

**(2008) 04 KAR CK 0024**  
**In the Karnataka High Court**  
**Case No : TOS No. 1 of 2006**

Sri J.T. Surappa and Another

APPELLANT

Vs

Sri Satchidhanandendra Saraswathi Swamiji Public Charitable  
Trust and Others

RESPONDENT

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**Date of Decision :** 16-04-2008

**Acts Referred:**

Succession Act, 1925 — Section 2 (h), 63, 63 (c), 68

**Citation :** AIR 2008 Kar 2433 : (2008) ILR (Kar) 2115 : (2008) 3 KCCR 1484 :  
(2008) 3 KLT 150

**Hon'ble Judges :** N. Kumar, J

**Bench :** Single Bench

**Advocate :** S.B. Lakshmi, for the Appellant; C.R. Subramanya, for D1, H.N. Shashidhar and Kesvy and Co. for R2, 3, 5 and 6 and Krishna S. Dixit, for D4, for the Respondent

**Final Decision :** Dismissed

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## Judgement

N. Kumar, J.—This petition/suit is filed for grant of letters of administration with a copy of the Will, which came into existence six hours prior to the death of the testator in ICU of the Hospital. By an order dated 1.3.2006 this Probate Petition was ordered to be converted into an original suit. Therefore, the parties to the proceedings are herein referred to as the plaintiffs and defendants in a suit.

2. The first plaintiff and defendants 5 and 6 are brothers. Second plaintiff is the son of the first plaintiff. Defendants 2 and 3 are the daughters of the 6th defendant. 1st and 4th defendants are beneficiaries under the Will.

3. Sri J.T. Ananthaswamy is the eldest brother of the first plaintiff and defendants 5 and 6. He died on 24.1.2003 at Mysore. He was a divorcee. He had no issues. The case of the plaintiffs is, that Sri J.T. Ananthaswamy has left an unregistered Will dated 24.1.2003 bequeathing all his properties in favour of the plaintiffs and defendants 1 to 4. Annexure-A to the plaint contains the assets and Annexure-B contains the liabilities. Therefore, the plaintiffs have filed the above suit for grant

of letter of administration with the Will annexed.

4. Notice to the defendants was ordered. A citation was ordered and it was duly published in the Indian Express. Notices were duly served on the defendants. Defendants 5 and 6, the two brothers of the deceased testator filed an impleading application and they came on record. Defendants 2 and 3 who are the daughters of the 6th defendant filed their statement of objections contesting the Will, though they were also the beneficiaries under the Will. Section 295 of the Indian Succession Act, 1925 provides that, when there is contention, the proceeding shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant. Therefore, the Court directed the Registry to register this probate petition as an original suit on the plaintiffs paying the requisite Court fee. The plaintiffs paid the requisite Court fee and by an order dated 1.3.2006 the probate petition was ordered to be converted into an original suit.

5. The first defendant filed his objections admitting the execution of the Will. It is defendants 2 and 3 who filed objections contesting the Will. They specifically contended that the deceased J.T. Ananthaswamy never executed any Will. The Will dated 24.1.2003 is a concocted one. J.T. Ananthaswamy died intestate. First plaintiff and defendants 5 and 6 are the legal heirs to succeed to the estate of deceased J.T. Ananthaswamy. The alleged Will of J.T. Ananthaswamy is forged by the plaintiffs to suit their needs. On 24-1-2003 the date of the alleged execution of the Will at Basappa Memorial Hospital at Mysore, no one in particular Sri. V. Shankarayanarayana and Y. Vasudeva, the attesting witnesses to the said Will were permitted to enter the hospital to see the deceased J.T. Ananthaswamy. On 24.1.2003 the deceased was not in a position to sign or execute any document. He died on that day at around 2.30 PM. In fact much before the date of his death and for long time the deceased was not in a position to sign, execute any document and more so the alleged Will. The properties of the deceased both movable and immovable are worth lakhs of rupees. The plaintiffs have never spent any amount on the deceased. The first plaintiff after the death of J.T. Ananthaswamy has illegally drawn the money from the deceased S.B. Account of Central Bank of India, K.R. Circle, Mysore and S.B. Account of Syndicate Extension Counter at Marimallappa's High School, Mysore, on the alleged ground that he is the nominee of the deceased J.T. Ananthaswamy. Therefore, they have sought for dismissal of the suit.

6. On 12.4.2006 the Court framed the following issue:

i) Whether the petitioners prove that J.T. Ananthaswamy executed a Will on 24.1.2003 while he was in sound disposing state of mind and has duly executed the same and that the petitioners are entitled to letters of administration as sought for in the petition?

7. The plaintiffs in support of their case examined the first plaintiff as PW1. They also examined one of the attesting witnesses to the Will V. Vasudeva as PW 2 who is also the scribe of the Will. They examined one Sri. Swami Atmanandendra Saraswathi, nephew of the deceased J.T. Ananthaswamy as PW 3. They examined Dr. Venkatappa as PW 4. In support of their case they have marked 99 documents which are marked as Exs. P1 to P99. Fifth defendant-Somashekar was examined as DW1 and two documents were marked as Exs. D1 and D2.

8. Smt. S.B. Lakshmi, the learned Counsel appearing for the plaintiffs contended that, though the deceased testator was in the hospital for a period of one month, before his death, at the time of execution of the Will he was in a sound state of mind. It is on his instructions the Will was prepared by PW 2 who along with another attesting witness has duly attested the said document. PW-4 the doctor has deposed to the state of mind of the deceased at the time of execution of the Will and Ex.P99 the case sheet maintained in the Basappa Memorial Hospital also show that the deceased testator was in a sound state of mind at the time of execution of the Will.

9. A perusal of the bequest shows that the deceased has distributed his assets to his kith and kin, including the contesting defendants, 2 and 3. Having regard to the evidence on record, the relationship between the parties, there is nothing unnatural in the bequest made and the evidence clearly establishes due execution of the Will, sound state of mind of the testator and clears any suspicious circumstances that may exist in the facts of the case. Therefore, the plaintiffs are entitled to the grant of letter of administration.

10. Sri H.N. Shashidhar, the learned Counsel appearing for the contesting respondents contended that, the material on record clearly discloses that the deceased was not in a sound state of mind and he was also not in a good physical condition to execute the Will on 24.1.2003. The alleged Will has come into existence about six hours before the death of the deceased testator. A bear perusal of the Will produced in the case shows that it is a fabricated document. The execution of the Will is not proved. Due attestation is also not proved. The suspicious circumstances surrounding the execution of the Will is not cleared. Ex.P99, the hospital records produced by the plaintiff itself shows, that the deceased testator was not in a sound state of mind. There is full of inconsistency in the evidence of the witnesses, who have been examined in proof of the Will and therefore, he contends that the Will is not proved and the suit is liable to be dismissed.

11. In view of the aforesaid pleadings, the evidence and the submissions, it clearly emerges that the Will set up by the petitioners is disputed by the contesting respondents. Not only the execution of the Will is denied, but, it is also contended that the will is a fabricated document and the testator was not in a sound state of mind at the time of the alleged execution and it has come into existence in suspicious circumstances. In the background of these specific defences taken, it is to be seen whether the plaintiff has proved the Will in

accordance with law.

12. Now let me examine the oral evidence adduced by the parties about the valid execution of the Will.

PW-1, the first plaintiff is one of the propounder of the Will. He is also a beneficiary. In the examination in chief which is by way of an affidavit, he has set out the relationship between the parties, the execution of the Will by J.T. Ananthaswamy, who are the beneficiaries under the Will, about the marriage of J.T. Ananthaswamy and the particulars of the assets which he has left behind. Through him 94 documents were produced, most of which are the share certificates showing the assets standing in the name of the deceased J.T. Ananthaswamy. In the cross-examination it is elicited that the deceased testator was working as Manager in M/s. Bimetal Bearings Limited which is situated at Hosur, Tamilnadu. He retired somewhere in 1994. Before retirement he was residing with his younger brother J.T. Nanjundaswamy, the 6th defendant for about 2 years. Prior to that he was staying at Janardhan Hotel, Bangalore. After retirement in 1994 he was staying with him. J.T. Ananthaswamy was married to one Shantha. The said marriage was dissolved by a judgment and decree dated 6.10.1987 in M.C. No. 22/1987 passed by the II Additional Civil Judge at Mysore, as per Ex.P79.

13. In 2001, the testator had a paralytic stroke and the movement of the left hand was hampered. He also had heart problem. In order to treat for paralysis he was admitted to Sitaranga Nursing Home at Mysore. He was an inpatient for a period of one week. He was also treated in the said Nursing Home for his heart ailment. He was smoking earlier which he gave up after retirement. He was also a diabetic patient. He was getting periodical checking done and he was taking some tablets. In December 2002 he had gangrene to his left leg. He was admitted to Vikram Hospital where he was an inpatient from 20.12.2002 to 1.1.2003. On 1.1.2003 he was admitted to Basappa Memorial Hospital. After three days of treatment in Basappa Memorial Hospital his left leg was amputee on 3.1.2003. He was in the special ward of the said hospital. On 21.1.2003 he had symptoms of heart attack. Again he was shifted to ICU where he breathed his last. PW1 was attending to the testator throughout. He alone was attending him. He was taking food to the testator. Even when he was in the ICU he was giving him the food, milk, D-protein, idli, rice and rasam. The testator was very particular, that he should feed him. Till he died he was feeding the food to him. He died on 24.1.2003 at 2.30 p.m. He saw him for the last time on 24.1.2003 at 8.30 a.m. On 24.1.2003 at 7.30 a.m. one Vasudeva came to see his brother. At 8.30 a.m Sri. Atmananda Saraswathi Swamiji had come to see his brother who is their maternal uncle. He went inside the ICU at 11.30 a.m. and came out. No other person visited the testator on that day. At 8.30 a.m. his brother requested him to shift him to the special ward after informing the doctor, as he was bored in the ICU. At that time, he gave him one idli and D-protien. At about 12 noon he came to know that his brother was put on ventilator. He was on drips. He denied

the suggestion that the testator was not in a position to sign on 24.1.2003. He saw only the Swamiji and Vasudev-PW2 coming to the hospital on 24.1.2003. Though he saw PW2 entering the hospital at 7.30 a.m. on 24.1.2003, by the time he returned at 8.30, PW2 had gone. He was present at the ICU till 2.30 p.m. on that day. He did not see any person entering the ICU between 8.30 a.m. to 11.30 am and 12 noon to 2.30 p.m. Again he reiterated that he did not see anyone entering the ICU except PW2 on that day and he did not see Shankaranarayana, another attesting witness to the Will in the hospital. He has not seen his brother signing the Will. The Will was handed over to him by PW2. It was handed over to him on the 14th day after the death of the testator. However, he was informed about the Will the next day after the death of the testator. The testator was treating all the three brothers alike. He was also in good terms with his brothers. The testator had the same love and affection towards all the three brothers. He denied the suggestion that the Will is a fabricated one.

14. PW 2 is one Vasudeva, who is the scribe as well as an attesting witness to the Will. In his examination-in-chief by way of affidavit, he has stated that the testator was his class mate and he is also his close friend. He was visiting the testator in the hospital regularly. The testator asked him to write a Will as per his wish and he requested him to take down as per his dictation. Accordingly, on 23.2.2003 evening he took down what the testator dictated. Thereafter, the testator requested him to get it typed and bring the same on the next day. Therefore, he got the Will typed for the testator the next day morning. The testator had requested Y.V. Shankaranarayana to visit him on the next day for the purpose of attesting his Will. On the next day when he handed over the typed copy of the Will to the testator, he went through the Will and he was fully satisfied with the contents of the Will. J.T. Ananthaswamy asked him to get Y.V. Shankaranarayana over phone. Therefore, Y.V. Shankaranarayana reached the hospital within half an hour. The testator requested both of them to attest his Will as attesting witnesses. The testator put his signature on the Will in their presence. He attested the Will as a witness and thereafter Y.V. Shankaranarayana attested the Will in the presence of J.T. Ananthaswamy as per his wish. After Shankaranarayana signed the Will as an attesting witness, the testator asked him to keep the Will in his custody and to hand over it to J.T. Surappa, PW1, after his demise. It is through this witness, the Will was marked as Ex.P95.

15. He deposed that he has signed the Will at 95(a), (b), (c), (d), (e), (f) and (g). The testator has signed at 95(h), (j) and (K). Shankarnarayana has signed the said will at Ex. P.95(1). He deposed that the testator for a period of one month prior to Ex.P.95 was telling him about the contents of the will. After gathering all the information, he prepared a draft. He showed the same to him. After he approved it, he got it typed.

16. In cross-examination he stated that he was visiting the testator in the hospital once in two or three days. On 23.1.2003, he had been to the hospital at about 5.30 pm in the evening. He took down the points as per his dictation. After

he got the will typed, he destroyed that handwritten note. He got the will typed on 23.1.2003 and took the said typed copy to testator on 24.1.2003. He showed the typed copy of the will to Ananthaswamy. He read it once to him. Testator also read once. Testator signed the Will first. He corrected the mistakes and thereafter, he affixed his signature. Testator requested him to send for Shankarnarayana. He phoned him at around 8.00 am. Then Shankarnarayana came between 8 and 8.30 am, and when he came, he was sitting outside the ward. Shankarnarayana alone entered the ward. Ex. P. 95(1) is the signature of Shankarnarayan. He did not see him affixing the said signature. Ex. P. 95(a)(b)(c)(d)(e) are his signatures which are affixed after making corrections. At that time, the testator could have affixed his signature also. Ex. P. 95(h) and (j) are the signatures of the testator. However, the testator has not affixed his signature after his signature at 95(a)(c) and (d). He was staying in the hospital till Shankarnarayan came out of the ward and he handed over the will to him. He came to know that Ananthaswamy died at about 2 or 2.30 pm. His brother Surappa informed him the said fact over phone. He informed Surappa, the first plaintiff about the said will after 14th or 15th day of the death of the testator. He also admitted that, what is stated in paragraph 5 of the affidavit of his examination-in-chief is not correct. He denied several suggestions made to him. He denied that the Will is a fabricated document.

17. In the re-examination it is elicited that the reason for not taking the signature of the testator at the bottom of the page was that there was no sufficient place left after typing. Therefore his signature was taken in the margin.

18. PW3 is one Swami Atmanandendra Saraswathi. He is the maternal uncle of the testator. His evidence by way of examination in chief is contained in his affidavit. He has deposed that he was attending to the testator every day. He was allowed to visit the testator even in the ICU. Testator's mental condition was good till he breathed his last. He was in a good state of mind and he used to understand the things around him and he used to chit chat with him. He has deposed in cross-examination, that he was visiting the testator in the hospital between 9 am and 11 a.m. and in the evening between 3 p.m. and 5 p.m. After the testator's leg was amputated, he was in the ICU for some time and thereafter, he was shifted to special ward. With the doctors' permission he was visiting him because, in his company the testator used to have peace of mind. On the date of his death, the testator was in the ICU of B.M. Hospital. He did visit him on 22nd and 23rd of January 2003. On 22nd of January 2003 he was taken to ICU. On the afternoon of 22nd January 2003, he had a massive cardiac arrest. On 22nd and 23rd he was not put on ventilator. From 2001, when he had paralysis stroke on his left hand, he was unable to write and sign. On 22nd- 23rd and 24th of January 2003, he was on drips and the same was fixed to his right hand. On 24th January 2003, he visited the testator at about 8.30 a.m. in the morning. He entered the ICU at 9 a.m. No one was with the testator at that time. The testator was in perfect state of mind according to his understandings. He was in good health. In fact, the testator even expressed his desire to get back to

Ashrama, so that he can hear the discourses of which he is fond of. At 9 a.m. the testator was on drips. No ventilators had been put. He was treating all his nephews alike. Now J.T. Somashekar and J.T. Nanjundaswamy are not visiting his Ashram after the death of the testator. He knew about the Will of Ananthaswamy. Vasudev, who met him at the gate of the hospital on 24th January 2003, informed him about the Will of J.T. Ananthaswamy. Vasudev was alone. On 23-1-2003 when he visited J T Ananthaswamy at 3 p.m., 15 minutes thereafter, Vasudev came to ICU. J.T. Ananthaswamy was speaking to Vasudev about some Will. It is at 8 30 a.m. on the next day, Vasudev mentioned to him about the Will. On 24-1-2003, he was in the hospital between 9 am to 11.15 am. At 11.15 am the testator's condition was sound and stable. He saw the first plaintiff at 11.15 a.m. when he came out of ICU to attend to the phone call. He has denied the allegation that he has colluded with the plaintiffs in preparing the Will.

19. PW-4 is one doctor by name Venkatappa. He has also filed his affidavit in lieu of his evidence by way of examination in chief. He has stated that he has been working as a Resident Medical Officer in Basappa Memorial Hospital, Mysore, for the last 9 years.

20. During January 2003, he was also working as a Resident Medical Officer. His duties consist of general supervision from time to time in a day of going through all the wards. He has seen the case sheet records maintained in respect of the testator who expired on 24.1.2003. He has produced the records maintained by the hospital related to him. When the testator was kept in ICU he had visited him. On 22nd, 23rd and 24th of January he visited the deceased three times a day. With permission one or the other person related to the patient in the corridor of ICU was permitted to go and see him in stipulated times. On 23rd the testator was administered drugs for broncho dilation. On 24th morning the same drugs were administered. On January 24\* at about 8 or 8.30 am, when he visited the testator he looked to be cheerful and was able to talk. He enquired about his health and the testator was able to respond saying that things seem to be improving and he would soon go back home. He again visited at 10.45 am and enquired with the duty doctor who told him that the testator was improving and also said that the testator had executed a Will on the same day. He received information at about 2.30 PM that the testator had a cardiac arrest and due to low blood pressure his breathing was irregular, he was put on ventilators. He supervised the putting up of mask and bag ventilators and felt that he would survive. He advised the duty doctor to give some adrenaline and atropine to improve the pulse and lung conditions and make him stable. However, he received information that he died at 2.45 PM. He produced the case sheet of the testator during his stay in the hospital and it was marked as Ex.P99. He deposed that the progress report at 8.45 AM shows that he was conscious. His B.P. was normal. His general appearance on his two visits on 24.1.2003 was one of improvement and he was cheerful and had no problems with his speech or action. He can definitely say that he was suffering from disease but his mental disposition was clear, correct and sound. The case sheet which is marked as

Ex.P99 contains pages 1 to 238. At page No. 94 it shows the progress report of the testator on 24.1.2003 at 8.45 AM.

21. In the cross-examination he has stated that the nature of work which he undertook during the Government service was treating outpatients in the hospital and also family planning services. In the Basappa Memorial Hospital his nature of work was overall supervision of Hospital work, signing of leave reimbursement bills, granting leave certificate and attending to the patients who are in Critical Care Unit thrice a day between 8 AM to 5 PM. He used to enquire from the patients in the ICU about their health condition. However, he was not entitled to record his observations in the progress sheet. He had no responsibility of treating the patients in the ICU. He was not competent to treat those patients or advice about the treatment to be given to those patients. His supervision work included finding out the maintenance of the wards, how the patient is treated, but he was not involved in the management of the hospital. Ex.P99 produced by him is called inpatient case sheet. In the entire case sheet he has not written anything at any point of time. He visited the testator on 24.1.2003 at about 8.30 AM along with the Specialists. He alone did not visit testator on that day. He went along with the Specialists. At 8.30 AM on 24.1.2003 when he visited the testator, he was not put on ventilators. He cannot say to which hand drips had been put to the testator. He does not know whether any close relatives of J.T. Ananthaswamy were present in the ICU when he visited him. To visit patients who are in ICU a particular time is prescribed in the hospital. However, with the permission of the authorities people will be allowed to visit the patients in the ICU. There will be 2 rounds in a day for the Specialists to visit the patients. The morning round will be 8.30 to 12.00 PM. In the evening it will be from 4.00 PM to 6.00 PM. During that period general public will not be allowed to the wards. He has not treated the testator at any point of time. He was not the competent authority to treat him since he was a patient of hypertension, diabetes and chronic oppressive pulmonary diseases. These diseases were looked after by concerned Specialists.

22. When he went to see the testator at 8.30 AM one Sri. S. Bhaskar, Physician, Sri. C.B. Murthy, General Surgeon, Dr. P. Herale, the Plastic Surgeon and Dr. Gurappa, Thyrostatic Surgeon were present in the ICU attending to the testator. All the four doctors have recorded in the case sheet about the health condition of the testator on 24.1.2003. No specialist attended the testator after 8.30 AM in the morning and before 2.00 PM. Around 2" 0 clock Dr. S. Bhaskar attended the testator. At 2.00 PM testator was having breathlessness, pain in the chest, and sweating. Dr. Bhaskar attended to these problems on that day. The testator died at 2.45 PM on that day. He was put on ventilators at 2.15 PM. It is the doctor who put the testator on ventilators, particular anaesthetic would do that job, but he does not know which doctor did it on that day. At 8.30 AM when he visited the patient he was lying on the bed, he was conscious, he was responding to commands. Both the hands of the testator were normal. His left leg was imputed on 3.1.2003 because of Gangarian. He does not remember whether his leg was imputed above the knee. It was his left leg. He has no idea about any person

being granted permission by the hospital authorities to visit J.T. Ananthaswamy in the ICU apart from visiting hours.

23. On behalf of the defendants J.T. Somashekar, defendant No. 5, is examined. He also filed his examination in chief by way of an affidavit. He has referred to his relationship with his brother, his brother being admitted to the hospital, the treatment given to him, those who were visiting him in the hospital and has denied the execution of the Will by the testator and the signature of the testator on the Will. He has also produced the discharge summary in respect of the testator which is marked as Ex. D1. Ex. D2 is the receipt issued by the hospital for receiving money for issuing Ex. D1. He admitted in the cross-examination, that he has filed a suit for partition in the Civil Court at Mysore and it is numbered as O.S.820/2006. He admitted execution of several documents in respect of the agricultural properties in favour of the Trust and he also admitted the relationship between the parties as well as the witnesses who were examined in the case. Nothing worthwhile has been elicited in his evidence which supports the case of the plaintiffs in proving the Will.

24. Apart from the oral evidence on record the plaintiffs got marked 99 documents. Out of the 99 documents, Exs. P1 to P75 pertain to share certificates standing in the name of the testator which has absolutely no bearing in proving the impugned Will. Ex.P76 is the survivor certificate. Ex.P77 is the death certificate of the testator; P78 is the death certificate of the father of the plaintiffs. Ex.P79 is the certified copy of the order in MC No. 22/1987 under which testator got divorce against his wife. Ex.P80 is the paper publication showing that the property at Mysore belonging to the testator is for sale. Ex.P81 is the Client Master List obtained by the testator. Ex.P82 is the original Will of the father of the testator. Ex.P83 is the mutation extract. Ex.P84 is the RTC extracts. P85 is tax paid receipts. Ex.P86 is mutation orders. Ex.P87 is 6 computerized RTC extracts. Ex.P88 is a copy of the letter given for change of mutation. Ex.P89 is identity card of the testator issued by the Election Commissioner. Ex.P90 is a letter written by PW1 to Vijaya Karnataka. Ex.P91 is the acknowledgement. Ex.P92 is the order sheet in revision petition filed before the Deputy Commissioner at Mysore. Ex.P93 is the petition copy filed by him and Ex.P94 is the objections filed in the said proceedings. Ex.P95 is the disputed Will. Ex.P96 to P98 are letters and Ex.P99 is the case sheet. Ex.D1 is discharge summary.

25. It is from this oral and documentary evidence on record, whether the Will is proved is to be found. Before doing that it is necessary to bear in mind the settled legal position in so far as proof of Will is concerned.

26. There is one important feature which distinguishes wills from other documents. It is one of the most solemn document known to law. Through it, a dead man entrusts to the living, the carrying out of his wishes. As it is impossible, that he can be called either to deny his signature or to explain the circumstances in which it was made, it is essential that trust worthy and effectual evidence should be given to establish the Will. Therefore, unlike other

documents, the Will speaks from the death of the testator. It is ambulatory and it becomes effective and irrevocable on the death of the testator. It is a declaration in the prescribed manner of the intention of the person making it, with regard to the matters which he wishes to take effect upon or after his death.

27. Therefore, when it is propounded or produced before a Court, the testator who has already departed the world, cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of wills, the Court will start on the same enquiry as in the case of the proof of documents. However, in the case of Wills, apart from proof of the documents, additional factors have to be satisfied, before the court could declare a document styled as "Will" is proved.

28. Therefore, the court has to tread a careful path in the enquiry to be conducted with regard to Will. The said path consists of five steps "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?

29. The word "Will" has been defined u/s 2(h) of the Indian Succession Act, 1925 (for short hereinafter referred to as "the Act"). Will means "the legal declaration of the intention of the testator with respect to his property which he desires to be carried into after his death". In India everyone is governed by their personal law in so far as inheritance or succession to their property is concerned. In the absence of a Will the property devolves on the legal heirs in accordance with the said personal law. If there is a will, it comes in the way of the operation of the said law. Therefore, the Will obstructs inheritance of the property. 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, 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. This is the First Step.

30. Once the aforesaid legal requirements are satisfied, the Second Step would be to find out whether under the Will, the testator has disinherited the persons who would have inherited or succeeded to his property in the absence of a Will. A Will may be executed by a person distributing his entire properties to his legal heirs in order to avoid a future dispute. Such distribution may not be equal also. It is quite natural. However, if under a Will the testator were to disinherit a legal heir, in particular his wife and children, then it would be improbable or unnatural, but not invalid. In such circumstances, it is necessary for the Court to find out the reasons for such disinheritance. The reason for such disinheritance sometimes could be found in the Will itself or from extrinsic evidence adduced. Such an exclusion, in the absence of a satisfactory explanation, may also constitute a suspicious circumstance. Therefore, when legal heirs are disinherited, the Court has to scrutinize the evidence with greater degree of care than usual.

31. The Third Step would be to find out whether the testator was in a sound state of mind at the time of executing the Will. The question of a sound mind is a dominant question in a court of probate. The test to judge a sound disposing mind is not an absurd test. Nor is it the test of a perfectly healthy and perfect mind. The test of a sound disposing mind is in law a workable test. It is not a hypothetical nor an impracticable test. It is not the test of a psychologist or a psychoanalyst or a psychiatrist who in the modern age, prone to consider all human mind to be inherently unsound by nature and abnormal. Nor, is it the scientific test, which would satisfy the highest technical medical examination. The mental soundness and the physical fitness of the testator is an important circumstance when the testimonial capacity is being scrutinized. In case of weakness of mind arising from near approach of death, strong proof is required that the contents of the will were known to the testator and that it was his spontaneous act. It is settled law that, the propounder has to show by satisfactory evidence that the Will was signed by the testator and at the relevant point of time he understood the nature and effect of the dispositions and put his signature to the document of his own free will. The real test in all cases of this kind is, whether the testator had a proper appreciation or comprehension of his act.

32. Thereafter, the Fourth Step would be to find out whether there exists any suspicious circumstance surrounding the execution of the Will. "A circumstance would be suspicious when it is not normal or is not normally expected in a normal situation or is not expected of a normal person or does not express the mind of the testator." The fact that the Will is unnatural, unreasonable and improper, calls for close examination. What is a suspicious circumstance depends on the facts of each particular case. There is no hard and fast rule. Several well recognised circumstances which are recognised over the years are only a pointer in this direction. They are, propounder taking a prominent role in the execution of a Will which confers substantial benefit on him; Will executed by a dying person or a person nearer to death or when the testator was physically and

mentally feeble and near his end; The Will containing shaky signatures and not registered. A feeble mind likely to be influenced; Unfair and unjust disposal of property; Disinheriting the natural legal heirs without any reason; The testator's intellect impaired or weakened by age or illness; The testator being a literate person putting his thumb impression on the Will; Marked variances between the signatures found at different places in the Will; The Will which has not seen the light of the day for a considerable period from the date of death of the testator; Incorrect recitals in the Will; Will written in a language which is unknown to the testator, etc., The evidence in support of the instrument must pass the test of jealous scrutiny. The suspicion so stirred is to be removed by clear proof, as regards the sound disposing mind of the testator being free from undue influence. Where there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court, before the court accepts the Will as genuine. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator.

33. The last and Fifth Step is to consider whether 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. In case of documents, which are compulsorily attestable, execution means some thing more than mere signing. It includes delivery and signing in the presence of witnesses or on personal acknowledgment of execution by executant. It includes the whole series of acts of formalities which are necessary to give the document validity.

34. Section 63 of the Act deals with execution of unprivileged Wills. It prescribes three rules which have to be satisfied before the Court can declare that the Will is duly executed. Evidence should be adduced to show that the testator has signed or affixed his mark to the Will. The said signature or mark of the testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing and lastly 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 received from the testator a personal acknowledgement of his signature or mark 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. Therefore, 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 affix his signature to the Will in their presence and if not at least they receive from the testator a personal acknowledgement 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.

35. 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 u/s 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 Court 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.

36. 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.

37. In the background of these legal principles it is to be seen, in the instant case, whether the Will is duly executed. There is no dispute regarding relationship between the parties. The father of the deceased testator was one J.S. Thimmappaiah. He had four sons. J.T. Ananthaswamy, J.T. Somashekar, J.T. Nanjundaswamy and J.T. Surappa. All of them were residents of Mysore. During the lifetime of their father all of them were living in the family house at No. 211, Kshretraiah Road, Mysore-24. The deceased testator was the eldest brother of the first plaintiff and defendants 5 and 6. Ex.P82 is the original Will of the father of J.T. Ananthaswamy. The beneficiaries are the first plaintiff and defendants 5 and 6, under which their father distributed both the agricultural properties owned by him which are situated at Halagainahundi Village as well as the house property where all of them were living. On the basis of the aforesaid Will the mutation entries were made in the name of the brothers. Exs. P83,84 are the mutation extracts, RTC extracts, P85 is tax paid receipt, P86 is the mutation order and Ex.P87 is six computerized RTC extracts. The said Will is not in dispute. Even in the absence of the Will, the four brothers would have inherited the property to the same extent.

38. Ex.P95 is the alleged Will and testament of J.T. Ananthaswamy. It is in writing, signed by the testator as well as two witnesses. It is not registered. The contents of the Will contain recitals to the effect that, the land measuring about 2 1/4th acre in Sy. No. 107/4 at Halagainahundi, Vajamangala Grama, Varuna Hobli, Mysore Taluk, which he got from his father under the Will is bequeathed in favour of Sri.Satchidanandendra Saraswathi Swamiji Public Charitable Trust, the first defendant in the suit. All the amount in the bank accounts and the shares are bequeathed in favour of first plaintiff-J.T. Surappa. As J.T. Somashekar, the fifth defendant had borrowed a sum of Rs. 1 Lakh and his daughter had borrowed Rs. 25,000/- and therefore he is not bequeathing anything to him.

However, he bequeathed Rs. 25,000/- to the 6th defendant's daughter. He has bequeathed a sum of Rs. 50,000/- to the second plaintiff, the son of the first plaintiff. He has donated a sum of Rs. 1 Lakh to Sadvidya Pathashala Education Trust, 4th defendant in the suit. The amount remaining after paying to the aforesaid people, he has bequeathed in favour of J.T. Surappa because, he with his family have looked after him very loyally for the past 10 years.

39. The evidence on record shows the testator before his retirement stayed with the second defendant whereas after retirement he has stayed with the plaintiff. PW-1, the first plaintiff in categorical terms has admitted that the testator was treating all the three brothers alike and the testator was in good terms with his brothers. PW3 also has reiterated what is stated by PW1. The first plaintiff and defendants 5 and 6 would have inherited the entire estate of the deceased testator in the absence of the Will. But, they have been disinherited.

40. The material on record discloses that the testator had blood pressure. He was a diabetic patient. In 2001, he had a paralytic stroke and the movement of his left hand was hampered. He also had heart problem. In December, 2002, he had gangrene to his left leg. Though the testator was suffering from all these ailments and in fact had a paralytic stroke in 2001 itself he did not choose to make any Will. In December, 2002 first he was admitted to Vikram Nursing Home to treat his problem of gangrene. He was an inpatient in Vikram Nursing Home from 20.12.2002 to 1.1.2003. On 1.1.2003 he was admitted to Basappa Memorial Hospital. After 3 days of treatment, his left leg was imputed on 3.1.2003. Thereafter he was shifted to Intensive Care Unit where he was there for 3 to 4 days. Thereafter he was shifted back to the general ward. From that day till 21.1.2003 the testator did not chose to make a Will. On 21.1.2003 he had symptoms of heart attack. Therefore, he was shifted to ICU. The petitioner has examined Dr. Venkatappa as PW4. Through him the case sheet of Sri. J.T. Ananthaswamy of Basappa Memorial Hospital, Mysore, was marked as Ex.P99. As the testator died at about 2.30 PM on 24.1.2003, the original Will is said to have been executed by him between 8 to 8.30 AM on that day. In order to find out what was his state of mind, it is necessary to look into the aforesaid medical record, at least from 22.1.2003 onwards.

41. Ex.P.99 shows the patient was confined to bed. He was given sponge bath. Back care given. Passive exercise was done for left hand. Psychological support was given. His left leg below the knee had been imputed and he was fed food orally. In this background we have to look into the physical and mental condition from 22.1.2003. The special observation on 22.1.2003 at about 12.45 PM by the doctor discloses that the testator was sweating and he was feeling discomfort at 11.45 Am. Duty doctor was informed. Sugar water was given. Patient vomitted about 200 ml at 3.15 PM. At 6.55 PM the patient complained of breathing problem and Dr. Bhaskar was informed about the same. At 7.30 PMBP was not recordable. Patient was sweating. At about 9.30 PMBP was not recordable. Pulse was not recordable and at 9.40 PM patient was unconscious and not responding

to commands. Both the pupils were dilated. The position continued to be the same when he was tested at 10.30 and 11.30 PM. It is on 23.1.2003 at 12.30 AM though BP and pulse was not recordable, patient was conscious, responding, pupils were dilated. At 1 AM again the patient was unconscious, BP and pulse was not recordable. At about 9.30 AM patient vomitted about 50 ml. Ryles tube was inserted as advised by Dr. Girish, hanging the left hand because of swelling. Thereafter patient became conscious. He started responding to oral commands. At 1.00 PM sips of water was given. On 24.1.2003, the crucial date, at 6.30 AM mouth wash was given. Back care was given. Bed making was done. At 7.10 AM patient was conscious, responding to verbal commands. At 7.20 AM vital signs were checked and marked. At 8.00 AM bed making was done. Position of the patient was changed. Dopain drip was continued. Dr. Shahib advised patient help to sitting position. At 11.45 AM patient was wheezing severely. At 12.15 PM he had severe breathing problem. At 2.35 PM BP was not recordable, pulse was feeble and he breathed his last and he died out of congestive cardiac failure and respiratory failure.

42. In this background, it is necessary to appreciate the oral evidence adduced by the witnesses regarding the physical and mental status of the testator. The propounder of the Will PW-1 has stated in his evidence that even when he was in the ICU he was giving him food, milk, D Protein, rice and rasam. The testator was very particular that he should feed him. From 21.1.2003 till he died for 3 days he was feeding the food. On 24.1.2003 at 8.30 am when he visited his brother in die ICU, he requested him to shift him to the special ward after informing the doctor as he was bored in the ICU. At that time he gave him one idli and D Protein. According to PW2, the attesting witness as well as the scribe of the Will, he took down what the testator dictated on 23.1.2003 evening. On the next day when he handed over the typed copy of the Will to the testator, he went through the Will and he was fully satisfied with the contents of the Will. He asked him to get Y.V. Shankaranarayana on the phone. The testator requested both of them to attest his Will as attesting witnesses. Testator put his signature on the Will in their presence. In the cross-examination, he has stated that on 24.1.2003 he showed the typed copy of the Will to the testator. He read it once to him. He also read once. He signed the Will first. The testator requested PW2 to send for Shankaranarayana. PW3 has stated that the testator was in perfect state of mind according to his understandings. He was in good health. In fact, the testator even expressed his desire to get back to Ashrama so that he can hear the discourses of which he was fond of. At 9.00 am on 24.1.2003 the testator was on drips. On 23.1.2003 when he visited the testator at 3 PM the testator was speaking about some Will. On 24.1.2003 he was in the hospital between 9 am to 11.15 am. The testator's condition was sound and stable. PW4, the doctor, has stated that on his two visits on 24.1.2003 was one of improvement and he was cheerful and had no problems with his speech or action.

43. This oral evidence is in direct conflict with the medical record. According to the medical record the testator was sweating and was fully discomfort. He was

vomiting. The testator complained of breathing problem. His BP was not recordable. The testator was unconscious and not responding to commands. Both the pupils were dilated. His pulse was not recordable. Though he was conscious, responding, again he became unconscious. There was swelling in the left hand and it was hanged. After he gained consciousness he started responding to oral commands. Sips of water was given. Mouthwash was given. Back care was given. Bed making was done. Patient was wheezing severely. He had severe breathing problem. Pulse was feeble and breathed his last on account of congestive cardiac failure and respiratory failure. Therefore, it is obvious that all the four witnesses examined on behalf of the plaintiffs are not speaking the truth, it is artificial, and therefore, their evidence cannot be believed. In the circumstances, the material on record clearly establishes that the testator was not in a sound state of mind as well as physically from 22.1.2003 till his death on 24.1.2003 at about 2.30 PM. The Will having come into existence at 8.30 AM on 24.1.2003 about 6 hours before his death certainly cannot be said to have come into existence when the testator was in a sound state of mind.

44. The next step would be to find out whether any suspicious circumstances exist surrounding the execution of the Will. In the instant case it is on record that the testator had good relationship with the first plaintiff and defendants 5 and 6. When he was hale and healthy he did not intend to make any Will bequeathing his property as he had no issue and he had divorced his wife. In fact the evidence of PW2 shows the testator was talking to him about the Will for the last one month prior to his death. But nothing materialized. The disputed Will is said to have been executed on 24.1.2003 between 8 am to 8.30 am. The testator died on the very same day between 2 pm to 2.30 pm i.e., the Will came into existence about 6 hours prior to his death.

45. A perusal of the original Will shows that in the pages 1 and 2 testator has not affixed his signature at the bottom of the page. The signatures in those two pages are found in the left margin of the sheets. It is curious to know not only in the margin the purported signature of the testator is found, below the signature of the testator, the signature of the scribe who is also the attesting witness is also found. There are few corrections in the said two pages and the attesting witness of the scribe has initialed those corrections and not the testator. Similarly, in the last page the word "be" is struck off but there is no initials. The date 24.1.2003 put in page No. 1 left margin below the signature appears to be in the same handwriting. No such date is put below the purported signature of the testator in page No. 2 as well as in page No. 3 above the word "J.T. Ananthaswamy" typed. The Will is on a white paper and in fact after the signature of two attesting witnesses it is typed as follows:

The above Will was dictated to me by Sri. J.T. Ananthaswamy and before he signed it was read to him and he has approved the contents.

46. Therefore, it is clear that the said endorsement was also typed along with the rest of the contents of the document. The explanation offered by PW2, the scribe

for obtaining the signature of the testator in the left hand margin is to be found in the re-examination. PW2 has stated that there was no sufficient place after typing and, therefore, his signature was taken in the margin. A bare perusal of the Will discloses that there is sufficient place at the bottom of the typed matter in each page for the testator to sign. Therefore, the explanation offered, that too in the re-examination cannot be accepted. It is to be remembered that the Will is on a white paper and it is not registered.

47. The medical evidence discloses that the testator was unconscious one day prior to the execution of the Will and even after he regained consciousness he was completely unaware of what was happening around him, who all were attending to him and what was done to him. That explains the urgency in creation of the Will which was not there for nearly one month and earlier as probably by 23rd it was certain that the testator would not survive any longer. The Will has come into existence about 6 hours prior to his death when he was struggling for life, and virtually he was half dead.

48. In fact all the witnesses examined in the case are well educated. They are fully conscious of the legal requirements of the Will. PW1 in his evidence is very cautious, in as much as, he does not want to give an impression that he had any role to play in the due execution of the Will. In his anxiety to keep away from the execution of the Will he stated that he saw PW2 on that day at 8.30 am in the cycle stand and he did not see the other attesting witness at all in the hospital. PW2 and 3 were aware that the Will to be valid, the executant should be in a sound state of mind at the time of the execution of the Will. It is in that context both of them asserted that the testator was talking to them, was happy, he was eager to get back to the house. PW4 the doctor who is examined to certify the fitness of the testator, had no role to play in the treatment of the testator while he was in the hospital. All these are shrouded with suspicious circumstance. The propounder of the Will has done very little to explain and remove any of these suspicious circumstance which they ought to have done before the Will could be said to have been duly executed. Therefore, the propounder has failed to remove the suspicious circumstance surrounding the execution of the Will.

49. In so far as due execution of the Will is concerned, at paragraph 4 of the affidavit in examination in chief, PW2, the scribe has deposed that the testator asked him to write the Will as per his wish and he requested him to take down as per his dictation. Accordingly, he dictated on 23.1.2003 evening and thereafter he requested him to get the typed copy on the next day. Therefore, he got the typed copy of the Will to him the next day morning. However, while making the original Will, few questions were put to him in examination-in-chief. At that time PW2 deposed that the testator for a period of one month prior to Ex.P95 was telling him about the contents of the Will. After gathering all the information he prepared a draft. He showed the same to the testator. After he got it approved, he got it typed. Both these versions are given by PW2 in examination in chief itself. But, in the cross-examination he has stated that on 23.1.2003 he had been

to the hospital at about 5.30 PM in the evening. He took down the points as per his dictation. After he got typed, he destroyed the handwritten note. He got the Will typed on 23.1.2003 and he took the said typed copy to the testator on 24.1.2003. Thus, there are three versions about the preparation of the Will.

50. In so far as execution and attestation of the Will is concerned, in the affidavit filed by way of examination in Chief, PW.2 at para 5 has stated as under:

As said above when I handed over the typed copy of the will, J.T. Ananthaswamy went through the will and he was fully satisfied with the contents of the will. As Mr. Y.V. Shankaranarayana at the time J.T. Ananthaswamy asked me to get him over phone, Mr. Y.V. Shankaranarayana reached the hospital within half-an-hour. J.T. Ananthaswamy requested both of us viz., myself and Y.V. Shankaranarayana to attest his will as attesting witnesses. J.T. Ananthaswamy put his signature on the will in my presence and after his signing the same I signed as a attesting witness. Thereafter Mr. Y.V. Shankaranarayana attested the will in the presence of J.T. Ananthaswamy as per his wish.

51. This is the evidence in proof of due attestation of the Will. In his cross-examination he deposed that he showed the typed copy of the will to Ananthaswamy. He read it once to him. He also read once. He signed the will first, PW2 corrected the mistakes. Thereafter, PW2 affixed the signature. Thereafter, the testator requested him to send for Shankaranarayana. PW2 phoned him at around 8 a.m. Then he came between 8 and 8.30 a.m. as he was staying at a distance of 1km. in Kalidasa Road. After Shankaranarayana came PW2 was sitting outside the ward, Shankaranarayana alone entered the ward. Ex. P95(1) is the signature of Shankaranarayana. PW2 did not see Shankaranarayana affixing the said signature. PW2 was staying in the hospital till Shankaranarayana came out of the ward and he handed over the will to PW2.

52. After his evidence, he was shown para 5 of his affidavit set out above and was asked, whether the contents of the same are true and correct. In reply he stated as under:

do admit that what is stated in paragraph 5 of the affidavit of my examination in chief is not correct.

53. From this evidence it is clear that Shankaranarayana has not seen the testator signing the Will. It is nobody's case that the testator acknowledged his signature to the Will to Shankaranarayana and thereafter Shankaranarayana has affixed his signature. Testator has not acknowledged his signature to Shankaranarayana. The other attesting witness PW2 did not see Shankaranarayana affixing his signature to the Will. With this evidence on record, it is to be seen whether the requirement of Section 63 of the Indian Succession Act, 1925 is fulfilled.

54. 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 nor 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 marks 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 affixed 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 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.

55. The aforesaid provision makes it clear before a Will is said to be duly executed, the three rules mentioned in the aforesaid Section shall be complied with. It is mandatory.

56. The first Rule is the said Will should be signed by the testator. If he is incapable of signing, his mark is to be affixed. If some other person is signing the Will, the other person shall affix his signature in the presence of the testator and on his direction. Therefore, it is mandatory that the Will should contain the signature or mark to authenticate the same, without which it cannot be said to be the Will of the testator.

57. The second rule is the signature or the mark shall be so placed on the Will, that it shall appear that it was intended thereby to give effect to the writing as a Will. The provision do not expressly stipulate the place where the signature of the testator has to be affixed. The signature or the mark of the testator may be placed anywhere on the Will, i.e. either at the commencement or at the end. Very often the signature of the testator and of the attesting witnesses are found at the last page. The signature of the testator may be found on all pages at the end also. According to Sub-section (b) the signature need not necessarily be at the end of the Will. It does not matter in which part of the Will the testator signs. If a Will is written on several sheets of paper, with all sheets severally signed, one signature on the last sheet made with the intention of executing the whole is sufficient. The place where said signature or mark is affixed should indicate that the person so signing or affixing his mark, has the intention of acknowledging the correctness of what is written on the page and in order to give effect to such writing which depicts his intention, he shall affix his signature. Mere signature found on the Will at some place is not sufficient. If the signature is found at some place of the page and it does not appear that such a signature was put

with any such intention or giving effect to the Will, then the signature or mark has no value. The test is whether the said signature found on the will, conveys the intention of the testator to give effect to the writing as a Will.

58. The third rule is the Will requires attestation by two or more witnesses. Attestation means the persons, who have affixed their signature as attesting witness, saw the executant, (in the case of a Will a testator), sign or affix his mark to the instrument. If for any reason they are not present at the time of the testator affixing his signature to the instalment, then it is obligatory that they should receive from the testator a personal acknowledgement of his signature or mark. It is either after seeing the testator sign the document or after obtaining the personal acknowledgement of his signature, they shall sign the Will in the presence of the testator. Therefore, not only the attesting witness should sign the Will in the presence of the testator, but they should also see with their eyes the testator signing the instrument or if they are not present at the time of signing the instrument, the testator should acknowledge to them his signature or mark to the said instalment.

59. Therefore, before a Will is said to have been duly executed, it has to pass through the dual test prescribed u/s 68 of the Evidence Act as well as Section 63 of the Act. Section 68 makes it clear that 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 Court and capable of giving evidence. Before the execution of the Will is held to be proved, examination of one attesting witness at least is a must, but that by itself will not prove the due execution of the Will. The said Will also should satisfy the other requirements prescribed u/s 63 of the Act. In so far as attestation is concerned, Sub-rule (c) of Section 63 explains, what attestation means which is in pari materia with the definition of the word "attested" found in Section 3 of the Transfer of Property Act. Before a document is said to be duly attested, evidence has to be adduced to the effect that two of the attesting witnesses have 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 in order to receive from the testator a personal acknowledgement of his signature or mark or the signature of such other person. It is thereafter each of the attesting witnesses shall sign the Will in the presence of the testator.

60. The aforesaid provision makes it clear for due execution of a Will it is not necessary that both the attesting witnesses be present at the same time. But, the question is if both the attesting witnesses are not present at the same time and has not seen the testator affix his signature or mark to the Will how is attestation proved? If only one attesting witness was present at the time the testator affixing his signature to the Will, it is obvious that the other attesting witness has not seen with his eyes the affixing of signature by the testator to the Will and also the other attesting witness signing the Will in the presence of the testator. The requirement of law is, each of the attesting witnesses shall sign the

Will in the presence of the testator. In such event, in order to prove due attestation, it is necessary to examine both the attesting witnesses. Though the requirement of Section 68 of the Evidence Act is satisfied by examining only one attesting witness, in such circumstances the requirement of due attestation as contemplated u/s 63(c) of the Act is not satisfied. Non-examination of the other attesting witness in such circumstances would be fatal. If the other attesting witness is not available, the propounder is not helpless. To prove due attestation u/s 63(c) it is open to the propounder of the Will to examine a person who was present at the time of attestation, who saw the testator acknowledging to such attesting witness who was not present at the time of the testator affixing his signature to the Will, acknowledging his signature or mark and then the attesting witness signing the Will in the presence of the testator. That would meet the requirement of Clause (c) of Section 63. If an attesting witness is not present when the testator affixed his signature and if the testator does not acknowledge his signature to the said attesting witness, before the attesting witness affixes his signature to the Will, then this requirement of law is not fulfilled and the Will is not proved. In those circumstances, if the other attesting witness is not examined or other evidence is not adduced regarding due attestation, the requirement of Section 63(c) is not complied with, Will is not proved.

61. The evidence on record discloses that the testator, the scribe, who is also one of the attesting witness are all educated persons. The contents of the will is in English. It is typed. Both of them knew the signature of the testator has to be at the bottom of the page below the typed matter. There is sufficient space for the testator to put his signature at the bottom of the page. According to them, the testator was in a sound state of mind. Before affixing his signature, he read the contents of the same, and he made corrections and he has initialed the corrections. But, he has failed to put his signature at the bottom of the page and has chosen to put the signature at the left hand margin in the first two pages. The explanation offered by PW2, for affixing the signature in the left hand margin, on the face of it is unacceptable, as there is sufficient space to affix the signature, at the bottom of the page. Therefore, the said signature do not indicate the intention of the testator to give effect to the writing as a Will, thus requirement u/s 63(b) of the Act is not fulfilled.

62. The evidence discloses that Sri Shankaranarayana, one of the attesting witness to the Will was not present at the time of testator affixing his signature to the Will. He has not seen the testator sign the Will. It is only after PW2 attested the Will and came out, he phoned to Sri Shankaranarayana and thereafter Sri Shankaranarayana came and entered the I.C.U. What transpired in the I.C.U. he does not know as he was staying outside the I.C.U. No one has spoken about what transpired in the I.C.U. Sri Shankaranarayana was not examined. PW2 has not seen Shankaranarayana attesting the will. The evidence of PW1 makes it clear, except PW2 and PW3 no one else entered the I.C.U. Therefore, on that date Sri Shankaranarayana did not enter the I.C.U. at all. In the absence of any evidence to show that the said Shankaranarayana received

from the testator a personal acknowledgement of his signature, and he affixed his signatures to the will in the presence of the testator due attestation is not proved. Within six hours from the time of execution of the will the testator died. Therefore, the requirement contemplated u/s 63(c) of the Act is not complied with.

63. From the aforesaid discussion, it is clear that the testator was not in a sound state of mind, at the time when the Will came into existence. It has come into existence under suspicious circumstances. The propounder of the Will has failed to remove the suspicious circumstances. The attestation and even execution of the Will is not proved in accordance with law. Therefore, the plaintiffs are not entitled to the letters of administration sought for. Hence, I pass the following order:

Suit is dismissed. No costs.