(2017) 06 AP CK 0045

ANDHRA PRADESH HIGH COURT

Case No: 2324 of 2016 in S A No 654 of 1997

T. Ramesh and others		APPELLANT
	Vs	
Laxmamma and others		RESPONDENT

Date of Decision: June 20, 2017

Acts Referred:

- Registration Act, 1908, Section 17 - Documents of which registration is compulsory
- Succession Act, 1925, Section 63, Section 71, Secti

Hon'ble Judges: Dr. B. Siva Sankara Rao

Bench: SINGLE BENCH

Advocate: V.L.N.G.K. Murthy, Ramakrishna K., B. Venkata Rama Rao, Gade Venkateswar Rao, A.S.C. Bose

Final Decision: Dismissed

Judgement

1. These three appeals are outcome of the respective three suit claims of O.S.Nos.136 of 1987, 90 of 1981 and 58 of 1989, from the conflicting findings of the respective decrees and judgments of the trial Court and the lower appellate Court.

2. These Second Appeals were earlier decided allowing the appeals by the common judgment and respective decrees, dated 25.02.1999, and when the same were impugned before the Apex Court in the Special Leave to appeal Civil Nos.19215 to 19217 of 1999, the Apex Court, by common judgment dated 11.11.2002, observing that this Court has not properly formulated the questions of law in the year, 1997 while admitting the Second Appeals, which are the pre-requisite, remanded the above three Second Appeals for fresh admission by formulation of the substantial questions of law involved and to decide afresh.

3. Pursuant to the remand orders of the Apex Court supra, the Second Appeals restored are since then pending, including for and by impleadment of parties or legal representatives of deceased parties, as the case may be.

4. Before framing the substantial questions of law from the grounds raised in the appeals, the factual background needful to mention is as follows:

4.(a). One Lingamaiah (predeceased his father prior to 1946), son of Yenkaiah (died prior to 1951)-the original owner of the suit lands, was the common ancestor to the plaintiffs of the three suits. Laxmaiah (died in 1974), Balraj (died in 1960, unmarried and issueless) and Balamma, w/o. T. Pochaiah are the three issues of said Lingamaiah. Laxmaiah married one Lachamma and Laxmamma, w/o. T. Jangaiah, is their daughter. Said Jangaiah (died in 1993) and Venkaiah (died in 1981) are the two sons of said Balamma. Jangaiah, through Laxmamma though issueless (for two children born and dead), through Andalamma, got three sons by name- Laxman, Murali and Ramadas (who are on record). Ramesh, who was the main person agitating in all the 3 suits, is the son, besides six daughters of Venkaiah, through 3rd wife-Indramma, leave about through 1st wife-Yallamma(died in 1993) got one daughter-Anasurya (not added as a party to any of the three suits as stated supra) and with no children through 2nd wife-Suselamma. Ramesh (died in 1999), leaving behind him, his wife Renuka and three children - Rakesh Goud, Vishali and Vinotha (who are on record), besides his mother-Indramma, on record in the three suits/appeals representing his estate also (since died in 2012). The fight is between the only daughter of Lingamaiah''s son Laxmaiah, by name Laxmamma, w/o. T. Jangaiah (2nd son of Balamma) and eldest son - Venkaiah of Lingamaiah''s daughter - Balamma, (that continues on one hand by Lachamma, mother of Laxmamma-died issueless on 22.02.2006 and also by said Lachamma brother''s son Shanker (D.3 in O.S.No.58 of 1989), as a legatee and alienee for some of the properties and, on the other hand, by Ramesh, Indramma and Suselamma and, after their death, by the wife and children of Ramesh, besides six sisters of Ramesh, by name - Shoba, Vijaya, Mamata, Anuradha, Bharati and Raja Rani, as LRs of Venkaiah, leave about for any separate estate of Jangaiah, to represent also by his 2nd wife''s three children).

4.(b). The status of Indramma, as wife of Venkaiah, is though chosen to dispute only from the so called deposition stray sentence in O.S.No.136 of 1987 of P.W.1-Ramesh, that his mother Indramma was kept by said Venkaiah, to his knowledge, since he was at the age of 2 years, apart from the positive presumption of wife from long living together, even what Ramesh deposed, no way doubts her status, as he says, since prior to his 2nd year, his mother and father were living together as man and wife, the three marriages of Venkaiah, if performed prior to the Hindu Marriage Act, 1955, those are valid and from the age of Ramesh even, it can be presumed of performed prior to 1955, and there is no dispute of their status as legal heirs of Venkaiah, in any pleadings or by any other evidence, worth to rely. Further, even Ramesh died in 1999, his mother, by name Indramma, is on record, apart from Susheela, with substantial representation of the estate of Venkaiah in all suits and appeals even, till LRs of Ramesh were brought on record

during Second Appeal stage, after death of Indramma in 2012, leave about Susheela died before 2002, and thereby none of the suits or appeals, in continuation of the three suits, with no finality from its pendency, abated, in any manner, and none can be held to be bad for non joinder or misjoinder of parties, that too when almost all the LRs of Venkaiah are on record as on to day in the matters, that too having been clubbed at First Appeal stage, of all those covered by common judgment in 1996, and also in the Second Appeals, for common disposal.

5. From the above, the facts of the three appeals arisen out of the three suits concerned are :

5(a). The first suit is O.S.No.90 of 1981, (originally filed on 18.07.1980 and numbered as O.S.No.177 of 1980 by Munsif Magistrate, E&N, Hyderabad) on the file of Principal District Munsif, Medchal, which is a suit for permanent prohibitory injunction with regard to the possession and enjoyment of the plaintiff-Laxmamma, over the suit land in Sy.Nos.143 to 147, 154, 155, 249, 282 and 372, in all admeasuring Ac.13.31 guntas of Nizampet Village, Medchal Taluq of Ranga Reddy District, described in the plaint, and with a further relief of correction in Pahani entries of the period from 1974 to 1986 in column Nos.9 and 11 by entering the name of plaintiff-(T. Laxmamma, w/o. T. Jangaiah cum d/o. Kate Laxmaiah (sic.Kota) by deleting the name of the 1st defendant-T. Venkaiah(elder brother of the 1st plaintiff''s husband-T. Jangaiah-2nd defendant, among the original 5 defendants, including Raghava Reddy, Manik Reddy and Bindla Pochaiah), besides Ramesh and Indramma added as D.6 & D.7, as LRs of D1-Venkaiah-died in 1981, in I.A.No.158 of 1982, for the suit lands and for costs and such other reliefs.

5(a)(i). The plaint averments, in nutshell, are that above suit lands originally belonged to one Yenkaiah (died 30 years prior to the suit date), whose only son-Lingamaiah, pre-deceased Yenkaiah and also left behind, his son Laxmaiah, father of Plaintiff-Laxmamma. Plaintiff did not mention about Balraj, much less of he was mentally challenged. Laxmaiah, in whose name the lands stand in revenue records, while cultivating died in 1974 and since then the plaintiff is in possession and enjoyment by personnel cultivation, through her relative (maternal uncle)-D. Sreeramulu-(father of D. Shanker) and farm servants, and paying land revenue, even though change in the Revenue records of her name not sought. Plaintiff''s husband T. Jangaiah (her father''s sister''s second son) deserted her 30 years back, and Venkaiah, elder brother of Jangaiah, with malafide intention and in collusion with Village Patwari, by taking advantage of original person Yenkaiah''s name and his name are one and same and in cause adding his father''s name in some pahanies. Defendants 1 to 5 tried to interfere with plaintiff''s possession and enjoyment, which she could resist through Sreeramulu etc., and plaintiff also came to know the manipulations in the Revenue records and thereby filed the suit.

5(a)(ii). The sum and substance of said plaint averment is that the plaint schedule property is her paternal great grand father''s property (ancestral) and her father and, after

him, herself are in possession and enjoyment, exclusively, by personnel cultivation and the D2 is her deserted husband, whose brother D1 and they with the aid of D3-5 tried to interfere and D1 cause manipulated his name from same name (being his maternal great grand father) of her paternal great grand father by cause entered his father''s name therein to grab the property and thereby entitled to permanent injunction and rectification of name in the Revenue pahanies for the property. As Venkaiah died in 1981, his son Ramesh through 3rd wife Indramma were added as D6 & D7.

5(a)(iii). The averments in the original common written statement of D1 & D2-Venkaiah and Jangaiah, respectively, dated 08.08.1980, in disputing the suit claim and denying the plaint averments, other than the relationship and genealogy, with contest, in nutshell, are that, K. Lingamaiah@ Lingaiah, s/o. Yenkaiah, was having two sons, viz., Laxmaiah (father of plaintiff) & Balraj, who got each undivided half a share in the suit property, Plaintiff''s mother Lachamma is also alive, Plaintiff''s husband T. Jangaiah is the illatom son-in-law of Laxmaiah and Lachamma, Plaintiff and her husband T. Jangaiah blessed with two children, who died and later issueless, and thereby Jangaiah with plaintiff''s consent married another woman, defendants 1 & 2- Venkaiah and Jangaiah, respectively, are enjoying the suit property jointly, including after death of plaintiff''s father- Laxmaiah in 1974, and Jangaiah was maintaining the plaintiff in his care till 1980 and later, at the instance of Sreeramulu, she became hostile towards Jangaiah and filed the suit with false claim. In the Revenue records, the name of Laxmaiah and Balraj continues for the lands and as Balraj made a Will (no Will filed with the written statement, no date, month and year even given, whether it was registered or unregistered not even mentioned) in the name of D1- Venkaiah, for his half share in the suit property.

5(a)(iv). It is also contended that in the suit lands the defendants raised vegetables and plantation of paddy in June, 1980, the plaintiff, by obtaining injunction orders with unsocial elements, is trying to destroy the crops. The name of D1-Venkaiah entered in the Revenue records as per law after completion of formalities in the year 1961-62, with mutation and zamabandi. Plaintiff''s father was having only half a share in the suit lands, for the remaining half share belongs to D1- Venkaiah, as D2-Jangaiah being illatom son-in-law of Laxmaiah, continues with the joint possession and enjoyment of the suit lands along with D1. Defendants 3 to 5 have no concern with the suit lands. There is no cause of action to the suit for the plaintiff. The additional grounds are - the suit without reliefs for declaration and possession wont lie, bad for non-joinder of Lachamma and misjoinder of (D3 to D5). The suit claim, at the instance of Sreeramulu, is false and is liable to be dismissed. Leave about the D6 & D7 as LRs of D1, not entitled to take any additional and new pleas by stepping into the shoes of late Venkaiah to file additional written statement that was filed in April, 1987 and with that even the alleged Will, if in existence, not filed and no date, month and year even given, whether registered or unregistered was not even mentioned, if at all any Will of said Balraj, died in 1960, in existence from the life time of Balraj.

5(b). The second suit O.S.No.136 of 1987 was filed on 25.09.1987(seven years after filing of the first suit supra, by the D6&7 therein viz., T. Ramesh, Indramma and one Suselamma supra) and without impleadment of other heirs of Venkaiah by name-Anasurya and six sisters of Ramesh, for the reliefs of partition of said property of Acs.13.31 guntas of Nizampet village, supra into two equal shares and to allot one such share to the plaintiffs 1 to 3. The three defendants in this O.S.No.136 of 1987 are Jangaiah (D.2 in O.S.No.90 of 1981), Laxmamma and Lachamma (plaintiffs 1 & 2 in O.S.No.90 of 1981) and later the 6 sisters of Ramesh supra came on record as per orders in IA No.244 of 1994, as D.4 to D.9. The plaint averments in O.S.No.136 of 1987 are with no improvement than repetition of the written statement averments in O.S.No.90 of 1981 supra. Even with O.S.No.136 of 1987 plaint, the alleged Will, if in existence, not filed and no date, month and year even given, whether registered or unregistered was not even mentioned, if at all any Will of late Balraj, died in 1960, in existence from life time of said Balraj, that too the suit claim is based on alleged Will of Balraj, without mentioning any particulars and without filing even a copy of it, being suit document, that too with plaint when filed three documents viz., Xerox copy of Ryth Pass Book in the name of Venkaiah, Xerox copies of mutation entries of pahanies of 1961, 1979-80, for no reason in not filing the alleged Will, if at all in existence, at least a copy of it, that too even nearly seven years later to the written statement filed in earlier suit by Venkaiah by setting up Will.

5(b)(i). D.1 and D.3 i.e., Jangaiah and Lachamma (husband and mother of D2-Laxmamma), respectively, remained exparte.

5(b)(ii). D.2-Laxmamma filed a Written Statement denying that the suits property was joint property of Plaintiff and Defendants. It is contended that the suits properties were the absolute properties of Laxmaiah, who enjoyed it, exclusively, during his life time. (No doubt, she cannot aprobate and reprobate, nor wriggle out from plaint averments in O.S.No.90 of 1981 supra of ancestral property). Balraj, brother of Laxmaiah, was born in unsound state of mind and died issueless, therefore, the question of his enjoying the suit properties did not arise and he lived along with Laxmaiah till his death and thus the allegation of Balraj made a Will in favour of Venkaiah in respect of his share in the suit properties is false. It is also contended that the alleged Will was forged and fabricated and brought into existence to usurp the properties. It is contended that said Venkaiah, in collusion with the Revenue authorities concerned, had manipulated the record by incorporating the name of Balraj. The alleged mutation in the name of Venkaiah in year 1961-62 is denied. The Defendants had no notice of the alleged mutation proceedings. Name of Venkaiah appearing in the Revenue records along with Laxmamma''s name is without any sanction. This Defendant (D2-Laxmamma) filed an application for rectification of entries in the Revenue records as per the Rights and Land Regulation Act, 1958 Fasli, before the District Revenue Officer, in respect of suits properties and said application was allowed, by order dated 22.02.1988, directing for deletion of the name of Venkaiah from Pattadar column of pahanies from 1955-56 and said order was implemented. It is alleged

mischievously on the basis of alleged Will that as if Venkaiah became half a share holder in the Plaint Schedule Properties along with Laxmaiah, after the death of Balraj. The allegation that Jangaiah went as illatom son-in-law of Laxmaiah and that after the death of Laxmaiah, Jangaiah(D1) became the legal heir, is denied. The allegation that the Plaintiffs and the Defendants are cultivating separate portions is denied. It is alleged that the plaintiffs and 1st defendant have no right whatsoever over the suits properties and hence the question of partition does not arise and that the properties are not liable for partition. It is also contended that there was no cause of action, since there was no occasion for the plaintiff to make any demand for partition. The question of proper court fee is also raised, following their contention that the Plaintiff was never in possession of the suit lands along with the Defendants.

5(c). The third suit in O.S.No.58 of 1989 was also filed by the self-same plaintiffs of O.S.No.136 of 1987 supra against three defendants viz; Laxmamma, Lachamma (plaintiffs 1 & 2 of O.S.No.90 of 1981) and one D. Shanker-Lachamma''s brother''s son), for the relief of permanent injunction restraining alienation of the suit property of Acs.13.31 guntas of Nizampet village supra or for converting the same into non-agricultural house plots.

5(c)(i). Similar contentions were raised by the respective parties in their pleadings in O.S.No.58 of 1989 and hence, those need not be repeated.

6. As T. Laxmamma, w/o T. Jangaiah and D/o. K. Laxmaiah & Lachamma, along with K. Lachamma (mother) as Class 1 legal heirs of K. Laxmaiah, succeeded his interest in the suit property from his death in 1974, from the death of T. Laxmamma on 22.02.2006, from her husband T. Jangaiah, besides pre-deceased her in 1993, none of other heirs of Jangaiah (including those Laxman, Murali and Ramadas, who came on record as per orders in I.A. No.874 of 1995, dated 13.06.1995, as First Appeal co-respondents 11 to 14, from their claim as also children through Andalamma- 2nd wife of late T. Jangaiah (1st defendant in O.S.No.136 of 1987 & 2nd defendant in O.S.No.90 of 1981), can claim as legal heirs of T. Laxmamma, in view of the bar under Section 15 of the Hindu Succession Act. Thus, the Lachamma, w/o. late Laxmaiah (as mother of the issueless and widow-Laxmamma) came on record in O.S.No.90 of 1981 as her sole legal heir, besides party defendant to O.S.Nos.136 of 1987 & 58 of 1989 supra). After O.S.No.90 of 1981 of Laxmamma was decreed, Ramesh etc., filed A.S.No.16 of 1990 and against said reversal decree and judgment in A.S.No.16 of 1990, she filed S.A.No.553 of 1992 and same was remanded to First Appeal Court and after said remand, A.S.No.16 of 1990(out come of O.S.No.90 of 1981 supra) came for common disposal along with A.S.Nos.73 of 1994 & 13 of 1995(out come of O.S.Nos.136 of 1987 & 58 of 1989 supra). A.S.Nos.73 of 1994 & 13 of 1995 filed by Laxmamma & Lachamma-defendants in O.S.Nos.136 of 1987 & 58 1989 supra, where the six sisters of Ramesh, by name Shoba, Vijaya, Mamata, Anuradha, Bharati and Raja Rani were impleaded as per the orders in I.A.No.244 of 1994, dated 17.06.1994, as R.4 to R.9; Laxman, Murali and Ramadas also came on record as per orders in I.A.No.874 of 1995, dated 13.06.1995, as First Appeal co-respondents 11 to 14,

from their claim as children of T. Jangaiah, through his another wife late Andalamma, along with her). Whereas, D. Shanker came on record as 3rd appellant in A.S.No.13 of 1995 (against O.S.No 58 of 1989). Against all the three First Appeals common judgment and decrees dated 06.03.1996 of the learned District Judge, Rangareddy, allowing the two appeals of Laxmamma and Lachamma in A.S.Nos.73 of 1994 & 13 of 1995, by reversing the trial Court decrees in O.S.Nos.136 of 1987 & 58 of 1989 and by dismissing those two suit claims of Ramesh, Indramma and Suselamma-(the present Second Appeal appellants), and in dismissing A.S.No.16 of 1990, by confirming the permanent injunction decree of the trial Court in O.S.No.90 of 1981, also with a direction for rectification of entries, the present three Second Appeals are thus filed.

7. While S.A.No.654 of 1997 (against A.S.No.73 of 1994 in O.S.No.136 of 1987) and S.A.No.666 of 1997 (against A.S.No.13 of 1995 in O.S.No.58 of 1989) are filed by Ramesh, Indramma and Suselamma (plaintiffs against First Appeal reversal decrees and common judgment; S.A.No.655 of 1997 (against A.S.No.16 of 1990 in O.S.No.90 of 1981) is filed by Ramesh and Indramma only (defendants 6 & 7 as LRs of D1-Venkaiah) against First Appeal (based on the order in S.A.No.553 of 1992 remanding A.S.No.16 of 1990) for fresh determination reversal decree and common judgment.

8. In these three Second Appeals, pursuant to the common judgment dated 11.11.2002 of the Apex Court, setting aside the common judgment and respective decrees, dated 25.02.1999, of this Court passed earlier, on restoration to formulate points on substantial question of law involved, if any, and to decide from hearing, since pending, there were applications filed by third parties seeking to come on record and some of co-respondents to the appeals sought for recognition of them as LRs of some of the deceased parties, the details of which, save those covered supra) and further relevant to the lis to mention are:

8(i). Vide orders dated 26.02.2013 in SAMP.No.3061 of 2011 in S.A.No.655 of 1997, as respondent No.10; and SAMP.No.3062 of 2011 in S.A.No.654 of 1997, as respondent No.17, Sri Durgam Shanker, s/o. Sri Ramulu, (who is 3rd respondent to S.A.No.666 of 1997), was impleaded as a pendent-lite alienee, pursuant to the registered Sale Deed, No.8755, dated 30.06.2005 in his favour for Acs.5.20 gts of Nizampet), executed by his father''s sister''s daughter- Smt. T. Laxmamma (since died on 22.02.2006); leave about his earlier claim as a legatee as per bequeaths made by said Laxmamma in the registered Will dated 27.10.1987, Document No.8/1987, vide order dated 26.02.2013 in SAMP.No.1281 of 2008, dismissed holding the petition as unnecessary, saying that said Lachamma by then alive and the bequeaths will come into force only after her death.

8(ii). SAMP.Nos.1602, 1601 and 1603 of 2013 in S.A. Nos. 655, 654 and 666 of 1997, respectively, filed by Renuka, T. Rakesh Goud, Vishali and Vinotha, no other than wife and children of 1st appellant - T. Ramesh, appears to have died in 1999, however, representing his estate, his mother Indramma as 2nd appellant continued on record till her death as one of Class-I legal heirs and from her death on 21.10.2012, in their claim, as such, that were allowed on 29.01.2016, as appellant Nos.3 to 6 in S.A.No.655 of 1997

and appellant Nos.4 to 7 in S.A.Nos.654 and 666 of 1997, respectively.

8(iii). SAMP. No. 377 of 2010 in S.A.No.655 of 1997, SAMP. No. 85 of 2010 in S.A. No. 654 of 1997 and SAMP.No.84 of 2010 in S.A.No.666 of 1997 filed by P. Narayan Goud to come on record as co-respondent, saying that he entered into a Sale Agreement dated 25.02.1980 with late Venkaiah (died in 1982) and Anasurya, D/o. of Venkaiah & Yallamma was demanded to execute Sale Deed and he filed O.S.No.75 of 1999 in Medchal Court for specific performance and as it was dismissed, A.S.No.110 of 2008 filed by him is pending in the Sub-Court, Medchal, and as Bharati, Raha Reddy and Prakasa Rao are impleaded, claiming as purchasers from Indramma, also covering for the property alienated to him, he is to be impleaded. It was dismissed, as he died later and his daughters filed SAMP.No.1238 of 2011 in S.A.No.655 of 1997, SAMP.No.1233 of 2011 in S.A.No.654 of 1997 and SAMP.No.1234 of 2011 in S.A.No. 666 of 1997 with self-same claim through late T. Narayan Goud to come on record and same were ended in dismissal on 26.02.2013, to pursue their remedies otherwise, if any, for the Second Appeals are mainly concerned with the disputes between the appellants and the respondents and not with the third parties.

8(iv). SAMP.No.2190 of 2009 in S.A.No.655 of 1997, SAMP.No.1943 of 2009 in S.A.No.654 of 1997 and SAMP.No.2186 of 2009 in S.A.No.666 of 1997 are filed by the three petitioners viz., one Bharati in claiming as a Donee under registered Gift Deed dated 29.11.2006 from one Raghuveer Reddy, in claiming that he under the Sale Deed of even date purchased the same from Indramma, and also K. Raji Reddy & M. Prabhakar Rao, as Agreement-cum-G.P.A. Holders dated 21.10.2003 from the said Indramma; all as pendent lite alienees from Indramma, who died on 21.10..2012, to come on record and those were allowed, by order dated 26.02.2013.

8(v). Laxman, Murali and Ramadas, who are on record as appeal co-respondents 11 to 14, from their claim as children of the 1st plaintiff''s husband T. Jangaiah, through his another wife late Andalamma, along with her, in SAMP No.2734 of 2011 in S.A.No.654 of 1997 (against O.S.No.136 of 1987), sought on 16.09.2011, to record them as legal heirs of K. Lachamma (died on 22.02.2006) was ended in dismissal, vide order dated 26.02.2013, holding that they are by no stretch of imagination become her legal heirs, so to record, being her husband''s 2nd wife''s children, to succeed her father''s property.

8(vi). One Satyanarayana came on record as respondent No.18, vide orders in SAMP.No.654 of 2016 - (on withdrawal of SAMP.No.515 of 2016) in S.A.No.654 of 1997, in claiming as alienee from T. Laxmamma supra, under Sale Agreement dated 09.02.1990, and based on it obtained registered Sale Deed No.5726/2005, dated 06.05.2005, through Court as per the decree dated 08.04.2004, for specific performance passed in O.S.No.28 of 2004, for Ac.1.10 gts in Sy.No.249 of Nizampet. No Doubt, there is an interim order dated 08.11.2004 in SAMP.No.23523 of 2002 in S.A.No.654 of 1997, including against said Laxmamma, not to alienate the properties covered by Plaint Schedule of Acs.13.31 gts, which include the land in Sy.No.249 of Nizampet supra.

8(vii). In the same line, one Avula Yadamma came on record as respondent No.19, vide orders in SAMP.No.687 of 2016 in S.A.No.654 of 1997, in claiming as purchaser under a registered Sale Deed No.415, dated 18.01.2005, for Ac.0.09 gts in Sy.No.372 of Nizampet from T. Laxmamma.

9. Before dealing with the Second Appeals, in deciding the substantial questions of law supra, from the subsequent events, right from the stage of filing of the suits for the respective suit reliefs, with the further developments till date referred supra, it is just to bring on record the family genealogy.

9(i). The Genealogy/family tree submitted by Respondent No.17- Sri D. Shanker, on behalf of appeals contesting respondents also, is as follows:

"IMAGE OMITTED"

9(ii). The Genealogy/family tree submitted by the appellants to the three Second Appeals is as follows:

"IMAGE OMITTED"

10. From the above, coming to the gist of results of the three suits and first appeals:

10(i). In O.S.No.90 of 1981, interim injunction pending suit was granted, subsequently, the suit was decreed by the trial Court on 30.11.1989, appeal filed by defendants 3 to 7 in A.S.No.16 of 1990 against Jangaiah, Laxmamma and Lachamma was allowed and, in the Second Appeal, the matter was remanded, as stated earlier. In the partition suit i.e., O.S.No.136 of 1987 (along with O.S.No.58 of 1989, which is a suit for perpetual injunction), the trial Court, having found that the plaintiffs were entitled for partition of the suit lands by metes and bounds, directed division of the suit properties into two equal shares and to allot and deliver one such share to the Plaintiffs and Defendants Nos.4 to 9, vide common judgment and decrees dated 15.12.1994, including not to alienate the properties. Aggrieved by said common judgment and decrees dated 15.12.1994 in O.S.No.136 of 1987 & O.S.No.58 of 1989, as Laxmamma filed appeal suits in A.S.No.73 of 1994 and A.S. No. 13 of 1995, respectively, and A.S.No.16 of 1990 arising out of O.S.No.90 of 1981, since remanded, also was pending in the same District Court, to answer the three appeals, basing on the rival contentions, the lower appellate Court framed the following points for determination viz.,

1. Whether the Will Ex.B.2 marked in O.S.No.90/81 and (Certified copy of which is marked as Ex.A.4 in O.S.No.136/87) is true and genuine?

2. Whether Venkaiah got half share in the suits properties through said Will?

3. Whether the partition suit was barred by limitation?

4. Whether the partition suit was bad for non joinder of parties?

10(ii). The lower appellate Court, having dealt with said points basing on the material and the evidence available on record and by referring various decisions of the Apex Court, and having found that the partition suit is well within time and also not bad for non-joinder of necessary parties, however, Ex.B.2-Will is not genuine and Venkaiah do not have half a share in the suit properties, vide common judgment and decrees dated 06.03.1996, allowed the appeals in A.S.Nos.73 of 1994 and 13 of 1995, by setting aside the judgments and decrees of the trial Court decreeing the suits in O.S.Nos.136 of 1987 and 58 of 1989, respectively; while dismissing the appeal in A.S.No.16 of 1990, by confirming the judgment and decree of the trial Court partly decreeing the suit in O.S.No.90 of 1981. Aggrieved by the same, the present Second Appeals in S.A.Nos.654, 655 and 666 of 1997 were preferred by the appellants - defendants 6 & 7 of O.S.No.90 of 1981 and plaintiffs in O.S.Nos.136 of 1987 and 58 of 1989. As already stated, the said Second Appeals were earlier decided by this Court, allowing the appeals; vide common judgment and respective decrees dated 25.02.1999, and when the same were impugned before the Apex Court in the Special Leave to appeal Civil Nos.19215 to 19217 of 1999, the Apex Court, by common judgment dated 11.11.2002, while observing that this Court has not properly formulated the questions of law in the year 1997, while admitting the Second Appeals, which are the pre-requisite, remanded the above three Second Appeals for fresh admission by formulation of the substantial questions of law involved and to decide afresh.

11. The grounds of these Second Appeals, in nutshell, which are the basis for framing the substantial questions of law raised, are as follows:

(a) The order under appeals is contrary to law and facts of the case.

(b) A common judgment dated 06.03.1996 in A.S.Nos.16 of 1990, 73 of 1994 and 13 of 1995 is a reversing judgment, reversing the decrees and judgment passed by the trial Court, without any reasoning or basis.

(c) The lower appellate Court has erred in holding that the presumption that the executor of the Will, though pleaded to have known the provisions of the instrument that he has signed, but the said presumption is rebutted by proof of suspicious circumstances.

(d) The lower appellate Court erred in holding that the presumption was rebutted.

(e) The lower appellate Court had totally exaggerated the circumstances referred to in para Nos.26, 27 and 28 as suspicious circumstances leading to an inference that the Will executed by Balraj was not genuine, which is erroneous and not based on any positive evidence and contrary to the pleadings.

(f) The lower appellate Court gave undue importance to certain insignificant things like who scribed the Will etc., creating a doubt about the genuineness of the Will, which is contrary to the evidence on record.

(g) The lower appellate Court is not justified in suspecting the veracity of the deposition of P.W.2 merely because he claimed to be a Gumastha of Patwari of Nizampet.

(h) The lower appellate Court failed to appreciate that the only available attesting witness was examined thereby complying with the requirement of law and that the execution of the Will was proved.

(i) Having admitted that the Original Will - Ex.B.2 was filed in O.S.No.90 of 1981, the lower appellate Court is not justified in suspecting its genuineness.

(j) Having admitted the reference of Original Will - Ex.B.2 executed by Balraj in favour of Venkaiah filed in O.S.No.90 of 1981, the lower appellate Court is biased and not justified in finding error with the plaintiffs in O.S.No.136 of 1987 for not giving the date of the Will.

(k) When Ex.B.2 - Will, which is in Urdu, was executed and signed by Balraj, who is a Hindu, the lower appellate Court is not justified in stating that there was no evidence about the testator speaking to the contents of Ex.B.2 or to suspect about the instructions given by Balraj to the scribe, who has written the recitals of Ex.B.2.

(l) The lower appellate Court is not justified in stating that the suspicious circumstances in execution of Ex.B.2 Will create a doubt whether the same was executed by Balraj in a fit state of mind.

(m) The lower appellate Court without any valid reasons, simply differed with the reasoning and the conclusion of the trial Court in accepting Ex.B.2 - Will.

(n) The lower appellate Court erred in refusing to take into account the Revenue records.

(o) The lower appellate Court erred in presuming the correctness of the entries in the Revenue records without any reason on the ground that the same must have been manipulated with the assistance of P.Ws.2 and 3.

(p) The lower appellate Court misconstrued the observation of the High Court in directing the lower Court in O.S.No.136 of 1987 to decide the questions raised therein on adducing evidence by both the parties without taking into consideration the disputed entries in the Revenue records.

(q) The lower appellate Court erred in appreciating the fact that land acquisition compensation was apportioned amongst the legal heirs of Laxmaiah and Venkaiah in respect of the suit lands and the statement of Mr. Venkaiah in Ex.X.7 that he and his

maternal uncle - Laxmaiah were joint pattadars of the suit lands and entitled to the amount equally, which statement was accepted to be true by Mr. Laxmaiah.

(r) The lower appellate Court is not justified in reversing the findings of the trial Court on issue Nos.1 and 2 and holding that defendant Nos.2 and 3 are absolute owners of the suit property.

(s) The lower appellate Court erred in holding that the suit was barred by limitation and that the plaintiffs are not entitled for the relief of rectification of entries in Revenue records.

(t) The lower appellate erred in reversing all the three judgments of the trial Court.

(u) The finding of fact recorded by the lower appellate Court reversing the finding of fact of the trial Court is arbitrary and liable to be set aside.

(v) The lower appellate Court misconstrued the evidence and erred in considering the facts in proper perspective by reversing the finding rendered by the trial Court on the basis of surmises and unreasonable inferences.

(w) The lower appellate Court erred in not dealing with the evidence relied upon by the trial Court.

(x) The lower appellate Court erred in considering the genuineness of Ex.B-2-Will on the ground that it was surrounded by certain suspicious circumstances and proceeded to appreciate the evidence in a wrong perspective.

(y) The lower appellate Court erred in disbelieving the evidence relied upon by the trial Court in coming to the conclusion and in reversing the judgment of the trial Court

(z) The reversal judgment of the lower appellate Court amounts to an error or defect in procedure giving rise to substantial question of law.

12. The Constitution Bench of the Apex Court in Chunilal Mehta v. Century Spinning and Manufacturing Company, AIR 1962 SC 1314, held that it is well settled that construction of a document of title or of a document, which is the foundation of the rights of parties, necessarily raises a question of law.

12(a). That apart, as held by a Bench of Three Judges in Santosh Hazari v. Purushottam Tiwari, 2001 (3) SCC 179, a particular question is a substantial question of law or not depends on facts and circumstances of each case.

12(b). Considering the above legal position and after hearing the respective Advocates of the parties on record in the three appeals - Sri V.L.N.G.K. Murthy, Sri B. Venkata Ramarao and Sri K.Ramakrishna, from the substantial questions of law raised, mainly as to the truth and genuineness of the Will, dated 13 Khurdad, 1356 Fasli, true copy of the

same marked as Ex.B.2 in the suit O.S.No.90 of 1981 and Certified copy of it marked in other two suits O.S.Nos.136 of 1987 and 58 of 1989 as Ex.A.4 (a) & (b), respectively, during common trial of those later two suits, which is in relation to the property of the original person - Kate Lingamaiah @ Lingaiah, s/o. Yenkaiah, by order dated 27.10.2016, this Court re-admitted the three Second Appeals, since involving substantial questions of law, framed as follows:-

1. Whether Section 90 of the Evidence Act, 1872, is applicable to the proof of a Will and the failure to apply the same by the Courts below is a perverse and unsustainable conclusion even concurrently and same is devoid of merits and even if so, for not specifically raised in the Courts below, whether open to raise and to consider in the second appeal?

2. Whether it is the wording of Section 63 of the Indian Succession Act, 1925 that is required to be reproduced by a witness in proof of a Will i.e., one of the attestors required to be examined or it is to be construed of the twin requirements from a reading of the evidence as a whole in appreciation with facts and law and, if so, the conclusions arrived by the Courts below of the Will is not proved by satisfying the twin requirements of Section 63 of the Act are perverse and unsustainable?

3. Whether the Will is shrouded with suspicious circumstances even same either under Section 90 of the Evidence Act, if at all to apply, and even otherwise from an overall reading of the evidence, as a whole, if taken as proved, to disbelieve the bequeaths therein?

4. Whether the trial Court and the lower appellate Court went wrong in rejecting the evidence of PW.3, who is son of Raji Reddy, as a whole, based on a stray suggestion rather than appreciation of evidence, as a whole, and if so, what is the impact on the conclusions arrived and is it a perverse and unsustainable finding therefrom and is liable to be set aside?

5. Whether the findings are outcome of ill-appreciation of facts and law and require interference by this Court while sitting in second appeal against the concurrent findings?

6. To what result, respectively?

13. Heard both sides at length at several sittings finally and perused the material on record and also the decisions placed reliance and written submissions of Counsel for R.17 - D. Shanker.

14. From the above, now to answer the substantial questions of law 1 to 5 framed, as to the applicability of Section 90 of the Evidence Act, 1872, to the proof of a Will and for not specifically raised in the Courts below to apply, whether open to raise now and to consider in the second appeal and failure to apply the same by the Courts below is unsustainable, the wording of Section 63 of the Indian Succession Act, 1925 is required to be reproduced by a witness in proof of a Will or evidence contains the proof of the twin requirements is enough, the Will is shrouded with suspicious circumstances, rejecting the evidence of PW.3, who is son of Raji Reddy, is unsustainable and the conclusions arrived by the Courts below of the Will is not proved, are outcome of illappreciation of facts and law and require interference by this Court, while sitting in second appeal against the concurrent findings concerned:

14(a). For more clarity, it is necessary to mention that the Indian Evidence Act (for short Evidence Act) is divided into 3-Parts, 11-Chapters with 167 Sections viz.,

(i). Part-1=Chapters-1&2-(Sec.1-55)-short title, extent, definitions or meanings & Relevancy of facts;

(ii). Part-2=Chapters-3-6-(Sec.56-100)-facts which need not be proved(s.56-58-chapter iv); of oral evidence (sec.59-60- chapter iv); of documentary evidence(which include presumptions as to documents-s.79-90 (sec.61-90-chapter v) & of the exclusion of oral by documentary evidence (sec.91-100-chapter vi) &

(iii). Part-3=Chapters-7-11-(101-167-of the burden of proof(which include presumptions-other than presumptions as to docts-s.79-90) (sec.101-114-chaptervii);

estoppel(sec.115-117-chapter-viii); of witnesses (sec.118-135-chapter ix); of the examination of witnesses(sec.135-166-chapter x) & of improper admission and rejection of evidence (sec.167-chapter xi).

14(b). Out of which, Sections 90, 100, 68-71 (besides Section 47 & 67 with Section 69) relevant herein to refer are:

(i). Section 90 of the Evidence Act, 1872 (in Chapter v) with title "Presumption as to documents of thirty years old" reads that- Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person"s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation- Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

Illustrations:

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B''s possession, which were deposited with him by B for safe custody. The custody is proper.

(ii). However Section 100 of the Evidence Act, 1872 (in Chapter VI) with title

''Saving of provisions of Indian Succession Act relating to Wills'' reads that-Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (10 of 1825)], as to the construction of Wills.

(iii). Whereas Sections 68-71 of the Evidence Act, 1872 (in Chapter V) read:

(a). Section 68. 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 executing, 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.

(b). Section 69. Proof where no attesting witness found -If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

In this context, along with Section 69, it is appropriate to read Section 47 & 67.

Section 47. Opinion as to handwriting, when relevant -When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation-A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration:

The question is, whether a given letter is in the handwriting of A, a merchant in London. B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B''s clerk, whose duty it was to examine and file B''s correspondence. D is B''s broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon. The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

Section 67. Proof of signature and handwriting of person alleged to have signed or written document produced -If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person''s handwriting must be proved to be in

his handwriting.

(c). Section 70. Admission of execution by party to attested document - The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be document required by law to be attested.

(d). Section 71. Proof when attesting witness denies the execution - If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

14(c). Now coming to Section 63 of the Indian Succession Act, 1925, which speaks on execution and proof of Wills with title ''Execution of unprivileged Wills''- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-

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

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

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

14(d). From the above provisions, there is a bar to apply Sections 91 to 99 of the Evidence Act as to when to adduce and when not to adduce oral evidence of the contents of Will, from what is laid down in Section 100 of the Evidence Act, leave about looking into any of the contents of Will, to rely for any collateral purpose, does not arise in the absence of proof of due execution of Will, as laid down by this Court in para 15(c) of the expression in Cheedella Padmavati v. Cheedella Radha Krishna Murthy etc., 2015(5)ALT 634 that from a reading of Section 68 of the Evidence Act and its proviso, it is not possible to hold that rigor of the section can be watered down in case of a Will, which is required by law to be attested, to prove it to use the same in evidence even for collateral purposes.

14(e). However, there is no bar laid down on application of other Sections of the Evidence Act to execution and proof of Wills, but for to say, in view of the specific provision covered by Section 63 of the Indian Succession Act, what is laid down by Section 68 of the Indian Evidence Act of where no denial of execution, no need to examine any attestor to the compulsorily registrable documents, is not applicable to Wills, for what is also saved by the proviso to Section 68 of the Evidence Act.

14(f). From the above provisions, now coming to the propositions on the scope of Section 90 of the Indian Evidence Act and its application or non application to Wills, leave about the facts and circumstances permit to exercise the discretion to apply, even if applicable, from the use of the word "may" and proof of existence of a document for past 30 years, to say 30 years old to the date of exhibiting the same, and produced, if from proper custody concerned:

(i). In Harihar Prasad Singh v. Balmiki Prasad Singh, 1975(1)SCC 212 , it was held by placing reliance upon the expression in Basanth Singh v. Brijraj Sadan Singh, AIR 1935 PC 132 (c)- regarding presumption of thirty years old document under Section 90 of the Indian Evidence Act, that a presumption can be raised only with reference to original document and not to copies thereof. If the document happens to be signed by

the agent of the person against whom the presumption is sought to be raised and there is no proof that he was an agent, Section 90 does not authorize the raising of a presumption as to the existence of authority on the part of the agent to represent that person. Even earlier to it, in the 3 Judge Bench expression of the Apex Court in Kalidindi Venkata Subbaraju v. Chintalapati Subbaraju, AIR 1968 SC 947 it was held a presumption is only in respect of original document and not for copies. No doubt while holding as per Section 59 of the Indian Succession Act, onus is on the person who relies on Will to establish that said testator was competent to execute, there was reference in making said observation of presumption in a Will case. It did not specifically observed with reference to Section 63 of the Indian Succession Act of same available to Will to draw presumption including in referring to the earlier expression of Munnalal v. Kashibai, (1947) AIR PC 15, Basant Singh (supra) and Harihar Prasad v. Deonarayan Prasad, AIR (1956) SC 305 to which Deonarayan and Munnalal supra, is also in cases of copy of will marked in not drawing the presumption for not original. It is leave apart said issue not raised to consider before the trial Court or earlier round of litigation in the first appellate Court or even on second appeal remand of O.S.No.90 of 1981 and even from common disposal of the three appeal suits by the 1st appellate Court later even. Thereby even it is a pure question of law difficult to accept that can now be raised and in Munnalal supra that was relied in Kalidindi supra it was categorically observed that no presumption to draw for no pleading that will was in existence and acted upon after death of attestor as a last will and in sound and disposition state of mind he made the bequeath.

(ii). In Union of India v. Ibrahim Uddin, 2012 (6) SCJ 432 : Civil Appeal No. 1374/2008, dated 17-07-2012, it was held regarding the general presumption of thirty years old document that the presumption is in respect of genuineness of a document as regards signature, execution and attestation, but not as regards the correctness of the contents of the document, which are to be proved by other independent evidence.

(iii). In Chakicherla Audilakshmamma v. Atmakaru Ramarao, AIR 1973 AP 149 it was held by a Division Bench of this Court that, it would be dangerous no doubt, for the courts to draw presumption of due execution mechanically on the face of the documents purporting to be 30 years old; and coming from proper custody in as much as the presumption dispense with proof of due execution, thereby the Court must act with extreme caution and utmost circumspection from the language used "May

presume" in Section 90 of the Evidence Act conferring judicial discretion to be exercised by the Court in drawing the presumption. It is within the judicial discretion of the Court having regard to facts and circumstances of each case. On an analysis of the provisions of Section 90 of the Evidence Act and its interpretation judicially, we may deduce the following propositions:

1. The presumption applies to documents proved to be 30 years or more old;

2. The document must come from proper custody;

3. The presumption is discretionary and in cases where a document is exfacie suspicious, the Court may very well refuse to take the presumption and call upon the party to offer other proof, forthwith;

4. The presumption can only be applied to the documents, which bear the signature of the writer or of witnesses, and the presumption cannot be drawn in the case of unsigned or anonymous papers; and

5. The extent of presumption relates only to the signature, execution or attestation of a document that is to say, its genuineness. The drawing of the presumption does not connote the idea that the contents of the documents are true or that they have been acted upon;

6. The presumption applies only to original documents and not on any copies thereof, certified or otherwise.

On facts, it was held that the document appears to be not genuine and no presumption under Section 90 of the Evidence Act can be drawn to it as the unsuspicious character of the document is absent, before the presumption contemplated by Section 90 of the Evidence Act could be drawn in its favour. On the question of proper custody, we have to bear in mind the Explanation appended to Section 90 of the Evidence Act. As per the Explanation, documents are said to be in proper custody, if they are in the place in which, and under the care of the person with whom they would naturally be, but no custody is improper, if it is proved to have had a legitimate origin, or if the circumstances of a particular case are such as to render such origin probable.

(iv). From the 69th report of the Law Commission of India, the amendments suggested include, amendments to Section 68 of the Evidence Act, and under Sections 57, 58 and 63 of the Indian Succession Act and Sections 59 and 123 of the Transfer of Property Act. The Law Commission 69th report recommendations also referred the opinion of Sarkar, the Author on the Evidence Act, that Section 68 of the Evidence Act should not apply, if the Will is more than 30 years old under Section 90 of the Evidence Act or was not produced, in spite of notice to produce under the Evidence Act; which proposals are broadly in conformity with the English Law, as it stands after the UK Evidence Act, 1938.....which accept even in case of Wills for other situations, where witness is kept out of way..... Sarkar on Evidence (15th edition-1999) at page 1124, Wigmour on Evidence at Para 1288, speak that the theory that parties must be deemed to have agreed that the attestor will be a person, who should speak about the circumstances of the execution, is not correct and there is no such agreement can be implied, particularly, when attestation is required by law. As per Sarkar, Page 1124 the attestor is in practice, not usually a person who knows anything about the circumstances preceding the document execution and also on the aspect, the words shall not be "used in evidence" mean that the document can be

used for collateral purposes. Several Jurists in America relaxed the said rule for the purpose of collateral or incidental use (Wigmour Section 129 quoted by Sarkar Page 1129) as relaxed the rule in admission of a mortgage bond in AIR 1939 Allahabad 366, AIR 1915 Allahabad 254. The Law Commission thus proposed that the inadmissibility must be confined to the testamentary disposition and not for collateral purpose and recommended that Section 68 of the Evidence Act must be confined only to Wills and required to be re-drafted and the exceptions added and referred to in the 69th report required. Said recommendation is not incorporated by any amended legislation.

(v). Regarding the written authority by husband to wife in a Will to adopt a child by her after his life time under uncodified Hindu law, it was observed in Para 453 of Mullah at page 780, that the written authority must be a registered one, unless it is given under a Will vide decision Mottasiddilal v. Kundanlal, 1906 (28) All. 377 and Rawat Sheo Bahadur Singh v. Beni Bahadur Singh v. Beni Bahadur Singh, AIR 1926 PC 97 and if the authority is given under a Will, it must be executed in accordance with the formalities required by Section 63 of the Indian Succession Act. It is to say collateral purpose is not recognized or considered in the above.

(vi). In Paranru Radhakrishnan v. Bharathan, AIR 1990 Kerala 146, by referring Sections 68 and 69 of the Evidence Act and also referring to the earlier expressions of the Calcutta, Oudh and Allahabad High Courts, the Kerala High Court held that from a reading of Section 68 of the Evidence Act, it is evident that a document, which is required by law to be attested, shall not be used at all as evidence, until one of the attesting witnesses, at least, has been examined to prove its execution. The imperative wording of Section 68 of the Evidence Act makes it clear that it does not permit utilisation of a document, which is required by law to be attested, as evidence until it is proved, strictly in accordance with the provisions of the Section. Said expression in Paranru Radhakrishnan and observations of the Author-Mullah were quoted with approval by this Court in Cheedella Padmavathi supra.

(vii). In fact for Wills, even the provisions of the Evidence Act apply other than Sections 91 to 99, once Section 68 of the Evidence Act is not dispensing with the proof of a Will, irrespective of non-denial of execution, by drawing the difference between Wills and other attestable documents, the question of drawing presumption of 30 years old document under Section 90 of the Evidence Act apart from, does not arise for Wills, even taken as arises, that no way dispense with the special requirements of Section 63 of the Indian Succession Act, 1925, which is besides the Special Law on Wills when compared to the Evidence Act, as a general law on all attestable documents, apart from otherwise being the Indian Succession Act, 1925, a subsequent legislation to the Indian Evidence Act,1872, in that way also prevails. Suffice to say, the presumption of 30 years old document that can be drawn under Section 90 of the Evidence Act, 1872 has no application to Wills from its implied repeal/exclusion in view of the special requirements of Section 63 of the Indian Succession Act, 1925.

(viii). It was also held by the Apex Court three Judges Bench in R. Venkatachala Iyengar v. B N. Thimmajamma, AIR (1959) SC 443, that a Will has to be proved like any other document, except that evidence tendered in proof of a Will should additionally satisfy the requirements of Section 63 of the Indian Succession Act, apart from the one under Section 68 of the Indian Evidence Act.

(ix). It was also categorically held by the Apex Court in Bharpur Singh v. Shamsher Singh, 2009 (3)SCC 687 that, a presumption regarding documents of 30 years old does not apply to Wills and thus a Will has to be proved in terms of Section 63(c) of the Indian Succession Act, read with Section 68 of the Indian Evidence Act.

(x). In M.B. Ramesh (D) by LRs. v. K.M. Veeraje Urs (D) by LRs., (2013) 8 S.C.R. 573, by quoting with approval the expression in Bharpur Singh supra, it was held that the requirement of Section 63(c) of the Indian Succession Act, 1925 was once not fulfilled, viz., that two or more witnesses have to see the testator sign or affix his mark to the Will, and each of the witnesses have also to sign the Will in the presence of the

testator, the document even of 35 years old, no presumption of genuineness of signatures, due execution and attestation can be drawn.

(xi).Thus, Section 90 of the Indian Evidence Act, 1872, can be said from the above law as not applicable to the proof of a Will and the failure to apply, the same by the Courts below is no way a perverse and unsustainable conclusion and same is no way devoid of merits, leave about the same not specifically raised in the Courts below, much less with factual foundation even to draw from what is discussed supra including from Munnalal supra; even same is taken as open to raise and to consider in the second appeal as a pure question of law.

15. Before discussing the requirements of evidence in proof of Section 63 of Indian Succession Act, 1925 Sections 68 to 71 of Evidence Act and whether there are suspicious circumstances and same were dispelled or not and due execution and attestation of the Will and the alleged bequeaths made by testator in a sound and disposing state of mind are proved or not concerned, it is needful to have a brief idea of Wills.

15(i). "Will", as defined in Section 2(h) of the Indian Succession Act- means, the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death". ''Will'' is derived from the Latin word "Voluntas" to mean expression of intention of a testator generally in a document. "Testament" is derived from the Latin word "Testatio-mentis" to mean testifies the determination of the mind. Thus, it is a legal declaration of a person''s intention to take effect after the death of that person. According to Shoulder''s- Law of Wills, a Will is the aggregate of man''s testamentary intention so far as the same is manifested in writing and duly executed according to the Statutes.

15(ii). Lord Wilmot, C.J. in Doe Long v. Laming (2 Burr. at pp.11-12) described the intention of the testator as the "pole star" and is also described as the "nectar-of the instrument".

15(iii). Underhill & Strahan on interpretation of Wills and Settlements - (1900 Edn.), while construing a Will, stated that "the intention to be sought is the intention which is

expressed in the instrument, not the intention, which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written Instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention....."

15(iv). In Halsbury''s Laws of England, 4th Edn., Vol.50, P.239, it is stated:

> "408. The only principle of construction which is applicable without qualification to all Wills and overrides every other rule construction, is that the testator''s intention is collected from a connection with any evidence properly admissible and tile meaning of the Will and of every text of it is determined according to that intention."

> 15(v). "Will", therefore, has the four essentialities- (i) It must be a legal declaration of testator''s intention, (ii) That declaration must be with respect to his property, (iii) The desire of the testator that the declaration should be effected after death of testator, and (iv) The other Essential quality of testamentary disposition is ambulatoriness of revocability during executants'' lifetime. Such a document is dependent upon executants'' death for its vigor and effect.

15(vi). A Will need not be stamped under the Indian stamp Act and need not be necessarily registered, being optional under Section 18 of the Indian Registration Act. It is different from Gift or Settlement or other disposition by transfer of rights in immovable property worth above Rs.100/-, which necessarily be registered under Section 17 of the Indian Registration Act, besides duly stamped, though when stamped or impounded and even unregistered can be admitted for collateral purpose under Section 49 of the Indian Registration Act. Though registration is optional and not compulsory and non-registration is by itself not a ground to doubt its due execution, registration is one of the positive circumstances to infer in favour of due execution, unless evidence on record shows otherwise. Registration of Will being optional, mere registration does not dispense with the proof of execution and attestation, but for to serve only a piece of evidence of the execution. Further, collateral purpose is unknown to Wills. That it is also of the reason that Will operates after the death of the testator and in his life time, he can alter or cancel the bequeaths by Codicil or fresh Will, any number of times, as facts and circumstances shown permitted, and thereby also the last disposition prevails over the earlier, even in same document for same property, in case of inconsistent bequeaths.

15(vii). In the interpretation of Wills in India, regard must be had mainly to the rules of law and construction contained in Part VI of the Indian Succession Act and, particularly,

Section 88 of the Indian Succession Act and not the Rules of the Interpretation of Statutes-vide- Mathai Samuel v. Eapen Eapen(d)by Lrs, 2013(1 ALT(1)(SC).

15(viii). In Narendra Gopal v. Rajat Vidhyardhi, (2009) 3 SCC 287 at para- 32(cl.3), it was held that, in appreciating the documents of unilateral dispositions and testamentary dispositions like Wills, the true intention of the testator (executant) has to be gathered, not by attaching importance to the isolated expressions, but by reading the document, as a whole.

15(ix). The nomenclature given by the parties to the transaction, in question, is not decisive, but the contents and the intention of the executant, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. One need to carry on the exercise of construction or interpretation of the document only, if the document is ambiguous or its meaning is uncertain. The real and the only reliable test, for the purpose of finding out whether the document constitutes a Will or a Gift/Settlement, is to find out as to what exactly is the disposition, which the document has made, whether it has transferred any interest in praesenti in favour of the beneficiaries or it intended to transfer interest in favour of the beneficiaries only on the death of the executant.

15(x). In Paranru Radhakrishnan v. Bharathan, AIR 1990 Kerala 146, it was held that the imperative and clear straight wording of Section 68 Evidence Act makes it clear that it does not permit the use of a document, which is required by law to be attested, as evidence until it is proved strictly in accordance with the provisions of the Section.

15(xi). In Shivdev Kour v. R.S. Grewal, 2013 (3) ALT 1 SC and in Balwant Kour v. Chanan Singh, AIR 2000 SC 1908, it was held that all the clauses of the Will must be read together to find out the intention of the testator. This is obviously on the principle that the last clause represents the latest intention of the testator (See also Section 88 of the Indian Succession Act).

15(xii). In fact, a Will speaks only from the grave of the testator, as the executant of the Will cannot be called upon to admit or deny its execution, much less to explain any circumstances raising a suspicion surrounding the execution and testamentary capacity and condition with reference to sound and disposing state of mind and thus for appreciating the evidence of due execution and genuineness of bequeaths, the Court will also, and with reference to the above, put itself into the armchair of the executant/testator. The intention of the testator, in this regard, must be ascertained not only from the words used, but also from surrounding circumstances with reference to the unimpeachable evidence regarding genuineness and authenticity as well as probabilities and improbabilities and unnatural or unfair bequeaths with reference to the direct or indirect beneficiaries of the bequeaths in the Will/testament known as propounder/s influence and role as to not a free will and volition of the testator in making the bequeaths and reasons or circumstances in relation to natural heirs and their relation with the testator for ignoring

and making bequeaths to other than natural heirs or preferring among the natural heirs or preferring other than natural heirs also as the legatees. Further, with reference to from death of the testator, leave in his lifetime, seen the light of the day. If, in relation to the above or otherwise, there are any suspicious circumstances or cloud shrouded around the execution and in the bequeaths, the propounder has to discharge of the burden lies on him also as held in Kalidindi supra, to prove and dispel the suspicious circumstances to clear the cloud and probablises the genuineness of execution and the bequeaths as per free will and volition of testator. No doubt mere ignoring the natural heirs or preferring among them or preferring other than natural heirs by itself not a ground to doubt the genuineness, for the reason that the testamentary dispositions by Will itself is to interfere or alter or divert the natural line and flow from the intestate succession and survivorship by reducing or depriving the share of natural heirs, if any, at the discretion and will of the testator.

15(xiii). Apart from that, it is absolutely necessary of execution of the Will under Section 63 of the Indian Succession Act to prove that the Will was attested by two attesting witnesses, at least, who saw the testator signing the Will or the testator must personally acknowledge the signature on the Will that of him in the presence of the two attesting witnesses and they themselves signed the same in the presence of the testator. Without attestation, execution of the Deed of Will is not valid. When no witness deposed of the alleged Will was signed by the deceased in his presence or that he had attested the document, execution of the very Will can be held as not proved. A reading of even Section 68 of the Evidence Act shows that attestation and execution are the two different acts, one following the other. Where the Will is registered and there are signatures of registering officer and of identifying witnesses affixed to registration endorsement, endorsement by the Sub-Registrar that the executant has acknowledged execution before him amounts to attestation and when all they deposed the same of due execution and attestation, it is a compliance of Section 63 of Indian Succession Act. It is for the Court to appreciate from the above, including intention of the testator with reference to contents, other attending facts and surrounding circumstances, like considerations in making bequeaths, instead of allowing the estate by intestacy to claim legal heirs equally, motive of the testator in the recitals even by making dispositions to the natural heirs, who, otherwise even succeed, propounder influence, if any, needless to say, propounder of the Will has to dispel with the suspicious circumstances shrouded around the Will and its execution and manner of dispositions, the position of the testator, his family relationship and preference of some among the family members or preference of some other than the family members and among the legal heirs remote to the nearest and other considerations in making bequeaths, propounder influence-(irrespective of not direct beneficiary). There are no set parameters to judge all these aspects, but for within these broad guidelines, to appreciate the evidence on record of the case on hand within the ordinary and reasonable prudence, to arrive at a just conclusion, for each case depends on its own facts - vide decisions in Raghunath Prasad Singh v. Deputy Commissioner, AIR 1929 PC 283, Mokshada Ranjan v. Surendra Bijos, AIR 1939 Calcutta 40, Dasarath

Gayan v. Satyanarayana Ghosh, AIR 1963 Calcutta-325, Lalta Baksh v. Phool Chand, AIR 1945 PC 113, Kapuari Kuer v. Shamnarain Prasad, AIR 1962 Patna-149, Savitri Ammal v. State, AIR 1960 Madras 217, Dr. M. Ratna v. K. Navaneetam, AIR 1994 AP 96, Ram Gopal v. Nandlal, AIR 1951 SC 139, Gnanambal Ammal v. T.Raju Iyyer, AIR 1951 SC 103, Raj Bhajrang Bahadur Singh v. Thakurian Bhaktaraj Kuer, AIR 1953 SC 7, **Girja Dutt v. Gangotri Dutt, AIR 1955 SC 346**, H. Venkatachala Iyangar v. B.N.Timma Rajamma, AIR 1959 SC 443, Kameswara Rao v. B.Surya Prakasa Rao, AIR 1962 AP 178, Rani Purnima Devi v. Kumar Khagrendra Narayan Deb, AIR 1962 SC 567, Peareylal v. Rameswar Das, AIR 1963 SC 1703, the Constitutional Bench expression in Shashi Kumar Benarji v. Shubodh Kumar Benarji, AIR 1964 SC 529, T.V. Kaur, AIR 1964 SC 1323, Surendra Pal v. Dr.(Smt) Saraswathi Arora, AIR 1974 SC 1999, Beni Chand v. Kamala Kunwar, AIR 1977 SC 63, Jaswant Kaur v. Amrit Kaur, AIR 1977 SC 74, Brijmohanlal Arora v. Giridharlal Manocha, AIR 1978 SC 1202, Smt. Indu Balabore v. Manindra Chandra Bose, AIR 1982 SC 133, Kalyan Singh v. Choti, AIR 1990 SC 396, Ram Pyar v. Bhagwanh, AIR 1990 SC 1742, Veerattalingam v. Ramesh, AIR 1990 SC 2201, Kasibhai v. Parwatibai, 1995 (6) SCC 213, Rabindranath Mukherjee v. Panchanan Benarji, AIR 1995 SC 1684, PPK Gopalan Nambiar, AIR 1995 SC 1852, Daulat Ram v. Sodha, AIR 2005 SC 233, S.Sundaresara Pai v. Sumangala T.Pai, AIR 2002 SC 317, Janki Narayan Bhoir v. Narayan Namdeo Kadam, AIR 2003 SC 761 : 2003 (1)Supreme, 297 , Umadevi Nambiar v. T C Sridhan, 2004(2)SCC 321, Daulat Ram v. Sodha, AIR 2005 SC 233, Sridevi v. Jayaraja Shetty, AIR 2005 SC 780, Pentakota Satyanarayana v. Pentakota Seetharatnam, AIR 2005 SC 4362, Gurdev Kaur v. Kaki, AIR 2006 SC 1975, Gopal Swaroop v. Krishna Murthy, AIR 2010(14)SCC 266, Mathai Samuel (supra).

15(xiv). The propositions laid down in Venkatachala Iyengar (supra) have been followed and explained in other judgments, including of a Bench of three Judges in Smt. Jaswant Kaur (supra), wherein it is observed that:

> 1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

> 2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 63 of the Succession Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

15(xv). The Apex Court three Judges Bench in Girja Datt Singh v. Gangotri Datt Singh, AIR 1955 SC 346, answered the requirements of evidence in proof of Section 63 of Indian Succession Act to the effect that:

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

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

In order to prove the due attestation of the will Ex.A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be

witnesses who had no regard for truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex.A-23 and Ex.A-36 from Gonda to Tarabganj for reasons best known to themselves.

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

15. When this position was realised the learned counsel for Gangotri fell back on an alternative argument and it was that the deceased admitted execution and completion of the will Ex.A.36 and acknowledged his signature thereto before the Sub-Registrar at Tarabganj and this acknowledgment of his signature was in the presence of the two persons who identified him before the Sub-Registrar, viz., Mahadeo Pershad and Nageshur who had in their turn appended their signatures at the foot of the endorsement by the Sub-Registrar. These signatures it was contended were enough to prove the due attestation of the will Ex. A. 36. This argument would have availed Gangotri if Mahadeo Pershad and Nageshur had appended their signatures at the foot of the endorsement of registration "animus attestandi".

But even apart from this circumstance it is significant that neither Mahadeo Pershad nor Nageshur was called as a witness to depose to the fact of such attestation if any. One could not presume from the mere signatures of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their

signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri.

16. The result therefore is that the will dated 17-3-1928 is not proved to have been duly executed and attested and cannot furnish a basis of title to Gangotri in regard to the ten annas share in the properties left by the deceased, the subject-matter of the two proceedings E. E. Act Case No. 11 of 1936 and Regular Suit No. 71 of 1938 in the Court of the Civil Judge, Gonda....."

15(xvi). In M.B. Ramesh (D) by LRs. supra, by quoting with approval the expression in Bharpur Singh supra, it was held that the requirement of Section 63(c) of the Indian Succession Act, 1925 was once not fulfilled, viz., that two or more witnesses have to see the testator sign or affix his mark to the Will, and each of the witnesses have also to sign the Will in the presence of the testator, there is no proof of Will, even it is a 30 years old document.

15(xvii). In B. Venkatamuni v. C.J. Ayodhya Ram Singh,(2006) 13 SCC 449 it was held that proof of execution of the Will in terms of Section 63 of the Indian Succession Act and Sections 67 and 68 of the Indian Evidence Act would be a pre-requisite, but, to take the same in evidence, it is also trite that while arriving at a finding as to whether the Will has duly been executed or not, the Court must satisfy its conscience having regard to the totality of the circumstances.

15(xviii). In Gopal Swaroop v. Krishna Murari Mangal, (2010) 12 SCALE 470, it was held that:

13. ..... What is to be seen is whether the examination of the said witness satisfies the requirements of Section 63 of the Evidence Act (supra). A careful analysis of the provisions of Section 63 would show that proof of execution of a Will would require the

following aspects to be proved:

(1) That the Testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of the Testator.

(2) The signature or mark of the Testator or the signature of the persons signing for him is so placed has to appear that the same was intended thereby to give effect to the writing as a Will.

(3) That the Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some other person signing the Will in the presence and by the direction of the Testator or has received from Testator a personal acknowledgement of the signature or mark or the signature of each other person.

(4) That each of the witnesses has singed the Will in the presence of the Testator.

14. The decisions of this Court in Bhagwan Kaur W/o Bachan Singh v. Kartar Kaur W/o Bachan Singh & Ors. 1994 (5) SCC 135, Seth Beni Chand (since dead) now by L.Rs. v. Smt. Kamla Kunwar and Ors. 1976 (4) SCC 554, Janki Narayan Bhoir v. Narayan Namdeo Kadam 2003 (2) SCC 91, Gurdev Kaur and Ors. v. Kaki and Ors. 2007 (1) SCC 546, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh

and Ors., 2009 (4) SCC 780, Rur Singh (dead) Through LRs. and Ors. v. Bachan Kaur, 2009 (11) SCC 1 and Anil Kak v. Kumari Sharada Raje and Ors. 2008 (7) SCC 695 recognize and reiterate the requirements enumerated above to be essential for the proof of execution of an unprivileged Will, like the one at hand.....

15(xix). Now in deciding the above, coming to what is meant by attestation and what is the mode of proof, Section 3 of the Transfer of Property Act, defines attestation in relation to an instrument (to mean non-testamentary, though same analogy applies to testamentary with reference to Section 63 of the Indian Succession Act), 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 executants a person 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. As per the Apex Court''s expression in Abdul Jabbar v. Venkata Shastry, AIR 1969 SC 1147- to attest is to bear witness to a fact. The essential conditions of a valid attestation are that two or more witnesses have seen the executant sign or affix his mark to the instrument, or have seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executants a person 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 executants to bear the witness to this fact, it is essential that the attesting witness has put his signature animus attestandi that is for the purpose of attesting the signature of the executant.

15(xx). Execution of Will includes attestation and its proof. Apart from the other expressions supra, the Constitutional Bench expression in Shashi Kumar Benarji (supra) held at page-531, para-3, that the mode of proving a 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,1925, which says the testator shall sign or affix his or her mark to the Will or it shall be signed by some other person in the presence and by his direction and the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his or her mark to the Will, or has seen some other person signed the Will in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator, and Section 68 of the Indian Evidence Act mandates in the case of denial or

not of execution, examination of one attesting witness atleast in proof of the Will, whether registered or not. In the absence of suspicious circumstances, it is suffice to prove testamentary capacity and due execution with attestation, and where there are suspicious circumstances, the onus is heavy on the propounder to dispel the same for the Court acceptance as genuine and last Will and testament. Attestation of a Will means, testifying the signature of the executant. It is equally important that for a Will to be valid and enforceable shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or the testator should personally acknowledge his signature or affixture of his mark to the Will in the presence of the attestors and without that acknowledgement, it cannot be inferred and further each of the witnesses has signed said Will in presence of testator and said provision is not a mere formality, but mandatory. Proof of attestation of the Will is also thus mandatory Dr. M. Ratna v. Kottaboina Navaneetham, AIR 1994 AP 96, Yumnam O.T.I.Devi (supra) & A.Poline D''Souza v. John D''Souza, 2007(7)SCC 225. However, Court cannot disregard evidence of attending circumstances on record, if those must satisfy itself as to compliance on the totality, like giving evidence by one attesting witness and there is no dispute about the presence of other attesting witness at the time of execution of the Will from the other contesting party from the other attester''s name finds place in the Will even the witness examined did not speak by mere non-recollection of said fact from lapse of time to the date of evidence from the date of document and its execution, vide decision M.B. Ramesh v. K.M. Veerajeurs, 2013(7) SCC 490. It is also no doubt held that such circumstances are, in fact, rare and as such, the attesting witness examined otherwise must also speak the presence and attestation of other witness also as part of proof. Thus, in view of Section 63(1)(c) of the Indian Succession Act r/w Sections 68 and 71 of the Indian Evidence Act, it is sufficient even one attestor is examined, but that attestor should speak, not only about the testator''s signature or affixing his mark to the Will or somebody else signing it in his presence and by his direction or that he had attested the Will after taking acknowledgement from the testator of the signature or mark, but he must also should speak that each of the witnesses had signed the Will in the presence of the testator. It is irrespective of non-denial of its execution, one attesting witness, at least as a concession out of minimum two persons to attest, as required, must be called upon to prove the deed, if there be even one alive and subject to the process of the Court. But what is significant is that said attesting witness examined must be able to speak to the attestation by the other attestor also. The Apex Court in Kashibai and another v. Parwatibai, 1995 (6) SCC 213. held at paras 10 and 11 that, Section 68 of the Indian Evidence Act shows that the attestation and execution are two different acts, one following the other. There can be no valid execution of a document, which is required by law to be attested, without the proof of its due attestation and if due attestation is also not proved; the fact of execution of the Will is of no avail - See also several expressions referred and discussed in the previous paras supra and, in particular, of the expression in Janki Narayan Bhoir supra - with reference to Section 3 of the Transfer of Property Act, 1882 Sections 68 to 71 of the Indian Evidence Act and Section 63 of the Succession Act, and with regard to the execution of unprivileged Wills, the word ''attested'' has been defined as in Section 3 of

the Transfer of Property Act.

15(xxi). Thus, the sum and substance of the expressions is clear that reproduction of wording of Section 63 is not necessary, but the evidence must speak the requirements of compliance of the section, as mandatory in proof of a Will and what is significant is that said attesting witness examined must be able to speak as to the due attestation by the other attestor also.

15(xxii). In this regard, coming to said proof, where and when application of Sections 69 to 71 of the Evidence Act, arise, it is clear from a reading of Sections 68 to 71 of the Evidence Act and Section 63 of the Indian Succession Act, that Section 71 of the Evidence Act has no application, if one of the two or more attesting witnesses examined failed to prove execution of the Will and the other attesting witness/s, even available, was not summoned and examined. It is also very clear from the language of Section 71 of the Evidence Act, that if an attesting witness examined denies or does not recollect execution of the document, its execution may be proved by other evidence (under Sections 47 and 67 and/or Sections 45, r/w. Section 51 and/or Section 73 of the Evidence Act). It arises to invoke Section 71 of the Evidence Act, where there is no other attesting witness alive and, even alive and summoned, failed to attend or untraced at the address and unknown to secure. Thus, invocation of Section 71 cannot be resorted to when one of the attesting witnesses fails to prove the Will and the other attesting witness, if alive and available, without his examination to prove the Will. Section 71 of the Evidence Act is only a permissive provision and enabling section to permit a party to lead other evidence only in certain circumstances, which are the above, as it is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and such impossibility cannot be let down without any other means of proving due execution by other evidence as well. Section 68 of the Evidence Act is not merely an enabling section as it lays down the necessary requirements, which the Court has to observe before holding that a document is proved. Thus, Section 71 of the Evidence Act cannot be read so as to absolve a party of his obligation under Section 68 of the Evidence Act, read with Section 63 of the Indian Succession Act - to liberally allow him, at his choice, to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the Court concerned and confer a premium upon his omission or lapse, to enable him to give a go-bye to the mandate of law relating to the proof of execution of a Will. Where the attesting witness called upon to prove execution is not in a position to prove the attestation of the Will by second witness, the evidence of the witness falls short of the mandatory requirements of Section 68 of the Evidence Act, read with Section 63 of the Indian Succession Act. See - Janaki Narayan Bhogir(supra), Karri Nukaraju v. Putra Venkatrao, AIR 1974 AP 13 Dr. M. Ratna and Babu Singh v. Ram Shahi@ram singh, 2008(14) SCC 754. In Janki Narayan Bhoir(supra), the Apex Court held at the end of the para 6 of the judgment that "it is true that although a Will is required to be attested by two witnesses, it could be proved by examining one of the attesting witnesses as per Section 68 of the Indian Evidence Act." It is also noted in paragraph 9 of the judgment that "one of

the requirements of due execution of a Will is its attestation by two or more witnesses, which is mandatory." In paragraphs 11 and 12 of the judgment, the Court noted the relevance of Section 71 of the Evidence Act by stating that "aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence." "Section 71 has no application when one attesting witness, who alone has been summoned, has failed to prove the execution of the Will and the other attesting witness, though available, has not been examined." In the facts of the case, therefrom, the Court held that attestation of the Will, as required by Section 63 of the Succession Act, was not established, which was equally necessary. Even way back this Court in Doctor M. Ratna v. Kottiboyina Navaneetam, 1993 (2)ALT 459 : AIR 1994 AP 96 held by referring to the Apex Court''s expression in Girija Datt v. Gangotri Datt, AIR 1955 SC 346 and Venkatachalaiah supra and commentary of Manta Ramamurthy on law of wills and the other expression of the Apex Court in Beni Chand supra held that attestation satisfies requirements for no implied acknowledgment as sufficient in proof of execution of a will.

15(xxiii). Further, Section 69 of the Evidence Act, applies in the absence of attesting witness and only when party moves the Court for summons under Order 16, Rule 10 CPC and the witness fails to obey the summons to prove the Will in the manner prescribed by Section 68 of the Evidence Act - vide Babu Singh (supra). If the attesting witnesses are dead, their signature can be proved by other evidence of person acquainted with or opinion from comparison with signature/handwriting/thumb impression, as the case may be (under Sections 47 and 67 and/or Section 45 r/w. Section 51 and/or Section 73 of the Indian Evidence Act).

15(xxiv). No doubt, it was held by a Division Bench of this Court in Alluri JS Lakshmi v. Kopparthi R Rao, 1994(1)ALT 217(DB) that execution of Will need not be proved, when it is admitted by other side and when contest is only on legal aspects as to the validity of bequeathing certain properties covered by the Will. For that conclusion, it mainly relied upon Section 58 of the Evidence Act.

15(xxv). In fact, the Apex Court in Kahibai v. Parwatibai, 1995(6)SCC 213 held that without attestation, execution of the Will is not valid. Thus, without attestation when execution is not complete and without proof of execution by attestation, the disputed contents of it cannot be looked into, as also laid down by the Apex Court in catena of expressions referred supra, there could be no question of taking a Will proved even from its admission, leave about in the case on hand, there is no any admission of execution and attestation and also its contents, since all are denied and disputed including signatures are not that of deceased Balraj and the alleged will is brought into existence for purposes of the cases. When genuineness of a Will is questioned, it is the duty to prove that the Will is the product of free mind of the testator and it is also the duty of the propounder to dispel the surrounding suspicious circumstances, if any- vide decisions in Savithri v. Karthyayani Amma, (2007) 11 SCC 621 ; Gopala Krishna Pillai v. Meenakshi Ayel, AIR 1967 SC 155, Venkatachala Iyangar and other decisions referred in the

previous paras (supra).

15(xxvi). Coming to the suspicious circumstances and burden of proof, in addition to the expressions supra on the scope of law, it is also relevant to consider the expression of the Apex Court in Surendra Pal & Ors. v. Dr. (Mrs.) Saraswati Arora & Anr. [(1974) 2 SCC 600], wherein the law on proof of Will by dispelling suspicious circumstances and the propounder to clear any cloud was stated in the following terms:

> "The propounder has to show that the Will was signed by the testator; that he was at the relevant time in a sound and disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the Will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the Will are not the result of the testator''s free will and mind. In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the Will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the Will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in relevant circumstances of the case, entertain."

16. From the above, coming back to some more relevant facts with regard to evidence, among the 3 suits, the suit in O.S.No.90 of 1981 (O.S.No.177 of 1980) was filed on 18.07.1980 and written statement filed by D1 & D2-Venkaiah and Jangaiah, respectively, was dated 08.08.1980 and the trial in O.S.No.90 of 1981 was commenced on 15.12.1987. The suit O.S.No.136 of 1987 was filed on 25.09.1987 and the suit O.S.No.58 of 1989 was filed on 25.05.1989. As referred supra, there is no date or month or year of the Will allegedly executed by Sri Balraj, in said written statement dated 08.08.1980 and it is not even mentioned, whether registered or

unregistered and as to what are the bequeaths in substance made, if any. Nothing even stated, including in O.S.No.136 of 1987 filed on 25.09.1987. The Will not seen the light of the day in any of the 3 suits but for the first time only from its filing in the Court on 16.12.1988 in O.S.No.90 of 1981 during trial after the evidence of P.Ws.1 to 3 completed by 22.11.1988 and without even confronting any of them with said Will, and without even at least putting any substance of the contents to any of the witnesses as to of what are the bequeaths and preference, if in existence, but for filed on 16.12.1988, which was before commencement of evidence of DW.1 on 23.12.1988, which speaks volumes against the very existence of the Will till then, despite contest including in O.S.No.136 of 1987. Even the alleged Will is in Urdu and the so called Balraj allegedly signed it in Telugu and not even in Urdu, leave about he is admittedly an illiterate. The translated copy filed through Advocate Commissioner appointed as per order passed in November, 1995 in IA.No.2740 of 1995 in A.S.No.73 of 1995 shows dated 15 Khurdad 1356 Fasli (1946 AD). In original Urdu language, it is not clear who were the attestors and who was the scribe.

17. Before discussing further, coming to the common trial of the partition suit and injunction suit filed by Ramesh etc., against Laxmamma etc., P.Ws.1 to 5 were examined during March, 1991 to September, 1992 and Exs.A.1 to A.32 were marked on their behalf. D.Ws.1 to 3 were examined during February, 1993 to January, 1995 and Exs.B.1 to B.53 were marked on behalf of defendants. Ex.X.1 to X.7 were also marked through witnesses.

18. In the first suit in O.S.No.90 of 1981, the Plaintiff- Laxmamma and 2 more witnesses, namely N.Veeraiah and N.Narasimhulu were examined as P.Ws.1 to 3 during December, 1987 to November, 1988 and marked Exs.A.1 to A.17 viz., Pahanies of the years 1966-68, 1971-72, 1979-80, 1984-87, Tax receipts, copy of the proceedings of District Revenue Officer, dated 22.02.1988, respectively. On behalf of defendants, Ramesh etc., D.6 Ramesh was examined as DW.1, one Bal Reddy as DW.2, one M. Balraj, s/o. M.Pochaiah as DW.3 (during December, 1988 to August, 1989) and Exs.B.1 to B.20 were marked viz., Vasool Baki, original Will dated 15.07.1956 Fasli, Pahanies of 1962-63, 1971-72, 1975-78, 1980-83, 1986-87, Adangal of 1986-87, Chow Fasla of 1978-79, Faisal Patti, 2 LR receipts, Ryth Pass Book and Sethwar, respectively. Exs.A.18 to A.20 viz., order of the Revenue Divisional Officer, dated 14.9.1990, and a Xerox copy of the General Power of Attorney executed by the 1st respondent in favour of K. Sri Ramulu, Pahani for the year 1961-62, respectively, and Exs.B.21 and B.22 viz., Certified copy of the proceedings of the District Social Welfare Officer, Land Acquisition, Hyderabad, dated 13.12.1976, and a Carbon copy of the order in W.P.No.2212 of 1991, respectively, that were marked at the stage of appeal in A.S.No.16 of 1990, prior to the remand.

19. Among said evidence, Ex.A.20 in O.S.No.80 of 1981 is the Pahani for the year 1961-62, an oldest Revenue record filed before the Court, shows only the name of Laxmaiah and not the name of Balraj, along with him. There is a correction incorporating

the name of Sri T. Venkaiah (D.1) and the same was deleted by rectified proceedings No.B3/9444/86, dated 22.02.1988, of the Revenue Divisional Officer under Exs.A.17 and A.18 and it also refers to the Faisal Patti for the lands in the year 1960-61 and Khasra Pahani for the year 1954-55 standing in the name of only Laxmaiah and also some of the Pahanies, out of the years 1965-66 to 1983-84 that were, in fact, marked by the R.D.O. in his proceedings as Exs.A.2 to A.9 along with M.R.O. proceedings with reference to Revenue records, by Memo dated 23.07.1987, as Ex.A.1 and no record was filed by Sri Ramesh and Indramma, respondents to the said proceedings before the R.D.O. supra, in relation to the suit lands, much less by showing mutation of name of Balraj or Venkaiah as a legatee of Balraj by referring to any Will. Ex.B.1, so called Certified copy of Vasool Baki of 1956 A.D. which refers Laxmaiah and Balraj, thereby cannot be given credence, that too after said proceedings of R.D.O., leave about the same even taken true for nothing to entitle by Venkaiah and his heirs and the R.D.O. proceedings also made final and same not even attacked by amendment of pleadings in the partition suit or injunction suits Ramesh etc.,supra. The Survey Numbers and extents not even given in the so called Will, in detail, for survey number-wise, but for Sy.Nos.130, 136, 181, 123 and 173, total admeasuring Acs.14.08 guntas mentioned in the translated copy, without mentioning the extent of each survey number, and the same is not even tallying with the referred survey numbers under Exs.P.17 and P.18 proceedings of R.D.O., that correlates to suit properties.

20. Leave it as it is, even from a perusal of Exs.B.21 and B.22 viz., Certified copy of the proceedings of the District Social Welfare Officer, Land Acquisition, Hyderabad, dated 13.12.1976, and Carbon copy of the order in W.P.No.2212 of 1991, respectively, that were also marked at the stage of appeal in A.S.No.16 of 1990, what it disclose is that part of the land belonging to the family i.e., Acs.3.38 guntas in Sy.No.257 of Nizampet, was acquired by the Government in the year 1976, whereunder Venkaiah (D.1) and Laxmamma (1st plaintiff) were awarded half of the compensation each for the acquired land, it cannot be said that the compensation paid was pursuant to the existence of and based on said Ex.B.2 - Will, more particularly from the facts referred supra and borne by record, including in the findings of the Courts below that the so called Will, if really in existence, since 1356 Fasli, in favour of Venkaiah, from Balraj died in 1960, said Will was not filed by Venkaiah and Jangaiah along with their common written statement dated 08.08.1980 in O.S.No.90 of 1981 (originally numbered as O.S.No.177 of 1980) nor even after the death of Venkaiah in 1981, Ramesh with his mother Indramma came on record in 1982 with additional written statement, nor even in O.S.No.136 of 1987 filed by Ramesh and Indramma with Suseelamma for partition, though the Will was made basis for the claim of partition. In fact, the said Will was filed in O.S.No.90 of 1981 supra only in December, 1988, which is after the cross-examination of PWs.1 to 3 and while letting in evidence of the defendants by Ramesh-D.6 as DW.1, as stated supra. In fact, in any of the pleadings by Venkaiah, Jangaiah, Indramma and Ramesh supra, they did mention even, at least the date or month or year of the Will and, whether registered or not, or atleast, the contents of the Will, in brief, of what are the exact dispositions, same not even

suggested in the cross-examination of P.W.1 -Laxmamma by Ramesh on 09.08.1988. What he suggested to her was, Balraj executed a Will in favour of D.1 in 1956 and not even confronted with or even suggested any date or month, but for, if at all, of the year 1956. However, a perusal of Ex.B.2 - Will, no way shows that it was executed in the year 1956. It is the case of Laxmamma and her mother Lachamma that, Balraj was a mentally challenged and had no sound and disposing state of mind and was staying with his elder brother Laxmaiah"s family only and never stayed with his sister Balamma or her sons Venkaiah and Jangaiah.

21. Even to say, Jangaiah was illatom son of Laxmaiah, being husband of 1st plaintiff - Laxmamma, with any composite family (vide decision Garimella Annapurnaiah v. Kota Appalanarasimha Murthy, 1994 (3) ALT 491 : (1995)(1) APLJ there is no scrap of paper and no any revenue mutation, including of any of his cultivation of any of the suit properties, even to give any credence to such a propounded contention of therefrom, only to equally benefit Venkaiah, Balraj bequeathed to him his so called undivided share; No doubt, a mutation in Revenue record does not confer any title and even it is the case of the plaintiff - Laxmamma of Balraj was mentally challenged and, if so, when Laxmaiah was managing, the mutation in his name does not take away any entitlement by Balraj of undivided interest therein to succeed after him by his legal representatives under Section 8 of the Hindu Succession Act, 1956 as Balraj admittedly died in 1960 left behind his brother, sister and family members. That is not the case, but for, if at all, to consider on merits, in the event of the so called Will propounded by Sri Venkaiah not proved. In this regard further, the evidence of DW.1- Ramesh shows that Balraj was an illiterate. But Ex.B.2 Will with Urdu contents contains the signatures in Telugu said to be that of Balraj, which also doubts the genuineness of the signature, which is even in dispute, not proved by any other evidence. Exs.B.13 and B.14 do not disclose that mutation was affected in the name of the 1st defendant on the basis of Ex.B.2 - Will. As per the Apex Court in Kalyan Singh supra referring to Section 61 of the Indian Succession Act, failure to remove suspicious circumstances by a person relying upon Will, Will could be said to be not genuine for the reason the executant of the Will cannot be called to deny or admit or explain circumstances of execution and as such the trustworthy and unimpeachable evidence must be produced in the Court to establish genuineness of the Will. In view of all these circumstances, apart from all those discussed by the trial Court in the suit, it cannot be said that Ex.B.2 - Will is a genuine document. Once the document not seen the light of the day, even prior to December, 1988, as referred supra and particulars of date, month and year not even given in any pleadings from 1980 and even from 1987, the very existence not proved from the above, much less of proper custody, there is nothing even to draw the discretionary presumption under Section 90 of the Indian Evidence Act, leave about said Section has no application to Wills, in view of specific proof required of Section 63 of Indian Succession Act, from the settled expressions of the Apex Court referred supra of Bharpur Singh and M.B.Ramesh relying upon H.Venkatachala Iyyangar supra. The suspicious circumstances shrouded around the alleged Will are thus not dispelled and the Will is not even proved, as required by law, as concluded by the Courts below.

What all deposed by Ramesh as DW.1 on 16.06.1989, for the first time, in his evidence in O.S.No.90 of 1981 is, the scribe - Jagir Asim Hussain of Ex.B.2 is no more, though he cannot say when he died and the particulars of his heirs. He does not know the residences of other persons, other than Linga Goud of Bachupally, among the witnesses not alive and denied the suggestion of Balraj was in unsound state of mind with no capacity to execute the Will and it is a created one for the purpose of defence in the suit and other suit claims. DW.2 - Bal Reddy in his cross-examination deposed that till the death of Balraj, he was resided only with Laxmaiah at his house. DW.3 - M. Balraj, s/o. Pochaiah (D.5) speaks nothing of the Will. Suffice to say, there is nothing to totally non-suit O.S.No.90 of 1981 claim, but for to say a suit for bare injunction was maintainable without relief of declaration vide Saraswathi v. Jaganmohanrao, 1985(1) APLJ-277, the plaintiffs are not the absolute owners for entire plaint schedule property, since Balraj''s share is therein and plaintiffs are in possession for that also, to confine the relief of not to interfere or dispossess the plaintiffs except through due process of law, which is subject to result of partition suit in O.S.No.136 of 1987 supra.

22. Coming back on the proof of alleged Will, in the suits for partition and injunction not to alienate maintained by Ramesh etc., where Certified copy of said Ex.B.2 - Will in O.S.No.90 of 1981 obtained is marked as Ex.A.4 and not even exhibiting the original by consent for or by seeking substitution of original certified copy of returned original of case marked in the other suit supra. It is his saying the Will refers to old survey numbers and said Will was executed in the presence of Jagirdar Asim Hussain. One Vittalaiah of Bachupally (P.W.2) and Raja Reddy(father of P.W.3) and Lingamaiah were present at the time of execution of the Will and Lingamaiah did not sign and the other two died subsequently. The age of Ramesh, as per his deposition in 1991, was stated to be about 33 years and practically he was not even born by then, but deposing, as if present, as to who were present and who signed among them. Suffice not to give credence to his version on the Will, but for, if at all, scribe and attestors, to say not alive. He admitted that Balraj died in Nizampet at the house of Laxmaiah and Laxmaiah performed his obsequies. What PW.2 - Vittalaiah, Patwari during 1950-69 of Nizampet, according to him, deposed is, Balraj did not go for marriage due to his ill-health. However, he did not describe said ill-health, which disables him to undergo marriage. That, in fact, substantiates the contention of Laxmamma of Balraj was mentally challenged and only staying under the care of them in their house till his death. It very clearly proves of Balraj was not having sound and disposing state of mind, though PW.2 - Vittalaiah pretends that Balraj executed Will bequeathing his share to Venkaiah, father of PW.1 - Ramesh. The so called Will said to have been executed at the house of Jagir. There were no circumstances to go to the Jagir''s house, much less without even knowledge or taking also of Laxmaiah, as Balraj was staying in the house of Laxmaiah under his care and due to his ill-health and had Laxmaiah been present, he could be a signatory to the Will, but it is not so. Even P.W.2 deposed that said Jagir Asim Hussain used to reside in Mangalhat and he has no even lands in Nizampet and the villagers do not go to the Jagir for drafting any transactions of the lands. He deposed that the Jagir''s Munshi is Shabuddin. When

the transaction is drafted, the signature of person drafted be there and Shabuddin''s signature is there as scribe. This evidence also varies to evidence of Ramesh supra as if Jagir''s scribe since P.W.2 says Shabuddin scribed at house of the Jagir and Jagir is not even attestor much less Laxmaiah if at all present and if at all true, being natural witnesses if executed there, rather chance witnesses P.W.2 Vittalaiah, Raji Reddy and any other persons. P.W.2 supra says the document was first signed by Balraj and then by others and later Jagirdar and to be sealed on the same. There is no any seal reflecting even on Ex.A.4. Even from this evidence of P.W.2 in O.S.No.136 of 1987, it no way establishes the requirements of due attestation of the executant signing seen by at least two attestors and their attesting/ signing seen by the executant which is suffice to say there is no proof of the Will and there are several suspicious circumstances around it. PW.2''s native place is in fact, Mangampet of Medak District and not even of Nizampet or nearby place to it, for believing his presence and for nothing deposed even of who called him and with what information to attest the Will, on that day and at that time and at that place of Jagir. Coming to the other attestor - Raji Reddy, stated to be Mali Patel, P.W.2 supra deposed to the effect that said Raji Reddy was involved in many Court cases. He also deposed that he was suspended for dereliction of duties and for manipulation of records and said Raji Reddy was not murdered, as suggested much less for manipulating the records. P.W.3 - Seetharam Reddy, s/o. Raji Reddy, claimed to be a Patwari of Nizampet during 1969-83, deposed that Ex.A.4 bears the signature of his father. In fact, Ex.A.4 is not the original Will, but only a certified copy. He was not even examined in O.S.No.90 of 1981, where original Will was filed, much less by referring to it. He denied the suggestion of his father was murdered due to land disputes and manipulations and instigating land disputes. He denied the suggestion of the signature on Ex.A.4 (B) is not that of his father and he is deposing falsehood and Ex.A.4 is a created one. It is also suggested that he never worked as Patwari of Nizampet. Even PW.2 did not depose of due execution and attestation of the Will, as per the legal requirements as referred supra and once such is the case, even PW.3''s evidence of his identifying his father''s so called signature, is of no significance, leave about the difficulty to compare and identify in a Photostat copy matter on seeing original; also to disbelieve apart from no proof of Section 63 of the Indian Succession Act compliance from the legal position discussed supra.

23. From the above, with reference to the legal position, as also found by the Courts below, none of the witnesses, including the so called attestor to the Will, had deposed that to their seeing the deceased-testator had signed the Will before them and they also saw the deceased when signing, for due attestation and in the absence of such evidence, it is difficult to accept that the execution of the Will is proved in accordance with law, but for to hold that the Will has not been proved, apart from the very execution of Will is riddled with suspicious circumstances supra and also its existence not shown till the same was filed in December, 1988 in the Court and there is nothing even to show it was acted upon from death of Balraj, in 1960. Thus, there is no proof of the Will to rely and the conclusions arrived by the Courts below against the Will are no way perverse and the evidence of P.Ws.2 and 3 in O.S.No.136 of 1987 was rightly not relied by the Courts

below for incredibility as discussed supra and for the so called deposition of PW.2-Vittalaiah in O.S.No.136 of 1987 no way complies with the legal requirements of proof of attestation and execution of the Will as per Section 63 of Indian Succession Act.

24. Coming to other aspects, even what PW.1 - Ramesh deposed in O.S.Nos.136 of 1987 and 58 of 1989 is of the self-same suit lands jointly belong to plaintiffs and defendants in equal halves. Thus, there is no question of anybody claiming adverse possession with animus possessandi in any of the 3 suits. It clearly reveals that the property originally belonged to Lingamaiah''s father Yenkaiah and Lingamaiah pre-deceased him prior to 1946 and as per the pleadings in O.S.No.90 of 1981, Yenkaiah also died 30 years ago, to say in or around 1950. By then, even the Hindu Women''s Right to Property Act, 1937 by extending to agricultural lands, as per the Madras Amendment under the composite State of Madras in 1945, was not applicable to the Telangana area, until the separate State of Andhra from Madras formed, later combined with the Telangana area, which was under erstwhile Nizam''s Rule and later separately and it is after those united and only from adaptation of the Laws, at best, that Act application can be presumed for Balamma, daughter of Lingamaiah, to claim any rights, otherwise but for only by Laxmaiah and Balraj. However, from death of Balraj as unmarried and issueless in 1960, for alleged Will not proved even, from the Hindu Succession Act, 1956 came into force, his brother Laxmaiah and sister Balamma succeed his undivided half share as when Balamma died is not stated anywhere and nothing to say she died prior to Balraj and as such to draw any presumption of she died prior to Balraj. Once such is the case as per the Hindu Succession Act, 1956 Section 8 r/w Schedule Class-II, items 3 and 4 viz; brother and sister to succeed. In that way, even any mutation in the Revenue records in the name of Venkaiah (D.1) of O.S.No.90 of 1981 or his brother Jangaiah, as sons of Balamma, no way confer any right on them other than for ¼th out of plaint schedule properties.

25. Thus, so far as partition suit O.S.No.136 of 1987 and equally the other suit O.S.No.58 of 1989 for injunction not to alienate and not to convert into non-agricultural of the suit lands are concerned, as discussed supra, out of the ancestral property jointly belonged to Laxmaiah and Balraj, sons of Lingamaiah, s/o. Yenkaiah, in each equal half share, from the death of Balraj in 1960, predeceased his brother and sister, Laxmaiah and Balamma, respectively, they succeed equally his undivided half share, to mean Balamma got ¼th and thus only ¼th of the suit property shall go to the sons of Balamma, namely Venkaiah and Jangaiah, equally, to say the Branch of Venkaiah, put together got ■th and the Branch of Jangaiah put together got ■th and remaining ¾th by Laxmaiah, and after his death in 1974, by his daughter Laxmamma and wife Lachamma, plaintiffs 1 and 2 in O.S.No.90 of 1981 and defendants 2 and 3 in O.S.Nos.136 of 1987 and 58 of 1989, respectively.

26. Having regard to the above, in the partition suit, since all the legal representatives of the respective branches are on record, for no way bad for non-joinder or mis-joinder and from the death of one or other, no way abated as there is a representation of the Estate

by the other parties on record, including for Ramesh, by mother Indramma and from her death, the wife and children of Ramesh, came on record, and for Jangaiah, besides his first wife Laxmamma, second wife Andalamma and her children came on record, that too, all the suits at the First Appellate stage were decided commonly in 1996 and the Second Appeals arisen therefrom by clubbed together for common disposal and said conclusion can be fortified by the expression of the Apex Court in Mahmud Mian (died) through L.Rs. v. Samsuddin Mian(died), 2005(11) SCC 582. The suits for injunction, respectively, supra, cannot be decreed in favour of any of the plaintiffs, exclusively, but for to say the undivided interest, respectively, cannot be alienated and any such alienation is subject to working out of equities by giving priority of the first sales over subsequent sales rather alienations or Court decrees, to that extent, respectively, to work out equities in the partition suit by filing final decree applications, as the Court is bound to consider in a suit for partition, as on the date of even passing of final decree, any changes to mould the relief by impleadment or the like and in working out the equities without the need of separate suit/s vide expression of the Division Bench of this Court, to which I am one of them in W.P.No.16068 of 2016, dated 12.07.2016 in late Karumanchi Venkaiah v. State of A.P.rep. by the Secretary, Law, (2016) 6 ALD 618, referring to several expressions in this regard.

Accordingly and in the result:-

(a). The S.A.No.655 of 1997 is allowed in part by modifying the decree and judgment for permanent injunction in O.S.No.90 of 1981 granted on 30.11.1989 by the trial Court and confirmed by the 1st appellate Court by Judgment and decree in A.S.No.16 of 1990 dated 06.03.1996 to the extent of holding that though the plaintiffs are in possession of the entire suit properties, however, not entitled to the relief of injunction for entire property not absolutely belong to them but for a major share therein and even for the other, what the plaintiffs possessed is on behalf and to the benefit of other share holders also and as such the plaintiffs are not liable to be dispossessed even by other shareholders or their alienees except through due process of law which is subject matter of the partition suit in O.S.No.136 of 1987 to the extent of its result.

(b) The S.A.No.654 of 1997 is allowed in part by setting aside the 1st appellate Court''s judgment and decree,dt.06.03.1996 in A.S.No.73 of 1994 and however by setting aside the findings of the trial Court to the extent of proof of Will as if proved in its decree and judgment in O.S.No.136 of 1987 dated 15.12.1994 and by partly decreeing the suit for partition holding the Ex.A.4 Will (original of Ex.B.2 in O.S.No.90 of 1981) is not proved true, valid and duly executed in a sound and disposing state of

mind by Balraj as a last testament with free will and volition with bequeaths in favour of Venkaiah and as such not entitled to the relief based on said Will as legal representatives of said legatee, however, the plaintiffs representing the branch of said Venkaiah (1st plaintiff''s father and husband of the plaintiffs 2 and 3), besides the plaintiff''s six sisters, Venkaiah''s another wife''s daughter Anasuya also to work out their respective shares out of the 1st plaintiff''s father late Venkaiah''s ■th undivided share in the plaint schedule property and for another ■th share fell to Venkaiah''s brother Jangaiah to claim by Jangaiah''s two wives including the 1st defendant of the partition suit late Laxmamma, now by eligible legal representatives or alienees or assignees, as the case may be, besides another late wife''s three children alive to work out their respective shares; however, for remaining ¾th share, since said Laxmamma(1st defendant in O.S.No.136 of 1987 and 1st plaintiff in O.S.No.90 of 1981) succeeded, also to work out her said share by anybody entitled to claim from her death including said Shanker either as successor in interest by any testamentary or intestate succession or by alienation or assignment as the case may be, and further any of the alienees can work out equities however, in preference of first alienation to prevail over subsequent including any bequeaths and claims pursuant thereto so to work out by filing final decree petitions.

(c) The S.A.No.666 of 1997'' is dismissed by confirming the 1st appellate Court''s reversal judgment (common) and decree dated 06.03.1996 in A.S.No.13 of 1995 against trial Court''s judgment in O.S.No. 58 of 1989 dated 15.12.1994 by common judgment and decree granting injunction not to alienate and subject to the observations that the plaintiffs since are not entitled to claim for injunction against alienation for entire property or undivided half share much less pursuant to the will to claim but for to say any alienation is to the extent binding on the respective shares as lis pendente alienee in preference of first alienation over the other and the like on others supra to work out for any equities in the partition suit supra.

(d) There is no order as to past profits in the suit for partition and claim of future profits if any are left open including against those persons in actual possession on behalf of and in claiming through plaintiffs in O.S.No.90 of 1981.

(e) S.A.M.P.No.2324 of 2016 in S.A.No.654 of 1997 filed to receive additional evidence at the stage of the second appeal is dismissed.

(f) There is no order as to costs in any of the three appeals.