(2025) 12 SC CK 0045

Supreme Court

Case No: Civil Appeal Nos. 14825-14826 Of 2025 (@Special Leave Petition (Civil) Nos.11057-11058 Of 2025

K. S. Dinachandran — APPELLANT

Vs

Shyla Joseph & Ors — RESPONDENT

Date of Decision: Dec. 17, 2025

Acts Referred:

- Indian Succession Act, 1925- Section 63, 63(c)
- Evidence Act, 1872- Section 68, 71

Hon'ble Judges: Ahsanuddin Amanullah, J; K. Vinod Chandran, J

Bench: Division Bench

Advocate: A. Hariprasad, Bijo Mathew Joy, Gifty Marium Joseph, Swathi H. Prasad, V. Chitambaresh, Mukund P. Unny, Sanjay Nair S., P.B. Krishnan, Sarath S. Janardanan, Anila Tharakan Thomas, Bijo Mathew Joy

Final Decision: Allowed

Judgement

K. Vinod Chandran, J

1. Leave granted.

2. Concurrent findings; disbelieving a will, excluding one out of nine children, who married out of the community, holding the estate of the testator partible, is challenged in the two appeals filed by two defendants.

3. The parties are referred to as the plaintiff and the defendants, the first respondent, common in both the appeals, is the plaintiff.

4. The relevant facts to be noticed are that one N.S. Sreedharan, executed Exhibit B2 will dated 26.03.1988 and registered it on the very next day, a Sunday, the Sub-Registrar having come to his house on commission. The will provided for allocation of the properties to the eight (the defendant Nos.1 to 8) out of the nine children of the testator; the plaintiff having been left out. An injunction suit was filed

by the defendant in the year 1990, against the plaintiff, who was the sole defendant therein, to restrain her from interfering with the peaceful possession and enjoyment of the suit property. A copy of the will was produced along with the plaint. The sole defendant therein did not choose to contest the matter. There was an ex parte judgment and decree passed by the Principal Munsif Court of Ernakulam which is produced as Annexure P2. It was later in the year 2011 that the present suit was filed seeking partition of the properties of the father.

5. The first defendant who was examined as DW-1 along with other defendants contested the suit on the strength of the will. There were two attesting witnesses, one of whom was no more at the time of trial and the other was examined as DW-2. The trial court decreed the suit on the ground that DW-2 only spoke of the execution of the will by the testator and his own attestation. Though, the presence of the other attesting witness at the time of execution was spoken of, his attestation was not deposed to by DW-2. It was also argued that the deposition of DW-2 indicated that the testator and he himself affixed their signatures in the presence of the Sub-Registrar, giving rise to an anomaly insofar as the will was dated 26.03.1988, while the registration was on the next day i.e. 27.03.1988, on which day DW2 according to his own testimony had not visited the house of the testator, which argument was not accepted even by the trial court.

6. The High Court found that though in the examination-in-chief, DW-2 did not depose on the attestation by the other witness, in cross-examination to a leading question he answered that all persons signed on the will on the date when DW-2 signed the same. It was held that by the leading question, the answer was put in the mouth of the witness and hence, it lacks probative value and fell short of the mandate under Section 63(c) of the Indian Succession Act, 1925 the Succession Act read with Section 68 of the Indian Evidence Act, 1872 the Evidence Act. The High Court emphasised the statement of DW-2 in cross examination that after signing the will on the date when it was prepared, he had not gone to the house of the testator till his death. Hence, the attestation by DW-2 itself was found suspicious when DW-2 also stated that when he reached the house of testator, the Sub-Registrar and the other witness were present there.

7. Mr.V.Chitambaresh and Mr.A.Hariprasad learned Senior Counsel for the appellants contended that the ingredients of Section 68 of the Evidence Act read with Section 63 of the Succession Act, were fully satisfied. DW-2 had not only spoken of the testator having affixed his signature on the will, Exhibit B2, but also spoke of his attestation and his introduction to the other witness by the testator and all of them having signed the will. Statements were taken out of context to disbelieve the will and in any event, the earlier will executed, clearly indicated the mind of the testator insofar as exclusion of the plaintiff. It is also argued that despite the will having come to the notice of the plaintiff in the suit filed in the year 1990, nothing was done for a long period, and the plaintiff is estopped from challenging the will.

The impugned judgment affirming the judgment of the trial court is clearly erroneous and against the evidence led in the suit. Both the judgments have to be reversed and the suit dismissed, is the contention.

8. Mr. P.B. Krishnan, learned Senior Counsel appearing for the first respondent/plaintiff argued that the first will was not proved and there can be no reliance placed on the same. It is also urged that in the earlier suit for injunction only a copy of the will was produced and, in any event, that was a simpliciter injunction suit. This would not stand in the way of the co-owner instituting later, a suit for partition. It is specifically pointed out from the deposition of DW-2 that he had stated categorically that his visit to the testators house was only once, in the presence of the Sub-Registrar, in which circumstances his signature on 26.03.1988, attesting the will and later on the back of the first page at the time of registration, on the next day cannot be believed. DW2 also stated that after the day the will was prepared, he had gone to the house of the testator only when he died. Both the trial court and the first appellate court rightly found the will to be not proved.

9. In support of his submissions, learned counsel for the respondent relied upon the decisions in **Meena Pradhan v. Kamla Pradhan** (2023) 9 SCC 734, **Rani Purnima Debi & Anr. v. Kumar Khagendra Narayan Deb & Anr**. (1962) 3 SCR 195, **Janaki Narayan Bhoir v. Narayan Namdeo Kadam** (2003) 2 SCC 91, **Vishnu Ramkrishna Wani v. Nathu Vittal Wani** AIR 1949 Bombay 266, **Raj Kumari & Ors. v. Surinder Pal Sharma** (2021) 14 SCC 500 and **Mansinghrao Yeshwantrao Patil v. Ramchandra Govindrao Patil** (1954) 1 SCC 688.

10. Before we go into the fact adjudication, we would look at the decisions relied upon by the respondent, in the chronology of its reporting.

11. **Vishnu Ramkrishna** AIR 1949 Bombay 266 found that the defendants failed to prove the due execution of the will since the one attesting witness examined, out of the four attestors, only spoke of the presence of one other attestor along with the testator, when the latter acknowledged her thumb impression in the will. The witness spoke of his attestation but not that of the other. It was also held that recourse to Section 71 of the Evidence Act is impermissible without exhausting the remedy under Section 68 of the Evidence Act of calling the available attesting witnesses and if they deny or fail to prove the execution, only then Section 71 of the Evidence Act could be invoked. Though finding insufficient proof as required under Section 68 of the Evidence Act, all the same, the High Court remanded the matter for further evidence of the other three attesting witnesses said to be available to determine whether there was due execution of the will. The remand was on dual reasoning; one, approaching the issue as a Court of Conscience, especially, to arrive at a satisfaction as to the last will and testament of the testator and then, to ensure that the bequest made in the subject will to a charity, is not defeated.

12. **Mansinghrao Yeshwantrao Patil** (1954) 1 SCC 688 cautioned the Courts from converting a question of fact into a question of law and mechanical use of time-honoured phrases like **the conscience of the Court being satisfied**. Though great caution should be exercised in upholding a will, where the legal heirs are divested in whole, proof of a will remains a question of fact and satisfaction of the conscience of the court is only a rule of prudence, was the declaration.

13. **Rani Purnima Debi** (1962) 3 SCR 195, a four Judge Bench decision of this Court disbelieved the will propounded, based on various suspicious circumstances, including doubts raised about the testators signature itself and the proclivity of the testator to sign blank papers to be delivered to his lawyer, who was also one of the three attesting witnesses examined. Especially considering the very serious suspicions on the due execution and attestation of the will, the testimony of the two probable witnesses whose signatures were found on the bottom of the will; other than those examined as attestors, one the registration clerk who came on commission and another, who identified the testator, were found to be grossly insufficient. The registration clerk merely spoke of having examined the testator, who admitted execution and the other, having merely identified the testator at that time, without anything more on the signature affixed, of the testator or himself.

14. **Meena Pradhan** (2023) 9 SCC 734 succinctly stated the formalities required under Section 63 of the Succession Act which was also declared to be of a standard affording sufficient proof to satisfy a prudent mind and not one of mathematical accuracy. Quite distinct from **Rani Purnima Debi** (1962) 3 SCR 195 which brought forth various suspicious circumstances in which there was felt a need for a higher standard of proof of execution.

15. What is relevant for the present case, which does not bring forth any such suspicious circumstance, is the requirement that, at least one of the attesting witnesses, if alive and capable of being examined, shall be examined, who shall speak on the execution of the testator; which he had witnessed or was acknowledged by the testator himself, and the attestation by both witnesses. It is pertinent that in the earlier suit for injunction, in which the plaintiff herein first appeared as a defendant and then did not contest, the will was spoken of and a copy was produced. The suit was one for injunction simpliciter and there was neither occasion to offer proof of the will nor was there a declaration of title sought; which disables a claim of res judicata being raised since the will or title was not a matter substantially in issue in the said suit. But the fact remains that despite knowledge, the plaintiff pleaded no suspicious circumstances and did not even mention the will in the plaint. The plaintiff also did not mount the box, and none were examined on her side. The attesting witness examined, hence in the facts of this case should speak about the execution of the will by the testator, his attestation and also about the attestation of the other witness who was no more, at the time the suit went to trial.

16. In **Janaki Narayan Bhoir** (2003) 2 SCC 91, the impugned judgment of the High Court relied on the evidence of the scribe, led under Section 71 of the Evidence Act, which was found to be incompetent insofar as one of the two attesting witnesses failed to prove the attestation of the other and the other, though available was not examined. This affirms the principle in **Vishnu Ramkrishna** AIR 1949 Bombay 266. In fact, the attesting witness examined, categorically stated that he was not even aware of the presence of the other attesting witness in the house wherein the execution was stated to have occurred. It was held in paragraph 10 that, **The one attesting witness examined, in his evidence has to satisfy the attestation of a Will by him and the other attesting witness in order to prove there was due execution of the Will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. (sic).**

17. **Raj Kumari** (2021) 14 SCC 500 was also a case in which one of the attesting witnesses failed to prove the examination of the other witness, who was not called to the box since he was the husband of one of the respondents. The principle of exhausting the remedy under Section 68 of the Evidence Act before invoking Section 71 was reiterated; which question does not arise in the instant case.

18. Learned Senior Counsel for the appellant relied upon the decision in **H. H. Maharaja Bhanu Prakash Singh v. Tika Yogendra Chandra** 1989 Supp (1) SCC 16 to contend that when evidence was recorded after a long period, minor discrepancies in the evidence would be a natural consequence. Therein the evidence was recorded about eight years after the execution of the will and in the present case, the examination of the attesting witness was twenty-four years after the execution of the will. It was argued that it is natural that a witness will not be able to remember as to when exactly he went to the house of the testator; which was truthfully spoken of by DW2.

19. Reliance was also placed by the appellant on **Gopal Swaroop v. Krishna Murari Mangal and Ors**. (2010) 14 SCC 266 in which satisfaction as to the proof of the will was entered, when it was stated by one of the attesting witnesses that the other attesting witness was also present at the time the testator affixed his signature.

20. We cannot but notice that there is clear departure, insofar as the decision in **Gopal Swaroop** (2010) 14 SCC 266, from the principles consistently declared in the other decisions above cited and also of a four-judge bench in **Rani Purnima Debi** (1962) 3 SCR 195. However, we are of the opinion that we need not look into that aspect, specifically considering the deposition of DW-2.

21. We think, at this point, it is apposite to extract paragraph 19 to 22 from the decision in **H. Venkatachala Iyengar v. B.N. Thimmajamma** 1959 Supp (1) SCR 426, as to the proof required in establishing a will, in varying circumstances: -

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such

legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word conscience in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harmes v. Hinkson [(1946) 50 CWN 895] where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth. It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

(underlining by us for emphasis)

22. The translation of the deposition of DW-2 has been provided in both the appeals and a copy of the vernacular Malayalam has also been handed over to us across the

Bar (one of us, Vinod Chandran, J being familiar with the language). The proof boils down to what has been stated by the witness. Looking at the chief-examination, it is clearly stated by DW-2 that he had signed on the thirteenth page and the back side of the first page of Exhibit B2 will, which was shown to him. He also affirmed that the signature of the executant was that of N.S. Sreedharan, the testator. He also spoke of N.S. Sreedharan; the testator, Xavier Mash (Teacher) & himself; the attesting witnesses, as also the Sub-Registrar being present at that time. If we look at the examination-in-chief alone, it cannot be said that there was proof of the other witness having put his signature in the document. In the cross examination of DW-2 to DW-8, a question was asked as to whether he saw the testator signing on the document which was answered in the affirmative. Answering a question as to his signature, it was said that he signed it in front of the testator. Again, there was no proof offered of the signature of the other attesting witness.

23. However, this missing piece was supplied in cross-examination by the plaintiff. In the cross-examination by the plaintiff, DW2 was specifically asked as to whether he had an acquaintance with Xavier, the other attesting witness. The answer was that the other attesting witness was known to him earlier, as introduced to him by the testator. Then a question was put as to whether the will was written after he reached there. The answer was in the negative and he added that it was already written and they put their signatures on it. Significant is the question put by the plaintiff, to DW-2 as to whether himself and others put their signatures on the will on the date on which it was written; answered in the affirmative. Hence, on the plaintiffs suggestion, DW-2 affirmed not only the signature of the testator and himself but also the other attesting witness.

24. We are definitely of the opinion that DW-2 spoke of the presence of the testator along with himself and the other attesting witnesses as also affirmed the signature of the testator and of both the attesting witnesses in the document.

25. Now, we have to deal with the confusion created as to whether DW-2 had gone to the house of the testator only on 26.03.1988, the date shown in the will on which day it is presumed to have been executed. A reading of the deposition clearly indicates that DW-2 had very close association with the testator and he was a frequent visitor to the house of the testator. DW-2 also had a part time job at the textile shop of the testator and had carried out such work even when he was working with an auditor; which he stopped after the death of the testator. He categorically deposed that the testator had summoned him to the testators house, over telephone, when he was at the Auditors office. At the testators house, he saw the testators wife and not the children. He did not reveal the factum of the will to the children since he understood it as a confidential matter. To a specific question as to whether the testator was bedridden, he answered in the negative and added that but for a small oedema in the legs, the testator had no ailments, bringing forth no doubts on his physical health, much less on the sound and disposing state of

mind of the testator; which was never disputed.

26. The specific issue on which the learned Senior Counsel for the plaintiff lays emphasis, are to two suggestions made in cross-examination, raising suspicion on the very execution of the will. The suggestion that but for the day on which the will is said to have been prepared, DW-2 has not gone to the house on any other date to sign the will, was answered in the affirmative. A further suggestion that DW2 after 26.03.1988 went to the house of the testator only after his death, was answered in the affirmative. Since the will is dated 26.03.1988 and the registration was on the next day, the execution itself is under a cloud, for reason that DW2 speaks of the presence of the Sub-Registrar too on the solitary day he was present in the house of the testator, is the argument.

27. We are unable to agree. The first suggestion only indicates that on the date the will was prepared, DW2 had gone to the house of the testator to sign on it and he had not visited the testator on any other day, to sign the will. This does not indicate that DW-2 had not visited the house of the testator otherwise than on 26.03.1988. It cannot also be said that he was not present on 27.03.1988; when he was present only for the registration and not the signing of the will. Another response emphasised by the plaintiff was to the suggestion that after 26.03.1988, DW-2 had gone to the testators house only after his death. The execution of the will was in the year 1988, the registration being on the very next day. The examination of the witness was on 25.05.2012, twenty-four years later. It would be puerile to think that the witness would have remembered the visits made to the testators house, even for execution of a will, with mathematical precision, especially given his close association and as is seen from the deposition, a frequent visitor to the testators house.

28. We find that in the present case the only suspicion raised about the execution of the will is the testamentary capacity of the testator, relatable specifically to his physical disposition, questioned in the cross-examination of DW2; unequivocally affirmed as sound. We also reiterate, with respect, that the rule of prudence; of the caution required in upholding a will which divests the legal heirs as a whole, is not the situation existing in the instant case. But, the person excluded was one of the children of the plaintiff, the sole one excluded. The propounders of the will are the siblings of the one excluded. There is a reason stated for such exclusion, the acceptability of which to our minds, is not what the rule of prudence dictates. We cannot put the testator in our shoes, and we should step into his. We cannot substitute our opinions in place of that of the testator; his desire prompted by his own justifications. As is trite, we would only ensure that, sitting in the arm-chair of the testator the rule of prudence is satisfied for the exclusion; which on the facts of this case amply satisfies the judicial conscience.

29. We find absolutely no reason to uphold the judgment of the High Court which affirmed the judgment of the trial court. We set aside both and find the will to have

been proved satisfactorily. The presence of the testator and the attesting witnesses and the signatures affixed on the will by each of them have been stated by DW-2 in his deposition. What was lacking in the examination-in-chief was brought out in the cross examination by way of a positive suggestion. Leading questions are permitted in cross-examinations and the response elicited cannot be said to have lesser probative value, as held by the High Court. The testator was also established to be of sound and disposing mind at the time of execution of the will. There can be no interference to the will which stands proved unequivocally. The judgment and decree of the High Court and that of the trial court stands set aside. The plaintiff is found to have no partible claim over the properties of her father, which by a will have been bequeathed to the other siblings of the plaintiff.

30. The learned Senior Counsel for the respondent then urged that the plaintiff in any event, would be entitled to only 1/9th share of the total properties which is a negligible portion of that held by her father. We are not on equity, and the wish of the testator assumes pre-eminence. The last will and testament of the testator cannot be digressed from or frustrated.

31. The appeals are allowed and the suit stands dismissed.

32. Pending applications, if any, shall stand disposed of.