

KAUK020043032024



**IN THE COURT OF THE ADDITIONAL SENIOR CIVIL JUDGE
AND JMFC, KARWAR, UTTARA KANNADA**

DATED THIS THE 10th DAY OF JULY 2026.

PRESENT : **SRI. GANESHA PADIYAR U.,**
B.Com. LL.B.
Addl. Senior Civil Judge & JMFC.,
Karwar.

O.S.No.36/2024

- Plaintiffs :**
1. Smt. Suman D/o Dolla Gunagi
@ Suman W/o Angada Gunagi,
Aged: 65 years, Occ: Housewife,
R/o: Melinkeri, Arga,
Tq: Karwar, U.K.
 2. Smt. Chandrakala D/o Dolla Gunagi
@ Chandrakal W/o Madhan Gunagi,
Aged: 54 years, Occ: Housewife,
R/o: Near ISCON Temple,
Habbuwada, Karwar, U.K.

(By Sri N. M. Madival, Advocate)

- Vs -

- Defendant :**
- Shri. Shankar S/o. Dolla Gunagi,
Age: 71 years, Occ: Retired Service,
R/o: Divakar Garage Road,
Gindiwada, Habbuwada,
Tq: Karwar, U.K.

(By Sri C. H. Naik Advocate)

Date of institution of the suit : **02-12-2024**

Nature of the suit : **Partition**

Date of the commencement of
the evidence : **22-04-2025**

Date on which the judgment was
pronounced : **10-07-2026**

Total duration	:	<u>Year/s</u>	<u>Month/s</u>	<u>Day/s</u>
		01	07	08

(Ganesha Padiyar U.)
Addl. Senior Civil Judge & JMFC.,
Karwar.

J U D G M E N T

This is a suit for Partition.

2. Case of the plaintiffs can be summarised as under:

One late Ira @ Kosa Honna Gunagi is the ancestor and propositus of the joint family of plaintiffs and defendant. The suit schedule properties as described in the plaint schedule is as follows:

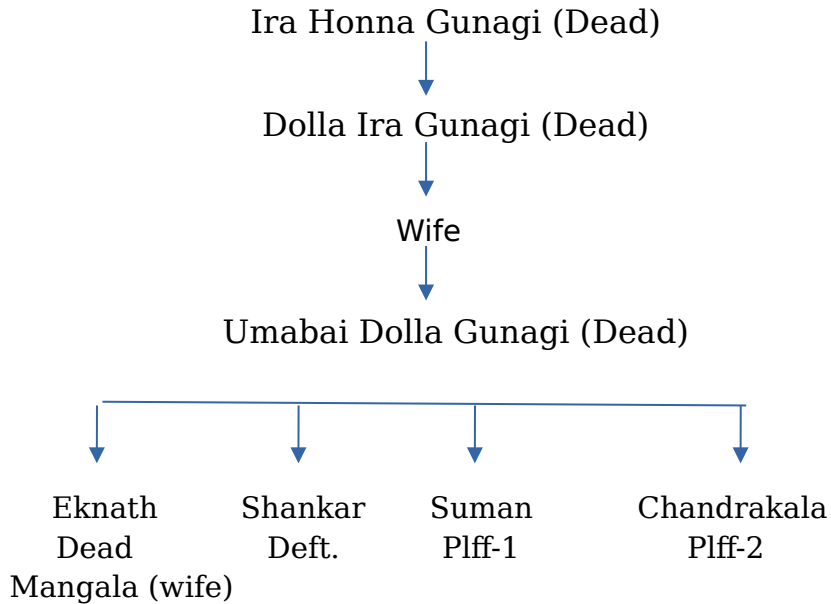
'A' Suit Schedule Properties

Sl.No.	Sy.No.	Village	Area	Assessment(Rs.)
1.	441/1K	Baad-I	00-10-01 out of 02-14-00	10.20
2.	441/3A	Baad-I	00-02-01 out of 00-09-08	03.23

'B' Suit Schedule Property

Karwar CMC House No.1817 and 1817A situated at above survey numbers.

3. For ease of understanding, the position of the parties is demonstrated through the following genealogy:



4. The suit schedule properties are tenanted lands. The aforesaid Ira Kosa Gunagi had filed application for grant of

occupancy rights. The Land Tribunal, Karwar granted occupancy rights in his favour on 22.06.1981. Revenue entries were mutated in his name vide M.E No.4536. After his death, the name of his son Sri Dolla Ira Gunagi came to be entered in the revenue records vide M.E No.4547. The father of the plaintiffs and defendant late Sri Dolla Gunagi constructed two houses in the suit schedule properties which were divided as eight portions. He died on 05.03.2011. After his death, his wife and four children entered their names in the revenue records as his legal heirs. His wife Smt. Umabai Dolla Gunagi also died. The plaintiffs and defendant are members of joint family and that the suit schedule properties are joint family properties. The plaintiffs are entitled to $\frac{1}{3}^{\text{rd}}$ share each in the suit schedule properties.

5. During the life time of late Sri Dolla Gunagi, land bearing Sy.No.441 measuring 00-14-01 was partitioned among himself, his wife Smt. Umabai and his elder son Eknath Dolla Gunagi, the plaintiffs and defendant. In the said partition, land measuring 00-04-00 out of 00-14-01 was entered in the name of aforesaid Eknath Dolla Gunagi and the same was certified in M.E No.A7823. Thus the aforesaid

Eknath Gunagi has separated himself from the joint family by taking his share as mentioned above. Subsequently, the said Eknath Dolla Gunagi also died and his LRs have entered their names in respect of the portion of property allotted to him in the said partition. Therefore, his LRs are not necessary parties to the suit. Though the plaintiffs have requested the defendant to effect partition of the suit schedule properties in the first week of October 2024, the defendant has refused to effect partition. This constrained the plaintiffs to bring the suit for partition claiming $\frac{1}{3}^{\text{rd}}$ share each in the suit schedule properties.

6. After due service of suit summons, the defendant has entered appearance through his counsel and resisted the suit by filing written statement and counter claim. In his written statement, the defendant while admitting the relationship of the parties as shown in the plaint and the death of his parents and that the suit schedule properties were tenanted lands and that his grandfather Mr. Ira Kosa Gunagi had applied for grand of occupancy rights, he has denied that the suit schedule properties are joint family properties. He has also denied the plaintiffs' share in the suit

schedule properties. Denying the material plaint averments, the defendant in his counter claim filed along with the written statement contended that his mother Smt. Umabai Dolla Gunagi had bequeathed her $\frac{1}{4}^{\text{th}}$ share in the suit schedule properties in his favour by virtue of a registered Will dated 31.12.2015. Therefore the defendant has raised a counter claim against the plaintiffs for a relief of declaration that he is the absolute owner in respect of $\frac{1}{4}^{\text{th}}$ share in the suit schedule properties which was bequeathed by his mother as per the aforesaid registered Will and that the plaintiffs have no right or share in the suit schedule properties or to claim any mesne profits thereon. With these, the defendant has sought for dismissal of the suit with costs and allow his counter claim.

7. Opposing the above counter-claim, the plaintiffs have filed written statement denying the counter claim averments. They have denied the execution of Will by their mother Smt. Umabai Dolla Gunagi in favour of the defendant. They specifically contended that the defendant has created the alleged Will. With these, the plaintiffs have sought for dismissal with the counter-claim with costs.

8. Based on the rival pleadings, this Court has framed the following:

ISSUES

1. Whether the Plaintiffs prove that suit schedule properties are joint family properties?
2. Whether the Defendant proves that his mother Smt. Umabai Dolla Gunagi had executed a registered Will dated 31-12-2015 in his favour bequeathing her 1/4th share in the suit schedule properties ?
3. Whether the Plaintiffs are entitled to a share in the suit schedule properties? If so, to what extent?
4. Whether the Plaintiffs are entitled to mesne profits as prayed ?
5. Whether the Defendant is entitled to the relief of declaration as prayed for in his counter-claim ?
6. What Decree or Order?

9. To prove their case, plaintiff No.1 has examined herself as PW.1 and got marked the documents as Ex.P.1 to Ex.P.16. On the other hand, the defendant has examined himself as DW.1 and got marked the documents as Ex.D.1 to

D.13. Ex.D1 has been marked in the cross-examination of PW.1. The defendant has examined two witnesses as DWs.2 & 3.

10. Learned counsel for the plaintiffs Sri N. M. Madival and the learned counsel for defendants Sri C. H. Naik have been heard.

11. My findings are as under :

<i>Issue No.1</i>	<i>: Affirmative.</i>
<i>Issue No.2</i>	<i>: Negative.</i>
<i>Issue No.3</i>	<i>: Affirmative.</i>
<i>Issue No.4</i>	<i>: Negative.</i>
<i>Issue No.5</i>	<i>: Negative.</i>
<i>Issue No.6</i>	<i>: As per final order</i>

for the following:

REASONS

12. **ISSUE NO.1:** A woodcut of the fact first.

13. According to the plaintiffs, the suit schedule properties are joint family properties. Because the said properties were originally the tenanted lands which were in cultivation of their grandfather Mr. Ira Kosa Gunagi who had applied for grand of occupancy rights in respect of those

lands and the Land Tribunal had conferred occupancy rights thereon in his favour and after his death, the father of the plaintiffs namely Dolla Gunagi has succeeded to the said properties and after his death, the properties were succeeded by his wife, the plaintiffs and defendant being his children. It is also the case of the plaintiffs that their brother Mr. Eknath Gunagi died and his wife and children are not arrayed as parties to the suit because during his life time a partition took place between the family members in the year 1989 and in the said partition 4 guntas of land was given to the aforesaid Mr. Eknath Gunagi. Thus, the plaintiffs assert that they have got $\frac{1}{3}^{\text{rd}}$ share each in the suit schedule properties.

14. The defendant has denied that the suit schedule properties are joint family properties.

15. Since I have narrated the gist of the case and contention of the parties hereinabove, it does not call for reiteration.

16. To prove their case, the 1st plaintiff has examined herself as PW.1. She has filed affidavit in lieu of examination-in-chief reiterating everything that is stated in the plaint.

17. The documents relied upon by the plaintiffs came to be marked as Ex.P.1 to Ex.P.16. They inter-alia include Mutation Register extracts, RTC extracts, certified copy of Written Statement filed by the defendant in earlier suit OS No.86/2020 and certified copy of Will produced in the said suit.

18. On the other hand, the defendant has examined himself as DW.1. He has filed affidavit reiterating everything that is stated in the written statement. The documents relied upon by the defendant came to be marked as Ex.D.1 to Ex.D.13. As already stated, Ex.D.1 is the certified copy of the Partition Deed dated 23.05.1989 which has been confronted to PW.1 during the course of cross-examination. The fact that Ex.D.1 partition came into being and according to which 4 guntas of land was fallen to the share of Mr. Eknath Gunagi, the brother of plaintiffs and defendant.

19. I have carefully scrutinized the documents relied upon by both the parties.

20. That is why the plaintiffs have not arrayed the wife of Mr. Eknath Gunagi to this suit. It appears to the Court that the plaintiffs are justified in not making her as a party to the

suit. Because it is an admitted fact. Both PW.1 and DW.1 have categorically admitted the said fact in their cross-examination.

21. Before adverting to the oral and documentary evidence tendered by the plaintiffs, a reference could be made to a judgment of Hon'ble Apex Court reported in **(2015) 11 SCC 269-- Shashidhar vs Ashwini Uma Mathad**. In this judgment, the Hon'ble Apex Court has held as under:

"When a suit is filed by a co-sharer, coparcener, co-owner or joint owner, as the case may be, for partition and separate possession of his/ her share qua others, it is necessary for the Court to examine:

(1) The nature and character of the properties in suit as who was the original owner of the suit properties, how and by which source he/ she acquired such properties, whether it was his/ her self-acquired property or ancestral property, or joint property or coparcenary property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be.

(2) How the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect.

(3) Whether the properties in suit are capable of being partitioned effectively and if so, in what manner.

(4) Whether all properties are included in the suit and all co-sharers, coparceners, co-owners or joint owners, as the case may be, are made parties to the suit?

These issues, being material for proper disposal of the partition suit, have to be answered by the Court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case.”

22. Bearing the above legal position in view, now, I would mention the admitted facts in the instant case. The facts admitted are as follows:

- (i) The plaintiffs and defendant are children of Mr. Dolla Gunagi. Therefore, the plaintiffs and defendant are siblings. Plaintiffs are the sisters of the defendant.
- (ii) The suit schedule properties were tenanted lands.
- (iii) The grandfather of the plaintiffs Mr. Ira Kosa Gunagi had applied for grant of occupancy rights in respect of those tenanted lands.
- (iv) The Land Tribunal, Karwar had conferred occupancy rights in his favour and the revenue records also stood mutated based on such a grant made in his favour.
- (v) The fact that the father of the plaintiffs and defendant Mr. Dolla Ira Gunagi died on 05.03.2011

and their mother Smt. Umabai Dolla Gunagi died on 05.03.2018 are not in dispute.

(vi) The fact that the deceased brother of the plaintiffs and defendant namely Mr. Eknath Gunagi was allotted 4 guntas of land in the suit survey number in a registered partition deed dated 23.05.1989 (Ex.D.1).

23. In addition to the above, the genealogical relation between the parties is also not in dispute.

24. I have carefully perused the entire evidence of PW.1, PW.1 has been thoroughly cross-examined by the learned counsel for defendant. However no dent could be made in the aforesaid cross-examination.

25. In the cross-examination of PW.1 it is elicited that the wedding ceremonies of the plaintiffs were conducted by their father and brother very grandly, in fact they took an active role in performing their marriages.

26. Just because the father and the brother of plaintiffs have played a prominent role in getting their marriages and huge amount of money was spent for their marriage, the plaintiffs being the daughters and legal heirs of the deceased Mr. Dolla Ira Gunagi, cannot be deprived of their legitimate

share over the properties. Therefore the answers elicited above in the cross-examination of PW.1 cannot be held to be fatal to the case of the plaintiffs.

27. Certain suggestion put to PW.1 in the cross-examination also give a clear indication that there is no dispute with regard to the relationship of the parties as narrated in the plaint.

28. Further in the cross-examination of PW.1 conducted on 03.09.2025, she has answered as under:

“9. ನಿಮ್ಮ ತಂದೆ ತೀರಿಕೊಂಡ ನಂತರ ನೀವು, ನಿಮ್ಮ ಸಹೋದರಿ, ಪ್ರತಿವಾದಿ ಹಾಗೂ ಮೃತ ಏಕನಾಥ ಗುನಗಿಯವರ ಪತ್ನಿ ಮತ್ತು ಮಕ್ಕಳು ವಂಶಸ್ಥರಾಗಿ ಅವರ ಕುಟುಂಬದ ಜೀವಂತ ಸದಸ್ಯರಾಗಿ ಬಂದಿರುತ್ತಾರೆ ಎಂದರೆ ಸರಿ.”

29. The above suggestion would give a clear indication that the plaintiffs and defendant are the sole surviving members of their deceased father.

30. A specific suggestion was put to PW.1 to the effect that during life time of their father a land measuring 4 guntas in suit survey number was given to their brother Mr. Eknath Gunagi why he was alive in a partition took place amongst them. PW.1 has admitted the said suggestion to be true.

Therefore it is an admitted fact also. The deed of partition has been confronted by the defendant in the cross-examination of PW.1 and she having admitted the same, the said partition deed has been marked as Ex.D.1.

31. Anyhow, PW.1 feigns ignorance as to how the suit schedule properties granted and who made an application for such grant.

32. The defendant who has examined himself as DW.1 has been cross-examined. In the cross-examination, he has deposed as follows:

“ದಾವಾ ಜಮೀನುಗಳೆಲ್ಲವೂ ಗೇಣಿ ಜಮೀನುಗಳು ಎಂದರೆ ಸರಿ. ಸದರಿ ಜಮೀನುಗಳನ್ನು ನಿಮ್ಮ ಅಜ್ಜ ಈರಾ ಹೊನ್ನಾ ಗುನಗಿ ಸಾಗುವಳಿ ಮಾಡುತ್ತಿದ್ದು ಅವರ ನಂತರ ನಿಮ್ಮ ತಂದೆ ಡೊಳ್ಳಾ ಈರಾ ಗುನಗಿ ಸಾಗುವಳಿ ಮಾಡುತ್ತಿದ್ದರು ಎಂದರೆ ಸರಿ. ದಾವಾ ಜಮೀನುಗಳ ಬಾಬು ಮಂಜೂರಾತಿ ಕೋರಿ ನಿಮ್ಮ ಅಜ್ಜ ಈರಾ ಹೊನ್ನಾ ಗುನಗಿ ಇವರು ಭೂ ನ್ಯಾಯ ಮಂಡಳಿಯ ಮುಂದೆ ಅರ್ಜಿ ಹಾಕಿದ್ದರು ಎಂದರೆ ಸರಿ. ಆ ಪ್ರಕಾರ ಅವರ ಹೆಸರಿಗೆ ದಾವಾ ಜಮೀನುಗಳು ಮಂಜೂರಾಗಿದ್ದವು ಎಂದರೆ ಸರಿ. ಆ ಪ್ರಕಾರ ಅವರ ಹೆಸರಿಗೆ ದಾವಾ ಜಮೀನುಗಳು ಮಂಜೂರಾಗಿದ್ದವು ಎಂದರೆ ಸರಿ. ಅದರಂತೆ ಕಂದಾಯ ದಾಖಲೆಗಳಲ್ಲಿ ಅವರ ಹೆಸರು ನಮೂದಾಗಿರುತ್ತದೆ ಎಂದರೆ ಸರಿ. ಅವರು ತೀರಿಕೊಂಡ ನಂತರ ನಿಮ್ಮ ತಂದೆಯವರ ಹೆಸರಿಗೆ ವಾರಸು ನಾತೆಯಲ್ಲಿ ಸದ್ರಿ ಜಮೀನುಗಳ ಬಗ್ಗೆ ಮ್ಯುಟೇಶನ್ ಎಂಟ್ರಿ ನಂ. 4547 ರ ಪ್ರಕಾರ ನಮೂದಾಗಿರುತ್ತದೆ ಎಂದರೆ ಸರಿ.”

33. Thus, from the answers elicited from the mouth of DW.1 and certain suggestions put even to PW.1 and upon careful appreciation of the documentary evidence led by both the plaintiffs and defendant, it is evident that the suit schedule properties are joint family properties. Notably, as could be seen from the entire cross-examination of PW.1, there is no suggestion to her by the defendant denying the plea of the plaintiffs that the suit schedule properties are joint family properties. Moreover, the alleged share claimed by the plaintiffs' over the suit schedule properties is also not seriously denied by the defendant. The plea of the plaintiffs that the suit schedule properties are joint family properties is acceptable.

34. Taking into consideration all the above, this Court on careful appreciation of the entire materials on record, is of the opinion that the suit schedule properties are joint family properties. Hence I answer Issue No.1 in the **Affirmative**.

35. **ISSUE NO.2:** The defendant has sought a declaratory relief claiming absolute ownership over the suit schedule properties in respect of his mother's $\frac{1}{4}^{\text{th}}$ share stated to have been bequeathed by his mother in his favour.

36. Admittedly, the Will set up by the defendant in his counter-claim is a registered Will. It is at Ex.D.13.

37. As per the defendant, his mother Smt. Umabai Dolla Gunagi had bequeathed her undivided $\frac{1}{4}^{\text{th}}$ share in the suit schedule properties in his favour by virtue of Ex.D.13 Will.

38. Since the defendant has set up the aforesaid Will, he is the propounder of the Will. The burden of proof that Ex.D.13 Will was validly executed and is a genuine document is on the propounder who is defendant herein. He is also required to prove that the testator (mother of the defendant) had signed the Will and that she had put her thumb impression out of her own free will having a sound disposing state of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But the onus would be on the defendant to remove the suspicion by leading sufficient and cogent evidence if there exists any.

39. So, clearly enough, burden is also on the propounder to prove due execution, attestation and sound disposing state of mind of the testator.

40. Before delving into the evidence on record, it is pertinent to reproduce the relevant provisions dealing with the validity and execution of Will.

41. In fact, the legal principles with regard to the proof of the Will are no longer res integra.

42. Section 63 of the Indian Succession Act, 1925 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 witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been 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 of 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.”

43. Section 68 of the Indian Evidence Act, 1872 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: xxx”

44. A bare reading of the aforementioned provisions would show that the requirements stipulated under Section 63 of the Indian Succession Act have to be complied with for the execution of the Will to be proven in terms of Section 68 of the Indian Evidence Act.

45. Section 63 of the Indian Succession Act, 1925 deals with the execution of unprivileged Will while Section 68 of the Indian Evidence Act, 1882 (now Section 67 of the

Bharatiya Sakshya Adhiniyam, 2023) deals with proof of execution of document required to be attested which includes a Will.

46. I may now take note of the relevant principles settled by the consistent decisions in regard to the process of examination of a Will when produced before a court of law.

47. At this juncture, it is worthy to refer a celebrated judgment of the Hon'ble Apex Court in the case of **H. Venkatachala Iyenger Vs. B.N. Thimmajamma and Others** reported in **AIR 1959 SC 443**. The relevant paragraphs of the said judgment is reproduced hereunder for quick reference:

“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."

48. Our Hon'ble High Court in **J.T. Surappa and Another Vs. Sri. Satchidhanandendra Saraswathi Swamiji Public Charitable Trust and Others** reported in **ILR 2008 KAR 2115**, has held as under :

“(A) INDIAN SUCCESSION ACT, 1925 – SECTION 2(h) – Will – Proof of – Legal requirements - Duty of the Court - Five steps to be considered - HELD, Under the Act, the Will to be valid, should be reduced into writing, signed by the testator and shall be attested by two or more witnesses and at least one attesting witnesses shall be examined. If these legal requirements are not found, in the eye of law there is no Will at all. Therefore, the first step is that if the documents produced before the Court prima facie do not satisfy these legal requirements, the Court need not make any further enquiry, in so far as its due execution is concerned and can negative a claim based on the said document -- FURTHER HELD, The second step is that when the legal heirs are disinherited, the Court has to scrutinize the evidence with greater degree of care than usual -- The third step would be to find out whether the testator was in a sound state of mind at the terms of executing the Will -- The fourth step would be to find out whether there exists any suspicious circumstances surrounding the execution of the Will -- The fifth step is to consider whether the Will that is executing is in accordance with Section 63 of the Act read with Section 68 of the Evidence Act.

(B) INDIAN SUCCESSION ACT, 1925 SECTION 63 R/W SECTION 68 - Execution of a Will under - Attestation and Execution -Procedure - HELD, The Will that is executed is in accordance with Section 63 of the Act read with Section 68 of the Evidence Act. The Will is a document required by law to be attested. The execution of Will must include both execution and attestation. "Attestation" and "execution" are different acts, one following the other. There can be no valid execution without due attestation, and if due attestation is not proved, the fact of execution is of no avail - The Court has to find out whether the Will bears the signature of the testator and the said signature is placed at a place with the intention of giving effect to the Will. Further the said Will has been attested by two witnesses and whether the witnesses have seen the testator affixing his signature to the Will in their presence and if not at least they receive from the stator personal acknowledgment of his signature or mark and each of them shall sign the Will as attesting witness in the presence of the testator though it shall not be necessary that both of them should be present at the same time -- FURTHER HELD, Section 68 of the Evidence Act deals with proof of

execution of documents required by law to be attested. A Will is a document which requires to be attested under Section 63(c) of the Act. Therefore, the said document shall not 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 subject to the process of the t and capable of giving evidence. Whether such a Will is registered or not registered, in the eye of law it makes no difference.

Even if the said Will is registered under the provisions of the Indian Registration Act, 1908 whether the execution of the Will is admitted or denied, it is necessary to call an attesting witness in proof of the execution of the said Will. Under no circumstances the proof of execution of the Will is dispensed with in law - It is only after the Court is satisfied that all these tests are successfully passed, the Court can declare that Will is executed in accordance with law, as such it is valid and enforceable."

49. Relying upon the above decisions, our Hon'ble High Court in a judgment reported in **ILR 2023 KAR 4350 - Sri. Krishna Rao since dead by LRs Vs. M.J. Vittal and Others**, has extensively dealt with as to how a Will is to be proved before a Court of law and deduced the gist of legal principles enunciated in the above decisions and observed that to succeed in proving the Will, the propounder of the Will is required to place satisfactory evidence that :

- (i) the Will was duly signed by the testator;
- (ii) the testator at the time of signing the will was in a sound and disposing state of mind;
- (iii) the testator understood the nature and effect of the dispositions; and
- (iv) that the testator had put his signature on the document of his own free will and lastly

- (v) That the will is free from suspicious circumstances surrounding the execution of the Will.

50. The Hon'ble Apex Court in ***Jagadish Chand Sharma vs Narain Singh Saini (Dead) Through LRs and Others*** reported in **(2015) 8 SCC 615**, the Hon'ble Apex Court referring to Section 63 of the Indian Succession Act had illustrated that *"the provisions contemplate that in order to validly execute the Will, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further, the signature or mark of the testator or signature of the person signing for him has to be so placed that it was intended to give effect to the writing as a Will. Section 63 mandates that the Will should be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other person sign it in the presence and on 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 has signed the Will in the presence of the testator, though it is not necessary that more than one witness be present at the same time and that no particular form of attestation is necessary. The execution and attestation of the Will are mandatory in nature and any failure and deficiency in adhering to the essential requirements would result in invalidation of the instrument of disposition of the property."*

51. In the light of the legal position aforementioned, let me now examine the evidence placed on record in the instant case.

52. Returning to the facts and circumstances of the case on hand, first and foremost, it can be noticed that, PW.1

has been cross examined by the learned counsel for the defendant referring to the execution of Ex.D.13 Will.

53. PW.1 has answered as follows:

“ನಿಮ್ಮ ತಾಯಿಗೆ ಬಂದ ಹಕ್ಕಿನ ಆಸ್ತಿಯನ್ನು ನಿಮ್ಮ ತಾಯಿ ಅವರ ಮಗನಾದ ಪ್ರತಿವಾದಿಗೆ ನೊಂದಾಯಿತ ಮೃತ್ಯು ಪತ್ರ ಯಾನೆ ವೀಲು ನಾಮೆ ಮೂಲಕ ಹಕ್ಕು ಪ್ರಾಪ್ತಿ ಮಾಡಿಕೊಟ್ಟಿರುತ್ತಾರೆ ಎಂದರೆ ಸಾಕ್ಷಿ ಅದು ನನಗೆ ಗೊತ್ತಿಲ್ಲ ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ನಿಮ್ಮ ತಾಯಿ ಬದುಕಿರುವಾಗಲೇ ಕಾನೂನು ಸಮ್ಮತವಾಗಿ ನೊಂದಾಯಿತ ವೀಲು ನಾಮೆಯನ್ನು ಬರೆದುಕೊಟ್ಟಿರುತ್ತಾರೆ ಎಂದರೆ ಸಾಕ್ಷಿ ನಮಗೆ ಗೊತ್ತಿಲ್ಲ ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ಸರ್ವೆ ನಂಬ್ರ 441/1ಕ 3ಅ ಹಾಗೂ ಸರ್ವೆ ನಂಬ್ರ 441/3ಅ ಗಳ ಬಾಬು ಸದ್ರಿ ವೀಲು ನಾಮೆಯನ್ನು ಬರೆದುಕೊಟ್ಟಿದ್ದಾರೆ ಎಂದರೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ.”

54. The above is the only cross-examination done to PW.1 referring to Ex.D.13 Will. It is no doubt true that PW.1 has feigned ignorance regarding the execution of alleged Will. Just because she has pleaded ignorance about the execution of the alleged Will it is not possible to say that the PW.1 has admitted the Will in question. Law is also well settled that even if the execution of Will is admitted, it does not dispense with its proof as mandated under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

55. PW.1 has denied certain other suggestions put to her in the cross-examination.

56. The defendant who has examined himself as DW.1 has been effectively cross-examined by the learned counsel for the plaintiffs as regards the execution of the alleged Will. During the course of cross-examination, the learned counsel for the plaintiffs has contended and suggested to DW.1 that he has created the alleged Will and the same is surrounded by suspicious circumstances since no mutation has been applied for on the basis of such a Will and the defendant has not referred the said Will in the previously instituted suit OS No.86/2020 and that the mother of defendant was not in sound disposing state of mind and she could not execute a Will as she was a paralytic patient and could not go outside the home.

57. Moreover, nothing has been suggested to PW.1 in her cross-examination with respect to the testamentary capacity of the testator. Nothing has been suggested that she was quiet hale and healthy and was in sound disposing state of mind in order to execute the Will in question in favour of the defendant.

58. The relevant portions of deposition pertaining to the cross-examination of DW.1 are reproduced herebelow for

ready reference. Because the answers elicited in his cross-examination are crucial to decide the validity and execution of Ex.D.13 Will.

“13. ಶಂಕರ ಡೊಳ್ಳಾ ಗುನಗಿ ಎಂದರೆ ನಾನೇ. ಮಂಗಲಾ ಏಕನಾಥ ಗುನಗಿ ನಿಮ್ಮ ಅತ್ತಿಗೆ ಎಂದರೆ ಸರಿ. ಮಂಗಲಾ ಏಕನಾಥ ಗುನಗಿ ಇವರು ಕಾರವಾರದ ಕಿರಿಯ ಶ್ರೀಣಿ ಸಿವಿಲ್ ಜಡ್ಜರ ನ್ಯಾಯಾಲಯದಲ್ಲಿ ಓ.ಎಸ್. ನಂಬ್ರ 86/2020 ರ ದಾವೆಯನ್ನು ದಾಖಲಿಸಿದ್ದು ಸದ್ರಿ ದಾವೆಯಲ್ಲಿ ನನಗೆ ಮಾನ್ಯ ನ್ಯಾಯಾಲಯದಿಂದ ಸಮನ್ಸು ಬಂದಿತ್ತು ಎಂದರೆ ಸರಿ. ಸದ್ರಿ ದಾವೆಯಲ್ಲಿ ನಾನು ಹಾಜರಾಗಿದ್ದೆ ಎಂದರೆ ಸರಿ. ಸದ್ರಿ ದಾವೆಯಲ್ಲಿ ನನ್ನ ತಾಯಿಯ ಹಕ್ಕನ್ನು ತನ್ನ ಹೆಸರಿಗೆ ವಿಲ್ ಬರೆದಿಟ್ಟಿದ್ದಾರೆ ಅಂತಾ ಹೇಳಿ ಸದ್ರಿ ವಿಲ್ ಪ್ರಕಾರ ಮಾಲೀಕತ್ವ ಕೇಳಿ ಘೋಷಣಾತ್ಮಕ ಪರಿಹಾರ ಕೇಳಿದ್ದರು ಎಂದರೆ ಸರಿ. ಸದ್ರಿ ದಾವೆಯಲ್ಲಿ ನಾನು ಹಾಜರಾಗಿ ಲಿಖಿತ ತಕರಾರನ್ನು ಸಲ್ಲಿಸಿರುತ್ತೇನೆ ಎಂದರೆ ಸರಿ. ಈ ಹಂತದಲ್ಲಿ ವಾದಿಯರ ಪರ ವಕೀಲರು ಓ.ಎಸ್.ನಂಬ್ರ 86/2020 ರ ಲಿಖಿತ ತಕರಾರಿನ ದೃಢೀಕೃತ ಪ್ರತಿಯನ್ನು ಸಾಕ್ಷಿಗೆ ತೋರಿಸಲಾಗಿ ಅದು ನೀವು ಸದ್ರಿ ದಾವೆಯಲ್ಲಿ ಸಲ್ಲಿಸಿದ ಲಿಖಿತ ತಕರಾರಲ್ಲವೇ ಅಂತಾ ಕೇಳಿದ್ದಕ್ಕೆ ಸಾಕ್ಷಿ ಅದನ್ನು ನೋಡಿ ಹೌದು ಅಂತಾ ಉತ್ತರಿಸಿರುವ ಕಾರಣ ಅದನ್ನು ನಿಪಿ-12 ಅಂತಾ ಗುರುತಿಸಲಾಯಿತು. ಸದ್ರಿ ಓ.ಎಸ್. ನಂಬ್ರ 86/2020 ರಲ್ಲಿ ಹಾಗೂ ಈ ದಾವೆಯಲ್ಲಿ ನೀವು ಒಂದೇ ವಕೀಲರ ಮೂಲಕ ಪ್ರತಿನಿಧಿಸುತ್ತಿದ್ದೀರಿ ಎಂದರೆ ಸರಿ. ಈ ಎರಡೂ ದಾವೆಯಲ್ಲಿ ಲಿಖಿತ ತಕರಾರನ್ನು ಸಲ್ಲಿಸಲು ವಕೀಲರಿಗೆ ನೀವೇ ಮಾಹಿತಿ ನೀಡಿದ್ದೀರಾ ಎಂದರೆ ಸಾಕ್ಷಿ ಹೌದು ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ನಿಪಿ-12 ನ್ನು ಓ.ಎಸ್ ನಂಬ್ರ 86/2020 ರ ದಾವೆಯಲ್ಲಿ ಸಲ್ಲಿಸುವ ಸಮಯದಲ್ಲಿ ನಿಮ್ಮ ತಾಯಿ ನಿಮ್ಮ ಹೆಸರಿಗೆ ಬರೆದಿಟ್ಟಿದ್ದಾರೆ ಎನ್ನಲಾದ ವಿಲ್ ಬಗ್ಗೆ ನಿಮಗೆ ಮಾಹಿತಿ ಇತ್ತಾ ಎಂದರೆ ಸಾಕ್ಷಿ ಹೌದು ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ಸದ್ರಿ ವಿಲ್ ಬರೆದಿಟ್ಟ ವಿಷಯವನ್ನು ಓ.ಎಸ್ ನಂಬ್ರ 86/2020 ರ ದಾವೆಯಲ್ಲಿ ಉಲ್ಲೇಖಿಸಿದ್ದೀರಾ ಎಂದರೆ ಸಾಕ್ಷಿ ನಿಪಿ-12 ನ್ನು ಓದಿ ನೋಡಿ ಉಲ್ಲೇಖಿಸಿಲ್ಲ ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ನಿಪಿ-12 ರಲ್ಲಿ ನಿಮ್ಮ ತಾಯಿ ನಿಮ್ಮ ಹೆಸರಿಗೆ ಬರೆದಿಟ್ಟಿದ್ದಾರೆ ಎನ್ನಲಾದ ವಿಲ್‌ನ ವಿಷಯವನ್ನು ಉಲ್ಲೇಖಿಸಲು ನಿಮಗೆ ತೊಂದರೆ ಇತ್ತಾ ಎಂದರೆ ಸಾಕ್ಷಿ ಇಲ್ಲಾ ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ನಿಮ್ಮ ತಾಯಿ ನಿಮ್ಮ ಹೆಸರಿಗಾಗಲೀ, ನಿಮ್ಮ ಅತ್ತಿಗೆಯ ಹೆಸರಿಗಾಗಲೀ ಯಾವುದೇ ವಿಲ್ ಅನ್ನು ಬರೆದಿಟ್ಟಿದ್ದು ಇರುವುದಿಲ್ಲ ಎಂದರೆ ಸುಳ್ಳು.”

59. From the above evidentiary admissions of DW.1, it is crystal clear that the defendant had not referred Ex.D.13 Will in the previously instituted suit referred to above. DW.1 has clearly deposed that he was very much aware of the execution of the alleged Will by his mother in his favour and that he had no impediment of whatsoever to whisper regarding the alleged Will in the previous suit. Furthermore, no plausible explanation is forthcoming from DW.1 as to why he had not referred the Will in question in that suit. This is one of the suspicious circumstances shrouded to the execution of Ex.D.13 Will. Matter does not rest here.

60. In addition to the above, it is also pertinent to note that as contended by the learned counsel for the plaintiffs in his arguments, the defendant has not at all applied for mutation based on Ex.D.13 Will. The answers elicited from the mouth of DW.1 in that regard is as follows:

“ನಿಡಿ-13 ರ ವಿಲ್ ಅನ್ನು ಸಂಬಂಧಪಟ್ಟ ಕಂದಾಯ ಅಧಿಕಾರಿಗಳ ಮುಂದೆ ಹಾಜರುಪಡಿಸಿದ್ದೀರಾ ಎಂದರೆ ಸಾಕ್ಷಿ ನಾನು ಹಾಜರುಪಡಿಸಿಲ್ಲ ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ನಿಮ್ಮ ತಾಯಿ ನಿಮ್ಮ ಹೆಸರಿಗೆ ವಿಲ್ ಬರೆದಿಟ್ಟಿದ್ದೇ ಆಗಿದ್ದಲ್ಲಿ ಮ್ಯುಟೇಶನ್ ಮಾಡಿಕೊಳ್ಳುವ ಸಂದರ್ಭದಲ್ಲಿ ಸಂಬಂಧಪಟ್ಟ ಕಂದಾಯ ಅಧಿಕಾರಿಗಳ ಮುಂದೆ ನಿಡಿ-13 ರ ವಿಲ್ ಅನ್ನು ಹಾಜರುಪಡಿಸಲು ತೊಂದರೆ ಇರಲಿಲ್ಲ ಎಂದರೆ ಸಾಕ್ಷಿ ತೊಂದರೆ ಏನು ಇರಲಿಲ್ಲ ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ.

ನಿಡಿ-13 ರ ವಿಲ್ ನ ವಿಷಯವನ್ನು ಈ ದಾವೆಯ ಲಿಖಿತ ತಕರಾರಿನಲ್ಲಿಯೇ
ಮೊದಲ ಬಾರಿಗೆ ಹೇಳಿರುವುದು ಎಂದರೆ ಸರಿ.”

61. The above answers elicited from the cross-examination of DW.1 make it abundantly clear that the defendant did not produce Ex.D.13 Will while getting the revenue records mutated in the name of plaintiffs and defendant after the death of his mother. DW.1 further clarifies that if his mother had really executed such a Will, nothing prevented him from bringing it to the notice of the concerned revenue authorities while mutating the revenue records pertaining to the suit schedule properties. Needless to state that the revenue records have been mutated jointly in the name of plaintiffs and defendant based on inheritance and no Will has come to light while carrying out such mutation. Furthermore, DW.1 has clearly admitted that he has introduced Ex.D.13 Will for the first time in his written statement. All these clearly create a reasonable doubt with respect to the execution of Ex.D.13 Will.

62. The learned counsel for the plaintiffs has relied upon a decision of Hon'ble Madhya Pradesh High Court reported in **AIR 2011 MADHYA PRADESH 195—Ramrao**

Karuji Baghale vs Natthu S/o Karuji Baghale and Others. In his decision, the Hon'ble High Court has observed as under:

“18. The second suspicious circumstance is that although the plaintiff was having Will in his possession and the said Will has been executed on 3-2-1984 and testator Karuji died on 24-11-1985, but, the plaintiff was keeping silent and did not act upon the basis of Will for years together which is against his natural conduct. Certainly a person would act upon the Will after death of the testator particularly it has been executed by his father or would disclose the factum of execution of the Will filing some application in the Revenue Court on the basis of the said Will, but, certainly he will not keep silent for years together. The plaintiff had not disclosed the Will for nearabout 5 years.

19. For the reasons stated hereinabove, the substantial question of law is answered and decided against the appellant by holding that the Will is suspicious and the suspicions are not removed and there is no misreading of evidence.”

63. Thus, the observation of the Hon'ble High Court in the above decision is aptly applicable to the facts and circumstances of the case on hand. In the instant case, the Will relied upon by the defendant was alleged to have been executed on 31.12.2015. Admittedly, the mother of the defendant Smt. Umabai Dolla Gunagi died on 05.03.2018. Thus it is clear that the defendant remain passive in the matter of introducing the Will in question so as to claim his

exclusive right over $\frac{1}{4}^{\text{th}}$ share of his mother in the suit schedule properties and has been silent for a period of more than 5 years. No explanation is offered by the defendant for such an inaction on his part. No prudent man would keep quiet in such a situation without getting the revenue records mutated in his name on the basis of the alleged Will. The defendant is neither a layman nor a rustic villager. He served in Forest Department. He retired as Deputy Range Forest Officer. So, it is not the case of the defendant that he was not aware of the execution of the alleged Will. Rather he states that he was very much aware of its execution. Moreover, his presence was also very much there at the time of the alleged execution of the Will. However, he has not clarified as to why he had not applied for mutation on the basis of the Will. Thus, his silence for years together speaks volume.

64. Clearly enough, the defendant has not at all bothered to remove all such suspicious circumstances pointed out by the plaintiffs as discussed above. Therefore, suffice it to state that the alleged execution of Ex.D.13 Will by the testator suffers from various doubts and discrepancies. Thus, this Court is of the considered opinion that the

defendant has failed to remove the suspicious circumstances surrounding the execution of Ex.D.13 Will.

65. As already stated, the plaintiffs have specifically contended that Ex.D.13 Will is created one and surrounded by suspicious circumstances. They have inter-alia attacked the testamentary capacity of their mother. The plaintiffs have contended that their mother had been suffering from paralytic stroke and as a result of which she could not move outside the home. DW.1 has been questioned on this aspect of the matter. He has deposed as under:

“ನಿಮ್ಮ ತಂದೆ ತೀರಿಕೊಂಡ ನಂತರ ನಿಮ್ಮ ತಾಯಿಯ ಆರೋಗ್ಯ ಔಷದೋಪಚಾರವನ್ನು ಯಾರು ನೋಡಿಕೊಳ್ಳುತ್ತಿದ್ದರು ಎಂದರೆ ಸಾಕ್ಷಿ ನಾನೇ ನೋಡಿಕೊಳ್ಳುತ್ತಿದ್ದೆ ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ಅವರನ್ನು ನಾನು ಕಾರವಾರ ಹೆಗಡೆಕಟ್ಟಿ ವೈದ್ಯರ ಬಳಿ ಚಿಕಿತ್ಸೆಗಾಗಿ ಕರೆದುಕೊಂಡು ಹೋಗುತ್ತಿದ್ದೆ ಹಾಗೂ ಅವರಿಗೆ ಪಾರ್ಶ್ವವಾಯು ಆದ ನಂತರ ಕಾರವಾರದ ಪಿಕ್ಕಳಿ ಆಸ್ಪತ್ರೆಗೆ ದಾಖಲಿಸಿದ್ದೆ ಅದಲ್ಲದೇ ಹೆಚ್ಚಿನ ಚಿಕಿತ್ಸೆಗಾಗಿ ದೇವಬಾಗದ ಅಗ್ರನಾಯಕ ಆಸ್ಪತ್ರೆಯಲ್ಲಿ ಚಿಕಿತ್ಸೆ ಕೊಡಿಸಿದ್ದೆ. ಪಾರ್ಶ್ವವಾಯು ಆದ ನಂತರ ನನ್ನ ತಾಯಿ ಓಡಾಡುವ ಸ್ಥಿತಿಯಲ್ಲಿ ಇರಲಿಲ್ಲ ಎಂದರೆ ಸರಿ.”

66. The above admissions given by DW.1 strike at the root of the matter. It negatively affect the testamentary capacity of his mother Smt. Umabai Dolla Gunagi. Because as admitted by DW.1, she has been suffering from paralytic stroke and has been undergoing treatment after treatment

for such ailment and disability. He has categorically stated that after paralytic stroke his mother was not in a position to move about anywhere. Therefore, it is clear that the contention of the plaintiffs that their mother was not in a sound disposing state of mind while executing the alleged Will appears to be probable, viewed from any angle.

67. Moreover, when the plaintiffs have specifically questioned the testamentary capacity of the testator, it is incumbent on the part of the defendant to satisfy the Court with clear and cogent evidence that the testator was in sound disposing state of mind. However, the defendant has neither pleaded nor adduced any evidence to that effect. No iota of evidence has been tabled by the defendant to prove the said fact. It is also relevant to note that even the oral evidence of DWs.2 & 3 are not good enough to prove the testamentary capacity of defendant's mother.

68. In order to prove the Will, the defendant has examined two witnesses as DWs.2 & 3. It is to be noted that, though Section 68 of the Indian Evidence Act mandates the examination of atleast one witness to prove a Will, the defendant has examined two witnesses. How far the

testimonies of those two witnesses would legally prove the Will is really germane for consideration. Now let me examine the evidence of those attesting witnesses.

69. DW.2 is Mr. Jagadish Murari Revandikar who is an Advocate practising in Karwar Courts. He has been summoned by this Court at the instance of the defendant. In his examination-in-chief, except mentioning about his presence at the time of executing the alleged Will and his signing the Will, he has not stated anything more to prove the essential requirements of Section 63 of the Indian Succession Act. Though he has narrated in his examination-in-chief one Mr. Gopal Waingankar Advocate to sign the Will as an attester, the relevant portion of the examination-in-chief of this witness is reproduced herebelow for quick reference.

“3. ದಿನಾಂಕ 30-01-2016 ರಂದು ಶ್ರೀ ಗೋಪಾಲ ವೈಂಗಣಕರ್ ವಕೀಲರು ನನಗೆ ಪೋನ್ ಮಾಡಿ ನಾನು ವಿಲ್ ಬರೆದು ಪೂರ್ತಿಗೊಳಿಸಿದ್ದೇನೆ ಆದ್ದರಿಂದ ನೀವು ಶ್ರೀಮತಿ ಜಯಂತಿ ನೋಟರಿಯವರ ಕಚೇರಿಗೆ ಬರಬೇಕು ಅಂತಾ ವಿನಂತಿಸಿದರು. ಆ ಪ್ರಕಾರ ನಾನು ಅದೇ ದಿನ ಮಧ್ಯಾಹ್ನ ಸುಮಾರು 12-00 ಗಂಟೆಗೆ ಶ್ರೀಮತಿ ಜಯಂತಿ ನೋಟರಿಯವರ ಕಚೇರಿಗೆ ಹಾಜರಿದ್ದೆ. ಆ ಪ್ರಕಾರ ಇನ್ನೊಬ್ಬ ಸಾಕ್ಷಿದಾರರಾದ ಉದಯ ಶೆಟ್ಟಿಯವರು ಸಹ ಹಾಜರಿದ್ದರು ಹಾಗೂ ವಿಲ್ ಬರೆದಿರುವ ವ್ಯಕ್ತಿ ಶ್ರೀಮತಿ ಉಮಾ ಬಾಯಿ ಡೊಳ್ಳಾ ಗುನಗಿಯವರು ಹಾಜರಿದ್ದರು. ಶ್ರೀ ಗೋಪಾಲ ವೈಂಗಣಕರ್ ವಕೀಲರು ಬರೆದಿಟ್ಟ ವಿಲ್ ನ ಪ್ರತಿಯನ್ನು ನನಗೆ ಓದಲು ಕೊಟ್ಟರು. ನಾನು ಪೂರ್ತಿಯಾಗಿ ವಿಷಯವನ್ನು ತಿಳಿದುಕೊಂಡಿದ್ದೇನೆ. ಅವರ ಕಚೇರಿಯಲ್ಲಿ

ತೆಗೆದುಕೊಂಡ ಟಿಪ್ಪಣಿ ಹಾಗೂ ಪೂರ್ತಿಯಾಗಿ ತಯಾರಿಸಿದ ವಿಲ್ ಅನ್ನು ನೋಡಿದಾಗ ಅವುಗಳಲ್ಲಿ ಯಾವುದೇ ವ್ಯತ್ಯಾಸ ಕಂಡು ಬಂದಿಲ್ಲ. ತದನಂತರ ನಾನು 2ನೇ ಸಾಕ್ಷಿಯಾಗಿ ವಿಲ್ ನಾಮೆಯ ಮೇಲೆ ನೋಟರಿಯವರ ಎದುರಿನಲ್ಲಿ ಸಹಿ ಹಾಕಿ ಬಂದಿರುತ್ತೇನೆ. ನಾನು ಸದ್ರಿ ವಿಲ್ ಅನ್ನು ನೋಡಿ ಅದರಲ್ಲಿರುವ ನನ್ನ ಸಹಿಯನ್ನು ಗುರುತಿಸಿಬಿಟ್ಟೆ. ಅದು ನಿಡಿ-13 ಆಗಿರುತ್ತದೆ. ಸಾಕ್ಷಿ ನಿಪಿ-13 ರಲ್ಲಿನ ತನ್ನ ಸಹಿಯನ್ನು ನೋಡಿ ಗುರುತಿಸಿಕೊಂಡಿರುವ ಕಾರಣ ಸಾಕ್ಷಿಯ ಸಹಿಯನ್ನು ನಿಡಿ-13(ಎ) ಅಂತಾ ಗುರುತಿಸಲಾಯಿತು.”

70. From the above deposition of DW.2 what can be gathered is that he had simply signed the Will in the office of Smt. Jayanti, Notary, Karwar and that he has read the draft Will and the notes prepared by Sri Gopal Waingankar Advocate. However his testimony is totally silent on the fact that he has seen the testator signing or that he has signed the Will in the presence of the testator. Pertinently, this witness has not stated that he signed the Will in the presence of the testator and that the testator had signed the Will in his presence or in the presence of each other. Therefore the testimony of this witness would not persuade this Court to believe the due execution of Ex.D.13 Will.

71. No doubt, DW.2 has been extensively cross-examined by the learned counsel for the plaintiffs. In the cross-examination he states that the Will was already typed when he visited the office of the Notary. He states that he

does not know whether Notarial Register number is mentioned in the Will or not. He also states that the Will was not registered at that time. He also states that he does not know as to who has affixed photographs on the Will.

72. Another attesting witness namely Mr. Uday Sheshagiri Shetti has been examined as DW.3. Notably, his evidence also does not satisfy the essential requirements of Section 63 of the Indian Succession Act. Though he has been summoned by this Court at the instance of defendant, he has filed affidavit in lieu of examination-in-chief. The contents of his affidavit filed in lieu of examination-in-chief is as follows:

“I am the witness in this case hence I know the fact of the case. On 30-01-2016, I have signed on willnama as a witness, which is executed by mother of defendant by name Shankar Dolla Gunagi. I have signed on will in the office of Smt. B. Jayanti, Advocate, Notary at Karwar. At the time of signing on will, Smt. Umabai Dolla Gunagi and her son by name Shankar Dolla Gunagi along with Shri. Gopal R. Waingnkar, Advocate who is drafted this will and another Advocate J.M. Revandikar were present. I have signed on will by read over the same. The executor of the will has written in her share as 1/4th in Sy. No.441/1K3A measuring area 00-10-01 and Sy. No.441/1/3A measuring 00-02-08, which is situated in Baad-I Gram.”

73. I have carefully gone through the contents of the aforesaid affidavit sworn to by DW.3. At the outset, it is to be noted that according to him the defendant was very much present in the office of Notary at the time when he visited there. This indicates that the defendant has taken active role in the matter of the alleged execution of Will. This is also one of the suspicious circumstances surrounding the execution of the alleged Will. Coming to the testimony of this witness, it is clear that his statements in the affidavit are bald one without mentioning anything which is essentially required to be deposed by an attesting witness. He has not at all stated that he has signed the Will in the presence of testator and that he has seen the testator signing the Will. The material particulars that are required to be stated by an attesting witness as required under Section 63 of the Indian Succession Act is conspicuously missing in the affidavit evidence of DW.3.

74. True, DW.3 has been cross-examined by the learned counsel for the plaintiffs. It is also pertinent to note that several contradictions are brought out in the cross-examination of both DWs.2 & 3. Notably, in the cross-

examination, DW.3 has deposed that the affidavit filed by him in lieu of examination-in-chief has been prepared by Mr. Gopal Waingankar Advocate who is said to have prepared the Will. Therefore, it is clear that DW.2 has filed affidavit which is prepared by Mr. Gopal Waingankar Advocate. Thus it is clear that this witness has deposed as desired by Mr. Gopal Waingankar Advocate. Furthermore, in the cross-examination DW.1 has deposed that his signature was first taken on the Will. He also states that he did not read the Will. He has signed the Will without reading it. Therefore it is clear that the testimony of this witness does not stand the scrutiny of this Court even for a minute.

75. As discussed above, attesting witness should speak not only about the testator's signatures but also each of the witnesses had signed the Will in the presence of the testator.

76. Furthermore, none of the attesting witnesses have deposed that the contents of the Will were read over and explained to the testator and the testator had affixed her thumb impression after understanding the contents of the Will.

77. Significantly, there is nothing on record to suggest that the testator had read out and signed the Will in the presence of DWs.2 & 3 and thereafter they had appended their signatures on Ex.D.13 Will.

⁷
78. Section 63 of the Indian Succession Act requires that the Will has to be executed in the presence of two attestors. What is attestation of a Will, is also define in this Section as follows:

- i. 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.
- ii. 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.
- iii. The Will shall be attested by two or more witnesses, each of whom has been 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.

79. However, in the case on hand, the testimonies of both DWs.2 & 3 do not satisfy the requirements contemplated in Section 63 of the Indian Succession Act. Therefore their testimony lacks the essential requirements to prove Ex.D.13 Will.

80. The Hon'ble Apex Court in ***AIR 2025 SC 4108-- Ramesh Chand (D) Through LRs vs Suresh Chand and Another***, held that "A Will must be proved in accordance with law. Observation of High Courts that requirement of examining attesting witnesses arises only in case of disputes between legal heirs was contrary to law. The Will propounded by plaintiff was also surrounded by suspicious circumstances and plaintiff had failed to remove suspicion and therefore Will propounded by plaintiff though registered would not confer any valid title.

81. Our Hon'ble High Court in ***2026(2) KCCR 1596, -- Santhosha C. A. vs Smt. Sujatha and Others***, reiterated the legal position that mere registration of Will does not dispensed with burden on propounder to remove suspicious circumstances. It is also held that where evidence regarding attestation, mental capacity and execution creates doubt, Will

cannot be accepted despite absence of proof of forgery by defendants.

82. Hence, in view of the decisions of Hon'ble Apex Court and High Courts mentioned supra, this Court is of the view that the testimonies of DWs.2 & 3 are insufficient to prove Ex.D.13 Will in accordance with Section 63 of the Indian Succession Act.

83. Therefore, this Court is of the considered opinion that the testimonies of both DWs.2 & 3 would not prove the due execution of Ex.D.13 Will.

84. It is also relevant to note that though Ex.D.13 Will was registered in the office of Senior Sub-Registrar, Karwar, there is no endorsement or note in the Will with regard to the fact that the testator had admitted the execution of Will before the Sub-Registrar.

85. Coming to Ex.D13 Will, it is to be noted that it does not contain the serial number of the Notarial Register maintained by the Notary before whom the Will was alleged to have been executed. The Notary before whom the Will alleged to have been executed is not examined by the

defendant though the plaintiffs have seriously disputed the execution of the Will and contended that the same is created one.

86. A perusal of Ex.D.13 Will also shows that the said Will appears to have been registered on 06.07.2017 in the office of Senior Sub-Registrar, Karwar. As could be seen from Ex.D.13 it shows that the photograph of defendant is also affixed on the last page of the Will and that he has also signed the Will. This also shows the active participation of the defendant in all these affairs.

87. During cross-examination, DW.3 has clearly deposed his signature was taken first after the Will being typed. This shows that he has signed the Will before the testator affixing her thumb impression. Further he also states that he does not remember whether photograph was affixed on the Will. He also states that no photograph was affixed to Notarial Register.

88. Neither DW.2 nor DW.3 have mentioned that the testator had affixed her thumb impression after reading and understanding the contents of the Will. They have not even

stated that the contents of Will were read over and explained to the testator. Thus it clearly indicates that the testator could not have read and understood the contents of the Will unless it was read over and explained to her.

89. It is also pertinent to mention that the testator was aged about 79 years at the time of the alleged execution of the Will. During the course of cross-examination, DW.2 has been questioned regarding the age and health condition of the testator. DW.2 has answered as under:

“ನೀವು ನೋಡಿದ್ದೀರಿ ಎನ್ನಲಾದ ಉಮಾ ಬಾಯಿಯವರು ಸಾಧಾರಣ ಎಷ್ಟು ವಯಸ್ಸಿನವರಿರಬಹುದು ಎಂದರೆ ಸಾಕ್ಷಿ 76 ರಿಂದ 80 ರ ಒಳಗಿನ ವಯಸ್ಸಿನವರಿರಬಹುದು ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ಸಾಮಾನ್ಯವಾಗಿ 75 ವರ್ಷ ಮೇಲ್ಪಟ್ಟ ವಯಸ್ಸಿನವರು ಒಬ್ಬರೇ ಹೊರಗಡೆ ಹೋಗುವುದು ಕಡಿಮೆ ಎಂದರೆ ಸರಿ. 75 ವರ್ಷ ಮೇಲ್ಪಟ್ಟ ವ್ಯಕ್ತಿಗಳಿಗೆ ಸಾಮಾನ್ಯವಾಗಿ ನೆನಪಿನ ಶಕ್ತಿ ಕಡಿಮೆ ಹಾಗೂ ವಯೋಸಹಜ ಆರೋಗ್ಯದ ಸಮಸ್ಯೆಗಳು ಇರುತ್ತದೆ ಎಂದರೆ ಸಾಕ್ಷಿ ಇರಬಹುದು ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ಉಮಾ ಬಾಯಿ ಗುನಗಿಯವರ ಆರೋಗ್ಯದ ಬಗ್ಗೆ ಗೋಪಾಲ ವೈಂಗಣಕರ್ ರವರಾಗಲೀ, ನೀವಾಗಲೀ ವಿಚಾರಿಸಿಲ್ಲ ಎಂದರೆ ಸಾಕ್ಷಿ ಹೌದು ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ.”

90. The answers elicited from the cross-examination of DW.2 as extracted above raise a reasonable doubt with respect to the sound disposing state of mind of the testator at

the time of execution of the alleged Will. Moreover, the testator was an illiterate lady.

91. The plaintiffs have contended that their mother did not execute the alleged Will and the defendant has created the same and he has played an active role in the matter of execution of the alleged Will with an intention to gulp down the properties.

92. This is yet another infirmity. Propounder himself takes a prominent part in the execution of the alleged Will which confers on him 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. The peculiar circumstance of the instant case is also not an exception. Because, it is a matter of fact and record that the defendant has taken active role in the alleged execution of the Will and thereby he has received the benefit under it. This suspicion is not at all removed by the defendant.

93. At this juncture, it may also be useful to refer to the principles enunciated by the Hon'ble Apex Court in ***Jaswant Kaur vs Amrit Kaur [(1977) 1 SCC 369]*** for dealing with a Will shrouded in suspicion, 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 impermissible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing the explanation of the suspicious circumstances surrounding the making of the will.”

94. The Hon'ble Apex Court in a recent Judgment rendered in the case of ***Sardari Lal vs Bishan Dass & Ors.*** [Civil Appeal No.10990 of 2016, Decided on 06.07.2026], reported in ***2026 LiveLaw (SC) 655***, held as follows:

“Proof of will is not just an exercise to prove the signature of the testator on the Will and its attestation in terms of Section 63 of the Succession Act; rather it is an exercise to satisfy the Court's conscience that the testator had signed the Will with

free will being aware of its contents and after understanding the nature and effect of the dispositions in the Will. Where there are suspicious circumstances regarding the execution of the Will, the propounder must explain those circumstances and dispel all reasonable doubts regarding its execution. Judicial pronouncements have left the phrase 'suspicious circumstances' open-ended so as to encompass any circumstance which creates doubt about the Will being expression of the free will of the testator, though it would not include a figment of imagination or fantasy of a doubting mind. Such doubt may arise from a shaky or doubtful signature of the testator; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs, particularly the dependents; active or leading part played by the beneficiary in making of the will etcetera."

95. Harking back to the case on hand, no satisfactory, clear and cogent explanation being offered by the defendant with respect to the doubtful circumstances projected by the plaintiffs.

96. Though the Will is not required to be registered, it is not forthcoming as to why the same is registered on 06.07.2017 nearly after 1½ years of its alleged execution.

A perusal of Ex.D.13 further goes to show that though the said Will was alleged to have been executed before Notary on 30.01.2016, the date of the alleged Will is shown as 31.12.2015. All these discrepancies remain unexplained by the propounder of the Will.

97. Furthermore, the defendant who propounded the Will has not specifically stated either in his written statement cum counter-claim or in his examination-in-chief with regard to the place where the Will was executed by the testator, who were all present at the time of its alleged execution and whether the testator was in sound disposing state of mind at that relevant point of time etc. DW.1 states that the Will was executed in the home of Mr. Gopal Waingankar Advocate. A specific suggestion to DW.1 in that regard is also crucial one.

It reads thus: “ನಿಡಿ-13 ರ ವಿಲ್ಲನ್ನು ಎಲ್ಲಿ ಬರೆಸಿದ್ದೀರಿ ಎಂದರೆ ಸಾಕ್ಷಿ ವೈಂಗಣಕರ್ ಎಂಬ ವಕೀಲರ ಮನೆಯಲ್ಲಿಯೇ ಬರೆಯಿಸಿದ್ದು ಅಂತಾ ಉತ್ತರಿಸುತ್ತಾರೆ. ಅವರ ಹೆಸರು ಶ್ರೀ ಗೋಪಾಲ ವೈಂಗಣಕರ್.” This answer of DW.1 amply suggests his active involvement in getting the Will prepared from the said Advocate. He also states that he has given photographs also the said Advocate.

98. Notably, the oral testimony of DW.1 does not specify as to where exactly the Will in question was executed by the testator. He has nowhere stated in his evidence that it was executed before Notary.

99. Pertinently, the person who said to have prepared or typed the Will and signed as scribe namely Mr. Gopal Waingankar has not been examined. DWs.2 & 3 state that the Will was prepared by Mr. Gopal Waingankar Advocate. The defendant has not even bothered to examine him. No plausible explanation is forthcoming to that effect. Whether the aforesaid Mr. Gopal Waingankar is alive or not and whether he is available for examination is also not clarified by the defendant. But, as deposed by DW.3, Mr. Gopal Waingankar Advocate has prepared his affidavit in lieu of examination-in-chief. That would mean that he is alive.

100. As seen from Ex.D.13 Will, except mentioning that the defendant had been look after the testator with all facilities and medication, no specific reasons are mentioned in the Will so as to exclude her daughters from the bequest. Thus it is clear that the reason as to why the bequest has

been made only to the son by ignoring the daughters has also not been sufficiently explained in the Will.

101. In so far as the registration of the Will is concerned, even as per the endorsements of the Sub-Registrar's Office on Ex.D.13, it is noted that the registration was made on 06.07.2017, after 1½ years of its alleged execution. The suspicion that arises is as to why the registration was made after 1½ years of its alleged execution.

102. It is also pertinent to mention that the evidence of DWs.2 & 3 who are prime witnesses examined by the defendant, do not also throw light to remove the suspicious circumstances.

103. Significantly, there is no identification of the thumb impression of the testator by any person on Ex.D.13 Will.

104. Therefore, for all these reasons, I come to a definite conclusion that Mr. Shankar Dolla Gunagi, the defendant herein has not been able to repel and remove all the suspicious circumstances surrounding the execution of alleged Will so as to satisfy this Court that the Will was validly executed.

105. In addition to the above it is also pertinent to note that the DW.1 has been suggested in the cross-examination as follows:

“21. 2017 ನೇ ಇಸವಿಯಲ್ಲಿ ನಿಮ್ಮ ತಾಯಿ ಪಾರ್ಶ್ವವಾಯುವಿನಿಂದ ಬಳಲುತ್ತಿದ್ದ ಕಾರಣ ಓಡಾಡುತ್ತಿರಲಿಲ್ಲ, ಮನೆಯಲ್ಲಿಯೇ ಇದ್ದರು ಎಂದರೆ ಸರಿ. ನಿಡಿ-13 ನೊಂದಣಿಯಾಗುವ ಸಮಯದಲ್ಲಿ ಸಬ್-ರಜಿಸ್ಟ್ರಾರ್ ಆಗಿ ಯಾರು ಕೆಲಸ ಮಾಡುತ್ತಿದ್ದರು ಎಂದರೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ನಿಡಿ-13 ನ್ನು ನೋಂದಾಯಿಸಿದ ಸಬ್-ರಜಿಸ್ಟ್ರಾರ್ ಶ್ರೀ ಕೆ.ವಿ.ಬಾಡಕರ್ ಎಂಬುದು ಕಾರವಾರದವರು ಎಂದರೆ ಇರಬಹುದು. ಶ್ರೀ ಕೆ.ವಿ.ಬಾಡಕರ್ ಎಂಬ ಸಬ್-ರಜಿಸ್ಟ್ರಾರ್ ರವರ ವಿರುದ್ಧ ವಿಲ್ಲು ನಾಮೆ, ಜಿ ಪಿ ಎ ವಗೈರೆಗಳ ಕಾನೂನು ಬಾಹಿರ ನೊಂದಣಿ ಹಾಗೂ ಕಚೇರಿಯಲ್ಲಿನ ಹಣಕಾಸಿನ ದುರುಪಯೋಗ ಆಪಾದನೆಗಳ ಮೇಲೆ ಕಾರವಾರದ ಮಾನ್ಯ ಸಿ.ಜಿ.ಎಮ್ ನ್ಯಾಯಾಲಯದಲ್ಲಿ ಕ್ರಿಮಿನಲ್ ಪ್ರಕರಣ ದಾಖಲಾಗಿರುತ್ತದೆ ಎಂದರೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ಅಂತಹ ಪ್ರಕರಣಗಳಿಂದಾಗಿ ಅವರನ್ನು ಸೇವೆಯಿಂದ ವಜಾಗೊಳಿಸಿದ್ದು ಅವರ ವಿರುದ್ಧ ಸಲ್ಲಿಸಲಾದ ಕ್ರಿಮಿನಲ್ ಪ್ರಕರಣ ಇನ್ನೂ ವಿಚಾರಣೆಗೆ ಬಾಕಿ ಇದೆ ಎಂದರೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ.”

106. From the above suggestions put to DW.1 in his cross-examination clearly goes to show that DW.1 pleads ignorance about the allegation against the Sub-Registrar who registered the Will that he had illegally registered Wills, GPAs and other documents and misappropriated funds in the office of Sub-Registrar. This circumstance also goes against the case of the defendant in the matter of execution of the alleged Will.

107. Therefore, all the above circumstances put together raises a serious doubt that the Will was executed by the testator with free will and full understanding of the nature and effect of disposition made therein.

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

109. In the absence of any plausible explanation by the propounder of the Will regarding the removal of suspicions, overall the evidence tendered by the defendant in the case on hand does not inspire confidence that the Will was duly executed.

110. The Hon'ble Apex Court in **2025 SAR (Civ) 170—Lilian Coelho and Others vs Myra Philomena Coelho**, laid down a clear distinction between “Valid Execution” and “Genuineness” of Will. It is also held that finding of valid execution of Will does not amount to finding on genuineness of Will. It is further held that suspicious circumstances can be considered even after finding valid execution and the

propounder must remove suspicious circumstances to the Court's satisfaction.

111. The learned counsel for the defendant has cited the following Judgments of Hon'ble Apex Court in support of his case.

1. AIR 2005 SC 4362
Pentakota Satyanarayana & Ors. vs.
Pentakota Seetharatnam & Ors.,
2. AIR 2005 SC 780
Sridevi & Ors., vs. Jayaraja Shetty & Ors.

112. Having gone through the above decisions, this Court is of the view that the said decisions are of no avail to the defendant because those decisions could be distinguished on facts and circumstances of the case. Therefore, these decisions would not lend much credence to the defendant's case.

113. In view of all these, the defendant has failed to prove the due execution of Ex.D.13 Will in accordance with law. As already stated, the so called attestors to the Will (DWs.2 & 3) have not spoken to as required under law. Further, the defendant has utterly failed to remove the

suspicious circumstances. Therefore Ex.D.13 Will stands not proved. Accordingly, I answer Issue No.2 in the **Negative**.

114. **ISSUE NO.3:** Next comes the question, whether the plaintiffs are entitled to partition and for a share in the suit schedule properties.

115. Since the plaintiffs have proved that the suit schedule properties are joint family properties, they are entitled to $\frac{1}{3}^{\text{rd}}$ share each in the suit schedule properties. Hence I answer Issue No.3 in the **Affirmative**.

116. **ISSUE NO.4:** The plaintiffs have claimed mesne profits from the defendant. Admittedly, the plaintiffs are the sisters of defendant. Furthermore, as already stated, the suit schedule properties are joint family properties. The plaintiffs and defendant are in joint possession and enjoyment of the suit schedule properties. Therefore, the question of claiming mesne profits in a suit for partition in respect of joint family properties does not arise. However, the plaintiffs can ask for accounts from the defendant but no such relief has been claimed by the plaintiffs. Therefore, this Court is of the opinion that the possession of the defendant over the suit

schedule properties is joint, it cannot be held to be illegal or unauthorized so as to claim mesne profits. Hence the plaintiffs are not entitled to mesne profits.

117. In partition suits, the concept of mesne profits does not ordinarily apply since the possession of one co-owner or coparcener cannot, by itself be characterize as wrongful. Until the joint family property is divided by metes and bounds, the possession of a sharer in occupation remains lawful. A sharer who is not in possession of the joint property is, however, entitled to seek rendition of accounts of the income derived from such property by the sharer in possession. However, no such claim is made in the instant suit.

118. Our Hon'ble High Court in ***ILR 1991 KAR 4506--Thammegowda vs Siddegowda***, held that in a suit for partition and separate possession, the question of mesne profits does not arise.

119. Similarly, in ***2002 SCC OnLine Kar 662—Parvathi vs Venkatramana Prasad***, our Hon'ble High Court has observed that mesne profits are conceptually confined to cases of wrongful possession and have no application to

partition suit. The right of a co-owner or tenant-in-common to claim a share in the income derived from joint property is not a claim for mesne profits, but an incident of the proprietary right itself, flowing from joint ownership until final division accomplished.

120. In view of the aforesaid decisions, the claim made by the plaintiffs towards mesne profits is untenable in the eye of law. Accordingly, I answer Issue No.4 in the **Negative**.

121. **ISSUE NO.5:** As the defendant has failed to prove the execution of Ex.D.13 Will, he is not entitled to any declaratory reliefs as prayed for in his counter-claim. Hence, I answer Issue No.5 in the **Negative**.

122. **ISSUE NO.6:** As an upshot of the above discussion, this Court arrives at the following conclusions :

- (i) The plaintiffs and defendant are siblings.
- (ii) The suit schedule properties are joint family properties.
- (iii) In a nutshell, there were suspicious circumstances surrounding the execution of Ex.D.13 Will which remained unexplained by its propounder to dispel the doubts regarding its valid execution by the testator.

- (iv) The defendant has failed to prove the execution of Ex.D.13 Will in accordance with law. Accordingly, the defendant being the propounder of the Will failed to discharge his burden to prove the same.
- (v) Therefore the defendant is not entitled to claim absolute or exclusive right over the suit schedule properties much less his mother's $\frac{1}{4}^{\text{th}}$ share therein.
- (vi) Furthermore, the plaintiffs and defendant are in joint possession and enjoyment of the suit schedule properties and therefore the defendant is not entitled to mesne profits.
- (vii) Admittedly no partition took place in the joint family of plaintiffs and defendant after the death of their parents.
- (viii) Thus the plaintiffs are entitled to $\frac{1}{3}^{\text{rd}}$ share each in the suit schedule properties by metes and bounds.
- (ix) Therefore the plaintiffs' suit deserves to be decreed and the counter-claim by the defendant is liable to be dismissed.
- (x) Taking into consideration the relationship between the parties, there is no order as to costs.

123. For the foregoing reasons and discussion, I pass the following:

ORDER

- (i) The suit is ***decreed*** as under:
- (ii) The plaintiffs are entitled to $\frac{1}{3}$ rd share each in the suit schedule properties.
- (iii) The defendant is entitled to $\frac{1}{3}$ rd share in the suit schedule properties.
- (iv) The Counter-claim of defendant is ***dismissed***.
- (v) There shall be a Final Decree proceedings under Order XX Rule 18 CPC.
- (vi) In view of the relationship of parties, there is no order as to costs.
- (vii) Draw preliminary decree accordingly.
- (viii) Office to put up the file for initiation of Final Decree Proceedings in this matter after appeal period is over, in view of the verdicts of Hon'ble Apex Court in **(2009) 9 SCC 689** – Shub Karan Bubna Vs Sita Saran Bubna and **Civil Appeal No(s).6406-6407 of**

2010--Kattukandi Edathil Krishnan
Vs Kattukandi Edathil Valsan and
Others.

- (ix) It is however made clear that the plaintiffs are at liberty to move a formal petition before this Court under Section 54 CPC for initiation of Final Decree Proceedings and if any such petition is filed, the office shall also verify, register and put up the same accordingly.

(Dictated to the Stenographer directly on computer, typed by her, corrected and then initialed by me and pronounced in the Open Court on this the 10th day of July, 2026)

(Ganesha Padiyar U.)
Addl. Senior Civil Judge & JMFC,
Karwar.

A N N E X U R E

1. **List of witnesses examined for the plaintiffs :**

P.W.1 : Smt. Suman Gunagi

2. **List of witnesses examined for the defendant :**

D.W.1 : Sri Shankar Gunagi

D.W.2 : Sri Jagadish Murari Revandikar

D.W.3 : Sri Uday Sheshagiri Shetti

3. **List of documents exhibited for the plaintiffs :**

Ex.P.1 : Certified copy of Mutation Register

Ex.P.2 : Certified copy of RTC

- Ex.P.3 : Cerified copy of Death Certificate
Ex.P.4 : Mutation Register extract
Ex.P.5to P.7: RTC extracts
Ex.P.8to P.11: Certified copies of Mutation Registers
Ex.P.12 : Certified copy of Written Statement in
O.S No.86/2020
Ex.P.13 : Certified copy of Order-sheet in
O.S No.86/2020
Ex.P.14 : Summons in O.S No.86/2020
Ex.P.15 : Copy of Complaint in O.S No.86/2020
Ex.P.16 : Certified copy of Will dated 27-07-2010

4. **List of documents exhibited for the defendant :**

- Ex.D.1 : Copy of Partition Deed
Ex.D.2 & D.3: RTC extracts
Ex.D.4 & D.5: Mutation Register extracts
Ex.D.6 : Bank Statement of Account
Ex.D.7 : RTI Endorsement
Ex.D.8 : True copy of Memorandum
dated 09.09.2015
Ex.D.9 : True copy of GPF bill
Ex.D.10 : True copy of Cheque
Ex.D.11 : True copy of KGID order
Ex.D.12 : True copy of Cheque
Ex.D.13 : Registered Will dated 31.12.2015
Ex.D.13(a) : Signature of DW.2 in Ex.D.13
Ex.D.13(b) : Signature of DW.3 in Ex.D.13

(Ganesha Padiyar U.)
Addl. Senior Civil Judge & JMFC,
Karwar.