IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

FRIDAY, THE 16TH DAY OF AUGUST 2019 / 25TH SRAVANA, 1941

RFA.No.56 OF 2011

JUDGMENT IN OS 663/2008 OF PRINCIPAL SUB COURT,IRINJALAKUDA

APPELLANTS/DEFENDANTS:

1 JOHNSON
AGED 53 YEARS
S/O. MALIYEKKAL KOONAN KOCHOUSEPH, KIZHAKKUMMURI,
PUTHANCHIRA VILLAGE, MUKUNDAPURAM TALUK.

2 JOSE
AGED 51 YEARS
S/O. MALIYEKKAL KOONAN KOUCHOUSEPH,
MALIYEKKAL HOUSE,KIZHAKKUMMURI, PUTHANCHIRA
VILLAGE, MUKUNDAPURAM TALUK.

3 BABY, AGED 80 YEARS
W/O. MALIYEKKAL KOOAN KOUCHOUSEPH, KIZHAKKUMMURI,
PUTHANCHIRA VILLAGE, MUKUNDAPURAM TALUK.

BY ADVS.
SRI.R.LAKSHMI NARAYAN
SMT.R.RANJINIE

RESPONDENTS/PLAINTIFFS:

1 ANNIE, AGED 53 YEARS,
D/O. MALIYEKKAL KOONAN KOUCHOUSEPH, W/O.
THERATTIL PUTHUSSERIPPADI DEVASSY,
MUTHIRAPADOM, THAIKKATTUKKARA, ALUVA VILLAGE,
ALUVA TALUK-683101.

2 LEELA, AGED 46 YEARS,
W/O. JAMES, CHIRAYATH, GURUNATHAN BOOKS,
PADINJARE CHALAKUDY, NEAR RAILWAY STATION,
CHALAKUDY VILLAGE, CHALAKUDY P O-680307.

R1 BY ADV. SRI.P.N.RAMAKRISHNAN NAIR
R1-2 BY ADV. SRI.AJITH VISWANATHAN
R1-2 BY ADV. P.VISWANATHAN (SR.)

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 24-06-2019, THE COURT ON 16-08-2019 DELIVERED THE FOLLOWING:

"CR"

A.HARIPRASAD
&
T.V.ANILKUMAR, JJ.

R.F.A.No.56 of 2011

Dated this the 16th day of August, 2019

JUDGMENT

T.V.Anilkumar, J.

The appellants are defendants 1 to 3 in O.S.No. 663/2008 on the files of Principal Sub Judge, Irinjalakuda and being aggrieved by the preliminary decree for partition passed on 30.10.2010 in favour of plaintiffs who are the respondents herein, this appeal is preferred before this Court. The main challenge advanced by appellants opposing partition claimed by the respondents was that the suit items which originally belonged to Kochouseph were not partible in view of alleged execution of Ext-B1 Will

dated 05.12.2003 being in their names. The appellants are the wife and two sons of the deceased Kochouseph. The plaintiffs/respondents are the two daughters of the deceased.

2. Sri. Kochouseph, the predecessor of parties died on 29.05.2004 at the age of 81. There is no dispute that if Kochouseph died intestate the appellants and respondents would succeed to him under the provisions of the Indian Succession Act 1925 (hereinafter referred to as 'the Act'). The respondents/plaintiffs demanded partition of the property after the death of Kochouseph, alleging that joint possession of the property caused inconvenience to their enjoyment. Appellants resisted the demand claiming under Ext.B1 Will and according to the respondents, on coming to know of the Will from the mouth of the appellants, they made enquiry and found that it was not a genuine document. Therefore, respondents filed the suit claiming 4/12th share as co-owners of suit items contending that Ext.B1 was cooked up.

3. Ext.B1 Will revealed that there was another Will

marked as Ext.B5 formerly executed and registered by the testator on 29.12.1990 in Sub-Registry, Mala, bequeathing suit items exclusively in favour of appellants. This Will was cancelled and with slight modifications, Ext.B1 was executed.

4. According to the respondents, Exts.B1 and B5 Wills are not genuine and were fraudulently created. They contended that on the alleged date of execution of Ext.B1 Will, their father was completely bed ridden taking liquid food without being able to move about and depending completely on others. It was said that he needed support of others in every respect since he was suffering from dementia also after he had suffered a stroke in the year 1989. Further, he was 81 also on the date of alleged execution of Ext.B1 last Will. It was also contended by respondents that the stroke affected the left side of his body and he was partially paralysed. According to them, there was no reason to execute a testament in favour of the appellants denying respondents any share in the property of the deceased because the father loved and treated all his

heirs alike. The respondents claimed that at the time of marriage, they were given only 10 sovereigns of gold and further there were occasions when they helped father financially also. Therefore, by all means execution of Exts. B1 and B5 Wills were not genuine at all.

5. The 3rd appellant who is the mother and other appellants-sons filed joint written statement resisting partition claimed. Both the Wills were executed by Kochouseph out of his testamentary capacity, according to them. He was in sound state of mind and was able to take independent decision. He was fully healthy till 10 days prior to his death in Kuzhikkattussery Maria Theresa Hospital. He died of heart attack even though he was during his last days suffering from Pulmonary Asthma. Appellants admitted that Kochouseph suffered a mild stroke in 1989 and he was admitted in Lisie Hospital, Ernakulam and treated. He was stated to be completely healthy and to have never suffered any impairment of mental faculty disabling him from forming rational judgment on the nature and quality of action affecting his interest in property. It

was contended that he executed Ext.B5 Will while being in sound disposing state of mind and later cancelling the former Will, he executed Ext.B1 Will on 05.12.2003 after effecting a few modifications regarding allotment of property among appellants 1 and 2. There was no substantial change between two Wills since in both Wills, 3rd appellant was given life estate. Provision for payment of Rs.10,000/- each was made in favour of respondents also. In the second Will, the joint share of the suit properties allotted to appellants 1 and 2 under Ext.B5 was divided and allotted separately. Except this minor change, Ext.B5 did not make any difference from Ext.B1 Will at all. According to appellants, at the time of marriage of plaintiffs, reasonable share of gold and cash were given and therefore the testator consciously disinherited them while executing Exts.B1 and B5 Wills on both occasions. Appellants also claimed to be in separate possession of properties allotted under Ext.B1 and regularly effecting payments of basic tax also. Appellants also contended that right from 1989 and till he was taken to hospital during his last days, the

testator had occasion to execute several registered documents marked as Exts.B2 to B4 which would sufficiently indicate that he was in sound disposing state of mind being able to act independently and on his own free will.

6. In the court below, the 2nd respondent/2nd plaintiff was examined as PW1 and she proved Ext.A1 partition deed dated 25.02.1957 containing suit properties allotted in the name of Kochouseph. No other evidence was adduced by her. Second appellant/2nd defendant was examined as DW7 and on the side of appellants, Exts.B1 to B8 were marked. The court below considered the major question as to whether the execution of Ext.B5 Will was genuine. After adverting to several suspicious circumstances, it held that it was very difficult to hold that the testator was at the time of execution of Ext.B1 in sound disposing state of mind. It was of the opinion that the testator was not in good health and physical condition and his mental faculties were so impaired as to disable him from forming reasonable judgment on his actions affecting the property. The advanced age in which

Ext.B1 Will was executed was also taken as a circumstance to doubt the soundness of his mind. Exclusion of respondents from the assets of the father was taken to be a major circumstance to doubt the genuineness of execution of both the Wills. The attesting witnesses examined were not believed as if they suppressed the real state of affairs known to them about the state of mind of the testator. The court below assumed that the testator suffered a major stroke in 1989 and thereafter he was not in sound disposing state of mind so as to be able to understand the nature and quality of the dispositions which he subsequently made. In short, the court below doubted that Kochouseph could not act on his own free mind after 1989 till his death. All these observations and findings of the court below in the impugned judgment were challenged before us by the appellants.

7. The questions that arise for consideration in this first appeal are whether execution of Ext.B1 Will was genuine and further whether testator was in sound disposing state of mind at the time of its alleged execution.

If Ext.B1 Will is found to be genuine, it goes without saying that demand of respondents for partition is untenable.

8. In the Appellate Court, the appellants filed I.A.No.2/19 seeking admission of additional evidence invoking Order XLI Rule 27 of the Code of Civil Procedure in support of their case that the deceased testator had requisite testamentary capacity at the time of execution of Ext.B1 Will. This petition was severely opposed by the respondents.

9. The burden to prove execution of Will and to show that it came out of free will of the testator is only on the appellants. A Will obtained by fraud, coercion or importunity is void under Section 61 of the Act. The testator, therefore, should have had necessary testamentary capacity to execute the Will and propounders claiming rights under the Will would have to establish that the testator was in sound disposing state of mind at the relevant period of time. The testator could be presumed to be of sound disposing state of mind when he was in a position to understand the nature and effect of the disposition he made

and also when he acted on his own free will. If there are suspicious circumstances affecting the genuineness of Will, the burden is still on the propounder to remove them and explain the circumstances. These legal principles could be culled out from ***H.Venkatachala Iyengar v. B.N.Thimmajamma & Others*** **[*AIR 1959 SC 443*],** ***Shashi Kumar Banerjee And Others v. Subodh Kumar Banerjee since deceased and after him his legal representatives and others [AIR 1964 SC 529], M.B.Ramesh (D) By L.R.S v. K.M.Veeraje Urs (D) By LRS. & Others [2013(2) KLJ 797]*** *and* ***Natarajan v. Sree Narayana D.S.Trust [1995 KHC 399]*** cited before us.

10. As per Section 63 of the Act, a Will is a compulsorily attestable document and it shall be attested at least by two witnesses. It also mandates that testator and attesting witnesses shall witness each other subscribing signatures to the Will. Attestation being compulsory and also essential part of execution of Will, Section 68 of the Indian Evidence Act prevents Will from being admitted in

evidence otherwise than by examination of at least one of the attesting witnesses, if attendance of such witness could be secured before the court. It could be thus gathered that Section 68 permits admission of a Will in evidence through examination of one of the attesting witnesses despite Section 63(c) of Indian Succession Act mandating that a Will shall be attested by two witnesses at least. On a conjoint and harmonious reading of Section 63 (c) of the Act and Section 68 of the Evidence Act, it is obviously clear that law does not mandate examination of co-attesting witness also in proof of execution of Will besides the attesting witness examined in compliance with Section 68. Quite often than not, question may therefore arise in courts as to whether the attesting witness examined in obedience to the mandate under Section 68 is legally competent to prove the attestation of co-attestor besides his own. In our opinion, he can certainly prove not only his own attestation but also of the co-attestor despite the best evidence being that of the co-attestor. But where the attesting witness examined in compliance with Section 68 either failed to prove or did not

actually witness co-attestation, examination of co-attestor if he is available is a must for proving co-attestation notwithstanding Section 68 is generally considered to be a relaxing provision. In other words, propounder of Will can claim himself being relaxed from picking up both the attestors and examining the two in proof of execution of Will only in a case where the attesting witness examined under Section 68 of the Evidence Act witnessed co-attestor also signing the Will and could successfully prove co-attestation. Section 68 of the Evidence Act does not enact a blanket exemption relieving the propounder from examining the co-attestor in all cases even when the attestor already examined has failed to prove that the Will was co-attested. Law in this respect was discussed in ***Janki Narayan Bhoir Vs. Narayan Namdeo Kadam [AIR 2003 SC 761]***.

11. In the present case, Exts.B1 & B5 Wills were sought to be proved through examination of single attesting witness in the respective Wills, namely DWs 2 and 3. Testimonies of these two witnesses indicate that testator

subscribed his signature to both the Wills right in their presence and they too signed the respective Wills in the presence of the testator in compliance with Section 63(c) of the Act.

12. The learned counsel for the respondents laying emphasis on the words in Section 63(c) of the Act " the Will shall be attested by two or more witnesses" submitted that this was a case where attestation of both the Wills should have been proved by examination of co-attestors besides DWs 2 and 3. On the other hand, learned counsel for the appellants emphasised that oral evidence given by DWs 2 and 3 sufficiently satisfied the legal requirement of Section 63(c) of the Act.

13. There is enough evidence to prove that Exts. B1 and B5 Wills relied on by the appellants were signed by the testator and attested by both the witnesses. DW2 is an attestor to Ext.B1 Will. DW3 is an attestor to Ext.B5 Will. These two witnesses proved that besides their signing the respective Wills in the presence of the testator and vice versa, co-attestors also similarly signed the Wills in

compliance with Section 63 (c) of the Act. DWs 2 and 3 witnessed the co-attestors also subscribing their signatures to the Wills immediately after the testator signed in their presence. There is clear evidence from DWs 2 and 3 that testator also witnessed the attestors subscribing signatures.

14. DW2 is a scribe attached to the office of his father, licensee who prepared Ext.B1. He said that his father was no more. The co-attestor-Mayadevi was another scribe of the same office and her whereabouts were not traceable. DW3 was also a document writer working under DW2's father in the same office. He said that Jaya who is the co-attestor to Ext.B5 was also a scribe of the same office. It is obviously clear from Exts.B1 and B5 that Mayadevi and Jaya also co-attested both the documents in terms of Section 63(c) of the Act with the intention of witnessing the testator executing the Wills.

15. From the whole evidence on record, we are satisfied that appellants proved the testator having executed Exts.B1 and B5 Wills in compliance with the requirements under Section 63 of the Act. There is no

ground to disbelieve DWs2 and 3 and we have not come across any legitimate ground assigned by the court below in the impugned judgment for rejecting the evidence of the witnesses as being untrustworthy. DW5 was examined to prove that he identified the testator before Sub-Registrar prior to registration of Ext.B1 Will. At the request of the testator he went to the Sub-Registrar Office and signed the testament. There is no reason to disbelieve this witness also for any earthly reasons. The mere proof that the testator signed the Will, will not complete proof of genuineness of Will unless it is also shown that he was in sound disposing state of mind at the relevant time to be able to take independent decision as regards his interest in the property.

16. The appellants admit that Kochouseph was during his last days treated in Kuzhikkattussery Maria Theresa Hospital from 12.05.2004 to 29.05.2009. He died of heart attack on 29.05.2004 as per the medical records. DW1 the doctor who treated him at the above hospital said that Kochouseph was suffering from Chronic Asthma. Since the

medical records produced before court were photocopies, they were not admitted in evidence. When the doctor was examined, he gave his opinion that Kochouseph who was suffering from Pulmonary Asthma was not likely to have maintained a sound disposing state of mind due to his physical illness and weakness. He made it very clear in his testimony that on the date of admission of the patient in the hospital, he was of weak mind. In our opinion, this evidence cannot be relied on to cast doubt on the sound disposing state of mind, if any, possessed by Kochouseph on the date of Ext.B1 Will. There was nothing before DW1 during his examination in court to suggest either way that the patient was capable or not capable enough to take an independent decision on his free mind affecting his rights over properties. There is no justification for the court below, in our opinion, in having relied on the evidence of DW1 and assumed without any basis that the testator was not in sound state of mind.

17. Ext.B1 Will was executed nearly 4½ months prior to the death of the testator. He was aged 81 years then. No

hard and fast view could be maintained with respect to every person crossing 80 years that he was deprived of sound disposing state of mind due to advanced age. It depends on the physical and mental status of each individual and in the case of Kochouseph, the court below, in our opinion, fell into the error of taking a wrong view that due to advanced age, the testator was incapable of taking independent decisions out of free will especially since 1981 when he suffered a stroke for the first time. We are not inclined to accept the approach made and view taken by the court below.

18. There is nothing to show that the testator was confined to bed as alleged by the respondents taking liquid food for the past one year prior to his death and was totally dependent on other persons for his life support. Even though, there is an allegation that he was treated in Lisie and Lekshmi Hospitals in Ernakulam, no records were forthcoming to prove that the testator had suffered any severe stroke as early as in 1989. Even respondents conceded in the court below that no records were available

despite their alleged efforts taken to secure production of relevant documents from these hospitals. The court below falling back upon the admission of DW7 who is the second defendant made during cross examination that his father had a minor stroke in 1989 and was treated in Lisie Hospital, held that the burden to show that the illness was not in aggravate form nor it affected father's mental health to take independent decision lay only on the appellants. This approach does not appear to be sound in the facts and circumstances of the case. In the absence of medical records which could have been the best evidence, the over all conduct of Kochouseph ever since 1989 and also the attendant circumstances indicating exercise of mental faculties during the relevant period alone could help the court to get at the true mental status of the testator. Exts.B1 and B5 Wills being registered should be deemed to have the legal presumption of due execution unless surrounding circumstances casting doubt on the mental competency of the executant could be shown as observed in ***Varghese v. Oommen*** **[1994 (2) KLT 620].**

19. The learned counsel for the respondents argued that Exts.B1 and B5 Wills were bad for improper attestation and therefore there was no valid execution. Inviting our attention to paragraph 5 of ***Janardhanan v. Jayachandran and Others [2019 (2) KHC 608],*** it was submitted that the witnesses attesting the Will should be persons having prior acquaintance with the testator/testatrix. It was held that Section 63 of the Indian Succession Act mandates by implication that a person could be regarded as being qualified to attest a Will only if he/she had previous knowledge or information about the identity of the testator and in the absence of proof of such knowledge or information, the Will could not be considered to be properly attested nor validly executed. The relevant portion of the aforesaid decision is extracted below:-

> "*The persons who were signed on a Will as attesting witnesses without knowing the identity of the testator/testatrix and without ascertaining their identity cannot be a sufficient compliance under Section 63(c) of Indian Succession Act. The person who is having no prior acquaintance with the testator/testatrix, having no information regarding*

their identity, are incompetent to stand as attesting witness in compliance of Section 63(c) of Indian Succession Act."

20. So far as Exts.B1 and B5 Wills are concerned, there is clear evidence that DW3, who attested Ext.B5 Will and DW2, who attested Ext.B1 Will had previous acquaintance and knowledge of the executant. But as regards other attesting co-witnesses in Exts.B1 and B5, evidence was not brought forth to establish that they had previous knowledge or acquaintance with the testator. With great respect, we are of the view that the proposition of law was too broadly stated in ***Janardhanan's*** case (supra). We find hardly any indication from Section 63 of the Act that the legislature ever intended to lay down a principle that the attesting witnesses should have had previous knowledge or information of identity of the testator. In our opinion, if such a broad view is taken, it would have the effect of deterring a person proposing to bequeath his property by means of a Will from carrying into effect his wish for the sole reason that he failed to secure

attendance of a witness having prior knowledge of the testator. It is one thing to say that absence of attestation by a witness having prior knowledge of testator may be picked up as a suspicious circumstance to doubt the genuineness of Will and another thing to say that law does not permit a witness not having prior knowledge of identity of testator to attest a Will. In the ***Janardhanan's*** case (supra) the learned Judge rightly relied on the suspicious circumstance arising on account of the attestation made by a witness who did not admittedly have previous acquaintance with the testator. The above legal proposition in ***Janardhanan's*** case (supra) seems to have been laid down overlooking the true difficulty of a testator who may sometimes be a stranger to a place, in securing the service of an attesting witness who knew him previously. There is nothing in Section 63 of the Act or Section 3 of the Transfer of Property Act to indicate that the attesting witness shall necessarily be one who maintains previous knowledge or acquaintance with the testator/testatrix. The previous knowledge, association or information etc., of the attesting

witness about the testator may be a relevant fact when the identity of the executant of the Will is in issue. Necessarily in such cases the test of previous acquaintance with the testator could be relied on as a circumstance to assess the genuineness of the Will. Since the proposition of law laid down in ***Janardhanan's*** case (supra) does not appear to be in tune with the scheme of Section 63 of the Act and further it appears to have transgressed the scope of the provision, we find it difficult to agree to the view expressed by the learned single Judge. We disapprove the above view in ***Janardhanan's*** case (supra) as it is an over statement of law without any legal basis. Although it may be true in the factual background of ***Janardhanan's*** case, such sweeping observations cannot be regarded as laying down principle in law. Therefore, the argument of the learned counsel for the respondents based on ***Janardhanan's*** case (supra) is repelled.

21. If Kochouseph was really affected by a heavy stroke and not in a position to move out as alleged by the respondents, one fails to understand as to how he could

have been able to execute Ext.B4 registered sale deed dated 08.07.1997 for consideration after hardly six years since Ext.B5 date, that too, in favour of Devassy, the husband of first plaintiff in respect of 10 cents. We do not think that Devassy would ever deny that the execution of sale deed proceeded out of a sound disposing state of mind.

22. Similarly, prior to Ext.B4 sale deed, the testator had executed Ext.B2 registered settlement deed on 02.04.2002 in favour of 3rd appellant, his wife. This appears to be another circumstance to presume that the testator had requisite disposing state of mind after he suffered the alleged stroke. It is also noteworthy that on the 3rd day of execution of Ext.B1, the deceased Kochouseph sold 847 sq.lings of land on 08.12.2003 under Ext.B3 sale deed to DW4, Sri. Jamson. These registered documents carry the ordinary presumption of law that the deceased duly executed them before the Sub-Registrar after undergoing necessary legal formalities under the Indian Registration Act, 1908.

23. DW2 is an attesting witness to Exts.B2 and B4

deeds also. There is enough ground to believe that he had sufficient opportunity to know the physical and mental condition of the deceased Kochouseph with whom his father Thomankutty had close acquaintance. DW2 said that Exts.B1 to B4 deeds were prepared by his father Thomankutty who was no more. In Ext.B3, DW2 was not an attesting witness. It was he who supplied stamp paper for preparation of Ext.B3. The evidence of this witness shows that he had occasion to associate with execution of these documents along with his father. DW2 further proved that Sri.Kochouseph signed Exts.B2 and B3 documents right in his presence. His evidence sufficiently indicates that nothing appeared to him from the conduct of Sri.Kochouseph during the course of execution of Exts.B1 to B4 documents that the executant had any serious problem affecting his mental or physical health. According to us, DW2 was a natural witness who had occasion to observe the activities of the testator. We do not find any sustainable reason to discard his evidence as the court below thought.

24. Likewise DW6, a surveyor also appears to be a

person who could be taken into confidence by the court. His testimony is that in obedience to the instructions of Sri.Kochouseph and to effectuate the terms of Ext.B1 Will and prepare a sketch, he measured out the suit items and divided them between appellants 1 and 2. The conduct of Kochouseph revealed through his evidence shows that the testator was in a position to act on his own free will and implement his own decision. In our view, the court below had no justifiable reason to discard this witness's evidence also.

25. The error committed by the court below appears to be that it assumed without any cogent materials before it that deceased had suffered a major stroke in 1989 and thereafter he was completely bedridden undergoing treatments in hospitals. This assumption is contrary to the evidence and therefore can be said to be only wrong. No medical records indicating the mental or physical health of Sri.Kochouseph at the relevant period were brought before the court by either party in this respect. At the same time, Sri.Kochouseph was proved to have been a party to

transactions evidenced by Exts.B2 to B4 and having acted in sound disposing state of mind. Exts.B7 and B8 are documents which too can probabilize when taken along with Exts.B2 to B4 that he was capable enough to take care of his own rights and interests and implement his decisions. He secured in 1998, Ext.B8 identity card from Election Commission of India after undergoing necessary procedural formalities of the Commission. He obtained Ext.B7 Kissan Credit Card in 2010 and Ext.B6 Pass Book in the year 2001 from Canara Bank and operated his account for a few years. All these circumstances taken together are sufficient to corroborate that the testator executed Exts.B1 and B5 Wills out of free will and while being in sound disposing state of mind.

26. In support of the view that Ext.B1 Will was vitiated and therefore not reliable, the court below relied on a few alleged suspicious circumstances surrounding execution of Will. According to the court below, complete exclusion of respondents from the immovable assets of the testator was a major suspicious circumstance to indicate

that execution of Will was not free from doubt. We find our way difficult to agree to this view of the court below in the facts and circumstances of this case.

27. It is true that till the death of the testator, he was in the company of appellants. PW1, the 2nd plaintiff said that each of the respondents/daughters was given only 10 sovereigns of gold ornaments at the time of their marriage. Nothing out of immovable assets of the parents was admittedly given to the daughters. DW7 who is the 2nd defendant, however, asserted that 17 ½ sovereigns of gold ornaments were given to first plaintiff along with cash amount of Rs.5,000/-. As regards PW2, he said that she was given cash amount of Rs.50,000/- besides 17 ½ sovereigns of gold ornaments.

28. Inequitable distribution of assets among the heirs or exclusion of any particular descendant from the assets of the testator cannot always be regarded as a circumstance sufficient to arouse suspicion in the matter of execution of Will. Bequeathal of properties under a Will is the absolute choice of the testator arising out of his sweet will and

pleasure and also his attitude to persons concerned. What a court of law is concerned in this respect is only to unearth whether testament came out of sound disposing state of mind and not dissect his decision nor find out whether distribution of the assets was fair, equitable or conscientious. Once it is shown that testator acted out of his free will and was capable enough to take decisions affecting his rights and interests, then any uneven distribution of assets or even denial of share to any descendent of the testator can seldom form a chain of suspicious circumstances vitiating execution of Will. This is because a decision which is not righteous to others may also come out of a conscious mind of the testator. Law in this respect was lucidly laid down in ***Ramabai Padmakar Patil (Dead) through LRS. And Others v. Rukminibai Vishnu Vekhande & Others [2003 (8) SCC 537]*** and ***Velayudhan Nair v. Kalliyanikutty Amma [2006 (1) KLT 884].*** Therefore the view of the court below accepting exclusion of respondents from the assets of the testator as a ground vitiating the Will cannot be said to be in keeping

with correct principle of law.

29. Non-examination of 3rd appellant as a witness was taken by the trial court as a ground for doubting the case of appellants as if her examination in court could have brought to light the actual weight of the gold and cash given to the respondents. This too is not a sound view since the 3rd appellant had no burden to prove the actual share of gold or cash given to her daughters at the time of marriage. She is one of the legatees who accepted Ext.B1 Will and agreed with the statement made by the testator in the Will that daughters were reasonably paid at the time of marriage. Therefore, her non-examination before the court below cannot be said to be a valid ground for discarding Ext.B1 Will.

30. In fact, there is no marked difference between terms in Exts.B1 and B5 Wills. The property set apart to the joint share of appellants 1 and 2 under Ext.B5 Will was later divided allotting separate shares to the same legatees under Ext.B1. Except this minor modification, no other changes were brought into effect as per the last Will. Even though

Ext.B5 Will vanished and became ineffectual after it was cancelled through Ext.B1 last Will, it is nevertheless a formidable circumstance to indicate that propounders under Ext.B1 had no motivating reason to exert any undue influence on the testator or to fabricate a bogus Will when they were already benefited by the former Will.

31. The court below in the impugned judgment observed that the signatures appearing in Exts.B1 to B4 as those of the testator were manifestly different from one another. We fail to understand as to how this alleged difference could affect the validity of the Will. In our opinion, the alleged difference could be quite natural due to the old age of the executant. Even assuming that there was difference in the signatures also, no reasonable doubt as to identity of the executant or due execution could be raised since the documents were registered before the Sub-Registrar in accordance with the provisions of the Indian Registration Act. The registered documents normally carry a rebuttable presumption of law that they were duly executed by persons who appeared to the Registry as

competent to execute, as held in ***Varghese v. Oommen [1994(2) KLT 620]*** though registration by itself may not be a fact sufficient to dispel suspicious circumstances as held in ***Natarajan v. Sri.Narayana D S Trust [1995 KHC 399]***.

32. Thus none of the views expressed by the court below for discarding Ext.B1 Will as ingenuine can hold good. We find that Ext.B1 Will executed by the deceased Kochouseph disinheriting the respondents is valid under law. The suit items are not partible. The respondents are not entitled to succeed the deceased and demand partition ignoring Ext.B1. Therefore the preliminary decree passed by the court below is liable to be set aside.

33. The appellants sought to admit a few documents as additional evidence through I.A.No.2/2019. The documents relied on by appellants were denied by the respondents. Since the evidence on record is adequate and helpful to court to decide the issues finally, we do not consider it proper to admit the additional evidence especially at this distance of time. I.A.No.2/2019 is,

therefore, dismissed.

In the result, we set aside the impugned judgment of Principal Sub-Court, Irinjalakkuda in O.S.No663/2008 and allow this appeal. O.S.No.663/2008 is dismissed.

Sd/-

A.HARIPRASAD
JUDGE

Sd/-

T.V.ANILKUMAR
JUDGE

Dxy/-