A.Gomathi Vs. A.Sangeetha

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SooperKanoon Citation : sooperkanoon.com/60779

Court : Chennai

Decided On : Jun-24-2015

Judge : M.Sathyanarayanan

Appellant : A.Gomathi

Respondent : A.Sangeetha

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

24. 06.2015 CORAM THE HONOURABLE MS.JUSTICE V.M.VELUMANI C.M.A.(MD)No.1054 of 2014 & M.P.(MD) No.1 of 2014 A.Gomathi ... Appellant Vs. A.Sangeetha ... Respondent Appeal filed under Order 384(1) of the Indian Succession Act, 1925, against the order dated 28.08.2014, passed in S.O.P.No.1 of 2011, on the file of I Additional District Court (PCR), Tiruchirappalli. !For Appellant : Mr.G.Prabhu Rajadurai ^For Respondent : Mr.M.Subash Babu :

JUDGMENT
This Civil Miscellaneous Appeal has been filed by the appellant/petitioner against the order dated 28.08.2014, passed in S.O.P.No.1 of 2011, on the file of I Additional District Court (PCR), Tiruchirappalli.

2. The appellant is the petitioner in S.O.P.No.1 of 2011. She has filed the present Civil Miscellaneous Appeal against the order of the learned I Additional District Judge (PCR), Tiruchirappalli, partly allowing the S.O.P. granting Succession

Certificate, 50% of schedule mentioned properties.

3. According to the appellant, the learned I Additional District Judge ought to have allowed the O.P. in full. The respondent is the daughter of first wife of the appellant's husband Arumugam.

4. The case of the appellant: The appellant's husband Arumugam divorced his first wife and married the appellant. Her husband by a registered Will, dated 18.03.2008, bequeathed the properties mentioned therein. While, he was alive, he sold one of the items viz., the house property mentioned in the Will, to settle the monies borrowed for his medical expenses. He died on 21.05.2011. He was working in Tiruchirappalli City Co-operative Bank Ltd. When the appellant claimed the death-cum-retirement benefits, she was directed to obtain a Succession Certificate. Hence, she filed S.O.P.No.1 of 2011. The first wife of Arumugam did not object to her claim. Only the daughter objected to her claim. Hence, the daughter A.Sangeetha alone is made as respondent.

5. The case of the respondent: The appellant is not a lawfully wedded wife of Arumugam. The respondent's mother was not divorced by her father. They were living together as husband and wife till his death. The alleged Will is forged one. Only immovable property can be bequeathed. Hence, the Will is not valid and legal.

6. Before the lower Court, the appellant examined herself as P.W.1 and four other witnesses were examined as P.Ws.2 to 5 and marked 11 documents as Exs.P1 to P11. The respondent examined herself as R.W.1 and marked two documents as Exs.R1 and R2.

7. The learned Judge framed necessary points for consideration. The learned Judge, after considering all the materials on record, held that the appellant is the legally wedded wife of Arumugam, but failed to prove the Will, dated 18.03.2008, marked as Ex.P4 and therefore, partly allowed the S.O.P., granting 50% share to the respondent in the schedule properties.

8. Against the said order dated 28.08.2014, the present appeal is filed.

9. Heard the learned counsel appearing for the parties.

10. The learned counsel for the appellant contended that the learned Judge erred in holding that the Will was not proved. The identifying witness has categorically stated that the Executor signed the Will Ex.P.4 and has stated that the Testator and the witnesses signed the Will and he signed as Identifier. The learned Judge ought to have seen that the intention of Testator is to give properties to the appellant. The entire evidence taken together shows that the appellant had proved the Will. The appellant only took care of the Testator. The Testator had already settled the property on the respondent.

11. The learned counsel for the appellant further contended that Ex.P4 Will is a registered Will and as per Section 68 of Indian Evidence Act, it is not necessary to give positive evidence, to prove that the Testator saw the attesting witnesses, put their signature or that the attesting witnesses saw the Testator signing the documents. Registration is Prima facie, execution of Will. As per Section 63(c) of the Indian Succession Act, 1925, if the attesting witnesses receive from the Testator, personal acknowledgement that amounts to attesting the signature of Testator. The Courts must also take into consideration the attendant circumstances and the intention of the Testator. Even though P.W.5 has stated that he did not see the Testator signing Ex.P.4, he has stated that the Testator declared that Ex.P.4 is his intention. He saw the other witnesses signing the Will. All the three were in the Office of Scribe of P.W.2.

12. The learned counsel for the appellant relied on the following Judgments: (i) Kabhai Pahadsing and another Vs. Bhupat Lallu [1966 (7) GLR421, wherein in paragraph 4, it has been held as follows: "4. Now this very question came up for decision in Manickbai v. Hormasji Bomanji, Qaveqtor reported in I.L.R.I. Bombay 547. In that case also, the acknowledgment made was of the will and not of the signature of the testator. After referring to some English authorities, Green J.

laid down the rule in the following words: The rule to be gathered from those cases is that, if the testator produces a piper and makes the witnesses understand that it is his will, that is an acknowledgment of his signature, if the Court is satisfied that his signature was on the will when the witnesses attested it. It is true that the

learned Judge was not called upon in this case to construe Section 63, Clause (c) aforesaid. The case arose under Section 50 of the Indian Succession Act (X of 1865). Unfortunately, the latter Act is not available to me to-day But Mr. Patel very fairly drew my attention to the commentary by Paruck on the Indian Succession Act where the learned author, after quoting the present Section 63, states in italics the difference between Section 50 of the old Succession Act and Section 63 of the present Act. From Mr. Paruck's note, it appears that the only difference between the old and the new sections is that, whereas the old section contained the word "must" at several places, that word has now been substituted by the word 'has' or "shall" in the new section. The same point came up for decision under Section 63 of the present Indian Succession Act before a Full Bench of the Madras High Court in Ganshamdoss Naraycmdoss v. Gulab Bi Sai reported in A.I.R. 1927 Madras 1054. The Full Bench at page 1056 decided the point in the following words: 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. In that case also, the acknowledgment was in the form that the document was a will and not in the form that the document bore the signature of the testator. The test which was laid down in this Full Bench case was accepted as correct by Wanchoo, C.J.

(as he then was) in Smt. Umrao and Anr. v. Bakahi Gopal Bux, A.I.R. 1957 Rajasthan 180. The same test was applied by the Punjab High Court in Chhanga Singh Indar Singh v. Dharam Singh and others, A.I.R. 1965 Punjab 204. The Calcutta High Court also accepted the same view in Amarendra Nath Chatterjee and another, minors, by their mother and guardian Dakshabala Debt v. Kashi Nath Chatterjee, I.L.R. 27 Calcutta 169. At page 171, Their Lordships following Manickbai's case held that the acknowledgment of a document as a will by a testator was a sufficient acknowledgment of the testator's signature. From these decisions, it is obvious that the case-law is against the proposition which Mr. Patel canvasses for. Apart from the fact that I agree with the above decisions, I am bound by one of them, viz. Manick-bai's case. Therefore, I have come to the conclusion that the acknowledgment proved to have been made by Bai Jivi that the document was her will was a sufficient acknowledgment and as the attestation

by the aforesaid two witnesses was made by them in the presence of Bai Jivi, the attestation was, sufficient in law. Thus, in my judgment, the learned appellate Judge was right in holding that the will had been, duly proved.?. (ii) Manjula Bhargava Vs. Bharat Bhusan Bhargava etc., [ILR1980 Delhi 1535]., wherein in paragraphs 8, 11 and 16, it has been held as follows: "8.Shri P. R. Mridul, learned counsel for Manjula, has submitted that a high degree of formality in the matter of execution of the Will is exacted and that two pre-emptory requirements in the matter at' attestation are : (1) there should be at least two attesting witnesses and (2) the testator should either sign in their presence or should make personal acknowledgement of his signatures in case the signatures are not put in the presence of the witness. It is pointed out that so far as O. P. Dua is concerned, he is categorical that Shri Ram Bhargava did not sign the Will in his presence while C. S. Aggarwal is not sure whether it was signed in his presence or not. It is also pointed out that while according to the testimony of C. S. Aggarwal there was a personal acknowledgement of signatures by Shri Ram Bhargava, the same is not true of O. P. Dua and, therefore, there is infraction of the provision of Section 63, the argument being that inasmuch as the Will was not attested by the two witnesses at one and the same time, all that can be said at the highest is that the Will is attested by one witness only. We do not find merit in this argument. The opening words of the deposition of O. P. Dua are : "Shri Ram Bhargava had told me that he had executed a Will". Personal acknowledgement of signatures by the testator can clearly be spelt from this part of the statement of the witness, particularly in the context of the witness having stated that Shri Ram Bhargava had come to his place after giving him a ring and also after disclosing the purpose of his visit, namely, getting his Will attested.

11. Strong exception has been taken by Mrs. Shyamla Pappu as to the observations made by the learned Single Judge in regard to attesting witnesses, namely, the attesting witnesses have tried to create loopholes to help Manjula, the statement that they signed at their residences, appear to be incorrect and the attestation clause appears to be correct, as also the conclusion drawn from their evidence that Shri Ram Bhargava had signed the Will in their presence and they had attested the same in his presence at one and the same time but they were not stating so. It is pointed out that while O. P. Dua has categorically stated that Shri

Ram Bhargava did not sign the Will in his presence, it cannot be spelt out from the evidence of C. S. Aggarwal that the Will was signed by Shri Rani Bhargava in his presence. It is also stated that the mere fact that endorsement on the Will in regard to Shri Ram Bhargava having signed the Will in the presence of the two attesting witnesses and the latter having signed the same in the presence of Shri Ram Bhargava has been admitted to bear the signatures of the attesting witnesses does not prove the correctness of the endorsement and, therefore, the conclusion drawn by the learned Single Judge stands vitiated.

16. We are satisfied that no consideration of there being any suspicious circumstance surrounding the 1976 Will arises at all and need not discuss. H. Venkatachak lyengar- v. B, N. Thimmajamma and Others, 1959 Supp (1) S.C.R. 426 (4) and Jaswant Kaur v. Amrit Kaur and Others, relied upon on behalf of the appellants. As the things stand, due execution of the Will stands amply proved by the evidence of O. P. Dua and C. S. Aggarwal, who have stated unequivocally that they were approached by Shri Ram Bhargava with the avowed purpose of getting his Will attested and that they attested the Will after procuring personal acknowledgement in regard to his signatures. The fact that they did not attest the Will in the presence of each other is hardly of any consequence, this being not an essential requirement of the Statute.?. (iii) M.B.Ramesh Vs. K.M.Veeraje URS and others [2013 (7) SCC490, wherein in paragraphs 20, 26 and 27, it has been held as follows:

"0. In the present matter, there is no dispute that the requirement of Section 68 of the Evidence Act is satisfied, since one attesting witness i.e. PW2was called for the purpose of proving the execution of the will, and he has deposed to that effect. The question, however, arises as to whether the will itself could be said to have been executed in the manner required by law, namely, as per Section 63(c) of the Succession Act. PW2has stated that he has signed the will in the presence of Smt Nagammanni, and she has also signed the will in his presence. It is however contended that his evidence is silent on the issue as to whether Smt Nagammanni executed the will in the presence of M. Mallaraje Urs, and whether M. Mallaraje Urs also signed as attesting witness in the presence of Smt Nagammanni. Section 63(c) of the Succession Act very much lays down the requirement of a valid and

enforceable will that it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, and each of the witnesses has signed the will in the presence of the testator. As held by a Bench of three Judges of this Court (per Gajendragadkar, J., as he then was) way back in H. Venkatachala Iyengar v. B.N. Thimmajamma [AIR 1959 SC443, that a will has to be proved like any other document except that evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, apart from the one under Section 68 of the Evidence Act.

26. While drawing the appropriate inference in a matter like this, a court cannot disregard the evidence on the attendant circumstances brought on record. In this context, we may profitably refer to the observations of a Division Bench of the Assam High Court in Mahaluxmi Bank Ltd. v. Kamakhyalal Goenka [AIR1958 Ass 56]., which was a case concerning the claim of the appellant Bank for certain amounts based on the execution of a mortgage deed. The execution thereof was being disputed by the respondents, amongst other pleas, by contending that the same was by a purdahnashin lady, and the same was not done in the presence of witnesses. Though the evidence of the plaintiff was not so categorical, looking to the totality of the evidence on record, the Court held that the execution of the mortgage had been duly proved. While arriving at that inference, the Division Bench observed: (AIR p. 62, para 11).11. ?. It was, therefore, incumbent on the plaintiff to prove its execution and attestation according to law. It must be conceded that the witnesses required to prove attestation has (sic) not categorically stated that he and the other attesting witnesses put their signatures (after having seen the execution of the document) in the presence of the executants. Nevertheless, the fact that they actually did so can be easily gathered from the circumstances disclosed in the evidence. It appears that the execution and registration of the document all took place at about the same time in the house of the defendants. The witnesses not only saw the executants put their signatures on the document, but that they also saw the document being explained to the lady by the husband as also by the registering officer. They also saw the executants admit receipt of the consideration, which was paid in their presence. As all this happened at the same time, it can be legitimately inferred that the witnesses also put their signatures in the presence of the executants after having

seen them signing the instrument. ?. ?. There is no suggestion here that the execution and attestation was not done at the same sitting. In fact, the definite evidence here is that the execution and registration took place at the same time. It is, therefore, almost certain that the witnesses must have signed the document in the presence of the executants.?. 27.The approach to be adopted in matters concerning wills has been elucidated in a decision on a first appeal by a Division Bench of the Bombay High Court in Vishnu Ramkrishna v. Nathu Vithal [AIR1949 Bom 266].. In that matter, the respondent Nathu was the beneficiary of the will. The appellant filed a suit claiming possession of the property which was bequeathed in favour of Nathu, by the testatrix Gangabai. The suit was defended on the basis of the will, and it came to be dismissed, as the will was held to be duly proved. In appeal it was submitted that the dismissal of the suit was erroneous, because the will was not proved to have been executed in the manner in which it is required to be, under Section 63 of Succession Act. The High Court was of the view that if at all there was any deficiency, it was because of not examining more than one witness, though it was not convinced that the testatrix Gangabai had not executed the will. The Court remanded the matter for additional evidence under its powers under Order 41 Rule 27 CPC. The observations of Chagla, C.J., sitting in the Division Bench with Gajendragadkar, J.

(as he then was in the Bombay High Court) in para 15 of the judgment are relevant for our purpose: (AIR pp. 270-71).15. ?. We are dealing with the case of a will and we must approach the problem as a court of conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a court of conscience would not permit such a thing to happen. We have not heard Mr Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the propounders of the will were negligent?.and grossly negligent?.in not complying with the requirements of Section 63 and proving the will as they ought to have, should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not. (emphasis supplied)"" (iv) Janaki Devi Vs. R.Vasanthi and others [2005 (1) MLJ357, wherein in paragraphs

25, 39 and 40, it has been held as follows: "25.In an unreported decision of this Court in Maria Stella v. Joseph Catherine, in C.M.A. No.1020 of 1990 dated 11.7.2002, one of us (K. Govindarajan, J.) has held, considering the previous decisions, as well as the effect of Section 68 of the Indian Evidence Act and the factum of registration of the Will, that it is clear that it is not necessary to give positive evidence to prove that the testatrix did see the attesting witnesses put their signatures or that attesting witnesses saw the testatrix sign the document. Where there is proof of signature, everything else is implied till the contrary is proved. In the absence of witnesses who are either dead or cannot be brought to Court or cannot recollect the facts, the second evidence is permitted. It is also further observed, relying on a Division Bench of this Court in Irudayammal v. Salayath Mary, 1972 (2) MLJ508 that it is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registration officer under Section 60 of the Registration Act is relevant for proving execution.

39. In Irudayammal v. Salayath Mary, 1972 (2) MLJ508 a Division Bench of this Court has held that certificate of registration under Section 60 of the Registration Act is relevant for proving the execution, wherein it is observed as follows: "It is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is prima facie evidence of its execution and the certificate of the registration officer under Section 60 of the Registration Act is relevant for proving execution."

40. In Hutchegowda v. Chennigegowda, AIR1953 Mys. 49, the following view was taken by a Division Bench: "Evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed."?. (v) Janki Narayan Bhoir Vs. Narayan Namdeo Kadam [2003 (2) SCC91, wherein in paragraph 11, it has been held as follows:

"1. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses,

though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (g) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by ?.other evidence?. as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him

to give a go-by to the mandate of law relating to the proof of execution of a will."

13. Per contra, the learned counsel for the respondent contended that the appellant failed to prove the genuineness of the Will, as per law. The learned Judge had considered the entire evidence and rightly held that the Will is not proved as per law. The learned counsel for the respondent further contended that P.W.5, the attesting witness has stated that he did not see the Testator signing the Will. Execution and attestation are two different things and the appellant has failed to prove the attestation, as contemplated under Section 63 of the Indian Succession Act.

14. The learned counsel for the respondent relied on the following Judgments: (i) Rengasamy Vs. Rugmini and others [2006 (5) CTC332, wherein in paragraphs 14 and 15, it has been held as follows: "14.Therefore in order to establish the claim based on the Will, the revision petitioner herein has to prove the execution of the will as contemplate under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

15. Here in this case, one of the attesters was not alive on the date of proving the Will and it could have been proved by the evidence of the other attester. But as per the evidence of P.W.3 in the cross-examination, be ha not seen Ammalu Nadathi signing the Will. Even P.W.1 had not accompanied Ammalu Nadathi to the Registrar's Office. Similarly, as per his evidence of the other witnesses, they had not seen the testator and the attesters signing the Will. Therefore, I am of the view that the execution of the alleged will by the Ammulu Ammal has not been proved as set out by the Court below. As there is no illegality in the order passed by the Court below, in my view, the petition filed under Article 227 of the Constitution of India has no merits, and as there is no illegality or error in the order passed by the Court below, this Court can not interfere with the findings of the Court below.?. (ii) Kannamaml Vs. Chinnaponnammal [1997 (I) CTC222, wherein in paragraph 15, it has been held as follows:

"5. In Roda Framroze Mody v. Kanta Varjivandas Saraiya , A.I.R1946 Bom. 12, a Division Bench of the Bombay High Court considered as to how the attestation has to be proved, and even in case only one attesting witness is examined, he must be

in a position to speak about the entire execution and attestation of the document. That means, he must be in a position to speak not only about his attestation to the document, but also about the attestation to the document by the other witness. In the said decision, it was held thus:- "Sec. 68, Evidence Act, does not say that a document required to be attested by two witnesses shall be proved by the evidence of one of them. All that the Section provides is that such a document shall not be accepted in evidence unless the evidence of atleast one of the attesting witnesses is called. The words 'at least' pre-suppose that more evidence may be required, and it can only be by reference to the circumstances of each case that the quantum of evidence necessary to discharge the onus of proof can be measured. Sec. 68, Evidence Act, lays down only the mode of proving and it does not define what is required to be proved under Sec. 63 (c), Succession Act Sec. 63 (c), Succession Act, requires that the will should be attested by two or more witnesses, each of whom had either seen the testator sign or affix his mark, or had received from the testator a personal acknowledgment of his signature or mark on the will. The combined effect of Sec. 63 (c), Succession Act, and Sec. 68, Evidence Act, is that what the person propounding the will has got to prove is that the will was duly and validly executed and that must be done by not simply proving that the signature on the will was that of the testator but that the attestations were also properly made as required by Sec. 63 (c). No doubt Sec. 68, Evidence Act, says that it is not necessary to examine both or all the attesting witnesses, but it does not follow therefrom that if one attesting witness only proves that the testator had acknowledged his signature to him it is not necessary that the acknowledgment by the testator before the other attesting witness need be proved. All that it means is that if two attesting witnesses had signed in each other's presence, it is not necessary to examine both of them to prove that they had received the acknowledgement from the testator. But if, as allowed under Sec. 63, the attestations to the testator's signature were not made at the same time, it is necessary to prove that both the persons, who put down their attesting signatures on different occasions, had done so on the acknowledgement of the testator. Accordingly where a will duly signed by the testator was attested by the witnesses not in the presence of each other but at different times on the acknowledgement by the testator of his own signature the evidence of one of the attesting witnesses

is not sufficient to prove execution of the will."

The said decision was followed by our High Court in the Bench decision reported in A. Rangaswami Pillai v. A. Subramania Pillai and others , A.I.R. 1975 Mad.

141. In Paragraph 6 of the judgment, their Lordships said thus:- ".... Under Sec. 63 (c) of the Indian Succession Act, a Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator. Therefore, proof of due ex ecution requires that either one or more of the attesting witnesses should prove the execution by the testator and the attestation by each of them. This is also the ratio of the judgment of a Division Bench of the Bombay High Court in Roada Framroze v. Kanta Varjivandas , A.I.R. 1946 Bom. 12."

The said principle was reiterated in the decision reported in Sarojini Ammal and another v. Anbazhagan and others , 1984 (II) M.L.J.

313, wherein it was held thus:- "Under Sec. 63 (c) of the Indian Succession Act, to amount to due attestation of the will, (1) each of the attesting witnesses should have seen the testator signing the will or must have received from the testator a personal acknowledgment of his signature; (2) each of the witnesses should have signed the will in the presence of the testator, and (3) if only one attesting witness is examined, there must be evidence to show that the other attesting witnesses was also present at the time when the executan t signed the document or received from the executant a personal acknowledgment of his signature or mark, valid attestation of the will can be said to have been proved not necessarily by calling both the attestors but even by examining one attestors provided his evidence shows that the other attesting witness was also present at the time when the executant signed the document or put his mark."" (iii) Valliammal and another Vs. Sokkammal [2012 (4) CTC639, wherein in paragraph 28, it has been held as follows:

"8. So far as the registered Will stated to have been executed by Chellapillai is concerned, it was produced as Ex.B3. No doubt the said Will was a registered one and therefore, it was argued that the genuineness of the Will may be taken note of by virtue of its registration. No doubt the registration can be considered as one of the pieces of evidence for its proof but the requirements of proof is governed by Section 68 of the Indian Evidence Act, coupled with the provisions of Section 63(c) of the Indian Succession Act. The attestation required was also explained in Section 63(c) of the Indian Succession Act. For better understanding, the provisions of Section 63(c) Indian Succession Act, has been extracted as follows: "63(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 been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, 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."" (iv) Chikkanan Vs. A.R.Perumal and others [2004 (2) TLNJ189, wherein in paragraph 12, it has been held as follows: "12.It is well settled by preponderance of decisions that attestation of a document as defined under Section 3 of the Transfer of Property Act should have been made with the intention to attest and that if a person puts his signature as a scribe he is not an attesting witness. Such proposition of law has been reiterated by the Supreme Court in ABDUL JABBAR v. VENKATA SASTRI [AIR 1969 SC1147, wherein Their Lordships have held in paragraph 8 as follows:- "Section 3 of the Transfer of Property Act gives the definition of the word "attested" and is in these words:- 'Attested', in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of

attestation shall be necessary. It is to be noticed that the word 'attested', the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Section 3 are (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."" (v) Kashibai and another Vs. Parwatibai and others [1995 (II) CTC476, wherein in paragraph 10, it has been held as follows:

"0. This brings us to the question of the will alleged to have been executed by deceased Lachiram in favour of his grand-son Purshottam, the defendant No.3. Section 68 of Evidence Act related to the proof of execution of document required by law to be attested. Admittedly, a Deed of Will is one of such documents which necessarily require by law to be attested. Section 68 of the Evidence Act contemplates that if a document is required by law to be attested, it shall not be used as evidence until the attesti ng witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. A reading of Section 68 will show that "attestation" and "execution" are two different acts one following the other. There can be valid execution of a document which under the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the feet of execution is of no avail. Section 63 of the Indian Succession Act, 1925 also lays down certain rules with (C) of Section 63 provides that the Will shall be attested by two or more witnesses each one 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 of mark of the such other person; and each of the witnesses should 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.?.

15. I have carefully considered all the materials on record and considered the arguments of the learned counsel for the appellant and the respondent.

16. The only issue to be decided in this appeal is whether the appellant proved the Will Ex.P4 as per law or not?.

17. As per Section 63 of the Indian Succession Act, 1925, the Testator must sign the Will, in the presence of two or more witnesses and the witnesses must sign in the presence of Testator and all must be present at the same time and put their signatures, in the presence of each other. The Will has to be proved by examining at least one attesting witness. Ex.P4 Will in question, is a registered Will. The appellant had examined the identifying witness, scribe and one of the attesting witnesses.

18. The scribe as P.W.2 has stated that the Testator gave instructions to him to prepare the Will. As per said instructions, he prepared the Will and gave draft to the Testator, who after reading the same, approved the contents. After that, P.W.2 prepared the fair Will. He signed in the last page in proof of having prepared the Will. From the evidence of P.W.2, the intention of the Testator and preparation of Will Ex.P4. P.W.3 identified the Testator at the time of registration and proved the registration. In these facts and circumstances, the evidence of P.W.5, the attesting witness, has to be considered as a whole. P.W.5 has deposed that he was called to attest the Will. When he went to P.W.2's Office, the Testator, P.W.2 and other attesting witness-Raman were present. The Testator stated that he is executing the Will. P.W.5 did not see the Testator signing the Will. But, he deposed that he saw the Testator, Scribe - P.W.2 and other attesting witnesses, when he signed Ex.P4 and also saw the other attesting witness signing Ex.P4. From the evidence of P.W.5, it is clear that the Testator has declared that he is executing the Will and P.W.5 signed the Will as attesting witness and saw other attesting witness signing the Will and all of them were present, at the same time in the office of P.W.2, the scribe of the Will.

19. As per Section 63(c) of the Indian Succession Act, 1925, the Testator and attesting witnesses must sign the Will in the presence of each other and all being present at the same time. Section 63(c) of the Indian Succession Act, 1925, reveals that when attesting witness puts his signature in the Will, based on the personal acknowledgement of Testator about his signature in the Will, then the attestation is valid attestation, even though the attesting witness has not seen the Testator signing the Will. This proposition has been approved by the Judgments referred to above.

20. Ex.P4 is a registered Will. A Division Bench of this Court in the Judgment reported in 2005 (1) MLJ357(supra) has held in paragraph 25 that "... Where there is proof of signature, everything else is implied till the contrary is proved."

Hence, the conclusion of the learned Judge that the appellant failed to prove the Will is contrary to law, as per well settled judicial pronouncements referred to above.

21. In deciding the genuineness of the Will, the Court as a Court of conscience, must consider the intention of Testator and the attendant circumstances. The respondent, except stating that the Will Ex.P4 is a forged one, has not opposed the same, on any other ground. The appellant had proved that she is a lawfully wedded wife of Testator and he lived with her till his death and she only performed his funeral rites.

22. Considering the pleadings, evidence, Section 63(c) of the Indian Succession Act, 1925 and the various Judgments relied on by the learned counsel for the parties, I am inclined to accept the contentions of the learned counsel for the appellant and I hold that the appellant has proved the genuineness of the Will Ex.P4 by her husband.

23. For the reasons stated above, this Civil Miscellaneous Appeal is allowed. The order of the learned I Additional District Judge, Tiruchirappalli, dated 28.08.2014, made in S.O.P.No.1 of 2011 is set aside. The appellant is entitled to succession to the entire amount mentioned in S.O.P.No.1 of 2011. No costs. Consequently, the connected miscellaneous petition is closed. To The I Additional District Judge

(PCR), Tiruchirappalli.