

**(2005) 04 AP CK 0101**  
**In the Andhra Pradesh High Court**  
**Case No : AS No. 101 of 1995**

Kasinath Patel

APPELLANT

Vs

Radha Bai and Others

RESPONDENT

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**Date of Decision :** 20-04-2005

**Acts Referred:**

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

**Citation :** (2005) 4 ALD 859 : (2005) 4 ALT 740

**Hon'ble Judges :** N.V. Ramana, J

**Bench :** Single Bench

**Advocate :** Fazal Yousufuddin, for the Appellant; V. Venkateswarlu, for the Respondent Nos. 1 and 2 and Sorla Pandari, for the Respondent No. 3, for the Respondent

**Final Decision :** Dismissed

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## Judgement

N.V. Ramana, J.—The appellant, assailing the judgment and decree dated 14.11.1994 passed by the Subordinate Judge, Bodhan, Nizamabad District, dismissing the suit O.S. No. 35 of 1985, filed by him for specific performance of agreement of sale dated 5-5-1983, filed the present appeal.

2. The appellant is the plaintiff and the respondents are the defendants. For the sake of expediency, the parties are referred to as arrayed in the suit.

3. The brief case of the plaintiff, as pleaded by him in the plaint and the amended plaint is that - plaintiff claims that defendant No. 1 agreed to sell him an extent of Ac. 10-34 guntas in Sy. No. 47 and Ac. 11-00 in Sy. No. 135 of Kandharpalli Village of Madnoor Taluk, for a sale consideration of Rs. 48,000/-, and accordingly defendant No. 1 executed an agreement of sale dated 5-5-1983 in his favour, and pursuant thereto, he having paid an amount of Rs. 12,005/-, claims that defendant No. 1 had also put him in possession of the said lands. Thereafter, he claims to have paid an amount of Rs. 10,201/- on 19-5-1983 and Rs. 4,450/- on 2-8-1984 towards sale consideration, and in acknowledgement of

which, defendant No. 1 also passed on receipts. The plaintiff claims that he in all paid an amount of Rs. 26,656/- to defendant No. 1, and that though he is ready and willing to pay the balance sale consideration of Rs. 21,344/-, in spite of repeated oral requests, defendant No. 1 had not come forward to perform her part of the contract, and deferred the execution of the sale deed in his favour on one pretext or the other.

4. While so, the plaintiff states that defendant No. 3, on the basis of a will dated 1-1-1982, alleged to have been executed by one Gopal Rao, husband of defendant No. 1, who died on 15-5-1982, in his favour bequeathing the properties covered by the agreement of sale and other properties, filed a suit in O.S. No. 138 of 1984 on the file of the Subordinate Court at Bodhan, Nizamabad District, for declaration of his title over the properties mentioned in the suit, and though defendant No. 1 contested the suit contending that the Will is a forged one, surprisingly she entered into a compromise with defendant No. 3, and ultimately, the said suit ended in a compromise, and in terms of which, a compromise decree was passed by the Court on 24-7-1985. The plaintiff states as the properties covered by the Will dated 1-1-1982 and compromise decree dated 24-7-1985, include the lands covered by the agreement of sale, and as on the basis of the said, documents and taking advantage of his absence in the village, defendant No. 3 occupied the lands covered by the agreement of sale, and as the cause of action for filing the suit arose on 5-5-1983, when the agreement of sale was executed in her favour by defendant No. 1, the plaintiff filed the present suit praying to set aside the will dated 1-1-1983 and the compromise decree dated 24-7-1985 passed by the Subordinate Court at Bodhan, and sought injunction to restrain the defendants from interfering with his possession of the lands covered by the agreement of sale and to direct respondent No. 1 to perform her part of the contract by executing the sale deed.

5. The defendants filed separate-written statements and amended written statements. Defendant No. 1 in her written statement specifically denied that she executed the agreement of sale dated 5-5-1983 agreeing to sell the lands covered thereby to the plaintiff, much less for the sale consideration mentioned therein. She denied having received any amount towards the sale consideration, much less on the dates mentioned in the suit, either by herself or through any of the defendants nor she passed any receipts nor she had put the plaintiff in possession of the lands, as claimed by him. She contended that the plaintiff was aware of the suit proceedings in O.S. No. 138 of 1984 and the resultant compromise decree dated 24-7-1985 passed therein, as he was the person who was instrumental in engaging an Advocate on her behalf to contest against defendant No. 3. The plaintiff is known for influencing people. The alleged agreement of sale dated 5-5-1983 is fabricated. As the plaintiff is aware of the suit proceedings between her and defendant No. 3 and the resultant compromise decree, he not being a party to the said suit, now cannot seek to challenge the compromise decree passed therein. She thus prayed that the plaintiff is not entitled to any relief, much less the relief of specific performance for execution of

the sale deed in his favour. To the very same effect is the stand taken by defendant No. 2 in his written statement.

6. Defendant No. 3 in his written statement while taking similar stand as taken by defendant Nos. 1 and 2 in their written statement inter alia contended that Gopal Rao, husband of defendant No. 1, much before his death on 15-5-1982, had executed a Will on 1-1-1982 bequeathing his properties mentioned in the will in his favour, and since then, he has been in possession and enjoyment of the same. When defendant No. 1 attempted to interfere with his possession and enjoyment of the lands covered by the Will, he filed suit in O.S. No. 74 of 1983 on the file of Subordinate Court, Nizamabad, seeking perpetual injunction against defendant No. 1. The suit on the point of jurisdiction was transferred to the Subordinate Court, Bodhan, and during the course of trial of the said suit, defendant No. 1 entered into a compromise with him, and accordingly the Court passed a compromise decree dated 24-7-1985. Defendant No. 3 thus submitted that the plaintiff is not entitled to any relief, much less the relief claimed in the suit, and consequently prayed for its dismissal.

7. Considering the rival pleadings, the Court below framed the following issues:

1. Whether the plaintiff purchased the suit lands from the 1st defendant for Rs. 48,000/- under agreement of sale dated 5.5.1983.

2. Whether the plaintiff was put in possession of suit lands by D.1 on 5.5.1983.

3. Whether the plaintiff paid Rs. 12,005/- to D.1 on 5.5.1983 Rs. 10,201/- on 19.5.1983 towards the part payment of the agreed price, under receipts executed by D.1.

4. Whether the plaintiff paid Rs. 4,450/- to D.2 at the request of D.1 on 2.8.1984 towards the part payment of the sale agreement under receipt executed by D.2.

5. What is the effect of the decree in O.S. No. 138/84 passed in favour of D.3 regarding the suit lands and whether the plaintiff is entitled to set aside the same.

6. Whether the plaintiff is entitled to perpetual injunction as prayed.

7. Whether the plaintiff is entitled to be put in possession of suit land Sy. No. 135.

8. Whether the plaintiff is entitled to future mesne profits in respect of land Sy. No. 135 from April, 1986 till recovery of possession.

9. Whether the Court fee paid is correct and sufficient.

10. To what relief the plaintiff is entitled.

8. The plaintiff in support of his case examined P.Ws. 1 to 5, including himself as P.W.I and marked documents Exs.A1 to A12. On behalf of the defendants, defendant No. 3 examined himself as D.W.1 and examined two others, as D.Ws.2 and 3 and got marked Exs.B1 to B11.

9. During the course of trial, it may be noted that defendant Nos. 1 and 2 remained absent, and as such, by order dated 23.6.1993 of the Court below, set them ex parte, and only defendant No. 3 contested the suit.

10. As Issue Nos. 1 to 4 are interrelated, and in fact, relate to the agreement of sale dated 5-5-1983 Ex.A1, through which the plaintiff claimed that defendant No. 1 agreed to sell him the land mentioned therein for a sale consideration of Rs. 48,000/-, and he having paid an amount of Rs. 12,005/- to defendant No. 1, was also put in possession of the land, and further claimed that pursuant to Ex.A1, he also made part payments of Rs. 10,201/- under receipt dated 19.5.1983. Ex.A2, and Rs. 4,450/- under receipt dated 2-8-1984 Ex.A3, the Court below proceeded to consider them jointly, and considering the evidence of P.W. Nos. 1 to 3 and the past litigation between defendant No. 1 and defendant No. 2 in O.S. No. 138 of 1984, held that the plaintiff failed to prove beyond doubt the execution of Exs. A1 to A3 by defendant No. 1 in his favour, and accordingly answered issue Nos. 1 to 4 against the plaintiff and in favour of the defendants. Likewise, the Court below answered issue No. 5 against the plaintiff and in favour of the defendants, and declined to set aside the decree in O.S. No. 138 of 1984 holding that the plaintiff was in the knowledge of the suit litigation between defendant No. 1 and defendant No. 3 and about the compromise entered into by and between them, and subsequently the passing of the compromise decree therein by the Court on the basis of the compromise. On Issue Nos. 6, 7 and 8, the Court below held that as the plaintiff failed to prove Exs. A1 to A3 on which he filed the suit, he is neither entitled to be granted perpetual injunction nor can he be put in possession of the suit land, nor is he entitled to mesne profits. On Issue No. 9, though there was no serious contest, the Court below held that the suit is not properly valued, and holding so, dismissed the suit.

11. Aggrieved by the above judgment and decree, the unsuccessful plaintiff, preferred the present appeal.

12. Heard the learned Counsel for the appellant-plaintiff and the learned Counsel for the respondent No. 3-defendant No. 3.

13. The learned Counsel for the appellant-plaintiff submits that Gopal Rao is the original owner of the suit land. He died issueless. According to him, under the provisions of the Indian Succession Act, 1925 if a Hindu husband dies issueless, his wife alone succeeds to his estate. As defendant No. 1's husband died issueless, defendant No. 1 succeeded to the properties of her husband, which is evident from Exs.A4 to A6-pahanies for the years 1983-84 and 1984-85, which show that defendant No. 1 is in cultivation of the suit property, and the plaintiff bona fide believing that defendant No. 1 is the owner of the properties, entered into an agreement with defendant No. 1 for purchasing the suit land for Rs. 48,000/-, vide agreement of sale dated 5-5-1983 Ex.A1, executed by defendant No. 1 in his favour, and he having paid a sum of Rs. 12,005/-, was also put in possession of the properties Thereafter, he paid Rs. 10,201/-and Rs. 4,450/- vide receipts dated 19-5-1983 and 2-8-1984 Exs.A2 and A3, towards part of the

balance sale consideration, and he has to still pay a balance sale consideration of Rs. 21,344/-. Though the plaintiff is ready and witting to pay the balance sale consideration and perform his part of the contract, defendant No. 1 is not coming forward to perform her part of the contract by executing the sale deed in respect of the suit property in his favour. Therefore, the suit for the relief of specific performance of the contract.

14. He submitted that the Will dated 1-1-1982 Ex.B9 through which defendant No. 3 is claiming the suit properties and other properties were bequeathed in his favour by the husband of defendant No. 1, is a forged and fabricated document, and as the same is coming in the way of his seeking the relief of specific performance of the agreement of sale under Ex.A1, he submits that the same to be set aside. He submits that the Will Ex. B9 is not genuine one, and at any rate, could not have been executed by Gopal Rao in favour of defendant No. 3, and more so when defendant No. 1 was alive, and the cloud surrounding the genuineness of the Will Ex.B9 is further fortified by the fact that defendant No. 1, who is the wife of Gopal Rao, contested the suit O.S. No. 138 of 1984 filed by defendant No. 1 seeking perpetual injunction restraining her from interfering with his possession, and though the said suit ended in a compromise and a compromise decree was passed on 24-7-1984, but defendant No. 1 in her written statement has taken a stand that the Will Ex.B9, has been forged by defendant No. 3, as if to give an appearance that her husband late Gopal Rao had bequeathed all his properties in his favour.

15. He submitted that the execution of the Will Ex.B9 by Gopal Rao in favour of defendant No. 3, is surrounded by suspicious circumstances. The suspicious circumstances, which according to the learned Counsel, surrounded the Will Ex.B9 are - (1) When the wife of Gopal Rao, namely defendant No. 1 was alive, the testator could not have executed the Will bequeathing all his properties to the benefit and enjoyment of defendant No. 3, without leaving anything to the benefit and enjoyment of his legally wedded wife; (2) The presence of defendant No. 3 at the time of execution of the Will Ex.B9. (3) As on the date of execution of the Will Ex.B9, the testator was suffering from paralysis; (4) D.W.2, the scribe of the Will Ex.B9 is closely related to defendant No. 3, as he is his brother-in-law; and (5) P.W.5, who is one of the attestors to the Will Ex.B9, in his evidence stated that it was brought into existence three months after the death of Gopal Rao. He thus submitted that though defendant No. 3 failed to clearly explain the afore suspicious circumstances surrounding the execution of the Will Ex.B9 by the testator in his favour, yet the Court below had erroneously held that defendant No. 3 has proved the Will Ex.B9 beyond doubt. In support of this contention that onus lies on the propounder to explain the suspicious circumstances surrounding the Will, the learned Counsel placed reliance on the judgments of the apex Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors.*, (1959) Supp. SCR 426 and *Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another*, and of this Court in *Suram Indira Devi Vs. Suram Bhoodevi and others*, .

16. He submitted that the plaintiff has no knowledge of the litigation between defendant No. 3 and defendant No. 1 in O.S. No. 138 of 1984 on the file of Subordinate Court, Bodhan, with regard to the Will Ex.B9 and the properties covered thereunder, which ultimately ended in a compromise decree on 24-7-1984, and at any rate, he submits that the plaintiff not being a party to the said suit, the compromise decree passed therein, is not binding on him, and as such, it should not come in the way of his seeking the relief of specific performance of the agreement of sale against defendant No. 1 on the basis of the agreement of sale Ex.A1. He further submitted that the suit in O.S. No. 138 of 1984 filed by defendant No. 3 against defendant No. 1 is a collusive suit, and this is evident from the fact that other defendants remained ex parte. The suit has been filed only to frustrate the agreement of sale Ex.A1, executed by defendant No. 1 in favour of the plaintiff, and as such, the compromise decree dated 24-7-1984 passed in the said suit, is required to be set aside.

17. The learned Counsel for the appellant submitted that though thirty persons are said to have attested the Will Ex.B9 as attesting witnesses, only one attesting witness has been examined, and as per the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 at least two attesting witnesses have to be examined, and as such, the Will Ex.B9 on the basis of the evidence of only one of the attesters to it, namely P.W.3, cannot be said to have been conclusively proved. In support of this submission, he relied on the judgment of the Apex Court in Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, . He submitted that defendant No. 3, who is claiming the suit property through the Will Ex.B9 has to establish the execution of the Will by the testator beyond preponderance of probabilities, and it should be free from doubts and suspicious circumstances surrounding the execution of the Will, which in the instant case, defendant No. 3 failed to do so. In support of this contention, he placed reliance on the judgment of the Bombay High Court in Vishnu Ramkrishna v. Nathu Vithal, AIR (36) Bom. 266.

18. He further submitted that in view of the evidence of the scribe of Ex.A1 and the attesters of Exs.A2 and A3, placed by the plaintiff through P.Ws. 1 to 3, the plaintiff should be held to have conclusively proved the execution of the agreement of sale Ex.A1 by defendant No. 1 in favour of the plaintiff, and as the plaintiff was put in possession of the lands covered thereby by defendant No. 1, the plaintiff should be held to be in possession of the land covered by the agreement of sale Ex.A1, and more so when it is evident from the evidence of P.W. 4 and P.W.5, adjacent land owners of the lands, who stated that the plaintiff is in possession of the lands.

19. Contesting the submissions of the appellant, the learned Counsel appearing on behalf of respondent No. 3-defendant No. 3 submitted that Gopal Rao, husband of defendant No. 1, much before his death, executed the Will dated 1-1-1982 Ex.B9 in favour of defendant No. 3 bequeathing all his properties in the presence of defendant No. 1 and thirty attesters. The Will Ex.B9 is genuine and

not a fabricated or forged one, and it stood proved by the evidence of P.W.5 and D.Ws. 1 to 3. Immediately after execution of the Will Ex.B9, defendant No. 3 got the lands covered by the Will Ex.B9 mutated in, his name in the revenue records, and this is evident from the mutation proceedings Ex.B7. Though the Will Ex.B9 was executed by Gopal Rao in the presence of defendant No. 1, she unfortunately interfered with his possession of the lands, and therefore, defendant No. 3, was constrained to file suit in O.S. No. 138 of 1984, which ultimately ended in a compromise between them, and a compromise decree was passed by the Court on 24-7-1984. He submitted that merely because the testator executed the Will Ex.B9 bequeathing all his properties to defendant No. 3, though as on the date of its execution, his wife was alive, and merely because he was present at the time of execution of the Will, it cannot be said that it is surrounded by suspicious circumstances, and more so when the testator at the time of executing the Will, was in a sound and disposing state of mind; the signature of the testator was testified by the witnesses D.Ws.2 and 3 spoke about the intention of the testator to execute the Will Ex.B9 in favour of defendant No. 3; the Will Ex.B9 itself provided that defendant No. 3 should maintain the testator and his wife till their death; and defendant No. 3 performed the last rites of the testator. He relied on the judgments in Bhagat Ram and Another Vs. Suresh and Others, , Crystal Developers Vs. Smt. Asha Lata Ghosh (Dead) through LRs. and Others, , Meenakshiammal (Dead) through LRs. and others v. Chandrasekaran and Anr., 2004 (8) Sup 418 and Daulat Ram v. Sodha, AIR 2005 SC 233 . In support of his contention that examination of one attesting witness would be sufficient to prove a Will, if no infirmity is found in his testimony, he placed reliance on the judgment of the apex Court in Ramabai Padmakar Patil (D) through LRs. and Others Vs. Rukminibai Vishnu Vekhande and Others, .

20. He submitted that the plaintiff filed the suit for specific performance of the agreement of sale Ex.A1, and it has nothing to do with the Will Ex.B9 executed by the husband of defendant No. 1 in his favour. He submitted that there was no reason or necessity for defendant No. 1 to take money from the plaintiff, and much less, execute the agreement of sale Ex.A1 agreeing to set the lands covered thereunder for a consideration of Rs. 48,000/-, and at any rate, he submits that as on the date when the agreement of sale dated 5-7-1983 Ex.A1 is alleged to have been executed by defendant No. 1, the lands having been bequeathed by the husband of defendant No. 1 in his favour under Ex.B13, he became the owner thereof, and this is evident from the mutation proceedings dated 1-5-1983 Ex.B7. Though the plaintiff relying on mutation proceedings dated 8-7-1983 under Ex.B5, contended that as on the date of execution of the agreement of sale Ex.A1 by defendant No. 1, the lands were mutated in the name of defendant No. 1, but they were got mutated without referring to the mutation proceedings dated 1-5-1983 Ex.B7, and therefore, defendant No. 3 filed appeal before the Revenue Divisional Officer, which were allowed, and the appeal filed by the plaintiff against the order of the Revenue Divisional Officer,

was dismissed by the District Collector, and the further appeal and L.P.A. filed by the plaintiff, were also dismissed. He submitted that the plaintiff is a Police Patel and is an influential person, and with a view to knock away the lands, with the assistance of P.Ws.2 and 3, who are Mali Patel and Revenue Inspector, who have access to the records, created the agreement of sale Ex.A1. Even the receipts Exs.A2 and A3 do not disclose in what context they came to be issued. Even Ex.A1 does not mention about the boundaries of the survey numbers, and it does not say as to whether the thumb impression, in fact, is of the right hand or the left hand. Further, there is no explanation as to why Ex.A2 came to be executed at Deloor when all the attesters, scribe, executant and P.W.I belong to Bichkonda of A.P., which is at a distance of 17 K.Ms. from Deloor. All these circumstances go to show that the very execution of the agreement of sale Ex.A1 by defendant No. 1 is doubtful.

21. He denied the submission of the plaintiff that he is unaware of the suit proceedings in O.S. No. 138 of 1984 between defendant No. 1 and defendant No. 3 and the decree passed therein, and contended that the plaintiff was working as Police Patel, and he has been fighting litigations in various Courts since 1955, and it cannot be said that he is not aware of the suit proceedings. The plaintiff knowing fully well of the suit proceedings between him and defendant No. 1, yet had not taken steps to get himself impleaded, and the fact that the plaintiff is aware of the suit proceedings, becomes clear from the fact that defendant No. 1 in her written statement stated that the plaintiff helped her in engaging an Advocate to contest the suit filed by defendant No. 3 against her.

22. He thus submitted that the Court below had rightly dismissed the suit, and no interference is called for with the judgment under appeal, and prayed for its dismissal.

23. Admittedly, the plaintiff filed the suit for specific performance of contract on the strength of the agreement of sale Ex.A1, said to have been executed by defendant No. 1 in his favour agreeing to sell the lands covered thereby for a sale consideration of Rs. 48,000/-, and though it is contended by the plaintiff that defendant No. 1 having received part payments under receipts Exs.A2 and A3, had also put him in possession, and prayed that the defendants be injuncted permanently from interfering with his possession of the suit lands, the same is disputed by the defendants. Though given the nature of the suit, the only question that requires consideration in the appeal is whether or not the plaintiff is entitled to grant of relief of specific performance of contract directing defendant No. 1 to perform her part of the contract by executing the sale deed, but in view of the rival claim put up by the defendants, especially defendant No. 1 that the suit lands and other properties were bequeathed to him by the husband of defendant No. 1 under the Will Ex.B9 much before the alleged execution of agreement of sale Ex.A1 by defendant No. 1, and the execution of the same having been disputed by the plaintiff contending that the Will Ex.B9 has been created to frustrate the suit, the genuineness or otherwise of not only

the agreement of sale Ex.A1, but also the Will Ex.B9, will have to be considered, for it is stated that the Will Ex.B9 is coming in the way of the plaintiff seeking the relief of specific performance of contract against defendant No. 1.

24. Therefore, considering the rival pleadings and contentions, the following questions do crop up for consideration in this appeal:

1. Whether the plaintiff proved the execution of the agreement of sale Ex.A1 and the receipts Exs.A2 and A3 evidencing part of sale consideration by defendant No. 1 in his favour beyond preponderance of probabilities, and if so, whether the same are binding on the defendant No. 3, and whether the plaintiff is entitled for grant of relief of specific performance of contract and consequently the relief of redelivery of possession?

2. Whether the Will Ex.B9 is genuine and valid?

In re question No. 1:

25. Whether the plaintiff proved the execution of the agreement of sale Ex.A1 and the receipts Exs.A2 and A3 by defendant No. 1 in his favour. The claim of the plaintiff of the relief of specific performance of contract is on the basis of the agreement of sale Ex.A1 and the receipts Exs.A2 and A3 said to have been executed by defendant No. 1 in his favour. It is the case of the plaintiff that after the death of Gopal Rao, he bona fide believing that his wife, namely defendant No. 1, succeeded to his estate, agreed to purchase the lands in an extent of Ac. 10-34 gts in Sy.No. 47 and an extent of Ac. 11-00 in Sy.No. 135 of Kandarpatti Village of Madnur Taluk from her, and in that regard defendant No. 1 executed an agreement of sale dated 5-5-1983 Ex.A1, agreeing to sell the said lands for a sale consideration of Rs. 48,000/-, and that she having received part payments issued receipts Exs.A2 and A3, and that though he is ready and willing to pay the balance sale consideration, defendant No. 1 in spite of repeated requests has not come forward to execute the sale deed in his favour by receiving the balance sale consideration, and therefore, he filed the suit for specific performance of the contract. Defendant Nos. 1 to 3 denied the execution of Exs.A1 to A3 and contended that they have been created by the plaintiff to snatch away the properties, and that defendant No. 3 became the owner of the properties by virtue of the Will Ex.B9 executed by the husband of defendant No. 1 in his favour.

26. As the plaintiff is claiming the reliefs prayed for by him in the suit on the basis of Exs.A1 to A3, burden lies upon him heavily to prove them. The plaintiff, who worked as Police Patel in Bichukonda, to prove Exs.A1 to A3, examined himself as P.W.I and two others as P.Ws.2 and 3, namely the Revenue Inspector and Mati Patel. The plaintiff in his evidence as P.W.I reiterated his case as stated supra, and contended that he is not aware of the suit proceedings in O.S. No. 138 of 1984 between defendant No. 1 and defendant No. 3 and the compromise decree dated 24-7-1984 passed therein, and as such, the compromise decree is not binding on him. The fact that the plaintiff is not aware of the suit proceedings in O.S No. 138 of 1998 before the Subordinate Court, Bodhan, and its eventual

compromise between defendant No. 1 and defendant No. 3, is belied since defendant No. 1 in her written statement stated that the plaintiff was the person who was instrumental in getting an Advocate engaged on her behalf to contest the suit filed by defendant No. 1. When defendant No. 1 in categorical terms stated that plaintiff was the person who was instrumental in getting an Advocate engaged on her behalf to contest the suit filed by defendant No. 3, which admittedly was filed on the basis of the Will Ex.B9, there is every reason to disbelieve the plea of the plaintiff that he was unaware of the suit proceedings in O.S. No. 138 of 1984 on the file of the Subordinate Judge, Bodhan, between defendant No. 1 and defendant No. 3 and the compromise decree passed therein. The fact that the plaintiff is unaware of the suit litigation in O.S. No. 138 of 1984 on the file of the Subordinate Judge, Bodhan, between defendant No. 1 and defendant No. 3 is further belied by the evidence of the plaintiff itself as P.W.I when he deposed that "he does not remember whether he filed a petition to implead himself as party-defendant in the suit O.S. No. 138 of 1984, that he did not get himself impleaded in the said suit, and that he did not try to get himself in the suit". If really the plaintiff had no knowledge of the suit proceedings and the compromise decree passed therein, he should have stated that he is not aware, but he did not do so, and proceeded to answer the question in the manner stated above. If really defendant No. 1 had agreed to sell the suit properties to the plaintiff, and in fact, had executed the agreement of sale Ex.A1 on 5-5-1983, nothing prevented the plaintiff from getting himself impleaded in the suit filed by defendant No. 3 against defendant No. 1, and more so when the right accrued in his favour by virtue of the agreement of sale Ex.A1, was adversely being affected in, view of the claim made by defendant No. 3 on the basis of the Will Ex.B9.

27. The plaintiff was in the knowledge of the suit proceedings further becomes lucid from the fact that the plaintiff just before filing of the suit by defendant No. 3 against defendant No. 1, obtained mutation proceedings in on the basis of agreement of sale Ex.A1 from the revenue authorities on 8-7-1983 under Ex.A-10, and in that regard litigation ensued between the plaintiff and defendant No. 3, which went up to the level of High Court, and at all the stages the plaintiff faced defeat, and the mutation proceedings in favour of defendant No. 3 were upheld, and therefore, it would be hard to believe that the plaintiff was not aware of the suit proceedings and the compromise decree passed therein, and more so when he stated in his evidence that he had been fighting his personal cases since 1957. The fact that the plaintiff has been fighting his personal cases since 1957 shows that he is an unrelenting fighter. In that view of the matter, the Court below had rightly disbelieved the version of the plaintiff that he was not aware of the suit proceedings between defendant No. 1 and defendant No. 3 and the compromise decree passed therein and that he came to know of the said fact only after filing the present suit.

28. Though the plaintiff contended that defendant No. 1 agreed to sell the lands under the agreement of sale Ex.A1 for want of necessity, in their evidence,

P.Ws.1, 2 and 3 stated that they do not know what was the necessity for defendant No. 1 to sell the properties to him. Further, the agreement of sale Ex.A1, does not mention about the date and month on which it was executed, but merely mentions the year as 1983, and this is spoken to by P.W.I in his evidence. When a legal document is executed, which seeks to transfer or convey property in others, the primary requirement is that the date, month and year, should be mentioned in the document, and in the absence of such details, the very execution of the document would become doubtful for it cannot be assumed as to on which date such a document was executed.

29. The plaintiff in his evidence as P.W.I stated that he has been contesting his personal cases since 1957, and that he has been in possession of the land in Sy.No. 47 even prior to 1950 and that he has been cultivating the land prior to police action, and that in fact, he and one Bhoomaiah were cultivating the said land as owners on the basis of consent decree against Gopal Rao. When the plaintiff as P.W.I stated that he has been in possession of the land in Sy.No. 47 even prior to 1950, there was no reason for him to purchase the same land again from defendant No. 1.

30. P.W.2 in his evidence deposed that the receipt Ex.A2 was executed at his house in Degloor, and that he is an attesting witness thereto, and that the scribe of Ex.A2 and other attesters do not belong to Degloor, and that except the receipt Ex.A2, he has not written any documents. When all the parties to the execution of the agreement of sale Ex.A1 and the receipt Ex.A2, namely the executant, scribe and attesters belonged to Bichukonda, there was no reason for all of them to go to Degloor, which is at a distance of 17 K.Ms. to execute Ex.A2 and receive the amount mentioned thereunder. Further, Ex.A2 does not refer to the contents of either the agreement of sale Ex.A1 nor refers to the transaction in connection with which it came to be executed.

31. P.W.2 in his evidence though admitted that in the receipt Ex.A2, the name of defendant No. 1 is mentioned, he stated that he does not know whether defendant No. 1 affixed her thumb impression, and that he does not even know the terms of the agreement of sale Ex.A1. The receipt Ex.A3, which is said to have been executed by defendant No. 2, is not a party to the agreement of sale Ex.A1. Ex.A3 does not refer to Ex.A1 or Ex.A2, and as similar to, the receipt Ex.A2. It does not refer to the transaction or in connection with which the amounts thereunder came to be received or as to why the same was executed. When a receipt acknowledging payment is issued, it should normally contain the consideration and should mention transaction in respect of which it is given, and it should also refer to the details of the transaction and importantly contain the signature, and in case, the person executing the document is putting his thumb impression, then it should indicate, whether the thumb impression belongs to the right hand or left hand, and in the absence of such details, it cannot be assumed in vacuum that the receipts executed were for a particular purpose or that the thumb impression in fact, belonged to the left hand or right hand of the

executant, and therefore, it cannot be said that the receipts Exs.A2 and A3 were executed by defendant No. 1 and defendant No. 2, and more so in connection with the agreement of sale Ex.A1.

32. Further the boundaries of the survey numbers, which the plaintiff claimed to have purchased are not mentioned in Ex.A1, and this is spoken to by P.W.3 in his evidence, and this belies the contention of the plaintiff that he was put in possession by defendant No. 1 pursuant to the agreement of sale Ex.A1. If one is claiming possession of a property by virtue of a document, he can be said to be in possession only when the document in his possession clearly specifies the boundaries surrounding the land, and the absence of the boundaries, it would not only be difficult to locate the land, but would be difficult to put him in possession in the event he is dispossessed. As the agreement of sale Ex. A1 does not mention of the boundaries of the survey numbers, the contention of the plaintiff that he was put in possession of the land by defendant No. 1 cannot be believed. Though the plaintiff in support of his contention that he was put in possession of the land, has relied on the revenue extracts Exs.A4 to A6, they merely show defendant No. 1 as the possessor of the property, and at any rate, they do not confer any ownership rights on defendant No. 1, much less on the plaintiff.

33. Further the evidence of P.W.4 on the aspect of possession of the plaintiff over the suit land discloses that the plaintiff was never put in possession of the land by defendant No. 1 pursuant to the agreement of sale Ex.A1, for in his evidence P.W.4 said that he does not remember the survey number of his lands, and that he does not know how much land defendant No. 3 has in Kandarpalli, and how many people from Kandarpalli are owning lands and how much. Had P.W.4 been really the neighbour of P.W.I, he would have stated the survey numbers of his land, which he did not do, and as such, the evidence of P.W.4 cannot be relied upon.

34. When a document is written, which seeks to convey or transfer a property, the scribe before taking the signature or thumb impression of the executant, is required to read over the contents thereof to the executant and ascertain whether the contents written by him in the document are correct or not, but in the instant case, this was not done by the scribe of Ex.A1, and this is admitted by the scribe in his evidence as P.W.3 when he said that he did not write in Ex.A1 that he had read over the contents thereof to defendant No. 1 and that she admitted the same to be true and correct. This evidence of P.Ws.I to 3, would clearly go to show that the very execution of Exs.A1 to A3 by defendant Nos. 1 and 2 is doubtful, and the Court below had rightly disbelieved them.

35. Though there is no rebuttal evidence placed by defendant Nos. 1 to 3 on the above aspects, but that by itself is not a ground to believe the documents Exs.A1 to A3, for burden is heavy on the plaintiff to prove them beyond preponderance of probabilities.

36. Since the plaintiff was held to be in the knowledge of the suit proceedings in

O.S. No. 138 of 1984 on the file of Subordinate Court, Bodhan, between defendant 1 and defendant No. 3, which was filed on the basis of the Will Ex.B9, which culminated into a compromise decree being passed therein, and the plaintiff have not chosen to get himself impleaded and contest the suit proceedings on the ground that the lands covered by Ex.A1 were agreed to be sold to him by defendant No. 1, and he not being a party to the said suit proceedings, now cannot be allowed to challenge the same, and further since the plaintiff failed to prove the execution of documents Exs.A1 to A3 by defendant Nos. 1 and 2, he cannot be allowed to contend that they are binding on defendant No. 3, and more so by the time the alleged documents Exs.A1 to A3 came to be executed by defendant No. 1 in his favour, defendant No. 3 had acquired ownership rights over the lands covered by the agreement of sale Ex.A1 by virtue of the Will Ex.B9, executed by the husband of defendant No. 1. Therefore, Exs.A1 to A3, which are not proved by the plaintiff, are not binding on defendant No. 3.

37. As the plaintiff failed to prove the execution of the agreement of sale Ex.A1 and receipts Exs.A2 and A3 by defendant No. 1, the question of granting relief of specific performance of contract does not arise. Be that as it may, the plaintiff except stating that he made oral requests calling upon defendant No. 1 to perform her part of the contract by receiving the balance sale consideration, he has not filed any material to show that, he in fact, got issued legal notice agreeing to pay the balance sale consideration, and that defendant No. 1 in spite of receiving such notice, failed to receive the balance sale consideration and perform her part of the contract by executing the sale deed in his favour. The condition precedent for a party seeking the relief of specific performance of contract, is that he should issue a notice expressing his willingness to pay the balance sale consideration and calling upon the contracting party to receive the balance sale consideration and perform his part of the contract, and unless this condition precedent is met, he cannot maintain suit for specific performance of contract. In the instant case, the said condition precedent has not been complied with, and even assuming that defendant No. 1 was competent to perform her part of the contract, yet he cannot do so without satisfying the above condition.

38. As the plaintiff failed to prove the execution of the agreement of sale Ex.A1 and the receipts Exs.A2 and 3 by defendant No. 1, and as the said documents are not binding on defendant No. 3, and he is not entitled to be granted the relief of specific performance of contract, the question of redelivery of possession of the land to the plaintiff does not arise. The question of grant of redelivery of possession would have arisen only if the plaintiff had proved the agreement of sale Ex.A1 and the receipts Exs.A2 and A3 on the basis of which he founded the suit. In that view of the matter, it is required to be held that the plaintiff is not entitled to grant of relief of redeliver of possession of the suit lands.

39. Accordingly, question No. 1 is answered in favour of defendant No. 1 and against the plaintiff.

In re question No. 2:

40. In view of my negative finding on question No. 1, there is no need to answer question No. 2, but since the plaintiff had questioned the genuineness of the Will Ex.B9 contending that it had been brought into to defeat the agreement of sale under Ex.A1, and since arguments were advanced against and in favour of the genuineness of the Will Ex.B9, it is appropriate to answer question No. 2.

41. Though the husband of defendant No. 1, Gopal Rao died issueless on 15-5-1982, but before his death, he is said to have executed a Will dated 1-1-1982 Ex.B9 in favour of defendant No. 3 bequeathing all his properties. There can be no dispute that under the provisions of the Indian Succession Act, 1925 if a Hindu husband dies issueless, his wife alone succeeds to his estate, but that does not mean that a Hindu husband during his lifetime, cannot execute a Will bequeathing all his properties to his children or the person whom he likes, and that he should bequeath all his properties to his wife. In the instant case, defendant No. 3 by virtue of the Will Ex.B9 executed by the husband of defendant No. 1 in his favour, claims to have become the owner of the properties mentioned therein, and to prove that he became the owner, he filed mutation proceedings dated 1-5-1983 Ex.B7. Admittedly, after the death of the testator, when his wife interfered with the possession of the properties, defendant No. 3 filed a suit in O.S. No. 74 of 1983 on the file of the Subordinate Court, Nizamabad, which was transferred to the Subordinate Court, Bodhan and was renumbered as O.S. No. 138 of 1984. The wife of the testator, as defendant No. 1, though resisted the suit inter alia contending that the Will Ex.B9 is a forged document, but after evidence on the side of the plaintiff (defendant No. 3) was led, she compromised with defendant No. 3, resulting in a compromise decree passed by the Court on 24-7-1984. In the compromise, defendant No. 1 admitted that the Will Ex.B9 is genuine and that it was executed by her late husband in favour of the plaintiff (defendant No. 3), and that after the death of her husband on 15-5-1982, defendant No. 3 succeeded to the properties under the Will Ex.B9, and that he became the owner thereof. The wife of the testator though disputed the genuineness of the Will Ex.B9, but in the compromise she admitted that the Will Ex.B9 is genuine. In view of the volte face stand taken by defendant No. 1 in the suit, which resulted in a compromise decree, the plaintiff contends that Will Ex.B9 is not genuine, and that to defeat the agreement of sale Ex.A1, defendant No. 1 colluded with defendant No. 3. He further contended that the execution of the Will Ex.B9 by the testator in favour of defendant No. 3, is surrounded with suspicious circumstances. According to him, the suspicious circumstances are - (1) When the wife of the testator, namely defendant No. 1 was alive, the testator could not have executed the Will Ex.B9 bequeathing all his properties to the benefit and enjoyment of defendant No. 3, without leaving anything to the benefit and enjoyment of his legally wedded wife; (2) The presence of defendant No. 3 at the time of execution of the Will Ex.B9. (3) As on the date of execution of the Will Ex.B9, the testator was suffering from paralysis; (4) D.W.2, the scribe of the Will Ex.B9 is closely related to defendant No. 3, as he

is his brother-in-law; and (5) P.W.5, who is one of the attesters to the Will Ex.B9, in his evidence stated that it was brought into existence three months after the death of the testator. In view of these suspicious circumstances pleaded by the plaintiff, it is appropriate to consider whether defendant No. 3 proved the Will Ex.B9 beyond preponderance of probabilities.

42. Before proceeding to deal with the suspicious circumstances, which according to the plaintiff surrounded the execution of the Will Ex.B9 by the testator in favour of defendant No. 3, it is appropriate to consider the case-law governing the proving of the Will.

43. The mode of proving a Will does not ordinarily differ from that of proving any other document, save 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 is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. However, if there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will can be accepted as genuine. But what are the suspicious circumstances must be judged in the facts and circumstances of each case. In case the person challenging the Will attributing undue influence, fraud or coercion, onus is on him to prove the same [See judgments of the apex Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors.*, and *Indu Bala v. Mahindra Chandra* (supra)].

44. This being the legal position, it may be noticed whether defendant No. 3 proved the Will Ex.B9 beyond preponderance of probabilities. D.W.2, Nagnath, the scribe of the Will, in his evidence stated that he was called by the testator, namely Gopal Rao, from his village Birkur, and he expressed his intention to execute the Will in favour of defendant No. 3, and that on his request he scribed the Will to his dictation in Urdu, and that about 20 to 30 people were present at the time of execution of the Will and that it was attested by one Eknath Rao and Hanmanth Rao (P.W.3). He said that Ex.B9 bears the signature of the testator in Marathi, and that at the time of executing Ex.B9, the testator was in sound health. D.W.2 in his evidence further deposed that at the time of execution of the Will by the testator, his wife, namely defendant No. 1 was present but she did not sign it. This version of D.W.2 is supported by the evidence of D.W.3. He said that the testator signed on the Will before him and that he attested to it, and that it was scribed by D.W.2. This version of D.Ws.2 and 3 supports the stand taken by defendant No. 3 that the Will Ex.B9 was executed by the husband of defendant No. 1, and that it is genuine.

45. That being the evidence on record, it may be noticed whether defendant No. 3 could remove the suspicious circumstances, which according to the plaintiff, surrounded the execution of the Will.

46. The first suspicious circumstance, which according to the plaintiff, surrounded the execution of the Will by the testator is that the testator could not have executed the Will Ex.B9 bequeathing all his properties in favour of defendant No. 3 without leaving anything to the benefit and enjoyment of his legally wedded wife. As observed supra, though the wife of the testator, defendant No. 1 disputed the Will Ex.B9 by way of written statement filed in the suit O.S. No. 138 of 1984 on the file of the Subordinate Court, Bodhan, the fact remains that she compromised with defendant No. 3, and it ultimately led to a compromise decree being passed by the Court therein on 24-7-1984. Be that as it may, to deal with this suspicious circumstance effectively, it would be appropriate to look into the contents of the Will Ex.B9. The Will Ex.B9 is in Urdu. The relevant portions of the English Translation of the Will Ex.B9, necessary for the purpose may be extracted, and they read thus:

I have no mate or female issues and there is no hope of begetting the same in future. Now I became very old and there is no hope of life. During my lifetime, I am having my ancestral property bearing Sy.Nos. wet and dry No. 7/A, 8/A, 37/A, 54/A, 135, 47 and a house bearing No. 1/ 23, situated within the sivar of Kundapalli Taluk, Madnoor and I am the absolute and exclusive owner of the same and I am in possession and enjoyment of the said property. But I became old and my wife namely Smt. Mathura Bai, being a lady, unable to manage and look after the property and I am also unable to manage and look after my property.

In such condition, the son of my real brother, namely Narsing Rao S/o Dattatri Rao, since a long time, is doing and looking after me and my wife and helping us in our agricultural operations and affairs. He is my real nephew and hope that he will continue to look after me and my wife during our lifetime and after my death, lie will look after my wife as there will be nobody else to took after her after my death.

In view of the above facts, I thought it necessary for the benefit of my wife and myself, to bequeath my entire Immovable property bearing Sy.Nos.7/A, 8/A, 37/A, 54/A, 135, 47 and house bearing No. 1-23, and moveable property in favour of Narsing Rao S/o. Dattatri Rao r/o Kundapalli Taluk, Madnoor. It will be his bounden duty to look after me during my lifetime, perform funeral ceremonies after my death and after my death he will be the full and absolute owner and possessor of the above said moveable and Immovable property and he will look after my wife after my death, and keep her happy, and she will not be entitled in any way, to get any moveable or Immovable property of mine.

47. The contents of the English Translation of the Will Ex.B9 would disclose that the testator though did not bequeath any of his properties to his legally wedded wife and said that she will not be entitled in any way, to get any moveable or Immovable property of mine, the fact remains, that while bequeathing all his properties in the name of defendant No. 3, he made a provision for the care taking of himself and his wife during their after death, after his death of his wife

by defendant No. 3, when he said that it Will be his (defendant No. 3's) bounden duty to look after me during my lifetime, perform funeral ceremonies after my death and after my death he will be the full and absolute owner and possessor of the above said moveable and Immovable property and he will look after my wife after my death, and keep her happy. Since the testator had made a provision casting a burden of defendant No. 3 for the care taking of himself and his wife after his death, including performing of funeral ceremonies, non-bequeathing of any properties in specific to the benefit and enjoyment of his wife, cannot be termed to be a suspicious circumstance, affecting the Will Ex.B9 executed by the husband of defendant No. 1 in favour of defendant No. 3 bequeathing the properties mentioned therein.

48. Coming to the second suspicious circumstance, namely presence of defendant No. 3, pleaded by the plaintiff, it is required to notice that all the witnesses in their evidence stated that apart from the wife of the testator, namely defendant No. 1, the propounder, namely defendant No. 3, and near about 20 to 30 other persons were present at the time of execution of the Will Ex.B9 by the testator. The scribe of the Will Ex.B9, D.W.2 in his evidence has categorically stated that he had scribed the Will Ex.B9 to the dictation of the testator and that near about 20 to 30 persons, including the wife of the testator was present. When the testator had executed the Will Ex.B9 in the presence of near about 20 to 30 persons, it cannot be said that the presence of defendant No. 3 who is the beneficiary of the Will Ex.B9, had created a suspicious circumstance affecting the very execution of the Will by the testator, and more so when it is not the case of the plaintiff that defendant No. 3 had influenced or induced the testator in any manner to bequeath all his properties in his favour, and at any rate, such inducement or influence cannot be inferred, when at the time of executing the Will Ex.B9 by the testator nearly about 20 to 30 persons, including the wife of the testator were present, and further the very contents of the Will Ex.B9, itself removes such a suspicion as the testator has himself in the Will stated that defendant No. 3 was the person who was taking care of him and his wife, and therefore, he intends to bequeath the properties in his name, and that after his death he has to take care of his wife. A reference in this context, be made to the judgment of the apex Court in *Sridevi and Ors. v. Jayaraja Shetty and Ors.*, 2005 (2) ALD 99 (SC). In the said case, a similar suspicious circumstance as to the presence of the propounder at the time of the execution of the Will was pleaded. Considering the facts and circumstances appearing therein, the apex Court held that the presence of the legatee at the time of the Will, which was pleaded to be a suspicious circumstance, stood dispelled as daughters of the testators were also present at the time of execution of the Will. The apex Court held thus:

Apart from establishing his presence in the house, no other part is attributed to Respondent No. 13 regarding the execution of the Will. Mere presence in the house would not prove that he had taken prominent part in the execution of the Will. Moreover, both the attesting witnesses have also stated that the daughters

were also present in the house at the time of execution of the Will. The attesting witnesses were not questioned regarding the presence of the daughters at the time of the execution of the Will in the cross-examination. The presence of the daughters in the house at the time of execution of the Will itself dispels any doubt about the so-called role which Respondent No. 13 had played in the execution of the Will. They have not even stepped into the witness box to say as to what sort of role was played by Respondent No. 13 in the execution of the Will.

49. In the instant case, inasmuch as near about 20 to 30 persons were present at the time of execution of the Will by the testator, the suspicion surrounding its execution in view of the presence of the legatee, stood dispelled, and more so when no inducement or coercion is attributed to the legatee.

50. The other suspicious circumstance pleaded by the plaintiff is that the testator at the time of executing the Will Ex.B9 was suffering from paralysis. Normally, people execute Wills only when they feel that they may not live for a longer time, and such Wills are normally executed to avoid disputes between family members. But when people execute the Wills, at the time of their execution, they should be in a sound and disposing state of mind, without his mental faculties impaired, and this is one of the important condition, that has to be kept in mind while considering the genuineness or otherwise of the Will. In this context, reference be made to the judgment of the apex Court in *Meenakshiammal (Dead) through LRs. and Ors. v. Chandrasekaran and Anr.* (supra), wherein it was held:

The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before it accepts the Will as genuine. Even where the circumstances give rise to doubts, it is for the propounder to satisfy the conscience , of the Court. The suspicious circumstances may be regarding the genuineness of the signature of the testator, the condition of the testator's mind, the disposition made in the Will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would normally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator.

51. Though the testator was suffering from paralysis, it may be noticed that the scribe and the attesting witness, namely D.Ws.2 and 3 in their evidence stated that the testator at the time of executing the Will was in a sound and disposing state of mind, and that he has put his signature on the Will. When the testator was in a sound and disposing state of mind and was capable of executing a Will, his suffering from paralysis, which has no relation to his mental stability, cannot be treated to be a suspicious circumstance, affecting the execution of the Will, and more so when it is not the case of the plaintiff that the testator at the time

of executing the Will was not in a sound and disposing state of mind.

52. Merely because D.W.2 is closely related to defendant No. 3, it does not create a suspicious circumstance, affecting the execution of the Will. May be D.W.2 is closely related to defendant No. 3, by at the time of execution of the Will, apart from 20 to 30 people, even the wife of the testator was present, and it is not that D.W.2 being close to defendant No. 3, had scribed the Will to the dictation of defendant No. 3, and in fact, D.W.3 in his evidence admitted that D.W.2 scribed the Will to the dictation of the testator, and that the testator having satisfied with the contents, had put his signature, to which he was an attesting witness.

53. The contention of the plaintiff that the deposition of P.W.5 to the effect that the Will Ex.B9 was brought into existence three months after the death of the testator cannot be accepted, for the reason that P.W.5 worked as Mali Patel, and he is not an illiterate, and it cannot be expected that a person who is literate will sign a Will which is brought into existence three months after the death of its executant. Though P.W.5 in his evidence deposed that the Will Ex.B9 was signed by the villagers after the death, he stated that the first signature on the Will belongs to him, and that the testator and his wife were on good terms, and that at the time of executing the Will about 25 persons attested, and if really the Will Ex.B9 was created by defendant No. 3 after the death of the owner of the properties, he should have brought the same to the notice of the police, but apart from signing on it, in his evidence he deposed that he did not inform the same to the police. Further in his evidence, he admitted that defendant No. 3 performed the last rites of the testator, and this testifies the contents of the Will Ex.B9, which states that defendant No. 3 shall perform the funeral rites of the testator.

54. Defendant No. 3, thus having completely removed the suspicious circumstances, which according the plaintiff, surrounded the execution of the Will Ex.B9 by the testator, the contention advanced on behalf of the plaintiff to the effect that as per the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, atleast two attesting witnesses have to be examined, and inasmuch as defendant No. 3 has examined only one attesting witness, the Will Ex.B9 should be held to have not conclusively proved by him. Before proceeding to consider this question, the law governing on this point may be noticed. In *Janki Narayan Bhoir v. Narayan Namdeo Kadam* (supra), the apex Court considered similar contention, as is raised in this appeal, and observed thus:

On a combined reading of Section 63 of the Succession Act read with Section 68 of the Evidence Act, it appears that a person propounding the Will has got to prove that the Will was duly and validly executed. That cannot be done by simply proving that the signature on the Will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at

least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a Will. To put in other words, if one attesting witness can prove execution of the Will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined in his evidence has to satisfy the attestation of a Will by him and the other attesting witness in order to prove there was due execution of the Will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the Will by other witness also, it falls short of attestation of Will at least by two witnesses for the simple reason that the execution of the Will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required u/s 63 of the Succession Act. Where one attesting witness examined to prove the Will u/s 68 of the Evidence Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. When one attesting witness is examined and he fails to prove the attestation of the Will by the other witness, there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

(emphasis supplied)

55. From the above it is clear that for a Will to be valid, as per Section 63(c) of the Indian Succession Act, 1925 it should be attested by two or more witnesses, and if the Will is to be used in evidence, as per Section 68 of the Evidence Act, 1872 at least one attesting witness, should be called for proving it. In the instant case, it has come in the evidence of D.Ws.2 and 3, namely the scribe and the attesting witness that near about 20 to 30 attested the Will Ex.B9 executed by the testator in favour of defendant No. 3, and that being the evidence, the execution of Will Ex.B9 by the testator in favour of defendant No. 3 satisfied the provisions of Section 63(c) of the Indian Succession Act, 1925, and inasmuch as defendant No. 3 through the evidence of D.W.3, the attesting witness could prove the execution of the Will Ex.B9 beyond doubt, there was no need for him to further examine another attesting witness. If defendant No. 3 had failed in proving the execution of the Will Ex.B9 through the evidence of the attesting witness, examined by him, then he would have been justified in contending that defendant No. 3 had not proved the execution of the Will Ex.B9 through the evidence of attesting witness, D.W.3., and as such, as per the provisions of Section 68 of the Evidence Act, 1872, there was every need for him to prove the same by calling another attesting witness. Merely because nearly 20 to 30 persons attested the Will Ex.B9, it does not mean that all or at least some or one more of the attesting witnesses, have to be examined for proving the execution of the same, and more so when the provisions of Section 68 of the Evidence Act, 1872 say that at least one attesting witness should be called to prove the execution of the Will, if it is to be used in evidence. Since defendant No. 3 could

prove beyond doubt the execution of the Will through the evidence of D.W.3, one of the attestors to the Will, there is no need for him to call another attesting witness to prove the same.

56. In the above premises, the appeal fails, and the same is accordingly dismissed.