

Seetha Mohanan Vs. Narasingha Shenoy

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Court : Kerala

Decided On : Dec-03-2014

Judge : Honourable Mr.Justice T.R.Ramachandran Nair

Appellant : Seetha Mohanan

Respondent : Narasingha Shenoy

Advocate for Def. : Shri. S.B. Premachandra Prabhu

Advocate for Pet/Ap. : Shri. T.M. Abdul Latheef, Shri. Abdul Latheef

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE
HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR & THE
HONOURABLE SMT. JUSTICE P.V.ASHA WEDNESDAY, THE 3D DAY OF
DECEMBER 2014 12TH AGRAHAYANA, 1936 RFA.No. 101 of 2008 ()
----- AGAINST THE

ORDER

/

JUDGMENT

IN OS5242005 of I ADDL.SUB COURT,ERNAKULAM DATED 0501-2008
APPELLANT(S)/PLAINTIFF: ----- SEETHA
MOHANAN D/O.LATE NARAYANA SHENOY, 40/5695, KALARIKKAL HOUSE

JEWS STREET, BEHIND PADMA THEATRE, ERNAKULAM. BY ADV.
SRI.T.M.ABDUL LATHEEF RESPONDENT(S)/DEFENDANTS:

----- 1. NARASINGHA SHENOY S/O.LATE
NARAYANA SHENOY, 40/5695, KALARIKKAL HOUSE JEWS STREET, BEHIND
PADMA THEATRE, ERNAKULAM.

2. K.N.VENKITESWARA SHENOY, AGED62YEARS S/O.LATE NARAYANA
SHENOY, 40/5695, KALARIKKAL HOUSE JEWS STREET, BEHIND PADMA
THEATRE, ERNAKULAM.

3. K.N.RADHA, AGED69YEARS, W/O.J.D.PAI5902, G.K.AVENUE, SOUTH
GATE PAUDITHAN TEMPLE, COCHIN-2.

4. K.N.VIMALA NAIK, AGED66YEARS W/O.NARAYANA NAIK, 40/5695,
KALARIKKAL HOUSE JEWS STREET, BEHIND PADMA THEATRE,
ERNAKULAM.

5. K.N.PRAMEELA RAJAM, AGED60YEARS D/O.RAJAM, T.D.SANNITHI ROAD,
EAST GATE ERNAKULAM.

6. GEORGE MAMPILLY, MANAGING PARTNER M/S.KERALA TRADERS,
M.G.ROAD, ERNAKULAM.

7. JOSEPH, PROPRIETOR, RANA TRADERS TAILORING HOUSE, BIO
CHEMIC CLINIC, M.G.ROAD ERNAKULAM.

8. PROPRIETOR, JOLLY FILMS, M.G.ROAD ERNAKULAM. (REMOVED) 9.
PROPRIETOR, ASIAN FRIED CHICKEN M.G.ROAD, NEAR PAICO,
ERNAKULAM.

10. JAIRAM BHATT, PROPRIETOR, SEETHAS CROCODILE, GARDEN
VARELLI DEALER, M.G.ROAD ERNAKULAM.

11. P.V.BABU, PROVISION MERCHANT SHENOY'S BUILDING, BASIN ROAD,
ERNAKULAM.

12. THE BRANCH MANAGER, ICICI BANK M.G.ROAD BRANCH, ERNAKULAM.

13. THE MANAGER, STATE BANK OF TRAVANCORE M.G.ROAD BRANCH, ERNAKULAM.
14. THE BRANCH MANAGER, CANARA BANK SHANMUGHOM ROADS, ERNAKULAM.
15. THE BRANCH MANAGER, BANK OF BARODA M.G.ROAD BRANCH, ERNAKULAM.
16. THE BRANCH MANAGER, IDBI BANK M.G.ROAD, ERNAKULAM.
17. THE BRANCH MANAGER DISTRICT CO-OPERATIVE BANK LIMITED ERNAKULAM SOUTH BRANCH, ERNAKULAM.
18. THE BRANCH MANAGER, INDIAN BANK M.G.ROAD BRANCH, ERNAKULAM.
19. THE BRANCH MANAGER, STATE BANK OF INDIA M.G.ROAD BRANCH, ERNAKULAM.
20. MR. B.K.NAGPAL, C/O.MAN MANDIR (PARTNER) M.G.ROAD, ERNAKULAM. (REMOVED) 21. MR. VED, C/O.MAN MANDIR (PARTNER) M.G.ROAD, ERNAKULAM. (REMOVED) 22. DR.JOSE THALIYATH PARTNER OF SWARNA MAHAL, M.G.ROAD, ERNAKULAM.
23. VARGHESE ITOOP, IMPERIAL AGENCIES CONVENT ROAD, COCHIN-682 035.
24. YOGESH, PROPRIETOR, MOCHI SHOE & LEATHER SHOP, XL/7318, K.G.ROAD ERNAKULAM.
25. SHIBU, KRISHNA AGENCIES C/F MADURA COATS, XL/82-20, M.G.ROAD ERNAKULAM.
26. BABU, C/F MADURA COATS, XL/82-19 M.G.ROAD, ERNAKULAM.
27. RENJUITH & SANTHOSH, PROPRIETOR BLUE BAY, CAFE & AFC (FOOD WITH FUN), M.G.ROAD NEAR PAICO, PADMA JUNCTION, ERNAKULAM.

28. K.RADHAKRISHNAN, KRISHNAN & SONS GENERAL MERCHANT, JEWS STREET, ERNAKULAM. R,R10 BY ADV. SRI.DINESH R.SHENOY R,R10 BY ADV. SRI.V.V.UNNIKRISHNAN R,R22 & R24 BY ADV. SRI.C.ANILKUMAR (KALLESSERIL) R,R6 BY ADV. SRI.PETER THARAKAN R,R4 & R5 BY ADV. SMT.R.RANJINI R,R4 & R5 BY ADV. SRI.S.RENJITH R,R12 BY ADV. SRI.KKM.SHERIF R,R12 BY ADV. SRI.LAL K.JOSEPH R,R12 BY ADV. SRI.A.A.ZIYAD RAHMAN R,R12 BY ADV. SMT.SHEENA SAMUEL R,R12 BY ADV. SRI.P.MURALEEDHARAN (THURAVOOR) R,R.1 BY ADV. SRI.G.SREENIVASA PRABHU R,R.1 & R2 BY ADV. SRI.S.B.PREMACHANDRA PRABHU R,R17 BY ADV. SRI.ABRAHAM K.JOHN R,R3 BY ADV. SRI.A.MUHAMMED HASHIM R,R3 BY ADV. SRI.E.N.VISHNU NAMBOODIRI (R8, R20 AND R21 REMOVED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT AS PER

ORDER

IN IIA4392009 DATED 62.2009) THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 29/2014, THE COURT ON 0312-2014, DELIVERED THE FOLLOWING: T.R.RAMACHANDRAN NAIR & P.V. ASHA, JJ.

----- R.F.A.NO.101 of 2008 -----
----- DATED THIS THE TH3D DAY OF DECEMBER, 2014

JUDGMENT

Ramachandran Nair, J.

This appeal is filed by the plaintiff in O.S. No.524/2005 on the file of the Sub Court, Ernakulam. The suit was filed claiming a decree for partition of 1/6th right of plaintiff and for a declaration and for a permanent prohibitory injunction. The declaration sought is to the effect that the will executed by her father is not a valid one. She claimed that the plaint schedule properties are ancestral ones. Respondents 1 and 2 herein are the brothers of the appellant. Respondents 3 to 5 are their sisters.

2. The trial court found that the father of the appellant late Shri Narayana Shenoy had executed a will bequeathing his immovable properties to defendants 1 and 2;

they are his self acquisitions and therefore the properties are not partible. The will was found genuine and properly executed. The trial court accepted the case of defendants 1 and 2 and dismissed the suit. RFA No.101/2008 -2- 3. Before going into the contentious issues raised between the parties, we will summarise the contentions raised by both sides. The parties are referred to as arrayed in the suit. The case pleaded in the plaint in a nut shell is given below: The plaintiff and defendants 1 to 5 are the children of late Shri Narayana Shenoy who died on 1.11.1985. At the time of his death, the mother of the plaintiff and defendants 1 to 5, Smt. Yamuna was alive and she also passed away on 19.8.1999. Late Shri Narayana Shenoy inherited ancestral properties and other properties both movable and immovable from his parents through inheritance and acquisition through the earnings of the parents and the plaintiff and defendants 1 to 5 are Hindus following Mithakshara System of devolution and the plaintiff and defendants 1 to 5 were co-parcenors of the properties scheduled in the plaint. Accordingly, the plaintiff claimed co-ownership over the properties along with defendants 1 to 5. It was also contended that even though some settlement deeds were executed in favour of defendants 1 and 2 by late Shri Narayana Shenoy, those items of properties continued to be co-parcenory properties and the plaintiff is entitled to ignore the said documents.

4. It is further contended that late Shri Narayana Shenoy had no right RFA No.101/2008 -3- to create a document in favour of defendants 1 and 2 as the properties were joint properties and as he was having only one share in the property. Therefore, any document by way of will or otherwise executed by him is not valid or binding on her. The properties continued to be joint properties also. It was further contended that the fourth defendant informed the plaintiff that she is entitled to only for an amount of Rs.20,000/- with interest as provided in the will. Since the deceased was very much affectionate towards his daughters also, he would not have given the plaint schedule properties to defendants 1 and 2 alone, to the exclusion of daughters. It is also pointed out that defendants 1 and 2 used to obtain the concurrence of the plaintiff also while any item of the property was given by way of equitable mortgage. No change in the registry was also effected and therefore defendants 1, 2 and 4 cannot contend that the plaint schedule properties were given by the father to defendants 1 and 2 alone. Even the amount of

Rs.20,000/- has not been given to the plaintiff till the filing of the suit also.

5. It is also contended that even if a will has been executed, it is not a free and voluntary will. Before three years of his death, he was not normal RFA No.101/2008 -4- and was not capable of understanding things and also lost his control over his decision making power, independence, etc. He was an acute asthma patient and was taking heavy doze medicines and hence any will stated to have been executed by him, was not his free will and if any such will is there, it was not a validly executed document and hence it is not binding on the plaintiff. The plaintiff and defendants 1 to 5 are co-owners and if at all a valid will can be executed by her father, he can confine it only to his share over the items.

6. Defendants 1 and 2 have filed joint written statement and raised a counter claim for mandatory injunction as against the plaintiff. They denied the averment that the plaint schedule properties are ancestral items but they are self acquired properties of late Shri Narayana Shenoy, who did not inherit any properties from his parents and all the properties were purchased by him by spending his own funds. The plaintiff and defendants 1 to 5 are not coparceners of plaint schedule properties. Late Shri Narayana Shenoy executed a will on 9.12.1983 in favour of his two sons, viz. defendants 1 and 2. On his death, the rights of late Shri Narayana Shenoy did not devolve upon the plaintiff and defendants 1 to 5. Apart from the same, he RFA No.101/2008 -5- had executed three settlement deeds in favour of defendants 1 and 2, his only sons. They are: document Nos.1385/1970 of S.R.O., Ernakulam in favour of defendant No.1 and document Nos.374/1972 and 1/1975 of S.R.O., Ernakulam, both in favour of defendant No.2. After execution of the documents, defendants 1 and 2 have been enjoying the properties as full owners and they are in exclusive possession of the same and these facts are known to the plaintiff and defendants 1 to 5. The will was registered as No.16/1983 of S.R.O., Ernakulam. It was contended that the execution of the will and registration of the same was also known to the plaintiff and defendants 3 to 5. After the death of Shri Narayana Shenoy on 1.11.1985, defendants 1 and 2 became the absolute owners in possession of his properties as per the terms of the will. The plaintiff and defendants 3 to 5 have not raised any objection regarding the same. The first defendant constructed a building in one of the properties, viz. the property in Sy.

No.419/5 of Ernakulam village, on the western side of M.G. Road, Ernakulam in the year 1989 and a textile business under the name and style "M/s. Sitas" was started by a third party. A portion of the building and undivided interest in 6.625 cents of land comprised in Sy. No.419/5 was RFA No.101/2008 -6- sold by the first defendant to one Shri Jayaram B. Bhat (10th defendant) on 15.11.1999 as per registered sale deed NO.4705/1999 of S.R.O., Ernakulam.

7. As per the direction in the will to give Rs.20,000/- each to the daughters, in the sale deed dated 15.11.1999 an amount of Rs.80,000/- was reserved to be paid to the plaintiff and defendants 3 to 5. Defendants 4 and 5 received the said sum from Shri Jayaram B. Bhat on 10.1.2000 and executed registered receipt No.112/2000 of S.R.O., Ernakulam. Since the plaintiff and defendant No.3 did not receive the amount, Shri Jayaram B. Bhat issued a registered notice on 17.1.2000 to them requesting to receive the amount and issue receipts. Those letters were acknowledged by the plaintiff and the third defendant on 22.1.2000 and 18.1.2000 respectively. But they did not send any reply or come forward to receive the amounts. The second defendant has also constructed a building in the property bequeathed to him. The ground floor is rented out and first floor is meant for his residence. In the light of these facts, defendants 1 and 2 pleaded that the plaintiff and defendants 3 to 5 have knowledge about the execution of the will and the suit is filed without any bonafides.

8. It has also been pointed out that the plaintiff was given in marriage RFA No.101/2008 -7- on 2.12.1982 to one Shri Mohanan who is a resident of Thuravoor and as per the custom in the community, the daughters become members of their husband's family and ceased to be a member of their father's family.

9. The allegation that Shri Narayana Shenoy was not normal and the will was not executed freely and voluntarily has also been denied and it is stated that he was capable of understanding things till death. Thus, it is contended that there is no common property to be divided.

10. As counter claim, defendants 1 and 2 sought a mandatory injunction directing the plaintiff and her family members to vacate the easternmost room in building

No.40/6803 situated in the property scheduled therein. It was contended that the plaintiff and her husband were allowed to reside in the building bequeathed to the first defendant while he was admitted in Sree Sudheendra Medical Mission Hospital, Ernakulam. She is only a permissive occupier.

11. The plaintiff filed a detailed written statement to the counter claim.

12. Defendants 4 and 5 filed a written statement admitting the execution and registration of the will and they supported the case pleaded RFA No.101/2008 -8- by defendants 1 and 2. The third defendant filed written statement supporting the plaintiff. The other defendants are tenants of various buildings. The 7th and 10th defendants filed written statements. The 10th defendant purchased a part of the property from the first defendant by sale deed No.4705 of 1999.

13. Before the court below, the plaintiff was examined as P.W.1 and D.Ws. 1 to 3 were examined in support of the plea of the defendants. D.W.1 is the first defendant and D.W.2 is Dr.T.L.P.Prabhu, one of the attestors of the will and D.W.3 is Shri Jayaraj B. Bhat (10th defendant).

14. On all points the trial court found against the plaintiff and dismissed the suit. The counter claim is partly allowed, directing the plaintiff to vacate the easternmost room in the schedule building.

15. We heard Shri T.M. Abdul Latheef, learned counsel for the plaintiff, Shri S.B. Premachandra Prabhu, learned counsel for defendants 1 and 2 and Shri R. Lakshminarayanan, learned counsel for the fourth and fifth defendants.

16. Before going into the legal arguments raised, we will refer to the details contained in the will. The same is dated 9.12.1983. In the opening RFA No.101/2008 -9- sentence it is stated that Shri Narayana Shenoy had already settled certain items of properties in favour of two sons as per document Nos.1385/1970, 374/1972 and 1/1975. He has made a bequest of all immovable items scheduled in the will, to be enjoyed by his sons freely after his death and that of his wife. Items 1, 2, 3 and 4 of the will deed are set apart for the elder son and items 5 and 6 to the second son. In clause 4 it is specified that his wife Smt.

Yamuna and his sister Ganga Babi can reside in the residential building, wherein he is residing till their demise. The elder son will have to meet the expenses towards their care and protection including food as long as they reside together. In clause 5 it is provided that if his wife survives him, within one year of her date of death and otherwise, within one year of his death, the elder son will have to pay Rs.20,000/- each to their daughters Radha, Vimala, Prameela and Seetha and it is further provided that payment to the elder daughter Radha should be made within one year, to the second daughter Vimala within two years, to the third daughter Prameela within three years and to the fourth daughter Seetha within four years from the date of his death. The elder son will have to give Rs.500/- every month to his mother from the date of his death. It is further RFA No.101/2008 -10- provided that if the elder son defaults in complying with any of the conditions, the same will be charged on the properties set apart to him and they can realise it with interest specified in the will itself. In Clause 6, a similar provision has been made making the second son liable to pay amounts to the four sisters at the rate of Rs.20,000/- each and that too within the same period. It is also specified that he should provide Rs.500/- per month to the mother from the date of his death, throughout her life. Similar provision has been made allowing them to realise the amounts from the properties charged, if he commits default in the matter. For conducting the religious obsequies annually of the testator, his wife and his sister, it is provided that both the sons together should equally share the expenses and conduct the same also. If only one person is sharing it, the share due from the other can be realised from the properties set apart for him and the said amount will be a charge on them. Clause 8 relates to the conduct of various poojas in Thirumala Devaswom which also will have to be done by both the sons by meeting the expenses in alternate years. If any default is committed by either of them, the other son can expend amounts for the same and the said amount can be charged on the properties and thus be realised. In clause RFA No.101/2008 -11- 9 it is provided that if any items of properties are left at the time of his death, movable or immovable, the same can also equally be enjoyed by the two sons. The schedule contains different items of properties. It is provided that the will takes effect on his death and he has signed in the presence of witnesses and the witnesses have signed in his presence.

17. We find from the judgment of the trial court that the court rejected the contention of the appellant/plaintiff that the properties are ancestral properties. The plaintiff had produced Ext.A6 to A9 title deeds in favour of the deceased Shri Narayana Shenoy relating to items 1, 2 and 4 of the plaint schedule properties which will go to show that they are properties purchased by deceased Shri Narayana Shenoy himself. Exts.B1 to B3 are the settlement deeds in their favour. As far as this appeal is concerned, learned counsel for the appellant submitted that the said question is not being re-agitated and the larger issue whether the will is valid or not will have to be considered. Learned counsel for the appellant raised the following arguments:

18. It is submitted that the appellant is disputing the execution of the will, as there are strong suspicious circumstances. It is submitted that the RFA No.101/2008 - 12- deposition of P.W.1 shows that different suspicious circumstances have been spoken to by her. Our attention was invited to the deposition of P.W.1 in this context. Learned counsel submitted that defendants 1 and 2 have availed loans from banks by mortgaging the plaint schedule properties and after obtaining concurrence by the sister alone, such loans have been obtained. They have not produced the will before any authorities concerned. Even the amounts reserved to be paid to them have not been given which evidence the fact that no will deed has been executed by the father. It is also submitted that even though Exts.B7 to B9 have been produced by the defendants 1 and 2, nothing is referred to therein about the will. Thus, the will deed was not brought into light at all prior to the suit.

19. According to the learned counsel, as far as the execution of the will deed is concerned, the testator normally will have to deal with his existing properties. Herein, various amounts have been earmarked to the daughters, that also to be payable by defendants 1 and 2 and not from any of the funds available with the father at that point of time. This itself is a suspicious circumstance.

20. Learned counsel submitted that the active participation of the RFA No.101/2008 -13- beneficiary in execution of the will deed itself is a suspicious circumstance, that also when natural heirs have been excluded. The evidence is to the effect that the first defendant had knowledge about the contents of the will and

he accompanied the testator to the Sub Registry Office also.

21. It is further submitted that there is no evidence to show that defendants 1 and 2 have paid any land tax to the properties and no documents are available before the court. Learned counsel further submitted that as far as the sound disposing mind of the father is concerned, no evidence has been adduced by the first defendant to prove the same.

22. He submitted that the principles as regards proof of a will have been laid down by the Apex Court in H. Venkatachala Iyengar v. B.N. Thimmajamma (AIR 1959 SC443). There should be evidence as regards the state of mind and other factors. These factors will have to be proved by the propounder of the will. Herein, the evidence regarding the same is shaky. It is also stated that even with regard to the notices sent as per Exts.A1 and A2, those have not been replied by defendants 1 and 2 which will show that actually there was no valid will executed. The will has not been brought to light immediately after the death of the father also. RFA No.101/2008 -14- 23. Even with regard to the attestation of the will, learned counsel submitted that the attestation has not been proved properly. Learned counsel took us through the evidence of D.W.2 and stated that with regard to the vital aspects concerning the attestation of the will and other factors, evidence is not sufficient. Even with regard to the attestation of the will, the sequence of events under which the testator executed the will, has not been explained properly.

24. It is further submitted that even with regard to the provisions of the will like payment to the mother, offerings in temples, meeting expenses for conducting religious rites, etc., no evidence has been adduced.

25. In this context, learned counsel submitted that evidence of D.W.1 is insufficient to show that the testator has understood the dispositions of the will. There is no evidence to show that D.W.2, the doctor has seen the testator signing the will. Therefore, pleadings are not clear and even after the death of the father no proper steps have been taken to show that mutation has been effected in their names. It is submitted that one of the attestors is an Advocate but he was not examined. The evidence of D.W.1 will show that there were discussions between him and the

father which will RFA No.101/2008 -15- also vitiate the execution of the will. Learned counsel for the appellant relied upon the following decisions of this Court and the Apex Court. "H. Venkatachala Iyengar v. B.N. Thimmajamma (AIR 1959 SC443, C. Mohammed Yunus v. Syed Unnissa and others (AIR 1961 SC808, Ramachandra Rambux v. Champabai and others (AIR 1965 SC354, Surendra Pal and others v. Dr. (Mrs) Saraswati Arora and another (AIR1974 SC1999, Gorantla Thataiah v. Thotakura Venkata Subbaiah and others (AIR 1968 SC1332, Smt. Jaswant Kaur v. Smt. Amrit Kaur & others (AIR 1977 SC74, Smt. Kavita v. State of Maharashtra and others (AIR 1981 SC2084, Kalyan Singh v. Smt. Chhoti and others {(1990) 1 SCC266, Ram Piari v. Bhagwant and others {(1990) 3 SCC364, Varghese v. Oommen (1994 (2) KLT620, Joseph v. Ippunny, (2007 (4) KLT853, Benga Behera and another v. Braja Kishore Nanda and others {(2007) 9 SCC728, Anil Kak v. Kumari Sharada Raje and others {(2008) 7 SCC695, Balathandayutham and another v. Ezhilarasan {(2010) 5 SCC770 and Mahesh Kumar (dead) By Lrs. v. Vinod Kumar and others {(2012) 4 SCC387.

26. Shri S.B. Premachandra Prabhu, learned counsel for defendants 1 and 2 mainly submitted that the plaint schedule items are not family properties. The title deeds of the properties acquired by the deceased father RFA No.101/2008 -16- of the parties have been produced before the court as Exts.A6 to A9 by the plaintiff and Exts.B1 to B3 by the defendants and all of them will show that the properties are self acquired properties. Therefore, the plaintiff's contention that she is a co-owner and therefore entitled for partition falls to the ground.

27. Learned counsel referred to in detail the schedule of properties contained in the plaint. Plaint schedule item No.1 is part of a large extent of 22 cents. It was acquired as per Ext.A6 and in 1972 by Ext.B2 6 cents was gifted to the second defendant and balance 14 cents have been included in the will as item No.1. Item 2 is 3 cents which has been given to the first defendant as per the will and item 3 is adjacent to item 2. Item 4 is 12 cents of property facing M.G. Road and 5 3/8 cents has been gifted to the second defendant by Ext.B2 in 1972 and balance is 6 = cents which has been bequeathed to the first defendant by the will. Item 5 is 7 cents with an old building in M.G. Road. Out of this, 4 and < cents and the building was settled in favour of the first defendant by Ext.B1 in 1970. By Ext.B3, the

deceased settled upper floor portion of the nearby building to the second defendant and the remaining land which the father retained including RFA No.101/2008 -17- ground floor has been bequeathed to the second defendant. It is submitted that four daughters including plaintiff were given in marriage. She was a teacher and was in Thuravoor in her husband's house till 1994. It is also submitted that even P.W.1 admitted that the father was healthy. It is clear that he was not treated for any particular ailment. In this context, learned counsel referred to paragraphs 9 and 12 of the plaint.

28. With regard to the will executed, learned counsel submitted that it is clear from the will that he had taken into consideration the interest of the legal heirs in the family. He has set apart amounts especially for wife and directed that both sons should pay to the mother Rs.500/- each every month, right of residence for the sister of the testator was specified and he bequeathed immovable assets and the sons have been directed to pay Rs.20,000/- each to their sisters. It is submitted that the dispositions are in tune with the financial capacity. The wife died in 1999. Apart from the same, the payments are charged on the properties. Thus, it is submitted that the recitals are natural as there is disposition in respect of all the legal heirs. It is important to notice, according to the learned counsel, that even belated payments invite payment of interest. RFA No.101/2008 -18- 29. On 19/9/2000 the first defendant sold to defendant No.10 some items and another portion to the mother of defendant No.10. In the sale deed reservation has been made in respect of Rs.80,000/- to be paid to four daughters and payments to defendants 4 and 5 were made on a registered receipt. The 10th defendant sent notice as Ext.B5 to plaintiff and third defendant and B6 is the acknowledgment card evidencing receipt of the same by the plaintiff. Ext.B13 is the acknowledgment card received from the third defendant. The suit is filed after five years of Ext.B5 and no reply was given to the 10th defendant also. Learned counsel submits that as regards the amounts to be given to the sisters, charge was created by the father in the will and hence the bank insisted for their signatures in the said circumstance.

30. Learned counsel further submitted that part of the residential property has been given to the second defendant wherein he has constructed a two storied

building and in the upper floor he is residing and the ground floor is rented out. Ext.B7 is the possession certificate dated 3.9.1997 in respect of 14.5 cents in Sy. No.421/2 wherein the will is mentioned. It is issued in favour of the first defendant and Ext.B8 is the certified copy of the RFA No.101/2008 -19- order in RCP No.105/97 of Addl. Munsiff and Rent Control Court, Ernakulam wherein the second defendant is the petitioner and the respondent therein was ordered to be evicted. Ext.B9 is the building permit issued in favour of the second defendant. It is therefore clear that they were acting upon in tune with the dispositions in the will. It is also submitted that the third defendant alone supported the plaintiff whereas defendants 4 and 5 supported defendants 1 and 2. The third defendant did not mount the box to depose in favour of the plaintiff.

31. It is submitted that D.W.2 is the family doctor who is well competent to speak about the state of health of the deceased. His evidence in chief examination will show that the deceased was in sound and perfect state of mind. He was examined about 24 years after the execution of the will and animus attestandi is evident from his deposition. Learned counsel emphasised the fact that the signature of the testator will show that it is unshaken which is so clear from Ext.B4 and the settlement deeds, Exts.B1 to B3. D.W.2 had deposed that he has seen the testator signing. The other witness signed in his presence. With regard to the general health of the testator, he has stated that he was healthy. There was no suggestion in the RFA No.101/2008 -20- cross examination that D.W.2 signed before the testator signing whereas the deposition is that the testator asked him to sign. Therefore, it is submitted that the formalities under Section 63 of the Indian Succession Act and Section 68 of the Evidence Act are evidently satisfied. The propounder has discharged his burden by proving attestation and in tune with Section 68 of the Evidence Act. The points for determination are: (i) Whether the deceased had executed the will, Ext.B4 voluntarily and he was in sound mental condition at the relevant time; (ii) Whether the propounder has discharged the burden in proving the execution of the will and it was validly attested; and (iii) Whether the plea of the appellant that there are suspicious circumstances to invalidate the will is correct or not.

32. With regard to the legal aspects, it is submitted that it is not the law that wherever there is deprivation as regards one of the legal heirs, it will be a suspicious circumstance. Learned counsel relied upon the following decisions in support of his arguments. Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee (AIR 1964 SC529, Velayudhan Nair v. Kalliyankutty Amma RFA No.101/2008 -21- (2006 (1) KLT884, Joseph v. Ippunni (2007 (4) KLT853, Savithri v. Karthyayani Amma (2007 (4) KLT811- SC), Ajay P. Ashjer v. Kirit P. Asher (2011 (3) KHC288 and M.B. Ramesh (D) By Lrs. v. K.M. Veeraje Urs (D) by Lrs. (2013 (2) KLJ797." 33. Shri Lakshminarayanan, learned counsel appearing for defendants 4 and 5 also supported the arguments of defendants 1 and 2 and he has also relied upon the following judgments: "Bharwada Bhoginbhai Hirijibhai v. State of Gujarat (AIR 1983 SC753, S. Sundaresa Pai and others v. Sumangala T. Pai and another (AIR 2002 SC317 and Ramabai Padmakumar Patil v. Rukminibai Vishnu Vekhande and others {(2003) 8 SCC537" 34. Learned counsel appearing for the respondents therefore submitted that herein the execution of the will has been properly proved and no suspicious circumstances have been established also. Importance should be given to the terms provided by the testator in the will, going by which the plaintiff is entitled to receive an amount of Rs.20,000/- each from defendants 1 and 2. Learned counsel Shri Premachandra Prabhu also submitted that the plaintiff was married away and was residing at Thuravoor for a long time and only in connection with her husband's illness RFA No.101/2008 -22- she started residing at Ernakulam. It is submitted that the 10th defendant had issued notice to her to receive the amount, but still there was no reply also.

35. The important judgment of the Apex Court relied upon by learned counsel on both sides is Venkatachala Iyengar's case (AIR 1959 SC443 to support their respective arguments. Regarding proof of wills, the Apex Court has clearly laid down the principles to be followed whenever question arises before the court concerned. In paragraph 18 of the judgment their Lordships examined the provisions under Sections 67 and 68 of the Evidence Act as well as Sections 59 and 63 of the Indian Succession Act. It was held that the question as to whether the will set up by the propounder is the last will of the testator, has to be decided in the light of the provisions under Sections 59 and 63 of the Indian Succession Act. The broad questions will be: Has the testator signed the will? Did he understand

the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? For advantage, we extract paragraph 18 hereunder:

"8. What is the true legal position in the matter of proof of wills It is well known that the proof of wills presents a recurring topic RFA No.101/2008 -23- for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his RFA No.101/2008 -24- presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will Did he understand the nature and effect of the dispositions in the will Did he put his signature to the will knowing what it contained Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the

proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribe by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters." In paragraph 19, their Lordships laid down, as to how the propounder will have to adduce satisfactory evidence on these aspects. It was held as follows: "The propounder would be called upon to show by satisfactory RFA No.101/2008 -25- 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." The next question considered in paragraph 20 is as to how the matters have to be dealt with when suspicious circumstances are alleged. We extract the whole paragraph hereunder: "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 RFA No.101/2008 -26- 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." 36. Learned counsel for the appellant Shri Abdul Latheef relied upon paragraph 21 of the judgment to support his argument that when the propounder himself has taken an active and prominent part in the execution RFA No.101/2008 -27- of the will, it will be a suspicious circumstance. He relied upon the following sentence in that paragraph: "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." In paragraph 22 their Lordships expressed the view that "no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence." 37. Shri Premachandra Prabhu, learned counsel appearing for defendants 1 and 2 also submitted that the Supreme Court has only cautioned that all the aspects will have to be considered in the proper manner by the court and it cannot be assumed that there is a suspicious circumstance, merely on the plea that propounder was present at the time of RFA No.101/2008 -28- execution of the will. It is submitted by the learned counsel that herein the evidence is otherwise and therefore no reliance can be placed on the said paragraph by the learned counsel for the appellant.

38. In Kalyan Singh v. Smt. Chhoti (AIR 1990 SC396 the above principles were reiterated. It was held in paragraph 20 as follows: "In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and

contents of the documents itself." Shri Abdul Latheef relied upon the following portion in paragraph 22 in support of his pleas: "The will in the present case, constituting the plaintiff as a sole legatee with no right whatever to the testator's wife seems to be unnatural. It casts a serious doubt on genuineness of the will. The will has not been produced for very many years before the court or public authorities even though there were occasions to produce it for asserting plaintiff's title to the property. The plaintiff was required to remove these suspicious circumstances by placing satisfactory material on record. He has failed to discharge his duty. We, therefore, concur with the conclusion of the High Court and RFA No.101/2008 -29- reject the will as not genuine." 39. The following are some of the decisions relied upon by Shri Abdul Latheef, learned counsel for the appellant:

1. Ramachandra Rambux v. Champabai and others (AIR 1965 SC354 lays down the very same principles after relying upon Venkatachala Iyengar's case (AIR 1959 SC443. It was held that while assessing the credibility of the witnesses, it is open to the court to look into the surrounding circumstances. Reference was made by the learned counsel to the discussion of evidence in the said case.
2. Gorantla Thataiah v. Thotakura Venkata Subbaiah and others (AIR 1968 SC1332. In paragraph 6 it is stated as follows: "If, however, the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the court should proceed in a vigilant and cautious manner." Paragraph 7 and its conclusions were also relied on. RFA No.101/2008 -30-
3. Surendra Pal and others v. Dr. (Mrs) Saraswati Arora and another (AIR 1974 SC1999 wherein it has been held as follows: "But where there are suspicious circumstances the onus will be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine; and where the caveator alleges undue influence, fraud and coercion the onus is on him to prove the same."

4. Smt. Jaswant Kaur v. Smt. Amrit Kaur and others (AIR 1977 SC74- Paragraph 8, wherein it was held that "the burden lies on the party who fail in the suit if no evidence were led on the fact alleged by him. Accordingly, the defendant ought to have led satisfactory evidence to prove the due execution of the will....."

4. Ramji Dayawala & Sons (P) Ltd. v. Invest Import (AIR 1981 SC2085 - Paragraph 16 wherein it was held as follows: "Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document, if the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would RFA No.101/2008 -31- not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue."

5. Ram Piari v. Bhagwant and others {(1990) 3 SCC364 - paragraph 4 wherein it was held as follows: "Even though it cannot be said to be hard and fast rule yet when disinheritance is amongst heirs of equal degree and no reason for exclusion is disclosed, then the standard of scrutiny is not the same and if the Courts below failed to be alive to it as is clear from their orders then their orders cannot be said to be beyond review."

6. Varghese v. Oommen (1994

(2) KLT620 wherein various principles have been discussed by a Division Bench of this Court.

7. Benga Behera and another v. Braja Kishore Nanda and others {(2007) 9 SCC728 wherein, in paragraph 40 the law regarding proof of execution of a will has been discussed and the general principles stated have been laid down in detail.

8. Anil Kak v. Kumari Sharada Raje and others {(2008) 7 RFA No.101/2008 -32- SCC695. In paragraph 49 it was held as follows: "The proving of execution of a will does not only mean proving of the signatures of the executors and the attesting

witnesses. It means something more. A will is not an ordinary document. It although requires to be proved like any other document but the statutory conditions imposed by reason of Section 63(c) of the Act and Section 68 of the Evidence Act cannot be ignored." Learned counsel also relied upon paragraphs 51 to 55. It was held in paragraph 55 that "unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation." 9. *Balathandayutham and another v. Ezhilarasan* {(2010) 5 SCC770. In paragraph 14 it was held as follows: "In a case where the testator's mind is feeble and he is debilitated and there is not sufficient evidence as to the mental capacity of the testator or where the deposition in the will is unnatural, improbable or unfair in the light of the circumstances or it appears that the bequest in the will is not the result of the testator's free will and mind, the court may consider that the will in question is encircled by suspicious circumstances." Learned counsel also relied upon paragraph 10 of the above judgment.

10. *Mahesh Kumar (dead) By Lrs. v. Vinod Kumar and RFA No.101/2008 -33-* others {(2012) 4 SCC387 - paragraphs 30 and 34; and 11. *Kalyan Singh v. Smt. Chhoti and others* {(1990) 1 SCC266(paragraph 22).

40. Apart from relying upon the judgment of the Apex Court in *Venkatachala Iyengar's case* (AIR 1959 SC443, learned counsel appearing for respondents 1 and 2 relied upon the decision of the Apex Court in *Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee and others* (AIR 1964 SC529 by a Constitution Bench wherein also the Apex Court relied upon the judgment in *Venkatachala Iyengar's case* (AIR 1959 SC443. In paragraph 5 it has been held as follows: "The fact that the will in dispute is a holograph will and admittedly in the hand of the testator and in the last paragraph of the will the testator had stated that he had signed the will in the presence of the witnesses and the witnesses had signed it in his presence and in the presence of each other raise strong presumption of its regularity and of its being duly executed and attested. If there is hardly any suspicious circumstance attached to the will it will require very little evidence to prove due execution and attestation of the will." 41. The next decision is by the Apex Court in *Savithri v. Karthyayani Amma* (2007 (4) KLT811- SC). In paragraphs 14 to 19 *RFA No.101/2008 -34-* various judgments of the Apex Court

have been discussed. It has been held in paragraph 19 that "deprivation of a due share by the natural heirs itself is not a factor which would lead to the conclusion that there exist suspicious circumstances. For the said purpose, as noticed hereinbefore, the background facts should also be taken into consideration." 42. The next one is of the Apex Court in *M.B. Ramesh (D) By Lrs. v. K.M. Veeraje Urs (D) By Lrs. & others* (2013 (2) KLJ797- SC). (Paragraph 18). Learned counsel also relied upon the decision of a learned Single Judge of this Court in *Velayudhan Nair v. Kalliyankutty Amma* (2006 (1) KLT884) wherein in paragraph 13 it has been held that "denial of property to natural heirs or uneven distribution of assets among the heirs under a will etc. do not by themselves constitute suspicious circumstances. The very purpose behind the execution of a will is to disturb the natural order of succession and therefore there cannot be anything unusual about it." He also relied upon the following sentences in paragraph 9 in this context: "The only reason attributed in support of the alleged testamentary incapacity of Velu Nair was asthma and stomach-ache which can RFA No.101/2008 -35- hardly be valid reasons to affect the cognitive faculties of a person. What the law requires is a sound state of mind which is different from a sound state of health. It is not the requirement of law that the testator should have a perfect health." The last of the decisions is *Ajay P. Asher v. Kirit P. Asher and another* (2011 (3) KHC288 wherein the entire case law has been discussed in detail.

43. Shri R. Lakshmi Narayanan relied upon a decision of the Apex Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* (AIR 1983 SC753 to contend for the position that while appreciating evidence much importance cannot be given to minor discrepancies.

44. The next decision relied upon is *S. Sundaresa Pai and others v. Mrs. Sumangala T. Pai and another* (AIR 2002 SC317 wherein it was held that uneven distribution of assets amongst children by itself, cannot be taken as suspicious circumstance and the will not giving anything to widowed daughter, is not unnatural. He also relied upon another decision of the Apex Court in *Ramabai Padmakar Patil (dead) through Lrs. and others v. Rukminibai Vishnu Vekhande and others* {(2003) 8 SCC537 for advancing the same principle. RFA No.101/2008 -36- 45. Now we will come to the main aspects. Even though before the court

below it was contended by the appellant/plaintiff that the properties scheduled are not separate properties of deceased Shri Narayana Shenoy, the finding of the court below is otherwise. Before us also, learned counsel for the appellant Shri Abdul Latheef submitted that the main aspect to be gone into is whether there is a valid will. Therefore, we proceed to consider the same.

46. We have already noticed the case of the plaintiff in the plaint. The main relief sought for is for partition of the plaint schedule properties by passing a preliminary decree declaring the 1/6th share of the plaintiff. The third relief is to grant a declaration that the will alleged to have been executed by the deceased Shri Narayana Shenoy is not a validly executed document. As regards the will, the averments disputing its validity are contained in paragraph 12 of the plaint. The following are the aspects pointed out: (i) Defendants 1 and 2 did not send any reply to the notices for separate division; (ii) When they took loan from the bank, they used to obtain concurrence of the plaintiff while giving the property by way of equitable mortgage; (iii) No change in registry was effected so far; (iv) The RFA No.101/2008 -37- plaintiff was not given the amount of Rs.20,000/- by defendants 1 and 2; (v) The will executed is not a free and voluntary will; (vi) The deceased was not capable of executing such a will, since three years before his death, he was not normal and was not capable of understanding things and also lost his control over his decision making power, independence, etc.; and (vii) He was an acute asthma patient and was taking heavy dose medicine and hence any will stated to be executed by late Shri Narayana Shenoy was not his will at all.

47. In the proof affidavit filed by P.W.1, viz. the plaintiff, what is stated in paragraph 8 is that loans have been taken with the signature of other daughters; the will has not been produced before any authority, Rs.20,000/- has not been disbursed to her by defendants 1 and 2; the will has not been executed with the consent and true willingness of the late father; during his lifetime he had never expressed any idea to execute a will; before three years of his death, he had lost his mental capacities and was unable to understand things and that he had memory loss and was unable to recognize even his children. He was also unable to take any decision on his own and that as he was taking lot of medicines for asthma and the will deed RFA No.101/2008 -38- has not been properly executed.

Going paragraph 2 of the proof affidavit, she has stated that she has been residing along with her husband and children as well as defendants 1, 2 and 4 and their children in their family house. The first defendant is not having children and the second defendant has constructed a residential building and is residing there now. Defendants 3 and 5 are residing along with their husbands in separate residential buildings. Except the family house, in the remaining items buildings are there, which have been given on rent. She has given the details of the amounts being received as rent and has stated that the rent is being collected by defendants 1 and 2 for various buildings and amounts are being deposited in different banks.

48. In Ext.B4 there are two attesters, viz. Shri S.K. Brahmanandan, Advocate, Ernakulam and Dr. T.L.Prabhakara Prabhu, Convent Road, Ernakulam. After the testator signed, the witnesses have signed in the following order: (1) Shri S.K. Brahmanandan and (2) Dr. T.L.P. Prabhu. Shri S.K. Brahmanandan has signed against the words "prepared by", below the signature of Dr. T.L.P. Prabhu. The handwriting is of one Shri Rishikesh who has signed after the signature of Shri S.K.Brahmanandan RFA No.101/2008 -39- and below it, the testator has again signed. The testator's signature is there in all the pages. He has given his signature after writing his full name in Malayalam as "K.K. Narayana Shenoy". His signature is very clear and is not shaken on any of the pages of Ext.B4. There is also no contention that it is not his signature. In the concluding part of the will before the schedule, it is stated by the testator that unless it is cancelled, it will be his last will; it will come into effect after his death and that in the presence of witnesses he has signed and the witnesses have signed in his presence.

49. To prove the attestation of the will, Dr. T.L.Prabhakara Prabhu has been examined as D.W.2. We will examine his evidence in detail. In chief examination he has stated that he knew the deceased Shri Narayana Shenoy and is aware that he has written a will deed. He identified his signature in Ext.B4 and also stated that it is the same will executed by deceased Shri Narayana Shenoy. To a question whether he has signed the same as attester, he answered "yes". He has signed as the second witness and his name has been written in his own handwriting and the first witness is Shri S.K. Brahmanandan. Both of them saw Shri Narayana Shenoy putting his signature. He has deposed that both the witnesses have signed in RFA

No.101/2008 -40- the presence of deceased Narayana Shenoy and the testator has seen both of them signing. To a specific question as to the physical and mental state of deceased Narayana Shenoy, it is answered that he had some physical problems, but his mental condition was stable. Regarding the physical ailments, it is stated that he had some complications due to asthma and heart problems. To a specific question whether he has signed the will voluntarily, he answered "would be". He volunteered to state that there was no force. According to him, in tune with the request made by the deceased it was signed by them. When he went to the house of Narayana Shenoy, the Advocate was present there. It is also deposed that it was signed in the residential house of Shri Narayana Shenoy.

50. In the cross examination of the plaintiff, he answered that at the time of execution of the will deed, he was working in Sudheendra Hospital and he has no qualification to treat mental problems. To a specific question as to the period from which he was treating Shri Narayana Shenoy, reckoned from the date of the will deed, he stated that it was from 1976 and the will deed was executed during 1981 - 1983 period. He deposed that the treatment records are not available now with him. He was asked whether he RFA No.101/2008 -41- could recollect any specific date just close to the date of the will either before or after, on which date he had treated the deceased and he answered in the negative and stated that now vague memory alone is there. He answered that Shri Narayana Shenoy requested him to put his signature in the will deed. According to him, there is no special reason for making the said request. To a specific question, he answered that the will deed was prepared by Shri S.K. Brahmanandan. To a specific question whether he has any idea about the time the will deed was prepared, he answered "no". He was asked whether Shri Brahmanandan was his lawyer also and he answered that "not at that time". He was asked whether Shri Brahmanandan was the lawyer of Shri Narayana Shenoy and he answered that it may be, but he has not thought of about it. He further deposed that he put his signature in the place shown by them and he signed after writing his name. He did not read through it. A specific question was asked as to who all were there in the house at the time of putting his signature. He stated that wife and children were there. Even though he was asked as to whether he remembers them by names, he answered "no". He was asked

about the period of death of Shri Narayana Shenoy. According to him, Narayana RFA No.101/2008 -42- Shenoy died a period of time thereafter due to cardiac arrest. He was asked whether he knows about the specific conditions in the will deed and about the properties, to which he answered in the negative. To a specific question as to whether he was aware that Narayana Shenoy had memory power at that point of time, he answered "yes". He further stated that he remembers that he had capacity to talk on matters. He was asked as to who all had signed before he put his signature and he answered that he would have signed after Shri Narayana Shenoy and Advocate Brahmanandan signed. To a specific question whether he remembers who had signed first, he answered that they have signed in the sequence in which their names are seen. To a specific question whether he had talked anything about the family matters of Narayana Shenoy, he answered in the negative. He did not go to the Office of the Sub Registrar also. He knew Vimala who told him first he will be examined in the case as a witness. Copy of the will deed was shown by the first defendant two weeks before. To the last question whether he has seen the deceased reading through the will and its contents, he answered in the negative.

51. The first defendant was examined as D.W.1. with regard to the RFA No.101/2008 -43- execution of the will various aspects have been spoken to by him in his cross-examination. He was asked whether he remembers matters as at the time of execution of the will deed. According to him, he had gone along with the father to the Registrar's Office at the time of registration of the will deed and one Shri Rishikesh was the witness there in whose handwriting the will was prepared. It was registered two months after the execution. During that period among the children, he was mingling with his father. He was asked whether the father had talked over the matter to him before the execution of the settlement deed and he stated that he knew from his mother and the father takes the decisions on his own. According to him, he knew about the execution of the will deed when he went along with the father to the Registrar's Office and he was not aware about the contents of the same. To a specific question as to who prepared it, he answered that it was prepared by Shri Brahmanandan. He knew that his father was discussing certain matters with Shri Brahmanandan and once Shri Brahmanandan was called to their house by the father through him. To a specific

question whether he had given all instructions in the matter, he answered in the negative and stated that the will deed was prepared by the RFA No.101/2008 -44- father without any persuasion from anybody and he knew only the matters as told by the mother.

52. In answer to a question whether the will was prepared on the same day when Shri Brahmananthan was requested to come, he answered that it was prepared within a span of 2-3 days as per the details given by the father. Shri Brahmanandan was known for a period of 10 to 30 years. At the time of preparing the Will all the family affairs were being looked after by the father himself. DW1 had known Sri.Brahmananthan even before the time the Will was prepared and himself and Dr. T.L. Prabhakara Prabhu had studied together. He added that he is their family doctor and that he is much famous also. To a specific question as to who insisted him to be a witness, DW1 answered that Dr. T.L. Prabhakara Prabhu was requested to come to the house as directed by the father to be a witness to the will. The doctor was taken to the house by him. To a specific question whether the father had any special consideration or attitude towards him, he answered that all the children were equal to the father. The father had acute asthma as well RFA No.101/2008 -45- as blood pressure. He had asthma for a long time, but he had been taking treatment only for a period of three to four years before his death and he was not being admitted in the hospital also. Usually DW1 was taking him to the doctor and his brother was not usually looking after such matters even though he will not keep away from it, but will abide if he is asked to do. He was asked a specific question whether he was involved in matters concerning the registration of the will, he answered that all the decisions were taken by the father. A specific question was put to him whether it was registered as per his insistence, to which he answered in the negative. He was asked whether the father had the required health to go to the office of the lawyer or Hospital and he answered in the positive. The father was conducting a tea shop earlier. He was asked whether going by the terms of the will deed and the value of the properties assigned to him and the second defendant, he had obtained more valuable properties, which he denied and according to him both are having equal value. Three items of properties were ear marked for him and one to his brother and all the other items were RFA No.101/2008 -46- settled and given as per the settlement deeds even while the

father was alive. He also deposed that the properties ear marked to defendants 1 and 2 are having equal importance to those bequeathed to him and they are properties facing the M.G. Road. But two other properties are not on the side of M.G. Road, but are in the market road and in the Basin road. He was asked whether the sisters were given any notice about the will and he answered that copies of the same were furnished to all the four sisters after the death of the mother directly by him. Only two sisters namely the plaintiff and K.N. Radha did not receive the amount of Rs. 20,000/- even though K.N. Radha stated that she is prepared to accept it. To a question whether he had issued any notice to any of the sisters asking them to receive the amount ear marked by the father, he answered that such a notice was issued to the plaintiff and to the others, it was orally communicated. According to him, notice was issued to the plaintiff after the death of the mother on 19-8-1999. To a specific question whether Ext.B4 was produced before any other authorities, he answered that it was produced before the Registrar's office as well as RFA No.101/2008 -47- village office and the Village Officer issued possession certificate during 1997 as per it. He was asked whether the Village Officer had conducted any enquiry and he answered that the will was directed to be produced and as per it the possession certificate was issued. He also deposed that the properties were acquired by the father by conducting business in tea shop and he has not inherited anything from the grandfather. He denied the suggestion that father stopped the tea shop due to loss of memory and deterioration of his health. He was not bedridden at the time of execution of the will and had not even cataract in the eyes. He died due to old age alone and was aged 75 at the time of death. In his deposition he has spoken in detail about every items of properties covered by Exts.A6 to A9, B1 to B4, other matters concerning the transactions done, applications filed, loans availed of, etc., details of rent being received, properties possessed and enjoyed separately by second defendant, etc. etc.

53. DW3 was examined to support the case of the defendants that he purchased the extent of 6.625 cents of land in Sy.No.419/5 and RFA No.101/2008 -48- the building therein by Registered Deed No.4705/1999. It is an item of property covered by the will deed and the prior title document was marked as Ext.B10. He has also deposed before the Court that he had issued notices to the sisters

including the plaintiff to receive the amount at the rate of Rs. 20,000/- set apart in the will deed. Notice dated 17/1/2000 issued to the plaintiff and the third defendant was marked as Ext.B5. Exts.B11 and B12 are the postal receipts and Ext.B6 is the acknowledgment card evidencing the receipt of the same by the plaintiff and Ext.B13 is the acknowledgment card evidencing the receipt of the same by the third defendant. Therefore according to him, the plaintiff had knowledge about the will deed much prior to the date of filing of the suit. He had shown the will to a lawyer to get opinion and came to know that the properties are self acquisitions and D.W.1 has right in it. In the cross examination, he deposed that the original of the sale deed has been produced before the Bank. To a specific question as to whether Shri Narayana Shenoy had any specific ailments, according to him, he had only complaints of Asthma, to his enquiry he RFA No.101/2008 -49- came to know that he had complaints of Asthma alone.

54. There are two main aspects to be considered, while considering the validity of the will, viz: (i) With regard to the attestation of the will; and (ii) Whether the testator was in sound state of mind? The two attestors are Shri S.K. Brahmanandan, Advocate and Dr. T.L.P. Prabhu. D.W.2 is Dr. T.L.P. Prabhu. He is their family doctor which fact is admitted by P.W.1 also. He has been treating the testator also. He has clearly deposed that the testator was in good shape of mind. He had attack of asthma and some heart problems during the said period. But he has clearly deposed that his faculties and mental state were perfect. That the plaintiff has no doubt about the competency of D.W.2, is clear from her answers in the cross examination. According to her, even from her childhood the doctor was known to her and was treating her father and he is the family doctor. In the light of the said evidence of D.W.2, there cannot be any doubt that even if some physical ailments were there, the testator was in perfect mental condition, i.e. his mental health was sound. He was not feeble or debilitated and there cannot be any doubt about his mental capacity. The testator himself had presented the will for registration which is stated in Ext.B4. RFA No.101/2008 -50- 55. Then, the next aspect is whether the attestation has been proved. What is important is animus attestandi. Regarding this aspect also, evidence of D.W.2 clearly shows that he has seen the testator signing the will and he signed after the testator and the first witness, Shri S.K. Brahmanandan signed. Therefore, he has clearly

spoken about the execution and attestation of the will also. He was requested to be a witness which he obliged. Necessary ingredients under Section 63 of the Succession Act and Section 68 of the Evidence Act have been clearly proved. The testamentary capacity of the testator has therefore been established clearly. D.W.2 being a competent witness who can speak about the mental and physical health of the testator, as he was the family doctor of the testator for a long period from 1976, we do not find any reason to agree with the specific contention of the learned counsel for the appellant that all the legal requirements concerning execution of the will have not been proved by defendants 1 and 2. The evidence of D.W.2 is not vague or doubtful. There is nothing to show that the testator has not exercised his free will and that he has not understood the nature and effect of the disposition. Evidence will show that the deceased prepared the will after consulting with Advocate RFA No.101/2008 -51- Shri S.K. Brahmanandan. There is no challenge to this part of the evidence of D.Ws.1 and 2. Hence, it can be safely concluded that the testator had understood the dispositions in the will. We have referred to the endorsement in the last page of the will by the testator which is before the schedule which clearly satisfies the test laid down by the Apex Court in Shashi Kumar Banerjee's case (AIR 1964 SC529, we have quoted in paragraph 40 above.

56. Even though Shri Abdul Latheef, learned counsel for the appellant submitted that Shri S.K. Brahmanandan, Advocate who has prepared the will and is also an attesting witness, has not been examined, we do not find any reason to accept the same as a vitiating factor. Going by the well settled principles in this regard, the examination of one attesting witness will be sufficient.

57. The next question is with regard to the alleged suspicious circumstances. Even though the plaintiff has a case that prior to three years of his death, late Shri Narayana Shenoy was not in a good physical and mental health and he had lost memory and was unable to take a decision on his own, the same is not supported by any evidence. Her stand in the RFA No.101/2008 -52- deposition that for those ailments he has not been treated in a self defeating statement. Mere assertion of the plaintiff cannot be treated as evidence in the matter. The admission by her that the deceased was being treated by D.W.2 itself will cut at the root of the argument

on behalf of the appellant. D.W.2 has categorically stated that the testator was in good shape of mind. The evidence of Dr. Prabhu, their family doctor itself will defeat her case. It is well settled that all the surrounding circumstances will have to be evaluated by the court while dealing with such a question.

58. As rightly held by a learned Single Judge of this Court in Velayudhan Nair's case (2006 (1) KLT884, what the law requires is a sound state of mind. Therein, in a similar case where an argument was raised that the testator was suffering from asthma, the learned Single Judge was of the following view: "The only reason attributed in support of the alleged testamentary incapacity of Velu Nair was asthma and stomach-ache which can hardly be valid reasons to affect the cognitive faculties of a person. What the law requires is a sound state of mind which is different from a sound state of health. It is not the requirement of law that the testator should have a perfect health." RFA No.101/2008 -53- We fully agree with the above view.

59. The first of the suspicious circumstances pointed out by the learned counsel for the appellant is that when defendants 1 and 2 availed loan from the bank, they used to obtain the signature of the plaintiff and other daughters while giving the properties by way of equitable mortgage and no change of registry has been effected so far.

60. Learned counsel Shri Premachandra Prabhu explained that since the right of the plaintiff as well as other daughters to receive amounts has been specified in the will, the bank has been insisting their signatures also, since the amount has been charged on the items of properties in the event of any default committed by defendants 1 and 2. According to us, the said argument is an acceptable one. Therefore, such a factor cannot be taken as a suspicious circumstance. Even if records to prove change of registry have not been produced, it will not be a vitiating factor, especially since defendants have entered into various transactions including availing of loans by mortgaging properties. The other circumstances pointed out are that defendants 1 and 2 did not send any reply for the notices for separate division. The notices have been produced as Exts.A1 and A2 of the year RFA No.101/2008 -54- 2001, whereby the plaintiff raised a demand for partition.

But it is clear from the evidence of D.Ws.1 and 3 that Ext.B5 notice was sent immediately after the sale deed was executed in favour of D.W.3 by the first defendant by selling his right in respect of 6 cents of land and a portion of the building, in the year 2000. The notices were issued to all the four daughters and two of them received the amounts also. The suit is filed only five years after that. Therefore, details regarding execution of the will were clearly within the knowledge of the plaintiff even at that point of time. Therefore, the absence of any reply to the notices issued by the plaintiff cannot be stated to be a suspicious circumstance.

61. Shri Abdul Latheef vehemently argued that the ration card is in favour of the entire family members and the bills for water charges and electricity charges are being issued in the name of Shri Narayana Shenoy himself. The other circumstance pointed out apart from the above, is that defendants 1 and 2 have not produced the will before any competent authorities, but the said argument is belied by the possession certificate, Ext.B7 produced in this case as well as the order Ext.B8 in R.C.P.No.105/1997 filed by the second defendant. In the possession RFA No.101/2008 -55- certificate, the will is clearly mentioned. D.W.1 has clearly answered that the will was produced before the Village Officer as demanded and such an entry was made in the possession certificate also. We do not find any reason to disregard the same. Further, the building permit has also been obtained by the second defendant as evident from Ext.B9. The order in R.C.P.No.105/2007 will show that the title to the building is claimed by the second defendant through settlement deed NO.374/1972 in the year 1972, which was accepted by the Rent Control Court. Therefore, none of the suspicious circumstances pointed out by the plaintiff would survive.

62. Apart from the above, even though the plaintiff maintains in her evidence that even after her marriage, she has been continuously residing in the family house, circumstances and the evidence clearly shows otherwise. According to D.W.1, the plaintiff started residing in the family house of her husband after marriage, at Thuravoor. In the evidence of the plaintiff, she has admitted that children were studying in a school in Pattanakkad for some time. As she was also employed, she had resided in Thuravoor in husband's family house. Her husband was an employee in Kerala State Road Transport Corporation at Cherthala. The

suggestion to her was that RFA No.101/2008 -56- she came to Ernakulam for better treatment of her husband for heart ailments. Even though she was asked about the year of her coming back to Ernakulam as 1994, she did not admit the same. But still, it is clear that she has also been working and the children were studying in Pattanakkad, near Cherthala for some time. These places are away from their family house at Ernakulam.

63. It was pointed out by Shri Premachandra Prabhu that going by the custom in the community, the daughters are married away to their husband's family. The plaintiff, in the proof affidavit clearly stated that they are governed by Mitakshara Law for devolution. Apart from the same, another factor also gives credence to the contentions of defendants 1 and 2. In the written statement and proof affidavit of the first defendant, the date of her marriage is given as 2.12.1982. This is stated in paragraph 4 of the proof affidavit. It has not been challenged in the cross examination. The will is executed in the year 1983, viz. on 9.12.1983. The testator died only in the year 1985. The case of the plaintiff is that the testator was not in good health three years back to his date of death. According to her, after the death of her sister Prameela's husband, due to worries out of it, his memory RFA No.101/2008 -57- was affected. To the next question as to the year of death of sister's husband, after taking time she said she does not remember. She has categorically admitted that the testator was not treated for such ailments by a doctor. All these cannot go together, evidently.

64. Apart from the same, she has pleaded ignorance on certain matters put to her in the cross examination. The first defendant had constructed a building in one of the items of properties, viz. the property in Sy. No.419/5 of Ernakulam Village, on the western side of M.G. Road. This is after the will came into effect. She answered that she does not know whether the first defendant had sold the building named "Seethas". Apart from the same, the second defendant is living separate in a building newly constructed by him in another plot of land. To the question put directly about the residential building constructed by the second defendant, her answer is that she does not know about it, which cannot be believed. In paragraph 2 of the plaint this has clearly been stated also. These circumstances are also therefore telling and go against the contentions of the plaintiff.

65. Going by the contentions of defendants 4 and 5 who are the other RFA No.101/2008 -58- two sisters of the plaintiff, in the joint written statement filed by them, they have stated that the father had executed a registered will dated 9.12.1983. During his lifetime he had executed three settlement deeds bearing Nos.1385/1970, 374/1972 and 1/1975. They fully support the contentions raised by defendants 1 and 2 as to their entitlement and enjoyment of properties and possession of them. They have also stated that they have received the amounts set apart for them as per the will and also executed valid receipts. The plaintiff and third defendant refused to receive the amount when it was offered. It is their contention in the written statement that the plaintiff was permitted to reside in the family house on humanitarian consideration while her husband was admitted in Sudheendra Medical Mission Hospital, Ernakulam during 1994.

66. D.W.3 in his evidence has deposed that he has paid amounts to defendants 4 and 5 and registered receipts have been obtained. In the light of the evidence as available, it cannot be said that the will has not been properly executed.

67. One of the suspicious circumstances pointed out by the learned counsel for the appellant is that nothing by way of immovable properties RFA No.101/2008 - 59- have been earmarked for daughters and the father was so affectionate towards his daughters and therefore it is so unnatural. As far as this aspect is concerned, the Apex Court in Savithri's case (2007 (4) KLT811 SC), has held in paragraph 19 that "deprivation of a due share by the natural heirs itself is not a factor which would lead to the conclusion that there exist suspicious circumstances." 68. The Apex Court in S. Sundaresa Pai's case (AIR 2002 SC317) also considered a similar question. It was considered whether, uneven distribution of assets amongst children by itself will be a suspicious circumstance. It was held as follows: "The uneven distribution of assets amongst children, by itself, cannot be taken as a circumstance causing suspicion surrounding the execution of the Will . The executant of Will/mother had three sons and two daughters. One son was given bulk of immovable properties; another none, another half share in one immovable property; other half being given to the plaintiff one of daughter's and another daughter and husband were given nothing. It is also not in dispute that some properties were given in gift to the plaintiff by her mother during her life time.

There was nothing unnatural. It is significant to note that only the plaintiff has questioned the Will. All RFA No.101/2008 -60- the defendants were supporting the Will. In view of the testimony of the attesting witness, the Will had been formally proved. Under these circumstances, conclusion about the Will being unnatural on the basis of uneven distribution of the assets by executant cannot be reached. The widowed daughter had not questioned the Will. She rather supported it. Therefore, it could not be taken as a circumstance to show that the Will was unnatural by observing that she was more deserving. It is a question which lies squarely within the pure discretion of the executant of the Will. The finding that the 'Will is most unnatural' cannot be sustained." Herein also, we cannot agree that dispositions are so unnatural. The testator has not earmarked immovable properties to any of the daughters. It is not a case that plaintiff, one of the daughters alone is singled out.

69. Similar is the view taken by the Apex Court in Ramabai Padmakumar Patil's case {(2003) 8 SCC537 wherein, in paragraph 8 the said question was considered and it was held as follows: "8. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all RFA No.101/2008 -61- suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. In PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar and others, AIR 1995 SC1852 it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. In this case, the fact that the whole estate was given to the son under the Will depriving two daughters was held to be not a suspicious circumstance and the finding to the contrary recorded by the District Court and the High Court was reversed. In Pushpavati and others v. Chandraja Kadamba and others, AIR 1972 SC2492 it has been held that if the propounder succeeds in removing the suspicious circumstance, the Court would have to give effect to the

Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. In *Rabindra Nath Mukherjee and another v. Panchanan Banerjee (dead) by LRs. and others* (1995) 4 SCC459 it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that RFA No.101/2008 -62- in some cases they are fully debarred and in some cases partly. The concurrent finding recorded by the District Court and the High Court for doubting the genuineness of the Will on the aforesaid ground was reversed." Herein, another aspect to be pointed out in this context is that the deceased had settled certain items of properties by three documents which have been produced as Exts.B1 to B3 in the early 1970, 1972 and 1975. Those properties were being enjoyed by defendants 1 and 2 independently. The ownership rights enjoyed by them are clear from availing loans, constructing buildings and in selling one to the 10th defendant which is five years before the filing of the suit. The first defendant alone had sold the property and no other member of the family has joined in it, going by his evidence. Even though the plaintiff pleads ignorance about these matters and has evaded direct answers on these aspects, it will clearly show that even long before the date of execution of the will, the testator had settled properties in favour of the two sons. Then also none of the properties were settled in favour of the daughters. It is also a valid background circumstance to be considered.

70. Then, the question is whether, as argued by Shri Abdul Latheef RFA No.101/2008 -63- learned counsel for the appellant, the disposition in favour of the first defendant could be said to be a suspicious circumstance, since he had taken a prominent part in executing the will. The only aspect that has come out in evidence is that he was sent for summoning D.W.2, Dr. T.L.P.Prabhu and had also occasion to call Shri S.K. Brahmanandan, Advocate as directed by the father. But there is nothing to show that the testator was in any way influenced by D.W.1, in preparing the will. Discussions were with Advocate Shri Brahmanandan, which shows that the testator had solicited advice in the matter from him and not from family members. There is nothing more by way of evidence on the part of the plaintiff to show that the free will of the father was influenced by any action on the

part of the first defendant. We have already held that the testator was of sound mind. It cannot be said that he was weak or infirm. The allegation by the plaintiff that he was taking heavy drugs and therefore his faculties have been clearly affected, stands disproved. Only D.W.2 was treating him and going by the evidence of D.W.1, only during the last three or four years he had been to hospital occasionally. Therefore, there is no evidence to show that the testator was so weak or infirm in his mind or body, susceptible to the RFA No.101/2008 -64- influence of the first defendant. In the absence of any other material to show the same, merely because he has accompanied his father to the office of the Sub Registrar (the purpose, according to him, was known only when the registration was done), or he was sent for getting D.W.2 and the other witness Shri S.K. Brahmanandan to the house of the testator for discussion, we cannot say that the same has influenced the deceased to earmark properties in favour of D.W.1. Mere presence of D.W.1 on such occasions cannot lead to the inference that he played a prominent part in executing the will. It is not at all a decisive factor. It is not a case where D.W.1 has prepared the document or conducted its execution.

71. In Mahesh Kumar's case {(2012) 4 SCC387 in paragraph 48 it has been held that "The fact that appellant was present at the time of execution of the will dated 10.2.1992 and that the testator did not give anything to respondents 1 and 2 from his share in joint family property are not decisive of the issue relating to genuineness or validity of the will." 72. In Ajay P. Asher's case (2011) 3 KHC288 the Division Bench held in paragraph 13 that "the fact that the 1st defendant (DW1) was a legatee under Ext.B9 will and he was present when that testament was got RFA No.101/2008 -65- attested by D.Ws.2 and 3 cannot at all be viewed as a suspicious circumstance where there is nothing more to indicate that the free will of the testator to make the deposition had been influenced by the conduct or act of the 1st defendant and, further, the testator was susceptible to such influence on account of his weak or infirm mind and body or such other cause affecting his decision making, more particularly, the making of his testament." Further, the evidence of D.W.2 will show that the wife and children of the testators were there in the house at the time of signing the will, even though he could not remember names. Hence, it cannot be said that D.W.1 had played a leading part. Therefore, the argument that he played a prominent part and thus obtained substantial

benefits which is a suspicious circumstance surrounding the execution of the will, can only be stated to be rejected and we do so.

73. The circumstances, if any, for non production of the will for a long time cannot help the plaintiff, if at all it is true, to contend that it is a suspicious circumstance. In the decision relied upon by Shri Premachandra Prabhu in M.B. Ramesh's case (2013 (2) KLJ797, the Apex Court in a case where the will was produced 35 years after its execution, rejected a RFA No.101/2008 -66- similar contention. In paragraph 9 it has been held as follows: "Similarly, no issue can be made out of the production and reliance on the will, some 35 years subsequent to its execution. There is no dispute about Smt. Nagammani's signature on the will and her wishes are clear. It is only when the properties bequeathed under the will had to be protected, that the will was required to be produced and relied upon. A will is required to be acted upon, only after the testator passes away, and in the instant case immediately when the occasion arose, the will was produced and relied upon." Therefore, the said circumstance also cannot defeat the rights of defendants 1 and 2.

74. Shri Abdul Latheef argued that D.W.2 has not spoken everyone of the details with regard to the will in his deposition. Learned counsel for the respondents submitted that he has clearly spoken to about the execution of the will and its attestation. Apart from the same, they also pointed out that he was examined in court 23 years after the execution of the will. Therefore, it cannot be said that minor discrepancies or omissions, if any, will be so fatal. The Apex Court, in the above cited decision held in paragraph 8, in similar circumstances, that "the fact however remains that P.W. 2 was giving deposition 35 years of execution of the will and therefore RFA No.101/2008 -67- no much credence be given to such discrepancies in his evidence." The same is also significant. Apart from the same, the witnesses to the will are totally independent personalities. One is a Lawyer and other is a Doctor by profession. Both are totally disinterested persons and are well known to both sides. They being persons of high professional competence, no doubt could be created by the plaintiff at all.

75. In the light of these aspects, we do not find any reason to accept the contention of the learned counsel for the appellant that various suspicious circumstances are there.

76. The approach made by the plaintiff in the plaint and in the deposition is that the properties are not self acquired properties of deceased Shri Narayana Shenoy and therefore she is a co-owner and accordingly she is claiming partition. It is in these circumstances also that she has raised a contention that Shri Narayana Shenoy had no exclusive right to execute a will or at any rate, he can execute a will only of his share in the whole properties. Exts.A6 to A9 were produced in evidence by her. One of the reliefs sought in the suit is to give a declaration that the will is not a validly executed document and will not affect the right of the plaintiff over the RFA No.101/2008 -68- plaint schedule properties and her right to inherit the properties. The fact that she had knowledge about the will at least from the year 2000 when the 10th defendant sent the notice, is clear. This aspect has been considered by the trial court to find that as far as the relief for declaration is concerned, the same is barred by limitation. This aspect was highlighted by the learned counsel appearing for the defendants also that she was aware about the execution of the will. For all these reasons, we find no reason to interfere with the judgment of the trial court. Hence, the appeal is dismissed, but without any order as to costs. (T.R.RAMACHANDRAN NAIR, JUDGE) (P.V.ASHA, JUDGE) kav/

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