IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 6TH DAY OF JANUARY, 2025

BEFORE

THE HON'BLE MR. JUSTICE RAVI V. HOSMANI

REGULAR SECOND APPEAL NO.1322 OF 2012 (RES)

BETWEEN:

1 . SRI M H ANJINAPPA,
S/O LATE M H JUNJAPPA,
SINCE DEAD BY LRs

1(a) SMT. SHARADAMMA,
AGED ABOUT 69 YEARS,
W/O LATE M.H. ANJINAPPA @ ANJANEYA M.H.,
R/A SRI SATHYANARAYANA NILAYA,
MAIN ROAD, MUNICIPAL COLONY,
KELAGOTE, CHITRADURGA - 577 501.

1(b) SRI YUVARAJA M.A.,
AGED ABOUT 49 YEARS,
S/O LATE M.H. ANJINAPPA @ ANJANEYA M.H.,
R/A SRI SATHYANARAYANA NILAYA,
MAIN ROAD, MUNICIPAL COLONY,
KELAGOTE, CHITRADURGA - 577 501.

1(c) SMT. BHAGYAMMA M.A.,
AGED ABOUT 45 YEARS,
S/O LATE M.H. ANJINAPPA @ ANJANEYA M.H.,
R/A SRI SATHYANARAYANA NILAYA,
MAIN ROAD, MUNICIPAL COLONY,
KELAGOTE, CHITRADURGA - 577 501.

1(d) SMT. MANJULA M.A.,
AGED ABOUT 41 YEARS,
S/O LATE M.H. ANJINAPPA @ ANJANEYA M.H.,
W/O RAGHAVENDRA R.,
R/A SRI SATHYANARAYANA NILAYA,
MAIN ROAD, MUNICIPAL COLONY,
KELAGOTE, CHITRADURGA - 577 501.

2 . SHRI M.H. KRISHNAMURTHY,
S/O LATE M.H. JUNJAPPA,
AGED ABOUT 52 YEARS,
R/AT KELAGOTE, CHITRADURGA - 577 501.

...APPELLANTS

[BY SRI K.K. VASANTH, ADVOCATE (PH)]

AND:

LATE DODDAKKA,
REP BY LEGAL REPRESENTATIVES

1 . SMT. GAYATHRAMMA,
W/O SHRI RANGASWAMY,
AGED BOUT 52 YEARS,
R/AT MADAKARIPURA,
CHITRADURGA TALUK - 577 501.

2 . SHRI M.H. HOSURAPPA,
S/O LATE M H JUNJAPPA,
SINCE DECEASED BY HIS LRs

2(a) SMT. KUMUDA,
AGED ABOUT 44 YEARS,
D/O LATE M.H. HOSURAPPA,
W/O SRI THARANATH,
R/A NO.2453, 10TH MAIN,
D BLOCK, 2ND STAGE, RAJAJINAGAR,
BENGALURU - 560 010.

2(b) SMT. NIRMALA,
AGED ABOUT 42 YEARS,
D/O LATE M.H. HOSURAPPA,
W/O SRI ASHWIN KUMAR,
R/A L-140, 3RD STAGE,
OPP. RMP QUARTERS,
KUVEMPUNAGAR,
MYSORE - 570 023.

2(c) SMT. PUSHPA,
AGED ABOUT 39 YEARS,
D/O LATE M.H. HOSURAPPA,
W/O SRI MANJUNATH,
R/A NO.79, T.G. LAYOUT,
NEAR RAGAVENDRA SWAMY TEMPLE,

ITTMADU, BSK - 3RD STAGE,
BENGALURU - 560 085.

3 . SMT. LAKKAMMA,
SINCE DEAD REP BY

3(a) SMT. GEETHAMMA,
W/O SRI NARASIMHAPPA,
AGED ABOUT 47 YEARS,
KALAHALLI VILLAGE,
CHITRADURGA TALUK - 577 501.

3(b) SRI NARASIMHAPPA ,
S/O SHRI HANUMAPPA ,
SINCE DECEASED BY HIS LRs

3(b)(i) SMT. SUNDARAMMA,
AGED ABOUT 45 YEARS,
W/O LATE NARASIMHA MURTHY,

3(b)(ii) SRI NARASIMHA SWAMY,
AGED ABOUT 24 YEARS,
S/O LATE NARASIMHA MURTHY,

3(c)(iii) SMT. SHIVAMMA,
AGED ABOUT 22 YEARS,
D/O LATE NARASIMHA MURTHY AND
W/O VENKATESHAPPA,

3(d)(iv) SMT. MAMATHA,
AGED ABOUT 20 YEARS,
D/O LATE NARASIMHA MURTHY,

THE RESPONDENTS NO.3(b)(i) TO 3(b)(iv)
ARE R/A C/O HOSAMNI NARASIMHAPPA,
MADAKARIPURA VILLAGE AND POST,
D.S. HALLI (VIA) CHITRADURGA TALUK
AND DISTRICT - 577 501.

4 . SMT.HOSURAMMA ,
W/O SHRI S N NARASIMHANNA,
AGED ABOUT 52 YEARS,
R/AT MADAKARIPURA,
CHITRADURGA TALUK - 577 501.

5 . SHRI M.H. DASAPPA ,
S/O LATE M.H. JUNJAPPA,
SINCE DECEASED BY HIS LRs

5(a) SMT.HAMPAMMA,
AGED ABOUT 75 YEARS,
W/O LATE M.H.DASAPPA,
R/A MADAKARIPURA VIA D.S. HALLI,
MADAKARIPURA POST,
CHITRADURGA TALUK & DISTRICT-577 501.

5(b) SMT.NAGARATHNA,
AGED ABOUT 50 YEARS,
D/O LATE M.H.DASAPPA AND
W/O NAGARAJ, R/A GOLLAHALLI,
YARABALLI POST,
HIRIYUR TALUK, CHITRADURGA
TALUK AND DISTRICT - 577 501.

5(c) SRI M.D. PRAKASH,
AGED ABOUT 48 YEARS,
S/O LATE M.H.DASAPPA,
R/A SANNADASAPPA LAYOUT,
NEAR VINAYAKA KALYANAMANTAPA,
CHALLAKERE ROAD,
CHITRADURGA TALUK
& DISTRICT - 577 501.

5(d) SRI M.D.NARASIMHA MURTHY,
AGED ABOUT 46 YEARS,
S/O LATE M.H.DASAPPA,
R/A MADAKARIPURA VIA D.S.HALLI,
CHITRADURGA TQ & DISTRICT-577 501.

5(e) SRI M.D. VIVEKANANDA,
AGED ABOUT 44 YEARS,
S/O LATE M.H.DASAPPA,
R/A MADAKARIPURA VIA D.S.HALLI,
CHITRADURGA TQ & DISTRICT-577 501.

5(f) SRI M.D.NAREDNRA BABU,
AGED ABOUT 42 YEARS,
S/O LATE M.H.DASAPPA,
R/A MADAKARIPURA VIA D.S.HALLI,
CHITRADURGA TQ & DISTRICT-577 501.

5(g) M.D. LOHITHESHA,
AGED ABOUT 40 YEARS,
S/O LATE M.H.DASAPPA,
R/A OPP. ANNAPOORNESHWARI TEMPLE,
MARUTHI NILAYA, KARNATAKA GOVT. FAIR
PRICE DEPOT, MAHILA VIVIDHODESHA

SAHAKARI SANGHA (R),
CHITRADURGA TALUK & DISTRICT - 577 501.

6. SMT.LAKSHMAVVA ,
W/O SHRI NARASIMHAPPA ,
AGED ABOUT 58 YEARS,
UPPARIGENAHALLI, HOLALKERE TALUK,
CHITRADURGA - 577 501.

7 . SMT.UMADEVI,
W/O NARAYANAPPA, MAJOR,
2ND MAIN, MUNICIPAL COLONY,
CHITRADURGA - 577 501.

8 . SMT.ONKARAMMA,
W/O LATE NARASIMHAPPA,
MAJOR, LIBRARIAN,
DHARAMPURA HIGH SCHOOL,
R/AT DHARAMPURA, HIRIYUR TALUK.
PIN CODE - 577 501.

…RESPONDENTS

[BY SRI S. BASAVARAJ, SR. COUNSEL APPEARING FOR
SRI GOUTHAM A.R., ADVOCATE FOR R1 TO R6, R7 & R8 ARE SERVED]

THIS RSA FILED U/S. 100 OF CPC AGAINST THE JUDGEMENT & DECREE DTD 17.4.2012 PASSED IN R.A.NO.39/2010 ON THE FILE OF ADDITIONAL SESSIONS JUDGE (FAST TRACK COURT), CHITRADURGA, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGEMENT AND DECREE DTD 25.2.2010 PASSED IN OS.NO.205/1998 ON THE FILE OF PRINCIPAL CIVIL JUDGE (SR.DN.) & C.J.M., CHITRADURGA.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 04.11.2024, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THROUGH VC FROM DHARWAD BENCH, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

CAV JUDGMENT

Challenging judgment and decree dated 17.04.2012 passed by Addl. Sessions Judge (Fast Track Court), Chitradurga, in R.A.no.39/2010, this appeal is filed.

2. Brief facts are that appellants were defendants no.1 and 2 in O.S.no.205/1998 filed by respondents/plaintiffs for declaration of *Will* dated 09.03.1981 registered on 18.03.1981 and executed by their father - MH Junjappa in respect of suit properties as null and void; to declare plaintiffs are entitled for 1/10th share of suit properties; for partition and separate possession of plaintiffs' 1/10th share in ***eastern portion*** measuring 01 Acre 9$^{1}/_{2}$ guntas out of total extent of 02 Acres 19 guntas in land bearing Sy.no.5/1 and ***eastern portion*** measuring 01 Acre 3$^{1}/_{2}$ guntas out of 02 Acres 07 guntas in Sy.no.5/2, both situated at Kelagote village, Kasaba Hobli, Chitradurga Taluk (`**suit properties'** for short); to enter name of plaintiffs in revenue records in respect of their 1/10th share in suit properties and to appoint Commissioner to divide share of plaintiffs by metes and bounds etc.

3. In plaint, it was stated, plaintiffs and defendants were children of MH Junjappa. In partition between his brothers, he received several movables/immovable properties yielding substantial income, with which he purchased other properties in 1962. In Oral partition between Junjappa and his sons, suit properties were given as share for maintenance of Junjappa and his wife Hosuramma. Even properties in said share yielded very good income providing for their needs.

4. Hanumakka died on 23.12.1981. At that time, Junjappa was residing with defendants. And when Omkaramma, his daughter became widow, she also joined Junjappa and resided with defendants. Due to death of his wife and son-in-law, Junjappa suffered depression and ill-health. By restricting Omkaramma from prohibiting and without properly taking care of Junjappa's health, defendants had made Junjappa their puppet. With ill-intention to knock off properties, defendants fraudulently got him to execute *Will* dated 09.03.1981 registered on 18.03.1981.

5. Plaintiffs also stated that Junjappa in frustration, went to Madakaripura on 05.10.1982 for performing pooja.

There, he confided with elders and well-wishers about fraud played by defendants and intended to nullify same. He also intended to fulfill wishes of his wife that all his children should get equal share in his properties. Therefore, he executed *Will* dated 06.10.1982, cancelling earlier *Will dated 19.03.1981. But* for various reasons said *Will* was not registered. Therefore, after death of Junjappa on 25.03.1984, all his children became entitled for equal share as per *Will dated 06.10.1982.* But as defendants had got their names entered in revenue records and were in hurry to sell away properties worth 7 to 8 lakhs of rupees for mere 2 to 2½ lakhs of rupees, contrary to subsequent *Will* dated 06.10.1982 and right of plaintiffs for 1/10th share each. Hence, suit was filed.

6. Upon appearance, defendants no.1 and 2 filed written statement admitting relationship between plaintiffs and defendants and oral partition in year 1969 and stated that said partition was confirmed by registration partition deed dated 04.06.1979, wherein suit properties were allotted to Junjappa. They stated that after partition, parents were residing with defendants no.1 and 2.

7. They also stated that suit properties were garden lands irrigated by Well and pump-set. After partition, there was depletion of water in Well due to borewells nearby. After death of Junjappa, when they could not make alternative arrangement, garden withered away. They admitted Hanumakka, their mother died on 25.01.1985 and later Omkaramma their sister lost her husband and began residing with them. They however stated that she was employed at Dharmapura and was residing there since 8 years. They stated Junjappa was residing with them happily and denied he was a puppet. They stated that on 09.03.1981, Junjappa executed a *Will* bequeathing suit properties in their favour while he was in sound disposing state of mind. And further that *Will* was duly attested and registered on 18.03.1981. They claim that it was last *Will* and testament and same was not vitiated by fraud or inducement as alleged. They denied entire assertion about Junjappa going to Medikerepura, seeking to elders and execution of another *Will* on 06.10.1982. They alleged said *Will* was forged and concocted. They claimed to have become owners of suit properties under *Will* dated 09.03.1981, after

death of Junjappa. They alleged suit was bad for non-joinder of Omkaramma.

8. Defendants no.4 and 5 filed separate written statements supporting defendants no.1 and 2, while defendant no.3 was placed *ex-parte.*

9. Based on pleadings, trial Court framed following issues and additional issues:

1) *Whether plaintiffs prove that their father Junjappa executed a will in their favour on 6/10/1982 and bequeathed the suit properties in their favour?*

2) *Whether the plaintiffs further prove that the will dated 6/10/1982 in their favour has to effect of cancelling the previous will dated 9/3/1981 in favour of defendants-1 and 2?*

3) *Whether defendants-1 and 2 prove that the will dated 6/10/1982 is not a genuine will and that is forged?*

4) *Whether plaintiffs prove that they are entitled for 1/10th share in the suit properties and for partition and separate possession by metes and bounds?*

5) *Whether defendants-4 and 5 prove that they are not necessary parties to the suit?*

6) *Whether defendants-4 and 5 prove that suit is barred by limitation?*

7) *To What order or decree the parties are entitled to?*

Additional Issue dated 29.07.2002

Whether the suit is properly valued and court fee paid is sufficient?

Additional Issue dated 15.07.2009

Whether suit is bad for non-joinder of necessary parties?

Additional Issue dated 13.10.2009

Whether the defendants-1 and 2 prove that the deceases Junjappa during his lifetime has executed will in their favour jointly on 09.03.1981 with respect to suit schedule property and the same is duly registered on 18.03.1981?

10. To establish their case, plaintiff no.4 and four others were examined as PWs.1 to 5. Exhibits P1 to P20 were marked. On other hand, defendant no.1 and two others were examined as DWs.1 to 3 and Exhibits D1 to D11 were marked.

11. On consideration, trial Court answered issues no.1, 2, 4, 5 and addl. issue dated 15.07.2009 in negative; issues no.3, 6, addl. issues dated 29.07.2022 and 13.10.2009 in affirmative. It answered issue no.7 by dismissing suit. Aggrieved, plaintiffs filed R.A.no.39/2010 on various grounds.

12. Based on contentions urged, first appellate Court framed following points for its consideration.

1) *Do plaintiffs that prove their father MH Junjappa executed the will on 6-10-1982 bequeathing the suit schedule properties in their favour to effect of canceling the previous will dtd.9-3-1981 which is registered on 18-3-1981 in favour of defendant no.1 and 2?*

2) *Do defendants 1 and 2 prove that the will dtd.6-10-1982 is not genuine and it is forged one?*

3) *Do plaintiffs prove that they are entitle for 1/10th share in the suit schedule properties by means of partition and separate possession by metes and bounds?*

4) *Whether further defendant no.4 and 5 proves that the suit is barred by law of limitation?*

5) *Do defendants no.1 and 2 proves that the deceased M.H.Junjappa has executed a will dtd.9-3-1981 in their favour when he was in sound disposing state of mind without knowing the dire consequences of execution of the will bequeathing the suit schedule property in their favour which was duly registered on 18-3-1981?*

6) *Whether impugned judgment passed by the learned trial court is arbitrary, perverse, and capricious and opposed to law?*

7) *Is there any sufficient reason to interfere in the order of learned trial court?*

8) *What decree or order?*

13. On consideration, it answered points no.1, 2, 4 and 5 in negative; points no.6 and 7 in affirmative and points no.3 and 8 by allowing appeal, setting aside judgment and decree passed by trial Court and holding each of plaintiffs no.1, 3, 4 and defendants no.3 to 5 entitled for 1/50th share; and each of plaintiffs no.2, 5 and defendants no.1 and 2 entitled for 11/50th share in suit properties etc.

14. Sri K.K. Vasanth, learned counsel for defendants no.1 and 2 submitted this appeal was against divergent findings in suit for declaration and partition. It was submitted, Sri MH Junjappa died on 25.03.1984 leaving behind his four sons and six daughters. His wife Hanumakka predeceased him on 23.01.1981. It was submitted, plaintiffs filed suit for cancellation of registered *Will* dated 09.03.1981 executed by Junjappa bequeathing suit properties to defendants no.1 and 2 and for declaration of their 1/10th share each in suit properties as per *Will* dated 06.10.1982 stated to have been executed by Junjappa.

15. To establish their case, plaintiff no.4 viz., Smt.Hosuramma was examined as PW-1. She got marked

Record of Right ('**RoR**') as Ex.P1, IR Extract as Exs.P2 and P3, Kethavaru Extract as Exs.P4 and P5, copy of RTC as Exs.P6 and P7, Photographs as Exs.P8 to P15, Negatives of photos to show Coconut and Arecanut trees grown in schedule property as Exs.P16 and P17, *Will* dated 06.10.1982 as Ex.P18 and signature of testator - father of PW-1 as Exs.P18 (a) & P18 (b). While reiterating plaint averments, she specifically stated that Junjappa executed Ex.P18 - *Will*, at about 12 O'clock in her house at Medikerepura, in presence of attesting witnesses - Mallanna, Govindappa, Mariswamy and Narasappa and scribe Thippeswamy. And at that time, Junjappa was hale and healthy and in sound disposing state of mind. In cross-examination, she admitted Junjappa died within six months of Ex.P18 - *Will.* She admitted it was executed in presence of all sons and daughters. In further cross-examination, she admitted Junjappa was Member of City Municipal Council, Chitradurga and that he died due to throat cancer while taking treatment at Cancer Hospital, Bangalore. She also admitted, he suffered for three years before death and was taken to hospital five to six months prior to death. She also admitted that after execution, Ex.P18 – *Will* was handed over to her.

16. However, she denied knowledge of earlier *Will* executed by Junjappa in favour of defendants no.1 and 2. She also denied suggestion that, Ex.P18 (a) and 18 (b) were not signatures of testator and that she with attesting witnesses and scribe had created *Will*. She also denied suggestion that erasing and overwriting was for creating *Will*.

17. It was submitted, in further examination-in-chief on 26.09.1996, PW-1 marked Sale deed dated 19.01.1953 bearing signature of Junjappa as Ex-P19 and identified his signature as Ex.P19A, P19B & P19C. She also marked Registered Partition Deed as Ex.P20. In cross-examination, however, she admitted Ex.P19 was with her brother Hosurappa - plaintiff no.2 and that they were not present at time of execution of Ex.P19. She however identified signature of MH Junjappa. Said statement was got marked as Ex.D11.

18. Plaintiff also examined Govindappa as PW.2. He deposed that he knew plaintiffs, defendants and also Junjappa. He stated during his life time, in year 1982, Junjappa had called him to house of Hosuramma, where all children of Junjappa as well as Narasappa, Mariswamy and Mallappa had

assembled. He stated, at that time Junjappa informed him about his wife's wish that earlier bequeathal of suit properties only to defendants was not proper and that all children ought to receive property equally. Therefore, he got *Will* at Ex.P18 written from Thippeswamy. He stated that *Will* was read over and thereafter Junjappa signed on it. He identified his own signature as well as that of Junjappa. He denied Ex.P18 - *Will* was an illegally created document. During his cross-examination he was confronted with Sale Deed dated 21.09.1955, Mortgage Deed dated 16.01.1953, Sale Deed dated 14.03.1963, Agreement of sale dated 14.03.1963 and Sale Deed dated 16.02.1960. Apart from identifying signatures of Junjappa on above documents, he also admitted registered *Will* dated 09.03.1981, which was got marked as Ex.D7. Signature of Junjappa on Ex.D7 was marked as Ex.D7 (a) to (g). He also admitted that all children of Junjappa were present when *Will* was executed and Junjappa told him about previous *Will*. It was submitted, suggestion about Ex.P18 being created, about Junjappa having no mental or physical capability to execute *Will* were denied.

19. Insofar as PW-3, it was submitted, though he deposed about Junjappa calling him, he visiting house of Hosuramma and about Junjappa expressing intention to cancel earlier *Will* by writing another *Will* to bequeath property to all children as per wishes of his wife, in cross examination, PW-3 stated Ex.P18 was written in his presence by Thippeswamy, as per instructions of Junjappa, it took about one hour to complete.

20. It was submitted, scribe examined as PW-4, stated that Junjappa called him to house of Hosuramma, gave copy of Ex.D7 – *Will* and told him as per wishes of his wife, he wanted it cancelled by writing new *Will* bequeathing properties to all his children. He has stated that, after writing *Will*, he read it aloud. After all persons agreed, it was correct, Junjappa signed it and thereafter Narasappa, Govindappa, Mariswamy and Doddamalla signed it. He denied suggestion that, himself and witnesses to *Will* created it. In cross examination, he admitted that Ex.P18 was written at 11 a.m. in his own pen but denied suggestion about tinkering with stamp paper.

21. It was submitted, thereafter plaintiff no.2 was examined as PW-5. He also deposed on similar terms as other plaintiff witnesses and denied suggestion about colluding with others and Ex.D7 being created.

22. It was submitted, defendants no.1 and 2 though sought to rely on Ex.D7 – *Will*, they did not prove it as mandated by law. They examined, Savithramma daughter of Stamp Vendor Neelakantappa as **DW-1**. She deposed Neelakantappa, her father, who was stamp vendor had died. She got marked his Stamp Register as Ex.D9 and identified his handwriting on it. She stated handwriting on 2nd page of Ex.P18 was not of her father. During cross-examination, it was suggested to her that stamp paper used to write - Ex.P18 was not purchased from her father and her father's signature was not affixed on second page. Further, NS Ashwathanarayana Rao, Advocate, was examined as **DW-2.** He stated that he was practicing since 42 years in Chitradurga and knew Junjappa for 35 years. He stated, as per instruction of Junjappa, he drafted and got typed - Ex.D7 - *Will* and he signed it after Junjappa. He stated Praveen Chandra and CN Ramachandrappa signed as attesters. He stated Junjappa was in good health at that time.

In cross-examination, it was elicited copy of draft was not retained and he was unaware about daughters of Junjappa. Thereafter, MH Anjanappa examined himself as **DW-3**, and admitted suit properties were allotted to Junjappa in partition, that his parents were residing with him at Chitradurga until death and about bequeathal of suit properties to defendants no.1 and 2 under Ex.D7 – *Will* was out of love and affection as they took care of Junjappa. He also stated after completion of death ceremonies of Junjappa, *Will* was discovered in trunk. In cross-examination, it was elicited, defendants bore ill-will against plaintiffs and Govindappa, MH Narasappa and Doddamallappa as Narasappa and Doddamallappa had signed as witnesses to Partition Deed.

23. It was submitted, Praveen Chandra, one of attestors of Ex.D7 was also examined. He deposed that on evening of 09.03.1981, Junjappa took him to office of NS Ashwathanarayana Rao, Advocate, by stating, he was executing *Will*. He stated, later CN Ramachandrappa also came there and NS Ashwathanarayana Rao handed over Ex.D7 – *Will*, which was already typed on stamp paper, to Junjappa. After it was read over, Junjappa signed on each page. Even

Ramachandrappa, NS Ashwathanarayana Rao also signed on it. He identified signature of Junjappa.

24. In view of above, it was submitted Ex.P18 suffered from various suspicious circumstances apart from innumerable inconsistency in deposition of witnesses which would discredit Ex.P18 – *Will*. On other hand, Ex.D7 – *Will* being duly registered and duly proved by production of original *Will* and examination of attestors, as required in law, defendants were entitled for suit properties in terms of bequeathal. It was submitted, impugned judgment and decree passed by first appellate Court was unsustainable and sought for answering substantial question of law in favour of defendants, set-aside judgment and decree passed by first appellate Court and confirm judgment and decree passed by trial Court.

25. On other hand, Sri S. Basavaraj, learned Senior Counsel appearing for Sri Goutham A.R., advocate for plaintiffs no.1 to 6 and defendant no.3 opposed appeal. It was submitted, PW-1 - Hosuramma deposed defendants took Junjappa for treatment to Chitradurga and got Ex.P18 alleged *Will* executed on ground that their mother insisted for equal

shares to daughters as they married into poor families. In cross-examination, DW-1 - Anjanappa stated that his mother died due to uterus cancer on 21.01.1981 and his father was under care of plaintiff no.1 at Medakeripura and his father died due to throat cancer. Further, DW-2 – Praveen Chandra an attesting witness to *Will* stated that propositus was residing in their village. It was stated further that he is not aware about date, month or year and even not aware of scribe of *Will,* but, he states that *Will* was read over to Junjappa by one Ashwathanarayana. He further stated that he was not aware of particulars of properties mentioned in *Will*. He stated he did not enquire about exclusive bequeathal of properties to defendants no.1 and 2 excluding others. He also admitted, he did know if Ashwathanarayana gave draft.

26. It was submitted, DW-3 - Ashwathanarayana Rao was scribe of *Will*. In cross-examination, it was elicited draft was prepared by him in Kannada language, but, same was not preserved. He further stated, he was not aware, where it was got typed. He admitted, he didn't have typewriter in his office and that Will was not typed in his office. It was submitted, DW-3 admitted that it was wrongly shown that *Will* was typed as

per his dictation. He admitted, on enquiry, Junjappa stated that his children had got it typed and brought to him. It was submitted, while dismissing suit trial Court relied on said admission in paras 56 and 59 as follows:

> "56. "Suppose the sons of M.H. Junjappa got typed Ex.D7 Will it goes to show that the said sons are none other than defendant No.1 and 2 who are propounder of the said Will. When the propounder has got typed the said Will it goes to show that the said defendants have played more prominent role in getting Ex.D7 Will. As the plaintiffs obtained their Will by taking participation in getting Ex.P17 Will. So at this juncture it is necessary draw our attention towards the decision reported in AIR 1959 SC 443 in case of Venkatachala lyengar v. B.N. Thimmajamma and others, Hon'ble Supreme Court of India has laid down law of principles as follows:
>
> Apart from the suspicious circumstances to which we have just referred in some cases the Wills propounded disclose another infirmity. Propounder themselves take a prominent part in execution of 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"
>
> Para 59. "Another important aspect shall have to be taken into account in respect of while executing Ex.D7 will why other children of M.H. Junjappa have been excluded. Only explanation offered is that Plaintiffs are well settled in life. But it is not the case of defendants they were not settled in life though the other children of testator settled in their life. Hence, these contentions of defendants as

> reasons for bequeath by the testator exclusively to defendant No.1 and 2 cannot be accepted in fact there is no proper and cogent evidence on behalf of defendants No.1 and 2 as reason of exclusion of other children by testator only to bequeath his properties to defendant No.1 and 2. Hence this is also a suspicious circumstances for creating of Ex.D7 by the defendants no.1 and 2. When the propounder is not examined the typist who typed the Will which is not in accordance with draft Will, there are suspicious circumstances for creation of Ex.D7."

27. It was further submitted, as admitted Hanumakka died on 21.01.1981 and execution of Ex.D7 – *Will* on 09.03.1981, within three months that too by excluding other children was a grave suspicious circumstance. Hence, first appellate Court rightly granted equal shares to all children of Junjappa in suit properties. In support of submissions, learned Senior Counsel relied on decisions of Hon'ble Supreme Court in case of **Moturu Nalini Kanth v. Gainedi Kaliprasad** (Dead, through LRs), reported in **2023 INSC 1004**; **H. Venkatachala Iyengar v. B.N.Thimmajamma & Ors**., reported in **1958 SCC OnLine SC 31**; **Thambammal v. Subbayammal,** reported in **2017 SCC OnLine Mad 1687**; and **Uthammappan v. S. Rajannan** (S.A.no.1356/2008 disposed of on 09.07.2015) High Court of Judicature at Madras. On

above grounds, prayed for answering substantial question of law against defendants no.1 and 2 and dismiss appeal.

28. Heard learned counsel, perused impugned judgment and decree and record.

29. This appeal is by defendants no.1 and 2 against divergent findings in suit for declaration and permanent injunction etc. Plaintiffs' claim for declaration is based on Ex.P18 - unregistered *Will.* As per plaint averments, need for declaration arose in view of fact that defendants no.1 and 2 were claiming exclusive right over suit properties under Ex.D7 – registered *Will*. Admittedly, there is no dispute about right of testator to bequeath suit properties.

30. It is seen that both parties are claiming right over suit properties under respective *Will.* Plaintiffs' claim is under Ex.P18 – unregistered *Will* dated 06.10.1982 by Junjappa bequeathing suit properties to all his children equally. And since, Junjappa had four sons and six daughters, they were claiming 1/10th share each. On other hand, claim of defendants no.1 and 2 is under Ex.D7 – registered *Will* dated 09.03.1981 by Junjappa bequeathing suit properties jointly to defendants

no.1 and 2 only. However, trial Court held Ex.P18 as not proved and same is upheld by first appellate Court. Plaintiffs are not in appeal.

31. Insofar as Ex.D7, trial Court, held it proved, said finding is reversed by first appellate Court. In this appeal, defendants no.1 and 2 are challenging divergent finding insofar as Ex.D7 - *Will*. In order to examine same, it would be useful to refer to law about claims based on *Will*. Hon'ble Supreme Court in case of ***Kavita Kanwar v. Pamela Mehta*****,** reported in **(2021) 11 SCC 209**, examined it in detail as follows:

> ***"Will — Proof and satisfaction of the Court:***
>
> 23. It remains trite that a will is the testamentary document that comes into operation after the death of the testator. The peculiar nature of such a document has led to solemn provisions in the statutes for making of a will and for its proof in a court of law. Section 59 of the Succession Act provides that every person of sound mind, not being a minor, may dispose of his property by will. A will or any portion thereof, the making of which has been caused by fraud or coercion or by any such importunity that has taken away the free agency of the testator, is declared to be void under Section 61 of the Succession Act; and further, Section 62 of the Succession Act enables the maker of a will to make or alter the same at any time when he is competent to dispose of his property by will. Chapter III of Part IV of the Succession Act makes the provision for execution of unprivileged

wills (as distinguished from privileged wills provided for in Chapter IV) with which we are not concerned in this case.

23.1. Sections 61 and 63 of the Succession Act, relevant for the present purpose, could be usefully extracted as under:

> "61. Will obtained by fraud, coercion or importunity.—A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void. …
>
> ***

63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules—

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not

be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

23.2. Elaborate provisions have been made in Chapter VI of the Succession Act (Sections 74 to 111), for construction of wills which, in their sum and substance, make the intention of legislature clear that any irrelevant mis-description or error is not to operate against the will; and approach has to be to give effect to a will once it is found to have been executed in the sound state of mind by the testator while exercising his own free will. However, as per Section 81 of the Succession Act, extrinsic evidence is inadmissible in case of patent ambiguity or deficiency in the will; and as per Section 89 thereof, a will or bequest not expressive of any definite intention is declared void for uncertainty. Sections 81 and 89 read as under:

"81. Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.—Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted. …

***

89. Will or bequest void for uncertainty.—A will or bequest not expressive of any definite intention is void for uncertainty."

Moreover, it is now well settled that when the will is surrounded by suspicious circumstances, the Court would expect that the legitimate suspicion should be removed before the document in question is accepted as the last will of the testator.

23.3. As noticed, as per Section 63 of the Succession Act, the will ought to be attested by two or more witnesses. Hence, any document propounded as a will cannot be used as evidence

unless at least one attesting witness has been examined for the purpose of proving its execution, if such witness is available and is capable of giving evidence as per the requirements of Section 68 of the Evidence Act, that reads as under:

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

24. We may now take note of the relevant principles settled by the consistent decisions in regard to the process of examination of a will when propounded before a court of law.

24.1. In H. Venkatachala Iyengar v. B.N.Thimmajamma, AIR 1959 SC 443, a three-Judge Bench of this Court traversed through the vistas of the issues related with execution and proof of will and enunciated a few fundamental guiding principles that have consistently been followed and applied in almost all the cases involving such issues. The synthesis and exposition by this Court in paras 18 to 22 of the said decision could be usefully reproduced as under: (AIR pp. 451-52)

"18. What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. 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, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, 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 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. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the

writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. 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 provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. 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 other documents so 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 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 to which we have just referred 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. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely 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 deciding a solemn question and it must be fully

satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard-and-fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harmes v. Hinkson [Harmes v. Hinkson, 1946 SCC OnLine PC 20: AIR 1946 PC 156: (1945-46) 50 CWN 895], "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

(emphasis supplied)

24.2. In Purnima Debi [Purnima Debi v. Kumar Khagendra Narayan Deb, (1962) 3 SCR 195: AIR 1962 SC 567], this Court referred to the aforementioned decision in H. Venkatachala Iyengar [H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443 : 1959 Supp (1) SCR 426] and further explained the principles which govern the proving of a will as follows : (Purnima Debi case [Purnima Debi v. Kumar Khagendra Narayan Deb, (1962) 3 SCR 195 : AIR 1962 SC 567] , AIR p. 569, para 5)

> "5. Before we consider the facts of this case it is well to set out the principles which govern the proving of a will. This was considered by this Court in H. Venkatachala Iyengar v. B.N. Thimmajamma [H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443: 1959 Supp (1) SCR 426]. It was observed in that case that the mode of proving a will did not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will was on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine. If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court. Further, what are suspicious circumstances was also

considered in this case. The alleged signature of the testator might be very shaky and doubtful and evidence in support of the propounder's case that the signature in question was the signature of the testator might not remove the doubt created by the appearance of the signature. The condition of the testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will might appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will might otherwise indicate that the said dispositions might 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 was accepted as the last will of the testator. Further, a propounder himself might take a prominent part in the execution of the will which conferred on him substantial benefits. If this was so it was generally treated as a suspicious circumstance attending the execution of the will and the propounder was required to remove the doubts by clear and satisfactory evidence. But even where there were suspicious circumstances and the propounder succeeded in removing them, the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations."

(emphasis supplied)

24.3. In Indu Bala Bose [Indu Bala Bose v. Manindra Chandra Bose, (1982) 1 SCC 20], this Court again said: (SCC pp. 22-23, paras 7-8)

"7. This Court has held that the mode of proving a will does not ordinarily differ from that of

proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case 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. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. [Ed. : See Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529; H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443 : 1959 Supp (1) SCR 426; Rani Purnima

Devi v. Kumar Khagendra Narayan Dev, AIR 1962 SC 567 : (1962) 3 SCR 195]

> *8. Needless to say that any and every circumstance is not a "suspicious" circumstance. A circumstance would be "suspicious" when it is not normal or is not normally expected in a normal situation or is not expected of a normal person*."

(emphasis supplied and in original)

24.4. We may also usefully refer to the principles enunciated in Jaswant Kaur [Jaswant Kaur v. Amrit Kaur, (1977) 1 SCC 369] for dealing with a will shrouded in suspicion, as follows: (SCC p. 373, para 9)

> "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."

(emphasis supplied)

24.5. In Uma Devi Nambiar [Uma Devi Nambiar v. T.C. Sidhan, (2004) 2 SCC 321], this Court extensively reviewed the case law dealing with a will, including the Constitution Bench decision of this Court in Shashi Kumar Banerjee v. Subodh Kumar Banerjee [Shashi Kumar

Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529] , and observed that mere exclusion of the natural heirs or giving of lesser share to them, by itself, will not be considered to be a suspicious circumstance. This Court observed, inter alia, as under: (Uma Devi Nambiar case [Uma Devi Nambiar v. T.C. Sidhan, (2004) 2 SCC 321], SCC pp. 332-34, paras 15-16)

> "15. Section 63 of the Act deals with execution of unprivileged wills. It lays down that the testator shall sign or shall affix his mark to the will or it shall be signed by some other person in his presence and by his direction. It further lays down that the will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator and each of the witnesses shall sign the will in the presence of the testator. Section 68 of the Indian Evidence Act, 1872 (in short "the Evidence Act") mandates examination of one attesting witness in proof of a will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the court while dealing with a case based upon a will has been examined in considerable detail in several decisions [H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443: 1959 Supp (1) SCR 426] , [Purnima Debi v. Kumar Khagendra Narayan Deb, (1962) 3 SCR 195: AIR 1962 SC 567] , [Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529] of this Court. … A Constitution Bench of this Court in Shashi Kumar Banerjee case [Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529] succinctly indicated the focal position in law as follows : (AIR p. 531, para 4)

'4. … The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. **If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence.** If the propounder succeeds in removing the suspicious circumstances the court would grant probate,

even if the will might be unnatural and might cut off wholly or in part near relations.'

16. A will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a will. It is true that a propounder of the will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar [P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar, 1995 Supp (2) SCC 664], it is the duty of the propounder of the will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstances, the court has to give effect to the will, even if the will might be unnatural in the sense that it has cut off wholly or in part near relations. … In Rabindra Nath Mukherjee v. Panchanan Banerjee [Rabindra Nath Mukherjee v. Panchanan Banerjee, (1995) 4 SCC 459], it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the will is to interfere with the normal line of succession and so, natural heirs

would be debarred in every case of will. Of course, it may be that in some cases they are fully debarred and in some cases partly."

24.6. In Mahesh Kumar [Mahesh Kumar v. Vinod Kumar, (2012) 4 SCC 387 : (2012) 2 SCC (Civ.) 526], this Court indicated the error of approach on the part of the High Court while appreciating the evidence relating to the will as follows: (SCC pp. 405-06, paras 44-46)

"44. The issue which remains to be examined is whether the High Court was justified in coming to the conclusion that the execution of the will dated 10-2-1992 was shrouded with suspicion and the appellant failed to dispel the suspicion? At the outset, we deem it necessary to observe that the learned Single Judge misread the statement of Sobhag Chand (DW 3) and recorded something which does not appear in his statement. While Sobhag Chand categorically stated that he had signed as the witness after Shri Harishankar had signed the will, the portion of his statement extracted in the impugned judgment gives an impression that the witnesses had signed even before the executant had signed the will.

45. Another patent error committed by the learned Single Judge is that he decided the issue relating to validity of the will by assuming that both the attesting witnesses were required to append their signatures simultaneously. Section 63(c) of the 1925 Act does not contain any such requirement and it is settled law that examination of one of the attesting witnesses is sufficient. Not only this, while recording an adverse finding on this issue, the learned Single Judge omitted to consider the categorical statements made by DW 3 and DW 4 that the testator had read out and signed the will in their

presence and thereafter they had appended their signatures.

46. The other reasons enumerated by the learned Single Judge for holding that the execution of the will was highly suspicious are based on mere surmises/conjectures. The observation of the learned Single Judge that the possibility of obtaining signatures of Shri Harishankar and attesting witnesses on blank paper and preparation of the draft by Shri S.K. Agarwal, Advocate on pre-signed papers does not find even a semblance of support from the pleadings and evidence of the parties. If Respondent 1 wanted to show that the will was drafted by the advocate after Shri Harishankar and the attesting witnesses had signed blank papers, he could have examined or at least summoned Shri S.K. Agarwal, Advocate, who had represented him before the Board of Revenue."

24.7. Another decision cited on behalf of the appellant in Leela Rajagopal [Leela Rajagopal v. Kamala Menon Cocharan, (2014) 15 SCC 570: (2015) 4 SCC (Civ) 267] may also be referred wherein this Court summarised the principles that ultimately, the judicial verdict in relation to a will and suspicious circumstances shall be on the basis of holistic view of the matter with consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature. This Court said: (SCC p. 576, para 13)

"13. A will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny

before the same can be accepted. It is the overall assessment of the court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before us."

24.8. We need not multiply the references to all and other decisions cited at the Bar, which essentially proceed on the aforesaid principles while applying the same in the given set of facts and circumstances. Suffice would be to point out that in a recent decision in Shivakumar v. Sharanabasappa (2021) 11 SCC 277, this Court, after traversing through the relevant decisions, has summarised the principles governing the adjudicatory process concerning proof of a will as follows : (SCC pp. 309-10, para 12)

"12. … 12.1. Ordinarily, 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. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting

witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own

free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is "suspicious" when it is not normal or is 'not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be "real, germane and valid" and not merely the "fantasy of the doubting mind".

12.7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances above noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a

> ***document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?***
>
> ***12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will."***
>
> (emphasis supplied)

32. While passing impugned judgment and decree, trial Court took note of deposition of plaintiff no.4 as PW-1, that Ex.P18 - *Will* was executed at her house in year 1982 at 12:00 p.m. in presence of attestors Mallanna, Govindappa, Mariswamy, Narasappa and scribe Thippeswamy who prepared it as per instructions given by Junjappa bequeathing suit properties in equal proportion to all his children. It observed, she identified signatures of Junjappa on *Will* as well as on Ex.P20 - partition deed, Ex.P19 – sale deed. It noted Pw-2 and 3 attestors as well as scribe reiterated same.

33. Thereafter, it took note of evidence let in by defendants. Firstly, Savithramma daughter of Stamp vendor examined as DW-1, produced stamp register maintained by her father as Ex.D9, stated handwriting on second page of Ex.P18 was not that of her father and entry at Ex.P9 (a) i.e. Sl.no.425 showed name of person to whom stamp paper was issued was Vimala. Secondly, Ashwathanarayana Rao Advocate, examined as DW-2 deposed that he knew Junjappa for 35 years and as per his instructions prepared draft *Will* and after it was read over, Junjappa signed it along with other attestors, in his presence.

34. Thirdly, Anjanappa – defendant no.1 examined as DW-3 stating that suit properties fallen to share of Junjappa in partition were bequeathed to defendants no.1 and 2 under Ex.D7 – *Will*. It observed DW-3 admitted Junjappa died due to cancer. Lastly, Praveen Chandra – attestor, deposed about Junjappa asking him to accompany him to office of Ashwathanarayana Rao advocate, for execution of *Will* and that after Ashwathanarayana Rao, read over *Will*, Junjappa signed it in presence of himself and Ramachandrappa and about Ashwathanarayana Rao, advocate also signing it.

35. Trial Court disbelieved Ex.P18 mainly on ground that unlike Ex.D7 – *Will* which was registered, Ex.P18 – *Will* was unregistered and drawn on stamp paper issued to one Vimala, which was suspicious circumstance. Further, handwriting expert certified signature found on Ex.P18 – *Will* was not by Junjappa. And if intention of testator was to cancel earlier *Will,* he could have done so without need for execution of one more *Will*.

36. Insofar as Ex.D7 – *Will,* it noted defendants had examined Praveen Chandra and Ashwathanarayana Rao as attestors apart from marking copies of sale deeds, partition deed, mortgage deed and registered agreement bearing signature of Junjappa to corroborate signature of executant on Ex.D7 – *Will*. It found explanation about marriage of daughters being celebrated during life time of Junjappa, by giving them sufficient money and jewelry as acceptable. On said findings, it dismissed suit.

37. In appeal, first appellate Court observed plaintiffs admitted Ex.D7 – *Will* as they had sought prayer for its cancellation and for grant of 1/10th share as per Ex.P18 – *Will*.

It noted plaintiff no.4 as PW-1, attestors Govindappa, Mallappa and scribe Thippeswamy as PWs-2 to 4 respectively, deposed that Ex.P18 – *Will* was executed in house of Hosuramma at 12:00 p.m. in year 1982, in presence of all children. It noted assertion of PW-1 that she along with brothers and sisters signed on *Will* to be contrary to record. It also noted PW-2 admitted Junjappa being under treatment for throat cancer with feeding tube inserted in his neck. It also noted admission by PW-5 (plaintiff no.2) that he was not present at time of execution of Ex.P18 – *Will,* and unaware of it, until after death of Junjappa when question arose about succession to properties left behind and its production by his father-in-law – Narasappa were material contradictions. It also noted handwriting expert had certified that signature on Ex.P18 was not by Junjappa, in addition Stamp Paper on which it was drawn had erasing marks and Stamp Register showed name of issuee as Vimala as unexplained suspicious circumstances, denying claim based on it.

38. Insofar as Ex.D7*,* it noted additional issue dated 13.10.2009 framed as per order passed in RFA.no.223/2003 cast burden of proving said *Will* on defendants. While assessing

evidence, it noted inconsistency in deposition of Ashwathanarayana Rao – scribe. It noted, prior to remand, he had deposed that he drafted *Will* and Junjappa got it typed, which he identified as Ex.D7 along with his signature as Ex.D7 (h) and about Junjappa executing it in presence of attestors. But, after remand, it noted, he stated that on enquiry, Junjappa told him that Ex.D7 – *Will* was got typed by his children would indicate propounders playing prominent role in preparation of Ex.D7 – *Will*. Further, admission that endorsement on *Will* that it was '*typed to his dictation*' was incorrect and Praveen Chandra stating that he was unaware who got Ex.D7 prepared and Junjappa having daughters, casting doubt. It also found scribe signing as attestor to be suspicious. Apart from above, it observed only explanation that other children were well settled would not justify bequeathal only to defendants no.1 and 2. On said reasons, it held Ex.D7 – *Will* as not proved, but granted relief of notional partition to plaintiffs.

39. It is seen, appeal was admitted on 08.07.2013 to consider following substantial question of law:

> "*Whether first appellate Court was justified in reversing finding of trial Court on additional issue dated 29.07.2002 regarding registered*

Will dated 09.03.1981 and consequently reversing judgment and decree passed by Court below?"

40. Same is in respect of divergent finding on additional issue framed on 13.10.2009 about validity of Ex.D7 – *Will*. It is seen first appellate Court disbelieved Ex.D7, on following suspicious circumstances:

- Inconsistent deposition by Ashwathanarayana Rao, Advocate, about drafting and preparation of Ex.D7;
- Propounders playing role in preparation of Ex.D7;
- Scribe deposing as attestor;
- Praveen Chandra being unaware of contents of Ex.D7 and about existence of daughters of Junjappa who were excluded from bequeathal;
- Unacceptable explanation for bequeathal by excluding some of natural successors;

41. As per **Kavita Kanwar**'s case (supra), in order to sustain claim under *Will*, propounder is not only required to establish due compliance with Section 63 of Indian Succession Act, 1925 and Section 68 of Indian Evidence Act, 1872, but also explain away all suspicious circumstances shrouding *Will*. Indeed, in B. **Venkatamuni v. C.J. Ayodhya Ram Singh**,

reported in **(2006) 13 SCC 449,** it is held, there exists distinction between well founded and bare suspicion and Court must not start with suspicion and close its mind to find truth as resolute impenetrable incredulity is not demanded even if there exists circumstances of grave suspicion. But scrutiny in an appeal under Section 100 of CPC would be limited only to substantial question of law. Normally, finding about *Will* suffering from suspicious circumstances would be a finding of fact, unless perverse.

42. Therefore, it has to be examined, whether finding of first appellate Court about validity of Ex.D7 was based on assessment of all material on record or was contrary to material on record. It is seen, to prove Ex.D7, defendants examined Ashwathanarayana Rao and Praveen Chandra. Ashwathanarayana Rao deposed that he was practicing as advocate since 50 years and knew Junjappa for more than 35 years. And that on 09.03.1981, Junjappa approached him for preparation of *Will*, and collected draft prepared by him. After it was got typed, Junjappa executed it, in presence of attestors - Praveen Chandra and Ramachandrappa. After remand, he added certain details, that Junjappa had approached him one

week prior to 09.03.1981, expressing intention to execute *Will* bequeathing suit properties to defendants no.1 and 2, collecting draft on morning of 09.03.1981 and returning at 5:00 pm with typed copy and thereafter executing it in presence of attestors and he signing it after Junjappa. In cross-examination, he admitted, he was unaware where Ex.D7 was got typed, and on enquiry, Junjappa informed him that his children got it typed. And on being questioned about he endorsing it as scribe, denying same.

43. Though, there is no dispute about law that '*attestation*', meant signing of document to signify that attestor is witness to execution of said document. And as per Section 63 (c) of Indian Succession Act, 1925, attesting witness was one who signs document in presence of executant after seeing execution of document or after receiving personal acknowledgment from executant about execution of document, as held by Hon'ble Supreme Court in ***Seth Beni Chand* v. *Kamla Kunwar***, reported in **(1976) 4 SCC 554**. Consequently, there would be no prohibition against scribe acting as attestor, first appellate Court has assessed evidence in light of entire circumstances about need for attestor to have

signed as scribe in light of his denial about where Ex.D7 was got typed. But, damning reason was deposition about testator disclosing to him about participation of propounders in process of preparation of *Will*, about which there was no explanation at all by defendants. It is also seen first appellate Court took note of admission by Praveen Chandra being unaware about properties of testator, about his daughters etc. despite claiming to be well acquainted with Junjappa.

44. Thus, assessment by first appellate Court is in light of entire material on record and compliant with principles for appreciation of suspicious circumstances espoused in **Kavita Kanwar**'s case (supra) as well as proper exercise of jurisdiction of first appellate Court as held in **Santosh Hazari v. Purushottam Tiwari**, reported in **2001 (3) SCC 179**. In light of fact that there is material about propounders playing role in preparation of Ex.D7, conclusion by first appellate Court cannot be held to be perverse.

45. Substantial question of law is therefore answered in affirmative. Consequently, following:

ORDER

Appeal is dismissed with costs.

Sd/-
(RAVI V. HOSMANI)
JUDGE

Psg/AV/GRD
List No.: 19 Sl No.: 2