S.R. Srinivasa & Ors vs S. Padmavathamma on 22 April, 2010

Equivalent citations: 2010 AIR SCW 3935, (2010) 88 ALLINDCAS 438 (RAJ), 2010 (3) AIR KANT HCR 662, 2010 (5) SCC 274, (2010) 2 MARRILJ 1, (2010) 3 CGLJ 433, (2010) 2 RAJ LW 1039, (2010) 2 WLC (RAJ) 335, (2010) 2 ORISSA LR 286, (2010) 4 RECCIVR 210, (2010) 4 SCALE 245, (2010) 3 UC 1565, (2010) 3 ALL RENTCAS 98, (2010) 3 ALL WC 3137, (2010) 3 CAL HN 54, (2010) 3 CURCC 146, (2010) 2 HINDULR 449, (2010) 2 CAL LJ 69, (2010) 3 CIVILCOURTC 359, (2010) 6 KANT LJ 1, (2010) 5 MAD LJ 78, (2010) 5 MAH LJ 642, (2010) 111 REVDEC 675, (2010) 4 ICC 522, (2010) 1 WLC(SC)CVL 742, (2010) 4 CALLT 1, (2010) 2 CURLR 248, (2010) 3 CIVILCOURTC 294

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Bench: Surinder Singh Nijjar, V.S. Sirpurkar

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4623 OF 2005

S.R. SRINIVASA & ORS. .....APPELLANTS

VERSUS

S. PADMAVATHAMMA ...RESPONDENT

JUDGMENT

SURINDER SINGH NIJJAR, J.

1. This appeal by special leave has been filed by the legal heirs of the original plaintiff, Lalithamma. OS No.195 of 1986 had been filed by Lalithamma in the Court of Civil Judge, Mysore which was subsequently re-numbered as OS No.1434 of 1990 in the Court of Principal Civil Judge, (Junior Division), Mysore. The suit was for declaration that the plaintiff and defendant No.4 are the absolute owners of the suit schedule property and for possession thereof. The suit was dismissed by the trial court. The appeal filed by the plaintiffs against the aforesaid judgment was allowed. The suit

filed by the plaintiffs was decreed as prayed. The High Court, however, in regular second appeal filed by the respondent herein, set aside the judgment of the first appellate court and restored the judgment of the trial court, i.e. the suit filed by the plaintiffs-respondents was dismissed. In these circumstances, the legal representatives of the original plaintiffs have filed the present appeal by special leave in this Court.

2. Briefly stated the facts of the case are that the plaintiffs claimed that Puttathayamma was wife of Sivaramaiah who pre-deceased her in 1950. Puttathayamma died on 15.11.1979. She had four children. Lalithamma (daughter) who died in 1990, was the original plaintiff. Subbaramaiah (son) who died issueless in 1973 and Smt. Kamalamma (daughter) also died issueless in 1998. She was impleaded as defendant No.4 in this suit. Smt. Indiramma was the 4th child. She also died issueless on 24.10.85. It is claimed that upon the death of Subbaramaiah, Puttathayamma inherited the suit property and became the absolute owner being class one heir of Subbaramaiah. Upon the death of Puttathayamma, the deceased plaintiff, defendant No.4, Kamalamma and Indiramma inherited her property. During her life time, Puttathayamma was living with Indiramma. Upon her death, Indiramma continued to be in possession of the property. The dispute about the property arose soon after the death of Indiramma.

3. Since the original plaintiff - Lalithamma and defendant No.4 were residing outside, they did not come to know about the death of their sister, Indiramma. Defendant No.1 claiming to be close relative of deceased Indiramma organized and performed her cremation ceremony. The house in which Indiramma was residing i.e., schedule property contained a lot of movable properties such as gold and silver jewellery and other articles which were of considerable value. He took charge of the house as well as the moveable properties by putting it under lock and key. On learning about the death of their sister, appellants and defendant No.4 came to Mysore. They demanded that defendant No.1 should hand over the possession of the house and moveable properties. He, however, refused to do so asserting that he was the absolute owner of the entire property. Not only this, it is stated that defendant No.1 had taken away several lacs of rupees which had been kept by Indiramma in various fixed deposits. Defendant No.1 had declined to hand over the title deeds of the schedule property as well as the bank deposit receipts.

4. The appellant and defendant No.4 also learnt that the first defendant had taken heavy advances from defendants No.2 and 3 and put them in possession of different portions of the schedule property as tenant. He had been recovering heavy rent from defendants No.2 and 3. During the pendency of the suit, defendants No.2 and 3 vacated the suit schedule property. Later, defendant no 5 was put in possession of the property.

5. In the suit, it is made clear that appellant and the 4 th defendant will take separate action regarding the bank deposits and other moveable properties in appropriate proceedings after ascertaining the particulars thereof. It is clarified that the present suit was filed for declaration of the title to the property and for possession as the first defendant has denied their title by refusing to hand over the property to them.

6. We may also notice here that during the pendency of the suit, defendant No.4 also passed away issueless. The amended suit was, therefore, pursued by the L.Rs of deceased Lalithamma.

7. In the written statement, it was claimed by the defendant No.1 that Puttathayamma had executed a Will on 18.6.1974 in favour of Indiramma. Consequently, there was no intestate succession. Testamentary succession devolved on late Indiramma. Therefore, neither the plaintiffs nor the 4th defendant could succeed to the properties of Puttathayamma at all. During the life time of Indiramma, her sister did not care to even look after her. The moment she died, they have claimed to be heirs of her estate. Defendant No.1, on the other hand, is the son of Seethamma, sister of Puttathayamma. He denied the entire claim made by the plaintiffs. He further explained that he had informed the plaintiff and defendant No.4 about the death of Indiramma. Although the plaintiff turned up on the 5th day, the 4th defendant did not choose to come at all. Defendant No.1 further claimed to have carried out extensive repairs of the house. It is also pleaded by defendant No.1 that Indiramma was the second wife of one Chalapati Rao, who pre-deceased her. Although Chalapati Rao did not beget any children with Indiramma, he died leaving four sons and two daughters from his first wife. According to the first defendant, the legal heirs of Chalapati Rao would have preference over the appellants and defendant No.4. Therefore, under any circumstances, no relief could be granted to them.

8. In reply to the amended plaint, defendant No.1 stated that an agreement of mortgage had been created in favour of 5 th defendant in respect of the schedule property. Upon receiving Rs.1,00,000/-, defendant No.1 has put defendant No.5 in possession.

9. With these pleadings parties led their evidence. Upon consideration of the entire material, the suit filed by the appellants herein was dismissed by the Trial Court.

10. The Trial Court notices that defendant No.1 is the son of Seethamma, sister of Puttathayamma. It is also noticed that Indiramma was the second wife of one Chelapathirao who had six children from his previous marriage. Indiramma, however, died issueless. The Will dated 18.6.1974 was produced by defendant No.1, during evidence. The Trial Court observed that the plaintiffs have not seriously disputed the execution of the Will by Puttathayamma in favour of Indiramma. Defendant No.1 had examined the scribe of the Will as DW2 to prove the Will. It has been held that the appellants in fact admitted the execution of the Will in a subsequent suit being OS No.233 of 1998 which was filed by the appellants herein as the legal heirs. In view of the testamentary succession, Indiramma became the absolute owner of the schedule property. Since husband of Indiramma had pre-deceased her, the property would devolve upon his children under Section 15 (1) (b) of the Hindu Succession Act, 1956 (hereinafter referred to as "the Act"). It would not devolve on the appellants and defendant No.4 under Section 15(2) of the Act. The Trial Court further notices the claim made by the first defendant during trial that Indiramma had executed a Will in his favour dated 2.10.1984, bequeathing the schedule property to him. The Trial Court further notices that though defendant No.1 had got the Will dated 2.10.84 marked as Exhibit, he had not chosen to examine any of the attesting witnesses to the document. Defendant No.1 had earlier not instituted any proceedings to prove his title over the schedule property pursuant to the alleged Will. Consequently, the claim of defendant No.1 over the schedule property has also been negatived. However, in view of the finding that appellants and

defendant No.4 cannot not inherit the property of Puttathayamma under Section 15 (2) of the Act, the suit has been dismissed.

11. The aforesaid judgment of the Trial Court was challenged by the petitioners in appeal. The first appellate court in a very elaborately written judgment recapitulated the undisputed facts. It is noticed that Puttathayamma had four children, namely, plaintiff, defendant No.4, Subbaramaiah (who pre-deceased Puttathayamma) and Indiramma. Indiramma was in possession of the schedule property. After the death of Puttathayamma, plaintiff and defendant No.4 were residing in their matrimonial homes away from Puttathayamma. Defendant No.1 had cremated Indiramma. Appellant and defendant No.4 had not been present at the time of the cremation. Subsequently, they demanded the possession of the house which the first defendant refused to hand over. The first defendant claimed to have put 5th defendant in possession as a mortgagee. Therefore they filed the suit claiming title over the property and possession thereof. In the written statement defendant No.1 claimed that entire movable and immovable property had been bequeathed to Indiramma in a Will dated 18.6.1974. The first appellate court upon examination of the entire evidence accepts the submission made on behalf of the petitioners that the execution of the Will is shrouded by suspicious circumstances. The first appellate court also negatived the submission made on behalf of the first defendant that the plaintiffs have admitted the execution of the Will in the subsequent suit. Upon examination of the evidence, the first appellate court had come to the conclusion that PW1 had not admitted the genuineness of the Will anywhere. This witness had also stated that he had come to know about the Will of Puttathayamma from the written statement filed by defendant No.1. It is, therefore, held that there can be no presumption with regard to the genuineness of the Will on the basis of the alleged admission. Therefore the first appeal was allowed, judgment and decree of the Trial Court were set aside. The suit filed by the plaintiffs/appellants was decreed with costs declaring that the legal representatives of the plaintiffs are the owners of the suit property and they are entitled for possession of the suit schedule property.

12. Aggrieved against this, defendant No.1 filed Regular Second Appeal No.641 of 2003 in the High Court of Karnataka, Bangalore. The High Court allowed the Regular Second Appeal and nonsuited the plaintiffs, with the following observations:-

> "5. The contesting 1st defendant does not set up a rival claim of title, but only disputes the title of the plaintiffs and their right to seek possession. According to the 1st defendant, Ex.D7 is the registered will executed by Puttathayamma in favour of her daughter, Indiramma. As argued by Shri T.N. Raghupathy, learned counsel for respondents- appellants, I find that PW1-1st plaintiff has unequivocally admitted in his evidence, about issuance of legal notice prior to the filing of the suit and allegations are made therein about execution of the will by Puttathayamma in favour of Indiramma and also admits that she was married to one Chalapati Rao who predeceased her and through his first wife, had four children. Ex.D36 is the certified copy of the plaint in OS 233/98 filed by the plaintiffs herein. In the said suit, there is categorical averment to the effect that Puttathayamma, during her lifetime, had executed the will, bequeathing her immovable properties in favour of Indiramma. When execution of the will has become an admitted fact by the plaintiff, formal proof

> of execution by examining the attestors would not be necessary in law. Therefore, I am unable agree with Sri Kashinath, learned counsel for the respondent that the will is not prove. Further the finding of the appellate court that the will is shrouded with suspicious circumstances is based on unwarranted surmises and contrary to the admissions of the plaintiff. Accordingly, point no. (1) is answered in the affirmative."

13. The High Court further holds that since the property had been acquired by Indiramma through Will, Section 15(2) of the Act would not be applicable. It is noticed that "The provisions of Section 15 (2) will apply only when the property is acquired by a female by way of intestate succession, otherwise, the property would devolve as directed under sub-Section (1). May be, the children of deceased husband of Indiramma being step sons, are not entitled to succession under sub-sec. (1) (a), but however as heirs of the husband, under sub-sec. (1) (b) of Sec.15, they will be entitled to succeed to the estate. In that view of the matter, the claim of title of property by the plaintiffs is untenable." It is further held that since the children of the first wife would be entitled to succeed to the estate, the appellants (plaintiffs) have no right to seek the relief of title by succession. Consequently, the appeal was allowed. The judgment and decree of the Appellate Court was set aside. The judgment and decree of the Trial Court was confirmed. This judgment is challenged before us in the present appeal.

14. Mr. Bhat, learned counsel for the appellants has submitted that the judgment of the High Court is wholly erroneous in facts as well as in law. According to the learned counsel, the first appellate court has rightly held that the execution of the Will has not been proved. There is no admission with regard to the execution or the genuineness of the Will in the second suit. It was merely stated that a Will has been executed by Puttathayamma. The Will had to be proved in accordance with the procedure laid down under Section 63 of the Act and in accordance with Section 68 of the Indian Evidence Act. The first appellate court, upon examination, of the entire circumstances came to the conclusion that the Will is shrouded by suspicious circumstances. The High Court, without examining any of the real issues has brushed aside the reasons given by the first appellate court. According to the learned counsel, the second suit had been filed by the appellants herein only to prevent respondent No.1 from dealing with the movable properties of Puttathayamma. Even if the execution of the Will is admitted, its genuineness had to be established by respondent No.1. None of the attesting witnesses were examined. The Sub Registrar was also not examined. DW2, the scribe did not anywhere mention that he had attested the Will. Therefore, his examination as a witness would not cure the defects. The High Court has also ignored the fact that Indiramma has taken an active part in execution of the Will. She was present when the Will was written. She was also present before the Sub Registrar. According to the learned counsel, the mother was not in a fit state of mind to have executed the Will, shortly after the death of her only son. This fact has been totally ignored by the High Court. If she had been the author of the Will, she would not have described her son as a "bachelor" whereas in fact he was a "divorcee". According to the learned counsel, the Will is a manufactured document created by defendant No.1 to exclude the appellants from succession. Learned counsel further submitted that since it was a judgment of reversal, it was necessary for the High Court to give cogent reasons to explain as to how the conclusions reached by the first appellate court were not acceptable. The High Court has reversed the judgment without giving any reasons. In support of his submissions, learned counsel has relied on the following judgments:-

(1) Jayantilal Mansukhlal and another vs. Mehta Chhanalal Ambalal, AIR 1968 Gujarat 212;

(2) State of Punjab vs. Balwant Singh and others, 1992 Supp (3) Supreme Court Cases 108;

(3) V. Dandapani Chettiar vs. Balasubramanian Chettiar (Dead) by L.Rs. and Others, (2003) 6 Supreme Court Cases 633; (4) Palanivelayutham Pillai and others vs. Ramachandran and others, (2000) 6 Supreme Court Cases 151; and (5) K. Kamalam (dead) and another vs. Ayyasamy and another, 2001 (7) Supreme Court Cases 503.

15. According to the learned counsel, the property would be thus inherited by the appellants as Puttathayamma died intestate. He further submitted that even if the Will dated 18.6.1974 is accepted as valid, defendant No.1 cannot inherit the property of Indiramma as she had died intestate. The Will dated 2.10.84 propounded by defendant No.1 to have been made by Indiramma has not been proved. Therefore, again under Section 15 (2) of the Act, the property will revert back to the plaintiffs/appellants. Learned counsel emphasized that defendant No.1 has no locus standi to contest the title of the appellants as he is a complete outsider for the family. Section 15 of the Act has been enacted to ensure that the property remains within the family. Therefore, this court has consistently held against stranger in matters of succession.

16. Learned counsel for the respondents, on the other hand, submitted that the Will from Puttathayamma is proved. There are no reasons to disbelieve a registered Will. The exclusion of the other daughters was because they were married and well settled. Therefore, the property was given in good faith to the unmarried Indiramma. Learned counsel further submitted that if a respondent is a trespasser, equally the appellants have not proved any better title. The first appellate court has wrongly stated that there is no explanation with regard to the custody of the Will as it was given to respondent No.1 by Indiramma. It is further submitted that the suspicious circumstances pointed out by the appellants are only conjectural. Therefore, the High Court has rightly disregarded the same. Genuineness of the Will cannot be disbelieved merely because the Sub Registrar or the scribe was not examined. It was not mandatory to examine either the scribe or the Sub Registrar. Indiramma's presence in the house at the time when the Will was written is natural as she was living with Puttathayamma. The description of the son in the Will as "bachelor" instead of "divorcee" would not be so material. The testator only wanted to say that he was unmarried. The appellants have failed to lead any evidence that Puttathayamma was not in a sound and disposing mind due to the death of her son. In fact it was only because her son had died that she bequeathed her property to Indiramma. Learned counsel further submitted that in view of the admission about the execution of the Will made in the subsequent suit, it cannot possible by held that the Will was not duly proved. According to the learned counsel, admissions are the best form of evidence. Unless it is effectively rebutted, the same can be relied upon. He relies on the following judgments:-

(1) Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and others, AIR 1960 Supreme Court 100; (2) Nagindas Ramdas v. Dalpatram Iccharam alias Brijram and others, AIR 1974 Supreme Court 471; and (3) Gautam Sarup vs. Leela Jetly and

others, (2008) 7 SCC 85.

17. In reply, Mr. Bhat has submitted that there is no clear admission in the subsequent suit which was only to prevent the respondents to be away from the movable property. In any event, admissions cannot be relied upon to dispense with proof of the Will as required under law. He relies on the judgments in the cases of Somnath Berman v. Dr.S.P. Raju and another, AIR 1970 Supreme Court 846 and Smt. Jaswant Kaur v. Smt. Amrit Kaur and others, AIR 1977 Supreme Court 74.

18. We have considered the submissions made by the learned counsel for the parties. It is not disputed that respondent No.1 is a rank outsider. He is not a lineal descendant of Puttathayamma. He is son of Puttathayamma's sister Seethamma. This would become clear from the genealogical graph of the family which is as under:-

Puttathayamma (died in 15.11.1997)		Sivaramaia (died in 1950)	
|	|	|	|
Smt. Lalithamma (died in 1990) (original plaintiff)	Subbaramaiah (died 1973) issueless (def.4)	Smt. Kamalamma (died 1998) issueless (husband Predeceased)	Smt. Indiramma (died issueless 24.10.1985

_____ | | | | S.R. Srinivasan B.S. Umadevi S.R. Venkat- S.R.V. S.R. Rajarao Krishnaiah Subbarao (plff.1) (plff.2) (plff.3) (plff.4) (plff.5)

19. Clearly if the Will dated 18.61974 is held not to be genuine, the property would be inherited by the appellants under Section 15 (2) of the Act. There is no dispute on this proposition of law by either side. The only question that needs determination in this case is as to whether the Will executed by Puttathayamma has been proved to be duly executed and the same was genuine.

20. The statutory provision regarding the rules of succession in case of female Hindus as enacted in Section 15 of the Hindu Succession Act, 1956 is as follows:

> "15. General rules of succession in the case of female Hindus.--(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,--

(a) firstly, upon the sons and the daughters (including the children of any predeceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother. (2) Notwithstanding anything contained in sub- section (1),--

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

21. A perusal of the aforesaid provisions would show that the basic aim of Section 15(2) is to ensure that inherited property of an issueless female Hindu dying intestate goes back to the source. It was enacted to prevent inherited property falling into the hands of strangers. This is also evident from the recommendations of the Joint Committee of the Houses of Parliament, which have been duly noticed by this Court in the case of State of Punjab v. Balwant Singh, 1992 Supp (3) SCC 108. The scheme underlying the introduction of the aforesaid provision had been discussed as follows:

"It came to be incorporated on the recommendations of the Joint Committee of the two Houses of Parliament. The reason given by the Joint Committee is found in clause (17) of the Bill which reads as follows:

"While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would prevent properties passing into the hands of persons to whom justice would demand they should not pass."

15. The report of the Joint Committee which was accepted by Parliament indicates that sub-

section (2) of Section 15 was intended to revise the order of succession among the heirs to a Hindu female and to prevent the properties from passing into the hands of persons to whom justice would demand that they should not pass.

That means the property should go in the first instance to the heirs of the husband or to the source from where it came."

22. This Court had occasion to consider the scheme of the aforesaid Section in the case of V. Dandapani Chettiar v. Balasubramanian Chettiar,(2003) 6 SCC 633. The extent and nature of the rights conferred by this section is expressed as follows:-

> "9. The above section propounds a definite and uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. This section groups the heirs of a female intestate into five categories described as Entries (a) to (e) and specified in sub-section (1). Two exceptions, both of the same nature are engrafted by sub-section (2) on the otherwise uniform order of succession prescribed by sub-section (1). The two exceptions are that if the female dies without leaving any issue, then (1) in respect of the property inherited by her from her father or mother, that property will devolve not according to the order laid down in the five Entries (a) to
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> (e), but upon the heirs of the father; and (2) in respect of the property inherited by her from her husband or father-in-law, it will devolve not according to the order laid down in the five Entries (a) to (e) of sub-section (1) but upon the heirs of the husband. The two exceptions mentioned above are confined to the property "inherited" from the father, mother, husband and father-in-law of the female Hindu and do not affect the property acquired by her by gift or by device under a Will of any of them. The present Section 15 has to be read in conjunction with Section 16 which evolves a new and uniform order of succession to her property and regulates the manner of its distribution. In other words, the order of succession in case of property inherited by her from her father or mother, its operation in confined to the case of dying without leaving a son, a daughter or children of any predeceased son or daughter."
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> "10. Sub-section (2) of Section 15 carves out an exception in case of a female dying intestate without leaving son, daughter or children of a predeceased son or daughter. In such a case, the rule prescribed is to find out the source from which she has inherited the property. If it is inherited from her father or mother, it would devolve as prescribed under Section 15(2)(a). If it is inherited by her from her husband or father- in-law, it would devolve upon the heirs of her husband under Section 15(2)(b). The clause enacts that in a case where the property is inherited by a female from her father or mother, it would devolve not upon the other heirs, but upon the heirs of her father. This would mean that if there is no son or daughter including the children of any predeceased son or daughter, then the property would devolve upon the heirs of

> her father. Result would be -- if the property is inherited by a female from her father or her mother, neither her husband nor his heirs would get such property, but it would revert back to the heirs of her father."

23. As noticed earlier by virtue of Section 15(2) (a) of the Act, the appellants would inherit the property in dispute. This right is sought to be defeated by defendant No.1 on the basis of the Will dated 18.6.1974, allegedly executed by Puttathayamma. Defendant No.1 being the sole beneficiary under the Will claims that the plaintiffs can not claim to `inherit' the property on the basis of intestate succession. Undoubtedly, therefore, it was for defendant No.1 to prove that the Will was duly executed, and proved to be genuine.

24. The mode, the manner and the relevant legal provisions which govern the proof of Wills have been elaborately dilated upon by this Court in a number of cases. We may make a reference only to some of these decisions.

25. In the case of H. Venkatachala Iyengar v. B.N. Thimmajamma, [1959 Supp (1) SCR 426] Gajendragadkar J. stated the true legal position in the matter of proof of Wills. The aforesaid statement of law was further clarified by Chandrachud J. in the case of Jaswant Kaur v Amrit Kaur [(1977) 1 SCC 369] as follows:

> "1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
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> 2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, 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.
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> 3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.
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> 4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by

> the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.
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> 5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.
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> 6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

26. Applying the aforesaid principles to this case, it would become evident that the Will has not been duly proved. As noticed earlier in this case, none of the attesting witnesses have been examined. The scribe, who was examined as DW.2, has not stated that he had signed the Will with the intention to attest. In his evidence, he has merely stated that he was the scribe of the Will. He even admitted that he could not remember the names of the witnesses to the Will. In such circumstances, the observations made by this Court in the case of M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons, [(1969) 1 SCC 573], become relevant. Considering the question as to whether a scribe could also be an attesting witness, it is observed as follows:

> "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."

27. In our opinion, the aforesaid test has not been satisfied by DW.2 the scribe. The situation herein is rather similar to the circumstances considered by this Court in the case of N. Kamalam v. Ayyasamy, [(2001) 7 SCC 503]. Considering the effect of the signature of scribe on a Will, this Court observed as follows:

> "26.The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting witnesses."
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> "The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself
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> -- this is again, however, not the situation existing presently in the matter under consideration."

28. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a Will can be held to have been proved when the statutory requirements for proving the Will are satisfied. The High Court has however held that proof of the Will was not necessary as the execution of the Will has been admitted in the pleadings in O.S.No.233 of 1998, and in the evidence of P.W.1.

29. The contention that the execution of the Will has been admitted by the appellants herein had been negated by the First Appellate Court in the following manner:

> "What is admitted under EXD 36 i.e. plaint in O.S No: 233/98 at Para 7 is only about the will and not the genuineness of the will. During evidence of PW 1, it is elicited in the cross examination that he came to know about the will of Puttathayamma as it was revealed in the written statement and that Puttathayamma might have written the will dated 4-7-74. But PW 1 has not admitted the genuineness of the will anywhere in his evidence. Therefore the contention of the learned Advocate for the first respondent that the execution of the will is admitted and therefore its genuineness is to be presumed cannot be accepted"

30. The aforesaid findings are borne out from the record produced before us, which we have perused. There is no admission about the genuineness or legality of the Will either in the plaint of OS No.233 of 1998 or in the evidence of PW1. The High court committed a serious error in setting aside the well considered findings, which the first Appellate Court had recorded upon correct analysis of the pleadings and the evidence.

31. It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless successfully withdrawn or proved to be erroneous. The legal position with regard to admissions and their evidentiary value has been dilated upon by this Court in many cases. We may notice some of them.

32. In the case of Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi (1960) 1 SCR 773 it was observed as follows:

> "An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous."

33. In the case of Nagindas Ramdas v. Dalpatram Ichharam, (1974) 1 SCC 242, it has been observed:

> "Admissions, if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

34. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in the case of Gautam Sarup v. Leela Jetly,(2008) 7 SCC 85 wherein it was observed as follows:

> "16.A thing admitted in view of Section 58 of the Evidence Act need not be proved. Order 8 Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order 12 Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom."

> "28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

35. Examined on the basis of the law stated above we are unable to agree with the High Court that there was no need for independent proof of the Will, in view of the admissions made in OS No.233 of 1998 and the evidence of PW1. In fact there is no admission except that Puttathayamma had executed a Will bequeathing only the immovable properties belonging to her in favour of

Indiramma. The First Appellate Court, in our opinion, correctly observed that the aforesaid admission is only about the making of the Will and not the genuineness of the Will. Similarly, PW1 only stated that he had come to know about the registration of the Will of his grandmother favouring Indiramma through the written statement of the first defendant. The aforesaid statement is followed by the following statements "Other than that I did not know about the Will. She was not signing in English. I have not seen her signing in Kannada. There was no reason for my grand mother to write a Will favouring Indiramma." Even in the cross- examination he reiterated that "I know about the will written by Puttathayamma on 18.6.1974 bequeathing the properties to Indiramma only through the written statement of the first defendant." In view of the above we are of the opinion that the High Court committed an error in setting aside the well-considered finding of the First Appellate Court. The statements contained in the plaint as well as in the evidence of PW1 would not amount to admissions with regard to the due execution and genuineness of the Will dated 18.6.1974.

36. In our opinion, the High Court also committed a serious error by totally disregarding the suspicious circumstances surrounding the execution of the Will. The First Appellate Court on analysis of the entire evidence had clearly recorded cogent reasons to conclude that the execution of the Will is surrounded by suspicious circumstances.

37. The First Appellate Court pointed out that the execution of the Will has not been proved as none of the attesting witnesses have been examined. The scribe who was examined as DW.2 nowhere stated that he had attested the Will. The animus to attest was not evident from the document. In the Will, D.W.2 had described himself as the scribe of the Will and signed as such. Therefore, in view of the ratio of law laid down in N. Kamalam (supra) the statutory requirement of attestation was clearly not satisfied.

38. The First Appellate Court also observed that the Will is not genuine, its execution being shrouded in suspicious circumstances. It is noticed by the First Appellate Court that although Puttathayamma had been allotted certain specific property, there is no recital in the Will as to which of the properties had been bequeathed to Indiramma. It is further noticed that son of Puttathayamma died on 27.10.73. She had, therefore, inherited the property which had been allotted to the share of the respondent. The Will does not describe the exact property that may have been bequeathed by Puttathayamma in favour of Indiramma. Non-description of the schedule property creates a reasonable suspicion as to whether Puttathayamma executed the Will Ex.D7. It is noticed that if she had the intention of bequeathing all her property to Indiramma, she would have mentioned the details of all the properties which belonged to her in the Will. The First Appellate Court further holds that no reason has been given as to why the Will was presented before the Sub Registrar on two separate occasions for registration. Although the son of Puttathayamma died after having been divorced from his wife he is described in the Will as a bachelor. No reason has been stated in the Will as to why the other two daughters have been excluded from the property by Puttathayamma. Since the suspicious circumstances have not been explained by defendant No.1, the Will is not genuine. The First Appellate Court also notices that although Indiramma is the sole beneficiary in the Will, she was present at the time when the Will was written. She was also present in the office of Registrar when the Will was presented for registration. This would clearly show that

Indiramma had an evil eye on the suit property and, therefore, the descriptions of the other properties were not given. The active participation of Indiramma in the writing and the registration of the Will may well create a suspicion about its genuineness. We may notice here the observations made by this Court in the case of Ramachandra v. Champabia [AIR 1965 SC 357]. This Court has held as follows:

> "This Court also pointed out that apart from suspicious circumstances of this kind where it appears that the propounder has taken a prominent part in the execution of the will which confers substantial benefits on him that itself is generally treated as a suspicious circumstances attending the execution of the will and the propounder is required to remove the suspicion by clear and satisfactory evidence. In other words, the propounder must satisfy the conscience of the court that the document upon which he relies in the last will and testament of the testator."

39. Since there were suspicious circumstances, it was necessary for the defendants to explain the same. The registration of the Will by itself was not sufficient to remove the suspicion. The first appellate court also notices that even in cases where the execution of the Will is admitted, at least one attesting witness of the Will has to be examined to receive the Will in evidence. DW2, who has been examined is the scribe of the Will, has given no plausible reasons as to why the Will was presented twice before the Sub Registrar for registration. Nor is it stated by this witness as to why the Will was not registered on the first occasion. It is also held by the First Appellate Court that non-examination of the Sub Registrar creates suspicion about the genuineness of the Will. Even the attesting witnesses to the Will have not been examined. There is no evidence whether the Will was read over by the Sub Registrar or anybody else before it was registered. It is not explained as to how the Will came into possession of defendant No.1. There is no evidence when he was put in proper custody of the Will. Considering the cumulative effect of all the circumstances, the First Appellate Court has held that execution of the Will is surrounded by suspicious circumstances. Consequently, the appeal was allowed and the judgment of the Trial Court was set aside.

40. The High Court in its judgment seems to have misread the entire evidence. Aforesaid findings recorded by the First Appellate Court have been brushed aside by dubbing them as conjectural. We are unable to appreciate the course adopted by the High Court. It was so influenced by the alleged admission made by the plaintiffs in the second suit, it did not deem it appropriate to examine the material which formed the basis of the findings recorded by the First Appellate Court. It appears that the pleadings, documents and the evidence was not read by the High Court yet it concluded that the findings of the Appellate Court were conjectural. We are unable to endorse the view expressed by the High Court.

41. The High court ought to have taken great care to satisfy its judicial conscience that the execution of the Will was not surrounded by suspicious circumstances. The Appellate Court had pointed out so many suspicious circumstances which could not have been brushed aside as being conjectural. The findings were based on documentary evidence. It was necessary for the defendant No.1 to answer a number of pertinent questions relating to the execution of the Will.

42. It was also necessary for the High Court to exercise care and caution to ensure that the propounder of the Will has removed all legitimate suspicion. We have earlier noticed that in this case Indiramma was living with her mother Puttathayamma at the time of her death. She was the sole beneficiary under the Will dated 18.6.1974. Her sisters, the original plaintiff and defendant No.4 that is, Lalithamma and Kamalamma had been excluded from the inheritance. There is no convincing reason as to why they were excluded from the inheritance. The Will merely mentions that these two ladies are well settled in their lives whereas Indiramma was not married. The Will does not specify which of the properties has been bequeathed to Indiramma, although Puttathayamma has been allotted certain specific property. Puttathayamma's son had died on 27.10.73 and the Will is stated to have been made on 18.6.1974. The Will is signed by Indiramma, even though she is the sole beneficiary under the Will. She was present in the office of the sub-Registrar at the time when the Will was registered. There is also a question as to why the Will was presented for registration on two different occasions. It appears that on the date when the Will was executed Indiramma also obtained a power of attorney from her mother which would demonstrate her anxiety to come into possession of the property immediately. Neither the scribe (DW2) nor DW1 were able to give any satisfactory explanation as to why the Will was not registered on the first occasion. In such circumstances it was the duty of the of the High Court to carefully examine the findings recorded by the lower Appellate Court together with the relevant documents on the record to ensure that there is a proper explanation given by defendant No.1 of the aforesaid suspicious circumstances. This Court in Iyengar case (supra) had clearly held that cases in which the execution of the Will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of his own free will. In such circumstances it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed by the mere assertion of the propounder that the Will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the Will was made.

43. In our opinion, the High Court failed to exercise proper care and caution by not thoroughly examining the evidence led by the party, especially when it was not in agreement with the reasons recorded by the First Appellate Court. In the case of Jaswant Kaur v. Amrit Kaur, (1977) 1 SCC 369 this Court reiterated the principles governing the proof of a Will which is alleged to be surrounded by suspicious circumstances. Justice Chandrachud speaking for the Court observed as follows:

> "8. The defendant who is the principal legatee and for all practical purposes the sole legatee under the will, is also the propounder of the will. It is he who set up the will in answer to the plaintiff's claim in the suit for a one-half share in her husband's estate. Leaving aside the rules as to the burden of proof which are peculiar to the proof of testamentary instruments, the normal rule which governs any legal proceeding is that the burden of proving a fact in issue lies on him who asserts it, not on him who denies it. In other words, the burden lies on the party which would fail in the suit if no evidence were led on the fact alleged by him. Accordingly, the defendant ought to have led satisfactory evidence to prove the due execution of the will by his grandfather Sardar Gobinder Singh.

> 9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will."

44. In our opinion, the High Court failed to examine the entire issue in accordance with the aforesaid principles laid down by this Court. We are, therefore, unable to uphold the impugned judgment. The appeal is allowed. Judgment of the High court is set aside and the judgment of the First Appellate Court i.e. the Court of the Principal Civil Judge (Senior Division) at Mysore is restored.

.....J. [V.S. SIRPURKAR] .....J. NEW DELHI; [SURINDER SINGH NIJJAR] APRIL 22, 2010.