K.P. Krishnakumar Vs Smt. Radhalakshmi Amma

Court: Karnataka High Court

Date of Decision: May 25, 2004

Acts Referred: Evidence Act, 1872 â€" Section 63, 65
Succession Act, 1925 â€" Section 63

Citation: (2005) 1 CivCC 21 : (2004) 4 KarLJ 391 : (2004) 3 KCCR 293 SN

Hon'ble Judges: S.R. Nayak, J; Ram Mohan Reddy, J

Bench: Division Bench

Advocate: P and V Associates, for the Appellant; M.D. Raghunath, for M.L. Dayananda Kumar, for the Respondent

Final Decision: Dismissed

Judgement

S.R. Nayak, J.
This R.F.A. preferred u/s 96 of the CPC is directed against the judgment and decree dated 23-3-1996 passed in O.S.

No. 10472 of 1993 on the file of the III Additional City Civil Judge, Mayo Hall, Bangalore (for short, "the Court below"). The appellant is the

defendant in the suit. The suit was filed by the respondent herein for partition of the suit schedule property by metes and bounds and for separate

possession.

2. The case of the plaintiff is as follows:

The plaintiff is the wife/widow of late M.C. Parameshwaran Nair. The defendant is the son of M.C. Parameshwaran Nair through his first wife, late

Kanakalatha by name. M.C. Parameshwaran Nair died intestate on 29-2-1992 at Bangalore leaving behind the plaintiff and the defendant as his

only surviving heirs to succeed to the suit property which was his self-acquired property. M.C. Parameshwaran Nair was employed in Indian

Airlines. The suit schedule property is a residential building consisting of ground and first floor. The defendant is in occupation of the ground floor

and he has let out the first floor to a tenant. The defendant was ill-treating the plaintiff even during the lifetime of M.C. Parameshwaran Nair and the

said ill-treatment aggravated after the demise of M.C. Parameshwaran Nair. The plaintiff has no independent source of income to support her

living. The plaintiff is entitled to half share in the suit schedule property. The plaintiff demanded from the defendant to effect partition, but he

refused. That lead to the plaintiff causing legal notice on 11-4-1992. The defendant sent an untenable reply. The cause of action to file the suit

arose on 29-2-1992 when M.C. Parameshwaran Nair died and on 11-4-1992 when she got issued legal notice to the defendant.

3. The suit was contested by the defendant by filing written statement. In the written statement, the defendant while admitting that the plaintiff is his

step-mother and second wife of his father, denied other material allegations in the plaint. The defendant stated that on 29-2-1992 his father died

leaving behind a Will dated 10-8-1987 and he was not aware of this fact before the death of his father and he came to know that fact only a week

after the death of his father when one Sudhakaran (D.W. 2) told the defendant about his father having executed the Will. Thereafter, the defendant

made a through search in the house and he could not find the original Will, but he could trace a carbon copy of the original Will dated 10-8-1987.

D.W. 2 having seen the said copy of the Will, told him that that was true copy of the original Will executed by M.C. Parameshwaran Nair. The

plaintiff has filed the suit vexatiously and at the instance of her brothers and other relatives. Under the Will, his father has bequeathed the suit

schedule property absolutely in favour of the defendant and directed the defendant to provide maintenance to the plaintiff. The defendant is ready

and willing to act according to the terms of the Will and, accordingly, he sent money orders towards monthly maintenance to the plaintiff, but the

plaintiff refused to receiver the same. The plaintiff has no right whatsoever in the plaint schedule property except to receive maintenance. The suit

instituted by the plaintiff is not maintainable and it is hit by the provisions of Order 23, Rule 1 as well as Order 2, Rule 2 of the CPC. The Court fee

paid on the plaint is insufficient. The plaintiff had earlier filed Misc. P. No. 461 of 1992 for partition and the said petition came to be dismissed as

withdrawn as the plaintiff filed a memo to that effect and, in that view of the matter, the plaintiff has abandoned her right to institute the present suit.

4. In the premise of the above pleadings of the parties, the Court below framed the following seven issues:

1. Whether plaintiff proves that she is entitled to half equal share in the suit property and further that she is entitled to separate possession of her

half share in the suit property?

2. Whether defendant proves that the present suit is barred under Order 23, Rule 1 of the CPC due to the dismissal of Misc. P. No. 461 of 1992?

3. Whether defendant proves that late M.C. Parameshwaran Nair died a testamentary death by executing his last Will and testament dated 10-8-

1987?

4. Whether defendant proves that the said Will dated 10-8-1987 was a true, genuine and a valid Will executed by his father M.C. Parameshwaran

Nair?

5. Whether defendant proves that the Court fee paid is insufficient? If so, what is the proper Court fee payable?

6. Whether plaintiff is entitled to claim future mesne profits?

7. To what reliefs the parties are entitled to?

5. The plaintiff, in support of her case, examined herself as P.W. 1 and produced 6 documents marked as Exs. P. 1 to P. 6. She also examined

one Smt. Bhargavi as P.W. 2, On behalf of the defendant, the defendant examined himself as D.W. 1 and examined three more witnesses as

D.Ws. 2 to 4 and produced 7 documents marked as Exs. D. 1 to D. 7.

6. The Court below having appreciated the evidence, oral and documentary, recorded its finding in the affirmative on Issue 1 and in the negative on

Issues 2, 3, 4 and 5. In the result, the Court below decreed the suit and held that the plaintiff is entitled to partition and separate possession of half

share in the suit schedule property by metes and bounds. Hence, this appeal by the aggrieved defendant.

7. We have heard learned Counsels for the parties. Sri K.N. Purushothaman, learned Counsel for the appellant would contend that the findings

recorded by the Court below are perverse and against the probabilities of the case, Learned Counsel would contend that the findings recorded on

Issues 1 and 3 are perverse, unsustainable having regard to Exs. D. 1 to D. 4 and other documents tendered in evidence. Learned Counsel would

contend that in recording the adverse findings against the defendant, the Court below has not appreciated the oral and documentary evidence in

right perspective. According to learned Counsel for the appellant, the Court below ought to have held that Ex. D. 4 is proved by oral testimony of

D.W. 2 and D.W. 4. Learned Counsel would highlight that D.Ws. 2 and 4 are independent and disinterested witnesses and their evidence taken

together would clinchingly prove that M.C. Parameshwaran Nair executed the Will on 10-8-1987 bequeathing the suit schedule property

exclusively in favour of the defendant, subject to the right of maintenance of the plaintiff. Learned Counsel would also contend that the finding

recorded by the Court below on Issue 2 is erroneous and is opposed to Order 23, Rule 1 of the CPC.

8. Sri M.D. Raghunath, learned Counsel for the plaintiff-respondent, per contra, while supporting the impugned judgment and decree, would

contend that the appellant has utterly failed to discharge the onus cast on him to prove Exhibit D. 4-Will. Sri M.D. Raghunath would contend that

Exhibit D. 4 tendered in defence is only a draft Will and that there is no evidence to"" show that after corrections of the draft Will it was retyped

carrying out corrections effected by Mr. M.C. Parameshwaran Nair. Sri Raghunath would contend that since execution of the Will by late

Parameshwaran Nair bequeathing the suit schedule property exclusively in favour of the appellant-defendant is not established, it is trite, the

respondent-plaintiff being the widow of the deceased, is entitled to half share of the suit schedule property.

9. Having heard the learned Counsels for the parties, the only point that arises for decision is whether the appellant-defendant has proved

execution of the Will-Exhibit D. 4 claimed to have been executed by M.C. Parameshwaran Nair on 10-8-1987?

10. An outstanding feature of a Will is that unlike other documents, it speaks from the death of the testator, and therefore, when it is produced

before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect necessarily introduces an

element of solemnity in the decision making process. It is said that a Will is one of the most solemn documents known to the law, and by it a dead

man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called as a witness either to affirm or deny his

signature or to explain the circumstances in which it was executed, it becomes imperative that that trustworthy substantive evidence should be

adduced by the propounder of the Will to establish compliance with the requirements of law. The proof of execution and attestation is one thing

and its admissibility in evidence is another.

11. The principles which govern the proof of a Will are well-settled. The mode of proving the Will does not ordinarily differ from that of proving

any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act.

The onus of proving the Will is on the propounder of the Will and, in the absence of suspicious circumstances surrounding the execution of the Will,

proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where, however, there are

suspicious circumstances, the onus is on the propounder of the Will to explain them to the satisfaction of the Court before it accepts the Will as

genuine. Wherever, the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such

pleas but the circumstances give rise to doubts, it is for the propounder of the Will to satisfy the conscience of the Court. The suspicious

circumstances may be as to the genuineness of the signature of the testator, the condition of the testator''s mind, the dispositions made in the Will

being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator''s

mind was not free. In such a case, the Courts would naturally expect that all legitimate suspicion should be completely removed before the

document is accepted as the last Will of the testator.

12. The Supreme Court in Kalyan Singh Vs. Smt. Chhoti and Others, dealing with the kind of evidence required to establish genuineness and

authenticity of the Will, in para 20, held thus:

20. It has been said almost too frequently to require repetition that a Will is one of the most solemn documents known to law. The executant of

the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trust worthy

and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will. It must be stated that the

factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder. In order to

judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would

be open to the Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself.

It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper

conclusion on the nature of the evidence adduced by the party"".

13. In this case, the relationship between the parties is admitted. The suit property is the only and self-acquired property of M.C. Parameshwaran

Nair. The plaintiff and the defendant being wife and son of Parameshwaran Nair are Class I heirs u/s 8 of the Hindu Succession Act. The whole

controversy revolves on a question as to whether Parameshwaran Nair died a testamentary death or intestate. If it is found that Parameshwaran

Nair died intestate, then, the suit has to be decreed granting half of the suit schedule property to the plaintiff and remaining half to the defendant. On

the other hand, if it is found that Parameshwaran Nair died a testamentary death leaving behind the Will dated 10-8-1987, then, the share and/or

interest of the plaintiff and the defendant in the suit schedule property have got to be worked out in terms of the Will.

14. It is the specific plea of the plaintiff that Parameshwaran Nair died after executing his last Will and testament dated 10-8-1987. The Will dated

10-8-1987 is not produced in the case. It is the case of the defendant that original Will dated 10-8-1987 is not with him and he pleads that the

same is with the plaintiff and he further alleges that the plaintiff must have destroyed it or misplaced it or is deliberately not producing the same to

the Court with intention to defeat the legitimate right of the defendant. The defendant, however, has produced a carbon copy of the claimed Will

dated 10-8-1987 and the same is marked in the evidence as Ex. D. 4. It is the plea of the defendant that Sri Sudakar who was examined as D.W.

2 has attested the original Will and the defendant came to know about the existence of the Will only after the death of Parameshwaran Nair when

he was told by D.W. 2 about the execution of the Will by Parameshwaran Nair and that when he made a search in the house to trace the Will he

could only find a Carbon copy of the Will dated 10-8-1987. The defendant has deposed that when he showed the Carbon copy of the Will to

D.W. 2, D.W. 2 affirmed that Ex. D. 4 is the Carbon copy of the original Will.

15. The defendant sought to prove the existence of the Will by adducing secondary evidence. The Supreme Court in Kalyan Singh''s case, supra,

while affirming the opinion of the High Court of Rajasthan that an original copy of sale deed marked as Ex. 3 in the case cannot be regarded as

secondary evidence u/s 63 of the Indian Evidence Act observed thus;

25. The High Court said, and in our opinion very rightly, that Ex. 3 could not be regarded as secondary evidence. Section 63 of the Indian

Evidence Act mentions five kinds of secondary evidence. Clauses (1), (2) and (3) refer to copies of documents; Clause (4) refers to counter-parts

of documents and Clause (5) refers to oral accounts of the contents of documents. Correctness of certified copies referred to in Clause (1) is

presumed u/s 79; but that of other copies must be proved by proper evidence. A certified copy of a registered sale deed may be produced as

secondary evidence in the absence of the original. But, in the present case Ex. 3 is not a certified copy. It is just an ordinary copy. There is also no

evidence regarding contents of the original sale deed. Ex. 3 cannot, therefore, be considered as secondary evidence. The Appellate Court has a

right and duty to exclude such evidence"".

16. Section 65 of the Indian Evidence Act deals merely with the foundation that has to be laid for reception of secondary evidence. Ono of the

circumstances under which Section 65 allows the secondary evidence to be given of the existence, condition or contents of a document is when the

original has been destroyed or lost. But, to admit the secondary evidence, however, it is not sufficient to show merely that the original document is

lost. The secondary evidence itself must be of the nature described in Section 63. A ""true copy"" of a document will not be admissible u/s 63 unless

it is shown that it has been made from or compared with the original. Further, there must be a sufficient proof of the search for the original to

render the secondary evidence admissible. It must be established that the party has exhausted all resources and means in search of the document

which was available to Mm. Since, this aspect falls within the domain vested in the Trial Court, an Appellate Court would not ordinarily interfere

with the exercise of such discretion. However, it would certainly interfere if it finds that the Trial Court has accepted the loss of the document as a

fact without taking into consideration the prerequisite conditions that are required by the Indian Evidence Act. At this juncture, it needs to be

noticed and highlighted that it is not the case of the defendant that Ex. D. 4 is made out of the original and consequently Ex. D. 4 is not admissible

u/s 63 of the Indian Evidence Act.

17. In Srimati Rani Haripriya v. Rukmini Devi (1892)19 Ind.App. 79 the Judicial Committee of the Privy Council refused to except as evidence a

document which had gone in as a copy of another document on the ground that none of the attesting witnesses had been called and no attempt

made to identify the exhibit as being a copy of the document which had been exhibited. The Supreme Court in H. Venkatachala Iyengar Vs. B.N.

Thimmajamma and Others, dealing with the proof of Wills and how Wills should be proved when contested in paragraphs (18), (19), (20), (21)

observed thus:

(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, Indian 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 propounder is proved

to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature

and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these

questions which determines the nature of the finding on the question of the proof of Wills. It would prima facie be true to say that the Will has to be

proved like any other document except as to the special requirements of attestation prescribed by 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.

(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 propounded 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 the context would, in our opinion, be purely technical and academic, if not pedantic. The test merely 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 deciding a solemn question and it must be fully

satisfied that it had been validly executed by the testator who is no longer alive"".

18. In the premise of the case-law noticed above governing proof of Wills and the nature of evidence required to prove Wills, let us have a look at

the evidence adduced by the defendant to prove the Will. The defendant in his evidence has stated that when he made enquiries with the plaintiff

about the original Will, she told him that she was not aware of any Will executed by Parameshwaran Nair. The defendant examined as D.W. 1 in

his evidence has stated thus:

When I showed this Will to Sudhakaran he affirmed that it is the same Will that was executed by my father and attested by him. I bona fide

believed that the original of this Will has to be with plaintiff. When I asked plaintiff to show the original Will, she told me that she is not aware of

such Will. Ex. D. 4 is the copy of this Will and its original is with plaintiff (This Ex. D. 4 is marked subject to satisfactory proof by the defendant

about the original Will being in the custody of the plaintiff)"".

19. Ex. D. 4 is the Carbon copy of the alleged original Will dated 10-8-1987 executed by Parameshwaran Nair and this document was marked

subject to proof of original Will dated 10-8-1987 either being lost or with the plaintiff. Admittedly and evidently Ex. D. 4 is not signed either by

Parameshwaran Nair or by D.W. 2 or by any other person. Defendant came to know about Ex. D. 4 only after the death of Parameshwaran Nair

and that too when D.W. 2 told him that Parameshwaran Nair had executed a Will in his favour. Therefore, it is quite clear that the defendant was

not at all aware of his father having executed a Will on 10-8-1987 at any time either during the lifetime of Parameshwaran Nair or after his death

before D.W. 2 told him about the execution of the Will by his father. This creates a serious doubt in the mind of the Court. The version of

defendant is highly incredible and does not inspire confidence in the mind of the Court when we weigh his version in the scales of common sense of

the Court. It has come in the evidence that the inter se relationship of the plaintiff, the defendant and Parameshwaran Nair was cordial, loving and

they lived jointly and happily. The plaintiff is the second wife of Parameshwaran Nair whom she married after the demise of the first wife. The

defendant is gainfully employed and having regular income whereas the plaintiff has absolutely no independent source of income to support her

living. She has no issue. These are the circumstances of the parties. We are at a loss to understand why late Sri Parameshwaran Nair would think

of giving away the entire suit property which is the only property held by him in favour of the defendant.

20. The Will is alleged to have been made by Parameshwaran Nair on 10-8-1987 and Parameshwaran Nair died on 29-2-1992. It is not

understandable that the Will by which property worth lakhs of rupees was disposed of should have remained a closely guarded secret from the

plaintiff, the defendant and the whole world of close and intimate friends and relatives. It is highly improbable that if Parameshwaran Nair in fact

had executed the Will as far back as on 10-8-1987 as claimed by the defendant and his witness, D.W. 2, at least, before he breathed his last, he

would have disclosed that fact to the defendant who is the sole legatee himself, if not to the plaintiff. It needs to be noticed that the plaintiff was not

present in the said house when her husband Parameshwaran Nair died on 29-2-1992 and she came to the suit house only when defendant

informed her about the death of his father. It is nobody''s case that Parameshwaran Nair died either abruptly or that his death was taken by

surprise by the defendant and other members of the family. Parameshwaran Nair was ailing before his death and at the time of his death only the

defendant and other relations of his were with him. Therefore, it is natural that if late Sri Parameshwaran Nair had executed a Will as claimed by

the defendant and D.W. 2, at least when he was ailing and nearing his end he would have disclosed that fact to the defendant or any of his close

relatives or friends. Non-disclosure of that fact to the defendant in the facts-situation seems to be totally unnatural. Therefore, the explanation of the

defendant that he hit upon Ex. D. 4 only when he made a search after he was told by D.W. 2 that his father had executed a Will in his favour, it

seems to our mind, is patently self-serving, lame and not at all acceptable.

21. It is the case of the defendant that the original Will executed by his father might have been lost or destroyed or misplaced by the plaintiff. The

question of original Will being lost or destroyed or misplaced would arise only if it is proved by the propounder of the Will to the satisfaction of the

Court that the original Will was signed and executed by the testator. Secondary evidence of a document can be allowed to be led only when

original is proved to have existed but was lost or misplaced. Copy of the alleged Will claimed to have been executed by late Sri Parameshwaran

Nair marked as Ex. D. 4, that too, an unsigned copy is merely a piece of paper and it has no standing as evidence.

22. In Kalyan Singh''s case, supra, it was held that an ordinary copy (not certified copy) of a sale deed cannot be considered as secondary

evidence. In order even to be termed ""copy"" it must have the support of a witness qualified to say that it represents and proves to the satisfaction

of the Court that late Sri Parameshwaran Nair had executed the Will on 10-8-1987. What the defendant has tried to prove in this case is only

about the existence of secondary evidence by producing Ex. D. 4. Since the defendant has failed to prove the existence of the Will alleged to have

been executed by his father on 10-8-1987, consideration of the question whether Ex. D. 4 could be regarded as secondary evidence would not

arise. Even D.W. 2 does not know as to what happened to the original Will after he is alleged to have signed it. It is quite curious that D.W. 2 does

not remember or know even the name of the other attesting witness. D.W. 2 also does not say why Parameshwaran Nair did not disclose the

execution of the Will either to his second wife, the plaintiff or to his son, the defendant who is the sole legatee under the Will.

23. In this case the Court is called upon to Judge a Will of a man with certain social and economic backgrounds. Parameshwaran Nair was an

officer in Indian Airlines. Parameshwaran Nair was a fairly well educated man and an officer in Indian Airlines. The evidence led before the Court

shows that he was a man with certain social and economic influence and he had fairly good circle of friends and relatives. This preface of ours to

the social and economic background of the testator is not to suggest that the burden of proof varies with the means of the man and if the man is

privileged in the sense that he has easy access to competent legal advice, he would normally await a scenario of clouds of suspicions, doubts,

misgivings about Will executed by him. We believe that Parameshwaran Nair was one of such privileged men.

24. There are certain strong situations which throw a cloud of suspicion on the making of the alleged Will by Parameshwaran Nair, The Will was

sought to be proved by oral evidence of D.W. 2 and D.W. 4 and documentary evidence Ex. D. 4. D. W. 2 is a retired Deputy Director of

Industries and Commerce. D.W. 2 in his evidence has stated that on 10-8-1987 at about 4.30 p.m. he went to the house of Parameshwaran Nair

as requested by the latter in the morning hours of the same day, and that Parameshwaran Nair brought a typed Will and asked him to sign the same

as a witness and he signed after Parameshwaran Nair subscribed his signature on the Will. D.W. 2 says that there was one more person at that

time in the house of Parameshwaran Nair and that person also signed the Will as a witness, but D.W. 2 does not know the name of that witness.

D.W. 2 has also stated that the Will was prepared by Sri T.K. Nair, Advocate who is examined as D.W. 4. D.W. 2 has stated that Ex. D. 4 is the

copy of the original Will. D.W. 2 in his evidence has not spoken about the contents of the Will. D.W. 2 in his cross-examination has deposed thus:

there were no copies of this Will"". The said admission of D.W. 2 in the cross-examination creates a strong suspicion that Ex. D. 4 is a document

fabricated for the purpose of the defence of the defendant.

25. The only other person whom defendant has examined as his witness to show that his father died a testamentary death is Sri T.K. Nair,

Advocate examined as D.W. 4. He was examined on Commission. It has come in the evidence of D.W. 4 that he was earlier practising as an

Advocate in Bangalore between 1956 to 1987 and later he shifted to his native place Veliyaveedu, in Palaghat District of Kerala State. D.W. 4 in

his examination-in-chief has stated that he did not know either the plaintiff or the defendant before he drafted the Will in his office when he was

practising in Bangalore. D.W. 4 after perusing Ex. D. 4 has stated that it was prepared in his office. In his cross-examination, D.W. 4 says that Ex.

D. 4 has not drafted the Will and it is a prototype and the original copy of the draft Will was given to Smt. Kamalamma, who is his junior for

execution. Having said that D.W. 4 again has stated the he cannot say whether Ex. D. 4 is prepared in his office or not, but, it appears to be the

copy of the Will prepared by him and Ex. D. 4 is the Carbon copy of the Will. Thus, it could be seen that the evidence of D.W. 4 is also totally

useless and not dependable to prove the existence of the Will claimed to have been executed by Parameshwaran Nair on 10-8-1987. The oral

evidence of D.W. 2 and D.W. 4 and Ex. D. 4 do not prove the existence of the Will. The circumstances already noticed above, if considered

cumulatively, would show that the defendant has utterly failed to prove that his father executed the Will on 10-8-1987 and that the original Will is

either destroyed or misplaced or lost. It is his assumption only that plaintiff must have destroyed or misplaced the original Will. The evidence of

D.W. 2 goes to show that there were no copies of the original Will at all. If that is the evidence of his own witness, we cannot understand how

defendant could produce Ex. D. 4 to the Court claiming that that is the carbon copy of the original Will.

26. In conclusion, we hold that the appellant-defendant has not proved the execution of the Will by his father Parameshwaran Nair on 10-8-1987.

In the result and for the foregoing reasons we dismiss the appeal with costs. Advocates'' fee is fixed at Rs. 2,000/-.