

S. Jagadish Vs. Dr. S. Kumaraswamy since dead by LR's S.K. Lingaraju and Ors.

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Court : Karnataka

Decided On : Mar-20-2007

Reported in : ILR2008KAR87; 2008(2)KCCRSN119; 2008(3)ICC421

Judge : N. Kumar, J.

Acts : [Indian Succession Act, 1925](#) - Sections 63 and 70; Transfer of Property Act - Sections 3; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100

Appeal No. : RSA No. 1810/2005

Appellant : S. Jagadish

Respondent : Dr. S. Kumaraswamy since dead by LR's S.K. Lingaraju and Ors.

Advocate for Def. : S.K. Manjunath, Adv. for ;Hegde Associates for Caveator R1-5 and R16-20 and ;C.P. Dayananda, Adv. for R6-15

Advocate for Pet/Ap. : Yoganarasimha, Sr. Counsel for ;Deepashree, Adv.

Disposition : Appeal allowed

Judgement :

N. Kumar, J.

1. This is the 4th defendant's second appeal against the decree for partition and separate possession. For the purpose of convenience, the parties to this appeal are referred to as they are referred to in the suit.

2. The plaintiff-Dr. S. Kumaraswamy, the 1st defendant-S. Gurudatt, the 4th defendant-S. Jagadish are the three sons of late Sri. H. Siddalingaiah. 2nd defendant-Smt. Nagarathna and 3rd defendant-Smt. Umadevi are his daughters. The plaintiff and defendants 1 to 3 died during the pendency of the proceedings and their legal representatives have been brought on record.

3. The case of the plaintiff is, his father late Sri. M. Siddalingaiah had no ancestral nucleus and he acquired the suit schedule property from his personal income as he was the former Registrar of the Karnataka University. He died on 13.8.1980 at Mysore. After the death of Sri. M. Siddalingaiah, plaintiff and defendants 1 to 4 became the tenants in common each getting 1/5th share in the property. Properties however continued to be in joint possession and enjoyment of the said heirs. The ground floor of the suit schedule property is rented to the 5th defendant-Bank for Rs. 450/- p.m. There were misunderstandings between the plaintiff and the 4th defendant. Even otherwise the brothers thought of effecting partition by metes and bounds. The 4th defendant was not agreeable. Therefore, a legal notice was issued to him. When he did not accede to the request made, the present suit is filed for partition and separate possession,

4. The plaint was got amended by introducing paragraph 3(a) to raise a plea that since late Siddalingaiah was a Co-obligate to the loan taken by 4th defendant's wife-Smt. Shanthakumari with the 5th defendant-Bank and the documents are given to the 5th defendant-Bank, the plaintiff, defendants 1 to 4 are not liable to the loan raised by the 4th defendant's wife.

5. The 4th defendant-the contesting defendant filed written statement. He did not dispute the relationship between the parties, the leasing of the property to the Bank, issuance of legal notice, and the reply. His specific case was his father wrote his last will in his own hand writing on 12.10.1978 and got it registered in the Sub Registrar's office bequeathing the suit schedule property in his favour. After the death of his father on 13-8-1980 he has become the absolute owner in

possession of the suit schedule property. Neither the plaintiff nor the other defendants i.e. 1 to 3 have any right, title or interest over the said property. The 5th defendant also filed written statement. They contended that the defendant-Bank is an unnecessary party to the proceedings as no relief is sought against them and they also referred to the loan borrowed by 4th defendant's wife and Late Siddalingaiah being the Co-obligate. The 1st defendant filed separate written statement conceding for a decree as prayed for by the plaintiff. He also stated in the written statement that around 12.10.1978 when his father was residing with the 4th defendant, 4th defendant came to him with a document claiming to have been executed by their father and reported to him that it was a will executed by his father and he has sent him to get attestation for it. He without going through the same put his signature. He called upon the 4th defendant to prove the will set up by him. He also stated that the late Siddalingaiah has cancelled the will by executing the registered cancellation deed and therefore, the suit property is liable to be divided among his children. Defendant Nos. 2 and 3 did not contest the claim by filing any written statement. The plaintiff filed a reply denying the existence of the execution of the will referred to by the 4th defendant as one executed by a person out of his own free will without any pressure. Further, he says it was because of the circumstances, late Siddalingaiah wrote out subsequent will dated 28.5.1980 again a registered will cancelling the first will.

6. On the above said pleadings the trial Court framed the following issues:

1. Whether the plaintiff proves that he along with defendants 1 to 4 continued to be in possession of the suit property as tenants in common after the death of their father?
2. Whether the 4th defendant proves that he has become absolute owner of the suit property for reasons stated in para 6 of his written statement?
3. Whether plaintiff proves that he is entitled for partition by metes and bounds and separate possession of his share as claimed?
4. Whether plaintiff proves that himself and defendants 1 to 4 are not liable for the loan raised by 4th defendant's wife Smt Shantha Kumari?

5. Whether 5th defendant proves that late Sri. M. Siddalingaiah as a security for repayment of loan amount executed an equitable mortgage by deposit of title deeds of the suit schedule property as stated in para 3 of the written statement?

6. Whether this suit is bad for Misjoinder rejoinder of parties?

7. To what relief plaintiff is entitled to?

Addl Issue:

8. Whether plaintiff proves that the will dated 12.10.1978 was later cancelled duly under cancellation deed dated 28.5.1980?

7. As per the request of the plaintiff and the 4th defendant, issues 1,4,5 and 6 were deleted as unnecessary vide a separate order dated 3.4.1991.

8. Plaintiff examined himself as PW1. He examined one M.G. Shivanna, scribe of deed of cancellation-Ex. P2 and one Nagappa one of attestors to Ex. P2. He produced 17 documents, which are marked as Exhibits PI to PI7. On behalf of the defendants, 4th defendant was examined as DW1. He examined a close associate of his father by name Shivarudrappa-D W2 who took active part in execution of the will-Ex. D1. DW3-Krishnaswamy an official of the State Bank of Mysore an attesting witness to the will Ex. DI was examined. He produced 9 documents, which are marked as exhibits D1 to D9.

9. The trial Court on appreciation of the aforesaid oral and documentary evidence held on the additional issue that the plaintiff has proved that the Will dated 12.10.1978 was duly cancelled by execution of the registered cancellation deed dated 28.5.1980. Thus, the suit schedule property is available for partition between the children of late Sri. Siddalingaiah and therefore, it granted a decree of 1/5th share to the plaintiff in the suit schedule property. Aggrieved by the said judgment and decree, the 4th defendant preferred the regular appeal.

10. The lower appellate Court on re-appreciation of the entire evidence on record and after formulating the points for consideration, held that the 1st/which was duly executed by late Sri. Siddalingaiah was duly cancelled by the deed of cancellation

and the trial Court committed no error in decreeing the suit of the plaintiff for partition. Thus it confirmed the decree of the trial Court and dismissed the appeal preferred by the 4th defendant.

11. This second appeal preferred by the 4th defendant was admitted on 23.11.2006 to consider the following substantial question of law:

Whether the plaintiff has proved the cancellation deed (Ex. P2) in the same way that of the Will under law?

12. Sri. Yoganarasimha, learned Senior Counsel appealing for the appellant contended that under Section 70 of the Indian Succession Act of 1925, for short hereinafter referred to as 'the Act' the deed of cancellation of a Will is to be proved in the same way as a Will is to be proved under Section 63 of the Act. In the instant case, PW3-the attesting witness to the deed of cancellation has not seen the executant sign the deed of cancellation and similarly, he did not attest the document in the presence of the executant and therefore, the requirements of Section 63(c) of the Act is not complied with. The execution of this document is shrouded with suspicious circumstances. It is unnatural, these aspects have not been taken note of and considered by the two courts below. Therefore, he submits that though the courts below have concurrently held Ex. P2 is duly executed, as they have misread the evidence on record, not kept in mind the legal principles which should have been taken note of, the judgment and decrees passed by the courts below is vitiated and requires to be set aside.

13. Per contra, the learned Counsel for the plaintiff contended that in order to prove the execution of Ex. P2, the plaintiff has examined the scribe, the attesting witness and the said document is duly registered. The two courts on careful consideration of the evidence of these witnesses have recorded a concurrent finding that the cancellation deed is duly executed. Due execution being purely a question of fact, when there is a concurrent finding, no case for interference is made out. Even otherwise, if the attesting witness has not seen the executant sign the deed of cancellation, he received an acknowledgment from the executant having affixed the signature and thereafter, the attesting witness have attested the said signature, which satisfies the requirement of Section 63(c) of the Act and

therefore, the cancellation deed-Ex. P2 is duly proved. He further contended that though the evidence on record discloses that the plaintiff has taken an active role in the preparation of the execution of Ex. P2, if the plaintiff had an evil eye on the property and wanted to deprive his brothers of their legitimate share, after the cancellation of the will, he could have persuaded his father to give the entire property to him. But he did not do so. Therefore, it would not constitute a suspicious circumstances. The learned Counsel in support of their contentions have relied on several judgments.

14. Both courts have concurrently held on appreciation of the oral evidence on record, that, the cancellation deed is duly executed. In the normal circumstance, this Court in second appeal, would not be inclined to interfere with such a concurrent finding of fact. In those circumstances, the question is whether a case for interference with a concurrent finding of fact is made out. The law on the point is well settled. After reviewing the entire case law this Court in the case of Mariam Hussain v. Syedani and Ors. RSA No. 305 of 2004 dated 1st March, 2007 has held as under:

Therefore, the law on the point is well settled. The concurrent findings recorded by the trial Judge as well as the First Appellate Judge on proper appreciation of the material on record should not be disturbed by the High Court while exercising its second appellate jurisdiction. However, it is not an absolute rule to be applied universally and invariably. When the Courts below ignore the weight of preponderating circumstances, allow the judgments to be influenced by inconsequential matters, when their judgment is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring the material evidence, or misdirected themselves in appreciating the question of law and place the onus on the wrong party, or when their finding has no basis in any legal evidence on record or on a misreading of evidence or suffers from any legal infirmity, the High Court would be justified in re-appreciating the evidence and coming to its own and independent conclusion, However the High Court should not in routine or causal manner by substituting its subjective satisfaction in place of the lower courts, interfere with the concurrent finding of fact.

15. In view of the stand taken by the appellant that while appreciating the evidence, the courts below have not kept in mind the legal principles and the evidence is misread, it is necessary for me to go through the entire evidence and then find out whether a case for interference with concurrent finding is made out.

16. From the material on record, it is not in dispute that the suit schedule property was the self acquired property of late Sri. Siddalingaiah. He had three sons-plaintiff, 1st defendant and 4th defendant and two daughters-defendants 2 and 3. He was a Professor of University Teacher's Training College, Mysore and retired as a Registrar of Karnataka University. He had executed a Will on 20.5.1971, which was duly registered on 12.10.1971. Under the aforesaid will, he had bequeathed the suit schedule property in favour of the children of the first defendant-his eldest son and the plaintiff-the second son. It discloses that as far back as in the year 1971, he had no intention to give the suit schedule property to his aforesaid two sons. But he gave it to his grand children. When the said Will was cancelled and he was making a Will in favour of the fourth defendant, being an educated person, worldly wise, he was conscious that the Will which he is going to make bequeathing the suit schedule property to the fourth defendant may be attacked after his demise, on the ground of existence of suspicious circumstance, as it will come in the way of natural succession. Therefore, he was careful enough to prepare the Will Ex. D.I keeping in mind the legal requirements and the law governing the execution of the Will. Probably he must have taken legal advice. The first thing he did was to write the Will in his own hand writing which runs to five pages, so that any attack to the Will on the ground that signature has been taken to a document, the contents of which he was not aware gets neutralized. In categorical terms, in the said Will, he has referred to the execution of earlier Will referred to supra and reasons for its cancellation. It is clear from the said document that as his third son-fourth defendant had no son, he had given the suit schedule property to the children of the plaintiff and the first defendant. But once his fourth son got a son, he thought of cancelling the earlier Will and gave the suit schedule property to the fourth defendant. Then he wanted to give reasons in the said Will for excluding the other children so that after his demise his Will should speak for itself. He recorded in the said Will, that he has provided ample financial assistance to his first son who is in business. In so far as second son-

plaintiff is concerned, he has financially assisted him in studying LMP and also gave him Site No. 167 situated in Yadavagiri Extension in Mysore, which he had purchased in the year 1946 and thereafter he has given him financial support to put up a construction on the said site. Therefore, he has, in categorical terms given the reasons for excluding his other two sons from bequest. He has two daughters. Both of them are married. They are living with their husbands separately at K.R. Nagar. Their husbands are in business. Therefore, he has given the out-house of the premises No. 1226/1 where he has put up a construction for his daughters. In fact, it is given by way of registered gift deed dated 29.8.1969. Thus in the Will he has stated how he has provided for his four children. As he has not given anything to his fourth son, he gave the suit schedule property to him exclusively. In fact, he has also recorded that his other children are aware of this bequest on his part. When this Will was executed by him, he was aged 83 years. The very fact that he wrote the entire document in his own hand writing substantiates his statement in the Will that on the date of the Will he was physically fit and mentally alert and that he has written this Will out of his own free will. The said Will is attested by the first defendant - the eldest son as well as the Manager of the 5th defendant Bank. Notwithstanding the fact that the Will is not disputed by any one, when the Will is propounded by the fourth defendant as a defence in the suit for partition, unless this Mil is proved, he cannot avoid a decree for partition being passed.

17. The fourth defendant has examined one of the attesting witness and also the person who actively assisted the testator in the execution of this Will. D.W-2 Shivarudrappa who is a well-wisher of Siddalingaiah has deposed about the execution of this Will. According to his evidence, Siddalingaiah paid him Rs. 25/- on 11.10.1978 that is a day prior to execution of Ex. D. 1 and asked him to bring stamp paper of Rs. 22.50. Accordingly he purchased the stamp paper on 12.10.1978. He further deposed that Siddalingaiah himself wrote the contents of Ex. D. 1 on 12.10.1978 sitting in his room in his presence. He (Siddalingaiah) asked him to read it. No one was present except him at the time of writing the Will. Later, the Manager of the fifth defendant-Bank was secured by him as per the request of Siddalingaiah. An attestor Raghavendra Rao also arrived there. Both read Ex. D 1. Siddalingaiah signed it in their presence. Later said two persons also

signed Ex. D1 in the presence of the testator. Later, Siddalingaiah and himself went to the first defendant. Siddalingaiah told him about Ex. D 1 for which he did not object. The first defendant also attested Ex. D1. On the next day i.e., on 13.10.1978 he and Siddalingaiah went to Sub-Registrar's office. He identified Siddalingaiah before the Sub-Registrar and his signature as Ex. D. 1(a). He took delivery of the registered Will from the Sub-Registrar's office on the authority letter of Siddalingaiah. Siddalingaiah was in sound state of mind when he executed Ex. D 1. D.W.3 Krishnamurthy, the Chief Manager of the State Bank of Mysore, has deposed that he attested the Will executed by Siddalingaiah and he identified the signature as Ex. D. 1(d). He stated that one Shivarudrappa took him to the house of Siddalingaiah and one Raghavendra Rao was also there and he read the Will and attested it with his signature as per the request of the testator. The testator also signed at Ex. D. 1(3) to D. 1(j). He had stated that all of them were present when testator signed Ex. D. 1. The testator was in a position to understand the things. In fact, not a single question was put to him in so far as his attesting the Will in the manner he has stated in his evidence. The two Courts below after carefully examining the evidence on record have concurrently held that Ex. D 1 - Will propounded by the 4th defendant is duly executed and proved. Before me none of the respondents assailed the said finding. The said finding being based on legal evidence, is just and proper, do not call for any interference.

18. Now the question is whether this Will is duly revoked as contended by the plaintiff. The learned Counsel for the appellant contended that the standard of proof that is required to prove a Will and the proof of cancellation of duly executed Will is one and the same. In that connection, he brought to my notice Sections 70 and 63 of the Act and several decisions of the Apex Court on the said point.

19. Section 70 of the Act deals with revocation of unprivileged Will or codicil which reads as under:

70. Revocation of unprivileged will or codicil. -No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be

executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

20. The counsel for respondents relied on the following judgments of the Apex Court:

(a) In *Anil Behari Ghosh v. Smt. Latika Bala Dassi and Ors.* : [1955]2SCR270 reported in the Supreme Court held, for proving that the Will had been revoked it has to be shown that the testator had made another Will or codicil by some writing declared his intention to revoke the Will. Such a document is required by Section 70 of the Act to be executed in the same manner as a Will. Such a revocation could also have been proved as the Section lays down, by burning, tearing or otherwise destroying the Will by the testator himself or by some other person in his presence and by his direction, thus clearly indicating his intention of revoking the Will.

(b) The Supreme Court in the case of *Bhagat Ram and Anr. v. Suresh and Ors.* : AIR 2004 SC436 held that Section 70 of the Succession Act re-enforces this proposition inasmuch as revocation of an unprivileged Will or codicil is placed at par in the matter of manner of execution.

(c) The Supreme Court in the case of *Durga Parshad v. Debi Charan and Ors.* : [1979]1SCR873 held that the onus is on the objector who relies on the revocation to prove that the Will had been revoked after it has been proved to have been duly executed. Under Section 70 of the Act, the Will can be revoked inter alia, by burning, tearing or otherwise destroying and unless any of the circumstances has been proved by the objector by cogent evidence, the question of the revocation of the Will will naturally not arise.

21. Therefore, it is settled law that a will could be revoked. The ' mode of revocation of will is provided under Section 70 of the Act. It provides for several modes of revocation of will. It could be by marriage, execution of another will or codicil, or by some writing revoking the will, or by burning tearing, or otherwise destroying with the intention to revoke the same. However, if the revocation is by

some writing declaring an intention to revoke the will, the said writing should be executed in the manner in which an unprivileged will requires to be executed as contemplated under Section 63 of the Act.

22. Section 63 of the Act provides for execution of unprivileged Will, which reads as under:

63. Execution of unprivileged wills - Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, [or an airman so employed or engaged] or a mariner at sea, shall execute his will according to the following rules:

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

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

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

23. In fact, though the word 'attested' has not been defined under the Act, the definition of the word attested as contained under Section 3 of the Transfer of Property Act is to be followed with regard to the proof of attestation of document. The definition clause in the Transfer of Property Act, reads as under:

'attested' - In relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has been the executant sign or affix his mark to the instrument, or has seen some other person

sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

The said word 'attested' is in parimateria with Clause (c) of Section 63 of the Act.

24. The rules which are prescribed for execution of an unprivileged will equally applies to revocation of will. When once a Will is duly proved to have been executed, the person who sets up the plea that such a Will is revoked by another deed, or will has to prove due execution of the said deed in the same manner in which due execution of the Will has to be proved. In this context, from the aforesaid statutory provisions and law on the point, it follows how a Will or a codicil or a deed of revocation of Will has to be proved. Firstly the document should be signed by the testator or he should put his mark or it should be signed by some other person in his presence and by his direction. The said mark or signature is to be placed on such writing so as to appear that it was intended there by to give effect to the writing as a Will or codicil or deed of revocation. The document has to be attested by atleast two witnesses. The said attesting witnesses should also see the testator sign or affix his mark to the deed of revocation. If they are not present at the time of testator signing the document, then atleast they must receive from the testator a personal acknowledgement of his signature or mark. They should sign by way of attestation to the said document in the presence of the testator, though it is not necessary that both of them should be present at the same time and no particular form of attestation is required. It is only when all these conditions are fulfilled, the document can be said to have been duly executed and it comes into operation. The proof of the said writing or deed of cancellation of will is placed on par with due execution of the will. Therefore, the said deed of revocation also should be duly signed by the testator, with the intention to cancell the will and it shall be duly attested by two or more witnesses. The testator should be in a sound state of mind at the time of execution of the deed of revocation. The propounder of the said deed of revocation, should not have taken an active part in the execution

and he should dispel all the suspicious circumstances surrounding the execution of such writing. Only then the said deed of revocation of will has the effect of revoking a duly executed will.

25. It is in the back ground of this legal position, we have to find out whether the plaintiff has proved due execution of Ex. P.2 and the two Courts below have properly appreciated the evidence on record before coming to the conclusion that Ex. P.2 is duly executed. The plaintiff admittedly was present throughout the execution of Ex. P.2 in the Sub-Registrar's office. Nonetheless his evidence is of no assistance in proving the due execution of Ex. P.2. P. W.2 is the scribe who has written Ex. P.2. He is not an attesting witness. But still, in order to properly appreciate the execution of Ex. P.2, his evidence is useful. It is in his evidence, that he did not know the father of the plaintiff prior to Ex. P.2. He admits that the testator had suffered a paralytic stroke to his right leg and left hand. He admits that the testator had not brought any document, except a note containing the particulars. It is his specific case that the testator himself called him to write Ex. P.2. He (the testator) was sitting on the Bench inside the office of the Sub-Registrar and at that time he called him (P. W.2) and told him to write Ex. P.2. He says Ex. P.2 was written as per the instructions of the testator. But it was written in his usual place that is verandah of the Sub-Registrar's office. He writes the documents usually in the verandah near the Sub-Registrar's office. After he wrote Ex. P.2, he read over the contents to the testator. The testator also read Ex. P.2 and then he signed it. At that time, the testator and he alone were present. He do not know who brought the attessor Ramesh. He did not know him earlier. Another attessor Nagappa PW3 is also a bond writer. He attested the document at the request of the party only. In reexamination, he asserts that no one was present when he and the testator signed Ex. P.2. Further he states the witnesses have signed Ex. P.2 after the testator signed it, in his presence in the Sub-Registrar's office.

26. P. W.3 is the attesting witness. He has stated that the testator u told PW2 to call him after Ex. P.2 was written and requested him to sign it as a witness. He ascertained the facts of Ex. P.2 later. He has not stated that he saw the testator sign Ex. P2. Therefore, it is admitted that when testator signed Ex. P.2 no attesting

witnesses were present and they have not seen the testator sign Ex. P2. The learned Counsel for the respondent too could not deny the said fact, as the evidence on record shows that the attesting witnesses were not present at the time of testator signing the will Ex. P2 and that they did not see the execution of the will by the testator.

27. Therefore, an alternative argument of acknowledgment of writing by the testator was put forth i.e. the attesting witness received personally the acknowledgement from the testator about his signature and thereafter they have attested the document, which satisfies the requirement of law. To prove the said acknowledgement which the attesting witness received from the testator is sufficient to prove the Will, he relied on several judgments;

(i) A Division Bench of Andhra Pradesh High Court in the case of Pachigolla Venkatara and Ors. v. Palepu Venkateswararao and Ors. AIR 1956 Andhra 1 (V 43 C 1 Jan) dealing with the attestation of witnesses after acknowledgement of testators signature under Section 63 held that, there is nothing wrong for a testator to get the attestation of witness after acknowledging before them that he had executed and signed the Will. It is not always necessary that the attesting witness should actually see the testator signing the Will. Even an acknowledgement by him would be sufficient.

(ii) In the case of Mahabir Singh v. Pirthi Singh AIR 1963 Punjab 66 dealing with the same subject, it was held that, under Section 63(c) an acknowledgement of execution by the testator followed by attestation position of Will in his presence is a sufficient attestation. Section 63 gives certain alternatives and it is sufficient if conformity to one of the alternatives is proved. The acknowledgement may assume the form of express words or conduct or both, provided, they unequivocally prove an acknowledgement on the part of the testator. Where a testator asks a person to attest his Will, it is a reasonable inference that he was admitting that the Will had been executed by him.

(iii) In the case of Chhanga Singh Indar Singh v. Dharam Singh , it was held that, a personal acknowledgment of execution need not necessarily be restricted to an express statement to that effect, but may include words or conduct, or both, on the

part of the testator which may be construed unequivocally as such an acknowledgment.

(iv) In the case of *Damodhar Bordoloi v. Mrinalini Devi Trust Board and Ors.*, it has been held that a Will is one of the most solemn documents known to law, by it a dead man intends to the living the carrying out of his wishes and as it is impossible that he can be called either to deny his/her signature or to explain the circumstances in which it was executed, it is essential that trustworthy and an effective evidence should be given in compliance with the necessary formalities of law. It cannot be laid down as a matter of law that because the witness did not state in Court that they signed the Will in the presence of the testator, there was no due attestation. Thus, if a witness owing to inadvertence fails to say that he had attested the document in the presence of the testator and narrates the consequence which leads to no other inference but one that he had put his signature in the presence of the testator, then this omission on the part of the witness would not invalidate the Will and it shall not preclude the court to infer this fact from other evidence on record that the witnesses had signed the document in the presence of the testator. The law does not emphasis that the witness must use the language of the Section 63 to prove the requisite matters thereof. In a case where attesting witnesses are produced and they have given clear and cogent testimony regarding execution, one should require very strong ground to repel the effect of such testimony. It will not do to talk airily about circumstance suspicion. When testimony is not seriously impaired in cross-examination, something more than suspicion is necessary to discredit the testimony of attesting witnesses who may be of inferior status to make a convincing argument based on the social status of such person.

28. Relying on these judgments, the learned Counsel for the respondent submitted that what the Court has to look into is the evidence in its entirety. Merely because PW.3 has not used the words which are used in the Section or he has not clearly stated that the testator did acknowledge his writing to him before he attested, it cannot be said that Section 63(c) of the Act is not complied with. When the witness has categorically stated that, before he attested the document, the testator called him, requested him to sign as a witness to Ex. P2 and then they attested the

document, it necessarily follows that the testator did acknowledge his signature before the attesting witnesses, attested the signature. In fact, P. W.3 has clearly stated that he has attested the signature of the testator.

29. Therefore, it is now necessary to examine the evidence to find out whether there is any such acknowledgement as required under law and whether the evidence on record would lead to an inference that there is substantial compliance of the requirement of Section 63(c) as contended by the learned Counsel for the respondent.

30. In fact, after reading the evidence of P. W.3-the attesting witness to Ex. P.2, it is clear that he was not present when the testator executed Ex. P.2. P.W.3 has stated that he attested the signature of late Siddalingaiah on Ex. P.2. Siddalingaiah read over the contents of Ex. P.2 and told him that it is regarding cancellation of previous Will. He was present when Siddalingaiah had signed Ex. P.2 at the time of registration before the Sub-Registrar at Ex. P.2(d) and he signed Ex. P.2 at the place where P. W.2-Shivanna was sitting, but after ascertaining the correctness of the contents of Ex. P.2 from Siddalingaiah. He has also stated that he and Shivanna used to sit in the same verandah of the Sub-Registrar's office. However, Siddalingaiah was sitting in the office of the Sub-Registrar's office. In re-examination, it is elicited that Siddalingaiah had seen him while he was signing Ex. P.2. From this evidence on record, it is clear that the testator after calling upon P.W.3 to attest the document did not acknowledge before him expressly his signature and called upon him to attest it.

31. Therefore, in the absence of such express acknowledgement, whether the circumstances in the case do indicate an acknowledgement. Even though there cannot be any hard and fast rule on this aspect, ultimately, the Court should be convinced from the material on record that though the attesting witness was not present at the time the testator signed the document and though the testator did not in express words acknowledge his writing before the attestor, whether the same could be inferred. It is in this context, the back ground and the veracity of the witnesses assumes importance. P. W.3 is a professional bond writer. Admittedly he was not present at the time of writing Ex. P.2 and he was also not present

when the testator signed Ex. P.2. It is also not the case of the plaintiff, that the testator called P. W.3 to acknowledge to him that Ex. P.2 is signed by him and then called upon him to attest the document. If the evidence of P. W.3 is to be believed, in more than one place he has stated, that for the last 18 years he is sitting in the verandah of the Sub-Registrar's office and writing the document. Ex. P.2 was also attested by him in the verandah after ascertaining the correctness of the contents of Ex. P.2 from the testator. If it is true then the testator did not see the attesting witness signing Ex. P.2. The fact remains that the testator had suffered a paralytic stroke to his right leg and left hand, virtually he was immobile and he was made to sit on a bench in the Sub-Registrar's office. He was aged 85 years on the date of execution of Ex. P.2. Similarly, the testator also has not seen the attesting witness signing the document. No doubt it is elicited in the re-examination of PW3 that the testator saw him while he was signing Ex. P2. PW3 is not a rustic or illiterate person. He is a professional scribe with 18 years experience. The testator saw him for the first time in life on the date of Ex. P2. DW2 's evidence disclose that he had met the testator in the plaintiff's house, two or three months prior to the testators death, the testator was not in a sound state of mind and he had lost the power of recognition. Plaintiffs evidence shows before death, the testator was in a state of coma. Under the circumstances and in the facts of the case it is not possible to infer an implied acknowledgment. Therefore the evidence on record do not prove due execution of Ex. P2 as required under Section 63 of the Act.

32. The testator, was a Professor of Teachers Training College of Mysore University. The Will-Ex. DA which was cancelled, was written in his own hand writing and the meticulous way the said Will is prepared, facts are stated, documents were attested and registered, clearly shows that the testator was in the habit of making meticulous preparation while preparing the document. It also shows that, he knew that if a duly executed will is cancelled, there should be weighty reasons for the same and the same has to be mentioned in the document itself, and accordingly he recorded the reasons in Ex. D1. Neither in the pleadings nor in the evidence anything has been stated contrary to the contents of Ex. D 1 where the testator has given cogent reasons for not giving any portion of the property to the other children. When once those facts remain uncontested, it is

clear that the testator during his life time gave sufficient money to the first defendant to set up his business, gave his site to the plaintiff and also assisted him in putting up construction and also gave money to run a poultry farm and gave his daughters the out house property. The only person who was not provided for is the fourth defendant. In fact as the fourth defendant did not have a son, the schedule property had been given to the children of the plaintiff and the first defendant. But once the fourth defendant begot a son, the testator cancelled the earlier Will and bequeathed the suit schedule property in favour of the fourth defendant. In order to see that his other children do not create any problem to the fourth defendant, and lay any claim on the suit schedule property, at the age of 83 he took precautions in writing the Will which is running to five pages in his own hand writing, got attested his will by the Manager of the Bank and also got it registered. In fact he stood as a Co-obligate, surety to the wife of the fourth defendant in raising a loan of Rs. 25,000/- in her favour. In turn the fourth defendant, his wife and child lived with the testator throughout his life except for the last four months.

33. In 1979 after the execution of the Will Ex. DI when he suffered a paralytic stroke, the testator was not shifted to any hospital. He was treated in the house with the best medical attention that one could get by the 4th defendant and his wife. In fact PW1 in his evidence has categorically admitted that the two doctors who attended to his father were the best available in the City. In this context, it is necessary to note except for the last four months before his death, the testator lived with the fourth defendant in his house. At no point of time, he lived with plaintiff or first defendant-his two elder sons. There is no evidence on record to show that at any point of time, neither the sons nor the two daughters ever took care of this testator. It is in this back ground when we look at the conduct of the plaintiff in bringing his father in the absence of the fourth defendant who had gone to Gundlupet on his official work without informing him from his house and then getting this document Ex. P2 prepared and registered and discontinuing the medical treatment which his father was getting for the last two years, assumes importance. When the plaintiff, the propounder of Deed of revocation, takes a prominent role in the execution of the deed and because of such revocation he gets 1/5 share in the property, which is the subject matter of the will, that itself would constitute a suspicious circumstances attending the execution of deed of

revocation, and in appreciating the evidence in such a case, the court should proceed in a vigilant and cautious manner. The onus of showing the righteousness of the transaction is thrown upon such propounder.

34. Admittedly in so far as the physical condition of the testator is concerned, he had a paralytic stroke and his right leg and left hand had been paralysed. The very fact that he did not write this Will-Ex. P2 in his own hand writing as in the case of Ex. D. 1 shows probably on the date of execution of Ex. P2, he was not in a position to write the Will. Therefore, he was physically not in a fit condition to write the will in his own handwriting. Now coming to his mental condition, it is for the plaintiff to show that his late father was in a sound state of mind when he executed Ex. P2 and he was free from influences from any quarter. No evidence is produced to show the testator's mental condition on the date of Ex. P2. In this regard his evidence is very much wanting. No explanation is forthcoming for not examining the first defendant as well as the other daughters who would have been the best witnesses to speak about the mental condition of the testator at the time of execution of Ex. P2. No doctor is examined to speak about his mental capacity. The evidence of DW2, associate of the testator, a family friend, who has no grudge against any one, in the circumstances assumes importance and has to be given due weightage. He has clearly stated that he had visited the testator about 2-3 months prior to his death and during the said visit, he noticed that the testator was not in a sound state of mind. He was not in good health and he had lost the power of recognition. It is on record that when he was taken to the Sub-Registrar's office to register Ex. D. 1 Will, he went in a car. When he went to Sub-Registrar's office nearly two years thereafter, the plaintiff had taken him in a rickshaw. The testator died within two months from the date of execution of Ex. P2. It is in the evidence of the plaintiff himself the testator died in the Nursing Home and before he was taken to Nursing Home, he was in the state of Coma. In this background the contents and execution of Ex. P2 is to be appreciated.

35. The effect of Ex. P2 is, a property which is bequeathed in favour of the fourth defendant as his rightful share of the property of the testator, after making provision for other children, is now sought to be taken away. Assuming that the testator was not in a position to write Ex. P2 but he was mentally alert, certainly if it

is the deed of revocation according to his wish, he would have certainly given reasons for cancelling Ex. D. 1, as was done while executing Ex. D 1. The same is not forthcoming. All that has been said in Ex. P2, is that, he is not satisfied with the 1st/Ex. D1 as the Will was not proper and therefore he is revoking the Will. But according to the plaintiff, the cause for revocation of the Will was the ill treatment meted to the testator by the fourth defendant. To substantiate the said contention he relies on Ex. P5 - Diary maintained by the testator. If we look into the entire Ex. P5 the diary, it discloses that the testator was a person with philosophical mind. At no point of time he had any grievance against any person. He had never made comments on any person. On the contrary the other diary which is not disputed shows that he has made entries meticulously about the amount spent by him at various times and the purpose for which it was paid. If the entire diary which is not in dispute is taken into consideration it shows the testator was a meticulous person. He was conscious of what he was doing. The reason mentioned in the diary is conspicuously missing in the reason mentioned in the document. If we look into those disputed writings, it gives an impression that the fourth defendant and his wife humiliated the testator and he was made to regret for making out a Will earlier. It is to be remembered that on the date of Ex. P2, the testator was not living in the house of the 4th defendant, and he was living with the plaintiff. While the testator was living with the 4th defendant, if really he was humiliated the testator would have recorded the said fact as he was a meticulous person. The fact that the said diary do not contain any such note while the testator was living with the 4th defendant and shows such entries on the date of Ex. P2, when he was in the house of the plaintiff shows that the same was fabricated for the case, as the same is not reflected in Ex. P2 also. Therefore, the evidence relied upon in terms of Ex. P.5 do not help the plaintiff to any extent, though the disputed entries containing those remarks, are all denied by the fourth defendant.

36. The eldest son and two daughters of the testator are parties to the suit. The material on record do not indicate that they ever visited their father, when he was in the schedule property or at the residence of the plaintiff. They were the proper persons as members of the family to have given evidence about the mental condition of the testator at the time of Ex. P.2. They would have been the proper persons to have deposed about how the 4th defendant, his wife and son treated

the testator during his last days when he was with them. It is also to be seen that the first defendant, the eldest son is an attesting witness to Ex. D 1. It is he who files a written statement virtually stating that his signature to Ex. D 1 is taken at his residence by the fourth defendant in the absence of the testator. It is he who for the first time propounded the deed of revocation of the will. It is on record that the son of the plaintiff is staying with the first defendant. That explains the conduct of the first defendant in not appearing before the Court and giving evidence but tacitly supporting the case of the plaintiff. Similarly the daughters to whom the testator has given the out-house property, by not contesting the matter are consenting to a decree to be passed in favour of the plaintiff. It is in this context it is to be noticed plaintiff having taken such an active part in the cancellation of a valid Will, when he issued the legal notice and when he filed the plaint he did not whisper a word about the Will or its cancellation. He has filed the suit as if this is the property belonging to his father who has died interstate leaving behind the parties to the suit as his legal heirs and, therefore, he is entitled to 1/5th share in the suit schedule property. It is only when the fourth defendant set up a Will, which admittedly was within the knowledge of the plaintiff, he comes up with a rejoinder pleading that the Will set up by the defendant is cancelled as per Ex. P2. In fact it is the first defendant for the first time in the written statement, after denying due execution of the Will Ex. D 1 sets up the plea of cancellation of Ex. D 1 by Ex. P2. This conduct is not explained by the plaintiff. Whatever reason he has tried to give is an after thought and is not satisfactory.

37. WT It is also to be remembered that the testator retired as a Registrar of the Karnataka University. He is a Mysurian. If he is making a Will, he would not have depended on a professional bond writer to write the document and to attest the document, when especially he is in the habit of writing and cancelling the Wills meticulously. It is unthinkable how a person of this status would go to the Sub-Registrar's office in a rickshaw, sit on a bench in the Sub-registrar 's office, call the bond writer whom he has not seen in his life, instruct him to write the document and get it attested by another bond writer and yet another witness whose whereabouts are not known to anybody and thus deprive a valuable right to his son, who took care of him throughout his life with whom he lived in his own house.

38. Unfortunately, the Courts below without proper application of mind have misread the evidence on record, ignored the material evidence on record and proceeded on the assumption that the scribe of the document has been examined, one of the attesting witness has been examined and the document is registered and, therefore, due execution of Ex. P2 is established. It is clear from the said reasoning that the Courts below have not meticulously seen the evidence adduced before the Court. They proceed on the assumption that the attesting witness were present at the time of writing the document and the testator affixing his signature on the said document in their presence and that they have also affixed their signatures in the presence of the testator, a finding which is contrary to the evidence on record. Similarly, the Courts below have not properly appreciated the circumstances under which the Will Ex. D 1 came into existence; what was the intention of the testator while making bequest under the Will Ex. D1; the circumstances under which Ex. P2 came into existence and the plaintiff taking active part in the preparation and execution of the document and the legal inferences flowing from such conduct of the plaintiff. Similarly, the Courts have not kept in mind Section 70 and Section 63 of the Act which warrants the standard of proof that is required for due execution of Ex. P2 is the same as Ex. D1. Therefore, it is a case of misreading the evidence on record, not taking into account the evidence which is material, drawing inferences which are contrary to law and also ignoring the legal position. In those circumstances notwithstanding the fact that the Courts below have recorded a concurrent finding that Ex. P2 is duly executed, it is to be held that the said finding is perverse, capricious and contrary to the material on record and, therefore, requires to be set aside. Once the Courts below are in complete ignorance of the legal position, misread the oral evidence and record a concurrent finding, not only this Court in its jurisdiction under Section 100 of CPC has jurisdiction to interfere with such concurrent finding of fact, it also becomes its duty to interfere with such finding, in order to prevent miscarriage of justice. Accordingly, the concurrent findings recorded by the Courts below requires interference.

39. For the aforesaid reasons, the findings recorded by the Courts below that Ex. P2, the deed of cancellation, is duly executed cannot be sustained and consequently it is liable to be set aside. Hence, I pass the following order:

(a) Appeal is allowed.

(b) The judgment and decree of the Courts below are hereby set aside.

(c) The concurrent findings recorded by the Courts below that Ex. D 1, the Will under which the testator bequeathed the property to the fourth defendant is proved is upheld and consequently the plaintiffs suit for partition is dismissed.

Parties to bear their own costs.

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