
(2010) 04 MAD CK 0381
In the Madras High Court
Case No : A.S. No. 784 of 1991

Ramachandra Marthandam

APPELLANT

Vs

Linga Vijayan and Others

RESPONDENT

Date of Decision : 13-04-2010

Acts Referred:

Evidence Act, 1872 — Section 114, 45, 47, 67, 68
Succession Act, 1925 — Section 59, 63
Transfer of Property Act, 1882 — Section 3

Citation : (2010) 4 CTC 385

Hon'ble Judges : B. Rajendran, J

Bench : Single Bench

Advocate : T.R. Rajaraman, for the Appellant; S. Meenakshi Sundaram, for the Respondent

Final Decision : Allowed

Judgement

B. Rajendran, J.—The Defendant in O.S. No. 301 of 1989 on the file of Principal Subordinate Judge, Tirunelveli is the Appellant in this Appeal. The said Suit was filed by the Respondents 1 and 2 herein for partition and separate possession of the 1/4th share in the schedule mentioned properties in the Plaint by metes and bounds. The Suit was decreed by passing a preliminary decree. For the sake of convenience, the parties shall be referred to as they were arrayed in the Suit.

2. The facts that led to filing of the Plaint was that the suit property originally belonged to one Mary Fernando. The said Mary Fernando sold the suit property through her power of attorney Innasi Fernando in favour of the Defendant and mother of the Plaintiffs namely Pushpam Ammal by a registered Sale Deed dated 26.11.1971 and from the date of such purchase, the Defendant and mother of the Plaintiffs were in peaceful possession and enjoyment of the suit property. While so, the said Pushpam Ammal, mother of the Plaintiffs and Thavamani Nadar, husband of Pushpam Ammal and father of the Plaintiffs, have jointly executed a registered will dated 26.03.1985 bequeathing all the properties

belonged to them, including the schedule mentioned property in the Suit, to the Plaintiffs. According to the Plaintiffs, the executants namely Pushpam Ammal and Thavamani Nadar have executed the will in a sound and disposing state of mind without coercion or undue influence. After the death of the said Pushpam Ammal, the Plaintiffs have claimed their share of the property as they are the legatees and beneficiaries under the will. According to the Plaintiffs, under Law, they have taken joint possession of the suit property along with the Defendant. They would contend that the Plaintiffs and Defendant are joint owners of the property. As the Defendant started making disturbances in regard to joint possession, according to the Plaintiffs, it is no longer possible to enjoy the property jointly, hence, they have filed the Suit claiming partition and separate possession of the schedule mentioned property.

3. The Defendant filed Written Statement contending that the Plaintiffs are none other than his brothers-in-law. It is true that the property stands in the name of the Defendant and the mother of the Plaintiffs- Pushpammal, but it is he who paid the entire sale consideration and Pushpammal was only a name lender. This fact has been suppressed by the Plaintiffs. Ever since the purchase of the suit property, this Defendant was in possession of the property absolutely without any interruption from any one. Even the patta in respect of the property stood transferred in the name of the Defendant. It was he who dug the well in the suit property by incurring a sum of Rs. 30,000/-. He would also claim that he prescribed his title by ouster. He would mainly contend that Pushpammal was seriously ill for a long period of three years and she was affected by Cancer. She was not in a good state of mind. The Defendant denied the will is not a genuine one. According to the Defendant, when Pushpammal was ill and bedridden for a period of three years and she was very weak bodily and mentally, during that period, the Plaintiffs, being her sons and residing along with her, took advantage of her illness and obtained the will in dispute. The Suit itself is premature as the Plaintiffs cannot claim the suit property under the will inasmuch the will was executed jointly by Pushpammal and Thavamani Nadar and Thavamani Nadar is still alive. It was specifically contended by the Defendant that the property was never in joint possession of the Plaintiffs and the Defendant and that he alone has dug the well by spending Rs. 30,000/-.

4. The Defendant has filed an additional Written Statement contending that the Suit is bad for non-joinder of parties namely Thavamani Nadar, who is the joint executants of the will and is still alive and also for non-joinder of Jhansi, daughter of the deceased Pushpammal. In view of non-joinder of Thavamani Nadar and Jhansi, especially in a Suit for partition, the Suit has to be dismissed.

5. The Plaintiffs have filed reply statement contending that neither Thavamani Nadar or Jhansi are necessary party to the suit as they did not get any property or benefit under the will.

6. Based on the above pleadings, the Trial Court framed five issues namely: (i) Whether the Defendant paid the entire sale consideration for purchasing the suit

property; (ii) Whether the Defendant has made any improvement in the suit property especially by digging a well by spending Rs. 30,000/-; (iii) Whether Pushpammal executed the will while she was in a sound and disposing state of mind; (iv) Whether the Suit is premature; (v) Whether the Plaintiffs are entitled to 1/4th share in the suit property as prayed for.

7. An additional issue was framed by the Court below as to (i) Whether the Suit is bad for non-joinder of necessary parties; (ii) Whether the parties are in possession of the suit property jointly; and (iii) Whether the Defendant ousted the right of the Plaintiffs.

8. Before the Court below, on behalf of the Plaintiffs, PWs. 1 to 4 were examined and Exs. A1 to A16 were marked. On behalf of the Defendant, the Defendant examined himself as DW1 and marked Exs. B1 to B7. The Trial Court, taking into consideration of the evidence on record came to the conclusion that the Suit is liable to be decreed. Accordingly, the Court below passed a preliminary decree for partition of the suit property. Aggrieved by the same, the present Appeal has been filed.

9. The learned Counsel for the Appellant has filed a Memo in the above Appeal stating that the Respondents 3 to 5 were brought on record as Legal Heirs of deceased 2nd Respondent and at that time, the Respondents 4 and 5 were minors and represented by their natural guardian mother, the Third Respondent herein. Now, the 4th Respondent namely Puvan Paneerselvam has attained majority and hence, he may be declared as major and his guardian may be discharged from her guardianship. Recording the Memo filed by the Appellant, the Fourth Respondent is declared as major and his guardian namely the Third Respondent is discharged from her guardianship.

10. The point for consideration in this Appeal, as argued by the Counsel for both sides are: (i) Whether the will has been executed by Pushpammal and Thavamani Nadar and such execution has been proved in accordance with law; and (ii) Whether the Plaintiffs are entitled for partition on the basis of the will.

11. Heard the Counsel for both sides. The case of the Plaintiffs is that the properties was jointly purchased by their mother Pushpammal and Defendant and thereafter the property was jointly enjoyed by the Plaintiffs and the Defendant. The Patta originally stood in the name of Pushpammal and later on it was transferred in the name of the Defendant. It is also the case of the Plaintiffs that Pushpammal executed the will, which was registered on 26.03.1985 by which the Plaintiffs, who are her sons, were allotted various properties, including the suit property and each of them are entitled to 1/4th share of the property in the suit property, as their mother is owning only half share in the suit property. It is recited in the will that apart from the Plaintiffs, one Jhansi, daughter was born to Pushpammal and Thavamani Nadar, she was given in marriage by incurring expenses and therefore she need not be given any property. Therefore, according to the Plaintiffs all the properties mentioned in the will devolve on them for their

exclusive enjoyment.

12. The Defendant would contend that the execution of the will is denied as his mother in law namely Pushpam Ammal was suffering from cancer for a long time and therefore, she was not be in a sound and disposing state of mind to execute the will. The Plaintiffs, being the sons of Pushpam Ammal and living with her, have taken advantage of her illness and created the will. Therefore, according to the Defendant, there is a cloud in the will. Under those circumstances, when the Plaintiffs relies on the will, it is they who have to prove the execution of the same in accordance with law.

13. In this context, it is necessary to look into Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act, which are as follows:

63. Execution of unprivileged wills.- Every Testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:

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

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

(c) The will shall be attested by two or more witnesses, each of whom has seen the Testator sign or affix his mark to the will or has been some other person sign the will, in the presence and by the direction of the Testator, or has received from the Testator, a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the Testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

68. Proof where no Attesting Witness found.-- If no such Attesting Witness can be found, or if the document purports to have been executed in the united Kingdom, it must be proved that the attestation of one Attesting Witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

14. The Second Plaintiff - Jegaveera Pandian was examined as PW1 before the Court, who in his evidence has stated that he does not know anything about the will as he was not present at the time of execution of the will. He further deposed that the property was purchased when he was 6 or 7 year old. Further it was deposed that the will was executed by her mother while she was in a sound and disposing state of mind and that the will was a registered will. He further stated that he does not know anything directly about the execution of the will and he was given the copy of the will only after execution of the same. Therefore, PW2

was examined, who is the attestor of the will. PW2 in his chief-examination would only say this much:

15. In the chief-examination, PW2, Attestor of the will, would only say that he is one of the Attestors to the will; that the will has been executed five years prior to his giving evidence; it was executed in the Registrar Office; it was read over to the executants. Thavamani Nadar and Pushpam Ammal and they have accepted the same. As far as the attestation is concerned, he would say that he saw the executants signing the will and that he was with them at the time of execution of the will. He would also say that the executants were in a sound and disposing state of mind at the time of execution of the will and nobody compelled or coerced them to write the will. He would further depose that apart from him, one Ramachandran was one of the Attesting Witnesses to the will.

16. According to the Defendant, the evidence of the PW2 is not clear and correct one for he did not say that neither the executants saw the Attesting Witnesses signing nor the Attesting Witnesses have seen the executors signing the will, which is one of the mandatory legal requirements to prove the will. Therefore, according to the Defendant, the will was not proved as per the Indian Succession Act and Indian Evidence Act. Further, in the cross-examination, PW2 stated that he does not exactly remember the date, month and year of the execution of the will but he would only say that it was executed five years prior to his giving evidence. Even in the cross-examination, it was stated that Thavamani Nadar has not seen Pushpam Ammal signing the will. In the cross-examination of PW2, it was also brought out that Ramachandran, the other Attesting Witnesses to the will is residing in the same Village, but he was not examined as a witness. Therefore, according to the Defendant, the witnesses examined on behalf of the Plaintiffs have not clearly adduced evidence to prove the proper execution of the will as contemplated u/s 63 of the Indian Succession Act.

17. PW3 was examined before the Court below to say that the property was in possession of the Plaintiffs and Defendant jointly.

18. PW4, Thavamani Nadar is husband of Pushpam Ammal and also one of the executants of the will. In his evidence, PW4 would depose that he and his wife have jointly executed the will and at that time, his wife was in a sound and disposing state of mind even though she was suffering from cancer at that time. He also deposed that he saw his wife signing the will and he and his wife jointly gave instruction to fill up the will and after his demise and the demise of his wife only, the children are entitled to get the benefits under the will. No where in the chief examination, he has stated anything about the Attestor signing the will or he saw the attestor signing the will. In the cross-examination, it was stated that the original title deeds of the suit property are with the Defendant. In the property, Patta stood in the name of both the Defendant and his wife Pushpammal, later on his wife's name was removed and even Kist is being paid by the Defendant in his name. The will was attested by two Attesting Witnesses, but PW4 has not stated anything that the Attesting Witnesses signed the will or

he and his wife saw the Attesting Witnesses signing the will. or he and his wife saw the Attesting Witnesses signing the will.

19. On the side of the Defendant, DW1 alone was examined. He would depose that Pushpammal was not in a sound and disposing state of mind at the time of execution of the will and he was in possession of the property exclusively. Further, he only paid the entire sale consideration to purchase the suit property and therefore the Plaintiffs cannot make any claim in the suit property.

20. The legal question which arise in this case is whether the will has been properly proved by legally acceptable evidence. In this context, the learned Counsel for both sides have strenuously made efforts to bring in various decisions rendered by the Honourable Supreme Court as well as this Court in support of their respective contentions.

21. The learned Counsel for the Defendant/Appellant would contend that the will has not at all been proved in accordance with law, therefore, once the will has not been proved, the suit has to be dismissed as the whole case is only on the basis of the will. He would contend that though both the alleged Attesting Witnesses are alive, only one witness namely Ramakani, PW2 was examined and the other witnesses namely Ramachandran was not examined before the Court. Even in his evidence, PW2 did not say that the Testators have seen the Attesting Witnesses signing the will. PW4, Thavamani Nadar, husband and also co-executants of the will also did not say that both the executors have seen the Attesting Witnesses signing the will. Hence, the Plaintiffs have failed to prove the due execution of the will and therefore the Suit has to be dismissed. In this context, the learned Counsel for the Defendant/Appellant relied on the decision of the three Judges of Honourable Supreme Court reported in Girja Datt Singh Vs. Gangotri Datt Singh, wherein in Para Nos. 14 and 15, it was held as follows:

14. It still remains to consider whether the attestation of the signature of the deceased on the will, Ex. A-36 was in accordance with the requirements of Section 63 of the Indian Succession Act. Section 63 prescribes that:

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

In order to prove the due attestation of the will-Ex. A.36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be witnesses who had no regard for truth and were ready and

willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves. If no reliance could thus be placed upon their oral testimony, where would be the assurance that they actually saw the deceased execute the will in their presence and each of them signed the will in the presence of the deceased. It may as well be that the signature of the deceased on the will was appended at one time, the deceased being there all alone by himself and the attestations were made by Uma Dutt Singh and Badri Singh at another time without having seen the deceased sign the will or when the deceased was not present when they appended their signatures thereto in token of attestation. We have no satisfactory evidence before us to enable us to come to the conclusion that the will was duly attested by Uma Dutt Singh and Badri Singh and we are therefore unable to hold that the will-Ex. A-36 is proved to have been duly executed and attested.

(emphasis supplied)

15. When this position was realised the learned Counsel for Gangotri fell back on an alternative argument and it was that the deceased admitted execution and completion of the will-Ex. A-36 and acknowledged his signature thereto before the Sub-Registrar at Tarabganj and this acknowledgment of his signature was in the presence of the two persons who identified him before the Sub-Registrar viz. Mahadeo Pershad and Nageshur who had in their turn appended their signatures at the foot of the endorsement by the Sub-Registrar. These signatures it was contended were enough to prove the due attestation of the will-Ex. A-36. This argument would have availed Gangotri if Mahadeo Pershad and Nageshur had appended their signatures at the foot of the endorsement of registration *animo attestandi*. But even apart from this circumstance it is significant that neither Mahadeo Pershad nor Nageshur was called as a witness to depose to the fact of such attestation if any. One could not presume from the mere signatures of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as Attesting Witnesses or can be construed to have done so in their capacity as Attesting Witnesses. Section 68 of the Indian Evidence Act requires an Attesting Witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as Attesting Witnesses. This line of argument therefore cannot help Gangotri.

22. Pointing out the above decision, the learned Counsel for the Defendant/Appellant would contend that in order to prove the due attestation of the will the Plaintiffs are bound to prove that the Attesting Witnesses saw the executants signing the will and they have signed the will in the presence of the executants, which is absent in this case.

23. The learned Counsel for the Defendant also relied on the decision of Three Judges decision of the Honourable Supreme Court reported in H. Venkatachala

Iyengar Vs. B.N. Thimmajamma and Others, wherein in Para No. 18 it was 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 of the Evidence Act are relevant for this purpose. u/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 Sections 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, Sections 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 proponent 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 Section 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.

(emphasis supplied)

24. The learned Counsel for the Defendant, relying on the above decision would contend that 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 and the test to

be applied would be the usual test of the satisfaction of the prudent mind in such matters. The will has to be proved like any other document except a special requirement of attestation prescribed by Section 63 of Indian Succession Act.

25. The learned Counsel for the Defendant/Appellant further relied on the decision rendered by Four Judges of the Honourable Supreme Court reported in Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, wherein the Honourable Supreme Court reiterated the special requirement of attestation prescribed in the case of proving the will by Section 63 of the Indian Succession Act and also refers to the decision reported in Girja Datt Singh Vs. Gangotri Datt Singh,

26. Further reliance was made by the learned Counsel for the Defendant/Appellant to the decision rendered by Five Judges of the Honourable Supreme Court (a Constitution Bench) in Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee (since deceased and after him his Legal Representatives and others), Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, The Constitution Bench refers to the judgment of the Supreme Court reported in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, and Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, In Para No. 15, the Constitution Bench held as follows:

15.....We propose therefore to take the evidence of the two Attesting Witnesses first to see whether in the circumstances of this case when we are dealing with a holograph will and when there are practically no suspicious circumstances and the intrinsic evidence in the will itself points to its execution when it purports to have been executed we can rely on that evidence. The two Attesting Witnesses are Manmathanath Mookerjee and Sambhunath Munshi. Manmathanath Mookerjee is the father-in-law of Sunil, one of the propounders and to that extent he is certainly interested in supporting the propounders' case. It may also be conceded that in certain respects he has not been as straight forward as he should have been, particularly with respect to his dealings with his son-in-law. But he is a respectable man and his son-in-law was not in any way concerned with the execution of this will and did not get any great advantage out of it except that one of the sons Sukumar was disinherited by this will and this had increased his share a little; but that was also the case with the shares of the other descendants of the Testator. Manmathanath was examined on commission and was cross-examined at inordinate length, sometimes on matters which were not very relevant to the point on which was giving evidence, namely, the attestation of the will in dispute. But in spite of the interest he has in his son-in-law, Sunil and in spite of his unsatisfactory replies with respect to his dealings with Sunil, it seems to us that there is really no sufficient reason to disbelieve him when he says that he attested this will at the instance and in the presence of the Testator and that the Testator signed it in his presence and that of Sambhunath Munshi and that they signed it in his presence and in each other's

presence.

(emphasis supplied)

27. As per the decision of the Constitution Bench of the Supreme Court, the requirement to examine the Attesting Witness has been insisted in accordance with Section 63 of the Indian Succession Act. It is very clearly stated that it should be proved that the Testator signs in the presence of the Attesting Witnesses and the Attesting Witnesses signs before the Testator. This requirement is mandatory. In this case, this mandatory procedure of Attesting Witnesses seeing the testor signing the will or the testor seeing the Attesting Witnesses signing the will has not at all been proved. In fact, it is not even stated during the chief-examination of PW2, one of the Attesting Witnesses, that all of them were present during the execution of the will and each of them saw others signing. When such clear evidence is not available, it has to be held that the execution has not been proved. Furthermore, PW4, one of the co-executant of the will and husband of the Testator Pushpam Ammal also specifically does not say about the Attesting Witnesses being present at the time of execution of the will or the executors see the Attesting Witnesses sign the will or the Attesting Witnesses saw the executors signing the will. This vital portion has not been elicited in the evidence. Moreover, the other Attesting Witnesses, even though was very much available, has not been examined to prove the due execution of the will in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

28. The learned Counsel for the Defendant further relied on the decision of the Honourable Supreme Court reported in M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, wherein the Honourable Supreme Court has analysed the word "attest" and also the essential conditions of attestation. In this case also, the decision of the Honourable Supreme Court reported in Girja Datt Singh Vs. Gangotri Datt Singh, , was referred to and in para No. 8, it was held as follows:

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

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

It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the

essential conditions of a valid attestation u/s 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an Attesting Witness.

(Emphasis supplied)

29. In this case, it is clear that the Attesting Witness-PW2 did not say that he got any acknowledgment of the signing of the Testator nor he put his signature *animo attestandi* before executing the document. As per the above decision of the Honourable Supreme Court, it is clear that even if it is taken that PW2 has signed in the will, it should be proved by other purposes namely to certify that he is the scribe or identifier or a Registering Officer and he cannot be construed as an Attesting Witness especially in the case of will which stands in a different footing and execution of the will has to be proved in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

30. In the decision reported in Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, it was held by the Honourable Supreme Court that in so far as attestation is concerned, even though Section 68 of Indian Evidence Act clearly says that it requires at least two or more witnesses, it is enough even one of the Attesting Witnesses is examined, however, such a single Attesting Witness examined should be in a position to prove the due execution of the will. If Attesting Witness examined fails to prove that besides his attestation other attestation was also made in accordance with legal requirement, then the other available Attesting Witness must be examined. Failure to do so will result in holding that execution of the will was not proved in law. In Para Nos. 8, 9 and 10 of the said decision, it was held as follows:

8. To say a will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e. (a) the Testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the Testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this Appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the Testator sign or affix his mark to the will, or must have seen some other person sign the will in the presence and by the direction of the Testator, or must have received from the Testator a personal acknowledgement

of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the will in the presence of the Testator.

9. It is thus clear that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one Attesting Witness at least has been called for the purpose of proving its execution, if there be an Attesting Witness alive, and subject to the process of the Court and capable of giving evidence. It flows from this Section that if there be an Attesting Witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the Testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the Attesting Witnesses must be examined. But at least one Attesting Witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one Attesting Witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one Attesting Witness even though the will has to be attested at least by two witnesses mandatorily u/s 63 of the Succession Act. But what is significant and to be noted is that one Attesting Witness examined should be in a position to prove the execution of a will. To put in other words, if one Attesting Witness can prove execution of the will in terms of Clause (c) of Section 63 viz. attestation by two Attesting Witnesses in the manner contemplated therein, the examination of the other Attesting Witness can be dispensed with. The one Attesting Witness examined, in his evidence has to satisfy the attestation of a will by him and the other Attesting Witness in order to prove there was due execution of the will. If the Attesting Witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the Testator but it means fulfilling and proof of all the formalities required u/s 63 of the Succession Act. Where one Attesting Witness examined to prove the will u/s 68 of the Evidence Act fails to prove the due execution of the will then the other available

Attesting Witness has to be called to supplement his evidence to make it complete in all respects. Where one Attesting Witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

(Emphasis supplied)

31. As per the above said decision of the Honourable Supreme Court, it is mandatory that if only one witness is examined as Attesting Witness, he should not only prove the due attestation, but shall be able to prove the attestation done by the other person also. For fulfilling the formalities u/s 63, the one Attesting Witness, who was examined, has to prove the due execution of the will and if he fails to do so, necessarily, the other available witness has to be called to supplement his evidence to make it complete in all other respects. In this case, it is clear that even though the other witness was very much available in the same Village, the Plaintiffs have not chosen to examine him. In so far as PW2, who was one of the Attesting Witnesses is concerned, as stated above, in his evidence there is deficiency in meeting the mandatory requirement of Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act.

32. In the case on hand, there is no evidence to show that the Testators have signed the will in the presence of the Attesting Witnesses and the witnesses have seen the Testators signing the will in their presence. As such the execution of the will was not proved as required under Law. In the evidence of PW2, one of the Attesting Witnesses to the will, he did not depose with regard to the presence of the Testators. Likewise, there is no evidence with regard to the presence of the Attesting Witnesses at the time when the Testators have signed the will. In the case on hand, one of the Attesting Witnesses examined on behalf of the Plaintiffs neither proved the due execution of the will nor due attestation by himself and the other Attesting Witness namely Ramachandran was also not examined.

33. The learned Counsel for the Appellant further relied on the decision reported in Apoline D'Souza Vs. John D'Souza, wherein in Para No. 13, it was held as follows:

13. Section 68 of the Evidence Act, 1872 provides for the mode and manner in which execution of the will is to be proved. Proof of attestation of the will is a mandatory requirement. Attestation is sought to be proved by PW2 only. Both the daughters of the Testatrix were nuns. No property, therefore, could be bequeathed in their favour. In fact one of them had expired long back. Relation of the testatrix with the Respondent admittedly was very cordial. The Appellant before us has not been able to prove that she had been staying with the testatrix since 1986 and only on that account she was made a beneficiary thereof. The will was full of suspicious circumstances. PW2 categorically stated that the will was drafted before her coming to the residence of the Testatrix and she had only proved her signature as a witness to the execution of the will but the document was a handwritten one. The original will is typed in Kannada, although the blanks

were filled up with English letters. There is no evidence to show that the contents of the will were read over and explained to the Testatrix. PW2 was not known to her. Why was she called and who called her to attest the will is shrouded in mystery. Her evidence is not at all satisfactory in regard to the proper frame of mind of the testatrix. There were several cuttings and over writings also in the will.

34. In the above decision, the Honourable Supreme Court categorically held that Section 68 of the Evidence Act, 1872 provides for the mode and manner in which execution of the will is to be proved and that proof of attestation of the will is a mandatory requirement.

35. The learned Counsel for the Plaintiffs/Respondent has relied on the decision rendered by four Judges of the Honourable Supreme Court reported in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, , wherein in Para No. 12, it was held thus:

12. It was also argued for the Appellant that there was no proof that the will was duly attested as required by Section 63 of the Indian Succession Act, and that it should therefore be held to be void. PWs. 1 and 2 are the two attestors, and they stated in examination-in-chief that the Testator signed the will in their presence, and that they attested his signature. They did not add that they signed the will in the presence of the Testator. Now, the contention is that in the absence of such evidence it must be held that there was no due attestation. Both the Courts below have held against the Appellant on this contention. The learned Judges of the High Court were of the opinion that as the execution and attestation took place at one sitting at the residence of PW 1, where the Testator and the witnesses had assembled by appointment, they must all of them have been present until the matter was finished, and as the witnesses were not cross-examined on the question of attestation, it could properly be inferred that there was due attestation. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the Testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the Attesting Witnesses signed in the presence of the Testator. This is a pure question of fact depending on appreciation of evidence. The finding of the Court below that the will was duly attested is based on a consideration of all the materials, and must be accepted. Indeed, it is stated in the judgment of the Additional District Judge that "the fact of due execution and attestation of the will was not challenged on behalf of the caveator at the time of the hearing of the Suit". This contention of the Appellant must also be rejected.

(emphasis supplied)

36. Relying on the aforesaid decision of the Honourable Supreme Court, the learned Counsel for the Respondents submitted that the Attesting Witnesses need not state in the chief-examination that they signed the will in the presence

of the Attestors. He would further contend that inasmuch one of the Attesting Witnesses was examined as PW2 and the co-executant and husband of the Testator Pushpam Ammal was also examined as PW4, who has spoken to about the execution and attestation of the will, thereby the execution of the will has been duly proved. Furthermore, according to the learned Counsel for the Respondents, the judgment rendered by the four Judges of the Honourable Supreme Court has not been overruled or distinguished even by the decision rendered by the Five Judges of the Honourable Supreme Court mentioned above in Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee (since deceased and after him his Legal Representatives and others, Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, Therefore, according to the learned Counsel for the Respondents, PW2 did not see the Attestors signing the will or the Testators did not see the Attesting Witnesses signing the will. will not be a lacuna or fault disentitling the Plaintiffs from getting the relief sought for in the Suit. Merely because it is not stated that the Testators did not see the Attesting Witnesses signing the will or vice-versa will not be a bar for the Plaintiffs from getting the relief.

37. When we look into the observations made by the Honourable Supreme Court in Para No. 12 of the decision reported in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, , the Honourable Supreme Court has categorically held that "It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the Testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the Attesting Witnesses signed in the presence of the Testator. This is a pure question of fact depending on appreciation of evidence. The finding of the Court below that the will was duly attested is based on a consideration of all the materials, and must be accepted. Indeed, it is stated in the judgment of the Additional District Judge that "the fact of due execution and attestation of the will was not challenged on behalf of the caveator at the time of the hearing of the Suit". In this case, the Honourable Supreme Court has taken into consideration that the very fact of attestation and execution of the will in that case was not at all denied by the other party. Even otherwise, it was held that it is a question of fact. Therefore, the Honourable Supreme Court held that merely because witness does not say that the will was signed in the presence of the attestor, it cannot be called as due attestation. Whereas, the facts in the present case are totally different. The Defendant/Appellant had specifically contended that at the time of the alleged execution of the will, one of the Testators namely Pushpam Ammal was suffering from cancer and she was not in a sound and disposing state of mind and therefore she could not have executed the will, as alleged. Furthermore, one of the legatees has not been given any share in the property and she was excluded from getting any benefit out of the will. Above all, the Defendant/Appellant had vehemently contended that the property in question was purchased out of his own funds and that his mother in

law Pushpam Ammal was only a name lender. Under those circumstance, there is a cloud over the due execution of the will. Therefore, when the very execution of the will is challenged, necessarily it has to be proved in accordance with Section 63 of the Indian Succession Act and u/s 68 of the Indian Evidence Act.

38. When PW2, one of the Attesting Witnesses did not speak about the fulfillment of mandatory procedures contemplated u/s 63 of the Indian Succession Act and u/s 68 of the Indian Evidence Act and as contemplated by the Honourable Supreme Court in the decisions rendered by Five Judges, Four Judges and Three Judges of the Honourable Supreme Court, the decision rendered by the Four Judges of the Honourable Supreme Court, relied on by the learned Counsel for the Respondents, reported in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, is clearly distinguishable on facts. In any view of the matter, I am bound by the decision rendered by the Constitution Bench of the Honourable Supreme Court reported in Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee (since deceased and after him his Legal Representatives and others, Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others,

39. The learned Counsel for the Respondents relied on the decision of the Honourable Supreme Court reported in Maria Stella, Karunai Nesam and David Mohan Babuji Vs. T. Joseph Catherine, T.X. Francis, A. Rosalin Stephen, N. Bernard, S. Christina, S. Philomina, S. Lidwin, S. Josephina, rep. By mother and guardian and A. Rosalin Stephen, , to say that it is not necessary to give positive evidence to prove that the Attesting Witnesses put their signature in the presence of the testatrix or vice-versa. 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.

40. This decision is also clearly distinguishable on the ground that, in that case, it was held in para No. 29 that husband of the First Appellant and father of the Appellants 2 and 3 had not only admitted the execution of the will of his mother, but also acted further as contemplated under Exs. A1 and A2 therein. Therefore, they themselves did not dispute the will, the persons claiming through him cannot sustain their objection regarding the genuineness of the said will. In that case also, the will was never called upon in question. Therefore, the observations made by this Court in the above said decision as to the fact of Testator seeing the Attesting Witnesses signing the will or vice-versa cannot come to the rescue of the Respondents/Plaintiffs.

41. In the latest decision of the Honourable Supreme Court reported in Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and Others, in which decision reported in Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, was also followed, it was held by the Honourable Supreme Court that the will was not proved as both the Attesting Witnesses either attested the will in presence of each other or the Testator had acknowledged his signature in presence of other witnesses. In

Para No. 16, it was held as follows:

16. The question which, thus, arises for consideration is as to whether execution of the will has been proved. In our opinion, it has not been. The requirements for proving a will have been laid down in a large number of decisions. We would, however, refer to only a few of them.

In Janki Narayan Bhoir, while dealing with the question elaborately, this Court held;

8. To say a will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e. (a) the Testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the Testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this Appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the Testator sign or affix his mark to the will, or must have seen some other person sign the will in the presence and by the direction of the Testator, or must have received from the Testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the will in the presence of the Testator.

9. It is thus clear that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one Attesting Witness at least has been called for the purpose of proving its execution, if there be an Attesting Witness alive, and subject to the process of the Court and capable of giving evidence. It flows from this Section that if there be an Attesting Witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the Testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the Attesting Witnesses must be examined. But at least one Attesting Witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by

law to be attested, shall not be used as evidence until one Attesting Witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one Attesting Witness even though the will has to be attested at least by two witnesses mandatorily u/s 63 of the Succession Act. But what is significant and to be noted is that one Attesting Witness examined should be in a position to prove the execution of a will. To put in other words, if one Attesting Witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two Attesting Witnesses in the manner contemplated therein, the examination of the other Attesting Witness can be dispensed with. The one Attesting Witness examined, in his evidence has to satisfy the attestation of a will by him and the other Attesting Witness in order to prove there was due execution of the will. If the Attesting Witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the Testator but it means fulfilling and proof of all the formalities required u/s 63 of the Succession Act. Where one Attesting Witness examined to prove the will u/s 68 of the Evidence Act fails to prove the due execution of the will then the other available Attesting Witness has to be called to supplement his evidence to make it complete in all respects. Where one Attesting Witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

(emphasis supplied)

Following the said decision, as also the other decisions in *Benga Behera*, this Court held:

21. It was also not necessary for the Appellants to confront him with his signature in the Xerox copy of the will, inasmuch as the same had not appeared in the certified copy. Execution of a will must conform to the requirement of Section 63 of the Succession Act, in terms whereof a will must be attested by two or more witnesses. Execution of a will, however, can only be proved in terms of Section 68 of the Evidence Act. In terms of the said provision, at least one Attesting Witness has to be examined to prove execution of a will.

42. In the above background, it is worthwhile to extract the decision of the Honourable Supreme Court reported in *Janki Narayan Bhoir Vs. Narayan Namdeo Kadam*, wherein in Para No. 12, it was held as follows:

12. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the Attesting Witnesses, though alive. This section provides that if an Attesting Witness denies

or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the Attesting Witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one Attesting Witness, who alone had been summoned, has failed to prove the execution of the will and other Attesting Witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the Court. It is clear from the language of Section 71 that if an Attesting Witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an Attesting Witness examined fails to prove the due execution of will as required under Clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one Attesting Witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other Attesting Witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available Attesting Witnesses should be called when the one Attesting Witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference u/s 114, Illustration (g) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling Section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling Section. It lays down the necessary requirements, which the Court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence"" as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation u/s 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the Court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will.

43. Therefore, it is clear that the Honourable Supreme Court categorically held that the attestation has to be properly proved by the party who relies upon the will. In this case, the execution of the attestation has not been proved by the Plaintiffs in accordance with law. If that be the case, what will be the resultant position is also to be seen. The Suit was filed for partition and separate possession by the Plaintiffs against their sister's husband contending that their mother owns half share in the suit property and therefore they are entitled to partition of the property. They have claimed that their mother had left a will dated 26.03.1985 bequeathing the suit property in their favour. It was also contended that in the will, no share has been allotted to the other daughter

namely Jhansi Rani and therefore, she was not impleaded as a party to the Suit.

44. It is well settled that in a Suit for partition, all the necessary parties have to be impleaded. In this context, it is necessary to look into the decision of the Honourable Supreme Court reported in Dhanalakshmi and Others Vs. P. Mohan and Others, wherein in para No. 5, it was held as follows:

5.....In the instant case, the Appellants have admittedly purchased the undivided shares of Respondents 2, 3, 4 and 6. It is not in dispute that the First Respondent P. Mohan has got an undivided share in the said suit property. Because of the purchase by the Appellants of the undivided share in the suit property, the rights of the First Respondent herein in the Suit or proceeding will not affect his right in the suit property by enforcing a partition. Admittedly, the Appellants, having purchased the property from the other co-sharers, in our opinion, are entitled to come on record in order to work out the equity in their favour in the final decree proceedings. In our opinion, the Appellants are necessary and proper parties to the Suit, which is now pending before the Trial Court. We also make it clear that we are not concerned with the other Suit filed by the mortgagee in these proceedings.

45. In this connection, I am also fortified by the judgment of this Court reported in Kaliammal Vs. Karuppan and 2 others, , wherein this Court held that non-impleadment of necessary party in a Suit for partition is fatal to the case. In Para Nos. 11 and 14, it was held as follows:

11. It is now settled law that in a Suit for partition, all the co-sharer are necessary parties and if those parties have not been added, the Suit is liable to be dismissed for non-joinder of any one of the parties.

14. There is also no dispute in the proposition that it is not desirable to keep out a sharer on the basis of a mere pleading by one if the rival parties contending in the absence of a particular sharer that he has no interest in the property. In this case, even though it is mentioned in the Plaint that Muruvayee was a co-sharer, no steps were taken by the Plaintiff to implead her, who had been left out.

46. Similarly, in the decision of this Court reported in R. Palanisami, Chinnammal and Parvathiammal Vs. R. Subramania Gounder and Others, a learned Judge of this Court held that non-impleadment of any one of the co-sharers/transferees in a Suit for partition is liable to be dismissed. In Para No. 10, it was held as follows:

10. It is a trite proposition of law that there cannot be any piecemeal partition and in a partition Suit, all necessary parties should be added and only in their presence comprehensively a partition suit could be decided. As such, both the Courts below were right in dismissing the Suit with the aforesaid finding that the suit was bad for non-joinder of necessary parties and also bad for adequate pleadings in support of the Plaintiff's prayer.

47. In this case, the Plaintiffs should have impleaded their sister Jhansi Rani as a party so that she can come and deny or support the averments made by the

Plaintiffs in the Suit. In a Suit for partition, merely because the will executed by their mother, which is also questioned, in which no share was given to their sister Jhansi Rani, she cannot be excluded from the array of parties to the Suit. She should have been necessarily impleaded as a party to the Suit for proper, effective and complete adjudication of the claim. In fact, the Defendant/Appellant has raised a specific plea in his Written Statement that Jhansi Rani is a necessary and proper party to the Suit and non-impleading of Jhansi Rani is fatal to the case put forth by the Plaintiffs. Furthermore, at the time of institution of the Suit, the other co-executant of the will namely Thavamani Nadar was very much alive but he was also not impleaded as a party to the Suit on the ground that the suit property does not belonged to him, but even then, in my considered opinion, Thavamani Nadar is a proper and necessary party the Suit. If the will is not proved and even if the Plaintiffs want partition in respect of the suit property devolving on the mother, then also necessarily the daughter Jhansi Rani has to be impleaded as a party, but in this case, Jhansi Rani is not impleaded, hence, the Suit for partition is liable to be dismissed on this ground also. In view of the above said decisions, definitely, non-impleading of the said Jhansi Rani as a party to the Suit is fatal to the case of the Plaintiffs. In the result, the substantial questions of law are answered in favour of the Defendant/Appellant and the Appeal Suit is allowed setting aside the decree and judgment of the Court below. No costs.