
**(2009) 5 ALD 698 : (2009) 5 ALT 604 : (2009) 3 APLJ 236 : (2009) 4 CivCC 797 :
(2010) 6 RCR(Civil) 397**

Andhra Pradesh High Court

Case No: A.S. No. 1699 of 1989

Mohd. Ghousuddin
(died) per L.Rs.

APPELLANT

Vs

Khaja Moinuddin (died)
per L.Rs. and Others

RESPONDENT

Date of Decision: July 13, 2009

Acts Referred:

Evidence Act, 1872 â€” Section 45, 47, 67, 68#Succession Act, 1925 â€” Section 59,
63#Transfer of Property Act, 1882 â€” Section 3

Citation: (2009) 5 ALD 698 : (2009) 5 ALT 604 : (2009) 3 APLJ 236 : (2009) 4 CivCC 797 :
(2010) 6 RCR(Civil) 397

Hon'ble Judges: P.S. Narayana, J

Bench: Single Bench

Advocate: Aziz Ahmed Khan, for the Appellant; J. Venkateswar Reddy and K. Vinaya Kumar,
for the Respondent

Final Decision: Allowed

Judgement

P.S. Narayana, J.

This appeal is filed by the unsuccessful first defendant being aggrieved of the judgment
and decree made in O.S. No. 65

of 1983 on the file of the Principal Subordinate Judge, Warangal.

2. The appellant died and the legal representatives, appellants 2 to 5 were brought on
record. The second defendant, Khader Mohiuddin, who is

shown as R-7 in the present appeal had not claimed any interest as can be seen in his
written statement. The appeal against R-7 had been

dismissed as per the order dated 15.6.2006. The contesting respondents, respondents 1 to 6, plaintiffs in the suit, filed the said suit O.S. No. 65 of

1983 on the file of the Principal Subordinate Judge, Warangal, for the relief of declaration, permanent injunction and other appropriate reliefs. The

first plaintiff Khaja Moinuddin died and the legal representatives, plaintiffs 2 to 6, were added as per the order made in I.A. No. 541 of 1989,

dated 12.6.1989.

3. The trial court, in the light of the respective pleadings of the parties, having settled the issues, recorded the evidence of P.Ws.1 to 4, D.Ws.1

and 2, marked Exs.A-1 to A-36 and ultimately came to the conclusion that the plaintiffs are entitled to the reliefs prayed for and accordingly

decreed the suit. Aggrieved by the same, the present appeal had been preferred.

4. Pleadings of the parties:

Averments made in the plaint:

It was averred in the plaint that the plaintiff and defendants 1 and 2 are the brothers and are the sons of late Basheerunnisa Begum, wife of late

Burhanuddin. Late Basheerunnisa Begum had four sisters namely Wazeerunnisa Begum, Hidayatunnisa Begum, Kareemunnisa Begum and

Azeezunnisa Begum. Wazeerunnisa Begum predeceased the other sisters.

5. Azeezunnisa Begum purchased an open site at Mandi Bazar, Warangal, and constructed houses bearing Nos. 14/575, 14/576 and 14/577. She

also purchased another house bearing Municipal No. 14/574 with the capital contributed by the plaintiff and all the four houses were treated as the

properties belonging to late Azeezunnisa Begum. Late Azeezunnisa Begum had brought up the plaintiff and got him settled in the business of cycle

taxi and also performed his marriage. Late Azeezunnisa Begum made an application to the Municipal Authorities on 24.12.1956 with a request to

mutate the said houses in the name of the plaintiff and pending the said proceedings, she executed a Will deed on 01.4.1957 in a sound state of

mind bequeathing all the above four houses in favour of the plaintiff. The said Will deed was scribed by the mother of the contesting parties

Basheerunnisa Begum and it was attested by Smt. Mariam Bee, Smt. Rasheemunnisa Begum and one Mohd. Burhanuddin. Azeezunnisa Begum

died on 17.4.1957 and the above said houses, as per the Will, devolved on the plaintiff with absolute rights. Azeezunnisa Begum had obtained

consent of all her sisters then surviving including the mother of the plaintiff at the time of making the bequest and even after the death of

Azeezunnisa Begum all the sisters approved of the bequest made in favour of the plaintiff. On 07.6.1957 a memo was issued by the Municipal

Authorities intimating about the mutation effected in the name of the plaintiff pursuant to the application made by Azeezunnisa Begum. The plaintiff

was living with Azeezunnisa Begum right from his childhood. The plaintiff made several improvements to the structures and obtained tap and

electricity connections for the premises.

6. The plaintiff sold a portion bearing Municipal No. 14/577 to one Sri Merugu Malleshham in 1976 under a registered sale deed and let out the

entire portion of house bearing No. 14/575 and one room out of house No. 14/576 to one Gulam Musthafa and the lessee was in occupation of

the same for 15 years till 20.11.1973. On 20.11.1978, defendant No. 3 obtained the said portion on lease for the purpose of his business from the

plaintiff on a monthly rent of Rs. 250/- and the lease deed was scribed by defendant No.

1. The plaintiff got the first defendant educated up to

B.Sc., and gave all assistance to settle him in life and also accommodated defendant No. 1 and his family in a portion of the suit premises consisting

of two rooms some time after his marriage. Defendant No. 3 was paying rents regularly till September 1982. Defendant No. 1 prevailed on the

third defendant and gained access to the portion under his occupation. In the month of July 1982 when the plaintiff enquired of the tax collector of

the Municipality about the non-collection of property tax etc., he was told that defendant No. 1 had already paid the tax and that some

proceedings were initiated by the first defendant in the municipal office. On enquiry in the municipal office, the plaintiff came to know that the first

defendant made an application on 20.4.1982 seeking mutation of the houses belonging to the plaintiff in his name on the basis of sale deed

executed by second defendant and the name of the second defendant was entered in the place of plaintiff's name in respect of the suit house. The

plaintiff filed objections in the said proceedings for mutation bringing to the notice of the Municipal Authorities the illegal attempt of defendants 1

and 2, but the petition was not considered by the Municipal Authorities.

7. The third defendant unauthorisedly allowed the first defendant to occupy the entire portion let out to him and he is under an obligation to restore

the possession let out to him to the plaintiff. Even otherwise, the plaintiff is entitled to seek eviction of the first defendant from the portion let out to

defendant No. 3. The plaintiff was deprived of the income in respect of the portion under the illegal occupation of defendant No. 1 since October

1982. Defendant No. 3 vacated the same having inducted defendant No. 1 in to possession over the same and the third defendant had refused to

pay the rents on the pretext that he had already vacated it. The plaintiff is entitled to claim mesne profits from October 1982 till possession is

delivered to him. The mesne profits from 01.10.1982 up to 01.4.1983 worked out to Rs. 1,500/-. The sale deed executed by second defendant in

favour of the first defendant on 08.4.1982 and registered as Document No. 2093 of 1982 in respect of the suit house is illegal, void and not

binding on the plaintiff.

8. Averments made in the written statement of the first defendant:

The first defendant pleaded that the relationship of the parties as averred in the plaint is correct. It is true that the suit houses bearing Nos. 14/575,

14/576, 14/577 and 14/574 belong to late Azizunnisa Begum, who is the natural sister of the mother of the plaintiff and defendants 1 and 2.

Azizunnisa Begum also had brought up her another sister's son Syed Ataur Rehman and later brought up the younger sister of the plaintiff and

defendants 1 and 2, Amina Begum. Late Azizunnisa Begum never intended that her entire property should devolve on the plaintiff. Legally, a

Muslim is not entitled to bequeath the property depriving the other legal heirs of their shares except to the limited extent allowed under personal law.

9. It is also stated that Late Azizunnisa Begum did not file any application on 24.12.1956 before the Municipality for mutation of house in the name

of the plaintiff. The plaintiff himself had created some false entries in the record. At the time of alleged mutation in favour of the plaintiff, none of the

other legal heirs were either made parties to the proceedings or given opportunity to file objections. Late Azizunnisa Begum did not execute the

Will deed on 01.4.1957 in favour of the plaintiff. The mother of the plaintiff did not scribe the Will and some other elders did not attest it. Late

Azizunnisa Begum never obtained consent of all her sisters, including the mother of the plaintiff, at the time of making the bequest. It is false to state

that subsequent to the death of Azizunnisa Begum all her sisters approved the bequest allegedly made in favour of the plaintiff by spoken word and

conduct. The plaintiff never came to exclusive possession of the properties of Azizunnisa Begum after her death and he made some improvements

by selling some properties belonging to the mother of the plaintiff and defendants 1 and 2 at Potakapally village of Peddapally taluk. Two separate

portions were constructed in 1965 and the entire properties were improved not by the contribution made by the plaintiff alone, but by

appropriating the sale proceeds of other property. Defendants 1 and 2 had contributed their part of the amount for developing and improvement of

the properties.

10. Out of three sisters of Azizunnisa Begum, the elder sister Vazirunnisa Begum died in 1956 and the other sister also died in or about 1960

leaving behind six sons and two daughters. The other sister Karimunnisa Begum and her son also died. The plaintiff was not in exclusive possession

of these houses for all these years. It is false to state that the plaintiff had contributed the entire amount required for purchase of H. No. 14/574.

House No. 14/577 was sold in favour of Merugu Mallesham and the plaintiff executed a registered sale deed, but out of the sale consideration, a

sum of Rs. 7,000/- was paid to the first defendant by the plaintiff and, therefore, the first defendant attested the document. The plaintiff, taking

undue advantage of this fact, is trying to set up false claim to the other houses. In fact, some of the houses were being let out to tenants. The first

defendant being youngest, the plaintiff himself used to manage the properties and that cannot confer any legal right exclusively in favour of the

plaintiff. The plaintiff never helped defendant No. 1 as alleged in the plaint. Defendants 1 and 2 have got equal rights in the above properties along

with the plaintiff. The amount of Rs. 5,000/- taken from the third defendant was appropriated by the plaintiff himself and in view of cordial relation

in between the brothers, defendant No. 1 did not mind the appropriation of the amount by the plaintiff.

11. Since the second defendant required money, he sold his share to the first defendant and executed a registered document in favour of the first

defendant. On 01.4.1957 late Azizunnisa Begum was in coma state and could not have executed the alleged Will deed and the elders, who tried to

settle the dispute, found fault with the plaintiff. The first defendant was not aware of any decision allegedly given in February 1983 by elders whose

description was not given in the plaint. When the third defendant vacated a portion, the first defendant, who had no sufficient accommodation

earlier, occupied the portion and residing therein as such possession of first defendant cannot be illegal. The plaintiff and second defendant are

equal shareholders. The sons and daughters of second sister Hidayathunnisa Begum are also entitled to a share, but they did not evince any interest

in claiming such share. They are also necessary parties to the suit and the suit is bad for non-joinder of necessary parties.

12. In view of the sale made by the second defendant in favour of the first defendant, the first defendant is entitled to 2/3rd share, while the plaintiff

is entitled to 1/3rd share in the suit houses and that the plaintiff is liable to render accounts of the income received by him for all these years in

respect of the suit properties. The sisters of the plaintiff and defendants 1 and 2 Rabia Begum, Amina Begum are also the legal heirs along with the

plaintiff and defendants 1 and 2 and they are also necessary parties to the suit and the suit is bad for their nonjoinder. The suit is barred by

limitation and the same is liable for dismissal.

13. Averments made in the written statement of second defendant:

It was pleaded that the first defendant had procured a deed from the second defendant under undue influence and misrepresentation when he was

residing with him; that this defendant was taken to the Sub-Registrar office three years back by the first defendant and he was asked to sign on a

deed without disclosing the contents thereof and this defendant had no right over the suit house and he never intended to sell it to first defendant;

that this defendant had lost his wife and had been residing with his sisters at Hyderabad; that having come to know about the fraud played by the

first defendant, this defendant is submitting the true facts and, hence, the suit may be decreed without making this defendant liable for costs.

14. The third defendant had chosen to remain absent and he was set ex parte.

15. Issues settled by the trial court:

(1) Whether the Will dt. 01.4.1957 executed by late Azizunnisa Begum is true and valid?

(2) Whether plaintiff got title to the suit property under the Will executed by late Azizunnisa Begum?

(3) Whether the suit is bad for nonjoinder of necessary parties?

(4) Whether first defendant is entitled to 2/3rd share in plaint schedule property?

(5) Whether plaintiff is entitled to past mesne profits of Rs. 1,500/-?

(6) Whether the suit is barred by limitation?

(7) Whether the suit is not properly valued for court fee?

(8) Whether plaintiff is entitled to future mesne profits? If so, at what rate?

(9) To what relief?

16. Oral and documentary evidence available on record:

Witnesses examined for plaintiffs:

P.W.1: Khaja Mohinuddin

P.W.2: Syed Qutbuddin

P.W.3: Mohd. Moulana

P.W.4: Syed Zulfiquar Ali

Witnesses examined for defendants:

D.W.1: Mohd. Ghousuddin

D.W.2: Mergu Mallesham

Documents marked for plaintiffs:

Ex.A-1: Municipal Tax receipt 1959-60

Ex.A-2: 13.7.65:special notice of property tax No. 15883

Ex.A-3: Bill of demand for property tax No. 13611 for the year 1965-67

Ex.A-4:7.11.69: Revision petition endorsement No. 18167

Ex.A-5:11.3.76: Revision petition endorsement No. 1449

Ex.A-6:2.4.80: Notice of demand of property tax No. 1069

Ex.A-7:9.8.57: Receipt of Municipality

Ex.A-8:19.1.74: Receipt for property tax No. 1407

Ex.A-9:17.7.70: Receipt for property tax No. 2363

Ex.A-10:9.3.72: Receipt for property tax No. 2689

Ex.A-11:2.2.77: Receipt for property tax No. 14303

Ex.A-12:24.10.77: Receipt for property tax No. 19010

Ex.A-13:21.3.78: Receipt for property tax No. 7317

Ex.A-14:24.1.79: Receipt for property tax No. 611

Ex.A-15:24.12.79: Receipt for property tax No.

Ex.A-16:31.3.79: Receipt for property tax No.

Ex.A-17:2.4.80: Receipt for property tax No.

Ex.A-18:3.3.81: Receipt for property tax No.

Ex.A-19:24.1.81: Receipt for property tax No.

Ex.A-20:1.12.86: Receipt for property tax No.

Ex.A-21:11.11.75: Receipt for property tax No.

Ex.A-22:14.7.76: Receipt for property tax No.

Ex.A-23:23.2.74: Receipt for property tax No.

Ex.A-24:2.4.80: Water tax No. 2405

Ex.A-25:13.10.81: Water Tax No. 42561

Ex.A-26:24.1.79: Water Tax No. 9133

Ex.A-27:1.4.1957: Original Will deed

Ex.A-28:24.12.1956: C.C. of the application of Azizunnisa Begum before the Municipality, Warangal

Ex.A-29:7.6.57: Memo issued by the Municipality intimating about the mutation in favour of P.W.1

Ex.A-30:16.4.62: Original Registered Relinquishment deed

Ex.A-31: Memo issued by APSEB to Mohd. Khaja Mohinuddin with regard to the security deposit

Ex.A-32:11.9.67: Receipt of electricity charges

Ex.A-33:3.9.88: Receipt of electricity charges

Ex.A-34: A portion in Ex.a-27

Ex.A-35: A portion in Ex.A-27

Ex.A-36: Signature in Ex.A-30

For defendants: NIL

17. Findings recorded by the trial court in nut-shell:

The trial court appreciated the evidence of P.Ws.1 to 4 and also Exs.A-1 to A-36 and the evidence of D.Ws.1 and 2 and while answering issues

1, 2, 4, 5 and 8 recorded reasons in detail at paras 12 to 33 and came to the conclusion that Ex.A-27 Will deed, dated 01.4.1957, was executed

by late Azeezunnisa Begum and the same is true, valid and binding and the plaintiff had got perfect title to the suit property under the Will deed

marked as Ex.A-27 and, hence, he is entitled for the reliefs prayed for. Further findings had been recorded at paras 34 to 37 while answering

issues 3, 6, 7 and 9 and ultimately the suit was decreed as prayed for.

18. Contentions of Sri Wasim Ahmed Khan:

Sri Wasim Ahmed Khan, learned Counsel representing the appellants, had pointed out to the oral and documentary evidence available on record

and would maintain that the consent of all the heirs had not been obtained and Ex.A-27 is an unregistered document and the ill-health of the

testator during the said period is not in serious dispute and though certain attestors were alive, none of the attestors had been examined and the

Will was not filed at the time of the institution of the suit and the other heirs were not impleaded as parties. At least, the signature of the alleged

attestor was not identified and the counsel while further elaborating his submissions pointed out the difference of colour of ink in relation to the note

portion and further pointed out to Ex.A34 and Ex.A-36 and further would maintain that except the assertion of P.W.1 that his mother is the scribe

of Ex.A-27, no other acceptable evidence had been placed. The testator herself is a teacher and in such a case the mother scribing the Will also is

improbable and further the adoption referred to in Ex.A-27 is unknown to the Mahomedan law. The counsel also further pointed out that D-2 died

issueless and even otherwise in the absence of the other sisters and the children of the sisters being impleaded as parties, the alleged consent

cannot be interfered and, hence, as per the principles of Mahomedan Law the Will Ex.A-27 cannot be held to be valid and further the learned

Counsel would point out that Ex.A-30 was not pleaded in the plaint and Ex.A-30 is being relied upon only to show that the Will had been referred

to in the recitals of Ex.A-30. Ex.A-30 was not duly proved. Even otherwise even if Ex.A-30, to be taken into consideration, it is clear that the

other sharers at the relevant point of time had interest in the property and in the absence of clear evidence relating to consent Ex.A-27 to be held

to be invalid. The learned Counsel also would point out to Mulla's principles of Mahomedan Law paras 117 and 119 and would maintain that a

bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator and if the bequests exceed the legal third,

and the heirs refuse their consent, the bequests abate ratably. The counsel also relied upon certain decisions in this regard.

19. Contentions of Sri Kowturu Vinaya Kumar:

Sri Kowturu Vinaya Kumar, learned Counsel representing the respondents would maintain that the circumstances had been taken into

consideration and the trial court recorded convincing reasons. The mother is the scribe of the Will Ex.A-27 and the same was mentioned in Ex.A-

30. Others are not disputing the Will and, hence, the consent is implied. The counsel also pointed out to the averments made in the written

statement of second defendant and would maintain that in the light of the stand taken by the second defendant it may be taken that Ex.A-27 was

consented to by the other sharers. Whether adoption mentioned in Ex.A-27 to be valid or invalid would not seriously alter the situation. The

counsel also would maintain that there was no necessity to plead about Ex.A-30, but Ex.A-30 was pressed into service to explain about consent

and other aspects. The counsel while further elaborating his submissions would maintain that one of the attestors being no more could not be

examined and the other two attestors also were not examined for the reasons explained by P.W.1. Under the Mahomedan Law Will can be oral or

written and when that being so, non-examination of the attesting witness would not seriously alter the situation. The counsel also would maintain

that absolutely there are suspicious circumstances surrounded Ex.A-27 and in the light of the convincing reasons, which had been recorded by the

trial court, this is not a fit matter to be interfered with and, hence, the appeal is liable to be dismissed. The learned Counsel also placed reliance on

several decisions to substantiate his submissions.

20. Heard the counsel on record, perused the respective pleadings of the parties, the evidence available on record and the findings recorded by the

trial court.

21. In the light of the submissions made by Sri Wasim Ahmed Khan and Sri Kowturu Vinaya Kumar, the counsel representing the parties, the

following points arise for consideration in this appeal.

(1) Whether the findings recorded by the trial court relating to Ex.A-27 to be confirmed or to be disturbed in the facts and circumstances of the

case?

(2) Whether the findings recorded by the trial court in relation to Ex.A-30 to be confirmed or to be disturbed in the facts and circumstances of the

case?

(3) If so, to what relief the parties would be entitled?

22. Point Nos. 1 and 2:

For the purpose of convenience these points are to be discussed together. The parties hereinafter would be referred to as shown in the plaint.

23. The respective pleadings of the parties, the evidence available on record, the issues settled, the evidence available on record and the findings

recorded by the trial court in nutshell already had been specified supra.

24. It is needless to say that the first defendant-appellant died and the legal representatives had been brought on record as appellants 2 to 5. It is

also pertinent to note that the plaintiff who instituted the suit Khaja Moinuddin died during the pendency of the suit itself O.S. No. 65 of 1983 and

plaintiffs 2 to 6, now the contesting respondents, were brought on record by virtue of an order in I.A. No. 541 of 1989, dated 12.6.1989.

25. It is not in serious controversy between the parties that none of the witnesses concerned with Ex.A-27 had been examined. It is no doubt true

that in the recitals of Ex.A-30, dated 16.4.1962, the original registered relinquishment deed, a reference had been made to Ex.A-27, the Will

deed, dated 01.4.1957. This is a strong circumstance, which had been argued in elaboration.

26. Strong reliance was placed on the decision in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, wherein the Apex Court at paras

18 to 22 observed as hereunder:

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, 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 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 prescribe 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.

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.

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

suspensions 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.

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.

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 Parc in *Harmes v. Hinkson* 50 CWN 895 : AIR 1946 PC 156

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.

27. Reliance also was placed on the decision in *Kalyan Singh Vs. Smt. Chhoti and Others*, wherein the Apex Court at paras 20 and 22 observed

as hereunder:

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 trustworthy 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 or 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.

The Privy Council in AIR 1937 101 (Privy Council) had an occasion to consider an analogous case where the wife was practically disinherited and

there was unexplained delay in producing the will in public. There the alleged will by a testator gave only a life estate to his daughter who was the

only child and who was to get some property at her marriage. The bulk of the estate was vested in the widow of the testator and three other

women, namely, his mother, his step-mother and his paternal aunt "these women though entitled under the Hindu Law only to maintenance were

made joint owners equally with the widow of the testator. None of the devisees could get the estate partitioned or alienate it for necessity. It was,

however, provided that the lady, who survived the other three devisees, would become the absolute owner of the estate. The widow of the testator

would not get her husband's estate, if she predeceased any of her co-devisees. The will was not produced until 22 years after its execution though

there were occasions to produce it, had it been in existence. Considering these circumstances, the Privy Council observed:

It is most unlikely that a person having a wife and a minor unmarried daughter, who should be the objects of his affection, would make a will which

would practically disinherit them.

That the testament is unnatural and runs counter to the ordinary sentiments of persons, having a status in society similar to that of Harbans Lal,

cannot be seriously disputed. But this is not the only circumstance, which tells against its genuineness. The will purports to have been executed on

24/08/1900, and the testator died within a month of that date. But it is strange that it was not produced until 1922, after the commencement of the

present litigation. During this long period of 22 years, which intervened, there were occasions when the widow or her advisers could have

produced the document, if it had been in existence; but they did not do so....

The will in the present case, constituting the plaintiff as a sole legatee with no right whatever to the testator's wife seems to be unnatural. It casts a

serious doubt on genuineness of the will. The will has not been produced for very many years before the court or public authorities even though

there were occasions to produce it for asserting plaintiff's title to the property. The plaintiff was required to remove these suspicious circumstances

by placing satisfactory material on record. He has failed to discharge his duty. We, therefore, concur with the conclusion of the High Court and

reject the will as not genuine.

28. Reliance also was placed on the decision in *Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria and Ors.* 2009 (1) SCJ 929 : 2009 (2)

ALD 19 (SC) wherein at paras 9, 14, 15, 17, 18 and 20 the Apex Court observed as hereunder:

Indisputably, the said provision is mandatory in nature. A Will is required to be attested by two or more witnesses. Section 68 of the Evidence Act

provides that the propounder must prove execution and attestation of the Will by examining at least one of the attesting witnesses.

What is meant by the word "attestation" is defined in Section 3 of the Transfer of Property Act which reads as under:

Section 3.-Interpretation-clause-In this Act, unless there is something repugnant in the subject or context,:

xxx xxx xxx

Attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has

seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of

the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person,

and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses

shall have been present at the same time, and no particular form of attestation shall be necessary.

It has, therefore, not been proved that both the attesting witnesses either attested the Will in presence of each other or the testator had

acknowledged his signature in presence of the other witnesses.

The learned Counsel, however, has drawn our attention to the statement made in the counter-affidavit that the said Mavajibhai Virajibhai had

expired on 2.5.1996. It was, however, very fairly stated that the said fact had not been brought on record before the Courts below. We, therefore,

are not in a position to accept the said contention raised before us for the first time.

We have noticed hereinbefore that there was a large number of suspicious circumstances in the instant case. We have also pointed out that

suspicious circumstances appear on the face of the Will. Inferences of suspicious circumstances must be drawn having regard to the evidence of

Ranjit Singh.

Even the statutory requirements for proof of the Will have not been complied with. It is a trite law that execution of a Will must be held to have

been proved not only when the statutory requirements for proving the Will are satisfied but the Will is also found to be ordinarily free from

suspicious circumstances. When such evidences are brought on record, the Court may take aid of the presumptive evidences also.

The question, which, thus, arises for consideration, is as to whether execution of the Will has been proved. In our opinion, it has not been.

29. Further reliance also was placed on the decision in Damodar Kashinath Rasane Vs. Shahajsdibi and Others, wherein while dealing with the

bequest in favour of a stranger under Mahomedan Law it was observed at paras 11 and 12 as hereunder:

We may now usefully summarise the position of law on the subject as interpreted by the aforesaid learned authorities. According to this exposition

of law, a Muslim cannot bequeath more than one-third of his property whether in favour of a stranger or his heir when there are heirs or other heirs

left by him as the case may be. When, however, there are no heirs or other heirs left by him, he can dispose of his entire property in favour of the

stranger or the sole heirs as against the right of the State to take by escheat. If the property bequeathed is in excess of one-third of the estate, the

excessive bequest is not valid unless the heirs, or other heirs, (if the bequest is in favour of one or some of the heirs) give their consent. Under the

Hanafi law the consent has to be given after the death of the testator, whereas under the other schools of law it can be given either before or after

the death of the testator. The estate bequeathed in excess of the bequeathable third will be valid to the extent of the share of the heir or heirs

consenting to such excess, whether the bequest is in favour of the stranger or the heir of heirs. Where, however, there are more bequests than one

which together exceed one-third of the estate, the bequests get reduced rateably. The bequests in favour of heirs are discouraged under the

Mahomedan Law, because the shares of the heirs are fixed and no bequest can be made to deprive the heirs of their rightful share. The object is

also to avoid internecine disputes between the heirs. While bequest in favour of an heir, according to one Mahomedan School of law is entirely

invalid even if it is confined to the bequeathable third, according to another school, it is valid only to the extent of one-third. It also, however,

appears that where other heirs consent to the bequest, according to both schools, the bequest is valid whether it is of one-third or of more of the

estate. Where only some of the heirs consent it is valid only to the extent of the share of the consenting heir or heirs.

It also further appears that where a testator dies leaving only a wife/ husband as her/his heir and no blood relations, if husband, he is entitled to

bequeath 5/6 of his estate and if a woman to bequeath 2/3 of her estate.

30. Further reliance also was placed on the decision in Narunnisa Vs. Shek Abdul Hamid, wherein the Division Bench of Karnataka High Court at

paras 12 and 17 observed as hereunder:

The well established position, in our opinion, is that a bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or

heir? and whosoever consents, the bequest is valid to that extent only and binds his or her share. That it is so is clear from the following enunciation

in Mahaboobi v. Kempaiah Second Appeal No. 99/1950-51: AIR 1955 Mys 705.

A Muhammadan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. But a bequest

of more than the legal third can be validated by the consent of the heirs; and similarly a bequest to an heir may be rendered valid by the consent of

the other heirs. The limits of testamentary power exist solely for the benefit of the heirs and they may if they like forego the benefit by giving their

consent.

Head Note (C).

The evidence regarding will is found in the depositions of D. Ws 1, 2 and 3. DW. 1 is W, S. Rodriques, who has identified Shaikh Abdul Ghani at

the time of execution of will. He has admitted that he does not know how many daughters Abdul Ghani had and he had not seen them. DW. 2 the

attestor of the will is brother's son of Shaik Abdul Ghani. There is nothing in his evidence to infer the knowledge, much less the consent, of other

heirs. DW. 3 is the first defendant. While he states that plaintiff, 2nd defendant and 3rd defendant knew about the execution of will, nothing is said

about 5th defendant. Admittedly, on the date of execution, none of the daughters or other sons were present. In this state of evidence to infer

implied consent on the part of fifth defendant would be erroneous and this finding cannot be sustained. Therefore, R.F.A.37/76 has to be allowed.

Consequently, 5th defendant will be entitled to her share; first defendant's share, as decreed has to be modified, deducting the share of the fifth

defendant in item-I of "A" schedule properties.

31. However, relating to the principles of Mahomedan Law and the consent relating thereto strong reliance was placed on the decision in AIR

1944 139 (Oudh) wherein the Division Bench observed that under the Mahomedan law one of the heirs may consent to a Will and as far as he is

concerned it will be held to be valid and none of his heirs can challenge it subsequently.

32. Reliance also was placed on the decision in A.E. Salayjee v. Fatima Bi Bi AIR 1922 PC 391 wherein it was held that the Mahomedan law

does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share,

and the burden of proving the consent of a particular heir is upon the legatee.

33. Reliance also was placed on the decision in Mahomed Hussein Haji Gulam Mahomed Ajam Vs. Aishabai, wherein it was held that a bequest

to heirs can only be rendered valid by consent of the other heirs. Such consent need not be express. It may be implied by the unequivocal conduct

of the other heirs.

34. In the light of the recitals of Ex.A-30 elaborate submissions were made in this regard relating to the implied consent.

35. Further reliance was placed on the decision of Division Bench in M. Krishna Rao and Another Vs. M.L. Narasikha Rao and Others, wherein

while dealing with release deed made in favour of some of coparceners it was held that it would enure to benefit of all other co-parceners and not

only in favour of those co-parceners in whose favour release was made. This decision had been strongly relied upon.

36. P.W.1 deposed in detail about the averments made in the plaint. It is no doubt true that Ex.A-30 as such had not been referred to in the

pleadings, may be that for certain reasons to prove certain facts at the stage of evidence it had been thought of and, hence, the mere fact that

Ex.A-30 was pressed into service at later point of time as such cannot be found fault. The following are certain of the facts, which appear to be not

in serious controversy.

I. The plaintiff and first and second defendant are brothers and they are the sons of late Basheerunnisa Begum, who had four sisters namely (1)

Wazeerunnisa Begum (2) Hidayatunnisa Begum, (3) Kareemunnisa Begum and (4) Azeezunnisa Begum.

II. Wazeerunnisa Begum predeceased Azeezunnisa Begum.

III. Suit property exclusively belonged to late Azeezunnisa Begum.

IV. The plaintiff sold house bearing No. 14/577 to Mergu Mallesham in the year 1976 under a registered sale deed.

V. That the plaintiff had let out a portion of a house to third defendant and the agreement of lease was scribed by first defendant.

VI. That the rent payable by the third defendant to the plaintiff was Rs. 250/- per month.

VII. That the first defendant came into possession of the portion of the house let out to D-3, when D-3 vacated said portion.

VIII. That the dispute between the contesting parties to the suit was referred to some elders, but the alleged decision of the elders is not filed by

any of the parties to the suit.

IX. The parties did not examine any of the elders, who had heard and decided the dispute of the parties.

X. That the plaintiff had obtained Rs. 5,000/- towards deposit from third defendant.

XI. Late Azizunnisa Begum died issueless on 17.4.1957.

37. P.W.1 deposed in detail about the relationship. This witness deposed that Basheerunnisa is his mother and she got four sisters. The names of

the sisters also had been given and on the date of examination of P.W.1 he deposed that his mother and her four sisters are no more alive.

Wazeerunnisa Begum died in 1956. Azeezunnisa died six months thereafter. One year thereafter Kareemunnisa died. One year six months later

Hidayathunnisa died. This witness also deposed about the death of Basheerunnisa. This witness also deposed that Azeezunnisa was the owner and

possessor of the suit house and she brought him up from childhood and he contributed his earnings for the said constructions from his cycle taxi

business. During her lifetime she applied to Municipality for mutation of his name in respect of suit house. Later she executed a Will deed, dated

01.4.1957, in his favour bequeathing the suit house in his favour. She executed Will deed in sound state of mind. His mother Basheerunnisa Begum

scribed it. It was executed in his presence. Azeezunnisa Begum signed the Will deed in his presence. The said attester signed in his presence. All

the sisters of Azeezunnisa Begum consented for the said Will deed. Exs.A-1 to A-26 are the property receipts issued in his name.

38. This witness also deposed about the letting out the portions of the property. This witness further deposed about the filing of objections before

Municipality and further deposed that D-2 filed written statement in this case supporting his claim. This witness further deposed about Ex.A-27, the

Will dated 01.4.1957, executed by Azeezunnisa Begum before Municipality. Ex.A-29 is the memo issued by the Municipal authorities intimating

about the mutation of his name. Ex.A-30 is the original registered relinquishment deed executed by his mother in his favour on 16.4.1962. Ex.A-31

is the memo issued by APSEB, Ex.A-32 and Ex.A-33 are the receipts showing payment of electricity charges. First defendant had not contributed

anything.

39. This witness in cross-examination also admitted that Azeezunnisa Begum had brought up some other children also. This witness also deposed

in cross-examination about Ex.A-28 and explained why Ex.A-28 had been obtained. Azeezunnisa Begum died at the age of 55 years and by that

time she was working as teacher. She died due to Cancer. She suffered for one year and she was admitted in MGM Hospital, Warangal and that

she expired in that hospital. She underwent treatment in MGM Hospital for three or four days in the month of April 1957. She died on 17.4.1957.

At the time of admission at MGM Hospital she became weak. This witness also deposed that except his mother, no other sister was present when

Azeezunnisa in her house executed Ex.A-27. His mother had purchased the stamp on the same day and it was affixed on Ex.A-27 on the date of

its execution. The note under Ex.A-27 was written by Azeezunnisa and it is to the effect that due to weakness or illness he got written this

document by Basheerunnisa. The said note is marked as Ex.A-34. The signature on the stamp on Ex.A-27 is that of Azeezunnisa. His mother

wrote ""A1 Abd"" i.e., a word signature put above the stamp on Ex.A-27. He filed Ex.A-27 in the court on 4.8.1988. It was in his custody prior to

said date. He had shown it to his counsel, but it was not handed over to him.

40. This witness also deposed that the sisters of Azeezunnisa had orally consented for Ex.A-27. Their consent was not in writing. The figure

1950"" is printed over the stamp on Ex.A-27. Only one attesor by name Burhanuddin is alive and he resides at Hanamkonda. The other two

attestors of Ex.A-27 are no more alive. The said Burhanuddin is the senior paternal uncle of his wife. He was a teacher in those days. Now he is

sick. The other attesor Maryam Bee was their servant. The other attesor Raheemunnisa Begum was a teacher in those days. The whereabouts of

said Maryam Bee are not known. It is true to suggest that xerox copy of Ex.A-27 was not filed in the court along with plaint. The writing of his

mother on Ex.A-27 is better than the writing of Azeezunnisa marked as Ex.A-34.

41. This witness also deposed about the health condition of the testator and no doubt this witness denied about the fabrication of Ex.A-27. Certain

questions were to be relating to mutation and other aspects. Certain questions were to be in relation to Ex.A-29, Ex.A-30 as well apart from

Ex.A-27 to P.W.1.

42. Apart from this witness, P.W.2 was examined who had deposed about Ex.A-30 and he had identified the said document and the said

document was written by him at Sub-Registrar office at Warangal.

43. P.W.3 deposed that he knows the parties to the suit and he also knows Basheerunnisa Begum. This witness deposed that he knows

Azeezunnisa Begum. Azeezunnisa Begum gave the property to P.W.1 as she brought him up as her own son. Though he was not present when the

document was executed, he deposed that he was stating certain facts.

44. P.W.4 deposed that he knows about Ex.A-30 and he had attested the said document as a person identifying the execution.

45. In the light of the evidence of P.Ws.2 and 4 even if to be taken that Ex.A-30 had been duly proved, whether by such proof of Ex.A-30 can it

be said Ex.A-27 also had been duly proved in accordance with law so as to sustain the decree granted by the trial court. Certain of the admitted

facts already had been referred to above. There cannot be any doubt or controversy relating to the propositions, which had been laid down in the

decisions specified supra. It is no doubt contended that inasmuch as under the Mahomedan Law the Will can be either oral or can be in writing.

The strict rules relating to the proof of execution of the Will need not be observed and, hence, especially in the light of the recitals made in Ex.A-30

executed by the mother of P.W.1 referring to Ex.A-27 and also further in the light of the evidence of P.W.1 well supported by P.W.2 and P.W.4

as well, it may have to be taken that the Will is not surrounded by any suspicious circumstances. It is but natural that since P.W.1 was brought up,

the testator could have executed Ex.A-27 in his favour.

46. Further, strong reliance was placed on the averments made in the written statement of D-2 supporting the version of P.W.1 in toto. Even under

Mahomedan Law when a Will is reduced to writing, the same standard of proof as contemplated by Indian Evidence Act is required. Section 68

of the Indian Evidence Act reads as hereunder.

Proof of execution of document required by law to be attested.-If a document is required by law to be attested, it shall not be used as evidence

until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the

process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been

registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it

purports to have been executed is specifically denied.]

47. Even if the evidence of P.W.1 to be taken into consideration, it is clear that one or two attestors are alive. No doubt, the evidence is not clear.

The non-availability and the death of the attestors also had been spoken to. Even in such a case, it is needless to say that when the attestors are

dead and the attestors of a Will are no more, even in such a case, at least the signatures of such attesting witness could have examined. Such steps

also had not been taken and the attestor, who is said to have been alive, may be sick at the relevant point of time, for the reasons best known, no

steps had been taken to examine the said attestor.

48. Specifically, the first defendant had denied the execution of the Will Ex.A-27. It is no doubt an unregistered Will, may be registration is not

compulsory in the case of a Will, however, the admission made by P.W.1 is that consent was obtained from the other sharers orally and certain

submissions were made that the consent to be made as implied. The settled principles of Mahomedan Law in this regard need not be repeated in

elaboration.

49. The evidence of D.Ws.1 and 2 is also available on record. D.W.1, no doubt, deposed that in relation to averments made in the written

statement D.W.2 supported the version of D.W.1. This oral evidence need not be dealt with in elaboration in the light of the findings recorded on

the aspect of proof of Ex.A-27. Inasmuch as Ex.A-27 was not duly proved in accordance with law, the other findings recorded by the trial court in

this regard could not detain this Court any longer.

50. It is needless to say that the other documents which had been relied upon, Exs.A-1 to A-26, Exs.A-28 to A-36, being only in support of

Ex.A-27. When it is to be held that Ex.A-27 had not been duly proved in accordance with law, the other findings recorded by the trial court

cannot be sustained and accordingly inasmuch as the findings recorded by the trial court being not in accordance with law, they are liable to be

disturbed and are liable to be set aside and are hereby set aside. It is needless to say that the appellants are bound to succeed.

51. Point No. 3:

In the result, the appeal is hereby allowed, however, in view of the close relationship between the parties, the parties to bear their own costs.