

Masappa And Others Vs. Kallavva And Others

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SooperKanoon Citation : sooperkanoon.com/1232733

Court : Karnataka Dharwad

Decided On : Feb-29-2024

Judge : Hanchate Sanjeevkumar

Appeal No. : RSA 2794/2006

Appellant : Masappa And Others

Respondent : Kallavva And Others

Judgement :

- 1 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 R IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH DATED THIS THE29H DAY OF FEBRUARY, 2024 BEFORE THE HON'BLE MR JUSTICE HANCHATE SANJEEVKUMAR REGULAR SECOND APPEAL No.2794 OF2006(PAR) C/W REGULAR SECOND APPEAL No.2795 OF 2006 IN RSA NO.2794/2006 BETWEEN:

1. MASAPPA S/O HANMAPPA KAMBALI, AGE:

50. YEARS2 AMEENAPPA S/O HANMAPPA KAMBALI AGE:

48. YEARS3 MALLAPPA S/O HANMAPPA KAMBALI AGE:

40. YEARS4 PARASAPPA S/O HANMAPPA KAMBALI AGE:

30. YEARS, 5. KAPALAPPA S/O HANMAPPA KAMBALI AGE:

26. YEARS6 SMT. MASAVVA, W/O. HANMAPPA KAMBALI AGE:70 YEARS. ALL ARE LRS OF AMARAVVA, W/O AMMENAPPA VATARAD ALL ARE AGRICULTURISTS AND COOLIES R/O KABBARAGI TQ: KUSHTAGI DT: KOPPAL-584121 APPELLANTS (BY SRI P G MOGALI, ADVOCATE) - 2 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 AND:

1. KALLAVVA W/O AMMENAPPA WARKAL AGE: MAJOR2 SIDDAPPA S/O AMEENAPPA WARKAL AGE: MINOR3 KALLAPPA S/O AMEENAPPA WARKAL AGE: MINOR4 RAVI KUMAR S/O AMEENAPPA WARKAL AGE: MINOR5 SIDDAVVA D/O AMEENAPPA WARKAL AGE: MINOR6 SHIVAMMA D/O AMEENAPPA WARKAL AGE: MINOR ALL LRS OF AMEENAPPA S/O SANGAPPA WARKAL AS RESPONDENT NO.2 TO6ARE MINORS, ARE REPRESENTED BY THEIR MOTHER GUARDIAN RESPONDENT NO.1 SMT. KALLAVVA.

7. YAMANAPPA S/O. SANGAPPA WARKAL AGE: MAJOR, ALL R/O MASTHIKATTI TQ: KUSHTAGI DT: KOPPAL-584121 RESPONDENTS (BY SRI N.P.VIVEKMEHATA, FOR SRI BASAVARAJ KAREDDY, ADVOCATE FOR R1; R2 TO R6 ARE MINORS REPRESENTED BY R1; R7 - APPEAL ABATED.) THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION100OF THE CODE OF CIVIL PROCEDURE, 1908, PRAYING TO SET ASIDE THE

JUDGMENT

AND DECREE PASSED BY THE LEARNED DISTRICT AND SESSIONS JUDGE AND THE FAST TRACK COURT-II, KOPPAL, IN - 3 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 R.A.NO.121/2004 DATED2607.2006 AND THE

JUDGMENT

AND DECREE PASSED BY THE LEARNED CIVIL JUDGE (JR.DN), KUSHTAGI IN O.S.NO.17/1997 DATED2203.2001 WITH COST THROUGHOUT IN THE INTEREST OF JUSTICE AND EQUITY. IN RSA NO.2795/2006 BETWEEN:

1. MASAPPA S/O HANMAPPA KAMBALI, AGE:

50. YEARS2 AMEENAPPA S/O HANMAPPA KAMBALI AGE:

48. YEARS3 MALLAPPA S/O HANMAPPA KAMBALI AGE:

40. YEARS4 PARASAPPA S/O HANMAPPA KAMBALI AGE:

30. YEARS, 5. KAPALAPPA S/O HANMAPPA KAMBALI AGE:

26. YEARS6 SMT. MASAVVA W/O. HANMAPPA KAMBALI AGE:70 YEARS LRS OF AMARAVVA W/O AMEENAPPA VATARAD ALL ARE AGRICULTURISTS AND COOLIES R/O KABBARAGI TQ: KUSHTAGI DT: KOPPAL-584121 .APPELLANTS. (BY SRI P.G.MOGALI, ADVOCATE.) AND:

1. KALLAVVA W/O AMMENAPPA WARKAL AGE: MAJOR, 2. SIDDAPPA S/O AMEENAPPA WARKAL AGE: MINOR.-. 4 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 3. KALLAPPA S/O AMEENAPPA WARKAL AGE: MINOR.

4. RAVI KUMAR S/O AMEENAPPA WARKAL AGE: MINOR.

5. SIDDAVVA D/O AMEENAPPA WARKAL AGE: MINOR.

6. SHIVAMMA D/O AMEENAPPA WARKAL AGE: MINOR. ALL LRS OF AMEENAPPA S/O SANGAPPA WARKAL AS RESPONDENT NO.2 TO6ARE MINORS, ARE REPRESENTED BY THEIR MOTHER GUARDIAN RESPONDENT NO.1 SMT. KALLAVVA.

7. YAMANAPPA S/O. SANGAPPA WARKAL AGE: MAJOR. ALL R/O. MASTHIKATTI TQ: KUSHTAGI, DT: KOPPAL-584121 RESPONDENTS (BY SRI N.P.VIVEKMEHTA, FOR SRI BASAVARAJ KAREDDY, ADVOCATE FOR R1; R2 TO R6 ARE MINORS REPRESENTED BY R1; R7 - APPEAL ABATED) THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION100OF THE CODE OF CIVIL PROCEDURE, 1908, PRAYING TO SET ASIDE THE

JUDGMENT

AND DECREE PASSED BY THE LEARNED DISTRICT AND SESSIONS JUDGE AND THE FAST TRACK COURT-II IN R.A.NO.120/2004 DATED 26.07.2006 AND THE

JUDGMENT

AND DECREE PASSED BY THE LEARNED CIVIL JUDGE (JR.DN), KUSHTAGI, IN O.S.NO.15/1997 DATED 22.03.2001 AND DECREE THE SUIT WITH COST THROUGHOUT IN THE INTEREST OF JUSTICE AND EQUITY.-. 5 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 THESE APPEALS COMING ON FOR FURTHER ARGUMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

RSA No.2794/2006 is filed by the defendants in O.S.No.17/1997 challenging the judgment and decree passed in R.A.No.121/2004 dated 26.07.2006 by the Fast Track Court-II, Koppal (first appellate Court), which confirmed the judgment and decree passed in O.S.No.17/1997 dated 22.03.2001, by the Court of Civil Judge (Jr.Dn.), Kushtagi (trial Court). This suit O.S.No.17/1997 was filed for partition and it was decreed, against which, R.A.No.121/2004 was filed and was dismissed.

2. Likewise, RSA No.2795/2006 is filed by the plaintiffs in O.S.No.15/1997 challenging the judgment and decree passed in R.A.No.120/2004 which confirmed the judgment and decree passed in O.S.No.15/1997. This suit O.S.No.15/1997 was filed for injunction and it was dismissed, against which, R.A.No.120/2004 was filed and was dismissed.-. 6 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 3. Therefore the defendants in RSA No.2794/2006 have filed this second appeal challenging the concurrent finding of facts so far as grant of partition in O.S.No.17/1997. The appellants (plaintiffs) in RSA No.2795/2006 have filed this second appeal challenging the concurrent finding of facts so far as rejection of suit for injunction in O.S.No.15/1997.

4. Brief facts of the case. The suit properties are ancestral properties and original propositus is Aminappa; his wife is amaravva; Masavva and Siddavva are two daughters of Aminappa and Amaravva. Therefore the respondents have filed O.S.No.17/1997 for partition claiming 1/3rd share in the suit properties. The appellants have filed O.S.No.15/1997 for permanent injunction against the respondents by alleging that the respondents are interfering with the possession of the appellants.

5. The trial Court had clubbed both the suits and recorded common evidence and dismissed the suit in O.S.No.15/1997 which was filed for injunction and decreed the suit in O.S.No.17/1997 which was filed for partition.-. 7 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 6. The appellants herein have preferred appeal in R.A.No.120/2004 against the dismissal of the suit in O.S.No.15/1997 filed for injunction and another appeal in R.A.No.121/2004 against decreeing the suit in O.S.No.17/1997, filed for partition and separate possession. Both the appeals were clubbed and common judgment and decree was delivered by the first appellate Court.

7. During the pendency of the appeals, Amaravva wife of Aminappa died. The appellants have taken contention that Amaravva has executed a Will as per Ex.D.11 in favour of children of elder daughter Masavva. Since Amaravva was alive during the pendency of the appeal, therefore, there is no question of considering the Will executed. Hence, the first appellate Court by formulating point for consideration regarding proof of Will, remanded the case to the trial Court. The trial Court after recording evidence on the Will, has held that the Will is not proved. Therefore the appellants are before this Court for seeking setting aside the judgment and decree passed in both the suits.-. 8 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 8. This Court on 06.02.2015 has framed the following substantial questions of law: i) Whether both the Courts below were justified in ignoring the bequest made by Amaravva in favour of Masavvas children while considering the status of the suit schedule property for partition between the family of plaintiffs and defendants?. ii) Whether both the Courts below were justified in disbelieving the bequest, merely

because other natural heirs were disentitled for share under the Will Ex.D.11?.

9. The learned counsel for the appellants submitted that the appellants are absolute owners in possession of the suit properties by virtue of the Will executed by Amaravva. It is canvassed by the learned counsel for the appellants that since Amaravva has filed a suit in O.S.No.15/1997 and she has stated that she has executed the Will, therefore the appellants are entitled for share of Amaravva in addition to 1/3rd share. It is submitted that even though the Will is not proved, but Amaravva had admitted in her suit O.S.No.15/1997 that she has executed the Will, therefore her half share what she would have got would enure to the - 9 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 benefit of the appellants. Therefore prays for dismissal of the suit filed by the respondents. He places reliance on the following judgments of the Honble Supreme Court. i) AIR 1985 SC500 in the case of Satya Pal Gopal Das vs. Smt.Panchubala Dasi and others (Satya Pal Gopal Dass Case). ii) AIR 2003 SC3109 in the case of Ramabai Padmakar Patil (D) through Lrs. vs. Rukminibai Vishnu Vekhande (Ramabai Padmakar Patils Case). iii) 1995(1) SCC198 in the case of Ramti Devi (Smt) vs. Union of India.

10. On the other hand, learned counsel for the respondents submitted that Amaravva has not executed Will in favour of the appellants but the will is created and concocted one. It is also proved from the evidence of DW7 that the Will is drafted and created at the instance of her husband and this is well considered and appreciated by both the Courts below and has rightly come to the conclusion that Will is disproved. Further even though the attested witnesses are no more but from other circumstances the Will could have been proved by the appellants but not proved. Further the respondents are excluded from the Will and as per the - 10 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 alleged Will, the entire property is bequeathed in favour of the appellants only and this is one of strong circumstances negating the Will as contended by the appellants. Therefore, upon appreciating the evidence on record, both the Courts below have disbelieved the Will. Therefore, the respondents are entitled for partition in the suit schedule

property and that is rightly decreed by both the Courts below. Since the said Amaravva died during the pendency of the appeal, therefore, the share is modified by giving half share each to the branch of appellants and branch of respondents. Therefore, submitted that no grounds are available to interfere with the well reasoned orders passed by both the Courts below. Therefore, prays to dismiss the appeals.

11. The respondents have filed suit for partition by claiming their 1/3rd share during the lifetime of Amaravva. The trial Court has granted decree granting 1/3rd share to the respondents.

12. The trial Court upon appreciating the evidence on record that DW7 has admitted in the course of cross examination that the alleged Will is created by her husband - 11 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 who is the son-in-law of Amaravva. Upon considering the Will propounded by the appellants, entire suit properties are bequeathed in favour of the appellants only without giving share to the respondents. The respondents are children of Siddavva and for what reason another daughter is excluded is not found in the Will. This is one of the suspicious circumstances found. Therefore, these are all the suspicious circumstances revealed about the Will which is rightly discarded by both the Courts below and in this regard finding of fact arrived at by both the Courts below cannot be interfered with.

13. Learned counsel for the appellants by placing reliance on the judgment in Satya Pal Gopal Das case supra and in Ramabai Padmakar Patil case supra argued that though the Will is not proved but the testator has stated she has executed Will hence, notional share would be given to Amaravva and the appellants are entitled for the share of Amaravva as she has stated that Will was executed. In both the cited cases the facts and evidence reveal that the finding on the execution of Wills were proved, therefore under these - 12 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 circumstances the Will was proved to have been executed. Under that

circumstance, it was laid down that propounder of Will is entitled to a share of testator also but now in the present case the facts and circumstances are different. In the present case, execution of Will is not proved. When execution of Will is not proved, then there is no question of allotment of share of Amaravva to the appellants. Therefore, having difference in factual matrix in the above cited two decisions and in the present case the above said two decisions are not applicable in the present case and they are not helpful in support of the contention of the learned counsel for the appellants. It is another submission made by the learned counsel for the appellants that Will in question is registered one. Therefore, the presumption can be raised on execution as per Section 17 of the Indian Registration Act and places reliance on the decision of the Honble Supreme Court in the case Ramabai Padmakar Patil case supra. In this decision, the document is a sale deed. It is held that unless the execution of registration of sale deed or otherwise the validity of the sale deed is found to be not in existence or - 13 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 is invalid, till then, presumption can be raised upon its registration. But in the present case, though the Will is registered Will, but it is not a compulsorily registerable document whereas the sale deed is compulsorily registerable document as per Section 17 of the Indian Registration Act. Therefore where in the case the registered sale deed is questioned unless it is annuled or set aside the registration of sale deed has the presumption of its valid registration and is in existence. But the said ratio is not applicable in the case of registered Will. Therefore, the above said decision is not applicable in the present case.

14. Proof of execution of registration of sale deed is different from the proof of execution of Will by the testator. The Will has to be proved as per Section 63 of the Indian Succession Act, 1925 and as per Section 68 of the Indian Evidence Act, 1872. Will is not compulsorily registrable document whereas, sale deed is compulsorily registrable document as per Section 17 of the Registration Act, 1908. Registration of sale deed is nothing to do with proof of execution of the Will. At the most, for registering - 14 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 the Will, one may create presumption in favour of propounder of the Will but not conclusive one irrespective of registration of Will. The Will has to be proved as required under the law above stated. Incase of registered sale deed, it is valid unless it is questioned and registered sale deed is valid till its execution is set aside by the competent Court. This makes difference in proof of sale deed and Will.

15. The Honble Supreme Court in the judgment of H. VENKATACHALA IYENGAR APPELLANT Vs. B. N. THIMMAJAMMA AND OTHERS reported in AIR 1959 SC443at Para Nos.18, 19, 20 and 21 stipulates as under:

18. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until - 15 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provision. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act, As in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the

satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may - 16 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be

completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances above referred to in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be - 17 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 fully satisfied that it had been validly executed by the testator who is no longer alive.

16. Further, I place reliance on the judgment of Honble Supreme Court in the case of JAGADISH CHAND SHARMA Vs. NARIAN SINGH SAINI (DEAD) THROUGH LEGAL REPRESENTATIVES AND OTHERS reported in (2015) 8 SCC612 at Para Nos.21 and 22 held as under: 21. As would be evident from the contents of Section 63 of the Act that to execute the will as contemplated therein, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further, the signature or mark of

the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect to the writing as will. The section further mandates that the will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgment of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the will in the presence of the testator. It is, however, clarified that it would not be necessary that more than one witness be present at the same time and that no particular form of attestation would be necessary.

22. It cannot be gainsaid that the above legislatively prescribed essentials of a valid execution and attestation of a will under the Act are mandatory in nature, so much so that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property.-. 18 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 . 22.1 In the evidentiary context Section 68 of the 1872 Act enjoins that if a document is required by law to be attested, it would not be used as evidence unless one attesting witness, at least, if alive, and is subject to the process of the court and capable of giving evidence proves its execution. The proviso attached to this section relaxes this requirement in case of a document, not being a will, but has been registered in accordance with the provisions of the Registration Act, 1908 unless its execution by the person by whom it purports to have been executed, is specifically denied. 22.2. These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of the court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a will, if the same has been registered in accordance with the provisions of the Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a will. The proof of a will to be admissible in evidence with probative potential, being a document required by law

to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the court concerned and is capable of giving evidence.

17. Further, I place reliance on the judgment of Honble Apex Court in the case of N. KAMALAM (DEAD) AND ANOTHER Vs. AYYASAMY AND ANOTHER reported in (2001) 7 SCC503 at Para Nos.1 and 3 are held as under: 1. The Latin expressions *onus probandi* and *animo attestandi* are the two basic features in the matter of the civil - 19 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 court's exercise of testamentary jurisdiction. Whereas *onus probandi* lies in every case upon the party propounding a will, the expression *animo attestandi* means and implies *animus* to attest: to put it differently and in common parlance, it means intent to attest. As regards the latter maxim, the attesting witness must subscribe with the intent that the subscription of the signature made stands by way of a complete attestation of the will and the evidence is admissible to show whether such was the intention or not (see in this context Theobald on Wills, 12th Edn., p. 129). This Court in the case of *Girja Datt Singh v. Gangotri Datt Singh* [AIR 1955 SC346] held that two persons who had identified the testator at the time of registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put *animo attestandi*. In an earlier decision of the Calcutta High Court in *Abinash Chandra Bidyanidhi Bhattacharya v. Dasarath Malo* [ILR (1929) 56 Cal 598 : AIR1929 Cal 123], it was held that a person who had put his name under the word scribe was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a scribe. In a similar vein, the Privy Council in *Shiam Sundar Singh v. Jagannath Singh* [54 MLJ43: AIR 1927 PC248] held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees. In this context, reference may be made to the decision of this Court in *M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons* [(1969) 1 SCC573: (1969) 3 SCR513] wherein this Court upon reference to Section 3 of the Transfer of Property Act has the following to state: (AIR p. 1151, para

8) It is to be noticed that the word attested, the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Section 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the 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 acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g., to - 20 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

3. Turning on to the former expression *onus probandi*, it is now a fairly well-settled principle that the same lies in every case upon the party propounding the will and may satisfy the court's conscience that the instrument as propounded is the last will of a free and capable testator, meaning thereby obviously, that the testator at the time when he subscribed his signature on to the will had a sound and disposing state of mind and memory and ordinarily, however, the onus is discharged as regards the due execution of the will if the propounder leads evidence to show that the will bears the signature and mark of the testator and that the will is duly attested. This attestation however, shall have to be in accordance with Section 68 of the Evidence Act which requires that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution and the same is so however, in the event of there being an attesting witness alive and capable of giving the evidence. The law is also equally well settled that in the event of there being circumstances surrounding the execution of the will shrouded in suspicion, it is the duty paramount on the part of the propounder to remove that suspicion by leading satisfactory evidence.

18. Further, I place reliance on the judgment of this Court in the case of SRI. J.

T. SURAPPA AND ANOTHER Vs. SRI SATCHIDHANANDENDRA SARASWATHI SWAMIJI PUBLIC CHARITABLE TRUST AND OTHERS reported in ILR 2008 KAR2115at Para Nos.23 and 24 are held as under: 23. There is one important feature which distinguishes wills from other documents. It is one of the most solemn document - 21 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 known to law. Through it, a dead man entrusts to the living, the carrying out of his wishes. As it is impossible, that he can be called either to deny his signature or to explain the circumstances in which it was made, it is essential that trust worthy and effectual evidence should be given to establish the Will. Therefore, unlike other documents, the Will speaks from the death of the testator. It is ambulatory and it becomes effective and irrevocable on the death of the testator. It is a declaration in the prescribed manner of the intention of the person making it, with regard to the matters which he wishes to take effect upon or after his death. Therefore, when it is propounded or produced before a Court, the testator who has already departed the world, cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of wills, the Court will start on the same enquiry as in the case of the proof of documents. However, in the case of Wills, apart from proof of the documents, additional factors have to be satisfied, before the court could declare a document styled as Will is proved.

24. Therefore, the court has to tread a careful path in the enquiry to be conducted with regard to Will. The said path consists of five steps PANCHAPADI. The path of enquiry and steps to be traversed are as under:- (1) Whether the Will bears the signature or mark of the testator and is duly attested by two witnesses and whether any attesting witness is examined to prove the Will?. (2) Whether the natural heirs have been disinherited?. If so, what is the reason?. (3) Whether the testator was in a sound state of mind at the time of executing the Will?. (4) Whether any suspicious circumstances exist surrounding the execution of the Will?. - 22 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 (5) Whether the Will has been executed in accordance with Section 63 of the Indian Succession Act, 1925, read with Section 68 of the Evidence Act?.

19. Where a suspicious circumstance is raised about execution of Will then the propounder of the Will shall have to prove that the testator had intention to bequeath the property by executing the Will. This factor of proving the testators intention to execute the Will is by circumstantial evidence. In this regard, it cannot be accepted as direct evidence. Therefore, in order to establish the fact that the testator had intention to bequeath the property only in favour of propounder/s the circumstances why the testator had excluded the natural legal heirs has also to be analyzed. This factum can be proved by the surrounding circumstances. Therefore, onus is on the propounder to remove suspicious circumstances. In this regard, I place reliance on the Honble Supreme Court in the case of BHARPUR SINGH AND OTHERS Vs. SHAMSHER SINGH reported in (2009) 3 SCC687 at Para No.23 is held as follows: - 23 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006
23. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will: i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature. ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time. iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason. iv. The dispositions may not appear to be the result of the testator's free will and mind. v. The propounder takes a prominent part in the execution of the Will. vi. The testator used to sign blank papers. vii. The Will did not see the light of the day for long. viii. Incorrect recitals of essential facts.

20. It is the case of the appellant that the attesting witnesses died, then, the appellant has to take recourse to prove execution of Will as per Section 69 of the Indian Evidence Act, which reads as follows: 69. Proof where no attesting witness found. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation

of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

21. If attesting witnesses cannot be found then, the Will must be proved that the attestation of one attesting - 24 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 witness at least is in his handwriting, and that the signature of the person executing document is in the handwriting of that person. But, in the present case, the appellant has not taken any recourse to prove execution of Will even as per Section 69 of the Indian Evidence Act.

22. The word Will is defined under Section 2(h) of The Indian Succession Act, 1925 which reads as follows: Section 2(h) in The Indian Succession Act, 1925 Will means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. (emphasis supplied by me) 23. Therefore, it is legal declaration of the intention of the testator with respect to his property which he desires to be carried into after his death.

24. Therefore, the intention of the testator of execution of Will shall be proved as it is a legal declaration of bequeathing or desire to bequeath the property in favour of propounder after his death. Therefore, this - 25 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 intention of testator shall be proved by surrounding circumstances by removing suspicious circumstances. Therefore, the action of proving intention of the testator is having meant that giving evidence by removing all suspicious circumstances. Proof of intention of testator and removing suspicious circumstances are going hand to hand in proving execution of Will. But, upon the finding circumstances, the appellant has failed to prove the execution of Will as per law declared above.

25. Having considered the reasoning given by both the Courts below tested with evidence on the Will there are so many suspicious circumstances are found out:

1. There is no explanation or reason by the testator why she has excluded other natural legal heirs and bequeathed the properties only in favour of the appellant.

2. Though attested witnesses were no more, but the appellants have not made any effort to prove the Will by any other evidence and circumstances.-. 26 - NC:

2024. KHC-D:4712 RSA No.2794 of 2006 C/W RSA No.2795 of 2006 3. The case of the respondents is corroborated that the Will is created or Will is not existing at all by appreciating the evidence of DW7 admitted by her that the Will is prepared at the instance of her husband who is the son-in-law of Amaravva.

26. Upon all these reasons, the execution of Will by the testator Amaravva is not proved and this is rightly considered by both the Courts below. Hence the concurrent finding of fact cannot be interfered with. Accordingly, I answer substantial question of law Nos.1 and 2 in the affirmative as the finding and results by both the Courts below are justified. Accordingly, appeals are found to be devoid of merits. Hence, the appeals are liable to be dismissed.

27. Regular Second Appeals are dismissed. Sd/- JUDGE MRK-para 1 to 9. KGK-para 10 to end. CT:ANB List No.:

1. SI No.:

2.

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