

(2009) 07 MAD CK 0311
In the Madras High Court
Case No : L.P.A. No. 140 of 2002

Appavu Mudaliar, Rathina Mudaliar, Givindasamy Mudaliar
and Rajakumari

APPELLANT

Vs

Manickkammal and Others

RESPONDENT

Date of Decision : 24-07-2009

Acts Referred:

Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63

Citation : (2009) 4 LW 229

Hon'ble Judges : Prabha Sridevan, J;C.T. Selvam, J

Bench : Division Bench

Advocate : R. Subramanian for S. Hemalatha, for the Appellant; R. Sundarrajan, for R2, for the Respondent

Judgement

Prabha Sridevan, J.—The defendants 1 to 3 and 8 are the appellants. They succeeded before the Trial Court but lost in the first appeal. The averments in the plaint in brief are as follows:

(i) The plaintiffs are the daughters and the defendants 1 and 2 are the sons of one Ponnaiah Mudaliar and Unnamalai Ammal both deceased. Both of them died intestate, the mother on 20-05-1978 and the father on 23-08-1979. The third defendant is the son of the first defendant. The eighth defendant is the sister of the third defendant and daughter of the first defendant. There was a registered partition deed where the properties held by Ponnaiah Mudaliar was divided amongst him, his wife and the defendants 1 and 2. The properties allotted to Ponnaiah Mudaliar are the A Schedule properties. The properties allotted to his wife Unnamalai Ammal are the B Schedule properties. The properties allotted to defendants 1 and 2 are C and D Schedule properties. E Schedule properties were kept in common between the defendants 1 and 2 who were directed to maintain the first wife of the first defendant out of the income. The parents were living with their sons namely defendants 1 and 2. Ponnaiah Mudaliar was running a rice mill, which was earning a good income. Part of the property in C Schedule was

sold by defendants 1 and 2 to the fourth defendant and therefore, he was made a party to the suit by way of amendment pleading that the sale was not binding on the appellant. The fifth defendant was one of the tenant and therefore, is made a party to the suit. Sixth and seventh defendant are made parties likewise. In view of the contention of the first defendant that Unnamalai Ammal has executed a Will in favour of eighth defendant, the daughter of the first defendant of whom the B Schedule items 7 to 10 were bequeathed was also made a party to the suit by way of amendment. Since the defendants did not agree to divide the property, after the death of the parents, the suit had to be filed.

(ii) The first defendant filed the written statement in which he admitted the relationship but had denied that the appellants had died intestate. It was specifically pleaded that the father had executed a Will on 05-02-1979 bequeathing all the properties including the rice mill to defendants 1 and 2. The Will was duly proclaimed during the funeral ceremonies and the beneficiaries had also taken possession of the properties as per the Will. It was also pleaded that by a settlement deed dated 17-08-1977 his mother had settled the plaint. Item Nos. 1 to 6 of B Schedule property to D3 his son, which was accepted by him. He also pleaded that suit item Nos. 7 to 10 of B Schedule were bequeathed by Unnamalai Ammal to her daughter Rajakumari under the Will dated 20-02-1978 which was also duly executed and attested. It was pleaded that Unnamalai Ammal executed the two documents voluntarily and she had some reason for bequeathing and setting properties as she did. Therefore, according to the first defendant, the suit had to be dismissed.

(iii) The defendants 2 and 3 filed a separate written statement. They too pleaded that Ponnaiah Mudaliar did not die intestate. He had executed a Will on 05-02-1979 which was attested and had excluded his daughters and therefore, the plaintiffs had no share in the A Schedule property. In his written statement too, there was reference to the settlement dated 17-08-1977 and the Will dated 20-02-1978.

(iv) Before the Trial Court, the plaintiffs marked 12 documents, the defendants marked 28 documents. The Commissioner's report was marked as Ex-C1. The second plaintiff examined herself as P.W.1, the Advocate Commissioner as P.W.2 and the handwriting expert P.W.3. On the side of the defendants, the second defendant was examined as D.W.1; the third defendant as D.W.2; D.W.3 is the attessor to Ex-B5 Will. D.W.4 is the scribe of Ex-B6; D.W.5 is another handwriting expert; D.W.6 is a vakil's clerk. The Trial Court dismissed the suit for partition holding that Ex-B4 settlement deed and Ex-B5 Will both by Unnamalai Ammal and Ex-B6, the Will of Ponnaiah Mudaliar had been duly proved.

(v) Therefore, the plaintiffs filed A.S. No. 272 of 1989. The appeal was allowed on the ground that there are suspicious circumstances in the execution of Exs-B4 to B6. The learned Single Judge did not take into account the evidence of either P.W.3 or D.W.5, the fingerprint experts not being impressed with their statements, but, however, held that the suspicious circumstances had not been

properly explained by the evidence. Aggrieved by this, the present appeal has been filed.

2. Mr. R. Subramanian, learned Senior Counsel for the appellant submitted that there are clear recitals in the documents Exs. B-4, 5 and 6 explaining as to why the daughters were not given anything. He submitted that as far as the settlement deed is concerned, it is registered and unless the executants of the said deed repudiate it, it must be held to be proved. He also submitted that though the scribe Rajagopal has not been examined, D.W.1, the attesting witness, has spoken of the execution and registration. He submitted that as regards Ex. B-5, D.W.1 is the scribe and D.Ws.2 and 3 are the attesting witnesses. They have spoken of its due execution and attestation and also the fact that the Will was read out to the testatrix. He submitted that the beneficiary under the Will is neither D.W.1 nor D.W.2, but one Rajakumari, who is the daughter of D.W.1's brother. He submitted that D.W.3 is a stranger and there is no reason why his evidence must be suspected. Except for a suggestion that D.W.3 and his father are the henchmen of the defendants, there is nothing in the evidence of D.W.3 that merits suspicion. The learned Counsel submitted that there is evidence to show that the Will was read out to Unnamalai Ammal. According to the learned Counsel, the Will was proved to have been executed by Unnamalai Ammal in a sound and disposing state of mind. Next is Ex. B-6, the Will of Ponnaiah. The learned Counsel submitted that there were as many as four attesting witnesses and D.W.3, the son of the attesting witnesses, had identified his father's signature. So, according to the learned Counsel, since the attestation of one witness was proved, this Will was also duly proved.

3. The learned Counsel for the respondents submitted that the learned Single judge had considered the evidence of the defendant's witnesses and it is only because of the contradictions in the evidence that the Wills and the settlement deed were disbelieved. The learned Counsel submitted that unless the conclusions in the appellate judgment were totally unacceptable, this Court should not interfere.

4. Here, we have three documents on the basis of which the appellants claim that the respondents are not entitled to any right in the properties. They are Ex. B-6 the Will of Ponnaiah and Exs. B-4 and 5, the settlement deed and Will of Unnamalai Ammal respectively. The rights of the appellant will depend on the acceptability and proof of these documents.

5. (i) Section 63 of the Indian Succession Act reads as follows:

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

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

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

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal 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.

(ii) Section 68 of the Indian Evidence Act, 1872 reads as follows:

68. Proof of execution of document required by law to be attested.-If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving 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 not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied.

6. We will examine the pleadings and evidence of the three disputed documents with regard to Evidence Act:

(i) Pleadings:

The plaintiffs have not pleaded that the Wills are not true or that they have been executed as a result of fraud, coercion, undue influence, or that the testator/testatrix were not aware of the contents of the Wills they have allegedly executed. Even after the written statements were filed, they have not filed any additional pleadings. This may not seriously affect their case, since it is the defendants who are burdened with the duty to prove the three documents to the satisfaction of the Court.

(ii) Plaintiff's evidence:

P.W.1 is the 2nd Plaintiff. In her evidence, she has stated that her parents had not executed any Will. Her father and the 1st defendant jointly managed the properties and that they lived together. She has further stated that her mother did not give any property to Rajakumari, and that her mother used to sign her name and that she was unwell for a year before her death. It is not correct to say that during this period she used to affix her thumb impression. She has stated that she is not aware that her mother has settled the properties on the

3rd defendant. She has stated that there is no enmity between the plaintiffs and the witnesses to Ex. B-6. She is unable to say whether the signatures in documents shown are her father's signatures. So there is no attack by this witness on the Will or the settlement deed.

P.W.2 is the Advocate Commissioner. According to him, he had taken a list of documents when he visited the suit property and some of the documents were blank papers with Ponnaiah's signature on them.

P.W.3 is a Handwriting Expert, who has opined that the signature of Ponnaiah in Ex. B-6 does not tally with his admitted signature.

Therefore, the pleadings and the evidence of the plaintiffs may affect the credibility of the Will, Ex. B-6 and nothing else.

7. But we cannot forget that the defendants are bound to prove the three documents and we will see if they have discharged their burden.

8. Ex. B-6 is the Will of Ponnaiah. Not less than four witnesses have attested the said Will. They are Venu Naidu, Chandrasekharan, M. Samikkannu and Perumal. D.W. 4, Kuppuswami is an acquaintance of both the plaintiffs and the defendants. He is the scribe of Ex.B-6. He has stated that except for Perumal, all the other witnesses are alive. P.W.2, Dhanusu is Perumal's son. He has identified his father's signature. On the basis of this, the Trial Court held that the Will was proved. This was rightly set aside in appeal. Section 68 of the Indian Evidence Act requires that at least one witness has to be called upon to speak of the attestation. Here, though admittedly three of the four witnesses are alive, none of them has given evidence. The evidence of the scribe will not be sufficient to prove the Will. If all the attesting witnesses had died, then the identification of the signature of one of them may have been acceptable. But on the facts of this case, we must confirm the finding that Ex. B-6 is not proved.

9. Next we will take up the two documents said to have been executed by Unnamalai Ammal. The plaintiffs are her daughters; defendants 1 and 2 are her sons; the beneficiaries under Ex. B-6 are her sons; her grandson D-3, son of D-1 is the settlee under Ex. B-4, and her granddaughter D-8 and daughter of D-1 is the beneficiary under the Will Ex. B-5; D-2, the brother of D-1, is D.W.1; and D-3 is D.W.2.

I. Ex. B-5 is the Will. The Will is not registered. It is dated 20.2.1978. D.W.1 (D-2) is the scribe. His evidence in chief is to the following effect:

My mother executed a Will on 20.2.1978. I wrote it. During the time of execution of Exs. B-4 and 5, my mother put her thumb impression. Previously, she would sign. But due to old age, she could not sign. Dhanusu (D.W.3) and Govindasami (D.W.2) were the witnesses. My mother said that what has already been given to the plaintiffs is sufficient. The Will relates to Schedule-II properties, Items 7 to 10. The witnesses and I saw her putting the thumb impression. My mother saw the attestation done by the witnesses. After I wrote the Will, I read it out and

she approved it as correct....

In cross-examination, he has stated as follows:

It is not correct to state that Ex. B-5 was brought about only because some properties were left out in Ex. B-4. I wrote the Will..... Since it was in the evening(maalai) when the Will was written, it was not registered. My mother lived for three months after the execution of the Will. It was executed in our house. She wanted to give to her granddaughter the properties left out of Ex. B-4. She gave the details of the properties. I wrote it. It is not correct to state that it is not her fingerprint or that she did not execute the Will.

This is DW-1's cross-examination regarding Ex. B-5. Except for the suggestions, there is nothing in the cross-examination to reject what he has said in his chief. Now we will see if his examination is in line with the evidence of D.Ws.2 and 3.

In his chief-examination, D.W.2 states as follows:

Unnamalai is my grandmother. She executed a Will in 1978 in favour of Rajakumari, her granddaughter. This is Ex. B-5. Ratnamudaliar (D.W.1) is the scribe. Dhanusu (D.W.3) and I are the witnesses. At that point of time, Unnamalai was in a sound and disposing state of mind. She saw me attest the Will.

In his cross-examination, he states thus:

I am one of the witnesses of Ex. B-5. She died two months after Ex. B-5. She has affixed her thumb impression in that also. I do not know why it was not registered. It is not correct to state that it was executed only because properties were left out of Ex-B4.... My uncle wrote Ex-B5. The other witness is Dhanusu. He is not our henchman.

We are unable to see anything in his evidence, which discredits the evidence of D.W.1.

In his chief-examination, D.W.3 states as follows:

I know Ponnaiah and Unnamalai Ammal. Unnamalai executed a Will in favour of Rajakumari. This was written in the 2nd month of 1978. D-1 wrote the Will. D.W.2 and I are the witnesses. It was written at her place in Vanoor. It was Unnamalai who wanted the Will to be made. They read out the Will to me. It was written at 2.00 pm. Unnamalai approved of it. I saw when she made her thumb impression. She saw me attest the Will. It is not correct to state the Will was fabricated. She was in a sound and state of mind at that time.

In his cross-examination, D.W.3 states:

I do not know if Unnamalai Ammal could read and write. D-1 wrote Ex. B-5. He is Rajakumari's uncle. I do not know why it was not registered. She was not continuously unwell. No draft was written for this. With the sale deed, Unnamalai gave the details... I had gone to her house to buy seedlings. At that time, D-2 wrote the details for the Will.

As far as the place of execution, all the three witnesses agree. D.W.2 has said that D.W.1 is the scribe. D.W.3 says that D-1 is the scribe in two places. But D.W.1 is actually D-2. But this is not a fatal error, because he says that the scribe is Rajakumari's uncle. So he knows who exactly the scribe of Ex. B-5 is. As regards the attesting witnesses, both of them speak of the attestation. D.W.1 and 3 say that the Will was read out and Unnamalai approved of it. All of them say that she was in a sound state of mind. So in all crucial aspects, the witnesses speak identically. It is, no doubt, true that D-2 was very much present and had in fact been the scribe. But he is not the beneficiary. It is his niece Rajakumari who gets all the properties.

10. We will compare the evidence of all the three witnesses as follows to see if there are any contradictions:

-----	Date of Execution
-----	D.W.1 Chief
20-02-1978(in favour of	granddaughter)
-----	Cross --
-----	D.W.2 Chief In 1978
-----	Cross --
-----	D.W.3 Chief 2nd
month of 1978 -----	
Cross -- -----	Identity of
Scribe -----	D.W.1 Chief --
-----	Cross Accepts that
he himself is the	scribe
-----	D.W.2 Chief D.W.1
-----	Cross --
-----	D.W.3 Chief
D1(Though this is wrong it is evident that D.W.3 knows who the scribe is	
because it is Rajakumari's	uncle)
-----	Cross --
-----	Manner of Execution
-----	D.W.1 Chief Thumb
impression -----	Cross --
-----	D.W.2 Chief
-----	Cross Thumb
impression -----	D.W.3
Chief Thumb impression	
-----	Cross --
-----	Attestation
-----	D.W.1 Chief D.Ws.2
and 3 are the	Attestors
-----	Cross --
-----	D.W.2 Chief "D.W.3 &
I" -----	Cross --

----- D.W.3 Chief "I &
D.W." ----- Cross --
----- Place of Execution
----- D.W.1 Chief "Our
house" ----- Cross --
----- D.W.2 Chief --
----- Cross --
----- D.W.3 Chief "At
Unnamalai Ammal"s place in Vanur"
----- Cross Gone to
Unnamalai Ammal house to get seedlings and at that time D2 wrote the details
for the Will ----- Subject
of Ex-B4 ----- D.W.1 Chief
Schedule II Items7 to 10
----- Cross Properties left
out of Ex-B4 ----- D.W.2
Chief -- ----- Cross Not
correct to state that it was executed because the properties were left out of Ex-
B4 ----- D.W.3 Chief
----- Cross --
----- Mental Condition of
Testatrix ----- D.W.1 Chief
Sound and disposing state of mind
----- Cross --
----- D.W.2 Chief Sound
and disposing state of mind
----- Cross --
----- D.W.3 Chief Sound
and disposing state of mind
----- Cross --
----- Reason for Non-
registration ----- D.W.1
Chief The Will was written in the evening
----- Cross --
----- D.W.2 Chief Do not
know the reason as to why it was not registered
----- Cross --
----- D.W.3 Chief
Execution of Will - 2:00pm.
----- Cross Do not know
the reason as to why it was not registered

It is seen that all the three witnesses support each other.

11. The propounder must prove that the Will was not executed under any

suspicious circumstances or that there was any element to vitiate the Will like fraud or coercion, etc. In the cross examination, there is not even a suggestion to this effect. The only question asked is, whether this was not brought about to include those properties which were left out of Ex. B-4. What more can be proved regarding the due execution and attestation of Ex-B5 than what has been done. The witnesses say that the properties subject matter of Ex-B5 are not the properties under Ex-B4. But at the same time D.W.1 says Ex-B5 was not brought about only so that the properties that had not been covered by Ex-B4 can be roped in. As regards the identity of the properties there is no contradiction in the evidence of the witnesses.

12. D.W.3 is a third party, in the sense he is not related to the defendants. Of course, there is a suggestion that he is their henchman, which is denied. Even if he were related, if his evidence is believable, we cannot reject him. His presence at that time is explained very naturally in his cross-examination when he says that he had gone there to get seedlings. It is true that the daughters have been disinherited, but a Will is executed only when the natural mode of devolution is intended to be deviated from. A reason is found in the document itself for such a decision, and that is, they have been already well provided. When the witnesses have spoken about each aspect of the Will and explained the execution of the Will, the conscious approval of the recitals by the testatrix and the attestation, we cannot reject it merely because we suspect something is amiss.

II. Ex. B-4:

This is with regard to Suit Schedule-II properties Items 1 to 6. The settlement deed was in favour of D-3 (D.W.2).

Chief examination of D.W.1:

My mother executed a settlement deed in favour of D-3 in respect of Suit Schedule-II properties Items 1 to 6. Rajagopal is the scribe. Kandaswami Mudaliar and I signed as witnesses. It was written in Vanoor in our house. The Sub-Registrar came to our house for registration. It was written as per the directions of Unnamalai Ammal. The scribe Rajagopal is dead. Kandaswami is close to 2nd plaintiff. The plaintiffs were aware of the execution of the Will and settlement deed. After my father died on the day of the milk ceremony, we informed everyone about the Will.

Cross-examination of D.W.1:

My mother knew to sign. In Ex-B4, she has affixed her thumb impression. Because her eye-sight was poor, she has done so. It is not correct to state that one year prior to her death she was unwell and in coma. If she had signed she would overwrite the letters and that is why she herself said that she will affix her thumb impression. On no occasion and in no document had my mother put her signature after the execution of Ex-B4. I have signed in Ex-B4 as a witness, the other witness Kandasamy is not a close relative. He is related like an uncle. Ex-

B4 was written in our house. I, first defendant and our parents all lived in the same house, but there was separate mess. It is not correct to state that I and DW.1 had the same residence or that we did not have separate mess and that I am saying so for the purpose of this case. I do not have a family and it is not correct to state that I am only interested in the family of D.W.1. It is not correct to state that the plaintiffs were on pleasant terms with my mother and there is no misunderstanding or that Ex-B4 was not written by my mother and that it is not her thumb impression. There is a Registrar's Office in Vanur. It is not correct to state that the three furlong distance between our village and Vanur is good road. There is no bus facility. Car can go on the road. We do have a van. When Ex-B4 was written my mother was healthy enough to go the Registrar's Office. But it was at her instance that it was registered by asking the Registrar to go to our residence. We gave the applications in the Registrar's Office in the morning. It was registered at 3p.m. When the Sub-Registrar came to our residence it was during office hours. It was our mother who decided to make an arrangement in respect of her share of the properties. When the Sub-Registrar came to our residence it was 3p.m. Even before he came, the document had been written. My mother wrote only one Will. At the time of execution of Ex-B4 there was no discussion about executing a Will. We gave an application to the Sub-Registrar to come to our residence. I do not remember what reason we gave. Our mother was treated at Pondicherry, Ashoka Hospital, Sethu Hospital and Doctor Palani at Dindivanam. It is not correct to state that my elder sister Manickammal took care of our mother. The plaintiffs knew about the settlement deed. Our mother said that some arrangements should be made regarding her properties and it should go to her grand son. Two days thereafter the settlement deed was executed. Two days" later it was registered. I brought Kandasamy Mudaliar to witness the settlement deed. My mother live for one and a half years after Ex-B4. The arrangement was that the third defendant to take care of my mother. My mother was with him. All the witnesses knew about this arrangement. Rajagopalan is the scribe of the settlement deed. Rajagopalan wrote the recitals after he was told which properties should be given and to whom The details were given by my mother. It is not correct to state that Ex-B4 was brought about in secrecy and it was not executed by Unnamalai Ammal.

Chief Examination of D.W.2:

Unnamalai wrote a settlement deed in my favour, that is, Ex-B4. Rajagopalan wrote the document in Vanur. Ratnamudaliar and Kandasamy Mudaliar were its witnesses. That is Unnamalai Ammal's share of property. After that, I am enjoying the property. Unnamalai Ammal has affixed the thumb impression in Ex-B4. Ex-B4 belongs to me.

Cross-examination of D.W.2:

It is correct to state that Unnamalai Ammal can sign. But she has only affixed her thumb impression in Ex-B4. It is not correct to state that before Ex-B4 she was unwell. It will only deal with the properties that came to her in partition. No

arrangement was made regarding the remaining properties at the time of Ex-B4. I do not know the reason. It is not correct to state that Unnamalai Ammal never executed Ex-B4. The witnesses in Ex-B4 are close to all the parties. D.W.2 is also one of the witnesses in Ex-B4. It was written in the evening. I do not remember the time.

Here too, we find the evidence believable.

13. Next we will take up the decisions.

(i) In Krishna Mohan Kul @ Nani Charan Kul and Another Vs. Pratima Maity and Others, a deed of settlement was said to have been executed by one D. There was a fight between relatives. A suit for declaration and injunction was filed by his granddaughter through his son. The witnesses whose names appeared in the deed were not existing. Several witnesses were examined to show that the execution was more than hundred years at the time of execution. He was paralytic and his mental and physical conditions were not in order. The Trial Court disbelieved the plaintiff. The Appellate Court also confirmed it. The High Court held that the executant was an illiterate person and not in a proper mental and physical state. In that case, no witness was examined to prove the execution by putting the thumb impression. The Supreme Court held that the High Court was right that the Courts below had wrongly placed the onus of proof on the plaintiff. The Supreme Court observed that when fraud, misrepresentation or undue influence is alleged by a party in the suit normally the burden is on him to prove undue influence etc. But when a person is in an active, confidential or fiduciary relationship with another and the latter is in a position of active confidence, he has to prove that there was fair play in the transaction and burden of proof to show that the transaction is fair is thrown upon the dominant party. The Supreme Court also observed that the Court watches with jealousy so that the protector may not use his influence or the confidence to his advantage.

(ii) Similarly, in Lakshmi Amma and Another Vs. Talengalanarayana Bhatta and Another, under the settlement deed negligible provision was made for the wife and the settlor did not give anything to his daughters or to his grandchildren and gave his entire estate to only one grandson. There the wife of the settlor gave evidence that the respondent who is the beneficiary threatened the settlor grandfather to affix his thumb impression and inspite of lengthy cross examination nothing is brought out to show why this lady, the grandmother of the appellant would perjure herself and make a false statement. There the evidence show that Narasimha Bhatta was in a state of senility.

(iii) In Madhukar D. Shende Vs. Tarabai Aba Shedage, , the Trial Court had upheld the Will.

(a) The Appellate Court summed up the suspicious circumstances as follows:

1. at the time of execution of the will, the late Bhagubai was about 80 years of age and there is complete absence of any medical evidence to show the sound

and disposing state of mind of the executant;

2. the will was executed on 22-9-1963 and within two days thereafter, on 24-9-1963, the executant expired;

3. the Sub-Registrar went to the house of the executant for registration of the will though his office was situated only half a furlong away from the residence of the executant and no reason has been assigned why the executant could not have gone to the office of the Sub-Registrar if she was in a sound mental and physical state;

4. Chingubai, the plaintiff and beneficiary under the will, has not been examined. Vasant, son of Chingubai, examined in evidence is not a witness to the execution of will;

5. Mohammed and Narhari, the two attesting witnesses to the will, also examined in the court, were classmates of Vasant.

(b) The Supreme Court set aside the judgment of the High Court and the following paragraphs are relevant:

8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in *R. v. Hodge* (1838) 2 Lewis CC 227) may be apposite to some extent:

The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal

and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict - positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

(c) Paragraph No. 10 of the above judgment shows that there are no pleadings raising the question of disposing capacity of the testator except for a bare denial and they held that there was nothing to show that the testator is mentally or physically incapacitated and the Supreme Court held that the Courts below had questioned the propriety of the Sub-Registrar having come to the testator's house for registering the Will and why she could not have gone to the office of the Registrar if she was fit. The attesting witnesses were interested because they were classmates of the beneficiary's son and because there was no medical evidence to show that the testator was in a sound and disposing state of mind, the same has been suspected though there is no rule of law is required that a Doctor to be present. The Courts-below have allowed their findings to be influenced by such suspicion and conjectures as have no foundation in the evidence and have no relevance in the facts and circumstances of the case and unwittingly allowed their process of judicial thinking to be vitiated by irrelevant reasonings and considerations.

14. Of course, in above case the Will was denied by a ranker trespasser. In this case, it is the daughters who are denying the Will. The Evidence Act requires that if a document is required to be attested at least one attesting witness must give evidence regarding the execution and without that it cannot be used as evidence. But if such a document is not a Will and it has been registered in accordance with law then it is not necessary to call the attesting witness unless the execution is specifically denied. Therefore, the first part of Section 68 of the Indian Evidence Act applies to the Will. The proviso will apply to the settlement since it has been registered. Though it is not necessary to call the attesting witness, here D.W.1

has given evidence regarding proof of execution. It has also been registered. There is actually no specific denial even in the pleadings and nor in the evidence. When this is the requirement of law with regard to proof of registered settlement deed then we cannot disbelieve it unless there are compelling circumstances to do so. It is true that D.W.1 figures largely in the execution of the two documents. But he is the son of Unnamalai Ammal and the parents lived with him and therefore, it is not unnatural for him to be present when his mother executes such an important document. Had there been any cross-examination with regard to undue influence or coercion, the matter would have been different. But not even a whisper is made of either force or undue influence or coercion and further as we have observed earlier, the beneficiary under the document is not D.W.1. They are his brother's children and not even his children and except for her failing eye-sight, Unnamalai Ammal has not been proved to be senile or incapable of making her own decisions.

15. Even the pleadings relating to disclosure of Will and the Settlement Deed at the time of the parents death and the evidence regarding that, has been denied only by P.W.2 and no other third party. The plaintiffs could have examined Kandasamy Mudaliar to prove that the attestation was not in accordance with law. They could have examined any of the relatives to show that after the death of the parents the existence of the Will and Settlement were not revealed. It is true that the defendants must prove the settlement and the Will and the onus is no on the plaintiffs and the Court should examine whether the Will and Settlement were properly executed. But as held by the Supreme Court in Madhukar D. Shende Vs. Tarabai Aba Shedage, which is again followed in Meenakshiammal (Dead) through LRs. and Others Vs. Chandrasekaran and Another, , the suspicion alleged must be one inherent in the transaction itself and not a doubt that may arise from the conflict of testimony.

14. The only feature, which may cause a little uneasiness, is the fact that none of the daughters got anything. But a reason has been given for that to the effect that they had been provided for. In Paragraph No. 6 of the written statement it is stated that Ponnaiah Mudaliar had purchased four acres benami in the name of third plaintiff. It is his own money and she had filed the suit in O.S. No. 9 of 1978 against the father which is pending even after his death. He has purchased one acre in the plaintiff's name and she was in enjoyment of the said property. He had also taken a usufructuary mortgage in favour of the second plaintiff with his own money. Therefore, it was pleaded that apart from the jewels and other presents which are customarily given to the daughters Ponnaiah Mudaliar had also made some arrangements with regard to Immovable properties in favour of his daughters. It is also pleaded that the Will was duly proclaimed even at the time of funeral ceremonies. In chief examination of D.W.1, he has said that the plaintiff knew about the Will and the Settlement Deed. To prove that they had been kept in secrecy, the plaintiffs could have examined some third party as witness. But there is no valid attack on the execution or attestation of the Will and the plaintiff, P.W.2's examination has already been extracted above, which is

really of no use.

15. Execution and attestation is proved. There is nothing to show undue influence, fraud, force or coercion. Moreover, the mental condition of the testatrix was in sound and disposing state as is spoken to by all the witnesses. So Exs-B4 and B5 must be accepted.

16. In the result, the appeal is partly allowed. The preliminary decree for partition is granted in respect of A Schedule property and dismissed with regard to B Schedule property.