

Padmini. Vs. Easwari and ors.

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Court : Chennai

Decided On : Jul-30-2012

Judge : C.Nagappan; R.Karupppiah, Jj.

Acts : [Hindu Succession Act, 1956](#) - Section 15, 15(2)(1)(a); [Indian Succession Act, 1925](#) - Section 63; [Indian Evidence Act, 1872](#) - Section 68, 69

Appeal No. : Appeal Suit No.904 of 2005 and CMP.No.566 of 2010

Appellant : Padmini

Respondent : Easwari and ors.

Advocate for Def. : Mr.J.R.K.Bhavanantham, Adv.

Advocate for Pet/Ap. : Mr.N.Damodaran, Adv.

Judgement :

Prayer in A.S.No.904/2005:- This Appeal is preferred against the judgment and decree, dated 11.8.2004, made in O.S.No.200 of 2004 on the file of the Additional District Judge, Fast Track Court, Poonamallee.

Prayer in CMP.No.566 of 2010: This Petition is filed by the appellant/plaintiff to receive the petition mentioned documents viz. (1) Sale deed dated 29.10.1927 (2) Sale deed dated 29.9.1938 and (3) Sale deed dated 22.4.1941 as additional documents on the side of appellant/plaintiff.

JUDGMENT

R.KARUPPIAH,J.

1. This Appeal Suit is directed against the judgment and decree, dated 11.8.2004, passed in O.S.No.200 of 2004 on the file of the Additional District Judge, Fast Track Court, Poonamallee. The plaintiff in the above said suit is the appellant herein.

2. For the sake of convenience, in this Judgment, the parties are referred to as arrayed in the suit.

3. The appellant/plaintiff has filed the suit for partition of her 1/3 share in the first and second schedule suit properties. Briefly, the case of the plaintiff is that one Elumalai Naicker and his wife Gangammal had two daughters and two sons viz., Rajammal (D6), Valliyammal, Raman and Lakshmanan (D1) and Valliyammal died intestate on 25.7.1960 leaving her only daughter Padmini, who is the plaintiff. Gangammal died intestate in the year 1968 and her husband Elumalai Naicker died intestate in the year 1974 and Raman also died intestate on 8.6.1982 leaving behind his legal heirs defendants 2 to 5. During the pendency of the suit, the first defendant died on 1.3.1996 and his wife and children are defendants 8 to 15. Sixth defendant who is one of the daughters of Elumalai also died as issueless.

4. According to the plaintiff, the first schedule properties i.e., item Nos.1 to 6 originally belonged to Elumalai Naicker and his wife Gangammal and patta pass book was also issued jointly in the name of husband and wife and the above said properties were not divided so far. It is further stated that second schedule properties i.e., item Nos.1 to 6 were jointly purchased with the assistance of income from the above said properties of Elumalai Naicker and Gangammal in the name of first defendant viz. Lakshmanan and his deceased brother Raman. Under the provisions of Section 15 of the [Hindu Succession Act, 1956](#), the plaintiff has got one fourth share and first and sixth defendants have got one fourth share each and the defendants 2 to 5 jointly have one fourth share in the first and second schedule properties and since the defendants were trying to alienate the properties, the plaintiff issued a legal notice dated 30.9.1994 to defendants 1 to 6

and except the first defendant, other defendants have received the notice and the first defendant's notice returned as undelivered. None of them replied to the plaintiff's legal notice and therefore the plaintiff filed the suit for partition of her 1/4 share in first and second schedule properties. During the pendency of the suit, one of the daughters of Elumalai Naicker namely 6th defendant died issueless and also 1st defendant, one of the sons of Elumalai, also died and defendants 8 to 15 are his legal heirs and hence the plaintiff amended the plaint praying for 1/3 share in the suit properties.

5. Before the Trial Court,, 7th defendant remained exparte and D1 and D6 were died and on the side of other defendants, the third defendant has filed written statement and adopted by D2 to D5 and D8 to D15, in which it is stated that some of the plaint schedule properties belonged to Elumalai and for the auspicious reason and also to give happy to his wife, Elumalai had purchased one item of plaint schedule properties i.e. an extent of 1.09 acres in the name of his wife Gangammal, who was house wife and not having any means to purchase and hence the above said item of the property also absolutely belonging to Elumalai.

6. The defendants have denied the allegation that Elumalai Naicker died intestate in the year 1974 as false and contended that Elumalai Naicker executed a registered Will and there is no question of division of properties by inheritance. According to the wish of Elumalai Naicker and as per Will, the defendants were enjoying the properties and the suit has been filed in the year 1995 with long delay and the plaintiff very well known that she has no right in the schedule mentioned properties and there is registered Will pertaining to the schedule mentioned properties and the same were absolute properties of Elumalai Naicker and according to the Will, the defendants are enjoying the properties. According to the defendants, some of the schedule mentioned properties were covered by registered sale deed and some of the properties were sold out during the life time of Elumalai Naicker.

7. It is further stated in the written statement that the plaintiff's mother got married before 1956 and the plaintiff has got married before 1989 and either in law or on facts, the plaintiff is not entitled over the schedule mentioned properties and as

such the question of partition will not arise. The defendants have also contended that the plaintiff has neither title to the properties nor in possession of the properties and hence she is not entitled for any relief.

8. From the above said pleadings, the learned Trial Judge had framed three issues and on the side of the plaintiff, the plaintiff deposed herself as PW.1 and marked five documents as Exs.A1 to A5 and on the side of the defendants, four witnesses were examined as D.Ws.1 to 4 and eight documents were marked as Exs.B1 to B8. On considering the oral and documentary evidence, the Trial Court finally held that the plaintiff is not entitled to any share in the suit properties and dismissed the suit. Aggrieved over the same, the plaintiff has filed the present appeal.

9 During the pendency of the appeal, the appellant/plaintiff filed CMP.No.566 of 2010 to receive three documents viz., (1) Copy of sale deed dated 29.10.1927 (2) Copy of sale deed dated 29.9.1938 and (3) Copy of sale deed dated 22.4.1941 in this appeal as additional documents.

10. Heard the learned counsel on both sides and perused the records.

11. The Points for determination in this appeal are:

"1. Whether the CMP.No.566 of 2010 is to be allowed?

2. Whether Ex.B2 registered Will dated 16.2.1974 is true and valid document?

3. Whether the appellant/plaintiff is entitled to 1/3 share in the suit first and second schedule mentioned properties?"

POINT NO.1:

12. The appellant/plaintiff has filed the suit for partition for her 1/3 share in the suit properties and the Trial Court has dismissed the suit and as against the same, this appeal has been filed. During the pendency of the appeal, the appellant/plaintiff has filed petition in CMP.No.566 of 2010 to receive three documents viz., (1) Copy of sale deed dated 29.10.1927 (2) Copy of sale deed dated 29.9.1938 and (3) Copy of sale deed dated 22.4.1941 as additional documents by stating that the above said documents could be traced out only recently. On the side of the

respondents, filed counter objecting to receive the above said documents as additional documents, but at the time of arguments, the respondents have not seriously objected to receive the documents. Further, the appellant/plaintiff had already pleaded in the plaint itself that 6 items of first schedule properties were purchased by Elumalai Naicker and his wife jointly, but at the time of trial, the above said documents were not marked since the same could not be traced out. The execution of the above said sale deeds were not disputed by the respondents and since the documents are not available at the time of trial, could not be marked the above said documents are necessary to decide this appeal as rightly contended by the learned counsel for the plaintiff and no prejudice will be caused to the respondents if the same are received. Therefore, we are of the view that the petition in CMP.No.566 of 2010 is to be allowed and three documents are to be marked on the side of the appellant/plaintiff as Exs.A6 to A8 and we answer this point accordingly.

POINT Nos.2 and 3:

13. The learned counsel for the appellant has contended that late Elumalai Naicker and his sons and daughters lived as joint family in the same house and purchased various properties and six items of First schedule properties were purchased in the name of Elumalai and his wife Gangammal and the above said properties stand in their joint name and to prove the same Exs.A3 to A8 were filed and with regard to second schedule properties, Elumalai and his sons constituted joint family and since the first schedule properties were fertile lands, the same were cultivated by late Elumalai and out of the income from six items of first schedule properties, six items of second schedule properties were purchased. The learned counsel for the appellant has further contended that the alleged Will dated 16.2.1974 said to have been executed by Elumalai is not true and valid in law since some of the properties in first schedule were purchased in the name of Gangammal, wife of late Elumalai and the above said Will is a created document and not executed by late Elumalai but the Trial Court has erroneously held that the Will was proved by relying upon the sole evidence of DW.2-R.Narayanasamy and therefore the appellant/plaintiff is entitled to 1/3 share in both first and second schedule properties.

14. Per contra, the learned counsel appearing for the respondents/defendants would contend that Gangammal, wife of Elumalai, had no independent source of income to purchase the properties and only Elumalai purchased the properties in the name of Gangammal for auspicious reason and also to give happy to his wife and therefore the entire six items of first schedule properties belonged to Elumalai. With regard to second schedule properties, the learned counsel for the respondents/defendants would contend that all the items of second schedule properties were self-acquired properties of Raman and Lakshmanan, who are sons of Elumalai and also their wives and the above said properties were not purchased with the aid of income from the properties of Elumalai and Gangammal and therefore the plaintiff is not entitled to any share in both first and second schedule properties. Further, the learned counsel for the respondents would contend that late Elumalai had executed Ex.B2-registered Will dated 16.2.1974 and as per the Will, the plaintiff is not entitled to any share in both first and second schedule properties.

15. Admittedly, the relationship of the parties, as stated in para 3, are not in dispute. With regard to six items of first schedule, the learned counsel for the appellant/plaintiff would contend that item Nos.1 to 3 of first schedule properties were jointly purchased in the name of Elumalai and his wife Gangammal and item No.4 was purchased by Gangammal alone and therefore Gangammal was entitled to half share in item Nos. 1 to 3 and entire fourth item in first schedule and Elumalai was entitled to only half share in items 1 to 3 and entire items in 5 and 6. To prove the above said contentions, on the side of the appellant/plaintiff has filed Ex.A3-patta pass book, Ex.A4-mortgage deed dated 26.8.1948, Ex.A5-mortgage deed dated 8.4.1941 and before this Court, filed three documents as additional documents and marked Exs.A6 to A8.

16. Per contra, the defendants denied the above said averments and contended that Gangammal was house wife and she had no means to purchase properties and Elumalai alone had purchased the above said properties for auspicious reason and also to give happy to his wife, purchased properties in the name of his wife Gangammal and therefore the entire six items of first schedule properties belong to Elumalai and Gangammal had no title in any one of the six items of first

schedule.

17. To prove the above said contention, on the side of the plaintiff, has marked Exs.A3 to A5 before the trial Court and on the side of the defendants, have marked Exs.B4 and B5 and during the pendency of this appeal, as discussed in point No.1, on the side of the plaintiff, 3 documents viz. Exs.A6 to A8 were filed as additional documents. A perusal of Ex.A3-patta pass book reveals that all six items of first schedule are in the name of both Elumalai and Gangammal; Ex.A4-mortgage deed dated 26.8.1948 reveals that both Elumalai and Gangammal mortgaged their property in item No.6 in first schedule viz. S.No.207; Ex.A5 reveals that both Elumalai and Gangammal mortgaged their properties in item Nos.1 to 3 and 5 in first schedule viz. S.Nos.587/4A, 587-4B, 587/3 and 178/1; Ex.A6 reveals that item No.2 in first schedule viz. S.No.587-4B was purchased by both Elumalai and Gangammal; Ex.A7 reveals that item No.1 in first schedule viz. S.No.587/4A was purchased by both Elumalai and Gangammal; Ex.A8 reveals that item No.4 in first schedule viz. S.No.176 was purchased by Gangammal alone. A perusal of Ex.B4 sale deed dated 4.7.1929 reveals that item No.5 in first schedule viz. S.No.178/1 was purchased in the name of Elumalai and Ex.B5 sale deed dated 16.4.1945 reveals that item No.6 in first schedule viz. S.No.207 was purchased by Elumalai alone. From the above said documents, it is clearly proved that item Nos.1 to 3 in first schedule properties were purchased by both husband and wife jointly and item No.4 was purchased by Gangammal separately and item Nos.5 and 6 in first schedule were purchased only in the name of Elumalai and patta was also issued in the name of both husband and wife for all six items of first schedule properties.

18. Therefore, item Nos.1 to 3 in first schedule were purchased in the names of both Elumalai and Gangammal and item No.4 was purchased in the name of Gangammal alone and item Nos.5 and 6 were purchased in the name of Elumalai alone and further it reveals from Ex.A3 patta pass book, all the first and second schedule properties are jointly in the name of Elumalai Naicker and Gangammal.

19. The defendants have not produced reliable oral and documentary evidence to prove that all the 6 items of first schedule properties were purchased only by

Elumalai Naicker. Per contra, the learned counsel for the appellant/plaintiff has contended that Gangammal had independent income by rearing cattle and milk vending business and out of the above said income, properties were purchased by her. As rightly contended by the learned counsel for the appellant/plaintiff, absolutely no reliable evidence except oral testimony of DW.1 to prove the fact that Elumalai Naicker purchased properties for auspicious reason and to give happy to his wife Gangammal.

20. As already stated, item Nos. 1 to 3 in first schedule properties were purchased jointly in the name of husband and wife Gangammal and 4th item in the name of Gangammal alone by way of registered sale deeds and also applied for patta in both names and patta also has been issued in the name of both husband and wife and therefore, the contentions of the defendants cannot be accepted. From the above discussion, we are of the view that with regard to item Nos.1 to 3 in first schedule, both Elumalai and Gangammal purchased jointly and therefore both of them are entitled to half share in each and with regard to item No.4 in first schedule, Gangammal alone entitled since it was purchased only by Gangammal and item Nos.5 and 6 were purchased only by Elumalai and therefore Elumalai alone entitled to item Nos.5 and 6 in first schedule.

21. With regard to item Nos.1 to 6 in second schedule properties are concerned, the learned counsel for the appellant/plaintiff would contend that the first schedule properties are fertile lands and the same were cultivated by Elumalai and his sons, which yielded good income and Elumalai Naicker and his sons constituted a joint family and out of the income from first schedule joint family properties, second schedule properties were purchased in the name of sons of late Elumalai Naicker viz. Raman and Lakshmanan and therefore the plaintiff is entitled to share in item Nos.1 to 6 in second schedule properties.

22. Per contra, the learned counsel for the defendants would contend that the entire items in second schedule properties are not joint family properties as alleged by plaintiff since the above said items were not purchased out of joint family funds and further item Nos.1 to 6 were purchased only in the name of Raman and Lakshmanan, who are sons of Elumalai and also some properties

were purchased in the names of their wives during the life time of Elumalai and hence the plaintiff is not entitled to any share in the item Nos.1 to 6 in second schedule properties.

23. Admittedly, the plaintiff has not produced any document to prove that item Nos. 1 to 6 in second schedule properties were purchased by Elumalai out of the income from joint family properties. Except oral evidence, no other documents were produced to prove the above said facts. In the oral evidence also, the plaintiff has not stated about the excess income from the joint family properties so as to purchase the second schedule properties. No reason is stated as to why the above said properties were purchased in the name of sons and daughter-in-law while Elumalai was alive at that time. Admittedly, the sons of Elumalai viz. Raman and Lakshmanan were employees in Railway and having independent income and therefore the contention of the plaintiff that the second schedule properties are joint family properties, is also not sustainable. From the above said discussion, it is clear that item Nos.1 to 3 in first schedule properties were jointly entitled to Elumalai and his wife Gangammal i.e., half share each and item No.4 belonged to Gangammal alone and item Nos.5 and 6 were belonged to Elumalai alone and items 1 to 6 in second schedule properties are concerned, the plaintiff has not proved that the properties were purchased out of income from joint family properties as alleged in the plaint and hence the plaintiff is not entitled to any share in second schedule properties.

24. Further case of defendants is that the above said Elumalai had executed Ex.B2 registered Will dated 19.2.1974 in favour of his sons viz. Raman and Lakshmanan and therefore the plaintiff is not entitled to any share in first schedule properties and the plaintiff has not filed any additional statement or not stated in the plaint challenging the above said alleged Ex.B2 Will and Elumalai was died on 4.9.1974 and Will came into effect and as per Ex.B2 Will dated 19.2.1974, only Raman and Lakshmanan are entitled to first schedule properties.

25. Though the plaintiff has not pleaded in her plaint about the alleged Will dated 16.2.1974, yet at the time of evidence, has denied the execution of the said Will. Since it is a Will, the propounder of the Will (i.e) the defendants to prove the above

said Will as per Section 63 of the [Indian Succession Act, 1925](#) and Section 68 of the [Indian Evidence Act, 1872](#). If the primary evidence is not available, then he has to prove by leading secondary evidence under Section 69 of the Indian Evidence Act and remove all suspicious circumstances.

26. The learned counsel for the respondents/defendants would contend that Ex.B2 Will was executed and registered on 19.2.1974 and the testator viz. Elumalai and all the attesting witnesses, identifying witness and scribe of the document were died and the above said fact is not denied by the appellant/plaintiff and the said fact was proved by the defendants by way of oral evidence and in the above circumstances, the defendants examined DW.2-R.Narayanasamy, who was present at the time of execution and registration of Ex.B2 Will so as to prove the thumb impression of the testator and the signatures and thumb impression of the attesting and identifying witnesses and scribe and therefore the defendants have proved the execution and registration of the said Ex.B2 Will under Section 69 of the Indian Evidence Act.

27. The learned counsel for the plaintiff has raised two suspicious circumstances and the first suspicious circumstance is that the defendants have not explained as to why the testator put his left thumb impression in Ex.B2 Will when he used to sign in all documents. Secondly, in Ex.B2 Will, no property was given to the plaintiff who is one of the daughter of the executor Elumalai and relied on the following two decisions.

"1. K. LAXMANAN Vs. THEKKAYIL PADMINI (2008 (6) CTC 92) and

2. S.R.SRINIVASA Vs. S.PADMAVATHAMMA (2010) 5 SCC 274)."

28. Per contra, learned counsel for the defendants would contend that the above said suspicious circumstances raised by the plaintiff are not sustainable when the defendants have proved the genuineness of the Will by examining DW.2 as per Section 69 of Indian Evidence Act and also removed the alleged suspicious circumstances raised by plaintiff and therefore the contention of the learned counsel for the plaintiff is unsustainable and in support of their contentions, the learned counsels for the respondents/defendants relied on the following three

decisions:

- "1. CORRA VEDACHALAM CHETTY Vs. G.JANAKIRAMAN (2001 (3) CTC 283),
2. RAMABAI PADMAKAR PATIL Vs. RUKMINIBAI VISHNU VEKHANDI (2003) 8 SCC 537) and
3. DAULAT RAM Vs. SODHA (2005) 1 SCC 40).

29. In the instant case, admittedly the testator of the Will viz. Elumalai Naicker died on 4.9.1974 and to prove the same, Ex.B3 Death Certificate was produced. The original registered Will Ex.B2 was marked through DW.1 who is the son of testator. It is not in dispute that the above said Ex.B2 Will is registered Will and also not disputed that all the witnesses viz. Rajammal, Krishnappa Naicker, Raju Naicker and scribe viz. Kothandapani were died and therefore the defendants have not examined any witnesses as prescribed under Section 68 of the Indian Evidence Act. On the side of the defendants have examined DW.2-R.Narayanasamy, who is the son of P.Raju Naicker, one of the identifying witnesses to prove the execution and attestation of the above said Will and in his oral testimony he has deposed that at the time of execution and registration of the Will, he accompanied with his father to the Registrar office and in the registration office, the Will was executed and registered, in which, Elumalai affixed his thumb impression and identified the thumb impression of the testator before the Court and also identified his father's signature and also deposed that Krishnappa Naicker affixed his signature and Rajammal affixed her thumb impression in the above said Will and Ex.B2 Will was executed by the scribe Kothandapani and now all of them were died. Admittedly, the above said will was a registered Will and the executor, all the witnesses and scribe were died and hence DW.2-R.Narayanasamy was examined to prove the thumb impression of late Elumalai and signatures of other witnesses and scribe and therefore Ex.B2 Will is proved as per Section 69 of Indian Evidence Act as rightly contended by learned counsels for defendants.

30. The learned counsel for the appellant/plaintiff would contend that the testimony of DW.2-Narayanasamy is unbelievable since he contradictorily deposed as if Krishnappa Naicker and his father Raju Naicker have affixed their signatures as

attesting witnesses but Raju Naicker affixed signature only as identifying witness and therefore the above said testimony of DW.2 is unbelievable and he has falsely deposed since he is the relative of DW.1-Mani.

31. On careful reading of entire oral evidence of DW.2-R.Narayanasamy reveals that Ex.B2 Will was executed and registered on the same day in the same Registrar office and the document writer had written the Will in the verandah of the Registrar office and obtained thumb impression from Rajammal, one of the daughters of Elumalai and Krishnappa Naicker as attesting witnesses and on the same day at the same place, obtained the signatures from Raju Naicker, who is the father of DW.2 and Krishnappa Naicker as identifying witness and DW.2 testified the affixing of thumb impression and signatures of all witnesses, testator and scribe. DW.2 has deposed about the Will after 20 years and there is no specific motive suggested for falsely deposing against the plaintiff. Therefore the oral evidence of DW.2 reveals that late Elumalai Naicker executed Ex.B2 Will and the above said Will was duly registered and therefore it is validly executed and registered as per Section 63 of the Indian Succession Act and it is proved under Section 69 of the Indian Evidence Act on the side of defendants.

32. The learned counsel for the appellant/plaintiff raised a suspicious circumstance that Elumalai Naicker used to sign in all documents but in Ex.B2 Will, he affixed his thumb impression and therefore there is serious suspicion in the above said Will. On a perusal of endorsement in Ex.B2 Will dated 16.2.1974, it is clear that executor Elumalai Naicker was literate and he used to sign in earlier documents, but at the time of execution of Ex.B2 Will, he affixed his thumb impression as due to old age, he was shivering and shaking condition and to that effect, endorsement also made in Ex.B2 Will itself as under:

VERNACULAR (TAMIL) PORTION DELETED

33. Admittedly, at the time of execution of Ex.B2 Will, late Elumalai Naicker was 95 years old, which is revealed from Ex.B3 death certificate of the above said Elumalai Naicker and further, after execution of Ex.B2 Will dated 16.2.1974, he died on 4.9.1974 after few months. Further, on the side of the appellant/plaintiff, has not produced any document to prove that at the time of alleged execution of

Ex.B2 Will, Elumalai Naicker used to sign and not affix thumb impression. Considering the age and endorsement in Ex.B2 Will and other factors, it is clear that Elumalai Naicker alone affixed his thumb impression and there is no suspicion in the above said fact.

34. The learned counsel for the appellant/plaintiff raised another suspicious circumstance that late Elumalai Naicker has not given any of his properties to the plaintiff, who is one of his daughters and only given to his two sons and therefore it creates serious suspicion about the said Will and in support of the above submission, relied on the following decisions of the Honourable Supreme Court:

"1. K. LAXMANAN Vs. THEKKAYIL PADMINI (2008 (6) CTC 92) and
2. S.R.SRINIVASA Vs. S.PADMAVATHAMMA (2010) 5 SCC 274)."

Admittedly, Raman and Lakshmanan are only sons of Elumalai Naicker and another daughter Rajammal died issueless and mother of the plaintiff viz. Gangammal died on 25.9.1960 itself. From the evidence of PW.1, the plaintiff, it reveals that the above said Rajammal brought up the plaintiff and also has given property in S.No.460 of an extent of 1 acre and 20 cents to the plaintiff and therefore the above said suspicious circumstances raised by the plaintiff is unsustainable.

35. The two decisions relied on by the learned counsel for the appellant are not applicable to the facts of the present case. In the decision in K. LAXMANAN Vs. THEKKAYIL PADMINI (2008 (6) CTC 92), it is stated in para No.24 as under:

"24. The only evidence led by appellant Propounder to prove the execution of the Will was by examining DW.4, the son of Attesting Witness Moolampalli Gopalan and by examining Kolayath Mammed who was an Identifying Witness to Ex.B3-Will. DW-4 though deposed that the signatures of Attesting Witness on Ex.B3 are of his father but, however, he did not state that his father was an attesting witness in respect of Ex.B3. On the other hand DW.3 stated that though he knew deceased-Chathu but on that day he went to the office of the Sub-Registrar as an Identifying Witness for someone else. In his entire deposition there was not even a

slightest indication to the fact that he had witnessed the execution of Ex.B3."

In the present case, as already discussed, DW.2 has clearly testified about the affixture of thumb impression and signatures of testator, witnesses and scribe and also identified at the time of evidence also. Therefore the facts of the above said decision is not applicable to the present case.

36. In another decision in S.R.SRINIVASA Vs. S.PADMAVATHAMMA (2010) 5 SCC 274), it is held in para 41 as under:

"41. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here, the signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a will can be held to have been proved when the statutory requirements for proving the will are satisfied. The High Court has however held that proof of the will was not necessary as the execution of the will has been admitted in the pleadings in O.S.No.233 of 1998, and in the evidence of PW.1."

The facts of the above decision relied on by the learned counsel for the appellant/plaintiff differs and not applicable to the facts of the present case. In the instant case, the testator, all witnesses and scribe were died but DW.2 had accompanied with them and seen the entire proceedings of execution and attestation also identified before the trial Court and therefore, the above said decision also not helpful to appellant/plaintiff.

37. Per contra, the learned counsel for the respondents/defendants relied on the following decisions:

1. DAULAT RAM Vs. SODHA (2005) 1 SCC 40)

and

2. RAMABAI PADMAKAR PATIL Vs. RUKMINIBAI VISHNU VEKHANDI (2003) 8 SCC 537).

38. In the decision in DAULAT RAM Vs. SODHA (2005) 1 SCC 40), para No.10 is relevant and the same is extracted below:

"10. Will being a document has to be proved by primary evidence except where the court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the [Indian Evidence Act, 1872](#), it cannot be used as evidence until one of the attesting witnesses 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. In addition, it has to satisfy the requirements of Section 63 of the [Indian Succession Act, 1925](#). In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so."

In the instant case, the plaintiff has not pleaded and proved that the testator was unsound mind or unable to understand at the time of execution of Will and further not proved that the above said thumb impression was forged by propounders of the Will and therefore the plaintiff has not proved that the above said document was forged one by reliable oral and documentary evidence so as to discharge her burden.

39. In the decision in RAMABAI PADMAKAR PATIL Vs. RUKMINIBAI VISHNU VEKHANDI (2003) 8 SCC 537, the relevant passage in para No.8 is extracted as under:

"8. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no

necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an offspring. In *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar* it has been held that it is the duty of the propounder of the Will to remove all the suspected features and not fantasy of the doubting mind. In this case, the fact that the whole estate was given to the son under the Will depriving two daughters was held to be not a suspicious circumstance and the finding to the contrary recorded by the District Court and the High Court was reversed."

In the present case, the Will was executed by Elumalai bequeathing the properties in favour of his two sons and admittedly, one daughter was issueless and also affixed her signature in the Will and the plaintiff alleged to have married as love marriage and living separately and also the plaintiff has admitted that Rajammal, one of the daughters of Elumalai brought up the plaintiff and also given the property of an extent of 1 acre and 20 cents to the plaintiff and therefore no property was given by testator viz. Elumalai to the plaintiff as rightly contended by the learned counsel for the defendants and therefore no suspicious circumstance arises in Ex.B2 Will.

40. As per the law laid down by the Honourable Apex Court in the above decisions, in the instant case, the defendants have proved the execution and registration of Ex.B2 Will and also removed all suspicious circumstances raised by the plaintiff and the defendants have proved the Will as genuine and valid and therefore only the defendants are entitled to the properties of late Elumalai as per Ex.B2 Will and we answer point No.2 accordingly.

41. As already discussed in earlier paragraph No.23, late Elumalai was entitled to entire item Nos.5 and 6 of first schedule properties and half share in items 1 to 3 in first schedule properties and Gangammal was entitled to half share in item Nos.1 to 3 and entire 4th item in first schedule properties and also held that Elumalai and his wife Gangammal were not entitled to any share in second schedule properties

since the second schedule properties were not purchased out of joint family properties as alleged by the plaintiff. Therefore the plaintiff is entitled to share in the properties of the deceased Gangammal alone as per Section 15 of the [Hindu Succession Act, 1956](#).

42. Section 15 of the [Hindu Succession Act, 1956](#) reads as under:

"15. General rules of succession in the case of female Hindus.- (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,-

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother;

(2) Notwithstanding anything contained in sub-section(1), -

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

43. In the instant case, the abovesaid Gangammal was died in the year 1968 and one of the daughters viz. Valliyammal pre-deceased her mother on 25.7.1960 and therefore as per Section 15(1)(a) of the [Hindu Succession Act, 1956](#), the two sons viz. Raman and Lakshmanan and daughter viz. Rajammal, the plaintiff, who is the daughter of deceased Valliyammal and the husband of Gangammal viz. Elumalai Naicker, were entitled to $1/5$ share each in the abovesaid properties of Gangammal.

44. Admittedly, Elumalai Naicker was died on 4.9.1974 and since the Will is upheld, Raman and Lakshmanan will get half share in $1/5$ share of Elumalai Naicker as per Ex.B2 registered Will. As already discussed, item No.4 in first schedule properties belonged to deceased Gangammal. Further pending suit, one of the daughters of Gangammal viz. Rajammal died. As per Section 15(2)(1)(a) of the [Hindu Succession Act, 1956](#), on the death of Rajammal, it devolves upon her father's heirs viz. two sons (Raman and Lakshmanan) and the plaintiff, who is daughter of deceased Valliyammal. So the plaintiff is entitled to get $8/30$ share in item No.4 in first schedule properties. D2 to D5, who are legal heirs of Raman and D7 to D15, who are legal heirs of Lakshmanan are entitled to get $11/30$ share to each branch respectively in the above said item No.4 in first schedule properties.

47. As already discussed, item Nos.1 to 3, joint properties of Elumalai Naicker and Gangammal, both of them entitled to half share each. As per Ex.B2 Will, plaintiff is not entitled to any share in Elumalai Naicker's half share. With regard to Gangammal's share, after the death of Elumalai Naicker, two sons Raman and Lakshmanan and daughter Rajammal and daughter of the pre-deceased daughter viz. the plaintiff Padmini will get $1/15$ share each in half share of Gangammal. So the plaintiff will get $1/15 = 4/30$ share in item Nos.1 to 3. Legal heirs of Raman and Lakshmanan are entitled to get $13/30$ share to each branch. Therefore the plaintiff is entitled to get $4/30$ share in items 1 to 3 and $8/30$ share in item No.4 in the first schedule properties and we answer the point No.3 accordingly.

45. In the result, there shall be a partition preliminary Decree that the appellant/plaintiff is entitled to $4/30$ share in item Nos.1 to 3 and $8/30$ share in item No.4 in the first schedule properties and the appeal is allowed to the extent

indicated above and the judgment and decree of the Trial Court dated 11.8.2004 are modified accordingly. CMP.No.566 of 2010 is allowed and Exs.A6 to A8 are marked. CMP.No.15280 of 2005 is closed. Considering the relationship of the parties, there shall be no order as to costs.

Additional Documents marked on the side of appellant/plaintiff.

Ex.A6- Certified copy of registered sale deed dated 29.10.1927 executed by Kistappan in favour of Elumalai Naicker and Gangammal in Doc.No.1752/1927 on the file of Sub-Registrar, Sembium.

Ex.A7- Certified copy of registered sale deed dated 29.9.1938 executed by Kanna Naicker and another in favour of Elumalai Naicker and Gangammal in Doc.No.1588/1938 on the file of Sub-Registrar, Sembium.

Ex.A8-Certified copy of sale deed dated 22.4.1941 executed by Bala Naicker and others in favour of Gangammal in Document No.548/1941 on the file of Sub-Registrar, Sembium.

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