

(1997) 03 MAD CK 0136
In the Madras High Court
Case No : A.S. No. 788 of 1989

Govindan Chettiar (Died)

APPELLANT

Vs

Akilandam alias Seethalakshmi and 24 others

RESPONDENT

Date of Decision : 07-03-1997

Acts Referred:

Evidence Act, 1872 — Section 67, 68
Succession Act, 1925 — Section 63, 63(c)

Citation : (1997) 03 MAD CK 0136

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : Hema Sampath, for the Appellant; M.V. Krishnan, S. Parthasarathy, R. Srinivasan and Mr. G. Ramakrishnan, for the Respondent

Judgement

S.S. Subramani, J.—First defendant in O.S. No. 1204 of 1984, on the file of Subordinate Judge's Court, Tiruchirappalli, is the appellant. He dies after the filing of the Appeal, and his legal representatives have been impleaded as appellants 2 and 3. The material facts may be summarised as follows:-

Defendants 1 to 3 and plaintiff are the sons and daughters of late Karuppanna Chettiar, who died on 1.9.1984. The property scheduled to the plaint, both "A" and "B" respectively, belonged to the deceased. Defendants 4 to 6 are various financial institutions in which these amounts were deposited. It is said that since Karuppanna Chettiar died intestate, plaintiff is entitled to 1/4th share, and defendants 1 to 3 are also equally entitled to one-fourth share each. Various demands were made to the defendants to co-operate with the plaintiff to effect a partition. Since the defendants refused to accede, suit was filed to pass a decree for partition by metes and bounds and allot one-fourth share to the plaintiff and permit her to get possession of the same, after terminating joint possession.

2. In the written statement filed by the appellant/first defendant, he said that on 9.7.1984, deceased has executed a registered Will wherein the "A" Schedule properties have been bequeathed to him absolutely. It is further said that the

Will was executed by the deceased while he was in a sound disposing state of mind, and the same was executed voluntarily. In so far as the "B" Schedule properties are concerned, i.e., deposits in various banks, the contention taken is that late Karuppanna Chettiar was not having any business ever since 1960, and the deposits were all made by him, and income from the business was utilised for making the various deposits. Even though the accounts stand as either or survivor, he is the exclusive owner. The allegation in the plaint that he is in constructive possession of the schedule properties is disputed. He prayed for dismissal of the suit.

3. Second defendant, who is the brother, also disputed the claim of first defendant that he is entitled to the moneys deposited in Banks. He also contended that at the time when the alleged Will is said to have been executed, the deceased was more than 90 years, and was not in a position to look after himself. The deceased was with him for years together, and six months prior to his death, appellant took him forcibly to his house. He was very weak in body and mind. In the year 1980, their mother fell ill, and thereafter the father also became very much upset and mentally weak. It is said that there was an iron safe with various articles and jewels. Exploiting the weakness of the father, respondent took possession of the same. The father did not have any sound disposing state of mind at the time when the Will was said to have been executed. He also said that the "B" Schedule properties are really moneys belonging to him.

4. Third defendant remained ex parte.

5. Other defendants who are financial institutions, did not seriously contest, but only put forward a statement that they will abide by the directions of Court.

6. A reply statement was filed by plaintiff wherein she denied that the deceased has executed a Will. She also said that there is no attestation and the Will also not properly registered. She submitted that the contentions in the written statement of the first defendant are not true. She prayed for a decree in terms of the plaint.

7. Before the Court below, EXX.A-1 to A-6 were marked, and plaintiff got herself examined as P.W.1. On the side of the defendants, Exx.B-1 to B-19 were marked. D.W. 1 is the first defendant. D.Ws 2 to 4 are the witnesses who have been examined to prove the Will Ex.B-5. D.W.5 is the second defendant.

8. After evaluating the entire evidence, the trial Court decreed the suit as prayed for. The trial Court came to the conclusion that the Will is not genuine, and the same cannot be taken as a legal bequest in favour of the appellant. The Court below was also of the view that the various suspicious circumstances were also not explained by the propounder. In regard to "B" Schedule movables, i.e., money deposits in various banks, the lower Court held that the amount belonged to the father only and merely they are either or survivor accounts, appellant will not become the absolute owner. It further held that the contention of the first

defendant is the owner of the amount, and the deposits belonged to him, is not proved. It was held that "B" Schedule was also liable to be partitioned. A preliminary decree was passed declaring one-fourth share of the plaintiff. In view of the close relationship between the parties, they were directed to suffer their own costs.

9. It is against the said judgment, first defendant has preferred this Appeal.

10. Since the trial Court has not discussed the entire evidence in regard to Ex.B-5, both parties wanted this Court to consider about the genuineness of the same, minutely.

11. The points that arise for consideration in this Appeal are;

1) Whether Ex.B-5 Will is genuine, and if so, plaintiff and other defendants are not entitled to any share over the property ?

2) Whether the contention of the appellant that the various amounts mentioned in "B" Schedule of the plaint are available for partition or whether the amounts absolutely belong to the appellant?

and

3) Whether the decision of the lower Court is liable to be interfered with in this Appeal?

12. I will first consider the question whether the Will alleged to have been executed by the deceased Karupanna Chettiar is genuine.

13. Ex.B-5 was marked through D.W.1, first defendant. From a reading of his deposition, it is clear that he knew minutely about the execution of the Will and he also participated in the execution of the Will. In his evidence, he said that on 9.7.1984, deceased executed a Will, and his father died on 1.9.1984. It is said that as per Ex.B-5, the only property that belonged to the deceased was bequeathed to him. The same was registered before the Sub Registrar's Office at Musiri. The same was written in the verandha of the Sub Registrar's Office at Musiri. He and his father along with two attestors were present at the time of registration of the document. The attestors as well as the document-writer were requested to sign Ex.B-5 by deceased himself. According to D.W.1, himself, his father and all others went together. Before the execution of the deed, the attestors were informed about the execution of the Will atleast two or three days before. All of them went in a Taxi, and deceased was also talking till they reached the Sub Registrar's Office. A draft of the Will was prepared by D.W.4 and the same was so done as per the directions of the deceased. It is the evidence of D.W.1 that the father wanted all his immovable properties to be given to the elder son, i.e., the appellant. He also said that for the purpose of executing the deed, Ex.B-1 was also taken by them. First D.W.4 was directed to prepare a draft. Thereafter, the same was read over to the deceased, and after the deceased approved the same, the document writer was directed to prepare the

original. After the original was prepared, the testator and attestors signed therein. It is said that the testator signed in the presence of the attestors, and the attestors signed in the presence of the testator. He said that the deceased signed Ex.B-5 only after he knew the contents and the consequences of his bequest. In cross-examination, by the second defendant, he said that after 1961, his father was not having any weaving business. His father did business only till 1961. All the documents of title also stood in the name of the father. After stating the nature of his business, and also about the business of his late father, regarding the Will, he said that at the time of execution of the same, his father was nearly 90 years old. He pleaded ignorance about late Karuppanna Chettiar doing agricultural work. But he said that the statement in the Will that Karuppanna Chettiar is a farmer is not correct. He also said that during the relevant time, his father was hale and healthy. He denied the suggestion that his father became unconscious every now and then. He also admitted that during that time his father cannot be said to be fully healthy. According to him, ever since his mother dies, his father was only with him. He was living with his wife and children,. Further down, in his deposition, he has said that for the purpose of executing the Will, stamp papers were purchased in his name. He denied the suggestion that the father affixed his signature without understanding the contents. He further said that the draft was prepared only in accordance with the directions of his father.

14. D.W. 2 is one Subramaniam, one of the attestors of the Will. He also speaks that he has attested the Will. It was at the instance of the deceased, he became an attestor. He said that he is the second witness to Ex.B-5. He said that he saw Karuppanna Chettiar affixing his signature, and during that time, the testator (Karuppanna Chettiar) understood the consequences of his bequest. He said that he signed Ex.B-5 only after he came to know that the testator had executed a Will, and that too in favour of his elder son. He also said that he went and attested the Will, at the request of the deceased.

15. Even though he was cross-examined at length, the Will was not shown to him, nor did he identify the signature of the testator and himself. Similar is the case of D.W.3, another attestor. But, through him also, neither the signatures of the attestors were identified, nor did he say that Ex.B-5 was signed by the testator.

In fact, there is a general statement that he has attested the Will, and the same was done at the request of the deceased. D.W.4 is a document writer. He also supported the case of the appellant. He said that he wrote the document only at the instance of the deceased. He further said that the Will happened to be executed at Musiri since everyone wanted to maintain secrecy.

16. This is generally the oral evidence, to prove the execution of Ex.B-5. Under normal circumstances, I would have said that on the basis of this evidence, the execution has been proved. But certain circumstances have been brought to the notice of Court which require further explanation from the appellant in this case.

17. It is the admitted case of the appellant that the father is not having any business, and after 1961, he (first defendant) is doing the business. It is his case that his father is not having right over the business, and, at the same time, D.W. 2 is a partner in the business conducted by the first defendant. D.W. 3 is the son of another partner. So far as the testator is concerned, the attestors are strangers, though they are closely associated with the appellant in his business.

Before execution of the Will, the stamp papers were also purchased by the appellant in his name, and the only item of immovable property possessed by the father is also alleged to have been bequeathed in favour of the appellant. Deceased was aged nearly 90 years at that time. The Sub Registrar's Office is far away from his residence. Whether the formalities to be complied with in the Sub Registrar's Office were made known to the testator, and whether he was aware that he was executing a Will, is not clear, and the evidence of the Sub Registrar is also lacking in this case. Whether the Sub Registrar really discharged his official duty in accordance with law is also not in evidence.

18. The only asset belonging to the deceased is alleged to have been bequeathed to the appellant, and he has also taken active part in the execution of the Will. In cases where the legatee has taken active part in the execution of the Will and the entire asset is also taken by him, better evidence is required regarding execution of the Will. In this connection, paragraph 7 of the written statement of the appellant is also very material. It is said thus:-

Karuppanna was aged 70 and became senile as early as 1961....

Of course, this statement was made by the appellant to allege that the textile business absolutely belonged to him, and consequently the deposits in "B" Schedule also belonged to him. When he says that Karuppanna became senile as early as in 1961, and the Will was executed only in 1984, a few days before his death, senility of the deceased might have further aggravated. Along with the same, we have the admission of all the parties that the deceased was quite often becoming unconscious. There is an assertion in Ex.B-5 itself wherein it is stated that the testator is becoming unconscious very often, and has become very old. The said statement also requires a little more explanation. There is a duty on the part of the propounder to explain that during the relevant time, the deceased understood the nature and consequences of his bequest.

19. In the written statement filed by the appellant,(first defendant), he has no case that the deceased was not in good terms with his other children.

Of course, in evidence, he gives a different story. It is his case that with the second defendant, he was at loggerheads, and even a police complaint had to be filed by the father against the second son. So far as the sisters are concerned, it is not a case of enmity, but he was not having any action, for, they had already been married and were residing with their husband in their matrimonial home. Therefore, he did not show any interest either in the second defendant or in the plaintiff, or third defendant. It is his further case that the appellant alone was

locking after him, and being an affectionate son, father thought of bequeathing the property to him alone.

20. I do not think the said submission of learned counsel for the appellants is in any way correct. It is true that Ex.B-1 was executed between the father and two sons. He did not provide anything to the daughters. But at the same, time, he retained for himself a good share. Merely because he did not provide in 1961, that does not follow that the daughters are not entitled to any share thereafter, nor it should be assumed that he will not provide for the daughters in future. If the father was really at loggerheads or was not interested in providing for the daughters, that would have been the very reason mentioned in the Will. The Will does not even say that the father had other children and what is the relationship of the father, executants of the Will, with them. The Will is very abstract. It only says that the property belongs to him absolutely as per Ex.B-1 and that right is given to the first defendant.

21. The Will is also executed on stamp papers, which is unnecessary. The stamp papers were also purchased a few days prior to the purported execution. Why the stamp papers were purchased in the name of first defendant stands unexplained. It is not the case of the first appellant that they have no other relations so that they could be attestors. The attestors are none other than his (first defendant's) business associates.

22. The signature appearing in the Will also seems to be very shaky, and whether the deceased would have affixed his signature while he was in his proper senses itself is doubtful. Evidence regarding the same is not satisfactory. The signature in each and every page appears to be different, and from the way in which they are affixed, an impression is created that they might not have been put by a person having full mental capacity.

23. I have already said that the procedure before the Sub Registrar is also not satisfactorily explained. Even before the Sub Registrar, the persons who identified the testator were D.Ws 2 and 3, who are close business associates of first defendant. There is also no evidence to show that D. W. 4, the document writer had any prior acquaintance with the deceased. He is a document-writer by profession. Whether D.W. 4 had written any document for the deceased earlier, is also not in evidence. Ex.B-1 does not disclose that D.W. 4 had any acquaintance, or that he was a document writer at that time. The Sub Registrar's Office is also not in the place where the deceased was residing. Why the appellant, with the attestors, took the deceased to a Sub Registrar's Office situated far away from his place and got the Will registered should also have been better Explained by the appellant. The only explanation that is offered is, that they wanted to maintain secrecy. In that case, better procedures are available. The deceased himself could have prepared a "Closed Will" and produced the same before the concerned Sub Registrar's Office situated near the place where he was residing. The genuineness of "Closed Wills" is on a better footing, according to judicial pronouncements. The Sub Registrar who registered Ex.B-5 Will was also not

examined. Merely because Ex.B-5 happened to be registered, it cannot be said that it should be accepted. If circumstances show that the formalities are perfunctory, registration by itself will not give a colour of genuineness.

24. Learned counsel for the appellant submitted that the contention that there is no Will executed by the deceased and when the same is proved by attestors in accordance with law, no other circumstance need be explained. It is for the other person who challenges the Will, to prove the suspicious circumstances.

25. I cannot agree with any of these submissions, it is true that the attestors have spoken about the affixing of signatures by the deceased, and that they have also attested the same as is legally required u/s 63 of the Indian Succession Act. But, while appreciating the credibility of a witness, Court cannot confine itself to what they have spoken. It is bound to look into the surrounding circumstances in coming to the conclusion whether the witness has spoken regarding the true version.

26. In *Ramchandra Rambux v. Champabai and others* (1964) 1 S.C. W.R. 629; in paragraph 8 of the judgment, their Lordships have said thus:-

In order to judge the credibility of attesting witnesses to a will, the Court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses, but it is open to it to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses. This issue cannot be determined by considering the evidence adduced in the Court separately from the surrounding circumstances which have also been brought out in the evidence, or which appear from the nature and contents of the document itself.

27. I have already said that the attesting witnesses in this case have not identified the signature of the deceased, nor the attestation by them. They only give a general statement about the procedure of attestation. When the signatures of the testator and the attestors are not identified, it cannot be said that the Will is properly proved. In *Suguna Bai v. Muniammal @ Dhanalakshmi and others* 1996- II- M.L.J. 596; I had occasion to consider a similar question. In paragraph 18 of the judgment, I have held thus:-

Even though D.W. 5 speaks that he is an attestor when he was examined. I do not find that the Will is shown to him and the signatures of the various attestors or the testator are identified by him. It is seen that Ex.B-8 was marked through D.W.3, the third defendant, wherein the Court noted "subject to proof. I do not find that any step has been taken by the third defendant (appellant) to have the same proved in accordance with law, i.e., when attestation to a Will is sought to be proved, naturally, the witness must say that the document contains either the thumb impression or signature of the attestor, and that he has also signed in token of the attestation. He must identify the signature as seen in the document.

(Emphasis Supplied)

In this case, the Will is marked through D.W. 1 who is the propounded The Will is not even shown to D.W. 2 or D.W. 3. Along with the same, the statement in the written statement that the deceased was senile even from 1961 also gains importance. Being business partners of the appellant, they were interested in him.

28. Regarding attestation, their Lordships of the Supreme Court have said as follows in the decision reported in *Girja Datt Singh Vs. Gangotri Datt Singh*,

It cannot be presumed from the mere signatures of two persons appearing at the foot of the endorsement of registration of a Will that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Evidence Act requires an attesting to be called as a witness to prove the due execution and attestation of the Will. This provision should be complied with in order that those two persons might be treated as attesting witnesses.

If this is the legal requirement of an attesting witness, as I have stated earlier, every attester will have to prove the signature which they had attested. That evidence is lacking in this case.

29. As has been held in *Kashibai and Another Vs. Parwatibai and Others*, Section 68 of the Evidence Act shows that attestation and execution are two different acts, one following the other. There can be no valid execution of a document which under the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the fact of execution is of no avail. Section 63 of the Succession Act also lays down certain rules with regard to the execution of unprivileged Wills. The word "attested" has been defined in Section 3 of the "Transfer of Property Act". On the basis of this decision, if the attestation is not properly proved, there cannot be any Will on the basis of which the appellant could claim as absolute owner of the plaint "A" Schedule item.

30. Learned counsel for the appellants submitted that even if D.W. 2 and D.W. 3 have not identified the signature, and have also not proved the attestation of the signatures, D.W.4 who is the document-writer has proved the same. D.W. 4 was shown Ex.B-5 Will and he has spoken about the details of attestation Learned Counsel submitted that the evidence of D.W. 4 is impartial and he has deposed as to how Ex B-5 was prepared, and he has also stated that he has attested the signature of the testator (deceased). Learned Counsel further submitted that D.W.4, though a scribe, is not disqualified from being called as an attester if he has witnessed the affixing of signature by the deceased and he has really attested the signature. Learned counsel relied on the decision reported in *Veerappudayan and Another Vs. Muthukarappan Thevan and Others*, wherein, (at page 536) a Division Bench of this Court has held thus:-

...The question whether, when the writer has signed his name below the executants, he can be regarded as an attester himself must depend on the facts and circumstances of each case. See *Radhakrishnan v. Fete Ali Ram* where the

writer was taken to be an attester and *Ranu v. Lakshman Row* where he was not so regarded as the statement by the writer that he wrote the document was a part of the document itself and was made above the signature of the executants. It is not necessary that the writer should describe himself as a witness, *Bryan v. While* or that there should be a testimony clause: *Burdett v. Spilsbury* and *Skinner v. Spilsbury*. It must no doubt appear that he intended to attest the execution but where he subscribes his name at the time of execution, it would not be improper to presume such intention....

31. Learned counsel also relied on the decision reported in *Paramasiva Udayan v. Krishna Padayachi* (1918) ILR 41 Mad 535-7 L.W.241; wherein it was held that "the writer of a document who signed the same as a scribe, can be regarded as an attesting witness, if he saw the signing of the document by the excitant.

32. Similar was the case in *Shamu Patter v. Abdul Kadir Ravuthan and others* 23 M.L.J. 323;.

33. On the basis of these decisions, the argument of Learned counsel for the appellants is that when D.W. 4. has spoken about the details of execution and attestation, even if we discard the evidence of D.W. 2 and D.W. 3 the same can be acted upon. It is further contended that there is no pleading about any suspicious circumstance. If that be so, when the execution and attestation are proved, the initial burden on (1st defendant's) part stands discharged, and it is for the respondents to adduce rebutting evidence.

34. In this connection, it was also urged that when P.W. 1 was examined, not even one question was put to him about the Will or about the mental capacity of the testator.

35. If the plaintiff has not stated anything about the invalidity of the Will, and when there is proof regarding the execution, Learned counsel submitted that the finding of the lower Court has to be set aside. The argument of learner counsel is that a Will also has to be proved in the same way as any other document, and the only additional point so far as the Will is concerned, is attestation is also to be proved. In that case, there was such evidence before Court. According to learned counsel, registration also gives a colour of genuineness. I do not think, the argument of learned counsel could be accepted so far as this case is concerned. Even if there is no pleading regarding suspicious circumstances, when the same is brought to the notice of Court and the same is apparent, a duty is cast on the propounder to explain the same. The Court is entitled to look into the surrounding circumstances regarding the execution of the Will. The decision reported in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, is necessary answer to the contention of learned counsel. The question whether the scribe could be an attester is also now a settled legal position. If the scribe has not identified himself as a scribe, the argument of learned counsel could be accepted. But when he describe himself as a scribe and then affixes his signature, his animus is clear, i.e., he affixes his signature only as a scribe and

not as attester to the signature of the testator. It is the actual witnessing of the signature along with the animus of the witness as an attester to the signature of the testator that is relevant. This point is now settled in view of the decision reported in *M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others*, wherein, in paragraphs 7 and 8, their Lordships have said thus:-

Section 3 of the Transfer of Property Act gives the definition of the word "attested" and is in these words:

"Attested" in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executants sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executants, or has received from the executants a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executants; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary.

It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under, Section 3 are : (1) two or more witnesses have seen the executants sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executants. It is essential that the witness should have put his signature *anime attestandi*, that is, for the purpose of attesting that he has seen the executants sign or has received from him a personal acknowledgment, of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

In every case the Court must be satisfied that the names were written *anime attestandi*" See *Jarman on Wills*, 8th ed., p.137. Evidence is admissible to show whether the witness had the intention to attest. "The attesting witnesses must subscribe with the intention that the subscription made should be complete attestation of the Will, and evidence is admissible to show whether such was the intention or not", See *The obald on Wills*, 12th ed. p. 129. In *Girja Datt v. Gangotri* the Court held that the two persons who had identified the testator at the time of the registration of the Will and had appended their signatures at the foot of the registration of the Will and had appended their signature at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put " *anime attestandi*". In *Abinash Chandra Bidwanidhi Bhattacharya v. Dasarath Mala* it was held that a person who had put his signature only for the purpose of authenticating that he was a "scribe". In *Shiam Sunder Singh v. Jagannath Singh*, the Privy Council held that the legatees who had put their signatures on the Will in token of their consent to its execution

were not attesting witnesses and were not disqualified from taking as legatees.

36. Their Lordships emphasised the fact that if a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

37. Our High Court had occasion to consider this point, and the same is reported in *Pichai Pillai Konar v. Krishnaswami Konar and others* 97 L.W.190; That is a case of a gift u/s 123 of the Transfer of Property Act which also requires attestation. In that case, a learned Judge of this Court held thus:-

According to S.123 of the Transfer of Property Act, a gift of immovable property can be effected only by a registered instrument signed by or on behalf of the donor and attested by atleast two witnesses. S. 68 of the Indian Evidence Act deals with proof of execution of document required by law to be attested.

Judicial opinion on the question whether a scribe or any one who does not sign in the capacity of an attesting witness can be regarded as an attesting witness is not uniform. One set of decisions takes the view that the person whose name appears in the document as a scribe is competent to prove the execution of that document if he was in fact present and witnessed the execution. Contrary view has been taken in a series of decisions to the effect that the scribe cannot be treated

as an attesting witness as contemplated in S. 68 of the Indian Evidence Act, unless he actually signed as an attesting witness. In so far as our High Court is concerned in the case reported in *Sathula Venkanna Vs. Namuduri Venkatakrishnayya and Another*, it has held that the fact person calls himself a scribe in a certain document does not debar himself from being an attesting witness, if he in fact witnessed the execution, on the ground that the essence of attestation of a document is that the person attesting must have seen the document executed by the executants.

Held: that the decision in 63 L.W. 1004 is not in accordance with the observation of the Privy Council in *Samu Pattar v. Abdul Kader*, 35, Mad.607, where it has been observed that the act of attestation must be done *anime attestandi*, i.e., with the intention to attest. The fact that his name is on the document does not make him an attesting witness, irrespective of the purpose for which it is there. According to the view of the Privy Council the mere presence of a person at the time of the execution of an instrument cannot make him an attesting witness. Any other construction would remove the safeguards which the law clearly intended to impose against the perpetration of frauds. A man can be considered to have attested the fact of execution, not only when he saw the execution, but also when he signed as an attesting witness.

The Supreme Court has categorically laid down in 1969 S.C. 1147 that a person who described himself as a scribe or an identifier or a registering officer cannot be called as an attesting witness. In view of this categorical observation that the

person who described himself as a Scribe cannot be an attesting witness; in this case P. W. 1 cannot be considered as an attester to Ex.A-1. The view taken by the first Appellate Court that P.W.1 cannot prove the settlement. Ex.A-1 is in accordance with the view expressed by the Supreme Court. In this case, there is evidence to, show that one of the attestors of Ex.A-1 is alive. In view of the conflicting decisions on the point in the past and the intricate aspects of the question this is a fit case where the appellant should be given an opportunity to prove Ex.A-1 according to law by summoning the sole surviving attester.

38. In Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, ; their Lordships explained as to what is meant by "Attestation". In paragraph 8 of the judgment, their Lordships held thus:-

...By attestation is meant the signing of a document to signify that the attester is a witness to the execution of the document, and by Section 63 (c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executants after seeing the execution of the document or after receiving a personal acknowledgement from the executants as regards the execution of the document....

39. In Dharam Singh Vs. Aso and another, their Lordships followed an earlier decision reported in M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, That is a case where the Registering Authority was treated as an attesting witness by the trial court. But when the matter was taken before the High Court of Punjab and Haryana, it was held that when a Registering Officer signed not as an attester, but only in token of discharging his official duty, he cannot be treated as an attester, though he might have seen the testator signing the document. The decision in M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, was approved in Dharam Singh Vs. Aso and another, .

40. In that view of the matter, I do not think the decisions cited by learned counsel for the appellants in (1918) 41 ILR Mad 535=7 L.W.241 (supra) and Veerappudayan and Another Vs. Muthukarappan Thevan and Others, require consideration;

41. Learned counsel further submitted that if there is no counter evidence from the side of the plaintiff the evidence adduced by the appellant stands uncorroborated and the same has to be accepted. I do not think the said contention is also correct. In a suit for partition, all the sharers are also in the position of plaintiff, and every plaintiff is in the position of a defendant. The second defendant is also a sharer, but for the Will. He has seriously disputed the genuineness of the Will and he has also adduced evidence regarding the same. Even if all the defendants remained ex parte, when the judicial conscience is to be applied, and suspicious circumstances are also apparent, unless the same are satisfactorily explained, the appellants will not be entitled to succeed. It is not a question whether a person contests the validity of the Will or not. The executants of the Will is not before Court. Therefore, the Court takes on itself the duty to

see whether there is a genuine Will before Court. Unless the execution is fully proved, and the suspicious circumstances are [dispelled, the appellant will not be entitled to succeed on the ground that he is the legatee under the Will. As I have already stated, evidence in that regard is not satisfactory.

42. Apart from the same, there are some suspicious circumstances also. Some of the documents filed in this case speak volumes as to how the appellant was treating his father and mother. Of course, those documents are years before Ex.B-5. The father has written to the second defendant in this case, about the appellant (first defendant) characterising him as unworthy of a son.

43. I have already said that there is no mention in the Will about the other children. Even the prior death of his wife is not stated. When a person executes a Will, it follows that he wants that his property should be taken according to his desire and last wish. There may also be a change in the ordinary law of succession. He wants to provide persons in the way he likes, or to whom he wishes to provide. Law does not stand in the way of a man disposing of his self-acquired property in the way he likes. That is the very purport of a Will. But, at the same time, when a person, who is a natural heir is disinherited, he is entitled to know why he has been disinherited.

44. In *Ram Piari v. Bhagwant and others* (1990) 3 SCJ 588; their Lordships held thus:-

Soft corner for grand-children or likeability for a son or daughter or their issues is not uncommon to our society. Rather at times it becomes necessary either to provide for the Lesser fortunate or to avoid the property from passing out of the family. But when disputes arise between heirs of some degree, and the beneficiary even chooses to deny the blood ties, and that too unsuccessfully, then Court's responsibility of performing its duties carefully and painstakingly multiplies. Unfortunately it was not properly comprehended by any of the Courts, including the High Court which was swayed more by happy marriage of appellant, a consideration which may have been relevant to speculate. Although freedom to bequeath one's own property amongst Hindus is absolute both in extent and person, including rank stranger, yet to have testamentary capacity or a disposable mind what is required of propounder to establish is that the testator at the time of disposition knew and understood the property he was disposing and persons who were to be beneficiaries of his disposition. Prudence, however, requires reason for denying benefit to those who too were entitled to bounty of testator as they had similar claims on him. Absence of it may not invalidate a Will but it shrouds the disposition with suspicion as it does not give any inkling to the mind of testator to enable the Court to judge if the disposition was voluntary act....

45. One big circumstance which goes against the Will is the statement of D. W.2 himself. While he was in the box, he said that the statement in the Will that the deceased was becoming unconscious every now and then is a statement by the

document writer himself, and not by the deceased. It is their further case that the deceased never said that he was becoming unconscious. If this evidence is accepted, as rightly held by the lower Court, the Will cannot be said to contain what was represented by the deceased to the document writer.

It is something which the document writer had prepared for himself. The draft which was prepared is also not before Court. All these circumstances must have been explained better by the appellant who has taken active part in the execution of the Will. But he has failed in that regard.

46. Regarding execution and attestation and also regarding removal of suspicious circumstances, the Supreme Court has said as follows in the decision reported in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*,

The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under S.67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. It would *prima facie* be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes Will from other documents. Unlike other documents, the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the

relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a find in favour of the propounder

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

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

Apart from the suspicious circumstances above referred to in some cases the Will propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the Wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstances attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with Wills that present suspicious circumstances that decision of English Courts often mention the test of the satisfaction of judicial conscience. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

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

No evidence is adduced in accordance with the above decision.

47. I have already said that in paragraph 7 of the written statement of the appellant, he has admitted that from 1961 onwards, deceased was senile. In Black's Law dictionary, 5th Edition, meaning of "senility" has been given as follows:-

Quality of being senile, an infirmity resulting from deterioration of mind and body experienced in old age, feebleness of body and mind in old age, incapacity to contract arising from impairment of intellectual includes.

If there was impairment of intellectual faculties, the burden is very heavy on the appellant to show that during the time when the deceased alleged to have executed the Will, he was in his proper senses. It is here, the statement in the Will about his ailment gains importance.

48. In so far as "ET Schedule items are concerned, learned counsel for the appellants submitted that from 1961 onwards, his father was not doing any business. He was having a flourishing business. He himself has saved huge amounts and put up constructions worth lakhs and, therefore, deposits referred to in " B" Schedule, must also belong to him. It was further contended that the father's name was also included as head of the family. It was also contended that merely because it happens to be "either or survivor" account, his ownership over the amount should not be denied, nor should those items be made partible.

49. I do not think, the appellants are entitled to succeed in that regard also.

50. Before the institution of the suit, a notice was issued by plaintiff in which details of the properties belonging to the deceased were given, and in that, even the "B" Schedule items are also mentioned. In the reply evidenced by Ex.B-2, it was said that the immovable property under "A" Schedule belonged to the deceased, and the same has been bequeathed to him. But, in regard to "B" Schedule assets, i.e., cash in Bank, the appellant himself admitted that it belonged to the deceased. When the admission is there, it is for the appellants to substantiate before Court that the admission is not true. It may be that he can prove that admission is not correct. But that admission can be taken advantage of by plaintiff as having discharged her burden. The appellant C first defendant)

was asked as regards the source of income, how the cash was deposited and when it was deposited. He only said that records are available. But, no document was produced. At the same time, the case of the second defendant is that these deposits were not deposits made for the first time. But they were renewed from time to time, and the initial deposit was made by his father. That is why even after a final renewal, it continued to be in the account "either or survivor".

51. The appellant (1st defendant) has no case that regarding other assets belonging to him, he has made use of his father's name. Only in regard to "B" Schedule items the father's name is made mention of as "either or survivor".

52. When this contention was taken, learned counsel submitted that because it is "either or survivor" account, the appellant can be treated as owner. For the said purpose, learned counsel relied on the statement in Tannan's Banking Law and Practice in India " 18th Edition (Reprint 1996) wherein, at page 195, it is said thus:-

Banks have now accepted the view that in an account where the operation is by "Either or Survivor", the survivor is the only person who is entitled to the balance thereof after the death of one of the account holders. This practice is based on the principle that the terms of operation form part of the contract of deposit.

I do not think, the said statement by the learned Author has any relevance to this case. Those cases relate to the interpretation of contract between the bank and the customer, and the Bank gets discharged when it makes payment to the survivor.

When an inter se dispute arises as to" the ownership or beneficiary of the amount, that ownership has to be proved de hors the receipt.

53. In a recent decision of our High Court reported in ILR (1996) 3 Mad 1978, a learned Judge of this Court has considered the entire case-law on the point and held that "Either or Survivor" account will not make the survivor the beneficiary or the owner of the amount. It only enables the survivor to collect the amount as Trustee for the other legal heirs. From the mere opening of an account as "Either or Survivor", an inference should not be made that the survivor is entitled to collect and appropriate the entire amount for himself.

54. I hold that the "B" Schedule items are also available for partition, and the decision, of the lower Court on that point is also confirmed. Finally, I do not think any ground has been made out to interfere with the judgment of the lower Court. The Appeal is accordingly dismissed. However, taking into consideration the close relationship between the parties, I dismiss the Appeal without any order as to costs.