K. LAXMANAN

v.

THEKKAYIL PADMINI & ORS.

(Civil Appeal No. 7082 of 2008)

DECEMBER 3, 2008

[TARUN CHATTERJEE AND DR. MUKUNDAKAM SHARMA, JJ.]

Evidence Act, 1872:

s.68 – Will – Genuineness of – Burden to prove – Held: Is on the propounder – When there are suspicious circumstances surrounding the Will, onus is on propounder to explain them to satisfaction of court – Will cannot be used as evidence until at least one of the attesting witnesses is called for proving its execution – On facts, scribe and one of attesting witnesses to the Will died before examination – Second attesting witness was not in good physical condition inasmuch as he was not able to speak or move, the fact which was proved by the deposition of the doctor – Consequently, as execution of Will could not be proved by primary evidence, propounder was required to lead secondary evidence – The evidence led thereof was not sufficient to satisfy the Court regarding the genuineness and valid execution of the Will – Hence Will cannot be accepted as genuine.

s.69 – Deed of Gift – Validity of – On facts, One of the two attesting witnesses to Deed of Gift died – The other attesting witness was neither examined nor any reason assigned by appellant-propounder for not examining him – Since both attesting witnesses were not examined, in terms of s.69, it was incumbent upon propounder to prove that attestation of one attesting witness at least was in his handwriting and that signature of person executing document was in the handwriting of that person – Identifying witness

stated that he had not signed as an identifying witness in respect of Gift deed and also that he did not know about the signature in Gift deed – Consequently, no interference called for with the findings recorded by Courts below that appellant failed to prove that deed of gift was executed by deceased – Constitution of India – Article 136.

Code of Civil Procedure, 1908: Order 6 r.1 – Pleadings – Replication – Non-filing of – Effect – Held: Mere non filing of replication would not mean admission of facts pleaded in written statement.

The appellant-fifth defendant and respondent No.1-plaintiff were brother and sister. After death of their father, respondent No.1 filed a suit contending that the property left behind by their father devolved upon her and other brother and sisters equally and, therefore, each were entitled to one fourth share. Before the trial Court, appellant stated that items 1 to 3 in the plaint schedule property were assigned in his favour by virtue of a document Ext.B1 and items 13 and 14 were assigned in his favour by virtue of Ext. B4. Further in respect of item Nos. 4 and 5, a gift deed Ext.B2 was executed in his favour. Also item Nos. 6 to 8 and 10 to 12 were bequeathed in his favour by Will Ext.B3. It was also pleaded that, in the Will, item No.9 was set apart to the share of daughters.

The trial Court held that Ext.B2 and Ext.B3 were properly proved by the appellant and therefore in terms of Ext.B3 Will, the only item available for division was item No.9 of the plaint schedule. On appeal, the First Appellate Court held that items 1 to 3 and 13 to 14 were not available for division which were the properties covered by Ext.B1 and B4. However, properties covered by Ext.B2 and B3 were available for division.

Appellant filed appeal before the High Court. The

High Court held that execution of both the Deed of Will and also Deed of Gift were shrouded in the mystery and, therefore, it was the responsibility of the appellant to dispel the suspicious circumstances by adducing evidences, which he failed to discharge. A

In the instant appeal, it was contended for the appellant that by virtue of s.68 of Evidence Act, 1872, the examination of atleast one of the attesting witnesses is mandatory only in the case of proving a Will and not in respect of proving any other document; that a registered Gift Deed need not be proved by examining an attesting witness inasmuch as respondent No.1 admitted execution of the Gift Deed by not specifically denying execution of the said Gift Deed in pleadings; and that dispute was only in respect of the properties covered by Ext. B2, Gift Deed and Ext. B3, Will, which were held by both the appellate courts to be available for division. B C D

Dismissing the appeal, the Court

HELD: 1.1. A bare reading of s.68 of the Evidence Act make it clear that the onus of proving the Will is on the propounder. The propounder has to prove the legality of the execution and genuineness of the said Will by proving absence of suspicious circumstances surrounding the said Will and also by proving the testamentary capacity and the signature of the testator. Once the same is proved, it could be said that the propounder has discharged the onus. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that E F G H

A **the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. [Paras 20 and 21] [1129-E-F-H; 1130-A-B]**

B *Shashi Kumar Banerjee v. Subodh Kumar Banerjee* **AIR (1964) SC 529 and** *Pushpavathi v. Chandraraja Kadamba* **(1973) 3 SCC 291, relied on.**

1.2. S.68 of the Act categorically provides that a Will C **is required to be attested and therefore, it cannot be used as evidence until at least one of the attesting witnesses is called for the purpose of proving its execution provided such attesting witness is alive, and subject to the process of the court and capable of giving evidence. The** D **scribe and one of the attesting witnesses to the Will died before the date of examination of the witnesses. The second attesting witness was also not in good physical condition inasmuch as neither was he able to speak nor was he able to move, the fact which was proved by the** E **deposition of the doctor examined as DW 2. Consequently, as the execution of the Will cannot be proved by leading primary evidence, the propounder i.e. the appellant was required to lead secondary evidence in order to discharge his onus of proving the Will. [Paras** F **22 and 23] [1130-E-G]**

Daulat Ram v. Sodha **(2005) 1 SCC 40, relied on.**

1.3. The only evidence led by appellant-propounder to prove the execution of the Will was by examining DW- G **4, the son of attesting witness and by examining an identifying witness to Ext. B3 Will. DW-4 though deposed that the signatures of attesting witness on Ext. B3 were of his father but, however, he did not state that his father was an attesting witness in respect of Ext. B3. On the** H **other hand, DW 3 stated that though he knew deceased**

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 Ext. B3. Moreover, no attempt was made by the appellant to prove and establish the mental and physical condition of the testator at the time of execution. Rather the respondent proved that the father, at the time of the alleged execution of the Deed of Will, was 82 years of age and was suffering from serious physical ailments and was not mentally in a good state of mind. [Paras 24 and 25] [1130-H; 1131-A-B-C-D]

1.4. The evidence led by the appellant was not sufficient to satisfy the Court regarding the genuineness and valid execution of the Will. It was also found by the two appellate courts that there was difference between the signatures of testator put on each and every page. There was no reason to take a different view than what was taken by the first appellate court as also by the High Court so far as it concerned the Deed of Will. [Para 26] [1131-D-F]

2.1. Incidentally, the Deed of Gift was also executed on the same day as that of the Will which was held to be not proved and established in accordance with law and was discarded by both the appellate courts. The attesting witnesses to the said Deed of Gift were also not examined. It is true that the pleadings regarding the execution of the Deed of Gift were stated for the first time in the written statement by the fifth defendant, who pleaded that the ordinary process of inheritance and succession would not apply in the present case in respect of properties in item 4 and 5 as a Deed of Gift was executed in his favour.It is however established that the issue of validity of the execution of both the Deed of Gift and Deed of Will was taken up by the respondent/plaintiff

A and specifically denied in the affidavits filed in respect of the injunction applications. The parties have also gone to trial knowing fully well that execution of both these documents is under challenge. Parties knowing fully the factual position led their evidence also to establish the B legality and validity of both the documents. In that view of the matter, it cannot be said that the said document should be deemed to be admitted by the plaintiff as no replication was filed by the plaintiff. [Paras 27 and 30] [1131-G-H; 1132-C-F]

C 2.2. Pleadings as is defined under the provision of Rule 1 Order VI CPC consist only of a plaint and a written statement. The respondents/plaintiff could have filed a replication in respect to the plea raised in the written statement, which if allowed by the court would have D become the part of the pleadings, but mere non filing of a replication does not and could not mean that there has been admission of the facts pleaded in the written statement. The specific objection in the form of denial was raised in affidavits filed in respect of the injunction E applications which were accepted on record by the Trial Court and moreover the acceptance on record of the said affidavit was neither challenged nor questioned by the appellant. [Para 31] [1132-G-H; 1133-A]

F 2.3. The legality and the validity of the Deed of Gift was under challenge in the trial for which the parties led evidence and therefore, the proviso to s.68 of the Act would not become operative and functional. In such cases, the document has to be proved in terms of s.68 of the Act. One of the two attesting witnesses to the said G Deed of Gift viz. Ext. B2 admittedly had died. The other attesting witness being alive could have been examined to establish the legality of the Deed of Gift. But neither was he examined nor any reason was assigned by the appellant for not examining him. Since both the attesting H witnesses have not been examined, in terms of s.69 of

the Act, it was incumbent upon the appellant to prove that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. DW 3, who was an identifying witness also in Ext B2, specifically stated that he had not signed as an identifying witness in respect of Ext. B2 and also that he did not know about the signature in Ext. B2. Besides, considering the nature of the document which was a Deed of Gift and even assuming that no pleading is filed specifically denying the execution of the document by the executant and, therefore, there was no mandatory requirement and obligation to get an attesting witness examined but still the fact remains that the plaintiff never admitted the execution of the gift deed and, therefore, the same was required to be proved like any other document. [Paras 32 and 35] [1133-B-C, H; 1134-A-E]

Rosammal Issetheenammal Fernandez (Dead) by Lrs. And Ors. v. Joosa Mariyan Fernandez and Ors. **(2000) 7 SCC 189, relied on.**

2.4. The person who was called to prove the document himself said that he had not signed as an identifying witness in respect of Ext. B2 and moreover he stated that he did not know about the signature in Ex. B2. The contents of the document were not proved as was required to be done. Taking all the factors into consideration and also noticing the fact that execution of the Will, which was executed on the same day as that of the Gift Deed, even the said document is found to be of suspicious nature and therefore the said deed is also held to be not duly proved. Consequently, no interference is called for with the findings recorded by both the courts below to the effect that the appellant has failed to prove that the said deed of gift was executed by deceased. That apart both the appellate courts below have found that

both the documents namely the Deed of Gift as also Deed of Will suffer from suspicious circumstances. The said findings are concurrent findings of fact which should not be normally interfered with by the Court by exercising the power under Article 136 of the Constitution of India. [Paras 36 and 37] [1134-F-H; 1135-A-B]

Case Law Reference:

AIR (1964) SC 529	**relied on**	**Para 21**
(1973) 3 SCC 291	**relied on**	**Para 21**
(2005) 1 SCC 40	**relied on**	**Para 23**
(2000) 7 SCC 189	**relied on**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7082 of 2008.

From the final Judgment and Order dated 28.9.2006 of the High Court of Kerala at Ernakulam in SA No. 183 of 1992 (E).

K. Rajeev for the Appellant.

A. Raghunath for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. The Deed of Will and Gift are the bone of contention between the parties in this appeal. Predecessor-in-interest of the plaintiff and the fifth defendant is one Shri Chathu who had three daughters and a son. He died in the year 1975 leaving behind him the aforesaid son and three daughters and a number of properties.

3. The present appellant was the contesting defendant being the fifth defendant and is a son of Chathu. The respondent No. 1 herein is one of the daughters of Chathu and was the

plaintiff in the suit. The suit was filed by her after demise of Chathu contending *inter alia* that the property left behind by Chathu devolved upon the plaintiff and the defendants equally and therefore they are entitled to one fourth share each. In the plaint, suit property was mentioned as item Nos. 1 to 12. Subsequently, plaintiff also incorporated Item Nos. 13 and 14 in the plaint for division.

4. In the written statement filed by the present appellant, he stated that items 1 to 3 in the plaint schedule property were assigned in his favour by virtue of a document Ext. B1 and items 13 and 14 were assigned in his favour by virtue of Ext. B4. It was his further case that his father Chathu had executed a gift deed on 26.04.1974, Ext. B2, in his favour with respect to items 4 and 5. Also, that his father Chathu had bequeathed properties being item Nos. 6 to 8 and 10 to 12 by executing a Will in his favour on the same day. It was also pleaded that in the Will item No. 9 was set apart to the share of daughters and therefore the properties described as items 1 to 8 and 10 to 13 are not available for division.

5. It was held by the Trial Court that Ext. B2 which is a gift deed and Ext. B3 which is a deed of Will had been properly proved by defendant No. 5- appellant herein and therefore, in terms of Ext. B3 Will, the only item available for division is item No. 9 of the plaint schedule property.

6. As against the said judgment and order passed by the Trial Court an appeal was preferred by the plaintiff. The Appellate Court after hearing the parties passed the judgment and order holding that items 1 to 3 and 13 to 14 are not available for division which are the properties covered by Ext. B1 and B4. However, so far as the other properties are concerned which are covered by Ext. B2 and B3, the Deed of Gift and Deed of Will, it was held that the entire items mentioned therein are available for division.

7. Being aggrieved by the said decision, a second appeal

A was filed by the fifth defendant, which was heard by the High Court of Kerala. The High Court, however, dismissed the second appeal by the impugned judgment and order which is under challenge in this appeal.

B 8. It was held by the High Court that execution of both the Deed of Will as also Deed of Gift are shrouded in mystery and therefore it is the responsibility of the fifth defendant to dispel the suspicious circumstances by adducing satisfactory evidences. After appreciation of the materials available on record, it was held that the Appellate Court was legal and C justified in coming to a conclusion regarding the suspicious circumstances pertaining to execution of the Will and also execution of the Deed of Gift and that the fifth defendant has failed to discharge the onus.

D 9. Narration of the aforesaid facts would thus clearly establish that execution of the Gift Deed and also of the Will are held to be suspicious and the genuineness of the same was doubted by the first appellate court as also by the High Court. That the appellant failed to dispel the suspicious circumstances E by adducing satisfactory evidences, was held, mainly on the ground that the attesting witnesses to both the documents were not examined.

10. Counsel appearing for the appellant by referring to the provision of Section 68 of the Indian Evidence Act, 1872 (for F short 'the Act') submitted before us that examination of at least one of the attesting witnesses is mandatory only in the case of proving a Will and not in respect of proving any other document like Gift Deed and therefore, both the two appellate courts namely the First Appellate Court as also the High Court were G not justified in placing the onus of proving both the documents on the appellant. He also submitted that a registered Gift Deed need not be proved by examining an attesting witness inasmuch as the plaintiff admitted execution of the gift deed by not specifically denying execution of the said gift deed in his H pleadings.

11. He also submitted that even in respect of the Will, sufficient, strong and cogent reasons have been furnished by the appellant for his inability to examine the attesting witnesses which should have been accepted as a valid reason and by accepting the same both the appellate courts should have *held* that both the Deed of Will as also the Deed of Gift are genuine and validly executed documents and should have dismissed the suit of the plaintiff in toto.

12. The aforesaid submissions of the counsel appearing for the appellant were however refuted by the counsel appearing for the respondent contending inter alia that Ext. B2 i.e. Gift Deed as also Ext. B3 i.e. the Deed of Will had not been proved as per Section 68 of the Act to be used as evidence in any court of law, and therefore, both the Appellate Courts were justified in holding that the same cannot be accepted as evidence in the present case. It was further submitted by him that the execution of the Gift Deed was specifically denied by the respondent/plaintiff.

13. Having mentioned the factual position and arguments advanced by the counsel appearing for the parties, we may now analyse the said factual position in the light of the legislative provisions, judicial interpretation and evidence on record.

14. In the plaint, the respondent/plaintiff has pleaded that on the death of the Chathu, who is predecessor-in-interest of both plaintiff and contesting fifth defendant, the properties left behind by him have devolved upon the plaintiff and defendants equally and therefore each one of them is entitled to one *fourth* share. The properties that were incorporated in the schedule of the plaint are items 1 to 14.

15. In the written statement filed by the contesting defendant No. 5 who is the present appellant and son of Chathu, it was claimed that items 1 to 3 in the plaint schedule property were assigned to him by virtue of a document Ext. B1 and items 13 and 14 were assigned in his favour by virtue of Ext. B4. It

A was his further case that his father had executed a Gift Deed Ext. B2 in his favour with respect to items 4 and 5, and thereafter on the very same day had executed a Will in his favour bequeathing properties in items 6 to 8 and 10 to 12. He however, pleaded that in the Will, item 9 was set apart to the B share of the daughters and therefore the properties described as items 1 to 8 and 10 to 13 are not available for division. No replication was filed by the plaintiff as against the aforesaid averments.

16. On the pleadings of the parties, eight issues were C framed. Parties went to trial and adduced their evidence to prove and establish their respective cases. The Trial Court on consideration of the materials held that properties i.e. items 1 to 3, 13 and 14 are not available for division. Those properties were covered by Ext. B1 and B4. In respect of Ext. B2 and B3, D the Trial Court held that the said documents have been duly proved and therefore only item available for division is item No. 9 of the plaint schedule property.

17. An appeal was preferred by the plaintiff against the E aforesaid decision. The appellate court by its judgment held that items 1 to 3, 13 and 14 are not available for division which are covered by Ext. B1 and B4. So far as it relates to properties covered by Ext. B2 and B3, the appellate court held that the entire items mentioned therein are available for division.

F 18. It is only as against the judgment and findings that the items of property covered by Ext. B2 and B3 are available for division that the second appeal was preferred by the fifth defendant in the High Court of Kerala. Therefore, the properties covered by Ext. B1 and B4 namely items 1 to 3, 13 and 14 are G no longer in dispute and the conclusions arrived at by the first appellate court that the said items are not available for division are final and binding on the parties.

19. What is in dispute and is open to further litigation are H only the properties covered by Ext. B2 and B3 which were held

by both the appellate courts to be available for division. Since we are concerned with the legality of execution of Deed of Will and Deed of Gift, Section 68 of the Act would have some relevance, which reads as follows:- A

> "68. *Proof of execution of document required by law to be attested.* – If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. B C
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> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied." D

20. Strong reliance was placed on this provision also by the learned counsel appearing for the parties. A bare reading of the aforesaid provision will make it crystal clear that so far as a Deed of Will is concerned, the position in law is no longer in doubt for the onus of proving the Will is on the propounder. The propounder has to prove the legality of the execution and genuineness of the said Will by proving absence of suspicious circumstances surrounding the said Will and also by proving the testamentary capacity and the signature of the testator. Once the same is proved, it could be said that the propounder has discharged the onus. E F

21. When there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to G H

A satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant B circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. The aforesaid view is taken by us C in consonance with the decision of this Court in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee* [AIR 1964 SC 529] and *Pushpavathi v. Chandraraja Kadamba* [(1973) 3 SCC 291].

22. So far as Section 68 of the Act is concerned, it categorically provides that a Will is required to be attested and D therefore, it cannot be used as evidence until at least one of the attesting witnesses is called for the purpose of proving its execution provided such attesting witness is alive, and subject to the process of the court and capable of giving evidence.

E 23. In the present case the scribe and one of the attesting witnesses to the Will namely Vasu died before the date of examination of the witnesses. The second attesting witness namely Gopalan was also not in good physical condition inasmuch as neither was he able to speak nor was he able to F move, the fact which is proved by the deposition of the doctor examined as DW 2. Consequently, as the execution of the Will cannot be proved by leading primary evidence, the propounder i.e. the appellant herein was required to lead secondary evidence in order to discharge his onus of proving the Will as G held by this Court to be permissible in *Daulat Ram v. Sodha* [(2005) 1 SCC 40].

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 H Kolayath Mammed who was an identifying witness to Ext. B3

Will. DW-4 though deposed that the signatures of attesting witness on Ext. B3 are of his father but, however, he did not state that his father was an attesting witness in respect of Ext. 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 Ext. B3.

25. Moreover, no attempt was made by the appellant to prove and establish the mental and physical condition of the testator at the time of execution. Rather the respondent has proved that Chathu, the father of the appellant, was at the time of the alleged execution of the Deed of Will was 82 years of age and he was suffering from serious physical ailments and was not mentally in a good state of mind.

26. As against the said evidence led, the evidence led by the appellant cannot be said to be sufficient to satisfy the Court regarding the genuineness and valid execution of the Will. It was also found as a matter of fact by the two appellate courts that there was ocean of difference between the signatures of Chathu put on each and every page. In view of the aforesaid suspicious circumstances brought on record regarding the execution of the Will and the same having not been proved in accordance with law, we find no reason to take a different view than what is taken by the first appellate court as also by the High Court so far as it concerns the Deed of Will.

27. This leaves us with the responsibility of considering the legality of execution of the Deed of Gift. Incidentally, the said Deed of Gift was also executed on the same day as that of the Will which was held to be not proved and established in accordance with law and was discarded by both the appellate courts.

28. Execution of the aforesaid Deed of Gift is also under challenge. The attesting witnesses to the said Deed of Gift are

A also not examined. It was, however, submitted that the mandatory requirement of examining an attesting witness under section 68 of the Act is only in respect of a Will and in respect of Gift Deed, if execution of the said is not specifically denied, then in that case there is no obligation on the part of the B propounder of the Deed of Gift to prove the execution by examining an attesting witness like that of a Deed of Will.

29. It is true that in the present case the pleadings regarding the execution of the Deed of Gift were stated for the first time in the written statement by the fifth defendant, who C pleaded that the ordinary process of inheritance and succession would not apply in the present case in respect of properties in item 4 and 5 as a Deed of Gift was executed in his favour.

D 30. It is however established in the present case that the issue of validity of the execution of both the Deed of Gift and Deed of Will was taken up by the respondent/plaintiff and specifically denied in the affidavits filed in respect of the injunction applications. The parties have also gone to trial E knowing fully well that execution of both these documents is under challenge. Parties knowing fully the aforesaid factual position led their evidence also to establish the legality and validity of both the documents. In that view of the matter, it cannot be said that the said document should be deemed to F be admitted by the plaintiff as no replication was filed by the plaintiff.

31. Pleadings as we understand under the Code of Civil Procedure (for short the "Code") and as is defined under the provision of Rule 1 Order VI of the Code consist only of a plaint G and a written statement. The respondents/plaintiff could have filed a replication in respect to the plea raised in the written statement, which if allowed by the court would have become the part of the pleadings, but mere non filing of a replication does not and could not mean that there has been admission H of the facts pleaded in the written statement. The specific

objection in the form of denial was raised in affidavits filed in respect of the injunction applications which were accepted on record by the Trial Court and moreover the acceptance on record of the said affidavit was neither challenged nor questioned by the present appellant.

32. The legality and the validity of the said Deed of Gift was under challenge in the trial for which the parties have led evidence and therefore in the present case the proviso to Section 68 of the Act does not become operative and functional. In such cases, the document has to be proved in terms of Section 68 of the Act. In this regard, we may appropriately refer to decision of this Court in *Rosammal Issetheenammal Fernandez (Dead) by Lrs. And Ors. v. Joosa Mariyan Fernandez and Ors.* [(2000) 7 SCC 189], wherein it was held as under:-

> 7.....In considering this question, whether there is any denial or not, it should not be casually considered as such finding has very important bearing on the admissibility of a document which has important bearing on the rights of both the parties.....It must also take into consideration the pleadings of the parties which has not been done in this case. Pleading is the first stage where a party takes up its stand in respect of facts which they plead.....
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> 11. Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered, is not specifically denied. Therefore, everything hinges on the recording of this fact of such denial. If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply. .....:."

33. The two attesting witnesses to the said Deed of Gift viz. Ext. B2 are K.T. Vasu and Urulummal Ukkappan. K.T. Vasu

A admittedly had died whereas Urulummal Ukkappan was alive. Urulummal Ukkappan being alive could have been examined in the present case to establish the legality of the Deed of Gift. But neither was he examined nor any reason was assigned by the appellant for not examining him.

B

34. Since both the attesting witnesses have not been examined, in terms of Section 69 of the Act it was incumbent upon the appellant to prove that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that C person. DW 3, who was an identifying witness also in Ext B2, specifically stated that he had not signed as an identifying witness in respect of Ext. B2 and also that he did not know about the signature in Ext. B2.

D 35. Besides, considering the nature of the document which was a Deed of Gift and even assuming that no pleading is filed specifically denying the execution of the document by the executant and, therefore, there was no mandatory requirement and obligation to get an attesting witness examined but still the E fact remains that the plaintiff never admitted the execution of the gift deed and, therefore, the same was required to be proved like any other document.

36. In the present case, the person who was called to prove the document himself said that he had not signed as an F identifying witness in respect of Ext. B2 and moreover he stated that he did not know about the signature in Ex. B2. The contents of the document were not proved as was required to be done. Taking all the factors as stated hereinbefore into consideration and also noticing the fact that execution of the Will, which was G executed on the same day as that of the Gift Deed, we hold that even the said document is found to be of suspicious nature and therefore the said deed is also held to be not duly proved.

37. Consequently, no interference is called for to the H findings recorded by both the appellate courts below to the

effect that the appellant has failed to prove that the said deed of gift was executed by deceased Chathu. That apart both the appellate courts below have found that both the documents namely the Deed of Gift as also Deed of Will suffer from suspicious circumstances. The said findings are concurrent findings of fact which should not be normally interfered with by the Court by exercising the power under Article 136 of the Constitution of India.

38. In that view of the matter, we find no reason to interfere with the findings arrived at by the High Court. The appeal has no merit and is dismissed. However, there shall be no order as to costs.

S.K.S. Appeal dismissed.