

**IN THE COURT OF II ADDITIONAL CIVIL JUDGE AND JUDICIAL
MAGISTRATE FIRST CLASS AT KUNDAPURA**

**Present : Sri. Chandrashekhar Banakar, B.A.LL.B.,LL.M
II Addl. Civil Judge & JMFC,
Kundapura.**

Dated this the 22nd day of April, 2019

Original Suit No. 113/2011

Plaintiff: Antoni Lazarus, 70 years,
S/o Late. E.P. Lazarus,
R/o Manoor Village and Post,
Udupi Taluk.

(By Advocate Sri/Smt. M.J.S.)

//Vs//

Defendants:

- 1) Clara Lazarus, 60 years,
D/o Late E.P. Lazarus.
- 2) Fathima Pirera, 58 years,
D/o Late E.P. Lazarus.
- 3) Joseph Lazarus, 54 years,
S/o Late E.P. Lazarus.
- 4) Olympeea Lazarus, 46 years,
D/o Late E.P. Lazarus,
 - The Defendants No. 1, 2 and 4
are residents of Manoor Village
and Post, Udupi Taluk.
 - The defendant No.3 is the
resident of 'Mildred'
Jangamarabettu, Moodu Thonse
Village, Kalyanapur Post,
Udupi District.

5) Volerian Almeida, 46 years,
S/o Late Annestella Almedida,
Nashthalia Compound,
Next to Chandru Poojary House,
Sasthana Post, Airodi Village,
Udupi Taluk.

**(By Advocate Sri/Smt. G.K.D. for D1, 2 and 4
Sri/Smt. G.S.K.S. for D3
D5 Exparte)**

Date of institution of the suit : 23-05-2011
Nature of the suit : Suit for Partition and Declaration
Date of commencement of
recording of evidence : 09-01-2013
Date on which the
judgment is pronounced : 22-04-2019
Total duration : Years Months Days
07 10 30

JUDGMENT

The suit is filed by the plaintiff seeking for the relief partition of the suit
“A” schedule property.

2. The brief facts as set out in the plaint are as follows:

- a. The plaintiff and defendants are the Christians by religion and they are governed by the Indian Succession Act 1925.
- b. The suit 'A' Schedule property originally belonged to the father of plaintiff and defendants by name Mr. E.P. Lazarus and he was in occupation and enjoyment of said property alongwith

his wife viz: the mother of plaintiff and defendants Smt. Apoline Lazarus.

- c. The suit 'A' Schedule property is a house site consists with residential house and coconut and other varieties of tree growths.
- d. The father of the plaintiff by name Mr. E.P. Lazarus got constructed a residential house over the 'A' Schedule property about 30 years back with financial assistance of this plaintiff. The plaintiff has also provided his financial assistance to his father to effect other improvements also over the suit 'A' Schedule property and as such the father of the plaintiff was in joint occupation and enjoyment of suit 'A' Schedule property with this plaintiff during his life time.
- e. The father of the plaintiff died intestate on 25/10/2000 leaving behind his widow Apoline Lazarus and children namely the plaintiff and defendants as his legal heirs.
- f. After the death of Mr. E.P. Lazarus, the mother of the plaintiff started managing the all affairs of suit 'A' Schedule property and she has also effected improvements over the said property with due assistance of the plaintiff.
- g. The mother of the plaintiff Smt. Apoline Lazarus above named died intestate on 21/09/2009 and as such the plaintiff and defendants become the co-owners of suit 'A' Schedule property and are in joint possession and enjoyment of the same.

- h.** The suit 'A' Schedule property consist with residential house and coconut and other varieties of tree growths and the net annual income of the same is not less than 1,500 coconuts and the defendants No. 3 and 4 are misappropriating the same since last year.
- i.** The suit 'A' schedule property is liable to be divided into 5 shares and the plaintiff is entitle for one such share and each defendants are entitle for 1/5th each and the plaintiff is also entitle for share in the income of suit 'A' Schedule property from the date of this suit the actual delivery of possession. Hence the suit.

3. In pursuance of the suit summons issued by this Court, the defendant Nos. 1 to 4 have appeared before this Court through their counsels. During the pendency of the suit, one Volerian Almeida was impleaded into the suit as defendant No. 5 and notice was served to him, but he remained absent. The defendant Nos. 1, 2 and 4 have not filed their written-statement. The defendant No. 3 filed his written-statement by contending as follows,

- a.** The suit of the plaintiff is most frivolous, vexatious, and distorted one and is neither maintainable under law nor on facts.
- b.** It is true that the plaintiff and defendants are Christians and are governed by the Indian Succession Act.

- c.** It is not correct that the plaint 'A' schedule property belonged to the father of the plaintiff and defendants and that he was in occupation and enjoyment of the said property along with his wife Smt. Apolin Lazarus and that the father of the plaintiff Mr. E.P. Lazaus got constructed a residential building over the 'A' schedule property about 30 years back with the financial assistance of the plaintiff.
- d.** It is absolutely false to say that the plaintiff has provided financial assistance to his father to effect other improvements over the 'A' schedule property and that the father of the plaintiff joint occupation and enjoyment of the suit 'A' schedule property with the plaintiff during his life time.
- e.** It is true that Mr. E.P. Lazarus the father of the plaintiff died on 25/10/2000, but not intestate.
- f.** It is false that his father has left his widow Apolin Lazarus and his children, i.e., plaintiff and defendants as his legal heirs. As a matter of fact E.P. Lazarus was survived by his eldest daughter Annestella as his one of the legal heir.
- g.** Sri. E.P. Lazarus has executed a will dated 10/10/1998 bequeathing his right in the suit 'A' schedule property in favour of "Smt. Mildred Lazarus, wife of this defendant.
- h.** It is absolutely false that Smt. Apolin Lazarus died intestate. As a matter of fact she has executed a will dated 12/08/2008 bequeathing her right in the suit 'A' schedule property in

favour of Jeevan Lazarus, Jasan Lazarus, Joel Lazarus, and Jyothi Benadina Lazarus, children of this defendant.

- i. Smt. Mildred Lazarus, wife of this defendant has been in joint possession and enjoyment of the suit 'A' schedule property along with her mother in law, after the death of her father in law.
- j. Smt. Mildred Lazarus died intestate on 13/04/2002, leaving behind this defendant and her children Jeevan Lazarus, Jason Lazarus and Joel Lazarus, as her legal representatives.
- k. After the death of the mother, this defendant has been in joint possession and enjoyment of the suit 'A' schedule property. Therefore it is absolutely false to say that the plaintiff and defendants became the co-owners of suit 'A' schedule property, after the death of Apolin Lazarus and that they are in joint possession and enjoyment of the same.
- l. The suit 'A' schedule property consists of a residential building, a cow pen building and a lavatory building, apart from coconut trees. It is absolutely false that the net annual income of the suit 'A' schedule property is not less than 1500 coconut per year. It is false to say that defendants No.3 and 4 are misappropriating the income of the suit 'A' schedule property since last year.
- m. It is absolutely false to say that the suit 'A' schedule property is liable to be divided into five shares and that the plaintiff is

entitled to one such share and that defendant Nos. 1 to 4 are entitled to one such share each.

- n.** In the event of partition of the suit 'A' schedule property, Lawrence Almeida and Vallerian Almeida the children of late Annestella Almeida are also entitled to a share. In that view of the matter the suit is bad for non joinder of necessary parties.
- o.** It is absolutely false to say that the residential building situate over the suit 'A' schedule property is constructed by the father of the plaintiff with the financial assistance of the plaintiff.
- p.** The then Bishop of Mangalore DIOCIS got constructed a residential building in the suit 'A' schedule property in the year 1967 by collecting Rs.500=00 from Smt. Apolin Lazarus the mother of this defendant and allowed to occupy the suit 'A' schedule property as a tenant. At that time Sri. E.P. Lazarus the father of this defendant was in Railway Service and was working in Eastern Railways at Shilon in Assam State. At that time the plaintiff was undergoing Priest hood training in Seminary at Allahabad.
- q.** On the coming into force of Karnataka Land Reforms Act, Smt. Apolin Lazarus filed application in the name of E.P. Lazarus for the grant occupancy right. The land tribunal as per its order dated 12/10/1979 in TRI No. 2988/1978-79 and batch ordered for registering Sri. E.P. Lazarus and Smt. Apolin as joint occupants in respect of the suit 'A' schedule property in pursuance there of the Special Tahasildar Land Reforms Udupi

has issued a certificate of registration dated 07/04/1980 in the name of Sri. E.P Lazarus. Hence prayed to dismiss the suit.

4. Based on rival pleadings of the parties, my learned predecessor in office has framed following issues:

- 1) Whether the plaintiff proves that suit 'A' schedule properties are liable to be divided into 5 fair and equal shares by metes and bounds and he is entitled for one such share in the suit 'A' schedule properties?
- 2) Whether the plaintiff proves that defendant Nos. 3 and 4 are liable to pay him share of profits in the 'A' schedule properties from the date of suit till the actual delivery of his share?
- 3) Whether the defendant No. 3 proves that his father E.P. Lazarus has executed a Will dated 10/10/1998 bequeathing his right in the suit 'A' schedule properties in his favour out of his free will and consent and in the manner contemplated under law?
- 4) Whether the defendant No. 3 proves that his mother Smt. Apolin Lazarus has executed a Will dated 12/08/2008 bequeathing her right in the 'A' schedule properties in favour of him out of free will and consent and in the manner contemplated under law?
- 5) Whether the defendant No. 3 proves that suit of the plaintiff is bad for non-joinder of necessary parties?
- 6) What order or decree?

5. This court vide its order dated 30/08/2017, has recasted the issue Nos. 3 and 4 as follows,

Recasted issue No. 3: Whether the defendant No. 3 proves that his father E.P.Lazurus has executed a Will dated 10/10/1998 bequeathing his right in the suit 'A' schedule properties in his wife's favour out of his free will and consent and in the manner contemplated under law?

Recasted issue No. 4: Whether the defendant No. 3 proves that his mother Smt. Apolin Lazarus has executed a Will dated 12/08/2008 bequeathing her right in the 'A' schedule properties in his children's favour out of free will and consent and in the manner contemplated under law?

6. In order to prove his case, the plaintiff is examined himself as PW1 and got marked one document as Ex.P1. In order to prove his case, the defendant No. 3 himself examined as DW1 and on his behalf two attesting witnesses were got examined as DW2 and DW3 and got marked 9 documents as Ex.D1 to Ex.D9.

7. I have heard arguments of Sri.M.J.S, learned advocate for the plaintiff, Sri. G.K.D, learned advocate for the defendant Nos. 1, 2 and 4 and Sri.G.S.K.S, learned advocate for the defendant No. 3.

8. My findings to the above issues are as under:

Issue No.1 : not survived for my consideration

Issue No.2 : not survived for my consideration

Recasted issue No.3: in the **negative**

Recasted issue No.4: in the **negative**

Issue No.5 : in the **affirmative**

Issue No.6 : as per final order

R E A S O N S

9. Undisputed facts: In this case, the relationship between the plaintiff and defendants and relationship in between the plaintiff and defendants with late Sri. E.P.Lazarus and with late Smt. Apolin Lazarus is not disputed. Further the dates of death of Sri. E.P.Lazarus and Smt. Apolin Lazarus are also not in dispute.

10. Recasted issue No. 3: It is the specific case of the defendant No. 3 that his father late E.P. Lazurus has executed a Will dated 10/10/1998 bequeathing his right in the suit 'A' schedule property in his wife's favour out of his free will and consent and in the manner contemplated under law. On the basis of above contention, the defendant No. 3 is claiming that his wife by name Smt. Mildred Lazarus became the absolute owner of the suit "A" schedule property by virtue of a Will dated 10/10/1998 executed by his father late E.P.Lazarus. On the other hand, the plaintiff contended that the Will dated 10/10/1998 said to have

been executed by his father in favour of Smt. Mildred Lazarus is forged and fraudulent document.

11. In this case, in support of his case the defendant No. 3 has produced the said alleged Will dated 10/10/1998 before the court through an attesting witness, who is examined as DW2.

12. At this point of time, it is very appropriate to quote a judgment passed by the Hon'ble High Court of Karnataka. In Parappa and others Vs Bhimappa and another reported in ILR 2008 KAR 1840, wherein the Hon'ble High Court of Karnataka has held that,

(D) EVIDENCE ACT, 1872 - SECTION 67, 68 To 71-- Proof of execution of a document – HELD, Section 68 of the Evidence Act states that 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 - FURTHER HELD, If the attesting witnesses are not alive, then Section 67 of the Evidence Act is attracted. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Section 67 does not prescribe any particular mode of proof. In

addition to usual modes, handwriting may also be proved by circumstantial evidence -- The Judgment and decree of the Appellate Court is justified.

13. In this case, the defendant No. 3 has examined one attesting witness of the Will dated 10/10/1998 by name Sri. B.N.Prakash Adiga. The evidence of the DW2 is having more relevance to the present case in view of the provision contained in Indian Evidence Act. The section 68 of the Indian Evidence Act reads as follows,

Sec 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.

14. In Ramabai Padmakar Patil (Dead) by LRs and others Vs Rukminibai Vishnu Vekhande and others, reported in AIR 2003 SC 3109, the Hon'ble Supreme Court of India has held that :

“A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. 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 circumstances especially in a case where the bequest has been made in favour of an offspring.”

15. In J.T. Surappa and another V/s Sri. Satchidhanandendra Saraswathi Swamiji Public Charitable Trust and other, reported in ILR 2008 KAR 2115 the Hon’ble High Court of Karnataka has laid down the Principles of “Panch Padi”. The Hon’ble High Court of Karnataka in the above case held as follows,

“The court has to tread a careful path in the enquiry to be conducted with regard to Will. The said path consists of five steps "Pancha Padi". The path of enquiry and steps to be traversed are as under:

- (1) Whether the Will bears the signature or mark of the testator and is duly attested by two witnesses and whether any attesting witness is examined to prove the Will?**

- (2) Whether the natural heirs have been disinherited? If so, what is the reason?**
- (3) Whether the testator was in a sound state of mind at the time of executing the Will?**
- 4) Whether any suspicious circumstances exist surrounding the execution of the Will?**
- (5) Whether the Will has been executed in accordance with Section 63 of the Indian Succession Act, 1925, read with Section 68 of the Evidence Act?**

In the above said judgment, the Hon'ble High Court of Karnataka has elaborately discussed the legal requirements in proof of Will. The Hon'ble Court has clearly held that the trial court should follow 5 steps so as to see whether the Will is legal, valid and acceptable.

16. The first step is that the Will should be reduced into writing, signed by the testator and shall be attested by two or more witnesses and atleast one attesting witness shall be examined. The same is explained in section 68 of the Indian Evidence Act i.e., the Will has to be proved before the Court by summoning and examining at least one attesting witness.

17. In this case, the defendant No. 3 in order to prove the alleged Will dated 10/10/1998, examined one attesting witness to the said Will i.e., Sri. B.N. Prakash Adiga as DW2. The DW2 deposed in his affidavit in lieu of

chief examination that late E.P.Lazarus had executed a Will dated 10/10/1998 bequeathing his right over the property. The said Will was prepared by Sri. Vishwanatha Shetty, advocate as per the instructions of the E.P.Lazarus. Firstly the said Vishwanatha Shetty prepared a draft and read over to the E.P.Lazarus and the said E.P.Lazarus agreed the contents of the said draft as correct and then the Will was typed in the Vishwanatha Shetty's office. Further he deposed that in his presence E.P.Lazarus and another attesting witness by name A.S.Pratap have signed to the said Will. He has further stated that the said Will was executed by E.P.Lazarus when he was in sound and disposing state of mind and capable of executing the Will. Further he deposed that the E.P. Lazarus has executed his Will with his free will and consent. But in his cross-examination, he deposed as follows,

“ನಿಡೀರ ದಾಖಲೆಯನ್ನು ಉಡುಪಿಯ ವಕೀಲರಾದ ಶ್ರೀ ವಿಶ್ವನಾಥ ಶೆಟ್ಟಿ ರವರು ತಯಾರು ಮಾಡಿರುತ್ತಾರೆ ಅವರ ಕಚೇರಿ ಉಡುಪಿ ನ್ಯಾಯಾಲಯದ ಎದುರುಗಡೆ ಇರುತ್ತದೆ. ನಿಡೀರ ಆಗಿದೆ ಎನ್ನುವ ದಿನ ನಾನು ವಕೀಲರ ಕಚೇರಿಗೆ ಹೋಗುವುದಕ್ಕಿಂತ ಮೊದಲು ಇ.ಪಿ. ಲಾಜರಸ್ ರವರು ಅಲ್ಲಿ ಹಾಜರಿದ್ದರು. ನಾನು ವಕೀಲರ ಕಚೇರಿಗೆ ಹೋಗುವ ಮೊದಲು ಎಷ್ಟು ದಿನದ ಮುಂಚೆ ನಿಡೀರ ದಾಖಲೆ ತಯಾರಿದೆ ಎಂದು ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ನಾನು ಆ ದಿನ ಮದ್ಯಾಹ್ನ 3-00 ರಿಂದ 4-00 ಗಂಟೆ ಸುಮಾರಿಗೆ ವಕೀಲರ ಕಚೇರಿಗೆ ಹೋಗಿರುತ್ತೇನೆ. ನಾನು ಹೋದಾಗ ವಕೀಲರು ನ್ಯಾಯಾಲಯಕ್ಕೆ ಹೋಗಿದ್ದರು, ವಕೀಲರ ಸಹಾಯಕರು ಕಚೇರಿಯಲ್ಲಿ ಇದ್ದರು ನಾವು ಅರ್ಧ ಗಂಟೆಗಳ ಕಾಲ

ಕಾದಿರುತ್ತೇವೆ ಆಗ ವಕೀಲರು ಬಂದಿರುತ್ತಾರೆ. ವಕೀಲರು ಬಂದ ಕೂಡಲೇ ವಕೀಲರು ನನ್ನ ಸಹಿ ಪಡೆಯುವಂತೆ ಹೇಳಿರುತ್ತಾರೆ ನಾನು ನಿಡೀರ ದಾಖಲೆಗೆ ಸಹಿ ಮಾಡಿರುತ್ತೇನೆ. ನಾನು ಸಹಿ ಮಾಡುವುದಕ್ಕಿಂತ ಮೊದಲು ವಕೀಲರು ಸದ್ರಿ ದಾಖಲೆಯನ್ನು ಎಲ್ಲಿ ಇಟ್ಟಿದ್ದರು ಎಂದು ನಾನು ಗಮನಿಸಿರುವುದಿಲ್ಲ. ನಾನು ನಿಡೀರ ದಾಖಲೆಗೆ ಸಹಿ ಮಾಡುವಾಗ ವಿಶ್ವನಾಥ ಶೆಟ್ಟಿ ಹಾಗೂ ಅವರ ಜೊತೆ ಮೂರು ನಾಲ್ಕು ಜನ ಅವರ ಸಹಾಯಕರು ಇದ್ದರು. ಇ.ಪಿ. ಲಾಜರಸ್ ರವರು ನಿಡೀರ ದಾಖಲೆಗೆ ಸಹಿ ಮಾಡಿದರು ನಂತರ ವಕೀಲರು ನನಗೆ ಸಹಿ ಮಾಡಲು ತೋರಿಸಿದರು ನಾನು ಸಹಿ ಮಾಡಿರುತ್ತೇನೆ. ಸಹಿ ಮಾಡಿದ ಕೂಡಲೇ ನಾನು ಅಲ್ಲಿಂದ ಹೊರಟು ಹೋಗಿರುತ್ತೇನೆ. ಆ ಸಮಯದಲ್ಲಿ ಬೇರೆ ಯಾರೂ ನನ್ನ ಒಟ್ಟಿಗೆ ಅಲ್ಲಿ ಇರಲಿಲ್ಲ. ವಕೀಲರಾದ ವಿಶ್ವನಾಥ ಶೆಟ್ಟಿ ರವರು ನಿಡೀರ ದಾಖಲೆಗೆ ಸಹಿ ಮಾಡಿದ್ದಾರಾ ಇಲ್ಲವಾ ಎಂದು ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ವಿಶ್ವನಾಥ ಶೆಟ್ಟಿ ರವರು ನಿಡೀರ ಅನ್ನು ಯಾವಾಗ ತಯಾರಿಸಿ ಇಟ್ಟಿರುತ್ತಾರೆಂದು ನನಗೆ ವೈಯಕ್ತಿಕವಾಗಿ ಗೊತ್ತಿಲ್ಲ. ಹಾಗೂ ನಿಡೀರ ದಾಖಲೆಯನ್ನು ಯಾರ ಮಾಹಿತಿ ಮೇರೆಗೆ ತಯಾರಿಸಿರುತ್ತಾರೆಂದು ನನಗೆ ವೈಯಕ್ತಿಕವಾಗಿ ಗೊತ್ತಿಲ್ಲ. ನಿಡೀರ ದಾಖಲೆಯನ್ನು ಯಾರ ಮಾಹಿತಿ ಪ್ರಕಾರ ತಯಾರಿಸಲಾಗಿದೆ ಎಂದು ಗೊತ್ತಿಲ್ಲ ಎಂದು ನನ್ನ ಮುಖ್ಯ ವಿಚಾರಣಾ ಅಫೀದಾವಿತ್ ತಯಾರಿಸುವಾಗ ವಕೀಲರಿಗೆ ಮಾಹಿತಿ ನೀಡಿರುತ್ತೇನೆ.”

So, on careful perusal of the above recitals of the cross-examination of the DW2, it implies that the alleged Will which was marked as Ex.D8 was prepared well before the date of the execution and the Ex.D8 is not prepared as per the directions of the late E.P.Lazarus in the presence of DW2. Further it implies that another attesting witness has not signed to the Ex.D8 in presence of DW2. He deposed that immediately after signing to the Ex.D8 he went away from the

office of the said advocate. On perusal of the above discussion, it appears that in this case the said Will is not executed as per law and therefore the first step is not fulfilled.

18. The second and fourth steps are that, when some of the legal heirs are disinherited, the court has to scrutinize the Will with greater degree of care than usual. In this case, the 3rd defendant has contended that his wife by name Smt.Mildred Lazarus looked over the E.P.Lazarus in his last days, therefore E.P.Lazarus has executed the Will in favour of Smt.Mildred Lazarus pertaining to the suit schedule property.

19. Para 3 of the alleged Will dated 10/10/1998 reads as follows,

“WHEREAS, my daughter-in-law Mrs. MILDRED LAZARUS, aged about 38 years, W/o Joseph Lazarus, residing at Ambalpady of Udupi District, has been looking after me in my old age and she is taking care of me and helping me in all respects. I have great love and affection towards her and I am very fond of her. Therefore, I hereby declare her as the sole beneficiary and universal legatee of my this LAST WILL.”

Contrary to this, the DW1 who is none other than the husband of the beneficiary of the alleged Will dated 10/10/1998 has deposed in his cross-examination as follows,

“ನಾನು ಕೆಲವು ಭಾರಿ ನನ್ನ ತಂದೆ ತಾಯಿಯ ಮೇಲೆ ಹಲ್ಲೆ ಮಾಡಿ ಗಲಾಟೆ ಮಾಡಿದ್ದೇನೆ ಎಂದರೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ನನ್ನ ತಂದೆಗಾಗಲೀ, ತಾಯಿಗಾಗಲೀ ನನ್ನ ಮೇಲೆ ಮತ್ತುನನ್ನ ಹೆಂಡತಿ ಮಕ್ಕಳ ಮೇಲೆ ಯಾವುದೇ ಪ್ರೀತಿ, ವಿಶ್ವಾಸ ಇರಲಿಲ್ಲ ಎಂದರೆ ಗೊತ್ತಿಲ್ಲ.”

From the above deposition, it appears that the DW1 has not denied those suggestions put forth by the learned advocate for the plaintiff, but he shows his ignorance about those facts. So, from the above observations, it appears that the relationship between the defendant No.3 and his wife with his father and mother was not good.

20. Further, in this case the defendant No. 3 has contended that during the old age, his wife by name Smt. Mildred Lazarus has taken care of E.P.Lazarus. Therefore, E.P.Lazarus had great love and affection towards Smt.Mildred Lazarus. But the DW1 in his cross-examination admitted as follows,

“ನನ್ನ ತಂದೆ ಮೃತಪಡುವ ಸಮಯದಲ್ಲಿ ಮತ್ತು ಅವರ ಪ್ರಾಯದ ಸಮಯದಲ್ಲಿ ನನ್ನ ತಂದೆ ಮತ್ತು ತಾಯಿಯ ಜೊತೆ ಇದ್ದದ್ದು ನಾಲ್ಕನೇ ಪ್ರತಿವಾದಿ, ನಾನು ಮತ್ತು ಅನಸ್ಥಳ ಉಡುಪಿ ಮತ್ತು ಐರೋಡಿಯಲ್ಲಿದ್ದವು, ವಾದಿ ಮುಂಬೈನಲ್ಲಿದ್ದರು. ಒಂದನೇ ಪ್ರತಿವಾದಿ ಅಕ್ಕ ಕ್ಲಾರಾ ಕನ್ಯಾಕುಮಾರಿಯಲ್ಲಿ, ಎರಡನೇ ಪ್ರತಿವಾದಿ ದುಬೈನಲ್ಲಿದ್ದರು.”

The above admission of the DW1 goes to show that during the last days of the E.P.Lazarus, it was the 4th defendant who taken care of the E.P. Lazarus and not by Smt. Mildred Lazarus. Hence, from the above said observations, it can be concluded that the reason for disinherit the other natural heirs is not explained properly and the alleged Will which was marked as Ex.D8 is suffers from suspicious circumstances. Hence, the second and fourth steps are not fulfilled.

21. The third step is to find out whether the testator was in sound state of mind at the time of execution of the Will. Admittedly, the age of executor at the time of execution of Will is 87 years. In this respect, the evidence of DW2, who is the attesting witness to the Ex.D8- Will shall have more credential than the evidence of any other witnesses. Because admittedly, the plaintiff and defendants were not present at the time of execution of Ex.D8-Will.

22. Sri. B.N. Prakash Adiga, who is the attesting witness of the alleged Will dated 10/10/1998 is examined as DW2. He in his affidavit filed in lieu of chief examination specifically stated that at the time of execution of Ex.D8-Will, Sri. E.P. Lazarus was in the sound state of mind and in disposing state of mind. There is no ground to disbelieve the evidence of the DW2 in this aspect. Hence, third step is fulfilled.

23. The fifth and final step is that whether the Will is executed in accordance with section 63 and 68 of the Evidence Act. In the case on hand, the DW2 has produced the original Will at Ex.D8. Further as required under section 68 of the Evidence Act, the Ex.D8 is attested by two witnesses and one of the attesting witness is examined in proof of its execution. Thus the plaintiff has fulfilled fifth step.

24. The learned advocate for the plaintiff has filed a list of judgments of the Hon'ble Supreme Court of India and Hon'ble High Court of Karnataka. They are as follows,

1. In V. Sayeesh Vs V.B. Dharmaiah Gowda and another reported in 2005(6) Kar.L.J.287(DB), wherein the Hon'ble High Court of Karnataka has held that;
“(A) INDIAN SUCCESSION ACT, 1925, SECTION 63 – Will – Proof of execution of – Suspicious circumstances surrounding execution of Will – Will purported have been executed by widowed woman of 89 years of age, ailing and not able to walk, bequeathing her entire property to son of her one son, leaving nothing to her other son and dying within month of execution of Will – Witnesses to attest Will were procured not from village where testator was residing, but from far off town – Evidence of attesting witnesses that they were not present either at time of writing Will by scribe or at time when testatrix affixed her

signature/thumb impression on *Will* – Circumstances evidencing that testatrix was not in state of sound mind of good health, and was in clutches and influence of legatee and his father – Valid execution of *Will*, not proved.

2. In Adivekka Vs Hanamavva Kom Venkatesh 'D' by L.R.S. and another reported in 2007 SAR (Civil) 553, wherein the Hon'ble Supreme Court has held that;

“Will – Suspicious circumstances – No apparent reason to execute will depriving wife and children – Onus on propounder to remove suspicion – Non-examination of propounder – Lead to drawal of an adverse inference.”

3. In S.R. Srinivasa and Ors Vs S. Parvathamma reported in 2010 SAR (Civil) 518, wherein the Hon'ble Supreme Court has held that;

“(B) Will – Execution of the Will was surrounded by suspicious circumstances – Burden of proof – Propounder has to be removed the suspicion – One “I” was living with her mother at the time of her death – Her sisters had been excluded from inheritance – There was no convincing reason as to why they were excluded – The will does not specify which of the properties has been bequeathed to “I” – She was present in the office of registrar at the time when the will was registered – Neither scribe nor DW1 were able to give explanation as to why the Will was not registered on the first occasion – Such suspicion cannot be removed by the mere registration of Will.”

4. In Sharanabasappa and Ors Vs Shivakumar and Ors reported in 2007 KAR 5160, wherein the Hon'ble High Court of Karnataka has held that;

“INDIAN SUCCESSION ACT, 1925 – SECTION 63 – Compliance of the provisions of WILL – Genuineness of – Onus of proof – Suspicious circumstances – Duty of the propounder to discharge – Discrepancies pointed out to take away the genuineness or validity of the WILL – HELD, Mere compliance of the provisions of law more particularly Section 63 of the Indian Succession Act by examining the relevant persons and the said persons speaking about the WILL alone is not sufficient – The WILL propounded should inspire the confidence of the Court as well – ON FACTS, HELD, The alleged testator himself had not made the WILL is evident from the fact that the handwritten draft which is said to have been enclosed in the envelope is incomplete and the same does not indicate that the same has been executed – Therefore, the enclosing of the draft itself becomes suspicious circumstance to indicate that the incomplete draft which has come into possession of the plaintiff has been turned out into a WILL by using the paper which was available in the envelope and therefore, the WILL is not a genuine document. Hence, the plaintiffs cannot seek relief of declaration on the basis of the said WILL – Judgment and Decree of the Trial Court is set aside.”

5. In G. Sekar Vs Geetha and Ors reported in 2009 SAR (Civil) 609, wherein the Hon'ble Supreme Court has held that;
“(B) Will – Execution of – It was stated that Will was prepared an attested was PW-4 – High Court held that PW-4 can not be characterized as an independent witness – PW-4 given the reply notice on behalf of the propounder of the will – There was no whisper in reply that in fact she had drafted the will and attested the same – Another witness (PW-3) stated that I do not know where the will was type written – PW-4 further deposed that I do not remember where I purchased the stamp papers – Whether High Court was justified in arriving at a finding that the will was not validity proved – Held: yes.”
6. In Yumnum Ongbi Tampha Ibemma Devi Vs Yumnam Joykumar Singh and Ors reported in 2009 SAR (Civil) 624, wherein the Hon'ble Supreme Court has held that;
“(A) Indian Succession Act, 1925 – Sec. 63 – Indian Evidence Act 1872, Sec. 68 – Will – Execution and attestation of – Attesting witness should speak not only about the testator's signature but also that each of the witnesses had signed the Will in the presence of testator – Witness, who claimed to be one of the attesting witnesses, stated that he did not know the nature of the document on which he had put his signature – He also did not state that testator had put his signature on the document or if the testator said anything about his signature – He did not say anything about presence of any another person as an

attesting witness – Held: the evidence of witness does not support the claim of due execution and attestation of the Will.”

(B) Indian Evidence Act, 1872 – Sec. 68 – Will – Mode and manner of proof of execution – Must be proved by at least one attesting witness if witness is alive – Evidence of an attesting witness clearly establishes that he did not sign in his presence, he did not know what was the nature of the document – There was no attesting witness who has signed in his presence Held: evidence of attesting witness do not support the claim of due execution and attestation of Will.”

7. In Joseph Antony Lazarus (Dead) by Lrs. Vs A.J. Francis reported in 2006 SAR(Civil) 366, wherein the Hon’ble Supreme Court has held that;

“A. Will – Genuineness and validity of – suspicious circumstances surrounding the execution and registration of the will – Testatrix died leaving behind her surviving two daughter and four sons – There is no reference to the two other sons in the will as to why they were denied their share – Another circumstances is the existence of the two signatures on each page of the will – And signatures are entirely different – Testatrix was 83 years old and appellant was living with her in house – Defendant’s contention that the appellant took advantage of the dependence will have to be taken into consideration – Will was executed on 5.7.1979 but was registered on 7.7.1980 – Non-examination of witness who is said to have drafted the

will and the non-examination of witness who is said to have drafted the will and the non-examination of the Sub-Register before whom the will is said to have been presented for presentation – Both the witnesses could have proved the facts relating to the preparation, execution and registration – Whether High Court was justified in holding that there was no proof that the document had ever been read over to the testatrix – Held; Yes.”

8. In Yashoda Gupta Vs Suniti Goyal and Ors reported in AIR 2002 DELHI 20, wherein the Hon’ble Supreme Court has held that;

“Succession Act (39 of 1925), Ss. 59,63,74 – Will – Suspicious circumstances – Proof – Non mention and disinheritance of wife of deceased by deceased in his Will – No explanation, for – Notation of sub-registrar that deceased was suffering from paralysis – No evidence to prove that he could speak coherently and did instruct deed writer about contents of Will – Assets of deceased transferred by defendant immediately antecedent to execution of Will – No explanation, for – Held, Will was neither genuine nor authentic.”

I have perused the principles laid down by the Hon’ble Supreme Court of India and Hon’ble High Court of Karnataka. Those principles already discussed above.

25. As discussed above, the 3rd defendant succeeded in proving the step Nos. 3 and 5, but the 3rd defendant failed to prove the step Nos. 1, 2 and 4. Therefore, in this case the dictum of law laid down in the decision noted supra is not fulfilled by the 3rd defendant in proof of due execution and attestation of the Will - Ex.D8. Therefore, I answered recasted issue No. 3 in **negative**.

26. Recasted issue No. 4: The defendant No. 3 has contended that his mother Smt. Apolin Lazurus has executed a Will dated 12/08/2008 bequeathing her right in the suit 'A' schedule property in his children's favour out of her free will and consent and in the manner contemplated under law. On the basis of above contention, the defendant No. 3 is claiming that his children by name Jeevan Lazarus, Jason Lazarus, Joel Lazarus and Jyothi Benadina Lazarus became the absolute joint owners of the suit "A" schedule property by virtue of a Will dated 12/08/2008 executed by his mother late Apolin Lazarus. On the other hand, the plaintiff contended that the Will dated 12/08/2008 said to have been executed by his mother in favour of children of 3rd defendant is forged and fraudulent document.

27. In this case, in support of his case the defendant No. 3 has produced the said alleged Will dated 12/08/2008 before the court through an attesting witness, who is examined as DW3.

28. In J.T.Surappa and another V/s Sri. Satchidhanandendra Saraswathi Swamiji Public Charitable Trust and other, reported in ILR 2008 KAR 2115, the Hon'ble High Court of Karnataka as noted supra has elaborately discussed the legal requirements in proof of Will. The Hon'ble Court has clearly held that the trial court should follow 5 steps so as to see whether the Will is legal, valid and acceptable.

29. The alleged Will should be reduced into writing, signed by the testator and shall be attested by two or more witnesses and at least one attesting witness shall be examined. This is the first step required to be proved by the defendant No. 3 in this case. In this case, the defendant No. 3 in order to prove the alleged Will dated 12/08/2008, examined one attesting witness to the said Will by name Sri. RaviShankar Nayak as DW3. The DW3 deposed that he knows the plaintiff and defendant Nos. 1 to 4. The said Will was prepared as per the instructions of the Apolin Lazarus by one Vishwanatha Shetty. After preparing a draft copy of the said Will, the said Vishawanatha Shetty read over the contents to the Apolin Lazarus and then said Apolin Lazarus agreed the contents and thereafter the Will was typed in the office of the said Vishawanatha Shetty. The said Apolin Lazarus had put her thumb impression to the said Will in his presence and in the presence of another attesting witness by name Smt. Girija. He has further stated that the said Will was executed by Apolin

Lazarus when she was in sound disposing state of mind and capable of executing the Will and executed with her free will and consent.

30. The DW3 was subjected to cross-examination, wherein he deposed as follows,

“ವಾದಿಯ ತಾಯಿಗೆ ಇಂಗ್ಲೀಷ್ ಅನ್ನು ಓದಲು, ಬರೆಯಲು ಮತ್ತು ಓದಿ ಹೇಳಿದರು ಅರ್ಥೈಸಿಕೊಳ್ಳಲು ಬರುವುದಿಲ್ಲ ಎಂದರೆ ಸಾಕ್ಷಿ ಅವರಿಗೆ ಗೊತ್ತಾಗುತ್ತಾ, ಗೊತ್ತಾಗುವುದಿಲ್ಲವಾ ಎಂದು ನನಗೆ ನೆನಪಿಲ್ಲ ಎಂದು ನುಡಿಯುತ್ತಾರೆ. ನಿಡಿ-9ರ ದಾಖಲೆಯನ್ನು ವಿಶ್ವನಾಥ ಶೆಟ್ಟಿ ವಕೀಲರ ಸಹಾಯಕ ಟೈಪ್ ಮಾಡಿರುತ್ತಾರೆ ಅವರ ಹೆಸರು ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ನಿಡಿ-9ರ ದಾಖಲೆಯನ್ನು ಇಂಗ್ಲೀಷ್ ನಲ್ಲಿ ಟೈಪ್ ಮಾಡಲು ಬೆರಳಚ್ಚುಗಾರರಿಗೆ ಯಾರು ಮಾಹಿತಿ ಕೊಟ್ಟರು ಎಂದರೆ ಸಾಕ್ಷಿ ಅಪೋಲಿನ್ ಲೆಜರಸ್ ರವರು ಮಾಹಿತಿ ನೀಡಿದ್ದಾರೆ ಸಾಕ್ಷಿ ಮುಂದುವರಿದು ಅವರು ಇಂಗ್ಲೀಷ್ ನಲ್ಲಿ ಕೊಟ್ಟಿದ್ದಾರೆ, ಕನ್ನಡದಲ್ಲಿ ಕೊಟ್ಟಿದ್ದಾರೆ ಎಂದು ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ನನ್ನ ಪ್ರಕಾರ ನಿಡಿ-9ರ ಬರವಣಿಗೆಯನ್ನು ನೇರವಾಗಿ ಬೆರಳಚ್ಚು ಮಾಡಿಸಲಾಗಿದೆ, ಬೆರಳಚ್ಚು ಮಾಡುವ ಪೂರ್ವದಲ್ಲಿ ಯಾವುದೇ ಕರಡು ಪ್ರತಿಯನ್ನು ಮಾಡಿ ಬೆರಳಚ್ಚು ಮಾಡಿರುವುದಿಲ್ಲ. ನನ್ನ ಪ್ರಕಾರ ಅಪೋಲಿನ್ ಲೆಜರಸ್ ರವರು ಬೆರಳಚ್ಚು ಮಾಡುವ ವ್ಯಕ್ತಿಗೆ ನೇರವಾಗಿ ಉಕ್ತಲೇಖನವನ್ನು ನೀಡುತ್ತಿದ್ದರು. ನನ್ನ ಪ್ರಕಾರ ಬೆರಳಚ್ಚುಗಾರ ಟೈಪ್ ಮಾಡುತ್ತಿದ್ದ. ವಿಶ್ವನಾಥ ಶೆಟ್ಟಿ ವಕೀಲರು ಅದನ್ನು ಬೆರಳಚ್ಚು ಮಾಡಿರುವುದಿಲ್ಲ.”

So, on careful perusal of the above recitals of the cross-examination of the DW3, the witness shows his ignorance by stating that he don't know whether the said Apolin Lazarus had given instructions to prepare the Ex.D9 in Kannada language or in English language. Further he deposed that the said Apolin

Lazarus has given instructions directly to the typist and before that no draft was prepared. Further he deposed that said Apolin Lizarus has directly dictated the contents of the Ex.D9 to the typist.

31. Further DW3 deposed as follows,

“ಸದಿ ಕರಡು ಪ್ರತಿಗೆ ಅಪೋಲಿನ್ ಲೆಜರಸ್ ರವರು ಎರಡು ಹೆಬ್ಬಿಟ್ಟಿನ ಗುರುತನ್ನು ಹಾಕಿರುತ್ತಾರೆ. ಆ ಕರಡು ಪ್ರತಿಗೆ ನಾನು ಸಹಿ ಹಾಕಿರಬಹುದು, ಅದಕ್ಕೆ ಗಿರಿಜಾ ಸಹಿ ಹಾಕಿರುತ್ತಾರೆ, ಅದು ಟೈಪ್ ಆಗಿದ್ದಾ ಅಥವಾ ಕೈಯಿಂದ ಬರೆದಿದ್ದಾ ಎಂದು ನನಗೆ ನೆನಪಿಲ್ಲ. ನಿಡಿ-9ರ ದಾಖಲೆ ಅಲ್ಲದೆ ಆ ದಿನ ಬೇರೆ ದಾಖಲೆ ತಯಾರು ಆಗಿದೆ ಮತ್ತು ಅದಕ್ಕೆ ಅಪೋಲಿನ್ ಲೆಜರಸ್ ಮತ್ತು ಗಿರಿಜಾ ಮತ್ತು ನಾನು ಸಹಿ ಹಾಕಿದ್ದು ಅದನ್ನು ಈ ದಿನ ನ್ಯಾಯಾಲಯದಲ್ಲಿ ನೋಡಿದ್ದೀರಾ ಎಂದರೆ ಸಾಕ್ಷಿ ನೋಡಿರುವುದಿಲ್ಲ ಎಂದು ನುಡಿಯುತ್ತಾರೆ.”

32. The above evidence of the DW3 goes to show that in the court he has not seen the document to which he, Apolin Lazarus, Girija have signed. That means the Ex.D9 is not the document to which the attesting witness/DW3 has signed in the office of the said Vishwantha Shetty. Therefore, on perusal of the above discussion, it appears that in this case, the first step is not fulfilled.

33. The second and fourth steps are that, when some of the legal heirs are disinherited, the court has to scrutinize the Will with greater degree of care than usual. In this case, the 3rd defendant has contended that his children by name Jeevan Lazarus, Jason Lazarus, Joel Lazarus and Jyothi Lazarus looked over the Apolin Lazarus in her last days, therefore Apolin Lazarus has executed

a Will in favour of children of Joseph Lazarus pertaining to the suit schedule property.

34. Para 3 of the alleged Will dated 12/08/2008 reads as follows,

“Whereas, my youngest son, Mr. Joseph Lazarus’s children Jeevan Lazarus, Jason Lazarus, Joel Lazarus and Jyothi Benadina Lazarus of residing at Jangamarabettu, Mooduthonse Village Kallianpura Post, udupi district, has been looking after me in my old age and they are taking care of me and helping me in all respects. I have great love and affection towards them and I am very fond of them. Therefore, I hereby declare them (only above mentioned grandchildren) as the sole beneficiary and universal legatee of my this last will.”

Contrary to this, the DW1 has deposed in his cross-examination as follows,

“ನಾನು ಕೆಲವು ಭಾರಿ ನನ್ನ ತಂದೆ ತಾಯಿಯ ಮೇಲೆ ಹಲವು ಮಾಡಿ ಗಲಾಟೆ ಮಾಡಿದ್ದೇನೆ ಎಂದರೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ನನ್ನ ತಂದೆಗಾಗಲೀ, ತಾಯಿಗಾಗಲೀ ನನ್ನ ಮೇಲೆ ಮತ್ತು ನನ್ನ ಹೆಂಡತಿ ಮಕ್ಕಳ ಮೇಲೆ ಯಾವುದೇ ಪ್ರೀತಿ, ವಿಶ್ವಾಸ ಇರಲಿಲ್ಲ ಎಂದರೆ ಗೊತ್ತಿಲ್ಲ.”

From the above deposition, it appears that the DW1 has not denied the suggestion put forth by the learned advocate for the plaintiff, but he shows his ignorance about the fact. So, from the above observations, it appears that the

relationship between the defendant No.3 with his father and mother was not good.

35. Further, in this case the defendant No. 3 has contended that during the old age, his children by name Jeevan Lazarus, Jason Lazarus, Joel Lazarus and Jyothi Lazarus has taken care of Apolin Lazarus. Therefore, Apolin Lazarus had great love and affection towards Jeevan Lazarus, Jason Lazarus, Joel Lazarus and Jyothi Lazarus. But the DW1 in his cross-examination admitted as follows,

“ನನ್ನ ತಂದೆ ಮೃತಪಡುವ ಸಮಯದಲ್ಲಿ ಮತ್ತು ಅವರ ಪ್ರಾಯದ ಸಮಯದಲ್ಲಿ ನನ್ನ ತಂದೆ ಮತ್ತು ತಾಯಿಯ ಜೊತೆ ಇದ್ದದ್ದು ನಾಲ್ಕನೇ ಪ್ರತಿವಾದಿ, ನಾನು ಮತ್ತು ಅನಸ್ಥಳ ಉಡುಪಿ ಮತ್ತು ಐರೋಡಿಯಲ್ಲಿದ್ದೆವು, ವಾದಿ ಮುಂಬೈನಲ್ಲಿದ್ದರು. ಒಂದನೇ ಪ್ರತಿವಾದಿ ಅಕ್ಕ ಕ್ಲಾರಾ ಕನ್ಯಾಕುಮಾರಿಯಲ್ಲಿ ಎರಡನೇ ಪ್ರತಿವಾದಿ ದುಬೈನಲ್ಲಿದ್ದರು.”

The above admission of the DW1 goes to show that during the last days of his father, it was the 4th defendant who taken care of his father and mother and not by Smt. Mildred Lazarus. Hence, from the above said observations, it can be concluded that the reason for disinherit the other natural heirs is not explained and the alleged Will which was marked as Ex.D9 is suffers from suspicious circumstances. Hence, the second and fourth steps are not fulfilled.

36. The third step is to find out whether the testator was in sound state of mind at the time of execution of the Will. Admittedly, the age of executor at the time of execution of Will is 88 years. In this respect, the evidence of DW3, who is the attesting witness to the Ex.D9-Will shall have more credential than the evidence of any other witnesses. Because admittedly, the plaintiff and defendants were not present at the time of execution of Ex.D9-Will.

37. Sri. Ravishankar Nayak who is the attesting witness of the alleged Will dated 12/08/2008 is examined as DW3. He in his chief examination specifically stated that at the time of execution of Ex.D3-Will, Smt. Apoline Lazarus was in the sound state of mind and in disposing state of mind. But in his cross-examination, he shows his ignorance about the physical and mental capacity of the Apoline Lazarus while execution of the alleged Will. He deposed as follows,

“ಜೋಸೆಫ್ ಲೆಜರಸ್ ರವರ ತಾಯಿ ಸುಮಾರು 2006ನೇ ಇಸವಿಯಿಂದ ಮಾನಸಿಕ ಮತ್ತು ದೈಹಿಕ ಅಸ್ತಿತ್ವರಾಗಿದ್ದರು ಎಂದರೆ ಸಾಕ್ಷಿ ನಾನು ನೋಡುವಾಗ ಆರೋಗ್ಯವಂತರಾಗಿದ್ದರು ಆ ಬಗ್ಗೆ ನನಗೆ ವೈಯಕ್ತಿಕ ಮಾಹಿತಿ ಇಲ್ಲ ಎಂದು ನುಡಿಯುತ್ತಾರೆ.”

So, on perusal of the above admission of the DW3, it appears that the attesting witness himself has not sure about the sound state of mind of the said

Smt. Apoline Lazarus while execution of the Will dated 12/08/2008. Hence, third step is not fulfilled.

38. The fifth and final step is that whether the Will is executed in accordance with section 63 and 68 of the Evidence Act. In the case on hand, the DW3 has produced the original Will at Ex.D9. Further as required under section 68 of the Evidence Act, the Ex.D9 is attested by two witnesses and one of the attesting witnesses is examined in proof of its execution. Thus the plaintiffs have fulfilled fifth step.

39. As discussed above, the 3rd defendant succeeded in proving the step No. 5 but the 3rd defendant failed to prove the step Nos. 1 to 4. Therefore, in this case the dictum of law laid down in the above decision is not fulfilled by the 3rd defendant in proof of due execution and attestation of the Will-Ex.D9. Therefore, I answered recasted issue No. 4 in **negative**.

40. Issue No. 5: It is the specific case of the defendant No. 3 that Lawrence Almeida and Vallerian Almeida, the children of late Annestella Almeida are the necessary parties to the suit of the partition. But they have not made as party to this suit. Hence the suit is bad for non joinder of necessary parties. During the pendency of the suit, the said Vallerian Almeida was impleaded to this suit as defendant No. 5.

41. In that connection, the plaintiff of this suit was subjected to cross-examination, wherein he admitted as follows,

“ನಾನು ಈ ದಾವಾ ದಾಖಲಿಸುವ ಸಂದರ್ಭದಲ್ಲಿ ನನ್ನ ತಂದೆಯ ಈ ಮೇಲೆ ಹೇಳಿದ 8 ಜನ ಮಕ್ಕಳಲ್ಲಿ 5 ಜನ ಮಕ್ಕಳು ಜೀವಂತ ಇದ್ದರು. ನನ್ನ ತಂದೆಯ ಜೀವಂತ ಇರುವಂತಹ 5 ಜನ ಮಕ್ಕಳನ್ನು ಈ ದಾವೆಯಲ್ಲಿ ಪಕ್ಕಗಾರರನ್ನಾಗಿ ಕಾಣಿಸಿರುತ್ತೇನೆ. ನನ್ನ ತಂದೆ ಮೃತಪಟ್ಟ ಸಂದರ್ಭದಲ್ಲಿ ನನ್ನ ತಂದೆಯ ಹಿರಿಯ ಮಗಳು ಎನಸ್ತಾಲಿಯಾ ಎಲ್ಮಿಡಾ ಜೀವಂತ ಇದ್ದರು. ಆದರೆ ಮಥ್ಯೂಲಾಜರಸ್ ಮತ್ತು ಮೈಕಲ್ ಲಾಜರಸ್ ನನ್ನತಂದೆ ಮೃತಪಟ್ಟ ಸಂದರ್ಭದಲ್ಲಿ ಜೀವಂತ ಇರಲಿಲ್ಲ. ಎನಸ್ತಾಲಿಯಾ ಎಲ್ಮಿಡಾರವರಿಗೆ ಎರಡು ಜನ ಮಕ್ಕಳು ಅವರೆಂದರೆ ಲಾರೆನ್ಸ್ ಮತ್ತು ವೆಲೇರಿಯನ್ ಎಂದರೆ ಸರಿ. ಈ ದಾವೆಯನ್ನು ದಾಖಲಿಸಿದಾಗ ಅವರಿಬ್ಬರು ಜೀವಂತ ಇದ್ದರು. ಮಾಥ್ಯೂ ಮತ್ತು ಮೈಕಲ್ ಮದುವೆಯಾಗದೆ ಸಣ್ಣ ವಯಸ್ಸಿನಲ್ಲಿಯೇ ಮೃತಪಟ್ಟಿರುತ್ತಾರೆ. ದಾವಾ ಆಸ್ತಿ ಪಾಲಾಗುವುದಾದರೆ ಲಾರೆನ್ಸ್ ಮತ್ತು ವೆಲೇರಿಯನ್‌ರವರಿಗೂ ಕೂಡ ದಾವಾ ಆಸ್ತಿಯಲ್ಲಿ ಪಾಲು ಇದೆ ಎಂದರೆ ಸರಿ.”

So, on perusal of the evidence of the PW1, it appears that Smt. Vallerian Almeida and Sri. Lawrence Almeida are the children of late Annestella Almeida and both are entitled for a share in the suit schedule property. However, the said Vallerian Almeida was impleaded as defendant No. 5. But the plaintiff has not impleaded the Lawrence Almeida to the suit on hand.

42. In Siddalingeshwar and others v/s Virupaxgouda and others reported in ILR 2003 KAR 2559, the Hon'ble High Court of Karnataka has held that,

“17. It is well settled that every person who is entitled to a share on partition is a necessary party to a suit for partition. But, where a family consists of several branches, it is sufficient if the heads of the branches are made parties, as the head of a branch represents the members of the branch.”

43. The learned advocate for the defendant No. 3 has filed the list of judgments of the Hon'ble Supreme Court of India and Hon'ble High Court of Karnataka. They are follows,

a. Kanakarathanammal v/s V.S.Loganatha Mudaliar, reported in AIR 1965 SC 271, wherein the Hon'ble Supreme Court of India has held that,

“CIVIL PROCEDURE CODE, 1908 – Order 1, Rules 9 and 10 – Non – joinder of necessary parties – Effect of – Suit seeking succession – Failure to implead other legal heirs – The suit is liable to be dismissed for want of impleadment of necessary parties. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis – joinder or non – joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in

the suit in bound to be fatal. Even in such cases, the Court can under Order 1 Rule 10, Sub – rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. Once it is held that the appellant’s two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the charger of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court.”

- b. Diwakar Shrivastava, Kumari Madhu Chansoriya, Kumari Jyoti v/s State of Madhya Pradesh, reported in AIR 1984 SC 468, wherein the Hon’ble Supreme Court of India has held that,

“The appellants in the several appeals before us question the relaxation granted to candidate belonging to the Scheduled Castes and Scheduled Tribes in regard to the minimum qualifying marks for admission into the medical colleges of the State of Madhya Pradesh. We are afraid we have to throw out these appeals on the preliminary ground that the persons likely to be affected if we agree with the submissions made on behalf of the appellants, that is, the candidates belonging to Scheduled Castes and the Scheduled Tribe who have secured admission into the medical colleges as a result of the relaxation granted to them have not been brought before us by being properly impleaded as parties. We fail to see how the question of the legality or validity

of the relaxation granted to them have not been brought before us by being properly impleaded as parties. We fail to see how the question of the legality or validity of the relaxation granted in their favour can possibly be decided in their absence. Rules of natural justice apply as much to proceedings in Courts of law as to proceedings before authorities elsewhere. It may be that where a general question is involved and a large number of persons are concerned, the Court may, in appropriate cases, permit a few of them to be sued in a representative capacity or may consider them as sufficiently represented by a few who have been properly impleaded as parties. That is not the situation here. No effort has been made to implead any person like affected as a party to the proceeding. All the appeals are liable to be dismissed on this ground”

c. Patel Chandrappa v/s Hanumanthappa, reported in ILR 1989 KAR 2384,

wherein the Hon’ble High Court of Karnataka has held that,

“The further question for consideration is whether the children of the 2nd defendant born out of such wed-lock with the 1st defendant are entitled to a share in the joint family properties. The trial Court on following the decision in Shantaram Tukaram Patil’s case, has held that the children of the 2nd defendant are not entitled to a share in the coparcenary property, therefore, they are not necessary parties to the suit. In a suit for partition of the joint family properties, all the heads of the branches, females, who are entitled to a share on partition, the purchaser of the joint family property in case the alienation is challenged or such

property is included in the suit, if the suit is brought by a purchaser from a coparcener, the coparcener who alienated, are proper parties. There are other persons who are proper parties to a suit for partition but it is not necessary to mention them because the children of defendant No.1 begotten through defendant No.2 do not fall in the category of proper parties. The question as to whether they are necessary parties to the suit depends upon the determination of the question as to whether they are entitled to a share in the coparcenary property.”

d. Puttaswamy and others v/s Lakshamma and others, reported in 2017(1)

KLJ 385, wherein the Hon’ble High Court of Karnataka has held that,

“A “necessary party” is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a “necessary party” is not impleaded, the suit itself is liable to be dismissed.”

44. The learned advocate for the plaintiff has filed a judgment in Balagouda Alagouda Patil and others v/s Babasaheb Ramagouda Patil, reported in ILR 1999 KAR 831, wherein the Hon’ble High Court of Karnataka has held that,

“(A) HINDU LAW - PARTITION – SUIT DISMISSED ONLY ON THE GROUND THAT ALL THE MEMBERS REPRESENTING EACH BRANCH HAVE NOT BEEN MADE PARTIES. HELD

-Where partition is claimed as between the Branches of the Family only, the Heads of the Branches alone need be made parties, of course, in such a case it is open to the others to apply for impleading them as parties.”

45. I have perused all the judgments of the Hon'ble Supreme Court of India and Hon'ble High Court of Karnataka as noted above. The judgment reported in ILR 1999 KAR 831, will not be applicable to the case on hand. Because, in this case the said Lawrence Almeida was not made as party to this suit and Vallerian Almeida, who was impleaded as party to this suit, is not the head of the branch of late Annestella Almeida. Moreover, the plaintiff nowhere in his entire case has contended that Vallerian Almeida is the head of the branch of late Annestella Almeida. Therefore, the said Vallerian Almeida is not representing the estate of Lawrence Almeida. Therefore, the said Lawrence Almeida, who is the necessary party to this suit, ought to have been made as party to this suit. In absence of said Lawrence Almeida, the suit on hand cannot be decided. Hence, the suit is bad for non-joinder of necessary party. Hence, I answer issue No. 5 in **affirmative**.

46. Issue Nos. 1 and 2: These issues are answered in common to avoid the repetition of facts and appreciation of evidence.

47. It is the specific case of the plaintiff that the suit 'A' schedule property is liable to be divided into 5 fair and equal shares by metes and bounds and he is entitled for one such share in the suit 'A' schedule property and defendant Nos. 3 and 4 are liable to pay him share of profits in the 'A' schedule property from the date of suit till the actual delivery of his share.

48. As noted supra Sri. Lawrence Almeida ought to have been made as party to this suit but the said Sri. Lawrence Almeida is not made as party to the suit on hand and the suit became bad for non joinder of necessary party. Hence, answering issue Nos. 1 and 2 does not arise. Hence, issue Nos. 1 and 2 not survived for my consideration.

49. **Issue No.6:** In view of findings on the above issues, I proceed to pass the following:

O R D E R

The suit of the plaintiff is hereby dismissed.

Draw decree accordingly.

Looking into the nature of the suit, no order as to cost.

(Typed by me in the Laptop, corrected and signed by me and then pronounced in the Open Court on this 22nd day of April, 2019)

(Chandrashekhar Banakar)
II Addl.Civil Judge & J.M.F.C.,
Kundapura.

ANNEXURES**The list of witness examined on behalf plaintiff:**

PW-1 : Antoni Lazarus

The list of documents exhibited on behalf of plaintiff:

Ex-P1 : Record of Rights bearing Sy. No. 271/2BP2 of Manuru Village

The list of witness examined on behalf of defendant:

DW-1 : Joseph Lazarus

DW-2 : B.N. Prakash Adiga

DW-3 : Ravi Shankar

The list of document exhibited on behalf of defendant:

Ex-D1 : Order passed by Land Tribunal, Udupi.

Ex-D2 : Form No.10

Ex-D3 : Certified copy of Order passed by Land Tribunal, Udupi

Ex-D4 to D6 : Death Certificates – 3 Nos.

Ex-D7 : Certificate issued by Thasildar, Udupi.

Ex-D8 and 9: Original Will – 2 Nos.

(Chandrashekhar Banakar)
II Addl.Civil Judge & J.M.F.C.,
Kundapura.

SNT/-