under:

“We have been taken through parts of the evidence on record. At the stage of the appeal, it cannot be disposed of merely on the basis of burden of proof in fact, it will have no importance when the entire evidence is before us. We agree with Palaniswamy, J., that the evidence as a whole, does not pin-point the source of purchase money for the site. On the one hand, at the time the site was purchased, the insolvent was affluent and was earning. At the same time, his wife, the appellant, was also not impecunious and she too appears to have had some money with her as evident from her issuing cheques and purchasing property in Ootacamund. In such an event, as there is no evidence of a common fund out of which the site could have been purchased and in the absence of evidence also that one or the other exclusively contributed any part of the purchase money, the second paragraph of Section 45 of the Transfer of Property Act will be applicable. More so, when the purchase was expressly stated to be in the joint names of both the appellant and the insolvent. There is a presumption when such a purchase is made and there is no evidence one way or the other as to the source of the purchase money, that the property, purchased belonged in common to both. That is the contention pressed by Mr. Parasaran for the Official Assignee, which we accept as valid. So far as the building is concerned, though Mr. Parasaran has vehemently contended before us that the same yardstick should be applied to it as well, we have these facts which lead us to a different conclusion. There is no question of joint purchase of the building. It was constructed in 1952 apparently out of the money borrowed by both the appellant and her husband on a mortgage executed by both of them. The money so borrowed amounted to Rs. 25,000. We have already mentioned that the building cost eventually Rs. 65,000. There is no evidence to show as to who contributed the balance of Rs. 40,000. We cannot assume that it was contributed or any part of it was contributed by the insolvent. The facts are not such as to warrant any presumption in support of it in favour of one or the other. But, so far as mortgage is concerned, the recitals in the mortgage deed showed that the executants treated themselves as joint owners of the property and of the building and borrowed Rs. 25,000. We are inclined to think that, in view of this recital, one half of this sum of Rupees 25,000 should be taken to have come from the appellant and the other half from her husband. Though it is not exactly equal to the consideration in respect of the joint sale deed, it is approximately nearing it and we think we will be justified in holding that only a sum of Rs. 25,000 raised by mortgage and

expended on the construction of the building can be treated as a common fund belonging to the appellant and her husband. So far as the sum of Rs. 40,000 is concerned in the absence of evidence, we have got to hold that the Official Assignee has not established that any part of it belonged to the insolvent.”

18. In the instant case also with the money which could be realised out of the transactions covered by Ex.B1 Sale Deed dated 16.8.1983, Ex.B2 Sale Deed dated 17.8.1983 and Ex.B3 Sale Deed dated 29.12.1983, which fetched Rs.16,800/-, 42,000/- and 21,000/- respectively, the land covered by Ex.A2 Sale Deed dated 9.3.1984 was purchased for Rs.1,85,000/- in the name of the plaintiff and Defendants 1 to 4. The total amount covered by Exs.B1, B2 and B3 would come to Rs.79,800/-, whereas the value of the property shown under Ex.A2 Sale Deed dated 9.3.1984 being Rs.1,85,000/-. There is no evidence on record produced by Defendant No.1 to demonstrate his source of the balance of purchase money apart from the money which the family could realise from Exs.B1 to B3. In the absence of the same, necessarily it needs to be concluded that the plaintiff would be entitled to the benefit of second limb of Section 45 of the T.P. Act.

19. In *Chiranjilal v. Bhagwan Das* (1 supra), the Delhi High Court at paragraphs 11, 17 and 19 held as under:

11. Section 45 of the Transfer of Property Act lays down that where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively

advanced. It is also laid down that in the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to equally interested in the property. In the plaint or in the written statements, there is no plea taken that there was any contract between the parties as to what share they will have in the property in question. The plaintiff is relying on evidence with regard to the contribution made by each of the parties respectively towards the consideration of the property in question in order to claim one-half in this property. The defendants, however, have set up the plea that there was common funds of the parties in which they had equal shares from which the consideration of the property was paid and in the alternative it is contended on behalf of the defendants that as there is no sufficient evidence to show as to the interests in the fund to which they were respectively entitled or as to the shares which they respectively advanced, thus, the parties have one-third shares each in the property in question.

17. The learned counsel for defendant No. 1 and 2 has vehemently argued that there is no satisfactory evidence available on the record to prove as to what funds had been contributed by each of the parties for purchase of the plot and for construction of the house and thus, it should be held that each had one-third share. He has contended that the Income Tax assessment orders and wealth-tax assessment orders which are based on the Income Tax and wealth-tax returns filed by the parties are not admissible in evidence. He has referred to Ss. 13 and 40 to 43 of the Indian Evidence Act in this connection. It is true that the Income Tax and wealth-tax assessment orders are not admissible in evidence under Ss. 40 to 42 of the Indian Evidence Act but they are definitely admissible in evidence under S. 43 as they contain the admissions of defendants 1 to 3 with regard to shares which they were having in the property in question. Counsel for the plaintiff has referred to *The Coca-Cola Company of Canada Ltd. v. Pepsi-Cola Company of Canada Ltd.*: Air 1942 Pc 40, wherein it has been held that the Court is not entitled to refer to or rely upon a judgment given in proceedings to which neither the plaintiff nor the defendant was a party, as proving the facts stated therein. This judgment is not applicable to the facts of the present case because admittedly the defendants have filed the Income Tax and wealth-tax returns which contain the admission regarding their shares and the contribution made by them towards requiring of the property in

question. Judgments which are not inter parties could be relevant and admissible under various provisions of the Indian Evidence Act. In *Lakshman Govind v. Amrit Gopal*, (1900) 2nd 24 Bom 591, it was held that judgments not inter parties, though not conclusive as *res judicata*, are admissible in evidence to show the conduct of the parties or particular instances of the exercise of a right or admissions made by the parties. This ratio was followed in *Chandulal v. Pushkar Raj*: Air 1952 Nag 271 and *Union of India v. Moksh Builders & Financiers Ltd.* and it was laid down that an admission by a party is substantive evidence of the fact admitted and admissions duly proved are admissible as evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to the admissions. It is not possible to hold the defendants Nos. 1 to 3 were making admissions in Income Tax and wealth-tax returns on the basis of which the assessments were made only to suit the convenience of plaintiff No. 1. They had become matured when they had started doing their own businesses and so, it cannot be said that they were making those admissions only at the behest of their father; rather in the written statement of defendants 1 and 2 and also of defendant No. 3 the averment made in the plaint that such admissions had been made was not disputed and only plea taken was that those admissions had been made for the convenience of plaintiff No. 1. It is admitted that at no point of time the defendants have withdrawn those admissions before the authorities concerned. If those admissions are kept in view it is evident that the contribution of defendants 1 to 3 towards the purchase of plot and for constructing the house in question was not up to the share of one-fourth even. So, keeping in view the provisions of S. 45 of the Transfer of Property Act and the contributions made by defendants 1 to 3 towards purchase of plot and construction of the house, it has to be held that according to their contributions they are not entitled to have more than one-fourth share i.e., one-fourth share for defendant No. 2 and one-fourth share for defendant No. 3 and one-half share would be of plaintiff No. 1. At the stage of arguments it was agreed before me that plaintiff No. 1, defendant No. 2 and defendant No. 3 be treated as owners of the property in question as they are the only persons in v. *Lose* favor the leave deed of the plot in question stands executed by the Government. The plea that plaintiff No. 2 and defendant No. 2 were holding Benami on behalf of plaintiff No. 1 and defendant No. 1 respectively was given up.

19. In view of the above discussion, I declare that plaintiff No. 2 is the owner of one-half share in the property in question whereas defendant No.2 and defendant No 3 are owners of one-fourth share each in the property in question. The issues are decided accordingly in favor of the plaintiffs and against the defendants.”

20. The Delhi High Court recorded the said findings on the basis of the evidence as to the admissions made by the parties therein. In the instant case, no such contingency does exist, as such, the said judgment would not render any assistance to the appellants.

21. In *Gyan Chand v. State* (4 supra), the Rajasthan High Court at paragraph 8 held as under:

“Under Section 45 of the Transfer of Property Act, 1882 where immovable property is transferred for consideration to two or more persons jointly makes them co-owners of the property transferred, their interest are in proportion to the share of the consideration they have advanced. In the absence of evidence of share of the consideration the co-owners shall be presumed to have equal interest in the property. Co-owners have unity of possession and commencement of title in the property but does not have unity of title or unity of interest in the property. Joint owner of the property cannot be said to have title and interest in the property of another co-owner. Every joint owner has his individual title and interest in the property purchased jointly by them. Thus relinquishment of title and interest in the joint property by one joint owner in favour of another joint owner would only be transfer of interest of one joint owner in favour of another joint owner, each joint owner having distinguishable, independent, individual title in the jointly purchased property.”

The above judgment also would not be helpful to the appellants in view of factual and circumstantial variation.

22. In *Mohan Lal v. Board of Revenue* (2 supra), the Allahabad High Court at paragraphs 2, 3, 4 and 8 held as under:

“2. It had been alleged that the plaintiff had contributed to the extent of half the consideration of sale deed to his uncle Surajmal and he had been in possession over his half share and the defendants had denied the claim of the plaintiff on the basis of the recital in the sale deed indicating 1/21 share of the plaintiff in the disputed property, hence the suit.

3. The defence in the suit was the denial of the plaintiff's share in the disputed property and it was alleged that the plaintiff's name was mentioned in the sale deed to the extent of 1/21 share on the request of the plaintiff and that the plaintiff had not contributed towards sale consideration and that the property belonged to the defendants' father Surajmal and various other pleas were taken.

4. The trial court and the appellate court substantially accepted the contentions of the plaintiff that he had contributed in the sale consideration to the extent of half share and that he was entitled to half share in the disputed property, hence the plaintiff's suit was decreed by them. In second appeal by the defendants the plaintiff's claim has been negatived and the plaintiff has been given a decree only to the extent of 1/21 share in the disputed property on the basis of the recitals in the title deed of the parties. Aggrieved by the judgment of the second appellate court the plaintiff-petitioner has approached this Court under Article 226 of the Constitution.

8. The second appellate court has dealt with the claims of the parties in paras 8 and 9 of its judgment. It appears that the second appellate court has mainly relied upon the recitals of the sale deed indicating the share of the plaintiff. According to the second appellate court if the plaintiff had contributed in sale consideration to the extent of half share he had remedy only in criminal court or civil court. The second appellate court has made the following observation in para 8 of its judgment.-

"No law has, however, been cited in respect of the second point. The contribution of a particular vendee towards the purchase price of a property cannot be held legally to determine his share is against specific recital in a sale deed. So far as revenue court is concerned, it is bound to accept the respective share holdings of the parties as they are mentioned in the sale deed."

In the absence of any evidence as to the source of balance amount for the Defendant No.1 to exclusively claim the property, the said judgment would not come to the rescue of Defendant No.1.

23. The judgment in *Guruswami Asari others v. Raju Asari* (3 supra) has no relevance to the facts of the present case.

24. In *State of Maharashtra and another v. B.E.Billimoria* (5 supra), the Hon'ble Apex Court at paragraph 5 held that in the absence of any evidence as to the interests in the fund to which the parties were respectively entitled or as to the shares which they respectively advanced, the parties would be entitled for equal shares. In the instant case also, except indicating that since Ex.B3 fetched only Rs.21,000/-, plaintiff would be entitled proportionately and Defendant No.1 failed to show his source of investment of the amount covered by Ex.A2 apart from the amounts fetched under Exhibits B1 to B3. Therefore, this judgment is helpful to the plaintiff in the facts and circumstances of the case.

Coming to the judgments cited by Sri V.S.R.Anjaneyulu:

25. In *(Saiyad) Abdullah v. Ahmad* (7 supra), the Allahabad High Court, while dealing with Section 45 of T.P. Act held that in the absence of specification of shares purchased by two persons in the sale deed, it must be held that both purchased equal shares.

26. In *Nanak v. Ahmad Ali* (8 supra), following the judgment in *(Saiyad) Abdullah v. Ahmad* (7 supra), the Full Bench of Lahore High Court held that in the absence of specification of shares in the sale deed, the two should be presumed to have purchased the house in equal shares and noted that paragraph 2 of Section 45 of T.P. Act provides that in the absence of

evidence as to the interests in the fund to which the co-vendees would be respectively entitled or as to the shares of consideration which they respectively advanced, the co-vendees shall be presumed to be equally interested in the property.

27. In *Durlabhji Dhanjibhai Patel v. Competent Authority and Deputy Collector, Surat* (10 supra), at paragraph 5, the Gujarat High Court held that in the absence of specific mention about shares of co-owners in any sale deed, all co-owners will have their equal share in the properties thereunder. This Court also followed the said judgment in *Nalamuru Nadipi Subbanna v. Kataru Chennamma* (11 supra).

28. In *Smt.M.Printer and others v. Marcel Martins* (12 supra) and *State of Maharashtra and another v. B.E.Billimoria* (13 supra), the Hon'ble Courts took the same view.

29. The principles laid down in the above referred decisions, drive this Court towards an irresistible conclusion that the finding of the trial Court on entitlement to the shares is in accordance with the provisions of Section 45 of the Transfer of Property Act and the same by any stretch of imagination cannot be faulted. Therefore, plaintiff would be entitled to the shares as held by the trial Court. Accordingly Point No.1 is answered.

30. With regard to Point No.2, it is required to be noted that Ex.A1 Agreement was entered into between vendor and Defendant No.1 and plaintiff was never a party to the same. The participation of the plaintiff in the transaction originated only from the date of execution of Ex.A2 registered Sale Deed and not anterior to the same. Though the plaintiff pleaded that Ex.A1 was also obtained on her behalf by Defendant No.1, no oral nor

documentary evidence was adduced by the plaintiff in the said direction. In the absence of the same, this Court is not inclined to consider granting any relief in favour of the plaintiff and accordingly Point No.2 is answered against the plaintiff.

Point No.3

31. The trial Court framed the issue, pertaining to Ex.B7 Will dated 20.10.1986 as Issue No.4 and held that execution of the same could be proved by the propounder of same i.e. Defendant No.1. According to Defendant No.1, pending the original suit his father, Sri- Seetharamaraju died and he executed Ex.B7 registered Will dated 20.10.1986, bequeathing his entire property in favour of Defendant No.1 in a sound and disposing state of mind. On the other hand, the plaintiff denied the very execution and proof thereof in accordance with the provisions of Indian Evidence Act and the Indian Succession Act. According to the learned counsel for the plaintiff, Defendant No.1 could not remove the suspicious circumstances, surrounding Ex.B7 Will, as such, the learned Subordinate Judge should have disbelieved the same. It is also the case of plaintiff that in view of glaring discrepancies in the evidence of D.Ws. 2 to 4, Ex.B7 Will is liable to be rejected. On this aspect and in support of his contentions, learned counsel for the plaintiff relies on the following judgments:

- (1) Rajamma v. A.Rami Reddi (14 supra)
- (2) Veeramallayyagari V.Sitaram v. Payala Chandrasekhar (15 supra)
- (3) Jagdish Chand Sharma v. Narain Singh Saini (dead) (16 supra)
- (4) Rani Purnima Debi v. Kumar Khagendra Narayan Deb (17 supra)

32. In *V.Rajamma v. A.Rami Reddi* (14 supra), this Court at paragraph 13 held as under:

“A Will is a solemn document. The executant would not be alive to testify to its correctness. The law therefore demands trustworthy,

unimpeachable and convincing evidence to establish genuineness and authenticity of the Will. Mere proof of Will as required under Section 68 of the Evidence Act and Section 63 of the Indian Succession Act, 1925, by itself would not suffice the legal requirements, when suspicious circumstances are alleged. The Court shall consider the circumstances brought out in the evidence, the contents of the document itself and the pre and post execution conduct of the parties to appreciate the probabilities (or improbabilities) of the Will being suspicious or otherwise. In a case of suspicious circumstances the lis ceases to be one between the propounder and challenger. The Court, then shall assume proactive role to pierce the events to satisfy itself the plausibility of the Will (see *H. Venkatachala Iyengar v. B.N. Thimmajamma*: AIR 1959 SC 443, *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*: AIR 1964 SC 529 and *Pinnka Hanumantha Rao (died per L.R.) v. Garlapati Dhanalakshmi and Andallu*: 2007 (2) ALD 435). Importantly, in this case, the Will, Ex.B1, was executed on 24.5.1960 and partition deed, Ex.B8, was executed on 22.1.1963. In an understandable manner, the latter does not refer the former which itself creates the suspicion. This Court considered the issue, keeping the above principles, and holds that Defendants 1 and 2 failed to discharge the burden of removing the suspicious circumstances surrounding the execution of the Will.

33. In *Veeramallayyagari V.Sitaram v. Payala Chandrasekhar* (15 supra), this Court at paragraph 45 held as under:

“Even when undue influence, fraud or coercion in the execution of the Will is alleged, the propounder has to remove all the doubts and satisfy the 'test of satisfaction of judicial conscience'. Whenever fraud is alleged or suspicious circumstances are alleged, the onus on the propounder of the Will is heavy and unless the Court is satisfied, even if the Will is proved to have been executed, the Court shall not treat the document as the last Will of the testator.”

34. In *Jagdish Chand Sharma v. Narain Singh Saini (dead)* (16 supra), the Hon'ble Apex Court at paragraph 47 held as under:

“That a propounder has to demonstrate that the Will was signed by the testator and that he was at the relevant time in a sound disposing state of mind and that he understood the nature and effect of the

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

35. In *Rani Purnima Debi v. Kumar Khagendra Narayan Deb* (17 supra), the Hon'ble Supreme Court at paragraph 5 held as under:

“Before we consider the facts of this case it is well to set out the principles which govern the proving of a will. This was considered by this Court in *H. Venkatachala Iyengar v. B. N. Thimmajamma*: [1959] 1 S. C. R. 426). It was observed in that case that the mode of proving a will did not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by section 63 of the Indian Succession Act. The onus of proving the will was on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine. If the caveator

alleged undue influence, fraud or coercion, the onus would be on him to prove the same. Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court. Further, what are suspicious circumstances was also considered in this case. The alleged signature of the testator might be very shaky and doubtful and evidence in support of the propounder's case that the signature in question was the signature of the testator might not remove the doubt created by the appearance of the signature. The condition of the testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will might appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will might otherwise indicate that the said dispositions might 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 was accepted as the last will of the testator. Further, a propounder himself might take a prominent part in the execution of the will which conferred on him substantial benefits. If this was so it was generally treated as a suspicious circumstances attending the execution of the will and the propounder was required to remove the doubts by clear and satisfactory evidence. But even where there suspicious circumstances and the propounder succeeded in removing them, the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations."

36. Coming to the oral evidence adduced by the Defendant No.1, in order to prove Ex.B7 registered Will, Defendant No.1 examined the scribe, one Sri Gollapudi Brahmanandam as D.W.2 and also examined the attestors namely, Sri Kanumuri Bapiraju and Sri P.V.S.R. Krishna as D.Ws.3 and 4. In this connection, it would be appropriate to refer to the relevant provisions under the Indian Evidence Act and the Indian Succession Act. Section 68 of the Indian Evidence Act, 1872 reads as under:

"Proof of execution of document required by law to be attested

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for

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

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

Section 63 of Indian Succession Act, 1925 stipulates as follows:

“Execution of unprivileged Wills

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-

- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
- (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

37. In the instant case, in the considered opinion of this Court, Defendant No.1 complied with the above statutory mandate. Though the learned counsel pointed out certain discrepancies in the evidence of D.Ws.2 to 4 as to the particulars of persons present and place of execution, in the considered opinion of this Court, the same are very minor in nature and do not completely nullify the very proof of execution of Ex.B7. In the facts and

circumstances of the case and the evidence adduced by Defendant No.1, the judgments cited by the learned counsel for the plaintiff would not render any assistance to the plaintiff. Therefore, this point is answered in favour of the Defendant No.1 and against the plaintiff and accordingly the finding of the trial Court is confirmed. In fact for believing the execution of Ex.B7 Will, the trial Court recorded cogent and convincing reasons in the impugned judgment at paragraph 13, as such, this Court does not find any valid reason to disturb the said valid and convincing reasons.

Point No.4

38. Pending these appeals, the mother of plaintiff and Defendant No.1 died. Defendant No.1 filed A.S.M.P.No.2908 of 2013 to declare him as legal representative of his mother while stating in the supporting affidavit that she executed a registered will dated 20.10.1986, bequeathing her entire properties in his favour. On 27.1.2014, this Court under Order 22 Rule 5 called for a report. The said order reads as follows:

“Petition filed under Section 151 of the Code of Civil Procedure to declare the 1st appellant Vatsavai Venkata Suryanarayana Raju as legal representative of the deceased 2nd appellant in the above appeal basing on the will allegedly executed by the 2nd appellant dated 20.10.1986 declaring her share in the schedule property to the 1st appellant. Thus, the 1st appellant, claimed to be legatee under the will, claiming share in the schedule property and filed a Photostat copy of the will in support of his contention.

However, learned counsel for the respondents disputed the very execution of will and entitlement of the petitioner to claim share in the schedule property as legatee under the will and that the 1st appellant cannot be recognized as legatee under the will to claim share of the 2nd appellant and prayed for dismissal of the petition.

However, this Court ordered the petition on 20.1.2014 permitting the petitioner to come on record as legal heir of the 2nd appellant being the legatee under the will subject to proof of will.

During the course of hearing of the appeal, learned counsel for the respondents contended that a finding is required to be recorded by the Appellate Court or call for a finding from the trial Court regarding genuineness of the will. Till then, the 1st appellant cannot be recognized as legatee under the will and drawn the attention of this Court to the judgment in *Jaladi Suguna (deceased) through L.Rs. vs. Satya Sai Central Trust & others* [(2008) 8 SCC 521], wherein it was held that

‘The provisions of Order 22 Rules 4 and 5 CPC are mandatory. When a respondent in an appeal dies and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the Court can proceed further in the appeal. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. For this purpose, the High Court could, as in fact it did, refer the question to a subordinate Court under the proviso to Order 22 Rule 5 CPC to secure findings. After getting the findings, it ought to have decided that question and permitted to person(s) who are held to be the legal representative(s) to come on record. Only then, there would be representation of the estate of the deceased respondent in the appeal’.

In view of the principle laid down in the above judgment and in view of the specific order passed by this Court i.e. recognizing the 1st appellant as legal heir subject to production of will, it is incumbent upon the Court to call for a finding from the trial Court, more particularly when there is a dispute regarding execution of will by the 2nd appellant in favour of the 1st appellant. Hence, I find that it is a fit case to direct the trial Court i.e. Subordinate Judge, Eluru to enquire about genuineness and validity of the will allegedly executed by the 2nd appellant in favour of the 1st appellant and record its finding and send the same within a period of two months from the date of receipt of a copy of this order.

Registry is directed to list the matter on receipt of finding from the trial Court as to genuineness of the will”.

39. Pursuant to the said order, Defendant No.1 filed I.A.No.2319 of 2014 before the Court of the Principal Senior Civil Judge, Eluru, praying the Court to record the evidence regarding the proof of Will. The plaintiff filed a counter on 18.11.2014, stating interalia that the alleged will is not a voluntary

transaction and is tainted with undue influence and that Defendant No.1 brought pressure on his parents to execute the wills and they were forced to execute the same much against their wish and that the executant died on 19.10.2011 and the alleged will came to light only after two years. The learned Senior Civil Judge recorded the evidence. On behalf of Propounder/Defendant No.1 apart examining himself as P.W.1, he also examined Sri Ch.Krishna Murthy and Sri G.Prabhakara Rao as P.Ws.2 and 3. Plaintiff examined herself as R.W.1. The learned Senior Civil Judge passed an order on 15.12.2014 in I.A.No.2319 of 2014, holding the said will as genuine and that Defendant No.1 proved the same as per law. The said will dated 20.10.1986 said to have been executed by mother is taken on record as Ex.P1 in these appeals.

40. According to Sri Adinarayanana Raju, learned counsel for appellants, Defendant No.1 could successfully prove execution of Ex.P1 will, as such, the finding of the learned Senior Civil Judge need not be interfered with and is liable to be confirmed. On the contrary, it is maintained by the learned counsel for the plaintiff, Sri V.S.R. Anjaneyulu that Defendant No.1 could not prove due execution of the will dated 20.10.1986.

41. According to Defendant No.1, one Gollapudi Brahmanandam scribed Ex.P1 will and the said Brahmanandam is no more now. According to Defendant No.1, Sri Kanumuri Bapiraju, their relative and P.V.S.R. Krishna Assistant of Sri Gollapudi Brahmanandam attested Ex.P1 will. As per Defendant No.1, Sri Kanumuri Bapiraju died on 2.2.2008. In order to identify his signature on Ex.P1, P.W.2 (Challa Radha Krishna Murthy) was examined. In his chief affidavit he stated that during the life time of Sri Kanumuri Bapiraju, both of them used to do real estate business, as such, he used to

have close acquaintance with him and also his signatures and stated eventually that the signature on Ex.P1 dated 20.10.1986 is of Kanumuri Bapiraju. During the course of cross examination, P.W.2 stated that he had no written proof to show his joint business with Kanumuri Bapiraju; that Kanumuri Bapiraju told him about subscribing the will in the year 1987; that he is not in the custody of any document containing the signature of Kanumuri Bapiraju to compare and tally with the signature on Ex.P1 will dated 20.10.1986. In the preceding paragraph of his cross examination, P.W.2 deposed that he is in custody of xerox copy of the document in respect of the site sold away by Bapiraju containing his signature and he did not file the same. The tenor of this witness does not strengthen the case of Defendant No.1. In the considered opinion of this Court, the evidence of P.W.2 is not trustworthy in the absence of any proper proof of his acquaintance with the signature of Sri Bapiraju. Admittedly, P.W.2 is not in the custody of any signatures of Sri Bapiraju, as such, it is not safe to rely on the said evidence to conclude in favour of due execution of Ex.P1. On the other hand, the evidence of P.W.2 raises a number of suspicions about his acquaintance.

42. The Defendant No.1, in order to prove Ex.P1 also examined one Sri Gollapudi Prabhakara Rao, son of late Sri Brahmanandam as P.W.3, who scribed Ex.P1. He stated in his chief affidavit that his father scribed Ex.P1 Will dated 20.10.1986 and did put his signature on the said document and signature on Ex.P1 belongs to his father. In the cross examination, he deposed that he can identify his father's signature and that he was not present when his father scribed Ex.P1 Will and that he did not bring any document, containing the signatures and writings of his late father to compare with the signature and writings on Ex.P1. In the absence of

production of any evidence of being in custody of the signatures and writings of Sri Brahmanandam, it is not safe to rely on the evidence of P.W.3 also. It is also significant to note that despite the availability of other attesting witness, Sri P.V.S.R. Krishna, Defendant No.1 did not examine him to prove his case for the reasons best known to him.

43. In this context, it may be appropriate to refer to the judgments cited by the learned counsel for the plaintiff.

- (1) Gondrala Sithamahalakshmi v. Pulipati Rajarao (19 supra)
- (2) Janki Narayan Bhoir v. Narayan Namdeo Kadam (20 supra)
- (3) Smt.Jaswant Kaur v. Smt.Amrit Kaur (23 supra)
- (4) Kalyan Singh v. Smt.Chhoti (21 supra)

44. In *Gondrala Sithamahalakshmi v. Pulipati Rajarao* (19 supra), a Division Bench of this Court, while referring to the judgment of the Hon'ble Apex Court in *N.Kamalam (dead) and another v. Ayyasamy* [2001(5) ALD 69 (SC)], at paragraph 7 held as under:

“In the case on hand also the plea of the respondents-defendants is that one attesting witness died and the whereabouts of another attesting witness was not known. In those circumstances, a duty is cast on the respondents-defendants to prove that the signature of the executant on the document is of his own and atleast the signature of one attesting witness has to be identified in a manner known to law. We are sure that mere saying that the signature of attesting witness is of him may not be sufficient unless he produces the signature of the attesting witness on some admissible document and make both the signatures available for comparison by the Court to find out whether the person acted as real witness. Those things had not taken place in this case. Hence we have to respectfully follow the said decision of the Supreme Court and hold that the scribe cannot act as attesting witness more so in the case of a will when the statute mandates that atleast one attesting witnesses should be thereto prove the execution of will”.

45. In *Janki Narayan Bhoir v. Narayan Namdeo Kadam* (20 supra), the Hon'ble Supreme Court at paragraphs 11 and 12 held as under:

"11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68, Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for the reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under Clause (c) of Section 63 of the Succession Act, it cannot be said that the Will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet, another reason as to why other available attesting witnesses should be called when the one attesting witnesses examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 illustration (g) of Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of Indian Evidence Act. Section 71 is permissive and an enabling Section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling Section. It lays down the necessary requirements, which the Court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility cannot be let down without any other means of proving due execution by "other evidence"

as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go bye to the mandate of law relating to proof of execution of a will.

12. Turning to the facts of the case on hand, it is evident that only one attesting witness Prabhakar Sinkar, examined in the case, did not prove the execution of the will inasmuch as he did not prove the attestation of the will by the other attesting witness Wagle who though available was not examined. The scribe examined in the case was not an attesting witness, which is clear from the evidence on record and as rightly conceded so by learned counsel for the respondent before us. Hence, it is unnecessary to go into the question whether the scribe in this case could or could not be an attesting witness. The evidence of Sinkar, the only attesting witness, does not satisfy the mandatory requirements of Section 68 of the Evidence Act. We are not in a position to accept the contention urged on behalf of the respondent that the evidence of other witness namely, that of the respondent and the scribe could be considered under Section 71 of the Evidence Act. Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and other attesting witness though available has not been examined. When the document is not proved as mandatory required under Section 68 of the Evidence Act, the provision of Section 71 of the Evidence Act, which is permissive, and enabling in certain circumstances as discussed above does not help the respondent. In Vishnu Ramkrishna and Ors. v. Nathu Vithal and Ors. MANU/MH/0100/1948 : AIR1949Bom266 , Chagla, C.J., speaking for the Division Bench in similar circumstances has stated that although Section 63 of the Succession Act requires that will has to be attested by two witnesses, Section 68 of the Evidence Act permits the execution of the will to be proved by only one attesting witness being called. Where the attesting witness, who is called to prove the execution, is not in a position to prove the attestation of the will by the second witness, the evidence of the witness called falls short to the mandatory requirements of Section 68. Section 71 of the Evidence Act can only be requisitioned when the attesting witnesses who have been called failed to prove the execution of the will by reason of either denying their own

signatures or denying the signature of the testator or having no recollection as to the execution of the document. This Section has no application when one attesting witness has failed to prove the execution of the will and other attesting witnesses were available who could prove the execution if they were called.”

46. In *Smt.Jaswant Kaur v. Smt.Amrit Kaur* (23 supra), the Hon’ble Supreme Court at paragraphs 9 and 21 held as under:

“9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple issue 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.

21. The will is unnatural and unfair in more than one respect. At the time that the will is alleged to have been made, the testator had a daughter Guraprakash Kaur who was born of Dalip Kaur and a daughter-in-law Joginder Kaur, being the widow of the testator's predeceased son Gurbachan Singh who was also born of Dalip Kaur. Gurbachan Singh and Joginder Kaur gave birth to the defendant Surjit Inder Singh and to a daughter Palvinder Kaur. The will contains not even a fleeting reference either to the testator's daughter or the widowed daughter-in-law or to the grand-daughter Palvinder Kaur. It is urged that all of these persons were happily placed in life and it was therefore needless for the testator to provide for them. If that be so, it was usually unnecessary to refer to the appellant Jaswant Kaur who also, it is common ground, has been married happily.”

47. In *Kalyan Singh v. Smt.Chhoti* (21 supra), the Hon’ble Apex Court at paragraph 20 held as under:

“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's 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."

48. In the instant case also, except saying that signature of attesting witness is of him, no signature of the attesting witness on any admitted document was produced for tallying and comparison with the signature of the attesting witness on Ex.P1. Therefore, the evidence of P.Ws.2 and 3 cannot be given any credence.

49. Another significant aspect, which needs mention in this context is that according to Defendant No.1, Sri Bapiraju, one of the attestors of Ex.P1 died, but other attestor, Sri P.V.S.R. Krishna is alive and there is no evidence forthcoming as to why the second attestor was not examined. This, in the considered opinion of this Court, is fatal to the case of the Defendant No.1 who is the propounder of Ex.P1. Therefore, the property covered by Ex.P1 is also liable to be partitioned and plaintiff is entitled for equal share in it along with Defendant No.1 and Defendant No.6 and plaintiff is entitled for 1/3rd share out of the same. Therefore, the order passed by the learned Senior Civil Judge in I.A.No.2319 of 2014 in O.S.No.26 of 1996 is liable to be set aside and is accordingly set aside.

50. In the result, A.S.No.1482 of 19904 and cross objections are dismissed and it is further declared that Defendant No.1 could not prove the execution of Ex.P1 registered Will dated 20.10.1986 in accordance with law and the share of the Defendant No.3 shall be divided into three equal shares and the plaintiff would be entitled for one such share out of the same. In view of the above judgment in A.S.No.1482 of 1994, the order and final decree dated 2.4.1998 passed by the learned Principal Senior Civil Judge, Eluru, West Godavari District in I.A.No.1382 of 1994 is set aside and the said I.A. stands restored to file for consideration by the Court below in accordance with the present judgment in A.S.No.1482 of 1994. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

Date: 29.1.2018

Note:

L.R. copy be marked.

B/o

DA



A.V.SESHA SAI, J



THE HON'BLE SRI JUSTICE A.V.SESHA SAI



A.S.Nos.1482 of 1994 &
215 of 2000

29.1.2018

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