REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6076 OF 2009

SHIVAKUMAR & ORS ..... Appellant(s)

Versus

SHARANABASAPPA & ORS ..... Respondent(s)

J U D G E M E N T

Dinesh Maheshwari, J.

PRELIMINARY AND BRIEF OUTLINE

1. By way of this appeal, the plaintiff-appellants have challenged the judgment and decree dated 26.10.2007 passed by the High Court of Karnataka at Bangalore in Regular First Appeal No. 910 of 2001 whereby, the High Court reversed the judgment and decree dated 12.09.2001 passed by the Court of Civil Judge (Senior Division), Koppal in Original Civil Suit No. 56 of 1994.

The civil suit aforesaid was filed by the plaintiff-appellants for declaration and injunction, essentially with the submissions that they had acquired ownership rights in the suit properties (described in Schedules A to D attached to the plaint) on the basis of a Will dated 20.05.1991 executed by

the owner of the said properties Sri Sangappa son of Pampanna Shettar of Koppal; and that a trust created by the defendants on 28.05.1994, in the name “Shri Sangappa Pampanna Gadagshettar Trust, Koppal” in relation to the suit properties, was illegal, void and not binding on the plaintiffs. The contesting defendants i.e., defendant Nos. 1 to 5 refuted the claim so made by the plaintiffs while questioning the genuineness of the alleged Will dated 20.05.1991. The defendant No. 7, one of the erstwhile trustees of the said trust, however, admitted and endorsed the claim of the plaintiffs.

After framing necessary issues and after taking the oral and documentary evidence adduced by the parties, the Trial Court, in its judgment dated 12.09.2001, decided the principal issue relating to the said Will dated 20.05.1991 in favour of the plaintiffs and, while also returning its findings on other necessary issues in favour of the plaintiffs, proceeded to decree the suit with declaration that the trust created by the defendants on 28.05.1994 was not binding on the plaintiffs, particularly in relation to the suit properties; and that the plaintiffs were owners of the suit properties as claimed. The Trial Court also issued injunction against defendant Nos. 1 to 5 that they shall not interfere with the plaintiffs’ peaceful possession and enjoyment of the suit properties.

The judgment and decree so passed by the Trial Court were questioned by the contesting defendants in the High Court by way of the said first appeal. The High Court, in its impugned judgment dated 26.10.2007 proceeded to allow the appeal while reversing the decision of Trial Court on

the principal issue relating to the genuineness of the Will in question. The High Court found several unexplained suspicious circumstances as also discrepancies in the Will in question and held that the alleged Will dated 20.05.1991 was not a genuine document. Being aggrieved, the plaintiffs have preferred the instant appeal.

THE LEAD PERSONS, PARTIES, WITNESSES AND DOCUMENTS AS ALSO THE PROPERTIES INVOLVED

2. It is but apparent that genuineness of the Will dated 20.05.1991, said to have been executed by Sri Sangappa son of Pampanna Shettar of Koppal, allegedly bequeathing the suit properties to the plaintiffs, is in question in this case.

3. For comprehension of the subject-matter and for effective determination of the questions raised in this appeal, we may take note of the principal persons involved in the matter with their respective roles as also the documents and the properties in question as *infra:*

The testator of the Will in question:

Late Sri Sangappa son of Pampanna Shettar of Koppal.

He was a businessman and was also the Chairman of Sri Gavisiddeshwara V.V. Trust, Koppal (which is different than the trust questioned in the suit). Late Smt. Mahantamma was his wife.

Undisputedly, both the testator and his wife died in a car accident on 20.05.1994. The testator and his wife did not have any surviving children, as their children had died in infancy and they were issueless on the date of their death.

The plaintiffs (the appellant Nos. 1 to 3 herein):

The plaintiffs S/Sri Shivakumar, Shashidhar and Karibasewaraj, all sons of Basetteppa, claim to be the legatees under the Will in question. They are full-brothers and are grand-nephews of the testator's wife. According to the plaintiffs, they were brought up by the testator and his wife and they were staying with the testator.

The contesting defendants (Respondent Nos 1 to 4 herein):

The defendant No. 1 Sri Sharanabasappa son of Pampanna is the younger brother of the testator; the defendant Nos. 2 and 3 Smt. Basavannemma and Smt. Siddama are the sisters of the testator; the defendant No. 4 Sri Pampanna son of Basappa and defendant No. 5 Sri Siddanna son of Fakirappa are the nephews of the testator.[1]-[2]

The defendant Nos. 6 to 8:

The defendant No. 6 Sri Gurushantappa, No. 7 Sri Veerabasappa and No. 8 Dr. N.S.Gaikwad were joined in the suit for being the members of the trust created by other defendants, which was questioned by the plaintiffs. The defendant No. 7 Sri Veerabasappa was said to be a close associate of the testator in running Gavisiddeshwar College of which, the testator was the Chairman of

~~1The defendant No. 2 Sm~~t. Basavannemma expired during the pendency of the suit and the fact was noted on the cause-title.

2 The defendant No. 4 Sri Pampanna (respondent No. 3 herein) expired during the pendency of this appeal and his legal representatives were brought on record by the order dated 30.03.2015.

Governing Body. This defendant was not related to either of the parties; he, however, filed a separate written statement, admitting and endorsing the claim of the plaintiffs.[3]

The trust in question: Sri Sangappa Pampanna Gadagshettar Trust: The defendants created this trust on 28.05.1994 (in the name of the testator) with inclusion of the properties in question, to pursue philanthropic and charitable purposes. The creation of this trust was challenged in the suit.

Special mention: Sri Gavisiddeshwara Swami, Koppal (Swamiji): According to the plaintiffs, the testator was a philanthropic and a devotee of Sri Gavisiddeshwara Swami, Koppal[4]; and the contested Will was opened in the presence of Swamiji. However, Swamiji was not examined as a witness in this case.

The key witnesses:

PW-1 Sri Basetteppa:

He is father of the plaintiff Nos. 1 to 3. He allegedly used to assist the testator in his business.

PW-3 Sri Radhakrishnarao and PW-4 Sri Ayyanagowda Hiregowdar: They are claimed to be the attesting witnesses of the contested Will.

PW-8 Sri Bhusnoormath, Advocate:

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3 The defendant No. 6 Gurushantappa expired on 13.10.2001. He was a trustee of the trust in question and no substitution was made in his place. The name of defendant No. 7 Veerabasappa was deleted from the array of parties before the High Court on 24.07.2006. The defendant No. 8 has remained on record as respondent No. 5 in this appeal.

4 Hereinafter also referred to as 'Swamiji'.

He was a friend and advocate of the testator. Allegedly, the testator handed over the contested Will to him in a sealed cover with the instructions that the same was to be opened after his death, only in the presence of Swamiji. The contested Will was allegedly opened after the sudden demise of the testator and his wife in the presence of Swamiji on 29.05.1994.

Relevant exhibited documents:

Ex. P.2: Will cancellation deed 26.09.1990 whereby, the testator cancelled an earlier Will executed by him in the year 1974.

Ex. P.3: Handwritten draft of the Will said to have been prepared by the testator and kept in the sealed cover with the executed Will.

Ex. P.4: The contested Will dated 20.05.1991.

Suit properties:

Schedule A: Consisting of the parcels of land in Sy. No. 631 and Sy. No. 632. These were in the name of the testator's wife as per the relevant records.

Schedules B, C & D: Consisting of shops and houses; admittedly they belonged to the testator.[5]

SUMMARY OF THE PLEADINGS; ISSUES; AND EVIDENCE

4. Having taken note of the persons and the properties involved in the matter, we may now summarise the pleadings of the parties, the issues

5 The testator owned several other properties too that were not mentioned in the Will, and hence, are not a part of the suit properties.

framed by the Trial Court, and the evidence led by the parties for appreciating the respective findings of the Trial Court and the High Court.

The plaint:

The plaintiff-appellants filed the suit aforesaid seeking declaration and injunction with the averments, *inter alia,* that Schedule A to D properties were owned and possessed by the testator Sri Sangappa Shettar of Koppal; that Schedule A properties, being the parcels of land, were standing in the name of the testator's wife Mahantamma but were purchased by him. It was averred that on 20.05.1994, the testator Sangappa Shettar and his wife died in a car accident on the National Highway between Hubli-Shiggoan. It was also averred that both of them died issueless as the children born to them had died in infancy. The plaintiffs further pointed out the relations of the parties with the testator and alleged that the testator was earlier joint with his family but, in or around the year 1964, a partition took place and thereafter, he remained separate until his demise. The plaintiffs asserted that their mother Mahadevamma was the sister of the wife of testator; that the testator Sri Sangappa, out of love and affection, brought up the plaintiffs by keeping them in his house; that the marriage of the plaintiffs' father (PW-1) was performed by the testator in the year 1972; and that the deceased testator also requested the father of the plaintiffs to assist him in the business. The plaintiffs further averred that the deceased testator executed a Will in the year 1974 but, being disillusioned by the behaviour of legatees, he cancelled the same on 26.09.1990. The plaintiffs pointed out that the deceased testator

was the Chairman of Sri Gavisiddeshwara V.V. Trust, Koppal and ardent devotee of Sri Gavisiddeshwara Swamiji of Koppal. The plaintiffs also averred that the deceased testator changed the name of the business from Gurukrupa Stores to Gurukrupa Traders.

The plaintiffs further averred that on 20.05.1991, the testator Sri Sangappa Shettar executed a Will bequeathing Schedule A properties in favour of the plaintiffs jointly; Schedule B property in favour of the plaintiff No. 1; Schedule C property in favour of the plaintiff No. 2; and Schedule D property in favour of the plaintiff No. 3 whereas his remaining properties were directed to be kept intact and plaintiffs were directed to apply those properties for charitable purposes. The plaintiffs asserted that the deed of the Will in question was executed by the deceased voluntarily and in sound state of mind; and after due execution, he kept the Will in a sealed cover and deposited the same with Sri Bhusanoormath, Advocate (PW-8) with directions to open the same after his death in the presence of Swamiji. According to the plaintiffs, after the death of the testator Sangappa, PW-8 Bhusanoormath, Advocate intimated about the Will and the same was opened on 29.05.1994 in the presence of Swamiji.

The plaintiffs maintained that the relationship between the deceased testator and the defendants was not cordial until his death; however, the deceased bequeathed a house to defendant no. 3 so that she may reside therein. The plaintiffs alleged that the defendants were well aware about the Will executed by the testator and yet created the trust in question which was,

in any case, not of any adverse effect on the rights of the plaintiffs who had become owners of the suit properties by virtue of the Will executed by the testator. With these averments, the plaintiffs sought declaration against the trust so created by the defendants as also on their ownership rights over the properties in question and further for injunction against the defendants.

The written statement by defendant No. 1 as adopted by defendant Nos. 2-6 and 8:

The contesting defendants refuted the plaint averments and contended, *inter alia*, that the suit was not maintainable under the provisions of Section 92 of the Code of Civil Procedure, 1908 ('CPC'); that the trust in question was not impleaded as party; and that the description of suit properties was not correct.

While stating that both Sri Sangappa and his wife died in the vehicular accident that took place at about 3:15 p.m. on 20.05.1994, these defendants stated that their dead bodies were identified after about 18 hours; and that the defendant Nos. 1 to 3 performed their last rites. The allegation regarding partition was denied.

The contesting defendants further denied the assertions that the plaintiffs were brought up by Sangappa and maintained that the plaintiffs were living with their father and mother in a rented house. The contesting defendants alleged that the relations between the deceased and the father of the plaintiffs were strained; and that father of the plaintiffs was, in fact, running the business in the name of Sri Karibasavashwar Trading Co.

opposite to the place of business of the deceased Sangappa that was running in the name of Gurukrupa Traders.

While questioning the Will propounded by the plaintiffs, the contesting defendants alleged that the plaintiffs are interested in the properties of the deceased and had forged the Will with ulterior motives. These defendants denied that the deceased prepared the Will and kept the same in the sealed cover and deposited it to the Advocate with instruction to open the same in the presence of Swamiji. The contesting defendants recounted various suspicious circumstances concerning the Will in question while alleging, *inter alia,* that the Will did not bear the signature of deceased Sangappa; that there was a mismatch in Hindi Calendar date with that of English Calendar; that the past events were stated in the Will in such a way that they would happen in future; that various blanks were left in the description of the properties and even otherwise, the description was incorrect; that the amount bequeathed to Rajeshwari and Siddabasemma was not shown; and that the description of the properties under the Will was inconsistent, incorrect and incomplete.

The contesting defendants also alleged that after the death of Sangappa and his wife, they became the Class II heirs of the deceased Sangappa according to Hindu Succession Act and the trust was created for implementation of the noble thoughts of the deceased. The contesting defendants also alleged that the declaration of the trust on 28.05.1994 was prior to the creation of the deed of disputed Will, which was allegedly opened

on 29.05.1994. It was also alleged that the defendant No. 7 started acting against the interest of the trust and he was removed from the trust by way of a resolution.

The written statement by defendant No. 7- supporting the plaintiffs

The defendant No. 7 filed a separate written statement, essentially admitting the claim of the plaintiffs. This defendant stated that he was a close associate of the deceased in running Gavisiddeshwar College; and that he was acquainted with the handwriting of the deceased. According to this defendant, after the demise of Sri Sangappa, the advocate met him and informed about the trust with religious and charitable objects to be formed out of the properties not bequeathed. Further, one day he stopped for paying respect to Swamiji near the house of Principal Mallikarjun Somalapur; and the advocate informed Swamiji about the Will left by the deceased; and Swamiji instructed that the Will be given effect to, which may give peace to the departed soul.

The defendant No. 7 further stated that the advocate handed him over a xerox copy of the Will and he was convinced about its genuineness after examining the same and after enquiring from the attesting witnesses; and he also found that the draft was in the handwriting of the deceased. This defendant also referred to the proceedings of the meeting of the trust on 10.06.1994, where a suggestion was made that the legatees under the Will should go and establish their claim in the Court of Law but he asserted that the Will should be given effect to as, according to him, litigating against the

plaintiffs was equivalent to asserting a false case that the deceased had not executed his Will and therefore, he disassociated himself from the trust.

Issues

On the pleadings of the parties, the Trial Court framed the following issues for determination of the questions involved in the matter:-

> "1.Whether the plaintiffs prove that the deceased Sangappa bequeathed the suit properties in their favour under the will deed dt: 20.05.1991?
> 2. Whether the defendants 1 to 5 prove that the Commission Agency shop business was kept joint in the partition of 1954, held during the life time of father of deceased Sangappa?
> 3. Whether the suit is not maintainable for not impleading Sri Sangappa Pamapnna Gadadshettar Trust, Koppal, as a party to the suit?
> 4. Whether the suit is not properly valued and court fee paid is not correct?
> 5. Whether the plaintiffs are entitled for the relief of declaration that the trust created under the name Sri Sangappa Pampanna Gandshettar Trust, Koppal, is illegal, void and not binding on them?
> 6. Whether the plaintiffs 1 to 3 are entitled for the relief of declaration that they are the joint owners of suit A schedule properties?
> 7. Whether the plaintiff No. 1 is entitled for the relief of declaration that he is the owner of suit B schedule properties?
> 8. Whether the plaintiff No. 2 is entitled for the relief of declaration that he is the owner of suit C schedule properties?
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> 9. Whether the plaintiff No. 3 is entitled for the relief of declaration that she is the owner of suit D schedule properties?
> 10.Whether the plaintiffs are entitled for the consequential relief of perpetual injunction against the defendants?
> 11. Whether the defendants are entitled for exemplary costs of Rs. 30,000?
> 12. What decree or order?"

Evidence

In order to prove their case, the plaintiffs examined as many as 8 witnesses, the material among them being their father Sri Basetteppa (PW-1); the two attesting witnesses of the Will in question Sri Radhakrishnarao (PW-3) and Sri Ayyanagowda Hiregowdar (PW-4); and the advocate Sri Bhusnoormath (PW-8), to whom the Will was allegedly handed over in a sealed cover and who opened the cover in the presence of Swamiji. The plaintiffs also produced 17 documents including Ex. P.2: the Will cancellation deed 26.09.1990 whereby, the testator cancelled the earlier Will executed by him in the year 1974; Ex. P.3: handwritten draft of the Will said to have been prepared by the testator and kept in the sealed cover with the executed Will; and Ex. P.4: the contested Will dated 20.05.1991. The defendants examined 2 witnesses and produced 16 documents.

FINDINGS OF THE TRIAL COURT

5. It is but apparent that the pivotal question in this case had been as to whether the deceased Sangappa bequeathed the suit properties in favour of the plaintiffs under the Will dated 20.05.1991? The Trial Court took up issue Nos. 1 and 6 to 10 together and found that Will in question was executed in accordance with Section 63 of the Indian Succession Act, 1925[6] and the same was proved as per the requirements of Section 68 of the Indian Evidence Act, 1872[7]; and the plaintiffs got the rights as claimed thereunder. The relevant aspects of the findings of the Trial Court could be summarised as follows:

6 Hereinafter referred to as 'the Succession Act'.
7 Hereinafter referred to as 'the Evidence Act'.

The Trial Court held that all the circumstances establishing that PW-8 was handed over the cover containing the Will in question and its draft and of his opening the same before Swamiji on 29.05.1994 cannot be suspected as he had no personal gain from the plaintiffs and had no enmity with the defendants.

The Trial Court further held that PW-3 and PW-4 have given the details about the Will but it was not necessary that they would meticulously know the contents of the Will; that both have unanimously spoken about the deceased Sangappa having shown them the typed Will, himself having read out the contents, and having signed before them. The Trial Court yet further observed that neither the Will was drafted nor it was got typed in the presence of the attesting witnesses and everything was ready for execution and therefore, any more details regarding typing of Will of the deceased were not expected. The Trial Court found that the Will in question was duly identified by the said witnesses as Ex. P. 4 and the signatures of Sangappa were also identified as Ex. P. 4 (a), (b) and (c); the signature of PW-3 was at Ex. P.4 (d) and that of PW-4 at Ex. P. 4 (f). The signatures of other two witnesses were also identified as Ex. P. 4 (e) and Ex. P. 4 (g). Thus, according to the Trial Court, the mode of proof as provided under Section 68 of the Evidence Act stood duly complied with.

The Trial Court also noticed and recounted various features which, in its opinion, lend credence to the factum of existence of the Will in question. The Trial Court observed, *inter alia*, that the draft of the Will was prepared in

the handwriting of the deceased as Ex. P.3; that PW-1 was a relative of the deceased who had been helping the deceased in business and was acquainted with the handwriting and signature of deceased; and thus, the handwriting and signature were identified as per Section 47 of Evidence Act. The Trial Court also observed that the draft was in the cover containing the executed Will and there was no chance to open the sealed cover; and that even if the Will did not contain all what was written in Ex. P.3, it was not a ground to raise any suspicion.

The Trial Court further observed that the fact that the deceased had taken help of PW-1, a distant relative, in presence of close relative like defendant No. 1 and his sons, was sufficient to hold that there was no love lasting between the deceased and the defendant No. 1 and his sons. The Trial Court observed that indisputably, the earlier Will, executed in the year 1974, was cancelled in the year 1990 but therein too, the defendant No. 1 and his family had not been given anything; and the intention of the deceased was clear that he was not willing to give anything to the defendant No. 1 and his family. The Trial Court also referred to the fact that defendant Nos. 2 & 3, the sisters of the deceased, did not come before the Court to speak against the Will in question.

As regards connectivity of the deceased with the plaintiffs, the Trial Court referred to the fact that in the admission forms of the plaintiff No. 1 pertaining to the years 1991-92 and 1993-94 for I.U.C. classes in Gavisidddeshwar College, Koppal, the deceased had signed in place of the

guardian; and as per the address given in those applications, he was staying in Warkar Galli C/o Sangappa Gadedshetter. Hence, the allegations of the defendants that the plaintiffs were staying separately were rejected. The Trial Court observed that even if father and mother of the plaintiffs were later on staying separately due to difference of opinion in women-fold, the fact remained that, prior to the year 1993, the plaintiffs and their parents were staying with the deceased as seen by the voter lists (Exs. P.12-16) of Koppal Town pertaining to years 1975 to 1993.

As regards the state of mind of the deceased, the Trial Court observed that the deceased was in sound state of mind at the time of execution of Will; and he died 3 years after making of Will and, on the day of his demise, had gone to attend the marriage 100 kms away, which showed that he was capable of managing himself. The Trial Court also observed that some of the discrepancies indicated by the defendants had essentially arisen because of self-scribing of the Will and it cannot be said that the deceased was a feeble person.

Discrepancies/Suspicions Answered by the Trial Court:

The Trial Court also proceeded to deal with some of the discrepancies pointed out by the defendants in the Will in question and answered the same as follows:

The Trial Court observed that the discrepancy in Hindi and English Calendar dates as found in Ex. P.3 cannot be made a ground to disbelieve the entire Will, particularly when the date mentioned in the Will i.e.,

20.05.1991 was falling on Monday and the same had been the statements of PW-3 and PW-4. This discrepancy, according to the Trial Court was of no bearing on the substance of the matter.

The Trial Court further observed that absence of property numbers cannot be a ground to hold that the Will was a forged one; and that the location of house property either in Warkar Galli or Katarki road was inconsequential so far as giving effect to the Will, as the deceased wanted to give the property with the boundaries mentioned therein. Similarly, the property shown as item number 2 in Schedule D was available with municipal number and was admittedly belonging to the deceased Sangappa. Therefore, according to the Trial Court, any discrepancy in particulars was of no bearing; and the blanks were also not casting any doubt or suspicion on the Will in question. The Trial Court further observed that certain inconsistencies or certain improper directions may not be called as suspicious circumstances; and that though the description of property in para 5 of the Will did not disclose the name of the legatee to whom it was bequeathed but, that too was not a circumstance to disbelieve the entire Will.

The Trial Court yet further observed that non-registration of Will cannot raise the presumption of forgery and fabrication. The Trial Court also observed that the reason for keeping the Will secret was that the legatees under the earlier Will were not respecting the feelings of the deceased and hence, the deceased kept everybody guessing about the contents of his last Will.

As regards the suspicious circumstance asserted by the defendants that deceased had not left anything for his wife in the Will executed in the year 1991, the Trial Court observed that when, apart from the properties shown in the Will, the deceased was leaving other properties too, definitely those properties would have gone to his wife and hence, not making the provision for wife in the Will was not a ground that could be raised as suspicion. The Trial Court also observed that in para 3 of the Will, 4 acres of the land of Irkalgada was given to Gopur Basaveshwara Temple, which clearly showed that the deceased had given properties to charitable purposes also.

As regards entering of the names of the legatees in the Will by the deceased by filing an application to municipality on 04.09.1993 during his life time, the Trial Court observed that such entries were of no legal effect and do not operate against the Will in question.

As regards the question raised by the defendants that even the past events were stated in the Will as if to happen in future, the Trial Court observed that in para 4 of the Will, the deceased had stated that Sangappa Uttangi had promised to vacate the shop and godown in the year 1990 and though the wording should have been different when the Will was written in the month of May 1991, but such a fact was irrelevant because Uttangi was a tenant and even if he had continued, that would not have affected the rights of legatees under the Will.

In relation to the suspicious features pertaining to the documents in question i.e., the draft of the Will Ex. P.3 and the deed of Will Ex. P.4, the Trial Court observed that only the strong suspicious circumstances were required to be explained by the propounder of the Will; and proceeded to dismiss the suspicions suggested by the defendants, with the observations and findings, *inter alia*, as follows :

The Trial Court observed that the loose sheets were removed from the exercise note book and used by the deceased to write the draft but, there was no evidence to show that the entire draft was made on one day; and the deceased might have written some pages on some day and some pages on some other day. After noticing that chronological numbers were not available on such loose sheets, the Trial Court observed that the draft could be used to read the intention and to interpret the Will Ex. P.4 but, it cannot be used to nullify the intention of the deceased. In this sequence, the Trial Court also observed that the persons challenging the Will were not expected to get any property through succession because, in the event of the demise of Sangappa alone, the properties would have gone to his wife.

As regards non-examination of the typist, the Trial Court observed that it was not at all a suspicious circumstance because the Will was a secret document and nobody, including the propounders, knew as to where the Will was typed.

Though the very opening recital in the Will in question mentioned about the likelihood of an accident but in this regard, the Trial Court observed

that none except deceased himself could give explanation as to what was the intuition for him to write in the Will about accident and death in the accident.

As regards the document itself (Ex. P.4), the Trial Court noticed that page numbers 1, 2 and 5 of the Will were green coloured, whereas the colour of page numbers 3 and 4 was not the same but observed that different coloured sheets might have been used by the typist.

The Trial Court, of course, noted the features that the signature of the testator on page number 1 of the document in question (Ex. P.4) was made with an ink pen whereas ballpoint pen was used on the next page but, observed in this regard that one of the witnesses had spoken that the ink pen did not write properly so the ballpoint pen was used. The Trial Court further observed that so far putting the signatures before the witnesses was concerned, there was no doubt that Ex. P. 4 (a) (b) & (c) were the signatures of the deceased, as proved in the testimonies of the attesting witnesses. The Trial Court yet further observed that the Will was kept by the deceased in sealed cover and this was a strong circumstance to show that the execution of Will by the deceased cannot be suspected.

In its conclusion, the Trial Court held that from every angle, the Will in question was natural; and the plaintiffs had discharged their burden of proving the same and also dispelled the suspicious circumstances stated by the defendants. The Trial Court, accordingly, held that overall reading of the Will indicated that the deceased had written the same with an intention of

bequeathing the properties to the legatees. Issue Nos. 1 and 6 to 10 were, therefore, decided in favour of the plaintiffs.

The Trial Court also returned the findings on other issues in favour of the plaintiffs and, accordingly, decreed the suit with declaration and injunction as noticed hereinbefore.

REVERSAL BY THE HIGH COURT

6. In appeal by the contesting respondents against the judgment and decree so passed by the Trial Court, the High Court took note of the material on record as also the rival contentions and framed two points for determination as follows:

> "i) Whether the plaintiffs proved that the deceased Sangappa bequeathed his properties in their favour under the will dated 20.5.1991?
> ii) Whether the trial Court was justified in holding the will dated 20.5.1991 executed by Sangappa as genuine or not?"

In relation to both the points aforesaid, which essentially revolved around the question of genuineness of the Will in question, the High Court took note of the principles exposited by this Court in the cases of ***Smt. Indu Bala Bose and Ors. v. Manindra Chandra Bose and Anr.*****: (1982) 1 SCC 20** and ***Smt. Jaswant Kaur v. Smt. Amrit Kaur and Ors.:*** **(1977) 1 SCC 369** and thereafter, proceeded to examine the basic contentions of the defendants that by its very nature, the Will appeared to be a fabricated document. After taking note of the discrepancies in the document itself and other unnatural circumstances as also after analysing the evidence of the star witnesses PW-4 and PW-8, the High Court found that the Trial Court had

erred in deciding the relevant issue in favour of the plaintiffs and, while reversing the findings of the Trial Court, held that the contested Will was not a genuine one. As the consequence, the judgment and decree passed by the Trial Court were set aside. Of course, as regards the question of possession, the High Court left it open for the contesting defendants to take recourse to appropriate remedies in accordance with law.

As regards discrepancies in the document in question, about the difference of the colour of the three sheets used and in the alleged signatures of the testator, the High Court meticulously examined the document and recorded its observations and findings as follows:

> "24. Keeping the observations of the Hon'ble Supreme Court in view, the WILL would have to be looked into since it has been strenuously contended by the learned senior counsel for the appellant that the very sight of the WILL would indicate that the same has been fabricated. The original of the WILL dated 20.5.1991 is marked as Ex.P4 which is available in the records secured from the Court below. The same is typed in Kannada script on three sheets which are normally used for typing papers which are submitted to Court. The colour of the three sheets are not similar. **The first sheet is light green, the second sheet is very light in colour (almost white) and the third sheet is darker among the three. At the outset, it is clear that all the three sheets are not from the same stock and if the same was got typed from a typist in a normal course as claimed, the sheets could not have been different from one another**. The alleged signature of the testator is found at the bottom of each page on the facing side only. **Though there is typed matter on the reverse side at pages 2 and 4 the same does not contain signatures. Even the signatures found on the facing sheet are not uniformly affixed.** On first page the signature is more than one inch below the last line of the typed matter and has the appearance of a prefixed signature. The second sheet (page-3) contains signature near to the typed matter. The last sheet (page 5) has the signature which is at a distance of about an

> inch below the last line of the typed matter. The name of the alleged testator typed below the signature has all indications of the same being typed below an existing signature. This is evident from the fact that the name would not have been typed so low from the typed matter, particularly when the place 'Koppal' and date typed on the left side of the sheet is at a lesser distance from the typed matter and are not in alignment with each other. The space provided for signature of four witnesses seems very unnatural and even in that circumstance the name of the alleged testator would not have been typed so low if it was a natural typing on a blank sheet. **The first page and last page have been signed using fountain ink pen but the pen used is not similar to one another. The second sheet is signed by a ballpoint pen.** The pattern of signatures if compared with the earlier admitted WILL dated 29.6.1990 which was registered but later revoked, which is marked as Ex.P1 would indicate uniform pattern immediately below the written matter without any gap and even a small correction has been attested, whereas in the propounded WILL, blanks have been left. **It does not require a detective like Sherlock Holmes to notice these discrepancies which are visible to naked eye and the very sight of the WILL does not inspire confidence that it could be genuine**."
>
> (emphasis supplied)

The unusual feature of the use of different instruments while making three signatures on the same document came up for its fuller exposition when the High Court proceeded to examine the explanation sought to be furnished by PW–4. While rejecting the testimony of this witness PW-4, the High Court observed and found, *inter alia*, as under: –

> "27. In this background, the discrepancies in the signatures and the different pens which were used also assumes importance. In this regard P.W.-4, Sri Ayyanagowda Hiregowdar who claims to be one of the attesting witness of the WILL in his cross examination admitted that Ex.P4(a) is the signature with ink pen, except Ex.P4(c) being the signature with ball pen and again signature Ex.P4(b) is by ink pen and he has also stated that the signatures in Ex.P4(a) and (b) have been made by the very same pen. He has further stated that both the pens were available with the

testator. He has sought to explain the same by stating that while signing the third page the ink pen was not working, this explanation is palpably false and cannot be believed for the reason that the first page has been signed by fountain ink pen and the third page again has been signed by the fountain ink pen whereas the second page has been signed by a ballpoint pen. Hence this would not only indicate the incorrect statement but would certainly indicate the unnatural circumstances that a person would be so careless while signing a document in the nature of a WILL which is fully known to him that it is a document regarding which he would not be available to explain the situation. One other reason for which the said explanation cannot be believed is that **if the fountain ink pen used by the testator was really not working after affixing the signature on the first page, it cannot be understood as to how he could have signed the second sheet with the ballpoint pen and thereafter once again sign the third sheet with the fountain ink pen more so, when the ink pen used in the first sheet and the third sheet are not similar to one another.** That apart the signatures of the so called attesting witnesses to the WILL would indicate that the same have been made with fountain ink pen and the said ink of these signatures are much fresher than the signatures of the alleged testator….."

(emphasis supplied)

The High Court also rejected the contentions of the plaintiffs that the alleged discrepancies could not take away the validity of the Will as it was produced by PW-8 and the sealed envelope was opened in the presence of Swamiji. The High Court pointed out that the very assertion, about availability of the handwritten draft of the proposed Will EX. P.3 in the sealed envelope along with the alleged executed Will EX. P.4, was that of another unnatural feature because if the testator had himself completed and executed the Will in the presence of witnesses, there was no reason to place the incomplete handwritten draft in the envelope. The High Court proceeded to observe that such feature gave strong indication that the plaintiffs had been able to place

their hands on an incomplete draft and have fabricated the Will using blank sheets signed by the testator at different times; and only to make it appear authentic, the story of the envelope containing the draft was weaved. While rejecting the story about the availability of the sealed envelope with the advocate PW-8 and its opening before Swamiji, the High Court also pointed out that the advocate concerned, PW-8, was known to the testator as also to the father of the plaintiffs PW-1 inasmuch as he had indeed appeared in his professional capacity on behalf of PW-1. Moreover, and as noticed, in regard to the assertion of the plaintiffs and the witnesses that the cover containing the Will was opened before Swamiji, the High Court observed that the said Swamiji was a very important and material witness in this case but the plaintiffs never took any steps to get his statement recorded.

After taking note of the aforesaid inexplicable features, unnatural circumstances, unreliability of the witnesses of the plaintiffs and the fact that no steps were taken by the plaintiffs to get recorded the statements of a material witness, namely the said Swamiji, the High Court also took note of the approach of the Trial Court and did not approve the same while observing, *inter alia*, as under:

> "28. The said discrepancies though noticed have been sought to be explained by the learned Judge of the Court below in a manner as though to overcome the same wherein the learned Judge states that the difference in the colour of the papers cannot be suspected because it could have been used by the typist. The learned Judge further holds that it cannot be suspected since the said papers contain the signatures and the signatures have been identified by the witnesses. As noticed by us above, the very signatures itself are doubtful that it has been affixed after the matter was

> typed and the explanation given by the witnesses are even more doubtful and as such the learned Judge could not have lightly brushed aside these aspects."

In view of the above, the High Court allowed the appeal and set aside the judgment and decree of the Trial Court. Hence, the unsuccessful plaintiffs have preferred this appeal.

RIVAL CONTENTIONS

7. Assailing the judgement of the High Court, learned senior counsel for the plaintiff–appellants has strenuously argued that the High Court has seriously erred in setting aside the findings of the Trial Court, which were based on due appreciation of the consistent evidence of the material witnesses. The learned counsel has contended that the facts are amply established on record that on 20.05.1991, the testator executed the Will in question in accordance with the provisions of Section 63 of the Succession Act and Section 68 of the Evidence Act with his signatures and with attestation by more than two witnesses who had seen the testator signing the Will. According to the learned counsel, the testator was in sound and disposing state of mind while voluntarily executing the Will, as required by Section 59 of Indian Succession Act. PW-3 and PW-4 deposed before the Trial Court that the testator himself showed the typed Will and put his signatures on the same; and the Will was duly attested by PW-3 and PW-4. Hence, the requirements of Section 68 of the Evidence Act are fulfilled. The learned counsel has referred to the decision in the case of ***H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors:*** **AIR 1959 SC 443** and has

contended that with all the legal requirements being fulfilled and there being no reason to ignore or disbelieve the Will, the Trial Court had rightly decreed the suit and the High Court has not been justified in upsetting the considered decision of the Trial Court.

The learned senior counsel has contended that the appellants have dispelled all suspicious circumstances qua the Will in question; that as per Section 74 of the Succession Act, it is not necessary that technical words be used in the Will; and what is necessary is only that the intention of the testator ought to be set out in the Will. According to the learned counsel, Ex. P3, the handwritten draft, makes the intention of the testator clear that he wanted to bequeath his properties to the appellants. Further, PW-5 and defendant No. 7 have clearly identified the signature of the testator. The learned counsel would urge that with the intention of the testator having been amply established on record, some blanks in the Will or some other minor inconsistencies cannot take away the substance thereof, particularly when the properties could be identified with the help of the boundaries. The learned counsel has referred to the decisions in ***Smt. Indu Bala Bose and Ors. v. Manindra Chandra Bose and Anr.:*** **(1982) 1 SCC 20** and ***P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar and Ors*****: 1995 Supp (2) SCC 664**. The learned counsel has further contended that exclusion of any legal heir from the Will is not a suspicious circumstance and has referred to the decision in ***Uma Devi Nambiar and Ors. v. T.C. Sidhan*****: (2004) 2 SCC 321.**

The learned senior counsel has further strenuously argued that it had not been the contention of the respondents that the document in question was drawn on blank signed papers and the observation of the High Court that the document in question was drawn on blank signed papers does not find support in the evidence and pleadings on record. In this regard, the learned counsel has relied upon the decision in ***Mahesh Kumar (dead) by LRs v. Vinod Kumar*** **and Ors: (2012) 4 SCC 387.**

In the last and in the alternative, the learned senior counsel has argued that if at all the High Court found the want of requisite evidence, the proper course was to exercise the power of remand under the provisions of Order XLI Rule 23-A CPC. The learned counsel has contended that the High Court being the first Court of Appeal, ought to have given the opportunity to the appellants to adduce proper additional evidence, considering the fact that the findings were being made on suspicious circumstances other than those raised by the defendants in their pleadings and evidence. The learned counsel has referred to and relied upon the decision in the case of ***Mohan Kumar v. State of Madhya Pradesh and Ors.*****: (2017) 4 SCC 92.**

8. *Per contra*, learned counsel for the contesting respondents has duly supported the judgement of the High Court with reference to the reasonings and observations therein. The learned counsel has also argued that right from the beginning, it had been the case of the respondents that the propounded Will was nothing but a fabricated document and it is incorrect to say that particular objection had not been taken by the respondents. The

learned counsel has referred to the decision in ***K. Laxmanan v. Thekkayil Padmini and Ors***.: (**2009) 1 SCC 354**.

POINTS FOR DETERMINATION

9. In view of the submissions made, the following points essentially arise for determination in this case:

1. As to whether the High Court was right in reversing the decision of the Trial Court and in holding that the contested Will was not a genuine document?

2. As to whether the High Court ought to have considered remanding the case to the Trial Court?

WILL – PROOF AND SATISFACTION OF THE COURT

10. As noticed, the basic point for determination in this case is as to whether the High Court was justified in taking a view contrary than that of the Trial Court and in holding that the Will propounded by the plaintiffs is not the genuine Will of the deceased Sangappa. Determination of this point, obviously, revolves around the legal principles applicable to the making of a testamentary document like Will, its proof, and its acceptance by the Court.

The Will being a rather solemn document that comes into operation after the death of the testator, special provisions are made 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 of a Will, 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 contains the provisions for execution of unprivileged Wills (as distinguished from privileged Wills provided for in Chapter IV). Section 63 of the Succession Act, relevant for the present purpose, reads as under: –

> **"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 witness, 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."

Elaborate provisions have been made in Chapter VI of the Succession Act, in Sections 74 to 111, for construction of Wills which, in their sum and substance, make the intention of legislature clear that any irrelevant misdescription 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, 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.

As noticed, as per Section 63 of the Succession Act, *inter alia,* requires that 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."

Learned Counsel for the appellant has referred to the decision in the case of *H. Venkatachala Iyenger* (supra). It is noticed that in paragraphs 18 to 22 of the said decision, this Court has synthesised and condensed

almost the entire panorama relating with execution and proof of a Will and the guiding principles for a Court while examining the document which is propounded as a Will. These passages in the said 3-Judge Bench decision of this Court could be usefully reproduced as under: –

> "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 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. 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 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.

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:(1946) 50 C.W.N. 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)

Learned Counsel for the appellant has referred to paragraphs 7 and 8 of the decision of this Court in the case of *Indu Bala Bose* (supra) which may also be taken note of as under: –

"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.: AIR 1964 SC 529
>
> 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)

In the case of *P.P.K. Gopalan Nambiar* (supra), the Will in question was a registered one and the endorsement made by the Registrar showed that the testator was in a sound disposing state of mind and the Will was executed out of the testator's free will. It was also found that the testator died 8 years after registration of the Will and though legatee propounded the Will in his written statement, but no plea was taken by the opposite party to question the validity of the Will. The Will was duly proved with examination of the attesting witness. In the given circumstances, the fact that whole of the estate was given to one son under the Will while depriving two daughters, was not

considered to be a suspicious circumstance. On the requisite approach, this Court said as under:-

> "5. Under these circumstances, the suspicion which excited the mind of the District Munsif is without any basis and he picked them from his hat without fact-foundation. The Subordinate Judge had rightly considered all the circumstances and upheld the will. The High Court, without examining the evidence, by merely extracting legal position set out by various decisions of this Court has upset the finding of the fact recorded by the Subordinate Judge in one sentence. It is trite that it is the duty of the propounder of the will to prove the will and to remove all the suspected features. **But there must be real, germane and valid suspicious features and not fantasy of the doubting mind**."
>
> (emphasis supplied)

In the case of *Uma Devi Nambiar* (supra), this Court reviewed the case law dealing with the Will to a large extent and, while referring to the Constitution Bench decision of this Court in the case of ***Shashi Kumar Banerjee and Ors. v. Subodh Kumar Banerjee and Ors.:*** **AIR 1964 SC 529,** observed that merely because the natural heirs have either been excluded or lesser share had been given to them, by itself, will not be considered to be a suspicious circumstance. This Court observed, *inter alia*, as under:-

> "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 of this Court…….A Constitution Bench of this Court in Shashi Kumar Banerjee's case succinctly indicated the focal position in law as follows: (AIR p. 531, para 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 earlier 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 specially 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 and Ors.: [1995] 2 SCR 585, it is the duty of the propunder 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 and Anr. v. Panchanan Banerjee (dead) by LRs. and Ors.: AIR 1995 SC 1684, 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."

In the case of *Mahesh Kumar* (supra), this Court indicated the error of approach on the part of High Court while appreciating evidence relating to the Will in the following:-

"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 (DW3) 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 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 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 ”

In the case of *K. Laxmanan* (supra), this Court, with reference to the settled principles including those in the case of *Shashi Kumar Banerjee* (supra) re-emphasised on the requirement that the propounder has to prove the legality of execution of the Will as also the genuineness thereof by proving the testamentary capacity of the testator as also his signatures and further by proving absence of suspicious circumstances. This Court, *inter alia*, said,-

> “18……The propounder has to prove the legality of the execution and genuineness of the said will by proving absence of suspicious circumstances surrounding the said will and also by proving the testamentary capacity and the signature of the testator. Once the same is proved, it could be said that the propounder has discharged the onus.

> 19. When there are suspicious circumstances regarding the execution of the will, the onus is also on the propounder to explain them to the satisfaction of the court and only when such responsibility is discharged, the court would accept the will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions 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….."

In *K. Laxmanan* (supra), this Court also explained the principles governing the pleadings in such matters while observing, *inter alia*, as under:–

> "28. It is however established in the present case that the issue of validity of the execution of both the deed of gift and deed of will was taken up by the respondent-plaintiff and specifically denied in the affidavits filed in respect of the injunction applications. **The parties have also gone to trial knowing fully well that execution of both these documents is under challenge. Parties knowing fully the aforesaid factual position led their evidence also to establish the legality and validity of both the documents. In that view of the matter, it cannot be said that the said document should be deemed to be admitted by the plaintiff** as no replication was filed by the plaintiff."
>
> (emphasis supplied)

We may also usefully refer to the principles enunciated in the case of *Jaswant Kaur* (supra) for dealing with a Will shrouded in suspicion, which were duly taken note of by the High Court in its impugned judgement, as follows: –

> "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)

11. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a Will could be broadly summarised as follows:–

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.

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.

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.

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 suspicions before the document can be accepted as the last Will of the testator.

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.

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.'

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 circumstance 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.

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?

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.

SUSPICIOUS CIRCUMSTANCES/FEATURES CONCERNING THE WILL IN QUESTION

12. Having considered the present matter in its totality while keeping the principles aforesaid in view, we have not an iota of doubt that the High Court has examined the matter in its correct perspective and there had been substantial and material reasons for which, the decision of the Trial Court could not have been upheld; and the High Court has rightly reversed the same.

13. In summation of the lengthy discussion of the Trial Court, it could be noticed that some of the major factors which weighed with the Trial Court in rejecting the objections of the contesting defendants against the Will in question had been: (i) that the testator Sangappa was not having warmth of relations with defendant No. 1 and his family and was not willing to give anything to them; (ii) that even in the earlier Will of the year 1974, Sangappa had not bequeathed any property to the contesting defendants; (iii) that the plaintiffs, the grand–nephews of testator's wife, were residing

with the testator; (iv) that the father of the plaintiffs was associated with the testator in his business and other dealings; (v) that the attesting witnesses were only the customers of the testator and were naturally chosen as independent persons to stand as witnesses to the Will; (vi) that the Will in question was in possession of PW-8 and was opened by him in the presence of Swamiji; and (vii) that PW-8 had neither any animosity with the defendants nor was gaining anything from the Will.

13.1 As regards the discrepancies indicated by the defendants, the Trial Court took the view that mere misdescription of the property was of no effect, particularly when its identification was not in doubt; and for this very reason, the Trial Court found the blank spaces as regards the particulars of the property to be of no effect. As regards mentioning of a past event as something to happen in future, the Trial Court found that it had no adverse bearing on the validity of the Will because existence of a tenant in the property was not going to affect the rights of the testator as also his legatees. As regards the statement in the Will about likelihood of accident, the Trial Court observed that the reason for making such a recital was known to the testator alone. On the suspicious factors concerning the document itself, the Trial Court observed that use of the sheets of paper of different colours could be attributed only to the typist who was not known to propounders. The Trial Court further found that the inconsistency regarding the dates from the Hindi Calendar and English Calendar were of no effect because the day of execution of the Will was Monday, as stated by the

witnesses. Further, the Trial Court found that the making of signatures by the testator by different pens on different pages was duly explained by the witness PW-4.

14. The High Court, on the other hand, felt dissatisfied with the document itself and found no explanation on record about numerous unnatural circumstances dilated upon and discussed by it in some of the passages extracted hereinbefore. Having examined the material placed on record, in our view, the observations and findings of the High Court remain unexceptionable.

15. Taking up the document itself, it is not in dispute that the same is carrying 5 typed pages on 3 different sheets of papers, which are definitely not of the same colour. It had been noticed by the Trial Court as also by the High Court, and it remains indisputable, that the said papers are of different colours and have not been picked up from the same stack. Use of 3 different sheets of paper for typing a document of Will running in 5 pages (with first and second paper being typed on both sides) is, in any case, not a normal action by a normal person in normal circumstances. True it is that this aspect could have been cleared only by the typist and the propounders are not expected to know the typist, particularly when they had not participated in execution and attestation of the document but, this circumstance is enough to indicate that the matter calls for closer scrutiny with due regard to all the surrounding factors because, ordinarily, such

document would be typed in one sitting and on the papers drawn from the same stack.

Proceeding further, another feature surfaces, which was found by the High Court (though not discussed by the Trial Court). This feature is about the placement of the signatures of the testator on 3 pages, where it is apparent that on the first and the last page, the distance of signatures from the typewritten contents is excessive than usual or natural. It is not in dispute that this feature also emanates from a bare look at the document in question.

The aforementioned two features, by themselves, may not be of material bearing but this much is clear that they stand at contradistinction to the ordinary course of dealings and give rise to legitimate suspicions about the genuineness of document. Now, the suspicion arising from the aforesaid two features is confounded by another factor that though the document carries 3 signatures of the testator, the same are not made from the same pen. It has been noticed, and again it remains indisputable, that while the signature of the testator at page number 1 are from an ink pen, that at page number 3 is from a ballpoint pen and then, again at page number 5, it is from an ink pen. The witness PW-4 has attempted to say that for the ink pen being not working properly, ballpoint pen was used. It sounds utterly unnatural and remains inexplicable that if the ink pen was not working and the second signature was made from a ballpoint pen, as to how and why the third signature, that is, the last one, was again made from another ink

pen? It had not been the explanation of the attesting witnesses that after making the signature at page number 3, the ballpoint pen also stopped working and, therefore, another ink pen was used for making the third signature. We may observe that even when the possibility of the testator using different pens or instruments for his signatures on different pages of the same document is not ruled out altogether and even this fact, by itself, may not be decisive of the matter but, this much is certain that such happening cannot be categorised as normal or natural in the course of execution of a document of Will.

15.3 Therefore, in the present case, three features of the document Ex. P.4, carrying unusual characteristics of their own, manifest themselves on the face of the record and nothing but a bare look at the document is sufficient to notice them. The aforesaid three unnatural and unusual features of the document in question, where different sheets of paper have been used; where placement of the signatures of the testator at least at two places is beyond normal distance from the last typed matter; and where in making of three signatures, at least two different pens were used, make it clear that a deeper probe is called for to find as to whether this document could at all be accepted as the last Will of the testator.

When the exploration is pushed slightly further, another major feature comes to the fore, which has been noticed by the High Court but which escaped the attention of the Trial Court altogether. The document in question is said to be a Will running in 5 pages which is typed (in kannada

script) on 3 sheets of papers with the first and second sheets carrying the typewritten contents on both sides; page number 2 being typed on the backside of page number 1 and page number 4 being typed on the backside of page number 3. The significant feature is that page number 2 and page number 4 of this document Ex. P.4 do not carry any signature at all!

It is apparent on the face of the record that even when the front facing pages i.e., page numbers 1, 3 and 5 carry the signatures of the testator, the backside pages i.e., page number 2 and page number 4 are not signed at all and have gone unsigned. When this material aspect is added to the above-referred three unusual features, the probative value of this document Ex. P.4 is shaken to the core and it becomes a serious question as to whether this document could be considered to be a Will that was got typed and signed by the testator in the presence of the alleged attesting witnesses.

In relation to this aspect of want of signatures of the testator on page number 2 and page number 4, we may also observe that as per the requirement of clause (b) of Section 63 of the Succession Act, the signature or mark of the testator is to be so placed that it shall appear that by such signature or mark, the intention was to give effect to the writing as a Will. Of course, when no specific form of making a Will is provided, in a given case, depending on the relevant facts and circumstances, a document drawn on several sheets but carrying signature only at the end may also be accepted

as a genuine Will where the document was authenticated by only one signature. However, the scenario like the present one, where the executant had purportedly signed 3 out 5 typewritten pages while omitting to sign the other 2, definitely stands at contradistinction to the dealing of any normal person in normal way. When the signatures of the testator are indeed available on page numbers 1, 3 and 5, it is difficult to find any plausible explanation for his omission to sign at page number 2 and page number 4 of the same document. The only explanation could be that the testator chose to sign the front face of each paper and did not consider it necessary to sign on the backside of the paper. However, accepting such a frail explanation, and that too in the face of other unusual features (as noticed hereinbefore), would tantamount to thrusting the probative value into the document while ignoring everything that is incongruous to, and incompatible with, the normal course of happenings.

The indisputable fact that page number 2 and page number 4 of the document in question (EX. P.4) do not carry the signatures of the testator whereas other pages do carry his signatures, in our view, places the document in conflict with, or at least non-compliant with, the requirement of clause (b) of Section 63 of the Succession Act. The document in question could be rejected outright for this reason alone. However, having regard to the circumstances of the case, it would be appropriate to deal with other factual aspects concerning the document in question before reaching to the final conclusion.

The discussion thus far makes it clear that at least four unusual features of the document in question are evident on the face of the record. To recapitulate, the disturbing unusual features of the document in question are that: (i) it is typewritten on 3 different sheets of paper; (ii) the placement of signatures of the testator is not of uniformity and excessive space is seen between the typewritten contents and the signatures on page number 1 and page number 5; (iii) different pens have been used for signatures on different pages with ink pen having been used for first and third signatures (on page number 1 and page number 5) and ballpoint pen having been used for the second signature (on page number 3); and (iv) all the typewritten pages do not carry the signatures of the testator, with there being no signature on page number 2 and page number 4. It does not require any great deal of elaboration that in the ordinary, normal and usual course, such a typewritten document is expected to be on the sheets of paper drawn from the same stack; there would be reasonable uniformity in placement of the signatures running through the document and every signature would be placed alongside or at a reasonable distance from the contents; a single pen or instrument would be used for signing at all places; and, ordinarily, a maker of the Will would not leave such ambiguity in expression of his intention as would arise by his signing 3 pages and not signing 2 other pages of the same document. In fact, in the normal and ordinary course of dealing, the maker of a Will is least expected to leave any page of the document unsigned. Although existence of some such

unusual features (as noticed above) cannot be ruled out during the course of typing and signing of the document but when all such unusual features combine together, the document becomes too vulnerable and cannot be readily accepted as a genuine document.

16. While proceeding further, we may usefully reiterate the principles relating to the examination of a document propounded as Will that the document is not approached with doubts but is examined cautiously and with circumspection. For what has been noticed hereinabove, the document in question carries several such features of unusualness which travel into the realm of abnormalities. The matter does not rest with such abnormalities only. These abnormal features get confounded with other unusual features available in the contents of this document. Indisputably, several blank spaces are found in relation to the particulars of the properties and even some of the properties are not correctly described. Yet further, the dates mentioned in the document with reference to Hindi Calendar and English Calendar do not match. Yet another curious feature is the recital in the document of a past event (about vacating of the shop by the tenant in the year 1990) in the manner that such event shall happen in future. Therefore, the abnormalities relating to paper, pen and signature get magnified with blank spaces in the document as also with incorrect and inexplicable recitals.

17. The problems relating to the probative value of the document Ex. P.4 do not end with the aforementioned abnormal features and curious factors.

A close examination of this document takes us from abnormalities to mysteries too. In the opening passage of this document, the recital is to the effect that the testator was making the Will because so many accidents do happen. The fact remains that the testator and his wife both died in the car accident on 20.05.1994 but, it would require travelling into an entirely mystical region to accept that while making the Will on 20.05.1991, the testator had the premonition that he would perish in a vehicular accident.

18. As noticed, even when a fishing enquiry with digging of the faults and lacuna is not to be resorted to while examining a Will but, and at the same time, the real and valid suspicions which arise because of anything standing beyond normal happening or conduct cannot be ignored either. Ignoring or brushing aside all the features noticed in relation to the document in question would require taking up an individual feature and ignoring it as being trivial or minor and then, proceeding with the belief that it had only been a matter of chance that all the abnormalities somehow chose to conglomerate into this one document. Such an approach would, obviously, be detached from realities and cannot be adopted. It needs hardly any emphasis that examination of a document propounded as Will has to be on the norms of reality as also normalcy; and the overall effect of all the features and circumstances is required to be examined.

19. When all the aforesaid abnormal, curious and rather mysterious circumstances are put together, the inescapable conclusion is that the document in question cannot be accepted as the last Will of the testator.

The unexplained, unusual and abnormal features pertaining to the document only lead to the logical deduction that the document in question was prepared after the demise of the testator with use of blank signed papers that came in possession of the propounders and their associates. The High Court has stated such deduction after thorough examination of the material on record and, in our view, rightly so. It is noticed that all the features and factors indicated hereinabove are very much available on the face of the record. However, the Trial Court, even while dealing with several contentions in excessive details, either failed to notice some of the features indicated above or simply brushed aside the particular feature carrying abnormality with the observations to the effect that the propounders were not to be expected to remove the suspicions concerning the document when they had no role in its execution. The Trial Court having, obviously, misdirected itself on several of the key and pivotal factors, its decision could not have been approved.

It is sought to be contented on behalf of the appellants that using of blank papers had not been the objection taken by the defendants. The contention remains bereft of substance for the simple reason that the defendants indeed asserted that the document in question was a fabricated one. The likelihood of it being drawn on the available blank papers with signatures of the testator is nothing but a deduction that logically comes out of the examination of the document in question.

20. Much emphasis is laid on behalf of the appellants on the submissions that execution of the Will in accordance with the requirements of Section 63 of the Succession Act and Section 68 of the Evidence Act has been duly established on record with the testimony of the attesting witnesses as also the witness with whom the Will along with the handwritten draft of the Will had been deposited by the testator. The submissions so made on behalf of the appellants cannot be accepted for the reason that mere proof of the document in accordance with the requirements of Section 68 of the Evidence Act is not final and conclusive for acceptance of a document as a Will. When suspicious circumstances exist and the suspicions have not been removed, the document in question cannot be accepted as a Will.

21. Even the aspect suggested on behalf of the plaintiffs and their witnesses that the document in question (Ex. P.4) was drawn up as a Will and was placed in a sealed cover with the handwritten draft (Ex. P.3) has its own shortcomings and the share of abnormalities. It remains indisputable that the said draft (Ex. P.3) had remained incomplete. It may be assumed that the same was being drawn up by the testator in his own handwriting for finally making his last Will after he had revoked the earlier Will but, it had remained incomplete draft only. If the testator himself had got his Will typed and then, took care to have it executed in the presence of 4 attesting witnesses; and if he intended such executed document to operate as his Will; and also had the intention that his Will be kept in a sealed cover to be

opened before Swamiji, in the ordinary course of dealings, it was least expected of him to put the said incomplete draft also in the envelope because placing of such incomplete draft could have only created confusion in regard to the actual Will, if there were any. Taking an overall view of the matter, the preponderance of probability is only to the effect that the entire story about execution of Will by the deceased Sangappa has been cooked up with use of readily available signed papers (though of different sheets of paper and with signatures with different instruments) and, in order to suggest some authenticity, the story of sealed envelope and leaving of the same with PW-8 was sought to be inserted. This feature only operates against the plaintiffs where it carries another unexplained unusualness.

22. The Trial Court had largely been swayed by the fact that the deceased Sangappa was not inclined to give any property to the defendant No. 1 and his family as had been the case of the earlier Will executed by him in the year 1974. Admittedly, the said Will of the year 1974 was cancelled by Shri Sangappa on 26.09.1990. He perished in the vehicular accident on 20.05.1991. Whether he intended to bequeath any property to the defendants or not is hardly of any bearing in relation to the suspicious circumstances noticed above.

23. Having dilated on various major features which, individually and cumulatively, lead only to the conclusion that the document in question cannot be accepted to be the last Will of late Shri Sangappa, it does not appear necessary to discuss several other shortcomings in the case of the

plaintiffs, including various other factors like that the plaintiffs never took steps to get the statement of the said Swamiji recorded, who was otherwise referred to by all the material witnesses as being the person before whom the document was allegedly opened.

24. In our view, the document in question falls flat at the very first question indicated in the case of *H. Venkatachala Iyenger* (supra) that is, as to whether the testator signed the Will in question. The answer to this question is only in the negative. This is apart from the fact that the document in question, propounded as a Will, is non-compliant with the requirements of clause (b) of Section 63 of the Succession Act.

In the ultimate analysis, we are satisfied that the High Court was right in reversing the decision of the Trial Court and in holding that the contested Will was not a genuine document.

WHETHER REMAND WAS CALLED FOR

25. Taking up the other point for determination, the submission of learned counsel for the appellants that the High Court ought to have considered remanding the case by taking recourse to the provision contained in Order XLI Rule 23A CPC, in our view, remains totally bereft of substance; this submission has only been noted to be rejected.

The procedure relating to appeals from original decrees (usually referred to as 'regular first appeal') is provided in Order XLI of the Code of Civil Procedure, 1908 and therein, various provisions relating to hearing of an appeal, remand of case, remitting of issues for trial, production of

additional evidence in Appellate Court etc. are contained in Rules 16 to 29 under the sub-heading *'Procedure on hearing'*. For their relevance, we may take note of the provisions contained in Rules 23, 23A, 24 and 25 of Order XLI CPC as follows: -

> **"23. Remand of case by Appellate Court**.- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.
>
> **23A. Remand in other cases.-** Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.
>
> **24. Where evidence on record sufficient, Appellate Court may determine case finally.-** Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.
>
> **25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.-**Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose

decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time."

Rule 23A came to be inserted in Order XLI CPC by way of the Code of Civil Procedure (Amendment) Act, 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the Appellate Court has the inherent power of remanding a case where it was considered necessary to do so in the interest of justice. Some of the High Courts had made similar provisions by way of their respective amendments. Insertion of Rule 23A in Order XLI by the Amending Act of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the Appellate Court shall have the power of remand, if a re-trial is considered necessary.[8]

A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23A of Order XLI is not complete without

8 Such powers of remand, as provided in Rules 23 and 23A of Order XLI, are different than the power of the Appellate Court to remit an issue for findings under Rule 25. The power of remitting is ordinarily to be resorted to when the Trial Court has omitted to try any material issue or to determine any question of fact. In other words, the proper procedure in a case where the Trial Court, while disposing of the suit on merits, had failed to determine one or more of the material issues/questions, is to remit the issue/question(s) under Rule 25 and not to remand the whole case for re-trial. Ordinarily, in the case of an order under Rule 25 of Order XLI, the matter is retained on the file of the Appellate Court and only the issue/question(s) are remitted to the Trial Court for findings. On the other hand, when an order of remand is made under Rule 23 or Rule 23A, the whole case goes back for decision to the Trial Court except on the point on which the Appellate Court has returned concluded finding, if any. While making a remand under Rule 23 or Rule 23A, the judgment and decree of the Trial Court is required to be set aside but it is not necessary to set aside the impugned judgment and decree when taking recourse to Rule 25 of Order XLI.

reference to the provision contained in Rule 24 of Order XLI that enables the Appellate Court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the Appellate Court proceeds on a ground entirely different from that on which the Trial Court had proceeded.

A conjoint reading of Rules 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

The decision cited by the learned Counsel for the appellants in the case of *Mohan Kumar (*supra) is an apt illustration as to when the Appellate Court ought to exercise the power of remand. In the said case, the appellant and his mother had filed the civil suit against the Government and local body seeking declaration of title, perpetual injunction and for recovery of possession in respect of the land in question. The Trial Court partly decreed the suit while holding that the plaintiffs were the owners of the land in dispute on which trespass was committed by the respondents and they were entitled to get the encroachment removed; and it was also held that the Government should acquire the land and pay the market value of the land to the appellant. Such part of the decree of the Trial Court was not challenged by the defendants but as against the part of the decision of the Trial Court which resulted in rejection of the claim of the appellant for allotment of an alternative land, the appellant preferred an appeal before the High Court. The High Court not only dismissed the appeal so filed by the appellant but proceeded to dismiss the entire suit with the finding that the plaintiff-appellant had failed to prove his ownership over the suit land inasmuch as he did not examine the vendor of his sale deed. In the given circumstances, this Court observed that when the High Court held that the appellant was not able to prove his title to the suit land due to non-examination of his vendor, the proper course for the High Court was to remand the case to the Trial Court by affording an opportunity to the appellant to prove his title by adducing proper evidence in addition to what

had already been adduced. Obviously, this Court found that for the conclusion reached by the High Court, a case for re-trial was made out particularly when the Trial Court had otherwise held that the appellant was owner of the land in dispute and was entitled to get the encroachment removed as also to get the market value of the land. Such cases where re-trial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill-up the lacuna in its case.

It gets perforce reiterated that the occasion for remand would arise only when the factual findings of Trial Court are reversed and a re-trial is considered necessary by the Appellate Court.

The present case had clearly been the one where the parties had adduced all their evidence, whatever they wished to; and it had not been the case of the plaintiff-appellants that they were denied any opportunity to produce any particular evidence or if the trial was vitiated because of any alike reason. As noticed, there had been several suspicious circumstances surrounding the Will in question, some of which were noticed by the Trial Court but were brushed aside by it on untenable reasons. The High Court has meticulously examined the same evidence and the same

circumstances and has come to a different conclusion that appears to be sound and plausible, and does not appear suffering from any infirmity. There was no reason or occasion for the High Court to consider remanding the case to the Trial Court. The contention in this regard is required to be, and is, rejected.

CONCLUSION

26. For what has been discussed hereinabove, we are satisfied that the High Court has rightly interfered with the decision of the Trial Court and has rightly held that the document in question cannot be accepted as the genuine Will of the deceased Sangappa; and there was no reason for the High Court to remand the case to the Trial Court.

27. Accordingly, and in view of the above, this appeal fails and is, therefore, dismissed while leaving the parties to bear their own costs throughout.

……J.
(A.M.KHANWILKAR)

……J.
(HEMANT GUPTA)

……J.
(DINESH MAHESHWARI)

New Delhi,
Dated: 24th April, 2020.