R

IN THE HIGH COURT OF KARNATAKA,

DHARWAD BENCH

DATED THIS THE 5TH DAY OF DECEMBER, 2024

BEFORE

THE HON'BLE MR. JUSTICE HANCHATE SANJEEVKUMAR

REGULAR SECOND APPEAL NO.5675 OF 2009 (DEC/INJ-)

BETWEEN:

1. SHRI. VISHWANATH NIRVENEPPA
BURJI,
AGE 69 YEARS,
OCC: AGRICULTURE AND BUSINESS
R/O BHOJ, TAL:CHIKODI – 591 201.
DIST:BELGAUM.

2. SMT.KASTURI
W/O JAGADEESH KOTHIWALE
AGE YEARS, OCC: H/W
R/O KAROSHI, TAL:CHIKODI– 591 201.
DIST:BELGAUM

3. SMT. NEELAWWA
W/O NANDEPPA HATTARAGI
AGE YEARS, OCC: H/W
R/O BHOJ, TAL:CHIKODI – 591 201
DIST:BELGAUM

(A-3 SINCE DECEASED AND LR'S ARE
ARRAYED AS RESPONDENTS 7,8,9)

...APPELLANTS

(BY SRI. SHIVRAJ.S. BALLOLI, ADVOCATE FOR A1 & A2;
A3-DECEASED)

AND:

1 . SHRI.UMESH
S/O MAHADEV KUDACHI,
AGE 37 YEARS,
OCC:AGRICULTURE,
R/O INGALI, TAL: CHIKODI–591201
DIST:BELGAUM.

2 . SHRI NANDESHWAR,
S/O MAHADEVKUDACHI
AGE 34 YEARS,
OCC: AGRICULTURE,
R/O INGALI, TAL:CHIKODI–591201,
DIST:BELGAUM.

3 . MISS ANJALI,
D/O MAHADEVKUDACHI
AGE 29 YEARS,
OCC:AGRICULTURE,
R/O INGALI, TAL:CHIKODI–591201.
DIST: BELGAUM.

4 . MISS VIDHYA
D/O MAHADEVKUDACHI
AGE 27 YEARS
OCC:AGRICULTURE
R/O INGALI, TAL:CHIKODI–591 201
DIST:BELGAUM.

5 . SMT PARVATI
W/O MAHADEVKUDACHI
AGE 52 YEARS
OCC:AGRICULTURE
R/O INGALI, TAL:CHIKODI–591201.
DIST:BELGAUM

6 . SHRI SHANTVEER
S/O SADASHIV BURJI
OC:AGRICULTURE,
R/O BHOJ, TAL: CHIKODI-591210
DIST:BELGAUM

7. SHRI. SANJEEV
S/O NANDEEPA HATTARGI,
AGE 62 YEARS,
OCC: BUSINESS,
R/O SADASHIVNAGAR,
BESIDE PETROL PUMP ROAD,
BELGAVI, BELGAVI – 590 019.

8. SHRI. RAJEEV
S/O NANDEEPA HATTARGI,
AGED 59 YEARS,
OCC: BUSINESS,
R/O SHIVABASAVA NAGAR, NEAR
KPTCL HALL, BELGAVI,
BELGAVI – 590 010.

9. SHRI. GIRISH
S/O NANDEEPA HATTARGI,
AGE 57 YEARS,
OCC: BUSINESS,
R/O SADASHIVNAGAR,
BESIDE PETROL PUMP ROAD,
BELGAVI, BELGAVI – 590 019.

(AMENDMENT CARRIED OUT IN
RESPECT OF R-7, 8 AND 9 V/O DT
12.06.2024)

……RESPONDENTS

(BY SRI. B S KAMATE, ADVOCATE FOR R1-R5;
R6, 7, AND 9 ARE SERVED;
V/O DATED 30.05.2024 NOTICE TO R8 IS HELD
SUFFICIENT)

THIS RSA FILED U/S. 100 OF CPC AGAINST THE JUDGMENT & DECREE DTD: 12/11/2009 PASSED IN R.A.NO:2/2007 ON THE FILE OF THE FAST TRACK COURT-I, CHIKODI, ALLOWING THE APPEAL, FILED AGAINST THE JUDGMENT AND DECREE DTD: 30/11/2006 PASSED IN O.S.NO.105/2000 ON THE FILE OF THE CIVIL JUDGE (SR.DN), CHIKODI, DISMISSING THE

SUIT FILED FOR DECLARATION AND CONSEQUENTIAL RELIEF OF INJUNCTION.

THIS APPEAL, HAVING BEEN HEARD AND RESERVED AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE HANCHATE SANJEEVKUMAR

CAV JUDGMENT

This Regular Second Appeal is filed by defendant Nos.1 to 3 challenging the judgment and decree dated 12.11.2009 passed in R.A.No.2/2007 on the file of the Fast Track Court-I, Chikodi, (for short ***'the First Appellate Court'***) by which the First Appellate Court reversed the judgment and decree dated 30.11.2006 passed in O.S.No.105/2000 on the file of the Civil Judge (Senior Division), Chikodi (for short ***'the Trial Court'***).

2. For the sake of convenience the rank of the parties is referred to as per their status before the Trial Court.

PLAINT:

3. The plaintiff filed the original suit for declaration and permanent injunction by pleading that the suit

properties are agricultural lands bearing R.S.No.571/3 measuring 7 acres 10 guntas to the extent of 1/3rd share and house property bearing V.P.C.No.1117 of Bhoj Village. Originally the suit properties were standing in the name of Shivaputra Burji, who is brother-in-law of the plaintiff. In the family partition the said suit properties were allotted to the share of Shivaputra Burji. The defendant No.1 is brother of Shivaputra Burji. Shivaputra Burji has acquired the suit property through family partition and accordingly, his name was mutated in the revenue records. Shivaputra Burji died at Sangali on 09.05.1996 leaving behind his wife Annapurna. Shivaputra Burji and Annapurna have no issues. After the death of Shivaputra Burji, name of Annapurna was entered in the revenue records and thus Annapura had become owner and was in possession of the suit property. The defendant Nos.2 and 3 are sisters of deceased Shivaputra Burji, who were given in marriage about 30 years before. The plaintiff is brother of Annapurna, he is looking after the suit schedule land and also during her lifetime, he was looking after her health

and was cultivating the land on her behalf. It is pleaded that relationship of Shivaputra Burji and Annapurna with defendant Nos.1 to 3 were not cordial.

4. Smt. Annapurna during her lifetime was suffering from ill-health because of kidney problem, diabetes and Hyper-tension. Hence, she was admitted to Adhar Hospital at Sangali by the plaintiff. The plaintiff was looking after Smt.Annapurna, since Annapurna was not keeping good health. Therefore, she expressed to Will away the suit properties and accordingly on 19.07.2000 Annapurna executed her First and Last Will in Adhar Hospital at Sangali in the presence of attesting witnesses, Advocate and Notary bequeathing the properties in favour of the plaintiff. It is pleaded that at the time of executing the Will Annapurna was completely in conscious state of mind and she has accordingly, bequeathed the property through the Will.

5. On 26.07.2000 Annapurna died in Waneless Hospital at Miraj. Thereafter, after the death of

Annapurna the plaintiff became absolute owner of the suit schedule lands.

6. The plaintiff had performed the last rites of Annapurna, according to the customs prevailing in the family. Therefore, plaintiff filed suit for declaration of his ownership to the suit lands, by virtue of the Will dated 19.07.2000 and for consequential relief of injunction.

WRITTEN STATEMENT:

7. Defendant Nos.1 and 4 appeared before the Trial Court through their Advocate. Defendants Nos.2, 3 and 5 have not appeared.

8. Defendant No.1 filed written statement and denied the plaint averments. But admitted that suit properties were belonging to Shivaputra Burji. After the death of Shivaputra Burji, his wife Annapurna succeeded to the suit property. After the death of Annapurna defendant Nos.1 to 3 have succeeded to the suit properties as legal heirs of Shivaputra Burji and

Annapurna, as per Hindu Law. It is contended that defendant Nos.1 to 3 are in possession and enjoyment of the properties. Defendant No.1 denied execution of Will dated 19.07.2000 by Annapurna. It is contended that the said Will is created, concocted, forged and manipulated one. Therefore, prays to dismiss the suit.

9. The Trial Court upon the pleadings has framed the following issues:-

> *"1. Whether the plaintiff proves that Smt. Annapurna out of her own wish and will has executed a legal and valid Will on 19.07.2000 in his favour bequeathing the suit properties?*
>
> *2. Whether the plaintiff proves that he is in lawful possession of the suit properties on the date of the suit?*
>
> *3. Whether the Plaintiff is entitled to the relief which he has claimed?*
>
> *4. What order or decree? "*

REASONING OF TRIAL COURT:

10. The Trial Court after appreciating the evidence on record has dismissed the suit of the plaintiff on the reason that the plaintiff was present at the time of execution of the Will and plaintiff has failed to prove that Annapurna was in sound state of mind, at the time of executing the alleged Will. It has assigned reason that mere execution of Will under Section 68 of the Indian Evidence Act, 1872 and under Section 63 of Indian Succession Act 1956, is not sufficient. The plaintiff being propounder of the Will has to remove all the suspicious circumstances, but has failed to remove the suspicious circumstances and therefore, dismissed the suit.

11. Further, the reason given by the Trial Court is that when Annapurna was admitted in the hospital in ICU because of failure of kidneys and was under treatment with external oxygen support, it is not possible for her to execute the Will. It appreciated the evidence that when Annapurna was given external oxygen support and was in

ICU, it is not possible to execute Will by putting signature or thumb impression and came to the conclusion that Annapurna was not in sound state of mind. Further the facts and evidence in the process of making the Will are appreciated and found that the entire process of making the Will is unnatural one, arising suspiciousness about execution of will. Therefore, disbelieved the case of the plaintiff. Discussion of the Trial Court is that when Annapurna was in ICU, she could not give instructions to execute the Will and it was not possible for her to take records pertaining to suit lands to the Hospital and not possible for her to give instructions to the Advocate for preparing the Will, therefore, raised suspiciousness and held that execution of the Will is disproved. Therefore, Trial Court after opining that the entire process of making the Will is unnatural one giving rise to suspiciousness, accordingly disbelieving the case of the plaintiff dismissed the suit.

FIRST APPELLATE COURT:

12. Being aggrieved by dismissal of the suit, the plaintiff has preferred regular appeal before the First Appellate Court. The First Appellate Court has set aside the judgment and decree passed by the Trial Court and decreed the suit and declared that the plaintiff is the owner of the suit land by virtue of the Will.

13. The First Appellate Court has assigned reasons that the plaintiff has proved execution of Will as per the legal requirement under Section 63 of the Indian Succession Act 1975 and under Section 68 of the Indian Evidence Act. Therefore, when the legal requirement of execution of Will are complied with, then it is held that the plaintiff has proved execution of Will and accordingly declared the plaintiff as owner of the said land, hence decreed the suit of the plaintiff as prayed for.

14. Being aggrieved by the judgment and decree passed by the First Appellate Court, the defendant Nos.1 to 3 have preferred the present Second Appeal.

SUBSTANTIAL QUESTIONS OF LAW:

15. This Court on 08.10.2013 while admitting the appeal has framed the following substantial questions of law:-

> *"1. Whether the lower appellate Court was justified in believing the certificate issued by the Doctor without his oral testimony when admittedly the Will is said to have been executed while the executant was in ICU and that admittedly, the executant died within 5 days after execution of the Will ?*
>
> *2. Whether the lower appellate Court has rightly appreciated the evidence available on record while reversing the judgment and decree passed by the trial Court. ? "*

16. Heard arguments of learned counsel for both the parties and perused the records.

SUBMISSIONS OF APPELLANTS/DEFENDANT NOS .1 TO 3 :

17. The learned counsel for the appellant/defendant Nos.1 to 3 submitted that the entire process of making the Will as pleaded by the plaintiff is highly suspicious one and

no prudent man can believe such process of making the Will. Therefore, submitted that just because the legal requirements as per Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act are complied with, that cannot alone be made a ground to say that the Will is properly executed. It is further submitted that the deceased Annapurna was admitted in ICU and was under ventilation and external oxygen was provided, besides applying drips to the veins of Annapurna. But it is the case of the plaintiff that the documents pertaining to lands were taken to the Hospital also and the said documents were handed over to the Advocate for preparation of the Will and under such conditions a scribe and a notary came to the Hospital and have taken instructions from Annapurna to prepare the Will is highly impossible, which creates suspiciousness. It is further submitted that it is highly improbable that the plaintiff while admitting the deceased to the Hospital that too in ICU, the records pertaining to lands were taken along with the deceased, this shows that the plaintiff has anticipated the death of

Annapurna and he was present in the Hospital, which shows the active participation of the plaintiff in getting preparation of the Will and execution of the same, which creates doubt regarding preparation of the Will.

18. It is further submitted that when admittedly the deceased was provided external oxygen support, then the deceased has given instructions for preparation of Will, is not at all believable one. From the date of execution of alleged Will within five days the deceased died. As per the plaintiff the Will is prepared in Adhar Hospital, Sangali, but the deceased died at Wanless Hospital at Miraj. Therefore, these circumstances prove that it could not be possible to execute the Will and therefore, the assertion made by the plaintiff with regard to the Will, is not believable.

19. It is Further submitted that when this being the health condition of deceased Annapurna, then the certificate issued by the Doctor at Adhar Hospital, Sangali as per Ex.P5(c) cannot be believed without corroboration from the Doctor, who has issued the certificate. The

Doctor, who has issued the certificate as per Ex.P5(c) is not examined. Therefore, mere production of certificate of the Doctor is not sufficient, which does not constitute proving of the mental status of the deceased Annapurna. But the First Appellate Court without considering the evidence produced in the course of cross-examination and without appreciating the evidence has blindly gone into the aspect that the Will is proved, by mere compliance of legal requirements. Therefore, submitted the Trial Court in detail has appreciated the evidence on record and rightly came to the conclusion that Will is not proved, thus dismissed the suit. But the First Appellate Court without appreciating the evidence on record only straight away on the aspect that attesting witness is examined, hence legal requirement is complied with, held the Will is proved. This approach of the First Appellate Court is not correct as the First Appellate Court has not appreciated the material on record, hence the approach of the First Appellate Court is perverse in nature, hence prays to set aside the judgment and decree passed by the First Appellate Court. Mere

attesting witness is examined as PW.2 does not constitute valid execution of Will and proving the Will. But it is incumbent upon the plaintiff, being propounder of Will to remove all the suspicious circumstances, but that is not done by the plaintiff. Hence the Trial Court after considering all these evidences on record has rightly dismissed the suit by holding the execution of the Will is not proved. Hence, justified the judgment and decree passed by the Trial Court and found fault with the judgment and decree passed by the First Appellate Court. Therefore, prays to allow the appeal and set aside the judgment and decree passed by the First Appellate Court by confirming the judgment and decree passed by the Trial Court.

SUBMISSION OF COUNSEL FOR RESPONDENTS /PLAINTIFFS:

20. On the other hand, learned counsel for the respondents/plaintiffs submitted that the plaintiff being propounder of the Will has examined PW.2, who is the

attesting witness. Therefore, from the evidence of PW.2 execution of Will is proved. Hence the plaintiff has complied with legal requirements of proving the Will, as per Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act and that is rightly considered by the First Appellate Court. Hence justified the judgment and decree passed by the First Appellate Court. Further submitted that the process of making the Will is proved by the plaintiff as deceased Annapurna had expressed to Will away the properties in favour of the plaintiff and is proved by the evidence of PW.2. PW.2 has deposed the process of preparation of Will, to keep present a notary in the hospital for attestation, and the Doctor has given a certificate that the deceased was in sound mental status and was aware of the worldly affairs. Therefore, it is proved that the deceased was mentally alert and this is rightly considered by the First Appellate Court. It is further submitted that at the time of execution of the Will, the plaintiff was not inside the ICU and he was outside the hospital, and this proves that the plaintiff has not

participated in making of the Will. Therefore, the plaintiff did not play any role in execution of the Will, but the deceased Annapurna on her own will and wish has executed the Will, and that is rightly considered by the First Appellate Court. Therefore, justified the judgment and decree passed by the First Appellate Court. Hence prays to dismiss the appeal.

REASONS:

21. The above two substantial questions of law are considered together in order to avoid repetition of facts and evidence.

22. The plaintiff is the propounder of the Will and he filed suit for declaration that he has become owner of the suit lands by virtue of the Will Ex.P5. It is the case of the plaintiff that attesting witness was present, when deceased was executing the Will and he is examined before the Court. Therefore, the Will is proved.

23. On the other hand, the defendants have stated that the deceased Annapurna was in ICU at Adhar Hospital, Sangali, and she was in feeble health condition, could not give instructions for preparation of Will as she was provided oxygen by external support. Hence, execution of Will is not proved.

24. It is profitable to bark upon the principle of law formulated by the Hon'ble Supreme Court and by this Court regarding proof of Will, to apply them to consider the facts, circumstances and evidence involved in this case.

25. The Hon'ble Supreme Court in the judgment of ***H. VENKATACHALA IYENGAR APPELLANT Vs. B. N. THIMMAJAMMA AND OTHERS***[1] at 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*

[1] ***AIR 1959 SC 443***

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 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 question as to whether the will set the 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 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 referre 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 fully satisfied that it had been validly executed by the testator who is no longer alive.*

26. Further, I place reliance on the judgment of Hon'ble Supreme Court in the case of ***JAGADISH CHAND SHARMA VS. NARIAN SINGH SAINI (DEAD) THROUGH LEGAL REPRESENTATIVES AND OTHERS***[2] 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*

[2] ***(2015) 8 SCC 612***

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.

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."

27. Further, I place reliance on the judgment of Hon'ble Apex Court in the case of ***N. KAMALAM (DEAD) AND ANOTHER Vs. AYYASAMY AND ANOTHER***[3] 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 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

[3] ***(2001) 7 SCC 503***

the case of Girja Datt Singh v. Gangotri Datt Singh [AIR 1955 SC 346] 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 : AIR 1929 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 MLJ 43 : AIR 1927 PC 248] 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 SCC 573 : (1969) 3 SCR 513] 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 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 their 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."

28. 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***[4] at 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 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.*

[4] ***ILR 2008 KAR 2115***

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?

(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?"

29. 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)"*

30. Therefore, Will is legal declaration of the intention of the testator to bequeath his property to the propounder to be carried into effect after his death. Therefore, it is also a burden on the propounder to prove that the testator had intention to bequeath property by placing circumstantial evidence.

31. Upon considering the principle of law laid down as above stated, it is not only sufficient just because legal requirement as per Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act, are complied with that to hold that execution of will is proved, but also suspicious circumstances shall have to be removed. As held above compliance of legal requirement is only first step towards proving execution of Will. Just because legal

requirements are complied with, that cannot in toto prove execution of Will, unless the other surrounding suspicious circumstances are proved to have been removed by the propounder of the Will. PW.2 has stated in his evidence that he knew the deceased Annapurna, her husband and plaintiff and when he heard the fact that Annapurna was admitted at Adhar Hospital, Sangali, he went to see the deceased in the Hospital on 19.07.2000 and when he visited the said Hospital one Balasaheb Desai was also present. It is evidence of PW.2 that while he was talking with Annapurna, she expressed her desire to execute the Will. Accordingly, the said Balasaheb Desai went and brought one Advocate by name Umesh R. Jadhav to the Hospital and at that time Annapurna gave her property documents to the said Advocate Umesh R. Jadhav and requested him to prepare the Will as per her wish. Accordingly the said Advocate Umesh R. Jadhav had taken the said documents and went out of the Hospital and came back after two hours after preparing the Will. It is evidence of PW.2 that the Advocate Umesh R. Jadhav had

read the contents of the Will and thereafter, the deceased Annapurna put her thumb impression and then PW.2 put his signature. This is the evidence given by PW.2. Here the suspicious circumstances is that the deceased Annapurna was admitted to Hospital in ICU and as per the evidence on record, it is revealed that Annapurna was given ventilator and was provided oxygen by external support. When this being the condition of Annapurna, how the deceased Annapurna has given instructions to prepare the Will, is a question to be considered by this Court and in this condition it is highly impossible to believe that the deceased Annapurna has given instructions to prepare the Will. It is an admitted fact that within a period of five days from the date of alleged execution of Will, Annapurna died. Further it is highly improbable circumstances that when the deceased Annapurna was admitted to the hospital by the plaintiff, she has also taken the entire land documents along with her to the hospital and in the hospital, she gave the said documents to the Advocate Umesh R. Jadhav, this is highly improbable circumstances

as deposed by the plaintiff and PW-2. The plaintiff/PW.1 while being examined had deposed that the deceased was under his care and custody and when the health condition of the deceased Annapurna deteriorated, he had admitted Annapurna to Adhar Hospital, Sangali and the deceased was in ICU, PW.2 is the attesting witness and one Advocate, came to the Hospital and prepared the Will. This is how the Will was prepared as deposed by the plaintiff and the same is tried to be supported by PW.2.

32. But considering the circumstances that health condition of Annapurna had deteriorated and she was under external oxygen support, drips were injected to her veins and was under ventilator, under such condition, is it possible for Annapurna to give instructions for preparing the Will, is the question to be considered. Further there is no signature of the deceased found on the Will, but as per the evidence of PWs.1 and 2, the thumb impression of the deceased was taken on the Will. The plaintiff admitted that the deceased Annapurna knows reading and writing

and used to make signature. PW.2 had admitted in the cross examination that the daughter of plaintiff was present in the ICU along with Balasaheb Desai during the preparation and execution of the Will. This proves the active participation of plaintiff in making the Will through his daughter. Therefore, on these two circumstances that the deceased was in ICU with the support of external oxygen and drips was injected and was on ventilator, hence it is highly improbable to believe that the deceased has given instructions for preparation of Will.

33. It is the case of the plaintiff that the Doctor, who had examined Annapurna in ICU had given the certificate as per Ex.P5(c) that Annapurna was in good state of mental condition to give instructions for preparation of Will, but the said Doctor has not been examined. Examination of the Doctor is very much necessary, not because that he has witnessed the execution of Will, but to state in what condition Annapurna was in ICU, to ascertain whether she was in good state of

mind and was able to speak to give instructions and also why the deceased put thumb impression but not made signature, for this purpose the evidence of Doctor ought to have been necessary, but the plaintiff has not examined the Doctor. Therefore, the certificate given by the Doctor as per Ex.P5(c) cannot be believed for want of corroboration by the Doctor. But the First Appellate Court has committed error in believing Ex.P5(c) certificate, accompanied with the Will. Therefore, mere production of certificate Ex.P.5(c) is not sufficient, but Doctor ought to have been examined before the Court, to prove the mental status and health condition of the deceased, whether she was able to give instructions for preparation of the Will. In this regard, the plaintiff being propounder has failed to prove the execution of Will.

34. The Will is solemn document. The intention of the testator to execute the Will shall have to be proved beyond reasonable doubt for the reason that by a document of Will property is conveyed to the propounder.

The testator is in the abode of God. He cannot come to the living world to depose about his Will. Therefore, the propounder must prove execution of Will and intention of testator to Will away the property by removing all suspicious circumstances. Just because the legal requirements are complied with as per Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, it is not sufficient to hold that execution of Will is proved. Thus compliance of legal requirements is only primary step and whatever suspicious circumstances have to be removed. All these can be done by the principle of applying the theory beyond reasonable doubt. Also intention on the part of the testator to bequeath the property in favour of propounder can be proved by the theory of beyond reasonable doubt. Therefore, it is incumbent upon the propounder of the Will shall have to prove that the testator had intention to bequeath the property with all his consciousness. It is the burden on the propounder of Will to prove that at the time of execution of Will the testator was in sound state of mental

health - even though the testator may be suffering from some diseases physically. Then also the burden is on the propounder to prove as to why the natural legal heirs are deviated while executing the Will. Therefore, upon following the principle of law laid down as above stated, considering the facts, circumstances and evidence in this case, though the plaintiff has proved compliance with the legal requirements while executing the Will, but has failed to remove the suspicious circumstances clouded while executing the Will.

35. The First Appellate Court has just swayed away upon compliance with legal requirement, which is brought during the course of evidence by PW.2, by holding that legal requirements as per Section 63 of the Indian Succession Act and 68 of the Indian Evidence Act, the Will is proved. Just by compliance of legal requirements, it cannot be said that Will is proved. The other surrounding circumstances, which are suspicious in nature ought to have been removed by the plaintiff, but upon considering

and appreciating the evidence on record, it is found that plaintiff has failed to remove all these suspicious circumstances in the preparation of the Will.

36. Upon considering the evidence of plaintiff/PW.1 that deceased Annapurna was suffering from a lot of pain, the functioning of Kidney of Annapurna were failed and thus she was admitted to ICU and under ventilation she was kept on saline and oxygen was externally given, when this being the health condition revealed and when the deceased was in ICU, it is highly improbable to believe that the deceased has given instructions for preparation of the Will. This is one of the circumstances, to hold that the Will is not genuine one.

37. Further the other circumstances, is that deceased Annapurna had handed over the documents pertaining to the suit schedule land to the Advocate Umesh R. Jadhav for preparation of the Will. When Annapurna was admitted to the Hospital in ICU, it is highly impossible to believe that she has also taken the

documents pertaining to the suit schedule lands along with her to the Hospital. While admitting a person in the Hospital, the paramount consideration would be to give attention to the patient, but not taking property documents to the Hospital. It is also one of the circumstances, to disbelieve the execution of the Will.

38. Ex.P5(c) is the certificate issued by the Doctor annexed to the Will, but Doctor is not examined. Under these facts and circumstances of the case, without corroboration form the evidence of the Doctor, the certificate Ex.P5(c) cannot be believed. But the First Appellate Court has not at all considered these aspects and has not at all made appreciation of evidence in this regard, resulting into perverse approach by the First Appellate Court. It is claimed by the plaintiff that he was not present in ICU, but was outside the Hospital, when Annapurna was giving instructions for preparation of the Will. Therefore, in this regard it is proved that the plaintiff has played a dominant role in the process of making of

Will. Even though the Will is stated to have been executed, but for the reasons above discussed and while appreciating the evidence on record, it is proved that execution of Will is not believable one. Upon considering all these scenarios in the alleged preparation of Will as pleaded and deposed by the plaintiff and PW-2, it is fully under the suspicious circumstances. When Annapurna requested Balasaheb Desai, he had gone out of the Hospital and brought the Advocate, and the said Advocate had prepared the Will. Then the question is who paid professional fees to the said Advocate for preparation of the Will, for which the plaintiff stated that he has not paid professional fees to the Advocate and also expressed ignorance as to who has paid professional fees. Hence in these circumstances, certainly the deceased Annapurna could not pay the professional fees to the Advocate for the preparation of Will. Even the plaintiff might have stated that after some time, he might have paid the fees, but that is also not stated in the evidence. But during the course of cross-examination of PW.2 it is revealed that the

daughter of plaintiff was present in the ICU, at the time of preparation of Will. Therefore, it is proved that there is active participation of the plaintiff in the process of making the Will, though he was outside the hospital, but through his daughter. Hence appreciating all these circumstances, it is proved that the Will is found to be not a genuine one and not executed by Annapurna as it is thickly clouded with suspicious circumstances.

39. The deceased Annapurna was suffering from so many ailments, when she was admitted to ICU in the hospital and from the date of the alleged execution of Will within five days, she died. Before that the deceased Annapurna was under ventilation and was given oxygen through external support as her kidney functioning had failed. Therefore, under such critical health condition of Annapurna, it is highly unbelievable fact that deceased had taken property documents to hospital and given instructions for preparation of the Will and executed the Will. These evidences are not at all appreciated by the

First Appellate Court. Therefore, the approach of the First Appellate Court is found to be perverse in nature.

40. Further though it is the pleading and evidence of PW.1 that Annapurna was admitted in Adhar Hospital at Sangali and then at Waneless Hospital at Miraj, during last days of deceased Annapurna, but the plaintiff has not produced any medical documentary evidence to prove that the deceased was admitted in the Hospitals at Sangali and Miraj. It is the case of the plaintiff that he was looking after the deceased Annapurna during her last days and had admitted the deceased to the Hospital at Sangali and Miraj, but the plaintiff has not at all produced any medical evidence in this regard to prove that the deceased was admitted in the Hospital. From the evidence of PW.2, it is proved that the deceased was living in Bhoj Village and the plaintiff is not resident of Bhoj Village, but he is residing in Ingali Village. Therefore, the plaintiff has not proved that the deceased was residing along with plaintiff during her last days and plaintiff admitted her to the

hospital as above stated. Therefore, upon appreciating the evidence on record all these circumstances, it is highly unbelievable that the deceased executed Will in favour of the plaintiff. This is rightly considered by the Trial Court disbelieving the case of the plaintiff and rightly dismissed the suit. But the First Appellate Court has not considered these aspects and only on the ground that legal requirements are complied with and on that reason only reversed the judgment and decree passed by the Trial Court, which is not correct approach and it amounts to perverse in nature. Therefore, the judgment and decree passed by the Trial Court requires to be confirmed by setting aside the judgment and decree passed by the First Appellate Court.

41. It is the case of the plaintiff that the deceased was admitted to Adhar hospital at Sangali, wherein the deceased has instructed and executed the Will, later on at Wanless hospital at Miraj - the deceased died within five days from the date of alleged executed of the Will, but the

plaintiff has not produced any medical documentary evidence proving the deceased was admitted to the Hospitals at Sangali and Miraj. But the only document produced is the Doctor's certificate as per Ex.P5(c) stated to have been issued by the Doctor/Medical Officer at Adhar hospital, Sangali. Mere production of the certificate is not sufficient in the absence of providing medical treatment at Adhar hospital, Sangali. Therefore, in this back drop examination of Doctor, who has issued certificate Ex.P5(c) assumes significance to prove the physical and mental health condition of the deceased. Therefore, non-examination of the Doctor, who has issued the certificate Ex.P5(c) is fatal to the plaintiffs case, hence proof of physical and mental health condition is necessary in the case. As depicted by the plaintiff that there ought to have been proof by producing medical documentary evidence for having admitted the deceased in the hospital, as discussed above, but not produced. Therefore, examination of the Doctor in support of issuance of the certificate as per Ex.P5(c) is inevitable. Thus, in the

absence of non-examination of Doctor in the above said circumstances, it is doubtful about execution of Will in the Hospital as projected by the plaintiff. Therefore, execution of the Will is not conclusively proved by the plaintiff. Hence, the plaintiff has failed to prove the execution of the Will. Accordingly, for the aforesaid reasonings, I answer point No.1 in the 'negative'.

42. Accordingly, I answer substantial question of law No.1 in the negative by holding that 'just believing the certificate of the Doctor holding that the Will is proved', is not acceptable one and accordingly execution of the Will is not proved.

43. Substantial question of law No.2 is answered in the negative holding that the Trial Court has rightly appreciated the evidence on record, but the First Appellate Court has not rightly appreciated the evidence on record. Hence the First Appellate Court is not justified in reversing the judgment and decree passed by the Trial Court.

Hence, I proceed to pass the following:-

ORDER

a. This Regular Second Appeal is ***allowed***.

b. The judgment and decree dated 12.11.2009 passed in R.A.No.2/2007 by the Fast Track Court I, Chikodi, is set aside.

c. The judgment and decree dated 30.11.2006 in O.S.No.105/2000 by the Civil Judge (Senior Division), Chikodi, stands confirmed.

d. Registry is directed to transmit the Trial Court Records forthwith.

e. Draw the decree accordingly.

f. No order as to costs.

Sd/-
(HANCHATE SANJEEVKUMAR)
JUDGE

NG*
CT: RK