# S.R. SRINAVASA AND ORS.
*v.*
# S. PADMAVATHAMMA
(Civil Appeal No. 4623 of 2005)

APRIL 22, 2010

**[V.S. SIRPURKAR AND SURINDER SINGH NIJJAR, JJ.]**

A B C D E F G H

*Will:*

*Execution of Will and its genuineness – Burden to prove – Held: The initial burden is on the propounder to remove all the reasonable doubts – Presence of suspicious circumstances make initial burden heavier – Will in respect of suit property in favour of one of the daughter – No reason given as to why the other legal heirs were excluded from inheritance – None of the attesting witnesses examined – No reason given as to why the Will was presented before the Sub-Registrar on two separate occasion for registration – Non-examination of Sub-Registrar – Active participation of sole beneficiary in writing and registering the Will – Cumulative effect of all the circumstances would create suspicion about genuineness of Will – Registration by itself not sufficient to remove suspicion – Such suspicion cannot be removed by mere assertion of propounder that the Will bore signature of testator or that the testator was in sound and disposing state of mind at the time of making Will – Thus, Will not proved to be genuine – Evidence Act, 1882 – ss.63, 68 – Hindu Succession Act, 1956 – s.15(2)(a).*

*Attesting witness – Scribe of a Will – Held: Does not become attesting witness – It is essential that the witness should put his signature animo attestandi, that is for the purpose of attesting that he saw executant sign – If a person puts his signature on the document to certify that he is a scribe or an identifier or a registering officer then he is not signing*

A *in the capacity of an attesting witness – Evidence Act, 1882 – ss.63, 68 – Witness.*

**The suit property devolved upon 'P' who was the mother of plaintiff and defendant 4 after death of their father. One of the sisters of plaintiff, 'I' was staying with the mother and looking after mother till she died. 'I' continued to be in possession of suit property. When 'I' died, her cremation was performed by her cousin, the defendant 1. Thereafter, Defendant 1 remained in possession of suit property and inducted defendant 2 and 3 as tenant.**

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**The plaintiff filed a suit for declaration that she and defendant 4 were the absolute owner of the suit property. The defence of defendant 1 was that on 18.6.1974, the mother of plaintiff had executed Will in favour of 'I', and since there was no intestate succession, neither the plaintiff nor the defendant 4 could succeed to the suit property. The trial court dismissed the suit holding that the plaintiffs did not seriously dispute the execution of Will by 'P' in favour of 'I' and in fact admitted the execution of the Will in a subsequent suit being O.S. no. 233 of 1998 which was filed by the appellants as the legal heirs of the plaintiff. The first appellate court reversed the judgment of trial court. On appeal, High Court restored the judgment of trial Court. Hence the appeal.**

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**Allowing the appeal, the Court**

**HELD: 1.1. It is not disputed that respondent No.1 was a rank outsider. He was not a lineal descendant of 'P'. He was son of P's sister. The property would be inherited by the appellants under Section 15(2) of the Hindu Succession Act if the Will dated 18.6.1974 was held not to be genuine. The basic aim of Section 15(2) is to ensure that inherited property of an issueless female**

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**Hindu dying intestate goes back to the source. It was enacted to prevent inherited property falling into the hands of strangers. This is also evident from the recommendations of the Joint Committee of the Houses of Parliament. [Paras 18, 19, 21] [997-F; 998-D-E; 999-D-E]**

*State of Punjab v. Balwant Singh* **1992 Supp (3) SCC 108;** *V. Dandapani Chettiar v. Balasubramanian Chettiar* **(2003) 6 SCC 633, relied on.**

*Jayantilal Mansukhlal and another v. Mehta Chhanalal Ambalal* **AIR 1968 Gujarat 212;** *Palanivelayutham Pillai and others v. Ramachandran and others* **(2000) 6 SCC 151;** *Somnath Berman v. Dr. S.P. Raju and another* **AIR 1970 SC 846;** *Smt. Jaswant Kaur v. Smt. Amrit Kaur and others* **AIR 1977 SC 74, referred to.**

**1.2. By virtue of Section 15(2)(a) of the Act, the appellants would inherit the property in dispute. This right was sought to be defeated by defendant No.1 on the basis of the Will dated 18.6.1974, allegedly executed by 'P'. Defendant No.1 claimed that the plaintiffs cannot claim to 'inherit' the property on the basis of intestate succession. Undoubtedly, therefore, it was for defendant No.1 to prove that the Will was duly executed, and proved to be genuine. [Para 23] [1001-G-H; 1002-A]**

*H. Venkatachala Iyengar v. B.N. Thimmajamma,* **1959 Supp (1) SCR 426;** *Jaswant Kaur v. Amrit Kaur* **(1977) 1 SCC 369, relied on.**

**1.3. None of the attesting witnesses were examined. The scribe, who was examined as DW.2, did not state that he had signed the Will with the intention to attest. In his evidence, he merely stated that he was the scribe of the Will. He even admitted that he could not remember the names of the witnesses to the Will. It is essential that the**

A witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., B to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness. The said test was not satisfied by DW.2 the scribe. The effect of subscribing a signature on the part of the scribe cannot be identified to be of the same status as that of the attesting C witnesses. [Paras 26, 27] [1004-B-H]

*M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons* (1969) 1 SCC 573; *N. Kamalam v. Ayyasamy* (2001) 7 SCC 503, relied on.

D 2.1. There is no admission about the genuineness or legality of the Will either in the plaint of OS No. 233 of 1998 or in the evidence of PW-1. It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless E successfully withdrawn or proved to be erroneous. The High Court erred in holding that there was no need for independent proof of the Will, in view of the admissions made in OS No.233 of 1998 and the evidence of PW1. In fact there was no admission except that 'P' had executed F a Will bequeathing only the immovable properties belonging to her in favour of 'I'. The First Appellate Court correctly observed that the said admission was only about the making of the Will and not the genuineness of the Will. The statements contained in the plaint as well as G in the evidence of PW1 would not amount to admissions with regard to the due execution and genuineness of the Will dated 18.6.1974. The First Appellate Court on analysis of the entire evidence clearly recorded cogent reasons to conclude that the execution of the Will was

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**surrounded by suspicious circumstances. [Paras 31, 35, 36] [1006-D; 1007-H; 1008-A-F]** A

*Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi* **(1960) 1 SCR 773;** *Nagindas Ramdas v. Dalpatram Ichharam* **(1974) 1 SCC 242;** *Gautam Sarup v. Leela Jetly* **(2008) 7 SCC 85, relied on.** B

**2.2. It was noticed by the First Appellate Court that although 'P' was allotted certain specific property, there was no recital in the Will as to which of the properties were bequeathed to 'I'. Non-description of the schedule** C **property creates a reasonable suspicion as to whether 'P' executed the Will. It was noticed that if she had the intention of bequeathing all her property to 'I', she would have mentioned the details of all the properties which belonged to her in the Will. The First Appellate Court** D **further held that no reason was given as to why the Will was presented before the Sub Registrar on two separate occasions for registration. Although the son of 'P' died after having been divorced from his wife he is described in the Will as a bachelor. No reason was stated in the Will** E **as to why the other two daughters were excluded from the property by 'P'. Since the suspicious circumstances were not explained by defendant No.1, the Will was not genuine. The First Appellate Court also noticed that although 'I' was the sole beneficiary in the Will, she was** F **present at the time when the Will was written. She was also present in the office of Registrar when the Will was presented for registration. This would clearly show that 'I' had an evil eye on the suit property and, therefore, the descriptions of the other properties were not given. The** G **active participation of 'I' in the writing and the registration of the Will may well create a suspicion about its genuineness. Since there were suspicious circumstances, it was necessary for the defendants to**

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**explain the same. The registration of the Will by itself was not sufficient to remove the suspicion. The first appellate court also noticed that even in cases where the execution of the Will is admitted, at least one attesting witness of the Will has to be examined to receive the Will in evidence. DW2, who was examined was the scribe of the Will, gave no plausible reasons as to why the Will was presented twice before the Sub Registrar for registration. Nor was it stated by this witness as to why the Will was not registered on the first occasion. It was also held by the First Appellate Court that non-examination of the Sub Registrar created suspicion about the genuineness of the Will. Even the attesting witnesses to the Will were not examined. There was no evidence whether the Will was read over by the Sub Registrar or anybody else before it was registered. It was not explained as to how the Will came into possession of defendant No.1. There was no evidence when he was put in proper custody of the Will. Considering the cumulative effect of all the circumstances, the First Appellate Court correctly held that execution of the Will was surrounded by suspicious circumstances. [Paras 38-39] [1009-B-G; 1010-C-G]**

*Ramachandra v. Champabia* AIR 1965 SC 357, relied on.

**3. The High Court in its judgment seemed to have misread the entire evidence. The said findings recorded by the First Appellate Court were brushed aside by dubbing them as conjectural. The High court ought to have taken great care to satisfy its judicial conscience that the execution of the Will was not surrounded by suspicious circumstances. It is a part of the initial onus of the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed**

**by the mere assertion of the propounder that the Will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the Will was made. [Paras 40-42] [1011-A-C; 1012-D-E]** A

**Case Law Reference:** B

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| **AIR 1968 Gujarat 212** | **referred to** | **Para 14** |
| **(2000) 6 SCC 151** | **referred to** | **Para 14** |
| **AIR 1970 SC 846** | **referred to** | **Para 17** |
| **AIR 1977 SC 74** | **referred to** | **Para 17** |
| **1992 Supp (3) SCC 108** | **relied on** | **Paras 14, 21** |
| **(2003) 6 SCC 633** | **relied on** | **Paras 14, 22** |
| **(1959) Supp 1 SCR 426** | **relied on** | **Para 25** |
| **(1977) 1 SCC 369** | **relied on** | **Para 25** |
| **(1969) 1 SCC 573** | **relied on** | **Para 26** |
| **(2001) 7 SCC 503** | **relied on** | **Paras 14, 27** |
| **(1960) 1 SCR 773** | **relied on** | **Paras 16, 32** |
| **(1974) 1 SCC 242** | **relied on** | **Paras 16, 33** |
| **(2008) 7 SCC 85** | **relied on** | **Paras 16, 34** |
| **AIR 1965 SC 357** | **relied on** | **Para 38** |

C D E F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4623 of 2005.

From the Judgment & Order dated 2.9.2003 of the High Court of Karnataka at Bangalore in R.S.A. No. 641 of 2003. G

S.N. Bhat for the Appellant.

Nand Kishore (for P.P. Singh) for the Respondent. H

A The Judgment of the Court was delivered by

**SURINDER SINGH NIJJAR, J.** 1.This appeal by special leave has been filed by the legal heirs of the original plaintiff, Lalithamma. OS No.195 of 1986 had been filed by Lalithamma B in the Court of Civil Judge, Mysore which was subsequently renumbered as OS No.1434 of 1990 in the Court of Principal Civil Judge, (Junior Division), Mysore. The suit was for declaration that the plaintiff and defendant No.4 are the absolute owners of the suit schedule property and for possession thereof. The suit was dismissed by the trial court. The appeal filed by the C plaintiffs against the aforesaid judgment was allowed. The suit filed by the plaintiffs was decreed as prayed. The High Court, however, in regular second appeal filed by the respondent herein, set aside the judgment of the first appellate court and restored the judgment of the trial court, i.e. the suit filed by the D plaintiffs-appellants was dismissed. In these circumstances, the legal representatives of the original plaintiffs have filed the present appeal by special leave in this Court.

2. Briefly stated the facts of the case are that the plaintiffs E claimed that Puttathayamma was wife of Sivaramaiah who predeceased her in 1950. Puttathayamma died on 15.11.1979. She had four children. Lalithamma (daughter) who died in 1990, was the original plaintiff. Subbaramaiah (son) who died issueless in 1973 and Smt. Kamalamma (daughter) also died F issueless in 1998. She was impleaded as defendant No.4 in this suit. Smt. Indiramma was the 4th child. She also died issueless on 24.10.85. It is claimed that upon the death of Subbaramaiah, Puttathayamma inherited the suit property and became the absolute owner being class one heir of G Subbaramaiah. Upon the death of Puttathayamma, the deceased plaintiff, defendant No.4, Kamalamma and Indiramma inherited her property. During her life time, Puttathayamma was living with Indiramma. Upon her death, Indiramma continued to be in possession of the property. The dispute about the property arose soon after the death of H Indiramma.

3. Since the original plaintiff – Lalithamma and defendant No.4 were residing outside, they did not come to know about the death of their sister, Indiramma. Defendant No.1 claiming to be close relative of deceased Indiramma organized and performed her cremation ceremony. The house in which Indiramma was residing i.e., schedule property contained a lot of movable properties such as gold and silver jewellery and other articles which were of considerable value. He took charge of the house as well as the moveable properties by putting it under lock and key. On learning about the death of their sister, appellants and defendant No.4 came to Mysore. They demanded that defendant No.1 should hand over the possession of the house and moveable properties. He, however, refused to do so asserting that he was the absolute owner of the entire property. Not only this, it is stated that defendant No.1 had taken away several lacs of rupees which had been kept by Indiramma in various fixed deposits. Defendant No.1 had declined to hand over the title deeds of the schedule property as well as the bank deposit receipts.

4. The appellant and defendant No.4 also learnt that the first defendant had taken heavy advances from defendants No.2 and 3 and put them in possession of different portions of the schedule property as tenant. He had been recovering heavy rent from defendants No.2 and 3. During the pendency of the suit, defendants No.2 and 3 vacated the suit schedule property. Later, defendant no 5 was put in possession of the property.

5. In the suit, it is made clear that appellant and the 4th defendant will take separate action regarding the bank deposits and other moveable properties in appropriate proceedings after ascertaining the particulars thereof. It is clarified that the present suit was filed for declaration of the title to the property and for possession as the first defendant has denied their title by refusing to hand over the property to them.

6. We may also notice here that during the pendency of

A the suit, defendant No.4 also passed away issueless. The amended suit was, therefore, pursued by the L.Rs of deceased Lalithamma.

7. In the written statement, it was claimed by the defendant B No.1 that Puttathayamma had executed a Will on 18.6.1974 in favour of Indiramma. Consequently, there was no intestate succession. Testamentary succession devolved on late Indiramma. Therefore, neither the plaintiffs nor the 4th defendant could succeed to the properties of Puttathayamma at all. During the life time of Indiramma, her sister did not care to even look C after her. The moment she died, they have claimed to be heirs of her estate. Defendant No.1, on the other hand, is the son of Seethamma, sister of Puttathayamma. He denied the entire claim made by the plaintiffs. He further explained that he had informed the plaintiff and defendant No.4 about the death of D Indiramma. Although the plaintiff turned up on the 5th day, the 4th defendant did not choose to come at all. Defendant No.1 further claimed to have carried out extensive repairs of the house. It is also pleaded by defendant No.1 that Indiramma was the second wife of one Chalapati Rao, who pre-deceased her. E Although Chalapati Rao did not beget any children with Indiramma, he died leaving four sons and two daughters from his first wife. According to the first defendant, the legal heirs of Chalapati Rao would have preference over the appellants and defendant No.4. Therefore, under any circumstances, no relief F could be granted to them.

8. In reply to the amended plaint, defendant No.1 stated that an agreement of mortgage had been created in favour of 5th defendant in respect of the schedule property. Upon G receiving Rs.1,00,000/-, defendant No.1 has put defendant No.5 in possession.

9. With these pleadings parties led their evidence. Upon consideration of the entire material, the suit filed by the

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appellants herein was dismissed by the Trial Court. A

10. The Trial Court notices that defendant No.1 is the son of Seethamma, sister of Puttathayamma. It is also noticed that Indiramma was the second wife of one Chelapathirao who had six children from his previous marriage. Indiramma, however, died issueless. The Will dated 18.6.1974 was produced by defendant No.1, during evidence. The Trial Court observed that the plaintiffs have not seriously disputed the execution of the Will by Puttathayamma in favour of Indiramma. Defendant No.1 had examined the scribe of the Will as DW2 to prove the Will. It has been held that the appellants in fact admitted the execution of the Will in a subsequent suit being OS No.233 of 1998 which was filed by the appellants herein as the legal heirs. In view of the testamentary succession, Indiramma became the absolute owner of the schedule property. Since husband of Indiramma had pre-deceased her, the property would devolve upon his children under Section 15 (1) (b) of the Hindu Succession Act, 1956 (hereinafter referred to as "the Act"). It would not devolve on the appellants and defendant No.4 under Section 15(2) of the Act. The Trial Court further notices the claim made by the first defendant during trial that Indiramma had executed a Will in his favour dated 2.10.1984, bequeathing the schedule property to him. The Trial Court further notices that though defendant No.1 had got the Will dated 2.10.84 marked as Exhibit, he had not chosen to examine any of the attesting witnesses to the document. Defendant No.1 had earlier not instituted any proceedings to prove his title over the schedule property pursuant to the alleged Will. Consequently, the claim of defendant No.1 over the schedule property has also been negatived. However, in view of the finding that appellants and defendant No.4 cannot not inherit the property of Puttathayamma under Section 15 (2) of the Act, the suit has been dismissed

11.. The aforesaid judgment of the Trial Court was challenged by the petitioners in appeal. The first appellate court

A in a very elaborately written judgment recapitulated the undisputed facts. It is noticed that Puttathayamma had four children, namely, plaintiff, defendant No.4, Subbaramaiah (who pre-deceased Puttathayamma) and Indiramma. Indiramma was in possession of the schedule property. After the death of B Puttathayamma, plaintiff and defendant No.4 were residing in their matrimonial homes away from Puttathayamma. Defendant No.1 had cremated Indiramma. Appellant and defendant No.4 had not been present at the time of the cremation. Subsequently, they demanded the possession of the house C which the first defendant refused to hand over. The first defendant claimed to have put 5th defendant in possession as a mortgagee. Therefore they filed the suit claiming title over the property and possession thereof. In the written statement defendant No.1 claimed that entire movable and immovable D property had been bequeathed to Indiramma in a Will dated 18.6.1974. The first appellate court upon examination of the entire evidence accepts the submission made on behalf of the petitioners that the execution of the Will is shrouded by suspicious circumstances. The first appellate court also negatived the submission made on behalf of the first defendant E that the plaintiffs have admitted the execution of the Will in the subsequent suit. Upon examination of the evidence, the first appellate court had come to the conclusion that PW1 had not admitted the genuineness of the Will anywhere. This witness had also stated that he had come to know about the Will of F Puttathayamma from the written statement filed by defendant No.1. It is, therefore, held that there can be no presumption with regard to the genuineness of the Will on the basis of the alleged admission. Therefore the first appeal was allowed, judgment and decree of the Trial Court were set aside. The suit filed by G the plaintiffs/appellants was decreed with costs declaring that the legal representatives of the plaintiffs are the owners of the suit property and they are entitled for possession of the suit schedule property.

H 12. Aggrieved against this, defendant No.1 filed Regular

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Second Appeal No.641 of 2003 in the High Court of Karnataka, Bangalore. The High Court allowed the Regular Second Appeal and nonsuited the plaintiffs, with the following observations:-

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> "5. The contesting 1st defendant does not set up a rival claim of title, but only disputes the title of the plaintiffs and their right to seek possession. According to the 1st defendant, Ex.D7 is the registered will executed by Puttathayamma in favour of her daughter, Indiramma. As argued by Shri T.N. Raghupathy, learned counsel for respondents-appellants, I find that PW1-1st plaintiff has unequivocally admitted in his evidence, about issuance of legal notice prior to the filing of the suit and allegations are made therein about execution of the will by Puttathayamma in favour of Indiramma and also admits that she was married to one Chalapati Rao who predeceased her and through his first wife, had four children. Ex.D36 is the certified copy of the plaint in OS 233/98 filed by the plaintiffs herein. In the said suit, there is categorical averment to the effect that Puttathayamma, during her lifetime, had executed the will, bequeathing her immovable properties in favour of Indiramma. When execution of the will has become an admitted fact by the plaintiff, formal proof of execution by examining the attestors would not be necessary in law. Therefore, I am unable agree with Sri Kashinath, learned counsel for the respondent that the will is not prove. Further the finding of the appellate court that the will is shrouded with suspicious circumstances is based on unwarranted surmises and contrary to the admissions of the plaintiff. Accordingly, point no. (1) is answered in the affirmative."

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13. The High Court further holds that since the property had been acquired by Indiramma through Will, Section 15(2) of the Act would not be applicable. It is noticed that "The provisions of Section 15 (2) will apply only when the property is acquired by a female by way of intestate succession, otherwise, the

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A property would devolve as directed under sub-Section (1). May be, the children of deceased husband of Indiramma being step sons, are not entitled to succession under sub-sec. (1) (a), but however as heirs of the husband, under sub-sec. (1) (b) of Sec.15, they will be entitled to succeed to the estate. In that B view of the matter, the claim of title of property by the plaintiffs is untenable." It is further held that since the children of the first wife would be entitled to succeed to the estate, the appellants (plaintiffs) have no right to seek the relief of title by succession. Consequently, the appeal was allowed. The judgment and C decree of the Appellate Court was set aside. The judgment and decree of the Trial Court was confirmed. This judgment is challenged before us in the present appeal.

14. Mr. Bhat, learned counsel for the appellants has submitted that the judgment of the High Court is wholly D erroneous in facts as well as in law. According to the learned counsel, the first appellate court has rightly held that the execution of the Will has not been proved. There is no admission with regard to the execution or the genuineness of the Will in the second suit. It was merely stated that a Will has E been executed by Puttathayamma. The Will had to be proved in accordance with the procedure laid down under Section 63 of the Act and in accordance with Section 68 of the Indian Evidence Act. The first appellate court, upon examination, of the entire circumstances came to the conclusion that the Will F is shrouded by suspicious circumstances. The High Court, without examining any of the real issues has brushed aside the reasons given by the first appellate court. According to the learned counsel, the second suit had been filed by the appellants herein only to prevent respondent No.1 from dealing G with the movable properties of Puttathayamma. Even if the execution of the Will is admitted, its genuineness had to be established by respondent No.1. None of the attesting witnesses were examined. The Sub Registrar was also not examined. DW2, the scribe did not anywhere mention that he H had attested the Will. Therefore, his examination as a witness

would not cure the defects. The High Court has also ignored the fact that Indiramma has taken an active part in execution of the Will. She was present when the Will was written. She was also present before the Sub Registrar. According to the learned counsel, the mother was not in a fit state of mind to have executed the Will, shortly after the death of her only son. This fact has been totally ignored by the High Court. If she had been the author of the Will, she would not have described her son as a "bachelor" whereas in fact he was a "divorcee". According to the learned counsel, the Will is a manufactured document created by defendant No.1 to exclude the appellants from succession. Learned counsel further submitted that since it was a judgment of reversal, it was necessary for the High Court to give cogent reasons to explain as to how the conclusions reached by the first appellate court were not acceptable. The High Court has reversed the judgment without giving any reasons. In support of his submissions, learned counsel has relied on the following judgments:-

(1) *Jayantilal Mansukhlal and another vs. Mehta Chhanalal Ambalal,* AIR 1968 Gujarat 212;

(2) *State of Punjab vs. Balwant Singh and others,* 1992 Supp (3) Supreme Court Cases 108;

(3) *V. Dandapani Chettiar vs. Balasubramanian Chettiar (Dead) by L.Rs. and Others,* (2003) 6 Supreme Court Cases 633;

(4) *Palanivelayutham Pillai and others vs. Ramachandran and others,* (2000) 6 Supreme Court Cases 151; and

(5) *K. Kamalam (dead) and another vs. Ayyasamy and another,* 2001 (7) Supreme Court Cases 503.

15. According to the learned counsel, the property would be thus inherited by the appellants as Puttathayamma died

A intestate. He further submitted that even if the Will dated 18.6.1974 is accepted as valid, defendant No.1 cannot inherit the property of Indiramma as she had died intestate. The Will dated 2.10.84 propounded by defendant No.1 to have been made by Indiramma has not been proved. Therefore, again B under Section 15 (2) of the Act, the property will revert back to the plaintiffs/appellants. Learned counsel emphasized that defendant No.1 has no locus standi to contest the title of the appellants as he is a complete outsider for the family. Section 15 of the Act has been enacted to ensure that the property C remains within the family. Therefore, this court has consistently held against stranger in matters of succession.

16. Learned counsel for the respondents, on the other hand, submitted that the Will from Puttathayamma is proved. There are no reasons to disbelieve a registered Will. The D exclusion of the other daughters was because they were married and well settled. Therefore, the property was given in good faith to the unmarried Indiramma. Learned counsel further submitted that if a respondent is a trespasser, equally the appellants have not proved any better title. The first appellate E court has wrongly stated that there is no explanation with regard to the custody of the Will as it was given to respondent No.1 by Indiramma. It is further submitted that the suspicious circumstances pointed out by the appellants are only conjectural. Therefore, the High Court has rightly disregarded F the same. Genuineness of the Will cannot be disbelieved merely because the Sub Registrar or the scribe was not examined. It was not mandatory to examine either the scribe or the Sub Registrar. Indiramma's presence in the house at the time when the Will was written is natural as she was living with G Puttathayamma. The description of the son in the Will as "bachelor" instead of "divorcee" would not be so material. The testator only wanted to say that he was unmarried. The appellants have failed to lead any evidence that Puttathayamma was not in a sound and disposing mind due to the death of her H son. In fact it was only because her son had died that she

bequeathed her property to Indiramma. Learned counsel further submitted that in view of the admission about the execution of the Will made in the subsequent suit, it cannot possible by held that the Will was not duly proved. According to the learned counsel, admissions are the best form of evidence. Unless it is effectively rebutted, the same can be relied upon. He relies on the following judgments:-

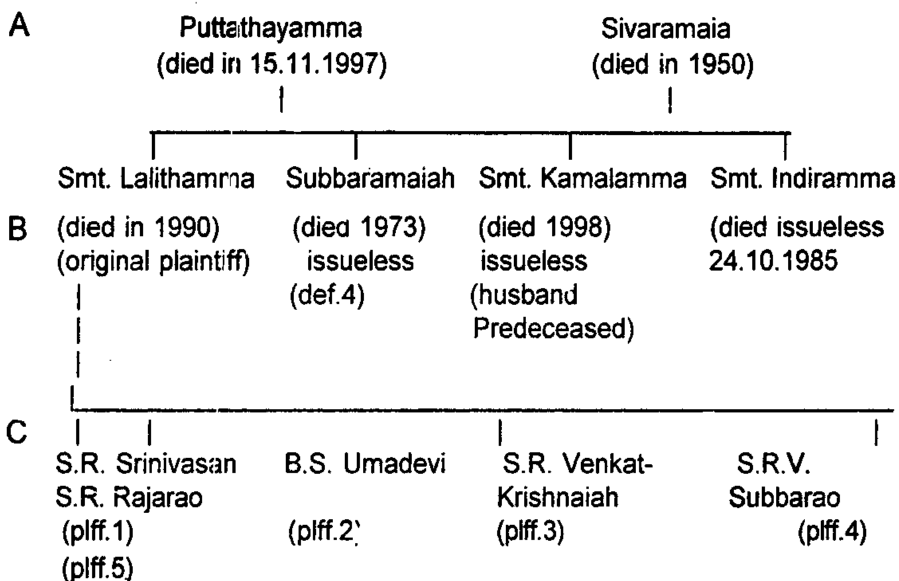
(1) *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and others,* AIR 1960 Supreme Court 100;

(2) *Nagindas Ramdas v. Dalpatram Iccharam alias Brijram and others,* AIR 1974 Supreme Court 471; and

(3) *Gautam Sarup vs. Leela Jetly and others,* (2008) 7 SCC 85.

17. In reply, Mr. Bhat has submitted that there is no clear admission in the subsequent suit which was only to prevent the respondents to be away from the movable property. In any event, admissions cannot be relied upon to dispense with proof of the Will as required under law. He relies on the judgments in the cases of *Somnath Berman v. Dr.S.P. Raju and another,* AIR 1970 Supreme Court 846 and *Smt. Jaswant Kaur v. Smt. Amrit Kaur and others,* AIR 1977 Supreme Court 74.

18. We have considered the submissions made by the learned counsel for the parties. It is not disputed that respondent No.1 is a rank outsider. He is not a lineal descendant of Puttathayamma. He is son of Puttathayamma's sister Seethamma. This would become clear from the genealogical graph of the family which is as under:-




19. Clearly if the Will dated 18.61974 is held not to be genuine, the property would be inherited by the appellants under Section 15 (2) of the Act. There is no dispute on this proposition of law by either side. The only question that needs determination in this case is as to whether the Will executed by Puttathayamma has been proved to be duly executed and the same was genuine.

20. The statutory provision regarding the rules of succession in case of female Hindus as enacted in Section 15 of the Hindu Succession Act, 1956 is as follows:

> "15. *General rules of succession in the case of female Hindus.*—(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,—
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> (*a*) firstly, upon the sons and the daughters (including the children of any predeceased son or daughter) and the husband;
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> (*b*) secondly, upon the heirs of the husband;
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> (*c*) thirdly, upon the mother and father;

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

(*e*) lastly, upon the heirs of the mother.

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

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

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

21. A perusal of the aforesaid provisions would show that the basic aim of Section 15(2) is to ensure that inherited property of an issueless female Hindu dying intestate goes back to the source It was enacted to prevent inherited property falling into the hands of strangers. This is also evident from the recommendations of the Joint Committee of the Houses of Parliament, which have been duly noticed by this Court in the case of *State of Punjab v. Balwant Singh,* 1992 Supp (3) SCC 108. The scheme underlying the introduction of the aforesaid provision had been discussed as follows: E F

"It came to be incorporated on the recommendations of the Joint Committee of the two Houses of Parliament. The reason given by the Joint Committee is found in clause (17) of the Bill which reads as follows: G

"While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly H

A property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would prevent properties passing into the hands of persons to whom justice would demand they should not pass."

B 15. The report of the Joint Committee which was accepted by Parliament indicates that sub-section (2) of Section 15 was intended to revise the order of succession among the heirs to a Hindu female and to prevent the properties from passing into the hands of persons to whom C justice would demand that they should not pass. That means the property should go in the first instance to the heirs of the husband or to the source from where it came."

22. This Court had occasion to consider the scheme of the D aforesaid Section in the case of *V. Dandapani Chettiar v. Balasubramanian Chettiar*,(2003) 6 SCC 633. The extent and nature of the rights conferred by this section is expressed as follows:-

"9. The above section propounds a definite and uniform E scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. This section groups the heirs of a female intestate into five categories described as Entries (*a*) to (*e*) and specified in sub-section (1). Two exceptions, both of the same nature F are engrafted by sub-section (2) on the otherwise uniform order of succession prescribed by sub-section (1). The two exceptions are that if the female dies without leaving any issue, then (*1*) in respect of the property inherited by her from her father or mother, that property will devolve not G according to the order laid down in the five Entries (*a*) to (*e*), but upon the heirs of the father; and (2) in respect of the property inherited by her from her husband or father-in-law, it will devolve not according to the order laid down in the five Entries (*a*) to (*e*) of sub-section (1) but upon the H heirs of the husband. The two exceptions mentioned above

are confined to the property "inherited" from the father, mother, husband and father-in-law of the female Hindu and do not affect the property acquired by her by gift or by device under a Will of any of them. The present Section 15 has to be read in conjunction with Section 16 which evolves a new and uniform order of succession to her property and regulates the manner of its distribution. In other words, the order of succession in case of property inherited by her from her father or mother, its operation in confined to the case of dying without leaving a son, a daughter or children of any predeceased son or daughter."

"10. Sub-section (2) of Section 15 carves out an exception in case of a female dying intestate without leaving son, daughter or children of a predeceased son or daughter. In such a case, the rule prescribed is to find out the source from which she has inherited the property. If it is inherited from her father or mother, it would devolve as prescribed under Section 15(2)(*a*). If it is inherited by her from her husband or father-in-law, it would devolve upon the heirs of her husband under Section 15(2)(*b*). The clause enacts that in a case where the property is inherited by a female from her father or mother, it would devolve not upon the other heirs, but upon the heirs of her father. This would mean that if there is no son or daughter including the children of any predeceased son or daughter, then the property would devolve upon the heirs of her father. Result would be — if the property is inherited by a female from her father or her mother, neither her husband nor his heirs would get such property, but it would revert back to the heirs of her father."

23. As noticed earlier by virtue of Section 15(2) (a) of the Act, the appellants would inherit the property in dispute. This right is sought to be defeated by defendant No.1 on the basis of the Will dated 18.6.1974, allegedly executed by Puttathayamma. Defendant No.1 being the sole beneficiary under the Will claims that the plaintiffs can not claim to 'inherit'

A the property on the basis of intestate succession. Undoubtedly, therefore, it was for defendant No.1 to prove that the Will was duly executed, and proved to be genuine.

B 24. The mode, the manner and the relevant legal provisions which govern the proof of Wills have been elaborately dilated upon by this Court in a number of cases. We may make a reference only to some of these decisions.

C 25. In the case of *H. Venkatachala Iyengar v. B.N. Thimmajamma,* [1959 Supp (1) SCR 426] Gajendragadkar J. stated the true legal position in the matter of proof of Wills. The aforesaid statement of law was further clarified by Chandrachud J. in the case of ***Jaswant Kaur v Amrit Kaur*** [(1977) 1 SCC 369] as follows:

D "1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

E 2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness F alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is G never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which H lies on the propounder can be taken to be discharged on

proof of the essential facts which go into the making of the will. A

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator. B C D E

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator. F G

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence H

A of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

B 26. Applying the aforesaid principles to this case, it would become evident that the Will has not been duly proved. As noticed earlier in this case, none of the attesting witnesses have been examined. The scribe, who was examined as DW.2, has not stated that he had signed the Will with the intention to attest. C In his evidence, he has merely stated that he was the scribe of the Will. He even admitted that he could not remember the names of the witnesses to the Will. In such circumstances, the observations made by this Court in the case of *M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons,* [(1969) 1 SCC D 573], become relevant. Considering the question as to whether a scribe could also be an attesting witness, it is observed as follows:

> "It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that E he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

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27. In our opinion, the aforesaid test has not been satisfied by DW.2 the scribe. The situation herein is rather similar to the circumstances considered by this Court in the case of *N. Kamalam v. Ayyasamy,* [(2001) 7 SCC 503]. Considering the G effect of the signature of scribe on a Will, this Court observed as follows:

> "26.The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting witnesses."

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"The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the prcpounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself — this is again, however, not the situation existing presently in the matter under consideration."

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

29. The contention that the execution of the Will has been admitted by the appellants herein had been negated by the First Appellate Court in the following manner:

"What is admitted under EXD 36 i.e. plaint in O.S No: 233/98 at Para 7 is only about the will and not the genuineness of the will. During evidence of PW 1, it is elicited in the cross examination that he came to know about the will of Puttathayamma as it was revealed in the written statement and that Puttathayamma might have written the will dated 4-7-74. But PW 1 has not admitted the genuineness of the will anywhere in his evidence. Therefore the contention of

A the learned Advocate for the first respondent that the execution of the will is admitted and therefore its genuineness is to be presumed cannot be accepted"

30. The aforesaid findings are borne out from the record produced before us, which we have perused. There is no B admission about the genuineness or legality of the Will either in the plaint of OS No.233 of 1998 or in the evidence of PW1. The High court committed a serious error in setting aside the well considered findings, which the first Appellate Court had recorded upon correct analysis of the pleadings and the C evidence.

31. It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless successfully withdrawn or proved to be D erroneous. The legal position with regard to admissions and their evidentiary value has been dilated upon by this Court in many cases. We may notice some of them.

32. In the case of *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi* (1960) 1 SCR 773 it was E observed as follows:

> "An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous."

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33. In the case of *Nagindas Ramdas v. Dalpatram Ichharam,* (1974) 1 SCC 242, it has been observed:

> "Admissions, if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or G judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them H and constitute a waiver of proof. They by themselves can

be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

34. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in the case of *Gautam Sarup v. Leela Jetly,* (2008) 7 SCC 85 wherein it was observed as follows:

"16.A thing admitted in view of Section 58 of the Evidence Act need not be proved. Order 8 Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order 12 Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom."

"28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

35. Examined on the basis of the law stated above we are unable to agree with the High Court that there was no need for independent proof of the Will, in view of the admissions made

A in OS No.233 of 1998 and the evidence of PW1. In fact there is no admission except that Puttathayamma had executed a Will bequeathing only the immovable properties belonging to her in favour of Indiramma. The First Appellate Court, in our opinion, correctly observed that the aforesaid admission is only B about the making of the Will and not the genuineness of the Will. Similarly, PW1 only stated that he had come to know about the registration of the Will of his grandmother favouring Indiramma through the written statement of the first defendant. The aforesaid statement is followed by the following statements C "Other than that I did not know about the Will. She was not signing in English. I have not seen her signing in Kannada. There was no reason for my grand mother to write a Will favouring Indiramma." Even in the cross-examination he reiterated that "I know about the will written by Puttathayamma D on 18.6.1974 bequeathing the properties to Indiramma only through the written statement of the first defendant." In view of the above we are of the opinion that the High Court committed an error in setting aside the well-considered finding of the First Appellate Court. The statements contained in the plaint as well as in the evidence of PW1 would not amount to admissions with E regard to the due execution and genuineness of the Will dated 18.6.1974.

36. In our opinion, the High Court also committed a serious error by totally disregarding the suspicious circumstances F surrounding the execution of the Will. The First Appellate Court on analysis of the entire evidence had clearly recorded cogent reasons to conclude that the execution of the Will is surrounded by suspicious circumstances.

37. The First Appellate Court pointed out that the execution G of the Will has not been proved as none of the attesting witnesses have been examined. The scribe who was examined as DW.2 nowhere stated that he had attested the Will. The animus to attest was not evident from the document. In the Will, D.W.2 had described himself as the scribe of the Will and H signed as such. Therefore, in view of the ratio of law laid down

in *N. Kamalam* (supra) the statutory requirement of attestation was clearly not satisfied. A

38. The First Appellate Court also observed that the Will is not genuine, its execution being shrouded in suspicious circumstances. It is noticed by the First Appellate Court that although Puttathayamma had been allotted certain specific property, there is no recital in the Will as to which of the properties had been bequeathed to Indiramma. It is further noticed that son of Puttathayamma died on 27.10.73. She had, therefore, inherited the property which had been allotted to the share of the respondent. The Will does not describe the exact property that may have been bequeathed by Puttathayamma in favour of Indiramma. Non-description of the schedule property creates a reasonable suspicion as to whether Puttathayamma executed the Will Ex.D7. It is noticed that if she had the intention of bequeathing all her property to Indiramma, she would have mentioned the details of all the properties which belonged to her in the Will. The First Appellate Court further holds that no reason has been given as to why the Will was presented before the Sub Registrar on two separate occasions for registration. Although the son of Puttathayamma died after having been divorced from his wife he is described in the Will as a bachelor. No reason has been stated in the Will as to why the other two daughters have been excluded from the property by Puttathayamma. Since the suspicious circumstances have not been explained by defendant No.1, the Will is not genuine. The First Appellate Court also notices that although Indiramma is the sole beneficiary in the Will, she was present at the time when the Will was written. She was also present in the office of Registrar when the Will was presented for registration. This would clearly show that Indiramma had an evil eye on the suit property and, therefore, the descriptions of the other properties were not given. The active participation of Indiramma in the writing and the registration of the Will may well create a suspicion about its genuineness. We may notice here the observations made by this Court in the case of *Ramachandra*

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A *v. Champabia* [AIR 1965 SC 357]. This Court has held as follows:

> "This Court also pointed out that apart from suspicious circumstances of this kind where it appears that the propounder has taken a prominent part in the execution B of the will which confers substantial benefits on him that itself is generally treated as a suspicious circumstances attending the execution of the will and the propounder is required to remove the suspicion by clear and satisfactory evidence. In other words, the propounder must satisfy the C conscience of the court that the document upon which he relies in the last will and testament of the testator."

39. Since there were suspicious circumstances, it was necessary for the defendants to explain the same. The D registration of the Will by itself was not sufficient to remove the suspicion. The first appellate court also notices that even in cases where the execution of the Will is admitted, at least one attesting witness of the Will has to be examined to receive the Will in evidence. DW2, who has been examined is the scribe of the Will, has given no plausible reasons as to why the Will E was presented twice before the Sub Registrar for registration. Nor is it stated by this witness as to why the Will was not registered on the first occasion. It is also held by the First Appellate Court that non-examination of the Sub Registrar creates suspicion about the genuineness of the Will. Even the F attesting witnesses to the Will have not been examined. There is no evidence whether the Will was read over by the Sub Registrar or anybody else before it was registered. It is not explained as to how the Will came into possession of defendant No.1. There is no evidence when he was put in proper custody G of the Will. Considering the cumulative effect of all the circumstances, the First Appellate Court has held that execution of the Will is surrounded by suspicious circumstances. Consequently, the appeal was allowed and the judgment of the Trial Court was set aside.

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40. The High Court in its judgment seems to have misread the entire evidence. Aforesaid findings recorded by the First Appellate Court have been brushed aside by dubbing them as conjectural. We are unable to appreciate the course adopted by the High Court. It was so influenced by the alleged admission made by the plaintiffs in the second suit, it did not deem it appropriate to examine the material which formed the basis of the findings recorded by the First Appellate Court. It appears that the pleadings, documents and the evidence was not read by the High Court yet it concluded that the findings of the Appellate Court were conjectural. We are unable to endorse the view expressed by the High Court.

41. The High court ought to have taken great care to satisfy its judicial conscience that the execution of the Will was not surrounded by suspicious circumstances. The Appellate Court had pointed out so many suspicious circumstances which could not have been brushed aside as being conjectural. The findings were based on documentary evidence. It was necessary for the defendant No.1 to answer a number of pertinent questions relating to the execution of the Will.

42. It was also necessary for the High Court to exercise care and caution to ensure that the propounder of the Will has removed all legitimate suspicion. We have earlier noticed that in this case Indiramma was living with her mother Puttathayamma at the time of her death. She was the sole beneficiary under the Will dated 18.6.1974. Her sisters, the original plaintiff and defendant No.4 that is, Lalithamma and Kamalamma had been excluded from the inheritance. There is no convincing reason as to why they were excluded from the inheritance. The Will merely mentions that these two ladies are well settled in their lives whereas Indiramma was not married. The Will does not specify which of the properties has been bequeathed to Indiramma, although Puttathayamma has been allotted certain specific property. Puttathayamma's son had died on 27.10.73 and the Will is stated to have been made on 18.6.1974. The Will is signed by Indiramma, even though she

A is the sole beneficiary under the Will. She was present in the office of the sub-Registrar at the time when the Will was registered. There is also a question as to why the Will was presented for registration on two different occasions. It appears that on the date when the Will was executed Indiramma also B obtained a power of attorney from her mother which would demonstrate her anxiety to come into possession of the property immediately. Neither the scribe (DW2) nor DW1 were able to give any satisfactory explanation as to why the Will was not registered on the first occasion. In such circumstances it C was the duty of the of the High Court to carefully examine the findings recorded by the lower Appellate Court together with the relevant documents on the record to ensure that there is a proper explanation given by defendant No.1 of the aforesaid suspicious circumstances. This Court in *Iyengar* case (supra) D had clearly held that cases in which the execution of the Will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of his own free will. In such circumstances it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter. The presence E of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed by the mere assertion of the propounder that the Will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the Will was made.

F 43. In our opinion, the High Court failed to exercise proper care and caution by not thoroughly examining the evidence led by the party, especially when it was not in agreement with the reasons recorded by the First Appellate Court. In the case of *Jaswant Kaur v. Amrit Kaur,* (1977) 1 SCC 369 this Court G reiterated the principles governing the proof of a Will which is alleged to be surrounded by suspicious circumstances. Justice Chandrachud speaking for the Court observed as follows:

> "8. The defendant who is the principal legatee and for all practical purposes the sole legatee under the will, is also H the propounder of the will. It is he who set up the will in

answer to the plaintiff's claim in the suit for a one-half share in her husband's estate. Leaving aside the rules as to the burden of proof which are peculiar to the proof of testamentary instruments, the normal rule which governs any legal proceeding is that the burden of proving a fact in issue lies on him who asserts it, not on him who denies it. In other words, the burden lies on the party which would fail in the suit if no evidence were led on the fact alleged by him. Accordingly, the defendant ought to have led satisfactory evidence to prove the due execution of the will by his grandfather Sardar Gobinder Singh.

9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will."

44. In our opinion, the High Court failed to examine the entire issue in accordance with the aforesaid principles laid down by this Court. We are, therefore, unable to uphold the impugned judgment. The appeal is allowed. Judgment of the High court is set aside and the judgment of the First Appellate Court i.e. the Court of the Principal Civil Judge (Senior Division) at Mysore is restored.

D.G. Appeal allowed.

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N. SURESH NATHAN & ORS., ETC. ETC.

*v.*

UNION OF INDIA & ORS. ETC. ETC.

(Civil Appeal No. 8468 of 2003)

B

APRIL 22, 2010

**[J.M. PANCHAL AND A.K. PATNAIK, JJ.]**

*Assistant Engineers (Including Deputy Director of Public Works Department) Group B(Technical) Recruitment Rules,* C *1965:*

*rr. 5 and 11(1) – Promotion to post of Assistant Engineer under 50% quota for degree-holder category of Section Officers/Junior Engineers – HELD: Clause (1) of Rule 11* D *does not provide for a separate stream or channel of promotion exclusively for degree-holders, who have completed three years service – In view of r.5, post of Assistant Engineer being a selection post, merit is the sole criteria and seniority in the grade of Section Officers/Junior Engineers is not at all relevant – Therefore, all the Section* E *Officers/Junior Engineers who are eligible for consideration under Rule 11(1) would be considered on the basis of comparative merit – Constitution of India, 1950 – Articles 16 and 141 – Code of Civil Procedure, 1908 – s.11.*

F *Constitution of India, 1950:*

*Article 141 – Law declared by Supreme Court to be binding on all courts – Decision of Supreme Court in* **N. Suresh Nathan's** *case – HELD: Was confined to the* G *eligibility for consideration for promotion to 50% vacancies for the posts of Assistant Engineers/Public Works Department, Pondicherry meant for degree-holder or equivalent in the grade of Section Officer/Junior Engineer, and there was no law declared by the Court, to be binding under Article 141, on the*

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*issue as to how Section Officers/Junior Engineers who become qualified for promotion to the post of Assistant Engineers would be considered for promotion – Nor would the said decision constitute* **res judicata** *on the issue – Precedents – Code of Civil Procedure, 1908 – s.11 – Assistant Engineers (Including Deputy Director of Public Works Department) Group B(Technical) Recruitment Rules, 1965 – rr. 5 and 11(1).*

**Promotion of appellant nos. 1 to 7 to the posts of Assistant Engineers, Public Works Department was challenged by respondent nos. 2 to 7, before the Central Administrative Tribunal. The Tribunal dismissed the application holding that in view of the decision of the Supreme Court in** *N. Suresh Nathan's*[1] **case, with regard to the procedure to be adopted for promotion of Section Officers/Junior Engineers, the applicants before it could not be allowed to raise the point once again nor was it open to the Tribunal to hold otherwise. But, the writ petition filed by the respondents challenging the order of the Tribunal was allowed by the High Court holding** ***inter alia*** **that the judgment of the Supreme Court in** *N. Suresh Nathan* **did not operate as** *res judicata.* **A review DPC was directed to be held.**

**Disposing of the appeals, the Court**

**HELD: 1. In** *N. Suresh Nathan & Ors.**, **this Court confined its decision to the qualification or eligibility for consideration for promotion to 50% vacancies for the post of Assistant Engineer meant for degree-holders or equivalent in the grade of Section Officer/Junior Engineer and held that only those Section Officers/Junior Engineers, who had completed three years' service after obtaining degree, were qualified or eligible for consideration to the 50% vacancies meant for the category of degree-holders or equivalent. In the said**

1. (1991) 2 Suppl. SCR 423.

A judgment, this Court did not decide on how the Section Officers/Junior Engineers who had completed three years' service in the grade after the degree in Civil Engineering or equivalent and had the qualification or eligibility for consideration for promotion to the 50% B vacancies meant for the category of degree-holders would be considered for promotion. Therefore, in *N. Suresh Nathan & Ors.,* there was no law declared by this Court so as to be binding on the courts under Article 141 of the Constitution, on the issue as to how Section C Officers/Junior Engineers, who become qualified or eligible for promotion to the post of Assistant Engineer would be considered for promotion; and, therefore, the decision in *N. Suresh Nathan* would also not constitute *res judicata* on the said issue. [Para 13-15] [1027-F-H; 1028-A-C-E; 1029-A-B]
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**N. Suresh Nathan & Ors. v. Union of India & Ors.* (1991) 2 Suppl. SCR 423 = (1992) 1 Suppl. SCC 584 - explained and distinguished.

E 2.1. Clause (1) of Rule 11 is only a provision laying down the qualification or eligibility for promotion to 50% of the posts of Assistant Engineers and the qualification or eligibility provided therein is either three years service in the grade of Section Officer/Junior Engineer after F degree in Civil Engineering or equivalent, or six years service in the grade of Section Officer/Junior Engineer with diploma in Civil Engineering. The provision also has a rider that if there are Section Officers/Junior Engineers. who have put in three years service after acquiring G degree or equivalent, available for consideration for vacancies, then they will be considered first for promotion and the turn for consideration for promotion of diploma-holders in Civil Engineering with six years service in the grade of Section Officer/Junior Engineer will come only thereafter. Thus, the Rule itself provides that if for
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**vacancies in the posts of Assistant Engineers, Section Officers/Junior Engineers possessing a recognized degree in Civil Engineering or equivalent with three years' service in the grade are not available, then Section Officers/Junior Engineers holding diploma in Civil Engineering with six years' service in the grade would be eligible for promotion. It cannot, therefore, be accepted that Clause (1) of Rule 11 provides for a separate stream or channel of promotion exclusively for degree-holders, who have completed three years service. [para 23] [1033-E-H; 1034-A-C]** A B C

**2.2. Rule 5 of the Recruitment Rules states that the post of Assistant Engineer in the Public Works Department is a selection post. The Recruitment Rules, however, do not lay down that seniority-cum-merit would be the criteria for promotion to the selection post of Assistant Engineer. The person, who is most meritorious, is the most suitable person to be promoted to the selection post. Thus, merit is the sole criteria for promotion to the selection post and, therefore, question of seniority in the grade of Section Officer/Junior Engineer is not at all relevant for promotion to the post of Assistant Engineer. [Para 29-30] [1036-E-F-G; 1037-E-F]** D E

*Dr. Jai Narain Misra v. State of Bihar & Ors.* **(1971) 1 SCC 30; and** *Guman Singh, etc. v. State of Rajasthan & Ors.* **(1971) 2 SCC 452, relied on.** F

*R. B. Desai & Anr. v. S. K. Khanolkar & Ors.* **(1999) 7 SCC 54;** *Chandravathi P.K. & Ors. v. C.K. Saji & Ors.* **2004 (2) SCR 330 = (2004) 3 SCC 734;** *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* **2007 (5) SCR 190 = (2007) 5 SCC 535; and** *M.B. Joshi v. Satish Kumar Pandey* **1993 Supp.(2) SCC 419, referred to.** G

*Suman Gupta v. State of J & K* **(1983) 4 SCC 339;** H

A *Munidra Kumar v. Rajiv Govil* **(1991) 3 SCC 368;** *Satya Narain Shukla v. U.O.I.* **(2006) 9 SCC 69;** P.U. *Joshi v. Accountant General* **(2003) 2 SCC 632;** *U.O.I. v. Pushpa Rani* **(2008) 9 SCC 242;** *Inderjeet Khurana v. State of Haryana* **(2007) 3 SCC 102;** *U.O.I. v. A.K. Narula* **(2007) 11 SCC 10;**
B **and** *A. K. Raghumani Singh & Ors. v. Gopal Chandra Nath & Ors.* **(2000) 2) SCR 943 = (2000) 4 SCC 30, cited.**

**2.3. In the absence of any indication in the Recruitment Rules that seniority in the grade of Section Officer/Junior Engineer will be counted for the purpose**
C **of promotion to the post of Assistant Engineer, consideration of all Section Officers/Junior Engineers under Clause (1) of Rule 11 of the Recruitment Rules who are eligible for such consideration has to be done on the basis of assessment of the comparative merit of the**
D **eligible candidates and the most suitable or meritorious candidate has to be selected for the post of Assistant Engineer. Such a method of selection will be consistent with Rule 5 of the Recruitment Rules and Article 16 of the Constitution which guarantees to all citizens equality of**
E **opportunity in matters of public employment. [Para 34] [1040-F-H; 1041-A]**

**2.4. In the considered opinion of the Court, therefore, the practice adopted by the Government on the advice**
F **of the UPSC of counting the service of the eligible candidates from the date of acquisition of the degree in Civil Engineering by them and the judgment and order of the High Court directing that the entire service of eligible candidates, both prior and after acquisition of the degree of Civil Engineering by them, would be counted for the**
G **purpose of promotion to the post of Assistant Engineer under Clause (1) of Rule 11 of the Recruitment Rules are contrary to the fundamental right guaranteed under Article 16 of the Constitution and r. 5 of the Recruitment Rules which are made under Article 309 of the**
H **Constitution. [Para 34] [1041-B-C]**

**3. The judgment of the High Court is set aside and the Government of Pondicherry is directed to consider, in accordance with merit, the cases of all Section Officers/ Junior Engineers, who have completed three years' service in the grade of Section Officers/Junior Engineers. It is made clear that the promotions to the posts of Assistant Engineers already made pursuant to the judgment and order of the High Court will not be disturbed until the exercise is carried out for promotion in accordance with merit as directed in this judgment and on completion of such exercise, formal orders of promotion to the vacancies in the posts of Assistant Engineers which arose during the pendency of the cases before this Court are passed in case of those who are selected for promotion and, after such exercise only, those who are not selected for promotion may be reverted to the post of Section Officer/Junior Engineer. [para 35] [1041-D-G]**

**Case Law Reference:**

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| **(1991) 2 Suppl. SCR 423** | **distinguished** | **para 7** |
| **(1999) 7 SCC 54** | **referred to** | **para 8** |
| **(2000) 2) SCR 943** | **cited** | **para 8** |
| **2004 (2) SCR 330** | **referred to** | **para 18** |
| **2007 (5) SCR 190** | **referred to** | **para 19** |
| **(1971) 1 SCC 30** | **relied on** | **para 29** |
| **(1971) 2 SCC 452** | **relied on** | **para 30** |
| **(1983) 4 SCC 339** | **cited** | **para 31** |
| **(1991) 3 SCC 368** | **cited** | **para 31** |
| **(2006) 9 SCC 69** | **cited** | **para 31** |
| **(2003) 2 SCC 632** | **cited** | **para 31** |

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| **(2008) 9 SCC 242** | **cited** | **para 31** |
| **(2007) 3 SCC 102** | **cited** | **para 31** |
| **(2007) 11 SCC 10** | **cited** | **para 31** |
| **1993 Supp. (2) SCC 419** | **referred to** | **para 32** |

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8468 of 2003.

From the Judgment & Order dated 23.6.2003 of the High Court of Judicature at Madras in Writ Petition No. 11236 of C 2000.

WITH

C.A. Nos. 698 of 2004, 3649-3650 of 2010 & 8470 of 2003.

D J.L. Gupta, L.N. Rao, M.S. Ganesh, V.G. Kanagaraj, Rakesh Dwivedi, K.V. Viswanathan, Satya Mitra Garg, S. Thananjayan, G. Balaji (for M/s. Mahalakshmi Balaji & Co.) S.R. Setia, V.G. Pragasam, S.J. Aristotle, P. Ramasubramanian, M.A. Chinnasamy, K. Krishna Kumar, Neha Sharma, S. Krishna, Preetika Dwivedi, Mukti Chaudhary, Amit Singh, E Abhishek Kaushik, P.B. Subramaian for the appearing parties.

The Judgment of the Court was delivered by

**A.K. PATNAIK, J.**1. Leave granted in S.L.P. (C) Nos. 7174-7175 of 2009.

2. These are appeals against the judgment and order dated 23.06.2003 passed by a Division Bench of the Madras High Court in Writ Petition No.11236 of 2000.

G 3. The relevant facts briefly are that the Government of Pondicherry, Planning & Development Department, made the Assistant Engineers (including Deputy Director of Public Works Department) Group 'B' (Technical) Recruitment Rules, 1965 [for short 'the Recruitment Rules'] for the post of Assistant Engineers for the Public Works Department initially by a

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Notification dated 31.01.1966. The Recruitment Rules were amended by a Notification dated 08.08.1986 and as per the amended Recruitment Rules the post of Assistant Engineer in the Public Works Department, Pondicherry, was a selection post and appointment to the 20% of the posts of Assistant Engineer was to be by direct recruitment and to the 80% of the posts by promotion. 50% of the promotion quota was to be filled up by Section Officers (now Junior Engineers) possessing a recognized degree in Civil Engineering or equivalent with three years service in the grade, failing which Section Officers holding diploma in Civil Engineering with six years service in the grade and the remaining 50% of the promotion quota was to be filled up by Section Officers (Junior Engineers) possessing a recognized diploma in Civil Engineering with six years service in the grade.

4. On 24.09.1968, the Chief Secretary, Government of Pondicherry, wrote to the Secretary, Union Public Service Commission (for short 'the UPSC') that there were Section Officers with diploma qualification who have acquired degree in Civil Engineering or equivalent and have putting in several years in service and having become qualified for consideration for 50% quota of the post of Assistant Engineers to be filled up by promotion and questions have arisen whether the service rendered by such Section Officers before and after possessing the degree or equivalent can be taken into account for consideration for promotion under the degree holders quota and whether their cases may be considered under the diploma holders quota as well for promotion to the post of Assistant Engineer. In the letter dated 24.09.1968, the Chief Secretary sought the advice of the Commission regarding the correct procedure to be followed in such cases. The UPSC gave its advice in its letter dated 06.12.1968 that the services of Section Officers, who qualify as graduates while in service, should be counted from the date they passed the degree or equivalent examination or from the date they started drawing Rs.225/- p.m. in the prescribed scale, whichever was earlier and Section

A Officers may continue to be considered in the diploma holders quota in case it is advantageous to them and the Government followed this advice of the UPSC.

5. In 1989, however, some Junior Engineers, who were B formerly Section Officers working in the Public Works and Local Administration Department of Government of Pondicherry, filed O.A. No. 552 of 1989 in the Central Administrative Tribunal, Madras Bench, (for short 'the Tribunal') and in its judgment and order dated 09.01.1990 the Tribunal held that when the C Recruitment Rules require three years service in grade, the Section Officers (now Junior Engineers) who ceased to be mere diploma holders having acquired the degree qualification have to be regarded as having total experience put in the grade of Section Officers before and after acquiring the degree qualification and there was nothing in the Recruitment Rules to D warrant the exclusion of a part of the experience acquired by such Junior Engineers while functioning in the grade of Section Officers (Junior Engineers). The Tribunal accordingly directed that the cases of the applicants in the O.A. be considered for promotion to the post of Assistant Engineers on par with other E degree holders Junior Engineers taking due note of their total length of service rendered in the grade of Junior Engineers and such a consideration should be along side other Junior Engineers, who might have acquired the necessary degree qualification earlier than the applicants while holding the post F of Junior Engineers.

6. The judgment and order dated 09.01.1990 of the Tribunal was challenged by N. Suresh Nathan and Others before this Court in Civil Appeal No. 4542 of 1991 and this Court G interpreting Rule 11 of the Recruitment Rules held in the judgment reported in 1992 Supp. (1) SCC 584 that the period of three years' service in the grade required for degree-holders as qualification for promotion in the category of degree-holders must mean three years' service in the grade as a degree-holder and, therefore, that period of three years can commence only H

from the date of obtaining the degree and not earlier and this interpretation of Rule 11 was in conformity with the past practice followed consistently by the Government and that the Tribunal was not justified in taking the contrary view and accordingly allowed the appeal. Review Petition No.50 of 1993 was filed against the judgment and order dated 22.11.1991 of this Court in the aforesaid case but the same was dismissed on 31.01.1993.

7. Thereafter, appellant Nos. 1 to 7 were promoted to the post of Assistant Engineer on 08.03.1997. Respondent Nos. 2 to 7 challenged the promotion of the appellant Nos. 1 to 7 before the Tribunal in O.A. No. 359 of 1997 contending *inter alia* that this Court in its judgment in *N. Suresh Nathan & Ors.* v. *Union of India & Ors.* (supra) has only held that three years' service required for eligibility for the promotion quota reserved for the category of degree-holders or equivalent should be considered from the date of acquiring the degree or equivalent, but has not decided the question of seniority as between degree-holders or equivalent and diploma-holders in the grade. The Government of Pondicherry in its reply filed in O. A. No.359 of 1997 before the Tribunal contended that the Departmental Promotion Committee met on 29.09.1996 and keeping in view the direction of this Court in the judgment in *N. Suresh Nathan & Ors.* v. *Union of India & Ors.* (supra) selected the Section Officers/Junior Engineers to the post of Assistant Engineers by preparing two lists, one list for considering promotions to the post of Assistant Engineer for the degree-holders quota and another list for considering promotion to the post of Assistant Engineers for the diploma-holders quota. The Government of Pondicherry further clarified in its reply that in the first list those who had joined as Section Officers/Junior Engineers with degree in Civil Engineering were placed above the Section Officers/Junior Engineers who had joined the service with diploma in Civil Engineering but had subsequently acquired degree in Civil Engineering and in the second list, the Section Officers/Junior Engineers who had joined with diploma were

A placed in order of seniority counted from the date of the joining in the grade. By the judgment and order dated 27.08.1999, the Tribunal dismissed O.A. No.359 of 1997 after holding that this Court has already taken a specific view in N. Suresh Nathan's case (supra) with regard to the procedure to be adopted for B promotion of Junior Engineers in the Public Works Department of Pondicherry construing the recruitment rules and the applicants in O.A. should not be allowed to raise the point once again and that the judgment of this Court in N. Suresh Nathan's case was binding on the Tribunal and it was not open for the C Tribunal to hold otherwise insofar as the interpretation of the recruitment rules for the post of Assistant Engineer in the Public Works Department in Pondicherry is concerned.

8. Aggrieved, respondents Nos.3, 4, 5 and 6 filed Writ Petition No.11236 of 2000 before the Madras High Court D against the judgment and order dated 27.08.1999 of the Tribunal in O.A. No.359 of 1997 and by the impugned judgment and order, a Division Bench of the Madras High Court held *inter alia* that in *N. Suresh Nathan & Ors.* v. *Union of India & Ors.* (supra) this Court only decided the question of eligibility E for promotion to the posts of Assistant Engineer meant for the category of degree-holders or equivalent, but did not decide the question of seniority of Section Officers/Junior Engineers, who had acquired a degree in Civil Engineering or equivalent after joining as Section Officers/Junior Engineers and, F therefore, the judgment of this Court in *N. Suresh Nathan & Ors.* (supra) did not operate as *res judicata.* The Division Bench of the Madras High Court, relying on the decisions of this Court in *R. B. Desai & Anr. v. S. K. Khanolkar & Ors.* [(1999) 7 SCC 54] and A. K. Raghumani Singh & Ors. v. Gopal G Chandra Nath & Ors. [(2000) 4 SCC 30], further held in the impugned judgment and order that the entire service of a person concerned even before acquiring the degree in Civil Engineering or equivalent have to be counted for the purpose of seniority and promotion and directed that a review DPC should be held to consider the question of promotion of the

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petitioners before the High Court vis-à-vis respondents 2 to 8 and other eligible persons, who had become eligible by the date of sitting of the DPC in 1996 and accordingly allowed the Writ Petition.

9. Mr. Jawahar Lal Gupta, Mr. L. Nageswar Rao and Mr. M.N. Rao, learned senior counsel appearing for the appellants, submitted that the view taken by the High Court in the impugned judgment and order is the same as has been taken by the Tribunal in its order dated 09.01.1990 in the earlier O.A. No.552 of 1989 and as the order dated 09.01.1990 of the Tribunal in O.A. No.552 of 1989 has been set aside by this Court in N. Suresh Nathan & Ors. (supra), the impugned judgment and order of the High Court cannot be sustained. They referred to the earlier order dated 09.01.1990 of the Tribunal in O.A. No.552 of 1989 to show that the Tribunal had directed the authorities to consider the applicants in the O.A. for promotion to the post of Assistant Engineer at par with other degree-holder Junior Engineers taking due note of their total length of service rendered in the grade of Junior Engineer, both before and after acquiring the degree of Civil Engineering or equivalent, and submitted that this Court set aside this direction of the Tribunal in the judgment in N. Suresh Nathan & Ors. (supra). They further submitted that once this Court set aside the order dated 09.01.1990 of the Tribunal in O.A. No.552 of 1989 on the ground that the order of the Tribunal was not in conformity with Rule 11 of the Recruitment Rules and the practice followed by the Department, the decision of this Court on the issue constitutes *res judicata* and the interpretation of Rule 11 of the Recruitment Rules by this Court was a declaration of law binding on the High Court under Article 141 of the Constitution.

10. Mr. M.S. Ganesh, learned senior counsel appearing for the Government of Pondicherry, reiterated these contentions of the learned counsel for the appellants.

11. Mr. Rakesh Dwivedi and Mr. K.V. Viswanathan,

A learned counsel appearing for respondents No. 2 to 19, in their reply, contended that the High Court has rightly held in the impugned judgment and order that in *N. Suresh Nathan & Ors* (supra), this Court only decided the question of eligibility of Section Officers or Junior Engineers for promotion to the post B of Assistant Engineers meant for the category of degree-holders and not the method in which the eligible candidates will be considered for promotion.

12. Para 5 of the judgment in *N. Suresh Nathan & Ors.* (supra) which contains the ratio decided by this Court is quoted C herein below:

> "5. The Recruitment Rules for the post of Assistant Engineers in the PWD (Annexure C) are at pages 57 to 59 of the paper book. Rule 7 lays down the qualifications D for direct recruitment from the two sources, namely, degree-holders and diploma-holders with three years' professional experience. In other words, a degree is equated to diploma with three years' professional experience. Rule 11 provides for recruitment by promotion E from the grade of Section Officers now called Junior Engineers. There are two categories provided therein – one is of degree-holder Junior Engineers with three years' service in the grade and the other is of diploma-holder Junior Engineers with six years' service in the grade, the F provision being for 50 per cent from each category. This matches with Rule 7 wherein a degree is equated with diploma with three years' professional experience. In the first category meant for degree-holders, it is also provided that if degree-holders with three years' service in the grade G are not available in sufficient number, then diploma-holders with six years' service in the grade may be considered in the category of degree-holders also for the 50 per cent vacancies meant for them. The entire scheme, therefore, does indicate that the period of three years' service in the H grade required for degree-holders according to Rule 11

as the qualification for promotion in that category must mean three years' service in the grade as a degree-holder and, therefore, that period of three years can commence only from the date of obtaining the degree and not earlier. The service in the grade as a diploma-holder prior to obtaining the degree cannot be counted as service in the grade with a degree for the purpose of three years' service as a degree-holder. The only question before us is of the construction of the provision and not of the validity thereof and, therefore, we are only required to construe the meaning of the provision. In our opinion, the contention of the appellants degree-holders that the rules must be construed to mean that the three years' service in the grade of a degree-holder for the purpose of Rule 11 is three years from the date of obtaining the degree is quite tenable and commends to us being in conformity with the past practice followed consistently. It has also been so understood by all concerned till the raising of the present controversy recently by the respondents. The tribunal was, therefore, not justified in taking the contrary view and unsettling the settled practice in the department."

13. On a close reading of the aforesaid para 5 of the judgment of this Court in N. Suresh Nathan & Ors. (supra), we find that this Court confined its decision to the qualification or eligibility for consideration for promotion to 50% vacancies for the post of Assistant Engineer meant for degree-holders or equivalent in the grade of Section Officers/Junior Engineers and held that only those Sections Officers or Junior Engineers, who had completed three years' service after obtaining degree, were qualified or eligible for consideration to the 50% vacancies meant for the category of degree-holders or equivalent. In the judgment in N. Suresh Nathan & Ors. (supra), this Court did not decide on how the Section Officers/Junior Engineers who had completed three years' service in the grade after the degree in Civil Engineering or equivalent and had the qualification or eligibility for consideration for promotion to the 50% vacancies

A meant for the category of degree-holders would be considered for promotion.

14. Article 141 of the Constitution states that the law declared by this Court shall be binding on all the courts within B the territory of India. In *N. Suresh Nathan & Ors.* (supra) this Court has set aside the order of the Tribunal dated 09.01.1990 in O.A. No.552 of 1989 after declaring that Section Officers/ Junior Engineers having three years' service in the grade after they acquired degree in Civil Engineering or equivalent will C become qualified or eligible for promotion to the 50% vacancies meant for the category of degree-holders or equivalent. In N. Suresh Nathan & Ors. (supra) this Court has not declared any law on how these Sections Officers/Junior Engineers, who had become qualified or eligible for promotion to the post of Assistant Engineer under the category of degree- D holders or equivalent, would be considered for such promotion. There was, therefore, no law declared by this Court on how Section Officers or Junior Engineers, who become qualified or eligible for promotion to the post of Assistant Engineer would be considered for promotion, which was binding on the courts E under Article 141 of the Constitution.

15. Section 11 of the Code of Civil Procedure Code (for short 'CPC') titled *'Res judicata'* states that no court shall try any issue which was directly or substantially in issue between F the same parties and which has been heard and finally decided by a competent court. Thus, unless an issue directly and substantially raised in the former case is heard and decided by the competent court, the principle of *res judicata* will not be attracted. In N. Suresh Nathan & Ors. (supra) this Court, while G setting aside the order dated 09.01.1990 in O.A. No.552 of 1989, has decided that those Section Officers/Junior Engineers who complete three years' service after acquiring the degree in Civil Engineering or equivalent are qualified or eligible for consideration for promotion to the 50% quota of vacancies for H the post of Assistant Engineer under the degree-holders

category but has not decided how such Section Officers/Junior Engineers who are qualified or eligible will be considered for such promotion under the degree-holders category. The decision of this Court in N. Suresh Nathan & Ors. (supra), therefore, did not constitute *res judicata* on the issue regarding the manner in which Section Officers/Junior Engineers who were qualified or eligible for consideration for promotion to the post of Assistant Engineer would be considered for promotion.

16. The High Court was, therefore, right in taking the view that in N. Suresh Nathan & Ors. (supra), this Court was concerned only with the question of eligibility but was not concerned whether the past services rendered by the diploma-holders would be counted for the purpose of seniority and that neither Article 141 of the Constitution nor the principle of *res judicata* was a bar for Tribunal or the High Court to consider whether past services of Section Officers/Junior Engineers who were diploma-holders before they acquired degree in Civil Engineering or equivalent could be counted for the purpose of promotion for the 50% vacancies for the post of Assistant Engineers meant for the category of degree-holders or equivalent.

17. Learned counsel for the appellants next submitted that Rule 11 of the Recruitment Rules provides for two streams or channels of promotion to the post of Assistant Engineer, Public Works Department, one stream or channel is for Sections Officers or Junior Engineers possessing a recognized degree in Civil Engineering or equivalent and the other for Section Officers/Junior Engineers holding diploma in Civil Engineering. They submitted that it is for this reason that the UPSC in its letter dated 06.12.1968 advised the Government that the services of Section Officers/Junior Engineers, who qualify as graduates while in service, should be counted from the date they passed the degree or equivalent while considering them for promotion for the channel or stream of promotion meant for Section Officers or Junior Engineers having degree in Civil

A Engineering or equivalent and the Government of Pondicherry has acted on this advice of the UPSC.

18. Mr. Nageswar Rao cited the decision in *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* [(2004) 3 SCC 734] in which B the question for consideration was whether in terms of the scheme of the Kerala Engineering Service (General Branch) Rules, diploma-holders were entitled to claim any weightage for the service rendered by them prior to their acquisition of degree qualification in the matter of promotion or transfer to C higher posts when specific quota is fixed for graduates and diploma-holders in the matter of promotion and this Court, on a conjoint reading of Rules 4 and 5 of the Kerala Engineering Service (General Branch) Rules, held that a diploma-holder Assistant Engineer who subsequently acquired a degree D qualification would be eligible for promotion as Assistant Executive Engineer, only in the event he fulfils the conditions precedent therefor and not otherwise and his case could be considered only after the cases of promotion of those who had been holding such degree qualification have been considered.

E 19. Mr. Ganesh adopted these arguments of learned counsel for the appellants and cited the decision in *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* [(2007) 5 SCC 535] wherein this Court interpreting the rules for promotion to the post of Assistant Engineers in CPWD, which has adopted by F the DDA, found that 25% of the total posts of Assistant Engineers were to be filled up by promotion from the category of graduate Junior Engineers and 25% of the total posts were to be filled up by diploma-holders with eight years' service and held that a separate quota was, thus, prescribed for promotion G of Junior Engineers for degree and diploma-holders to the higher post of Assistant Engineer. He submitted that in the aforesaid case of *Shailendra Dania & Ors.* (supra), this Court emphatically held that the service experience required for promotion from the post of Junior Engineer to the post of H Assistant Engineer in the limited quota of degree-holder Junior

Engineers in the service experience of a degree-holder and cannot be equated with the service rendered as a diploma-holder. Relying on this decision, learned counsel for the Government of Pondicherry submitted that the prior service experience of a Section Officer or Junior Engineer while he was diploma-holder and when he had not acquired the degree in Civil Engineering or equivalent cannot be counted for the purpose of consideration for the 50% quota of promotion to the post of Assistant Engineer meant for degree-holders.

20. Learned counsel appearing for the respondents 2 to 19, on the other hand, submitted that Rule 11 of the Recruitment Rules does not provide for two streams or channels of promotion as contended by learned counsel for the appellants and it only lays down the qualification or eligibility of three years' service after degree in Civil Engineering or equivalent as a qualification or eligibility and once a diploma-holder acquires a degree in Civil Engineering or equivalent, his entire length of service both prior to acquisition of such degree in Civil Engineering or equivalent and after acquisition of such degree or equivalent has to be taken into consideration at the time of consideration for promotion to the post of Assistant Engineer meant for degree-holders.

21. Mr. Viswanathan cited this Court's decision in *R. B. Desai & Anr. v. S. K. Khanolkar & Ors.* [(1999) 7 SCC 54] for proposition that if at the time of consideration for promotion, the candidates concerned have acquired eligibility, then unless a rule specifically gives an advantage to a candidate with earlier eligibility, the date of seniority should prevail over the date of eligibility. He submitted that in the present case, the rules for promotion from the post of Section Officer or Junior Engineer to Assistant Engineer did not give any such priority to the candidates acquiring earlier eligibility. He submitted that *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* (supra) was a case where the rules, namely, the Kerala Engineering Service (General Branch) Rules, were different from the Recruitment

Rules in the present case and the Kerala Engineering Service (General Branch) Rules clearly provided for two different streams or channels of promotion for the posts of Assistant Engineer, i.e. for diploma-holders and degree-holders. He submitted that in *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* (supra) cited by the learned counsel for the appellants and the Government of Pondicherry, the question for consideration was whether a diploma-holder Junior Engineer, who obtained a degree while in service, became eligible for promotion to the post of Assistant Engineer on completion of three years of service after he obtained the Engineering degree or on completion of three years of service prior to obtaining the degree in Engineering and while answering this question, this Court held that a diploma-holder Junior Engineer became eligible for promotion to the post of Assistant Engineer on completion of three years' service after he obtained the Engineering degree. He submitted that the decision of this Court in *Shailendra Dania & Ors.* (supra), therefore, is not an authority for proposition that the service of diploma-holders put in prior to the acquisition of the degree or equivalent by him will have to be ignored while considering them for promotion to the post of Assistant Engineer meant for degree holders.

22. Rule 11 of the Recruitment Rules in the present case is quoted herein below :-

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| "11. In case of recruitment by promotion/deputation/ Transfer grades from which promotion/deputation/ transfer to be made. | Promotion<br>1. Section Officer possessing a recognized degree in Civil Engineering or Equivalent with 3 Years service in the grade failing which Section Officers holding diploma in Civil Engineering with 6 years service in the grade – 50%. |

2.Section Officers possessing a recognized diploma in Civil Engineering with 6 years service in the grade – 50%"

23. A plain reading of Rule 11 of the Recruitment Rules quoted above would make it clear that for the 50% quota for the posts of Assistant Engineer mentioned under Clause 1 of Rule 11, Section Officers (now Junior Engineers) possessing recognized degree in Civil Engineering or equivalent with three years' service in the grade, failing which Section Officers possessing diploma in Civil Engineering with six years' service in the grade would be eligible for consideration for promotion. All that the Rule provides is that if for vacancy in the post of Assistant Engineer, Section Officers possessing recognized degree in Civil Engineering or equivalent with three years' service in the grade are not available, Section Officers holding diploma in Civil Engineering with six years service in the grade could be considered for promotion. Clause 1 of Rule 11 is, therefore, only a provision laying down the qualification or eligibility for promotion to 50% of the posts of Assistant Engineer and the qualification or eligibility provided therein is either three years service in the grade of Section Officers or Junior Engineers after degree in Civil Engineering or equivalent or six years service in the grade of Section Officers or Junior Engineers with diploma in Civil Engineering. This provision also has a rider that if there are Section Officers/Junior Engineers, who have put in three years service after acquiring degree or equivalent, available for consideration for vacancies, then they will be considered first for promotion and the turn for consideration for promotion of diploma-holders in Civil Engineering with six years service in the grade of Section Officers/Junior Engineers will come only thereafter. Thus, the Rule itself provides that if for vacancies in the post of Assistant Engineer, Section Officers possessing a recognized degree in

A Civil Engineering or equivalent with three years' service in the grade are not available, then Section Officers holding diploma in Civil Engineering with six years' service in the grade would be eligible for promotion. We, therefore, cannot accept the submission of learned counsel for the appellants and the B Government of Pondicherry that Clause 1 of Rule 11 provides for a separate stream or channel of promotion exclusively for degree-holders, who have completed three years service and we are of the opinion that learned counsel for the respondents 2 to 19 are right in the submission that Clause 1 of Rule 11 C only lays down the qualification or eligibility for consideration for promotion to 50% of the posts of Assistant Engineers.

24. In *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* (supra), cited by Mr. L. Nageshwara Rao, on the other hand, this Court held that under Rules 4 and 5 of the Kerala D Engineering Service (General Branch) Rules there were separate avenues of promotion for the degree-holders and the diploma holders. This will be clear from the observations of the Court in para 30 of the judgment in *Chandravathi P. K.,& Ors. v. C.K. Saji & Ors.* (supra), quoted herein below:

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> "A bare perusal of Rules 4 and 5 of the Kerala Engineering Service (General Branch) Rules would clearly go to show that the avenues for promotion for the degree-holders and the diploma holders were separate. ......" [(2004) 3 SCC F 734 at 748]

25. In *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* (Supra) cited by learned counsel Mr. Ganesh, this Court similarly found that there were two different channels or streams of promotion for degree-holders and diploma holders to the G post of Assistant Engineer in the relevant rules. This will be clear from the findings in para 44 of the judgment quoted herein below:

> "...... There is watertight compartment for graduate Junior H Engineers and diploma-holder Junior Engineers. They are

entitled for promotion in their respective quotas. Neither a diploma-holder Junior Engineer could claim promotion in the quota of degree-holders because he has completed three years of service nor can a degree-holder Junior Engineer make any claim for promotion quota fixed for diploma-holder Junior Engineers. [(2007) 5 SCC 533 at 560)]"

26. In the present case, on the other hand, Clause 1 of Rule 11 of the Recruitment Rules does not provide for "separate avenues" or "watertight compartments" for promotion to the post of Assistant Engineers for degree-holders and diploma-holders. As we have seen Clause 1 Rule 11 of the Recruitment Rules only lays down the qualification or eligibility for consideration for promotion to the post of Assistant Engineers earmarked for the 50% quota. The two decisions of this Court in *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* (supra) and *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* (Supra) are, therefore, of no assistance to the appellants.

27. In *R. B. Desai & Anr. v. S. K. Khanolkar & Ors.* (supra) cited by Mr. Viswanathan, this Court found that the amended rules of 1988 pertaining to the promotion to the cadre of Assistant Conservator of Forests provided that Range Forest Officers with five years regular service in the grade and possessing diploma of Forest Rangers' Training from Forest Rangers College in India or equivalent were eligible for promotion to the post of Assistant Conservator of Forests and the Court held in para 9:

"............ that if at the time of consideration for promotion the candidates concerned have acquired the eligibility, then unless the rule specifically gives an advantage to a candidate with earlier eligibility, the date of seniority should prevail over the date of eligibility. The rule under consideration does not give any such priority to the candidates acquiring earlier eligibility and, in our opinion, rightly so. In service law, seniority has its own weightage

A and unless and until the rules specifically exclude this weightage of seniority, it is not open to the authorities to ignore the same. [(1999) 7 SCC 54 at 58]

28. In the passage of the judgment of this Court in *R.B.* B *Desai & Anr. V. S. K. Khanolkar & Ors.* (supra) quoted above, it is laid down that in service law, seniority has its own weightage and unless and until the rules specifically exclude this seniority, it is not open to the authorities to ignore the same. In the aforesaid case though the post of ACF was mentioned to be a selection post in the amended rules of 1988, the question C whether for a selection post seniority would have weightage or merit would have weightage while considering the eligible candidates for promotion was not raised or decided and the only question which was raised before this Court was whether ranking assigned in the eligibility list or the ranking assigned D to the seniority list should be given weightage and this Court held that between the candidates who are eligible, ranking in seniority must be given weightage irrespective of the date for which the candidate becomes eligible.

E 29. In the present case, we find that Rule 5 of the Recruitment Rules states that the post of Assistant Engineer in the Public Works Department, Pondicherry, is a selection post. The Recruitment Rules, however, do not lay down that seniority-cum-merit would be the criteria for promotion to the F selection post of Assistant Engineer. In *Dr. Jai Narain Misra v. State of Bihar & Ors.* [(1971) 1 SCC 30] a three-Judge Bench of this Court held that the question of seniority was not relevant for promotion to the selection post in the language of the judgment of this Court in *Dr. Jai Narain Misra v. State of* G *Bihar & Ors.* (supra):

"It was not disputed before us that the post of Director of Agriculture is a selection post. Therefore, the question of seniority was not relevant in making the selection. It is for the State Government to select such officer as it considers as most suitable. In this view we think the High Court was

not justified in going into the question of seniority nor will we be justified in going into that question." A

Thus, the question of seniority in the grade of Section Officers or Junior Engineers is not at all relevant for promotion to the post of Assistant Engineer in the Public Works Department, Government of Pondicherry. The practice adopted by the Government of Pondicherry in consultation with the UPSC of counting the services of Section Officers or Junior Engineers, who qualified as graduates while in service from the date they passed the degree or equivalent examination and placing them in order of seniority accordingly for the purpose of consideration for promotion to the post of Assistant Engineer under Clause 1 of Rule 11 of the Recruitment Rules is contrary to Rule 5 of the Recruitment Rules. Similarly, the direction of the High Court in the impugned judgment and order to count the entire service of a person concerned even before acquiring degree in Civil Engineering for the purpose of seniority and promotion to the post of Assistant Engineer under Clause 1 of Rule 11 of the Recruitment Rules is contrary to Rule 5 of the Recruitment Rules. B C D

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30. The person, who is most meritorious, is the most suitable person to be promoted for the selection post. Merit, in other words, is the sole criteria for promotion to the selection post. In *Guman Singh, etc. v. State of Rajasthan & Ors.* [1971 (2) SCC 452] a five-Judge Bench of this Court speaking through Vaidialingam, J. explained how merit of candidates for promotion is to be assessed in para 35 at page 408 of the judgment in the following words: F

"………. No doubt the term 'merit' is not capable of an easy definition, but it can be safely said that merit is a sum total of various qualities and attributes of an employee such as his academic qualifications, his distinction in the University, his character, integrity, devotion to duty and the manner in which he discharges his official duties. Allied to this may be various other matters or factors such as his G H

A punctuality in work, quality and outturn of work done by him and the manner of his dealings with his superiors and subordinate officers and the general public and his rank in the service. We are only indicating some of the broad aspects that may be taken into account in assessing the B merits of an officer. In this connection it may be stated that the various particulars in the annual confidential reports of an officer, if carefully and properly noted, will also give a very broad and general indication regarding the merit of an officer."

C Where, therefore, there are large number of eligible candidates available for consideration for promotion to a selection post, the Government can issue executive instructions consistent with the principle of merit on the method to be followed for considering such eligible candidates for promotion to the D selection post.

31. Learned counsel for the appellants however submitted that when the Recruitment Rules are silent on the procedure to be adopted by the Government in selecting the candidates for E promotion, the Government is the best authority to decide what procedure to be adopted in such promotion and the Court will not interfere with the procedure so adopted unless it was unconstitutional, arbitrary, unreasonable or otherwise illegal. In support of this submission, Mr. L. Nageswar Rao cited the F decisions of this Court in *Suman Gupta v. State of J & K* [(1983) 4 SCC 339], *Munidra Kumar v. Rajiv Govil* [(1991) 3 SCC 368], *Satya Narain Shukla v. U.O.I.* [(2006) 9 SCC 69], *P.U. Joshi v. Accountant General* [(2003) 2 SCC 632], *U.O.I. v. Pushpa Rani* [(2008) 9 SCC 242], *Inderjeet Khurana v. State of Haryana* [(2007) 3 SCC 102] and *U.O.I. v. A.K. Narula* G [(2007) 11 SCC 10]. Learned counsel for the appellants submitted that in the present case the Government of Pondicherry in consultation with the UPSC has adopted the procedure since 1968 that the services of Section Officers/ Junior Engineers who qualified as graduates while in service

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should be counted from the date they passed the degree or equivalent examination for the promotion under clause 1 Rule 11 of the Recruitment Rules and this procedure is not unconstitutional, arbitrary, unreasonable or illegal and, therefore, the High Court by the impugned judgment and order should not have interfered with this procedure and should not have directed that the entire service of a person concerned even before acquiring the degree in civil engineering or equivalent has to be counted for the purpose of seniority and promotion to the post of Assistant Engineer under clause 1 of Rule 11 of the Recruitment Rules. Learned counsel appearing for the Government of Pondicherry adopted this contention of the learned counsel of the appellants.

32. Learned counsel for the respondents No.2 to 19, in their reply, submitted that the Government cannot adopt a procedure for selection by way of promotion to the post of Assistant Engineer contrary to the Recruitment Rules. They submitted that the Recruitment Rules do not provide that for promotion under clause 1 of Rule 11, the services of Section Officers/Junior Engineers who qualified as graduates while in service, would be counted from the date they passed the degree or equivalent examination and their services prior to the date of passing the degree or equivalent examination would be ignored. They further submitted that the Government also cannot adopt the procedure of selection which violates the fundamental right guaranteed under Article 16 of the Constitution of India to equality of opportunity in matters of public employment. They submitted that once a candidate became eligible or qualified to be considered for promotion to the post of Assistant Engineer under clause 1 of Rule 11 of the Recruitment Rules, he has a right to be considered for such promotion and such consideration cannot be denied by laying down a procedure which ignores his seniority in the grade of Section Officer/Junior Engineer. They relied on the decision of this Court in *M.B. Joshi v. Satish Kumar Pandey* [1993 Supp.(2) SCC 419].

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A 33. In *M.B. Joshi v. Satish Kumar Pandey* (supra), the State Government had been applying the principle of counting the seniority of Graduate Sub-Engineers from the date of their continuous officiation irrespective of the date on which such diploma-holder Sub-Engineer acquired the degree of B graduation in Engineering and on the basis of such seniority, the Departmental Promotion Committee was considering Graduate Sub-Engineers for promotion to the post of Assistant Engineers. When this method adopted by the State Government was challenged by some of the Sub-Engineers C before the Madhya Pradesh Administrative Tribunal, Jabalpur, the Tribunal held that the seniority of such Sub-Engineers must be determined from the date of acquiring the degree of graduation in Engineering and this Court held that the Tribunal was wrong in determining the seniority from the date of D acquiring degree of Engineering and it ought to have been determined on the basis of length of service on the post of Sub-Engineer and the Government was right in doing so and there was no infirmity in the orders passed by the Government. In this case also, the question did not arise whether for selection post seniority would have weightage or merit would have weightage E while considering the eligible candidates for promotion.

34. As we have seen, Rule 5 of the Recruitment Rules in the present case states that the post of Assistant Engineer is a selection post and the Recruitment Rules no where provide F that seniority-cum-merit would be the criteria for promotion. In the absence of any indication in the Recruitment Rules that seniority in the grade of Section Officers / Junior Engineers will be counted for the purpose of promotions to the post of Assistant Engineer, consideration of all Section Officers / Junior G Engineers under Clause 1 of Rule 11 of the Recruitment Rules who are eligible for such consideration has to be done on the basis of assessment of the comparative merit of the eligible candidates and the most suitable or meritorious candidate has to be selected for the post of Assistant Engineer. Such a H method of selection will be consistent with Rule 5 of the

Recruitment Rules and Article 16 of the Constitution which guarantees to all citizens equality of opportunity in matters of public employment. In our considered opinion, therefore, the practice adopted by the Government of Pondicherry on the advice of the UPSC of counting the service of the eligible candidates from the date of acquisition of the degree in Civil Engineering by them and the impugned judgment and order of the High Court directing that the entire service of eligible candidates, both prior and after acquisition of the degree of Civil Engineering by them, would be counted for the purpose of promotion to the post of Assistant Engineer under Clause 1 of Rule 11 of the Recruitment Rules are contrary to the rules made under Article 309 of the Constitution and the fundamental right guaranteed under Article 16 of the Constitution.

35. For the aforesaid reasons, we set aside the impugned judgment of the High Court and direct the Government of Pondicherry to consider the cases of all Section Officers or Junior Engineers, who have completed three years' service in the grade of Section Officers or Junior Engineers, for promotion to the vacancies in the post of Assistant Engineer, Public Works Department, Government of Pondicherry, in accordance with their merit. We make it clear that the promotions to the post of Assistant Engineers already made pursuant to the judgment and order of the High Court will not be disturbed until the exercise is carried out for promotion in accordance with merit as directed in this judgment and on completion of such exercise, formal orders of promotion to the vacancies in the posts of Assistant Engineer which arose during the pendency of the cases before this Court are passed in case of those who are selected for promotion and after such exercise only those who are not selected for promotion may be reverted to the post of Section Officer or Junior Engineer.

The appeals are disposed of accordingly with no order as to costs.

R.P. Appeals disposed of.