REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7528 OF 2019
(ARISING OUT OF SLP (CIVIL) NO. 4382 OF 2019)

GOVINDBHAI CHHOTABHAI PATEL & ORS. .....APPELLANT(S)

VERSUS

PATEL RAMANBHAI MATHURBHAI .....RESPONDENT(S)

J U D G M E N T

HEMANT GUPTA, J.

1) Leave granted.

2) The order passed by the High Court of Gujarat on September 5, 2018 in second appeal is the subject matter of challenge in the present appeal on behalf of the plaintiffs-appellants.

3) The appellants are sons of Chhotabhai Ashabhai Patel[1] who died on December 6, 2001. During his life time, he purportedly executed a gift deed dated November 15, 1977 in favour of defendant Ramanbhai Mathurbhai Patel[2].

4) The parties went to trial on the following issues:

(i) Whether the plaintiffs prove that the disputed gift deed is

1 for short, 'Donor'
2 for short, 'Donee'

fabricated?

(ii) Whether the plaintiffs prove that the suit properties are ancestral properties and late Chhotabhai Ashabhai had no right to execute the gift deed?

(iii) Whether the plaintiffs prove that the defendant has no right, title or interest over the said property?

(iv) Whether the plaintiffs prove that they are entitled to get the relief as prayed for?

(v) Whether the defendant proves that the plaintiffs have no right to file the present suit?

(vi) What order and decree?

5) The High Court framed five substantial questions of law and after giving findings on such substantial questions of law, the judgment and decree passed by the learned Trial Court on February 10, 2014 and the judgment and decree passed by the First Appellate Court on October 9, 2017 were set aside.

6) The findings recorded by the High Court, *inter alia*, are that execution of the gift deed was not specifically denied in the suit filed. Therefore, it is not necessary for the Donee to examine one of the attesting witnesses in terms of proviso to Section 68 of the Indian Evidence Act, 1872[3]. It is also held that the suit property is not ancestral property. The property was purchased by Ashabhai Patel, father of the Donor and it is by virtue of Will executed by Ashabhai Patel, property came to be owned by the Donor in the year 1952-1953. The High Court, thus, held that the Donor was competent to execute the gift deed dated November 15, 1977 as the property was not ancestral in the hands of Donor. The relevant

3 for short, 'Evidence Act'

findings on such questions which arose for consideration in the second appeal, read as under:

> "92. Once again, at the cost of repetition, I state that Section 68 of the Evidence Act has been thoroughly misconstrued by the Courts below. The occasion for applying the rule of exclusion from evidence in Section 68 arises when a party seeking to rely upon a document requiring attestation, fails to prove it in a given manner. As observed by me earlier, the party will then not be able to use it as evidence. But this procedural disability against use of a document as evidence cannot by any stretch be regarded as an affirmative finding that the grounds of attack for avoidance of the deed as claimed in the original relief or cancellation subsisted. The plaintiff cannot succeed relying upon the weakness or a flaw in the case set up by the defendant. The law is that the plaintiff can succeed in the suit only on the strength of his own case.
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> 105. The case of the plaintiffs is very specific. According to them, the suit properties were purchased by their grandfather and those properties came to be devolved upon their father by Testamentary disposition i.e. on the strength of the will of their grandfather. The Hindu Law, as it stands today, clearly postulates that if it is a self-acquired property of the father, it falls into the hands of his sons not as coparcenary property, but would devolve on them in their individual capacity. Where the property is a self-acquired property of the father, it falls into the hands of his son in his individual capacity and not as coparcenary property in such case son's son cannot claim right in such property.
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> 108. In view of the above, I hold that the suit properties devolved upon the father of the plaintiffs could not be said to be coparcenary property. The properties were purchased by the grandfather of the plaintiffs, as pleaded and admitted by the plaintiffs themselves. Such self-acquired properties of the grandfather came to be devolved upon the father of the plaintiffs by way of a 'will' i.e. testamentary disposition. In such circumstances, it could be said that the properties are

> self-acquired properties of the father of the plaintiffs. The succession would have been in accordance with Section 8 of the Hindu Succession Act. When the properties could be said to be self-acquired properties of the father of the plaintiffs, then the father could have definitely transferred those properties by way of a gift deed.
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> 114. In view of the above, I hold that the suit properties were self-acquired properties of the father of the plaintiffs, and in such circumstances, it was open for the father of the plaintiffs to execute the gift deed in favour of the defendant."

7) Learned counsel for the appellants submitted that the High Court has exceeded its jurisdiction in second appeal as findings recorded by the First Appellate Court were not specifically dealt with. It is, thus, argued that the interference in the second appeal is contrary to judgment of this Court in ***Thulasidhara & Anr.*** v. ***Narayanappa & Ors.***[4]. It is argued that the appellants have produced old revenue record and from the documents (Exhibits 107 to 126), the property is proved to be ancestral and such is the finding recorded by the Trial Court and the First Appellate Court. Such evidence was not controverted by the Donee. It is argued that the findings recorded by the High Court that the property devolved on the Donor by virtue of a Will, therefore, it ceases to be an ancestral property is contrary to the judgment of this Court in ***C.N. Arunachala Mudaliar*** v. ***C.A. Muruganatha Mudaliar & Anr.***[5]. The reliance is also placed upon judgment of this Court in

4 (2019) 6 SCC 409
5 AIR 1953 SC 495

Shyam Narayan Prasad v. ***Krishna Prasad & Ors.***[6] that self-acquired property of a grandfather devolves upon his son as ancestral property.

8) On the other hand, learned counsel for the Donee argued that the plaintiffs have failed to prove that the property was ancestral property after admitting that their grandfather has purchased the property and given it under Will to their father to the exclusion of other family members. The argument raised by learned counsel for the appellants that the High Court has exceeded its jurisdiction by reversing the findings of fact recorded by the First Appellate Court does not hold good as the very reasoning recorded has been found to be illegal. It is argued that judgment in ***C.N. Arunachala Mudaliar*** is to the effect that the property bequeathed or gifted to a son by a Mitakshara father will be treated as self-acquired property in the hands of Donee.

9) The first and the foremost question required to be examined is as to whether the appellants have proved that the property in the hands of Donor was ancestral property.

10) Govindbhai Chhotabhai Patel (PW-1) has stated, vide Exhibit 34, that the property in question was purchased by his grandfather Ashabhai Patel and after death of his grandfather, property was owned by the Donor according to the inheritance since 1952-1953. The appellants stated in the cross-examination that there was

6 (2018) 7 SCC 646

family partition in the year 1964 between the Donor and his two brothers Chimanbhai Patel and Motibhai Patel. It is, thus, sought to be argued that since the property was partitioned in 1964, therefore, the Donor has acquired the property not as self-acquired property but as ancestral property.

11) We find that a statement in the cross-examination that there was partition between the Donor and his two brothers will not make the property ancestral in the hands of Donor. The Will executed by the father of Donor has not been produced by the appellants to show as to what was intended by his grandfather when the Will was executed in favour of Donor. It is admitted fact that grandfather purchased the property, thus, such self-acquired property came to be bequeathed to the Donor even as per the judgment relied upon by the Appellant.

12) This Court in three Judge Bench in ***C.N. Arunachala Mudaliar*** considered the question as to whether the properties acquired by defendant No. 1 under Will are to be regarded as ancestral or self-acquired property in his hands. It is a case where the plaintiff claimed partition of the property in a suit filed against his father and brother. The stand of the father was that the house property was the self-acquired properties of his father and he got them under a Will executed in the year 1912. It was held that father of a Joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable

property and his male issue could not interfere with these rights in any way. The Court while examining the question as to what kind of interest a son would take in the self-acquired property of his father which he receives by gift or testamentary bequest from him, it was held that Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants. It was held that it was not possible to hold that such property bequeathed or gifted to a son must necessarily rank as ancestral property. It was further held that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor.

13) The Court found that such questions have been answered in different ways by different High Courts. The Calcutta High Court held that properties become ancestral property in the hands of his son as if he had inherited it from his father but in other High Courts, the question is treated as one of construction to be decided in each case with reference to its facts as to whether the gifted property was intended to pass to the sons as ancestral or self-acquired property.

14) The Bombay High Court in ***Jugmohan Das*** v. ***Sir Mangal Das***[7] held that if the son takes by devise, the property continues to be self-acquired in his hands. A man can give away his self-acquired

7 (1886) I.L.R. 10 Bom 528

property to whomsoever it pleases, including his own sons and that property so given would be considered self-acquired in the hands of the donee. The Court held as under:

> "I now come to the question, whether a son, to whom a father leaves his self-acquired property by will, takes the estate by devise or by descent. This is a most important point, perhaps the most important point in the case. For, if the son takes by devise, the property would, in my opinion, continue to be self-acquired in his hands, and a ready means would be afforded by the use of the testamentary power of checking enforced partitions…
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> The principle is now settled beyond question, that under Hindu law a man may alienate his property to the same extent by a will as he might by a gift *inter vivos.* In the *Tagore Case* (Ind. Ap. Sup. Vol. at p. 68) their Lordships of the Privy Council say: "A gift by will is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take, upon the death of the testator, as if he had given the property in his life-time."
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> A bequest by will, therefore, is a gift made in contemplation of death. It only differs from a gift in the fact that it takes effect at a future time instead of immediately. But it must clearly be governed and controlled by the general rules regarding gift. Now, there is no doubt that a man can give away self-acquired property to whomsoever he pleases, including his own sons; and there is no doubt that property so given would be considered self-acquired in the hands of the donee. It would, therefore, follow that property given by will would equally be self-acquired in the hands of the devisee."

15) Such view of the Bombay High Court was accepted by the Allahabad High Court[8] and the Lahore High Court[9]. This Court in

8 Parsotam v. Janki Bai, ILR 29 All 354
9 Amarnath v. Guran, AIR 1918 Lah 394

C.N. Arunachala Mudaliar approved the view of the Bombay High Court and held as under:

> "9. ... It was held, therefore, that the father of a joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way. This statement of the law has never been challenged since then and it has been held by the various High Courts in India, and in our opinion rightly, that a Mitakshara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons [Vide *Muddun* v. *Ram*, 6 WR 71] but he can make a gift of such property to one of his own sons to the detriment of another [Vide *Sital* v. *Madho*, ILR 1 All 394] ; and he can make even an unequal distribution amongst his heirs [Vide *Bawa* v. *Rajah*, 10 WR 287].
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> 10. So far the law seems to be fairly settled and there is no room for controversy. The controversy arises, however, on the question as to what kind of interest a son would take in the self-acquired property of his father which he receives by way of gift or testamentary bequest from him, vis-a-vis his own male issue. Does it remain self-acquired property in his hands also, untrammeled by the rights of his sons and grandsons or does it become ancestral property in his hands, though not obtained by descent, in which his male issue become co-owners with him?.....
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> 11. In view of the settled law that a Mitakshara father has right of disposition over his self-acquired property to which no exception can be taken by his male descendants, it is in our opinion not possible to hold that such property bequeathed or gifted to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest..."

16) Still further, it was held that the father's gifts are exempt from partition. The reason for this distinction is that the theory of equal ownership between the father and the son in the ancestral property

is not applicable to the father's gifts at all. The Court held as under:

> "12. ...But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. A good deal of confusion, we think, has arisen by not keeping this distinction in mind. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. The Mitakshara, we think, is fairly clear on this point. It has placed the father's gifts under a separate category altogether and in more places than one has declared them exempt from partition. Thus in Chapter I, Section 1, Placitum 19 Mitakshara refers to a text of Narada which says:
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> > "Excepting what is gained by valour, the wealth of a wife and what is acquired by science which are three sorts of property exempt from partition; and any *favour conferred* by a father."
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> 15. Another argument is stressed in this connection, which seems to have found favour with the learned Judges of the Patna High Court who decided the Full Bench case [Vide *Bhagwat* v. *Mst. Kapornı*, ILR 23 Pat 599] referred to above. It is said that the exception in regard to father's gift as laid down in placitum 28 has reference only to partition between the donee and his brothers but so far as the male issue of the donee is concerned, it still remains partible. This argument, in our opinion, is not sound. If the provision relating to self-acquisition is applicable to all partitions, whether between collaterals or between the father and his sons, there is no conceivable reason why placitum 28, which occurs in the same chapter and deals with the identical topic, should not be made applicable to all cases of

> partition and should be confined to collaterals alone. The reason for making this distinction is undoubtedly the theory of equal ownership between the father and the son in the ancestral property which we have discussed already and which in our opinion is not applicable to the father's gifts at all. Our conclusion, therefore, is that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor."

17) This Court further held that on reading of the Will as a whole, the conclusion becomes clear that the testator intended the legatees to take the properties in absolute rights as their own self-acquired property without being fettered in any way by the rights of their sons and grandsons. In other words, he did not intend that the property should be taken by the sons as ancestral property. Consequently, the appeal was allowed and the suit for partition by the son against his father was dismissed.

18) In other case reported as ***Pulavarthi Venkata Subba Rao & Ors.*** v. ***Valluri Jagannadha Rao (deceased) by his Heirs & LRs & Ors.***[10], life estate was given by Valluri Jagannadha Rao to his two sons, Srivatsankara Rao and Narasimha Rao. There was a condition that if any of his sons left no son, the sons of his other son would be entitled to the properties at the end of the life estate. The High Court held that the properties taken by two sons of Narasimha Rao under Will were their separate properties and not ancestral properties as there was no such intention in the Will. This Court held as under:

10 AIR 1967 SC 591

> "8. The contention of the judgment-debtors was that there were two persons who were legatees under the will. They took the villages not as ancestral properties but as self-acquired properties, and the *peshkash* payable on these two villages must be divided between them before Section 3(*ii*), proviso (D) of the Act was made applicable. The contention on the side of the decree-holders was that these properties were held by an undivided Hindu family and the sons of Narasimha Rao took the properties under the will as ancestral properties, and the *peshkash* in respect of the two villages must be added together for the purpose of the application of the said proviso. The High Court held that the properties taken by the two sons of Narasimha Rao under the will, were their separate properties and not ancestral properties, as there were no words to show a contrary intention. The High Court also referred to the conduct of the respondents in partitioning the villages and held that the property was held not jointly but in definite shares. The High Court, therefore, held that the *peshkash* in respect of the two villages could not be aggregated. The High Court, accordingly, broke up the *peshkash* in respect of Kalagampudi and the three-fifth share of Pedamamidipalli into two halves and held that as each son of Narasimha Rao was required to pay only his share, the *peshkash* paid by them individually did not exceed Rs 500 mentioned in proviso (D), and that the judgment-debtors were, therefore, agriculturists. This part of the case was not challenged before us by the learned Advocate-General of Andhra Pradesh. Indeed, the decision of the High Court is supported by *C.N. Arunachala Mudaliar* v. *C.A. Muruganatha Mudaliar* [(1954) SCR 243], in respect of the character of the property inherited by the two sons of Narasimha Rao, and this fundamental fact could not be questioned....."

19) Learned counsel for the appellants has referred to ***Shyam Narayan Prasad***. That is a case in which the property in question was held to be ancestral property by the Trial Court. The plaintiffs therein being sons and grandson of one of the sons of Gopal Prasad, the last male holder was found to have equal share in the

property. The question examined was whether the property allotted to one of the sons of Gopal Prasad in partition retains the character of coparcenary property. It was the said finding which was affirmed by this Court. This Court held as under:

> "12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship."

20) The question examined in the aforesaid case was in respect of status of the property after partition. The said question is not arising in the present case as it is not a question of partition but testamentary succession in favour of the Donee.

21) In view of the undisputed fact, that Ashabhai Patel purchased the property, therefore, he was competent to execute the Will in favour of any person. Since the beneficiary of the Will was his son and in the absence of any intention in the Will, beneficiary would acquire the property as self-acquired property in terms of ***C.N. Arunachala Mudaliar*** case. The burden of proof that the property was ancestral was on the plaintiffs alone. It was for them to prove that the Will of Ashabhai intended to convey the property for the benefit of the family so as to be treated as ancestral property. In

the absence of any such averment or proof, the property in the hands of Donor has to be treated as self-acquired property. Once the property in the hands of Donor is held to be self-acquired property, he was competent to deal with his property in such a manner he considers as proper including by executing a gift deed in favour of a stranger to the family.

22) The other material question is whether the appellants have specifically denied the execution of the gift deed in terms of proviso to Section 68 of the Evidence Act, to make it mandatory for the defendant to examine one of the attesting witnesses to prove the Gift deed in his favour.

23) Section 68 of the Evidence Act, reads as under:

> "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:
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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."

24) A gift deed is required to be compulsorily attested in terms of Section 123 of the Transfer of Property Act, 1882. Similar is the provision in respect of execution of a Will which is required to be

attested in terms of Section 63 of the Indian Succession Act, 1925. Section 68 of the Evidence Act makes it mandatory to examine one of the attesting witnesses for the purpose of proving of the execution of Will but such limitation is not applicable in respect of proof of execution of any document which has been registered in accordance with provisions of the Indian Registration Act, 1908, unless the execution is specifically denied.

25) The gift deed (Ex.104) is registered and that all the requirements of Section 123 of the Transfer of Property Act have been fulfilled, is the finding of the Trial Court. The learned Trial Court recorded the following findings:

> "However, as far as it is concerned with the gift deed of Exh-104, in order to prove that Late Chhotabhai Ashabhai executed this gift deed in favour of the defendant in fully conscious state, it is necessary as per section – 123 of the Transfer of Property Act that this gift deed should be signed by the executer in presence of the two witnesses that means it should be executed in the presence of two attesting witnesses. Moreover, it should be proved that such gift deed is registered. Looking to the gift deed at Exh – 104, it is an undisputable fact that it is properly registered before the Sub Registrar, Padra. It is also an indisputable fact that (1) Bhikhabhai Ramabhai and (2) Karshanbhai Dhulabhai have put their signatures in this gift deed as the attesting witnesses. Thus, it is found that all the requirements of section 123 of the Transfer of Property Act have been fulfilled. However, along with this, it is also necessary to examine the attesting witnesses of the deed."

26) The argument of the learned counsel for the appellants is that the attesting witnesses of the gift deed are Bhikhabhai Ramabhai and

Karsanbhai Dhulabhai, whereas Solanki Bhikhabhai Ramabhai and Vaid Alkaben Vinodchandra are the witnesses at the time of registration of the document. It is argued that the attesting witnesses of the document have not been examined which is a mandatory requirement to prove execution of the gift deed in terms of Section 68 of the Evidence Act. The High Court has held that the appellants have not denied specifically the execution of the gift deed, therefore, it was not necessary for the Donee to examine one of the attesting witnesses.

27) The issue No. 1 framed by the Trial Court is whether the gift deed is fabricated. Such issue arises on the basis of averments made in the plaint wherein, the appellants have admitted the execution of the gift deed but alleged that Donee has made unsuccessful effort for grabbing the property. The appellants have, *inter alia*, pleaded that Chanchalben, wife of the Donor, died in August, 1997. Thus, there was no reason for the Donor to execute the gift deed as real nephews of the Donor were taking complete control of the Donor. The other ground of challenge was that the attesting witnesses have no relation with the Donor nor they are friends of the Donor. It was also alleged that the gift is not for religious reasons or to any religious trust or institution or for public use nor the consent has been sought by the Donor from the appellants. The specific averments in the plaint are as under:

> "2) The deceased Chhotabhai Ashabhai who was the father of plaintiff Nos. 1 to 4 and plaintiff Nos. 1 to 4 were living in USA (America) since many years and the

deceased Chhotabhai Patel and the mother of plaintiff Nos. 1 to 4 Chanchalben wife of Chhotabhai Ashabhai who had expired in and around August, 1997, and since August, 1997, deceased Chhotabhai Ashabhai was living alone thus, taking advantage of his loneliness the defendant on 15/11/1997 executed one gift deed which was registered in the office of Sub-Registrar, Padra at Sr. No. 1004 made unsuccessful efforts for grabbing the said property thus, the plaintiffs are constrained to file this suit, on the grounds which are stated as under:

(a) The deceased Chhotabhai Ashabhai was not in any manner related to the defendant Ramanbhai Mathurbhai.

(b) The deceased Chhotabhai Ashabhai Patel and his wife Chanchalben wife of Chhotabhai Ashabhai Patel were living in America since many years prior to 1997.

(c) Chanchalben the wife of deceased Chhotabhai Ashabhai had expired during the period of August, 1997, thus, on 15/11/1997, there was no reason for Chhotabhai to execute the gift deed, not only that but the real nephews of the deceased Chhotabhai Ashabhai who were living at Ghayaj were taking complete care of deceased Chhotabhai Ashabhai, thus, outside their knowledge, at any time the deceased Chhotabhai had no reason to execute deed.

(d) In the gift deed dated 15/11/1997, the witnesses that have signed (1) Bhikhabhai Ramabhai and (2) Karshanbhai Dhulabhai who were not having any kind of relations with the deceased Chhotabhai Ashabhai and/or they were not even related as his friends. There was no reason of making the gift deed in their presence.

(e) In the gift deed dated 15/11/1997 the details of the date of the unregistered Will executed by deceased Chhotabhai Ashabhai is kept blank and the date and registration number of the registered Will is also kept blank, and in this manner, with incomplete details the gift deed is registered which is made hastily which supports the facts of the plaintiffs.

(f) In the gift deed dated 15/11/1997 it is clearly evident that the signature of the deceased Chhotabhai

> Ashabhai is forged, and in this manner on the basis of the forged signature the gift deed is registered, in this regard we are constrained to file the present suit.
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> (g) The gift deed dated 15/11/1997 which is contrary to the provisions of law, therefore, also by such gift deed the defendant does not acquire any rights, interests or claims on the said property….."

28) The appellants refer to Will dated December 3, 2001 said to be executed by the Donor in their favour. But no issue has been framed in respect of Will propounded by the appellants. In fact, no attesting witness of the Will has been examined. Therefore, the Will relied upon by the appellants cannot be said to be proved.

29) The High Court held that the appellants have not led any evidence that signature of their father on the gift deed was forged as neither the specimen signature nor writings of their father for the purpose of comparing the disputed signature on the gift deed have been attempted. There is no report of an expert in respect of signatures of the Donor on the gift deed nor any request was made for sending the document to the Forensic Science Laboratory. The High Court held as under:

> "67. In my view, the plaintiffs have miserably failed to prove any forgery. If it is the case of the plaintiffs that the signature of their father on the disputed gift deed is forged, then the burden is on them to establish and prove by leading cogent evidence that the signature is forged by another. A mere doubt or assertion or an allegation of forgery by itself is not sufficient to even *prima facie* draw an inference of fraud. The plaintiffs tried to rely upon the 'will' said to have been executed by their late father just two days before his demise in

> the year 2001. One of the cousins of the plaintiffs took out the 'will' out of the blue and handed over to the plaintiffs. The plaintiffs tried to capitalize on this 'will' because in the said 'will', there is a thumb impression of the father of the plaintiffs i.e. the testator. The plaintiffs thereby tried to create a doubt in the mind of the Courts below that the father was illiterate and was unable to put his signature. However, if the plaintiffs wanted to rely upon the 'will', they should have produced the original and proved the same in accordance with law by examining one of the attesting witnesses to the said 'will'. The 'will' has not even been exhibited, and therefore, there is no question of looking into the same. The entire approach of the Trial Court could be said to be erroneous and has led to a serious miscarriage of justice. I am of the view that the plaintiffs have practically led no evidence even to *prima facie* create a doubt that the signature of their father on the gift deed is forged. The plaintiffs could have produced the specimen signature or writings of their father, if any, for the purpose of comparing the disputed signature on the gift deed. The Trial Court could have been asked to seek an opinion of an expert in this regard by sending the document to the Forensic Science Laboratory. Nothing of this sort was done. All that has been asserted in the evidence is that the father had no good reason to execute the gift deed in favour of the defendant, more particularly, when the sons were taking good care of their father. This hardly could be termed as evidence with regard to fraud or forgery. The plaintiffs have not even pleaded or deposed that their father was illiterate and was not able to put his signature. If the evidence on record is looked into, then the plaintiffs have in substance just expressed doubts as regards the signature of their father."

30) At this stage, we may reiterate that though the learned Trial Court has discussed the evidence on record but in view of the finding that the property is ancestral, no finding was recorded whether the gift deed is forged or not as per the issue framed. The First Appellate Court in a short judgment affirmed the finding of the learned Trial

Court. The Trial Court has not retuned any finding that the gift deed is forged. Therefore, the High Court was within its jurisdiction to decide the Issue No. 1 on the basis of evidence led by the parties.

31) The appellants challenged the gift deed on account of probabilities as the witnesses were not related to the family or the friends or that the gift was not for religious or charitable purposes. The other challenge was on the ground of forgery or fabrication. The entire reading of the plaint does not show that there was any specific denial of execution of the gift deed.

32) The appellants have referred to the judgments in ***Rosammal Issetheenammal Fernandez (Dead) by LRs & Ors.*** v. ***Joosa Mariyan Fernandez & Ors.***[11] and ***K. Laxmanan*** v. ***Thekkayil Padmini & Ors.***[12]. However, we find that both the judgments are not applicable to the facts of the present case. In ***Rosammal***, the appellant had filed a suit for partition and challenged the execution of the gift deed, settlement deed and the Will. The High Court found that the execution of the gift deed was specifically denied. After finding so, the High Court recorded the following findings:

> "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. In the present case as we have

11 (2000) 7 SCC 189
12 (2009) 1 SCC 354

> held, there is clear denial of the execution of such document by the plaintiff, hence the High Court fell into error in applying the said proviso which on the facts of this case would not apply. In view of this the very execution of the gift deed, Exhibit B-1 is not proved. Admittedly in this case none of the two attesting witnesses has been produced. Once the gift deed cannot be tendered in evidence in view of the non-compliance of Section 68 of the Indian Evidence Act, we uphold that the plaintiff has successfully challenged its execution…"

33) In the facts of the said case, the High Court found that there is specific denial of execution of the gift deed, therefore, in the absence of examining one of the attesting witnesses, the gift deed is not proved.

34) In ***K. Laxmanan***, a suit was filed by daughter claiming estate of Chathu on the basis of natural succession. The defendant (son of Chathu) relied upon a gift deed (Ex.B-2) as well as Will in his favour. The High Court held that both the attesting witnesses were not examined, therefore, the gift deed and Will are not proved to be executed. It was found that gift deed was relied upon in the written statement which was specifically denied in the affidavit filed in respect of injunction applications. The Court held as under:

> "29. 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 6 of the Code consist only of a plaint and a written statement. The respondent-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 of the facts pleaded in the written statement. The specific objection in the form of denial

> was raised in the 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."

35) In the abovesaid case, the plaintiff claimed natural succession whereas the defendant relied upon gift deed. In the aforesaid judgments, it has been held as a matter of fact that there was specific denial of execution of gift deed. But in the present case, the appellants came out with the plea of forgery and fabrication of the gift deed which is based on different allegations and proof than the proof of document attested.

36) Order VI Rule 4 of the Code of Civil Procedure, 1908 warrants that in all cases in which allegation of any misrepresentation, fraud, breach of trust, wilful default, or undue influence, the necessary particulars are required to be stated in the pleadings.

37) In ***Badat and Co. Bombay*** v. ***East India Trading Co.***[13], considering the provisions of Order VIII Rule 3, it was held that written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively and answer the points of substance. If his denial of the said fact is not specific but evasive, the said fact shall be taken to be admitted.

38) The appellants went to trial on the basis of fabrication of gift deed. The appellants have admitted the execution of the gift deed but

13 AIR 1964 SC 538

alleged the same to be forged or fabricated. However, the appellants have not been able to prove any forgery in the execution of the gift deed.

39) ***Dashrath Prasad Bajooram*** v. ***Lallosingh Sanmansingh & Anr.***[14] was dealing with the issue as to whether defendant No. 1 executed the mortgage deed with proper attestation and for consideration. Considering the proviso to Section 68 of the Evidence Act, the Court held that word 'specific' has to be given some meaning appearing in proviso to Section 68. The Court held as under:

> "11. That however raises the question whether a mere general denial of a mtge or not admitting it can be regarded as a specific denial. It will be observed that the proviso to Section 68 of the Evidence Act speaks of a specific denial. Some meaning must be given to the word 'specific'. It must mean something over & above a general denial. Accordingly in my judgment it is not sufficient to have a mere general denial to; attract the provisions of S. 68. That was the distinction drawn in '*Jhillar* v. *Rajnarain*', AIR (22) 1935 All 781 at p. 784 : (156 IC 45) & in '*Laehman Singh* v. *Surendra Bahadur Singh*', 54 All 1051 at p. 1058 : (AIR (19) 1932 All 527 FB). But those decisions must in my opinion be held to have gone too far in view of the decision of their Lordships of the P.C. in '*Surendra Bahadur* v. *Behari Singh*', AIR (26) 1939 PC 117 : (ILR 1939 KAR 222). In view of what their Lordships have stated it must now be accepted that if a party specifically says that he does not admit a particular fact that amounts to a specific denial within the meaning of the proviso to Section 68 of the Evidence Act. But the P.C. decision is, in my opinion, distinguishable.
>
> 12. In the P.C. case both execution & attestation were expressly not admitted. It was not a case of a mere general denial of the mtge. The written statement there was in these terms:

14 AIR 1951 Nag 343

> "The contesting deft. does not admit the execution & completion of the document sued on" & at the trial, the P.C. said
> "it was contended on behalf of Lachman Singh that the execution & 'due attestation' of the mtge bond……had not been proved."

13. The case is in my opinion different when there is no specific denial or when the fact of execution is not specifically not admitted but there is a mere general denial. As I have said, some meaning must be given to the words 'specifically denied'. So also some meaning must be given to the provisions of O. 8 R. 3 of the CPC which state that

> "It shall not be sufficient for a deft. in his written statement to deny generally the grounds alleged by the pltf., but the deft. must deal specifically with each allegation of fact of which he does not admit the truth……"

40) In ***Kannan Nambiar*** v. ***Narayani Amma & Ors.***[15], the Division Bench of the Kerala High Court was considering a suit filed by daughter of a donee claiming share in the property. The gift deed was admitted in evidence without any objection. The Court held that specific denial of execution of gift is an unambiguous and categorical statement that the donor did not execute the document. The Court held as under:

> "14. Ab initio we have to examine whether there is any specific denial of the execution of the document, in the pleadings. Before considering whether there is specific denial we have to consider what is the exact requirement demanded when the proviso enjoins a specific denial. 'Specific' means with exactness, precision in a definite manner (See *Webster's 3rd New International Dictionary*). It is clear, that something more is required to connote specific denial in juxtaposition to general denial. See *Dashrath Prasad* v. *Lallosing* (AIR. 1951 Nag. 343)

15 1984 SCC OnLine Ker 174 : 1984 KLT 855

> 15. We think that specific denial of execution of gift is an unambiguous and categorical statement that the donor did not execute the document. It means not only that the denial must be in express terms but that it should be unqualified, manifest and explicit. It should be certain and definite denial of execution. What has to be specifically denied is the execution of the document. Other contentions not necessarily and distinctly referring to the execution of the document by the alleged executant cannot be gathered, for the denial contemplated in the proviso.
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> xx xx xx
>
> 18. The question which elicited the above answer gives a clear understanding of the case of the defendants as they understood their case. Defendants have no case that no document was executed by Anandan Nambiar. Their case is that the document is not valid because it had been executed under circumstances which would render the document invalid. There is no specific denial of the execution of the document. The respondents can seek the aid of the proviso to S. 68 of the Evidence Act. No defect in not calling an attesting witness to prove the document. We do not think that we can ignore Ext. A1 gift deed on the ground that no attesting witness has been called for, for proving the gift deed."

41) The facts of the present case are akin to the facts which were before the Kerala High Court in ***Kannan Nambiar***. The appellants have not denied the execution of the document but alleged forgery and fabrication. In the absence of any evidence of any forgery or fabrication and in the absence of specific denial of the execution of the gift deed in the manner held in ***Kannan Nambiar***, the Donee was under no obligation to examine one of the attesting witnesses of the gift deed. As per evidence on record, the Donee was taking care of the Donor for many years. The appellants were residing in the United States but failed to take care of their parents.

Therefore, the father of the appellants has executed gift deed in favour of a person who stood by him. We find that there is no error in the findings recorded by the High Court.

42) Thus, we do not find any error in the judgment of the High Court which may warrant interference in the present appeal and accordingly, the appeal is dismissed.

.....J.
(L. NAGESWARA RAO)

.....J.
(HEMANT GUPTA)

NEW DELHI;
SEPTEMBER 23, 2019.