Tamilkodi Vs N. Kalaimani and Others

Court: Madras High Court

Date of Decision: April 10, 2015

Acts Referred: Civil Procedure Code, 1908 (CPC) - Order 5 Rule 3, 100, 63
Contract Act, 1872 - Section 16
Evidence Act, 1872 - Section 123(4), 13, 60(b), 63, 65
Succession Act, 1925 - Section 213, 63
Transfer of Property Act, 1882 - Section 23, 59

Citation: (2015) 4 CTC 771

Hon'ble Judges: S. Vimala, J

Bench: Single Bench

Advocate: V. Raghavachari, for the Appellant; M.V. Karunakaran for K. Vennila, Advocates for the Respondent

Judgement

S. Vimala, J
The suit has been filed by the plaintiff claiming 1/3rd share in respect of the suit property through partition.

2. The suit property is located at Door No. 3, III Cross Street, Lake area, Nungambakkam, ground measuring 2560 sq.ft. with construction of

three floors of an area of 3330 sq.ft.

3. Brief Facts:-

(i) The Plaintiff and the defendants (D1 and D2) are the legal heirs of late N. Natarajan and Ponnammal. The Plaintiff''s father died on 01.01.2010.

The plaintiff is the eldest daughter. Out of hardwork, the plaintiff earned a lot and substantially contributed the same to her father towards purchase

of the suit property. However, she is not asserting any independent right except as the heir of her deceased parents.

(ii) After the death of the father, the plaintiff issued notice dated 05.11.2010 seeking partition of the suit property. The first defendant issued a reply

dated 25.11.2010 stating that he is not willing for effecting any partition. Hence, the plaintiff was compelled to file the suit.

4. The Brief averments made in the written statement of the first defendant:-

(i) The suit property originally belonged to the plaintiff''s father by virtue of the sale deed dated 15.12.1966. After purchasing the property, he

obtained sanctioned plan for construction of the building. The parents borrowed amount of Rs. 9480/- from the Government servant''s Co-

operative Mortgage Society on 20.06.1968 for the purpose of constructing the ground floor. This was repayable in 186 instalments at the rate of

Rs. 95.10/-.

(ii) Thereafter, the father borrowed Rs. 11,000/- for the construction of the first floor, on 02.09.1969. Thereafter, for the purpose of putting

additional constructions, he borrowed a sum of Rs. 1,00,000 from Nungambakkam Saswatha Dhaana Rakshaka Nidhi Limited and executed a

mortgage deed dated 26.06.1989. This was executed along with his son Kalaimani and wife Ponnammal.

(iii) Apart from that, the father was paying the water tax, property tax and electricity charges.

(iv) The deceased Natarajan executed a registered Will dated 28.02.2002, bequeathing the entire property to 1. Ezhil, 2. Elangudi and 3. Minor

Kalaivani, who are the daughters of the first defendant. Later the Will was cancelled by virtue of the cancellation deed dated 20.12.2006. On the

day of revocation, the father executed a settlement deed dated 20.12.2006, settling the suit property in favour of Kalaimani giving him life interest

and thereafter absolute rights to the daughters of Kalaimani. Therefore, the property belongs to the first defendant and his daughters.

(v) The plaintiff has absolutely no right over the suit property. The plaintiff has knowledge about the settlement deed and in fact she was abusing

her father for having executed the settlement deed. Therefore, the suit has to be dismissed.

5. The following issues were framed for trial:

1. Whether the plaintiff is entitled to a declaratory decree with regard to 1/3rd share as claimed by him?

2. whether the deceased N. Natarajan executed the Will on 28.02.2002 and cancelled the will on 20.12.2006?

3. Whether N. Natarajan had executed the settlement deed on 20.12.2006 creating life interest in favour of the first defendant and vested

remainder to the legal heirs of the deceased first defendant?

6. According to the case of the plaintiff, the suit property should be divided into three shares and plaintiff should be allotted one such share out of

it.

6.1. The case of the first defendant is that the suit property is not divisible as it belongs to him and his legal heirs according to the settlement deed

executed by his father.

6.2. Therefore, whether the property is a property belonging to the father and therefore, it is divisible or the father executed documents in favour of

the defendant and his legal heirs and therefore, the property is not divisible viz a viz the plaintiff, is the main issue to be decided.

7. The relationship between the Plaintiff and the defendants as sister and brothers is an admitted fact. They are the legal heirs of the deceased N.

Natarajan and Ponnammal.

8. The specific defence of the first defendant is that his father originally executed a will and later on cancelled the same on 20.12.2006 and

thereafter executed a settlement deed on the very same date i.e. on 20.12.2006 bequeathing life interest in favour of the first defendant and the

vested remainder in favour of the legal heirs of the first defendant.

9. The fact that the property originally belonged to the father of the Plaintiff and the defendants is an undisputed fact. Therefore, the only question

to be decided is whether the first defendant has proved the execution of the settlement deed in favour of him and his legal heirs.

10. It is the contention of the learned counsel for the plaintiff that the defendant did not examine attesting witness to the settlement deed and

therefore the settlement deed has not been proved and therefore the first defendant cannot claim any title based upon the settlement deed.

11. On the other hand it is contended by the learned counsel for the defendant that the execution of the settlement deed is not specifically denied

by the plaintiff and therefore it is not necessary for the first defendant to examine any of the attesting witnesses.

12. The learned counsel for the first defendant brought the attention of the Court to Section 68 of the Indian Evidence Act.

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 execution, if there be an attesting witness alive, and

subject to the process of the Court and capable of giving evidence: 1[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.]

Section 68 deals with proof of a document which is required by law to be attested. Deed of settlement is a document which requires attestation. If

the deed is a document required by law to be attested, it is mandatory that at least one attesting witness should have been examined. This

mandatory requirement would be operative only when the execution is specifically denied (except in the case of Will).

13. So far as Will is concerned, a special mode of proof is prescribed by Section 63 of the Indian Succession Act. Section 68 of the Evidence Act

prescribes a mode of proving the Will. When the law prescribes special mode of proof for Will, de hors the objections raised or not, a duty is cast

upon the parties to prove the will, in the manner prescribed. As the will is a document required by law to be attested, it shall not be used in

evidence until at least one attesting witness is examined. In order to prove due attestation of the will, the propounder of the will has to prove that

two witnesses saw the testator signing the will and that they themselves signed the will in the presence of the testator.

14. So far as this case is concerned, the first defendant claims title based upon the settlement deed. It is his case that the date of cancellation of will

and the date of settlement deed is one and the same. When the execution of the settlement deed is preceded by the cancellation of the will it is

necessary that at least the Will, the cancellation of the will are the documents which require closer scrutiny. The will dated 28.02.2002 bequeathing

the properties in favour of the legal heirs of the first defendant is marked as Ex. D26. The cancellation of the will is dated 20.12.2006 (which is

marked as Ex. D27).On the very same date, the father is claimed to have executed the settlement deed under Ex. D28. Admittedly, the only

witness on the side of the defendant is the first defendant Kalaimani through whom 70 documents have been marked.

15. Admittedly, no attesting witness has been examined to prove the will. Strictly speaking will need not be proved as the first defendant is not

basing his claim on the basis of will, but only on the basis of the settlement deed. But, the settlement deed follows the cancellation of the will. It is a

different matter if the first defendant is exclusively placing reliance upon the settlement deed alone when the cancellation of the will has a bearing on

the execution of the settlement deed the first defendant should have examined at least one attesting witness to prove the execution of the will which

would have the effect of strengthening the existence of the settlement deed. Be that as it may, it is necessary to look into the necessity of adducing

evidence of an attesting witness in respect of the settlement deed.

16. It is the contention of the learned counsel for the first defendant that the execution of the settlement deed is not specifically denied by the

plaintiff and therefore there is no necessity to examine the attesting witness. Whether the plaintiff specifically denied the execution of the settlement

deed is the primary issue to be considered.

17. It is the case of the learned counsel for the plaintiff that there is no opportunity for the plaintiff to deny the execution of the settlement deed, as

the opportunity was wilfully deprived of by the first defendant. It is pointed out that in the reply notice issued by the first defendant, he did not

disclose the existence of the settlement deed. The plaintiff being the first person to approach the Court there was no opportunity to deny the

settlement deed. It is pointed out that in the evidence, the execution of the settlement deed has been denied by the plaintiff, which was the first

opportunity to deny.

18. In the reply notice, the first defendant has taken efforts to point out that when the plaintiff has sought for partition, the plaintiff must have clearly

described the property. The grievance was that the property was not fully and completely described. But it is admitted in the evidence of D.W. 1

that he did not mention anything about the existence of will, cancellation of will and settlement deed, in his reply notice. In the written statement only

he has mentioned about those three documents. Therefore, there is no opportunity for the plaintiff to specifically dispute the execution of the

settlement deed.

19. The learned counsel for the first defendant has relied upon the following decisions in support of the proposition that a) when the plaintiff has not

specifically disputed the execution of the settlement deed, there is no necessity to examine the attesting witness; b) in the absence of pleadings,

there can be no evidence and that no amount of evidence can be looked into in the absence of pleadings.

(i) Periasami Kachirayar and Others Vs. Varadappa Kachirayar (died) and Others, AIR 1950 Mad 486 : (1942) 55 LW 310

That the nature of a tenancy mentioned in a will may be regarded as a statement made in the course of a transaction by which certain property

was bequeathed to a legatee under the will and that consequently the statement made in the will may be taken as evidence under Section 13,

Evidence Act.

(ii) Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others, AIR 2005 SC 4362 : (2005) 5 CTC 207 : (2005) 2 DMC

669 : (2005) 12 JT 258 : (2005) 7 SCALE 682 : (2005) 8 SCC 67 : (2005) 3 SCR 719 Supp

18. A perusal of Ex. B9 (in original) would show that the signatures of the Registering Officer and of the identifying witnesses affixed to the

registration endorsement were, in our opinion, sufficient attestation within the meaning of the Act. The endorsement by the sub-registrar that the

executant has acknowledged before him execution did also amount to attestation. In the original document the executants signature was taken by

the sub-registrar. The signature and thumb impression of the identifying witnesses were also taken in the document. After all this, the sub-registrar

signed the deed. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a

court, the testator who has already departed the world cannot say whether it is his Will or not and this aspect naturally introduces an element of

solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and the testament of departed

testator.

(iii) Waterfall Estate (East) Pvt. Limited Vs. The State of Tamil Nadu, (2007) 138 CompCas 57 : (2008) 81 SCL 434 .

.... Therefore, the object of registering document is to give notice to the world that such a document has been executed, to prevent fraud and

forgery and to secure a reliable and complete account of transactions effecting the title of the property"".

(iv) Om Prabha Jain Vs. Abnash Chand and Another, AIR 1968 SC 1083 : (1968) 3 SCR 111

12. .... The ordinary rule of law is that evidence is to be given only on a plea properly raised and not in contradiction of the plea. Here the pleas

were made on two different occasions and contradicted each other. The evidence which was tendered contradicted both the pleas. The source of

the information was not attempted to be proved and the witnesses who were brought were found to be thoroughly unreliable. In these

circumstances we do not propose to refer to the evidence in this judgment any-more.

(v) Dattatraya Vs. Rangnath Gopalrao Kawathekar (Dead) by his legal representatives and Others, AIR 1971 SC 2548 : (1972) 4 SCC 181

4. As seen earlier both the first defendant as well as the second defendant had pleaded that there was a partition in the family. Therefore the only

question that fell for decision was whether the suit properties fell to the share of the first defendant or the second defendant. There was no basis in

the pleadings for the finding of the learned District Judge that the suit properties were the joint family properties of the first and the second

defendants. This was entirely & new case made out by the District Judge. The pleadings in the case did not permit the learned District Judge to

come to such a conclusion. Hence in our opinion the High Court was justified in reversing that finding of the first appellate Court. An attempt was

made before us to justify the finding of the first appellate Court that the suit properties were joint family properties of defendants 1 and 2 by

referring to the evidence in the case. We are not satisfied that there is any evidence to support that case. Further a case not pleaded cannot be

made out by evidence.

(vi) Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, AIR 1987 SC 1242 : (1987) 2 JT 76 : (1987) 1 SCALE 700

: (1987) 2 SCC 555 : (1987) 2 SCR 805 : (1987) 2 UJ 162

6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the

license was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well

settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should

be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by

it. .....

(vii) 1995 Supp (4) Supreme Court Cases 422 (Syed and Company and others vs. State of Jammu & Kashmir and others)

7. In opposition to this, the learned counsel for the respondent would urge by looking at the entire pleadings of the State before the prescribed

authority, it can be seen nowhere, it has been stated as to what exactly was the basis for claiming the price of timber extracted by the respondent.

Without specific pleadings in that regard, evidence could not be let in since it is a settled principle of law that no amount of evidence can be looked

unless there is a pleading.

(viii) Khagendra Lall Dutta and Another Vs. Jacob Sole Jacob, (1995) 5 SCALE 32 : (1995) 5 SCC 446 : (1995) 2 SCR 803 Supp

6. In the absence of any specific plea in the written statement qua the appellant that a sub-tenancy was created between the appellant and the

respondent by acquiescence of the appellant, no amount of evidence can be looked into in that behalf. It is a well settled principle of law and needs

no elaborate consideration. Shri Ganguli fairly conceded that there is no such specific plea. He, however, pointed out that in para 2 of the written

statement plea of limitation, estoppel etc. had been raised, which would show that the respondent has pleaded acquiescence in the sub-tenancy as

well. We cannot agree, as the pleas advanced in para 2 are too general and akin to those pleas which are regularly taken virtually in all written

statements.

7. In the absence of any specific plea of sub-tenancy qua the appellant, no amount of evidence can be looked into in that behalf. The trial court has

given a finding that there is no sub-tenancy and the Division Bench has not gone into that question. We have applied our mind and find no

substance in the case of the respondent.

(ix) Prataprai N. Kothari Vs. John Braganza, AIR 1999 SC 1666 : (1999) 4 JT 443 : (1999) 123 PLR 55 : (1999) 3 SCALE 109 : (1999) 4

SCC 403 : (1999) 2 UJ 785 : (1999) AIRSCW 1284 : (1999) 5 Supreme 10

10. Reliance was sought to be placed on the additional evidence admitted by the learned Single Judge during the pendency of the appeals to

prove that the appellant had title to the property. It is settled law that in the absence of any plea, no evidence is admissible. The Single Judge of the

High Court overlooked that when there was no plea or issue on the question of title, no evidence whatever was admissible regarding the same. He

acted beyond his jurisdiction in permitting additional evidence to be filed in appeals.

(x) Prataprai N. Kothari Vs. John Braganza, AIR 1999 SC 1666 : (1999) 4 JT 443 : (1999) 123 PLR 55 : (1999) 3 SCALE 109 : (1999) 4

SCC 403 : (1999) 2 UJ 785 : (1999) AIRSCW 1284 : (1999) 5 Supreme 10

10. Reliance was sought to be placed on the additional evidence admitted by the learned Single Judge during the pendency of the appeals to

prove that the appellant had title to the property. It is settled law that in the absence of any plea, no evidence is admissible. The Single Judge of the

High Court overlooked that when there was no plea or issue on the question of title, no evidence whatever was admissible regarding the same. He

acted beyond his jurisdiction in permitting additional evidence to be filed in appeals.

(xi) T.H. Musthaffa Vs. M.P. Varghese and Others, AIR 2000 SC 153 : (1999) 3 CTC 569 : (1999) 7 JT 427 : (1999) 6 SCALE 190 : (1999)

8 SCC 692 : (1999) 3 SCR 162 Supp : (1999) AIRSCW 4237 : (1999) 8 Supreme 532

10. ..... The pleading raised in the case does not refer to either Rule 39 or 56 of the Rules much less to the "pamphlet showing illustrative cases of

valid and invalid postal and ordinary ballot papers" issued by the Election Commission of India, nor any specific allegations are found in the case.

The allegation made in the course of the petition is that there is wrong acceptance of invalid votes polled for respondent No. 1. It is not made clear

as to how many votes are liable to be rejected for using wrong instrument by the voters for expressing their preference. There is no further

indication as to how many of such votes had been polled in favour of respondent No. 1 so as to materially affect the result of the election. In the

absence of such plea the learned Judge could not have granted the relief of recount. Therefore, the view taken by the High Court that the pleadings

are insufficient to order recount is perfectly in order. So far as the evidence that had been adduced in the case is concerned, it need not have been

looked at by the learned Judge in the absence of appropriate pleadings in that regard. However, Shri E.M.S. Anam, the learned Counsel for the

appellant, submitted that the fact that votes in the two polling stations at Varikole school and Koothmannoor school had been cast by using a

wrong instrument was not in dispute and the evidence of the Returning Officer clearly indicated the use of the wrong instrument in the two polling

stations which amounted to an admission in the case and, therefore, even in the absence of an appropriate pleading in that regard the evidence

could be looked at. We fail to appreciate this argument. Unless the appellant had put forth his case in the pleading and the respondents are put on

notice, the respondents cannot make an admission at all and there is no such admission in the course of the pleadings. If the pleadings did not

contain the necessary foundation for raising an appropriate issue, the same cannot go to trial, Any amount of evidence in that regard, however

excellent the same may be, will be futile. Therefore, the learned Counsel is not justified in making the said submission and the same is rejected. The

learned Judge noticed that the appellant, though had raised objection in this regard in the application for recount, did not reiterate the same in

second application much less any averment is made in the petition. The learned Judge held, in our view, rightly that there is no pleading in this

regard and the evidence adduced cannot be looked into as no issue thereto arises.

(xii) Ravinder Singh Vs. Janmeja Singh and Others, AIR 2000 SC 3026 : (2000) 10 JT 583 : (2000) 6 SCALE 424 : (2000) 8 SCC 191 :

(2000) 3 SCR 331 Supp : (2000) AIRSCW 3403 : (2000) 6 Supreme 289

7. The election petition is singularly silent of any such averment that the returned candidate, even ""if, it be assumed for the sake of the arguments,

had published and distributed certain documents, (Annexures A-1 to A-7), as alleged in the election petition either himself or through any other

persons with his consent, that those statements were false and that the returned candidate either believed them to be false or did not believe them

to be true, though in paragraph 9 of the election petition, which has been verified as correct on the basis of legal advice, this requirement emanating

from Section 123(4) has been mentioned but without any assertion that the returned candidate in this case, published the false statements knowing

them to be false and/or not believing them to be true. The submission of Mr. Talwar, that at the trial, the petitioner could have said so in his

evidence is futile. It is an established proposition that no evidence can be led on a plea not raised in the pleadings and that no amount of evidence

can cure defect in the pleadings.

(xiii) Thayammal and Others Vs. A.T. Muthukumaraswami Chettiar, (1930) ILR (Mad) 119 : (1929) 57 MLJ 588

Act XXXI of 1926, which amends Section 68 of the Indian Evidence Act, relates only to processual law and not to substantive law. Hence, it is

retrospective in its operation. If the execution of a deed required to be attested by law is not denied by the executant, it need not be proved by any

attesting witness, though it might have been executed before the Act.

(xiv) Surendra Kumar Vs. Nathulal and Another, AIR 2001 SC 2040 : (2001) 1 JT 520 Supp : (2001) 3 SCALE 647 : (2001) 5 SCC 46 :

(2001) 2 UJ 1157 : (2001) AIRSCW 1862 : (2001) 3 Supreme 622

16. In the present case there exists a registered deed of gift signed by the donor and attested by two witnesses. Therefore, the requirement of the

law as incorporated in the Section is satisfied. Section 68 of the Indian Evidence Act, 1872 makes a provision regarding proof of execution of a

document required by law to be attested. Therein it is laid down that:

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose

of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

17. The proviso to the section, which is relevant for the present purpose, reads:

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.

(Emphasis supplied)

18. On a plain reading of the proviso, it is manifest that a registered deed of gift can be received in evidence without examining one of the attestors

if the person who has executed the deed of gift has not specifically denied its execution. In the present case, the donor Chand Bai has specifically

admitted execution of the deed of gift in favour of the appellant. Therefore, the lower appellate Court was in error in holding that the deed of gift

has not been duly proved since one of the attestors has not been examined as witness. Indeed the certified copy of the registered deed of gift was

produced in the trial Court along with an application filed by the plaintiff in the previous suit, suit No. 69/70(4/76) that the same may be called for.

The trial Court, being satisfied about the reason for non-production of the original document, marked the certified copy of the deed of gift as

Exhibit-3"".

(xv) Adanganpuravan Assankutty''s daughter Kadiya Umma and Others Vs. Adanganpuravan Rayankutty''s son Mayankutty and Others, AIR

1992 Ker 261 : (1992) 2 ILR (Ker) 187

15. I have carefully gone through the pleadings in para 5 of the plaint on which great reliance was placed by counsel for plaintiffs, but I am unable

to see anything in the pleading which can be described as specific denial of execution of the documents. The plea that plaintiffs were not aware of

the execution of the documents would not amount to specific denial of execution. There is no other pleading, which can be described as specific

denial of execution. The decisions referred to above fully support this view. In the circumstances, in my opinion, the lower appellate Court went

wrong in holding that since there is want of proof of execution, the impugned gift deeds should fail.

(xvi) Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs., AIR 2000 SC 426 : (2000) 1 CTC 359 : (1999) 9 JT 305 : (2000) 125

PLR 56 : (1999) 7 SCALE 277 : (2000) 1 SCC 434 : (1999) 5 SCR 24 Supp : (2000) 1 UJ 666 : (1999) AIRSCW 4573 : (1999) 10 Supreme

POINT 2: We shall first deal with the proof of the certified copy of the deed of mortgage. So far as the mortgage deed is concerned, the plaintiff

filed a certified copy and called upon the defendant to file the original. The defendant refused to do so. The plaintiff, therefore, proceeded to file the

certified copy as secondary evidence under sub-clause (a) of section 65 of the Evidence Act. This was certainly permissible. The mortgage is a

document required to be attested by two attestors under section 59 of the Transfer of Property Act and in this case it is attested by two attestors.

The mode of proof of documents required to be attested is contained in sections 68 to 71 of the Evidence Act. Under section 68, if the execution

of a document required to be attested is to be proved, it will be necessary to call an attesting witness, if alive and subject to the process of Court

and is capable of giving evidence. But in case the document is registered-then except in the case of a will-it is not necessary to call an attesting

witness, unless the execution has been specifically denied by the person by whom it purports to have been executed. This is clear from section 68

of the Evidence Act. It reads as follows:

Section 68: If a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for

the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

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

registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have

been executed is specifically denied.

In the present case, though it was stated in the written statement that there was no relationship between the parties as mortgagor and mortgagee,

the defendant admitted in his additional pleas in the same written statement that the mortgage deed was executed but he contended that it was

executed to circumvent the Rent Control legislation. In fact, in his evidence as DW2 the defendant admitted the execution of the mortgage. It must

therefore be taken that there was no specific denial of execution. Hence it was not necessary for the plaintiff to call the attestor into the witness

box, this not being a will. The plaintiff could therefore not be faulted for not examining any of the attestors. Hence the mortgage stood proved by

the certified copy. The Courts below were right in accepting that the deed was proved. Point 2 is decided in favour of plaintiffs-appellants.

20. The proposition that no amount of evidence could be looked into unless there are pleadings cannot be disputed, but, the first defendant has

forgotten the fact that the burden of proof is upon him to show that there was a settlement deed executed by his father and that it is valid. It is not

as if that the validity of the settlement deed has been accepted. It was not specifically denied in the plaint because the reply notice issued by the first

defendant was not specific in spelling out his defence he is armed with a settlement deed. The plaintiff has denied it in her evidence as P.W. 1,

where she has stated that the document is spurious one.

21. There is one more circumstance available in this case which would amount to specific denial regarding execution of settlement deed, that is by

challenging the very existence of the attesting witness. It would be appropriate to point out important admissions made in the evidence of D.W. 1,

during cross examination and the admissions are as follows:

1. As per Ex. D28, the attesting witnesses are Latha and Aravindan.

2. As per Ex. D27 and D28, the attesting witnesses signed in Ex. D27 and D28 are one and the same persons.

3. I was not personally present at the time of execution of D27 and D28.

4. I was not present at the time of registration of both Ex. D27 and Ex. D28. (Witness adds: Later on I was present at the time of signing the

witnesses and my father in my house)

5. It is correct to state that both in Ex. D27 and D28, the signature of Aravindan looks like Arumugam.

6. I deny the suggestion that in both D27 and D28 only Arumugam has signed and Aravindan was not at all an attesting witness.

7. In the registration endorsement column, the name of the second witness is mentioned as Aravindan, No. 62 Elango Salai. At present 102 Lake

Area 3rd street, Chennai-34.

8. I deny the suggestion that there was no Door Number 102 Lake Area 3rd Street (Witness adds-There as encroachment by people by Local

Valluvarkuppam behind the school ground by the side of southern compound wall of Corporation Play Ground, where the temporary numbers

were given from 100. At present they had cleared the encroachment.)

9. I am not going to examine the attesting witnesses in Ex. D27 and Ex. D28. 10. The attesting witness signed in Ex. D27 and Ex. D28 are the

friends of my earlier servant maid''s husband.

From the admissions made, it is clear that the first defendant wanted to play hide and seek game with the Court and that he was not inclined to

divulge the truth before the Court. When it is pointed out that one of the attesting witnesses could not have been the person who has purported to

have signed as attesting witness, it is the duty of the defendant to have produced and examined at least one attesting witness. When the plaintiff

P.W. 1 has stated that the document is spurious one, then the burden shift on defendant to show that the document is a genuine one. When the

questions raised in the cross examination of D.W. 1 regarding the availability/existence of the attesting witness, then it is the duty of the first

defendant to have examined the attesting witness. He has not done so. The Court is not a place to make use of the opportunity by taking refuge

under the procedural law to hide the truth and to defeat the rights of the parties. Once the document discloses that whether a particular person

could have signed as an attesting witness or not, the first defendant should have come forward to examine him at least after his cross examination.

That willingness to examine the witness was not there. Therefore, the inference is that the examination of the attesting witness would be against the

interest of the first defendant. Therefore, this Court come to the conclusion that the suspicion surrounding the execution of settlement deed, having

been allowed to remain uncleared, the settlement deed is not proved.

22. The learned counsel for the plaintiff relied upon the following decisions contending that the settlement deed is not proved in accordance with

law and therefore, the settlement deed should not be accepted.

(i) Valliammal and Gopalakrishnan Vs. Sokkammal, (2012) 4 CTC 639

26. In this case, admittedly no attesting witness was examined by the Defendants. No particulars were given regarding the existence of those

attesting witnesses. When the attesting witnesses were not available or dead, the Defendants could examine some other witness, to prove the

Settlement Deed-Ex. B1 but it was not explained on the side of the Defendants about the attesting witnesses, to the satisfaction of the Court.

Therefore, the Settlement Deed said to have been executed by Chellapillai in favour of the 1st Defendant could not be found as proved. The

finding reached by the 1st Appellate Court in these lines was quite correct and in accordance with law. Therefore, I could find no perversity on the

part of the 1st Appellate Court in interfering with the findings of the Trial Court.

(ii) P. Sivabushanam and Another Vs. E. Sivamani and Another, (2013) 2 MLJ 102

(v) The settlement deed is a document which requires attestation by at least two witnesses (under Section 23 of the Transfer of Property Act). In

order to prove the document under Section 68 of the Indian Evidence Act, at least one attesting witness ought to have been examined. When such

is a requirement, the plaintiffs ought to have examined atleast one of the attesting witnesses and that has not been done.

17. As the settlement deed is void, there is no necessity to file a suit to set aside the same. There is no proof to show that the settlor understood

the contents of the settlement deed and then signed it or put thumb impression upon it. Therefore, there is no valid execution of document in the eye

of law. The registration of the document does not cloth the document with sanctity, when the execution itself is not proved.

(iii) G. Ganesan and Others Vs. P. Sundari, R. Varalakshmi and M. Kasthuri, (2011) 2 CTC 435 : (2011) 1 LW 639 : (2011) 4 MLJ 98

18. Now in the case on hand, the question is as to whether the unprobated Will is sought to be proved by the respondents for collateral purpose

as it is claimed by them. The learned counsel for the respondents would submit that no right or title is attempted to be established under the Will so

as to fall within the bar contained in Section 213 of the Act, instead, according to him, the document is used only to prove that the earlier Will for

which Letters of Administration is sought for has been subsequently canceled. This according to the learned counsel for the respondents is a

collateral purpose. But, we find it too difficult to accept the said contention. The said Will of the year 1993 is sought to be used to defeat the claim

of the appellants to get letters of administration on the earlier Will. Unless, the due execution and contents of the said Will by which the earlier Will

is stated to have been cancelled are proved, the respondents cannot succeed in their plea to defeat the claim of the appellants for Letters of

Administration. The contents of the said Will of the year 1993 can be proved only in an appropriate probate proceeding. Unless the said Will of

the year 1993 is proved that it is the last Will of the deceased and it satisfies all the other legal requirements, the earlier Will for which Letters of

Administration proceeding has been initiated cannot be negatived. Proof of the same cannot be made in the present suit because the same could be

done if only the respondents approach the Court for probating the said Will either by making a counter claim or by initiating separate proceedings.

For the respondents, the right to oppose the issuance of probate in respect of the earlier Will itself is derived only from the unprobated subsequent

Will. As held by the Full Bench of this Court in Ganshamdoss Narayandoss Vs. Gulab Bi Bai, AIR 1927 Mad 1054 : (1927) ILR (Mad) 927 :

(1927) 26 LW 697 : (1927) 53 MLJ 709 , the bar contained in Section 213 of the Indian Succession Act is applicable even to a defendant in a

suit. Therefore, we are of the firm view that the purpose for which the Will of the year 1993 is sought to be proved by the respondents in evidence

is only for the main purpose to establish that the said Will is the last Will which cancels the earlier Will and the said purpose is not merely collateral

as it is sought to be made out by the respondents. Apart from that, in Commissioner v. Mohan Krishan Abrol (cited supra) the Honble Supreme

Court has held that even for such collateral purposes the unprobated Will cannot be used in a probate proceedings.

19. The learned Single Judge, after having referred to the Judgment of the Honble Supreme Court in Hem Nolini v. Isolyne Sarojbashini (cited

supra) and the judgment of the Kerala High Court in Cherichi v. Ittianam (cited supra), has held that those were the cases where the title was

claimed under an unprobated Will and that was the reason why the Courts took the view that such unprobated will could not be proved in

evidence. In essence, the view taken by the learned Single Judge is that no right or title is claimed under the unprobated Will in the instant case, by

the respondents and therefore, the contention of the respondents that the unprobated Will which is sought to be proved is only for collateral

purpose is sustainable. In view of our foregoing discussions, we regret, we are unable to persuade ourselves to agree with the said conclusion

arrived at by the learned Single Judge.

(iv) Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, AIR 1977 SC 74 : (1977) 1 SCC 369 : (1977) 1 SCR 925

9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What,

generally, is an adversary proceeding becomes in such cases a matter of the court''s conscience and then the true question which arises for

consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly

executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a ''cogent and convincing

explanation of the suspicious circumstances surrounding the making of the will.

(v) S.R. Srinivasa and Others Vs. S. Padmavathamma, (2010) 4 JT 296 : (2010) 4 SCALE 245 : (2010) 4 SCR 981

39. As noticed earlier in this case, none of the attesting witnesses have been examined. The scribe, who was examined as DW. 2, has not stated

that he had signed the Will with the intention to attest. In his evidence, he has merely stated that he was the scribe of the Will. He even admitted

that he could not remember the names of the witnesses to the Will. In such circumstances, the observations made by this Court in the case of M.L.

Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons become relevant. Considering the question as to whether a scribe could also be an attesting

witness, it is observed as follows: (SCC p. 577, para 7)

7. ...It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant

sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose,

e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

40. In our opinion, the aforesaid test has not been satisfied by DW. 2 the scribe. The situation herein is rather similar to the circumstances

considered by this Court in the case of N. Kamalam v. Ayyasamy. Considering the effect of the signature of scribe on a Will, this Court observed

as follows: (SCC pp. 518-19, paras 26-27)

26. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting

witnesses....

27. ....The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The

statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the

witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to

satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due

attestation unless the situation is so expressed in the document itself-this is again, however, not the situation existing presently in the matter under

consideration.

41. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here signature of

the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a Will can be held to have been proved

when the statutory requirements for proving the Will are satisfied. The High Court has however held that proof of the Will was not necessary as the

execution of the Will has been admitted in the pleadings in O.S. No. 233 of 1998, and in the evidence of P.W. 1.

(vi) H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, AIR 1959 SC 443 : (1959) 1 SCR 426 Supp

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the

death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say

whether it is his will or not ; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document

propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the

same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was

signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of

the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is

disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator''s mind and his signature as required by law, courts

would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on

proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the

testator may be very shaky and doubtful and evidence in support of the propounder''s case that the signature, in question is the signature of the

testator may not remove the doubt created by the appearance of the signature; the condition of the testator''s mind may appear to be very feeble

and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions

made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the

said dispositions may not be the result of the testator''s free will and mind. In such cases the court would naturally expect that all legitimate

suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious

circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the

document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the

execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a

doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus

to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity.

Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the

propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a

suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory

evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the

satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made

by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word ''conscience'' in

this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question

as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully

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

(vii) K. Laxmanan Vs. Thekkayil Padmini and Others, AIR 2009 SC 951 : (2008) 13 JT 380 : (2008) 15 SCALE 551 : (2009) 1 SCC 354 :

(2009) AIRSCW 10

23. Moreover, no attempt was made by the appellant to prove and establish the mental and physical condition of the testator at the time of

execution. Rather the respondent has proved that Chathu, the father of the appellant, was at the time of the alleged execution of the Deed of Will

was 82 years of age and he was suffering from serious physical ailments and was not mentally in a good state of mind.

24. ....

25. ....

26. ....

27. ....

28. It is however established in the present case that the issue of validity of the execution of both the Deed of Gift and Deed of Will was taken up

by the respondent/plaintiff and specifically denied in the affidavits filed in respect of the injunction applications. The parties have also gone to trial

knowing fully well that execution of both these documents is under challenge. Parties knowing fully the aforesaid factual position led their evidence

also to establish the legality and validity of both the documents. In that view of the matter, it cannot be said that the said document should be

deemed to be admitted by the plaintiff as no replication was filed by the plaintiff.

(viii) Lakshmi Amma and Another Vs. Talengalanarayana Bhatta and Another, AIR 1970 SC 1367 : (1970) 3 SCC 159

Wills - Execution of will and settlement deed attacked as born of undue influence - Contract Act, 1872 (9 of 1872) - Section 16 - Applicability -

Testator of weak health and of advanced age - Negligible provision for wife and corpus to go to one grandson to the exclusion of other grandsons

- Voluntary nature of execution disputed - Burden of proof of genuineness and validity on the person setting up the will - Finding of High Court that

the will was valid reversed in appeal.

(ix) S. Rathnam Naidu and Another Vs. Kanni Ammal and Others, AIR 1972 Mad 413 : (1972) 85 LW 372

14. Veeraswami, J. (as he then was) took into consideration the fact that the settlement deed reserved nothing for the first defendant who had

completely denuded himself of all his properties by executing the settlement deed. After elaborately discussing all these aspect, Veeraswami, J. (As

he then was) held in that case that the donee has not probed the settlement deed and as such the settlement deed is void. The next case cited by

Mr. (Parthasarathi Iyengar is Wajid Khan v. Ewas Ali Akhan, (1886) ILR 13 Cal 545. In that case it has been held that- ""This transaction was

within the well-recognised principle that every onus is thrown upon a person filling a fiduciary character towards another of showing conclusively

that he has acted honestly, and bona fide without influencing the donor, who has acted independently of him"".

The next case cited by Mr. Parthasarathi Iyengar is 44 Mad LW page 255 and the decision is also to the same effect. Then another case cited by

the learned counsel is Powell v. Powell, 1900-1 Ch page 243. In the above decision it has been observed that (pages 245 and 246):-

It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter

impeached the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had

ceased for so long that the donor was under no must show (and the onus is on him) that the donor either was emancipated, or was placed, by the

possession if the independent advice, in a position equivalent to emancipation"".

In Rash Behari Naskar and Others Vs. Haripada Naskar and Others, AIR 1934 Cal 762 : 152 Ind. Cas. 561 , it has been laid down that ""where

the executant of a document had no opportunity to have it cancelled on the ground of undue influence, it is open to his representatives to raise the

defence of undue influence"".

The learned counsel Mr. Parthasarathi Iyengar also cited the decision Mt. Sewti v. Rattam wherein it has been observed that-

Now there is no doubt that the appellant is an old illiterate woman and that the respondent, her only, living relation, has been living with her since

the lifetime of her husband. It has clear therefore that the appellant was completely in the hands of the respondent. The relationship existing

between the parties was therefore sufficient to raise the presumption that the deed in question had been obtained through undue influence which

rendered the fraud possible. This presumption is strengthened all the more by the fact that the gift covers the entire property belonging to the

appellant that being so, it was incumbent upon the respondent to prove, in the words of the aforesaid ruling contained in Inche Noriah binte

Mohamed Tahir vs. Shaik Allie bin Omar115 Ind. Cas. 733 (Privy Council) , that the gift was spontaneous act of the donor acting under

circumstances which enabled her to exercise an independent will. This onus the respondent has failed to discharge"".

(x) Guro (Smt.) Vs. Atma Singh and Others, (1993) 1 DMC 394 : (1992) 2 JT 125 : (1992) 1 SCALE 552 : (1992) 2 SCC 507 : (1992) 2 SCR

30 : (1992) 2 UJ 21

Will - Genuineness - Proof of - Suspicious circumstances - Burden on propounder to remove the suspicion - Held on facts, burden not

discharged and will not proved to be a genuine document - High Court not justified in interfering with findings of fact of the first appellate Court

based on proper appreciation of evidence - Succession Act, 1925, S. 63 - Civil Procedure Code, 1908, S. 100.

(xi) D.R. Rathna Murthy Vs. Ramappa, (2010) 11 JT 398 : (2011) 2 RCR(Civil) 414 : (2011) 1 SCC 158

15. The First Appellate Court failed to appreciate that there was no shara (noting) in respect of interlineations in the sale deed. The respondent

had deposed as under:

At that time there was no mention in respect of conditional sale deed. In front of sub registrar nothing was spoken about the conditional sale deed.

At the time of purchase the suit land was fallen land. After purchase I formed the land and improved its fertility. I spent about 10 to 15,000/- for

the improvement of the land. I grow ragi and ground nut crops. I dig one Well in the suit land. I spent Rs. 20,000/- to dug the Well. Prior to filling

of this suit plaintiff did not approach me with a request to execute sale deed in his favour. No panchayat was held in respect of the suit lands.

Neither witnesses nor scribe intimated me about the Avadhi transaction in respect of suit lands. At the time of change of revenue records the

plaintiff did not file any objections contending that the sale is conditional one. I came to know about the Avadhi only after filing of this suit. I sent

reply notice to the plaintiff''s legal notice. After sale the plaintiff is not related to suit land. I have not agreed for re sale of suit land"".

Had it been a case of conditional sale, the appellant could have asked the respondent to wait for mutation or raise the objection before the

Revenue Authorities in spite of the fact that mutation is a revenue entry and does not refer to the title of the land. Had it been the case of

conditional sale deed enabling the appellant to repurchase the land any time within ten years, the respondent could not have spent huge amount of

his life savings for improving the land, nor would he have dug a Well in the suit land spending twenty thousand of rupees. The aforesaid

circumstances make it clear that the respondent had never agreed for reconveyance.

16. The interlineations had been made at four places in the sale deed. Word ""Avadhi"" had been mentioned at three places in the margin of the sale

deed. The appellant did not attest the said word by putting his signatures at the time of registration. Attestation testifies/certifies the genuineness of

the document. Attestation and execution are different acts, one following the other. Execution includes delivery and signing of the document in the

presence of the witnesses and also the whole series of acts or formalities which are necessary to render the document valid. Attestation of sale

deed is imperative. In the instant case, we find that the animus to attestation remain totally absent. It is settled legal proposition that the document

may be admissible but probative value of the entries contained therein may still be required to be examined in the fact and circumstances of a

particular case. (Vide State of Bihar & Ors. v. Sri Radha Krishna Singh & Ors., AIR 1983 SC 1984; and Bharatha Matha & Anr. (Supra).

(xii) Bharpur Singh and Others Vs. Shamsher Singh, AIR 2009 SC 1766 : (2009) 1 JT 590 : (2009) 1 SCALE 481 : (2009) 3 SCC 687 : (2009)

AIRSCW 1338

Succession Act (39 of 1925), S. 63 - Evidence Act (1 of 1872), S. 68, S. 69, S. 70 and S. 90 - Will - Nature of proof required - Suspicions

circumstances surrounding execution of Will indicated - Propounder must offer reasonable explanation to remove such suspicious circumstances.

(xiii) Dayanandi Vs. Rukma D. Suvarna and Others, (2012) 114 CLT 391 : (2012) 1 CTC 206 : (2011) 4 RCR(Civil) 856 : (2011) 2 SCALE

306 : (2012) 1 SCC 510

17. We have gone through Exhibit P. 1, which was got produced by respondent No. 1 from the appellant. Four corrections have been made on

pages 1 and 2 of this document. The figures written in letters (four) were substituted with numbers (3) and the name of respondent No. 1 was

scored out (page 2). At the end of the Will, the testator appended his left thumb mark. On the right side of thumb mark a line has been written with

the ink pen/ball pen suggesting that the corrections/alterations were made prior to putting of left thumb mark by the testator. However, the space

between the last line of the typed Will (in Kannada) and what was written with the ink pen/ball pen leaves no manner of doubt that the writing on

the right side of the thumb mark was made after execution of the Will. If the corrections/alterations had been made before the testator had

appended his left thumb mark, there was no reason why the line showing deletion of the name of respondent No. 1 and corrections in the figures

were not reflected in the typed Will and why the line was inserted in the little space left between the concluding portion of the Will and the space

where the left thumb mark was put by the testator. Therefore, we approve the view taken by the High Court that the corrections/alterations made

in Exhibit P1 cannot be said to have been duly attested by the testator as per the requirement of Section 71 of the Act and respondent No. 1 is

entitled to share in the property specified in Schedule "B" appended to the plaint.

23. The legal position that proof of Will requires examination of attesting witness even if the execution of will is admitted is a settled one. So far as

settlement deed is concerned, examination of attesting witness would be necessary only in case there is a specific denial regarding execution. So far

as this case is concerned, when the plaintiff issued a notice claiming partition, the defendant did not say in his reply notice that he has a settlement

deed in his favour. Therefore, the plaintiff has no opportunity to dispute the settlement deed in the plaint. However, in the written statement, for the

first time the defendant has opened his mouth to say that there is a settlement deed. Therefore, now the question is whether the plaintiff could have

filed a reply statement disputing the execution of the settlement deed.

24. It would be relevant to consider the original side rules providing for filing of reply statement. Order 5 Rule 3 of the Original Side rules provides

for filing of the reply statement.

Time for reply statement to counter-claim.

3. If the plaintiff intends to defend any set-off or counter-claim by a defendant, he shall file a Written Statement within two weeks after the service

upon him of the defendant''s written statement containing the set-off or counter-claim, or within a further period of five days with the consent of the

defendant or his advocate endorsed on the plaintiff''s Written Statement.

Set off or counter claim how to be filed and tried.

2. A defendant in a suit may set-off, or plead by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or

counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross suit, so as to enable the Court to

pronounce a final judgment in the same suit both on the original and on the cross-claim. But the Court may, on the application of the plaintiff before

trial, if in the opinion of the Court such set-off or counter-claim cannot be conveniently disposed of in the pending suit, or ought not to be allowed,

refuse permission to the defendant to avail himself thereof and direct the same to be tried separately.

A defendant pleading a set-off or counter-claim shall within three days of his filing the same serve the plaintiff or his advocate with a copy of the

written statement containing such set-off or counter-claim.

25. As per rule 2 whether the written statement filed by the defendant can be construed to be counter claim or set off has to be considered.

26. In order to appreciate this question, it is necessary to point out the distinction between a set off and a counter claim. The meaning of set-off as

given in Halsbury''s Laws of England, third edition, volume 34 at page 395.

Meaning of set-off - When A has a claim for a sum of money against B and B has a cross-claim for a sum of money against A, such that B is to

the extent of his cross-claim entitled to be absolved from payment of A''s claim, and to plead his cross-claim as a defence to an action by A for the

enforcement of his claim, then B is said to have to the extent of his cross-claim a right of set-off against A(a).

The word Set-off is defined in Motion''s pocket Law Lexicon, Eight edition wherein it is stated that in an action to recover a money, a set-off is a

cross claim for money by the defendant for which he might maintain a separate action against the plaintiff. Set-off extinguishes the plaintiff''s claim

pro tanto so that the plaintiff can recover against the defendant the balance of his claim after deducting what is due from him to the defendant. In

other words, set-off is a ground of defence, a shield and not a sword, which if established, affords an answer to the plaintiff''s claim, wholly or

protanto. A counter claim as such affords no defence to plaintiff''s claim, but is a weapon of offence which enables a defendant to enforce a claim

against the plaintiff as effectively as in an independent action.

27. Coming to the facts of this case, the claim of the defendant would amount to counter claim as he can maintain an independent action based

upon the settlement deed against the plaintiff. But, the defendant did not ask for any relief for himself, but, instead asked for dismissal of the

plaintiff''s claim alone. Therefore, the plaintiff would not have chosen to file the reply statement. In any event, there are two circumstances which

compelled the defendant to have adduced the evidence regarding the valid execution of the Settlement Deed

a. From the nature of the issues framed, the first defendant could have got a clue that he has to adduce evidence with regard to execution of the

Settlement Deed.

b. The first defendant should have realized his duty to satisfy the conscience of the Court, when the apparent difference in the signature and in the

writings of a particular witness have been brought out during cross examination. The first defendant should have adduced evidence of one attesting

witness when the existence/availability of the witness itself as described in the document was brought out to be an apparent concoction.

28. Therefore, the next question is whether the specific denial should have been taken only in the pleadings or at any stage of the proceedings. As

discussed earlier, the plaintiff has denied execution of the settlement deed in the course of the proceedings.

29. During the course of evidence, the plaintiff has successfully established that the settlement deed could not have been brought into existence in

the manner alleged. Therefore, the cross examination of the plaintiff by the defendant establishes the fact that there is denial with regard to

execution of settlement deed. The defendant ought to have examined atleast one attesting witness. In the absence of the same, the only conclusion

is that the defendant failed to establish the settlement deed by examining the attesting witness. Therefore, the claim of the defendant has to fail and

the claim of the plaintiff has to succeed.

30. In the result, the Civil Suit is decreed granting preliminary decree for partition of plaintiff''s 1/3rd share in the suit property. No costs.