

(2001) 10 KAR CK 0022

In the Karnataka High Court

Case No : Regular First Appeal No. 542 of 1995

Virupakshappa Malleshappa Sanklapur and Others

APPELLANT

Vs

Akkamahadevi and Others

RESPONDENT

Date of Decision : 15-10-2001

Acts Referred:

Succession Act, 1925 — Section 63

Citation : AIR 2002 Kar 83 : (2002) 2 CivCC 520 : (2002) ILR (Kar) 1963 :
(2002) 1 KarLJ 394 : (2002) 4 RCR(Civil) 232

Hon'ble Judges : V.G. Sabhahit, J;P. Vishwanatha Shetty, J

Bench : Division Bench

Advocate : Nalini Venkatesh, for the Appellant; Prabhulinga K. Navadgi, for the Respondent

Final Decision : Dismissed

Judgement

P. Vishwanatha Shetty

1. Appellants 1 to 5 in this appeal were defendants 1 to 4 and 7 respectively. In this appeal, they have called in question the correctness of the judgment and decree dated 22nd June, 1995 made on O.S. No. 2 of 1990 by the Court of Civil Judge at Koppal.

2. The parties, in the course of this judgment, will be referred to with reference to their respective ranking before the Trial Court.

3. Brief facts of the case, which may be relevant for the disposal of this appeal, may be stated as hereunder:

Respondents 1 and 2 filed suit O.S. No. 2 of 1990, on the file of the Court of Civil Judge at Koppal seeking for partition and award of possession of their one-fourth share in the suit schedule properties and also for future mesne profits from the date of the suit till they are put in possession of the suit schedule properties.

(b) The plaintiffs and defendant 6 are the daughters of one Siddaramappa

Sanklapur. Defendant 5 is the wife of the said Siddaramappa Sanklapur. According to the case set up by the plaintiffs, one Malleshappa Sanklapur was the propositus of the family; and he has four sons viz., the aforesaid Siddaramappa Sanklapur, Gurusiddappa, Shankarappa and Virupakshappa; and after the death of Malleshappa, his four sons continued as members of the joint family till the year 1959; and in the year 1959, since Gurusiddappa and Shankarappa, the two sons of Malleshappa, could not pull on well with the other members of the family, they separated from the joint family taking their share in the agricultural lands; and the oil mill and other properties held by the family, which were set out in detail to the schedule given to the plaint, continued as joint family assets in the hands of the said Siddaramappa and his brother, Virupakshappa; the said Siddaramappa having expired in the year 1985, his brother, Virupakshappa refused to give their one-fourth share in spite of the demand made.

(c) In the suit, Virupakshappa was made as defendant 1 and two of his sons viz., Mallikarjun and Sharanappa, were made as defendants 2 and 3 and his son-in-law was made as defendant 4. The mother and sister of the plaintiffs were made as defendants 5 and 6. The oil mill known as "Sri Siddeshwara Oil Mill" the business of which was carried on by a partnership firm, was made as defendant 7. According to the plaintiffs, on the death of their father, Siddaramappa, their mother, Virupakshamma and their sister, Girija Gangamma i.e., defendants 5 and 6, being the legal heirs of the said Siddaramappa are entitled for half share in the joint family properties i.e., the suit schedule properties.

(d) Defendants 1 to 4 resisted the claim of the plaintiffs contending inter alia, that since the said Siddaramappa had executed a Will dated 17th October, 1984 (Exhibit D. 11), the plaintiffs are not entitled for the share claimed in the suit. According to them, the legal heirs of late Siddaramappa are not entitled to succeed to his properties except to the extent provided for in the Will. It is their further case that Item No. 1 of the suit schedule properties i.e., land measuring 9 acres 15 guntas in Survey No. 46/1 having been purchased by defendant 2 by means of registered sale deed dated (Exhibit D. 9) defendant 2 being the absolute owner of the said property, the said property is not available for partition and Item No. 3 of the suit schedule properties i.e., house and shop situated at Koppal bearing No. 5-2-152/A having been purchased by defendant 3 by means of sale deed (Exhibit D. 10), the said item of the property is also not available for partition. It is also claimed by them that Item No. 2 of the suit schedule properties belongs to defendant 4 as he has succeeded to the said property on the death of his mother, Gangamma, though the Municipal records show that the said property stands in the name of defendant 1, and therefore, the said property is also not available for partition.

(e) In the light of the pleadings of the parties, the Trial Court has framed the following issues:

(i) Whether the plaintiffs prove that suit properties shown as Item Nos. 1(b), 2

and 3 in the schedule are joint family properties?

(ii) Whether the plaintiffs prove that defendant 7-firm is a joint family firm?

(iii) Whether the defendants prove that late Siddaramappa executed the Will dated 17-10-1984 bequeathing Rs. 20,000/- to 2nd plaintiff, half portion of the house namely Item No. 4 shown in the Schedule to defendant 5 and to get the children of 6th defendant educated and decently married and Rs. 2,000/- per month to defendant 5, etc.?

(iv) Whether the plaintiffs are entitled for relief of partition? If so, what is their share?

(v) Whether the Court fee paid is proper?

(vi) To what order and decree?

(f) In the course of the trial of the suit, the second plaintiff examined herself as P.W. 1; and documents, Exhibits 1 to 4 were marked in support of the case of the plaintiffs. Defendants 1 to 4, in support of their case, examined defendant 1 as D.W. 1 and Attestor of the Will one Shankarappa as D.W. 2; and got marked Exhibits D. 1 to D. 15.

(g) The Trial Court, on the basis of the materials on record, held on Issue No. 1 that Item No. 1(b) of the suit schedule properties is the joint family property and Item Nos. 2 and 3 are not joint family properties. The Trial Court answered Issue No. 2 in favour of the plaintiffs and held that the business carried on by the 7th defendant-firm is a joint family business. Issue No. 3 was answered by the Trial Court against the contesting defendants and the Trial Court held that the contesting defendants have failed to prove the Will. On Issue No. 4, the Trial Court held that each of the plaintiffs is entitled for one-eighth share in Item Nos. 1 and 1(b), 4, 5, 6 and 9 of Plaintiff Schedule I properties and also in the movables found in the inventory. Issue No. 5 was held in favour of the plaintiffs.

4. Smt. Nalini Venkatesh, learned Counsel appearing for the appellants, challenging the finding recorded by the Trial Court on several issues referred to above, against the contesting defendants, submitted that the judgment and decree passed by the Trial Court is vitiated on account of total misreading of the evidence on record. Elaborating this submission, the learned Counsel firstly pointed out that the conclusion reached by the Trial Court that the contesting defendants have failed to establish the Will (Exhibit D. 11) is totally erroneous in law. It is her submission that the finding of the Trial Court that since D.W. 2 has not stated in his evidence that the attesting witnesses have not signed the Will in the presence of the testator and, therefore, the Will, Exhibit D. 11 is not proved, is totally erroneous in law. She pointed out that the narration of the sequence of events by D.W. 2, which ultimately led to the signature by attesting witnesses, clearly establishes that the attesting witnesses had signed the Will in the presence of the testator and the testator had signed the Will in the presence of the attesting witnesses. According to the learned Counsel, the absence of a

specific statement by D.W. 2 to the effect that the attesting witnesses had signed the Will in the presence of the testator, is not a ground to hold that the Will has not been proved. Secondly, she submitted that the reasons given by the Trial Court to reject the Will as not a genuine Will, is also erroneous in law. She pointed out that the age of the testator of the Will mentioned as "30" is obviously a mistake and the same should not have been taken as a suspicious circumstance to reject the Will. She also pointed out that merely because D.W. 2 was not a close friend of the testator of the Will and he was much younger to the testator of the Will, was not a ground to reject the testimony of D.W. 2. Thirdly, she submitted that the finding recorded by the Trial Court that Item No. 1(b) of the suit schedule properties is a joint family property, is erroneous in law. It is her submission that the Trial Court on the basis of the evidence on record, ought to have held that the said property is an exclusive property of the second defendant-Mallikarjun as he had purchased the same by means of sale deed, Exhibit D. 9. Fourthly, she submitted that the Trial Court has also seriously erred in law in taking the view that the business carried on by the 7th defendant-partnership firm is a joint family business. She submitted that the finding on this question recorded by the Trial Court, is vitiated on account of non-consideration of the material evidence on record, In support of her submission, she relied upon the decisions in the following cases:

- (a) Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, ;
- (b) Ram Lal Vs. Harikishan, ;
- (c) Smt. Rajeshwari Rani Pathak Vs. Smt. Nirja Guleri and Others, ;
- (d) Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, ;
- (e) Smt. Radharani Devi and Others Vs. Smt. Kadambini Devi and Others, ;
- (f) Smt. Ladhi Bai Vs. Thakur Shriji and Others, ;
- (g) Kshetra Mohan-sannyasi Charan Sadhukhan Vs. Commissioner of Excess Profits Tax, West Bengal, ;
- (h) Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. Hukumchand Mannalal and Co., ;
- (i) Gurbanta Singh Vs. Piara Ram Jaggu Ram and Others, ;
- (j) CHANDRAKANT MANILAL SHAH AND ANOTHER Vs. COMMISSIONER OF Income Tax., ;
- (k) I.P. Munavalli Vs. Commissioner of Income Tax, Mysore, .

5. However, Sri Prabhulinga K. Navadgi, learned Counsel appearing for respondent 2, strongly supported the judgment passed by the Trial Court. He submitted that the inconsistency in the evidence of D.W. 2 with regard to the timing of the writing of the Will and the improbabilities of his being called as an

attesting witness to the Will and non-examination of the scribe of the Will, the inherent improbabilities of late Siddaramappa excluding his wife and daughters from succeeding to his properties and preferring his brother, the first defendant, who along with his two sons, has a half share in the joint family properties, makes the Will highly suspicious and the said suspicious circumstances surrounding the Will are sufficient to hold that Will, Exhibit D. 11 is not the genuine Will executed by late Siddaramappa. He further submitted that the Trial Court was fully justified on appreciation of the evidence of D.W. 2, in holding that the evidence of D.W. 2 cannot be accepted as true and reliable. It is his further submission that though the Will states that the agricultural land situated at Dharoji Village was given to the first plaintiff, no material was placed before the Court by the contesting defendants, to show that any such properties were given to the first plaintiff. He also submitted that it is against the normal human conduct for any one to exclude his wife and children for whom he has all the love and affection from succeeding to his properties and bequeath his properties to his brother, who is well-placed in life and who also has half share in the joint family properties. Therefore, Sri Navadgi submitted that this one circumstance itself is sufficient to cast doubt on the genuineness of the execution of Will, Exhibit D. 11 by late Siddaramappa. He also pointed out that it is unthinkable that late Siddaramappa would execute a Will exposing his wife and daughter, who is neglected by her husband, and her minor children to the mercy of his brother, Virupakshappa and his son-in-law, the 4th defendant. Therefore, he submitted that defendant 4, who was admittedly managing the suit schedule properties and more particularly the family business, was responsible for getting Will, Exhibit D. 11 got up in an attempt to deprive the wife and children of the said Siddaramappa of their legitimate half share in the joint family properties. He submitted that the Trial Court has, on careful appreciation of the evidence on record, rightly taken the view that the execution of Will, Exhibit D. 11 has not been proved. Secondly, he submitted that the finding recorded by the Trial Court that Item Nos. 1 , (1)(b), 4, 5, 6, 7 and 9 of plaint Schedule I are the joint family properties and the business carried on by the 7th defendant-firm is a family business, is unexceptionable and there is no infirmity in the finding recorded by the Trial Court on this question. In this connection, he referred to us the evidence of P.W. 1 and D.W. 2. In support of his submission, Sri Navadgi relied upon the decisions in the following cases:

- (a) Ram Piari Vs. Bhagwant and others, ;
- (b) Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, ;
- (c) H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, ;
- (d) Manbharibai v. B.R. Mill;
- (e) Meenakshi Achi v. P.S.M. Subramanian;
- f) Mamooji Moosaji v. Tayebali and Ors.

6. In the light of the rival contentions advanced by the learned Counsels appearing for the parties, the questions that would arise for consideration in this appeal, are-

(i) Whether the finding recorded by the Trial Court on Issue No. 3 holding that the contesting defendants have failed to prove the execution of Will, Exhibit D. 11, dated 17th October 1984 by late Siddaramappa, suffers from any infirmity and requires to be interfered with by this Court?

(ii) Whether the business carried on by the 7th defendant-firm is a joint family business?

(iii) Whether the Trial Court has committed any error in holding that Item Nos. 1, 1(b), 4, 5, 6, 7 and 9 of plaint Schedule I are the joint family properties?

(iv) Whether the Trial Court has committed any error in taking the view that the movables found in the inventory prepared by the Commissioner are the joint family properties?

Re: Question (i):

6-A. It is not in dispute that if the suit schedule properties are held to be the joint family properties and also the business carried by the 7th defendant-firm is a joint family business, the plaintiffs and defendants 5 and 6, who are the daughter and the widow respectively of late Siddaramappa, are entitled for half share in the suit schedule properties, they being Class 1 heirs of the said Siddaramappa. However, as noticed by us earlier, the defence of the contesting defendants i.e., defendants 1 to 4, is that (1) except suit Item No. 1, none of the suit schedule properties are the joint family properties; (2) the business carried on by the 7th defendant is not the joint family business; and (3) in view of Will, Exhibit D. 11 executed by Siddaramappa, his legal heirs are not entitled for any share in the suit schedule properties except to the extent provided for in the said Will.

7. Now, the question is, whether Will, Exhibit D. 11 put forward by the first defendant is the last Will executed by late Siddaramappa? Before we proceed to consider this question, it is useful to refer to the salient features of the Will. As per the terms of the Will, the second plaintiff, who is one of the three daughters of late Siddaramappa, was entitled to receive only a sum of Rs. 20,000/- out of the assets of late Siddaramappa. The wife of Siddaramappa i.e., the 5th defendant, was entitled for half portion on the southern side of the house bearing No. 7-6-5y whenever she makes a demand in that behalf. Whether the 5th defendant gets an absolute interest in the said half portion of the house, is not made clear. On the other hand, the proper construction of the Will would indicate that the 5th defendant will be entitled only for a right of residence in the said half portion of the house. Further, the first defendant was required to give only Rs. 2,000/- per month to the 5th defendant. Insofar as the 6th defendant, who is one other daughter of late Siddaramappa is concerned, the first defendant was

required to educate her children and get them married after meeting the expenses of the marriage. It is further stated in the Will that after the death of the 5th defendant, all her assets, both movables and immovables, should go to the first defendant. The 4th defendant, who is the son-in-law of the first defendant, was appointed as an executor of the Will and was given the right to manage the properties along with the 4th defendant. It is stated that he has been so appointed as executor of the Will after obtaining his consent

8. It is well-settled that when a Will is put forward, the burden is on the propounder of the Will to prove that the Will has been executed voluntarily by the testator after being fully aware of the contents and consequences of the bequeath made in the Will and the attesting witnesses have signed the Will in the presence of the testator. The onus of proving the execution of the Will lies in every case upon the party propounding the Will and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. "By free and capable testator" is generally meant that the testator, at the time when he made the Will, had a sound and disposing state of mind and memory. No doubt, ordinarily, the burden of proving the due execution of the Will is discharged if the propounder of the Will leads evidence to show that the Will bears signature or mark of the testator and that the Will is duly attested. However, where the circumstances surrounding the execution of the Will are shrouded with suspicious circumstances, it is the duty and obligation of the propounder to remove the suspicion by leading cogent and satisfactory evidence. Since the requirement of the law is that the Will should be attested by two or more witnesses, each of whom has seen the testator sign and should sign the Will in the presence of the testator, the Court, while examining the question as the Will propounded has been executed by the testator of the Will; whether the Will suffers from suspicious circumstances and it is the last Will and testament of the testator, will have to carefully analyse and examine the evidence placed before it. It is no doubt true that no hard and fast or inflexible rules can be laid down for appreciation of the evidence. But, generally it can be stated that a propounder of a Will has to prove the due and valid execution of the Will and if there are any suspicious circumstances surrounding the execution of the Will, the propounder must remove the said suspicion from the mind of the Court by cogent and satisfactory evidence. Whether the two general and broad principles, referred to above, have been satisfied or not, would always depend upon the facts and circumstances of the case and on the nature and quality of the evidence adduced by the parties. In this connection, it is useful to refer to the two decisions of the Supreme Court, wherein the law has been laid down with regard to the guiding factors, which are required to be kept in mind by the Court while considering the due execution and proof of the Will arising for consideration. In the case of H. Venkatachala Iyengar, *supra*, the Hon'ble Supreme Court has, at paragraphs 19 and 20 of the judgment, observed as follows:

"19. However, there is one important feature which distinguishes Wills from other

documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which, the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounded case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the Will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last Will of the testator. It is true that, if a Caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may have to be proved by the Caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the Will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter".

In the case of Shashi Kumar Banerjee, *supra*, the Supreme Court has, at paragraph 4, observed thus:

"The principles which govern the provisions of a Will, are well settled (See H. Venkatachala Iyengar's case, *supra*). The mode of proving a Will does not

ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the Will as genuine. Where the Caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations ... ".

Keeping in mind the law laid down by the Hon"ble Supreme Court with regard to the approach required to be made by the Courts when the execution and genuineness of the Will is under serious dispute, we will proceed to examine as to whether the finding recorded by the Trial Court that the contesting defendants have failed to prove Will, Exhibit D. 11.

9. The Trial Court has assigned mainly three reasons to hold that the first defendant has not proved the Will. Firstly, on a careful consideration and appreciation of the evidence of D.W. 2, who was the attesting witness to the Will, it has taken the view that his evidence cannot be accepted to prove the Will. Secondly, the Trial Court has taken into consideration the suspicious circumstances manifest in the Will. Thirdly, the Trial Court has taken the view that since D.W. 2 in his evidence, has not stated that the attesting witnesses had signed the Will in the presence of the testator of the Will, the requirement of law that the attesting witnesses must sign in the presence of the testator having not been satisfied, it must be held that the Will is not proved. On careful reappraisal of the evidence on record by us, we have no reason to differ from the first of the two reasons assigned by the Trial Court referred to above, to take the view that the first defendant has failed to prove the Will. But we are unable to accept the third reason assigned by the Trial Court as a valid ground to reject the Will in the light of the evidence of D.W. 2. However, merely because the third reason referred to above assigned by the Trial Court, is not a valid reason, by that itself

it is not possible to take the view that the finding recorded by the Trial Court that the first defendant had failed to prove the Will requires to be nullified. As noticed by us earlier, the Trial Court, on close examination and scrutiny of the evidence of D.W. 2, has taken the view that his evidence cannot be accepted to come to the conclusion that deceased Siddaramappa had executed Will, Exhibit D. 11 as claimed by him. In paragraph 15 of the judgment, the Trial Court has carefully analysed the evidence of D.W. 2. We are in total agreement with the reasons assigned by the Trial Court to reject the evidence of D.W. 2. As rightly pointed out by the Trial Court, D.W. 2 has admitted in his evidence that on the date of the execution of the Will, he was about 46 years younger in age to the testator of the Will, late Siddaramappa. Further, even according to D.W. 2, at no point of time, Siddaramappa had asked him to act as an elder either in the affairs of his family or business; and it is only for the first time on the date of the execution of the Will, casually he met D.W. 2 who was standing in front of his shop and asked him to come to his mill at 2.00 p.m. D.W. 2 does not even state that they had any discussion at that time about the intention of Siddaramappa executing the Will and D.W. 2 being required to sign the Will as an attesting witness to the Will. D.W. 2 has further admitted in his evidence that there are other elderly persons who are more closely connected with the said Siddaramappa; D.W. 2 was not his close friend; and D.W. 2 was known to Siddaramappa since he was also a businessman like Siddaramappa, and was also related to him. In the chief examination, D.W. 2 has stated that "when he went to oil mill, the Will was being written", and after the Will was written, "Siddaramappa went through the Will"; and after going through the Will, "Siddaramappa affixed his signature to the Will". However, in the cross-examination, D.W. 2 has stated that "the writing of the Will started after he "went to the oil mill"; and after he went to the mill, Siddaramappa started narrating the contents of the Will and the same was reduced into writing by Thotappa. This inconsistency, in our view, is sufficient to reject the evidence of D.W. 2. The timing of the writing of the Will; the signing of the Will by the testator and the attesting witnesses signing the Will are very crucial factors. Normally, if the attesting witness is a truthful witness, there cannot be any inconsistency with regard to these facts. Further, the evidence of D.W. 2 also would clearly indicate that he would not have been the natural choice of deceased Siddaramappa to pick him up as the attesting witness and take him into confidence for the purpose of executing the Will, especially when he is excluding his wife and children from inheriting his properties. The consequence of disclosure of such a Will to his wife and children by D.W. 2 would be serious and it would have driven Siddaramappa of incurring displeasure of his wife and children also or alienating their affection and warmth. Admittedly, late Siddaramappa and his wife and children had mutual affection for each other. D.W. 2 has admitted in his evidence that he and the 4th defendant-Basavaraj were friends. D.W. 2 has also admitted that Siddaramappa had friends of his own age and he had acquaintance with many people. When Siddaramappa intended that his properties should go to the first defendant, who is admittedly having half share in the joint family properties along with him excluding his wife and children

who are the natural heirs to succeed to his properties, in our view, he would have taken care to take the assistance of his close associates who could be taken into confidence. Though there is no bar that a youngster like D.W. 2, who is not closely associated with the said Siddaramappa to be an attesting witness to the Will, as rightly pointed out by the Trial Court, the normal conduct of a person would be to take the assistance of a confident of the testator of the Will as the assisting witness. Further, as noticed by us earlier, the inconsistency in the evidence of D.W. 2 with regard to the crucial facts relating to the time of the writing of the Will makes the version of D.W. 2 highly doubtful and unreliable. In our view, if D.W. 2 was actually present at the time of preparation of the Will, there cannot be two versions, at one stage saying that when he went to the oil mill, the Will was being written; and at another saying, that the writing of the Will started after he went to the mill. No doubt, the other attesting witness Sangappa Pampanashettar, according to D.W. 2, had expired 15 days prior to the date of his giving evidence i.e., 17-6-1994. D.W. 1 was examined on 3rd December, 1993. It is not known why steps were not taken to examine Sangappa Pampanashettar immediately after the completion of the evidence of D.W. 1. Further, the scribe of the Will one Thotappa has not been examined. No explanation has been offered for his non-examination. Neither D.W. 1 nor D.W. 2, in their evidence, explained as to why the said Thotappa was not examined. In our view, examination of Thotappa was very important for reasons more than one. The execution of the Will was seriously disputed by the plaintiff. The Will, prima facie, is surrounded by suspicious circumstances. It had not seen the light of the day till the date of filing of the suit. It excludes the wife and children of the testator of the Will from inheriting his properties though they are Class 1 heirs and he had all love and affection for them. The other attesting witness was not available to be examined as he had died before the conclusion of the trial of the suit. In Exhibit D. 4, the age of Siddaramappa was mentioned as "34" but it is admitted by both D.W. 1 and D.W. 2 that he was more than 70 years on the date of the execution of the Will. The scribe of the Will would have been the best person to explain the discrepancy in the age of Siddaramappa referred to in Will, Exhibit D. 11. We are of the view that in a matter like this, having regard to the facts and circumstances of the case, the non-examination of the scribe of the Will the aforesaid Thotappa casts a serious doubt with regard to the case set up by the first defendant about the execution of the Will by late Siddaramappa. We are of the view that Thotappa, who is stated to have written the Will, was not examined by the first defendant either for the fear of contradictions in the evidence of the said Thotappa and the evidence of D.W. 1 being placed before the Court and on the ground that the falsity of the case as set up by the first defendant being exposed, or on the ground that the said Thotappa was not ready and willing to give a false evidence before the Court. Further, if the evidence of D.W. 1 is also appreciated along with the suspicious circumstances shrouding the Will, we have no hesitation to take the view that the version of D.W. 2 that Siddaramappa had executed the Will in his presence, cannot be accepted as true. Both D.W. 1 and D.W. 2, in their evidence, have admitted that late Siddaramappa

had lot of love and affection for his wife and children. P.W. 1 also has stated that her father had lot of love and affection for his children and he intended to give properties to them. Admittedly, the 6th defendant, who is one other daughter of Siddaramappa and who is deserted by her husband, was living in the joint family along with Siddaramappa, her mother and defendants 1 to 3 with her young children. This indicates that Siddaramappa was taking care of his daughter and her children, who were not looked after well by her husband. The wife of Siddaramappa was comparatively old in age. Under these circumstances, it is not the normal human conduct for any husband, father or grandfather to exclude his wife who is of advanced age and the daughter and her children, who are not taken care of by her husband, to leave them to the mercy of his younger brother and his son-in-law who is appointed as the executor of the Will. Further, we cannot overlook the fact that the son-in-law of the first defendant, was not only appointed as the executor of the Will, but was also given the right to manage the properties along with the first defendant. There is no explanation offered as to what prompted Siddaramappa to execute the Will, Exhibit D. 11 ignoring his wife and children. It is not as if the first defendant and his children are in financial need and they have shown greater love and affection to Siddaramappa as against his wife and children. When the first defendant and his children have half share in the joint family properties, it is not possible to believe that late Siddaramappa would have given his share also to the first defendant by making a provision for payment of only Rs. 20,000/- to the second plaintiff and at the rate of Rs. 2,000/- per month to his wife with the right of residence on the southern half portion of the house to her and with further instructions to the first defendant to educate the children of the 6th defendant and get them married. There is no charge created on the property to protect the interest of his wife and also the 6th defendant and her children who are required to be educated and married. According to the contents of the Will, the first plaintiff was given agricultural lands at Daroji Village. P.W. 2, in her evidence, has stated that no agricultural property situated at Daroji was given to her. The defendants have not placed any evidence to show that the first plaintiff was given any agricultural properties situated at Daroji Village. If, as a matter of fact, some agricultural property was given as recited in the Will, it would not have been difficult for the first defendant to place documentary evidence before the Court. Therefore, we will have to proceed on the basis that the recital in Will, Exhibit D. 11 that agricultural land situated at Daroji Village were given to the first plaintiff, is false. Can it be expected that a father who had not given any property to the first plaintiff, would recite in the Will stating that he has given some properties to her, especially when he had all the love and affection to his daughter, to give scope to his daughter to develop a feeling that her father has lied. Therefore, we have every reason to think that the recital in the Will that some agricultural properties of Daroji Village were given to the first plaintiff was deliberately made to explain as to why she was being excluded from giving any property by late Siddaramappa. Further, it is also necessary to state that when there is no dispute between Siddaramappa and his children and two of his sons-in-law i.e., the

husbands of the plaintiffs, we are also not able to understand as to why he would prefer the 4th defendant to appoint him as the executor of the Will and give him the right to manage the joint family properties along with his brother, the first defendant. The recitals in the Will that the 4th defendant was entitled to manage the properties along with the first defendant is indicative of the fact that he is the brain behind in getting the Will prepared as a defence to the suit filed seeking partition and in that effort, he has taken the assistance of D.W. 2, who is his friend. We also find that there is no merit in the submission of the learned Counsel for the appellants made relying upon the judgment of the Supreme Court in the case of Beni Chand, supra, to the effect that the exclusion of the wife and children from the Will does not create any doubt about the genuineness of the Will. The decision of the Hon''ble Supreme Court in the case of Beni Chand, supra, purely based on the facts of that case where there was serious difference of opinion between the mother and the son and in those circumstances, the Hon''ble Supreme Court took the view that merely because the son was excluded by the mother, is not a ground to cast suspicion on the genuineness of the Will. In this connection, it is useful to refer to the observation made by the Supreme Court in the said decision, which reads as follows:

"Son is excluded by mother as his behaviour was far too unfilial and remorseless, for him, to find a place in the affections of his mother".

In our view, the principle laid down by the Hon''ble Supreme Court in the decision relied upon by the learned Counsel for the appellants is of no assistance to her. Therefore, on careful consideration of the evidence of D.W. 2 and the suspicious circumstances surrounding the Will, we are fully satisfied that Will, Exhibit D. 11 is a got up document and it is not the last Will of late Siddaramappa. Therefore, the Trial Court did not rightly act upon the Will put forward by the defendants.

Re: Question (ii):

10. The next question that would arise for consideration is, whether the business carried on by the 7th defendant-firm is the joint family business or the business of the partners alone who constituted the firm? Insofar as this question is concerned, in our considered view, the finding recorded by the Trial Court that the business carried on by the firm is the joint family business, does not suffer from any error either in the matter of appreciation of evidence or on the application of law. The Trial Court, after elaborately considering both oral and documentary evidence, at paragraphs 23 to 31, has found that the business carried on by the firm was the business of the joint family. P.W. 1, in her evidence, has categorically stated that her father, Siddaramappa was the member of the joint family at the time of his death and all the properties were joint family properties and he held half share in the suit schedule properties at the time of his death. She has also further stated that though the partnership firm was constituted by her father and the first defendant, the business carried on by the firm was treated as a joint family business and some of the suit

schedule items were acquired out of the joint family income, which includes the income earned from the business of the firm. In fact, the plaintiffs also do not dispute that their father and the first defendant constituted a partner firm and subsequently, defendants 4 and 5 were inducted as partners to the firm. It is their specific case both in the plaint and in the evidence that though the partnership was constituted, it was constituted out of the joint family assets and the business carried on by the firm was throughout treated as a joint family business and not the business of the individual partners who constituted the firm. Even according to the first defendant, who has been examined as D.W. 1, the father of the plaintiffs, the first defendant and two other brothers viz., Gurusiddappa and Shankarappa, were residing jointly as the members of the Hindu Undivided Family till the year 1959; and in the year 1959, the partition took place between the father of the plaintiffs and the first defendant on the one hand and two other brothers, the aforesaid Gurusiddappa and Shankarappa, on the other; and the house which was jointly occupied by all of them, was assigned to the share of the said Gurusiddappa and Shankarappa in the partition. He has further stated in his evidence that after the partition that has taken place in the year 1959, the father of the plaintiffs and he started residing in the house bearing TMC No. 1-2-157 belonging to the 4th defendant-Basavaraj; and during the year 1975, the father of the plaintiffs and the first defendant built a house on the premises of Siddeshwara oil mill and since then, they have been residing in the house. No doubt, he has stated that the oil mill was started by him and his brother, Siddaramappa by the partnership firm and the said partnership firm came into being in 1959. It is useful to extract the said statement made by D.W. 1, which reads as follows:

"The mill started by us is a partnership concern. The said partnership came into being in 1959".

Therefore, it is clear that when the father of the plaintiffs and the first defendant were the members of the joint family, they had constituted the partnership firm, the evidence on record shows that the joint family was an affluent family since the beginning. He has also admitted in his evidence that on submersion of their lands on account of Thungabhadra Dam, the family had received compensation and the father of the plaintiffs and the first defendant purchased the mill with the aid of the compensation received; and before the purchase of the mill, it belonged to the Mercantile Corporation. In this connection, it is useful to refer to the evidence of D.W. 1, which reads as under:

". . . It is true that our family has been an affluent family since beginning. We had 2 houses at Sankalpur and out of 2 houses one was used for residence and the other was used for feathering cattle. . . . We received compensation in respect of the acquisition of our lands in the said project. My father and ourselves purchased D-7 mill with the aid of the compensation we received... The mill was purchased during 1947-48. Mill was purchased in the names of myself, and my 3 brothers. We purchased the mill after the death of our father The

said mill is situate in an area of 2 acres in Survey No. 678. The rest of the portion of Sy. No. 678 is an agricultural land. Sy. No. 678 shown at Sl. No. 1 of Schedule 1 belongs to our family. Initially the mill had little business. The business went on developing and now it is on large scale.... At the said partition the partition was effected in all the joint family properties including D-7 mill. In the said partition houses, plots, and lands were assigned to the shares of my brothers, namely Gurusiddappa and Shankarappa. The properties assigned to the share of myself and my brother, Siddaramappa including the mill in the said partition remained as the joint family properties between myself and Siddaramappa. Memo of partition came to be effected in respect of the partition that took place in 1959. It is true that myself and my 3 brothers were the signatories to the said memo. Bhimachar Jagaradar and Siddalingappa were the elder at the time of said partition. I now see the said memo of partition at Ex. P. 4..."

The admission of D.W. 1 referred to above made in the cross-examination, clearly shows that the mill was acquired out of the joint family funds and in the partition between the plaintiffs father and the first defendant on the one hand and two of his brothers, referred to above, on the other, the mill was assigned to the share of the father of the plaintiffs and the first defendant. Therefore, there cannot be any doubt that the nucleus provided for the constitution of the 7th defendant-firm with the father of the plaintiffs and the first defendant, was out of the income and asset of the joint family. If the nucleus was provided to the firm out of the joint family income and the business of the family was taken over by a firm constituted by two of the senior members of the joint family, in our view, the partnership was constituted in the year 1959 by the father of the plaintiffs and the first defendant for the purpose of carrying on the business of the joint family. There is no legal bar for the members of the joint family to constitute a firm and carry on the business of the joint family out of the assets or nucleus provided by the joint family. Further, some of the members of the joint family who constituted the firm, can also treat the business of the firm as the joint family business and blend the assets of the firm as the joint family assets.

11. Now, the other question is, since one Smt. Rudramma was taken as a partner of the firm subsequent to the constitution of the firm by the father of the plaintiffs and the first defendant and the subsequent induction of the second defendant-Mallikarjun, who is the son of the first defendant, to the firm in the year 1976-77 in the place of the said Rudramma, and also the subsequent induction of the 4th defendant as a working partner to the firm and the 5th defendant as a partner of the firm consequent on the death of the father of the plaintiffs, whether such induction would alter the nature of the business carried on by the partnership as joint family business to that of individual business of the partners of the firm? We are of the view that on the basis of the evidence on record, it is not possible to take such a view. Admittedly, the second defendant is one of the members of the joint family. Though it is asserted by D.W. 1 that his sister, Rudramma invested money into the firm as her share and became a

partner of the firm at the time of her induction, we are unable to believe this version of D.W. 1. In our view, no satisfactory evidence is placed before us to substantiate the said statement of D.W. 1. Further, even according to D.W. 1, during the year 1976-77, the share of the said Rudramma, which was stated to be Rs. 40,000/- in the firm, was transferred in favour of the second defendant-Mallikarjun and he was inducted as a partner. If, as a matter of fact, the said Rudramma had contributed any money to the firm and on that basis, she had become a partner of the firm, we are unable to understand as to why her share of money in the firm was not returned to her and why it was transferred in the name of the second defendant, who is admittedly a member of the joint family. Therefore, we are of the view that the said Rudramma was inducted to the firm only as a nominal partner by lending her name. Similar is the position in the case of induction of the 4th defendant-Basavaraj. D.W. 1 has also admitted in his evidence that the 4th defendant-Basavaraj has not invested any money in the firm. Even according to D.W. 1, he was taken only as a working partner. There is no evidence placed before us to show that he had contributed any money to the firm. Further, we cannot also ignore the fact that the 4th defendant-Basavaraj is not a total stranger to the family. He is the son-in-law of the first defendant. There is also no evidence to show that at any time, the 4th defendant had actually contributed his labour and skill to improve the business of the firm. He has not stepped into the witness-box and given evidence. Therefore, we are of the view that the 4th defendant has only lent his name as a partner of the firm. Insofar as the induction of the 5th defendant as a partner of the firm is concerned, admittedly she was inducted subsequent to the death of her husband. There is also no evidence placed before us to show that the profit earned by the firm was actually paid to the partners of the firm. On the other hand, the evidence of D.W. 1 shows that the income earned by the business of the firm was utilised for the expenses of the joint family. Therefore, in our view, the induction of Smt. Rudramma as a partner, the 4th defendant-Basavaraj as a working partner and the 5th defendant as a partner of the firm, did not make any change in the nature of the business in the oil mill carried on and the said business continued to be the joint family business. Maybe, it is carried on in the name of the firm by constituting a partnership firm. Except the 4th defendant-Basavaraj, all others were the members of the joint family. It may be for the accounting or tax purposes, the joint family business was carried on by constituting a partnership firm. So long as the joint family business was taken over by a firm and the nucleus was provided by the firm and the business was carried on by majority members of the joint family, the business of the 7th defendant-firm, in our view, must be held as the business of the joint family and not as the business of the partners of the firm. In the case of Nibaran Chandra Shaha Vs. Lalit Mohan Brindaban Shaha, , it is held as follows:

"A Hindu joint family business does not cease to be so, if in addition to the heirs of the deceased original owner of the business, it is also owned by the daughter of the original owner married to a gharjamai and her sons and also by other

dependent members and relations who are de facto members of the family, provided that the proceeds of such business, like the proceeds of all joint family property, are utilised and made available for the maintenance and other legitimate expenses of the family".

It is also relevant to state that there is no material placed before the Court to show that the accounts of the firm were actually struck and the partners were provided their shares out of the profits earned by the firm. On the other hand, the evidence of D.W. 1 clearly shows that till the death of Siddaramappa, the said Siddaramappa, his wife and children were all residing as members of the joint family and the profits earned by the firm were used to be utilised for the joint family. In this connection, it is useful to refer to the evidence of D.W. 2, which reads as follows:

"Till the death of Siddaramappa, myself, Siddaramappa, his wife and children were residing together as the members of HUF. The profits earned by the firm used to be utilised for meeting out the expenses of our family after crediting the same to the accounts of each partner according to their share. It is not true to suggest that the mill belongs to the joint family and that partnership deeds came to be executed with a view to avoid payment of excess income tax".

Therefore, apart from the evidence of P.W. 1, the admission made by D.W. 1 in the course of his cross-examination, clearly supports the conclusion reached by the Trial Court that the business carried on by the 7th defendant-firm is the joint family business. We have no hesitation to concur with the said finding recorded by the Trial Court. Therefore, question (ii) is held against the appellants.

Re: Question (iii):

12. Now, let us examine whether the finding recorded by the Court below that suit Item Nos. 1, 1(b), 4, 5, 6, 7 and 9 are joint family properties.

Suit Schedule Item No. 1 is an agricultural land measuring 15 acres 2 guntas in Survey No. 678 situated at Koppal Village. D.W. 1, in his evidence, has stated that the 7th defendant-mill is situated in Survey No. 678 of Koppal in a land measuring 2 acres. He has further stated that the rest of the portion in the said land bearing Survey No. 678 is an agricultural land and land bearing Survey No. 678 shown at Serial No. 1 in plaint schedule belongs to the joint family. Therefore, in the light of the categorical admission made by D.W. 1 in the course of the cross-examination, there cannot be any doubt that the entire extent of land measuring 15 acres 2 guntas in Survey No. 678 which includes the oil mill, is a joint family property.

(b) Now, the question is whether Item No. 1(b) of the plaint Schedule measuring 9 acres 15 guntas in Survey No. 46/1 situated at Koppal Village, which stands in the name of the second defendant, is also the joint family property. Suit Item No. 1(b) was purchased by means of sale deed, Exhibit D. 9, dated 4th May, 1978. The second defendant is the son of the first defendant and a junior member of

the joint family. Though D.W. 1 says that the said property was purchased by the second defendant out of his separate income, there is no evidence placed before the Court to show that second defendant has any separate income of his own other than the income from the joint family. P.W. 1 has asserted in her evidence that the said property was purchased by her father in the name of the second defendant. The second defendant has not examined himself and controverted the said evidence of P.W. 1. On the other hand, D.W. 1, who is the father of the second defendant, has stated that his son, the second defendant purchased the said item of the property "with the assistance and share held in the partnership firm". Therefore, the evidence of D.W. 1 itself clearly establishes that suit Item No. 1(b) was purchased in the name of the second defendant out of the share held by the second defendant in the partnership firm. We have already come to the conclusion that the business carried on by the 7th defendant-firm is the business of the joint family. In the light of the above conclusion, it follows that Item No. 1(b) of the plaint schedule having been acquired out of the income of the joint family business, the said property also should be held as a joint family property. Therefore, we do not find any error in the conclusion reached by the Trial Court insofar as Item No. 1(b) of the plaint schedule is concerned.

(c) Insofar as Item 4 of the plaint schedule is concerned, D.W. 1 has admitted in his evidence that the house property shown at Item No. 4 was built by him and Siddaramappa out of the income from the 7th defendant. Therefore, the said item of the property can be held to be a joint family property. We do not find any infirmity in the finding recorded by the Trial Court to that effect in paragraph 35 of the judgment.

(d) Since we have already held that the oil mill and the business carried on by the 7th defendant-firm is a joint family business, Item No. 5 in the plaint schedule i.e., godown and office of the mill; Item No. 6, the oil mill; and the machineries in the oil mill, which are shown at Item No. 7 of the plaint schedule, also have to be held as the joint family properties as rightly held by the Trial Court. Therefore, we do not find any justification to interfere with the finding recorded by the Trial Court holding that plaint schedule Item Nos. 5, 6 and 7 are joint family properties.

(e) Insofar as Item No. 7 of the plaint schedule is concerned, it is an open plot situated in land bearing Survey No. 29 of Koppal. The first defendant, at paragraph 4 of the written statement, has admitted that the said item of the property is a property of the 7th defendant-firm. We have held that the business carried on by the firm is the business of the joint family and all the assets of the firm are the assets of the joint family. Therefore, Item No. 9 of the plaint schedule is also the joint family property as held by the Trial Court.

Re: Question (iv):

13. Now, the only other question that would arise for consideration is, whether the Trial Court was justified in taking the view that the movables found in the

inventory prepared by the Court Commissioner, are the joint family properties? It is an admitted fact that the family continued to be joint. When the family is the joint family, it is for the first defendant to show that the movables in question were acquired out of his separate income. He has not placed any evidence to show that he had any separate income other than the income from the joint family. Further, he has admitted in his evidence that the income from the 7th defendant-firm and the ancestral land shown at Item No. 1 in the plaint schedule, were the only source of income for the family. Under these circumstances, the Trial Court was justified in taking the view that the movables as per the inventory prepared by the Court Commissioner are the joint family properties.

14. In the light of the discussion made above, we concur with the finding recorded by the Trial Court that the plaintiffs have proved that Item Nos. 1 , 1(b), 4, 5, 6, 7, 8 and 9 of the plaint schedule are the joint family properties; and in the said properties, the father of the plaintiffs, late Siddaramappa had half share and the remaining half share was held by the first defendant. Therefore, the Trial Court was justified in taking the view that the plaintiffs and defendants 5 and 6, who are the Class 1 heirs, are entitled to inherit equally half share held by Siddaramappa and taking the view that each of the plaintiffs is entitled for one-eighth share in the properties, referred to above.

15. Therefore, in the light of the discussion made above, this appeal is liable to be dismissed. Accordingly, it is dismissed with costs.