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**(2012) 08 KAR CK 0214**

**In the Karnataka High Court**

**Case No : Regular First Appeal No. 430 of 2010**

Mrs. Maya Akber and Mrs. Bina Philipose

APPELLANT

Vs

Mrs. Rani Menon, Mr. Aman Varghese and Ms. Priya

RESPONDENT

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**Date of Decision : 16-08-2012**

**Acts Referred:**

Evidence Act, 1872 — Section 68

Succession Act, 1925 — Section 213, 222, 276, 63

**Citation : (2012) 08 KAR CK 0214**

**Hon'ble Judges : A.S. Bopabna, J**

**Bench : Single Bench**

**Advocate : S Sreevatsa for M/s. Lexplexus and C.M. Poonacha, for the Appellant; Ajoy Kumar Patil, for C/R-1 R2 and R3 Served, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

A.S. Bopabna, J.—The appellant:- herein are defendants No.1 and 2 in O.S. No. 4059/2004. The said suit was filed by the first recpndent herein seeking for partition and separate possession of her share in the suit schedule property. The trial Court after considering the case has decreed the suit by its judgment dated 30.01.2010 holding that the plaintiff is entitled to 1/4th share in the suit schedule property. The defendants No.1 and 2 claiming to be aggrieved by the same are before this Court in this appeal. The parties would be referred to in the same rank as assigned to them before the Court below for the purpose of convenience and clarity.

2. The plaintiff claims that the plaintiff aid defendants No. 1 and 2 are the daughters of late E.A.Varghese. The defendants No. 3 and 4 are the children of her brother late Mohan Varghese. It is her case that her father was the absolute owner of the suit schedule property having purchased the same under a sale deed dated 26.03.1955. The father who had retired from the Indian Air force was living in the said house along with his family after his retirement till he died on 25.05.1980. He had left behind the mother of the plaintiff, Mrs.Mary Varghese

and the parties herein as also the brother of the plaintiff. The suit schedule property had been bequeathed by their father to their mother under a WILL dated 21.10.1968. The said WILL was probated in C.P. No. 5/1981 and as such their mother was the absolute owner exercising all rights of ownership until she died on 6.6.2000. The brother of the plaintiff has predeceased their mother. According to the plaintiff, their mother late Mary Varghese died intestate leaving behind the plaintiff, defendants No. 1 and 2 and the defendants No. 3 and 4 who are the lineal descendants of her brother. It is therefore averred that after the death of their mother, the plaintiff and defendants have succeeded to the estate including the suit schedule property. It is in that context she contends that she is entitled to 1/4th share. The plaintiff further claims that the first defendant handed over 6 fixed deposit receipts and one pair of diamond earrings to the plaintiff on 18.04.2004. The plaintiff has received the same without prejudice to claim the share in the other movable and immovable properties left behind by her mother. According to her, she had demanded her legitimate share at that point in time itself and defendant No.1 had promised to give the same at the earliest.

3. The plaintiff further states that the first defendant is now all of a sudden claiming herself to be the sole surviving legal representative entitled to succeed to the suit schedule property and is making hectic attempts to alienate the suit schedule property in favour of third parties without the consent of the plaintiff. Since the plaintiff had knowledge of the same during May 2004 has chosen to file the suit for partition and separate possession of her legitimate share. It is further pleaded that the first defendant having handed over the fixed deposit receipts and a pair of diamond earrings of their mother to the plaintiff has acknowledged that the plaintiff is entitled for a share in the estate left behind by their mother and as such the first defendant is estopped from alienating the property. The plaintiff has also made reference stating that defendant No.1 is claiming that their mother had executed a WILL bequeathing all the properties in her favour and had filed P & SC No. 15048/2000 for grant of probate but, was subsequently unable to prove the said WILL and as such the defendant No. 1 withdrew the said case on 31.07.2002. In that context, plaintiff contends that her share be granted to her.

4. On being served with the suit summons, the third defendant did not choose to appear and was placed ex-parte. The defendants No. 1, 2 and 4 appeared but, the first defendant alone filed the written statement. The relationship between the parties and the fact that the property in question originally belonged to late E.A.Varghese and was bequeathed in favour of late Mary Varghese under a WILL dated 21.10.1968 and on the same being probated, late Mary Varghese became the absolute owner of the property is not disputed. However, the first defendant contended that her mother i.e., late Mary Varghese died on 06.06.2000 and she had left behind a WILL dated 07.05.1986. It is her case that under the said WILL dated 07.05.1986, the property in question was bequeathed in favour of the first defendant and her brother late Mohan Varghese. The brother is stated to have

died on 02.02.1998 and since he had predeceased their mother, the first defendant and the legal heirs of late Mohan Varghese are entitled to the property. It is further explained that after the death of late Mary Varghese, the first defendant filed a petition in P & SC No. 15048/2000 in the City Civil Court seeking probate of the WILL dated 07.05.1986. The plaintiff herein had filed a caveat in the said proceedings and appeared through counsel on 20.01.2001. However, due to the amendment to Section 213 of the Indian Succession Act (CIS Act" for short), the petition was withdrawn as seeking probate of a WILL executed by an Indian Christian was not compulsory. On withdrawing the petition, the WILL dated 07.05.1986 was acted upon and the Khatha in respect of plaint schedule property was changed.

5. In order to justify the contents of the WILL whereunder the plaintiff has been excluded, the first defendant ought to put forth the contention that the parents of the plaintiff and the plaintiff did not enjoy cordial relationship and she never even visited nor had communication though they were aging and ailing. It is averred that after the marriage of the plaintiff in the year 1951, the relationship was estranged. The first defendant contends that she took care of the parents in their old age. The second defendant who is their sister and lives in the same vicinity had helped the first defendant in taking care of the parents. When their father passed away on 25.05.1980, the plaintiff came from Chennai to attend the funeral but, after that did not keep contact with her mother and she had come for the funeral of the mother on 06.06.2000 when the death was informed to her. The first defendant also refers to certain investments made by her mother in fixed deposits in the joint names of herself and her children respectively. The said fixed deposits were renewed from time to time till the mother's death. Thereafter the matured deposit receipts were handed over by the first defendant to the respective children. Insofar as the fixed deposits in the joint names of the mother and the plaintiff, the same was handed over to the Advocate of the plaintiff along with the diamond earrings as desired by their mother. The same was collected on behalf of the plaintiff on 18.04.2004. On having received the same, the present suit has been filed with mala fide intentions. The first defendant has further referred to the averments made in the plaint with reference to each paragraph and has disputed the claim of the plaintiff. The valuation made by the plaintiff is also disputed with reference to the value of the property.

6. The Court below on taking note of the rival contentions has framed as many as 5 issues for consideration. However, issue No. 1 was recast while considering the matter. The issues read as hereunder:

1. Whether the plaintiff proves that the suit schedule property is liable to be partitioned as contended in para 3 of the plaint ?

2. Whether the defendant Nos. 1, 2 & 4 proves that the mother Smt. Mary Bai has executed a Will dated 7.5.1986 and bequeathed the suit schedule property in favour of defendant No. 1 and her another son Late Mr. Mohan Varghese, who is

the father of defendant Nos. 3 & 4?

3. Whether the defendant Nos. 1, 2 & 4 further prove that as per the Will dated 7.5.1986, the defendant No. 1 had handed over the diamond ring to the plaintiff and as such, she is not entitled to the partition?

4. Whether the plaintiff is entitled to the partition and separate possession? If so, to what extent?

5. What Order or decree?

7. The parties in order to discharge the burden cast on them have tendered their evidence. The son of the plaintiff as general power of attorney holder examined himself as PW.1 and relied on documents at Ex.P1 to P25. The first defendant examined herself as DW.1 and one of the witnesses to the WILL dated 07.05.1986 was examined as DW.2. The documents at Exhs.D1 to D12 were marked. The Court below has thereafter decreed the suit holding that the plaintiff is entitled to one-fourth share and its separate possession.

8. Sri Srivatsa, learned senior counsel appearing on behalf of M/s. Lex Plexus, learned counsel for defendants No.1 and 2 would contend that the Court below has erroneously rendered a finding that the WILL has not been proved. It is contended that the plaintiff, who was aware of the WILL being executed by their mother, has not challenged the said WILL but, has sought for partition in the property which is the subject matter of the WILL. Hence, the suit itself is not maintainable. At an earlier point, since the law required that the WILL was to be probated, a petition in that regard had been filed and the plaintiff having impleaded herself therein, was aware about the WILL. The petition was not required to be pursued in view of the amendment to Section 213 of the Indian Succession Act. Though the petition was withdrawn, the plaintiff did not seek to question the WILL in any other forum. In the instant suit, though reference is made in the plaint, the invalidity of the WILL has not been pleaded. Despite there being no pleading and proof to indicate suspicious circumstances, the Court below could not have imagined certain situations as suspicious circumstances and answered the same in the manner as it has done. In the absence of pleading to that effect, all that the first defendant as a Propounder of the WILL was required to do was to prove the execution of the WILL and the same has been done in accordance with law by examining one of the attesting witnesses to the WILL. Hence, when the WILL has been proved and if it was to be disbelieved on the ground that the suspicious circumstances have not been dispelled, the same could have been done only if the plaintiff had pleaded specifically with regard to the suspicious circumstances. In the instant case, neither the plaintiff pleaded anything with regard to the WILL not being valid, though having indicated that the WILL has been executed and has also not chosen to file a rejoinder with leave nor has a counter claim been raised. Even otherwise, from the materials which were available before the Court, there were no suspicious circumstances arising in the instant case nor was it made out. The observations made by the

Court below calling them to be suspicious circumstance is also not sustainable inasmuch as the same do not constitute 'Suspicious circumstance' to invalidate a solemn document. The probate petition was filed on 15.09.2000 and the memo to dismiss as withdrawn was allowed on 31.07.2002. Though the plaintiff was aware that the first defendant had asserted her right, the instant suit has been filed only in the year 2004 which would indicate that the same is an afterthought despite being aware that she has no right. Hence, it is contended that the judgment of the Court below is liable to be set aside by allowing the instant appeal.

9. Sri Ajoy Kumar Patil, learned counsel for the plaintiff would seek to sustain the judgment passed by the Court below. It is his contention that it is a simple suit for partition and there is no need for the plaintiff to plead and attack the WILL. Since, the relationship was not in dispute and the deceased mother was the owner of the property and according to the plaintiff, when she had died intestate, a share in the property was sought. The procedure relating to seeking probate and the fact that the plaintiff herein had entered caveat is referred in detail and it is contended that though the plaintiff had knowledge of the WILL, a copy of the same had not been given. Since at that stage in the year 2000 when there was requirement to probate the WILL and the plaintiff herein had opposed the same, notwithstanding the amendment to Section 213 of the Indian Succession Act, the WILL ought to have been probated by proving that WILL. In that view, the plaintiff has pleaded that the first defendant was unable to prove the WILL and has thereafter sought for her share which is sufficient. Since the khatha was transferred in the year 2003, there was cause of action and accordingly, the suit was filed. Reference is made to Section 105 of the Act to point out that the legal representatives of Mohan Varghese would not be entitled as contended. In the instant proceedings, even in the absence of the pleadings, the first defendant being the Propounder of the WILL was required to prove the WILL in accordance with law. The mere examination of the witness was not sufficient, The first defendant having put forth her explanation for exclusion of the plaintiff in the WILL and having pleaded regarding estranged relationship has not established the same. Further, such contention being urged itself would constitute a suspicious circumstance to indicate that the legatee has taken part in creating the WILL. The series of letters are referred to indicate that the relationship of plaintiff with her mother was cordial and therefore, the same could not have been a reason for exclusion. The letters relied on by the first defendant reveal that the plaintiff had vented out her feelings which is of no consequence. The second suspicious circumstance according to the learned counsel is that the doctor who has certified in the WILL is a stranger and that too, she has signed the WILL on the next day 08.05.1986 and she has also not been examined. The third suspicious circumstance contended is that the other witness to the alleged WILL has not been examined and even the evidence of the witness who has been examined is not reliable. He contends that fourth circumstance is that the first defendant does not disclose as to how she had knowledge of the WILL with

certainty and there is contradictory evidence of the Propounder. The fifth circumstance contended is that though the WILL is claimed to have been executed in the year 1986 and the son who was one of the legatees had expired subsequently on 02.02.1998 and the mother had lived up to the year 2000 but, she had not made any change to the WILL which is not natural. Keeping all the said aspects in view, the Court below was entitled to take note of the entire circumstances arising from the evidence tendered by the parties so as to form an opinion with regard to the genuineness or otherwise of the claim made by the first defendant and as such the Court below was justified in returning a finding that the WILL had not been proved. It is therefore contended that the judgment passed by the Court below does not call for interference in this appeal.

10. In the light of the above, the following points arise for consideration in this appeal:

- i) Whether the Court below was justified in referring to certain circumstances as suspicious circumstances in the absence of there being pleading to that effect?
- ii) Whether the appellant's contention that the Court below has assumed certain circumstances to be suspicious circumstance without basis is to be accepted?
- iii) In the facts and circumstances of the instant case, whether the WILL dated 07.05.1986 could be held as not proved?
- iv) Notwithstanding the lack of pleading, whether the circumstances alleged is really suspicious circumstances so as to make the WILL unreliable?

11. The undisputed fact is that the suit schedule property was the absolute property belonging to late Mary Varghese i.e., the mother of the parties. She had acquired the same under a WILL dated 21.10.1968 executed in her favour by the father of the parties. The mother of the parties died on 06.06.2000. The plaintiff contends that she being one of the lineal descendants is entitled to her share in the said property left behind by her mother. The defendants in order to repudiate the claim have relied on a WILL dated 07.05.1986 said to have been executed by their mother and have contended that the property in question has been bequeathed in favour of the first defendant and their deceased brother whose children are the defendants No. 3 and 4. The parties are Indian Christians. In view of the amendment to Section 213 of the Indian Succession Act by Act 26 of 2002, the legacy under a WILL is aught to be established without the WILL being probated as the said requirement had stood altered as on the date of the instant suit.

12. However, it is to be noticed that as on the date of death of the mother on 06.06.2000 when the WILL came into effect the amendment had not taken place. As such, the first defendant herein had filed a petition under Sections 222 and 276 of the Act seeking probate of the WILL dated 07.05.1986. That petition filed on 15.09.2000 was registered as P & SC No. 15048/2000. The plaintiff had filed a caveat on the same day which appears to be subsequent to registration of the

petiton. In any event, the plaintiff got herself impleaded in the petition as respondent to oppose the grant of probate. In that regard, the objection statement was filed. When this was the position, the words "Indian Christians" was inserted in Section 213 of the Act which took away the requirement for probate of the WILL executed by Indian. Christians as well. Hence, the first defendant who was the petitioner therein filed a memo dated 31.07.2002 withdrawing the petition which was ordered by the Court. The certified copy of the petition, memo and the order in P & Sc. No. 15048/2000 which had not been produced in the suit has now been brought on record through I.A. No. 1/2032 filed under Order 41 Rule 27 of C.P.C. The same being certified copies of judicial proceedings is not opposed and the same is taken on record by allowing I.A. No. 1/2012.

13. Though the learned counsel for the plaintiff contended before me that probating herein was necessary as the insertion is subsequent to the date of death of the alleged Testator, it cannot be accepted. The compliance required u/s 213 was that a WILL could have been relied on in any other Court of Justice only if the Competent Court had granted probate. That requirement was removed by the insertion. Therefore, as on the date when the occasion has arisen for the legatee to rely on the WILL, before the Court of Justice in the instant case, the requirement had ceased to exist irrespective of the date on which the WILL had come into effect. The withdrawal of the petition was before the Court which was the competent Court to grant probate and at that stage there was no need to proceed further.

14. In this background, it would be clear that the plaintiff was aware as far back as on 15.09.2000 that her mother had left behind a WILL and in that proceedings has learnt about the WILL dated 07.05.1986 being relied on by the first defendant herein. Notwithstanding the withdrawal of the petition, if the plaintiff herein had any grievance, she ought to have challenged the WILL in an appropriate proceedings. Even in the instant suit, the plaintiff in Para 8 has referred to the WILL and the claim made by the first defendant but, has stated that P & SC No. 15048/2000 was withdrawn being unable to prove the WILL. She has however not attacked the WILL. Thereafter, the plaintiff has claimed a share in the property as if the mother had died intestate. There is no gainsaying that she was not given a copy of the WILL when she was a party to the proceedings and was aware of it. There is no allegation regarding the WILL not being genuine. However, the Court below has proceeded to hold the WILL as not proved on making several observations of its suspect nature. Whether that could have been done in the absence of pleading is the issue raised at the outset in this appeal by the defendants.

15. The learned senior counsel appearing for the appellant relied on the judgment of the Division Bench of the Calcutta High Court in the case of Jabeda Khatun and Another Vs. Hazi Mohammed Ibrahim and Others, wherein it is held that to defeat a party on a case, of which he had no fair notice and no

opportunity to adduce evidence, is obvious denial of justice. It is held therein that the pleadings should be sufficiently raised. The learned counsel for the plaintiff however sought to distinguish the same by stating that in such case, it would be permissible to make appropriate amendment and in any case, the same would give an indication that if it was considered as an issue before the Court, it would be sufficient. It is also contended by him that in the case of WILL, the law is well settled that the Propounder is one who has to prove the WILL and as such the pleading of the plaintiff is immaterial.

16. Insofar as the legal position that the Propounder of the WILL is required to prove the same, there can be no doubt whatsoever, but the question would still remain as to what is meant by proof of the WILL which is initially required to be discharged by the Propounder. The decisions of the Hon'ble Supreme Court, relied on by the learned senior counsel for the defendants, in the case of Madhukar D. Shende Vs. Tarabai Aba Shedage, ; in the case of Sridevi and Others Vs. Jayaraja Shetty and Others, and in the case of Mahesh Kumar (Deed) By Lrs -Vs.- Vinod Kumar & Ors (2012 (4) SCG 387) would lay down the principle and reiterate to hold that the initial burden would be discharged by the Propounder on satisfying the requirement u/s 63 of IS Act and Section 68 of Evidence Act. Thereafter the burden would shift back in terms of Section 101 to 104 of Evidence Act on the Propounder only when the contestant opposing the WILL brings material on record to show suspicious circumstances. Certainly, as pointed out by the learned counsel for the plaintiff from the very same judgments, it is to be kept in view in each case as to who are the persons supporting and opposing the WILL and that well-founded suspicion would be a ground for closer scrutiny. However, I find that what has also been held is that suspicion alone cannot form the foundation of a judicial verdict, positive or negative.

17. In that backdrop, there can be no doubt that the Propounder who relies on the WILL would have to at the outset establish that the WILL relied on is a document which complies with the requirement as contemplated u/s 63 of the IS Act. When that has been established, the proof of the said document should be in terms as contemplated u/s 68 of the Evidence Act. In the instant case, the WILL dated 07.05.1986 (Ex. D7) on the face of it would indicate that the same is signed by the Testatrix and by two attesting witnesses under a statement that they have signed in the presence of each other. The WILL refers to the property which is the subject matter of the suit and that the Testatrix is the absolute owner of the same. Further, the Testatrix has bequeathed all the movable and immovable properties to the first defendant and the son of the Testatrix, Mohan Varghese. Such disposition in my view would refer to the bequeathing of the property in question and the observation of the Court below that no bequeath is made under the WILL is patently erroneous. It is true that a certificate endorsed by a Doctor is found at the foot of the WILL which is dated different from the date of the WILL. Such certificate in any event is not a requirement of law so far as the proof of the WILL in terms of Section 68 of the Evidence Act nor is it

contemplated u/s 63 of IS Act. While dealing with allegation of suspicious circumstances, that aspect would be considered separately. Therefore, if the other aspects of the WILL are kept in view, it answers the requirement of Section 63 of the IS Act.

18. The question therefore would be as to whether the WILL has been proved as required u/s 68 of the Evidence Act. Unlike in other documents, the person who has executed the documents would not be available. Therefore, one of the witnesses to the document is necessary to be examined to speak with regard to the fact of the Testator having signed in his/her presence and that all of them were simultaneously present. Such witness need not know the contents of the WILL but has to only testify with regard to the fact of the Testator having executed the WILL, in the presence of the witnesses and the Testator having taken active part. Hence, the observation of the Court below even on that aspect that the WILL cannot be believed as the witness has no knowledge of the contents is also erroneous.

19. Keeping in view the requirement contemplated in law, in the instant case, the first defendant has examined herself as DW.1 and has referred to the sequence in which the mother, who is the Testatrix of the WILL had become the absolute owner of the property which has been bequeathed and she having died on 06.06.2000 and about the nature of the bequeath made thereunder. The signature of the mother has been identified as at Ex.D7(a). The details with regard to the attempt made by her to seek probate of the WILL and the reason for which it was withdrawn has also been stated. In the cross examination, she has also stated with regard to the manner in which she had come in possession of the WILL after the death of her mother and the way in which it has been acted upon. Though the said witness has been cross examined in detail with regard to there being no reason for exclusion of the plaintiff, that is a matter to be considered separately when the aspect of suspicious circumstances as alleged is to be considered. However, from the viewpoint of the WILL being executed by the mother, the cross-examination does not discredit the evidence inasmuch as there is nothing to dispute the signature of the mother and the WILL having not being executed at all by the mother.

20. In that context, a perusal of the evidence of DW.2, namely Sri Arnjad Hussain that is one of the witnesses to the WILL which is filed in the nature of affidavit evidence would indicate that it has been categorically stated by him that on 07.05.1986 himself and Sri Mani Zachariah i.e., the second witness who has been indicated in the WILL were present at the time of execution of the WILL dated 07.05.1986 by late Mary Varghese and she has signed on the said WILL in the presence of the two witnesses. The said witness also has been cross examined in detail and though certain discrepancies with regard to his statement that he did not know the son of late Mary Varghese was pointed out, that in itself cannot discredit the evidence insofar as the said witness being present and having signed the WILL. It is also to be noticed that in respect of a fact relating

to the year 1986, he was being cross-examined in the year 2009. Yet there is no discrepancy with regard to the question in issue. In fact, in the cross examination, he stated more in detail about the active part taken by the Testatrix requiring their presence both on 07.05.1986 and 08.05.1986 and that she herself had got the WILL prepared. In addition, the WILL itself contains the statement that the witnesses and the Testatrix have signed the WILL in the presence of each other.

21. In the above background of the said facts, the tests which have been indicated in the judgment of this Court in the case of Vincent Britto vs. Mrs. Eunica Britto (AIR 2002 Kar 179) relied on by the learned senior counsel would be of assistance to arrive at the conclusion since the tests laid therein in addition to what has been stated by the Hon'ble Supreme Court are satisfied insofar proof of the WILL. Hence, if any other circumstances for discarding the WILL was there, it should have been pleaded by the plaintiff. Though the learned counsel for the plaintiff sought to distinguish the said judgment on the ground that it was rendered in a probate proceedings and that too in respect of a "Holograph WILL", the said distinction is of no consequence, Firstly, the proof of the WILL to the said extent alone is required to be considered at the first instance, before other material if any brought on record is to be considered. Secondly, in the instant case, though the WILL is typewritten, there is no allegation that the Testatrix is an illiterate person without worldly knowledge and therefore did not know the contents. Therefore, in such circumstance, when the signature of the Testatrix and the fact of execution is established, the same would answer the requirement.

22. Though having arrived at the above conclusion, the question that would still remain for consideration is with regard to there being no pleading with regard to suspicious circumstance in the instant case and the manner of consideration thereto arid as to whether the same would prejudice the case of the defendants herein. As noticed, the proceedings in P & SC No. 15048/2000 was initiated earlier. To that extent, the plaintiff no doubt has referred to the same and has averred that the first defendant being unable to prove the WILL, withdrew the case on 31.07.2002. However, a perusal of thf: memo dated 31.07.2002 which has been taken on record would indicate that the first defendant had categorically stated therein that in view of the amendment to Section 213 of the Act wherein it is not compulsory to probate a WILL left behind by an Indian Christian, the petitioner therein i.e., the first defendant be permitted to withdraw the petition with liberty to take action as permitted under law. The said memo has not been objected to in that proceedings by the plaintiff herein who was a respondent therein. The Court below accordingly has dismissed the petition on accepting the memo. Hence, the averment that it was being withdrawn since the first defendant was unable to prove the WILL cannot be accepted as correct. Having withdrawn, based on the said WILL, the legatees have secured khatha. Except for contending that the change of khatha had provided cause of action, no objection was raised before the Corporation authorities though in the P8B SC proceedings the first defendant had relied on a WILL and while withdrawing, it

had been indicated in the memo that they would take action as permitted in law. Further, the objection filed in P & SC proceedings has been marked in the instant proceedings as Ex. D3 by confronting it to DW.1. The said document cannot be considered as a pleading in the instant case but, having taken such contention earlier and if the WILL was not acceptable to the plaintiff, she ought to have pleaded the same so as to put the defendants on notice and also to enable appropriate issues to be raised in the suit. Once the plaintiff was aware of the WILL, it was necessary for her to plead and raise such circumstance to contend that the same would not bind her for the reasons to be put forth by her and to avoid the WILL coming in her way for seeking partition. Instead, she could not have assumed that the WILL was not proved and claimed as if it is intestate succession. In that situation, when ultimately the Court below has proceeded to consider the matter referring to certain suspicious circumstances to return a finding against the defendants, it has certainly caused prejudice to the legatees under the WILL. Only if the suspicious circumstance had been pleaded, there would have been an opportunity for the legatees to dispel the same. In the instant case, apart from there being no pleading, the son of the plaintiff who was examined as PW.1 also does not state anything with regard to this aspect of the matter.

23. Notwithstanding the above conclusion, considering the nature of the circumstance which has been brought out by the Court below and which is sought to be sustained by the learned counsel for the plaintiff, it would have to be considered as to whether what has been contended would actually constitute suspicious circumstance so as to discard the WILL. Therefore, merely because the defendants have put forth certain contentions to sustain the WILL by contending that the plaintiff has been excluded by their mother due to estranged relationship and having failed to establish the same, whether that in itself is a circumstance enough to doubt the WILL also needs consideration. In that regard, it is the vehement contention of the learned counsel for the plaintiff that the allegation of the estranged relationship cannot be accepted. The learned counsel, referring to the cross-examination of DW.1 would contend that not only the plaintiff but, the first defendant and their brother Mohan Varghese have all married outside the religion and therefore, the reason put forth by the Propounder of the WILL that the plaintiff was excluded for the said reason at the outset cannot be accepted. Further, the learned counsel with reference to the letters at Exhs.P4 to P22 would contend that their relationship has always been cordial, as seen from the affection which is reflected in the said letters. Though the first defendant has relied on the letters at Exhs.D4 to D6 to contend that the relationship was not cordial, the said letters are subsequent to the date of the alleged WILL and by the said letters, the plaintiff has only vented out her feelings and therefore, that itself cannot be a justification for exclusion. It is therefore contended that when the first defendant has chosen to put forth certain contentions to justify the exclusion and when it is not factually correct, it would indicate that the first defendant being a legatee under the WILL has taken active

part in securing the WILL and as such it is a strong suspicious circumstance to discard the WILL.

24. The above. Te said contentions, in my view, cannot be accepted since the mere justification sought to be put forth, even if not accepted and in the absence of there being any other material to indicate that the Propounder who is also a legatee has taken active part in the WILL coming into existence, the same cannot form a suspicious circumstance. That would have been fatal if the other circumstances had indicated the WILL to be suspect. From the evidence of DW2, it would be clear that none of the children had taken part. Further, in the instant case, the WILL has come into existence on 07.05.1986 and as already noticed above, the /nether of the parties was worldly wise and was aware of what she had done and the WILL had been signed in the presence of witness as also her signature is not disputed. In such circumstance, if in, fact the mother had been forced to execute the WILL contrary to her interest or liking, the mother had thereafter lived up to 06.06.2000 i.e., more than 14 years and there was ample time to revoke the same. That apart, when the plaintiff herself claims that she had cordial relationship with her mother, naturally the mother would have brought the aspect of the WILL having been obtained by force to her notice. In addition, in the instant case, the exclusion is not only of the plaintiff, but the second defendant i.e., another daughter has also been excluded.

25. Hence, the WILL is to be understood by looking at it from the armchair of the Testatrix. The instant property is the only one item of immovable property which was owned by the mother and the same measures 80 ft x 110 ft. Hence, if the property of that size is desired to be divided between only two children of the Testatrix by excluding the other two, it cannot be considered as unnatural. The WILL is of 1986 when much value was not attached and first defendant was throughout a resident of Chennai and the other daughter who is excluded owns property in the same street. It is not as if the 11 testatrix owned several properties and gave everything to only one or two to make the exclusion suspicious. If she was to include all the children just to make it appear natural, there was no purpose in executing the WILL. In fact if the exclusion of any of the lineal descendant in itself is to be considered as a suspicious circumstance, then in all cases without even the circumstance being pleaded by the person assailing the WILL, it would have to be set aside which is not the law. If such view is taken, the very provision in the IS Act for testamentary succession would be rendered otiose.

26. Further, in the instant case, it is to be noticed that at the first instance, the father of the parties here had excluded all the lineal descendants and had bequeathed the property only in favour of his wife under the WILL dated 21.10.1968. Hence, execution of WILL is not something which was unknown in the family. It cannot also be ignored in the instant case that the mother had left about six bank deposits and an account in favour of the first defendant. Merely because, along with the bank deposit receipts a pair of diamond earrings were

given to the first defendant as per Exhs.D-10 to D-12, it cannot be assumed that it was intestate succession as it was given despite all movables being bequeathed to the legatees. Firstly, the deposits were in the joint names of the mother and the plaintiff and as such it cannot strictly be the movable property of the mother as the survivor of a joint deposit would be entitled to it. Probably, that was the way the mother has provided for all the children in different modes and if that was her wish and in that direction, insofar as the immovable property and other movables, if she had made provision under a WILL which is a solemn document, the same cannot be held to be a suspicious document merely because the aggrieved person is excluded from inheritance.

27. The second circumstance stated by the learned counsel for the plaintiff is that the doctor who has signed the WILL and certified the good health of the Testatrix is a stranger and that she has signed Ex.D-7 on 08.05\_1986 i.e. the next day adds to the suspicion. Firstly, the doctor had not signed the WILL as a witness and as such the signature being made on 08.05.1986 in respect of WILL dated 07.05.1986 would not invalidate the WILL for not satisfying the requirement contemplated in Section 68(c) of the Evidence Act. Secondly, the certification of the good health by the medical practitioner is not a requirement under the Act to make a valid WILL. Thirdly, the witness DW-2 is the only person who has personal knowledge of the happening on the said two dates. The said witness has explained the circumstances in his evidence and stated the reason for which the Doctor had signed on the next day and about his presence on both the days and that it was at the insistence of the Testatrix herself. Above all, the plaintiff has neither pleaded, deposed nor suggested that the mother's health as on 07.05.1986 was not good and was incapacitated to understand and execute the WILL. In the absence of the same, there was no need to examine the, said Doctor as a requirement in law. Hence, neither the identity nor non-examination is fatal. Therefore, that aspect cannot be accepted as a suspicious circumstance.

28. The third circumstance projected is the non-examination of the other witness to the WILL and the evidence of the witness examined being not reliable. Here again, it is to be stated that when the plaintiff had not pleaded nor deposed in this regard, the defendants could not have imagined the requirement which was not otherwise contemplated in law. Section 68 of the Evidence Act provides that at least one witness is to be examined to use a document which is required to be attested. One of the witnesses has been examined as DW-2. As already noticed above, the said witness has stated the manner in which the document came to be executed. I have already indicated above that the evidence of DW-2 has not been discredited in the cross-examination so as to make it a suspicious circumstance. He had identified all the signatures in the WILL and stated about simultaneous presence and affixing signatures in the presence of each other.

29. The fourth circumstance projected is that the Propounder i.e. the first defendant has contradicted herself in her evidence as DW-1 regarding the knowledge of the WILL. I have perused the cross examination of DW-1 carefully.

All that she has stated is that her mother had told her earlier that she has executed the WILL and made arrangements and her uncle also told about that in the year in 1988-89. Thereafter, she says that she knew the contents of the WILL only when the Advocate read over the WILL. It cannot be assumed as a contradiction as earlier even if she knew about a WILL being executed, she would certainly have not known the contents if the mother had not disclosed it to her. Further the first defendant has explained the manner in which she found the WILL in the locker belonging to her mother and thereafter she informed the concerned and the same was perused. There is nothing unnatural about that since it is stated to be on 7th or 3th June 2000 i.e., immediately after the death. She has clarified that the locker in which the WILL was found was in the house.

30. The last suspicious circumstance projected is that the son of the testator died about two years after the date of the alleged WILL and the testator had lived up to 6.6,2000, yet no change was made which is a suspicious circumstance, since a change would have been effected if it was a WILL over which the Testatrix had control. In this regard, I do not find the contention to be of avail to the plaintiff. What should happen in such case is provided in Section 109 of the Act and not as provided in Section 106 as contended. If the intention of the testator was that one half of the property should go to her son, it would have to be assumed that it is to his family i.e., the grand children. through her only son. Hence, though he had died, if the understanding of the Testatrix was that his children will take the property and in that view, if the Testatrix did not choose to effect any change, it would be too much for this Court to accept the same to be a suspicious circumstance.

31. The analysis and the view taken by me on the aspect relating to suspicious circumstance is also fortified by the law laid down by the Hon''ble Supreme Court while considering the aspect of suspicious circumstance, in the case of Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another, and in the case of Ramabai Padmakar Patil (D) through LRs. and Others Vs. Rukminibai Vishnu Vekhande and Others, relied on by the learned Senior Counsel for the defendants. On the other hand, the learned Counsel for the plaintiff has relied on the decision of the Hon''ble Supreme Court in the case of Gorantla Thataiah Vs. Thotakura Venkata Subbaiah and Others, with specific reference to paragraph-6. That was a case where the owner of the property had died issueless and the others were litigating with regard to the property and the Propounder had set up a WILL dated 17.06.1939 and the alleged Testator had died on 24.06.1939. As such the jurden was heavy on the Propounder. The circumstance in the instant case has been discussed which is not akin and as such the decision would not be of assisto.nee. Another decision relied on is in the case of Kalyan Singh Vs. Smt. Chhoti and Others, That was a case where the wife was excluded and community interest was claimed in respect of the property and the WILL was brought forth after very many years. As such Propounder''s case was not accepted. Hence, it does not make a difference to the above conclusion.

32. In terms of the discussions made above, the points raised for consideration are all answered in favour of the defendants. Accordingly, the Court below was not justified in holding the WILL dated 07.05.1986 as not proved and granting the decree for partition in favour of the plaintiff. In the result, the following.

ORDER

- (i) The appeal in R.F.A. No. 430/2010 is allowed.
- (ii) The judgment and decree dated 30.01.2010 passed in O.S. No. 4059/2004 is set aside.
- (iii) Consequently the suit in O.S. No. 4059/2004 is dismissed.
- (iv) Keeping in view the relationship between the parties, they shall bear their respective costs.