

(2002) 07 MAD CK 0180
In the Madras High Court
Case No : C.M.A. No. 1020 of 1990

Maria Stella, Karunai Nesam and David Mohan Babuji APPELLANT
Vs

T. Joseph Catherine, T.X. Francis, A. Rosalin Stephen, N. RESPONDENT
Bernard, S. Christina, S. Philomina, S. Lidwin, S. Josephina,
rep. By mother and guardian and A. Rosalin Stephen

Date of Decision : 11-07-2002

Acts Referred:

Estate Duty Act, 1953 — Section 56
Evidence Act, 1872 — Section 45
Limitation Act, 1963 — Article 137
Registration Act, 1908 — Section 60
Succession Act, 1925 — Section 59

Citation : AIR 2003 Mad 270 : (2002) 3 MLJ 111

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : T.R. Mani, for S. Sounthar, for the Appellant; B. Kumar, for K. Chandrasekaran, for R2 to R8, for the Respondent

Judgement

K. Govindarajan, J.—One Mariakannammal, an Indian Christian had two sons and no daughters, of whom her first son Xavier predeceased her leaving behind him two sons and a daughter through his first wife and a daughter through his second wife. Another son Joseph had no male issues and had only two daughters. She executed a will on 10.8.1941. Thereafter, after making certain changes, she executed another will dated 20.10.1949. In 1954, she executed a codicil dated 15.8.1954 to the said will. Again on 22.12.1958 she executed another will, the registration copy of which is marked as Ex.A1. On 17.7.1959 she made a codicil, the registration copy of which has been marked as Ex.A2.

2. According to the respondents, confirming the said will and codicil, she executed two settlement deeds marked as Exs.A5 and A6 in favour of Joseph Catherine giving immediate effect to the legacy provided to her under the will. She also executed another settlement deed dated 10.10.1966, marked as Ex.A7.

According to the respondents, the will and the codicil executed on 22.12.1958 and 17.7.1959 had been referred to in the above said settlement deeds. She died on 25.3.1967. So, the will came into effect from the said date. After complying with the estate duty formalities, the respondents filed a petition in O.P.No.3 of 1985 on the file of the District Court, East Tanjore and it was transferred to Sub Court, Mayiladuthurai and renumbered as O.P.No.46/1985, seeking to issue probate of the will and the codicil, copies of which are marked as Exs.A1 and A2.

3. The 3rd appellant in this C.M.A. filed a counter and the appellants 1 and 2 adopted the same. In the said counter, it is stated that Mariakannammal was not in good health and not in a sound disposing state of mind at the time of execution of Exs.A1 and A2 by Mariakannammal. There were absolutely no reason for Mariakannammal to provide more properties for her predeceased son's son alone. According to the appellants, she had no intention to disinherit her daughter Thangamani and provide very little to the heirs of her second son (Joseph Nadar). According to them, the wills dated 10.8.1941 and 22.12.1958 and the codicil thereon were not executed by Mariakannammal and they are not true and valid. The said documents were not executed in sound disposing state of physical and mental condition of Mariakannammal. According to them, Mariakannammal's physical energy was very diminished right from 1940 and her mental power had also been impaired, and she was incapable of making the will. Francis and Stephen, the respondents 2 and 3 managed to benefit and enrich themselves over the other legitimate heirs to get such a will contrary to the intention of the testatrix. Even with respect to the building constructed by Francis in "D" schedule properties, it is the case of the respondents that the same was done from and out of the income and resources of common properties of Mariakannammal. They have also pointed out regarding the inordinate delay of many years to apply for probate, and on that basis it is stated that the will and codicil are not genuine. They have denied the statement that the original wills are with the appellants herein. It is further stated that the appellants are suppressing the original documents, as, if they are produced, they could not substantiate the contention of the appellants that the will and the codicil were executed by Mariakannammal.

4. Appreciating the pleadings, both oral and documentary, the lower court found that the will and codicil are genuine and so the petitioners before it are entitled to probate in respect of Exs.A1 and A2. Aggrieved, the respondents 1 to 3 in the O.P. filed C.M.A.No.172/89, and this Court remanded the case to the lower court for fresh disposal, and again the lower court granted probate accepting the case of the respondents. So the respondents 1 to 3 in the O.P. filed C.M.A.No.1020/90 and one Margaret filed C.M.A.No.1072/90.

5. Learned Senior Counsel appearing for the appellants submitted that the Original Petition though originally was allowed by granting probate, the same was challenged before this Court by filing appeal, and the learned Judge had

remanded the matter for fresh disposal after giving opportunities to the parties to examine the necessary witnesses. After remand, one of the attestors was examined as P.W.6, but his evidence is not at all useful to the respondents to discharge their burden contemplated under Sec.68 of the Indian Evidence Act. Since the respondents have failed to discharge their burden as contemplated under the said provision, the lower court should have dismissed the petition as the genuineness of the will has not been proved. He has also submitted that the respondents herein have not produced the original will to establish the execution of the same, especially when the same has been questioned by the appellants. He referred to the evidence in support of his submission that the testatrix was not in a good and sound state of mind and good health so as to execute the said will and codicil on her own accord. Learned Senior Counsel further submitted that to establish that the testatrix had executed the said will and codicil on her own free will, the respondents herein had relied on Exs.A5 and A7, the registration copies of the settlement deeds. Though in the said documents, Exs.A1 and A2 had been referred to, unless the respondents discharge their burden as contemplated under Sec.68 of the said Act, they cannot simply rely on the said recitals for the purpose of granting probate with reference to the said will and codicil. On the other hand, he further submitted that irrespective of the said reference in those documents about the will, the respondents ought to have proved the will independent of the same. He further submitted that there is no reason for not allotting the properties equally to all the heirs, and giving more properties to the petitioners before the lower court. According to him, though she died on 25.3.1967, the O.P. Was filed only in 1985. The learned Senior Counsel, on that basis has submitted that there is no reason for the delay in filing the petition, and such a delay substantiate the case of the appellants herein. With reference to the suspicious circumstances, he also referred to the evidence available on record in support of his submission.

6. Learned Senior Counsel appearing for the respondents submitted that since the other attestor and scribe could not be examined, and, P.W.6, one of the attestors could not recollect the facts, the respondents have established their case regarding the execution of the will and codicil as contemplated under Sec.71 of the Evidence Act. According to the learned Senior Counsel, the submission made on behalf of the appellants that P.W.6 is not useful to substantiate the case of the respondents and so the petition has to be rejected, cannot be sustained as the respondents have discharged their burden in establishing their case by adducing other evidence. Referring to Exs.A5, A6 and A7, learned Senior Counsel further submitted that in those documents, Exa.A1 and A2 have been referred to by the testatrix herself. The genuineness of the said documents, namely, Exs.A5 to A7 has not been disputed by the appellants in their counter. The learned Senior Counsel, referred to the fact that after executing the will and codicil marked as Exs.A1 and A2, the testatrix had lived for about 8 years and made certain changes in the said will and codicil by executing Exs.A5 to A7 during her lifetime. According to him, in view of the above, the genuineness of the will

Ex.A1 and the codicil Ex.A2 cannot be doubted. Referring to the earlier will executed in 1941, the learned Senior Counsel submitted that the will in question was executed in supersession of the earlier wills. Referring to the delay which has been very much relied on by the learned Senior Counsel for the appellants, the learned Senior Counsel appearing for the respondents submitted that the petition to grant probate on the basis of the will and the codicil could be done only after the proceedings before the Estate Duty Authorities were over. The said proceedings before them were started in March 1968 and they had ended only in 1995, and immediately thereafter the petition was filed. With reference to the possession of the original will, the learned Senior Counsel relied on Ex.A72 and submitted that the 3rd appellant produced the original will on 23.7.84 before the authorities, and after comparing the same, he got back the same, and so they cannot come forward with the plea that adverse inference should be taken for non-production of the originals. The learned Senior Counsel appearing for the respondents further submitted that to prove such production of the document by the 3rd appellant, the respondents filed a petition to call for the proceedings referred to in Ex.A72. Though the lower court had ordered the same, the concerned authority did not comply with the same, but they have challenged that order by filing Revision. The learned Senior Counsel also referred to Exs.A45 and A61 in support of his submission that Joseph Nadar accepted the will and acted on that.

7. With reference to the intention of the testatrix in distributing the properties, the learned Senior Counsel appearing for the respondents submitted that the testatrix wanted to give more properties to the son's sons and the appellants are only great grand sons through Joseph Nadar's daughter. The learned Senior Counsel referred to Ex.A1 in support of his submission that even according to the testatrix, if Joseph Nadar had son, the properties should be divided between the respondents and the said son. While referring to the arguments of the learned Senior Counsel for the appellants that Thangamani, the daughter was not given any property, the learned Senior Counsel appearing for the respondent referred to paragraph 5 of the will in which the reason for not giving any property has been explained.

8. With reference to the illness of the testatrix, which has been relied on by the learned Senior Counsel appearing for the appellants to contend that the testatrix was not in sound disposing state of mind, the learned Senior Counsel appearing for the respondents submitted that the appellants have not given any evidence in support of their case as mentioned in the counter.

9. On the basis of the above said pleadings and arguments on either side, now we have to examine whether the execution of the said will and codicil (Exs.A1 and A2) has been proved, and the respondents are entitled for the order of probate as prayed for.

10. The respondents herein filed an Application for probate of the will and codicil marked as Exs.A1 and A2. The testatrix also died on 25.3.1967. Though those

documents were registered, in view of Section 68 of the Indian Evidence Act 1872, the execution of the same has to be proved by examining at least one attesting witness. Though one attesting witness was alive and available for examining him to prove the execution of the same, he was not examined. So, even without complying with the said requirement u/s 68 of the Indian Evidence Act, probate was issued with respect to the said will and codicil. So, the appellants filed Appeal in C.M.A.No.172/89. In the order dated 17.10.89, the learned Judge remanded the matter to the lower court for fresh disposal in accordance with law. Such remand was made for the purpose of examining the available attessor Swaminathan in order to establish the execution of the will and the codicil marked as Exs.A1 and A2. Though the learned Judge has given certain findings on facts, ultimately observed that the court below should not in any manner be influenced by any of the observations contained in the order, and the court below was directed to deal with and dispose of the matter on consideration of the entire oral as well as documentary evidence already on record and also the evidence of the attestors to the will and codicil if evidence is made available to the court by the respondents therein.

11. After remand, before the lower court the only available attessor Mr.Swaminathan had been examined through Commissioner. No other additional documents were filed after the remand. It is no doubt true that the original documents are not before the court and only the registration copy of the same have been marked as Exs.A1 and A2, and even after the remand though only the available attessor was examined, his evidence is not useful to the respondents to prove the execution of the will. After appreciating the available oral and documentary evidence and also the evidence of Swaminathan, the learned Sub-Judge again allowed the application in the order dated 31.6.90 and granted probate.

12. According to the learned Senior Counsel appearing for the appellants, even if the propounder could not prove the execution of the will by examining anyone of the attestors as contemplated under Sec.68 of the Evidence Act, it should be proved by adducing other evidence. According to him, there should be an evidence by a person who saw the testatrix signing the will in the presence of the attestors, and the attestors attesting the said document in the presence of the testatrix. Learned Senior Counsel further submitted that there is no such evidence available in this case and any other evidence including Exs.A5 to A7 will not support the respondents to discharge their burden to establish the execution of the will and codicil by the testatrix.

13. The onus lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. Every presumption will be made in favour of the execution and attestation in the case of a will regular on the face of it and apparently duly executed.

14. The Apex Court had also considered the correct legal position in the matter

of proof of wills. In the decision in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, , the Apex Court has held as follows:-

"(18).What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S.67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss.59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

(19)However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be last will and

testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated."

15. If the attesting witness is not available and even available if he is not able to recollect the facts, under Sec. 71 of the Indian Evidence Act, the propounder can prove the execution of the will by any other evidence that may be available and it is not necessary that the scope of proof should be as submitted by the learned senior counsel appearing for the appellants. This view of mine is supported by the decision in *Pateshwari Prasad v. Shankar Dayal*, 1924 All 217.

16. Even the Calcutta High Court as early as in 1916 in the decision *Brahmadat Tewari v. Chaudan Bibi*, AIR 1916 Cal 374, has held as follows:-

"....The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will...

.....

..It is not necessary, however, that affirmative evidence should be forthcoming that the testator did, as a matter of fact, see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively, or as Walde, J., said in *re Trimnell*, (1865) 2 Jur 248, the true test is whether the testator might have seen, not whether he did see, the witnesses sign their names *Newton and Thomas v. Clarke*, (1839) 2 Curt 320." (Emphasis is applied)

17. The Division Bench of the Calcutta High Court in the decision in *Manindra Nath Ganguli v. Durga Charan Ganguli*, ILR 1949 Cal 471, held that where the attesting witnesses or some of them prove hostile and unreliable and they could not recollect the facts, the probate Court is not powerless to declare in favour of

the will and, if from some other evidence on record and the circumstances taken as a whole, it is in a position to hold that the will was duly executed and attested, it will pronounce in favour of its validity."

18. While construing Sec.71 of the Evidence Act, the Division Bench of the Patna High Court in the decision in *Mr.MankiKaur v. Hansraj Singh*, AIR 1938 Patna 301, has held as follows:-

"Does it mean that witness was called or available whose absence was not otherwise Act, or does it mean one witness of whom S. 68 speaks? Speaking for myself I would very much rather decided this question after a much more careful consideration than is possible in the circumstances of this case. But I do most certainly hold the view that whatever the English law may be, Ss.68 to 71,Evidence Act, do not necessarily state it, and the matter is governed by the expression found in S. 68, which is as follows: "until one attesting witness is called for the purpose of proving its execution." If, the words had had been "at least one attesting witness is called to prove and has proved execution", the matter would have been different and I do not think in that case that there could be any doubt that the argument advanced by the applicant would be a correct one. But in my view the words I have read indicate that it is incumbent upon the plaintiff to call at east one witness,and if that witness denies or does not recollect the execution of the document, then the execution may be proved aliunde."

19. The Division Bench of the Kerala High Court in the decision in *Ittoop Varghese Vs. Poullose and Others*, , has held as follows:-

"(5)When the Court is satisfied as in this case that the witnesses deliberately and falsely denied that they attested the will, the Court is entitled to look into the other circumstances and the regularity of the will on the face of it and comes to the conclusion on the question of attestation...."

20. In the present case, the will and the codicil are registered. While considering the importance of Registration, the Privy Council in *Mohammed Ihtishan Ali v. Jamna Prasad*, AIR 1922 P.C. 56,has held that registration is a solemn act and if no other evidence is available, the Court can presume that the Registrar performed his duty of satisfying himself that the document presented to him for registration was duly executed by the executant and the executant was duly and properly identified before him.

21. Even the Bench of Mysore High Court in the decision in *Huthegowda v. Chennigegowda*, A.I.R.1953 Mys.49, has held that the evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed.

22. In *Revanna v. Dr.A.V.Ranga Rao*, AIR 1952 Mys. 119, it is observed that in cases where it is impossible for any person to prove execution of a document on account of the death of all the persons concerned, the best and the only possible evidence that may be available is that of a certified copy of the registered

document and that in such cases, a presumption would arise u/s 60 of the Registration Act along with Section 114 of the Evidence Act. (See also Kashibai Martand Vs. Vinayak Ganesh and Others, . It will be seen that in the ultimate analysis, the problem in each case is, "has the best evidence been adduced on the facts of each case"; in the instant case, we have not the slightest hesitation in holding that this essential test for arriving at the truth has been amply satisfied.

23. Considering the above decisions, the Division Bench of this High Court in the decision in Irudayammal and Others Vs. Salayath Mary, , has held that, it is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registration officer u/s 60 of the Registration Act is relevant for proving execution.

24. From the above settled principles of law, it is clear that it is not necessary to give positive evidence to prove that the testatrix did see the attesting witnesses put their signatures or that attesting witnesses saw the testatrix sign the document. Where there is proof of signature, everything else is implied till the contrary is proved. In the absence of witnesses who are either dead or cannot be brought to court or cannot recollect the facts, the secondary evidence is permitted. Since the will and codicil, viz., Exs.A1 and A2 are registered, it is some evidence of its execution by the person by whom it purports to have been executed. Now, on that basis we have to decide the issue raised in this case as the attestor Swaminathan has not deposed that he had seen the testatrix signing Exs.A1 and A2.

25. In the present case, the Application has been filed to issue probate on the basis of Exs.A1 and A2. It is claimed that one Mariakannammal had executed the said documents, who died on 25.3.67. Her husband David Nadar died in 1928. The said Mariakannammal had two sons, namely Xavier and Joseph Nadar and two daughters, namely, Thangamaniammal and Joseph Catharine, the 1st respondent herein. He had no issues. The petitioners 2 and 3 in the O.P. are the children of her another son Xavier, through his first wife Kalsen Mary. Under the said will, "A" schedule property was given to her son Joseph Nadar, the husband of 1st appellant herein, and Francis and Stephen equally, one third each, with the direction to clear the family debts and to perform her last rites. Out of the "B" schedule property, the land measuring 20 mahs was given to Joseph Catherine, her daughter for her lifetime and after her death, 10 mahs of lands should go to 3rd appellant, Babuji, the grandson of Joseph Nadar and the 1st appellant absolutely, and the balance 10 mahs should go to Francis and Stephen, the respondents 2 and 3 herein. Another 15 mahs of land was given to Francis. Stephen was also given the land measuring 15 mahs. Victoria, the granddaughter was given 3 mahs for her lifetime with a reminder to her son. Another 4 mahs was earmarked for performing pooja in the Church and Annadhanam to poor which should be done by Joseph Nadar and after his

death, Francis and Stephen. "C" schedule properties were given to Joseph Nadar, her son, for his lifetime and after his death they should go to Francis and Stephen. The building bearing Door No.110 in "D" schedule, in T.S.No.817/1A and 817/1B was given to Joseph Catherine, her daughter for her lifetime and after her death it should go to Babuji, the 3rd appellant. Door No.27 in "D" schedule properties was given to Francis absolutely after the death of Joseph Nadar. Till his death, he was permitted to enjoy the income from the house properties. "E" schedule properties were given to Joseph Nadar. It is stated that in case Joseph Nadar gets male descendent, the "C" and "D" schedule properties have to be divided into 3 shares, one share should be given to Joseph Nadar and his male descendent and Francis and Stephen shall get one share each in them. Under the codicil she gave 10 mahs instead of 7 mahs of land to her daughter Joseph Catherine, but it should be enjoyed by her during her lifetime and thereafter it should be taken by the 2nd appellant herein. Similarly, she provided the entire income from the "D" schedule properties to Francis instead of Stephen and Francis. She had also provided a right of residence in the family residential house in favour of the 1st appellant, wife of Joseph Nadar.

26. She had stated in Ex.A1 why she wanted to execute another will altering the will dated 20.10.1949. Again the rights given under the will and codicil had been altered by the testatrix herself under Exs.A5, A6 and A7 settlement deeds dated 18.5.61, 14.10.63 and 10.10.66 respectively. Ex.A65 is the original of Ex.A5. P.W.4, the 1st respondent had spoken to about the execution of Ex.A5 and her mother's health condition at the time of such execution of the said documents. It is clearly stated so under Ex.A5, which is not under challenge. At the request of the 1st respondent, the properties given to her under the will, had been given under the settlement deed to the 1st respondent, so as to enable her to get the properties immediately to enjoy the same even during the life time of her mother. As stated in the document, the said change was made as requested by the 1st respondent, Joseph Catherine. Even under Ex.A6, referring to the will Exs.A1 and the Codicil Ex.A2, she gave the right of enjoyment with respect to the property mentioned therein under the said settlement. It is also stated that the said property was given to her in modification of Ex.A1. It is also specifically stated that after the lifetime of the settler, the 1st respondent, the property should go to the person mentioned under the will and the codicil. She had also executed Ex.A7 settlement deed in favour of Victoria. Under the will, Victoria was given life interest with respect to the property in question. She is the daughter of Xavier, the son of Mariakannammal. Even under Ex.A7, the testatrix had referred to the will and codicil. As requested ;by her grand daughter, the testatrix executed the said settlement deed Ex.A7 giving absolute right with respect to the portion of "D" schedule properties mentioned in the will, giving life interest to the said Victoria. Such a settlement was executed under Ex.A7 to enable the said Victoria to get possession of the land given to her even during the lifetime of the testatrix, for the purpose of construction of house. The said document has been spoken to by the scribe p.W.5. In all these three documents, the testatrix had

referred to the will and codicil, Exs.A1 and A2. It is relevant to mention here that pursuant to the settlement deeds,the settlees acted on those documents. Even in the counter filed by the 3rd respondent,they have not disputed the execution of those documents. Moreover, the respondents have examined P.W.4,the settlee under Exs.A5 and A6, and P.W.5,the scribe under Ex.A7, to speak about these documents. As already stated,the settlor had not only mentioned about her will Ex.A1 and the codicil Ex.A2, dated 22.12.58 and 17.7.59 respectively, but also it is specifically stated that the reasons for altering the bequeath given under the said will and the codicil, by executing the said settlement deeds. The above said fact clearly establishes that the testatrix had executed the will and the codicil with her free will and mind.

27. Moreover, P.W.1 the Registrar had deposed that he was working as Sub-Registrar during 1957-1960. In the chief examination,he has stated as follows:-

@capiy mth; vGjpajhfj; bjhptpj;J mjpy; cs;s ifbaGj;J mtUilaJ vd;gija[k; xg;g[f;bfhz;L mij gjp[t bra;a rk;kjpj;jhh;/@

He has also deposed as follows:-

@mij gjpt[bra;a[kbghGJ ey;y kd epiyapy; ,Ue;jhh;/ k/rh/M/2 capypy; mDge;jj;ija[k; ehd;jhd; gjpt[bra;Js;nsd;/@

The above said evidence also gives some support to the case of the respondents to prove the execution of Exs.A1 and A2. According to him, the testatrix had admitted her signature in his presence. P.W.3, the person who identified the testatrix had also deposed that he signed the document as an identifying witness. He has also deposed that the testatrix was in sound disposing state of mind at the time of execution of the will.

28. The attesting witness Swaminathan had deposed that he knows the family of the testatrix, Mariakannammal. He admits that he attested the documents of Mariakannammal. He also admits that he used to mostly sign as it has been done in Exs.A1 and A2. He has also not denied that he attested Exs.A1 and A2.

29. The husband of the 1st appellant and the father of the appellants 2 and 3, Joseph Nadar had sold certain properties under Ex.B44 dated 3.11.70 got under the will. The fact that he got the properties mentioned under Ex.B44, under Ex.A1 has also been mentioned in the said document. That shows that Joseph Nadar had not only accepted the genuineness of the will Ex.A1 executed by his mother but also enjoyed the benefits got under the said will. Under Ex.A61 an objection was raised by the said Joseph Nadar, son of the testatrix, along with Stephen and Francis before the Authorised Officer (Land Reforms),Mayuram. In paragraph 3 of the said objection it is stated that Joseph Nadar is entitled to a life interest in the properties and the others are entitled to the property after his lifetime. They have also mentioned about the will executed by late Mariakannammal. Before the Authorised Officer (Land Reforms), Joseph Nadar, who has been examined as P.W.1, had also admitted the execution of the will

Ex.A1. The said deposition has been marked as Ex.A62. Even in the estate duty proceedings, the said Joseph Nadar filed the return on the basis of the bequeaths to various persons in the will and codicil. Even under Ex.A74, the sale deed executed by Joseph Nadar in favour of one Rajangamalai, selling the property got under the will, he has specifically mentioned that he got the said property under the will executed by his mother. Similarly, under Ex.A75 he executed the sale deed in favour of one Kandasami. Even from the above said documents, it is clear that Joseph Nadar, the husband of the 1st appellant and father of appellants 2 and 3 had not only admitted the execution of the said will by his mother but also acted further as contemplated under Exs.A1 and A2. When Joseph Nadar himself did not dispute the execution of the said will, the persons claiming through him cannot sustain their objection regarding the genuineness of the said will. Moreover, during the life time of Joseph Nadar, till 15.10.84 when he died, the appellants have not raised any dispute with respect to Exs.A1 and A2. though Mariakannammal died on 25.3.67 and though various transactions had taken place on the basis of the said will. But after the death of Joseph Nadar, the 3rd appellant filed a suit in O.S.No.754/84 seeking a decree for injunction against the defendants therein.

30. On appreciation of the above evidence as a whole, it has to be found that the lower court is correct in holding that the respondents have discharged their burden in establishing that Exs.A1 and A2 are the will and codicil executed by Mariakannammal and the same are her last will and codicil.

31. Learned Senior Counsel appearing for the appellants submitted that the said will is an unnatural one as the properties were not allotted equally to the heirs of Mariakannammal and so the said will is surrounded by suspicious circumstances. On that basis learned Senior Counsel submitted that the probate issued by the lower court without removing the cloud cannot be sustained in law. The following circumstances are pointed out as unnatural under the said will. Most of the properties were allotted to the said Francis and Stephen, the grandsons of Mariakannammal, the testatrix, through his son Xavier. Neither Joseph Nadar nor appellants 1 to 3 were not allotted sufficient properties and also Thangamani ammam, the daughter was not allotted any property. The said unnatural distribution of the properties has been properly explained in the evidence and also in the said will itself. Though the said Mariakannammal had two sons, namely, Xavier and Joseph Nadar, Joseph Nadar had only daughters at the time of executing the said will. Xavier had two sons, namely, Stephen and Francis. With a view to give properties to male heirs of her family through her son, major portions of the property had been allotted to her grand sons, and the rights of Joseph Nadar also protected; by giving certain properties, namely, giving life interest. Even under Ex.A1, it is stated that if Joseph Nadar gets male child, then the properties should be divided into three shares, one share to Joseph Nadar and his son or sons, and the other one-third share to Stephen and Francis each. These reasonings and the intention of Mariakannammal have to be accepted for not giving equal right to all. Her intention is that the properties

should go only to the male heirs of the family. Moreover, even under the will, it is stated that Thangamani Ammal, her daughter was not given any property, as she was given properties under the earlier wills. This Court cannot sit on Appeal on the intention of the testatrix regarding the distribution of her properties.

32. While considering similar circumstances and objections raised, the Apex Court in the decision in *Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others*, , the Apex Court has held as follows:-

"As to the first circumstance, we would observe that this should not raise any suspicion, because the whole idea behind execution of will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of will of course, it may be that in some cases they are fully debarred and in others only partially. As in the present case, the two executors are sons of a half-blood brother of Saroj Bala, whereas the objectors descendants of a full blood sister, the disinheritance of latter could not have been taken as a suspicious circumstance, when some of her descendants are even beneficiaries under the will."

In view of the above, the said submission of the learned Senior Counsel appearing for the appellants cannot be countenanced.

33. The next submission of the learned counsel appearing for the appellants is the delay in filing the Application which gives rise to doubt about the genuineness of the will. The testatrix died in 1967 and the application was filed on 5.1.85. The learned Senior Counsel relied on the decision in *N. Saroja Vs. Sri Vidya Chits and Finance (P) Ltd. and Another*, , has submitted that the delay in taking steps to get a probate gives rise to suspicion. In the said decision, no doubt the learned Judge has considered the said issue and held as follows:-

"9. The next question that has to be considered is whether there is any justifiable reason for the delay even if Art.137 of the Limitation Act is not applicable, since it has been held in the decision reported in the matter of last will of *Smt. Jayalakshmi - S. Krishnaswami*, (1990) 1 L.W. 337, that though the proceedings filed for grant of probate or Letters of Administration may not come within the mischief of Art.137 of the Limitation Act, yet the delay aspect is relevant to treat the genuineness of the will propounded and that delay in taking steps gives rise to suspicion and the longer the delay the stronger the suspicion. It is to be noted that the learned counsel appearing for the appellant contends that the application is barred by limitation since the petitioner had knowledge when the second respondent has filed his counter in the Execution Petition. The second respondent was a judgment-debtor against whom a preliminary decree has been passed. In the final decree proceedings, the second respondent has not stated that his wife has filed O.P.No.43 of 1979 and has obtained Letters of Administration on 23.6.1979. It cannot be stated that he was not aware of the grant of Letters of Administration when the final decree proceedings were pending from 1977. The final decree has been passed only on 27.6.1979 after the grant of Letters of Administration. Therefore, he had sufficient time to raise this

plea before the final decree could be passed against him three days after the grant of Letters of Administration in favour of his wife. It cannot be stated that he was not aware of the alleged will in favour of his wife till the final decree is passed. In the above circumstances, the failure of the second respondent to say that his mother had executed an unregistered will in favour of his wife and she is taking steps to get the Letters of Administration and had obtained Letters of Administration on 23.6.1979 are all to be noted. The petitioner, who has filed the execution petition, therefore, might not have taken the objection raised by the second respondent in the execution petition, that Letters of Administration has been granted in favour of his wife, seriously on acknowledgment of his failure to take such a stand during the final decree proceedings. Therefore, it cannot be stated that the petitioner had knowledge of the Letters of Administration being granted and he has committed delay in filing the application to revoke the Letters of Administration. Thus viewing from any manner, it is thus seen that the order passed by the Principal District Judge, Tiruchi revoking the Letters of Administration is well-founded and does not call for any interference by this Court and the appeal is liable to be dismissed as no merits."

34. In the present case, the respondents have explained the delay properly. Under Sec.56 of the Estate Duty Act, the petition to probate a will can be filed only after paying the estate duty. The documents Exs.A45 to A47 clearly establish that such proceedings were initiated in March 1968 itself. The Estate Duty proceeding ended in 1985, and so immediately the present petition was filed. So, the appellants cannot rely on the said fact that the Application was filed in 1985, though the testatrix died in 1967.

35. The testatrix died nearly after 8 years from the date of execution of the said will and codicil and so the presumption under Sec.114 of the Indian Evidence Act has to be applied. While considering the similar circumstances, the learned Judge of this Court in the decision in Jayalakshmi Ammal v. K.Lakshmi Iyengar, 1992-2-L.W. 523, has held as follows:-

"4.It is not in dispute that the propounder was the younger sister of the deceased plaintiff. In her affidavit she has described herself as a retired Professor of Education. In the will her educational qualification is stated to be M.A.,M.Ed. The will gives her address as 3, Dharma Prakash Chawl at Kudand in Bilaspur, Madhya Pradesh State. According to the recitals in the will, she was working as Principal of a Women's College at Bilaspur at that time. No attempt has been made by the petitioner to contest the correctness of the said recitals in the will as regards the status and educational qualification of the respondents. The testatrix was herself was retired Medical Officer of the Pondicherry Government. She was living in Bangalore and she had been to Thanjavur in connection with the obsequies ceremonies following the death of her husband. Thus, the undisputed facts are that the testatrix was a highly educated person with rich worldly experience and had retired from Government service, whereas the legatee, who was her sister, was also highly educated, working as the head of

an educational institution and living far away from the testatrix. The will in question was undoubtedly presented for registration on 27.1.1976 and registered as Document no.4 of 1975 in Book 3 Volume 122 on 2.1.1976 by the Joint Sub Registrar-I at Thanjavur. The said Sub Registrar has appeared before Court and given evidence that he registered the will in the normal course of his official duties. No suggestion has been made in the cross-examination that he was interested in giving evidence in support of the respondent. The very fact that he deposed that he did not know the testatrix personally previously, shows that he was speaking the truth before the Court. His evidence is sufficient to make out that a person claiming herself to be Dr.Kamala Rajagopalan appeared before him and presented the will for registration stating that it was executed by her. The testatrix died nearly 12 years after the registration of the will. Unless a definite case is pleaded by the petitioner that somebody was interested in impersonating the testatrix as early as in 1976 and getting a will registered as if it was her will, the Court is not entitled to make surmises and assume anything contrary to the document. The Court is bound to apply the presumption u/s 114 of the Evidence Act and hold that the will was presented for registration by its execution and registered properly in accordance with law. The plea of undue influence or coercion cannot stand scrutiny for a moment. There is not even a plea that the testatrix was of weak intellect so as to be influenced unduly by another person. It is too much to say that the undue influence or coercion continued for a period of nearly twelve years and the testatrix had no opportunity to change the will during her lifetime. The plea of forgery is equally reckless. The undisputed facts already referred to are sufficient to throw out the same."

36. The learned Senior Counsel appearing for the appellants further relied on the fact that the original of Exs.A1 and A2 had not been produced, especially when the genuineness of the same had been disputed. According to him, unless the original is produced the execution of the will by the testatrix cannot be established. It is the case of the learned Senior Counsel that there is an evidence to show that the original will was received back and is with Francis, the second respondent, and in spite of the same, they were not produced. Referring to his evidence as P.W.2, he has stated that he had produced the original will and the codicil before the municipality for the purpose of changing the name in the property tax register and also before the Tahsildar for transfer of patta. Subsequently, the 3rd appellant produced the will on 23.7.87 and he took back the same after the Special Revenue Inspector, authenticated by himself as true copy in the typed copy, in token of having verified the original document. This has been revealed from the letter of Agriculture Income Tax Officer, Mayiladuthurai dated 5.8.86, and the said letter was summoned by the Court order dated 9.10.87. But the same was not produced by the said Officer. So, in view of the said dispute regarding the possession of the will, the submission of the learned senior counsel appearing for the appellants on the basis that the original will was not produced cannot be sustained.

37. The remaining question is whether the testatrix had executed the documents

Exs.A1 and A2 in sound disposing state of mind. Regarding the illness, except the counter affidavit, no other evidence was adduced by the appellants. It is not in dispute that the testatrix was alive for 9 years from the date of execution of Exs.A1 and A2. She executed three settlement deeds after applying her mind to the recitals in the will and request of the settlees to execute the settlement deeds. Even according to R.W.2, the 3rd appellant, he was 15 years old when the testatrix died. So he should be only 6 years old at the time of execution of the said will and codicil. R.W.2 had deposed that he was studying at Madras till 1967. He has also admitted that the testatrix used to visit him at Madras. When he admits that she was able to visit the 3rd appellant when he was studying at Madras till 1967, the case of the appellants that the testatrix was not in sound disposing state of mind throughout cannot be accepted. Even if the appellants are able to establish that the testatrix was ill, that does not mean that she was not in sound disposing state of mind to decide the family matters and executing the documents. Ex.A68, dated 25.12.1954 clearly establishes that she entered into a partition along with others, which clearly establish that she was able to deal with the affairs of the family members of the family. P.Ws.1 and 2 have deposed about the sound state of mind of the testatrix during the relevant point of time. In the present case, the respondents have not established that the testatrix was not in sound disposing state of mind to execute the documents Exs.A1 and A2.

38. The lower court has elaborately dealt with all the relevant documents and ultimately found that the execution of the will and the codicil Exs.A1 and A2 by Mariakannammal had been established and the said documents are genuine and acted upon even by the predecessors-in-title of the appellants.

39. For the foregoing reasons, I do not find any reason to interfere with the judgment and decree of the lower court. Accordingly, this C.M.A.No.1020/90 is dismissed with costs.